

Regional Cooperative Federalism and the U.S. Electric Grid

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ABSTRACT

The U.S. Constitution makes no direct mention of regional governing entities, yet they are an entrenched part of our federalist system. In the area of electric grid governance, the federal government enlists independent, private entities called regional transmission organizations (“RTOs”) to implement federal policy and achieve state energy goals. RTOs are the most prominent form of regional cooperative federalism, and other policy spheres, such as opioid control, also incorporate a similar regional approach. These types of regional governance structures are a twist on the classic form of cooperative federalism, in which the federal government relies upon individual states to achieve federal mandates.

The regionally governed electric grid is a critical policy area. The availability of reliable electricity directly drives economic and human health outcomes, and populating the grid with clean sources of electricity while maintaining grid reliability is urgent. The use of regional cooperative federalism in this area therefore calls for a fresh look at federalism principles. Many RTOs are geographically massive; the largest RTO covers all or part of the territories of fifteen states. In many ways, RTOs better serve the core federalism principles ascribed to more decentralized governmental control, including policy experimentation and innovation, efficiency, and accountability to stakeholders. Some RTOs have been particularly innovative in formulating new policies to address changing circumstances, such as demand for more renewable energy. But in the accountability sphere, other RTOs have struggled to address stakeholder needs.

Regional cooperative federalism will be increasingly important in a world of complex policy issues that spill beyond local and state lines yet require locally tailored solutions. This Article constructs a normative framework for analyzing the successes and failures of this underrecognized approach, using the attributes of federalism as guideposts, and suggests a path forward for productively expanding and improving this governance form.

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INTRODUCTION

The allocation of authority among different levels of government rarely occurs on a blank slate. Indeed, the Founders faced entrenched interests in the form of states with individual constitutions and semi-autonomous control.¹ The prospect of forming a federal government that would directly and solely control individual constituents was null.² Nor were the states likely to accede to an arrangement whereby they would act as mere administrative units of the federal government.³ The states, therefore, played a predictably prominent role in the constitutional drafting debates, and obtained an important sovereign status within the nascent U.S. federalist system.⁴

Regional institutions, too, operated at the time of the Founding and were contemplated by the Framers.⁵ The Compact Clause, written

1 See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 416 (1821) (“The framers of the constitution would naturally examine the state of things existing at the time, and their work sufficiently attests that they did so.”); THE FEDERALIST NO. 44, at 235–36 (James Madison) (George W. Carey & James McClellan eds., 2001) (discussing the need for the Constitution’s Supremacy Clause by expounding the problems that would have ensued if “the supremacy of the state constitutions had been left complete”); THE FEDERALIST NO. 47, at 252–55 (James Madison) (George W. Carey & James McClellan eds., 2001) (examining the separation of executive, judicial, and legislative power under various state constitutions in defending the structure of the U.S. Constitution); Gregory E. Maggs, *A Guide and Index for Finding Evidence of the Original Meaning of the U.S. Constitution in Early State Constitutions and Declarations of Rights*, 98 N.C. L. REV. 779, 781 (2020) (observing that state constitutions “proved very influential in the formation of the United States Constitution”).

2 This was a product of the Framers’ concerns about avoiding the perpetuation of an English-style monarchy and their acute awareness of the need to balance state sovereignty with greater national control. See RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* 122 (2009).

3 See, e.g., John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1313 (1997) (observing that when the Framers drafted the Constitution, “[s]tates were much more than mere field offices of the national government; nor were they simply the instruments of decentralized administration”).

4 See Maggs, *supra* note 1, at 781. The states’ sovereign authority under the Constitution was, however, weaker than it had been under the Articles of Confederation. BEEMAN, *supra* note 2, at 99–199 (describing a view among the Founders that the Articles of Confederation had been insufficient in providing for “common defence [sic], security of liberty, and general welfare” and that “no . . . treaties among the whole or part of the States, as individual Sovereignties, would be sufficient” in remedying the Articles’ deficiencies).

5 See, e.g., Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 760

in part to address state coordination that had occurred prior to 1787,⁶ requires congressional consent for states to reach an “Agreement or Compact.”⁷ This incorporation of regionalism within the very structure of American government makes clear that there is more to federalism than the federal government and states.⁸ The historical context surrounding the Compact Clause suggests a recognition among the Framers that in some cases, states would continue to band together to address policy issues that arose between the state and federal levels.⁹ What the drafters of our Constitution did not foresee, however, were the complex forms of regionalism that would later develop. And indeed, courts have since allowed extensive regional collaboration without the need for congressional approval pursuant to the Compact Clause.¹⁰

Since the Founding, legal doctrine and scholarship have recognized a variety of new combinations of jurisdictional authority—many of them regional. For example, states implement federal policy

(2010) (noting the existence of “four interstate boundary agreements” under the Articles of Confederation that followed from a long tradition of British colonies entering into “intercolonial agreements to settle conflicting territorial claims under their respective charters”). There were also proposals at the Constitutional Convention for more widespread regionalism, including one by Edmund Randolph under which the executive branch would have been comprised of three members, each representing one part of the country. See Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV. 377, 379 n.6 (2018) (citing James Madison, *Proceedings of Committee of the Whole House, May 30–June 19, in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 88 (Max Farrand ed., 1911)).

⁶ R.H. Leach, *Interstate Compacts and American Federalism*, 2 AUSTRALIAN J. POL. & HIST. 196, 196 (1957) (explaining that the Founders added the Compact Clause to the Constitution because they “recognized the existence of the practice” of interstate compacts at the time of the Founding).

⁷ U.S. CONST. art. I, § 10, cl. 3.

⁸ There was apparently no discussion of the Compact Clause at the Constitutional Convention. Abraham C. Weinfeld, *What Did the Framers of the Federal Constitution Mean by “Agreements or Compacts”?*, 3 U. CHI. L. REV. 453, 454 (1936). Yet scholars and courts have concluded that the Framers had specific intent with respect to this Clause—notably, to allow for the peaceful resolution of disputes among states, as had occurred prior to the Founding. See, e.g., *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 725–26 (1838) (describing the background of the Compact Clause and explaining that it was intended “to guard against the derangement of [states’] federal relations with the other states of the Union”); Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 692 (1925) (suggesting that the Compact Clause recognized the “[n]egotiation between the contending colonies” over previous border disputes).

⁹ See *supra* note 55.

¹⁰ See Hollis, *supra* note 5, at 743 (noting that the Supreme Court has allowed “the states to conclude whole categories of agreements with no congressional consent whatsoever”); *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 473 (1978) (requiring congressional approval under the Compact Clause only for interstate agreements that enhance “state power *quoad* the National Government”).

through what is now known as cooperative federalism, the federal government operates regional and local offices, and state and federal actors serve coequally on certain regional commissions.¹¹ But through a largely unrecognized form of governance, the federal government also enlists nonfederal regional entities to carry out its policies.¹² The major recent scholarship exploring regional governance in the United States largely omits mention of the most widespread use of regional cooperative federalism: regional transmission organizations (“RTOs”), which govern much of the U.S. electric grid.¹³ In 2021,

11 For a discussion of states implementing federal policy, see, for example, David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1811–13 (2008) (defining cooperative federalism approaches and comparing those approaches with other forms of federalism), and William W. Buzbee, *Federal Floors, Ceilings, and the Benefits of Federalism’s Institutional Diversity*, in PRE-EMPTION CHOICE 98 (William W. Buzbee ed., 2009) (exploring and critiquing cooperative federalism). For a discussion of dispersed federal governance, see generally Dave Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58 (2016) (analyzing the dispersion of federal authority within the U.S. Army Corps of Engineers with respect to the Corps’ regional field offices), and Hannah J. Wiseman & Dave Owen, *Federal Laboratories of Democracy*, 52 U.C. DAVIS L. REV. 1119 (2018) [hereinafter Wiseman & Owen, *Federal Laboratories of Democracy*] (analyzing experimentation by regional branches of federal agencies). For a discussion of different forms of regionalism arrangements, see generally, Frankfurter & Landis, *supra* note 8, at 695–754 (exploring interstate compacts and other forms of regional governance); Patricia S. Florestano, *Past and Present Utilization of Interstate Compacts in the United States*, 24 PUBLIUS 13 (1994) (exploring interstate compacts); Bulman-Pozen, *supra* note 5, at 384–94 (identifying and analyzing three forms of regionalism—interstate collaborations, federal administrative divisions, and joint federal-state organizations); Owen, *supra*, at 113–16 (exploring how the existence of regional offices of federal agencies creates opportunities for regional governance efforts between federal, state, and local governmental entities); Dave Owen & Hannah J. Wiseman, *Coequal Federalism and Federal-State Agencies*, 55 GA. L. REV. 287 (2020) [hereinafter Owen & Wiseman, *Coequal Federalism*] (exploring the practice and promise of joint federal-state action through independent regional agencies).

12 See *infra* Section I.B.

13 RTOs and independent system operators (“ISOs”) are essentially the same types of entities, although they were formed under different Federal Energy Regulatory Commission (“FERC”) orders. Compare Regional Transmission Organizations, 65 Fed. Reg. 810 (Jan. 6, 2000) (codified at 18 C.F.R. pt. 35) (authorizing and encouraging the formation of RTOs), with Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540 (May 10, 1996) (codified at 18 C.F.R. pt. 35, 385) (authorizing and encouraging the formation of ISOs). This Article refers to RTOs and ISOs interchangeably. For the focus of the regionalism literature and its omission of RTOs, see, for example, Bulman-Pozen, *supra* note 5, at 415–27 (describing states working together through regional compacts and less formal mechanisms, and federal agencies operating at the regional level); Yishai Blank & Issi Rosen-Zvi, *Reviving Federal Regions*, 70 STAN. L. REV. 1895, 1899, 1920 (2018) (describing “[m]ore than one hundred” federal agencies with regional offices and briefly noting other regional configurations); Owen, *supra* note 11 (exploring in depth federal agencies’ use of regional offices); Florestano, *supra* note 11 (discussing compacts among states); Frankfurter & Landis, *supra* note 8 (same). The one exception of which the author is aware is Owen & Wise-

RTOs entered common parlance, as millions of Texans and residents in neighboring southern states were left in the dark and cold during the cold snap.¹⁴ Much of the state and national blame for this catastrophe fell—whether fairly or not—on the Electric Reliability Council of Texas (“ERCOT”), which is an RTO.¹⁵

In many respects, regional cooperative federalism—on display most prominently in the RTO context—matches the core values of federalism more closely than state-led policy or traditional cooperative federalism, in which states implement federal law.¹⁶ Many federalism accounts point to policy experimentation and innovation by states as a key virtue.¹⁷ Yet experimentation by states, even with federal direction through a cooperative regime, can be haphazard, and state

man, *Coequal Federalism*, *supra* note 11, at 326 (citing Hannah J. Wiseman & Hari M. Osofsky, *Regional Energy Governance and U.S. Carbon Emissions*, 43 *ECOLOGY L.Q.* 143, 184–88 (2016)) (noting RTOs and the potential promise of a regional approach for transmission siting).

¹⁴ See, e.g., Ike Brannon, *Will the Southeast Import the Texas Energy Model?*, *FORBES* (Feb. 19, 2021, 11:30 AM), <https://www.forbes.com/sites/ikebrannon/2021/02/19/will-the-south-east-import-the-texas-energy-model/?sh=5be4bf8be18a> [<https://perma.cc/Z36D-4T34>] (discussing RTOs in the context of the February 2021 Texas cold snap crisis).

¹⁵ See, e.g., Bob Sechler, *Grid Pricing Glitch May Have Played Role in Texas Electricity Shortage*, *AUSTIN AM.-STATESMAN* (Feb. 27, 2021, 9:17 AM), <https://www.statesman.com/story/business/2021/02/26/ercot-grid-pricing-glitch-texas-electricity-shortage/6837201002/> [<https://perma.cc/4E5G-UD69>] (noting Texas Senate hearings in which senators focused on problems with ERCOT’s electricity pricing model, which failed to create high enough prices to incentivize available peak generators to come online during the outage); Reese Oxner, Mitchell Ferman & Julián Aguilar, *Catastrophic Texas Power Outages Prompt Finger Pointing and Blame Shifting at Legislative Hearings*, *TEX. TRIB.* (Feb. 26, 2021), <https://www.texastribune.org/2021/02/25/texas-house-senate-ercot/> [<https://perma.cc/4Q9K-QC66>] (“There’s this very carefully curated discussion of blame by the governor that always speaks to ERCOT . . .” (quoting Rafael Anchía, *Tex. House of Rep.*)). Other RTOs that cover single states are the California Independent System Operator (“CAISO”) and the New York Independent System Operator (“NYISO”). See *RTOs and ISOs*, *FERC* (Apr. 15, 2021), <https://www.ferc.gov/electric/power-sales-and-markets/rtos-and-isos> [<https://perma.cc/J2MW-Q8MS>] (showing CAISO’s and NYISO’s territories on a larger map). They are “regional” because they control the grid in a relatively large geographic area with diverse generation sources; it just so happens that the large geographic area falls within the political boundaries of one state. For further discussion of the 2021 cold snap in Texas, as well as analysis of how multistate RTO policies might have impacted the crisis, see *infra* Section II.B.1.b.

¹⁶ This Article employs the values of federalism, such as enhancing policy innovation and experimentation, improving efficiency, and enhancing accountability, as normative metrics because they serve as a direct means of contrasting regional cooperative federalism with other federalism approaches. Other scholars have used broader metrics, including these and other federalism values, for assessing the merits of other types of regionalism. See, e.g., Blank & Rosenzvi, *supra* note 13, at 1944–66 (framing a long list of merits and drawbacks of regional units of the federal government, some of which overlap with the federalism values explored here).

¹⁷ See, e.g., Ann Althouse, *Vanguard States, Laggard States: Federalism and Constitutional Rights*, 152 *U. PA. L. REV.* 1745, 1750–76 (2004) (discussing Justice Brandeis’s vision of states as laboratories and the subsequent application of this vision by the Supreme Court and legal schol-

governments are often loath to take the risk of innovating.¹⁸ Implementation of federal policy by an actor situated between the federal government and states allows for coordinated experimentation toward a more clearly defined federal goal.¹⁹ This regional implementation can support *more* innovation than might otherwise occur by states acting on their own or implementing federal directives. This is because both the individual members of regional entities—states and (in some cases) private entities—and the federal government sometimes all push for innovative policies, providing top-down and bottom-up impetus for policy change.²⁰

Regional bodies' coordination of policies among states has also supported state based innovation, thus compounding their effects.²¹ Further, regional cooperative federalism addresses the negative spillover effects of state-by-state experimentation.²² But within such ar-

ars); Wiseman & Owen, *Federal Laboratories of Democracy*, *supra* note 11, at 1121 (cataloging common assumptions about federalism and experimentation).

18 See Susan Rose-Ackerman, *Risk Taking and Relection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 610–11 (1980); Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1351, 1355 (2009).

19 See *infra* Section II.B.

20 See *infra* Section II.B.1.a (describing FERC's encouragement of RTOs to develop "innovative" policies and contrasting this innovative push with traditional cooperative federalism approaches). In three of the four RTOs that cover more than one state, states are nonvoting members and are relegated to attempting to influence RTO decisions through the courts and as nonvoting stakeholders. See also CHRISTOPHER A. PARENT, KATHERINE S. FISHER, WILLIAM R. COTTON & CALI C. CLARK, GOVERNANCE STRUCTURE AND PRACTICES IN THE FERC-JURISDICTIONAL ISOs/RTOs (2021), https://yq5v214uei4489eww27gbgsu-wpengine.netdna-ssl.com/wp-content/uploads/2021/02/ISO-RTOGovernanceStructureandPractices_19Feb2021.pdf [<https://perma.cc/MMB5-F8ZB>] (showing that states are voting members only in the Midcontinent ISO ("MISO")); Shelley Welton, *Rethinking Grid Governance for the Climate Change Era*, 109 CALIF. L. REV. 209, 258, 268 (2021) (noting that "states have been left with merely an advisory role in RTO policy-making in most regions," but noting that MISO gives states membership and a substantial voting bloc); CHRISTINA SIMEONE, PJM GOVERNANCE: CAN REFORMS IMPROVE OUTCOMES? 26 (2017), <https://www.pjm.com/-/media/committees-groups/forums/stakeholder-process/2017/20170724-stakeholder/20170724-kleinman-center-paper-pjm-governance-reforms.ashx> [<https://perma.cc/2GJG-U8XH>] (noting the limits on state participation in one RTO, the PJM Interconnection LLC ("PJM")); cf. JENNIFER CHEN & GABRIELLE MURNAN, NICHOLAS INST. FOR ENV'T POL'Y SOLS., DUKE UNIV., STATE PARTICIPATION IN RESOURCE ADEQUACY DECISIONS IN MULTISTATE REGIONAL TRANSMISSION ORGANIZATIONS 6 (2019), https://nicholasinstitute.duke.edu/sites/default/files/publications/state_participation_in_resource_adequacy_decisions_web.pdf [<https://perma.cc/CEZ9-SSXG>] ("Every multistate RTO has a Regional State Committee (RSC) that provides the collective input of the states on RTO proposals.").

21 The best planning and building of transmission lines for wind energy has occurred within midwestern RTOs, where most states have requirements for renewable energy generation. See *infra* notes 179–82 and accompanying text.

22 See *infra* Section II.B.3. This is perhaps best highlighted by the challenge of addressing

rangements, the federal government, states, and private interests sometimes hamper innovative regional efforts due to conflicting goals that are difficult to reconcile.²³ And clear challenges of integrating innovative policies to address important goals, such as the expansion of renewable generation and maintenance of grid reliability—i.e., the ability to keep the electric grid operational—remain, as evidenced by the events in Texas in 2021.²⁴

Beyond supporting innovation and experimentation, regional cooperative federalism encompasses another oft-touted virtue of federalism—the efficiency accomplished when smaller governments closer to constituents offer varied policies.²⁵ State lines are artificial political dividers. Many neighboring states share benefits and challenges with respect to physical features, climate, and political culture.²⁶ Allowing regional entities to address national issues with an eye to the peculiar local instantiations of these issues can better address the demands of constituents for governmental goods and services within those regions. Indeed, in the transmission grid context, some RTOs have spurred the construction of major new transmission networks that support renewable energy, in an era in which building interstate transmission infrastructure is critical yet exceedingly difficult.²⁷ And through another

interstate air pollution under the Clean Air Act, 42 U.S.C. §§ 7401–7671q, which relies on traditional cooperative federalism. *See infra* notes 41, 67, and accompanying text.

²³ One example of this is FERC’s Minimum Offer Price Rule, which resulted from the divergence of policy priorities among the federal government, an RTO, and the states that RTO served. *See infra* notes 306–08 and accompanying text.

²⁴ *See generally* HOBBY SCH. OF PUB. AFFS., UNIV. OF HOUS., THE WINTER STORM OF 2021, at 1 (2021), <https://uh.edu/hobby/winter2021/storm.pdf> [https://perma.cc/TZ83-3KWJ] (describing the events); ENERGY INST., THE UNIV. OF TEX. AT AUSTIN, THE TIMELINE AND EVENTS OF THE FEBRUARY 2021 TEXAS ELECTRIC GRID BLACKOUTS (2021), <https://energy.utexas.edu/sites/default/files/UTAustin%20%282021%29%20EventsFebruary2021Texas%20Blackout%2020210714.pdf> [https://perma.cc/4EGP-9MFA] (same).

²⁵ *See infra* Section II.C.

²⁶ *See, e.g.*, Peter J. Rentfrow, Samuel D. Gosling, Markus Jokela, David J. Stillwell, Michal Kosinski & Jeff Potter, *Divided We Stand: Three Psychological Regions of the United States and Their Political, Economic, Social, and Health Correlates*, 105 J. PERSONALITY & SOC. PSYCH. 996, 996–98 (2013) (exploring how regions within the United States are “characterized in terms of the political, economic, social, and health characteristics that are shared by neighboring states”); Bulman-Pozen, *supra* note 5, at 380 n.12 (collecting sources exploring “regional culture, identity, and psychology” within the United States).

²⁷ *See infra* notes 169, 231, and accompanying text (describing the cost savings associated with MISO’s “Multi-Value Projects” (“MVPs”) that resulted in the construction of new interstate transmission infrastructure); *see also, e.g.*, MISO, REGIONALLY COST ALLOCATED PROJECT REPORTING ANALYSIS (2021), <https://cdn.misoenergy.org/MVP%20Dashboard%20Q3%202021117055.pdf> [https://perma.cc/5LPJ-Y269] (showing seventeen completed MVPs as of the third quarter of 2021); Ill. Com. Comm’n v. FERC, 721 F.3d 764, 771–72 (7th Cir. 2013) (describing MISO MVPs, which were designed in part to allow for the construction of more wind energy

type of efficiency—administrative efficiency—regional cooperative federalism makes the process of governing less costly by centralizing employee training and providing a coordinated planning and decision-making system at the subfederal level.²⁸

A final, frequently cited attribute of traditional federalism is accountability—governments' responsiveness to stakeholders.²⁹ Here, too, regional cooperative federalism offers some advantages over traditional or cooperative federalism.³⁰ One might assume that individual states implementing federal policy will better respond to and incorporate constituents' concerns. But regional institutions some-

throughout the Midwest); cf. DAVID HURLBUT, NAT'L RENEWABLE ENERGY LAB'Y, STATE CLEAN ENERGY PRACTICES: RENEWABLE PORTFOLIO STANDARDS 2–3, 14 (2008), <https://www.nrel.gov/docs/fy08osti/43512.pdf> [<https://perma.cc/7FQP-FTTB>] (describing adequate transmission capacity as an essential element for states to impose successful renewable portfolio standards (“RPS”) and concluding that “[t]he effectiveness of an RPS in any particular state often depends on regional coordination”). But see Danny Cullenward & Shelley Welton, *The Quiet Undoing: How Regional Electricity Market Reforms Threaten State Clean Energy Goals*, 36 YALE J. ON REGUL. BULL. 106, 113–19 (2019) (describing PJM's and ISO New England's problematic proposals to restructure capacity markets, which would make it more difficult for states to achieve renewable energy generation mandates); Welton, *supra* note 20, at 246–48, 258 (arguing that RTOs have impeded efforts to promote clean energy).

²⁸ See *infra* notes 265–68 and accompanying text.

²⁹ For the panoply of definitions of accountability, see, for example, Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2073 (2005) (“Accountability can be roughly defined as the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance or its explanation.”). See also Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 499 (2003) (arguing that accountability “requires elected officials to make policy decisions because they are subject to the check of the people if they do not discharge their duties in a sufficiently public-regarding and otherwise rational, predictable, and fair manner”).

³⁰ Many have rejected “accountability” as a useful or well-defined value, but federalism commentators nonetheless repeatedly cite to this value. For critiques of the usefulness of accountability as a metric, see, for example, Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 360–61 (2000) (describing critiques that portray the conception of accountability as a virtue of federalism as “theoretically simplistic and empirically dubious” and analyzing the merits of such critiques); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 197–209 (1995) (doubting that accountability can “be used as a structural mechanism aimed at achieving direct responsiveness to public opinion” in the context of executive branch decision making); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1181 (2000) (arguing that “accountability” is not “a value that stands on its own” in the context of separation of powers law). For accounts connecting federalism to accountability, see, for example, *Printz v. United States*, 521 U.S. 898, 929–30 (1997) (concluding that allowing the federal government to commandeer state officials diminishes the accountability of federal or state officials); Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1580 & n.65 (1994) (concluding that federal commandeering of the states “confuses the lines of political accountability”).

times create unusual collaborations among stakeholders who do not typically group together, thus upending traditional political economic dynamics and opening up new policy dialogues that are more responsive to diverse stakeholder demands.³¹ Yet regional cooperative federalism also has substantial limitations with respect to accountability. This is particularly the case for RTOs, which are *private* organizations comprised entirely of private members performing a public governance role.³² Several scholars and interest groups have critiqued RTOs for inadequate attention to the demands of the public at large and certain minority stakeholders.³³ Indeed, the fact that states—which are forging ahead with aggressive clean energy goals—are not even members of most RTOs potentially presents a major accountability problem.³⁴ Regional cooperative governance does not have to involve an independent private entity.³⁵ But the fact that the major example of this governance form involves *corporations* that make critical governance decisions—and do so beneath somewhat limited agency review³⁶—requires close attention to these accountability limitations.

In light of the overall promise of regional cooperative federalism, Congress and agencies should consider this governance form when designing statutes and regimes for implementing them. Indeed, in the

³¹ See *infra* Section II.D. (exploring how RTOs bring diverse groups of constituents together through member and stakeholder participation in RTO decision making); see also, e.g., Stephanie Lenhart, Natalie Nelson-Marsh, Elizabeth J. Wilson & David Solan, *Electricity Governance and the Western Energy Imbalance Market in the United States: The Necessity of Interorganizational Collaboration*, 19 ENERGY RSCH. & SOC. SCI. 94, 95 (2016).

³² See, e.g., *infra* notes 276–82 and accompanying text (discussing private RTO membership and stakeholder groups); Welton, *supra* note 20, at 233 (observing that RTOs functionally “operate as policy-making bodies”).

³³ See, e.g., Welton, *supra* note 20, at 258 (“States are largely powerless within RTO governance processes to do anything about the fact that RTOs are undermining their lawful state policies”); Michael H. Dworkin & Rachel Aslin Goldwasser, *Ensuring Consideration of the Public Interest in the Governance and Accountability of Regional Transmission Organizations*, 28 ENERGY L.J. 543, 546 (2007) (“[T]he administration of wholesale markets and transmission should routinely consider the larger public interest”).

³⁴ See sources cited *supra* note 20; *infra* Section III.C (exploring ways in which RTOs can improve accountability to the public). State membership is not a necessary prerequisite to RTOs’ representing state goals, however. MISO—an RTO in which states are not voting members—has arguably done the most to support state-based renewable energy goals. See *MISO Region Engagement*, MISO, <https://www.misoenergy.org/stakeholder-engagement/miso-engagement/> [<https://perma.cc/G2PU-BTCB>] (showing “state regulatory entities” as nonmember sectors). For discussion of MISO’s successful multi-value transmission projects to support renewable energy, see *infra* notes 180–82 and accompanying text.

³⁵ See *infra* Section I.B (describing some purely public forms of regional cooperative federalism).

³⁶ For a discussion of the legal developments that have limited FERC’s review of RTO decisions, see Welton, *supra* note 20, at 232–37.

midst of the COVID-19 global pandemic, numerous states hastily formed regional agreements and councils to address economic re-opening efforts.³⁷ But these efforts would likely be far more effective if guided by the unifying voice of a federal agency, or if they at least involved federal agency review and input. Health experts have repeatedly called for a more uniform response to COVID-19,³⁸ and these calls appear to be based at least partially on the fact that the disease can spread quickly across political boundaries. As early as 1893, the Supreme Court recognized the fundamental importance of regional compacts for addressing highly contagious and deadly diseases, holding that these types of compacts do not need congressional preapproval under the Constitution.³⁹ But a federal-regional response to COVID-19 would better allow states to address their shared economic and social challenges in the context of the pandemic while also incorporating important uniform, scientifically informed federal guidelines.

Some existing regimes might also merit modification to encompass aspects of regional cooperative federalism. Take the case of the Clean Air Act,⁴⁰ in which states individually tasked with achieving national air quality mandates consistently send pollution to other states,

³⁷ See Press Release, Andrew M. Cuomo, Governor, New York, Governor Cuomo, Governor Murphy, Governor Lamont, Governor Wolf, Governor Carney, Governor Raimondo Announce Multi-State Council to Get People Back to Work and Restore the Economy (Apr. 13, 2020), <https://www.governor.ny.gov/news/governor-cuomo-governor-murphy-governor-lamont-governor-wolf-governor-carney-governor-raimondo> [https://perma.cc/4D6A-Q6WK]; Press Release, Gretchen Whitmer, Governor, Michigan, Midwest Governors Announce Partnership to Reopen Regional Economy (Apr. 16, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90640-526088—,00.html [https://perma.cc/T7R6-Q2QZ]; Press Release, Gavin Newsom, Governor, California, Colorado & Nevada Join California, Oregon & Washington in Western States Pact (Apr. 27, 2020), <https://www.gov.ca.gov/2020/04/27/colorado-nevada-join-california-oregon-washington-in-western-states-pact/> [https://perma.cc/AF7B-FLSU].

³⁸ Lauren Leatherby & Rich Harris, *States that Imposed Few Restrictions Now Have the Worst Outbreaks*, N.Y. TIMES (Nov. 18, 2020), https://www.nytimes.com/interactive/2020/11/18/us/covid-state-restrictions.html?campaign_id=9&emc=edit_nn_20201119&instance_id=24248&nl=the-morning®i_id=61655712&segment_id=44896&te=1&user_id=2c3a17e3f84f0be8ebfbf96b5b298eda [https://perma.cc/GFT5-RBVU] (“One of the biggest problems in the United States so far has been the lack of a coherent, cohesive national response, said Wafaa El-Sadr, an epidemiologist at Columbia University. ‘It’s been piecemeal,’ Dr. El-Sadr said. ‘It’s been largely delegated to a subnational level, to the states, for example, and municipalities to figure it out themselves.’”).

³⁹ *Virginia v. Tennessee*, 148 U.S. 503, 518 (1893) (“[I]n case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened States could not unite in providing means to prevent and repel the invasion of the pestilence, without obtaining the consent of Congress, which might not be at the time in session.”).

⁴⁰ 42 U.S.C. §§ 7401–7671q.

causing those states to violate the Act.⁴¹ The result has been the expost formation of somewhat haphazard regional efforts to address cross-state air pollution, with decades of litigation and unresolved disputes among the states.⁴²

Despite its promise in some policy areas and its prominence in the energy space, regional cooperative federalism lacks an adequate framework for normative analysis. This Article constructs a framework using three central attributes of federalism—policy innovation and experimentation, governmental efficiency, and accountability—as guideposts. It then analyzes the strengths and weaknesses of regional cooperative federalism within this framework using examples from the electric grid governance context, where regional cooperative federalism is most prominent.

