ARTICLE

INTRA-AGENCY COORDINATION

Jennifer Nou

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Conventional accounts portray agency design as the outcome of congressional and presidential quests for political control. This perspective aligns with administrative law's preoccupation with agencies' external constraints. The main unit of analysis from this point of view is the agency, and the central question is how political principals outside of the agency restrain it. In reality, however, agency actors must also abide by controls internal to the agency: how do these mechanisms arise and what explains their design? For their part, legislative and executive specifications invariably leave organizational slack. Agency heads thus possess substantial discretion to impose internal structures and processes to further their own interests. By and large, however, agency heads have been neglected as important determinants of institutional design. Indeed, like the need for interagency coordination, the bureaucracy requires intra-agency coordination.

This Article seeks to provide a general account of how agency heads, distinct from Congress or the President, manage and operate their organizational divisions. It presents a theory of how administrative leaders use internal hierarchies and procedures to process information in light of their individual preferences and exogenous uncertainties. In doing so, this Article offers a conceptual framework to analyze agency design problems as well as to explain variations in bureaucratic form. Armed with these insights, the analysis then considers some of the resulting normative implications for political and legal oversight. It concludes by suggesting various reforms such as the judicially enforceable disclosure of agencies' internal rule-drafting processes, as well as doctrines further designed to foster transparency and accountability.

INTRODUCTION

Observers of the rulemaking process have long recognized the salience of bureaucratic structure to regulatory outcomes. Organizational design choices can determine who controls the levers of influence, both formal and informal, within an administrative agency.[1] In

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[1] *See, e.g.*, ROBERT A. KATZMANN, REGULATORY BUREAUCRACY 7 (1980) ("Organizational arrangements have much to do with determining how power is distributed among participants in the decision-making process, the manner in which information is gathered, the types of data that are collected, the kinds of policy issues that are discussed, the choices that are made, and the ways in which decisions are implemented."); Terry M. Moe, *The Politics of Bureaucratic*

one prominent view, Congress can "stack the deck"[2] through structures and processes designed to ensure that certain constituents continue to influence regulatory policy.[3] For example, a statute could strategically define an agency's jurisdiction, impose for-cause removal restrictions on its officials, or limit the availability of judicial review — all in efforts to preserve the interests of the winning legislative coalition.[4] Other scholars have developed analogous theories of presidential bureaucratic design as well.[5] From these perspectives, the structural determinants of regulatory policy are "more the product of politics than of any rational or overarching plan for effective administration."[6]

This general lens is in keeping with administrative law's overwhelming focus on the influence of agencies' external monitors. The main unit of analysis from this point of view is the agency, and the central question is how actors outside of that agency exercise control over it. Comparatively lacking, however, is work assessing controls *internal* to the agency: how these mechanisms arise, what explains their design, and how agency heads can shape and implement them. Consequently, what the structure-and-process account still requires is an examination of how agency heads themselves can, and do, impose mechanisms to further their own interests.[7] These intra-agency units of analysis have many different names in the real world: "divisions,"

Structure, *in* CAN THE GOVERNMENT GOVERN? 267, 267 (John E. Chubb & Paul E. Peterson eds., 1989) ("The bureaucracy arises out of politics, and its design reflects the interests, strategies, and compromises of those who exercise political power.").

[2] Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 444 (1989) (emphasis omitted).

[3] *See id.*; *see also* Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); David B. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 28 J. LEGAL STUD. 413 (1999) (explaining political attempts to influence policy choices of regulatory agencies).

[4] Other statutory possibilities include granting certain interest groups access to an agency's decisionmaking process, determining terms of office and salary levels, or promoting interagency competition. *See* Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 99–108 (1992).

[5] *See, e.g.*, DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN (2003); Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, LAW & CONTEMP. PROBS., Spring 1994, at 1, 13–15. Still others have developed further sophisticated insights into the dynamics between the legislature and executive. *See, e.g.*, Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 843–52 (2014); B. Dan Wood & John Bohte, *Political Transaction Costs and the Politics of Administrative Design*, 66 J. POL. 176 (2004).

[6] LEWIS, *supra* note 5, at 2. *But see* O'Connell, *supra* note 5, at 882–88 (arguing that political actors also seek agency "competence," *id.* at 882).

[7] *See* Glen O. Robinson, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Political Uses of Structure and Process*, 75 VA. L. REV. 483, 488–89 (1989) (critiquing the congressional structure-and-process account as incomplete given that "[i]nternal structural arrangements for [major] agencies are within the prerogative of the agency or, in appropriate cases, the executive department in which it resides," *id.* at 488).

"bureaus," "centers," and "offices," to name a few.[8] What unites them analytically here is that they constitute organizational units of analysis within agencies, which possess governmental authority.[9]

Just as in the interagency context, which has generated a substantial amount of recent scholarship,[10] many of these internal agency divisions have intersecting duties when it comes to regulatory development. Alternatively, these units can perform independent substantive functions. These dynamics analogously require what this Article calls *intra-agency coordination*. The Commodity Futures Trading Commission (CFTC), for example, assigns the oversight of regulatory cost-benefit analyses to both its Office of the Chief Economist and its Office of General Counsel.[11] At the same time, staff members across the CFTC's various divisions — whether in the Division of Market Oversight or the Division of Clearing and Risk — are responsible for drafting these analyses.[12] To better manage these overlapping dynamics,

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[8] As illustrative examples, consider the Office of the General Counsel and the Center for Faith-Based and Neighborhood Partnerships within the Department of Health and Human Services, *see HHS Organizational Chart*, U.S. DEP'T HEALTH & HUM. SERVS., http://www.hhs.gov/about/agencies/orgchart/index.html (last updated July 17, 2015) [http://perma.cc/8Y2F-NMWS], the Bureau of Labor Statistics and the Office of Congressional and Intergovernmental Affairs within the Department of Labor, *see Organizational Chart*, U.S. DEP'T LAB., http://www.dol.gov/dol/aboutdol/orgchart.htm [http://perma.cc/4SW5-52TF], and the Division of Enforcement and Division of Economic and Risk Analysis at the Securities and Exchange Commission, *see Divisions and Offices*, U.S. SEC. & EXCH. COMMISSION, http://www.sec.gov/divisions.shtml (last updated Sept. 12, 2015) [http://perma.cc/4U7S-RTR8].

[9] One way to think about the subagency is relative to the Administrative Procedure Act's own definition of an "agency." *See* 5 U.S.C. § 551(1) (2012) (defining "agency" as "each authority of the Government . . . whether or not it is within or subject to review by another agency, but does not include — (A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; [or] (D) the government of the District of Columbia").

[10] *See, e.g.*, Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1103–04 (2013); Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745, 750–54 (2011); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1139–41 (2012); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201; David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446 (2014); Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181 (2011); Jason Marisam, *Interagency Administration*, 45 ARIZ. ST. L.J. 183 (2013); Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211 (2015); Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805 (2015).

[11] *See* OFFICE OF THE INSPECTOR GEN., U.S. COMMODITY FUTURES TRADING COMM'N, A REVIEW OF COST-BENEFIT ANALYSES PERFORMED BY THE COMMODITY FUTURES TRADING COMMISSION IN CONNECTION WITH RULEMAKINGS UNDERTAKEN PURSUANT TO THE DODD-FRANK ACT, at i–iii (2011) [hereinafter REVIEW OF COST-BENEFIT ANALYSES], http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oig_investigation_061311.pdf [http://perma.cc/S9MV-485D].

[12] *See id.* at ii. The Inspector General's report refers to the CFTC's "Division of Clearing and Intermediary Oversight" and relays that a "team member" in this division prepared the "draft cost-benefit analysis." *Id.* at 17. Since the report's publication, however, the CFTC Commission-

the Commissioners of the CFTC have engaged in various restructurings and procedural reforms in recent years.[13]

Intra-agency coordination mechanisms can also serve as instruments of control in the presence of information asymmetries. Such tools may be used by agency heads to discipline appointed subordinates or resistant career staff. Consider, for example, Environmental Protection Agency (EPA) Administrator Christine Todd Whitman's efforts to transfer the Agency's Ombudsman from the Office of Solid Waste and Emergency Response to another internal office, the Office of the Inspector General.[14] The stated purpose of the reorganization was "to improve the effectiveness of [the Ombudsman] program by giving the Ombudsmen and those who may contact them a clear and consistent set of operating policies and expectations."[15] Critics of the proposal, however — most vocally, the sitting Ombudsman — accused Whitman of attempting to effectively "dissolv[e]" the Ombudsman's position.[16] On this account, by subordinating the Ombudsman role to the authority of the Inspector General, the Ombudsman would in practice be left without independent internal authority.[17] Despite opposition from some members of Congress and ultimately unsuccessful litigation by the Ombudsman himself,[18] Whitman nevertheless implemented the reorganization plan, resulting in the Ombudsman's eventual resignation.[19]

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ers have reorganized the CFTC such that the "Division of Clearing and Intermediary Oversight" has now "been reconfigured into two new divisions: the Division of Swap Dealer and Intermediary Oversight and the Division of Clearing and Risk" — indeed an example of intra-agency coordination. Reassignment of Commission Staff Responsibilities and Delegations of Authority, 78 Fed. Reg. 22,418, 22,418 (Apr. 16, 2013).

[13] *See* REVIEW OF COST-BENEFIT ANALYSES, *supra* note 11, at i–iii; *see also* Garrett F. Bishop & Michael A. Coffee, Note, *A Tale of Two Commissions: A Compendium of the Cost-Benefit Analysis Requirements Faced by the SEC & CFTC*, 32 REV. BANKING & FIN. L. 565, 638–39 (2013) (discussing the ways in which the CFTC has "undergone structural reorganizations in its rulemaking teams to improve the efficacy of cost-benefit analysis").

[14] *See* Press Release, EPA, Whitman Announces Reorganization of EPA Ombudsman Office, EPA 01-R-234 (Nov. 27, 2001), 2001 WL 1498204; Mark Hertsgaard, *Conflict of Interest for Christine Todd Whitman?*, SALON (Jan. 14, 2002, 7:47 PM), http://www.salon.com/2002/01/15/whitman_5 [http://perma.cc/JB35-WFUV].

[15] Draft Guidance for National Hazardous Waste Ombudsman and Regional Superfund Ombudsmen Program, 66 Fed. Reg. 365, 365 (Jan. 3, 2001).

[16] Edward Walsh, *EPA to Transfer Ombudsman*, WASH. POST (Nov. 29, 2001), http://www.washingtonpost.com/archive/politics/2001/11/29/epa-to-transfer-ombudsman/8dae42fa-a252-447b-9237-d60bb36c54a5/ [http://perma.cc/NG52-NUQW] (quoting a memo from the Ombudsman).

[17] *Id.* (quoting the Ombudsman's view that "the [Inspector General] is taking over my cases" and that "[t]hey're going to be doing my job").

[18] *See* Hertsgaard, *supra* note 14; Robert McClure & Paul Shukovsky, *Watchdog Quits EPA: Silenced, He Says*, SEATTLE POST-INTELLIGENCER (Apr. 22, 2002, 10:00 PM), http://www.seattlepi.com/news/article/Watchdog-quits-EPA-Silenced-he-says-1085783.php [http://perma.cc/S6BK-F9SA].

[19] *See* McClure & Shukovsky, *supra* note 18.

Changes in the external monitoring environment can also prompt renewed coordination efforts, though they invariably leave room for institutional discretion. Agency heads can thus exercise a form of "residual decision rights," or rights "actor[s] may possess under a . . . governing arrangement that allow [them] to take unilateral action at [their] own discretion when the formal agreement is ambiguous or silent about precisely what behaviors are required."[20] For example, the D.C. Circuit recently struck down the Securities and Exchange Commission's (SEC) shareholder proxy rule on the basis of an insufficient cost-benefit analysis.[21] As a result, the SEC Commissioners granted the agency's Chief Economist the authority to review and sign off on cost-benefit analyses of future regulations.[22] To further augment the agency's economic capacity, the Commissioners also bolstered the number of economists in the SEC's Division of Risk, Strategy, and Financial Innovation (now known as the Division of Economic and Risk Analysis), as well as enhanced the entity's role in the regulatory drafting process.[23]

Executive agency heads have also engaged in organizational design — not only as a reaction to judicial oversight but also as a response to presidential initiatives. For instance, after President Ronald Reagan issued an executive order requiring agencies to submit major regulations for review, the Secretary of the Department of Health and Human Services (HHS) published a new rule in the *Federal Register*.[24] The rule's stated purpose was to "revis[e] . . . the Department's regulations development processes to assure consistency with the objectives of the President's regulatory relief program in all of the Department's regulatory actions."[25] Specifically, while HHS had previously exempted the Food and Drug Administration (FDA) from its internal review process, it now subjected all "FDA regulations involving significant public policy" to HHS secretary-level review and approval.[26] In other

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[20] Moe & Wilson, *supra* note 5, at 14.

[21] Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

[22] *See* OFFICE OF INSPECTOR GEN., SEC, REPORT NO. 516, IMPLEMENTATION OF THE CURRENT GUIDANCE ON ECONOMIC ANALYSIS IN SEC RULEMAKINGS 9–15 (2013), http://www.sec.gov/oig/reportspubs/516.pdf [http://perma.cc/99V8-W3GK]; Sarah N. Lynch, *SEC Looks to Economists for Legal Cover*, REUTERS (Apr. 16, 2012, 6:23 PM), http://www.reuters.com/article/2012/04/16/us-sec-economic-analysis-idUSBRE83F16W20120416 [http://perma.cc/4VVS-CSC6].

[23] *See* Bruce R. Kraus, *Economists in the Room at the SEC*, 124 YALE L.J.F. 280, 302–04 (2015), http://www.yalelawjournal.org/pdf/KrausPDF_g8okks6z.pdf [http://perma.cc/6UZR-CAVH].

[24] *See* Raising the Level of Rulemaking Authority of the Food and Drug Administration in Matters Involving Significant Public Policy; Response to Executive Order 12291, 46 Fed. Reg. 26,052 (May 11, 1981).

[25] *Id.* at 26,052.

[26] *Id.*

words, the HHS Secretary changed the agency's internal rule-management process to require the FDA to provide more specific information to the Secretary, thereby facilitating more direct political oversight of the FDA.

What is important to note about these examples of internal reform is that none of them were the direct result of a statute or executive order detailing an agency's design. Instead, they all illustrate how agency heads possess substantial autonomy to make these kinds of organizational choices themselves.[27] Focusing on agency divisions in this manner raises a novel set of questions distinct from those raised in the interagency context: For example, how do agency heads organize and coordinate overlapping divisions to accomplish their respective goals, and are these coordination tools different from those deployed within the executive branch more broadly? To what extent are these intra-agency structures and processes influenced by the President and Congress, or other external actors? More generally, what factors might explain the organizational forms that agencies take, and why?

Asking such questions responds in part to the lament that "internal administrative law" has been "largely ignored by modern administrative law scholarship."[28] In other words, the myopic focus on exterior constraints has failed to account fully for the ways in which agency actors actually understand themselves to be restrained — by the rules, procedures, and hierarchies that determine their everyday interactions with each other and the public. Consequently, despite some valuable advances,[29] the resulting literature has yet to sufficiently incorporate

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[27] *See* KATZMANN, *supra* note 1, at 113 ("Like previous administrations, the new regime viewed reorganization as a means to establish institutional arrangements that could facilitate the adoption of its policies and dissolve those structures that hindered the realization of its objectives."); Robinson, *supra* note 7, at 488.

[28] Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1470 (2010); *see also* Sidney Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 464 (2012) (noting that the dominant "paradigm treats public administration as a simple agent of the legislature, rather than a substantive institution in its own right, even though this understanding has always been at odds with regulatory and legislative realities").

[29] *See, e.g.*, Hyman & Kovacic, *supra* note 10, at 1464–65; Jerry L. Mashaw, *Mirrored Ambivalence: A Sometimes Curmudgeonly Comment on the Relationship Between Organization Theory and Administrative Law*, 33 J. LEGAL EDUC. 24 (1983); Gillian E. Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. (forthcoming 2015), http://papers.ssrn.com/abstract_id=2501422 [http://perma.cc/U9M4-PL3S]; Peter H. Schuck, *Organization Theory and the Teaching of Administrative Law*, 33 J. LEGAL EDUC. 13 (1983); Sidney A. Shapiro, *Why Administrative Law Misunderstands How Government Works: The Missing Institutional Analysis*, 53 WASHBURN L.J. 1 (2013); Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577 (2011); William H. Simon, *The Organizational Premises of Administrative Law*, 78 LAW & CONTEMP. PROBS., nos. 1 & 2, 2015, at 61; David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 985–92 (2004); *see also* sources cited *infra* notes 34, 36–42.

the lessons and perspectives from public administration's long concern with internal agency norms and socialization;[30] organizational theory's insights on the implications of alternative bureaucratic arrangements;[31] congressional information theories in political science;[32] or the "new institutional" turn in economics and related developments in theories of the firm.[33]

Previous legal scholars have certainly considered questions of internal agency structure, but the bulk of this work was done decades ago, largely in the context of administrative adjudication, as opposed to rulemaking[34] — the main focus here. As adjudication waned as a policymaking vehicle,[35] commentators turned in earnest to other rulemaking issues, but analogous questions of agency structure and process did not follow suit as readily. When they have arisen, the resulting inquiries have been pursued in discrete contexts such as cost-benefit analysis,[36] or else in narrower case studies of select agencies or subject areas.[37] More recent legal scholarship has also considered the internal

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[30] *See* Metzger, *supra* note 29 (manuscript at 16–19); Shapiro, *supra* note 29, at 1, 5–10 ("Public administration . . . is largely focused on how hierarchy controls, institutional norms, and professionalism promote accountability from inside an agency . . . ." *Id.* at 1.); Shapiro & Wright, *supra* note 29, at 597 ("The public administration literature emphasizes how bureaucratic controls, organizational culture, and professionalism ensure the democratic accountability of agencies.").

[31] *See, e.g.*, HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR (4th ed. 1997); JAMES Q. WILSON, BUREAUCRACY 23–28 (1989).

[32] *See, e.g.*, KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION (1991).

[33] *See, e.g.*, EIRIK G. FURUBOTN & RUDOLF RICHTER, INSTITUTIONS AND ECONOMIC THEORY (2d ed. 2005); OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES (1975); Jean Tirole, *The Internal Organization of Government*, 46 OXFORD ECON. PAPERS 1 (1994).

[34] *See, e.g.*, JERRY L. MASHAW, BUREAUCRATIC JUSTICE (1983); Ronald A. Cass, *Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 B.U. L. REV. 1 (1986); Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965 (1991). Similarly, Professor Michael Asimow's analysis of the internal separation of functions is primarily focused on adjudication, though he does briefly consider issues related to rulemaking. *See* Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 792–96 (1981). He largely concludes that "arguments for separation are unpersuasive when ordinary notice-and-comment procedures are employed, and only slightly more persuasive when the rules are made through" formal procedures. *Id.* at 793.

[35] *See* Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 2017 (2012) ("[S]ince the 1970s, informal rulemaking has been the preferred means of implementing agency policy, instead of individualized agency adjudications.").

[36] *See generally* THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY (1991); Michael A. Livermore, *Cost-Benefit Analysis and Agency Independence*, 81 U. CHI. L. REV. 609 (2014).

[37] *See, e.g.*, KATZMANN, *supra* note 1, at 112–33 (discussing Federal Trade Commission internal organization); JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990) (the National Highway Traffic Safety Administration (NHTSA)); JOEL A. MINTZ, ENFORCEMENT AT THE EPA 184–202 (rev. ed. 2012) (EPA); RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS 135–36 (2005) (national intelligence agencies); Mariano-Florentino Cuéllar, *"Securing" the Nation: Law, Politics, and Organization at the Federal Security Agency, 1939–1953*, 76 U. CHI. L. REV. 587 (2009) (the Federal Security Agency); Luis Garicano

dynamics of agencies more broadly, but has largely focused on mechanisms directly imposed by Congress and the President,[38] as opposed to this study's focus on agency leaders. This still-nascent literature has further addressed distinct but related topics, such as the ways in which particular offices within an agency can exert influence,[39] how agencies regulate themselves,[40] and how internal constraints interact with separation of powers concerns[41] as well as a potential constitutional "duty to supervise."[42]

This Article seeks to synthesize and build upon these efforts to examine how agency heads, as opposed to Congress or the President, can design internal structures and processes to further their own regulatory agendas. The central claim is that agency heads will engage in reorganizations or procedural reforms in response to changed informational needs, but only when the projected value of such information out-

& Richard A. Posner, *Intelligence Failures: An Organizational Economics Perspective*, J. ECON. PERSP., Fall 2005, at 151, 152 (national intelligence agencies); Jerry L. Mashaw & David L. Harfst, *Inside the National Highway Traffic Safety Administration: Legal Determinants of Bureaucratic Organization and Performance*, 57 U. CHI. L. REV. 443 (1990) (NHTSA); Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, LAW & CONTEMP. PROBS., Autumn 1991, at 57 (EPA); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655 (2006) (national intelligence agencies).

[38] Professors Elizabeth Magill and Adrian Vermeule, for example, note the many ways in which an agency's "structure and required processes . . . allocate authority within the agency." Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1072 (2011). Their main examples, however, all focus on the way in which Congress and the President, as opposed to the agency head herself, can make organizational determinations. For instance, they observe that Congress often vests specific responsibilities to statutory delegates, just as the President occasionally designates specific officials within an agency to perform certain functions or duties. *See id.* at 1072–73. Their examples of agency structural choices are those that "are explicitly fractured *by law*." *Id.* at 1059 (emphasis added). Similarly, they point out that statutory provisions like the deliberative privilege exception in the Freedom of Information Act or the Administrative Procedure Act's adjudication requirements can also allocate authority within the agency in different ways. *See id.* at 1074–76; *see also* Hyman & Kovacic, *supra* note 10 (also focusing on structural constraints imposed by Congress and the President).

[39] *See* Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 60–62 (2014).

[40] *See* Elizabeth Magill, Annual Review of Administrative Law — Foreword, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859 (2009). Magill anticipates some of this Article's themes when she mentions the ways in which "[a]gencies can use self-regulatory measures to advance their policy goals, whatever those may be." *Id.* at 883. For example, they could "structure the decisionmaking process to facilitate desired outcomes" as well as require centralized or decentralized decisionmaking, give certain officials sign-off authority, or withhold it. *See id.* at 886. The analysis here seeks to generalize and develop these insights further by drawing upon team production and principal-agent theories.

