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Cooperative Subfederalism

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Cooperative Subfederalism

Dave Owen*

Cooperative federalism is one of the most important innovations of American governance. In a cooperative federalism system, the federal government delegates to states the authority to implement a federally-created program, and those state implementing actions are subject to federal administrative oversight and mandatory review. This basic governance model now pervades federal-state relations and has received enormous amounts of academic attention.

This Article considers whether analogous arrangements make sense for state and local governments. Such arrangements do exist, but they are not nearly as prevalent as their federal-state counterparts, and they have received little attention from scholars. Yet many of the theoretical arguments in favor of traditional cooperative federalism extend to relationships between state and local government. And a review of three long-established, state-local programs—land use regulation in Oregon and Florida and air quality regulation in California—demonstrates that these cooperative subfederalism arrangements can succeed. That success never comes easily, and it depends upon a highly interactive governance model. The divided spheres of traditional federalism theory hold little promise in this realm. Nevertheless, cooperative subfederalism offers a promising alternative to more traditional ways of structuring state-local relationships.

Beyond supporting changes in state and local governance, this study also has implications for traditional federalism doctrine. Most importantly, it undercuts the tendency, which is particularly pronounced in Supreme Court decisions, to assume that state government subsumes the benefits of localism. It also corroborates and extends recent scholarly work emphasizing federalism as a system of governmental integration, and it undermines the Court's and some commentators' emphasis on federalism as a system of divided and limited governmental authority.

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INTRODUCTION

In the middle of the Twentieth Century, after the New Deal had redrawn the dividing lines of American governance, lawmakers began dabbling with cooperative federalism.¹ Rather than simply divide authority between the federal government and the states, as traditional federalism theory would suggest,² cooperative

1. See Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 723–24 (2006) (describing early innovations); John Kincaid, *From Cooperative to Coercive Federalism*, 509 ANNALS AM. ACAD. POL. & SOC. SCI. 139, 139–45 (1990).

I use the phrase “cooperative federalism” in this article because these are accepted terms of art, not because the adjective “cooperative” is consistently accurate.

2. See *Printz v. United States*, 521 U.S. 898, 921 (1997) (“This separation of [federal and state] spheres is one of the Constitution’s structural protections of liberty.”); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (“It was the genius of [the Framers’] idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.”).

federalism emphasizes overlap.³ Under the classic cooperative federalism model, the federal government sets overall program mandates and goals.⁴ States then have the option of leading program implementation. If they accept that option, the day-to-day work of administering the program happens largely at the state level.⁵ But the federal government retains an oversight role, which typically means that a federal administrative agency must review, and approve or disapprove, some of the states' efforts.⁶ In some programs, if the states fail to fulfill their duties or decline to assume authority in the first place, the federal agency must implement the program itself.⁷

Cooperative federalism has become an integral part of American governance.⁸ Many of the United States' governmental programs, in fields ranging from social service delivery to air quality planning, now use variations on this basic model.⁹ The United States is not unique in this trend; around the world, balancing parochial impulses against needs for centralized coordination has become one of the defining governance challenges of our era, and some of that balancing has been attempted through cooperative federalism-like systems.¹⁰ Not surprisingly, an enormous body of literature, both judicial and academic, evaluates cooperative federalism.¹¹

Within that literature, almost all of the attention focuses upon the federal government and the states.¹² Particularly in Supreme Court decisions, local governments have often been federalism's forgotten stepchildren.¹³ Academic

3. See *New York v. United States*, 505 U.S. 144, 168 (1992) (describing cooperative federalism's basic structures).

4. See Philip J. Weiser, *Toward a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665–66 (2001).

5. *New York*, 505 U.S. at 168.

6. See, e.g., Jonathan H. Adler & Nathaniel Stewart, *Is the Clean Air Act Unconstitutional? Coercion, Cooperative Federalism, and Conditional Spending After NFIB v. Sebelius*, 43 *ECOLOGICAL L.Q.* 671, 672–73 (2016) (describing the Clean Air Act's cooperative federalism provisions).

7. See, e.g., *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1594 (2014) (describing federal obligations under the Clean Air Act).

8. See Heather Gerken, *Slipping the Bonds of Federalism*, 128 *HARV. L. REV.* 85, 116 (2014) (“[O]ne of the most important forms of state power now lies inside the federal administrative state.”).

9. See, e.g., *New York*, 505 U.S. at 168 (describing examples); *Alaska Dep't. of Health and Human Servs. v. Ctrs. for Medicare & Medicaid Servs.*, 424 F.3d 931, 934 (9th Cir. 2005) (“Medicaid is a cooperative federal-state program . . .”); Weiser, *supra* note 4, at 675–81 (describing cooperative federalism in telecommunications law).

10. See, e.g., *FEDERALISM AND ECONOMIC REFORM: INTERNATIONAL PERSPECTIVES* (Jessica S. Wallack & T.N. Srinivasan eds., 2006); ROBERT SCHÜTZE, *FROM DUAL TO COOPERATIVE FEDERALISM: THE CHANGING STRUCTURE OF EUROPEAN LAW* (2009).

11. One statistic captures the size of this literature: on January 10, 2018, a search of Westlaw's Law Reviews and Journals database for the phrase “cooperative federalism” produced 3,421 hits.

12. Heather Gerken, Foreword, *Federalism All the Way Down*, 124 *HARV. L. REV.* 7, 21 (2010) (noting that “[f]ederalism scholars have typically confined themselves to states” and that “the Supreme Court itself has often (if unreflectively) treated local institutions as undifferentiated stand-ins for the state”) (parentheses in original).

13. David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 *U. PA. L. REV.* 487, 487 (1999) (“We do not think of local governments . . . as important components of the federal constitutional structure.”).

studies are somewhat more balanced,¹⁴ though state–federal relationships still get an oversized share of attention, and the studies that do integrate local government into their federalism discussions typically focus on state–local conflict.¹⁵ The possibility of recreating cooperative–federalism–like regimes between states and local governments—an approach I refer to as cooperative subfederalism—has received very little academic or judicial attention.¹⁶

Yet cooperative subfederalism programs do exist. Particularly (but not only) in the realms of land use, environmental, and natural resources law, which are the primary focuses of this article, states often delegate authority to local governments while mandating state-level administrative oversight and review.¹⁷ Sometimes the delegations are systemic, with entire programs implemented primarily by local governments.¹⁸ Sometimes they are selective, with a few local governments assuming lead responsibilities while the state government retains implementing authority throughout the rest of the state.¹⁹ Sometimes the programs involve dual layers of delegations, with the federal government delegating authority to the state, while still retaining an administrative oversight role, and the state then sub-delegating its authority to local levels while again retaining administrative oversight.²⁰ Other programs do not involve federal participation. In short, cooperative subfederalism programs come in a variety of models. And while these programs are not nearly as prevalent as their more famous federal-state cousins, they do address some important tasks. They could address many more.

The inattention to these programs is somewhat surprising, for many arguments for traditional cooperative federalism would seem to extend to state–local relationships.²¹ Cooperative federalism is, at its best, a principled compromise between nation- and state-centric modes of governance; it attempts to secure the benefits of each governing level and of their mutual interactions. According to conventional wisdom, diffusing power away from the national government promotes individual liberty, governmental innovation, and political participation,

14. See, e.g., Annie Decker, *Preemption Conflation: Dividing the Local from the State in Congressional Decision Making*, 30 YALE L. & POLY REV. 321, 351 (2012) (summarizing key distinctions).

15. See, e.g., Richard Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018).

16. See Decker, *supra* note 14, at 356 (“[T]heories of cooperative federalism still tend to focus on the federal-state dyad.”). For the articles that come closest to my subject matter, see Richard Briffault, *What About the ‘Ism’? Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1307–09 (1994); and Justin Weinstein-Tull, *Abdication and Federalism*, 117 COLUM. L. REV. 839, 839 (2017). Briffault describes general parallels between federal-state and state–local relationships but focuses on traditional federalism rather than cooperative arrangements, and Weinstein-Tull focuses on programs where the state makes little effort to monitor the exercise of the delegated authority, in contrast to a cooperative subfederalism program, which uses continued state administrative oversight to avoid abdication.

17. See *infra* Part I.

18. See, e.g., *infra* notes 0–230 and accompanying text.

19. See *infra* notes 5–59 and accompanying text (describing air quality planning in Kentucky, Pennsylvania, and Tennessee).

20. See *infra* Part I.A.

21. See *infra* Part II.

and allows government to take advantage of decentralized expertise.²² Conversely, federal administrative review ensures faithful adherence to national goals, allows governance to draw upon the greater expertise and economies of scale associated with federal agencies, and protects against negative spillover effects between jurisdictions.²³ More recent scholarship has reframed these debates, arguing that cooperative federalism's greatest benefit is that it requires interaction, and sometimes productive conflict, among governmental entities responsive to different electorates.²⁴ One could make—and people sometimes do make—similar arguments about relationships between state and local governments,²⁵ particularly in larger states, some of which now have larger populations, economies, and geographic areas than many nations.²⁶ Particularly for these larger jurisdictions, cooperative subfederalism might offer a promising option.

This Article therefore evaluates the promise and the perils of cooperative subfederalism. Part I uses a brief survey of cooperative subfederalism programs to demonstrate that this governance model is more than just a theoretical possibility. The survey begins with California, which, in this realm as in many others, has been a hotspot of governmental innovation. One of the latest initiatives responds to the state's high-stakes challenges with groundwater management, and it relies on a regulatory structure borrowed from one of the classic cooperative federalism systems of federal law.²⁷ While California's groundwater experiment provides a particularly clear example, Part I shows that such cooperative subfederalism programs are not unique to California. The literature evaluating these programs is sparse, and it would be a stretch to call them abundant, but they are scattered across the nation.

Part II explores theoretical reasons why these programs exist and why more such programs might be desirable. The article focuses on the classic arguments explaining traditional cooperative federalism, and it explains how those arguments extend to the relationships between state and local government. The arguments generally fall into two categories. The first set of claims explains why cooperative federalism should produce better policy than alternative arrangements. The second

22. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

23. See Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 613–27 (1997).

24. See Jessica Bulman-Pozen & Heather Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1268–69, 1291 (2009).

25. See Briffault, *supra* note 16, at 1304 (“[M]any of federalism’s values are the same as those urged by the advocates of local governments when they make their case for the autonomy of local governments from the states.”).

26. UNITED STATES CENSUS BUREAU, HISTORICAL STATISTICS OF THE UNITED STATES, 1789–1957, at 25 (1949) (showing the United States population in 1789); *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2017*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2017/demo/popest/state-total.html> [<https://perma.cc/7GXT-DC4R>] (last updated May 8, 2018).

27. See Craig A. Carnes, Jr., *California’s Historic Groundwater Legislation: The Sustainable Groundwater Management Act*, WATER RESOURCES COMMITTEE NEWSL. (Am. Bar Ass’n, Chi., Ill.), Feb. 2015, at 11.

set explains why cooperative federalism is politically appealing—often for reasons that have little to do with good policy. Both sets of arguments hold similar resonance for state-local collaborations.

Part III turns to the potential pitfalls of cooperative subfederalism. Many of these pitfalls are similar to those encountered by traditional cooperative federalism regimes, and a growing literature explores the many ways in which federal delegations can be deeply problematic.²⁸ Some additional pitfalls arise from distinctive features of local governance, and therefore are accentuated by, if not unique to, state-local relationships.

Part IV turns from a theoretical account to real-world experience. Drawing upon a focused review of three cooperative subfederalism programs, it considers whether cooperative subfederalism offers a promising governance model and how it can succeed. Two of these programs—one from Florida and the other from Oregon—involve land use regulation, while the third is California’s practice of delegating air quality planning authority from state government to local air districts. For each program, I combined a literature review²⁹ with interviews with state and local officials, private-sector attorneys, and planners who had been integrally involved in program implementation.

That review leads to several key conclusions. First, and most importantly, cooperative subfederalism is a promising alternative to traditional state-local governance systems. While recent academic literature on state-local relationships and delegated governance is filled with horror stories, and while no one describes multi-level governance as easy, participants generally viewed cooperative subfederalism as a system with strengths outweighing its weaknesses.³⁰ Their arguments in favor of cooperative subfederalism echo many of the traditional tenets of federalism theory, and they address many of the classic concerns about local government.³¹ Second, however, those strengths depend on a highly interactive and amply-staffed governance model, often involving flexible boundaries between state and local responsibilities.³² Some of the judicial proclamations and academic literature on traditional federalism suggest that legal architects should draw clear lines and promote hands-off relationships between different levels of government.³³ That hands-off approach has little prospect of success with the states and the locals. And by analogy, a study of cooperative subfederalism suggests that a governance philosophy premised in division and governmental limitation has limited value for federal-state interactions as well.

28. See, e.g., Weinstein-Tull, *supra* note 16.

29. For California’s air quality management program, there was not much literature to review. Oregon’s and Florida’s land use regulatory programs have produced many studies.

30. See *infra* Part III.B.1.

31. See *infra* Part III.B.1.

32. See *infra* Part III.B.2.

33. See *infra* notes 268–275 and accompanying text.

The practice of cooperative subfederalism also holds another important implication for traditional federalism theories. In many of the classic accounts of federalism, state and local governments are largely interchangeable, and “[d]eference to *state* lawmaking ‘allows *local* policies “more sensitive to the diverse needs of a heterogeneous society”³⁴ No doubt that identification is partly just carelessness, but it also serves an argumentative function: it allows the partisans of state-centric federalism to claim the benefits of local governance as part of their case against federal authority.³⁵ An examination of cooperative subfederalism reveals the tenuous foundations of that view. The core reason why cooperative subfederalism is both appealing and challenging is that the states and local governments are not just different from, but also in frequent tension with, each other, and these tensions arise partly because states relate to local government in ways that are similar to federal relationships with states.³⁶ That does not mean that state governance cannot build on the advantages of local governance; the assumptions of traditional federalism theory are not entirely wrong. But if states are to claim credit for those advantages, they should have governance structures that facilitate successful state-local collaboration. A cooperative subfederalism scheme, if implemented well, offers a particularly promising option.³⁷

I. EXAMPLES OF COOPERATIVE SUBFEDERALISM: A BRIEF SURVEY

In 2014, amid an epic drought, California enacted the Sustainable Groundwater Management Act.³⁸ The law marked a dramatic shift. For decades, California legislators had been famously reluctant to adopt regulatory programs for groundwater use, leaving the choice to regulate—or, more often, not regulate—to the discretion of local governments.³⁹ But the drought underscored the dangers of this approach. In normal years, groundwater provides almost half of the state’s

34. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2673 (2015) (emphasis added) (quoting *Bond v. United States*, 564 U.S. 211, 221 (2011)).

35. *See, e.g., Nat’l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (asserting that state power ensures that authority is “held by governments more local and more accountable than a distant federal bureaucracy”); *United States v. Lopez*, 514 U.S. 549, 557 (1995) (warning that we should not “obliterate the distinction between what is national and what is local and create a completely centralized government”) (quoting *Nat’l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

36. *See infra* notes 328–332 and accompanying text.

37. A decentralized state administrative structure also could help realize the benefits of local governance. *See* Dave Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58, 116–20 (2016) (arguing that federal decentralization can realize some of the benefits traditionally associated with state governance).

38. For information about the statute, its implementation regulations, and other supporting materials, see *SGMA Groundwater Management*, CAL. DEPT’WATER RESOURCES, <https://water.ca.gov/Programs/Groundwater-Management/SGMA-Groundwater-Management> [https://perma.cc/4J8M-FFE9] (last visited Sept. 12, 2018).

39. *See* Tina Cannon Leahy, *Desperate Times Call for Sensible Measures: The Making of the California Sustainable Groundwater Management Act*, 9 GOLDEN GATE U. ENVTL. L.J. 5, 39 (2015); Joseph L. Sax, *We Don’t Do Groundwater: A Morsel of California Legal History*, 6 U. DENV. WATER L. REV. 269 (2003).

water supply, and during droughts, when surface water is particularly scarce, the state's groundwater dependence increases.⁴⁰ For years, California's aggregate groundwater use had exceeded natural recharge, which meant the state was steadily depleting one of its most important resources, much like a family living outside its means and spending down its financial reserves. The drought brought nationwide attention to this unsustainable state of affairs, and the resulting sense of urgency allowed the passage of a major new law.⁴¹

While the Sustainable Groundwater Management Act changed the legal landscape, it did so only partially. State legislators did not completely centralize groundwater management authority in Sacramento. Instead, they called for the creation of local "groundwater management agencies," which will create and implement "groundwater management plans."⁴² Those plans, in theory, will fulfill the new law's substantive goals.⁴³ Local government, in other words, will take the lead. But state administrative agencies will remain involved. The contents of groundwater management plans will be partially determined by regulations issued by a state agency,⁴⁴ and state agencies must review the local plans for legal adequacy.⁴⁵ Another state agency will place areas with inadequate plans (or no plans) on "probation," and must eventually create its own plans if the local agencies' plans remain inadequate or are not created at all.⁴⁶ The entire system flows from the dual premises, enshrined by the California Legislature in the new law's findings, that "[g]roundwater resources are most effectively managed at the local or regional level" but that "[i]n those circumstances where a local groundwater management agency is not managing its groundwater sustainably, the state needs to protect the resource."⁴⁷

This is not the classic model of local governance. As Richard Briffault once observed, delegations to local government often come with few strings attached: "[i]n most states, local governments operate in major policy areas without significant external legislative, administrative, or judicial supervision."⁴⁸ Or, alternatively, states often simply preempt local governance (Figure 1, below, summarizes these different regimes).⁴⁹ Governance systems coupling local

40. Leahy, *supra* note 39, at 14 ("Groundwater provides about 40%-50% of California's total agricultural and urban water supply in an average year. . . . During drought, the state can become reliant on groundwater for 60% or more of the overall water supply.").