In undertaking these objectives, this Article proceeds as follows. Part I situates regional cooperative federalism within the U.S. federalist system and the existing regionalism literature. This Part uses the RTO example to define the contours of this underexplored governance approach. Part II then examines how regional cooperative federalism achieves and constrains three of the core values ascribed to traditional federalism—innovation, efficiency, and accountability. Part III explores alternative approaches that could address some of the weaknesses of regional cooperative federalism beneath these three metrics. Finally, Part IV explores potential legal impediments to the regional cooperative approach. The nondelegation doctrine is one concern, particularly in light of a reshuffled Supreme Court that has hinted at a willingness to apply this largely forgotten principle.⁴³ But

⁴¹ See, e.g., *Clean Air Act Section 126 Petitions*, HARV. ENV'T & ENERGY L. PROGRAM (Jan. 22, 2020), <https://eelp.law.harvard.edu/2020/01/clean-air-act-section-126-petitions/> [<https://perma.cc/FX6A-47HU>] (cataloging numerous petitions regarding interstate pollution problems).

⁴² See, e.g., *Clean Air Act—Cost Considerations—EPA v. EME Homer City Generation, L.P.*, 128 HARV. L. REV. 351, 352–53 (2014) (describing and cataloging the D.C. Circuit's repeated rejection of the EPA's and states' efforts to address interstate air pollution). The federal government has, however, created some exceptions to this generally haphazard response. Congress initiated a ground level ozone trading program, which, under the guidance of a regional organization called the Ozone Transport Commission, has resulted in a somewhat successful regional cap and trade program to address interstate smog pollution. See 42 U.S.C. § 7511c(a) (forming an ozone transport region, comprised of northeastern and mid-Atlantic states and Washington, D.C.); OZONE TRANSPORT COMM'N, EPA, NOX BUDGET PROGRAM 1999–2002 PROGRESS REPORT (2003), <https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P1002LY4.txt> [<https://perma.cc/55TG-SJCL>] (describing the Commission and its facilitation of the regional cap and trade program). This ground level ozone cap and trade program was modeled off the EPA's successful acid rain trading program, but that effort was national, not regional. See *id.*

⁴³ See *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) (arguing that a federal child sex offender statute impermissibly delegated congressional authority to

RTOs are likely to survive even a relatively rigorous application of the doctrine and other challenges, such as those rooted in the Tenth Amendment.⁴⁴

The nationwide experiment in grid governance offers an important window of opportunity to compare the successes and failures of regional cooperative federalism with alternative governance structures. RTO governance of the electric grid is the most widely used form of regionalism—affecting the provision of electricity to approximately two-thirds of the U.S. population⁴⁵—and this policy area is a critical one. The availability of electricity is directly tied to economic growth and human wellbeing.⁴⁶ Lessons about the merits of regional cooperative federalism in the electric grid context will be increasingly important in the many policy areas with effects that are simultaneously local, state, regional, and national, such as COVID-19 and the ongoing opioid crisis.⁴⁷ These types of policy areas call for a multilevel approach that accommodates distinct localized needs while also addressing spillovers from a top-down perspective.

I. A REGIONAL GOVERNANCE FRAMEWORK

Regional governance, broadly defined, is a governmental approach in which an institution addresses policy issues that are common

“a single executive branch official” such that this official could effectively “write his own criminal code”). Of course, the Justices who have indicated a desire to revive the nondelegation doctrine are likely less concerned about delegation to private entities such as RTOs than they would be about delegation to actual public regional agencies. *Cf., e.g.,* Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 718–19 (2010) (arguing that policymakers have privatized numerous government functions not just for efficiency, but also to alter policies in substantive ways).

⁴⁴ See *infra* Part IV.

⁴⁵ *Electric Power Markets*, FERC (July 10, 2021), <https://www.ferc.gov/electric-power-markets> [<https://perma.cc/FN8X-QXCH>] (noting that “two-thirds of the nation’s electricity load is served in RTO regions”).

⁴⁶ An unreliable grid can cause billions of dollars in economic damage and higher death rates. See, e.g., U.S.–CAN. POWER SYS. OUTAGE TASK FORCE, FINAL REPORT ON THE AUGUST 14, 2003 BLACKOUT IN THE UNITED STATES AND CANADA: CAUSES AND RECOMMENDATIONS 1 (2004), <https://www3.epa.gov/region1/npdes/merrimackstation/pdfs/ar/AR-1165.pdf> [<https://perma.cc/E8JH-Q2QK>] (noting between \$4 billion and \$10 billion in economic costs associated with the 2003 blackout that extended through parts of the United States and Canada); G. Brooke Anderson & Michelle L. Bell, *Lights Out: Impact of the August 2003 Power Outage on Mortality in New York, NY*, 23 EPIDEMIOLOGY 189, 191 (2012) (concluding that “power outages can immediately and severely harm human health” and noting increased mortality in New York caused by the 2003 blackout).

⁴⁷ See sources cited *supra* note 37 and accompanying text (describing loosely coordinated regional action on COVID-19 issues); see *infra* notes 72–78 and accompanying text (describing a regional governance approach that has been used in response to opioid trafficking).

to multiple geopolitical units of government, or that cross boundary lines between the units.⁴⁸ The regional governing body itself can include a collection of representatives from these geopolitical units, a federal agency that operates outside of the nation's capital, or an independently formed government that operates between the state and federal levels—or between the local and state levels, in the case of counties or municipalities that form intrastate regional governing organizations. Some regional governance is quite informal, with states creating uniform law commissions that recommend adoption of similar rules;⁴⁹ other regional governance arrangements can, subject to some limitations, produce mandates that carry the full force of law.

A long running regionalism literature has explored these many governance forms.⁵⁰ But this literature largely overlooks regional cooperative federalism, in which regional entities implement federal policy and, in the case of RTOs, also address bottom-up demands from private entities, local governments, and states.⁵¹ The Table below summarizes the many types of regional governance arrangements described here.

⁴⁸ See, e.g., Bulman-Pozen, *supra* note 5, at 383 (describing regional governance as a system that “departs from established state and federal jurisdictional lines to form a suprastate yet subnational area” and that involves “a subnational area encompassing all or part of multiple states”). Although counties address issues common to municipalities, this Article’s definition of regionalism excludes them.

⁴⁹ *Id.* at 387–88 (describing these types of regionalism arrangements).

⁵⁰ See sources cited *supra* note 13 (summarizing the literature).

⁵¹ For example, many stakeholders have demanded more RTO recognition of state renewable energy policies, and some RTOs have positively responded. See *infra* notes 160–61 and accompanying text (describing MISO’s multi-value transmission planning project). Others, however, have impeded these state policies in problematic ways. See Welton, *supra* note 20, at 248–52.

FORMS OF U.S. REGIONAL GOVERNANCE

	Regional federal administration ⁵²	Horizontal col- laboration ⁵³	Joint federal- state govern- ance ⁵⁴	Regional coop- erative federal- ism
Description	The federal gov- ernment imple- ments its policies through regional offices populated with federal em- ployees.	States or local governments, or both, join to govern a par- ticular policy area largely free of federal oversight.	Independent regional agen- cies comprised of representa- tives from the state and federal levels govern.	The federal government enables the for- mation of inde- pendent region- al agencies that carry out federal directives and respond to state and local needs.
Examples	Environmental Protection Agency, Army Corps of Engineers, federal circuit courts, Federal Reserve Banks, North American Electric Reliability Corporation ⁵⁵	Regional de- velopment agencies, cli- mate and COVID-19 compacts ⁵⁶	River basin commissions, airport authori- ties ⁵⁷	High Intensity Drug Traffick- ing Areas, regional transmis- sion organiza- tions ⁵⁸

⁵² Professor Dave Owen coined this term in a 2016 article exploring regionalism and the U.S. Army Corps of Engineers. *See* Owen, *supra* note 11, at 62–64; *see also* Bulman-Pozen, *supra* note 5, at 388–89 (referring to this approach using the term “[f]ederal [a]dministrative [d]ivisions”); Blank & Rosen-Zvi, *supra* note 13, at 1899–1900 (describing this form of govern- ance as involving “federal regions”).

⁵³ In describing the prevalence of interstate compacts as a form of regionalism, Professor Jessica Bulman-Pozen calls this approach “[i]nterstate [c]ollaboration.” Bulman-Pozen, *supra* note 5, at 384–85.

⁵⁴ *See* Owen & Wiseman, *Coequal Federalism*, *supra* note 11, at 299–307 (exploring “joint federal-state governance”). Professor Bulman-Pozen describes this as “[j]oint [f]ederal-[s]tate [o]rganization.” Bulman-Pozen, *supra* note 5, at 392–93.

⁵⁵ Circuit courts are not regional divisions of a federal court but are federal entities that operate at the regional level. They should, therefore, fit within a different subcategory of regional federal administration. *See Court Role and Structure*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/court-role-and-structure> [<https://perma.cc/HPB8-P8QJ>] (describing circuit courts as presiding over “regional circuits” that “sit below the U.S. Supreme Court”). The other examples here involve federal agencies, with home offices in Washington, D.C., that oversee regional branches throughout the United States. *See* Owen, *supra* note 11, at 62–63 (describing the U.S. Army Corps of Engineers as a prominent example of regional federal administration); Blank & Rosen-Zvi, *supra* note 13, at 1899 (“More than one hundred federal departments, agencies, offices, and bureaus . . . operate through a system of regional offices strategically located across the country.”); Bulman-Pozen, *supra* note 5, at 389–90 (noting many other examples). The North American Electric Reliability Corporation (“NERC”) is a complex example of regional federal administration because NERC is a 501(c)(3) entity, and its standards and enforcement actions all must be approved by the Federal Energy Regulatory Commission. FERC, RELIABILITY PRIMER 34-35 (2020), <https://www.ferc.gov/media/2135> [<https://perma.cc/U3A3-XPFU>]. NERC enlists six regional entities to do much of its work, including enforcing reliability stan-

A. *Federal, State, and Local Regionalism*

Most forms of regionalism explored in the literature involve only a single level of government. At the highest level, the federal government simply decentralizes its functions, sending federal agents to far-flung parts of the country to govern local or regional affairs.⁵⁹ The federal government often accomplishes this decentralization through the creation of regional offices for entities such as the Environmental Protection Agency and the Army Corps of Engineers.⁶⁰ In other contexts, the federal government forms independent regional entities that are not merely geographic subunits of a higher-level agency, such as the U.S. Courts of Appeals, Federal Reserve Banks, and regional entities that help to maintain the reliability of the electric grid under North American Electric Reliability Corporation (“NERC”) and Federal Energy Regulatory Commission (“FERC”) guidance.⁶¹

At the state or local level, many regional institutions are comprised of collections of political entities that cooperate horizontally—at the same level of government. These include, for example, local governments that form Regional Development Corporations to jointly

dards. *ERO Enterprise Regional Entities*, N. AM. ELEC. RELIABILITY CORP., <https://www.nerc.com/AboutNERC/keyplayers/Pages/default.aspx>. [<https://perma.cc/9LUK-7X5P>]. These regional entities are not merely subunits of NERC, however, and have distinct responsibilities relating to specific reliability challenges within their region. *Id.* For further discussion of regional entities, see Hari M. Osofsky & Hannah J. Wiseman, *Hybrid Energy Governance*, 2014 U. ILL. L. REV. 1, 36–37.

⁵⁶ See Bulman-Pozen, *supra* note 5, at 385–86 (“[M]ore than 150 interstate compacts are in effect, and the regional form remains dominant.” (footnote omitted)); *id.* (noting the topics that interstate compacts cover); sources cited *supra* note 37 (describing regional COVID-19 agreements); *What is the Compact?*, SE. FLA. REG’L CLIMATE CHANGE COMPACT, <https://southeast-floridaclimatecompact.org/about-us/what-is-the-compact/> [<https://perma.cc/WEL9-N5VW>] (describing “a partnership between Broward, Miami-Dade, Monroe, and Palm Beach Counties” that “work[s] collaboratively” on climate change-related matters in Southeast Florida).

⁵⁷ See Owen & Wiseman, *Coequal Federalism*, *supra* note 11, at 293–94; Bulman-Pozen, *supra* note 5, at 392–93.

⁵⁸ See *infra* Section I.B.

⁵⁹ See Owen, *supra* note 11, at 61 (noting that eighty-five percent of federal officials do not work in Washington, D.C.).

⁶⁰ *Id.* at 62 n.21.

⁶¹ See *supra* note 55. The circuit courts were originally merely subunits of a federal entity—the U.S. Supreme Court. From 1789–1801 and 1802–1869, the circuit courts were comprised only of Supreme Court Justices sitting at the circuit level, with occasional participation by district judges. *The U.S. Circuit Courts and the Federal Judiciary*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/u.s.-circuit-courts-and-federal-judiciary> [<https://perma.cc/H3DH-DSEG>]. For a discussion of Federal Reserve Banks and the potential regional governance categories in which they could reasonably reside (including regional cooperative federalism), see *infra* note 79. For a description of Regional Entities in the electric reliability context, see *supra* note 55.

tax property and implement economy-enhancing measures.⁶² States also enter into compacts or similar sister state agreements to address issues ranging from climate change to shared bridges and, more recently, the COVID-19 pandemic.⁶³

In a third form of regionalism, federal and state entities form a separate governing entity at a new level—one that sits between the states and federal government. Federal and state representatives act as equal partners, voting to implement policies that bind both federal and state members.⁶⁴ This “coequal federalism” is common for rivers that run between several states, and which therefore implicate both state and national interests.⁶⁵

All of these regional institutions are far more important than most federalism accounts recognize. They involve collections of states and local governments, or federal and state officials, that make decisions in the jurisdictional gray areas between state, local, and federal control, or even independent of this control. Another form of regionalism, which the literature has largely overlooked, involves the federal government enlisting regional entities to carry out its policies while simultaneously addressing the interests of local, state, and private stakeholders, as explored in the following Section.

B. Regional Cooperative Federalism

In a somewhat novel approach to regionalism—the arrangement at the heart of this Article—the federal government establishes regional entities and sets mandates for those regional entities to implement, thus creating a system of regional cooperative federalism. Under the classic form of cooperative federalism, the federal government establishes a national policy that states must implement. The Clean Air Act⁶⁶ is a prominent example. Through this Act, Congress directed the Environmental Protection Agency to set national limits

⁶² See, e.g., LEAGUE OF MINN. CITIES, HANDBOOK FOR MINNESOTA CITIES: INTERGOVERNMENTAL COOPERATION 1, 8 (2020) (describing the powers and attributes of Regional Development Corporations under Minnesota law).

⁶³ See, e.g., Florestano, *supra* note 11, at 20 (providing a table compiling these types of modern interstate compacts); sources cited *supra* note 37 (describing states’ multilateral efforts in the COVID-19 context).

⁶⁴ See Owen & Wiseman, *Coequal Federalism*, *supra* note 11, at 293 (explaining that joint federal-state agencies can “issue rules and orders that b[ind] federal and participating-state officials and private actors”).

⁶⁵ See *id.* at 326–30 (providing in-depth analysis of the Susquehanna and Delaware River Basin Commissions); Bulman-Pozen, *supra* note 5, at 392–94 (describing “hybrid” federal-state entities).

⁶⁶ 42 U.S.C. §§ 7401–7671q.

on the concentration of pollution in the air and required states to write plans to achieve these limits.⁶⁷

Cooperative federalism does not always involve simple mandates issued by the federal government to states. It can also include arrangements in which the federal government allows states to design their own policy approach such as a state-operated healthcare exchange, within the confines of federal standards, or to alternatively default to a federal approach.⁶⁸ Some cooperative federalist approaches alternatively involve the federal government working with states and local governments to accomplish a national policy goal, albeit with the federal government setting the conditions of the grants that it dispenses to state and local governments.⁶⁹

Regional cooperative federalism involves the federal government forming or sanctioning the formation of an agency that is not itself a federal branch—unlike regional federal administration. The agency is therefore “independent” from the federal government, although it still must ultimately obtain approval of its actions from a federal agency. This independent agency can be comprised of local, state, and federal entities serving on executive boards—as is the case for High Intensity Drug Trafficking Areas (“HIDTAs”)—or of private entities operating as a board of directors or managers, as with RTOs.⁷⁰ The federal government issues direct orders to the regional agency or approves the actions of this agency, essentially delegating federal work. The agency also spends much of its time responding to demands of the local and state governments within its jurisdictional territory while still hewing to federal requirements.

The HIDTA program was created by Congress and is administered by the U.S. Drug Enforcement Administration and regional ex-

⁶⁷ See 42 U.S.C. §§ 7410(a), 7411(b); David E. Adelman, *Environmental Federalism When Numbers Matter More than Size*, 32 UCLA J. ENV'T L. & POL'Y 238, 246 & n.26 (2014) (describing the Clean Air Act as a classic form of cooperative federalism and citing authority supporting that proposition).

⁶⁸ See Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 585–88 (2011) (describing several forms of federal-state relations under the Affordable Care Act, none of which fit neatly within the traditional definition of cooperative federalism but all of which involve federal-state collaboration to implement a statute).

⁶⁹ See *infra* notes 71–77 and accompanying text.

⁷⁰ See, e.g., *HIDTA*, U.S. DRUG ENF'T ADMIN., <https://www.dea.gov/operations/hidta> [<https://perma.cc/6NFS-8DC9>] (describing HIDTA Executive Boards). See generally PARENT ET AL., *supra* note 20, at 5–7 (describing RTO governance boards, including their structures and roles).

ecutive boards.⁷¹ The federal government issues top-down directives to a federally approved regional agency comprised of states or local governments and federal officials working together.⁷² This program allows counties in regions that experience large amounts of drug trafficking to form regional groups called HIDTAs. To establish a HIDTA, “a coalition of law enforcement agencies” from counties located within the proposed HIDTA must petition the federal government for approval.⁷³ The federal government then determines whether the HIDTA may be formed based on four statutory criteria.⁷⁴ Once established, each HIDTA engages in five main activities: (1) assessing the drug trafficking problem and its effects, such as opioid addiction and deaths; (2) developing a strategy; (3) identifying specific initiatives to carry out the strategy; (4) requesting funding for these initiatives; and (5) reporting on performance.⁷⁵ Each HIDTA has “discretion” to select the strategies and initiatives that best address the problems in its region,⁷⁶ but HIDTAs must meet federally estab-

⁷¹ See *Office of National Drug Control Policy*, THE WHITE HOUSE, <https://www.whitehouse.gov/ondcp/> [<https://perma.cc/5CXP-WHNM>] (describing the HIDTA program as “support[ing] collaborative Federal, state, local, and tribal law enforcement and public health efforts to . . . disrupt drug trafficking and production”); U.S. DEP’T OF JUST., FY 2019 BUDGET AND PERFORMANCE SUMMARY: DRUG ENFORCEMENT ADMINISTRATION 2, <https://www.justice.gov/jmd/page/file/1033151/download> [<https://perma.cc/4C6C-ZHL9>] (explaining that in 2019, the President transferred control over the HIDTA program from the Office of National Drug Control Policy to the Drug Enforcement Administration); *HIDTA*, *supra* note 70 (observing that Congress established the HIDTA program and that “[a]t the local level, the HIDTAs are directed and guided by Executive Boards composed of an equal number of regional Federal and non-Federal” law enforcement officers).

⁷² See *HIDTA*, *supra* note 70.

⁷³ EXEC. OFF. OF THE PRESIDENT OF THE U.S., HIGH INTENSITY DRUG TRAFFICKING AREAS (HIDTA) PROCESS FOR DESIGNATION—AN OVERVIEW 1 (2019).

⁷⁴ KRISTIN FINKLEA, CONG. RSCH. SERV., R45188, HIGH INTENSITY DRUG TRAFFICKING AREAS (HIDTA) PROGRAM 2 (2018), <https://fas.org/spp/crs/misc/R45188.pdf> [<https://perma.cc/YHK4-2C8Z>]. The statutory criteria include the extent to which (1) the proposed area “is a significant center of illegal drug” production and/or trafficking; (2) local “law enforcement agencies have committed resources to respond to the drug trafficking problem in the area”; (3) the drug-related activities are causing harm to the public; and (4) the “allocation of Federal resources is necessary to respond” to the drug trafficking problems in the area. *Id.* (quoting 21 U.S.C. § 1706(d)).

⁷⁵ *Id.* at 2–4 (describing the HIDTAs and their roles). There are currently thirty-three HIDTAs in operation in the United States. *ONDCP Recognizes Outstanding Counter-Drug Efforts by the High Intensity Drug Trafficking Areas Program*, OFF. NAT’L DRUG CONTROL POL’Y (Feb. 7, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/ondcp-recognizes-outstanding-counter-drug-efforts-high-intensity-drug-trafficking-areas-program/> [<https://perma.cc/K66Y-SQG6>].

⁷⁶ FINKLEA, *supra* note 74, at 4.

lished conditions to receive funding.⁷⁷ The federal government also works directly with HIDTAs. For example, federal law enforcement officers assist local and regional police in addressing trafficking, and federal law enforcement officials sit on HIDTA executive boards.⁷⁸

In another approach to regional cooperative federalism, the federal government delegates responsibilities to subfederal entities, but the subfederal agents are federally sanctioned, independent, and *private* regional institutions rather than groups of state and local governments or independent agencies comprised of federal and local government representatives. Regional transmission organizations that govern the operation of the electric grid appear to be the only example of this public-private form of regional cooperative federalism—albeit a prominent example.⁷⁹ In the grid context, the federal government strongly encourages the formation of RTOs that implement federal policies for the planning and operation of the grid and address state and electric utility demands for grid governance.⁸⁰ In order to form, the entities must meet a federally established set of conditions,

⁷⁷ See, e.g., *id.* at 9 (explaining that “there are specific restrictions on how HIDTA funding can be used for prevention and treatment activities” and noting other funding specifications).

⁷⁸ See *id.* at 4 (noting that “there must be an equal proportion of federal and nonfederal representatives” on a HIDTA Executive Board); U.S. DEP’T OF JUST., *supra* note 71, at 2 (“DEA currently participates in and coordinates with the various HIDTAs.”).

⁷⁹ Although RTOs appear to be the only public-private regional cooperative entity, they need not be. Take the HIDTA example from above. Imagine a scenario in which the federal government authorized the formation of independent opioid control organizations, led by individuals within nongovernmental organizations who are experts in crime control, drug trafficking, addiction, drug treatment, and emergency response. Other governance arrangements come very close to the RTO model, such as the Federal Reserve System’s regional Federal Reserve Banks. These banks seem somewhat closer to the federal regional administration model than the regional cooperative federalism model, in that they are in a sense branches of the Federal Reserve Board. See *About the Federal Reserve System*, BD. GOVERNORS FED. RSRV. SYS. (Sept. 10, 2021), <https://www.federalreserve.gov/aboutthefed/structure-federal-reserve-system.htm> [<https://perma.cc/FW5Y-Y972>] (explaining that there are “three salient features” of the Federal Reserve System: “(1) a central governing Board, (2) a decentralized operating structure of 12 Reserve Banks, and (3) a combination of public and private characteristics,” but noting that the Reserve Banks are under the direct supervision of the Board of Governors).

⁸⁰ See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540, 21,541, 21,549–50 (May 10, 1996) (to be codified at 18 C.F.R. pt. 35, 385) (reiterating a policy of encouraging the formation of regional entities similar to RTOs and issuing a final rule requiring public utilities to offer services on an open basis with respect to grid access because “consumers are demanding access to lower cost supplies . . . and access to the newer, lower cost generation resources”); Regional Transmission Organizations, 65 Fed. Reg. 810, 831 (Jan. 6, 2000) (to be codified at 18 C.F.R. pt. 35) (stating that FERC, “as a matter of policy, . . . strongly encourage[s] transmission owners to participate voluntarily in RTOs”).

and they must carry out specific federal directives.⁸¹ RTOs cover a territory that serves more than two-thirds of U.S. electric customers.⁸² As required by FERC, they must operate the grid on an open access basis, allowing any generators to use the grid's transmission infrastructure—i.e., electrical wires—on a first-come, first-served basis until space in the wires runs out.⁸³ They also must ensure that the rates charged for the use of the wires are just and reasonable, and they must regionally plan for the expansion and financing of new wires.⁸⁴ In order to carry out these federal policies, FERC issues a variety of orders that apply to RTOs and other grid operators. For example, RTOs and other grid operators must grant nontraditional generators access to the grid and to energy markets enabled by the grid.⁸⁵

RTOs highlight the extent to which regional cooperative federalism involves an “agency” that simultaneously addresses federal, state, and local policy demands.⁸⁶ Indeed, FERC orders require RTOs to address state policies, including, for example, state mandates that a

⁸¹ See *infra* notes 83–84 and accompanying text.

⁸² *Electric Power Markets*, FERC (July 20, 2021) <https://www.ferc.gov/industries-data/market-assessments/overview/electric-power-markets> [<https://perma.cc/K2TJ-YH8W>].

⁸³ See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. at 21,540–45.

⁸⁴ Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. 49,842, 49,842 (Aug. 11, 2011) (to be codified at 18 C.F.R. pt. 35).

⁸⁵ See Wholesale Competition in Regions with Organic Electric Markets, 73 Fed. Reg. 64,100, 64,103 (Oct. 28, 2008) (to be codified at 18 C.F.R. pt. 35) (requiring that demand response resources are granted “participation in organized energy markets” on effectively equal terms as other resources); Demand Response Compensation in Organized Wholesale Energy Markets, 76 Fed. Reg. 16,658, 16,659 (Mar. 24, 2011) (to be codified at 18 C.F.R. pt. 35) (requiring improved compensation for demand response providers). For another example of a directive, see, Interconnection for Wind Energy, 70 Fed. Reg. 34,993, 34,994–96 (June 16, 2005) (to be codified at 18 C.F.R. pt. 35) (requiring transmission line operators to establish uniform criteria for the grid interconnection of large wind energy). Demand response is nontraditional because it is energy nonuse, as opposed to generation, and it can be utilized by grid operators to directly displace generation by incentivizing consumers to use less electricity. See Demand Response Compensation in Organized Wholesale Energy Markets, 76 Fed. Reg. at 16,659 n.2 (“Demand response means a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy.” (citing 18 C.F.R. § 35.28(b)(4) (2010))); *id.* at 16,659 n.3 (“Demand response resource means a resource capable of providing demand response.” (citing 18 C.F.R. § 35.28(b)(5))).

⁸⁶ RTOs are nonprofit organizations, not agencies, but they function in a manner similar to agencies. See Dworkin & Goldwasser, *supra* note 33, at 552–53. Some sources describe them as “quasi-governmental organizations.” See, e.g., SIMEONE, *supra* note 20, at 2; Dworkin & Goldwasser, *supra* note 33, at 555–56 (noting that RTOs can be conceived of as “quasi-governmental organizations”).

certain percentage of electricity generated or consumed within the state must come from clean energy.⁸⁷

In some respects, the electric grid is a natural fit for regional cooperative federalism. The grid is physically interconnected and defies state lines, yet the owners of the grid are utilities governed by states. To further complicate matters, the federal government has jurisdiction over the operation of the electric grid, while the states regulate the siting of electric transmission lines and the generators that use the regionally shared grid.⁸⁸ This mishmash of state, regional, and federal involvement essentially requires an alternative to pure top-down or bottom-up control. Indeed, early regionalism scholars projected that electric transmission would be one area in which regional governance would be necessary.⁸⁹ And nearly sixty years later, formally organized regional institutions began to emerge and now cover the bulk of the United States.⁹⁰

⁸⁷ See *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 76 Fed. Reg. 49,842, 49,845–46, 49,849 (Aug. 11, 2011) (requiring regional planning for transmission lines and specific consideration of “transmission needs driven by Public Policy Requirements,” such as state renewable energy mandates).

⁸⁸ See 16 U.S.C. § 824(b)(1) (“The Commission shall have jurisdiction over all [interstate] facilities for such transmission or sale of [wholesale] electric energy, but shall not have jurisdiction . . . over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce”); Alexandra B. Klass & Elizabeth J. Wilson, *Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch*, 65 VAND. L. REV. 1801, 1814–15 (2012) (describing state authority over transmission line siting under the Federal Power Act).

⁸⁹ Frankfurter & Landis, *supra* note 8, at 714 (“[T]he problems of transmission are not capable of being drawn completely within the area of solution by Congress”). Frankfurter and Landis further observed that “some co-ordination of policy between these State-wide transmission systems and interstate transmission will call for a mechanism of control regional and not merely State-wide in its operation” would be needed “in order to secure interconnection, exchange and distribution of power.” *Id.*

⁹⁰ FERC began to strongly encourage the formation of institutions similar to RTOs as early as 1993 when it issued its “Regional Transmission Group Policy Statement,” and it reiterated that encouragement in FERC Order No. 888 in 1996. See *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 61 Fed. Reg. 21,540, 21,549 (May 10, 1996) (“In the RTG Policy Statement, the Commission announced a policy encouraging the development of RTGs.”); *id.* at 21,548 n.82 (defining an RTG as “a voluntary organization of transmission owners, transmission users, and other entities interested in coordinating transmission planning (and expansion), operation and use on a regional [basis]” (quoting *Policy Statement Regarding Regional Transmission Groups*, 58 Fed. Reg. 41,626 (Aug. 5, 1993))). FERC further encouraged the formation of RTOs in early 2000. See *Regional Transmission Organizations*, 65 Fed. Reg. 810, 831 (Jan. 6, 2000).

