GUBERNATORIAL ADMINISTRATION

Miriam Seifter

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Miriam Seifter[*]

Scholarly preoccupation with presidential power has left another story of executive power largely untold: the rise of American governors. Once virtually powerless figureheads, governors have emerged today as the drivers of state government. On issues from clean energy to voting rights, disaster relief to discrimination, governors regularly exercise their authority in ways that deeply affect millions of people within their home states. And governors' reach extends beyond state borders. Governors leverage their control of state executive branches to shape national policy, mobilizing (or demobilizing) state agencies as a means of supporting or resisting federal actions on immigration, environmental law, healthcare, and more.

This Article identifies and evaluates the modern regime of gubernatorial administration. It uncovers how and why governors have gained authority, including powers that Presidents lack, and describes the limited checks on gubernatorial power from state-level institutions. It shows that centralized gubernatorial power not only has significant policy consequences, but also provides a new perspective on several contemporary debates — regarding executive power, federalism, and local government law. Gubernatorial administration emerges as a promising vehicle for efficacious governing and a new source of state resilience. But concentrated gubernatorial power also creates opportunities for executive overreach, at least in the absence of strong oversight by other institutions, such as state legislatures, courts, media outlets, or civil society — institutions that may currently lack the capacity or incentives to serve as effective checks.

INTRODUCTION

Now, as ever, presidential power is in the spotlight. Both before and after the recent election, some commentators have decried an "imperial" presidency,[1] and most others agree that the President and the executive

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[1] *See* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973); *see also* BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 6 (2010) (arguing that the presidency "has become a far more dangerous institution during the forty years" since the publication of Arthur Schlesinger's book). For additional commentary, see, for example, Ross Douthat, Opinion, *The Making of an Imperial President*, N.Y. TIMES (Nov. 22, 2014), https://www.nytimes.com/2014/11/23/opinion/sunday/ross-douthat-the-making-of-an-imperial-president.html [https://perma.cc/V5WA-UXQP]; Daniel Kato, *The Imperial Presidency 3.0*, JACOBIN (Jan. 31, 2017), https://www.jacobinmag.com/2017/01/trump-imperial-presidency-executive-orders-muslim-ban [https://perma.cc/VN2T-K4JT]; and Paul David Miller, *Barack Obama Welcomes You to Don-*

branch are the most dominant forces in the federal government.[2] In the field of administrative law, longstanding debates explore the extent of the President's power over administrative agencies[3] and the idea of a unitary executive.[4] This presidential power literature seems certain to grow in the Trump era. In contrast to the thorough elucidation of presidential authority, there is virtually no attention paid to an even more dramatic story of executive power: the rise of American governors.

Now is an opportune time to take heed. People across the political spectrum are focusing their attention on state government — whether because of an overarching preference for decentralization, or because of a hope that states will be engines of innovative policymaking or federal resistance.[5] State governments, which already control broad swaths of the economy, implement major federal programs through cooperative federalism arrangements, and shape people's day-to-day lives as much or more than the federal government does,[6] have been much more legislatively productive than the federal government in recent years.[7] And governors, this Article shows, possess new and extensive powers to set

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ald Trump's Imperial Presidency, THE FEDERALIST (Feb. 20, 2017), http://thefederalist.com/2017/02/20/barack-obama-welcomes-donald-trumps-imperial-presidency [https://perma.cc/ZDU2-EHR3].

[2] *See, e.g.*, Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1727 (1996); Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1810–43 (2010).

[3] *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006); Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

[4] *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601 (2005); Harold J. Krent, *The Sometimes Unitary Executive: Presidential Practice Throughout History*, 25 CONST. COMMENT. 489 (2009) (book review).

[5] *See, e.g.*, Jeffrey Rosen, Opinion, *States' Rights for the Left*, N.Y. TIMES (Dec. 3, 2016), https://www.nytimes.com/2016/12/03/opinion/sunday/states-rights-for-the-left.html [https://perma.cc/ZCV3-BKU3].

[6] *See, e.g.*, Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage*, 154 U. PA. L. REV. 565, 567 (2006) ("[T]he bulk of the regulatory . . . programs that affect the daily lives of individuals . . . are created and administered by state and local governments.").

[7] *See, e.g.*, Liz Essley Whyte & Ben Wieder, *Amid Federal Gridlock, Lobbying Rises in the States*, CTR. FOR PUB. INTEGRITY (May 18, 2016, 4:09 PM), https://www.publicintegrity.org/2016/02/11/19279/amid-federal-gridlock-lobbying-rises-states [https://perma.cc/WYV2-PLTV] (stating that in 2013 and 2014, Congress passed 352 bills and resolutions, while states passed over 45,000 bills).

state agendas. On issues from clean energy[8] to voting rights,[9] disaster relief[10] to discrimination,[11] governors regularly exercise their authority within their home states in ways that deeply affect millions of people. Their work is often thoroughgoing rather than piecemeal; they enact policy agendas, not just policies.[12]

What is more, governors' reach extends beyond state borders. Governors leverage their control of state executive branches to shape *national* policy, mobilizing (or demobilizing) state agencies as a means of supporting or resisting federal actions on immigration, environmental law, healthcare, and more. On immigration, many governors have leveraged their administrative control to resist national efforts to resettle refugees,[13] while other governors have pledged to oppose the new administration's crackdown on so-called sanctuary cities within their

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[8] *See About REV*, N.Y. ST., http://rev.ny.gov/about [https://perma.cc/U59W-CKKV] (stating that New York Governor Andrew Cuomo "tasked" four state agencies "to work together to make the Governor's strategy for a clean, resilient, and more affordable energy system a reality"); Letter from Andrew M. Cuomo, Governor of N.Y., to Audrey Zibelman, CEO, N.Y. State Dep't of Pub. Serv. (Dec. 2, 2015), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Renewable_Energy_Letter.pdf [https://perma.cc/Z5D9-AS3F] (directing the department to establish a clean energy standard for the state).

[9] *Compare, e.g.*, *Governor McAuliffe's Restoration of Rights Policy*, VIRGINIA.GOV (Aug. 22, 2016), https://commonwealth.virginia.gov/media/6733/restoration-of-rights-policy-memo-82216.pdf [https://perma.cc/TY2U-9VGM] (explaining Virginia governor's decision to restore individually the voting rights of thousands of people with past felony convictions), *with* Iowa Exec. Order No. 70 (Jan. 14, 2011), http://publications.iowa.gov/10194/1/BranstadEO70.pdf [https://perma.cc/C7S3-BY55] (rescinding a prior governor's executive order restoring voting rights to certain individuals with felony convictions).

[10] *See, e.g.*, Gigi Douban, *Gulf Coast Residents Upset by BP Settlement Funds*, MARKETPLACE (Nov. 29, 2016, 4:09 PM), http://www.marketplace.org/2016/11/29/world/alabama-gulf-coast-residents-upset-states-use-bp-settlement-funds [https://perma.cc/N24M-YQ6S] (describing Alabama Governor's role, as chair of the Gulf Coast Recovery Council, in distributing $1 billion of BP settlement money in the Gulf Coast, including for restoration of a governor's mansion and projects unrelated to the Gulf).

[11] *Compare, e.g.*, Matt Pearce, *Kansas Governor Removes Protections for LGBT Employees*, L.A. TIMES (Feb. 10, 2015, 5:28 PM), http://www.latimes.com/nation/la-na-kansas-governor-gay-protection-20150210-story.html [https://perma.cc/R84Q-DEAN], *with* Karen Langley, *Wolf's Executive Orders Expand Protections Against Discrimination for State Workers, Contract Employees*, PITTSBURGH POST-GAZETTE (Apr. 8, 2016, 12:00 AM), http://www.post-gazette.com/news/state/2016/04/08/Wolf-s-executive-orders-expand-protections-against-discrimination-for-state-workers-contract-employees/stories/201604080056 [https://perma.cc/5KR4-EE4X].

[12] *See* Adam Nagourney & Jonathan Martin, *As Washington Keeps Sinking, Governors Rise*, N.Y. TIMES (Nov. 9, 2013), http://www.nytimes.com/2013/11/10/us/politics/as-washington-keeps-sinking-governors-rise.html [https://perma.cc/Q58M-6TC9] (describing "a particularly activist class of governors, often empowered by having a legislature controlled by a single party as they enact the kind of crisp agenda that has eluded both parties in Washington").

[13] *See* Ashley Fantz & Ben Brumfield, *More than Half the Nation's Governors Say Syrian Refugees Not Welcome*, CNN (Nov. 19, 2015, 3:20 PM), http://www.cnn.com/2015/11/16/world/paris-attacks-syrian-refugees-backlash/ [https://perma.cc/8TSR-WBJJ]. Although a state violates federal law if it accepts federal funding for refugee resettlement but refuses to settle Syrian refugees in particular, *see* Exodus Refugee Immigration, Inc. v. Pence, 838 F.3d 902, 903–05 (7th Cir. 2016),

borders.[14] With respect to the federal Clean Power Plan (CPP) regulations, some governors forbade their executive branches from preparing a state implementation plan,[15] while others directed state agencies to plan for CPP compliance.[16] Some governors have acted unilaterally to expand Medicaid coverage under the Affordable Care Act (ACA), sometimes over the objection of their legislature,[17] while others have dismantled state health insurance exchanges;[18] both types of actions affect access to the national insurance program for millions of people.[19]

Behind all of these consequential actions is a fundamental shift in the legal landscape: American governors, originally created to be virtually powerless figureheads, have emerged as the drivers of state government. Smarting from the excesses of colonial governors, states crafted their early constitutions to minimize executive power, and many governors long remained bit players in state administration.[20] But in the past century, and especially in recent decades, most governors have gained a spate of powers that eclipse not only their Founding-era authority, but also the domestic powers of modern Presidents. A majority of governors can reorganize their executive branches, including by restructuring, creating, or disbanding agencies; the President cannot. Most governors

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states can leverage their control of state agencies to make resettlement more difficult, and can decline federal funding altogether, *see* Press Release, Office of the Governor, Governor Abbott Statement on Texas' Intention to Withdraw from Refugee Resettlement Program (Sept. 21, 2016), http://gov.texas.gov/news/press-release/22682 [https://perma.cc/KL9C-UHUL].

14 *See, e.g.*, Alaine Griffin, *Malloy Says He Will Fight Attempts to Restrict Refugees*, HARTFORD COURANT (Nov. 22, 2016, 6:18 PM), http://www.courant.com/news/connecticut/hc-malloy-meets-with-immigrants-20161122-story.html [https://perma.cc/W82T-CFT6] (noting Governor Dannel Malloy's position that "Connecticut would not act on behalf of the federal government" in detaining undocumented immigrants).

15 *See, e.g.*, Okla. Exec. Order No. 2015-22 (Apr. 28, 2015), https://www.sos.ok.gov/documents/executive/978.pdf [https://perma.cc/824Q-TPVS]; Wis. Exec. Order No. 186 (Feb. 15, 2016), https://walker.wi.gov/sites/default/files/executive-orders/EO_2016_186.pdf [https://perma.cc/N4HL-DGWQ].

16 *See, e.g.*, Mont. Exec. Order No. 01-2016 (Jan. 7, 2016), http://governor.mt.gov/Portals/16/docs/2016EOs/EO-01-2016%20Amended%20CPP%20Executive%20Order.pdf [https://perma.cc/JR59-EX3X].

17 *See Where the States Stand on Medicaid Expansion*, ADVISORY BD. (Mar. 30, 2017, 11:23 AM), https://www.advisory.com/daily-briefing/resources/primers/medicaidmap [https://perma.cc/SBV5-5T3L] (providing state-by-state descriptions of governors' actions regarding Medicaid expansion).

18 *See, e.g.*, Amber Phillips, *Kentucky, Once an Obamacare Exchange Success Story, Now Moves to Shut It Down*, WASH. POST: THE FIX (Jan. 14, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/01/14/a-republican-governors-move-to-shutter-kentuckys-obamacare-exchange-explained/ [https://perma.cc/EV7Q-UT9D].

19 *See* Drew Altman, *In La. and Ky. Shifts on Medicaid Expansion, a Reminder of Governors' Power in Health Care*, WALL ST. J.: WASH. WIRE (Aug. 3, 2016, 7:00 AM), http://blogs.wsj.com/washwire/2016/08/03/in-la-and-ky-shifts-on-medicaid-expansion-a-reminder-of-governors-power-in-health-care/ [https://perma.cc/5BGB-SA3J].

20 *See infra* section I.A, pp. 493–95.

now control the state regulatory process through souped-up state versions of the federal Office of Information and Regulatory Affairs (OIRA), which often allow governors (unlike the President) to veto or rescind regulations outright.[21] Almost all governors, unlike the President, can exercise item veto power over spending legislation, and some can alter the substance of provisions unrelated to monetary appropriations. Through a combination of these tools and others, governors explicitly and unabashedly claim a strong form of "directive authority"[22] — the power to dictate the outputs of administrative agencies — that scholars conventionally deem unavailable to Presidents.[23] These developments have created a new normal, in which governors are the primary drivers of state executive branches. To adapt the locution of then-Professor Kagan, the modern era in the states is one of gubernatorial administration.[24]

This Article identifies and evaluates the modern regime of gubernatorial administration. It uncovers how and why governors have gained authority, including powers that Presidents lack, and describes the limited checks on gubernatorial power from state-level institutions. It shows that centralized gubernatorial power not only has significant policy consequences, but also provides a new perspective on several contemporary debates — regarding executive power, federalism, and local government law. Gubernatorial administration emerges as a promising vehicle for efficacious governing and a new source of state resilience. But concentrated gubernatorial power also creates opportunities for executive overreach, at least in the absence of strong oversight by other institutions — such as state legislatures, courts, media outlets, or interest groups — that may currently lack the capacity or incentives to serve as effective checks.

The potency of gubernatorial administration comes not just from the governor's tools, but also from the unique and understudied institutional context of states.[25] Gubernatorial administration is not merely state-

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[21] For a survey of these "state OIRAs," which I discuss further in Part II, see JASON A. SCHWARTZ, INST. FOR POLICY INTEGRITY; N.Y.U. SCH. OF LAW, 52 EXPERIMENTS WITH REGULATORY REVIEW: THE POLITICAL AND ECONOMIC INPUTS INTO STATE RULEMAKINGS (2010).

[22] Directive authority is discussed extensively in the literature on the scope of presidential power over agencies, and the definitions used there generally comport with mine. *See, e.g.*, Kagan, *supra* note 3, at 2250–51 (defining directive authority as "commands to executive branch officials to take specified actions within their statutorily delegated discretion"); Stack, *supra* note 3, at 267 (defining directive authority as "the power to act directly under the statute [conferring power on executive officials] or to bind the discretion of lower level officials").

[23] *See infra* section III.A, pp. 515–18.

[24] *See* Kagan, *supra* note 3. I am indebted to Justice Kagan's work for inspiring this project and its title.

[25] The legal literature pays very limited attention to state administrative law and institutional design. *See* Arthur Earl Bonfield, *State Law in the Teaching of Administrative Law: A Critical*

level or junior-varsity presidential administration. Rather, gubernatorial power must be evaluated with attention to the particular features of state administrative and constitutional law. This contextual evaluation reveals that powerful governors lack many of the familiar checks that are said to legitimate presidential power. Governors also face some checks that Presidents do not, but the ultimate picture is one of authority and flexibility rather than constraint.

The missing checks in state government are manifold. Many state legislatures are composed of part-time lawmakers who are relatively inactive overseers; state agencies are often poorly funded and potentially less expert than their federal counterparts; civil service reforms have removed neutrality from some state bureaucracies; and interest groups, the media, and courts may be relatively inactive or ineffective checks on gubernatorial actions.[26] Just as important as these structural differences is a political one: while the federal government has featured divided government for most of the last two decades (though not at present), most state governments in that period have been unified, with the legislature and governor representing the same political party.[27] Today, there are thirty-two states with unified governments, seven Democratic and twenty-five Republican.[28] Thus, whereas then-Professor Kagan explicitly envisioned presidential administration as a response to divided government,[29] most governors can collaborate with friendly legislatures to effect policy change without the gridlock (or compromise) present in the oft-divided federal government.

My claim of concentrated gubernatorial power may sound surprising to students of state constitutional law, given the familiar multiple-executive structure in the states.[30] But as this Article argues, the import of that structure should not be overstated: in most states, for example,

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Analysis of the Status Quo, 61 TEX. L. REV. 95, 95 (1982) (noting that, in administrative law courses, "*state* law is usually treated as if it were unimportant, redundant, irrelevant, or uninformative"); *see also, e.g.*, Kathryn A. Watts, *Regulatory Moratoria*, 61 DUKE L.J. 1883, 1953–55 (2012) (describing scholarly inattention to state regulatory review and reform). There are important exceptions, though even these sources tend to note the scarcity of attention to the topic. *See, e.g.*, MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW (4th ed. 2014); Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 551–59 (2001) (describing differences between state and federal systems, *id.* at 554–59, while noting the dearth of similar work, *id.* at 551–53).

[26] *See infra* section III.B, pp. 518–25.

[27] *See infra* section III.B.2, pp. 520–21.

[28] *See* 2017 State and Legislative Partisan Composition, NAT'L CONF. ST. LEGISLATURES (Aug. 4, 2017, 10:00 AM), http://www.ncsl.org/Portals/1/Documents/Elections/Legis_Control_2017_August_4th_10am_26973.pdf [https://perma.cc/LX9A-VEW6] [hereinafter Partisan Composition]; *see also infra* note 258.

[29] *See* Kagan, *supra* note 3, at 2250.

[30] *See* Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1386 (2008); William P. Marshall, Essay, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 (2006).

attorneys general and governors share the same political party affiliation, and not all state courts (or governors) regard separately elected officials as free from a governor's control.[31] Moreover, focusing on the existence of independent officers can obscure the substantial control that governors possess over the majority of state agencies. The claim of gubernatorial administration might also surprise those whose states have traditionally featured weak governors or very powerful legislatures — but even in those states, the tides have turned to some extent.[32]

Gubernatorial administration has implications for a number of ongoing debates in public law. First, gubernatorial administration shines new light on both descriptive and normative work regarding federalism. The rise in gubernatorial power should provide some reassurance to those concerned about federal government encroachments on state power. This is in part because governors are now efficacious leaders of state executive branches — bureaucracies that, in many states, were once so sprawling and disorganized that they were regarded as unable to govern. As governors grab the reins of power, they are able to promote coherent state governance and act with dispatch, thereby enhancing the state's overall capacity. Moreover, governors have increasing opportunities to leverage this control of state administration against the national government, as policy is increasingly set through negotiations between state and federal executive branches — a phenomenon known as "executive federalism."[33] In essence, governors' productive, efficacious leadership points to a new variant of "process federalism"[34] that provides tools for vindicating the interests of states and their leaders.

At the same time, gubernatorial administration deepens our understanding of executive power — and in so doing, may complicate normative arguments for devolving power to state governments. Governors provide a reference point of a stronger and less constrained executive

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[31] *See infra* Part III, pp. 515–29.

[32] *See* Carl T. Bogus, *The Battle for Separation of Powers in Rhode Island*, 56 ADMIN. L. REV. 77, 133 (2004) (describing Rhode Island's adoption of a constitutional amendment establishing a separation of powers doctrine after a history of legislative supremacy); Jonathan Weisman, *In Texas, a Weak Office Becomes Stronger*, WALL ST. J. (Sept. 12, 2011), https://www.wsj.com/articles/SB10001424053111903532804576564741924419026 [https://perma.cc/ZNT5-PVFG]. Even in North Carolina, where the legislature recently limited the governor's appointment power, changes in gubernatorial power over the last century have left the governor with a number of tools of influence. *See* Ferrel Guillory, Opinion, *Cooper Is Far from Powerless*, SALISBURY POST (Dec. 16, 2016, 9:55 PM), http://www.salisburypost.com/2016/12/16/ferrel-guillory-cooper-far-powerless [https://perma.cc/QT3X-SC6R] (describing "informal" powers of North Carolina governors).

[33] *See* Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 954 (2016) (defining "executive federalism" as the development of national policy by interactions of state and federal executives).

