6-2013

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http://lsr.nellco.org/nyu_pltwp/465

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Agency Coordination in Consumer Protection

Catherine M. Sharkey†

The federalization of consumer protection has created thorny issues of agency coordination. Preemption doctrine responds, at least in part, to the need for vertical coordination when federal law and agencies enter an area of historic significance to the states. But, in the field of consumer protection, horizontal coordination—necessitated when Congress charges different federal agencies with discrete and overlapping jurisdiction—raises equally intractable problems. Or at least, problems that, to date, have received considerably less attention by courts and academics.

Murky doctrinal issues lurk within the topic of horizontal agency coordination. When multiple federal agencies interpret and enforce the same statute, should a single agency’s interpretation be accorded Chevron deference? Should it matter whether it is in synch, or at odds, with its fellow agencies? The case law is far from pellucid on these questions.

In an apparent effort to address this deference conundrum, Congress, when creating the Consumer Financial Protection Bureau (CFPB) in the Dodd-Frank Act, stipulated that the CFPB should be given as much deference when interpreting or enforcing “federal consumer financial laws” as it would be were the CFPB the sole agency involved. But there are areas of overlapping or shared regulatory responsibilities outside of federal consumer financial laws. An especially significant overlapping realm is the enforcement of unfair or deceptive acts or practices by the CFPB, the Federal Trade Commission (FTC),

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the Officer of Comptroller of the Currency (OCC), the Federal Reserve, and the Federal Deposit Insurance Corporation (FDIC).

This Article explores two agency coordination strategies that point in opposite directions. The first, a balkanization strategy, attempts to overcome the overlapping agency jurisdiction problem by urging agencies to create separate, non-overlapping spheres of authority to thereby regain *Chevron* deference due the agency that reigns supreme. We can expect “agency self-help measures” that stake out respective turfs to emerge from this strategy. The FDIC has made an early gesture in this direction, stating that it will not try to maintain unfair or deceptive acts or practices enforcement authority over the entities for which the CFPB has such enforcement authority. The balkanization approach—carving out discrete fiefdoms from spheres of overlapping agency jurisdiction—finds considerable judicial and academic support.

The second strategy, a model of judicial review as agency coordinator, exploits (rather than constrains) overlapping agency jurisdiction. Under this model, when faced with an interpretation by an agency that operates in shared regulatory space, courts would solicit input from the other relevant agencies. And, to the extent that there is agreement among the different agencies, *Chevron* deference would be especially warranted (regardless of whether all of those agencies were parties before the court), in sharp contrast to certain courts’ blanket stance that *Chevron* deference is inappropriate when multiple agencies interpret the same statute.

To some extent, the provision in the Dodd-Frank Act that gives veto power over the CFPB to the Financial Stability Oversight Council (FSOC) operates as an agency-driven oversight mechanism to harness multiple agencies’ perspectives. By two-thirds vote, FSOC can veto regulations that imperil the safety and soundness of the banking system. In effect, then, a CFPB regulation that withstands FSOC screening comes with the imprimatur of multiple agencies with overlapping jurisdiction. That said, it is a partial mechanism at best, soliciting the Council members’ views only on the dimension of the safety and soundness of the banking system, not the overlapping area of consumer protection.

The realm of consumer protection therefore contains both coordination strategies to a degree, but much complexity remains in this overlapping regulatory space. In light of the
The recent US Supreme Court decision in City of Arlington v. Federal Communications Commission, the balkanization strategy may prove to be more effective in forthcoming agency initiatives. Nevertheless, facilitating agency coordination may be the better policy in certain shared spaces.

I. FEDERALIZATION OF CONSUMER PROTECTION

The Dodd-Frank Act reined in the federal preemptive authority of the OCC and empowered state regulators in the area of consumer financial protection, while simultaneously establishing an all-powerful new federal regulator, the CFPB. Legislators and policy advocates focused a great deal of attention on the vertical dimension of federal agency-state relations: namely federal preemption. In sharp contrast, legislators and policy advocates paid almost no attention to the horizontal dimension of overlapping agency jurisdiction, even though the CFPB expanded into spheres already occupied by the FTC, the OCC, the Federal Reserve, and the FDIC.

Thus far, it appears that the CFPB has been in synch with its co-regulators, dividing up turf and coordinating actions. But what will happen when, as is inevitable, the CFPB and a co-regulator do not see eye-to-eye? The Dodd-Frank Act does not provide any guidance here. Indeed, the CFPB was created to occupy shared regulatory space without much attention devoted to the issue of overlapping agency jurisdiction. This Part canvasses the existing academic literature on the advantages and drawbacks of overlapping jurisdiction. It then outlines the CFPB’s regulatory framework and examines the joint actions it has taken in its incipiency.

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1 133 S Ct 1863 (2013).
3 While all of the financial regulatory agencies discussed herein are “independent” agencies, in that their leadership is subject only to good faith removal, Congress gave the CFPB more independent features than it did others. See generally Kirti Datla and Richard L. Revesz, Deconstructing Independent Agencies (And Executive Agencies), 98 Cornell L Rev 769 (May 2013). Among other factors, the CFPB has a unitary chairperson, subject only to good faith removal and receives its appropriations independent of congressional oversight. See id at 787–88.
A. Overlapping Agencies

To the consternation of administrative law scholars,\(^4\) the issue of regulatory overlap and coordination has received insufficient judicial attention to date. In a recent Supreme Court decision, *City of Arlington v Federal Communications Commission*,\(^5\) Chief Justice Roberts made passing mention of the issue in a sharp dissent (joined by Justices Kennedy and Alito). Whereas the majority held that a court should apply *Chevron* to an agency’s determination of its own jurisdiction,\(^6\) the dissent insisted that “whether a particular agency interpretation warrants *Chevron* deference turns on the court’s determination whether Congress has delegated to the agency the authority to interpret the statutory ambiguity at issue.”\(^7\) To illustrate the need for this more particularized inquiry by the courts—and the unanticipated complexities that would arise from according *Chevron* deference to agency assertions of jurisdiction—Chief Justice Roberts points out that “statutes that parcel out authority to multiple agencies . . . ‘may be the norm, rather than an exception.’”\(^8\)

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\(^5\) 133 S Ct 1863 (2013).

\(^6\) Id at 1868 (holding that, with respect to *Chevron* deference, there is no difference between jurisdictional and non-jurisdictional agency interpretations). According to the majority, a general conferral of rulemaking or adjudicative authority is sufficient for all actions in that substantive field. Id at 1874 (“It suffices to decide this case that the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication and the agency interpretation at issue was promulgated in the exercise of that authority.”).

\(^7\) Id at 1881 (Roberts dissenting). Given that Congress did not specifically confer to the FCC authority to interpret jurisdiction, the dissent would not accord *Chevron* deference to agency jurisdictional determinations.

1. Drawbacks of regulatory overlap.

Significant downsides of overlapping regulatory authority include risks of inconsistency (both in terms of interpretation of regulations and enforcement), uncertainty, and over-regulation.

J.B. Ruhl and James Salzman have highlighted the problems of over-regulation.9 They depict an administrative state plagued by “regulatory accretion”: namely, one suffering from high societal costs imposed by excessive agency regulations.10 To Ruhl and Salzman, regulatory accretion is the inevitable outcome of overlapping agencies.

