GUBERNATORIAL ADMINISTRATION

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ABSTRACT

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 the energy sector to election law, 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 an effective check.

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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 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.

This is an opportune time to take heed. People across the political spectrum are now 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 progressive 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 increasing their productivity in recent years.[7] And governors, this Article shows, possess

[1] *See* 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); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973). The label appears in the popular press as well. *See, e.g.*, Ross Douthat, *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?_r=0.

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

[3] *See, e.g.*, Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007) [hereinafter Strauss, *Overseer*]; Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987–89 (1997); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 984–86 (1997) [hereinafter Strauss, *Presidential Rulemaking*].

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

[5] *See, e.g.*, Jeffrey Rosen, *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.

[6] *See* 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—such as (to name just a few) education, domestic relations, land use, transportation, and professional and business licensing—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), https://www.publicintegrity.org/2016/02/11/19279/amid-federal-gridlock-lobbying-rises-

new and extensive powers to set state agendas. On issues from the energy sector[8] to election law,[9] disaster relief[10] to discrimination,[11] governors regularly exercise their authority in ways that deeply affect millions of people within their home states. 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, at least 31 governors have leveraged their administrative control to resist national efforts to resettle refugees,[13] while other governors have pledged to oppose the new

states (stating that Congress passed 352 bills and resolutions in 2013 and 2014, while states passed more than 45,000 bills in that same time period).

[8] *See About REV*, NY.GOV (last visited Jan. 27, 2017), http://rev.ny.gov/about/ (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, N.Y. Governor, to Audrey Zibelman, CEO, N.Y. Dep't of Pub. Serv. (Dec. 2, 2015), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Renewable_Energy_Letter.pdf.

[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 (explaining Virginia Governor Terry McAuliffe's decision to restore individually the rights of thousands of people with past felony convictions, in the wake of a state supreme court ruling that he could not do so on a categorical basis, *Howell v. McAuliffe*, 788 S.E. 2d 706 (2016)), *with* Press Release, Branstad Signs Two Executive Orders, IOWA.GOV (Jan. 14, 2011), https://governor.iowa.gov/2011/01/branstad-signs-two-executive-orders (describing Iowa Governor Terry Branstad's rescission of prior Governor Tom Vilsack's executive order restoring voting rights to certain individuals with past felony convictions).

[10] *See, e.g.*, Gigi Douban, *Gulf Coast Residents Upset by BP Settlement Funds*, MARKETPLACE (Nov. 29, 2016), http://www.marketplace.org/2016/11/29/world/alabama-gulf-coast-residents-upset-states-use-bp-settlement-funds (describing Alabama Governor Robert Bentley'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), http://www.latimes.com/nation/la-na-kansas-governor-gay-protection-20150210-story.html, *with* Karen Langley, *Wolf's Executive Orders Expand Protections Against Discrimination for State Workers, Contract Employees*, PITT. POST-GAZETTE (Apr. 8, 2016), 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.

[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 (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 Brumfeld, *More than Half the Nation's Governors Say Syrian Refugees Not Welcome*, CNN (Nov. 19, 2015),

administration's crackdown on so-called sanctuary cities within their borders.[14] With respect to the federal Clean Power Plan (CPP) regulations, some governors have issued executive orders forbidding their executive branches from taking the steps necessary to prepare a state implementation plan,[15] while others have used executive orders to direct CPP compliance.[16] Some Governors have acted unilaterally to expand Medicaid coverage under the Affordable Care Act, sometimes over the objection of their legislature,[17] while others have dismantled state health insurance exchanges;[18] both types of actions change the meaning of the national insurance program for millions of people.[19]

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http://www.cnn.com/2015/11/16/world/paris-attacks-syrian-refugees-backlash/. 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, No. 16-1509, 2016 WL 5682711 (7th Cir. Oct. 3, 2016), 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; Letter from Charles Smith, Exec. Comm'r, Tex. Health & Human Servs. Comm'n, to Robert Carey, Dir., Fed. Office of Refugee Resettlement (Sept. 21, 2016), http://gov.texas.gov/files/press-office/RefugeeResettlementLetter_09212016.pdf.

[14] *See* Alaine Griffin, *Malloy Says He Will Fight Attempts to Restrict Refugees*, HARTFORD COURANT (Nov. 22, 2016), http://www.courant.com/news/connecticut/hc-malloy-meets-with-immigrants-20161122-story.html.

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

[16] *See* 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?ver=2016-01-08-125951-207. In addition, the governor of Virginia vetoed a bill that would have prevented state compliance with the CPP. *See* Tamara Dietrich, *Va. Governor Vetoes Bill to Block Clean Power Plan*, DAILY PRESS (Mar. 3, 2016), http://www.dailypress.com/news/science/dp-nws-clean-power-plan-veto-20160303-story.html.

[17] *See, e.g.*, Laurel Andrews, *Judge Dismisses Alaska Legislature's Lawsuit Over Medicaid Expansion*, Alaska Dispatch News (July 7, 2016), https://www.adn.com/politics/article/superior-court-judge-dismisses-legislatures-lawsuit-against-medicaid-expansion/2016/03/02/; Naomi Lopez Bauman & Christina Sandefur, *Governors Flouting the Law on Medicaid*, NAT'L REV. (Sept. 8, 2015), http://www.nationalreview.com/article/423714/governors-flouting-law-medicaid-naomi-lopez-bauman-christina-sandefur; Dan Zak, *Spurning the Party Line*, WASH. POST (Jan. 5, 2016), http://www.washingtonpost.com/sf/national/2016/01/05/deciderskasich/; *see generally Where the States Stand on Medicaid Expansion*, ADVISORY BD. (Jan. 13, 2016), https://www.advisory.com/daily-briefing/resources/primers/medicaidmap.

[18] *See* Amber Phillips, *Kentucky, Once an Obamacare Exchange Success Story, Now Moves to Shut It Down*, WASH. POST (Jan. 14, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/01/14/a-republican-governors-move-to-shutter-kentuckys-obamacare-exchange-explained/?utm_term=.ad0a343d6a73.

[19] *See* Drew Altman, *In La. and Ky. Shifts on Medicaid Expansion, a Reminder of Governors' Power in Health Care*, WALL ST. J., Aug. 3, 2016,

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 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

http://blogs.wsj.com/washwire/2016/08/03/in-la-and-ky-shifts-on-medicaid-expansion-a-reminder-of-governors-power-in-health-care/.

[20] *See, e.g.*, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE 30–33 (2008); CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775-1789 (1923); *infra* Part I.A.

[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. SCHOOL OF LAW, 52 EXPERIMENTS WITH REGULATORY REVIEW: THE POLITICAL AND ECONOMIC INPUTS INTO STATE RULEMAKINGS (2010), *http://policyintegrity.org/files/publications/52_Experiments_with_Regulatory_Review.pdf* . I have spoken about these developments in another forum. Miriam Seifter, Presentation at the Ohio State Law Journal Symposium on State Constitutions in the United States Federal System: Executive Review in the States (Mar. 6, 2015) (on file with author).

[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.*, Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487 (2011) (defining directive authority as "the authority to dictate the substance of regulatory decisions entrusted by statute to agency heads"); 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"); 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").

[23] *See infra* Part III.A.

paraphrase 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 civil society—institutions that may currently lack the capacity or incentives to serve as an effective check.

Indeed, 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-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

[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 Analysis of the Status Quo*, 61 TEX. L. REV. 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, and noting the difficulties of state-level research). There are, of course, important exceptions, though even these tend to note that 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 (2001) (describing differences between state and federal systems, while noting the dearth of similar work).

gubernatorial actions.[26] 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 states with unified government, five 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, attorneys general and governors share the same political party affiliation,[31] and not all state courts (or governors) regard separately elected officials as free from governor control.[32] Moreover, focusing on the existence of independent officers can obscure the substantial control that governors possess over the majority of state agencies, which they do control. 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.[33]

Gubernatorial administration has implications for a number of ongoing debates in public law. First, gubernatorial administration shines

[26] *See infra* Part III.B.
[27] *See infra* note 255.
[28] *See infra* Part III.B.1.b.
[29] *See* Kagan, *supra* note 3, at 2250.
[30] *See* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446 (2006); Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008).
[31] *See infra* Part III.C.1.
[32] *See infra* Part III.
[33] *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 STREET J. (Sept. 12, 2011), http://www.wsj.com/articles/SB10001424053111903532804576564741924419026. Even in North Carolina, where the legislature recently limited the governor's appointment power, changes in gubernatorial power over the last century leave the governor with a number of tools of influence. *See* Ferrel Guillory, Opinion, *Cooper Is Far From Powerless*, SALISBURY POST (Dec. 16, 2016), http://www.salisburypost.com/2016/12/16/ferrel-guillory-cooper-far-powerless/ (describing "informal" powers of North Carolina governors).

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."[34] In essence, governors' productive, efficacious leadership points to a new variant of "process federalism"[35] 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 than the modern presidency to date.[36] Governors' unique control tools enhance the dynamism, efficacy, and accountability that fans of executive power extol.[37] But gubernatorial control may also elevate partisan politics over more neutral expertise,[38] 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.[39] In turn, strong forms of gubernatorial administration—those that lack robust monitoring and checking—undermine the federalism arguments that envision state

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

[35] *See infra* Part IV. B.

[36] *See generally* Briffault, *supra* note 44; Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 359 (2000) (praising the undertaking of state-federal "comparative constitutional law").

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

[38] It bears noting that centralized gubernatorial power can serve either regulatory or deregulatory agendas; the Progressive movement to centralize gubernatorial authority was part of a pro-regulatory mission, while most governors today, 33 of whom are Republican, express more deregulatory visions.

[39] *See, e.g.*, ACKERMAN, *supra* note 1, at 37–40; PETER M. SHANE, MADISON'S NIGHTMARE 114–15 (2011).

governments as more likely to be "under the close watch and secure control of their citizens."[40]

Finally, gubernatorial administration bears on local government law and state-local relations.[41] Scholars sometimes frame state-local relations as turf battles for institutional power,[42] 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 end game. 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 study's scope. First, any national study of state administrative law faces perils of generalization.[43] 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 gubernatorial administration, this Article does not claim to be all-encompassing. Rather, I seek to elucidate a model that captures important and widespread developments. On key points, I include appendices that document the extent of these developments and identify exceptions to them. 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 serve as an overview, launching rather than concluding 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: Part III.A considers the legal foundations of governors' directive authority, and Part 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

[40] *See* Levinson, *supra* note 37, at 49 (describing Anti-Federalist sentiments).

[41] For a new and illuminating view of local administrative institutions, see Nestor Davidson, *Localist Administrative Law*, 126 YALE L. J. 2 (2017).

[42] *See* Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627 (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 (2000) ("preemption doctrine provides states with a significant check on local government power"). For a different take, though one that does not attend to the role of governors, see Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113 (2007) (describing how savvy interest groups avail themselves of vague preemption doctrines to advance private interests).

[43] *See* Rossi, *supra* note 25.

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 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 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.

A. The Founding: Weak Governors, Strong President

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 the historian 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 created by December 1776[50] (and at least two created in the years immediately following)[51]

[44] Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171 (1993).
[45] *See* Louis E. Lambert, *The Executive Article*, in in STATE CONSTITUTIONAL REVISION 185 (W. Brooke Graves ed., 1959) (quoting CHARLES BEARD & MARY BEARD, THE RISE OF AMERICAN CIVILIZATION (1930)).
[46] *See id.* at 185–86.
[47] Allan R. Richards, *The Traditions of Government in the States*, in THE FORTY-EIGHT STATES: THEIR TASKS AS POLICYMAKERS AND ADMINISTRATORS (American Assembly, 1955).
[48] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, 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 135–36.
[51] *See* WOOD, *supra* note 48, at 138, 140 (describing constitutions of Georgia and South Carolina).

vehemently opposed executive power.[52] They "destroyed the substance of an independent magistracy,"[53] leaving a governor that was "a very pale reflection 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 office was 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 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 chairman of their executive boards";[59] Governor Randolph of Virginia referred to himself as "a member of the executive."[60] Finally, governors were given very few affirmative powers. Not only were they forbidden from participating in the legislative process or vetoing legislation,[61] but they also lacked the power 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

[52] *Id.* at 135.
[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 140.
[57] *See* THACH, *supra* note 20, at 27 (citing works of James Wilson); WOOD, *supra* note 48, at 139.
[58] See THACH, *supra* note 20, at 16 (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 20, at 17 (quoting letter of Edmund Randolph to Washington, Nov. 24, 1786).
[61] *See* RAKOVE, *supra* note 48, at 250.
[62] *See* WOOD, *supra* note 48, at 148.
[63] *See* LESLIE LIPSON, THE AMERICAN GOVERNOR FROM FIGUREHEAD TO LEADER 14 (1939)..
[64] For an account of criticisms of legislative dominance that occurred even as the first constitutions were being developed, with attention to how negative reactions to Pennsylvania's "radically democratic" constitution fueled the checks on legislative power

approach—among them John Jay and John Adams—worked toward a "restoration of executive power" in the New York (1777) and Massachusetts (1780) constitutions, respectively.[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 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 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 19th 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 anti-corruption and populist sentiments. State constitutional reforms during this era established popular election of

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 in the power exclusively in the governor. *Id.*

[67] *See* JOHN ADAMS, THOUGHTS ON GOVERNMENT; RAKOVE, *supra* note 48, at 253; WOOD, *supra* note 48, at 141.

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

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

[70] *See id.* vol. 2 at 74.

[71] ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA: THE COMPLETE AND UNABRIDGED VOLUMES 82 (1932).

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 subject to direct election.[74] As 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] when scholars like Woodrow Wilson championed greater effectiveness and efficiency in government.[78] Progressive reform movements in the states (as at the federal level) sought to realize these values by advocating a strong executive.[79] They argued that constitutional checks and balances constraining the executive impeded effective governing.[80] Eventually—but only gradually, as Progressive values percolated through political thought, state reform commissions, and

[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 "the movement to strengthen the governor's role gained momentum" "[a]s Jackson fought with the Congress and the Supreme Court, [and] the chief executive became the champion of the people in the eyes of the people").

[74] LOREN P. BETH, THE DEVELOPMENT OF THE AMERICAN CONSTITUTION 1877–1917, 74 (1971); Lambert, *supra* note 45, at 186.

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

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

[77] On the complexity and pluralism embedded within Progressive era thought, see, for example, Daniel T. Rodgers, *In Search of Progressivism*, 10 REVIEWS IN AMERICAN HISTORY 113 (1982).

[78] Woodrow Wilson, *The Study of Administration*, 2 POLIT. SCI. Q. 197 (1887). For an account of state organizations emphasizing the influence of Wilson and the federal Brownlow Committee, see James Conant, *In the Shadow of Wilson and Brownlow: Executive Branch Reorganization in the States, 1965-1987*, 48 PUB. ADMIN. R. 892 (1988).

[79] *See* TARR, *supra* note 50, at 151;

[80] *See id.*; Richard Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1383 (2012) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND (2010)).

constitutional conventions—these principles prompted states to reorganize and consolidate their sprawling bureaucracies under the governor.[81]

The earliest efforts at state executive branch reform occurred at the turn of the 20th century.[82] Several states formed reorganization commissions or committees, enacted reorganization legislation, and proposed constitutional changes that would extend the reorganization effort.[83] In addition, strong, charismatic governors eager to claim these powers—like Charles Evan 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.[84] 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.[85] 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.[86]

In the post-war 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.[87] The Model State Constitution of 1963 and its accompanying commentary stressed the need for consolidation of the growing bureaucracy under the governor.[88] This echoed the then-prevailing views in the field of public administration,

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[81] *See* Michael B. Berkman & Christopher Reenock, *Incremental Consolidation and Comprehensive Reorganization of American State Executive Branches*, 48 AMER. J. POL. SCI.796, 797 (2004) ("a Progressive-inspired rhetoric of efficiency and economy through streamlined and rationalized state governments dominated many debates about reforming executive branches"); LARRY SABATO, GOODBYE TO GOOD-TIME CHARLIE 61 (2nd ed., 1983) (describing "a modern avalanche" of state reorganization, leaving "the governor considerably strengthened" in each reorganized state).

[82] *See* A.E. Buck, *Administrative Consolidation in State Governments*, NAT. MUN. REV., SUPP. 639, 640 (1919).

[83] *See id.*

[84] *See* William F. Swindler, *The Executive Power in State and Federal Constitutions*, 1 HASTINGS 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 ambiguities about state executive power). For an argument that these governors' "early efforts in executive-power building" shaped the modern presidency, see SALADIN M. AMBAR, HOW GOVERNORS BUILT THE MODERN PRESIDENCY 11 (2012).

[85] Buck, *supra* note 82, at 667.

[86] A leading overview of state executive branch reorganization, which divides reorganizations into "waves" as described above, is JAMES L. GARNETT, REORGANIZING STATE GOVERNMENT: THE EXECUTIVE BRANCH 5 (1980).

[87] Tarr, *supra* note 50, at 155.

[88] NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION 11, 71–72 (6th ed. 1963).

which "favor[ed] an elective governor who appoints the heads of departments and members of his cabinet, so that they may be directly responsible to him."[89] 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,[90] they noted the associated "benefit" of "great improvement in the whole administrative process" resulting from greater centralized "supervision and control."[91]

Governors themselves also fueled reform efforts. As late as the 1950s, governors still complained not only of their inability to control the state bureaucracy, but 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.[92] Governors eagerly sought to control the bureaucracy in order to become more effective.

