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## State Enforcement in a Polycentric World

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## State Enforcement in a Polycentric World

David A. Hyman, William E. Kovacic\*

*If you tell the Army "Secure that building!" They will surround it with armor and heavy infantry and not let anyone out of it until told to[.] If you tell the Marines "Secure that building!" They will storm the building, eliminate any resistance, and allow no one to enter it until told to. If you tell the Navy "Secure that building!" They will turn out the lights, close and lock all doors and windows and post a fire watch. If you tell the Air Force "Secure that building!" They will take out a 30-year lease with an option to buy.<sup>1</sup>*

— Anonymous Reddit Post

*It was the late 1950s and General Curtis LeMay was the Chief of Staff of the Air Force. The Air Force and the Navy at that time were vying for who would have the primary mission of the strategic defense of the country. The Air Force was advocating its land based strategic bombers and intercontinental ballistic missiles. The Navy was advocating its ballistic missile submarines and putting nuclear capable aircraft aboard aircraft carriers. The debate was heated and there was not enough money to do both. The future missions of both services were at stake. An Air Force Colonel was briefing General LeMay on the Soviet threat versus the strategic requirements funded in the budget. The Colonel told General LeMay that the Russians, our enemy, were capable of . . . and at that point General LeMay stopped him. LeMay was quoted*

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1. *The Differences Between the Branches of the US Military*, REDDIT (Mar. 2, 2018), [https://www.reddit.com/r/Jokes/comments/81n73v/the\\_differences\\_between\\_the\\_branches\\_of\\_the\\_us/](https://www.reddit.com/r/Jokes/comments/81n73v/the_differences_between_the_branches_of_the_us/).

*as saying, "The Russians are our adversary. The Navy is our enemy."<sup>2</sup>*

—John Melchner

*"State Enforcement in an Interstate World" is an important topic – fully deserving of all the attention it has received. Past commentators on this topic have generally treated the federal government as a unitary entity. Building on prior work on the subject, this Article explores the polycentric nature of federal regulatory authority and shows how cooperation and rivalry have long been dominant realities of the modern administrative state. The Article discusses how these dynamics complicate analysis of state enforcement in an interstate world and identifies strategies for reducing the frequency and magnitude of the seemingly inevitable conflicts.*

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## I. INTRODUCTION

For legal academics, there is no shortage of policy perennials and federalism is always near or at the top of that list. Debates over

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2. John Melchner, *Managing the Budget Process*, 1998 J. PUB. INQUIRY 11, 13, <https://www.ignet.gov/sites/default/files/files/jpifw98.pdf>.

the proper allocation of regulatory authority in a federalist system and the role of state enforcement in an interstate world have waxed and waned in intensity, but they have never been non-issues.<sup>3</sup> Careers have been made and tenure has been granted for participating in these debates.<sup>4</sup>

Those involved in these debates have generally treated both federal and state authority as unitary entities, although recent scholarship has recognized the possibility of plural interests within an individual state—such as when the AG is from one political party, and the governor is from another political party.<sup>5</sup> Less attention has been paid to the ways in which regulatory and enforcement authority is also divided and shared within and across agencies within the federal government and how that polycentric reality might (or should) affect the federalism debate.

In theory, each of the entities with regulatory authority could “mind their own business” — minimizing the possibility of friction, conflict, and inconsistency. Alternatively, each of the entities with regulatory authority could “play nice,” by coordinating their activities to minimize the possibility of such problems. Although federal agencies often manage to either “mind their own business” or “play nice,” there are also reasonably frequent circumstances when they do neither. Drawing from examples across the administrative state, this Article shows how fragmentation of regulatory and enforcement authority within the federal administrative

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3. The intensity of these debates has boomed after major shifts in the division of authority and/or the perception that such shifts were necessary (i.e., the New Deal, World War II, and the Civil Rights movement). There have also been less impressive boomlets after more minor adjustments (i.e., New Federalism, Obamacare, and decisions by the Supreme Court involving dual sovereignty).

4. We are not aware of a prize for coming up with the cutest name for the various theories of federalism, but that has not deterred participants in these debates from doing their utmost to come up with cute names, including “Marble Cake Federalism,” “Layer Cake Federalism,” and “Picket Fence Federalism.” Less cute names include “Our Federalism,” “Progressive Federalism,” “New Federalism,” “Dual Federalism,” “Cooperative Federalism,” “Fiscal Federalism,” and “Creative Federalism.” Federalism debates appear to attract frustrated taxonomists.

5. Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689, 1754–55 (2018); Bridget A. Fahey, *Health Care Exchanges and the Disaggregation of States in the Implementation of the Affordable Care Act*, 125 YALE L.J. FORUM 56 (2015), [https://www.yalelawjournal.org/pdf/Fahey\\_PDF\\_zhtyvuqa.pdf](https://www.yalelawjournal.org/pdf/Fahey_PDF_zhtyvuqa.pdf).

state has resulted in both cooperation and conflict.<sup>6</sup> These dynamics of polycentric federal regulatory authority further complicates the problem of state enforcement in an interstate world, rendering it into an even more “wicked” problem than would otherwise be the case.<sup>7</sup>

## II. FEDERAL POWER: THE POLY-CENTRIC REALITY

We begin with three brief case studies, drawn from competition law, privacy, and the humble (but tasty) salmon.

### A. Competition Law

The Federal Trade Commission (FTC) and the Department of Justice (DOJ) have long shared regulatory authority over certain aspects of competition law. During the 1920s, there were cases where both agencies opened files to deal with the same conduct. For obvious reasons, this dynamic created repeated conflicts—so the agencies devised informal methods of consultation to avoid duplicative parallel inquiries. This “good fences make good neighbors” approach resulted in a written liaison arrangement (commonly called “clearance”) which allowed the agencies to avoid conflicts in the exercise of their concurrent regulatory power.<sup>8</sup> A 2002 press release describes the clearance process, as well as some of the challenges that deregulation and technological chance posed to the smooth functioning of that process:

The FTC/DOJ clearance process was formally established in 1948; refinements were implemented in 1963, 1993, and 1995. The

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6. Even when agencies have chosen to avoid conflicts by focusing on their own policy duties—i.e., they have chosen to “stay in their own lanes”—there are instances in which new policy issues arise and do not fit clearly within the mandate of any existing agency. The modern policy domain of privacy emerged from the 1960s onward as a distinct, largely novel area of concern. See David A. Hyman & William E. Kovacic, *Implementing Privacy Policy: Who Should Do What*, 29 *FORDHAM INTELL. PROP., MEDIA & ENT. L. J.* 1117 (2019). The appearance of regulatory terra nova can trigger contests among agencies seeking to stake claims to the new terrain.