[34] *See infra* section IV.A.2, pp. 531–34.

than the modern presidency to date.[35] Governors' unique control tools enhance the dynamism, efficacy, and accountability that fans of executive power extol.[36] But gubernatorial control may also elevate partisan politics over more neutral expertise,[37] and it may do so in the absence of institutions capable of exposing and resisting a governor's actions. Under these circumstances, gubernatorial administration can substantiate the fears expressed by some scholars of presidential power: that a powerful executive is a threat to the rule of law.[38] In turn, strong forms of gubernatorial administration — those that lack robust monitoring and checking — undermine the federalism arguments that envision state governments as more likely to be "under the close watch and secure control of their citizens."[39]

Finally, gubernatorial administration bears on local government law and state-local relations.[40] Scholars sometimes frame state-local relations as turf battles for institutional power,[41] and courts evaluate purported conflicts through the limited lens of preemption doctrine. Gubernatorial administration offers a different perspective, one in which governors are key actors and state power is not always the endgame. Rather, governors may work to displace *or enhance* local authority as a means of increasing the governor's own policy agenda.

Before proceeding, two cautionary notes are in order regarding the Article's scope. First, any national study of state administrative law faces perils of generalization.[42] There are fifty different approaches to each development discussed herein, and a reader may justifiably retort that any given observation does not resonate in her state. In describing

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[35] *Cf., e.g.*, Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 359 (praising the undertaking of state-federal "comparative constitutional law").

[36] For a recent discussion that links the executive's "capacity" to the question of who controls executive power, see Daryl J. Levinson, *The Supreme Court, 2015 Term — Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 46–54 (2016).

[37] It bears noting that centralized gubernatorial power can serve either regulatory or deregulatory agendas; the Progressive Era movement to centralize gubernatorial authority was part of a proregulatory mission, while many governors today, thirty-six of whom are Republican, *Governor's Roster 2017*, NAT'L GOVERNORS ASS'N (Aug. 7, 2017), https://www.nga.org/files/live/sites/NGA/files/pdf/directories/GovernorsList.pdf [https://perma.cc/8UQE-TCWY], express more deregulatory visions.

[38] *See, e.g.*, ACKERMAN, *supra* note 1, at 37–40; PETER M. SHANE, MADISON'S NIGHTMARE 114–15 (2009).

[39] Levinson, *supra* note 36, at 49 (describing Antifederalist sentiments).

[40] For a new and illuminating view of local administrative institutions, see Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564 (2017).

[41] *See, e.g.*, Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 630 (2001) (asking whether "local governments [are] suitably protected from state encroachments upon their interests"); Paul S. Weiland, Comment, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 265 (2000) ("[P]reemption doctrine provides states with a significant check on local government power.").

[42] *See* Rossi, *supra* note 25, at 553–54.

gubernatorial administration, this Article does not claim to be all-encompassing. Rather, I seek to elucidate a model that, drawing on extensive state-by-state research, captures important and widespread developments.[43] Second, the Article discusses a broad range of gubernatorial powers and actions. Many of these powers could be the topic of a stand-alone paper. This Article therefore is intended to launch rather than conclude dialogue on gubernatorial administration.

Part I of the Article documents the historical rise of gubernatorial administration, identifying several periods of notable change. Part II lays out the modern toolkit of gubernatorial power. Part III of the Article analyzes gubernatorial administration: section III.A considers the legal foundations of governors' directive authority, and section III.B assesses state-level institutional checks. Part IV explains how gubernatorial administration both shapes and is shaped by several ongoing debates in public law.

In documenting and critiquing the rise of governors, this Article aims not only to shed light on an important phenomenon, but also to widen the lens of administrative law. Studying developments at the state level, and comparing them to more familiar features of federal administrative law, has the potential to enrich public law dialogue. As Professor Richard Briffault has written, studying state government structure "can enable us to consider alternative means of organizing representative democratic governments, assess the efficacy of different mechanisms for governing, and illuminate the implications and consequences of aspects of the federal government's structure that we ordinarily take for granted."[44] The Article thus proposes a new, or renewed, discourse on state and intergovernmental administrative law, one that grapples in greater depth with the rich environs of state government.

I. THE RISE OF GUBERNATORIAL ADMINISTRATION

Governors today dominate the state bureaucracy, and they do so in ways that shape state, interstate, and national policy. This Part explains the rise of governors to power, identifying key developments in the Founding, Jacksonian, and Progressive eras.

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[43] For state-by-state documentation of these developments and relevant exceptions, see Miriam Seifter, *Gubernatorial Administration: Appendices* (Univ. Wis. Law Sch. Legal Studies Research Paper Series, Paper No. 1407, 2017), http://ssrn.com/abstract=2934671 [https://perma.cc/W9VX-J3EA].

[44] Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171, 1171 (1993).

A. The Founding: Weak Governors, Strong Presidents

The framers of early state constitutions desired, and created, a weak governorship. They did this because, in their eyes, the colonial governors had been "coarse and brutal,"[45] consumed with lining their own pockets, and dangerously oriented toward domination.[46] And, "[h]aving thrown off the yoke of concentrated executive power," the colonists "were not likely to reinstitute it."[47] Thus, as Professor Gordon Wood has written, "[t]he Americans' emasculation of their governors lay at the heart of their constitutional reforms of 1776."[48] Armed with the memory of colonial corruption, and with a heavy dose of political theory in the Whig tradition,[49] all eight of the state constitutions drafted by December 1776[50] (and at least one drafted the following year[51]) vehemently opposed executive power.[52] They "destroyed the substance of an independent magistracy,"[53] leaving a governor that was "a very pale reflection indeed of his regal ancestor."[54]

In particular, these early state constitutions constrained gubernatorial power through design choices regarding how governors were to be selected, how their offices were structured, and what powers governors possessed. As to selection, most states' governors were chosen by the legislature,[55] usually for a one-year term.[56] This gave the legislature power that may now seem imprudent or improper, but the drafters of these provisions had faith in the legislature that matched their suspicion of governors.[57] The structure of the governorship reinforced its lack of

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[45] Louis E. Lambert, *The Executive Article*, *in* MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 185, 185 (W. Brooke Graves ed., 1960) (quoting CHARLES A. BEARD & MARY R. BEARD, THE RISE OF AMERICAN CIVILIZATION 113 (1930)).

[46] *See id.* at 185–86.

[47] Allan R. Richards, *The Traditions of Government in the States*, *in* AM. ASSEMBLY, THE FORTY-EIGHT STATES: THEIR TASKS AS POLICY MAKERS AND ADMINISTRATORS 40, 41 (1955).

[48] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 149 (1969); *see also* JACK N. RAKOVE, ORIGINAL MEANINGS 250 (1996) ("The evisceration of executive power was the most conspicuous aspect of the early state constitutions . . . .").

[49] WOOD, *supra* note 48, at 135 (attributing "radical changes" to gubernatorial power in 1776 to "unaltered Whig fear of magisterial power").

[50] *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 61 tbl.3.1 (1998); WOOD, *supra* note 48, at 135–38.

[51] *See* WOOD, *supra* note 48, at 140 (describing the Georgia Constitution, which was drafted in 1777, TARR, *supra* note 50, at 61 tbl.3.1).

[52] WOOD, *supra* note 48, at 135–41.

[53] *Id.* at 138.

[54] *Id.* at 136. Pennsylvania's constitution eliminated the position of governor altogether. *Id.* at 137.

[55] *Id.* at 139.

[56] *Id.* at 139–40.

[57] *See, e.g.*, CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775–1789, at 27 (1923) (citing 1 JAMES WILSON, THE WORKS OF JAMES WILSON 356–58 (James DeWitt Andrews ed., Chi. Callaghan & Co. 1896)); WOOD, *supra* note 48, at 139.

authority. Most governors were part of a plural executive structure — not in the sense we conceive of it today, with, say, attorneys general elected independently, but rather with executive councils whose input or consent was required for a broad array of gubernatorial actions.[58] In this format, governors were "little more than chairmen of their executive boards";[59] Governor Edmund Randolph of Virginia referred to himself as "a member of the [e]xecutive."[60] Finally, governors were given very few affirmative powers. Not only were they deprived of lawmaking authority and denied a legislative veto,[61] but they also possessed limited power, if any, to appoint other executive officers — a power the framers thought the colonial governors had abused.[62] This pattern among the states provides the context for the oft-told story that when William Hooper returned from North Carolina's constitutional convention and was asked how much power they gave the governor, his answer was "just enough to sign the receipt for his salary."[63]

Still, not everyone favored such dramatic curtailment of executive power and the corresponding elevation of the legislature.[64] Skeptics of this approach — among them John Jay and John Adams — worked toward a "restoration of executive power" in the New York (1777) and Massachusetts (1780) Constitutions.[65] These constitutions provided for the popular election of the governor (for terms of three years in New York and one year in Massachusetts) and gave the governor a role in vetoing legislation.[66] But given the societal suspicion of executive

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58 *See* THACH, *supra* note 57, at 28 & n.7 (collecting constitutional provisions on councils and commenting that while "[t]he exact degree of conciliar control varied . . . the general result was the same"); *see also* WOOD, *supra* note 48, at 138–39.

59 WOOD, *supra* note 48, at 138.

60 THACH, *supra* note 57, at 29 (quoting Letter from Edmund Randolph to George Washington (Nov. 24, 1786), *in* MONCURE DANIEL CONWAY, OMITTED CHAPTERS OF HISTORY 59, 60 (N.Y.C., Putnam's Sons 1888)).

61 *See* RAKOVE, *supra* note 48, at 250.

62 *See* WOOD, *supra* note 48, at 141, 148 (explaining that some state constitutions prohibited gubernatorial appointments altogether, while others limited governors' appointment authority).

63 LESLIE LIPSON, THE AMERICAN GOVERNOR FROM FIGUREHEAD TO LEADER 14 (1939) (quoting 3 DEBATES IN THE MASSACHUSETTS CONSTITUTIONAL CONVENTION, 1917–1918, at 940 (1920)).

64 For an account of criticisms of legislative dominance that occurred even as the first constitutions were being developed, including how negative reactions to Pennsylvania's "radically democratic" constitution fueled the checks on legislative power typical of later state constitutions and the Federal Constitution, see Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541, 547–48 (1989).

65 *See* RAKOVE, *supra* note 48, at 253.

66 *See id.* at 252–53. In New York, the governor was merely a part of the "council of revision" that could veto legislation; Massachusetts vested the power exclusively in the governor. *Id.*

tyranny at the time, even Adams and Jay did not give executive power a full-throated endorsement.[67]

Nevertheless, it did not take long for the new states to sour on the legislative dominance established in the 1776 constitutions. By the time of the Philadelphia Convention in 1787, the prevailing attitude was that the state constitutions were models of what to avoid.[68] In advocating for greater checks on legislative authority, James Madison commented that "[t]he Executives of the States are in general little more than Cyphers; the legislatures omnipotent."[69] He observed that the "[e]xperience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex"; "[t]his was the real source of danger to the American Constitutions," and to him it "suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles."[70] These discussions fed into the Framers' ultimate design of a strong executive, about which many volumes have been written. My focus here remains on the states; skepticism of legislative dominance was rising there too, but change was slow. Well into the nineteenth century, commentators like Alexis de Tocqueville continued to characterize state legislatures as "supreme" and the executive as under the legislature's "immediate control."[71]

B. Jacksonian Populism

The next period of state constitutional development occurred in the Jacksonian era, fueled by anticorruption and populist sentiments. State constitutional reforms during this era established popular election of governors, as well as longer term limits.[72] These reforms, paired with the Jacksonians' broader faith in executive power,[73] increased the prominence of governors.

But the era of Jacksonian populism did not empower governors to control state bureaucracies. To the contrary, states simultaneously diffused executive power among a multitude of new agencies and officers

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[67] *See* JOHN ADAMS, THOUGHTS ON GOVERNMENT 15–16 (Phila., John Dunlap 1776); RAKOVE, *supra* note 48, at 253; WOOD, *supra* note 48, at 141.

[68] *See* TARR, *supra* note 50, at 64.

[69] Notes of James Madison (July 17, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 25, 35 (Max Farrand ed., 1911).

[70] Notes of James Madison (July 21, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 69, at 73, 74.

[71] ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA: THE COMPLETE AND UNABRIDGED VOLUMES 88 (Henry Reeve trans., Schocken Books 1961) (1840).

[72] *See* Lambert, *supra* note 45, at 186. States also imposed various reforms to rein in legislatures. *See* TARR, *supra* note 50, at 118–21.

[73] *See* Richards, *supra* note 47, at 45 (noting that "[a]s Jackson fought with the Congress and the Supreme Court, the chief executive became the champion of the people in the eyes of the people" and "the movement to strengthen the governor's role gained momentum").

subject to direct election.[74] As Professor Herbert Kaufman put it, the turn to a multitude of elected officers (and ultimately the so-called long ballot) "was partly a simple extension of the logic of representativeness to its extreme; if popularly elected officials are more responsive to the electorate than are non-elected officials, then make as many of them elective as possible."[75] But by allocating executive power among so many different officials, the new constitutions stymied gubernatorial control of the growing administrative state.[76]

C. The Progressive Era and Beyond: Consolidation and Entrepreneurs

The seeds of gubernatorial administration were planted in the Progressive Era.[77] One initial aim of Progressive reformers was to reduce the excessive politicization of governance, and they pursued this in part by creating myriad politically insulated boards and commissions to administer new government programs.[78] Governors generally had little control over these new boards and commissions.[79] By the early twentieth century, state governments were "thoroughly fractionalized;"[80] legislatures, elected officials, and boards and commissions operated disjointedly, and sometimes at cross-purposes.[81]

The dysfunction that resulted helped to fuel the spread of another Progressive ideal: greater effectiveness and efficiency in government,[82] to be achieved through a stronger chief executive.[83] Progressive reformers argued that constitutional checks and balances constraining the executive impeded effective governing.[84] Eventually — but only gradually, as Progressive values percolated through political thought, state reform commissions, and constitutional conventions — these principles

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[74] *See* LOREN P. BETH, THE DEVELOPMENT OF THE AMERICAN CONSTITUTION 1877–1917, at 73 (1971); Lambert, *supra* note 45, at 187.

[75] HERBERT KAUFMAN, POLITICS AND POLICIES IN STATE AND LOCAL GOVERNMENTS 36 (1963).

[76] *See* LIPSON, *supra* note 63, at 22–24; Lambert, *supra* note 45, at 187.

[77] On the complexity and pluralism embedded within Progressive Era thought, see, for example, Daniel T. Rodgers, *In Search of Progressivism*, 10 REVS. AM. HIST. 113, 121–27 (1982).

[78] *See* KAUFMAN, *supra* note 75, at 37–39; Lambert, *supra* note 45, at 187.

[79] Lambert, *supra* note 45, at 187.

[80] KAUFMAN, *supra* note 75, at 40.

[81] *See, e.g.*, *id.* at 40–41.

[82] *See* Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 197 (1887). For an account emphasizing the influence of Wilson and the federal Brownlow Committee on state executive branch reorganizations, see James K. Conant, *In the Shadow of Wilson and Brownlow: Executive Branch Reorganization in the States, 1965 to 1987*, 48 PUB. ADMIN. REV. 892, 892–93 (1988).

[83] *See* TARR, *supra* note 50, at 151.

[84] *See id.*; Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1383 (2012) (book review).

prompted states to reorganize and consolidate their sprawling bureaucracies under their governors.[85]

The earliest efforts at state executive branch reform occurred at the turn of the twentieth century.[86] Several states formed reorganization commissions or committees, enacted reorganization legislation, and proposed constitutional changes that would extend the reorganization effort.[87] In addition, a handful of strong, charismatic governors eager to claim these powers — like Charles Evans Hughes of New York, Robert LaFollette of Wisconsin, and Hiram Johnson of California — showed what was possible in the governor's seat, with or without formal reorganization.[88] But widespread change was slow. As A.E. Buck wrote in 1919, even states that embraced the reorganization movement had not fully consolidated power under their governors, and would require constitutional change to do so.[89] Developments in executive reform at the federal level — the Brownlow Committee in the 1930s and the first Hoover Commission in the 1940s — prompted further "waves" of state reorganization.[90]

In the postwar era, centralization of state executive branches — and the rise of gubernatorial administration — really took hold. State constitutional reformers were impressed by the federal government's performance, and the federal constitutional structure "became the standard for constitutional reform" in the states.[91] The Model State Constitution of 1963 and its accompanying commentary stressed the need for consolidation of the growing bureaucracy under the governor.[92] This echoed the then-prevailing views in the field of public administration, which "favor[ed] an elective governor who appoints the heads of departments

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[85] *See* LARRY SABATO, GOODBYE TO GOOD-TIME CHARLIE 61 (2d ed. 1983) (describing "a modern avalanche" of state reorganization, leaving "the governor considerably strengthened" in each reorganized state); Michael B. Berkman & Christopher Reenock, *Incremental Consolidation and Comprehensive Reorganization of American State Executive Branches*, 48 AM. J. POL. SCI. 796, 797 (2004).

[86] *See* A.E. Buck, *Administrative Consolidation in State Governments*, 8 NAT'L MUN. REV. SUPPLEMENT 639, 640 (1919).

[87] *See id.*

[88] *See* William F. Swindler, *The Executive Power in State and Federal Constitutions*, 1 HASTINGS CONST. L.Q. 21, 24 (1974) (noting the potential impact of a "strong or charismatic individual," including these three examples, despite the existence of both constraints on and divisions within state executive power). For an extreme example, see Gerard N. Magliocca, *Huey P. Long and the Guarantee Clause*, 83 TUL. L. REV. 1, 9 (2008), describing Governor Long's "aggressive" and "disturbing" means of augmenting his power as Governor of Louisiana. For an argument that some governors' "early efforts in executive power-building" shaped the modern presidency, see SALADIN M. AMBAR, HOW GOVERNORS BUILT THE MODERN AMERICAN PRESIDENCY 11 (2012).

[89] Buck, *supra* note 86, at 667.

[90] JAMES L. GARNETT, REORGANIZING STATE GOVERNMENT: THE EXECUTIVE BRANCH 4 n.3 (1980).

[91] TARR, *supra* note 50, at 155.

[92] NAT'L MUN. LEAGUE, MODEL STATE CONSTITUTION 11, 71–72 (6th ed. 1963).

and members of his cabinet, so that they may be directly responsible to him."[93] And as political theorists continued to advocate a "short ballot" — decreasing the number of elected state officials — with the goal of making elections more meaningful,[94] they noted the associated "benefit[]" of "great improvement in the whole administrative process" resulting from greater centralized "supervision and control."[95]

Governors themselves also fueled reform efforts. As late as the 1950s, governors still complained not only of their inability to control state bureaucracies, but also of virtual irrelevance. One respected report recounted the anecdote of a governor who had to travel from town to town to communicate with constituents because he was unable to garner newspaper coverage.[96] Governors eagerly sought to control the bureaucracy in order to become more effective.

As all of these factors coalesced, the mid- to late twentieth century witnessed a "golden era" of state executive reorganization.[97] Its hallmarks were the elimination of some agencies, consolidation of others, and restructuring of bureaucratic hierarchy with the governor at the top.[98] At least twenty-two states conducted comprehensive reorganizations,[99] while many others reorganized incrementally.[100]

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Thus, over the course of two centuries, the governorship was transformed. Once "little more than Cyphers"[101] with only the status of "figureheads," governors acquired the powers of leaders.[102] And yet, obstacles to gubernatorial leadership remained. A 1983 study showed that a minority of agency officials (thirty-eight percent) believed their governor to be their most influential principal.[103] As late as 1991, the Winter Commission, another national commission focused on improving state and local government, recommended strengthening chief executives,

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93 Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928, 964 (1968).

94 *See* James Kerr Pollock, *Election or Appointment of Public Officials*, 181 ANNALS AM. ACAD. POL. & SOC. SCI. 74, 74–75 (1935) ("No voter, however intelligent, can adequately perform his duty when confronted with a piece of paper resembling a bed sheet in size . . . .").

95 *Id.* at 78; *see* Grad, *supra* note 93, at 964 (noting how the political theory driving the short-ballot movement also led to centralization).

96 James W. Fesler, *The Challenge to the States*, *in* AM. ASSEMBLY, *supra* note 47, at 7, 10.

97 *See* Conant, *supra* note 82, at 894 (identifying the golden era as spanning 1965–1987).

98 *See id.*

99 *See id.*

100 For a state-by-state look, see GARNETT, *supra* note 90, at 176–96 tbl.A.1. *See also* Berkman & Reenock, *supra* note 85, at 796.

101 Notes of James Madison (July 17, 1787), *supra* note 69, at 35.

102 *See* LIPSON, *supra* note 63, at 14.

103 Glenn Abney & Thomas P. Lauth, *The Governor as Chief Administrator*, 43 PUB. ADMIN. REV. 40, 40 (1983).

finding that state executive power was still too diffuse in many states.[104] In particular, the authors concluded, governors should have more extensive powers of appointment, reorganization, and direction.[105]

Against this backdrop, of a rising chief executive still impeded by diffusion and insulation within the executive branch, dawned the modern era of gubernatorial administration.