As all of these factors coalesced, the late 20th century brought a "golden age" of reform of state executive reorganization.[93] Its hallmarks were the elimination of some agencies, consolidation of others, and restructuring of bureaucratic hierarchy with the governor at the top.[94] At least twenty-two states conducted comprehensive reorganizations, while twenty others reorganized incrementally.[95]

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Thus, over the course of two centuries, the governorship was transformed. Once "little more than Cyphers"[96] with only the status of "figureheads," governors acquired the powers of leaders.[97] And yet, obstacles to gubernatorial leadership remained. A 1983 study showed that a minority of agency officials (38%) believed governors to be their most influential principal.[98] As late as 1991, the Winter Commission, another

[89] Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928, 964 (1968).
[90] *See* James Kerr Pollock, *Election or Appointment of Public Officials*, 181 ANNALS OF AMER. ACAD. OF POLIT. & SOC. SCI. 74, 75 (1935) ("No voter, however intelligent, can adequately perform his duty when confronted with a piece of paper resembling a bedsheet in size . . . . So many offices must be filled by popular election that often we get a complete negation of democracy instead of an accurate expression of it.").
[91] *Id.* at 77, 78; *see* Grad, *supra* note 89, at 964 (noting how the political theory driving the short-ballot movement also led to centralization).
[92] James W. Fesler, *The Challenge to the States* 10, in THE FORTY-EIGHT STATES (The American Assembly ed., 1955).
[93] *See* Conant, *supra* note 78 (identifying the golden age as spanning 1965-1987).
[94] *See id.*
[95] *See id.* For a state-by-state look, see GARNETT, *supra* note 86, at Table A.1.
[96] *See supra* note 69.
[97] *See* LIPSON, *supra* note 63.
[98] Glenn Abney & Thomas P. Lauth, *The Governor As Chief Administrator*, 43 PUB. ADMIN. REV. 40, 48 (1983).

national commission focused on improving state and local government,[99] recommended a stronger chief executive, finding that state executive power was still too diffuse in many states."[100] In particular, the authors concluded, governors should have more extensive powers of appointment, reorganization, and direction.[101]

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

The modern governor has an extensive toolbox with which to control agency action. In this Part, after briefly explaining the incentives that motivate governors, I offer a taxonomy of the tools with which they control the outputs of state agency action.

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.[102] Looking beyond the regulatory process itself, governors have other powers, some shared and some not shared by the President. Governors in 44 states have item veto authority; the President does not.[103] Governors in 37 states have the power to reorganize the executive branch by executive order, usually with some form of legislative approval; the President does not.[104] Like the federal government but arguably with more abandon and fewer restrictions, governors privatize executive-branch services, taking them out of government hands and public view, and allowing them to match outputs to their own preferences. Finally, like Presidents, governors have the power to remove—and in theory, to thereby influence—the heads of most agencies. But governors appear, at least in a substantial number of states, to have more power than Presidents over nominally *independent* agencies, with state law sometimes

[99] The Commission's official name was the National Commission on the State and Local Public Service, and it was organized through the Rockefeller Institute of Government at the State University of New York. It was known as the Winter Commission because it was chaired by William F. Winter, a former governor of Mississippi.

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

[101] *See id.* at 21.

[102] In these two respects, gubernatorial administration resembles Kagan's account of presidential administration. *See* Kagan, *supra* note 3, at 2285, 2299 (identifying three "techniques" of presidential administration as (1) formal directives to agencies prescribing certain actions, (2) review of agency rules, (3) and appropriation, or "public assertion of ownership of agency action"). Governors also appropriate responsibility for agency outputs, and like Presidents, they have an increasingly extensive set of ways (including social media and blog posts) to speak directly to the public.

[103] *See* Appendix C; *see also* COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 2016 165–66, Table 4.5 (2016).

[104] *See id.* at 163–64, Table 4.4 [hereinafter BOS Table 4.4]; *see also* Appendix B.

validating the notion that governors can direct and bind even those they cannot fire.

Some of these tools have been developing for the past century; others, like state offices of centralized regulatory review, are more recent innovations, rising mostly in the last two decades. The modern era combines all of these tools with a new "psychology of government"[105] in which governors understand their office to be a controlling one. The status of the governorship has grown—not only because of the formal powers described here, but because of the growth of cooperative federalism regimes implemented by state executive branches, because of governors' frequent aspirations to national office, and because of the related increase in national attention to governors' actions. In turn, governors have shown a willingness to use their office aggressively, to claim control of state administration with a sense of certainty rather than hesitation, and to leverage their powers on matters of both state and national policy.

A. Gubernatorial incentives to control the bureaucracy

Understanding governors' incentives helps explain why governors have pushed to obtain new tools of bureaucratic control and used existing tools forcefully. The basic reason is that state bureaucracy, like the federal administrative state, plays an ever-expanding role in an increasingly complex society[106]—and governors, like Presidents, have a built-in drive to control administrative activity.

Terry Moe's well-known essay explains this dynamic regarding the presidency.[107] Similar factors feed this drive in the governorship. Most fundamentally, governors cannot accomplish much, if anything, without the myriad agencies charged with implementing the law.[108] Yet governors enter office with policy agendas, and in the modern era, the public judges them by their ability to carry out their policy agendas and act as "generalized leaders of the government."[109] Many governors seek to satisfy this judgment not only for the sake of their immediate constituencies, but also to establish their viability as a candidate for a future national office.[110] What Moe concludes about presidents is true for

[105] Peter Strauss coined this term in *Presidential Rulemaking*, *supra* note 3, and Kagan invoked it to explain how a president's repeated claims of authority to direct agencies could affect "the understanding of agency and White House officials alike of their respective roles and powers." Kagan, *supra* note 3, at 2299.

[106] For an illuminating account, see JON C. TEAFORD, THE RISE OF THE STATES: EVOLUTION OF AMERICAN STATE GOVERNMENT (2002).

[107] *See* Terry M. Moe, *The Politicized Presidency*, in THE NEW DIRECTION IN AMERICAN POLITICS 235 (John E. Chubb & Paul E. Peterson eds., 1985).

[108] *Cf. id.* at 239.

[109] *Id.*; *see also* THAD KOUSSER & JUSTIN H. PHILLIPS, THE POWER OF AMERICAN GOVERNORS 2 (2012) (describing governors as facing "unlimited expectations but limited powers").

[110] *See* Margaret Ferguson, *Governors and the Executive Branch* in POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS 208 (10th ed. 2013).

governors: the mismatch between "the expectations surrounding [their] performance" and their "institutional capacity" gives governors "a strong incentive to enhance their capacity by initiating reforms and making adjustments in the administrative apparatus."[111]

One difference is worth noting here. Whereas Moe observes that presidents have been able to effect change only incrementally, given the significant and diverse checks on and impediments to large-scale change in the federal bureaucracy,[112] I develop in Part III that governors face lesser checks. In turn, governors have been more successful in continuing and extending their consolidation of power into the modern era. The sections that follow catalogue those powers.

B. Directives

Modern governors commonly instruct agencies to take or refrain from taking particular actions in regard to the regulation of private parties. Following Kagan and for ease of reference, I call these gubernatorial actions "directives,"[113] though they may be styled as directives, executive orders, memorandums, or letters.[114] I save for Part III analysis of whether these directives are lawful. 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.[115] Governors initially performed this function

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[111] *See id.* at 269.

[112] *See id.* at 240–43.

[113] *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).

[114] For example, instructions labeled as directives in the state of Washington, *see Directives*, WA.GOV, http://www.governor.wa.gov/office-governor/official-actions/directives (last visited Jan. 28, 2017) ("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 use of one method versus another, see Foy & Ferguson, Unilateral Power in the Governor's Office, at 24 (stating that less formal "[e]xecutive actions are much more common than executive orders").

[115] There is scarce literature on gubernatorial executive orders, and even less on the phenomenon of directives and directive authority. The slim literature on the executive order tends to focus on how understudied the executive order is. *See, e.g.*, E. Lee Bernick & Charles Wiggins, *The Governor's Executive Order: An Unknown Power*, 16 STATE & LOCAL GOV. REV. 3, 3, 7 (1984). For a more recent article proposing that executive orders have emerged as an important means of gubernatorial control, even in the absence of a short ballot, see Margaret R. Ferguson & Cynthia J. Bowling, *Executive Orders and Administrative Control*, 68 PUB. ADMIN. R. 520, 521 (2008).

through informal means,[116] but then began, consistent with the presidential model, using more formal, publicly posted documents.[117]

Today, gubernatorial directives are commonplace and far-reaching, both within states and vis-à-vis the national government. 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, same-sex marriage, and more**.**[118] 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[119] and a Michigan governor's directive to deny applications to bottle and sell Great Lakes water.[120] They have taken stances on other issues of public concern, from unionization of private workers,[121] to women's health,[122] to consumer protection.[123] 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. 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.[124]

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[116] *See* Bernick & Wiggins, *supra* note 115, at 3, 7 (noting that governors had begun using executive orders to "affect the state policymaking process," which they had previously done "in a less visible, or public, manner via verbal directive, internal office memoranda, and personal letter").

[117] *See* Ferguson & Bowling, *supra* note 115.

[118] *See supra* notes 8–12.

[119] Penn. Exec. Order No. 2015-03 (Jan. 29, 2015), https://www.governor.pa.gov/executive_orders/executive-order-2015-03-leasing-of-state-forest-and-state-park-land-for-oil-and-gas-development/.

[120] Mich. Exec. Directive No. 2005-5 (May 26, 2005), http://www.michigan.gov/formergovernors/0,4584,7-212-57648_36898-118987--,00.html

[121] *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).

[122] *See* Tex. Exec. Order No. RP-65 (Feb. 2, 2007), http://www.lrl.state.tx.us/scanned/govdocs/Rick%20Perry/2007/RP65.pdf (order by Texas Governor Rick Perry directing Texas's state health commission to mandate vaccinating young girls for HPV).

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

[124] As in the federal government, executive directives can be trumped by legislation and sometimes are, as with Governor Perry's HPV directive. *See* Wade Goodwyn, *In Texas, Perry's Vaccine Mandate Provoked Anger*, NPR (Sept. 16, 2011), http://www.npr.org/2011/09/16/140530716/in-texas-perrys-vaccine-mandate-provoked-anger. This appears to be a relatively rare occurrence, for reasons discussed in Part III.

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 Texas directed certain state agencies not to assist in refugee resettlement, when governors in numerous states instructed their environmental agencies not to plan for CPP compliance, and when governors directed state health agencies to dismantle insurance exchanges under Obamacare.[125] Governors are thereby able to undermine and resist federal initiatives with which they disagree, while stopping short of the outright conflict that would make federal preemption a foregone conclusion. On the very same issues, governors in other states 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.[126] One striking feature of these now-familiar patterns of cooperative or uncooperative federalism[127] is the extent to which the state role rests on the governor's directive authority—her ability to control the outputs of state agencies.

C. 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,[128] a recent wave of centralized review programs in the states has given governors greater and more explicit review power.

At least 38 states have adopted systems of centralized regulatory review, in which executive branch actors—usually governors or their agents—claim authority to control agency outputs.[129] Many of these offices empower governors to exercise more power than OIRA claims: to halt regulatory processes before they begin,[130] veto regulations outright,[131]

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[125] *See* Phillips, *supra* note 18.

[126] *See supra* notes 17–19.

[127] Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 188 YALE L. J. 1256 (2009).

[128] *See* Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487 (2011) (stating that "each President's regulatory review program has disclaimed such authority"). Like the Clinton Executive Order that preceded it, President Obama's Executive Order pertaining to OIRA review leaves untouched authority otherwise granted to agencies by law. *See* Exec. Order No. 13,563, §7(b), 76 Fed. Reg. 3821 (Jan. 21, 2011).

[129] *See* Appendix A (collecting state statutes). These programs were created through a mix of statutes and executive orders; a few appear to operate solely by convention. *See* SCHWARTZ, *supra* note 21.

[130] *See, e.g.*, Coyne v. Walker, 2016 WL 2902742, *1 (explaining that Wisconsin's Act 21 "now allows the Governor . . . to permanently halt the rulemaking process").

or unilaterally rescind disfavored regulations.[132] Some governors have stopped regulatory output altogether through blanket moratoria.[133] Others have interpreted the review schemes to apply to agency actions other than rulemaking, like the imposition of permit conditions.[134]

A few of these review offices dates back to the 1980s or earlier,[135] but most are more recent, and at least 15 states have created or substantially strengthened their centralized review in the past decade.[136] Like OIRA's history, 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 rescission of regulations: the mission of Michigan's Office of Regulatory Reinvention, 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 (-2055 at last viewing).[137] New review offices in several other states have similar missions.[138] 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

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

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

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

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

[135] *See* Arthur E. Bonfield, *An Introduction to the 1981 Model State Administrative Procedure Act, Part I*, 34 ADMIN. L. REV. 1, 8 (1982).

[136] *See* Appendix A (collecting state statutes). Interestingly, at the same time states were adopting centralized review, the drafters of the Model State Administrative Procedure Act (MSAPA) were apparently souring on it. Whereas the 1981 version of MSAPA recommended robust governor review as a means of rationalizing the rulemaking process, *see* SCHWARTZ, *supra* note 21, at 35, the 2010 MSAPA deleted the governor review authority without explanation. *See id.* at 47, 446 (redline version of MSAPA showing absence of governor review provision).

[137] *See* Michigan Office of Regulatory Reinvention, http://www.michigan.gov/budget/0,4538,7-157-76309_35738---,00.html (last accessed Jan. 30, 2017). 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.

[138] *See, e.g.*, Ohio, http://www.governor.ohio.gov/PrioritiesandInitiatives/CommonSenseInitiative.aspx; Florida, http://floridahasarighttoknow.myflorida.com/regulation_rulemaking; Indiana Office of Management and Budget, http://www.in.gov/omb/.

review as a reform tool,[139] and most adopters in the recent wave had Republican leaderships.

On the other hand, state regulatory review is not merely a partisan affair. Just as Democratic presidents, like Republicans, have 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.[140]

The generally opaque nature of these mini-OIRAs impedes comprehensive study—with a few exceptions,[141] states do not provide anything like OIRA's regulatory dashboard or means of seeing which proposals are under review or with what result. Yet the information that is available, including a 2010 study and occasional news stories, indicates that many state regulatory review offices exert substantial influence over state policy.[142] State agency heads and regulated parties now describe governors as the final arbiters of state policy.[143] In many cases, this 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 allowed to do so without 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;[144] the New York governor's office rejected proposed qualifications for certain state hospital

[139] *See* ALEC, Regulatory Review and Rescission Act, *available at* [perma cc]; Paige Lafortune, *Massachusetts Governor Sets the Bar for Regulatory Reform*, ALEC (May 4, 2015), https://www.alec.org/article/massachusetts-governor-sets-regulatory-reform/ (praising Massachusetts Governor Charlie Baker's executive order imposing a "regulatory pause and review" and linking to ALEC's model act).

[140] *See* Appendix A.

[141] One example is Ohio's Common Sense Initiative, which has adopted a similar web interface.

[142] Claiming that state centralized review empowers the governor is not the same as claiming (as some governors have touted in creating such programs) that it reduces overall regulation. The limited studies to date do not support the latter proposition. *See* STUART SHAPIRO & DEBRA BORIE-HOLTZ, THE POLITICS OF REGULATORY REFORM (2013).

[143] *See, e.g.*, Letter from William A. Passetti, Chief, Fla. Bureau of Radiation Control, to James L. Lynch, State Agreements Officer, U.S. Nuclear Regulatory Comm'n Region III (May 13, 2011), http://www.nrc.gov/docs/ML1114/ML11143A062.pdf (Florida process); Richard Seamon & Joan Callahan, *Achieving Regulatory Reform by Encouraging Consensus*, ADVOC., Feb. 2013, at 27–29 (Idaho process). I discuss legislative rules review, and its connection to gubernatorial administration, in Part III.B.

[144] *See* Associated Press, *Arizona Panel Votes to Bar New Citizens Clean Elections Commission Rules*, KATR NEWS (Feb. 2, 2016), http://ktar.com/story/884991/arizona-panel-votes-to-bar-new-citizens-clean-elections-commission-rules/.

employees;[145] and the Wisconsin governor's office substantially changed clean water regulations.[146]

D. Reorganization

Another tool of bureaucratic control is reorganization. Part II discussed wholesale reorganizations of state executive branches as part of the rise of gubernatorial administration—a key feature of the Progressive Era phase of consolidating and centralizing sprawling state bureaucracies. Here I refer to a more granular, tailored power—the ability to create, disband, and restructure individual agencies. At the federal level, Presidents have this power 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.[147] But a majority of governors (at least 28),[148] as a residuum of the Progressive era reorganizations,[149] do possess reorganization authority, and many have used it to enhance their control of the agency in question.

The source and scope of reorganization provisions varies among the states. Some gubernatorial reorganization powers come from constitutional provisions and some from statutes; others are apparently based on convention.[150] 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

[145] *See* Rudder v. Pataki, 711 N.E.2d 978, 980 (1999) (dismissing challenge for lack of standing).

[146] *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 (describing scope statements obtained through open records law requests).

[147] *See* EEOC v. CBS, Inc., 743 F.2d 969, 971 (2d Cir. 1984) (holding 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, Public Law 98-614, now codified at 5 U.S.C. § 906(a) (2016). *See generally* HENRY B. HOGUE, CONG. RESEARCH SERV., PRESIDENTIAL REORGANIZATION AUTHORITY: HISTORY, RECENT INITIATIVES, AND OPTIONS FOR CONGRESS 7 (2012) ("The authority expired at the end of 1984 and subsequently has not been available to the President.").

[148] *See* Appendix B. The Book of the States, based on an annual survey distributed to state officials, identifies a higher number—38—of states in which governors have reorganization authority. *See* BOS Table 4.4, *supra* note 104 (listing reorganization authority by state). I was only able to identify positive law or clear practice for gubernatorial reorganizations in 28 states.

