DELEGATION AND DYSFUNCTION

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Abstract: Much of the scholarly literature lauds cooperative federalism, in which states regulate to achieve federal standards, as an innovative federal-state partnership. But delegation of authority also has grave dangers caused by principal-agent problems. The largely toothless nondelegation doctrine captures these problems, and the challenge bleeds far beyond Congress's delegation of duties to agencies. Congress or federal agencies—the principals who craft and oversee cooperative federalism under many existing statutes—sometimes delegate authority knowing that sub-federal actors will not fully implement a statute. Even delegation for more noble purposes can cause regulatory failure when federal actors struggle or refuse to adequately oversee sub-federal agents or perform their own duties. The recent case of Flint, Michigan, where tainted drinking water permanently harmed thousands of children due to flagrant violations of a cooperative federalism statute, poignantly highlights this. But delegation is often necessary and can be beneficial, particularly where sub-federal agents are more motivated to implement basic risk-preventing regulatory requirements than their federal principal is. Broad-brush cooperative federalism theory tends to ignore the regulatory design of delegation and its associated pathologies and benefits.

This Article cuts to the core of the dysfunction of delegated governance regimes within cooperative federalism. It argues that given the federal statutes in place—with requirements that even recalcitrant federal and state agencies must follow—the design and implementation of cooperative federalism must change. Even if the original purpose of delegation was an ignoble one, the baseline requirements of federal statutes may not and should not be ignored.

The Article builds a theoretical framework for understanding and normatively assessing the shared features of numerous forms of delegation under cooperative federalism, and it applies this framework to environmental and energy law case studies. It argues that necessary regulatory design changes include, among others, consistent case-by-case and long-term monitoring of principals' and agents' behavior and expanded use of judicial review and other mechanisms for overseeing both federal and sub-federal actors within delegated governance regimes.

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INTRODUCTION

In early 2016, a city-wide regulatory failure attracted national attention when officials learned that Flint, Michigan's drinking water supply had been contaminated with lead and other pollutants for months.[1] This largely low-income minority community suffered from irreversible effects of lead poisoning, with the most severe impacts falling on the youngest members of the population.[2] A great deal of finger-pointing ensued, with agencies and politicians citing to the refusal of officials at numerous levels to act despite warnings.[3] Retrospective review revealed severe breakdowns in inter-agency communications and a failure of officials at all levels to comply with minimum requirements of the federal Safe Drinking Water Act (SDWA).[4] Indeed, the principal ultimately responsible for these cascading failures—the Environmental Protection Agency (EPA)—failed for months to require the city and state to comply with the SDWA, allowing lead poisoning and its irreversible effects to continue unabated.[5] The Flint crisis, which implicated city, county, state, regional, and national agencies and policymakers, sheds light on the broader challenges that arise from a common, inadequately-studied phenomenon:

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1 *Examining Federal Administration of the Safe Drinking Water Act in Flint, Michigan*, FULL HOUSE COMMITTEE ON GOVERNMENT OVERSIGHT AND REFORM, Feb. 3, 2016, https://oversight.house.gov/hearing/examining-federal-administration-of-the-safe-drinking-water-act-in-flint-michigan/ (last visited Feb. 1, 2017) (showing the first congressional hearing addressing the Flint crisis).

2 *See* Chinaro Kennedy et al., *Blood Lead Levels Among Children Aged <6 Years—Flint, Michigan, 2013-2016*, Morbidity and Mortality Weekly Report (MMWR), Ctrs. for Disease Control and Prevention, July 1, 2016, https://www.cdc.gov/mmwr/volumes/65/wr/mm6525e1.htm (noting that "very young children consume more water per unit of body mass than do older children and adults"); *What Do Parents Need to Know to Protect Their Children?*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/nceh/lead/acclpp/blood_lead_levels.htm ("Even low levels of lead in blood [in children] have been shown to affect IQ, ability to pay attention, and academic achievement. And effects of lead exposure cannot be corrected.") (last visited Jan. 31, 2016).

3 *See, e.g.*, *Examining Federal Administration of the Safe Drinking Water Act in Flint, Michigan, Part 2*, FULL HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, Mar. 17, 2016, https://oversight.house.gov/hearing/examining-federal-administration-of-the-safe-drinking-water-act-in-flint-michigan-part-3/ (calling for the resignation of federal and regional officials and criticizing the failure of the EPA to accept responsibility for the crisis).

4 FLINT WATER ADVISORY TASK FORCE FINAL REPORT, https://www.michigan.gov/documents/snyder/FWATF_FINAL_REPORT_21March2016_517805_7.pdf.

5 *See infra* note 120 and accompanying text.

federal government actors relying on sub-federal entities to do much of the heavy lifting in identifying and regulating risks.

The SDWA—like most environmental statutes and many other federal directives—relies on "cooperative federalism," a broad category of regulatory approaches characterized by the federal government delegating some or most of the authority to implement federal requirements to sub-federal actors.[6] Indeed, the delegation that occurs within the broad rubric of cooperative federalism is quite expansive, involving many types and degrees of delegated authority. In the examples explored in this Article, Congress directs agencies to delegate some or most of their authority,[7] or agencies use discretionary powers under enabling statutes and choose to delegate. Despite much the literature's tendency to hail cooperative federalism, broadly construed, as an innovative, effective federal-state partnership,[8] all of these forms of delegation share a common principal-agent flaw[9] that arises from their regulatory design. The constitutional

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[6] *See, e.g.*, David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1811-12 (2008) ("In its simplest form, cooperative federalism is a system of shared authority between the federal and state governments. Typically, Congress delegates broad regulatory authority to a federal agency (such as standards setting, enforcement, and permitting) and authorizes the agency to delegate program implementation to states that satisfy certain requirements."); Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 740 (2006) (explaining that a unifying principle of cooperative federalism is Congress's creation of a "significant role for the states either in implementing the federal standards or in supplementing federal regulatory initiatives").

[7] *See infra* notes 56 and 202 and accompanying text.

[8] *See, e.g.*, David E. Adelman, *Environmental Federalism When Numbers Matter More than Size*, 32 UCLA J. ENVTL. L. & POL'Y 238, 246 n. 26 (2014) (summarizing the literature that praises the Clean Air Act—the original cooperative federalism statute—as a template for cooperative federalism more generally); William W. Buzbee, Federal Floors, Ceilings, and the Benefits of Federalism's Institutional Diversity, *in* PREEMPTION CHOICE 98, 98-114 (William W. Buzbee, ed.) (exploring the benefits of cooperative federalism regimes in which states regulate above a minimum federal floor, although noting the drawbacks of regulation beneath federal "ceilings). *But see* Glicksman, *supra* note 6, at 755 (2006) (arguing that cooperative federalism, used in most federal environmental statutes, is a "constraint on the capacity of either level of government to take effective steps to protect the environment"); Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 559, 579 (2000) (arguing that cooperative federalism suffers from an accountability problem because it "separates political initiative and authorship from responsibility for results").

[9] M.C. Jensen & W.H. Meckling, *Agency costs and the theory of the firm*, 3 J. FIN. ECON. 305, 308 (1976) (defining the principal-agent "relationship as a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority to the agent"). There is a broad literature on the principal-agent problem when Congress delegates power to agencies, but there is less discussion of how the same problems pervade

nondelegation doctrine—now a narrow, infrequently-applied rule[10] that requires Congress to provide agencies with adequately detailed directives when delegating policymaking authority[11]—captured the essence of this problem. But the principal-agent undertones of the doctrine bleed far beyond its narrow confines, permeating numerous forms of delegation within cooperative federalism regimes. Federal agencies struggle, or refuse, to adequately oversee sub-federal parties responsible for basic regulatory duties, as recently dramatically demonstrated through the Flint crisis.

The principal-agent problem is a bidirectional one.[12] From the top down, principals that rely on other entities to carry out a task struggle to provide adequately detailed yet flexible directives to their agents, oversee and enforce agent responsibilities while minimizing transaction costs, and step in where agents fail to carry out these responsibilities.[13] And recent dramatic changes in the U.S. executive state highlight a phenomenon that has long lurked within U.S. law. Due to political ideology, capture,[14] or

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cooperative federalism regimes. For discussion of the principal-agent problem in the Congress-agency relationship and the literature that explores this problem, *see* J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1452-1456 (2003). For discussion of the principal-agent concept in the context of the nondelegation doctrine, *see, e.g.*, Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1744 (2002) (in an article arguing that there is no such thing as delegation of legislative responsibility to executive agencies (because agencies are simply exercising executive, not legislative, power), noting that under any form of delegation, "a leader or principal delegates broad authority to agents").

10 *See, e.g.,* Richard D. Cudahy, *The Nondelegation Doctrine: Rumors of its Resurrection Prove Unfounded*, 16 J. CIV. RIGHTS & ECON. DEVELOPMENT 1, 3, 38 (2002) (noting that Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001), which showed a rare yet temporary revival of the nondelegation doctrine, was the first time the Supreme Court had employed the doctrine to invalidate a statute "for more than 60 years" and concluding that under the *American Trucking* holding "it is difficult to see . . . how Congress could violate the nondelegation doctrine).

11 *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (allowing congressional delegation of authority to other actors provided that Congress provides an "intelligible principle" with which the delegate "is directed to conform"); Lisa Schulz Bressman, Schechter Poultry *at the Millenium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1404 (2000) (describing *Hampton* as the "most familiar judicial formulation of the nondelegation doctrine").

12 *See, e.g.*, Cudahy, *supra* note 10, at 3 (noting how the doctrine was designed, among other purposes, to make Congress more accountable and force it to make "hard choices" rather than passing them off to another entity).

13 *See, e.g.*, Jensen & Meckling, *supra* note 9 (describing monitoring and enforcement concerns that run both ways in the principal-agent relationship within the context of the firm); DeShazo & Freeman, *supra* note 9, at 1452 (noting the concern that Congress cannot adequately control its agents).

14 For extensive discussion of the ability of special interests to capture governments operating within delegation regimes, *see* DAVID SCHOENBROD, POWER WITHOUT

other incentives or disincentives, the principals themselves—in this case, Congress, federal agencies, and the executive branch more generally—are sometimes openly averse to requiring agents to carry out existing federal directives, even those designed to prevent basic market failures or risks.[15] And they often delegate as a means of obscuring their motives, leaving hard decisions to other levels of government, or otherwise avoiding clear responsibilities under existing statutes.[16] In these cases, sub-federal agents—even those motivated to carry out their duties under the delegated governance scheme—struggle to hold their federal principals to task[17] for failing to uphold their end of the cooperative federalism problem.

Yet delegation, with its bidirectional oversight challenges and deeply politicized nature, is not universally dysfunctional. When federal agents refuse to act or are prohibited from carrying out their duties under existing federal statutes, sub-federal actors with adequate resources and discretion can choose to pick up the slack.[18] And even willing federal policymakers and agencies simply cannot, and, often should not, attempt to address each and every societal problem that requires a regulatory solution.[19] There are important opportunities for innovative and effective

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RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 49-57 (1993).

[15] *Cf.* John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1186 (1995) (observing that "[i]nterest groups and politicians opportunistically exploit the fragmentation of the federalist system to achieve their short-term goals" and providing examples of political groups that laud "state autonomy" only when it achieves their substantive goals and quickly shift to support preemption when states take an opposite substantive tack); SCHOENBROD, *supra* note 14, at 80 (arguing that Congress purposefully piled increasingly complex rules on the states under the Clean Air Act, knowing that "it was unworkable," and that "legislators seem to be unconcerned about imposing delay, complexity, and confusion on their constituents when they delegate").

[16] *See, e.g.*, SCHOENBROD, *supra* note 14, at 10 (describing delegation designed for blame-shifting).

[17] *See, e.g.*, *id.* at 80 (noting that "EPA met fewer than 15 percent of the rulemaking deadlines set under the 1970 and 1977" Clean Air Act amendments).

[18] *Cf.* Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459 (2012) (exploring the importance of involving sub-federal entities in serving as a "check" on federal actions).

[19] For the extensive literature on the benefits of including numerous institutions within the regulatory project, *see, e.g.*, Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 6, 47-48 (2010) (noting the importance of involving groups at numerous level, including the grassroots level of citizens and non-profits, in the governance project); Jodi Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012) (exploring both the benefits and drawbacks of overlapping institutions); Buzbee, *supra* note 8, at 98-114; Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997) (analyzing the benefits and risks of industry involvement in the regulatory process);

governance in regimes involving delegated regulatory power. With better regulatory design, delegation regimes could consistently take advantage of these benefits and avoid the central causes of dysfunction.

A theory of delegation within cooperative federalism regimes—and specifically, a theory of the regulatory design of these programs—is necessary in order to understand and analyze the deep dysfunction of delegation as well as its potential. This Article takes on this task, providing a unifying theoretical framework for understanding, critiquing, and improving numerous types of delegated governance regimes, all of which fall beneath the general umbrella of "cooperative federalism." After identifying common features of disparate delegation forms within cooperative federalism, the Article applies this framework to environmental and energy law case studies that demonstrate the panoply of delegation types and the benefits and drawbacks of these approaches. The Article uses the framework, and the lessons from case studies, to inform how the regulatory design of delegated regimes must improve.

Although Congress and agencies sometimes do not design delegated governance regimes with a purpose of achieving effective regulatory results, such as protecting the public from externalities and other market failures, existing, explicit statutory directives command these results.[20] Absent statutory revision, principals and agents may not ignore these basic mandates and must design and implement better regimes. This Article operates on this premise, providing a framework for analyzing and improving design in order to achieve these results.

Part I of the Article explores the broad contours of the concept of delegation within cooperative federalist regimes and the principal-agent challenge that permeates all delegated governance forms. It describes three primary meanings of "delegation." These include: 1) Congress's general act of delegating responsibilities to agencies, constrained only by the relatively weak non-delegation doctrine in the Constitution; 2) Congress's specific directives to federal agencies requiring them to delegate certain responsibilities to sub-federal actors, as occurs under most environmental

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Bulman-Pozen, *supra* note 18 (exploring the benefits of sub-federal "checks" and abilities to fill in gaps).

[20] *See, e.g.*, 42 U.S.C. § 7409 (under the Clean Air Act, requiring the EPA to publish air quality standards that "are requisite to protect the public health" "with an adequate margin of safety"); 42 U.S.C. § 7410 (requiring states to adopt plans providing for "implementation, maintenance, and enforcement" of these standards"); 42 U.S.C. § 300g-1 (under the Safe Drinking Water Act, requiring the EPA to "promulgate a national primary drinking water regulation for a contaminant" if "the contaminant may have an adverse effect on the health of persons," among other factors); *id*. at § 300g-2 (directing the states to have primary enforcement authority for achieving these standards if the states meet minimum requirements for their regulatory programs).

statutes; and 3) agencies' discretionary decision to delegate certain responsibilities to sub-federal actors, constrained only by agencies' enabling statutes. These latter two categories both generally fall within the rubric of cooperative federalism because they involve sub-federal actors in the project of achieving federal goals, regardless of whether Congress or an agency has initiated the delegation. Part I explores how the constitutional non-delegation doctrine, despite its waning force, embodies principal-agent concepts that bleed well beyond the Constitution into the cooperative federalism field.

Having explored the common principal-agent thread that connects numerous forms of delegation, including delegation from agencies and Congress to sub-federal entities, Part II then provides a theoretical framework for categorizing and systematically evaluating the regulatory design of delegated governance regimes within cooperative federalism. I propose that all of these regimes, despite their seemingly limitless contours, share three common features. These features influence the extent to which these regimes suffer from classic principal-agent challenges of inadequate guidance and oversight, or demonstrate unusual and innovative means of maintaining accountability in delegated governance regimes.

First, the *type of regulatory work* that the entity with delegated authority performs varies in terms of whether it drafts and promulgates regulations, monitors compliance with those regulations, and enforces compliance, or only carries out some of these functions. Second, the *degree of authority* held by the delegated entity[21] differs based on the federal agency's back-up authority (federal action only when the state fails to act) or parallel authority (federal action alongside the state). Similarly affecting the degree of control delegated is the extent to which the federal entity can and does perform ongoing review of the delegated entity's individual actions and this entity's overall performance of its duties. Finally, the *entities to whom the federal agency allocates responsibility*, such as local and state governments, regional agencies, or private organizations, are far more varied than the legal literature typically acknowledges.[22]

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21 *See* Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 585-588 (2011) (describing parallel regimes).

