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## Understanding State Agency Independence

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# UNDERSTANDING STATE AGENCY INDEPENDENCE

Miriam Seifter\*

*Conflicts about the independence of executive branch officials are brewing across the states. Governors vie with separately elected executive officials for policy control; attorneys general and governors spar over who speaks for the state in litigation; and legislatures seek to alter governors' influence over independent state commissions. These disputes over intrastate authority have weighty policy implications both within states and beyond them, on topics from election administration and energy markets to healthcare and welfare. The disputes also reveal a blind spot. At the federal level, scholars have long analyzed the meaning and effects of agency independence—a dialogue that has deepened under the Trump Administration. In contrast, there is virtually no systematic scholarly attention to the theory or practice of agency independence in the states.*

*This Article begins that study. Surveying historical developments, judicial decisions, and legislative enactments across the country, it shows that state agency independence is an inexact, unstable, and variegated concept. Whereas federal courts treat independent agencies as a distinct legal category, state courts tend to eschew categorization in favor of contextual holdings. Moreover, despite the common notion that states' plural-executive structure cements independence, these rulings just as frequently undermine it. State legislatures, for their part, revisit independence frequently, often in the wake of partisan realignments. And their creations are diverse, combining a range of vectors of insulation in different arrangements. The result is that there is no single meaning of state agency independence even within a state, and rarely a strong norm surrounding it.*

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*States' legislatively driven, bespoke approach to independence offers insights for scholars of both state and federal institutional design. The state approach may yield better-tailored and more democratic arrangements. But it also displays raw partisanship, and the combination of weak norms with strong governors may stack the deck against independence. The state approach also raises deeper questions for public law: What are the costs and benefits of allowing the rules of the game to be consistently up for grabs? There is no formula for weighing these considerations beyond the context of any individual dispute, but this Article provides a launching pad for their sustained exploration.*

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## INTRODUCTION

Some of the most important decisions of law and policy, now and in the coming years, will rest with state-level administrative agencies that have some claim to independence from governors or other partisan leaders. State public utilities commissions will substantially shape our energy future. State boards of regents and education set the course of public education. State attorneys general, as heads of state departments of justice, play an increasing role in challenging and influencing national policies. Other elected state officials govern topics from insurance to state finances. The legal status of these potentially independent state entities is poorly understood but increasingly consequential. Governors clash with separately elected members of the executive branch,<sup>1</sup> and attorneys general, rising in prominence,<sup>2</sup> spar with governors and agencies over who speaks for the state in litigation.<sup>3</sup> In some states, legislatures or governors work to subject allegedly wayward independent state commissions to greater political control.<sup>4</sup> In others, stories of government corruption are spurring calls to add or empower independent watchdog agencies.<sup>5</sup>

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1. See, e.g., Jon Kamp, *Governors, Attorneys General Clash Amid Political Tensions*, WALL STREET J. (May 17, 2017, 1:27 PM), <https://www.wsj.com/articles/governors-attorneys-general-clash-amid-political-tensions-1495042044> (on file with the *Michigan Law Review*) (collecting stories in multiple states); Jack Suntrup, *Governor's Administration Obstructed Audit of Missouri Tax Refund Process, State Auditor Says*, ST. LOUIS POST-DISPATCH (Jan. 8, 2018), [http://www.stltoday.com/news/local/govt-and-politics/governor-s-administration-obstructed-audit-of-missouri-tax-refund-process/article\\_d0c284d1-d7de-5662-a889-53b5a53e7b3b.html](http://www.stltoday.com/news/local/govt-and-politics/governor-s-administration-obstructed-audit-of-missouri-tax-refund-process/article_d0c284d1-d7de-5662-a889-53b5a53e7b3b.html) [<https://perma.cc/2K8B-K3D4>].

2. See, e.g., PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA (2015); Alan Greenblatt, *The Story Behind the Prominent Rise of State AGs*, GOVERNING (June 2015), <http://www.governing.com/topics/politics/gov-attorneys-general-lawsuits-policymaking.html> [<https://perma.cc/JUQ9-T3TX>].

3. See, e.g., *North Carolina v. N.C. State Conference of the NAACP*, 137 S. Ct. 1399, 1400 (2017) (Roberts, C.J., statement respecting denial of certiorari) (describing “the blizzard of filings over who is and who is not authorized to seek review in this Court under North Carolina law”).

4. See, e.g., Scott Bauer, *Wisconsin GAB in Final Days as State's Elections Authority*, MILWAUKEE WIS. J. SENTINEL (June 26, 2016), <http://archive.jsonline.com/news/statepolitics/wisconsin-gab-in-final-days-as-states-elections-authority-b99751280z1-384455051.html> [<https://perma.cc/BK7J-Z6X6>] (describing Wisconsin legislation replacing a nonpartisan Government Accountability Board commission with two commissions “made up of partisan appointees”); Jesse Paul, *Colorado Governor's Power in Question as GOP-Led Committee Advances Measure from Top Statehouse Republican*, DENVER POST (Feb. 7, 2018, 4:27 PM), <https://www.denverpost.com/2018/02/07/kevin-grantham-bill-questions-colorado-governor-power/> [<https://perma.cc/WRP9-B2KE>] (describing proposed legislation to prevent Senate-rejected appointees from continuing to serve on state commissions).

5. See, e.g., Judy L. Thomas et al., *State Leaders Split on Need for Auditor to Tackle Secrecy Issues in Kansas*, KAN. CITY STAR (Nov. 20, 2017, 6:33 PM), <http://www.kansascity.com/news/politics-government/article185722893.html> [<https://perma.cc/VU5W-B46W>] (describing proposals for independent Kansas auditor).

At the federal level, scholars have carefully analyzed the meaning and implications of agency independence—a dialogue that has only deepened under the Trump Administration.<sup>6</sup> The topic has especial resonance in the current political climate: the President has strained or violated norms surrounding independence;<sup>7</sup> the independence of special counsel Robert Mueller is of great public intrigue;<sup>8</sup> and the changing composition of the Supreme Court portends changes in the law of independence.<sup>9</sup> But even in a period of possible flux, the conceptual terrain of agency independence is well trodden. We teach as black-letter doctrine<sup>10</sup> that federal independent agencies are those with tenure-protected leaders;<sup>11</sup> that such protection implies some degree of insulation from substantive interference by the president;<sup>12</sup>

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6. This coverage spans a range of mediums and topics. See, e.g., SECTION OF ADMIN. LAW & REGULATORY PRACTICE, AM. BAR ASS'N, IMPROVING THE REGULATORY PROCESS: A REPORT TO THE PRESIDENT-ELECT OF THE UNITED STATES 10 (2016), [https://www.americanbar.org/content/dam/aba/administrative/administrative\\_law/Final%20POTUS%20Report%2010-26-16.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/administrative_law/Final%20POTUS%20Report%2010-26-16.authcheckdam.pdf) [<https://perma.cc/6Y7W-KCMR>] (recommending that independent agencies be subject to the analysis and review requirements of Executive Orders 12866 and 13563); Cary Coglianese, *Improving Regulatory Analysis at Independent Agencies*, 67 AM. U. L. REV. 733 (2018); Susan E. Dudley, *Make 'Independent' Regulatory Agencies More Accountable to the Public*, FORBES (May 9, 2017, 7:00 AM), <https://www.forbes.com/sites/susandudley/2017/05/09/make-independent-regulatory-agencies-more-accountable-to-the-public> [<https://perma.cc/8YVZ-ABQM>]; Peter Shane, *Donald Trump and the War Against Independent Agencies*, WASH. MONTHLY (Nov. 25, 2016), <https://washingtonmonthly.com/2016/11/25/donald-trump-and-the-war-against-independent-agencies/> [<https://perma.cc/GLY8-78CN>].

7. See Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2207–15 (2018).

8. Coverage of Mueller's probe, and of his independence in particular, has become the stuff of daily news. For just one of countless examples, see David Jackson, *As Trump Attacks Mueller and FBI, Critics Warn About Special Counsel Dismissal*, USA TODAY (Mar. 18, 2018, 11:30 AM), <https://www.usatoday.com/story/news/politics/2018/03/18/trump-attacks-mueller-and-fbi-critics-warn-special-counsel-dismissal/436088002/> [<https://perma.cc/M5HJ-5W3F>].

9. As a judge on the D.C. Circuit, Justice Brett Kavanaugh authored opinions skeptical of agency independence. See *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016), *rev'd en banc*, 881 F.3d 75 (D.C. Cir. 2018). The Department of Justice has written briefs asking the Supreme Court to address questions of independence anew. See *Lucia v. SEC*, 138 S. Ct. 2044, 2050 n.1 (2018) (declining government's request to decide the constitutionality of ALJ removal restrictions).

10. Every major Administrative Law casebook features agency independence, with a largely consistent descriptive definition. See, e.g., STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 121–147 (8th ed. 2017); GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 237 (7th ed. 2016); JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW 203–301 (7th ed. 2014); PETER L. STRAUSS ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW 916–22 (12th ed. 2018).

11. See, e.g., Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1168–69 (2013) (noting that “[c]ommentators broadly agree that for-cause tenure protection is the sine qua non of agency independence,” and that in judicial and executive-branch precedents, “the doctrine clearly makes for-cause tenure protection critical”).

12. See, e.g., Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 773 (2013) (observing that “there is a sort of con-

and that such insulation has a constitutional limit.<sup>13</sup> To be sure, serious disagreements persist, including about whether the existing doctrines are the best interpretation of the Constitution. But these debates only deepen a rich awareness of the topic and its basic parameters.

One reason agency independence has received such sustained attention is that it implicates fundamental public law questions. Agency independence is a separation of powers issue, because it allows Congress, controversially, to limit presidential power.<sup>14</sup> Agency independence is also at the heart of concerns that some policy decisions must be insulated from politics<sup>15</sup>—and, conversely, that insulating decisions too much creates accountability problems.<sup>16</sup> Because agency independence cuts to the heart of American law and politics, it is no wonder that federal public law scholars have spent so many decades studying it.

In contrast, there is virtually no systematic attention to the concept, theory, or practice of agency independence in the states.<sup>17</sup> Moreover, some im-

stitutional force field around independent agencies,” with “[t]he consensus view” being “that presidents cannot constitutionally involve themselves in independent agency decision making to the same extent as executive agency decision making, though the contours of that rule are unclear”). As the Article will describe below, however, disagreement persists on this point, and some of the commentators who advocate presidential control of such agencies now hold influential positions in government. *See, e.g.*, Eileen J. O’Connor & Susan E. Dudley, *Will OIRA Extend Its Review to Independent Agencies?*, FEDERALIST SOC’Y (Apr. 26, 2018), <https://fedsoc.org/commentary/blog-posts/greater-executive-agency-transparency-and-accountability-through-oira> [<https://perma.cc/4GFT-X5HN>] (reporting that OIRA Administrator Neomi Rao “strongly hinted that independent regulatory agencies” may soon be subject to OIRA’s regulatory review process).

13. *See* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 493–95 (2010) (explaining a line of cases delineating how the president’s Article II powers create a constitutional limit on removal restrictions).

14. *Compare, e.g.*, Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 126 (1994) (“Insulation from presidential control, often accomplished through the establishment of independent agencies, restores a balance of powers by preventing the agglomeration of executive and legislative power in the President . . .” (footnote omitted)), with Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 96–97 (“The independent agency is a constitutional sport, an anomalous institution created without regard to the basic principle of separation of powers upon which our government was founded.”).

15. *See, e.g.*, Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 17 (2010) (“The insulated agency, its designers hope, will better resist short-term partisan pressures and instead place more emphasis on empirical facts that will serve the public interest in the long term.”); Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1131 (2000) (noting that a founding purpose of agencies insulated “from the political melee was . . . to safeguard the commissions from partisan politics, which would enable the experts to make logical decisions based on empirical data”).

16. *See, e.g.*, Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2–3 (1994) (“A strongly unitary executive can promote important values of accountability, coordination, and uniformity in the execution of the laws . . .”).

17. Save for articles specifically on state *elected* officials, which I describe below, I have not found modern legal scholarship on the general concept of agency independence across the

portant work specifically on separately *elected* executive officials in the states, like state attorneys general,<sup>18</sup> seems to feed an assumption that states are home to particularly robust independence.<sup>19</sup> In reality, states' plural executive structure raises, rather than answers, the question of legal and operational independence. We have not yet probed whether and how elected state executives—and many nonelected state agencies and officers with apparent markers of insulation—possess independence from political leaders.

This untapped inquiry has important implications. Most concretely, understanding state agency independence can shed light on pending cases at the state and federal levels, where confusion about the respective roles of state executive officials has vexed state and federal courts and led to denials of certiorari.<sup>20</sup> Federal statutory programs, too, sometimes require a state agency to be “independent,” without defining what that means.<sup>21</sup> More broadly, studying independence in the states provides a clearer sense of how states conceive of and operationalize their constitutional separation of powers. Zooming out further still, studying how states structure independence can provide a new comparative window into federal independence and can unearth deeper differences in state and federal institutional design.

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states. For earlier views, see JAMES W. FESLER, *THE INDEPENDENCE OF STATE REGULATORY AGENCIES* 2 (1942); Charles Kettleborough, *Removal of Public Officers: A Ten-Year Review*, 8 AM. POL. SCI. REV. 621, 623–26 (1914). I have flagged this question for future attention. Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 513 (2017).

18. Works on this topic include Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2111 (2015); William P. Marshall, Essay, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446 (2006); and Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage*, 154 U. PA. L. REV. 565 (2006). See also Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008) (discussing state and local governments as the primary example of an unbundled executive structure).

19. See, e.g., John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1228 n.80 (1993) (“Independent election by the people gives those elected state executive officials far greater autonomy, and far greater control over their departments, than any federal official enjoys.”); Williams, *supra* note 18, at 573–74 (“Because these officials are neither appointed by the governor nor (more importantly) removable by her, the governor has little or no formal influence over how these officials perform their constitutionally assigned duties.”); Note, *Appointing State Attorneys General: Evaluating the Unbundled State Executive*, 127 HARV. L. REV. 973, 992 (2014).

20. See, e.g., *North Carolina v. N.C. State Conference of the NAACP*, 137 S. Ct. 1399, 1400 (2017) (Roberts, C.J., statement respecting denial of certiorari).

21. See, e.g., *Wilson v. State ex rel. Office of Disability Affairs*, 2015-1163, p. 4, 7 (La. App. 1 Cir. 2/26/16); 191 So. 3d 603, 607 (rejecting a challenge by the terminated executive director of Louisiana’s Statewide Independent Living Council (“SILC”)—which is required, as a condition of receiving financial assistance under the Federal Rehabilitation Act, to be “independent from any state agency”—on the ground that “[t]he federal legislation mandating that SILC be independent from any state agency does not specifically mandate that [the executive director’s] position also be independent from a state agency”).

With those aims in mind, this Article provides the first full treatment of state agency independence. It explores the origins of independent state agencies and officials and surveys their modern forms. The Article then uncovers the legal realm of state agency independence—one that differs markedly from the federal model. Unlike federal courts, state courts tend not to treat independence as a distinct legal category, and their narrow, ad hoc decisions that touch on independence neither follow nor seem to create a strong norm. Rather, state jurisprudence largely leaves questions of independence to the legislative and political domains. State legislatures, for their part, revisit independence much more often than Congress does, and they do so in innovative ways that depart from the familiar federal design. I argue that this distinctive state approach to independence—variegated, shifting, and often politically charged—yields de facto, if not de jure, limits on agency independence: How independent can an official be if her independence itself is consistently up for grabs? In turn, the state landscape of independence has theoretical and normative implications, which the Article examines.

In pursuing all of these questions, this Article focuses primarily on the independence of state agencies and officials from the governors of their state. That is not the only possible form of independence, of course. We might also profitably assess an agency's independence from the state legislature or from outside interest groups,<sup>22</sup> and this Article does provide some views on the former.<sup>23</sup> Yet an agency's independence from the governor has particular importance for both law and theory. In an era of rising gubernatorial power, governors frequently claim authority over agencies or officials with markers of independence.<sup>24</sup> We need better legal resources to understand (if not easily resolve) these disputes. Moreover, at the level of theory, administrative and constitutional law scholars have traditionally focused on agency independence from the president. Focusing on the parallel question of independence from the governor offers a valuable comparative window and indicates that the federal approach to independence is not inevitable.

Consider first lessons from state court decisions on agency independence. Unlike federal courts, most state courts have not elected to create an overarching, transsubstantive doctrine of agency independence. To be sure, every state has some case law related to independence, addressing subsidiary issues like the selection, removal, and supervision of particular agencies or officials. This Article describes such case law, both in the text and separate Appendices.<sup>25</sup> Yet in contrast to federal courts, state courts seldom make ex-

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22. See Barkow, *supra* note 15, at 17 (stating that “the creation of an independent agency is often motivated by a concern with agency capture,” not just “insulation from the President”).

23. See *infra* Part IV (discussing state agencies' independence from state legislatures).

24. See Seifter, *supra* note 17, at 515–18 (discussing gubernatorial directive authority over state agencies); *infra* Section III.B.3.

25. Specifically, I have compiled three Appendices, each a fifty-state survey. Miriam Seifter, *Understanding State Agency Independence: Appendices*, SSRN (Mar. 1, 2019), <https://ssrn.com/abstract=3369026> [<https://perma.cc/K5K4-LNTC>]. Appendix A details how constitutional agencies and officers are selected in the states, and what powers they are given.



press reference to “independent agencies” (or any similar phrase), and they do not conclude from the presence of any one indicator of independence (say, removal authority or independent selection) that the affected agency or official must be independent from the governor across the board. State court holdings on topics like executive appointments, supervision, and removal tend to rely on particular positive-law provisions specific to the given official or power, rather than any freestanding notion of agency independence.

This approach sheds new light on an important divide in federal separation-of-powers law. Federal courts regularly invoke an abstract, categorical approach to agency independence and to separation of powers questions more broadly. Scholars of varied ideological predilections have critiqued that approach, arguing that federal courts should eschew such abstractions and apply the commands of the directly relevant statutes and constitutional clauses.<sup>26</sup> State courts hew closer to the “ordinary interpretation”<sup>27</sup> that these scholars prefer. The state-court experience thus indicates that a noncategorical, nonbinary approach is certainly possible, and it may well display the judicial modesty that scholars seek. But it is not all upside. State courts’ clause-by-clause interpretation, combined with a tendency toward narrow and fact-based rulings,<sup>28</sup> creates a body of law that is hard to decipher. The resulting confusion, I argue, impedes development of stable norms, thus undermining independence overall.

Studying the state law of agency independence also complicates assumptions about the differences between state and federal executive branches. A common notion, sometimes implicit and sometimes explicit, is that the states’ “plural” or “unbundled” executive branches create more robust independence than exists in the federal counterpart.<sup>29</sup> That is not consistently true. Although state courts do condone one form of independence that the federal scheme does not—selection of high-ranking officials separately from the chief executive<sup>30</sup>—they have not interpreted independence robustly across the board. In part this is because, although many state constitutions create executive officials other than the governor, most of the relevant claus-

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Appendix B documents constitutional, statutory, and decisional law regarding gubernatorial removal power. Appendix C gathers case law bearing on the governor’s power to supervise agencies. I provide more detail on the Appendices in Part III.