C. Choosing Among Regional Governance Forms

One might argue that RTOs are an anachronism, and that regional cooperative federalism is unlikely to extend beyond this unique context. RTOs are, after all, somewhat unique in that they involve regionally connected wires over which the federal government and states have jurisdiction.⁹¹ But there are many areas with similar features. Take the opioid context—one of the few other areas in which regional cooperative federalism already exists.⁹² Here, the federal government has strong jurisdictional authority over activity such as opioid trafficking that occurs over shared highways.⁹³ Yet states and local governments have similarly powerful authority and policy interests in the areas of emergency response, hospital funding and operations, and welfare, all of which are affected by the opioid crisis.⁹⁴

There are several characteristics of a particular policy area that point to regional cooperative federalism as a superior governance approach to address that area, as compared to the many other potential regional governance forms. As identified in other accounts investigating regional governance regimes, these include powerful jurisdictional interests of both federal and state governments, and policy challenges shared across state borders.⁹⁵ But additional characteristics of a given policy area make regional cooperative federalism, in particular, a potentially better fit. These include: (1) negative spillovers among states, which are likely best addressed by a top-down federal entity influencing the regional agency's work; (2) the need for specific, collective technical expertise in formulating policy, which will often call for the inclusion of individuals working outside of government who possess that expertise, rather than just federal and state representatives; and

⁹¹ See Shelley Welton, *Electricity Markets and the Social Project of Decarbonization*, 118 COLUM. L. REV. 1067, 1079–80 (2018) (describing the varying geographical reach of RTOs and federal governmental involvement in RTOs); Welton, *supra* note 20, at 231–32 (describing RTOs' and the states' role in transmission policy); Osofsky & Wiseman, *supra* note 55, at 47–54 (describing RTOs as “hybrid” organizations that bridge local, state, regional, and federal lines of authority).

⁹² See *supra* notes 71–72 and accompanying text.

⁹³ See *United States v. Ballinger*, 395 F.3d 1218, 1225–26 (11th Cir. 2005) (citing various cases and noting that the Supreme Court has characterized interstate highways as a channel of interstate commerce subject to federal authority).

⁹⁴ See generally, e.g., Elizabeth Y. McCuskey, *Body of Preemption: Health Law Traditions and the Presumption Against Preemption*, 89 TEMP. L. REV. 95, 123–41 (2016) (describing state and federal authority with respect to hospitals, providers, public health, and other health related areas, and noting a substantial regulatory role for the states).

⁹⁵ See Owen & Wiseman, *Coequal Federalism*, *supra* note 11, at 323.

(3) the importance of providing a federal “check” or backstop on the actions of the agency due to important federal authority in the area.

With some qualifications, these factors are present in the policy spheres in which regional cooperative federalism governance arrangements predominate. In the case of HIDTAs, opioid trafficking among states has clear spillover effects, tackling this trafficking is a complex endeavor, and federal oversight is needed simply because the federal government provides the majority of funding for the policies carried out within HIDTAs.⁹⁶ In the case of RTOs, electricity physically crosses state lines through interconnected wires,⁹⁷ the constant balancing of supply and demand required to maintain a specific voltage within these wires is technically challenging, and FERC operates under a mandate from Congress to govern the transmission of electricity in interstate commerce. It is unlikely that FERC could fully delegate its authority to a regional agency and thereby forfeit its ability to review the agency’s action.⁹⁸

That said, FERC’s review of RTOs is somewhat limited. Take, for example, the D.C. Circuit’s decision in *NRG Power Marketing v. FERC*.⁹⁹ In that case, the RTO PJM Interconnection (“PJM”) had proposed a specific design for its capacity auctions, which are competitive markets in which generators bid to provide generation infrastructure, or alternatives to generation, if electricity is needed in the future.¹⁰⁰ As part of this design, PJM set a minimum price at which generators were required to bid into the auction.¹⁰¹ This was purportedly an attempt to prevent artificially low bids—by generators that receive state subsidies and can afford to bid at a very low price, for example—that could crowd out other market entrants.¹⁰² Based on consensus from stakeholders, PJM proposed two modifications to the

⁹⁶ See FINKLEA, *supra* note 74, at 4–6 (describing the federal funding structure for HIDTAs).

⁹⁷ U.S. DEP’T OF ENERGY, NATIONAL TRANSMISSION GRID STUDY 2 (2002) <https://www.ferc.gov/sites/default/files/2020-04/transmission-grid.pdf> [<https://perma.cc/Y6UE-NBG6>] (describing the major U.S. grid interconnections).

⁹⁸ See 16 U.S.C. § 824b(a)(4) (requiring FERC to authorize any “proposed disposition, consolidation, acquisition, or change in control” of transmission facilities by a public utility “if it finds that the proposed transaction will be consistent with the public interest”); *id.* § 824b(b) (“The [FERC] may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the [FERC].”).

⁹⁹ 862 F.3d 108 (D.C. Cir. 2017).

¹⁰⁰ See *id.* at 111–12.

¹⁰¹ *Id.* at 112.

¹⁰² See *id.* at 111–12.

minimum offer price rule, including creating categorical exemptions from the rule for certain generators and an extension of the time for which the rule applied to generators.¹⁰³ PJM sought FERC approval of this rule, and FERC proposed modifications to the rule, including a requirement that some generators be able to avoid the rule through individual approval, called “unit-specific review.”¹⁰⁴ FERC also proposed to eliminate the extension of the application of the rule.¹⁰⁵ PJM agreed to these changes, and FERC approved the rules.¹⁰⁶

Several generators sought judicial review, arguing that FERC had impermissibly set a new rate rather than approving a rate, which was impermissible under FERC’s governing statute. The D.C. Circuit, in an opinion authored by then-Judge Kavanaugh, agreed, concluding that the statute does not allow FERC to impose an “entirely different rate design” on an RTO.¹⁰⁷ Notably, the court viewed FERC as setting a new rate despite the fact that FERC allowed PJM to maintain the categorical exemptions that it had originally proposed.¹⁰⁸ While the need for federal influence in the electricity grid context is no less present after *NRG Power Marketing*, it is worth noting the limits on that influence that apply within the RTO regional cooperative federalist sphere.

An in-depth analysis of RTOs—the most prevalent form of regional cooperative federalism—allows for a more concrete understanding of the design and operation of regional cooperative federalism and the strengths and weaknesses of this governance form.

II. FUNCTIONAL FEDERALISM: ACHIEVING THE VALUES OF FEDERALISM BEYOND GEOPOLITICAL LINES

By and large, federalism scholars view states as the essential bearers of federalism values.¹⁰⁹ This intense focus on political subunits ig-

¹⁰³ *Id.* at 112–13.

¹⁰⁴ *Id.* at 114.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 115 (quoting *W. Res., Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993)).

¹⁰⁸ *Id.* at 116 (concluding that “FERC’s modifications *expanded* the exemptions by layering the two new exemptions on top of unit-specific review, and by exempting certain new generators from the price floor after one year instead of after three years” and categorizing the modifications as an entirely new rate, which FERC could not impose on the RTO despite the RTO’s agreeing to the rate).

¹⁰⁹ *See, e.g.*, Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1550 (2012) (noting that federalism scholars “typically divide into camps,” but in describing the camps, observing that all camps favor some form of state power). Some accounts pull in local governments, too. *See generally, e.g.*, Nestor M. Davidson, *Cooperative Localism: Federal-Local*

nores the functionalist undertones of most federalism values. Many of the purported benefits of federalism arise simply from decentralization, which diffuses governance responsibilities to a lower level.¹¹⁰ The smaller the entities, and the more numerous these entities are, the more likely it is that they will respond more effectively to diverse stakeholder demands, offer varied policies from which voters may choose, experiment with a wider variety of policies, and better represent varied constituent interests.¹¹¹ But the formation of numerous governmental institutions operating below the national level does not require any one particular form of political subunit—or even a *political* unit at all, as evidenced by private nonprofit RTOs that govern much of the electric grid.¹¹² In other words, federalism, in which a *governmental* entity separate from the federal government exercises some degree of independent sovereign authority, is not a prerequisite to decentralization.¹¹³

Rather than rely on states to implement national policies, the federal government can simply enlist large numbers of federal agents to make localized policy decisions, through regional or even smaller offices.¹¹⁴ But there is a further step toward decentralization, in which the government relies on independently formed regional entities to implement national policies. RTOs, which are private, nonprofit governing entities, and which owe their existence to approval by a federal

Collaboration in an Era of State Sovereignty, 93 VA. L. REV. 59 (2007) (discussing the roles of the federal government and local governments in policy areas of national concern); Laurie Reynolds, *A Role for Local Government Law in Federal-State-Local Disputes*, 43 URB. LAW. 977 (2011) (citing Davidson, *supra*).

¹¹⁰ See MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 20 (2008).

¹¹¹ This concept of decentralization is also described as subsidiarity. *E.g.*, Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 382 (2004) (“[S]ubsidiarity maintains that all governmental tasks are best carried out at the level closest to those affected by them.”).

¹¹² The economist Charles Tiebout has written that “fiscal federalism” can be theoretically analyzed to “neutralize political variables” by “arrang[ing] governments solely on the basis of economic efficiency.” Charles M. Tiebout, *An Economic Theory of Fiscal Decentralization*, in *PUBLIC FINANCES: NEEDS, SOURCES, AND UTILIZATION* 79, 79 (Nat’l Bureau of Econ. Rsch. ed., 1961). Tiebout theorized a world in which “no states, counties, metropolitan authorities” and the like had yet formed, faced with the new task of organizing “the provision of public goods.” *Id.* In light of differences in the benefits of public goods, Tiebout explored the size of the governing units that would likely emerge to provide these goods. *Id.* at 80.

¹¹³ See FEELEY & RUBIN, *supra* note 110, at 20–21 (distinguishing federalism from decentralization); *cf.* Lobel, *supra* note 111, at 382 (describing *decentralization*, rather than mere federalism, as promoting “diversity, competition, and experimentation”).

¹¹⁴ See Bulman-Pozen, *supra* note 5, at 388–92 (providing examples of federal government operations at the regional and local levels); Owen, *supra* note 11, at 65–67 (same).

agency (e.g., FERC), highlight the government's ability to skirt the confining boundaries of existing political subunits when decentralizing governance.¹¹⁵ As explored here, in some respects these subunits better achieve the purported benefits of federalism than states or a traditional cooperative federalist regime would. In other respects, however, there are weaknesses in the RTO model of regional governance that constrain its current ability to achieve the traditional benefits of federalism.

A. *Measuring Benefits*

The effort to construct a framework for normative analysis of regional cooperative federalism systems requires, of course, defining virtues. The sections below use the oft-cited virtues of federalism—experimentation and innovation, efficiency, and accountability—as means of comparing regional cooperative federalism with other approaches. As explored in this Part, the case studies of regional cooperative federalism approaches point to several factors that suggest that regional cooperative federalism achieves some of the core, commonly cited benefits of federalism more clearly than traditional federalism or cooperative federalism would. The primary mode of analysis deployed here is to compare RTO action to that of individual states operating under the “pure federalism” model, or individual states implementing a federal mandate, as they do under the cooperative federalism model. This comparison is possible because only two-thirds of the U.S. population lives within an RTO area, so for a given issue area, one can compare grid governance approaches in RTOs with approaches in states.¹¹⁶

In some respects, individual states operating under something closer to a pure federalism model have been more innovative, accountable, and efficient—in terms of addressing diverse demands of constituents—than RTOs, as discussed below. But RTOs generally perform quite well in comparisons between RTOs and traditional cooperative federalism. For example, as explored further below, FERC requires all utilities to engage in regional and interregional planning for new transmission lines that are needed for reliability and for ad-

¹¹⁵ RTOs are nonprofit organizations and are thus private, not public entities. *See supra* note 86. Yet in nearly all senses of the word, they set policy. *See Welton, supra* note 20, at 233 (noting that RTOs are effectively “policy-making bodies”); *see also supra* Section I.B (describing the purpose of RTOs and their general activities).

¹¹⁶ *See supra* note 82 and accompanying text.

dressing state policies, including renewable energy policies.¹¹⁷ Utilities in many areas outside of RTOs have performed abysmally in this area, whereas some RTOs have planned for and spurred the construction of substantial new interstate transmission line mileage.¹¹⁸

Comparing the performance of one type of regional cooperative federalist arrangement—the RTO—to other *existing* governance arrangements is somewhat limited, however, in that it fails to address how a governance regime could perform even better in terms of providing innovative, responsive, diverse policies for the electric grid. This Part addresses both strengths and some deficiencies in the RTO governance model, while Part III explores how RTOs or alternative governance approaches could better achieve these values.

B. *Experimentation and Innovation*

Proponents of federalism frequently argue that the devolution of authority to subfederal governments spurs innovation and experimentation in the policy sphere.¹¹⁹ When a federal government gives lower-level authorities the space to achieve a policy goal, the assumption is that these authorities will develop more creative, diverse, and potentially effective approaches than would one centralized entity.¹²⁰

There are many holes in this “laboratory of the states” theory.¹²¹ These include, for example, the fact that state and local government

¹¹⁷ Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. 49,842 (Aug. 11, 2011).

¹¹⁸ See *infra* note 181 and accompanying text.; cf. MASS. INST. OF TECH., THE FUTURE OF THE ELECTRIC GRID 43 (2011), <https://energy.mit.edu/wp-content/uploads/2011/12/MITEI-The-Future-of-the-Electric-Grid.pdf> [<https://perma.cc/VQL5-MFQN>] (commending MISO for a regional planning process that could serve as a model for effective interregional planning); Paul L. Joskow, Transmission Policy in the United States 48–49 (Oct. 1, 2004) (unpublished manuscript), <https://economics.mit.edu/files/1178> [<https://perma.cc/LH7U-QSC3>] (concluding that PJM has a “reasonably good system . . . for supporting merchant transmission projects that enhance interconnection capacity between PJM and neighboring control areas,” unlike other parts of the United States, but noting a lack of a systemic process in PJM or other RTOs to identify needed interregional connections). *But see* MASS. INST. OF TECH., *supra*, at 84 (noting that the Western Electricity Coordinating Council (“WECC”), which is not an RTO or ISO, has “long been a leader in wide-area transmission planning”). The existence of an RTO or ISO, in other words, is not a necessary precondition to the success of broad scale transmission planning. What does seem to be essential is the existence of some sort of umbrella organization that spans states and coordinates the planning. In the case of the West, the WECC is a federally regulated entity responsible for ensuring the reliability of the transmission grid. *Id.*

¹¹⁹ For a collection of authorities propounding this view, see, for example, Hannah J. Wiseman, *Regulatory Islands*, 89 N.Y.U. L. REV. 1661, 1663 n.1 (2014).

¹²⁰ See *supra* note 17 and accompanying text.

¹²¹ Justice Louis Brandeis first popularized the term “laboratory of the states” in 1932. See *infra* note 223 and accompanying text. For an in-depth discussion of the deficiencies of the the-

officials are often risk averse and unlikely to innovate.¹²² Government officials might simply copy each other rather than develop diverse approaches. Indeed, any official that innovates produces a nonexcludable, nonrival public good that is easily stolen by other governments, thus dampening incentives to be a first mover in the policy space.¹²³ Even if government officials do take the plunge and experiment with new policy, this innovation is nothing close to a coordinated experiment, but rather creates a haphazard patchwork of policies.¹²⁴

As to the latter problem of a lack of real experimentation, diverse policy efforts to address one centralized mandate or goal would be more effective if conducted in a manner that tested possible alternative approaches and measured the results, producing lessons for all governments to build from.¹²⁵ Furthermore, haphazard experimentation by local governments or states can lead to problematic externalities that cross state or local lines.¹²⁶ The highly varied state and local response to the COVID-19 pandemic illustrates the massive social costs of messy experimentation by individual, relatively uncoordinated governments in a policy area that is simultaneously local, regional, and national in scope.¹²⁷

Regional cooperative federalism addresses many of these problems in the policy experimentation sphere, including spurring in-

ory and citations to many other of its critics, see Wiseman & Owen, *Federal Laboratories of Democracy*, *supra* note 11, at 1122 n.5, 1136–45, and Wiseman, *supra* note 119, at 1664–68.

¹²² See, e.g., Rose-Ackerman, *supra* note 18, at 594; Galle & Leahy, *supra* note 18, at 1360–61 (concluding that the assumption that subfederal entities are unlikely to innovate due to free riding is largely supported by the evidence, with some exceptions).

¹²³ See Rose-Ackerman, *supra* note 18, at 605. *But see id.* at 605 n.20 (noting some general caveats to this conclusion).

¹²⁴ See *infra* notes 169–70, 178, and accompanying text. Some might argue that Justice Brandeis did not intend for “real” or rigidly scientific experiments, but his language implies at least some expectation of a scientific approach to policy experimentation. See Althouse, *supra* note 17, at 1751.

¹²⁵ See, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 288, 345 (1998) (proposing design elements for rigorous policy experimentation through a federalist system); Wiseman & Owen, *Federal Laboratories of Democracy*, *supra* note 11, at 1161–67 (exploring the design features of more effective policy experimentation).

¹²⁶ Cf. Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1212 (1977) (proounding the race to the bottom theory in which states refrain from adopting potentially socially beneficial regulations for fear of losing “industry and commerce” to other states).

¹²⁷ See, e.g., Sarah Mervosh, *How West Virginia Became a U.S. Leader in Vaccine Rollout*, N.Y. TIMES (Feb. 8, 2021), <https://www.nytimes.com/2021/01/24/us/west-virginia-vaccine.html> [<https://perma.cc/757D-5R2E>] (noting that “many states are struggling to hand out the shots that the federal government has provided to them” and “widespread logistical problems” in the rollout of vaccines).

novation, coordinating policy experimentation, and avoiding some of the cross-state externalities of individual experiments.

1. *Spurring Policy Risk Taking and Coordinating Experiments*

Two recent energy challenges highlight the distinct ability of regional cooperative federalism to spur innovation. First, there is growing demand for grid operators to integrate larger amounts of renewable energy on the grid.¹²⁸ Second, and relatedly, operators must maintain grid reliability despite the presence of more variable, intermittent resources on the grid, meaning that they must supply enough power to match demand at all times and avoid outages.¹²⁹ The need to enhance reliability measures has become more urgent as regions increasingly experience extreme weather and other events, such as wildfire.¹³⁰

a. *Innovative Measures for Integrating Renewable Energy*

With regards to the imperative of integrating large amounts of renewables to address climate change, air pollution, and other impacts of fossil fuels, individual states have, in some respects, been more innovative than regional organizations or the federal government. Take the example of Texas, which has its own nonregional RTO.¹³¹ Texas leads the nation in the production of wind energy; it accomplished this by mandating the construction of transmission lines leading from windy areas to large population centers.¹³² And other states, acting within their individual authority to control the energy generation mix, have promoted renewable electricity generation by requiring the con-

¹²⁸ See, e.g., DSIRE, RENEWABLE AND CLEAN ENERGY STANDARDS (2020), <https://s3.amazonaws.com/ncsolarcen-prod/wp-content/uploads/2020/09/RPS-CES-Sept2020.pdf> [<https://perma.cc/SU7K-BBVQ>] (summarizing state clean energy standards that mandate that 100 percent of energy in the state come from clean (zero-carbon) energy within several decades).

¹²⁹ N. AM. ELEC. RELIABILITY CORP., 2021 ERO RELIABILITY RISK PRIORITIES REPORT 22 (2021), https://www.nerc.com/comm/RISC/Documents/RISC%20ERO%20Priorities%20Report_Final_RISC_Approved_July_8_2021_Board_Submitted_Copy.pdf [<https://perma.cc/VAZ2-2M5G>].

¹³⁰ *Id.* at 26.

¹³¹ See *Electric Power Markets*, *supra* note 82 (describing ERCOT as “an independent system operator, managing the flow of electrical power to 24 million customers in the state of Texas”).

¹³² See *Texas Ranks First in U.S.-Installed Wind Capacity and Number of Turbines*, U.S. ENERGY INFO. ADMIN. (July 31, 2019), <https://www.eia.gov/todayinenergy/detail.php?id=40252> [<https://perma.cc/ZGD6-ALWU>]; JULIE COHN & OLIVERA JANKOVSKA, TEXAS CREZ LINES: HOW STAKEHOLDERS SHAPE MAJOR ENERGY INFRASTRUCTURE PROJECTS 12–13 (2020), <https://www.bakerinstitute.org/media/files/files/eb251d15/ces-pub-texascrez-111720.pdf> [<https://perma.cc/2S2X-UP6D>].

struction of large amounts of clean energy capacity.¹³³ But most of these latter states have not yet succeeded in individually ensuring that there will be adequate transmission infrastructure to support this new clean energy; multistate RTOs such as the Midcontinent ISO (“MISO”) and Southwest Power Pool (“SPP”) have had more success in this area by planning for the construction of transmission infrastructure across state lines.¹³⁴ Indeed, to support the net-zero carbon emissions goals that a growing number of states have committed to, the existing mileage of U.S. transmission lines would have to expand dramatically.¹³⁵ Without some regional coordination and planning—as has occurred through RTOs—it seems unlikely that states will accomplish this. Indeed, although Congress has created a formal option for states to enter into transmission siting compacts to plan for the siting of transmission infrastructure across state lines, no states have taken up this option.¹³⁶

The challenges of relying on individual states, under a traditional federalism framework, to plan for and approve a massive new net-

¹³³ See DSIRE, *supra* note 128 (showing states with policies setting standards that require a certain percentage of the state’s electricity to come from renewable or other low-carbon energy sources).

¹³⁴ See, e.g., Alexandra B. Klass & Jim Rossi, *Reconstituting the Federalism Battle in Energy Transportation*, 41 HARV. ENV’T L. REV. 423, 464–70 (2017) (discussing states’ blocking of the Plains & Eastern Clean Line transmission project and federal efforts to overcome these barriers); Jeff St. John, *7 Transmission Projects that Could Unlock a Renewable Energy Bounty*, GREENTECH MEDIA (Apr. 9, 2020), <https://www.greentechmedia.com/articles/read/9-transmission-projects-laying-the-paths-for-cross-country-clean-energy> [<https://perma.cc/J5AU-D6YD>] (describing one successful transmission line project to support renewable energy that would extend from Wyoming to the West Coast and state based hurdles faced by other major projects); JOSEPH H. ETO, LAWRENCE BERKELEY NAT’L LAB’Y, BUILDING ELECTRIC TRANSMISSION LINES: A REVIEW OF RECENT TRANSMISSION PROJECTS (2016), <https://eta-publications.lbl.gov/sites/default/files/lbnl-1006330.pdf> [<https://perma.cc/M5VH-ABQJ>] (summarizing barriers to transmission lines that cross state lines); *infra* notes 160–78 and accompanying text (describing relatively successful planning for new transmission lines by SPP and MISO).

¹³⁵ See ERIC LARSON ET AL., PRINCETON UNIV., NET-ZERO AMERICA: POTENTIAL PATHWAYS, INFRASTRUCTURE, AND IMPACTS 17 (2020), https://environmenthalfcenury.princeton.edu/sites/g/files/toruqf331/files/2020-12/Princeton_NZA_Interim_Report_15_Dec_2020_FINAL.pdf [<https://perma.cc/AW38-ZK3Y>] (showing eleven states that have committed to attaining net-zero carbon emissions by the year 2050); *id.* at 106 (noting the need to expand existing transmission infrastructure by approximately sixty percent by the year 2030 and expand even further by 2050 in order to reach zero-carbon goals in the United States).

¹³⁶ See Alexandra B. Klass, *The Electric Grid at a Crossroads: A Regional Approach to Siting Transmission Lines*, 48 U. CAL. DAVIS L. REV. 1895, 1946 (2015) (“[The Energy Policy Act of 2005, § 216(i), 16 U.S.C. § 824p(i),] allows three or more contiguous states to enter into interstate compacts to establish regional siting authorities to determine the need for future transmission facilities within those states and carry out the transmission siting responsibilities of those states.”); *id.* at 1947 (“To date, no states have entered into such compacts and there is currently no real incentive for them to do so.”).

work of transmission lines arise from several sources. Beyond the most obvious hurdle in the form of transaction costs of coordinating across state lines, there are high barriers to state innovation—perhaps in particular when one state’s decision to implement more transmission lines could simply be thwarted by a neighboring state’s decision not to continue those lines within its territory.

Indeed, despite the assumption that decentralization naturally spurs innovation and experimentation in the policy realm, there is strong evidence suggesting that government officials are hesitant to innovate. In addition to the free rider potential noted above, taking a risky and unusual stance on a particular policy issue could pay off in terms of reelection, but it could also backfire if the policy approach proved to be suboptimal—or optimal, but unpopular with voters.¹³⁷ Innovation also requires resources in the form of funding, staff, and time, which simply are not available to many governments—especially smaller governments.¹³⁸ Governments need safe spaces to innovate, and regional cooperative governance can create these spaces and provide the coordination among innovators that is necessary in the transmission planning context.

Indeed, FERC, which oversees RTOs, sometimes requires innovation as part of its delegation of authority to these regional institutions, albeit not always successfully. For example, in the transmission context, FERC—the federal entity in charge of regulating the reliability and use of the U.S. interstate transmission system—has set a federal policy requirement of ensuring a reliable grid through regional and interregional transmission planning.¹³⁹ Under this mandate—called Order No. 1000—entities that operate transmission lines must plan for new transmission lines to ensure that adequate generation will be available for customers and that all customers will benefit from new wires.¹⁴⁰ Regional planning entities also must address individual state generation policies, such as requirements that large percentages of energy in a state come from renewable energy, by, for example,

¹³⁷ See Rose-Ackerman, *supra* note 18, at 605, 614 (noting that insecure incumbent politicians in a system of monolithic government—assuming no potential movement of state politicians to a federal political positions—may be willing to take higher risks that might pay off with large voter net benefits, whereas secure incumbents are unlikely to do so).

¹³⁸ See *id.* at 611 (explaining that voters “have no reason to support a local government that spends large amounts of money on risky [policy] projects”); Galle & Leahy, *supra* note 18, at 1349.

¹³⁹ See Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. 49,842 (Aug. 11, 2011).

¹⁴⁰ See *id.* at 49,845.

considering the need to plan for and finance new transmission lines to support renewable energy.¹⁴¹ Beyond mandating that transmission plans address new state policies, this federal directive also encourages policy innovation by aiming to ensure that transmission lines selected in the planning process are “the more efficient or cost-effective solutions available.”¹⁴²

This is not to say, however, that Order No. 1000, mandating inter-regional transmission planning, has met uniform success. Indeed, recent commentators observe that the large regional and interregional transmission projects envisioned by Order No. 1000 were largely built *before* the order’s promulgation.¹⁴³ They conclude that the order may have even stifled these types of projects—the very type that the order hoped to expand—by imposing “bureaucratic planning requirements on the national transmission system.”¹⁴⁴

Despite the significant limitations of Order No. 1000, FERC also explicitly encourages RTO policy innovation in several other areas. Constructing new transmission lines is important in terms of allowing more renewable energy to come online, decreasing wholesale electricity costs by further diversifying the generation mix, and improving reliability.¹⁴⁵ When FERC pushed for the formation of RTOs through Order No. 2000, it expressly “encourage[d] RTOs to develop and propose innovative ratemaking practices” to finance the construction of new transmission lines.¹⁴⁶ In supporting this type of policy, FERC created an approval process for “innovative transmission rate treatments” that would authorize RTOs to depart from the agency’s traditional transmission pricing requirements.¹⁴⁷ Through this process, FERC aimed to allow for more flexible strategies, in part to improve

¹⁴¹ See *id.* at 49,857 (noting the need for regional planning requirements arises in part because “regional transmission planning could better identify transmission solutions for reliably and cost-effectively integrating location-constrained renewable energy resources needed to fulfill . . . the renewable portfolio standards adopted by many states”).

¹⁴² *Id.* at 49,846.

¹⁴³ See, e.g., Tony Clark, *Order No. 1000 at the Crossroads: Reflections on the Rule and Its Future* 1 (2018), wbklaw.com/uploads/file/Articles-%20News/2018%20articles%20publications/WBK-%20TC-Order%201000%20whitepaper%20Final.pdf (“[M]ajor transmission projects of the kind that many thought the order would spur came out of a pre-Order No. 1000 world.”).

¹⁴⁴ *Id.*

¹⁴⁵ See *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 76 Fed. Reg. at 49,851.

¹⁴⁶ *Regional Transmission Organizations*, 65 Fed. Reg. 810, 913 (Jan. 6, 2000).

¹⁴⁷ *Id.* at 913–14.

policy, but also largely to lure new transmission line owners into RTOs, thus expanding their reach and benefits.¹⁴⁸

Within Order No. 2000, FERC additionally both required and encouraged new RTOs to adopt certain principles into their approved rate tariffs, required RTOs to offer the transmission lines on an open access basis, and included other service-based and rate-based requirements. The principles required by Order No. 2000 are among the transmission pricing practices labeled as relatively “innovative” by FERC.¹⁴⁹ These principles included, among others, a prohibition against RTOs adopting tariffs that result in “rate pancaking.”¹⁵⁰ This phenomenon “occurs when electricity is scheduled across more than one transmission provider’s borders and each provider assesses full or partial transmission charges for the use of the transmission facilities they manage”; it results in inefficient “duplicate transmission fees” being charged to a single customer.¹⁵¹ Similar to prohibiting rate pancaking, FERC also encouraged RTOs to waive charges that typically apply when electricity crosses a border between two RTOs.¹⁵² This was designed to improve the ability of utilities and generators to more easily send electricity long distances, over lines operated by different RTOs.¹⁵³

Pure cooperative federalism, in which the federal government allows states to innovate while working to accomplish a federal goal, can and sometimes does spur policy innovation, too.¹⁵⁴ But the inclusion of a regional entity also provides coordination among individual jurisdictions that can avoid other problems associated with experimentation and innovation, such as interstate spillovers. Furthermore,

148 *See id.* at 914 (explaining that FERC was not attempting “to ‘bribe’ transmission-owning utilities to join an RTO,” but was aiming “to capture significant net benefits from promoting competitive generation markets”).

149 *See id.* at 913–14 (encouraging “RTOs to develop and propose innovative ratemaking practices” and providing incentives for “innovative transmission rate treatments”).

150 *Id.* at 915.

151 SW. POWER POOL, RATE PANCAKING AND UNRESERVED USE STUDY 3 (2019), https://www.misostates.org/images/stories/Seams_Coordination_Efforts/Market_Monitor_Study_on_Rate_Pancaking.pdf [<https://perma.cc/FQ5H-ECXM>].

