

# FURTHER FROM THE PEOPLE? THE PUZZLE OF STATE ADMINISTRATION

MIRIAM SEIFTER\*

*Civil society today vitally supplements the traditional legislative and judicial checks on the powerful federal executive branch. As many commentators have observed, individuals, interest groups, and media outlets actively monitor, expose, and impede federal executive misdeeds. But much of government administration now occurs in the states. State executive branches have burgeoned in size and responsibility in recent decades, and state and national leaders advocate further expanding state authority. Underlying such calls is a notion that states are “closer to the people” than the federal government, and thus more attentive and responsive to the public’s needs. Yet commentators seldom question these premises, and there is scant attention to whether and how civil society constrains administration in the states.*

*This Article identifies and theorizes the role of civil society oversight at the state level. It finds that state agencies frequently lack the civil society check that commentators celebrate at the federal level. State agencies are, on the whole, less transparent than their federal counterparts, less closely followed by watchdog groups, and less tracked by the shrinking state-level media. These insights complicate certain tenets of federalism theory—those that assume a close connection between state governments and their citizens—while strengthening theories concerned about state-level faction. As a practical matter, civil society oversight is one factor that can help explain serious regulatory failures in the states—and more optimistically, success stories. Finally, attending to civil society oversight can highlight reforms available to those who seek a state government that is more visible to and constrained by its people.*

INTRODUCTION .....	108
I. CIVIL SOCIETY OVERSIGHT OF ADMINISTRATIVE GOVERNMENT.....	114
A. <i>The Who and How of Oversight</i> .....	116
1. <i>The Rise of “Monitory Democracy”</i> .....	116
2. <i>Who Are the Watchdogs?</i> .....	118
3. <i>Tactics and Tools</i> .....	120
B. <i>What Can the Civil Society Check Achieve?</i> .....	123

---

\* Copyright © 2018 by Miriam Seifter, Assistant Professor of Law, University of Wisconsin Law School. For helpful comments and conversations at various stages of this project, I thank Nick Bagley, Andy Coan, Lew Friedland, Michael Greve, Emily Hammond, Vladimir Kogan, Jon Michaels, Anne Joseph O’Connell, Eloise Pasachoff, Dave Pozen, Mila Sohoni, David Super, Shelley Welton, Christa Westerberg, Rob Yablon, and workshop participants at Antonin Scalia Law School, Marquette University Law School, the Reflections on Administrative Law and Executive Power conference at the University of Wisconsin Law School, the Junior Energy Scholars Workshop at the University of Colorado Law School, and the New Administrative Law Scholarship Roundtable at Ohio State Moritz College of Law. Thanks to Emi Passini, Dan Schneider, Betsy Stone, and Lauren Weber for excellent research assistance. Any errors are mine alone.

1. <i>Legal Compliance and Avoiding Regulatory Failure</i> .....	124
2. <i>Avoiding Regulatory Capture</i> .....	126
II. THE STATE ADMINISTRATIVE SPHERE AND OBSTACLES TO OVERSIGHT .....	128
A. <i>State Bureaucracy</i> .....	128
1. <i>Growth in General</i> .....	128
2. <i>Opacity: Data Collection, Disclosure, and Centralization</i> .....	131
B. <i>State Civil Society</i> .....	134
1. <i>The Rise of State-Level Lobbying</i> .....	135
2. <i>A “Bias Towards Business”</i> .....	137
C. <i>State and Local Media Outlets</i> .....	141
D. <i>Ripple Effects</i> .....	143
III. EVALUATING THE STATE ADMINISTRATIVE SPHERE ....	146
A. <i>Revisiting Theories of Federalism</i> .....	146
1. <i>Closer to the People?</i> .....	146
2. <i>Federalism and Faction</i> .....	148
B. <i>Practical Implications</i> .....	151
1. <i>Drinking Water</i> .....	153
2. <i>Pipeline Safety</i> .....	156
3. <i>Election Administration</i> .....	161
4. <i>Housing</i> .....	163
5. <i>Licensing</i> .....	166
IV. NORMATIVE DIMENSIONS AND REFORMS .....	168
A. <i>Justifications for the Status Quo</i> .....	169
B. <i>Fostering Citizen Oversight</i> .....	171
CONCLUSION .....	173

## INTRODUCTION

The power of the federal executive branch has risen in recent decades, but so too have the checks on it. These checks do not come merely from the coordinate branches of government, as the traditional separations of powers scheme envisions. Rather, many subconstitutional actors push back directly.<sup>1</sup> In particular, countless watchdogs

<sup>1</sup> See, e.g., Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 428–34 (2009) (describing a variety of mechanisms within the executive branch that constrain presidential power); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 530–51 (2015) [hereinafter Michaels, *Enduring*] (describing the rise of an “administrative separation of powers” in which civil society constitutes one check); Jon D. Michaels, *Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 239–41 (2016) [hereinafter Michaels,

within civil society now work to monitor, expose, and impede executive misdeeds.<sup>2</sup> The role of these watchdogs has become even more pronounced in the Trump era, and scholars are devoting more attention to their worth: In the face of apparent threats of executive overreach, many have taken heart in the ability of civil society to patrol and rein in potential misconduct.<sup>3</sup>

These insights are important, but they address a relatively small slice of executive governance. State administrative agencies have burgeoned in size and responsibility in recent decades,<sup>4</sup> and today do a lion's share of governance affecting people's day-to-day lives. Moreover, groups on both sides of the political aisle have (for different reasons) expressed renewed interest in devolving more responsibility to state governments.<sup>5</sup> Yet state agencies have remained largely invisible. Whereas a "synopticon"<sup>6</sup> of watchdogs monitors the federal executive

---

*Custodians*] (describing the ways in which civil society participates directly in the administrative process).

<sup>2</sup> See *infra* Section I.A.2.

<sup>3</sup> See, e.g., DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* 5–13 (2016) (arguing that "civil society groups" shape constitutional law, including by checking abuses of presidential power); Daron Acemoglu, *We Are the Last Defense Against Trump*, *FOREIGN POL'Y* (Jan. 18, 2017, 8:00 AM), <http://foreignpolicy.com/2017/01/18/we-are-the-last-defense-against-trump-institutions> (opining that only civil society, and not government institutions, can rein in an overreaching executive bent on "personal rule"); Jack Goldsmith, *Libertarian Panic, Unlawful Action, and the Trump Presidency*, *LAWFARE* (Nov. 22, 2016, 2:28 PM), <https://www.lawfareblog.com/libertarian-panic-unlawful-action-and-trump-presidency> (predicting that "[a]n array of actors outside the Executive branch," including "journalists and civil society," "will also make it hard for Trump to engage in illegal national security action"); Jonathan Rauch, *Containing Trump*, *ATLANTIC* (Mar. 2017), <https://www.theatlantic.com/magazine/archive/2017/03/containing-trump/513854> (stating that the mobilization of civil society is the key to protecting democratic institutions from a potentially authoritarian President).

<sup>4</sup> See *infra* Section II.A.1; see also GARY F. MONCRIEF & PEVERILL SQUIRE, *WHY STATES MATTER: AN INTRODUCTION TO STATE POLITICS* 86 (2d ed. 2017) (describing the "dramatic expansion of state bureaucracies over the last half-century").

<sup>5</sup> See, e.g., Alexander Burns, *Going Around Trump, Governors Embark on Their Own Diplomatic Missions*, *N.Y. TIMES* (July 15, 2017), <https://nyti.ms/2um31C3> (explaining how governors of both parties are working internationally "to offset Trump administration policies they see as harmful to their constituencies"); Lauren Camera, *With Push for States' Rights, Trump Team Stirs Fear*, *U.S. NEWS & WORLD REP.* (Feb. 27, 2017, 5:45 PM), <https://www.usnews.com/news/national-news/articles/2017-02-27/trump-administrations-calls-to-return-power-to-states-stirs-fear> (describing remarks by Trump administration officials committed to "returning power to the states" on education matters); Heather Gerken, *We're About to See States' Rights Used Defensively Against Trump*, *VOX* (Jan. 20, 2017, 2:14 PM), <https://www.vox.com/the-big-idea/2016/12/12/13915990/federalism-trump-progressive-uncooperative> (describing how "progressive federalism" can foster both resistance and compromise).

<sup>6</sup> JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at 207–10 (2012) (explaining how a variety of actors inside and outside government constrain executive power).

branch at every turn, state bureaucracy does not operate in a fishbowl. Scholars, for their part, seldom discuss state administration or the lack of public checks on it.<sup>7</sup> To be sure, the work of state agencies *sometimes* becomes salient, and the role of civil society can help explain important course corrections. But state agencies are, on the whole, less transparent than their federal counterparts, less closely followed by watchdog groups, and less tracked by the shrinking state-level media.

This Article identifies and theorizes the role of civil society oversight at the state level. Scholars today recognize that civil society oversight forms a consequential constraint on the federal executive branch; we should pursue the same analysis in the states. Attending to state civil society offers a new angle for evaluating accountability and separation of powers principles at the state level, and for assessing decisions to devolve power to state governments. The analysis reveals an important misconception: Despite the common refrain that state government is closer to the people,<sup>8</sup> modern state administration often produces just the opposite effect.

There are several reasons to believe civil society oversight faces a headwind in the states. First, features of state-level agencies—including their relative opacity, their increasing politicization in many states, and their complex relationships with local governments—create a more difficult job for civil society overseers.<sup>9</sup> Second, state civil society has distinctive traits. Recent studies show that groups acting on behalf of regulatory beneficiaries—so-called “public interest” groups—are relatively weak in the states, both compared to other state-level interest groups and to federal counterparts, and have comparatively limited resources.<sup>10</sup> Third, the decline in state media, and the dwindling numbers of state journalists covering state government, exacerbate the difficulties of meaningful civil society oversight.<sup>11</sup>

---

<sup>7</sup> Even in the public administration literature, the work of state agencies “generally has been perceived as a hidden, submerged, or inconsequential component of governance in the states.” Cynthia J. Bowling & Deil S. Wright, *Public Administration in the Fifty States: A Half-Century Administrative Revolution*, 30 ST. & LOC. GOV'T REV. 52, 53 (1998).

<sup>8</sup> See *infra* Section III.A.1; see also, e.g., Gregory v. Ashcroft, 501 U.S. 452, 458 (1991); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1509 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)) (“One of the principal arguments for substantial state autonomy was that representatives in a smaller unit of government will be closer to the people.”).

<sup>9</sup> See *infra* Section II.A.

<sup>10</sup> See *infra* Section II.B.2.

<sup>11</sup> See *infra* Section II.C.

These insights have both theoretical and practical implications. First, they undermine those federalism theories that depend on close links between state citizens and their government. For example, scholars and jurists often argue that state government's proximity to state citizens yields good government and avoids abuse, echoing the Antifederalist logic that state government would be "well guarded" by its citizens.<sup>12</sup> These supposed advantages would seem to yield executive branch benefits, helping states avoid core regulatory pitfalls of capture and outright performance failures. Indeed, the case for cooperative federalism, which dominates the American regulatory landscape, depends heavily on the idea that states will be good administrators—that they will ably implement federal laws, and will do so in ways that better serve the needs of state citizens than national administration would.<sup>13</sup> Yet the starting premise is often false when it comes to state administration. Federalism may have many other values, but it does not tend to bring agency action closer to the eyes of the general public.<sup>14</sup> Instead, in many states, the choice to delegate primary administration to a state agency rather than a federal agency is a selection of the less publicly constrained bureaucracy.

The Article's insights about state civil society contribute to long-standing debates in federalism theory about state-level faction. Commentators have long disputed whether states are more prone than the national government to factional policymaking. James Madison famously feared that the answer was yes, and especially that homogeneous majorities in the states would oppress minority preferences.<sup>15</sup> Modern scholars, especially in the public choice literature, have divided on the question. Many agree with Madison that state governments will be more responsive to state majorities, but view that as a sign of democratic health rather than a threat of faction.<sup>16</sup> Others

---

<sup>12</sup> See Letter XVII from the Federal Farmer to the Republican (Jan. 23, 1788), reprinted in *THE ANTI-FEDERALIST* 87, 92 (Murray Dry & Herbert J. Storing eds., 1985); Daryl J. Levinson, *The Supreme Court, 2015 Term — Foreword: Looking for Power in Public Law*, 130 *HARV. L. REV.* 31, 49 (2016) (describing the Antifederalist view that state governments would be "under the close watch and secure control of their citizens"); *infra* Section III.A.1.

<sup>13</sup> See, e.g., Martin A. Kurzweil, *Disciplined Devolution and the New Education Federalism*, 103 *CALIF. L. REV.* 565, 580 (2015) (collecting these arguments).

<sup>14</sup> As David Schleicher insightfully observes, praise for state government may also miss important features of state elections. See David Schleicher, *Federalism and State Democracy*, 95 *TEX. L. REV.* 763, 765 (2017) (arguing that state and local elections are "second order," in that voters know little about the candidates and instead vote based on their national partisan preferences).

<sup>15</sup> See *THE FEDERALIST* NO. 10, at 75 (James Madison) (Clinton Rossiter ed., 2003) (explaining that minority faction would usually be defeated by the majority through the "regular vote").

<sup>16</sup> See *infra* notes 253–55 and accompanying text.

share Madison's concern about state-level faction, but suggest the skew will favor small, special interests, which they predict will be unmatched in the states by advocacy for the general public;<sup>17</sup> still others contest these predictions.<sup>18</sup> These accounts, while important in their own right, have not focused on the burgeoning world of state administration.

Attending to the state administrative sphere raises concerns of minoritarian faction. States today are not as homogenous as Madison envisioned,<sup>19</sup> nor is the mass public well organized in state agency decisionmaking. Rather, the confluence of limited openness, a limited and imbalanced monitoring community, and limited media attention—the absence of the watchful eye that the Antifederalists anticipated—often redounds to the benefit of concentrated interests. Such groups offer politicians the prospect of votes and fundraising dollars, and offer administrators information and cooperation. At the same time, the opacity of state agencies and skew of the watchdog community reduce the risk of pushback through the ballot box, litigation, or bad press. Citizens, for their part, face increasing information costs as a barrier to state-level engagement, as few media outlets or other intermediaries keep them apprised of state agency developments.

The Article's account of state administration has practical implications. State agencies have a record of regulatory slippage—and sometimes outright regulatory failure—in implementing federal (as well as state) programs.<sup>20</sup> For example, state implementation of the

<sup>17</sup> See *infra* notes 256–57 and accompanying text.

<sup>18</sup> See *infra* notes 258–59 and accompanying text.

<sup>19</sup> See John Sides, *Most Americans Live in Purple America, Not Red or Blue America*, WASH. POST (Nov. 12, 2013), [http://wapo.st/17mTfKb?tid=SS\\_tw&utm\\_term=.A4821fbec439](http://wapo.st/17mTfKb?tid=SS_tw&utm_term=.A4821fbec439).

<sup>20</sup> See, e.g., DANIEL L. HATCHER, *THE POVERTY INDUSTRY: THE EXPLOITATION OF AMERICA'S MOST VULNERABLE CITIZENS* 25–27 (2016) (assessing and explaining state human services agencies' failures to serve their missions); William L. Andreen, *Delegated Federalism Versus Devolution: Some Insights from the History of Water Pollution Control*, in *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION* 257, 260–61 (William W. Buzbee ed., 2009) (describing the prevalence of states' "lax implementation" and "lethargic enforcement" of the Clean Water Act); Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1635 (2012) ("A state's commitment to actually enforcing federal law is often lackluster."); cf. David Markell, "Slack" in the Administrative State and Its Implications for Governance: The Issue of Accountability, 84 OR. L. REV. 1, 39–44 (2005) (describing data limitations that impede assessment of state performance).

As explained further in Part III, this Article draws primarily on examples from cooperative federalism programs, where the choice whether to delegate power to states is most explicitly on the table and where program requirements are standardized and readily identified.

Safe Drinking Water Act has left numerous communities—most famously Flint, Michigan—with water that is unsafe to drink.<sup>21</sup> At odds with federal law, state agencies have also failed to inspect natural gas pipelines (to disastrous effect);<sup>22</sup> failed to conduct required voter registration;<sup>23</sup> and allowed subsidized housing to depart dangerously from habitability standards.<sup>24</sup> In addition, some states have imposed dubious occupational licensing requirements that burden the many for the sake of the few.<sup>25</sup> To be sure, some regulatory slack is inevitable, and in some cases might be justified as a form of healthy, federalism-infused dissent.<sup>26</sup> But this Article addresses more blatant regulatory failures—those that virtually no one wants.<sup>27</sup> As to these, the Article argues, the absence of robust civil society oversight is an important contributing factor. More public oversight—although not seamless to achieve—can help to correct or prevent such failures by altering the incentives of agency staff, agency leaders, and their political principals.

A few caveats are in order. First, public oversight is not an unmitigated good; government at some point can be stymied by too much constraint.<sup>28</sup> The Article's claim is simply that much of state administration does not appear to be close to that line. At the same time, the Article does not make absolutist claims about the dynamics of all state agencies; obviously, there is variation both across and within states. It also does not intend to slight the extraordinary service of innumerable state officials, or the efforts of existing watchdog groups and state media outlets. To the contrary, one aim of this project is to convey the existing significance of state-level watchdogs, and their importance to an understanding of state administration on the ground. The Article does argue that where certain widespread dynamics hold in the state administrative sphere, they complicate existing federalism theories and fail to stem regulatory failures.

Part I provides theoretical foundations: It elaborates on the premise that civil society oversight provides an imperfect but important source of executive constraint, and it describes the main players,

---

<sup>21</sup> See *infra* Section III.B.1.

<sup>22</sup> See *infra* Section III.B.2.

<sup>23</sup> See *infra* Section III.B.3.

<sup>24</sup> See *infra* Section III.B.4.

<sup>25</sup> See *infra* Section III.B.5.

<sup>26</sup> See generally Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *YALE L.J.* 1256 (2009) (describing how states may push back against federal law while implementing federal programs, and identifying benefits of such pushback).

<sup>27</sup> I discuss the concept of regulatory failure in more depth in Section I.B.1.

<sup>28</sup> See *infra* notes 383–85 and accompanying text.

mechanisms, and effects of this check at the federal level. In short, it explains that the watchful eye of myriad civil society overseers can push federal agencies to avoid regulatory capture and outright failures. Parts II and III offer a novel account of civil society oversight of state agencies. Part II catalogues obstacles to civil society oversight at the state level: the relative opacity and recent politicization of state agencies; the composition and dynamics of state civil society; and the decline in state media outlets. Part III discusses implications for theory and practice. It begins by explaining how the realities of the state administrative sphere cast new light on federalism theory—how, if state administration is not indeed closer to the people, it may be vulnerable to the very pitfalls that common rhetoric seems to assume it avoids. It then offers case studies that show how the state-level watchdog system interacts with regulatory failure. Part IV considers normative takeaways, exploring potential justifications for the status quo and costs to changing it. It then sketches ways in which public entities and private foundations could support a more thoroughgoing oversight role for state-level watchdogs—and, in turn, a higher-performing state bureaucracy—in appropriate circumstances.

## I

### CIVIL SOCIETY OVERSIGHT OF ADMINISTRATIVE GOVERNMENT

Since at least the late twentieth century, scholars have observed a dramatic rise in federal executive branch power, paired with a perceived fall in pushback from the courts and Congress.<sup>29</sup> In light of these developments, scholars have begun to describe new forms of checking, balancing, and constraining executive power. Scholars including Jack Goldsmith,<sup>30</sup> Neal Katyal,<sup>31</sup> Gillian Metzger,<sup>32</sup> Jon Michaels,<sup>33</sup> and Margo Schlanger<sup>34</sup> have explained how the executive branch today is subject to restraint by a system of other actors—an

---

<sup>29</sup> See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 4–6 (2010) (arguing that the presidency has become a dangerous institution); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973) (cataloguing then-recent increases in presidential power); Martin S. Flaherty, *The Most Dangerous Branch*, 105 *YALE L.J.* 1725, 1727 (1996) (noting the widespread recognition of “[t]he dominance of executive power”); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 *YALE L.J.* 2314, 2316, 2319–22 (2006) (discussing the power of, and need for checks against, the modern presidency).

<sup>30</sup> GOLDSMITH, *supra* note 6.

<sup>31</sup> Katyal, *supra* note 29.

<sup>32</sup> Metzger, *supra* note 1.

<sup>33</sup> Michaels, *Custodians*, *supra* note 1; Michaels, *Enduring*, *supra* note 1.

<sup>34</sup> Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 *CARDOZO L. REV.* 53 (2014).



“internal,”<sup>35</sup> “new,”<sup>36</sup> or “administrative”<sup>37</sup> separation of powers. In this view, meaningful checks can come from a combination of subconstitutional actors (though these may or may not suffice in any given case). Some of these actors operate from inside the administrative state, including civil servants of different stripes.<sup>38</sup> And, crucially for this Article, some checks have begun to operate from outside of government—from a civil society composed of interest groups of all kinds, including businesses, nonprofits, lawyers, organized citizens, and the media.<sup>39</sup>

The discussion that follows builds on this literature, elaborating further the role of civil society oversight in constraining the executive branch. Section I.A sketches the players and tactics of the modern public oversight ecosystem. Section I.B shows that civil society plays an important role in addressing two distinct concerns regarding administration: that agencies will depart from their legal charges or be captured by regulated entities.

Although the views I describe in this Part have a normative dimension, my point is primarily analytic and expositive: that civil society oversight has emerged as a consequential check on the federal executive, and that this oversight is relevant to existing literature on executive and administrative government. I save for Part IV a normative treatment of the existing versions of such oversight in the states.

---

<sup>35</sup> See Katyal, *supra* note 29; Metzger, *supra* note 1; Schlanger, *supra* note 34, at 59–65.

<sup>36</sup> See Michaels, *Custodians*, *supra* note 1, at 234–41.

<sup>37</sup> See Michaels, *Enduring*, *supra* note 1, at 538–51.

<sup>38</sup> See Katyal, *supra* note 29, at 2317–18 (characterizing bureaucracy and the civil service as valuable checks on presidential power); Metzger, *supra* note 1, at 429–31 (describing intra-executive checks, including inspectors general and the civil service); Schlanger, *supra* note 34, at 62–65 (describing how advisory offices within agencies spur attention to values beyond the agency’s primary mission).

<sup>39</sup> See GOLDSMITH, *supra* note 6, at 207 (listing external actors that watch and constrain presidential power); Michaels, *Custodians*, *supra* note 1, at 239–40 (explaining how members of civil society “directly, broadly, and meaningfully” participate in administrative governance); Miriam Seifter, *Complementary Separations of Power*, 91 N.Y.U. L. REV. ONLINE 186, 197 (2016) (noting that civil society efforts can complement congressional oversight of agencies). I define civil society broadly to encompass all of those individuals and associations outside of government, including the media. For overviews of the notion of “civil society,” see, for example, JEAN L. COHEN & ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY*, at ix (1992) (defining the term), MICHAEL EDWARDS, *CIVIL SOCIETY* 6–11 (2d ed. 2009) (tracing the historical evolution of the notion of civil society), and JOHN EHRENBERG, *CIVIL SOCIETY: THE CRITICAL HISTORY OF AN IDEA* 34–35 (2d ed. 2017) (recounting Plato and Cicero’s views of civil society).

### A. *The Who and How of Oversight*

Civil society, like so many other institutions of legal significance, is not an “it.”<sup>40</sup> Rather, civil society has a variety of members, and a variety of tools with which to check executive activity. These members and tools are part of a relatively recent transformation in the way the public understands and interacts with government.