41. *See id.* at 14.

42. CAL. WATER CODE § 10723 (2017) (requiring the creation of "groundwater sustainability agencies"); *id.* §§ 10727–10728.4 (setting criteria for groundwater sustainability plans).

43. *Id.* §§ 10727–10728.4 (setting criteria for groundwater sustainability plans). For general discussion of this framework, and the associated challenges, see MICHAEL KIPARSKY ET AL., DESIGNING EFFECTIVE GROUNDWATER SUSTAINABILITY AGENCIES: CRITERIA FOR EVALUATION OF LOCAL GOVERNANCE OPTIONS (2016).

44. WATER § 10733.2 (authorizing regulations).

45. *See id.* §§ 10733–10733.8 (requiring state-level review of local plans).

46. *Id.* §§ 10735.2–10736.

47. A.B. 1739, 2014 Assemb., 2014–15 Sess. §§ 6, 9 (Cal. 2014).

48. Briffault, *supra* note 16, at 1318.

49. *See* Schragger, *supra* note 15 (compiling dozens of examples of state preemption).

implementation with continuous state administrative oversight and review rarely appear in the state and local government or federalism literatures. But to observers of federal regulation, this system will sound familiar. Its closest analog is the state implementation planning requirements established by the Clean Air Act, and similar programs appear in many fields of federal regulatory governance.⁵⁰ Similarly, the intuitions underlying those federal programs—that some problems are best managed by states, with federal administrative agencies providing oversight and a backstop—foreshadowed California’s rationales for its state-to-local delegation.⁵¹

Figure 1. Comparing Cooperative Subfederalism and Traditional State-Local Governance Regimes: A Simplified Typology

	Traditional State-Dominant Regime	Traditional Local Governance	Cooperative Subfederalism
State Legislature’s Roles	Define program outcomes and requirements. Delegate authority to administrative agency.	Delegate authority to local government. Ad hoc oversight and intervention.	Define program outcomes and requirements. Delegate oversight and review authority/ obligations to state administrative agency. Delegate implementation authority to local government.
State Administrative Agency’s Roles	Implement program.	No legally defined role.	Flesh out program requirements. Review and approve or disapprove local implementation plans.
Local Governments’ Roles	No legally defined role.	Implement program.	Develop implementation programs. Submit implementation programs for state agency approval. Implement program.

50. See Dave Owen, *Probabilities, Planning Failures, and Environmental Law*, 84 TUL. L. REV. 265, 280–81 (2009) (describing the Clean Air Act’s planning requirements).

51. See *infra* notes 79–116 and accompanying text.

This Part catalogues such state-local programs and describes different ways in which they are constructed. While the summary is not complete—the paucity of literature on these programs makes it nearly impossible to compile a comprehensive list—it should illustrate the basic points that these programs do exist in modest but significant numbers and that they often address important tasks.

A. Dual Delegation Programs

Many cooperative subfederalism programs are embedded within traditional cooperative federalism programs. In these dual delegation programs, the federal government delegates authority to a state government while requiring a federal administrative agency to provide review and oversight. The state then delegates authority to a local government while again retaining continuing administrative oversight.

This model is particularly prevalent with air quality planning. Section 110 of the Clean Air Act requires states to develop and implement “state implementation plans,” which are designed to bring the states’ air into compliance with federal air quality standards.⁵² States must submit their plans to the United States Environmental Protection Agency (EPA) for review and approval, and EPA must prepare its own “federal implementation plan” if the state does not submit a legally sufficient plan.⁵³ Other sections of the Clean Air Act create permitting programs for individual sources and empower governmental enforcement, and states can take over responsibility for implementing these programs as well.⁵⁴

In many states, planning, permitting, and enforcement authority remain at the state level, and air quality management just exemplifies a traditional cooperative federalism regime.⁵⁵ But other states subdelegate their authority to local governments. In some states, like California, the delegations include a broad suite of Clean Air Act authorities, as well as authority under parallel state statutes.⁵⁶ In others—Ohio, for example—planning authority remains with the state while permitting and enforcement authority is delegated.⁵⁷ Similarly, some states delegate

52. 42 U.S.C. § 7410 (2012).

53. *Id.* § 7410(c).

54. See John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1194 (1995) (describing delegated permitting authority).

55. See *RBLC Links for State and Local Air Pollution Control Agencies*, U.S. ENVTL. PROTECTION AGENCY, <https://cfpub.epa.gov/rblc/index.cfm?action=Agency.AgencyLinks> [<https://perma.cc/W5VG-ZLRY>] (last updated Feb. 14, 2017).

56. See *Hall v. U.S. Env'tl. Prot. Agency*, 273 F.3d 1146 (9th Cir. 2001) (evaluating a challenge to a SIP amendment initially prepared by Clark County, Nevada); James D. Fine & Dave Owen, *Technocracy and Democracy: Conflicts Between Models and Participation in Environmental Law and Planning*, 56 HASTINGS L.J. 901, 946–47 (2005) (describing federal, state, and local roles).

57. See, e.g., *About CDAQ*, CLEVELAND DEP'T PUB. HEALTH, http://www.clevelandhealth.org/network/air_quality/about_air_quality.php [<https://perma.cc/9DEV-ZNY2>] (last visited Sept. 12, 2018) (describing Cleveland's air quality authority, which includes monitoring, enforcement, and permitting but not SIP development).

authority to local jurisdictions throughout the state, while others delegate authority to just a few cities or counties. California again exemplifies the former approach,⁵⁸ while Pennsylvania's delegations to Allegheny and Philadelphia Counties exemplify the latter.⁵⁹

Analogous programs also exist under federal water quality laws. Municipal stormwater permitting, for example, uses a complex federal-state-local regulatory model. Most states hold delegated authority to implement the National Pollutant Discharge Elimination System, which is one of the Clean Water Act's key permitting programs, and that program extends to municipal discharges of polluted stormwater.⁶⁰ States therefore issue storm water permits to municipal governments, and the permit terms (which are partly dictated by federal law) require those municipal governments to establish regulatory programs governing the private entities that send stormwater runoff into municipal systems.⁶¹ Indeed, in California, there are actually three levels of delegation: EPA delegates its permitting authority to the California State Water Resources Control Board, which delegates that same authority to regional water quality control boards, which issue permits that require local governments to regulate private entities.⁶²

Other legal arenas contain additional examples. The Safe Drinking Water Act establishes monitoring and testing requirements for water supplies, and states often delegate their responsibilities under the act to local governments.⁶³ Similarly, the Coastal Zone Management Act delegates authority from the federal government to states, but states then oversee coastal zone planning done by local governments.⁶⁴ Outside the environmental realm, food safety law originates partly at the federal level, but the federal government delegates much of the work of inspecting food facilities to states, which in turn delegate that authority to local government while retaining some continuing oversight responsibilities.⁶⁵ Education law is edging toward a similar model. While public K-12 education was traditionally the province of local governments, the Race to the Top program, which required local

58. See *infra* Part IV.A.3.

59. See also 25 PA. CODE § 127.706 (2018).

60. See 33 U.S.C. § 1342(p) (2012) (defining the scope of NPDES permit coverage for urban stormwater runoff).

61. See 40 C.F.R. § 122.34 (2011) (describing mandatory elements of municipal stormwater permits).

62. See *Nat. Res. Def. Council, Inc. v. County of Los Angeles*, 725 F.3d 1194, 1198–99 (9th Cir. 2013) (describing the system of delegations).

63. See Hannah Wiseman, *Dysfunctional Delegation*, 35 YALE J. ON REG. 233, 259–65 (2008).

64. See Thomas J. Schoenbaum & Ronald H. Rosenberg, *The Legal Implementation of the Coastal Zone Management Act: The North Carolina Model*, 1976 DUKE L.J. 1, 2.

65. OFFICE OF THE INSPECTOR GEN., DEP'T OF HEALTH & HUMAN SERVS., VULNERABILITIES IN FDA'S OVERSIGHT OF STATE FOOD FACILITY INSPECTIONS (2016) (describing delegations); see also Daniel E. Ho, *Does Peer Review Work? An Experiment of Experimentalism*, 69 STAN. L. REV. 1, 28–29 (2016) (describing roles in food safety inspections).

governments to implement grants that the federal government issued to states, injected a dose of cooperative subfederalism into a major new area of law.⁶⁶

B. Single Delegation Programs

Although some cooperative subfederalism programs are offshoots from traditional cooperative federalism programs, others do *not* involve the federal government. In these programs, the state is only an overseer, not an intermediary, and the local government is the only delegate.

Some of the most prominent examples of cooperative subfederalism involve land use planning, a field in which the federal government is nominally absent.⁶⁷ In most states, continuing state involvement is also minimal: the state may set general standards and protocols for local land use planning, and it retains the legal option of preempting local law, but continuing state administrative oversight and review—a key element of a cooperative subfederalism program—is not part of the legal regime.⁶⁸ A handful of states, however, have tried alternative legal models in which local land use management plans must receive some level of state review and approval.⁶⁹ Oregon and Florida, both of which Part III discusses in depth, are two of the most prominent examples. Other states have embarked on similar experiments with using cooperative subfederalism to govern natural resource management. Massachusetts, for example, delegates wetlands protection authority to local “conservation commissions,” which implement state law and make decisions reviewable by a statewide environmental agency.⁷⁰ Similarly, if less successfully, Maine has offered local governments the opportunity to assume delegated authority to implement the state’s Natural Resources Protection Act.⁷¹

These examples demonstrate that cooperative subfederalism is important in some spheres of governance. Nevertheless, the list is limited, and it is particularly limited with respect to single-delegation programs. Even a brief sampling of traditional cooperative federalism programs would identify many more programs; it

66. See LISA DRAGOSET ET AL., *USAGE OF POLICIES AND PRACTICES PROMOTED BY RACE TO THE TOP 1–2* (2015).

67. See *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 161 (2001) (noting “the States’ traditional and primary power over land and water use”). In fact, federal environmental laws, funding programs, and fiscal policies also play important roles.

68. Edward J. Sullivan & Jessica Yeh, *Smart Growth: State Strategies for Managing Sprawl*, 45 URB. LAW. 349, 354 (2013) (“Most states do not oversee the land use planning process, instead delegating planning authority to local governments with few checks or guidelines on processes or outcomes.”).

69. See generally STATE & REGIONAL COMPREHENSIVE PLANNING: IMPLEMENTING NEW METHODS FOR GROWTH MANAGEMENT (Peter A. Buchsbaum & Larry J. Smith eds., 1993) [hereinafter STATE & REGIONAL COMPREHENSIVE PLANNING] (describing several states’ programs).

70. Cymie Payne, *Local Regulation of Natural Resources: Efficiency, Effectiveness, and Fairness of Wetlands Permitting in Massachusetts*, 28 ENVTL. L. 519, 520–21 (1998).

71. See ME. REV. STAT. ANN. tit. 38, § 480-F (2018); David M. Zirschky, *Rebalancing, Matching, and Over-Lapping Delegated Authority Under Maine’s Natural Resources Protection Act 2* (2015) (unpublished student paper) (on file with author) (“[N]o municipality has exercised its option to assume authority under 480-F.”).

also would include many initiatives in non-environmental spheres like utility regulation, social service provision, and education.⁷² That contrast shows that cooperative subfederalism has not yet taken the world by storm. But cooperative subfederalism's somewhat humble present underscores a future possibility: cooperative subfederalism programs could expand, perhaps substantially. States hold sweeping authority to define the powers and responsibilities of local government,⁷³ and there is no legal reason why states could not make cooperative subfederalism just as prevalent as its federal-state equivalent.⁷⁴

II. WHY COOPERATIVE SUBFEDERALISM?

Why might a state want to a cooperative subfederalism program? Many of the arguments will be familiar to anyone who has perused the vast literature on traditional cooperative federalism.⁷⁵ According to its proponents, cooperative federalism offers the best of two worlds: it allows the governance program to draw upon the distinctive advantages of both the federal government and the states.⁷⁶ According to its critics, cooperative federalism serves less salutary ends, with delegation allowing legislators to claim credit for addressing problems while leaving the hard work to someone else.⁷⁷ Or, alternatively, it is just a way for the federal government to steamroll state interests and requisition state administrative resources while feigning deference and respect.⁷⁸ As the discussion below explains, both the policy justifications and the political explanations could apply with similar force to delegations from state to local governments.

A. Policy Arguments

The traditional arguments favoring cooperative federalism derive from arguments for federalism more generally. According to traditional federalism theory, state and local governments offer several major advantages over centralized national

72. See, e.g., *F.E.R.C. v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 779–80 (2016) (noting that the Federal Energy Regulatory Commission implements a cooperative federalism program); *T-Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808, 816 (2015) (stating that the Telecommunications Act of 1996 reflects cooperative federalism principles); *Schaffer v. Weast*, 546 U.S. 49 (2005) (noting that the Individuals with Disabilities in Education Act is grounded in cooperative federalism); *Wis. Dept. of Health & Family Servs. v. Blumer*, 534 U.S. 473, 495 (2002) (noting that Medicaid is a cooperative federalism program).

73. See Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187, 198 (2005) (“[T]he conventional wisdom is that . . . the state legislatures, if permitted by their state constitutions, can freely alter or abolish local governments.”).

74. Politics can be another story. The legal explanation of local regulatory authority—that it derives from state authority—does not always accord with views in the political sphere, where local governance is often assumed to be a default condition.

75. See Briffault, *supra* note 16, at 1312–16 (observing that traditional federalism arguments favor local governance).

76. See *infra* notes 79–111 and accompanying text.

77. See *infra* notes 120–137 and accompanying text.

78. See *infra* notes 128–129 and accompanying text.

governments. Most importantly, because of their greater geographic proximity to the problems they regulate, state governments are presumed to be more sensitive to local conditions, accessible for citizen participation, and responsive to local preferences.⁷⁹ That sensitivity, in combination with the possibility of different electoral coalitions forming at state levels, theoretically leads to more nuanced and diverse policies, which in turn should produce three secondary advantages.⁸⁰ The first is states' ability to function as federalism's famous "laboratories of democracy," the places where new policy ideas can emerge and be put to the test.⁸¹ Second, the diversity of policy approaches theoretically allows and responds to "competition for a mobile citizenry."⁸² Third, and lurking behind all of these justifications, is a more sweeping theory: diffusing power outside the national government establishes important checks and balances on governmental authority, precluding tyranny and protecting individual liberty.⁸³ Indeed, some jurists have gone so far as to suggest that these features make state and local government, not the national government, the true heart of our democracy.⁸⁴

On their own, those arguments would suggest a very limited role for the federal government, and many participants in federalism debates have deployed these claims simply to empower the states. But there is a powerful countervailing set of arguments in favor of continued federal authority. States, as many people have noted, are often poorly matched to the geographic scale of regulatory challenges.⁸⁵ Without a national response to problems like interstate air or water pollution, the citizens of downstream or downwind states are likely to suffer.⁸⁶ Similarly, federal governance can offer economies of scale and the benefits of consolidated expertise.⁸⁷ Rather than have fifty states each invent their own response to a recurring regulatory problem, sometimes it is more efficient for the

79. See *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) ("Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed . . . [and] more accountable than a distant federal bureaucracy.").

80. See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)) ("The first, and most axiomatic, advantage of decentralized government is that local laws can be adapted to local conditions and local tastes, while a national government must take a uniform—and hence less desirable—approach.").

81. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

82. *Bond v. United States*, 564 U.S. 211, 221 (2011) (quoting *Gregory*, 501 U.S. at 458).

83. See *id.*

84. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 576 (1985) (Powell, J., dissenting) (describing "the far more effective role of democratic self-government at the state and local levels").

85. See, e.g., Esty, *supra* note 23, at 587.

86. E.g., *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1593 (2014) ("Left unregulated, the emitting or upwind State reaps the benefits of the economic activity causing the pollution without bearing all the costs.").

87. See Esty, *supra* note 23, at 614.

national government to craft one response.⁸⁸ Finally, national regulation corresponds with a widespread sense that shared national interests in some matters ought to trump more parochial state concerns.⁸⁹ According to this view, an individual state should not have unfettered discretion to neglect its citizens' education or to allow pollution of their air.

Like the arguments in favor of state authority, these arguments could just support exclusive federal authority, and sometimes proponents offer them to that end. But to a policymaker who believes that both sets of arguments have some heft, cooperative federalism offers an appealing compromise.⁹⁰ It allows each governance level to bring its relative advantages to the table, while providing protection against the potential disadvantages of both the federal government and the state. Working together, federal and state agencies can draw upon local knowledge, for example, while retaining checks on interstate externalities.⁹¹

In recent years, many commentators have questioned the simple dualities drawn by traditional federalism theory. Some have questioned whether the salutary descriptions that federalism rhetoric often offers of state government are supported by empirical evidence.⁹² Others argue that the states do have important roles, and that combined federal-state governance has real value, but that conventional theory misunderstands the nature of that value. Jessica Bulman-Pozen and Heather Gerken, for example, have argued that cooperative federalism is often a misnomer, and that much of the value of these systems lies in their ability to provide contained forums for conflict between the federal government and the states.⁹³ Similarly, I have argued that subnational offices within the federal government can offer many of the benefits traditionally attributed to state government.⁹⁴ Nevertheless, many critics of traditional federalism theory still support cooperative federalism.⁹⁵ We would readily concede that some value arises from joint state-federal governance—

88. *Id.* (noting that “[i]t makes no sense” to ask individual states or localities to repeat tasks like determining the health effects of inhaling particulate matter).

