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How to Improve Allocations of Regulatory Authority

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A recent dispute illustrates how policymakers often miss crucial insights about structuring government.

Ever since Ronald Reagan [declared](#) government to be the problem rather than the solution, the federal bureaucracy has been the target of criticism from right-leaning

think tanks, regulatory skeptics in academia, and politicians of all political persuasions. Lately, members of the federal judiciary have visibly joined this chorus of criticism.

Among the charges leveled against regulation and the agencies responsible for issuing and enforcing rules is the claim that, even assuming the validity of regulatory goals, traditional regulatory approaches too often fail to achieve them or impose unjustified social costs. Others assert that regulatory “intrusions” on the operation of the free market are antithetical to the protection of individual liberty and the economic system on which our nation was built.

We take a different view.

Government regulation serves a critical role in promoting the public interest by, for example, restricting activities that threaten health, safety, and the environment. Studies [indicate](#) that the monetized aggregate benefits provided by federal regulation consistently exceed its costs. Notwithstanding these truths, it is nonetheless also the case that many regulatory programs have been unable to entirely achieve the ends for which policymakers established them.

A significant but overlooked factor in many of these past regulatory failures is flawed institutional design. Academics and policymakers have spent considerable effort exploring both the substantive content of regulation and the procedural requirements imposed on administrative agencies authorized by Congress to implement that regulation. Although the structural configuration of regulatory authority has not been entirely ignored, it has not received the attention it deserves.

In our recent book, *[Reorganizing Government: A Functional and Dimensional Framework](#)*, we propose a novel approach to thinking about how best to allocate the authority to administer regulatory programs, focusing largely on the implications of alternative ways of structuring intra- and inter-governmental relationships. Our analytical framework is based on two key insights.

First, policymakers should develop different regulatory strategies based on different government functions, such as funding, research, information distribution, information analysis, planning, standard-setting, implementation, permitting, inspection and compliance monitoring, and enforcement. For example, an allocation

of authority that makes sense for financing a regulatory program may be ill-suited to functions such as permitting or enforcement.

Second, policymakers should recognize three dimensions of regulatory authority. First, authority can range from very centralized to very decentralized. Second, it can overlap with the authority of other state or federal agencies or be distinct. Finally, it can require coordination with other agencies or allow independent action.

Policymakers routinely conflate these dimensions and fail to differentiate among governmental functions, resulting in allocations of authority that do not suit the problems they were intended to address and that undermine agency effectiveness.

Consider, for example, the recent controversy surrounding the [revocation](#) by the [Environmental Protection Agency \(EPA\)](#) and the [National Highway Traffic Safety Administration \(NHTSA\)](#) of California's authority to regulate greenhouse gas emissions from newly manufactured motor vehicles.

The law underlying this controversy is clear. The [Clean Air Act preempts](#) state authority to regulate tailpipe emissions. It affords special treatment to California, however, based on its long history as a leader in air pollution control and the seeming intractability of its air pollution problems. The statute [authorizes](#) the state to apply to EPA for a waiver authorizing it to adopt emission standards that are more stringent than EPA's. The statute [requires](#) EPA to grant the state's request if the state can show that "compelling and extraordinary conditions" justify the waiver. Other states are free to [adopt](#) any California standard for which EPA has granted a waiver.

During the Obama Administration, EPA [approved](#) a waiver for California's effort to regulate greenhouse gas emissions from newly manufactured cars and trucks. EPA and NHTSA justified revoking the waiver last month by [asserting](#) that doing so would benefit the auto industry by eliminating redundant fuel economy standards requirements that "unjustifiably increase manufacturers' compliance costs, which must be either passed along to consumers or absorbed by the industry." According to the agencies, it would also [ensure](#) "the uniform national requirements that Congress intended."

This justification is a poster child for the kind of flawed analysis of regulatory structure that we warn against in our book. The Trump Administration's assertion about

congressional intent notwithstanding, the effect of revoking California's authority to adopt more stringent standards for greenhouse gas emissions from mobile sources creates a more centralized and distinct form of regulation than Congress plainly intended when it adopted the current statute.

Conceivably, greater centralization might promote greater efficiency by eliminating the need for the automakers to comply with two sets of standards—although that has not been a problem so far, partly because California standards have been adopted broadly enough that they constitute a huge marketplace that manufacturers cannot ignore. Centralization might also ensure a unitary standard that applies in all states. But centralizing sacrifices the countervailing advantages of decentralized authority. Dual regulation of the kind authorized by the Clean Air Act allows California to experiment with innovative forms of regulation that other states (and even the federal government) can then choose to emulate. It also allows California to pursue an approach that is best suited to addressing its particular localized pollution challenges.

Likewise, in moving from an overlapping to a distinct regulatory regime in which only EPA is allowed to craft tailpipe emission standards for greenhouse gases, EPA has ignored the advantages of retaining overlapping authority. Overlapping federal-state authority might increase administrative and compliance costs for regulated entities, but it reduces the risk of under-regulation and agency capture. Congress apparently recognized the wisdom of relying on overlapping standard-setting to create a safety net in the event of inadequate federal regulation by preserving California's capacity to regulate tailpipe emissions and the ability of other states to follow California's lead.

The revocation of California's waiver, which is currently being **challenged** in court, also highlights the importance of considering the tradeoffs resulting from allocating authority along the third dimension of authority: coordination. Requiring California to seek EPA's approval of its standard-setting initiatives is a form of hierarchical coordination.

Coordination may be useful in pooling resources, enhancing accountability, and creating a uniform set of regulatory obligations. Of course, independent authority without coordination brings its own countervailing advantages, such as promoting beneficial competition among regulators, minimizing groupthink, and reducing administrative transaction costs. These latter advantages may justify either narrowing

the grounds for EPA's denial of future California waiver requests or allowing California to adopt tailpipe emission standards without the need to seek EPA approval.

In the case of the California waiver, the advantages of decentralized, overlapping, and at least somewhat independent authority outweigh the advantages of creating a centralized, distinct, and highly coordinated system. Others who prioritize different values than we do might reach a different assessment. Furthermore, even if a decentralized, overlapping, and independent regime makes the most sense for standard setting, the tradeoffs might very well differ for other functions.

By failing to take account of the full array of functional and dimensional choices in crafting agency authority, policymakers risk missing the structural options best suited to achieving their goals. cursory analysis of the likely consequences of structural allocations or reallocations of the kind reflected in the Trump Administration's flawed justification for its waiver revocation is likely to generate further regulatory failures of exactly the kind that have fueled unwarranted criticisms of the administrative state writ large.



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