

THE *STATE* CAPACITY CRISIS

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Abstract: Crumbling infrastructure, inadequate housing supply, failing schools, public disorder—few government services seem to work as they should. For a decade, a nascent scholarly movement has been warning that America faces a crisis of state capacity. Although the major figures in this “state capacity movement” have identified the right problem, they concentrate almost exclusively on the federal government. That yields a misdiagnosis of why the American government lacks capacity and leads to solutions that are unlikely to accomplish much. In the United States, it is state and local governments that do most of what “the state” does, and they suffer from different pathologies from the federal government. First, voters know next to nothing about their state and local representatives, and instead base their votes on national political affiliation. That dulls public accountability for good government performance. Second, state administrative law is as strict, and often stricter, than federal administrative law, especially when it comes to rules around public participation. That privileges interest groups that have the organizational wherewithal to exploit the procedural opportunities that administrative law affords. Third, states have limited fiscal capacity relative to the federal government. When a recession depletes tax revenue, states have few choices except to increase taxes or reduce spending, right when public services are needed most. These three factors are the primary drivers of a dearth of American state capacity, and they are all getting worse. Yet they are basically invisible in the state capacity literature. To improve the quality of American governance, we must examine the right governments and ask the right questions.

INTRODUCTION

It is an extraordinary fact about the 2024 election that the areas that turned most aggressively toward President Trump were those cities and states that have long been Democratic bastions. In 2020, for example, the Bronx went for President Biden over President Trump by sixty-nine points; in 2024,

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Thanks to Michael Asimow, Nestor Davidson, Noah Kazis, Brink Lindsey, Zachary Liscow, Richard Pildes, and Steve Teles for their terrific comments. Thanks to Adrianna Dugan, Alex Izbiky, Alex Kremer, Ian Miller, and Isabelle Zaslavsky for research assistance.

NOTE: Because not all electronic retrieval database platforms support graphics, the figures found in this article (in color and larger scale) are archived at <https://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/66-7/schleicher-bagley.pdf> [<https://perma.cc/M7XR-Y3JU>].

Vice President Harris won by just twenty-two points.¹ In 2024, President Trump's Chicago vote share jumped from 12% to 22%, and Miami-Dade County shifted nineteen points to the right.² New Jersey and New York were the two swingiest states, both moving more than ten points in President Trump's favor.³ These shifts were not enough to turn these jurisdictions red, but their scale and consistency are remarkable. The whole country turned right in 2024, but the areas most familiar with Democratic governance turned right the hardest.

This led to many questions about whether this shift was caused by something about state and city governance in blue states, or whether the quality of governance more broadly led to dissatisfaction with the party associated with more government.⁴ Whatever the case may be, the electorate has plenty of reasons to be unhappy with the quality of American governance, especially in big cities and in its richest blue states.⁵ Housing prices remain stubbornly high because new housing is so hard to build.⁶ Crime rates and road deaths surged during and after the pandemic.⁷ Homeless encampments in public spaces—

¹ Sally Goldenberg, Bill Mahoney, Nick Reisman & Joe Anuta, *Democrats' New York Blues: Trump Markedly Improves His Margin in the Empire State*, POLITICO (Nov. 6, 2024), <https://www.politico.com/news/2024/11/06/trump-voter-gains-new-york-00188078> [<https://perma.cc/A52M-MVWR>].

² Derek Thompson, *How Donald Trump Won Everywhere*, THE ATLANTIC (Nov. 6, 2024), <https://www.theatlantic.com/politics/archive/2024/11/donald-trump-covid-election/680559/> [<https://perma.cc/UPQ5-3H2M>].

³ Victor Nava, *Deep Blue NY and NJ Had Double-Digit Swings Toward Trump, Leading the Way Nationwide*, N.Y. POST (Nov. 18, 2024), <https://nypost.com/2024/11/18/us-news/ny-and-nj-had-double-digit-swings-toward-trump-leading-the-way-nationwide/> [<https://perma.cc/4ESV-ESPS>].

⁴ See, e.g., Josh Barro, *Trump Didn't Deserve to Win, but We Deserved to Lose*, VERY SERIOUS (Nov. 7, 2024), <https://www.joshbarro.com/p/trump-didnt-deserve-to-win-but-we> [<https://perma.cc/SC23-4FGZ>] ("I am unfortunately a Democrat, but as someone who lives in a place that is governed very badly by Democrats, I can easily understand why 'can you imagine what incompetent, lunatic shit those people will do if they get control of the government?' would fall flat as an argument against Republicans."); Emily Badger & Alicia Parlapiano, *Is the Urban Shift Toward Trump Really About Democratic Cities in Disarray?*, N.Y. TIMES (Dec. 6, 2024), <https://www.nytimes.com/2024/12/06/upshot/urban-vote-shift-trump.html> [<https://perma.cc/H4SH-93RC>] ("That shift may reflect not just the sour national mood, Democratic strategists and commenters have warned, but a backlash to big cities themselves . . .").

⁵ See Badger & Parlapiano, *supra* note 4 (arguing that blue state governance does not explain President Trump's success in big cities).

⁶ See Drew Desilver, *A Look at the State of Affordable Housing in the U.S.*, PEW RSCH. CTR. (Oct. 25, 2024), <https://www.pewresearch.org/short-reads/2024/10/25/a-look-at-the-state-of-affordable-housing-in-the-us/> [<https://perma.cc/Z4QE-4HNS>] ("31.3% of American households were cost burdened in 2023").

⁷ See Marin Cogan, *Why the US Had a Violent Crime Spike During Covid—and Other Countries Didn't*, VOX (July 8, 2024), <https://www.vox.com/politics/358831/us-violent-crime-murder-pandemic> [<https://perma.cc/XL2N-G7A3>] (detailing violent crime); Emily Badger & Ben Blatt, *Traffic Enforcement Dwindled in the Pandemic. In Many Places, It Hasn't Come Back*, N.Y. TIMES (July 29, 2024), <https://www.nytimes.com/interactive/2024/07/29/upshot/traffic-enforcement-dwindled.html> [<https://perma.cc/EW38-35SA>] (detailing road deaths).

parks, sidewalks, subway stations—have proliferated in urban centers.⁸ Shoplifting has become a scourge.⁹ Roads are potholed, trains are slow, airports are crowded and difficult to access. The quality of our public schools varies wildly but is often appallingly low, especially for Black and Latino kids.¹⁰ Many of the most basic government services do not seem to work as they should.

Although the election was about many things, President Trump's overperformance likely owes at least something to a crisis of confidence in government. In a sense, this is not a surprise. Over the last ten years or so, a nascent scholarly movement has coalesced around the idea that America has a problem with "state capacity." This term, borrowed from a highly theorized branch of development economics and political science, refers to the ability of the government officials, or the people themselves, to use legislation and administration to achieve their goals or produce good policy.¹¹ Adherents of the state capacity movement, notable for their ideological diversity, draw on the concept to dramatize concerns about the enervated American state. Tyler Cowen, the prominent libertarian economist, declares that traditional libertarianism has run its course and should be replaced with "state capacity libertarianism."¹² Progressive groups like the Roosevelt Institute claim there is an urgent need for "democratic state capacity."¹³ Books like *Can America Govern Itself?* and law

⁸ See TANYA DE SOUSA & MEGHAN HENRY, U.S. DEP'T OF HOUS. & URB. DEV., THE 2024 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS, at v (2024), <https://www.huduser.gov/portal/sites/default/files/pdf/2024-AHAR-Part-1.pdf> [<https://perma.cc/D2XX-29NU>] (documenting 18% increase in homelessness between 2023 and 2024).

⁹ See Charles Fain Lehman, *It's Time to Talk About America's Disorder Problem*, THE CAUSAL FALLACY (Sep. 26, 2024), <https://thecausalfallacy.com/p/its-time-to-talk-about-americas-disorder> [<https://perma.cc/5AN4-DB5Q>] (documenting the rise in urban disorder, including retail theft).

¹⁰ See *State Achievement-Level Results*, NATION'S REPORT CARD, <https://www.nationsreportcard.gov/reading/states/achievement/?grade=4> [<https://perma.cc/3ZJS-L88V>] (documenting the reading scores of students across racial and ethnic groups in fourth grade as of 2022).

¹¹ See *infra* notes 92–212 and accompanying text.

¹² Tyler Cowen, *What Libertarianism Has Become and Will Become—State Capacity Libertarianism*, MARGINAL REVOLUTION (Jan. 1, 2020), <https://marginalrevolution.com/marginalrevolution/2020/01/what-libertarianism-has-become-and-will-become-state-capacity-libertarianism.html> [<https://perma.cc/U465-BU94>]; Tyler Cowen, *Libertarian Ideas are Evolving in Response to Covid and Recession*, BLOOMBERG (Apr. 11, 2021), <https://www.bloomberg.com/opinion/articles/2021-04-11/libertarian-ideas-are-evolving-in-response-to-covid-and-recession> [<https://perma.cc/XDQ9-ZYDY>]. For discussions of "state capacity libertarianism," see Samuel Hammond, *Three Motivations for "State Capacity Libertarianism"*, NISKANEN CTR. (Jan. 24, 2020), <https://www.niskanencenter.org/three-motivations-for-state-capacity-libertarianism/> [<https://perma.cc/H733-7XAW>] (discussing Cowen's argument); Ryan H. Murphy & Colin O'Reilly, *Assessing State Capacity Libertarianism*, 40 CATO. J. 735, 735, 737 (2020) (same).

¹³ K. SABEEL RAHMAN, ROOSEVELT INST., BUILDING THE GOVERNMENT WE NEED: A FRAMEWORK FOR DEMOCRATIC STATE CAPACITY 5 (2024), <https://rooseveltinstitute.org/publications/democratic-state-capacity/> [<https://perma.cc/8E6Q-48VB>]; Suzanne Kahn, *What 50 Years of Weakened State Capacity Means for Progressive Policy Wins*, ROOSEVELT INST. (Mar. 11, 2024), <https://rooseveltinstitute.org/2024/03/11/what-50-years-of-weakened-state-capacity-means-for-progressive-policy-wins/> [<https://perma.cc/2S8V-DGVE>].

review articles like *The Neglected Value of Effective Government* appeared.¹⁴ Think tanks built whole programs about American state capacity, or the lack thereof.¹⁵

The contributors to this state capacity movement differ on particulars, but they are united in the belief that the United States has gone too far in disabling its governing institutions from achieving reasonable policy ends. Common culprits are political polarization, the filibuster, a dearth of high-quality staff at Congress and agencies, and the hyper-proceduralization of federal administration.¹⁶

We *emphatically* agree. Like the other proponents of a greater need for state capacity, we see the difficulties government officials and popular majorities face in achieving effective government to be one of the country's biggest challenges. We share their frustration with a government that is failing so obviously to carry out the basic tasks of governance.