26. See Datla & Revesz, *supra* note 12, at 773 (“Implying additional constraints on presidential control over an agency beyond those specified in an agency’s enabling statute is a mistake.”); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1941 (2011) (“[I]nterpreters should apply tools of ordinary textual interpretation to construe the particular clauses that make up the constitutional structure.”). Versions of this debate span decades. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 12 (1980) (describing and critiquing “clause-bound” interpretation of the federal constitution).

27. See Manning, *supra* note 26.

28. See, e.g., Lawrence Friedman, *Reactive and Incompletely Theorized State Constitutional Decision-Making*, 77 MISS. L.J. 265, 306 (2007) (commenting that state courts “treat constitutional law as a species of common law”).

29. See *supra* notes 18–19 and accompanying text.

30. This includes both election and legislative appointment. See *infra* Section III.B.1.

es also expressly allow state legislatures to prescribe those officials' powers, and in turn to decide whether the governor will supervise their work.<sup>31</sup> Many state legislatures have answered yes.<sup>32</sup> Nor has state jurisprudence uniformly limited gubernatorial removal power, including over separately selected officials. Here too, state constitutions offer legislatures leeway, and many state courts have enhanced gubernatorial prerogative by reviewing removals deferentially or not at all. This is not at all to say that governors always prevail in such disputes. Rather, this Article's point is that the plural executive structure has sown more uncertainty than independence. Ultimately, state court decisions individually, and their unevenness collectively, leave state legislatures a wide berth to revisit and remodel independence as they see fit.

State legislatures, for their part, have run with their power to shape the independence of state officials. State legislative tinkering with independence seems to occur on the same plane as substantive policymaking, rather than occupying an enduring status as part of the "rules of the game," as at the federal level.<sup>33</sup> In some cases, that involves plainly partisan actions after elections. For example, the Democrat-controlled Maryland legislature authorized its Democratic attorney general to sue the federal government without the Republican governor's permission,<sup>34</sup> and the Republican-controlled North Carolina legislature and Democratic governor have been locked in extensive battles over the governor's power, including over state boards and commissions.<sup>35</sup> In other cases, adjustments to independence have a less partisan cast and appear targeted at agency dysfunction or corruption. Either way, legislative revision of independence seems part of ordinary state lawmaking. And, unlike at the federal level, the resulting differences are not minimized by category-driven doctrines or conventions about what agency independence means. The result echoes the finding of one of the few studies of state agency independence, James Fesler's concise volume from the 1940s, in which he observed that states have followed "no uniform rule" regarding agency independence; instead, "[c]ommissions and

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31. Over two thirds of all constitutional agencies, and over three quarters of elected constitutional agencies, authorize legislative control. *See infra* Section II.A.1.

32. *See infra* Section III.B.

33. *See, e.g.,* Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 662, 665 (2011) (exploring how "the 'rules of the game'" become elevated "above ordinary political contestation").

34. *See* Ian Duncan, *Facing Trump and a Republican Governor, Democrats Empowered Maryland Attorney General*, BALT. SUN (Apr. 16, 2017, 10:14 PM), <https://www.baltimoresun.com/news/maryland/politics/bs-md-attorney-general-powers-20170416-story.html> [<https://perma.cc/7DNY-HZDK>].

35. *See generally* Anne Blythe, *Roy Cooper Sues NC Lawmakers Again—Over Appeals Court and Industrial Commission Appointments This Time*, NEWS & OBSERVER (May 26, 2017, 3:37 PM), <http://www.newsobserver.com/news/politics-government/state-politics/article152887174.html> [<https://perma.cc/U6Y3-698U>] (discussing litigation by North Carolina governor challenging legislation that reduced the size of the state court of appeals and eliminated the governor's power to appoint members of various state boards and commissions).

departments, regulatory agencies and service agencies are independent or not as their particular statutes may determine.”<sup>36</sup>

These features of state-level executive independence implicate both advantages and risks. On one hand, the common state practice of leaving independence to an active legislative process rather than the courts may (depending on one’s definitions) imbue agency independence with a stronger democratic pedigree than the federal parallel can claim.<sup>37</sup> In addition, by tailoring independence to specific contexts, state legislatures may wind up with more accurate or fitting institutional designs.<sup>38</sup> By honoring those legislative choices rather than crafting a categorical doctrine of independence, state courts avoid a criticism that scholars across the ideological spectrum have leveled against federal agency independence.<sup>39</sup> And by leaving some legal boundaries blurry, state law may encourage cautious, collaborative behavior by executive branch actors.<sup>40</sup>

On the other hand, agency independence might arguably become too democratic, driven by raw partisanship rather than deliberation or good government. The instability and uncertainty of intrastate conflicts can generate suboptimal litigation costs and cloud substantive policymaking.<sup>41</sup> Rather than prompting caution, blurriness may simply mean that each actor vigorously pursues her own position.<sup>42</sup> Because state institutional design is often of very low salience, the decisions that result are likely to lack the checks on partisanship that a public spotlight may bring.<sup>43</sup> Moreover, the modern power dynamics of state executive branches dominated by ever-rising governors suggest that governors will have the upper hand in negotiations.<sup>44</sup> In turn, the state approach to independence seems structured to di-

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36. FESLER, *supra* note 17, at 2.

37. See generally Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 7–8 (1996) (arguing that judicial “minimalism can be democracy-forcing”).

38. This tracks the rules-versus-standards debate to some extent. See generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 605–06 (1992) (exploring the factors affecting whether rules or standards will be more accurate).

39. See *infra* Section IV.A.

40. Cf., e.g., John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 979–82 (1984) (describing, in other contexts, circumstances in which uncertainty regarding legal rules may cause over-compliance with the rule).

41. See *infra* Section V.A.

42. Cf. Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO ST. L.J. 391, 409 (2008) (“In theory, an unclear, ambiguous division of power between the branches that leaves each branch uncertain of its legal authority could further compromise and cooperation. However, modern social science research suggests that the opposite occurs. Each side in the dispute is likely to grasp onto aspects or factors within the ambiguous or complex reality to support its own self-serving position.”).

43. See, e.g., Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107 (2018) (discussing the connection between salience and regulatory capture).

44. See Seifter, *supra* note 17 (chronicling the rise of American governors).

minish independence on the whole, or at least to place it continually against the ropes. And while independence has its own downsides,<sup>45</sup> it has long been associated, at least as in some contexts, with core values of expertise, professionalism, and good governance.<sup>46</sup> There is no formula for calculating these costs and benefits beyond the context of any individual dispute, but this Article provides a launching pad for their sustained exploration—and for building on existing dialogue with a new and comparative perspective.<sup>47</sup>

Part I of the Article briefly reviews, for comparative purposes, the law and norms of federal agency independence. Part II describes the origins of state agency independence, noting how different eras of state government expansion established different forms of independent state entities, including elected executive officials, constitutionally created agencies, and other multimember boards and commissions. It explains that these apparently independent entities coexist with constitutional revisions favoring gubernatorial control, creating a deeply conflicted image of independence in most state constitutions.

Part III then describes how state courts have interpreted these varied materials and mixed signals. Part IV explores the legislative realm of agency independence, discussing its instability and creativity. It further discusses how and why, unlike at the federal level, state agency independence does not seem to be governed by “conventions” or “norms.”<sup>48</sup> Finally, Part V considers theoretical and normative takeaways of the states’ bespoke and shifting approach to independence.

## I. FEDERAL AGENCY INDEPENDENCE: A REVIEW

This Part briefly canvasses highlights of the law and norms of federal agency independence. Mindful that commentators too often view state con-

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45. See, e.g., Susan Bartlett Foote, *Independent Agencies Under Attack: A Skeptical View of the Importance of the Debate*, 1988 DUKE L.J. 223, 223 (describing the “functional critique” that “[w]ithout clear lines of authority from one branch of government, independent agencies are politically unaccountable, and therefore vulnerable to regulatory inefficiency and external manipulation”).

46. See, e.g., Barkow, *supra* note 15, at 19–24 (identifying justifications for independent agencies including expertise, nonpartisanship, and the avoidance of capture).

47. Beyond this Article’s focus on independence in the states, there are other valuable comparative frameworks that warrant attention. Professor Anne Joseph O’Connell’s illuminating study uses “boundary organizations”—organizations like the Post Office, Amtrak, and others that do not neatly fit the executive versus independent agency binary—“as a lens to reexamine some classic administrative law doctrines about more centrally located agencies.” Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 852 (2014). Professor Nestor M. Davidson’s work shows that understanding local administration “can usefully throw core concerns of administrative law into relief,” while also showing common themes across levels of government. Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 629 (2017).

48. See Vermeule, *supra* note 11; Renan, *supra* note 7.

stitutional law through a federal lens,<sup>49</sup> my purpose here is decidedly not to suggest that federal law provides the “correct” baseline, or that state law’s differences alone imply any normative conclusions at all. Rather, this Part sets the stage for the Article’s exploration of the state sphere because familiarity with federal practice can help to contextualize the significance of various state design choices. This familiar federal backdrop can highlight ways in which those choices are or are not distinct and suggest how particular legislative and judicial choices may affect independence.

First, the vocabulary: by agency independence, the federal legal community refers to the agency’s insulation from the president.<sup>50</sup> This Article follows that approach by conceiving of state agency independence mostly as a question of independence from the governor. Notably, scholars dispute whether federal independent agencies are best understood as wholly independent, or whether their insulation from the president is “simply . . . replaced by increased subservience to congressional direction.”<sup>51</sup> But, perhaps understandably given the high stakes for both theoretical and practical meanings of executive power, the federal discourse focuses primarily on independent agencies’ presidential relationship.

Second, there is a well-trodden debate about the constitutionality of federal independent agencies. Those who read the federal Constitution as creating a “unitary” executive deem independent agencies impermissible.<sup>52</sup> While several Supreme Court justices seem to share that view, precedent has been more tolerant of independence.<sup>53</sup> Under existing law, agency independence is allowed—and the president must respect the independence that Congress lawfully creates—but there is some outer limit where it would impermissibly interfere with the president’s powers under Article II of the Constitution.<sup>54</sup>

Third, there is a trio of crucial features of the black-letter law of federal agency independence. Federal courts treat agency independence as a binary, meaning every federal agency is either independent or executive (not inde-

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49. See, e.g., James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 766 (1992).

50. See Jacob E. Gersen, *Designing Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 347 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010) (“Independence is a legal term of art in public law, referring to agencies headed by officials that the President may not remove without cause.”).

51. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 523 (2009) (plurality opinion). *But see* Brian D. Feinstein, *Designing Executive Agencies for Congressional Influence*, 69 ADMIN. L. REV. 259, 288 (2017) (finding, to the contrary, that Congress is less likely to oversee agencies with features of independence).

52. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 599 (1994).

53. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 493–95 (2010) (extolling the idea of unitariness, but not revisiting precedent allowing agency independence).

54. See *id.* at 494–95 (discussing *Morrison v. Olson*, 487 U.S. 654 (1988)).

pendent).<sup>55</sup> The key indicator of whether an agency is one or the other is whether the agency's leaders have tenure protection (that is, are removable only "for cause" or some similar formulation).<sup>56</sup> And once an agency falls in the "independent" category, courts imply some limits on the president's involvement in the agency's work.<sup>57</sup> Importantly, these three features—binary, categorical, and across-the-board independence—are judicial choices, not obvious legislative mandates. As critics have recently stressed, Congress in fact creates agencies along a spectrum of independence.<sup>58</sup> Other commentators, in perhaps a rising tide, believe the president must have "directive authority over all federal agencies."<sup>59</sup> Still, up to this point, courts' category-based recognition of independent agencies has been reasonably well settled, producing an understanding shared by courts, scholars, and law school classes.<sup>60</sup>

Fourth, federal agency independence is driven substantially by unwritten rules—that is, norms or conventions—shared by members of the legal community.<sup>61</sup> Even when an agency lacks tenure protection, these unwritten rules may impel relevant actors to treat the agency as independent.<sup>62</sup> Moreover, when agencies are categorized as independent, either because of tenure protection or a convention regarding that agency, deviations from the rules of independence are readily recognized as such.<sup>63</sup> If the norms of independence do not squelch presidential meddling altogether, they equip legal observers to identify and decry the norm violation.<sup>64</sup>

55. See Datla & Revesz, *supra* note 12, at 772.

56. See *id.*

57. See *id.* at 773 (describing the practice of "[i]mplying additional constraints on presidential control over an agency beyond those specified in an agency's enabling statute"). Invoking Justice Scalia, then-Judge Kavanaugh recently explained the rule this way: "As Justice Scalia once memorably noted, an attempt by the president to direct (or threaten to remove) the head of an independent agency with respect to a particular substantive decision is statutorily impermissible and likely to trigger 'an impeachment motion in Congress.'" *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 32–33 (D.C. Cir. 2016), *rev'd en banc*, 881 F.3d 75 (D.C. Cir. 2018) (quoting Transcript of Oral Argument at 59, *Free Enter. Fund*, 561 U.S. 477 (No. 08-861), 2009 WL 4571555). This does not mean that the president has no influence over independent agencies. See, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 590 (1984) (describing such influence).

58. See Datla & Revesz, *supra* note 12, at 835; see also Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 559, 630 (2010); O'Connell, *supra* note 47 (describing the traits of "boundary" entities).

59. Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1210 (2014).

60. See *supra* note 10 (collecting sources).

61. See Vermeule, *supra* note 11; Renan, *supra* note 7.

62. See Vermeule, *supra* note 11.

63. See *id.* at 1186.

64. See Patrick M. Corrigan & Richard L. Revesz, *The Genesis of Independent Agencies*, 92 N.Y.U. L. REV. 637, 648 (2017) (noting "significant criticism" of President Obama's interac-

Finally, whether because of norms, path dependence, or other features that make federal institutions durable,<sup>65</sup> federal agency independence has been a sticky phenomenon. Once Congress creates an independent agency, it does not treat that agency's independence as a choice to tinker with each time a new legislative coalition gains control.<sup>66</sup> Congress may well rein in wayward independent agencies through informal pressure<sup>67</sup> or through substantive or procedural rules.<sup>68</sup> Moreover, Congress does sometimes terminate agencies,<sup>69</sup> and between 1932 and 1984 Congress had periodically authorized the president to undertake reorganizations of the executive branch;<sup>70</sup> either of these actions could directly or indirectly limit agency independence. But that has not been the general practice. Presidential reorganizations were not vehicles for eliminating independence.<sup>71</sup> Nor have independent agencies been favored candidates for termination. As political scientist David Lewis has found, "agencies insulated from presidential control are more durable than other agencies" and "have a significantly higher expected duration."<sup>72</sup> At a minimum, Congress's choice of independence or nonindependence does not change with each new political alignment.<sup>73</sup>

tions with the FCC); Vermeule, *supra* note 11 (describing a "firestorm of criticism" regarding President Bush's termination of U.S. attorneys).

65. See Levinson, *supra* note 33, at 681.

66. This does not mean that Congress *never* alters the status of agencies—just that it does not do so as regularly or casually as state legislatures seem to. For more detail on this comparison, see *infra* note 73.

67. See Feinstein, *supra* note 51, at 275 n.64 (collecting case studies demonstrating independent agencies aligning with congressional preferences).

68. For example, Congress responded to perceived agency capture with myriad statutory deadlines and other action-forcing mechanisms. See, e.g., Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW & CONTEMP. PROBS. 185, 205 (1994).

69. See David E. Lewis, *The Politics of Agency Termination: Confronting the Myth of Agency Immortality*, 64 J. POL. 89, 90 (2002) (describing this phenomenon).

70. HENRY B. HOGUE, CONG. RESEARCH SERV., R42852, PRESIDENTIAL REORGANIZATION AUTHORITY: HISTORY, RECENT INITIATIVES, AND OPTIONS FOR CONGRESS I (2012).

71. This may not be surprising given Congress's possession of a legislative veto over these plans. For example, during the Truman Administration, Congress vetoed multiple reorganization plans, including some that would have centralized presidential authority over certain independent agencies or entities. See *id.* at 21. One prior version of the reorganization statute explicitly precluded reorganization of a list of agencies, many of which were independent commissions. *Id.* at 12–13, 13 n.54.

72. David E. Lewis, *The Adverse Consequences of the Politics of Agency Design for Presidential Management in the United States: The Relative Durability of Insulated Agencies*, 34 BRIT. J. POL. SCI. 377, 377, 396 (2004) (addressing commissions with fixed terms and party balance requirements).

73. Thus, the point is not that Congress has never altered an agency's independence; this has occurred, particularly when Congress terminates an agency and transfers its functions elsewhere. See HOGUE, *supra* note 70, at 13–14 (quoting 91 Cong. Rec. 9413, 9445 (1945)). But these changes are a heavy lift and not an ordinary occurrence. For contrast, see *Commission History*, ARK. PUB. SERV. COMM'N, <http://www.apscservices.info/commission-history.asp>

The remainder of this Article shifts focus to the state realm. With references where relevant to these familiar federal patterns, it investigates the constitutional, judicial, and political determinants of state agency independence.

## II. THE CONSTITUTIONAL ORIGINS OF STATE AGENCY INDEPENDENCE

State constitutions today send mixed signals about independence. This Part describes and historicizes the competing provisions relevant to independence. On one hand, as Section II.A explains, almost all state constitutions open the door to agency independence, including by establishing both elective and appointive executive branch officials other than the governor. On the other hand, as Section II.B explains, most state constitutions also contain provisions that empower governors, including authorizations seemingly more expansive than those the president possesses.<sup>74</sup>

Given the textual uncertainty, historical context might be a helpful aid: What were the constitutional drafters, and the state legislatures filling in the details, trying to achieve? The federal narrative of agency independence, after all, is steeped in understandings of why Congress created such agencies<sup>75</sup>—generally, to “foster[] independence from the President.”<sup>76</sup> But a purposive account of state agency independence faces two historical complications: it emerged for varying purposes and is informed by greater subsequent constitutional change. Most state independent entities were *not* designed to forge independence from the governor, who was a weak figure until relatively recently. Moreover, they emerged in bursts across different historical eras, and must be understood both in the context of those eras and in light of later (and sometimes continual) revision of state constitutions. Interpreters seeking to ascertain the status of any given entity must, in Alan Tarr’s words, “act as constitutional geologists, examining the textual layers from various eras in order to arrive at their interpretations.”<sup>77</sup>

### A. *Signs of Independence: The Plural Executive*

States today have various officials and agencies with plausible claims to independence. For simplicity, I refer to these throughout the Article as “independent agencies,” although of course the extent of their independence is

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[<https://perma.cc/EXQ6-7S3D>] (describing approximately twenty major reorganizations in the Arkansas Public Service Commission’s history, including several switches from independent to executive status). I thank Anne O’Connell for helpful dialogue on this point.

74. Some of these provisions were in the original state constitutions and some were later added to centralize executive power. See *infra* notes 134–144 and accompanying text.

75. See, e.g., *Wiener v. United States*, 357 U.S. 349, 354 (1958).

76. *Datla & Revesz*, *supra* note 12, at 771.