22 Other discussions of cooperative federalism and regulatory design use different metrics, although some of them encompass aspects of the categories framed here. For example, for areas of rapidly evolving risk, Professors David Markell and Robert Glicksman provide a framework for analyzing which actors should be involved in the regulatory regime, such as states and civil society representatives in addition to federal agencies; the best legal or informal mechanisms for achieving regulatory goals, such as issuing regulations or policy statements; and the specific tools for reaching these goals, such as enhanced technological monitoring of compliance and making compliance or noncompliance more transparent.

In identifying the three common features of delegated governance regimes and how these features enhance or constrain principal-agent problems, Part II uses case studies both to help describe these features and to demonstrate how this framework can be used to allow for effective comparison of many types of delegated governance regimes. I deploy studies from environmental and energy law, exploring the regulation of oil and gas waste disposal, air pollutant emissions, electric grid reliability, and drinking water quality.

Part II uses these examples because they represent the divergent points along the broad continuum of delegation designs that fall beneath the general rubric of cooperative federalism. They also show areas in which Congress or agencies seemed to genuinely wish to achieve a regulatory result, and others in which the aim appears more suspect. In the category of desiring genuine regulatory progress, there is general agreement that we must maintain the reliability of the electric grid so that businesses and individuals have access to a constant and adequate supply of electricity.[23] Additionally, enforcing basic standards for minimum drinking water quality is an issue that receives bipartisan support, or at least lip service.[24] The oil and gas context represents the other extreme, in which an agency delegated most of its regulatory responsibilities under a federal environmental act—the Resource Conservation and Recovery Act—with knowledge that states had not, and likely would not, fully carry out their authority.[25]

Finally, Part III of the Article identifies regulatory design features from the three categories of the delegation framework—the type of authority delegated, degree of authority delegated, and the entity to whom the delegation occurs—that can limit the principal-agent problems inherent to delegation. The Article documents how parallel federal agency authority to write, monitor compliance, and enforce regulation alongside the delegated entity's powers is particularly important when all of these regulatory functions have been delegated. It also emphasizes the importance of consistent, effective oversight mechanisms within cooperative federalism, including tools for the review of both the

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David L. Markell & Robert L. Glicksman, *Dynamic Governance in Theory and Application, Part I*, 58 Ariz. L. Rev. 563, 568-570 (2016).

[23] *See* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) (in a rare bipartisan statute with large substantive goals, requiring federal regulation of electric grid reliability).

[24] *See, e.g.*, Full House Committee on Oversight and Government Reform, *supra* note 3 (observing that "EPA has failed to significantly update the Safe Drinking Water Act (SDWA) and the Lead and Copper rule since 1991" despite directives to do so and criticizing the EPA for refusing "to take responsibility for not taking quick and decisive action in Flint and has not held anyone accountable for their failures").

[25] *See infra* note 57 and accompanying text.

individualized actions of actors exercising delegated authority, such as enforcement choices, and the overall performance of the entities with delegated responsibility. These types of monitoring are particularly important when an agency delegates several regulatory functions to private entities and retains little back-up or parallel authority. But to ensure that accountability runs both ways, review of the federal entity originally responsible for regulation is equally important. This calls for enhanced judicial review as well as the involvement of independent agencies[26] tasked with reviewing the efficacy of agencies and the regulations that they implement, among other solutions explored in Part III.

In an age of increasing delegation and growing calls for abdication of certain federal regulatory control, a means of better evaluating delegation decisions and how to best design and implement federal agency delegation is critical. Without this framework and an understanding of the dysfunction within delegation, numerous risks could remain unidentified or inadequately controlled, with some leading to substantial, potentially irreversible harm. Further, policymakers and agencies making delegation decisions need an organized, understandable set of delegation options from which to choose and an associated normative framework that describes how delegation might be most effectively accomplished. This Article builds this framework.

I. UNDERSTANDING DELEGATED GOVERNANCE AND ITS PRINCIPAL-AGENT CHALLENGE

The concept of delegation encompasses numerous regimes and doctrines involving the transfer of responsibility from one entity to another. This Part explores the contours of this doctrine and the delegation that is the focus of this paper—federal agencies' transfer of regulatory responsibility to sub-federal entities, either under a specific directive of Congress or through discretionary interpretation of enabling legislation, both of which fall within the general rubric of cooperative federalism. It extends the basic principles embodied within the nondelegation doctrine to the cooperative

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[26] The Article explores how several of these independent agencies already operate in other contexts and have improved federal regulation. For example, the sole function of the National Transportation Safety Board is to investigate the cause of transportation accidents, such as rail collisions and derailments and flight crashes, and to suggest needed changes to regulation. *See About the National Transportation Safety Board*, Natl. Transportation Safety Bd., https://www.ntsb.gov/about/pages/default.aspx; Hannah J. Wiseman, *Negotiated Rulemaking and New Risks: A Rail Safety Case Study*, 7 WAKE FOREST J. L. & POL. __ (forthcoming 2017, invited symposium contribution) (describing how the role of the NTSB improved the National Railroad Commission's rail safety regulations after oil train derailments and explosions increased)

federalism field, exploring the unifying principal-agent thread that binds together the many forms of delegation.

A. THE FORMS AND PURPOSES OF DELEGATION

Delegation is such a broad concept that it threatens to defy distinction or productive parsing. But a closer look at delegation among bodies of government (as opposed to delegation that also occurs *within* these bodies, such as from agency heads to staff members[27]), shows that there are useful dividing lines and means of focusing scholarly discussion on more limited aspects of delegation.

1. Nondelegation, Congressional Delegation to Agencies, and Federal Delegation to States

The term "delegation" describes a variety of scenarios. First, as captured by the constitutional nondelegation doctrine, the concept relates to Congress's general practice of transferring certain policymaking responsibilities to agencies, and the weak yet not-entirely-defunct requirement[28] that agencies provide adequately intelligible principles[29] for agencies to follow when Congress initiates this transfer. Second, it describes Congress's specific directives to agencies to delegate some or most of their regulatory authority in a particular substantive area to sub-federal entities, such as through the classic cooperative federalism scheme crafted by the Clean Air Act.[30] And finally, federal agencies sometimes delegate authority to sub-federal entities using discretionary powers granted to them by Congress, either broadly interpreting an enabling statute or acting within specific flexibility created by Congress. For example, in the oil and gas case study in Part II, Congress directed the EPA to study whether the EPA or states should be the entities primarily responsible for regulating oil and gas wastes under the federal Resource Conservation and

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27 This, too, is of course an important aspect of delegation. *See, e.g.*, DeShazo & Freeman, *supra* note 9 (exploring this form of delegation as well as delegation among institutions).

28 *But see* Cudahy, *supra* note 10, at 3 (arguing that the doctrine is largely defunct); Posner & Vermeule, *supra* note 9 (arguing that the doctrine simply does not apply to Congressional delegation to agencies).

29 *See supra* note 11.

30 *See* David E. Adelman, *Environmental Federalism When Numbers Matter More than Size*, 32 UCLA J. ENVTL. L. & POL'Y 238, 244 (2014) (noting that the Clean Air Act "established the model for cooperative federal-state regulation found in the major national environmental laws").

Recovery Act and to make a regulatory determination based on this study.[31] The EPA chose to transfer most of its authority to state actors.[32]

These latter two categories both receive their own label of "cooperative federalism"—a term that describes a variety of delegation scenarios in which sub-federal entities partner with federal agencies in the regulatory project.[33] Typically, this means that sub-federal entities are partially or mostly responsible for implementing and achieving specific federal standards, such as limits on the quantity of pollutants in the ambient air or the level of acceptable contaminants in drinking water. But more broadly construed, it also includes areas in which various levels of government are involved in achieving more generalized federal goals, or both general and specific goals. For example, in the sphere of maintaining the reliability of the electricity supply—a case study explored in Part II—Congress in 2005 directed the Federal Energy Regulatory Commission (FERC) to receive recommendations for the content of reliability standards from a newly-formed sub-federal, public-private entity.[34] FERC maintains the ultimate responsibility for approving or rejecting these standards,[35] but the content of the specific regulatory goals comes initially from a sub-federal level. FERC and the sub-federal entity retain joint responsibility for enforcing these standards once they are finalized.[36]

2. The Political Economy of Delegation

Delegation regimes also differ in terms of the purpose underlying the original delegation scheme. When Congress directs agencies to delegate responsibilities to a sub-federal level, its motives range from the ignoble to the genuinely practical. Indeed, an extensive delegation literature explores the merits of this approach. Political scientists, economists, and legal scholars who focus on Congress's delegation of tasks to agencies (or states) debate whether this promotes or undermines democracy, among other

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31 Regulatory Determination for Oil and Gas and Geothermal Exploration, Development and Production Wastes, 53 Fed. Reg. 25,446, 25,455-56 (July 6, 1988).

32 *Id*.

33 *See* Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 183 (2005) (defining cooperative federalism as governance regimes in which "both levels of government [state and federal] play some role).

34 EPAct 2005 § 1211 (codified at 16 U.S.C. § 824*o*) (providing that "[t]he Electric Reliability Organization shall file each reliability standard or modification to a reliability standard that it proposes to be made effective under this section with the Commission" and granting FERC the authority to approve each standard or to disapprove the standard "in whole or in part").

35 *Id*.

36 *See infra* note 205 and accompanying text.

values.[37] And a large body of judicial cases[38] and federalism scholarship explores how engaging sub-federal entities in federal policymaking goals can promote experimentation, improved response to local concerns, and other values.[39] But despite the benefits that sometimes flow from federal delegation of authority to agencies or sub-federal entities, its purposes and results can also be more nefarious, as parts of these literatures recognize.[40]

In the context of delegation that is part of cooperative federalism regimes, Congress expressly directs a federal agency to engage states in assisting with the implementation of a federal statute, or an agency has used discretionary or specifically flexible powers granted to it by Congress and has chosen to delegate some or most of its regulatory responsibility. The motives of each of these entities choosing to delegate might be similar. Both Congress and agencies sometimes wish to shift the financial and political burdens of regulation to another level,[41] even when they are aware that local or state entities also often lack the resources or political will to regulate.

With respect to political burdens, Congress and agencies sometimes genuinely desire to address a societal problem but know that solutions will be politically controversial, thus attempting to avoid the blame for regulatory solutions. Or they recognize that the only feasible way of achieving even part of the regulatory goal is to give sub-federal entities

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[37] For a summary of the competing literatures in this area, *see* Bressman, *supra* note 11, at 1406-1408. *See also* SCHOENBROD, *supra* note 14, at 10 (critiquing delegation as anti-democratic); *Peter H. Schuck, Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 780-83 (1999) (while acknowledging the "constraints" of agency actions, arguing that Congressional delegation of policymaking authority to agencies promotes democracy because, among other reasons, it "[t]he administrative agency is often the most accessible site for public participation," enables more meaningful citizen participation in concrete and detailed policies, and it enables more *effective* citizen participation because citizens—who receive notice regarding the details of the specific proposed regulation—can educate the agency about the risks and benefits of the proposal); Dan M. Kahan, *Democracy Schmemocracy*, 20 CARDOZO L. REV. 795, 803-804 (1999) (arguing that given the many variants on defining "democracy," this concept can be used to defend or critique congressional delegation to agencies and that the benefits of delegation vary locally)

[38] For the original coinage of the term "laboratory of the states," as used in a positive sense, *see* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[39] *See, e.g.*, Larry Kramer, Understanding Federalism, 47 VAND. L. REV. 1485, 1499 (1994) (lauding the benefits of federalism and their continued validity); Heather K. Gerken, *Foreword: Federalism All the Way Down, The Supreme Court 2009 Term*, 124 HARV. L. REV. 4, 6, 47-48 (2010) (exploring traditional defenses of federalism); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (describing the ability of voters to shop among jurisdictions by moving).

[40] *See infra* note 45 and accompanying text.

[41] *See supra* note 16 and accompanying text.

more control over the means of implementing that goal.[42] Finally, federal policymakers sometimes believe that the complexity of the regulatory solutions necessitates some state or local involvement. The Clean Air Act—a cooperative federalism statute—appears to show some combination of all three of these purposes. In enacting major revisions to the statute that contained pollution limits with genuine "teeth," Congress exhibited a sincere desire to improve air quality.[43] Yet at the same time, it recognized the politically controversial nature of intervening in a previously state-dominated policy area as well as the need for involving sub-federal actors in implementing such a detailed statute that required extensive regulatory resources. Several senators noted the incredible investment in federal resources that would be required for the federal government to independently implement such a complex statute.[44]

In other cases, Congress and agencies delegate for less noble political reasons, with the goal of obscuring their true purpose for delegating.[45] For political ideological reasons, such as preferring market solutions to the intervention of the regulatory state or appeasing special interests,[46] both of these entities might wish to create an appearance of

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[42] *See infra* note 44 and accompanying text.

[43] *See, e.g.*, Richard Lazarus, *Environmental Law Without Congress*, 30 J. LAND USE & ENVTL. L. 15, 22 (2014) (noting the "tough, new federal air pollution legislation" of the 1970s, which had "significant bipartisan support).

[44] *See* John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1192-93 (1995) (describing senators' statements, observing that "[t]he chief Senate sponsor, Senator Muskie . . . contemplated that effective implementation of the Act required state and local cooperation" and that members of "Congress were concerned with the practical difficulties that would arise from implementing, enforcing, and funding the vast and complicated Clean Air Act").

[45] For general observations about the nefarious or ignoble purposes of delegation of congressional power to agencies, *see, e.g.*, Posner & Vermeule, *supra* note 9, at 1744 (noting that "[c]ritics of delegation argue that Congress delegates for nefarious purposes--to make transfers to interest groups and to avoid responsibility for difficult political decisions"); DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 9 (1999) (noting political reasons for delegating, including the political fall-out (or "costs") of regulating at the federal level).

[46] *See* SCHOENBROD, *supra* note 14, at 55 (providing an example in which a statute that delegated broad authority to the Secretary of Agriculture to issue marketing orders for fruits—orders designed to create an "orderly" market and allow various growers to participate in the market while keeping prices at an allegedly reasonable level for consumers—gave large grower associations undue influence over the agency, led to higher prices, and helped to "insulate Congress and the White House from political accountability for supporting laws that are harmful to the broad public interest"); *id*. at 55 (noting that the statute delegating these marketing powers to the agency was "framed in terms of 'attractive abstractions such as 'orderly' markets," and "privacy or leaving agricultural policy to the

addressing a regulatory problem without actually doing so. When they delegate to sub-federal governments who similarly lack the political will to regulate, or the resources to do so, they achieve this desired result.

Of course, this approach can also backfire; states that wish to aggressively regulate now have the leeway to do so. As the "iterative federalism,"[47] "uncooperative federalism,"[48] and "negotiated federalism"[49] literature recognizes, cooperative federalism can involve a back-and-forth between the federal and state governments, with motivated, rebellious states sometimes pushing the federal government toward more effective solutions even in the face of federal resistance. (Alternatively, rebellious states also might prefer to shirk,[50] and, if not closely monitored by their agencies, face no consequences for this shirking.) But if Congress or agencies (or agencies acting in response to specific directives from the President[51]) are determined to reduce regulatory intervention, they sometimes preempt the "non-shirking" states, especially those that are unusually motivated to act. For example, under the Clean Air Act—a cooperative federalism statute—California has more flexibility than other states to implement its own, more stringent regulations to achieve air quality, including regulation of mobile sources such as cars.[52] In some cases, however, California must receive approval (a "waiver") from the federal government to more aggressively regulate. Over time, presidential administrations have denied certain waiver requests,[53] and the Trump administration has expressed a general goal of preempting this state power entirely.[54]

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experts . . . rather than in terms that might reveal legislative support of high prices to consumers").