[41] *See, e.g.*, Neal Kumar Katyal, Essay, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2324–27 (2006); Gillian E. Metzger, Essay, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 426–34 (2009); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 530–50 (2015).

[42] *See* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015).

weighs the implementation costs for any given constraint. These constraints include budgetary limitations, as well as fixed legislative and executive design choices. In turn, agency heads will choose intra-agency coordination mechanisms to facilitate the production of information that has become increasingly valuable due to changes in preferences or exogenous uncertainties.

To better understand how agency heads approach organizational decisions, Part I first examines the nature of the organizational problem facing the agency head. Specifically, it draws upon the social science literature to conceive of administrative agencies as information-processing organizations, and considers how leaders subdelegate their responsibilities accordingly. In contrast with administrative law scholarship's tendency to focus only on principal-agent premises, the analysis also explores the issue as one of team theory: how agency heads manage their internal resources and staff in common pursuit of regulatory production. The main idea here is that, holding all else constant, increases in exogenous levels of uncertainty will prompt intra-agency reforms that promote the more efficient transmission of privileged information to the agency head.

Part II then provides a typology of the coordination mechanisms that agency heads can use to prioritize the information most important to them. These tools include structural choices such as the centralization of internal oversight, the specialization of functions and divisions, as well as the separation of decisionmaking and analyses. In addition, agency heads can also coordinate through various processes such as the standardization of information and the implementation of procedures governing clearance authority and priority-setting within the agency. Finally, Part III evaluates the tradeoffs between these various coordination approaches from the broader outlook of the administrative state as a whole. Specifically, increased intra-agency coordination could introduce broader threats to political accountability, efficiency, and the protection of scientific expertise across agencies. At the same time, such risks could be ameliorated by legislative changes designed to increase the transparency of internal coordination devices, as well as judicial doctrines that police against inappropriate forms of political influence.

I. INTERNAL STRUCTURE AND PROCESS

This Part examines features of the bureaucratic autonomy afforded to agency heads by the inevitably incomplete agency design choices made by Congress and the President.[43] The first section describes the

[43] *See infra* section II.B.2, pp. 475–78; *cf.* DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY (2001) (discussing how organizational reputation can foster latitude

position and diverse goals of the agency head, who wields considerable managerial discretion. The second section develops a theory of bureaucratic design based on the concept of administrative agencies as information processors, while the last section considers the kinds of information that agency heads often find valuable during the rulemaking process.

A. The Agency Head

Legislative and executive choices can determine many aspects of agency structure and process.[44] These congressional and presidential designs, however, inevitably leave significant organizational slack. To illustrate from the grantmaking context, consider the restructuring efforts of the National Endowment for the Arts (NEA) in the wake of the agency's controversial decision to fund Robert Mapplethorpe's sexually explicit art.[45] The NEA consequently became a political target, once House Republicans that vowed to end the Endowment were finally voted into power.[46] In anticipation of the impending budget cuts, the NEA's Chairwoman, Jane Alexander, decided to impose new structures and processes in an attempt to "develop a new public image and shift [the agency's] constituency."[47] In doing so, her hope was to "survive" legislative opposition.[48]

After months of internal agency deliberations, Alexander first decided to change the NEA's programmatic structure.[49] While the agency had previously had seventeen independent programs with their own budgets and review panels, Alexander now called for the specialization of her staff according to the four "themes" of "Creation & Presentation, Education & Access, Heritage & Preservation, and Planning & Stabilization."[50] In addition, she standardized the information requested by the grant application and condensed its requirements to a single set of guidelines that emphasized what the arts had in common, as opposed to the prior disciplinary focus (in literature, dance, and so on).[51] She

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from Congress and the President to spur policy innovation); DANIEL CARPENTER, REPUTATION AND POWER (2010) (arguing that the FDA's reputation for exercising enforcement discretion has enhanced its regulatory power); GREGORY A. HUBER, THE CRAFT OF BUREAUCRATIC NEUTRALITY (2007) (arguing that agencies can use discretion to pursue "strategic neutrality" to garner political support); George A. Krause, *The Institutional Dynamics of Policy Administration: Bureaucratic Influence over Securities Regulation*, 40 AM. J. POL. SCI. 1083 (1996).

[44] *See infra* section II.B.2, pp. 475–78.

[45] *See* Thomas Peter Kimbis, *Planning to Survive: How the National Endowment for the Arts Restructured Itself to Serve a New Constituency*, 21 COLUM.-VLA J.L. & ARTS 239, 241 (1997).

[46] *Id.* at 242.

[47] *Id.* at 239, 242.

[48] *Id.* at 239.

[49] *Id.* at 244.

[50] *Id.*

[51] *Id.*

also designed a new set of internal review procedures around these themes.[52]

Importantly, Congress had mandated a particular internal review process of its own. Specifically, it required internal statutory panels with geographic, ethnic, and artistic diversity to make recommendations to the National Arts Council, a group nominated by the President to review applications before forwarding them to the NEA Chairwoman for a final decision.[53] On top of this legislatively mandated procedure, however, Alexander added initial steps of review designed to influence the grants eventually awarded. To do so, she created review groups composed of experts from various artistic disciplines, who would then forward their rankings to new Combined Arts Panels (CAPs) structured around the four programmatic themes. While the CAPs complied with the statutory requirements, the initial review groups did not.[54]

In this manner, faced with hostility to the agency's mission, the NEA's Chairwoman shifted the agency's priorities and designed new organizational means of implementing them. She, not Congress or the President, was the "[c]hief" actor in this redesign effort.[55] In particular, the Endowment "restructured itself as an agency benefitting art audiences and other art users, in addition to its former constituency of artists."[56] Congress had specified some aspects of these internal dynamics, to be sure, but the agency head was able to supplement them in pursuit of her own goals.

The ultimate goals of individual agency heads, of course, are more diverse than those of private firm managers with profit-maximizing incentives — though both face analogous organizational challenges.[57] Indeed, the administrative state features many different types of agency heads, government executives charged with administering an agency.[58] Most are political appointees, often picked by the President and

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[52] *Id.* at 246–48.

[53] *Id.* at 247–48.

[54] *Id.*

[55] *Id.* at 239; *see also id.* at 247–48.

[56] *Id.* at 248.

[57] *See* WILSON, *supra* note 31, at 197 ("[G]overnment executives face a different set of personal incentives than do private executives. The head of a business firm is judged and rewarded on the basis of the firm's earnings — the bottom line."); *cf.* ALFRED P. SLOAN, JR., MY YEARS WITH GENERAL MOTORS 139–43 (1990) (explaining the implementation of a reporting system for General Motors managers as a method of controlling a decentralized organization). Indeed, future work should do more to explore the many fruitful analogies between private firm managers and agency heads arising from their shared problem of how to manage information in large organizations.

[58] *See* WILSON, *supra* note 31, at 196 ("[G]overnment . . . executives are responsible for maintaining their organizations.").

confirmed by the Senate.[59] Others, such as the heads of the National Weather Service or the National Institute of Standards and Technology, are career bureaucrats promoted from within the agency or comparable agencies.[60] The professional trajectories of agency heads are also varied, ranging from years of prior government service to previous careers in elected office, academia, or the private sector. The institutional features of these positions are similarly diverse. Sometimes, for example, agency heads are removable at will, or alternatively, for cause.[61] They may be subject to tenure limits.[62] In addition, agency heads can serve alone at the top of the agency hierarchy or as part of a multimember commission or board,[63] which may be subject to partisan-balancing requirements.[64]

Agency heads cannot promulgate rules without statutory authorization; in this sense, many of their substantive goals are restrained by Congress. Most authorizing statutes, however, are ambiguous and thus allow for substantial discretion.[65] Constraints imposed by the executive and the courts are similarly limited in scope, whether due to statutory restrictions or simple time and resource limitations.[66] As a result, agency heads are not always the perfect agents of the President or

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[59] *Id.* at 198 ("The chief executive of most federal agencies, bureaus, and departments is a political appointee."). Political appointees can be defined broadly to include "any employee who is appointed by the President, the Vice President, or agency head." *Political Appointees*, U.S. OFF. GOV'T ETHICS, http://www.oge.gov/Topics/Selected-Employee-Categories/Political-Appointees [http://perma.cc/953F-DZG5]. As Professor Nina Mendelson further explains:

> The layer of appointed agency officials subject to Senate confirmation in a given agency is often two or three deep, occasionally four. The President may have the ability to select officials lower down in the agency as well, but these appointments do not depend on Senate confirmation.
>
> For example . . . at the Department of Labor the secretary and deputy secretary of labor are presidential appointees, subject to Senate confirmation. The assistant secretaries are subject to Senate confirmation as well. But other posts, such as the associate deputy secretary, deputy assistant secretaries, and chiefs of staff, include "noncareer" (or political) appointees exempt from Senate confirmation.

Nina A. Mendelson, *The Uncertain Effects of Senate Confirmation Delays in the Agencies*, 64 DUKE L.J. 1571, 1582–83 (2015) (footnotes omitted).

[60] WILSON, *supra* note 31, at 198.

[61] *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 786–89 (2013).

[62] *Id.* at 789–92.

[63] *Id.* at 792–97. While the main focus of this Article's analysis is on the single presidentially appointed agency head, future work should consider the additional organizational dynamics introduced by multimember commissions.

[64] *Id.* at 797–99.

[65] *Cf.* Muscarello v. United States, 524 U.S. 125, 138 (1998) ("[M]ost statutes are ambiguous to some degree.").

[66] *See generally* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Gillian E. Metzger, Essay, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010).

Congress, and thus their organizational design choices deserve study in their own right. Indeed, this basic premise — that agency heads have preferences that do not always align with that of their principals — has generated decades of scholarship attempting to explain or mitigate the principal-agent problems posed by the federal bureaucracy.[67]

In turn, there are many explanations for the potential preference divergence between agency heads and their political overseers. First is the prospect of bureaucratic capture, the notion that agency actors are beholden to external special interests, whether the regulated industry or broader public interest groups.[68] The revolving door that often ensures that departing agency heads can continue their careers with these same interest groups only exacerbates this concern.[69] Yet another possibility is that political appointees may end up supporting the views of their zealous career staff, as opposed to those of their political monitors.[70] Finally, even the most would-be faithful agency heads are agents of multiple principals, and must thus make difficult tradeoffs in their attempts to serve many masters. These tradeoffs arise any time the goals set forth by regulatory principals conflict.

When Congress and the presidency are controlled by different political parties, for instance, there are likely to be diverging amounts of demand for regulations and disagreements about their desired scope. Tensions may also arise under conditions of unified government, as when agency heads are subject to statutes directing their agencies to pursue several, conflicting goals.[71] Consider, for example, the Director of the Bureau of Land Management's legislative mandate to "balance[]" various considerations, including the need for timber and min-

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[67] For a useful overview, see Jacob E. Gersen, *Designing Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 336–42 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

[68] *See generally, e.g.*, PAUL J. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES (1981). According to this argument, regulated industries have the resources, incentives, and information necessary to influence agency actors, while public interest groups are also influential given their ability to marshal publicity and political pressure. *See* BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR (1981); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 169 (1990).

[69] *See* QUIRK, *supra* note 68, at 143–74.

[70] *See* E. Donald Elliott, *TQM-ing OMB: Or Why Regulatory Review Under Executive Order 12,291 Works Poorly and What President Clinton Should Do About It*, LAW & CONTEMP. PROBS., Spring 1994, at 167, 176. These views may be particularly informed by some career staff that have spent decades or even their entire careers at the agency, perhaps becoming heavily invested in the release of internally resource-intensive regulatory actions. *See* David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407, 424 (1997) ("[A]n agency with a well-defined mission will tend to attract bureaucrats whose goals are sympathetic to that mission.").

[71] *See* Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1 (2009).

erals, as well as the protection of scenic and scientific values.[72] In these situations, the Director must make regulatory policy decisions that necessarily trade off between multiple, contradictory interests. Similarly, the head of the Department of the Interior is charged with protecting natural resources, managing offshore leasing, collecting revenue, and overseeing permitting and operational safety.[73]

Given their resource and cognitive constraints, different agency heads will necessarily value certain kinds of data and advice more than other kinds according to their own preferences and assessments of relative risk. A rich literature accordingly attempts to isolate the more particular determinants of bureaucratic behavior within their respective constraints. Prominent theories posit that agency heads attempt to maximize their operating budgets,[74] institutional reputations,[75] or future career prospects.[76] In reality, agency heads are likely to have complex utility functions that take into account many, if not all, of these considerations.[77] The present analysis need not choose among these competing hypotheses, but need assume only that agency heads act to maximize their own utility when engaging in regulatory production.

B. Agencies as Information Processors

In pursuit of their respective goals, however, agency heads with rulemaking authority require vast amounts of information.[78] Numerous statutes and executive orders mandate that certain kinds of infor-

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[72] 43 U.S.C. § 1702(c) (2012) (defining "multiple use" as "the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; . . . a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output"); *see also* Biber, *supra* note 71, at 3.

[73] *See* 43 U.S.C. §§ 1332, 1334–1338a, 1344, 1347–1348 (2012).

[74] *See* WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 22 (1971) (defining "bureaucrat" as the "senior official of any bureau with a separate identifiable budget"); *id.* at 36–42 (discussing the theory of budget maximization).

[75] *See* CARPENTER, REPUTATION AND POWER, *supra* note 43, at 45–67.

[76] *See* ANTHONY DOWNS, INSIDE BUREAUCRACY 92–96 (1967); GORDON TULLOCK, THE POLITICS OF BUREAUCRACY (1965), *reprinted in* 6 THE SELECTED WORKS OF GORDON TULLOCK 1, 48–50 (Charles K. Rowley ed., 2005).

[77] *See* DOWNS, *supra* note 76, at 2 ("Bureaucratic officials in general have a complex set of goals including power, income, prestige, security, convenience, loyalty (to an idea, an institution, or the nation), pride in excellent work, and desire to serve the public interest.").

[78] *See* Cary Coglianese, Richard Zeckhauser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 281–85, 302 (2004); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1427–29 (2011).

mation accompany most regulations: from the rule's anticipated costs and benefits, to impacts on the environment, states, small businesses, and paperwork obligations.[79] Regulatory decisions are sometimes also made on other grounds, such as political reasons that are not always disclosed.[80]

At the same time, agency heads must often make regulatory decisions under conditions of uncertainty.[81] Uncertainty can be defined in many ways,[82] but as understood here, the concept refers to the gap between the information that an agency head currently possesses and the amount of information necessary to make a decision with full knowledge of the consequences.[83] Put differently, uncertainty is the difference between the store of information required to ensure some outcome and that which is already retained by the agency head. In this sense, regulatory uncertainty consists of the agency head's informational deficit regarding the anticipated impacts of the rule. This deficit, in turn, depends on the probability distribution of the rule's potential effects on the world, as well as the probability that the rule itself could be reversed or struck down before implementation.[84]

Accordingly, the level of uncertainty increases whenever an exogenous political or legal change requires the agency head to gather more internal information than is currently available through existing channels. So, for example, as courts began to take a hard look at regulatory policy decisions under arbitrary-and-capricious review, agency

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[79] *See, e.g.*, 2 U.S.C. § 1532 (2012) (statements regarding unfunded mandates on state, local, or tribal governments, or the private sector); 5 U.S.C. § 604 (2012) (regulatory flexibility analyses); 42 U.S.C. § 4332(2)(C) (2012) (environmental impact statements); 44 U.S.C. § 3507(a)(1)(D)(ii)(V) (2012) (paperwork burden analyses).

[80] *See* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 19, 23–26 (2009) (collecting examples of agency "failure to transparently disclose political influences," *id.* at 26).

[81] *See* Stephenson, *supra* note 78, at 1427 ("Most government decisions must be made under conditions of substantial uncertainty, in which the optimal choice depends on information about consequences that can never be known with anything approaching certainty.").

[82] Some, for example, understand uncertainty as applying to situations where the probability of some harm is nonquantifiable — distinguishing it from the concept of "risk," where such probabilities can be attached. *See, e.g.*, FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT 197–232 (1921).

[83] This definition draws from a concept of uncertainty that some refer to as "decision uncertainty" — a state in which the decisionmaker is unable to structure her preferences between alternative scenarios. *See* Mathew D. McCubbins, *The Legislative Design of Regulatory Structure*, 29 AM. J. POL. SCI. 721, 721, 730 (1985). This notion is also similar to Professor Jay R. Galbraith's definition of uncertainty as "the difference between the amount of information required to perform the task and the amount of information already possessed by the organization." *See* JAY R. GALBRAITH, ORGANIZATION DESIGN 36–37 (1977) (emphasis omitted).

[84] *See* Albert J. Reiss, Jr., *The Institutionalization of Risk*, *in* ORGANIZATIONS, UNCERTAINTIES, AND RISK 299, 305 (James F. Short, Jr. & Lee Clarke eds., 1992) ("[T]he uncertainty faced in surrendering control of the outcome of a case to a third party must often be balanced with the uncertainty faced when error is reviewed and one is held accountable for decisions.").

heads faced greater uncertainty regarding how to formulate and draft their regulations in ways that would withstand judicial challenge.[85] Holding these dynamics constant, an individual agency head's level of uncertainty also increases when she privileges different kinds of information due to a change in preferences for particular outcomes. For example, an FDA appointee with little technical training, but deep partisan loyalties, may seek more information about a rule's political implications relative to its expected scientific impacts. Similarly, a head of the EPA with political aspirations after leaving her position might be more concerned with appeasing the White House relative to the D.C. Circuit. Thus, she may seek more information about the President's preferences, rather than the regulation's litigation risks.

Administrative agencies must thus confront what organizational theorists refer to as the problem of "uncertainty absorption": how organizations operate "when inferences are drawn from a body of evidence and the inferences, instead of the evidence itself, are then communicated."[86] When the available data are complex, what constitutes the "correct" interpretation of that data is contestable and can yield equally plausible inferences. As a result, the organizational division within the agency that engages in such interpretation wields substantial power.[87] It is therefore in the agency head's interests to organize these sources in ways that ensure that such information is presented to her in a way that best serves her priorities. In other words, the agency head can design structures and procedures to process internal information in ways that she finds most salient.[88] Indeed, this analysis assumes that agency heads would rather select policies with consequences that are known rather than those that are unknown; that is, they are risk averse.[89] When consequences are known, an agency head can take credit accordingly and produce outcomes in line with her prefer-

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[85] *See infra* notes 152–157 and accompanying text.

[86] JAMES G. MARCH & HERBERT A. SIMON, ORGANIZATIONS 165 (1958).

[87] *See* Thomas H. Hammond, *Agenda Control, Organizational Structure, and Bureaucratic Politics*, 30 AM. J. POL. SCI. 379, 415 (1986) (indicating that in a hierarchical model of an organization, "only one person may be needed to knock [an alternative] out of further consideration" (emphasis omitted)); Raghuram G. Rajan & Luigi Zingales, *Power in a Theory of the Firm*, 113 Q.J. ECON. 387, 388 (1998) (characterizing "privileged access to [a] resource" as a form of power within an organization).

[88] *See* McCubbins et al., *supra* note 3, at 256 (describing as one "motive for broad delegation of authority" the situation in which "political leaders are uncertain about what politically is the most desirable policy," and thus "[i]t can then be in their interest to set in motion processes that will resolve these uncertainties and that will use the newly acquired information to carry out the policy preferences they would have if fully informed"); *cf.* Coglianese et al., *supra* note 78, at 279 (analyzing how regulators use various strategies and procedures to gather information from regulated industries).

[89] *Cf.* KREHBIEL, *supra* note 32, at 62 (describing legislators' preference for policies with known consequences over those with uncertain consequences).

ences.[90] By contrast, when consequences are uncertain or unknown, there is a risk that the agency head will be unable to achieve her desired results — surprise and humiliation loom.[91]

In this sense, the agency can be understood as an information processor. The literature treating organizations as information-processing systems is vast and interdisciplinary,[92] but one insight that emerges and is developed in depth here is that managers often attempt to optimize the organization's capacity to process information in light of changes in external uncertainties.[93] In this view, as uncertainty increases, the agency's existing information-processing capacity is challenged. To avoid an undesired decrease in output, the agency head must react by increasing the agency's information-processing capacity.[94] The manager or agency head can do so in multiple ways — the most important of which, for our purposes, is by decreasing the costs of coordination among the agency's various divisions. In this sense, the institutional design problem facing the agency head can be understood as one of how to manage a team with superior information efficiently to achieve some level of desired regulatory output. When agency heads are newly appointed or otherwise confronted with novel sources of uncertainty, they can impose their own coordination mechanisms to process internal information in line with their regulatory goals.[95]

Of course, as later discussed, these efforts are themselves limited by the costs of implementing these changes subject to various constraints. These constraints could include both budgetary limits as well as any

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[90] *Cf. id.*

[91] *Cf. id.*

[92] *See generally, e.g.*, JAMES A. BRICKLEY, CLIFFORD W. SMITH & JEROLD L. ZIMMERMAN, MANAGERIAL ECONOMICS AND ORGANIZATIONAL ARCHITECTURE (5th ed. 2009); RICHARD M. CYERT & JAMES G. MARCH, A BEHAVIORAL THEORY OF THE FIRM (1963); GALBRAITH, *supra* note 83; JACOB MARSCHAK & ROY RADNER, ECONOMIC THEORY OF TEAMS (1972); Roy Radner, *Hierarchy: The Economics of Managing*, 30 J. ECON. LITERATURE 1382 (1992); Roy Radner, *The Organization of Decentralized Information Processing*, 61 ECONOMETRICA 1109 (1993); Roy Radner & Timothy Van Zandt, *Information Processing in Firms and Returns to Scale*, ANNALES D'ÉCONOMIE ET DE STATISTIQUE, January/June 1992, at 265; Timothy Van Zandt, *Real-Time Decentralized Information Processing as a Model of Organizations with Boundedly Rational Agents*, 66 REV. ECON. STUD. 633 (1999).