II. MODERN GUBERNATORIAL ADMINISTRATION

Modern governors have an extensive set of tools with which to control state agency action. In this Part, I offer a taxonomy of these tools.

By way of preview, most governors routinely claim the authority to direct agency action on the front end, and, especially in the last decade, they follow it with a mightier scheme of centralized review than exists at the federal level. Looking beyond the regulatory process itself, governors have other powers, some shared and some not shared by the President. Governors in forty-four states have item veto authority; the President does not.[106] Governors in at least twenty-seven states have the power to reorganize the executive branch by executive order, usually with some form of legislative approval; the President does not.[107] Like the federal executive branch but arguably with more abandon and fewer restrictions, governors can privatize executive branch services, taking them out of government hands and public view, and allowing them to match outputs to their own preferences.[108] Finally, like Presidents, governors have some authority to remove agency leaders. Although governors' removal powers vary widely, many states allow governors more leeway to control agencies that federal law would regard as independent, including by firing their leaders.[109]

A host of informal powers and developments augment these formal powers in important ways.[110] First, governors, more so than other state officials, have become focal points of state news outlets, and they can "exploit their media advantage to set their state's policy agenda."[111]

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104 NAT'L COMM'N ON THE STATE & LOCAL PUB. SERV., HARD TRUTHS/TOUGH CHOICES: AN AGENDA FOR STATE AND LOCAL REFORM 15 (1993).

105 *See id.* at 21–24.

106 *See* Seifter, *supra* note 43, at 18–24 (Appendix C); *see also* COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 2016, at 163–64 tbl.4.4 (2016) [hereinafter BOS Table 4.4].

107 *See* COUNCIL OF STATE GOV'TS, *supra* note 106, at 165–66 tbl.4.5; *see also* Seifter, *supra* note 43, at 10–17 (Appendix B).

108 *See infra* pp. 510–12.

109 *See infra* pp. 512–16.

110 *See, e.g.*, THAD KOUSSER & JUSTIN H. PHILLIPS, THE POWER OF AMERICAN GOVERNORS 24–25 (2012) (discussing the importance of governors' "political circumstances and resources," *id.* at 24, and "informal powers to persuade," *id.* at 25, to gubernatorial policy success).

111 GARY MONCRIEF & PEVERILL SQUIRE, WHY STATES MATTER 79 (2d ed. 2017). On the limitations of state media as a check on governors despite governors' relative prominence, see *infra*

Second, many cooperative federalism regimes put governors in influential positions in major federal regulatory programs, both legally and symbolically.[112] Third, both because governors frequently aspire to national office[113] (for which there is an ever-longer campaign season[114]) and because the public tends to thank or blame the governor for state executive branch actions,[115] governors have ever more incentive to exercise what powers they can over agency action.[116] Meanwhile, as Part III describes, governors have encountered relatively little pushback against their assertions of power. Whereas the many watchdogs and institutions that check the presidency have often caused Presidents to limit the directive authority they claim,[117] governors seldom face comparable pressure.[118] This combination of powerful tools and incentives with limited checks is part of what makes the governorship, in the words of Professor Alan Rosenthal, "the best job in politics."[119]

The makings of the modern era I describe have been present since the middle of the twentieth century. Some of the tools described below have been spreading gradually across the states since that time; informal developments, too, like governors' media spotlight, have gradually risen. Given this gradual evolution, it would be artificial to pinpoint one particular date as launching the modern era.[120] I locate the modern era as

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section III.B.5, pp. 523–25.

112 *See, e.g.*, *infra* note 341 and accompanying text (discussing governors' roles in implementing the Affordable Care Act).

113 *See, e.g.*, Margaret Ferguson, *Governors and the Executive Branch*, *in* POLITICS IN THE AMERICAN STATES 208, 241 (Virginia Gray et al. eds., 10th ed. 2013) ("Governors are ubiquitous potential presidential nominees in both parties.").

114 *See, e.g.*, Alicia Parlapiano, *How Presidential Campaigns Became Two-Year Marathons*, N.Y. TIMES: THE UPSHOT (Apr. 16, 2015), https://www.nytimes.com/2015/04/17/upshot/how-presidential-campaigns-became-two-year-marathons.html [https://perma.cc/5QHF-22KQ].

115 Professor Terry Moe explains this dynamic regarding the presidency. *See* Terry M. Moe, *The Politicized Presidency*, *in* THE NEW DIRECTION IN AMERICAN POLITICS 235, 238–39 (John E. Chubb & Paul E. Peterson eds., 1985); *see also* KOUSSER & PHILLIPS, *supra* note 110, at 2 (collecting literature that makes a similar point about governors).

116 Of course, informal factors can also limit a governor's influence. Perhaps most notably, although the empirical picture is mixed, unpopular governors may struggle to achieve ambitious policy agendas. *See* KOUSSER & PHILLIPS, *supra* note 110, at 170–71.

117 *See* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND 123 (2010) (arguing that Presidents limit their own discretion to signal their credibility).

118 *See infra* section III.B, pp. 518–25.

119 ALAN ROSENTHAL, THE BEST JOB IN POLITICS: EXPLORING HOW GOVERNORS SUCCEED AS POLICY LEADERS 8 (2013); *see also id.* at 4 ("Presidents have far more responsibilities than governors and considerably less capacity for meeting them.").

120 I likewise resist as artificial the attempt to quantify or rank gubernatorial power in one state compared to that in another. Although some early and influential works in political science attempted to develop numerical indices of gubernatorial power, *see, e.g.*, Joseph A. Schlesinger, *The Politics of the Executive*, *in* POLITICS IN THE AMERICAN STATES 210, 214–15 (Herbert Jacob & Kenneth N. Vines eds., 2d ed. 1971), the more recent trend is to recognize the limitations of such efforts, *see, e.g.*, Margaret R. Ferguson & Joseph J. Foy, Unilateral Power in the Governor's Office:

commencing roughly in the past two decades, when many states added centralized regulatory review — in some ways the quintessential tool of directive authority — to their arsenal. This tool, I believe, has contributed to a new "psychology of government"[121] in which governors understand their office to be a controlling one.

A. Directives

Modern governors commonly instruct agencies to take or refrain from taking particular actions in regard to the regulation of private parties. For ease of reference, I call these gubernatorial actions "directives,"[122] though they may be styled as directives, executive orders, memoranda, or letters.[123] I save for Part III an analysis of the legality of these directives. For now, the focus is on the important role they have come to play in the governor's arsenal.

The notion that a governor could freely direct agency action would have been surprising to early governors and commentators on state government. But as governors gained control over the executive branch through state reorganizations, so too did they seize opportunities to tell agencies what to do.[124] Governors initially performed this function through informal means,[125] but then began, consistent with the presidential model, using more formal, publicly posted documents.[126]

Beyond Executive Orders 2–5 (2011) (paper presented at 2011 national meeting of Midwest Political Science Association) (on file with author).

121 Professor Peter Strauss coined the term "psychology of government," Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 984–86 (1997), and then-Professor Kagan invoked it to explain how a President's claims of directive authority could affect "the understanding of agency and White House officials alike of their respective roles and powers," Kagan, *supra* note 3, at 2299.

122 *See* Kagan, *supra* note 3, at 2293–95. On the "heavy use" of directives in the Obama Administration, see Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 701–03 (2016).

123 For example, instructions labeled as directives in the state of Washington, *see Directives*, GOVERNOR JAY INSLEE, http://www.governor.wa.gov/office-governor/official-actions/directives [https://perma.cc/35L8-5CX7] ("Directives are issued by the governor, usually to a specific agency or set of agencies, directing a certain action be taken."), might be styled as executive orders or memoranda in other states. On the choice among these, see Ferguson & Foy, *supra* note 120, at 24 (stating that less formal "[e]xecutive actions are much more common than Executive Orders").

124 There is scarce literature on gubernatorial executive orders, and even less on the phenomenon of directives and directive authority. *See, e.g.*, E. Lee Bernick & Charles W. Wiggins, *The Governor's Executive Order: An Unknown Power*, 16 ST. & LOC. GOV'T REV. 3, 3, 7 (1984). For a more recent article portraying executive orders as a rising means of gubernatorial control, see Margaret R. Ferguson & Cynthia J. Bowling, *Executive Orders and Administrative Control*, 68 PUB. ADMIN. REV. (SPECIAL ISSUE) S20, S21 (2008).

125 *See* Bernick & Wiggins, *supra* note 124, at 3, 7 (noting that governors had begun using executive orders to "affect the state policymaking process," *id.* at 7, which they had previously done "in a less visible, or public, manner via verbal directive, internal office memoranda, and personal letter," *id.* at 3).

126 *See* Ferguson & Bowling, *supra* note 124, at S23.

Today, gubernatorial directives are commonplace and far-reaching. As noted in the introduction, governors have used directives to specify the content of state policy on significant and controversial issues related to environmental protection, LGBT rights, and more.[127] They have also shaped state commerce by directing agencies to approve or deny certain categories of permits or applications, like a Pennsylvania governor's directive to deny oil and gas leasing applications[128] and a Michigan governor's directive to deny applications to bottle and sell Great Lakes water.[129] They have taken stances on other issues of public concern, from unionization of private workers,[130] to women's health,[131] to consumer protection.[132] Often, media coverage of these policymaking actions obscures the pivotal role of directive authority, reporting simply that the governor "required" or "prohibited" a particular act.[133] But in each case, the governor's power flows from his or her ability to tell agencies — to whom the legislature has delegated discretion over an issue — what to do.[134]

Directives also affect national policy. On the most pressing national policy questions of the day, governors leverage their control over state agencies to resist or advance key federal government programs. They may direct agencies to take actions that impede federal initiatives, as when the Texas Governor directed certain state agencies not to assist in refugee resettlement,[135] when governors in numerous states instructed their environmental agencies not to plan for CPP compliance,[136] and

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127 *See* sources cited *supra* notes 8–12.

128 Pa. Exec. Order No. 2015-03 (Jan. 29, 2015), http://www.oa.pa.gov/Policies/eo/Documents/2015_03.pdf [https://perma.cc/36Z3-6GRE].

129 Mich. Exec. Directive No. 2005-5 (May 26, 2005), http://www.michigan.gov/formergovernors/0,4584,7–212–57648_36898–118987--,00.html [https://perma.cc/2VUY-78Y6].

130 *See* David L. Gregory, *Labor Organizing by Executive Order: Governor Spitzer and the Unionization of Home-Based Child Day-Care Providers*, 35 FORDHAM URB. L.J. 277, 279 (2008).

131 *See* Tex. Exec. Order No. RP-65 (Feb. 2, 2007), http://www.lrl.state.tx.us/scanned/govdocs/Rick%20Perry/2007/RP65.pdf [https://perma.cc/NN64-KCJ7] (directing Texas's state health commission to mandate vaccination of young girls for HPV).

132 *See, e.g.*, Mich. Exec. Directive No. 2003-6 (Feb. 26, 2003), http://www.michigan.gov/formergovernors/0,4584,7–212–57648_36898–62284--,00.html [https://perma.cc/R7WV-DJVL] (directing state agencies to investigate unfair gasoline prices); *Governor Cuomo Dispatches States Consumer Protection Unit to Help Safeguard Against Fraud*, N.Y. ST. (Aug. 20, 2014), https://www.governor.ny.gov/news/governor-cuomo-dispatches-states-consumer-protection-unit-help-safeguard-against-fraud [https://perma.cc/LU28-SPEW].

133 *See, e.g.*, Miguel Bustillo, *Texas Requires HPV Vaccine*, L.A. TIMES (Feb. 3, 2007), http://articles.latimes.com/2007/feb/03/nation/na-vaccine3 [https://perma.cc/36SH-WV2F] (stating that Texas Governor Rick Perry's executive order "require[d]" girls to be vaccinated).

134 As in the federal government, executive directives can be trumped by legislation and occasionally are, as with Governor Perry's HPV directive. *See* Wade Goodwyn, *In Texas, Perry's Vaccine Mandate Provoked Anger*, NPR (Sept. 16, 2011, 3:22 PM), http://www.npr.org/2011/09/16/140530716/in-texas-perrys-vaccine-mandate-provoked-anger [https://perma.cc/Q8G5-8PLS].

135 *See* Fantz & Brumfield, *supra* note 13.

136 *See* sources cited *supra* note 15.

when governors directed state health agencies to dismantle insurance exchanges under Obamacare.[137] On the very same issues, governors in other states may use their control of state agencies to facilitate and further the national agenda, as when governors instructed their state agencies to begin CPP compliance or create state insurance exchanges.[138] One striking feature of these now-familiar patterns of cooperative or uncooperative federalism[139] is the extent to which the state role rests on the governor's directive authority — her ability to control the outputs of state agencies.

B. Centralized Regulatory Review

In many states, governors' ex ante use of directives to prescribe state agency action is strengthened by a strong power to *review* agencies' proposals and actions. Whereas Presidents and their legal counselors have hesitated to claim veto power over agency action,[140] a recent wave of centralized review programs in the states has given governors greater and more explicit review power.

At least thirty-four states have adopted systems of centralized regulatory review, in which executive branch actors — usually governors or their agents — claim authority to control agency outputs.[141] Many of these offices empower governors to exercise more power than OIRA claims: to halt regulatory processes before they begin,[142] veto regulations outright,[143] or unilaterally rescind disfavored regulations.[144] Some governors have stopped regulatory output altogether through blanket moratoria.[145] Others have interpreted the review schemes to apply to agency actions other than rulemaking, like the imposition of permit conditions.[146]

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137 *See* Phillips, *supra* note 18.

138 *See* sources cited *supra* notes 15–19.

139 *See generally* Jessica Bulman-Pozen & Heather K. Gerken, Essay, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1256–60 (2009).

140 *See* Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2487 (2011) (stating that "each President's regulatory review program has disclaimed such authority").

141 *See* Seifter, *supra* note 43, at 2–9 (Appendix A).

142 *See, e.g.*, Coyne v. Walker, 879 N.W.2d 520, 524 (Wis. 2016) (explaining that Wisconsin's Act 21 "now allows the Governor . . . to permanently halt the rulemaking process"). On the scope of the Wisconsin statute, see *infra* note 218.

143 *See* ASIMOW & LEVIN, *supra* note 25, at 550 (discussing governor vetoes in Wyoming, Hawaii, Nebraska, and Oklahoma); *see also* ARIZ. REV. STAT. ANN. § 41-1052 (2016); LA. STAT. ANN. § 49:968 (2014); MINN. STAT. § 14.05 (2016).

144 *See* ASIMOW & LEVIN, *supra* note 25, at 550 (identifying Indiana, Iowa, and Louisiana as examples of states in which statutes confer gubernatorial rescission authority).

145 *See* Watts, *supra* note 25, at 1906–15 (describing "hard" and "soft," *id.* at 1906, regulatory moratoria imposed by governors).

146 *See* Clean Wis., Inc. v. Wis. Dep't of Nat. Res., No. 2015CV002633 (Dane Cty. Cir. Ct. July 14, 2016).

A few of these offices date back to the 1980s or earlier,[147] but most are more recent, and at least fifteen states have created or substantially strengthened centralized review in the past decade.[148] Like the rise of OIRA, this wave of development appears to have both ideological and institutional underpinnings. On one hand, parallel to President Reagan's early empowerment of OIRA as a means of deregulation, some state review offices expressly focus on regulatory rescission: the mission of Michigan's Office of Regulatory Reinvention (ORR), for example, is to "simplify Michigan's regulatory environment by reducing obsolete, unnecessary, and burdensome rules that are limiting economic growth," and the front page of its website provides a tally of rules rescinded (2122 at last viewing).[149] New review offices in several other states have similar missions.[150] The similarity of these recent developments in multiple states appears not to be a coincidence; rather, the American Legislative Exchange Council (ALEC) has promoted regulatory review as a reform tool,[151] and most adopters in the recent wave had Republican leaderships.

On the other hand, centralized regulatory review in the states is not merely a partisan affair. Just as Democratic Presidents have also embraced OIRA, appreciating its role in enhancing the President's institutional power, so too have Democratic governors adopted or continued programs of state regulatory review. For example, recent Democratic governors of Virginia, New York, and Rhode Island all have deployed centralized review.[152]

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147 *See* Arthur Earl Bonfield, *An Introduction to the 1981 Model State Administrative Procedure Act, Part I: General Provisions, Access to Agency Law and Policy, Rulemaking, and Review of Rules*, 34 ADMIN. L. REV. 1, 8 (1982).

148 *See* Seifter, *supra* note 43, at 2–9 (Appendix A)

149 *Welcome to the Office of Regulatory Reinvention*, MICH. STATE BUDGET OFFICE, http://www.michigan.gov/budget/0,4538,7-157-76309_35738---,00.html [https://perma.cc/A2KG-SM2M]. The ORR is now part of the Office of Performance and Transformation. *See* Mich. Exec. Order No. 2016-4 (Feb. 2, 2016), http://www.michigan.gov/documents/snyder/EO_2016-4_512748_7.pdf [https://perma.cc/6HLM-3EJZ].

150 *See, e.g.*, *Regulation and Rulemaking*, FLA. HAS A RIGHT TO KNOW, http://florida hasarighttoknow.myflorida.com/regulation_rulemaking [https://perma.cc/4SR4-W8R3]; *Common Sense Initiative*, GOVERNOR OF OHIO, http://www.governor.ohio.gov/PrioritiesandInitiatives/CommonSenseInitiative.aspx [https://perma.cc/49QK-RNG3] [hereinafter GOVERNOR OF OHIO]; *Indiana Office of Management & Budget*, IN.GOV, http://www.in.gov/omb [https://perma.cc/U5YU-K9PD].

151 *See* AM. LEGISLATIVE EXCH. COUNCIL, REGULATORY REVIEW AND RESCISSION ACT (2012), https://www.alec.org/model-policy/regulatory-review-and-rescission-act/ [https://perma.cc/5VTQ-TWBZ] (ALEC's model act); Paige Lafortune, *Massachusetts Governor Sets the Bar for Regulatory Reform*, AM. LEGISLATIVE EXCH. COUNCIL (May 4, 2015), https://www.alec.org/article/massachusetts-governor-sets-regulatory-reform/ [https://perma.cc/KD5P-PKK6] (praising Massachusetts Governor Charlie Baker's executive order imposing a "regulatory pause and review," and directing readers toward ALEC's model act).

152 *See* Seifter, *supra* note 43, at 2–9 (Appendix A).

The generally opaque nature of these mini-OIRAs impedes comprehensive study. With a few exceptions, states do not provide anything like OIRA's regulatory dashboard[153] or other means of seeing which proposals are under review or with what result.[154] Yet the information that is available indicates that centralized regulatory review offices in many states exert substantial policy influence. State agency heads and regulated parties now describe governors as the final arbiters of state policy.[155] In many cases, this authority likely prompts agencies to tailor their policy agendas to the governor's agenda ex ante, rather than invest resources in developing a proposal (if they are even allowed to do so without prior approval) only to have it returned or vetoed. And when agencies do go their own way, there are examples of showdowns: Arizona's OIRA-equivalent, the Governor's Regulatory Review Council, ordered the state's Citizens Clean Elections Commission to rescind certain campaign finance rules;[156] the New York Governor's Office of Regulatory Reform rejected proposed qualifications for certain state hospital employees;[157] and the Wisconsin Governor's office substantially changed clean water regulations.[158]

C. Reorganization

Another tool of bureaucratic control is reorganization. Part I discussed wholesale reorganizations of state executive branches as part of the rise of gubernatorial administration — a key feature of the

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153 One example is Ohio's Common Sense Initiative, which has adopted a web interface similar to OIRA's dashboard. *See* GOVERNOR OF OHIO, *supra* note 150.

154 OIRA's regulatory dashboard identifies which agency actions are under review and displays some details regarding the review process. *See* Office of Mgmt. & Budget, *List of Regulatory Actions Currently Under Review*, REGINFO.GOV, https://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp [https://perma.cc/K5LV-D9KV]. On the dashboard's limitations, see, for example, Lisa Heinzerling, *Who Will Run the EPA?*, 30 YALE J. ON REG. ONLINE 39, 42 (2013).

155 *See, e.g.*, Richard Seamon & Joan Callahan, *Achieving Regulatory Reform by Encouraging Consensus*, THE ADVOCATE, Feb. 2013, at 27, 27–29 (Idaho process); Letter from William A. Passetti, Chief, Fla. Bureau of Radiation Control, to James L. Lynch, State Agreements Officer, Nuclear Regulatory Comm'n (May 13, 2011), http://www.nrc.gov/docs/ML1114/ML11143A062.pdf [https://perma.cc/Q9AK-J52D] (Florida process).