47 *See* Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1108, 1128-1137 (2009).

48 Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1275 (2009).

49 Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011).

50 The literature on delegation from Congress to federal agencies frequently employs the concept of shirking. Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 247 (1987).

51 *See* DeShazo & Freeman, *supra* note 9, at 1454-55 (noting that sometimes and agency "casts aside congressional policy preferences not necessarily to pursue its own agenda, but to pursue those of other principals," including the President).

52 42 U.S.C. § 7543 (providing California's waiver authority).

53 *See* 73 Fed. Reg. 12,156 (Mar. 6, 2008) (denying California's waiver request for regulating greenhouse gas emissions from automobiles). *But see* 74 Fed. Reg. 32,744 (July 8 2009) (showing the Obama administration's later grant of the waiver request).

54 Evan Halper, *Trump's EPA pick casts doubt on California's power to regulate auto emissions*, L.A. TIMES, Jan. 18, 2017, http://www.latimes.com/nation/la-na-pol-epa-confirmation-20170118-story.html (last visited Feb. 15, 2017) ("Oklahoma Atty. Gen. Scott Pruitt said at a contentious confirmation hearing Wednesday that he cannot commit to

An example of both Congress and agencies desiring to delegate authority through a cooperative federalism regime—perhaps in part for pure political economic reasons of satisfying powerful interest groups—comes from the Resource Conservation and Recovery Act. This federal act covers the generation, transport, and disposal of both hazardous and non-hazardous wastes on land, with the goal of preventing disposal operations from polluting of land and water.[55] But after heavy lobbying from the oil and gas industry, Congress directed the EPA to study whether the hazardous waste portion of RCRA, which contains the most stringent limitations on generation, transport, and disposal of wastes, should apply to the disposal of oil and gas wastes and to make a final decision after this study.[56] The EPA subsequently concluded that although some gaps in state regulation remained, it would be very expensive for oil and gas companies to comply with RCRA.[57] It accordingly left most responsibility for regulating the disposal of wastes from oil and gas drilling and hydraulic fracturing to states, although it retained marginal authority by indicating that it would continue to work with states to improve their regulations.[58] The EPA has since remained involved in a public-private group that reviews the environmental adequacy of state regulations in this area and makes non-mandatory recommendations to improve these regulations,[59] with only mixed success.[60]

While the delegation goals of Congress and agencies are sometimes shared by both, in other cases each body has very different reasons for delegating. With respect to the Clean Air Act, although Congress's initial intent for delegating appeared to primarily stem from a genuine belief that involving states and local governments in the Act was necessary from a resource-based perspective (and for political feasibility),[61] executive agencies over time have chosen to give these sub-federal entities more or less leeway in their decisions. Administrations more opposed to regulatory intervention have resisted California's efforts to aggressively regulate

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keeping in place the current version of a decades-old federal waiver that allows California to set emissions standards stricter than elsewhere in the United States.").

55 42 U.S.C. § 6822 (a)-(c).

56 Regulatory Determination for Oil and Gas and Geothermal Exploration, *supra* note 31 (describing Congress's directive).

57 *Id*. at 25,450, 25,455 (noting the economic impacts if the hazardous waste portion of RCRA were to apply to the wastes but acknowledging that "because of certain regulatory gaps [in state regulation], damages have occurred even where wastes are managed in compliance with existing requirements")

58 *Id*.

59 *See infra* Part II.

60 *See infra* Part II.

61 *See supra* note 44 and accompanying text.

emissions[62] and have tended to be more deferential to the actions of states that are not implementing the minimum requirements of the act. Other administrations have more aggressively enforced states' responsibilities.[63]

In this same realm of split agency-congressional motivations within the delegation framework, a growing literature also documents agencies' and agency staff members' motives—largely independent of their directives from Congress—to choose action, inaction, or a middle ground when implementing enabling statutes as agents of their congressional principal. These motives include, among many others, preserving political capital for the highest-priority agency initiatives; following the directives of the President or an agency leader, rather than Congress; or sheer "performance-based"[64] reasons such as motivated or lazy agency staff.[65] And courts, too, substantially constrain agency behavior by interpreting Congress's directives to agencies and expanding or limiting agencies' discretionary activity beneath enabling statutes—not always in a manner that Congress necessarily intended. One strand of the literature argues that courts have largely tied agencies' hands and have dangerously slowed needed regulation by requiring agencies to expend so many resources documenting their choices.[66]

Although the types of delegation and purposes behind it differ dramatically, all forms of delegation—regardless of the underlying motives—share a principal-agent challenge. This challenge is well-documented in the context of the nondelegation doctrine, and Congress's delegating responsibilities to federal agencies, but has been less thoroughly explored in the equally important area of Congress and agencies delegating

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62 *See supra* notes 53-54and accompanying text.

63 For example, the Obama administration engaged in extensive litigation with Texas over the state's alleged failure to meet minimum federal requirements of the Clean Air Act, albeit not very successfully. *See, e.g.*, Richard O. Faulk & John S. Gray, Climate Change Regulation and Litigation: A "Lost Decade" of Controversy and Confrontation, 61 The Advoc. (Texas) 13, 16-17 (2012) (documenting the history of Texas's resistance to various EPA Clean Air Act requirements, including, under the years that covered the Obama Administration's tenure, efforts by the EPA to require Texas to comply with provisions of the Act that it believed the state was failing to follow).

64 Professors DeShazo and Freeman divide agencies' actions as agents into two categories: preference (such as choices to follow the directive of an agency head more closely than those of Congress) and performance (such as laziness). DeShazo & Freeman, *supra* note 9, at 1454.

65 *See id*. at 1453-1458; Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L. J. 251 (2009).

66 *See* Thomas O. McGarity, *Some Thoughts On "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 538 (1997) (reasserting that court requirements for extensive agency documentation are the primary causes of delayed agency action).

federal responsibilities to the sub-federal level. A better understanding of the principal-agent challenge that pervades all forms of delegation—including cooperative federalism—is necessary to support the framework that this Article constructs in Part II. This framework allows for productive, comparative analysis of delegation within cooperative federalism regimes and proposals for improved regulatory design in this area.

B. THE PRINCIPAL-AGENT PROBLEM WITHIN COOPERATIVE FEDERALISM

The principal-agent challenge at the heart of Congress's delegation to agencies is embodied within the nondelegation doctrine itself. The most familiar, early formulation of the doctrine emerged from *J.W. Hampton v. U.S.* (1928),[67] which involved a customs collector charging a chemical importer a specific tariff.[68] The collector charged the tariff under a statute that allowed the President, with the assistance of the U.S. Tariff Commission, to vary tariffs based on assessments of the differences in domestic and international production costs of goods.[69] The importer argued that this was an unconstitutional delegation of powers, but the Supreme Court found that "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[70]

Noting the widely-accepted law of "agency" within the public and common law, the Court began its analysis by recognizing the shared principle "delegatas non potest delegari," which prohibits the delegation of powers that already have been delegated.[71] In the context of governance, the central application of this principle is the separation of powers—as noted by the Supreme Court in *J.W. Hampton*, "it is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch . . . ."[72] Pieces of the general duty to govern (originally held by the public)[73] already have been delegated[74] to

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67 Earlier cases already had espoused the principle, however, portraying it in terms of allowing Congress to seek the assistance of other branches in terms of fact-finding. *See* Cudahy, *supra* note 10, at 8-9.

68 276 U.S. 394, 400.

69 *J.W. Hampton*, 276 U.S. at 400-403.

70 *J.W. Hampton*, 276 U.S. at 409.

71 *J.W. Hampton*, 276 U.S. at 405.

72 *J.W. Hampton* 276 U.S. at 406.

73 *See* Posner & Vermeule, *supra* note 9, at 1733 (observing that the maxim means that "the legislature may not redelegate the powers delegated to it by the people," although arguing

each of these three branches, and a *second* delegation of these duties is unconstitutional. But the Court concluded that one branch, such as Congress, may enlist another branch, such as the executive, to assist Congress in its duties, provided Congress does not "assume the constitutional field" of the executive. The court assessed the constitutionality of the delegation by looking to the "extent and character" of the assistance sought[75] and concluded that the intelligible principle that must be provided by Congress to the executive agency helped to ensure that delegation remained within constitutional confines.[76]

The Court subsequently used the doctrine only twice to strike down legislation,[77] but a large body of literature unfolded exploring the meaning of the doctrine and its purpose. Indeed, much of the literature implicitly or explicitly incorporated principal-agent reasoning and broader concepts of accountability. The principal-agent challenge, as outlined in the economics literature, is more of a utilitarian than value-based problem. Economists note principals' need for agents to help carry out tasks—in the context of the firm, for example—and the difficulties that principals encounter in attempting to provide adequate direction to agents and to monitor and enforce agents' behavior. One classic article that explores the theory in the context of the firm describes the principal-agent relationship as one in which "one or more persons (the prinical(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority to the agent."[78] Within this relationship, the principal is concerned that agent will "diverge[] from his interest" and will attempt to limit this problem by providing adequate up-front directives and incentives for hewing to the principal's goals, as well as incurring monitoring costs over time.[79] The agent, in turn, will to some extent have its own incentives to act in the interest of the principal (the agent, after all, benefits monetarily and in other ways from being tasked with carrying out the principal's duties) and to monitor the principal to ensure that the principal upholds its end of the bargain.[80]

These economists acknowledged that the principal-agent challenges within delegation extend well beyond the firm-based context that was their

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that there is "remarkably little evidence that the Framers envisioned such a constraint on legislative authority").

74 *See id*. (noting these branches' obligations regarding "actual administration of the government").

75 *Id*.

76 *Id*.

77 Cudahy, *supra* note 10, at 3.

78 Jensen and Meckling, *supra* note 9, at 308.

79 *Id*.

80 *Id*.

focus, including to governments.[81] And indeed, within the legal and political science literatures, the principal-agent challenge that pervades Congress's delegation of responsibility to agencies is widely discussed. This includes problems involving the accountability of Congress to its principal (the "public," which it represents) and of agencies to their congressional principals. For example, as Judge Cudahy explains, the nondelegation doctrine "encourages accountability on the part of Congress, which will be less able, if it has to make the hard choices itself, to claim credit for the successes of its programs while blaming the failures on their implementation by the regulatory agencies."[82] Other judges and scholars focus more explicitly on the principal-agent purposes embodied within the doctrine. For example, Professors DeShazo and Freeman note the extensive consensus within the principal-agent delegation literature that "delegation is dangerous because by assigning decisionmaking power to non-elected bureaucrats, Congress risks losing control over policy outcomes."[83] Professor Jerry Mashaw frames the dominant principal-agent theme within the delegation literature as involving "the linkage between legislative and administrative action," in which "agencies are created and empowered in order to implement policy choices made in the legislative process"—in other words, agencies are viewed as the agents of Congress.[84] But Mashaw argues that a simple principal-agent focus is far too narrow, noting that agencies have much more stand-alone authority in practice: they "behave more like independent entrepreneurs seeking funding from the Congress for projects of their own than like well-instructed agents implementing their principal's orders." [85]

The cooperative federalism literature has not focused as extensively on the similar challenges that pervade the federal-state relationship.[86] Yet principal-agent problems are accentuated at this level. With agencies

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[81] *Id*. at 309.

[82] Cudahy, *supra* note 10, at 3.

[83] DeShazo & Freeman, *supra* note 9, at 1452.

[84] JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 106 (1997).

[85] *Id*.

[86] However, a growing literature has revealed nuanced forms of shared governmental authority that exist within this cooperative federalism structure and at its fuzzy edges. Scholars like Professor William Buzbee have documented and analyzed the important differences in state standards that augment federal requirements, exploring regimes in which states regulate above minimum federal standards (a regulatory "floor," such as a minimum level of environmental quality) and in which the federal government sets a ceiling of standards. William W. Buzbee, Federal Floors, Ceilings, and the Benefits of Federalism's Institutional Diversity, *in* PREEMPTION CHOICE 98, 98-114 (William W. Buzbee, ed.). *See also* Greve, *supra* note 8 (exploring accountability problems in cooperative federalism).

delegating certain regulatory roles to states, either at the specific directive of Congress or by using their discretionary powers, there are at least two layers of delegation, first from Congress to the agency and then from the federal to the sub-federal level.[87] Indeed, sometimes the delegation cascades even farther. As shown in the case studies below, agencies acting within a cooperative federalism regime often enlist several layers of sub-federal actors, including states, private industry, and local governments, in implementing federal regulation. Under the SDWA, many local governments own and operate the water treatment and delivery systems and are responsible for complying with state laws that implement the SDWA as well as certain federal drinking water standards,[88] and they often enlist private consultants to help with this task.[89]

Principal-agent challenges in the cooperative federalism context run in both directions. In some cases, federal agencies that act as principals do not only struggle to adequately monitor sub-federal entities and ensure that they are complying with minimal federal requirements—they choose not to. And when state agents wish to regulate more aggressively to address problems that they disproportionately shoulder (such as air pollution from cars in California's Los Angeles region), the principal sometimes impedes their mission.[90] Further, it is difficult for sub-federal agents, or other entities such as the general public, to monitor and influence the behavior of principals to ensure that they are carrying out their minimal duties under federal statutes given the federal-state structure and the limitations of citizen suits.

Understanding the basic building blocks that form the many different types of delegated authority within cooperative federalism enables more nuanced analysis of the principal-agent challenge in this context and methods of addressing the challenge. It supports a better understanding of the pieces that can be used to form the whole of a delegated regulatory regime, and the benefits and dangers that any one piece might pose. For example, any policymaker starting from scratch in designing delegated regulation for an area of new risk would needs to ask whether private and public actors should be involved in regulating; which actors should write and promulgate standards, monitor and enforce compliance; and the extent to which a federal agency should review and oversee other entities' regulatory work, among other questions. Agencies choosing to delegate

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87 Justin Weinstein-Tull extensively explores the accountability problems created by states' delegation or abdication of federal responsibilities to local governments. *See* Justin Weinstein-Tull, *Abdication and Federalism*, __ COLUM. L. REV. __ (forthcoming 2017).

88 *See infra* Part II.

89 *See infra* Part II.

90 *See supra* note 54 and accompanying text.

should ask these same questions. Although given certain ignoble purposes of delegation, Congress or agencies may not *wish* to design an effective regime, under existing statutory commands for basic public protections, they are required to.[91] The following Part constructs these building blocks, providing a theoretical framework for assessing delegation of federal responsibilities to sub-federal entities within cooperative federalism regimes and the need for ensuring accountability within these regimes—accountability to existing statutes mandating basic regulatory protections, to the public, and to all of the entities involved in implementing regulation.

II. THE REGULATORY DESIGN OF DELEGATION

The regulatory design of the many forms of delegation within cooperative governance serves to accentuate or limit the principal-agent challenge that unifies these forms. This calls for a theoretical framework for productive analysis. Regardless of who does the delegating, and to whom, nearly all delegation regimes can be categorized by examining three features of each regime, including the type of regulatory authority delegated (drafting and enacting regulation, for example, or monitoring and enforcing compliance), the degree of authority delegated and retained, and the type of entity receiving delegated authority.[92] This Part provides a theoretical framework for understanding the many forms of delegated agency governance that exist and for analyzing their effectiveness in terms of limiting principal-agent accountability problems. In building this framework, it uses case studies from the environmental and energy fields to provide examples of these building blocks and reveal the many ways in which they can be combined to form a delegated risk governance regime.

C. VARIATIONS IN DELEGATED REGULATORY REGIMES

When examining the panoply of ways in which federal agencies delegate their regulatory duties three basic attributes emerge. First, federal agencies delegate some or all of their regulatory responsibilities. Second, agencies delegate these responsibilities to different degrees, choosing to retain some authority by operating in parallel with those entities—for example, independently enforcing violations—or as a back-up, when the entities do not properly perform their duties. Agencies also sometime retain

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[91] *See supra* note 20.

[92] Other metrics also could be used, of course, but these are the three most basic blocks. For an example of alternative metrics in another context, *see, e.g.*, *supra* note 22.

some control over the regulatory project by reviewing the individual actions of entities with delegated control, the overall performance of those entities, or both. Finally, when delegating their regulatory duties, agencies choose to delegate to one or more types of entities, including, among others, local, state, or regional governments or private actors.