But we think the contributors to the state capacity movement—closely aligned with the “abundance agenda”—have misdiagnosed the principal source of public frustration by training their attention on the federal government.¹⁷ The old joke is that the federal government is really an insurance company

¹⁴ See generally SSRC ANXIETIES OF DEMOCRACY: CAN AMERICA GOVERN ITSELF? (Frances E. Lee & Nolan McCarty eds., 2019) (evaluating the changes to United States representation and political climate); Richard H. Pildes, *The Neglected Value of Effective Government*, 2023 U. CHI. LEGAL F. 185 [hereinafter Pildes, *The Neglected Value*] (focusing on the failure of federal democratic governments); MARC J. DUNKELMAN, WHY NOTHING WORKS: WHO KILLED PROGRESS—AND HOW TO BRING IT BACK (2025) (proposing justifications for why America's infrastructure has been derailed); Fred Bauer, *An Era of State Capacity?*, CITY J. (Sep. 20, 2022), <https://www.city-journal.org/article/an-era-of-state-capacity> [<https://perma.cc/P6UN-JPWC>]; JENNIFER PAHLKA, RECODING AMERICA: WHY GOVERNMENT IS FAILING IN THE DIGITAL AGE AND HOW WE CAN DO BETTER (2023) (examining the struggles of modern American government as technology advances); Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804 (2014) (evaluating political divide in America); JOHN J. DI IULLIO JR., BRING BACK THE BUREAUCRATS: WHY MORE FEDERAL WORKERS WILL LEAD TO BETTER (AND SMALLER!) GOVERNMENT (2014) (calling for an expansion of the American federal workforce).

¹⁵ See generally JENNIFER PAHLKA & ANDREW GREENWAY, NISKANEN CTR., THE HOW WE NEED NOW: A CAPACITY AGENDA FOR 2025 AND BEYOND (2024), https://www.niskanencenter.org/wp-content/uploads/2024/12/Niskanen-State-Capacity-Paper_-Jen-Pahlka-and-Andrew-Greenway-2.pdf [<https://perma.cc/EAW4-H3A4>] (studying state capacity challenges); *Who We Are*, CTR. FOR EFFECTIVE GOV'T, U. CHI. HARRIS SCH. PUB. POL'Y, <https://effectivegov.uchicago.edu/about/who-we-are> [<https://perma.cc/YAA7-VYNW>] (describing the Center's mission to strengthen democratic institutions and enhance government capacity). These efforts supplement think tanks devoted to state capacity as part of the work of development economics. See, e.g., *Mission*, INST. FOR STATE EFFECTIVENESS, <https://effectivestates.org/who-we-are/> [<https://perma.cc/FC4N-U5S3>]; *Building State Capability: Our Work*, HARV. KENNEDY SCH., <https://bsc.hks.harvard.edu> [<https://perma.cc/NUS4-KBG6>].

¹⁶ See *infra* notes 214–326 and accompanying text.

¹⁷ See generally EZRA KLEIN & DEREK THOMPSON, ABUNDANCE (2025) (coining the term “abundance agenda”).

with an army. It doles out checks for old people through Social Security and Medicare, but does not much involve itself in service provision.¹⁸

In contrast, state and local governments provide almost all government services that people depend on—schools, police, fire, etc.—either mostly independently or in partnership with the federal government (through cooperative federalism programs).¹⁹ State and local governments build and operate almost all infrastructure, and fund most of it.²⁰ A huge majority of public officials in America work for state and local governments.²¹ The federal government supplies lots of money, guidance and regulatory oversight (for good and for ill). But it is state and local governments that do most of the things “the state” does.

So, if we have a crisis of state capacity, its roots are in state and local governments. That simple point—one familiar to scholars of American political development—is mostly absent from the new state capacity literature. That’s a problem. Although some of the stories that are told about the lack of federal capacity map more or less cleanly onto state and local governments, many have no application at all. State and local governments also face challenges that are quite distinct from difficulties at the federal level. Ignoring states and localities leads to a misunderstanding of why the American state lacks capacity—and to solutions that are unlikely to address the problem fully.

Three areas are of particular concern to us. First, the linchpin of the usual story about the lack of state capacity is the claim that Congress is broken. The reasons are familiar. The rise of polarization—driven by clearer partisan sort-

¹⁸ Mark Thoma, *Who First Said the US Is ‘an Insurance Company with an Army’?*, ECONOMIST’S VIEW (Jan. 17, 2013, 2:29 PM), <https://economistsview.typepad.com/economistsview/2013/01/who-first-said-the-us-is-an-insurance-company-with-an-army.html> [<https://perma.cc/9CZJ-HVPX>] (noting that Paul Krugman credits Peter Fischer as the first person to describe the federal budget this way). It is also, as we will discuss below, an important regulator, both of private actors and state and local governments.

This is also why President Trump will struggle to find efficiencies in federal administration—transfers to citizens or to state and local government account for almost all non-defense spending by the federal government. See Moraa Ogeni & David Wessel, *What Is Discretionary Spending in the Federal Budget?*, BROOKINGS INST. (July 11, 2023), <https://www.brookings.edu/articles/what-is-discretionary-spending-in-the-federal-budget/> [<https://perma.cc/4ZH8-WPNQ>] (providing that most of the discretionary spending pays the benefits and salaries of government employees, states and municipalities, and purchases within the private sector). The argument that shrinking the number of public officials is likely to improve the quality of government is likely wrong; much of the inefficiency of government comes from an insufficient capacity inside the bureaucracy to plan and consider costs. See Nicholas Bagley, *Musk and Ramaswamy Are Making a Big Mistake*, THE ATLANTIC (Dec. 3, 2024), <https://www.theatlantic.com/ideas/archive/2024/12/musk-ramaswamy-doge-mental-model/680856/> [<https://perma.cc/JY3G-XXSR>] (making this argument).

¹⁹ See *infra* notes 101–119 & 192–212 and accompanying text.

²⁰ See *infra* notes 120–159 and accompanying text. Much of the infrastructure that is not owned and operated by state and local governments is in private hands but is regulated by state and local governments. See *infra* notes 120–159 and accompanying text.

²¹ See *infra* notes 101–119 and accompanying text.

ing, razor-thin electoral margins, and the atrophying influence of big-tent political parties that serve as moderating forces—creates gridlock.²² Congressional staff is insufficient and underpaid.²³ The filibuster compounds the problem.²⁴ So too does the explosion of small-dollar donations that encourage legislative ideologues to pander to their core supporters.²⁵ All of this makes it hard for legislators to translate voter preferences into public policy.

State legislatures, however, are not broken in the same way that Congress is. Polarization notwithstanding, in thirty-nine out of fifty states, both houses of legislatures and the governor come from the same party and only rarely have institutional limits like the filibuster.²⁶ As a result, majority parties can usually do what they want. Gridlock is not the problem. Yet state legislatures are in an even *worse* spot than Congress. Voters know almost nothing about what is happening in state politics, and increasingly vote for the same party for state legislature that they do for President and Congress.²⁷ This pervasive nationalization of state and local elections means that state legislative performance has little connection to electoral outcomes. Gerrymandering is also a much worse problem at the state level than at the federal level, with voting majorities often failing to even come close to achieving legislative power, as is the lack of staff capacity and resources.²⁸ The natural consequence is inattention to genuine public priorities.

²² See generally EZRA KLEIN, WHY WE'RE POLARIZED (2020) (discussing sources and consequences of polarization); FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN (2016) (arguing that a closely divided Congress that swings between parties leads to minority party obstruction).

²³ See generally CONGRESS OVERWHELMED: THE DECLINE IN CONGRESSIONAL CAPACITY AND PROSPECTS FOR REFORM (Timothy M. LaPira, Lee Drutman & Kevin R. Kosar eds., 2020).

²⁴ Ezra Klein, *The Definitive Case for Ending the Filibuster*, VOX (Oct. 1, 2020), <https://www.vox.com/21424582/filibuster-joe-biden-2020-senate-democrats-abolish-trump> [<https://perma.cc/K2KM-LNJ3>].

²⁵ See Richard H. Pildes, *Small-Donor-Based Campaign-Finance Reform and Political Polarization*, 129 YALE L.J.F. 149, 156–61 (2019), https://www.yalelawjournal.org/pdf/Pildes_SmallDonorBasedCampaignFinanceReformandPoliticalPolarization_1nbukg72.pdf [<https://perma.cc/343C-SY8H>] (small donors contribute substantially to polarization).

²⁶ Rosie Ettenheim & Randy Yeip, *Midterm Elections Produce More States Controlled by One Party*, WALL ST. J. (Nov. 30, 2022), <https://www.wsj.com/articles/midterm-elections-produce-more-states-controlled-by-one-party-11669785444> [<https://perma.cc/W7QK-BZUT>]; see John Dinan, *The Constitutional Politics of Abortion Policy After Dobbs: State Courts, Constitutions, and Lawmaking*, 84 MONT. L. REV. 27, 62–66 (2023) (discussing lack of institutional limits in most state legislatures).

²⁷ David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 765–66 (2017) [hereinafter Schleicher, *Federalism and State Democracy*]; DANIEL J. HOPKINS, THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED 168 (2018).

²⁸ See Miriam Seifter, *Counter-majoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1757–63 (2021) (describing how districting practices reduce majoritarianism and democratic provenance of state legislatures, and how state legislatures lack staff and resources).