#### 1. *The Rise of “Monitory Democracy”*

The federal executive branch has not always been the subject of constant public scrutiny.<sup>41</sup> In a recent, compelling book, journalism scholar Michael Schudson traces the development of our modern culture of watchdogs and transparency. He argues that the era between the late 1940s and 1970s witnessed “the rise of the right to know.”<sup>42</sup> During this period of time, Schudson argues, an array of developments coincided. The institutions of American democracy were evolving, including in the form of a greatly expanded executive branch;<sup>43</sup> happenings in everyday politics were fostering a desire for information-forcing laws;<sup>44</sup> and, in both private and public life, the nation was experiencing a newfound “ethos or spirit” of openness, in part due to growing educational emphasis on “critical inquiry.”<sup>45</sup>

This cultural and political transformation had lasting implications for executive power. Legal developments in the 1960s and beyond facilitated attention to the rapidly expanding federal administrative state.<sup>46</sup> These included the Freedom of Information Act,<sup>47</sup> the

---

<sup>40</sup> Cf. Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

<sup>41</sup> See, e.g., William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171, 171 (2009) (“‘Public participation’ and ‘transparency’ are hallmarks of American administrative law, but this has not always been the case.”).

<sup>42</sup> MICHAEL SCHUDSON, *THE RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY, 1945–1975* (2015).

<sup>43</sup> See *id.* at 241–43.

<sup>44</sup> See *id.* at 25 (describing congressional and executive support for legislation promoting openness).

<sup>45</sup> See *id.* at 26.

<sup>46</sup> See SCHUDSON, *supra* note 42, at 25 (discussing the Freedom of Information Act and National Environmental Policy Act); Funk, *supra* note 41, at 174 (listing the Freedom of Information Act, the Federal Advisory Committee Act, and the Government in the Sunshine Act as statutes “intended to increase transparency and public participation”); see also, e.g., Reuel E. Schiller, *Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1145 (2001) (describing “the reinvigorated administrative state of the 1960s and early 1970s”).

<sup>47</sup> Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (2012)).

Government in the Sunshine Act,<sup>48</sup> the National Environmental Policy Act of 1969,<sup>49</sup> the Federal Advisory Committee Act,<sup>50</sup> and judicial review doctrines.<sup>51</sup> Although none of these statutes' and doctrines' goals have been fully realized,<sup>52</sup> they have undoubtedly prompted agencies to be more conscious about documenting their decisionmaking processes, sharing their records, and engaging with the public.<sup>53</sup> Moreover, and as discussed more below, they have given would-be government watchdogs a set of tools with which to monitor executive actions.

The shift toward openness and public monitoring had several reverberations. It yielded the now-familiar commitment of media and public interest institutions to continually evaluate such openness.<sup>54</sup> More broadly, it arguably shifted the way that our democracy functions. Schudson links this cultural shift to the work of other democratic and political theorists who have observed that ours is now a "monitory democracy."<sup>55</sup> They posit that we no longer demand accountability from government merely at the time of elections. Rather, we constantly examine government decisions; we pressure government actors on a day-to-day, not annual or quadrennial, basis.<sup>56</sup>

---

<sup>48</sup> Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified as amended at 5 U.S.C. § 552b (2012)).

<sup>49</sup> Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. § 4321 (2012)).

<sup>50</sup> Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. (2012)).

<sup>51</sup> See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1670 (1975) (asserting that "judges have greatly extended the machinery" available to challenge administrative actions as a way "to protect new classes of interests").

<sup>52</sup> See, e.g., Funk, *supra* note 41, at 197 (characterizing the Government in the Sunshine Act and the Federal Advisory Committee Act as unsuccessful and, to some degree, counterproductive); David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1156 (2017) (concluding that the Freedom of Information Act "fall[s] short of its transparency and accountability aspirations").

<sup>53</sup> Indeed, one thread of scholarship posits that federal agencies are now attentive to so many requirements that the regulatory process has become ossified. See generally, e.g., Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385 (1992) (discussing the negative policy consequences of the "increasingly rigid and burdensome" rulemaking process).

<sup>54</sup> See SCHUDSON, *supra* note 42, at 24–25.

<sup>55</sup> *Id.* at 233–37 (quoting JOHN KEANE, *THE LIFE AND DEATH OF DEMOCRACY* 737 (2009)).

<sup>56</sup> See KEANE, *supra* note 55, at 688–89 (describing how "independent monitors of power" put "politicians, parties and elected governments permanently on their toes").

## 2. *Who Are the Watchdogs?*

The individuals and institutions comprising the watchdog ecosystem have also proliferated: A vast and growing web of watchdogs has developed to monitor federal agencies daily.

First, there are individuals. Although the traditional view is that individuals lack the expertise and resources to engage meaningfully with agencies,<sup>57</sup> eras of robust civil engagement—including the present day—show that this is not always true. Individuals may well become concerned enough to follow what particular agencies are doing (or not doing), and they may try to contest those actions directly or indirectly, through marches, phone calls, and more. Since the election of President Trump, some reports reflect the act of calling one's representative to object to a particular executive action as a regular<sup>58</sup> (and for some, daily)<sup>59</sup> ritual. A number of recent websites and tech-based tools make it ever easier to do so.<sup>60</sup>

Second, interest groups—organizations that advocate before the government on policy issues<sup>61</sup>—are more ubiquitous, and typically more influential, than individuals in monitoring and challenging executive action.<sup>62</sup> Such groups come in many forms, address a wide variety of subject areas, and convey a range of viewpoints on those topics.<sup>63</sup> There are interest groups devoted to trans-substantive

<sup>57</sup> See, e.g., William F. West & Connor Raso, *Who Shapes the Rulemaking Agenda? Implications for Bureaucratic Responsiveness and Bureaucratic Control*, 23 J. PUB. ADMIN. RES. & THEORY 495, 498 (2013) (“[T]here is a consensus that . . . information costs limit viable participation primarily to organized interests . . .”).

<sup>58</sup> See, e.g., Kathryn Schulz, *What Calling Congress Achieves*, NEW YORKER (Mar. 6, 2017), <https://www.newyorker.com/magazine/2017/03/06/what-calling-congress-achieves> (“In the weeks following the Inauguration of Donald J. Trump, so many people started [calling their congressional representatives] that, in short order, voice mail filled up and landlines began blurring out busy signals.”).

<sup>59</sup> See Kathleen Gray, *Michael Moore Offers Advice: Call Up Congress Daily*, DETROIT FREE PRESS (Jan. 21, 2017, 6:01 PM), <http://on.freep.com/2jKKOs8> (quoting filmmaker Michael Moore's advice to “[b]rush your teeth, make the coffee, walk the dog and call Congress”).

<sup>60</sup> See, e.g., Brian Fung, *You Can Now Call Your Elected Officials Through Facebook*, WASH. POST (Mar. 27, 2017), [http://wapo.st/2nsZNBx?tid=SS\\_tw&utm\\_term=.Af3a07c18078](http://wapo.st/2nsZNBx?tid=SS_tw&utm_term=.Af3a07c18078). In addition, websites like 5calls.org facilitate calling representatives by providing contact information for relevant legislators.

<sup>61</sup> For a review of the varying ways that scholars have defined the term “interest group,” see FRANK R. BAUMGARTNER & BETH L. LEECH, *BASIC INTERESTS: THE IMPORTANCE OF GROUPS IN POLITICS AND IN POLITICAL SCIENCE* 25–30 (1998).

<sup>62</sup> For a detailed account of interest-group involvement in politics, see KAY LEHMAN SCHLOZMAN ET AL., *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* 265–311 (2012).

<sup>63</sup> Some scholars include corporations within the category of interest groups. On the role of corporations in lobbying, see LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE* 44–46 (2015).

agendas; groups devoted to particular subject areas or particular issues within those areas, and, notable for this Article, groups devoted to issues of good government. There are groups that represent, or purport to represent, particular constituencies, corporate entities, or levels of government; there are other groups that pursue advocacy based on issues or causes.<sup>64</sup> Some of these groups take controversial positions, and many are not nearly as representative or participatory as their advocacy (often “on behalf of” some putative membership) may suggest.<sup>65</sup> It is this active, imperfect interest group universe that often takes the lead in monitoring, exposing, and challenging agency actions.<sup>66</sup>

The third primary player in the watchdog ecosystem is the press. This category includes both “new” and “old” media outlets that broadcast agency actions.<sup>67</sup> Traditional (“old”) organizations, like “[n]ewspapers, network and local television news, [and] radio news” are centralized enterprises in which the media outlet addresses a large audience (“one-to-many” communication).<sup>68</sup> These traditional press institutions are now joined by an array of new entities, which some term the “Fifth Estate.”<sup>69</sup> These new, network-based entities allow direct communication of “the many with the many”<sup>70</sup>: They include an array of blogs, social media sites, chat platforms, and more.<sup>71</sup> Both categories include entities that independently investigate executive actions,<sup>72</sup> as well as those that report the findings of others. In addition to new and old sources of media coverage, hybrid entities like polling organizations may also fit in the press category; they generally are not advocacy-oriented, but they play a role in reporting (and sometimes shaping) public opinion.<sup>73</sup>

---

<sup>64</sup> See, e.g., Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1312–13 (2016) (offering a typology of interest group organizational forms).

<sup>65</sup> See *id.* at 1332–52.

<sup>66</sup> See, e.g., *id.* at 1315–17 (describing how various modes of administrative participation favor interest groups).

<sup>67</sup> See, e.g., Adam Cohen, *The Media that Need Citizens: The First Amendment and the Fifth Estate*, 85 S. CAL. L. REV. 1, 3 (2011) (describing “new” and “old” media).

<sup>68</sup> *Id.*

<sup>69</sup> See *id.*; see also William H. Dutton, *The Fifth Estate Emerging Through the Network of Networks*, 27 PROMETHEUS 1, 2 (2009).

<sup>70</sup> See Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 565 (2000).

<sup>71</sup> See Cohen, *supra* note 67, at 3 (listing a variety of new, network-based entities).

<sup>72</sup> For an illuminating take on investigative journalism, see JAMES T. HAMILTON, *DEMOCRACY’S DETECTIVES: THE ECONOMICS OF INVESTIGATIVE JOURNALISM* (2016).

<sup>73</sup> For a critical take, see DAVID W. MOORE, *THE OPINION MAKERS: AN INSIDER EXPOSES THE TRUTH BEHIND THE POLLS* 102–18 (2008) (arguing that polling outlets create

Taken together, these actors—individuals, interest groups, and the media—are a constant presence in watching, exposing, and pressuring the executive branch.<sup>74</sup> They have made federal agencies “some of the most extensively monitored government actors in the world,”<sup>75</sup> and the presidency itself “the most visible institution in all of government.”<sup>76</sup>

### 3. *Tactics and Tools*

Scholars in the interest group literature within political science and public administration have long observed that interest groups have a variety of tools, or tactics, with which to pursue their agendas.<sup>77</sup> One prominent framework comes from the work of Jeffrey Berry.<sup>78</sup> He identifies three categories of tactics: (1) “direct communication between lobbyists and government officials,” including congressional testimony, personal contacts, and litigation or administrative intervention;<sup>79</sup> (2) lobbying through constituents, in which groups mobilize their members to interact with government;<sup>80</sup> and (3) efforts to shape public opinion or election results, such as through political contributions or politically oriented public engagement.<sup>81</sup>

These tactics seek to tap into executive officials’ varied interests. Scholars have deployed a wide range of assumptions about what motivates agencies and politicians, and I will not reprise those debates here. Some common themes do emerge. First, agency officials are likely to respond (to varying degrees) to the demands of their political principals—Congress and the President.<sup>82</sup> Those principals care

---

rather than report public opinion, and do so in ways that undermine democracy). For an earlier analysis of the so-called “bandwagon effect,” in which polling data shapes preferences, see, for example, Kurt Lang & Gladys Engel Lang, *The Impact of Polls on Public Opinion*, 472 ANNALS AM. ACAD. POL. & SOC. SCI. 129, 134 (1984).

<sup>74</sup> See SCHUDSON, *supra* note 42, at 247–51 (discussing factors supporting the growth of opportunities for public expression and political participation outside of elections).

<sup>75</sup> Jacob E. Gersen & Anne Joseph O’Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157, 1161 (2009).

<sup>76</sup> Michael A. Fitts, *The Foibles of Formalism: Applying a Political “Transaction Cost” Analysis to Separation of Powers*, 47 CASE W. RES. L. REV. 1643, 1649 (1997).

<sup>77</sup> See, e.g., DRUTMAN, *supra* note 63, at 79 (describing scholarly agreement that lobbyists use a variety of tactics). Based on his interviews with in-house corporate lobbyists, Drutman catalogs twenty-one different tactics, ranging from talking to media, to working with legislators directly, to attending fundraisers, which lobbyists identified as useful. See *id.* at 79–82.

<sup>78</sup> See JEFFREY M. BERRY, *LOBBYING FOR THE PEOPLE: THE POLITICAL BEHAVIOR OF PUBLIC INTEREST GROUPS* (1977).

<sup>79</sup> *Id.* at 213.

<sup>80</sup> *Id.* at 213–14.

<sup>81</sup> *Id.* at 214.

<sup>82</sup> See Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 246–53 (1987) (noting that federal agencies are

acutely about reelection and campaign fundraising prospects,<sup>83</sup> but also consider (sometimes related) factors like ideology, public spiritedness, and reputation.<sup>84</sup> Apart from the preferences of their political principals, agency officials and staff may care about several things, including their job security, their ability to do the work they want to do, their reputation, and their future political or professional prospects.<sup>85</sup> Once armed with information about what agency actors are doing, civil society can trigger an agency's interests in different ways. A lawsuit against an agency head, for example, may diminish both her ability to get work done and her reputation. Calls asking Congress to rein in an agency may harm the future political prospects of responsible administrative officials. Unfavorable press may undermine their job security.

To some extent, the executive branch now operates in the shadow of these tactics. Public attention, whether through individual or interest-group mobilizations or media coverage, or both, can spur better government behavior *ex ante*. As Jack Goldsmith writes, "officials are much more careful merely by virtue of being watched."<sup>86</sup> Executive branch officials, fearing bad press, a public rebuke, or a lawsuit, may adjust their behavior to avoid undesired consequences.<sup>87</sup>

Watchdog tactics also operate as a corrective after misdeeds have occurred. This is why, for example, the courts,<sup>88</sup> individual justices,<sup>89</sup>

---

agents of Congress and the President and describing mechanisms for limiting principal-agent problems).

<sup>83</sup> In the political science literature, a seminal work is DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 5–6 (1974) (developing an account of legislators' behavior based on their desire for reelection). In the legal literature, see, for example, Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 *GEO. L.J.* 1119, 1125–28 (2011) (describing congressional behavior as influenced by reelection concerns). *Cf.* SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 6–9 (5th ed. 2016) (describing prominent theories of the behavior of elected officials).

<sup>84</sup> See Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 *N.Y.U. L. REV.* 1, 31 (1991) (arguing that legislators have motivations besides reelection concerns).

<sup>85</sup> See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 *HARV. L. REV.* 915, 920 (2005) (discussing public officials' incentives).

<sup>86</sup> GOLDSMITH, *supra* note 6, at 207.

<sup>87</sup> See Michaels, *Enduring*, *supra* note 1, at 549 (describing agency officials as "[m]indful of the so-called *Washington Post* test").

<sup>88</sup> See, e.g., *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (noting "the basic assumption of our political system that the press will often serve as an important restraint on government"); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (praising the role of print media and stating that "informed public opinion is the most potent of all restraints upon misgovernment").

<sup>89</sup> See Potter Stewart, *Or of the Press*, 26 *HASTINGS L.J.* 631, 634 (1975) (describing the free press as "a fourth institution outside the Government [that provides] . . . an additional check on the three official branches").

and First Amendment scholars<sup>90</sup> have cast the press as serving a checking function. The media-as-check trope can go too far, but there are many real examples of public exposure leading to changes in government action. Watergate is perhaps the most famous in recent times; more recently, there have been a number of changes in course by the Trump administration that occurred only after facts known to the administration were broadcast by the press.<sup>91</sup> The legal journalist Adam Cohen describes other “evidence that th[e] checking function is effective, from quantitative studies correlating newspaper readership with lower rates of public corruption to Amartya Sen’s assertion that famines disappeared in India with the rise of multi-party democracy and a free press.”<sup>92</sup> Similarly, lawsuits, lobbying, and protests can serve as an ex post constraint on executive actions.

\* \* \*

One reason for the growth and persistence of this federal watchdog system may be that, at several levels, its appeal is bipartisan and thus sticky across administrations. At the most partisan political level, whichever party is out of power has an incentive to monitor and check the party in power.<sup>93</sup> In addition, as Schudson points out, monitoring federal agencies appeals to core principles often associated with competing ideologies—both the desire to limit public spending or

---

<sup>90</sup> For a few examples, see Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 528 (describing the press’s ability to check the abuse of official power), William T. Coleman, Jr., *A Free Press: The Need to Ensure an Unfettered Check on Democratic Government Between Elections*, 59 TUL. L. REV. 243, 250 (1984) (describing the press’s capacity to manage the flow of information from the government to the public), and Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729, 754 (2014) (describing, among other functions, the press’s ability to impede government abuse of the criminal justice system).

<sup>91</sup> For example, HHS Secretary Tom Price resigned after reporters unearthed his undisclosed use of private jets, see Dan Diamond & Rachana Pradhan, *How We Found Tom Price’s Private Jets*, POLITICO MAG. (Oct. 4, 2017), <http://politi.co/2xUT3a1>, and President Trump fired National Security Advisor Michael Flynn only after the *Washington Post* reported that the White House had been warned that Flynn was compromised, see Michael D. Shear, *How the White House Explains Waiting 18 Days to Fire Michael Flynn*, N.Y. TIMES (May 9, 2017), <https://nyti.ms/2pZGyIw>.

<sup>92</sup> Cohen, *supra* note 67, at 29–30 (citing Amartya Sen, *Democracy as a Universal Value*, 10 J. DEMOCRACY 3, 8 (1999)).

<sup>93</sup> See, e.g., Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2344 (2006) (arguing that divided government leads to aggressive monitoring).



keep government small<sup>94</sup> and the desire to ensure that public programs assist all those within their missions.<sup>95</sup>

### B. *What Can the Civil Society Check Achieve?*

Commentators have identified many reasons—sometimes conflicting<sup>96</sup>—for seeking to constrain executive power.<sup>97</sup> Checks on the executive might preserve liberty,<sup>98</sup> serve the majority will,<sup>99</sup> foster deliberation,<sup>100</sup> drive adherence to the rule of law,<sup>101</sup> or avoid arbitrary policymaking.<sup>102</sup> Depending on which value one prioritizes, optimal checking might look different in different circumstances. Still, there is a common overarching concern about excessive concentrations of executive power, as well as about undesirable results that may follow. And, whether expressly or implicitly, the existing literature on executive constraint recognizes an important role for civil society.

One important part of this literature pertains to the President. Scholars have written extensively about the President's outsized clout

<sup>94</sup> See Arthur C. Brooks, *The Art of Limited Government*, 15 NAT'L AFF. 104, 105 (2013), <https://www.nationalaffairs.com/publications/issues/number-15-spring-2013> (arguing that advocates of limited government must “evaluat[e], and then constrain[ ], all government activity”). Limited-government advocates also prize civil society's ability to act as a substitute for and stronghold against government involvement. See *id.* at 118–19 (championing “a strong civil society” as “the only bulwark against the limitless expansion of the state”); cf. Clarence Thomas, *A Return to Civility*, 33 TULSA L.J. 7, 8 (1997) (“By defining a private sphere and by protecting it, civil society and its institutions prevent tyranny, whether by an individual or by a majority.”).

<sup>95</sup> SCHUDSON, *supra* note 42, at 4.

<sup>96</sup> See, e.g., Cristina M. Rodríguez, *Complexity as Constraint*, 115 COLUM. L. REV. SIDEBAR 179, 185–86 (2015) (describing the desire to prevent tyranny by presidents and bureaucrats as two possible but countervailing goals of separation).

<sup>97</sup> See, e.g., Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 381 (2016) (articulating that “the separation of powers promotes a plurality of values, not just a single one”); Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303–04 (1989) (describing divergent justifications for separation of powers over time).

<sup>98</sup> See THE FEDERALIST NO. 51, *supra* note 15, at 318 (James Madison) (describing the separation of powers as “essential to the preservation of liberty”).

<sup>99</sup> See Michaels, *Enduring*, *supra* note 1, at 520 (identifying “political accountability” as one of several different values served by the separation of powers).

<sup>100</sup> See, e.g., PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS DEMOCRACY* 7 (2009) (asserting that the involvement of a “multiplicity of institutions, each with different constituencies,” serves the “affirmative virtue” of “fostering deliberation”).

<sup>101</sup> See Verkuil, *supra* note 97, at 304–05 (highlighting the “rule of law version” of separation of powers, which suggests that one rationale for separating power among branches was to ensure adherence to the rule of law and minimize conflicts of interest).

<sup>102</sup> See *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (“The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.”).

vis-à-vis the other branches,<sup>103</sup> and some have recognized civil society oversight's role in addressing these concerns. For example, Jack Goldsmith has explained how civil society constrained the President's legally questionable foreign affairs conduct after 9/11. In his compelling account, a "synopticon" of watchers,<sup>104</sup> including journalists, non-profit watchdogs, and lawyers outside of the government, "forced the executive branch to account for its actions."<sup>105</sup> More recently, new work is considering how these forces of civic engagement amount to a check on the Trump administration and its alleged legal violations.<sup>106</sup>

The chief executive, however, is not this Article's primary focus—at least not in isolation. Rather, I describe here how civil society oversight shapes the less high-profile, but no less consequential, world of administration. To that end, I consider two goals widely associated with agency oversight—compliance with legal obligations and the avoidance of capture—and identify the role that civil society plays in each.

### 1. *Legal Compliance and Avoiding Regulatory Failure*

Perhaps the most basic goal of administrative oversight is to ensure that agencies comply with the legal commands of their political principals. A familiar premise here is that Congress and agencies exist in a principal-agent relationship, in which the goal is to minimize principal-agent slack.<sup>107</sup> Presidents, too, are relevant principals, with some distinct authority to direct agency behavior.<sup>108</sup> As positive political theory (PPT) explains, Congress may use oversight to impel agency

---

<sup>103</sup> See *supra* note 29.

<sup>104</sup> See GOLDSMITH, *supra* note 6, at 205–07 (connecting the idea of the "presidential synopticon" to David Brin's notion of "reciprocal transparency," in which citizens surveil the government and thereby keep it accountable (discussing DAVID BRIN, *THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM?* 11–12 (1988))).

<sup>105</sup> *Id.* at 207. Goldsmith also describes the important role of checks that are not my focus here, including government lawyers, Congress, and the courts. See *id.*

<sup>106</sup> See *supra* note 3.

<sup>107</sup> See, e.g., Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 433–34 (1989) (describing the principal-agent relationship between Congress and agencies). For discussions in the administrative law literature, see, for example, Sharon B. Jacobs, *The Administrative State's Passive Virtues*, 66 ADMIN. L. REV. 565, 605 (2014) (describing "a faithful agency" as "one that takes legislative goals and instructions as its guiding principles"), and Stewart, *supra* note 51, at 1676–81 (describing the desire to cabin agency discretion and the techniques used by the courts to do so).