William Buzbee sounds a wholly different alarm bell: the regulatory void. Directly contrary to Ruhl and Salzman, Buzbee predicts under-regulation as a result of overlapping agency jurisdiction.11 With many regulators sharing potential jurisdiction over an area, Buzbee illustrates the scenario whereby the concerns voiced by parties negatively impacted by the lack of regulation will be diluted, as each turns to a different regulator, none of which will have a sense of the sum of all of the parts.12 Nor will any one regulator have an incentive to deviate from the status quo, given that no one regulator can be wholly blamed for problems stemming from the absence of regulation.13 Moreover, unilateral action on the part of one regulator would be inefficient and potentially ineffective without action by the other regulators. Buzbee terms this the “regulatory commons” effect, which will tend to stymie efforts for comprehensive regulation in fields where multiple agencies occupy the same regulatory sphere.14

2. Advantages of regulatory overlap.

In recent years, some academics have focused on the potential advantages of overlapping agency jurisdiction—in the form of greater expertise, more complete coverage, and

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10 Id at 800–19.
12 See id at 22–33.
13 Id at 31.
14 Id at 22–23.
coordinated action—and have analyzed tools with an eye toward harnessing these benefits.

For example, Robert Ahdieh identifies four primary benefits of regulatory overlap: (1) addressing the complexity of regulated subjects; (2) overcoming regulatory inertia; (3) encouraging innovation in regulatory design; and (4) facilitating integration across jurisdictional lines. Ahdieh also suggests that the critics of regulatory overlap have oversimplified the discussion because agencies can overlap in numerous ways and to varying degrees.

Similarly, Todd Aagaard challenges the traditional claim that regulatory overlap leads to inefficient, duplicative, and conflicting regulation. He argues in particular that regulatory overlap can often be an efficient way to ensure that there are no gaps between various agencies’ statutory boundaries. He goes so far as to suggest that Congress deliberately creates overlap more frequently than is acknowledged and that certain areas of law are more prone to regulation by overlapping agencies. Aagaard acknowledges that such overlap certainly has the potential to create inefficiencies. But he proposes that the benefits of overlap—including reliability and policy innovation—can best be supported by overlap that is intragovernmental, that is between agencies with similar perspectives (for example, the Environmental Protection Agency and Occupational Safety and Health Administration both protect health and safety), and that defines clear priorities of action between or among the overlapping agencies so that each one knows when to act.

Lawrence Baxter argues that regulatory overlap makes capture—a term used for the idea that regulated entities can exert controlling influence on the agency that regulates them—more difficult, particularly in the area of bank regulation, both

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16 Id at 898 (“[I]ntersystemic regulation encompasses more than any single pattern of regulatory engagement across jurisdictional lines. Rather, an array of interactions—distinct in the degree of dependence and the valence of the relationship, among other factors—is encompassed within the universe of intersystemic regulation.”).
18 Id at 292–95.
19 Id at 285.
20 Id at 286.
21 Aagaard, 29 Va Envir L J at 300–01 (cited in note 17).
because there is no single regulator and also because banks occupy a “quasi-public role.” He suggests that, while a bipolar relationship exists in certain areas of regulation, pitting government action against the interests of the private sector, the idea of “private interest” in the banking sector is less diametrically opposed to government interest. Baxter argues that an analysis of agency overlap in the banking sector must account for the fact that working relationships between regulators and regulated entities are beneficial for both parties. He proposes that this balance can best be maintained through (1) adequate regulatory capacity; (2) meaningful transparency on the part of agencies; (3) meaningful access by stakeholders; and (4) external checks on regulators.

B. CFPB and Shared Enforcement

A core area of regulatory overlap in the realm of consumer protection is enforcement against unfair or deceptive acts or practices (UDAP). The Federal Trade Commission (FTC) is charged with enforcing against UDAP under § 5 of the FTC Act. Banks, however, are exempt from such FTC enforcement. The FDIC, OCC, Federal Reserve, and the CFPB are charged with UDAP enforcement authority over their respective regulated banks.

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23 Id at 551 (“The financial industry, perhaps unlike any other . . . possesses some fundamentally distinct characteristics that make its level of influence both inevitable and, to a certain degree, essential.”).
24 Id.
25 Id at 560–63.
27 15 USC § 45(a)(2).
1. Regulatory framework.

As a centerpiece of the 2010 Dodd-Frank regulatory overhaul, Congress created the CFPB. The CFPB is charged with rooting out abuses in consumer banking services, such as sub-prime mortgages and payday loans. Prior to the establishment of the CFPB, the FDIC, the OCC, and the Federal Reserve were responsible for banks’ safety and soundness as well as consumer protection—goals that were often in conflict.

Congress gave the CFPB broad oversight over federal consumer financial laws. The CFPB has primary enforcement authority with respect to the federal consumer financial laws over covered persons—defined as insured depository institutions with total assets of more than $10 billion. The agency has authority to prevent “unfair, deceptive, or abusive” acts and practices (UDAAP) with respect to these covered entities. The CFPB adopts the FTC’s definitions of “unfair” and “deceptive.” It has wider jurisdiction than the FTC, however, to consider “abusive” acts or practices, defined by the Dodd-Frank Act as

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30 See, for example, Adam J. Levitin, The Consumer Financial Protection Agency, Pew Financial Reform Project, online at http://www.pewtrusts.org/uploadedFiles/wwwpewtrusts.org/Reports/Financial_Reform/Pew-Levitin-CFPAPDF (visited Sept 15, 2013) (“For federal banking regulators, there is a conflict between their primary mission—bank safety-and-soundness—and the consumer protection mission. . . . Placing the two missions together in a single agency ensures that one will trump the other, and historically consumer protection has not won out . . . ”).
32 12 USC § 5515(a)–(b).
33 12 USC § 5531(a).
acts or practices that take advantage of a consumer’s lack of sophistication or understanding.\textsuperscript{35}

The CFPB and the FTC share regulatory enforcement over non-depository consumer financial product providers.\textsuperscript{36} The CFPB must consult with the FTC in defining respective jurisdictions. The statute thus contemplates that the two agencies can agree on a division of enforcement authority.\textsuperscript{37}

The FDIC, the OCC, and the Federal Reserve Board enforce the FTC’s prohibition on unfair or deceptive acts or practices (§ 5 of the FTC Act) against the financial institutions they

\textsuperscript{35} The Dodd-Frank Act defines an “abusive” act or practice as one that:

1. materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
2. takes unreasonable advantage of

(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;

(B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or

(C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.


\textsuperscript{36} The CFPB has no authority to enforce the FTC Act. \textsuperscript{12 USC § 5481(14) (specifying that the term “Federal consumer financial law” does not include the Federal Trade Commission Act). “Covered persons” under Dodd-Frank are defined as “(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate or a person described in subparagraph (a) if such affiliate acts as a service provider to such person.” \textsuperscript{12 USC § 5481(6). The set of entities included in this definition of covered persons is substantially broader than the set of bank entities excluded from direct FTC enforcement authority in § 5 of the FTC Act. See 15 USC § 45(a). Thus, a substantial source of overlap is the set of covered persons under Dodd-Frank who can also face direct FTC enforcement.