[149] *See* James K. Conant, *Executive Branch Reorganization: Can It Be an Antidote for Fiscal Stress in the States?*, 24 STATE & LOC. GOV. REV. 3, 5 (1992); Berkman & Reenock, *supra* note 81, at 797.

[150] *See* Appendix B; *see also* BOS Table 4.4, *supra* note 104.

process.[151] In addition, some states explicitly limit reorganizations to certain agencies or parameters, while others do not specify limitations.[152]

Governors have deployed reorganizations in a variety of contexts, though the end effect, I argue, is usually an increase in the governor's control of the administrative agenda**.**[153] Some reorganizations have reined in, downsized, or eliminated agencies based on discord or a desire to shift priorities away from certain areas.[154] Others have consolidated and centralized control among dispersed agencies with overlapping jurisdictions, increased control over agencies that previously enjoyed insulation or independence from the governor, and initiated new regulatory programs.[155]

To some extent, the significance of gubernatorial reorganization as a control tools tracks predictably the scope and source of the power. In states with broad constitutional reorganization authority, like Michigan,[156] governors have accomplished wholesale recreation of agencies under

[151] *See* Appendix B; *see also* Gerald Benjamin & Zachary Keck, *Executive Orders and Gubernatorial Authority to Reorganize State Government*, 74 ALB. L. REV. 1613, 1632 & Tbl. 1 (2011).

[152] *See* Appendix B.

[153] Sometimes unilateral reorganizing is associated with questionable conduct, as with New York Governor Andrew Cuomo's recent actions in establishing, influencing, and disbanding an ethics commission in the span of one year. *See* Susanne Craig, William K. Rashbaum, & Thomas Kaplan, *Cuomo's Office Hobbled Ethics Inquiries By Moreland Commission*, N.Y. TIMES (July 23, 2014), https://www.nytimes.com/2014/07/23/nyregion/governor-andrew-cuomo-and-the-short-life-of-the-moreland-commission.html.

[154] *See, e.g.*, Craig Pittman, *Under Scott, Department of Environmental Protection Undergoes Drastic Change*, TAMPA BAY TIMES (Oct. 18, 2014), http://www.tampabay.com/news/environment/under-scott-department-of-environmental-protection-undergoes-drastic-change/2202776; Associated Press, *Kansas Governor Signs Arts Reorganization Order*, KSHB (Feb. 7, 2011), http://www.kshb.com/news/political/kansas-governor-signs-arts-reorganization-order (describing Governor Brownback's order to abolish the Kansas Arts Commission and transfer the agency's responsibilities to the Kansas Historical Society). The Kansas legislature vetoed the order, *see* http://www.kansas.com/news/article1060148.html, but as noted below, the Governor ultimately effected a similar change by defunding the agency.

[155] *See, e.g.*, House Speaker v. Governor, 506 N.W.2d 190 (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 board and commissions" related to natural resources to the new Department); Weisman, *supra* note 33 (describing Governor Rick 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 Housing, 70 A.3d 559, 561 (N.J. 2013) (rejecting Governor Chris Christie's attempt to abolish independent affordable housing agency).

[156] *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. Where these changes require the force of law, they shall be set forth in executive orders and submitted to the legislature.").

governor-selected leadership.[157] In states with narrower, legislatively conferred reorganization authority (usually subject to legislative veto or approval), governors may be more circumspect, gauging legislative support before attempting to reorganize (and having their plans struck down if they do not). But legislative opposition may not always be a significant limitation. Not only do governors and legislatures typically come from the same political party, but governors have found creative ways to reorganize despite legislative opposition—by using techniques that do not require legislative approval,[158] or by reconstituting agencies between legislative sessions.[159]

E. 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 legislature.[160] The executive budget was a product of early 20th century reform movements in the states aimed at streamlining the myriad scattered agencies independently interfacing with legislatures.[161] As Eloise Pasachoff has recently explored in the federal context, executive budget control can amount to substantial policy influence.[162] Here I focus not on executive budgets generally,[163] but on a distinct tool that originated with

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[157] Straus v. Governor, 92 N.W.2d 53 (Mich. 1999); *House Speaker*, 506 N.W.2d 190.

[158] *See* Weisman, *supra* note 33 (describing Governor Rick Perry's creation of a homeland-security division within the governor's office). This tactic, unlike others discussed here, has a presidential analogue.

[159] *See, e.g.*, Tom Loftus, *Bevins' 7 Reorganizations in Past 2 Months*, COURIER J. (June 22, 2016), http://www.courier-journal.com/story/news/politics/ky-governor/2016/06/22/bevins-7-reorganizations-past-2-months/86225102/.

[160] *See generally* Ferguson, *supra* note 110, at 222 (identifying the executive budget as a "20th century response to the chaotic fiscal situations found in state government at the turn of the century"); Edward J. Clynch & Thomas P. Lauth, *Budgeting in the American States: Important Questions about an Important Activity* in GOVERNORS, LEGISLATURES, AND BUDGETS: DIVERSITY ACROSS THE AMERICAN STATES 1 (Edward B. Clynch & Thomas J. Lauth eds., 1991). In twenty-eight states, the governor has exclusive power to propose the budget, whereas in twenty-two states, the proposal power is shared with the legislature or a separate budgeting entity. *See* BOS Table 4.4, *supra* note 104 (distinguishing between full and shared responsibility for budget preparation).

[161] *See* Roger H. Wells, *The Item Veto and State Budget Reform*, 18 AM. POL. SCI. REV. 782, 782-83 (1924).

[162] *See* Eloise Pasachoff, *The President's Budget As A Source of Agency Policy Control*, 125 YALE L.J. 2182 (2016) (explaining how the budget process empowers the President to control agencies both before the budget is submitted and after it is finalized).

[163] 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 constitutional 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

budgetary control: the item veto. Presidents at one time also had this power, by virtue of a statute that allowed them to "cancel" certain types of already-enacted statutory spending provisions.[164] The Supreme Court ruled the statute unconstitutional, because striking out provisions was tantamount to legislating.[165] But the states—to the envy of Presidents[166]—have retained the item veto, allowing them to revise certain statutes before they become law[167]—and as described below, it is not always limited to spending matters. This is an additional power governors can wield to control agencies.

The item veto is widespread in the states. Governors in 44 states possess some item veto authority.[168] Of these, roughly 39 states require the underlying legislation to be related to appropriations, while the remaining states allow the item veto over non-appropriations bills.[169] Even within the states that apply the item veto only to appropriations-related legislation, approximately half allow the veto to address non-appropriations provisions within appropriations bills.[170] Thus, governors in a significant plurality of states can not only item veto appropriations matters, but also other substantive provisions.

Consider first the impact of the item veto over appropriations amounts themselves. As 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

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).

[164] *See* Clinton v. City of New York, 524 U.S. 417, 436 (1998) (describing Line Item Veto Act of 1996). Proposals for item veto authority began surfacing decades before the 1996 statute was enacted. *See* Briffault, *supra* note 44, at 1171 n.2.

[165] *See Clinton*, 524 U.S. at 421 (holding that the statute violated the Presentment Clause).

[166] 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 (Feb. 26, 2007), https://georgewbush-whitehouse.archives.gov/news/releases/2007/02/20070226.html.

[167] *See, e.g.*, Briffault, *supra* note 44, at 1175-76 (1993); NAT'L CONFERENCE OF STATE LEGISLATURES, *General Legislative Procedures*, http://www.ncsl.org/documents/legismgt/ilp/98tab6pt3.pdf (last visited May 25, 2016); *s*Roger H. Wells, *The Item Veto and State Budget Reform*, 18 AM. POL. SCI. REV. 782, 782–83 (1924).

[168] *See* Appendix C; BOS Table 4.4, *supra* note 104; *see also* Thomas P. Lauth, *The Other Six: Governors Without The Line-Item Veto*, PUB. BUDGETING & FIN. 1 (2016) (discussing absence of item veto in Indiana, Nevada, New Hampshire, North Carolina, Rhode Island, and Vermont).

[169] *See* BOS Table 4.4, *supra* note 104 (listing item veto powers across the states).

[170] *See id.* (identifying 18 states allowing item veto of non-appropriations provisions in appropriations acts); *see* Appendix C (identifying 15 states with positive law or case law expressly extending the item veto to such provisions, and five more in which the question remains open).

anything about it unless they accede to many of the Governor's fiscal desires."[171] 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.[172]

But whether because the state allows governors to use the veto on non-appropriations statutes or construes appropriations broadly, governors have also used their veto power to affect the substance and structure of agency work. Governors have used the power to reject legislative riders within appropriations statutes pertaining to agency structure, such as bipartisanship requirements,[173] the procedures for appointing agency leaders,[174] or the creation and authorization of a Steering Committee within an agency.[175] Some governors have used their item veto power to strike out riders that would have functioned as directives to agencies to spend funds on particular projects—and in some cases, forbidding the pursuit of those projects altogether.[176]

To be sure, courts sometimes strike down attempted line-item vetoes as beyond the governors' power; the case law across states is messy, but most state courts tend to treat the item veto with caution.[177] 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

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

[172] *See* Tim Carpenter, *NEA Rejects Kansas Bid for Arts Funding*, CAPITAL-JOURNAL (Aug. 16, 2011), http://cjonline.com/news/2011-08-16/nea-rejects-kansas-bid-arts-funding (noting that the state cuts also made the agency ineligible for over a million dollars in federal and regional funding).

[173] *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).

[174] *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 (describing governor's use of partial veto authority to change number of approved names legislature must provide for governor's appointees to ethics board from "up to three" to "three").

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

[176] *See* Tex. Att'y Gen. Op. KP-0048 (2015) (discussing gubernatorial veto of various appropriations riders, and 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, 598 Pa. 16, 54 (2008) (upholding governor's item veto of state transportation agency funds earmarked for a particular project).

[177] *See* Briffault, *supra* note 44.

approved," and that governors thus have a powerful tool of agency control in their arsenal.[178]

F. 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.[179] Governors in recent years have privatized, or proposed to privatize, state welfare systems,[180] prisons,[181] health and social services,[182] and more.[183] In the last few years, at least nine states have formed new privatization commissions,[184] seeking to identify "government functions" that "are or may be appropriate for privatization."[185]

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 less in ideological implications and more in institutional ones: privatization can enhance

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[178] *Id*.

[179] The federal constraints should not be overstated. Apart from some arguable but mostly untested constitutional boundaries, *see generally* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1456–85 (2003) (non-delegation doctrine); Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1511–12 (2001) (Appointments Clause), 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 (2006) (discussing, inter alia, OMB Circular A-76). 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. 481, 482 (1998) (discussing state constitutional provisions that could be conceived of as limiting privatization).

[180] *See* Foy & Ferguson, *supra* note 114 (describing Indiana Governor Mitch Daniels' privatization of welfare services).

[181] *See* Joe Guillen, *Gov. Kasich Plans to Sell Prisons, Privatize State Liquor Profits for Now, Turnpike Lease Could Be In Near Future*, CLEVELAND PLAIN DEALER (Mar. 15, 2011), http://www.cleveland.com/open/index.ssf/2011/03/gov_kasich_plans_to_sell_priso.html.

[182] *See, e.g.*, Jay Greene, *Michigan Would Privatize Mental Health Funding, Services Under Snyder's Proposed Budget*, CRAIN'S DET. BUS. (Feb. 11, 2016), http://www.crainsdetroit.com/article/20160211/NEWS/160219967/michigan-gov-rick-snyders-proposed-budget-would-privatize-mental.

[183] *See* 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.

[184] *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").

[185] *See* N.J. Exec. Order No. 17 (Mar. 11, 2010), http://nj.gov/infobank/circular/eocc17.pdf.

executive power.[186] By transferring an executive function to private hands, governors may be able to pursue a substantive agenda with greater flexibility and less public scrutiny.[187]

This greater flexibility arises because privatization does not impose the same constraints as does the insulated, semi-autonomous bureaucracy. Notwithstanding the many levels 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.[188] 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."[189]

Privatizing government functions may also decrease public scrutiny, which can reinforce gubernatorial flexibility. As 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."[190] This is not a claim that contractors are entirely opaque or that public administration is entirely transparent. But transferring the administration of a prison, welfare system, or healthcare operation to a contractor (whose name or identity itself may not be well known) has the potential to obscure policy choices that might otherwise surface more readily.[191]

In its connection to gubernatorial discretion, the move toward privatization is thus conceptually linked with another movement in state executive branches: limitations on collective bargaining and civil service laws. These recent changes have, inter alia, implemented at-will employment,[192] modified hiring and promotion protocols,[193] scaled back

[186] *See* Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 723 (2010) (arguing that privatization can be "executive aggrandizing").
[187] *See id.* at 745, 751.
[188] *See, e.g.*, MARISSA MARTINO GOLDEN, WHAT MOTIVATES BUREAUCRATS?: POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS (2000).
[189] *Cf.* DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES (2001) (describing additional determinants of bureaucratic autonomy).
[190] *See* Michaels, *supra* note 186, at 751.
[191] *See id.* at 752.
[192] *See* TENN. CODE ANN. §§ 8-30-316, 317, 318 (2016); ARIZ. REV. STAT. ANN. § 41-742 (2016); , N.C. GEN. STAT. §§ 126-5(b)(1),(d)(1) (2016); *see also* Jonathan Walters, *Life After Civil Service Reform: The Texas, Georgia, and Florida Experiences*, GOVERNING MAG. 7-8 (Oct. 2002), https://sites.duke.edu/niou/files/2011/05/Walters-Life-after-Civil-Service-Reform-The-Texas-George-and-Florida-Experiences.pdf (describing Georgia's 1996 switch to at-will employment),.
[193] *See* ARIZ. REV. STAT. § 41-772(B); COLO. REV. STAT. § 24-50-112.5; TENN. CODE ANN. §§ 8-30-313(a)-(b); 46 N.J. Reg. 1331 (June 2, 2014); 2016 Pa. Act. 69 § 2, Wis. Stat. § 230.06(1)(a) (2013-14).

grievance and appeals procedures,[194] and brought civil service supervision under gubernatorial control.[195] In most states, these have been enacted with legislative cooperation, not gubernatorial unilateralism,[196] but the ensuing discretion inures to the governor's benefit. In other words, shifting executive functions to the public 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.[197]

G. 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 executive substantial influence over the subordinate official, even though political costs may attend and sometimes preclude actual firings.[198] Conversely, where the executive is limited to "for-cause" removal, agency heads enjoy more independence.[199]

Yet the distinction between at-will and for-cause removals is remarkably fuzzy at the state level, and there are some indications that governors have a broader and surprising power: to remove even agency heads that would be regarded as "independent" at the federal level. Deep evaluation of this power—and of the tangled concept of state agency

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

[195] *See, e.g.*, COLO. REV. STAT. § 24-50-103; KAN. STAT. ANN. §§ 75-2935(3); TENN. CODE ANN. §§ 8-30-108(a),(c) (2016).

[196] An exception occurred in New Jersey, where Governor Chris Christie imposed civil service reform over legislative opposition by directing the state's Civil Service Commission (all members of which Christie had appointed) to do so. *See* Brent Johnson, *Christie Administration's Civil Service Changes Adopted Despite Opposition*, NJ.COM (May 7, 2014), http://www.nj.com/politics/index.ssf/2014/05/christie_administrations_changes_to_nj_civil_service_rules_adopted_despite_opposition.html.

[197] And they need not be alternatives; they can be complements. *See* Dannin, *supra* note 184, at 505 ("Often privatization was bundled with other changes to government workers' benefits, pay, civil-service protections, collective bargaining rights, and union representation.").

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

[199] At the federal level, restrictions on presidential removal are widely viewed as the "legal touchstone for agency independence," Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1165 (2013). And though recent scholars have showed that removal alone does not prove or explain agency independence, see *id*; Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013), removal restrictions still can impede presidential influence, *see* Kagan, *supra* note 3, at 2274.

independence—warrants treatment in a separate work.[200] 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 (27 states) or statutory (22 states) removal provision. 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.[201] Courts have further interpreted these provisions.[202]

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 officers created by state *constitutions* (especially those that are separately elected) are the classic examples of executive entities that are "not subject to gubernatorial control."[203] But not all states regard such constitutional officers as either "independent" or protected from gubernatorial removal.[204] Second, when state 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,"[205] some states have interpreted

[200] *See* Miriam Seifter, *The Puzzle of State Agency Independence* (working paper on file with author). There has been virtually no attention to this question in the legal literature in recent decades. For earlier views, see R. E. H., Annotation, *Conclusiveness of Governor's Decision in Removing or Suspending Officers*, 92 A.L.R. 998 (1934); Charles Kettleborough, *Removal of Public Officers: A Ten-Year Review*, 8 AM. POL. SCI. REV. 621, 623–26 (1914).

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

[202] *See, e.g.*, ASIMOW & LEVIN, *supra* note 25, at 531–34 (noting the wide variety of gubernatorial removal authority among states and collecting cases).

[203] Marshall, *supra* note 30, at 2448. Marshall's illuminating article includes counter-examples, but, consistent with a dominant paradigm, casts a "divided" or "plural" executive as involving "independent" officers. *Id.*

[204] *See, e.g.*, Ahern v. Bailey, 451 P.2d 30 (1969) (concluding that the governor "must have the power to select subordinates and remove them if they are unfaithful" and rejecting direct legislative participation in removal).

[205] Mistretta v. United States, 488 U.S. 361, 410–11, (1989). 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 (1994) (positing that "purely as a textual matter," words like "good cause" "might even allow discharge of commissioners who have frequently or on important occasions acted in ways inconsistent with the President's wishes with respect to what is required by sound policy"), but is the dominant and conventional 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").