156 *See* Laurie Roberts, *Governor's Panel Votes to Block Dark Money Disclosure*, ARIZ. REPUBLIC (Feb. 2, 2016, 11:57 AM), http://www.azcentral.com/story/opinion/op-ed/laurieroberts/2016/02/02/roberts-governors-panel-votes-block-dark-money-disclosure/79703790 [https://perma.cc/UX75-G2AU].

157 *See* Rudder v. Pataki, 711 N.E.2d 978, 980 (N.Y. 1999) (dismissing, for lack of standing, a challenge to the constitutionality of the executive order establishing the Governor's Office of Regulatory Reform).

158 *See* Steven Verburg, *After Scott Walker's Office Alerts Farm Lobby, Clean Water Regulations Scaled Back*, WIS. ST. J. (Aug. 1, 2016), http://host.madison.com/wsj/news/local/environment/after-scott-walker-s-office-alerts-farm-lobby-clean-water/article_2215adcc-238e-5f45-ab82-2b9a093e560a.html [https://perma.cc/SNV6-DA65] (describing scope statements obtained through open records law requests).

Progressive Era objective of consolidating sprawling state bureaucracies. Here I refer to a more granular power: the ability to create, disband, and restructure individual agencies. At the federal level, Presidents have authority to abolish or restructure agencies only when Congress gives it to them, and the last such statutory provision lapsed in 1984, after a court held it unconstitutional.[159] But a majority of governors (at least twenty-seven),[160] as a residuum of the reorganizations discussed in Part I,[161] do possess reorganization authority. Many governors have used this tool to enhance their control of the agency in question.

The source and scope of reorganization provisions vary among the states. Some gubernatorial reorganization powers come from constitutional provisions and some from statutes; others are apparently based on convention.[162] Some gubernatorial reorganization plans may be rejected by a two-house or one-house veto; others must be affirmatively enacted through legislation; and some states are vague about the process.[163] In addition, some states explicitly limit reorganizations to certain agencies or parameters, while others do not specify limitations.[164]

Reorganizations may increase gubernatorial control in a variety of ways. Some reorganizations rein in, downsize, or eliminate agencies based on the governor's disagreement with the agency or desire to shift priorities elsewhere.[165] Others consolidate previously dispersed

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159 *See* EEOC v. CBS, Inc., 743 F.2d 969, 971 (2d Cir. 1984) (holding that the Reorganization Act's one-house legislative veto was unconstitutional under *INS v. Chadha*, 462 U.S. 919 (1983)). The amended statute requires Congress affirmatively to enact any proposed reorganizations. *See* Reorganization Act Amendments of 1984, Pub. L. No. 98-614, 98 Stat. 3192 (codified at 5 U.S.C. § 906(a) (2012)). *See generally* HENRY B. HOGUE, CONG. RESEARCH SERV., R42852, PRESIDENTIAL REORGANIZATION AUTHORITY 2 (2012) ("The authority expired at the end of 1984 and subsequently has not been available to the President.").

160 *See* Seifter, *supra* note 43, at 10–17 (Appendix B). The Book of the States, based on an annual survey distributed to state officials, identifies a higher number — thirty-eight — of states in which governors have reorganization authority. *See* BOS Table 4.4, *supra* note 106 (listing reorganization authority by state). I was only able to identify positive law or clear practice for gubernatorial reorganizations in twenty-seven states.

161 *See* Berkman & Reenock, *supra* note 85, at 797; James K. Conant, *Executive Branch Reorganization: Can It Be an Antidote for Fiscal Stress in the States?*, 24 ST. & LOC. GOV'T REV. 3, 5 (1992).

162 *See* Seifter, *supra* note 43, at 10–17 (Appendix B); *see also* BOS Table 4.4, *supra* note 106.

163 *See* Seifter, *supra* note 43, at 10–17 (Appendix B); *see also* Gerald Benjamin & Zachary Keck, *Executive Orders and Gubernatorial Authority to Reorganize State Government*, 74 ALB. L. REV. 1613, 1632–34 tbl.1 (2011).

164 *See* Seifter, *supra* note 43, at 10–17 (Appendix B).

165 *See, e.g.*, Craig Pittman, *Under Scott, Department of Environmental Protection Undergoes Drastic Change*, TAMPA BAY TIMES (Oct. 18, 2014, 4:30 PM), http://www.tampabay.com/news/environment/under-scott-department-of-environmental-protection-undergoes-drastic-change/2202776 [https://perma.cc/9WKL-2K9J] (outlining "drastic changes" by Governor Rick Scott's administration that included reducing Department of Environmental Protection funding and staff); Associated Press, *Kansas Governor Signs Arts Reorganization Order*, KSHB (Feb. 7, 2011, 4:35

agencies, increase gubernatorial control over agencies that previously had insulation from the governor, or initiate new regulatory programs.[166]

To some extent, the significance of gubernatorial reorganization as a control tool tracks the scope of the reorganization power. In states with broad constitutional reorganization authority, like Michigan,[167] governors have wholly recreated agencies and installed new leadership.[168] In states with narrower reorganization authority (i.e., subject to a one-house veto, legislative approval, or substantive limitations), governors may be more circumspect, gauging legislative support before attempting to reorganize. But legislative opposition may not always be a significant limitation. Not only do governors and legislatures often come from the same political party,[169] but governors have found creative ways to reorganize despite legislative opposition — by using techniques that do not require legislative approval,[170] or by reconstituting agencies between legislative sessions.[171]

D. Line-Item Veto Power

Like Presidents, most governors oversee their state's budget process, allowing them to collect agency budget requests, impose their own priorities and limitations, and present a unified executive budget to the

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PM), http://www.kshb.com/news/political/kansas-governor-signs-arts-reorganization-order [https://perma.cc/BS77-S88Z] (describing Governor Sam Brownback's attempt to "abolish the Kansas Arts Commission and transfer the agency's responsibilities to the Kansas Historical Society"). The Kansas legislature vetoed the order, *see* Todd Fertig & Hurst Laviana, *Senate Votes to Preserve Kansas Art Commission*, WICHITA EAGLE (Mar. 16, 2011, 12:00 AM) http://www.kansas.com/news/article1060148.html [https://perma.cc/4LN5-ZRQ8], but as noted *infra* p. 509, the Governor ultimately effected a similar change by defunding the agency.

166 *See, e.g.*, House Speaker v. Governor, 506 N.W.2d 190, 195 (Mich. 1993) (upholding governor's plan to abolish and recreate under gubernatorial control the state's Department of Natural Resources, and transferring the functions of "eighteen legislatively established boards and commissions" related to natural resources to the new Department); Weisman, *supra* note 32 (describing Governor Perry's consolidation of "[twelve] health-and-human-services agencies into five, with power centralized under a commissioner, named by the governor"). *But see In re* Plan for Abolition of Council on Affordable Hous., 70 A.3d 559, 561–62 (N.J. 2013) (rejecting Governor Chris Christie's attempt to abolish independent affordable housing agency).

167 *See* MICH. CONST. art. V, § 2 ("[T]he governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration.") Note that "where [the governor's] changes require the force of law," they are subject to a sixty-day, two-house veto. *Id.* The Michigan Supreme Court has described the governor's reorganization power as "nearly plenary." Straus v. Governor, 592 N.W.2d 53, 57 (Mich. 1999).

168 *See, e.g.*, *Straus*, 592 N.W.2d at 55; *House Speaker*, 506 N.W.2d at 195.

169 *See infra* section III.B.2, pp. 520–21.

170 *See* Weisman, *supra* note 32 (describing Governor Perry's creation of a "homeland-security division within the governor's office"). This tactic, unlike others discussed here, has a presidential analogue.

171 *See, e.g.*, Tom Loftus, *Bevin's 7 Reorganizations in Past 2 Months*, COURIER-J. (June 22, 2016, 2:19 PM), http://www.courier-journal.com/story/news/politics/ky-governor/2016/06/22/bevins-7-reorganizations-past-2-months/86225102/ [https://perma.cc/WL89-KS72].

legislature.[172] The executive budget was a product of early twentieth-century reform movements in the states aimed at streamlining the myriad scattered agencies independently interfacing with legislatures.[173] As Professor Eloise Pasachoff has recently explored in the federal context, executive budget control can effect substantial policy influence.[174] Here I focus not on executive budgets generally, but on a distinct tool that originated with budgetary control: the line-item veto. When Congress attempted to grant Presidents a similar power, the Supreme Court ruled the statute unconstitutional.[175] But most states — to the envy of Presidents[176] — have retained the item veto, allowing governors to revise certain statutes before they become law.[177] This is an additional power governors can wield to control agencies.

The item veto is widespread in the states. Governors in forty-four states possess some item veto authority.[178] Roughly forty states require the underlying legislation to be related to appropriations, while the remaining states allow the item veto over nonappropriations bills.[179] Even within the states that apply the item veto only to appropriations-related legislation, just under half allow the veto to address nonappropriations provisions within appropriations bills.[180] Thus, governors in a

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172 *See generally* Ferguson, *supra* note 113, at 222. A fine-grained assessment of executive budgets and correspondent gubernatorial power would require much more space, as many variables matter. To take just one example, governors wield more power in states that have balanced budget requirements and authorize the governor to make the official revenue projections. *See* George A. Krause & Benjamin F. Melusky, *Concentrated Powers: Unilateral Executive Authority and Fiscal Policymaking in the American States*, 74 J. POL. 98, 101 (2012). For a detailed rundown of budget procedures in the fifty states, see NAT'L ASS'N OF STATE BUDGET OFFICERS, BUDGET PROCESSES IN THE STATES (2015).

173 Ferguson, *supra* note 113, at 222 (identifying the executive budget as a "twentieth-century response to the chaotic fiscal situations found in state government at the turn of that century").

174 *See* Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control,* 125 YALE L.J. 2182, 2186 (2016).

175 *See* Clinton v. City of New York, 524 U.S. 417, 421 (1998) (holding that the Line Item Veto Act of 1996 violated the Presentment Clause).

176 As President George W. Bush stated in a meeting with the National Governors Association: "I wish I had the line-item veto like . . . some of you do. It makes it easier to deal with the issues like earmarks or these interests that get stuffed into these bills at the last minute without having been debated." President Bush Meets with the National Governors Association, 1 PUB. PAPERS 188, 190 (Feb. 26, 2007).

177 *See, e.g.*, Briffault, *supra* note 44, at 1175–76; NAT'L CONFERENCE OF STATE LEGISLATURES, INSIDE THE LEGISLATIVE PROCESS 6-29 (1998), http://www.ncsl.org/documents/legismgt/ilp/98tab6pt3.pdf [https://perma.cc/SS9A-LXA7].

178 *See* Seifter, *supra* note 43, at 18–24 (Appendix C); *see also* BOS Table 4.4, *supra* note 106; Thomas P. Lauth, *The Other Six: Governors Without the Line-Item Veto*, PUB. BUDGETING & FIN., Winter 2016, at 26 (discussing the absence of item veto in Indiana, Nevada, New Hampshire, North Carolina, Rhode Island, and Vermont).

179 *See* BOS Table 4.4, *supra* note 106 (listing item veto powers across the states).

180 *See id.* (identifying eighteen states allowing item veto of nonappropriations provisions in appropriations acts); Seifter, *supra* note 43, at 18–24 (Appendix C) (identifying sixteen states with

significant plurality of states can item veto not only appropriations matters, but also other substantive provisions.

Consider first the impact of the item veto over appropriations amounts themselves. As Professor Jonathan Zasloff has observed, "Governors [in California] have used this power to spectacular effect, cutting through legislative budget priorities and leaving lawmakers impotent to do anything about it unless they accede to many of the Governor's fiscal desires."[181] Of specific interest here, governors can use this power of the purse to affect an agency's priorities or authority, much as a reorganization would. For example, when the Kansas legislature overrode Governor Sam Brownback's proposed Executive Reorganization Order to eliminate the Kansas Arts Commission, he used his veto power to eliminate the Commission's entire appropriation.[182]

Governors have also used their veto powers to affect the substance and structure of agency work, either because state law allows governors to veto nonappropriations statutes or because it construes appropriations broadly. For example, governors have rejected provisions pertaining to agency structure, such as bipartisanship requirements,[183] the procedures for appointing agency leaders,[184] or the creation and authorization of a steering committee within an agency.[185] Some governors have used their item veto to strike riders directing agencies to spend funds on particular projects; sometimes that action effectively forbids pursuit of those projects altogether.[186]

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positive law or case law expressly extending the item veto to such provisions and six more in which the question remains open).

181 Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079, 1110–11 (2004).

182 *See* Tim Carpenter, *NEA Rejects Kansas Bid for Arts Funding*, TOPEKA CAP.-J. (Aug. 16, 2011, 11:18 PM), http://cjonline.com/news/2011-08-16/nea-rejects-kansas-bid-arts-funding [https://perma.cc/S3ZH-UX6F]. The state cuts also made the agency ineligible for over one million dollars in federal and regional funding. *Id.*

183 *See* Welsh v. Branstad, 470 N.W.2d 644, 650 (Iowa 1991) (upholding item veto of a requirement that a state export trade delegation be bipartisan or nonpartisan).

184 *See* Jessie Opoien, *Scott Walker Signs Campaign Finance, GAB Bills in Private Ceremony*, CAP. TIMES (Dec. 16, 2015), http://host.madison.com/ct/news/local/govt-and-politics/scott-walker-signs-campaign-finance-gab-bills-in-private-ceremony/article_19e6a800-01d6-5e88-9625-646db869a022.html [https://perma.cc/KT3Q-X52S] (describing the Governor's use of partial veto authority to change the number of approved names the legislature must provide for the Governor's appointees to the ethics board from "up to three" to "three").

185 *See* Ark. Op. Att'y Gen. 2001-118 (May 9, 2001) (declaring "constitutionally suspect" the Governor's item veto in these circumstances, but describing the absence of controlling case law in the state).

186 *See* Tex. Op. Att'y Gen. KP-0048 (Sept. 28, 2015) (explaining that when an appropriations statute provides that appropriated funds "shall be expended only for the purposes shown," vetoing a rider means that none of the appropriated funds may be used for the vetoed projects); *cf.* Jubelirer v. Rendell, 953 A.2d 514, 518, 537–38 (Pa. 2008) (upholding the Pennsylvania Governor's item veto of state transportation agency funds earmarked for a particular project).

To be sure, courts sometimes strike down attempted line-item vetoes as beyond the governors' power, and many courts treat the item veto with caution.[187] But it remains the case that "[t]o veto an item and approve the remainder of a bill is always to enact a piece of legislation that the legislature had not approved," and that governors thus have a powerful tool of agency control in their arsenal.[188]

E. Privatization

In some instances, governors have deployed privatization as a tool of agency control, and they do so with fewer formal constraints than the federal government.[189] Governors in recent years have privatized, or proposed to privatize, state welfare systems,[190] prisons,[191] health and social services,[192] and more.[193] In the last few years, at least nine states

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187 *See* Briffault, *supra* note 44, at 1185–87, 1189–94.

188 *Id.* at 1187.

189 The federal constraints should not be overstated. Apart from some arguable but mostly untested constitutional boundaries, *see generally* Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1511–12 (2001) (Appointments Clause); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1456–86 (2003) (nondelegation doctrine), the main federal limit is the federal contracting process and the bar against privatizing "inherently governmental functions," *see generally* Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 436–66 (2006) (discussing, inter alia, Circular A-76, which forbids the federal government from outsourcing inherently governmental functions, *id.* at 437); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR NO. A-76 (REVISED) (2003), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/circulars/a076/a76_incl_tech_correction.pdf [https://perma.cc/2PW6-VLKK] (defining inherently governmental functions as those "activit[ies] that [are] so intimately related to the public interest as to mandate performance by government personnel," *id.* at A-2). Although these limits have not stopped extensive federal privatization, *see, e.g.*, Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023, 1025 (2013), they establish procedures and limiting principles that do not seem to exist at the state level. *But cf.* Clayton P. Gillette & Paul B. Stephan III, *Constitutional Limitations on Privatization*, 46 AM. J. COMP. L. SUPPLEMENT 481, 492–501 (1998) (discussing state constitutional principles and provisions that could be conceived of as limiting privatization).

190 *See, e.g.*, Ferguson & Foy, *supra* note 120, at 6, 14 (describing Indiana Governor Mitch Daniels's privatization of welfare services).

191 *See, e.g.*, Joe Guillen, *Gov. Kasich Plans to Sell Prisons, Privatize State Liquor Profits for Now, Turnpike Lease Could Be in Near Future*, PLAIN DEALER (Cleveland) (Mar. 15, 2011, 9:00 PM), http://www.cleveland.com/open/index.ssf/2011/03/gov_kasich_plans_to_sell_priso.html [https://perma.cc/MZ4P-X73H].

192 *See, e.g.*, Jay Greene, *Michigan Would Privatize Mental Health Funding, Services Under Snyder's Proposed Budget*, CRAIN'S DETROIT BUS. (Feb. 15, 2016), http://www.crainsdetroit.com/article/20160211/NEWS/160219967/michigan-gov-rick-snyders-proposed-budget-would-privatize-mental [https://perma.cc/3BMV-UL84].

193 *See, e.g.*, Kim Geiger, *After Privatization Fails, Illinois Governor Creates New Economic Development Arm*, GOVERNING (Feb. 4, 2016), http://www.governing.com/topics/mgmt/tns-illinois-economic-development.html [https://perma.cc/QUR8-F95Y].

have formed new privatization commissions,[194] seeking to identify "government functions [that] are or may be appropriate for privatization."[195]

For some governors, privatization reflects a commitment to smaller government or to a more efficient government, one that leverages the best traits of the private sphere. But my interest here is in institutional implications rather than ideological ones: privatization can enhance executive power.[196] By transferring an executive function to private hands, and by shaping the substance of the delegation, governors may be able to pursue a substantive agenda with greater flexibility and less public scrutiny.[197]

This greater flexibility arises because privatization does not impose the same constraints as does the insulated, semi-autonomous bureaucracy. Notwithstanding the many levers of gubernatorial control discussed in this Article, the state civil service, like the federal civil service, can be a source of friction against gubernatorial prerogatives.[198] Independently minded, career-level professionals, that is, may have a view that differs from that of the governor or agency head, and that may contribute to a sort of "bureaucratic autonomy."[199]

Privatizing government functions may also decrease public scrutiny, which can reinforce gubernatorial flexibility. As Professor Jon Michaels has argued, privatization may result in the public lacking "the same access to information that they are accustomed to receiving when policy is directed through customarily more transparent public administrative channels."[200] This is not a claim that contractors are entirely opaque or that public administration is entirely transparent.[201] But transferring the administration of a prison, welfare system, or healthcare operation to a contractor (whose name or identity may not be well known) has the potential to obscure policy choices that might otherwise surface more readily.[202]

In its connection to gubernatorial discretion, the move toward privatization is thus conceptually linked with another movement in state executive branches: one toward limitations on collective bargaining and

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194 *See* Ellen Dannin, *Privatizing Government Services in the Era of ALEC and the Great Recession*, 43 U. TOL. L. REV. 503, 505 (2012) (listing New Jersey, as well as "Virginia, Maryland, Arizona, Kansas, Oregon, Illinois, South Carolina, and Pennsylvania").

195 N.J. Exec. Order No. 17, 42 N.J. Reg. 690(a) (Mar. 11, 2010).

196 *See* Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 719 (2010) (arguing that privatization can be "executive aggrandizing").

197 *See id.* at 745, 751.

198 *See, e.g.*, Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 540–41 (2015).

199 *Cf.* DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY 3–4 (2001) (describing additional determinants of bureaucratic autonomy).

200 Michaels, *supra* note 196, at 751.

201 *Id.* at 751–52.