\textsuperscript{37} See \textsuperscript{12 USC § 5514(a)(1); 12 USC § 5514(a)(2). Although the CFPB has finalized two rulemakings defining its jurisdictional scope under this provision of Dodd-Frank, it has yet to do so with respect to its overlap with the FTC. See generally Defining Larger Participants of the Consumer Debt Collection Market, 77 Fed Reg 65775 (Oct 31, 2012); Defining Larger Participants of the Consumer Reporting Market, 77 Fed Reg 42873 (July 20, 2012).
regulate.\textsuperscript{38} Like the CFPB, these federal regulators adopt the FTC’s definitions of “unfair” and “deceptive.”\textsuperscript{39} The regulators’ consumer protection jurisdiction, apart from § 5, depends on the size of the depository institution and whether or not the CFPB decides to regulate. The FDIC has authority to enforce the CFPB’s UDAAP rules with respect to smaller institutions (in other words, depository institutions with less than $10 billion in assets).\textsuperscript{40} According to the FDIC’s website (as of October 2013), only 108 of 6,903 FDIC-insured institutions have total assets greater than $10 billion, leaving the vast majority of these banking institutions under the FDIC’s UDAAP enforcement authority.\textsuperscript{41}

2. Joint agency actions.

CFPB’s first three adjudications were the product of enforcement actions that entailed coordination with other financial regulatory agencies. To date, only one of its rulemakings has been jointly undertaken.

a) Joint enforcement actions. In its first enforcement action, CFPB took on Capital One, one of the nation’s largest

\textsuperscript{38} See Federal Deposit Insurance Corporation, \textit{Payment Processor Relationships Revised Guidance} *2 n 2 (Jan 31, 2012), online at http://www.fdic.gov/news/news/financial/2012/fil12003.pdf (visited Sept 15, 2013) (“Under Section 8 of the Federal Deposit Insurance Act, the FDIC has authority to enforce the prohibitions against Unfair or Deceptive Acts or Practices.”). Before Dodd-Frank, the FDIC had explicit authority to enforce the FTC Act over its regulated banks. 15 USC § 57(f). Curiously, Dodd-Frank repealed this explicit enforcement authority but preserved the exemption for banks from FTC enforcement authority. 15 USC § 45(a)(1). Although one could read this legislative action as contemplating a complete removal of UDAAP enforcement authority from the FDIC, the FDIC has affirmed its authority to prevent unfair or deceptive acts and practices generally under § 8 of the FDI Act in a 2012 Financial Institution Letter. See Federal Deposit Insurance Corporation, \textit{Payment Processor Guidance} at *2 n 2 (cited in note 38).


\textsuperscript{40} Section 1026 of Dodd-Frank states that for depository covered persons with $10 billion or less in deposits, the prudential regulators have primary enforcement authority with respect to federal consumer financial law. See 12 USC § 5516.

bonds.\textsuperscript{42} A vendor working for the bank pressured and deceived cardholders into buying products presented as a way to protect against identity theft and hardships like unemployment or disability.\textsuperscript{43} CFPB reached a settlement with Capital One, whereby Capital One agreed to reimburse $140 million to more than two million customers, in addition to paying $35 million in fines.\textsuperscript{44} As part of a coordinated action, the OCC required Capital One to reimburse customers “harmed by unfair billing practices” over a ten-year span.\textsuperscript{45}

At the time of the settlement with Capital One in July 2012, CFPB Director Richard Cordray made clear that policing the financial industry for deceptive practices would be a mainstay of CFPB’s operations: “We know these deceptive marketing tactics for credit card add-on products are not unique to a single institution. We expect announcements about other institutions as our ongoing work continues to unfold.”\textsuperscript{46} Less clear were the respective roles, going forward, to be played by the CFPB and the OCC (and other banking regulators) in enforcing against unfair, deceptive, or abusive practices.\textsuperscript{47}

\begin{thebibliography}{99}
\bibitem{matter2} Id at *5–6.
\bibitem{matter3} See id at *14–21.
\bibitem{matter6} Nor is it clear the extent to which the banking regulators will—or should—coordinate with state attorneys general, who are likewise active in this area. As reported by Proess and Silver-Greenberg, the West Virginia AG reached a $13.5 million settlement with Capital One over payment protection plans. Id. The Mississippi AG sued Capital One for enrolling customers without consent; the Hawaii AG has sued several other banks, including Bank of America, JPMorgan Chase, and HSBC, for the allegedly deceptive sale of add-on products; and the Minnesota AG has sued Discover over duping customers into buying products. Id.

As Abbe Gluck has perceptively noted, scholars’ “recent focus on concurrent administrative jurisdiction has mostly failed to acknowledge the states.” Abbe Gluck, \textit{Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond}, 121 Yale L J 534, 557–58 (2011), citing Freeman and Rossi, 125 Harv L Rev at 1155 (cited in note 4); Gersen, 2006 S Ct Rev at 203 (cited in note 8). Gluck’s pioneering work attempts to fill this gap. See, for example, Gluck, 121 Yale L J at 542–44 (cited in note 47); Abbe R. Gluck and Lisa Schultz Bressman, \textit{Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting},
In a later enforcement action, the CFPB pursued American Express for violations of § 5 of the FTC Act and Title X of Dodd-Frank (covering “unfair, deceptive, or abusive acts or practices”). American Express engaged in allegedly deceptive marketing practices, whereby customers were misled into believing that they would receive $300 plus bonus points if they signed up for the “Blue Sky” credit card; however, customers who met the qualifications did not receive the $300 bonus payment. The FDIC (along with the Utah Department of Financial Institutions) conducted an examination, which the CFPB joined. The CFPB, the OCC, and the Board of Governors of the Federal Reserve System (as well as the Utah Department of Financial Institutions) took separate actions against various entities related to American Express. In a comprehensive settlement, American Express agreed to a consent order, an order for restitution, and orders to pay $85 million to more than 250,000 consumers, in addition to $27 million in civil monetary fines.

The CFPB’s third administrative enforcement action was its joint action with the FDIC against Discover Bank’s deceptive marketing of certain credit card products. Telemarketers working for Discover allegedly misled consumers (by misrepresentations and omissions) about whether they were purchasing a product during calls. This was compounded by the fact that Discover did not need to ask for credit card information because it could directly bill its members. Discover agreed to a consent order and stipulation based on violations of § 5 of the FTC Act in addition to the sections of the Dodd-Frank


49 Id at *3.
50 Id at *2.
53 Id.
54 Id.
Act governing UDAAP. The bank was ordered to pay $14 million in civil fines in addition to providing at least $200 million in restitution to eligible customers.

b) Joint rulemaking. The CFPB has participated in one joint rulemaking in conjunction with the Federal Reserve, the FDIC, and the OCC (as well as the Federal Housing Finance Agency and the National Credit Union Administration). The rule, issued under the Truth in Lending Act, sets out more stringent conditions for obtaining appraisals when a consumer takes out a high-priced (subprime) mortgage loan. Oddly, the CFPB’s final rule does not mention that the rule was jointly promulgated with the other banking agencies.