"cause" in a more permissive (or literal you-had-a-reason) sense.[206] In other states, the phrase seems to be subject to ad hoc, context-specific interpretation—in these states, the doctrine appears (somewhat like standing or preemption)[207] to bend to the apparent necessities of the case.[208]

The third puzzle is that, even where state law seems to suggest that an agency head has tenure, governors sometimes fire them.[209] One possible reason for this is that the governor or her counsel makes case-by-case judgments on the likelihood of litigation and the relative uncertainty of state law. Another possibility tracks Eric Posner and Adrian Vermeule's assessment of the presidency—that the governor is relatively "unbound" by formal legal constraints, though still hemmed in by factors like public opinion and politics,[210] 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[211]—that is, the choice to assert certain powers sometimes is the end of the matter.

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[206] *See* ASIMOW & LEVIN, *supra* note 25, at 531 (collecting cases).

[207] *See, e.g.*, Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 458 (2008) (noting widespread recognition of "the Court's haphazard application of the presumption [against preemption]"); Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505 (2008) (criticizing standing doctrine as "haphazard").

[208] *See* ASIMOW & LEVIN, *supra* note 25, at 531 (collecting cases).

[209] *See, e.g.*, Katie Kerwin McCrimmon, *Governor Boots Vocal Appointee From Health Exchange Board*, HEALTH NEWS COLO. (Dec. 15, 2014), http://www.healthnewscolorado.org/2014/12/15/governor-boots-vocal-appointee-from-health-exchange-board/ (describing governor's removal of board member who was critical of the exchange and, per statute, could only be removed "for cause"); Associated Press, *Kentucky Governor Fires Entire U of L Board, Makes New Appointments*, WATE.COM (June 30, 2016), http://wate.com/2016/06/30/governor-who-fired-entire-board-makes-new-appointments/; *cf.* John Celock, *Cindy Hill, Wyoming Elected Schools Chief, Demoted by Legislature*, HUFFINGTON POST (Jan. 29, 2013), http://www.huffingtonpost.com/2013/01/29/cindy-hill-wyoming-schools_n_2576810.html (describing Governor's defense of the legislation).

Relatedly, governors also claim directive authority over apparently independent agencies. *See supra* note 144 (Arizona example); Coyne v. Walker, 368 Wis. 2d 444 (2016) (rejecting 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, the majority neither rejects gubernatorial directive authority over other state executive officials nor deems the superintendent "independent." *Cf. id.* at 525 (concurring opinion referring to superintendent as independent).

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

[211] Foy & Ferguson, *supra* note 114, 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 Foy and Ferguson 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.*

* * *

All of these developments contribute to a new psychology of gubernatorial dominance. One way to see this is the about-face in the responsibility that governors accept. In his classic 1939 study, Leslie Lipson wrote of governors who claimed they had no power at all to direct the state bureaucracy.[212] Today, governors accept responsibility for the failures of state agencies, even when their direct role is minimal. Consider the drinking water crisis in Flint, Michigan.[213] A state investigative task force identified the state's executive branch, and by extension, Governor Rick Snyder, as the prime culprits:[214] The state-level emergency managers that Snyder appointed to oversee Flint's governance[215] made the decision to switch to Flint River water as the city's drinking water source to save money,[216] and the state's Department of Environmental Quality continued to insist that Flint's water was safe despite contrary evidence. Snyder's wrongdoing, for which he has largely accepted responsibility,[217] was a failure to override these state-agency determinations and thereby fulfill his duty to oversee the executive branch— a duty unknown to governors as recently as the mid-20th century.[218]

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

This Part begins to situate gubernatorial administration in the context of state constitutional law and practice. Part III.A frames the legal analysis of gubernatorial administration, identifying factors that separate the inquiry from legal evaluations of presidential administration. Part III.B

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[212] LIPSON, *supra* note 63.

[213] *See* Lenny Bernstein & Brady Dennis, *Flint's Water Crisis Reveals Government Failures at Every Level*, WASH. POST (Jan. 24, 2016), https://www.washingtonpost.com/national/health-science/flints-water-crisis-reveals-government-failures-at-every-level/2016/01/23/03705f0c-c11e-11e5-bcda-62a36b394160_story.html?utm_term=.a7a6bdb0c31b.

[214] See FLINT WATER ADVISORY TASK FORCE—FINAL REPORT (2016), https://www.michigan.gov/documents/snyder/FWATF_FINAL_REPORT_21March2016_517805_7.pdf.

[215] In 2011, Snyder declared a financial emergency in Flint and appointed state emergency managers to oversee Flint's governance, pursuant to the state's Emergency Manager Law (which was rejected by public referendum, but enacted by Snyder and the legislature in slightly altered, referendum-proof form shortly thereafter). *See* Julie Bosman & Monica Davey, *Anger in Michigan Over Appointing Emergency Managers*, N.Y. TIMES (Jan. 22, 2016), https://www.nytimes.com/2016/01/23/us/anger-in-michigan-over-appointing-emergency-managers.html.

[216] *See* FLINT WATER ADVISORY TASK FORCE, *supra* note 214.

[217] *See, e.g.*, Paul Egan & Kathleen Gray, *Snyder Apologizes for Flint Crisis, to Release Emails*, DET. FREE PRESS (Jan. 20, 2016) (stating that Governor Snyder "accepted major responsibility" in his state of the state address).

[218] *See id.*

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 extent of the President's legal power to direct the executive branch. The rise in gubernatorial administration raises a parallel question: is gubernatorial directive authority lawful under state law? [219] I do not aim to resolve that question definitively here. States vary widely in their constitutional and statutory schemes, and in how their courts have interpreted those schemes. Even within a state, decisional law on executive power is often vague, and sometimes at odds with apparent constitutional foundations. What I do hope to show is that the legality or illegality of gubernatorial administration does not rest on the same principles as the analysis at the federal level, and—my only firm conclusion here—that the bottom-line legal answer is not obvious.

It helps to begin with the more familiar federal context. The "conventional" view at the federal level is that the President lacks directive authority.[220] The rationale for this 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.[221] This argument has a constitutional basis insofar as it requires rejecting a unitary-executive mandate for presidential control (or rejecting as unconstitutional statutes that afford agencies discretion).[222] On this view, the text of Article II "settles no more than that the President is to be the overseer of executive government."[223] Scholars shore up the case

[219] In focusing on state law, I sideline the interesting (but presently non-justiciable) question of whether the Guarantee Clause could ever be used to 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 (1998) (discussing the possibility that the Guarantee Clause governs state separation of powers issues). I also subscribe here to the dominant view in state constitutionalism: "that the interpretation of a state constitution must rely on unique state sources of law." Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993). Kahn offers a dissenting view, proposing instead a more diffuse vision of "American constitutionalism." *See id.*

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

[221] Stack, *supra* note 3, at 263 ("[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.").

[222] *See* Stack, *supra* note 3, at 266–67.

[223] Strauss, *Presidential Rulemaking*, *supra* note 3, at 979, 985.

against presidential directive authority with appeals to public values: enabling some degree of independent judgment by agencies promotes agency expertise, democracy, and the rule of law.[224]

In addition to the conventional view, there are also two well-known minority viewpoints on presidential authority. Unitary executive theorists argue that the President *must* have directive authority.[225] As an alternative view, then-Professor Kagan proposed an interpretive principle under which Congress is generally *presumed* to have included presidential directive authority when it delegates to executive agencies, though not to independent agencies.[226] None of these three views translates easily to the state level.

First, it is not clear whether state constitutions, generally or individually, reflect similar ambivalence about executive power and directive authority. On one hand, most state constitutions' creation of executive officers elected or appointed separately from the governor may seem strongly to undermine directive authority: if the constitution deliberately divided executive power, it would be incongruous for a governor to claim authority to centralize it.[227] On the other hand, many state constitutions can be read, despite creating more than one executive officer, to place the governor atop the hierarchy. Whereas the federal Constitution vests in the President "the executive power"[228] (a phrase unitary-executive scholars emphasize), many states have vesting clauses that give governors "the supreme executive power" or make the governor the "chief executive."[229] Some states also afford governors reorganization authority in the constitution, perhaps further suggesting robust gubernatorial power over agencies.[230] Then there are the puzzling removal clauses, discussed above; these might strengthen or weaken the case for gubernatorial directive authority, depending on their scope.[231] Because most state constitutions have been amended multiple times in different

[224] *Id.* at 985; Stack, *supra* note 3, at 268, 321–22.
[225] *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).
[226] *See* Kagan, *supra* note 3, at 2327–28.
[227] *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 legislative attempt to transfer core functions away from elected state treasurer).
[228] U.S. CONST. Art. II.
[229] *See, e.g.*, State v. Dawson, 119 P. 360, 363 (1911) (construing the phrase 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); State v. Tucker, 35 N.E.2d 270, 291 (1941) (distinguishing between the *executive* power given to the governor and the *administrative* offices of the elected Secretary of State, Treasurer, Auditor).
[230] *See, e.g.* MICH. CONST. art. V, § 2.
[231] *See supra* notes 201–02.

historical eras, many include multiple, conflicting moods about executive power, leaving the constitutional status of directive authority uncertain.[232]

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 power clauses.[233] 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,[234] and are hard to square with later constitutional developments empowering the executive. Moreover, many state constitutions authorize inter-branch 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.[235] 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.[236] Whether gubernatorial directive authority would pass muster under such a doctrine would depend on the particular constellation of state constitutional and statutory provisions. But states have not developed such a jurisprudence; despite the many differences in state government and

[232] *See generally* TARR, *supra* note 50 (describing history and eras of state constitutional development).

[233] *See* Zasloff, *supra* note 171, at 1102. Looking at historical sources, Zasloff concludes that states incorporated these clauses without much deliberation or reflection, through "an extended exercise in cutting and pasting." *Id.*; *see also id.* at 1104–08 & n.126 (documenting the lack of discussion about the clause at various states' constitutional conventions).

[234] As Gordon Wood explains:

> The separation of the executive, legislative, and judicial powers had a much more limited meaning in 1776 than it would later have in American constitutionalism. The constitution-makers invoked Montesquieu's doctrine, not to limit the legislatures, but rather to isolate the legislatures and the judiciaries from the kind of executive manipulation or "corruption" of the members of Parliament that characterized the English constitution.

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

[235] *See, e.g.*, State v. Berger, 368 N.C. 633, 649 (2016) (dissenting) ("Unlike the Federal Constitution, the state constitution is not an express grant of power but a limitation on power," with the default that power "resides in the people and is exercised through the General Assembly.").

[236] For a proposal along these lines, see John Devlin, *Toward A State Constitutional Analysis of Allocation of Powers*: *Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205 (1993).

state constitutions, many states say that, as a general matter, they follow federal separation of powers principles.[237]

Third, statutory interpretation is the heart of the directive authority analysis, and states may have a variety of statutes on point. Recall that the directive authority debate at the federal level considers whether and when Congress should be understood to delegate exclusively to the named agency head, as opposed to baking in an understanding that the agency head is always subordinate to the President. State statutes may speak more directly to this point. For example, when the Florida Supreme Court rejected a governor's attempt to suspend agency rulemaking by executive order,[238] 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.[239] On the other hand, state statutes may also weigh in favor of directive authority. One could imagine that a legislature that has afforded 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,[240] and state courts may conclude that the two do not travel together.[241]

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 non-judicial actors: the legislature, the public, and governors themselves. The next section considers this institutional context.

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[237] *See* James A. Gardner, *The Positivist Revolution That Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109, 115 (1998); see also Zasloff, *supra* note 171, at 1150 ("Unfortunately, many states have ignored [the] basic point" that "federal separation of powers law simply does not apply in the state context.").

[238] 79 So. 3d 702, 716–17 (Fla. 2011).

[239] *Whiley*, 79 So. 3d at 710 (citing §§ 120.54(3)(a)(1), 120.54(1)(k), FLA. STAT. (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 § 20.05(1)(a), (e), Fla. Stat. (2010)).

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

[241] *See, e.g.*, State Highway Comm'n of Colo. v. Haase, 537 P.2d 300 (Colo. 1975) (ruling that the governor lacked directive authority to override a decision of the state highway commission, even though the Commission had been statutorily reorganized under an at-will governor appointee and the governor had certain statutory powers to resolve disputes).

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 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 here 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,[242] this development should not be overstated. In a majority of states (34), being a legislator is still not a full-time job, legislators' salary is not enough to constitute their sole income, and legislators have relatively small staff and resources.[243] Moreover, across all states, legislators' salaries are low compared to those of state agency officials.[244] In part to counteract these deficiencies, many states have implemented legislative review of agency rulemaking, in which a committee within the state legislatures reviews a rule before it becomes final.[245] But in practice, this is only a modest

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

[243] *See* NAT'L CONFERENCE OF STATE LEGISLATURES, *Full and Part-Time Legislatures*, http://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx. In the two categories of professionalization that are not full-time (which the NCSL dubs "gray" and "gold"), the average number of total partisan and non-partisan staff members is 479 and 169, respectively. *Id.* Table 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.

[244] 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*, *prepared for* 2014 meetings of the American Political Science Association and the Midwest Political Science Association 4 (2015).

[245] *See generally* Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States,* 52 VAND. L. REV. 1167, 1201 (1999).

check: legislative rules review committees in most states do not have actual veto authority, and in those that do, a majority cannot veto rules without the governor's approval.[246]

The question remains, then, whether thinly staffed and low-paid legislatures have the capacity and incentives to engage in meaningful oversight of a governor-driven executive branch. One answer may lie in the salience of state elections generally and individual state administrative actions specifically. Scholars of legislative oversight have theorized that legislators expend scarce resources on oversight to the extent that it is likely to enhance their political fortunes.[247] If that is true, one might expect less robust oversight at the state level, where voters are less informed about government activity and legislators' time would be better spent on other, more visible forms of outreach.[248] Or one might expect skewed oversight, tailored to those interest groups—primarily business-oriented—that are sufficiently organized and funded to monitor state agency actions.[249]

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.[250] 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, the state's governor and legislature have been controlled by a single political party.[251]

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[246] *See* Brian J. Gerber, Cherie Maestas & Nelson C. Dometrius, *State Legislative Influence Over Agency Rulemaking: The Utility of Ex Ante Review*, 5 STATE POL. & POLICY Q. 24 (2005).

[247] *See* Seymour Scher, *Conditions for Legislative Control*, 25 J. OF POLITICS 526 (1963).

[248] *See generally* Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 400 (2013) (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").

[249] *See* Anthony K. Nownes & Adam J. Newmark, *Interest Groups in the States*, in POLITICS IN THE AMERICAN STATES, *supra* note 110, at 121 (discussing studies finding that "general business groups are the most powerful types of groups in the states").

[250] Kagan, *supra* note 3; *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).").

[251] NAT'L CONFERENCE OF STATE LEGISLATURES, *State and Legislative Partisan Composition Table* (2016), http://www.ncsl.org/Portals/1/Documents/Elections/Legis_Control_2016_Apr20.pdf (last visited December 1, 2016) (showing state partisan composition by year). At present, 30 states have a legislature and governor from a single party (25 Republican and 5 Democratic); 7 more states have a divided legislature, with the governor sharing the party

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,[252] the general dynamics extend to state government. Divided government can hem in executive power: a President may be able to energize and direct the executive branch, but a hostile Congress will push back against overreach.[253] In contrast, unified government diminishes the likelihood of interbranch checks that animate the Madisonian model of accountability.[254] As Pildes and Levinson 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."[255] A governor who shares the political party of the legislative majority will have an easier time advancing her policy agenda.[256] Unified government facilitates inter-branch collaboration on legislation and reduces the risk that the legislature will hold up the governor's appointments or override unilateral executive actions.[257]

3. Agency pushback

Executive agencies themselves can be another form of check against chief executives. At the federal level, an agency may create substantial friction against the President's agenda.[258] The agency, after all, has its own experts, a cadre of non-partisan civil servants who do not serve

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of one legislative chamber; and 12 states have a legislature and governor from different parties. *See generally 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 (describing changes after 2016 election). (Nebraska's legislature is formally nonpartisan, but is generally understood to be Republican in practice.) This feature of state government has returned despite a long period of decline after World War Two. *See* Morris P. Fiorina, *An Era of Divided Government*, 107 POL. SCI. Q. 387, 391 (1992).

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

[253] *See, e.g.*, *id.* at 2357.

[254] *See id.* at 2343–47.

[255] *Id.* at 2339. *See also* Katyal, *supra* note 250, at 2321 ("When the political branches are controlled by the same party, loyalty, discipline, and self-interest generally preclude interbranch checking.").

[256] 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 199 (describing legislative collective action problems).

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

[258] 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 (2007).

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.[259] 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 appropriate qualifications.[260] 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 place significant focus on deregulation, the absence of a robust check from state agencies can facilitate the governor's agenda.

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[259] *See, e.g.*, D. Zachary Hudson, Comment, *A Case for Varying Interpretive Deference at the State Level*, 119 YALE L.J. 373, 382 (2009) ("Managerial officials at federal agencies generally seem to earn about fifty percent more than their state counterparts."); William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147, 172 (1991) (discussing state agency resource limitations).

[260] *See generally* ARTHUR 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."). Claims of understaffed state agencies are commonplace; some are more dire than others. To take just one recent example, the drinking water crisis in Flint, Michigan has been tied to 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*, DET. NEWS (Feb. 17, 2016), http://www.detroitnews.com/story/opinion/2016/02/17/issues-deq-cited-years-flint-crisis/80532786/. 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").