[93] *See* GALBRAITH, *supra* note 83, at 174–75. *See generally* MARSCHAK & RADNER, *supra* note 92.

[94] *See* GALBRAITH, *supra* note 83, at 37 (indicating that an increase in variables that an organization must consider will lead to "bottlenecks").

[95] *See* KATZMANN, *supra* note 1, at 9 ("In their efforts to shape policy outcomes, executives seek to control the process by which decisions are reached."); Hammond, *supra* note 87, at 382 ("The structure of a bureaucracy . . . influences which options are to be compared, in what sequence, and by whom [such that] a particular organizational structure is, in effect, the organization's agenda." (emphasis omitted)); Magill, *supra* note 40, at 886; Weisbach & Nussim, *supra* note 29, at 985–92 (discussing coordination costs).

organizational restrictions imposed by Congress, the President, and parent agency heads (such as, for example, the Secretary of HHS's oversight of the FDA's Commissioner). More generally, for any fixed constraint, agency heads will engage in reorganizations or process reforms in response to changed informational needs only when the expected value of such information outweighs the implementation costs.

In adopting this approach, this analysis seeks to expand beyond the dominant tendency of administrative law scholarship to conceive of bureaucracies solely in principal-agent terms — that is, primarily defined by a divergence of preferences between agency heads and their staff. From this assumption, the principal-agent paradigm largely presumes that organizations set up hierarchies in order to yield the benefits of subordinate expertise while minimizing shirking and other agency costs.[96] By contrast, the team production approach initially assumes away divergent preferences between the agency head and her staff.[97] Instead, it considers the distinct problems that arise when productive activity requires the coordination and investment of resources by two or more groups or individuals within an organization.[98]

Why is the team theory approach not only plausible but also a persuasive way to understand the bureaucracy? While principal-agent perspectives have long traded on anecdotes of defiant career staff, thicker case studies of the sort found in the public administration literature emphasize instead the ways in which civil servants seek to support — not undermine — their political principals.[99] One explanation for this observation arises from how civil servants often perceive their own roles: "to present information to political appointees, to let the appointees make the decision, and then to carry out the president's or the appointee's directives."[100] Many career staff, that is, understand their function as that of information provision, not policymaking. As a

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[96] *See, e.g.*, PAUL MILGROM & JOHN ROBERTS, ECONOMICS, ORGANIZATION, AND MANAGEMENT 214–39 (1992). *See generally* Oliver E. Williamson, *Hierarchical Control and Optimum Firm Size*, 75 J. POL. ECON. 123 (1967) (discussing diminishing returns to scale within hierarchical organizations).

[97] *See* Weisbach & Nussim, *supra* note 29, at 984 (characterizing team theory as an approach that "assume[s] away any divergence of preferences among individual agents").

[98] *See* Masahiko Aoki, *The Contingent Governance of Teams: Analysis of Institutional Complementarity*, 35 INT'L ECON. REV. 657, 658–60 (1994); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 249 (1999); Luis Garicano, *Hierarchies and the Organization of Knowledge in Production*, 108 J. POL. ECON. 874, 874 (2000); Weisbach & Nussim, *supra* note 29, at 983–84.

[99] *See, e.g.*, MARISSA MARTINO GOLDEN, WHAT MOTIVATES BUREAUCRATS? (2000); James P. Pfiffner, *Political Appointees and Career Executives: The Democracy-Bureaucracy Nexus in the Third Century*, 47 PUB. ADMIN. REV. 57 (1987).

[100] GOLDEN, *supra* note 99, at 155; *see also id.* ("[C]areer civil servants are motivated, at least in part, by their role perception, [which] leads them to cooperate with their appointed principals in the executive branch.").

result, this "internal code of conduct" can mitigate temptations to otherwise resist appointed superiors.[101] At the same time, civil servants may also act as team players out of self-interest.[102] Recalcitrant career staff in the Senior Executive Service, for example, can face possible demotions, undesirable reassignments, and even termination.[103] Civil servants may also cooperate in search of career advancement by "hitch[ing] their wagons" to well-connected agency heads.[104] For any of these reasons, bureaucrats may in fact be more responsive than resistant to their appointed superiors.

At the same time, of course, these two perspectives — principal-agent and team-oriented — are, in many ways, inextricably linked. Principal-agent problems often arise because of information asymmetries, and, in this respect, efforts to reduce internal information-acquisition costs can also help mitigate potential agency problems. As such, principal-agent insights are still relevant to the present analysis and will be developed further in future work.[105] The main thesis explored in the present study, however, is that internal managerial forms arise not only to monitor and police agents but also to handle limitations on information processing. It is these limitations, in turn, that require that relevant informational tasks be divided and then coordinated through higher tiers in the agency's hierarchy, or through other related structures and processes.[106] This perspective accordingly focuses on minimizing not only agency costs but information costs as well.

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101 *Id.*

102 *Id.* at 23 (finding "considerable support" for the idea that "[c]areer civil servants frequently acted in ways that served their own self-interest," and finding that "self-interest calculations led to a wide range of behaviors . . . including complying with the directives of political principals").

103 *See id.* at 158–59 ("Career bureaucrats cooperated rather than resisted because they feared for their jobs, wanted to avoid the wrath of their appointed bosses, did not want to be demoted or banished, and sought to advance their careers."); Patricia W. Ingraham & Charles Barrilleaux, *Motivating Government Managers for Retrenchment: Some Possible Lessons from the Senior Executive Service*, 43 PUB. ADMIN. REV. 393, 395 (1983) (noting that the "act of signing the SES contract removed the managers from many of the traditional securities of civil service protection" and discussing the incentives that were meant to "provide the president and his appointees with a more flexible and responsive managerial corps which would be more clearly accountable to presidential leadership and direction").

104 GOLDEN, *supra* note 99, at 159.

105 That work will attend, among other things, to the ways in which agency heads design internal structures and processes to undermine or otherwise avoid incompetent or uncooperative career staff. Whether principal-agent or team theory models are ultimately more valuable will depend in part on how well they describe the actual behavior of agency actors. It is possible that both models are useful given the variety of administrative agencies, their individual histories and cultures, and the resulting potential (or lack thereof) for preference divergence between agency heads and their career staff.

106 *See* Weisbach & Nussim, *supra* note 29, at 984.

C. The Need for Subdelegation

For the same reasons that Congress and the President delegate to agency heads, so too must agency heads delegate within their own ranks.[107] These subdelegations can arise because agency heads face numerous constraints — whether in terms of time, expertise, or resources — requiring them to rely on agents within the bureaucracy to help produce rules and sustain them through various political and legal challenges. As a result, agency heads frequently require a team that can provide the requisite information to draft a regulation and help determine its substance.[108]

This section accordingly discusses some of the most important developments in the administrative state that have influenced agency heads' general need for certain kinds of internal information, whether political, legal, economic, or scientific in nature.[109] The account is not intended to be comprehensive, only illustrative.[110] Different agencies will also require more specific kinds of information depending on the scope and subject of their regulatory domains. While there is a rich literature about how agencies acquire information from external sources,[111] the inquiry here is distinct. Specifically, the analysis holds the level of information possessed by the agency constant, and asks how exogenous dynamics can change the agency head's demand for that information within the agency.

1. Political. — Administrative agencies are subject to multiple political overseers that possess numerous means to delay or otherwise prevent a regulation from going into effect. Congress, for example, has

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[107] *See* Magill, *supra* note 40, at 884–86.

[108] *See* Stephenson, *supra* note 78, at 1427–30 (discussing agents "or their subordinates," *id.* at 1429, conducting research in order to respond to scientific, economic, and political uncertainties facing agencies).

[109] The boundaries between these categories of knowledge are contestable and fluid but map onto familiar typologies in administrative law and other disciplines. *See, e.g.*, KATZMANN, *supra* note 1, at 105 (arguing that a Federal Trade Commissioner "has the license to consider legal, economic, political, and other factors in reaching his decision"); Magill & Vermeule, *supra* note 38, at 1077–78 ("The ongoing contest over the roles of expertise, legalism, and politics in administrative law can . . . be viewed in sociological terms as a contest among different types of professionals, with different types of training and priorities."). See also ALVIN I. GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD (1999), in which Professor Goldman distinguishes among special domains of knowledge including "science," "law," and "democracy." *Id.* at 221–348. Goldman also discusses "education" as a domain of knowledge, *id.* at 349–73, which is not relevant to the bureaucratic context as understood here.

[110] Others have provided more extensive accounts of various external judicial and political influences on the agency. *See generally* Magill & Vermeule, *supra* note 38. The purpose here is to reframe some of these external dynamics in terms of categories of information that the agency head requires as a result of exogenous factors, thus motivating the various structures and processes discussed in Part III.

[111] *See, e.g.*, Coglianese et al., *supra* note 78, at 281–85; Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J.L. ECON. & ORG. 469, 476–77 (2007).

always been able to override a regulation by amending the authorizing statute.[112] In addition, Congress can refuse to grant an agency funds to enforce the rule, or subject the agency head to bruising oversight hearings.[113] Because passing new legislation is difficult, a number of innovations have also sought to lower the cost of striking down an agency's regulation. The legislative veto, for example, attempted to reserve to Congress the ability to nullify executive actions taken pursuant to the underlying statute — though it was eventually struck down as unconstitutional.[114] Instead, Congress must now pass a joint resolution of disapproval under the Congressional Review Act[115] to overturn a regulation; this resolution, like a statutory amendment, requires presidential assent to go into effect.[116]

The President, for his part, also possesses various mechanisms of control. At the most extreme, he could threaten an uncooperative agency head with removal. Alternatively, the President could also seek to exercise directive authority over his appointee.[117] Perhaps his most important tool of late has been his ability to review executive agency regulations through a process currently coordinated by the Office of Information and Regulatory Affairs (OIRA).[118] President Reagan was arguably the first to exert such supervisory control "self-consciously and openly"[119] through an executive order establishing a review regime that broadly continues through bipartisan consensus today. Specifically, under current governing orders, executive branch agencies must submit "significant" rules to OIRA.[120] Significant regulations meet one of multiple criteria. They may be expected to have an annual economic effect of $100 million or more; raise potential inconsistencies with

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112 *Cf.* R. Douglas Arnold, *Political Control of Administrative Officials*, 3 J.L. ECON. & ORG. 279, 280–83 (1987) (discussing ways that Congress can influence agency decisions and operations).

113 *See* Beermann, *supra* note 66, at 122–26.

114 *See* INS v. Chadha, 462 U.S. 919, 958–59 (1983).

115 5 U.S.C. §§ 801–808 (2012).

116 *See id.* at § 801. That Act, among other things, requires agencies to send a copy of every new final rule and its associated analysis to Congress and the Government Accountability Office. *Id.* at § 801(a)(1)(A)–(B). Within a sixty-day review period, Congress can use expedited procedures to pass a joint resolution of disapproval overturning the rule. *Id.* at §§ 801(a)(3)(B), 802. Since the statute's 1996 enactment, it has only been used once to invalidate a rule. That rule was the Occupational Safety and Health Administration's ergonomics standard in March 2001, "an action that some believe to be unique to the circumstances of its passage." MORTON ROSENBERG, CONG. RESEARCH SERV., RL30116, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT OF THE CONGRESSIONAL REVIEW ACT AFTER A DECADE 6 (2008).

117 *See* Kagan, *supra* note 66.

118 *See id.* at 2277–90.

119 *Id.* at 2277.

120 Exec. Order No. 12,866 § 6(a), 3 C.F.R. 638, 644–46 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2012).

other agencies; "[m]aterially alter the budgetary impact of" certain programs; or invoke "novel legal or policy issues."[121]

Many of these criteria reflect factors that Presidents consider highly salient either to advance their own regulatory agendas or their parties' electoral interests. Indeed, one explicit standard of presidential review is whether the regulation demonstrates consistency with the "President's priorities" and prevents "conflict" with "policies or actions taken or planned by another agency."[122] OIRA thus helps to coordinate a process that explicitly engages in a kind of political review to ensure that the regulation aligns with presidential preferences.[123] Should a conflict arise, OIRA can effectively reverse an agency action on behalf of the President in a number of ways, including the use of "return" letters explaining the reason for the return, encouraging the agency to withdraw the rule, or otherwise suggesting revisions.[124]

Thus, agency heads seeking to avoid reversal of their regulations by the President or Congress will demand information about the extent to which they will face such external opposition. Such opposition not only increases the probability that their rules will be reversed, but also is costly in terms of the time and resources required to engage and respond. To minimize these risks, agency heads thus value information about the relative likelihood of reversal. In this sense, such "political information" can be understood as knowledge or data about the consequences of a regulation for various electoral interests.[125] These inter-

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[121] *Id.* § 3(f), 3 C.F.R. at 641–42. The text in full states:

> "Significant regulatory action" means any regulatory action that is likely to result in a rule that may:
>
> (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
>
> (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
>
> (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
>
> (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Id. OMB's *Circular A-4*, in turn, states that "Executive Order 12866 requires agencies to conduct a regulatory analysis for economically significant regulatory actions as defined by Section 3(f)(1)." OFFICE OF MGMT. & BUDGET, CIRCULAR A-4, REGULATORY ANALYSIS 1 (2003).

[122] Exec. Order No. 12,866 § 2(b), 3 C.F.R. at 640.

[123] *See* Stuart Shapiro, *Unequal Partners: Cost-Benefit Analysis and Executive Review of Regulations*, 35 ENVTL. L. REP. 10,433, 10,433–34 (2005) (distinguishing between "OIRA's role as the eyes and ears of the president in overseeing regulatory agencies" and its "analytical mission," *id.* at 10,434).

[124] *See* Exec. Order No. 12,866 § 6(b)(3), 3 C.F.R. at 647.

[125] *See* McCubbins et al., *supra* note 3, at 258 (referring to "political information" as that which is gained when "the agency learns [through notice-and-comment procedures] who are the relevant political interests to the decision and something about the political costs and benefits associated with various actions").

ests could include those of individual legislators or the White House, as well as interest groups and other stakeholders engaged in "fire-alarm" oversight.[126]

Political information of this sort is often possessed by political appointees within the agency, who are sometimes presidentially appointed and Senate-confirmed. Because of their partisan affiliations, such internal actors often have more knowledge relative to others within an agency about how a regulation may be politically perceived. Because executive branch norms constrain informal communications between the White House and career civil servants, these communications are often channeled through the political appointees in the agency.[127] Some agencies also have dedicated offices of legislative affairs, which form more long-term relationships with congressional staff.[128]

2. Legal. — In addition to political checks, administrative agencies are also subject to a number of legal constraints reinforced through judicial review. Many of these requirements arise from the Administrative Procedure Act[129] (APA), its associated common law doctrines,[130] and the agency's own organic statutes. As a result, agency heads also need legal advice regarding a rule's litigation risks and the extent to which statutes and judicial decisions may constrain their regulatory options. In the words of one observer:

> [T]he main tasks of the lawyer in public administration are divided into two basic functions. One is protective; he must safeguard his agency against legal challenge from the outside. The other is facilitative; time and again officials need the expert in framing legal devices for the attainment of administrative ends.[131]

Put differently, administrative lawyers are trained to anticipate potential litigation risks and help agency heads brainstorm legal options that

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126 *See* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984) (describing "fire-alarm oversight" as a "less centralized" type of oversight that relies on "a system of rules, procedures, and informal practices that enable individual citizens and organized interest groups" to hold agencies accountable).

127 *Cf.* Richard J. Pierce, Jr., *Outsourcing Is Not Our Only Problem*, 76 GEO. WASH. L. REV. 1216, 1223 (2008) (book review) ("A political appointee can usually do battle with the [White House's] Office of Management and Budget over both policy decisions and important issues involving the agency's budget and staffing in a more effective manner than can a career government employee."); *id.* ("A career FSO Ambassador can communicate with the White House only through the elaborate chain of command established by the Secretary of State. Most politically appointed ambassadors have personal relationships with the President that allow them to engage in far more effective direct communication with the White House.").

128 *See infra* notes 250–253 and accompanying text.

129 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

130 *See* Metzger, *supra* note 66.

131 Fritz Morstein Marx, *The Lawyer's Role in Public Administration*, 55 YALE L.J. 498, 507 (1946).

will allow them to accomplish their desired ends. In this sense, their comparative advantages can best be characterized as providing information about the applicable law, as well as how that law will be applied to the circumstances of specific rulemakings.[132]

Consequently, many agency heads have established general counsel's offices with varying degrees of autonomy from the programmatic operating divisions.[133] These lawyers' responsibilities differ across agencies and between various levels of the hierarchy. Broadly speaking, however, lawyers in general counsel's offices often have the following duties related to rulemaking: providing legal advice and opinions to the agency and the public; drafting and reviewing reports, rules, and legislation; and generally assisting the policymaking process within the agency as a whole.[134]

Beyond these functional responsibilities, lawyers are also likely to bring a distinctive perspective to regulatory problems, given their general background, demographics, and professional schooling.[135] Some commentators, for example, posit that "lawyers, by training, are more tolerant of institutional rules and procedures that yield decisions perceived to be wrong or mistaken in specific cases but yield superior outcomes in general."[136] With regard to administrative lawyers specifically, others argue that since lawyers are not charged with the management or execution of policies, they are likely to be more detached than other agency actors and thus better able to balance multiple interests.[137] At the same time, however, this orientation has also been

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[132] *See* GOLDMAN, *supra* note 109, at 273 (characterizing legal knowledge as concerned with the "material (nonlegal) facts of the case" and "the legal basis for classifying [a] case under the target category or categories" (emphases omitted)); WILSON, *supra* note 31, at 284 ("[A]s courts become more important to bureaucracies, lawyers become more important in bureaucracies."); Magill & Vermeule, *supra* note 38, at 1078 ("[R]ules and structures that empower lawyers will carry in their wake the distinctive culture of lawyers.").

[133] *See* KATZMANN, *supra* note 1, at 15–26, 36–57 (discussing the role of lawyers within the Federal Trade Commission's Bureau of Competition and these lawyers' clashes with economists); Marx, *supra* note 131, at 499 ("[T]he lawyers one finds hidden in the nooks and crannies of nearly all government agencies [are] sometimes formed into fairly compact bodies in such functional units as the general counsel's office, sometimes more or less closely attached to various operating divisions, and sometimes doing business as relatively free entrepreneurs by spotting trouble as they look around.").

[134] Raymond P. Baldwin & Livingston Hall, *Using Government Lawyers to Animate Bureaucracy*, 63 YALE L.J. 197, 198 (1953).

[135] *See, e.g.*, Magill & Vermeule, *supra* note 38, at 1058–62, 1072–73; Schlanger, *supra* note 39, at 61; *cf.* JACK GOLDSMITH, POWER AND CONSTRAINT 124–25 (2012) (noting the unique role of lawyers in military operations).

[136] Magill & Vermeule, *supra* note 38, at 1078 n.141 (citing FREDERICK SCHAUER, THINKING LIKE A LAWYER 8–10 (2009); Frederick Schauer, *Is There a Psychology of Judging?*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION-MAKING 103 (David Klein & Gregory Mitchell eds., 2010)).

[137] *See* Marx, *supra* note 131, at 516 ("In the character of his counsel, whether on policy or operating situations, the government lawyer can convey the value of a just balance of interests . . . .

criticized as fostering an unnecessary amount of conservatism and risk aversion, particularly in highly uncertain contexts such as national security.[138]

Nevertheless, many exogenous doctrinal changes have had the effect of increasing or decreasing the internal need for lawyers with these perspectives.[139] Perhaps one of the most important examples is that of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[140] which calls for judicial deference to an agency's reasonable statutory interpretation when the underlying statute is ambiguous.[141] Its two-part test is a familiar one: first, the judge must ask "whether Congress has directly spoken to the precise question at issue."[142] If Congress's intent is "clear," then that intention governs;[143] but if the statute is ambiguous or silent, then in Step Two courts ask whether the agency's interpretation is "permissible" and, if so, defer accordingly.[144]

Before *Chevron*, many cases emphasized the court's role as the definitive interpreter, but allowed for deference to an agency's interpretation when the agency had demonstrated the "power to persuade," usually by virtue of its expertise and experience administering the statute.[145] Consequently, as former EPA general counsel Donald Elliott explains, lawyers usually offered a "point estimate" of what they perceived as the "best" statutory interpretation.[146] In this capacity, lawyers often played a dominant role within the agency.[147] Since ambiguous statutes could yield multiple reasonable interpretations in *Chevron*'s wake, however, agency heads no longer required authorita-

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Free from the ties that bind other officials to action programs, he is better able to marshal constructive detachment in appraising the means of departmental action." (footnote omitted)).

138 *See* Michael B. Mukasey, *The Role of Lawyers in the Global War on Terrorism*, 32 B.C. INT'L & COMP. L. REV. 179, 182–83 (2009) ("[M]any people in . . . intelligence agencies claimed that their efforts to protect our country were hampered by risk-averse lawyers.").

139 *See* Magill & Vermeule, *supra* note 38, at 1042–54.

140 467 U.S. 837 (1984).

141 *Id.* at 842–44. Some lower courts have also incorporated elements of arbitrary-and-capricious review and inquire as to whether an agency engaged in reasoned decisionmaking. *See, e.g.*, Sierra Club v. Leavitt, 368 F.3d 1300, 1304 (11th Cir. 2004); Consumer Fed'n of Am. v. U.S. Dep't of Health & Human Servs., 83 F.3d 1497, 1505–07 (D.C. Cir. 1996); *see also* Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997); Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2105 (1990) ("[*Chevron*'s] reasonableness inquiry should probably be seen as similar to the inquiry into whether the agency's decision is 'arbitrary' or 'capricious' within the meaning of the APA.").

142 *Chevron*, 467 U.S. at 842.

143 *Id.*

144 *Id.* at 843.

145 *See, e.g.*, Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

146 *See* E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 11 (2005).

147 *Id.*

tive answers from lawyers and turned instead to subject-specific experts and political appointees within the agency for information and advice.[148]

Subsequent doctrinal refinements have preserved an interpretive role for lawyers,[149] but the validity of a legal interpretation now turns on the consequentialist policy rationales offered by agencies in the rule's preamble.[150] As a result, administrative processes within an agency evolved to reflect this change in informational priorities.[151] Agency heads now need less access to lawyers, and more efficient internal mechanisms for incorporating the views of scientists and policy experts into the regulatory development process.