Second, a key plank of the state capacity literature is that administrative law imposes too many procedural rules on government agencies.²⁹ However well-intentioned, these rules bog agencies down in often-senseless red tape, augment the power of narrow interest groups to twist agency outcomes to private ends, and license courts to halt agency action for ticky-tack or partisan reasons.³⁰ But while this “procedure fetish” is a big problem for the federal administration, as one of us has argued extensively, it is in many ways a bigger problem for states and localities. State administrative law is as strict, and often stricter, than federal administrative law, both with respect to the procedures it imposes and the intensity of judicial review. State and, in particular, local governments have extremely powerful rules requiring lots of public participation in administration. Because small groups with members who care intensely about state and local decisions are much easier to form than groups representing a diffuse public interest, unrepresentative private interests—whether that’s the Chamber of Commerce or neighborhood NIMBYs—overwhelm administrative process at the expense of majoritarian preferences.³¹

Third, there is a blind spot in the state capacity literature about budgets. The reason is that the federal government has extraordinary fiscal capacity, including the ability to deficit-spend during recessions. That power was on stark display during the COVID-19 pandemic when the federal government spent nearly \$5 trillion to stave off economic collapse.³² The picture looks very different at the state level. Every state (save Vermont) is legally required to balance its budget, no state can print money to inflate away its deficits, and all states face both legal and market limits on their capacity to borrow.³³ When a

²⁹ E.g., BRINK LINDSEY, NISKANEN CTR., STATE CAPACITY: WHAT IS IT, HOW WE LOST IT, AND HOW TO GET IT BACK 5–7 (2021), <https://www.niskanencenter.org/wp-content/uploads/2021/11/brinkpaper.pdf> [<https://perma.cc/2KVY-WSSQ>]; Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 348 (2019) [hereinafter Bagley, *Procedure Fetish*].

³⁰ Bagley, *Procedure Fetish*, *supra* note 29, at 393–400.

³¹ See *infra* notes 214–250 and accompanying text. NIMBY stands for “not in my backyard,” and the group is an opponent of new development. Steven Cohen, *The Not in My Backyard Syndrome and Sustainability Infrastructure*, COLUM. CLIMATE SCH. (Jan. 4, 2016), <https://news.climate.columbia.edu/2016/01/04/the-not-in-my-backyard-syndrome-and-sustainability-infrastructure/> [<https://perma.cc/6KPH-QF7Q>].

³² See *The Federal Response to COVID-19*, USASPENDING (July 31, 2025), <https://www.usaspending.gov/disaster/covid-19> [<https://perma.cc/SBP3-CLTE>] (\$4.65 trillion in total budgetary resources).

³³ Vermont has some balanced budget rules, and other states have quite limited ones, leading to some debate over whether there are no states without balanced budget rules, just Vermont, or several. For more on balanced budget requirements, see NAT’L CONF. STATE LEGIS., NCSL FISCAL BRIEF: STATE BALANCED BUDGET PROVISIONS 2 (2010), <https://docs.house.gov/meetings/JU/JU00/20170727/106327/HHRG-115-JU00-20170727-SD002.pdf> [<https://perma.cc/329A-ZRBA>] (noting debate over whether Vermont is the only state without a balanced budget requirement); *Vermont: State Fiscal Briefs*, URB. INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/projects/state-fiscal-briefs/vermont> [<https://perma.cc/7T5P-Q3NL>] (Sep. 2025) (“The legislature is not required to pass a balanced budget, the governor is not required to sign one, and deficits

recession depletes tax revenue, states have few choices except to increase taxes or reduce spending—right when public services are needed most. States' limited fiscal capacity thus contributes mightily to poor governance, especially during recessions. Budget constraints are becoming increasingly salient as Medicaid consumes ever-larger fractions of state budgets, the costs of state and local public services increase faster than inflation, and states and localities deal with the consequences of underfunding their pension obligations.³⁴

Taken together, these forces—the unaccountability of state and local politics, the excessive strictures of state and local administrative law, and the sharp limits on state fiscal powers—dull officials' incentives to govern well, privilege narrow interest groups at the expense of the majority, and frustrate efforts to build capacity. They are the root causes of the government dysfunction that has stoked voters' anger about the quality of American governance. Yet they are missing from the new state capacity literature. We aim to rectify that.

Refocusing attention on the state and local level should also prompt reconsideration of some common stories we tell about the federal government. Because it turns out that, if American governance as a whole is characterized by a lack of state capacity, the federal government may be more the exception than the rule. In both of the last two major economic shocks, federal macroeconomic management was more active and more successful than most peer countries and regions.³⁵ The Affordable Care Act successfully expanded insurance access to tens of millions of people without causing an increase in health-care inflation.³⁶ Major reforms of financial regulation and taxes (for good or

may be carried over into the following year. However, the state has budget rules that require lawmakers to balance revenues and expenditures.”) For more on limits on issuing debt, see Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 915–18 (2003); DAVID SCHLEICHER, IN A BAD STATE: RESPONDING TO STATE AND LOCAL BUDGET CRISES 53–54, 83–84, 130–33 (2023) [hereinafter SCHLEICHER, IN A BAD STATE].

³⁴ See *infra* notes 251–281 and accompanying text.

³⁵ See Greg Ip, *How the U.S. Nailed the Economic Response to Covid-19*, WALL ST. J. (Sep. 15, 2021), <https://www.wsj.com/economy/how-the-u-s-nailed-the-economic-response-to-covid-19-11631714400> [<https://perma.cc/N4VY-PS48>] (reporting on the United States' stronger recovery post-COVID due to better macroeconomic policy); Benjamin Harris & Neil Mehrotra, *The U.S. Economic Recovery in International Context*, U.S. DEP'T OF TREASURY (June 8, 2022), <https://home.treasury.gov/news/featured-stories/the-us-economic-recovery-in-international-context> [<https://perma.cc/AMA4-4WFE>] (reporting that the United States' macroeconomic response was better than Europe's); Marilyn Geewax, *U.S. Economic Recovery Looks Good Compared with Sluggish Europe, Asia*, NPR (June 17, 2016), <https://www.npr.org/sections/thetwo-way/2016/06/17/482328208/u-s-economic-recovery-looks-good-compared-with-sluggish-europe-asia> [<https://perma.cc/AWH3-U3MD>] (providing that the United States' post-2008 recovery was better than Europe and Asia due to better macroeconomic management); Mark Weisbrot, *Why Has Europe's Economy Done Worse Than the US?*, THE GUARDIAN (Jan 16, 2014), <https://www.theguardian.com/commentisfree/2014/jan/16/why-the-european-economy-is-worse> [<https://perma.cc/E9S5-9N9J>] (same).

³⁶ See Sarah Somers, *The Affordable Care Act: Reflections on 10 Years*, NETWORK FOR PUB. HEALTH L. (May 6, 2021), <https://www.networkforphl.org/news-insights/the-affordable-care-act-reflections-on-10-years/> [<https://perma.cc/B4PY-KZMN>] (showing gains from ACA); Ezekiel J.

for ill) were enacted.³⁷ And we waged two wars abroad (again, for good or for ill) over two decades, often concurrently.³⁸ If the federal government is just an insurance company with an army, well, it's doing OK at that.³⁹

In saying this, we do not mean to excuse congressional dysfunction or downplay concerns about federal administration. Dozens of examples of weak federal capacity come readily to mind: lackluster rates of tax collection, slow FDA approvals for medically necessary drugs, and endless permitting delays for infrastructure and energy projects. By the same token, some problems that might be chalked up to the deficiencies of state and local capacity cry out for a federal solution. Utilities struggle to build interstate transmission lines, for example, because they need to secure dozens of state and local approvals.⁴⁰ The immediate source of the problem is state and local permitting, but blame really lies with a dysfunctional Congress that has failed to address the collective-action problem. Similarly, state governmental capacity is often inhibited by federal regulations, as when state-run infrastructure must go through huge numbers of procedural hurdles and lawsuits based on federal law. Moreover, deficiencies in federal capacity can *become* problems for state and local governments—if, say, the federal fiscal response to an economic downturn is insuf-

Emanuel, *Why Haven't Health Care Cost Increases Exceeded Inflation? There's a Very Good Reason*, STAT (Dec. 21, 2023), <https://www.statnews.com/2023/12/21/health-care-costs-inflation-affordable-care-act/> [<https://perma.cc/2TGH-U58T>] (“[H]ealth care costs have remained at or below 18% of GDP since the enactment of the Affordable Care Act in 2010.”).

³⁷ See Noah Berman, *What Is the Dodd-Frank Act?*, COUNCIL ON FOREIGN RELS. (May 8, 2023), <https://www.cfr.org/background/what-dodd-frank-act> [<https://perma.cc/G8ED-2DTY>] (discussing the content of the Dodd-Frank Act and subsequent changes to the law); William G. Gale et al., *Effects of the Tax Cuts and Jobs Act: A Preliminary Analysis*, BROOKINGS INST. (June 14, 2018), <https://www.brookings.edu/articles/effects-of-the-tax-cuts-and-jobs-act-a-preliminary-analysis/> [<https://perma.cc/T2BQ-BM9T>] (“On December 22, 2017, Donald Trump signed into law the biggest tax overhaul since the Tax Reform Act of 1986.”).

³⁸ Raphael S. Cohen, *Ukraine and the New Two War Construct*, WAR ON THE ROCKS (Jan. 5, 2023), <https://warontherocks.com/2023/01/ukraine-and-the-new-two-war-construct/> [<https://perma.cc/2VH4-GVGJ>]. The United States has pulled back from its commitment to have the ability to fight two wars at once, now seeking to be able to fight one war and do serious damage in another sphere. *See id.* (noting this change and arguing that the United States should be able to fight one war and arm an ally to fight another).

³⁹ Its decision-making *obviously* can be questioned. But even during periods of gridlock, many truly epochal bills have passed, including the TARP bailout program in 2007 and the huge COVID-era stimulus bills. *See* Jim Saksa, *What if Congress Isn't Hopelessly Locked in Partisan Gridlock? What if It's Getting a Lot Done?*, ROLL CALL (Mar. 3, 2022), <https://rollcall.com/2022/03/03/congress-gridlock-getting-stuff-done/> [<https://perma.cc/8T5P-FBYC>] (noting that by number of pages, Congress has been passing lots of law and quoting famous congressional scholar Frances Lee saying, “Congress is not in gridlock”).

⁴⁰ *See* BRIAN POTTER, INST. FOR PROGRESS, *HOW TO SAVE AMERICA'S TRANSMISSION SYSTEM* 10 (2024), <http://ifp.org/wp-content/uploads/How-to-Save-Americas-Transmission-System.pdf> [<https://perma.cc/2493-U9YB>] (“Transmission lines require approval from every state they cross (and, in some states, every county), and states often only consider in-state benefits when making their decision, rather than the benefits to the grid as a whole.”) (internal citation omitted).

ficient or mistimed, or if the federal partner in a cooperative federalism scheme (e.g., Medicaid, unemployment insurance) does its job poorly. Federal, state, and local incapacities can magnify one another, which means that improving American state capacity will require improving governance at all levels.