77. G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 332 (2003–2004).



part of the study itself.<sup>78</sup> I categorize these into three groups, each of which has a slightly different claim to independence: (1) separately elected executive branch officials; (2) constitutionally established (but nonelected) state agencies; and (3) multimember boards and commissions created by state legislatures. In the discussion that follows, I trace the rise of each of these types of independent agencies and attempt to identify what their backstory indicates about their intended independence.<sup>79</sup>

### 1. Elected Executive Officials

Almost all states today elect some number of officials other than the governor, and the vast majority establish this arrangement in the constitution itself.<sup>80</sup> Forty-three states popularly elect an attorney general;<sup>81</sup> thirty-seven elect a secretary of state,<sup>82</sup> thirty-four elect a treasurer,<sup>83</sup> twenty-four elect an auditor,<sup>84</sup> and twenty-two elect a superintendent of public instruction or members of a board of education.<sup>85</sup> There are other examples sprinkled throughout the country: for example, nine states elect a controller, nine elect a commissioner of agriculture, and two elect members of a corporation commission.<sup>86</sup> Still other separately elected officials are specific to a single state, like the board of trustees for the Office of Hawaiian Affairs and Louisiana's elected elections official.<sup>87</sup>

The selection of some executive officials separately from the governor was woven into the design of the earliest state constitutions. As is by now well known, most of the early state constitutions created remarkably weak

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78. A more accurate moniker would be “potentially” or “apparently” independent agencies, or perhaps “officials with a plausible claim to independence.”

79. For the view that state constitutions can be understood with reference to the period of political development in which they were enacted, see G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 56 & n.120 (1998) (citing “studies that emphasize the periodicity of state constitutions”). Obviously, this brief discussion will do no justice to the complexity of state constitutional history. For works in that literature that look across states, see, for example, CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA’S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR (2008); TARR, *supra*, and Williams, *supra* note 18. For works on particular states or regions, see, for example, DAVID ALAN JOHNSON, FOUNDING THE FAR WEST (1992).

80. See Seifter, *supra* note 25, at Appendix A.

81. See *id.* In addition to the forty states electing attorneys general pursuant to their state constitutions, which are identified in Appendix A, three states elect attorneys general through statutory authorization. See IND. CODE § 4-6-1-2 (2009); OR. REV. STAT. § 180.020 (2017); VT. STAT. ANN. tit. 3, § 151 (2015).

82. See Seifter, *supra* note 25, at Appendix A.

83. See *id.* In addition, Florida has an elected official called the “Chief Financial Officer,” who serves as the state’s chief fiscal officer. FLA. CONST. art. IV, §§ 4–5.

84. See Seifter, *supra* note 25, at Appendix A.

85. See *id.*

86. See *id.*

87. See *id.*

governorships.<sup>88</sup> The drafters of those constitutions sought to avoid the abuses of executive power they suffered at the hands of colonial governors.<sup>89</sup> It was of a piece with that spirit of chief-executive limitations to divide up executive power. Each of the original thirteen states provided for an attorney general selected separately from the governor.<sup>90</sup> And there were others: for example, the Massachusetts Constitution established a Solicitor General, and the original Virginia Constitution established a Secretary.<sup>91</sup> Constitutions drafted later (as most were) continued the practice of establishing separately selected executive officials.<sup>92</sup>

In the mid-nineteenth century, and consistent with tenets of Jacksonian democracy, many states provided for the popular election, rather than appointment or legislative election, of their existing executive officials.<sup>93</sup> Other states added executive positions for the first time and created them as elective offices.<sup>94</sup> Direct election was thought to enhance accountability to the public and to reduce the patronage that had emerged through legislative selection of executive officials.<sup>95</sup> Another wave of elected positions occurred in southern states during or after Reconstruction, rooted in frustration with legislative or gubernatorial overreach.<sup>96</sup> Yet electing so many officials caused its own problems, and the reformers of the “Short Ballot Movement” that followed sought to limit the number of separately elected officials.<sup>97</sup> The re-

88. See, e.g., GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 135-49 (1969).

89. See *id.*

90. Marshall, *supra* note 18, at 2450. For greater detail on when and how states provided for the selection of attorneys general, see BYRON R. ABERNATHY, *SOME PERSISTING QUESTIONS CONCERNING THE CONSTITUTIONAL STATE EXECUTIVE* 32-33 (1960); JEWELL CASS PHILLIPS, *STATE AND LOCAL GOVERNMENT IN AMERICA* 207-08 (1954). These and other resources are gathered in a more recent article, Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL’Y 1, 31 (1993).

91. MASS. CONST. of 1780, pt. 2d, ch. II, § I, art. IX; VA. CONST. of 1776, paras. 35-36.

92. See, e.g., IND. CONST. of 1816, art. IV, § 24 (creating treasurer and auditor elected by legislature); IND. CONST., art. V, § 1 (amended 1970) (switching those officials to popular election); MONT. CONST. of 1889, art. VII, §§ 1-2 (establishing popular election of governor, lieutenant governor, secretary of state, attorney general, treasurer, auditor, and superintendent of public instruction).

93. See, e.g., V.O. KEY, JR., *AMERICAN STATE POLITICS: AN INTRODUCTION* 197 (1956) (describing the Jacksonian emergence of popular election of executive officers).

94. See, e.g., CAL. CONST. of 1849, art. V, § 20 (providing for election of comptroller, treasurer, attorney general, and surveyor general).

95. See KEY, *supra* note 93, at 197.

96. See TALBOT D’ALEMBERTE, *THE FLORIDA STATE CONSTITUTION* 137-38 (2d ed. 2017) (explaining that Florida’s “unique institution” of an elected Cabinet arose “as a reaction to a more powerful governor during Reconstruction”); John C. Eastman, *When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education 1776-1900*, 42 AM. J. LEGAL HIST. 1, 28 (1998) (stating that multiple southern states established elected education superintendents in part to insulate education from the legislature).

97. Woodrow Wilson, for example, wrote that “making all offices elective” had been a mistake, Woodrow Wilson, *Hide-and-Seek Politics*, 191 N. AM. REV. 585, 599 (1910), and that

formers made gradual progress but did not achieve the systematic overhaul they urged;<sup>98</sup> numerous officials remained, and remain today, elected.

These separately elected executive branch officials may be the quintessential symbols of state agency independence, inasmuch as they are the icons of the plural or “unbundled” executive structure.<sup>99</sup> But this view faces both textual and historical complications.

As a textual (or structural) matter, the inference of independence rests largely on the official’s separate, popular selection. But separate selection is not synonymous with independence; the latter has multiple drivers. What is striking about the plural executive structure is how little state constitutions say—despite their well-earned reputation for verbosity overall<sup>100</sup>—about how separately elected officials are to interact with the governor after their election. By my tally, state constitutions establish 497 constitutional offices, 210 of which are separately elected.<sup>101</sup> Of those provisions, virtually none address the office’s relationship with the governor, much less prescribe independence from her.<sup>102</sup> Indeed, roughly two-thirds of all state constitutional offices, and over three-quarters of elected constitutional offices, do not have express constitutional powers.<sup>103</sup> Rather, the constitution leaves their powers to be filled in substantially, or sometimes entirely, by the legislature.<sup>104</sup> Moreover, as Part III details further, few state constitutions resolve the governor’s removal powers, even as to separately elected officials. Separately elected officials might be independent, in purpose or in practice, but the constitutional text does not resolve that.

Were these officials *meant* to be independent of the governor? The answers here vary. Particularly in the earliest state constitutions, the plural ex-

“the short ballot [was] the key to the whole problem of the restoration of popular government in this country,” THE NAT’L SHORT BALLOT ORG., THE SHORT BALLOT: A MOVEMENT TO SIMPLIFY POLITICS 29 (1916).

98. See BERNARD HIRSCHHORN, DEMOCRACY REFORMED: RICHARD SPENCER CHILDS AND HIS FIGHT FOR BETTER GOVERNMENT 58 (1997).

99. Berry & Gersen, *supra* note 18. Although I refer to these officials as “executive” for narrative ease, some states—as I discuss further below—find that certain agencies or elected officials are not within any branch of government. See, e.g., Opinion of the Justices, 2015 ME 27, ¶ 8, 112 A.3d 926, 932 (stating that the Maine Attorney General “does not fall within any particular branch of government”).

100. Justice Hans Linde colorfully observed: “Most state constitutions are dusty stuff—too much detail, too much diversity, too much debris of old tempests in local teapots, too much preoccupation with offices, their composition and administration, and forever with money, money, money.” Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 196 (1984).

101. See Seifter, *supra* note 25, at Appendix A (identifying the names, selection method, and powers of each state’s constitutional offices).

102. The few provisions that do address elected officials’ relationship with the governor point the other way. See, e.g., CAL. CONST. art. V, § 13 (“Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State.”).

103. See Seifter, *supra* note 25, at Appendix A.

104. See *id.*

executive structure coincided with other efforts to ensure limited gubernatorial power.<sup>105</sup> It thus may be proper to say, as the Minnesota Supreme Court has, that some state constitutions reflect a “conscious effort,” given the “colonial aversion to royal governors who possessed unified executive powers,” to “divide[] the executive powers of state government.”<sup>106</sup> States that chose an elected plural executive due to Jacksonian instincts, however, were primarily seeking to reduce legislative and machine corruption. They tended to be more sympathetic to chief executive power, and gubernatorial insulation may have been more an incident than an aim for them.<sup>107</sup> Later creations of elected executives, including those during and after Reconstruction, may or may not have intended gubernatorial insulation, depending on the politics that spurred them.<sup>108</sup>

## 2. Constitutional Agencies

State constitutions also establish numerous agencies that are not elected. For example, twenty-eight state constitutions feature appointed state boards of education, boards of regents for public universities, or both.<sup>109</sup> Nine constitutions create commissions regulating state government employment or compensation, four constitutions establish an appointed tax commission, six more create a wildlife commission or board, and three create an appointed labor commission.<sup>110</sup> In addition, a number of state constitutions include unique appointive agencies, like Arkansas’s State Geologist, California’s Director of Alcoholic Beverage Control, and Ohio’s Livestock Care Standards Board.<sup>111</sup> Some offices in this category have oscillated between elective and appointive status.<sup>112</sup>

Here again, the text is indeterminate—most provisions simply do not answer how the offices should interact with the governorship.<sup>113</sup> What about the history: Was independence from the governor part of the design of these offices? For that matter, why did states choose to enshrine these offices in the constitution rather than statute, and why appoint rather than elect?

105. See WOOD, *supra* note 88, at 446.

106. State *ex rel.* Mattson v. Kiedrowski, 391 N.W.2d 777, 782 (Minn. 1986).

107. See, e.g., Herbert Croly, *State Political Reorganization*, 8 PROC. AM. POL. SCI. ASS’N 122, 124 (1911) (stating that “Jacksonian Democrats . . . dealt the [state] legislature a body blow” and “placed more confidence in the executive than in the legislature”); Louis E. Lambert, *The Executive Article*, in MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 185, 186–87 (W. Brooke Graves ed., 1960) (describing how Jacksonians increased gubernatorial power, though also limiting it through direct election of executive officers).

108. See *supra* note 96.

109. See Seifter, *supra* note 25, at Appendix A.

110. See *id.*

111. See *id.*

112. For example, the Superintendent of Education in Alabama was an elected position until 1969, when it became an appointed position. *Id.*

113. See *id.*

The choice to constitutionalize an office has usually corresponded to its perceived import. Education, in particular, has long been a fundamental issue and a constitutional matter in the states.<sup>114</sup> The state corporation and labor commissions were also viewed as too important to leave to legislative chance.<sup>115</sup> Most of these were established in Progressive-Era constitutions, when concerns about business and labor issues dominated national politics and several states “attempted to head off” judicial opposition to state regulation of large enterprises “by constitutionalizing their ‘suspicion of big business.’”<sup>116</sup> In other cases, the creation of a constitutional agency was more idiosyncratic—a response to a discrete incident or particularly heated controversy.<sup>117</sup>

On the choice of appointment over election, the most pervasive explanation relates back to the short ballot movement. After the long ballot had lost its luster, states often turned to gubernatorial appointment as the preferred means of avoiding political corruption and enhancing accountability.<sup>118</sup> Constitutional scholar John Mabry Mathews echoed this view when he noted in 1917, regarding state boards of education, that “[i]n order to secure a non-partisan board, popular election should be avoided.”<sup>119</sup> Notably, however, the selection method of numerous constitutional agencies has varied over time. Virginia’s State Corporation Commission was originally appointed by the governor, then elected, then appointed by the governor, and ultimately elected by the state legislature.<sup>120</sup> Alabama’s Board of Education was initially

114. See, e.g., EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES* 67–105 (2013) (explaining the history of state constitutions’ inclusion of education rights).

115. See *id.* at 106–45 (explaining the history of state constitutions’ labor provisions); see also JOHN D. LESHY, *THE ARIZONA STATE CONSTITUTION* 405 (2d ed. 2013) (stating that the Arizona Constitution’s inclusion of a mine inspector “illustrate[s] the prominence of the mining industry in Arizona at statehood, and the pro-labor framers’ determination—in reaction to mining company domination of territorial government—to make its government regulator directly accountable to the people”).

116. John D. Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L.J. 1, 88–89 (1988) (quoting LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 351 (2d ed. 1985)).

117. See, e.g., THE OHIO STATE UNIV. COLL. OF VETERINARY MED. & UNIV. OF MINN. COLL. OF VETERINARY MED., *THE OHIO LIVESTOCK CARE STANDARDS BOARD* (2011), <https://vet.osu.edu/sites/vet.osu.edu/files/documents/about/history/Final%20Copy%20of%20Case%20Study.pdf> [<https://perma.cc/FG7F-YFJZ>] (describing the creation of the Ohio Livestock Care Standards Board as a means of defeating a Humane Society ballot initiative).

118. See HIRSCHHORN, *supra* note 98, at 27–62. In some instances, the agency’s structure may also have been a function of the state practice of borrowing provisions from other constitutions. See generally TARR, *supra* note 79, at 50–55 (describing state borrowing). Other positions (like Wyoming’s state geologist) may have been regarded as requiring too much specialized expertise for popular election. See WYO. CONST. art. IX, § 6 (repealed 1990) (“No person shall be appointed to this position unless he has such theoretical knowledge and such practical experience and skill as shall fit him for the position . . .”).

119. JOHN MABRY MATHEWS, *PRINCIPLES OF AMERICAN STATE ADMINISTRATION* 306 (2d ed. 1924).

120. See VA. STATE CORP. COMM’N, *SCC 1903–2003: CELEBRATING A CENTURY OF SERVICE TO THE COMMONWEALTH* 4, <https://www.scc.virginia.gov/comm/cent.pdf>

elected, then abolished during Reconstruction-era dissatisfaction with state governance and education, then appointed, and now elected from districts drawn to facilitate racial representation.<sup>121</sup>

Whether state constitutions intended to make appointive constitutional agencies independent from the governor seems context dependent.<sup>122</sup> For some agencies, there is historical evidence of intent to insulate the agency from the governor.<sup>123</sup> More commonly, the stated aim was to insulate constitutional agencies from politics generally,<sup>124</sup> and if a political institution was named at all, it was the legislature.<sup>125</sup> History, like the text, is a limited guide on gubernatorial control.

### 3. Multimember Boards and Commissions

States have also created myriad statutory boards and commissions, many of which persist even after twentieth-century attempts at centralization. Most of these entities are tenure protected; many describe themselves as “independent.”<sup>126</sup> Although these boards and commissions are not them-

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[<https://perma.cc/HVS7-7K4K>]. Similarly, although Arizona’s Corporation Commission remains elected, multiple constitutional amendments have proposed to make it appointive. Leshy, *supra* note 116, at 355–57.

121. WILLIAM H. STEWART, *THE ALABAMA STATE CONSTITUTION* 222 (2d ed. 2016); see also John Hall, *Alabama State Department of Education*, *ENCYCLOPEDIA OF ALA.* (Feb. 6, 2015), <http://www.encyclopediaofalabama.org/article/h-3656> [<https://perma.cc/NFK2-S5SL>].

122. It is not inconsistent to say that the governor can appoint an entity but not control it: that is the expectation regarding both appointed judges and federal independent agencies, and it also is consistent with Progressive ideals, which embraced both a strong chief executive and a sphere of insulated administration. See, e.g., Woodrow Wilson, *The Study of Administration*, 2 *POL. SCI. Q.* 197 (1887); Andrea Scoseria Katz, *The Progressive Presidency and the Shaping of the Modern Executive*, SSRN (Aug. 1, 2011), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1900936](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1900936) [<https://perma.cc/9GHZ-YGXJ>] (discussing the views of Woodrow Wilson and Frank Goodnow).

123. See, e.g., Richard B. Crockett, *Constitutional Autonomy and the North Dakota State Board of Higher Education*, 54 *N.D. L. REV.* 529 (1978). For an opposing example, consider Florida’s State Board of Education, which was reconstituted and made appointive in 1998 in part to increase “the governors’ accountability for education policy.” Michael D. Waters, *Alabama’s Framework for Public Education—A Survey of the Education Provisions in Alabama’s Constitution of 1901*, 33 *CUMB. L. REV.* 401, 403–404 (2002–2003).

124. See, e.g., ANN M. LOUSIN, *THE ILLINOIS STATE CONSTITUTION* 235–36 (2011) (describing the 1970 shift from electing to appointing the State Board of Education as an effort to “take education out of politics”). In a few cases this aim is present in the constitutional text rather than just in background materials. See CAL. CONST. art. IX, § 9 (stating that the University of California “shall be entirely independent of all political and sectarian influence . . . in the administration of its Affairs”).

125. This may raise an interpretive question of whether honoring the original intent requires insulation from governors, who are now powerful political figures, at least where positive law does not provide otherwise. Some state statutes do provide otherwise, as Part III will explore.

126. A few states have made efforts to centralize control of independent boards and commissions in the wake of *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S. Ct. 1101, 1116 (2015), which indicated that state officials provide “active

selves created by state constitutions, some state constitutions contain specific provisions regarding “boards and commissions” as a class.<sup>127</sup>

These boards and commissions proliferated in the early twentieth century, as states created them en masse to respond to new social problems. As one study put it, “[t]he urge to create separate elective offices in the early 1800s was matched by a later zeal for the creation of separate administrative agencies having no responsibility to the governor.”<sup>128</sup> States were confronting new problems and new endeavors, and “[e]very new line of activity result[ed] in the formation of a special board or commission until these [could] be counted by the score in almost any state.”<sup>129</sup> For example, as a New York court recounted, its state government in the early twentieth century had “a miscellaneous collection of 187 offices, boards, commissions and other agencies.”<sup>130</sup>

This sea of new administrative entities in the states did not report to the governor, and in that sense qualify as “independent” in our modern parlance. As Louis Lambert described it, “[a]lmost never was the governor given any control over these new agencies. . . . Seldom was any recognition given to the concept of administrative leadership by the governor.”<sup>131</sup>

supervision” of certain state boards to qualify for federal antitrust immunity. *E.g.*, H.B. No. 1425, Miss. Leg., 2017 Reg. Sess. (Miss. 2017), <http://billstatus.ls.state.ms.us/documents/2017/pdf/HB/1400-1499/HB1425SG.pdf> [<https://perma.cc/JB8L-2XCV>]; *see also* Nick Sibilla, *Mississippi Becomes National Leader for Supervising Licensing Boards*, INST. FOR JUST. (Apr. 13, 2017), <http://ij.org/press-release/mississippi-becomes-national-leader-supervising-licensing-boards> [<https://perma.cc/J2CV-GEH8>]. Other states have proposed similar legislation, but none has passed at the time of this writing. At least two states’ governors have implemented greater supervision of licensing boards through executive orders. *See* Mass. Exec. Order No. 567 (Mar. 28, 2016), <https://archives.lib.state.ma.us/bitstream/handle/2452/392840/ocn456714827-2016-eo567.pdf> [<https://perma.cc/PUX7-P7R7>]; Okla. Exec. Order No. 2015-33 (July 17, 2015), <https://www.sos.ok.gov/documents/executive/993.pdf> [<https://perma.cc/2TRB-W67A>].