3. Scientific. — *Chevron* was not the only doctrinal change to augment the informational role of scientists and other policy experts within the agency. Most notably, courts have also increased the agency head's demand for internal agency expertise by extending a "hard look" under arbitrary-and-capricious review.[152] Under this standard, agencies are required to show that they have "examine[d] the relevant data" and then "articulate a satisfactory explanation for [their] action."[153] More specifically, these explanations must demonstrate "rational connection[s] between the facts found and the choice[s] made."[154] What is important to note about this standard is that it is framed exclusively in terms of technocratic factors.[155] Agencies must be able to explain changes in regulatory policy with respect to the scientific and policy-specific evidence available in the rulemaking record.[156] As a result, substantive experts within an agency have become increasingly important to aiding the agency head in making the eventual policy choice.[157]

A number of legislative and executive branch developments have further augmented the agency head's need for internal access to

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148 *Id.* at 11–13; Magill & Vermeule, *supra* note 38, at 1046.

149 *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) ("[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking . . . ."). If an agency's interpretation does not qualify for *Chevron* deference, then *Skidmore* deference again calls for the agency to provide a persuasive legal interpretation. *Id.* at 234–39.

150 *See* Elliott, *supra* note 146, at 12–13.

151 *Cf. id.* at 12 (noting the "effect of *Chevron* on the internal dynamics of agency decisionmaking").

152 *See* 5 U.S.C. § 706(2)(A) (2012).

153 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

154 *Id.* (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

155 *See* Watts, *supra* note 80, at 19–20.

156 *See id.* at 54.

157 *See* Magill & Vermeule, *supra* note 38, at 1053–55.

trained scientists and policy professionals. In the face of criticisms that agencies were relying on "junk" science, Congress in 2000 passed the Information Quality Act.[158] The Act directs the Office of Management and Budget (OMB) to promulgate guidelines that will help federal agencies develop more agency-specific information quality guidance; create administrative mechanisms allowing affected persons to request informational corrections; and submit to OMB periodic progress reports.[159]

Pursuant to the statute, OMB soon issued a bulletin defining various terms and specifying the substantive standards for information quality, including standards of utility, objectivity, and integrity.[160] Moreover, the bulletin created a presumption of objectivity for "data and analytic results [that] have been subjected to formal, independent, external peer review."[161] Peer review generally consists of an independent, expert review of a study's methodology, analysis, and inferences by individuals capable of understanding and critically assessing the reviewed product.[162] OMB subsequently issued a separate peer review bulletin applying the first bulletin to all "influential scientific information" disseminated by the agency, but distinguishing policy determinations left to the agency head's discretion.[163] As a result, agency heads now require more internal expertise in order to meet higher standards of information quality. While judicial review may be limited, OMB continues to play a role in policing the relevant provisions.[164]

4. Economic. — Finally, another important development influencing agency heads' internal need for information — this time of an economic nature — is the rise of what some have called the "cost-benefit" state: the convergence of executive, legislative, and judicially imposed requirements for agencies to analyze the costs and benefits of their

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158 *See* Pub. L. No. 106-554, § 515, 114 Stat. 2763A-153, 2763A-153 to 2763A-154 (2000), *reprinted in* 44 U.S.C. § 3516 note (2012) (Policy and Procedural Guidelines); *see also* Margaret Pak, Comment, *An IQ Test for Federal Agencies? Judicial Review of the Information Quality Act Under the APA*, 80 WASH. L. REV. 731, 731–32 (2005).

159 Pak, *supra* note 158, at 731–32.

160 *See* Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8452, 8458–60 (Feb. 22, 2002); *see also* Patrick A. Fuller, Note, *How Peer Review of Agency Science Can Help Rulemaking: Enhancing Judicial Deference at the Frontiers of Knowledge*, 75 GEO. WASH. L. REV. 931, 940–43 (2007).

161 Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. at 8459.

162 *See id.* at 8459–60.

163 *See* Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664, 2665 (Jan. 14, 2005).

164 *See* Jim Tozzi, *DOJ Notifies the Ninth Circuit that OMB is the Court of Last Resort on DQA Issues: Implications for Climate Change*, CTR. REG. EFFECTIVENESS (Mar. 16, 2015), http://www.thecre.com/oira/?p=4124 [http://perma.cc/5ZSH-M88P].

regulations.[165] As a result, agency heads seeking to successfully promulgate a rule now require substantial amounts of economic information from their staff. To meet these demands, federal agencies employed an increasing number of policy analysts and economists.[166]

Cost-benefit analysis (CBA) can mean different things in different contexts,[167] but as defined here, it consists of an accounting of the anticipated quantitative and qualitative effects of a regulation. This definition tracks that of governing executive orders, which currently require executive agencies to analyze economic considerations in addition to political ones.[168] In doing so, they require covered agencies "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."[169] The orders also note that agencies "may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts."[170] Agencies must then submit these analyses to OIRA as part of the presidential review process.[171]

Congress has also imposed a number of legislative demands that mandate similar cost-benefit considerations, albeit in narrower contexts. The Safe Drinking Water Act Amendments of 1996,[172] for example, constituted "the first substantive law" to require the use of cost-benefit analysis.[173] Moreover, a number of statutes such as the National Environmental Policy Act,[174] the Regulatory Flexibility Act,[175] the Unfunded Mandates Reform Act,[176] and the Paperwork Reduction Act[177] currently demand that agencies provide information

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165 *See, e.g.*, CASS R. SUNSTEIN, THE COST-BENEFIT STATE, at ix (2002); Magill & Vermeule, *supra* note 38, at 1049–51.

166 *See* MARION FOURCADE, ECONOMISTS AND SOCIETIES 108–12 (2009).

167 *See* John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 890 (2015); Richard A. Posner, *Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers*, 29 J. LEGAL STUD. 1153, 1153 (2000); Amy Sinden, *Formality and Informality in Cost-Benefit Analysis*, 2015 UTAH L. REV. 93, 95–96.

168 *See* Exec. Order No. 13,563 §§ 1(b), 2–6, 3 C.F.R. 215, 215–17 (2012), *reprinted in* 5 U.S.C. § 601 app. at 101–02 (2012); Exec. Order No. 12,866 § 6(a)(3)(C), 3 C.F.R. 638, 645–46 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91.

169 Exec. Order No. 13,563 § 1(c), 3 C.F.R. at 216.

170 *Id.*

171 Exec. Order No. 12,866 § 6(a)(3)(B)–(C), 3 C.F.R. at 645–46.

172 Pub. L. No. 104-182, 110 Stat. 1613 (codified as amended at 42 U.S.C. §§ 300f–300j (2012) and in scattered sections of 16 U.S.C., 21 U.S.C., 33 U.S.C., and 40 U.S.C.).

173 Richard D. Morgenstern, *The Legal and Institutional Setting for Economic Analysis at EPA*, *in* ECONOMIC ANALYSES AT EPA 5, 20 (Richard D. Morgenstern ed., 1997).

174 42 U.S.C. §§ 4321–4347 (2012).

175 5 U.S.C. §§ 601–612 (2012).

176 Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified as amended in scattered sections of 2 U.S.C.).

177 44 U.S.C. §§ 3501–3520 (2012).

about a rule's anticipated costs and benefits on the environment, states, small businesses, and paperwork obligations, respectively.[178] More recently, there have been a number of legislative proposals to require CBAs from independent agencies as well, though none have yet managed to garner the requisite bicameral support.[179] Accordingly, Congress has increasingly sought to require agency heads to provide a more explicit consideration of costs and benefits.

Similarly, courts have also begun to fashion common law default rules in favor of allowing agencies to consider CBA when the statute is otherwise ambiguous. In *Entergy Corp. v. Riverkeeper, Inc.*,[180] for instance, the Supreme Court held that a Clean Water Act provision calling for the "best technology available for minimizing adverse environmental impact"[181] allowed the EPA to balance costs and benefits.[182] Many have understood the case as signaling an increasing judicial receptivity to CBA as a canon of statutory construction.[183] This understanding is also consistent with a number of D.C. Circuit cases interpreting several provisions of the Clean Air Act that made no mention of costs to allow the EPA to take costs into account.[184] More aggressively, the Supreme Court in *Michigan v. EPA*[185] interpreted a Clean Air Act provision allowing the EPA to regulate power plans when "appropriate and necessary" as a requirement that the agency consider costs.[186] Similarly, some have read the D.C. Circuit's *Business Roundtable v. SEC*[187] decision to not only allow, but actually mandate, CBA as well.[188] In this view, a statute requiring the SEC to consider the rule's impact on "efficiency, competition, and capital for-

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178 *See* 2 U.S.C. § 1532 (2012) (unfunded mandates on state, local, tribal governments, or private sector); 5 U.S.C. § 604 (regulatory flexibility analyses); 42 U.S.C. § 4332(2)(C) (environmental impact statements); 44 U.S.C. § 3507(a)(1)(D)(ii)(V) (paperwork burden analyses).

179 *See, e.g.*, Independent Agency Regulatory Analysis Act of 2015, S. 1607, 114th Cong. (2015).

180 556 U.S. 208 (2009).

181 *Id.* at 221 (emphasis omitted) (quoting 33 U.S.C. § 1326(b) (2012) (emphasis added)).

182 *Id.* at 226. Here, the majority read Congress's silence about the propriety of considering "cost," relative to other statutory provisions in the Act, to mean that the EPA could consider it as a decisional factor, and therefore upheld the agency action under *Chevron*'s reasonableness inquiry. *Id.* at 225–26.

183 *See, e.g.*, Jonathan Cannon, *The Sounds of Silence: Cost-Benefit Canons in* Entergy Corp. v. Riverkeeper, Inc., 34 HARV. ENVTL. L. REV. 425, 426–28 (2010).

184 *See* Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000); Nat. Res. Def. Council v. EPA, 824 F.2d 1146 (D.C. Cir. 1987) (en banc).

185 135 S. Ct. 2699 (2015).

186 *Id.* at 2711 (holding that the EPA "must consider cost — including, most importantly, cost of compliance — before deciding whether regulation is appropriate and necessary").

187 647 F.3d 1144 (D.C. Cir. 2011).

188 *See, e.g.*, Robert B. Ahdieh, *Reanalyzing Cost-Benefit Analysis: Toward a Framework of Function(s) and Form(s)*, 88 N.Y.U. L. REV. 1983, 2008 (2013); Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 437 (2015). *But see* Yoon-Ho Alex Lee, *The Efficiency Criterion for Securities Regulation: Investor Welfare or Total Surplus?*, 57 ARIZ. L. REV. 85, 93–98 (2015).

mation" amounted to a requirement that the SEC engage in cost-benefit analysis.[189]

II. INTRA-AGENCY COORDINATION

By conceiving of the agency as an information processor, this Part develops and applies the resulting insights about how agency heads engage in this coordination task and why. The core idea here is that agency heads faced with novel exogenous uncertainties must manage their resources and personnel teams to ensure efficient access to favored internal information sources. In doing so, they can choose among various coordination mechanisms designed to reduce the processing costs for particular kinds of privileged information. Information requires internal processing in the sense that it must be interpreted and then effectively communicated to decisionmakers. Thus, when confronted with exogenous uncertainties requiring more specialized knowledge, agency heads can respond by creating structures and processes that lower the costs of internal information processing.[190]

Specifically, agency heads can lower such costs through structural choices such as centralizing their authority through hierarchy, reorganizing their staff to gain more direct access to specialized knowledge, or separating informational sources from final decisionmakers. Agency heads have process-oriented options as well, including standardizing informational inputs or imposing priority-setting procedures or internal-clearance chains that incorporate particular kinds of information directly into the decisionmaking process.

A. Coordination Mechanisms

Agency heads possess substantial discretion over how to manage their agency's rulemaking resources in ways that further their own goals and priorities. While the APA mandates some features of the internal organization of adjudicatory actors,[191] no analogous provisions exist for individuals engaged in rulemaking. Instead, many agency enabling acts are silent or ambiguous with respect to how agency heads can structure and select their rulemaking staff.[192] Chairmen of multimember commissions, for example, are sometimes authorized to appoint the heads of "major administrative units," but what constitutes a

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189 *See Business Roundtable*, 647 F.3d at 1148 (quoting 15 U.S.C. §§ 78c(f), 80a–2(c) (2012)).

190 *See, e.g.*, KNIGHT, *supra* note 82, at 268 ("When uncertainty is present and the task of deciding what to do and how to do it takes the ascendency over that of execution, the internal organization of the productive groups is no longer a matter of indifference or a mechanical detail.").

191 *See, e.g.*, 5 U.S.C. § 554(d) (2012) (isolating administrative law judges from agency prosecutorial staff in various ways).

192 *See* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1168 (2000).

"major administrative unit" is largely left within their discretion.[193] Accordingly, while Congress and the President can write more specific dictates governing internal agency organization,[194] agency heads remain otherwise unbound by detailed legislative or executive strictures. By and large, the task of intra-agency coordination falls to the agency head.[195]

Some of the following design choices can be implemented by Congress and the President as well,[196] but many are distinctive to the agency head's toolkit. A few ways in which the management problem for the agency head may differ from that of the President is that the former often has less relative control over her budget constraint and is also subject to more direct means of accountability; for example, agency heads are often called to testify in defense of their agencies before Congress, while presidents are not.[197] Moreover, agency heads often have more informal, though less transparent, means of imposing these coordination mechanisms, whether through internal memoranda or verbally in meetings. By contrast, the President often operates through more public documents such as executive orders or presidential memoranda.

1. Centralization. — Organizational theorists and economists have long recognized that the centralization of authority is often necessary to coordinate dispersed information, especially in the absence of price signals that can serve the same function in the market.[198] This observation is especially true in the context of government bureaucracies,

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[193] *Id.* at 1173 (citing 10 C.F.R. § 1.11(a) (2000)) (describing the example of the Nuclear Regulatory Commission's enabling act); *see also id.* app. (providing numerous other examples).

[194] *See infra* section II.B.2, pp. 475–78. In addition, the President can sometimes act pursuant to his reorganization authority to restructure or transform independent agencies into cabinet-level agencies. For instance, Executive Order 12,835 made the EPA Administrator a member of the new National Economic Council, giving the Administrator "secretary-like" rank for the first time. Exec. Order No. 12,835 § 2(k), 3 C.F.R. 586, 587 (1994); *see* Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN. L.J. AM. U. 461, 511 (1994). For an example of how Congress can affect agency structure, see Joseph J. Thorndike, *Reforming the Internal Revenue Service: A Comparative History*, 53 ADMIN. L. REV. 717 (2001), which describes legislative changes resulting in the internal restructuring of the Internal Revenue Service, *id.* at 768–78.

[195] *See* SIMON, *supra* note 31, at 326–27 (noting that the agency head is responsible for establishing and maintaining the organizational structure); Sally Katzen, Correspondence, *A Reality Check on an Empirical Study: Comments on "Inside the Administrative State,"* 105 MICH. L. REV. 1497, 1506 (2007) ("[T]he responsibility for intra-agency coordination is peculiarly within the province of . . . the head of [the] department or agency . . . .").

[196] *See infra* section II.B.2, pp. 475–78.

[197] *See* Beermann, *supra* note 66, at 124–25.

[198] *See, e.g.*, KNIGHT, *supra* note 82, at 268–69. *See generally* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 526–28 (1945) (arguing that price signals lead to the efficient distribution of information).

which produce outputs that are difficult to value and measure.[199] Professor Kenneth Arrow, for example, points out that "the centralization of decision-making[] serves to economize on the transmission and handling of information" within organizations.[200] In his view, it is less costly and thus more efficient to transmit internal information to a centralized source, rather than to multiple individuals within an organization, given that the transmission of such information is costly.[201]

Not only does such communication take time, but it also requires the resource-intensive translation of often complex concepts into forms more accessible to generalized audiences.[202] Thus, it is often cheaper for one individual or office to make the final decision based on that collective information rather than to decentralize the decisionmaking process. Vertically centralizing authority in this manner minimizes the number of expensive communication channels within bureaucracies.[203]

As a practical matter, centralizing authority within an organization such as an administrative agency can take many forms. What unites these different design choices is the location of the informational source in the agency's vertical hierarchy — how close it is to the authorized final decisionmaker. Consider as an analogy well-known discussions about centralized presidential authority. These debates often focus on a cluster of related phenomena such as the creation of an office, like OIRA, organizationally located near the President, as well as the separate institutionalization of a regulatory review process.[204]

Similarly, two important strategies to centralize the agency head's authority within an agency also include structural decisions about organizational location as well as the establishment of an internal review

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[199] *See* POSNER, *supra* note 37, at 135–36; Weisbach & Nussim, *supra* note 29, at 992 ("The key difference between government and market contexts is that there is no obvious measure to determine how well the government is doing . . . .").

[200] KENNETH J. ARROW, THE LIMITS OF ORGANIZATION 69 (1974).

[201] *Id.* at 68; *see also* Michael C. Jensen & William H. Meckling, *Specific and General Knowledge, and Organizational Structure*, J. APPLIED CORP. FIN., Summer 1995, at 4–6.

[202] Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1793 (2013) (describing the ways in which agency staff must "communicate and present" information "to nonspecialists" as "a process of translation from unstated assumptions to clearly stated ones, from jargon to plain English, from the use of complex appendices to executive summaries, and so on").

[203] *See* ARROW, *supra* note 200, at 68.

[204] *See, e.g.*, Donald R. Arbuckle, *The Role of Analysis on the 17 Most Political Acres on the Face of the Earth*, 31 RISK ANALYSIS 884, 885 (2011) ("OMB is a key agency within the Executive Office of the President, and a significant part of OIRA's role since its creation has been the coordination of regulatory policy within the White House."); William F. West, *Presidential Leadership and Administrative Coordination: Examining the Theory of a Unified Executive*, 36 PRESIDENTIAL STUD. Q. 433, 442–44 (2006) (discussing the impact of the centralized review process); *see also* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006) (discussing the structure and effect of OMB and OIRA on regulation).

process. To illustrate the first dimension, again through analogy, note that many credit the hierarchical placement of OIRA within the executive branch with the augmented role that the office has played in rulemaking.[205] OIRA is part of OMB within the Executive Office of the President (EOP).[206] OMB is charged with advising the President on budgetary and spending matters and, accordingly, also contains several "resource management offices," which evaluate the performance of agency programs and review budgetary requests.[207] Should an agency refuse to cooperate with OIRA's review, the agency knows it could face proposed cuts to its programs given OIRA's close relationship with OMB's resource management offices. Similarly, because OIRA is operationally close to other EOP actors such as the Domestic Policy Council, it often enjoys more direct channels of access to the President's closest advisors.[208] In this manner, OIRA's organizational location close to the President helps to explain its outsized influence on the regulatory process, as well as the persistent role that CBA plays in executive branch rulemaking.

In this same vein, agency heads might choose to place informational sources directly within their offices at the top of the agency's hierarchy. The closer the informational sources — whether economists, lawyers, or scientists — are to the organizational apex, the less costly it is for the policymaking appointee to access and control the resulting information flow. Reasons for this dynamic vary. One explanation has to do with organizational culture. Hierarchies inform institutional roles and their perceived limits: for example, who should be included in certain meetings with the agency head or otherwise consulted. Another explanation has to do with physical location. Offices within an agency are often physically organized according to hierarchies, which affords those higher up the chain with greater day-to-day access to agency leadership. As a result, particular analysts often speak directly to the agency head as opposed to being filtered through multiple hierarchical layers. The more the informational source is integrated as part of the top-level decision apparatus, the more likely its considerations will influence the final regulatory option picked.

One of the most striking examples of this intra-agency design choice can be found in executive agencies — once more, in response to the cost-benefit analysis requirements imposed by the President. According to one former OIRA agency head: "The greatest benefit of OMB review . . . may result from the agency mechanisms established

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[205] *See, e.g.*, Arbuckle, *supra* note 204, at 884–86, 888–89; West, *supra* note 204, at 433, 444–45.

[206] 44 U.S.C. § 3503 (2012).

[207] *The Mission and Structure of the Office of Management and Budget*, WHITE HOUSE, http://www.whitehouse.gov/omb/organization_mission [http://perma.cc/4TBH-SYXN].

[208] *See* Arbuckle, *supra* note 204, at 891.

to respond to the kinds of questions that OMB raises. In response to Executive Order 12,291, agencies either established or enhanced their in-house capabilities to analyze their regulatory decisions."[209] Specifically, these agencies often established separate offices dedicated to economics, and then placed these offices at the tops of the hierarchies within the offices of the agency heads.

Take, for example, the evolution of internal changes at the EPA — an evolution made possible by organizational choices that lie within the discretion of the EPA Administrator.[210] As background, the EPA is an executive agency charged with developing and enforcing federal environmental laws.[211] The EPA's regulatory programs are mainly structured around its principal sources of statutory authority, including different offices dealing with water, air, site cleanup, and pesticides and toxic chemicals.[212] In addition to these offices, the EPA has always had economists on staff, but they have been housed in different locations within the agency at different points in the agency's history. Before Reagan's executive order, most economists engaged in economic analysis were dispersed across the program offices.[213] In 1983, however — two years into the implementation of the executive order — the EPA began to centralize its economists in offices that have evolved into what is today known as the National Center for Environmental Economics (NCEE).[214]

The NCEE was established in 2000 within the Office of Policy, which is itself located within the Office of the EPA Administrator.[215] Before that, similar entities were situated in what was then known as the Office of Policy, Planning, and Evaluation, and later moved to the

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[209] *See* Christopher C. DeMuth & Douglas H. Ginsburg, Commentary, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1085 (1986).

[210] *See* Robinson, *supra* note 7, at 488 n.12 ("[I]t is important to emphasize that the EPA's internal organization is not a product of congressional design.").

[211] *See Our Mission and What We Do*, U.S. ENVTL. PROTECTION AGENCY, http://www2.epa.gov/aboutepa/our-mission-and-what-we-do [http://perma.cc/H2Y5-CHFU].

[212] *See* Linda K. Breggin & Leslie Carothers, *Governing Uncertainty: The Nanotechnology Environmental, Health, and Safety Challenge*, 31 COLUM. J. ENVTL. L. 285, 324–25 (2006).

