

REGULATORY HORCRUXES

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ABSTRACT

The regulator that designs and first implements a federal regulatory program does not always have the ability to control the timing and process of how that regulatory program will, in this Symposium's language, "exit." As the 2016 election has demonstrated, the initiating regulator cannot necessarily plan in advance for the program's expiration, diminution, or scaling back. A successor instead wields this power. Whether one views this as a terrible thing or a salutary feature of democracy depends in part upon one's relationship to the regulatory status quo, but also implicates broader questions about policy stability and democratic accountability. At the very least, however, this fact raises several important questions about strategic regulatory design. First, is it possible to insulate or harden regulatory programs from successor exit? And second, when, if ever, would this be a good thing? This Article offers a systematic account of how regulators can make regulatory exit more challenging by looking outward, beyond the walls of a single, primary federal agency to other potential regulators or co-regulators, including secondary federal agencies, the states, and private actors.

This Article identifies as a potential antidote to regulatory exit a constellation of strategic techniques that I call regulatory horcruxes—much like the horcruxes Lord Voldemort created by placing portions of his soul into multiple external objects in order to ensure his immortality.¹ An initiating regulator, be it Congress or a federal agency, can use such horcruxes in an effort to make successor exit more difficult by splitting programs beyond the walls of a single federal agency into other institutions. This Article first offers an analytical framework laying out five primary types of horcrux. It then examines horcruxes

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1. J.K. ROWLING, HARRY POTTER AND THE HALF-BLOOD PRINCE 497 (Scholastic 2013).

from a normative perspective, evaluating the comparative benefits and costs of their use in terms of their potential impact both on the durability of regulatory programs and on the quality of democratic deliberation. It acknowledges that horcruxes are an imperfect solution. Although dispersal or fragmentation of regulatory authority may insulate a program from deregulatory pressure, the fragmented regulatory program may exist in a weakened form that cannot accomplish as much as more direct, centralized regulation can. The Article concludes by offering a research agenda, including suggestions for further empirical research.

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INTRODUCTION

J.B. Ruhl and Jim Salzman have called for legislators and regulators to think more comprehensively about regulatory “exit,” which they define as “the intentional, significant reduction in governmental intervention initiated at a particular time under specified processes and conditions.”² They offer a taxonomy of different types

2. J.B. Ruhl & James Salzman, *Regulatory Exit*, 68 VAND. L. REV. 1295, 1302 (2015) (emphasis omitted). Exit includes not only complete termination of a program, but other, less drastic steps, such as diminution or scaling back of a program, or reducing the number of beneficiary classes, for example. *Id.* For the seminal theoretical account of exit, see ALBERT O.

of exit, ranging from one embedded into a regulatory program ex ante with concrete and transparent legal rules either for the government or a party to exit, to a “messy” form, which occurs ex post and lacks such clear rules.³ Normatively, exit is good if regulatory goals have been achieved, or if scarce resources could be better devoted to other problems; however, exit is problematic if there remains work to be done.⁴ They conclude that initiating “legislatures and agencies should explicitly consider exit at the creation of new regulatory programs.”⁵

No matter what kind of exit strategy initiating regulators build into a specific regulatory program ex ante, however, there always remains the possibility that a successor administration will exit based on background legal rules.⁶ In other words, despite Ruhl and Salzman’s useful framework and prescriptive conclusion, even if a statute or regulatory scheme clearly spells out all of the conditions for exit in advance, certain background legal rules exist that permit a successor to end or amend a regulatory program. Congress can repeal or amend a statute pursuant to Article I, Section 7 of the Constitution.⁷ An agency

HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970). The concept of regulatory exit is distinct from the idea, elaborated upon by Charles Tiebout, that a mobile citizenry has the power to “exit” one jurisdiction and move to another when policies are adopted that do not meet the citizen’s preferences. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

3. Ruhl & Salzman, *supra* note 2, at 1302–03.

4. *Id.* at 1309–11.

5. *Id.* at 1325.

6. This question of fidelity to the enacting coalition’s wishes is central to the so-called delegation problem within administrative law, namely the tension between the delegation of authority to agencies whose personnel are unelected and the exercise of political control by elected principals in Congress and the president. Although the literature addressing this tension is too voluminous to cite, for a few examples discussing these issues both theoretically and empirically, see generally Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) [hereinafter McNollgast, *Administrative Procedures*]; Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) [hereinafter, McNollgast, *Structure and Process*]; David B. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 28 J. LEG. STUD. 413 (1999) (noting a lack of empirical testing of the “structure and process” theory). This question also arises in the literature on “coalitional drift,” which examines “the influence of subsequent political coalitions on the development and administration of the law.” Murray J. Horn & Kenneth A. Shepsle, *Commentary on “Administrative Arrangements and the Political Control of Agencies”*: *Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 499 (1989) (distinguishing coalitional drift from the bureaucratic drift that is central to the delegation problem). For further discussion on these two forms of drift, see *infra* notes 14–17 and accompanying text.

7. U.S. CONST. art. I, § 7.

can repeal or amend a regulation pursuant to the notice-and-comment procedures set forth in the Administrative Procedure Act.⁸ If the regulation is recent enough, Congress and the president can revoke it pursuant to the Congressional Review Act (CRA).⁹ And there are numerous informal ways to reduce program resources, including by slashing agency budgets, reassigning staff, declining to enforce a regulatory program, or seeking delays in the courts.¹⁰ Of course, there are both legal and political costs associated with these types of deregulatory actions. But these formal and informal background mechanisms nonetheless exist, and therefore must be accounted for in any theory of exit.

This potential for successor exit raises a set of complex questions. First, against the backdrop of these default legal rules, is it possible to insulate or harden a regulatory program against premature successor exit? Second, when, if ever, would such insulation be a good thing?¹¹ Some scholars have examined the strategies that federal agencies can employ internally to insulate their actions from presidential, congressional, or judicial control during particular phases of political cycles, such as in the lame duck period after an election.¹² Others have

8. See Administrative Procedure Act, 5 U.S.C. § 553 (2012); *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983).

9. See Congressional Review Act, 5 U.S.C. §§ 801–808 (2012) (granting Congress a 60-day period in which to review rulemakings and pass a joint resolution of disapproval, which, with presidential signature, not only repeals an existing rule, but also purports to preclude the agency from promulgating a rule in the future on the same subject matter). Prior to the 2016 election, the CRA had been used only once. In the first months of the Trump administration, the CRA was used fourteen times to overturn regulations adopted at the end of the Obama administration. Of those fourteen regulations, four related to energy and the environment. Three were regulations adopted by the Department of Interior (DOI) relating to resource management planning, wildlife, and stream protection. One was a regulation of the Securities and Exchange Commission (SEC) requiring the disclosure of payments to foreign governments by entities involved in resource extraction. *Congressional Review Act FAQs*, GOV'T ACCOUNTABILITY OFF., <https://www.gao.gov/legal/congressional-review-act/faq> [<https://perma.cc/32ZR-V5NU>].

10. See Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1156 (2009) (“[W]hat Congress and the President give, they can just as easily take away.”); Jonathan Remy Nash, J.B. Ruhl & James Salzman, *The Production Function of the Regulatory State: How Much Do Agency Budgets Matter?*, 102 MINN. L. REV. 695 (2017) (noting that the Trump administration proposed to slash the budget of the Environmental Protection Agency (EPA) by 25 percent).

11. Cf. Lazarus, *supra* note 10, at 1158, 1206 (arguing that laws addressing climate change should be designed to include asymmetric “precommitment strategies” that deliberately make it hard (but never impossible) to change the law” in an anti-environmental direction in response to short-term economic or other interest group pressures (footnote omitted)).

12. See Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 589–93, 606–10 (2003) (examining techniques

examined how institutional design—for example, the design of independent agencies—can insulate them from short-term interest group capture to promote long-term public welfare based on expertise.¹³ The “structure and process” thesis of Matthew McCubbins, Roger Noll, and Barry Weingast (McNollgast) posits that Congress uses authorizing legislation *ex ante* to embed structures and procedures into agency decisionmaking in ways that can favor substantive outcomes.¹⁴ In other words, regulatory and legislative design can “stack[] the deck” in favor of the coalition that enacted the original regulatory program and against “bureaucratic drift.”¹⁵ Murray Horn, Jonathan Macey, and Kenneth Shepsle expand this logic, arguing that an enacting coalition must be mindful of shifting preferences not only within the agency *vis-à-vis* the enacting coalition, but also of the shifting preferences of political actors outside the agency.¹⁶ In their

including midnight rulemaking, hiring, and promotions before a presidential transition); Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1782–1803 (2013) (examining strategies that allow agencies to increase the cost of presidential review when agency and presidential preferences diverge); Anne Joseph O’Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 474–75 (2011) (empirically examining agency rulemaking in the face of presidential, congressional, and judicial transitions). Notably, Richard Lazarus offers menus of both internal design strategies and some external ones to create asymmetric precommitments favoring climate policy. *See Lazarus, supra* note 10, at 1206, 1209–31 (suggesting “interagency, scientific advisory, and stakeholder consultation requirements . . . ; statutory and regulatory hammers . . . ; federal preemption and non-preemption triggers . . . ; and limited and enhanced judicial review provisions” among others (emphasis omitted)).

13. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 18–19 (2010) (noting that the problem of capture by one-sided interest group pressure exists in many policy areas, and focusing on consumer protection); McNollgast, *Administrative Procedures, supra* note 6, at 253–64; McNollgast, *Structure and Process, supra* note 6, at 435–45; Spence, *supra* note 6, at 415–16 (discussing structure and process hypothesis); *cf.* David E. Lewis, *The Adverse Consequences of the Politics of Agency Design for Presidential Management in the United States: The Relative Durability of Insulated Agencies*, 34 BRIT. J. POL. SCI. 377, 379 (2004) (concluding that independent agencies are effectively insulated from presidential control and will have a longer expected duration).

14. *See* McNollgast, *Structure and Process, supra* note 6, at 435–45.

15. *See* McNollgast, *Administrative Procedures, supra* note 6, at 253–64; McNollgast, *Structure and Process, supra* note 6, at 435–45. *But see* David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407, 424–25 (1997) (arguing that the procedural control arguments are “weak” because empirical studies have demonstrated that opponents of the “enacting coalition” can likewise benefit from neutral procedures like notice and comment).

16. Horn & Shepsle, *supra* note 6, at 499 (arguing that managing coalitional drift and bureaucratic drift involves tradeoffs); Jonathan Macey, *Organizational Design and the Administrative Control of Agencies*, 8 J.L. ECON. & ORG. 93, 93–94, 108–09 (1992) (questioning the significance of the tradeoff between bureaucratic and coalitional drift, and arguing that both can be addressed through design of “who an agency represents,” such as through the creation of a “single-industry regulatory agency,” or through inter-agency competition over jurisdiction);

view, the enacting coalition must guard not only against “bureaucratic drift,” which is the classic principal-agent problem that agency bureaucrats will stray from the principal’s wishes when implementing policy, but also against “coalitional drift,” namely “the influence of subsequent political coalitions on the development and administration of the law.”¹⁷ It is the latter concern that is more salient in the context of a new, deregulatory coalition.