152 Regional Transmission Organizations, 65 Fed. Reg. at 916.

153 *Id.*

154 *See generally, e.g.,* Adelman & Engle, *supra* note 11 (noting state leadership in climate policy innovation). Professor Susan Rose-Ackerman has also identified ways in which independent innovation can occur. For example, she has explored the promise of federal intervention in the form of prizes or other monetary incentives for lower-level governments to innovate within the pure cooperative federalism model. *See* Rose-Ackerman, *supra* note 18, at 615–16. As described above, cooperative federalism can provide both federal mandates and incentives for innovation.

states working together through regional entities might develop more effective policy solutions, particularly when the policy problem they address is not state specific. This is the case with electric transmission because the transmission network crosses multiple state lines, and electricity is not confined to state borders.¹⁵⁵ Indeed, in the case of RTOs, many of the key stakeholders are multistate corporations that would prefer to operate beneath uniform policies that apply across state lines.¹⁵⁶ This tends to drive RTOs toward decisions that transcend artificial boundaries and the externalities that state-by-state policies—such as limitations on the construction of interstate transmission lines—can create.

Effective innovation and risk taking within regional cooperative federalism are perhaps best demonstrated by recent RTO-led planning processes for the construction of massive new transmission networks.¹⁵⁷ Because regionalism is critical in the electricity transmission context, in parts of the country where RTOs operate, these RTOs have led the regional and interregional planning process mandated by FERC.¹⁵⁸ A limited number of RTO initiatives have been even more ambitious than the planning requirement demands, although typically only within each RTO's region, not between regions. For example, MISO, which covers a territory spanning fifteen states and one Canadian province,¹⁵⁹ proposed and is now implementing a regional plan of “Multi-Value Projects” (“MVPs”).¹⁶⁰ The projects are “multi-value” because, by expanding transmission lines in targeted areas, they improve the reliability of the electricity system and allow more wind energy to come online, thus helping states meet renewable energy

¹⁵⁵ *Electric Power Markets*, *supra* note 82 (showing regional electricity markets).

¹⁵⁶ The presence of such large, multistate stakeholders, however, risks capture of the process. See Welton, *supra* note 20, at 256, 270–71 (noting how the existence of “mega-holding companies” in the energy industry allows for corporate energy conglomerates to hold large voting sway in RTO governance and predicting that “heavyweight corporations with holdings that cut across . . . sectors will continue to have the ability to manipulate votes toward their best interest”).

¹⁵⁷ See *infra* notes 160–69, 175–78, and accompanying text.

¹⁵⁸ See Order Instituting Section 206 Proceedings, 169 FERC ¶ 61,054, at 1–3 (Oct. 17, 2019) (preliminary) (noting that RTOs must demonstrate compliance with Order No. 1000).

¹⁵⁹ See *Interregional Coordination*, MISO, <https://www.misoenergy.org/planning/interregional-coordination/> [<https://perma.cc/P3VF-H4J3>] (showing a map of the areas in which MISO operates).

¹⁶⁰ See generally *Multi-Value Projects (MVPs)*, MISO, <https://www.misoenergy.org/planning/planning/multi-value-projects-mvps/#nt=%2Fmultivalueprojecttype%3AMVP%20Triennial%20%20Reviews&t=10&p=0&s=FileName&sd=desc> [<https://perma.cc/KGT8-V8TH>] (describing MISO's MVPs and the process for reviewing and implementing them).

mandates and allowing for the delivery of low cost wind energy to more customers.¹⁶¹

When MISO began the process of regional planning, it did so primarily because many of the individual MISO states had renewable energy mandates.¹⁶² Some states also had—and continue to maintain—specific clean energy or carbon standards that limit carbon emissions within the states.¹⁶³ In other words, states within MISO’s territory were experimenting with renewable energy policy, putting in place diverse requirements that impacted the demand for construction of new renewable energy generation capacity in each state, how much of that renewable energy had to be “local,” i.e., in state, and so on. States likely would not have achieved their renewable and clean energy goals without the help of regional grid planning. This is because new renewable generation typically requires new transmission lines to carry the generation to areas with large numbers of electricity centers, or “load centers” in industry parlance.¹⁶⁴

MISO could have simply identified the new generation resources required by states’ renewable portfolio standards and conducted a straightforward mapping effort to identify areas where new transmission lines would connect to planned renewable generation. Instead, MISO carefully analyzed the tradeoffs of building more wind generation infrastructure close to customers versus less generation infrastructure—and more transmission infrastructure—farther from customers in windier areas.¹⁶⁵ MISO used sophisticated data to help

161 MISO describes these three values as encompassing “reliability, public policy and economic benefits.” MISO, MULTI VALUE PROJECT PORTFOLIO RESULTS AND ANALYSES 1, 64–65 (2012), <https://cdn.misoenergy.org/2011%20MVP%20Portfolio%20Analysis%20Full%20Report117059.pdf> [<https://perma.cc/M9HF-B5Z2>].

162 See MISO, MTEP17 MVP TRIENNIAL REVIEW 12 (2017), <https://cdn.misoenergy.org/MTEP17%20MVP%20Triennial%20Review%20Report117065.pdf> [<https://perma.cc/4QXM-FYE6>] (“[T]he adoption of Renewable Portfolio Standards (RPS) . . . across the MISO footprint drove the need for a more regional and robust transmission system . . .”).

163 See, e.g., *North Dakota v. Heydinger*, 825 F.3d 912, 915–16 (8th Cir. 2016) (describing Minnesota’s Next Generation Energy Act, MINN. STAT. § 216H (2021)); MISO, *supra* note 161, at 10 (“Twelve of thirteen states in the MISO footprint have enacted either RPS requirements or renewable energy goals which require or recommend varying amounts of load be served with energy from renewable energy resources.”).

164 See HURLBUT, *supra* note 27, at 3 (noting the need for a “regional transmission system [that] is sufficiently robust to move renewable power from resource-rich areas” to load centers across multiple states, which requires “multistate institutions to coordinate transmission planning and expansion”).

165 MISO, *supra* note 161, at 64–65; ADITYA JAYAM PRABHAKAR, LAURA RAUCH, LIANGYING HECKER & JOHN LAWHORN, BUSINESS CASE JUSTIFICATION FOR MULTI-VALUE PROJECTS IN THE MISO MIDWEST REGION 2 (2013), <https://ieeexplore.ieee.org/stamp/stamp.jsp?tp=&arnumber=6672745> [<https://perma.cc/42P2-PSD8>].

states identify the windiest areas in the region that were likely to produce the most renewable energy in the least costly way.¹⁶⁶ Based on the data, MISO, in coordination with the states, selected energy zones scattered throughout the Midwest, creating a regional map of the areas where new generation would best be built.¹⁶⁷ The planned transmission lines that resulted from the process were based on the location of these zones as well as careful consideration of how new lines would improve the reliability of electricity service, prevent the construction of new wires where possible, and reduce the loss of electricity as it flows through wires, among other benefits.¹⁶⁸

MISO estimates that the regional approach, as opposed to simply planning for in-state generation close to customer bases, required eleven percent less wind infrastructure than otherwise would have been built, resulting in \$1.4 to \$2.5 billion in estimated savings.¹⁶⁹ It is unlikely that states, without the assistance of a regional organization, would have produced such a map, in which low cost generation to support multiple states' standards was organized in discrete clusters throughout the region.¹⁷⁰

¹⁶⁶ See MISO, *supra* note 161, at 2 (collecting data on the voltage that could be generated by renewables in various states along with the estimated costs of constructing associated transmission lines).

¹⁶⁷ See *id.* at 10, 22–41.

¹⁶⁸ See *id.* at 52–61.

¹⁶⁹ *Id.* at 65.

¹⁷⁰ See *supra* note 116; cf. Joskow, *supra* note 118, at 49 (noting the lack of any process for “systematically . . . evaluat[ing] opportunities to expand transmission capacity” across RTO borders). With the help of regional convening institutions, some states have engaged in regional transmission planning efforts to work with federal entities to build needed transmission infrastructure. See State Voluntary Agreements to Plan and Pay for Transmission Facilities, 86 Fed. Reg. 33,700, 33,701 (June 25, 2021) (noting New Jersey’s efforts—working through the RTO PJM Interconnection—to initiate a voluntary coordinated planning process for transmission lines needed to support offshore wind). FERC’s policy supporting this type of process allows voluntary transmission agreements, including agreements between two or more states, and agreements between FERC and individual states, regarding the construction and cost of new transmission lines, among other entities. See *id.* Through organizations such as the Western Governors’ Association, states have also produced somewhat less sophisticated maps of the most productive areas to build renewable generation within a region. See W. GOVERNORS’ ASS’N & U.S. DEPT OF ENERGY, WESTERN RENEWABLE ENERGY ZONES—PHASE 1 REPORT (2009), https://www.energy.gov/sites/prod/files/oeprod/DocumentsandMedia/WREZ_Report.pdf [<https://perma.cc/Q9JB-U6UD>]. Although these zones did not create any direct siting or permitting authority, they influenced states in approving several new transmission line projects. See Daniel Getman & David Hurlbut, Nat’l Renewable Energy Lab’y, Greening the Grid: Implementing Renewable Energy Zones for Integrated Transmission and Generation Planning Presentation 46–47 (Dec. 1, 2015), https://cleanenergysolutions.org/sites/default/files/documents/gtg_rez_webinar_draft_30nov2015.pdf [<https://perma.cc/5EYP-997K>] (noting “[n]o direct link to transmission authority,” but observing that several transmission projects were “in permitting”).

Despite the positive MISO example, the fact that an RTO performed better than individual states attempting to coordinate renewable planning does not, by itself, suggest that regional cooperative federalism is the best mode for innovation. Indeed, even RTOs have largely failed at *interregional* transmission planning to address “seams” that separate transmission at their borders. This failure persists despite the existence of agreements to address the need for interregional lines.¹⁷¹ Here, again, SPP and MISO are an exception. In 2020 they commenced a joint effort to identify transmission lines needed to support the new interconnection of low-cost renewable sources that benefit both RTOs.¹⁷²

Despite the limits of RTO planning, there is some evidence that the RTO approach is superior to other regional governance options with respect to achieving the transmission expansions needed for a cleaner, more reliable grid. For example, the Federal Power Act¹⁷³ allows states to form regional compacts for transmission line siting, but none have taken up the call.¹⁷⁴ In the MISO example, the existence of a public-private regional entity with generator members who needed new transmission lines might have spurred action that a purely federal-state or state-coordinated regional approach would not have.

171 For descriptions of RTOs’ interregional planning efforts and associated formal agreements for such planning, see, for example, *Interregional Planning*, PJM, <https://www.pjm.com/planning/interregional-planning> [<https://perma.cc/2M7Z-FTUT>], and MISO, *supra* note 161. For a description of the limits on RTOs’ interregional planning, see, for example, Joskow, *supra* note 118, at 49 (noting that despite PJM having expanded the territory in which it operates, “transmission investment planning appears to continue to be balkanized across the individual PJM regions” and concluding that “[i]nadequate attention to opportunities to expand inter-control area transmission capacity . . . is a continuing problem”). *But see* JOSEPH H. ETO & GIULIA GALLO, INTERREGIONAL TRANSMISSION COORDINATION: A REVIEW OF PRACTICES FOLLOWING FERC ORDER NOS. 890 AND 1000 22, 32–33 (2019), https://eta-publications.lbl.gov/sites/default/files/interregional_transmission_coordination_final_oct2019.pdf [<https://perma.cc/XPJ9-ASQF>] (noting planned interregional transmission projects in the Western Interconnection and interregional cost allocation for new transmission projects spanning MISO and PJM).

172 *See generally* SPP-MISO JOINT STUDY TEAM, SPP-MISO 2021 JOINT TARGETED INTERCONNECTION QUEUE STUDY: SCOPE OF WORK 1 (2021), <https://spp.org/documents/64101/spp-miso%20jtiq%20detailed%20scope%2002192021%20final.pdf> [<https://perma.cc/W4JM-3FFW>] (“This document presents the scope and schedule of work for the SPP-MISO 2021 Joint Targeted Interconnection Queue (JTIQ) study.”).

173 16 U.S.C. §§ 791–828c.

174 16 U.S.C. § 824p(i) (“[Authorizing] three or more contiguous States to enter into an interstate compact, subject to approval by Congress, establishing regional transmission siting agencies”); *see* AVI ZEVIN, SAM WALSH, JUSTIN GUNDLACH & ISABEL CAREY, BUILDING A NEW GRID WITHOUT NEW LEGISLATION: A PATH TO REVITALIZING FEDERAL TRANSMISSION AUTHORITIES 65 n.118 (2020), <https://www.energypolicy.columbia.edu/research/report/building-new-grid-without-new-legislation-path-revitalizing-federal-transmission-authorities> [<https://perma.cc/XWU7-GQSJ>] (noting that § 824p(i) “has never been used”).

At least one other RTO operating under the same FERC directives as MISO has formed similarly innovative policies in the renewable energy context. For example, SPP, which borders MISO and extends farther south, established priority transmission projects similar to MISO's MVPs. This innovative process was the result of a multistakeholder "Synergistic Planning Project Team" made up of state regulators and SPP members.¹⁷⁵ These stakeholders focused on the need for a "robust, flexible and cost-effective transmission system" that spanned the SPP region.¹⁷⁶ Like MVPs, the priority lines supported states' policies for renewable generation and other generation and improved reliability.¹⁷⁷ The team that produced the priority transmission project idea also suggested other innovative policies, including a new way of sharing the costs of constructing new transmission lines.¹⁷⁸

Individual states and utilities might similarly innovate if required to do so by FERC. But in many cases this innovation would be uncoordinated, and it would lack most attributes of an actual policy experiment.¹⁷⁹ Indeed, outside of RTOs, FERC's required regional planning process for new transmission has been "stalled, and at worst, ineffective in identifying valuable projects."¹⁸⁰ In contrast, MISO's regional planning process requires transmission providers—the entities responsible for actually building new power lines—to "coordinate or consolidate, where possible, individually defined transmission projects into more comprehensive cost-effective developments."¹⁸¹ MISO and SPP have successfully planned for billions of dollars of new transmission investments needed to support new wind energy projects.¹⁸²

¹⁷⁵ See *Priority Projects*, Sw. POWER POOL, <https://www.spp.org/engineering/transmission-planning/priority-projects/> [<https://perma.cc/2P3W-QN8Z>].

¹⁷⁶ *Id.*

¹⁷⁷ See *id.*

¹⁷⁸ *Id.*

¹⁷⁹ See Wiseman & Owen, *Federal Laboratories of Democracy*, *supra* note 11, at 1137–45 (describing the ways in which states do not experiment with policy in the traditional sense of experimentation).

¹⁸⁰ SCOTTMADDEN, INC., *INFORMING THE TRANSMISSION DISCUSSION 288* (2020), <https://www.scottmadden.com/insight/informing-the-transmission-discussion/> [<https://perma.cc/BM4T-YXD3>].

¹⁸¹ MISO, *FERC ELECTRIC TARIFF ATTACHMENT FF: TRANSMISSION EXPANSION PLANNING PROTOCOL 27* (2021), <https://www.misoenergy.org/legal/tariff/> [<https://perma.cc/HQK8-R7WY>].

¹⁸² See *supra* notes 160–78 and accompanying text.

b. Maintaining Grid Reliability in the Face of New Challenges

The combination of FERC pushing for innovative regional planning, and states within RTO territories providing bottom-up impetus for change, appears to have been an important factor driving effective grid planning to support renewable energy. But one challenge of the modern grid—regardless of the amount of renewable energy penetration—is reliability in the face of extreme weather and other events partially exacerbated by climate change.¹⁸³ This challenge was highlighted by the Southern freeze and blackout in 2021. By and large, grid operators have kept the lights and heat on for customers.¹⁸⁴ But several incidents have demonstrated the immense difficulty of the task of maintaining grid reliability regardless of exogenous extremes.

One recent incident that challenged grid reliability occurred in 2014, when MISO's territory experienced an unusually long cold snap caused by the polar vortex.¹⁸⁵ This resulted in “the coldest temperatures in twenty years” in early January, with an extended period of subzero temperatures.¹⁸⁶ MISO had a total of thirty-two incidents of “[o]perating [r]eserve scarcity” during this period, meaning that the power plants that were supposed to provide backup resources during periods of peak demand, such as periods of extreme cold or heat, were not fully available.¹⁸⁷ This was in part because natural gas plants were

¹⁸³ See, e.g., N. AM. ELEC. RELIABILITY CORP., 2021 ERO RELIABILITY RISK PRIORITIES REPORT 26 (2021), https://www.nerc.com/comm/RISC/Documents/RISC%20ERO%20Priorities%20Report_Final_RISC_Approved_July_8_2021_Board_Submitted_Copy.pdf [<https://perma.cc/7MUX-QEX5>] (listing “extreme events” as a priority reliability risk to address in 2021).

¹⁸⁴ See, e.g., N. AM. ELEC. RELIABILITY CORP., POLAR VORTEX REVIEW, at iii, 2 (2014) (noting widespread generation outages due to cold weather but very little loss of power to customers due to effective management of the grid). Notable exceptions are historic cold weather events. These include, for example, Texas in February 2021, when blackouts—triggered primarily by fuel supply disruptions for natural gas and the lack of winterization of all forms of power plants—caused deaths and major economic damage. See THE PERRYMAN GRP., PRELIMINARY ESTIMATES OF ECONOMIC COSTS OF THE FEBRUARY 2021 TEXAS WINTER STORM 1 (2021); *Power Struggle: Examining the 2021 Texas Grid Failure: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Com.*, 117th Cong. 3–4, 30–31, 40–41 (2021) [hereinafter *Power Struggle: Examining the 2021 Texas Grid Failure Hearing*]. A similar cold snap that enveloped the Southwest and Texas in 2011 affected millions of power customers. FERC & N. AM. ELEC. RELIABILITY CORP., REPORT ON OUTAGES AND CURTAILMENTS DURING THE SOUTHWEST COLD WEATHER EVENT OF FEBRUARY 1–5, 2011, at 1 (2011), <https://www.ferc.gov/sites/default/files/2020-04/08-16-11-report.pdf> [<https://perma.cc/VU3Z-WJVZ>].

¹⁸⁵ MISO, MISO 2013–2014 WINTER ASSESSMENT REPORT: INFORMATION DELIVERY AND MARKET ANALYSIS 3 (2014), <https://cdn.misoenergy.org/2014%20Winter%20Assessment%20Report103560.pdf> [<https://perma.cc/MFT5-NNW7>].

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 4.

limited in the amount of gas that they could receive due to frozen equipment at gas wells.¹⁸⁸ Despite these challenges, customers did not experience widespread electricity outages.¹⁸⁹

MISO has subsequently taken steps to prepare for future cold snaps. In 2019, when the MISO region experienced even colder temperatures than in 2014, the demand reduction measures that MISO had implemented helped to mitigate stress on the grid during “[p]eak electricity loads.”¹⁹⁰ That said, during the extreme cold weather event in 2021, MISO and SPP, like ERCOT, had to force rolling blackouts (short term power outages) in small portions of their footprints that experienced the same temperatures as Texas in 2021.¹⁹¹ MISO’s and SPP’s blackouts were not as extensive or long, however.¹⁹² While the 2021 episode demonstrates that no electric grid can be perfectly reliable in every circumstance, the proactive steps that RTOs have taken to enhance the reliability of their grids suggest that these such unreliable circumstances may continue to be somewhat rare.

RTOs in the New England and Mid-Atlantic regions—ISO New England and PJM, respectively—have also implemented measures to prepare for future events and have successfully navigated several extremely cold periods.¹⁹³ Additionally, FERC has approved several

¹⁸⁸ *Id.* at 16.

¹⁸⁹ *See id.* at 3 (noting that MISO was “able to reliably manage the power grid” and only limited curtailments of power exports during the extreme cold).

¹⁹⁰ April Lee, *Extreme Cold in the Midwest Led to High Power Demand and Record Natural Gas Demand*, U.S. ENERGY INFO. ADMIN. (Feb. 26, 2019), <https://www.eia.gov/todayinenergy/detail.php?id=38472> [<https://perma.cc/BWV3-DBGB>] (noting MISO’s “deployment of load-modifying resources”).

¹⁹¹ OFF. OF CYBERSECURITY, ENERGY SEC., & EMERGENCY RESPONSE, U.S. DEP’T OF ENERGY, *EXTREME COLD & WINTER WEATHER UPDATE #1*, at 1 (2021), <https://www.energy.gov/sites/prod/files/2021/02/f82/TLP->

[WHITE_DOE%20Situation%20Update_Cold%20%20Winter%20Weather_%231.pdf](https://www.energy.gov/sites/prod/files/2021/02/f82/TLP-WHITE_DOE%20Situation%20Update_Cold%20%20Winter%20Weather_%231.pdf) [<https://perma.cc/3M6F-86FZ>] (noting that ERCOT, MISO, and SPP “have implemented controlled power outages across portions of their systems to manage load”).

¹⁹² *See* SW. POWER POOL, *A COMPREHENSIVE REVIEW OF SOUTHWEST POWER POOL’S RESPONSE TO THE FEBRUARY 2021 WINTER STORM: ANALYSIS AND RECOMMENDATIONS* 6 (2021) (describing directions to reduce energy consumption “by about 1.5% for 50 minutes Feb. 15 and again to lessen [regional energy consumption] by about 6.5% for a little more than three hours Feb. 16”); MISO, *THE FEBRUARY ARCTIC EVENT, FEBRUARY 14–18, 2021: EVENT DETAILS, LESSONS LEARNED AND IMPLICATIONS FOR MISO’S RELIABILITY IMPERATIVE 5–6* (2021), <https://cdn.misoenergy.org/2021%20Arctic%20Event%20Report554429.pdf> [<https://perma.cc/S8VR-GPAF>] (describing forced load reductions that lasted just several hours, for the most part, although one instance in Eastern Texas spanned a day).

¹⁹³ *See, e.g.*, Andrew Gillespie, *ISO New England, Winter Reliability Program Updated: Restructuring Roundtable* (Sept. 25, 2015), https://www.iso-ne.com/static-assets/documents/2015/09/final_gillespie_raab_sept2015.pdf [<https://perma.cc/V98D-3WRL>]; PJM INTERCONNECTION, *PJM’S EVOLVING RESOURCE MIX AND SYSTEM RELIABILITY* (2017), <https://www.pjm.com/-/me->

ISOs' proposed changes to their capacity markets—markets for generation available in the future—to more closely address “fuel assurance,” which ensures that electricity generators will actually have the fuel necessary to run during periods of peak demand, including cold snaps when some types of fuel are in short supply.¹⁹⁴ As an example of capacity market changes to enhance reliability during cold periods, FERC approved ISO New England's “pay for performance” capacity market modification, “paying capacity resources more when they deliver energy or reserves during reserve shortages and penalizing capacity resources that fail to perform during such events.”¹⁹⁵ FERC also required ISO New England's ancillary services market—the market for instantaneous services provided to the grid for reliability purposes—to have higher penalties for resources that fail to provide backup generation reserves during energy shortages.¹⁹⁶ FERC also “clarified” an ISO New England tariff to confirm that generators providing capacity “may not take ‘economic’ outages, including outages based on economic decisions not to procure fuel or fuel transportation.”¹⁹⁷

Contrast these requirements with those in Texas in 2021, when ERCOT, the RTO that governs the grid throughout most of the state, forced massive “load shedding”—i.e., outages caused by the grid operator—in order to avoid a catastrophic system failure. Unlike other RTOs, ERCOT is not governed by FERC.¹⁹⁸ During the February 2021 freeze, ERCOT cut off power to customers for limited periods—with outages lasting up to three days—to avoid more widespread

dia/library/reports-notice/special-reports/20170330-pjms-evolving-resource-mix-and-system-reliability.ashx [https://perma.cc/XRF4-DR9D] (noting PJM's, ISO-NE's, and MISO's steps taken after the 2014 Polar Vortex to improve preparedness for cold weather events).

¹⁹⁴ See Centralized Capacity Markets in Regional Transmission Organizations and Independent System Operators, 149 FERC ¶ 61,145, at 1, 5 (Nov. 20, 2014) (preliminary).

¹⁹⁵ *Id.* at 5.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *ERCOT*, FERC (July 13, 2020), <https://www.ferc.gov/industries-data/electric/electric-power-markets/ercot> [https://perma.cc/32NZ-HEQL].

blackouts.¹⁹⁹ Millions of Texans were cold and without power, and freezing pipes in buildings caused lasting damage.²⁰⁰

It appears that in the ERCOT footprint, with just one state pressuring innovation from the bottom-up and no formal FERC oversight,²⁰¹ ERCOT did not do as much as other RTOs in preparing for weather extremes, as exemplified by its lack of measures such as fuel assurance penalties.²⁰² This is not to say, however, that FERC oversight caused uniformly better RTO performance. Indeed, after the major Southern cold snap in 2011—in which ERCOT forced rolling blackouts for 3.2 million customers—FERC and NERC issued a report advising, among other measures, that Texas and other states in the Southwest consider requiring that power plants adopt winterization plans and accurate reporting of the temperatures at which generating units and associated equipment could operate.²⁰³ The Texas Legislature required power plants to report on weatherization efforts and allowed the Public Utility Commission of Texas to make “recommendations” for improvements, but did not issue substantive mandates.²⁰⁴ Neighboring RTOs that operate under FERC jurisdiction,

199 *Power Struggle: Examining the 2021 Texas Grid Failure Hearing*, *supra* note 184, at 28 (statement of Bill Magness, President and CEO, ERCOT); *id.* at 27–28 (noting “load shed[s]” beginning on February 15 and reductions in some load sheds beginning on February 17); Russell Gold, *Why Is Texas Experiencing Power Outages?*, WALL ST. J. (Feb. 18, 2021, 12:31 PM), <https://www.wsj.com/articles/texas-weather-power-outage-11613425923> [<https://perma.cc/3ZT9-AXAB>] (describing “three straight days of widespread blackouts” in Texas).

200 *Power Struggle: Examining the 2021 Texas Grid Failure Hearing*, *supra* note 184, at 4 (statement of Rep. Diana DeGette, Chairperson, Subcomm. on Oversight & Investigations).

201 *See* Bill Magness, Review of February 2021 Extreme Cold Weather Event—ERCOT Presentation 3 (Feb. 24, 2021) (“The Public Utility Commission of Texas (PUC) has complete authority over ERCOT’s finances, budget and operations, with oversight by the Texas Legislature.”).

202 *Compare id.* at 21 (listing the measures that ERCOT took after the 2011 Texas cold snap), *with* PJM INTERCONNECTION, STRENGTHENING RELIABILITY: AN ANALYSIS OF CAPACITY PERFORMANCES 1–2 (2018), <https://www.pjm.com/-/media/library/reports-notice/capacity-performance/20180620-capacity-performance-analysis.ashx> [<https://perma.cc/R2RR-EVJX>] (noting the success of the Capacity Performance incentives instituted after the 2014 Polar Vortex event in improving “overall generator performance” during instances of grid stress); Sw. POWER POOL, *supra* note 192, at 93–97 (documenting measures taken by SPP following the 2011 cold snap, including, for example, specific power plant “testing requirements” with “seasonal parameters”).

203 FERC & N. AM. ELEC. RELIABILITY CORP., *supra* note 184.

204 S. 1133, 82d Leg. (Tex. 2011), <https://capitol.texas.gov/tlodocs/82R/billtext/html/SB01133F.htm> [<https://perma.cc/BZ7M-QADC>]; *see* James Osborne & Eric Dexheimer, *Texas Grid Fails to Weatherize, Repeats Mistake Feds Cited 10 Years Ago*, HOUS. CHRON. (Feb. 17, 2021, 2:25PM), <https://www.houstonchronicle.com/business/energy/article/Texas-grid-again-faces-scrutiny-over-cold-15955392.php> [<https://perma.cc/7Q3T-XCZ5>] (noting the 2011 weatherization plan reporting requirement). While power plant owners submit their weatherization plans to the Texas Public Utility Commission, ERCOT’s ability to confirm whether any power

although taking a variety of measures to address cold weather conditions, also failed to mandate plant winterization and rather issued guidelines providing how plants “should” winterize.²⁰⁵

Beyond the lack of power plant winterization mandates, during the 2021 Texas crisis some generators initially failed to provide power because the prices were not high enough to incentivize them to do so; they lacked the “economic outage” prohibitions such as those spurred by FERC in ISO-NE.²⁰⁶ It is unclear, however, whether such prohibitions would have made much of a difference when there was simply too little natural gas available.²⁰⁷ Perhaps more importantly, unlike RTOs regulated by FERC, Texas lacks capacity markets that ensure adequate generation reserves for periods of high demand, including cold snaps.²⁰⁸ In this case, a capacity market likely would have spurred the construction of more reserves, but still not enough to cover demand during the cold snap. Approximately half of all available generating plants in Texas were not operational during the peak of the crisis, and demand—i.e., load—would have exceeded available generation by approximately fifty percent but for ERCOT having forced

plant within its territory is limited. *See* Magness, *supra* note 201, at 17 (“While [ERCOT] request[s] and review[s] detailed plant records, the only entity that can confirm that a plant is ‘weatherized’ to any particular standard is the entity that owns or operates the plant.”).

²⁰⁵ MISO, MISO WINTERIZATION GUIDELINES (2018), <https://cdn.misoenergy.org/4.%202018%20MISO%20Winterization%20Guidelines287888.pdf> [<https://perma.cc/7KRK-DN2D>]; *cf.* *Final Report on February 2021 Freeze Underscores Winterization Recommendations*, FERC (Nov. 16, 2021), <https://www.ferc.gov/news-events/news/final-report-february-2021-freeze-underscores-winterization-recommendations> [<https://perma.cc/5DSB-W8Y4>] (“[P]rotecting just four types of power plant components from icing and freezing could have reduced outages by 67 percent in the ERCOT region, 47 percent in the Southwest Power Pool (SPP) and 55 percent in the Midcontinent Independent System Operator South (MISO) regions.”).