7. Horst W.J. Rittel & Melvin M. Webber, *Dilemmas in a General Theory of Planning*, 4 *POL’Y SCI.* 155 (1973).

8. James C. Grimaldi, *Enron Case Attracts Lawyers Like a Flame Attracts Moths, More than You Can Shake a Stick at*, *WASH. POST*, Jan. 28, 2002, at E2 (“There are a handful of industries in which both the FTC and Justice Department have expertise. So when a hot merger comes up, and the staff of each agency wants a piece of it, the assistant attorney general for antitrust and the FTC chairman have to sort it out.”).

traditional methodology for allocating matters between the agencies has emphasized historical experience in addressing specific commercial sectors. As the boundaries that separate individual sectors have blurred in the face of rapid technological change, and as deregulation measures have allowed firms to diversify, this clearance methodology has begun to break down. In a growing number of important economic sectors of mutual concern to the FTC and the DOJ, the effectiveness of the experience-based allocation methodology that has anchored past clearance agreements has diminished significantly.<sup>9</sup>

The FTC and DOJ sought to resolve this dispute by negotiating and publishing a comprehensive statement that described the division of labor the two agencies intended to follow with respect to specific market sectors, and set out how future disagreements would be resolved.<sup>10</sup> Although the DOJ ultimately abrogated the agreement under pressure from Senator Ernest Hollings, the underlying dynamics that gave rise to these problems have not changed materially in the intervening years.<sup>11</sup> As such, it should not come as a surprise that in 2019 the FTC and DOJ negotiated a similar agreement focusing on the tech sector. Pursuant to that agreement, the FTC agreed to focus on Facebook and Amazon, and the DOJ agreed to focus on Google and Apple.<sup>12</sup> (The irony of two competing competition agencies repeatedly negotiating over how best to divide a market does not escape us).

Roughly two months later, a turf war broke out when the DOJ asserted it would be reviewing the behavior of “social media[] and some retail services online”—a statement that was “widely interpreted by the legal community to mean Facebook and Amazon, two companies that under the earlier agreement stood to

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9. Press Release, FTC, FTC and DOJ Announce New Clearance Procedures for Antitrust Matters: Memorandum of Agreement Allocates Industry Sectors Between Agencies (Mar. 5, 2002), <https://www.ftc.gov/news-events/press-releases/2002/03/ftc-and-doj-announce-new-clearance-procedures-antitrust-matters>.

10. David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446, 1483 (2014).

11. *Id.*; see also Lauren Kearney Peay, *The Cautionary Tale of the Failed 2002 FTC/DOJ Merger Clearance Accord*, 60 VAND. L. REV. 1307 (2007).

12. Brent Kendall & John D. McKinnon, *Congress, Enforcement Agencies Target Tech*, WALL ST. J. (June 3, 2019, 7:27 PM), <https://www.wsj.com/articles/ftc-to-examine-how-facebook-s-practices-affect-digital-competition-11559576731>.

have at least some of their conduct reviewed by the FTC.”<sup>13</sup> Such claim-jumping heightened tensions between the two agencies, which were already inflamed by the DOJ’s recent intervention in a case the FTC brought against Qualcomm.<sup>14</sup> Such disagreements are not new: any list would include the dispute in 2008 over the appropriate standards for enforcing Section 2 of the Sherman Act,<sup>15</sup> the FTC’s opposition in 2007 to the granting of cert in a private antitrust case against Pacific Bell where the DOJ filed an amicus brief urging the granting of cert, the DOJ’s 2005 opposition to the

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13. John D. McKinnon & James V. Grimal, *Justice Department, FTC Skirmish Over Antitrust Turf: Concerns Grow that Tussle Could Disrupt Coming Probes into Big Tech Companies*, WALL ST. J. (Aug. 5, 2019, 5:45 PM), <https://www.wsj.com/articles/justice-department-ftc-skirmish-over-antitrust-turf-11564997402>; see also Brent Kendall, *Senators Question Two Agencies’ Investigation of Big Tech Firms*, WALL ST. J. (Sept. 17, 2019, 6:01 PM), <https://www.wsj.com/articles/senator-questions-two-agencies-investigations-of-big-tech-firms-11568750084> (“On Big Tech, lawmakers cited evidence that the two agencies aren’t getting along and questioned whether turf wars are interfering with the government’s ability to tackle pressing issues . . .”).

14. McKinnon & Grimal, *supra* note 13; see also Asa Fitch, *Justice Department Warns Against Broad Penalty for Qualcomm in FTC Case*, WALL ST. J. (May 3, 2019, 2:30 AM), <https://www.wsj.com/articles/justice-department-warns-against-broad-penalty-for-qualcomm-in-ftc-case-11556865004>; Timothy Syrett, *The FTC’s Qualcomm Case Reveals Concerning Divide with DOJ on Patent Hold-Up*, IP WATCHDOG (June 28, 2019), <https://www.ipwatchdog.com/2019/06/28/ftcs-qualcomm-case-reveals-concerning-divide-doj-patent-hold/id=110764/> (“The public feuding between the two federal antitrust enforcement agencies about how to resolve a case litigated by one [of] them was a remarkable spectacle. It also brought into focus a broader divide between the FTC and DOJ on the role of antitrust law in addressing patents that are essential to industry standards (SEPs) and subject to commitments to license on fair, reasonable, and non-discriminatory (FRAND) terms.”).

For those who are unfamiliar with the facts, in 2017 a divided FTC issued a complaint attacking Qualcomm’s patent licensing practices. In 2019, the district court found that Qualcomm had engaged in illegal monopolization and enjoined the company from continuing the challenged conduct. Toward the close of the district court proceedings, DOJ filed an “expression of interest” in the case and cautioned the trial judge to avoid the imposition of severe remedies. Following the district court’s decision, DOJ successfully petitioned the Ninth Circuit to stay the implementation of a number of the district court’s remedies.