This Article closely examines what happens when regulators and legislators look outward beyond the walls of a single, primary federal agency to embed features of regulatory programs, or entire programs, in other potential regulators or co-regulators: other federal agencies, the states, and private, nongovernmental organizations (NGOs). It identifies a constellation of techniques—*regulatory horcruxes*—that have the potential to render successor exit more challenging through decentralization or fragmentation of regulatory authority. It then examines the comparative benefits and costs of their use.¹⁸ These

Kenneth A. Shepsle, *Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey*, 8 J.L. ECON. & ORG. 111, 114–15 (1992) (arguing that the enacting coalition seeks to optimize the balance between protecting against each of these types of drift).

17. Horn & Shepsle, *supra* note 6, at 499, 503 (noting that the enacting coalition “cannot constrain private interests and future coalitions from tampering with an enacted agreement”).

18. This Article thus builds and expands upon legal scholarship examining the extent to which regulatory programs that are shared across multiple federal agencies or embedded within secondary agencies, and situations in which agencies can “check and balance” one another’s decisions under different regulatory programs, are more “durable” than other regulatory programs or promote other values like better decisionmaking. These studies tend to focus on shared regulatory space or regulatory redundancy across multiple agencies within the federal government. *E.g.*, Todd S. Aagaard, *Environmental Law Outside the Canon*, 89 IND. L.J. 1239, 1264 (2014) (discussing “embedded” environmental law as programs with environmental goals housed in federal agencies other than the EPA); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1135 (2012) (focusing on coordination challenges of shared regulatory space across federal agencies and advocating presidential control); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317 (2006) (focusing on “checks and balances” across federal agencies in the foreign affairs context); Jean-Jacques Laffont & David Martimort, *Separation of Regulators Against Collusive Behavior*, 30 RAND J. ECON. 232, 233–34, 257 (1999) (arguing, based on economic modeling, that “[t]he separation of regulators may be an optimal organizational response to the threat of capture,” but focusing on different regulatory programs housed in different agencies rather than single regulatory programs); Louis J. Sirico, Jr., *Agencies in Conflict: Overlapping Agencies and the Legitimacy of the Administrative Process*, 33 VAND. L. REV. 101, 101, 102 n.3, 113 (1980) (discussing three types of redundancy across federal agencies, including “blockage, policy interference, and advocacy”); *cf.* Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 215 (2015) (discussing the informal “pooling” of power across federal agencies in practice, rather than in formal authority). Regulatory horcruxes include not only programs shared or split into different federal agencies, but also programs shared or split with the states and with private actors. In addition, by examining not only shared or overlapping regulatory

questions of strategic institutional design are especially timely in the context of the expressly deregulatory stance of both the Trump administration and the 115th Congress, with their strong focus on reducing environmental, energy, climate, and natural resource management standards adopted and enforced by the Environmental Protection Agency (EPA), the Department of Energy (DOE), the Department of Transportation (DOT), the Department of Interior (DOI), and its subcabinet agencies like the Bureau of Land Management (BLM).¹⁹ Because regulatory programs addressing the environment are the subject of deep divides across partisan lines, and those federal agencies whose missions are environmental, energy, or natural resources related are currently in the crosshairs of recent and ongoing deregulatory efforts,²⁰ the Article examines the concept of horcruxes through the lens of regulatory programs that affect the environment.²¹ And because the primary agency addressing

space, but also regulatory programs that have been fully externalized into secondary federal agencies and the states with only the threat of their destruction remaining in the central regulator, the horcrux concept broadens this discussion about regulatory design. Identifying horcruxes as a single constellation of techniques allows for comparisons of the different forms along common normative dimensions.

19. *Climate Deregulation Tracker*, SABIN CTR. FOR CLIMATE CHANGE L., <http://columbiaclimatelaw.com/resources/climate-deregulation-tracker/all-updates> [<https://perma.cc/BUE3-ZJ8X>] (compiling a list of deregulatory actions in the environmental and energy space taken since January 2017); see also Nadja Popovich & Livia Albeck-Ripka, *60 Environmental Rules on the Way Out Under Trump*, N.Y. TIMES (Jan. 31, 2018), https://www.nytimes.com/interactive/2017/10/05/climate/trump-environment-rules-reversed.html?_r=0 [<https://perma.cc/9Z6F-89PG>].

20. The Trump administration has disbanded scientific advisory committees, notified the international community of the intent of the United States to withdraw from the Paris Agreement on Climate Change, issued a proposed rule to repeal the Clean Power Plan, and taken other steps such as issuing executive orders to reduce regulatory “burdens” like environmental reviews for infrastructure projects. Agencies including the EPA, the DOE, the DOT, and others have frozen, delayed, or withdrawn energy efficiency and renewable fuel standards, announced their intention to revisit vehicle emissions standards, and begun to undertake other deregulatory actions, especially with respect to climate change. See *Climate Deregulation Tracker*, *supra* note 19. Many scholars have noted that environmental and climate change legislation and regulation are both difficult to pass and likely to be the subject of deregulatory pressure because regulators and members of the public are subject to cognitive biases that lead us to prioritize reducing immediate, monetizable costs in the short-run, rather than hard-to-monetize, diffuse harms in the future, among other biases. Lazarus, *supra* note 10, at 1173–79 (discussing myopia bias, among other biases in the climate context); David A. Dana, *A Behavioral Economic Defense of the Precautionary Principle*, 97 NW. U. L. REV. 1315, 1316, 1320 (2003) (same).

21. Although this analysis focuses on environmental regulatory programs, the concept of regulatory horcruxes has broader salience. For example, regulatory horcruxes can exist for other areas of the law including human rights, civil rights, consumer protection, and employment protections, among others.

environmental programs is often, though not always, the EPA, I use the “EPA” throughout this Article as a shorthand for a primary federal agency with an expressly environmental mission.

The remainder of this Article proceeds as follows. Part I introduces an analytical framework that identifies five types of horcrux. It also answers the basic questions about who can employ them and at what stage in a regulatory program’s lifecycle they can be employed. It offers examples of horizontal horcruxes, vertical horcruxes, and private horcruxes: regulatory programs in which a secondary federal agency, the states, or private actors, respectively, play a role. These types are not necessarily exclusive, as hybrid forms exist. Part II then asks the basic normative question—why create a horcrux? What policy goals does it potentially serve and disserve? These instruments can potentially increase the durability of regulatory programs against the threat of successor exit through dispersal of regulatory authority. Horcruxes may likewise improve the chance of a program’s durability through increased democratic deliberation. By requiring those initiating regulatory programs to engage with multiple audiences and justify their programs in terms of broader values than mere “environmental” protection, they are more likely to be defended in the future by different, crosscutting constituencies and interest groups. Yet horcruxes have disadvantages as well, even for those who might benefit from their deployment. They may increase the costs of creating a program, and the decentralization may weaken the regulatory program. Combining these insights yields the Article’s hypothesis that policies that are fragmented across institutions far enough from the center to harden them against deregulatory pressure may be imperfectly embedded or may be weaker at achieving regulatory goals than direct, centralized regulation. Part III raises key empirical questions, and concludes by offering an agenda for further research.

A few takeaways are worth noting here. First, the Article’s primary analytical contribution to the literature on strategic regulatory design is viewing these horcruxes as a single phenomenon. This generates a comparative hypothesis that a greater degree of fragmentation away from centralization in a single federal agency better insulates horcruxes from deregulatory pressure directed at the center. However, fragmentation can simultaneously weaken institutional power to achieve regulatory goals. Horizontal horcruxes that involve co-regulation by federal agencies are the most centralized form, and likely retain the most regulatory power. For example, these

may best address problems of nationwide scope or interstate spillovers. Yet horizontal horcruxes are simultaneously likely to be the weakest at resisting deregulatory pressure. Private horcruxes may fare best at resisting deregulatory pressure because private actors are not answerable to the same public constituencies as federal agencies. Yet private horcruxes may have less power to address national problems. And private enforcement may be stymied by standing limitations in the courts. The middle option, vertical horcruxes, in which the states or local governments play a role in a regulatory program, may strike the best balance between the degree of insulation and retention of power.

Second, although the horcrux analogy is a useful heuristic, it is imperfect. For example, unlike the inanimate external objects used by Lord Voldemort as mere receptacles for portions of his soul, the relevant secondary institutions for regulatory horcruxes—federal agencies, the states, and private actors—are not inanimate objects.²² They are institutions with their own leaders and stakeholders. Thus, action by the initiating federal regulator may create the necessary conditions for a horcrux, but with respect to both vertical and private horcruxes, mere action by the center may not be sufficient. Creating a horcrux in the regulatory context is a two-step process that requires not only action by the federal government, but also further action by the states or private actors to fully animate the horcrux.

I. A FRAMEWORK FOR HORCRUXES

This Part systematically explores the central descriptive characteristics of horcruxes, including what a horcrux is, the five primary types of horcrux, who can create each kind of horcrux, and when such horcruxes can be created.

A. *What Is a Regulatory Horcrux?*

The term “horcrux,” familiar to any reader of the *Harry Potter* series, refers to the external objects into which the villain Lord Voldemort placed portions of his soul in an effort to achieve immortality.²³ Splitting one’s soul into horcruxes operates as a means of self-preservation from attack: “Even if one’s body is attacked or destroyed, one cannot die, for part of the soul remains earthbound and

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

23. ROWLING, *supra* note 1, at 497.

undamaged.”²⁴ The concept of a horcrux is thus consistent with the notion that decentralization or fragmentation can be protective against threats to a centrally organized system. The separation of powers among the executive, legislature, and judiciary ensures that there are centers of power outside any one branch of the federal government. Our federal constitutional structure also guarantees that too much power is not concentrated in the hands of the federal government vis-à-vis the states, but rather is fragmented across different regulators.

Decentralization or fragmentation can be technological as well as political. For example, the U.S. Department of Defense (DoD) has invested extensively in the creation of microgrids, which are local sources of distributed energy generation, to insulate its operations from disruption if the electric power grid is attacked.²⁵ And though it would be impossible to conclude that everyone who helped to create the internet shared a single rationale for its decentralized structure, one argument for its lack of a single, central hub was that it could “surviv[e] a nuclear attack.”²⁶ Other, more mundane examples of “fragmentation as insulation” abound, from the method the fast-food chain KFC uses to protect its secret recipe by dividing the recipe’s production among different suppliers, each of whom knows only a portion of the ingredients,²⁷ to the basic principle of diversifying one’s investment portfolio to reduce risk. Insulation through fragmentation is not uniformly beneficial, however, depending upon one’s perspective. For example, the rise of decentralized networks of terrorist cells has made it more difficult for the United States to combat such organizations as compared to more conventional national forces, and has increased their unpredictability, anonymity, and effectiveness.²⁸ The value of fragmentation also runs up against concerns about power. The two are likely to exist in an inverse relationship. Returning to the horcrux analogy, Lord Voldemort’s humanity was diminished when his soul

24. *Id.*

25. SCOTT B. VAN BROEKHOVEN, NICHOLAS JUDSON, S. V. T. NGUYEN & WILLIAM ROSS, MICROGRID STUDY: ENERGY SECURITY FOR DOD INSTALLATIONS 1 (2012), <https://www.serdp-estcp.org/News-and-Events/News-Announcements/Program-News/Microgrid-Study-Energy-Security-for-DoD-Installations> [<https://perma.cc/NQ88-Y6MP>].