II. BALKANIZATION APPROACH

The predominant thrust of the judicial and scholarly response to issues posed by regulatory overlap has been in the direction of what I term the “balkanization approach”—that is, that agency jurisdiction should be construed to yield clear boundaries. This Part first examines judicial treatment of overlapping agency jurisdiction in general and then describes responses by Congress and the relevant agencies in the specific context of consumer protection enforcement by multiple agencies.

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55 Id.
56 In the Matter of Discover Bank (Joint Consent Order, Order for Restitution, and Order to Pay Civil Money Penalty 2012) at *28 (cited in note 52).
57 On its own, the CFPB has issued several final rules pursuant to Dodd-Frank, as well as rules amending the regulations implementing the Equal Credit Opportunity Act (Regulation B), Electronic Fund Transfer Act (Regulation E), Real Estate Settlement Procedures Act (Regulation X), and Truth in Lending Act (Regulation Z).
58 See Environmental Protection Agency, National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters, 78 Fed Reg 7215, 7217 (2013), codified at 40 CFR § 1222. The rule allows a creditor to offer a consumer a high-priced mortgage loan only if the creditor obtains a written appraisal of the property that is performed by a licensed appraiser who physically visits the property and inspects the interior. Id. The rule also provides for certain disclosures (including a free copy of the appraisal) to be made available to such consumers. Id. For a more detailed summary of the rule, see Consumer Financial Protection Bureau, Summary of final rule on providing appraisals and valuations (Jan 18, 2013), online at http://files.consumerfinance.gov/f/201301_cfpb_ecoa-appraisals-rule_summary.pdf. (visited Sept 15, 2013).
A. Judicial Deference to Overlapping Agencies

Jacob Gersen has aptly described “an exclusive jurisdiction canon” by which, in the face of statutes implemented by multiple federal agencies, “courts go to great length either to conclude that no agency was given law-interpreting authority . . . or to conclude that only one agency was given law-interpreting authority.” Gersen highlights as a prime example the US Supreme Court’s decision in Gonzalez v Oregon. In that case, the Attorney General of the United States had interpreted the Controlled Substances Act to preclude doctors’ prescription of drugs to facilitate assisted suicide. The Controlled Substances Act gave interpretive authority to the Department of Health and Human Services in addition to the Department of Justice. The Supreme Court thus faced the issue of what level of deference to accord an agency’s interpretation of a statute that gives authority to multiple agencies. The Court held that deference should be given to the agency that has the relevant expertise, which the Court decided was the Secretary of Health and Human Services, not the Attorney General: “The deference here is tempered by the Attorney General’s lack of expertise in this area and the apparent absence of any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment.” This holding suggests that relevant expertise should be a factor in assessing deference in a shared space, contrary to the traditional view.

1. Traditional view: no deference.

The traditional view in the DC Circuit Court of Appeals—the “specialized administrative law court” in the US—holds

59 Gersen, 2006 S Ct Rev at 222 (cited in note 8).
61 Id at 249.
62 Id at 259, citing 21 USC § 821.
63 Gonzalez, 546 US at 261–62.
64 Id at 269.
65 See Gersen, 2006 S Ct Rev at 225 (cited in note 8) (“[O]ne reason the majority did not defer to the Attorney General’s interpretation was that the Attorney General lacked the relevant expertise . . . . When one agency has greater expertise than another agency, it is not ludicrous to suggest that courts should defer to the more expert one.”).
66 See generally Hon. Douglas H. Ginsburg, Remarks Upon Receiving the Lifetime Service Award of the Georgetown Federalist Society Chapter, 10 Georgetown J L & Pub
that agencies interpreting statutes applied by other agencies should receive no deference.\textsuperscript{67} The court provided such a categorical pronouncement in \textit{Rapaport v United States Department of Treasury, Office of Thrift Supervision}.\textsuperscript{68} In \textit{Rapaport}, the Office of Thrift Supervision (OTS) had sued to enforce an agreement signed by the majority shareholder of a failed financial institution in which he had pledged his personal wealth as a guaranty for the institution’s capital.\textsuperscript{69} OTS had argued that, by failing to honor the agreement, the shareholder was unjustly enriched within the meaning of 12 USC § 1818(b)(6)(A), and that the court should defer to OTS’ construction of § 1818 because it was the agency tasked with enforcing it against Rapaport.\textsuperscript{70} The court stated: “[W]e owe no \textit{Chevron} deference to the OTS' interpretation of § 1818 because that agency shares responsibility for the administration of the statute with at least three other agencies.”\textsuperscript{71}

This categorical no deference position, moreover, has been taken to heart by the lower federal courts. As summarized by one federal district court judge within the DC Circuit: “[I]n this Circuit, where multiple agencies are charged with administering a statute, a single agency’s interpretation is generally not entitled to \textit{Chevron} deference; instead the court must review the agency’s interpretation de novo.”\textsuperscript{72} There are myriad additional examples of cases interpreting a diverse range of statutes that

\textsuperscript{67} Other circuits have not taken such a categorical approach. The Second Circuit has taken a middle approach, between the extreme poles of no deference and full \textit{Chevron} deference. See \textit{1185 Axe of Americas Associates v Resolution Trust Corp}, 22 F3d 494, 497 (2d Cir 1994). As the court explained, “Where Congress has entrusted more than one federal agency with the administration of a statute a reviewing court does not owe as much deference as it might otherwise give if the interpretation were made by a single agency similarly entrusted with powers of interpretation.” Id. However, the court’s statement here is dicta, given that the court interprets the statute at issue with no reference to the agency’s interpretation.

\textsuperscript{68} 59 F3d 212 (DC Cir 1995).

\textsuperscript{69} Id at 213–14.

\textsuperscript{70} Id at 216.

\textsuperscript{71} Id. In \textit{Rapaport}, the court interpreted what was essentially dicta from an earlier DC Circuit opinion. See \textit{Wachtel v Office of Thrift Supervision}, 982 F2d 581, 585 (DC Cir 1993). In \textit{Wachtel}, the court disparaged the agency’s statutory interpretation as “barely intelligible.” Id. The court went on to comment (in dicta) that, even if OTS were the only agency interpreting the statutory provision, the court would not give \textit{Chevron} deference to OTS’ interpretation because the statutory language is unambiguous and the agency’s interpretation is “capricious.” Id.

\textsuperscript{72} \textit{New Life Evangelistic Center, Inc v Sebelius}, 753 F Supp 2d 103, 122 (DDC 2010).
follow this basic position. For example, in considering the Secretary of the Army’s interpretation of a statute, a federal district court accorded no deference to the Secretary’s position in light of the fact that the statute applied to all branches of the military, not solely the army.\(^73\) In similar fashion, the DC Circuit withheld deference to the OCC’s interpretation of the Financial Institutions Reform, Recovery and Enforcement Act in favor of de novo review on account of the fact that “multiple agencies besides the Comptroller administer the act.”\(^74\)

A categorical no deference position in the face of overlapping agency jurisdiction, however, makes little sense from either a jurisprudential or policy perspective. Such an approach is not supported by either of the two dominant theories of judicial deference: expertise or democratic accountability.\(^75\) Nor is it in sync with what drafters of congressional legislation typically intend.\(^76\) The no deference position makes sense for a limited category of cases, namely with respect to certain statutes (such as the Administrative Procedure Act, Freedom of Information Act, and National Environmental Policy Act) that apply across

\(^73\) See *Lipsman v Secretary of the Army*, 257 F Supp 2d 3, 8 (DDC 2003) (“When an agency shares responsibility for the administration of a statute with other agencies, the court owes the agency’s statutory interpretation no *Chevron* deference.”).

