

## Delegation and Dysfunction

Hannah J. Wiseman<sup>†</sup>

*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, among others. The largely toothless nondelegation doctrine captures these challenges, but the bidirectional difficulties of principals adequately monitoring agencies, and vice versa, extend 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 subfederal 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 subfederal agents or perform their own duties. Further, subfederal agents often lack the tools needed to hold federal agencies to task. 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 subfederal 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*

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<sup>†</sup> Attorneys' Title Professor, Florida State University College of Law. J.D., Yale Law School, A.B., Dartmouth College. The author thanks Professors Hope Babcock, William Buzbee, Lisa Heinzerling, Mark Seidenfeld, and David Super, the students in Professor Babcock's seminar at Georgetown Law, Professors Eric Biber, Holly Doremus, Dan Farber, and John Yoo and their students for comments in a seminar at Berkeley law, and the University of Georgia Law School faculty for their comments on drafts of this paper.

*include, among others, consistent case-by-case and long-term monitoring of both principals' (federal agencies) and agents' (subfederal governments') behavior and expanded use of judicial review and other mechanisms for overseeing all 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.<sup>1</sup> This largely low-income minority community suffered from the irreversible effects of lead poisoning, with the most severe impacts falling on the youngest members of the population.<sup>2</sup> A great deal of finger-pointing ensued, with agencies and politicians citing to the refusal of officials at numerous levels to act despite warnings.<sup>3</sup> Review revealed severe breakdowns in interagency communication and a failure of agencies at all levels to comply with minimum requirements of the federal

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1. *Examining Federal Administration of the Safe Drinking Water Act in Flint, Michigan: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 114th Cong. (2016), <http://oversight.house.gov/hearing/examining-federal-administration-of-the-safe-drinking-water-act-in-flint-michigan> [<http://perma.cc/UJ7V-YNK2>].

2. See Chinaro Kennedy et al., *Blood Lead Levels Among Children Aged <6 Years—Flint, Michigan, 2013-2016*, CTR. FOR DISEASE CONTROL & PREVENTION (July 1, 2016), <http://www.cdc.gov/mmwr/volumes/65/wr/mm6525e1.htm> [<http://perma.cc/492F-LYUM>] (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?*, CTR. FOR DISEASE CONTROL & PREVENTION, [http://www.cdc.gov/ncch/lead/acclpp/blood\\_lead\\_levels.htm](http://www.cdc.gov/ncch/lead/acclpp/blood_lead_levels.htm) [<http://perma.cc/V4Z4-3ZXG>] (“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.”).

3. E.g., *Examining Federal Administration of the Safe Drinking Water Act in Flint, Michigan, Part 3: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 114th Cong. (2016) [hereinafter *Flint Hearing*] (noting that a member of Congress called for the resignation of federal and regional officials and criticizing the failure of the EPA to accept responsibility for the crisis).

Safe Drinking Water Act (SDWA).<sup>4</sup> 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.<sup>5</sup> This crisis represented a failure of agencies, including a failure to recognize a sorely underfunded state program for regulating the safety of drinking water,<sup>6</sup> as well as acts and omissions by individual officials and staff members.

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: federal government actors relying on subfederal 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 implementation of federal requirements to subfederal actors.<sup>7</sup> 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 directed agencies to delegate some or most of their authority,<sup>8</sup> or agencies used discretionary powers under enabling statutes and chose to delegate. Despite much of the literature’s tendency to hail cooperative federalism, broadly construed, as an innovative, effective federal-state partnership,<sup>9</sup> all of these forms of delegation

4. Flint Water Advisory Task Force, *Final Report*, OFF. GOVERNOR RICK SNYDER (Mar. 2016), [http://www.michigan.gov/documents/snyder/FWATF\\_FINAL\\_REPORT\\_21March2016\\_517805\\_7.pdf](http://www.michigan.gov/documents/snyder/FWATF_FINAL_REPORT_21March2016_517805_7.pdf) [<http://perma.cc/WNW7-2BYC>].

5. See *infra* notes 134-140 and accompanying text.

6. See Flint Water Advisory Task Force, *supra* note 4, at 27 (“Michigan is particularly challenged because fees to operate the [SDWA] program are generally lower than fees charged by other states, requiring the state to rely more heavily on general funds and federal revenue.”); *id.* at 50 (“Prior to Flint’s water supply conversion, EPA’s delegation of primacy for enforcement of the SDWA in Michigan had been challenged by a series of disagreements and concerns over compliance requirements and sampling practices.”).

7. 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”).

8. See *infra* notes 157, 220 and accompanying text.

9. 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, *Federalism Floors, Ceilings, and the Benefits of Federalism’s Institutional Diversity*, in PREEMPTION CHOICE 98 (William W. Buzbee ed., 2009) (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 7, at 754-55

share a common principal-agent flaw that arises from their regulatory design.<sup>10</sup> The constitutional nondelegation doctrine—now a narrow, infrequently-applied rule<sup>11</sup> that requires Congress to provide agencies with adequately detailed directives when delegating policymaking authority—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 subfederal parties responsible for basic regulatory duties, as dramatically demonstrated through the Flint crisis. Just as importantly, federal agencies sometimes fail to carry out their basic responsibilities as principals, or even thwart motivated subfederal agents from adequately regulating risks, and subfederal agents sometimes lack the necessary tools and resources to independently act or hold their federal principals to task.

The principal-agent problem in cooperative federalism is thus a decidedly bidirectional problem.<sup>12</sup> From the top down, principals that rely on other entities to implement existing federal requirements 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

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(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”).

10. See 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 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, 1452-56 (2003). For discussion of the principal-agent concept in the context of the nondelegation doctrine, see, for example, Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1743-44 (2002), which argues that there is no such thing as delegation of legislative responsibility to executive agencies (because agencies are simply exercising executive, not legislative, power), and notes that under any form of delegation, “a leader or principal delegates broad authority to agents.”

11. See, e.g., Richard D. Cudahy, *The Nondelegation Doctrine: Rumors of Its Resurrection Prove Unfounded*, 16 ST. JOHN’S J. LEGAL COMMENT. 1, 2-3, 38 (2002) (noting that in *Whitman v. American Trucking Ass’ns*, 531 U.S. 457 (2001), the lower court had used the doctrine to strike down a statute, which the Supreme Court had not done “for more than 60 years,” and concluding that following the Court’s reversal of this lower court decision, under *American Trucking*, “it is difficult to see . . . how Congress could violate the nondelegation doctrine”); 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 Millennium: 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 11, at 3 (noting how the nondelegation doctrine was designed in part to make Congress more accountable and force it to make “hard choices” rather than passing them off to another entity).

to carry out these responsibilities.<sup>13</sup> And changes like the election of President Trump—a dramatic shift in executive leadership—highlight a phenomenon that has long lurked in U.S. law. Due to political ideology, capture,<sup>14</sup> or 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.<sup>15</sup> 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.<sup>16</sup> In these cases, subfederal agents—even those motivated to carry out their duties under the delegated governance scheme<sup>17</sup>—struggle to hold their federal principals to task<sup>18</sup> for failing to uphold their end of the cooperative federalism problem, or they lack the needed authority or resources to act independently.<sup>19</sup>

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, subfederal actors with adequate resources and discretion can choose to pick up the slack.<sup>20</sup> And even willing federal policymakers and agencies simply

13. See, e.g., DeShazo & Freeman, *supra* note 10, at 1451 (noting the concern that Congress cannot adequately control its agents); Jensen & Meckling, *supra* note 10 (describing monitoring and enforcement concerns that run both ways in the principal-agent relationship within the context of the firm).

14. For extensive discussion of the ability of special interests to capture governments operating within delegation regimes, see DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 49-57 (1993).

15. See *id.* 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”); John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1186, 1199 (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).

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

17. For a discussion of why states and local governments are sometimes motivated to fill federal gaps in the environmental area and examples of ambitious efforts by these entities, see, for example, Glicksman, *supra* note 7, at 779-86. Relatedly, William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 WM. & MARY ENVTL. L. & POL’Y REV. 1, 47-56 (1997), provides a description of instances in which states have acted to implement relatively stringent standards that provides potential explanations for why states might do so but also provides examples of resistance to ambitious environmental regulation at the state level.

18. See, e.g., SCHOENBROD, *supra* note 14, at 80 (noting that “EPA met fewer than 15 percent of the rulemaking deadlines set under the 1970 and 1977” Clean Air Act amendments).

19. For examples of administrations thwarting attempted independent action by state agents, see *infra* note 110.

20. Cf. Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459 (2012) (exploring the importance of involving subfederal entities as a “check” on federal actions).

cannot, and, often should not, attempt to address each and every societal problem that requires a regulatory solution.<sup>21</sup> There are important opportunities for innovative and effective 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 framework for understanding the regulatory design of delegation within cooperative federalism regimes is necessary to understand and analyze the deep dysfunction of delegation as well as its potential. This Article takes on this task, categorizing central regulatory design elements of cooperative governance regimes for understanding, critiquing, and improving numerous types of delegated governance regimes. 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 could improve.

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 nondelegation doctrine in the Constitution; 2) Congress’s specific directives to federal agencies requiring them to delegate certain responsibilities to subfederal actors, as is the case under most environmental statutes; and 3) agencies’ discretionary decision to delegate certain responsibilities to subfederal actors, constrained only by agencies’ enabling statutes. These latter two categories both generally fall within the rubric of cooperative federalism because they involve subfederal 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 nondelegation doctrine, despite its waning force, embodies principal-agent concepts that bleed well beyond the Constitution into delegated governance regimes.

Having explored the common principal-agent thread that connects numerous forms of delegation, including delegation from agencies and Congress

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21. For the extensive literature on the benefits of including numerous institutions within the regulatory project, see, for example, *id.*, which explores the benefits of subfederal “checks” and abilities to fill in gaps; Buzbee, *supra* note 9, at 2-3, which observes that “states have predictably copied and sometimes improved on federal innovations and eroded the often more inflexible and bureaucratic EPA’s preeminence as an environmental regulator”; Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997), which analyzes the benefits and risks of industry involvement in the regulatory process; Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012), which explores both the benefits and drawbacks of overlapping institutions; and Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 47-48 (2010), which notes the importance of involving groups at numerous levels in the governance project.

to subfederal entities, Part II then provides a framework for 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 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).<sup>22</sup> 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 similarly affects the degree of control delegated. 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.<sup>23</sup>

In identifying the three common features of delegated governance regimes and their role in enhancing or constraining 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 seem to genuinely desire a regulatory result, and others in which the aim appears more suspect. There is general agreement that we must maintain the reliability of the electric grid so that businesses and individuals have access to a

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22. See Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 585-87 (2011) (describing parallel regimes).

23. Other discussions of cooperative federalism and regulatory design use different metrics, although some of them encompass aspects of the categories framed here. As an example, for areas of rapidly evolving risk, 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. David L. Markell & Robert L. Glicksman, *Dynamic Governance in Theory and Application, Part I*, 58 ARIZ. L. REV. 563, 568-70 (2016).



constant and adequate supply of electricity.<sup>24</sup> Enforcing basic standards for minimum drinking water quality is also an issue that receives bipartisan support, or at least lip service.<sup>25</sup> 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.<sup>26</sup>

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. It argues that the most important normative improvement within delegated governance regimes would be to strengthen tools that allow federal principals to better monitor and hold to task subfederal actors, both with respect to short-term actions and longer-term performance, and for subfederal actors to similarly oversee their federal principals. Specifically, it emphasizes the importance of consistent, effective oversight mechanisms within cooperative federalism, including tools for reviewing both the individualized actions of principals as well as agents exercising delegated authority and the overall performance of federal principals and their subfederal agents. This calls for potential sunseting or softer deadlines that would require periodic renewal or rejection of the delegated governance regime, improved citizen suit features, more consistent review of entities that exercise responsibilities within the delegated governance regime, and the involvement of agencies<sup>27</sup> external to those entities involved in regulatory work to perform some of these review functions. These external agencies—which I call “review agencies”—are primarily tasked with analyzing the efficacy of agencies and the regulations that they implement. Part III also 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, and how

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24. See Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) (codified in scattered sections of 42 U.S.C.) (requiring federal regulation of electric grid reliability in a rare bipartisan statute with ambitious substantive goals).

25. See, e.g., *Flint Hearing*, *supra* note 3 (observing that the “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 . . . not [holding] anyone accountable for their failures”).

26. See *infra* note 158 and accompanying text.

27. The Article explores how several of these 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 Hannah J. Wiseman, *Negotiated Rulemaking and New Risks: A Rail Safety Case Study*, 7 WAKE FOREST J.L. & POL’Y 207, 214 (2017); *About the National Transportation Safety Board*, NAT’L TRANSP. SAFETY BOARD, <http://www.ntsb.gov/about/pages/default.aspx> [<http://perma.cc/6KYX-DWSD>] (describing how the role of the NTSB improved the National Railroad Commission’s rail safety regulations after oil train derailments and explosions increased).

in determining the type of functions to delegate, the comparative advantages of different levels of government should be more closely examined.

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 that 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 type of delegation that is the focus of this Article—federal agencies’ transfer of regulatory responsibility to subfederal 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. This Part then extends the basic principal-agent focus of the nondelegation doctrine to delegated governance regimes, exploring agency law as a unifying thread that ties together the many forms of delegation.

### A. *The Many Forms 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<sup>28</sup>), defines useful dividing lines and means of focusing scholarly discussion on more limited aspects of delegation.

With respect to the many uses of the term “delegation,” the constitutional nondelegation doctrine—which is of limited use but worthy of brief discussion—addresses Congress’s general practice of transferring certain policymaking responsibilities to agencies. This doctrine contains the weak yet not-entirely-

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28. This, too, is of course an important aspect of delegation. See, e.g., DeShazo & Freeman, *supra* note 10 (exploring this form of delegation as well as delegation among institutions); Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON. 135, 137 (1957) (arguing that principal-agent models are deficient in that they fail to “face the fact that governments are concrete institutions run by men”).

defunct requirement<sup>29</sup> that Congress provide adequately “intelligible principles” for agencies to follow when Congress initiates this type of transfer.<sup>30</sup> Second, “delegation” describes Congress’s specific directives to agencies to delegate some or most of their regulatory authority in a particular substantive area to subfederal entities, such as through the classic cooperative federalism scheme crafted by the Clean Air Act.<sup>31</sup> And federal agencies sometimes delegate authority to subfederal 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 determine whether the Agency or states should be primarily responsible for regulating oil and gas wastes under the Federal Resource Conservation and Recovery Act.<sup>32</sup> The EPA chose to transfer most of its authority to state actors.<sup>33</sup>

These latter two categories both receive their own label of “cooperative federalism”—a term that describes a variety of delegation scenarios in which subfederal entities partner with federal agencies in the regulatory project.<sup>34</sup> Typically, this means that subfederal 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, subfederal, public-private entity.<sup>35</sup> FERC maintains the ultimate responsibility for approving or rejecting these standards,<sup>36</sup> but the content of the specific regulatory goals comes initially from a subfederal level.

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29. *But see* Cudahy, *supra* note 11, at 3 (arguing that the doctrine is largely defunct); Posner & Vermeule, *supra* note 10, at 1721 (arguing that the doctrine simply does not apply to congressional delegation to agencies).

30. *See* sources cited *supra* note 11.

31. Adelman, *supra* note 9, at 244 (noting that the Clean Air Act “established the model for cooperative federal-state regulation found in the major national environmental laws”).

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

33. *Id.*

34. *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”).

35. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1211(a), 119 Stat. 594, 941 (codified at 16 U.S.C. § 824o (2012)) (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”).