26. WALTER ISAACSON, THE INNOVATORS 250–51 (2014) (quoting Vint Cerf, one of the creators of ARPANET).

27. *Corporate Espionage: Secrets and Lies*, BRAND STRATEGY, Oct. 9, 2006, at 25.

28. Nicholas B. Pace, *Decentralization: The Future of ISIS*, SMALL WARS J. (Nov. 5, 2014), <http://smallwarsjournal.com/jrnl/art/decentralization-the-future-of-isis> [<https://perma.cc/9YYB-MZM4>].

was fragmented into pieces.²⁹ And ultimately, both the horcruxes and Lord Voldemort were destroyed. Fragmentation's benefits for insulation from attack may come at the expense of the power that derives from centralization.

By viewing this constellation of strategies together, this Article builds on prior scholarship discussing how regulatory programs can exist in shared regulatory space across multiple federal agencies or be embedded in an agency other than the natural primary regulatory agency;³⁰ that regulatory power can be distributed between a federal agency and state governments or within the states alone;³¹ or that regulatory power can be distributed through public-private partnerships, “new governance,” “modular environmental regulation,” and other types of flexible, multipolar governance schemes with private participants.³² Scholars in each of these areas have recognized the possibility of regulatory or governance initiatives in which federal, state, local, and/or private actors play roles and examined the many values that such structures promote.³³ Focusing in-depth on shared

29. See *Horcrux*, HARRY POTTER WIKI, <http://harrypotter.wikia.com/wiki/Horcrux> [https://perma.cc/6S75-THFD] (“Creating multiple Horcruxes rendered the soul unstable and liable to break apart if the creator of the Horcruxes was killed. For instance, Dumbledore explicitly stated that Voldemort’s soul had become so unstable that it simply ‘broke apart’ when Voldemort tried to murder Harry Potter . . .”).

30. See, e.g., Aagaard, *supra* note 18, at 1239; Freeman & Rossi, *supra* note 18, at 1131 (focusing on coordination challenges of shared regulatory space and advocating presidential control); Sarah E. Light, *The Military-Environmental Complex*, 55 B.C. L. REV. 879, 881, 885 (2014) (discussing the DoD’s role in promoting climate resilience to protect national security, rather than environmental, interests); Spence, *supra* note 6, at 416 (noting that distribution of power between federal agencies, or between the agency and a principal like Congress through a more limited delegation, may affect policy outcomes).

31. Discussions of the values promoted by federalism, decentralization, and cooperative federalism, and examples of such programs are too numerous to cite. For several in-depth discussions, see generally William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1555–56 (2007); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 314 (1998); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996); Sarah E. Light, *Precautionary Federalism and the Sharing Economy*, 66 EMORY L.J. 333 (2017); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

32. See Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 798–803 (2005) (proposing dynamic, flexible, and adaptive arrangements for environmental governance in contrast to traditional environmental law); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344–47 (2004) (discussing the shift from a top-down regulation model to a multipolar governance model).

33. Anne Joseph O’Connell has explored the related, though distinct, phenomenon of bureaucratic institutions at the boundary of the federal administrative state, in which the

regulatory space across multiple federal agencies, between the federal government and the states, or through public-private hybrid governance generates valuable insights in each specific context. Examining regulatory horcruxes as a single phenomenon reveals a bigger picture story about how comparative methods of strategic institutional design can make successor exit more challenging in a deregulatory environment, while retaining power to achieve regulatory goals.

B. Institution and Degree of Overlap

There are three sets of institutions that can either share regulatory authority with or replace the primary federal agency responsible for environmental or natural resources protection. The first set of institutions comprises federal agencies whose primary mission is something other than environmental protection, such as the DoD or the Securities and Exchange Commission (SEC), among others. Because these agencies do not have environmental protection as their primary mission, I refer to them here as “secondary” agencies. Regulatory programs can exist either entirely in such a secondary federal agency or can be shared between a secondary agency and the primary agency. Such splitting or sharing of regulatory programs at the federal level generates *horizontal horcruxes*. The second set of institutions comprises government agencies at the subfederal level, including state and local governments.³⁴ Splitting or sharing of regulatory programs between the primary agency and subfederal institutions creates *vertical horcruxes*. Finally, it is possible for private institutions, including NGOs, private corporations or other firms, and industry groups, among others, to share regulatory space with federal

institutions themselves incorporate aspects of international, state, or private participation, such as in the cases of the National Railroad Passenger Corporation, the National Guard, the World Bank, and the U.S. Postal Service. Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 846 (2014).

34. Recent scholarship on “regionalism” has argued that decentralized federal actors can generate policy variation and are worthy of examination in the federalism literature. *See generally* Yishai Blank & Issi Rosen-Zvi, *Reviving Federal Regions*, 70 STAN. L. REV. (forthcoming 2018) (draft on file with the *Duke Law Journal*); Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV. 377 (2017); David Fontana, *Federal Decentralization*, VA. L. REV. (forthcoming 2018) (draft on file with the *Duke Law Journal*); David Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58 (2016). However, because these actors remain federal actors within the hierarchy of a single federal agency, they do not fit in the discussion of vertical horcruxes. To the extent that regionalism exists within the context of a horizontal horcrux, the analysis of horizontal horcruxes may apply.

agencies. This final set of institutions generates *private horcruxes*.

The second feature that differentiates the various types of horcrux is the degree of overlap or split in power between the primary and the secondary institution. At one end of this continuum lie those programs that involve overlapping jurisdiction between the primary federal agency and the secondary institution or institutions. These are *shared horcruxes*. At the other end of the spectrum are those that exist entirely within the secondary institution, without any continuing oversight or participation by the primary federal agency. These are *external horcruxes*. Different degrees of sharing and continuing participation by the primary federal agency exist along a continuum, so this binary analysis necessarily involves some oversimplification.³⁵

C. *The Two-Step Creation Process*

Of course, the horcrux analogy, although useful, is imperfect. To create a horcrux, Lord Voldemort had to commit murder.³⁶ The creation process for regulatory horcruxes is somewhat less bloody, but one step more complex. Unlike most of the horcruxes into which Lord Voldemort split his soul—a diary, a ring, a locket, a cup, and a diadem³⁷—the secondary institutions examined here are not inanimate objects. They are institutions with both independent leadership and either public or private constituencies and stakeholders. Therefore, the creation of a regulatory horcrux has both a necessary condition and a sufficient condition. The necessary condition is some action on the part of the federal government to place either some or all of a regulatory program into a secondary institution. Action in this sense extends to action that consciously does not preclude the secondary institution from acting on its own, for example, a conscious decision by Congress

35. Alejandro Camacho and Robert Glicksman have argued that efforts at agency design and redesign have often failed to appreciate three different dimensions of centralization, overlap, and coordination, each of which affects how well programs fare against the normative values of effectiveness, efficiency, equity, and legitimacy. Alejandro E. Camacho & Robert L. Glicksman, *Functional Government in 3-D: A Framework for Evaluating Allocations of Government Authority*, 51 HARV. J. ON LEGIS. 19, 21–23 (2014). Here, I focus on centralization and overlap measured against the value of durability, but do not address the efforts at coordination that have been the subject of extensive discussions elsewhere.

36. See ROWLING, *supra* note 1.

37. See *Horcrux*, *supra* note 29 (listing the different horcruxes that Lord Voldemort created). It is worth noting that one horcrux was embedded into a living snake, and that there is some debate over whether Harry himself became a horcrux when Lord Voldemort killed his parents. *Id.* However, the majority were inanimate objects.

or an agency not to preempt state action.³⁸ Perfection of a horcrux requires additional action on the part of the secondary institution to accept it.

In the case of horizontal horcruxes, these two steps merge into one: Congress can simply assign shared authority over a regulatory program to both the primary agency and a secondary agency, or assign all of the regulatory program to a secondary agency. However, these two steps are discrete in the case of both vertical and private horcruxes. Congress can create a regulatory program in which the federal government and the states share regulatory authority. Or Congress can create a program that does not preempt the states from acting on their own. Likewise, Congress can create a program in which the federal government and a private actor share regulatory responsibility. In the second step, the state or private actor must accept responsibility to enforce or implement the horcrux.

Only when both of these steps occur do external horizontal and vertical horcruxes fit into the horcrux model. The center, however defined, must intentionally vest these alternative regulators with regulatory power and must retain the power to destroy the horcrux. This two-step process thus reveals that purely private environmental governance³⁹ does not fit into the horcrux framework. Mere federal government inaction in a particular sphere is not sufficient to meet the horcrux creation threshold. Private environmental governance can arise if Congress simply chooses not to regulate in a particular area, or when an agency likewise chooses not to exercise its authority to regulate. Yet the federal government cannot preempt private actors from undertaking private governance that goes beyond federal standards. Because the federal government does not need to act intentionally to create private environmental governance, and cannot

38. Cf. generally Sarah E. Light, *Advisory Nonpreemption*, 95 WASH. U. L. REV. 327 (2017) (discussing how a federal agency can choose not to exercise preemptive power granted to it by Congress to permit state experimentation).

39. See, e.g., Sarah E. Light & Eric W. Orts, *Parallels in Public and Private Environmental Governance*, 5 MICH. J. ENVTL. & ADMIN. L. 1, 9–12 (2015) [hereinafter Light & Orts, *Parallels in Public and Private Environmental Governance*] (examining the parallel tools that private and public environmental governance employ); Sarah E. Light, *The New Insider Trading: Environmental Markets Within the Firm*, 34 STAN. ENVTL. L.J. 3, 5–6 (2015) (discussing private carbon fees and emissions trading schemes as forms of private environmental governance with global implications); Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 133–34 (2013) (identifying private environmental governance as occupying a significant role in environmental standard-setting and enforcement in light of gaps in positive environmental law).

destroy private environmental governance through preemption, it does not fit the horcrux framework.⁴⁰

Combining these three sets of institutions with the different degrees of overlap yields the following 3 x 2 matrix:

Table 1: A Matrix of Horcruxes

| | | Institutional Actor | | |
|---------------------------------|----------|---|--|--|
| | | Horizontal Horcrux | Vertical Horcrux | Private Horcrux |
| Degree of Overlapping Authority | Shared | Concurrent jurisdiction between the primary federal agency and the secondary federal agency | Concurrent jurisdiction between the federal government and the states/local government Cooperative federalism | Public-Private Partnerships Collaborative Governance Reflexive Law Management-based regulation Private Citizen Suits |
| | External | Program exists entirely in a secondary federal agency or agencies | State or local control over a regulatory program without federal agency involvement | Not a Horcrux Private Environmental Governance |

40. That being said, as I and others have argued elsewhere, private environmental governance is an important regulatory phenomenon in its own right. *See supra* note 39. In addition, law is certainly necessary to create the space for private organizations and civil society to function and adopt private environmental governance. Light & Orts, *Parallels in Public and Private Environmental Governance*, *supra* note 39, at 11–12 & nn.36–38 (citing ERIC W. ORTS, BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM 1–108 (rev. ed. 2015)); Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. (forthcoming 2019) (draft on file with the *Duke Law Journal*) (arguing that corporate law, antitrust law, securities regulation, and bankruptcy law, collectively affect private firms' incentives to engage in private environmental governance).