202 *See id.* at 752.

civil service laws. These recent changes have, inter alia, implemented at-will employment,[203] modified hiring and promotion protocols,[204] scaled back grievance and appeals procedures,[205] and brought civil service supervision under gubernatorial control.[206] In most states, these changes have been enacted with legislative cooperation, not gubernatorial unilateralism,[207] but the ensuing discretion inures to the governor's benefit. In other words, shifting executive functions to the private realm and supporting reforms that imbue the public realm with more of the flexibility of the private realm may be two different means of enhancing executive discretion.[208]

F. Removal and the Dilemma of Independent Agencies

Finally, governors can exert control over state agencies by removing state agency heads. Governors can remove some set of agency heads at will, and this affords governors influence paralleling that of Presidents over "executive" agencies. In both cases, the idea is that the ability to fire — or, perhaps more importantly, threaten to fire — gives the chief executive substantial influence over the subordinate official, even though political costs may attend and sometimes preclude actual firings.[209] Conversely, where the chief executive is limited to "for-cause" removal, agency heads presumably enjoy more independence.[210]

Yet the legal contours of agency independence are much fuzzier at the state level, including in ways that empower governors. Unlike at

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[203] *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-742 (2013); TENN. CODE ANN. §§ 8-30-316 to -318 (2016); *see also* JONATHAN WALTERS, LIFE AFTER CIVIL SERVICE REFORM: THE TEXAS, GEORGIA, AND FLORIDA EXPERIENCES 23 (2002), https://sites.duke.edu/niou/files/2011/05/Walters-Life-after-Civil-Service-Reform-The-Texas-George-and-Florida-Experiences.pdf [https://perma.cc/4Z76-M9EZ] (describing Georgia's 1996 switch to at-will employment).

[204] *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-772(B); COLO. REV. STAT. § 24-50-112.5 (2016); 2016 Pa. Laws 465 § 2; TENN. CODE ANN. § 8-30-313(a) to -(b); 46 N.J. Reg. 1331(c) (June 2, 2014).

[205] *See, e.g.*, ARIZ. REV. STAT. § 41-745(B).

[206] *See, e.g.*, COLO. REV. STAT. § 24-50-103; KAN. STAT. ANN. § 75-2935(3) (2015); TENN. CODE ANN. § 8-30-108(a), (c).

[207] An exception occurred in New Jersey, where Governor Christie imposed civil service reform over legislative opposition by directing the state's Civil Service Commission to do so. *See* Brent Johnson, *Christie Administration's Civil Service Changes Adopted Despite Opposition*, NJ.COM (May 19, 2014, 6:29 PM), http://www.nj.com/politics/index.ssf/2014/05/christie_administrations_changes_to_nj_civil_service_rules_adopted_despite_opposition.html [https://perma.cc/KKY7-VKB4].

[208] And they need not be alternatives; they can be complements. *See* Dannin, *supra* note 194, at 505 ("Often privatization was bundled with other changes to government workers' benefits, pay, civil-service protections, collective bargaining rights, and union representation.").

[209] *See, e.g.*, Kagan, *supra* note 3, at 2273–74; Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1, 7–8 (2007).

[210] *See* Kagan, *supra* note 3, at 2274 (describing removal restrictions as "pos[ing] a particularly stark challenge to the aspiration of Presidents to control administration," while also identifying more pervasive obstacles to presidential control).

the federal level, where removal restrictions are the "legal touchstone of agency independence,"[211] and the independent agency is a recognized legal category implying insulation from the President,[212] many states make removal restrictions less of an obstacle to gubernatorial control. Deep evaluation of this observation — and of the murky concept of state agency independence — warrants treatment in a separate work.[213] Here I identify the basics of the legal puzzles.

At the outset, note that these puzzles arise despite more extensive guiding legal texts regarding removal at the state level. Unlike the federal government, virtually every state has an explicit constitutional or statutory removal provision.[214] These provisions differ widely, with some specifying *which* officers can be removed, some specifying *for what* officers can be removed, and some specifying *how* (through what process) removal must occur.[215] Courts have further interpreted these provisions.[216]

Taken together, these sources generate three puzzles. First, the set of agency heads that states deem removable at will (either by positive law or judicial gloss) seems to be a mishmash. For example, there is a seemingly widespread vernacular that executive offices created by state *constitutions* (especially those that are separately elected) are the classic examples of executive entities that are "not subject to gubernatorial control."[217] But not all states regard such constitutional officers as "independent" or protected from gubernatorial control.[218] Second, when state

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[211] Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1165 (2013).

[212] Scholars have offered valuable critiques of courts' categorical approach in recent years. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 772 (2013) ("Agencies cannot be neatly divided into two categories."); Vermeule, *supra* note 211, at 1165–66 (arguing that conventions, rather than tenure protection, explain "operational independence," *id.* at 1166).

[213] I will explore this question in a subsequent project. *See* Miriam Seifter, Understanding State Agency Independence (unpublished manuscript) (on file with author). There has been almost no attention to this question in the legal literature in recent decades. One exception is a helpful student note. *See* Eric R. Daleo, Note, *The Scope and Limits of the New Jersey Governor's Authority to Remove the Attorney General and Others "For Cause,"* 39 RUTGERS L.J. 393 (2008) (focusing on New Jersey law but surveying the law of other states). For an earlier overview of governor removal power, see Charles Kettleborough, *Legislative Notes and Reviews: Removal of Public Officers. A Ten-Year Review*, 8 AM. POL. SCI. REV. 621, 623–26 (1914).

[214] *See* ASIMOW & LEVIN, *supra* note 25, at 531; Seifter, *supra* note 213 (collecting sources).

[215] Thad L. Beyle & Scott Mouw, *Governors: The Power of Removal*, 17 POL'Y STUD. J. 804, 806–22 (1989).

[216] *See, e.g.*, ASIMOW & LEVIN, *supra* note 25, at 531–34 (describing case law interpreting the wide variety of gubernatorial removal authority among states).

[217] Marshall, *supra* note 30, at 2448. Professor William Marshall's illuminating article includes counterexamples, but, consistent with a dominant paradigm, casts a "divided" executive as involving "independent" officers. *Id.*

[218] *See, e.g.*, Riley v. Cornerstone Cmty. Outreach, Inc., 57 So. 3d 704, 740 (Ala. 2010) (holding that the Attorney General could not countermand the Governor's litigation decisions because "there

law does impose a "for-cause" limit on removal, there is extensive disagreement about what constitutes cause. Unlike at the federal level, where the prevailing understanding is that "cause" is a demanding standard that "prevent[s] the President from exercising 'coercive influence' over independent agencies,"[219] some states have interpreted "cause" much more permissively.[220] In other states, courts have deemed at least some gubernatorial removal decisions judicially unreviewable.[221]

The third puzzle is that, even where state law seems to suggest that an agency head has tenure, governors sometimes fire them.[222] One possible reason for this is that a given state law may admit ambiguity, such that a governor and her legal counsel believe their position would, or at least could, prevail in court. Another possibility tracks Professors Eric Posner and Adrian Vermeule's assessment of the presidency — that the governor is relatively "unbound" by formal legal constraints, though still

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is a constitutional hierarchy within the executive branch and one office — the Governor — is at its top" (internal quotation marks omitted)); People *ex rel.* Deukmejian v. Brown, 624 P.2d 1206, 1209 (Cal. 1981) (concluding that the Attorney General could not sue the Governor because "the Attorney General may act only 'subject to the powers' of the Governor" (quoting CAL. CONST. art. V, § 13)); *see also* Coyne v. Walker, 879 N.W.2d 520, 525 (Wis. 2016) (rejecting the Wisconsin Governor's claimed authority to suspend rulemaking by the state's independently elected superintendent of education). Although the Wisconsin Supreme Court ruled against the Governor's specific attempt, the majority neither rejected gubernatorial directive authority over other state executive officials nor deemed the superintendent "independent." *Id.* Relatedly, governors sometimes claim directive authority over apparently independent, nonelected agencies. *See* Roberts, *supra* note 156 (describing an example in Arizona).

219 Mistretta v. United States, 488 U.S. 361, 411 (1989) (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 630 (1934)); *see id.* at 410–11. This understanding is not obvious as a textual construction, *see* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 110–11 (1994), but is the prevailing view, *see* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 502 (2010) (stating that the Court's precedents do not "suggest" that "simple [policy] disagreement . . . could constitute 'good cause' for . . . removal").

220 *See* ASIMOW & LEVIN, *supra* note 25, at 532–33 (collecting cases); Daleo, *supra* note 213, at 438–39 (same); Seifter, *supra* note 213 (same).

221 *See, e.g.*, Keenan v. Perry, 24 Tex. 253, 264 (1859) (describing the governor as "the sole judge of the causes" for removal); Daleo, *supra* note 213, at 436–37.

222 *See, e.g.*, Associated Press, *Kentucky Governor Fires Entire U of L Board, Makes New Appointments*, WATE.COM (June 30, 2016, 4:54 AM), http://wate.com/2016/06/30/governor-who-fired-entire-board-makes-new-appointments/ [https://perma.cc/HSF6-7BTE]; Katie Kerwin McCrimmon, *Hickenlooper Boots Businesswoman from Health Exchange Board*, HEALTH NEWS COLO. (Dec. 15, 2014, 2:07 PM), https://www.bizjournals.com/denver/news/2014/12/15/hickenlooper-boots-businesswoman-from-health.html [https://perma.cc/YPM7-46S4] (describing the Colorado Governor's removal of a board member who was critical of the exchange and, per statute, could only be removed "with cause"); *cf.* John Celock, *Cindy Hill, Wyoming Elected Schools Chief, Demoted by Legislature*, HUFFINGTON POST (Jan. 29, 2013, 6:52 PM), http://www.huffingtonpost.com/2013/01/29/cindy-hill-wyoming-schools_n_2576810.html [https://perma.cc/NS2Y-JAQL] (describing the Wyoming Governor's defense of legislation removing Wyoming's elected superintendent of public instruction and replacing her with an appointed state education director).

hemmed in by factors like public opinion and politics,[223] which may impose less of a headwind at the state level. Either way, there appears to be some validity to statements that the governor's office is what you make it[224] — that is, the choice to assert certain powers sometimes is the end of the matter.

III. THE STATE CONTEXT: GUBERNATORIAL ADMINISTRATION AND SEPARATIONS OF POWER

This Part situates gubernatorial administration in the context of state constitutional law and practice. Section III.A frames the legal analysis of gubernatorial administration, identifying factors that separate the inquiry from legal evaluations of presidential administration. Section III.B considers the distinctive state scheme of separated powers. It argues that many of the familiar checks on presidential power do not exist in similar form at the state level, particularly for governors with largely deregulatory agendas, and describes other institutions that might push back against a governor's control.

A. The Legal Foundations of Gubernatorial Administration

A great deal of scholarship has explored the President's legal power to direct the executive branch. The rise in gubernatorial administration raises a parallel question: can the governor lawfully prescribe the positions of state agencies?[225] I do not aim to resolve that question definitively here. States vary widely in their constitutional and statutory schemes, and in judicial interpretations of those schemes. Even within a state, decisional law on executive power is often vague and sometimes at odds with apparent constitutional foundations. My claim here is simply that the analysis of gubernatorial administration's legality does not rest on the same principles as the federal analysis, and that the bottom-line legal answer is not obvious.

It helps to begin with the more familiar federal context. According to the "conventional" view, the President lacks directive authority — that is, the President cannot "dictate the substance of regulatory

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[223] *See* ERIC POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND (2010).

[224] Ferguson & Foy, *supra* note 120, at 4 ("Each observer of the Indiana governorship with whom we spoke . . . said something along the lines of 'the office can be whatever the incumbent wants to make of it.'"). As Professors Margaret Ferguson and Joseph Foy note, there is some resonance with a quote from Woodrow Wilson about the presidency: "His office is anything he has the sagacity and force to make it." *Id.* (quoting WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 69 (1908)).

[225] In focusing on state law, I sideline the interesting (but presently nonjusticiable) question of whether the Guaranty Clause could ever limit gubernatorial administration. *See, e.g.*, Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51, 59–60 (1998) (discussing the possible relationship between the Guaranty Clause and state separation of powers questions).

decisions that agencies are required by law to make."[226] The rationale is that statutes mean what they say: when Congress delegates authority to an agency or agency head, Congress means to confer independent discretion upon that named actor.[227] If agency heads take policy positions the President does not like, the President may attempt to influence those positions, or may incur the political cost of firing (some) agency heads, but may not simply substitute his own judgment.[228] This argument has a constitutional basis insofar as it requires rejecting a unitary executive mandate for presidential control.[229] On this view, the text of Article II "settles no more than that the President is to be the overseer of executive government."[230] Scholars shore up the case against presidential directive authority with appeals to public values: enabling independent judgment by agencies promotes expertise, democracy, and the rule of law.[231]

In addition to the conventional view, there are two well-known minority viewpoints on presidential directive authority. Unitary executive theorists argue that the President *must* have directive authority.[232] As an alternative, then-Professor Kagan proposed an interpretive principle: Congress is generally *presumed* to have included presidential directive authority when it delegates to executive agencies.[233] None of these three views translates easily to the state level.

First, it is not clear whether state constitutions reflect similar ambivalence about executive power and directive authority. On one hand, most state constitutions' creation of executive officers selected separately from the governor undermines directive authority: if the constitution deliberately divided executive power, it would be incongruous for a governor to claim authority to centralize it.[234] On the other hand, many state constitutions can be read to place the governor atop this executive hierarchy. Whereas the Federal Constitution vests in the President "[t]he

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226 Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 965 (2001) (describing and embracing this "conventional wisdom").

227 *See* Stack, *supra* note 3, at 268 ("[S]tatutory grants of authority to an official (alone) should be read as vesting the official with an independent duty and discretion, not a legal duty to the President.").

228 *See id.* at 316.

229 *See id.* at 266–67.

230 Strauss, *supra* note 121, at 985 (emphasis omitted); *see also id.* at 979.

231 *See id.* at 985; Stack, *supra* note 3, at 268, 321–22.

232 *See* Calabresi & Prakash, *supra* note 4, at 593–99.

233 *See* Kagan, *supra* note 3, at 2327–28.

234 *See, e.g.*, State *ex rel.* Mattson v. Kiedrowski, 391 N.W.2d 777, 782 (Minn. 1986) (positing that the state's constitutional drafters made "a conscious effort" to "divide[] the executive powers of state government among six elected officers," and thus rejecting a legislative attempt to transfer core functions away from the elected state treasurer).

executive Power,"[235] many state constitutions' vesting clauses give governors "the supreme executive power" or make the governor the "chief executive."[236] Some states also afford governors reorganization authority in the constitution, perhaps further suggesting robust gubernatorial power over agencies.[237] Then there are the puzzling removal clauses, discussed above; these might strengthen or weaken the case for gubernatorial directive authority, depending on their respective scopes.[238] Because most state constitutions have been amended multiple times in different historical eras, many include multiple, conflicting moods about executive power, leaving the constitutional status of directive authority uncertain.[239]

Second, critics fear that presidential directive authority imperils federal separation of powers principles by usurping or undermining Congress's lawmaking function. But, as with executive power, separation of powers considerations may not have the same meaning in state constitutional law. Unlike the Federal Constitution, most state constitutions include explicit separation of powers clauses.[240] But many of these clauses originated from the revolutionary-era desire to cabin executives, rather than to confine each of the branches in accordance with modern thought,[241] and are hard to square with later constitutional developments empowering the executive. Moreover, many state constitutions authorize interbranch dynamics (the line-item veto, the one-house veto, and legislative appointments) that would violate federal constitutional separation of powers principles. And unlike the Federal Constitution, which confers only enumerated powers, states generally confer plenary power on their legislatures, subject to constitutional limitation.[242] All of this could lead to a nuanced state doctrine of separation of powers, where branches must respect the unique roles the particular state constitution confers.[243] Whether gubernatorial directive authority would

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235 U.S. CONST. art. II, § 1.

236 *See, e.g.*, State *ex rel.* Stubbs v. Dawson, 119 P. 360, 363 (Kan. 1911) (construing the phrase "supreme executive power" broadly and deeming a statute authorizing the governor to "direct" the attorney general to institute a prosecution to be "in harmony" with the constitutional provision); *see also* Tucker v. State, 35 N.E.2d 270, 291 (Ind. 1941) (distinguishing between the executive power given to the governor and the administrative offices of the elected "Secretary, Auditor, and Treasurer of State").

237 *See, e.g.*, MICH. CONST. art. V, § 2.

238 *See supra* notes 214–16.

239 *See generally* TARR, *supra* note 50 (describing the history and eras of state constitutional development).

240 *See* John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1236–37 (1993).

241 *See* Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 917 (1993).

242 *See, e.g.*, TARR, *supra* note 50, at 7.

243 For a proposal along these lines, see Devlin, *supra* note 240, at 1264–68.

pass muster under such a doctrine would depend on the particular constellation of state constitutional and statutory provisions. But many states have not developed such a jurisprudence; despite the differences in state governments and state constitutions, many states say that, as a general matter, they follow federal separation of powers principles.[244]

Third, statutory interpretation is the heart of the directive authority analysis, and states may speak more directly to the issue. Recall that the directive authority debate at the federal level considers whether and when Congress should be presumed to delegate exclusively to the named agency head, as opposed to a presumption that the agency head is always subordinate to the President. Some state statutes address the question head-on. For example, when the Florida Supreme Court rejected a governor's attempt to suspend agency rulemaking by executive order,[245] the court relied heavily on a state statute requiring an agency head's approval of rules and barring transfer of that approval responsibility to any other person.[246] On the other hand, state statutes may also weigh in favor of directive authority. One could imagine that a legislature that has granted a governor reorganization authority impliedly assumes the governor also has the lesser power to direct agency actions. But here too ambiguity remains: the powers to reorganize and direct are not identical,[247] and state courts may conclude that the two do not travel together.[248]

All of this points to the absence of easy legal answers about gubernatorial directive authority. Further study is warranted. That said, we should not place undue emphasis on judicial interpretation. Agency heads seldom sue over directive authority, and state courts (like federal courts) have numerous doctrines that may make such questions either nonjusticiable or avoidable. In many cases, the pivotal interpreters of gubernatorial authority will be nonjudicial actors: the legislature, the public, and governors themselves. The next section considers this institutional context.

B. Diminished Separations of Power

It is not just the legal landscape of executive power that looks different at the state level. The institutional context, too, is a different

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[244] *See* James A. Gardner, *The Positivist Revolution that Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109, 111–14 (1998).

[245] Whiley v. Scott, 79 So. 3d 702, 716–17 (Fla. 2011).

[246] *Id.* at 710 (citing FLA. STAT. § 120.54(3)(a)(1), 120.54(3)(e)(1), (1)(k) (2010)). In addition, other state legislation "expressly placed the power to act on the delegated authority in the department head, and not in the Governor or the Executive Office of the Governor." *Id.* at 715 (citing FLA. STAT. § 20.05(1)(a), (e)).

[247] *Cf.* Stack, *supra* note 3, at 295–96 (explaining why removal and directive authority are distinct in both principle and practical effect).

[248] *See, e.g.*, State Highway Comm'n v. Haase, 537 P.2d 300, 302–03 (Colo. 1975) (ruling that the governor lacked authority to override a decision of the state highway commission, even though the commission had been statutorily reorganized under an at-will governor appointee).

world. And whereas scholars have developed rich accounts of the ways that a host of actors — Congress, the courts, political parties, interest groups, and agencies themselves — check the President, there is virtually no attention in the legal literature to analogous checks in the states. This section charts the landscape of state-level checks on executive power. I first catalog four familiar federal-level checks, highlighting ways in which their state equivalents are both different and often less robust. I then describe three checks that exist only at the state level. Ultimately, the picture that emerges is one of executive power rather than constraint.

1. Legislative Oversight. — To begin, there is reason to doubt the extent of legislative pushback against gubernatorial administration, as compared to congressional oversight of federal agencies' presidentially driven work. Although political science literature has documented the increasing "professionalization" of state legislatures in the past few decades,[249] this development should not be overstated. In forty states, being a legislator is still not a full-time job, legislators' salaries are not enough to constitute their sole income, and legislators have relatively small staffs and resources.[250] Moreover, across all states, legislators' salaries are low compared to those of state agency officials.[251] In part to counteract these deficiencies, many states have implemented legislative review of agency rulemaking, in which a committee within the state legislature reviews a rule before it becomes final.[252] But in practice, this may be only a modest check: legislative rules review committees in many states do not have actual veto authority, and a majority of those that do cannot veto rules without the governor's approval.[253]

The question remains, then, whether thinly staffed and low-paid legislatures have the capacity and incentives to engage in meaningful

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[249] *See, e.g.*, Neal D. Woods & Michael Baranowski, *Legislative Professionalism and Influence on State Agencies: The Effects of Resources and Careerism*, 31 LEGIS. STUD. Q. 585 (2006).