In its filings, DOJ urged the court of appeals to vacate the lower court’s decision, assailed the FTC’s theory of the case and the district judge’s application of the law, and enlisted the Departments of Defense and Energy to bolster its arguments. Shara Tibken, *DOJ: Antitrust Ruling Against Qualcomm Could ‘Put Our Nation’s Security at Risk*, CNET (July 16, 2019, 5:01 PM), <https://www.cnet.com/news/doj-says-antitrust-ruling-against-qualcomm-could-put-our-nations-security-at-risk/>. For various filings relating to the FTC’s case against Qualcomm, see Qualcomm Inc., Fed. Trade Commission (July 19, 2019), <https://www.ftc.gov/enforcement/cases-proceedings/141-0199/qualcomm-inc>.

15. *Competition Over the Antitrust Laws: DOJ and FTC Part Ways in the Supreme Court*, MAYER BROWN (Oct. 17, 2008), <https://www.mayerbrown.com/en/perspectives-events/publications/2008/10/competition-over-the-antitrust-laws-doj-and-ftc-pa>.

granting of cert in the FTC's case against Schering-Plough, and the DOJ's refusal to represent the FTC before the Supreme Court in *Indiana Federation of Dentists*—prompting the FTC to pursue the case itself.<sup>16</sup>

### B. Privacy Law

Privacy law presents another useful case study of polycentrism at the federal level, with some (but by no means all) of the ground rules set by Congressional action. The most important federal privacy institution is the FTC.<sup>17</sup> Congress authorized the FTC to pursue a privacy mandate in certain specified areas, but the FTC has built a more extensive “common law” of privacy protection using cases brought pursuant to its statutory mandate to pursue “unfair or deceptive acts and practices.”<sup>18</sup> The FTC has also used its rulemaking authority to build important elements of the national privacy architecture, including the Do-Not-Call rule.<sup>19</sup>

But primacy does not mean monopoly. The FTC Act largely exempts banks, common carriers, and not-for-profit institutions from the FTC's oversight.<sup>20</sup> Various sectoral regulators occupy much of this policy terrain. For example, the Federal Communications Commission (FCC) exercises privacy oversight for telecommunications providers—with the boundary between what is (and is not) a telecommunications service moving in response to technological change, court decisions, and the FCC's own actions.<sup>21</sup> Similarly, the Department of Education enforces the Family

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16. James C. Miller III, *Causes and Implications of the Regulatory Revolution at the FTC*, in *THE REGULATORY REVOLUTION AT THE FTC: A THIRTY YEAR PERSPECTIVE ON COMPETITION AND CONSUMER PROTECTION* 1, 7 (James Cooper ed., 2013).

17. See CHRISJAY HOOFNAGLE, *FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY* 192 (“The Federal Trade Commission has emerged as the nation’s top regulator of online privacy.”); Woodrow Hartzog & Daniel J. Solove, *The Scope and Potential of FTC Data Protection*, 83 *GEO. WASH. L. REV.* 2230, 2267 (2015) (“In the current U.S. privacy regulatory system, the FTC has grown into the role of being the leading regulator of privacy . . . .”); David C. Vladeck, *Charting the Course: The Federal Trade Commission’s Second Hundred Years*, 83 *GEO. WASH. L. REV.* 2101, 2102–11 (2015).

18. David A. Hyman & William E. Kovacic, *Implementing Privacy Policy: Who Should Do What?*, 29 *FORDHAM INTELL. PROP. MEDIA & ENT. L. J.* 1117, 1119–49 (2019).

19. *Id.* at 1131–32.

20. These jurisdictional limitations are described in *ANTI-TRUST LAW DEVELOPMENTS* 658–59 (Jonathan I. Gleklen et al. eds., 7th ed. 2012).

21. See Paul Ohm & Blake Reid, *Regulating Software When Everything Has Software*, 84 *GEO. WASH. L. REV.* 1672, 1674–75, 1697–98 (2016).



Educational Rights and Privacy Act (FERPA), which imposes record-disclosure duties and limits on educational institutions and state educational bodies that receive federal funds. The Department of Health and Human Services (HHS) plays the lead role in enforcement of the Health Insurance Portability and Accountability Act (“HIPAA”), which established data privacy obligations and security requirements to safeguard medical information. Then there is the DOJ, which is responsible for enforcing a collection of criminal statutes which can be used to attack privacy-related cybercrimes.

So far, we have focused on consumer-facing privacy—but of course, multiple federal departments, agencies, and bureaus collect and maintain information that implicates privacy concerns. The good news is that many of these public entities have their own privacy offices.<sup>22</sup> The bad news is that each of them is largely free to set their own privacy policies and make their own trade-offs.

As with competition law, there have been periodic disputes among the regulatory agencies that occupy this policy space. Consider the issue of how much privacy protection medical records should have—and whether and when those privacy-related interests should give way in the context of law enforcement investigations. In an oral history interview conducted in 2007, former HHS Secretary Donna Shalala explained that when the HIPAA regulations were being drafted, HHS personnel prioritized medical privacy while DOJ personnel prioritized law enforcement interests:

On the privacy regulations, Janet Reno stopped me from—she wanted any sheriff to be able to rifle through anyone’s health records without a court order. I thought that was a terrible idea. I lost it. We had a change in the chief of staff. Her deputy left who was hot to trot on this issue. I went back in and argued the issue and won it. Sticking around for eight years made a difference.<sup>23</sup>

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22. See, e.g., *Privacy*, DEP’T OF HOMELAND SECURITY, <https://www.dhs.gov/topic/privacy> (last visited Nov. 3, 2019); *Office of Privacy and Civil Liberties*, U.S. DEP’T OF JUST., <https://www.justice.gov/opcl> (last visited Nov. 3, 2019). In addition, HHS, the Department of the Treasury, and the Department of Housing and Urban Development all have privacy offices as well.

23. *Donna Shalala Oral History*, MILLER CTR. (May 15, 2007), <https://millercenter.org/the-presidency/presidential-oral-histories/donna-shalala-oral-history-secretary-health-and-human>.

But in Washington, in the words of former Secretary of State George Schultz, “it’s never over.”<sup>24</sup> Secretary Shalala’s victory may turn out to be substantially undone if a recent notice of proposed rulemaking issued by the Substance Abuse and Mental Health Services Administration (SAMHSA) is any indication.<sup>25</sup>

The FTC and FCC have also tussled over the best approach to consumer privacy for internet service providers,<sup>26</sup> and the FTC and the Department of Commerce (“Commerce”) have waged a behind-the-scenes campaign over which agency has the better framework for advocating privacy when the United States is dealing with foreign nations.<sup>27</sup>

As these examples illustrate, when it comes to privacy, different agencies within the federal administrative state can have very different interests, priorities, and goals. There is a Federal Privacy Council, which is intended to support inter-agency coordination of privacy protection.<sup>28</sup> But the existence of the Privacy Council does not mean that coordination across agencies will result. Some disputes, like the one over law enforcement access to medical records, involve claims where it is difficult or impossible to split the baby. Finally, even when an agency has a long and distinguished history of protecting privacy, the “felt necessities of the time” may cause that agency to reverse course and then bury the evidence—

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24. JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 300 (1989).