These categories are not necessarily exclusive. It is possible that a program may be shared between two federal agencies and incorporate state participation as well.

The next sections offer more specific examples of the different types of horcrux to fill out the contours in greater depth. It is worth noting that these examples were not necessarily created with a horcrux framework in mind. This framework is intended to be both analytical and descriptive, but it is not a positive account of why existing regulatory programs look the way they do.

D. Horcrux Examples

1. *Horizontal Horcruxes.* Federal agencies are simultaneously tasked with achieving multiple goals, including potentially conflicting goals, in a phenomenon that Eric Biber has dubbed the challenge of “multiple-goal agencies.”⁴¹ Rather than considering how a single agency prioritizes conflicting goals, the horcrux framework focuses on the goal itself, and the impact that fragmenting a program across multiple agencies or placing it entirely into an agency with a different core mission has on achieving that goal over time. Thus, horcruxes represent a shift from a framework of multiple-goal agencies to multiple-agency goals or alternative-agency goals. Horizontal horcruxes are likely to be the strongest of the three types at maintaining the scope of a program, including addressing interstate spillovers or other problems of national scope. Yet they are likely the weakest of the three types at resisting deregulatory pressure at the federal level. In the environmental context, if the EPA is in the crosshairs of a deregulatory push by the president and Congress, other agencies may face a similar deregulatory push by those same principals. However, the need to frame a problem differently to generate a horizontal horcrux, in terms that are consistent with the mission of the secondary agency, may provide some insulation from this pressure, as different constituencies may continue to support the program for different reasons.

Some federal regulatory programs are shared between the primary federal agency and secondary agencies. These shared horizontal horcruxes take a variety of forms.⁴² Well-known examples

41. Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 4–6 (2009).

42. See generally Freeman & Rossi, *supra* note 18 (offering different mechanisms for coordinating shared regulatory space including interagency consultation, interagency agreements,

in the environmental context include the shared authority under the Clean Water Act permitting program, pursuant to which the EPA and the U.S. Army Corps of Engineers jointly define the “waters of the United States” for federal permitting requirements under Sections 402 and 404 of the Act.⁴³ The EPA and the DOE share responsibility for administering the Energy Star program, a government-sponsored certification program for energy-efficient appliances and other products which has, since the program’s creation in 1992, reduced greenhouse gas emissions by 2.7 billion metric tons.⁴⁴ Other shared horizontal horcruxes include regulatory programs addressing lead paint in residential housing, in which both the Department of Housing and Urban Development (HUD) and the EPA play a role.⁴⁵

External horizontal horcruxes include programs housed entirely in a secondary federal agency or agencies whose mission does not expressly include environmental protection. Many of the programs that are part of “the military-environmental complex”⁴⁶ fit into this category. Although the DoD’s mission is to protect the national security interest of the United States, not the environment, it is also the largest consumer of energy in the nation, the federal agency that would respond to geo-political instability resulting from extreme weather events, a landowner that manages military installations facing the threat of rising seas, and a warfighter that must equip its personnel with energy resources in remote operational locations.⁴⁷ Congress has therefore tasked the DoD with reducing fossil fuel energy use and developing new sources of renewable energy for electric power generation to promote national security. Congress created an external horizontal horcrux when it directed the DoD, alone among federal

joint policymaking, and joint rulemaking).

43. Clean Water Act §§ 402, 404, 33 U.S.C. §§ 1342, 1344 (2012). There is also a vertical horcrux in these provisions. *See infra* notes 64–65 and accompanying text.

44. 42 U.S.C. § 6294a (2012); U.S. ENVTL. PROT. AGENCY, ENERGY STAR OVERVIEW OF 2015 ACHIEVEMENTS (2015), https://www.energystar.gov/sites/default/files/asset/document/ES_OverviewAchievements_040816-508.pdf [https://perma.cc/W6ZT-H45E]. *See generally Energy Star*, U.S. ENVTL. PROT. AGENCY, <https://www.energystar.gov> [https://perma.cc/DV4B-HH8S]. This figure is equivalent to taking 578 million cars off the road for one year. *Greenhouse Gas Equivalencies Calculator*, U.S. ENVTL. PROT. AGENCY (Sept. 2017), <https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator> [https://perma.cc/E2DA-Q76A].

45. Residential Lead-Based Paint Hazard Reduction Act of 1992 § 1018, 42 U.S.C. § 4852d (2012) (directing HUD and EPA to require the disclosure of known lead-based paint hazards before the sale or lease of housing built prior to 1978).

46. Light, *supra* note 30, at 884.

47. *Id.* at 881, 885, 892, 893–94, 899 & n.100.

agencies, “to produce or procure not less than 25 percent of the total quantity of facility energy it consumes within its facilities during fiscal year 2025 and each fiscal year thereafter from renewable energy sources.”⁴⁸ Given the significant impact of electricity generation on greenhouse gas emissions in the United States, increasing the share of renewables in the grid can have a net positive impact on the environment, and DoD actions can have positive spillover effects in the private sector.⁴⁹ Notwithstanding the many deregulatory efforts targeting the climate and environmental programs housed in primary federal agencies with environmental missions like the EPA and the DOI, Congress nonetheless passed the National Defense Authorization Act for Fiscal Year 2018, which expresses Congress’s position that “climate change is a direct threat to the national security of the United States,” and directs the DoD to “ensure that it is prepared to conduct operations both today and in the future and that it is prepared to address the effects of a changing climate on threat assessments, resources, and readiness.”⁵⁰

Other external horizontal horcruxes include environmental disclosure rules adopted and enforced by the SEC, whose mission is to protect investors, to maintain fair markets, and facilitate the formation of capital.⁵¹ Under the Securities Act of 1933 and the Securities Exchange Act of 1934, the SEC requires publicly traded firms to disclose information that is “material” to investors.⁵² Significant environmental matters, such as material risks to a firm’s business arising out of domestic or international regulations or litigation, must be disclosed in quarterly and annual reports to investors.⁵³ In 2010, the SEC issued guidance to public companies making clear that these existing rules require disclosure of climate-related risks, including

48. 10 U.S.C. § 2911(e) (2012); Light, *supra* note 30, at 908.

49. U.S. ENVTL. PROT. AGENCY, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS ES-24 (2015), https://www.epa.gov/sites/production/files/2017-02/documents/2017_complete_report.pdf [<https://perma.cc/LGU7-YZ3D>].

50. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 335(b), 131 Stat. 1283, 1358 (2017).

51. *What We Do*, U.S. SEC. AND EXCH. COMM’N, <https://www.sec.gov/Article/whatwedo.html> [<https://perma.cc/E3SJ-763F>].

52. Standard Instructions for Filing Forms Under Securities Act of 1933, Securities Exchange Act of 1934 and Energy Policy and Conservation Act of 1975—Regulation S-K 17 C.F.R. §§ 229.10–229.702 (2012).

53. *See generally* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999) (discussing the history of environmental and social disclosures under SEC rules).

those arising from existing or potential climate litigation or regulations and those relating to the physical effects of climate change.⁵⁴ This information disclosure regime is analogous to various environmental disclosure regimes managed by the EPA,⁵⁵ but is housed entirely within a secondary federal agency.

2. *Vertical Horcruxes.* The allocation of authority between the federal government and subfederal governments can take a variety of forms, only some of which allow the states or local governments to act as co-regulators with the federal government, or solo regulators pursuing continued regulatory action in the face of federal retrenchment or deregulation. Although the federal government can expressly create a shared vertical horcrux with co-regulatory authority in the states, the federal government can only take the first step to enable the necessary conditions for an external vertical horcrux. In that case, the state or local government must accept the invitation. The federal government maintains a “trump card” under the Supremacy Clause to preempt state or local rules that are not identical to a federal standard.⁵⁶ This preemption can occur expressly in statutory language, as in the Federal Insecticide, Fungicide, and Rodenticide Act, which expressly prohibits state pesticide labeling rules.⁵⁷ In other cases, even in the absence of express language, courts have concluded that Congress has impliedly preempted the entire “field,” because federal regulation is so pervasive that there is no room for state or local governance, or because there is a conflict between state and federal law.⁵⁸ Thus, whether vertical horcruxes can exist in either form is a

54. SEC Commission Guidance Regarding Disclosure Related to Climate Change (Final Rule), 75 Fed. Reg. 6289, 6290–97 (Feb. 8, 2010) (codified at 17 C.F.R. pts. 211, 231, and 241).

55. Sarah E. Light, *NEPA's Footprint: Information Disclosure as a Quasi-Carbon Tax on Agencies*, 87 TUL. L. REV. 511, 513 (2013) (discussing various environmental information disclosure regimes).

56. Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 118 (2014) (noting that Congress holds a “supremacy trump card”); see also Buzbee, *supra* note 31, at 1590–92 (discussing ceiling preemption, which he calls “[u]nitary [f]ederal [c]hoice”). But see Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1265, 1276–78 (2009) (arguing that states are sometimes “uncooperative” in federal schemes where the federal government maintains preemptive power, limiting the federal government’s ability to play its “trump card”).

57. 7 U.S.C. § 136v(b) (2012).

58. See Buzbee, *supra* note 31, at 1560–76 (discussing different forms of preemption under federal law); Christopher H. Schroeder, *Supreme Court Preemption Doctrine*, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION 119 (William Buzbee ed., 2009) (discussing the Supreme Court’s preemption doctrine).

question of strategic regulatory design at the federal level. Shared vertical horcruxes are likely to be as powerful as horizontal horcruxes at achieving national goals or addressing interstate spillovers that the states alone could not address because in each case the federal government retains a role in the program.⁵⁹ External vertical horcruxes are likely to be weaker in this regard, however, as one state may be unable to address pollution arising from another state. With respect to deregulatory pressure, what can be created can likewise be taken away; thus, vertical horcruxes remain within the zone of deregulatory danger.⁶⁰ However, by creating a new constituency within a state or states that participate in the implementation and enforcement of a regulatory program, this deregulatory power may become more difficult to exercise over time.⁶¹

In the absence of preemption or any other constitutional limits on state action such as under the Dormant Commerce Clause,⁶² however, states and local governments can be co-regulators with a primary federal agency or solo regulators in different forms of vertical horcruxes. A decision by the federal government to create a cooperative federalism regime generates shared vertical horcruxes. Examples include state enforcement of federal regulatory standards under the Resource Conservation and Recovery Act (RCRA).⁶³ A second example under the Clean Water Act is the structure of the

59. See generally Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341 (1996) (proposing ways to address interstate pollution externalities more effectively than the EPA and courts were doing at the time).

60. Indeed, states' rights are often cited as a rationale for deregulation though there is always the risk that this may include only states' rights to pollute, not states' rights to promote greater environmental protection. Richard Revesz, Opinion, *According to Scott Pruitt, States Only Have the Right to Pollute, Not Protect Their Environments*, L.A. TIMES (Mar. 20, 2017, 4:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-revesz-pruitt-epa-federalism-20170320-story.html> [<https://perma.cc/V8P4-B4GZ>].

61. See Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39, 43–44 (1980) (discussing the “endowment effect,” which is the theory that people ascribe greater value to what they already own, as the “underweighting of opportunity costs”).