127. Approximately ten constitutions have a provision regarding boards and commissions. *E.g.*, ALASKA CONST. art. III, § 26 (describing the appointment and removal processes for boards or commissions that are the heads of their departments or agencies); TEX. CONST. art. XVI, § 30a (describing the terms of office for boards composed of different levels of membership).

128. Bennett M. Rich, *The Governor as Policy Leader*, in NAT’L MUN. LEAGUE, SALIENT ISSUES OF CONSTITUTIONAL REVISION 80, 84 (John P. Wheeler, Jr. ed., 1961).

129. JAMES QUAYLE DEALEY, *GROWTH OF AMERICAN STATE CONSTITUTIONS* 165 (1915).

130. *Cappelli v. Sweeney*, 634 N.Y.S.2d 619, 624 (Sup. Ct. 1995) (quoting STATE OF N.Y. EXEC. CHAMBER, REPORT OF RECONSTRUCTION COMMISSION TO GOVERNOR ALFRED E. SMITH ON RETRENCHMENT AND REORGANIZATION IN THE STATE GOVERNMENT 6 (1919), <https://ia800200.us.archive.org/21/items/cu31924014005106/cu31924014005106.pdf> [<https://perma.cc/PBB7-69H5>]), *aff’d mem.*, 646 N.Y.S.2d 454 (App. Div. 1996). The case also discusses past efforts, like the Moses Commission Report, to streamline the state’s government. *See id.*

131. Lambert, *supra* note 107, at 187.

### B. *The Modern Move to Centralization*

The sprawling state bureaucracies that accumulated fed the movement for gubernatorial control. Commentators and public officials alike came to view state administration as “unwieldy, wasteful, and thoroughly unbusinesslike,”<sup>132</sup> and viewed state administrative reorganization as an “urgent” matter.<sup>133</sup> Reorganization, in this view, would need to centralize power under the governor: “The activities of the government should be consistent,” the thinking went, “and the more independent agencies, the more possibilities for inconsistencies.”<sup>134</sup> Subscribing to what reformers termed the integration doctrine,<sup>135</sup> states began adopting reforms, both piecemeal and wholesale, aimed at centralizing executive branch control under the governor.<sup>136</sup>

In some states, like Florida and Michigan, reformers amended the Constitution to consolidate and reorganize the executive branch.<sup>137</sup> At least seven states granted governors powers of supervision;<sup>138</sup> an overlapping group of ten more conferred the gubernatorial power to reorganize executive branches.<sup>139</sup> Other states acted more stepwise, through more limited constitutional or statutory changes.<sup>140</sup> For example, states eliminated or consolidated individual agencies, usually charging the governor with supervision of the re-

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132. DEALEY, *supra* note 129, at 165. To be sure, governors were not always entirely omitted from agencies’ design. Even in the nineteenth century, governors in some states enjoyed some powers of both appointment and removal. For examples, see Eric R. Daleo, *The Scope and Limits of the New Jersey Governor’s Authority to Remove the Attorney General and Others “For Cause,”* 39 RUTGERS L.J. 393, 401–02 (2008).

133. John M. Mathews, *State Administrative Reorganization*, 16 AM. POL. SCI. REV. 387, 387 (1922) (quoting W.F. WILLOUGHBY, *THE GOVERNMENT OF MODERN STATES* 393 (1919)).

134. York Willbern, *Administration in State Governments*, in AM. ASSEMBLY, *THE FORTY-EIGHT STATES* 111, 119 (1955).

135. See FESLER, *supra* note 17, at 2.

136. Daniel Elazar called this the “managerial” trend. See Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, PUBLIUS, Winter 1982, at 11, 12–13, <https://doi.org/10.1093/oxfordjournals.pubjof.a037380> [<https://perma.cc/3KL2-T9MT>].

137. See, e.g., D’ALEMBERTE, *supra* note 96, at 141 (characterizing Florida’s constitutional amendments—in particular, Article IV, section 6—as “part of a movement toward government efficiency that began in the early 1900s”).

138. Seven states refer expressly to supervision. See ALASKA CONST. art. III, § 24; FLA. CONST. art. IV, § 6; HAW. CONST. art. V, § 6; MICH. CONST. art. 5, § 8; N.J. CONST. art. 5, § 4, para. 2; N.D. CONST. art. 5, § 7; S.D. CONST. art. IV, § 9. Several more states authorize governors to “transact all executive business with the officers of the government,” or use similar phrasing. See, e.g., ARIZ. CONST. art. V, § 4.

139. See ALASKA CONST. art. III, § 23; CAL. CONST. art. V, § 6; FLA. CONST. art. IV, § 1, para. (e); ILL. CONST. art. V, § 11; KAN. CONST. art. I, § 6; MD. CONST. art. II, § 24; MASS CONST. art. of amend. art. LXXXVII; MICH. CONST. art. V, § 2; N.C. CONST. art. III, § 5, para. (10); S.D. CONST. art. IV, § 8.

140. See Michael B. Berkman & Christopher Reenock, *Incremental Consolidation and Comprehensive Reorganization of American State Executive Branches*, 48 AM. J. POL. SCI. 796 (2004).



maining entity.<sup>141</sup> Furthermore, governors gradually gained appointment and removal powers.<sup>142</sup> These clauses built on longstanding provisions that had initiated gubernatorial power: the vesting clauses, take care clauses, and opinions clauses.<sup>143</sup> Taking the wholesale and incremental additions together, the new mood of state constitutionalism was one of enhanced gubernatorial power.<sup>144</sup>

These developments might affect an interpreter's view of agency independence. They might suggest that, whatever state constitutions intended when they first created independent agencies, they now envision a stronger governor and less independence. This would be especially true if one believes that the most recent changes to a constitution are entitled to special weight.<sup>145</sup> As Robert Williams has observed, a state court could observe a pattern of increasing gubernatorial empowerment and "interpret[] his powers accordingly."<sup>146</sup>

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The picture that emerges from this discussion is one of constitutional possibility: state constitutions hardly settle the matter of executive officials' independence. Rather, they provide fodder that might be construed—by courts or legislatures—to support or cabin independence. Parts III and IV describe how state courts and legislatures have responded to that invitation.

### III. STAGE AGENCY INDEPENDENCE IN THE COURTS

How have American state courts interpreted state constitutions' mixed signals regarding agency independence? This Part offers two core findings. First, state court jurisprudence refutes the idea that state constitutional structure is necessarily linked to robust independence. As noted, most state constitutional provisions creating or recognizing separate executive officials leave some or all of the powers, appointment, and removal of those officials

141. See *id.* at 797.

142. See Kettleborough, *supra* note 17, at 623–26.

143. See DEALEY, *supra* note 129, at 162 (describing these provisions as common in the states); Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323, 342 (2016) (noting the early origins of these clauses in sixteen states).

144. See generally LARRY SABATO, *GOODBYE TO GOOD-TIME CHARLIE* (2d ed. 1983) (describing the expansion of gubernatorial power).

145. For exploration of this interpretive approach, see Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1262 (2001) (advocating "looking at older parts of the Constitution through the lens of more recent amendments in understanding what the Constitution as a whole has become," and considering objections to this approach).

146. ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 239 (2009) (describing a New Jersey case following that approach).

to state legislatures.<sup>147</sup> In following both constitutional text and their characteristic deference to state legislation,<sup>148</sup> state courts have followed suit, rendering much of state agency independence a legislative choice. And although state legislation is an ever-changing landscape (a topic Part IV explores), state legislatures have generally trended in favor of gubernatorial control of the executive branch.<sup>149</sup> State agency independence thus does not follow ineluctably from separately electing members of the executive branch.

Second, whether or not a constitutional punt to the legislature is at issue, the rulings and methodologies of state courts tend to limit certainty about independence. As Part III.A explains, state courts do not adopt a binary approach to independence like federal courts do; that is, they do not divide the executive branch into agencies that are independent and those that are not.<sup>150</sup> Nor do state courts infer across-the-board independence from the presence of one indicator, again as federal courts do.<sup>151</sup> Their approach instead resembles the “ordinary interpretation” that John Manning has urged at the federal level, eschewing value-based generalities about independence in favor of “clause-based” rulings.<sup>152</sup> And many of these decisions go further in their specificity, limiting their analysis not only to the agencies or offices at issue but also to the particular context—the sort of narrow, thinly theorized decisionmaking that commentators of state courts have both critiqued and defended in other contexts.<sup>153</sup>

The absence of a categorical approach to independent agencies impedes study of the topic, as it is not possible to simply review all state court rulings on “agency independence.” Still, it is possible to get a window into the subject by studying state approaches to subsidiary questions central to independence: the governor’s powers of appointment, removal, and supervision. Part III.B provides an overview of those issues. Most states permit nongubernatorial (usually legislative) appointments, subject to functional, often ambiguous limits. But state courts blunt the effect of nongubernatorial selection through their approaches to removal and supervision. Regarding removal, most state courts (following their constitutional text) leave the standards to the legislature, allowing the legislature potentially vast ability to

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147. For a breakdown of the grants of power to these officials, see Seifter, *supra* note 25, at Appendix A. I provide more detail on appointment and removal restrictions in Section III.B.

148. See Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 693–94 (2000) (noting the “deferential standard” of state courts toward state legislation).

149. See Seifter, *supra* note 17; *supra* Section II.B.

150. Cf. Datla & Revesz, *supra* note 12 (describing and critiquing the binary approach).

151. Cf. *id.*

152. See Manning, *supra* note 26, at 2039–40.

153. Compare Gardner, *supra* note 49 (describing state constitutional law as an inevitably “vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements” in which judges inadequately engage with state constitutions), with David Schuman, Correspondence, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274, 276 (1992) (describing the existence, possibility, and value of meaningful state constitutionalism).

impose independence. But state courts also empower governors in removal cases, either by interpreting “for cause” generously or by limiting judicial review of removals. As for supervision, the relationship between the governor and agencies is usually whatever the legislature says it is, subject to limits that are sometimes acknowledged but almost never defined. On each of those three issues, state court approaches tend to inhibit legal certainty.

One caveat at the outset: Like all nationwide studies of state law, this inquiry poses methodological challenges. A thorough study of federal agency independence might consider a few dozen cases, but there are hundreds of cases that address independence across the states, and understanding each may require state-specific context. Still, as scholars of state constitutional law have concluded in other contexts,<sup>154</sup> there are generalizable conclusions regarding state approaches. In particular, it is possible to identify certain questions that are crucial to defining independence and then focus on state courts’ answers to those questions across the country. Guided by that approach, this Part addresses several questions that are at the heart of whether independence exists and what it means.<sup>155</sup>

The features of state court decisions described here—noncategorical reasoning, deference to the political process, and narrow holdings—all feed the argument Part IV develops further: that independence in the states is neither a clear category nor a strong norm. But first, I substantiate these characterizations of state court practice.

#### A. *Agency Independence as Neither a Binary nor a Category*

First, the vast majority of state courts do not follow the binary approach of federal law, under which each agency is either “independent” or not.<sup>156</sup> In addition to being nonbinary, the state approach is also noncategorical: most states do not use the term “independent agency” (or any similar term) to invoke a transsubstantive category. A few state statutes provide a transsubstan-

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154. See Devlin, *supra* note 19, at 1241 (contending that it is “possible to make useful comparisons among states with respect to basic principles of allocation of powers between governor and legislatures,” and noting that “[c]ourts in fact do so”); Jonathan Zasloff, *Taking Politics Seriously: A Theory of California’s Separation of Powers*, 51 UCLA L. REV. 1079, 1084 (2004) (“Enough commonality exists between states that the field [of state constitutional law] need not fragment itself into fifty pieces . . .”).

155. My use of appointment, supervision, and removal as determinants of independence is generally compatible with, though not identical to, other lists of the drivers of independence. See, e.g., Datla & Revesz, *supra* note 12, at 784 (identifying “seven indicia of independence: removal protection, specified tenure, multimember structure, partisan balance requirements, litigation authority, budget and congressional communication authority, and adjudication authority”); Jennifer L. Selin, *What Makes an Agency Independent?*, 59 AM. J. POL. SCI. 971, 972–75 (2015) (asserting that statutory provisions affecting appointment and removal, as well as provisions affecting an agency’s “ability . . . to make policy decisions without political interference,” are important determinants of independence).

156. See Datla & Revesz, *supra* note 12, at 772–73 (describing one of the “fundamental assumptions” about federal agency independence as the “binary view” that “agencies can be divided into two identifiable, distinct sets: independent and executive”).

tive definition of “independent agency,” though without judicial interpretation or a connection to the case law on independence from the governor;<sup>157</sup> others use the phrase in passing and with little or no explanation.<sup>158</sup> Thus, even cases that implicate independence tend not to reason from a notion that certain agencies or officials are classified as “independent,” much less that any set of agencies or officials is independent in the same way.

The dominant, noncategorical approach is that state courts reach rulings affecting agencies’ insulation from the governor without making reference to any category or transsubstantive rules. To take one example of this dominant approach, consider New Mexico’s case law on removal. In *State ex rel. New Mexico Judicial Standards Commission v. Espinosa*, the New Mexico Supreme Court rejected a challenge to Governor Bill Richardson’s removal of the previous governor’s appointees to the Judicial Standards Commission, which acts as the judiciary’s “watchdog” and handles complaints against and investigations of judges.<sup>159</sup> The state constitution’s removal clause authorizes the governor to “remove any officer appointed by him unless otherwise provided by law,”<sup>160</sup> and the statute was silent on removal.<sup>161</sup> The challengers argued that the legislature had implicitly limited the governor’s removal power by setting fixed terms for the commissioners’ service and by making it apparent that the Commission needed to be “independent from political influence.”<sup>162</sup> The court rejected that argument, holding that “a limit on the Governor’s removal power must be expressly stated.”<sup>163</sup>

157. Iowa, Pennsylvania, and Maryland have statutes offering a transsubstantive definition of an independent agency. See IOWA CODE §§ 7E.3–4 (2017) (defining “independent agency” as “an administrative unit which, because of its unique operations, does not fit into the general pattern of operating departments,” but stating that the heads of departments and independent agencies have the same duties); MD. CODE ANN., BUS. REG. § 9A-101 (LexisNexis 2017) (defining “independent agency” as “an office, commission, board, department, or agency established as an independent unit of government that may receive budgetary or administrative support from the federal, State, or local government”); 62 PA. CONS. STAT. § 103 (2018) (one of several state statutes defining “independent agency” as “[b]oards, commissions and other agencies and officers of the Commonwealth which are not subject to the policy supervision and control of the Governor”).

158. Sometimes what little explanation exists indicates further distance from the federal paradigm of independence equaling insulation from the governor. See, e.g., ARK. CODE ANN. § 20-8-104 (2017) (establishing the Health Services Permit Agency as an independent agency “under the supervision and control of the Governor”); LA. STAT. ANN. § 29:725 (2018) (stating that the Governor’s Office of Homeland Security and Emergency Preparedness is “an independent agency in the office of the governor” and that the director reports directly to the governor).

159. 2003-NMSC-017, ¶¶ 1–3, 11, 134 N.M. 59, 73 P.3d 197, 200, 205. The court explained that Governor Richardson, upon taking office, had been “removing executive officers, state employees and board members and replacing them with his own appointees.” *Espinosa*, 2003-NMSC-017 at ¶ 3.

160. *Id.* at ¶ 5 (quoting N.M. CONST. art. V, § 5).

161. *Id.* at ¶ 6.

162. *Id.* at ¶ 20, 23–24.

163. *Id.* at ¶ 27.

Yet in *American Federation of State, County and Municipal Employees v. Martinez*,<sup>164</sup> the New Mexico Supreme Court held that the governor lacked authority to fire at will the members of the Public Employee Labor Relations Board, reasoning that the governor's removal would flout the statute's purpose of creating a "neutral and balanced" board<sup>165</sup> and in turn would violate the governor's obligation to faithfully execute the laws.<sup>166</sup> The court drew several factual distinctions between the Board and the commission at issue in *Espinosa*, including the nature of the appointment process and the Board's adjudicative functions (including in cases involving the governor).<sup>167</sup> The court thereby suggested that the governor's removal power will depend on case-specific, multifactor judgments about the legislature's intent to divorce the governor from the agency's work. But the courts do not resolve these cases by reasoning that the agency at issue is or is not an "independent agency." As Section III.B will show, similarly noncategorical approaches dominate on other questions, including the threshold for for-cause removals,<sup>168</sup> the reviewability of removals,<sup>169</sup> and the constitutionality of legislative appointment.<sup>170</sup>

There are a few noteworthy exceptions to this pattern. Some state courts do discuss independent agencies as a category, but even they eschew clear delineations of which agencies count as independent. Whereas the federal courts generally infer independent status from the presence of tenure protection,<sup>171</sup> the states in this group consider the totality of the circumstances. Utah, for example, considers four nonexhaustive, nondispositive factors to determine whether an agency is "subject to direct executive supervisory control";<sup>172</sup> Nebraska, New Jersey, and Pennsylvania have at times taken a similar tack in asking whether an agency is executive or independent for

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164. 2011-NMSC-018, 150 N.M. 132, 257 P.3d 952.

165. *Martinez*, 2011-NMSC-018 at ¶ 8–9.

166. *See id.* at ¶ 5. The court also questioned whether the governor's removal would violate due process, particularly because the governor is often a party to dispute the board adjudicates. *Id.* at 956.

167. *Id.* at 957.

168. *See infra* Section III.B.2 (discussing Massachusetts case law).

169. *See infra* Section III.B.2 (discussing Oklahoma).

170. *See infra* Section III.B.1.

171. *See supra* Part I.

172. *Beehive Tel. Co. v. Pub. Serv. Comm'n*, 2004 UT 18, ¶ 21, 89 P.3d 131 ("In determining whether state agencies are subject to direct executive supervisory control we look to a number of factors, including, but not limited to, whether the agency was established as an independent agency by the legislature, whether the agency is governed by a board or executive officer, whether executive officials play a significant role in agency affairs, and whether the agency receives state funding. No one factor is dispositive to our decision." (citation omitted)).

purposes of joint appointment rules, gubernatorial reorganization, and termination.<sup>173</sup>

Moreover, most state courts do not infer independence across the board from the presence of one indicator of independence. This contrasts with the federal court approach, which tends to assume that if the president cannot fire an agency head, he also cannot control the agency head's decisions.<sup>174</sup> Often, as noted, hybrid independence is what the positive law commands, be it through constitutions, statutes, or both. As the California Court of Appeals explained in *Brown v. Chiang*, "while California's executive branch is divided in the sense that the officers are independently elected, and therefore cannot be removed by the Governor, the Governor is charged [by statute] with supervising the official conduct of these officers."<sup>175</sup> Indeed, Part III observes that plenty of state officials with some form of tenure protection are subject to gubernatorial supervision, and state courts generally bless this arrangement.