36. *Id.*

FERC and the subfederal entity retain joint responsibility for enforcing these standards once they are finalized.<sup>37</sup>

### B. *The Principal-Agent Problem Within Delegation*

A challenge that pervades all forms of delegation is the fact that delegation embodies a sort of principal-agent relationship, in which one entity, the principal, relies on another, the agent, to do some or much of its work. In more technical terms, one party, “designated as the agent, acts for, on behalf of, or as a representative for the other, designated the principal, in a particular domain of decision problems.”<sup>38</sup> At their core, principal-agent arrangements involve individuals or other entities forming “relationships of authority and power among themselves.”<sup>39</sup>

In the governmental context, the principal-agent relationship is somewhat different from the term as it is used in other legal contexts, such as in corporate law. For example, in corporate law this relationship means that “directors are agents of the firm’s shareholders”<sup>40</sup> and owe fiduciary duties to them, although there are competing theories of directors’ roles.<sup>41</sup> Recent legal literature has attempted to assign a similar fiduciary-type role to governmental actors,<sup>42</sup> such as Congress, but there are substantial differences between firms and governmental actors that challenge this analogy.<sup>43</sup> As Seth Davis observes, unlike areas in which “courts have defined the metes and bounds of the corporate director’s duty of loyalty . . . . There is no similar consensus on the ends of administrative or constitutional law.”<sup>44</sup>

Despite the definitional confines of the principal-agent relationship within certain areas of the law, this relationship has been used—for better or worse—to describe and critique a variety of relationships,<sup>45</sup> including governmental ones.

37. See *infra* note 223 and accompanying text.

38. Stephen A. Ross, *The Economic Theory of Agency: The Principal’s Problem*, 63 AM. ECON. REV. 134, 134 (1973).

39. Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm*, 16 YALE L. & POL’Y REV. 265, 271 (1998).

40. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 290 (1999).

41. *Id.* at 258-59, 269-72 (critiquing the principal-agent theory as applied in corporate law and proposing an alternative approach, arguing that principal-agent models ignore factors such as agents’ difficulties holding principals to task).

42. See, e.g., Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1147-48 (2014) (summarizing this literature).

43. See generally *id.* (critiquing the theory that would assign certain fiduciary duties to public officials and noting differences between public officials and, for example, corporate managers).

44. *Id.* at 1166.

45. See, e.g., Blair & Stout, *supra* note 40, at 249 (noting that “the public corporation is hardly unique in its use of agents” and that “[o]ther organizational forms, including partnerships, proprietorships, privately-held corporations, and limited liability companies, also routinely do business through hired managers and employees,” but acknowledging that the use of the principal-agent theory as an analytical tool is limited); Orts, *supra* note 39, at 273-74 (noting principal-agent relationships in the form of businesses hiring employees, clients hiring lawyers, and other contexts); Ross, *supra* note 38, at

The principal-agent concept provides a useful, albeit imperfect,<sup>46</sup> method of understanding some of the challenges at the heart of delegation. The theory focuses too much on the unidirectional challenge of the principal finding least-cost ways of ensuring that the agent acts as the principal has requested, despite the principal's inability to constantly monitor the agent.<sup>47</sup> But more recent work views agency theory as a "two-way street," with principals' failure to fulfill their responsibilities sometimes described as "sharking," in contrast to agencies' "shirking."<sup>48</sup> And the problems of principal-agent relationships as defined in the economics and political science literatures, such as principals' difficulty monitoring agents to ensure that agents do not act in ways that impede principals' goals (and vice versa),<sup>49</sup> pervade the federal-state relationship, too.

### 1. Principal-Agent Core Principles

The principal-agent challenge, as theorized and described 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 exploring the theory describes the principal-agent relationship as one in 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."<sup>50</sup> Within this relationship, the principal is concerned that the 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.<sup>51</sup> The agent, in turn, will to some extent have its own incentives to act in the interest of the principal (the agent, after all, reaps certain benefits from being

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134 (noting that "[e]xamples of agency are universal . . . Essentially all contractual arrangements, as between employer and employee or the state and the governed, for example, contain important elements of agency.").

46. See, e.g., Kathleen M. Eisenhardt, *Agency Theory: An Assessment and Review*, 14 *ACAD. MGMT. REV.* 57, 57 (1989) (noting the limits of using agency theory in a variety of contexts and scholars' critique of agency theory as failing to address specific problems or being too narrow).

47. Blair & Stout, *supra* note 40, at 759 (arguing that mathematical principal-agent models fail to address the scenario in which "the agent might have trouble getting the principal to perform her end of the deal"); Sanford J. Grossman & Oliver D. Hart, *An Analysis of the Principal-Agent Problem*, 51 *ECONOMETRICA* 7 (1983) (focusing on this problem).

48. Orts, *supra* note 39, at 279-280.

49. See, e.g., *id.* at 275-76 (describing the typical approach to agency costs, which focuses on monitoring difficulties and bonding as a solution).

50. Jensen & Meckling, *supra* note 10, at 308.

51. *Id.* Bonding, too—in which the goals of the agent and principal are somehow bound together through monetary and other agreements—also helps to solve this problem. See, e.g., Grossman & Hart, *supra* note 47, at 7-8 (noting that the typical proposal for addressing the principal-agent problem is "to suppose that the principal chooses the risk-sharing contract, or incentive scheme, to maximize his expected utility"); Orts, *supra* note 39, at 275-76 (describing the typical approach to agency costs, which focuses on monitoring difficulties and bonding as a solution).

tasked with carrying out the principal's duties) and to monitor the principal to ensure that the principal upholds its end of the bargain.<sup>52</sup>

The economics literature on principal-agent theories within the firm acknowledges that the principal-agent challenges within delegation extend more broadly, including to governments.<sup>53</sup> 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.<sup>54</sup> The legal literature explores in depth the principal-agent problems that arise between Congress and agencies specifically although not typically with respect to the design and outcomes of delegated governance regimes.<sup>55</sup>

## 2. The Nondelegation Doctrine and Agency

The principal-agent problem at the heart of Congress's delegation to agencies is also embodied in the nondelegation doctrine itself. As Judge Richard Cudahy explains, the 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."<sup>56</sup>

The few courts that have used the doctrine to strike down federal laws have also noted the principal-agent theme that it embodies. The most familiar, early formulation of the doctrine emerged in *J.W. Hampton v. United States*<sup>57</sup> where the Supreme Court held 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

52. Jensen & Meckling, *supra* note 10, at 308.

53. *Id.* at 309.

54. See, e.g., SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY 6 (1978).

55. DeShazo and Freeman note the 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." DeShazo & Freeman, *supra* note 10, at 1452. 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. JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 106 (1997). But Mashaw argues that a simple principal-agent focus is far too narrow, noting that agencies have much more stand-alone authority in practice. *Id.*; see also Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1398 (2011) (arguing that "agency delays constitute a principal-agent problem that raises democratic accountability concerns when foot-dragging stems from divergent policy preferences of the agency itself, a regulated interest group, or a competing political principal acting outside the legislative process," although noting that some delays result in Congress hobbling agencies' ability to act and thus making them dysfunctional).

56. Cudahy, *supra* note 11, at 3.

57. 276 U.S. 394 (1928). Earlier cases already had espoused the principle, however, portraying it in terms of allowing Congress to seek the assistance of other branches in fact-finding. See Cudahy, *supra* note 11, at 8-9.

legislative power.”<sup>58</sup> Noting the widely-accepted law of “agency” within the public and common law, the Court began its analysis by recognizing the shared principle *delegate potestas non potest delegari*, which prohibits the delegation of powers that already have been delegated.<sup>59</sup> In the context of governance, pieces of the general duty to govern (originally held by the public) already have been delegated to each of the three governmental branches, and a *second* delegation of these duties is unconstitutional if not crafted correctly.<sup>60</sup> The Court subsequently used the doctrine only twice to strike down legislation,<sup>61</sup> thus making the nondelegation doctrine largely a footnote within broader discussions of delegation. But it provides a convenient starting point from which to pull still-relevant principal-agent lessons into a common form of delegation that is very much alive and frequently used: cooperative federalism.

### 3. The Principal-Agent Problem in Cooperative Federalism

The cooperative federalism literature has not focused as extensively on the principal-agent challenges that pervade the federal-subfederal relationship, as opposed to the Congress-agency relationship.<sup>62</sup> Yet principal-agent-type problems are accentuated at this level. With agencies 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 subfederal level.<sup>63</sup> 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 subfederal actors, including states, private industry, and local governments. Under the SDWA, the EPA relies on many local governments to implement the Act; these governments own and operate the water treatment and delivery systems and are responsible for complying with state laws that

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58. *J.W. Hampton*, 276 U.S. at 409 (emphasis added).

59. *Id.* at 405.

60. See Posner & Vermeule, *supra* note 10, at 1733 (observing that the maxim means that “the legislature may not redelegate the powers delegated to it by the people,” although arguing that there is “remarkably little evidence that the Framers envisioned such a constraint on legislative authority” and noting the three governmental branches’ obligations regarding actual administration of the government).

61. Cudahy, *supra* note 11, at 2.

62. 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 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. Buzbee, *supra* note 9, at 98-114; see also Greve, *supra* note 9 (exploring accountability problems in cooperative federalism).

63. 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*, 117 COLUM. L. REV. 839 (2017).

implement the SDWA and federal drinking water standards, and they often enlist private consultants to help with this task.<sup>64</sup>

a. Barriers to Monitoring and Bonding Agents

The central principal-agent challenge that pervades cooperative federalism regimes is one of monitoring. From the perspective of ensuring good performance of the subfederal entities, federal agencies can and sometimes do require subfederal agents to report information to them, as Jessica Bulman-Pozen notes.<sup>65</sup> Federal agencies often lack the staff or money—or sometimes the incentives—to adequately monitor these entities, as discussed in detail in the case studies in Part II. Additionally, in some respects, federal agencies lack the types of monitoring and enforcement tools available in other contexts. For example, the federal government cannot hold out a direct threat of “firing” its state agents. Federal agencies can withdraw states’ primacy, reclaiming their direct responsibility over regulatory programs.<sup>66</sup> But in light of already-stretched federal budgets and staff as well as political resistance from states, agencies are extremely hesitant to use this “nuclear” option and rarely do so.<sup>67</sup> Similarly, the federal statutes that allow agencies to withdraw certain funding for states if states fail to carry out their delegated duties meet stiff political resistance and, after *National Federation of Independent Business v. Sebelius*,<sup>68</sup> might be constitutionally suspect.<sup>69</sup>

Bonding mechanisms to link federal and state incentives in the cooperative federalism context are also somewhat limited. For example, there is no contingency fee in the regulatory context as there is in the principal-agent client-attorney context.<sup>70</sup> But the federal government can use a variety of tools to cajole subfederal agents. For example, in the immigration context the government has in some cases simply “asked” local and state agencies to share information on

64. See *infra* Section II.B.1.

65. Jessica Bulman-Pozen, *supra* note 20, at 475.

66. See, e.g., Markus G. Puder & Michael J. Paque, *Tremors in the Cooperative Environmental Federalism Arena*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 71, 87-88 (2005) (discussing the rare EPA threats and proceedings to withdraw certain state primacy under the Safe Drinking Water Act); *infra* note 194 and accompanying text (noting the EPA’s responsibility under the Clean Air Act for issuing a federal implementation plan when a state’s program does not meet federal requirements).

67. Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 331-32 & n.12 (2013) (describing primacy withdrawal as a “nuclear” option and observing the “EPA has rarely initiated a withdrawal proceeding on its own,” although providing rare examples in which the EPA withdrew or threatened to withdraw primacy).

68. 567 U.S. 519 (2012).

69. Jonathan H. Adler & Nathaniel Stewart, *Is the Clean Air Act Unconstitutional? Coercion, Cooperative Federalism and Conditional Spending after NFIB v. Sebelius*, 43 ECOLOGY L.Q. 671 (2016) (arguing that the provision within the Clean Air Act under which the EPA must withdraw highway funds for certain failures of state CAA programs could be unconstitutional).

70. Orts, *supra* note 39, at 276 (providing the contingency fee as an example of bonding in the attorney-client context).



illegal immigrants, has made certain databases and other useful sources of information more accessible to these agencies in an effort to encourage them to share information, and has offered funding only if they complied with federal immigration statutes.<sup>71</sup>

At the level of substantively overseeing the enforcement efforts of subfederal entities under a delegated governance regime, the federal government has certain tools for ensuring that states are holding up their end of the bargain. Again, as noted by Bulman-Pozen, cooperative federalism regimes have a variety of enforcement designs. Sometimes states must give notice of planned enforcement before moving forward—thus allowing the federal government to choose to enforce instead—or states may “enforce federal law only under the supervision of the federal executive,” among other designs.<sup>72</sup> Additionally, some statutes allow an agency like the EPA to bring an independent enforcement action against a violator of a federal statute even if the state, using its delegated authority under the statute, also has enforced the statute.<sup>73</sup> However, courts have limited this “overfiling” practice under *res judicata* principles.<sup>74</sup> Additionally, in some cases, local and state enforcement actions under federal statutes or waivers from enforcement have been treated as revisions of states’ approved delegated programs and must receive federal approval.

#### b. Limited State Tools for Monitoring and Holding Federal Principals to Task

Principal-agent challenges in the cooperative federalism context do not run just from the federal government to the states; they are bidirectional. In some cases, federal agencies that act as principals not only struggle to adequately monitor subfederal entities and ensure that they are complying with minimal federal requirements—they choose not to monitor at all. 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.<sup>75</sup>

States acting within cooperative federalism regimes—as well as individuals working from a grassroots level—have some, albeit limited, options for monitoring and influencing the behavior of their federal principals if they believe that these principals are not generally upholding their duties within a delegated governance regime. They may participate in citizen suits against federal agencies

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71. Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 YALE L. & POL’Y REV. 87, 111-114 (2016).

72. Bulman-Pozen, *supra* note 65, at 474.

73. Lisa Dittman, Comment, *Overfiling: Policy Arguments in Support of the Gorilla in the Closet*, 48 UCLA L. REV. 375, 377 (2000).

74. *Id.* at 378.

75. *See infra* note 110.

and petition for an agency to initiate rulemaking under a federal statute.<sup>76</sup> Citizen-suit provisions enlist “citizens” broadly construed (including states and local governments) as “private attorneys general” and allow suits against federal agencies for failing to perform nondiscretionary duties under statutes.<sup>77</sup> However, these suits face numerous limitations, including the types of federal or state agency actions or inaction that may be challenged.<sup>78</sup> Alternative litigation strategies include local governments and states arguing, via the Administrative Procedure Act or other statutes, that their principals have reached too far in controlling their agents under a cooperative federalism statute,<sup>79</sup> or using these types of suits to attempt to spur more federal action.<sup>80</sup>

Beyond the courts, states can and often do comment within agencies’ notice-and-comment rulemaking processes, arguing that the regulation is inadequate to carry out a federal statute, fails to comply with that statute, or gives too much or too little discretion to the states, among other comments,<sup>81</sup> but the agency need only respond to comments rather than substantively change the rule. Additionally, as others have observed, federal agencies sometimes change policies within consent decrees following a lawsuit, thus shutting states out of the notice-and-comment opportunity.<sup>82</sup> If a federal agency appears to be underperforming, subfederal entities also may use disclosure and “shaming” and information disclosure mechanisms, or directly lobby the federal government,<sup>83</sup> in an effort to gain more control over their federal principals.

76. See, e.g., Letter from Veera Tyagi et al. to Gina McCarthy, EPA Adm’r (June 3, 2016), [http://www.epa.gov/sites/production/files/2016-09/documents/petition\\_to\\_epa\\_ultra\\_low\\_nox\\_hd\\_trucks\\_and\\_engines.pdf](http://www.epa.gov/sites/production/files/2016-09/documents/petition_to_epa_ultra_low_nox_hd_trucks_and_engines.pdf) [<http://perma.cc/4EPN-HP8S>] (showing numerous state and local governments as petitioners for a rulemaking that would decrease emissions from heavy duty trucks).