[250] *See Full and Part-Time Legislatures*, NAT'L CONF. ST. LEGISLATURES (June 14, 2017), http://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx [https://perma.cc/9LGM-6T6K]. In the two categories of professionalization that are not full-time (which the National Conference of State Legislatures (NCSL) dubs "gray" and "gold"), the average numbers of total partisan and nonpartisan staff members are 469 and 160, respectively. *Id.* tbl.2. Although these numbers are small, I do not suggest here that the number of staff members is the primary constraint on state legislative oversight; the far greater number of congressional staffers (over 20,000 in recent years) corresponds to a much larger realm of federal agencies. Rather, the part-time nature of legislators' work, the meagerness of their salaries, and the lack of incentives to engage in oversight seem like more significant limitations.

[251] State legislators generally earn less than state agency officials; this contrasts with the rough parity present at the federal level. *See* Graeme T. Boushey & Robert J. McGrath, *Experts, Amateurs, and Bureaucratic Influence in the American States*, 27 J. PUB. ADMIN. RES. & THEORY 85, 93 (2017).

[252] *See* Brian J. Gerber, Cherie Maestas & Nelson C. Dometrius, *State Legislative Influence over Agency Rulemaking: The Utility of Ex Ante Review*, 5 ST. POL. & POL'Y Q. 24, 26 (2005).

[253] *See id.* at 27–28.

oversight of a governor-driven executive branch. One answer may lie in the salience of both state elections and individual state agency actions. Scholars of legislative oversight have theorized that legislators expend scarce resources on oversight only to the extent that it is likely to enhance their political fortunes.[254] If that is true, one might expect less robust oversight at the state level, where voters are less informed about government activity, and where legislators' time likely would be better spent on other, more visible forms of outreach.[255] Or one might expect skewed oversight, tailored to those interest groups — primarily business-oriented entities — that are sufficiently organized and funded to monitor state agency actions.[256]

2. Political Parties. — The normative case for presidential administration has depended in large part on the existence of divided government — a President and Congress controlled by opposing political parties — and the vigorous rivalry that comes with it.[257] Indeed, for much of the last half century — though not after the recent election — the federal government has been divided. In contrast, for most of the last two decades, and especially in recent years, most states' governors and legislatures have been controlled by a single political party.[258]

This removes an important check on the chief executive. Although most studies in the legal literature on the effects of unified and divided government focus on Congress and the President,[259] the general dynamics extend to state government. Divided government can hem in executive power: a chief executive may be able to energize and direct the

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254 *See* Seymour Scher, *Conditions for Legislative Control*, 25 J. POL. 526, 528–29 (1963).

255 *See generally* Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 401 (detailing obstacles to meaningful voter representation in state government, including that voters base state-level decisions mostly on "their party's performance at the national level").

256 *See* Anthony J. Nownes & Adam J. Newmark, *Interest Groups in the States*, *in* POLITICS IN THE AMERICAN STATES, *supra* note 113, at 105, 121 (discussing studies finding that "general business interests are the most powerful types of groups in the states," *id.* at 121).

257 *See* Kagan, *supra* note 3, at 2346–47; *see also* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2318 (2006) ("[T]he Kagan thesis depends crucially on oversight by the coordinate legislative branch (typically controlled by a party in opposition to the President).").

258 *See* Partisan Composition, *supra* note 28. At present, thirty-two states have a legislature and governor from a single party (twenty-five Republican and seven Democratic); three more states have a divided legislature, with the governor sharing the party of one legislative chamber; and fourteen states have a legislature and governor from different parties. (Nebraska's legislature is unicameral and nonpartisan.) *See id.*; Alan Greenblatt, *Republicans Add to Their Dominance of State Legislatures*, GOVERNING (Nov. 9, 2016), http://www.governing.com/topics/elections/gov-republicans-add-dominance-state-legislatures.html [https://perma.cc/4SYJ-SLYN] (describing state legislative and gubernatorial control after the 2016 election). The prevalence of unified government in the states has returned despite a long period of decline after World War II. *See* Morris P. Fiorina, *An Era of Divided Government*, 107 POL. SCI. Q. 387, 391 (1992).

259 *See, e.g.*, Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2339 (2006).

executive branch, but a hostile legislature will push back against overreach.[260] In contrast, unified government diminishes the likelihood of interbranch checks that animate the Madisonian model of accountability.[261] As Professors Daryl Levinson and Richard Pildes put it, "[t]here is reason to fear that unified governments will do too much too quickly, too extremely, and with too little deliberation or compromise."[262] Although intraparty divisions certainly exist, a governor who shares the political party of the legislative majority will generally have an easier time advancing her policy agenda than one who does not.[263] Unified government facilitates interbranch collaboration on legislation and reduces the risk that the legislature will hold up the governor's appointments or override unilateral executive actions.[264]

3. Agency Pushback. — Executive agencies themselves can be another check against chief executives. At the federal level, an agency may create substantial friction against the President's agenda.[265] The agency, after all, has its own experts, a cadre of nonpartisan civil servants who do not serve at the President's pleasure and have a sense of their own legislative mission.

Although the circumstances of state agencies vary significantly among the states, there are reasons to believe that many state agencies provide a less robust check against chief executive direction than their federal counterparts. State agencies are often poorly funded.[266] They have, by and large, less expertise than their federal counterparts — not because they necessarily attract less talented individuals (a claim which has been made, but which surely casts undeserved aspersions on many excellent state-level employees), but because resource-strapped, understaffed agencies may lack sufficient numbers of employees with

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260 *See, e.g.*, *id.* at 2357.

261 *See id.* at 2343–47.

262 *Id.* at 2339; *see also* Katyal, *supra* note 257, at 2321 ("When the political branches are controlled by the same party, loyalty, discipline, and self-interest generally preclude interbranch checking.").

263 Unified government, of course, has implications for both governors and legislators, but as noted above, the governor's increased nimbleness and autonomy heighten the possibility of overreach. *Cf.* Vermeule, *supra* note 211, at 1197 (describing legislative collective action problems).

264 *See, e.g.*, THE EXECUTIVE BRANCH OF STATE GOVERNMENT: PEOPLE, PROCESS, AND POLITICS 194–96 (Margaret R. Ferguson ed., 2006).

265 To take one well-publicized example, the Bush White House's alleged politicization of science related to climate change led to resistance by career agency staff and some top agency scientists, including through high-profile resignations and public statements. *See generally* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 55.

266 *See, e.g.*, William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147, 172 (1991) (discussing state agency resource limitations); D. Zachary Hudson, Comment, *A Case for Varying Interpretive Deference at the State Level*, 119 YALE L.J. 373, 379 n.24 (2009) ("Managerial officials at federal agencies generally seem to earn about fifty percent more than their state counterparts.").

appropriate qualifications.[267] To be sure, these limitations may sometimes cut against a governor's agenda — for instance, by making it more difficult to develop new regulatory programs. But in the many states whose governors prioritize deregulation, the absence of a robust check from state agencies can facilitate the governor's agenda.

In addition to budgetary restrictions, limitations on the independence of agency employees may reduce pushback against the chief executive. The recent wave of civil service reform in the states, described in Part II, has removed civil service protection for some state employees.[268] Whether praised for increasing government efficiency or decried for inviting politicization and cronyism, these civil service cutbacks generally increase the governor's power over agency personnel decisions.[269] Other changes, like the strengthening of state-level OIRAs or requirements that only the governor's political appointees in any agency may communicate with the press, may also reduce agency staffs' ability or willingness to act as a check on central commands.[270] The likely result of these developments is a reduced pool of state employees with incentives

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[267] *See generally* ARTHUR EARL BONFIELD, STATE ADMINISTRATIVE RULE MAKING § 2.1.2, at 30–33 (1986) ("Sometimes . . . the lack of such expertise on the state level will entirely preclude state use of certain solutions to problems. For example, widespread reliance on formal economic impact statements may simply be impractical in some states because there are not enough people in state government that are competent to do such analyses at any sophisticated technical level." *Id.* at 33.). Claims of understaffed state agencies are commonplace; some are more dire than others. To take one recent example, the drinking water crisis in Flint, Michigan, has been tied to the understaffing of the Michigan Department of Environmental Quality that impeded the agency's ability to detect lead in the water supply. *See* Ted Roelofs, *Issues at DEQ Cited Years Before Flint Crisis*, DETROIT NEWS (Feb. 17, 2016, 11:32 PM), http://www.detroitnews.com/story/opinion/2016/02/17/issues-deq-cited-years-flint-crisis/80532786 [https://perma.cc/SNX6-VPYN]. For a thoughtful reflection on state agency expertise, see Aaron Saiger, Chevron *and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 580 (2014) (concluding that the extent of state agency expertise "is a question that awaits more work").

My inquiry into the incentives of state administrators to push back against gubernatorial direction should not be mistaken for a claim about the overall impact of state executive branches, which has been on the rise. *See generally* JON C. TEAFORD, THE RISE OF THE STATES: EVOLUTION OF AMERICAN STATE GOVERNMENT (2002). The total number of state government employees has risen substantially over the past half-decade, since the advent of major cooperative federalism and grant-in-aid programs. *See* JOHN J. DIIULIO JR., BRING BACK THE BUREAUCRATS 16 (2014). But these numbers are not an illuminating indicator of the potential for agency pushback against central authority. Not only are state employees unevenly dispersed — more than half work in higher education, hospitals, and corrections, *see State Government Employment: Totals by Job Type: 1960–2015*, GOVERNING, http://www.governing.com/gov-data/public-workforce-salaries/state-government-employment-by-agency-job-type-current-historical-data.html [https://perma.cc/YH6M-T5PY] — but the mere number of employees also does not resolve whether they are underpaid, have requisite qualifications, and so on.

[268] *See* Melissa Maynard, *States Overhaul Civil Service Rules*, USA TODAY (Aug. 27, 2013, 12:43 PM), http://www.usatoday.com/story/news/nation/2013/08/27/states-civil-service-government/2707519 [https://perma.cc/QYE4-L2WZ].

[269] *See, e.g.*, Neal D. Woods & Michael Baranowski, *Governors and the Bureaucracy: Executive Resources as Sources of Administrative Influence*, 30 INT'L J. PUB. ADMIN. 1219, 1220 (2007).

[270] *See supra* sections II.B–C, pp. 503–07.

to resist gubernatorial involvement that deviates from their legislative mandates or agency mission.

4. Courts. — Judicial review amounts to a potentially important check on executive power. For decades, legal scholars have debated the constitutional and statutory limitations on presidential action, and these debates have rested on the premise (sometimes explicit) that courts have a meaningful role to play in patrolling presidential power.[271]

Whatever one thinks the federal-court baseline is with respect to presidential power, state courts are a wild card. Unlike at the federal level, the majority of state high court judges are elected — some in partisan elections, some in nonpartisan elections, and some in retention elections.[272] The effect of election versus appointment on state judges' disposition toward state agencies (and state legislatures) is a question of ongoing debate, but the most likely answer is that context matters.[273] In some instances, state courts, especially those that do not feature a majority from their governor's political party, may stand poised to effect a check on governors that otherwise is lacking. But even in that context, there is reason to doubt the consistency and robustness of the court-imposed check. As detailed below, there are limitations on the existence and resources of organized litigants to question gubernatorial action. When litigants do bring cases, they may benefit from relaxed standing requirements in state courts[274] — but some scholars have found that state courts, like federal courts, tend to avoid deciding questions of executive power.[275] There is also scholarship showing that courts are less likely to buck majorities in times of unified government — which, as noted above, is the status quo in most states.[276]

5. Interest Groups and the Media. — Finally, the media and interest groups — a broadly construed civil society — offer another potentially important check on gubernatorial administration. Interest groups may

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[271] To be sure, some recent work challenges these prevailing accounts and depicts the presidency as an office that courts do not meaningfully constrain. *See* ACKERMAN, *supra* note 1; POSNER & VERMEULE, *supra* note 223.

[272] *E.g.*, AM. BAR ASS'N, FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES, http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf [https://perma.cc/G65A-KCP9].

[273] *See, e.g.*, Saiger, *supra* note 267, at 561–63, 561 n.50 (collecting sources and analyzing the effect of judicial selection methods on the applicability of the *Chevron* doctrine).

[274] *See, e.g.*, Christopher S. Elmendorf, Note, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs*, 110 YALE L.J. 1003, 1006–07 (2001) (describing how "state courts and legislatures often relax the background rules of standing," *id.* at 1006, including through public interest exceptions, taxpayer standing, and "environmental rights acts," *id.* at 1007).

[275] *See* Michael S. Herman, *Gubernatorial Executive Orders*, 30 RUTGERS L.J. 987, 1017–21 (1999) (reaching this conclusion about New Jersey courts).

[276] *See* Levinson & Pildes, *supra* note 259, at 2368 (discussing "a deep irony of countermajoritarian judicial review," namely, that judicial review is most needed but least availing "in eras of strongly unified government").

sound so-called "fire alarms" at critical junctures to alert the legislature to executive branch wrongdoing.[277] Interest groups and others may also challenge such action in court. More generally, civil society is an emerging pillar in the "administrative separation of powers,"[278] and interest groups and the media are linchpins in the factors of "credibility,"[279] or of "politics and public opinion"[280] that supposedly constrain Presidents. This check, too, is unlikely to be as forceful against governors as it is against Presidents.

Regarding interest groups, scholars and courts have long suggested that engagement by so-called public interest groups — advocates for generalized constituent interests — can provide some degree of protection against the "capture" of the executive branch by special interests or regulated entities. These public-oriented groups may have less of a presence at the state level. On this view, the national stage is more likely to attract the funding and organization necessary to propel public interest groups, whereas states are more likely to yield to factional or special interests.[281] Recent empirical studies support that claim, showing a higher probusiness skew among state lobbyists.[282] If that is true, then the interest-group ecosystem patrolling, publicizing, commenting on, and championing or resisting gubernatorial action would give more voice to concentrated groups and regulated parties than to groups addressing generalized constituent concerns or diffuse harms.[283] Of course, whether those groups check or fuel the governor's agenda

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[277] *See* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

[278] Michaels, *supra* note 198, at 520 (identifying civil society as one element of a new triadic "administrative separation of powers"). For a preliminary discussion of the role of civil society in checking agencies, see Miriam Seifter, *Complementary Separations of Power*, 91 N.Y.U. L. REV. ONLINE 186 (2016).

[279] RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS 186–90 (1990).

[280] POSNER & VERMEULE, *supra* note 223, at 15.

[281] *See* THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 2003); *see also* Warren L. Ratliff, *The De-Evolution of Environmental Organization*, 17 J. LAND RESOURCES & ENVTL. L. 45, 73 (1997); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1213 (1977). For a dissenting account, see Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 568–71 (2001).

[282] *Compare* David Lowery et al., *Explaining the Anomalous Growth of Public Sector Lobbying in the American States, 1997–2007*, 43 PUBLIUS 580, 583 (2013) (estimating the percentage of state-level private-sector lobbyists at close to seventy percent), *with* Lee Drutman, *The Business of America is Lobbying: Explaining the Growth of Corporate Political Activity in Washington, D.C.* 1 (unpublished manuscript), https://techliberation.com/wp-content/uploads/2012/12/business_of_america_is_lobbying.pdf [https://perma.cc/VB4M-SF76] (stating that "[c]onsistently, almost half" of federal lobbyists "represent business").

[283] *Cf.* James Q. Wilson, *The Politics of Regulation*, *in* THE POLITICS OF REGULATION 357, 369 (James Q. Wilson ed., 1980) (discussing the implications of laws with concentrated or diffuse costs and benefits).

depends on how their agendas compare to the governor's. But if public interest groups tend to be outmuscled at the state level, then there is less to allay fears of capture.

Nor is the media likely to be the same watchdog for executive excess that it is at the federal level. Media coverage can effect a meaningful check on elected officials;[284] as political scientists explain, media coverage is a measure of issue salience,[285] and issue salience affects politicians' responsiveness.[286] One reason for less attentive media coverage may be the lesser transparency accompanying gubernatorial as opposed to presidential action.[287] The media cannot report on what it cannot see, and state media groups may not have sufficient resources or incentives to conduct extensive records requests.

Another important phenomenon is the decline of state media outlets. To be sure, governors receive a significant share of state media's attention to state government.[288] But that is a slice of a shrinking pie. Recent studies have documented a pronounced reduction of state political coverage.[289] Fewer state newspapers are covering statehouses, and a very small fraction of local television stations assign a full- or part-time reporter to state politics.[290] Moreover, the economics of modern media make it less likely that state-level news outlets will pursue investigative journalism, which in turn can limit the amount of coverage that digs beneath gubernatorial talking points.[291] In all, unlike at the federal level, there is seldom a media fishbowl probing, exposing, and ultimately checking the acts of the state executive branch.[292]

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284 *See, e.g.*, William T. Coleman, Jr., *A Free Press: The Need to Ensure an Unfettered Check on Democratic Government Between Elections*, 59 TUL. L. REV. 243, 250 (1984).

285 *See* Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 67 (2000) (proposing media coverage as a measure of issue salience).

286 *See* David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CALIF. L. REV. 1125, 1175 (1999) (stating that "scholars of Congress are almost unanimous in their acceptance of the proposition that the desire for reelection makes legislators feel constrained by strongly held public opinion on salient issues"); *see also, e.g.*, BRYAN D. JONES & FRANK R. BAUMGARTNER, THE POLITICS OF ATTENTION: HOW GOVERNMENT PRIORITIZES PROBLEMS 216, 219 (2005).

287 *See supra* section II.B, pp. 503–05 (discussing state-level centralized review).

288 *See* MONCRIEF & SQUIRE, *supra* note 111, at 79.

289 *See* Jodi Enda, Katerina Eva Matsa & Jan Lauren Boyles, *America's Shifting Statehouse Press*, PEW RESEARCH CTR. (July 10, 2014), http://www.journalism.org/2014/07/10/americas-shifting-statehouse-press [https://perma.cc/8ZQ4-N8QJ]; Reid Wilson, *The Precipitous Decline of State Political Coverage*, WASH. POST (July 10, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/07/10/the-precipitous-decline-of-state-political-coverage [https://perma.cc/ESR4-WAV9].

290 *See* Enda et al., *supra* note 289.

291 *See* JAMES T. HAMILTON, DEMOCRACY'S DETECTIVES: THE ECONOMICS OF INVESTIGATIVE JOURNALISM 10 (2016).

292 *Cf.* Jacob E. Gersen & Anne Joseph O'Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157, 1161 (2009) (stating that federal "admin-

C. Distinctive State Checks

All of that said, state government includes some checks that the federal government does not. Here I explore these checks, and reflect on their ability to constrain gubernatorial action.[293]

1. The Multiple-Executive Structure. — The first and most obvious place to look is the multiple-executive structure of state constitutions, which scholars recognize as a dramatic and important difference from the Federal Constitution.[294] In some states and under some circumstances, the presence of independently elected (or otherwise constitutionally established) executive officers appears to be a serious check. For example, Zasloff and Professor Vikram Amar have each described how independently elected officers, including attorneys general and state controllers, have repeatedly thwarted or impeded gubernatorial prerogatives in California — over the issuance of same-sex marriage licenses, the listing of hazardous chemicals, and the implementation of the governor's fiscal plan.[295] Professor William Marshall has characterized the presence of independently elected attorneys general as a source of conflict that "foster[s] an intrabranch system of checks and balances."[296]

But the presence of separately elected officials does not necessarily spell gubernatorial constraint. First, and perhaps most importantly, the appetite for and likelihood of intra-executive conflict depends heavily on partisan affiliations. In just under three-quarters of the states, the attorney general and governor share the same political party.[297] Partisan affiliation is not an all-encompassing explanation for either official's behavior,[298] but party unification within the "divided executive"[299] no

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istrative agencies in the United States are some of the most extensively monitored government actors in the world").

[293] By necessity, this list is not exhaustive. To take one significant example, large cities, which I discuss mostly as objects of gubernatorial administration, can in some settings be checks against gubernatorial power.

[294] *See* Berry & Gersen, *supra* note 30, at 1386–87.

[295] *See* Vikram David Amar, *Lessons from California's Recent Experience with Its Non-Unitary (Divided) Executive: Of Mayors, Governors, Controllers, and Attorneys General*, 59 EMORY L.J. 469, 477–78, 484–87 (2009) (discussing litigation over controller's refusal to implement governor's fiscal plan); Zasloff, *supra* note 181, at 1113–14, 1113 n.152 (recounting attorneys general "refus[ing] to cooperate," *id.* at 1113, with governors on issues of same-sex marriage licenses and listings of carcinogenic chemicals).

[296] Marshall, *supra* note 30, at 2448.

[297] The current exceptions are Colorado, Illinois, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Montana, New Mexico, Vermont, and Maine (in which the legislature elects the attorney general). *See State Political Parties*, KAISER FAMILY FOUND., http://kff.org/other/state-indicator/state-political-parties [https://perma.cc/SA69-EUKE]; *Who's My AG?*, NAT'L ASS'N ATT'YS GEN., http://naag.org/naag/attorneys-general/whos-my-ag.php [https://perma.cc/NYA9-GR6K].