The total number of state-government employees has risen over the past half-decade, since the advent of major cooperative federalism and grant-in-aid programs, *see* JOHN J. DILULIO, BRING BACK THE BUREAUCRATS 16 (2014); the state and federal governments have roughly comparable numbers of employees per capita, see Mike Maciag, *States Where Government Workers Are Most Prevalent*, GOVERNING THE STATES AND LOCALITIES (2014), http://www.governing.com/topics/mgmt/gov-states-where-public-employees-most-prevalent.html. 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 GOVERNING THE STATES AND LOCALITIES, *State Government Employment: Totals By Job Type: 1960-2014*—but the mere number of employees does not resolve whether they are underpaid, have requisite qualifications, and so on.

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.[261] 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.[262] 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 staff's ability or willingness to act as a check on central commands.[263] The likely result of these developments is a reduced pool of state employees with incentives 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. Yet recent work, including books by Adrian Vermeule and Eric Posner and by Bruce Ackerman, depicts the presidency as an office that courts do not meaningfully constrain.[264] On this account, courts tend not to decide most questions about executive power, and when they do, they defer to the President.[265] For these scholars, there may be other constraints on presidential power—in the view of Posner and Vermeule, the important checks come from "politics and public opinion"[266]—but the courts are not material players in that effort.

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 courts are elected—some in partisan elections, some in nonpartisan elections, and some in retention elections.[267] The effect of election versus appointment on state judges' disposition toward

[261] *See* Melissa Maynard, *States Overhaul Civil Service Rules*, USA TODAY (Aug. 27, 2013), http://www.usatoday.com/story/news/nation/2013/08/27/states-civil-service-government/2707519/.

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

[263] *See supra* Part II.C.

[264] *See* POSNER & VERMEULE, *supra* note 210; Ackerman, *supra* note 1.

[265] *See* POSNER & VERMEULE, *supra* note 210, at 52–58.

[266] *Id.* at 15.

[267] *E.g.*, Fact Sheet on Judicial Selection Methods in the States, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf (last visited June 3, 2016).

state agencies (and state legislatures) is a question of ongoing debate, but the most likely answer is that context matters.[268] In some instances, state courts, especially those that do not feature a majority from the governors' 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[269]—but some scholars have found that state courts, like federal courts, tend to avoid deciding questions of executive power.[270] 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.[271]

5. Interest groups and the media

Finally, the media and interest groups offer another potentially important check on gubernatorial administration. After all, formal and consistent oversight may be unnecessary if interest groups sound so-called "fire alarms" at critical junctures to alert the legislature[272] or if interest groups or others are able to trigger meaningful judicial review. More generally, interest groups and the media are lynchpins in the factors of "credibility,"[273] or of "politics and public opinion"[274] 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 suspected that engagement by 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.[275] These public-oriented groups may have less of a presence at the

[268] *See, e.g.*, Saiger, *supra* note 260 (collecting sources and analyzing the effect of judicial selection methods on the applicability of the *Chevron* doctrine).

[269] *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 (2001) (describing how "state courts and legislatures often relax the background rules of standing," including through public-interest exceptions, taxpayer standing, and "environmental rights acts").

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

[271] *See* Levinson & Pildes, *supra* note 252, at 2368 (discussing the "deep irony of countermajoritarian judicial review" that judicial review is most needed but least availing "in eras of strongly unified government").

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

[273] *See* RICHARD NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS (1990).

[274] POSNER & VERMEULE, *supra* note 210, at 15.

[275] For discussion of the role of civil society in checking agencies, see Miriam Seifter, *Complementary Separations of Power*, N. Y. U. L. REV. ONLINE (2016).

state level. The conventional view is that the national stage is more likely to attract the funding and organization necessary to propel so-called public interest groups, whereas states are more likely to yield to factional or special interests.[276] And recent empirical studies support that claim, showing a higher pro-business skew among state lobbyists.[277] 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 groups speaking for generalized constituent concerns or diffuse harms.[278] Of course, whether special interests check or fuel the governor's agenda depends on the agendas of dominant groups as compared 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. Here it is worth noting the connection political scientists draw between media coverage and electoral responsiveness: media coverage is a measure of issue salience,[279] and issue salience affects politicians' responsiveness.[280] One reason for less attentive media coverage may be the lesser transparency accompanying gubernatorial as opposed to presidential action.[281] Unlike federal agencies, governors and state agencies do not live in a media fishbowl.[282] The media

[276] THE FEDERALIST NO. 10, at 54 (James Madison) (Lawrence Goldman ed., 2008); *see also* Warren J. 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, 568-69 (2001).

[277] *Compare* David Lowery et al., *Explaining the Anomalous Growth of Public Sector Lobbying in the American States, 1997–2007*, 43 PUBLIUS 4 (2013) (estimating percentage of state-level private-sector lobbyists at close to 70%); *with* Lee Drutman, THE BUSINESS OF AMERICA IS LOBBYING (2015) (stating that "[c]onsistently, almost half" of federal lobbyists "represent business"); .

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

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

[280] *See* David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125 (1999) (collecting sources to support the proposition that "scholars of Congress are almost unanimous in their acceptance of the proposition that the desire for re-election 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 316, 319 (2005).

[281] *See supra* Part II.C (discussing state-level centralized review).

[282] 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

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. Recent studies have documented a pronounced reduction of state political coverage.[283] 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.[284] There are other news sources that fill the void—the Associated Press, non-traditional (and sometimes ideologically oriented) news outlets, and direct communications from politicians or lobbyists—but it is not clear that any given mix of those actors will fulfill the more traditional role of state media as "the watchdog of government."[285]

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.

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.[286] 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, Jonathan Zasloff and 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.[287] William Marshall has characterized the presence

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

[283] *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/; 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/.

[284] *See* Enda et al., *supra* note 283.

[285] *Id.*

[286] *See* Berry & Gersen, *supra* note 30.

[287] *See* Zasloff, *supra* note 171, at 1113–14 & n.152 (recounting attorneys generals' "refus[als] to cooperate" with governors on issues of same-sex marriage licenses and listings of carcinogenic chemicals); 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 (2009) (discussing litigation over controller's refusal to implement governor's fiscal plan).

of independently elected attorneys general as a source of conflict that "foster[s] an intrabranch system of checks and balances."[288]

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.[289] Partisan affiliation is not an all-encompassing explanation for either official's behavior, but party unification within the "divided executive"[290] no 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.[291]

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,[292] and some state supreme courts have held that the governor's constitutionally "supreme" authority entails power to direct the positions of other constitutional officers.[293] Even if these are minority positions 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.[294] Some states, too, confer broad (or at least highly ambiguous) removal authority that explicitly or apparently extends to constitutional officers.[295] And, again, even where governors lack authority

[288] Marshall, *supra* note 30, at 2448.
[289] The current exceptions are Colorado, Illinois, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Montana, New Mexico, North Carolina, West Virginia, and Maine (in which the legislature elects the attorney general). *See State Political Parties 2016*, KAISER FAMILY FOUND., http://kff.org/other/state-indicator/state-political-parties (last accessed Oct. 11, 2016).
[290] Marshall, *supra* note 30, at 2448.
[291] 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 ("Through pooling, the executive augments capacity by mixing and matching resources dispersed across the bureaucracy.").
[292] *See* People *ex rel.* Deukmejian v. Brown, 624 P.2d 1206, 1209 (Cal. 1981).
[293] *See supra* note 204.
[294] *See* Amar, *supra* note 287, at 484–87 (distinguishing attorneys general from state controller); Coyne v. Walker, 2016 WL 2902742, *1.
[295] *See supra* note 201.

over constitutional officers or have unclear authority, there are nonetheless examples of governors claiming the ability to direct or fire such officials.[296]

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 described, governors possess tools with respect to both executive and (statutorily) independent agencies that Presidents do not. To assume that the multiple-executive structure makes governors weak, or less powerful than Presidents, overlooks the tools 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 for the state executive branch.[297] 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.[298] And there are many substantive areas into which the machinery of cooperative federalism now extends.[299]

This is a real limitation, but it is also an opportunity. Governors may also 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 themselves). 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. Larry Kramer's work on federalism details how "federal dependency on state administrators" gives the latter a voice in federal policymaking.[300] More recently, Abbe Gluck and others have described how, by "exerting their powers from the inside,"[301] 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 Jessica Bulman-Pozen and Heather Gerken, in which states can use their subordinate or insider status to act as a "dissenter, rival, or challenger."[302]

[296] *See id.*
[297] Of course, legislation and the federal Constitution also hem in gubernatorial action, but those are constraints that also apply to the President.
[298] The controversy over the EPA's Recent "Clean Water Rule" involved opposition from governors arguing that EPA had overstepped its bounds.
[299] *See, e.g.*, Abbe R. Gluck, *Our (National) Federalism*, 123 YALE L.J. 1996 (2014).
[300] Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1544 (1994).
[301] Gluck, *supra* note 299, at 2005.
[302] Bulman-Pozen & Gerken, *supra* note 127, at 1258.

Thus, while the Supremacy Clause imposes a constraint on governors that Presidents do not face, a check runs the other way as well.[303]

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.[304] These mechanisms originated in state constitutions during the Progressive Era as an attempt to rein in unresponsive state government.[305] 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,[306] but also by imposing new laws that trump or limit gubernatorial policy prerogatives and that the governor cannot veto.[307]

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 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.[308] Backing an initiative may help a governor achieve a policy goal they could not accomplish through the legislature, or it may generate attention for issues

[303] Moreover, many federal programs are implemented through Spending Clause legislation, which arguably offers states greater protections from legislative restrictions than the federal executive branch enjoys from congressional restrictions.

[304] For an overview of state initiative, referenda, and recall provisions, see *Initiative, Referendum, and Recall*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx, and http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx. NCSL reports that twenty-four states allow popular referenda, eighteen states permit recall of state officials, and twenty-four states allow citizen initiatives. *Id.* These figures exclude legislative referenda—when the state legislature refers a measure to the voters for approval or rejection—which can occur in all fifty states. *See id.*

[305] *See* TARR, *supra* note 50, at 158.

[306] *See* NCSL, *supra* note 304 (identifying the recall of California Governor Gray Davis, who was replaced by Arnold Schwarzenegger, as a salient recent example).

[307] 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 (2009).

[308] *See* Elizabeth Garrett, *Crypto-Initiatives in Hybrid Democracy*, 78 S. CAL. L. REV. 985 (2005) (noting that scholarship on initiatives has focused on "the influence of organized and well-funded interest groups," as opposed to "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).

governors want the public to focus on.[309] These may allow a governor "to make credible policy commitments to voters,"[310] or to increase voters' ability to understand a particular policy.[311] Or they may be a means of governors or other members of their political party attempting to manipulate voter turnout and thus influence electoral outcomes.[312] 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.

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 have 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 calls for a political lens for 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.[313]

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[309] *See* Magleby, *supra* note 308 (noting that "placing an initiative on the ballot, regardless of the outcome of the election, generates widespread media attention for [an] issue").

[310] *See* Garrett, *supra* note 308, at 987.

[311] *See id.* at 988.

[312] *See* Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. CAL. L. REV. 949 (2005).

[313] *See, e.g.*, Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1 (2004); John Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997); Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and*

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."[314] 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 divided. Whether inside or outside federal programs—setting state energy policy, for example, while the CPP litigation plays out; or fighting Zika[315]; or developing plans to improve state criminal justice systems[316]—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.[317] And, as Rick Hills points out, governors' broader perspective on state government may make them more likely than siloed bureaucrats to oppose federal overreach.[318]

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," studies of how various institutions may protect federalism's core values in the absence of judicial enforcement.[319]

Politics: The Afterlife of American Federalism, 123 YALE L.J. 1920, 1921 (2014) (critiquing the framing of state "autonomy").

[314] Grad, *supra* note 89, at 929 (describing this view as "part of the rhetoric of the 1960s"); Ernest Young, *Federalism As A Constitutional Principle*, 83 U. CIN. L. REV. 1057 (2015) (expressing doubt that non-judicial safeguards suffice to protect federalism given the "pretty inexorable expansion of national power vis-à-vis the States over the past two centuries").

[315] *See* Press Release, Six-Step New York State Zika Action Plan, https://www.ny.gov/6-step-new-york-state-zika-action-plan/6-step-new-york-state-zika-action-plan (last visited Jan. 28, 2017).

[316] *See, e.g.*, Ill. Exec. Order No. 15-14 (Feb. 11, 2015), https://www.illinois.gov/Government/ExecOrders/Pages/2015_14.aspx (establishing the Illinois State Commission on Criminal Justice and Sentencing Reform).

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

[318] 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.

[319] *See* Bulman-Pozen, *supra* note ,313, at 1921 & n.4 (2014) (describing process federalism); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001).

Six decades ago, Herbert Wechsler famously coined the "political safeguards of federalism," which he rooted in states' "crucial role in the selection and composition" of the Senate, the House, and the president.[320] Decades later, Larry 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." [321] 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—ties that exceed state agencies' ties to their own government, a concept known as "picket fence federalism."[322] Even for scholars who disagree about whether states are losing ground 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.[323]

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."[324] Scholars have noted the potential of this arrangement to "coop[t]" state agencies into federal missions and diminishing the role of "elected political generalists" that might more likely push back against federal mandates.[325] For better and worse,

[320] 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).

[321] Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1544, 1554 (1994) [hereinafter Kramer, *Understanding Federalism*]; DEIL WRIGHT, UNDERSTANDING INTERGOVERNMENTAL RELATIONS 63 (1978).

[322] *See* Kramer, *Understanding Federalism*, supra note 321, at 1554.

[323] *See, e.g.*, Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 Yale L. J. 1889, 1189–90 (2014) (introducing a Feature of essays on federalism that move beyond "the traditional trappings of sovereignty and separate spheres," as well as "the notion that state autonomy matters above all else"); Bulman-Pozen, *supra* note 313, at 1932.

[324] Roderick M. Hills, Jr., *The Eleventh Amendment As Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1236 (2001); *see also* Kramer, *Understanding Federalism*, *supra* note 321 (describing this phenomenon).

[325] Hills, *supra* note 324, at 1241–42; 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").

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 governors' role. Some scholars, most prominently Jessica Bulman-Pozen in the legal literature, have elucidated accounts of "executive federalism," in which state and federal executive interactions, rather than legislative pronouncements at either level, are drivers of national policy.[326] 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.[327] The same pattern applies to numerous state positions regarding federal law or policy: to recognize same-sex marriage or refuse to do so;[328] to advance the federal aim of protecting transgender rights or refuse to do so;[329] to participate in federal refugee resettlement or to withdraw.[330] 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 Affordable Care Act without the governor's support.[331]

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[326] Bulman-Pozen, *supra* note 34, at 954–55. The term also appears in the public administration literature. *See* Thompson, *supra* note 325, at 4 (describing the recent recognition of executive federalism by public administration scholars).

[327] *See supra* Part II.B.

[328] *See id*.

[329] *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, *with* Press Release, Governor Cuomo Introduces Regulations to Protect Transgender New Yorkers from Unlawful Discrimination (Oct. 22, 2015), https://www.governor.ny.gov/news/governor-cuomo-introduces-regulations-protect-transgender-new-yorkers-unlawful-discrimination.

[330] *See supra* note 13.

[331] In Mississippi, the elected state insurance commissioner sought to establish a health insurance exchange under the Affordable Care Act despite the governor's objection. The state attorney general concluded that the commissioner was authorized to do so. *See* Office of the Attorney General, State of Mississippi, Opinion No. 2013-00010, 2103 WL 764876 (Jan. 15, 2013). But the federal agency within HHS reviewing the application rejected the commissioner's application based on a *federal* requirement of gubernatorial

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,[332] begin to bear a political, rather than bureaucratic, gloss. State inputs into national policymaking, that is, will flow more from Herbert Kaufman's "executive leadership" model than from "neutral competence"[333]—in modern parlance, more from politics than expertise.[334]

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 "inevitabl[e]"[335]—of federal executive power in the domestic realm. Scholars have debated for decades the President's authority to direct agency outcomes,[336] to remake agencies from within,[337] and to effect unilateral policy change with "a pen and a

approval. *See* Letter from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, to Mike Chaney, Comm'r of Ins., Feb. 8, 2013, https://www.cms.gov/CCIIO/Resources/Files/Downloads/ms-exchange-letter-02-08-2013.pdf. In other instances, the gubernatorial role is specified in the federal statute itself. *See* 42 U.S.C. §4368 (conditioning EPA grants to "qualified citizen groups" on certification of the group by the governor, in consultation with the state legislature); 20 U.S.C. §7920 (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).

[332] *See* Timothy Meyer, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 CAL. L. REV. 885 (2007) (describing "how [state attorneys general] have used litigation to become a regulatory force at the national level"). Governors often involve themselves in multi-state impact litigation, align themselves with its goals, and take credit for its successes.

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

[334] *See, e.g.*, Freeman & Vermeule, *supra* note 258.

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

[336] *See* Strauss, *Overseer*, *supra* note 3.

[337] *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 Terry 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 107, at 244-45.

phone," even as Congress sits gridlocked. [338] 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 efficiency, energy, and accountability.[339] A single President supervising the bureaucracy is more visible than an assortment of agency heads, and unlike those agency heads, she can be held accountable through elections for her policy choices.[340] A single President can also bring "dynamism"[341] and "dispatch" [342] 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.[343] A President sitting atop the hierarchy can coordinate agency efforts, establish overarching priorities, and facilitate the coherence and efficiency of administrative outputs.[344]

On the flip side, scholars worry that presidential control of the administrative state imperils "neutral competence,"[345] injects politics where expertise should govern, and thwarts deliberation and the diversity of perspectives (and congressional intent to promote those values).[346] Add these costs up, and you get an overarching concern about tyranny[347] and the subversion of the rule of law.[348] In light of these concerns, critics of modern presidential power often seek to reinvigorate checks on the

[338] *See* Tamara Keith, *Wielding a Pen and a Phone, Obama Goes it Alone*, NPR (Jan. 20, 2014), http://www.npr.org/2014/01/20/263766043/wielding-a-pen-and-a-phone-obama-goes-it-alone.