So count us in on nixing the filibuster, reforming NEPA, and changing federal election law. We just want to be realistic about how far that will get us if we don't *also* address more meaningful drivers of the deficiencies in American governance: the nationalization of state and local politics; the excessive reliance on procedures, litigation, and public participation in state and local regulation; and the challenges of state and local fiscal affairs. To improve the quality of government, we must examine the right governments and ask the right questions.

I. STATE CAPACITY, THEN AND NOW

Before we proceed, we should lay our methodological cards on the table. What is state capacity anyhow? We start with what the term means to the development economists, historians, and political scientists who built the concept. We then explore how their ideas relate to the (somewhat different) concept that contemporary American commentators have begun to deploy.⁴¹

A. State Capacity in the Academic Literature

In the 1960s, 70s, and early 80s, scholars like Theda Skocpol, Samuel Huntington, and Charles Tilly argued for “bringing the state back in” to studies of political and economic development, reviving a tradition most commonly associated with Max Weber.⁴² Since then, many of the best-known political scientists, economic historians, and other analysts of economic development

⁴¹ See *infra* notes 68–91 and accompanying text.

⁴² E.g., Theda Skocpol, *Bringing the State Back in: Strategies of Analysis in Current Research*, in BRINGING THE STATE BACK IN 3–37 (Peter B. Evans, Dietrich Rueschemeyer & Theda Skocpol, eds., 1985); see also Dietrich Rueschemeyer & Peter B. Evans, *The State and Economic Transformation: Toward an Analysis of the Conditions Underlying Effective Intervention* (building on Max Weber's theory that well-functioning states have a strong bureaucracy), in BRINGING THE STATE BACK IN, *supra*, at 44, 44–48. See generally THEDA SKOCPOL, STATES AND SOCIAL REVOLUTIONS: A COMPARATIVE ANALYSIS OF FRANCE, RUSSIA, AND CHINA (1979) (comparing causes of social revolutions across nations); THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE (Charles Tilly ed., 1975) (focusing on national development in western Europe); SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 3 (1968) (writing about historical institutionalism and how the level of government, rather than the government type, is the primary political distinction); STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920 (1982) (evaluating the adaptations of America's three government branches as the national government expanded). For more on the deep connections between this work and the work of Weber, see Luciana Cingolani, *The Role of State Capacity in Development Studies*, 2. J. DEV. PERSPS. 88, 91–94 (2018).

have put state capacity at the center of their work.⁴³ The idea seems straightforward enough. The “dominant strand” in the literature, according to Luciana Cingolani, defines state capacity as the ability of government officials to achieve “official goals against potential resistance, by means of taxation, the bureaucracy, the military, the legislature, and the courts, and throughout its entire domains.”⁴⁴ So defined, state capacity has obvious links to economic and social outcomes, as Martin Williams argues. “[S]trong, capable states are central to processes of long-run development” because they enforce contracts and protect property rights, stop private violence, supply public goods, mobilize capital, and so on.⁴⁵

Surface simplicity notwithstanding, complications abound. Typically, state capacity is presented as a theory about principals and agents. Whoever is running a government (the principal) selects policy goals and attempts to carry out those goals through the state (the agent). But who is the principal? In modern states, policy choices—not just the implementation of those choices—are the product of many different principals jockeying with one another, including the head of state, the national legislature, bureaucracies, civil society, the courts,

⁴³ E.g., Francis Fukuyama, *The Strange Absence of the State in Political Science*, AM. INT. (Oct. 2, 2012), <http://blogs.the-american-interest.com/fukuyama/2012/10/02/the-strange-absence-of-the-state-in-political-science/> [<https://perma.cc/9YS3-U3H6>] (observing the lack of discourse on states in modern American political discussion). See generally FRANCIS FUKUYAMA, *THE ORIGINS OF POLITICAL ORDER: FROM PREHUMAN TIMES TO THE FRENCH REVOLUTION* (2011) (arguing that stable political order is a function of the state); FRANCIS FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY* (2014) (focusing on the decline of various societies as a function of the state); DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* (2012) (looking at what separates rich and poor countries across the globe); Daron Acemoglu, *Politics and Economics in Weak and Strong States*, 52 J. MONETARY ECON. 1199 (2005) (concluding that a balance of power between the state and its citizens are necessary for economic development); DARON ACEMOGLU & JAMES A. ROBINSON, *THE NARROW CORRIDOR: STATES, SOCIETIES AND THE FATE OF LIBERTY* (2019) [hereinafter ACEMOGLU & ROBINSON, *NARROW CORRIDOR*] (theorizing how to achieve liberty); BARBARA GEDDES, *POLITICIAN’S DILEMMA: BUILDING STATE CAPACITY IN LATIN AMERICA* (1994) (looking at how politicians in Latin America balance the need to spend to increase long-run state capacity and the need to spend to ensure short-term political ends); CHARLES TILLY, *DEMOCRACY* (2007) [hereinafter TILLY, *DEMOCRACY*] (identifying the factors that have led to the rise and fall of democratic processes across the world); DOUGLASS C. NORTH, JOHN JOSEPH WALLIS & BARRY R. WEINGAST, *VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY* (2009) (analyzing the difference in societies that were developed through limited access social orders, from those that were developed by open access social orders); DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990) (considering how institutional changes alter economies).

⁴⁴ Cingolani, *supra* note 42, at 106 (emphasis omitted); see *id.* at 105 (“The dominant view, however, differs from input, process, or goal content-centered approaches. It focuses instead on the state’s ability to fulfill its goals, regardless of the goals’ nature. This dominant view is therefore non-normative in terms of both policy content and how policy execution should be carried out.”).

⁴⁵ Martin J. Williams, *Beyond State Capacity: Bureaucratic Performance, Policy Implementation and Reform*, 17 J. INSTITUTIONAL ECON. 339, 339 (2021).

and more.⁴⁶ A gap, say, between a president's goals and policy outcomes might reflect a lack of state capacity. But it also might mean the president's views did not prevail.

Bringing subnational governments into the discussion compounds the problem.⁴⁷ In evaluating the capacity of a state or local government, for example, it surely matters whether officials or voter majorities at that level can translate their views into policy. But that can't be the whole story: the Supremacy Clause means that states won't be allowed to do everything they might like.⁴⁸ Figuring out who is the "principal" and who or what is the "agent" in the cacophony of multi-level democracy is difficult. The capacity of a subnational government must be measured with reference to a blend of national and subnational influences, with no fixed agreement as to how much or how little of each ought to matter.

Further, "state capacity" is often presented as a predictive theory. The claim is that greater state capacity will produce particular outcomes, especially economic growth.⁴⁹ Testing the claim, however, requires a metric of state ca-

⁴⁶ *Id.* at 348–52.

⁴⁷ Definitions of state capacity frequently import an assumption of nationalism into them. Take Cingolani's definition, drawn from her summary of the dominant strain of the literature: state capacity is the ability of a state's leading officials to achieve "official goals against potential resistance, by means of taxation, the bureaucracy, the military, the legislature, and the courts, and *throughout its entire domains*" does this explicitly. Cingolani, *supra* note 42, at 106 (first emphasis omitted). Daryl Levinson argues that one way to understand American federalism is that it was an effort to avoid a competent (and hence threatening) national government by substitution. DARYL J. LEVINSON, *LAW FOR LEVIATHAN: CONSTITUTIONAL LAW, INTERNATIONAL LAW, AND THE STATE* 107–09 (2024). That is, if governance were provided by states, then the federal government would never develop the capacity to threaten freedoms.

Although we think both of these arguments are powerful, it is important not to confuse means with ends. Under certain circumstances, distributed state authority can lead to greater, rather than lesser capacity, and greater rather than lesser threats to freedom. For instance, American infrastructure building in the late nineteenth and early twentieth century far exceeded comparable European efforts, a fact which is largely attributed to the fact that local governments did not need approval or funding from the center to build. See SCHLEICHER, *IN A BAD STATE*, *supra* note 33, at 55. And local authority, as much as national authority, can threaten individual rights—a lesson on offer from Jim Crow to state abortion bans (and, as Levinson notes, the rights of some groups protected by a lack of national capacity can translate into rights losses for others). *Id.*

Further, those who would like to enhance American state capacity should probably take much of the current allocation of power as given. Relying on a wild bank shot that failing to improve state governance will create greater support for federal competence seems foolhardy. Instead, they should rely on the wisdom of the bank robber Willie Sutton, who, when asked why he robbed banks, allegedly responded "because that's where the money is." See WILLIE SUTTON, *WHERE THE MONEY WAS: THE MEMOIRS OF A BANK ROBBER* 120–22 (1976) (denying that he ever said such a thing, noting that the real reason he robbed banks was that he "was more alive when [he] was inside a bank, robbing it, than at any other time in [his] life"). State capacity is in the states and that is where reformers should go.

⁴⁸ U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

⁴⁹ Williams, *supra* note 45, at 343.

capacity that is independent of outcomes.⁵⁰ Finding reliable metrics is harder than it sounds. Some approaches look at things like the professionalization of the bureaucracy, but outward forms of professionalization may mask on-the-ground cronyism or unproductive inflexibility.⁵¹ Other models use the quality of state decision-making processes as measures of state capacity: they ask, for example, whether those processes allow states to set goals or avoid particularism. But that is both hard to measure and risks conflating claims about state capacity (can the government translate policy goals into action?) with claims about whether the government has good policy goals.⁵²

Beyond that, part of the appeal of state capacity as a concept is that it is trans-substantive. But having capacity in one area does not mean that a state has capacity in others.⁵³ A country could have an effective military and ineffective transit agencies, for example. Using a small number of variables to capture state capacity can sand down the different capabilities and incapacities of states.

Perhaps most fundamentally, scholars disagree sharply over the role that state capacity plays in the emergence of rich, liberal, democratic states—how a country can become a “Denmark,” as Lant Pritchett and Michael Woolcock memorably put it.⁵⁴ Some argue that states must first become strong and capable; others insist that democracy must come first; still others think there is a complicated, iterative relationship.⁵⁵ The debates proliferate from there. Do

⁵⁰ See MIGUEL A. CENTENO, ATUL KOHLI, DEBORAH J. YASHAR & DINSHA MISTREE, STATES IN THE DEVELOPING WORLD 7 (Miguel A. Centeno, Atul Kohli, Deborah J. Yashar & Dinsha Mistree, eds. 2017) (“A common critique of notions of state capacity is the danger of tautology or the blurring of the line between causes and outcomes.”).

