

# THE UNITARY GOVERNOR: EXECUTIVE ENERGY AND UNILATERAL ACTION IN STATE GOVERNMENT

CAESAR A. SCHANZENBACH\*

## I. INTRODUCTION

The philosophical underpinning of the American executive branch is its inherent and unique “energy” to act.<sup>1</sup> This concept is best understood in the federal context, in regard to the President.<sup>2</sup> A tremendous amount of scholarship has picked through the inner and outer limits of presidential power, from foreign affairs to the domestic agenda.<sup>3</sup> Indeed, the growth of presidential power has proven divisive, irrespective of the political affiliation of the President in office.<sup>4</sup> However, as these debates have raged on in litigation and public advocacy, a parallel trend amongst the states has largely

---

Copyright © 2024, Caesar A. Schanzenbach.

\* 2025 Juris Doctor, Capital University Law School. 2022 Bachelor of Arts, University of Tennessee, Knoxville. President of the Capital University Federalist Society and law clerk in the Office of Governor Mike DeWine, to whom and his team I owe a great deal. Thank you to Professor Bradley A. Smith for his dedication to maintaining a conservative presence in legal education, and for his close mentorship during my time at Capital. This note is dedicated to my friends: Daemon Rhein, David Shafar, Jacqueline Seifert, and MacKenzie Mueller. Your friendship and support have been indispensable in navigating law school; I am honored that we may begin our careers together.

<sup>1</sup> See THE FEDERALIST NO. 70 (Alexander Hamilton) (“Energy in the Executive is a leading character in the definition of good government.”).

<sup>2</sup> See, e.g., *Trump v. United States*, 603 U.S. 593, 610 (2024) (“The Framers [of our Constitution] sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority [of a branch of government] . . . .” (internal quotations omitted)); Adam J. White, *Ethics in the Executive Branch: The Constitutional Need to Preserve Presidential Energy*, 22 TEX. REV. L. & POL. 257, 261 (2018) (“Our Constitution depends on energy in the executive [branch].”).

<sup>3</sup> See, e.g., Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 260 (2009) (“Inconclusive debates over the scope of presidential power have erupted regularly throughout American history.”).

<sup>4</sup> See Erin Peterson, *Presidential Power Surges*, HARV. L. TODAY (July 17, 2019), <https://hls.harvard.edu/today/presidential-power-surges/> [<https://perma.cc/PE2Y-4STJ>].

gone unnoticed by the public.<sup>5</sup> Our nation's governors, as individual chief executives in a Union that embraces and reinforces federalism, also maintain an inherent "energy."<sup>6</sup> And they, too, increasingly test the waters on our common understanding of separation of powers.<sup>7</sup>

Two controversial examples include recent unilateral action taken by governors in the Southwest, frustrated by the political constraints of the state legislature, to further their policy goals.<sup>8</sup> In September 2023 in New Mexico, Governor Michelle Lujan Grisham directed the state Department of Health to issue a public health order in response to high levels of gun violence in Albuquerque.<sup>9</sup> The order forbade members of the public from carrying firearms about the city, and was met with backlash from Republicans and Democrats alike.<sup>10</sup> When the Sheriff of Bernalillo County (the seat of which is Albuquerque) denounced the political and constitutional virtues of the order, the Governor, undisturbed, cited to the exigency: "I don't need a lecture on constitutionality . . . what I need is *action*."<sup>11</sup>

During the same month, long-standing tensions over executive agency nominations in Arizona boiled over.<sup>12</sup> After the Republican-controlled state Senate rejected Democratic Governor Katie Hobbs's choice for the state

---

<sup>5</sup> See, e.g., Perla Trevizo, *Greg Abbott Ran as a Small-Government Conservative. But the Governor's Office Now Has More Power than Ever.*, TEX. TRIB. (Oct. 25, 2022, 5:00 AM), <https://www.texastribune.org/2022/10/25/greg-abbott-texas-governor/> [<https://perma.cc/V87N-RDY8>].

<sup>6</sup> See *Powers and Authority*, NAT'L GOVERNORS ASS'N, <https://www.nga.org/governors/powers-and-authority/> [<https://perma.cc/UTM6-U9MU>] ("Governors advance and pursue new and revised policies and programs . . .").

<sup>7</sup> See Walter Olson, *Are the Lockdown Orders Constitutional?*, CATO INST. (May 2, 2020), <https://www.cato.org/commentary/are-lockdown-orders-constitutional> [<https://perma.cc/82VX-HEZB>].

<sup>8</sup> See Zoë Richards, *New Mexico Governor's Gun Ban Draws Bipartisan Backlash*, NBC NEWS (Sept. 11, 2023, 7:28 PM), <https://www.nbcnews.com/politics/politics-news/new-mexico-governor-grishams-gun-ban-draws-bipartisan-backlash-rcna104500> [<https://perma.cc/5CSY-NCTE>]; see also Kevin Reagan, *Gov. Hobbs Withdrawing All Director Nominees from Senate Committee*, 12 NEWS, <https://www.12news.com/article/news/politics/gov-katie-hobbs-withdrawing-all-nominees-senate-committee-gop-democrats/75-70bf5340-510b-47c5-8887-4b5aa5095f94> [<https://perma.cc/5W6J-PZP9>] (Sept. 25, 2023, 5:07 PM).

<sup>9</sup> N.M. DEP'T OF HEALTH, PUBLIC HEALTH EMERGENCY ORDER IMPOSING TEMPORARY FIREARM RESTRICTIONS, DRUG MONITORING AND OTHER PUBLIC SAFETY MEASURES (2023).

<sup>10</sup> Richards, *supra* note 8.

<sup>11</sup> *Id.* (emphasis added).

<sup>12</sup> See Reagan, *supra* note 8.

Department of Housing, Hobbs, citing “partisan obstructionism,” withdrew the rest of her outstanding nominees from consideration.<sup>13</sup> She announced that “other lawful means” would instead be pursued to ensure that state government was staffed.<sup>14</sup> This manifested by installing these 13 nominees as “executive deputy directors” of their respective agencies through the appointment of “five minute” interim directors.<sup>15</sup> These deputy positions do not require Senate confirmation and allow for the automatic assumption of duties as director while the office is vacant.<sup>16</sup> Opposition was intense; the State Treasurer refused to recognize the right of some former nominees to sit as agency heads at meetings of the State Board of Investment.<sup>17</sup> Notwithstanding the controversy, Governor Hobbs’s justification was the same as in New Mexico: “[t]he people of Arizona elected me *to get things done*.”<sup>18</sup>

These examples stretch the common understanding of executive power and may continue to face legal challenges, as Governor Lujan Grisham’s order and its revisions already have.<sup>19</sup> Nonetheless, they reflect a shared comprehension at both the gubernatorial and presidential level that the nature of the executive office is one of action on demand.<sup>20</sup> This paper will argue that

---

<sup>13</sup> *Id.*

<sup>14</sup> Governor Katie Hobbs (@GovernorHobbs), TWITTER (Sept. 25, 2023, 3:30 PM), <https://twitter.com/GovernorHobbs/status/1706390655067451420> [<https://perma.cc/Q3MC-UFE2>].

<sup>15</sup> Howard Fischer, *Hobbs to Skip Confirmation for Agency Leaders in Showdown with Senate*, TUCSON.COM, [https://tucson.com/news/local/subscriber/arizona-governor-legislature-department-heads/article\\_068b44b6-5bdc-11ee-89f0-ab69cafae793.html](https://tucson.com/news/local/subscriber/arizona-governor-legislature-department-heads/article_068b44b6-5bdc-11ee-89f0-ab69cafae793.html) [<https://perma.cc/6F68-8QG4>] (Sept. 27, 2023).

<sup>16</sup> *Id.*

<sup>17</sup> Howard Fischer, *Yee Refuses to Recognize Hobbs’ ‘Executive Deputy Directors’*, ARIZ. CAPITOL TIMES (Sept. 27, 2023), <https://azcapitoltimes.com/news/2023/09/27/yee-refuses-to-recognize-hobbs-executive-deputy-directors/> [<https://perma.cc/9Z6V-DVAN>].

<sup>18</sup> Letter from Katie Hobbs, Governor, State of Ariz., to Warren Petersen, President, Ariz. S. (Sept. 25, 2023) (on file with author) (emphasis added).

<sup>19</sup> Susan Montoya Bryan, *Judge Blocks New Mexico Governor’s Suspension of Right to Carry Firearms in Public*, PBS NEWSHOUR, <https://www.pbs.org/newshour/politics/judge-considers-requests-against-new-mexico-governors-order-suspending-right-to-open-carry-firearms> [<https://perma.cc/7UQK-3B3R>] (Sept. 13, 2023, 6:18 PM); Rich McKay, *U.S. Judge Upholds Suspension of Right to Carry Guns in Some New Mexico Parks*, REUTERS, <https://www.reuters.com/legal/us-judge-upholds-suspension-right-carry-guns-some-new-mexico-parks-2023-10-12/> [<https://perma.cc/EM2R-C8H7>] (Oct. 12, 2023, 5:08 AM).

<sup>20</sup> See Hobbs, *supra* note 18 (“The people of Arizona elected me to get things done.”).

this is true and is justified by oft-shared vestments of authority in state constitutions.