### B. Independence-Affecting Rulings

State courts' noncategorical approach to agency independence complicates the effort to study what independence means. However, as noted, some evaluation is possible by considering patterns in state court rulings on three core variables of independence: selection, supervision, and removal. This Section offers highlights of state court approaches on each of these three sets of questions. Taken together, they support the two main claims of this Part: that state constitutional structure does not necessitate agency independence, and that state court methodologies limit certainty about the legal status of independence. In each of these three areas, state courts primarily engage in focused, "clause-based" interpretation of their constitutions—which often coincides with Thayerian deference to legislative discretion.<sup>176</sup> In addition, the rulings tend to be narrow and fact bound. Setting aside the normative implications and institutional drivers of state courts' methodologies, the case law as a whole makes the result of any given case hard to predict in most states and likely suppresses the emergence of norms regarding independence.

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173. See *State ex rel. Johnson v. Chase*, 25 N.W.2d 1, 12 (Neb. 1946) (joint appointment); *In re Plan for the Abolition of the Council on Affordable Hous.*, 70 A.3d 559, 561 (N.J. 2013) (reorganization); *Arneson v. Wolf*, 117 A.3d 374, 376 (Pa. Commw. Ct. 2015) (removal).

174. See *Datla & Revesz*, *supra* note 12, at 835 (describing and critiquing the implication from *Wiener v. United States*, 357 U.S. 349 (1958), that "if an agency has a for-cause removal protection provision, it can claim for itself additional protections to achieve that 'absolute freedom' from presidential control").

175. 132 Cal. Rptr. 3d 48, 69 (Ct. App. 2011). Similarly, state courts have declined to infer gubernatorial supervisory power from the presence of at-will removal power. See *Whiley v. Scott*, 79 So. 3d 702 (Fla. 2011).

176. See *Schapiro*, *supra* note 148, at 690–92 (linking state courts "highly deferential standard" toward state legislation to the preferred approach of James Bradley Thayer, who advocated judicial deference to legislation).

### 1. Selection Power

The creation of officials who are not selected by the governor is the most distinctive feature of agency independence in the states. Independent selection powers are not unlimited and, critically, are often not paired with other forms of independence, but separate selection still forms the high-water mark of state agency independence.

Separate selection allows insulation from the chief executive in ways not possible at the federal level. Nearly every state allows forms of independent selection that the federal constitution does not.<sup>177</sup> At the federal level, it is familiar fare that the Appointments Clause prescribes the methods for selecting executive branch officials.<sup>178</sup> Among other things, it bars legislative appointments,<sup>179</sup> and it requires that all principal officers be selected by the president with the Senate's consent.<sup>180</sup> These requirements ensure that, at the highest levels of the federal government, the president gets to choose who will serve. Of course, not all presidential nominees will be confirmed, but it goes without saying that neither Congress nor the public can displace the president and select a high-ranking executive branch official themselves.

Things look different at the state level. As noted in Part I, the majority of state constitutions themselves establish direct popular election of some executive branch officials other than the governor. Perhaps less well known is that the majority of state courts also bless schemes of legislative appointment.<sup>181</sup> In some states, the constitution expressly prescribes legislative appointment of particular officials,<sup>182</sup> or even an entire set of officials.<sup>183</sup> In most states, the language of appointments clauses is broad enough to allow

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177. See Seifter, *supra* note 25, at Appendix A. My observations and analysis on state court selection and appointment procedures within this section are drawn from the survey of all fifty states' constitutions presented in Appendix A.

178. See U.S. CONST. art. II, § 2, cl. 2; *Buckley v. Valeo*, 424 U.S. 1, 125–26 (1976).

179. See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986); *Buckley*, 424 U.S. at 135–36 (“Congress is precluded under the principle of separation of powers from vesting in itself the authority to appoint those who will exercise such authority.”).

180. See U.S. CONST. art. II, § 2, cl. 2; cf. *Edmond v. United States*, 520 U.S. 651 (1997) (clarifying the definition of a principal officer).

181. For compatible findings, see 1 NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 3:21 (7th ed. 2010) (collecting cases from thirty-five states); Devlin, *supra* note 19, at 1242–51; David R. Carpenter, Note, *On the Separation of Powers Challenge to the California Coastal Commission*, 79 N.Y.U. L. REV. 281, 286 n.16 (2004) (updating Devlin's collection).

182. For example, the Maine Constitution empowers its legislature to select the attorney general, secretary of state, and treasurer. ME. CONST. art. IX, § 11; *id.* art. V, pt. 2, § 1; *id.* pt. 3, § 1. The Maryland Constitution authorizes its legislature to select the Treasurer, MD. CONST. art. VI, § 1, and the Michigan Constitution directs the legislature to select the Auditor General, MICH. CONST. art. IV, § 53.

183. For example, the Louisiana Constitution authorizes the legislature to appoint the members of boards and commissions; the governor appoints officials leading single-headed agencies. LA. CONST. art. IV, § 5(H).

for legislative appointments;<sup>184</sup> for example, many such clauses state that officers' selection will be as provided "by law" or that the governor's appointment power is subject to legislative specification.<sup>185</sup> Moreover, to the extent these provisions are ambiguous about whether they permit legislative appointments (as opposed to mere legislative specification of qualifications or appointment processes),<sup>186</sup> state courts tend to invoke the principle that state constitutions are limitations on, rather than grants of, legislative power.<sup>187</sup>

As noted, it is this feature of nongubernatorial selection that has gotten the most attention in scholarship on state executive branches and generated the conception of states as home to meaningful intraexecutive independence. Yet even on this issue, the unpredictability of state independence appears. For one, while appointment cases tend to be more straightforward and transsubstantive than state cases on removal and supervision, state courts have fostered some uncertainty. Most states that permit legislative appointments do not permit *all* legislative appointments.<sup>188</sup> Instead, they subject legislative appointments to functional, case-by-case separation of powers analysis.<sup>189</sup> In one prominent case, the California Supreme Court explained that the applicable standard it found consistent with standards in other states was "whether these provisions, viewed from a realistic and practical perspective, operate to defeat or materially impair the executive branch's exercise of its constitutional functions."<sup>190</sup> The court answered this question in the negative by looking at the nature of the commission's work, the nature of its functions, and the relationship between the commission's work and the governor's executive duties.<sup>191</sup> This test is a bit like the U.S. Supreme Court's

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184. See Devlin, *supra* note 19, at 1243 (explaining that state appointments clauses are "generally phrased to permit a construction that would allow legislatures to determine both how and by whom statutory administrative officials may be chosen").

185. See *id.* at 1238 n.117 (gathering examples).

186. Restrictions on appointee qualifications can also constrain the governor, as they do the president at the federal level. Some of these constraints may be incidental effects of a separate policy goal. For example, Iowa requires gender balance on certain boards and commissions, IOWA CODE § 69.16A (2018), and Kentucky imposes racial ratios on certain boards, KY. REV. STAT. ANN. § 164.821 (LexisNexis 2017) (requiring that the governor's appointees to Board of Trustees of the University of Louisville reflect "[n]o less than the proportional representation of the minority racial composition of the Commonwealth"). In other instances, legislatures may use qualifications to substantively stack the deck—ensuring, for example, that the governor's party will never have a majority, see *Cooper v. Berger*, 809 S.E.2d 98 (N.C. 2018) (rejecting such an attempt), or that appointees will likely have a particular point of view, see, e.g., *Ky. Ass'n of Realtors v. Musselman*, 817 S.W.2d 213 (Ky. 1991) (upholding statute limiting governor's appointments to state Real Estate Commission to agents chosen from a list created by the Kentucky Association of Realtors).

187. See Devlin, *supra* note 19, at 1244 & n.138.

188. See *id.* at 1245–46, 1245 n.140.

189. See *id.* at 1246.

190. *Marine Forests Soc'y v. Cal. Coastal Comm'n*, 113 P.3d 1062, 1087 (Cal. 2005).

191. See *id.* at 1087–89.



*Morrison v. Olson* approach to removal,<sup>192</sup> though more arrangements seem to flunk the state test than would flunk *Morrison*.<sup>193</sup>

More importantly, the broad and relatively straightforward power that states confer on legislatures to participate in appointments of executive officials is not extended to independence from supervision and removal. The next two subsections explain.

## 2. Removal

Removal—the classic indicator of independence under federal law—exemplifies the mixed picture of state agency independence. On one hand, state constitutions and decisional law are much more tolerant of removal restrictions than the federal Constitution. On the other, state legislatures have not accepted the invitation to insulate every agency from the governor by granting it tenure protection. And when they have, state courts have often interpreted those restrictions in ways that favor the governor’s prerogative. In doing so, state courts have not broken with the pattern of ordinary interpretation described above. They have instead gone to the opposite extreme: they have relied upon specific constitutional removal provisions, removal-constraining statutes, and common-law presumptions about reviewability without identifying any deeper value at issue. The resulting case law is particularly tangled.

To begin, the traditional view is that removal is not an inherent executive power in the states.<sup>194</sup> Rather, the governor’s removal power is a matter of positive law. Most state constitutions (roughly twenty-nine) have a transsubstantive removal clause (or clauses).<sup>195</sup> A few of these give the governor substantial at-will removal power,<sup>196</sup> but the majority of states (thirty-five) authorize the legislature to set the parameters for removal, either because the removal clause says so or because the constitution does not address

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192. 487 U.S. 654, 693 (1988) (examining “whether the Act, taken as a whole, violates the principle of separation of powers by unduly interfering with the role of the Executive Branch”).

193. See Devlin, *supra* note 19, at 1246–47.

194. See, e.g., *State ex rel. Ayers v. Kipp*, 74 N.W. 440, 442 (S.D. 1898) (finding no implied gubernatorial removal power preventing the legislature from enacting removal restrictions, and collecting similar cases from other states); MATHEWS, *supra* note 119, at 98 (“The state governor . . . is not considered as having any power of removal, either as a result of his general executive power, or as an incident of his power of appointment. What power of removal the governor has must . . . be derived from some specific provision of the constitution or statutes.”).

195. See Seifter, *supra* note 25, at Appendix B.

196. See, e.g., ALASKA CONST. art. III, § 25; HAW. CONST. art. V, § 6; ILL. CONST. art. V, § 10; PA. CONST. art. VI, § 7. Interestingly, Pennsylvania courts have read the constitutional at-will removal provision in conjunction with the more legislatively driven appointments provision and determined that the legislature is permitted to create agencies with tenure protection. See *Arneson v. Wolf*, 117 A.3d 374 (Pa. Commw. Ct. 2015).

removal.<sup>197</sup> Thus, although cutting the governor out of the removal process altogether would flatly violate some state constitutions, there is at least an argument that many constitutions would allow the legislature to make every agency tenure protected, and thus “independent” in the federal sense.

But, reinforcing the claim that constitutional possibility and reality are distinct, state statutes generally have not slashed gubernatorial removal. Indeed, as noted in Part I, a core element of the reform of most state executive branches was to *increase* the number of agency officials the governor could remove,<sup>198</sup> and many state statutes affirmatively provide for broad gubernatorial removal power, at least as a default.<sup>199</sup> Still, every state legislature has chosen to preserve for-cause removal status for some state agencies, boards, and commissions. As to those, the question is whether and to what degree the removal limitations constrain the governor.

At the federal level, courts and scholars widely view tenure protections, like requirements that the president can only remove an officer “for cause,” as a substantial limit on presidential removals. That view depends on two premises that are widely true in federal court but ultimately optional. First, federal courts generally understand removal restrictions like “for cause” to impose a high bar, precluding termination for mere policy disagreements.<sup>200</sup> Second, federal courts (apparently) stand ready to review presidential firings

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197. In nine of the constitutions included in this tally, there is no mention of removal at all, and the legislature has interpreted that silence as an invitation to fill the void. *See, e.g.,* IDAHO CONST.; KY. CONST.; *Hawley v. Bottolfsen*, 98 P.2d 634 (Idaho 1940) (assessing governor’s evidence underlying removal); *Johnson v. Laffoon*, 77 S.W.2d 345 (Ky. 1934). In twenty-five of the states that do include a removal clause, the constitution expressly authorizes the legislature to set removal parameters. *See* Seifter, *supra* note 25, at Appendix B.

198. *See, e.g.,* FERREL HEADY, STATE CONSTITUTIONS: THE STRUCTURE OF ADMINISTRATION 16 (1961) (noting “a trend to broaden the removal powers of the governor,” but noting that states were “still far from” the Model State Constitution’s recommendation that all department heads be appointed by and removable at will by the governor). For an example of a state statute conferring broad removal powers on governors, *see* W. VA. CODE § 6-6-4 (2015), which gives the governor the discretion to remove any appointee at will.

199. *See* Seifter, *supra* note 25, at Appendix B.

200. *See* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 502 (2010) (rejecting the possibility that “simple disagreement with the Board’s policies or priorities could constitute ‘good cause’ for its removal”). This seems to be the prevailing wisdom, though as scholars have noted, the Supreme Court has not consistently been clear about the standard. *See* Aditya Bamzai & John F. Duffy, *Is Barney Frank Right About the President’s Power to Remove the CFPB Director?*, 36 YALE J. ON REG.: NOTICE & COMMENT (Jan. 10, 2017), <http://yalejreg.com/nc/is-barney-frank-right-about-the-presidents-power-to-remove-the-cfpb-director-by-aditya-bamzai-john-f-duffy/> [<https://perma.cc/W37P-PW4B>]. For a recent concurring opinion suggesting a lower standard, at least in the context of the Dodd-Frank Act’s particular textual limits, *see* *PHH Corp. v. Consumer Financial Protection Bureau*, 881 F.3d 75, 124 (D.C. Cir. 2018) (Griffith, J., concurring), which concluded that the Act’s limitation of removal to instances of “inefficiency, neglect of duty, or malfeasance in office” constitutes “only a minimal restriction on the President’s removal power.”

to ensure they complied with the relevant standard.<sup>201</sup> The majority of state courts part ways with the federal approach on one or both of these premises.

First, although state courts have widely divergent views on the meaning of restrictions like “for cause” and “misconduct,” a few place the bar decidedly lower than at the federal level, and most have left the question unclear.<sup>202</sup> For example, the New Hampshire Supreme Court upheld as sufficient cause an official’s public disagreement with the governor,<sup>203</sup> and the New Jersey Supreme Court found “reasons of economy” to constitute cause.<sup>204</sup> Other cases seem, more subtly, to interpret conduct strictly against the terminated official: if the conduct *could* be classified as inappropriate, then it suffices for termination.<sup>205</sup> Still other states have expressly stated that the strenuousness of the removal standard will vary for each agency, depending on the nature of the office.<sup>206</sup> Most commonly, state courts either lack precedent elaborating the meaning of for-cause termination, or they rule narrowly on the dispute before them without articulating what the standard means.<sup>207</sup>

The second and perhaps more important way in which some state courts have sheltered governors from limited removal power is through their approach to reviewability. Roughly half the states have case law stating that removal decisions are unreviewable or reviewed with substantial deference.<sup>208</sup> Those cases that declare removal unreviewable align with an early, influential state treatise on public officers, which described the determination of “cause” as a matter of pure executive discretion.<sup>209</sup> In states that ad-

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201. See Bamzai & Duffy, *supra* note 200.

202. See Seifter, *supra* note 25, at Appendix B.

203. *Bennett v. Thomson*, 363 A.2d 187, 188–91 (N.H. 1976); see also Daleo, *supra* note 132, at 438–39 (identifying additional cases).

204. *Barringer v. Miele*, 77 A.2d 895, 897 (N.J. 1951).

205. For example, a South Carolina case upheld the governor’s termination of an officer for “misconduct” based on the officer’s delay in providing the governor information, reasoning that a statute required public officers to “immediately furnish” requested information to the governor. *Rose v. Beasley*, 489 S.E.2d 625, 627–28 (S.C. 1997) (quoting S.C. CODE ANN. § 1-3-10 (1986)).

206. See *Flomenbaum v. Commonwealth*, 889 N.E.2d 423, 428 (Mass. 2008) (“[W]hat constitutes sufficient cause to remove the head (or a member) of a governmental agency from office is determined in the context of the authority of the particular agency to act as an independent body.”).

207. See Seifter, *supra* note 25, at Appendix B.

208. See Seifter, *supra* note 25, at Appendix C.

209. MONTGOMERY H. THROOP, A TREATISE ON THE LAW RELATING TO PUBLIC OFFICERS AND SURETIES IN OFFICIAL BONDS § 396, at 387 (1892) (“[T]he removing authority is the sole and exclusive judge of the cause, and the sufficiency thereof; and . . . the courts cannot review its decision in any case where it ha[s] jurisdiction.”). The other major state treatise on the topic envisions a greater, but still somewhat deferential, role for judicial review. FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS § 450, at 285–86 (1890) (“Where no particular cause is so specified, it must rest in the discretion of the executive, sub-

here most closely to this understanding, the for-cause standard either becomes irrelevant<sup>210</sup> or reduces to a sort of magic-words exercise: the standard is met “whenever the governor is satisfied” that one of the listed causes exists.<sup>211</sup> Those that find removal subject only to light review generally state that courts can ensure that the governor was acting within his jurisdiction (that is, for one of the enumerated statutory causes) or root out arbitrariness, but will not review the evidence supporting the governor’s decision.<sup>212</sup> For a further twist, in Oklahoma, the reviewability of a governor’s removal decision depends on whether the court believes the legislature intended the decision to be reviewable for the particular agency or official in question.<sup>213</sup> Finally, a number of the states with precedents deeming removals unreviewable also have cases that review removals on the merits, often without explanation of the contradiction.<sup>214</sup>

Scholars of federal agency independence may observe that the result is roughly the mirror image of the federal approach: Federal courts hold that constitutional law limits agency independence<sup>215</sup> but have arguably eroded those limits through a series of statutory rules of thumb.<sup>216</sup> In contrast, many state courts, stuck with constitutions that plant seeds of independence, have recognized its constitutional footing but narrowed it through subconstitutional means.

### 3. Governors’ Supervisory Powers

The third leg of independence is the governor’s supervisory powers, which include the ability to control agencies’ decisions or affairs. In broad-strokes comparison at the federal level, the president must retain some con-

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ject to the right of the courts to examine as to its existence, to determine what cause shall be sufficient.” (footnote omitted)).

210. See, e.g., *Keenan v. Perry*, 24 Tex. 253, 264 (1859) (describing the governor as “the sole judge of the causes” for removal).

211. *State ex rel. McReavy v. Burke*, 36 P. 281, 284 (Wash. 1894).

212. See, e.g., *Taylor v. Lee*, 226 P.2d 531, 540 (Utah 1951) (concluding that removal review would only be for arbitrariness, and describing dual concerns of deterring governors from inflicting “the possible ruination of the man removed” for arbitrary reasons, while also ensuring executive efficiency “without interference by the judicial department”). The *Taylor* court ultimately rejected the governor’s attempted removal in that case. See *id.* at 547.