89. *See, e.g.*, Richard B. Stewart, *Environmental Quality as a National Good in a Federal State*, 1997 U. CHI. LEGAL F. 199.

90. *See* Weiser, *supra* note 4, at 665–66 (noting advantages over dualistic models of federalism).

91. In recent years, many scholars have emphasized the policy benefits that result from such collaborations. *See, e.g.*, David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796 (2008); Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795 (2005); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005).

92. *E.g.*, Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333 (2009); Susan Rose-Ackerman, *Risk Taking and Relection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 594 (1980).

93. Bulman-Pozen & Gerken, *supra* note 24.

94. Owen, *supra* note 37.

95. *See, e.g.*, Adelman & Engel, *supra* note 91 (arguing in favor of interactive, overlapping federalism); William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547 (2007) (arguing for overlapping state and federal roles); Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889 (2014) (arguing that federalist systems help preserve national unity); Schapiro, *supra* note 91.

and would concede, even more readily, that the idea holds powerful political appeal.⁹⁶

These arguments for cooperative federalism could extend to state and local relationships. Notwithstanding the Supreme Court's tendency to treat state and local governance as interchangeable, many of the traditional premises for criticizing federal governance—that it is geographically removed, and therefore less sensitive and accountable—can be and are often lobbed at states.⁹⁷ Many states are large and are geographically, economically, and politically diverse. Decisions made from Austin, Boston, or Sacramento therefore might strike residents of other parts of the state as no less out-of-touch than decisions from the federal government.⁹⁸ Participating in decisions made in a state capital also can be just as difficult as participating in federal decision-making, particularly for people in far-flung parts of a large state.⁹⁹ Similarly, if fifty state laboratories of democracy¹⁰⁰ sound desirable, then a system with several thousand local laboratories of democracy might sound even more appealing, and might also seem to facilitate even more robust competition for a mobile citizenry.¹⁰¹ In short, if we really believe the traditional federalism arguments in favor of state government, there is no obvious reason to stop with states; delegation to local government might seem even more appealing.¹⁰²

Conversely, continuing state administrative oversight of local governments might bring many of the same benefits that federal oversight brings to state action. Perhaps most importantly, state oversight could correct for spillover effects. California's groundwater management challenges exemplify this potential. The

96. *E.g.*, Owen, *supra* note 37, at 113–16 (describing symbiotic relationships between states and regional federal offices).

97. *See, e.g.*, Paul Feuer, Letter to the Editor, *Oppose Preposterous Bills*, NAPLES DAILY NEWS, Mar. 28, 2017, <http://www.naplesnews.com/story/opinion/readers/2017/03/27/letters-editor-tuesday-march-28-2017/99668186/> [<https://perma.cc/Y28Y-399Z>] (“Rules involving local commerce should be made by [local officials], not by bureaucrats in Tallahassee.”); Kevin Miller, *Candidates’ Gloves Come off at Bangor Event*, BANGOR DAILY NEWS, Oct. 12, 2010 (quoting then-candidate, and later governor, Paul LePage as saying, “I believe the county commissioners do a better job of understanding what is needed in their county than bureaucrats in Augusta.”); Dennis Wyatt, *Time to Dismantle Sacramento and Rebuild from the Ground Up*, MANTECA/RIPON BULL., May 20, 2009, <https://www.mantecabulletin.com/opinion/local-columns/time-to-dismantle-sacramento-and-rebuild-from-the-ground-up/>.

98. *E.g.*, Miller, *supra* note 97. Of course, many state administrative agencies have regional offices, so decisions are often made outside the state capital.

99. *See, e.g.*, Telephone Interview with Or. Attorney (July 25, 2017) (describing local officials who needed to drive six hours each way to testify before the state legislature).

100. How often the label “laboratory” fairly applies to state and local government is a matter of some debate. *See* Hannah J. Wiseman & Dave Owen, *Federal Laboratories of Democracy* (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3076066 [<https://perma.cc/DUK8-Y693>].

101. *See* Decker, *supra* note 14, at 362. The theory of interjurisdictional competition originated in studies of local government. *See* Christopher M. Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 898–903 (2007) (summarizing Tiebout’s hypothesis and subsequent literature); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

102. *See* Gerken, *supra* note 12, at 23–24.

geographic boundaries of many aquifers extend beyond the jurisdiction of individual management agencies,¹⁰³ and groundwater moves in response to pumping,¹⁰⁴ creating the threat of a tragedy of the commons, in which individual agencies' reluctance to regulate pumping depletes neighboring jurisdictions' supplies.¹⁰⁵ The classic response to such tragedies is to impose collective solutions, but that often requires intervention from a higher level of government.¹⁰⁶ Groundwater management is hardly unique in this respect. Many local government actions, including quintessential local duties like policing, providing public education, making land use decisions, and annexing land, have implications well beyond local boundaries.¹⁰⁷ Individual localities, for example, have strong incentives to use zoning law to screen out poorer residents. While those actions may protect the local educational system and property values, they shift financial and environmental burdens onto neighboring communities (and harm poor people).¹⁰⁸ State oversight can check such parochialism.¹⁰⁹

Similarly, state governments can sometimes pool greater levels of expertise and benefit from economies of scale. Sometimes setting a policy once in the state capital will be much more efficient than setting it in hundreds of cities and counties across the state. That may be particularly true if policymaking requires a high degree of technical specialization. Groundwater management, for example, often requires complex simulation modeling, and it may be easier for the state than for local governments to develop that modeling expertise.¹¹⁰ Finally, just as support for federal governance sometimes reflects perceptions that some issues are inherently matters of national interest, state governance can reflect the widely shared intuition that some subjects are too collectively important to be left to unfettered local discretion.¹¹¹

Indeed, of all the classic arguments in favor of cooperative federalism, only one does *not* translate to state-local relationships. That argument is textual and historical; it is that, regardless of any functional justification for cooperative federalism, a balance of federal and state authority is required by the text and

103. KIPARSKY ET AL., *supra* note 43, at 21–22 (describing scale mismatches).

104. See Dave Owen, *Taking Groundwater*, 91 WASH. U. L. REV. 253, 264 (2013).

105. See Barton H. Thompson, Jr., *Tragically Difficult: The Obstacles to Governing the Commons*, 30 ENVTL. L. 241, 249–53 (2000).

106. *Id.* at 244 (describing this solution and some of the associated challenges).

107. See Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931, 935–49 (2010); Dave Owen, *Mapping, Modeling, and the Fragmentation of Environmental Law*, 2013 UTAH L. REV. 219, 237 (describing spillover effects).

108. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 3 (1990); Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 781 (1969).

109. See, e.g., CAL. GOV'T CODE §§ 65580–65589.8 (requiring affordable housing). *But see* PAUL G. LEWIS, CALIFORNIA'S HOUSING ELEMENT LAW: THE ISSUE OF LOCAL NONCOMPLIANCE (2003).

110. See KIPARSKY ET AL., *supra* note 43, at 23–24.

111. For discussion of this rationale in the context of federal policymaking, see Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1217–18 (1977).

structure of the United States Constitution, and by the dueling historical traditions of federal supremacy and state sovereignty that intertwine with that text.¹¹² Cooperative federalism offers a fleshed-out and modern incarnation of constitutional law's core compromises¹¹³—and, perhaps, a way to work around the constraints of anti-commandeering doctrine¹¹⁴—while cooperative subfederalism cannot claim any such pedigree. The United States did not host a constitutional convention or fight a horrific civil war to determine the relative authorities of state and local governments. Nor, in many states, can local governments press constitutional claims analogous to those made by states under the federal constitution.¹¹⁵ They never enjoyed political sovereignty, and legally, at least, their authority exists at the discretion of the state.¹¹⁶

But in the constitutional debates of the real world, those distinctions are not particularly important. Sovereignty and constitutional text appear frequently in the discourse of federalism, but usually not for long; both jurists and scholars tend to justify their positions primarily through functional claims.¹¹⁷ And if those functional claims are the arguments that really matter, then the similarities between federal-state relationships and state-local relationships are much greater than the differences. Similarly, while the doctrinal differences between federal-state and state-local relationships might appear profound, the practical realities are not so different. Federally-untrammelled zones of state authority are more myth than reality,¹¹⁸ while the political appeal of localism ensures that state authority is far from unfettered.¹¹⁹

B. Political Explanations

The arguments recited above purport to explain why cooperative federalism is good policy. It might also be good politics, and that political economy, rather than functional benefits, may explain why cooperative federalism systems are so

112. See *Alden v. Maine*, 527 U.S. 706, 713 (1999) (“Various textual provisions of the Constitution assume the States’ continued existence and active participation in the fundamental processes of governance.”).

113. See James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837, 909–13 (2004) (analogizing James Madison’s ideas about states’ roles to modern cooperative federalism theory). That claim would be contested, of course, by the many commentators who believe a dual federalism model is more consistent with the Constitution.

114. See *New York v. United States*, 505 U.S. 144, 168–69 (1992) (concluding that cooperative federalism is constitutional while direct orders for state legislation are not).

115. See Barron, *supra* note 13, at 487 (“[B]lack-letter constitutional law formally deems [local governments] to be mere administrative appendages of the states that ‘create’ them.”).

116. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980).

117. See Gerken, *supra* note 12, at 23 (“Neither originalism nor textualism drives the theory.”). *But see* Briffault, *supra* note 16 (arguing that these historical and legal distinctions should be more important than functional arguments).

118. See Gerken, *supra* note 8, at 116 (noting that state authority is primarily expressed within spheres of federal governance).

119. See Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627 (2001) (discussing localism’s appeal and influence).

prevalent. It also can explain why cooperative subfederalism programs are likely to arise.

Many of the political arguments start with a simple premise: for a legislator interested primarily in reelection, an appealing response to a thorny problem is a bill that allows that legislator to claim credit for solutions while deflecting blame for implementation struggles.¹²⁰ Cooperative federalism can do this rather well. The national government can claim credit for addressing some important problem, while layers of delegation provide plausible deniability, and an abundance of scapegoats, when implementation goes awry.¹²¹ Similarly, if the states do take on implementation responsibility, then the federal government can claim responsibility for a solution while only paying for part of the associated administrative costs.¹²²

Closely related is another political benefit: cooperative federalism regimes can allow legislators to duck thorny policy conflicts.¹²³ Cooperative federalism regimes can emerge from contexts in which there are strong disagreements about both the appropriate stringency of a policy response and the degree to which the federal government or the states should assume primacy.¹²⁴ Often, also, these issues are intertwined, with skeptics of the regulatory program hoping for a more lenient response from the states than the federal government.¹²⁵ Cooperative federalism could allow legislators to finesse this problem. They can claim, perhaps somewhat accurately, to have found a statesmanlike compromise to the conflict between federal and state authority, while politically savvy regulated entities can keep powder dry for future administrative policymaking fights.¹²⁶ Those compromises might allow legislative sponsors to secure votes for bills that otherwise would not pass.¹²⁷

That description assumes that a primary goal of cooperative federalism regimes is to create the appearance of a robust regulatory response while leaving actual regulation, and the associated political costs, to someone else. But there is another possibility: legislators supporting cooperative federalism really do want a robust regulatory program, and the nod to state discretion is the politically expedient

120. See Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 56–58 (explaining similar dynamics in delegations to federal administrative agencies).

121. See Wiseman, *supra* note 63.

122. See *id.* at 14.

123. This claim parallels arguments often made in discussions of direct delegations to federal agencies. See, e.g., *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring) (criticizing Congress for “simply avoiding a choice”).

124. See Kincaid, *supra* note 1, at 145 (noting that for many people, cooperative federalism leaves “either a cup half full or a cup half empty”).

125. See, e.g., N. William Hines, *History of the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform*, 4 GEO. WASH. J. ENERGY & ENVTL. L. 80, 97 (2013) (describing disagreements over the stringency of the Clean Water Act and the states’ implementation roles).

126. See Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885, 902 (2006).

127. See Sarah Buckley, *Clean Air Post-Healthcare: The Federalism Limits of the Spending Power and the Future of Environmental Regulation*, 101 VA. L. REV. 807, 814–15 (2015) (describing these dynamics in the context of air quality regulation).

sham.¹²⁸ According to this critique, cooperative federalism is often a fig leaf to cover over federal coercion and dragooning of the states.¹²⁹ Conversely, a very different political game is also possible. Political expediency can sometimes advance rather than retard program implementation, for one benefit of cooperative federalism programs, from a state regulator's perspective, is the opportunity to impose controls that those state regulators support while simultaneously blaming the federal government.¹³⁰ Either of these dynamics might help explain these programs' political appeal.

That appeal also could extend to state and local relationships. California's groundwater legislation again provides an instructive example. Achieving sustainable groundwater management in California will require compelling or convincing many water users to use less water.¹³¹ But getting people to give up shares of a resource to which they feel entitled, and over which they can assert legal claims of right, is one of the most difficult challenges government can take on.¹³² By delegating authority to local governments to address that problem, while defining overall goals in fairly general terms, state legislators could claim credit for responding to an important problem while also maintaining some political cover.¹³³

Other scholars' research documents similar dynamics. Justin Weinstein-Tull, for example, has chronicled many ways in which states delegate unwanted tasks to local governments, knowing full well that the local governments lack the resources to fulfill their mandates, and then disclaim legal or political responsibility for the ensuing messes.¹³⁴ Similarly, Hannah Wiseman has documented situations in which dysfunctional delegations create accountability voids.¹³⁵ The classic example of this type of debacle, as Wiseman observes, is the lead contamination fiasco in Flint, Michigan.¹³⁶ There, federal law delegated authority to the state, which sub-delegated that authority to local government (which then, to complicate the story, saw its operations taken over again by an agency of the state), and only when the crisis

128. See Kincaid, *supra* note 1, at 145 (“[C]ooperative federalism also served, for many reformers, as a rhetorical device to allay public fears of centralization.”); Mario Loyola, *The Dangers of ‘Cooperative’ Federal-State Programs*, NAT’L REV., Dec. 20, 2012, <https://www.nationalreview.com/corner/dangers-cooperative-federal-state-programs-mario-loyola/> [<https://perma.cc/3G9C-799Q>].

129. See Kincaid, *supra* note 1, at 149 (discussing Ronald Reagan’s view of cooperative federalism as “a cartellike venture by liberal federal, state, and local policy activists to expand the public sector”).

130. See Brigham Daniels, *Environmental Regulatory Nukes*, 2013 UTAH L. REV. 1505, 1522–23 (quoting former EPA Administrator William Ruckelshaus’s description of this “gorilla in the closet” role).

131. TARA MORAN & DAN WENDELL, *THE SUSTAINABLE GROUNDWATER MANAGEMENT ACT OF 2014: CHALLENGES AND OPPORTUNITIES FOR IMPLEMENTATION* 20 (2015).

132. See Thompson, Jr., *supra* note 105, at 252–53.

133. The Sustainable Groundwater Management Act contains several appealing generalities that seem to serve just this end. See, e.g., CAL. WATER CODE § 10721(x), (y) (defining sustainability—a key substantive goal—as the avoidance of “undesirable results,” and defining “undesirable results” in language that leaves ample room for discretion).

134. Weinstein-Tull, *supra* note 16.

135. Wiseman, *supra* note 63.

136. *Id.* at 259–65.

became headline news did all levels of government begin to respond.¹³⁷ Until that moment, delegating and deflecting responsibility had seemed rather expedient.

The political appeal of delegation thus has two important implications. One, as the Flint example suggests, is that the practice of cooperative federalism or cooperative subfederalism could be much messier than prevailing federalism theory might suggest. The other implication is that the flaws of delegated governance are intertwined with—and, sometimes, part of—its political appeal. Multi-level governance may be tempting, particularly for government programs that are controversial or costly, precisely because it provides the appearance, but not the reality, of effective and collaborative action. That will not necessarily be the case, and a cooperative subfederalism system offers the promise of more state oversight and more intergovernmental checks than a Flint-style system of delegation without meaningful follow-up. Nevertheless, the threat of governance gaps is quite real.

III. THE DISTINCTIVE CHALLENGES OF COOPERATIVE SUBFEDERALISM

The primary point of the preceding Part is that much of the appeal and many of the challenges associated with cooperative federalism should extend to cooperative subfederalism. But there are divergences as well. This Part explores those differences. Most arise from the introduction of local actors into the governance arrangement, for the distinctive nature of local governance accentuates some challenges associated with federal-state delegations and creates others. Other challenges arise from casting a familiar actor—the state—in a new role.

That discussion comes with two major caveats. First, local governance in the United States is diverse, and none of the generalizations made here will apply equally across the entire local government realm.¹³⁸ The issues faced by a small rural county or special district are likely to be profoundly different from those confronted by major cities. My more modest claim is that these issues will often arise. Second, the comparative baseline matters. The discussion that follows focuses primarily on a contrast between cooperative subfederalism and pure state authority. But in the real world, often the choice is between cooperative federalism and largely unfettered local authority—or no regulation at all.¹³⁹ In that second circumstance, a cooperative subfederalism program can ameliorate rather than accentuate the challenges described below.

137. See FLINT WATER ADVISORY TASK FORCE, FINAL REPORT (2016) (describing governance failures).

138. See Nestor Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 587 (2017) (noting “the vast number of local governments—nearly 90,000 such entities, depending on the method of counting” and “the variety of local agencies”).

139. See, e.g., Telephone Interview with Fla. Lawyer (Sept. 20, 2017) (noting that “the state had to recoup some of its delegated authority from local governments . . . in a state that had been a strong home rule state”); *supra* note 39 and accompanying text (describing California groundwater management prior to SGMA).