⁵¹ *Id.* at 15–16.

⁵² See Cingolani, *supra* note 42, at 103–04 (discussing Samuel Huntington’s work, among others).

⁵³ See Williams, *supra* note 45, at 345 (“[I]ncreased individual capacity within one area of the organisation—or one organisation within the broader government—is unlikely to translate into a one-for-one improvement in overall performance, and may sometimes be entirely disconnected from it.”).

⁵⁴ See Lant Pritchett & Michael Woolcock, *Solutions When the Solution Is the Problem: Arraying the Disarray in Development*, 32 WORLD DEV. 191, 192 (2004) (“[M]ost agree that the (perhaps very) long-run goal is to ensure that the provision of key services such as clean water, education, sanitation, policing, safety/sanitary regulation, roads, and public health is assured by effective, rules-based, meritocratic, and politically accountable public agencies—that is, something resembling Weberian bureaucracies. We call such a world ‘Denmark.’ By ‘Denmark’ we do not, of course, mean Denmark. Rather, we mean the common core of the structure of the workings of the public sector in countries usually called ‘developed’ (including new arrivals like Singapore).”) (footnotes omitted); see also FUKUYAMA, ORIGINS, *supra* note 43, at 14 (discussing the concept of “getting to Denmark”).

⁵⁵ See generally TILLY, DEMOCRACY, *supra* note 43 (contending that strong states can limit democracy, but weak states lead to internal division, with stability only available in some middle path); DAVID STASAVAGE, THE DECLINE AND RISE OF DEMOCRACY: A GLOBAL HISTORY FROM ANTIQUITY TO TODAY (2020) (arguing that weak states requires leaders to ask society for resources, leading to pressures for greater democracy); SHERI BERMAN, DEMOCRACY AND DICTATORSHIP IN EUROPE: FROM THE ANCIEN RÉGIME TO THE PRESENT DAY 376–409 (2019) (articulating that the relationship

wars grow state capacity?⁵⁶ Can international institutions and foreign aid help poor countries develop it?⁵⁷ How do democracy and state capacity interact to generate economic development?⁵⁸

Relatedly, more state capacity is not necessarily good. Leaders at the helm of governments with too much capacity can become tyrants and exploit the public; leaders without sufficient capacity can fail to protect their citizens and undersupply basic public services. (To the extent the state capacity literature has penetrated legal discussions, it is mostly in the former register.)⁵⁹ For many theorists, “getting to Denmark” is about finding what Daron Acemoglu and James Robinson call the “narrow corridor” between insufficient state capacity and insufficient social development that checks state power.⁶⁰ Yet theorists disagree about what allows countries to stay in the corridor: the relationship between state capacity, economic development, and political development is complex and disputed.⁶¹ Needless to say, as the theories get more intricate and depend more on specific conditions, they become less useful for making generalizable predictions.

Given these complications, “state capacity” turns out not to be one idea but a family of related ideas. In a literature review, for example, Luciana Cin-

between democracy and state capacity is multi-faceted and multi-directional and results are contingent and not permanent).

⁵⁶ See Charles Tilly, *War Making and State Making as Organized Crime* (war leads to state capacity), in BRINGING THE STATE BACK IN, *supra* note 42, at 169; Timothy Besley & Torsten Persson, *Wars and State Capacity*, 6 J. EUR. ECON. ASS’N 522, 522 (2008) (proposing a model that shows that civil wars leads to less investment in the ability to raise taxes while external wars lead to greater investment).

⁵⁷ See Williams, *supra* note 45, at 342–43 (discussing literature on relationship between aid and state capacity).

⁵⁸ See Jonathan K. Hanson, *Democracy and State Capacity: Complements or Substitutes?*, 50 STUD. COMPAR. INT’L DEV. 304, 308–13, 328 (2015) (discussing literature on whether capacity and democracy are complements or substitutes in promoting economic development, and finding evidence that they are substitutes).

⁵⁹ See Daryl J. Levinson, *Incapacitating the State*, 56 WM. & MARY L. REV. 181, 195 (2014) (discussing *incapacitating* the state, i.e. reducing state power).

⁶⁰ See ACEMOGLU & ROBINSON, *NARROW CORRIDOR*, *supra* note 43, at 17–33 (laying out the argument that too little state capacity, or an “absent Leviathan,” or too much state authority relative to societal development, or a “despotic Leviathan” both lead to tyranny, while only a balance between society and state authority leads to freedom and greater state capacity in the end, or a “shackled Leviathan”).

⁶¹ Compare STASAVAGE, *supra* note 55 (weak states lead to democracy), and TILLY, *DEMOCRACY*, *supra* note 43 (weak states can be hindrance to democratic development), and ACEMOGLU & ROBINSON, *NARROW CORRIDOR*, *supra* note 43, at 28–30 (there is a “narrow corridor” between a too powerful despotic state relative to a weak society and a too weak government relative to powerful forces in society), with HUNTINGTON, *supra* note 42, at 8 (too much democracy at early stages of development can lead to bad outcomes), and SEBASTIÁN L. MAZZUCA & GERARDO L. MUNCK, *A MIDDLE-QUALITY INSTITUTIONAL TRAP: DEMOCRACY AND STATE CAPACITY IN LATIN AMERICA* (2020) (relationship between democracy and state capacity is complex, and the key is the development of virtuous cycle of state capacity and democratic development that reinforce one another).

golani finds at least 33 ways of think about state capacity and a dizzying number of statistics used to measure it.⁶² The definitional problems multiply when discussions of state capacity make the jump from describing long-run trends in the history of economic development to analyzing specific problems in contemporary liberal states.⁶³ By the 1990s, Barbara Geddes could observe that the state had indeed been “brought back in” to academia, but was now a “great clumsy creature that no one quite knows what to do with.”⁶⁴

One strand of the state capacity literature—one that we think better reflects what the contemporary American political discourse means by “state capacity”—aims to dissolve some of these conceptual and methodological challenges. Instead of inquiring into the specific policy goals of specific political principals, scholars sometimes just ask whether states supply basic public goods.⁶⁵ This inquiry, more common among economists than political scientists, is not at all neutral about ends. Instead, it operates on the assumption that all states wish to reduce crime, collect taxes, enforce contracts, secure property rights, build infrastructure, and so on. Those that do so have strong state capacity. Those that don’t, don’t.

In this literature, the central question is under what conditions government officials have the proper incentives to invest in state capacity, rather than using resources for some other purpose.⁶⁶ There’s no need to define the “principal” because state capacity is not defined in principal-agent terms. There’s

⁶² See Cingolani, *supra* note 42, at 102 fig.1 (listing different conceptions of state capacity); *id.* at 104 fig.2 (listing different measures).

⁶³ See Williams, *supra* note 45, at 340 (“[T]he concept of bureaucratic capacity becomes less useful for understanding government bureaucracies the farther one moves away from the broad, aggregate abstraction of the original macro-historical concept towards the discussion of specific bureaucracies, policies or reforms.”).

⁶⁴ GEDDES, *supra* note 43, at 1.

⁶⁵ See generally Daron Acemoglu & Thierry Verdier, *Property Rights, Corruption and the Allocation of Talent: A General Equilibrium Approach*, 108 ECON. J. 1381 (1998) (discussing government’s decision to invest in government wages as a balance between reducing corruption that would interfere with private contracting and worry about attracting talent away from private sector); Acemoglu, *Politics and Economics in Weak and Strong States*, *supra* note 43 (contending that selfish leaders must choose between investing in consumption today or investments in revenue-raising capacity and economic development; leaders of weak states will have short time horizons while leaders of excessively stable states will not have strong enough incentives to accumulate); Timothy Besley & Torsten Persson, *State Capacity, Conflict, and Development*, 78 ECONOMETRICA 1 (2010) [hereinafter Besley & Persson, *State Capacity*] (modeling investments in revenue-generating capacity and legal capacity to enforce contracts and property rights as investments by government officials under conditions of uncertainty); Timothy Besley & Torsten Persson, *The Origins of State Capacity: Property Rights, Taxation, and Politics*, 99 AM. ECON. REV. 1218 (2009) [hereinafter Besley & Persson, *The Origins of State Capacity*] (developing a model for understanding the conditions under which a government will choose to forego current spending for investments in fiscal capacity and investments in legal capacity, defined as protections for property rights). For a discussion of this way of looking at state capacity, see Cingolani, *supra* note 42, at 104.

⁶⁶ See, e.g., Besley & Persson, *State Capacity*, *supra* note 65, at 1–3 (reviewing the different variables that affect government motivation).

also no need to find reliable outcome-independent metrics of state capacity. Results are all that matter.

This strand of the literature, however, is dogged by a different problem: the goals that states ought to have may not be the goals they actually have. What may look like government incapacity may in fact reflect a considered choice about resource allocation and the value of consumption today against investment in state capacity for tomorrow; a critique of economic rights to property and to enforce contracts; ambivalence about what the government is up to and worries about a government that might too easily trammel on freedoms; or a deliberate prioritization of values other than efficiency and competence, like participation or procedural fairness. Claims about state capacity can look a great deal like claims about the quality of democratic processes—or, more prosaically, complaints that the wrong sort of people won the last election.

That challenge notwithstanding, measuring state capacity with reference to consensus markers of successful governance has much to recommend it. If there is no Republican or Democratic way to clean the streets, there is also no excuse for failing to clean them at all.⁶⁷ And it's that approach to state capacity, we will argue, that has jumped from the broader academic literature into debates about modern American politics.

B. State Capacity in Contemporary American Politics

If the old state capacity literature is a blend of political science and development economics, the new state capacity literature is different. It is insistently national, even parochial: it asks not about the conditions through which all nations advance over time, but probes why the United States today can no longer do big things. It is primarily historical, not comparative: an author may compare infrastructure costs in the United States and Europe to set up the narrative, but the engine driving the argument is that America has lost the swagger and confidence of the postwar decades. It is relentlessly negative: it takes a glass-is-half-empty perspective on American capacity, which minimizes the rather obvious fact that, by global or historical standards, the quality of U.S. governance is high. And it is evangelizing, not just descriptive: it takes sides in live

⁶⁷ The saying “[t]here is no Democratic or Republican way to pick up garbage” is usually attributed to Fiorello LaGuardia, and it's both true and a bit misleading. David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 GEO. MASON J.L. & POL. 419, 421 n.16, 422–23 (2007) [hereinafter Schleicher, *City Council Elections*]. Often, the saying is taken to mean that local issues are inherently not ideological. Nothing could be further from the truth. There can be intense arguments over whether different approaches to local policies will produce good outcomes, including over cleaning the streets (in particular, whether garbage services should be privatized). It would be silly to claim that debates over broken window policing or the best methods for teaching reading are not ideological—people on both sides of them have different worldviews, different views of evidence and different values. Because of the nationalization of politics, however, these local ideological divides do not translate neatly into political party divisions.

political battles over, say, permitting reform of the filibuster. (It is also, we should say, completely correct in its broad diagnosis.)