²⁰⁶ *See supra* text accompanying note 197; Sechler, *supra* note 15 (noting testimony from ERCOT’s CEO that some generators in Texas initially did not run because prices were artificially low due to problems with ERCOT’s pricing system, but also noting that many generators could not have run even if they wished because the cold weather had incapacitated many power plants).

²⁰⁷ ENERGY INST., THE UNIV. OF TEX. AT AUSTIN, *supra* note 24, at 9.

²⁰⁸ *See* Stephanie Kelly, Tim McLaughlin & Swati Verma, *Explainer: Texas’s One-of-a-Kind Power System Raises Questions During Price Spike*, REUTERS (Feb. 16, 2021, 4:43 PM), <https://www.reuters.com/article/us-usa-weather-power-prices-explainer/explainer-texas-one-of-a-kind-power-system-raises-questions-during-price-spike-idUSKBN2AG2KD> [<https://perma.cc/ZF7H-YJVF>] (noting that “ERCOT does not have a capacity market . . . to handle events like” a cold snap); THOMAS JENKIN, PHILIPP BEITER & ROBERT MARGOLIS, NAT’L RENEWABLE ENERGY LAB’Y, CAPACITY PAYMENTS IN RESTRUCTURED MARKETS UNDER LOW AND HIGH PENETRATION LEVELS OF RENEWABLE ENERGY 4 (2016), <https://www.nrel.gov/docs/fy16osti/65491.pdf> [<https://perma.cc/MWY8-JWG3>] (summarizing RTOs with capacity markets).

blackouts.²⁰⁹ This load far exceeded typical backup reserves ensured by other RTO markets, which tend to provide a “reserve margin” of approximately fifteen percent more generation than forecasted peak load.²¹⁰ But Texas’ relative isolation of its grid, as compared to truly regional RTOs, also meant that there were fewer reserves to draw upon in other parts of the country.²¹¹ Indeed, portions of neighboring RTOs that also experienced extreme cold fared better largely because they were able to import electricity from other parts of their regions and from other regions.²¹²

The outages in Texas resulted from numerous factors beyond pricing and the lack of capacity markets and reserves—electricity failures that incapacitated natural gas compressors and pumps at natural gas storage sites, a failure of natural gas compressors to be designated as critical resources that should receive power even during outages, and frozen equipment and materials at natural gas well sites, to name just a few.²¹³ ERCOT’s and the state public utility commission’s management of generators prior to the crisis, however, such as failure to directly mandate weatherization of plants, also played an important role.

In summary, there are some weather events that are likely to cause outages in even the most well-planned and well-run grids. But in contrast with ERCOT, FERC-regulated RTOs’ relative resilience despite the extreme events of 2021 and earlier years highlight the importance of top-down FERC action and organic, reliability-enhancing measures voluntarily implemented by RTOs such as MISO, ISO New

209 Magness, *supra* note 201, at 10 (“Approximately 48.6% of generation was forced out at the highest point due to the impacts of various extreme weather conditions.”). *See id.* at 15 (at its peak, showing nearly 50,000 megawatts of available generation and more than 75,000 megawatts of load if load had not been shed).

210 *See, e.g.*, PJM, 2019 PJM RESERVE REQUIREMENT STUDY 8 (2019), <https://www.pjm.com/-/media/committees-groups/subcommittees/raas/20191008/20191008-pjm-reserve-requirement-study-draft-2019.ashx> [<https://perma.cc/UAD3-NQW4>] (recommending reserve margins between fourteen and fifteen percent over four consecutive “Delivery Year[s]”); *M-I Reserve Margin*, N. AM. ELEC. RELIABILITY CORP., <https://www.nerc.com/pa/RAPA/ri/Pages/PlanningReserveMargin.aspx> [<https://perma.cc/82B4-DNKL>] (“[R]eserve margin is the difference between available capacity and peak demand . . .”).

211 *See Power Struggle: Examining the 2021 Texas Grid Failure Hearing*, *supra* note 184, at 58–59.

212 MISO, *supra* note 192, at 23 (noting intra- and interregional transfers of power to address the deficit caused by the cold); Sw. POWER POOL, *supra* note 192, at 9 (noting significant reliance on imports during the cold snap).

213 *See Power Struggle: Examining the 2021 Texas Grid Failure Hearing*, *supra* note 184, at 38, 104.

England, and SPP.²¹⁴ Policy innovation does occur within regional cooperative federalist regimes—in some cases more than in traditional federalist or cooperative federalist regimes—in part due to the combination of top-down and bottom up pressures to improve policy.

2. *Enhancing “Real” Policy Experiments*

The assumption that federalist regimes will produce innovation is closely intertwined with the pervasive belief that such regimes encourage experimentation by subfederal actors. A central flaw of the “organic” experimentation that judges and scholars tend to assume will naturally flow from federalism is its haphazard nature. If the federal government simply sets a policy mandate and tells states to experiment, with few or no guidelines, the result will be a flurry of loose activity that lacks most attributes of a true policy experiment.²¹⁵ States are unlikely to overcome coordination barriers to produce a hypothesis to test, a scenario with a control, carefully selected digressions from the control, a uniform method of collecting and reporting results, and mechanisms for repeating experiments and testing results.²¹⁶ Indeed, even the most basic aspects of experimentation, such as data collection and reporting, are unlikely to arise from the experimentation that may occur under pure federalism.²¹⁷ State policy officials might trumpet positive results but carefully hide negative ones, and even the positive results are likely to be reported using different metrics of success.²¹⁸

Regional cooperative federalism, if designed properly, can create a policy experiment that more closely resembles a real experiment. The federal government potentially could, for example, require or at least strongly incentivize different regional entities to take different approaches and compare the success of these approaches.²¹⁹ The fed-

²¹⁴ Top-down reliability standards from NERC has also helped, although NERC has not yet mandated winterization. See Alexandra Klass, Joshua Macey, Shelley Welton & Hannah Wiseman, *Grid Reliability Through Clean Energy*, 74 STAN. L. REV. (forthcoming 2022) (manuscript at 52), <https://ssrn.com/abstract=3900194> [<https://perma.cc/2GQD-QXKU>].

²¹⁵ Wiseman & Owen, *Federal Laboratories of Democracy*, *supra* note 11, at 1141–42.

²¹⁶ For these and other design features of “true” policy experiments, see, for example, Dorf & Sabel, *supra* note 125, at 340–56 (describing the roles of Congress and administrative agencies in facilitating and organizing policy experimentation), and Michael Abramowicz, Ian Ayres & Yair Listokin, *Randomizing Law*, 159 U. PA. L. REV. 929, 945–46 (2011) (noting the benefits that follow “when governmental institutions have sponsored . . . research by supporting the randomization of policy”).

²¹⁷ See Wiseman, *supra* note 119, at 1722–23.

²¹⁸ See Galle & Leahy, *supra* note 18, at 1354.

²¹⁹ Wiseman & Owen, *Federal Laboratories of Democracy*, *supra* note 11, at 1184–85.

eral government has not gone this far in the transmission policy context. Nor has it established a hypothesis or a “control” policy. But in encouraging innovative ratemaking to spur transmission line owners to join RTOs, FERC has created somewhat of a structured experiment. For example, in its order encouraging the formation of RTOs and promoting innovative ratemaking practices to spur more transmission owners to form or join RTOs, the agency developed a menu of acceptable ratemaking practices designed to allow flexibility and encourage experimentation within parameters that will—the agency believes—prevent unreasonable rates.²²⁰ RTOs proposing to implement these practices had to explain to FERC how and why the practices would likely meet the policy goals at which FERC aims, including, for example, “efficient use of and investment in the transmission system” and rate impacts that fare well under a cost benefit analysis,²²¹ among others.

In addition to spurring innovation within a more clearly defined experiment, FERC also requires the sharing of RTOs’ “experimental” results. For example, under FERC Order Nos. 890 and 1000 for regional transmission planning, RTOs and all other utilities required to conduct regional transmission planning must make their transmission planning processes transparent and include progress reports from transmission operators.²²²

3. *Avoiding the Externalities of Uncoordinated Experimentation*

Beyond producing something closer to a real experiment—and a more coordinated one—regional cooperative federalism also avoids many of the externalities that result from more decentralized experimentation. It achieves this result by grouping together local governments and states and creating a policy formation process that overarches state and local lines.

When introducing the “laboratory of the states” concept in the 1930s, Justice Brandeis observed that states could “try novel social

²²⁰ See *Regional Transmission Organizations*, 65 Fed. Reg. 810, 915–27 (Jan. 6, 2000).

²²¹ *Id.* at 913.

²²² See *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 76 Fed. Reg. 49,842, 49,907–08 (Aug. 11, 2011) (requiring “identification and joint evaluation of interregional transmission facilities” and that transmission providers in neighboring planning regions, in their FERC compliance filings, describe “the type[s] of transmission studies that will be conducted” in identifying the potential efficiencies or cost benefits of “interregional transmission facilities”); *id.* at 49,908 (describing FERC Order No. 890’s additional requirement that transmission providers report on progress toward transmission upgrades planned within the regional planning process).

and economic experiments without risk to the rest of the country.”²²³ But a great deal of state policy experimentation can generate externalities that flow beyond state borders. This is the case even with pure cooperative federalism, in which the federal government sets a national policy goal and gives states leeway in trying to achieve it. For example, despite federal standards requiring relatively similar state controls on large air pollution sources, there is a substantial problem with air pollution traveling across state lines and causing violations of air quality standards in downwind states.²²⁴

The MISO MVP process for electric transmission planning once again provides a helpful example of how regional cooperative federalism can avoid some of the externalities of less coordinated state experimentation. Within MISO, all states, with the exception of Kentucky, have renewable generation requirements,²²⁵ and newly built renewable generation typically requires thousands of miles of new, unsightly transmission lines that fragment wildlife habitat and disrupt landscapes.²²⁶ These lines often cross through states in which the residents strongly object to hosting the lines.²²⁷ Furthermore, many residents object to the generation infrastructure itself, arguing that wind farms are unsightly, loud, destructive of wildlife, and dangerous if improperly decommissioned.²²⁸

Regional planning for the location of new generation to meet multiple states’ policy requirements can lead to generation infrastructure to be located in the most productive areas—those with the most

223 *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

224 For ongoing problems with interstate transfers of air pollution, see, for example, Complaint for Declaratory and Injunctive Relief, *New Jersey v. Wheeler*, No. 1:19-cv-03247, (D.D.C. Oct. 29, 2019), 2019 WL 5595247, https://www.epa.gov/sites/production/files/2019-10/documents/newjersey_1.19cv3247_complaint_10292019.pdf [<https://perma.cc/4E9Q-6S4K>] (showing continued litigation by states affected by upwind states’ air pollutant emissions, with the affected suing for EPA regulatory action against nearby polluting states).

225 MISO, *supra* note 161, at 3, 10 (showing the states within MISO’s footprint that have renewable energy mandates and clean energy goals).

226 See, e.g., MANITOBA HYDRO, FURS, FEATHERS, FINS & TRANSMISSION LINES: HOW TRANSMISSION LINES AND RIGHTS-OF-WAY AFFECT WILDLIFE 47–48 (3d ed. 2010) (describing the habitat and landscape effects of transmission lines).

227 See *Klass & Rossi*, *supra* note 134, at 440–41 (describing state opposition to interstate lines needed to support renewable energy development); *Klass & Wilson*, *supra* note 88, at 1803–04; MISO, *supra* note 161, at 3.

228 See BUREAU OF LAND MGMT., U.S. DEP’T OF INTERIOR, FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT ON WIND ENERGY DEVELOPMENT ON BLM-ADMINISTERED LANDS IN THE WESTERN UNITED STATES 5-20 to -27 (2005) (documenting the noise impacts of wind generation infrastructure and noting complaints of nearby residents); *id.* at 5-53 to -75 (impacts on wildlife); *id.* at 5-90 to -95 (visual impacts); *id.* at 5-77 (decommissioning impacts).

sun and wind, for example—and can result in the construction of less generation infrastructure and fewer transmission lines, avoiding an overlapping, duplicative web of wires.

The MISO MVP process avoided the construction of unneeded wind farms and wires—which can create substantial cross-state externalities—by regionalizing the planning process and identifying transmission routes that individual states might not have considered.²²⁹ Planning by individual clusters of states could have resulted in duplicative, needlessly costly infrastructure, with the costs shouldered by the utilities using the wires in those states. Further, the process reduced “reserve margin” requirements, which are requirements for utilities to have adequate backup generation in the event of an emergency or a sudden spike in demand.²³⁰ When utilities have access to generation throughout a region—generation that is connected to these utilities by transmission lines—they can more easily share reserves and avoid having to build their own. MISO estimates that the lower reserve margin planning as a result of the MVP process produced \$1 to \$5.1 billion in savings.²³¹

In sum, regional approaches, by coordinating the process of planning for innovative policy, avoid the many spillovers that can arise from state-by-state planning—overlapping, duplicative, or conflicting policies that spur the construction of too much generation and transmission.

C. *Efficient Governance*

In addition to innovation and experimentation, one of the most commonly cited attributes of federalism is that devolving authority to governmental units situated below the federal level enhances the efficiency of governance.²³² Efficiency, as used in this context, refers to the ability of a government to provide services at the level and price demanded by constituents, thus avoiding a situation of too much governance at too high a cost, or too few services and too low of an associated tax burden.²³³ Additionally, the cost of providing a given unit of

²²⁹ See, e.g., MISO, *supra* note 161, at 10 (noting avoidance of overbuilding of wires as a result of regional planning).

²³⁰ *Id.* at 57.

²³¹ *Id.*

²³² See, e.g., Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 614 (2007); Daniel J. Elazar, *Cooperative Federalism*, in *COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM* 65 (Daphne A. Kenyon & John Kincaid eds., 1991).

²³³ See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416,

governance—government “overhead,” in other words—can be lower or higher depending on whether governments are more or less centralized.²³⁴ This latter form of efficiency is typically referred to as administrative efficiency.²³⁵

1. *Diverse Governance Packages for Footvoters*

Federalism can create efficiencies by diversifying policies and thus providing a greater range of policy options for constituents to choose from. Economics and political science literatures have tended to focus on state and local governments providing this diversity, but as explored here, regional institutions can offer an even broader array of policy options that more effectively address distinctive local and regional needs.

As Charles Tiebout famously observed in the 1950s, it is difficult for governments to accurately assess individuals’ preferences for goods and services and the taxes needed to pay for these goods and services.²³⁶ But when subfederal governments offer different levels of services and taxes, individuals reveal their preferences through “foot-voting”—by moving to the jurisdiction that best matches their preferences.²³⁷

In many cases, full devolution of governance authority—say, to the local level—might be the most efficient approach in terms of providing an adequate diversity of governance packages and costs to match individual preferences. This may be the case for land use regulation, for example. People have strong and highly divergent preferences for the type of place they live at, in terms of how urban or rural it feels, what neighbors may or may not do with their property, and

417 (1956) (describing “the government’s revenue-expenditure pattern for goods and services” and explaining that “[t]he consumer is, in a sense, surrounded by a government whose objective it is to ascertain his wants for public goods and tax him accordingly”); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (praising federalism for “assur[ing] a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society” and for “mak[ing] government more responsive by putting the States in competition for a mobile citizenry”).

²³⁴ Past efforts to encourage or discourage the regionalization of federal agencies have explored this form of efficiency. *See, e.g.*, Blank & Rozen-Zvi, *supra* note 13, at 1940 (noting assumptions under the Clinton Administration that regional federal administration was less efficient than a centralized approach due to potentially redundant actions by different regional offices of a federal agency).

²³⁵ *See, e.g., id.* at 1983 (describing an agency head’s rejection of regional implementation of a federal statute on the grounds of “administrative efficiency” (quoting *Drummond Coal Co. v. Hodel*, 610 F. Supp. 1489, 1493 (D.D.C. 1985), *aff’d*, 796 F.2d 503 (D.C. Cir 1986))).

²³⁶ *See* Tiebout, *supra* note 233, at 417 (noting the difficulty of forcing consumer-voters to “reveal their true preferences for public goods”).

²³⁷ *Id.* at 418.

the extent to which property values stay low or high.²³⁸ Footvoting principles also apply in the regional context, however, as explored here.

a. Regional Footvoting

Tiebout developed the footvoting hypothesis in the local government context, but in many cases, regional differentiation of policy is the superior means of offering diverse governance packages while also ensuring that governance is effective. Indeed, regional grid governance has enhanced policy diversity in the electricity context—often beyond the diversity offered by the few states that have restructured their electricity markets. Regional planning for the construction and financing of new wires provides the backbone for more types of generation resources.²³⁹ RTOs also offer competitive markets—designed and governed somewhat differently within each RTO—that are unavailable in states with traditionally regulated markets.²⁴⁰ This leads to the interesting scenario of some electricity customers living in traditionally regulated states with respect to retail electricity, where generation, transmission, and distribution are still treated as natural monopolies,²⁴¹ and also within competitive wholesale markets for electricity.²⁴²

This diversity of policy approaches within RTOs allows footvoting by individual electricity consumers—in the unlikely event that they care enough to move solely on the basis electricity policy. But more importantly, generators, transmission line owners, other members of the electricity industry, and even states can engage to some degree in the footvoting game.

An interesting, somewhat unique aspect of footvoting in the RTO context, as highlighted by the example of electricity consumers in traditionally regulated states embedded within regional competitive wholesale markets, is that it offers opportunities for policy shopping

²³⁸ See, e.g., LEE ANNE FENNELL, *THE UNBOUNDED HOME* 3 (2009) (noting homebuyer concerns about “neighborhood ambience and community composition”—values that extend beyond the home itself).

²³⁹ See Regional Transmission Organizations, 65 Fed. Reg. 810, 812–17 (Jan. 6, 2000) (describing the progress toward competition and diversity of generation enabled by RTOs and the need for further progress).

²⁴⁰ See *Electric Power Markets*, *supra* note 82 (describing the variety of markets offered by RTOs and traditional vertically integrated utilities in non-RTO areas).

²⁴¹ See Joshua C. Macey, *Zombie Energy Laws*, 73 VAND. L. REV. 1077, 1087 (2020).

²⁴² See *Electric Power Markets*, *supra* note 82 (describing the footprints of the RTOs and ISOs and their coverage of traditionally regulated states).

without exit.²⁴³ And this shopping is different from mere “voice”; it involves importing a desired policy regime to one’s doorstep. This is quite important because one notable constraint within Tiebout’s footvoting model was its assumption of perfect mobility,²⁴⁴ which many Americans lack. It is difficult to move in order to seek out certain policies, particularly because policies are “lumpy,” and one must accept the good with the bad when moving to a new jurisdiction.²⁴⁵ Furthermore, many individuals are constrained by ties to family or jobs, or simply lack the financial resources to move in search of a rosier package of goods and services.

In the RTO context, some utilities can avoid these footvoting constraints altogether because they can join RTOs without moving. Provided the utility is within the geographic territory of the RTO, when the utility voluntarily joins the RTO, the RTO can fold the utility into its markets and practices without the utility having to move an inch.²⁴⁶ RTOs can also expand their territories to cover new utilities that wish to join, as MISO has done several times, thus bringing the government to those who want it.²⁴⁷ The ability of utilities outside RTO regions to join RTOs led consumers in traditionally regulated states like South Carolina—which recently experienced billions of dollars in ratepayer losses for a failed nuclear power project—to de-

²⁴³ See *U.S. Electricity Grid & Markets*, U.S. ENV’T PROT. AGENCY, https://19january2021snapshot.epa.gov/greenpower/us-electricity-grid-markets_.html [<https://perma.cc/QLQ8-KRGE>] (showing that RTOs such as MISO, which have competitive wholesale electricity markets, cover many states that do not have competitive retail electricity).

²⁴⁴ See Tiebout, *supra* note 233, at 419 (noting the assumption that “[c]onsumer-voters are fully mobile and will move to that community where their preference patterns . . . are best satisfied”).

²⁴⁵ See, e.g., Daniel E. Walters, *Lumpy Social Goods in Energy Decarbonization: Why We Need More Than Just Markets for the Clean Energy Transition*, U. COLO. L. REV. (forthcoming) (focusing on a the lumpiness of energy infrastructure, such as the simultaneous need for new renewable generation and transmission lines to support that generation, and the importance of coordinated policies in this area); FENNEL, *supra* note 238, at 12, 72 (describing the numerous, often conflicting preferences of homeowners within a neighborhood, which are lumped together due to the proximity of homes within a physical community).

²⁴⁶ See, e.g., *Market Participation*, MISO, <https://www.misoenergy.org/markets-and-operations/market-participation/#t=10&p=0&s=fileName&sd=asc> [<https://perma.cc/B6R6-XK5C>] (showing how utilities in the MISO footprint can apply to participate in MISO’s energy market).

²⁴⁷ See, e.g., *Navigating MISO*, SUSTAINABLE FERC PROJECT, <https://sustainableferc.org/navigating-miso/> [<https://perma.cc/TXR6-2JF8>] (“MISO expanded significantly into the middle South in 2013, with the addition of the Entergy utilities and other electricity companies in parts of Arkansas, Mississippi, Louisiana, and Texas.”); see also SUSTAINABLE FERC PROJECT, UNDERSTANDING ENERGY: PJM EXPLAINED 2, https://www.nrdc.org/sites/default/files/media-uploads/pjm_explainer_-_sustainableferc.pdf [<https://perma.cc/5KH7-GEY7>] (“One by one, utilities opted into PJM’s territory to take advantage of competitive energy markets.”).

mand admission to an RTO, despite the state not bordering any RTO region.²⁴⁸ Indeed, even utilities not directly contiguous to existing RTO regions can join certain RTO markets, such as the markets for certain energy services offered by SPP and California's RTO.²⁴⁹ And states can require their utilities to join an RTO—indeed, some have.²⁵⁰

There are some limits to RTO expansion. RTOs must have some physical regionalism, meaning they cannot have too many spot territories that are separated from the primary RTO area.²⁵¹ But some RTOs increasingly look like a gerrymandered political map, thus demonstrating the RTOs' flexibility in terms of folding in new utilities that wish to benefit from competitive markets and access more wires.²⁵²

In the other direction, some states are so upset by RTO policies—which they view as impeding essential progress toward renewables, particularly in the Mid-Atlantic and Northeast—that they have threatened to exit.²⁵³ Indeed, utilities have in some cases exited RTOs over objections to policies, such as some of MISO's ambitious trans-

²⁴⁸ See, e.g., Kristi E. Swartz, *Talk of Forming Grid Operator Erupts in Regulated Carolinas*, ENERGYWIRE (Apr. 24, 2019), <https://www.eenews.net/stories/1060208513> [<https://perma.cc/A24H-WPRK>] (describing discussions for the formation of a regional grid authority in the Carolinas); Mengqi Sun, *The \$4.7 Billion Nuclear Bill That No One Wants to Pay*, WALL ST. J. (Aug. 25, 2018), <https://www.wsj.com/articles/the-4-7-billion-nuclear-bill-that-no-one-wants-to-pay-1535194801> [<https://perma.cc/8KA2-HRFQ>] (describing the economic damage from the failed plants).

²⁴⁹ *Western Energy Imbalance Service Market*, SW. POWER POOL, <https://spp.org/weis> [<https://perma.cc/WYK6-3JJ2>] (“SPP will administer the WEIS on a contract basis beginning February 2021. Utilities do not have to be a member of the SPP regional transmission organization (RTO) to participate.”); *About*, W. ENERGY IMBALANCE MKT., <https://www.westerneim.com/Pages/About/default.aspx> [<https://perma.cc/8DNQ-HJ4L>] (showing active participants and planned entrants not contiguous with the California ISO's (“CAISO”) territory).

²⁵⁰ See *Regional Transmission Organizations*, 65 Fed. Reg. 810, 815 (Jan. 6, 2000) (describing several states' requirements for utilities to join FERC-approved ISOs and RTOs); Jason Plautz, *Nevada Passes Clean Energy Bill Requiring State to Join RTO, Accelerating \$2B Transmission Project*, UTIL. DIVE (June 2, 2021), <https://www.utilitydive.com/news/nevada-passes-clean-energy-bill-requiring-state-to-join-rto-accelerating/601106/> [<https://perma.cc/KS6C-855Z>] (describing a new Nevada requirement for utilities to join RTOs).

²⁵¹ The specific FERC requirement for approving an RTO is that the RTO region be “of appropriate scope and configuration.” *Regional Transmission Organizations*, 65 Fed. Reg. 810, 860 (Jan. 6, 2000). While FERC leaves the responsibility of proposing initial boundaries to the parties seeking to form or join an RTO, Order No. 2000 counsels that “an appropriate region is one of sufficient scope and configuration to permit the RTO to effectively perform its required functions and to support efficient and nondiscriminatory power markets.” *Id.* at 860–61.

²⁵² See *About*, MISO, <https://www.misoenergy.org/about/> [<https://perma.cc/F7A3-URAS>] (showing the ISO's territory, which covers a broad swath of states and partial areas of states).

²⁵³ See Welton, *supra* note 20, at 258–59.

mission plans and proposals to equally allocate costs among all utilities to pay for that transmission.²⁵⁴

In summary, RTOs offer somewhat unique opportunities for the real types of footvoting envisioned by Tiebout, at least for utilities, because there are real entry and exit options. RTOs even compete for utility “customers” through policy packages. For example, SPP and the California ISO (“CAISO”) both offer submarkets—i.e., “energy imbalance markets”—for nonmember utilities that need extra electricity during periods of peak demand and would benefit from a competitive market for such energy.²⁵⁵ But the policy diversity spurred by footvoter shopping in the RTO context is not an inherent feature of all forms of regional cooperative federalism. It is the design of RTOs, in particular, that allows it. The regional jurisdiction of the organization must be somewhat malleable, as it is with RTOs, for this type of meaningful footvoting to occur, and for maximum policy diversity to arise—and hence afford efficiency for constituents.

b. Federal Control and Varied Regional Governance Models

Adding layers of governance to a particular policy area can further improve the diversity of policies—and hence opportunities for footvoting. In the context of regional cooperative federalism, regional entities govern a policy area under the direction of the federal government. Adding federal control to regional governance does not necessarily enhance the diversity of regional approaches, but it can. This is perhaps the case in the RTO context, where FERC both explicitly requires and encourages innovation and allows entities to select from a menu of innovative approaches to planning and fees for electricity transmission.²⁵⁶ Furthermore, when constituents of regional organizations are dissatisfied with the policy options available to them, they can—and often do in the RTO context—complain to the federal agency. In the context of RTOs, members regularly sue FERC for approving or disapproving a particular RTO tariff (“policy”) element, and it is not uncommon for them to prevail.²⁵⁷ The threat of federal intervention enhances constituents’ voice, potentially producing a more meaningful diversity of policy approaches.

²⁵⁴ See Klass et al., *supra* note 214, at 41.

²⁵⁵ See *supra* note 249 and accompanying text.

²⁵⁶ See *supra* note 146 and accompanying text.

²⁵⁷ See, e.g., *infra* note 329 and accompanying text (describing states’ successful lawsuits against FERC for approving PJM’s equal allocation of costs for new transmission line to all utilities).

Yet another element that enhances the diversity of policies—and thus the likelihood that policies will better match constituents' preferences—is that the federal entity overseeing regional cooperative governance can require or encourage different policy approaches in different regions. In the case of RTOs, FERC produced a diversity of policies inadvertently—and even unwillingly. FERC likely would have preferred to mandate RTOs throughout the United States, but, recognizing political resistance to this approach among some states, the agency instead opted to spur regional diversity in grid governance by strongly encouraging the formation of RTOs, rather than requiring their formation.²⁵⁸ Some parts of the country still follow very traditional, state-centric governance of utilities and the transmission lines that they build, eschewing regional markets.²⁵⁹ Other parts of the United States are within the territories of innovative RTOs that have pushed for aggressive new regional grid policies to support renewable energy.²⁶⁰ Still others fall within regions that have taken a middle ground, relying upon integrated grid governing entities to regionalize some grid functions, but avoiding the formalization of regional governance through an RTO.²⁶¹

The Western Interconnection provides a useful example of this middle ground approach. The Western Interconnection covers an expansive territory encompassing the West Coast and much of the Rocky Mountain region and Southwest, including territory in Canada and parts of Mexico.²⁶² In the Western Interconnection, utilities coor-

²⁵⁸ See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540, 21,549–50 (May 10, 1996) (noting FERC's policy of "encouraging the development" of Regional Transmission Groups, a predecessor of RTOs, to facilitate heightened access and competition in transmission markets); Regional Transmission Organizations, 65 Fed. Reg. 810, 831–34 (Jan. 6, 2000) (noting FERC's policy of "strongly encourag[ing] transmission owners to participate voluntarily in RTOs," but noting the considerations, including state resistance, that led FERC to conclude that "a voluntary approach to participation in RTOs" was appropriate).

²⁵⁹ KATHRYNE CLEARY & KAREN PALMER, US ELECTRICITY MARKETS 101, at 1–3 (2020), https://media.rff.org/documents/US_Electricity_Markets_101.pdf [<https://perma.cc/C7SQ-5L8V>] (describing traditional regulated markets and showing the areas outside of RTOs). *But see id.* at 4 (noting that even some states with traditional regulated markets are members of an RTO, thus combining state-centric decisions about the construction of new generation infrastructure with regional, competitive markets for trading the electricity generated by that infrastructure).

²⁶⁰ See, e.g., *supra* notes 160–68, 174–77, and accompanying text (describing successful efforts by MISO and SPP to site and implement new networks of transmission lines, which accommodated the integration of new renewable electricity production resulting from state renewable energy policies).

²⁶¹ See *infra* notes 262–64 and accompanying text.