A. Local Fragmentation

One classic argument against federal delegation to states—that it will lead to fragmented decision-making—applies with even greater force to local government decision-making. The reason may seem obvious but is important. In all but the smallest states, there are many more local government units than there are states within the United States.¹⁴⁰ Those local government units also come in greater varieties than states. Cities and counties can be dramatically different from each other; the differences, for example, between New York City and a tiny rural town are more dramatic than the differences between even California and Alaska or Rhode Island. Beyond counties, cities, and towns, local governance also includes a variety of special purpose districts, many with geographic boundaries that do not align with those of general-purpose governmental units.¹⁴¹ Consequently, delegating authority to local governments means delegating authority into particularly complex and fragmented institutional terrains.¹⁴² And while the state, by retaining oversight authority, may provide checks on cross-border effects and work to ensure interjurisdictional coordination, doing so requires coordinating with many more entities than a federal agency working with just fifty states.

There are potential fixes for this problem. One is to create new local governmental entities with larger territories. In many states, for example, air quality management districts govern territories that integrate many individual cities or towns.¹⁴³ An alternative approach is to create coordinating bodies that work across the boundaries of individual governance units.¹⁴⁴ Indeed, that latter option is a core element of a cooperative subfederalism regime, which envisions the state as the coordinating entity. But either of these fixes takes work and requires adding additional institutions and layers of bureaucracy to an already complex mix. Sometimes either retaining centralized state authority or leaving everything to the locals will be easier.¹⁴⁵

B. Local Capacity

A second set of challenges arises from the distinctive ways in which local governments are staffed. In many jurisdictions, local government depends heavily

140. See ROBERT C. ELLICKSON ET AL., *LAND USE CONTROLS: CASES AND MATERIALS* 45 (4th ed. 2013) (noting that the 2010 census counted 39,044 general purpose governments and 50,532 special districts in the United States).

141. See Gerken, *supra* note 12, at 21–22.

142. See Davidson, *supra* note 138, at 598–600 (noting multiple dimensions of fragmentation).

143. See, e.g., *California Map for Local Air District Websites*, CAL. AIR RESOURCES BOARD, <https://www.arb.ca.gov/capcoa/dismap.htm> [<https://perma.cc/6ECK-4KPH>] (last visited Sept. 12, 2018).

144. See, e.g., *What Is Metro?*, METRO, <http://www.oregonmetro.gov/regional-leadership/what-metro> [<https://perma.cc/8W9N-PG9V>] (last visited Sept. 12, 2018) (describing Portland Metro, which governs land use planning in the Portland, Oregon metropolitan area).

145. Purely local mechanisms, like interlocal agreements, also can alleviate these issues without requiring state intervention. See Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190 (2001).

upon part-time volunteers.¹⁴⁶ While larger cities can afford a professionalized and specialized staff, other local government administrative units are often overseen by voluntary boards.¹⁴⁷ A professional staff may support those boards—a town planning commission, for example, may be supported by a professional planner—but that staff is often skeletal, and some local governments rely primarily on the episodic services of external consultants (and lawyers).¹⁴⁸ Other local governments have become so destitute that they cannot serve even basic public needs, let alone hire staff or consultants for specialized tasks like resource management.¹⁴⁹ And even with a strong professional staff, some key decision-makers are likely to be people whose appointment requires no specialized knowledge and who work for the government only when their day jobs are done.¹⁵⁰

The reliance on volunteer staffing creates challenges with expertise.¹⁵¹ While voluntary participants may be well-versed in the politics of the community, there is no guarantee that they will have technical sophistication. Yet their decisions are likely to implicate subject matter that demands that sophistication. Local groundwater management boards, for example, are likely to make decisions in reliance on complex, computer-based simulation models, each of which will likely have uncertainties and debatable assumptions baked into its input data and internal logic.¹⁵² A local volunteer board might have participants who understand modeling, but such expertise is not particularly common.¹⁵³ Nor will it be easy for a once-a-month volunteer with another job to develop that expertise. And while the state, in its role as reviewer and overseer, might provide some help, sometimes it will be easier for a state with more technically sophisticated staff to simply take the lead.

C. Self-Dealing

Local government's reliance on volunteers raises other concerning questions: who would be motivated to participate on a governing board, and how might their

146. See Davidson, *supra* note 138, at 623. Some state government agencies also rely on volunteer commissions. Oregon's land use planning scheme, for example, is overseen by a board of essentially unpaid volunteers. DEPT OF LAND CONSERVATION & DEV., OREGON'S STATEWIDE PLANNING GOALS & GUIDELINES 1 (2010); see also OR. REV. STAT. ANN. § 292.495 (2008) (providing for very small stipends).

147. See Davidson, *supra* note 138, at 608 (noting the prevalence of volunteer boards).

148. See, e.g., Vanessa Levesque et al., *Planning for Sustainability in Small Municipalities: The Influence of Interest Groups, Growth Patterns, and Institutional Characteristics*, 37 J. PLAN. EDUC. & RES. 6 (2017) (finding that most Maine towns lack a staff planner).

149. Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118 (2014).

150. See Davidson, *supra* note 138, at 608.

151. These expertise disparities are not unique to the state-local relationship. See Stewart, *supra* note 111, at 1218 (“[F]ederal health and environmental protection bureaucracies are generally larger and more professional than their state and local counterparts.”).

152. See TARA MORAN, PROJECTING FORWARD: A FRAMEWORK FOR GROUNDWATER MODEL DEVELOPMENT UNDER THE SUSTAINABLE GROUNDWATER MANAGEMENT ACT (2016) (describing the importance of groundwater models to SGMA implementation). For discussion of modeling uncertainties and subjectivity, see Fine & Owen, *supra* note 56, at 921–33.

153. Fine & Owen, *supra* note 56, at 936.

motivations affect their decision-making?¹⁵⁴ The obvious answers are that at least some participants are likely to have a personal stake in the subject matter of decision-making and that they are likely to use their position to self-deal. With groundwater, for example, some participants on governing boards may be water or irrigation district managers or farmers who rely upon groundwater pumping.¹⁵⁵ A board composed of such people might arrive at particularly thoughtful decisions; after all, its members are likely to understand long-term threats to the resource and the implications of different regulatory approaches. But such a board also may prioritize immediate needs over long-term sustainability, and it is likely to give little weight to the needs of water users outside the agency's jurisdiction, or to environmental outcomes.¹⁵⁶ Studies considering management of other resources—particularly fisheries—suggest that this threat is very real.¹⁵⁷

D. Factions and Salience

The likelihood of flawed administration is not a fatal critique of delegations to local governments, for most theories of administrative law begin with the premise that administrators are highly imperfect.¹⁵⁸ Instead, a basic premise of our administrative governance systems is that voters, either directly or, more likely, through their elected representatives, will provide oversight and accountability for administrative decision-makers.¹⁵⁹ But voting also works rather differently at local levels, and the differences have implications, not all of them positive, for the potential performance of local delegates.

Studies of local voting patterns have revealed a variety of differences from higher-level elections. Potential voters tend to have less awareness of local elections.¹⁶⁰ They tend to participate at lower rates.¹⁶¹ Votes are less likely to be contested.¹⁶² And voters vote for different reasons. Unlike state and federal elections, where the ideological sorting of political parties and individual charisma

154. See J. ERIC OLIVER, LOCAL ELECTIONS AND THE POLITICS OF SMALL-SCALE DEMOCRACY 90 (2012) (noting that governance “is typically hard and thankless work”).

155. See E-mail from Linda Esteli Mendez Barrientos, Ph.D. Student, Univ. of Cal. at Davis, to author (Oct. 27, 2017, 02:06 PM) (on file with author) (describing her research into the composition of GSA boards).

156. See Eric Helland & Andrew B. Whitford, *Pollution Incidence and Political Jurisdiction: Evidence from the TRI*, 46 J. ENVTL. ECON. & MGMT. 403, 404 (2003) (“[W]e find systematic evidence of free riding by jurisdictions when pollution can be more easily exported to neighboring states.”).

157. See JOSH EAGLE ET AL., TAKING STOCK OF THE REGIONAL FISHERY MANAGEMENT COUNCILS (2004) (finding major problems with biased participation).

158. See STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 204 (7th ed. 2011).

159. See *Newman v. Apfel*, 223 F.3d 937, 943 (9th Cir. 2000) (“[P]olitical accountability . . . is the very premise of administrative discretion in all its forms.”).

160. The few voters who actually show up for local elections (if those elections do not coincide with national elections) may be highly informed. See OLIVER, *supra* note 154, at 179–80.

161. See *id.* at 55.

162. John Gerring et al., *Demography and Democracy: A Global, District-Level Analysis of Electoral Contestation*, 19 AM. POL. SCI. REV. 574, 589 (2015).

provide the key distinctions among candidates, local elections often turn on issues like the preservation of landowners' property values.¹⁶³ Finally, the rules of voting may be different. One-person-one-vote principles extend to city and county elections, but not necessarily to elections carried out by special districts.¹⁶⁴ Those districts may instead allocate voting rights by measures like landownership, which can give a powerful edge, or even unassailable political dominance, to small groups of people.¹⁶⁵

The consequences of these differences are difficult to discern and will likely vary from place to place. Some commentators, echoing James Madison, have argued that local governments are particularly prone to factionalism and elite capture.¹⁶⁶ Others have argued that low participation rates in local government reflect a healthy absence of partisanship and ideology; voters, in this view, are unlikely to participate in local government because they are basically happy with it, not because they are ignorant of the issues or have lost hope that their votes will exert any real influence.¹⁶⁷ But that optimistic view is most likely to hold true when local governments are providing what political scientists refer to as unbiased governance—that is, governance that provides relatively consistent service levels across the population.¹⁶⁸ When a small group of people has a strong stake in the subject matter of governance—as is likely to be the case with school board elections, for example, or natural resource governance—low issue salience and low voter turnout mean that elections are unlikely to check special interest dominance.¹⁶⁹

Of course, voting is not the only potential check on poor government agency performance. At federal and state levels, procedural requirements, judicial review, conflict of interest rules, and open government laws are all designed to provide additional accountability. But these measures also can work differently at local levels. Some local agencies lack conflict of interest rules, and it might be difficult to find volunteers if such rules do exist. Additionally, reliance on contractors for basic governance functions can create “porous line[s] between public and private at the local level,” further diminishing the effectiveness of checks traditionally associated with federal or state administrative law.¹⁷⁰ Procedures may be highly informal, and

163. See WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS* 4–6 (2001).

164. See *Ball v. James*, 451 U.S. 355 (1981) (declining to extend one-person-one-vote principles to a water and energy supply district); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) (allowing water district voting that was weighted by landownership).

165. See Camille Pannu, Comment, *Drinking Water and Exclusion: A Case Study from California's Central Valley*, 100 CALIF. L. REV. 223, 257–58 (2012).

166. See Nestor Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 962 (2007) (“Local governments often give life to the Madisonian fear of the tyranny of local majorities.”).

167. See OLIVER, *supra* note 154. *But see* David Schleicher, *Why is There No Partisan Competition in City Council Elections? The Role of Election Law*, 23 J.L. & POL. 419 (2007) (questioning rosy views of local democracy).

168. OLIVER, *supra* note 154, at 83.

169. *Id.* at 48, 83–85 (noting that the dynamics of school board elections are likely to be different from those of city council elections).

170. Davidson, *supra* note 138, at 573.

separation of powers, though foundational to federal and state law, “is a concept foreign to municipal governance.”¹⁷¹

E. Ideological Relocation

Cooperative subfederalism also can relocate decisions to political constituencies with systematically different ideologies. Perhaps the starkest divide in American politics, which holds constant in nearly every state, is between liberal cities and conservative outer suburbs and rural areas.¹⁷² Delegating authority from urban state capitals to rural counties, towns, or special districts therefore can mean trading a blue or purple decision-making site for one that is decidedly red. The converse also is true; if establishing a cooperative regime means limiting traditional local autonomy and empowering the state, then decision-making is likely to shift to more centrist or liberal areas. That is not always the case; with air quality, for example, many state-to-local subdelegations have gone from centrist or politically conservative states to urban and more liberal cities or counties.¹⁷³ But often, particularly in the realms of environmental and natural resources law, delegations will run in the opposite ideological direction, for the simple reason that most natural resource exploitation occurs in rural areas.

Relocating decisions to different polities is both an advantage and a disadvantage of cooperative subfederalism (and, to a somewhat lesser extent, of traditional cooperative federalism). Traditional federalism theory often extolls the advantages of having smaller political constituencies adapt broad programs to their own distinctive preferences and needs.¹⁷⁴ And state oversight provides some check, at least in theory, on local governments’ ability to gut regulatory programs, and provides some necessity for state and local authorities to hash out differences.¹⁷⁵ But if the success of a program depends on at least a baseline level of commitment to regulatory goals, then delegating implementation authority to anti-regulatory administrators sometimes just won’t work.¹⁷⁶ California’s groundwater management experiments may yet provide a cautionary example of this principle. A core and

171. *Id.* at 38 (quoting *Moreau v. Flanders*, 15 A.2d 565, 579 & n.16 (R.I. 2011)); *see also id.* at 42 (“In nearly half the states, local agencies do not fall within the ambit of the relevant state APA.”).

172. *See* Justin Davidson, *Cities v. Trump: Red State, Blue State? The Urban-Rural Divide Is More Significant*, N.Y. MAG. (Apr. 18, 2017), <http://nymag.com/daily/intelligencer/2017/04/the-urban-rural-divide-matters-more-than-red-vs-blue-state.html> [<https://perma.cc/T6LV-EU4K>].

173. *See, e.g.*, Susan Carroll, *Texas High Court Rejects City Air Pollution Rules*, HOUS. CHRON., Apr. 30, 2016 (describing Houston’s clashes with the Texas Department of Environmental Quality, some occurring during a period when Houston held authority to implement state air quality law); *see also* Schragger, *supra* note 15, at 1190–91 (noting that state legislatures are often more conservative than their constituencies).

174. *See* Bulman-Pozen & Gerken, *supra* note 24, at 1268 (describing “microspheres of autonomy”).

175. *See generally id.* (describing ways in which cooperative federalism compels federal-state interactions).

176. As one Florida land use lawyer warned, “the rural areas, the folks on the fringes of town and stuff, they thought this was some kind of communism” Telephone Interview with Fla. Lawyer (July 21, 2017).

rather optimistic premise of the new law is that local governments, many of which for years declined to regulate groundwater use, will now be willing recipients of state oversight and effective leaders at the new regulatory frontier.¹⁷⁷ The accuracy of that premise remains to be seen.

F. Changing the Role of the State

In addition to introducing a new set of actors into governance arrangements, cooperative federalism also recasts the role of the states. No longer the delegates, unless the program involves dual layers of delegation, they now occupy the traditional federal role of delegator and overseer. That shift also has implications for the potential success of governance programs.

In many ways, the implications of this alternative state role should not be as dramatic as they might initially seem. The traditional rhetoric of federalism draws stark contrasts between federal and state governance, but that rhetoric is often overblown. The federal government is not actually a centralized, distant, and monolithic entity adopting one-size-fits-all solutions, despite all the caricatures to the contrary.¹⁷⁸ States, as the discussion that follows explains in more depth, can be somewhat removed from local conditions. And both levels of government share certain structures in common, including bicameral legislatures, chief executives, suites of professionalized regulatory agencies, and at least moderately similar systems of administrative law.¹⁷⁹ Similarly, while most states lack formal constitutional doctrines that limit state incursions upon local authority, and thus lack any analog for the legal limits of federalism, localism has very powerful political appeal.¹⁸⁰ The “political safeguards of localism” therefore can provide local autonomy with more meaningful protection than constitutional doctrine ever could.¹⁸¹ Consequently, the state role in cooperative subfederalism may be quite similar to the federal role in traditional cooperative federalism regimes.

Nevertheless, there are meaningful differences between the states and the federal government. Cataloguing all the relevant distinctions would require more space than is worthwhile here,¹⁸² but even a partial sampling would include a few

177. Any lingering doubts about local authority to regulate groundwater were settled by *Baldwin v. County of Tehama*, 36 Cal. Rptr. 2d 886 (Cal. Ct. App. 1994). Yet strong local groundwater regulation remained rare until the passage of SGMA. See MAC TAYLOR, LIQUID ASSETS: IMPROVING MANAGEMENT OF THE STATE’S GROUNDWATER RESOURCES 9 (2010).

178. See generally Owen, *supra* note 70 (critiquing these caricatures).

179. For an explanation of both similarities and differences (though with somewhat greater focus on the differences), see Aaron Saiger, *Chevron and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555 (2014).

180. See Rodriguez, *supra* note 119.

181. *Id.* at 630 n.16 (coining this phrase). As Richard Schragger has noted, however, states’ respect for local governance is typically greater when that governance comes from rural or suburban areas. See Schragger, *supra* note 15, at 1214 (discussing hostility toward Austin, Texas).

182. For a detailed account of differences, with particular focus on doctrines that authorize greater state authority over local governments than the federal government has over states, see Briffault, *supra* note 16, at 1335–44.

key items. Perhaps most importantly, while the federal government now has a half-century of experience implementing many cooperative federalism programs, most states lack analogous traditions.¹⁸³ Governance does usually require some learning, and state administrative agencies would start at a much lower point on that curve. Additionally, because of the possibility of interstate competition, states may be more susceptible to the influence of regulated entities, and therefore less able to provide robust oversight, than their counterparts in federal agencies.¹⁸⁴ Finally, states vary dramatically in their political support for regulatory oversight and in the resources they are willing to devote to the cause. That variance exists at the federal level too, of course; dramatic swings can happen from one administration to the next. But the dampening effect of a permanent civil staff with lasting institutional identities has meant, so far at least, that a federal culture of state oversight has remained at least moderately robust.¹⁸⁵ A state with skeletal administrative resources would struggle to establish that same culture.