77. See James R. May, *Now More than Ever: Trends in Environmental Citizen Suits*, 10 WIDENER L. REV. 1, 4-5 (2003) (describing the types of citizen suits permitted, remedies allowed, requirements for the types and timing of violations for which suits may be filed, and other citizen suit requirements); Anuradha Sivaram, *Why Citizen Suits Against States Would Ensure the Legitimacy of Cooperative Federalism Under the Clean Air Act*, 40 ECOLOGY L.Q. 443, 447 (2013) (“Nearly every major contemporary federal environmental statute contains a citizen suit provision.”); *Massachusetts v. EPA*, 549 U.S. 497 (2007) (providing an example of state and local governments and nonprofit groups successfully suing the EPA for its failure to justify its inaction in determining whether greenhouse gases from vehicles endanger human health).

78. See May, *supra* note 77, for a discussion of these and other limitations.

79. See, e.g., *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008); *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000); Hannah J. Wiseman & Hari M. Osofsky, *Regional Energy Governance and U.S. Carbon Emissions*, 43 ECOLOGY L.Q. 143, 207-08 (2016) (describing twenty-seven states that opposed the Clean Power Plan in the courts).

80. See, e.g., Wiseman & Osofsky, *supra* note 79, at 207-08 (describing the eighteen states and several local governments that supported the Clean Power Plan in the courts).

81. Henry N. Butler & Nathaniel J. Harris, *Sue, Settle, and Shut Out the States: Destroying the Environmental Benefits of Cooperative Federalism*, 37 HARV. J.L. & PUB. POL’Y 579, 586 (2014) (noting policies “allowing states to participate in notice-and-comment rulemaking”).

82. *Id.* at 582-584, 586.

83. See generally Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953 (2014) (describing states that form associations to discuss and vote on various initiatives and other agreements and then lobby the federal government on the basis of these agreements, although often without clarifying the extent to which all state members of the association agreed with the lobbying position taken).

At the level of enforcement, as opposed to allegations of principals' general failure to perform duties, states can request to work with the federal government to enforce portions of statutes. Indeed, in the environmental context, states often partner with the DOJ's Environment and Natural Resources Division to prosecute environmental crimes and otherwise enforce the statutes that states partially administer.<sup>84</sup> But states can do little if the DOJ uses its enforcement discretion to ignore certain violations or refuses to assist the states in certain enforcement actions for budgetary, political, or other reasons. In these situations, states are primarily limited to exercising their own authority to prosecute or otherwise enforce statutory violations under the delegated governance regimes.<sup>85</sup> Here, citizens have more monitoring and oversight power in their ability to sue both states and the federal government for a failure to enforce laws under certain statutes.<sup>86</sup>

Identifying 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, as well as 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 need 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, states, and citizens should review and oversee other entities' regulatory work. Agencies choosing to delegate should ask these same questions. Given certain ignoble purposes of delegation, Congress or agencies may not *wish* to design an effective regime, though they are required to do so under existing statutory commands for basic public protections.<sup>87</sup>

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84. *Environmental Crimes Section*, U.S. DEP'T JUST. (May 13, 2015), <http://www.justice.gov/enrd/environmental-crimes-section> [<http://perma.cc/2SAH-RF4G>] ("In order to conserve resources and improve the efficiency of environmental enforcement efforts, [Environmental Crimes Section] attorneys have often helped assemble environmental crimes task forces. Consisting of federal, state, and local personnel, these task forces have successfully identified and handled many environmental crimes cases.").

85. See, e.g., David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1571-72 (1995) (noting that "essentially all the modern major environmental laws provide uniform, minimum national standards with the states 'deputized,' to a greater or lesser degree, to do the permitting and enforcing for the federal government" and that when states lack the resources to adequately enforce, the federal government typically has not picked up the slack).

86. See, e.g., *id.* at 1618 ("Since 1972, the CWA has authorized citizens to act as private attorneys general to enforce CWA violations that EPA or the states were unwilling or unable to prosecute."); *id.* at 1618-19 (documenting how citizen suits spurred federal enforcement action).

87. See, e.g., 42 U.S.C. § 300g-1 (2012) (requiring that the EPA "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.* § 300g-2 (directing states to have primary enforcement authority for achieving these standards if the states meet minimum national requirements for their

The following Part describes critical attributes that form delegated governance regimes, providing a theoretical framework for assessing delegation of federal responsibilities to subfederal 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—a challenge that can impede the effectiveness of regulatory regimes. This calls for a theoretical framework for productive analysis. The framework presented here has one common, relatively simple normative basis: it is designed to enable scrutiny of all forms of delegated governance regimes to determine the extent to which those regimes carry out the functions they are required to under federal statutes and the extent to which principal-agent challenges prevent these regimes from being fully effective. A vast scholarly literature on regulatory failure observes that many other factors limit the effectiveness of regulation, such as inadequate staffing and resources,<sup>88</sup> capture of the process by anti-regulatory interests,<sup>89</sup> agency ossification under increasingly stringent judicial review,<sup>90</sup> and shifting political directives, among many others. Indeed, Robert Glicksman argues that the original form of cooperative federalism under the Clean Air Act has been problematically converted to a system in which both states and the federal government are hindered in their attempts to achieve environmental goals.<sup>91</sup> But principal-agent challenges also appear to be an important contributor to the problem—as described in the case studies here—and seem particularly susceptible to improvement through better regulatory design.

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regulatory programs); *id.* § 7409 (requiring the EPA to publish air quality standards that “are requisite to protect the public health” “with an adequate margin of safety”); *id.* § 7410 (requiring that states adopt plans providing for “implementation, maintenance, and enforcement” of these standards).

88. See, e.g., Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741, 1742-43 (2008) (noting that this problem and others have contributed to regulatory failure).

89. William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1595 (2007) (noting capture and other contributors to regulatory failure).

90. See Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 539 (1997) (reasserting that court requirements for extensive agency documentation are the primary causes of delayed agency action); Thomas O. McGarity, *Some Thoughts On “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); see also Jerry L. Mashaw & David L. Harfst, *From Command and Control to Collaboration and Deference: The Transformation of Auto Safety Regulation*, 34 YALE J. ON REG. 167, 170 (2017) (defining ossification as the reality “that informal rulemaking has become so encumbered by procedural and analytic requirements that it is no longer capable of delivering the results expected of it”).

91. Glicksman, *supra* note 7.

This normative baseline is simple in that I define effectiveness as whether the regulatory regime is meeting existing federal statutory requirements. Statutory requirements are of course the product of various political deals and influence, and sometimes, they do not even represent a genuine belief that the requirements will or can be achieved. But regardless of their imperfections, they are the law. Where Congress has enacted federal requirements and designed delegated governance regimes to meet these requirements—or agencies have chosen to allow delegated governance—it is important to ask whether delegated governance is in fact carrying out its purpose. This type of analysis can also be predictive. Lessons of past failures or successes in terms of using delegated governance to achieve existing statutory mandates can inform the formation of new delegated governance regimes designed to implement newly-formed standards.

This Part provides my proposed theoretical framework for understanding the many forms of delegated agency governance that exist and analyzing their effectiveness in avoiding principal-agent accountability problems that can impede the effectiveness of regulation (as defined by whether the regulation achieves statutory requirements). In constructing this framework, it uses case studies from the environmental and energy fields to provide examples of the framework's building blocks and to reveal the many ways in which they can be combined to form a delegated risk governance regime.

#### *A. 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 sometimes retain some control over the regulatory project by engaging in case-by-case or relatively frequent review of the individual actions of entities with delegated control, longer-term review of 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 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 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

Agencies often partially delegate the authority to draft and promulgate regulations. For example, in the electric reliability example below, a federal agency relies on a private organization to propose standards to prevent grid blackouts,<sup>92</sup> but the agency itself must ultimately approve and formalize those standards before they become enforceable.<sup>93</sup> 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, 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.<sup>94</sup>

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 concerned citizens—monitor whether regulatory targets are complying with the regulation. Monitoring takes many forms. For example, 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.<sup>95</sup> Another very common yet resource intensive form of monitoring involves agency inspectors physically visiting regulatory targets to identify potential violations.<sup>96</sup>

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92. See *supra* note 35 and accompanying text.

93. *Id.*

94. *RACT/BACT/LAER Clearinghouse (RBLC)*, ENVTL. PROTECTION AGENCY, <http://cfpub.epa.gov/rblc> [<http://perma.cc/8FH2-396V>].

95. See *infra* note 259 and accompanying text.

96. See, e.g., Hannah J. Wiseman, *The Capacity of States To Govern Shale Gas Development Risks*, 48 ENVTL. SCI. & TECH. 8376, 8384 (2014) (noting inspection limitations in the oil and gas context).

### c. Enforcing Compliance

A final necessary element of regulation is enforcing corrections to 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.<sup>97</sup> At a 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 remedial actions by a certain date, and in some cases, pay civil penalties and damages.<sup>98</sup> 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.<sup>99</sup>

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 through several avenues. 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

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97. E-mail from Leslie Savage, Chief Geologist, Tex. R.R. Comm'n, to author (Feb. 27, 2012, 9:01 AM) (on file with author).

98. See Wiseman, *supra* note 96, at 8383-84 (describing the enforcement process).

99. For a general discussion of agencies' use of these less formal enforcement means, see Tim Wu, *Agency Threats*, 60 DUKE L.J. 1841 (2011).

promulgate regulations, 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, review the overall performance of an entity with delegated authority and pressure it to improve, as shown by the oil and gas example below.

Review and monitoring of regulatory actions is also a two-way street; agents must have ways to hold principals to tasks and ensure that principals are complying with the federal statutes that they administer. There are several tools available, including petitions for additional action, citizen suits, and suits using the Administrative Procedure Act and similar statutes and arguing that agency failed to perform a nondiscretionary duty or misinterpreted a federal statute in refusing to take a particular action.<sup>100</sup>

### 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 regulating oil and gas pollution sometimes directly incorporate standards written by the American Petroleum Institute into their regulations.<sup>101</sup> 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<sup>102</sup> and agencies' contracting out duties to private entities, the literature has only more recently begun to closely examine agencies' delegation of responsibilities to private actors. For example, Karen Bradshaw Schulz and Dean Lueck examine

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100. See *supra* Section I.B.3.b.

101. See, e.g., 16 TEX. ADMIN. CODE § 3.13 (2017) (requiring a specific type of casing (lining) for oil and gas wells).

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 14001 and Firms' Regulatory Compliance*, 49 AM. J. POL. SCI. 235 (2005); Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129 (2013).



federal agencies' reliance on landowners and nonprofit groups for much of the habitat conservation required for endangered and threatened species.<sup>103</sup>

The following Section 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.

### *B. Delegation Case Studies*

When Congress directs a federal agency to delegate its responsibilities or an agency decides to delegate, a wide menu of options is available. 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—which agencies must comply with even if Congress did not in fact intend to achieve the statutory purpose, or if the Executive Branch and Congress now disagree with this purpose—the pathologies of delegation must be explored and addressed. These case studies begin with the strongest examples of 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.

In assessing the apparent successes and failures of these delegation programs and the tools that they employ, I recognize that Congress or an agency does not always form a delegated governance framework with the aim of achieving statutory goals. Indeed, the political economy of delegation suggests that there are many reasons for delegation that are somewhat unrelated to the goal of meeting statutory obligations, and some of these reasons are more noble

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103. Karen Bradshaw Schulz & 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).

than others.<sup>104</sup> In some cases, Congress creates a delegated governance regime simply because it does not believe that imposing federal standards will otherwise be politically acceptable to the states.<sup>105</sup> At times, Congress also desires to shift the resource-based burdens or political fall-out of regulation to subfederal entities<sup>106</sup> or believes that a regulatory task is so complex that the federal government could not accomplish it alone absent a massive expansion of federal funds and staff.<sup>107</sup> And Congress or agencies<sup>108</sup>—or both—sometimes wish to create an appearance of acting to address a public problem while masking the fact that delegation makes it unlikely that effective regulation will occur.<sup>109</sup> For example, Congress or an agency can likely largely preserve the status quo if they know that states will strongly resist implementing a federal requirement, yet delegate anyway without providing many tools for monitoring or enforcing state action.<sup>110</sup> Despite these and other nonstatutory reasons for delegation, I roughly

104. For general observations about the nefarious or ignoble purposes of delegation of congressional power to agencies, see DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 9 (1999), who note political reasons for delegating, including the political fall-out (or “costs”) of regulating at the federal level; and Posner & Vermeule, *supra* note 10, at 1744, who observe 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.”

105. See, e.g., Dwyer, *supra* note 15, at 1192-93 (noting members of Congress’s observations regarding the need for state inclusion for the Clean Air Act to be feasible).

106. See EPSTEIN & O'HALLORAN, *supra* note 104, at 2.

107. The Clean Air Act is an example of this. See Dwyer, *supra* note 15, at 1192-93 (“The chief Senate sponsor, Senator Muskie . . . contemplated that effective implementation of the Act required state and local cooperation . . . members of Congress were concerned with the practical difficulties that would arise from implementing, enforcing, and funding the vast and complicated Clean Air Act.”).

108. Congress and agencies do not always share the same desires with respect to carrying out the goals of a statute. Agency motives differ in part due to the fact that agency heads and staff are agents of both the President and Congress. See DeShazo & Freeman, *supra* note 10, at 1454-55 (noting that sometimes an agency “casts aside congressional policy preferences not necessarily to pursue its own agenda, but to pursue those of other principals,” including the President). And a broad literature explores the many reasons for agencies’ action and inaction. DeShazo and Freeman divide agencies’ actions as agents into two categories: preference (such as choices to follow the directives of an agency head more closely than those of Congress) and performance (such as laziness). *Id.* at 1454. For a discussion of the various personal and professional motivations of agency officials and staff, see, for example, *id.* at 1453-58; and Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251 (2009).

109. SCHOENBROD, *supra* note 14, at 55 provides 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.” Schoenbrod also notes 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 experts . . . rather than in terms that might reveal legislative support of high prices to consumers.” *Id.*

110. Of course, this approach can also backfire. States that wish to aggressively regulate now have the leeway to do so. As the “iterative federalism,” “uncooperative federalism,” and “negotiated federalism” 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. See Jessica Bulman-Pozen &

assess success and failure through this metric because regulatory approaches are legally supposed to hew to these goals—albeit with a fair degree of federal agency discretion—and they provide a relatively direct means of assessing effectiveness.

The following case studies focus on the environmental and energy fields for several reasons. First, although numerous legal fields involve cooperative federalism, cooperative federalism emerged in earnest with the enactment of the environmental statutes in the 1970s.<sup>111</sup> Indeed, nearly all federal environmental statutes have a substantial cooperative federalism component.<sup>112</sup> Many accounts of cooperative federalism or variations of cooperative federalism accordingly rely at least in part on environmental examples,<sup>113</sup> and I aim to import more serious consideration of the design and operation of delegation into this conversation.