[298] For example, executive officials may be part of rivalrous segments within a political party, or may have personal rivalries for political capital.

[299] Marshall, *supra* note 30, at 2448.

doubt lessens the supposed checking function on gubernatorial action. Indeed, the opposite can result: independently elected executive officials may *bolster* rather than check gubernatorial power. When the attorney general and governor are from the same party, that is, the attorney general may act in ways that enhance and advance the governor's priorities — for example, by issuing legal opinions that legitimize novel exercises of gubernatorial power or by defending such actions in court. To the extent that the state constitutional structure, unlike the federal constitutional structure, partitions the executive power of governors and other state executive officers, they may "pool" their powers to advance a unified agenda.[300]

Moreover, as discussed earlier, it is not so clear that the multiple-executive structure necessarily confers legal independence. In some states, the attorney general is prohibited from taking positions at odds with the governor,[301] and some state supreme courts have held that the governor's constitutionally "supreme" authority entails the power to direct the positions taken by other constitutional officers.[302] Even if these are minority approaches with respect to attorneys general, it is not clear that opposing precedents extend to the less-studied and less-salient context of other state constitutional officials, like controllers, insurance commissioners, and education superintendents.[303] Some states, too, grant governors broad (or at least highly ambiguous) removal authority that explicitly or implicitly extends to constitutional officers.[304] And, again, even where governors lack authority over constitutional officers or have unclear authority, there are nonetheless examples of governors claiming the ability to direct or fire such officials.[305]

Finally, focusing on the multiple-executive structure can obscure the substantial control governors possess over the majority of state agencies that have no constitutional status. As Part II describes, governors possess an array of tools to control such agencies, including tools that Presidents do not. To assume that the multiple-executive structure makes governors weak, or less powerful than Presidents, overlooks the tools

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300 This term comes from Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 213 (2015), which identifies the phenomenon of pooling in the federal executive branch. As Renan explains, "[t]hrough pooling, the executive augments capacity by mixing and matching resources dispersed across the bureaucracy." *Id.*

301 *See, e.g.*, People *ex rel.* Deukmejian v. Brown, 624 P.2d 1206, 1209–10 (Cal. 1981).

302 *See, e.g.*, State *ex rel.* Stubbs v. Dawson, 119 P. 360, 363 (Kan. 1911) (holding that the governor has the power to direct the attorney general).

303 *See* Coyne v. Walker, 879 N.W.2d 520, 525 (Wis. 2016) (holding unconstitutional, as applied to the State Superintendent of Education, a statute authorizing the governor to halt agency rulemaking, because the state constitution expressly vested "supervision of public instruction" in the Superintendent); Amar, *supra* note 295, at 484–87 (distinguishing attorney general from state controller).

304 *See* ASIMOW & LEVIN, *supra* note 25, at 531–34.

305 *See* sources cited *supra* note 222.

that governors possess with respect to the vast majority of state executive entities not established by the state constitution.

2. The Supremacy Clause and the Federal Bureaucracy. — Governors are constrained in another way that Presidents are not: by the Supremacy Clause. The federal executive branch, through cooperative federalism programs and other state-affecting regulations, can significantly limit the range of permissible actions of the state executive branch.[306] For example, a governor seeking to regulate state lands or state agriculture may discover that certain preferred policies have been ruled out by conflicting federal regulations regarding protected wetlands.[307] And there are many more substantive areas into which the machinery of cooperative federalism now extends.[308]

This is a real limitation, but it is also an opportunity. Governors may use the requirements of federal law as an opening to discuss and direct attention to their own ideas (and sometimes to increase their visibility as future presidential candidates). In addition to this expressive value, governors can impose substantial friction on federal policy, making it harder for the federal government to achieve its goals. As Professor Larry Kramer's work on federalism details, "federal dependency on state administrators" gives the latter a voice in federal policymaking.[309] More recently, Professor Abbe Gluck and others have described how, by "exerting their powers from the *inside*,"[310] states implementing federal programs can exact concessions, waivers, or other accommodations. These modes of influence fit into an account of "uncooperative federalism," set forth by Professors Jessica Bulman-Pozen and Heather Gerken, in which a state can use its subordinate or insider status to act as a "dissenter, rival, and challenger."[311] Thus, while the Supremacy Clause imposes a constraint on governors that Presidents do not face, a check runs the other way as well.

3. Referenda and Ballot Initiatives. — Finally, roughly half of the states, unlike the federal government, empower citizens to affect and potentially check government action through some combination of popular referenda, initiatives, and recalls.[312] These mechanisms originated

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306 Of course, legislation and the Federal Constitution also hem in gubernatorial action, but those constraints also apply to the President.

307 The controversy over the EPA's recent "Clean Water Rule" involved opposition from governors arguing that the EPA had overstepped its bounds. *See In re* U.S. Dep't of Def., U.S. EPA Final Rule: Clean Water Rule: Definition of "Waters of U.S.," 817 F.3d 261 (6th Cir. 2016), *cert. granted sub nom.* Nat'l Ass'n of Mfrs. v. Dep't of Def., 137 S. Ct. 811 (2017).

308 *See, e.g.*, Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 1997–2002 (2014).

309 Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1544 (1994).

310 Gluck, *supra* note 308, at 2005.

311 Bulman-Pozen & Gerken, *supra* note 139, at 1258.

312 For an overview, see *Initiative, Referendum and Recall*, NAT'L CONF. ST. LEGISLATURES (Sept. 20, 2012), http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx [https://perma.cc/9C9N-HFUR]; and *Initiatives and Referendum States*,

in state constitutions during the Progressive Era as an attempt to rein in unresponsive state governments.[313] Taken for all they are worth, these citizen-action devices have the potential to constrain governors — not only by actually replacing the governor through a recall,[314] but also by imposing new laws that trump or limit gubernatorial policy prerogatives and that the governor cannot veto.[315]

But here again, the check posed by direct democracy is limited, and not just because it exists in fewer than half of the states. Like the other checks discussed in this section, the initiative turns out to be not just a check on governors, but also a tool and opportunity for them. It is no secret that the initiative process has become a major industry — often involving the expenditure of millions of dollars by professional lobbyists serving organized interests. What may get less attention is that, as Professors David Magleby and Elizabeth Garrett have each explained, governors now regularly use the initiative to their own advantage, sponsoring initiatives that appear on the ballot during their gubernatorial campaigns.[316] Backing an initiative may help a governor achieve a policy goal when the legislature will not act on it, or it may generate attention for issues governors want the public to focus on.[317] These initiatives may allow a governor "to make more credible policy commitments to voters,"[318] or to increase voters' ability to understand a particular policy.[319] Or they may be a way for governors (or their allies) to try to affect voter turnout and thus influence electoral outcomes.[320] Whatever the motivation, the extensive gubernatorial involvement in engineering and supporting initiatives undermines the claim that direct democracy in the states is a consistent restraint on gubernatorial power.

NAT'L CONF. ST. LEGISLATURES (Dec. 2015), http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx [https://perma.cc/3C4C-7Q6Z]. NCSL reports that twenty-four states allow popular referenda, eighteen states permit recall of state officials, and twenty-four states allow citizen initiatives. *Id.*

313 *See* TARR, *supra* note 50, at 158.

314 *See Initiative, Referendum and Recall*, *supra* note 312 (identifying the recall of California Governor Gray Davis, who was replaced by Arnold Schwarzenegger, as a salient recent example).

315 For discussion and examples in the context of land use, see Marcilynn A. Burke, *The Emperor's New Clothes: Exposing the Failures of Regulating Land Use Through the Ballot Box*, 84 NOTRE DAME L. REV. 1453, 1476–1520 (2009).

316 *See* Elizabeth Garrett, Commentary, *Crypto-Initiatives in Hybrid Democracy*, 78 S. CAL. L. REV. 985, 986 (2005) (noting that scholarship on initiatives has focused on "the influence of organized and well-funded interest groups," rather than "the involvement of political actors"); David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 29 (1995) (collecting examples).

317 *See* Magleby, *supra* note 316, at 28 (noting that "placing an initiative on the ballot, regardless of the outcome of the election, generates widespread media attention for [an] issue").

318 Garrett, *supra* note 316, at 987.

319 *See id.* at 988.

320 *See* Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policy-making by Direct Democracy*, 78 S. CAL. L. REV. 949, 969–80 (2005).

IV. GUBERNATORIAL ADMINISTRATION AND PUBLIC LAW

The prior sections have advanced the claim that governors, owing to a series of legal and practical developments, now exercise far more power than they used to over state agencies — and in some cases, more than Presidents exercise over federal agencies — in an environment of relatively weak checks and balances. To reiterate, this depiction of gubernatorial administration is an account of what is possible under modern law in many states, not a universal claim. But wherever and whenever gubernatorial administration takes hold, it has significance for a number of ongoing debates in public law.

This Part explores these implications. It explains how the rise in governors' power sheds new light on issues of federalism, executive power, and state and local relations. Gubernatorial administration should please those seeking state bulwarks against federal overreach, in part because it increases state resilience by uniting and rationalizing state governance. But strong versions of gubernatorial administration, involving consolidated executive power in the absence of meaningful checks, threaten to undermine rule-of-law values and complicate normative arguments for devolving power to states in the first place. In the local domain, gubernatorial administration offers up a political lens for understanding debates over preemption and local control.

A. Federalism

1. Federalism and State Capacity. — First, gubernatorial administration offers optimism to those concerned about states' capability to resist federal overreach.[321] Commentators have long expressed concern that "states [are] involved in a losing battle against the encroachments of the strong central authority of the Federal Government."[322] Governors' centralized control of state administration may help. Unlike the fragmented, chaotic state bureaucracies of earlier eras, centralized administration helps states marshal resources to further unified, coherent positions, and to be productive rather than internally stalled. Whether inside or outside federal programs — setting state energy policy, for example, while the CPP litigation played out; or fighting Zika;[323] or

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321 *See, e.g.*, Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1921–33 (2014) (critiquing the framing of state "autonomy," *id.* at 1922); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1392–1405 (1997); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 63–65 (2004).

322 Grad, *supra* note 93, at 929 (describing this view as "part of the rhetoric of the 1960's"); Ernest Young, *Federalism as a Constitutional Principle*, 83 U. CIN. L. REV. 1057, 1076 (2015) (expressing doubt that nonjudicial safeguards suffice to protect federalism given the "pretty inexorable expansion of national power vis-à-vis the States over the past two centuries").

323 *See Six-Step New York State Zika Action Plan*, N.Y. ST., https://www.ny.gov/programs/6-

developing plans to improve state criminal justice systems[324] — gubernatorial administration highlights states responding swiftly to the pressing issues of our day. The unitary figure of the governor, unimpeded by collective action problems and internal veto points, now has an army of agency resources at her disposal.[325] And, as discussed further below, governors' broader perspectives on state government may make them more likely than siloed bureaucrats to oppose federal overreach.[326]

2. Governors and the Safeguards of Federalism. — Governors bring this capacity to bear in their numerous interactions with the federal government. In turn, gubernatorial administration sheds light on "process federalism," theories of how various institutions may protect federalism's core values in the absence of judicial enforcement.[327]

Six decades ago, Professor Herbert Wechsler famously coined the term "the political safeguards of federalism," which he rooted in states' "crucial role in the selection" of the Senate, the House, and the President.[328] Decades later, Kramer and other scholars offered a fresh take on the political safeguards, locating the real protection for states in political parties, as well as — most relevant here — the "interlocking administrative bureaucracy."[329] In this view, states have clout both because the federal government needs state agencies' help to carry out its cooperative federalism programs, and also because state and federal administrators develop strong personal and cultural ties rooted in their shared substantive missions.[330] These ties may exceed state agencies' ties to their own government, a concept known as "picket fence federalism."[331] Even for scholars who disagree about whether states are losing ground

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step-new-york-state-zika-action-plan [https://perma.cc/X9LS-VR9D].

[324] *See, e.g.*, Ill. Exec. Order No. 15-14 (Feb. 11, 2015), https://www2.illinois.gov/Documents/ExecOrders/2015/ExecutiveOrder2015-14.pdf [https://perma.cc/4F5Q-WF36] (establishing the Illinois State Commission on Criminal Justice and Sentencing Reform).

[325] *See, e.g.*, ALAN ROSENTHAL, GOVERNORS AND LEGISLATURES: CONTENDING POWERS 22 (1990) (describing governors' "power of unity").

[326] *See* Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1241–42 (2001). I do not suggest, however, that governors will consistently pursue state power for its own sake. Rather, their substantive, political, and ideological commitments may motivate them to oppose or support national initiatives. *See* Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 983 & n.128 (2014) (collecting sources). My point here is that they are better positioned to take a broad and considered view of the impact of a federal policy on the state, constituents, and other stakeholders.

[327] *See* Bulman-Pozen, *supra* note 321, at 1921–22, 1921 n.4 (describing process federalism); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001).

[328] Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954).

[329] Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism,* 100 COLUM. L. REV. 215, 224 (2000); *see also* DEIL S. WRIGHT, UNDERSTANDING INTERGOVERNMENTAL RELATIONS 63 (1978); Kramer, *supra* note 309, at 1544.

[330] *See* Kramer, *supra* note 309, at 1542–44, 1554.

[331] *See id.* at 1554.

or whether state autonomy is an important goal, the study of how states engage with the federal branches of government has emerged as a critical enterprise to understanding modern governance.[332]

Gubernatorial administration refines these accounts. As an initial matter, it showcases governors' central role in mediating state reactions to national policy. It thus provides a counter-story to the administrative safeguards account, and its corollary of picket fence federalism, advanced by Kramer and public administration scholars. The picket fence metaphor captured their claim that "state agency officials . . . feel primary loyalty" not to the governor or state legislature, but "to the federal agencies that share the state agency's mission."[333] Scholars have noted the potential of this arrangement to "coopt[]"[334] state agencies into federal missions and diminish the role of "elected political generalists" who might more likely push back against federal mandates.[335] For better and worse, gubernatorial administration paints the opposite picture. Because governors have increased ability to direct state agencies, state bureaucracies become less scattered and decentralized, and their messages to federal counterparts less apolitical and parochial. State input into federal programs once again becomes the domain of "elected political generalists" — here, the governor.

Gubernatorial administration also adds detail to more recent federalism scholarship that does attend to the role of governors. Some legal scholars, most prominently Bulman-Pozen, have explored "executive federalism," in which state and federal executive interactions, rather than legislative pronouncements at either level, are drivers of national policy.[336] Gubernatorial administration reinforces executive federalism and adds to it, highlighting centralized executive control as a key mode of state engagement. Many instances of state-federal engagement involve governors exercising their central control over state agencies to achieve state positions they could not realize alone. Governors cannot themselves implement or refrain from implementing the CPP, for example; they need directive authority to instruct state agencies to do so.[337] The same pattern applies to numerous state positions regarding federal law or policy: to recognize same-sex marriage or impede such

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[332] *See, e.g.*, Bulman-Pozen, *supra* note 321, at 1932–33; Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1889–90 (2014).

[333] Hills, *supra* note 326, at 1236; *see also* Kramer, *supra* note 309, at 1554 (describing this phenomenon).

[334] Hills, *supra* note 326, at 1242.

[335] *Id.* at 1241; Frank J. Thompson, *The Rise of Executive Federalism: Implications for the Picket Fence and IGM*, 43 AM. REV. PUB. ADMIN. 3, 5 (2013) (describing "problems for democratic governance" arising from "excessive bureaucratic autonomy").

[336] Bulman-Pozen, *supra* note 33, at 954–55.

[337] *See supra* section II.B, pp. 503–05.

recognition;[338] to advance the federal aim of protecting transgender rights or refuse to do so;[339] to participate in federal refugee resettlement or to withdraw.[340] And in some instances gubernatorial administration gets a boost from the federal government; for example, the Federal Department of Health and Human Services has decided that an elected state insurance commissioner may not establish a state health insurance exchange under the ACA without the governor's support.[341]

All of these examples involve governors marshaling the resources and authority of state agencies. They yield state engagement that is more coherent, robust, and arguably more partisan than earlier eras of more fragmented state administration allowed. As governors gain control of executive branches, state positions vis-à-vis the federal government, through policy statements, negotiations, and litigation positions,[342] begin to bear a political, rather than bureaucratic, gloss. State inputs into national policymaking, that is, will flow more from Kaufman's "executive leadership" model than from "neutral competence"[343] — in modern parlance, more from politics than

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338 *See, e.g.*, Robert T. Garrett, *Abbott: Texas Will Protect Religious Liberty of Gay Marriage Foes*, DALLASNEWS.COM (June 2015), https://www.dallasnews.com/news/news/2015/06/26/abbott-texas-will-protect-religious-liberty-of-gay-marriage-foes [https://perma.cc/5BZG-WLFJ]; Editorial, *As Gov. Sam Brownback Signals Intolerance with Gay Marriage Directive, Gov. Jay Nixon Promotes Equality*, KAN. CITY STAR (July 8, 2015, 5:36 PM), http://www.kansascity.com/opinion/editorials/article26818819.html [https://perma.cc/EL5U-JSMS].

339 *Compare* Sarah Chaffin, *Arkansas Governor Recommends Schools "Disregard" Obama's Transgender Directive*, KATV NEWS (May 13, 2016), http://katv.com/news/local/arkansas-governor-recommends-schools-disregard-obamas-transgender-directive-05-13-2016 [https://perma.cc/ER96-YFN5], *with Governor Cuomo Introduces Regulations to Protect Transgender New Yorkers from Unlawful Discrimination*, N.Y. ST. (Oct. 22, 2015), https://www.governor.ny.gov/news/governor-cuomo-introduces-regulations-protect-transgender-new-yorkers-unlawful-discrimination [https://perma.cc/PY22-QWDQ].

340 *See supra* note 13.

341 In Mississippi, the elected state insurance commissioner sought to establish a health insurance exchange under the ACA over the governor's objection. The state attorney general concluded that the commissioner was authorized to do so. *See* Miss. Op. Att'y Gen. 2013-00010, 2013 WL 764876 (Jan. 15, 2013). But the federal agency reviewing the application rejected it based on a *federal* requirement of gubernatorial approval. *See* Letter from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, Ctrs. for Medicare & Medicaid Servs., U.S. Dep't of Health & Human Servs., to Mike Chaney, Comm'r of Ins., Miss. Ins. Dep't (Feb. 8, 2013), https://www.cms.gov/CCIIO/Resources/Files/Downloads/ms-exchange-letter-02-08-2013.pdf [https://perma.cc/8DTC-5ESN]. In other instances, the gubernatorial role is specified in the federal statute itself. *See* 42 U.S.C. § 4368 (2012) (conditioning EPA grants to "qualified citizens groups" on certification of the group by the governor, in consultation with the state legislature); 20 U.S.C. § 7920 (2012) (requiring state educational agencies to "consult in a timely and meaningful manner" with their governor in developing state plans under the Every Student Succeeds Act).

342 Even where governors lack formal authority to direct litigation by attorneys general, *cf. supra* pp. 527–28, governors often involve themselves in multi-state impact litigation on national issues, align themselves with its goals, and take credit for its successes.

343 *See* Herbert Kaufman, *Emerging Conflicts in the Doctrines of Public Administration*, 50 AM. POL. SCI. REV. 1057, 1062–67 (1956).

expertise.[344] In turn, governors, free of picket fence allegiances, motivated by their own electorate (and elections), and sometimes fueled by partisan opposition to the national government, may be more dedicated watchdogs of state affairs.[345]

B. Executive Power and Accountability

Gubernatorial administration can also deepen our understanding of executive power — and may simultaneously complicate the normative arguments for devolving power to states.

1. The Highs and Lows of Executive Power. — The rise in governors' powers implicates ongoing conversations about the expansion — perhaps "inevitable"[346] — of federal executive power in the domestic realm. Scholars have debated for decades the President's authority to direct agency outcomes,[347] to remake agencies from within,[348] and to effect unilateral policy change with "a pen and a phone," even as Congress sits gridlocked.[349] Gubernatorial administration shows us what a stronger, less constrained executive looks like. It therefore highlights the highs and lows of a powerful executive and in turn sharpens appreciation of executive power's benefits and costs.

Consider the normative debates over the President's ability to direct agency decisions (and to fill agencies with loyalists). On the benefits side, those who support unified control of the administrative state generally tout values of effectiveness, energy, and accountability.[350] A single President supervising the bureaucracy is more visible than an assortment of agency heads, and unlike those agency heads, she can be held

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344 *See, e.g.*, Freeman & Vermeule, *supra* note 265, at 54–66.