IV. COOPERATIVE SUBFEDERALISM IN PRACTICE

The foregoing discussion shows that there are some reasons to think that cooperative subfederalism will work and other reasons to think it will not. And while California's latest cooperative subfederalism program is still quite new, other programs with longer track records have put the theoretical promises and perils of cooperative subfederalism to the test. This Part reviews three such programs. For each, I conducted interviews with government officials, private lawyers, and private planners who have spent years in the implementation trenches.¹⁸⁶ I draw upon those interviews, and upon the written literature associated with each program, to offer

183. See *supra* Part I (noting that cooperative subfederalism programs exist but are not abundant).

184. See Scott R. Saleska & Kirsten H. Engel, *Facts Are Stubborn Things: An Empirical Reality Check in the Theoretical Debate over the Race-to-the-Bottom in Environmental Standard-Setting*, 8 CORNELL J.L. & PUB. POL'Y 55 (1998). Saleska and Engel's article is part of a large debate about whether this race exists and, if it does, whether it is problematic. See Glicksman, *supra* note 1, at 736 n.94 (compiling sources on both sides).

185. See Telephone Interview with Cal. Local Air Quality Regulator (Aug. 17, 2017). He explained:

[J]ust as an aside, it's really disheartening to see EPA kind of getting dismantled right now, because they have the expertise, they have the extremely dedicated staff, and they have an internal culture of protecting the public health that I think is just a treasure for the country, and I don't know how many people realize that.

Id. For a theoretical account of the importance of this bureaucratic stability, see Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53 (2008).

186. In total, I conducted twenty-two interviews, all by telephone, and also exchanged follow-up emails and had one follow-up call. Seven interview subjects had worked in Florida, six in Oregon, and nine in California. I promised anonymity to all interview subjects. The Florida and Oregon interviewing included people who had served as top staff or as political appointees in state agencies responsible for land use planning, private attorneys who had represented developers, municipalities, and local governments, and several non-attorneys who had held similar roles. Many of the interview subjects had held several of these roles. The California air quality interviewees generally were current administrative agency staff. Most were relatively senior. None were political appointees.

several conclusions about how cooperative subfederalism can function in the real world.

That research methodology creates some important limitations. Every government program is unique in some ways, and while a study of three programs demonstrates possibilities, it cannot produce conclusions generalizable across all state and local relationships. Additionally, while my research method draws upon several hundred years of governance experience—most of my interview subjects have worked in their fields for decades—this was not a randomized and quantitative test of a discrete hypothesis. What follows therefore is a compilation of informed advice, not a proof. Nevertheless, that informed advice can help other researchers and policymakers as they consider governance alternatives.

The discussion that follows also comes with one other overarching caveat. A central premise of much of the legal literature on federalism, and on governance more generally, is that governmental structure matters.¹⁸⁷ Indeed, perhaps the most important intellectual contribution of the United States' founders was to accept the inevitability of human flaws and to focus on creating governance systems that can succeed even when individual leaders are self-aggrandizing.¹⁸⁸ This Article shares that basic orientation; I focus on governance structures (and procedures) rather than individual behavior. Yet when I asked people what mattered most in helping a cooperative subfederalism system succeed, human behavior was often the first thing they wanted to talk about.¹⁸⁹ That inclination, which was borne of years of experience, provides a reminder that no matter how well a governance system is structured, the quality of its leadership and the conduct of its participants both remain crucially important.¹⁹⁰

A. The Programs

1. Oregon Land Use

In 1973, the Oregon Legislature enacted, and Governor Tom McCall enthusiastically signed, legislation creating a statewide system of land use

187. See, e.g., *Bond v. United States*, 564 U.S. 211, 221 (2011) (asserting that the structures of federalism promote individual liberty); *INS v. Chadha*, 462 U.S. 919, 946 (1983) (emphasizing the importance of separation of powers).

188. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 129 (1976) (“[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.”); see also *Bowsher v. Synar*, 478 U.S. 714, 721–22 (1986) (tracing these ideas to Montesquieu).

189. Telephone Interview with Fla. Attorney (July 19, 2017) (“[R]eally key to success was having a respectful attitude.”); Telephone Interview with Fla. Attorney (July 11, 2017) (emphasizing the importance of “the people on both the state end and the local end approaching any given situation as a collaboration and trying to figure out how to help each other achieve their goals”).

190. See Telephone Interview with Fla. Attorney (July 11, 2017) (“Because at the end of the day, people are what make things work or not, and it doesn’t matter how well-crafted some statute is or some . . . org chart or some timeline if the people administering the program aren’t generally trying to collaborate with one another.”).

planning.¹⁹¹ The new legislation propelled Oregon to forefront of land use law reform.¹⁹² For decades, in Oregon and elsewhere, land use planning was a local responsibility—if it happened at all.¹⁹³ In many states, that local primacy remains in place.¹⁹⁴ But Oregon’s law broke with tradition. Land use planning responsibility would remain at local levels, but those local governments now had a state mandate to develop binding plans, which needed to include “urban growth boundaries” designed to limit suburban expansion and facilitate infill development.¹⁹⁵ The urban growth boundary requirement was just one of many ways in which the local plans and plan updates had to be consistent with state statutes, and with an exceedingly detailed set of state regulations.¹⁹⁶ Additionally, the consistency determinations—acknowledgements, in Oregon land use parlance—would be made by a state administrative agency, through processes that would be subject to administrative and judicial review and to the possibility of advocacy groups’ citizen suits.¹⁹⁷ A policy arena that had been dominated by local discretion was now highly legalized, and the state was in control.

Forty-five years later, that same legal structure remains in place, and many Oregonians credit it with encouraging sensible urbanization, protecting rural landscapes, and maintaining Oregon’s distinctive quality of life.¹⁹⁸ The program also

191. See PETER A. WALKER & PATRICK T. HURLEY, *PLANNING PARADISE: POLITICS AND VISIONING OF LAND USE IN OREGON* (2011).

192. See Ed Sullivan, *Oregon Blazes a Trail*, in *STATE AND REGIONAL COMPREHENSIVE PLANNING*, *supra* note 69, at 51 (referring to Oregon as “one of the pioneers”).

193. John M. DeGrove, *The Emergence of State Planning and Growth Management Systems: An Overview*, in *STATE & REGIONAL COMPREHENSIVE PLANNING*, *supra* note 69, at 1, 3 (“Before the 1970s, with the single exception of Hawaii, all states relied almost exclusively on local governments for whatever planning took place.”).

194. See ELLICKSON ET AL., *supra* note 140, at 45.

195. DEP’T OF LAND CONSERVATION & DEV., *OREGON’S STATEWIDE PLANNING GOALS & GUIDELINES 1* (2010), http://www.oregon.gov/LCD/docs/goals/compilation_of_statewide_planning_goals.pdf [<https://perma.cc/G8RF-V8AX>] (“Oregon’s statewide goals are achieved through local comprehensive planning.”).

196. See *id.*

197. See Sullivan, *supra* note 192, at 56–64 (describing these processes).

198. See, e.g., KATHERINE H. DANIELS & EDWARD J. SULLIVAN, *OREGON’S 40-YEAR-OLD INNOVATION: A REMARKABLE PLANNING PROGRAM FACES A MILESTONE—AND CONTINUING CHALLENGES* 5 (2013), http://www.oregon.gov/LCD/docs/Oregons_40_year_old_innovation.pdf [<https://perma.cc/JS6Y-V35L>] (“To see the obvious success of the state’s land-use program over the past 40 years, one has only to drive through Oregon’s Willamette Valley and take note of the remarkable extent of uncluttered, open working farm and forest landscapes that are close to compact urban areas.”); DeGrove, *supra* note 193, at 7 (praising Oregon’s program). Many studies have reached more qualified conclusions. See, e.g., Judith A. Dempsey & Andrew J. Plantinga, *How Well Do Urban Growth Boundaries Contain Development? Results for Oregon Using a Difference-in-Difference Estimator*, 43 *REGIONAL SCI. & URB. ECON.* 996 (2013) (finding real but limited effects on growth); Myung-Jin Jun, *The Effects of Oregon’s Urban Growth Boundary on Urban Development Patterns and Commuting*, 7 *J. URB. STUD.* 1333 (2003) (finding that Portland’s UGB redirected suburbanization across the Columbia River into Washington); Jae Hong Kim, *Measuring the Containment and Spillover Effects of Urban Growth Boundaries: The Case of the Portland Metropolitan Area*, 44 *GROWTH & CHANGE* 650 (2013); Jeffrey D. Kline & Ralph J. Alig, *Does Land Use Planning Slow the Conversion of Forest and Farmlands?*, 30 *J. URB. & REGIONAL POL’Y* 3 (1999) (finding success at concentrating

remains iconic in the worlds of land use planning and law.¹⁹⁹ Its supporters aren't just Portlandian environmentalists, though support in Oregon's largest metropolis is stronger than it is in most other parts of the state.²⁰⁰ Much of the original impetus came from farmers who worried that suburban expansion would crowd out their livelihood, and some construction advocates liked the increased certainty that the program provided.²⁰¹

Despite that fame and support, implementation has not always been smooth.²⁰² Many of Oregon's rural areas have chafed at the program's constraints.²⁰³ In 2004, Oregon voters passed, with strong statewide support, a ballot initiative known as Measure 37, which allowed landowners to seek compensation for any new government regulation that restricted their ability to develop their property.²⁰⁴ Measure 37 was part of a broader national movement against government regulation, but it also reflected widespread perceptions that Oregon land use law had become somewhat overbearing.²⁰⁵ Three years later, after seeing the chaos of Measure 37 in action, Oregon voters approved a second ballot measure limiting Measure 37's reach, but they did not completely eliminate compensation requirements.²⁰⁶ A somewhat compromised version of Oregon's original land use planning system thus remains in place.

2. Florida Land Use

In the 1970s and early 1980s, Florida enacted a series of laws that placed it alongside Oregon at the vanguard of statewide land use planning.²⁰⁷ At a general

development within urban growth boundaries but more uncertainty on other effects). The program also has no shortage of critics. *See, e.g., A Look Back at Oregon's Senate Bill 100*, ANTIPLANNER (June 3, 2013), <http://ti.org/antiplanner/?p=7956> [<https://perma.cc/7A2W-A3XV>].

199. *See* WALKER & HURLEY, *supra* note 191, at 22–23 (including several quotes describing the program's prominence); DeGrove, *supra* note 193, at 4 (describing Oregon's program as "the most comprehensive of all the state efforts" and stating that it "has had the greatest influence on other state systems").

200. *See* WALKER & HURLEY, *supra* note 191, at 12–14.

201. *See id.* at 50–53 (describing farmers' support); *id.* at 73–75 (describing industry support). As one practicing attorney put it: "[Y]ou can't use 'the character of the neighborhood' or some bullshit like that to frustrate housing." Telephone Interview with Or. Attorney (Aug. 14, 2017).

202. Telephone Interview with Or. Lawyer (Sept. 20, 2017) ("A lot of the development interests hated it. So the legislative conservatives consistently jerked DLCD, the department, and the commission around.").

203. *See* WALKER & HURLEY, *supra* note 191, at 204–12 (describing opposition in southern Oregon).

204. *See* JOHN D. ECHEVERRIA & THEKLA HANSEN-YOUNG, *THE TRACK RECORD ON TAKINGS LEGISLATION: LESSONS FROM DEMOCRACY'S LABORATORIES 27–32* (2008) (describing the passage of Measure 37).

205. *See* WALKER & HURLEY, *supra* note 191, at 111–55 (exploring why Measure 37 passed).

206. *See* ECHEVERRIA & HANSEN-YOUNG, *supra* note 204, at 42–45 (describing the passage of Measure 49).

207. *See* Thomas G. Pelham, *The Florida Experience: Creating a State, Regional, and Local Comprehensive Planning Process*, in *STATE & REGIONAL COMPREHENSIVE PLANNING*, *supra* note 69, at 94, 95–97; Nancy Stroud, *A History and New Turns in Florida's Growth Management Reform*, 45 J. MARSHALL L. REV. 397, 398–406 (2012).

level, Florida's system was similar to that of Oregon: local governments were required to develop binding land use plans and to submit those plans to a state agency for review and approval.²⁰⁸ Florida's land use planning system also established "concurrency" requirements, which required local governments to ensure that needed public infrastructure would be in place to support development,²⁰⁹ and it established interjurisdictional coordination requirements for plans and large projects with potential cross-jurisdictional impacts.²¹⁰

Like Oregon's system, Florida's was controversial, and that controversy ultimately proved its undoing. Construction and real estate industries are important just about everywhere, but they are especially important in Florida; many participants in land use planning simply refer to Florida as a "growth state."²¹¹ By design, the Growth Management Act sometimes limited that growth—in one famous episode, a court actually ordered a completed but noncompliant housing development torn down²¹²—and over time, developers' and local governments' frustrations with state oversight built toward a breaking point.²¹³ Even sympathetic commentators charged that some requirements had been implemented poorly or counterproductively.²¹⁴ They also identified positive outcomes, including increased prevalence of, and competence with, planning and a more clearly defined process for resolving land use disputes.²¹⁵ But the exalted tones in which many

208. Tom Pelham, *Twenty Years Later: Three Perspectives on the Evolution of Florida's 1985 Growth Management Act: First Perspective*, 58 PLAN. & ENVTL. L. 3, 3 (2006).

209. See Pelham, *supra* note 207, at 103–04, 107–08.

210. *Id.* at 99–102.

211. Telephone Interview with Fla. Attorney (July 14, 2017) ("Florida is a growth state [T]he money that flows from development is critically important to local governments and states at every level."); see also David Powell, *Twenty Years Later: Three Perspectives on the Evolution of Florida's 1985 Growth Management Act: Second Perspective*, 58 PLAN. & ENVTL. L. 7, 8 (describing intense development pressures).

212. *Pinecrest Lakes, Inc. v. Shidel*, 795 So. 2d 191, 209 (Fla. Dist. Ct. App. 2001) ("The statutory rule is that if you build it, and in court it later proves inconsistent, it will have to come down.").

213. See Telephone Interview with Fla. Attorney (July 21, 2017) ("I used to attend the interviews with all the legislative candidates, and it was incredible . . . all but two, Democrats and Republicans, said we've got to deal with the Department of Community Affairs. They're out of control. We've got to do away with the act.").

214. See, e.g., Richard Grosso, *Florida's Growth Management Act: How Far We Have Come, and How Far We Have Yet to Go*, 20 NOVA L. REV. 589 (1996); Pelham, *supra* note 208, at 5 ("[I]ntergovernmental coordination has been a major disappointment."); David L. Powell, *Growth Management: Florida's Past as Prologue for the Future*, 28 FLA. ST. L. REV. 519, 531–43 (2001) (identifying a series of problems and calling for reforms); Stroud, *supra* note 207, at 407 (observing that concurrency requirements sometimes increased sprawl).

215. See, e.g., Powell, *supra* note 211; Telephone Interview with Fla. Attorney (July 20, 2017) (noting improvements in intergovernmental coordination). Even one of the most critical interviewees argued that the regulatory, top-down elements of the act's structure had brought important benefits:

One time we had a group of probably about fifteen of us sitting around a table, and there was the agency secretary at the time who was not really sure he liked the . . . command and control process. [He] said, "Do you think we could have gotten this far . . . with planning in the state of Florida had it not been for the top-down regulatory process?" And all but him said that it could not have gotten this far. We could not have achieved what we did had it not been for using more of a stick than a carrot.

Telephone Interview with Fla. Attorney (July 21, 2017).

commentators describe Oregon land use planning are largely absent from discussions of Florida.

Eventually, frustrations with the program came to head. Over time, state administrators asserted the program with less and less force,²¹⁶ and then a resurgence of state support coincided with the Great Recession, which hit Florida particularly hard.²¹⁷ Meanwhile, power in Florida's state government was shifting to the political right, and the Department of Community Affairs—the state agency in charge of approving local plans—became a politicians' piñata, as did growth management more generally.²¹⁸ In 2011, the Florida Legislature dramatically amended the Growth Management Act, curtailing the system of state oversight and placing a bookend on Florida's experiment with cooperative subfederalism.²¹⁹

3. *California Air Quality*

My third area of study involves air quality planning in California. As described earlier, the federal Clean Air Act requires states to generate legally enforceable plans—known as state implementation plans, or SIPs—that will achieve compliance with national ambient air quality standards.²²⁰ California subdelegates that authority to local air districts, some of which generate SIP updates that the California Air Resources Board (CARB) then reviews, approves, and submits to EPA.²²¹ The air districts vary in their scale—the smallest have just one or two staff members, while the largest have hundreds—and some are departments of county governments

216. Powell, *supra* note 211, at 9 (“There has been a steady decline in the DCA’s assertiveness . . .”).

217. Telephone Interview with Fla. Attorney (July 21, 2017) (“[W]e had a return of a secretary to the agency who had almost become more and more regulatory . . .”); Telephone Interview with Fla. Attorney (July 20, 2017) (noting that in Secretary Tom Pelham’s second term, “the law was very strong”).

218. See *An Obituary: Growth Management 1985–2011*, TAMPA BAY TIMES, June 5, 2011. The critiques began before the economic crash. See Powell, *supra* note 214, at 531 (quoting harsh criticism from Governor Jeb Bush).