Additionally, energy law involves a complex interplay of different levels of government, in part because of the physical infrastructure it governs.<sup>114</sup> There is growing attention to cooperative federalism in this field.<sup>115</sup> States or local

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Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1275 (2009); Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1108, 1128-37 (2009); Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011). Alternatively, rebellious states also might prefer to shirk, and, if not closely monitored by their agencies, face no consequences. The literature on delegation from Congress to federal agencies frequently employs the concept of shirking. See, e.g., Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 247 (1987). If Congress or agencies (or a President directing agencies) are determined to reduce regulatory intervention, they sometimes preempt the “nonshirking” states, especially those that are unusually motivated to act. See, e.g., Notice of Decision Denying a Waiver of Clean Air Act Preemption, 73 Fed. Reg. 12,156 (Mar. 6, 2008) (denying California’s request for regulating greenhouse gas emissions from automobiles under the Clean Air Act). *But see* Notice of Decision Granting a Waiver of Clean Air Act Preemption, 74 Fed. Reg. 32,744 (July 8, 2009) (showing the Obama administration’s later grant of the waiver request); see also Evan Halper, *Trump’s EPA Pick Casts Doubt on California’s Power To Regulate Auto Emissions*, L.A. TIMES (Jan. 18, 2017, 3:45 PM), <http://www.latimes.com/nation/la-na-pol-epa-confirmation-20170118-story.html> [<http://perma.cc/5ZL9-UX6H>] (“Oklahoma Atty. Gen. Scott Pruitt said at a contentious confirmation hearing Wednesday that he cannot commit to 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.”).

111. See Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 669 (2001) (“Beginning most notably with the environmental statutes enacted in the late 1960s and early 1970s, the federal government began to rely on state agencies to implement federal regulatory requirements.”).

112. Adelman & Engel, *supra* note 7, at 1802; Weiser, *supra* note 111, at 742 (“Under most of the federal pollution control statutes, states have the option of applying to EPA for authorization to administer the permit programs that provide the principal means of applying emission standards or other regulatory obligations, such as monitoring, recordkeeping, and reporting, to individual regulated entities.”).

113. To name just a few examples, Christopher K. Bader, *A Dynamic Defense of Cooperative Federalism*, 35 WHITTIER L. REV. 161, 186-87 (2014), describes positive cooperative principles within the environmental area; Jessica Bulman-Pozen, *supra* note 20, at 487, uses an example from the Clean Air Act; and Bulman-Pozen & Gerken, *supra* note 110, at 1276-78, discuss the issue of cooperative and uncooperative federalism under the Clean Air Act.

114. See Hari M. Osofsky & Hannah J. Wiseman, *Dynamic Energy Federalism*, 72 MD. L. REV. 773, 787-90 (2013).

115. See, e.g., Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. 399, 452-455 (2016) (noting the Supreme Court’s identification of certain energy regulation as involving

governments largely regulate generation and the distribution wires that carry electricity to homes and businesses, whereas FERC regulates generation for wholesale sales in interstate commerce as well as electricity transmission;<sup>116</sup> regional private actors and individual utilities are also involved in governing transmission.<sup>117</sup>

### 1. The Safe Drinking Water Act as Applied to Flint, Michigan

The regulation of the quality of drinking water provided to the public is an unusually complex form of delegation 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 alongside private consultants—that coordination and monitoring failures appear to be rampant, as demonstrated by the Flint crisis. 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. In this case, numerous actors were responsible for different tasks under the Act, with county and state health agencies conducting monitoring of drinking water, the state environmental agency implementing EPA requirements and enforcing these requirements, and the EPA maintaining a back-up enforcement function.

The state environmental agency was the primary actor to blame for the crisis—it failed to require a water treatment system clearly mandated by the SDWA; misled the EPA to suggest that the system had been installed (thus making EPA correction of failures by its agents slower and more difficult); and resisted warnings from the EPA, citizens, academics, and other state officials regarding water quality problems. But other actors, failed, too, showing the cascading problems that can result when numerous tasks are delegated to numerous entities. For example, city and county officials did not conduct the proper tests that would have indicated water quality problems sooner.

#### 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 goals (MCLG) for water pollutants,<sup>118</sup> which is the level of pollutant concentration at which drinking water is deemed to have no adverse impacts on

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cooperative federalism and noting possibilities for expanding cooperative federalism arrangements in this field); Jim Rossi & Thomas Hutton, *Federal Preemption and Clean Energy Floors*, 91 N.C. L. REV. 1283, 1288, 1331 (2013) (similarly identifying possibilities for more reliance on cooperative federalism in the energy law field).

116. Osofsky & Wiseman, *supra* note 114, at 805-06.

117. *Id.* at 804-805.

118. Flint Water Advisory Task Force, *supra* note 4, at 22.

public health, including sensitive populations such as children, and is the level that states must aim to achieve.<sup>119</sup> States are not required to implement these standards; they may choose to allow the EPA to directly regulate within their territory. However, most states have opted to receive delegated authority, meaning that they apply to the EPA to receive “primacy” under the Act.<sup>120</sup> A state with primacy becomes the entity that monitors and enforces compliance with those regulations,<sup>121</sup> and the state must submit a plan to the EPA showing that it has adequate procedures and resources for monitoring and enforcing compliance with the SDWA.<sup>122</sup> States with primacy also must write certain drinking water regulations that are at least as strict as federal regulations and ensure compliance with federal water quality requirements.<sup>123</sup> 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 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.<sup>124</sup>

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 state program adequacy, 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 thirty days.<sup>125</sup>

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119. See 40 C.F.R. § 141.2 (2016) (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”).

120. MARY TIEMANN, CONG. RES. SERV., RL31243, SAFE DRINKING WATER ACT (SDWA): A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS 7 (2017) (noting that only the District of Columbia and Wyoming lack primacy).

121. *Understanding the Safe Drinking Water Act*, ENVTL. PROTECTION AGENCY (June 2004), <http://www.epa.gov/sites/production/files/2015-04/documents/epa816f04030.pdf> [<http://perma.cc/9JXW-RHHX>].

122. 42 U.S.C. § 300g-2(a) (2012).

123. *Understanding the Safe Drinking Water Act*, *supra* note 121.

124. See *infra* note 140 and accompanying text.

125. 42 U.S.C. § 300g-3(a).

### c. Types of Entities with Delegated Control

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,<sup>126</sup> 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.<sup>127</sup> 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 report on 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.<sup>128</sup> The MCLG for lead is zero milligrams of lead per liter.<sup>129</sup> 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.<sup>130</sup> For monitoring purposes the federal rule also requires, among other mandates, drinking water suppliers to collect a specific number of samples of water quality at the tap within system users' homes and businesses.<sup>131</sup>

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 enforcing compliance.<sup>132</sup> Specifically, the Michigan Department of Environmental Quality (MDEQ)

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126. See *infra* note 134 and accompanying text.

127. See *infra* note 145 and accompanying text.

128. Flint Water Advisory Task Force, *supra* note 4, at 22.

129. *Id.*

130. 40 C.F.R. § 141.82 (2016); Flint Water Advisory Task Force Final Report, *supra* note 4, at 22-23.

131. 40 C.F.R. § 141.86(c).

132. 42 U.S.C. § 300(g)(2) (2012) (describing how states with primacy have "primary" SDWA enforcement authority); Flint Water Advisory Task Force, *supra* note 4, at 26.

provides water system “operator training and certification, operates certified laboratories, and monitors and reports on public water system violations.”<sup>133</sup>

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 MDEQ for two permit modifications.<sup>134</sup> 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.<sup>135</sup> The EPA’s regional office—an office that engages in certain inspection and enforcement activities and advises parties regarding regulatory requirements<sup>136</sup>—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.”<sup>137</sup> But even after the Agency learned that the technology had not been installed, it failed to act for months.<sup>138</sup> Further, the EPA did not exercise discretionary emergency authority triggered when a contaminant threatens public health.<sup>139</sup> 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.<sup>140</sup> This demonstrates inadequate monitoring of the overall performance of an entity with delegated authority.

In addition to MDEQ, other state agencies also failed in their duties. The state health agency did not properly monitor children’s blood lead levels in Flint and failed to adequately interpret data showing high blood lead levels.<sup>141</sup> And the Governor of Michigan is ultimately responsible for the decisions of both MDEQ and the state health office.<sup>142</sup> 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.<sup>143</sup> Further, the Governor and his office participated in the initial decisions to switch the Flint water supply, while the state Department of Treasury formally approved the decision.<sup>144</sup>

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133. Flint Water Advisory Task Force, *supra* note 4, at 26.

134. *Id.* at 27.

135. *Id.*

136. *Cf.* David L. Markell, *The Role of Deterrence-Based Enforcement*, 24 HARV. ENVTL. L. REV. 1, 51-52 (2000) (discussing the inconsistent regional office application of the Resource Conservation and Recovery Act).

137. *Id.* at 28.

138. *Id.* at 51.

139. 42 U.S.C. § 300i (2012); Flint Water Advisory Task Force, *supra* note 4, at 49.

140. Flint Water Advisory Task Force, *supra* note 4, at 50.

141. *Id.* at 33.

142. *Id.* at 35.

143. *Id.* at 36.

144. *Id.*

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 its 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.<sup>145</sup> 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, which it did not do.<sup>146</sup> The city's failure to invest in updated pipes for distributing water also contributed to the crisis.<sup>147</sup> 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.<sup>148</sup> Finally, the county's health department and the city did not timely notify the public of the dangers of the water, and the department conducted inadequate testing of children's blood lead levels.<sup>149</sup> Of course, many of these deficiencies related to the major economic crisis facing the city and county, demonstrating the challenges of 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 reveals numerous failures within a delegated governance regime. No one failure appears to be the primary cause of the problem, leading to a *mélange* of lessons that cannot all be reasonably ordered by priority. However, one particular flaw that could be highlighted above others is the EPA's delegation of numerous tasks to the state and local entity—and maintenance of that delegation—despite warnings of the lack of resources that these entities had to fulfill their duties under the SDWA.

Here, the EPA had the authority to (and did) write regulations governing the problems encountered in Flint, but it 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 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

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145. *Id.* at 43-44.

146. *Id.* at 45.

147. *Id.*

148. *Id.* at 51.

149. *Id.* at 47-48.



responsible parties were solving any problems that arose, demonstrating a sort of regulatory commons-type problem.<sup>150</sup> 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.<sup>151</sup>

In many respects, Flint involved failures by *individuals*, not agencies, highlighting how the principal-agent challenge operates not only in the federal-state context but also within governmental units.<sup>152</sup> The need for each responsible government to adequately monitor and enforce the behavior of individual agents is striking within this example. Although the principal-agent problem within agencies is beyond the scope of this Article, regulatory design tools to address this challenge, such as improving training and incentives for regulatory staff, enhancing compliance monitoring techniques that do not rely on human inspection and reporting (and thus avoid certain human error), and increasing permitting fees to adequately fund agencies and staff hiring are important considerations in this context.

## 2. The Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act (RCRA) provides another example of challenges within a cooperative federalism delegated governance regime. In this case, the EPA delegated all three types of regulatory tasks described above to one entity (the states), rather than the many different entities with regulatory responsibilities. The EPA appears to have retained too little authority in this area, and, as discussed below, a recent lawsuit forced the EPA to reclaim some this authority by updating its environmental regulations.

RCRA covers the generation, transport, and disposal of both hazardous and nonhazardous wastes on land, with the goal of preventing disposal operations from polluting land and water.<sup>153</sup> The Act’s delegated governance regime came about due to a specific congressional decision to let the EPA 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.<sup>154</sup> Thus, unlike the SDWA,

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150. See William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 6-7, 7-12 (2003) (defining the regulatory commons as an area in which multiple governments have some control, but not over the entire problem; government officials may fail to notice gaps; and government officials might lack adequate incentives to address their portion of the regulatory problem due to free riding and their lack of control over all externalities, among other challenges).

151. Flint Water Advisory Task Force, *supra* note 4, at 51.

152. See *supra* note 28.

153. 42 U.S.C. § 6902(a) (2012).

154. See Regulatory Determination for Oil and Gas and Geothermal Exploration, Development and Production Wastes, 53 Fed. Reg. 25,446, 25,446 (July 6, 1988) (describing the congressional directive that led to the EPA’s decision).

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<sup>155</sup>—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. (Recently, unsuccessful petitions have been filed to try to trigger the EPA to reinstitute RCRA responsibility.<sup>156</sup>)

RCRA appears to be an example of both Congress and agencies desiring to delegate authority through a cooperative federalism regime—perhaps in part to satisfy powerful interest groups. After Congress enacted the original act, heavy lobbying from the oil and gas industry led Congress to direct 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.<sup>157</sup> 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.<sup>158</sup> 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.<sup>159</sup> The EPA has since remained involved in a public-private group that reviews the environmental adequacy of state regulations in this area and makes nonmandatory recommendations to improve these regulations, with only mixed success.<sup>160</sup>

#### a. Type of Authority Delegated

Under the SDWA, states and local governments are responsible for implementing federal standards. The same is true for states that have primacy under RCRA, which regulates the disposal of both hazardous and nonhazardous wastes; local governments, however, are not generally involved. In the case of oil and gas development, the EPA determined in 1988 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.<sup>161</sup> This decision delegated to states the independent authority to draft and

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155. *See id.* at 25,446-47.

156. *See infra* note 186 and accompanying text.

157. 53 Fed. Reg. at 25,446 (describing Congress's directive).

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

159. *Id.*

160. *See infra* note 166.

161. *See supra* note 158 and accompanying text.

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 nonhazardous wastes (including oil and gas wastes generally)—the Clean Water Act, and the SDWA to fill gaps in federal regulation of oil and gas wastes.<sup>162</sup> 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.<sup>163</sup> Second, the EPA planned to work “with the Congress to develop any additional statutory authority that may be required.”<sup>164</sup> And finally, the Agency indicated that it would “encourage” changes to state regulation of oil and gas waste by working with the states.<sup>165</sup>

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 monitoring and enforcement policies. Specifically, the agency funded and participated in a nonprofit organization (STRONGER)<sup>166</sup> 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 one hundred 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, while others provide more general criteria. Considering state programs regulating the siting of oil and gas waste management facilities as an example, the guidelines provide that facilities should not be “located in a flowing or

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162. 53 Fed. Reg. at 25,446-47.

163. *Id.* at 25,447.

164. *Id.*

165. *Id.*

166. *Non-Voting Members*, ST. REV. OIL & NAT. GAS ENVTL. REGS., <http://www.strongerinc.org/our-team/non-voting-members> [http://perma.cc/2FF6-68X3] (showing EPA participation on the STRONGER board); *Support*, ST. REV. OIL & NAT. GAS ENVTL. REGS., <http://www.strongerinc.org/support> [http://perma.cc/8ESE-NJFA] (showing funding sources, including the EPA).

intermittent stream”<sup>167</sup> (a seemingly obvious priority to many, perhaps). 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.<sup>168</sup>

With respect to state monitoring of 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.<sup>169</sup> They also recommend that if states issue individual permits, the permits “should be issued for fixed terms,” so that states can periodically review and potentially revise them.<sup>170</sup> 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.<sup>171</sup>

Finally, regarding enforcement of state regulations, the guidelines recommend mechanisms such as the ability to issue notices indicating violations by regulated entities and establishing a schedule that the entities must follow for remedying the violation.<sup>172</sup> They also provide that states should be able to immediately restrain a waste activity that “is causing or may cause damage to public health or the environment,” in addition to the use of other enforcement tools, such as enabling courts to address violations.<sup>173</sup>

Initially, the EPA was directly involved in writing these provisions; it worked with a group of states to write and publish guidelines in 1989 and 1990.<sup>174</sup> 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 coauthor of the guidelines. Rather, one EPA representative is a nonvoting member of STRONGER,<sup>175</sup> which writes and updates the guidelines. However, the Agency has continued to periodically maintain an active role in reviewing the adequacy of states’ oil and gas waste regulation. In 2014 the agency prepared a report reviewing state regulations and

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167. 2015 Guidelines, ST. REV. OIL & NAT. GAS ENVTL. REG. 40 (2015), <http://www.strongerinc.org/wp-content/uploads/2015/08/2015-STRONGER-Guidelines.pdf> [<http://perma.cc/7CDH-F9U2>].

168. *Id.* at 40-41.

169. *Id.* at 21.

170. *Id.*

171. *Id.* at 22.