1. Type of Authority Delegated

Delegated governance regimes vary substantially in terms of the type of authority delegated by the federal agency. In a typical regulatory regime, responsibilities include: 1) drafting and promulgating standards or regulations, as well as permits issued to individual regulated entities to ensure compliance with these standards or regulations, 2) monitoring compliance with those regulations, and 3) enforcing compliance through penalties or other means when regulations are violated.

a. Drafting and Promulgating Regulations

The category of regulation drafting and promulgation is itself sometimes split because agencies do not consistently delegate this full duty. For example, in the electric reliability example described below, a federal agency relies on a private organization to propose standards to prevent grid blackouts,[93] but the agency itself must ultimately approve and formalize those standards before they become enforceable.[94] Additionally, even where federal agencies have delegated regulation drafting and promulgation to other entities, they sometimes assist with the drafting portion. For example, under the Clean Air Act example below, the EPA relies on states to write regulations designed to achieve federal air quality standards and issue permits to individual polluters that incorporate those regulations. But the EPA provides guidance as to the types of technologies that states should require through permits and regulations in order to control air pollutant emissions.[95]

b. Monitoring Regulatory Compliance

Once regulations have been drafted and finalized, effective control of various risks requires that the regulatory entity—sometimes with assistance from regulatory targets (through self-reporting of violations) or

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[93] *Supra* note 34.

[94] *Id.*

[95] Envtl. Protection Agency, RACT/BACT/LAER Clearinghouse, https://cfpub.epa.gov/rblc/.

concerned citizens—monitor whether regulatory targets are complying with the regulation. Monitoring takes many forms. Some can be done electronically. For example, digital technologies on smokestacks can measure the types and quantity of pollutants emitted from an industrial plant; this information is then automatically transmitted to an agency and posted for public review. In other cases, individual citizens or citizen groups file written complaints with an agency, call a hotline, or, if permitted, file a citizen suit, alleging violations. Additionally, some citizens and local governments conduct their own electronic monitoring by, for example, placing air pollution measurement devices near oil and gas wells.[96] Another very common yet resource intensive form of monitoring involves agency inspectors physically visiting regulatory targets to identify potential violations.[97]

c. Enforcing Compliance

A final necessary element of regulation is enforcing a violation once it has been identified. This, too, takes many forms. Sometimes enforcement occurs simply by identifying a violation and requesting that the regulatory target remedy it. For example, states—which are primarily responsible for regulating environmental impacts at oil and gas sites—commonly send inspectors to sites. These inspectors sometimes orally notify an oil and gas company of a problem, and the company immediately fixes the problem; in these cases, the violation is sometimes not even reported.[98] At another, more formal level of enforcement, the inspector issues a notice of alleged violation; the oil and gas company can dispute the allegation or remedy the problem. More formal enforcement hearings often ensue, which result in an order or settlement requiring the oil and gas company to take certain actions by a certain date to remedy violations, and, in some cases, pay civil penalties and damages.[99] Agencies take similar approaches in other areas of the law. For example, when the EPA enforces various federal environmental laws it often uses relatively informal means of enforcement, such as letters, to attempt to pressure an entity to comply; in other cases the agency files a civil suit or immediately issues a monetary penalty or other sanctions.[100]

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96 *See infra* note 231 and accompanying text.

97 *See, e.g.*, Hannah J. Wiseman, *The Capacity of States to Govern Shale Gas Development Risks*, 48 ENVTL. SCI. & TECH. 8376, issue 15 (2014) (noting inspection limitations in the oil and gas context).

98 E-mail from Leslie Savage, Chief Geologist, Texas Railroad Commission, to Hannah Wiseman, Feb. 27, 2012.

99 *See* Wiseman, *supra* note 97 (describing the enforcement process).

100 For a general discussion of agencies' use of these less formal enforcement means, *see*

Under cooperative federalism regimes, agencies independently or under congressional directive choose to delegate some or most of these regulatory tasks, as discussed in the following section.

2. Degree of Authority Delegated

Even when a federal agency delegates some or all of its three primary regulatory responsibilities—drafting and promulgating regulations, monitoring compliance with them, and enforcing compliance—the agency often retains some degree of oversight in some or all of these areas and thus does not fully delegate. The agency does this in several ways. First, an agency sometimes retains parallel authority to act alongside the delegated entity. For example, the agency might rely on another entity to write and promulgate most regulations but retain the ability to independently promulgate its own rules. Or the agency may independently enforce any violation of a regulation promulgated by the delegated entity or the entity itself. Second, an agency sometimes retains back-up authority, which allows it to write regulations, conduct monitoring, or enforce violations only when the delegated entity has failed in these duties. Finally, an agency might retain only review authority, which means that it relies on the delegated entity to write and promulgate, monitor compliance, and enforce regulations but may review this entity's actions and require the entity to change course. This is the case in the electricity reliability example below. A federal agency relies on a private organization to write all standards, but the agency must review and approve those standards and may direct the organization to re-submit and change them. Some agencies, although not reviewing each individual regulation or enforcement action of an entity with delegated authority, review the overall performance of that entity and pressure it to improve, as shown by the oil and gas example below.

3. Type of Entity with Delegated Control

An important third element of delegated governance regimes involves the types of actors that receive delegated authority. These actors differ in terms of the level at which they operate; at the lowest level citizens or grassroots organizations are sometimes involved in the regulatory effort through grassroots monitoring, citizen suits, or other mechanisms, followed by local, state, or regional governments. Private entities also play an important and sometimes overlooked role. These include individual private actors and associations of private actors. For example, states responsible for

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Tim Wu, *Agency Threats*, 60 DUKE L.J. 1841 (2011).

regulating oil and gas pollution sometimes directly incorporate standards written by the American Petroleum Institute into their regulations.[101] And in the electric reliability example below, the private entity responsible for drafting regulations to be approved by a federal agency relies heavily on the regulated electric utilities to assist in drafting.

While there is an extensive literature on industry self-governance[102] and agencies' contracting out duties to private entities, the literature has only more recently begun to closely examine agencies' delegating responsibilities to private actors. For example, Professors Karen Bradshaw Schulz and Dean Lueck examine federal agencies' reliance on landowners and nonprofit groups for much of the habitat conservation required for endangered and threatened species.[103]

The following Part provides examples of the three primary building blocks of delegated governance regimes, demonstrating the impressive range of variation in each of these three areas and how the blocks are combined in different ways. In exploring these three areas, these case studies show the principal-agent pathologies, as well as positive opportunities for improving delegated governance, within delegated governance regimes.

D. DELEGATION CASE STUDIES

When Congress directs a federal agency to delegate its responsibilities, or an agency decides to delegate if permitted by its enabling legislation, there is a wide menu of options to choose from. Although Congress and agencies have both ignoble and practical reasons for delegating (including, sometimes, a goal of obfuscating purposeful inaction), this Part assumes that given the explicit requirements of existing federal statutes, the pathologies of delegation must be explored and addressed. These case studies begin with the strongest examples of

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101 *See, e.g.*, 16 TEX. ADMIN. CODE § 3.13 (Westlaw 2017) (for oil and gas wells, requiring: "Casing meeting the performance standards set forth in API Specification 5CT: Specification for Casing and Tubing (or a Commission-approved equivalent standard) shall be used through the protection depth.").

102 *See, e.g.*, Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursors to a New Paradigm?*, 89 Geo. L.J. 257, 286 (2001); Matthew Potoski & Aseem Prakash, *Green Clubs and Voluntary Governance: ISO 15001 and Firms' Regulatory Compliance*, 49 Am. J. Pol. Sci. 235 (2005); Michael P. Vandenbergh, *Private Environmental Governance*, 99 Cornell L. Rev. 129 (2013).

103 *See* Karen Bradshaw Schulz and Dean Lueck, *Contracting for Control of Landscape-Level Resources*, 100 IOWA L. REV. 2507 (2015) (exploring the agency contracting literature and examining the particular phenomenon

dysfunction caused by a failure of federal principals—the agencies tasked with administering delegated programs—to fulfill their role within the program and to adequately monitor and enforce agents' behavior or support their needs with funding and other resources. It then moves to cases that exhibit more success—albeit with lingering challenges—in terms of both principals and agents carrying out their duties and creating synergies in both directions, with principals sometimes pushing agents toward improved regulation and, at other times, agents suggesting and carrying out effective programs that they initiate.

The case studies also fall along a broad spectrum of delegation tools, involving delegation of most or just some regulatory tasks; close or very loose short- and long-term monitoring of agents and principals; retention of small or large amounts of federal authority; and delegation to a limited number or numerous types of entities.

1. Safe Drinking Water Act

The regulation of the quality of drinking water provided to the public is an unusually complex form of delegation regime within cooperative federalism, relying on numerous layers of principals and agents. In fact, so many layers of delegation are involved—with states and local governments acting as the primary implementers of the act, and private consultants also playing a key role—that coordination and monitoring failures appear to rampant, as demonstrated by Flint. The large amount of authority delegated to these entities by the principal—the EPA—as well as the relatively small amount of authority retained by the agency accentuate these challenges.

a. Type of Authority Delegated

The EPA is responsible for writing federal standards for drinking water quality under the SDWA. The agency sets federal maximum contaminant level goal (MCLG) for water pollutants,[104] which is a particular concentration of the pollutant in drinking water. This is the level at which drinking water is deemed to have no adverse impacts on public health, including sensitive populations such as children, and is the level that states must aim to achieve.[105] States are not required to implement these

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[104] Flint Water Advisory Task Force Final Report, *supra* note 4, at 22.

[105] *See* 41 C.F.R. 141.2 (defining MCLG as the "maximum level of a contaminant in drinking water at which no known or anticipated adverse effect on the health of persons would occur, and which allows an adequate margin of safety").

standards; they may choose to allow the EPA to directly regulate within their territory. However, most states[106] have opted to receive delegated authority, meaning that they apply to the EPA to receive "primacy" under the Act. A state with primacy becomes the entity that monitors and enforces compliance with those regulations,[107] and the state must submit to the EPA a plan showing, inter alia, that it has adequate procedures and resources for monitoring and enforcing compliance with the SDWA.[108] States with primacy also must write certain drinking water regulations that are at least as strict as federal regulations and that ensure compliance with federal water quality requirements.[109] This initial application for primacy is the closest review that the EPA does regarding the adequacy of the states' (the agents') regulatory programs. It is a one-time review without a specific sunset date, meaning that over time, if the adequacy of state programs weakens over time, the agency sometimes fails to notice or take adequate action; this occurred in the case of Flint, despite warnings from various citizens to the EPA that the state lacked adequate money or resources to carry out basic SDWA requirements.[110]

b. Degree of Authority Delegated

The EPA retains only moderate authority under the Act once it has granted primacy to a state because it lacks parallel enforcement authority—the ability to enforce the Act alongside the state. This, along with the fact that the agency primarily only conducts a one-time review of the adequacy of the state program, is another central flaw in the design of this delegation scheme. Under the Act the agency only has limited back-up enforcement authority. If the public water system violates "any applicable requirement" or fails to meet a deadline—such as a deadline for installing required water treatment technology—the EPA must notify the state and issue a compliance order if the state fails to remedy the noncompliance within 30 days.[111]

c. Types of Entities with Delegated Control

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106 Mary Tiemann, https://fas.org/sgp/crs/misc/RL31243.pdf (all but two states).
107 *See* Envtl. Protection Agency, Understanding the Safe Drinking Water Act (2004), https://www.epa.gov/sites/production/files/2015-04/documents/epa816f04030.pdf (describing primacy and explaining that only the District of Columbia and Wyoming lack primacy under the SDWA).
108 42 U.S.C. § 300g-2(a).
109 Envtl. Protection Agency, *supra* note 107.
110 *See infra* note 125 and accompanying text.
111 42 U.S.C. § 300g-3(a).

Once the EPA has conducted its one-time review of a particular state's regulatory program and granted the state primacy, both private and public entities are involved in implementing the SDWA, and, as shown by this case study, numerous levels of government are involved. Local governments own and operate many drinking water systems,[112] the state regulates and monitors local governments under federal and state standards, and the EPA writes the federal standards and conducts back-up monitoring and enforcement. Local governments also sometimes hire private consultants to conduct a number of functions at their water plants and to advise them regarding required treatment technologies under the regulations.[113] The regulation of drinking water quality in Flint, Michigan—in a state with primacy—shows how the state and other entities are responsible for all three regulatory functions and failed to effectively carry out these functions.

d. Program Results

As the task force examining the Flint crisis explains, the relevant regulation involved in the Flint crisis was a federal water quality standard under the SDWA called the lead and copper rule.[114] The MCLG for lead is 0 milligrams of lead per liter.[115] To ensure that lead concentrations in drinking water are as close to the MCLG as possible, the federal lead and copper rule requires drinking water authorities to install certain types of systems that control the extent to which the water will corrode lead and copper-based pipes when it flows through them.[116] Among other mandates, for monitoring purposes the federal rule also requires drinking water suppliers to collect a specific number of samples of water quality at the tap within system users' homes and businesses, with the number of samples differing depending on the number of entities served by the supplier.[117]

In the case of lead, the State of Michigan does not have regulations to augment the federal ones. However, the state issues individual permits to public water purveyors that contain specific requirements designed to ensure compliance with the federal lead and copper standard. Further, the state is the primary entity responsible for monitoring compliance with the federal lead and copper rule (and the associated state permits), and

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112 *See infra* note 120 and accompanying text (describing how the City of Flint operated the drinking water treatment and delivery plant).
113 *See infra* note 130 and accompanying text.
114 Flint Water Advisory Task Force Final Report, *supra* note 4, at 22.
115 *Id*.
116 40 C.F.R. 141.82; Flint Water Advisory Task Force Final Report, *supra* note 4, at 22-23.
117 40 C.F.R. 141.86(c).

enforcing compliance.[118] Specifically, MDEQ provides water system "operator training and certification, operates certified laboratories, and monitors and reports on public water system violations."[119]

When the City of Flint, which owns and operates the water system, wanted to switch its water source to the Flint River, it applied to the Michigan Department of Environmental Quality (MDEQ) for two permit modifications, which the MDEQ granted.[120] In granting these modifications, the MDEQ failed to ensure compliance with the federal lead and copper rule in two key ways. It did not require that Flint install a corrosion control system, and it failed to require sampling of the quality of tap water in homes.[121] The EPA's regional agency and ultimately the federal EPA, in turn, failed to exercise their back-up enforcement mandate, in part because MDEQ reported to the EPA that it had in fact required an "optimized corrosion control program."[122] But even after the agency learned that the technology had not been installed, it failed to act for months.[123] Further, the EPA did not exercise discretionary emergency authority triggered when a contaminant threatens public health.[124] Finally, complaints lodged prior to the Flint crisis had warned the EPA that Michigan's drinking water quality program might be inadequate, and that it was problematic that the state still had primacy for the program.[125] This demonstrates inadequate monitoring of the overall performance of an entity with delegated authority.