219. See Kacie A. Hohnadell, *Community Planning Act: The End of Meaningful Growth Management in Florida*, 42 STETSON L. REV. 715, 727–31 (2013).

220. See 42 U.S.C. § 7410 (2012). California law establishes independent requirements, including stricter standards, but regulators told me that federal law drives decision-making “because the federal Clean Air Act has more teeth in it in terms of sanctions.” Telephone Interview with Cal. Air Quality Regulator (Aug. 23, 2017); see also Telephone Interview with Cal. Air Quality Regulator (Aug. 17, 2017) (“It’s the federal ozone standard that really drives our process.”).

221. See Fine & Owen, *supra* note 56, at 946–47.

while others are independent local governance entities.²²² The independent entities still have governing boards composed of city and county elected officials.²²³

Figure 2. California Air Districts Map

From <https://www.arb.ca.gov/capcoa/dismap.htm>



While California air quality planning shares with Oregon and Florida land use the combination of local planning and state oversight, the program is different in several key ways. Initially, it is a double delegation program. EPA oversees the state's efforts, and there is no analogous federal role in land use planning.²²⁴ Additionally,

222. Compare, e.g., IMPERIAL COUNTY AIR POLLUTION CONTROL DISTRICT, <http://www.co.imperial.ca.us/AirPollution/> [<https://perma.cc/8BQT-EHY8>] (last visited Sept. 12, 2018) (describing the Imperial County Air Pollution Control District, which is a department of the county government), with About, S. COAST AQMD, <http://www.aqmd.gov/nav/about> [<https://perma.cc/6EHP-GF4Z>] (last visited Sept. 12, 2018) ("The SCAQMD is the air pollution control agency for all of Orange County and the urban portions of Los Angeles, Riverside, and San Bernardino counties.").

223. See, e.g., *Governing Board*, S. COAST AQMD, <http://www.aqmd.gov/home/governing-board> [<https://perma.cc/AH3X-8EB5>] (last visited Sept. 12, 2018).

224. See Dave Owen, *Probabilities, Planning Failures, and Environmental Law*, 84 TUL. L. REV. 265, 280–81 (2009) (describing EPA's oversight role).

California's air quality regulators have a somewhat less controversial task than their counterparts in land use planning. While the goals of land use planning are often profoundly contested, and some critics even question whether it makes sense to plan at all,²²⁵ almost everyone wants clean air.²²⁶ That task also is more discrete. Although air quality regulation is technically complex and implicates a wide variety of economic activities, the ultimate goal—compliance with a few numeric standards—is fairly clear.²²⁷

Perhaps because of that clarity of purpose, California air quality planning has never assumed as high or controversial a profile as land use planning in Florida or Oregon. It also has achieved some success. In the decades since the Clean Air Act was passed, air quality in most parts of California has improved dramatically.²²⁸ But California's air quality planning history still has not been easy. State and local regulators often express frustration with federal mobile source controls, which preempt state and local regulation and which state and local regulators perceive as insufficiently stringent.²²⁹ And despite major emissions reductions, violations of federal and state air quality standards still are routine events in the Los Angeles basin and in much of the Central Valley, and the problems are likely to persist for years to come.²³⁰

B. *The Lessons*

A study of three programs is not a comprehensive survey of governance. But the officials and staff who have implemented these programs do have decades of experience and a track record of accomplishments (and failures). The programs therefore can support tentative conclusions about the viability of cooperative

225. See, e.g., Andrew P. Morriss & Roger E. Meiners, *The Destructive Role of Land Use Planning*, 14 TUL. ENVTL. L.J. 95 (2000).

226. See, e.g., Telephone Interview with Air Quality Regulator (Sept. 6, 2017) (“[I]t helps that at least in our work . . . even someone that maybe says I think there should be less regulation . . . those people are still in agreement with saying, well, we don’t want to see brown skies and people coughing up a lung.”); *Environment*, GALLUP, <http://www.gallup.com/poll/1615/environment.aspx> [<https://web.archive.org/web/20170902203211/http://www.gallup.com/poll/1615/environment.aspx>] (last visited Sept. 2, 2017) (showing support for air quality protection).

227. See *NAAQs Table*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/criteria-air-pollutants/naaqs-table> [<https://perma.cc/T3PB-JFTV>] (last updated Dec. 20, 2016).

228. See Tony Barboza, *New Attack on California’s Dirty Air*, L.A. TIMES, Oct. 1, 2015, <http://www.latimes.com/local/lanow/la-me-ln-what-new-smog-rules-mean-for-california-air-pollution-20150930-story.html> [<https://perma.cc/4KPT-S96V>] (showing dramatic reductions in ozone levels in the Los Angeles basin); *History of Air Resources Board*, CAL. AIR RESOURCES BOARD, https://www.arb.ca.gov/html/40th_history.htm [<https://perma.cc/J6WT-UJGJ>] (last updated Aug. 29, 2017) (“Californians today breathe the cleanest air since measurements have been recorded.”).

229. See *Engine Mfrs. Assoc. v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (describing the preemption regime); Interview with California Air Quality Regulator (Sept. 13, 2017) (“It’s increasingly a source of frustration that we’re called upon to reduce emissions all over the place . . . and yet EPA is not . . . reducing emissions for sources under their control.”).

230. Associated Press, *Los Angeles and Bakersfield Top List of Worst Air Pollution in the Nation*, L.A. TIMES, Apr. 20, 2016, <http://www.latimes.com/local/lanow/la-me-air-pollution-report-20160420-story.html> [<https://perma.cc/QU3H-74AY>].

subfederalism and the conditions under which it can succeed. I summarize key findings in the subsections below.

1. *The Viability of Cooperative Subfederalism*

The most important lesson is simple: cooperative federalism can deliver on its theoretical promise. Participants in cooperative subfederalism programs generally agreed that a balance of local expertise and state oversight is a good model for governance.²³¹ As one air quality official put it, “the state-local hybrid model worked very well and guarded against undue influence applied at either level.”²³² They also generally believed that their programs had delivered concrete benefits.²³³ Even participants in Florida’s program, which was the least politically durable of the three I reviewed, credit the program with advancing Florida’s approach to land use planning, providing predictability to developers, and avoiding or improving ill-conceived development projects.²³⁴ Participants did not advocate cooperative subfederalism as a universal governance model; as one noted, “[i]f there is nothing unique across the state. . . it would be best to have the state [regulate].” But they did all agree that the model has value.²³⁵

The reasons for this support echo many of the theoretical arguments for traditional cooperative federalism, and they respond to many of the concerns that pervade local governance literature. For example, interviewees consistently agreed with the premise that governance seems more legitimate when it comes from nearby.²³⁶ Somewhat surprisingly, this view holds true even when the state capital

231. *See, e.g.*, Telephone Interview with Cal. Local Air Quality Regulator (Oct. 26, 2017) (extolling the virtues of local governance, but noting that “[i]t does provide a check . . . to make sure that things are happening at the local level”); Telephone Interview with Or. Lawyer (Oct. 16, 2017) (“I think the best thing is to have what I always call a federal system.”). The weakest endorsement came from a Florida land use lawyer, who, after providing a lengthy explanation of pros and cons, concluded by saying, “I have to fall back on . . . ‘it depends.’” E-mail from Fla. Land Use Lawyer to author (Oct. 11, 2017, 09:03 PST) (on file with author).

232. E-mail from Local Air Quality Official to author (Oct. 11, 2017, 08:20 PST) (on file with author). He went on to explain:

Spreading the risks/rewards/tasks/responsibilities to shared partnerships between state and local also avoids or ameliorate sudden program shifts caused by a single court case, piece of legislation, executive management, etc. There is a griping that goes on at the local level that “those jerks at the state don’t understand our situation.” While this can be true, in a way, having the state focused on the end goals of a program and keeping the pressure on with that focus is a great thing over time. And speaking from the state level, it is simply unwieldy for a state agency to try to do essentially local tasks all over the state.

Id.; *see also* Telephone Interview with Or. Planner (Sept. 12, 2017) (“If [channeling urbanization] is the policy goal, I don’t see how you could accomplish it any other way.”).

233. *E.g.*, Telephone Interview with Or. Attorney (Sept. 20, 2017) (“I’m a big supporter. I think it’s a great thing for Oregon.”).

234. *See, e.g.*, Powell, *supra* note 211, at 9–10; Telephone Interview with Fla. Attorney (Sept. 20, 2017). The attorney, who had spent much of his career representing developers, repeatedly emphasized the importance of a predictable and clear process.

235. Telephone Interview with Cal. Air Quality Regulator (July 20, 2017).

236. *See, e.g.*, Telephone Interview with Or. Lawyer (Aug. 29, 2017) (“[M]ost people involved in governance believe that the best government is the one that’s closest to you, your house, your neighborhood, your town.”).

isn't distant at all; one former Oregon government official, for example, commented on how governance from Metro, which is a regional governance authority in the Portland metropolitan area,²³⁷ strikes locals as preferable to governance from the state capitol, which is a mere hour's drive from Portland's downtown.²³⁸

Another classic trope of both federalism and localism and is that localized governments will have a better grasp of local conditions and issues.²³⁹ Participants in cooperative subfederalism programs agreed with this claim.²⁴⁰ “What the local level brings,” as one air quality planner put it, “is . . . a better real-world handle on what's going on.” State-level employees generally agreed: as a California Air Resources Board employee put it, “the air districts know their local sources and their local community groups, industry, etc., much better than we ever do so on a statewide level.”²⁴¹ As that last quote suggests, the heightened knowledge was closely tied to accessibility. As one Oregon attorney explained, regulated entities “are the ones in the community who . . . the city council and planning commission members and the city staff see at the Rotary clubs and . . . go to church with, the store. I think that's just a real natural thing.”²⁴² This access to local knowledge, they believed, was crucially important to the success of a regulatory program.²⁴³ A California air quality planner summarized this conventional view:

I always think that local administration is preferable, because . . . we're closer to the constituents, we're closer to the public. It's easier for somebody to come by my office to talk to me about an issue than it is to go down to Sacramento. Just the feedback I always get from folks is, they like having a local person—not just the public, but also the regulated community . . . I know that the staff at senior levels at the Air Resources Board, they've said . . . “you guys are closer to the issues you have locally” . . . they like to defer to us as much as they can.”²⁴⁴

Agreement with this claim, however, partially explains why interviewees saw important benefits from state oversight. To them, greater accessibility to local

237. See METRO, <http://www.oregonmetro.gov> [<https://perma.cc/358A-SKAB>] (last visited Sept. 12, 2018).

238. See Telephone Interview with Or. Lawyer (Aug. 29, 2017). Our exchange appears below:
 Lawyer: And there was a sense that the Metro planner, who's maybe only fifteen miles from your county courthouse or city hall, is more accessible to you than the planner in Salem.
 Me: The proximity argument—I mean, Salem's what, an hour from Portland?
 Lawyer: Uh huh . . . It seems much farther away.

Id.

239. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 576–77 (1985) (Powell, J., dissenting).

240. See, e.g., Telephone Interview with Fla. Attorney (July 13, 2017) (noting that developers are “more likely to be connected to, you know, county commissioners, local government officials . . .”).

241. Telephone Interview with Cal. Air Quality Regulator (Sept. 18, 2017).

242. Telephone Interview with Or. Attorney (July 25, 2017).

243. See Telephone Interview with Cal. Air Quality Regulator (Sept. 13, 2017) (“[M]y agency, at least, has worked pretty well with industry, because . . . you can't adopt a regulation that's impossible . . . [and] they're the experts in their various realms.”).

244. Telephone Interview with Cal. Local Air Quality Regulator (Oct. 26, 2017).

influence was a double-edged sword. Local governments, they noted, could be overly solicitous of regulated entities. One planner from rural Oregon bluntly summarized the general view: “Developers know they’ll have more success at the local level than at the state.”²⁴⁵ Local governments also could get caught in “the race-to-the-bottom effect that is so prevalent in local land use and zoning decisions as local governments vie for new development to enhance their tax bases.”²⁴⁶ And their focus could be overly parochial. As one Florida attorney somewhat sarcastically put it, local government officials “will never do a good job of planning outside their boundaries. They consider it a violation of their oath of office, I think.”²⁴⁷

Interviewees agreed that the state offered a valuable role in checking these local tendencies.²⁴⁸ States could serve as referees, helping local governments resolve interjurisdictional disputes.²⁴⁹ They also could give local government officials a useful excuse for imposing sensible regulatory restrictions.²⁵⁰ As another Florida attorney explained, “I’ve heard over and over . . . that local elected officials might not feel empowered enough to stand up for some of the good planning that was happening, but if they could sort of blame it on the state it gave them more backbone.”²⁵¹ A California air quality regulator made a similar point:

245. Telephone Interview with Or. Planner (Sept. 12, 2017); *see also* Telephone Interview with Or. Attorney (July 25, 2017) (“The development community is going to have more influence at the local level and some local governments are more prone to that than others.”); Telephone Interview with Or. Attorney (July 25, 2017) (“[O]f course, it can lead to bad results where a favored developer is given some approval that another developer is denied based on substantially similar circumstances”); Telephone Interview with Fla. Attorney (July 14, 2017) (“Yes, capture’s always a problem because . . . you know, who has the money has the power.”). Interviewees did note that some local jurisdictions are intensely opposed to development, which creates its own problems, and that sometimes a state legislature (particularly in Florida) can become aggressively anti-regulatory. *See, e.g.*, Telephone Interview with Or. Attorney (July 25, 2017) (describing the politics of Corvallis, Oregon).

246. E-mail from Fla. Attorney to author (Oct. 11, 2017, 09:22 PST) (on file with author).

247. Telephone Interview with Fla. Attorney (July 20, 2017).

248. No one made this claim about Florida’s current state government. As one private attorney put it, “at the state level right now . . . the developers have all the cards So the state legislature is hostile to local government right now, extremely hostile to local governments that say no to their friends, extremely hostile and unabashedly very up front about it.” Telephone Interview with Fla. Attorney (July 20, 2017). As another put it:

I strongly believe that lobbying by special interest groups, development groups in particular, has a big impact at the local level, and that’s one of the reasons why we need state review and oversight. But when you shift the decision-making up to the state level, you’re going to get the same political games that would be played.

Telephone Interview with Fla. Attorney (July 19, 2017).

249. E-mail from Fla. Attorney to author (Oct. 11, 2017, 09:22 PST) (on file with author); Telephone Interview with Or. Lawyer (Sept. 15, 2017) (“[T]hose are some of the most unpopular decisions that the state makes, is saying no to communities that are pushing, pushing, pushing, trying to put development on their periphery to capture a market.”); *see also* Gillette, *supra* note 145, at 190–91 (explaining this concern’s importance to local government theorists).

250. Telephone Interview with Fla. Attorney (July 20, 2017) (“Many local governments wanted someone to blame.”).

251. Telephone Interview with Fla. Attorney (July 14, 2017). Another attorney described a somewhat different dynamic:

[W]e're kind of caught in the middle all the time here, by design . . . we have a pretty conservative board . . . and they have industry's back, and they want to know that we're doing everything we can to reduce or minimize the impacts to industry. But of course, we always feel like we have responsibility to the public for . . . the public health aspects of all this."²⁵²

State and federal oversight, he explained, helped his staff maintain an appropriate balance.²⁵³ State officials emphasized similar dynamics. “[W]e are certainly willing,” one put it, “to give them cover.”²⁵⁴

Interviewees also consistently identified the capacity challenges of local government as a crucial reason for state involvement. As many of them pointed out, the resources available to local governments tend to vary dramatically, and “having adequate funding is always a challenge for local governments.”²⁵⁵ While some urban governments have abundant resources available,²⁵⁶ many local units—particularly small cities or counties in rural areas, where, sometimes, “the guy who does the plan also does the building inspections, also does the budget, and also does fleet maintenance”—lack the resources to staff up a sophisticated governance initiative.²⁵⁷ This is particularly true if governance requires some technical sophistication. As one local air quality regulator put it, the state is “where all the big modeling computers are, where all the Ph.D.s are.”²⁵⁸ Consequently, and as the following Section discusses in more depth, interviewees consistently identified state support for local decision-making as an essential element of a successful program.

If you were a county commissioner and . . . your builder friend that contributed to your campaign wanted to build in an environmentally sensitive area, you didn't think it was a good idea, but you were worried about getting your campaign contribution the next time around, you could say yes knowing that it would be set up for state review and then, you know, they might question it, so . . . in some respects it was helpful to local governments, so they didn't always have to be the bad guy.

Telephone Interview with Fla. Attorney (July 13, 2017).

252. Telephone Interview with Cal. Air Quality Regulator (Aug. 17, 2017).

253. *Id.* (“We have EPA telling us here are your marching orders, and that's what we tell the board . . . It's always easier that way. Yeah, that dynamic plays out all the time.”).

254. Telephone Interview with Cal. Air Quality Regulator (Sept. 18, 2017).

255. Telephone Interview with Fla. Attorney (July 13, 2017).

256. Not all do. *See* Anderson, *supra* note 149.

257. Telephone Interview with Fla. Attorney (Sept. 20, 2017); *see also* Telephone Interview with Cal. Air Quality Regulator (Aug. 21, 2017) (“[W]e get the mandates directed towards us and we have to figure out how we're going to fund it locally . . . That creates a lot of problems for us. Our boards really have problems with that.”); Telephone Interview with Fla. Attorney (July 11, 2017) (“[Y]ou have . . . hundreds of small cities and counties that do not have the financial wherewithal to plan . . . They basically just . . . asked applicants ‘what do you want’ and then they kind of did it.”); Telephone Interview with Or. Attorney (Sept. 15, 2017) (“[I]t's an issue for small rural communities that . . . you know, sometimes they have a planner, sometimes their planner is the city recorder who's also the public works director.”).