172. *Id.* at 23.

173. *Id.*

174. *Id.* at 5.

175. *See supra* note 167 and accompanying text.

identifying gaps (although not weighing in on whether these gaps were problematic).<sup>176</sup> Still, the EPA 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 nonprofit entity that includes both industry representatives<sup>177</sup> and state and federal regulators. Industry representatives can provide important perspectives on the technologies and practices that might best control waste. And the inclusion of representatives from environmental groups on the board might help offset potential industry pressure to make guidelines less stringent.

### 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 that with respect to its guidelines specific to hydraulic fracturing, the states reviewed by STRONGER implemented sixty-six percent of its recommendations to improve their regulatory programs, and partially implemented an additional twenty-five percent of recommendations.<sup>178</sup> 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 are adequately lined with steel pipes called “casing” cemented into the well before they are fractured, 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 include the “casing necessary to withstand . . . stresses” and that they “be cemented in a manner which will anchor and support the casing.”<sup>179</sup>

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176. Memorandum from Patrick M. Kelly, Env'tl. Eng'r, Office of Res. Conservation & Recovery, to File (Apr. 1, 2014), [http://www.epa.gov/sites/production/files/2016-04/documents/state\\_summaries\\_040114.pdf](http://www.epa.gov/sites/production/files/2016-04/documents/state_summaries_040114.pdf) [<http://perma.cc/N6U6-EF34>] [hereinafter Kelly Memorandum].

177. *Who We Are*, ST. REV. OIL & NAT. GAS ENVTL. REGS., <http://www.strongerinc.org/about-us/who-we-are> [<http://perma.cc/2M8M-GE56>].

178. *A Report and Summary of Outcomes from 2010-2012 Hydraulic Fracturing State Reviews*, ST. REV. OIL & NAT. GAS ENVTL. REGS. 4 (2016), <http://www.strongerinc.org/wp-content/uploads/2016/10/A-Report-and-Summary-of-Outcomes-from-2010-2012-Hydraulic-Fracturing-State-Reviews.pdf> [<http://perma.cc/3H4G-MVSR>] [hereinafter *STRONGER Report*].

179. LA. ADMIN CODE tit. 43, § XIX.433(G)(2)(a) (2017).

But a closer look at the numbers reveals a more nuanced story. Of the small number of states reviewed, implementation varies substantially, leaving certain populations more vulnerable than others. For example, while Colorado fully implemented all STRONGER recommendations, Oklahoma fully implemented only two of five recommendations.<sup>180</sup> 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."<sup>181</sup> While agencies of course are at the mercy of legislative budgets, the responses that the state "is heavily dependent on revenues generated by the oil and gas agency" and that more work is required are not assurances that the Agency will in fact actively and aggressively seek means of improving its resources.<sup>182</sup> Additionally, Oklahoma's oil and gas regulatory agency indicated that it would not specially train its staff, as recommended by STRONGER, due to resource limitations.<sup>183</sup>

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,<sup>184</sup> 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 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 before finally conceding that practices needed to change.<sup>185</sup>

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 (NRDC), 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

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180. *STRONGER Report*, *supra* note 178, at 3.

181. *Id.* at 29-30.

182. *Id.* at 30.

183. *Id.*

184. RegionTrack, *Economic Assessment of Oil & Gas Tax Policy in Oklahoma*, ST. CHAMBER OKLA. 18 (Dec. 2013), <http://www.regiontrack.com/www/wp-content/uploads/OK-Oil-Gas-Tax-Policy-Dec-2013.pdf> [<http://perma.cc/GV6E-HGHP>] (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").

185. See Mike Soraghan, *Okla. Agency Linked Quakes to Oil in 2010, But Kept Mum Amid Industry Pressure*, ENERGYWIRE (Mar. 3, 2015), <http://www.eenews.net/stories/1060014342> [<http://perma.cc/XF7P-XSB5>] (describing the Oklahoma Oil and Gas Survey's rejection of scientists Katie Keranen's findings regarding links between oil and gas wastewater disposal activity and earthquakes and how OGS scientists Holland continued to point to "natural causes" of earthquakes).

environmental resources,<sup>186</sup> and noted substantial gaps in state regulations.<sup>187</sup> 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.<sup>188</sup> Other publications similarly note gaps in regulation.<sup>189</sup> The EPA's own review of states' oil and gas waste regulatory programs reports that states "typically" do not have regulations that require groundwater 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.<sup>190</sup>

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,<sup>191</sup> and some have resulted in pollution of environmental resources.<sup>192</sup> 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 a creative mechanism of involving industry, environmental groups, and federal and state agencies in an effort to review the adequacy of agents' regulatory programs, although these are largely one-time reviews with limited follow-up.

186. Letter from Nat. Res. Def. Council to Lisa Jackson, EPA Adm'r 8, 12 (Sept. 8, 2010), [http://www.nrdc.org/sites/default/files/ene\\_10091301a.pdf](http://www.nrdc.org/sites/default/files/ene_10091301a.pdf) [<http://perma.cc/KX8B-XFQ7>] [hereinafter Nat. Res. Def. Council Letter].

187. *Id.* at 24.

188. *Id.*

189. Michael Burger, *Fracking and Federalism Choice*, 161 U. PA. L. REV. ONLINE 150 (2012) (arguing that there is a case for federal regulation of hydraulic fracturing and noting the impacts on communities); Hannah J. Wiseman, *Risk and Response in Fracturing Policy*, 84 U. COLO. L. REV. 729 (2013) (documenting regulation variation); Nathan Richardson et al., *Resources for the Future, The State of State Shale Gas Regulation: Maps of State Regulations*, CTR. ENERGY ECON. & POL'Y (2013), [http://www.rff.org/files/document/file/RFF-Rpt-StateofStateRegs\\_StateMaps\\_0.pdf](http://www.rff.org/files/document/file/RFF-Rpt-StateofStateRegs_StateMaps_0.pdf) [<http://perma.cc/D9WU-AMXS>] (showing variations in a variety of state requirements, including some states that simply do not regulate in areas that other states do).

190. Kelly Memorandum, *supra* note 176, at 4.

191. See Lauren A. Patterson et al., *Unconventional Oil and Gas Spills: Risks, Mitigation Policies, and State Reporting Requirements*, 51 ENVTL. SCI. & TECH. 2563, 2567 (2017) (finding that between two and sixteen percent of active unconventional oil and gas wells in four states experienced spills during all stages of the life cycle); *Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States*, ENVTL. PROTECTION AGENCY 5-48 (2016), <http://cfpub.epa.gov/ncea/hfstudy/recordisplay.cfm?deid=332990> [<http://perma.cc/N3HL-S8TZ>] (reporting a spill rate of 0.4 to 12.2 percent for the hydraulic fracturing process).

192. For an examination of some of the risks and actual pollution events, see Wiseman, *supra* note 189.

### 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. However, both state and local governments are centrally involved in its implementation. As with the SDWA, numerous regulatory tasks, including drafting and enacting, monitoring, and enforcing regulations—or at least portions of these tasks—are delegated. Still, the EPA retains more substantial authority to independently enforce violations of the Act, and private entities are less centrally involved in the regulatory scheme.

Despite the EPA's retention of authority, in some cases the EPA has not been able to correct states' failures to implement federal requirements—due largely to the political difficulty associated with its efforts to impose direct federal regulations on states, particularly in areas that involve regulatory fields traditionally dominated by state and local governments, such as land use. But the EPA has also effectively used its relatively strong retained authority to use soft tools—backed up by credible threats—to motivate state action, as discussed in an example below where Colorado implemented innovative controls at oil and gas sites partially in response to EPA pressure.

#### 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 statute's complex cooperative federalism scheme, 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).<sup>193</sup> States also must monitor compliance and enforce these permits. When the EPA reviews SIPs, 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 has not fully delegated control to the states. It retains substantial parallel and back-up authority. 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, directly imposing federal requirements on actors previously regulated

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193. 42 U.S.C. § 7410 (2012).



by the states.<sup>194</sup> Although the EPA has only rarely exercised this authority, largely for political reasons,<sup>195</sup> 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 increasing air pollution—Congress required the EPA to write technology-based standards to control pollution from these sources.<sup>196</sup> 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.<sup>197</sup>

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 do so.<sup>198</sup> 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.<sup>199</sup> To implement federal controls on certain emissions, the Agency also requires some polluters to continuously monitor emissions from their smokestacks;<sup>200</sup> 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

194. *Id.* § 7410(c) (giving the EPA the authority to write and issue a federal implementation plan).

195. See Thomas O. McGarity, *Missing Milestones: A Critical Look at the Clean Air Act's VOC Emissions Reduction Program in Nonattainment Areas*, 18 VA. ENVTL. L.J. 41 (1999) (noting that federal implementation plans are rarely used).

196. 42 U.S.C. §§ 7470-79.

197. *RACT/BACT/LAER Clearinghouse (RBLC)*, *supra* note 94.

198. 42 U.S.C. § 7410 (a)(2)(B), (C).

199. See *id.* § 7414 (granting the EPA the authority to require reporting and to inspect regulated entities in addition to other monitoring authority under the Clean Air Act).

200. 40 C.F.R. pt. 75 (2017).

a Clean Air Act regulation, permit, or SIP.<sup>201</sup> For example, the EPA may issue orders requiring regulated entities to comply with SIPs or permits.<sup>202</sup> 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.<sup>203</sup> 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 partially delegates to citizens the role of monitoring and enforcement, citizens may<sup>204</sup> and often do file lawsuits alleging that the EPA has failed to perform a nondiscretionary duty, such as writing a rule under the Clean Air Act. They also may sue alleging that the EPA and states have failed to address an entity's violation of the Clean Air Act. Citizens may not, however, sue the states for failing to perform a nondiscretionary duty under the Act. 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.<sup>205</sup>

### d. Program Results

The Clean Air Act has been hugely successful in reducing the concentration of numerous pollutants in the air,<sup>206</sup> although some persistent pollution problems continue to elude regulators—particularly pollution from cars. Further, the EPA continuously battles with certain states over their SIPs, and its use of federal implementation plans (FIPs) is very rare, in part due to political difficulties associated with past attempts. For example, as documented by 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.<sup>207</sup> The Agency eventually stopped defending certain aspects of the FIPs on appeal, and Congress repealed the requirement that states include land

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201. 42 U.S.C. § 7413(a)(1).

202. *Id.*

203. *Id.* § 7413(a)(2).

204. *Id.* § 7604.

205. See Sivaram, *supra* note 77.

206. See *Environmental National Emissions Totals*, ENVTL. PROTECTION AGENCY (Feb. 6, 2015), [http://www.epa.gov/sites/production/files/2015-07/national\\_tier1\\_caps.xlsx](http://www.epa.gov/sites/production/files/2015-07/national_tier1_caps.xlsx) [<http://perma.cc/FWR3-6P25>] (showing substantial reductions in air pollutants over time).

207. See Dwyer, *supra* note 15, at 1204-05.

use elements in their SIPs. After Congress required states to include inspection and maintenance programs in their SIPs or face EPA sanctions 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.<sup>208</sup> 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.<sup>209</sup>

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 step in and directly regulate.<sup>210</sup> This allows the EPA to monitor whether states' SIPs are working. When the EPA determines that they are not, it 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. For example, as oil production expanded near Denver, 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. 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.<sup>211</sup>

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.<sup>212</sup> The Agency signed a compact with the state and other entities responsible for maintaining air quality under Colorado's SIP (including local governments).<sup>213</sup> Through this "early action

208. *Id.* at 1212-16.

209. *See* 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); 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 in *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008)); Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000) (upholding most aspects of the EPA's rule regarding numerous state SIPs and addressing emissions of nitrogen oxide that cross state borders).

210. However, the EPA must write a federal implementation plan if the state "is not implementing a previously approved SIP." James D. Braddock & Alec C. Zacaroli, *Meeting Ambient Air Standards: Development of the State Implementation Plans*, in THE CLEAN AIR ACT HANDBOOK 49, 62 (Julie R. Domike & Alec C. Zacaroli eds., 4th ed. 2016). Violating national air quality standards could indicate inadequate implementation, in which case a federal plan is technically required.

211. Dale Wells, Condensate Tank Emissions 2 (unpublished manuscript), <http://www.epa.gov/ttnchie1/conference/ei20/session6/dwells.pdf> [<http://perma.cc/7QR7-73P9>].

212. *Denver's Air Quality Violates Federal Ozone Standard*, ENVTL. PROTECTION AGENCY, <http://yosemite.epa.gov/opa/advpress.nsf/8b770facf5edf6f185257359003fb69e/9b53db89076c8dd585257399005f6483> [<http://perma.cc/P45W-VZFD>].

213. *Id.*

compact,” these entities agreed to take certain actions to attempt to reduce ground-level ozone emissions.<sup>214</sup> These actions failed, but the EPA granted several extensions for the state to attempt to come into compliance.<sup>215</sup> 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.<sup>216</sup>

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 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 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 many portions of Texas, one of the leading opponents of implementing the Act—to remain out of compliance with federal standards.<sup>217</sup>

#### 4. Energy Policy Act

FERC’s regulation of electricity reliability under the Energy Policy Act offers a final example of substantial reliance on a private organization to carry out regulatory responsibilities—but also shows an unusual degree of federal oversight authority. 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

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214. *Id.*

215. *Id.*

216. *Id.*

217. See *Current Nonattainment Counties for All Criteria Pollutants*, ENVTL. PROTECTION AGENCY (June 20, 2017), <http://www3.epa.gov/airquality/greenbook/ancl.html> [<http://perma.cc/KPX5-H6K7>] (showing that many counties in Texas are failing to comply with federal air quality standards).

despite arguably having congressional authorization to do so.<sup>218</sup> Instead, the Agency had left most responsibility to a private organization called the North American Electric Reliability Council (NERC). This council, comprised of utilities that own and operate power plants 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 below.

FERC's reliance on a private entity to draft standards and later enforce them, combined with its close review of these standards and NERC's individual enforcement actions, appears to be a relatively strong model of reliance on industry to develop and implement highly technical standards, subject to strong governmental oversight. As discussed below, however, some have argued that this oversight is excessive, reducing in some cases NERC's effectiveness by causing confusion and unpredictability, such as by using different standards to review NERC's actions.

a. Type of Authority Delegated

The lack of public involvement in regulating electricity reliability changed in 2003 when a massive electricity blackout cascaded through the eastern electricity grid, leaving millions of people in the dark.<sup>219</sup> 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.<sup>220</sup> 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 propose 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<sup>221</sup> and identifying all

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218. 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. 16 U.S.C. § 824(a) (2012).

219. *Final Report on the August 14, 2003 Blackout in the United States and Canada* 74, U.S.-CAN. POWER SYS. OUTAGE TASK FORCE (Apr. 2004), <http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/BlackoutFinal-Web.pdf> [<http://perma.cc/F4ZS-Z2HC>].

220. See Energy Policy Act of 2005, Pub. L. No. 109-58, § 1211, 119 Stat. 594, 941 (codified at 16 U.S.C. § 824o(a)-(c) (2012)) (directing FERC to select an electric reliability organization and receive proposals for reliability standards from this organization).