<sup>108</sup> See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

compliance with legislative goals.<sup>109</sup> Rather than undertaking all oversight itself (the “police-patrol” model), Congress may prefer to empower various actors to monitor and challenge administrative action—through decentralized “fire-alarm” oversight.<sup>110</sup> Presidents, too, albeit to a somewhat lesser extent, may rely on decentralized fire alarms to shape their oversight agenda.<sup>111</sup> In either context, fire alarms change the principal’s political calculus, signaling to the President or members of Congress that there may be an electoral benefit (or, intermediately, a fundraising payoff) to addressing the concern.<sup>112</sup>

Key to this Article, those who sound fire alarms are typically members of civil society. For example, “individual citizens and organized interest groups” monitor agency actions,<sup>113</sup> and the media both investigates agency actions and amplifies the findings of others.<sup>114</sup> Moreover, “Congress itself need not always get involved.”<sup>115</sup> Civil society can check agencies directly, without relying on Congress to answer the alarm—as Michaels puts it, “more fire brigade than fire alarm.”<sup>116</sup> Congress, after all, may lack the political will,<sup>117</sup> resources,<sup>118</sup> or collective agreement to push back itself,<sup>119</sup> even as agencies flout or misconceive legislative direction. Agencies may

<sup>109</sup> The classic works on this point in positive political theory include Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984), and McCubbins et al., *supra* note 107.

<sup>110</sup> See McCubbins & Schwartz, *supra* note 109, at 166.

<sup>111</sup> See, e.g., Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 412–13 (2010) (observing that “the White House—like Congress—can use ‘fire alarm’ signals from interest groups, influential constituents, and the media to identify targets” for “presidential attention”).

<sup>112</sup> See McCubbins & Schwartz, *supra* note 109, at 168.

<sup>113</sup> *Id.* at 166.

<sup>114</sup> See, e.g., Pozen, *supra* note 52, at 1110–11, 1138–43 (characterizing the Freedom of Information Act as a mechanism of fire-alarm oversight because it facilitates investigative journalism and consequently draws legislative attention to agency actions).

<sup>115</sup> McCubbins & Schwartz, *supra* note 109, at 173.

<sup>116</sup> Michaels, *Custodians*, *supra* note 1, at 249 (emphasis omitted). Civil society is likely to be more constant than other forms of monitoring, filling in gaps that more formal oversight misses. See *id.*; Seifter, *supra* note 39, at 189 (describing civil society as a source of “more nimble and constant oversight” than Congress); see also McCubbins & Schwartz, *supra* note 109, at 171–72 (describing fire-alarm oversight as more effective than centralized oversight, in part because it can be more consistently active).

<sup>117</sup> See Katyal, *supra* note 29, at 2321 (observing that Congress may lack political incentives to check the executive during times of unified partisan government).

<sup>118</sup> See, e.g., Lee Drutman & Steven Teles, *Why Congress Relies on Lobbyists Instead of Thinking for Itself*, ATLANTIC (Mar. 10, 2015), <https://www.theatlantic.com/politics/archive/2015/03/when-congress-cant-think-for-itself-it-turns-to-lobbyists/387295> (arguing that lack of staff and resources limits congressional expertise, substantive engagement with issues, and Congress’s ability to generate its own policies).

<sup>119</sup> For a discussion of factors contributing to “the demise of the congressional checking function,” see Katyal, *supra* note 29, at 2320–21.

respond to this direct public pushback for a number of reasons, including because they fear a judicial rebuke, prefer to avoid the headache of litigation altogether, or dislike bad press.

To be sure, many legal scholars would dispute the PPT premise that agency compliance with political principals' direction is *per se* desirable. Agencies might deserve deference in deciding how to allocate scarce resources, for example,<sup>120</sup> and complying fully with all congressional preferences might be unreasonably costly. Relevant to this Article, some commentators may privilege *state* agencies in resisting congressional direction as a mode of federalism-oriented dissent.<sup>121</sup>

To isolate the role of civil society, this Article avoids those closer cases in favor of normative common ground. Whatever one's priors, there are certain types of *gross* regulatory failures that would trouble virtually everyone: those agency legal deviations<sup>122</sup> that cause serious, undisputed harm or undermine the basic efficacy of the regulatory program.<sup>123</sup> In the subsequent Parts of this Article, I explore how civil society oversight relates to such regulatory failures in the states.

## 2. *Avoiding Regulatory Capture*

Whether or not agencies are violating legal obligations outright, commentators have long feared that agencies will fall prey to capture by regulated interests, or at least to "domination" by such interests.<sup>124</sup> Civil society oversight might mitigate this problem in a number of ways. The combination of required transparency and public monitoring might avert agency behavior that is the most egregious, or that agencies anticipate would generate rebuke from some combination of political principals and the general public.<sup>125</sup> To the extent that civil society oversight takes the form of direct participation in agency pro-

---

<sup>120</sup> See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985).

<sup>121</sup> See Bulman-Pozen & Gerken, *supra* note 26, at 1258–59.

<sup>122</sup> I bracket from this discussion harmful agency actions that cannot be construed as a deviation from an agency's legal mandate—in other words, actions that are prescribed by law.

<sup>123</sup> To be sure, words like "serious harm" and "basic efficacy" invite disputes of their own. I posit, however, that there is some subset of agency action that is very broadly undesirable, no matter how difficult it is to define the operative terms with precision.

<sup>124</sup> See Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 459–60 (1999) (explaining the threat of "domination of agency decisionmaking by special interest groups"). For a recent look at capture, see PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David A. Moss eds., 2014). Note that the problems of capture or domination and regulatory failure may or may not overlap: There can be capture without failure, failure without capture, or both at once.

<sup>125</sup> See Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 183–84 (1997).

ceedings by previously underrepresented stakeholders, it might also expose agency officials to points of view that they had not previously considered.<sup>126</sup> Indeed, Thomas Merrill has observed that many of the administrative procedures that opened the administrative process to greater participation and review were efforts to remedy or avoid agency capture.<sup>127</sup>

In identifying a linkage between civil society oversight and the reduction or avoidance of capture, I do not mean to suggest that such efforts to date have been wholly, or even largely, successful at the federal level. They have been hindered by at least two problems. First, because capture is partly a function of the underlying distributions of power within civil society, many procedures created to reduce capture can have the effect of replicating existing inequalities.<sup>128</sup> For example, if the population of entities that monitor agencies is heavily skewed toward concentrated interests, monitoring procedures will not reduce capture. This observation has led some scholars to brainstorm ways to reach beyond administrative procedure to promote equality in engagement, not just equality in access.<sup>129</sup> Second, any critique of administrative capture should consider that legislatures and chief executives may be prone to similar biases. Thus, if the goal is to avoid unwarranted policy skews, reformers must zoom out enough to address the problem systematically.

But none of these concerns refute the basic point I tease out from this literature: that monitoring and engagement by civil society can, under certain conditions, address the problems of regulatory failures and capture. The next Part turns to evaluating these conditions in the states.

---

<sup>126</sup> See Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1063–67 (1997) (discussing developments in federal administrative law that have attempted to “bring[ ] previously excluded or underrepresented interests into the administrative process”).

<sup>127</sup> See *id.*

<sup>128</sup> See, e.g., Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445, 1500 (2016) (“[T]hose designing institutions might adopt rules and regulations to increase public participation or prevent capture, but the well-to-do and their associated interest groups will in practice be better suited to navigate those rules and regulations.”).

<sup>129</sup> See, e.g., Heather K. Gerken & Alex Tausanovitch, *A Public Finance Model for Lobbying: Lobbying, Campaign Finance, and the Privatization of Democracy*, 13 ELECTION L.J. 75, 87–88 (2014) (proposing a “leveling-up” approach in which public funding for legislative research could counteract privately funded lobbying); Saule T. Omarova, *Bankers, Bureaucrats, and Guardians: Toward Tripartism in Financial Services Regulation*, 37 J. CORP. L. 621, 623–24 (2012) (advocating a type of tripartism—that is, a way for public interest groups, and not just regulators and regulated entities, to participate in decisionmaking—in which a Public Interest Council would represent taxpayer interests in financial regulation).

## II

### THE STATE ADMINISTRATIVE SPHERE AND OBSTACLES TO OVERSIGHT

So far I have argued that oversight by civil society is a key feature of the modern apparatus that constrains federal administrative government. This Part explores civil society oversight at the state level, documenting a series of structural obstacles. Far from the Antifederalist ideal of states as “well guarded,”<sup>130</sup> state administration today is a largely unguarded giant.

My point of departure is that a working state-level system of civil society oversight has three main components: (1) state agencies that are visible and accessible; (2) a civil society with the capacity to monitor state agencies; and (3) a media “megaphone” for amplifying findings. I describe each of these components, and their challenges, in turn.

Section II.A describes the modern landscape of state administration, with a focus on the challenges of monitoring state agencies. Although state bureaucracies have grown drastically in size in the past half-century, they have little public salience, often do not keep or share relevant records, and may have organizational features that impede meaningful oversight. Section II.B sketches the demographics, asymmetries, and incentives of the state universe of interest groups. This description indicates that diffuse groups face greater challenges at the state level. Section II.C details the obstacles posed by the decline in state media outlets and state and local investigative journalism. Part III then considers what this state of affairs means for federalism theory and practical governance outcomes.

#### *A. State Bureaucracy*

##### *1. Growth in General*

The last half-century has witnessed a drastic, but largely unheralded, growth in state-level administration—what two public administration scholars have called an overlooked “revolution.”<sup>131</sup> There are a variety of ways to describe this growth.<sup>132</sup> The number of state government employees has increased approximately threefold over the last fifty-plus years, while the federal workforce has essentially stayed

---

<sup>130</sup> See *supra* note 12 and accompanying text.

<sup>131</sup> Bowling & Wright, *supra* note 7, at 52–53.

<sup>132</sup> See James K. Conant, *The Growing Importance of State Government*, in HANDBOOK OF PUBLIC ADMINISTRATION 25 (James L. Perry ed., 1st ed. 1989) (describing seven factors contributing to “the growing importance of the states’ role in the federal system,” including growth in states’ expenditures, employment, and “fiscal and institutional capacity”).

the same.<sup>133</sup> State governments employed 1.4 million people in 1960; as of 2016, that number had grown to 4.3 million<sup>134</sup>—most of whom work in the executive branch.<sup>135</sup> State budgets and expenditures have also risen.<sup>136</sup> States collectively spent \$31.6 billion in 1960;<sup>137</sup> that number leapt to over \$2.1 trillion in 2015,<sup>138</sup> more than eight times as much, after adjusting for inflation.

States have also created numerous new agencies to respond to emerging problems.<sup>139</sup> Gary Moncrief and Peverill Squire document this expansion by tracking the creation of new state agencies, by subject matter, in each decade.<sup>140</sup> In the 1980s, for example, at least three-quarters of the states added eight common agencies, including for ground water management and hazardous waste; in the first decade of the twenty-first century, three-quarters of the states added seven more common agencies, including for campaign finance, recycling, and census data.<sup>141</sup> This expansion into new subject areas has occurred at the same time that governors have increased their control over state executive branches, effectively streamlining and centralizing much of state bureaucracy—a development I have termed “gubernatorial administration.”<sup>142</sup> One way to understand these dual trends is to say

---

<sup>133</sup> JOHN J. DI IULIO, JR., *BRING BACK THE BUREAUCRATS: WHY MORE FEDERAL WORKERS WILL LEAD TO BETTER (AND SMALLER!) GOVERNMENT 13–17* (2014) (describing trends in state, local, and federal government employment). Di Iulio’s figures combine state and local government employees, but the tripling trend appears when state government employees are considered in isolation. See *State Government Employment: Totals by Job Type: 1960-2016*, GOVERNING, <http://www.governing.com/gov-data/public-workforce-salaries/state-government-employment-by-agency-job-type-current-historical-data.html> (last updated Sept. 28, 2017).

<sup>134</sup> *State Government Employment*, *supra* note 133.

<sup>135</sup> The Census does not measure state employment by branch. As a rough indicator, however, consider that in 2015, state governments collectively employed 4.3 million people, *id.*, and state legislative staffs accounted for roughly 32,000 of those employees, see *Size of State Legislative Staff*, NAT’L CONF. ST. LEGISLATURES (Dec. 4, 2017), <http://www.ncsl.org/research/about-state-legislatures/staff-change-chart-1979-1988-1996-2003-2009.aspx>.

<sup>136</sup> *E.g.*, Conant, *supra* note 132, at 28.

<sup>137</sup> BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, *COMPENDIUM OF STATE GOVERNMENT FINANCES IN 1962*, at 1 (1963).

<sup>138</sup> *2015 State Government Finances Summary Table*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2015/econ/state/historical-tables.html> (last updated July 27, 2017).

<sup>139</sup> See Bowling & Wright, *supra* note 7, at 55, 56 tbl.2 (chronicling the growth and development of state administrative agencies over the second half of the twentieth century).

<sup>140</sup> MONCRIEF & SQUIRE, *supra* note 4, at 65–66, 66 tbl.3.4 (citing Bowling & Wright, *supra* note 7).

<sup>141</sup> See *id.*

<sup>142</sup> See Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483 (2017).

that states are taking on new tasks and are able to perform them in a more coordinated and thus effective way.<sup>143</sup>

This growth is in a sense unsurprising. States have much more to do today than fifty years ago. In an evermore complex society, states continually face new challenges; moreover, they are often able to respond more quickly than the national government.<sup>144</sup> Cybersecurity and opiate addiction, as others have noted, are recent examples of states breaking new regulatory ground.<sup>145</sup> In addition, some of the states' traditional areas of regulation—especially incarceration—have required more and more resources.<sup>146</sup> Perhaps most of all, the federal government now gives the states a great deal to do. As John J. DiIulio, Jr.'s work shows, states today are in a sense the proxy workers for the federal government, implementing myriad federal programs and grants.<sup>147</sup> State bureaucratic growth has far outpaced federal bureaucratic growth in recent decades, and federal grants to states have increased (more than ten times as much in 2012 as in 1960).<sup>148</sup> State executive agencies are, in many ways, doing the bulk of American governing, even as attention focuses on their national counterpart.

One might ask why, if states are now carrying out so many federal programs, the many watchdogs of the federal government have not simply turned their gaze to the state administrative domain. Surely some have, at least on select issues—but they have not managed to create for state administration the sort of fishbowl that federal agencies occupy. The reasons for this discrepancy, which I develop further in the sections that follow, likely flow from information deficiencies, resource limitations, and competing priorities. Federal watchdogs require information about the goings-on at state agencies—but this can be hard to come by, as state bureaucracy can be relatively opaque and byzantine,<sup>149</sup> and state media outlets are shrinking and providing scant coverage of state administration. National watchdog groups that

---

<sup>143</sup> See *id.* at 530–31 (explaining how centralization may foster effective and productive state governance).

<sup>144</sup> See MONCRIEF & SQUIRE, *supra* note 4, at 43.

<sup>145</sup> See *id.*

<sup>146</sup> Cf. Peter Wagner, *Tracking State Prison Growth in 50 States*, PRISON POL'Y INITIATIVE (May 28, 2014), <https://www.prisonpolicy.org/reports/overtime.html> (showing dramatic rise in number of people incarcerated in state prisons per 100,000 population, and attributing the rise to state policy).

<sup>147</sup> See DI IULIO, *supra* note 133, at 16–17 (discussing rapid growth in federal grants to states and concomitant increases in state administrative employees implementing federal programs).

<sup>148</sup> *Id.* (figures adjusted for inflation).

<sup>149</sup> See generally Justin Weinstein-Tull, *State Bureaucratic Undermining*, 85 U. CHI. L. REV. (forthcoming 2018) (demonstrating how state bureaucratic complexity and lack of coordination undermines federal rights).



monitor federal agencies might in theory bridge this gap—for example, by trying to force state-agency disclosures and by patrolling state agencies’ under-the-radar decisionmaking—but such efforts require diffusing limited resources across fifty different bureaucracies, likely to the exclusion of other pressing matters on the national stage. At least to date, the federal watchdogs have therefore not simply increased oversight of state agencies to match that of their national counterparts.

## 2. *Opacity: Data Collection, Disclosure, and Centralization*

This growing state bureaucracy is often difficult for citizens to monitor. Difficulties arise for several reasons.

First, many states have neither a systematic scheme for collecting and sharing agency data nor a requirement that agencies keep electronic records. In many instances, states do not collect the data needed to assess a program’s performance. For example, as described in Part III, most states do not keep records of voter registrations that states complete under federal statutes.<sup>150</sup> States also fail to keep records that parallel the federal government’s recording of freedom of information requests.<sup>151</sup> In a related vein, Christopher Elmendorf and Darien Shanske argue that the limitations of state recordkeeping impede meaningful assessment of whether states are complying with their educational obligations under state constitutions.<sup>152</sup>

In other instances, states may *have* relevant records, but may be unable to manage, process, or analyze them.<sup>153</sup> For example, the National Instant Criminal Background Check System, a database of individuals whose mental illness bars them from buying guns, relies on

---

<sup>150</sup> See *infra* notes 340–41 and accompanying text.

<sup>151</sup> See Katherine Fink, *State FOI Laws: More Journalist-Friendly, or Less?*, in *TROUBLING TRANSPARENCY* (David E. Pozen & Michael Schudson eds., forthcoming 2018) (manuscript at 1) (on file with the New York University Law Review) (finding that “many state agencies do not keep FOI request logs . . . or do not make logs publicly available”).

<sup>152</sup> Christopher S. Elmendorf & Darien Shanske, *Solving ‘Problems No One Has Solved’: Courts, Causal Inference, and the Right to Education*, 2018 U. ILL. L. REV. (forthcoming 2018) (manuscript at 30, 32–34), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2886754](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2886754) (explaining that many states either lack or prohibit recordkeeping practices that would enable researchers to track students’ “educational experiences” and link them to other data about the students).

<sup>153</sup> See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, *GUN CONTROL: SHARING PROMISING PRACTICES AND ASSESSING INCENTIVES COULD BETTER POSITION JUSTICE TO ASSIST STATES IN PROVIDING RECORDS FOR BACKGROUND CHECKS* 11–12 (2012), <http://www.gao.gov/assets/600/592452.pdf> (stating that mental health records “originate from numerous sources within the state—such as courts, private hospitals, and state offices of mental health—and are not typically captured by any single state agency” and that technological barriers prevent several states from identifying and collecting them).

state data contributions.<sup>154</sup> But it “lacks millions of records it needs to be effective,”<sup>155</sup> which in some cases is because states have no way of managing or centralizing their existing records.<sup>156</sup> In other contexts, state records may be hard to access because state records have not yet been digitized.<sup>157</sup> Despite pockets of technological innovation,<sup>158</sup> many anecdotes describe state agencies that still rely on (and may not archive) handwritten or informal records.<sup>159</sup>

Second, although the evidence is murkier, many sources indicate difficulties accessing state agency information through open records acts.<sup>160</sup> At least three national organizations have conducted fifty-state evaluations of states’ freedom-of-information laws, and each has given most states failing or near-failing grades.<sup>161</sup> The most recent

---

<sup>154</sup> Jeff Brady, *States Aren’t Submitting Records to Gun Database*, NPR (Aug. 16, 2012, 12:44 PM), <http://www.npr.org/2012/08/16/158932528/states-arent-submitting-records-to-gun-database>.

<sup>155</sup> *Id.*

<sup>156</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 153, at 11–12.

<sup>157</sup> See, e.g., *id.* at 12; NAT’L ASS’N OF SEC’YS OF STATE, *HARNESSING THE POWER OF DIGITAL IN STATE RECORDS MANAGEMENT* 6 (2016) (on file with the New York University Law Review) (describing progress across the states toward digital recordkeeping, but noting that “paper records will remain an important part of state government business”); Fink, *supra* note 151 (manuscript at 8–9) (describing handwritten freedom-of-information request logs in two states’ environmental agencies).

<sup>158</sup> See Susan Urahn, *A Robust Vision for Using Data in Government*, PEW CHARITABLE TR. (Dec. 7, 2016), <http://www.pewtrusts.org/en/about/news-room/opinion/2016/12/07/a-robust-vision-for-using-data-in-government> (describing “success stories” of state innovation in making use of data).

<sup>159</sup> See Fink, *supra* note 151 (manuscript at 8–9); Michele Bush Kimball, *Shining the Light from the Inside: Access Professionals’ Perceptions of Government Transparency*, 17 COMM. L. & POL’Y 299, 314 (2012) (quoting a municipal clerk who described records as a “chaotic assemblage of paperwork”); Steve Mistler, *LePage’s Handwritten Notes Show Failings in Maine’s Record Retention Law*, PORTLAND PRESS HERALD (Jan. 11, 2016), <http://www.pressherald.com/2015/08/17/lepages-handwritten-notes-show-failings-in-maines-record-retention-law> (noting failure to archive Governor LePage’s handwritten letters, even those “involv[ing] state policy or other matters of public interest connected to his official duties”).

<sup>160</sup> See Justin Cox, *Maximizing Information’s Freedom: The Nuts, Bolts, and Levers of FOIA*, 13 N.Y. CITY L. REV. 387, 412–16 (2010) (surveying state freedom of information laws and the enforcement difficulties they present); Laura Danielson, Comment, *Giving Teeth to the Watchdog: Optimizing Open Records Appeals Processes to Facilitate the Media’s Use of FOIA Laws*, 2012 MICH. ST. L. REV. 981, 993–97 (describing failures of state open records processes and connecting these failures to the decline in media budgets); Joe Regalia, *The Common Law Right to Information*, 18 RICH. J.L. & PUB. INT. 89, 114–16 (2015) (highlighting state freedom of information frameworks that differ from the federal FOIA in ways likely to limit disclosure).

<sup>161</sup> See BETTER GOV’T ASSOC., *FREEDOM OF INFORMATION IN THE USA* 11–13 (2002), <https://www.documentcloud.org/documents/681003-foi2002irebga.html> (reporting results of a study in which eight states earned F grades, and forty-one states earned a C or worse); Charles N. Davis, *States Failing FOI Responsiveness*, NAT’L FREEDOM INFO. COALITION (Oct. 2007), <http://www.nfoic.org/states-failing-foi-responsiveness> (reporting results of joint study with the Better Government Association in which thirty-eight out of fifty states

study, by the Center for Public Integrity, criticizes state freedom-of-information schemes for being “riddled with loopholes,” failing to respond quickly and with explanations, and using “high fees and lengthy delays to suppress controversial material.”<sup>162</sup> Other tales, though admittedly anecdotal, paint similarly bleak pictures, showing individuals persistently frustrated with state agency noncompliance or foot-dragging.<sup>163</sup> That said, the story of federal Freedom of Information Act administration is hardly rosy,<sup>164</sup> so it is hard to pin down the extent to which state schemes are comparatively deficient. Indeed, as Katherine Fink reports, there is a meta-issue that impedes systematic analysis of these critiques: Because states also don’t collect much data on their compliance with freedom-of-information laws, it is difficult to say for sure how these laws operate in practice.<sup>165</sup>

Third, the recent trend of centralization of state executive branches affects the accessibility of state administration. At face value, consolidating executive power seems like a boon for state administrative accountability—and sometimes it is. Even as governors are less monitored and constrained than presidents,<sup>166</sup> the governor’s involvement can raise the profile of otherwise obscure administrative actions and steer them towards what the governor perceives as the public interest.