Indeed, many of the nation's governors derive their respective constitutional authorities from the same text as the President.<sup>21</sup> Executive power, characterized by its unique energy, is unitary in nature and empowers governors to manage the affairs of their executive branches.<sup>22</sup> To this end, the doctrine of separation of powers commands respect for governors' ability to unilaterally act where appropriate, such as in the contexts of administrative rulemaking and the command of resources to achieve policy goals.<sup>23</sup>

Part II of this paper begins with an overview of the unitary executive theory, the Hamiltonian notion of executive energy, and various presidents' implicit reliance on their power to act as a justification for unilateral decisions. Part II will also touch on judicial responses to the expansion of federal executive power and the extent to which the federal judiciary has acknowledged that the presidency is a unitary creature. The discussion will then shift to the history of state constitutions, from original conceptions of tempered authority to the modern, general conformity with the federal constitutional model.

Part III makes two main arguments. First, that executive power vested in state constitutions should be read in the same manner as the federal constitution. This will include well-recognized analysis of state supreme court decisions that apply the separation of powers principle to state constitutions through analogy to federal jurisprudence. Second, that governors have a unitary prerogative to control state administrative rulemaking and provide direct oversight to agencies' activities, contrary to common legislative deference that is inconsistent with the federal understanding of executive power. In support of this argument, the Florida case *Whiley v. Scott*<sup>24</sup> is discussed critically, as well as an older case from Ohio with a similar holding.<sup>25</sup> The Part concludes with the argument that governors have the inherent power to command the resources within their control to achieve external policy goals, subject to the checks constitutionally exercised by state legislatures and the judiciary. The application of this principle was broadly

---

<sup>21</sup> Compare, e.g., OHIO CONST. art. III, § 5 ("The supreme executive power of this state shall be vested in the governor."), with U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

<sup>22</sup> *Powers and Authority*, NAT'L GOVERNORS ASS'N, <https://www.nga.org/governors/powers-and-authority/> [<https://perma.cc/MDF3-FTKG>].

<sup>23</sup> See *id.*

<sup>24</sup> 79 So.3d 702 (Fla. 2011).

<sup>25</sup> State *ex rel.* Dann v. Taft, 848 N.E.2d 472 (Ohio 2006).

seen at the outset of the COVID-19 pandemic, and since then, multiple governors have put it into practice for other ends.<sup>26</sup>

## II. HISTORICAL BACKGROUND

### A. *The Unitary Executive Theory*

A central debate over the ratification of the federal constitution concerned the proposed executive branch.<sup>27</sup> Anti-Federalists, such as New York Governor George Clinton, believed that an arrangement in which a single person is invested with executive power would eventually turn dictatorial.<sup>28</sup> In the Constitution's defense, Alexander Hamilton wrote a series of papers, incorporated into *The Federalist*, arguing that the exercise of presidential power would be kept in check by other constitutional functions.<sup>29</sup> Nonetheless, in *Federalist No. 70*, Hamilton did acknowledge that power and discretion would be a characteristic of the president.<sup>30</sup> He called this “[e]nergy in the Executive”—a necessary, inherent “vigour” which contributes not to dictatorship, but to “steady administration of the laws” and national security.<sup>31</sup> The foremost ingredient of this energy is unity of power in one individual.<sup>32</sup> A single executive is needed for the proper exercise of “[d]ecision, activity, secrecy, and despatch” necessary to effectively govern.<sup>33</sup>

This conceptualization of the American executive has led many—particularly over the last three decades—to debate presidential authority “in terms of the ‘unitary executive.’”<sup>34</sup> “Simply put, the term designates presidents’ ability to act unilaterally through executive orders, presidential signing statements, and the like,” as a function of the office’s unified control

---

<sup>26</sup> Andy Markowitz & Jenny Rough, *List of Coronavirus-Related Restrictions in Every State*, AARP, <https://www.aarp.org/politics-society/government-elections/info-2020/coronavirus-state-restrictions.html> [<https://perma.cc/7U52-D9UJ>] (Oct. 20, 2023); see N.M. DEP’T OF HEALTH, *supra* note 9.

<sup>27</sup> *The Debate Over the President and the Executive Branch*, CTR. FOR THE STUDY OF THE AM. CONST., <https://csac.history.wisc.edu/document-collections/constitutional-debates/executive-branch/> [<https://perma.cc/V885-A9QR>].

<sup>28</sup> *See id.*

<sup>29</sup> *See* THE FEDERALIST NOS. 67–77 (Alexander Hamilton).

<sup>30</sup> THE FEDERALIST NO. 70 (Alexander Hamilton).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Rogan Kersh, *Federalist No. 67: Can the Executive Sustain Both Republican and Energetic Government?*, 71 PUB. ADMIN. REV. (SPECIAL ISSUE) S90, S94 (2011).

over the executive branch.<sup>35</sup> At the core of the theory is this default power to take unilateral action, which channels the executive's inherent energy to act.<sup>36</sup>

As scholarship on the topic of presidential power has grown, the unitary executive theory has been used to explain the trend of expanding authority.<sup>37</sup> It is undisputed that presidents have increasingly relied on Article II to legitimize unilateral action.<sup>38</sup> As early as 1822, President James Monroe began the practice of issuing signing statements to supplement legislation; he clarified that a pending law would be executed in a manner so as to not conflict with his Article II power of appointing officers.<sup>39</sup>

The presidency of Abraham Lincoln was virtually premised on the chief executive's standalone decisions.<sup>40</sup> Within two months of his inauguration, he bypassed the weakened Congress and directed an expansion of the army and navy.<sup>41</sup> This was done despite the Constitution listing "[t]o raise and support Armies" and "[t]o provide and maintain a Navy" as enumerated powers of the legislature.<sup>42</sup> Further, Lincoln used these self-constituted forces to (arguably) make war in the absence of a congressional declaration.<sup>43</sup> His initial raising of 75,000 militiamen following the Battle of Fort Sumter also seemingly violated

---

<sup>35</sup> *Id.*; see also *Trump v. Mazars USA, LLP*, 591 U.S. 848, 868 (2020) ("The President is the only person who alone composes a branch of government."); *Trump v. United States*, 603 U.S. 593, 639–40 (2024) ("[U]nlike anyone else, the President is a branch of government, and the Constitution vests in him sweeping powers and duties.").

<sup>36</sup> THE FEDERALIST NO. 70 (Alexander Hamilton) ("That unity is conducive to energy will not be disputed.").

<sup>37</sup> See, e.g., Richard J. Pierce, Jr., *Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of The Unitary Executive by Steven G. Calabresi and Christopher S. Yoo*, 12 U. PA. J. CONST. L. 593, 595 (2010) ("Calabresi and Yoo claim that their research shows that all forty-three presidents believed in the theory of the unitary executive as they describe it . . .").

<sup>38</sup> See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("Particular reliance is placed on provisions in Article II which say that 'the executive Power shall be vested in a President' . . .").

<sup>39</sup> Presidential Signing Statements, 31 Op. O.L.C. 23, 26 (2007).

<sup>40</sup> See Michael Burlingame, *Abraham Lincoln: Impact and Legacy*, MILLER CTR., <https://millercenter.org/president/lincoln/impact-and-legacy> [<https://perma.cc/R2RS-GXDQ>] (describing Lincoln "[a]s the most activist President in history.").

<sup>41</sup> *Proclamation 83—Increasing the Size of the Army and Navy*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/proclamation-83-increasing-the-size-of-the-army-and-navy> [<https://perma.cc/X73P-K9RR>].

<sup>42</sup> U.S. CONST. art. I, § 8, CL. 12–13.

<sup>43</sup> See Burlingame, *supra* note 40.

Congress's prerogative to "call[] forth the Militia to . . . suppress Insurrections."<sup>44</sup> This course of action merely coincided with the exercise of *his* enumerated ability to call for an extraordinary session of Congress.<sup>45</sup> Perhaps the best remembered of President Lincoln's wartime actions was his nationwide proclamation suspending the writ of *habeas corpus*.<sup>46</sup> The controversial nature of this decision led Congress to briefly consider indemnifying the President for losses sustained in litigating his power to do so.<sup>47</sup> It ultimately decided to retroactively codify the proclamation on its own authority.<sup>48</sup>

Lincoln justified the unprecedented nature of his actions throughout the Civil War by emphasizing the need for resolute decision.<sup>49</sup> He recognized that "[t]he conditions of the Civil War brought various constitutional provisions into irresolvable conflict" with reality.<sup>50</sup> In the face of such conflicts, he reasoned that the crisis facing the Union allowed for unilateral "pro-constitutional actions" that "restore the conditions for honoring the Constitution."<sup>51</sup> As should be expected, Lincoln's warrant for such an outlook on presidential power was based on the energetic nature of the office: "[h]e had been elected . . . to take all measures required to deal with [the existing emergency]."<sup>52</sup> He believed that the president has a "special duty" to *act* in times of crisis.<sup>53</sup>

More than to simply protect the nation and fulfill the ends of the Constitution, presidents have cited their vested executive power in

---

<sup>44</sup> *Proclamation 80—Calling Forth the Militia and Convening an Extra Session of Congress*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/proclamation-80-calling-forth-the-militia-and-convening-extra-session-congress> [<https://perma.cc/9PZU-W2WK>]; U.S. CONST. art. 1, § 8, CL. 15.

<sup>45</sup> AM. PRESIDENCY PROJECT, *supra* note 41.

<sup>46</sup> *Proclamation 94—Suspending the Writ of Habeas Corpus*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/proclamation-94-suspending-the-writ-habeas-corpus> [<https://perma.cc/JWF3-CHXZ>].

<sup>47</sup> CONG. GLOBE, 37th Cong., 3d Sess. 14. (1862).

<sup>48</sup> Habeas Corpus Suspension Act of 1863, 12 Stat. 755 (1863).

<sup>49</sup> See Sotirios A. Barber & James E. Fleming, *Constitutional Theory, the Unitary Executive, and the Rule of Law*, 50 NOMOS 156, 158 (2011).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Burlingame, *supra* note 40.