345 On issues of high salience, partisan motivations may well overwhelm others, leading to a predictable checkerboard of red and blue states supporting or opposing national initiatives. *See* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080 (2014). But on lower-salience issues, or issues that place partisanship in tension with the state fisc or perceived voter preferences, states' positions on national interventions may not track party lines or presidential preferences. For one recent example, see Mattie Quinn, *Where GOP Governors Stand on "Repeal and Replace,"* GOVERNING (Jan. 13, 2017), http://www.governing.com/topics/health-human-services/gov-republican-governors-obamacare-repeal.html [https://perma.cc/HU26-GMR6].

346 *See* William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters,* 88 B.U. L. REV. 505, 509 (2008).

347 *See generally* Strauss, *supra* note 3.

348 *See* David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1096 (2008). In Moe's words, presidential attempts to control in this way are a form of "politicization," whereas attempts to control agency outputs through OIRA are a form of "centralization." *See* Moe, *supra* note 115, at 244–45.

349 *See* Tamara Keith, *Wielding a Pen and a Phone, Obama Goes It Alone*, NPR (Jan. 20, 2014, 3:36 AM), http://www.npr.org/2014/01/20/263766043/wielding-a-pen-and-a-phone-obama-goes-it-alone [https://perma.cc/F7NU-ASJT].

350 *See* Berry & Gersen, *supra* note 30, at 1402–03; Kagan, *supra* note 3, at 2331–46. I bracket in this discussion the unitarian argument that the Constitution compels directive authority and focus instead on nonconstitutional normative grounds.

accountable through elections for her policy choices.[351] A single President can also bring "dynamism"[352] and "dispatch"[353] unavailable to scattered agency heads or a collectively sluggish bureaucracy. In turn, Presidents may be uniquely well positioned in the federal government to get things done.[354] A President sitting atop the hierarchy can coordinate agency efforts, establish overarching priorities, and facilitate the coherence and efficiency of administrative outputs.[355]

On the flip side, scholars worry that presidential control of the administrative state imperils "neutral competence,"[356] injects politics where expertise should govern, and thwarts deliberation and the diversity of perspectives (and congressional intent to promote those values).[357] Add these costs up, and you get an overarching concern about tyranny[358] and the subversion of the rule of law.[359] In light of these concerns, critics of modern presidential power often seek to reinvigorate checks on the President.[360] Indeed, even fans of presidential administration hinge their support on the presence of adequate checks on presidential power.[361] The shared premise is that a centrally dominated bureaucracy requires careful and capable watchdogs to avoid costs to rule-of-law values.

Presidential administration to date, it turns out, has displayed these costs and benefits on a modest scale. Presidents, after all, do not actually veto or rescind agency rules, and they have been shy about claiming the legal power to direct agency outcomes, even with regard to executive agencies. They can politicize agencies to some degree through staffing, but they cannot reorganize or disband agencies altogether. They can veto agency-related appropriations, but have no line-item veto. They are bound, at least by convention, to respect the independence of independent agencies.[362] And most of all, they are monitored and checked from all sides — by courts, a divided government, a watchful Congress,

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351 *See* Kagan, *supra* note 3, at 2331–32.

352 *Id.* at 2339.

353 THE FEDERALIST NO. 70, *supra* note 281, at 423 (Alexander Hamilton).

354 *See* Berry & Gersen, *supra* note 30, at 1406–07 (describing the Framers' concern with "energy" as pertaining to "the incentive for government officials to be diligent in the performance of public functions," *id.* at 1407); Kagan, *supra* note 3, at 2339 (describing Presidents' "capacity and . . . willingness" to regulate, "with a fair degree of expedition, to solve perceived national problems").

355 *See* Kagan, *supra* note 3, at 2340.

356 *See* Moe, *supra* note 115, at 239 (quoting Kaufman, *supra* note 343, at 1057) (describing but critiquing the prominence of this ideal).

357 *See, e.g.*, Barron, *supra* note 348, at 1098–99.

358 *See, e.g.*, 1 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS bk. XI, ch. 5, at 182–83 (J.V. Prichard ed., Thomas Nugent trans., D. Appleton & Co. 1900) (1748).

359 *E.g.*, SHANE, *supra* note 38, at 114–15.

360 *See* ACKERMAN, *supra* note 1, at 143 (proposing a "Supreme Executive Tribunal").

361 *See* Kagan, *supra* note 3, at 2345–46.

362 *See* Vermeule, *supra* note 211, at 1165.

and a vibrant civil society.[363] Presidential actions encounter seemingly indefatigable scrutiny from what Professor Jack Goldsmith calls a "synopticon" of watchdogs.[364]

But governors, as explained earlier, generally possess the above-named powers and lack a corresponding barrage of checks. Gubernatorial administration thus amps up both the benefits and costs of the executive-control model. As to the benefits, today's governors are energetic and effective — enacting, as noted, not just the occasional policy, but entire policy platforms. If the value of "energy" suggests a value in government doing things — taking action, making policy, realizing a regulatory (or deregulatory) vision — then gubernatorial administration suggests virtues of giving the executive even greater administrative authority in a less constrained environment. Indeed, the productivity of modern state governments provides a stark contrast to the gridlock and paralysis that sometimes befall the federal government, even with powerful Presidents at the helm. And this dynamism and productivity come with a type of accountability praised in presidential administration: governors are visible and they are elected (albeit in elections that usually have lower turnout), and people commonly refer to state agencies as part of the "[Governor's name] Administration" in much the same way they do for Presidents.

At the same time, if concentrated executive power is cause for concern, gubernatorial administration — more extensive powers with weaker checks — raises significant risks. By claiming the reins of administrative states that were once decentralized and heterogeneous, governors inevitably crowd out diversity of thought and expertise. By requiring agency positions to align with their platforms, governors very likely inject politics into administration. By doing all of this in a manner that is usually opaque and seldom closely checked, they raise the very rule-of-law concerns that presidential detractors fear.

2. Executive Power in the State Context. — Notions of the highs and lows of executive power do not map perfectly onto the state context. Rather, some distinguishing features of state government and the federal system may make gubernatorial administration more or less salutary.

On one view, federalism values might validate a degree of chief executive power that would be worrisome at the federal level. The argument here would be that, insofar as strong executive control also enhances state resilience against federal overreaching, the costs of gubernatorial power described above are offset by benefits to the federal system as a whole, especially in the face of a strong national government.

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[363] *See* Kagan, *supra* note 3, at 2346.

[364] JACK GOLDSMITH, POWER AND CONSTRAINT 207 (2012).

We might imagine this as a sort of good-government "system effect,"[365] comprising a state level of active, unconstrained government to resist the more powerful federal government. Moreover, one could argue that the ideal degree of executive constraint is unclear,[366] and that even if checking government power is a legitimate goal, federal separation of powers norms and jurisprudence are by no means inevitable.[367]

But that doesn't mean that limiting executive power is misplaced in state constitutional law, or that attempts to do so are futile. Complicated and diverse as state constitutions are, they share a deep concern about guarding against government excess to protect individual liberty.[368] This might be a feature of what Professor Paul Kahn calls "American constitutionalism"[369]: a desire to build in multiple checks on state action out of a Madisonian recognition that men are not angels.[370] No doubt most governors are public-minded, law-abiding leaders — but the constitutional plan, both state and federal, calls for the structure of government to properly cabin those who are not.[371]

Indeed, the normative grounds for federalism, and for devolving power to states, arguably bolster the case against the strongest forms of gubernatorial administration. One pillar of the normative case for state power is that state government will be more closely monitored and checked than the federal government.[372] At the state level, the thinking goes, it will be "far easier for citizens to exercise a greater and more effective degree of control over their government officials."[373] This view has roots in the sentiments of the Founding-era Antifederalists, who believed that "states could be trusted with substantial power because they were under the close watch and secure control of their citizens."[374]

To be sure, there are some reasons to think that gubernatorial power only solidifies state government accountability. After all, centralized power, rather than power dispersed among bureaucrats, fosters electoral

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[365] *See generally* Adrian Vermeule, *The Supreme Court, 2008 Term — Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4 (2009).

[366] *See, e.g.*, Cristina M. Rodríguez, *Complexity as Constraint*, 115 COLUM. L. REV. SIDEBAR 179, 184–85 (2015).

[367] *See* M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 604 (2001).

[368] *See* WOOD, *supra* note 48, at 453; *supra* section III.A, pp. 515–518.

[369] *See* Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1147 (1993).

[370] *See* THE FEDERALIST NO. 51, *supra* note 281, at 319 (James Madison).

[371] *See* TARR, *supra* note 50, at 157–61; THE FEDERALIST NO. 47, *supra* note 281 (James Madison).

[372] *See, e.g.*, Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1504 (1987) (book review) (asserting that "direct popular control" of government officials "is stronger" at the state level).

[373] Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 778 (1995).

[374] Levinson, *supra* note 36, at 49.

accountability. And, as Professor David Schleicher has argued, governors may have a democratic edge as compared to other state elected officials, since citizens are more likely to have informed preferences about governors.[375] Moreover, if a person is dissatisfied with a governor's leadership, she can, as a conventional federalism argument goes, "exit" to a state that suits her better.[376]

But electoral accountability only goes so far. If, as Part III describes, governors lack surrounding institutions that meaningfully monitor and check their actions, it is unlikely that modern state government will be closely watched or securely controlled in the way that small-government principles suppose. It is also unlikely that exit options mitigate the problem. Not only are Tieboutian conceptions of seamless mobility[377] undermined by more recent scholarship about the stickiness of one's state of residence and high costs of relocating,[378] but the sorts of governance risks caused by strong gubernatorial administration would be common to many states and thus difficult to escape.[379] All told, gubernatorial administration holds real promise for the efficacy, rationality, and resilience of state government — but loses legitimacy without adequate oversight.

3. State-Local Relations. — Gubernatorial administration also offers purchase on relations between state and local governments. Scholars often couch state-local disputes in terms of state power and local power, with each entity presumably seeking to defend its own turf.[380] Courts, for their part, evaluate state-local conflicts through the framework of preemption, which often perpetuates (explicitly or implicitly) the notion of states and localities as undifferentiated entities, each of which desires power.[381] Even within the valuable work shedding new light on state-local relations — for example, highlighting the role that business groups play in challenging local regulations,[382] or the fascinating array of local administrative entities, many of which are subject to both state and local oversight[383] — there is seldom much discussion of the role of governors.

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375 *See* David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 775–76 (2017).

376 *See* Levinson, *supra* note 36, at 102–05 (discussing and critiquing this justification).

377 *See generally* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); Aaron J. Saiger, *Local Government Without Tiebout*, 41 URB. LAW. 93 (2009).

378 *See, e.g.*, Richard Briffault, *Our Localism: Part II — Localism and Legal Theory*, 90 COLUM. L. REV. 346, 420–21 (1990) (highlighting costs of "[i]nterjurisdictional movement," *id.* at 420, and their greater effect on poorer populations).

379 *Cf.* Levinson, *supra* note 36, at 102–05 (noting that "federalism-as-exit," *id.* at 102, only helps those interests that "can command majority support," *id.* at 105, in a state).

380 *See, e.g.*, Rodriguez, *supra* note 41, at 630; Weiland, *supra* note 41, at 265.

381 *See* GERALD E. FRUG ET AL., LOCAL GOVERNMENT LAW: CASES AND MATERIALS 127–28 (6th ed. 2015) (collecting state preemption cases).

382 *See* Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1136–40 (2007).

383 *See* Davidson, *supra* note 40, at 570–72; Aaron Saiger, *Local Government as a Choice of Agency Form*, 77 OHIO ST. L.J. 423, 436–37 (2016).

The absence of governors from this dialogue is understandable; local preemption, for example, is formally a legislative affair. But gubernatorial administration provides another perspective and a different set of explanations for state-local relations. It highlights that governors often are, in fact, relevant actors in engaging localities, sometimes motivating or partnering with state legislators or sometimes working on their own. And the gubernatorial administration lens emphasizes, as others have recognized, that state actors in state-local conflicts have objectives other than simply state power for its own sake.[384] Governors have higher priorities, including their substantive policy agendas, the principles and success of their political parties, and their reelections or political futures.[385] Seen in that view, governors may sometimes try to stamp out local control, but they may do so for predominantly political reasons, and may reverse themselves as the political context changes. Perhaps more surprisingly, governors may sometimes choose to *enhance* local power as a means of advancing a substantive policy agenda.

To take the latter scenario first, consider the issue of environmental and "smart-growth" restrictions on land use. Land use and permitting of new developments is traditionally a local function. But owing to the possibility that localities will ignore or undervalue externalities, many states require regional or state-level assessments of major development projects.[386] Ramping up the scrutiny imposed by this state or regional body decreases local government prerogative; decreasing its authority affords local governments flexibility. Governors play a role in this regulatory scheme, as in environmental regulation more broadly, by issuing executive orders,[387] appointing agency heads and directing agency action, making funding decisions, and reorganizing the relevant agencies. For example, Governor Rick Scott of Florida campaigned on the issue of eliminating the state's regional growth management agency, the Department of Community Affairs, as part of his platform of promoting economic growth.[388] Once in office, he signed into law a bill that abolished the agency.[389] This type of action empowers cities, which often

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384 *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 945–46 (2005).

385 *Cf. id.* at 948–50 (explaining that government officials are motivated by "political incentives," *id.* at 948, that may not further their jurisdiction's power or wealth).

386 *See, e.g.*, Patricia E. Salkin, *From* Euclid *to Growing Smart: The Transformation of the American Local Land Use Ethic into Local Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 109, 119–20 (2002) (describing state role).

387 *See id.* at 121–25 (cataloguing executive orders and task forces related to smart growth).

388 *See* John Kennedy, *How Rick Scott's Regulations Rollback Led to Today's Building Boom*, PALM BEACH POST (May 27, 2016, 8:00 AM), http://www.mypalmbeachpost.com/news/news/state-regional-govt-politics/florida-statewide-building-boom-follows-rollback-o/nrTy6/ [https://perma.cc/F3JD-K652].

389 *Id.*

resist state-level or regional planning, in the service of the governor's substantive policy agenda.[390]

More commonly, governors involve themselves in limiting local authority — but not necessarily because they crave state power for its own sake. To begin, governors commonly use executive actions to take control of local affairs in times of crisis. These temporary assertions of state authority may be familiar, but they can also be controversial and consequential. In Ferguson, Missouri, for example, Governor Jay Nixon used executive orders to set a local curfew, deploy the State Highway Patrol, and activate the state militia to address high-profile civil and racial unrest in the city.[391] Groups from all sides criticized the governor's reaction — as too late, too anti–law enforcement, and too supportive of the use of force.[392]

In other instances, gubernatorial influence on local affairs is animated by political differences. One salient pattern of late has been Republican-led states preempting local ordinances (from Democrat-led cities) on social and labor issues, an approach reportedly promoted by ALEC.[393] The preemptive law is usually legislation, but that can obscure the often instrumental role governors play. For example, Arizona Governor Doug Ducey referred to local wage and employment laws as "trendy, feel-good policies that are stifling opportunities across the nation," and he vowed to use "every constitutional power of the Executive Branch and leverage every Legislative relationship to protect small businesses" that such laws affect — including by cutting off state aid to cities that pass these laws.[394] Governor Pat McCrory of North Carolina

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390 Another example of governors empowering local governments comes from education. Governor Jerry Brown recently spearheaded California's school funding legislation, which affords school districts greater discretion in spending state funds. *See* Press Release, Office of Governor Edmund G. Brown Jr., Governor Brown Signs Historic School Funding Legislation (July 1, 2013), https://www.gov.ca.gov/news.php?id=18123 [https://perma.cc/X36U-58HD]; Kevin Yamamura, *Jerry Brown Pushes New School Funding System in California, but Districts May Not Share Equally*, HUFFINGTON POST (Feb. 25, 2013), http://www.huffingtonpost.com/2012/12/26/jerry-brown-pushes-new-fu_n_2364205.html [https://perma.cc/AZA9-JXUR] (describing the governor's role).

391 *See* Mo. Exec. Order No. 14-09 (Aug. 18, 2014), http://www.sos.mo.gov/library/reference/orders/2014/eo14_09 [https://perma.cc/3Z79-5MLE]; Mo. Exec. Order No. 14-08 (Aug. 16, 2014), http://www.sos.mo.gov/library/reference/orders/2014/eo14_08.asp [https://perma.cc/9SLX-3U4H].

392 *See* Mitch Smith, *Missouri Governor Jay Nixon's Legacy Firmly Linked to Ferguson*, N.Y. TIMES (Sept. 23, 2015), https://www.nytimes.com/2015/09/24/us/missouri-governor-jay-nixons-legacy-firmly-linked-to-ferguson.html [https://perma.cc/G2HB-8XH5] (describing criticisms by "various groups" regarding these issues).

393 *See* Valerie Bauerlein & Jon Kamp, *Cities Clash with State Governments over Social and Environmental Policies*, WALL ST. J. (July 7, 2016, 12:30 PM), http://www.wsj.com/articles/cities-clash-with-state-governments-over-social-and-environmental-policies-1467909041 [https://perma.cc/TH7J-KK6V]; Henry Grabar, *The Shackling of the American City*, SLATE (Sept. 9, 2016), http://www.slate.com/articles/business/metropolis/2016/09/how_alec_acce_and_pre_emptions_laws_are_gutting_the_powers_of_american_cities.html [https://perma.cc/JN3H-5DQL].

394 *See* Governor Doug Ducey, Arizona State of the State Address (Jan. 11, 2016), https://

backed HB2, the state's attention-getting "bathroom bill," and engaged in explicit negotiation with the city of Charlotte, proposing to call a special legislative session to repeal the bill if the city of Charlotte repealed its antidiscrimination ordinance.[395] In other circumstances, intraparty feuds ostensibly motivate governors to impede the agendas of local leaders, particularly those who may be competitors for party leadership.[396]

CONCLUSION

The modern role of state governors makes it hard to imagine a time when they were powerless figures, holders of a ceremonial office specifically created to carry no real weight in state government. The status of American governors has transformed since the Founding. The directive actions and emboldened attitudes described in this Article reflect a new regime of state government, one that has been developing for more than a century and has entered a novel era. It is an era of gubernatorial administration, in which governors can remake and direct the state executive branch. In turn, governors have enhanced ability to shape both state and national policy in highly consequential ways.

In some respects, the rise of gubernatorial power should be celebrated. A centralized executive branch can replace the sprawling, uncoordinated state bureaucracies of old with effective, rational policymaking. The ability of state governments to look to a full-time, energized leader can help empower states to act as the counterweights the Founders imagined. The clearer lines of authority afforded by a strong chief executive can imbue states, once criticized for corruption and ineptitude, with accountability to their citizens.

And yet, the legitimacy and desirability of gubernatorial administration depends heavily on the ability of state-level institutions to keep tabs on it. A foundational view of our federalist system — that state governments could have plenary power because they are "closer to the people" and would be "well guarded" by state citizens — requires having state-level institutions that monitor and check a governor's actions. The existence and capacity of such state-level institutions is worth sustained attention.

More broadly, attending to gubernatorial administration, and to state executive power in general, can enrich discourse in administrative and

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azgovernor.gov/governor/news/2016/01/watch-arizona-state-state-address [https://perma.cc/V7BB-H7YE].

395 *See* Colin Campbell, Jim Morrill & Steve Harrison, *Governor's Office: HB2 Repeal Possible if Charlotte Drops LGBT Ordinance First*, CHARLOTTE OBSERVER (Sept. 16, 2016, 3:17 PM), http://www.charlotteobserver.com/news/politics-government/article102255582.html [https://perma.cc/AQ5Z-GKCS].

396 *See, e.g.*, Mireya Navarro & Charles V. Bagli, *Cuomo-de Blasio Feud Threatens New York City's Plans for Affordable Housing*, N.Y. TIMES (Feb. 29, 2016), https://www.nytimes.com/2016/02/29/nyregion/cuomo-de-blasio-feud-threatens-new-york-citys-plans-for-affordable-housing.html [https://perma.cc/5BXG-D8DG].

constitutional law. It can bring into clearer focus a host of alternatives to the status quo in federal law — including many different ways of structuring the administrative state, of conceiving of separation of powers issues, and of interpreting constitutional and statutory provisions regarding the place of chief executives. It can shine light on the costs and benefits of different visions of democracy, bureaucracy, and leadership, and prompt deeper reflection on assumptions of what is possible and desirable in modern administration.