\(^74\) *Grant Thornton LLP v Office of the Comptroller of the Currency*, 514 F3d 1328, 1331 (DC Cir 2008). See also *Proffitt v Federal Deposit Insurance Corporation*, 200 F3d 855, 860 (DC Cir 2000) (“When a statute is administered by more than one agency, a particular agency’s interpretation is not entitled to *Chevron* deference.”).

\(^75\) Consider Gersen, 2006 S Ct Rev at 220 (cited in note 8). Gersen outlines a “competing agents” framework, whereby competition (as opposed to coordination) among agencies is key to better regulations. Id. Gersen posits that the exclusive jurisdiction canon may be an attempt to recreate Congressional intent by assuming Congress delegated to the most informed agency. Id. This canon therefore wrongly views expertise as static and exogenous when it can actually change over time. See id. Agencies will enter jurisdictional gaps and fight over overlaps by investing in expertise to capture and preserve jurisdiction. Gersen, 2006 S Ct Rev at 213–15. Jurisdictional overlap therefore acts as a stick and underlap as a carrot toward development of agency expertise.

The D.C. Circuit was off-base when it concluded—as a general matter—that in shared regulatory space “there is thus not the same basis for deference predicated on expertise as we found in *Chevron*.” *Proffitt*, 200 F3d at 860, quoting *Salleh v Christopher*, 85 F3d 689, 692 (DC Cir 1996).

\(^76\) In an empirical study based upon a survey of 137 congressional staffers (drawn from both political parties, both chambers of Congress, and numerous committees), Abbe Gluck and Lisa Schultz Bressman report that “[i]n the context of multiple federal agencies, only two of our 137 respondents (1%) indicated that overlapping regulatory duties indicate a congressional intent to delegate to neither agency.” Gluck and Bressman, 65 Stan L. Rev at 1006–07 (cited in note 47). To the contrary, “[a]lmost 25% of . . . respondents [stated] that overlapping regulatory duties signal intent to delegate to both agencies, and roughly the same number (23%) indicated that only one agency is intended to have interpretive authority.” Id at 1007.
the board to all agencies but are not administered by any agency. But outside of that limited context, withholding deference simply on account of shared interpretive authority is counterproductive.


A more nuanced view—albeit still within the balkanization paradigm—emerges from the DC Circuit case law. Judge Rogers, in a concurrence in *Rapaport*, took the position that “it appears too facile to conclude that deference is inappropriate simply because more than one agency is involved in administering a statute.”

Judge Rogers further argued that while consideration should be given to the fact that multiple agencies administer a statute, “deference may nonetheless be appropriate where only expert banking agencies administer the statute and there is no disagreement among them about their respective responsibilities or the agency position under review.”

The same reasoning should apply to non-banking expert agencies; the “no disagreement about respective responsibilities” clause is an angle of attack that some courts and agencies could use to circumvent no-deference where Congress has left the boundaries ambiguous.

Courts have designed a strategy to preserve deference so long as the overlapping area of authority can be carved up. Namely, where multiple agencies have overlapping jurisdiction, but each agency’s interpretation only applies to a distinct subset of the regulated population, the court may defer to the agency’s interpretation.

Statutes in which expert enforcement agencies have in essence mutually exclusive authority over separate sets of regulated persons lend themselves to this type of analysis.

For example, the Alternative Mortgage Transaction Parity Act (AMTPA) is applied by three different banking agencies—OTS, OCC, and National Credit Union Administration—but each agency regulates a distinct subset of the covered

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77 *Rapaport*, 59 F.3d at 221 (Rogers concurring).
78 Id.
79 See, for example, *Trans Union LLC v Federal Trade Commission*, 295 F.3d 42, 50 (DC Cir 2002) (according *Chevron* deference to the FTC’s interpretation of a statute administered by several agencies where the agencies had non-overlapping jurisdiction); *National Home Equity Mortgage Assn v Office of Thrift Supervision*, 271 F. Supp 2d 264, 273 (DDC 2003).
population. OTS made a determination that two of the regulations in AMTPA did not preempt state law and that state housing creditors must therefore comply with states’ regulations governing these items. OTS’ amended rule applied strictly to its particular regulated entities. Thus when the rule was challenged in National Home Equity Mortgage Association v Office of Thrift Supervision, the federal district court held that OTS’ interpretation was entitled to deference.

Courts have thus recognized that if a statute delegates enforcement authority over distinct sub-groups of the regulated population in order to take advantage of different agencies’ expertise, deference may still be appropriate. In such cases, it does not seem at odds with congressional intent, and the prudential bases for deference are preserved. National Home Equity distinguished its holding from past instances of no deference in the DC Circuit by explaining that particular expertise was present here.

The carve-up approach is consistent with Chevron jurisprudence where agency expertise is maintained and Congress did not unambiguously desire jurisdictional overlap to continue. As a matter of policy, it may be preferable to the no deference standard because it overcomes the accountability problem inherent in overlapping jurisdiction and vests interpretive authority with an expert agency rather than a court.

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80 National Home Equity Mortgage, 271 F Supp 2d at 274 (noting that each agency “is limited to identify regulations that apply only to their respective institutions”).
81 Id at 268.
82 Id at 267–68.
84 Id at 273.
85 The classic prudential bases for Chevron deference are expertise and accountability. Where intent is ambiguous, courts may at times presume that Congress would prefer deference to non-deference simply because it makes for more effective policy. See Daniel Lovejoy, The Ambiguous Basis for Chevron Defeference: Multiple-Agency Statutes, 88 Va L Rev 879, 887 (2002).
86 271 F Supp 2d at 274 (“In those cases, however, none of the agencies had particular expertise in handling the substance of the statutes. As a result, the policy basis underlying Chevron deference—namely, deference to the agency’s particular expertise—had not been satisfied.”).
87 See also Gersen, 2006 S Ct Rev at 212–13 (cited in note 8) (arguing that the assignment of jurisdiction can be used to create incentives for agencies to invest in the development of expertise while simultaneously overcoming regulatory drift).
B. Congressional Response

Congress seems to appreciate that agencies may not receive deference when interpreting statutes that are also administered by other agencies. Yet Congress has not legislated to eliminate overlap.\textsuperscript{88} To the contrary, Congress has continued to create overlapping regulatory schemes.\textsuperscript{89}

Presumably in an attempt to strengthen the Consumer Financial Protection Bureau (CFPB), Congress provided that:

The deference that a court affords to the Bureau with respect to a determination by the Bureau regarding the meaning or interpretation of any provision of a Federal consumer financial law shall be applied as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law.\textsuperscript{90}

With this little-noticed provision,\textsuperscript{91} Congress tried to shore up the deference to be accorded CFPB when it acted in shared regulatory space.