[339] *See* Kagan, *supra* note 3, at 2331; Berry & Gersen, *supra* note 30, at 1402–03. I bracket in this discussion the unitarian argument that the Constitution compels directive authority, and focus instead on those who debate presidential control on non-constitutional normative grounds.

[340] *See* Kagan, *supra* note 3, at 2331-32.

[341] *See id.* at 2339.

[342] THE FEDERALIST NO. 70, at 344 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

[343] *See* Kagan, *supra* note 3, at 2339 (describing presidents' "capacity and . . . willingness to adopt, modify, or revoke regulations, with a fair degree of expedition, to solve perceived national problems"); GersenBerry & 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").

[344] *See* Kagan, *supra* note 3, at 2340.

[345] *See* Moe, *supra* note 107, at 239 (describing but critiquing the prominence of this ideal) (quoting Kaufman, *supra* note 333).

[346] *See, e.g.*, Barron, *supra* note 337, at 1098-99.

[347] *See, e.g.*, CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS VOL. I, BOOK XI, CHAP. V 182-183 (Thomas Nugent, trans., J.V. Prichard, ed., D. Appleton and Co. 1900) (1748).

[348] *E.g.*, SHANE, *supra* note 39, at 114–15; ACKERMAN, *supra* note 1, at 37–40.

President.[349] Indeed, even fans of presidential administration hinge their support on the presence of adequate checks on presidential power.[350] 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.[351] And most of all, they are checked, as Kagan observed in her seminal article, from all sides—by courts, divided government, a watchful Congress, and a vibrant civil society.[352] Presidential actions are hemmed in by what Jack Goldsmith calls a "synopticon" of watchdogs.[353]

But governors, as explained earlier, generally possess the above-named powers and lack a 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 suggest 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 the governor's platform, they very likely inject politics into administration. By doing all of this in a manner

[349] *See* ACKERMAN, *supra* note 1, at 143 (proposing a "Supreme Executive Tribunal").
[350] *See* Kagan, *supra* note 3, at 2345–46.
[351] *See* Vermeule, *supra* note 199.
[352] *See* Kagan, *supra* note 3, at 2346.
[353] JACK GOLDSMITH, POWER AND CONSTRAINT 207-11 (2012).

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 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 government. We might imagine this as a sort of good-government system effect,[354] 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,[355] and that even if checking government power is a legitimate goal, federal separation of powers norms and jurisprudence are by no means inevitable.[356]

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.[357] This might be a feature of what Paul Kahn calls "American constitutionalism:[358] a desire to build in multiple checks on state action out of a Madisonian recognition that men are not angels.[359] 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.[360]

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

[354] *See generally* Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4 (2009).
[355] *See, e.g.*, Cristina M. Rodríguez, *Complexity As Constraint*, 115 COLUM. L. REV. SIDEBAR 179, 184–85 (2015).
[356] *See* M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603 (2001).
[357] *See supra* Parts I.A, III.A; WOOD, *supra* note 48, at 453.
[358] *See* Kahn, *supra* note 219.
[359] *See* Federalist No. 51 (Madison).
[360] *See* TARR, *supra* note 50; Federalist No. 47 (Madison).

checked than the federal government.[361] 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."[362] This view has roots in the sentiments of the Founding era Anti-Federalists, who believed that "states could be trusted with substantial power because they were under the close watch and secure control of their citizens."[363]

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 accountability. And, as David Schleicher has argued, governors may have a democratic edge even as compared to other state elected officials, since citizens are more likely to have informed preferences about governors.[364] 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.[365]

But electoral accountability only goes so far. If, as Part III described, governors lack surrounding institutions that meaningfully monitor and check their actions, it is not clear that modern state government will be closely watched or securely controlled in the way that small-government principles suppose. In turn, gubernatorial administration can undermine one justification for state power—or call for reforms that would yield stronger state-level watchdogs or institutional competitors. And it is not clear that exit options mitigate the problem. Not only are Tieboutian conceptions of seamless mobility[366] undermined by more recent scholarship about the stickiness of one's state of residence and high costs of relocating,[367] but the sorts of governance risks caused by strong gubernatorial administration would be common to many states and thus difficult to escape.[368] All told, gubernatorial administration holds real promise for the efficacy, rationality, and resilience of state government—but loses legitimacy without adequate oversight.

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[361] *See, e.g.*, Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1504 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)) (asserting that "direct popular control" of government officials "is stronger" at the state level).

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

[363] Levinson, *supra* note 37, at 49.

[364] *See* David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. __ (forthcoming 2016).

[365] *See* Levinson, *supra* note 37, at 102–05 (discussing and critiquing this justification).

[366] *See* 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).

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

[368] *Cf. id.* (noting that "federalism-as-exit" only helps those interests that "can command majority support" in a state, which is not true for most interests).

C. State-local relations

Gubernatorial administration also offers purchase on relations between states 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.[369] Courts, for their part, evaluate state-local conflicts through the framework of preemption, which often perpetuates (explicitly or implicitly) the focus on states and localities as undifferentiated entities, each of which desires power.[370] Even among the valuable work shedding new light on state-local relations—for example, highlighting the role that business groups play in challenging local regulations,[371] or the fascinating array of local administrative entities, many of which are subject to both state and local oversight[372]—here is seldom much discussion of the role of governors.

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 state power for its own sake.[373] Governors have higher priorities, including their substantive policy agenda, the principles and success of their political party, and their re-election or political future.[374] 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 increasing 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

[369] *See* Rodriguez, *supra* note 355; Weiland, *supra* note 42.
[370] *See* FRUG ET AL., LOCAL GOVERNMENT LAW: CASES AND MATERIALS xx (6th ed. 2014) (collecting state preemption cases).
[371] *See* Diller, *supra* note 42.
[372] *See* Davidson, *supra* note 41, at 2017; Aaron Saiger, *Local Government as a Choice of Agency Form*, 77 OHIO ST. L. J. 423, 436–37 (2016).
[373] *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 945 (2005).
[374] *Cf. id.* at 949–50 (explaining that government officials are motivated by "political incentives" that do not necessarily track the expansion of their jurisdiction's power or wealth).

projects.[375] 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,[376] 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.[377] Once in office, he signed into law a bill that abolished the agency.[378] This empowers cities, who often resist state-level or regional planning, in the service of the governor's substantive policy agenda.[379]

More commonly, governors involve themselves in limiting local authority—but not 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.[380] Groups from all sides criticized the governor's reaction – as too late, too anti-law enforcement, and too supportive of the use of force.[381]

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[375] *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).

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

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

[378] *See id.*

[379] Another example of governors working to empower local governments comes from education. Governor Jerry Brown recently spearheaded California's school funding legislation, which affords school districts greater discretion in how they spend state funds. *See* 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; Kevin Yamamura, Sacramento Bee, *Jerry Brown Pushes New School Funding System in California, But Districts May Not Share Equally*, HUFFINGTON POST (Dec. 26, 2012), http://www.huffingtonpost.com/2012/12/26/jerry-brown-pushes-new-fu_n_2364205.html (describing the governor's role).

[380] *See* Mo. Exec. Order No. 8 (Aug. 16, 2014); Mo. Exec. Order No. 9 (Aug. 18, 2014).

[381] *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 (describing criticisms by "various groups" regarding these issues).

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 Democratically led cities) on social and labor issues, an approach apparently promoted by ALEC.[382] 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.[383] Governor Pat McCrory of North Carolina 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.[384] In other circumstances, intra-party feuds ostensibly motivate governors to impede the agendas of local leaders, particularly those who may be competitors for party leadership.[385]

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 which 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.

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[382] *See* Valerie Bauerlein & Jon Kamp, *Cities Clash With State Governments Over Social and Environmental Policies*, WALL STREET J. (July 7, 2016), http://www.wsj.com/articles/cities-clash-with-state-governments-over-social-and-environmental-policies-1467909041; 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.

[383] *See* 2016 State of the State Address, http://azgovernor.gov/governor/files/2016-state-state-address.

[384] *See* Colin Campbell, Jim Morrill & Steve Marrison, *Governor's Office: HB2 Repeal Possible if Charlotte Drops LGBT Ordinance First*, CHARLOTTE OBSERVER (Sept. 16, 2016), http://www.charlotteobserver.com/news/politics-government/article102255582.html.

[385] *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.

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 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 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.

Appendix A: Executive Regulatory Review in the States[1]

			Type of Authority				
State	**Reviewer**	**Source of Authority**	**Return with Comments**	**Veto or Required Approval**	**Rescission**	**Other**	**Date of Enactment**
AL	N/A[2]						
AK	Governor[3]	Alaska Stat. §44.62.040(c)	X	X[4]			1995
AZ	Governor's Regulatory Review Council (GRRC) (governor-appointed)	Ariz. Rev. Stat. Ann. § 41-1052	X[5]	X		X[6]	1986
AR	Governor	Exec. Order 15-02		X			2015
CA	Office of Administrative Law (OAL) (governor-appointed head)	Cal. Gov't Code § 11349.1	X	X			1980[7]

[1] For a similar table, current as of 2010, see JASON A. SCHWARTZ, INST. FOR POLICY INTEGRITY, 52 EXPERIMENTS WITH REGULATORY REVIEW 88–97 (2010). I have used some of the same column headings for consistency within the field. This table may mention, but does not comprehensively document, review by the legislative branch (over which the governor may possess veto authority) or Attorney General (AG).

[2] Although there is no direct executive review, agencies may appeal the legislative review body's disapproval of a rule to the lieutenant governor, who may sustain the disapproval or approve the rule (which approval the legislature can override via joint resolution). *See* ALA. CODE § 41-22-23(b) (2016).

[3] And AG. *See* ALASKA STAT. § 44.62.125(b) (2016).

[4] Approval required by Department of Law within AG's office. *See id.* In addition, governor may return a rule before it becomes effective. *See* ALASKA STAT. § 44.62.040(c) (2016).

[5] Agencies appear before GRRC to answer questions. *See Governor's Regulatory Review Council (GRRC),* AZ.GOV, https://grrc.az.gov/grrc-process (last visited Jan. 22, 2017).

[6] Regulatory moratorium instituted in 2015 for 1 year. *See* Ariz. Exec. Order No. 2016-03 (Feb. 8, 2015), http://apps.azsos.gov/public_services/register/2016/16/26_governor_EO.pdf (in effect until December 31, 2016).

[7] The governor's Reorganization Plan No. 2 of 2012 moved the OAL into the Government Operations Agency. *See* CAL. LEGISLATIVE COUNSEL'S DIGEST, GOVERNOR'S REORGANIZATION PLAN NO. 2 OF 2012 (2012), https://www.gov.ca.gov/docs/Reorganization_plan.pdf.

			Type of Authority				
State	**Reviewer**	**Source of Authority**	**Return with Comments**	**Veto or Required Approval**	**Rescission**	**Other**	**Date of Enactment**
CO	Department of Regulatory Agencies (DORA) (governor-appointed Exec. Director)	Colo. Rev. Stat. § 24-4-103(2.5)(a)	X[8]				2003
CT	Governor	Exec. Order 37	X	X			2013
DE	N/A						N/A
FL	Office of Fiscal Accountability and Regulatory Reform (OFARR)	Exec. Order 11-211	X	X[9]			2011
GA	N/A						N/A
HI	Governor	Haw. Rev. Stat. § 91-3(c)		X			1965
ID	Governor; Administrator of Division of Financial Management (governor-appointed)[10]	Idaho Code § 67-1910		X[11]			N/A

[8] DORA's authority is limited to requiring an agency to undertake a cost-benefit analysis and "urg[ing]" the agency to make changes to the regulation. § 24-4-103(2.5)(a). Agencies must seek an opinion from the AG regarding the rule's "constitutionality and legality." § 24-4-103(8)(b).

[9] Formerly mandatory, but struck down by the Florida Supreme Court in Whiley v. Scott, 79 So. 3d 702 (Fla. 2011). The new executive order states that OFARR's recommendations "constitute the strongly held view of the Governor, and agency performance in light of OFARR's recommendations…will be [a] factor[] in the Governor's continual evaluation of his Administration." Fla. Exec. Order No. 11-211 (Oct. 19, 2011), http://www.flgov.com/wp-content/uploads/orders/2011/11-211-ofarr.pdf.

[10] Idaho voters recently approved HJR 5, a constitutional amendment authorizing a legislative veto of regulations. KTVB, *Voters Approve Amendment to Idaho Constitution*, KTVB.COM (Nov. 9, 2016), http://www.ktvb.com/news/politics/elections/voters-approve-amendment-to-idaho-constitution/350350415.

			Type of Authority				
State	**Reviewer**	**Source of Authority**	**Return with Comments**	**Veto or Required Approval**	**Rescission**	**Other**	**Date of Enactment**
IL	Governor	5 Ill. Comp. Stat. § 100/5-30; 5 Ill. Comp. Stat. § 100/5-40				X[12]	1991
IN	Governor[13]	Ind. Code § 4-22-2-34		X[14]			2013 (moratorium)
IA	Governor	Iowa Code § 17A.4	X[15]	X	X		1978
KS	Governor; Citizens Regulatory Review Board (governor-appointed)[16]	Exec. Order 11-02	X[17]				2011
KY	Governor	Ky. Rev. Stat. Ann. § 13A.330				X[18]	1996

[11] As a matter of practice, the governor and DFM Administrator review and must approve rules prior to promulgation. *See* OFFICE OF THE ADMIN. RULES COORDINATOR, THE IDAHO RULE WRITER'S MANUAL (2012), https://adminrules.idaho.gov/rulemaking_templates/rule_draftmanual.pdf; IDAHO DIV. OF FIN. MGMT., FORMS, IDAHO.GOV, https://dfm.idaho.gov/state_agencies/forms/forms.html; SCHWARTZ, *supra* note 1, at 90.

[12] The governor can request a public hearing on a proposed rule, or request an economic impact analysis. (A group of "25 interested individuals" has those same powers.) 5 ILL. COMP. STAT. § 100/5-40 (2016). Regulatory review in Illinois is dominated by the legislative review entity, the Joint Committee on Administrative Rules (JCAR). SCHWARTZ, *supra* note 1, at 216–18.

[13] After approval by AG. IND. CODE § 4-22-2-32 (2016).

[14] Governor may approve or disapprove with or without cause. IND. CODE § 4-22-2-34 (2016). By executive order, an ongoing rulemaking moratorium is also in place in Indiana. Ind. Exec. Order No. 13-03 (Jan. 14, 2013), http://www.in.gov/legislative/iac/20130206-IR-GOV130031EOA.xml.pdf.

[15] The Governor (along with the AG and Legislature) can object to any part of a rule. If the agency chooses to proceed, the agency has the burden in any enforcement proceeding or judicial proceeding to show that the rule is not "unreasonable, arbitrary, capricious, or otherwise beyond the authority delegated to the agency." IOWA CODE § 17A.4 3.b.(1) (2016); § 17A.4 6.a.

[16] *See* KAN. STAT. ANN. § 66-1222 (2016).

[17] Board may review and comment on rules and submit comments to Governor for consideration. Kan. Exec. Order No. 11-02 (Feb. 9, 2011), http://kslib.info/DocumentCenter/View/3183.

			Type of Authority				
State	**Reviewer**	**Source of Authority**	**Return with Comments**	**Veto or Required Approval**	**Rescission**	**Other**	**Date of Enactment**
LA	Governor	La. Stat. Ann. § 49:970		X	X[19]		1981
ME	Governor	Exec. Order 20 FY 11/12		X			2011
MD	Governor	Md. Code Ann., State Gov't § 10-111.1		X[20]			1985
MA	Secretary of Administration & Finance (governor-appointed)	Exec. Order 562		X			2015
MI	Office of Performance and Transformation[21]	Exec. Order 2016-4; Mich. Comp. Laws Ann. § 24.245	X		X[22]		2011
MN	Governor	Minn. Stat. § 14.05(6)	X[23]	X			1999

[18] Governor reviews rules, and may approve or disapprove, if a legislative committee first finds the regulation "deficient." KY. REV. STAT. ANN. § 13A.330 (2016).
[19] Governor may, by executive order, suspend or veto rules within 30 days of adoption. LA. STAT. ANN. § 49:970 (2016).
[20] Governor may approve, reject, or "instruct [agency] to modify" rules after committee opposes them. MD. CODE ANN., STATE GOV'T § 10-111.1 (West 2016).
[21] The State Budget Director, who is a gubernatorial appointee and member of the governor's cabinet, appoints the OPT Director. Mich. Exec. Order No. 2016-4 (Feb. 2, 2016), http://www.michigan.gov/documents/snyder/EO_2016-4_512748_7.pdf.
[22] Authority to "order … elimination, suspension, or modification" is limited to "non-rule regulatory action[s]." Mich. Exec. Order No. 2011-5 (Feb. 23, 2011), https://www.michigan.gov/documents/snyder/2011-5_346312_7.pdf.
[23] By practice, the governor's office conducts an extensive review process prior to promulgation through the Governor's Office of Legislative and Cabinet Affairs. *See* OFFICE OF THE GOVERNOR, ADMINISTRATIVE RULES REVIEW PROCESS (2016), http://www.health.state.mn.us/rules/manual/gov-plcy.docx; SCHWARTZ, *supra* note 1, at 273 (describing interviews about process).