What the old and new literatures share is a recognition of the intimate relationship between economic development, government capacity, and political stability. The United States is hardly a failed state, but many of its most urgent political and policy problems can be traced to the perception that government is unable or unwilling to meet people's basic needs. Housing shortages, the opioid crisis, sluggish economic growth, urban violence, climate change, crumbling infrastructure—feckless government is implicated in all of them. By yoking itself to the old state capacity literature, the new state capacity literature suggests that the dismal day-to-day functioning of government institutions is not just a garden-variety problem. Instead, it may foreshadow political collapse or, at least, declining economic growth and international standing.

We are generalizing, of course. Not all authors, etc. What the contemporary American policy literature does *not* generally do is ask whether leading officials can rely on the bureaucracy to achieve their idiosyncratic goals. It asks, instead, whether government is producing “good” policy outcomes, measured with reference to international or historical comparisons. Because good things are good, the assumption (sometimes explicit, often not) is that it is worth making whatever tradeoffs must be made in order to achieve them. If the only way to build subways efficiently is to limit public participation, measuring state capacity by looking at construction costs tacitly assumes that cheap subways are more valuable than the loss in public participation.

That approach won't work if the goal of studying state capacity is to assess, say, the effect that a high-quality national bureaucracy has on long-term economic growth rates. It mixes up the goals of politicians with the capacity of the bureaucracy and effectively imposes ideological consistency onto a world characterized by ideological difference.

But that's not really a problem for the contemporary American literature, which rests on the normative claim that the United States lacks sufficient state capacity to produce basic public goods under current conditions. You may be on board with this argument, or you may not be. You may reasonably think the downsides of greater state capacity—from increased risk of tyranny to lost public participation—are too high. We are not here to convince you that more state capacity would make America a better place (although you definitely—*definitely*—should think that). We are here, instead, to argue that if you care about state capacity, you should care about state and local governments.

Which is why it's a problem that the new state capacity literature centers its calls for reform on the *federal* government. Consider, for example, Brink Lindsey's excellent piece, *State Capacity: What Is It, How We Lost It, and How*

to *Get It Back*.⁶⁸ Although he identifies problems at different levels of government, Lindsey directs his reform proposals mostly to the national government—staffing the *federal* workforce, improving *federal* tax collection, enhancing *federal* information technology, and streamlining *federal* environmental laws.⁶⁹ Lindsey recognizes that dispersing authority across federal, state, and local jurisdictions complicates policymaking.⁷⁰ But he considers it “a waste of time” to litigate questions of constitutional structure because “[t]he U.S. Constitution is absurdly difficult to amend.”⁷¹ Fair enough, but if states and localities occupy center-stage in much policy development and implementation in the United States, we ought to care a great deal about how *they* are structured. And amending state constitutions and city charters is relatively easy.

Or take Rick Pildes’s crucial article on “the neglected value of effective government.”⁷² Democratic theory and election law, he argues, give top billing to other values—in particular, political accountability, formal equality, transparency, and fair representation.⁷³ Yet efforts to advance those values have undermined the government’s ability to get stuff done. As an argument about contemporary democratic theory, it is both convincing and powerful. And Pildes acknowledges that governance challenges “extend[] down to the local level” and notes the problems of “the bureaucratic complexity . . . across multiple jurisdictions in the highly decentralized U.S. political system.”⁷⁴ Still, Pildes’s criticism is leveled at features of *federal* law: the short terms in office for U.S. representatives, campaign finance laws that limit contributions to political parties, the packing of minority voters into safe districts under the Voting Rights Act, and counterproductive transparency laws.⁷⁵ Some of these apply to state and local elections, but their differential import for state and local government, and the unique challenges of democracy at the state and local level, is mostly off-stage.

Steve Teles’s classic article, *Kludgeocracy*, now a decade old, anticipated many of the ideas that have become prominent in the state capacity literature.⁷⁶ Teles criticizes the byzantine complexity and startling incoherence of many

⁶⁸ LINDSEY, *supra* note 29, at 1.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 2.

⁷² Pildes, *The Neglected Value*, *supra* note 14, at 185. Pildes’s work in this area is usefully quite comparative, focusing on the decline of the center in political systems all around the world. *Id.* (discussing the decline of effective government in the United States in the context of similar declines across western democracies).

⁷³ *Id.* at 189.

⁷⁴ *Id.* at 189, 210.

⁷⁵ *See id.* at 193–210 (considering political accountability at the federal level).

⁷⁶ *See generally* Steven M. Teles, *Kludgeocracy in America*, 17 NAT’L AFFS. 97, 98 (2013) (articulating America’s “clumsy but temporarily effective” public policy at the federal level).

government bureaucracies, with special attention to the difficulties that arise when states implement federal programs. But his solutions are addressed almost exclusively to Congress: ending the filibuster, reducing referrals to multiple congressional committees, leaving more micro-level decision-making to agencies, a supermajority rule for new tax credits and deductions. Only one of his proposals involves state governance: he thinks we should establish a “norm” that the sovereign who pays also administers.⁷⁷ Otherwise, Teles argues, federal regulations will degrade the quality of state and local services, both by introducing administrative complexity and removing accountability. We think Teles’s argument has much to recommend it. But it is a call to end cooperative federalism as we know it, which is not in the cards.⁷⁸

Washington think tanks are now getting in on the game.⁷⁹ At the left-leaning Roosevelt Institute, for example, K. Sabeel Rahman has called for “a framework for democratic state capacity.”⁸⁰ In Rahman’s view, the state capacity discussion in the United States is too unidimensional. Instead of a “policy-neutral quality that dials up or down,” state capacity ought to be oriented around “democracy and equity.”⁸¹ He thinks, too, that discussions about state capacity have concentrated too much on procedural burdens and too little on the resources and personnel needed to make government work better.⁸² In making this argument, however, Rahman focuses exclusively on claims about the federal government: the lack of congressional funding to improve federal capacity; presidential initiatives to tackle corporate concentration and advance equity; and hostile congressional and judicial oversight of federal agencies.⁸³ States and localities are not part of his account.⁸⁴

⁷⁷ *Id.* at 110.

⁷⁸ Peter Schuck’s book, *Why Government Fails So Often*, shares the state capacity movement’s concern with the poor quality of government performance. See generally PETER H. SCHUCK, *WHY GOVERNMENT FAILS SO OFTEN: AND HOW IT CAN DO BETTER* (2014). Yet Schuck also does not “consider state and local programs” in his indictment because it “would be an unmanageable undertaking.” *Id.* at 18.

⁷⁹ At the centrist Niskanen Center, Jennifer Pahlka and Andrew Greenway recently authored *The How We Need Now: A Capacity Agenda for 2025 and Beyond*. PAHLKA & GREENWAY, *supra* note 15. Though Pahlka and Greenway are (unusually) attentive to states and localities in describing the state capacity problem, their recommendations concentrate on “[a]ctions for the White House,” “[a]ctions for Congress,” and “[a]ctions for civil society”—not calls for reform at the state or local level. *Id.* at 45.

⁸⁰ See generally RAHMAN, *supra* note 13.

⁸¹ *Id.* at 5 (emphasis omitted).

⁸² See *id.* at 9–11 (arguing that internal state capacity is actually a function of money, information, and people).

⁸³ *Id.* at 9, 13–15.

⁸⁴ We also question whether Rahman’s project is really about state capacity as that term is conventionally understood. Rahman starts from the premise that a more inclusive state will have greater capacity, all else equal, because it can avoid “breakdowns of legitimacy and trust.” *Id.* at 7. Rahman draws from that high-level principle a particular policy prescription: that the state must promote some voices—engage in the “affirmative inclusion of vulnerable or marginalized constituencies in the for-

We think it matters that the federal government looms so large in these authors' telling.⁸⁵ It risks conflating *American* governance with *federal* governance, even though most administration happens at the state and local level. It suggests that the right targets for a reform agenda are Congress, federal agencies, the federal civil service, or federal courts—not state and local leaders. And it obscures how state-and-local grassroots efforts like the YIMBY movement have already enlisted foot soldiers in the war for stronger state capacity.⁸⁶

Some of the ground-up work on state capacity does better. In a recent study, for example, Zach Liscow, Will Nober, and Cailin Slattery find that it costs less to build and maintain roads in states whose departments of transportation are seen as having higher capacity.⁸⁷ Thomas Hochman has carefully

mulation and design of public policy”—and act to protect the state against the risk of special interest capture. *Id.*

In so arguing, Rahman makes three moves to indicate that what he means by state capacity is both distinctive and unusual. First, the state capacity literature is deeply attuned to tradeoffs, recognizing that well-intentioned laws that produce some benefits for participation or representation can have deleterious consequences for collective governance, including for the most vulnerable. For Rahman, however, participatory rights for marginalized groups necessarily enhance legitimacy and thus increase state capacity. That's apparently so *even if* those participatory rights frustrate the government's ability to advance its policy goals. *Id.* at 7–9. Tradeoffs are brushed aside.

Second, Rahman assumes there is broad social agreement about who is a vulnerable or marginalized constituency and who is a special interest. *Id.* at 7. There isn't. One side's vulnerable group is the other side's special interest. Even if there were consensus, there's no reason to think that manipulating the relative contributions of each will foster a state's legitimacy. A democratic state can be broadly inclusive and popularly legitimate without enhancing the ability of specific groups to participate in discrete policymaking choices. That's what popular elections and the rule of law are for.

Third, Rahman argues for dismantling the state's ability to “enforce particular forms of racialized or gendered inequity—such as through immigration or carceral or punitive state structures.” *Id.* at 5. To us, that reads like a claim about the policy goals that an enlightened state ought to have. It is not a claim about the ability of a democratic majority to use the state to achieve its goals. Nor is it an argument about whether the state can achieve widely agreed upon ends, as these are the subject of intense ideological wrangling. The result is ironic: in the name of making state capacity more democratic, Rahman would restrict the ability to effectuate policies he disapproves of, even if that's where elections end up.