<sup>53</sup> *Id.*

furtherance of self-serving policy.<sup>54</sup> For instance, Richard Nixon and his administration advocated for an absolute executive privilege over presidential communications.<sup>55</sup> Although the Supreme Court declined to deem such a privilege absolute, it nonetheless recognized its existence and presumptive enforceability.<sup>56</sup> The Court considered executive privilege to be one<sup>57</sup> of the “[c]ertain powers and privileges [that] flow from the nature of enumerated powers” and are “fundamental to the operation of Government.”<sup>58</sup> This authoritative internal privilege, too, is supported by the theoretical need to preserve executive action and flexibility.<sup>59</sup>

The Court’s ruling in *United States v. Nixon* is an important example of the federal judiciary’s general recognition of the unitary presidency. The implications of the theory have most directly been discussed in the historically controversial context of the presidential removal power.<sup>60</sup> In *Myers v. United States*,<sup>61</sup> former President and then-Chief Justice William H. Taft concluded that Article II vested in the president a unilateral power of removal over executive officers, incident to the enumerated appointment power.<sup>62</sup>

In *dicta*, the *Myers* Court framed its decision with the philosophical foundation of the unitary executive theory.<sup>63</sup> It reasoned that the “duties of

---

<sup>54</sup> See, e.g., *Statement About Executive Privilege*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/statOPerement-about-executive-privilege> [<https://perma.cc/9UE5-FGD4>] (“The doctrine of executive privilege is . . . rooted in the Constitution, which vests ‘the Executive Power’ solely in the President . . .”).

<sup>55</sup> See *United States v. Nixon*, 418 U.S. 683, 705 (1974).

<sup>56</sup> *Id.* at 708, 713.

<sup>57</sup> *I.e.*, the Court implied that there are others.

<sup>58</sup> *Id.* at 705, 708. The Supreme Court recently used *Nixon* to support its recognition of the president’s presumptive immunity from criminal prosecution for official acts. *Trump v. United States*, 603 U.S. 593, 613–14 (2024).

<sup>59</sup> AM. PRESIDENCY PROJECT, *supra* note 54 (“Without [the protection afforded by executive privilege] . . . the decisionmaking [sic] process of the executive branch could be impaired.”). See also Olivia B. Waxman, *President Trump Invoked Executive Privilege. Here’s the History of that Presidential Power*, TIME (June 13, 2019, 1:00 PM), <https://time.com/5605930/executive-privilege-history/> [<https://perma.cc/DE5Z-LFZE>] (quoting Jefferson in stating that Washington believed the president “‘ought to refuse [the disclosure of papers] which would injure the public.’”).

<sup>60</sup> See, e.g., *Myers v. United States*, 272 U.S. 52, 135 (1926); *Morrison v. Olson*, 487 U.S. 654, 685–90 (1988).

<sup>61</sup> 272 U.S. 52 (1926).

<sup>62</sup> See *id.* at 119.

<sup>63</sup> See *id.* at 135.

officers prescribed by statute come under the general administrative control of the President” in order to “secure [the] *unitary and uniform* execution of laws which Article II . . . evidently contemplated in vesting general executive power in the President *alone*.”<sup>64</sup> As distilled further, the “*energy*” of an executive officer is subject to the president’s supervision “in *his* administrative control.”<sup>65</sup>

Though the *Myers* Court took a strong stance in favor of unitary administrative control by the president, later Courts stepped away from Taft’s expansive rationale in emphasizing the energy inherent in Article II’s vestment clause.<sup>66</sup> In *Humphrey’s Executor v. United States*,<sup>67</sup> the Court construed *Myers* narrowly and explicitly “disapproved” of those rationales that are “out of harmony” with its holding that Congress may create limits on presidential removal of officers with quasi-legislative or judicial functions.<sup>68</sup> In *Morrison v. Olson*,<sup>69</sup> the Court similarly ruled on the act providing for the appointment of independent counsels.<sup>70</sup> There, Chief Justice Rehnquist opined that Congress’s vesting of the counsel’s removal power in the Attorney General and limiting its exercise to “good cause” did not unduly infringe on presidential authority.<sup>71</sup> The Court held that the judicial inquiry should only extend to whether the limit interferes with the president’s exercise of “executive power.”<sup>72</sup>

Despite the negative treatment towards a unitary executive branch, Justice Scalia’s now prominent dissent in *Morrison* found holes in the majority’s reasoning.<sup>73</sup> He pointed out that *Humphrey’s Executor* had been effectively “swept into the dustbin of repudiated constitutional principles” as the Court rejected the “purely executive” officer inquiry that case focused on.<sup>74</sup> And though the majority reiterated its disapproval of the broader strokes of *Myers’s dicta*,<sup>75</sup> Scalia emphasized that *Humphrey’s Executor* carried over the principle that the president alone remains a repository for “*all* executive

---

<sup>64</sup> *Id.* (emphasis added).

<sup>65</sup> *Id.* (emphasis added).

<sup>66</sup> *E.g.*, *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 626 (1935).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 626, 629.

<sup>69</sup> 487 U.S. 654 (1988).

<sup>70</sup> *See id.* at 689–90.

<sup>71</sup> *Id.* at 695–96.

<sup>72</sup> *Id.* at 689–90.

<sup>73</sup> *Id.* at 724–27 (Scalia, J., dissenting).

<sup>74</sup> *Id.* at 725.

<sup>75</sup> *Id.* at 687 n.24 (majority opinion).

power” under Article II.<sup>76</sup> As a prosecutor—independent or not—is “the virtual embodiment of the power to ‘take care that the laws be faithfully executed,’” Scalia worried that, despite the majority’s conclusion that *Myers* was “undoubtedly correct in its holding,” restricting the removal power meant that the Court had opened the door for constitutionally regressive experimentation by Congress.<sup>77</sup>

*Morrison*’s utility in refuting the virtues of a unitary executive is further weakened by Rehnquist’s own acceptance of some of the theory’s practical applications.<sup>78</sup> He embraced unilateral action justified by executive energy, particularly when it came to Lincoln’s view of the presidency.<sup>79</sup> For example, Lincoln advocated for the understanding that each branch of government maintains “coordinate, coequal authority” to interpret the Constitution for itself.<sup>80</sup> While such a position poses other questions, Rehnquist still summarized the separation of powers in this way in *Morrison*: “[t]ime and again we have reaffirmed the importance . . . of the separation of governmental powers into three *coordinate* branches.”<sup>81</sup> In addition, a critical analysis of Rehnquist’s “practical[] embrace[]” of *inter arma silent leges* noted his conceptual failure to see—as Lincoln otherwise did—the affirmative obligations of the executive to maintain “the conditions for constitutional democracy and the rule of law.”<sup>82</sup>

### B. State Constitutions & Executive Power

Much like the initial debates over the form of the federal executive, the form and function of executive branches in the states has been a central issue in the evolution of their constitutions.<sup>83</sup> The historical trend, however, has unmistakably been one of steady consolidation of independent executive

---

<sup>76</sup> *Id.* at 726 (Scalia, J., dissenting).

<sup>77</sup> *Id.*; *id.* at 690 (majority opinion).

<sup>78</sup> See Barber & Fleming, *supra* note 49, at 159.

<sup>79</sup> See *id.* (discussing Rehnquist’s embrace of *inter arma silent leges*, the idea that “during war, constitutional restraints are silent.”).

<sup>80</sup> Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227, 1241 (2008). See also Burlingame, *supra* note 40 (“Lincoln maintained that the President was one of the three ‘coordinate’ departments of government, not in any way subordinate to Congress or the courts.”).

<sup>81</sup> *Morrison*, 487 U.S. at 693.

<sup>82</sup> Barber & Fleming, *supra* note 49, at 159.

<sup>83</sup> See, e.g., Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 758 (2003) (identifying the need for “stable and energetic law execution” as a source of constitutional development).

power, now more or less mirroring the role of the federal presidency.<sup>84</sup> The present state of gubernatorial prerogative stands in stark contrast to the original manifestations of executive authority.<sup>85</sup>

Indeed, upon the shedding of the Crown as the all-powerful law enforcement arm of the government, the revolutionary states maintained their executive powers wholly within their legislative bodies.<sup>86</sup> Many legislatures, in turn, delegated executive authority to appointed “committees of safety.”<sup>87</sup> In Massachusetts, for instance, these committees were initially decentralized; they operated on the municipal level “to act as the general executive while the legal authority was in abeyance,” until they were eventually co-opted by the state.<sup>88</sup> These committees proved unstable.<sup>89</sup> They were English products, born in a similar situation as the national Committee of Safety established by Parliament at the beginning of the English Civil War.<sup>90</sup> There, the experiment of an executive beholden to the legislature failed because of “the problem of responsible government.”<sup>91</sup> The revolutionary states encountered the same problem: the energy required to sustain stable execution of the laws could not be found where governmental power was ultimately vested in one institution.<sup>92</sup> As states began to draft constitutions, this principle was voiced across the infant country.<sup>93</sup>

Many states first “adopted constitutions with a nominally separate executive.”<sup>94</sup> Some (predating the United States Constitution) chose to vest their governors with textual variations on “the supreme executive power.”<sup>95</sup> Still, “a proper separation of powers” was inhibited by a demanding distrust

---

<sup>84</sup> See, e.g., John A. Fairlie, *The Veto Power of the State Governor*, 11 AM. POL. SCI. REV. 473, 477 (1917) (naming North Carolina as the only state without the gubernatorial veto in 1917).

<sup>85</sup> See, e.g., Prakash, *supra* note 83, at 763.

<sup>86</sup> *Id.* at 757.