²⁶² See *The Western Interconnection*, W. ELEC. COORDINATING COUNCIL, <https://>

dinate a number of functions to make it easier for generators to send electricity long distances over numerous utilities' wires, and to reduce the need for individual utilities to maintain separate backup generation reserves in emergencies.²⁶³ But utilities have so far opted out of the formation of an RTO—albeit with an expectation that they will eventually move to this more formal regional approach, or at least something closer to it.²⁶⁴

The ability of utilities to both shop among RTOs and choose whether or not to join an RTO, form a more loosely coordinated entity, or “go it alone” produces an added layer of policy diversity that could better address constituents' preferences. This is particularly true as RTOs work to convince utilities in places like the Western Interconnection that (1) it is worth joining an RTO, and (2) it is worth joining a *particular* RTO, such as CAISO or SPP. In this sense, regional cooperative federalism produces more of a diversity of policy approach than pure federalism or cooperative federalism, in which governed entities cannot opt out of state governance altogether, for example. In the context of RTOs, governed entities can choose to re-

www.wecc.org/epubs/StateOfTheInterconnection/Pages/The-Western-Interconnection.aspx [<https://perma.cc/H2ME-Q82B>].

²⁶³ See Craig L. Williams, Presentation on the Overview of WECC System Operations 1, 220 (Apr. 22–23, 2015), <https://www.wecc.org/Administrative/WECC-System-Overview-2-slides-per-page.pdf> [<https://perma.cc/6JQM-SB64>] (noting reserve sharing groups through the Western Electricity Coordinating Council); VARIABLE GENERATION SUBCOMM. MKTG. WORKGROUP, W. ELEC. COORDINATING COUNCIL, ELECTRICITY MARKETS AND VARIABLE GENERATION INTEGRATION 1, 12–13 (2011), <https://www.wecc.org/Reliability/WECC%20Whitepaper%20-%20Electricity%20Markets%20and%20Variable%20Generation%20Integration.pdf> [<https://perma.cc/J4BJ-NE2F>] (noting a “two-year pilot program that eliminates transmission rate pancaking” for some transactions, thus easing the transmission of electricity over wires owned by different utilities that would typically charge different rates for the use of the wires).

²⁶⁴ See, e.g., NEXT 10, A REGIONAL POWER MARKET FOR THE WEST: RISKS AND BENEFITS 1, 6 (2018) (noting the benefits of enhanced competition and reduced utility bills if the western states were to form an RTO and estimating billions in savings to California utility customers if California were to join it); Allen Best, *Why Unification of the Western Electric Grid is Probably Inevitable*, ENERGY NEWS NETWORK (July 24, 2018), <https://energynews.us/2018/07/24/west/why-unification-of-the-western-electric-grid-is-probably-inevitable/> [<https://perma.cc/BE5Z-XCTG>] (observing that “many regard a unification of the Western grid as inevitable,” but noting the difficulties expected if the region were to attempt to create a full scale RTO). But see Michael Brooks, *Western RTO or Bust? Not So, Says Industry*, RTO INSIDER (Aug. 13, 2018), <https://rtoinsider.com/mountain-west-western-power-issues-roundtable-western-rto-98017/> [<https://perma.cc/SV3R-MTWZ>]. Several western utilities have chosen to join limited parts of RTOs. This might be the model of the future, as these utilities are wary of giving up certain aspects of their relative independence. See Robert Walton, *Xcel, 3 Other Colorado Utilities Choose California's Imbalance Market Over Southwest Power Pool*, UTIL. DIVE (Dec. 18, 2019) (noting how four Colorado utility companies chose to join the Western Energy Imbalance Market, a sub-market operated by CAISO).

ject regional governance altogether, or opt for a looser regional governance form than RTOs.

2. *Reducing the Overhead of Governance*

Another form of government efficiency, beyond policies that provide constituents with the level of services that they demand at a cost that they prefer, involves the actual cost of governing. Each “unit” of governance provided—say, a government’s review and approval of a proposal to interconnect with transmission lines—can be cheaper or more expensive depending on how efficiently the government operates. Centralization of governance within a regional entity overseen by the federal government can enhance this type of efficiency, albeit with limitations.

Relying on numerous individual governments to perform one function often involves needless duplication of effort, such as technical training of staff in multiple offices.²⁶⁵ The failure to centralize governance also requires hiring more staff and renting or owning more offices and equipment than would be required in a more coordinated regime.²⁶⁶ In view of these concerns, relying on regional cooperative federalism to implement policy, as opposed to the states, enhances efficiency. Past critiques of regionalism in the context of federal agencies with regional offices have focused on redundancy and inefficiency,²⁶⁷ yet the option of relying on states to implement federal policy is even worse in this sense, as there are more states than regional federal offices.

Here, regional cooperative federalism can offer an important compromise between excessive integration or diffusion of governance responsibilities. In the electric grid context, regional entities acting under federal supervision have relatively centralized physical offices; one or two sets of complex computer technology required to schedule the flow of electricity through the grid; one well-developed and frequently updated model for predicting the benefits and costs of various grid configurations; and a well trained staff housed in one or just a few locations, which builds up critical knowledge over time and passes this

²⁶⁵ Cf. Jason Marisam, *The Interagency Marketplace*, 96 MINN. L. REV. 886, 887–88 (2012) (noting the Economy Act, 31 U.S.C. § 1535, allows federal agencies to “tap into each other’s expertise and infrastructure without having to waste money building up their own duplicative expertise and infrastructure”).

²⁶⁶ See, e.g., Blank & Rosen-Zvi, *supra* note 13, at 1963 (noting the potential for “duplicate costly overhead such as office space, machines, and purely administrative positions”).

²⁶⁷ See *id.* at 1962.

knowledge directly to new staff hired into the same office.²⁶⁸ In this sense, RTOs reduce the overhead costs of governance as compared to individual utilities and states planning for and overseeing the electric grid.

Despite these benefits, excessive integration through regionalism can create a governance unit too distant from those who are governed. The cost of identifying and addressing diverse needs throughout the governed area can become high and can offset the efficiencies of avoided duplicative training and hiring. Furthermore, a regional entity can become so large that it is simply overloaded—struggling to address a range of diverse issues that arise within a massive territory.²⁶⁹ Indeed, this appears to be a challenge for some RTOs, such as PJM and MISO, that span very distinct regions of the country.²⁷⁰

Regional governments sometimes do become too large and unwieldy to offer the benefits of administrative or service-based efficiency; after all, the larger the RTO, the less likely it is that the policies that it sets within a FERC-approved tariff (policy) will respond to the cost and service-based demands of its diverse constituents. But these efficiency losses might be partially offset by innovation gains: the sprawling RTOs that must meld highly divergent preferences of state and utility stakeholders might ultimately produce the most innovative—and potentially feasible—policies.

D. Accountability

Beyond efficiency and innovation, another factor often cited in favor of federalism is government accountability to constituents—the extent to which a government includes stakeholders within governance processes and listens and responds to constituent input.²⁷¹ The

²⁶⁸ See, e.g., *Locations*, MISO, <https://www.misoenergy.org/about/contact-us/locations/> [<https://perma.cc/X32D-38K9>] (describing MISO's—the largest RTO—three office locations for an RTO that covers parts of fifteen states); *MISO Model Manager*, MISO, <https://www.misoenergy.org/markets-and-operations/MSE/miso-model-manager/#t=10&p=0&s=Updated&sd=desc> [<https://perma.cc/5HB3-DPGG>] (describing updates to MISO's computer modeling system).

²⁶⁹ See, e.g., SIMEONE, *supra* note 20, at 2 (“Policy setting over a large geographic region presents challenges to regional markets, as states may have inconsistent or conflicting electricity sector priorities.”).

²⁷⁰ See, e.g., *Ill. Com. Comm'n v. FERC*, 576 F.3d 470, 474–75 (7th Cir. 2009) (describing the opposition of utilities located in Midwestern states to paying a uniform, pro rata share for new transmission facilities rather than an individualized share based on benefits received from those facilities because the bulk of the new infrastructure was to be built in the eastern portion of the RTO).

²⁷¹ See *supra* note 29 for accountability definitions.

assumption is that smaller governments perform better beneath this metric because representatives are more accessible and more closely attuned to their constituents' preferences. Furthermore, when decisionmakers elected by the people directly make decisions, they cannot pass the blame for unpopular decisions to others.²⁷² Regionalizing governance, and adding a federal layer on top of this regionalism, could exacerbate these concerns. But despite these accountability problems, agglomeration of grid governance through RTOs also enhances accountability in some cases, as explored here.

1. *Inclusiveness*

The extent to which the entities affected by governance decisions are included within the decision-making process is an important component of a government's accountability to its members. RTOs are more inclusive of stakeholders than are alternative grid-based decision-making processes—although this by no means suggests that they are adequately inclusive. In areas without regional grid governance, the utility that owns and operates transmission lines applies to FERC for a tariff in which all of the utility's rates and terms of service are set out.²⁷³ Concerned constituents may only participate in this proceeding by formally intervening in the FERC proceeding—a somewhat technical endeavor.²⁷⁴ And intervenors typically must travel to Washington, D.C. if they wish to participate in a proceeding in person because FERC's few regional offices address only hydropower projects.²⁷⁵

²⁷² With respect to federalism principles, the blame shifting concern tends to arise in the anticommandeering context. *See supra* note 30. For critiques of the blame shifting account, see, for example, Levinson, *supra* note 30, at 360 (noting commentator's conclusion that the argument is "theoretically simplistic and empirically dubious").

²⁷³ *Cf.* Regional Transmission Organizations, 65 Fed. Reg. 12,088, 12,096–97 (Mar. 8, 2000) (explaining that within RTOs, the RTO files a tariff representing all transmission owners within its territories, but that transmission owners retain limited filing rights to ensure that the particular rates that they receive under the RTO tariff are fair).

²⁷⁴ *See FERC Responds to Certified Questions on Standing: Retail Ratepayers Have the Right to File Complaints with FERC Against Wholesale Sellers*, FERC PRAC. & PROC. MANUAL NEWSL., Jan. 2016, at 2 (noting that, in order to participate in a FERC proceeding, "retail ratepayers may file complaints and protest transmission rates . . . before the Commission" (quoting FERC)); *FERC Online*, FERC (Nov. 8, 2021), <https://www.ferc.gov/ferc-online/overview> [<https://perma.cc/L2RS-B5TY>] (noting that providing comments on FERC proceedings via "eComment" is limited to only certain proceedings and that an "eRegistration account" is required for certain types of FERC filings, including motions to intervene); 18 C.F.R. § 385.214 (describing intervention procedures).

²⁷⁵ *See Contact Us*, FERC (Apr. 26, 2021), <https://www.ferc.gov/contact-us> [<https://perma.cc/HM7W-PTXA>] (discussing how regional offices focus on hydropower projects). For broader FERC policies that apply to all transmission operators, including those within RTOs, stakeholders may comment on the proposed policies through typical notice-and-comment proce-

In contrast with the relatively centralized and formal FERC process, stakeholders are included in RTO decision making by design. RTOs contain several built-in features for participation by entities impacted by grid policy. First, RTOs have members, which typically can include anyone who is an electricity customer within the RTO region or a transmission line owner, provided such parties pay the initial and then annual fees to become and maintain membership.²⁷⁶ Members influence RTOs by voting on the composition of the board of directors in addition to voting on substantive policies ultimately decided by the board of directors.²⁷⁷ For those who do not meet the membership criteria or who cannot afford the sometimes steep cost of membership, there are also participatory options as “stakeholders.”²⁷⁸

RTOs require the formation of stakeholder committees, which include specific “sectors” with different stakeholder groups.²⁷⁹ The extent of stakeholder inclusion varies among RTOs because RTOs follow one of two primary decision-making structures, in which stakeholders directly vote on policies or merely advise the board of directors on policies.²⁸⁰ In the direct vote models, stakeholders must approve and recommend a particular grid policy before the board of directors may vote on it and send it to FERC for approval.²⁸¹ Under

dures. See *FERC Responds to Certified Questions on Standing: Retail Ratepayers Have the Right to File Complaints with FERC Against Wholesale Sellers*, *supra* note 274. However, FERC is in the process of establishing an Office of Public Participation, which may improve some access by stakeholders to FERC proceedings. See FERC, THE OFFICE OF PUBLIC PARTICIPATION (2021), <https://www.ferc.gov/media/ferc-report-office-public-participation> [<https://perma.cc/B6W2-74FB>].

²⁷⁶ See *Guide to MISO Region Engagement*, MISO, <https://cdn.misoenergy.org/Guide%20to%20MISO%20Region%20Engagement476181.pdf> [<https://perma.cc/8T38-SLQC>] (showing membership criteria).

²⁷⁷ *Id.* (showing members as voting on the composition of the MISO Board of Directors as well as advisory committee matters and other stakeholder committee matters).

²⁷⁸ *Id.*

²⁷⁹ See, e.g., Kyungjin Yoo & Seth Blumsack, *Can Capacity Markets Be Designed by Democracy?*, 53 J. REGUL. ECON. 127, 130 (2018) (describing sectors and their membership).

²⁸⁰ See *id.* at 128 (explaining that some RTOs “develop policies and rule changes through a process intended to be highly democratic” while others “seek stakeholder input, but final decisions on filings to FERC are made by the RTO staff and Boards”); MARK JAMES, KEVIN B. JONES, ASHLEIGH H. KRICK & RIKAELA R. GREANE, R STREET, *HOW THE RTO STAKEHOLDER PROCESS AFFECTS MARKET EFFICIENCY 4* (2017), <https://www.rstreet.org/wp-content/uploads/2017/10/112.pdf> [<https://perma.cc/8PMB-T9SL>] (also including a third governance model of “governor-appointed boards”); PARENT ET AL., *supra* note 20, at 2-2 to 2-7 (explaining that “CAISO employs a public, advisory-only stakeholder process that provides input to CAISO and the CAISO Board” and describing similar advisory processes for RTOs such as ISO-NE).

²⁸¹ Christina E. Simeone, *Reforming FERC’s RTO/ISO Stakeholder Governance Principles*, 34 ELEC. J. 1, 3 (2021) (“Proposed solutions must be majority vote-approved up through the chain (if applicable) of lower-level committees then forwarded to the higher-

the second model, stakeholder groups do vote on policy, but only in an advisory capacity; the board of directors takes this advice into consideration, but it makes an independent decision about the content of the policy that it sends to FERC for approval.²⁸²

Under both the advisory and direct voting stakeholder models, constituents are automatically included within RTO decision-making processes, unlike the FERC model that requires individual intervention. Not all stakeholders are represented, however, and this is a major area for improvement. Indeed, a common objection is that some RTOs do not include states as members, and most do not provide dedicated representatives of the general public with a formal vote.²⁸³ There are also concerns that suppliers—the producers of electricity and transmission—are overrepresented within RTOs, at the expense of consumers. In several RTOs, there is only one “end user” in the stakeholder sector (i.e., electricity consumer), and the majority of the other sectors are on the supply side.²⁸⁴ Despite these concerns, however, RTOs do give many stakeholders, including some members of the public, a direct seat at the decision-making table—and typically a vote. This gives constituents a cheaper, less formal means of participating in grid-based decision making than they have at the federal and often the state levels.

Take the example of MISO, which until recently had ten distinct, sector-specific stakeholder advisory groups on its Advisory Committee. These sectors formally vote on MISO policy and make recommendations to the MISO Board of Directors, and they include, beyond supply side interests, public nonprofit organizations that advocate for electricity consumers, state utility regulatory authorities, “Environmental/Other Stakeholder Groups,” customers who purchase electricity from utilities within MISO, “Coordinating Members,” and

level. . . . Depending on which governing documents is being amended by the proposal . . . the PJM Board must vote on the proposal before it is filed with FERC.”)

²⁸² See Yoo & Blumsack, *supra* note 279, at 128.

²⁸³ See Dworkin & Goldwasser, *supra* note 33, at 581–82, 595 (noting “the public’s interest in RTO decision-making is extremely difficult to particularize” because it is only represented through the divergent interests of other stakeholders and suggesting the possibility of a “regional public advocate program within the [RTO] stakeholder process”); Welton, *supra* note 20, at 258 (noting states’ weak role within RTOs).

²⁸⁴ See, e.g., Yoo & Blumsack, *supra* note 279, at 130 (describing how supply side sectors dominate PJM’s “sector-weighted voting” model of stakeholder participation); cf. Welton, *supra* note 20, at 255–56 (describing how the union of supply and demand side entities and interests under “mega-holding companies” in the highly consolidated energy industry has subjected many RTO member and stakeholder decision-making processes to industry capture).

entities that build and develop transmission lines.²⁸⁵ Current representatives within the “Environmental/Other” sector include, for example, Natural Resources Defense Council—a leading national environmental nonprofit—and organizations such as Clean Grid Alliance and The Sustainable FERC Project, both of which fight for MISO policies that will support more low-carbon generation.²⁸⁶

Another interesting aspect of these stakeholder committees representing a range of interests is their fluidity with respect to inclusiveness. When stakeholders feel that they lack enough of a distinct voice, RTOs sometimes change the structure of stakeholder advisory committees to include them. For example, interest groups for the coal industry had long requested the creation of a new stakeholder sector to represent coal and mining interests.²⁸⁷ MISO accordingly approved the formation of an eleventh sector, the “Affiliate Sector,” primarily so that groups with views largely divergent from the environmental sector could have an independent voice on the Advisory Council.²⁸⁸ The most vocal group that pressed for this separate sector—and which is now a member of it—was the lignite coal industry, but other entities may now also choose to join this sector.²⁸⁹ Indeed, as of late June 2021, the “Affiliate Sector” stakeholder group had twenty-one members, nearly all of which represent coal, mining, and other business interests.²⁹⁰

2. Influence

The debate regarding voting rights for a newly created stakeholder sector highlights another important strand of accountability—

²⁸⁵ MISO, MISO STAKEHOLDER GOVERNANCE GUIDE 9 (2021), <https://cdn.misoenergy.org/Stakeholder%20Governance%20Guide105455.pdf> [<https://perma.cc/TL9B-REHM>].

²⁸⁶ MISO, STAKEHOLDER GROUP PARTICIPATION (2021), <https://cdn.misoenergy.org/Stakeholder%20Group%20Participation95902.pdf> [<https://perma.cc/2TGW-DJC8>]; *See About*, CLEAN GRID ALL., <https://cleangridalliance.org/about> [<https://perma.cc/QFS5-HCXH>] (noting the many members of the alliance, all of which “support renewable energy”); *About the Project*, SUSTAINABLE FERC PROJECT, <https://sustainableferc.org/about-the-project/> [<https://perma.cc/776T-RDLG>] (noting the project’s mission).

²⁸⁷ *See Federal Energy Regulatory Commission Approves New “Affiliate Sector” on the MISO Advisory Council, Gives Lignite Energy Council a Role on the Advisory Committee*, LIGNITE ENERGY COUNCIL (July 29, 2020), <https://lignite.com/news/federal-energy-regulatory-commission-approves-new-affiliate-sector-on-the-miso-advisory-council-gives-lignite-energy-council-a-role-on-the-advisory-committee/> [<https://perma.cc/AL5L-Q6MY>] (noting the years-long effort of the Lignite Energy Council to become a stakeholder in MISO’s Advisory Council).

²⁸⁸ *Id.*

²⁸⁹ *See* MISO, *supra* note 286.

²⁹⁰ *See id.*

the extent to which stakeholders' voices are heard and ultimately influence substantive decisions. Decision-making processes can include stakeholders but leave them largely mute and powerless, or they can give them a meaningful voice. The extent of stakeholder influence largely depends on processes for stakeholder comments and voting on proposed and final policies, and the accessibility of these processes to voters.

The assumption in federalism literature is that delegating decision-making authority to the state level enhances accountability and ensures that policies are more likely to capture voter preferences because the decision-making process is "closer" to the people.²⁹¹ Recent critiques expertly cast doubt on this common assumption—arguing that state and local processes are by no means automatically more "democratic" or accessible than alternative decision-making fora.²⁹² Indeed, James Madison's concerns about the tyranny of a local majority faction have taken a real life form in some state-based decision making.²⁹³

Although state-based grid decision-making processes are physically closer to the people, they are far less accessible, and potentially less susceptible to meaningful influence by a wide range of stakeholders, than the RTO alternative.²⁹⁴ In states that follow traditional regu-

²⁹¹ See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("This federalist structure of joint sovereigns . . . increases opportunity for citizen involvement in democratic processes."); Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 146–47 (2018) (noting that "scholars, courts, and policymakers" all "tend to agree that states are closer to the people in some way that matters" and disputing then this claim).

²⁹² See, e.g., David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 784, 787 (2017) (observing that the national-level political affiliations of state voters affect the outcomes of state elections, leaving "no reason to believe that [state] policies will be made according to local preferences" and creating "less [policy] variation across jurisdictions"); Timothy Meyer, Comment, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 CALIF. L. REV. 885, 889 (2007) (arguing that some federal legislative or administrative proceedings may better encompass "accountability" than state litigation challenging federal legislation).

²⁹³ THE FEDERALIST NO. 10, at 45 (James Madison) (noting the risk of majority factions carrying "into effect schemes of oppression"). See, e.g., Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 554–55 (1999) ("[T]he risk that negative but popular biases against welfare recipients—particularly racial biases—will color policy decisions appears to heighten as decisions are moved closer to the people. This risk of a 'tyranny of the majority,' by which local prejudices go unchecked by any outside forces, was a key concern animating James Madison's vision of a two-tiered system of national and state government.").

²⁹⁴ MISO—the largest RTO—covers fifteen states and approximately 65,000 miles of transmission lines, and has only three offices in Indiana, Arkansas, and Minnesota. *Locations, supra* note 268; MISO, MISO OPERATING CONDITIONS: FREQUENTLY ASKED QUESTIONS 1 (2020),

lation of the electricity sector, state public utility commissions (“PUCs”) approve utilities’ decisions about investing in new transmission lines or adding new generation units to supply electricity.²⁹⁵ Individual electricity consumers, or members of the public wishing to advocate for more accessibility to green energy, for example, may intervene, but their voices are often drowned out by utilities, which are notoriously influential within PUCs.²⁹⁶ Indeed, some utility regulators view grassroots advocates as “ill informed, irresponsible, and obstructionist.”²⁹⁷ Furthermore, as noted with respect to inclusiveness, state PUCs lack the types of stakeholder committees offered by RTOs, and thus limit many groups to the relatively difficult option of intervening in PUC proceedings or advocating for their goals with state legislatures.²⁹⁸ Many states fund a public governmental entity to represent ratepayers within utility proceedings, but this entity tends to be limited in its mission—such as only seeking low rates for consumers—and is often underfunded.²⁹⁹

RTOs are, in many ways, also more likely to accommodate stakeholder preferences than FERC is—albeit with the very important ca-

<https://cdn.misoenergy.org/FAQ%20Emergency%20Operations%2010-2020318049.pdf> [<https://perma.cc/KM8P-F5AS>].

²⁹⁵ CLEARY & PALMER, *supra* note 259, at 1–2 (describing traditional regulated markets).

²⁹⁶ See WILLIAM T. GORMLEY, JR., *THE POLITICS OF PUBLIC UTILITY REGULATION* 129 (1983) (finding that utility commissioners tend to agree with utilities’ preferred policies over those of grassroots groups); see also Stefan H. Krieger, *An Advocacy Model for Representation of Low-Income Intervenors in State Public Utility Proceedings*, 22 *ARIZ. ST. L.J.* 639, 647–48 (1990) (noting the unique skills needed to effectively intervene on behalf of clients in a PUC proceeding, which involves an “inherently political” decision-making process that considers divergent interests); *id.* at 650 (“Utilities and many industrial and commercial intervenors have substantially greater funding sources than consumer groups.”).

²⁹⁷ William T. Gormley, *Public Advocacy in Public Utility Commission Proceedings*, 17 *J. APPLIED BEHAV. SCI.* 446, 449 (1981).

²⁹⁸ See, e.g., Krieger, *supra* note 296, at 677–78 (noting the difficulty of effectively intervening in PUC proceedings for “low-income intervenors” and describing the arduous processes of some public interest groups to effect change via protests, “direct . . . actions at [PUC] rate hearings,” and lobbying efforts in state legislatures).

²⁹⁹ See, e.g., Karen Uhlenhuth, *Missouri Consumer Advocate: Stop Funding Efficiency During Pandemic*, *ENERGY NEWS NETWORK* (Apr. 9, 2020), <https://energynews.us/2020/04/09/missouri-consumer-advocate-stop-funding-efficiency-during-pandemic/> [<https://perma.cc/ZJ6C-4A4Z>] (noting the Missouri Office of Public Counsel’s urging that energy efficiency programs in Missouri be suspended due to the pandemic, despite minimal utility bill savings for customers, which renewable energy proponents criticized as a pretextual argument used to disguise the Office’s desire to end energy efficiency programs it “has long been critical of”); Darryl G. Stein, *Perilous Proxies: Issues of Scale for Consumer Representation in Agency Proceedings*, 67 *N.Y.U. ANN. SURV. AM. L.* 513, 524 (2012) (noting that there are ratepayer “proxy advocates” in forty-five states); *id.* at 569 (“Alabama’s proxy advocate has a statutory budget of \$250,000 whereas other states fund their proxy advocates in excess of two million dollars.”).

veat that traditionally public entities, such as states, are not members of some RTOs and must find channels other than formal votes for influencing RTO behavior.³⁰⁰ Under some models of democratic accountability, any delegation of a federal agency's authority to a regional entity erodes accountability and responsiveness because this increases the amount of separation between the democratically elected President and the exercise of administrative power.³⁰¹ But there are grounds for skepticism of this “presidential control” model of agency accountability, particularly because, as Dave Owen has observed, it is to some degree paradoxical.³⁰² On the one hand, “standard federalist theory” holds that devolving decision-making authority to the states, and thus allowing states to respond to people's diverse needs, enhances accountability.³⁰³ But on the other hand, the theory also suggests that allowing agency divergence from the federal executive's unitary directives under federal regional administration erodes accountability.³⁰⁴

If one follows the assumption that giving federal agencies some discretion to depart from a unitary executive command enhances accountability, then FERC's delegation of some decision-making authority to RTOs appears to be beneficial when it comes to stakeholders influencing policy outcomes. Take the example of the controversial Minimum Offer Price Rule (“MOPR”). FERC, operating beneath the watchful gaze of a President who vowed to revive the U.S. coal industry,³⁰⁵ insisted that PJM—an RTO in the Mid-Atlantic region—force state-subsidized, new renewable energy resources to bid into PJM's capacity market auctions at an artificially high price in order to protect existing resources such as coal and natural gas from

³⁰⁰ See *supra* note 20.

³⁰¹ See Blank & Rosen-Zvi, *supra* note 13, at 1964–65 (citing Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–32 (2001)) (describing how federal agency delegation of authority to regional federal offices erodes accountability under prominent accounts of executive power, and citing to arguments such as those of now-Justice Elena Kagan); see also, e.g., Owen, *supra* note 11, at 76 & n.107 (noting the emphasis on “centralized accountability” and providing sources); Bressman, *supra* note 29, at 485–91 (describing the “Presidential Control Model” of accountability); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (noting that the chief executive is “directly accountable to the people”).

³⁰² See Owen, *supra* note 11, at 76–77.

³⁰³ *Id.* at 77.

³⁰⁴ *Id.*

³⁰⁵ See, e.g., Eric Lipton, ‘*The Coal Industry Is Back, Trump Proclaimed. It Wasn't.*’, N.Y. TIMES (Oct. 18, 2020), <https://www.nytimes.com/2020/10/05/us/politics/trump-coal-industry.html> [<https://perma.cc/V264-TQUK>] (noting then-President Donald Trump's proclamations that he would reinvigorate America's coal industry soon after taking office in 2017).

competitive disadvantage.³⁰⁶ This made it more likely that coal or natural gas—and not subsidized renewables such as wind and solar energy—would clear the auction and receive payments for offering capacity. Many of the states and stakeholders within PJM vociferously objected to FERC’s approach.³⁰⁷ And the RTO itself—although largely angering pro-renewable states through its MOPR actions—has attempted to moderate this mandate. For example, it has asked for alternative ways of allowing clean energy to bid into auctions without damaging the chances that this energy will clear the auction.³⁰⁸

Another interesting aspect of the PJM example is its exposure of the competing levels of accountability within a regional cooperative federalist regime. The traditional story is that states must be free to directly respond to their voters’ preferences—not commandeered by

³⁰⁶ See Calpine Corp., 169 FERC ¶ 61,239, at 3 (Dec. 19, 2019) (preliminary) (requiring PJM to extend its “MOPR to include both new and existing resources . . . that receive, or are entitled to receive, certain out-of-market payments,” although exempting *existing* energy resources from this requirement); Catherine Morehouse, *FERC Move to Raise PJM Capacity Market Bids Shows ‘Clear Bias’ Against New, Clean Generation: Glick*, UTIL. DIVE (Dec. 20, 2019), <https://www.utilitydive.com/news/ferc-move-to-raise-pjm-capacity-market-bids-shows-clear-bias-against-new/569483/> [<https://perma.cc/2SM5-8C8E>] (describing National Mining Association’s support for FERC’s MOPR ruling because the ruling would assist coal resources that the Association views as having been subjected to “market manipulation”). For further background on the MOPR, see *supra* notes 100–06 and accompanying text.

³⁰⁷ See, e.g., *PJM Board Okays Plan to Ease Concerns with MOPR Ruling*, NUCLEAR NEWSWIRE (July 14, 2021, 7:59 AM), <https://www.ans.org/news/article-3067/pjm-board-okays-plan-to-ease-concerns-with-mopr-ruling/> [<https://perma.cc/BJP2-DATT>] (noting states’ threats to withdraw from PJM as a result of the MOPR and stakeholders’ proposed alternatives).