[213] *See* MCGARITY, *supra* note 36, at 240 ("EPA decided in the mid-1970s to decentralize its regulatory analysis staff and to give the program offices the primary responsibility for drafting regulatory analysis documents . . . .").

[214] *See* Livermore, *supra* note 36, at 627–28; Alan Carlin, *History of Economic Research at the EPA*, U.S. ENVTL. PROTECTION AGENCY (updated Aug. 2006), http://yosemite.epa.gov/ee/epa/eed.nsf/o/2f68aa9ffb75364b8525779700781a24 [http://perma.cc/CN9T-NJR3] ("From 1971 to 1983, . . . [m]ost economic analysis . . . took place either in [the Office of Policy, Planning, and Evaluation] or in the program offices such as air and water.").

[215] *Organization and History*, U.S. ENVTL. PROTECTION AGENCY, http://yosemite.epa.gov/EE%5Cepa%5Ceed.nsf/webpages/Organization.html [http://perma.cc/RZH2-M4YL]; *see also* Livermore, *supra* note 36, at 627–28.

Office of Policy and Reinvention.[216] As a result of this organizational location, economists within the office often have "the ear of the two most influential persons in the agency: the Administrator and the Deputy Administrator."[217] Because of the NCEE's organizational location at the top of the hierarchy, the Administrator is also able to process the NCEE's information more cheaply and can ensure that the NCEE is a core part of the decisionmaking process. The Office of Policy has been aptly described as a "mini-OMB" within the EPA to reflect its status as a "powerful institutional force"[218] that has been "'consciously integrated' into the internal rulemaking process."[219] In this manner, the NCEE became a high-level, centralized office of professional economists.

In addition to this prominent vertical location for cost-benefit analysts, the EPA Administrator has also established a centralized review process to exercise oversight of CBAs prepared by the subject matter program offices within the agency. As a general matter, the initial task of regulatory drafting is usually given to career staff within these subject matter–specific offices.[220] Their responsibilities usually include conducting research to determine the scope of the regulatory problem as well as generating policy options from which to select.[221] In addition, staff within these program units will also often prepare the initial regulatory analyses.[222] For those rules determined to be "economically significant" — that is, expected to cost $100 million or more — the rule-writing team is expected to submit a draft of the regulation to an internal review process, which includes the NCEE.[223] The NCEE, along with other EPA offices, can then submit substantive comments and suggestions for how to revise the rule. Should disagreements

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216 *See* Robert W. Hahn et al., *Environmental Regulation in the 1990s: A Retrospective Analysis*, 27 HARV. ENVTL. L. REV. 377, 384 (2003).

217 *See* MCGARITY, *supra* note 36, at 256.

218 *Id.*

219 *Id.* (quoting Interview by Thomas O. McGarity with Stuart Sessions, Dir., Regulatory Policy Div., Office of Policy Analysis, Office of Policy, Planning, and Evaluation, EPA (May 29, 1984)); *see also* Livermore, *supra* note 36, at 627–28.

220 *See* OFFICE OF POLICY, EPA, EPA'S ACTION DEVELOPMENT PROCESS 40 (2011) [hereinafter EPA'S ACTION DEVELOPMENT PROCESS], http://yosemite.epa.gov/sab%5CSAB PRODUCT.NSF/5088B3878A90053E8525788E005EC8D8/$File/adp03-00-11.pdf [http://perma.cc/JL4N-E3JW]; Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1018–19 (2015) (noting that "career civil servants" comprise "the population with the greatest likelihood of substantial experience in [rule] drafting and interpretation").

221 *See* EPA'S ACTION DEVELOPMENT PROCESS, *supra* note 220, at 38–39; William F. West, *The Growth of Internal Conflict in Administrative Regulation*, 48 PUB. ADMIN. REV. 773, 775 (1988) (describing the general regulatory drafting process in agencies).

222 *See* MCGARITY, *supra* note 36, at 256.

223 *See* EPA'S ACTION DEVELOPMENT PROCESS, *supra* note 220, at 16, 41–44.

persist, the issue can then be elevated to higher levels of the agency's hierarchy.[224]

Consider, by contrast, the vertical placement of economists within independent agencies not subject to cost-benefit executive orders. The Federal Communications Commission (FCC), for example, is a multimember commission with jurisdiction over interstate radio, television, satellite, and cable communications.[225] Like the EPA, the Commissioners of the agency possess the discretion to organize their own internal staff and resources.[226] In contrast to the EPA, however, the FCC has no office exclusively devoted to cost-benefit analysis.[227] In addition, the FCC Commissioners have not centralized the review of the few economic analyses prepared by the agency's regulatory drafting staff. Most of its cost-benefit analysts are not professional economists and are diffusely spread throughout the agency.[228] While the FCC does have a Chief Economist, she is usually an academic professor visiting in a one- or two-year position appointed by the Commission Chair and thus provides only limited economic advice.[229] In recent years, the position has sometimes been left vacant.[230]

Taking a step back from these two illustrations, note that the variation in organizational form between the EPA and FCC likely reflects the different informational priorities of the EPA's Administrator and the FCC Commissioners. These diverging priorities can be explained, at least in part, by the fact that the EPA is subject to OIRA's review of its cost-benefit analyses, while the FCC is not. Due to the EPA Administrator's higher demand for cost-benefit information, centralization is a more attractive coordination strategy because it reduces the internal information-processing costs.

In addition, just as in the interagency context, vertical centralization can result in potentially beneficial jurisdictional redundancy and

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[224] *See id.* at 43.

[225] *See What We Do*, FED. COMM. COMMISSION, http://www.fcc.gov/what-we-do [http://perma.cc/S8UP-V959].

[226] The statute creating the agency simply provides that the Commission organize its staff into "integrated bureaus" and "other divisional organizations" as it "may deem necessary." 47 U.S.C. § 155(b) (2012); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-79, FCC MANAGEMENT: IMPROVEMENTS NEEDED IN COMMUNICATION, DECISION-MAKING PROCESSES, AND WORKFORCE PLANNING 4–5 (2009).

[227] *See* Thomas W. Hazlett, *Economic Analysis at the Federal Communications Commission* 7 (Res. for the Future, Discussion Paper No. 11-23, 2011), http://www.rff.org/RFF/Documents/RFF-DP-11-23.pdf [http://perma.cc/GXY5-EWWD].

[228] *See id.*

[229] *Id.*; *see also* J. Scott Marcus & Juan Rendon Schneir, *Drivers and Effects of the Size and Composition of Telecoms Regulatory Agencies* 9 n.7 (European Reg'l ITS Conference Paper, 2010), http://papers.ssrn.com/abstract=1675705 [http://perma.cc/J79D-SUHL].

[230] Philip J. Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State*, 61 ADMIN. L. REV. 675, 712 (2009).

overlap for agency heads.[231] Indeed, agency heads may seek to subdelegate functionally similar responsibilities to two or more entities for many reasons. They could, for example, grant a hierarchically superior office the responsibility to review a lower program office's work in an attempt to control the program's output; thus, an EPA Administrator may use the NCEE to monitor the cost-benefit analyses of the EPA's air or water office. In doing so, the Administrator is able to benefit from two independent assessments of a rule's costs and benefits, while at the same time, mediating how any conflicts should be resolved.[232] Alternatively, the agency head may not trust either office to generate unbiased economic information. Thus, she may seek to weigh information from the horizontally specialized office against information from the more centralized policy shop. In this way, the agency head can attempt to foster productive intra-agency competition in order to independently evaluate the information generated as a result.[233]

On the flip side, agency heads can also decentralize particular agency functions according to their priorities and preferences. Take, for example, EPA Administrator Anne Gorsuch's efforts to disperse enforcement responsibilities across various internal agency divisions, including the toxic substances, water and air pollution, noise and radiation, and solid waste offices.[234] During her tenure as a Colorado legislator, Gorsuch had gained a reputation as a foe of robust environmental protection policies.[235] In line with this reputation, one of her decentralizing reorganizations of the EPA eliminated its Office of Enforcement, which had previously coordinated internal enforcement efforts.[236] Gorsuch also created two new associate administrator positions — one for legal and enforcement counsel and the other for policy and resources — who reported directly to her.[237]

Despite Gorsuch's public insistence that the change would foster more "efficient operation,"[238] in fact, the move "separated technical

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231 *See* Freeman & Rossi, *supra* note 10, at 1151; O'Connell, *supra* note 37, at 1704; Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 AM. J. POL. SCI. 274, 287 (2003).

232 *See generally* Freeman & Rossi, *supra* note 10, at 1151.

233 *See* Ryan Bubb & Patrick L. Warren, *Optimal Agency Bias and Regulatory Review*, 43 J. LEGAL STUD. 95, 123 (2014) (providing analysis of "why the heads of agencies will employ agency staff with biased policy preferences to generate information about regulatory opportunities, especially when they can effectively review the policy decisions of such staff — either themselves or through their own intra-agency review office"); Freeman & Rossi, *supra* note 10, at 1151; Stephenson, *supra* note 78, at 1463.

234 *See* Philip Shabecoff, *Environment Agency Chief Announces Reorganization*, N.Y. TIMES (June 13, 1981), http://www.nytimes.com/1981/06/13/us/environment-agency-chief-announces-reorganization.html.

235 Sidney M. Wolf, *Hazardous Waste Trials and Tribulations*, 13 ENVTL. L. 367, 380 (1983).

236 *See* Shabecoff, *supra* note 234.

237 *See id.*

238 *Id.*

and programmatic enforcement staff from the legal enforcement planning and implementation functions."[239] As a result, coordination between these two sets of actors decreased. According to one contemporaneous observer, this change "spell[ed] the end to civil or criminal litigation by E.P.A. in all but the most extreme cases."[240] In one congressional staffer's view, the net result was that "enforcement activity at the agency would have to be channeled through several bureaucratic levels," resulting in greater coordination costs and thus internal delays.[241] In short, Gorsuch no longer sought information regarding environmental enforcement activities, which was reflected in her internal restructuring choices.

2. Specialization. — If centralization is a coordination strategy for placing informational sources at the top of an administrative hierarchy, then specialization is concerned instead with the horizontal allocation of tasks across an agency.[242] Instead of focusing on the layers of management between the decisionmaking authority and informational source, specialization as understood here examines the ways in which different informational sources are divided within an agency, independent of their proximity to hierarchical authority.[243]

One potentially helpful way to think about this dimension is in terms of the difference between functional and divisional forms, a well-known distinction in the organizational economics literature.[244] Functional organizations allocate staff in terms of their training and disciplinary backgrounds — say, by assembling an agency's political appointees, lawyers, economists, and scientists into separate groups.[245] Thus an agency could have dedicated general counsel and economists' offices that specialize in their respective disciplines. The benefits of this design choice include opportunities for skill development and better staff retention, while the drawbacks include the potential for more tunnel vision and workload bottlenecks.[246]

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[239] *EPA Administrator Reorganizes Agency's Enforcement Operations*, EPA 93-R-163, ENVTL. NEWS (July 22, 1993), 1993 WL 274976.

[240] Shabecoff, *supra* note 234.

[241] *Id.*

[242] *See, e.g.*, Masahiko Aoki, *Horizontal vs. Vertical Information Structure of the Firm*, 76 AM. ECON. REV. 971 (1986); Gersen, *supra* note 67, at 351–53.

[243] *See* Weisbach & Nussim, *supra* note 29, at 983–84; *cf.* Oliver Hart & John Moore, *On the Design of Hierarchies: Coordination Versus Specialization*, 113 J. POL. ECON. 675, 676 (2005).

[244] *See, e.g.*, RICHARD L. DAFT, ORGANIZATION THEORY AND DESIGN 102–07 (9th ed. 2007); Luke M. Froeb, Paul A. Pautler & Lars-Hendrik Röller, Essay, *The Economics of Organizing Economists*, 76 ANTITRUST L.J. 569, 575 (2009); Weisbach & Nussim, *supra* note 29, at 986–92.

[245] Froeb et al., *supra* note 244, at 575–76.

[246] *See id.* at 576.

By contrast to functional entities, divisional organizations disperse informational sources across subject matter areas or policy sectors.[247] For example, as previously discussed in the context of the EPA,[248] these divisions could focus on specific substantive areas such as air or water pollution, or hazardous waste management. Instead of assigning a lawyer or economist to a devoted general counsel or economists' office, the agency head could accordingly assign her to a program office. Because of the policy-specific specialization of divisional forms, the resulting legal or economic analyses could be more tailored and specialized to the subject matter. At the same time, however, divisional models could also result in uneven quality and substantive inconsistency across policy areas.[249] Thus, when confronted with a horizontal design choice, agency heads must consider the advantages and disadvantages of both functional and divisional forms.

To illustrate these choices, first consider examples of how some agency heads have established functional offices to obtain information about the potential political consequences of a regulation. Political information of this kind becomes particularly important when external partisan coalitions have changed as a result of new elections or changes in party platforms. Accordingly, many agency heads have established specialized offices within their agencies specifically to ensure continuing relationships with members of Congress or the President.[250]

For instance, a number of agencies have dedicated Offices of Legislative Affairs, which are usually charged with maintaining a continuing flow of political information between their agencies and Congress.[251] The FCC's version "provides lawmakers with information regarding FCC regulatory decisions, answers to policy questions, and assistance with constituent concerns."[252] The Department of Homeland Security's version carries out similar duties in addition to "working with the White House and within the Executive Branch."[253]

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[247] *Id.* at 579.

[248] *See supra* p. 455.

[249] *See* Froeb et al., *supra* note 244, at 580.

[250] *See, e.g.*, A.W. Eoff, II, *The Navy and the Congress*, 22 JAG J. 123 (1968) (discussing the establishment and duties of the Office of Legislative Affairs within the Department of the Navy by the Secretaries of Defense and of the Navy).

[251] *See, e.g.*, *id.*; *see also* Christopher J. Walker, Federal Agencies in the Legislative Process: Technical Assistance in Statutory Drafting 13, 28–30 (2015) (draft report to the Administrative Conference of the United States), http://www.acus.gov/sites/default/files/documents/technical-assistance-draft-report.pdf [http://perma.cc/ZP2H-PA3V] (describing an agency's legislative affairs office as "the agency's official liaison with Congress and manages all agency communications and interactions with the Hill," *id.* at 13, regarding technical assistance in statutory drafting).

[252] *Office of Legislative Affairs, About the*, FED. COMM. COMMISSION, http://www.fcc.gov/encyclopedia/office-legislative-affairs-about [http://perma.cc/5BR2-M3L6].

[253] *Office of Legislative Affairs*, U.S. DEP'T HOMELAND SECURITY, http://www.dhs.gov/about-office-legislative-affairs [http://perma.cc/76ME-YCPA].

Agency heads have also established specific offices to manage communications and informational exchanges with the President. The Department of Commerce, for example, has an Office of White House Liaison charged with managing interactions with many of the President's appointees.[254]

By contrast, other agency heads have chosen divisional allocations of specialized authority to obtain the same information. Specifically, many will place political appointees across various substantive program areas — an institutional choice some have likened to a "merger" between political appointees and the more permanent bureaucracy of career staff.[255] While many of these new positions were created by Presidents, agency heads have often had a role in the selection of appointees. As then-Professor David Barron observes, "because many of these new appointed positions are not formally for the President to make, it is possible that agency heads use them to augment their own capacity to formulate a semi-independent policy that is potentially counter to the White House."[256] Indeed, these lower-level appointees are frequently chosen for their alignment with the agency head's regulatory vision.[257]

In short, agency heads who prioritize particular kinds of information — say, political over scientific data — can increase the relative specialization of horizontal units within their agencies through either functional or divisional forms. Doing so can decrease the costs of processing such information over time, especially when these specialized units exhibit increased economies of scale. In other words, agency heads can access specialized information more cheaply by structuring their staffs to reflect their longer-term priorities — particularly when the net gains from such reorganization increase as staff size increases.[258] As a result, agency heads can have more efficient access to their preferred forms of information.

3. Separation. — Separation as a coordination strategy refers to the agency head's ability to render certain determinations — either between internal organizational units, or between the agency and some

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[254] *See* OFFICE OF THE SEC'Y, U.S. DEP'T OF COMMERCE, DOO 15-18, OFFICE OF WHITE HOUSE LIAISON (1992), http://www.osec.doc.gov/opog/dmp/doos/doo15_18.html [http://perma.cc/JWV5-JNBE].

[255] *Cf.* David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1124 (2008) (discussing the President's appointments); Terry M. Moe, *The Politicized Presidency*, *in* THE NEW DIRECTION IN AMERICAN POLITICS 235, 244–45 (John E. Chubb & Paul E. Peterson eds., 1985) (same).

[256] Barron, *supra* note 255, at 1128–29.

[257] *See id.*

[258] It is also possible that specialization could increase coordination costs should it ultimately require greater internal transaction costs. *See* Weisbach & Nussim, *supra* note 29, at 986 (noting that "specialization is limited by the costs of coordination" since "[t]oo much specialization means that coordination of the specialized activities becomes difficult").

external body — independent. Separation "drops an imaginary curtain" between two sets of actors through various means, such as restrictions on ex parte contacts and other prohibitions against participation and consultation.[259] To invoke a familiar illustration of the principle (albeit a statutory one), section 554(d) of the APA prohibits adversarial agency staff members from "participat[ing] or advis[ing]" in final decisions rendered by administrative law judges in formal adjudicatory proceedings.[260] Adversarial staff members are accordingly separated from administrative law judges.

Separation is a decision to increase the flow of independently derived information to the agency head. The strategy blocks particular information flows from occurring until an independent determination of some kind has been made — after which the agency head can process that information to make a final decision. Separation can be either internal or external: an agency head can separate organizational structures within an agency, that is, or between the agency and an outside body. To illustrate, take design choices that various agency heads have made with respect to risk assessments — studies of the likely adverse health effects of environmental hazard exposure.[261] Some agency heads have chosen to separate those responsible for preparing such studies from decisionmakers by placing each group into a distinct and autonomous entity within an agency. Internally separate offices provide risk assessments for specific rules, programs, or agency-wide actions, while other offices subsequently evaluate the results and recommend regulatory options.

For instance, at one point the EPA's Carcinogen Assessment Group (CAG) was independent from the risk management divisions of the EPA.[262] The CAG was initially created in 1976 by EPA Administrator Russell Train as a separate body within the EPA's Office of Research and Development that reported directly to its Assistant Administrator.[263] In 1979, however, EPA Administrator Douglas Costle established a separate Office of Health and Environmental Assessment within the Office of Research and Development — in which the CAG

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259 Asimow, *supra* note 34, at 759.

260 5 U.S.C. § 554(d) (2012); *see also* Asimow, *supra* note 34, at 761–62, 765.

261 *See* COMM. ON THE INSTITUTIONAL MEANS FOR ASSESSMENT OF RISKS TO PUB. HEALTH, NAT'L RESEARCH COUNCIL, RISK ASSESSMENT IN THE FEDERAL GOVERNMENT: MANAGING THE PROCESS 18 (1983), http://www.nap.edu/openbook.php?isbn=0309033497 [hereinafter NAT'L RESEARCH COUNCIL, RISK ASSESSMENT] (discussing the "merits of separating the analytic functions of developing risk assessments from the regulatory functions of making policy decisions," *id.* at 2).

262 *Id.* at 105.

263 *Id.*; *see also* Roy E. Albert, *Carcinogen Risk Assessment in the U.S. Environmental Protection Agency*, 24 CRITICAL REVS. TOXICOLOGY 75, 77, 79 (1994).

was one of several risk assessment entities.[264] As a result, CAG staff became "insulated from the day-to-day pressures of program offices."[265]

Alternatively, agency heads have also requested that risk assessments be developed or reviewed by entities formally outside the agency, while retaining separate decisionmaking processes inside the agency for how to regulate in light of those assessments. For example, many agencies use standing advisory committees like the National Advisory Committee on Occupational Safety and Health or other outside independent expert panels such as various committees of the National Research Council (NRC). The NRC is the operating unit for the advisory functions of the National Academy of Sciences,[266] and is made up of a number of ad hoc committees composed of recognized industry and governmental experts as well as academics.[267] Importantly, agency heads retain the ability to reject or accept the conclusions drawn by the NRC. The conclusions themselves are often independently reviewed within the agency after the reports are released.[268]

Interestingly, some empirical work on the FDA suggests that agency heads strategically seek input from independent advisory committees to avoid blame when risks are uncertain.[269] At the FDA, advisory committees can be created and established by the FDA Commissioner, who can also determine the committees' meeting agendas as well as decide which drugs merit committee review.[270] Data collected from 1985 to 2006 reveal that the FDA Commissioner was eighteen to twenty-two percent more likely to send priority rather than nonpriority drugs to committees for review.[271] Priority drugs are drugs with new formulations that have only been tested under experimental conditions.[272] As a result, they are the drugs with the most uncertain risks. The same data reveal that more pharmacologically complex drugs were eight to thirteen percent more likely to receive advisory committee review.[273] As such, "[t]wenty years of FDA advisory committee experience suggest the agency chooses to send the drugs with the most uncertain implementation profiles to its public advisors."[274] The more

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264 NAT'L RESEARCH COUNCIL, RISK ASSESSMENT, *supra* note 261, at 105.
265 *Id.*
266 *Id.* at 114.
267 *See id.* at 114–15.
268 *See id.* at 114.
269 *See generally* Susan L. Moffitt, *Promoting Agency Reputation Through Public Advice: Advisory Committee Use in the FDA*, 72 J. POL. 880 (2010).
270 *See id.* at 883.
271 *Id.* at 886.
272 *Id.* at 884.
273 *Id.* at 886.
274 *Id.*

uncertainty increases, in other words, the more likely it is for agency heads to employ external separation strategies.