<sup>87</sup> *Id.*

<sup>88</sup> ENCYCLOPEDIA AMERICANA 325 (Frederick C. Beach et al. eds., 1904).

<sup>89</sup> Prakash, *supra* note 83, at 757–58.

<sup>90</sup> See Lotte Glow, *The Committee of Safety*, 80 ENG. HIST. REV. 289, 289 (1965) (“[P]arliament had to create for itself, without precedent, an executive which was efficient for war, responsible to parliament and easily dismissed when no longer needed.”).

<sup>91</sup> *Id.* at 312.

<sup>92</sup> Prakash, *supra* note 83, at 758.

<sup>93</sup> *Id.* at 757 (citing Maryland, North Carolina, Pennsylvania, and New York as examples).

<sup>94</sup> *Id.* at 758.

<sup>95</sup> *Id.*

of executive authority ingrained in American political culture.<sup>96</sup> “From the weakest to the strongest” early constitutional executives, their purpose was limited solely to the enforcement of law enacted by the legislatures.<sup>97</sup>

This limitation manifested in at least three primary ways: (1) leaving the exercise of executive authority under the explicit purview of the legislature; (2) denying governors’ veto authority; and (3) enforcing legislative dominance through direct appointment or very short terms in office.<sup>98</sup> State constitutions often provided that the executive’s authority could only be exercised “according to the laws.”<sup>99</sup> “Language like this fairly invited legislative interference” and left the nominal executive subordinate to the state legislature.<sup>100</sup> By the end of the American Revolution, only the Massachusetts constitution empowered its governor to unilaterally veto proposed laws.<sup>101</sup> The structural reservations of the early state constitutions preserved the issue of the stability still desired in the absence of the old monarchy—early governors lacked the energy necessary to be “responsible administrators.”<sup>102</sup>

Nonetheless, the formation of independent executives represents a first step toward the recognition of the unitary powers that characterize that branch of government.<sup>103</sup> And, indeed, further steps were taken as the nation grew, both in the legal and literal senses.<sup>104</sup> The ratification of the federal constitution and its strong executive branch brought new political exigency to state constitutional revision.<sup>105</sup> By 1800, about half of the original states had

---

<sup>96</sup> *Id.* at 759.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 760–61.

<sup>99</sup> *Id.* at 760 (citing the original constitutions of Delaware, Georgia, Maryland, North Carolina, and Virginia).

<sup>100</sup> CHARLES C. THACH, JR., *THE CREATION OF THE AMERICAN PRESIDENCY 1775–1789*, at 29 (1923).

<sup>101</sup> *How the First State Constitutions Helped Build the U.S. Constitution*, CONST. RTS. FOUND. 12, <https://www.crf-usa.org/images/pdf/gates/First-States-Constitution.pdf> [<https://perma.cc/K885-FA76>].

<sup>102</sup> Prakash, *supra* note 83, at 759 (citing MARGARET BURNHAM MACMILLAN, *THE WAR GOVERNORS OF THE AMERICAN REVOLUTION* 60 (1943)).

<sup>103</sup> *See id.* at 763 (“As a result of the lessons learned from the state constitutions, the federal executive power would be far more capable and powerful.”).

<sup>104</sup> *See, e.g.*, Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS 57, 63 (1982) (“Of the constitutions drafted in 1776–77, four lasted for more than half a century; the others were soon discarded.”).

<sup>105</sup> *Id.* (“Ratification of the national Constitution provided additional stimulus to the movement for state constitutional revision.”).

implemented new constitutions at least one time.<sup>106</sup> Furthermore, the election of President Andrew Jackson some 28 years later brought with it a newfound appreciation of the federal executive branch as a champion of the “common man.”<sup>107</sup> Jacksonian democracy was widely emulated at the state level: governors, in line with the federal constitution, soon found themselves with “a longer term, popular election, [and] restoration of the veto power.”<sup>108</sup>

Indeed, even before the pot boiled over in 1828, the popularity of legislative primacy was on the decline, largely due to widespread legislation favoring private interests and enhancing the status of other branches.<sup>109</sup> Most original constitutions of new states followed the federal format and provided governors a term of four years.<sup>110</sup> Such was the case in Illinois, which adopted its first constitution in 1818.<sup>111</sup> Indiana’s 1816 constitution left in place the unilateral gubernatorial veto, as did Wisconsin in 1848; both constitutions closely track the language used by the federal constitution to establish the president’s power to veto.<sup>112</sup> And although Ohio’s original 1802 constitution reflected legislative control in reaction to the powers maintained by the territorial governor,<sup>113</sup> its current form could be considered “incomplete” without the influence of the “complementar[y]” federal constitution.<sup>114</sup>

In kind with the evolution of the presidency (as detailed above) came the structural reforms that have left all state executives “modeled after the Federal Government.”<sup>115</sup> The presidency’s display of energy and versatility during the

---

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 64.

<sup>108</sup> *Id.* at 65.

<sup>109</sup> *Id.* at 64.

<sup>110</sup> *Id.* at 65.

<sup>111</sup> ILL. CONST. of 1818, art. III, § 3.

<sup>112</sup> Compare IND. CONST. of 1816, art. IV, § 22, and WIS. CONST. of 1848, art. V, § 10, with U.S. CONST. art. I, § 7, cl. 2.

<sup>113</sup> Nathaniel M. Fouch, “*A Document of Independent Force*”: Towards a Robust Ohio Constitutionalism, 49 U. DAYTON L. REV. 1, 46 (2023); *The Northwest Ordinance and Westward Expansion*, CONST. RTS. FOUND. 9, <https://www.crf-usa.org/images/pdf/gates/NorthwestOrdinance.pdf> [<https://perma.cc/SNA6-FL7D>].

<sup>114</sup> Nathaniel M. Fouch, *Comparing the State and Federal Constitutions*, OHIO STATE BAR ASS’N (Oct. 20, 2023), <https://www.ohiobar.org/member-tools-benefits/practice-resources/practice-library-search/practice-library/2023-ohio-lawyer/comparing--the-state-and--federal--constitutions/> [<https://perma.cc/L5NS-NRM5>] (citing DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 96 (1988)).

<sup>115</sup> See *State and Local Government*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/our-government/state-local-government/> [<https://perma.cc/MUA7-NUK4>].

Civil War led southern and border states to fully embrace independent executives in their Reconstruction constitutions: South Carolina, Virginia, Tennessee, and West Virginia established the veto power amidst Reconstruction.<sup>116</sup> By 1909, only North Carolina was left with a governor lacking this core power of the federal executive (and this was remedied in 1996).<sup>117</sup>

Modern state governments are only modeled after the federal government, however, and are not identical; the nation's constitutions were "written at different times, by different people and for different purposes."<sup>118</sup> It is notable, then, that as the role of the governor evolved from being subservient to the will of the legislature to having prerogatives equivalent to that of the president, many states have gone beyond the restraints of the federal constitution to craft unique executive powers.<sup>119</sup> The best example is the line-item veto: the power to reject portions of spending bills instead of rejecting the whole.<sup>120</sup> While this practice has been declared unconstitutional on the federal level as violative of the Presentment Clause,<sup>121</sup> 44 states vest this power in their governors.<sup>122</sup> Six states protect amendatory vetoes, which allow governors to formally amend proposed legislation and thereby directly participate in the lawmaking process.<sup>123</sup>

The authoritative role the modern governor plays in state government should not be left unrecognized. As sought after through Jacksonian revision and proved through the development of a strong federal example, the states' executive offices have been brought to a place characterized by an ability to act independently of—and, in some instances, exert direct influence on—the legislative branch.<sup>124</sup> The innovative decision to establish formal executive

---

<sup>116</sup> Fairlie, *supra* note 84, at 477.

<sup>117</sup> *Id.*; *Gubernatorial Veto Instituted, 1996*, N.C. DEP'T OF NAT. & CULTURAL RES. (Jan. 1, 2016), <https://www.dncr.nc.gov/blog/2016/01/01/gubernatorial-veto-instituted-1996> [<https://perma.cc/FT89-EGYR>].

<sup>118</sup> Fouch, *supra* note 114.

<sup>119</sup> See, e.g., Li Zhou, *How Wisconsin's Governor Bested the GOP and Secured Education Funding for 400 Years*, VOX (July 6, 2023, 3:12 PM), <https://www.vox.com/politics/2023/7/6/23786064/wisconsin-governor-tyony-evers-education-funding> [<https://perma.cc/UJ7S-QBYE>].

<sup>120</sup> *Id.*

<sup>121</sup> *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1996).

<sup>122</sup> Zhou, *supra* note 119.

<sup>123</sup> Daniel C. Vock, *Govs Enjoy Quirky Veto Power*, STATELINE (Apr. 24, 2007, 12:00 AM), <https://stateline.org/2007/04/24/govs-enjoy-quirky-veto-power/> [<https://perma.cc/6XH2-JSPH>].

<sup>124</sup> See *id.* (the discussion of amendatory vetoes).

departments hinged on the need for stability and “energetic law execution over the long term.”<sup>125</sup> Now, executive energy has been taken beyond mere curation by legislatures and buttressed by constitutional independence and unique functions not reflected in the federal government.<sup>126</sup>

### III. CONSTITUTIONAL SYNTHESIS & PRACTICAL USES OF GUBERNATORIAL POWER

#### A. *Federal & State Constitutional Synthesis*

Given that governors and the president now share much of the same textual authority, should gubernatorial power be interpreted with the same unitary theories as presidential power? It should—state vestment clauses operate in the same manner as the federal equivalent and, therefore, the federal unitary executive theory can be used to support relevant action by governors.<sup>127</sup> For this to be the case, intentionality must be shown, both in the spirit of the text and in actual application of federal principles on the separation of powers at the state level.