But Congress’ deference provision only covers CFPB’s interpretations of “[f]ederal consumer financial law[s].” The Dodd-Frank Act, however, excludes the FTC Act from the definition of “[f]ederal consumer financial law.”\textsuperscript{92} Thus, in situations where the CFPB overlaps with the FTC, the FDIC, and the OCC in enforcing against unfair or deceptive acts or practices, the deference conundrum persists.

\textsuperscript{88} Buzbee, for example, has urged Congress to act to eliminate overlap in light of concern about under-regulation due to “regulatory commons.” Buzbee, 89 Iowa L Rev at 22–23 (cited in note 11).

\textsuperscript{89} Freeman and Rossi suggest that overlapping delegations may be committee power grabs, attempts to insulate policy from presidential influence, or policy compromises. Freeman and Rossi, 125 Harv L Rev at 1138–46 (cited in note 4). Alternatively, they suggest that such delegations may be to harness greater agency expertise or promote insulation from politics. Id.

\textsuperscript{90} 12 USC § 5512(b)(4)(B).

\textsuperscript{91} Todd Zywicki mentions the deference provision as one of several structural defects of the CFPB, an entity that Zywicki charges is unique in the history of American bureaucracy for the degree to which it has vast, vaguely defined power coupled with relatively scant accountability. See Todd J. Zywicki, The Consumer Financial Protection Bureau: Savior or Menace?, 81 Geo Wash L Rev 856, 893–99 (2013). Zywicki characterizes the deference provision as symptomatic of a lack of judicial control over the agency. Id at 893.

\textsuperscript{92} 12 USC § 5481(14).
In addition to addressing regulatory overlap in the consumer regulatory space, Congress also acknowledged the overlap between the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC). The Dodd-Frank Act requires that the SEC and the CFTC consult with each other before beginning any rulemaking regarding swaps or those trading in them, though Congress stopped short of calling for joint rulemaking on the issue.93

C. Agency Response

The FDIC has stated that it will not try to maintain UDAP enforcement authority over the entities for which the CFPB has such enforcement authority.94 With this “self-help” measure, the FDIC voluntarily cedes regulatory and interpretive authority to the CFPB, thereby preserving the two agencies’ entitlement to deference in their respective regulatory spheres.95 But this solution raises questions: Should agencies have the power to regain deference by unilaterally creating separate, non-overlapping spheres of authority? Should their voluntary carve-up agreements pass legal muster?

Some courts have given weight to agreements between agencies regarding allocation of jurisdiction, while others have disregarded such agreements and determined jurisdiction based on statutory authority alone.96 The US Supreme Court’s decision

93 See Dodd-Frank Act § 712(a), 124 Stat at 1641, codified at 15 USC § 8302(a).
94 Section 1025 of Dodd-Frank grants the CFPB primary enforcement authority with respect to federal consumer financial laws to covered persons that are insured depository institutions with total assets of more than $10 billion. See 12 USC § 5515. This section also establishes that regulators, who would otherwise have authority to enforce the federal consumer financial laws, shall have “backup enforcement authority” with respect to those institutions and the federal consumer financial laws. 12 USC § 5515(c)(3).
95 Because the FDIC has affirmed its enforcement authority with respect to the FTC Act’s UDAP provisions, as opposed to the CFPB’s UDAAP provisions, this section should not affect the FDIC’s status as primary regulator of the banks it regulates. If the FDIC were to take this position, then these banks (covered persons—that is, depository institutions with greater than $10 billion in deposits) would face FDIC enforcement of FTC UDAP rules as well as CFPB enforcement of UDAAP rules. The FDIC, however, seems to have voluntarily ceded this authority.
96 This voluntary carve-up only applies to the CFPB’s overlap with the FDIC.
97 See Jason Marisam, Duplicative Delegations, 63 Admin L Rev 181, 237–38 (2011) (collecting cases). For an example of a court’s giving weight to such agency agreements, see Public Citizen v Foreman, 631 F2d 969, 975 (DC Cir 1980) (finding an agreement between the U.S. Department of Agriculture and the FDA to be significant). For an example of a court’s refusing to credit such an agreement, see Chicago Board of Trade v
in *City of Arlington* supports deference when an agency engages in voluntary carve-up, at least with respect to ambiguous jurisdictional boundaries. If, as *City of Arlington* holds, agencies are afforded *Chevron* deference for an interpretation of their jurisdiction, then there should be no reason why an agency agreement on splitting jurisdiction should not be treated in a similar fashion as a general matter.\(^97\)

A further caveat to the prospect of voluntary carve-up as a solution is that, while these agencies have declared an intention not to have multiple agencies regulating the same entity, they all explicitly reference the other agencies’ statutory interpretations.\(^98\) Shared interpretations create a consistent regulatory regime but lean closer to coordination than balkanization. If deference requires exclusive jurisdictional spheres, shared interpretations may be seen as overlap.

III. COORDINATION APPROACH

While balkanization may be the dominant response to regulatory overlap, an equally—if not more promising—strategy points in the opposite direction, toward coordination.

A. Congressional Mandates for Agency Interaction

1. Consultation.

   Dodd-Frank § 1022 requires the CFPB to consult with “the appropriate prudential regulators or other Federal agencies prior to proposing a rule and during the comment process regarding consistency with prudential, market, or systemic

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\(^{97}\) One significant point with respect to statutory ambiguity at *Chevron* “Step One” warrants mention. The majority in *City of Arlington* framed its holding as an application of the general rule that agencies are always limited by their statutory authority and any interpretation within that authority that relates to a statutory ambiguity warrants deference. *City of Arlington*, 133 S Ct at 1868–69. If a court, however, determined that that statutory boundary between two agencies’ jurisdiction were clear, then an agency carve-up agreement to the contrary would not warrant deference.

\(^{98}\) See, for example, Federal Deposit Insurance Corporation, *Compliance Manual* at *§ VII–1.2–3* (cited in note 39) (citing the Federal Trade Commission’s definitions of “unfair” and “deceptive”); Consumer Financial Protection Bureau, *Handbook* at *§5* (cited in note 34) (explaining that CFPB examiners “should be informed by the FTC’s standard for deception”).
objectives administered by such agencies.” Indeed, it is common for Congress to require interagency consultation prior to decisionmaking where an action will impact a shared regulatory space.

This congressional mandate thereby forces some interaction among the agencies, at least with respect to balancing safety and soundness concerns with consumer protection. The consultation mandate by no means assures any degree of coordination. Nonetheless, having been directed to consult on matters of safety and soundness of the banking system, agencies might develop de facto coordination of their respective consumer protection policies as well.