			Type of Authority				
State	**Reviewer**	**Source of Authority**	**Return with Comments**	**Veto or Required Approval**	**Rescission**	**Other**	**Date of Enactment**
MS	N/A[24]						N/A
MO	Governor	Mo. Rev. Stat. § 536.022		X[25]			1979
MT	N/A[26]						N/A
NE	Governor	Neb. Rev. Stat. § 84-908		X			1953
NV	N/A[27]						N/A
NH	N/A						N/A
NJ	Governor; Red Tape Review Commission	Exec. Orders 2, 3, 41, 155, 198				X[28]	2010
NM	N/A						N/A
NY	Governor; Governor's Director of State Operations	Exec. Order 20 (1995); Exec. Order 14 (2014)	X	X[29]			1995

[24] Both Mississippi and Missouri have review boards to assess regulatory impacts on small businesses; the governor appoints some of the members of these boards. *See* MO. REV. STAT. § 536.300 et seq. (2016); MISS. CODE ANN. § 25-43-4.103 (2016). In Missouri, the board is supposed to report to the governor annually. MO. REV. STAT. § 536.310 (2016).

[25] The statute indicates that a "rule or any portion of a rule of a state agency" may be "suspended or terminated by action of the governor." MO. REV. STAT. § 536.022 (2016).

[26] Some sources report that the governor exercises informal review for consistency with gubernatorial policy. *See* SCHWARTZ, *supra* note 1, at 287.

[27] Governor plays a role in the approval of emergency rules. Otherwise, regulatory review is largely legislative. *See* OFFICE OF THE ATTORNEY GENERAL, ADMINISTRATIVE RULEMAKING: A PROCEDURAL GUIDE (2014), http://ag.nv.gov/uploadedFiles/agnvgov/Content/Publications/RulemakingManualComplete.pdf.

[28] Through a series of executive orders, Governor Chris Christie established a Red Tape Review Commission to minimize regulatory burdens. Although the work of the group is primarily retrospective and advisory, and thus beyond the scope of this chart, the Executive Orders contain some language imposing ongoing (but somewhat ambiguous) obligations on agencies—e.g., to justify regulatory burdens and utilize cost-benefit analysis—and are thus listed here on the assumption that the Governor's office may play some role in reviewing the resulting justifications and analyses.

[29] A 1995 executive order required gubernatorial approval of proposed rules through the Governor's Office of Regulatory Reform. N.Y. Exec. Order No. 20 (Nov. 30, 1995). A 2011 executive order retains the requirement of gubernatorial approval but revokes the formal process established in the earlier Order, leaving

			Type of Authority				
State	**Reviewer**	**Source of Authority**	**Return with Comments**	**Veto or Required Approval**	**Rescission**	**Other**	**Date of Enactment**
NC	Office of State Budget and Management (OSBM) (governor-appointed); Rules Review Commission (quasi-executive)	N.C. Gen. Stat. § 150B-21.4; Exec. Order 48 (2014); N.C. Gen. Stat. § 143B-30.1 et seq.	X[30]	X[31]			1991 (§ 150B-21.4) 1985 (§ 143B-30.1)
ND	N/A[32]						N/A
OH	Governor; Common-Sense Initiative (Lieutenant Governor's Office)	Exec. Order 2011-01K; Ohio Rev. Code Ann. § 107.61	X				2011
OK	Governor	Okla. Stat. tit. 75, § 303; Exec. Order 2013–34		X[33]			2013
OR	N/A						N/A

the details to be prescribed by the Governor's Director of State Operations. N.Y. Exec. Order No. 14 (Apr. 27, 2011), https://www.governor.ny.gov/news/no-14-revocation-executive-order-no-20. No description of the new process has been published.

[30] OSBM analyzes certain significant proposed rules and may return to agency with comments. N.C. GEN. STAT. § 150B-21.4 (2016).

[31] RRC must approve final rules before they take effect, based on four criteria specified by statute. N.C. GEN. STAT. § 143B-30.1 et seq. (2016).

[32] Agencies must submit a regulatory analysis if the governor (or any legislator) requests one, N.D. CENT. CODE § 28-32-08 (2016), but the AG grants regulatory approval, N.D. CENT. CODE. § 28-32-14 (2016). The governor must approve emergency rules. N.D. CENT. CODE § 28-32-03 (2016).

[33] Under the executive order, agencies must submit notices of rulemaking intent to the governor, who may disapprove of them. *See* Exec. Order 2013–34, § 3. If the governor does not disapprove, the rule proceeds to the legislative review process, the results of which the governor may in some cases override. *See* Okla. Stat. § 308.3.

			Type of Authority				
State	**Reviewer**	**Source of Authority**	**Return with Comments**	**Veto or Required Approval**	**Rescission**	**Other**	**Date of Enactment**
PA	Governor's General Counsel, Secretary of the Budget, and Policy Director	71 Pa. Cons. Stat. § 732-301; Exec. Order 1996-1	X	X[34]			1980
RI	Office of Regulatory Reform in OMB (governor-appointed)	Exec. Order 15-07	X	X			2015
SC	N/A[35]						N/A
SD	N/A						N/A
TN	N/A						N/A
TX	N/A[36]						N/A
UT	Governor's Office of Planning and Budget; Governor's Office of Economic Development	Exec. Order 013/2011	X				2011
VT	Interagency Committee on Administrative Rules (ICAR) (members serve at governor's pleasure)	Vt. Stat. Ann. tit. 3, § 820	X[37]				1981

[34] *See* Pa. Exec. Order No. 1996-1, § 4(e) (Feb. 6, 1996), http://www.oa.pa.gov/Policies/eo/Documents/1996_1.pdf.
[35] Like other states noted above, South Carolina has a Small Business Regulatory Review Committee. The governor appoints 5 of 11 members. See S.C. CODE ANN. § 1-23-280 (2016).
[36] Rules are filed with the Lieutenant Governor, TEX. GOV'T CODE ANN. § 2001.032 (West 2016), and the AG sometimes provides review and advice. *See* OFFICE OF THE ATTORNEY GENERAL, 2014 ADMINISTRATIVE LAW HANDBOOK (2014), https://www.texasattorneygeneral.gov/files/og/adminlawhb.pdf.
[37] ICAR's role includes "review of existing and proposed rules of agencies designated by the Governor for style, consistency with the law, legislative intent, and the policies of the Governor." VT. STAT. ANN. tit. 3, § 820(b) (2016).

			Type of Authority				
State	**Reviewer**	**Source of Authority**	**Return with Comments**	**Veto or Required Approval**	**Rescission**	**Other**	**Date of Enactment**
VA	Governor; Governor's Chief of Staff	Va. Code Ann. § 2.2-4013; Exec. Order 17		X			2001 (§ 2.2-4013) 2014 (Exec. Order)
WA	N/A[38]						N/A
WV	N/A[39]						N/A
WI	Governor	2011 Act 21	X	X			2011
WY	Governor	Wyo. Stat. Ann. § 16-3-103(d).		X			1977

[38] The governor also responds to appeals from people who have petitioned agencies to take action on rules. *See* WASH. REV. CODE § 34.05.330 (2016). In addition, as in other states, the governor approves or disapproves the rules review committee's decisions to suspend rules. *See* WASH. REV. CODE § 34.05.640 (2016).

[39] Unlike other states and the federal government, West Virginia requires rules to be approved for promulgation "by an act of the Legislature" before they become effective. See W. VA. CODE § 29A-3-9 (2016). Accordingly, the governor plays a limited role insofar as the governor can veto the legislation that would effectuate the rule promulgation. See W. VA. SEC'Y OF STATE, SUMMARY OF REGULAR RULE MAKING STEPS (2017), http://www.sos.wv.gov/administrative-law/rulemaking/Pages/stepsummary.aspx.

Appendix B: Gubernatorial Reorganization Authority[1]

State	Source of Authority	Notable Limits on Governor's Authority[2]	Legislative Role[3]	Year of Enactment
AL	N/A			
AK	Alaska Const. art. III, § 23[4]		Two-house veto: majority of members in joint session.[5]	1956
AZ	N/A			
AR	Ark. Code Ann. § 25-16-201	Only when necessary to comply with federal law or regulations.[6]	Two-house veto: If the reorganization deprives an agency of "any authority or jurisdiction," the legislature may rescind it by joint resolution at the next legislative session.[7]	1971

[1] For similar efforts, see COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 2016, 163–64 (2016) (Table 4.4—The Governors: Powers) [hereinafter BOS] and Gerald Benjamin & Zachary Keck, *Executive Orders and Gubernatorial Authority to Reorganize State Government*, 74 ALB. L. REV. 1613, 1632–34 (2011). BOS, based on survey responses from state officials, includes the following states for which neither I nor Benjamin and Keck found positive-law support: Colorado, Delaware, Georgia, Hawaii, Iowa, Louisiana, Mississippi, North Dakota, and Utah. BOS also excludes three states for which I located support: Idaho, New York, and Pennsylvania.

[2] This column refers to express limitations imposed on the governor in the authorizing statute. There may be instances in which a power expressly forbidden in some states would, if tested in court, be found to be implicitly forbidden in other states. For clarity and consistency—and to examine which limitations were deemed sufficiently important to make explicit—I include only the limitations found in positive law.

[3] This column describes only legislative involvement as established in positive law.

[4] Governor may change the executive branch's organization or reassign functions among its units when the governor considers the changes "necessary for efficient administration." ALASKA CONST. art. III, § 23.

[5] The legislature has 60 days during a regular session, or the entirety of a session shorter than 60 days, to disapprove the governor's executive reorganization orders. *Id.*

[6] More specifically, the governor may "establish, combine, abolish, or otherwise reorganize" any agencies, departments, or units of the executive branch, but only when necessary to comply with federal law or regulations. ARK. CODE ANN. § 25-16-201(a) (2016).

[7] § 25-16-201(b).

State	Source of Authority	Notable Limits on Governor's Authority[2]	Legislative Role[3]	Year of Enactment
CA	Cal Gov't Code § 12080.2	Several, including that the plan may not abolish constitutionally granted agencies or functions, and may not create new administrative powers.[8]	One-house veto: resolution adopted by majority vote of members of either house.[9]	1967
CO	N/A[10]			1937
CT	Conn. Gen. Stat. § 3-6	Governor may not create new taxpayer-funded positions or alter existing statutes.[11]	Ambiguous. In practice, governors appear to seek legislation for major reorganizations.	
DE	N/A			
FL	Fla. Const. art. IV, § 1, para. (e)		Ambiguous, but affirmative legislation appears to be required to enact governor's plan.	1968
GA	N/A			
HI	N/A			
ID	Implicit[12]			

[8] More specifically, on the latter, the plan may not "[a]uthorize any agency to exercise any function which is not expressly authorized by law to be exercised by an agency in the executive branch at the time the plan is transmitted to the Legislature." CAL. GOV'T CODE § 12080.4 (West 2016).
[9] CAL. GOV'T CODE § 12080.5 (West 2016).
[10] Like governors in many states lacking explicit reorganization authority, Colorado governors regularly create executive-branch commissions, task forces, and the like. This may be one reason that BOS, *supra* note 1, includes Colorado as a state with gubernatorial reorganization authority. But in the absence of positive authority or a more established convention of reorganizing agencies that can act with the force of law, Colorado (and other states designated "N/A" here) are outside the scope of this appendix.
[11] Indeed, the Connecticut governor's reorganization authority is in some senses no greater than that of governors excluded from this chart, as described *supra* note 10. But, based on § 3-6, an Attorney General opinion has recognized the governor's authority to establish (and appoint members of) a state contracting board that has some ability to bind parties directly. *See* Conn. Att'y Gen. Op. No. 05-019 (2005), 2005 WL 1865128, at *3 (stating, *inter alia*, that governor has authority, through the board, to impose certain requirements for state contracting).
[12] Included here because of past practice. *See* Idaho Exec. Order No. 2006-18 (June 6, 2006), https://adminrules.idaho.gov/bulletin/2006/07.pdf#page=16 (directing the reorganization of the Department of Health and Welfare).

State	Source of Authority	Notable Limits on Governor's Authority[2]	Legislative Role[3]	Year of Enactment
IL	Ill. Const. art. V, § 11; 15 Ill. Comp. Stat. 15/2		One-house veto within 60 days.[13]	1970 (Constitution) 1979 (implementing legislation)
IN	Ind. Code § 4-3-6-4		Affirmative legislation required to enact governor's plan.[14]	1967
IA	N/A			
KS	Kan. Const. art. I, § 6	May not reorganize constitutionally delegated functions, and must identify statutory authority when abolishing other functions.[15]	One-house veto within 60 days or end of legislative session, whichever is sooner.[16]	1972
KY	Ky. Rev. Stat. Ann. § 12.028	The governor may not affect the organizational structure of "an administrative body headed by" an "elected state officer unless requested in writing by that officer."[17]	During a legislative session, the governor may propose reorganizations for legislative approval. Between legislative sessions, the governor may, by executive order, effect temporary reorganizations; these terminate 90 days after the subsequent legislative session "unless otherwise specified by the General Assembly."[18]	1982[19]
LA	N/A			

[13] ILL. CONST. art. V, § 11.
[14] IND. CODE § 4-3-6-7 (2016).
[15] KAN. CONST. art. I, § 6.
[16] *Id.*
[17] KY. REV. STAT. ANN. § 12.028(2) (West 2016).
[18] § 12.028(1)–(5).
[19] An earlier version of the statute, enacted in 1960, provided for the governor to establish reorganizations by executive order, and to "recommend legislation . . . to confirm [such] reorganizations." *See* KY. REV. STAT. ANN. § 12.025 (repealed 1982).

State	Source of Authority	Notable Limits on Governor's Authority[2]	Legislative Role[3]	Year of Enactment
ME	N/A			
MD	Md. Const. art. II, § 24; Md. Code Ann., State Gov't § 8-301	May not abolish constitutionally created offices or alter constitutionally delegated powers.[20]	Reorganizations that are not "inconsistent with existing law" and do not "create new governmental programs" are effective without legislative involvement. Reorganizations that are inconsistent with existing law or create new programs are subject to a one-house veto within 50 days.[21]	1970 (Constitution) 1984 (Statute)
MA	Mass. Const. Art. of Amend. art. LXXXVII	May only affect agencies "within the executive department of the government."[22]	One-house veto within 60 days.[23]	1966
MI	Mich. Const. art. V, § 2		Two-house veto within 60 days.[24]	1963
MN	Minn. Stat. § 16B.37[25]		Effective upon timely filing with Secretary of State, except that certain types of reorganization orders require affirmative legislative vote to enact.[26]	1984
MS	N/A			

[20] MD. CONST. art. II, § 24.
[21] *Id.*
[22] MASS. CONST. Art. of Amend. art. LXXXVII.
[23] *Id.*
[24] MICH. CONST. art. V, § 2.
[25] Empowers Commissioner of Administration to order reorganizations of state agencies, but governor must approve reorganization plans. MINN. STAT. § 16B.37(1) (2016).
[26] § 16B.37(2) (An order that "transfers all of substantially all of the powers or duties or personnel of a department, the Housing Finance Agency, or the Pollution Control Agency is not effective until it is ratified by concurrent resolution or enacted into law.").

State	Source of Authority	Notable Limits on Governor's Authority[2]	Legislative Role[3]	Year of Enactment
MO	Mo. Rev. Stat. § 26.500	May only affect agencies "in the executive branch of the state government."[27]	One-house veto within 60 days.[28]	1967
MT	Mont. Code Ann. § 2-7-103[29]			1947
NE	N/A			
NV	Practice[30]			
NH	N/A			
NJ	N.J. Stat. Ann. § 52:14C-4	Governor cannot, *inter alia*, create or abolish a "principal department," extend terms of office, or provide authority for new functions.[31] If a plan abolishes functions, governor must identify statutory authority for the abolition and explain cost savings or efficiency increase.[32]	Two-house veto within 60 days.[33]	1969

[27] The statute also provides that reorganizations "shall relate only to abolishing or combining" agencies or "changing the organization thereof or the assignment of functions thereto." MO. REV. STAT. § 26.540 (2016). But this language does not preclude, and may sometimes require, establishing a new agency to perform the functions being reassigned from other agencies. *See* Mo. Atty. Gen. Op. 167, at *4 (1971).
[28] MO. REV. STAT. § 26.510 (2016).
[29] The statute provides that, in conjunction with continuous evaluation of the executive branch and each agency, the governor "shall, by executive order or other means . . . take action to improve the manageability of the executive branch." MONT. CODE ANN. § 2-7-103 (2016).
[30] *See* Nev. Dep't of Admin., *Governor's Executive Orders*, http://admin.nv.gov/Executive-Order/ (last visited Jan. 29, 2017) (stating that governor may issue executive orders "to reorganize or control bureaucracy"); Nev. State Library, Archives & Pub. Records, *Nevada State Governors Executive Orders* (2014), http://nsla.nv.gov/Archives/Executive_Orders/ (same).
[31] N.J. STAT. ANN. § 52-14C-6 (West 2016).
[32] N.J. STAT. ANN. § 52-14C-4(b) (West 2016).

State	Source of Authority	Notable Limits on Governor's Authority[2]	Legislative Role[3]	Year of Enactment
NM	N/A			
NY	N.Y. Exec. Law § 31[34]		The legislature has express constitutional authority to reorganize the executive branch,[35] but neither the constitution nor the relevant statute specifies the legislative role in executive reorganization.	1951
NC	N.C. Const. art. III, § 5, para. (10); N.C. Gen. Stat. § 143A-8		Reorganizations that "affect existing law" are subject to a one-house veto, and may be modified by joint resolution.[36]	1971 (both)
ND	N/A			
OH	N/A			
OK	Okla. Stat. tit. 74, § 10.3	Governor may create and modify an advisory cabinet subject to Senate confirmation, but may not create or change other agencies.[37]		1986
OR	N/A[38]			

[33] N.J. STAT. ANN. § 52:14C-7 (West 2016).
[34] The statute lists ten existing divisions within the executive branch, and authorizes the governor to "establish, consolidate, or abolish additional divisions and bureaus." N.Y. EXEC. LAW § 31 (McKinney 2016).
[35] *See* N.Y. CONST. art. V, § 3.
[36] N.C. CONST. art. III, § 5, para. (10).
[37] OKLA. STAT. tit. 74, § 10.3 (2016).
[38] Agency heads may initiate reorganizations of their individual agencies, subject to the governor's approval. Examples include Or. Rev. Stat. § 409.110(1)(c) (Human Services); Or. Rev. Stat. §657.610(1) (Employment Department) OR. REV. STAT. § 705.115 (2016) (Department of Consumer and Business Services); OR. REV. STAT. § 401.062 (2016) (Office of Emergency Management); OR. REV. STAT. § 413.011 (2016) (Oregon Health Authority).