62. See *Am. Trucking Ass'n v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005) (noting that the Dormant Commerce Clause precludes the states from “plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear” (quoting *Okl. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995)) (alteration in original)).

63. States have lead responsibility for implementing federal regulatory requirements, and must submit their programs to the EPA for a so-called “determination of adequacy.” Resource Conservation and Recovery Act § 4005, 42 U.S.C. § 6945(c)(1)(C) (2012). The EPA can authorize states to implement their own approved state programs instead of the federal program. § 3006, 42 U.S.C. § 6926 (2012); 40 C.F.R. § 271.1 (2017).

Section 402/404 permit program.⁶⁴ Whereas the EPA and the U.S. Army Corps of Engineers share responsibility for ensuring that no discharge of a pollutant into waters of the United States occurs without a federal permit, the Act incorporates a significant shared vertical horcrux. Under Section 401, one seeking a permit to discharge into the navigable waters of the United States must further seek approval from the relevant state, which has authority to set water quality standards.⁶⁵ State approval is required even if the entity requesting the permit is a federal agency. Thus, in the face of federal retrenchment or any easing in the granting of permits, the states serve as an important potential regulatory backstop.

When a state is afforded special authority under a federal statute to adopt its own regulatory standards, subject to EPA approval, this creates a vertical horcrux. For example, although the Clean Air Act generally preempts any state or political subdivision from adopting or attempting to enforce “any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines,”⁶⁶ there is an external vertical horcrux embedded within this regulatory program. California is exempt from preemption if it can demonstrate that its emissions standards are “at least as protective of public health and welfare as” the federal standards, and obtains a waiver from the EPA.⁶⁷ The California waiver has been crucial in the iterative development of motor vehicle emissions standards over time, and now arguably serves as one of the most important backstops against federal efforts to reduce the stringency of vehicle emissions and fuel economy standards.⁶⁸

The federal government can also create external vertical

64. Clean Water Act §§ 402, 404, 33 U.S.C. §§ 1342, 1344 (2012).

65. 33 U.S.C. § 1341; *see also* PUD No.1 of Jefferson Cty. v. Wash. Dept. of Ecology, 511 U.S. 700, 711 (1994); *cf.* Spence, *supra* note 6, at 426 (noting that Section 401 was adopted to “creat[e] more proenvironment decision outcomes in the hydro licensing program” managed by the Federal Energy Regulatory Commission(FERC)).

66. 42 U.S.C. § 7543(a) (2012).

67. *Id.* § 7543(b). Other states may then adopt California’s standards. *Id.* § 7507. Ironically, McNollgast’s discussion of the federalism issues within the Clean Air Act is a story of increasing “federalization” in the federal government. McNollgast, *Structure and Process*, *supra* note 6, at 446–49. This Article finds the more interesting issue to arise from the authority that was left behind in the states.

68. *See* Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 Nw. U. L. REV. 1097, 1099–1100 (2009); Jacques Leslie, *In the Face of a Trump Environmental Rollback, California Stands in Defiance*, YALEENVIRONMENT360 (Feb. 21, 2017), <http://e360.yale.edu/features/in-the-face-of-trump-environmental-rollback-california-stands-in-defiance> [https://perma.cc/PW7W-PZEU].

horcruxes when the federal government regulates in an area but specifically exempts a particular practice from federal rules. State governance of oil and gas leases or hydraulic fracturing is a prime example.⁶⁹ For example, the Safe Drinking Water Act requires the EPA to set minimum requirements for effective state underground injection permit programs to prevent endangerment of drinking water.⁷⁰ However, the underground injection of hydraulic fracturing “fluids or propping agents” is specifically exempt from this requirement, leaving regulation in this area up to the states.⁷¹

Efforts by the states to address climate change from stationary sources, such as California’s AB-32 cap-and-trade program,⁷² likewise exemplify external vertical horcruxes. The Clean Air Act’s preemption provisions only apply to motor vehicle emissions; thus Congress expressly allowed the states to exceed federal standards from stationary sources of air emissions. This federal choice to allow the states to exceed federal standards permits the states to step in. A particularly compelling recent example of the importance of this external vertical horcrux arises out of the Trump administration’s statement that the United States intends to withdraw⁷³ from the Paris Agreement on Climate Change (the Paris Agreement).⁷⁴ On June 5, 2017, several days after the president notified the international community of his intent to withdraw from the Agreement, the “We Are Still In” Declaration (the Declaration) was released.⁷⁵ The

69. See David B. Spence, *Federalism, Regulatory Lags, and the Political Economy of Energy Production*, 161 U. PA. L. REV. 431, 506–08 (2013) (arguing that the states can continue to take a leading role in regulating hydraulic fracturing).

70. 42 U.S.C. § 300h(b)(1).

71. *Id.* § 300h(d)(1)(B)(ii).

72. California Global Warming Solutions Act of 2006, CAL. HEALTH & SAFETY CODE §§ 38500–38599 (2006).

73. See Michael D. Shear, *Trump Will Withdraw U.S. from Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html> [<https://perma.cc/VGV8-H3VD>]. Under the terms of the Agreement, withdrawal cannot formally take place until November 4, 2020, one year after a party gives notice of withdrawal, which cannot occur until three years after the agreement entered into force. Brad Plumer, *The U.S. Won't Actually Leave the Paris Climate Deal Anytime Soon*, N.Y. TIMES (June 7, 2017), <https://www.nytimes.com/2017/06/07/climate/trump-paris-climate-timeline.html> [<https://perma.cc/ZWU7-LVLN>].

74. Conference of the Parties Dec. 1/CP.21 (Dec. 12, 2015), in Report of the Conference of the Parties on Its Twenty-First Session, Held in Paris from 30 November to 13 December 2015, Addendum, Part Two: Action Taken by the Conference of the Parties at Its Twenty-First Session, FCCC/CP/2015/10/Add.1 (Jan. 29, 2016) [hereinafter Paris Agreement].

75. “WE ARE STILL IN” DECLARATION, <https://www.wearestillin.com/we-are-still-declaration> [<https://perma.cc/D8SB-Y52T>].

Declaration states: “We, the undersigned mayors, county executives, governors, tribal leaders, college and university leaders, businesses, and investors are joining forces for the first time to declare that we will continue to support climate action to meet the Paris Agreement.”⁷⁶ The Declaration acknowledges that “it is local, tribal, and state governments, along with businesses, that are primarily responsible for the dramatic decrease in greenhouse gas emissions in recent years. Actions by each group will multiply and accelerate in the years ahead, no matter what policies Washington may adopt.”⁷⁷ As of January 2018, more than 2,500 cities, states, private firms, and universities have signed the Declaration.⁷⁸ In addition, the governors of California, New York, and Washington State created the U.S. Climate Alliance to ensure “coordinated state action” to meet the goals of the Paris Agreement, which now counts among its members fourteen states and Puerto Rico.⁷⁹ At the local level, 389 Mayors “representing 69 million Americans” have signed on as Climate Mayors and remain committed to meeting the goals of the Paris Agreement.⁸⁰ America’s Pledge is an additional effort led by Governor Jerry Brown and former Mayor of New York Michael Bloomberg “to compile and quantify the actions of states, cities and businesses” to reduce their greenhouse gas emissions.⁸¹ These vertical horcruxes have potential to keep the United States moving in the right direction toward the goals set by the United States under the Paris Agreement, even in the face of exit by the federal government. This was not merely a random, fortuitous event, but depended upon strategic institutional design in the Clean Air Act and the Paris Agreement. The Paris Agreement expressly contemplated a role for subnational action to contribute to meeting the Agreement’s goals.⁸² And had Congress expressly preempted all state

76. *Id.*

77. *Id.*

78. *Id.*

79. UNITED STATES CLIMATE ALLIANCE: STATES UNITED FOR CLIMATE ACTION, <https://www.usclimatealliance.org> [<https://perma.cc/9DTK-5L6H>].

80. CITIES ADOPT THE PARIS CLIMATE AGREEMENT GOALS, <http://climatemayors.org> [<https://perma.cc/2962-JB22>].

81. AMERICA’S PLEDGE, <https://www.bloomberg.org/program/environment/americas-pledge> [<https://perma.cc/K5NX-2FKL>].

82. *See* Paris Agreement, *supra* note 74, § V (Non-Party stakeholders); *id.* para. 117 (welcoming “the efforts of non-Party stakeholders to scale up their climate actions” and encouraging those actions to be registered “in the Non-State Actor Zone for Climate Action platform”); *id.* para. 133 (welcoming “the efforts of all non-Party stakeholders to address and respond to climate change, including those of civil society, the private sector, financial institutions,

and local action to reduce greenhouse gas emissions arising from stationary sources under the Clean Air Act, such actions would not be possible in the face of deregulatory pressure at the federal level.

3. *Private Horcruxes*. The final type of horcrux, which exists only in a shared form, involves private institutions acting as co-regulators with the federal government. There are many different private horcruxes, all of which fall at different points along the continuum of overlapping authority. As a result, they also have different degrees of tradeoff between centralization and insulation from deregulatory pressure. The private horcrux that retains the highest degree of both centralization and power to achieve national regulatory priorities is contained in the citizen-suit provisions that Congress adopted in almost every major federal environmental statute.⁸³ After giving notice of an environmental violation to the violator, the relevant state, and the EPA administrator, a private citizen or an environmental advocacy organization may file suit to enforce federal environmental regulations.⁸⁴ These citizen-suit provisions encourage private actors to bring such suits by providing for attorney's fees.⁸⁵ Unlike other federal statutes that expand private remedies for private wrongs,⁸⁶ these citizen-suit provisions allow private actors to deter and enjoin public wrongs as "private attorneys general"⁸⁷ when there is a concern that

cities and other subnational authorities"); NAZCA: TRACKING CLIMATE ACTION, <http://climateaction.unfccc.int> [<https://perma.cc/9L9W-FGCY>] (recording "the commitments to climate action by companies, cities, subnational, regions, investors, and civil society organizations").

83. Citizen-suit provisions are found in the Endangered Species Act, 16 U.S.C. § 1540(g) (2012); the Clean Water Act, 33 U.S.C. § 1365 (2012); the Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (2012); the Clean Air Act, 42 U.S.C. § 7604 (2012); and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659 (2012). I do not include suits against an agency for failing to undertake a non-discretionary duty, which are also contained in these provisions, as horcruxes. Citizen-suit provisions do exist outside the environmental context, notably in the False Claims Act, 31 U.S.C. §§ 3729–3731 (2012). Judicially created private rights of action exist in other regulatory contexts as well. See Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1198 (1982) (examining different judicially created private rights to address regulatory failures).

84. See *supra* note 83.

85. 33 U.S.C. § 1365(d); 42 U.S.C. § 6972(e); 42 U.S.C. § 7604(d); 42 U.S.C. § 9659(f). More citizen suits have been litigated under the Clean Water Act than any other statute. Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 204 (2000).

86. An example of this is Section 4 of the Clayton Act, 15 U.S.C. § 15 (2012), which allows for the awarding of treble damages and attorney fees.

87. Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 837 (1985).

the federal or state governments are underenforcing public law. However, private citizen suits are not necessarily as powerful as the federal government itself enforcing these laws. To invoke the federal courts' jurisdiction, private citizens must demonstrate standing, and they are generally, though not always, limited to seeking relief for ongoing harm through injunctive relief, rather than damages for past harms.⁸⁸ To the extent that they are permitted by the statutes to seek damages, such damages are paid to the federal treasury. Although Congress adopted these citizen-suit provisions as part of the original statutory schemes, it was only in the mid-1980s that private actors began to use them in significant measure, precisely when the federal EPA was in a deregulatory phase under the Reagan administration.⁸⁹ Congress could certainly destroy these private horcruxes by amending these statutes, but their power to address national problems remains significant.

A second set of private horcruxes falls under the category of reflexive law or management-based regulation, in which the federal government encourages a private entity, often a firm, to adopt a private environmental management system or otherwise to exceed mandatory compliance levels.⁹⁰ One example of this is the now-defunct Project XL, in which the EPA would agree to approve a single, comprehensive permit for a firm that made private commitments to improve its environmental performance, thus streamlining the often complex permitting process. Government agencies can also incorporate private standards by reference, can endorse private standards, or can adopt them as safe harbors or best practices.⁹¹ Alternatively, federal agencies can contract with private entities to implement federal programs or provide services pursuant to federal programs.⁹²

88. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 50 (1987) (holding that the Clean Water Act citizen-suit provision permits only suits for ongoing violations). After *Gwaltney*, Congress amended the Clean Air Act to permit citizen suits for past violations. 42 U.S.C. § 7604(a)(1).

89. Boyer & Meidinger, *supra* note 87, at 835.

90. See Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC'Y REV. 691, 696–700 (2003); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 55–66 (1997); Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1271–72 (1995).

91. See generally Lesley K. McAllister, *Harnessing Private Regulation*, 3 MICH. J. ENVTL. & ADMIN. L. 291 (2014) (discussing multiple ways in which agencies can “harness” private governance); David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 296 (2006) (discussing how agencies adopt private “best practices” as regulatory standards).

92. See Freeman, *supra* note 90, at 55–66 (offering examples of collaboration between public agencies and private contractors).

E. *Who Can Create Horcruxes?*

The question of who can create a horcrux depends largely upon the type. For horizontal horcruxes, Congress is likely to be the initiator because there are limits on whether one agency can redelegate authority over a regulatory program to a different agency. With respect to vertical horcruxes, the authority is somewhat more dispersed. In an authorizing statute, Congress may (a) choose to preempt state law expressly, (b) create a comprehensive scheme that a court might find to preempt the field as a matter of implication, (c) not preempt state law, or (d) carve out a limited exception from preemption of state law such as the California waiver provision under the Clean Air Act.⁹³ But federal agencies, too, have a role to play in preemption both when Congress has expressly delegated authority to the agency to determine whether state law is preempted, and when Congress has delegated interpretive power to the agency, with preemptive consequences.⁹⁴ Even when Congress delegates power to agencies to preempt or to interpret statutory provisions that will have preemptive effect, the agency need not always choose to exercise that authority—a form of nonpreemption, which is often a matter of conscious choice.⁹⁵ For shared private horcruxes, Congress may create a program that involves joint federal-private action, or an agency may choose to delegate standard-setting authority to a private institution or choose to work with a private actor in some form of collaborative governance.

F. *When Can Horcruxes Be Created?*

Unlike agency burrowing or self-insulation techniques, which are

93. See *supra* note 70.

94. See generally Light, *supra* note 38, at 327 (discussing nonpreemption of state regulatory experimentation through agency interpretive power); Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695 (2008) (arguing for limiting agencies' authority to preempt state law); Catherine Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521 (2012) (discussing federal agencies' role in preemption). *But see* Joshua Hawkes & Mark Seidenfeld, *A Positive Defense of Administrative Preemption*, 22 GEO. MASON L. REV. 63, 64 (2014) (offering a more positive view of agency preemption). For example, in the 2016 amendments to the Toxic Substances Control Act, Congress authorized the EPA to grant waivers from preemption of state law under certain circumstances. Sarah E. Light, *Regulating Toxic Chemicals Through Precautionary Federalism*, 3 PENN UNDERGRADUATE L.J. 1, 12–13 (2016) (discussing preemption and waiver provisions).

95. Light, *supra* note 38, at 328; *cf.* Lazarus, *supra* note 10, at 1228–29 (discussing different “triggers” for federal preemption or nonpreemption of state action in the climate context, such as a “formal finding or action by a designated government official” or committee of experts).

best employed during the lame duck period,⁹⁶ or the creation of a new independent agency designed to be insulated from short-term interest group pressure,⁹⁷ there is some flexibility as to when a regulatory horcrux can be created.

Undoubtedly, horcruxes can be created by the initiating regulator at the program's inception. But they can also be added later by a sympathetic successor government.⁹⁸ In addition, a successor agency can create a vertical horcrux through its interpretive powers to choose nonpreemption of state law.⁹⁹ In some sense, private horcruxes are the most flexible type. Agencies frequently delegate standard-setting power to private standard-setting organizations and have the ability to redelegate or withdraw that power over time.¹⁰⁰ The key point is that the creation and destruction of horcruxes is not limited to the initiating regulator at the time a regulatory program is created. Just as antiregulatory successors can take steps to move toward regulatory exit, proregulatory successors have the ability to harden or insulate existing regulatory programs through the use of horcruxes.

II. WHY HORCRUXES?

While Part I examines the basic characteristics of horcruxes, this Part asks the normative question of why a regulator would employ horcruxes at all. What policy objectives do they serve and what challenges or harms might they present from the perspective of the initiating regulator and successor administrations? The primary normative concern animating this entire discussion is to ensure that a regulatory program ends when it “should”—neither too early, nor too late. The challenge of course, is that at any given moment, opposing interest groups will likely perceive the current regulatory program to

96. Mendelson, *supra* note 12, at 565 n.34.

97. Barkow, *supra* note 13, at 17.

98. *Cf.* Spence, *supra* note 6, at 426 (discussing the adoption of Section 401 of the Clean Water Act as a structural control designed to “creat[e] more proenvironment decision outcomes” in the separate regulatory licensing program for hydropower managed by FERC).

99. *See* Light, *supra* note 38, at 328, 330 n.13 (noting that the agency's interpretation of whether the Motor Vehicle Safety Act preempted state law changed from a position of preemption to one of nonpreemption).

100. *See* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 551–56 (2000) (discussing private standard-setting as a common aspect of public law); Emily Hammond, *Double-Deference in Administrative Law*, 116 COLUM. L. REV. 1705, 1710 (2016) (expressing concern that agencies give private standard-setting organizations deference, and then courts reviewing agency action give deference to such standards, without sufficient oversight at either level).

be overdue for exit and at the same time not yet fulfilling its regulatory mission. This Part therefore acknowledges that one's perspective differs depending upon one's relationship to the regulatory status quo.¹⁰¹

A. *Advantages*

Horcruxes are precautionary.¹⁰² They are more likely to preserve the status quo in the face of short-term opposition to a regulatory program, because they increase both the number of hoops that must be jumped through to exit a regulatory program and the number of constituencies with different values who are likely to care about continuing the program.¹⁰³ Thus, they are a regulatory correlate of William Eskridge's "vetogates"—rules of proceedings adopted by the House and Senate that "create multiple opportunities in each chamber for opponents to kill proposed legislation."¹⁰⁴ Programs shared across multiple federal agencies are often governed by multiple committees within the House or Senate, each of which may have an interest in continuing the program to maintain their control.¹⁰⁵ Programs shared between the federal government and the states likewise have the power to generate multiple constituencies of support who may be reluctant to give up the benefits of the program. Such constituencies include not only regulators at the subfederal level, and public interest group beneficiaries of the regulations, but private firms whose business

101. See Freeman & Rossi, *supra* note 18, at 1135 n.4, 1138–39 (citing an extensive political science literature on "redundancy," concluding that "[i]t is hard to generalize about redundancy, since sometimes it leads to beneficial outcomes and other times does not") (citing JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 274 (1989)).

102. Cf. Light, *supra* note 38, at 346–50, 360–65 (discussing how dynamic overlapping jurisdiction is precautionary, and exploring the circumstances under which precaution is desirable).

103. For a seminal discussion of the "costs of exit" in the political science literature, see Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 252, 262 (2000) (arguing that political actors often design policies in ways that "make preexisting arrangements hard to reverse" in anticipation of shifting political control).

104. Cf. William N. Eskridge, Jr., *Vetogates*, Chevron, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1444–46 (2008) (arguing that House and Senate rules create multiple "vetogates"—procedural points in the legislative process where bills can die—beyond the requirements of Article I, Section 7 of the Constitution).

105. Freeman & Rossi, *supra* note 18, at 1139, 1144 ("[M]embers will be reluctant to dispense with delegation regimes that increase their ability to take credit and disperse blame or that help them to manage principal-agent slack."); Horn & Shepsle, *supra* note 6, at 504 (discussing durability as a result of the congressional committee system).

models depend upon stability in the regulatory environment.¹⁰⁶ Programs shared between the federal government and private actors often have benefits in efficiency and expertise, in which the regulated community has a greater hand in shaping the regulations that govern it, and thus, greater buy-in. Programs that exist solely within secondary institutions likewise entrench their own constituencies of support.

Horcruxes have the potential to improve democratic deliberation. Amy Gutmann and Dennis Thompson have argued that deliberative democracy is the solution to the problem of making binding, collective decisions despite “continuing moral conflict” in pluralistic societies.¹⁰⁷ Such conflict undoubtedly exists in the context of environmental regulation. Framing a problem as an environmental one may make a program more of a deregulatory target than framing it as a matter of national security, public health, or providing material information to investors.¹⁰⁸ Because more voices play a role in the legislative or regulatory process, horizontal horcruxes may, like vetogates, increase the number of “legislative compromises, logrolls, and bundles” in a way that requires multiple voices to conclude that the program should end and its goals have been met.¹⁰⁹ Daniel Farber and Anne Joseph O’Connell have recently argued that overlapping jurisdiction or requirements of coordination across federal agencies can “foster fuller development of information and debate, along with broader

106. William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WIS. L. REV. 1037, 1057, 1063 (arguing that overlapping jurisdiction creates constituencies of support among private firms in markets created by regulations, and that such constituencies rely on regulatory stability).

107. See Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy is Different*, 17 SOC. PHIL. & POL’Y 161, 161 (2004) (noting that the fundamental principle of a deliberative theory “is that citizens owe one another justifications for the laws they collectively impose on one another”).

108. See generally Sarah E. Light, *Valuing National Security: Climate Change, the Military, and Society*, 61 UCLA L. REV. 1772, 1780–93 (2014) (surveying literature demonstrating partisanship and boomerang effects with respect to environmental framing of climate change as compared to framing climate change as a public health issue or one of national security).

109. See Eskridge, *supra* note 104, at 1449, 1453–54:

If vetogates make statutes hard to enact, they make them doubly hard to repeal. To repeal a statute, supporters must not only press their proposal through various vetogates, but they must contend with a regulatory endowment effect: most statutes create constituencies and reliance interests for their regulatory regime, and these engender extra opposition to changing or abandoning the statutory policy.