2. Financial Stability Oversight Council veto.

Congress gave limited veto power over the CFPB rules to a multi-agency Financial Stability Oversight Council (FSOC). Section 1023 of Dodd-Frank lays out a framework for the FSOC review, whereby, under a narrow set of conditions, final CFPB rules can be vetoed and set aside. Any member agency of the FSOC can petition to set aside a final CFPB rule (or any provision thereof). By two-thirds majority vote, the FSOC can set aside a regulation on the ground that it threatens to imperil the safety or soundness of the banking system. This FSOC

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100 See Freeman and Rossi, 125 Harv L Rev at 1157 (cited in note 4). As Freeman and Rossi elaborate, consultation may be most beneficial where new information or perspectives can help to overcome an insular agency culture or decisionmaking process. Id. It may also help where the potential for mission conflict is high, expertise is diffuse, and the risk of silo decisionmaking is present. Consultation typically involves a lead agency as the main decisionmaker, which maintains accountability but nevertheless considers the priorities and expertise of other agencies with related missions.
101 FSOC member agencies include: the Board of Governors of the Federal Reserve System; the Commodity Futures Trading Commission; the Federal Deposit Insurance Corporation; the Federal Housing Finance Agency; the National Credit Union Administration; the Office of the Comptroller of the Currency; the Securities and Exchange Commission; the Treasury Department; and the Consumer Financial Protection Bureau. See Financial Stability Oversight Council: About FSOC (U.S. Department of the Treasury 2013), online at http://www.treasury.gov/initiatives/fsoc/about/Pages/default.aspx (visited Sept 15, 2013).
102 See 12 USC § 5513.
103 The petition must be published in the Federal Register. 12 USC § 5513(a)(2).
104 12 USC § 5513(a) (proclaiming that the FSOC can veto a regulation or provision that “would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk”). After a petition is filed, the regulation will become final unless the FSOC acts within either forty-five or ninety
veto power recognizes the importance of balancing safety and soundness goals against consumer protection goals, even when those functions have been assigned to separate agencies.

More generally, the multi-agency Council has the makings of a model for agency coordination. But its capacity to serve as a prompter of coordinated agency action is inherently limited. The FSOC’s only statutory role is to allow the other agencies’ safety and soundness missions to trump the CFPB’s consumer protection mission if enough of the agencies agree. The veto threat could incentivize inter-agency communication and consistent policy even without being used, but it is a blunt instrument that the FSOC might find too unwieldy for facilitating coordination.

B. Agency Collaboration Initiatives

To the extent the scholarly literature has urged a coordination approach, it has focused primarily on agency-initiated collaboration. Jody Freeman and Jim Rossi argue that agency overlap has the potential for tremendous efficiency gains, if the agencies can properly coordinate their actions. They propose two agency collaboration initiatives—interagency agreements and joint policymaking—to harness the potential of multiple agencies acting in a “shared regulatory space.” Interagency agreements primarily take the form of Memoranda of Understanding (MOUs). To Freeman and Rossi, the relative

days (depending upon whether the Council agrees to a preliminary stay). 12 USC §§ 5513(b)–(c).

105 Rachel Barkow, however, warns that the FSOC veto employs the type of “involvement by other agencies that can undermine the CFPB’s own structural protections.” Rachel E. Barkow, Insulating Agencies: Avoiding Capture Through Institutional Design, 89 Tex L Rev 15, 75 (2010).

106 For example, Freeman and Rossi cite the FTC’s and DOJ’s coordination on merger guidelines, the Environmental Protection Agency (EPA)–National Highway Traffic Safety Administration (NHTSA) joint rule on greenhouse gas emissions, and the Memorandum of Understanding between the Department of Energy and National Oceanic and Atmospheric Agency to collaborate on research as examples of agency-initiated collaboration. Freeman and Rossi, 125 Harv L Rev at 1183–85 (cited in note 4).

107 See id at 1181–89.

108 Id at 1157.

109 Generally unenforceable and unreviewable in court, MOUs are negotiated by agencies to further some statutory objective. MOUs can be used for a variety of purposes: delineating jurisdiction, setting up procedures for information sharing, collaborating on a common mission, coordinating reviews (such as with licensing), and agreeing on substantive policy. Id at 1161.
informality, ease of enactment, and adaptability of these non-binding agreements make them potentially valuable coordination tools.\textsuperscript{110} Joint policymaking marks a step up in terms of agency coordination. Akin to interagency regulatory negotiation, agencies can incorporate each other’s rules, follow model rules, interlock their rules, or adopt a single text (joint rulemaking). Joint policymaking encourages agencies to move beyond their traditional arm’s length relationships to pool resources and collaborate on major tasks.\textsuperscript{111}

In a similar vein, Robert Ahdieh focuses on voluntary and “dialogic” agency interactions—agencies want to learn from and share ideas with agencies with a similar mission.\textsuperscript{112} Dialogic regulation is most effective when regulatory entities with jurisdictional overlap and a degree of dependence on one another engage in recurrent interaction, experimentation, learning, and growth.\textsuperscript{113} Dependence fosters cooperation as each agency needs the other to achieve what it hopes to accomplish.

Each of these agency collaboration initiatives, however, can break down. As Freeman and Rossi note, where conflict is high, such agreements are of little use without centralized supervision by another branch.\textsuperscript{114} Freeman and Rossi suggest that the president would do well to attempt to harness the potential of coordinated agencies, though they warn that presidential attempts to do so may be met with congressional resistance.\textsuperscript{115} They argue that the President is in a unique position to spur coordination given his heightened accountability for agency policy and his burden to ensure that the laws are faithfully executed.\textsuperscript{116} The caveat is that Congress may have fragmented authority specifically to insulate the agencies from presidential control, and the President may face legal barriers in compelling independent agencies to coordinate sans congressional support.

\textsuperscript{110} Freeman and Rossi, 125 Harv L Rev at 1192 (cited in note 4).

\textsuperscript{111} Freeman and Rossi cite a joint rulemaking in 2009 by the EPA and NHTSA as an example of agency staffs working closely together on promulgating a single federal standard for automobile greenhouse gas emissions. Id at 1169. By collaborating on a single regulatory scheme, the agencies were able to harmonize their conflicting regulatory approaches and benefit from one another’s expertise. Id.

\textsuperscript{112} See generally Ahdieh, 38 Conn L Rev 863 (cited in note 4).

\textsuperscript{113} Id at 914.

\textsuperscript{114} Freeman and Rossi, 125 Harv L Rev at 1173 (cited in note 4).

\textsuperscript{115} Id at 1173–81.

\textsuperscript{116} Id at 1174.
Freeman and Rossi are far less sanguine about the potential for judicial review to prompt agency coordination.\footnote{Freeman and Rossi suggest that requiring agencies to work together may run afoul of the prohibition on judicially imposed procedures. Id at 1208, citing Vermont Yankee Nuclear Power Corp v Natural Resources Defense Council, Inc, 435 US 519 (1978). Further, while opposed to the exclusive jurisdiction canon, they argue that interagency consensus should not be afforded greater deference by courts. Freeman and Rossi, 125 Harv L Rev at 1203–09 (cited in note 4).}

C. Judicial Review as Agency Coordinator

The model of judicial review as agency coordinator exploits (rather than constrains) overlapping agency jurisdiction. Under this model, when faced with an interpretation by an agency that operates in shared regulatory space, courts would solicit input from the other relevant agencies. And, to the extent that there is agreement among the different agencies, \textit{Chevron} deference is especially warranted (regardless of whether all of those agencies are parties before the court).