4. Standardization. — In addition to structural hierarchies and separation techniques, agency heads can also lower their information-processing costs by standardizing their decisionmaking processes. Indeed, the notion that information costs can be reduced in this manner is familiar in other legal arenas, such as contract[275] and property law.[276] The basic insight is that greater amounts of discretion require more time and resources to gain the requisite data needed to tailor and individualize each decision. By reducing the amount of discretion through a one-time investment aimed at generating standardized terms and options, agency heads can lower the future information costs necessary to make an optimal decision.[277] Put differently, standardization "provide[s] shortcuts that enable individuals to identify the type of challenge they face efficiently, focus their attention on the kind of information needed for that sort of situation, and invoke an applicable rule of behavior swiftly."[278] Codifying such informational shortcuts, in turn, allows knowledge to be more cheaply communicated within the institution, thus transcending any individual's agency-specific expertise.[279]

Agency heads can standardize the information used in rulemaking decisions in many ways, whether as rules, guidance documents, memoranda, or operating procedures and manuals, among many other forms.[280] Each of these choices has different implications and effects for agencies as well as third parties.[281] Legislative rules, for example, are generally applicable rules with binding, legal consequences — on

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[275] *See* Joshua Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract*, 58 EMORY L.J. 1401, 1419 (2009).

[276] *See generally* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1 (2000).

[277] *See* Freeman & Rossi, *supra* note 10, at 1182.

[278] Kenneth A. Bamberger, *Regulation As Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 414 (2006).

[279] *See* Érica Gorga & Michael Halberstam, *Knowledge Inputs, Legal Institutions and Firm Structure: Towards a Knowledge-Based Theory of the Firm*, 101 NW. U. L. REV. 1123, 1144 (2007) ("Once knowledge is codified, standardized, and rendered explicit . . . it is no longer embedded in the individual, but 'can be communicated from its possessor to another person in symbolic form, and the recipient of the communication becomes as much "in the know" as the originator.'" (quoting Sidney G. Winter, *Knowledge and Competence as Strategic Assets*, *in* THE COMPETITIVE CHALLENGE 159, 171 (David J. Teece ed., 1987))).

[280] *See* Magill, *supra* note 40, at 877 ("Memos, circulars, guidebooks, press releases, interpretative rules, policy statements, and legislative rules can all be mechanisms by which an agency announces limits on its own discretion.").

[281] *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1437–42 (2004).

the public, the courts, and the agency itself.[282] By contrast, guidance documents are interpretive rules and statements of policy intended to clarify existing regulatory policies and legal interpretations.[283] Finally, internal memoranda and manuals are more akin to management tools intended to help train and guide agency staff.[284]

A relatively straightforward illustration of this coordination mechanism arises whenever agencies promulgate legislative rules interpreting the statutes that they administer. By promulgating such rules, agency heads can essentially standardize the ways in which their enforcement agents and other agency staff provide legal information within the agency and to third parties. By tying its hands in this manner, the agency can also reduce, through *Chevron* deference, the amount of legal uncertainty it faces.[285] Similarly, agency heads can also issue guidance documents outlining their current understandings of scientific issues, as the EPA has done recently regarding childhood cancer risks[286] and the FDA has done with emerging nanotechnology issues.[287] In doing so, these agency heads can provide nonbinding notice to regulated entities, and more relevantly here, information to their own internal staff and future agency heads, about the scientific expertise currently available within the organization.

Analogous insights can also help to explain the behavior of agency heads who have increasingly standardized their approaches to CBA in response to the heightened uncertainty presented by successful judicial and presidential challenges. In 2010, for example, the EPA Adminis-

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[282] *See* Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co., 284 U.S. 370, 386 (1932) ("When under this mandate the Commission declares a specific rate to be the reasonable and lawful rate for the future, it speaks as the legislature, and its pronouncement has the force of a statute.").

[283] *See* Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (discussing distinctions between interpretive and legislative rules); Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1332–55 (1992) (providing examples of agency uses of nonlegislative policy documents).

[284] *See* Anthony, *supra* note 283, at 1384.

[285] *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) ("[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.").

[286] *See* Notice of Availability of the Document Entitled Guidelines for Carcinogen Risk Assessment, 70 Fed. Reg. 17,766 (Apr. 7, 2005).

[287] *See* Guidance for Industry: Considering Whether a Food and Drug Administration–Regulated Product Involves the Application of Nanotechnology; Availability, 79 Fed. Reg. 36,534 (June 27, 2014); Guidance for Industry: Assessing the Effects of Significant Manufacturing Process Changes, Including Emerging Technologies, on the Safety and Regulatory Status of Food Ingredients and Food Contact Substances, Including Food Ingredients that Are Color Additives; Availability, 79 Fed. Reg. 36,533 (June 27, 2014); Guidance for Industry: Safety of Nanomaterials in Cosmetic Products; Availability, 79 Fed. Reg. 36,532 (June 27, 2014).

trator issued revised *Guidelines for Preparing Economic Analyses*.[288] Among other things, the revisions included new standardized methods for calculating baselines, as well as more detailed guidance on discounting and distributional effects.[289] The EPA's first version of this document was promulgated in 1983[290] — shortly after President Reagan issued the first order requiring executive agencies to engage in CBA.[291] Other agencies like the Department of Transportation have issued official guidance regarding specific CBA issues, such as how to measure the value of statistical life.[292]

In the wake of *Business Roundtable v. SEC* — which, recall, struck down an SEC rule as arbitrary and capricious for a deficient CBA[293] — and other similar cases,[294] numerous independent agency commissioners from the SEC to the CFTC have also issued their own guidance documents for economic analyses.[295] Specifically, the SEC's cost-benefit guidance "[e]xpressly equates the benefits of a rule with gains

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[288] NAT'L CTR. FOR ENVTL. ECON., EPA, GUIDELINES FOR PREPARING ECONOMIC ANALYSES (2010, updated May 2014), http://yosemite.epa.gov/ee/epa/eerm.nsf/vwAN/EE-0568-50.pdf/$file/EE-0568-50.pdf [http://perma.cc/XBT4-Y3VG].

[289] *See* Livermore, *supra* note 36, at 646.

[290] *See id.* at 642; *see also EPA Guidance*, U.S. ENVTL. PROTECTION AGENCY, http://yosemite.epa.gov/ee/epa/eed.nsf/dcee735e22c76aef85257662005f4116/550c4984d3985754852577f800072d5e [http://perma.cc/7XWC-WKNC]. Prior to the 2010 revision, the EPA made several revisions to its 1983 document, most recently in 2000. *See* NAT'L CTR. FOR ENVTL. ECON., *supra* note 288, at 1-1.

[291] *See* Livermore, *supra* note 36, at 614.

[292] The Department of Transportation in 2011 adopted a value of statistical life of $6.2 million (2011 dollars). *See* Memorandum from Polly Trottenberg, Assistant Sec'y for Transp. Policy, U.S. Dep't of Transp., & Robert Rivkin, Gen. Counsel, U.S. Dep't of Transp., to Secretarial Officers & Modal Adm'rs, Re: Treatment of the Economic Value of a Statistical Life in Departmental Analyses — 2011 Interim Adjustment (July 29, 2011), http://www.transportation.gov/sites/dot.gov/files/docs/Value_of_Life_Guidance_2011_Update_07-29-2011.pdf [http://perma.cc/KF9P-JZ4W].

[293] Bus. Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011).

[294] *See, e.g.*, Chamber of Commerce v. SEC, 412 F.3d 133 (D.C. Cir. 2005).

[295] *See, e.g.*, Memorandum from Dan M. Berkovitz, Gen. Counsel, U.S. Commodity Futures Trading Comm'n & Jim Moser, Acting Chief Economist, U.S. Commodity Futures Trading Comm'n, to Rulemaking Teams, Re: Guidance on and Template for Presenting Cost-Benefit Analyses for Commission Rulemakings (Sept. 29, 2010), *reprinted in* OFFICE OF THE INSPECTOR GEN., U.S. COMMODITY FUTURES TRADING COMM'N, AN INVESTIGATION REGARDING COST-BENEFIT ANALYSES PERFORMED BY THE COMMODITY FUTURES TRADING COMMISSION IN CONNECTION WITH RULEMAKINGS UNDERTAKEN PURSUANT TO THE DODD-FRANK ACT, at Ex-1 (Apr. 15, 2011), http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/oig_investigation_041511.pdf [http://perma.cc/VY87-BPBS]; Memorandum from the Div. of Risk, Strategy & Fin. Innovation, SEC & the Office of the Gen. Counsel, SEC, to Staff of the Rulewriting Divs. & Offices, Re: Current Guidance on Economic Analysis in SEC Rulemakings (Mar. 16, 2012), http://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf [http://perma.cc/Z7RS-VLY3]; *see also* Arthur Fraas & Randall Lutter, *On the Economic Analysis of Regulations at Independent Regulatory Commissions* 5–6 (Res. for the Future, Discussion Paper No. 11–16, 2011), http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-DP-11-16_final.pdf [http://perma.cc/DZ7U-2PE4].

in economic efficiency,"[296] which could include "enhanced competition, lower costs of capital, reduced transaction costs and elimination of market failures such as collective action problems."[297] In addition, the SEC guidance requires rule-writing teams to clearly identify the proposed rule's justification, explicitly define the baseline against which to measure the proposed rule's economic impact, identify and discuss reasonable alternatives to the proposed rule, and analyze the economic consequences of the proposed rule and the principal regulatory alternatives.[298]

While the terms of the guidance document still leave rule-writing staff with substantial discretion, according to a former SEC senior official, "[t]he 2012 Guidance has in effect amended the micro-constitution of the SEC staff, elevating the economists to the status of a co-equal branch of the agency."[299] In other words, the guidance document has helped to standardize, as well as prioritize, the value of economic information to the SEC's decisionmakers. Indeed, this official also testified to a resulting change in the relationship between agency lawyers and economists — from "a stable dysfunctional equilibrium," where economists stood at the sidelines, to one in which "economists [are] at the table from the beginning of each rule to the end."[300] By all accounts, these documents have also increased the consistency of scientific and regulatory analyses prepared by agency staff.[301] Most importantly for present purposes, they have likewise decreased the informational costs for the SEC Commissioners to make rulemaking decisions on the basis of economic considerations. As a general matter, by standardizing previously contested issues of scientific and economic policy, agency heads can more efficiently determine regulatory policy on these grounds without engaging in expensive internal deliberations.

5. Procedures. — Beyond structural choices and standardization techniques, agency heads can also implement procedural coordinating mechanisms to ensure that certain kinds of information will be given

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[296] Bruce Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 YALE J. ON REG. 289, 328 (2013).

[297] *Id.* at 328–29.

[298] *See* Memorandum from the Div. of Risk, Strategy & Fin. Innovation, SEC & the Office of Gen. Counsel, SEC, *supra* note 295, at 4.

[299] Kraus, *supra* note 23, at 302.

[300] *Id.*

[301] *See, e.g.*, *id.* at 302–03 (explaining how a "seemingly simple [guidance] document has focused and enhanced how the [SEC] and its staff approach economic thought and utilize the expert [economic] staff" (quoting Craig M. Lewis, Chief Economist & Dir., Div. of Econ. & Risk Analysis, SEC, Keynote Address at the Investment Company Institute 2014 Mutual Funds and Investment Management Conference (Mar. 18, 2014), http://www.sec.gov/News/Speech/Detail/Speech/1370541172162 [http://perma.cc/K5TH-5C5G])); Livermore, *supra* note 36, at 645–46 (noting that guidelines are part of a broader agency push to identify best CBA practices).

higher priority than other kinds during the regulatory drafting process. Depending on the procedural form — whether a rule, guidance document, or operating manual — agency heads can essentially determine which internal interests will have access to a rulemaking decision, with varying degrees of entrenchment. Two prominent examples of such coordination mechanisms are internal-clearance and priority-setting processes. Internal-clearance processes grant certain offices or individuals within the agency sign-off authority before the regulation can be approved by the agency head. Priority-setting processes, in turn, ensure that certain regulations will receive more attention from the agency head, thus increasing the probability of the rule's promulgation relative to others in the queue.

(a) Internal Clearance. — In response to changes in external uncertainties, agency heads often either impose or revise internal-clearance procedures. These procedures require particular individuals within an agency to sign off on a document to signal their approval. Before promulgating official documents like proposed or final rules, agency heads can require particular agency officials with the relevant expertise to review the draft before signing it themselves. One purpose of these procedures is "to make sure that every administrative unit inside the government . . . contributes its special knowledge, point of view, and sympathy for its clientele to the final [rulemaking] product."[302] At the same time, however, agency heads can also manipulate these procedures to choose which offices or divisions should have a say in the regulatory development process, and when the information provided by those offices or divisions should be considered, if at all.

Recall that agency heads generally subdelegate the initial task of regulatory drafting to career staff within program offices.[303] Analo-

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[302] HERBERT KAUFMAN, RED TAPE 49 (1977) (emphasis omitted); *see also* Magill, *supra* note 40, at 886 (noting that agencies can self-regulate by "empower[ing] a large number of officials with sign-off authority before a major action is undertaken"); Schlanger, *supra* note 39, at 94 ("Regardless of the impact on the document subjected to clearance, even the softest of clearance requirements ensures that each office asked to clear is kept informed of what is going on at other government offices, which has its own benefits.").

[303] *See, e.g.*, EPA'S ACTION DEVELOPMENT PROCESS, *supra* note 220, at 25 (describing "[l]ead [o]ffice [d]elegation[s]" as those regulatory actions that are handled solely within the agency's "lead office[]"); FED. HIGHWAY ADMIN., RULEMAKING MANUAL 7 (2000) [hereinafter FHWA MANUAL], http://www.dot.gov/sites/dot.dev/files/docs/FHWARulemaking%20Manual.pdf [http://perma.cc/3578-X47Q] (identifying the "program office" as the "technical office responsible" for "[d]rafting rulemaking documents"); William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 53 (1975) (describing as the "most active" members in a regulatory work group "those representing the 'lead office' or 'office of primary interest' — the office which first had the idea for the rule or has been assigned responsibility for it"); West, *supra* note 221, at 775 (defining "lead offices" as "the line units [within an agency] that have substantive, programmatic responsibility for the policies in question"); *see also supra* notes 220–224 and accompanying text.

gous to legislative committees in terms of their jurisdictional scope,[304] these "lead" offices usually contain the individuals within the agency with the most subject-specific expertise. The Department of Transportation, for example, has multiple divisions that specialize in the regulation of federal highways, aviation, pipelines and hazardous materials, motor carriers, railroads, and maritime activities.[305] Rule-writing staff responsibilities usually include assembling the myriad materials that comprise a rulemaking docket, from the regulatory text eventually codified in the *Code of Federal Regulations*, to the rule's preamble, to any analyses required by statute or executive order.[306] After the team has completed the draft rule and assembled the relevant materials, it must then guide the document through the agency's internal-clearance process.

By strategically engineering these clearance procedures, agency heads can process information in ways that align with their individual priorities. In this sense, they can hardwire their preferences into the regulatory drafting process itself. First, agency heads can choose which functional or divisional offices must explicitly grant approval before the draft can proceed.[307] An agency head particularly concerned with how Congress might react to her regulations — say, under conditions of divided government — can specify that the agency's office of legislative affairs has clearance authority. In this manner, she can ensure that the agency's political information is brought to bear on the regulatory decision.

An agency head seeking to ensure that cost-benefit considerations are adequately taken into account can also confer sign-off power upon agency economists. The Federal Trade Commission's leadership, for instance, currently seeks the concurrence of its Bureau of Economics as well as its Commissioners.[308] Similarly, recall that the SEC's Com-

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[304] *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 908 (2013).

[305] These divisions include, inter alia, the National Highway Traffic Safety Administration, the Federal Aviation Administration, the Federal Highway Administration, the Pipeline and Hazardous Materials Safety Administration, the Federal Motor Carrier Safety Administration, the Federal Railroad Administration, and the Maritime Administration. *Our Administrations*, U.S. DEP'T TRANSP., http://www.transportation.gov/administrations (last updated Apr. 27, 2015) [http://perma.cc/32MC-CY6N].

[306] *See* CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING 65, 81 (4th ed. 2011).

[307] *See* Magill, *supra* note 40, at 882 (noting that an agency could "adopt a rule, for instance, that both the general counsel and the relevant program official have to consent to policy changes before a rule or enforcement action is initiated . . . [or] might even adopt a rule requiring consensus among all relevant program officers before any significant action is taken").

[308] *See* FTC, OPERATING MANUAL §§ 7.3.5.2, 7.3.8.3, http://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch07rulemaking.pdf [http://perma.cc/4GUB-Q55V].

missioners recently granted the agency's Chief Economist explicit clearance authority over economic analysis during its internal rule review process.[309] By contrast, the Federal Highway Administration's (FHWA's) review process does not require that its economists clear a regulation; rather, the FHWA Administrator requires concurrence first from the agency's program offices, then its legal division, its Legislation and Regulations Division, and, finally, the agency's chief counsel.[310] Similarly, a draft rule within the Internal Revenue Service (IRS) must secure the approval of a branch reviewer; the Associate, Deputy, and Chief Counsels; the Assistant to the Commissioner; and, finally, the Commissioner before moving on to the Department of Treasury for final authorization.[311]

In addition to choosing which offices get a say during the clearance process, agency heads can also structure the ways in which internal disputes between various offices are resolved, and by whom. Generally speaking, those with sign-off authority do not possess hard internal vetoes in the sense that they can definitively stop the rulemaking from proceeding.[312] However, they can internally delay the draft rules as they raise their objections and concerns about the draft.[313] Should such disagreements persist, clearance procedures usually specify how these issues should be elevated in the agency hierarchy and which higher-level policy official should ultimately resolve the remaining disagreements.[314]

To illustrate, at the EPA, if there is an internal conflict between the program office, the office of legislative affairs, and the legal counsel's office about how to interpret an authorizing statute, a representative from each unit can brief the relevant policy official, who will then de-

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[309] *See* OFFICE OF INSPECTOR GEN., *supra* note 22, at ii ("[T]he OIG found that the Commission has taken steps to improve its process for economic analysis by: (1) requiring RSFI economists to be involved in the three stages of the rulemaking process; (2) hiring economists with financial industry knowledge; and (3) formalizing the Chief Economist's review and concurrence process.").

[310] *See* FHWA MANUAL, *supra* note 303, at 31.

[311] *See* IRS, INTERNAL REVENUE MANUAL § 32.1.6.8.4, http://www.irs.gov/irm/part32/irm_32-001-006.html [http://perma.cc/78GX-GPUN].

[312] *See* Schlanger, *supra* note 39, at 94 ("[O]ne government office ordinarily cannot authoritatively stop the issuance of a document by its sibling office.").

[313] *Id.* ("[I]t is possible to give an office assigned a clearance role something very close to that power, by structuring the conflict resolution procedure so that it is the operational office that needs to 'appeal' a clearance denial.").

[314] The FHWA manual, for instance, explicitly states that the rulemaking team is responsible for "resolv[ing] issues or elevat[ing] issues to management for resolution." FHWA MANUAL, *supra* note 303, at 8. Similarly, the EPA provides that "[i]f workgroup members cannot agree, the issues of disagreement should be presented to management for resolution." EPA'S ACTION DEVELOPMENT PROCESS, *supra* note 220, at 34; *see id.* at 71 (discussing the process of informal and formal elevation of disagreements to management and other policy officials such as the Administrator).

cide the interpretation with which to proceed.[315] Under most circumstances, the EPA Administrator has specified that the Deputy Administrator should adjudicate the disagreement,[316] though she allows for elevation to the Administrator for the most controversial issues.[317] By comparison, the Commissioner of the IRS specifies that the Associate Chief Counsel within a division should usually resolve the dispute, though the matter could also be elevated to higher levels when necessary.[318]

In this manner, agency heads possess substantial discretion to determine the processes through which a regulation is drafted and revised before it gets elevated for their final review and signature. Not only can agency heads determine which offices or bureaus should (and should not) weigh in during the process, but they can also specify how conflicts among these offices are resolved and who within the agency can resolve them in the first instance. Moreover, such mechanisms can promote internal accountability by demanding that certain staff members take responsibility for particular aspects of a regulation, such as the supporting legal, economic, or scientific analyses. Accordingly, the power to implement and revise internal-clearance procedures is an important coordination device available to the agency head.

(b) Priority-Setting. — Agency heads, however, have limited time and resources. As do career staff. Thus, agency leaders must also impose procedures for how to prioritize particular regulations, when to release them, and how to determine which rules deserve the most internal attention. Accordingly, another coordination mechanism available to agency heads is the ability to privilege certain kinds of regulations to ensure that informational resources are allocated accordingly.

Indeed, about three-quarters of major rulemaking agencies currently employ some kind of internal priority-setting system.[319] The EPA Administrator, for example, uses a three-tier approach to categorize the agency's internal priorities.[320] The first tier is designated for rules expected to have major economic impacts, provoke interagency conflicts and external controversy, or "present[] a significant opportunity for the

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315 *See* McGarity, *supra* note 37, at 81–82.

316 *See* Pedersen, *supra* note 303, at 57 ("By the nature of the way EPA is (dis)organized, really sticky issues are escalated at least to the [Deputy Assistant Administrator] level and maybe higher for resolution." (alteration in original) (quoting Memorandum from a senior EPA official to William F. Pedersen, Jr. (May 4, 1975) (on file with *Yale Law Journal*))).

317 *See* EPA'S ACTION DEVELOPMENT PROCESS, *supra* note 220, at 71 (noting that issues could ultimately be formally elevated to the Administrator, though doing so would be "unusual" except for the most significant rules).

318 IRS, *supra* note 311, § 32.1.6.3.

319 *See* KERWIN & FURLONG, *supra* note 306, at 131.

320 *See* EPA'S ACTION DEVELOPMENT PROCESS, *supra* note 220, at 22.

[a]gency to advance the Administrator's priorities."[321] As a result, the first-tiering mechanism requires EPA program offices to learn about the preferences of the EPA Administrator and which regulatory actions she is likely to favor. The second tier, in turn, consists of less consequential rules that still require the attention of authoritative decisionmakers, while the third category receives attention from only the relevant program office.[322]

In designing these systems, agency heads are able to highlight their most important regulatory goals in advance. At the same time, however, some agency heads must also be able to adapt and respond quickly to external disruptions and uncertainties.[323] Those heads most likely to confront such contingencies have thus chosen priority-setting criteria keyed to the degree of expected congressional or executive branch response. The Coast Guard within the Department of Homeland Security, for instance, scores regulations based "on the type and amount of external and internal interest (for example, congressional, judicial, White House, or DHS)."[324]

By contrast, other agency heads prioritize criteria grounded in more objective risks, rather than immediate public fears. The Nuclear Regulatory Commission's leadership, for example, currently scores its developing rules according to their likelihood for increasing safety and security, as well as their expected effectiveness.[325] As a result, the Commissioners may desire more scientific information when deciding how to give precedence to certain projects on their regulatory agendas. By implementing a priority-setting mechanism based on criteria such as safety and effectiveness, these Commissioners can coordinate their informational sources to ensure that such information is internally privileged. This institutional choice may reflect the fact that the agency is headed by a multimember commission congressionally designed to be relatively shielded from more political forms of influence.