While, as the historical overview above helps to illustrate, the notion that modern state governments are “modeled” after the federal government is a truism,<sup>128</sup> the American legal principle of the separation of powers outdates the federal constitutional convention.<sup>129</sup> The states were first to adopt constitutions;<sup>130</sup> the issue, then, comes with how the federal framers utilized that precedent to inform the drafting of the federal system and executive branch. Professor Saikrishna Prakash argues that early state constitutions were of little help and served as “reminders of what to avoid”:<sup>131</sup>

The anemic and defenseless state executives were not the templates for the federal chief executive . . . . Unlike the divided state executives, the Constitution’s executive is unitary. Unlike the default state executives, the Constitution’s many executive powers cannot be modified by

---

<sup>125</sup> Prakash, *supra* note 83, at 758.

<sup>126</sup> See, e.g., John Haughey, *The Rise of State Governors and the Executive Powers They’ve Started to Wield*, FISCALNOTE (June 22, 2020), <https://fiscalnote.com/blog/state-governors-and-executive-powers> [<https://perma.cc/5Q7E-A98A>].

<sup>127</sup> Arch T. Allen, III, *A Study in Separation of Powers: Executive Power in North Carolina*, 77 N.C. L. REV. 2049, 2122 (1999).

<sup>128</sup> THE WHITE HOUSE, *supra* note 115.

<sup>129</sup> E.g., *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

<sup>130</sup> See, e.g., N.H. CONST. of 1776.

<sup>131</sup> Prakash, *supra* note 83, at 763.

ordinary legislation. Unlike the vulnerable state executives, the Constitution's executive enjoyed veto authority to help prevent Congress from usurping or dividing-and-conquering the executive power. Unlike the dependent state executives, the Constitution's executive is selected by electors (rather than the legislature) and enjoys a lengthy four-year term. Unlike the ineffectual state executives, the Constitution's executive plays the dominant role in selecting executive officers. As a result of the lessons learned from the state constitutions, the federal executive power would be far more capable and powerful.<sup>132</sup>

At a surface level, this is undoubtedly true.<sup>133</sup> Proponents of the federal constitution advocated for its strong formulation of the presidency because they sought to distance themselves from the weak constitutions that states had at the time.<sup>134</sup> However, this view is nonetheless simplistic and fails to take a holistic perspective on the influence state constitutions had on the development of the federal government. For just as Hamilton denounced the usefulness of the 18th century governor in defining what the presidency ought to be,<sup>135</sup> James Madison emphasized that the states—despite their individual weaknesses—served as the preeminent examples for the effective operation of the separation of powers.<sup>136</sup>

Specifically, Madison sought to defend against the Anti-Federalist argument that the constitution failed to uphold “the political maxim[] that the legislative, executive, and judiciary departments, ought to be separate and distinct.”<sup>137</sup> In the objectors' view, the constitutional scheme “distributed and blended [the branches] in such a manner as . . . to expose some of the essential parts . . . to the danger of being crushed by the disproportionate weight of other parts.”<sup>138</sup> Madison acknowledged this blending but sought to distinguish the separate principle of checks and balances from “the WHOLE power of one

---

<sup>132</sup> *Id.*

<sup>133</sup> *See, e.g.,* THE FEDERALIST NO. 70 (Alexander Hamilton) (arguing for a unitary executive in contrast to some states' practice of subjecting executive power “to the control and co-operation of others”).

<sup>134</sup> *See id.*

<sup>135</sup> *See id.*

<sup>136</sup> THE FEDERALIST NO. 47 (James Madison) (acknowledging that state constitutions have “many excellent principles” relative to the effective operation of separation of powers).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

department” being “exercised by the same hands which possess the WHOLE power of another department”—at which point “the fundamental principles of a free constitution are subverted.”<sup>139</sup> To do so, he looked toward the states as organic examples of government functionally respecting the separation of powers while still being “fully aware of the impossibility and inexpediency of avoiding any mixture” of power between the branches.<sup>140</sup>

For instance, Madison cited the Massachusetts constitution, which visited each branch and declared that it “shall never exercise” the power of the other two.<sup>141</sup> Although he called this language “less pointed” than other phrasing contained in contemporary counterparts,<sup>142</sup> the Massachusetts constitution went on to provide a clear policy for the separation of powers: “to the end it may be a government of laws and not of men.”<sup>143</sup> This maxim now undergirds American democracy and our concept of constitutionalism.<sup>144</sup> Its ubiquity within the national conscience serves as an easy example of the influence state constitutions had on the principles that laid the foundation for the federal government.<sup>145</sup> It should be agreeable, then, that theory based on federal separation of powers has weight when applied to the states.<sup>146</sup>

Justice Scalia implicitly made this argument in *Morrison v. Olson*: his analysis of the unitary presidential removal power, based on separation of powers theory, began with the recitation of the “laws, not men” maxim of the 1780 Massachusetts constitution.<sup>147</sup> “The Framers of the Federal Constitution *similarly* viewed the principle of separation of powers,” he prefaced.<sup>148</sup> In other words, Scalia acknowledged that state law had given the separation of powers its teeth in the federal context, from which the executive vesting clause can be understood to have a unitary nature.<sup>149</sup> Again, the federal framers did think that the president ought not be like the weak governors that dominated

---

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*; MASS. CONST. of 1780, art. XXX.

<sup>142</sup> THE FEDERALIST NO. 47 (James Madison).

<sup>143</sup> MASS. CONST. of 1780, art. XXX.

<sup>144</sup> See, e.g., Jeffrey H. Smith, *Of Laws, Not Men*, JUST SEC. (June 9, 2017), <https://www.justsecurity.org/41969/laws-men/> [<https://perma.cc/J9PL-7DC8>] (“Those old enough to remember Watergate will recall that ‘we are a government of laws, not men’ became a mantra. It was repeated so often as to risk banality.”).

<sup>145</sup> *Id.*

<sup>146</sup> See *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> See *id.*

the nation's executive branches at the time.<sup>150</sup> But just as Hamilton distinguished specific checks and balances from broader separation of powers,<sup>151</sup> so too did Scalia in *Morrison*.<sup>152</sup> He identified that the framers' "fortification" of executive authority through the installation of the veto power and rejecting multiple executives merely "achieve[d] the separation of powers" that otherwise existed in principle.<sup>153</sup>

Notwithstanding *Morrison*'s support for the argument that the states' adoption of the separation of powers principle was a necessary antecedent for the development of the unitary executive theory, modern state courts have often used interpretation of federal separation of powers doctrine to analogize gubernatorial power to that of the president.<sup>154</sup> This often arises (to say nothing of the topic's politically controversial nature) in the context of executive privilege, the conception of which came from federal law and the United States Constitution.<sup>155</sup>

In 2005, the *Toledo Blade* published an article exposing the Ohio Bureau of Worker's Compensation for investments made to a rare coins fund managed by a powerful Republican donor.<sup>156</sup> State Senator Marc Dann then made requests for public records, asking Governor Bob Taft for hundreds of weekly reports from the bureau's administrator.<sup>157</sup> The Governor refused to fulfill most of the requests, claiming the reports were "protected by the executive privilege."<sup>158</sup> In taking up *State ex rel. Dann v. Taft*, the Ohio Supreme Court was tasked with deciding whether the governor did have an inherent privilege over communications.<sup>159</sup>

The court held that the privilege did exist and could be enforced.<sup>160</sup> It came to this conclusion by analogies to (1) the presidential vesting clause and

---

<sup>150</sup> See THE FEDERALIST NO. 70 (Alexander Hamilton) ("A feeble Executive implies a feeble execution of the government.").

<sup>151</sup> THE FEDERALIST NO. 47 (James Madison).

<sup>152</sup> *Morrison v. Olson*, 487 U.S. at 698–99 (Scalia, J., dissenting).

<sup>153</sup> *Id.*

<sup>154</sup> See, e.g., *State ex rel. Dann v. Taft*, 848 N.E.2d 472, 483–84 (Ohio 2006).

<sup>155</sup> See *id.*; *United States v. Nixon*, 418 U.S. 683, 704 (1974).

<sup>156</sup> Mike Wilkinson & James Drew, *Ohio Agency Sinks Millions Into Rare Coins*, THE BLADE (Apr. 3, 2005, 4:52 AM), <https://www.toledoblade.com/frontpage/2005/04/03/Ohio-agency-sinks-millions-into-rare-coins.html> [<https://perma.cc/YUT7-NFJ4>].

<sup>157</sup> *Taft*, 848 N.E.2d at 476.

<sup>158</sup> *Id.* (internal quotations omitted).

<sup>159</sup> *Id.* at 475.

<sup>160</sup> *Id.* at 484 ("We agree with the unassailable premise established in *Nixon* [on executive privilege].").