213. See, e.g., *Hall v. Tirey*, 501 P.2d 496, 501 (Okla. 1972) (holding that “the Legislature intended to create an independent administrative board free of the influence that a Governor can assert” and therefore a removed member “is entitled to have the courts decide whether his removal complied with the standards established by the Legislature”).

214. See *Seifter*, *supra* note 25, at Appendix B. Compare, e.g., *Roberts v. Richardson*, 2005-NMSC-007, ¶¶ 12–14, 137 N.M. 226, 109 P.3d 765, 767, with *State ex rel. Ulrick v. Sanchez*, 255 P. 1077, 1077 (N.M. 1926).

215. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 513–14 (2010); *Myers v. United States*, 272 U.S. 52, 176 (1926).

216. See *Bamzai & Duffy*, *supra* note 200 (exploring these statutory rules in federal court).

stitutional minimum of supervisory power over agencies; above that minimum, Congress may insulate agencies.<sup>217</sup> Interestingly, there is little federal precedent on supervision by itself, because the Supreme Court typically treats removal and supervision as intertwined. It has doubted that anything short of at-will removal power amounts to real supervision,<sup>218</sup> while also assuming that, where removal power is limited, so is supervisory power.<sup>219</sup> Turning to the states, does decisional law cement any constitutional ground rules regarding supervision itself? Is there a core of gubernatorial supervisory power that state legislatures cannot divest, or a core of agency independence that the governor (or legislature) cannot invade?

One caveat before proceeding is that, although state cases provide some answers, there are far fewer state decisions on supervision than on appointment and removal,<sup>220</sup> and few of the relevant cases resolve exactly the same legal issue.<sup>221</sup> Given the limited data points, this discussion offers a rough sketch of paths state courts follow—first on disputes among constitutional officers, and then on disputes between governors and legislative agencies—rather than a precise tally of state positions.

*Clashes Between Governors and Constitutional Officers.* Supervision disputes between governors and constitutional officers are unique in that both sides can claim constitutional executive power. These cases—governor versus attorney general, or governor versus controller, for example—are those in which the popular wisdom assumes complete agency independence. In reality, these rulings are all over the map.

At least one case does fully follow the popular wisdom and illustrates its underlying logic. In *Brown v. Barkley*, the Kentucky Supreme Court rejected a gubernatorial executive order that would have transferred power from the

217. See *supra* Part I; *Free Enter.*, 561 U.S. at 501–02 (concluding that multi-level tenure protection deprived the president of his constitutional “power to oversee executive officers”); *Morrison v. Olson*, 487 U.S. 654, 695–97 (1988) (concluding that the president’s role in appointing, supervising, and removing the independent counsel provided sufficient control).

218. See *Free Enter.*, 561 U.S. at 500 (stating that the “bureaucratic minutiae” of oversight authority does not substitute for removal power).

219. See *supra* Part I; see also Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1863 (2015) (remarking on the limited judicial development of the supervision concept).

220. See Seifter, *supra* note 25, at Appendix A. I focus here on cases I take to be at the heart of legal independence: rulings on whether the legislature (or governor) exceeded constitutional bounds in limiting (or ignoring limits on) the governor’s constitutional power to shape an agency’s decisions. Perhaps there are few supervision cases because most litigation occurs around the more concrete events of appointment and removal—or perhaps it is because state officials (sometimes) work things out without courts. See *State ex rel. McGraw v. Burton*, 569 S.E.2d 99, 114 n.21 (W. Va. 2002) (suggesting that “principles of accommodation, respect, and comity among affected branches and officers of government have usually operated to resolve such issues without litigation”).

221. See Seifter, *supra* note 25, at Appendix C.

elected Commissioner of Agriculture to a governor-appointed agency.<sup>222</sup> The court found popular election to be evidence of independence: Because constitutional officers like the Commissioner “are to be elected by the people . . . they are not answerable to the supervision of anyone else.”<sup>223</sup> The court stressed that the governor lacks powers of “supervision and control” over them and indicated that this arrangement served the valuable purpose of “the diffusion of executive power.”<sup>224</sup>

The Kentucky court seems to stand alone, however, in deriving such a categorical rule of independence. At the other end of the spectrum, several cases take the opposite categorical position. In *Tucker v. State*, for example, the Indiana Supreme Court rejected legislation that would have overhauled the executive branch. In its opinion, the court underscored that the governor alone wields the executive power—including the power to supervise other executive officials—and that other elected constitutional officers, in contrast, are merely “minor administrative officers.”<sup>225</sup> A handful of cases in other states similarly construe their constitutions to establish seemingly categorical supervision by the governor over other constitutional officers.<sup>226</sup>

But most cases in my sample, twenty of the twenty-six cases involving constitutional officers, forge a middle ground, reaching “clause-based”<sup>227</sup> decisions, or simply deferring to the legislature, without overarching conclusions about agency independence or the governor’s supervisory power.<sup>228</sup> Where the relevant constitutional clause vests the officer with a concrete power, state courts hold that the legislature may not transfer that power to the governor, and the governor may not claim it for himself.<sup>229</sup> But because most state constitutions qualify the power of separate constitutional officers by bestowing only powers “provided by law” (the “minimalist approach” described in *Brown v. Chiang*),<sup>230</sup> these cases generally hinge on whatever the legislature has stated.<sup>231</sup> If the legislature attempts to deprive an officer of *all*

222. 628 S.W.2d 616, 618 (Ky. 1982). The governor based this order on his statutory re-organization power. *Brown*, 628 S.W.2d at 619.

223. *Id.* at 622–23.

224. *Id.* at 622.

225. 35 N.E.2d 270, 291–93 (Ind. 1941).

226. *In re Riley v. Cornerstone Cmty. Outreach, Inc.*, 57 So. 3d 704, 718 (Ala. 2010); *Bronster v. United Pub. Workers*, 975 P.2d 766, 772 (Haw. 1999); *State ex rel. Hartley v. Clausen*, 264 P. 403, 405–06 (Wash. 1928).

227. See Manning, *supra* note 26.

228. See Seifter, *supra* note 25, at Appendix C.

229. See, e.g., *Greenwood Cemetery Land Co. v. Routt*, 28 P. 1125, 1127–28 (Colo. 1892) (holding that where the constitution had delegated authority to a state board of land commissioners, that authority was necessarily not part of the “supreme executive power . . . vested in the governor”).

230. 132 Cal. Rptr. 3d 48, 69 (Ct. App. 2011) (citation omitted).

231. See, e.g., *Ahearn v. Bailey*, 451 P.2d 30, 34 (Ariz. 1969) (noting that the state attorney general’s constitutional powers are “as prescribed by law,” making them “wholly within the control of the Legislative Department”).

power, state courts identify the “core” or minimum power that the constitutional establishment of the office requires.<sup>232</sup> But where the legislature merely attempts incrementally to expand or contract an official’s power, these cases are typically resolved by legislative text, without extensive constitutional analysis.<sup>233</sup> Indeed, some cases expressly decline to theorize broadly given the difficulty and sensitivity of the cases.<sup>234</sup>

*Clashes Between Governors and Boards or Commissions.* A second set of cases involves disputes regarding the governor’s control over officials created not by state constitutions, but by state legislatures. These disputes are closer to the classic federal agency independence cases, like *Humphrey’s Executor v. United States*<sup>235</sup> and *Free Enterprise Fund v. Public Company Accounting Oversight Board*,<sup>236</sup> which likewise involve chief executive control of legislatively established agencies. Because these state disputes do not involve any competing constitutional powers of the agency, their resolution focuses on whether the governor possesses an irreducible core of supervisory power that the legislature cannot violate.

Again, some state cases reach broad rulings in favor of either independence or gubernatorial power, but most defer to the legislature. At least one court has concluded that the governor has no implied supervisory power, such that the legislature can deny the governor all control over an agency’s decisions (subject to separate limits on appointment and removal).<sup>237</sup> At the

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232. *E.g.*, *State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777, 780 (Minn. 1986) (stating that the majority approach among states is to prevent legislatures from eliminating the “core functions” of a constitutional office); *State ex rel. McGraw v. Burton*, 569 S.E.2d 99, 107 (W. Va. 2002) (“[T]here are certain core functions of the Office of Attorney General that are inherent in the office, of which the Office of Attorney General may not be deprived . . . .”); *Powers v. State*, 2014 WY 15, ¶ 24, 318 P.3d 300, 308 (Wyo. 2014) (echoing this majority view).

233. Of course, deference to legislation that expands a constitutional officer’s power effectively upholds less than complete gubernatorial supervision. For one interesting departmentalist take on that issue, see *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1265–66 (Mass. 1977), which states that if the legislature thought the attorney general’s power invaded the governor’s “supreme” power, the legislature could revise the statute.

234. *See, e.g.*, *State ex rel. Stubbs v. Dawson*, 119 P. 360, 364 (Kan. 1911) (“We are not required to explore and delimit the frontiers of the supreme executive power . . . [or] to foreshadow . . . controversies which may never arise.”). For an intriguing case showing greater willingness to engage the constitutional puzzle of the plural executive, see *Perdue v. Baker*, 586 S.E.2d 606 (Ga. 2003). There, the Georgia Supreme Court concluded that the governor and attorney general both possessed litigation authority—an allocation that “provides a system of checks and balances within the executive branch”—before deferring to the legislature’s designation of the attorney general as the proper party to bring the suit at issue (regarding legislative redistricting). *See id.* at 610, 614.

235. 295 U.S. 602 (1935).

236. 561 U.S. 477 (2010).

237. *See State ex rel. S. Monroe & Son Co. v. Baker*, 147 N.E. 501, 504 (Ohio 1925) (“The Governor’s authority is supreme in the sense that no other executive authority is higher or authorized to control his discretion, where discretion is lodged in him, and yet it is not supreme in the sense that he may dominate the course and dictate the action and control the discretion

other extreme, a few cases take the approach of the North Carolina Supreme Court's recent decision in *Cooper v. Berger*,<sup>238</sup> concluding that the constitution mandates that the governor retain some minimum degree of control over the state's executive branch—in that case, the ability to “hav[e] ‘the final say’” on the decisions of the Bipartisan State Board of Elections and Ethics Enforcement.<sup>239</sup>

But, as with the constitutional disputes, most clashes between governors and legislative agencies take no categorical constitutional position. Most simply defer to the legislature. In some cases, the courts do not even mention the possibility that the legislation might go too far in the direction of either independence or supervision.<sup>240</sup> In others, state courts have indicated that some line exists but have not identified it. The leading case from Alabama, for example, seemed to make the matter one of pleading: because the governor had not shown himself to be totally powerless, and had not articulated a workable standard for the limits of his power, he could not succeed on a claim that he'd been denied sufficient authority over a particular state commission.<sup>241</sup>

As with the clashes among constitutional officers, the disputes involving gubernatorial control over boards and commissions sow unpredictability—either because they allow the legislature carte blanche to define supervision, or because they impose limits on the legislature but decline to develop those limits beyond the contours of the case under review.

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of other executive officers . . . acting within the scope of the powers, duties, and authorities conferred upon them respectively.”).

238. 809 S.E.2d 98 (N.C. 2018).

239. *Cooper*, 809 S.E.2d at 114. *Cooper* disavows the creation of a rule and states that all decisions about gubernatorial supervision must be made case by case, *id.* at 111, but, as the dissent suggests, the majority's reasoning seems to require that the governor be able to hold a majority of appointments to every multimember board, *id.* at 117–19 (Martin, J., dissenting) (noting that the Federal Election Commission would be unconstitutional under the majority's analysis). For other cases giving gubernatorial supervision a categorical constitutional case, see *State ex rel. McCrory v. Berger*, 781 S.E.2d 248, 258 (N.C. 2016), and *Kenny v. Byrne*, 365 A.2d 211 (N.J. Super. Ct. App. Div. 1976), which states that the governor “has the duty and power to supervise all employees in each principal department,” *id.* at 215–16. Notably, however, New Jersey courts have upheld statutes that limit gubernatorial supervision by placing agencies “in, but not of” the executive branch. See *In re Plan for the Abolition of the Council on Affordable Hous.*, 70 A.3d 559 (N.J. 2013).

240. See, e.g., *Edwards v. Bd. of Trs. of the State Emps. Grp. Benefits Program*, 94-0674 (La. App. 1 Cir. 10/7/94); 644 So. 2d 776 (upholding governor's inspection of tenure-protected agency as consistent with governor's statutory budget authority); *Chang v. Univ. of R.I.*, 375 A.2d 925, 929 (R.I. 1977) (rejecting governor's attempted control of university employment practices where legislature delegated that responsibility to the state's Board of Regents).

241. *State ex rel. King v. Morton*, 955 So. 2d 1012 (Ala. 2006).



In addition to the significance of the selection, supervision, and removal doctrines individually, it is noteworthy that the absence of a categorical approach to independence has led many courts to embrace divergent rules related to each of the three drivers of independence. A state may generously allow legislative appointments, but then require strong gubernatorial supervision.<sup>242</sup> Or a state may make it very easy for governors to remove officers, but difficult to supervise them.<sup>243</sup> Or state law may provide for expansive gubernatorial supervision, but limited removal power.<sup>244</sup>

All told, as interpreted by state courts, the plural executive structure itself does not *require* strongly independent state executive branches. Rather, the plural executive structure establishes the *possibility* of strong independence. The decisional rules and methodologies described above do not embrace that independence to its fullest extent; nor do they cement strong gubernatorial control. Both because state constitutions so often leave independence to legislative construction, and because state courts eschew categorical pronouncements on independence, the result—*de facto* even when *de jure*—is independence that is heavily contingent on the political process.

#### IV. STATE AGENCY INDEPENDENCE OUTSIDE THE COURTS

This Part considers the arenas in which most decisions affecting state agency independence occur: the legislature and the broader realm of politics. Section IV.A describes the instability of agency independence, noting how frequently and readily states alter the insulation of particular entities. Section IV.B highlights state legislative creativity, surveying some of the novel ways that state legislatures create, combine, and separate vectors of independence.

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242. For example, consider the pairing of *Marine Forests Society v. California Coastal Commission*, 113 P.3d 1062, 1088 (Cal. 2005), which allowed legislative appointment of official performing executive functions, and *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206, 1209 (Cal. 1981), which emphasized the governor's "supreme executive power" in the context of supervision. Another state with internal tensions on these questions is New Jersey, which is often known for its constitutional amendments that "created a very strong, probably the strongest, governor," ROBERT F. WILLIAMS, *THE NEW JERSEY STATE CONSTITUTION* 127–28 (2d ed. 2012), but which has allowed the creation of independent agencies (despite seemingly contrary constitutional text) and limited the governor's supervision of them, *see Council on Affordable Hous.*, 70 A.3d at 561–62; *N.J. Exec. Comm'n on Ethical Standards v. Byrne*, 569 A.2d 264 (N.J. Super. Ct. App. Div. 1990).

243. *Whiley v. Scott*, 79 So. 3d 702, 713–15 (Fla. 2011) (stating that "the power to remove is not analogous to the power to control"). This decision rested on state statutes, however, which the legislature amended in the governor's favor in the wake of the decision. *See* Travis L. Miller, *Coming Full Circle: Florida Legislature Sides with Governor in Affirming Executive Branch Control over Rulemaking*, FED'N REG. COUNSEL (2012), <http://www.forc.org/Public/Journals/2012/Articles/Summer/Vol23Ed2Article3.aspx> [<https://perma.cc/E3J6-DRJK>].

244. *Compare State ex rel. Stubbs v. Dawson*, 119 P. 360, 363 (Kan. 1911) (suggesting that the Kansas constitution gives the governor broad authority to "secure an efficient execution of the laws," though linking its ultimate holding to a statute), *with Barrett v. Duff*, 217 P. 918 (Kan. 1923) (narrowly construing the Kansas governor's removal power).

Section IV.C theorizes how the combination of variation and instability, combined with other factors in the state legal realm, make agency independence a weak norm.

### A. Instability

The malleability of state institutions, and the rate at which state legislatures alter the structure of government bodies, warrants a study of its own.<sup>245</sup> Here I want to flag just one tentative observation: states appear to restructure agencies more frequently than the federal government, and without the controversy one would expect if the federal government attempted similar changes.<sup>246</sup>

Consider first some examples of state legislatures tinkering with independence in the past couple of years alone. Several states have proposed or enacted legislation altering the powers of their attorneys general or other elected officials.<sup>247</sup> For example, after the election of a Republican governor, Maryland's Democratic legislature empowered its Democratic attorney general;<sup>248</sup> North Carolina's Republican legislature, in contrast, decreased the power of its Democratic attorney general and empowered its Republican superintendent of public instruction.<sup>249</sup> A number of states have taken steps to revise the structure or powers of their appointed boards and commissions.<sup>250</sup>

245. I plan to pursue this question in future work. See Miriam Seifter, Professor, Univ. of Wis., *Federalism and the Role of State, Local, and Tribal Governments: Remarks at the UCLA Law Review Symposium 1:10:49–2:21:30* (Feb. 2, 2018), <https://uclalaw.hosted.panopto.com/Panopto/Pages/Viewer.aspx?id=3d86acb9-08f2-4ab9-a9f9-a86b0132dcc9> (on file with the *Michigan Law Review*).

246. For discussion of the federal baseline, see *supra* Part I.

247. For examples beyond those in the text, see S.B. 2268, 100th Gen. Assemb. (Ill. 2018) (proposing to expand the attorney general's authority over labor and employment matters); Brad McElhinny, *House Moving Bill to Rein in How Attorney General May Use Lawsuit Settlement Funds*, METRONews (Jan. 15, 2018, 5:35 PM), <http://wvmetronews.com/2018/01/15/house-moving-bill-to-rein-in-how-attorney-general-may-use-lawsuit-settlement-funds/> [<https://perma.cc/BVH3-YTHN>]; Shira Schoenberg, *Bills Would Strip Attorney General Maura Healey's Authority to Regulate 'Copycat' Assault Weapons*, MASSLIVE (Nov. 16, 2017, 5:34 PM), [https://www.masslive.com/politics/index.ssf/2017/11/bills\\_would\\_strip\\_attorney\\_gen.html](https://www.masslive.com/politics/index.ssf/2017/11/bills_would_strip_attorney_gen.html) [<https://perma.cc/D2EL-CL8M>]; and Deborah Yetter, *Andy Beshear Livid After Bill Introduced to Strip Attorney General's Powers*, COURIER J. (Mar. 8, 2017, 9:34 AM), <https://www.courier-journal.com/story/news/politics/2017/03/08/andy-beshear-livid-after-bill-introduced-strip-attorney-generals-powers/98881818/> [<https://perma.cc/6Q2F-Q8ZS>].

248. Duncan, *supra* note 34.

249. See Anne Blythe & Craig Jarvis, *NC Lawmakers Attempt to Clip Gov. Cooper's Wings Further in Budget*, NEWS&OBSERVER (June 21, 2017, 6:38 PM), <https://www.newsobserver.com/news/politics-government/article157473739.html> [<https://perma.cc/2K3J-LJBQ>].