³⁰⁸ The story of the RTOs’ involvement in the MOPR is long and complex, but the case of PJM provides a useful case study. PJM in part contributed to the problem of the rule by proposing two alternative capacity markets—one of which would have had subsidized resources (including renewables) compete in a separate auction, and one of which would have expanded the MOPR to subsidized resources. But both rules had relatively broad exemptions for renewable resources—exemptions that FERC rejected, to the consternation of the PJM. See Gavin Bade, *PJM Files Competing Capacity Market Reforms at FERC*, UTIL. DIVE (Apr. 10, 2018), <https://www.utilitydive.com/news/pjm-files-competing-capacity-market-reforms-at-ferc/520982/> [<https://perma.cc/4HWK-2Q69>] (describing PJM’s initial filings with FERC in April 2018); Request for Rehearing and Request for Clarification of PJM Interconnection, L.L.C., Calpine Corp., No. EL 16–49–00, at 3–4 (FERC Jan. 21, 2020) (arguing that FERC’s MOPR order “disrupts the balance that has successfully worked to accommodate the interests of states and integrated utilities, with appropriate guardrails, while maintaining the integrity of the market”). For objections to the MOPR by states within PJM, see, for example, Catherine Morehouse, *PJM: MOPR Compliance Plan Aims to Avoid FERC’s ‘Immense’ and ‘Unreasonable’ Burden*, UTIL. DIVE (June 4, 2020), <https://www.utilitydive.com/news/pjm-mopr-compliance-plan-aims-to-avoid-fercs-immense-and-unreasonable/579179/> [<https://perma.cc/SL6L-ZKQ9>] (quoting the Maryland Public Service Commissioner’s statement that he was “appalled” by FERC’s subsequent decision to reject a PJM proposal for implementing the 2019 FERC MOPR order, instead holding that the MOPR requires that utilities that provide electricity service to customers who have not selected a competitive provider—so-called “default” service—be treated as a subsidized form of generation).

the federal government—in order to be accountable.³⁰⁹ And the federal executive, which is directly elected by the people, must not excessively delegate its authority and thereby shirk the executive's representative duties.³¹⁰ Placing an institution between these two levels might confound the fragile federal-state relationship in which the federal government avoids overly intruding on state officials' autonomy.³¹¹ In other respects, however, regional institutions might *better* respond to the many voters who fail to find adequate solutions at either the state or the federal levels, whether that is because they are in the minority at one of those levels or lack a meaningful way to influence the decision-making process within either policy space. As Blank and Rosen-Zvi observe, “regions serve as buffers between the states and Washington and between crude political pressures and professional expertise” and are not “wholly subordinated to the increasingly polarized politics of Washington and of the states.”³¹² In the case of the MOPR, PJM has in some ways attempted to serve as that buffer with its proposed modifications to the MOPR that would better accommodate renewable energy, but it has failed to adequately appease either FERC or its state members. The MOPR process has angered state members to the point that they have threatened to exit, and FERC wholly rejected PJM's arguments in its motion for rehearing.³¹³

E. *A Note on Private Regional Cooperative Governance*

One essential feature permeating the accountability analysis in this Part is that RTOs are a form of *private* regional cooperative governance. Unlike HIDTAs in the opioid context, which form regional entities comprised of government officials, law enforcement, and similar governmental or government-affiliated entities, RTOs are non-profit organizations whose stakeholders are primarily members of the electricity industry—generators, power marketers, transmission line owners, and the like.³¹⁴ It is possible that some of the beneficial aspects of regional cooperative governance noted in this Part arise both

³⁰⁹ See Blank & Rosen-Zvi, *supra* note 13, at 1902.

³¹⁰ See *supra* note 301 (describing executive accountability arguments).

³¹¹ See Blank & Rosen-Zvi, *supra* note 13, at 1963.

³¹² *Id.* at 1965.

³¹³ Welton, *supra* note 20, at 258–59 (describing states' exit threats); Calpine Corp., 171 FERC ¶ 61,034, at 57–58 (Apr. 16, 2020) (preliminary), <https://www.pjm.com/-/media/documents/ferc/orders/2020/20200416-el16-49-001.ashx> [<https://perma.cc/5EA4-U8C6>].

³¹⁴ See, e.g., Cullenward & Welton, *supra* note 27, at 110 (describing “RTO members” as “predominantly utilities and generators”); *Members & Market Participants*, SW. POWER POOL, <https://www.spp.org/about-us/members-market-participants/> [<https://perma.cc/4ZF7-B7ZZ>] (showing primarily industry-based membership in SPP).

from the regional and the private nature of this approach. Consider the example of footvoting and policy innovation. RTOs can perhaps act more nimbly and quickly in response to stakeholder demands than a formal governmental entity, and they can more easily offer “a la carte” governance that allows stakeholders to pick and choose aspects of a governance regime that best fit their needs.³¹⁵ Furthermore, the inclusion of industry actors as stakeholders in a governance regime is hard to avoid in the area of grid policy. Here, many policy determinations are infused with highly technical questions, such as equipment and practices needed to ensure proper voltage within wires and to avoid outages, for which industry has the most expertise and information.

This is not to say, however, that RTOs must be private. Public governance regimes incorporate industry knowledge and concerns through notice-and-comment rulemaking and, in highly technical areas, negotiated rulemaking.³¹⁶ Further, the private nature of RTOs in some cases constrains their ability to achieve the values explored here—particularly in the accountability sphere, as documented by a growing body of critical scholarship.³¹⁷ Part III explores these types of obstacles and means of overcoming them. Part III also analyzes scenarios in which regional cooperative governance might not only be superior to state centric or traditional cooperative federalist approaches, but also better than other forms of regional governance regimes.

III. IMPROVING AND EXPANDING THE BENEFITS OF REGIONAL COOPERATIVE FEDERALISM

Regional cooperative federalism—a governance approach used most fully in the electric transmission context—offers great promise. This governance form performs quite well along the major good governance metrics commonly cited in the federalism discourse. But there is substantial need for improvement, and this Part explores how federal-regional regimes could be better designed to ensure greater innovation and experimentation, efficiency, and accountability.

³¹⁵ See *infra* note 325 and accompanying text.

³¹⁶ See generally Hannah J. Wiseman, *Negotiated Rulemaking and New Risks: A Rail Safety Case Study*, 7 WAKE FOREST J.L. & POL'Y 207 (2017) (explaining that although the use of negotiated rulemaking has declined, the Department of Transportation still uses it relatively regularly, particularly for complex technical issues such as the regulation of train technology to enhance rail safety).

³¹⁷ See Yoo & Blumsack, *supra* note 279; Dworkin & Goldwasser, *supra* note 33; see also Welton, *supra* note 20, at 256–57.

A. *Enhancing Innovation and Experimentation*

Within regional cooperative federalism, the presence of a federal entity pushing for innovation, along with states and other stakeholders providing bottom-up impetus for change, can generate genuinely ambitious and creative policies. But FERC could require far more innovation than it currently does. Take the example of “clean energy,” which, judging by the number of state level policies addressing renewable power generation, is one of the highest priority areas in need of policy innovation.³¹⁸ The regionalization of the electric grid has already supported a vast expansion of renewables by improving generators’ access to customers and providing a diversity of resources available at different times of the day, thus helping to balance out intermittency challenges.³¹⁹ But RTOs could do even more to integrate higher percentages of renewables by planning both within their region and with neighboring RTOs to draw from renewable resources at different geographic locations at different times of day.³²⁰ Aggregating a range of solar power generators from east to west can help to provide solar energy throughout the day, and incorporating wind generation from regions that tend to have different weather pressure systems and elevations can reduce the intermittency of generation.³²¹ FERC could also incentivize or require RTOs to develop better intermittency models and other models projecting generation from renewables. This would further reduce the need for reserve generation

³¹⁸ See DSIRE, *supra* note 128 (showing thirty states and the District of Columbia as requiring some percentage of renewable or “clean” energy); Welton, *supra* note 20, at 238–40 (noting the “sectoral transformation” of the grid that will be necessary to reduce U.S. carbon emissions).

³¹⁹ See, e.g., M. MILLIGAN, B. KIRBY, R. GRAMLICH & M. GOGGIN, *IMPACT OF ELECTRIC INDUSTRY STRUCTURE ON HIGH WIND PENETRATION POTENTIAL 2* (2009), <https://www.nrel.gov/docs/fy09osti/46273.pdf> [<https://perma.cc/5EU5-WT54>] (concluding that RTOs and ISOs, which have “open market structures with large geographic scope, along with day-ahead, hour-ahead, and sub-hourly market clearing,” best accommodate the integration of wind because they allow for conventional resources, which can compensate for intermittent periods of low wind generation, to be more maneuverable, and they allow grid operators to draw from areas that tend to be windy at different times of day, thus further reducing intermittency).

³²⁰ See Elaine K. Hart, Eric D. Stoutenburg & Mark Z. Jacobson, *The Potential of Intermittent Renewables to Meet Electric Power Demand: Current Methods and Emerging Analytical Techniques*, 100 *PROC. IEEE* 322, 328–29 (2012) (noting the benefits of “geographical aggregation” of renewable power sources, such as wind and solar generation, which can “reduce forecast errors associated with portfolios of intermittent generators” and can otherwise “reduce intermittency”; the measure of these benefits “is a function of the resource, distance, terrain, and time scale”).

³²¹ See *id.* at 328.

and would help to break down barriers at the borders between RTOs, which tend to impede electricity transfer among regions.

In fostering more innovation, FERC could use mandates—as it did through Order No. 1000, which required regional transmission planning—or work with the Department of Energy to encourage the use of grants or competitive prizes. FERC could also take advantage of its role as a top-down regulator to require regular reporting of RTO progress within a particular policy area and to synthesize and distribute information about the policies that seem to be most effective. FERC’s requirement of transparency and reporting with respect to RTOs’ and utilities’ transmission planning process and progress under Order Nos. 890 and 1000 is a step in the right direction.³²² And indeed, FERC’s regular analysis of RTOs’ performance after cold-weather events prior to the winter 2021 event seemed to have inspired real change, although not enough in some RTOs—particularly ERCOT.³²³

Enhanced analysis of RTO policies and their effectiveness would make policy experimentation and innovation more useful because different approaches taken and lessons learned from each RTO could be synthesized and, where relevant, borrowed and adapted by other RTOs.

B. Expanding Governance Options for Constituents and Enhancing Efficiencies

Beyond innovation, regionalism in the electric grid context has provided an important alternative to state-based grid approaches. In so doing, it has opened up opportunities for new, cleaner generation and less expensive forms of energy.³²⁴

Additional efforts could further the diversity of the electricity supply and governance options offered by regional cooperative federalism. One of the most promising options is for regional organizations

³²² See *supra* note 222 and accompanying text.

³²³ See, e.g., FERC & N. AM. ELEC. RELIABILITY CORP., *supra* note 184 (documenting failures during the 2011 cold snap and making recommendations for improvement); FERC & N. AM. ELEC. RELIABILITY CORP., THE SOUTH CENTRAL UNITED STATES COLD WEATHER BULK ELECTRIC SYSTEM EVENT OF JANUARY 17, 2018 (2019), <https://cms.ferc.gov/sites/default/files/legal/staff-reports/2019/07-18-19-ferc-nerc-report.pdf> [<https://perma.cc/P6FG-G8XZ>] (doing the same for the 2018 cold snap).

³²⁴ See, e.g., MISO, MISO TRANSMISSION EXPANSION PLAN 44–47 (2011) (noting that “[p]ublic policy decisions over the last decade have driven changes in how the transmission system is planned” and pointing specifically to state renewable portfolio standards within MISO’s territory); *supra* notes 27, 166–69 (describing the success of MISO’s MVPs at implementing new transmission infrastructure to accommodate increases in renewable generation associated with state policies).

to more regularly offer “a la carte” or retail governance options. Specifically, these organizations could offer up certain governance services to entities who are not their members, as SPP and CAISO have done for markets that supply real time electricity needs.³²⁵ This is a particularly important option for efficiency because it allows entities looking for specific governance strategies to avoid paying for unwanted governance services along with services that meet their needs. For example, if constituents want the efficiencies of a competitive market for real time energy but believe that longer term generation capacity planning within the RTO is too cumbersome, they can choose to join the energy market only. This avoids the “all-or-nothing,” lumpy attributes of governance that often create inefficiencies. Retail shopping for RTO services also enhances administrative efficiencies, allowing utilities and states to rely on an RTO for certain organizational and operational services for markets and grid planning, rather than duplicating this effort.³²⁶

C. *Enhancing Accountability Through Improved Decision-Making Processes*

The areas of experimentation, innovation, and efficiency require mere tweaking for RTOs to vault from being “good” governance options to excellent ones. Accountability, however, represents the single largest challenge of the regional cooperative federalism model, at least with respect to RTOs. As noted in Part II, RTOs are private entities consisting nearly exclusively of private members—utilities, transmission line owners, and the like.³²⁷ As Shelley Welton and others have argued, one way of enhancing RTO accountability is to

³²⁵ These programs create special submarkets within the RTO for those utilities that only need to purchase limited amounts of electricity at certain times to support their customers’ electricity demand when the utility’s generation capacity is being taxed. See *Western Energy Imbalance Service Market*, *supra* note 249 (detailing SPP’s Western Energy Imbalance Services Market, from which utilities can purchase electricity “on a contract basis” to “balance generation and load regionally and in real time”); *About*, *supra* note 249 (noting that CAISO’s Energy Imbalance Market, which has many utility members that are not ISO members, “automatically finds low-cost energy to serve real-time consumer demand across the west” and “improves the integration of renewable energy”).

³²⁶ For an analogous discussion of how federal agencies sometimes rely on other federal agencies to perform certain functions, see Marisam, *supra* note 265, at 887–88 (“[T]he vast, yet unexplored, interagency marketplace can be used to improve decision making, by allowing agencies to better take advantage of each other’s regulatory expertise and experience.”).

³²⁷ See *supra* notes 86, 314, and accompanying text (describing the private nature of RTOs, as well as the predominance of utilities and other industrial representatives among their members).

expand representation of the public within their processes, or even transform RTOs into public organizations.³²⁸

Beyond more directly incorporating public stakeholders, RTOs need more tools for resolving the inevitable clashes that arise among many private and public interests affected by regional decisions. It is common for RTOs to have FERC approve a tariff revision, such as a plan for new transmission lines and the financing of those lines, only then to face legal challenges to the approved tariff by stakeholders within the RTO.³²⁹ The challenges often drag on for years, with courts sending the tariff back to FERC for further revisions, and stakeholders once again challenging the tariff post-revision.³³⁰ To some extent, these challenges are unavoidable. For certain policy decisions, stakeholders will be dissatisfied with the substantive outcome no matter how many opportunities for engagement are offered. But more effective stakeholder engagement before federal approval of the regional policy could avoid some of these conflicts. One approach used—albeit sparingly—in the federal context is negotiated rulemaking, in which stakeholders formally participate in the drafting of a rule.³³¹ The governance organization makes the final decision about the content of the rule, but stakeholders have unusually large amounts of input in its formation.³³² One goal of this “reg-neg” approach is to reduce later challenges to the rule. There is some evidence that reg-neg achieves this result, but other studies suggest that reg-neg does not reduce litigation.³³³

328 See Welton, *supra* note 20, at 256–57 (noting the problems of adequately representing the public interest within an RTO governance structure dominated by industry actors and arguing that even “a well-structured private RTO would still likely have interests out of step with the pressing and growing public interest in addressing climate change”); Dworkin & Goldwasser, *supra* note 33, at 595 (expounding strategies to “ensur[e] representation of the public interest in RTO decision-making”).

329 See, e.g., *Ill. Com. Comm’n v. FERC*, 576 F.3d 470, 478 (7th Cir. 2009) (agreeing with stakeholders’ opposition to FERC’s approval of PJM’s cost allocation scheme); *Ill. Com. Comm’n v. FERC*, 756 F.3d 566, 564–65 (7th Cir. 2014) (same).

330 See, e.g., *supra* note 329 (showing two successful stakeholder challenges to PJM’s transmission line financing rule); *Ill. Com. Comm’n*, 756 F.3d at 556 (“It’s been almost five years since we remanded this case to the Federal Energy Regulatory Commission.”).

331 See, e.g., Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1256–57 (1997) (describing the negotiated rulemaking process).

332 See *id.* (describing the influence of “regulated firms, trade associations, citizen groups, and other affected organizations” in the negotiated rulemaking with federal agencies).

333 See Wiseman, *supra* note 316, at 207, 210–11 (describing the reduced litigation claim and scholars who dispute the claim and providing sources).

Strategies short of formal negotiated rulemaking could help to reduce conflict and make federal-regional decision making more efficient. In some cases, RTOs should consider establishing subregional decision-making processes for policies that implicate strong state and local preferences. For example, committees representing different groups of states within RTOs could propose policy strategies to the RTO, and the RTO could propose a tariff to FERC that reflected these strategies. The resulting tariff could, if needed, provide for different policies within different parts of the region, as already occurs with license plate rates.³³⁴ License plate rates allow a utility to pay one rate for use of transmission lines throughout the entire region, but the single rate paid by utilities for use of all of the wires differs depending on each utility's location.³³⁵ This allows for the recognition of different conditions within different subregions of the RTO.

There is a delicate balance between allowing and encouraging RTOs to adopt policies that differ within subregions of the RTO and requiring a more uniform approach. Too much subregional policy could defeat the very purpose of the RTO, which is to make it easier for generators to send electricity over numerous transmission lines owned by different utilities and for generators to access more customers in a broader variety of locations.³³⁶ And at some point, with enough policy variation within the region, the very purpose of the regional organization—aside from coordinating these policies—might seem moot. But allowing for some policy diversity within the RTO encourages more utilities to agree to forming an RTO, thus ensuring that the overall purpose of RTOs is accomplished.³³⁷

D. Transferring the Regional Cooperative Federalism Model to Other Contexts

Beyond improving the most common form of regional cooperative governance found in the United States, this area is ripe for use in

³³⁴ See Regional Transmission Organizations, 65 Fed. Reg. 810, 915 (Jan. 6, 2000) (noting one commenter's point that "a single region-wide rate [for transmission] may not be appropriate in a large region with legitimate cost differences" and that license plates rates can partially address this problem); *id.* at 917 (allowing RTOs to charge license plate rates).

³³⁵ See *id.*

³³⁶ See, e.g., *id.* at 811 (noting that RTOs could enhance market performance and competition and "benefit consumers through lower electricity rates resulting from a wider choice of services").

³³⁷ FERC expressly recognized this in allowing license plate rates, which vary within the RTO. See *id.* at 917. The Commission noted its concern that without these rates, "the potential for cost-shifting could act as an impediment to RTO formation, thereby denying all stakeholders the benefits that come from RTO membership." *Id.*

other policy areas other than only RTOs. Indeed, as noted in Part I, regional cooperative federalism is also used in the context of opioid control, where the federal government approves groups of counties with high intensity drug trafficking to form regional entities that implement federally approved programs.

Several factors must be present for regional cooperative federalism to work well. Many of these factors apply to all regional approaches, such as regional federal administration and federal-state joint governance. First, there must be challenges, such as opioid trafficking, or natural or artificial features and infrastructure, such as rivers or transmission lines, that cross subfederal political lines. Second, regionalism is most needed when state-by-state or local approaches would create substantial spillover effects if implemented independently. Third, the policy area must implicate strong federal and subfederal interests and authority. For example, for rivers and watersheds that feed rivers and cross state lines, the federal government has long regulated navigability and water quality, whereas states regulate water quantity.³³⁸ States, through delegated authority under the Clean Water Act,³³⁹ also have substantial control over water quality issues.³⁴⁰ Federal and state actors, therefore, must both be involved in any regional approach. Similarly, with respect to transmission lines, the federal government regulates their operation, whereas states regulate the utilities that connect to the lines and the physical siting of the transmission lines.³⁴¹

There are at least two additional features that make regional cooperative federalism, specifically, a likely candidate for governance. One is a distinct need for innovation, and, in some cases, speedy inno-

³³⁸ See *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 103, 108 (2004) (discussing federal regulation of water quality under the Clean Water Act and noting that Congress expressly reserved to the states the ability to regulate water quantity under the Act).

³³⁹ 33 U.S.C. §§ 1251–1387.

³⁴⁰ See, e.g., *S. Fla. Water Mgmt. Dist.*, 541 U.S. at 107 (noting that, under the Clean Water Act, “a State may set individualized ambient water quality standards by taking into consideration ‘the designated uses of the navigable waters involved’” (quoting 33 U.S.C. § 1313(c)(2)(A))); State Program Requirements; Approval of Application by Oklahoma to Administer the National Pollutant Discharge Elimination System (NPDES) Program, 61 Fed. Reg. 65,047, 65,047, 65,052 (Dec. 10, 1996) (approving, “pursuant to Section 402 of the [Clean Water Act],” an Oklahoma water pollution discharge program to “operate *in lieu of*” a similar federal program administered by the EPA and listing states with similarly approved delegated authority).

³⁴¹ See 16 U.S.C. § 824(b) (“The [FERC] shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specif[ic]ed . . . , over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce . . .”).

vation. As explored in Part II, policymakers are often risk averse and are unlikely to innovate for a variety of reasons.³⁴² There is likely less risk aversion within regional organizations. When state or county actors coordinate to address a shared issue—with or without a federal actor within the organization—they might be more willing to take risks. If the policy ultimately fails, voters might blame the regional organization, not the individual state or county policymaker within that organization. Furthermore, officials coordinating within a regional organization partially avoid the free riding problem, in which neighboring states immediately copy any policies that turn out to be beneficial. Within regional organizations, the neighboring jurisdictions are in one room at the decision-making table.

Even with these barriers to innovation lowered in a regional setting, policy innovation might not happen rapidly enough in regional organizations that lack direct federal oversight. Diverse counties or states within the regional organization might bicker over the proper way forward, and they might still fear blame from voters for having assented to a regional policy that did not fully match local voters' preferences. In this case, when innovation to address a difficult policy problem is needed, and needed speedily, a top-down federal actor driving that innovation might be important.³⁴³

Another policy characteristic that uniquely calls for regional cooperative federalism is the need for a substantial infusion of federal resources and expertise in the policy-making process. The few federal-state hybrid organizations that currently operate benefit from some federal expertise and funds, but these benefits tend to be relatively marginal. For example, river basin commissions have only one federal representative, and most of their money comes from the states that make up the respective commission's membership.³⁴⁴ And the Metropolitan Washington Airports Authority is self-funded through "fees, rents, and revenues."³⁴⁵ Policy areas that call for the expertise of a large, federal agency with long-term, well-paid staff and an infusion of

³⁴² See *supra* notes 15, 123, and accompanying text.

³⁴³ As explored in Part II, FERC has played this precise role in the regional grid governance context, both mandating and encouraging different forms of innovative policymaking by RTOs for regional grid planning and development. See *supra* Section II.B.1.a. But FERC has also stifled states' creative approaches to subsidizing renewables, as demonstrated by its orders with respect to the MOPR in PJM. See *supra* notes 306–08 and accompanying text.

³⁴⁴ See Owen & Wiseman, *Coequal Federalism*, *supra* note 11, at 302, 304 & n.63, 326–30 (describing multistate river basin commission composition and funding).

³⁴⁵ *MWAA History and Facts*, METRO. WASH. AIRPORTS AUTH., <https://www.mwaa.com/about-authority/mwaa-history-and-facts> [<https://perma.cc/G6HE-Z5J8>].

federal grant money and other aid are likely best governed through a regional cooperative federalism approach.

The electricity transmission and opioid trafficking examples illustrate these features. Both areas demand relatively rapid innovation and substantial resources and expertise. With respect to innovation, FERC encouraged the formation of RTOs in the midst of widespread dissatisfaction over rising electricity rates and increasing demands for consumer access to more diverse generation sources.³⁴⁶ And the opioid crisis spread quickly around certain regions as doctors overprescribed drugs and drug companies pumped out large quantities of relatively cheap painkillers.³⁴⁷ This called for rapid responses as the crisis ballooned out of control, overwhelming healthcare systems and leading to deaths, “lost productivity,” family crises, and criminal justice problems, among other serious impacts.³⁴⁸

The electricity transmission and opioid contexts both also benefit particularly from the infusion of federal expertise. Reliably operating the transmission grid is a complex and technical task, and assessing how to best plan for and regulate this grid is an expensive, time-consuming endeavor.³⁴⁹ Having FERC review and approve RTO actions adds an important layer of expertise and resources to those that already exist at the RTO level. Indeed, the case law limiting FERC’s review of RTOs to all-or-nothing approval or rejection of energy market design is likely problematic, as it constrains FERC’s ability to partially amend RTO policy in ways that improve the policy.³⁵⁰ In the

³⁴⁶ See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540, 21,550 (May 10, 1996).

³⁴⁷ See, e.g., Cornelius A. Thiels, Stephanie S. Anderson, Daniel S. Ubl, Kristine T. Hanson, Whitney J. Bergquist, Richard J. Gray, Halena M. Gazelka, Robert R. Cima & Elizabeth B. Habermann, *Wide Variation and Overprescription of Opioids After Elective Surgery*, 266 ANNALES SURGERY 564, 564 (2017) (“The majority of patients were overprescribed opioids. Significant prescribing variation exists that was not explained by patient factors.”).

³⁴⁸ See *Opioid Data Analysis and Resources*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 10, 2021), <https://www.cdc.gov/drugoverdose/data/analysis.html> [<https://perma.cc/EV6X-R2TM>].

³⁴⁹ See, e.g., PJM INTERCONNECTION, RELIABILITY IN PJM: TODAY AND TOMORROW 1 (2021), <https://pjm.com/-/media/library/reports-notice/special-reports/2021/20210311-reliability-in-pjm-today-and-tomorrow.ashx> [<https://perma.cc/RPP2-ART7>] (“[K]eeping the lights on . . . involves around-the-clock system monitoring and the dispatch of power by trained operators; real-time coordination with other operating entities and industry sectors; and extensive planning to ensure the grid is equipped to serve future needs.”).

³⁵⁰ See *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 115 (D.C. Cir. 2017) (reiterating that FERC may not “suggest modifications that result in an ‘entirely different rate design’ than the utility’s original proposal or the utility’s prior rate scheme,” even if an RTO consents to those modifications (quoting *W. Res., Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993))); Gary

opioid context, many of the regions suffering most heavily from the crisis tend to be poor and rural, and in particular need of a federal cash infusion.³⁵¹

Other policy areas similarly demand rapid, coordinated, innovative solutions and an infusion of federal expertise and resources. These include, for example, adaptation to climate change, as neighboring counties and states search for ways to address sea level rise. This area implicates strong local (e.g., land use) and state and federal (e.g., water-based regulatory and housing) interests and involves substantial spillover effects that are inadequately coordinated.³⁵² If, for instance, a local government or landowner places protective engineering infrastructure along a coastline, the displaced wave action caused by such construction can exacerbate coastline loss on neighboring lands.³⁵³ Furthermore, relatively rapid sea level rise is a problem that calls for similarly rapid, innovative responses, and an infusion of fed-

D. Bachman & Douglas W. Smith, *D.C. Circuit Decision Creates Significant Uncertainty Concerning PJM Capacity Auction Results*, VAN NESS FELDMAN LLP (July 12, 2017), <https://www.vnf.com/dc-circuit-decision-creates-significant-uncertainty-concerning-pjm> [<https://perma.cc/FK7X-EJCF>] (noting practical and legal implications of the ruling).

³⁵¹ See, e.g., Carmen Heredia Rodriguez, Elizabeth Lucas & Orion Donovan-Smith, *Federal Grants Restricted to Fighting Opioids Miss the Mark, States Say*, NPR (June 13, 2019, 5:00 AM), <https://www.npr.org/sections/health-shots/2019/06/13/731512068/federal-grants-restricted-to-fighting-opioids-miss-the-mark-states-say> [<https://perma.cc/QA2Y-H37A>] (noting that Ohio and Pennsylvania had acute opioid problems and needs for federal funding, which “enabled them to invest significantly in programs like training medical providers . . . [and] offering more points of access for treatment”).

³⁵² See, e.g., Daniel A. Farber, *Climate Adaptation and Federalism: Mapping the Issues*, 1 SAN DIEGO J. CLIMATE & ENERGY L. 259, 273 (2009) (noting spillover effects in adaptation, such as “[w]hen infrastructure projects or other adaptation efforts affect multiple states”); cf. William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 13 (2003) (“Global warming also confronts no matching or commensurate political or legal regime that, due to the regime’s geographical turf, subject responsibilities, or political constituency, is logically situated to take the lead and address global warming’s causes and anticipated harms.”).

³⁵³ See, e.g., Steven J. Dundas & David J. Lewis, *Estimating Option Values and Spillover Damages for Coastal Protection: Evidence from Oregon’s Planning Goal 18*, 7 J. ASS’N ENV’T & RES. ECONOMISTS 519, 521 (2020) (describing armoring, displaced wave action, and erosion on neighboring properties); ROBERT A. MORTON, U.S. GEOLOGICAL SURV., AN OVERVIEW OF COASTAL LAND LOSS: WITH EMPHASIS ON THE SOUTHEASTERN UNITED STATES (2003), <https://pubs.usgs.gov/of/2003/of03-337/landloss.pdf> [<https://perma.cc/HP9J-5KT4>] (“Engineering structures such as groins, breakwaters, seawalls/bulkheads, and revetments are designed to control coastal land loss, but they can accelerate land loss of adjacent beaches by changing wave refraction patterns and depleting sand supply.” (citation omitted)); cf. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1074–75 (1992) (Stevens, J., dissenting) (crediting as scientifically supported findings of the South Carolina legislature regarding the cross-property effects of beach and coastline erosion in considering a regulatory taking challenge to South Carolina land use regulations under the Fifth Amendment).

eral resources to fund for relocation, pumps, coastal strengthening projects, and other responses is critically needed.³⁵⁴ Counties in several states have created relatively robust regional organizations for this purpose,³⁵⁵ but regional cooperative federalism would likely spur more coordinated, innovative responses and provide needed funds.