(2) federal separation of powers jurisprudence.<sup>161</sup> First, the court noted that the Ohio constitution vests the governor with “[t]he supreme executive power,” along with a duty to faithfully execute laws.<sup>162</sup> It thus reasoned that the state constitution vests the governor with “authority comparable to that of executive authority exercised by the President.”<sup>163</sup> Second, recognizing that the executive branch shared a “rough equality” with the other branches, the court repeated its understanding that the “doctrines [of separation of powers] is implicitly embedded in the entire framework [of state government].”<sup>164</sup> As the doctrine requires that “each branch . . . be permitted to exercise its constitutional duties without interference from the other[s],” the court found the privilege to be in the interest of providing the governor the freedom necessary to make executive decisions—“the same interest[] advanced by the analogous presidential privilege.”<sup>165</sup>

A few years after this case, the New Mexico Supreme Court was presented with a similar situation.<sup>166</sup> In *Republican Party of New Mexico v. New Mexico Tax’n & Revenue Dep’t*, petitioner had requested public records pertaining to the issuance of driver’s licenses to foreign nationals and a related audit ordered by Governor Bill Richardson.<sup>167</sup> The state produced the requested documents, but certain information was redacted under a claim of executive privilege.<sup>168</sup> The court was called upon to decide to what extent gubernatorial privilege could be validly invoked when stacked against statutory public records law.<sup>169</sup>

The *Republican Party of New Mexico* case is important because the court reaffirmed the principles by which it recognizes gubernatorial executive privilege.<sup>170</sup> Specifically, as in *Taft*, the court identified that the governor “is vested [with] the ‘supreme executive power of the state’” under New Mexico’s constitution.<sup>171</sup> Because the state constitution also provides a

---

<sup>161</sup> *Id.* at 483–84.

<sup>162</sup> *Id.* at 483 (quoting OHIO CONST. art. III, § 5) (internal quotations omitted).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* (quoting *City of South Euclid v. Jemison*, 503 N.E.2d 136, 138 (Ohio 1986)).

<sup>165</sup> *Id.* at 484.

<sup>166</sup> *Republican Party of New Mexico v. New Mexico Tax’n & Revenue Dep’t*, 283 P.3d 853, 860 (N.M. 2012).

<sup>167</sup> *Id.* at 856–57.

<sup>168</sup> *Id.* at 857.

<sup>169</sup> *Id.* at 856 (“[I]t falls on this Court to delineate under what circumstances the executive may properly invoke [its] privilege pursuant to [the state sunshine law].”).

<sup>170</sup> *Id.* at 868.

<sup>171</sup> *Id.* at 856 (quoting N.M. CONST. art. V, § 4); *State ex rel. Dann v. Taft*, 848 N.E.2d 472, 483 (Ohio 2006).

separation of powers clause (unlike in Ohio),<sup>172</sup> the court needed only to analogize to federal caselaw on presidential privilege (*i.e.*, *United States v. Nixon*<sup>173</sup>) for the conclusion that *state* separation of powers requires “recognition of an executive privilege [over communications].”<sup>174</sup> The New Mexico Supreme Court had previously identified that the decision-making interest behind presidential privilege supports a finding that privilege is “inherently necessary” under a state’s own application of the separation of powers principle.<sup>175</sup>

*Taft* and *Republican Party of New Mexico* are just two examples of state supreme courts interpreting the operation of their respective constitutions’ vesting clauses by reference to federal jurisprudence on what the doctrine of separation of powers requires.<sup>176</sup> Other state courts have done the same within the context of executive privilege.<sup>177</sup> This line of cases shows that principles developed within the federal understanding of separation of powers have tremendous weight when applied to modern state constitutions.

This is not just true of executive privilege—state courts have also incorporated the federal constitution’s nonjusticiable political question doctrine into state jurisprudence through analysis of federal separation of powers.<sup>178</sup> In *Gilbert v. Gladden*, the New Jersey Supreme Court was tasked with determining whether the informal practice of “gubernatorial courtesy” (which allowed for a variation of the pocket veto) was permissible under the state constitution’s presentment clause.<sup>179</sup> In coming to the conclusion that the dispute was nonjusticiable under state law, the court looked to federal precedent, namely *Baker v. Carr*.<sup>180</sup> It held that separation of powers, as a

<sup>172</sup> See N.M. CONST. art. III, § 1.

<sup>173</sup> 418 U.S. 683 (1974).

<sup>174</sup> *Republican Party of New Mexico*, 283 P.3d at 866 (quoting *State ex rel. Att’y Gen. v. First Jud. Dist. Ct. of New Mexico*, 629 P.2d 330, 333 (N.M. 1981)).

<sup>175</sup> *First Jud. Dist. Ct. of New Mexico*, 629 P.2d at 333.

<sup>176</sup> *Taft*, 848 N.E.2d 472, 483–84 (Ohio 2006); *Republican Party of New Mexico*, 283 P.3d at 865–66.

<sup>177</sup> See, e.g., *Nero v. Hyland*, 386 A.2d 846, 853 (N.J. 1978) (“[T]he Governor, as chief executive, must be accorded a qualified [executive privilege]. This power is analogous to the constitutionally-based privilege of the President.”); *Mathews v. Pyle*, 251 P.2d 893, 896 (Ariz. 1952) (“The Governor should be given the authority to deny in the first instance the right of inspection if he thinks that the document is privileged.”).

<sup>178</sup> See, e.g., *South Carolina Pub. Int. Found. v. Jud. Merit Selection Comm’n*, 632 S.E.2d 277, 278–79 (S.C. 2006); *Gilbert v. Gladden*, 432 A.2d 1351, 1354 (N.J. 1981).

<sup>179</sup> *Gilbert*, 432 A.2d at 1353.

<sup>180</sup> *Id.* at 1354; *Baker v. Carr*, 389 U.S. 186 (1962).

doctrine, is “*shared*” by states and the federal government, and, as stated in *Baker*, the ““nonjusticiability of a political question is primarily a function of the separation of powers.””<sup>181</sup> The court continued by stating the “[United States] Supreme Court has provided us with guidance” as to what a political question is, through *Baker*; that definition was thereafter followed.<sup>182</sup> The word “us” presumably refers to the states at large and not New Jersey in particular<sup>183</sup>; *Gilbert* therefore implicitly held that the fruits of federal separation of powers theory fall onto the states.<sup>184</sup>

As this line of case law illustrates, state courts have strongly favored the view that the separation of powers acts as a doctrinal bridge between federal and state government, despite the existence of otherwise distinct constitutions, as well as sovereigns which those constitutions govern.<sup>185</sup> From this understanding springs the operative notion that, because the unitary executive theory is premised upon the separation of powers,<sup>186</sup> state gubernatorial vesting clauses should be read in the same manner as Article II’s equivalent and the unitary theory derived from it. State courts have paved the way for governors to argue that their vested power is buttressed by a whole realm of jurisprudential and academic thinking on the nature of the presidency—and they should feel justified when acting in accordance with it.<sup>187</sup>

There could likewise be great value for governors to explore the extent of their vested power on this basis.<sup>188</sup> Justice Brandeis believed it “one of the happy incidents” of federalism that states may “try novel social and economic experiments without risk to the rest of the country.”<sup>189</sup> Innovative

---

<sup>181</sup> *Gilbert*, 432 A.2d at 1354 (emphasis added) (quoting *Baker*, 389 U.S. at 210).

<sup>182</sup> *Id.* at 1354–1355.

<sup>183</sup> See, e.g., *South Carolina Pub. Int. Found.*, 632 S.E.2d at 279 (“Likewise, other state courts have declined to answer political questions when Constitutional provisions grant the power to another branch of government.”).

<sup>184</sup> See *Gilbert*, 432 A.2d at 1354.

<sup>185</sup> See *State ex rel. Dann v. Taft*, 848 N.E.2d 472, 483 (Ohio 2006).

<sup>186</sup> See *Morrison v. Olson*, 487 U.S. 654, 704 (1988) (Scalia, J., dissenting) (“I begin with a consideration of the fountainhead of [executive power] jurisprudence, the separation and equilibration of powers.”).

<sup>187</sup> See *Taft*, 848 N.E.2d at 484.

<sup>188</sup> See Benjamin B. Klubes, *Laboratories of Democracy: A New Breed of Governor Creates Models for National Growth*, 26 HARV. J. ON LEGIS. 680, 685 (1989) (opining that the “greatest significance” of David Osborne’s book *Laboratories of Democracy* “may not be as an index of [gubernatorial] programs or the articulation of a vision, but rather as a challenge to aspiring leaders to find persuasive answers to voters’ hard questions”).

<sup>189</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

gubernatorial action could establish favorable precedents for other states or on the national level.<sup>190</sup> Or, at the least, exploration and any controversy that follows could shed light on the unique history of states' constitutions and clarify original public meaning.<sup>191</sup>

*B. Practical Applications of Unitary Gubernatorial Power*

Gubernatorial action often reflects familiar presidential power.<sup>192</sup> “[Governors] manage the bureaucracy and help set the policy agenda through speeches, calling special sessions or taking unilateral action [through executive orders].”<sup>193</sup> These functions, as in the case of the presidency, channel the fundamental exigency of a separate, unitary executive: the necessary energy to govern dynamically.<sup>194</sup> Indeed, it is “true for governors” that the use of executive orders is a foundational method to “quickly alter policy” and “direct agencies, particularly in disparaging political environments.”<sup>195</sup> However, despite the parallel roles of governor and president and the analogous vested powers of those offices, state courts have traditionally viewed governors' participation in agency management and policymaking with a different lens than federal courts have with the president.<sup>196</sup> This is inconsistent and an error—unless the state constitution provides contrary guidance, state vesting clauses remain operative.<sup>197</sup> By virtue of the separation of powers, governors maintain the ability to manage

---

<sup>190</sup> See, e.g., Klubes, *supra* note 188, at 681 (recounting President Franklin Roosevelt's exclamation that “[p]ractically all the things we've done in the federal government are like things Al Smith did as governor of New York” (internal quotations omitted)).

<sup>191</sup> See Fouch, *supra* note 114 (noting that the federal and state constitutions “were written at different times, by different people and for different purposes”).

<sup>192</sup> Mitchell Dylan Sellers, *Gubernatorial Use of Executive Orders: Unilateral Action and Policy Adoption*, 37 J. PUB. POL'Y 315, 315 (2017) (“Presidents develop policies formally through unilateral action . . . . Governors fill an analogous role within their states.”).