⁸⁵ It should be noted that our work has the same flaws! See generally Bagley, *Procedure Fetish*, *supra* note 29 (criticizing the reflexive embrace of procedural rules in federal administrative law, while ignoring states and localities).

⁸⁶ *About*, YIMBY ACTION, <https://yimbyaction.org/about/> [<https://perma.cc/BX53-FYC4>]. YIMBY is a network of pro-housing development advocates across the country. *Id.* Since beginning in San Francisco, YIMBY has partnered with similar movements in other cities to create a unified network. *Id.*

⁸⁷ Zachary Liscow, Will Nober & Cailin Slattery, *Procurement and Infrastructure Costs* 22 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31705, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4582322 [<https://perma.cc/54NJ-8MFJ>]. For further work on infrastructure, see ERIC GOLDWYN, ALON LEVY, ELIF ENSARI & MARCO CHITTI, N.Y.U., MARRON INST. OF URB. MGMT., TRANSIT COSTS PROJECT: UNDERSTANDING TRANSIT INFRASTRUCTURE COSTS IN AMERICAN CITIES 8–18 (2023), https://transitcosts.com/wp-content/uploads/TCP_Final_Report.pdf [<https://perma.cc/8ENW-NDNV>]; Leah Brooks & Zachary Liscow, *Infrastructure Costs*, 15 AM. ECON. J. 1, 1–25 (2023).

documented how state and local permitting, more than federal permitting, serves as the principal chokepoint to new development.⁸⁸ Jennifer Pahlka's *Recoding America* brings to vivid life how a cover-your-butt culture that prizes legalistic compliance is especially pernicious for government tech at both the federal and state levels.⁸⁹ Michael Gerrard was among the first to document how federal, state, and local laws, and the challenges in coordinating among federal and state agencies, would complicate the transition to renewable energy.⁹⁰ On housing, a variety of scholars have focused on how a lack of government capacity and excessive procedures had led to bad outcomes.⁹¹

But this work typically concentrates on specific issue areas and, as such, is inattentive to the systematic obstacles that states and localities face in improving their capacity to govern. The bigger-picture work provides deep explanations of the ideological and intellectual moves that have led to a lack of investment in state capacity, but concerns itself primarily with the federal government. We think that is unfortunate. The new state capacity movement is onto something important. Precisely because it is so important, however, the movement needs to direct its reformist zeal to the right place. The federal government matters, of course. But when it comes to state capacity, state and local governments matter more.

⁸⁸ THOMAS HOCHMAN, FOUND. FOR AM. INNOVATION, THE STATE PERMITTING PLAYBOOK 1–2 (2024), <https://cdn.sanity.io/files/d81rla4f/staging/ccal1b0e8b57426cb7ec0b5c1f3c0e4ce1bbf22f4.pdf> [<https://perma.cc/8QM5-RRSU>].

⁸⁹ See generally PAHLKA, *supra* note 14 (exploring this dynamic).

⁹⁰ See Michael B. Gerrard, *Legal Pathways for a Massive Increase in Utility-Scale Renewable Generation Capacity*, 47 ENV'T L. REP. 10591, 10604 (2017) (explaining the interplay between federal agencies, state approvals, and judicial review for environmental projects). For further work on the conflict between environmental laws and green development, see J.B. Ruhl & James Salzman, *What Happens When the Green New Deal Meets the Old Green Laws?*, 44 VT. L. REV. 693, 713–16 (2020); J.B. Ruhl & James Salzman, *The Greens' Dilemma: Building Tomorrow's Climate Infrastructure Today*, 73 EMORY L.J. 1, 34–48 (2023) [hereinafter Ruhl & Salzman, *The Greens' Dilemma*]; ELI DOURADO, CTR. FOR GROWTH & OPPORTUNITY, UTAH STATE UNIV., BRINGING NEPA BACK TO BASICS 1–3 (2023), <https://www.thecgo.org/wp-content/uploads/2023/03/Bringing-NEPA-Back-to-Basics-v1.pdf> [<https://perma.cc/2UHH-6YKX>]; Brian Potter, Arnab Datta, & Alec Stapp, *How to Stop Environmental Review from Harming the Environment*, INST. FOR PROGRESS (Sep. 13, 2022), <https://ifp.org/environmental-review/> [<https://perma.cc/DA89-S38B>].

⁹¹ Sara C. Bronin, *Zoning by a Thousand Cuts*, 50 PEPP. L. REV. 719, 732 (2023). See generally Christopher S. Elmendorf, Eric Biber, Paavo Monkkonen & Moira O'Neill, *Making It Work: Legal Foundations for Administrative Reform of California's Housing Framework*, 47 ECOLOGY L.Q. 973 (2020); David Schleicher, *City Unplanning*, 122 YALE L.J. 1670 (2013).

Outside the academy, some public commentators have also focused on how states and localities have hampered state capacity. See, e.g., Ezra Klein, Opinion, *The Problem with Everything-Bagel Liberalism*, N.Y. TIMES (Apr. 2, 2023), <https://www.nytimes.com/2023/04/02/opinion/democrats-liberalism.html> [<https://perma.cc/S4S8-HYFD>]; Misha David Chellam, *The What, How, and Why of Abundance*, MOD. POWER (Aug. 29, 2022), <https://modernpower.substack.com/p/whathowwhyofabundance> [<https://perma.cc/UJD6-4F8H>]; Jerusalem Demsas, *Not Everyone Should Have a Say*, THE ATLANTIC (Oct. 19, 2022), <https://www.theatlantic.com/ideas/archive/2022/10/environmentalists-nimby-permitting-reform-nepa/671775/> [<https://perma.cc/MJ9X-S2DH>].

II. “THE STATE” IS THE STATES AND THEY LACK CAPACITY

That the American “state” largely consists of state and local governments will not surprise students of American government of the eighteenth and nineteenth centuries. As William Novak and others have shown, the common belief in a weak state that didn’t do very much is the product of an excessive focus on the federal government.⁹² State and local governments invested a huge amount both in building public infrastructure and in regulating behavior.⁹³

Yes, the federal budget exploded in the post-New Deal and Great Society periods, and it continues to grow today.⁹⁴ Yes, the federal government assumed vastly more regulatory authority in the twentieth century than it had in the nineteenth. Nonetheless, outside of a few areas—the military, Medicare, social security, intellectual property regulation, drug safety, the postal service, etc.—states and localities still *administer* most government programs in the United States.⁹⁵ (One important exception is income tax collection and enforcement,⁹⁶ an area that is central to most understandings of state capacity and where federal capacity is at the center of the story.)⁹⁷ That’s true even for those govern-

⁹² See generally WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996) (discussing extensive social and economic regulation by states and localities in the nineteenth century); William J. Novak, *The Myth of the “Weak” American State*, 113 AM. HIST. REV. 752, 763 (2008) (showing that, although the American state largely lacked “despotic” power, it had substantial “infrastructural power” through state and local governments).

⁹³ Emily Zackin similarly argues that flawed beliefs about American constitutional law—that rights in the United States are all “negative” protections from governments—are a product of an excessive federal focus. See generally EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* (2013) (arguing that American *state* constitutional law does contain positive rights, like most national constitutions). As Zackin shows, state constitutions are shot through with positive rights—most famously, rights to education, but also labor and environmental rights. *Id.* These rights are often enforceable in courts and are one of the sources of the problems of state capacity. *Id.*

⁹⁴ DAN COATS & KEVIN BRADY, JOINT ECON. COMM’N REPUBLICANS, AN ECONOMIC HISTORY OF FEDERAL SPENDING & DEBT: ECONOMIC GROWTH & FEDERAL BUDGETING TRENDS WITH INSIGHTS FOR THE FUTURE 1, 14 (2015), https://www.jec.senate.gov/public/_cache/files/aeff50d-dc8e-4e0b-ab9f-def32f184179/20150910-jec-spendingstudy.pdf [<https://perma.cc/K5YA-UY5T>].

⁹⁵ See *Intergovernmental Relationships: How The Three Levels of Government Work Together*, NORWICH U., <https://online.norwich.edu/online/about/resource-library/intergovernmental-relationships-how-three-levels-government-work-together> [<https://perma.cc/KNJ7-EDGN>] (describing the states’ role in implementing federal programs).

⁹⁶ This is obviously not so for types of taxes, like property and sales taxes, for which there is no federal analog.

⁹⁷ Federal dominance in income tax enforcement creates its own pathologies. See David Gamage & Darien Shanske, *Tax Cannibalization and Fiscal Federalism in the United States*, 111 NW. U. L. REV. 295, 298–300 (2017) (overviewing problems created by a federal-led tax system that largely overlaps with state taxes). As a result of federal dominance of income tax enforcement, state tax policy often piggybacks on federal definitions of the tax base, simply increasing the tax rate on different tax bases (e.g. personal income, corporate income, capital gains). *Id.* But adding state taxes to federal taxes creates “vertical [tax] externalities,” as state taxes reduce economic activity, reducing the revenue the federal government collects. *Id.* at 297–98. It would be better if states and the federal govern-

ment programs that the federal government funds and regulates.⁹⁸ And it's true even though the centrality of states and localities to American governance may partly reflect federal dysfunction, with important federal programs devolved to the states or never taken over by the feds.⁹⁹

Our point is that state capacity is substantially (or even mostly) a product of state and local administration. Or so we will argue, drawing on the variables that scholars of state capacity have identified to separate high-capacity states from low-capacity states.¹⁰⁰ Those variables include (but are by no means limited to) public employment; the security of property and contract rights; crime prevention; the quality and extent of public infrastructure; and the provision of public services.

A. Public Employment

If personnel is policy, state and local governments dominate policy in the United States. The federal government employs about two million civilians, give or take.¹⁰¹ If you include active-duty military personnel and postal service workers, the number grows to 3.8 million.¹⁰² But that top-line figure is misleading because the federal government contracts out many of its responsibilities.¹⁰³ After including contract and grant employees, the total swells to 9.1 million.¹⁰⁴ That tally of the “blended workforce” is rough: it's not always easy to tell which of a contractor's employees are the practical equivalent of full-time government employees and which are really just contractors.¹⁰⁵

ment taxed different bases, but federal administrative capacity encourages states to target the same bases as the federal government.