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In short, agency heads faced with political, legal, economic, or scientific uncertainties can employ a number of coordination mechanisms to reduce their internal information-processing costs. First, they can place staff with the relevant expertise toward the top of the agency's vertical hierarchy. Doing so allows agency heads direct access to relevant information without costly filters through multiple layers of management. At the same time, it also allows them to control and refine

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[321] *See id.* at 25.
[322] *See* KERWIN & FURLONG, *supra* note 306, at 132.
[323] *See id.* at 134.
[324] *Id.* at 133.
[325] *Id.* at 132–33.

the kinds of information most valuable to them. Alternatively, agency heads can encourage horizontal specialization within the agency by organizing functional or divisional offices of experts. Grouping staff in this manner allows for greater economies of scale and can promote regulatory consistency. Agency heads can also strategically separate information-providing sources from decisionmaking apparatuses to avoid blame for a policy's potential consequences or to solicit outside expertise. Such coordination can also be achieved through standardization. Standardization requires a one-time investment of resources by agency heads, which can then later decrease the informational costs for future regulations. Agency heads can also selectively impose coordinating procedures to govern clearance authority and priority-setting. Such procedural choices can essentially fuse an agency head's preferences into the regulatory drafting process.

B. Constraints

While agency heads possess substantial organizational discretion due to the realities of resource-limited overseers, they must still operate within several constraints. These constraints include a reorganization's implementation costs, as well as mandated design choices from Congress or the President.

1. Implementation Costs. — Administrative agencies are bureaucracies, and bureaucracies are notoriously resistant to change.[326] As sociologist Max Weber observed, the career incentives and training of civil servants usually orient them toward perpetuating the stability of their institutions, rather than embracing administrative innovations: "The individual bureaucrat is, above all, forged to the common interest of all the functionaries in the perpetuation of the apparatus . . . ."[327] In addition, civil servants usually possess various salary and tenure protections that are not directly tied to any measurable government output.[328] As a result, their longer time horizons often promote the creation of routines and organizational norms that are difficult to modify without voluntary buy-in and resource-intensive retraining.[329] Civil servants may also resist attempts at top-down organizational reform,

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[326] *See* WILSON, *supra* note 31, at 221–32 (discussing how bureaucracies can resist adaption to innovation).

[327] Max Weber, *Bureaucracy*, *in* CLASSICAL SOCIOLOGICAL THEORY 328, 337 (Craig Calhoun et al. eds., 3d ed. 2012); *see also id.* at 328–38.

[328] *See* RONALD N. JOHNSON & GARY D. LIBECAP, THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY 7 (1994).

[329] *See* Daniel B. Rodriguez, Comment, *Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 DUKE L.J. 1180, 1189 (1994) (noting that thick "[o]rganizational norms and practices limit . . . opportunities for significant changes in behavior, strategy, and internal agency structures").

secure in the knowledge that their tenures at the agency are likely to outlast that of the more fleeting political appointee.

As a result, incoming administrative leaders seeking to restructure their agencies or implement new procedures often face substantial implementation costs.[330] Depending on the agency head's budget constraints, these implementation costs can be outcome-determinative. As a practical matter, centralization, specialization, and separation strategies can require internal transfers of functions among existing career staff.[331] These transfers implicate a complex set of regulations and guidance documents promulgated by the Office of Personnel Management (OPM).[332] Compliance requires an investment of time and resources the agency head could devote to other activities. OPM's handbook for "agency leader[s] or manager[s]" contemplating such reorganization alone spans over one hundred pages.[333] The implementation of internal proceduralization and standardization efforts is also costly. Formulating such procedures and internal guidance documents can take months, even years, of internal discussions and negotiations between agency heads and career staff.[334] Path dependence further promises that such attempts will likely be expensive in terms of the staff meetings and documentation required to shift agency practices.

Prior structural choices may have also fostered powerful constituencies within and outside of the agency that actively resist top-down changes. Congressional committees, White House entities, as well as powerful interest groups, may have also developed their own relationships around the existence of certain agency offices or procedures. They may therefore object to or even actively block attempts at internal administrative reform. Indeed, many "[s]ubordinate bureaus within the agency often represent entrenched policy orientations, which the

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330 *See, e.g.*, KATZMANN, *supra* note 1, at 129.

331 *See* U.S. OFFICE OF PERS. MGMT., WORKFORCE RESHAPING OPERATIONS HANDBOOK 115 (2009), http://www.opm.gov/policy-data-oversight/workforce-restructuring/reductions-in-force/workforce_reshaping.pdf [http://perma.cc/CBR4-52QW] (defining "[t]ransfer of [f]unction" as "(1) [t]he transfer of the performance of a continuing function from one competitive area to one or more different competitive areas, except when the function involved is virtually identical to functions already being performed in the other competitive area(s); or (2) the movement of the competitive area in which the function is performed to another local commuting area"); *see also id.* at 114 (defining "[r]eorganization" as "[t]he planned elimination, addition, or redistribution of functions or duties in an organization").

332 *See* U.S. OFFICE OF PERS. MGMT., *supra* note 331.

333 *Id.* at 3.

334 *See, e.g.*, Kimbis, *supra* note 45, at 241–43 (discussing various planning retreats and meetings occurring over a number of years as part of the National Endowment for the Arts' restructuring efforts).

administrator cannot entirely negate."[335] Bureaucratic inertia can thwart even the best-laid plans.

Previous agency heads may have also entrenched their own clearance and priority-setting procedures through rules that require expensive processes to modify or reverse. Recall, for example, HHS's rule published in the *Federal Register* that eliminated a previous exception that had allowed the FDA to avoid the need for clearance approval by the HHS Secretary.[336] The new rule required the FDA to submit all "significant" regulations to HHS for oversight and approval.[337] Because of the form in which the internal-clearance procedure was issued, future changes to it would likely require similar publication in the *Federal Register*. Even decisions to revise coordinating mechanisms through operating manuals or guidance instead of published rules can consume a substantial amount of agency resources. Drafting such documents often requires numerous time-consuming meetings and negotiations among otherwise busy political and career officials.[338]

As a result, the expected benefits of particular intra-agency coordination mechanisms to an agency head must outweigh the potentially considerable implementation costs in order to proceed. This calculus itself may depend on the expected length of the agency head's tenure. Those agency heads who are quickly confirmed at the start of a presidential administration, for example, are more likely to invest the time and political capital necessary to impose or change a coordination mechanism, given that they are more likely to benefit from the longer-term expected payoffs. While implementing such strategies may be expensive at first, once established, they could eventually yield greater net savings in information-processing costs.

2. Mandatory Design Requirements. — Congress and the President can also engage in the organizational design of agencies. In doing so, they can constrain agency heads' choices regarding how and whether to centralize authority, demand internal specialization, separate decisionmaking from information gathering, standardize decisions, and implement internal procedures. These legislative and executive requirements can be agency-specific or else apply across an array of agencies. Consider, for example, the proliferation of "chief officer"

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[335] *See* Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 246 (1984).

[336] *See* Raising the Level of Rulemaking Authority of the Food and Drug Administration in Matters Involving Significant Public Policy; Response to Executive Order 12291, 46 Fed. Reg. 26,052 (May 11, 1981).

[337] *Id.*

[338] *See* Cass R. Sunstein, *On Not Revisiting Official Discount Rates: Institutional Inertia and the Social Cost of Carbon*, 104 AM. ECON. REV. (PAPERS & PROC.) 547, 547–49 (2014) (describing "institutional inertia," *id.* at 547, that often prevents revisions to internal agency guidance documents).

statutes across various agencies.[339] With these statutes, Congress has mandated a number of specialized senior positions to helm particular agency functions such as financial management,[340] information technology,[341] human resources,[342] and procurement.[343] These legislative choices constrain the ability of agency heads to determine the full array of internal functions or forego particular kinds of information.

In addition to demanding certain kinds of functional specialization, some of these statutes also compel the centralization of authority. To illustrate, the laws governing chief financial and information officers require that these officers report directly to the agency head.[344] Thus, at the Nuclear Regulatory Commission, for instance, the Chief Financial Officer's line of authority flows directly to the agency's Commissioners.[345] By contrast, statutes establishing chief human capital and chief acquisition officers leave those officers' internal reporting relationships to the discretion of the agency head.[346] Thus, the National Aeronautics and Space Administration's (NASA's) chief human capital officer, for example, reports to the Associate Administrator for Mission Support Directorate, not to the NASA Administrator directly.[347] In this manner, Congress can either require the centralization of authority or else leave it to the agency head's discretion.

Numerous other examples of legislative determination of internal coordination abound. Congress has, for example, required the separation of expert judgments in certain agencies through statutorily mandated advisory committees. The law governing the CFTC, for example, demands the establishment of the Energy and Environmental

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[339] *See* CLINTON T. BRASS, CONG. RESEARCH SERV., RL32388, GENERAL MANAGEMENT LAWS: MAJOR THEMES AND MANAGEMENT POLICY OPTIONS 26–29 (2004) [hereinafter BRASS, GENERAL MANAGEMENT LAWS]; CLINTON T. BRASS, CONG. RESEARCH SERV., RL30795, GENERAL MANAGEMENT LAWS: A COMPENDIUM 4 (2004); DAVID E. LEWIS & JENNIFER L. SELIN, ADMIN. CONFERENCE OF THE UNITED STATES, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 122–23 (2012), http://permanent.access.gpo.gov/gpo37402/Sourcebook-2012-Final_12-Dec_Online.pdf [http://perma.cc/P7RV-TYYS].

[340] *See* 31 U.S.C. §§ 901–903 (2012); *see also* BRASS, GENERAL MANAGEMENT LAWS, *supra* note 339, at 28 tbl.1.

[341] *See* 40 U.S.C. § 11315 (2012); 44 U.S.C. § 3506 (2012); *see also* BRASS, GENERAL MANAGEMENT LAWS, *supra* note 339, at 28 tbl.1.

[342] *See* 5 U.S.C. §§ 1401–1402 (2012); *see also* BRASS, GENERAL MANAGEMENT LAWS, *supra* note 339, at 28 tbl.1.

[343] *See* 41 U.S.C. § 1702 (2012); *see also* BRASS, GENERAL MANAGEMENT LAWS, *supra* note 339, at 28 tbl.1.

[344] 31 U.S.C. § 902(a)(1); 44 U.S.C. § 3506(a)(2)(A).

[345] *NRC Organization Chart*, U.S. NUCLEAR REG. COMMISSION, http://www.nrc.gov/about-nrc/organization/nrcorg.pdf [http://perma.cc/HL6Q-3T2Y].

[346] *See* BRASS, GENERAL MANAGEMENT LAWS, *supra* note 339, at 28 tbl.1.

[347] *Office of Human Capital Management*, NASA ONLINE DIRECTIVES INFO. SYS., http://nodis3.gsfc.nasa.gov/npg_img/N_PD_1000_003E_/OHCM_April2015.pdf [http://perma.cc/L94V-E26M].

Markets Advisory Committee.[348] By contrast, the Secretary of the Department of Energy can create advisory committees as "he may deem appropriate to assist in the performance of his functions."[349] Congress has also revised internal-clearance procedures by imposing "mandatory consultation" requirements whereby agencies must confer with other agencies before taking certain actions.[350] According to Professors Jody Freeman and Jim Rossi, these requirements can effectively "function as a veto," since ignoring the results of the consultation has legal ramifications.[351]

When statutes are otherwise silent or ambiguous, the President can also determine internal agency structure and process.[352] One prominent example is the creation and evolution of "Regulatory Policy Officers" (RPOs) within executive branch agencies. In 1993, President Clinton established RPOs to help improve the rulemaking process; he allowed agency heads the discretion to designate RPOs from among the agency staff.[353] President George W. Bush, however, modified the position's scope and function through his own executive order.[354] While RPOs could previously be career civil servants, Bush required agency heads to choose RPOs from among the agency's presidential appointees.[355] In doing so, he effectively reorganized agencies' internal hierarchies, elevating his own appointees' role in the regulatory process and augmenting presidential control. Furthermore, the executive order also prohibited rulemakings from commencing without RPO approval and no longer explicitly required RPOs to report directly to agency heads.[356] Both changes constituted further presidential revisions to agencies' internal rulemaking processes — at least until the executive order was revoked shortly after President Obama entered office.[357]

In this manner, both Congress and the President can impose organizational restrictions that constrain the extent to which agency heads themselves can implement internal coordination mechanisms. Agency heads can restructure their agencies to process internal information on-

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348 7 U.S.C. § 2(a)(15)(A) (2012); *see also* LEWIS & SELIN, *supra* note 339, at 122.

349 42 U.S.C. § 7234 (2012); *see also* LEWIS & SELIN, *supra* note 339, at 122.

350 Freeman & Rossi, *supra* note 10, at 1158.

351 *Id.*

352 *See generally* PERI E. ARNOLD, MAKING THE MANAGERIAL PRESIDENCY (2d ed., rev. 1998); LEWIS, *supra* note 5; Moe & Wilson, *supra* note 5.

353 *See* Exec. Order No. 12,866 § 6(a)(2), 3 C.F.R. 638, 645 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2012).

354 *See* Exec. Order No. 13,422 § 5(b), 3 C.F.R. 191, 193 (2008), *revoked by* Exec. Order No. 13,497, 3 C.F.R. 218 (2010), *reprinted in* 5 U.S.C. § 601 app. at 100–01 (2012).

355 *Id.*

356 *See id.* § 4(b), 3 C.F.R. at 192. *Compare id.*, *with* Exec. Order No. 12,866 § 6(a)(2), 3 C.F.R. at 645.

357 *See* Exec. Order No. 13,497, 3 C.F.R. 218.

ly insofar as legislative and executive restrictions allow them to do so. While the congressional and presidential design of agencies has been well-studied elsewhere,[358] the dynamics of intra-agency coordination thus invite greater scholarly attention to the interactions between externally and internally imposed structures and processes.[359]

III. IMPLICATIONS

This Part now takes a step back to consider the implications of intra-agency coordination for the administrative state more broadly. Specifically, it considers the potential dynamic effects on political and legal accountability, as well as on internal agency expertise and efficiency. Against this backdrop, this Part concludes by suggesting some resulting avenues for reform.

A. Political Accountability

At its core, administrative law aims to legitimate the delegation of authority from politically accountable legislators to the unelected bureaucrats working in federal agencies. Central to this project is the premise that when high-level agency heads are called before Congress in oversight hearings or sued in federal court, they are responsible for the vast bureaucracies they ostensibly lead.[360] Greater intra-agency coordination — whether in the form of more centralization, specialization, separation, standardization, or proceduralization — could increase agency-head accountability in the political arena, provided that such coordination efforts are transparent.

Consider, for example, how public reaction to a planned internal reorganization of the FDA affected one of President George W. Bush's FDA nominees, Mark McClellan. Among other changes, the proposal sought to move the oversight responsibility for regulating therapeutic

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[358] *See, e.g.*, David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697 (1994); William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095 (2002); Timothy J. Muris, *Regulatory Policymaking at the Federal Trade Commission: The Extent of Congressional Control*, 94 J. POL. ECON. 884 (1986); *see also* sources cited *supra* notes 3–5.

[359] Interesting research questions include the extent to which legislative innovations such as inspectors general, advisory committees, and ombudsmen can be explained as efforts to dislodge specific agency-head organizational choices. Another worthwhile project might examine how mandatory versus discretionary coordination mechanisms — say, advisory committees required by Congress versus those established by agency heads — systematically differ in terms of composition and recommendations, if at all.

[360] *See* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1261 (2006) ("When a litigant sues the Secretary of Health and Human Services, or Congress summons the Commissioner of the Food and Drug Administration to a hearing, both assume that these high-level officials have effective control over the bureaucracies that they manage.").

biotech drugs from the FDA Center for Biologics Evaluation and Research (CBER) to the agency's Center for Drug Evaluation and Research (CDER).[361] McClellan defended the organizational decision before Congress during a Senate committee hearing, claiming that it was intended to "improve overall management" and take advantage of "more consistency and economies of scale" within the two divisions.[362] In addition to legislative scrutiny, the move also faced opposition from observers arguing that the move would harm small biotechnology companies that would suffer from the lack of guidance as a result of the shift.[363] Others worried that the transfer of responsibility would compromise the robust protocols CBER had established for approving novel technologies.[364] In this manner, FDA nominee Mark McClellan became the face of the FDA's internal restructuring.

McClellan's intra-agency coordination decisions became a matter of political debate because they were made public and disclosed in advance of their implementation. As it currently stands, however, administrative agencies vary widely in the extent to which they document and release their internal operating procedures, clearance chains, and updated organizational charts. On one end of the spectrum, for instance, the IRS has a highly formalized manual available online that details its internal regulatory drafting and clearance procedures.[365] Similarly, both the EPA and the FHWA also provide extensive public documents describing their regulatory development and priority-setting mechanisms in detail, alongside their organizational charts.[366]

On the other end of the transparency range, however, are agencies like the FCC, which provides little public information about its internal rulemaking process. While the FCC Chairman in 2010 issued a public memorandum designed "to formalize a process" for its internal units to regularly consult with each other,[367] at least one current commissioner has decried the agency's "unnecessarily opaque" internal rulemaking procedures — particularly in the context of the FCC's high-profile net neutrality proceedings.[368] As a result, this Commissioner has called upon the FCC to "consider, adopt, and post official

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[361] *See* Jeffrey L. Fox, *FDA Appointee Faces Angry, Demoralized Staff*, 20 NATURE BIOTECHNOLOGY 1065, 1065 (2002).

[362] *Id.*

[363] *See id.*

[364] *See id.*

[365] *See* IRS, *supra* note 311, § 32.1.6.

[366] *See generally* EPA'S ACTION DEVELOPMENT PROCESS, *supra* note 220; FHWA MANUAL, *supra* note 303.

[367] *Intra-agency Coordination*, FED. COMM. COMMISSION (Feb. 18, 2010), http://www.fcc.gov/encyclopedia/intra-agency-coordination [http://perma.cc/C6JZ-8PUC].

[368] *See* Michael O'Rielly, *Fixing Flawed and Non-Existent "Editorial Privileges,"* OFFICIAL FCC BLOG (Mar. 9, 2015, 3:58 PM), http://www.fcc.gov/blog/fixing-flawed-and-non-existent-editorial-privileges [http://perma.cc/MJ2V-ML5D].

rules of procedure" that would eventually be codified in the *Code of Federal Regulations*.[369]

Transparency not only increases the political accountability of the agency head's managerial decisions, but also can contribute to greater consistency and uniformity across the agency's rules. Transparency further facilitates greater public participation by revealing the real sites of decisionmaking power within the agency and mechanisms through which to contest the exercise of such power.[370] Thus, legislative or executive branch reforms aimed at requiring the disclosure of both agency structure and internal procedure would yield many salient benefits. The APA, as amended and recodified by the Freedom of Information Act[371] (FOIA), currently demands that agencies publish in the *Federal Register* "descriptions" of their "central . . . organization."[372] According to the *Attorney General's Manual on the Administrative Procedure Act*, this provision requires each agency to "list[] its divisions and principal subdivisions and the functions of each."[373] Numerous courts have refused to enforce this provision, however, unless the parties before them could show that they were adversely affected by the agency's failure to publish.[374] As a result, agencies have not been required to publish their organizational charts or internal delegations of authority absent a showing of specific harm.[375]

Congress could amend this statute, however, to override these judicial decisions and instead render enforceable the publication requirement for agency organizational descriptions without a showing of adverse effect. It could take this opportunity to add language requiring the publication of internal rulemaking procedures as well. This legislative amendment could further subject both publication requirements

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369 *Id.*

370 *See* Metzger, *supra* note 42, at 1893.

371 5 U.S.C. § 552 (2012).

372 *Id.* § 552(a)(1) ("Each agency shall separately state and currently publish in the Federal Register for the guidance of the public . . . descriptions of its central and field organization . . . .").

373 U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 20 (1947); *see also* Sean Croston, *It Means What It Says: Deciphering and Respecting the APA's Definition of "Rule*,*"* 53 WASHBURN L.J. 27, 44–47 (2013).

374 *See, e.g.*, New York v. Lyng, 829 F.2d 346, 354 (2d Cir. 1987); United States v. Goodman, 605 F.2d 870, 887–88 (5th Cir. 1979); Hogg v. United States, 428 F.2d 274, 280 (6th Cir. 1970).

375 In practice, many agencies publish their "[d]escriptions of the agency's legal authorities, public purposes, programs, and functions" as well as "[l]ists of officials heading major operating units" in the *United States Government Manual*. 1 C.F.R. § 9.2(a) (2015). Regarding FOIA, however, a former Attorney General has opined that the information in the manual "should not be regarded as a substitute for, but merely a useful supplement to, the requirement to 'currently publish' such information in the Federal Register." RAMSEY CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT 7 (1967), *reprinted in* 20 ADMIN. L. REV. 263, 274 (1968).

to FOIA's enforcement provisions.[376] These enforcement provisions were intended to reverse the APA's previous restriction of access to agency materials to "persons properly and directly concerned" with the information.[377] To the contrary, FOIA does not require those requesting access to agency records to show why they need such information. Rather, agencies must disclose requested information to any person for any reason unless explicitly exempted.[378] Denial of such information establishes standing for suit.[379]

To further spur disclosure, the President could also issue an executive order requiring executive agencies to publish their organizational charts and internal rulemaking procedures in the *Federal Register*. This order could encourage independent agencies to do so as well. In addition, or alternatively, OMB or OIRA could formulate disclosure guidance for agencies pursuant to recent open government initiatives.[380] To the extent they possess the relevant discretion by statute and executive order, agency leaders could then be more publicly responsible for any perceived failures to manage their internal procedures and staff effectively.