In addition to MDEQ, other state also agencies failed in their duties. The state health agency failed to properly monitor children's blood lead levels in Flint and failed to adequately interpret data showing high blood lead levels.[126] And the Michigan Governor is ultimately responsible for the decisions of both MDEQ and the state health office.[127] Despite evidence that the water was contaminated (including direct evidence from the General Motors plant that it could not use the new water supply because it was corrosive), the Governor's office did not timely require these agencies to address their missteps.[128] Further, the Governor and Governor's office

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118 42 U.S.C. 300(g)(2) (describing how states with primacy have "primary" SDWA enforcement authority); Flint Water Advisory Task Force Final Report, *supra* note 4, at 26.
119 Flint Water Advisory Task Force Final Report, *supra* note 4, at 26.
120 *Id*. at 22.
121 *Id*. at 27.
122 *Id*. at 28.
123 *Id*. at 51.
124 *Id*. at 49; 42 U.S.C. §300i.
125 *Id*. at 50.
126 Flint Water Advisory Task Force Final Report, *supra* note 4, at 33.
127 *Id*.
128 *Id*. at 36.

participated in the initial decisions to switch the Flint water supply, and the state Department of Treasury formally approved the state emergency manager's and Flint City Council's decision to switch the water supply.[129]

At the local level, beyond the City Council's participation in switching to a corrosive water supply without installing a corrosion control system, the city hired consulting engineers for their water plant that lacked "adequate expertise and experience with river water treatment" and failed to question the state's decision to not require corrosion treatment.[130] Furthermore, although MDEQ was responsible for enforcing the lead and copper rule, it was the city's responsibility under the rule to install the corrosion treatment system and perform required sampling of tap water, which it did not do.[131] The city's failure to invest in updated pipes for distributing water also contributed to the crisis.[132] And the city, which was responsible for sampling tap water under the lead and copper rule, failed to meet sampling requirements, thus providing the EPA with flawed information.[133] Finally, the county's health department and the city failed to timely notify the public of the dangers of the water, and the department conducted inadequate testing of children's blood lead levels.[134] Of course, many of these deficiencies related to the major economic crisis the city and county faced, demonstrating the challenges that this community faced in implementing requirements due to severe budgetary constraints and the need for the principal to provide resources to assist agents who lack the resources to adequately implement regulations.

The Flint example under the SDWA shows numerous failures within a delegated governance regime. Here, the EPA had the authority to (and did) write regulations governing the problems encountered in Flint, but the EPA did not properly assert its mandatory back-up enforcement authority. Further, improper monitoring of compliance by the state agency—despite numerous warnings of likely violations from citizens and academic experts—meant that noncompliance was not detected in time to avert the disaster. The EPA also failed to respond to general concerns regarding the State of Michigan's overall performance in implementing its SDWA responsibilities, thus falling short in its monitoring responsibilities. And finally, the involvement of multiple levels of delegation in this case—including the local water provider's delegation of certain matters to private engineers without proper training in compliance requirements—might have

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129 *Id*.
130 *Id*. at 43-44.
131 *Id*. at 45.
132 *Id*.
133 *Id*. at 51.
134 *Id*. at 47-48.

exacerbated the problem. The number of entities involved in regulation might have created confusion as to who was responsible for what, and many entities might have assumed that other responsible parties were solving any problems that arose, demonstrating a sort of "regulatory commons" problem.[135] Indeed, the final Flint report diagnosing the regulatory failures in this case points to the EPA's excessive deferral of issues to the state in this matter. The report notes that except for sending "strident e-mails" to the state and issuing one interim report, the agency failed to timely Act to bring the state and City of Flint into compliance with the SDWA.[136]

2. Resource Conservation and Recovery Act

In another example of challenges within a cooperative federalism delegated governance regime, the delegated governance regime under RCRA came about due to a specific delegation Congressional decision, in which Congress directed the EPA to decide whether or not to regulate most oil and gas wastes under the hazardous waste portion of the act or to leave this regulation mostly to the states.[137] Thus, unlike the SDWA, where Congress formed a cooperative federalism regime, Congress gave the EPA the leeway to decide. The EPA's subsequent decision to leave most control to the states—one made despite agency recognition of gaps in state regulation[138]—created a regime involving delegation of nearly all federal responsibilities, with the EPA only maintaining the ability to take back regulatory control under RCRA if it so chooses. (There have recently been unsuccessful petitions to try to trigger the agency to reinstitute RCRA responsibility.[139])

a. Type of Authority Delegated

Under the SDWA example examined above, states and local governments are primarily responsible for implementing federal standards. The same is true for states that have primacy under RCRA, which regulates the disposal of both hazardous and non-hazardous wastes on land under Subtitles C (hazardous wastes) and D (non-hazardous wastes) of the Act; local governments, however, and not generally involved. In the case of oil

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135 *See* William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps,* 89 IOWA L. REV. 1 (2003).

136 Flint Water Advisory Task Force Final Report, *supra* note 4, at 51.

137 *See supra* note 57 (source describing the congressional directive that led to the EPA's decision).

138 *See supra* note 57.

139 *See infra* note 168 and accompanying text.

and gas development, in 1988 the EPA determined that most wastes resulting from the production of oil and gas—even wastes with hazardous characteristics—should not be defined as hazardous for the purposes of RCRA.[140] This decision delegated to states the independent authority to draft and promulgate regulations controlling the disposal of hazardous oil and gas wastes and to monitor and enforce compliance with these regulations.

b. Degree of Authority Delegated

When the EPA made this delegation decision, it did not wholly abdicate its regulatory, monitoring, and enforcement responsibilities. The Agency observed that some management and disposal of hazardous oil and gas wastes under state regulations had caused contamination and public health problems, and that certain gaps in state regulation remained. The EPA therefore developed a three-pronged strategy for reviewing states' regulatory decisions. First, the agency indicated that it already was using other parts of RCRA—such as the portion that covers non-hazardous wastes (including oil and gas wastes generally)—and the Clean Water Act and SDWA to fill gaps in federal regulation of oil and gas wastes.[141] For example, under the SDWA the EPA regulates the underground injection of oil and gas wastes, and the EPA indicated that its efforts to strengthen this regulatory program to address certain gaps were already underway.[142] Second, the EPA planned to work "with the Congress to develop any additional statutory authority that may be required."[143] And finally, the agency indicated that it would "encourage" changes to state regulation of oil and gas waste by working with the states.[144]

The most relevant of these approaches from the delegation perspective was the agency's decision to work with states through a voluntary program that would nudge states toward improving their regulations. While this decision did not retain any formal parallel regulatory authority for the EPA, it allowed the agency to be at least marginally involved in states' drafting and promulgation of regulation and their policies regarding monitoring and enforcement. Specifically, the agency funded and participated[145] in a non-profit organization (STRONGER)[146]

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140 *See supra* note 57 and accompanying text.
141 *Id*. at 25,446, 25,447.
142 *Id*. at 25,447.
143 *Id*.
144 *Id*.
145 *Our Team*, STATE REV. OF OIL & NATURAL GAS ENVTL. REGS., http://www.strongerinc.org/our-team/board-of-directors/ (showing EPA participation on the STRONGER board).

that made recommendations to states regarding the adequacy of the content of their regulations as well as their compliance and enforcement programs. The most recent STRONGER guidelines occupy more than 100 pages and include detailed recommendations for state regulation of oil and gas waste disposal. Some of the guidelines are quite specific with respect to substantive regulations, and others provide more general criteria. For example, in the category of state programs regulating the siting of oil and gas waste management facilities, the guidelines provide that facilities should not be "located in a flowing or intermittent stream" (a seemingly obvious priority to many, perhaps).[147] More generally, the guidelines indicate that "[w]here necessary to protect human health," new oil and gas waste management facilities should not be located near "existing residences, schools, hospitals, or commercial buildings" and that states should consider providing minimum required setback distances between the waste facilities and these types of buildings.[148]

With respect to states' monitoring regulated entities and enforcing compliance with their oil and gas waste regulations, the guidelines provide that states should monitor compliance by requiring waste management facilities to receive an individual permit or other type of approval.[149] They also recommend that if states issue individual permits, the permits should be periodically reviewed and potentially revised by the states and thus "should be issued for fixed terms."[150] Additionally, the guidelines suggest that states should have means of conducting "comprehensive investigations" of waste management and investigating specific complaints or other information about potential violations as well as the "capability to conduct regular inspections" of facilities in addition to other compliance recommendations.[151]

Finally, regarding enforcement of state regulations, the guidelines recommend mechanisms such as the ability to issue notices indicating that regulated entities have violated state oil and gas waste management rules and establishing a schedule that the entities must follow for remedying the violation.[152] They also provide that states should be able to immediately restrain a waste activity that "is causing or may cause damage to public

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146 *Support*, STATE REV. OF OIL & NATURAL GAS ENVTL. REGS., http://www.strongerinc.org/support/ (showing funding sources, including the EPA).
147 State Rev. of Oil & Gas Envtl. Regs., 2015 Guidelines 40, http://www.strongerinc.org/wp-content/uploads/2015/08/2015-STRONGER-Guidelines.pdf.
148 *Id*. at 40-41.
149 *Id*. at 21.
150 *Id*.
151 *Id*. at 22.
152 *Id*. at 23.

health or the environment" as well as use courts to address violations, among other enforcement tools.[153]

Initially, the EPA was directly involved in writing these guidelines; it worked with a group of states to write and publish guidelines in 1989 and 1990.[154] Thus, while the agency did not retain parallel authority to write regulations or monitor and enforce compliance with them, it encouraged states to regulate in certain ways by publishing the guidelines. The agency is now less involved through this role because it is not a co-author of the guidelines. Rather, one EPA representative is a non-voting member of STRONGER,[155] which writes and updates the guidelines. However, in 2014 the agency prepared a report reviewing state regulations and identifying gaps (although not weighing in on whether these gaps were problematic), showing that the agency has continued to periodically maintain an active role in reviewing the adequacy of states' oil and gas waste regulation.[156] However, the agency still has not chosen to adopt parallel regulatory authority in this area.

c. Types of Entities with Delegated Control

In delegating most of its regulatory responsibilities to the states, and less formally to STRONGER, the EPA has ceded authority to both public and private entities. The states are responsible for regulating, yet they are reviewed (if they so choose) by STRONGER--a non-profit entity that includes industry representatives[157] but also state and federal regulators. Industry representatives can provide important perspectives on the technologies and practices that might best control wastes at and beyond well sites. And the inclusion of representatives from environmental groups on the board might help offset potential industry pressure to make guidelines less stringent than they should be.

d. Program Results

The success of the regulation of oil and gas wastes under RCRA appears to be mixed at best. STRONGER claims substantial success, noting

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153 *Id*.

154 *Id*. at 5.

155 *See supra* note 145.

156 Memorandum from Patrick E. Kelly, Envtl. Protection Agency, to File, Review of State Oil and Natural Gas Exploration, Development, and Production (E&P) Solid Waste Management Regulations, Apr. 1, 2014, https://www.epa.gov/sites/production/files/2016-04/documents/state_summaries_040114.pdf.

157 *Board of Directors*, State Rev. of Oil & Nat. Gas Envtl. Regs., http://www.strongerinc.org/about-us/who-we-are/.

that with respect to its guidelines specific to hydraulic fracturing, the states reviewed by STRONGER implemented 66% of its recommendations to improve their regulatory programs, and an additional 25% of recommendations were partially implemented.[158] And many of the recommendations resulted in important regulatory changes. For example, one critical means of ensuring that hydraulically fractured wells do not allow oil, natural gas, or fracturing chemicals to seep into underground or surface water is to ensure that the wells, before they are fractured, are adequately lined with steel pipes called "casing" cemented into the well, and that the cement and casing will not crack or otherwise be compromised due to the pressure placed on the well by fracturing. In response to a recommendation by STRONGER, Louisiana issued emergency statewide rules requiring, among other things, that hydraulically fractured wells including "casing necessary to withstand . . . stresses that may be encountered" and that "the well shall be cemented in a manner which will anchor and support the casing."[159]

But a closer look at the numbers reveals a more nuanced story. Of the small number of states reviewed, even these states' implementation of the recommendations varies substantially, thus leaving certain populations more vulnerable than others. For example, while Colorado fully implemented all STONGER recommendations, Oklahoma fully implemented only two out of five recommendations.[160] In response to one STRONGER recommendation that the state's oil and gas agency "develop a more stable source of funding" so that it could have adequate staffing and equipment to run a regulatory compliance program, the agency simply indicated that it had obtained approval to get some funding from a state petroleum tax but "more work needs to be pursued in this area."[161] While agencies of course have limited control over their own funding and are at the mercy of legislative budgets, the response that the state "is heavily dependent on revenues generated by the oil and gas agency" and that more work is required is not an assurance that the agency will in fact actively and aggressively seek means of improving its resources.[162] Additionally, Oklahoma's oil and gas regulatory agency indicated that it would not

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158 State Rev. of Oil & Nat. Gas Envtl. Regs., A Report and Summary of Outcomes from 2010-2012 Hydraulic Fracturing State Reviews 4, http://www.strongerinc.org/wp-content/uploads/2016/10/A-Report-and-Summary-of-Outcomes-from-2010-2012-Hydraulic-Fracturing-State-Reviews.pdf.

159 LAC 43:XIX.205(A).

160 *Id*. at 3.

161 *Id*. at 29

162 *Id*.

specially train its staff, as recommended by STRONGER, due to resource limitations.[163]

Although inadequate inspection and enforcement resources, including training resources, plague many oil and gas states, it is also possible that Oklahoma's decision to not follow some of the STRONGER recommendations stems from the fact that the oil and gas industry is a major component of the state's economy,[164] and the state tends to resist calls to modify its regulations or address environmental impacts caused by the industry. For example, despite mounting scientific evidence[165] that underground disposal wells for liquid oil and gas wastes were causing numerous earthquakes in the state, including relatively large earthquakes, the state repeatedly denied a causal link[166] before finally conceding that practices needed to change.[167]

The STRONGER recommendations themselves—even when implemented by states—might not be enough to control the risks of oil and gas waste disposal. The Natural Resources Defense Council, which unsuccessfully petitioned the EPA to revisit the agency's exemption of oil and gas wastes from RCRA hazardous waste regulation, pointed to state agency reports and other sources showing toxic oil and gas wastes, some of which contaminated environmental resources,[168] and noted substantial gaps

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163 *Id*. at 30.

164 State Chamber of Oklahoma, Top Economic Facts About Oklahoma's Oil and Gas Industry (Jan. 2014), http://www.okstatechamber.com/files/MS_OilGasFacts.pdf (estimating that "[o]il and gas firms account for only 3.2% of all business establishments but hire 5% of wage and salary workers, produce 10% of state GDP, and generate 13.5% of total earnings statewide").

165 *See, e.g.*, Cliff Frohlich, *Two-year survey comparing earthquake activity and injection-well locations in the Barnett Shale, Texas*, 109 PROC. NATL. ACAD. SCI. 13834 (2102) (showing a link between disposal wells and earthquakes); Katie M. Keranen et al., *Potentially Induced Earthquakes in Oklahoma, USA: Links Between Wastewater Injection and the 2011 Mw 5.7 Earthquake Sequence*, 45 GEOLOGY 699 (Mar. 26, 2013) (showing a correlation and likely causation between the disposal wells and earthquakes).

166 *See, e.g.*, Corey Jones, *Mounting evidence says injection wells cause Oklahoma's earthquakes*, TULSA WORLD, Apr. 11, 2016, http://www.tulsaworld.com/news/state/mounting-evidence-says-injection-wells-cause-oklahoma-s-earthquake-surge/article_bf9a2055-01de-5b26-914e-48dac5c0eded.html (last visited Feb. 10, 2017) (noting "years" of debate and denials before the state took action).

167 *See Earthquakes in Oklahoma FAQs*, Oklahoma.gov, https://earthquakes.ok.gov/faqs/ (last visited Feb. 16, 2017) (state agency conceding that "there's little doubt that wastewater injection from fracking operations is playing a role in the state's increased seismic activity" and noting that "[t]he State of Oklahoma is now telling oil and gas companies to reduce their wastewater injections at dozens of disposal sites").

168 Letter to The Honorable Lisa Jackson from Natural Resources Defense Council, Sept. 8, 2010, Petition for Rulemaking Pursuant to 6974(a) of the Resource Conservation and Recovery Act Concerning the Regulation of Wastes Associated with the Exploration,

in state regulations.[169] For example, NRDC observed that some states limit the minimum distance between application of oil and gas waste to the surface of land (a method allowed in many states), but the siting distances vary, and some states have no siting regulations for land application of waste.[170] Other publications similarly note gaps in regulation.[171] The EPA's own review of states' oil and gas waste regulatory programs notes that states "typically" do not have regulations that require ground water monitoring around oil and gas solid waste facilities, among other missing regulations at the state level, although the report does not pass judgment based on this observation.[172]

Beyond the regulatory gaps, there is evidence of pollution from inadequate control of waste disposal. Surface spills at oil and gas sites are not uncommon,[173] and some have resulted in pollution of environmental resources.[174] Thus, on the one hand, RCRA delegation—under which the EPA originally transferred most authority to states with the explicit recognition that some gaps remained in state regulation—might have achieved its partially ignoble purpose of avoiding potentially important regulation due to its costs to industry and the political pressures against more stringent regulation. On the other hand, the use of STRONGER shows

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Development, or Production of Crude Oil or Natural Gas or Geothermal Energy 8, 12, https://www.nrdc.org/sites/default/files/ene_10091301a.pdf.