Disaster response, too, would likely benefit from adding a regional layer beneath the Federal Emergency Management Authority (“FEMA”)—not the regional FEMA divisions that already exist,³⁵⁶ but regional organizations comprised of counties, states, and other stakeholders, and overseen by FEMA. Many areas of the country share characteristics that make them susceptible to particular types of disasters, such as wildfires or flooding. Responses within one local government or state can have spillover effects. For example, allowing land development without adequate flood control—such as too little undeveloped land that can absorb water, too few catchment basins, and other approaches—can cause flooding problems in neighboring areas.³⁵⁷ Insufficient attention to controlled or accidental burns in national forests can allow wildfires to quickly expand and spread across public-private and state lines.³⁵⁸ Yet regionally coordinated disaster response actions need federal funding assistance, as evidenced by the increasingly large amounts of federal dollars flowing to emergency response.³⁵⁹ And the federal government’s long history of emergency re-

³⁵⁴ *The Impacts of Sea Level Rise on Domestic Energy and Water Infrastructure: Hearing Before the S. Comm. on Energy and Nat. Res.*, 112th Cong. 47 app. I (2012), <https://www.govinfo.gov/content/pkg/CHRG-112shrg76897/html/CHRG-112shrg76897.htm> [<https://perma.cc/PK6H-KUVZ>] (responses of Benjamin H. Strauss, COO and Director, Program on Sea Level Rise, Climate Central) (“It seems very likely that many or most coastal cities, counties and states will not be able to afford the cost of adapting to sea level rise, or at least will choose not to pay it.”).

³⁵⁵ See, e.g., *supra* note 56 (noting the Southeast Florida Climate Change Regional Compact).

³⁵⁶ See *Regions*, FEMA (Sept. 15, 2020), <https://www.fema.gov/about/organization/regions/> [<https://perma.cc/8W2T-HLHA>].

³⁵⁷ See generally FEMA, TYPES OF FLOODS AND FLOODPLAINS 2-1, <https://training.fema.gov/hiedu/docs/fmc/chapter%20%20-%20types%20of%20floods%20and%20flood-plains.pdf> [<https://perma.cc/L7TM-Q26T>] (describing different types of flooding and the associated causes, including lack of adequate avenues for “surface water runoff” and overdevelopment and urbanization).

³⁵⁸ See, e.g., Matthew Bloch, Scott Reinhard, Lucy Tompkins, Bryan Pietsch & Giulia McDonnell Nieto del Rio, *Fire Map: California, Oregon and Washington*, N.Y. TIMES (Oct. 1, 2020), <https://www.nytimes.com/interactive/2020/us/fires-map-tracker.html> [<https://perma.cc/APJ5-VWXX>].

³⁵⁹ See WILLIAM L. PAINTER, CONG. RSCH. SERV., R45484, THE DISASTER RELIEF FUND: OVERVIEW AND ISSUES 17–18 (2020), <https://fas.org/sgp/crs/homsec/R45484.pdf> [<https://perma.cc/S6DT-A8ZH>] (graphs depicting increasing disaster relief expenditures between fiscal years 1964 and 2020). Indeed, recent disaster events such as wildfires and hurricanes have

sponse experience through FEMA—although a troubled history—shows that this federal layer of expertise could augment local and state emergency response capabilities.³⁶⁰

Regional cooperative federalism will not always be a superior governance approach, but its potential applications are numerous. The expanded use of this approach could, however, spur legal challenges—albeit likely unsuccessful ones—as explored below.

IV. OVERCOMING LEGAL IMPEDIMENTS TO REGIONAL APPROACHES

With modification, regional cooperative approaches to federalism can better achieve many of the purported values of federalism than can states acting alone, or than can states exercising delegated authority within a traditional cooperative federalism regime. But these approaches could encounter legal hurdles—potentially in the form of the nondelegation doctrine under the Constitution or under the Tenth Amendment. These are unlikely to ultimately impede an expansion of regional cooperative federalism, but they merit consideration in light of potential legal challenges.

A. *Nondelegation*

The Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,”³⁶¹ which further implies that Congress may not vest this power elsewhere through delegation of its responsibilities.³⁶² Congress cannot feasibly shoulder the full burden of legislating (if we assume that Congress’s governmental role should remain at its current level—a contested point). Given this burden, the Supreme Court has interpreted nondelegation to mean that Congress, when delegating any portion of its legislative power, must provide an “intelligible principle” to guide the specified governmental entity in implementing the congressional

prompted Congress to act in order “to broaden federal investments from the [Disaster Relief Fund] into mitigation efforts that protect public infrastructure.” *Id.* at 11 (describing Congress’s passage of the Disaster Recovery Act of 2018 “in the wake of wildfires in California as well as Hurricanes Harvey, Irma, and Maria”).

³⁶⁰ See generally FEMA, THE FEDERAL EMERGENCY MANAGEMENT AGENCY PUBLICATION 1 (2010), https://www.fema.gov/sites/default/files/2020-03/publication-one_english_2010.pdf [<https://perma.cc/67TS-N284>] (describing the older and more recent history of the federal government’s involvement in local disaster relief and insurance).

³⁶¹ U.S. CONST. art. I, § 1.

³⁶² See *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (“Accompanying that assignment of power to Congress is a bar on its further delegation.”).

enactment.³⁶³ The Supreme Court has only twice struck down statutes under the nondelegation doctrine—with the most recent of such decisions occurring in 1935.³⁶⁴ Many have declared the doctrine to be essentially dead.³⁶⁵ And although some hypothesized that a more conservative Court—such as the current Court—might revive the doctrine, it declined this opportunity in *Gundy v. United States*,³⁶⁶ which involved a sex offender registration statute and the purportedly impermissible delegation of legislative authority to the U.S. Attorney General.³⁶⁷

Despite its rarity, the doctrine still arises in numerous challenges to legislation and could potentially arise in the regional cooperative federalism context. More relevantly, the delegation of legislative authority to regional governing entities might validly raise questions as to whether such delegations conform with the *values* underlying the nondelegation doctrine. These values include, among others, ensuring a decision-making process that respects individual stakeholders' and states' prerogatives, as well as ensuring that competent institutions are entrusted to make policy decisions.³⁶⁸

1. *The Status of the Nondelegation Doctrine*

As noted above, the central concern of courts reviewing a congressional delegation of policymaking authority is that Congress give the delegee an “intelligible principle” to which that delegee must “conform” in implementing the enactment.³⁶⁹ When Congress delegates authority to the executive branch, such as a federal administrative agency, the nondelegation concern is that this delegation allows

³⁶³ *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [implement the enactment] is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

³⁶⁴ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Pan. Refin. Co. v. Ryan*, 293 U.S. 388 (1935).

³⁶⁵ See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315–16 (2000) (noting assumptions about the death of the nondelegation doctrine but arguing that courts simply apply the doctrine through other legal canons).

³⁶⁶ 139 S. Ct. 2116 (2019).

³⁶⁷ *Id.* at 2121.

³⁶⁸ See, e.g., Sunstein, *supra* note 365, at 315, 331, 342 (arguing that the nondelegation doctrine is “alive and well” in terms of its underlying values and noting “the idea that administrative agencies will not be allowed to interpret ambiguous provisions so as to preempt state law” and a “ban [on Congress] authorizing administrative agencies, or the executive branch, [to] mak[e] certain decisions”); *id.* at 331–34 (describing values that implicate individual rights and states' roles in the federalist system).

³⁶⁹ *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

policy decisions that eschew the legislative process.³⁷⁰ These concerns can be categorized within the camps of procedure, federalism, and decision-making competence, among many others.³⁷¹ Procedurally speaking, unelected officials promulgate policy when exercising delegated authority, and this risks jeopardizing the many accountability-based reasons to endow Congress, and Congress alone, with legislative authority.³⁷² And with respect to federalism, states' rights are affected too when agencies, rather than a Congress composed of representatives of the states, make decisions.³⁷³ States have a particularly powerful voice in the Senate, and the loss of decision making within Senate chambers—the “federal institution specifically designed to represent the states”—can negatively affect state power.³⁷⁴

Courts have identified processes that can adequately substitute for the accountability potentially lost when agencies are permitted to skirt the bicameral process under delegated authority, provided Congress has issued the requisite intelligible principle to the agency. For example, the Supreme Court observed in *A.L.A. Schechter Poultry Corp. v. United States*³⁷⁵ that when Congress delegates authority to an administrative body, with standards to be “enforced upon hearing, and evidence,” this comports with the Constitution.³⁷⁶

With respect to competence, courts worry that giving the executive branch a duty that is not within its wheelhouse—law writing, rather than law implementing—weakens decision making.³⁷⁷ On the

³⁷⁰ See *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) (affirming the validity of federal legislation over a nondelegation challenge and observing that the nondelegation doctrine is “rooted in the principle of separation of powers” and that Congress “cannot delegate its legislative power to another Branch,” although Congress can obtain “the assistance of its coordinate Branches”).

³⁷¹ For other concerns, see, for example, Sunstein, *supra* note 365, at 320–21 (noting rule of law considerations, such as whether residents are adequately on notice of what is required by the law and what the penalties will be for violations).

³⁷² See *id.* (noting the political accountability aspects of the doctrine and that “[t]he evident obstacles to the enactment of federal law . . . might be overcome if Congress could ask another institution, not subject to those obstacles, to enact law as it chooses”).

³⁷³ See, e.g., Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1374 (2001) (observing that the nondelegation doctrine “safeguards federalism” by preventing Congress from avoiding “the lawmaking procedures established by the Constitution to . . . preserve the governance prerogatives of the states”); Sunstein, *supra* note 365, at 319 (“In light of the particular design of the central lawmaking institution, any delegation threatens to eliminate the special kind of accountability embodied in that institution (not incidentally including, in the Senate, the representation of states as such).”).

³⁷⁴ Clark, *supra* note 373, at 1344.

³⁷⁵ 295 U.S. 495 (1935).

³⁷⁶ *Id.* at 540.

³⁷⁷ Cf. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV.

flip side, courts *allow* congressional delegation of policymaking largely out of a recognition that “the modern administrative state could not function if Congress were actually required to make a significant percentage of the fundamental policy decisions.”³⁷⁸ Despite these concerns about delegation, they are rarely serious enough to invalidate congressional delegation to agencies such as FERC.³⁷⁹

2. *Nondelegation and Regional “Agencies”*

If regional cooperative federalism—and RTOs, in particular—were challenged on nondelegation grounds, it is unlikely that courts would find a nondelegation violation. Beyond the fact that the Court only rarely strikes down congressional delegations of authority to the executive branch, regional organizations seem to hold up reasonably well under the principles of accountability and competence that dominate the Court’s nondelegation jurisprudence. This might not appear to be true at first glance because regional cooperative federalism involves double delegation, in a sense.³⁸⁰ Congress delegates policymaking authority to FERC, and FERC, in turn, issues directives to utilities and RTOs. For example, FERC directs these entities to regionally plan for new transmission lines needed to support states’ public policies and enhance reliability.³⁸¹ FERC, and only FERC, ultimately approves the proposed transmission policy of each utility and RTO.³⁸² But because FERC cannot pick apart each and every RTO policy proposal, RTOs substantially influence the content of transmission policy.³⁸³

1231, 1241 (1994) (bemoaning the “the demise of the nondelegation doctrine, which allows the national government’s now-general legislative powers to be exercised by administrative agencies”).

³⁷⁸ *Id.* (arguing that this is the justification underlying courts’ repeated rejection of asserted nondelegation problems).

³⁷⁹ *See, e.g., Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474–75 (2001) (citing a string of precedents for the proposition that the Supreme Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law” (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting))).

³⁸⁰ For extensive discussion of delegation or regulatory authority to self-regulated enterprises, see Emily Hammond, *Double Deference in Administrative Law*, 116 *COLUM. L. REV.* 1705 (2016).

³⁸¹ *See supra* notes 139–40 and accompanying text.

³⁸² *See supra* note 329 and accompanying text (describing courts’ review of FERC’s approval of transmission plans).

³⁸³ *See supra* note 36 and accompanying text (noting the limits on FERC’s ability to review RTO proposals with great nuance).

This quasi-double delegation from Congress to FERC and then to RTOs could be problematic under some accounts. Courts interpret the Federal Power Act³⁸⁴ to mean that FERC must reject or approve certain RTO decisions wholesale and cannot partially amend them.³⁸⁵ Furthermore, RTOs, with FERC approval, make major policy decisions with substantial economic consequences.³⁸⁶ Justice Gorsuch's dissent in *Gundy* could be read to imply that Congress may not delegate away these types of decisions.³⁸⁷ But since 1935, Congress has tasked FERC with the responsibility of ensuring “just and reasonable” rates—an express directive from Congress to FERC under the Federal Power Act.³⁸⁸ And as noted above, FERC has not fully delegated its authority over transmission to RTOs. This differs from other examples of impermissible agency subdelegation, such as the Department of Homeland Security effectively delegating administration and adjudication of certain visa claims to the Department of Labor, with the Department of Labor having the final say in the matter.³⁸⁹ In this type of situation, the United States Court of Appeals for the Tenth Circuit held that an agency may not “delegate its decision-making responsibility to an entirely different agency”—a practice that the court criticized in an unpublished opinion as “passing the buck on a non-delegable duty.”³⁹⁰

384 16 U.S.C. §§ 791–828.

385 See *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 115 (D.C. Cir. 2017).

386 See, e.g., *Ill. Com. Comm'n v. FERC*, 721 F.3d 764, 774 (7th Cir. 2013) (noting that MISO's Multi-Value Projects resulted in estimated cost savings worth hundreds of millions of dollars); Joshua C. Macey & Robert Ward, *MOPR Madness*, 42 *ENERGY L.J.* 67, 71 (2021) (arguing that MOPRs in place within several RTOs “force consumers to pay for capacity they do not need” and reprice “a significant percentage of resources that participate in east coast electricity markets,” among other negative economic impacts); *Ill. Com. Comm'n v. FERC*, 576 F.3d 470, 474 (7th Cir. 2009) (rejecting an RTO transmission financing decision that could have forced one utility “to contribute hundreds of millions of dollars” to a transmission line project located far from that utility, for which the court believed the benefits to the utility were not adequately specified).

387 See *Gundy v. United States*, 139 S. Ct. 2116, 2131, 2136–37 (2019) (Gorsuch, J., dissenting) (asserting that Justice Gorsuch “would not wait” to revisit the nondelegation doctrine and laying out a proposed test for determining when the nondelegation doctrine is violated); *id.* at 2141 (arguing that agencies cannot “fill in statutory gaps” for “major questions” involving “a question of deep ‘economic and political significance’ that is central to the statutory scheme” and thus analogizing the “major question” doctrine in administrative law to the nondelegation analysis (quoting *King v. Burwell*, 576 U.S. 473, 485–86 (2015))).

388 16 U.S.C. § 824d(a).

389 See *G.H. Daniels III & Assocs. v. Perez*, 626 F. App'x 205, 207 (10th Cir. 2015); Bijal Shah, *Interagency Transfers of Adjudication Authority*, 34 *YALE J. ON REGUL.* 279, 281–82 (2017) (discussing *G.H. Daniels III*).

390 *G.H. Daniels III*, 626 F. App'x at 207.

FERC does not rely on RTOs to make final decisions; it must approve their tariffs and subsequent tariff revisions.³⁹¹ And Congress, in establishing FERC's authority to oversee and regulate wholesale power rates, likely understood that FERC would review and approve or reject rates and service practices formulated and proposed by others.³⁹² This was the existing practice at the state level when Congress approved the modern Federal Power Act.³⁹³

Beyond lacking the potential problems of subdelegation, regional cooperative federalism to some degree also fulfills, rather than impedes, the values of the nondelegation doctrine. As compared to a singular federal process, regional cooperative federalism enhances the accountability of decisionmakers to constituents, strengthens state representation—at least to a limited degree—and potentially improves the competence of the entities exercising decision-making authority. As explored in Part II, constituents wishing to comment on RTO policy get two bites at the apple, with an opportunity to participate in RTO stakeholder meetings and again to intervene at the FERC level.³⁹⁴ Rather than simply imposing one national policy, such as a mandate for financing new transmission lines, FERC relies on individual utilities and RTOs to submit specific financing proposals within their tariffs, which FERC approves or rejects.³⁹⁵ This can help respond to differing preferences of individual constituents and states.

Furthermore, regional cooperative federalism does not eschew any federal agency processes that would have been available in the absence of FERC's subdelegation to RTOs. Individuals may still intervene within FERC proceedings and appeal FERC decisions to the

³⁹¹ See, e.g., *supra* note 386 (describing cases reviewing FERC's approval of RTOs' proposed tariff revisions).

³⁹² Congress amended the Federal Power Act in 1935 in order to establish FERC's predecessor, the Federal Power Commission, as an independent regulatory agency and empowered it to regulate "[a]ll rates and charges, made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission . . ." Public Utility Act of 1935, Pub. L. No. 74-333, § 205(a), 49 Stat. 803, 851 (codified at 16 U.S.C. § 824d).

³⁹³ See, e.g., *Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 85–86, 90 (1927) (reversing the Rhode Island Public Utility Commission's approval of a utility's proposed rate increase for electricity transferred between two states because it interfered with interstate commerce and noting that if rate regulation is required "it can only be attained by the exercise of the power vested in Congress").

³⁹⁴ See *supra* Section II.D.1 (describing and contrasting the processes for intervention in FERC proceedings with the RTO stakeholder participation process).

³⁹⁵ See *supra* note 386 (describing cases reviewing FERC's approval of RTOs' proposed tariff revisions for financing transmission lines).

federal courts.³⁹⁶ While some might reasonably challenge Congress's delegation of transmission grid and electricity market regulation to FERC as unduly vague, that is a question separate from the issue of subdelegation to regional agencies.

With respect to competence, FERC's reliance on RTOs to do much of the policymaking work also likely improves the policymaking processes. Just as Congress could not realistically set policies in the hundreds of subject areas in which policies now exist, FERC would be hard pressed to establish transmission policy—particularly specific plans for the location of new wires and their financing—for each distinct region covered by an RTO.

In a final affirmation of the likely constitutionality of RTOs' quasi-delegated authority from FERC, some nondelegation decisions have addressed agencies' approvals of industries somewhat similar to the transmission industry—those that serve the public, involve infrastructure that is expensive and often in limited supply, and that could act as unfettered monopolies if not regulated by the government. For example, the Supreme Court blessed Congress's delegation of power to the Federal Radio Commission—later the Federal Communications Commission—to approve licenses to use particular broadcasting frequencies and to regulate radio stations' broadcasting practices.³⁹⁷ Congress directed the Commission to grant licenses in the “public interest, convenience, or necessity,” and the Court deemed that this language, combined with the requirements, purpose, and context of the enabling act, did not violate the nondelegation doctrine.³⁹⁸ The Court also affirmed the ability of FERC's predecessor, the Federal Power Commission, to set just and reasonable rates for the price of wholesale natural gas, although a dissenting Justice argued that the Commission's choices in ratemaking are constrained by the nondelegation doctrine.³⁹⁹

³⁹⁶ See *supra* note 274 and accompanying text; 16 U.S.C. § 8251 (setting forth the process and requirements for filing an appeal from a FERC order in the U.S. Courts of Appeals).

³⁹⁷ See *Fed. Radio Comm'n v. Nelson Brothers Bond & Mortg. Co.*, 289 U.S. 266, 282 (1933) (holding that the Federal Radio Commission acted within its legitimately delegated authority from Congress in issuing licenses to radio stations to use certain broadcasting frequencies); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943) (addressing regulation of “chain broadcasting,” i.e., affiliated radio stations broadcasting identical content, by the Federal Communications Commission).

³⁹⁸ See *Nat'l Broad. Co.*, 319 U.S. at 216, 225–26.

³⁹⁹ See *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 602–03 (1944) (holding that an order by the Federal Power Commission requiring that the respondent reduce its wholesale natural gas prices “cannot be condemned under the [Natural Gas] Act as unjust and unreasonable”). *But see id.* at 620–21 (Reed, J., dissenting) (arguing that there are limits on the then-

B. *The Tenth Amendment*

Another issue quite close to the nondelegation doctrine is the question of the type of entity exercising delegated power. Just as the Court has had many occasions to address congressional delegation to federal agencies, it has also reviewed delegation of power to private parties. Indeed, courts might be particularly concerned that RTOs, as private nonprofit organizations, are not subject to federal procedural requirements that agencies must follow. Historically, this issue arose under the Tenth Amendment of the U.S. Constitution, which provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁴⁰⁰ On its face, this Amendment could be interpreted to mean that only two entities have lawmaking authority under the Constitution—the federal government and the states, and not private parties. Indeed, the Court initially interpreted the Amendment in this manner in *Schechter Poultry*, but that approach quickly died out.⁴⁰¹

One of the only two cases in which the Supreme Court struck down a statute on nondelegation grounds also involved what the Court characterized as a Tenth Amendment issue—the delegation of decision-making authority to private groups.⁴⁰² In *Schechter Poultry*, Congress allowed the President to approve “codes of fair competition” proposed by trade or industry groups provided that these codes ensured genuine competitiveness—a lack of “inequitable restrictions on admission to membership” and a lack of monopolistic practices, for example.⁴⁰³ Under this statute, the President approved an industry-written “Live Poultry Code,” which was an effort to ensure fair competition in the nation’s largest live poultry industry in New York City.⁴⁰⁴ The code contained standards with limits on employees’ weekly hours, minimum pay rates and employee age limits, and allowances for collective bargaining.⁴⁰⁵ Fatal to the code was the fact that the industry drafted it under a very vague congressional directive

FPC’s ratemaking authority because the Commission, unlike Congress, may not fix any utility rate that it pleases, subject only to basic constitutional constraints such as due process and takings, and noting that the Commission is limited “by the standards of the delegation”).

⁴⁰⁰ U.S. CONST. amend. X.

⁴⁰¹ See *infra* notes 418–19 and accompanying text.

⁴⁰² A.L.A. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935).

⁴⁰³ *Id.* at 521 & n.4, 522 (quoting National Industrial Recovery Act, ch. 90, § 3(a), 48 Stat. 195, 196 (codified at 15 U.S.C. § 703)).

⁴⁰⁴ *Id.* at 523.

⁴⁰⁵ *Id.* at 524.

to write a code of “fair competition”—a standard too loose to be an intelligible principle guiding the agency in rulemaking.⁴⁰⁶ But another point against the code was the fact that the code was privately written. Congress provided that an industry advisory committee, “to be selected by trade associations and members of the industry,” was to administer the code and submit periodic reports of its code administration to the Secretary of Agriculture and the Administrator of the National Industrial Recovery Act.⁴⁰⁷

The *Schechter Poultry* Court criticized this arrangement on Tenth Amendment grounds, noting that the statute did not “seek merely to endow voluntary trade or industrial associations or groups with privileges or immunities.”⁴⁰⁸ Rather, it involved “the coercive exercise of the law-making power” by private trade groups, which were to write codes of fair competition with enforceable penalties for their violation.⁴⁰⁹ These trade groups paid for the expenses of code administration themselves, and the President, not Congress, approved the codes.⁴¹⁰ Further, executive agencies, not Congress, reviewed reports submitted by the industry group writing and administering the code to ensure that consumers and others were adequately protected under the code.⁴¹¹

The *Schechter* arrangement sounds eerily similar to RTOs. RTOs are, in many respects, trade groups. Although they are nonprofit organizations, the bulk of their members are owners of utilities.⁴¹² And they are *private* organizations, not states or the federal government. Further, FERC requires RTOs to submit periodic reports on, for example, the status of their implementation of FERC orders, such as the requirement for regional transmission planning.

This very type of approach was a problem in *Schechter*—the fact that private entities exercised authority caused them to act extraconstitutionally under the Tenth Amendment.⁴¹³ It did not matter that the President approved the codes proposed by these private entities or that executive agencies reviewed reports by these entities to ensure that consumers and others were being protected by the codes adminis-

⁴⁰⁶ *Id.* at 521–22.

⁴⁰⁷ *Id.* at 524–25.

⁴⁰⁸ *Id.* at 529.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* at 521–24.

⁴¹¹ *Id.* at 525.

⁴¹² See Hart et al., *supra* note 320; *supra* text accompanying note 320.

⁴¹³ *Schechter Poultry*, 295 U.S. at 528.

tered by trade associations.⁴¹⁴ The Court characterized this as “action which lies outside the sphere of [Tenth Amendment] constitutional authority.”⁴¹⁵

Despite this seeming legal peril for RTOs, since the 1935 *Schechter Poultry* decision—which contained only one paragraph discussing the Tenth Amendment—the Court has substantially constrained the meaning of the Tenth Amendment.⁴¹⁶ In *New York v. United States*,⁴¹⁷ for example, the Court emphasized that although the Tenth Amendment “restrains the power of Congress,” these restraints do not actually come from the Tenth Amendment.⁴¹⁸ Rather, the Tenth Amendment simply means that Article I of the Constitution—which expressly lays out the boundaries of federal authority—might in some cases restrain federal power vis-à-vis the states.⁴¹⁹ In simpler terms, the Tenth Amendment, rather than specifying whether a particular governmental power is constitutional or not, serves as a guiding principle in determining whether the federal government has impermissibly intruded into states’ sovereign authority.

Another Tenth Amendment challenge to regional cooperative federalist entities such as RTOs might focus on the threat that regional entities operating beneath a federal mandate will somehow expand federal powers too much, thus intruding into state sovereign territory. States made an argument akin to this in a challenge to MISO’s initiative to expand transmission for wind energy, arguing that FERC’s approval of MISO’s MVPs effort was essentially coercing the states to accept MISO’s planned transmission projects within their territories.⁴²⁰ The Seventh Circuit rejected the argument as “frivolous,” finding no such coercion and emphasizing that MISO’s projects,

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ Delegation of regulatory authority to a private entity could also run afoul of the private nondelegation doctrine, but as Emily Hammond notes and examines in detail, “courts and scholars have recently questioned both the history of the doctrine and its continuing existence.” Hammond, *supra* note 380, at 1722–28.

⁴¹⁷ 505 U.S. 144 (1992).

⁴¹⁸ *Id.* at 156–57 (emphasizing that the Tenth Amendment is “essentially a tautology”); *see also* *United States v. Darby*, 312 U.S. 100, 124 (1941) (“There is nothing in the history of [the Tenth Amendment’s] adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution . . .”).

⁴¹⁹ *See* *New York v. United States*, 505 U.S. at 157 (“[T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power.”).

⁴²⁰ *See* Ill. Com. Comm’n v. FERC, 721 F.3d 764, 773 (7th Cir. 2013).

approved by FERC, simply offered “a carrot that states won’t be able to resist eating” due to the benefits of the project.⁴²¹ And this was “a far cry from the federal government’s conscripting a state government into federal service” through a federal-regional initiative.⁴²²

All in all, the continued dormancy of the nondelegation doctrine, combined with a Tenth Amendment largely restricted to policing federal-state relations—not delegation to private parties—makes regional cooperative federalism relatively immune to legal challenges. There are, of course, important limits to this immunity. For example, if states band together to address a policy issue with federal agency oversight, but without the formal blessing of Congress, this might be labeled as a violation of the Compact Clause.⁴²³ But Congress has granted regional entities authority under the Compact Clause in a variety of contexts—including regional transmission planning—if the states ultimately preferred to follow this course.⁴²⁴ Indeed, Congress has given states the opportunity to create formal compacts in the line siting context, although they have not opted to do so.⁴²⁵

CONCLUSION

The United States faces a growing list of complex policy issues that are intensely local, regional, and national. Many local governments have pledged to move to wholly carbon-free energy mix in the not-too-distant future, yet this will require even more cross-state planning for transmission lines to support new generation.⁴²⁶ These governments will similarly need to coordinate climate adaptation efforts as sea levels and flood waters rise and threaten to engulf critical public infrastructure and numerous homes.⁴²⁷ Strong storms unleash their fury in small or vast swaths of the country—with hurricanes dumping fifty inches of rain on Houston, for example, or cutting a vast path across the entire Southeast.⁴²⁸ Even intensely local storms create regional

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *But see supra* note 10 (describing the many types of state agreements not deemed to be compacts that require congressional approval).

⁴²⁴ *See, e.g.,* Florestano, *supra* note 11, at 20.

⁴²⁵ *See supra* note 136 and accompanying text.

⁴²⁶ *See, e.g., Local Government Climate and Energy Goals*, AM. COUNCIL FOR AN ENERGY-EFFICIENT ECON. (June 2021), <https://database.aceee.org/city/local-government-energy-efficiency-goals> [<https://perma.cc/53UU-MX8K>] (documenting local government goals and commitments).

⁴²⁷ *See supra* Section III.D.

⁴²⁸ *See generally* Tom Di Liberto, *Reviewing Hurricane Harvey’s Catastrophic Rain and Flooding*, NOAA: CLIMATE.GOV (Sept. 18, 2017), <https://www.climate.gov/news-features/event->

challenges such as planning for flood control and coordinating evacuation routes and shelter plans. Pockets of opioid addiction riddle rural towns and large cities, with ravaging effects on families, the health care system, and the economy rippling beyond state lines.

Regional cooperative federalism could offer a highly effective governance solution to these types of problems. It enables federal oversight of local problems and coordinates local and state officials across state boundaries, allowing them to address distinctive challenges while also harmonizing their responses to these challenges. It can also reduce the negative spillovers that would arise from individual governments acting alone. The example of RTOs—the most common form of regional cooperative federalist regime—perhaps best exemplifies these benefits. Although there is much room for improvement, some RTOs have successfully planned for transmission expansions to support burgeoning renewable energy projects and enhance reliability, and most have kept the lights on through recent extreme weather events. They have done this while navigating substantial differences among policies in the states covered by RTO territory and avoiding potentially duplicative transmission and generation infrastructure.

Well beyond the electricity context, addressing problems that implicate strong local, state, regional, and federal interests will increasingly require innovation, a diversity of policy responses, and responsiveness to constituents' demands—in other words, a system that encompasses federalism values beyond state lines. Regional cooperative federalism offers a promising path forward.

tracker/reviewing-hurricane-harveys-catastrophic-rain-and-flooding [https://perma.cc/LC3V-GWR2]; *Hurricanes in History*, NOAA: NAT'L HURRICANE CTR. & CENT. PAC. HURRICANE CTR., <https://www.nhc.noaa.gov/outreach/history/> [https://perma.cc/A59Z-PAWE] (“Katrina brought hurricane conditions to southeastern Louisiana, southern Mississippi, and southwestern Alabama.”).