221. See *FAC-003-04 Transmission Vegetation Management*, NORTH AM. ELECTRIC RELIABILITY CORP., [http://www.nerc.com/\\_layouts/PrintStandard.aspx?standardnumber=FAC-003-4&title=Transmission%20Vegetation%20Management&jurisdiction=United%20States](http://www.nerc.com/_layouts/PrintStandard.aspx?standardnumber=FAC-003-4&title=Transmission%20Vegetation%20Management&jurisdiction=United%20States) [<http://perma.cc/7ELS-V9JT>].

vulnerable computer controls of plants and lines that could be subject to cyber-attack or technical failures.<sup>222</sup> 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.<sup>223</sup> 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, 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.<sup>224</sup> This forces the Agency to continuously review the content of the regulations written by the entity holding delegated authority. Although FERC may not independently draft standards, it may require 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.<sup>225</sup>

#### c. Entities with Delegated Authority

Given the unusual degree of direct delegation to a private entity here, this substantial oversight is likely for good reason. NERC is a corporation, not a government agency, and utility owners and operators are very active in developing NERC-proposed standards through its committees.<sup>226</sup> NERC also follows a process approved by the American National Standards Institute,<sup>227</sup> a

222. *CIP-002-5.1a, Cyber Security – BES Cyber System Categorization*, NORTH AM. ELECTRIC RELIABILITY CORP., <http://www.nerc.com/layouts/PrintStandard.aspx?standardnumber=CIP-002-5.1a&title=Cyber%20Security%20%E2%80%94%20BES%20Cyber%20System%20Categorization&jurisdiction=null> [<http://perma.cc/6P9H-B7AP>] (providing the standard requiring identification of all vulnerable computerized devices).

223. Energy Policy Act § 1211 (codified at 16 U.S.C. § 824o(e)(3), (4)).

224. *See supra* note 35.

225. Energy Policy Act § 1211 (codified at 16 U.S.C. § 824o(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”).

226. *See Standing Committees and Other*, NORTH AM. ELECTRIC RELIABILITY CORP., <http://www.nerc.com/comm/Pages/default.aspx> [<http://perma.cc/M7ZZ-Y7JB>].

227. *See* Memorandum from NERC Legal Standards Departments to NERC Standards Process Input Group (Mar. 15, 2012), [http://www.nerc.com/pa/Stand/Standards%20Processes%](http://www.nerc.com/pa/Stand/Standards%20Processes%20)

nonprofit organization that develops standards-approval processes used by industry associations and other nonprofits writing their own norms and guidelines.<sup>228</sup> 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. Without adequate supervision, however, it also could result in an undue amount of private influence.

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 (REs). REs include all segments of the utility industry—power plant owners and operators, transmission line owners and operators, electricity end users, and others.<sup>229</sup> 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 transmission grid and power plants that are subject to reliability standards.<sup>230</sup>

#### d. Program Results

As FERC has reviewed NERC's and REs' standard-development processes and enforcement actions, it has used its strong oversight authority, rather than merely rubber stamping 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).<sup>231</sup> The Commission has also ordered NERC to submit revised standards that FERC had requested and NERC failed to timely provide.<sup>232</sup> In the compliance and enforcement context, FERC has sometimes imposed additional penalties for a utility's violation of a standard<sup>233</sup> or indicated that notices and settlements or standards are inadequately detailed to support accurate penalty calculation.<sup>234</sup> Several observers have noted that these and other FERC actions have generated substantial tension between the two entities<sup>235</sup> and

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20Manual%20revisions%20SPIG%20Recommen/ANSI\_Memorandum\_FINAL.pdf [http://perma.cc/9EJ8-Q55P] (describing NERC processes that meet or exceed ANSI requirements and those that differ).

228. See, e.g., Bill Bush, *ANSI Reaccredits API's Standards Program*, API (Oct. 6, 2011), <http://www.api.org/news-policy-and-issues/news/2011/10/06/ansi-reaccredits-apis-standards-program> [http://perma.cc/Z4TA-793T].

229. *Key Players*, NORTH AM. ELECTRIC RELIABILITY CORP., <http://www.nerc.com/AboutNERC/keyplayers/Pages/default.aspx> [http://perma.cc/9TG7-ZZMR].

230. Florida Blackout, 129 FERC ¶ 61,016 (2009) (showing that Florida Power and Light was acting as the Reliability Coordinator for the RE under a contract with the RE).

231. John S. Moot, *When Should the FERC Defer to the NERC?*, 31 ENERGY L.J. 317, 321 (2010).

232. See, e.g., *Mandatory Reliability Standards for the Bulk Power Systems*, 130 FERC ¶ 61,218 (2010).

233. Scott Grover, *FERC Guidance Order Shows Inter-Agency Tension*, NAT. RESOURCES & ENV'T, Winter 2009, at 61, 63 (describing FERC Guidance Order No. 672).

234. *Id.*

235. *Id.* at 63; Moot, *supra* note 231, at 323.

the perception of FERC as inflexible and inadequately deferential to NERC's expertise.<sup>236</sup>

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 Hurricane 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 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 and agencies choosing to delegate based on existing enabling authority would both benefit 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 or through shared 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 flesh out the costs and benefits of different approaches under each building block. This Part analyzes some of the key normative considerations that can drive this effort.

The strongest lesson from the case studies is the importance of designing delegated governance regimes for adequate monitoring of principals' and agents' behavior, as well as the correction of that behavior when it deviates from a federal statute's directives or purposes. I describe both the monitoring of behavior and efforts to substantively change that behavior as "oversight." In the case of Flint, the EPA should have responded to warnings that Michigan had not properly exercised its primacy under the statute long before the Flint disaster.<sup>237</sup> Additionally, it should have exercised its ability to withdraw primacy under the program and to conduct back-up enforcement. Even if the EPA had been more

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236. Moot, *supra* note 231, at 323-24.

237. See *supra* note 140 and accompanying text.



diligent, its limitation to back-up enforcement instead of parallel enforcement also might have been problematic. This demonstrates how agencies that have delegated numerous functions might need to preserve the ability to work alongside the state when it comes to enforcing regulatory requirements.

This Part will discuss how oversight of both principals and agents within delegated governance can be conducted by numerous entities, including citizens and independent “review” agencies. The Flint problem finally came to light due to the diligence of individuals at many levels, including county and state health and environmental officials, a federal EPA official, citizens, and academics.<sup>238</sup> But citizens, local governments, and states also need ways to correct a failure of the principal to carry out its duties, thus highlighting the importance of adequately expansive citizen suit provisions in addition to other mechanisms discussed here.

Beyond the importance of adequate oversight tools, those designing regimes should consider both the benefits and limitations of assigning different regulatory tasks to numerous levels of government, including considering the comparative advantages of these entities, ensuring that an agency plays a coordinating function among the different responsible entities, and implementing safeguards that address the inevitable human error within agencies—error that can be amplified the more agencies and staff are involved. In Flint, government officials from the city, county, state, and federal EPAs were all centrally involved in protecting the water supply, and despite warnings from officials at all of these levels, months of foot-dragging occurred before action was taken. This represents, among other problems, a failure of coordination. Relatedly, designers of delegated governance regimes should more closely consider the comparative advantages of different levels of government and different types of “governing” entities—including private parties—when delegating different types of regulatory functions. For example, private parties might best be involved in regulation drafting in a regulatory regime involving highly technical standards, as shown by the FERC case study. There are numerous other design features to consider if—as I argue should be done—legislatures and agencies take the mechanics of delegation more seriously. This Part therefore proposes initial considerations rather than providing a comprehensive toolbox for design.

#### *A. Improving the Quality, Quantity, and Duration of Oversight*

The Flint crisis, in particular, sheds light on the critical role that federal agencies play in overseeing entities to which they have delegated regulatory tasks, as well as the equal importance of citizens, state agents, and other entities

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238. See Flint Water Advisory Task Force, *supra* note 4, at 20 (noting warnings about high lead level from citizens, professors, state environmental and health office officials, individuals representing the federal EPA, and county officials, among others).

overseeing federal principals. Particularly in an area that is central to public health 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 oversight is conducted, what types of oversight occur, and how often officials and other entities undertake oversight efforts, such as review of the effectiveness of delegated governance programs and proposals for substantive modifications to those programs.

### 1. Ensuring High-Quality Oversight: Enhanced Use of Technology, Citizen Monitoring, and Independent Review Agencies

With respect to the quality of oversight within delegated governance regimes, officials at all levels need an adequate amount of accurate information in order to properly assess the outcomes of a delegated regulatory program and whether principals or agents are achieving those outcomes. Wendy Wagner has noted the challenges of governing without adequate data generally—not just in the delegated governance context—and how difficult it is to obtain this data.<sup>239</sup> In the case of Flint, the informational errors were relatively basic: they tended to involve human error rather than complex tasks of measuring and assessing risks. 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.<sup>240</sup> And EPA officials initially lacked proper data about potential water problems because state and local officials told them that a corrosion control system had been installed, which was not true.<sup>241</sup> The crisis was only fully revealed after academics, citizens, and officials from multiple levels of government repeatedly sent complaints and testing data to state and federal agencies identifying problems with the water.<sup>242</sup>

The SDWA and the lead and copper rule promulgated under it have testing requirements designed to help avoid this type of situation—requirements that the local water authority and state agency simply did not follow.<sup>243</sup> 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

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239. Wendy E. Wagner, *Commons Ignorance: The Failure of Environmental Law To Provide the Information Needed To Protect Public Health and the Environment*, 53 DUKE L.J. 1619 (2005).

240. Flint Water Advisory Task Force, *supra* note 4, at 51 (noting that the EPA was “hampered by poor information derived from Flint’s flawed water quality sampling”).

241. *Id.* at 50 (observing that the EPA did not become aware of the lack of a corrosion control treatment system until a citizen brought it to the Agency’s attention and that it took two months for the Michigan Department of Environmental Quality to concede that it was not implementing this treatment).

242. *Id.* at 20-21, 50.

243. *See supra* note 135 and accompanying text.

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, who highlighted the enormous potential of technology to revolutionize environmental law,<sup>244</sup> many scholars have noted the opportunity for monitoring technologies to improve compliance.<sup>245</sup> 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 could automatically send 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 “bucket brigades” documents.<sup>246</sup> 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 indicated that it lacks the funding even to properly train its inspectors,<sup>247</sup> although it might have 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 a high payoff 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 oversight effort.<sup>248</sup>

A final, important tool in improving monitoring of both federal principals and their agents is the expanded use of review agencies, the role of which is

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

245. See, e.g., Markell & Glicksman, *supra* note 23 (describing the potential of electronic monitoring technologies).

246. 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).

247. See *supra* note 183 and accompanying text.

248. Cf. Flint Water Advisory Task Force, *supra* note 4, at 25-26 (“[A] team of scientists from multiple Michigan universities is expected to test Flint drinking water in 2016.”). For a discussion of relatively effective bucket brigades that helped monitor air quality near oil and gas sites, see O’Rourke & Macey, *supra* note 246.

solely to analyze the adequacy of regulation, risks that arise under a regulatory scheme, and potential needed improvements of regulation. These agencies are independent agencies,<sup>249</sup> not primarily comprised of political appointees, and are somewhat immune to the dramatic political shifts that occur over time. Their role in monitoring the adequacy of regulatory programs is key. They typically review federal agency actions,<sup>250</sup> but some also review the state and local role in addressing risks. A useful model comes from the National Transportation Safety Board (NTSB), 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.<sup>251</sup> The NTSB recommends federal, state, and local changes needed in order to improve transportation safety.<sup>252</sup> Independent agencies formed in other regulatory areas with missions similar to the NTSB 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.

## 2. Conducting Frequent and Long-Term, Micro- and Macro-Scale Oversight

Beyond demonstrating the need to ensure that monitoring provides accurate, high-quality data needed for oversight, all of the case studies in Part I highlight the importance of conducting oversight of certain individual actions carried out by the principal and the agents with delegated authority (even if only a sampling of these actions), as well as long-term assessment of program results. Additionally, they show the need to conduct oversight at different geographic scales—for example, at individual oil and gas sites or water taps—what could be described as the “micro” scale—in addition to more centralized or “macro” locations. With respect to the frequency of review, 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.<sup>253</sup> The EPA helps to avoid this problem through a network of

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249. The “review” agencies that I discuss here do not refer to all independent agencies, but rather those independent agencies like the National Transportation Safety Board that are primarily tasked with informational projects such as investigating the causes of accidents and recommending improved policies rather than promulgating regulations.

250. *About the NTSB*, NAT’L TRANSP. SAFETY BOARD, [http://www.nts.gov/about/Pages/about\\_ntsb.aspx](http://www.nts.gov/about/Pages/about_ntsb.aspx) [http://perma.cc/AP5L-ZBF2].

251. 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 27.

252. *See, e.g., Safety Recommendation H-17-015*, NAT’L TRANSP. SAFETY BOARD, <http://www.nts.gov/safety/safety-recs/reletters/H-17-015.pdf> [http://perma.cc/8VUN-CP43] (making recommendation to the Maryland State Department of Education to change certain school bus driver requirements).

253. *See, e.g., Wells*, *supra* note 211, at 2 (noting the growth of oil and gas development in the region, which contributed to nonattainment).

digital air quality monitors managed by local governments, tribes, states, and the federal government around the country<sup>254</sup> and by requiring continuous monitoring of certain emissions from smokestacks.<sup>255</sup> However, there is growing recognition of micro-pockets of polluted air at the spatial level,<sup>256</sup> such as near oil and gas sites,<sup>257</sup> which would not be detected by existing stationary monitors. And sometimes federal agencies are not motivated to act on this monitoring data or lack the funding or political will to conduct monitoring. In some cases, the federal EPA has addressed pollution at these smaller levels. For example, in Colorado—where booming oil and gas development contributed to previously-underestimated air quality nonattainment problems—federal EPA staff “used a vehicle fitted with measuring devices to remotely measure and calculate emissions” from fifty-two individual tanks at oil and gas sites.<sup>258</sup> Additionally, citizens, local governments, and academics have helped to catch these types of “micro” 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,<sup>259</sup> and recent studies have highlighted certain air quality problems near oil and gas sites around the United States.<sup>260</sup>

With respect to the importance of longer-term oversight of program performance, 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: either short-term, frequent review of actions by the delegated entity or longer-term, overall performance review. The STRONGER reports on state oil and gas regulatory programs and recommendations for improvements in those programs have been somewhat effective.<sup>261</sup> But STRONGER reviews are conducted on a voluntary basis, do not cover many of the states responsible for

254. *Air Quality System*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/aqs> [<http://perma.cc/QQD5-XZGX>] (“The Air Quality System (AQS) contains ambient air pollution data collected by EPA, state, local, and tribal air pollution control agencies from over thousands of monitors . . . . AQS data is used to assess air quality, assist in Attainment/NonAttainment designations, evaluate State Implementation Plans for NonAttainment Areas, perform modeling for permit review analysis, and other air quality management functions.”).

255. 40 C.F.R. pt. 75 (2017).

256. Rafael Borge et al., *Assessment of Microscale Spatio-Temporal Variation of Air Pollution at an Urban Hotpot in Madrid (Spain) Through an Extensive Field Campaign*, 140 *ATMOSPHERIC ENV'T* 432 (2016) (noting strong spatial and temporal variations in air quality).

257. See Hilary M. Goldberg et al., *It's a Nuisance: The Future of Fracking Litigation in the Wake of Parr v. Aruba Petroleum, Inc.*, 33 *VA. ENVTL. L.J.* 1, 3 (2015) (noting numerous private lawsuits against energy companies alleging that hydraulic fracturing has led to air pollution).

258. Wells, *supra* note 211, at 1-2, 10.

259. AirResource Specialists, *Garfield County 2013 Air Quality Monitoring Report*, GARFIELD COUNTY PUB. HEALTH DEP'T, at v (June 30, 2014), [http://www.garfield-county.com/air-quality/documents/airquality/GARCO\\_MonitoringReport\\_2013\\_Final.pdf](http://www.garfield-county.com/air-quality/documents/airquality/GARCO_MonitoringReport_2013_Final.pdf) [<http://perma.cc/F37A-E47E>] (noting that air quality monitoring is conducted near oil and gas sites).