(citing Thaler, *supra* note 61, at 43–44 (defining the “endowment effect”)); cf. Freeman & Rossi, *supra* note 18, at 1142 (noting benefits of harnessing the “unique expertise and competencies of different agencies”).

representation for conflicting interests.”¹¹⁰ As with the vetogates model, horcruxes operate in a more complex fashion than simply making it harder to deregulate. It bears repeating that the challenge is not simply to increase the length of time that a program exists in a linear fashion at all costs. The challenge is rather to ensure that a regulatory program ends when its goals have been met and continues when its goals have not. By placing programs in the hands of multiple institutions, often with different primary missions, horcruxes can increase the likelihood that coalitions must form to change the program.

When a single primary regulator like the EPA is the subject of special, targeted deregulatory pressure, horcruxes have the potential to increase the costs of short-term deregulatory pressure by providing alternative institutions to enforce regulatory programs.¹¹¹ Jody Freeman and Jim Rossi have pointed out that when authority is dispersed across multiple agencies, interest groups must divide their lobbying efforts, which is costly.¹¹² Dispersing authority also decreases the risk of agency capture¹¹³ and can improve policymaking.¹¹⁴ William Buzbee has argued that by lessening the impact of deregulation at the centralized federal level of government, overlapping jurisdiction between the federal government and the states can “hedge” against the consequences of regulatory reversal or “implementation failure” for

110. Daniel A. Farber & Anne Joseph O’Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375, 1384–87, 1407 (2017) (offering a taxonomy of different forms of interagency conflict, observing that conflicts can also occur within agencies, describing mechanisms by which such conflicts are resolved, and finding both benefits and costs in such conflicts).

111. Cf. Aagaard, *supra* note 18, at 1275:

Congress can mitigate the risk of EPA implementation failure, or indeed implementation failure by any particular agency, by legislating across multiple fronts—for example, multiple embedded environmental laws administered by different agencies, or both canonical and embedded environmental laws—thereby improving the likelihood that some policy to address the problem will be implemented. Delegating environmental laws across a broader range of institutions could allow other agencies to implement substitute policies when EPA is stymied.

(footnote omitted) (citing Todd S. Aagaard, *Regulatory Overlap, Overlapping Legal Fields, and Statutory Discontinuities*, 29 VA. ENVTL. L.J. 237, 292–94 (2011)). Although Aagaard’s account focuses only on the embedding of environmental laws into other federal agencies, horcruxes can be created not only in other federal agencies subject to the control of the new administration, but also into the states and private hands, which are less subject to control by the president or Congress.

112. Freeman & Rossi, *supra* note 18, at 1142–43.

113. *Id.* at 1185–86.

114. *Id.* at 1143; cf. Katyal, *supra* note 18, at 2317 (“When [federal agencies] have to convince each other of why their view is right . . . better decision-making results.”).

private firms that depend upon regulatory stability.¹¹⁵ Many of the same arguments hold for private horcruxes as well, though the institutions that must be lobbied differ.¹¹⁶

By limiting the ability of short-term coalitions or factions to reflexively end regulatory programs, horcruxes have the potential to foreground the long-term public interest.¹¹⁷ Other scholars have written about the tradeoff between agency independence and democracy in the context of independent, rather than executive, agencies such as the Federal Reserve or the SEC, the heads of which are removable by the president only for cause, thus giving these agencies a measure of independence from political pressure that executive agencies lack.¹¹⁸ This independence arguably allows agencies to make decisions based on “expert information” rather than short-term political pressure, especially for policies that may have short-term costs but long-term benefits.¹¹⁹ Environmental policies distribute costs and benefits across large time scales, making them a particular target for short-term interest group pressure.¹²⁰ Others focusing on the phenomenon of “agency burrowing” before a presidential transition have argued that agencies can “entrench” policies to offset the concern that a new administration will be “overly responsive to a majoritarian faction.”¹²¹ The same concern may arise over a nonmajoritarian faction.

115. Buzbee, *supra* note 106, at 1039.

116. There is a substantial literature on the impact of activist and interest group pressure directly on firms, rather than public regulators or legislators through the political process. *See generally* David P. Baron, *Private Politics*, 12 J. ECON. & MGMT. STRATEGY 31 (2003) (discussing activist boycotts targeting private firms as “private politics” and the resulting firm behavior as “private regulation”); David P. Baron, *Private Politics, Corporate Social Responsibility, and Integrated Strategy*, 10 J. ECON. & MGMT. STRATEGY 7 (2001) (same); David P. Baron & Daniel Diermeier, *Strategic Activism and Nonmarket Strategy*, 16 J. ECON. & MGMT. STRATEGY 599, 600–01 (2007) (discussing firm responses to activism).

117. *Cf.* Barkow, *supra* note 13, at 19, 28–29 (arguing that agency independence prioritizes long-term public welfare over short-term political pressure); O’Connell, *supra* note 12, at 528 (suggesting that the insulation of existing policies by outgoing presidents can be advantageous if they have long-term goals in mind).

118. Barkow, *supra* note 13, at 24–29. *See generally* PETER CONTI-BROWN, *THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE* (2016).

119. Barkow, *supra* note 13, at 33; Lazarus, *supra* note 10, at 1184–87 (identifying climate change as a “super wicked” problem because it magnifies various human biases against addressing long-term issues, and legislation to address it has long-term benefits and short-term costs).

120. Lazarus, *supra* note 10, at 1174–76; Light, *supra* note 31, at 348.

121. Mendelson, *supra* note 12, at 620.

B. Disadvantages

Durability of the status quo, however, is not always a good thing, at least not from the perspective of a successor administration which arguably has a democratic mandate to advance its own regulatory priorities.¹²² Although the list of disadvantages may be shorter than the list of advantages, the primary concern is one that is deeply important to our democratic system: if horcruxes in fact make it more difficult for a successor administration to exit a regulatory program, horcruxes have the potential to limit the democratic accountability of the regulatory state, a problem that is central to administrative law.¹²³ Given the fact that the federal agencies that implement and enforce such regulatory programs are not themselves democratically accountable institutions, but rather derive their legitimacy from their status as agents of elected members of Congress and the president, any further loss of political accountability would be significant.¹²⁴

Horcruxes may limit the flexibility of a new administration to respond to changing or changed circumstances.¹²⁵ In the context of constitutional interpretation, entrenchment of “original” interpretations over the concept of a “living” constitution has been referred to as creating the “dead hand” problem.¹²⁶ Many scholars and political philosophers have rejected the idea that one generation’s understanding of the constitution should bind another, and that instead an understanding of the constitution as a living document is needed.¹²⁷

122. Cf. Bruce R. Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L.J. 991, 995 (2014). Huber draws the important distinction between durability and longevity, arguing that durability implies “resilience and robustness in the face of strain or pressure or opposition,” while “[l]ongevity alone is generally not problematic.” *Id.* at 995, 995 n.14. In the horcrux context, the key issue is how to preserve the right kind of durability, not longevity alone. For an argument questioning the assumption that more political control necessarily produces “good or popular policies,” see Spence, *supra* note 15, at 438–39.

123. See Mendelson, *supra* note 12, at 566–67.

124. See *id.* at 577–78.

125. Cf. O’Connell, *supra* note 12, at 528.

126. See Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CALIF. L. REV. 277, 357 (1985) (“The dead hand of the past ought not to govern, . . . and any theory of interpretation that demands that it does is a bad theory.”); Reva B. Siegel, Heller & *Originalism’s Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1401 (2009).

127. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 11 (1980) (“[T]o the extent that [the Constitution] ever represented the ‘voice of the people’ . . . [it] represent[s] the voice of people who have been dead for a century or two.”); David Hume, *Of the Original Contract*, in *ESSAYS: MORAL, POLITICAL AND LITERARY* 452, 457 (Oxford Univ. Press 1963) (1748) (rejecting the idea of “consent of the fathers to bind the children”); Jean-Jacques Rousseau, *Of the Social Contract or Principles of Political Right*, in *THE*

In the context of regulatory programs, an analogous argument could be made. Many administrative law scholars have argued that regulatory agencies are uniquely positioned to reinterpret the law to address changed circumstances.¹²⁸ Horcruxes could potentially limit this flexibility. And though it may remain possible to overturn or reverse existing regulatory programs that contain horcruxes, these splits of regulatory authority could potentially increase the costs of such reversals.¹²⁹ Finally, even if there is no immediate effort to exit such a regulatory program, regulatory overlap can be more costly at the outset.¹³⁰

Richard Lazarus has argued compellingly, however, that in the climate change context in particular, precommitment strategies to protect regulation from short-term reversals do not undermine democratic accountability; rather such asymmetric efforts to harden climate change law against deregulatory pressure enhance democratic accountability.¹³¹ In his view, ensuring the durability of climate change regulation or legislation is necessary to give future generations the ability to engage in the democratic process at all.¹³² In a similar vein,

SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 39, 111–12 (Cambridge Univ. Press 1997) (1762) (rejecting the idea that one generation can bind another through “perpetual Government”); Daniel E. Herz-Roiphe & David Singh Grewal, *Make Me Democratic, But Not Yet: Sunrise Lawmaking and Democratic Constitutionalists*, 90 N.Y.U. L. REV. 1975, 2005 (2015) (characterizing the countermajoritarian difficulty as an intertemporal problem); Lazarus, *supra* note 10, at 1195–1200 (discussing debates over the “dead hand” problem and the value of precommitment strategies in the climate context).

128. See generally David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013) (arguing that “big waiver”—a congressional delegation to agencies of the power to “unmake . . . statutory provisions”—is a powerful tool to update stale laws); Daniel T. Deacon, *Administrative Forbearance*, 125 YALE L.J. 1548 (2016) (discussing express delegations of administrative forbearance as a tool to address changed circumstance); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014) (stating that federal agencies are well situated to update existing legislation to address new problems like climate change).

129. Cf. Mendelson, *supra* note 12, at 589–99 (increasing the procedures that must be utilized to reverse a rule increases the costs of doing so); Nou, *supra* note 12, at 1814–15 (increasing the scope of review in response to self-insulation increases the costs and resources required to review and overturn the rule, which may make such reviews so expensive that an executive who would otherwise overturn them decides not to do so).

130. See Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 184 (2011) (arguing that “antiduplication institutions” are needed to avoid the problems associated with redundancy). Freeman and Rossi reject the term “redundancy” as “misleading” because it “suggests literal duplication, and instead favor the more nuanced concept of ‘shared regulatory space.’” Freeman & Rossi, *supra* note 18, at 1135–36 (noting that the term “redundancy” comes from political science literature).

131. Lazarus, *supra* note 10, at 1194–1205 (offering reasons why asymmetric precommitment strategies in the climate context do not offend democratic values).

132. *Id.* at 1195; see also *id.* at 1154 (noting that the purpose of strategies to enhance the

Cass Sunstein has likened the need for precautionary legal rules in the climate context, in which climate change can lead to irreversible, catastrophic harm, as similar to purchasing an “option” to prevent harm at a later date.¹³³ While these accounts focused on a different set of tools, the argument likewise applies to horcruxes in this context.