While the transparency prompted by these measures could yield accountability-enhancing benefits, disclosure requirements might pose potential drawbacks as well. As an initial matter, such requirements could prevent agency heads from pursuing valuable internal reforms for fear of the costly interest group involvement that might result. They could also chill the candid internal conversations required to address sensitive political and management issues.[381] Protracted public

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[376] *See* 5 U.S.C. § 552(a)(1) ("Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.").

[377] Administrative Procedure Act, Pub. L. No. 79-404, § 3(c), 60 Stat. 237, 238 (1946), *amended by* Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54 (codified as amended at 5 U.S.C. § 552).

[378] *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136 (1975).

[379] *See* Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 449–50 (1989); John G. Roberts, Jr., Comment, *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1228 n.60 (1993) ("When an agency wrongfully denies an individual's FOIA request, that particular individual has suffered injury in fact under Article III and has standing to sue in federal court to redress that injury.").

[380] *See* Transparency and Open Government, Memorandum for the Heads of Executive Departments and Agencies (Jan. 21, 2009), *in* 74 Fed. Reg. 4685 (Jan. 26, 2009); Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, to Heads of Exec. Dep'ts & Agencies (Dec. 8, 2009), http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf [http://perma.cc/J9WP-36BR]. For examples of such guidance documents, see Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, to Heads of Exec. Dep'ts & Agencies (Jan. 4, 2012), http://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/clarifying-regulatory-requirements_executive-summaries.pdf [http://perma.cc/3435-QHZ2]; and Memorandum from Clay Johnson III, Deputy Dir. for Mgmt., Office of Mgmt. & Budget, to Heads of Exec. Dep'ts & Agencies (Dec. 17, 2004), http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2005/m05-04.pdf [http://perma.cc/H8WD-HD9H].

[381] *See* Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1166–67 (2010).

battles and FOIA litigation could occupy resources the agency head would rather spend advancing the agency's mission.[382] Such interest group participation, in turn, may be skewed toward better-funded lobbyists who work at cross-purposes with the agency heads' goals.[383] Consequently, transparency obligations may freeze into place structures and processes that would otherwise benefit from flexibility or experimentation. A reduction in overall agency effectiveness may result.

Relatedly, a transparency mandate could also further drive underground the real "folkways" of influence — the informal norms of conduct — within the agency.[384] Indeed, it would be naive to claim that the inner workings of complex bureaucracies could be captured neatly in charts or guidelines. To the contrary, management decisions necessarily require exercises of judgment tailored to the personalities and culture of various teams at a given point in time. Thus, requiring agencies to make their internal processes public may encourage the production of organizational charts or other documents that are opaque or otherwise misleading. For all of these reasons, transparency is not a panacea for the failures of agency heads to be held accountable for their organizational decisions. At the very least, however, it may help to foster a much-needed public debate about the consequences of alternative institutional choices.

B. Efficiency, Effectiveness, and Expertise

While transparent intra-agency coordination mechanisms could help promote political and legal accountability, such mechanisms could also pose potential tradeoffs with other administrative desiderata such as efficiency, effectiveness, and the incorporation of technical expertise.

1. Efficiency and Effectiveness. — By definition, intra-agency coordination mechanisms decrease the net information-processing costs for knowledge the agency head values. While initial implementation costs may be substantial, these mechanisms, once implemented, decrease the resources necessary for the agency head to acquire the information required to reach a rational conclusion. From the perspective of the agency head, intra-agency coordination is thus likely to increase efficiency by lowering the costs necessary to make a deci-

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[382] *See* Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 907 (2006) ("[D]isclosure requirements also undeniably raise the fiscal costs of government.").

[383] *See* Kimberly D. Krawiec, *Don't "Screw Joe the Plummer": The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53 (2013); Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 110–13 (2011).

[384] *Cf.* Donald R. Matthews, *The Folkways of the United States Senate: Conformity to Group Norms and Legislative Effectiveness*, 53 AM. POL. SCI. REV. 1064, 1064 (1959) (defining "folkways" as "unwritten but generally accepted and informally enforced norms of conduct").

sion.[385] Consequently, for any given budget constraint, greater coordination helps the agency head pursue regulatory (or deregulatory) goals that she prefers. These efficiency gains, in turn, would allow agency heads to be more effective with the same level of resources.

Whether such coordination is efficient or more effective from a broader societal perspective, then, depends on whether one believes the outcomes pursued by the agency head are desirable, since coordination can help to reduce the costs necessary to achieve those outcomes. Put differently, determining whether greater coordination is socially efficient or otherwise maximizes effectiveness requires an evaluation of the extent to which the ends that an agency head attempts to achieve are the correct ones, whether grounded in welfare-maximization or some notion of the "public interest," however defined.[386] Of course, what those desired ends should be in the administrative state is a notoriously contentious question. Perhaps one believes that a duly appointed agency head should be free to pursue whatever goals she prefers, even if nakedly political, as long as she stays within statutory bounds.[387] Others would likely argue that agency heads have more robust duties.[388] As a result, those who disagree with the objectives of specific agency heads or otherwise believe their discretion should be better cabined should advocate for the kinds of congressional and presidential constraints that would reduce the agency head's organizational discretion.

2. Expertise. — Relative to a baseline of no coordination, agency head attempts to coordinate internal actors are likely to increase the potential for undue political interference with expert information. Agency heads may centralize their authority or design their clearance procedures to bypass scientists or other policy professionals within the agency, signing and issuing regulations that are ill-informed at best and motivated solely by partisan ends at worst. Indeed, stories of

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[385] *See* Freeman & Rossi, *supra* note 10, at 1181 (characterizing "decision costs" as "relate[d] to efficiency" (emphasis omitted)).

[386] *See* SIMON, *supra* note 31, at 258 ("It can be seen that the criterion of efficiency as applied to administrative decisions is strictly analogous to the concept of maximization of utility in economic theory."); Paul R. Verkuil, *Understanding the "Public Interest" Justification for Government Actions*, 39 ACTA JURIDICA HUNGARICA 141 (1998).

[387] *See* Watts, *supra* note 80.

[388] *See, e.g.*, Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 121 (2006) ("Agencies also are bound by a duty of fidelity to their statutory mandates, and duties of care and loyalty to their statutory beneficiaries."); Metzger, *supra* note 42 (proposing that courts and political actors can identify some "constitutional line," *id.* at 1908, that triggers the constitutional duty to supervise).

high-level interference with staff scientific judgments abound — from Republican and Democratic administrations alike.[389]

Of course, influence by a political appointee is not always illegitimate. To the contrary, such oversight should arguably be embraced in a legal system such as ours that empowers the executive branch to determine policy when the underlying statutes are otherwise ambiguous.[390] Where to draw the line between legitimate and illegitimate influence is not a straightforward inquiry.[391] Some familiar conceptual categories, however, can be instructive. Professor Kathryn Watts, for example, draws from civic republican theory to suggest that appeals to "public values" should be permissible categories of political influence, while those grounded in mere "naked preference[s]" should not be.[392] In other words, regulatory policies should not be legitimated by reference to horse-trading and partisanship, but rather should be justified by reference to the public interest more generally.[393] Watts acknowledges that such analytic tests are necessarily imprecise,[394] but these formulations may nevertheless serve as useful poles against which to evaluate the consequences of alternative coordination mechanisms in fact-specific contexts.

At the same time, however, note that agency heads who value expert information as a basis for regulatory decisionmaking could also choose coordination mechanisms like centralization and specialization to privilege that expertise. Take, for example, FDA Commissioner Margaret Hamburg's 2014 efforts to reorganize the FDA. Commissioner Hamburg is a noted doctor and scientist.[395] To some observers, her reorganization efforts represented an "attempt to [make the FDA] become more specialized and able to address increasing scientific and regulatory complexity."[396] One of her significant changes was her cre-

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389 *See, e.g.*, CHRIS MOONEY, THE REPUBLICAN WAR ON SCIENCE (2005); TODD WILKINSON, SCIENCE UNDER SIEGE (1998); Jody Freeman & Adrian Vermeule, Massachusetts v EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 54–64.

390 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984); *see also supra* 140–151 and accompanying text.

391 *See* Watts, *supra* note 80, at 56.

392 *Id.* at 53. *See generally* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992).

393 *See* Watts, *supra* note 80, at 53–54.

394 *See id.* at 56 ("[T]rying to define what sorts of political influences should be viewed as legitimate and which should be viewed as illegitimate is not an easy task that can be summed up with a precise test.").

395 *See Commissioner's Page*, U.S. FOOD & DRUG ADMIN., http://web.archive.org/web/20150315035455/http://www.fda.gov/AboutFDA/CommissionersPage/default.htm (archived Mar. 15, 2015) (characterizing Hamburg as "an experienced medical doctor, scientist, and public health executive").

396 Alexander Gaffney, *Major Overhaul of FDA Planned in Bid to Become More Specialized*, REG. AFF. PROFESSIONALS SOC'Y (Feb. 4, 2014), http://www.raps.org/focus-online/news/news-article-view/article/4595 [http://perma.cc/E5VC-SAQ6].

ation of a deputy commissioner position for medical products and tobacco within the Office of the Commissioner.[397] Its first occupant was Dr. Stephen Spielberg, a former dean of Dartmouth Medical School.[398] The move sought to "provide high-level coordination and leadership" to the agency's centers dealing with drugs, biologics, medical devices, and tobacco products.[399]

In this manner, centralization can be used to place experts close to the top of the agency hierarchy and allow them to better influence regulatory policy. Creating a more specialized position also helps augment the role of expertise in internal decisionmaking. Because intra-agency coordination serves the preferences of specific agency heads and reflects how much they value expertise in the regulatory process, the net effects of particular mechanisms will ultimately be an empirical question, hopefully informed by the analyses here.

C. Judicial Oversight

While requiring greater transparency of intra-agency coordination mechanisms could augment agency head accountability through political channels, and legislative and executive constraints on organizational discretion could better foster efficiency and expertise, a distinct issue is the extent to which such mechanisms should be subject to judicial review. In general, courts have been "reluctant" to police agency structure and process against claims of dysfunction or poor design.[400] Indeed, the legal basis for judicial intervention in agency coordination practices is currently tenuous. As Professor Gillian Metzger explains, executive branch supervision is "largely excluded" from traditional tenets of constitutional and administrative law.[401] Specifically, she points out, courts have generally refused to incorporate the actual functioning of agencies into constitutional doctrines of standing, nondelegation, and government-officer supervisory liability, among others.[402]

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[397] *Hamburg Reorganizes Commissioner's Office, Adds Deputy Commissioner*, 19 FDA ADVERT. & PROMOTION MANUAL NEWSL. (FDA, Silver Spring, MD), Sept. 2011, at 8.

[398] *Id.*

[399] *Id.*

[400] *See* Gillian E. Metzger, Annual Review of Administrative Law — Foreword, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1367 (2012); *see also* Kagan, *supra* note 66, at 2269 ("[C]ourts incline instead toward enforcing structures and methods of decisionmaking designed to enable or assist other actors . . . to influence administrative actions and policies.").

[401] Metzger, *supra* note 42, at 1859; *see also id.* at 1846 (defining "administration" as "the running or managing of an organization or activity" including "internal organization and structure" and "intra-agency . . . coordination"); *id.* at 1871–73 (discussing administrative law exclusions).

[402] *See id.* at 1859–70.

As for administrative law, the APA allows review only for "final agency action[s]" that result in identifiable harms.[403] Consequently, litigants can challenge only specific agency actions as opposed to the more general structures or processes that resulted in the action.[404] Administrative law's hesitancy to police agency inaction further forestalls the ability of courts to intervene in systemic management failures.[405] Furthermore, rules regarding "agency organization, procedure, or practice" are not subject to notice and comment[406] and are thus exposed to less public scrutiny. Because such rules lack a robust public record, litigants may find it difficult to bring arbitrary-and-capricious challenges against them.

While Metzger compellingly argues that courts should invoke a constitutional duty to supervise in "extreme" circumstances, such as cases involving a complete lack of coordination resulting in widespread or longstanding harms,[407] worries about the wisdom of direct judicial enforcement nevertheless persist in more common situations. Chief among them are the institutional competence and separation of powers worries that Metzger readily acknowledges.[408] Judges are not well positioned to assess the relative merits of different agency structures and processes.[409] Not only do judges usually lack sufficient managerial experience, but they also lack access to empirical data that might shed light on the comparative effectiveness of different organizational forms. Equally disconcerting is the likely absence of judicially manageable standards for distinguishing inadequate from adequate agency coordination as well as the difficulties of formulating remedial actions.[410] Perhaps for these reasons, courts have been deferential to agency heads' judgments of how to manage their organizational resources, especially when such decisions are not fixed by statute.[411]

Indeed, one of the most compelling rationales militating against judicial entanglement in agency design is potentially highlighted by the account offered here: intra-agency coordination decisions are ultimately political determinations. They are political in the sense that they often track the preferences and priorities of appointed agency heads

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403 5 U.S.C. § 704 (2012); *see also id.* § 702; Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n, 324 F.3d 726, 731 (D.C. Cir. 2003); Metzger, *supra* note 42, at 1872.

404 *See* Metzger, *supra* note 42, at 1872.

405 *See id.* at 1871–73.

406 5 U.S.C. § 553(b)(3)(A).

407 Metzger, *supra* note 42, at 1907; *see also id.* at 1907–08.

408 *See id.* at 1843 ("[C]oncerns about judicial role and competency are real.").

409 *See id.* at 1843, 1906.

410 *See id.* at 1906–07.

411 *See id.* at 1872 (referencing Justice Scalia's declaration that individuals "cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made" (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990))).

amid extant uncertainties. They are also political in that they represent how these leaders prioritize and trade off among competing sources of information. Inviting courts to upset this balance not only confuses the judicial function, but also threatens to upset the equilibrium between agency heads and other political actors, such as Congress and the President, who can impose constraints on intra-agency coordination.[412] These other actors are electorally accountable in a way that courts are not. They also already engage in ongoing study, oversight hearings, and supervision from which they can arguably make more informed organizational choices.[413] For these reasons, Metzger's suggestion that the political branches may be better situated to enforce a constitutional duty to supervise may be her most promising.[414]

Perhaps more desirable than direct judicial policing, then, is judicial acknowledgment of intra-agency coordination as a means of reinforcing political oversight.[415] Courts have already demonstrated receptivity to this role. Most famously, the Supreme Court in *United States v. Mead Corp.*[416] refused to grant *Chevron* deference to an agency's statutory interpretation contained in a tariff classification ruling letter, partially on the grounds that such letters could be issued at various ports of entry without centralized supervision from the agency's headquarters.[417] While the majority's rationale did not center on this observation — focusing instead on indicia of congressional intent[418] — it nevertheless recognized the institutional difference between centralized and decentralized legal conclusions as a potential basis for deference.

Justice Scalia in his dissent took up this line of reasoning more forcefully. Specifically, he advocated for a deference regime that would simply look to whether the interpretation is "authoritative" in the sense that it "represents the official position of the agency."[419] Because the Customs letter's interpretation in *Mead* had been ratified by the General Counsel of the Treasury, in Justice Scalia's view, that interpretation "represent[ed] the authoritative view of the agency" and

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412 *See supra* section II.B.2, pp. 475–78.

413 *See* Metzger, *supra* note 42, at 1927.

414 *See id.* at 1927–32.

415 *See id.* at 1905–13 ("[J]udicial involvement often may be limited to acknowledging the existence of a constitutional duty to supervise, with direct enforcement left to the political branches." *Id.* at 1913.).

416 533 U.S. 218 (2001).

417 *See id.* at 233–34; Magill & Vermeule, *supra* note 38, at 1062–63; Metzger, *supra* note 42, at 1973.

418 *See Mead*, 533 U.S. at 229–31.

419 *Id.* at 257 (Scalia, J., dissenting); *see also* David J. Barron & Elena Kagan, Chevron's *Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 204 ("We contend that the deference question should turn on a different feature of agency process, traditionally ignored in administrative law doctrine and scholarship — that is, the position in the agency hierarchy of the person assuming responsibility for the administrative decision.").

therefore *Chevron* deference was appropriate.[420] One implication of this approach is that it would create incentives for agency heads to engage in greater intra-agency coordination by privileging the interpretations that have been directly authorized by those agency heads.

Extending these insights further, another way in which courts might acknowledge intra-agency coordination while leaving its evaluation to political actors is to grant *Chevron* deference to agency interpretations of statutes governing agency design.[421] Doing so would ensure that agency heads, not judges, determined interstitial issues of bureaucratic form. Because *Chevron* is partially grounded in the political accountability of the agency head,[422] organizational decisions that reflect agency head priorities may be prime candidates for deference. Doctrinally, the touchstone inquiry is whether Congress has delegated the authority to act with the force of law, and the agency has acted accordingly.[423] The resulting analysis primarily turns on the kind of procedure the agency head has deployed when interpreting the ambiguous statute — in particular, whether that procedure fosters "fairness and deliberation."[424]

In practice, agency heads are unlikely to engage in internal reforms through notice-and-comment given that "rules of agency organization, procedure, or practice" are exempt from the requirement.[425] As a result, the potential for *Chevron* deference through other procedures may encourage agency heads to make their organizational choices more transparent and determined in ways that desirably invite public participation and input. To be sure, the Court has recently made clear that it would not distinguish between different kinds of statutes for the purposes of its deference inquiry.[426] Some scholars have observed, however, that courts in reality are tailoring their deference analyses nonetheless[427] — a practice that should be extended to intra-agency coordination decisions.

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[420] *Mead*, 533 U.S. at 258 (Scalia, J., dissenting).

[421] *See supra* notes 140–144 and accompanying text.

[422] *See* Kagan, *supra* note 66, at 2373–74.

[423] *Mead*, 533 U.S. at 226–27.

[424] *Id.* at 230.

[425] 5 U.S.C. § 553(b)(3)(A) (2012).

[426] City of Arlington v. FCC, 133 S. Ct. 1863, 1871 (2013) ("[T]he question in every [*Chevron*] case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not."); Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 713 (2011) (recognizing "the importance of maintaining a uniform approach to judicial review of administrative action" (quoting Dickinson v. Zurko, 527 U.S. 150, 154 (1999))).

[427] *See, e.g.*, Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 500 (2011) ("[J]udicial precedents tend to rely most heavily on other cases involving the agency under review, even for generally applicable administrative law principles."); Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT.

In this manner, the judicial recognition of an agency's organization and internal procedures would better match the practical realities of bureaucratic decisionmaking as well as the political nature of agency design.[428] More broadly, it could also create positive incentives for agency heads to take ultimate responsibility for administrative actions, instead of secretly subdelegating them to subordinates. By fostering doctrines that recognize the extent to which agency heads are attempting to coordinate their internal operations, courts should recognize that agencies operate according to sophisticated internal structures and decisionmaking processes. These factors, in turn, can serve as proxies for characteristics such as accountability or expertise that judges otherwise often attempt to address in an institutional vacuum.

CONCLUSION

Administrative law's tendency to treat the agency as a black box has obscured a number of important questions about the actual determinants of agency structure and process. Current accounts of internal agency dynamics often focus on congressional, presidential, or judicial influences on agency actors without adequately considering how an appointed agency head may mediate between these external pressures. This view tends to neglect the ways in which agency leadership can filter and prioritize among these often-conflicting exogenous demands through bureaucratic design.

By contrast, this Article has sought to develop more general insights into the unique ways in which an agency head's organizational choices can influence rulemaking outcomes. Specifically, agency heads faced with political, legal, economic, and scientific uncertainties can employ a number of coordination mechanisms designed to reduce their internal information-processing costs. These tools could include the centralization of internal oversight, the specialization of functions and divisions, the separation of decisionmaking and analyses, the standardization of information, as well as the implementation of procedures governing clearance authority and priority-setting within the agency.

REV. 1, 29 (arguing that the "differential implementation of *Chevron* suggests the Court is embracing a more grounded, realist's stance on the deference issue").

428 *See* Metzger, *supra* note 42, at 1842 (noting the "deeply troubling disconnect between the realities of government and constitutional requirements imposed on exercises of governmental power"); Peter L. Strauss, *On Capturing the Possible Significance of Institutional Design and Ethos*, 61 ADMIN. L. REV. 259, 259–60 (2009) (lamenting that "judges seem rarely to think about issues of institutional design and ethos when considering the issues of administrative law" in particular concrete instances, *id.* at 277); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 810 (2001) ("The anthropomorphic tendency to treat agencies as if they were a single human actor is particularly distracting and distorting when one is analyzing a medium that the constituent elements of complex institutions use to speak to each other.").

One hypothesis that results from this analysis is that, holding all else constant, increases in exogenous levels of uncertainty will prompt internal reforms that promote the more efficient transmission of privileged information to the agency head. Thus, one might expect to see an increase in the number of intra-agency coordination mechanisms at agencies uniquely affected by that change. Another possibility is that the partisan affiliation of agency heads may also help to explain bureaucratic variation, reflecting changes in internal informational priorities. Empirical work might test these hypotheses against a broader array of agencies by coding agencies' respective organizational forms and procedures. The account here has provided some motivating examples that could help inform this research agenda.

While this study has attempted to open further lines of conversation between those working in administrative law and other disciplines, its scope has been necessarily limited. Many other potentially rich veins of inquiry remain. For example, others may want to extend the themes explored here to contexts beyond rulemaking: to look at, say, how agency heads coordinate adjudication, enforcement, grantmaking, or permitting, and whether these dynamics differ and why. Multimember commissions and boards also raise questions not explored here about the ways in which multiple agency heads introduce different organizational dynamics and complicate decisions about internal design. Are there, for instance, different voting rules for structural or procedural changes, and should there be? 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.

Finally, as a normative matter, intra-agency coordination also raises a number of important questions about the socially optimal scope of agency head control. This Article has argued that, at a minimum, such coordination mechanisms should be publicly disclosed in the *Federal Register*. Congress or the President could impose disclosure requirements directly, or they could be fostered through judicial doctrines that reward the agency head for taking responsibility for facets of agency design. Such efforts are particularly important amid the modern observation that broad legislative delegations, partisan polarization, and limited executive resources have increasingly called into question the extent to which politically accountable actors can realistically monitor their appointed agency heads. For these reasons, administrative law must evolve, as it always has, to adjust to these new realities — by further turning to the ways in which agency actors can and do govern themselves.