258. Telephone Interview with Cal. Air Quality Regulator (Sept. 13, 2017). She noted that two of the largest air districts in California are partial exceptions to this statement.

In summary, experienced practitioners of cooperative subfederalism agreed, almost unanimously, that it offers a promising balance of state and local authority.²⁵⁹ They also agreed for reasons responsive to the classic concerns of federalism and local government theory; cooperative subfederalism, in their view, provides promising mechanisms for facilitating inter-local collaboration, countering interest group influence, and bolstering the financial resources available to local government, all while retaining key benefits of localism. That might sound like a rather hum-drum affirmation of old theory, except for a twist. My interview subjects were not describing the allocation of authority between the federal government and the states, nor were they affirming some widely-discussed model of local governance. Instead, they were extending old arguments to a new context; this form of state-local relationship has never really entered into the traditional federalism literature, and it exists but is far from ubiquitous on the ground.²⁶⁰ If cooperative subfederalism programs were to become as common as interview subjects suggested they should be, state and local governance would be dramatically changed.

2. *The Intervening State*

While interviewees agreed about the value of cooperative subfederalism, they also agreed that implementation is not easy. As one participant explained, “there’s a lot of tension and friction—a lot of pushing and shoving—in those relationships One of the big challenges to policy makers is how to protect and enhance the working relationships between state and local governments in a shared-powers regime.”²⁶¹ Other interviewees agreed, describing the state-local relationship as “naturally a tense one” and noting that “it requires constant attention to keep it diplomatic.”²⁶² These observations are entirely consistent with the written literature on land use regulation in Florida and Oregon. Of all the lessons that emerge from that writing, none is clearer than the basic point that cooperative state-local governance is difficult and politically fraught work.²⁶³ And the track record of cooperative subfederalism programs—some have crumbled and others have never gotten started—also suggests that implementation is almost always an uphill climb.²⁶⁴

So, if cooperative subfederalism offers the promise but no certainty of good governance, what sets apart the systems with good odds of succeeding from those that fail? Participants identified many features, and they did not always agree. In

259. See Weiser, *supra* note 4, at 698–703 (summarizing classic rationales for cooperative federalism).

260. See *supra* Part I.

261. E-mail from Fla. Attorney to author (Oct. 11, 2017, 09:22 PST) (on file with author).

262. Telephone Interview with Or. Attorney (Aug. 29, 2017).

263. See, e.g., WALKER & HURLEY, *supra* note 191 (describing numerous episodes of state-local tension).

264. See Zirschky, *supra* note 71, at 2 (explaining that Maine’s cooperative sub-federalism program went twenty-five years without any local takers); *supra* notes 216–19 and accompanying text (describing the demise of Florida’s Growth Management Act).

particular, questions about the importance of clear and specific legal mandates produced a range of views,²⁶⁵ as did my questions about whether programs should be broad and integrative or narrow and focused.²⁶⁶ Practitioners also disagreed about the value of litigation from non-governmental advocacy groups.²⁶⁷ But their recommendations and the written literature discussing these programs did coalesce around one particularly important element of institutional design. A cooperative subfederalism system requires intensive, ongoing interaction between state and local government, often to the point of altering traditional boundaries between state and local roles.

That assertion runs contrary to some key threads of traditional federalism theory. The Supreme Court, for example, has emphasized division, not overlap.²⁶⁸ Federalism, in the Court's oft-expressed vision, succeeds largely because we carve out spaces in which states can act without federal interference.²⁶⁹ It is that autonomous space, both the Court and commentators often opine, that allows states to serve as democracy's laboratories, check the power of the center, and compete for mobile citizens.²⁷⁰ Cooperative federalism is, of course, a partial rejection of this view; it presumes that either the federal government or the states

265. Many interviewees emphasized the importance of clear, bright-line rules that provide clear goals for local government and certainty for regulated entities. *E.g.*, Telephone Interview with Cal. Air Quality Regulator (Aug. 23, 2017) (supporting clear legal mandates “so there’s no debate over what needs to be done”); Telephone Interview with Fla. Attorney (July 20, 2017) (emphasizing the importance of certainty for developers and noting that its current absence is “a real problem”); Telephone Interview with Or. Planner (Sept. 12, 2017) (“People appreciate the certainty that the land use regulations have provided.”). Others emphasized the importance of flexibility to adapt to particular circumstances. *E.g.*, Telephone Interview with Fla. Attorney (July 21, 2017) (“[Y]ou lost that freedom to kind of cut a break to a county that was maybe 95% but not 100% there, and everyone had to meet 100 without the same level of expertise and money, and that was one of the factors that brought it to the end.”). And many emphasized the value of both while acknowledging the tensions between these goals. *E.g.*, Telephone Interview with Or. Attorney (Sept. 15, 2017) (asserting, while laughing, that it is important to “set some clear standards” while also “not overdoing it”). The only clear conclusion that emerges is that balancing specificity and flexibility is, as one Oregon attorney put it, “a constant battle.” Telephone Interview with Or. Attorney (July 25, 2017).

266. *Compare, e.g.*, Telephone Interview with Fla. Lawyer (Sept. 20, 2017) (“[T]he reason it didn’t work is because we couldn’t pry our fingers off covering all the issues . . .”), *with* Telephone Interview with Or. Lawyer (Aug. 14, 2017) (“Don’t focus on one thing. You’ve got to look at planning from a holistic perspective.”).

267. Some viewed the threat of third-party suits as a crucial incentive for compliance, particularly when the state’s commitment to implementation flagged. Others viewed citizen suits as drivers of excessive legalization. *See* WALKER & HURLEY, *supra* note 191 (echoing this overlegalization critique).

268. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (emphasizing the importance of “a distinction between what is truly national and what is truly local”).

269. *See* *Printz v. United States*, 521 U.S. 898, 928 (1997) (“It is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority.”).

270. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (describing the virtues of divided federalism).

can pursue a task, and it calls for federal oversight of state action.²⁷¹ Nevertheless, one might still think that even in a cooperative federalism system, state autonomy ought to be protected to the maximum extent allowed by law.²⁷² And one might readily export the same idea to cooperative subfederalism: we might conclude that its benefits will be maximized if states delegate authority and then step back, leaving local governments to act with maximal autonomy.

Other traditional arguments for cooperative federalism—and, by extension, for cooperative subfederalism—also suggest a largely hands-off role for higher-level authorities. If, as some scholars have suggested, a key purpose of federalism is to allow higher-level governments to achieve their policy goals without overstretching their resources, then leaving the lower-level governments alone might seem like a crucial first step.²⁷³ Similarly, if an important goal of a federalist system is producing clear lines of accountability—to avoid the “maze of interlocking jurisdictions” that Ronald Reagan once lamented—then maintaining clear boundaries also would seem important.²⁷⁴ Again, a cooperative regime is a partial rejection of these priorities; one of its defining elements is administrative review of state or local decisions. Nevertheless, hands-on, continuing state involvement in local action might seem to defeat much of the purpose of a cooperative subfederalism governance structure.²⁷⁵

In a wide variety of ways, however, participants in cooperative subfederalism programs rejected this vision of intergovernmental separation. Instead, they credited the successes of their programs to robust and continuous systems of interaction, to governance structures that would seem to blur intergovernmental lines, and to major state investments in both empowering and supporting—as well as demanding—local governance.²⁷⁶ And when they spoke of their programs’ struggles, a recurring theme was the lack of state investment and involvement in local governance. One comment sums up the general consensus: “the state has to be participating early and often.”²⁷⁷

271. *See, e.g.*, 42 U.S.C. § 7410 (2012) (subjecting state plans to federal review and, possibly, replacement).

272. *See* Wis. Dep’t of Health & Family Servs. v. Blumer, 534 U.S. 473, 495 (2002) (“When interpreting other [cooperative federalism statutes], we have not been reluctant to leave a range of permissible choices to the States . . .”).

273. *See* Stewart, *supra* note 111, at 1196 (identifying the federal government’s “limited implementation and enforcement resources” as a reason for cooperative federalism programs).

274. Ronald W. Reagan, President of the United States, State of the Union Address (Jan. 26, 1982), <http://www.presidency.ucsb.edu/ws/index.php?pid=42687> [<https://perma.cc/N8P2-NAFF>]. Reagan went on to say that voters “don’t know where to turn for answers, who to hold accountable, who to praise, who to blame, who to vote for or against.” *Id.*

275. *See* EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1617 (2014) (Scalia, J., dissenting) (arguing that centralized federal control would thoroughly undermine cooperative federalism).

276. *See, e.g.*, Telephone Interview with Staff Member, Cal. Air Pollution Control Officers Ass’n (Sept. 1, 2017) (“There needs to be sort of an ongoing co-mingling of staff and ideas . . .”). For a somewhat analogous governance vision, in which the institutional structures of governance are adapted on an ongoing basis to particular tasks, see Freeman & Farber, *supra* note 91.

277. Telephone Interview with Or. Attorney (Sept. 15, 2017).

One recurring example of this theme involves communication. Each of the systems I studied requires local governments to develop plans and then submit those plans to the state for review and approval. The state could leave local governments alone to develop plans, waiting for their submission much like a professor waiting for the first draft of a research paper and trying to avoid micromanagement of his student's work. But no one recommended doing that.²⁷⁸ Instead, both local and state staff consistently talked about the importance of communication even before plans were due.²⁷⁹ One Florida lawyer, for example, explained the crucial importance of sharing drafts with the state prior to formal submission, and thus giving the state the opportunity for early feedback.

Even though . . . my clients got their ox gored an awful lot on that, I thought from a policy perspective it did a good job of just getting the issues on the table at the front end and creating a space for local governments and the state and any private interests or public interests . . . to try to work things out prior to the actual final local approval of the plan amendment.²⁸⁰

Other interviewees emphasized the importance of maintaining multiple lines of communication, with staff, executives, and oversight boards all maintaining contact.²⁸¹ “You can have one or two of those relationships not going so well,” one air quality regulator observed, “but the third can still be fine [T]here could be a disagreement at the executive level but staff is still working together on very specific issues.”²⁸² And frequency mattered. As both state and local air district staff noted, the California Air Resources Board has frequent calls with its districts; with one particular district, a weekly call has been occurring for about fifteen years.²⁸³ Both state and local staff viewed this frequent communication as a very positive thing.

Similarly, both state and local staff consistently agreed that the state, rather than viewing its delegations to local governments as labor-saving devices, needed to

278. See Telephone Interview with Or. Attorney (Sept. 15, 2017) (asserting that one of “the worst situations” occurs if “the state isn’t involved early and then comes in toward the end and raises all sorts of objections”); Telephone Interview with Cal. Air Quality Planner (Sept. 1, 2017) (“[Y]ou can’t just turn the locals loose and turn the state loose, and the only time they get together is when someone submits a plan, and it gets either rejected or approved.”).

279. E.g., Telephone Interview with Or. Planner (Sept. 12, 2017) (“[W]here I saw success was where there was early participation on the part of . . . field representatives or even the Salem specialists . . .”). Another regulator explained:

[B]ecause of working relationships we’ve developed over the years at both ARB and our local regional office of EPA . . . they’re willing to take . . . a day or two and . . . look through the documents saying, “Yes, this is all looking good, hey, we just have a question here. It’s not necessarily wrong, but maybe if you could expand this it will help us when we get to the in-depth review.”

Telephone Interview with Cal. Air Quality Regulator (Sept. 6, 2017).

280. Telephone Interview with Fla. Lawyer (July 11, 2017).

281. Telephone Interview with Cal. Air Quality Regulator (Aug. 23, 2017).

282. *Id.*

283. Telephone Interview with Cal. Air Quality Regulator (Sept. 20, 2017) ([W]ith the San Joaquin Valley, we have had a weekly call with them on Tuesdays . . . since like 2001.”); Telephone Interview with Cal. Air Quality Regulator (Sept. 13, 2017) (noting those same calls).

invest heavily in developing local capacity, particularly for smaller (and often rural) local governments. Some of that support can come as funding.²⁸⁴ Sometimes it involves developing educational programs and publishing guidance documents.²⁸⁵ Sometimes it could be model plans that local governments could use as templates.²⁸⁶ Sometimes it means taking field trips to far-flung parts of the state, either to gather information²⁸⁷ or to allow the locals to see state decision-making in action.²⁸⁸ Throughout the interviews, the importance of state support for local governance was a recurring theme, as were complaints about problems that arose when that state support was insufficient.²⁸⁹

In other circumstances, states went beyond providing grants and education and actually helped staff up local governance initiatives. In California, for example, many air districts rely on state staff to complete some of the more technical elements

284. *E.g.*, Telephone Interview with Cal. Air Quality Regulator (Aug. 21, 2017) (“So if the state is coming out with a new program that’s going to be handled by local entities, there really needs to be funding identified for it . . . I think . . . it generally should come from the state.”).

285. *E.g.*, OR. DEP’T OF LAND CONSERVATION & DEV., AN INTRODUCTORY GUIDE TO LAND USE PLANNING FOR SMALL CITIES AND COUNTIES IN OREGON (2007); Telephone Interview with Fla. Attorney (July 20, 2017) (“[I]n my bureau, we took it upon ourselves to initiate guidance letters, sometimes requested by local government. And that was critical . . .”); Telephone Interview with Or. Lawyer (Aug. 29, 2017) (“[T]he state has always had a training program for new elected officials, although they often resist it.”).

286. *E.g.*, OR. TRANSP. & GROWTH MGMT. PROGRAM, MODEL DEVELOPMENT CODE & USER’S GUIDE FOR SMALL CITIES (2d ed. 2005), <http://www.oregon.gov/LCD/TGM/docs/modelCode05/pdf/guide.pdf?ga=t> [<https://perma.cc/S2AL-7ZC5>].

287. *E.g.*, Telephone Interview with Or. Lawyer (July 25, 2017). The attorney described an episode from his time working for the state:

[W]e got word that a small community on the southern Oregon coast had amended its comprehensive plan to facilitate the construction of some dwellings . . . down on or very close to the high-water line on the beach. It was pretty shocking to us where they had agreed to allow a developer to build . . . And the way they had done it was totally at odds with the state process, the state law . . . So we had to send . . . a letter putting them on notice that their action was unlawful . . . We could’ve stopped there . . . [but] I remember making a trip down to the south coast and walking out onto the beach with their planner and their mayor and the local state representative and some of my staff . . . [W]e came to a place where we said . . . you can put it here . . . and then we helped them through the process of notice and the public hearing. We explained to them . . . the steps that they needed to go through to make it happen . . . I had no question that if we just said no, they would have, you know, gone away with a very bad taste for their interaction with the state regulatory agency. But we made the effort not just to say no but then [to] find out what they really wanted to do and work with them . . . [W]hen our agency budget was up for the next couple of sessions that mayor made a point of taking his time to drive up to Salem to testify in front of the Ways and Means Committee in support of our agency budget and the work that we did.

Id.

288. *See, e.g.*, Telephone Interview with Or. Lawyer (Sept. 20, 2017). He explained:

[W]hen we did meet outside of Salem . . . we’d invite all the local officials, including the tribes . . . And we would invite them to tell us what the issues were. And what are we doing good and what are we doing bad. What can we do better? And it allowed local people to see that, oh, these aren’t some pointy-headed bureaucrats in Salem. These are actually normal people . . . It benefitted the commissioners too, because they could see, meet the local people, they could see what the local issues are, they could see stuff on the ground.

Id.

289. *E.g.*, Telephone Interview with Fla. Lawyer (Sept. 20, 2017) (“So money was one component of how to make it work . . . wasn’t enough money, but it did take the sting out of the ask.”).

of their planning processes, like air quality modeling.²⁹⁰ Similarly, the State of Oregon hires regional staff who live in and work with (and often come from) regions of the state; their job is “to deliver the state’s message as diplomatically as possible and then to bring the message of the counties back to the state agency.”²⁹¹ As another Oregon attorney explained, “The smaller communities are pretty reliant on state staff to provide technical assistance.”²⁹²

Finally, some interviewees recommended extending flexibility to the choice of tasks taken on by local governments. On the land use side, both the written literature and some of my interviewees emphasized the frustrations felt by small, rural local governments in low-growth areas, who felt that they were being asked to take on tasks for which they had neither the capacity nor the need.²⁹³ In some circumstances, that reluctance may have sprung from ideological hostility to the goals of state land use regulation.²⁹⁴ Other objections had non-ideological justifications: some places just are not growing and do not need sophisticated plans.²⁹⁵ California’s air quality regulators have found a sensible response to this problem. In areas where small, local air districts do not have capacity to conduct their own planning, the state has created consolidated planning areas where larger air districts can take the lead, or the state simply does much of the work itself.²⁹⁶ Even at some of the larger districts, developing and writing major parts of an air quality plan may be done by the state.²⁹⁷

This example reflects a broader theme. Of the three programs I studied, California’s air quality management system has been the most willing to adjust the boundaries of state and local responsibility (though all have done so to some extent). Communications between state and local government (and, often, with the EPA)

290. Telephone Interview with Cal. Air Quality Regulator (Sept. 13, 2017).

291. Telephone Interview with Or. Lawyer (Aug. 29, 2017); *see also* Telephone Interview with Or. Lawyer (Sept. 12, 2017) (“[O]ne of the things the Department of Land Conservation and Development learned early on was that they needed to have representatives in different regions of the state.”).