However, governors do not get involved with every administrative decision, and even where they do, the centralization trend can lead, perhaps counterintuitively, to opacity. In some states, agencies may not expend state resources without gubernatorial approval,<sup>167</sup> and at least some agencies must vet their communications with the governor’s office in advance.<sup>168</sup> Although such centralization increases

---

earned F grades); Nicholas Kusnetz, *Only Three States Score Higher Than D+ in State Integrity Investigation*; 11 Flunk, CTR. FOR PUB. INTEGRITY (Nov. 23, 2015, 10:56 AM), <https://www.publicintegrity.org/2015/11/09/18693/only-three-states-score-higher-d-state-integrity-investigation-11-flunk> (reporting that forty-seven out of fifty states earned a D+ or worse, including eleven states with an F).

<sup>162</sup> Kusnetz, *supra* note 161; *see also* Cox, *supra* note 160, at 414–15 (criticizing the lack of state employees trained to respond to records requests).

<sup>163</sup> For a compilation of stories describing open records travails in the states, *see* Kelly Hinchcliffe, *Here Are 20 of the Best Open-Records Stories So Far This Year*, POYNTER (Mar. 20, 2017), <http://www.poynter.org/2017/here-are-20-of-the-best-open-records-stories-so-far-this-year/452860>.

<sup>164</sup> *See, e.g.*, Pozen, *supra* note 52, at 1156.

<sup>165</sup> *See* Fink, *supra* note 151 (manuscript at 1).

<sup>166</sup> *See* Seifter, *supra* note 142, at 518–29 (describing the limited checks on gubernatorial power).

<sup>167</sup> *See id.* at 503–05 (describing forms of centralized regulatory oversight in the states).

<sup>168</sup> *See Retired WI DNR Staff and Chiefs Ask EPA for Prompt Action in Clean Water Act Compliance*, MIDWEST ENVTL. ADVOCATES (Dec. 7, 2015), <http://www.documentcloud.org/documents/2755261-Retired-WI-DNR-Staff-and-Chiefs-Ask-EPA-for.html>

transparency about where the buck stops,<sup>169</sup> it may also mean that some information—especially day-to-day information about permits, guidance, and the like—may not be shared at all.<sup>170</sup> In states implementing new limitations on civil service protection,<sup>171</sup> employees may also fear that sharing information in response to public inquiries could pose a risk to their jobs.

Finally, state agencies may further devolve their administrative tasks in ways that are hard to track. Many state executive branches rely on private entities to carry out a wide variety of public programs.<sup>172</sup> Furthermore, state agencies delegate many tasks to local governments and often disclaim responsibility for or knowledge of the results.<sup>173</sup> To be sure, both of these types of devolution affect transparency at the federal level too: Privatization and cooperative federalism are watchwords of the modern federal administrative apparatus. But when combined with the scarcity and opacity of state records, and the lesser salience of state affairs overall, it seems reasonable to expect that devolutions *from* state governments may be harder to track.

### B. State Civil Society

The second component of the state administrative sphere is a civil society that engages with or monitors state agencies. This requires some defining at the outset. Not all monitoring is salutary, and

---

[hereinafter *Letter from Former Wisconsin Officials*] (detailing restrictions on communication by agency employees); Tia Mitchell, *Ousted FDLE Commissioner Accuses Gov. Rick Scott, Aides of Politicizing Agency*, FLA. TIMES-UNION (Feb. 1, 2015, 2:12 PM), <http://jacksonville.com/2016-03-09/stub-376> (reporting that the governor's attempts at political influence over agency communications precipitated agency head's resignation).

<sup>169</sup> See Seifter, *supra* note 142, at 534–38 (discussing the relationship between gubernatorial power and government accountability); cf. Kagan, *supra* note 108, at 2331–33 (developing the claim that centralized presidential administration increases accountability).

<sup>170</sup> See, e.g., *Letter from Former Wisconsin Officials*, *supra* note 168 (expressing concern about “gag orders on DNR employees commenting on science issues” wherein “only DNR administrators may speak to the press,” and about transfers of decisionmaking authority from career staff to agency appointees).

<sup>171</sup> See Steven W. Hays & Jessica E. Sowa, *A Broader Look at the “Accountability” Movement: Some Grim Realities in State Civil Service Systems*, 26 REV. PUB. PERSONNEL ADMIN. 102, 106 (2006) (finding, inter alia, “a widespread increase in the number of positions that are being declassified or uncovered from civil service guidelines” and “a reduction in the employees’ ability to grieve supervisory decisions”); Seifter, *supra* note 142, at 511–12 (noting recently enacted limitations on civil service protections).

<sup>172</sup> See Cynthia J. Bowling, *State Bureaucracies*, in POLITICS IN THE AMERICAN STATES 503, 516, 517 tbl.17-5 (Virginia Gray et al. eds., 11th ed. 2018) (describing and quantifying state use of private service providers).

<sup>173</sup> See Justin Weinstein-Tull, *Abdication and Federalism*, 117 COLUM. L. REV. 839 (2017).

imbalanced monitoring in any direction can raise problems of undue domination.<sup>174</sup> In line with the scholarship described in Part I, I accept here a need for balance in the watchdog community. To constitute a plausible check on executive action, civil society must encompass individuals or groups who consider themselves independent of, and who are inclined to question, the executive. This must include some groups often called “public interest” groups—those that can be classified as pursuing the interests of a diffuse public, on either side of the partisan aisle.<sup>175</sup> As described below, civil society in the states generally lacks this balance, even more so than at the federal level.<sup>176</sup>

### 1. *The Rise of State-Level Lobbying*

Recent years have witnessed a surge in interest group engagement in the states.<sup>177</sup> State-level lobbying is no longer small-time, and the groups that participate are neither homogenous nor parochial. One study reports that the number of registered lobbyists in the states jumped from around 15,000 in 1980 to over 47,000 in 2013.<sup>178</sup> The authors opine that “there are now more groups in more states than ever before.”<sup>179</sup> The number of entities with lobbyists at the state level has also risen, even as that number has fallen at the federal level.<sup>180</sup>

---

<sup>174</sup> See, e.g., Merrill, *supra* note 126, at 1069 (explaining how “mature public choice theory” casts suspicion on “all organized groups demanding services from political institutions,” rather than only on industry groups).

<sup>175</sup> For a history of how the public interest group umbrella evolved to encompass both liberal and conservative causes, see Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of “Public Interest Law,”* 52 UCLA L. REV. 1223 (2005).

<sup>176</sup> These findings describe the overall dynamics of state interest communities, rather than the strength of any particular group or sector. There are certainly some groups, including those that fit into this Article’s public interest classification, that may organize more readily at the state or local level than at the federal level. See, e.g., Clayton P. Gillette, *Comment: Interest Groups in the 21st Century City*, 32 URB. LAW. 423, 426–29 (2000) (positing that tenants will be best able to “organize, if at all, at the local level”).

<sup>177</sup> See Liz Essley Whyte & Ben Wieder, *Amid Federal Gridlock, Lobbying Rises in the States*, CTR. FOR PUB. INTEGRITY (May 18, 2016, 4:09 PM), <https://www.publicintegrity.org/2016/02/11/19279/amid-federal-gridlock-lobbying-rises-states> (describing a recent study that showed an increase in the number of entities with lobbyists in the states).

<sup>178</sup> Adam J. Newmark & Anthony J. Nownes, *Interest Groups in the States*, in *POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS* 99, 101 (Virginia Gray et al. eds., 11th ed. 2018).

<sup>179</sup> *Id.* at 121. The authors also observe, citing Daniel Elazar’s seminal work, that state “political culture[s]” cause variation in interest group participation among states, as state cultures may have different views on the extent to which participation is a legitimate and worthy activity. See *id.* at 107 (citing DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* (3rd ed. 1984)).

<sup>180</sup> See Whyte & Wieder, *supra* note 177 (calculating that between 2010 and 2014, the number of entities with registered federal lobbyists declined by 25%, while the number of organizations sending lobbyists to the states rose by 10%); see also Alec Goodwin & Emma Baccellieri, *Number of Registered Lobbyists Plunges as Spending Declines Yet*

The money spent on lobbying has also risen in the states. A *Washington Post* study showed that, in the twenty-eight states that disclosed data, lobbying expenditures totaled \$2.2 billion between 2013 and 2014, “with virtually every state seeing dramatic growth over the last decade.”<sup>181</sup> This figure, moreover, “vastly underestimates” the total spent for a host of reasons.<sup>182</sup> For one, many states do not require the disclosure of (and thus do not include in the expenditures total) the amount of money that clients pay to lobbyists,<sup>183</sup> which may account for the majority of total funds spent on lobbying.<sup>184</sup>

Further refuting the Madisonian notion of parochial state spheres, much of the money spent lobbying state government comes from out-of-state interests.<sup>185</sup> A recent report by the Center for Public Integrity shows dozens of corporations and trade associations that lobby in all fifty states; it also shows many large, national corporations or trade associations among the top five in lobbying expenditures in each state.<sup>186</sup> This practice of lobbying across state lines, and the more general increase in state-level lobbying overall, raises the possibility that the state sphere today may be less parochial than Madison envisioned. And indeed, we no longer view most states as having a single

---

*Again*, OPENSECRETS.ORG (Aug. 9, 2016), <https://www.opensecrets.org/news/2016/08/number-of-registered-lobbyists-plunges-as-spending-declines-yet-again> (reporting that the total number of federal lobbyists declined from 2007 through 2016). One confounding factor, however, is the extent to which various actors engage in lobbying (at both the state and federal levels) without registering. *See id.* (indicating that some individuals do not register themselves as lobbyists because they do not believe they meet the threshold requirements); Whyte & Wieder, *supra* note 177 (explaining that states have different registration thresholds).

<sup>181</sup> Reid Wilson, *Amid Gridlock in D.C., Influence Industry Expands Rapidly in the States*, WASH. POST: GOVBEAT (May 11, 2015), <https://www.washingtonpost.com/blogs/govbeat/wp/2015/05/11/amid-gridlock-in-d-c-influence-industry-expands-rapidly-in-the-states>.

<sup>182</sup> *See id.* (explaining that varying disclosure rules and data collection practices result in expenditure estimates that are underreported or not publicly available).

<sup>183</sup> *See* Jonah Hahn, *How Transparent Is Your State's Lobbying Disclosure?*, SUNLIGHT FOUND. (Aug. 12, 2015, 10:59 AM), <https://sunlightfoundation.com/2015/08/12/how-transparent-is-your-states-lobbying-disclosure>.

<sup>184</sup> *See State-Level Lobbyist Spending in 2015*, NAT'L INST. ON MONEY ST. POL., <https://www.followthemoney.org/show-me?dt=3&lby-y=2015&lby-f-fc=2&lby-f-fc=2#{1—gro=lby-d-typ> (last visited Jan. 29, 2018) (showing that in states that disclosed lobbyist compensation, it made up \$1.1 billion of the total of \$1.4 billion in state lobbying expenditures).

<sup>185</sup> Yue Qiu et al., *Here Are the Interests Lobbying in Every Statehouse*, CTR. FOR PUB. INTEGRITY (Feb. 11, 2016, 5:00 AM), <https://www.publicintegrity.org/2016/02/11/19283/here-are-interests-lobbying-every-statehouse> (demonstrating that the entities with the most lobbying activity in the states are primarily national corporations).

<sup>186</sup> *See id.*

dominant economic or even political culture.<sup>187</sup> But, as I discuss next, this diversification has not extended significantly to nonbusiness interests.

## 2. A “Bias Towards Business”

Despite the greater number of lobbyists and dollars in state civil society, and its decreasingly parochial nature, recent evidence shows that public interest groups are outmanned by private interests in state lobbying—even more so than at the federal level. To be sure, compared to the studies of lobbying at the federal level, there has been less work evaluating state-level lobbying. The studies that do exist, however, all seem to point to a “bias towards business.”<sup>188</sup> To paraphrase E.E. Schattschneider’s famous line, the state-level chorus of interest groups sings with a particularly privileged accent.<sup>189</sup>

First, private sector interest groups outnumber other interest groups at the state level.<sup>190</sup> Leading scholars studying state-level interest group communities have found it “clear” that the organizations they classify as “private sector interests”—generally, entities that have a business-oriented or for-profit mission—“dominate state interest communities.”<sup>191</sup> They estimate that these entities made up just under 70% of state lobbying entries in 2007.<sup>192</sup> The public interest

<sup>187</sup> See Levinson, *supra* note 12, at 103 (“[P]olitically salient interests have ceased to align with state boundaries.”); Clive S. Thomas & Ronald J. Hrebener, *Interest Groups in the States, in POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS* 123, 142 (Virginia Gray et al. eds., 5th ed. 1990) (“[T]he days of states being run by one or two dominant interests . . . are virtually gone. There are no longer any ‘company states.’”).

<sup>188</sup> This phrase comes from the work of my colleagues Jason and Susan Webb Yackee, who found that “business commenters, but not nonbusiness commenters, hold important influence over the content of final rules” at the federal level. Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 128 (2006).

<sup>189</sup> See E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* 34–35 (Dryden Press 1975) (1960) (criticizing pluralism on the ground that the interest group system is not broadly representative: “The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent”); see also SCHLOZMAN ET AL., *supra* note 62, at 1–27 (discussing Schattschneider’s insight and measuring unequal political voice at the federal level).

<sup>190</sup> See Yue Qiu et al., *supra* note 185; see also David Lowery et al., *Explaining the Anomalous Growth of Public Sector Lobbying in the American States, 1997–2007*, 43 PUBLIUS J. FEDERALISM 580, 583–85 (2013) (noting the disparity but observing that the number of public sector interest groups increased in the years studied).

<sup>191</sup> Lowery et al., *supra* note 190, at 583; see also Virginia Gray & David Lowery, *The Institutionalization of State Communities of Organized Interests*, 54 POL. RES. Q. 265, 271 & fig.2 (2001) (demonstrating that for-profit interests occupied a larger percentage of the interest community from 1980 to 1997).

<sup>192</sup> See Lowery et al., *supra* note 190, at 583. That number is close to, but slightly less than, their measurements in earlier decades. See Gray & Lowery, *supra* note 191, at 271 fig.2 (placing the for-profit share at 72% or 73% in 1980, 1990, and 1997).

advocacy community made up 12.4% of lobbying in 2007, and public sector interests—governmental entities like local governments, school districts, and universities<sup>193</sup>—represented the other 18.4%.<sup>194</sup> In contrast, at the federal level, business-oriented lobbyists were estimated to have constituted 51.5% of all lobbyists in 2006.<sup>195</sup>

Business interests also dominate lobbying *expenditures* in the states, slightly more so than at the federal level. John de Figueiredo and Brian Kelleher Richter find “[o]verwhelming evidence” that “[c]orporations and trade associations comprise the vast majority of lobbying expenditures” in the states<sup>196</sup>—specifically, 86%.<sup>197</sup> Estimates on the comparable figure at the federal level range from “more than three-quarters”<sup>198</sup> to over 84%.<sup>199</sup> Other ways of slicing and dicing the state-level interest group sphere—and, to be sure, there are many more than I explore here—give a similar impression of a business-oriented skew. In most states, corporations or trade associations dominate the list of the top five “most active” lobbyists.<sup>200</sup> And in recent scholarly efforts to rank types of interest groups by their relative power, “general business interests” are considered “the most powerful types of groups in the states.”<sup>201</sup>

In addition to being outnumbered and outspent on lobbying, public interest-oriented groups in the states are also likely to be comparatively resource poor. By this I mean that these groups have less money in their coffers than many potential state-level opponents in business or industry, and also less money on average than federal groups devoted to similar issues. To take the paradigmatic example of

<sup>193</sup> See Lowery et al., *supra* note 190, at 583.

<sup>194</sup> *Id.*

<sup>195</sup> See SCHLOZMAN ET AL., *supra* note 62, at 355, 356 tbl.12.2. The authors note that the number has fallen from 69.2% in 1981, a change they attribute partly to changes in recordkeeping rather than reality. *Id.* at 350, 355; cf. Philip T. Hackney, *Taxing the Unheavenly Chorus: Why Section 501(c)(6) Trade Associations Are Undeserving of Tax Exemption*, 92 DENV. U. L. REV. 265, 279–82 (2015) (“[B]usiness interests made up 73.8% of the [state] lobbying community in 1997 as compared to 62% at the federal level one year prior in 1996.”).

<sup>196</sup> John M. de Figueiredo & Brian Kelleher Richter, *Advancing the Empirical Research on Lobbying*, 17 ANN. REV. POL. SCI. 163, 165 (2014).

<sup>197</sup> *Id.* (citing John M. de Figueiredo, *The Timing, Intensity, and Composition of Interest Group Lobbying: An Analysis of Structural Policy Windows in the States* 18–19 (Nat’l Bureau of Econ. Research Working Paper No. 10588, 2004)).

<sup>198</sup> DRUTMAN, *supra* note 63, at 14.

<sup>199</sup> de Figueiredo & Richter, *supra* note 196, at 165 (citing de Figueiredo, *supra* note 197, at 18–19).

<sup>200</sup> See Yue Qiu et al., *supra* note 185; see also *Methodology*, CTR. FOR PUB. INTEGRITY, <https://www.publicintegrity.org/2016/02/11/19257/methodology> (last visited Nov. 14, 2017) (defining activity based on the number of lobbyist registrations from 2010 through 2014).

<sup>201</sup> Newmark & Nownes, *supra* note 178, at 118.



environmental law,<sup>202</sup> the groups leading the charge for pollution limits at the state level tend to have fewer dollars at their disposal than would-be state-level polluters and also shallower pockets than comparable environmental groups at the national level.<sup>203</sup>

Although (or perhaps because) this resource disparity is intuitive, it has not received rigorous empirical assessment. The leading effort, in fact, offers a counterpoint: In 2001, Richard Revesz argued that environmental groups were, for various reasons, *unlikely* to be disadvantaged in the states. Regarding the resources of such groups, he found that, between 1989 and 1996, the “allocation of foundation grants to environmental organizations” showed a trend in favor of state and local groups,<sup>204</sup> and by 1996, state and local groups received roughly 75% of the 100 largest environmental grants.<sup>205</sup> Today, the trend appears to have reversed: Based on data available from the Foundation Center, 81% of the funding from the largest environmental foundation grants in 2016 went to nationally-oriented organizations.<sup>206</sup> Moreover, to the extent that state and local public interest groups receive smaller grants, those grants may come with more strings and substantive limitations, thus limiting the groups’ agility.<sup>207</sup> To be sure, foundation money is not everything, or even most of the pie for many public interest groups, which also rely on individual donations, government contracts, and the sale of services or products. But I am not aware of any evidence that state-level public interest

---

<sup>202</sup> While selecting an example with a largely dyadic interest structure for simplicity, I acknowledge that some issues, including some of those I discuss in Part III, have more complex constellations of interested parties. See, e.g., William T. Gormley, Jr., *Regulatory Issue Networks in a Federal System*, 18 *POLITY* 595, 596–97 (1986) (noting the diversity of regulatory conflicts).

<sup>203</sup> See, e.g., Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 *MICH. L. REV.* 570, 597–98, 597 n.79 (1996) (discussing the financial asymmetry between polluters and environmental groups).

<sup>204</sup> Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 *HARV. L. REV.* 553, 570–71, 571 tbl.1 (2001).

<sup>205</sup> *Id.* at 571.

<sup>206</sup> See Miriam Seifter, Appendix of Environmental Grants Awarded to Interest Groups in 2016 (Apr. 26, 2017) (on file with New York University Law Review). The data do not address the extent to which nationally-oriented groups might spend some of their funding on locally-oriented projects; I have not found data on that very interesting question. Rather, the figures here simply capture what share of foundation funds are allocated to groups that originate and operate primarily at the subnational level. That share was small in 2016.

<sup>207</sup> See generally Garry W. Jenkins, *Who’s Afraid of Philanthrocapitalism?*, 61 *CASE W. RES. L. REV.* 753, 758–59 (2011) (stating that “grantmakers influenced by this movement are becoming more paternalistic, leaning toward foundation-centered problem-solving models that disempower grantees and the communities they serve”).

groups are affluent along any measure, or that they face anything but day-to-day struggles to manage scarce resources.<sup>208</sup>

Registered lobbyists and their resources, of course, are only part of the picture. In recent years, groups have also worked to influence executive branch government in the states through more multifaceted, long-term strategies. A report by the *Milwaukee Journal Sentinel* documented the work of the Bradley Foundation, a conservative organization that “has been quietly using its vast resources to construct state-by-state networks of activist groups to win support for its conservative agenda from coast to coast.”<sup>209</sup> Leveraging in the ballpark of \$900 million, the Bradley Foundation funds a variety of types of organizations to run various aspects of on-the-ground advocacy, including “local think tanks, opposition research centers, candidate recruitment groups, conservative media, bill-drafting organizations and litigation centers around the nation.”<sup>210</sup> Similar organizational structures exist for liberal or progressive causes<sup>211</sup>—indeed, the Bradley Foundation models some of its strategies on earlier efforts by “liberal philanthropists”<sup>212</sup>—though some observers suggest they are weaker or less effective.<sup>213</sup> How these efforts will shake out in any given state—whether they will foster balance or capture in the executive branch—remains to be seen.

---

<sup>208</sup> In addition, state-level public interest groups that receive Federal Legal Services Corporation (LSC) funding are not permitted to advocate on public policy issues, which rules out some activities in which watchdogs would typically engage. See 45 C.F.R. §§ 1612.1, .3 (2016); Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 *FORDHAM URB. L.J.* 1213, 1214–15 (2002) (describing limitations imposed on recipients of LSC funding); Robert R. Kuehn, *Undermining Justice: The Legal Profession’s Role in Restricting Access to Legal Representation*, 2006 *UTAH L. REV.* 1039, 1053 (estimating that the restrictions “encumber up to eighty-five percent of funding for civil legal services nationwide,” such that “[i]n twenty-one states, there is no legal service provider unencumbered by the restrictions; in fourteen others, there is only one unrestricted civil legal assistance entity”).

<sup>209</sup> Daniel Bice, *Hacked Records Show Bradley Foundation Taking Its Conservative Wisconsin Model National*, *MILWAUKEE J. SENTINEL* (May 5, 2017), <https://projects.jsonline.com/news/2017/5/5/hacked-records-show-bradley-foundation-taking-wisconsin-model-national.html>.

<sup>210</sup> *Id.*

<sup>211</sup> See, e.g., *About the DA*, DEMOCRACY ALLIANCE, <http://democracyalliance.org/about> (last visited Jan. 2, 2018) (“[The Democracy Alliance] play[s] a leading role in fostering the infrastructure necessary to advance a progressive agenda for America.”); Bice, *supra* note 209 (describing groups within the state of Wisconsin that “recruit and train liberal candidates and grass roots activists” and conduct investigative journalism “while pursuing a left wing agenda”).

<sup>212</sup> Bice, *supra* note 209 (citing ADAM SCHRAGER & ROB WITWER, *THE BLUEPRINT: HOW THE DEMOCRATS WON COLORADO (AND WHY REPUBLICANS EVERYWHERE SHOULD CARE)* (2010)).