169 *Id*. at 24.

170 *Id*.

171 NATHAN RICHARDSON ET AL., RESOURCES FOR THE FUTURE, THE STATE OF STATE SHALE GAS REGULATION: MAPS OF STATE REGULATIONS (2013), http://www.rff.org/files/document/file/RFF-Rpt-StateofStateRegs_StateMaps_0.pdf, (showing variations in a variety of state requirements, including some states that simply do not regulate in areas that other states do); Hannah J. Wiseman, *Risk and Response in Fracturing Policy*, 84 U. COLO. L. REV. 729 (2012) (documenting regulation variation); Michael Burger, *Fracking and Federalism Choice*, 161 U. PA. L. REV. ONLINE 150 (2013) (arguing that there is a case for federal regulation of hydraulic fracturing and noting the impacts on communities).

172 Memorandum from Patrick M. Kelly, P.E., Office of Resource Conservation and Recovery, Review of State Oil and Natural Gas Exploration, Development, and Production (E&P) Solid Waste Management Regulations, Apr. 1, 2014, https://www.epa.gov/sites/production/files/2016-04/documents/state_summaries_040114.pdf.

173 *See* Lauren A. Patterson et al., *Unconventional Oil and Gas Spills: Risks, Mitigation Policies, and State Reporting Requirements*, ENVTL. SCI. & TECH. (forthcoming 2016) (finding that between 2 and 16% of active unconventional oil and gas wells in four states experienced spills during all stages of the life cycle); ENVTL. PROTECTION AGENCY, HYDRAULIC FRACTURING: IMPACTS FROM THE HYDRAULIC FRACTURING WATER CYCLE ON DRINKING WATER RESOURCES IN THE UNITED STATES (2016) (reporting a spill rate of 0.4 to 12.2 percent for the hydraulic fracturing process).

174 For an examination of some of the risks and actual pollution events, *see, e.g.*, Wiseman, *supra* note 171.

a creative mechanism of involving industry, federal and state agencies, and environmental groups in an effort to review the adequacy of agents' regulatory programs, although these are largely one-time reviews with limited follow-up.

3. Clean Air Act

The Clean Air Act—one of the most complex and frequently-discussed examples of cooperative federalism—does not involve as many layers of delegation as the SDWA does. However, both states and local governments are centrally involved in its implementation, and, as with the SDWA, numerous regulatory tasks, including drafting and enacting, monitoring, and enforcing regulations—or at least portions of these tasks—are delegated. The EPA retains more substantial authority to independently enforce violations of the Act, and private entities are less centrally involved in the regulatory scheme.

a. Type of Authority Delegated

The Clean Air Act is one example of a federal agency delegating portions of all three regulatory functions to states but retaining strong parallel and back-up authority. As required by the complex cooperative federalism scheme required by the statute, the EPA directs the states to promulgate their own regulations to achieve federal air quality standards and issue permits to ensure compliance with these regulations; the states must do this through state implementations plans (SIPs).[175] States also must monitor compliance and enforce these permits. When the EPA reviews SIPs, among other things states must specifically demonstrate that they have the resources necessary to implement their regulations and proper penalties for enforcing noncompliance.

b. Degree of Authority Delegated

Although the EPA has delegated all three regulatory functions under the Clean Air Act, it retains substantial parallel and back-up authority and therefore has not fully delegated control to the states. With respect to back-up authority in this area, if states write an inadequate SIP or fail to write one within federal deadlines, or if their plan becomes outdated and weak, the EPA may "recall" the SIP and issue its own, thus directly imposing federal

[175] 42 U.S.C. § 7410.

requirements on actors previously regulated by the states.[176] Although the EPA has only rarely used this authority in practice—largely for political reasons[177]—it is a strong back-up authority with respect to the ability of the agency to issue its own regulations rather than relying on the state to do so.

As directed by Congress, the EPA also retains parallel authority to write and promulgate certain regulations. For example, although states must achieve federal standards through regulations and permits issued under their SIPs, as air quality issues have continued or new problems have emerged, Congress has directed the EPA to write specific standards, which states must then incorporate into their SIPs. One of the major federal standards applies to new sources of pollution. As numerous new industrial sources were constructed—thus causing expanding air pollution—Congress required the EPA to write technology-based standards to control pollution from the sources.[178] States must then implement these standards by drafting and promulgating specific regulations under their SIPs and including technology-based requirements in the individual permits that they issue to polluters. Here, too, the federal government retains some control in the states' drafting of regulations. The government defines which technologies states may choose to include in their regulations and permits through a clearinghouse that identifies the pollution control equipment and processes that polluters have successfully tested or used at their facilities.[179]

As introduced above, states are additionally responsible for indicating within their SIPs how they will monitor and enforce compliance with SIPs and demonstrating that they will have adequate resources to conduct this monitoring and enforcement.[180] But in another example of parallel authority, the EPA has the ability to independently monitor regulated entities' compliance with both state and federal requirements under the Act. For instance, the agency may inspect the premises of regulated entities and require reporting and emissions measurement.[181] To implement federal controls on certain emissions, the agency also requires some polluters to continuously monitor emissions from their

176 42 U.S.C. § 7410(c) (giving the EPA the authority to write and issue a federal implementation plan).

177 *See* Thomas O. McGarity, *Missing Milestones: A Critical Look at the Clean Air Act's VOCE Emissions Reduction Program in Nonattainment Area*, 18 VA. ENVTL. L.J. 41 (1999) (noting how FIPs are rarely used).

178 42 U.S.C. §§7470-7479.

179 Envtl. Protection Agency, *supra* note 95.

180 42 U.S.C. § 7410 (a)(2)(B)-(C).

181 *See* 42 U.S.C. § 7414 (under the Clean Air Act, granting the EPA the authority to require reporting and to inspect regulated entities in addition to other monitoring authority).

smokestacks;[182] digital readings from these monitors flow to a centralized EPA database that reports these emissions.

The agency also retains substantial enforcement authority under the Act. Some of this enforcement authority is independent, parallel authority to enforce a violation, meaning that either the state or the EPA may require compliance with a Clean Air Act regulation, permit, or SIP.[183] For example, the EPA may issue orders requiring regulated entities to comply with SIPs or permits.[184] Other authority is back-up authority; the EPA must first find that the state has consistently failed to enforce its SIPs or permits under the SIP before conducting its own enforcement—including, for example, issuing penalties and taking civil actions for violations of the SIP.[185] The EPA also must first give the state the opportunity to correct its failed enforcement program before the EPA uses this enforcement authority.

c. Types of Entities with Delegated Control

Beyond the states, citizens and citizen groups play an important role in triggering the drafting and promulgation of regulations, monitoring compliance, and enforcing compliance. Through a citizen suit provision that essential partially delegates to citizens the role of monitoring and enforcement, citizens may[186] and often do file lawsuits alleging that the EPA has failed to perform a non-discretionary duty, such as writing a rule under the Clean Air Act. They also may sue alleging that an entity has violated the Clean Air Act and the EPA and states have failed to address this violation. Citizens may not, however, sue the states for failing to perform a non-discretionary duty, and some argue that this is a major flaw in the act because it requires the EPA to monitor the entities primarily responsible for implementing the Act.[187]

d. Program Results

The Clean Air Act has been hugely successful from the perspective of reducing the concentration of numerous pollutants in the air,[188] although some persistent pollution problems continue to elude regulators—

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182 40 C.F.R. part 75.
183 42 U.S.C. 7413(a)(1).
184 *Id*.
185 42 U.S.C. 7413(a)(2).
186 42 U.S.C. § 7604.
187 Anuradha Sivaram, *Why Citizen Suits Against States Would Ensure the Legitimacy of Cooperative Federalism under the Clean Air Act*, 40 Ecology L.Q. 443 (2013).
188 *See* Envtl. Natl. Emissions Totals, https://www.epa.gov/sites/production/files/2015-07/national_tier1_caps.xlsx (showing substantial reductions in air pollutants over time).

particularly pollution from cars. Further, the EPA continuously battles with certain states over their SIPs, and its use of FIPs is very rare, in part due to political difficulties associated with past attempts to impose FIPs. For example, as documented by Professor John Dwyer, after Congress attempted to require all states to include transportation and land use controls in their SIPs to address air pollution (from cars traveling long-distances from poorly-designed suburbs, for example), the EPA's FIPs failed in many circuit courts.[189] The agency eventually stopped defending certain aspects of the FIPs on appeal, and Congress repealed the requirement that states include land use elements in their SIPs. Further, after Congress required states to include inspection and maintenance programs in their SIPs or be sanctioned by the EPA, and several states failed to implement proper programs, the EPA refused to issue these sanctions for a long period of time. Additionally, it reached political compromises with states like California rather than issuing sanctions.[190] More recently, the agency's efforts to prevent states from approving activities that send harmful pollutants across state borders resulted in court battles spanning more than a decade.[191]

In other cases, the EPA has more actively reviewed and enforced state SIP failures. Under the Clean Air Act, if states through their SIPs have not achieved compliance with federal air quality standards, EPA may, but is not required to, step in and directly regulate.[192] This allows the EPA to monitor whether states' SIPs are working. When the EPA determines that they are not, if often gives states a grace period during which they can attempt to improve their regulatory programs. If the state still has failed to meet the standards, the EPA designates the region of the state that is not in compliance as a "nonattainment" area, which triggers additional, stricter federal regulations that apply to sources of air pollution. One helpful

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189 John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1204 (1995).

190 *Id*. at 1212-1216.

191 Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000) (upholding most aspects of the EPA's rule (a NOx SIP Call) recalling numerous state SIPs and addressing emissions of nitrogen oxide that cross state borders); North Carolina v. EPA, 531 F.3d 896 (D.C. Cir. 2008) (vacating the EPA's Clean Air Interstate Rule designed to reduce sulfur dioxide and nitrogen oxides that crossed state borders, but later keeping the rule in place until the EPA developed a new rule, North Carolina v. EPA, 550 F.3d 1176 (D.C. Cir. 2008)); *EPA v. EME Homer City Generation*, 134 S.Ct. 1584 (2014) (upholding the EPA's Cross-State Air Pollution Rule, which replaced the Clean Air Interstate Rule).

192 However, the EPA must write a FIP if the state "is not implementing a previously approved SIP," and a NAAQS violation could indicate inadequate implementation, in which case a FIP is technically required. Alec C. Zacaroli, Meeting Ambient Air Standards: Development of the State Implementation Plans, *in* THE CLEAN AIR ACT HANDBOOK 43, 53-54 (Julie R. Domike & Alec C. Zacaroli, eds. (2011).

example of this form of EPA monitoring of states' regulatory programs comes from Colorado in the area around Denver, which recently experienced booming oil production. As oil production expanded, oil companies stored more of a substance called "condensate" near wells. Condensate is a very light, more volatile form of oil that, when stored in open tanks or tanks with leaky valves, sends various pollutants into the air due to volatilization of the substance. Condensate, along with traffic in the Denver area, was one of the primary contributors to this area's smog problem caused by ground-level ozone.[193]

Due to the persistent smog problems in this area, the EPA designated it as nonattainment. However, it delayed formal designation, giving the state additional time to attempt to reduce smog.[194] The agency signed a compact with the state and other entities responsible for maintaining air quality under Colorado's SIP (including local governments).[195] Through this "early action compact," these entities agreed to take certain actions to attempt to reduce ground-level ozone emissions.[196] These actions failed, but the EPA granted several extensions for the state to attempt to come into compliance.[197] In 2007, when attainment of federal air quality standards still had not been achieved in this area, the EPA refused to further extend Colorado's options, and it officially labeled the Denver area as being in nonattainment.[198]

This is an example of a relatively active role of the agency in monitoring the adequacy of a delegated entity's regulatory program. In this case EPA continued to review whether Colorado's updated regulatory efforts to reduce smog were working. When these efforts failed, the agency stepped in and triggered additional federal requirements.

In summary, the Clean Air Act—the first major cooperative federalism statute, which served as a model for many others to come—represents a complex combination of the primary delegation building blocks. In administering the Act, EPA has had both successes in terms of monitoring and working proactively with states to achieve important regulatory outcomes, and major failures in terms of its inability to rein in states like Texas, which have repeatedly resisted implementation of the Act. While some "rebelliousness" under the Act has allowed states to take

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193 Dale Wells, Colorado Department of Public Health and Environment, Condensate Tank Emissions at 2, http://www.epa.gov/ttnchie1/conference/ei20/session6/dwells.pdf.

194 *Denver's air quality violates federal ozone standard*, ENVTL. PROTECTION AGENCY, https://yosemite.epa.gov/opa/admpress.nsf/8b770facf5edf6f185257359003fb69e/9b53db89076c8dd585257399005f6483!OpenDocument (last visited Jan. 10, 2017).

195 *Id*.

196 *Id*.

197 *Id*.

198 *Id*.

aggressive measures to address localized, problematic conditions like smog caused by automobiles in Southern California, similar resistance has resulted in foot-dragging, leading to some parts of the country—including major portions of Texas, one of the leading opponents to implementing the act—to remain out of compliance with federal standards.[199]

4. Energy Policy Act

A final area that shows substantial reliance on a private organization to carry out regulatory responsibilities—but also an unusual degree of oversight authority exercised by a federal agency—is FERC's regulation of electricity reliability under the Energy Policy Act. Maintaining a reliable electricity supply involves ensuring that power plants instantaneously provide adequate amounts of electricity when customers demand it and ensure that the power grid is not compromised by physical problems, such as falling trees or vandalism, or cyber issues. Prior to 2005, FERC had essentially no regulatory role in this area. This was not a matter of delegation. Rather, FERC simply had not regulated electricity reliability despite arguably having congressional authorization to do so.[200] Instead, the agency had left most responsibility to a private organization called the North American Electric Reliability Council. This council, comprised of utilities that own and operate power plans and transmission lines, was a self-regulatory entity. These industry members wrote guidelines, monitored compliance, and self-enforced the guidelines. This later changed, as described in the delegation system explored in this section.

a. Type of Authority Delegated

The lack of public involvement in regulating electricity reliability changed beginning in 2003, when a massive electricity black-out, which started in Ohio, cascaded throughout the eastern electricity grid, leaving

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199 *See Current Nonattainment Counties for all Criteria Pollutants*, Envtl. Protection Agency, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0ahUKEwi8w5ShhKnSAhXollQKHS29DwoQFggkMAI&url=https%3A%2F%2Fwww3.epa.gov%2Fairquality%2Fgreenbook%2Fancl.html&usg=AFQjCNFrWoq6dkQ9HFAIbMpYa8qhYV7Wxg&sig2=jMPTL_S7aonvIoqYoY8k9g&cad=rjt (showing many counties in Texas as failing to comply with federal air quality standards).

200 The Federal Power Act granted to FERC's predecessor the authority to regulate "transmission of electric energy in interstate commerce," and most of the transmission grid is considered to involve interstate commerce.

millions of people in the dark.[201] Following this blackout, Congress through the Energy Policy Act of 2005 directed FERC—the federal agency primarily responsible for regulating energy—to select an electric reliability organization that would govern grid reliability.[202] NERC was the only organization that applied for this job, and FERC approved it as the U.S. electric reliability organization. Pursuant to congressional directives, FERC still maintains a primary role in promulgating but not enforcing regulations. NERC must prose electricity reliability standard-—the rules that require electric utilities and owners and operators of electricity transmission lines to take actions like regularly trimming trees that could fall on power lines[203] and identifying all vulnerable computer controls of plants and lines that could be subject to cyber attack or technical failures.[204] FERC then reviews and approves those standards.