292. Telephone Interview with Or. Lawyer (Sept. 15, 2017).

293. *E.g.*, Telephone Interview with Or. Lawyer (Sept. 20, 2017) (describing waivers and flexibility for rural areas that had limited planning capacity and anticipated little growth).

294. *See id.* (“There were a lot of people that viewed it as communism.”).

295. Of course, an area that isn’t growing now might grow in the future. One Oregon attorney warned:

You have some cities in eastern, southern, and coastal Oregon where they have plans that are basically the same as adopted in the 1980s. So there’s a Google that wants to move in, they have to amend their plan and then they have people that can blackmail them by threatening to appeal.

Telephone Interview with Or. Attorney (Aug. 14, 2017).

296. *See* CAL. HEALTH & SAFETY CODE § 40150 (2014) (authorizing counties to enter into unified air pollution control districts); *id.* § 40300 (authorizing entry into regional air districts); *id.* § 40960 (creating the Sacramento Metropolitan Air Quality Management District).

297. Telephone Interview with Cal. Air Quality Regulator (Sept. 13, 2017) (“[W]e’ve worked with CARB very, very closely from the beginning of SIP development . . . They were often presenters at our workshops . . . and huge portions of the SIP, especially the technical appendices, would be written by CARB staff.”).

routinely occur even where no statute or regulation requires them.²⁹⁸ The air districts themselves are highly heterogeneous, both in their geographic scale and in their responsibilities. A large air district like the South Coast Air Quality Management District, which has hundreds of employees,²⁹⁹ will take on tasks that its smaller neighbors leave to the state.³⁰⁰ And beyond state-local collaborations, the districts also work with each other, both through bilateral expertise-sharing arrangements and through a statewide organization—the California Association of Air Pollution Control Districts—devoted partly to interagency coordination.³⁰¹ To a striking extent, state and local officials seemed happy with these arrangements.³⁰² One local official told me that he had heard EPA and state officials express frustrations with the smaller air districts,³⁰³ and I heard stories of past conflicts,³⁰⁴ but both state and local officials seemed pleased with their present working relationships.

298. *See, e.g.*, Telephone Interview with Cal. Air Quality Regulator (Aug. 21, 2017). The regulator, who worked for a smaller district, explained the division of labor for an “attainment request,” which affirms that the district will continue to meet air quality standards for a pollutant:

[W]e’re working with the Air Resources Board on that and it’s very collaborative. We will draft up elements of this thing. We’ll send it to them to look at. They’ll comment and send it back. They’re doing calculations—there’s a lot of heavy duty calculations that have to be done and we’re not real familiar with—they will do that. If modeling were required, they would do that.

Id. Another regulator, from a much larger district, described a different allocation of responsibilities but similar integration:

[E]ven if it’s informal it’s highly integrated. We rely on them for some of the emission inventories for a lot of the categories that they control, including the mobile sources. They provide all the models. They come up with the mobile source emission inventories. They do the modeling, the complex air quality modeling that translates emissions into concentrations. They do the same modeling we do and they use similar platforms and everything is checked and double-checked and results are compared for consistency.

Telephone Interview with Cal. Air Quality Regulator (Aug. 23, 2017).

299. The district’s internal phone book is fifty-nine pages long. *See* S. COAST AIR QUALITY MGMT. DIST., TELEPHONE DIRECTORY (2018), <http://www.aqmd.gov/docs/default-source/default-document-library/phone-directory.pdf?sfvrsn=4> [<https://perma.cc/L5P5-DUDE>].

300. Telephone Interview with Cal. Air Quality Regulator (Aug. 21, 2017).

301. Telephone Interview with Cal. Air Quality Regulator (Aug. 23, 2017) (describing several arrangements); Telephone Interview with Cal. Air Quality Regulator (Aug. 15, 2017) (describing how his district redirects some state funding to an upwind district with more use for the money). For general discussion of the importance of such organizations, see Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008).

302. *See, e.g.*, Telephone Interview with Cal. Air Quality Regulator (Aug. 15, 2017) (“[A]s a rural air district that tends to be pretty isolated . . . it would be easy for us not to get the attention we feel like we deserve, but I think that we get every bit of attention we ever ask for. It’s been really nice.”).

303. Telephone Interview with Cal. Air Quality Regulator (Aug. 21, 2017) (“I’ve had a person from EPA tell me that if it was up to EPA . . . California wouldn’t have thirty-five air districts. They’d consolidate some of the smaller districts and I can understand why they’re saying that.”).

304. This positive assessment may reflect some selection bias. I was unable to interview all of the air districts that work on planning efforts, and EPA staff declined requests for interviews. The people who did speak with me may have done so partly because they expected to have positive things to say.

All of this flexibility has potential pitfalls. In particular, air district staff repeatedly emphasized the importance, at the outset of any state-local initiative, of articulating clear goals, defining lines of responsibility, specifying expectations for decision-making processes, and maintaining lines of communication.³⁰⁵ This sort of flexible subfederalism also requires robust staffing; it is not governance on the cheap. But even with those caveats, interviewees clearly viewed a complex, interwoven, and interactive governance system not as an impediment, but as a key element of success.

IV. IMPLICATIONS FOR TRADITIONAL FEDERALISM DOCTRINES

The primary point of this study is that cooperative subfederalism is a promising option for state and local governance. That thesis, of course, has its most obvious implications for interactions between state and local governments, not for the federal-state relationships addressed by traditional federalism doctrines. But cooperative federalism does also hold lessons for traditional federalism theory. This final Part explains two of the most important of these implications.

A. Federalism and a Commitment to Governance

The first implication is straightforward: if cooperative subfederalism is at all analogous to traditional federalism, then a federal-state governance structure that treats interactive governance as an important and challenging craft, not a thing to be limited, holds the best odds of success.

That position departs from some traditional notions of federalism.³⁰⁶ For dual federalists—a group particularly well represented on the current Supreme Court—federalism is overtly about division and limitation and implicitly about skepticism of governance. In both the traditional judicial rhetoric of dual federalism, and in academic offshoots like the “matching principle,” the working assumption seems to be that if tasks are divided in a sensible way, with the federal government abandoning its activist habits and playing a relatively small role, then good outcomes will emerge.³⁰⁷ We will thrive, in other words, when government is kept in its proper place, and particularly when the limits constrain the higher levels of the governance hierarchy.³⁰⁸ And so long as the limits are in place, the mechanics of governance

305. *E.g.*, Telephone Interview with Cal. Air Quality Regulator (Sept. 13, 2017) (recommending that people “[m]eet regularly” and “[h]ave clear definitions of what each other’s roles are, but also build into that process opportunities to review each other’s work”).

306. On the other hand, it affirms claims made in the largely non-legal literature on collaborative governance. *See, e.g.*, JULIA M. WONDOLLECK & STEVEN L. YAFFEE, MAKING COLLABORATION WORK: LESSONS FROM INNOVATION IN NATURAL RESOURCE MANAGEMENT (2000).

307. Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL’Y REV. 23 (1996). The matching principle suggests that governance tasks should be assigned to the lowest level of governance whose jurisdiction encompasses the geographic scope of the problem at hand. *Id.* at 25. In Butler and Macey’s account, this would mean reassigning many tasks currently carried out by the federal government. *Id.*

308. *See* *Bond v. United States*, 564 U.S. 211, 221 (2011).

will sort themselves out. Those premises fit with a political culture that is skeptical of regulation³⁰⁹ and deeply committed to negative conceptions of liberty.³¹⁰ Not surprisingly, then, dual federalism has become closely linked with deregulation and with generalized hostility to governance.³¹¹

The state and local officials and private attorneys I spoke with espoused a very different governance philosophy. As the previous Part has explained in detail, intergovernmental interaction is a prominent part of that vision, but so too is a commitment to the idea of governance itself. Even when done with strong institutional structures, committed leadership, and ample funding, regulating land use or air quality is challenging work, which is likely to create constant tensions among governance institutions and between the regulators and the regulated.³¹² Consequently, the people I spoke with embraced the idea of governance as an important and meaningful craft, which could be, and needed to be, done well at every level of the governance system.³¹³ Conversely, they offered no suggestion that a governance structure premised primarily on division and limitation would ever be adequate to the tasks at hand. They were not disparaging federalism; a balance of local, state, and federal authority, in their view, has many virtues.³¹⁴ Nor were they ignoring the burdens faced by regulated entities. An important element of good governance, in their view, is a set of structures and processes for responding to those concerns.³¹⁵ But theirs was a federalism of governmental engagement, not limitation.

That view aligns my interviewees with another school of federalist thought, which celebrates federalism as a system of redundancy and overlap. To this “interactive federalism” camp,³¹⁶ federalism is both an insurance policy and a device to insure the intergovernmental transfer of ideas.³¹⁷ It ensures that if one governance level fails to address a problem, another can step up, and if multiple levels respond, they can learn from each other’s efforts.³¹⁸ Broadly speaking, my

309. See Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1938 (2017) (describing “a judicial agenda hostile to a robust regulatory state”).

310. See, e.g., *DeShaney v. Winnebago Cty. Dept. of Soc. Servs.*, 489 U.S. 189, 195 (1989) (“But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.”).

311. See Joel Rogers, *Foreword: Federalism Bound*, 10 HARV. L. & POL’Y REV. 281, 282 (2016) (describing this version of “bad federalism”).

312. No single quote distills this observation; it is an aggregate impression. Instead, I was struck by how often interviewees spoke of challenges and tensions, and how they never described anything about governance as simple or easy.

313. E.g., Telephone Interview with Fla. Lawyer (July 14, 2017) (“I think that it is so important to have good leadership in setting up a system like this, and committed regional and state actors, and respected regional and state actors.”); Telephone Interview with Or. Lawyer (Aug. 29, 2017) (emphasizing the importance of “maturity and seasoning on all sides” to the program’s successes).

314. See *supra* notes 231–2259 and accompanying text.

315. See *supra* notes 239–244 and accompanying text (describing the value regulators placed on repeated contact with regulated entities).

316. This term, which comes from Schapiro, *supra* note 91, is just one of many.

317. See *supra* note 95 (citing multiple sources).

318. See Schapiro, *supra* note 91, at 289–90.

study of cooperative subfederalism is consistent with this view, but with a change in emphasis. Most of the traditional studies favoring interactive federalism focus primarily on doctrines, like preemption, that allocate authority, not on the systems governments use to operate within their areas of shared power.³¹⁹ While the interactive federalists espouse the value of interaction and dialogue, their accounts of the day-to-day operations of federalism remain thin.³²⁰ Yet, as this study shows, it is one thing to identify the possibility of productive interaction—or productive conflict—in a multi-tiered system of governance, and it is another matter to figure out how to turn that possibility into reality. As scholars and policymakers approach that latter challenge, cooperative subfederalism provides promising examples for learning and imitation.

B. Reconsidering the State and a Federalist System

The second important lesson for traditional federalism involves doctrine. More specifically, a study of cooperative subfederalism exposes the fallacy of the habit, which recurs throughout federalism case law and theory, of collapsing state and local governance into a single category.³²¹

In many federalism cases, the Court has identified states with the benefits of local governance.³²² States, in this usual account, possess localized expertise, while the federal government is the distant and somewhat ignorant outsider.³²³ While the conflation of state and local governance may be partly due to sloppiness, they also serve a rhetorical purpose: they give states a boost in federalism's classic power struggles. Consider, for example, *United States v. Morrison*,³²⁴ in which the Court found that the Violence Against Women Act exceeded Congress's authority under the Commerce Clause. The Court wrote:

The Constitution requires a distinction between what is truly *national* and what is truly *local*, and there is no better example of the police power, which

319. There are exceptions to this generalization. *See, e.g.*, Freeman & Farber, *supra* note 91; J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CALIF. L. REV. 59, 109–19 (2010) (offering “weak ties networks” as a strategy for intergovernmental collaboration); Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011) (discussing intergovernmental negotiations within a federalist system).

320. *See* Owen, *supra* note 37, at 113–14 (noting this gap).

321. *See* Briffault, *supra* note 16, at 1312 (noting this tendency); Gerken, *supra* note 12, at 21 (same).

322. *See, e.g.*, *Bond v. United States*, 564 U.S. 211, 221 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)) (equating “state sovereignty” with “local policies ‘more sensitive to the diverse needs of a heterogeneous society’”); *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (equating state and local governance); *United States v. Lopez*, 514 U.S. 549, 568 (1995) (contrasting national and local governance, without mentioning states); *New York v. United States*, 505 U.S. 144, 168 (1992) (“Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people.”).

323. *See, e.g.*, *Bond*, 564 U.S. at 221 (contrasting state lawmaking with “remote central power”); McConnell, *supra* note 80, at 1493 (“[A] national government must take a uniform—and hence less desirable—approach.”).

324. 529 U.S. 598 (2000).

the Founders undeniably left reposed in the *States* and denied the central Government, than the suppression of violent crime and vindication of its victims.³²⁵

Or consider *National Federation of Independent Business v. Sebelius*.³²⁶ The Court, again checking federal authority under the Commerce Clause, claimed that “[t]he independent power of the *States* also serves as a check on the power of the *Federal Government*,” which helps ensure that powers are “held by governments more *local* and more accountable than a distant federal bureaucracy.”³²⁷

But cooperative subfederalism holds value precisely because states are not local and do not automatically subsume the benefits of local governance. They are often somewhat removed from local conditions.³²⁸ They are often less accessible to both the public and to regulated industries.³²⁹ Because of that relative distance, they are often less able to implement locally-tailored solutions. They often operate in tension with local government.³³⁰ At the same time, states bring advantages to local-state interactions, including a heightened ability to make decisions that transcend parochial priorities.³³¹ But those advantages accord with the virtues traditional federalism doctrine assigns to the federal government, not the states.³³² The result, then, is federalism as a messy fractal pattern, which repeats itself—though not with complete consistency—at multiple scales, not a binary division between the federal government and everyone else.³³³

Of course, the fact that the states can be unaware of or indifferent to local conditions does not mean that they must be. As the discussion in Part III demonstrates, state and local governments can work together in ways that bring the benefits of local knowledge up to state levels. But “work” is an important word here. State governments do not benefit from localized knowledge unless they build governance structures to assimilate that knowledge and then work hard to implement them well. When they do not do so, and even sometimes when they do, state and local governance operate in conflict.³³⁴

That reality necessitates a shift in traditional federalism theory, particularly as it has been espoused by the Supreme Court.³³⁵ In many cases, the Court has recited,

325. *Id.* at 599 (emphasis added); see also *New York*, 505 U.S. at 168 (“Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people.”).

326. 567 U.S. 519 (2012).

327. *Id.* at 536 (emphasis added).

328. See *supra* notes 239–244 and accompanying text.

329. See *supra* notes 239–244 and accompanying text.

330. See *supra* notes 261–264 and accompanying text.

331. See *supra* notes 248–53 and accompanying text.

332. See Esty, *supra* note 23, at 587, 614 (describing traditional arguments for federal governance).

333. For cautionary notes against viewing federalism as an *orderly* fractal pattern, see Aaron Saiger, *Local Government as a Choice of Agency Form*, 77 OHIO ST. L.J. 423, 442 (2016).

334. See *supra* notes 261–264 and accompanying text.

335. Academics have been somewhat more attuned to conflicts between state and local government, but they have not focused on cooperative subfederalism models as responses to those

without supporting evidence, a series of functional claims about the virtues of state governance.³³⁶ The apparent implication is that the truth of these statements is so obvious as to make unnecessary any inquiry into their accuracy, or, perhaps, that their faithful repetition alone will render them true. The asserted sensitivity of states to local conditions is just one of these cherished myths of traditional federalism.³³⁷ And like the best mythology, this particular myth grows from kernels of truth: if states invest effort in doing so, they can indeed create governance structures and policies that validate the classic assumptions of federalism theory. But if a state does not invest that effort, the claims of state sensitivity to local needs may be nothing more than empty falsehoods. Consequently, if the Court is going to accord weight to these claims,³³⁸ it should ask whether a state is doing the hard work necessary to integrate the benefits of localism into state policy and law. The existence of a cooperative subfederalism program would be powerful evidence of that commitment.

CONCLUSION

The tension between parochialism and central engagement creates some of the defining challenges of our political era. And while academics and judges in the United States are accustomed to viewing that challenge through the lens of federal-state relationships, it can emerge with similar force in the relationships of local governments and states. Almost every vice or virtue that traditional federalism theory ascribes to the federal government can be similarly ascribed to the states, and almost every virtue or vice that states claim can also be claimed by local governments. That raises questions about whether cooperative federalism, which theorists have suggested as a compromise designed to harness the benefits of multitier governance, can be extended to relationships between states and locals.

This Article concludes that it can. Cooperative subfederalism systems exist, and while some, like California's new groundwater regulatory system, are brand new, participants in some older programs view them as successful governance systems. They make no claims that governance within a cooperative subfederalism system is easy, and the struggles of the existing programs—and Florida's late system—would belie any such assertion. Indeed, the tensions and challenges of cooperative subfederalist systems only underscore the extent to which traditional federalism theory has glossed over the differences between state and local governance. But with strong commitments to collaboration and to state support of local governance, a cooperative subfederalism system can thrive.

conflicts. *See, e.g.*, Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1 (2002) (arguing that state-centered federalism limits local innovation); Davidson, *supra* note 138.

336. *See, e.g.*, *Bond v. United States*, 564 U.S. 211, 222–23 (2011); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

337. *See Gregory*, 501 U.S. at 458.

338. Whether the Court actually does accord much weight to these claims, or whether they just provide rhetorical backfill for decisions reached on other grounds, is difficult to discern. But the lines are repeated often enough to support an inference that they do matter.