<sup>213</sup> See *id.*

### C. State and Local Media Outlets

State-level media outlets are a third and critical component of the state administrative ecosystem. Even if state agencies made information accessible and civil society had the capacity and incentives to monitor it, meaningful oversight would still require the amplifying and publicizing function of the press. But in recent years, the media presence at the state level has significantly contracted. Driven by plummeting advertising revenues and evolving consumption habits, the traditional news industry as a whole has suffered. State and local outlets have been especially hard hit.<sup>214</sup> In the words of a recent special edition of the *Columbia Journalism Review*, “[p]ick your metric—numbers of reporters, newspapers, readers—and nearly all the trendlines veer downhill” for local journalism.<sup>215</sup> The number of daily newspapers in the United States decreased by more than 100 between 2004 and 2014,<sup>216</sup> leaving “news deserts” across the country.<sup>217</sup>

This contraction means less coverage of state and local government,<sup>218</sup> and it disproportionately imperils investigative journalism about state and local government.<sup>219</sup> As James Hamilton documents in an illuminating new book, recent “[c]hanges in media markets put local investigative reporting particularly at risk.”<sup>220</sup> Hamilton explains that investigative journalism is resource intensive and not always remunerative: It entails the high fixed costs of developing a story, the risk that the digging will not bear fruit, the high transaction costs of obtaining information the government prefers not to share, and positive spillovers to society that the newspaper cannot recoup.<sup>221</sup> As competing online information sources have made it harder for newspapers to cover reporting costs, smaller newspapers, which cannot as

---

<sup>214</sup> See Michael Rosenwald, *Is the Quest for Profits and Clicks Killing Local News?*, COLUM. JOURNALISM REV. (Spring 2017), [https://www.cjr.org/local\\_news/is-the-quest-for-profits-and-clicks-killing-local-news.php](https://www.cjr.org/local_news/is-the-quest-for-profits-and-clicks-killing-local-news.php); see also Rasmus Kleis Nielsen, *Introduction: The Uncertain Future of Local Journalism*, in LOCAL JOURNALISM: THE DECLINE OF NEWSPAPERS AND THE RISE OF DIGITAL MEDIA 1, 2–5 (Rasmus Kleis Nielsen ed., 2015) (examining the rise of digital media and the challenges facing local journalism).

<sup>215</sup> Kyle Pope, *In Search of a Local News Solution*, COLUM. JOURNALISM REV. (Spring 2017), [https://www.cjr.org/local\\_news/local-news-pulitzer-election.php](https://www.cjr.org/local_news/local-news-pulitzer-election.php).

<sup>216</sup> PEW RESEARCH CTR., STATE OF THE NEWS MEDIA 2016, at 9 (2016), <https://assets.pewresearch.org/wp-content/uploads/sites/13/2016/06/30143308/state-of-the-news-media-report-2016-final.pdf>.

<sup>217</sup> Yemile Bucay et al., *America's Growing News Deserts*, COLUM. JOURNALISM REV. (Spring 2017), [https://www.cjr.org/local\\_news/american-news-deserts-donuts-local.php](https://www.cjr.org/local_news/american-news-deserts-donuts-local.php).

<sup>218</sup> See Jodi Enda et al., *America's Shifting Statehouse Press*, PEW RES. CTR. (July 10, 2014), <http://www.journalism.org/2014/07/10/americas-shifting-statehouse-press> (finding a 35% decrease in statehouse newspaper reporters between 2003 and 2014).

<sup>219</sup> HAMILTON, *supra* note 72, at 9–10.

<sup>220</sup> *Id.* at 10.

<sup>221</sup> See *id.* at 12–32.

easily “aggregate audiences,” have struggled the most.<sup>222</sup> This does not mean that state and local media never investigate. But it may mean that their investigative coverage is more likely to follow than to lead—to wait for evident disasters or scandals of the sort that trigger what Anthony Downs calls the “issue-attention cycle.”<sup>223</sup>

The decline in coverage of state government has ripple effects. For one, some scholars posit that state government is more prone to malfeasance,<sup>224</sup> or simply less attentive to constituents,<sup>225</sup> in the absence of a media spotlight. Less media coverage of state government may also decrease citizen engagement at the state level,<sup>226</sup> forming a sort of feedback loop with the weakness of state civil society watchdogs. Without information about what state government is doing, that is, it is harder to take responsive action.<sup>227</sup> It is also harder to cast informed votes: Perhaps unsurprisingly, studies show that retrospective voting—holding officials accountable for their past records—“critically depends on the volume, tone, and sources of information that voters have about recent changes in the relevant domains of public life.”<sup>228</sup>

---

<sup>222</sup> *Id.* at 17. The relative paucity of state investigative reporting is not altogether new, but recent financial troubles may both contract its supply and impede its expansion. Back in the 1980s, political scientist William Gormley called state investigative reporting “anemic” compared to local and national investigative journalism, but he suggested that reporters might change course and, in turn, dramatically affect state politics. See Gormley, *supra* note 202, at 604.

<sup>223</sup> Anthony Downs, *Up and Down with Ecology: The “Issue-Attention Cycle,”* 28 PUB. INT. 38, 39 (1972); see also JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 90–100 (2d ed. 2011) (describing disasters as a pathway for getting policymakers’ attention).

<sup>224</sup> See Paul Starr, *Goodbye to the Age of Newspapers (Hello to a New Era of Corruption)*, NEW REPUBLIC (Mar. 4, 2009), <https://newrepublic.com/article/64252/goodbye-the-age-newspapers-hello-new-era-corruption> (“[C]orruption is more likely to flourish when those in power have less reason to fear exposure.”); *id.* (“The watchdog role of the regional press is even more critical at the state level, where no one else is likely to step in when newspapers cut back.”).

<sup>225</sup> See James M. Snyder, Jr. & David Strömberg, *Press Coverage and Political Accountability*, 118 J. POL. ECON. 355, 402 (2010) (finding that, where overlap between newspaper markets and congressional districts yields greater newspaper coverage of local congressmen, “[p]oliticians respond to the increased media coverage by more actively pursuing their constituencies’ interests”).

<sup>226</sup> See Danny Hayes & Jennifer L. Lawless, *As Local News Goes, So Goes Citizen Engagement: Media, Knowledge, and Participation in US House Elections*, 77 J. POL. 447, 460 (2015); see also Danny Hayes, *The Decline of Local News Is Threatening Citizen Engagement*, WASH. POST (Jan. 23, 2015), [http://wapo.st/1EB6mJ6?tid=SS\\_tw&utm\\_term=.0e9c761ec6f2](http://wapo.st/1EB6mJ6?tid=SS_tw&utm_term=.0e9c761ec6f2).

<sup>227</sup> See Hayes & Lawless, *supra* note 226, at 459. For a general discussion of the connection between journalists and interest groups, see Christopher A. Cooper et al., *Interest Groups and Journalists in the States*, 7 ST. POL. & POL’Y Q. 39 (2007).

<sup>228</sup> Christopher R. Berry & William G. Howell, *Accountability and Local Elections: Rethinking Retrospective Voting*, 69 J. POL. 844, 845 (2007).

### D. Ripple Effects

The limited systems of civil society oversight in the states have an important ripple effect: They diminish the likelihood that other entities with authority to rein in state agency behavior, including courts and state legislatures, will do so. This ripple effect occurs because the internal and external checks on agency action are deeply intertwined.<sup>229</sup> And in states where courts and state legislatures are already weak overseers of agency action, this ripple effect may leave regulatory failures particularly unguarded.

Consider first the possibility of judicial checks. At the federal level, as mentioned in Part I, civil society often pushes back against the federal executive branch through litigation. But litigation requires litigants. The composition and resources of the interest group community—the pool of most would-be litigants—shapes the type of pushback agencies experience. As Daryl Levinson has observed, “courts will only offer a promising solution” to regulatory capture “to the extent that special interests are less dominant in the litigation process than in the regulatory or administrative processes.”<sup>230</sup> The biases discussed in the previous discussion suggest that many state agencies are more likely to be sued for regulating at all rather than for failing to regulate.

When litigants do wish to challenge state regulatory failures, they may face distinct challenges. First, even when challenging state agency implementation of federal statutes, litigants may struggle to get into federal court. State agencies fall outside the scope of the federal Administrative Procedure Act (APA),<sup>231</sup> and Supreme Court decisions have limited the availability of implied private rights of action.<sup>232</sup> Even in the presence of an express private right, other federal-court

---

<sup>229</sup> See, e.g., Levinson, *supra* note 12, at 40 (arguing that “democratic-level actors,” including voters and interest groups, “compete for control of . . . government institutions and direct their decisionmaking”); Seifter, *supra* note 39, at 197 (noting that action by civil society may provoke action from the legislative, executive, and judicial branches); cf. Metzger, *supra* note 1, at 443–45 (explaining ways in which internal and external separation of powers mechanisms may also be mutually reinforcing).

<sup>230</sup> Levinson, *supra* note 12, at 118–19.

<sup>231</sup> See 5 U.S.C. § 701(b)(1) (2012) (defining agency as “each authority of the Government of the United States”); Josh Bendor & Miles Farmer, *Curing the Blind Spot in Administrative Law: A Federal Common Law Framework for State Agencies Implementing Cooperative Federalism Statutes*, 122 YALE L.J. 1280, 1290–91 (2013) (describing the omission of state agencies from the APA).

<sup>232</sup> Where a federal statute does not provide an express private right of action, litigants might attempt to sue under another authority, but case law limits such approaches. See, e.g., *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383–84 (2015) (rejecting an implied right of action under the Supremacy Clause); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (construing narrowly the rights enforceable under 42 U.S.C. § 1983 (2012)).

limitations—like rising pleading standards and limited attorneys’ fees—may comparatively disadvantage poorly resourced state-level interest groups.<sup>233</sup> If plaintiffs are limited to state courts, they face another set of variables and limitations. Although state courts may lack the standing-doctrine barriers of federal courts,<sup>234</sup> state law may not allow suits against state agencies for failed implementation of federal regulatory programs.<sup>235</sup> In addition, the use of partisan judicial elections in many states raises uncertain questions about judges’ willingness to rebuke the executive, though that is a matter of both theoretical and empirical debate.<sup>236</sup> A full exploration of whether and how state courts address regulatory failures across the fifty states would require an article of its own. But given the organizational and legal obstacles to getting into court to challenge such failures, it would be unwise to put too much faith in judicial salvation.

Limitations on civil society oversight may also dampen state legislative checks against agency failures. Legislatures may be skewed by the same underlying power dynamics as agencies.<sup>237</sup> Even where this is not true, state legislatures in particular may not have sufficient incentives to prioritize agency oversight. Whereas members of Congress may well find agency oversight politically beneficial, in the sense that it may raise their public profile or please key constituents, state legislative oversight of low-salience, opaque state agencies may offer comparatively little political payoff.<sup>238</sup> Moreover, most state

---

<sup>233</sup> See Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 *YALE L.J.* 248, 255–56 (2014) (collecting cases and describing how Supreme Court decisions have narrowly construed statutory rights, raised pleading standards, and limited attorneys’ fees).

<sup>234</sup> See, e.g., *Jenner v. Ill. Dep’t of Commerce & Econ. Opportunity*, 59 N.E.3d 204 (Ill. App. Ct. 2016) (finding taxpayer standing to challenge regulations issued in excess of statutory authority).

<sup>235</sup> See, e.g., *Andersen v. Dep’t of Nat. Res.*, 796 N.W.2d 1, 19 (Wis. 2011) (holding that complainants alleging that a state permit violates federal law have no remedy from the state agency issuing the permit and that “[i]f [they are] entitled to a remedy, the remedy rests with the EPA”).

<sup>236</sup> See Aaron Saiger, *Chevron and Deference in State Administrative Law*, 83 *FORDHAM L. REV.* 555, 561–63 (2014) (reviewing relevant literature on the relationship between state courts and state executive branches).

<sup>237</sup> See Levinson, *supra* note 12, at 118 (“Legislative capture may beget agency capture by design.”).

<sup>238</sup> See Seifter, *supra* note 142, at 520 (drawing this comparison); Neal D. Woods & Michael Baranowski, *Legislative Professionalism and Influence on State Agencies: The Effects of Resources and Careerism*, 31 *LEGIS. STUD. Q.* 585, 590 (2006) (hypothesizing and finding evidence that state legislators seeking reelection or political careers prioritize work that is more “electorally profitable” than “oversight, which is largely ignored by the electorate”).

legislatures operate part-time,<sup>239</sup> earn lower salaries than their executive branch counterparts,<sup>240</sup> and lack a strong committee system.<sup>241</sup> State legislatures may therefore lack the bandwidth, resources, or organizational structure that would help hold agencies' feet to the fire.<sup>242</sup>

There are other entities that could discipline state agencies beyond state courts and legislatures. In cooperative federalism programs, federal agencies ostensibly oversee state agencies. But federal agencies often have very limited budgets to oversee state programs and depend on the states to monitor their own programs.<sup>243</sup> Even when they become aware of state failures, federal agencies generally hesitate to cut off state funding for noncompliance.<sup>244</sup> Furthermore, the governor or state agencies may sometimes be willing to reform themselves, even without pressure from outside checks, especially where the regulatory failure was unknown or inadvertent—but such self-corrections are less likely where the problem was driven by political incentives or underlying power structures.<sup>245</sup>

---

<sup>239</sup> Seifter, *supra* note 142, at 519 (noting that, in forty states, state legislative service is not a full-time job).

<sup>240</sup> *See id.* at 519 & n.251 (citing Graeme T. Boushey & Robert J. McGrath, *Experts, Amateurs, and Bureaucratic Influence in the American States*, 27 J. PUB. ADMIN. RES. & THEORY 85, 93 (2017)).

<sup>241</sup> Richard A. Briffault, *Beyond Congress: The Study of State and Local Legislatures*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 23, 25 (2003) (“[I]n most state legislatures the committee system is quite weak.”).

<sup>242</sup> *See Full- and Part-Time Legislatures*, NAT'L CONF. ST. LEGISLATURES (June 14, 2017), <http://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx> (explaining that the capacity of legislatures is informed by whether each legislator works full-time in that role, the legislators' compensation, and size of the their staffs). To be sure, many states have created some legislative oversight of agency rulemaking, and in some cases this may provide significant legislative control. In most of these states, however, the relevant legislative committee's veto power over agency action is subject to the governor's approval, and many committees have only advisory authority. *See* Seifter, *supra* note 142, at 519 (citing Brian J. Gerber et al., *State Legislative Influence over Agency Rulemaking: The Utility of Ex Ante Review*, 5 ST. POL. & POL'Y Q. 24, 26–28 (2005)).

<sup>243</sup> *See* Pasachoff, *supra* note 233, at 307–08, 326–28 (discussing federal agencies' limited enforcement capacity, but observing that capacity limits are a common feature of law enforcement and suggesting ways that agencies could marshal resources more effectively).

<sup>244</sup> *See id.* at 252–55 (identifying and critiquing reasons for the infrequency of funding cut-offs).

<sup>245</sup> To the extent that the shift to state-executive centralization simultaneously removes certain features of state administrative practice that fostered insulation from lobbying pressure—features like civil service protection, public advocates, and the ability to generate and share information with the public—gubernatorial oversight may enhance the possibility of agency capture or domination. For a discussion of similar design features in federal agencies, see Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 42–64 (2010).

\* \* \*

The state administrative sphere today is larger and more active than ever before. But its watchdogs have not kept pace. Because of the features of state-level administration, civil society, and media, the public bulwark against state executive malfeasance is a shadow of its federal counterpart. The next Part discusses the theoretical and practical implications of this state of affairs.

### III

#### EVALUATING THE STATE ADMINISTRATIVE SPHERE

If the familiar (if sometimes rhetorical) praise of state governments as “closer to the people” were apt, then states should be well-positioned to achieve both of the regulatory objectives described in Part I: States’ proximity to constituents should help ward off severe regulatory failures and also avoid captured or factional policymaking. But this Article’s account of the state administrative sphere suggests a different story. The weakness of civil society oversight in the states undermines the notion that state governments are closer to the people; in turn, it highlights their vulnerability to regulatory failures and factional influence. Attending to the state administrative sphere thus weakens key arguments for state power while strengthening others. Section III.A explores these questions.

Section III.B turns to practical implications. As Part I posited, civil society oversight is a variable that can help explain why some state regulatory failures persist while others get noticed and corrected. Of course, it is not the sole factor that explains state regulatory failures, or a cure-all for them. But civil society’s attention and agitation sometimes make a difference in determining which state programs public officials mend. To illustrate, Section III.B describes civil society watchdogs at work (or not at work) in five different areas of state administration: drinking water, pipeline safety, elections, public housing, and occupational licensing.

#### A. *Revisiting Theories of Federalism*

##### 1. *Closer to the People?*

Even as scholars, courts, and policymakers spar over which level of government (or which combination of governments) should have authority over any given issue, they tend to agree that states are closer to the people in some way that matters.<sup>246</sup> In particular, the traditional

---

<sup>246</sup> See, e.g., *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 41 (2013) (Alito, J., dissenting) (“Because the States are closer to the people, the Framers thought that state



praise for proximity suggests that it makes state governments more responsive to their constituents' desires or deters abuses of state power, or both.<sup>247</sup> In turn, it stands to reason that physical or geographic proximity could help to avoid the sort of gross regulatory failures described in Part I.

Consider how the accounts of state government proximity—though usually crafted with state legislatures in mind—translate to the administrative realm. The features of small communities, either homogeneity or the relative ease of landing a government job, might produce leaders who are closely connected to the community, and who will try to spare the community from gross regulatory failures.<sup>248</sup> Physical proximity might also make it easier for constituents to interact with public officials, and citizen engagement can push state officials to adhere to their regulatory duties. As the Antifederalists believed, proximity might additionally improve *ex post* checking of state officials, reining in missteps.<sup>249</sup> Indeed, the arguments just stated undergird the case for cooperative federalism, the now-dominant paradigm in American regulation: Through some combination of engaged citizens and responsive leaders, state agencies will ably carry out their regulatory duties, and will tailor them in ways that make sense for state citizens.<sup>250</sup>

Where this Article's account of the state administrative sphere holds, however, devolution actually sends administration to agencies that are further from the people along the dimensions just described. The public is not deeply engaged with the work of state agencies; in some cases state residents may be scarcely aware of those agencies at all, and state interest groups and media outlets do not serve as

---

regulation of federal elections would 'in ordinary cases . . . be both more convenient and more satisfactory.'" (quoting *THE FEDERALIST* NO. 59, at 363 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); Larry Kramer, *Understanding Federalism*, 47 *VAND. L. REV.* 1485, 1498–99 (1994) ("State government was also said to protect liberty, because state governments are smaller and closer to the people, hence more democratic and constitutive of popular self-government."); McConnell, *supra* note 8, at 1509 ("One of the principal arguments for substantial state autonomy was that representatives in a smaller unit of government will be closer to the people.").

<sup>247</sup> As Michael McConnell notes, Madison agreed that "within a small sphere, this voice [of the people] could be most easily collected, and the public affairs most accurately managed." McConnell, *supra* note 8, at 1509–10 (alteration in original) (quoting Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 *THE PAPERS OF JAMES MADISON* 205, 212 (Robert A. Rutland et al. eds., 1977)).

<sup>248</sup> See Letter II from the Federal Farmer to the Republican (Oct. 9, 1787), reprinted in *THE ANTI-FEDERALIST*, *supra* note 12, at 41–42 ("[T]he state governments will possess the confidence of the people, and be considered generally as their immediate guardians.").

<sup>249</sup> See Letter XVII from the Federal Farmer to the Republican, *supra* note 12, at 95; Levinson, *supra* note 12, at 49.

<sup>250</sup> See, e.g., Kurzweil, *supra* note 13, at 580 & nn.82–86 (collecting these arguments).

educative intermediaries as much as they do at the national level. The public and its intermediaries therefore do not as commonly clamor for particular agency actions or protest agency slack. Because so much of the work of public officials is reacting to pressures and demands, the lack of attention to their work may result in underinvestment and neglect. Being further from public attention can thus contribute to regulatory failure, even where state agencies are not captured by any particular interest (a possibility the next subsection considers).

To be sure, there may be separate reasons to involve states in administration. For example, while the states-as-laboratories argument for federalism does conventionally depend on tailoring to state populations, variety might be desirable for its own sake. Moreover, limiting the power of the national government can have benefits other than state-specific tailoring. The argument here simply suggests skepticism of claims that state implementation offers the advantage of proximity to public eyes. Scholars, policymakers, and courts should be mindful that the opposite may be true—and should consider pursuing reforms.

## 2. *Federalism and Faction*

In a related vein, attending to the state administrative sphere also sheds new light on longstanding debates about state-level faction. Rather than promoting responsive and faithful agency action, state administration's lack of meaningful connection to state civil society may foster capture and factional decisionmaking. Previous work has divided on the possibility and form of such factions, and has not focused on the dynamics of state agencies in particular. This Article's account suggests that minoritarian faction is a legitimate concern in state administration.

The controversy over states and factions dates back to James Madison, who famously worried that states' small, parochial spheres increased the risk of dominant majority blocs (or factions) in each state—which, in turn, might infringe minority rights.<sup>251</sup> Modern theorists, especially in the public choice literature, are less sure that majoritarian faction is the prime concern. While the federal government surely plays an essential role in protecting minority rights,<sup>252</sup> not all majoritarian government is oppressive. Rather, where Madison

---

<sup>251</sup> See *supra* note 15 and accompanying text.

<sup>252</sup> See, e.g., Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 784 (1995) (stating that "the powerful argument" that the "national government may protect unpopular minority groups more effectively" than state governments "has proven true").

saw the risk of faction, many scholars see good government.<sup>253</sup> They reason that geographically smaller jurisdictions make it easier for citizens to access their officials;<sup>254</sup> that, at least on salient issues, such engagement can yield more responsive policies;<sup>255</sup> and that there is no a priori reason to malign responsive policymaking as factional or ill spirited. Moreover, Madison's focus on majoritarian faction may have "underestimated both the dangers of minority rule and the defensive resources of minority groups,"<sup>256</sup> and therefore may have paid insufficient attention to the risk of minoritarian faction.

Other scholars have indeed raised concerns about minoritarian faction at the state level. In particular, these accounts note that groups devoted to the public interest might struggle to gain clout in the states, in part due to diseconomies of scale compared to the national level.<sup>257</sup> But in response to these claims, Revesz's influential piece posited that, at least as to environmental groups, states may instead be just as conducive to public interest lobbying.<sup>258</sup> This exchange left the question of state-level minoritarian faction largely unresolved.<sup>259</sup>

This Article's account of the state administrative sphere offers a reappraisal. To the extent that the prevailing view is that states are

<sup>253</sup> See, e.g., Jim Rossi, *The Political Economy of Energy and Its Implications for Climate Change Legislation*, 84 TUL. L. REV. 379, 397–98 (2009) ("Public choice theory generally views local governments as preferable to a centralized government. Since local governments are relatively small, homogenous, and possess a limited range of functions, they will have the fewest democratic problems in adopting policies that reflect and are responsive to the preferences of voters.").

<sup>254</sup> See Roderick M. Hills, Jr., *Federalism and Public Choice*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 207, 221 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (describing the mixed empirical support for this proposition).

<sup>255</sup> See *id.* at 220–21.

<sup>256</sup> McConnell, *supra* note 8, at 1502.

<sup>257</sup> See Esty, *supra* note 203, at 597–98 (noting that "asymmetries" between "polluters and pollutees" "may be more significant at the state and local levels"); *id.* at 650–51 (suggesting that the relatively little attention paid to state environmental policy, "[t]he difficulty of mobilizing the public in many separate jurisdictions," and the difficulty small groups face in "assembl[ing] the data, information, and scientific analysis that carry great sway with regulators" all support this asymmetry); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1213–15 (1977) (arguing that the difficulty of organizing in multiple jurisdictions, the need to "attain[] . . . a critical mass of skills, resources, and experience," disadvantages in fundraising, and the unreceptiveness of state lawmakers all disadvantage environmental interests at the state level compared to the national level).

<sup>258</sup> See Revesz, *supra* note 204, at 563 ("[T]he theory of collective action does not predict greater success for environmental groups at the federal level. Much the opposite: it suggests that, given the necessarily larger size of groups acting at the federal level, groups will in fact be less effective than at the state level.").