<sup>193</sup> *Id.*

<sup>194</sup> See, e.g., Kenneth R. Mayer, *Executive Orders and Presidential Power*, 61 J. POL. 445, 446 (1999) (noting that executive orders are used by presidents “as a symbol of their intent to act decisively”).

<sup>195</sup> Sellers, *supra* note 192, at 319.

<sup>196</sup> Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537, 1543 (2019) (“Unlike federal courts, most state courts have not elected to create an overarching, transsubstantive doctrine of agency independence.”).

<sup>197</sup> *Id.* at 1543, 1560, 1576.

the affairs of their state bureaucracy and can advance policy through it to the extent possible under the state constitution and law.<sup>198</sup>

The jurisprudence of state administrative rulemaking and agency independence remains one of the greatest sources of tension with the theory of unitary gubernatorial prerogative.<sup>199</sup> As governors have tried to exercise unilateral supervisory and removal powers over the years, state courts have produced a mixed grab-bag of doctrines and results.<sup>200</sup> This inconsistency is likely explained by the fact that state courts approach such controversies in a vacuum: “there is virtually no systematic attention to the concept, theory, or practice of agency independence in the states.”<sup>201</sup> Relationships within state executive branches are further complicated by the frequent inclusion of other executive officers in the constitutional scheme, such as an attorney general and secretary of state.<sup>202</sup> This additional complexity has spawned its own dedicated, diverse case law.<sup>203</sup>

However, certain traditions have formed contrary to our understanding of how courts interpret analogous presidential powers over appointed executive officers.<sup>204</sup> These include a view that “removal is not an inherent executive power” of a governor (opposite of the Supreme Court’s holding in *Myers*) and a strong “deferential standard” towards state legislation as an exercise of the state’s general plenary authority.<sup>205</sup> In cases testing the supervisory role of a governor over his or her administration, state courts therefore have a tendency to “reach broad rulings in favor of either independence or gubernatorial power,

---

<sup>198</sup> *Id.* at 1559.

<sup>199</sup> *See id.* at 1545 (“State legislatures, for their part, have run with their power to shape the independence of state officials.”).

<sup>200</sup> Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 515 (2017) (“Even within a state, decisional law on executive power is often vague and sometimes at odds with apparent constitutional foundations.”); Miriam Seifter, *Understanding State Agency Independence: Appendices*, SOC. SCI. RSCH. NETWORK *passim*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3369026](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3369026) [<https://perma.cc/L434-XEJC>] (Apr. 12, 2023).

<sup>201</sup> Seifter, *supra* note 196, at 1541.

<sup>202</sup> *Id.* at 1541–42.

<sup>203</sup> *See id.* at 1572–74 (“[T]hese rulings are all over the map.”).

<sup>204</sup> *See, e.g., id.* at 1570 (“The majority of state courts part ways with the federal approach on one or both [of the modern premises of the executive removal power].”).

<sup>205</sup> *Id.* at 1561, 1568; Robert A. Schapiro, *Judicial Deference and Interpretive Coordination in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 693–94 (2000).

but most [nonetheless] defer to the legislature.”<sup>206</sup> This is, of course, not the trend with respect to the president’s supervisory and removal powers.<sup>207</sup>

Notwithstanding the rich debate on necessary and state-specific restrictions on the relationship between a governor and other constitutional executive officers, these standards have created case law that misunderstand the unitary nature of vested gubernatorial power.<sup>208</sup> For example, a recent trend amongst conservative governors has seen unilateral pauses on executive agency rulemaking in the name of public accountability.<sup>209</sup> In Florida, Governor Rick Scott’s attempt to do the same was met with a lawsuit claiming overreach, due to the legislature’s statutory grant of rulemaking authority to the affected agencies.<sup>210</sup> In *Whiley v. Scott*, the Florida Supreme Court agreed—it held that, because “[r]ulemaking is a derivative of lawmaking,” it is a “legislative function [that] the Legislature has expressly placed . . . in the [appointed] department head[] and not in the Governor,” preventing the latter’s ability to control it.<sup>211</sup>

This holding cannot be right, and it would not be right if analyzed under the federal constitution. Despite the *Whiley* court’s attempt to separate the governor’s “power to remove” at-will officers from the “power to control” them,<sup>212</sup> this distinction is one of the inconsistent “divergent rules” recognized by state courts through misplaced deference to state law.<sup>213</sup> The Florida Constitution vests the governor with “supreme executive power.”<sup>214</sup> The

---

<sup>206</sup> Seifter, *supra* note 196, at 1574 (emphasis added).

<sup>207</sup> See *Morrison v. Olson*, 487 U.S. 654, 690 (1988) (“*Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some ‘purely executive’ officials who *must* be removable by the President at will if he is to be able to accomplish his constitutional role.” (emphasis added)); *Edmond v. United States*, 520 U.S. 651, 664 (1997) (“The power to remove officers, we have recognized, is a powerful tool for control.”).

<sup>208</sup> See, e.g., *Whiley v. Scott*, 79 So. 3d 702 (Fla. 2011); *State ex rel. S. Monroe & Son Co. v. Baker*, 147 N.E. 501 (Ohio 1925).

<sup>209</sup> Press Release, Iowa Governor Kim Reynolds, Gov. Reynolds Signs Executive Order Directing Administrative Rulemaking Moratorium and Review (Jan. 11, 2023) (on file with author); Press Release, Office of Alabama Governor Kay Ivey, Governor Ivey Issues Executive Order to Cut Red Tape for Citizens and Businesses (Mar. 8, 2023) (on file with author).

<sup>210</sup> *Whiley*, 79 So. 3d at 706.

<sup>211</sup> *Id.* at 710, 715.

<sup>212</sup> *Id.* at 715.

<sup>213</sup> Seifter, *supra* note 196, at 1576, 1576 n.243 (noting that the decision rested solely on state statutes that were amended in the governor’s favor following the ruling).

<sup>214</sup> FLA. CONST. art. IV, § 1(a).

court’s holding, insulating executive agencies from gubernatorial control, “impl[ies] legislative authority to create appointed agency heads with the ability to exercise executive power independent from the governor.”<sup>215</sup> If a federal case, this principle would fly in the face of our understanding that the president may control purely executive officers by operation of the Vesting Clause.<sup>216</sup> Had a traditional separation of powers analysis been used (as in executive privilege and political question cases),<sup>217</sup> it is likely that the statute would have given way to the unitary power of the governor.

Another example of unwarranted inconsistency by state courts can be found in *State ex rel. S. Monroe & Son Co. v. Baker*.<sup>218</sup> There, Ohio Governor Vic Donahey had involved himself in awarding contracts for public infrastructure projects, issuing commands to department heads through executive orders.<sup>219</sup> The Ohio Supreme Court balked at the Governor’s argument that at-will executive officers “do not have such independent discretion . . . as will permit them to act contrary to the Governor’s will.”<sup>220</sup> Instead, the court deferred to the legislature.<sup>221</sup> It held wholesale that “[s]tate officials in the executive departments are not in any sense deputies of the Governor . . . except in those instances where it is otherwise provided [by the legislature].”<sup>222</sup> A judicially-imposed rule that vested gubernatorial authority “is not supreme in the sense that he may dominate the course . . . and control the discretion of other executive officers of inferior rank” seems simply antithetical to the common understanding of the role of a chief executive.<sup>223</sup>

---

<sup>215</sup> Eric Miller, *Whiley v. Scott: Misinterpreting Florida’s Historical Scope of Constitutional Executive Power*, 43 SETON HALL LEGIS. J. 1, 36 (2019) (emphasis added).

<sup>216</sup> See *Edmond v. United States*, 520 U.S. 651, 664 (1997) (“The power to remove officers, we have recognized, is a powerful tool for control.”).

<sup>217</sup> See *Myers v. United States*, 272 U.S. 52, 126 (1926).

<sup>218</sup> 147 N.E. 501 (Ohio 1925).

<sup>219</sup> *Id.* at 503.

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

<sup>221</sup> *Id.* at 504 (“[G]eneral law-making power is conferred upon the legislative branch of the government.”).

<sup>222</sup> *Id.* at 505 (emphasis added).

<sup>223</sup> *Id.* at 504; *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 627 (1935) (“[A]n officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, *whose subordinate and aid he is.*” (emphasis added)); OHIO LEGIS. SERV. COMM’N, A GUIDEBOOK FOR OHIO LEGISLATORS 115 (2023) (“The Governor supervises [legislatively established] departments and agencies.”).

Nevertheless, *Baker* is still good law, though it is at odds with the court's more recent understanding of the state vesting clause in *State ex rel. Dann v. Taft*.<sup>224</sup>

The latter understanding is, of course, the better to choose as a legal principle. An energetic, functional executive requires unity in its powers.<sup>225</sup> The maintenance of an integrated, unitary executive requires the other branches of government to respect that unity in turn.<sup>226</sup> This is one of the functions of the separation of powers doctrine, which bridges federal and state governments and provides consistency in the application of the unitary executive theory.<sup>227</sup> If it is to be used when identifying the contours of a governor's "supreme executive power"—as this paper argues it should—then governors have the ability to act unilaterally within their executive branches and bureaucracies.<sup>228</sup>

The discretion to direct the course of executive agencies allows governors to additionally achieve external policy goals.<sup>229</sup> Of course, like the president, governors are widely subject to the constitutional command to take care that the laws are faithfully executed.<sup>230</sup> From this command springs both the authority of executives to issue orders and the judiciary to review whether this was properly done, pursuant to statute or enumerated constitutional power.<sup>231</sup> Despite this basic restraint, necessary as a check on the executive,<sup>232</sup> governors should not feel restrained in their ability to unilaterally allocate resources in fields where the legislature has not yet regulated. Indeed, pursuing "new administrative goals" within issue areas "devoid of [legislative]

---

<sup>224</sup> 848 N.E.2d 472, 483 (Ohio 2006).