State	Source of Authority	Notable Limits on Governor's Authority[2]	Legislative Role[3]	Year of Enactment
PA	71 Pa. Cons. Stat. § 750-4	Governor may not, *inter alia*, abolish or transfer all functions of an entire executive or administrative department or authorize agencies to perform functions that are not legislatively authorized.[39]	One-house veto within 30 days.[40]	1955
RI	42 R.I. Gen. Laws § 42-6-5	Governor may not transfer functions expressly assigned to one department to another department.[41]		1939
SC	N/A			
SD	S.D. Const. art. IV, § 8	Governor's reorganization may not include elected constitutional officers.[42]	One house-veto within 90 days.[43]	1972
TN	Tenn. Code Ann. § 4-4-102[44]	Governor likely may not abolish altogether a statutorily created department.[45]		1937
TX	N/A			

[39] *See* 71 PA. CONS. STAT. § 750-6 (2016).
[40] Plan can become effective by failure to act, or by affirmative vote of majority of members of each house. *See* 71 PA. CONS. STAT. § 750-7 (2016).
[41] In contrast, governor may designate which officials within departments will perform functions, and may assign to a department of her choice functions not expressly assigned by statute. R.I. GEN. LAWS § 42-6-5 (2016).
[42] S.D. CONST. art. IV, § 8.
[43] *Id.*
[44] Governor may also authorize department commissioners to reorganize their departments. TENN. CODE ANN. § 4-4-101 (2016).
[45] *See* Tenn. Att'y Gen. Op. 91-18 (1991).

State	Source of Authority	Notable Limits on Governor's Authority[2]	Legislative Role[3]	Year of Enactment
UT	N/A			
VT	Vt. Stat. Ann. tit. 3, § 2001; Vt. Stat. Ann. Tit. 3, § 2002(a)		One-house veto within 90 days.[46]	1969
VA	Va. Code Ann. § 2.2-129	Governor may not authorize an agency to perform a function not authorized by law.[47]	Requires affirmative two-house vote to enact. Either house may delete part of a reorganization plan while approving the rest.[48]	2001
WA	N/A			
WV	N/A			
WI	N/A			
WY	N/A			

[46] VT. STAT. ANN. tit. 3, § 2002(b) (2016).
[47] VA. CODE ANN. § 2.2-131 (2016).
[48] VA. CODE ANN. § 2.2-132 (2016).

Appendix C: Line Item Veto Authority[1]

State	Source of Authority	Only Appropriations Bills	Non-Appropriations Matters Allowed[2]	Year of Enactment
AL	Ala. Const. art. V, § 126	X	Yes[3]	1875
AK	Alaska Const. art. II, § 15	X	No[4]	1912
AZ	Ariz. Const. art. V, § 7	X	No[5]	1901
AR	Ark. Const. art. VI, § 17	X	Yes[6]	1874
CA	Cal. Const. art. IV, § 10, para. (e)	X	No[7]	1879

[1] For a similar effort, see COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 2016, 163–64 (2016) (Table 4.4: The Governors: Powers). Because the Book of the States does not include case (or other) citations, I was unable to verify its findings, which differ from mine in some states. I have included citations to relevant cases and attorney general opinions where the authorizing text does not explain the scope of the line item veto power.

[2] Approximately 19 states—most of the states designated "No" in this column—have precedents stating that the governor can veto substantive conditions or riders as long as she also vetoes the appropriation itself. I have designated these governors as lacking authority to veto non-appropriations matters because their veto authority will in most cases be functionally equivalent to governors who can only veto appropriations (and in turn strike out the attached riders). Further work that focuses on state budgeting processes would reveal more on this question.

[3] The case law does not directly address this question, *see, e.g.*, Hunt v. Hubbert, 588 So.2d 848, 850 (Ala. 1991) (mentioning governor's veto of various provisions of a bill but striking the veto down on procedural grounds), but recent governors have exercised the power for non-appropriations matters. *See also* Mike Cason, *Alabama General Fund Budget Final After Governor's Line-Item* Veto, AL.COM (Apr. 4, 2014), http://blog.al.com/wire/2014/04/alabama_general_fund_budget_fi.html.

[4] *See* Alaska State Legislature v. Knowles, 86 P.3d 891, 895 (Alaska 2004).

[5] *See, e.g.*, Black & White Taxicab Co. v. Standard Oil Co., 218 P. 139, 147 (Ariz. 1923).

[6] The scope of this power is unclear and largely untested, *see, e.g.*, Ark. Att'y Gen. Op. 2001-118 (2001) (speculating that a court would likely allow the governor to veto riders or restrictions only if the governor also vetoed the accompanying appropriation), but recent practice reflects the governor using the authority to do more than just eliminate appropriations—namely, to *reinstate funding* for programs (such as the Medicaid expansion). *See* Chris Hickey & Jacob Kauffman, *Arkansas Governor Uses Veto Plan to Continue Medicaid Expansion*, UALR PUB. RADIO (Apr. 21, 2016), http://ualrpublicradio.org/post/arkansas-governor-uses-veto-plan-continue-medicaid-expansion#stream/0.

State	Source of Authority	Only Appropriations Bills	Non-Appropriations Matters Allowed[2]	Year of Enactment
CO	Colo. Const. art. IV, § 12	X	No[8]	1876
CT	Conn. Const. art. IV, § 16	X	No[9]	1924
DE	Del. Const. art. III, § 18	X	No[10]	1897
FL	Fla. Const. art. III, § 8, para. (a)	X	No[11]	1875
GA	Ga. Const. art. III, § 5, para. XIII	X	Yes[12]	1861
HI	Haw. Const. art. III, § 16	X	Unknown[13]	1894[14]
ID	Idaho Const. art. IV, § 11	X	No[15]	1889
IL	Ill. Const. art. IV, § 9, para. (d)	No[16]	Yes[17]	1884 (item veto)[18]

[7] *See* Harbor v. Deukmejian, 742 P.2d 1290, 1295 (Cal. 1987) (distinguishing a legitimate "item of appropriation," which sets aside funds to pay a particular claim, from substantive legislative provisions that impact the treasury).
[8] *See* Colo. Gen. Assembly v. Owens, 136 P.3d 262, 267 (Colo. 2006).
[9] *See* Caldwell v. Meskill, 320 A.2d 788, 792 (Conn. 1973) (collecting cases for the proposition that an item of appropriation is a specified sum of money).
[10] *See* Perry v. Decker, 457 A.2d 357, 360 (Del. 1983).
[11] *See* Fla. Senate v. Harris, 750 So.2d 626, 629–30 (Fla. 1999).
[12] For a description of how the power works in practice, see Thomas P. Lauth & Catherine C. Reese, *The Line-Item Veto in Georgia: Fiscal Restraint or Inter-Branch Politics?*, 26 PUB. BUDGETING & FIN. 1 (2006).
[13] Neither case law, attorney general opinions, nor recent practice appear to answer this question.
[14] Prior to Hawaii's statehood, its President possessed the item veto power.
[15] *See* Cenarrusa v. Andrus, 582 P.2d 1082, 1090 (Idaho 1978) (governor "may disapprove only items of appropriation of money").
[16] *See* ILL. CONST. art. IV, § 9, para. (e) (amendatory veto power applies to any bill, but requires each house of the legislature to approve).
[17] But when the governor exercises an item rather than amendatory veto, it still appears to be construed narrowly. *See* Ill. Att'y Gen. Op. S-630 (1973) (governor could veto overall appropriation for junior colleges, but could not use item veto authority to reduce reimbursement rate per semester hour for junior colleges).
[18] The amendatory veto, see Ill. Const. art. IV, §9, para. (e), was added in 1970.

State	Source of Authority	Only Appropriations Bills	Non-Appropriations Matters Allowed[2]	Year of Enactment
IN	N/A[19]			
IA	Iowa Const. art. III, § 16	X	Yes[20]	1968
KS	Kan. Const. art. II, § 14, para. (b)	X	Yes[21]	1904
KY	Ky. Const. § 88	X	Unknown[22]	1891
LA	La. Const. art. IV, § 5, para. (G)	X	Yes[23]	1879
ME	Me. Const. art. IV, pt. 3, § 2-A	No[24]	Unknown[25]	1995
MD	Md. Const. art. II, § 17, para. (e)	X[26]	No[27]	1891

[19] On Indiana and the other five states that lack item veto power, see Thomas P. Lauth, *The Other Six: Governors Without The Line-Item Veto*, PUB. BUDGETING & FIN. 1 (2016).
[20] Rants v. Vilsack, 684 N.W.2d 193, 206 (Iowa 2004) (governor may veto appropriations; substantive riders; and conditions accompanying appropriations, where the accompanying appropriation is also vetoed).
[21] For recent practice, see KHI News, *Governor Signs Budget with Line-Item Vetoes*, KAN. HEALTH INST. (Apr. 13, 2009), http://www.khi.org/news/article/governor-signs-budget-line-item-vetoes (describing governor's use of line-item veto to eliminate requirements prescribing how appropriations to state universities would be spent). For an attorney general opinion concluding the governor could use the item veto power to strike conditions attached to a lump-sum budget provision, see Kan. Att'y Gen. Op. 2012-1 (2012).
[22] *See* Ky. Att'y Gen. Op. 03-003 (2003) (predicting that a court would require the underlying statute to be an appropriations bill, but noting that no case law interprets the scope of the item veto authority or provides guidance on what matters within an appropriations bill may be vetoed).
[23] *See* Henry v. Edwards, 346 So.2d 153, 158 (La. 1977).
[24] The provision states: "The Governor has power to disapprove any dollar amount appearing in an appropriation section or allocation section, or both, of an enacted legislative document." ME. CONST. art. IV, pt. III, § 2-A.
[25] No case law, attorney general opinions, or recent practice appear to answer this question.
[26] Probably yes. The text states that the governor "shall have power to disapprove of any item or items of any Bills making appropriations of money embracing distinct items." Md. Const. art. II, § 17, para. (e).
[27] Probably no. *See* Md. Att'y Gen. Op. 61OAG247 (1976).

State	Source of Authority	Only Appropriations Bills	Non-Appropriations Matters Allowed[2]	Year of Enactment
MA	Mass. Const. art. of amend. LXIII, § 5	X	Yes[28]	1918
MI	Mich. Const. art. V, § 19	X	No[29]	1908
MN	Minn. Const. art. IV, § 23	X	No[30]	1876
MS	Miss. Const. art. IV, § 73	X	No[31]	1890
MO	Mo. Const. art. IV, § 26	X	No[32]	1875
MT	Mont. Const. art. VI, § 10, para. (5)	**X**	No[33]	1889
NE	Neb. Const. art. IV, § 15	X	Unclear[34]	1875
NV	N/A			
NH	N/A			
NJ	N.J. Const. art. V, § 1, para. 15	X	Yes[35]	1875

[28] *See* Opinion of the Justices, 643 N.E.2d 1036, 1039, 1043 (Mass. 1994).
[29] Probably no. *See* Mich. Att'y Gen. Op. 46 (1991) (stating that the governor may not veto conditions upon an appropriation unless the governor vetoes the line item itself).
[30] *See* Johnson v. Carlson, 507 N.W.2d 232, 233 (Minn. 1993).
[31] *See* Barbour v. Delta Corr. Facility, 871 So.2d 703, 707 (Miss. 2004).
[32] *See* State v. Bond, 495 S.W.2d 385, 386 (Mo. 1973) (en banc).
[33] *See* City of Helena v. Omholt, 468 P.2d 764, 769 (Mont. 1970).
[34] *See* Neb. Att'y Gen. Op. 01023 (2001) (identifying absence of case law). The Attorney General opines that while the governor likely could not strike conditions without striking related appropriations, the legislature could not circumvent the governor's item veto authority "by the device of a lump-sum appropriation followed by subdivisions calling for the expenditure of the lump sum in specified amounts for named purposes." *Id.*
[35] Karcher v. Kean, 479 A.2d 403, 406 (N.J. 1984).

State	Source of Authority	Only Appropriations Bills	Non-Appropriations Matters Allowed[2]	Year of Enactment
NM	N.M. Const. art. IV, § 22	X	Yes[36]	1889
NY	N.Y. Const. art. IV, § 7	X	Yes[37]	1874
NC	N/A			
ND	N.D. Const. art. V, § 9	X	No[38]	1889
OH	Ohio Const. art. II, § 16	No	Yes[39]	1903
OK	Okla. Const. art. VI, § 12	X	No[40]	1907
OR	Or. Const. art. V, § 15a.	No[41]	Unclear[42]	1916
PA	Pa. Const. art. IV, § 16	X	No[43]	1873
RI	N/A			
SC	S.C. Const. art. IV, § 21	X	No[44]	1895

[36] The New Mexico Supreme Court has held that some legislative conditions on appropriations are sufficiently detailed that they unconstitutionally usurp the executive power and are thus subject to the governor's veto. It has also held that some conditions are sufficiently unrelated to the appropriation that they constitute general legislation and may not, pursuant to the state's constitution, be included in an appropriations act. These types of conditions, too, may be vetoed by the governor. *See* State v. Carruthers, 759 P.2d 1380, 1384–87 (N.M. 1988).

[37] *See* N.Y. Att'y Gen. Op. 78-76 (1978).

[38] *See* State v. Olson, 286 N.W.2d 262, 270–71 (N.D. 1979) (governor "may not veto conditions or restrictions on appropriations without vetoing the appropriation itself").

[39] State v. Ferguson, 291 N.E.2d 434, 438 (Ohio 1972).

[40] Johnson v. Walters, 819 P.2d 694, 699 (Okla. 1991).

[41] Also allows governor to approve declarations of emergency in non-appropriations bills. *See* OR. CONST. art. V, § 15a; Lipscomb v. State, 753 P.2d 939, 947 (Or. 1988) (en banc).

[42] No case law, attorney general opinions, or recent practice appear to answer this question.

[43] Governor may not veto language regarding an appropriation without vetoing the appropriated funds. *See* Jubelirer v. Rendell, 953 A.2d 514, 537 (Pa. 2008).

State	Source of Authority	Only Appropriations Bills	Non-Appropriations Matters Allowed[2]	Year of Enactment
SD	S.D. Const. art. IV, § 4	Unclear	No[45]	1889
TN	Tenn. Const. art. III, § 18	X	No[46]	1953
TX	Tex. Const. art. IV, 14	X	No[47]	1866
UT	Utah Const. art. VII, § 8, para. (3)	X	No[48]	1895
VT	N/A			
VA	Va. Const. art. V, § 6, para. (d)	X	No[49]	1902
WA	Wash. Const. art. III, § 12	No[50]	Yes[51]	1889
WV	W. Va. Const. art. VI, § 51, para. (11)	X	Yes[52]	1872

[44] *See* Amisub of S.C., Inc. v. S.C. Dept. of Health & Envtl. Control, 757 S.E.2d 408, 414–15 (S.C. 2014).
[45] *See* S.D. Att'y Gen. Op. 72-12 (1972) (collecting cases for proposition that governor cannot veto conditions on appropriations unless the governor also vetoes the appropriated funds).
[46] *See* Tenn. Att'y Gen. Op. 84-227 (1984).
[47] *See* Jessen Associates, Inc. v. Bullock, 531 S.W.2d 593, 599 (Tex. 1976).
[48] *See* Utah Att'y Gen. Op. 91-01 (1991).
[49] The governor may veto conditions on appropriations only by vetoing the appropriation. *See* Brault v. Holleman, 230 S.E.2d 238, 242 (Va. 1976).
[50] While the line item veto is related to appropriations items, "legislative attempts at weaving substantive policy provisions into" appropriations bills "may be constitutionally infirm" and thus subject to judicial invalidation at the governor's urging, without a veto. *See* Wash. State Legislature v. State, 985 P.2d 353, 358 (Wash. 1999) (en banc).
[51] *See id.* at 358–61 (explaining that governor may veto "nondollar provisos" in appropriations bills, which "mak[e] no reference to a specific dollar amount").
[52] *See* State *ex rel.* Brotherton v. Blankenship, 214 S.E.2d 467, 480 (W. Va. 1975) (governor may veto "language of purpose, finding, direction and condition" without vetoing associated appropriation).

State	Source of Authority	Only Appropriations Bills	Non-Appropriations Matters Allowed[2]	Year of Enactment
WI	Wis. Const. art. V, § 10, para. (1)(b)	X	Yes[53]	1930
WY	Wyo. Const. art. IV, § 9	X	Yes[54]	1889

[53] See Risser v. Klauser, 558 N.W.2d 108, 111 (Wis. 1997) (governor may veto non-appropriations portions of appropriations bills, and may strike individual words or digits, but, after a constitutional amendment, may no longer strike out individual letters to create new words—the so-called "Frankenstein veto").
[54] *See* Mgmt. Council of Wyo. Legislature v. Geringer, 953 P.2d 839, 844–46 (Wyo. 1998) ("the Governor has the power to use his line-item veto for any portion of any bill making appropriations," including "substantive provisions").