25. Alison Knopf, *SAMHSA Ushers in Law Enforcement “Fishing Expeditions” for MAT Patients*, FILTER MAG. (Aug. 28, 2019), <https://filtermag.org/samhsa-law-enforcement-mat/> (discussing SAMHSA proposal that would allow investigation of one suspect to permit the seizure of records of any other connected individuals or entities).

26. Amir Nasr, *Roles of FTC, FCC Are Front and Center in Privacy Debate*, MORNING CONSULT (Sep. 27, 2016, 7:11 PM), <https://morningconsult.com/2016/09/27/roles-ftc-fcc-front-center-privacy-debate/>.

27. *Compare FTC Staff Issues Privacy Report, Offers Framework for Consumers, Businesses, and Policymakers*, FED. TRADE COMMISSION (Dec. 1, 2010), <http://www.ftc.gov/opa/2010/12/privacyreport.shtm>; *Commerce Department Unveils Policy Framework for Protecting Consumer Privacy Online While Supporting Innovation*, NAT’L TELECOMM. & INFO. ADMIN. (Dec. 16, 2010), <https://www.ntia.doc.gov/press-release/2010/commerce-department-unveils-policy-framework-protecting-consumer-privacy-online-w>.

28. *Purpose and Vision*, FED. PRIVACY COUNCIL, <https://www.fpc.gov/federal-privacy-council/> (last visited Nov. 4, 2019).

as was the case with the Census Bureau's release of information on Japanese-Americans during World War II.<sup>29</sup>

*C. Salmon*

In the 2011 State of the Union Address, President Barack Obama spoke of the importance of reorganizing government to make it work better:

We live and do business in the Information Age, but the last major reorganization of the government happened in the age of black-and-white TV. There are twelve different agencies that deal with exports. There are at least five different agencies that deal with housing policy. Then there's my favorite example: The Interior Department is in charge of salmon while they're in fresh water, but the Commerce Department handles them when they're in saltwater. I hear it gets even more complicated once they're smoked.<sup>30</sup>

The joke about smoked salmon was the biggest laugh line of the 2011 State of the Union Address.<sup>31</sup> The accompanying infographic, reproduced below as Figure 1, also indicates that the problem of regulatory authority over salmon is not to be taken seriously, and is easily remedied once it is recognized as a problem.

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29. Teresa Watanabe, *In 1943, Census Released Japanese Americans' Data*, L.A. TIMES (Mar. 31, 2007 12:00 AM), <https://www.latimes.com/archives/la-xpm-2007-mar-31-na-census31-story.html>; OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 3 (Belknap Press of Harvard Univ. Press 2009) (1881) ("The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.").

30. President Barack Obama, State of the Union Address (Jan. 25, 2011).

31. Admittedly, there typically isn't much competition for the title of "biggest laugh line in the State of the Union Address."



Figure 1: Allocation of Regulatory Responsibility for Salmon<sup>32</sup>

But, salmon (whether in fresh water, saltwater, or smoked) actually exemplify the ways in which regulatory authority within the federal administrative state is polycentric, as well as the role of historical accident in creating that outcome. For starters, President Obama is correct that regulatory authority over saltwater salmon is in Commerce—but the only reason the National Oceanic and Atmospheric Administration (NOAA) is in Commerce is because of President Nixon’s personal pique at the then-Secretary of the Department of the Interior (which was the leading candidate for housing NOAA when it was created).<sup>33</sup> Similarly, although regulatory authority for fresh-water salmon primarily resides in the

32. 2011 *Enhanced State of the Union Address Graphics*, SLIDESHARE (Jan. 26, 2011) (slide 54), <https://www.slideshare.net/whitehouse/2011-enhanced-state-of-the-union-address-graphics>.

33. See Steven Eli Schanes, *The Battle for the National Oceanic and Atmospheric Administration (NOAA) 1969-71*, SCHANES (May 21, 2008, 8:11 PM), <http://schanes.wordpress.com/2008/05/21/the-battle-for-the-national-oceanic-and-atmospheric-administration-noaa/>; see also Steven Eli Schanes, *Putting NOAA Together- 1970*, SCHANES (May 24, 2008, 7:56 PM), <http://schanes.wordpress.com/2008/05/24/putting-noaa-together-1970/>; Eileen L. Shea, *A History of NOAA*, NOAA HISTORY [http://www.history.noaa.gov/legacy/noaahistory\\_1.html](http://www.history.noaa.gov/legacy/noaahistory_1.html) (last updated June 8, 2006, 9:24 AM).

Department of the Interior (“Interior”), there are actually four autonomous units within Interior that have some degree of responsibility: the U.S. Fish & Wildlife Service, the Bureau of Indian Affairs, the Bureau of Land Management, and the Bureau of Reclamation. Plus, there’s the Department of Defense (Army Corps of Engineers), the Department of Energy (Bonneville Power Administration), Commerce (the National Marine Fisheries Service), and two autonomous units within the U.S. Department of Agriculture (USDA): the U.S. Forest Service and the Agricultural Marketing Service. Fish that are caught and destined to be smoked fall within the jurisdiction of the NOAA and the Department of Health & Human Services (Food and Drug Administration). Finally, the Environmental Protection Agency is involved, both while the fish are alive in the wild (in connection with the Endangered Species Act) and after they are caught (in connection with the packaging materials used on smoked and raw fish).