<sup>225</sup> THE FEDERALIST NO. 70 (Alexander Hamilton) ("That unity is conducive to energy will not be disputed.").

<sup>226</sup> See *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (prefacing that separation of powers, as derived from state constitutions, is the "absolutely central guarantee of a just Government.").

<sup>227</sup> See *id.*

<sup>228</sup> Kersh, *supra* note 34, at S94.

<sup>229</sup> Sellers, *supra* note 192, at 319.

<sup>230</sup> U.S. CONST. art. II, § 3. See, e.g., OHIO CONST. art. III, § 6; GA. CONST. art. V, § 2, para. 2.

<sup>231</sup> See, e.g., *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 885 (Pa. 2020); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue [an] order must stem either from an act of Congress or from the Constitution itself.").

<sup>232</sup> E.g., Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2131 (2019) (describing a Federalist writer's appeal that the faithful execution clause is what distinguishes the President from a monarch and that violations would be justiciable).

approval or action” is a core function of executive orders, channeling executive energy into the ability to act decisively.<sup>233</sup>

This notion is one that rocketed to the fore at the outbreak of the COVID-19 pandemic.<sup>234</sup> Unilateral gubernatorial action in issuing stay-at-home orders and the like was near universal at the outset: 42 governors responded to the unprecedented emergency by using executive orders that widely affected commerce.<sup>235</sup> Taken altogether, it was a favorably treated experience: “[m]any legislatures were out of session when the pandemic hit;” “these actions were taken over a short period of time, limiting court action;” and “many of these . . . directives were bipartisan, with both Republican and Democratic governors acting to close their states.”<sup>236</sup> Even where courts did opine on the nature of pandemic-related restrictions, deference was placed towards gubernatorial action.<sup>237</sup>

For instance, the Pennsylvania Supreme Court recognized that the governor had the flexibility to act pursuant to “broad emergency management powers under the Emergency Code.”<sup>238</sup> It noted that this power derives from the state’s vesting and faithful execution clauses.<sup>239</sup> Likewise, in Michigan, the Sixth Circuit granted a stay to allow Governor Gretchen Whitmer to implement her “incremental approach” to state reopening.<sup>240</sup> It determined that only a “very modest” rational basis standard of review was necessary, noting that “almost without exception, courts [in most cases involving

---

<sup>233</sup> Sellers, *supra* note 192, at 319.

<sup>234</sup> See, e.g., Carol S. Weissert et al., *Governors in Control: Executive Orders, State-Local Preemption, and the COVID-19 Pandemic*, 51 PUBLIUS 396, 397 (2021) (“The COVID-19 response in 2020 provides a new venue for this research on state centralization.”).

<sup>235</sup> Sarah Mervosh et al., *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> [<https://perma.cc/DV7J-GD8T>].

<sup>236</sup> Weissert, *supra* note 234, at 397.

<sup>237</sup> Linda A. Sharp, Annotation, *COVID-19 Related Litigation: Constitutionality of Stay-at-Home, Shelter-in-Place, and Lockdown Orders*, 55 A.L.R. Fed. 3d Art. 3 § 2 (2020) (“[W]hen the courts were confronted with determining this balance between governmental restrictions instituted because of the pandemic and individual liberties, they adopted a deferential approach to the governmental restrictions.”).

<sup>238</sup> *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 885 (Pa. 2020).

<sup>239</sup> *Id.*

<sup>240</sup> *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App’x 125, 127, 130 (6th Cir. 2020).

unilateral executive actions] have appropriately deferred to the judgments of the executives in question.”<sup>241</sup>

Emerging from the pandemic, governors have increasingly leveraged the energy of their offices to make an impact on policy through this vein of executive action.<sup>242</sup> In September 2020, California Governor Gavin Newsom issued an order requiring that all new cars sold in the state be zero-emission by 2035.<sup>243</sup> The Governor called his order “the most impactful step our state can take to fight climate change,” not wishing to wait for prior legislative action.<sup>244</sup> In 2022, Texas Governor Greg Abbott, citing the need “to enforce the immigration laws enacted by Congress,” ordered agents of the Texas National Guard and Department of Public Safety to apprehend immigrants violating federal law and return them to ports of entry.<sup>245</sup> And in 2023, New Mexico Governor Lujan Grisham sought to “curb gun violence and illegal drug use” by unilaterally prohibiting Albuquerque residents from carrying firearms in public.<sup>246</sup>

These examples are undoubtedly controversial and may not withstand judicial scrutiny.<sup>247</sup> However, they are useful illustrations of the purposes to which state executives are directing the energy designed to be inherent in the title of governor through otherwise permissible means; such instances are

---

<sup>241</sup> *Id.* at 126 (citing *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 407 (2020); *McCarthy v. Cuomo*, No. 20-cv-2124 (ARR), 2020 WL 3286530, at \*6 (E.D.N.Y. June 18, 2020); *Cassell v. Snyders*, 458 F. Supp. 3d 981, 1003 (N.D. Ill. 2020).

<sup>242</sup> *See infra* notes 243, 245, 246.

<sup>243</sup> Press Release, Office of Governor Gavin Newsom, Governor Newsom Announces California Will Phase Out Gasoline-Powered Cars & Drastically Reduce Demand for Fossil Fuel in California’s Fight Against Climate Change (Sept. 23, 2020) (on file with author).

<sup>244</sup> *Id.*

<sup>245</sup> Tex. Exec. Order No. GA 41 (July 7, 2022).

<sup>246</sup> Richards, *supra* note 8.

<sup>247</sup> *See, e.g., id.* (“Rep. Ted Lieu . . . said that while he supported gun safety laws, Lujan Grisham’s order violated the Constitution.”); *We the Patriots, Inc. v. Grisham*, 697 F. Supp. 3d 1222, 1228 (D.N.M. 2023) (recounting that Lujan Grisham’s order was enjoined because plaintiffs “had shown a substantial likelihood of success on the merits as to their Second Amendment challenge”). Governors Newsom and Lujan Grisham also face a unique challenge in their attempt to achieve substantive policy ends without legislative input, whereas Governor Abbott’s executive order only allocated resources to enforce existing law. Separation of powers commands equal respect for the prerogatives of the legislative branch. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952) (holding that Congress’s power to prescribe “rules of conduct to be followed” and authorize regulations “needed to carry . . . policy into execution . . . is beyond question”).

likely to continue.<sup>248</sup> Operating in the same manner as in the federal constitution, state vesting clauses are powerful repositories that preserve a unitary executive and allow governors to manage the affairs of their branch to both internal and external ends.<sup>249</sup>

#### IV. CONCLUSION

Governors were the original chief executives of the United States.<sup>250</sup> Though weak at the outset and varied in their powers,<sup>251</sup> it was the vesting of the whole executive power in a separate branch of government that inspired the framers of the federal constitution to create a robust system of separation of powers that respected unity in the office of the president.<sup>252</sup> Energy—the ability to act—was the key principle that motivated the framers’ characterization of the presidency.<sup>253</sup> They recognized that it existed for state governors, too, defending the early states’ original formulations of checks and balances.<sup>254</sup>

As state constitutions evolved and governors began closely emulating their federal counterpart, state courts established a trend that has adopted federal separation of powers doctrine when attempting to understand what the vested power of a governor requires.<sup>255</sup> The result has been the recognition of the unitary governor.<sup>256</sup> Like the president, separation of powers requires that the other branches of government respect and refrain from exercising the executive power explicitly placed in the hands of one.<sup>257</sup> This is to preserve the energy necessary to govern effectively; it may be put to use in handling the affairs of the administrative state or in crafting external policy where otherwise not forbidden by state law.<sup>258</sup>

This unitary power is, of course, not “autocratic, absolute, despotic, or arbitrary,” and it cannot be put to these ends.<sup>259</sup> But the exercise of it is also

---

<sup>248</sup> Richards, *supra* note 8.

<sup>249</sup> See Prakash, *supra* note 83, at 758–61.

<sup>250</sup> See CONST. RTS. FOUND., *supra* note 101, at 11.

<sup>251</sup> See Prakash, *supra* note 83, at 758–61.

<sup>252</sup> See Morrison v. Olson, 487 U.S. 654, 697, 698 (1988) (Scalia, J., dissenting).

<sup>253</sup> THE FEDERALIST NO. 70 (Alexander Hamilton).

<sup>254</sup> See THE FEDERALIST NO. 47 (James Madison).

<sup>255</sup> See, e.g., State *ex rel.* Dann v. Taft, 848 N.E.2d 472, 483 (Ohio 2006) (acknowledging the doctrine of separation of powers is implicitly embedded in the state constitution).

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 484.

<sup>258</sup> See *id.*

<sup>259</sup> State *ex rel.* S. Monroe & Son Co. v. Baker, 147 N.E. 501, 504 (Ohio 1925).

not, as the Ohio Supreme Court once believed, the same as “Louis XIV once declar[ing], ‘I am the state.’”<sup>260</sup> It merely denotes a governor’s inherent “ability to act unilaterally through executive orders . . . and the like,” fulfilling the promise of the separation of powers.<sup>261</sup> For the sake of good government and energy in the executive, this power must be fully recognized and respected.

---

<sup>260</sup> *Id.*

<sup>261</sup> Kersh, *supra* note 34, at S94.