<sup>259</sup> See Hills, *supra* note 254, at 217–18 (noting that "[t]he evidence . . . that scale affects democratic accessibility is sketchy and inconclusive at best").

more aligned with their populaces and less prone to minoritarian faction than the national government,<sup>260</sup> this Article suggests the opposite. Consider a stylized version. Concentrated interests lobby state administrators, as well as their legislative and gubernatorial principals, to reduce regulatory burdens. On the other side, the diffuse public in the states seldom engages with the agency (less than at the national level), in part because of information deficiencies, as neither state-level public interest groups nor the media are positioned to detect state agencies' underenforcement or regulatory slippage. State politicians may thus assume that acquiescing to the requests of concentrated interests creates opportunities for votes and campaign contributions. Even in the absence of conscious favoritism, state legislators and governors may simply channel fewer resources to agencies whose shortcomings prompt no squeaky wheel. Administrators, for their part, may respond to pressure from their political principals, and may also independently want to avoid litigation and operational headaches. In turn, state agencies may reduce regulatory burdens on concentrated interests through lenient policymaking or relaxed enforcement.<sup>261</sup>

This discussion counsels skepticism of claims that federalism or devolution enhances majoritarian administration (or avoids capture). At a minimum, greater cognizance of state administrative dynamics should force us to be more specific about why we value state government and what might be gained or lost from devolution. Part IV sketches considerations relevant to those normative and policy decisions. First, however, I turn to examples of state civil society oversight in practice.

---

<sup>260</sup> See *id.* at 221. Much of the literature on federalism and public choice addresses the separate question of whether state regulation is efficient (and whether it will create a race to the top or the bottom); there has been less attention paid to the democratic performance of state government. See *id.* at 207 (describing these trends in the literature).

<sup>261</sup> Indeed, in many cases, the trio of features of the state administrative sphere—opaque agencies, weak or skewed civil society, and weak state media—moves state administration toward “regulatory minimalism.” See generally Ernest A. Young, *Federal Preemption and State Autonomy*, in *FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS* 249, 255–57 (Richard A. Epstein & Michael S. Greve eds., 2007) (exploring the model of libertarian federalism, which envisions that state competition leads to regulatory minimalism). In turn, state administrative spheres may prove conducive to the normative theories of libertarian federalism or “competitive federalism”—which prioritize individual liberty and generally favor regulatory minimalism—even without the active judicial policing that those theories prescribe. See generally MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 5–8 (2012) (defending the theory of competitive federalism).

### B. *Practical Implications*

This Section turns to the practical role of civil society oversight in the states. Through a series of examples, the discussion shows that civil society oversight can play a part in addressing regulatory failures, including those rooted in capture, domination, or simple inattention.

Some words of explanation may be useful before proceeding. First, the term “regulatory failure” is susceptible to different meanings.<sup>262</sup> For clarity and simplicity, and following Part I, I define a regulatory failure as the state executive branch’s consequential divergence from a legal mandate, whether from the state legislature, Congress, or a federal agency. My goal is to explore the role of civil society in avoiding or redressing outright or gross regulatory failures, rather than to explore what might count as a regulatory failure at the margins.

As for the examples, I selected these in part for variety along several dimensions. In addition to substantive variety, they showcase different features of the state administrative sphere that Part II described: Each involves a slightly different version of state agency opacity or inaccessibility, and a different role for civil society. Sometimes it is civic groups leading the charge to provide oversight, sometimes journalists, and sometimes the problem is brewing largely unchecked. Relatedly, the examples garnered varying amounts of public attention, along with varying responses from elected officials and the agencies involved. The examples also range in the root of the regulatory problem: Some flow from the undue influence of powerful groups, while others are grounded in neglect or inattention.

The examples are similar, however, in two respects. First, each involves a regulatory failure that harms the diffuse public—consumers, voters, and taxpayers, for example—as opposed to a concentrated group or interest. As public choice theory suggests, these types of diffuse harms are most likely to persist because the harms (or lost benefits) are spread too thinly across the population for anyone to

---

<sup>262</sup> See, e.g., Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 591–93 (2002) (noting different perspectives on “what constitutes ‘bad’ public policymaking” and observing that “the policy scientist’s regulatory failure may be the political philosopher’s success story”).

act.<sup>263</sup> These are failures for which civil society watchdogs are most needed.<sup>264</sup>

Second, each failure is in some sense nonobvious, either because it is complex (like drinking water quality) or because it flies under the radar.<sup>265</sup> Monitoring and investigation are preconditions to getting these issues on the public agenda. In contrast, I omit state executive branches' most high-profile actions, often taken by governors themselves, which are far more likely to get the attention of the public or other government officials, or both.

The examples here are illustrative of the real-life challenges of state watchdog systems, but they obviously are not comprehensive. Examples also exist in many other areas: in Medicaid, where states struggle to ensure equal access to healthcare;<sup>266</sup> in education, where states seldom meet federal targets and receive poor marks in providing special education;<sup>267</sup> or in child welfare, where states often fall below minimum standards for serving the needs of threatened

---

<sup>263</sup> See, e.g., Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 231 (1986) (describing the view that “laws are likely to benefit the few at the expense of the many, because no one has an incentive to enact laws that benefit the people in general”). Similar logic suggests that, even if such laws are enacted, they will be weakened over time by the imbalance of interests in their enforcement. See generally Susannah Camic Tahk, *Public Choice Theory and Earmarked Taxes*, 68 TAX L. REV. 755, 763 (2015) (“Even when an entrepreneurial-politics law does manage to pass, the concentrated oppositional groups work to erode the law’s provisions over time. In contrast, no subgroup has a sufficient incentive to fight in favor of the law.”); James Q. Wilson, *The Politics of Regulation*, in THE POLITICS OF REGULATION 357, 370–72 (James Q. Wilson ed., 1980) (describing the dynamics of “entrepreneurial politics”).

<sup>264</sup> This means that I have excluded examples where state regulatory failure harms a concentrated, affluent group. I do not suggest that these are not regulatory failures—merely that they are failures that rely less on civil society oversight.

<sup>265</sup> This way of grouping regulatory failures—according to the diffuseness of harm and salience of the issue—builds on, but parts ways with, typologies of regulation advanced by James Wilson and William Gormley. Wilson’s classic typology organizes issues by the concentration or diffuseness of their costs and benefits, but does not focus on the factor of salience. See Wilson, *supra* note 263, at 366–72. Gormley’s classification arranges issues by complexity and salience, but defines salience by the significance of effect rather than public awareness. See Gormley, *supra* note 202, at 598–600. My approach here highlights the fact that monitoring, exposure, and public awareness are preconditions to any resistance to agency actions.

<sup>266</sup> See, e.g., Julia Bienstock, Note, *Administrative Oversight of State Medicaid Payment Policies: Giving Teeth to the Equal Access Provision*, 39 FORDHAM URB. L.J. 805 (2012) (discussing states’ failure to comply with the equal access provisions of the Medicaid Act, in part due to oversight difficulties).

<sup>267</sup> See, e.g., Chris Kardish, *How States Are Failing Students with Disabilities*, GOVERNING (June 24, 2014), <http://www.governing.com/topics/education/gov-new-grading-system-shows-states-failing-students-with-disabilities.html> (describing new Department of Education evaluations that designated only eighteen states as satisfying requirements of the Individuals with Disabilities Education Act).

children.<sup>268</sup> Each context of state regulatory failure and watchdog intervention has its own permutations.

Finally, I wish to reemphasize that the somewhat dispiriting tales that follow are by no means an indictment of state government. Federal government and local government have plenty of shortcomings of their own, many of which are well documented in other works. I do not suggest that state government necessarily fares worse on the whole. My aim here is to isolate the variable of civil society engagement, and to show how it operates in a variety of examples.

### 1. *Drinking Water*

States bear primary responsibility for ensuring that water from our taps is safe to drink. The Safe Drinking Water Act, enacted in 1974, established a cooperative federalism program for the nation's public water systems.<sup>269</sup> The EPA sets national standards for drinking water, which the states (excluding Wyoming) implement.<sup>270</sup> Yet recent studies suggest that the water in many states falls below federal standards, and that problems of data collection, transparency, and public attention are pathologies of state administration of water systems.<sup>271</sup>

To get some purchase on the core players and issues in the administrative ecosystem of state drinking water regulation, consider the drinking water tragedy in Flint, Michigan, which led to the "chronic toxic exposure of an entire population."<sup>272</sup> This is an unusually catastrophic example, but it also provides an unusual window into agency decisionmaking and civil society oversight. The Flint disaster is properly understood as a failure of executive branch governance, and civil society oversight has belatedly helped improve (although not eliminate) the drinking water problems in Flint and elsewhere.

*a. Executive Branch Actors and Regulatory Failure.* The problems first arose due to actions of various executive branch actors. In 2011, Michigan's governor declared a financial emergency in Flint and

---

<sup>268</sup> See generally CHILDREN'S ADVOCACY INST., SHAME ON U.S.: FAILINGS BY ALL THREE BRANCHES OF OUR FEDERAL GOVERNMENT LEAVE ABUSED AND NEGLECTED CHILDREN VULNERABLE TO FURTHER HARM (2015), [http://www.caichildlaw.org/Misc/Shame%20on%20U.S.\\_FINAL.pdf](http://www.caichildlaw.org/Misc/Shame%20on%20U.S._FINAL.pdf) (criticizing the federal government's failure to oversee and enforce shortcomings by state agencies that implement child welfare programs).

<sup>269</sup> Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended at 42 U.S.C. §§ 300f-300j-26 (2012)).

<sup>270</sup> 42 U.S.C. §§ 300g-1 to -2; MATTHEW M. DAVIS ET AL., FLINT WATER ADVISORY TASK FORCE: FINAL REPORT 26 (2016).

<sup>271</sup> See ERIK OLSON & KRISTI PULLEN FEDINICK, NAT. RES. DEF. COUNCIL, WHAT'S IN YOUR WATER? FLINT AND BEYOND 5 (2016); Michael Wines & John Schwartz, *Unsafe Lead Levels in Tap Water Not Limited to Flint*, N.Y. TIMES (Feb. 8, 2016), <https://nyti.ms/2jUSFCV>.

<sup>272</sup> DAVIS ET AL., *supra* note 270, at 55.

appointed the first in a series of state emergency managers to oversee Flint's governance, pursuant to the state's Emergency Manager Law.<sup>273</sup> In 2013, an appointed emergency manager decided to switch the city's drinking water source to Flint River water to save money; the actual switch occurred in 2014.<sup>274</sup> Both state agencies with authority over drinking water—primarily the Michigan Department of Environmental Quality (MDEQ) and its Office of Drinking Water and Municipal Assistance (ODWMA),<sup>275</sup> and secondarily the Michigan Department of Health and Human Services (MDHHS)—had formal and informal authority to mitigate the harm from the switch, but failed to do so.

Formally, the MDEQ flouted federal regulations mandating corrosion control treatment for lead pipes and a protocol of sampling the tap water.<sup>276</sup> Informally, despite staff-level concerns about the safety of the Flint River water, the agency leaders “deferred to state emergency manager decisions to proceed” rather than objecting in various interagency meetings and communications.<sup>277</sup> As problems began to emerge, MDEQ officials dug in their heels, “obstinately . . . insist[ing] on the accuracy of . . . erroneous data,” and “dismiss[ing] . . . concerns of Flint residents, elected officials, and external . . . experts.”<sup>278</sup> The state-solicited commission report identifies MDEQ as the primary cause of the crisis, and attributes the agency's actions in part due to “cultural shortcomings,”<sup>279</sup> including an insufficient commitment to public health and inadequate public transparency.<sup>280</sup>

For its part, the MDHHS, which is tasked with preventing and alleviating public health problems in the state, initially ignored or explained away evidence of rising blood lead levels and cases of legionellosis.<sup>281</sup> The agency denied access to state records to a doctor at a local hospital who had begun independently testing the elevated blood lead levels in children.<sup>282</sup> And even after problems were clear,

---

<sup>273</sup> Mich. Comp. Laws §§ 141.1501–141.1531 (repealed 2011). The law was initially rejected by public referendum, but it was enacted by Snyder and the legislature in slightly altered, referendum-proof form shortly thereafter. See Julie Bosman & Monica Davey, *Anger in Michigan over Appointing Emergency Managers*, N.Y. TIMES (Jan. 22, 2016), <https://nyti.ms/2ug0Qfv>.

<sup>274</sup> See DAVIS ET AL., *supra* note 270, at 16–17.

<sup>275</sup> The staff of ODWMA “are not required to be licensed operators or have experience with drinking water treatment plant or distribution system operations.” *Id.* at 26.

<sup>276</sup> *Id.* at 27.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 28.

<sup>280</sup> *Id.* at 29–30.

<sup>281</sup> See *id.* at 31–32.

<sup>282</sup> See *id.* at 32.



the agency failed adequately to convey its findings to MDEQ and the public.<sup>283</sup>

*b. The Role of Civil Society.* Civil society oversight plays a pivotal role in the Flint story. The traditional interbranch checks were nowhere to be found; it was not legislative oversight, judicial rebuke, or even gubernatorial directive that prompted the relevant state and local actors to change course. Rather, it was the confluence of civil society complaints—from citizens, doctors, scientists, and ultimately the state’s largest newspaper—that prompted a response. At the same time, their efforts were delayed by the difficulties described in Part II. The state agencies did not readily share data, even when formal disclosure requests were made. After initially deferring to the perceived preferences of the city’s emergency managers,<sup>284</sup> MDEQ refused to assist or protect citizens who brought problems to its attention.<sup>285</sup>

There was also no nonprofit or watchdog entity transforming the relevant state agencies into a fishbowl or sufficiently well organized to take swift action on behalf of Flint residents. Still, within a month of the change to Flint River water, citizens began complaining to various state and federal government officials about their discolored and foul-smelling water, or about rashes or illnesses affecting their children.<sup>286</sup> A full year later, through an introduction by an EPA employee, one of those residents enlisted the help of a scientist at Virginia Tech; his widely publicized findings confirmed the city’s dangerous lead levels.<sup>287</sup> It was then that public pressure began to overwhelm the state agencies. Around the same time, a doctor at a local hospital held a press conference regarding her findings of elevated blood lead levels in children.<sup>288</sup> Within a week, the Detroit Free Press published an

---

<sup>283</sup> See *id.* at 33–34.

<sup>284</sup> See *id.* at 27.

<sup>285</sup> See *id.* at 29 (“[W]hen confronted with evidence of its failures, MDEQ responded . . . with a degree of intransigence and belligerence that has no place in government.”). As others have noted, the Flint failure properly registers as one of environmental and racial injustice. See David A. Dana & Deborah Tuerkheimer, *After Flint: Environmental Justice as Equal Protection*, 111 NW. U. L. REV. ONLINE 93, 94–102 (2017) (emphasizing that the neglected residents were “disproportionately poor and predominantly African-American” and offering a framework for understanding underenforcement of environmental laws as an equal protection problem).

<sup>286</sup> See DAVIS ET AL., *supra* note 270, app. V at 6; Susan J. Masten et al., *Flint Water Crisis: What Happened and Why?*, J. AM. WATER WORKS ASS’N, Dec. 2016, at 22, 23.

<sup>287</sup> See Donovan Hohn, *Flint’s Water Crisis and the ‘Troublemaker’ Scientist*, N.Y. TIMES MAG. (Aug. 16, 2016), <https://nyti.ms/2IM4A5c>.

<sup>288</sup> See DAVIS, ET AL., *supra* note 270, at 21 (describing the doctor’s September 2015 press conference).

analysis confirming the doctor's findings.<sup>289</sup> The following month, the city, now under pressure from all sides, switched back to its previous water source.<sup>290</sup>

The city's water problems are not over. Although it is now using a better water source, the now lead-tainted pipes mean that residents still cannot drink from their taps.<sup>291</sup> Replacing those pipes will take tremendous time and money.<sup>292</sup> In the meantime, the city is developing infrastructure plans and distributing free bottled water.<sup>293</sup>

## 2. Pipeline Safety

Unlike in the Flint situation, state-level civil society has, to date, been unable to make much headway on state regulatory failures related to pipeline safety. Because of a combination of state agency opacity, lack of civil society watchdogs, and media disinterest, these failures have gone largely unattended for decades—though that may be starting to change.

The United States is home to an ever-growing network of oil and gas pipelines, with many more planned over the coming decades to keep up with domestic oil and gas development.<sup>294</sup> This network includes, at present, over two and a half million miles of intrastate natural gas pipelines, supervised primarily by the states.<sup>295</sup> Energy

<sup>289</sup> See *id.* at 21; Kristi Tanner & Nancy Kaffer, *State Data Confirms Higher Blood-Lead Levels in Flint Kids*, DETROIT FREE PRESS (Sept. 29, 2015, 11:26 AM), <http://on.freep.com/1FreMIj>.

<sup>290</sup> See DAVIS, ET AL., *supra* note 270, at 21 (noting that Flint switched water sources on October 16, 2015).

<sup>291</sup> Liam Stack, *Lead Levels in Flint Water Drop, but Residents Still Can't Drink It*, N.Y. TIMES (Jan. 24, 2017), <https://nyti.ms/2kr3uKw>.

<sup>292</sup> Estimates have varied. See, e.g., Ryan Felton, *Fixing Flint's Contaminated Water System Could Cost \$216m, Report Says*, GUARDIAN (July 14, 2017, 3:18 PM), <https://www.theguardian.com/us-news/2016/jun/06/flint-water-crisis-lead-pipes-infrastructure-cost>. Including costs beyond just pipe replacement leads to much higher projections. See *id.* ("Some lawmakers have projected total costs including dissemination of bottled water, lead testing, and health treatment at \$1bn.").

<sup>293</sup> See *Flint Water Crisis Fast Facts*, CNN (Oct. 23, 2017, 1:55 PM), <http://cnn.it/1SoH4aA>.

<sup>294</sup> See Scott DiSavino, *New U.S. Pipelines to Drive Natural Gas Boom as Exports Surge*, REUTERS (Apr. 12, 2017, 1:35 PM), <http://www.reuters.com/article/us-usa-lng-pipelines-analysis-idUSKBN17E2CH> (reporting that the United States will be the world's third largest exporter of natural gas by 2018).

<sup>295</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-221, PIPELINE PERMITTING: INTERSTATE AND INTRASTATE NATURAL GAS PERMITTING PROCESSES INCLUDE MULTIPLE STEPS, AND TIME FRAMES VARY 4 (2013); *infra* note 300 and accompanying text; see also *Pipeline Mileage and Facilities*, PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., <https://www.phmsa.dot.gov/pipeline/library/data-stats/pipelinemileagefacilities> (last updated Oct. 31, 2017) (collecting annual data on pipeline infrastructure). This figure includes intrastate gathering, transmission, and distribution lines. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra*, at 4.

experts generally consider pipelines safer than other means of transporting oil and gas,<sup>296</sup> but the infrastructure is aging and inherently dangerous, and catastrophic pipeline failures occur annually.<sup>297</sup> Many of these catastrophes are preventable: Regular inspections can reveal pipeline defects that avoid failures.<sup>298</sup> State energy agencies and public service commissions across the nation are tasked with performing these inspections, but their record of enforcing pipeline safety is spotty.<sup>299</sup>

*a. Executive Branch Actors and Regulatory Failure.* Forty-eight states have elected to assume authority for pipeline safety in their state pursuant to the Natural Gas Pipeline Safety Act of 1968 and successor statutes.<sup>300</sup> Under this scheme, the Pipeline and Hazardous Materials Safety Administration (PHMSA) sets minimum safety standards for natural gas pipelines and related facilities,<sup>301</sup> states make certain certifications and reports regarding their oversight of intrastate (and some interstate<sup>302</sup>) pipelines,<sup>303</sup> and states can receive

---

<sup>296</sup> See, e.g., LINCOLN L. DAVIES ET AL., ENERGY LAW AND POLICY 684 (2015) (“Overall, pipelines have proven a comparatively safe vehicle for energy transportation.”). But cf. James Conca, *Pick Your Poison for Crude—Pipeline, Rail, Truck or Boat*, FORBES (Apr. 26, 2014, 10:35 AM), <https://www.forbes.com/sites/jamesconca/2014/04/26/pick-your-poison-for-crude-pipeline-rail-truck-or-boat> (observing that which mode of transport is “safest” depends on what variable one seeks to minimize—for example, human deaths, property damage, or environmental harm).

<sup>297</sup> See, e.g., PAUL W. PARFOMAK, CONG. RESEARCH SERV., R41536, KEEPING AMERICA’S PIPELINES SAFE AND SECURE: KEY ISSUES FOR CONGRESS 2–3 (2013), <https://fas.org/sgp/crs/homesecc/R41536.pdf> (describing the pipeline safety record and major incidents in recent years); *Pipeline Incident 20 Year Trends*, PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., <https://www.phmsa.dot.gov/pipeline/library/data-stats/pipelineincidenttrends> (last updated Nov. 6, 2017) (collecting incident data demonstrating that notable, fatality-inducing pipeline failures have occurred regularly since 1997 through the present day).

<sup>298</sup> See NAT’L TRANSP. SAFETY BD., NTSB/SS-15/01, SAFETY STUDY: INTEGRITY MANAGEMENT OF GAS TRANSMISSION PIPELINES IN HIGH CONSEQUENCE AREAS 1 (2015), <https://www.nts.gov/safety/safety-studies/Documents/SS1501.pdf> [hereinafter NTSB SAFETY STUDY] (stating that the most common causes of pipeline incidents are detectable through proper inspection programs).

<sup>299</sup> See *id.* at 26 (“[T]he intrastate gas transmission pipeline HCA incident rate was 27 percent higher than that of the interstate gas transmission pipeline [high consequence area] incident rate.”); PARFOMAK, *supra* note 297, at 15–18 (discussing an ongoing shortage of state pipeline inspectors).

<sup>300</sup> See Pub. L. No. 90-481, 82 Stat. 720 (codified as amended in scattered sections of 49 U.S.C.); *State Programs Overview*, PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., <https://www.phmsa.dot.gov/working-phmsa/state-programs/state-programs-overview> (last updated Aug. 22, 2017).

<sup>301</sup> See 49 U.S.C. § 60102 (2012).

<sup>302</sup> See Sarah L. Stafford, *Will Additional Federal Enforcement Improve the Performance of Pipelines in the U.S.?*, 37 INT’L REV. L. & ECON. 137, 138 (2014) (“[The Office of Pipeline Safety] has authorized some states to act as its agent and inspect the sections of interstate pipelines that run through the state in addition to intrastate pipelines.”).

federal funding for their efforts.<sup>304</sup> PHMSA can revoke a state's authority and the associated funding for state noncompliance.<sup>305</sup> In practice, PHMSA's oversight leaves much of the work to the states: PHMSA's approach, even in its own words, is largely based on trust.<sup>306</sup>

In many instances, so is state regulation. The limited reports that exist on the issue—mainly from the Department of Transportation's Inspector General,<sup>307</sup> occasional state audits,<sup>308</sup> and scattered media investigations<sup>309</sup>—indicate that many states rely largely on self-reporting from utilities to detect problems.<sup>310</sup> Most of the state regulatory commissions have not been funded to keep up with recent oil and gas development and have far too few resources and inspectors for their intrastate pipelines.<sup>311</sup> Many states do not disclose relevant information about their pipelines or their oversight.<sup>312</sup>

<sup>303</sup> § 60105(a)–(c) (describing required state certifications and reports).

<sup>304</sup> See § 60107 (describing state pipeline safety grants).