Even if we focus on a more limited setting (say salmon that are, or might one day, be swimming in the Columbia River Basin), the number of federal entities that are involved is still quite impressive. A 2002 Government Accountability Office (GAO) report counted fully eleven federal agencies: The Department of Commerce’s National Marine Fisheries Service (NMFS)

is responsible for preparing a recovery plan and consulting with other federal agencies to determine whether the agencies’ planned actions will jeopardize listed salmon and steelhead populations. In addition to NMFS, the federal agencies involved in the recovery effort include the following:

- The U.S. Army Corps of Engineers and the Bureau of Reclamation, which operate the Columbia River Basin dams that salmon and steelhead must pass, and the Bonneville Power Administration, which markets the electric power created by water flowing through the dams’ turbines.
- The U.S. Forest Service, Bureau of Land Management, and U.S. Fish and Wildlife Service manage natural resources, which include habitat for salmon and steelhead, for multiple purposes, such as timber, grazing, fish, wildlife, and recreation.
- The Environmental Protection Agency, U.S. Geological Survey, Natural Resources Conservation Service, and Bureau of Indian Affairs, which carry out various actions, such as setting water

quality standards, performing research, working with landowners, and protecting tribal fishing rights, all of which, directly affect salmon and steelhead populations.<sup>34</sup>

Unsurprisingly, the welter of federal entities with an interest in salmon has caused disputes.<sup>35</sup> These disputes have broken down along entirely predictable lines: the parts of the federal government that care about outdoor recreation and threatened/endangered species sided with the salmon, while the parts of the federal government that care about dams, electrical power, and water for agriculture were unconcerned about the plight of the salmon. Consider the framing of the lawsuit that Oregon and a number of private individuals and organizations brought against the federal government:

Oregon wanted the federal agencies th[at] manage the flow of the Columbia and Snake Rivers. . . to spill more water over dams in order to improve young salmon's [sic] odds of survival. Oregon was supported by . . . some federal agencies sympathetic to more salmon protection (the Fish and Wildlife Service and the National Park Service). Unified against the suit were other, more prominent agencies of the U.S. government (the Army Corps of Engineers, Bureau of Reclamation, and Bonneville Power Administration or BPA). . . .<sup>36</sup>

That particular lawsuit dragged on for more than twenty years, with multiple trips to the Ninth Circuit Court of Appeals.<sup>37</sup> The case

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34. U.S. GOV'T ACCOUNTABILITY OFF., GAO 02-612, COLUMBIA RIVER BASIN SALMON AND STEELHEAD: FEDERAL AGENCIES' RECOVERY RESPONSIBILITIES, EXPENDITURES AND ACTIONS 2 (2002), <https://www.gao.gov/new.items/d02612.pdf>.

35. In fairness, there are many additional disputes involving various combinations of individuals, states, native tribes, Canada, and Japan.

36. Ctr. for the Study of the Pac. Nw., Univ. of Wash., *Lesson Two: To Whom Does the Pacific Northwest Belong?*, UNIVERSITY OF WASHINGTON, <https://www.washington.edu/uwired/outreach/cspn/Website/Classroom%20Materials/Pacific%20Northwest%20History/Lessons/Lesson%202/2.html> (last visited Oct. 3, 2019).

37. BILL CRAMPTON & BARRY ESPENSON, COLUMBIA BASIN BULLETIN, AN ACCOUNT OF LITIGATION OVER FEDERAL COLUMBIA RIVER POWER SYSTEM BIOLOGICAL OPINIONS FOR SALMON AND STEELHEAD, 1991-2009 6 (1st ed. 2019); see also The Oregonian, *Timeline, Major Players in the Northwest Salmon Lawsuit in the Columbia River Basin*, [https://www.oregonlive.com/environment/2011/05/timeline\\_major\\_players\\_in\\_the.html](https://www.oregonlive.com/environment/2011/05/timeline_major_players_in_the.html) (last updated Jan. 10, 2019).

went on so long that the district court judge who first handled it (Malcolm Marsh) became known as the “salmon judge.”<sup>38</sup>

Finally, although we focused in this section on salmon, environmental matters present multiple instances of different parts of the federal government being on opposite sides of the issue.<sup>39</sup>

#### *D. Jurisdictional Chaos: Its Everywhere You Look*

As these three case studies suggest, one can find overlapping regulatory authority and inter-agency conflict everywhere one looks in the federal government.<sup>40</sup> For those who think we have cherry-picked a few unrepresentative examples, we highlight the findings of several official government reports drawn from the last four decades. First up is a 2011 report from the GAO. Table 1 in that report made it clear that there were multiple examples of duplication, overlap and fragmentation, including fifteen different agencies overseeing food-safety laws; more than twenty separate

38. Kelly A. Zusman, *Judicial Profile Hon. Malcom F. Marsh US District Judge, District of Oregon*, FED. BAR ASS'N (July 2004), [http://www.fedbar.org/PDFs/Past-Judicial-Profiles/Ninth-Circuit\\_1/Marsh-Hon-Malcolm.aspx](http://www.fedbar.org/PDFs/Past-Judicial-Profiles/Ninth-Circuit_1/Marsh-Hon-Malcolm.aspx); US DISTRICT COURT OF OREGON HISTORICAL SOCIETY, MALCOLM MARSH: AN ORAL HISTORY, at ix (Donna Sinclair, ed.) (2007) <https://usdchs.files.wordpress.com/2016/05/malcolm-marsh-usdchs-oral-history.pdf>.

39. See FEDERAL GOVERNMENT REORGANIZATION: A POLICY AND MANAGEMENT PERSPECTIVE 118 (2008) (“Senator Frank Moss ascribed the conflict between the National Park Service and the Army Corps of Engineers over the Florida Everglades to ‘uncoordinated activities.’ Park service officials complained that the engineers drained the Everglades National Park almost *dry* in their efforts to halt wetlands flooding and reclaim glad country for agriculture. The Army Corps of Engineers argued that wetlands were ‘for the birds’ and flood control for the people.”). In *U.S. v. Mast*, Mast found himself criminally prosecuted for draining wetlands, even though the U.S. Fish & Wildlife Service (part of the Department of the Interior) and the U.S. Natural Resources Conservation Service (part of the Department of Agriculture) disagreed on whether his actions were permissible or not. 938 F.3d 973, 974 (8th Cir. 2019). See also Lyndsey Layton, *Pentagon Fights EPA on Pollution Cleanup*, WASH. POST (June 30, 2008) <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/29/AR2008062901977.html> (“Although the law gives final say to EPA Administrator Stephen L. Johnson in cleanup disputes with other federal agencies, the Pentagon refuses to recognize that provision. Military officials wrote to the Justice Department last month to challenge EPA’s authority to issue the orders and asked the Office of Management and Budget to intervene.”); Elana Schor, *Canada-U.S. Oil Pipeline Poses Few Environmental Risks – State Dept.*, N.Y. TIMES (Aug. 26, 2011) <http://www.nytimes.com/gwire/2011/08/26/26greenwire-canada-us-oil-pipeline-poses-few-environmental-63932.html> (noting disagreement between Department of State and EPA over approval of Keystone pipeline, and the completeness of the Environmental Impact Statement that was completed).