260. O'Rourke & Macey, *supra* note 246 (describing the results of air quality monitoring by citizen “bucket brigades” near oil and gas sites); *Oil and Gas Emission Inventory, Eagle Ford Shale: Technical Report*, ALAMO AREA COUNCIL GOV'T (Apr. 4, 2014), <http://www.aacog.com/DocumentCenter/View/19069> [<http://perma.cc/T643-5DRK>].

261. See *supra* note 179 and accompanying text.

regulating oil and gas wastes, and have only been completed for six states that regulate hydraulic fracturing for oil and gas.<sup>262</sup> However, STRONGER has reviewed twenty-four states' general oil and gas waste management regulations, as opposed to hydraulic fracturing-specific regulations.<sup>263</sup> The 2014 EPA report also highlights overall performance and deficiencies of the states in regulating oil and gas wastes.<sup>264</sup> But neither the EPA nor STRONGER regularly or periodically reviews whether states are enforcing violations of their regulations; instead, STRONGER reviews whether states have adequate inspection resources or staff for conducting inspections. Nor do these reports focus on problems at individual well sites or even within smaller portions of states, which could result in an uneven distribution of environmental impacts.

Although more frequent review, as well as additional micro-level 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, thus creating further frustration.<sup>265</sup> 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,<sup>266</sup> and the Department of Energy has written several larger reliability assessments.<sup>267</sup>

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262. *STRONGER Report*, *supra* note 178, at 2.

263. *State Reviews*, ST. REV. OIL & NAT. GAS ENVTL. REG., <http://www.strongerinc.org/state-reviews> [<http://perma.cc/R865-UHXJ>].

264. Kelly Memorandum, *supra* note 176.

265. *See Moot*, *supra* note 231, at 322 (describing FERC's changing its standard of reviewing NERC actions and resulting objections).

266. *Reports & Analyses*, FED. ENERGY REG. COMMISSION, <http://www.ferc.gov/market-oversight/reports-analyses/reports-analyses.asp> [<http://perma.cc/J2RU-7AUW>] (showing FERC seasonal reliability reports).

267. *Cf.* Office of Elec. Delivery & Energy Reliability, *Transmission Reliability Program Overview*, U.S. DEP'T ENERGY, [http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/OE\\_FS\\_TRP\\_web.pdf](http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/OE_FS_TRP_web.pdf) [<http://perma.cc/YC8C-VBQP>] (describing the Department of Energy's grid reliability activities, including developing a tool that allows NERC to "monitor compliance" with reliability rules in real time).

In the case of Flint, the EPA's, state's, and local governments' individualized and longer-term oversight, as well as micro- versus macro-scale oversight, was inadequate. The EPA failed to properly review and remedy the one-time decision by the plant to switch to river water without installing a corrosion control system, as did the many other entities responsible for this system. Further, the EPA failed to respond to warnings that Michigan's overall SDWA program performance was lacking<sup>268</sup> and that the state had not invested the resources necessary to operate an effective regulatory program.

Review of both agents' and principals' performance under delegated governance regimes is potentially the most important yet most underappreciated aspect of design in the delegation context. The fact that many states operate under a long-term grant of regulatory primacy by the EPA, checked primarily only by periodic citizen suits that frequently result in inaction, shows that periodic review of performance, as well as longer-term lookbacks, is largely lacking in these regimes.

### 3. Expanding Tools for Changing Substantive Behavior in Response to Monitoring

One of the most substantial challenges for entities within delegated governance regimes is calling responsible actors to task when monitoring shows that there is a problem. In terms of oversight from the federal to subfederal level, the tendency in delegation is for the agency to conduct close, up-front review of the delegated entity (described by Emily Hammond and David Markell as the "gatekeeper" function in primacy<sup>269</sup>) but to then lag in later reviews (described by Hammond and Markell as the *ex post* monitoring responsibility<sup>270</sup>). 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 sporadic despite federal agencies' ability to revoke states' primacy for a variety of reasons.<sup>271</sup>

Having sunset dates for primacy or mandatory periodic review periods could help to solve this problem. Statutes creating a cooperative federalism regime could mandate that a federal agency creating primacy for a state (primary authority to implement a federal regulatory regime) only allow this primacy to continue for a certain number of years; these statutes could also allow for agency renewal of primacy only if the state demonstrated that it continued to uphold its responsibilities under the statute. Softer options than sunseting are also

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268. See *supra* note 140 and accompanying text.

269. Hammond & Markell, *supra* note 67, at 331.

270. *Id.*

271. *Id.* at 330-32.

available; the statute could merely that require the agency review specific aspects of states' programs every few years without requiring withdrawal of primacy.

But as recent political changes demonstrate, federal agencies might lack the resources or political will to uphold their duties under federal acts or to adequately oversee entities exercising delegated federal power. Here, the statutorily-enabled abilities of citizens, local governments, and states to encourage or force federal agency action are important tools. As introduced in Part II, citizens, including states and local governments, can petition agencies and argue that they have violated a nondiscretionary duty by, for example, failing to reconsider a previous decision to abdicate federal responsibility.<sup>272</sup> The agency need not substantively change its behavior based on this petition, but it at least must adequately respond.<sup>273</sup> For example, the Natural Resources Defense Council and other environmental groups 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.<sup>274</sup> Although this was unsuccessful, it did cause the EPA to review the adequacy of state programs.<sup>275</sup> Additionally, another environmental citizen suit alleging that the EPA had failed to update other RCRA regulations that apply to oil and gas wastes, thus violating a nondiscretionary duty, was successful and resulted in a consent decree under which the EPA agreed to issue new rules for oil and gas wastes by 2019.<sup>276</sup>

When agencies decline to take action on the basis of a petition, citizen suits can and have sometimes forced substantial changes in agency behavior.<sup>277</sup> For example, these types of suits have forced the EPA to issue some of the most stringent air quality regulations under the Clean Air Act.<sup>278</sup> There are, however,

272. Robert L. Glicksman, *The Value of Agency-Forcing Citizen Suits To Enforce Nondiscretionary Duties*, 10 WIDENER L. REV. 353, 353 (2004) (noting that most federal environmental laws contain citizen suit provisions that “authorize private citizens to sue persons alleged to be in violation of their statutory or regulatory obligations or to sue government agencies alleged to have failed to perform nondiscretionary duties”).

273. See, e.g., Diana R. H. Winters, *Intractable Delay and the Need To Amend the Petition Provisions of the FDCA*, 90 IND. L.J. 1047, 1052-53 (2015) (noting citizens' ability under the Food, Drug, and Cosmetics Act to petition for various actions with respect to rules prohibiting certain substances in food and the Food and Drug Administration's duty to respond—albeit a duty that includes much discretion).

274. Nat. Res. Def. Council Letter, *supra* note 186.

275. ADAM VANN ET AL., CONG. RES. SERV., R43152, HYDRAULIC FRACTURING: SELECTED LEGAL ISSUES, CONG. RES. SERV. 11 (2014) (noting that the EPA had not yet acted on the petition); Kelly Memorandum, *supra* note 176 (reviewing state regulation of oil and gas wastes).

276. Consent Decree, *Envtl. Integrity Project v. McCarthy*, 319 F.R.D. 8 (D.D.C. Dec. 28, 2016) (No. 1:16-CV-00842-JDB), ECF No. 33.

277. For an example of a successful citizen suit filed by public interest groups, local governments, and states following the denial of a rulemaking petition, see *Massachusetts v. EPA*, 549 U.S. 497, 511-12 (2007).

278. Glicksman, *supra* note 272, at 358-59 (describing the suit that forced the creation of the Prevention of Significant Deterioration program under the Clean Air Act—a program that requires new, major sources of air pollution that are located in areas that have attained federal air quality standards to install high-performing pollution control technology).



substantial limitations to the petition and citizen-suit process. In some cases, citizens may not petition or sue states to force them to carry out nondiscretionary duties.<sup>279</sup> Particularly where numerous types of regulatory tasks have been delegated, citizens also should have the ability to make similar petitions regarding the failure of subfederal agents to perform duties under delegated programs.

In terms of holding principals to task, Congress may need to specify a standard of review that is more likely to force agencies at all levels, including the federal level, to perform nondiscretionary duties. Despite some early citizen suits that resulted in dramatic changes such as stringent Clean Air Act regulations, citizen suits have not recently had as much success, in part due to narrow judicial interpretations and a general reluctance of courts to force agencies' hands.<sup>280</sup> This is in part due to the narrow wording of citizen-suit provisions themselves, which tend to only allow suits for nondiscretionary duties and a failure to enforce individual violations of a statute after an agency has received notice of this problematic failure to enforce.<sup>281</sup> Statutes, particularly those designed for extensive delegation, should likely have wording that provides a clear, nondiscretionary duty for an agency to review the adequacy of delegated program performance within specified time frames. Alternatively, the citizen suit provision could be more broadly worded to include "failure of the agency to reasonably oversee and correct delegated entities' performance" as a cause of action.

In light of political gridlock and Congress's general sluggishness in revising statutes, it is unlikely that additional statutory causes of action for citizen suits will emerge anytime soon. Other suggestions for nudging federal agencies toward action where they are failing to comply with a statute could potentially be more promising. For example, Michael Livermore and Richard Revesz have proposed that the Office of Information and Regulatory Affairs (OIRA) should review agencies' refusal to act in response to citizen petitions for rulemaking.<sup>282</sup> Under this proposal, agencies would be required to "justify their disposition of petitions to OIRA using some form of cost-benefit reasoning."<sup>283</sup>

### *B. Enhancing the Use of Disaggregated Regulatory Authority*

Involving numerous levels of government in a regulatory project, including through a delegated governance approach, can be effective. Federalism scholars have noted that this framework can provide the types of checks and balances

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279. See *supra* note 205 and accompanying text.

280. May, *supra* note 77, at 28.

281. See *id.* at 1-2.

282. Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1379-90 (2013).

283. *Id.* at 1390.

seen at the federal level with the tripartite governance system.<sup>284</sup> If one entity fails in its regulatory duties, another might notice this failure and pick up the slack. Further, Jody Freeman and Jim Rossi have observed that overlapping authority over a particular regulatory issue—whether at the same or multiple governance levels—allows different entities to bring different skills and resources to the regulatory table.<sup>285</sup>

The case studies from Part II show that assigning different types and degrees of regulatory duties to different levels of government can have benefits while also producing substantial coordination and regulatory commons-type problems that no single entity has the authority or the motivation to address.<sup>286</sup> These problems do not only involve a failure of agencies; they also poignantly demonstrate the threat of failures by individuals within multiple levels of government—failures that can perhaps be lost in the maze of responsibility created by many different entities performing many different duties. In the case of Flint, individuals from the federal EPA, state environmental and health agencies, county health agency, and city utilities department all expressed concerns about water quality and even had conference calls and in-person meetings about these concerns long before anyone took action,<sup>287</sup> in large part due to failures by other key individuals. This coordination was sporadic and inadequate, as noted by the final task force investigating the causes of the Flint crisis.<sup>288</sup> But the crisis shows that even with some coordination, massive regulatory failures are possible.

This Part focuses on three considerations in the design of delegated governance regimes that could help to ensure that the principal-agent relationship created by this regime enhances rather than hinders effective governance and prevents regulatory failures. First, it is important to assess the comparative advantages of different levels of government and the particular tools they bring to the table. Second, assigning an existing agency or creating a new entity to play the role of a coordinating “umbrella” organization seems important when several regulatory roles have been delegated to a substantial degree. And finally, although engaging several levels of government in a regulatory project can help provide a form of insurance if there is failure at any one level, government agencies are still subject to human error, as poignantly shown by Flint. Implementing safeguards against the failure of individuals is important,

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284. See Bulman-Pozen, *supra* note 20, at 459 (observing that cooperative federalism, not just full delegation of authority to states, can enhance separation of powers protections).

285. Freeman & Rossi, *supra* note 21, at 1150-51. *But see id.* (also noting challenges).

286. Buzbee, *supra* note 9.

287. See, e.g., Flint Water Advisory Task Force, *supra* note 4, app. V, at 7 (noting that Genesee County Health Department representatives held a conference call with city water quality staff regarding “county’s concerns about Legionellosis outbreak and possible connection to city’s water system”); *id.* app. V, at 8 (noting that Genesee County hospital officials met with staff from the Michigan health and environmental agencies as well as the county health department to discuss the Legionellosis outbreak).

288. *Id.* at 8.

particularly where responsibilities have been divided among numerous levels and individual failures could be overlooked, potentially leading to collective failure.

### 1. Comparative Advantages of Citizens, Local Governments, States, and Federal Agencies

Many delegated governance regimes have operated for decades. Substantially changing the levels of government responsible for carrying out various regulatory tasks would require statutory revision or at least significant change to agency policy. But where governments are designing these regimes from scratch—and even for existing regimes—it is worthwhile to consider the comparative advantages that different levels of government might bring to the table. Although delegation occurs for many reasons unrelated to the goal of most effectively carrying out the purposes of the statute (including, in some cases, shifting the blame for difficult decisions to another level of government), this is a worthy project in light of the fact that delegated governance regimes operate within statutory mandates.

The federalism literature has extensively explored these comparative advantages. 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,<sup>289</sup> 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. But as demonstrated by the EPA staff member who drove a remote air pollution monitor near well sites in Colorado to determine micro-level emissions,<sup>290</sup> federal agencies can competently address very localized problems.<sup>291</sup> Indeed, even with closer consideration of various governments' characteristics, it is nearly impossible to state that any one level of government will consistently be better at drafting and promulgating regulations or monitoring and enforcing them.

Despite these difficulties, the fact that different levels of government have historically tended to perform different functions suggests that certain expertise might have built up at this level and would be worth drawing from. For example, if a delegated governance regime requires, in part, regulatory solutions that require changing traditional land use regulations, such as zoning laws, the fact that local governments have been promulgating and enforcing these regulations for so long and have resources built up in this area might suggest that they should manage this task. In the case of the SDWA and Flint, ensuring drinking water

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289. See, e.g., Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Grey Area*, 66 MD. L. REV. 503, 601 (2007).

290. See *supra* note 258 and accompanying text.

291. See, e.g., Dave Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58 (2016) (describing 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).

quality requires the operation of thousands of water treatment plants around the country, and local governments, which have historically carried out this function,<sup>292</sup> are thus likely logical entities to involve in the regulatory project.

Beyond looking to governments' longstanding functions and expertise, some additional generalizations about their advantages are at least marginally helpful. For example, to the extent that federal agencies lack the resources to have officials from Washington, D.C. or a regional office perform work like driving to oil and gas sites to measure air emissions, Heather Gerken's "federalism all the way down"<sup>293</sup> approach suggests that engaging nonprofits and citizens in the monitoring and enforcement aspects of the regulatory project is also key. STRONGER provides a beneficial example of environmental group and industry involvement—as well as state and federal agency participation—in monitoring the long-term performance of state programs in the oil and gas context, although this process has limitations, as discussed in Section III.A.

Additionally, a large body of literature provides support for the concept that delegating certain tasks to private entities in the regulatory process—rather than simply coordinating with them—will be beneficial in some cases.<sup>294</sup> Particularly where regulations require complex, technical understanding of the regulated activity, industry actors have a great deal to contribute. For example, oil and gas development involves technologies with which those outside of the industry are often unfamiliar, such as special types of "blowout preventers" that help to prevent uncontrolled pressure buildups and explosions during drilling and fracturing and a variety of other relatively complicated technologies.<sup>295</sup> Those who work in the industry or government officials who previously worked in

292. Local Gov't Advisory Comm., *Clean and Safe Drinking Water*, ENVTL. PROTECTION AGENCY 5 (Oct. 26, 2016), [http://www.epa.gov/sites/production/files/2016-10/documents/lgac\\_water\\_report\\_final-draft\\_3.1.pdf](http://www.epa.gov/sites/production/files/2016-10/documents/lgac_water_report_final-draft_3.1.pdf) [<http://perma.cc/U7NQ-RXYL>] (noting that local governments "are experienced in overcoming challenges" associated with drinking water provision and identifying ways to better serve their constituents).