A final concern is that there are weaknesses embedded within the horcruxes themselves. As regulatory authority becomes more dispersed or fragmented into secondary institutions away from the primary agency, this may increasingly insulate a program from deregulatory attack, yet the program may exist in a weakened state. For example, fragmentation may lead to coordination failures. After the September 11 attacks on the United States, the 9/11 Commission concluded that fragmentation among the nation’s intelligence and national security agencies led to failures of coordination that limited the ability of government to act on relevant intelligence information.¹³⁴ There are other ways in which a fragmented regulatory program may be less able to accomplish what a program centralized in a single primary regulator at the federal level could. Two examples illustrate this challenge. First, of all of the types, private horcruxes are unquestionably the most removed from federal deregulatory pressure, as private actors do not face pressure from the same voter constituencies. Yet private actors lack the same enforcement capacity as government agencies. Notably, they must establish standing to enforce citizen-suit provisions. The impacts of other kinds of public-private actions such as reflexive law or management-based regulation may affect only a small number of firms, and thus may have a smaller impact than centralized federal regulations. Second, vertical horcruxes that allow states to adopt environmental regulatory programs have the potential to be incredibly significant in the face of withering federal action, especially with respect to climate change. Yet states cannot so easily address interstate pollution spillovers from other states, a primary rationale for uniform, federal rules.¹³⁵ And in the case of the

durability of climate change legislation or regulations is “not to protect the present at the expense of the future, but the precise opposite: to protect the future at the expense of the present”).

133. Cass R. Sunstein, *Irreversible and Catastrophic*, 91 CORNELL L. REV. 841, 841 (2006).

134. Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1657 (2006) (noting the 9/11 Commission’s concerns about fragmentation, but arguing that “[u]nification can . . . have costs as well: for example, destroying needed safeguards and eliminating beneficial agency or committee competition,” and advocating a balance between redundancy and centralization).

135. See *supra* note 31.

states, the federal government can always exercise its authority under the Supremacy Clause to prohibit the states from acting at all.¹³⁶ Thus, policy fragmentation limits the concentration of power both for positive and negative ends.

III. A RESEARCH AGENDA

Further empirical research is needed to understand whether regulatory horcruxes actually withstand deregulatory pressures better than programs housed within a primary federal agency like the EPA in the environmental context, and which types are the most effective in this regard. In addition, further empirical research is needed to understand the impact of each type of horcrux on deliberative democracy, including whether they encourage broader framing of what could easily be understood as purely environmental programs.

On the question of durability, to be sure, there has been significant political pushback against both vertical and horizontal horcruxes by deregulatory forces. For example, at the horizontal level, there have been efforts to block the SEC from enforcing its climate guidance, though the regulations and guidance currently remain in effect.¹³⁷ On February 28, 2017, President Trump issued an executive order calling on the EPA and U.S. Army Corps of Engineers to review the existing regulatory definition in the “Clean Water Rule” that had expanded federal jurisdiction, and to consider interpreting the term “navigable waters” more narrowly.¹³⁸ On June 27, 2017, the EPA and the U.S. Army Corps of Engineers signed the proposed rule that would limit federal jurisdiction, although there was no effort to amend the states’ power under Section 401 to issue water quality certificates.¹³⁹ The White House’s proposed 2018 budget sought to eliminate the Energy Star program, and the U.S. House of Representatives Committee on Appropriations voted in the summer of 2017 to reduce the program’s

136. See *supra* note 56; see also *infra* note 144 (discussing the EPA’s intention to roll back vehicle emissions standards).

137. Mindy Lubber, *SEC Climate Risk Disclosure Effort Under Serious Attack from Congress*, FORBES (July 18, 2016, 11:21 AM), <https://www.forbes.com/sites/mindylubber/2016/07/18/sec-climate-risk-disclosure-effort-under-serious-attack-from-congress/#249f8cc33cc2> [https://perma.cc/W3SE-AH3L].

138. Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017).

139. Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (proposed July 27, 2017) (to be codified at 33 C.F.R. pt. 328); see also *supra* note 9 (noting CRA repeal of SEC rule obligation for firms in extractive industries).

funding by 40 percent.¹⁴⁰ The fate of that program remains to be seen.

Among vertical horcruxes, the most significant pushback has been talk of withdrawing or revoking the current California tailpipe emissions waiver under the Clean Air Act.¹⁴¹ California has received every waiver it has applied for under the Clean Air Act except one, when California first sought to regulate greenhouse gas emissions from motor vehicles.¹⁴² In 2009, however, the Obama administration granted this waiver. Subsequently, California and the EPA reached an agreement with the auto industry to adopt uniform rules for motor vehicle emissions, which were also harmonized with the DOT's rules on new vehicle fleetwide fuel economy standards.¹⁴³ Yet on April 2, 2018, the EPA Administrator announced that the current uniform fleetwide standards are “not appropriate and should be revised.”¹⁴⁴ Although the Clean Air Act has no statutory provision governing revocation of a waiver, there is always the potential for the EPA simply to deny future waiver requests. The EPA's April 2018 announcement stated that “cooperative federalism doesn't mean that one state can dictate standards for the rest of the country,” and that the EPA looked forward to working with California, among others, on setting a uniform standard.¹⁴⁵ As of the date of publication, California's waiver remains intact. These horcruxes may not have been created with the issue of resisting deregulatory pressure in mind. However, whether horcruxes are more or less subject to deregulatory efforts than programs housed solely within the EPA, whether certain types of horcruxes (vertical, horizontal, private, shared, or external) are more or less subject to such pressures, and which are most likely to endure, are all questions that can be tested through empirical methods.

140. Emily Holden, *White House Plans to 'Close Out' Energy Star, Other Programs*, CLIMATEWIRE (Mar. 6, 2017), <https://www.eenews.net/stories/1060050976> [<https://perma.cc/45Y9-8RJ3>]; Press Release, Appropriations Committee Approves Fiscal Year 2018 Interior and Environment Bill (July 18, 2017), <https://appropriations.house.gov/news/documentsingle.aspx?DocumentID=395024> [<https://perma.cc/5863-NV44>].

141. Robinson Meyer, *The Coming Clean-Air War Between Trump and California*, ATLANTIC (Mar. 6, 2017), <https://www.theatlantic.com/science/archive/2017/03/trump-california-clean-air-act-waiver-climate-change/518649> [<https://perma.cc/6KHS-L28N>].

142. *Id.*

143. Jody Freeman, *The Obama Administration's National Auto Policy: Lessons from the 'Car Deal'*, 35 HARV. ENVTL. L. REV. 343, 344–45 (2015).

144. News Release, U.S. Env'tl. Prot. Agency, EPA Administrator Pruitt: GHG Emissions Standards for Cars and Light Trucks Should Be Revised (Apr. 2, 2018), <https://www.epa.gov/newsreleases/epa-administrator-pruitt-ghg-emissions-standards-cars-and-light-trucks-should-be> [<https://perma.cc/46EQ-MT87>].

145. *Id.*

A unique question arises in the context of horizontal horcruxes, given the structural differences across federal agencies. If the primary federal agency and the secondary agency are both executive agencies, then the balance of power between Congress and the president in both creating and deregulating such programs is likely to be similar in nature. However, if the two agencies are of different design—for example, the primary agency is the EPA and the secondary agency is the Federal Energy Regulatory Commission (FERC) or the SEC, both of which are independent agencies, the balance of regulatory and deregulatory power may be different.¹⁴⁶ In addition, different types of agencies may have different degrees of independent litigating authority, setting up potential enforcement conflicts in the case of shared horizontal horcruxes. Thus, further empirical research is warranted on whether embedding a horcrux in an executive or an independent agency renders it either more or less durable over time.

On the question of whether horcruxes promote deliberative democracy, this too can be tested empirically. The hypothesis would be that those seeking to create horizontal horcruxes speak in terms of different values—beyond the environment—when advocating for such programs to be housed in federal agencies whose missions are focused on issues other than environmental protection. Whether such broader framing also exists for vertical and private horcruxes remains an open question. If programs that are framed more broadly have greater durability, this would also yield important insights for regulators designing programs in the future.

CONCLUSION

This systematic effort to understand the role of horcruxes makes three contributions to the literature on strategic regulatory design and on regulatory exit. First, it brings together insights from disparate literatures on federalism, interagency coordination, and collaborative governance, suggesting that there is significant value in comparing the different horcruxes along common normative metrics. A greater degree of fragmentation and distance from the center can harden such horcruxes from deregulatory pressures but can likewise weaken the ability of the regulatory program to achieve all of the same regulatory goals. Although horizontal horcruxes are likely to be the weakest at resisting deregulatory pressure focused on federal agencies, they will

146. Thanks to Ricky Revesz on this point.

be strongest at addressing interstate spillovers. And private horcruxes may be the strongest at resisting deregulatory pressure but may lack the scope and enforcement capacity of a centralized regulatory program. This leaves vertical horcruxes—regulatory programs embedded in whole or in part in the states—as perhaps attaining the best balance among the available options.

Second, this framework demonstrates that demarcation lines—like whether a statute fits into or outside of the “environmental law canon,”¹⁴⁷ or whether a regulatory program is a form of “new governance”—are orthogonal to this analytical framework that anticipates deregulatory challenges. The Clean Water Act is unquestionably a canonical environmental law statute, not based on a new governance or modular approach to environmental regulation. It was adopted during the height of federal congressional action to protect the environment in the “environmental decade” of the 1970s.¹⁴⁸ Yet it nonetheless contains both a horizontal horcrux that shares power to preserve water quality between two federal agencies as well as a vertical horcrux that gives the states power to preserve water quality as a backstop when federal permitting decisions are insufficiently protective of human health and the environment. Likewise, the Clean Air Act’s delegation to the EPA to limit emissions from new motor vehicles is unquestionably part of the environmental canon and an example of top-down regulation rather than a form of new governance. Yet the California waiver provision is a significant vertical horcrux that has been crucial in the iterative development of motor vehicle emissions standards over time, and that now arguably serves as one of the most important backstops against federal deregulatory efforts to reduce the stringency of vehicle emissions standards.¹⁴⁹

Finally, although some might argue that vertical or private horcruxes are themselves equivalent to deregulation, this Article challenges that assumption. Vertical and private horcruxes can preserve much of a federal regulatory program’s substance even when the federal government wishes to exit. Given that the current administration has indicated its intent to pull out of the Paris

147. See Aagaard, *supra* note 18, at 1239, 1297 (arguing that embedding environmental programs into federal agencies other than the EPA can “offer an alternative model to the environmental law canon”); Freeman & Farber, *supra* note 32, at 798–803; Lobel, *supra* note 32, at 344–47.

148. See generally LETTIE M. WENNER, *THE ENVIRONMENTAL DECADE IN COURT* (1982) (discussing litigation over the major environmental legislation of the 1970s).

149. See *supra* note 68.

Agreement on Climate Change, many states and cities have declared their commitments to meet the Agreement's goals through vertical horcruxes.¹⁵⁰ Far from simply a fortuitous circumstance, the Paris Agreement expressly contemplated a role for participation and commitment by subnational governments.¹⁵¹ And the Clean Air Act permits these subfederal actors to take such actions without fear of preemption. Thus, regulatory horcruxes represent an antidote to regulatory exit when these external constituencies support the continuation of the regulatory program and remain publicly committed to its terms.

Administrative law and empirical scholars should investigate the extent to which different forms of regulatory horcruxes follow these predicted patterns. Further empirical research in this area will yield insights for policymakers both designing new regulatory programs and amending existing ones.

150. *See supra* note 75.

151. *See supra* note 82.