1. Deference to multiple agencies’ shared interpretation.

Where multiple agencies share regulatory space—but all agree on the interpretation of a statute—it makes little sense for courts to withhold deference from that shared interpretation when put forth by a single agency. Judge Rogers embraced this view in her Rapaport concurrence: “\textit{[D]eference may nonetheless be appropriate where only expert banking agencies administer one statute and there is no disagreement among them about their respective responsibilities or the agency position under review.}”\footnote{Rapaport, 59 F3d at 221 (Rogers concurring).} Jacob Gersen picks up a similar thread in resisting the “exclusive jurisdiction canon” when he advocates that with respect to “joint-enforcement statutes... courts should give deference to both agencies, at least absent an affirmative conflict between the two.”\footnote{Gersen, 2006 S Ct Rev at 227 (cited in note 8).}

Hints of this approach can be found in existing case law. The \textit{Skidmore} deference doctrine has given courts latitude to consider multiple agency interpretations in the pursuit of consistency.\footnote{See Skidmore v Swift & Co, 323 US 134 (1944). \textit{Skidmore} deference applies to agency interpretive rules that do not have the “force and effect of law” necessary to garner \textit{Chevron} deference. Id. Courts may defer to agency judgments nonetheless based
whether HIV infection constituted a disability, the US Supreme Court looked to the “consistent course of agency interpretation before and after enactment of the [Americans with Disabilities Act].”\(^{122}\) While the Court did not decide whether any agency’s interpretation was entitled to \textit{Chevron} deference,\(^{123}\) it stated that “[i]t is enough to observe that the well-reasoned views of the agencies implementing a statute ‘constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.’”\(^{124}\) Likewise, in \textit{Collins v National Transportation Safety Board},\(^{125}\) the DC Circuit indicated that the level of \textit{Skidmore} deference would diminish in light of conflicting positions espoused by agencies operating in shared regulatory space: “If the three enforcement agencies were found to have conflicting (though individually very reasonable) interpretations, the varied positions ‘power to persuade’ would sharply fall.”\(^{126}\)

2. Soliciting absent agencies’ views.

According deference to the interpretation shared by multiple agencies is one way to prompt or encourage coordination or collaboration amongst agencies operating in shared regulatory space. It is worth considering, in addition, a process by which courts can solicit agency views in order to promote further coordination and to overcome the problem that some courts will only defer to agencies if all of the agencies that have jurisdiction in that particular area have explicitly stated their position.

Consider in this regard, the position taken by the federal district court in \textit{New Life Evangelistic Center, Inc v Sebelius}:

\[\text{[I]}f \text{ all agencies charged with administering a particular statute possessed the same interpretation, then deference}\]

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\(1^{21}\) 524 US 624 (1998).

\(1^{22}\) Id at 642.

\(1^{23}\) “[W]e need not pause to inquire whether this causes us to withhold deference to agency interpretations under [\textit{Chevron}].” Id.

\(1^{24}\) Id, quoting \textit{Skidmore}, 323 US at 139–40.

\(1^{25}\) 351 F3d 1246 (DC Cir 2003).

\(1^{26}\) Id at 1253–54.
would be appropriate, but because one of the three agencies charged with administering the [Act] was not before the court, “the existence of an alternative agency interpretation is at least theoretically possible.”

The Ninth Circuit took a contrary approach in Navajo Nation v Department of Health and Human Services, holding that when all agencies agree, or when only one has yet weighed in on the issue, the mere “theoretical possibility” of conflicting agency interpretation is not “sufficient grounds to jettison Chevron deference.”

A better approach would be for courts to solicit views from agencies with overlapping jurisdiction. The DC Circuit’s staunch “no deference” position has impeded development along these lines. Proffitt v FDIC is illustrative. In that case, the DC Circuit rejected the FDIC’s determination that 28 USC § 2462, which imposes a five-year statute of limitations on “an action . . . for the enforcement of any . . . penalty” did not apply to the FDIC’s removal of a bank director (pursuant to section 8(e), 12 USC § 818(e), of the Federal Deposit Insurance Act) because the sanction is remedial, not punitive. At the outset of its analysis, the court reiterated its traditional view that “[w]hen a statute is administered by more than one agency, a particular agency’s interpretation is not entitled to Chevron deference.” More specifically, the court explained that “[b]ecause a section 8(e) proceeding can be initiated by more than one agency, namely, the FDIC, the OCC, the Federal Reserve and the Office of Thrift Supervision, we do not extend Chevron deference to [the FDIC’s] interpretation of the statute.”

Reading the DC Circuit’s decision in Proffitt, one might be left with the impression that the FDIC simply put forth its own singular view of the applicability of the statute of limitations to

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127 New Life Evangelistic Center, 753 F Supp 2d at 123.
128 285 F3d 864 (9th Cir 2002), affd on other grounds, 325 F3d 1133 (9th Cir 2003) (en banc).
129 Id at 874–75.
130 200 F3d 855 (DC Cir 2000).
131 Id at 861.
133 Proffitt, 200 F3d at 863 n 7, citing Wachtel v Office of Thrift Supervision, 982 F2d 581, 585 (DC Cir 1993); Bowen, 476 US at 643 n 30.
its removal proceeding. But in fact, as the underlying enforcement decision makes clear:

Because the case involves an important issue of first impression before the FDIC . . . which affected all of the banking agencies, the Executive Secretary . . . issued an Order reopening the record to permit further briefing on the issue including an invitation to the other banking agencies—the Office of Thrift Supervision (“OTS”), the Office of the Comptroller of the Currency (“OCC”), and the Board of Governors of the Federal Reserve System (“Federal Reserve”)—to submit amicus briefs if they so desired.134

Indeed, the FDIC Board’s determination that the statute of limitations was inapplicable to removal actions was buttressed by the same interpretation put forth by the Federal Reserve and the OTS in their amicus briefs.135 But this solicitation of agency views did not merit any acknowledgement by the DC Circuit.

Although balkanization benefits from clearer lines of accountability, agency coordination may benefit from greater expertise, greater innovation, and greater consistency among agencies in a shared space. There does not appear to be a satisfying policy rationale for denying deference where all relevant expert agencies agree.

IV. CONCLUSION

Where agency missions are in conflict, coordination may be contrary to congressional intent and counterproductive; in such cases, balkanization may be the best approach. For example, the CFPB looks out for consumer safety, which can place it at odds with sister agencies more concerned with bank soundness. Yet when agencies coordinate in a shared space, they can more easily produce consistent policy and share expertise, such as when consumer protection agencies interlock regulations and reference one another’s interpretations.

The balkanization and coordination approaches point in opposite directions, but both appear to be better policy than a

135 Id at *7.
rigid no deference standard. Courts have accepted the carve-up coordination strategy in the past, and may accept it more readily as the jurisprudence after City of Arlington develops with regard to agency interpretations of jurisdiction.

Judicial review as agency coordinator, while a more novel approach, could be a promising strategy in certain cases. Although deference is a presumption about congressional intent, it is ultimately a judicially created default rule. Courts could easily, therefore, adopt a clear default rule in overlapping delegations to better facilitate agency coordination and exploit shared spaces to reach better policy outcomes, such as soliciting absent agency views in determining deference.

Ultimately, a modified Chevron will need to develop to address the unique problems and potential benefits inherent in shared regulatory spaces. The realm of consumer protection is ripe to advance this heretofore underdeveloped area of regulatory policy.

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