250. See Andrew Brown, *Lawmakers in S.C. House to Vote on Some Nuclear-Related Bills, but Wait on the Most Controversial*, POST & COURIER (Jan. 22, 2018), [https://www.postandcourier.com/news/lawmakers-in-s-c-house-to-vote-on-some-nuclear/article\\_bb4d2182-ff97-11e7-95f9-0bb49c99d5fc.html](https://www.postandcourier.com/news/lawmakers-in-s-c-house-to-vote-on-some-nuclear/article_bb4d2182-ff97-11e7-95f9-0bb49c99d5fc.html) [<https://perma.cc/637N-6YQP>] (describing legislation proposing to alter the structure and increase oversight of the state Public Service Commission in the wake of failed nuclear projects); Margaret Reist, *Senator Wants to Eliminate*

Many of these changes affect the governor's power, some indirectly and some directly; in one pending example, a new ballot measure in Arizona would subject the state's Clean Election Commission to gubernatorial oversight.<sup>251</sup> Still other states have targeted their governor in particular and seek to limit gubernatorial power in selecting, supervising, or removing other officials.<sup>252</sup>

These examples are recent anecdotes, but state legislatures engaging in executive branch restructuring dates back much further. In many of the cases reviewed for this Article, the court's description of the agency revealed multiple changes to the agency's structure since its initial creation.<sup>253</sup> Indeed, historical studies of state executive branches illuminate a long history of in-

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*nate Nebraska Board of Education, Give Control to Governor*, LINCOLN J. STAR (Jan. 20, 2018), [http://journalstar.com/news/local/govt-and-politics/senator-wants-to-eliminate-nebraska-board-of-education-give-control/article\\_c312c1b4-0365-589b-8abd-042d09b010cb.html](http://journalstar.com/news/local/govt-and-politics/senator-wants-to-eliminate-nebraska-board-of-education-give-control/article_c312c1b4-0365-589b-8abd-042d09b010cb.html) [<https://perma.cc/7A8T-F74Y>]; Mark Sommerhauser, *Scott Walker Signs Bills Dismantling GAB, Overhauling Campaign Finance Law*, WIS. ST. J. (Dec. 16, 2015), [http://host.madison.com/wsj/news/local/govt-and-politics/scott-walker-signs-bills-dismantling-gab-overhauling-campaign-finance-law/article\\_1b7a6063-8e98-514b-bceb-269f21f44574.html](http://host.madison.com/wsj/news/local/govt-and-politics/scott-walker-signs-bills-dismantling-gab-overhauling-campaign-finance-law/article_1b7a6063-8e98-514b-bceb-269f21f44574.html) [<https://perma.cc/29T4-TKU4>]; Alan Suderman, *Northam Voices 'Significant Concerns' on Electric Rate Bills*, RICHMOND TIMES-DISPATCH (Jan. 25, 2018), [https://www.richmond.com/news/virginia/government-politics/general-assembly/northam-voices-significant-concerns-on-electric-rate-bills/article\\_bf0722c8-20b2-5b8f-9e28-c5ddd8191bfa.html](https://www.richmond.com/news/virginia/government-politics/general-assembly/northam-voices-significant-concerns-on-electric-rate-bills/article_bf0722c8-20b2-5b8f-9e28-c5ddd8191bfa.html) [<https://perma.cc/6TJZ-ZNVP>] (noting 2015 legislation that limited the power of Virginia's State Corporation Commission over electric utilities rates); JoAnne Young, *Bills Would Seek to Solve Recent Nebraska State Patrol Officer Accountability Problems*, LINCOLN J. STAR (Jan. 4, 2018), [http://journalstar.com/legislature/bills-would-seek-to-solve-recent-nebraska-state-patrol-officer/article\\_8c70d8cf-ec86-5be7-87ee-8086a7aa868f.html](http://journalstar.com/legislature/bills-would-seek-to-solve-recent-nebraska-state-patrol-officer/article_8c70d8cf-ec86-5be7-87ee-8086a7aa868f.html) [<https://perma.cc/B4YC-P39S>] (describing legislation proposing to expand the powers of the Nebraska Crime Commission over investigations of State Patrol officers and to limit the attorney general's obligation to defend such officers).

251. The new ballot measure, HCR 2007, would require any changes to the Commission's rules to be approved by the Governor's Regulatory Review Council, a body made up of six members appointed by the governor. See Letter from Thomas M. Collins, Exec. Dir., Ariz. Citizens Clean Elections Comm'n, to Members and Staff of Ariz. Legislative Council (June 27, 2018), <https://storage.googleapis.com/core.usgovcloudapi.net/public/docs/293-clean-elex-ed-ltr-to-leg--cnl-.pdf> [<https://perma.cc/6D4X-ZH7Z>].

252. See Blythe, *supra* note 35. After Cooper prevailed in court, the legislature proposed a constitutional amendment to solidify that the legislature controls "the powers, duties, responsibilities, appointments, and terms of office" of all boards and commissions it creates. Act of June 28, 2018, 2018 N.C. Sess. Laws 117, § 6; see also Meaghan Kilroy, *Judge Dismisses Lawsuit Questioning Kentucky Governor's Ability to Restructure Pension Fund Board*, PENSIONS & INVS. (Jan. 9, 2018, 4:00 PM), <http://www.pionline.com/article/20180109/ONLINE/180109829/judge-dismisses-lawsuit-questioning-kentucky-governors-ability-to-restructure-pension-fund-board> [<https://perma.cc/9L4D-3U4L>].

253. See, e.g., *State v. Falcon*, 152 A.3d 687 (Md. 2017) (describing restructuring of the public service commission); *Thompson v. Craney*, 546 N.W.2d 123, 138–39 n.6 (Wis. 1996) (Wilcox, J., concurring) (chronicling the legislature's repeated restructuring of the state's education board); see also *Commission History*, *supra* note 73 (describing approximately twenty major reorganizations in the history of the Arkansas Public Service Commission, including several switches from independent to executive status); *supra* notes 120–121 and accompanying text (describing serial restructuring of constitutional agencies in Alabama and Virginia).

cremental tinkering,<sup>254</sup> as well as a broader spirit of experimentation with institutions of government.<sup>255</sup> And, on the whole, state legislatures seem to be more productive and less gridlocked than Congress, making legislative preference more likely to become legislative reality.<sup>256</sup>

This is not to say that legislatures are micromanaging state agencies and altering their structure at any misstep. That is almost certainly not the case. Most state legislatures are still part-time,<sup>257</sup> and their agency oversight is not as frequent or attentive as congressional oversight of federal agencies.<sup>258</sup> A more apt depiction is that, when state legislators do attend to problems in the state executive branch, they are more willing and able than Congress to respond with structural changes to the office itself.<sup>259</sup> Arguably, such contingent independence makes state agencies less independent of the legislature, whatever their relationship with the governor.

Why might state legislatures act in this way? As an initial matter, it is apparent why legislatures would pursue institutional design in the first in-

254. See Berkman & Reenock, *supra* note 140.

255. See WILLIAMS, *supra* note 146; John Dinan, *Framing a "People's Government": State Constitution-Making in the Progressive Era*, 30 RUTGERS L.J. 933, 937 (1999) (relaying that "state [constitutional] conventions have served as forums for confronting, and occasionally revising, principles and institutions of governance that have gone largely uncontested at the national level").

256. See PEVERILL SQUIRE & KEITH E. HAMM, 101 CHAMBERS 117 (2005); Liz Essley Whyte & Ben Wieder, *Amid Federal Gridlock, Lobbying Rises in the States*, CTR. FOR PUB. INTEGRITY (Feb. 11, 2016, 5:00 AM), <https://www.publicintegrity.org/2016/02/11/19279/amid-federal-gridlock-lobbying-rises-states> [<https://perma.cc/Y2ZG-S39Q>] (stating that in 2013–2014, Congress passed 352 bills, whereas states passed 45,000). There are complications to any effort to measure and compare productivity. For one, what to make of the single subject rule in many states? See James R. Rogers, *The Impact of Divided Government on Legislative Production*, 123 PUB. CHOICE 217, 224 & n.11 (2005) (deeming the rule's effect "indeterminate": it might spur the splitting of omnibus legislation, but, by diminishing log rolling, might also decrease legislatures' incentives to work on legislation as opposed to constituent services). State legislation may be in some ways easier to enact; for example, most states have no filibuster. See SQUIRE & HAMM, *supra* at 122–23. But state constitutions also regulate legislative procedure in ways that the federal Constitution does not. See WILLIAMS, *supra* note 146, at 258, 281. The net effect of those restrictions is unclear. See *id.* (contending that legislatures often ignore them).

257. See Seifter, *supra* note 17, at 519 n.250 (describing compilation of data on which legislatures are part-time).

258. See, e.g., Marjorie Sarbaugh-Thompson et al., *Legislators and Administrators: Complex Relationships Complicated by Term Limits*, 35 LEGIS. STUD. Q. 57, 60, 81 (2010) (finding, based on their own study of the Michigan legislature and of the limited existing literature, that oversight of state agencies was a "low priority" for state legislatures and that state legislators who have undertaken oversight have struggled to monitor agencies effectively); Neal D. Woods & Michael Baranowski, *Legislative Professionalism and Influence on State Agencies: The Effects of Resources and Careerism*, 31 LEGIS. STUD. Q. 585, 585–87, 601 (2006) (noting weak legislative control over state agency policy as an impetus behind the legislative professionalization movement, but observing that professionalization has decreased legislative incentives to engage in oversight).

259. Cf. Levinson, *supra* note 33, at 663, 692–97 (exploring why, at least at the federal level, "processes and structures of political decisionmaking" are "more stable and enduring" than substantive policies).

stance: scholars have long recognized that structure can affect policy outcomes.<sup>260</sup> Legislatures' specific motivations for altering independence may vary. As the discussion above suggests, some of these state changes have occurred on party lines in the wake of an election. Such changes suggest a desire to demote one's political opponents wholesale rather than fighting issue-by-issue over policy.<sup>261</sup> These changes roughly parallel the conventional view that Congress creates federal independent agencies "to limit presidential control" when the president is of the opposite party.<sup>262</sup>

In other instances, the state-level changes have seemed less partisan, and instead have responded to an agency scandal or publicly disfavored decision. Examples include attempts to reorganize state public utilities after unpopular decisions that led to higher consumer bills,<sup>263</sup> and the Massachusetts legislature restructuring the city of Boston's transportation authority after a winter of repeated transit shutdowns.<sup>264</sup> In these cases, subjecting an independent entity to greater political oversight seems to be an effort to create greater political accountability and greater congruence between agency actions and public preferences. The opposite pattern can also occur: increasing an agency's independence after it has appeared too beholden to politics or particular politicians.

Given the benefits of ongoing legislative adjustments to agency independence, the real question may be why federal choices regarding agency independence become sticky once the agency is created, while state legislatures continue to tinker with independence. A complete answer to that question must await future work.<sup>265</sup> Surely, some analysis of transaction costs is part

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260. See generally Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 444 (1989) (explaining how Congress may use agency procedures and structures to enhance congressional control and "stack the deck" in favor of preferred groups).

261. See Blythe, *supra* note 35 (North Carolina changes); Duncan, *supra* note 34 (Maryland changes).

262. Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 462 (2008). *But see* Corrigan & Revesz, *supra* note 64 (rejecting this view and identifying other variables, including presidential approval ratings, the size of the Senate's majority and its alignment with the president, and the role of entrepreneurs).

263. See Brown, *supra* note 250 (South Carolina changes); Suderman, *supra* note 250 (Virginia changes).

264. See CTR. FOR LEGISLATIVE STRENGTHENING, NAT'L CONFERENCE OF STATE LEGISLATURES, *STATE LEGISLATIVE POLICYMAKING IN AN AGE OF POLITICAL POLARIZATION* 8 (2017).

265. See Seifter, *supra* note 17, at 513 n.213. Clues may lie in Daryl Levinson's framework for addressing the puzzle of why institutional "rules of the game" are ever more stable than substantive rights. See Levinson, *supra* note 33. If, as Levinson persuades, institutional stability generally arises because the benefits of coordination exceed the costs of the constraint at issue, *id.* at 712, 730–31, we should ask whether and why those costs and benefits differ in the state context. If, to take some examples, state officials have a shorter-term view (are not repeat players), or if the costs of change are low (because few interest groups have invested substantially in the status quo), leaving the rules of the game up for grabs may be rational.

of the picture.<sup>266</sup> Another partial answer may come from the norms surrounding independence, which, as the rest of this Part will explore, are weaker in the states.

### B. *Legislative Creativity*

The long leash the state courts offer, and the absence of any predetermined notion of independence, has led to a wide variety of legislative creations and a spectrum of independence.<sup>267</sup> I focus here on a few intriguing species: legislative combinations unfamiliar at the federal level.

First, legislatures combine tenure protection with gubernatorial supervision or directive authority. Whereas at the federal level tenure-protected agencies are presumed to be immune from presidential control, state legislatures routinely involve governors in the decisionmaking processes of tenure-protected agencies. To take a few of the many examples, the Arizona governor can only remove members of the Arizona Game and Fish Commission for “inefficiency, conflict of interest, neglect of duty or misconduct in office,”<sup>268</sup> yet the governor must approve many of the Commission’s substantive decisions.<sup>269</sup> The Arkansas governor can only remove members of the State Board of Health for good cause, but the governor directs important aspects of the Board’s work.<sup>270</sup> The Massachusetts governor can only remove members of the state’s Port Authority for cause, but the governor must approve any Port Authority construction or project.<sup>271</sup> The Missouri governor can only remove members of the Clean Water Board for cause, but the governor can approve or alter water plans and designate areas for special attention.<sup>272</sup> (There are also plenty of examples of governors taking part in decisions of tenure-protected agencies even when statutes do not expressly give them a role.)<sup>273</sup>

266. See O’Connell, *supra* note 47, at 893–94 (discussing positive theories of why agencies are restructured, and noting that “there are considerable transaction costs attached to changing the structure of an existing agency”).

267. For an argument that Congress has also created a spectrum at the federal level—albeit one that federal courts have not fully honored—see Datla & Revesz, *supra* note 12.

268. ARIZ. REV. STAT. ANN. § 17-202(B) (2015).

269. See *id.* §§ 17-202(A), -232, -241, -242, -621(B)(5) (2015).

270. See ARK. CODE ANN. §§ 20-7-102, -110, -113 (Supp. 2017); ARK. CODE ANN. § 25-16-804 (2014).

271. See MASS. GEN. LAWS ANN. ch. 91 App., §§ 1-2, 1-4 (West 2018).

272. See MO. REV. STAT. §§ 644.021, 644.141 (2016).

273. For example, Arkansas Governor Asa Hutchinson recently “sent a letter to Ted Thomas, chairman of the Arkansas Public Service Commission (APSC), directing the commission to work with utilities to ‘as expeditiously as possible’ take the necessary steps to pass on the benefits of the recently passed corporate tax cut to Arkansas ratepayers.” Press Release, Governor Hutchinson Applauds Energy Arkansas’s Plan to Pass Tax Savings on to Customers (Feb. 28, 2018), <https://governor.arkansas.gov/press-releases/detail/governor-hutchinson-applauds-entergy-arkansas-plan-to-pass-tax-savings-on> [https://perma.cc/E6AF-RGS7].

Second, state legislatures also routinely impose gubernatorial supervision on elected executive officials. It certainly would stand to reason that, as some scholars have stated, “[b]ecause these officials are neither appointed by the governor nor (more importantly) removable by her, the governor has little or no formal influence over how these officials perform their constitutionally assigned duties.”<sup>274</sup> Or that “[i]ndependent election by the people gives those elected state executive officials far greater autonomy, and far greater control over their departments, than any federal official enjoys.”<sup>275</sup>

But in fact, in most states, the governor has directive or other authority over some elected (or legislatively appointed) official’s work. Roughly a dozen states, like California, have a blanket statute charging the governor with supervision of the work of all executive branch officials, without excluding those who are elected.<sup>276</sup> Still more states specify the governor’s role in shaping the decisions of specific agencies or officials that are separately selected. Consider the state attorneys general, whose stars have been rising in recent years.<sup>277</sup> Many states allow the governor to direct the work of the attorney general in some way—either to direct the attorney general to file lawsuits, or to prevent the attorney general from filing suit without gubernatorial approval.<sup>278</sup> There are also some states in which constitutional officials can be removed by the governor,<sup>279</sup> and more in which the question is unclear.<sup>280</sup> In contrast, some states have precedent confirming the more intuitive notion that elected officials can only be impeached.<sup>281</sup>

Third, whereas the presence of multiple members of a federal agency’s leadership is typically associated with independence (although not immutably so), multi-membership does not indicate either tenure protection or independence in the states. As just noted, there are commissions with tenure protection that lack operational separation from the governor; most of those

274. Williams, *supra* note 18, at 573–74; see also Berry & Gersen, *supra* note 18, at 1404.

275. Devlin, *supra* note 19, at 1228 n.80.

276. See ARIZ. REV. STAT. ANN. § 41-101(A)(1) (2013); CAL. GOV’T CODE § 12010 (West 2018); HAW. REV. STAT. § 26-34(d) (2009); IDAHO CODE § 67-802(1) (2014); MD. CODE ANN., STATE GOV’T § 3-302 (LexisNexis 2014); MISS. CODE ANN. § 7-1-5(d) (2014); N.C. GEN. STAT. § 147-12(a)(1) (2017); N.D. CENT. CODE § 54-07-01(1) (2014); S.D. CODIFIED LAWS § 1-7-1(1) (2012); UTAH CODE ANN. § 67-1-1(1) (LexisNexis 2016); WASH. REV. CODE § 43.06.010(1) (2016); WYO. STAT. ANN. § 9-1-201 (2017).

277. See generally NOLETTE, *supra* note 2 (detailing the increasing power of state attorneys general to shape national policy); Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43 (2018).

278. For examples of state statutes allowing the governor to direct the attorney general to file suit, see GA. CODE ANN. § 45-15-35 (2016); IOWA CODE § 13.2(1)(b) (2017); and MICH. COMP. LAWS § 14.28 (1979). For examples of states allowing the governor to block all or certain types of attorney general lawsuits, see 71 PA. STAT. AND CONS. STAT. ANN. § 732-204(e) (West 2012) (consent decrees), and *In re Riley v. Cornerstone Cmty. Outreach, Inc.*, 57 So. 3d 704, 718–22 (Ala. 2010).

279. See MD. CONST. art. II, § 22 (Secretary of State); MICH. CONST. art. V, § 10.

280. See, e.g., Daleo, *supra* note 132, at 435–39.

281. See *State ex inf. Nixon v. Moriarty*, 893 S.W.2d 806, 808 (Mo. 1995).

are multimember entities.<sup>282</sup> There are also multimember commissions removable at the governor's pleasure.<sup>283</sup>

Again, the varied ways in which state agencies can be partly independent (but not wholly independent) goes a long way toward explaining why state agency independence is neither a clear concept nor a strong norm.

### C. Weak Norms

This Part has argued so far that agency independence in the states is unstable, because state legislatures continue to revisit institutional structure, and variegated, because state legislatures create species of independence that are unfamiliar on the federal scene. A third feature of agency independence outside the courts is that it does not seem to be governed by a strong norm.