40. See Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641 (2020) (identifying multiple instances of conflict between executive agencies and administrative agencies that played out in legal proceedings).

programs (spread across seven federal agencies) to help the homeless; eighty programs for economic development (spread across four federal agencies); eighty-two programs to improve teacher quality (spread across ten federal agencies); eighty programs to help disadvantaged people with transportation (spread across 8 federal agencies); forty-four programs for job training and employment (spread across three agencies); and fifty-six programs spread across twenty agencies intended to improve financial literacy.<sup>41</sup>

That report spawned a series of annual reports, the most recent of which was issued in May 2019.<sup>42</sup> All nine of these reports documented multiple examples of duplication, overlap, and failed coordination.

Next, there is the 2003 Volcker commission report on government organization:

Prior to the post 9/11 reorganizations, over 40 federal agencies were involved in activities to combat terrorism. The Department of Housing and Urban Development operates 23 self-sufficiency and economic opportunity programs that target tenants of public housing and other low-income clients. Responsibility for federal drug control strategies and their implementation is fragmented among more than fifty federal agencies. There are over 90 early childhood programs scattered among 11 federal agencies and 20 offices. Nine federal agencies administer 69 programs supporting education and care for children under age five. There are 342 federal economic development related programs administered by 13 of the 14 cabinet departments. Seven agencies administer 40 different programs that have job training as their main purpose. At least 86 teacher-training programs in nine federal agencies fund similar types of services. Four agencies are responsible for federal land management. . . There are 50 homeless assistance programs administered by eight agencies . . . . 29 agencies collectively share responsibility for federal clean air, clean and safe water, and better waste management programs . . . . these

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41. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-318SP, OPPORTUNITIES TO REDUCE POTENTIAL DUPLICATION IN GOVERNMENT PROGRAMS, SAVE TAX DOLLARS, AND ENHANCE REVENUE (2011).

42. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-285SP, 2019 ANNUAL REPORT: ADDITIONAL OPPORTUNITIES TO REDUCE FRAGMENTATION, OVERLAP, AND DUPLICATION AND ACHIEVE BILLIONS IN FINANCIAL BENEFITS (2019).



divided responsibilities have produced 541 separate areas of program activity.<sup>43</sup>

Twenty-six years earlier, when President Carter announced a comprehensive study of reorganization in 1977, he provided similar examples of duplication and inefficiency.<sup>44</sup>

We close with an example that should have particular resonance for the citizens of Utah. Utah contains physically contiguous National Parks, National Monuments, and National Forests – all within easy driving distance of Provo. But the National Parks and National Monuments are under the authority and jurisdiction of Interior, while the National Forests are under the authority and jurisdiction of USDA – with profound differences in how the land in question is managed and the culture of the responsible agencies. Since the lands in question are physically adjoining, decisions made by the National Park Service will have spillover effects on the land regulated by the U.S. Forest Service, and vice-versa.

Of course, this dynamic isn't limited to Utah: the fifteen million acres of federal land surrounding and including Yellowstone National Park "are managed by four federal agencies, the National Park Service, the U.S. Forest Service, the U.S. Fish and Wildlife Service and the Bureau of Land Management, each with differing missions and organizational structures."<sup>45</sup> And there are more than a dozen national forests that adjoin national parks.<sup>46</sup> The history of the National Forest Service is replete with examples of its attempts

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43. NAT'L COMM'N ON THE PUB. SERV., URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY 36-37 (2003) [hereinafter "Volcker Commission"], <https://www.brookings.edu/wpcontent/uploads/2016/06/01governance.pdf>.

44. The Am. Presidency Project, *Jimmy Carter: Executive Branch Reorganization Studies Remarks to Reporters Announcing the Studies*, UC SANTA BARBARA, <http://www.presidency.ucsb.edu/node/244146> (last visited Oct. 4, 2019).

45. *About*, GREATER YELLOWSTONE COORDINATING COMMITTEE, <https://www.fedgycc.org/about>.

46. Hannah Featherman, *Sixteen National Forests Near National Parks*, NATIONAL FOREST FOUNDATION (Jun. 17, 2013), <https://www.nationalforests.org/blog/sixteen-national-forests-near-national-parks>. The specific states are Arizona, California, Colorado, Montana, North Carolina, South Dakota, Utah, Washington, West Virginia, and Wyoming.

to manage this and other situations that call for coordination with other branches of the federal government.<sup>47</sup>

### III. IMPLICATIONS FOR FEDERALISM

#### A. Cooperation, Rivalry, and Conflict Within the Federal Government

As Section II and our prior work make clear, the division of regulatory “ownership” can result in cooperation, but it can also result in rivalry and conflict.<sup>48</sup> Agencies do not always agree on whether there is a problem that needs fixing.<sup>49</sup> Even when agencies agree on the nature and seriousness of the problem, they can have profound disagreements on the optimal solution, the best way to achieve that outcome, and which of the rival agencies is best situated to implement that solution. These disputes are often driven by differences among agencies in tradition, culture, and ways of looking at the world.

The two quotes with which we begin this Article exemplify the ways in which we observe such patterns of conflict across different branches of the military. A naïve observer might hope that such problems are easily solvable within a single Department (like the Department of Defense, or “DoD”), but difficult to solve across Departments and independent agencies. Unfortunately, the problem is sticky (if not intractable) even in the presence of strong leadership exercised within a single Department. Once again, as the two quotes that begin this Article exemplify, there are fundamental persistent rivalries within individual branches of the military.<sup>50</sup> Even the children of military personnel are rapidly socialized into the tribal nature of the individual services.<sup>51</sup> Further evidence on

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47. See, e.g., ROBERT D. BAKER, ROBERT S. MAXWELL, VICTOR H. TREAT & HENRY C. DETHLOFF, *TIMELESS HERITAGE: A HISTORY OF THE FOREST SERVICE IN THE SOUTHWEST* (1988), <http://npshistory.com/publications/usfs/region/3/history/>. Chapter 14 is devoted to “Relations with Other Federal and State Agencies.”