FERC also relies on NERC to monitor compliance and enforce reliability standards, although FERC has parallel enforcement authority.[205] Additionally, FERC's retained authority to oversee the entity to which it has delegated power is unusually detailed, as discussed in the following section. Unlike the Clean Air Act, where the federal agency reviews SIPs but must give states a reasonable amount of latitude in their choice of regulations under the SIPs, FERC maintains broad discretion to reject the standards.

b. Degree of Authority Delegated

Under the Energy Policy Act of 2005 Congress mandates that FERC directly monitor NERC, and FERC therefore maintains an important regulatory role. As introduced above, the Act requires FERC to review and approve, reject, or approve as modified all electric reliability standards proposed by NERC.[206] This forces the agency to continuously review the content of the regulations written by the entity holding delegated authority. Although FERC many not independently draft standards, it may require

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201 U.S.-Canada Power System Outage Task Force, Final Report on the August 14, 2003 Blackout in the United States and Canada (2004), https://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/BlackoutFinal-Web.pdf.

202 *See* EPAct 2005 § 1211 (codified at 16 U.S.C. § 824*o*(a)-(c) (directing the Federal Energy Regulatory Commission to select an electric reliability organization and receive proposals for reliability standards from this organization).

203 *See* FAC-003-04, Transmission Vegetation Management, http://www.nerc.com/_layouts/PrintStandard.aspx?standardnumber=FAC-003-4&title=Transmission%20Vegetation%20Management.

204 CIP-002-5.1a, Cyber Security – BES Cyber System Categorization (standard requiring identification of all vulnerable computerized devices).

205 Energy Policy Act 2005 § 1211 (codified at 16 U.S.C. § 824o (e)(3).

206 *Supra* note 34.

NERC to write standards addressing specific issues and remains ultimately responsible for promulgating the standards. Additionally, Congress requires the agency to receive notice of all of NERC's enforcement actions, and each action may be reviewed and approved or rejected by FERC.[207]

c. Entities With Delegated Authority

This substantial amount of oversight is likely for good reason because of the unusual degree of direct delegation to a private entity in this case. NERC is a corporation, not a government agency, and utility owners and operators are very active in developing NERC-proposed standards through its committees.[208] NERC also follows a process approved by the American National Standards Institute,[209] a non-profit organization that develops standards approval processes used by industry associations and other non-profits writing their own norms and guidelines.[210] The participation of industry actors in developing reliability standards is critical because they are most familiar with the technical aspects of the grid that ensure reliability, but it also could result in an undue amount of private influence without adequate supervision.

FERC's oversight authority is also important because NERC is not the only entity with delegated FERC authority. NERC delegates much of its work for drafting reliability standards and enforcing them to smaller groups called Regional Entities, or REs. RE members include all segments of the utility industry, including power plant owners and operators, transmission line owners and operators, and electricity end users, among other members.[211] REs, in turn, are responsible for carrying out the requirements of reliability standards and ensuring that the grid is in fact reliable; they often delegate the tasks of implementing reliability standards through contracts with utilities, which are responsible for operating the

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207 EPAct 2005 § 1211 (codified at 16 U.S.C. § 824*o*(e)(1)-(2) (requiring the electric reliability organization to file "notice and the record of the [enforcement] proceeding" with FERC and providing that "[s]uch penalty shall be subject to review by the Commission, on its own motion or upon application by the user, owner or operator that is the subject of the penalty").

208 *Standing Committees and Other,* NORTH AM. ELECTRIC RELIABILITY CORP., http://www.nerc.com/comm/Pages/default.aspx (last visited Feb. 23, 2017).

209 *See* Memorandum from NERC Legal Standards Departments to NERC Standards Process Input Group, Mar. 15, 2012 (describing NERC processes that meet or exceed ANSI requirements and those that differ).

210 *See, e.g.*, ANSI Reaccredits API's Standards Program, http://www.api.org/news-policy-and-issues/news/2011/10/06/ansi-reaccredits-apis-standards-program.

211 *Regional Entities*, NERC, http://www.nerc.com/AboutNERC/keyplayers/Pages/Regional-Entities.aspx.

transmission grid and power plants that are subject to reliability standards.[212]

d. Program Results

As FERC has reviewed NERC's and REs' standards and processes for developing standards, as well as their enforcement actions, it has used its strong oversight authority and has not merely rubber stamped the proposals. It often has required numerous changes to the standards (albeit, in some cases, changes that NERC anticipated that it would have to make).[213] The Commission also has ordered NERC to submit revised standards that FERC had requested and NERC failed to timely provide.[214] In the compliance and enforcement context, FERC sometimes has required additional penalties to be imposed for a utility's violation of a standard[215] or indicated that notices of penalty or settlements between NERC and violators or standards are inadequately detailed and lack needed information to support accurate penalty calculation.[216] Several observers have noted that these and other FERC actions have generated substantial tensions between the two entities[217] and that some view FERC as inflexible and inadequately deferential to NERC's expertise.[218]

It is unclear whether FERC's relatively strong exertion of its authority has resulted in improved electricity reliability. The electric grid remains highly vulnerable to cyber attacks, as shown by recent incursions by China and other countries, and large storms, as demonstrated by Superstorm Sandy. But substantial progress toward grid liability also has been made.

Together, these four case studies demonstrate substantial variance among delegated governance regimes in terms of the type of authority delegated, the extent to which the delegating agency oversees others' actions, and the types of entities receiving delegated authority. The

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212 Order Approving Stipulation and Consent Agreement, Docket No. IN08-5-000, https://www.ferc.gov/CalendarFiles/20091008102212-IN08-5-0001.pdf (showing that Florida Power and Light was acting as the Reliability Coordinator for the RE under a contract with the RE).

213 Jon S. Moot, *When Should The FERC Defer to The NERC?*, 31 Energy L.J. 317, 321 (2010).

214 *See, e.g.*, Mandatory Reliability Standards for the Bulk Power Systems, Order Setting Deadline for Compliance, 130 F.E.R.C. P 61,218 (2010).

215 Scott Grover, *FERC Guidance Order Shows Inter-Agency Tension*, 23-WTR Nat. Resources & Env't 61, 63(2009) (describing FERC Guidance Order No. 672).

216 *Id*.

217 Moot, *supra* note 213; Grover, *supra* note 213.

218 Moot, *supra* note 213.

following Part draws lessons from these case studies regarding the benefits and pitfalls to be considered within each building block of a delegated governance regime in order to constrain principal-agent challenges and enhance opportunities for effective regulation under delegated governance.

III. LESSONS FROM DELEGATED GOVERNANCE REGIMES

Legislators considering requiring an agency to delegate certain responsibilities, or agencies choosing to delegate based on existing enabling authority, would benefit greatly simply from an understanding of the basic components of delegated regimes and the aspects of regulatory design that appear to enhance or limit principal-agent challenges. This would allow them to separately consider, for example, whether the exercise of drafting versus promulgating regulation, or enforcing and monitoring compliance, would best be primarily conducted by the federal agency or an entity with delegated authority. But to effectively piece together the various building blocks of the regime, these entities need guidance as to the likely opportunities and drawbacks posed by the choices within each category. Much more scholarly and practical work will be required to fully flesh out the costs and benefits of different approaches under each building block, but this Part analyzes some of the key normative considerations that must drive this effort.

A. TYPE OF AUTHORITY DELEGATED: ENHANCING DISAGGREGATED REGULATORY AUTHORITY

When considering whether to delegate all or some of the core regulatory functions of drafting and promulgating regulations, monitoring compliance, and enforcing regulations, designers of a delegated governance regime should consider the trade-offs of lumping these functions together and relying on one level of government to perform all three versus parceling out different tasks to different entities. Federalism scholars have noted the benefits of making several levels of government responsible for a particular regulatory task, as it can provide the types of checks and balances seen at the federal level with the tripartite governance system.[219] If one entity fails in its regulatory duties, another might notice this failure and pick up the slack. Further, Professors Jody Freeman and Jim Rossi have observed that

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[219] *See* Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459 (2012) (observing that cooperative federalism, not just full delegation of authority to states, can enhance separation of powers protections).

overlapping authority over a particular regulatory issue—whether at the same or several governance level—allows different entities to bring different skills and resources to the regulatory table,[220] although also noting the challenges.[221]

But the Flint case study, in particular, highlights these challenges. The many entities with different regulatory responsibilities—the local government's operation of the plant and duty to implement state and federal standards, the state's duty to enforce plant decisions, the EPA's mandate to conduct enforcement where the state failed to, and state and county health agencies' responsibility for proper monitoring of the effects of poor water quality—all brought different skills to the table. Health agencies, rather than environmental agencies, likely have the staff with the expertise necessary to monitor blood lead levels, for example. But poor communications among these entities, and a failure of any one responsible agency to correct others' failures, led to disaster. Here, there were several "umbrella" entities that could have gathered the various parties and coordinated their actions, such as the Governor's office or the Michigan environmental agency, as well as the EPA and its regional office. They failed to play this coordinating role. When so many levels of delegation are involved, clearer roles for umbrella organizations must be specified to ensure that the many players are properly monitored and coordinated.

One solution would be for the federal agency, when delegating to multiple parties, to specify a particular organization responsible for coordinating a website in which all parties shared information on regulatory activities, including permits or variances granted, new standards approved, enforcement actions taken, etc. An individual at each organization with delegated responsibilities would be assigned the task of regularly updating this website, and the site could be configured so as to alert the other entities to a new action.

As an alternative to engaging an umbrella organization in oversight and coordination functions, Jody Freeman and Jim Rossi have noted a variety of other tools for inter-agency coordination, and these could apply equally to inter-governmental coordination among federal, state, local, and other entities. These tools include, for example, inter-agency consultation and coordination agreements in addition to a higher-level coordinating entity (in the case of federal agencies, the President, but a governor of a state or a state agency could perform a similar function).[222]

The comparative advantage of various levels of governments also must be carefully considered in deciding which regulatory functions to delegate.

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220 Freeman & Rossi, *supra* note 13 at 1150-51.

221 *Id*.

222 Freeman & Rossi, *supra* note 19, at 1157-1181.

For example, as discussed in Part III.C, in the electricity reliability example, NERC likely is the best entity to originally propose the content of reliability standards because of its detailed expertise in the technical details of electricity reliability. And FERC's role in reviewing and finally approving the standards is beneficial because it provides a check on any potential industry bias against necessary reliability standards viewed as overly stringent. Further, although federal agencies with adequate numbers of staff could be just as "close" to the governed entities as states, under the existing structure regional entities and NERC are likely the best entities to primarily rely upon for monitoring and enforcement given their frequent interactions with the regulated industry. Again, involving FERC in individually reviewing enforcement actions also helps to check potential problems associated with the fox guarding the hen house.

Additionally, taking "federalism all the way down"[223] seriously by engaging non-profits and citizens in the monitoring and enforcement aspects of the regulatory project is also key, as discussed below in the context of considerations regarding the levels and types of entities to which tasks should be delegated. STRONGER provides an beneficial example of environmental group and industry involvement—as well as state and federal agency participation—in monitoring the performance of state programs in the oil and gas context.

B. Degree of Authority Retained: Improving the Quality, Quantity, and Duration of Monitoring

The Flint crisis, in particular, sheds light on the critical role of federal agencies in overseeing the entities to which they have delegated regulatory tasks, and the equal importance of citizens, state agents, and other entities overseeing federal principals. Particularly in an area that is central to public health—where just one mis-step can lead to a dangerously contaminated water supply and affect large numbers of people—delegation without adequate oversight is extremely dangerous. The crisis also demonstrates the importance of designing and carrying out an oversight regime that carefully considers how well monitoring is conducted, what types of monitoring occur, and how often officials conduct monitoring activities.

1. Quality Monitoring: Enhanced Use of Technology and Citizen Oversight

223 Gerken, *supra* note 19.

With respect to the quality of monitoring within delegated governance regimes, officials need correct information in order to properly assess the outcomes of a delegated regulatory program. In the case of Flint, EPA officials initially lacked proper data because state and local officials told them that a corrosion control system had been installed, which was not true. Additionally, state and federal officials lacked adequate and accurate data from tap water tests because the Flint plant operators had not conducted the proper amount or type of tap water testing. The crisis was only fully revealed after academics and citizens repeatedly sent testing data and complaints to officials at the federal and state level indicating that there was a problem with the water.

The SDWA, and the lead and copper rule promulgated under the SDWA, has testing requirements designed to avoid this type of situation—requirements that the local water authority and state agency simply did not follow.[224] But when a federal regulation contains requirements both for substantive outcomes, such as installing proper water treatment technologies and maintaining certain water quality, as well as testing for those outcomes, federal officials need to properly review whether the entity with delegated authority is meeting both of these requirements. Due to limited capacity at the federal level (and, in some cases, federal resistance to regulatory involvement generally), this task can be difficult, but there are several solutions.

Following the lead of Daniel Esty,[225] who highlighted the enormous potential of technology to revolutionize environmental law, many scholars have noted the opportunity for monitoring technologies to improve compliance.[226] Indeed, for a challenge like water contaminated by the pipes leading into homes and businesses, "smart" digital technologies installed on even a few hundred taps—which automatically sent information to the water supplier—would have quickly revealed the lead contamination. Some water systems already deploy similar digital monitors to transfer information about water leaks and other system inefficiencies, and similar devices could reasonably be deployed for water contamination. Indeed, using technology rather than people to monitor large-scale problems like contamination at thousands of individual water taps would save agencies at all levels of government a great deal of time and money.

Where monitoring technologies are not broadly deployed—or even where they are—citizens also play a critical role, as a growing literature on

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224 *See supra* note 121and accompanying text.

225 Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115 (2005).

226 *See, e.g.*, Markell & Glicksman, *supra* note 22 (describing the potential of electronic monitoring technologies).

"bucket brigades" documents.[227] Individuals with "boots on the ground" can conduct the large-scale monitoring that a few agency inspectors cannot realistically perform. While there are substantial challenges associated with educating these citizen enforcers so that they collect and report accurate and uniform data, regulatory officials and academics can help to provide the training and resources necessary. This is also costly. As shown in the RCRA case study, Oklahoma indicates that it lacks the funding even to properly train its inspectors,[228] although it might have also other motivations for less-than-optimal levels of training and inspection. But an up-front investment in training and the technologies that citizens need in order to conduct effective monitoring could have high pay-off and save money over time by replacing certain official inspections with citizen efforts. Further, as shown by the Flint crisis, academics that already have the expertise needed for effective monitoring could be more regularly consulted and supported in order to assist the monitoring effort.

2. Frequent and Long-Term Review

Beyond ensuring that monitoring provides accurate, high-quality data, all of the case studies in Part I highlight the importance of conducting frequent monitoring of individual actions carried out by the principal and the agents with delegated authority, as well as long-term assessment of program results. In the case of the Clean Air Act, if federal officials do not regularly, repeatedly review states' SIP programs—and whether states are meeting federal air quality standards—they will miss changes that cause increased air pollution, such as booming oil and gas development. The EPA avoids this problem by maintaining a network of digital air quality monitors around the country, typically operated by states, and by requiring continuous monitoring of emissions from smokestacks. However, there is growing recognition of micro-pockets of polluted air,[229] such as near oil and gas sites, which would not be detected by existing monitors. And sometimes federal agencies are not motivated to act on this monitoring data, or the President encourages them to shirk. Here, again, citizens,[230] local

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227 *See, e.g.*, Dara O'Rourke & Gregg P. Macey, *Community Environmental Policing: Assessing New Strategies of Public Participation in Environmental Regulation*, 22 J. POL'Y ANALYSIS & MGMT. 383 (2003) (describing citizens' involvement in monitoring air quality at hydraulically fractured oil and gas sites).

228 *See supra* note 163 and accompanying text.

229 Rafael Borge, *Assessment of microscale spatio-temporal variation of air pollution at an urban hotpot in Madrid (Spain) through an extensive field campaign*, 140 ATMOS. ENV'T 432 (2016) (noting strong spatial and temporal variations in air quality).