Scholars have offered varying definitions of norms, but all involve a felt obligation to comply with rules that are not legally required.<sup>284</sup> Norms are closely related to "conventions," which involve "(1) regular patterns of political behavior (2) followed from a sense of obligation."<sup>285</sup> As Daphna Renan and Adrian Vermeule have recently observed, norms (or conventions) play an important role in defining (both expanding and contracting) presidential power.<sup>286</sup> Of prime relevance to this Article, norms have helped shape the rules that relevant legal actors perceive regarding federal agency independence.<sup>287</sup>

But norms require certain predicates to form and persist, and these tend to be missing at the state level. One such predicate, as just noted, is a consistent pattern of behavior. As Vermeule explains, "there is no convention if the relevant patterns of political behavior are ill-defined or fluctuating."<sup>288</sup> Where "the behavior of political institutions and actors in the public sphere amounts to a random walk, in which circumstantial contingencies drive behavior and no well-settled norm of any kind can be observed . . . the lens of convention has no purchase."<sup>289</sup> This more or less describes state agency independence. It may not be a "random walk," but the instability of institutional forms, unpredictability of judicial rulings, and degree of legislatively driven variation between agencies stifle the emergence of a pattern of behavior.

282. See *supra* text accompanying notes 268–272.

283. See, e.g., MINN. STAT. ANN. § 15.059(4) (West 2013) (creating an at-will default); PA. CONST. art. VI, § 7 (same).

284. See, e.g., Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 378 (1997); Renan, *supra* note 7.

285. Vermeule, *supra* note 11, at 1185.

286. See Renan, *supra* note 7, at 2189 (arguing that norms "provide the infrastructure that any particular President inhabits" and that they "both augment[] and constrain[]" presidential power); Vermeule, *supra* note 11, at 1198.

287. See Renan, *supra* note 7, at 2227; Vermeule, *supra* note 11, at 1175–81.

288. Vermeule, *supra* note 11, at 1185.

289. *Id.*



Moreover, the state-government ecosystem may suppress the emergence of a norm regarding independence. Scholars of legal norms and conventions have observed that both the formation and the persistence of norms require a relevant legal community that will detect and react to compliance or deviations.<sup>290</sup> Renan emphasizes the importance of pluralistic institutional checks,<sup>291</sup> including intraexecutive actors like the Office of Legal Counsel (“OLC”) and other “legal elites” trained on the scope of executive power,<sup>292</sup> as well as the press and civil society groups who respond to media coverage.<sup>293</sup> But who will notice, or mind, if the governor, legislature, or agency official exceeds the proper boundaries of state agency independence? States, to my knowledge, generally do not have the equivalent of the OLC. More broadly, even if a roughly similar institution exists, there is no “cult of the [state] constitution,”<sup>294</sup> especially on structural matters—no office or community whose focus is the state separation of powers. Nor do state-level media outlets or civil society groups pay significant attention to questions of executive power.<sup>295</sup>

#### V. THE PROMISES AND PITFALLS OF STATE AGENCY INDEPENDENCE

The picture of state agency independence created so far—one that is unstable, context specific, and seldom backed by a strong norm—creates advantages and disadvantages. This Part explores them. This discussion is intended as an assessment of the state approach to independence, but it also has federal significance. For one, commentators who decry the recent erosion of certain federal agency independence norms should observe that such erosion essentially moves the federal model closer to the state model. That move, if effectuated, may well have costs, but it may also provide benefits discussed here—or at least is unlikely to bring the sky crashing down. On the flip side, scholars across the spectrum who critique the federal court practice of abstracting independence and treating it as a binary may find of interest that a move to more contextualized independence might have costs as well as benefits.

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290. See, e.g., Renan, *supra* note 7, at 2204–06 (discussing the importance of “the presidency’s institutional surrounding”: “norms of presidential behavior will be more salient to elite political, professional, and social networks than to most voters most of the time”); Vermeule, *supra* note 11, at 1174–75 (stating that it is “[t]he communities that operate the administrative state—executive and legislative officials, agency personnel, the administrative law bar, commentators on administrative law, and regulated parties”—who “create and follow observable norms of agency independence”); see also McAdams, *supra* note 284, at 358 (discussing the importance of risk detection—and the awareness of “the relevant population” of that risk—to norm formation).

291. See Renan, *supra* note 7, at 2210.

292. *Id.* at 2219–20, 2229.

293. *Id.* at 2215.

294. TARR, *supra* note 79, at 31.

295. See Seifter, *supra* note 43.

### A. Tailoring: Accuracy and Uncertainty

The state approach to independence is bespoke: state legislatures have employed creative combinations of mechanisms to effectuate different degrees of independence. State courts, for their part, have honored those legislative choices, departing from the federal assumption that independent agencies fit a standard mold. On the whole, the tailored state approach portends the benefit of accuracy both as an interpretive matter and as a matter of institutional design. But, at least as currently practiced by state courts, it also yields significant uncertainty about what the law requires.

Consider first how the state approach yields benefits as a matter of institutional design: A tailored approach to independence may produce greater accuracy. That is, because state requirements are “agency-specific,” they may be a better fit for the official or agency in question.<sup>296</sup> The “fit” of independence is arguably important, because not all agencies work best with the same degree of independence. For example, when scholars explain the need for agency independence, they often begin with the Federal Reserve: of course, the argument goes, it does not make sense to leave monetary policy vulnerable to political whim.<sup>297</sup> In contrast, the need for insulation is less obvious when it comes to, say, the Federal Communications Commission. By adjusting the degree and form of independence to the agency at issue, perhaps states achieve a particularly good fit.

The state choice to grant tenure protection to some agencies while subjecting them to some gubernatorial supervision might exemplify this sort of well-tailored design. Perhaps we do not want a governor to fire the state’s attorney general without a very good reason, but we still can identify sensitive contexts in which the governor ought to play a supervisory role in the attorney general’s work. Many state legislatures appear to believe that important litigation decisions are in this category.<sup>298</sup> Again, by tailoring the modes of independence to the office and issue, states may produce a better fit.

State courts uphold the benefits of tailoring by recognizing it rather than overlooking it—and in so doing, they avoid some alleged pitfalls of the decisional law of federal agency independence. Scholars across the ideological spectrum have criticized federal courts’ categorical approach to agency independence. Kirti Datla and Richard Revesz have criticized federal courts for obscuring “the diversity of agency form,” misconstruing congressional purpose, and creating a categorical doctrine of agency independence where

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296. Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 576 (2011) (“[B]ecause each agency is unique—and derives its authority from unique statutory provisions with disparate goals and means for achieving them—optimization of administrative law doctrine may require tailoring to particular circumstances.”).

297. See, e.g., Bressman & Thompson, *supra* note 58, at 602.

298. See *supra* note 278.

none exists.<sup>299</sup> John Manning has argued, similarly, that there is no free-floating constitutional doctrine of the separation of powers.<sup>300</sup> These needless abstractions arguably distract from what the positive law really requires.<sup>301</sup> Manning has urged that courts should instead apply the relevant constitutional clauses as written, prohibiting only what the text of those clauses, fairly construed, prohibits.<sup>302</sup>

If that sort of interpretive precision is a virtue, then scholars should be pleased with the narrowness and (for the most part) discipline of state courts. One could go further: the focused, clause-based approach of most state courts on questions of independence is a partial rebuttal to the numerous articles criticizing state courts for their miserable constitutional jurisprudence.<sup>303</sup> To the extent the critics' claim is that state courts are not trying to develop a distinctive jurisprudence of state constitutional law, those claims seem misplaced on questions of independence. And if part of the design of state constitutions is to limit the power of the judicial branch, and not just the legislative and executive branches,<sup>304</sup> then the state courts' choice of agency-specific precedents over universal pronouncements seems particularly appropriate.

That said, state legislatures and decisional law have arguably gone too far in their contextualization of independence. On the legislative side, the creation of endless, idiosyncratic forms of independence increases the cost of figuring out which rules apply in any given context.<sup>305</sup> Judicial decisions muddy the waters further. Agency-specific precedents do not tell other agencies much.<sup>306</sup> Moreover, because of the narrow, thinly theorized decisions

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299. See Datla & Revesz, *supra* note 12, at 773 (critiquing the federal approach of “in-fer[ring] an additional feature of independence from the presence of another feature of independence”).

300. See Manning, *supra* note 26.

301. In the state context, Jonathan Zasloff has urged that “[i]t makes no sense to deal in abstractions” regarding the separation of powers. Zasloff, *supra*, note 154, at 1101. Zasloff noted a number of cases (separate from the issue of agency independence) where state courts were dealing in such abstractions. *Id.* at 1087–93.

302. See Manning, *supra* note 26, at 2006–08.

303. See, e.g., Gardner, *supra* note 49, at 781 (“Just as striking as the infrequency of state constitutional decisions, and undoubtedly one of its causes, is what can only be characterized as a general unwillingness among state supreme courts to engage in any kind of analysis of the state constitution at all.”); Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 103 (1998) (characterizing state courts as “less assertive in defining and enforcing constitutional rights” and “reluctan[t] to engage in independent interpretation of the state constitution”).

304. See, e.g., Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1703–04 (2014).

305. For a similar defense of standardization in the field of property law, see Thomas W. Merrill and Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 30 (2000).

306. See Levy & Glicksman, *supra* note 296, at 574 (noting that agency-specific law increases “the costs associated with correctly ascertaining the applicable doctrine”).

about selection, supervision, and removal, such cases may not even provide much notice to the agency covered by the precedent. To be sure, much of the messiness of the law of independence is because state constitutions themselves are messy, and so the uncertainty is not a problem that state courts alone have caused. But any accounting of advantages and disadvantages in this context must wrestle with a world in which most members of the legal community, and even the officials themselves, harbor significant uncertainty about their legal independence. I take up that question next.

### B. *Cooperation or Conflict?*

So far I have suggested that the state approach to independence, partly because of its bespoke and evolving nature, and partly because of the narrowness of relevant precedents, breeds uncertainty about legal rules. Is that a benefit or cost?

To be sure, ambiguity may be salutary in some circumstances. Most relevant here, scholars of law and economics have predicted that vague legal rules will sometimes lead to overcompliance.<sup>307</sup> Overcompliance may prove advantageous by avoiding costly and distracting conflicts. A governor and an attorney general may work to find common ground on a litigation position so as to avoid distracting litigation about which one of them has ultimate authority to set the state's position.<sup>308</sup> Or an "independent commission" may tolerate gubernatorial interventions that are of ambiguous legality so as to move ahead with important policy choices. To the extent that the ambiguity of the state law on independence drives officials to avoid conflicts over who has the power to decide matters of policy, state officials can focus their time and budgets on making those policy decisions.

But uncertainty about the respective obligations of governors, legislatures, and other executive officials may also generate costs. To begin, the likelihood of the sort of cooperation just described depends on contingent assumptions. A state official unsure of her legal authority is more likely to push the envelope rather than cooperate when the risk of sanction is low and the potential gains from pushing the envelope are high.<sup>309</sup> These criteria are context specific, but it is not farfetched that they will apply. Consider the attorney general and governor who choose to litigate a question of their respective authority rather than submit to the other's divergent policy preference. Each official will have to spend time and (public) funds on the

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307. Calfee & Craswell, *supra* note 40, at 979–82 (describing, in other contexts, circumstances in which uncertainty regarding legal rules may cause overcompliance with the rule).

308. See Scott Dolan, *Up for a Challenge: Maine Governor vs. Attorney General*, PORTLAND PRESS HERALD (Feb. 22, 2015), <https://www.pressherald.com/2015/02/22/up-for-a-challenge/> [<https://perma.cc/5U9L-CXMZ>] (quoting former Governor John Baldacci as saying, of his relationship with then–Attorney General Janet Mills: “There will always be agreements and disagreements on particular issues, but those get resolved,” and “[w]e found ways to work together”).

309. Cf. Calfee & Craswell, *supra* note 40, at 981–82.

litigation over authority, but that may defer or prevent the bad policy decision they want to avoid. In some cases, the litigation may also elevate either or both of the officials' public profiles in politically advantageous ways.

Other studies suggest that actors "faced with ambiguity" will tend to "be biased in a manner that favors themselves."<sup>310</sup> Such biases would seem to make it more likely that state officials will push the envelope in their own favor—especially, again, where the potential advantages of winning are significant and the costs of losing are manageable.

If state officials are frequently locked in disputes over their authority, the persistent conflict will impose costs on the public. For one, a system in which the rules of the game are unsettled adds costs (to the public fisc) to each decision.<sup>311</sup> Moreover, in some cases, the lack of clarity may stymie policymaking or dispute resolution altogether. For example, the Supreme Court has recently denied certiorari in part because of disagreement among the litigants regarding who could speak for the state.<sup>312</sup>

### C. Democratic Values

Another important variable to consider is the democratic pedigree of state agency independence. In some circumstances, both the legislative specificity and the frequent revision of structures of independence seem to be promising antidotes to the fear that independent agencies lack democratic accountability. But some tinkering with independence suggests an unattractive version of democratic behavior, and in some instances democracy (and majoritarianism in particular) is a curious value to prioritize in the first place.

On the benefits side, there may be something satisfyingly democratic about the relative frequency of legislative revision of state agency independence. When state legislatures rein in wayward agencies for greater centralized oversight, they seem to avoid the concern that the administrative state "may slip from the Executive's control, and thus from that of the people."<sup>313</sup> Even when the legislative change enhances independence, the legislature's willingness to revisit that choice mitigates the risk of serious departures from the public will. Thus, if a leading modern fear of independent agencies is their potential disconnect from the public will, then state legislatures' greater

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310. Leigh Thompson & George Loewenstein, *Egocentric Interpretations of Fairness and Interpersonal Conflict*, 51 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 176, 177 (1992).

311. See Levinson, *supra* note 33, at 673–74.

312. See *North Carolina v. N.C. State Conference of the NAACP*, 137 S. Ct. 1399, 1400 (2017) (Roberts, C.J., statement respecting denial of certiorari); see also *Me. Mun. Ass'n v. Mayhew*, 64 F. Supp. 3d 251, 267 (D. Me. 2014) (declining federal jurisdiction because, "though immigration policy is largely a federal concern, in the context of this internecine dispute between elected Maine officials, the federal court would risk meddling in a dispute that resonates with state governmental and policy concerns").

313. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010).

appetite for structural revision seems a promising solution. For example, if a state public utilities commission makes an unpopular decision—say, charging consumers for a failed nuclear plant,<sup>314</sup> or failing to inspect pipelines that later explode<sup>315</sup>—a subsequent legislative effort to make that commission less independent, and thus more susceptible to oversight by elected principals, seems like a sound channeling of the public's disapproval.

Yet there are reasons to doubt that revisions to independence are typically so responsive to the public will. More fundamentally, it is not clear that public responsiveness is what we should want from independent agencies.

First, legislative revisions of agency independence sometimes seem like raw partisanship, or actions intended to benefit the party itself rather than any public majority.<sup>316</sup> These sorts of actions swap the shine of democratic responsiveness with a coarser vision of partisan battle—one that is hard to defend on good-government grounds. For example, state legislatures on both sides of the aisle have altered the powers of their governor or attorney general immediately after a political opponent won election to that post.<sup>317</sup> The actual choices about the content of the official's power might be desirable on other grounds, but it is hard to see why we should appreciate them as faithful legislative channeling of the public will (particularly where the public just elected both the legislature and the demoted official).

Perhaps more importantly, more work would need to be done to establish whether and when accountability, and majoritarian accountability in particular, are appropriate values to prioritize for state agencies, either as a matter of state constitutional law or otherwise. Undoubtedly, notions of accountability have been central to state constitutional development, but as Part II described, parsing those layers of activity is complex. If the desire for accountability is untethered from the state constitution, then it must navigate the academic literature showing that accountability is not an unalloyed good.<sup>318</sup> For present purposes, it suffices to note that one common rationale for agency independence is political neutrality.<sup>319</sup> The more one believes that an agency's decision needs to be based on factors other than public prefer-

314. See Brown, *supra* note 250.

315. See Seifter, *supra* note 43, at 159–60 (describing California scandal involving the San Bruno pipeline explosion).

316. This aligns with what Justin Levitt calls “tribal partisanship.” Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787, 1798 (2014) (describing the term as involving activity undertaken “purely” to benefit one’s political party, “wholly divorced from—or . . . contrary to[] the policymaker’s conception of the policy’s other merits”).

317. See *supra* text accompanying notes 34–35.

318. For a concise summary of five types of critiques of accountability, see Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185, 187 n.6 (2014).

319. To be sure, as this Article has indicated, that is not the only rationale for creating officials with some degree of insulation from the governor. Elected executive officials, in particular, undermine the idea of the supposed dichotomy of independence and accountability.

ences, the less one is appeased by institutional design that favors majoritarianism. The next Section pursues this idea further.

#### D. Independence

The state approach to independence seems to undermine independence overall. Why might this undermining occur? First, the power dynamics in most states in the era of gubernatorial administration make it more likely that governors dominate in negotiations over independence where the legal rule is unclear.<sup>320</sup> This is partly because, as at the federal level, there is reason to expect the chief executive's appointees (or members of her party) to be loyal.<sup>321</sup> But the effect is likely amplified in the states, where there will often be neither a clear law nor a strong norm against a particular gubernatorial intervention. In that situation, even a political opponent of the governor (especially one who lacks the political prominence of, say, the attorney general) may not be able to justify the private and public costs of resistance.

The legislative habit of continually revising independence also undermines it in a more fundamental sense. The point of independence is that decisionmakers can do their work insulated from politics. But if revising independence itself is part of ordinary politics, then "independent" decisionmakers *do* need to pay attention to politics or risk losing their independence.

Whether this is a benefit or a cost is a freighted question best considered in particular contexts. In some instances, reduced independence will be a benefit. As I have written elsewhere, concentrating power in the governor can yield more efficient, effective, and transparent state government, even as it also raises the problems of concentrated executive power.<sup>322</sup> But states make some agencies and offices independent for good reason. The irony of this variegated, evolving state approach is that in the effort to get independence just right, state officials may create an atmosphere that inhibits independence. If the rules of independence are murky, ever-changing, and different for each agency, and if those factors occur in a legal community where independence is not a salient topic, then state agency independence will be harder to forge and sustain, even where state governments intend to do just that.

#### CONCLUSION

This Article has shown that the concept of agency independence in the states is more variegated and unstable than in the federal government and

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320. See generally Seifter, *supra* note 17 (discussing the modern regime of gubernatorial administration, including how and why governors have gained authority).

321. See Devins & Lewis, *supra* note 262, at 461. But see Keith S. Brown & Adam Candeb, *Partisans & Partisan Commissions*, 17 GEO. MASON L. REV. 789, 790 (2010) (finding that, at the FCC, "party affiliation does not drive voting to the degree one might expect").

322. See Seifter, *supra* note 17.

has attempted to refute the conventional wisdom that states' "plural executive" structure necessarily produces significant independence from the governor. Furthermore, I have argued that precisely because independence is so variegated, unstable, and prone to legislative revision, it often amounts to a weak norm. By placing agency independence roughly on the plane of ordinary politics, the states have made it more tailored, but also more fragile.