<sup>305</sup> See §§ 60105(e)–(f), 60106(d)–(e) (granting the Secretary of Transportation the power to monitor and terminate state certifications and agreements for noncompliance).

<sup>306</sup> See Brief for Appellant at 3, *City & Cty. of San Francisco v. U.S. Dep't of Transp.*, 796 F.3d 993 (9th Cir. 2015) (No. 13–15855) (describing PHMSA's position).

<sup>307</sup> See OFFICE OF INSPECTOR GEN., U.S. DEP'T OF TRANSP., AV-2014-041, AUDIT REPORT: PHMSA'S STATE PIPELINE SAFETY PROGRAM LACKS EFFECTIVE MANAGEMENT AND OVERSIGHT 8–10 (2014), <https://www.oig.dot.gov/sites/default/files/PHMSA%20State%20Pipeline%20Safety%20Program%20Audit%205E5-7-14.pdf> (describing investigation finding widespread violations by five randomly selected states of pipeline safety program requirements).

<sup>308</sup> See, e.g., Brian Nearing, *DiNapoli Cites State Natural Gas Pipeline Safety Issues*, TIMES UNION (Mar. 30, 2016, 10:20 PM), <http://www.timesunion.com/tuplus-business/article/DiNapoli-cites-state-natural-gas-pipeline-safety-7219034.php> (reporting that the New York Public Service Department did not verify pipeline companies' claims that their employees were qualified and depended on company reports to learn of leaks).

<sup>309</sup> See Christopher N. Osher & Bruce Finley, *Oil and Gas Industry Pipeline Problems are Well-established. Why Did It Take a Fatal Explosion to Spur Action?*, DENV. POST (May 25, 2017, 3:41 PM), <http://www.denverpost.com/2017/05/07/firestone-explosion-raises-questions-pipeline-risks/> (“A review by The Denver Post shows regulators for decades relied only on self-reporting by companies or complaints to identify failed pipelines even though pipelines are the leading cause of oil and gas leaks to the environment.”).

<sup>310</sup> See, e.g., Scott Waldman, *Comptroller: State Must Improve Gas Safety Oversight*, POLITICO (Mar. 15, 2016, 5:06 AM), <http://www.politico.com/states/new-york/albany/story/2016/03/comptroller-state-must-improve-gas-safety-oversight-032373> (reporting that the New York State Comptroller found that “[t]he Cuomo administration is too reliant on gas-line operators to self-report mishaps or accidents, and as a result, the state [Department of Public Service] was not properly notified of six gas-related pipeline incidents in 2015 alone”).

<sup>311</sup> See PARFOMAK, *supra* note 297, at 18 (explaining that state budget deficits have negatively impacted state pipeline safety agencies).

<sup>312</sup> See *State Pipeline Safety Website Transparency Review*, PIPELINE SAFETY TR., <http://pstrust.org/trust-initiatives-programs/transparency-of-pipeline-information> (giving most states a failing grade due to the lack of transparency on the states' pipeline safety websites).

*b. The Role of Civil Society.* Despite the serious risk that lax oversight poses to the growing population of people who live near transmission or distribution lines, civil society attention to state pipeline safety regulation has traditionally been nonexistent or weak.<sup>313</sup> There are few watchdog groups or journalists whose “beat” includes pipeline safety, and those who do occupy this space tend to lack the information, access, and megaphone to have an impact. Conversely, pipeline owners—usually regulated entities that appear frequently before state public utilities commissions—are likely to have a closer relationship with the commissions that supervise them.<sup>314</sup>

Consider the revelations after a major natural gas pipeline explosion in 2010 in San Bruno, California, which killed eight people, injured fifty-eight more, and destroyed thirty-eight homes.<sup>315</sup> According to the National Transportation Safety Board’s (NTSB) official accident report, the explosion occurred due to inadequate monitoring and inspection of the pipeline, which had been built in 1956 and did not meet industry standards even then.<sup>316</sup> The relevant state agency, the California Public Utilities Commission (CPUC), had “fail[ed] to detect the inadequacies.”<sup>317</sup> In an opinion concurring with the report, the NTSB Chairman criticized the CPUC for “plac[ing] a blind trust in the companies that they were overseeing—to the detriment of public safety.”<sup>318</sup> This problem, it turned out, may have had deep roots in the agency: Emails released in the wake of the explosion showed a “cozy” relationship between leaders of the CPUC and the

---

<sup>313</sup> Cf. CHARLIE HARAK, JOHN HOWAT & OLIVIA WEIN, NAT’L CONSUMER LAW CTR., *A CONSUMER’S GUIDE TO INTERVENING IN STATE PUBLIC UTILITY PROCEEDINGS* (2004), [https://www.nclc.org/images/pdf/energy\\_utility\\_telecom/additional\\_resources/consumers\\_guide.pdf](https://www.nclc.org/images/pdf/energy_utility_telecom/additional_resources/consumers_guide.pdf) (describing obstacles to public participation before state public utilities commissions).

<sup>314</sup> In most states, safety regulation is implemented by state public utility commissions. On the repeat-player dynamics that may animate these commissions, see, for example, Heather Payne, *Game Over: Regulatory Capture, Negotiation, and Utility Rate Cases in an Age of Disruption*, 52 U. SAN. FRAN. L. REV. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3025917](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3025917). For an overview of the scholarly debate regarding capture in these commissions, see Rossi, *supra* note 253, at 385–87.

<sup>315</sup> CAL. PUB. UTILS. COMM’N, *THE SAN BRUNO CATASTROPHE AND ITS AFTERMATH: HOW SHOULD REGULATORS RESPOND TO UTILITY-CAUSED DISASTERS?* 2 (2012), [http://www.in.gov/iurc/files/Zeller\\_-\\_San\\_Bruno\\_Catastrophe\\_Aftermath.pdf](http://www.in.gov/iurc/files/Zeller_-_San_Bruno_Catastrophe_Aftermath.pdf). The explosion also damaged seventy more homes in the neighborhood. *Id.*

<sup>316</sup> NAT’L TRANSP. SAFETY BD., *NTSB/PAR-11/01, PIPELINE ACCIDENT REPORT: PACIFIC GAS AND ELECTRIC COMPANY NATURAL GAS TRANSMISSION PIPELINE RUPTURE AND FIRE, SAN BRUNO, CALIFORNIA, SEPTEMBER 9, 2010*, at 127 (2011), <https://ntsb.gov/investigations/AccidentReports/Reports/PAR1101.pdf>.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at 135.

utility, and arguably inappropriate ex parte contacts between them.<sup>319</sup> The CPUC does have one vocal watchdog: The Utility Reform Network (TURN).<sup>320</sup> But although TURN is a longtime critic of both the CPUC and the utilities it regulates, its attempts at sounding alarms did not become salient until after San Bruno.<sup>321</sup>

The San Bruno disaster, more than any other I discuss, is in one sense a success story for administrative reform: It spurred Congress to order new studies and rulemakings,<sup>322</sup> created massive liability for the utility in multiple forums,<sup>323</sup> and generated state legislation to make the CPUC (somewhat) more transparent and safety-conscious.<sup>324</sup> In another sense, however, it reflects the deep challenges of monitoring state administration. For over five decades after the utility installed a substandard pipeline in San Bruno, no one—no investigative journalist, watchdog group, or other interested party—managed to expose the fact that the CPUC was not actually inspecting the pipeline's integrity.

All of this may be starting to change. The recent, high-profile public protests of the construction of new interstate oil pipelines—the Keystone XL and the Dakota Access Pipeline—have jumpstarted

---

<sup>319</sup> See, e.g., Marc Lifsher, *Drinks, Dinners, Favors Helped PG&E Lobbyist Build PUC Ties, Emails Show*, L.A. TIMES (Apr. 22, 2015, 5:00 AM), <http://www.latimes.com/business/la-fi-puc-cherry-emails-20150422-story.html>.

<sup>320</sup> See *About Us*, TURN, <http://www.turn.org/about> (last visited Nov. 14, 2017) (“We hold utility corporations accountable by demanding fair rates, cleaner energy, and strong consumer protections.”).

<sup>321</sup> See Richard Nemeč, *Consumer Watchdog Alleges CUPC-PG&E Rule Violations*, NAT. GAS INTELLIGENCE (Aug. 14, 2014), <http://www.naturalgasintel.com/articles/99381-consumer-watchdog-alleges-cpuc-pge-rule-violations> (discussing TURN's criticism of both the utility and the CPUC in the days after the San Bruno incident); Jaxon Van Derbeken, *PG&E Targeted Critics After San Bruno Blast, E-mails Show*, SFGATE (Jan. 31, 2015, 5:16 PM), <http://www.sfgate.com/bayarea/article/PG-E-targeted-critics-after-San-Bruno-blast-6054156.php> (same).

<sup>322</sup> See Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2016, Pub. L. No. 114-183, 130 Stat. 514 (codified as amended in scattered sections of 49 U.S.C.) (requiring PHMSA to study more stringent requirements).

<sup>323</sup> A federal jury convicted the utility of six federal felony counts. *United States v. Pac. Gas & Elec. Co.*, No. 14-cr-00175-TEH, 2016 WL 6804575, at \*9 (N.D. Cal. Nov. 17, 2016) (denying PG&E's motion for judgment of acquittal on all counts). The CPUC levied a \$1.6 billion penalty against the utility. See Marc Lifsher, *California Regulators Fine PG&E a Record \$1.6 Billion in San Bruno Blast*, L.A. TIMES (Apr. 9, 2015, 3:12 PM), <http://www.latimes.com/business/la-fi-puc-fine-20150409-story.html>.

<sup>324</sup> See George Avalos, *Lawmakers Kill Major Revamp of PUC, but Some Reforms Get Approved*, MERCURY NEWS (Aug. 31, 2016, 5:50 PM), <http://www.mercurynews.com/2016/08/31/lawmakers-kill-major-revamp-of-puc-but-some-reforms-get-approved> (describing three bills passed by the California legislature that were designed to increase transparency and disclosure of communications with utilities).

greater public interest in pipeline safety more generally.<sup>325</sup> State and national environmental groups now cover the issue;<sup>326</sup> state newspapers and nonprofit good government groups have begun to publish in-depth explainers.<sup>327</sup> What remains to be seen is whether this interest will translate into attention to the quotidian, invisible work—or inaction—of the regulators charged with ensuring the safety of intrastate lines.

### 3. *Election Administration*

Like pipeline safety, state election administration is an area in which a combination of agency opacity and civil society absence have, for decades, left regulatory failures unattended. But as with pipelines, this issue, too, may be starting to garner more interest.

*a. Executive Branch Actors and Regulatory Failure.* States play a crucial role in administering elections.<sup>328</sup> The Supreme Court has characterized this as a valuable element of state sovereignty.<sup>329</sup> But the practice of state election administration has hardly been seamless.<sup>330</sup> Although limited studies exist, the work that has been done—including an illuminating recent article by Justin Weinstein-Tull<sup>331</sup>—indicates that states exhibit “widespread noncompliance”<sup>332</sup> with key federal election statutes: the National Voter Registration Act of 1993 (NVRA),<sup>333</sup> the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA),<sup>334</sup> and the Help America Vote Act of 2002 (HAVA).<sup>335</sup> These laws, respectively, require states to provide voter

---

<sup>325</sup> See, e.g., Jen Fifield, *As Pipelines Proliferate, So Do Protests*, PEW CHARITABLE TR.: STATELINE (Dec. 30, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/12/30/as-pipelines-proliferate-so-do-protests>.

<sup>326</sup> E.g., Richard Stover, *America’s Dangerous Pipelines*, CTR. FOR BIOLOGICAL DIVERSITY, [http://www.biologicaldiversity.org/campaigns/americas\\_dangerous\\_pipelines](http://www.biologicaldiversity.org/campaigns/americas_dangerous_pipelines) (last visited Nov. 14, 2017).

<sup>327</sup> See, e.g., George Joseph, *30 Years of Oil and Gas Pipeline Accidents, Mapped*, CITYLAB (Nov. 30, 2016), <https://www.citylab.com/environment/2016/11/30-years-of-pipeline-accidents-mapped/509066>.

<sup>328</sup> See, e.g., *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (“States have ‘broad powers to determine the conditions under which the right of suffrage may be exercised.’” (quoting *Carrington v. Rash*, 380 U.S. 89, 91 (1965))).

<sup>329</sup> See *id.* at 2623.

<sup>330</sup> See Douglas R. Hess, *States Are Ignoring Federal Law About Voter Registration. Here’s Why.*, WASH. POST (July 4, 2015), [http://wapo.st/1JMzBfg?tid=SS\\_tw&utm\\_term=.43b09abbcfcb](http://wapo.st/1JMzBfg?tid=SS_tw&utm_term=.43b09abbcfcb) (reporting on states’ poor compliance with the National Voter Registration Act, particularly with respect to low-income citizens).

<sup>331</sup> See Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747 (2016).

<sup>332</sup> *Id.* at 753.

<sup>333</sup> 52 U.S.C. §§ 20501–20511 (Supp. II 2015).

<sup>334</sup> §§ 20301–20311 (Supp. II 2015).

<sup>335</sup> §§ 20901–21145 (Supp. II 2015).

registration when providing various other state services;<sup>336</sup> to facilitate timely overseas voting;<sup>337</sup> and to modernize their voting machines and voter registration systems.<sup>338</sup> Taken together, these laws are ways Congress has attempted to impose a federal baseline that makes voting easier and more reliable.<sup>339</sup>

Yet states have apparently made little progress. As Weinstein-Tull reports, the most recent study to address the NVRA found that “almost none of the states covered by the law can document” their compliance with it.<sup>340</sup> The study attributes this to both inadequate recordkeeping practices and a lack of incentives to prioritize election law implementation.<sup>341</sup> The data that do exist show pervasive compliance failures.<sup>342</sup> Regarding overseas ballots, a number of states have not adequately facilitated the timely voting of those entitled to do so.<sup>343</sup> As for voting technology under HAVA, progress arguably has been better, but significant problems remain.<sup>344</sup> For example, although “[p]art of the design of HAVA is to ensure that . . . voters with disabilities [ ] can cast votes without assistance,”<sup>345</sup> studies report numerous impediments to voting access for disabled voters.<sup>346</sup>

*b. The Role of Civil Society.* Without good information on election administration, there are few smoking guns or enticing stories for journalists to report. Compounding the problem, there have been few watchdogs demanding such records. As the Pew report further notes,

---

<sup>336</sup> §§ 20504, 20506(a)(3)(B) (including state or local government offices, such as those providing driver’s licenses, marriage licenses, fishing and hunting licenses, unemployment compensation services, and public library services).

<sup>337</sup> § 20302(a)(8).

<sup>338</sup> §§ 21081–21084.

<sup>339</sup> See Weinstein-Tull, *supra* note 331, at 755–59 (describing the purposes of the three statutes).

<sup>340</sup> *Id.* at 795 (quoting CHRISTOPHER B. MANN, PEW CHARITABLE TR., MEASURING MOTOR VOTER 2 (2014), <http://www.pewtrusts.org/~media/assets/2014/05/06/measuringmotorvoter.pdf>).

<sup>341</sup> See MANN, *supra* note 340, at 2, 4 (describing how motor vehicle agencies do not prioritize voter registration).

<sup>342</sup> See STUART NAIFEH, DEMOS, DRIVING THE VOTE: ARE STATES COMPLYING WITH THE MOTOR VOTER REQUIREMENTS OF THE NATIONAL VOTER REGISTRATION ACT? 2 (2015), [http://www.demos.org/sites/default/files/publications/Driving%20the%20Vote\\_0.pdf](http://www.demos.org/sites/default/files/publications/Driving%20the%20Vote_0.pdf) (describing finding that many states “fail to make voter registration an integral part of driver’s license services,” and instead “place the burden of [registration] . . . on voters”); Weinstein-Tull, *supra* note 331, at 759–60 (describing findings that states received few new voter registration applications from public assistance agencies).

<sup>343</sup> See Weinstein-Tull, *supra* note 331, at 760 (highlighting studies reaching this conclusion).

<sup>344</sup> See *id.* at 761 (describing the compliance challenges under HAVA).

<sup>345</sup> Rabia Belt, *Contemporary Voting Rights Controversies Through the Lens of Disability*, 68 STAN. L. REV. 1491, 1504 (2016).

<sup>346</sup> See *id.* at 1493 (“We are missing about three million voters with disabilities because of this participation gap.”).



most of the public does not know what states are required to offer regarding voter registration.<sup>347</sup> Moreover, much of state election administration happens in the depths of state (and local) bureaucracies.<sup>348</sup> Unlike archetypal regulatory agencies such as environmental or natural resource departments, the state agencies nominally responsible for implementing these statutes—including the Departments of Motor Vehicles and public welfare and disability offices—lack a consistent watchdog presence.<sup>349</sup>

In view of increasing national attention on elections and turnout, this, too, may be on the cusp of change. In addition to a raft of recent litigation challenging state election-related legislation,<sup>350</sup> several national groups have launched campaigns to educate voters and improve state administration.<sup>351</sup> If they succeed in reforming state practices, it will be in large part through the revival of civil society engagement with the work of state agencies.

#### 4. *Housing*

Public housing programs offer another challenge for state watchdog systems. In some cases, state and local housing programs are riddled with graft and improper allocation of funds.<sup>352</sup> In other cases, as described below, the housing that these programs provide

---

<sup>347</sup> See MANN, *supra* note 340, at 3 (discussing polling data revealing that nearly one-third of respondents did not know that they could register to vote at a motor vehicle agency and that about one-fourth believed that their voter registration is automatically updated when they move).

<sup>348</sup> Many of these responsibilities are also delegated to local governments, further blurring the accountability trail. See Weinstein-Tull, *supra* note 331, at 778 (describing the delegation of election administration by some states to local governments).

<sup>349</sup> Cf. MANN, *supra* note 340, at 3 (noting that the lack of public understanding of voter registration “removes the most basic level of oversight from” the implementation of the Motor Voter program under the National Voter Registration Act).

<sup>350</sup> See generally *Major Litigation That Could Impact Voting Access*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/major-litigation-could-impact-voting-access> (last updated May 15, 2017) (cataloging recent litigation).

<sup>351</sup> See, e.g., *Government Agency Registration*, PROJECT VOTE, <http://www.projectvote.org/issues/government-agency-registration> (last visited Nov. 24, 2017) (describing the efforts of Project Vote, along with “Demos, the Lawyers’ Committee for Civil Rights Under Law, and other civil rights organizations,” to “ensur[e] that state agencies fulfill their responsibilities”).

<sup>352</sup> See, e.g., Sean P. Murphy & Scott Allen, *From Chelsea to Springfield, Massachusetts Public Housing Chiefs Face Little Accountability*, BOS. GLOBE (Oct. 13, 2012), <https://www.boston.com/news/local-news/2012/10/13/from-chelsea-to-springfield-massachusetts-public-housing-chiefs-face-little-accountability> (linking scandals in Massachusetts to “the vulnerability of housing authorities to fraud and abuse, sometimes taking advantage of regulators who seem to be looking the other way”); Kevin D. Williamson, *The Architecture of Graft*, NAT’L REV. (June 28, 2013, 4:00 AM), <http://www.nationalreview.com/article/352292/architecture-graft-kevin-d-williamson> (describing scandals around the nation involving HUD-funded housing authorities).

fails federal standards for quality and safety. Watchdogs, then, are needed—to expose both what the state and local officials are not doing, as well as what they are.

*a. Executive Branch Actors and Regulatory Failure.* Consider the issue of housing quality. The Section 8 program provides rental housing subsidies for low-income tenants.<sup>353</sup> In exchange for a government voucher covering much of the tenant’s rent, landlords must comply with a host of federal requirements, including keeping their properties “decent, safe, sanitary and in good repair.”<sup>354</sup> The U.S. Department of Housing and Urban Development (HUD) distributes money to state and local agencies to run the program.<sup>355</sup> Although leading scholars regard voucher-based housing assistance programs as a promising model for alleviating poverty,<sup>356</sup> the Section 8 program has faced implementation challenges in the United States, and the minority of eligible households that receive a voucher often cannot find a landlord who will accept it.<sup>357</sup> With regard to landlords who do accept Section 8 vouchers, some housing authorities fail to enforce HUD’s requirements. In some cases, the noncompliance is dramatic and poses health and safety risks.<sup>358</sup>

---

<sup>353</sup> See 42 U.S.C. § 1437f(a) (2012); *Section 8 Program Background Information*, U.S. DEP’T HOUSING & URB. DEV., [https://portal.hud.gov/hudportal/HUD?src=/Program\\_offices/housing/mfh/rfp/s8bkinfo](https://portal.hud.gov/hudportal/HUD?src=/Program_offices/housing/mfh/rfp/s8bkinfo) (last visited Nov. 14, 2017).

<sup>354</sup> 24 C.F.R. § 5.703 (2017).

<sup>355</sup> See generally *Housing Choice Vouchers Fact Sheet*, U.S. DEP’T HOUSING & URB. DEV., [https://www.hud.gov/topics/housing\\_choice\\_voucher\\_program\\_section\\_8](https://www.hud.gov/topics/housing_choice_voucher_program_section_8) (last visited Nov. 14, 2017). In addition, many states have some forms of housing assistance that they fund themselves. See DANILO PELLETIERE ET AL., NAT’L LOW INCOME HOUS. COAL., *HOUSING ASSISTANCE FOR LOW INCOME HOUSEHOLDS: STATES DO NOT FILL THE GAP 2–3* (2008), <http://nlihc.org/sites/default/files/Housing-Assistance-2008.pdf> (analyzing state government assistance).

<sup>356</sup> See, e.g., MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 299–313* (2016) (discussing vouchers as a critical anti-poverty tool and proposing a universal voucher program).

<sup>357</sup> See Alana Semuels, *How Housing Policy Is Failing America’s Poor*, ATLANTIC (June 24, 2015), <https://www.theatlantic.com/business/archive/2015/06/section-8-is-failing/396650> (describing how landlords’ refusal to take vouchers often traps low-income tenants in the poorest neighborhoods); Laura Sullivan & Meg Anderson, *Section 8 Vouchers Help the Poor — But Only if Housing Is Available*, NPR (May 10, 2017, 4:35 PM), <http://www.npr.org/2017/05/10/527660512/section-8-vouchers-help-the-poor-but-only-if-housing-is-available> (providing anecdotes from low-income tenants who struggled to find landlords willing to accept vouchers).

<sup>358</sup> See Chris Pomorski, *Public-Private Partnership Aims to Save Section 8 Units from ‘Demolition by Neglect’*, OBSERVER (Feb. 10, 2015, 5:13 PM), <http://observer.com/2015/02/public-private-partnership-aims-to-save-section-8-units-from-demolition-by-neglect> (describing properties in “dire” need of repair); cf. Semuels, *supra* note 357 (describing properties with inadequate plumbing and rodent and cockroach infestations); Christopher Swope, *Section 8 Is Broken*, SHELTERFORCE (Jan. 1, 2003), <https://shelterforce.org/2003/01/01/section-8-is-broken> (describing Section 8 landlords in Baltimore who “ignored maintenance”).