48. Hyman & Kovacic, *supra* note 10, at 1497.

49. The brawl between the FTC and the DOJ over Qualcomm exemplifies this possibility. See *supra* note 14.

50. See *supra* note 14.

51. MARY ELLEN WERTSCH, *MILITARY BRATS: LEGACIES OF CHILDHOOD INSIDE THE FORTRESS* 311–12 (2006) (“When I was a small child, I understood that we were something called an ‘Army family,’ although I had only a vague idea of what that meant. But I knew one thing for certain: We were most definitely *not* Navy. . . . One Army colonel’s daughter told me her father refused to attend her wedding because she was marrying a Navy brat.”).

this point is provided by the continuing debates over whether military commands should be regional or functional, and where to place the United States Space Force inside DoD.<sup>52</sup>

What are the implications of our findings for federalism? To the extent there are differences of opinion within the polycentric federal administrative state on an issue that raises issues of federalism, the case for deference to the approach preferred by the federal government (let alone preemption) is much weaker. After all, if the federal government can't speak with one voice or one mind on the issue, why should the states lose to an internally divided federal government in federalism cases?<sup>53</sup> A hard-nosed approach to this problem will create a substantial incentive for the federal government to do a better job of getting its act together (in every sense of those words) and take the necessary steps to fix the organizational structure of the federal administrative state.

### *B. Engineering, Not Physics in Managing Federalism*

During three years of private practice in the 1980s, one of us (Kovacic) worked extensively with engineers in companies that had participated in the U.S. space program in the 1960s. In a number of conversations, the engineers recounted their frustration in listening to physicists talk about space travel without addressing the practical difficulties associated with sending humans 240,000 miles to the moon—and then returning them alive. As Kovacic recalls, one engineer observed that “the physics of going to the moon was relatively straightforward—but the engineering was really dif-

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52. Sandra Erwin, *Defense Officials: New Military Branch Designed for the 'Unique Culture' of Space*, SPACE NEWS (Mar. 2, 2019), <https://spacenews.com/defense-officials-new-military-branch-designed-for-the-unique-culture-of-space/>.

53. See also Shah, *supra* note 40, at note 279 (“We love to hear from the federal government. . . but it’s a bit awkward to hear from them on both sides.”); Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CON. L. 558, 573–74 (2003) (“Inconsistency will not only annoy judges, it will eliminate the otherwise natural tendency to defer to the government’s presumably well-thought-out position. Both in her direct admonitions, and indirectly through the evident importance that she attaches to the matter and her somewhat testy tone, Judge Wald makes clear that simply as a matter of litigating strategy it is a bad idea for the government to contradict itself.”); cf. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (“[W]hatever argument might be mustered for deferring to the Executive on grounds of political accountability, surely it becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable.”).

ficult.” Brilliant physics without equally brilliant engineering would guarantee mission failure.

Discussions about public policy often reflect an analogous form of tunnel vision. Politicians and policymakers (particularly those who wish to be thought of as visionary leaders) routinely set out a grand vision without thinking hard about the steps needed to actually implement that vision in practice. Big policy ideas (the physics of public administration) are destined to disappoint, unless they are accompanied by skillful implementation (the engineering of public administration).

In the federal-state relationship, the tension between policy diversification and policy coherence poses daunting implementation challenges. But treating the matter as one of engineering (rather than of physics) suggests various strategies for moderating these challenges. At the outset, we set aside the most dramatic solution of vesting sole responsibility in federal agencies, and automatic preemption of state efforts and participation. On the whole, we believe the benefits of decentralized authority – notably, useful policy experimentation and prototyping, the supplementation of federal resources with state funding, and a critical safeguard against simultaneous fifty-state catastrophic failure – warrants continuation of a significant state role in multiple policy domains.<sup>54</sup> The politics of these issues are also quite daunting. Stated differently, fair-weather federalism is far more common than all-weather federalism.<sup>55</sup>

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54. We address these arguments in Hyman & Kovacic, *supra* note 6.

55. See, e.g., Glenn Harlan Reynolds, *Chuck Schumer and Elizabeth Warren Are All for State Autonomy – When the GOP’s in Charge*, USA TODAY (Apr. 23, 2018), <https://www.usatoday.com/story/opinion/2018/04/23/chuck-schumer-elizabeth-warren-marijuana-federalism-column/540253002/> (“Schumer and Warren’s interest in federalism would be welcome if it were general and sincere, but it is limited and insincere.”); Michael Jonas, *Progressive Politics From the Ground Up*, COMMONWEALTH (Jul. 11, 2017), <https://commonwealthmagazine.org/politics/progressive-politics-from-the-ground-up/> (“[B]oth sides are fair-weather federalists. Both sides will, depending on the politics of the moment, prefer state or national power, depending on where they’re in control.”) (quoting Dean Heather Gerken); Jacob Sullum, *Fair-Weather Federalists*, REASON (July 2012), <https://reason.com/2012/06/14/fair-weather-federalists/> (noting selective invocations of federalism arguments); Garrett Epps, *The Opportunists Friend (and Foe): State’s Rights*, N.Y. TIMES (Nov. 20, 2001), <https://www.nytimes.com/2001/11/20/opinion/the-opportunist-s-friend-and-foe-states-rights.html> (“[W]hen it comes to states’ rights, we are all hypocrites. . . One scans American history in vain to find a major figure whose position on states’ rights

At the same time, we think there is considerable room to achieve greater policy coherence and more effective use of public resources through “softer” forms of cooperation. We acknowledge that our proposals are neither earth-shattering nor flamboyant—a weakness which we believe is more than offset by the reality that our modest strategies actually work well in practice, unlike the more sweeping solutions that have been floated.<sup>56</sup>

Our chief suggestion is to expand the use of opt-in networks to join up federal and state regulators. For example, a “Domestic Competition Network” would engage federal and state agencies with a competition policy mandate in regular consultations about matters of common interest.<sup>57</sup> For antitrust law and other areas of regulatory policy, the program of a network of regulators would have several dimensions, including the creation of working groups to address various commercial phenomena, identifying allocations of agency resources that would maximize the contributions of all network participants, engage in common research projects, establish interagency guidelines and protocols that clarify substantive standards and procedures, and convene events (e.g., hearings and conferences) on topics of common concern.

To be successful, the networks would need to encourage engagement at three levels of agency personnel: top leadership, senior division managers, and case-handlers. For the latter group, we can imagine a regular program of secondments by which agencies exchange personnel to work inside their counterpart

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was not directly connected to his or her position on the underlying political question. When it suits our leaders, they are in favor of broad federal power; when it does not, they claim ‘states’ rights.’”)