293. Gerken, *supra* note 21, at 4.

294. See, e.g., Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997) (exploring the advantages of involving regulated entities within the regulatory process although also noting limitations); Dennis D. Hirsch, *Project XL and the Special Case: The EPA's Untold Success Story*, 26 COLUM. J. ENVTL. L. 219, 223-25 (2001) (describing Project XL, in which industry engaged in various creative pilot projects to reduce the pollution while avoiding some of the most stringent requirements under federal environmental statutes that apply to these pollutants, and lauding its benefits); 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 90 app. IV (2015) (exploring how participation of nongovernmental entities in suggesting the content of rules through an advisory committee to an agency can be beneficial). *But see*, e.g., Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997) (noting that the claimed benefits of negotiated governance have not been empirically proven); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003) (similar); Rena I. 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").

295. See, e.g., MICH. ADMIN. CODE r. 324.406 (2017) (requiring a "double ram blowout preventer, including pipe and blind rams," in addition to other equipment).

industry are likely to be most familiar with these technologies and those that are likely to be most effective if required by regulation. Similarly, maintaining electricity reliability requires an array of electrical equipment and operating procedures with descriptions that hint at their complexity. For instance, to ensure that an adequate amount of electricity is provided to nearly exactly match instantaneous demand—the practice of “balancing” power—a NERC reliability standard requires the following:

Each Balancing Authority [the entity responsible for ensuring adequate power to meet demand] shall operate such that, on a rolling 12-month basis, the average of the clock-minute averages of the Balancing Authority’s Area Control Error (ACE) divided by 10B ([a frequency bias]) times the corresponding clock-minute averages of the Interconnection’s Frequency Error is less than a specific limit.<sup>296</sup>

This description is followed by a lengthy algebraic equation.<sup>297</sup> For regulatory areas like this, involving industry in drafting regulations can lead to better regulation, although substantial safeguards against regulatory capture are needed. Additionally, involving these entities in enforcement—as exemplified by NERC—draws on their technical expertise in identifying the failures of entities to comply with highly technical regulation.

The energy reliability case study from Part II shows some of the safeguards that can be used to help prevent private actors from proposing or enforcing inadequately stringent standards when regulatory tasks are delegated to them. For example, NERC can only propose reliability standards, and FERC must approve them; FERC often requires changes.<sup>298</sup> Additionally, FERC reviews each and every NERC enforcement action and does not take this job lightly, often rejecting NERC’s approach for a more stringent one.<sup>299</sup> Additional safeguards are available for agencies that use negotiated rulemaking—a process in which an advisory committee convened by the agency proposes rules before the agency submits those rules to the broader public for notice-and-comment rulemaking.<sup>300</sup> Federal acts that encourage and enable this “reg-neg” process require certain procedural measures that can help to guard against undue influence by any one entity participating in the process, such as public disclosure of certain advisory committee documents and formation of a representative advisory committee.<sup>301</sup>

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296. *Standard BAL-001-0—Real Power Balancing Control Performance*, NORTH AM. ELECTRIC RELIABILITY CORP., <http://www.nerc.com/layouts/PrintStandard.aspx?standardnumber=BAL-001-0&title=Real%20Power%20Balancing%20Control%20Performance&jurisdiction=United%20States> [<http://perma.cc/BPG5-F4HG>].

297. *Id.*

298. *See supra* notes 231-232 and accompanying text.

299. *See supra* notes 233-234 and accompanying text.

300. *See, e.g.,* Coglianese, *supra* note 294, at 1257 (describing the reg-neg process).

301. *But see* Wiseman, *supra* note 27, at 270 (noting inadequate inclusion of local communities and rail safety groups in the advisory committee to the Federal Railroad Administration, which promulgates regulations to prevent accidents such as the derailment and explosion of trains carrying hazardous products).

Some have argued that FERC's oversight is *too* close, particularly in reviewing draft standards. These commenters believe that FERC's relatively nondeferential 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 with the highly technical details of the grid.<sup>302</sup> 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 consistently apply the most stringent of the oversight safeguards noted in Section II.A., including case-by-case review of individual regulations and enforcement, as well as regular review of the overall performance of the entity with delegated authority.

Despite the advantages of relying on different types of government entities, the Flint case study, in particular, highlights the dangers of involving multiple entities in a regulatory project, including inadequate communication among responsible entities and human errors that can lead to regulatory failure. The following Sections discuss how these types of problems could potentially be avoided, both through better coordination and the use of safeguards to reduce the impact of human error within agencies.

## 2. Coordinating Actions Through Umbrella Organizations and Other Mechanisms

Although much of the blame in the Flint crisis appears to fall on individual regulators, the numerous entities involved in regulating the quality of drinking water suggest that a coordinating entity might have helped some, particularly if the officials within that organization had pieced together the numerous individual warnings and recognized their significance. Here, there were several "umbrella" entities that could have gathered the various parties and better 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.

In some cases, a third-party "umbrella" organization may be needed to oversee all of the entities, track their actions, and alert them to failures. This third party could help to avoid the free riding and regulatory commons-type problems that can occur among the entities within the delegated governance regime when, for example, these entities incorrectly assume that another responsible entity has taken care of a problem. The interagency coordination literature has explored the potential for existing or newly-formed entities to play this type of role,

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302. See Moot, *supra* note 231.

particularly in the context of coordination among federal agencies. For example, as explained by Michael Livermore and Richard Revesz, OIRA “circulates proposed rules and the accompanying regulatory impact statements [statements that described costs and benefits of regulations] to other agencies and solicits their feedback on regulatory proposals.”<sup>303</sup> Agencies may then “weigh in and express concerns about the regulatory actions being contemplated by other agencies.”<sup>304</sup>

A related solution based solely on information sharing would be for a federal agency that delegated tasks to multiple levels of government 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, and enforcement actions taken. An individual at each organization would be assigned the task of regularly updating this website. This format would create an electronic trail of data that would potentially amplify concerns such as those raised by individuals from multiple levels of government in the Flint crisis. A website that collectively tracked the numerous warning e-mails, conference calls, and reports from all of these individuals might have more quickly alerted officials to a real problem.

Jody Freeman and Jim Rossi have noted a variety of tools for inter-agency coordination at the federal level that could potentially—and already sometimes do—apply across different levels of government. For example, they note more formal tools, such as consultation mandates,<sup>305</sup> and the less formal, more common use of interagency memoranda of understanding (MOUs).<sup>306</sup> Indeed, in many contexts the federal government, tribes, states, and local governments use these memoranda to coordinate their efforts, including in some delegated governance regimes. For example, it is not uncommon for states, tribes, and the federal government to enter into MOUs regarding the issuance and enforcement of water quality permits under the Clean Water Act. In one MOU between the EPA, Shoshone-Bannock Tribes, and Idaho Department of Environmental Quality, the tribes and IDEQ agreed to each independently write and revise water quality standards for land on or adjoining tribal lands but to first provide notice of intent to the other entity, then provide a notice of rulemaking and potentially provide technical support to the other entity.<sup>307</sup> They also agreed to share water quality and other information.<sup>308</sup> More detailed MOUs, if implemented and followed, could benefit all delegated governance regimes, although it may be

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303. Livermore & Revesz, *supra* note 282, at 1367.

304. *Id.*

305. Freeman & Rossi, *supra* note 21, at 1192.

306. *Id.* at 1161.

307. *Memorandum of Understanding for Water Quality Standards Between the Shoshone-Bannock Tribes and the Idaho Department of Environmental Quality and the U.S. Environmental Protection Agency Region 10*, ENVTL. PROTECTION AGENCY 2 (Sept. 25, 2008), [http://yosemite.epa.gov/r10/water.nsf/34090d07b77d50bd88256b79006529e8/24053f0cfc7869a2882574aa006bf017/\\$FILE/MOU%20for%20WQS%20SB-IDEQ-EPA.pdf](http://yosemite.epa.gov/r10/water.nsf/34090d07b77d50bd88256b79006529e8/24053f0cfc7869a2882574aa006bf017/$FILE/MOU%20for%20WQS%20SB-IDEQ-EPA.pdf) [<http://perma.cc/5JQG-TJ2S>].

308. *Id.* at 3.

necessary to appoint one of the agencies in the MOU—or an independent body—to coordinate implementation and ensure that all parties follow the MOU. As Freeman and Rossi observe, there are several types of MOUs—some dividing up jurisdiction, some committing to information sharing among agencies, and so on.<sup>309</sup> To improve delegation frameworks, particularly where numerous tasks have been delegated to different parties, MOUs will likely need to include very clear jurisdictional lines. And if the parties follow the centralized website approach suggested here, the MOU should specify who will create and maintain this website; which types of information will be shared, such as complaints received about potential risks and inspections and enforcement actions taken; and the frequency with which parties will enter data into the website.

### 3. Safeguarding Against Inevitable Human Error

A final challenge when regulatory tasks are parceled out to several levels of government is the human error that occurs within agencies, which is partly the result of internal principal-agent problems, and also the inevitable fact that agencies run by humans will suffer human flaws. Agency officials and staff act or fail to act for a variety of reasons, such as a commitment to using up scarce political capital on the issues they care most deeply about or more personal reasons like ambition or laziness.<sup>310</sup> And in some cases officials and staff are not properly trained or lack the resources to carry out their individual duties. Regardless of the cause, agencies need to implement safeguards to prevent and mitigate this failure—particular in the case of delegation and potential “error pile-up.” The private context provides useful lessons here. Organizations such as the Institute of Nuclear Power Operations have detailed training modules for all employees at nuclear plants that have proven highly effective.<sup>311</sup> While regulation is not always as high-stakes as an operation involving radioactive material, similar, consistent training and periodic review programs—albeit lower-level programs that did not require as many resources—could aid agencies.

A less rigorous but still relevant training example comes from the oil and gas context. As noted in the RCRA case study, states have the majority of control over the regulation of oil and gas development and the wastes associated with that development. States have been quite assertive in attempting to maintain that role and have tended to lobby against federal action in this area.<sup>312</sup> As part of their effort to maintain regulatory control, many leading oil and gas states have

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309. Freeman & Rossi, *supra* note 21, at 1162-63.

310. See Seidenfeld, *supra* note 108, at 263-64, 270-71.

311. See *What We Do*, INST. NUCLEAR POWER OPERATIONS, <http://www.inpo.info/AboutUs.htm#whatwedo> [<http://perma.cc/QQX4-A22H>].

312. See Hannah J. Wiseman, *Remedying Regulatory Diseconomies of Scale*, 94 B.U. L. REV. 235, 262-63 (2014) (documenting state officials’ assertions that they are effective regulators of oil and gas development).



created a “States First” organization. As suggested by its name, a central purpose of this organization is to persuade the public and the federal government that states are the best regulators in the oil and gas context. But to try to help prove this, the states have also embarked upon a collective effort to train the state agency inspectors who visit oil and gas sites and look for problems, including improper disposal of waste and potential pollution from that waste. The states are working with academics to develop training programs that certify field inspectors.<sup>313</sup>

It is not clear that adequate up-front training would have prevented the multiple human errors that occurred in Flint. Many of these errors were the result of personal beliefs about the lack of credibility of citizen complaints<sup>314</sup> and a failure to acknowledge and correct mistakes brought to the attention of officials by officials in several other levels of government. For example, one e-mail from a Michigan Department of Environmental Quality official complains that he is “not sure why region 5 [EPA] sees this one sample [showing lead in water] as such a big deal.”<sup>315</sup> State environmental agency officials also attempted to shift their responsibilities; as summarized by the team investigating the crisis *ex ante*, one official reminded the county’s health department—whose staff members had repeatedly raised red flags—that an epidemiological investigation was their job and indicated that the county should approach the Michigan health department “if they need[ed] support.”<sup>316</sup> State environmental agency officials further complained in e-mails about federal EPA “over-reaches,” stating that the federal Agency’s “constant second-guessing of how we interpret and implement our rules is getting tiresome.”<sup>317</sup> Addressing problems like these requires changing the culture of an agency—a difficult task that can be accomplished only if agencies have adequate resources to hire and retain staff committed to carrying out their public mission and to maintain strong morale within the agency.

Understanding how to effectively design and operate delegated governance regimes to ensure that these regimes achieve statutory mandates will be a long-term project, and there is no single formula for success. Indeed, this Article has only touched upon some of the factors that might help to improve how subfederal entities carry out federal tasks and also ensure that federal actors are carrying their weight. An overarching challenge is the resource question: none of these suggestions can be implemented without adequate regulatory funding, and agencies are chronically underfunded. Some tools above, such as involving citizens in the monitoring process and industry in regulatory drafting, can help

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313. *Priorities*, ST. FIRST (2014), <http://www.statesfirstinitiative.org/priorities> [<http://perma.cc/254U-TUJ9>].

314. Flint Water Advisory Task Force, *supra* note 4, at 6 (noting that Michigan Department of Environmental Quality staff were “dismissive and unresponsive” when the federal EPA offered to assist by providing lead experts).

315. *Id.* app. IV, at 9.

316. *Id.* app. IV, at 10.

317. *Id.* app. IV, at 12.

shift some burdens away from agencies, but they still require agency oversight. Mechanisms such as decoupling a larger portion of agency funding from legislative budget approval and allowing agencies to raise more funds through permit fees and similar agency-initiated charges could help, although these tools, too, have their perils.<sup>318</sup> Despite the many hurdles along the path to better delegation, this Article endeavors to suggest how regulatory design might play a role in creating better delegated governance regimes.

## Conclusion

Delegation within the cooperative federalism sphere presents a scholarly and practical conundrum: it is necessary yet highly dysfunctional. Part of this dysfunction arises from the principal-agent relationship bound up within any form of delegated governance, with federal agencies acting as principals and states, local governments, or private entities carrying out various duties as agents. There are of course numerous other challenges associated with delegation that are not directly related to the classical principal-agent challenges of ensuring that each party within the relationship fulfills its duties. But many of the problems identified in the case studies here have principal-agent undertones.

Federal agencies frequently delegate substantial regulatory responsibilities to subfederal actors without implementing regimes for effective long-term monitoring and oversight of those actors. Additionally, delegation of several types of regulatory tasks to several different government actors can result in coordination problems in which regulatory failures do not come to light quickly enough. And there is a risk that inevitable human error that occurs within agencies can pile up. Federal agencies, in turn, sometimes do not uphold their end of the bargain, and subfederal agents, too, need better tools for overseeing their principals and working more effectively with federal agencies. A recent manifestation of this dysfunction was a tragic one. City, county, state, regional, and federal agencies, as well as private actors, all failed to protect thousands of 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.

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318. For example, there is the risk that agencies will be incentivized to issue too many permits simply to raise funds. Properly tailoring individual permit fees to cover the full expense of agency review could help to limit this incentive.

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. Nonprofit 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. And private entities have essential technical information that can assist in regulation drafting if adequate safeguards against concerns such as capture are implemented.

Regarding the degree of authority delegated or retained by the federal agency, as more tasks are delegated to a 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 oversight and longer-term program performance oversight is critical. In the case of Flint, 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.<sup>319</sup>

As emphasized in this Article, oversight 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 subfederal agents to perform nondiscretionary duties. Many statutes already provide for the former type of review, but fewer allow for the latter. Providing a judicial outlet to address situations in which federal principals leave slack, and only some state agents are motivated to pick up that slack, is important. Review agencies are similarly important in monitoring the actions of both federal agencies and sub-level entities and ensuring the adequacy of regulatory programs from a relatively apolitical perspective.

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 averted.

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319. See *supra* note 140 and accompanying text.