230 Parr v. Aruba Petroleum, Cause No. CC–11–01650–E (County Court, Dallas County, Texas, Mar. 8, 2011).

governments, and academics have helped to catch these types of problems and bring them to the attention of the EPA. For example, Garfield County, Colorado, conducts continuous monitoring of air quality near certain oil and gas sites,[231] and recent studies have highlighted certain air quality problems near oil and sites around the United States.[232]

With respect to longer-term review of program performance under the Clean Air Act, the EPA's measurement of air quality at centralized stations helps to provide a direct indictor of whether the states are achieving federal air quality standards or not, and the EPA has acted on this information in some cases by recalling SIPs. Although this has resulted in years of litigation, in some cases the agency ultimately devised an acceptable plan that would improve state regulation and push air quality at least closer to the required federal standards.[233]

The RCRA and Energy Policy Act case studies provide examples of the potential problems that can result when an agency tends to focus on just one type of review—short-term, frequent review of actions by the delegated entity or longer-term, overall performance review. The voluntary STRONGER reports on state oil and gas regulatory programs and recommendations for improvements in those programs have been somewhat effective. But STRONGER reviews are conducted on a voluntary basis, thus not covering many of the states responsible for regulating oil and gas wastes, and have only been completed for six states that regulate hydraulic fracturing for oil and gas.[234] (However, STRONGER has reviewed 24 states' general oil and gas waste management regulations, as opposed to hydraulic fracturing-specific regulations.[235]) The 2014 EPA report also helps to highlight overall performance and deficiencies of the states in regulating oil and gas wastes. But neither the EPA nor STRONGER regularly or periodically reviews whether states are enforcing violations of their regulations, for example; instead, STRONGER reviews whether states

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231 Garfield County Public Health Department, Garfield County 2013 Air Quality Monitoring Report v (June 30, 2014), https://www.garfield-county.com/air-quality/documents/airquality/GARCO_MonitoringReport_2013_Final.pdf (noting that air quality monitoring is conducted near oil and gas sites).

232 Alamo Area Council of Governments, Oil and Gas Emission Inventory, Eagle Ford Shale; O'Rourke & Macey, *supra* note 227 (describing the results of air quality monitoring by citizen "bucket brigades" near oil and gas sites).

233 North Carolina v. EPA, 531 F.3d 896 (D.C. Cir. 2008); EPA v. EME Homer City Generation, 134 S.Ct. 1584 (2014).

234 State Rev. of Oil & Nat. Gas Envtl. Regs., Report and Summary of Outcomes, *supra* note 158, at 2.

235 State Reviews, State Rev. of Oil & Nat. Gas Envtl. Regs., http://www.strongerinc.org/state-reviews/.

have adequate inspection resources, for example, or staff for conducting inspections.

Although more frequent review would likely improve state oil and gas regulatory programs, FERC's experience under the Energy Policy Act shows the challenges of conducting this type of review. Reviewing each regulation and enforcement action with a fine-toothed comb can result in tensions between the delegating agency and the delegatee, and less cooperation in terms of improving regulation and compliance. Indeed, as FERC conducted frequent reviews it also changed its position on the standard that it would follow in reviewing reliability standards several times,[236] thus creating further frustration. Federal agencies must strive to strike a balance in this area. They should not abandon the effort to regularly monitor the delegated entity, but they should periodically communicate with that entity regarding its concerns about the burdens of this monitoring and attempt to identify ways to reduce those burdens, such as providing predictable standards of review and working to reduce the delegated entity's costs of reporting to the federal agency.

The Energy Policy Act example also shows how focusing resources on individualized, frequent review without overall review of performance can be dangerous, resulting in risks such as blackouts. Luckily, another agency in this case helps to pick up the slack, and FERC does conduct some periodic evaluations. FERC provides seasonal reports on reliability,[237] and the Department of Energy has written several larger reliability assessments.[238]

In the case of Flint, the EPA's and states' individualized and longer-term oversight of lower-level entities was inadequate. The EPA failed to adequately review and remedy the one-time decision by the plant to switch to river water without installing a corrosion control system, as did the state. Further, the EPA failed to respond to warnings that Michigan's overall SDWA program performance was lacking and that the state had not invested the resources necessary to operate an effective regulatory program.

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236 *See* Moot, *supra* note 213 (describing FERC's changing its standard of reviewing NERC actions and resulting objections).

237 *Reports & Analyses*, Fed. Energy Reg. Commn., https://www.ferc.gov/market-oversight/reports-analyses/reports-analyses.asp (showing FERC seasonal reliability reports).

238 *Cf.* U.S. Dept. of Energy, Office of Electricity Delivery & Energy Reliability, https://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/OE_FS_TRP_web.pdf (describing the DOE's grid reliability activities, including developing a tool that allows NERC to "monitor compliance" with reliability rules in real time, as well as reports and research).

3. Effective Oversight

One of the most substantial challenges for federal agencies overseeing delegated regulatory regimes is ensuring that individualized, frequent oversight as well as broader performance reviews continue over time. This ensures both that the agency catch any negative changes in state programs, such as lapsed regulations or reduced enforcement resources, and any needed updates to address changing conditions. The tendency in delegation is for the agency to conduct close, up-front review of the delegated entity but to then lag in later reviews. For example, under the Clean Air Act, SDWA, and RCRA, the agency conducts a thorough initial review to determine whether the state has adequate regulations and regulatory resources to receive primacy, or whether an activity regulated by the state should be exempted from the federal regulation altogether. But later, follow-up reviews tend to be lacking and only sporadic. Having sunset dates for primacy or mandatory periodic review periods can help to solve this problem. So, too, can the use of citizen suits, which are included within nearly every federal environmental act. Citizens can petition agencies and argue that they have violated a non-discretionary duty by failing to re-consider a previous decision to abdicate federal responsibility. For example, the Natural Resources Defense Council petitioned the EPA arguing that conditions had changed so dramatically since its 1988 determination of state control that the EPA should now regulate these wastes under the hazardous waste portion of RCRA. Although this was unsuccessful, it did trigger EPA to again review the adequacy of state programs. Citizens also should have the ability to make similar petitions regarding the failure of sub-federal agents to perform duties under delegated programs, thus potentially requiring expanded citizen suit provisions and attendant judicial review.

A final, important tool in improving oversight of both federal principals and their agents is the expanded use of independent agencies, the role of which is solely to review the adequacy of regulation, risks that arise under a regulatory scheme, and potential needed improvements of regulation. These agencies are not primarily comprised of political appointees and are somewhat immune to the dramatic political shifts that occur over time, and their role in monitoring the adequacy of regulatory programs is key. They typically primarily review federal agency actions, but their role could expand, particularly for cooperative federalism programs. A useful model comes from the National Transportation Safety Board, the sole mission of which is to review the cause of accidents such as rail collisions and aviation incidents and to recommend needed regulatory

changes.[239] These agencies could and should play a much broader role in monitoring risks under regulatory programs and suggesting needed changes both to regulations and to the principals and agents tasked with implementing them.

C. TYPE OF ENTITY RECEIVING DELEGATED AUTHORITY: EFFECTIVELY HARNESSING THE BENEFITS OF MULTILEVEL INVOLVEMENT

Policymakers and administrators have long recognized the benefits of delegating certain regulatory tasks to non-federal governments. The traditional practical federalism argument for delegation is that state and local governments are more familiar with local conditions and thus better able to regulate,[240] and they can implement regulation more effectively because they are physically closer to the regulated entity and can therefore better carry out inspection and enforcement activities.

Local and state governments are not the only entities that are necessarily "closer" to the governed activity. As Dave Owen observes, the federal government, too, can conduct operations "on the ground," as evidenced by the numerous Army Corps of Engineers offices around the country in which staff work closely with entities seeking permits to fill in wetlands and other waters.[241] The federal government plays an even more localized role through the U.S. Department of Agriculture (USDA). In 1914 the USDA partnered with the states' 100 land-grant universities to form county extension offices that "apply research and provide education in agriculture,"[242] directly educating farmers about ways to reduce soil erosion and other agricultural practices, and the agency is still deeply involved in this partnership. This is as local as regulation gets, with officials visiting farms to demonstrate practices, breeding crops, and growing sample demonstration crops to assist in the education process. But as policymakers noted in enacting the Clean Air Act, detailed federal involvement at the local and state level requires resources that the federal government might not want to devote to this type of cause, particularly where the states would prefer to implement federal standards for political reasons.

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239 For extensive discussion of the role of the NTSB and its contribution to recently improved rail safety regulations in the context of transporting oil, *see* Wiseman, *supra* note 26.

240 *See, e.g.* Erin Ryan, *Federalism and the Tug of War Within*, 66 MD. L. REV. 503, 601 (2007).

241 Dave Owen, *Regional Federal Administration*, 63 UCLA L. Rev. 58 (2016).

242 *National Institute of Food and Agriculture*, USDA, Extension, https://nifa.usda.gov/extension.

Enlisting states and local governments in the regulatory process has its perils, as recently highlighted by the Flint crisis. The team assigned by the Michigan Governor to review the causes of the contamination incident places most of the blame on the state. It notes that it was state-appointed emergency managers of Flint who decided to switch to a corrosive water supply without taking proper safeguards and the Michigan environmental agency that repeatedly failed to take actions required by federal standards, in addition to resisting federal assistance and ignoring warnings from citizens and academics that there were problems with the water supply. The oversight techniques proposed in Part II.B. are particularly essential where a federal agency has delegated such substantial responsibilities to state and local entities.

Similar safeguards are needed when federal agencies rely on private entities to draft regulations, monitor compliance, and enforce regulations, as occurs under the Energy Policy Act. Scholars like Professors Jody Freeman,[243] Jeffrey Lubbers,[244] Cary Coglianese,[245] Kimberly Krawiec[246] and others who focused on the negotiated regulation techniques used extensively in the 1990s have long noted the benefits and drawbacks of federal agencies relying on private entity expertise. Through negotiated regulation a federal agency—following federals laws that guide this technique[247]—appoints a committee comprised of regulated stakeholders to help draft a rule. The agency then subjects that rule to a traditional public notice and comment process and modifies, approves, or rejects rule based on its own judgment and the comments submitted. Proponents of this technique noted the benefits of relying on regulated entities who are most familiar with the ins-and-outs of the activity regulated by the agency as well as the time savings and reduced conflict that the process arguably produced. But others flagged the traditional dangers of regulatory capture by these stakeholders and the exclusion of important public voices in the process of drafting the rule.

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243 Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997).

244 Jeffrey S. Lubbers, *Enhancing the Use of Negotiated Rulemaking by the U.S. Department of Education*, *in* RECALIBRATING REGULATION OF COLLEGES AND UNIVERSITIES: REPORT OF THE TASK FORCE ON FEDERAL REGULATION OF HIGHER EDUCATION app. IV, at 90.

245 Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997) (noting that the claimed benefits have not been empirically proven).

246 Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003).

247 5 U.S.C. § 565(a)(1).

Through a process similar to negotiated governance, but one that relies even more on industry involvement, governments sometimes make regulatory requirements more flexible when industry actors can show that they have achieved the mandatory result (e.g., limiting pollution to a certain level) through alternative means. The most common example of this is Project XL, in which industry engaged in various creative pilot projects to reduce the pollution that it generates while avoiding some of the most stringent requirements under federal environmental statutes that apply to these pollutants.[248] Some hail this program as a success,[249] while others are somewhat more skeptical of the program's benefits or its broader applicability.[250]

These benefits and concerns of involving industry centrally in governance are magnified when an agency formally delegates certain regulatory work to a private entity, as FERC does under the Energy Policy Act. Here, the private entity is even more directly involved in the regulatory process, with NERC drafting rules and enforcing them. But FERC's close oversight of NERC, including case-by-case review of each standard proposed and enforcement action taken, helps to ensure that NERC, comprised largely of the industry regulated by reliability standards, does not propose weak rules or take inadequately stringent enforcement actions.

Some have argued that FERC's oversight is *too* close, particularly in reviewing draft standards. These commenters believe that FERC's relatively non-deferential approach to the standards is improper given the strong expertise of the utility representatives and other participants in NERC standard-drafting process who are intimately familiar the highly technical details of the grid.[251] But given the unusually strong involvement of a private entity in both drafting and enforcing the standards, FERC's approach is likely necessary to ensure that the public interest is adequately represented. When legislators and administrators delegate so many regulatory responsibilities to a private entity, they should likely consistently apply the most stringent of the oversight safeguards noted in Part II.B., including case-by-case review of individual regulations and enforcement as

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248 *See, e.g.*, Dennis D. Hirsch, *Project XL and the Special Case: The EPA's Untold Success Story*, 26 COLUM. J. ENVTL. L. 219, 223-225 (2001) (describing Project XL and arguing that it produced a variety of benefits).

249 *See id*.

250 *See, e.g.*, Rena Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 124 (1998) (concluding that "Project XL has proved a disappointment to virtually all of its outside constituencies").

251 Jon S. Moot, *When Should The FERC Defer to The NERC?*, 31 ENERGY L.J. 317 (2010).

well as regular review of the overall performance of the entity with delegated authority.

CONCLUSION

Delegation within the cooperative governance sphere presents a scholarly and practical conundrum: it is necessary yet highly dysfunctional. Federal agencies frequently delegate substantial regulatory responsibilities in relatively high-risk areas to sub-federal actors without implementing regimes for effective long-term monitoring and oversight of those actors. Federal agencies, in turn, sometimes do not uphold their end of the bargain when sub-federal agents wish to fulfill their regulatory duties but lack adequate expertise and resources to do so. The most recent manifestation of this dysfunction was a tragic one. A city, state, regional, and federal agency, as well as private actors, all failed to protect thousands of disadvantaged children in Flint, Michigan from the irreversible effects of lead poisoning.

Delegation's dysfunction calls for a theoretical framework that enables productive analysis of the regulatory design of delegated programs and how to improve this design. There are three key features of the regime that can accentuate or limit the principal-agent challenge common to all forms of delegation within cooperative federalism programs: the type and degree of regulatory tasks delegated, the amount of control retained by the federal agency, and the types of entities receiving delegated authority. Within each of these categories, the case studies provided here highlight the opportunities and challenging for improving the regulatory design of delegation.

With respect to the type of authority delegated, Congress and agencies must carefully consider the comparative advantages of various levels of government when choosing which tasks to delegate to whom; this category of analysis thus blends into the question of whether private, local, state, or federal entities—or a combination of them—should receive or retain delegated tasks. Non-profit groups and citizens can play important roles in the monitoring and enforcement tasks, in particular, given their ability to provide the "boots on the ground" that governments at all levels struggle to maintain under resource constraints.

Regarding the degree of authority delegated or retained by the federal agency, as more tasks are delegated to greater number of actors, the agency's role in coordinating and reviewing the actions of these entities becomes even more critical. And both short-term case-by-case monitoring, as FERC does in the electricity reliability context, as well as periodic program performance review, is quite important. In the case of Flint,

Michigan, citizens had alerted the EPA that the State of Michigan's overall program for carrying out its duties to protect drinking water was failing, but the agency did not act.

And monitoring responsibilities do not run one way. If federal agencies fail in their duties as principals, either due to resource constraints or a simple refusal to maintain responsibility for a regulatory program despite a statutory mandate, motivated agencies must have adequate room to conduct their own regulatory activities. Here citizen suits play an important role, and citizen suit provisions may need to be expanded to allow challenges to both the failure of federal and sub-federal agents to perform non-discretionary duties. Many statutes already provide for the former type of review, but few allow for the latter. Providing a judicial outlet where federal principals leave slack, and only some state agents are motivated to pick up that slack, is important. Independent agencies are similarly important in monitoring the actions of both federal agencies and sub-level entities involved in regulatory programs. The sole function of these agencies is to review the adequacy of regulatory programs from a relatively apolitical perspective and to suggest needed changes, and their role could be expanded beyond the federal level.

Much concrete work remains to be done in redesigning delegation within existing cooperative federalism regimes, but this Article provides guidance for a path forward. With serious revisitation of basic mechanisms for case-by-case monitoring, long-term oversight, and improved coordination among all entities within these governance approaches, regulatory failures like Flint could be more than an anomaly.