*b. The Role of Civil Society.* The Section 8 program in Maine provides an interesting case study of the state watchdog system. The Maine State Housing Authority administers the state's program, which includes approximately 3200 Section 8 units and involves roughly \$100 million in annual federal assistance.<sup>359</sup> In late 2011, a fire damaged a low-income rental property in the small town of Norway, Maine, leaving eleven people homeless. The staff of a small local newspaper, the Advertiser Democrat, "heard talk of blocked secondary exits, missing smoke alarms and other safety hazards," and decided to investigate the town's Section 8 housing.<sup>360</sup> They subsequently ran a scathing exposé documenting the poor quality and inadequate inspections of Section 8 housing in the state's southwest region.<sup>361</sup> The story "prompted an emergency meeting of state and local officials, tenants, landlords and other concerned residents."<sup>362</sup> The agency's director stated that reading the article alerted him to the agency's enforcement shortcomings.<sup>363</sup> The state commenced an investigation of the program, as did HUD.<sup>364</sup> HUD's report found that 87% of inspected units failed minimum requirements, and 46% had "emergency or life-threatening violations requiring correction within 24 hours."<sup>365</sup> The report concluded that Maine's housing agency's failures of oversight and management, including of a privately contracted inspection service, were to blame.<sup>366</sup>

---

<sup>359</sup> See OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOUS. & URBAN DEV., 2012-BO-1005, MAINE STATE HOUSING AUTHORITY, AUGUSTA, ME: HOUSING CHOICE VOUCHER PROGRAM AND OTHER EXPENDITURES OF HUD FUNDS 4 (2012), <https://www.hudoig.gov/sites/default/files/documents/2012-BO-1005.pdf> [hereinafter HUD REPORT].

<sup>360</sup> Bill Nemitz, *Maine Housing Self-Audit Ammo for Its Critics*, PORTLAND PRESS HERALD (Jan. 8, 2012), [http://www.centralmaine.com/2012/01/08/mainehousing-self-audit-ammo-for-its-critics\\_2012-01-07](http://www.centralmaine.com/2012/01/08/mainehousing-self-audit-ammo-for-its-critics_2012-01-07).

<sup>361</sup> The initial article of the exposé was A.M. Sheehan & Matt Hongoltz-Hetling, *Slumlords, Shoddy Oversight, Tax Dollars . . . Living on Section 8*, ADVERTISER DEMOCRAT (Oct. 27, 2011, 12:00 AM), <https://web.archive.org/web/20111030015307/www.advertiserdemocrat.com/featured/story/025-42-news-2011-housing-draft2-267wo-photos>. See also HUD REPORT, *supra* note 359, at 4 (citing the article); Nemitz, *supra* note 360 (same). The authors were finalists for a 2012 Pulitzer Prize for their work on this series. *Finalist: A.M. Sheehan and Matthew Hongoltz-Hetling of Advertiser Democrat, Norway, Maine, a Weekly*, PULITZER PRIZES, <http://www.pulitzer.org/finalists/am-sheehan-and-matthew-hongoltz-hetling> (last visited Nov. 14, 2017).

<sup>362</sup> Leslie H. Dixon, *Rental Housing in Norway . . . Five Years Later*, ADVERTISER DEMOCRAT (Apr. 21, 2016), <http://advertiserdemocrat.com/rental-housing-in-norway-five-years-later>.

<sup>363</sup> See Nemitz, *supra* note 360.

<sup>364</sup> See HUD REPORT, *supra* note 359, at 4–5 (describing the federal inspections); Nemitz, *supra* note 360 (describing the state investigation).

<sup>365</sup> HUD REPORT, *supra* note 359, at 6–7.

<sup>366</sup> *Id.* at 15–16.

Reforms quickly followed. Maine's housing agency stopped relying on contracted inspectors and "brought in-house" all of its inspection work.<sup>367</sup> It also implemented regulatory and policy changes: Tenants are now present during inspections, and inspectors reportedly both enforce quality standards more strictly and provide on-site help to improve dangerous conditions that are easily resolved.<sup>368</sup> By all accounts, these reforms are a success story for the state's watchdog system. Their occurrence in a relatively small community also supports a theory advanced by some journalism scholars: When an audience with common interests intersects with political boundaries—as could be said of the small state of Maine—investigative journalism has its greatest effect.<sup>369</sup>

## 5. *Licensing*

The examples offered so far show state regulatory failures that occur through lax behavior and failures to follow through on or oversee legal requirements—in short, through underregulation. Although that type of failure more commonly causes under-the-radar harms to the diffuse public, overregulation can too. Overzealous state licensing boards may fit this description.<sup>370</sup>

*a. Executive Branch Actors and Regulatory Failure.* Every state has a variety of boards and commissions that administer and enforce licensing requirements for professions that require licenses. The prevalence of these requirements has increased substantially in recent decades.<sup>371</sup> In concept, these boards provide an important public service, protecting consumers by controlling the quality of professional services.<sup>372</sup> In practice, however, critics from both political parties have argued that many such boards operate excessively, beyond what

<sup>367</sup> Dixon, *supra* note 362.

<sup>368</sup> *Id.*

<sup>369</sup> See Snyder & Strömberg, *supra* note 225, at 356–57 (proposing that “congruence” between legislative districts and newspaper markets affects legislators’ responsiveness to constituents).

<sup>370</sup> See DEP’T OF TREASURY OFFICE OF ECON. POLICY ET AL., OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 22 (2015) [hereinafter WHITE HOUSE REPORT], [https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing\\_report\\_final\\_nonembargo.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf) (“Licensing is a policy with concentrated benefits (for the licensed practitioners) and diffuse costs (for consumers and would-be practitioners).”).

<sup>371</sup> See *id.* at 17 (showing that “the percentage of the workforce covered by state licensing laws grew from less than 5 percent in the early 1950s to 25 percent by 2008, meaning that the state licensing rate grew roughly 5-fold during this period”); Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1102 (2014) (describing the rise of state occupational licensing).

<sup>372</sup> See WHITE HOUSE REPORT, *supra* note 370, at 22.

state law requires, to the public detriment.<sup>373</sup> They can raise prices for consumers, limit access to valuable services, and unreasonably deny business and career opportunities to qualified people.<sup>374</sup> They can also be senselessly frustrating—or so found an Oregon man who, after making mathematical calculations to challenge a local speeding camera, was fined for practicing engineering without a license.<sup>375</sup> Moreover, the boards are often opaque and insular, making public oversight difficult.<sup>376</sup>

*b. The Role of Civil Society.* In 2012, the Institute for Justice, funded by Charles and David Koch and devoted to protecting individual liberty by “limit[ing] the size and scope of government power,”<sup>377</sup> published a national study of the burden of state licensing requirements on more than 100 low- and moderate-income occupations.<sup>378</sup> The study has been cited in over 300 news articles.<sup>379</sup> State newspapers have also initiated their own studies of state licensing’s impacts. A series of reports by Iowa’s *Des Moines Register*, for example, contributed to a push for state leaders to revisit licensing requirements for some professions.<sup>380</sup> The Institute for Justice has also represented individuals across the country in impact litigation against state licensing boards. In response to a lawsuit against Washington’s

---

<sup>373</sup> See Edlin & Haw, *supra* note 371, at 1098–99.

<sup>374</sup> See *id.* at 1102–06.

<sup>375</sup> See Patricia Cohen, *Yellow-Light Crusader Fined for Doing Math Without a License*, N.Y. TIMES (Apr. 30, 2017), <https://nyti.ms/2qmCdwC>.

<sup>376</sup> See, e.g., Dave Biscobing, *Governor Ducey Vetoes Health Board Reform Bill; Calls for Overhaul of State System*, ABC15 ARIZ. (May 19, 2016, 7:34 PM), <http://www.abc15.com/news/local-news/investigations/governor-ducey-vetoes-health-board-reform-bill-calls-for-overhaul-of-state-system> (describing an investigation revealing state’s dental board’s lack of transparency); Editorial, *Iowa Needs Comprehensive Job Licensing Review*, DES MOINES REG. (Jan. 24, 2017, 5:32 PM), <http://dmreg.co/2kqjI6D>.

<sup>377</sup> *About Us*, INST. FOR JUST., <http://ij.org/about-us> (last visited Nov. 8, 2017).

<sup>378</sup> See DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING (1st ed. 2012), <http://ij.org/wp-content/uploads/2015/04/licensetowork1.pdf>. A new edition of this report was released in 2017. DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING (2d ed. 2017), [http://ij.org/wp-content/themes/ijorg/images/ltw2/License\\_to\\_Work\\_2nd\\_Edition.pdf](http://ij.org/wp-content/themes/ijorg/images/ltw2/License_to_Work_2nd_Edition.pdf).

<sup>379</sup> See *Occupational Licensing*, INST. FOR JUSTICE, <http://ij.org/issues/economic-liberty/occupational-licensing> (last visited Nov. 8, 2017).

<sup>380</sup> See Editorial, *Iowa Rightly, Finally Sued over Job Licensing Law*, DES MOINES REG. (Oct. 28, 2015, 11:56 AM), <http://dmreg.co/1MizOVU> (noting that the newspaper’s editorial board had been encouraging reform by state leaders for over two years); see also, e.g., Brianne Pfannenstiel, *Branstad Urges Reform to Professional Licensing Requirements Despite Legislative Pushback*, DES MOINES REG. (Mar. 6, 2017, 1:20 PM), <http://dmreg.co/2mxdDdx>.

Department of Licensing, for example, the Department announced its agreement that African hair braiding did not require a license.<sup>381</sup>

The Institute for Justice's emerging crusade against state licensing boards represents a watchdog success, though it may be best understood as a workaround, rather than a vindication, of state civil society oversight. Judicial solutions to state regulatory failures require willing and able litigants. Yet state-based groups have not been active or effective in monitoring and challenging state licensing boards, even as those boards have operated in a notoriously insular, opaque, and self-protecting fashion. The Institute for Justice overcame these civil society deficits by launching an extremely well-resourced, national campaign.

#### IV

#### NORMATIVE DIMENSIONS AND REFORMS

At face value, the states' languid system of civil society oversight appears to undermine arguments for devolution of power to state governments. After all, the federalism literature, and the popular vernacular of devolution, rest heavily on arguments that states are closely guarded by and bound to their residents.<sup>382</sup> It is those purportedly close ties that facilitate much of what we praise about state-level control—including tailoring to local preferences and conditions, fostering civic engagement, and holding government accountable. Those same ties are supposed to ward off regulatory failure and capture. But state governance today is dominated by state executive agencies and a largely invisible bureaucracy. The executive action and inaction that ensue are often largely unmonitored by state civil society, or monitored in a highly uneven way, even as the federal experience shows that civil society oversight can be a critical safeguard on executive governance.

The full normative picture, however, is somewhat murkier. This Part first explores the normative critique of the lack of public checks on state administrative government, considering a number of reasons why this problem is either not so bad or simply intractable. Ultimately, I find that the status quo as I have described it is undesirable, but that there are real and structural obstacles to improving it. This Part concludes with potential ways to strengthen the state-level system

---

<sup>381</sup> See *Washington Hair Braiding*, INST. FOR JUST., <http://ij.org/case/washington-african-hair-braiding> (last visited Nov. 8, 2017) (summarizing the litigation and the Department's response).

<sup>382</sup> See *supra* notes 246–50 and accompanying text.

of civil society oversight, with the caveat that none are likely to be a complete, or completely satisfying, solution.

### A. *Justifications for the Status Quo*

There are several potential rebuttals to the notion that reformers should attempt to strengthen the watchdog community in the states.

A pair of initial rebuttals is easily resolved. First, civil society oversight is not an unmitigated good: In the abstract, there can be too much transparency,<sup>383</sup> too much accountability,<sup>384</sup> and too many checks.<sup>385</sup> Second, even where civil society oversight is valuable because it confers legitimacy and constraint, it may be fungible; other institutions, like the legislature or state courts, may provide the needed checks. These two points are valid, but are not apt given conditions in the states today. Civil society oversight is not close to being excessive, and even less so when it comes to the seemingly mundane business of state agencies rather than the most high-profile actions of governors. And, as I mentioned in Section II.B and have detailed in prior work, many states lack a robust system of checks to substitute for civil society oversight. Part-time or understaffed state legislatures, for example, are hardly constant monitors of executive behavior.<sup>386</sup>

An intermediate set of rebuttals also warrants consideration: Is the state administrative sphere really the problem? One could argue that invisibility is instead a feature of implementation itself, a trait that holds true regardless of which level of government does the implementing. In this view, the mundane, day-to-day details of implementation—whether by state or federal agencies—are not easily

---

<sup>383</sup> See, e.g., ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN* WRIT SMALL 181–82 (2007) (discussing problems associated with transparency, including that it may actually lead to lower-quality government deliberation and may empower “narrow interest groups”); Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 902 (2006) (cataloguing problems that would flow from “complete transparency,” including “logistical problems and expenditures,” as well as “infring[ing] upon the privacy interest of individuals who give personal information to the government”).

<sup>384</sup> See Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185, 195 (2014) (describing the possibility that agents will prioritize pandering to the public over professional competence).

<sup>385</sup> For arguments that this has occurred within the administrative process, see, for example, McGarity, *supra* note 53, and Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1493–94 (2012) (defending the longstanding thesis that the modern notice-and-comment rulemaking process is problematically slow and resource-intensive).

<sup>386</sup> See *supra* notes 239–42 and accompanying text; see also Woods & Baranowski, *supra* note 238, at 590–91 (arguing that even “professionalized” state legislators have limited incentives to monitor administrative agencies, because careerism spurs them to favor other uses of their time that offer more political benefits).

objects of public attention. The more specific and narrow any agency's work becomes, the harder it becomes for watchdogs to monitor it and to sustain collective interest in it. An agency's promulgation of permitting *standards*, for example, is a visible, one-time event; the individual permitting *decisions* that follow may be both harder to track and to understand without site-specific expertise. And indeed, when implementation falls to federal agencies, there are plenty of examples of federal agency regulatory failures, as well as lapses in federal civil society oversight. The federal agency responsible for pipeline safety, for example, was once widely viewed as captured, ineffective, and largely unguarded.<sup>387</sup>

There is, however, a response. The analysis in Part II shows that the core components of the state administrative sphere are each weaker or less conducive to watchdog operation than their federal counterparts. Thus, while decentralized implementation is undoubtedly more difficult to monitor than initial policy decisions, there are structural reasons to believe the state sphere amplifies these lapses.<sup>388</sup>

A final set of rebuttals is the most powerful: What if state-level civil society oversight cannot be fixed because the public simply would not care about state administration, even if it were easier to monitor? This rebuttal has several variants. First, perhaps states do not handle tasks that people care about. People care about high-profile national disputes, and they care about the zoning fights on their local block. State affairs, in contrast, may be lost in the boring and inconsequential middle.<sup>389</sup> This critique seems wrong. Although people may *associate* states with inconsequential, rote, or tedious tasks, state administration today governs—with ample discretion—much of what people hold most dear. In 1983, for example, William Gormley classified state regulatory issues as “low in salience” because they did not encompass the

---

<sup>387</sup> See, e.g., Lena Groeger, *Pipelines Explained: How Safe Are America's 2.5 Million Miles of Pipelines?*, PROPUBLICA (Nov. 15, 2012, 2:27 PM), <https://www.propublica.org/article/pipelines-explained-how-safe-are-americas-2.5-million-miles-of-pipelines> (explaining criticisms of the PHMSA).

<sup>388</sup> Though hardly a conclusive data point, a recent study shows that state-monitored pipelines fail more often than federally monitored ones. See NTSB SAFETY STUDY, *supra* note 298, at 26. I am not aware of empirical efforts to compare systematically state and federal regulatory outcomes. For one study in the banking context, see Sumit Agarwal et al., *Inconsistent Regulators: Evidence from Banking*, 129 Q.J. ECON. 889, 889 (2014) (finding that “federal regulators are systematically tougher” than their state counterparts in banking regulation, and linking state “leniency” to “costly outcomes, such as higher failure rates”).

<sup>389</sup> See Gormley, *supra* note 202, at 596 (stating that compared to federal regulatory issues, “state regulatory issues, such as insurance regulation, banking regulation, and occupational licensing, are typically low in salience. They do not stir the blood in quite the same way, nor do they arouse the indignation of so many journalists and citizens”).



issues that matter most to people, including “energy, environment, employment, health, safety, and quality-of-life issues.”<sup>390</sup> Today, state administration is prevalent in all of those issues.

A second strand of the impossibility critique strikes me as more plausible. Citizens’ appetite and endurance for information and government monitoring is finite.<sup>391</sup> At a time when national politics, and some local politics, prompt outrage and protest, people may have little energy left for state administration. This rebuttal seems to have some present explanatory power, as the Trump era has prompted a wave of protests and agitation against perceived presidential transgressions and missteps. Yet such fatigue may be irrational or misplaced: State administration may well affect people’s lives more than does the latest Trump scandal. Wherever that rationality gap persists, there ought to be at least the possibility of information and resource campaigns that motivate greater awareness and concern. The next Section sketches some possibilities.

### B. *Fostering Citizen Oversight*

There are a number of ways forward for those who wish to foster citizen oversight of state executive branches. Indeed, some of these efforts are already getting off the ground.

First, private foundations, charitable organizations, and individual philanthropists (with a wide range of budgets) can fund state watchdog groups, state-level media outlets, or state oversight activities by national groups. The Institute for Justice’s project on state licensing demonstrates the possible impact of large dollars and a well-oiled organization.<sup>392</sup> The Democracy Fund, for example, a foundation established by the billionaire philanthropist Pierre Omidyar, “invests in organizations working to ensure that our political system is able to withstand new challenges and deliver on its promise to the American people.”<sup>393</sup> Through its funding, organizations devoted to government transparency—like the Center for Public Integrity, Demos, and ProPublica—have received substantial grants.<sup>394</sup> But recipients need not necessarily (or optimally) be actors at the national level. Actors with roots and expertise in state institutions—who can specialize in

---

<sup>390</sup> See *id.* at 601, 604 (“Because state issues are seldom salient, citizens’ groups are rarely active at the state level.”).

<sup>391</sup> See, e.g., Downs, *supra* note 223, at 42 (noting that news “competes with other types of entertainment for a share of each person’s time”).

<sup>392</sup> See *supra* notes 377–81 and accompanying text.

<sup>393</sup> *About the Democracy Fund*, DEMOCRACY FUND, <http://www.democracyfund.org/about-us> (last visited Nov. 13, 2017).

<sup>394</sup> See *Our Investees*, DEMOCRACY FUND, <http://www.democracyfund.org/portfolio> (last visited Nov. 13, 2017).

state affairs—are linchpins of healthy civil society oversight in the states. The examples in Part III suggest that dedicated watchdogs of a state’s drinking water, pipelines, and voter registration would fill a gap, and that supporting organizations like California’s TURN and Maine’s Advertiser Democrat would be a public service.<sup>395</sup> Consistent with these observations, new pilot projects aimed at supporting local journalism are beginning to emerge.<sup>396</sup> Expanding these programs could provide a promising means of chipping away at civil society deficits in the states.

State officials, too, can play an important role in facilitating oversight.<sup>397</sup> State politicians and agencies themselves can increase their openness; the pipeline and licensing examples in Part III reflect states moving in that direction, at least after public attention turned to them.<sup>398</sup> State actors can also share best practices across borders, both vertically and horizontally. In the area of pipeline safety, for example, associations of state officials have informed federal regulators of problems they faced in their programs.<sup>399</sup> Such self-reporting will not curb state administrators bent on misconduct, but it can be fruitful for the majority of state officials who are well intentioned but face programmatic difficulties.

Finally, federal regulators could insist on better state monitoring as a condition of delegating authority to states in cooperative federalism programs,<sup>400</sup> and, as Eloise Pasachoff has argued, they could

---

<sup>395</sup> In addition, Hamilton’s book offers suggestions for sustaining investigative journalism in particular: “(1) real reform of [state and federal] FOIA laws; (2) changes in federal research and development policies and IRS nonprofit rules, both of which would flow from recognition of the market failures involved with public affairs reporting; and (3) truer implementation of open government and transparency policies.” HAMILTON, *supra* note 72, at 281.

<sup>396</sup> See *Join ProPublica’s New Project to Work with Local Newsrooms*, PROPUBLICA (Oct. 5, 2017, 8:00 AM), <https://www.propublica.org/article/join-propubicas-new-project-to-work-with-local-newsrooms> (announcing a grant to support one full-time reporter at up to six qualifying news organizations in cities with a population of less than one million people).

<sup>397</sup> Where regulatory failures result from inattention, it might seem optimal for state politicians simply to fund and motivate agencies better in the first instance, rather than facilitating public oversight that might spur such funding and motivating. Practically speaking, however, oversight and public appeals may be a precondition for such political decisions.

<sup>398</sup> See *supra* notes 322–27, 377–81 and accompanying text.

<sup>399</sup> See NTSB SAFETY STUDY, *supra* note 298, at 16 (describing the role of the National Association of Pipeline Safety Representatives).

<sup>400</sup> Cf. Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1854 (2015) (articulating the “increasing[ ]” importance of supervision by federal agencies to state-agency accountability, while also noting the significant role of “state oversight mechanisms”).

patrol federal requirements more aggressively.<sup>401</sup> I rank this suggestion last only because, at present, it is not clear the federal government has the appetite to amp up federal oversight, especially where it would result in greater regulatory enforcement.<sup>402</sup>

These suggestions are clearly not silver bullets. First and foremost, they may be unable to overcome the civil society fatigue described earlier.<sup>403</sup> In addition, it is possible that astroturf or sham groups could take advantage of new funding.<sup>404</sup> Bringing outside money into the state policymaking sphere could also dilute the distinctive character of a state's government. But with appropriate caution and realism, some combination of these efforts—and particularly the reinvigoration of state-level media outlets—seems worth attempting.

### CONCLUSION

The federal executive branch, through both the presidency and expansive administrative state, is checked today by a robust system of watchdogs. This checking culture has its limits, but by and large, commentators of varied stripes embrace it. By keeping public eyes on the most powerful branch of government, civil society can increase executive branch adherence to a host of public law values, including the rule of law.

We should hope for the same in the states. States today are not merely setting electricity rates and regulating banks—though even those tasks have proven consequential. Rather, whether as innovators or street-level implementers, states are at the fore of the many issues that will affect people's lives most: energy and the environment, voting, housing, education, healthcare, and much more.

Our fifty administrative states can do much good, but like any public institutions, they can also diverge from their charges. Civil society oversight—a linchpin of the modern separation of powers—can help. The present weaknesses in this system undermine some of

<sup>401</sup> See Pasachoff, *supra* note 233, at 322–26.

<sup>402</sup> See generally, e.g., Lisa Heinzerling, *The Legal Problems (So Far) of Trump's Deregulatory Binge*, 12 HARV. L. & POL'Y REV. (forthcoming 2018) (manuscript at 3), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3049004](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3049004) (describing the Trump administration as “racing to upend a wide variety” of regulations); *An Assessment of the White House's Progress on Deregulation*, ECONOMIST (Oct. 14, 2017), <https://www.economist.com/news/business/21730170-donald-trump-has-blocked-new-regulations-ease-repealing-old-ones-will-be-harder> (“Deregulation, along with tax cuts and trade reform, is one of the three pillars of President Donald Trump's economic agenda.”).

<sup>403</sup> See *supra* note 391 and accompanying text.

<sup>404</sup> Cf. Melissa J. Durkee, *Astroturf Activism*, 69 STAN. L. REV. 201, 229–32 (2017) (discussing astroturf activism in the international context as a strategy whereby entities approach lawmakers “through front groups that obscure the identity of the profit-seeking enterprise that is really the relevant actor”).

the most sacred arguments in favor of state power. Some of these weaknesses will be hard to change, but directing more dollars and attention to the states that govern us is a place to start.<sup>405</sup>

---

<sup>405</sup> To the extent these efforts begin to revitalize state and local civil society, additional benefits may follow. On the need to revive civil society to reduce economic inequality, see Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 *YALE L.J.* 148 (2013).