For a recent example, see Kendall, *supra* note 13 (noting opposition by Democrats in Congress to a federal antitrust investigation of four automobile companies that “struck a deal with California on vehicle-emissions standards”).

56. Three rationales justify starting small. First, such measures can make useful contributions by themselves. Second, in the aggregate, they can create an environment in which bolder approaches might flourish, while simultaneously operating as a test bed for developing prototypes for more elaborate programs in the future. And third, small steps stand a greater chance of success because their scale is more manageable, and they are less likely to trigger push-back than “swinging for the fences.”

57. See William E. Kovacic, *Toward a Domestic Competition Network*, in *COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY* 316 (Richard A. Epstein & Michael S. Greve eds., 2004).

institutions.<sup>58</sup> This mechanism provides a means for sharing knowledge and building the personal relationships and trust that facilitate interagency cooperation. The sharing of knowledge is a vital objective of the networking initiatives we propose, since it accelerates learning and convergence on better practices far quicker than would be the case if each institution functioned in isolation. Networking can convert a collection of flatter learning curves into a single steeper learning curve that enables all participating institutions to make progress more quickly.

Enhanced networking also fits well into a decentralized policy environment and stimulates opting-in to better practices. Individual institutions would continue to conduct policy experiments, informed by the larger body of experience accumulated by all related institutions. Networking would encourage agencies to report to each other on the design and implementation of individual policy experiments and to devise techniques for measuring outcomes. The disclosure of experiment design and operations, and the evaluation of results would inform judgments by each policymaker about whether to emulate the policy technique in question.

Of course, creating and nurturing these networks involves answering a host of practical questions, virtually all of which lie beyond the scope of this paper. For those who are skeptical of the utility of opt-in networks to improve policymaking, we note that we are not writing on a blank slate. As part of the modernization of their competition regime in 2004, the European Union established a European Competition Network that joins up the EU Member State competition authorities in regular discussions, along with the

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58. To be sure, secondments are not a magical solution to rivalry and cultural conflict. See John Diamond, *CIA & FBI in the Hot Seat; Officials Seek 'Smoking Gun' as Agencies Trade Volleys in Sept. 11 Blame Game*, USA TODAY, June 4, 2002, at A10 (noting that after the CIA and FBI announced that analysts from each agency would be detailed to the other in order to break down these barriers, personnel at both agencies called it a "hostage exchange program"). Attitudes toward the secondment were understandably negative: "One of the FBI agents tapped to participate in the program turned down the assignment and went to the CIA only after he was ordered to report there. 'A detail assignment [to the CIA] was like death,' he recalled. 'I thought, "I don't know these people. I don't like these people. I don't trust these people.'"" AMY B. ZEGART, *SPYING BLIND: THE CIA, THE FBI, AND THE ORIGINS OF 9/11*, at 79 (2007).

Competition Directorate of the European Commission.<sup>59</sup> Similarly, when the United Kingdom reformed its competition system in 2014, it formed a competition network that engages the Competition and Markets Authority (the national competition agency) in regular discussions with sectoral regulators (such as OFCOM, the telecommunications regulator) with a competition mandate.<sup>60</sup> A third example is the Common Ground Conferences that the FTC and various state attorneys general have convened to address specific policy issues.<sup>61</sup> All of these networks have proven valuable in improving the performance of the overall regulatory system while preserving opportunities for individual experimentation.

Of course, forming new institutional frameworks does not guarantee that the potential benefits (enhanced policy coordination) will be realized in practice, let alone maximized. For networks to work well, top agency leadership must visibly commit time and effort to building and maintaining relationships with their counterparts across regulatory entities. Effectiveness also depends on the willingness of senior leadership to operate collegially with their agency peers and to see value in the development of enhanced interagency collaboration. The success achieved by the three networks highlighted previously shows that networking initiatives can be done and done well.

Over time, soft convergence mechanisms embodied in networking can provide a basis for developing more formal binding policy instruments. The confidence and experience gained by networked cooperation can inform judgments about statutory reform regarding substantive standards and procedures, with convergence on better, if not necessarily best, practices. Stated differently, our modest proposal can be an important step toward bolder forms of policy convergence.

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59. *European Competition Network*, EUROPEAN COMMISSION—COMPETITION, [https://ec.europa.eu/competition/ecn/index\\_en.html](https://ec.europa.eu/competition/ecn/index_en.html) (last visited Oct. 3, 2019).

60. *UK Competition Network*, GOV.UK, <https://www.gov.uk/government/groups/uk-competition-network> (last visited Oct. 3, 2019).

61. See, e.g., *Working Together to Protect Midwest Consumers: A Common Ground Conference*, FEDERAL TRADE COMMISSION (Sep. 19, 2019), <https://www.ftc.gov/news-events/events-calendar/working-together-protect-midwest-consumers-common-ground-conference>.

### C. Reasons for Optimism

To say that our proposals are “modest” is not to say that they are easy to execute. But all is not lost. Even though the federal administrative state is polycentric, usually different agencies can get on the same page – or at least in the same ballpark. And federal and state authorities seem to be able to figure out how to get along much of the time, with some jousting at the margins to ensure each side respects the other’s turf.

In practice, these temporary *détentes* paper over the dispute long enough for us to resolve most of the issues that are the bread and butter of federalism scholars. And, the proposals we outline in Part III.B may help deal with an appreciable number of the remainder. However, for those issues where there is persistent divergence within the federal administrative state, we think it is time to say “enough already” in handling that subset of federalism cases.

As the Volcker Commission noted, “[t]hose who enter public service often find themselves at sea in an archipelago of agencies and departments that have grown without logical structure, deterring intelligent policymaking. The organization and operations of the federal government are a mixture of the outdated, the outmoded and the outworn.”<sup>62</sup> Given this dynamic, it is remarkable that our polycentric federal administrative state operates as well as it does.

## IV. CONCLUSION

There are good reasons why we keep fighting about federalism. Like all wicked problems, disputes over federalism surface fundamental disagreements about priorities and goals. Technological development changes the facts on the ground – and often prompts reexamination of old compromises and upend the (once stable, but now fragile) coalitions that supported those solutions. That is why wicked problems resist permanent solutions. But, our ongoing debates over federalism also offer an opportunity and a focal point for improving the performance of the federal

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62. Volcker Commission, *supra* note 43, at 1.



administrative state, and coordination between the state and federal governments. We can do better. We should start doing so.