⁹⁸ See *State and Local Expenditures*, URB. INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-expenditures> [<https://perma.cc/5N3R-CJ3A>] (providing that the states receive federal funds for education, among other purposes).

⁹⁹ JACOB M. GRUMBACH, *LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS* 10–11 (2022).

¹⁰⁰ See *supra* notes 42–67 and accompanying text.

¹⁰¹ PAUL C. LIGHT, VOLCKER ALL., *THE TRUE SIZE OF GOVERNMENT* 2, tbl.1 (2017), https://www.volckeralliance.org/sites/default/files/attachments/Issue%20Paper_True%20Size%20of%20Government.pdf [<https://perma.cc/7GLJ-U3AA>] (showing numbers as of 2015).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

TABLE I: The True Size of the Federal Government's Blended Workforce, 1984–2015

TYPE OF EMPLOYEE	1984	1990	1993	1996	1999	2002	2005	2010	2015
FEDERAL EMPLOYEES	2,083,000	2,174,000	2,139,000	1,891,000	1,778,000	1,756,000	1,830,000	2,128,000	2,042,000
CONTRACT EMPLOYEES	3,666,000	3,427,000	3,245,000	3,042,000	2,398,000	2,791,000	3,882,000	4,845,000	3,702,000
GRANT EMPLOYEES	1,234,000	1,352,000	1,344,000	1,351,000	1,415,000	1,236,000	1,578,000	2,344,000	1,583,000
ACTIVE-DUTY MILITARY PERSONNEL	2,138,000	2,044,000	1,705,000	1,472,000	1,386,000	1,412,000	1,518,000	1,384,000	1,315,000
POSTAL SERVICE EMPLOYEES	673,000	761,000	692,000	761,000	798,000	753,000	705,000	584,000	492,000
TOTAL	9,794,000	9,758,000	9,125,000	8,517,000	7,775,000	7,948,000	9,513,000	11,285,000	9,134,000

Figure 1

Whatever figure you use, state and local workforces dwarf the federal workforce. All told, the Census Bureau reckons that states and localities employ 19.9 million people, heavily concentrated in education, public hospitals, police protection, and corrections.¹⁰⁶ Public employment in the educational sector *alone* (11.3 million) is bigger than even the most generous tally of federal employment.¹⁰⁷ Nearly three in four of non-federal government workers are employed by local government entities (counties, townships, school boards, cities, etc.).¹⁰⁸ Crucially, these figures do *not* include contractors or grant recipients, even though state and local governments, like their federal counterparts, also depend on the private sector to carry out many public functions. The actual disparity is thus even larger than the raw numbers suggest.

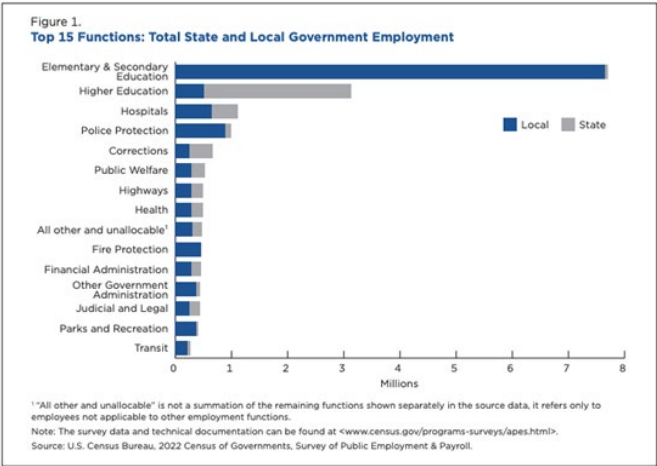


Figure 2

¹⁰⁶ See KIMBERLY ENNIS ET AL., U.S. CENSUS BUREAU, ANNUAL SURVEY OF PUBLIC EMPLOYMENT & PAYROLL SUMMARY REPORT: 2024, at 1 (2025), <https://www.census.gov/content/dam/Census/library/publications/2024/econ/ASPEP%20Summary%20Report%202024.pdf> [<https://perma.cc/JD4W-YTX4>] (72.3%).

¹⁰⁷ *Id.* at 2.

¹⁰⁸ *Id.* at 1.

It may be tempting to dismiss the employment figures as uninformative. Sure, states and localities employ lots of teachers and police officers, but those workers do not set government policy in the same way as, say, an EPA official does. If you're trying to get a handle on state capacity, what matters isn't the numbers. It's the influence.

Tempting, but wrong. For most Americans most of the time, it's the day-to-day performance of state and local institutions that matters most. A distant official's choice about whether to crack down on air pollution, approve a given drug, or tighten scrutiny of investment banks may be important, but not nearly as much as whether your local public school can teach your kid to read. Many schools in America can't.¹⁰⁹ The same holds true for public safety, local transportation, housing policy, and many other policy domains in which, to a first approximation, federal workers play no role.

It's also a mistake to think that workers like teachers and police officers do not make policy. They do. They make it in the conventional sense that the institutions in which they operate formulate explicit policies of general application that affect the performance of their public functions.¹¹⁰ But they also make policy through the day-to-day performance of their job duties. A school district with good teachers carries out a very different public policy than a comparable district with lousy teachers. So too with policing: public safety suffers when officers shirk their duties or abuse the public. Their actions, taken collectively, do not just influence government policy. They *are* government policy.¹¹¹ Further, state and local officials sometimes struggle in demanding that officials, like police officers, actually carry out public policies.¹¹² Public employee resistance to directives issued by mayors or school boards is also a form of policy.

In any event, most federal jobs are not so different from state and local jobs. Federal law enforcement agencies—including Customs and Border Patrol, the Transportation Security Administration, the Federal Bureau of Investi-

¹⁰⁹ See *State Achievement-Level Results*, *supra* note 10 (“In 2022, the percentage of fourth-grade public school students performing at or above the *NAEP Proficient* level in reading was 32 percent nationally.”).

¹¹⁰ One of our favorite examples of this is fictional. During Season 3 of the TV show *The Wire*, a police major in Baltimore creates “Hamsterdam,” a zone where drug sales and use is legal. See *THE WIRE* (HBO television broadcast, aired Sep. 19, 2004–Dec 19, 2004). For a discussion of the Hamsterdam plot line, see Lance McMillian, *Drug Markets, Fringe Markets, and the Lessons of Hamsterdam*, 69 WASH. & LEE L. REV. 849, 852 (2012).

¹¹¹ See MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* 13, 16–18 (2d ed. 2010) (“[W]hen taken in concert, their [street-level bureaucrats'] individual actions add up to agency behavior.”).

¹¹² See, e.g., Gregory Krieg, *There's No Playbook for the Battle Between Mayors and Police Right Now*, CNN (June 20, 2020), <https://www.cnn.com/2020/06/20/politics/mayors-police> [<https://perma.cc/VK4B-UEL8>] (discussing the difficulty mayors have in getting police to follow their commands).

gation—employ about 137,000 full-time officers who are authorized to make arrests or carry firearms.¹¹³ The U.S. Department of Veterans Affairs employs more than 371,000 people in what is effectively the nation’s largest health-care system—accounting for nearly twenty percent of the federal civilian workforce.¹¹⁴ The Internal Revenue Service has 80,000 employees, but state and local tax agencies employ many thousands in similar roles (California: more than 5,000;¹¹⁵ Florida: nearly 5,000;¹¹⁶ New York, 3,800;¹¹⁷ Texas: 2,760¹¹⁸).

The biggest difference between federal workers and their state and local counterparts is not that they do different jobs. It’s that there are many millions more of the latter. We don’t want to overdraw the point: if you want to know about military capacity, you ought to focus on the federal government. (Though even there, don’t forget the National Guard, which operates under state authority and counts 430,000 reservists.)¹¹⁹ But if you want to know about almost anything else, you would do better to train your attention on the levels of government that employ a very large majority of the workers that carry out government policy in the United States.

B. Infrastructure

High-quality infrastructure has been a symbol of effective governance for as long as there have been governments.¹²⁰ Roman roads and aqueducts are evidence of both the grandeur and the skill of the Roman Empire.¹²¹ The giant

¹¹³ CONNOR BROOKS, U.S. DEP’T OF JUST., BUREAU OF JUST. STATS., FEDERAL LAW ENFORCEMENT OFFICERS, 2020—STATISTICAL TABLES 1 (2023), <https://bjs.ojp.gov/document/fleo20st.pdf> [<https://perma.cc/56MT-GJ2U>].

¹¹⁴ *About VHA*, U.S. DEP’T OF VETERANS AFFS., <https://www.va.gov/health/aboutvha.asp> [<https://perma.cc/B76X-6RG4>] (Jan. 20, 2025).

¹¹⁵ FRANCHISE TAX BD., STATE OF CAL., CAREERS WITH FRANCHISE TAX BOARD 2 (2017), <https://www.ftb.ca.gov/about-ftb/careers/7801M.pdf> [<https://perma.cc/6CYH-2NTN>].

¹¹⁶ *Careers at Revenue*, FL. DEP’T OF REVENUE, <https://floridarevenue.com/Pages/EmploymentOpportunities.aspx> [<https://perma.cc/98NY-B8CG>].

¹¹⁷ *Leadership Team*, N.Y.S. DEP’T OF TAX’N & FIN., <https://www.tax.ny.gov/about/leadership-team.htm> [<https://perma.cc/V4DY-QS28>] (Sep. 10, 2025).

¹¹⁸ GLENN HEGAR, TEX. COMPTROLLER OF PUB. ACCTS., AGENCY WORKFORCE PLAN 2021–2025, at 7 (2020), <https://comptroller.texas.gov/transparency/reports/cpa-operations/workforce-plan/2021-25.pdf> [<https://perma.cc/FG7Y-DXGT>].

¹¹⁹ Diana Roy, Noah Berman & Anshu Siripurapu, *What Does the U.S. National Guard Do?*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/backgrounder/what-does-us-national-guard-do> [<https://perma.cc/5QEX-XCWX>] (Sep. 30, 2025).

¹²⁰ It can be difficult to define infrastructure; this difficulty became a subject of some debate early in the Biden Administration. See SCHLEICHER, IN A BAD STATE, *supra* note 33, at 179 n.39 (pointing out that some believe childcare should be included within the meaning of “infrastructure”). But here we are referring to “hard” infrastructure, things built out of concrete and steel, not other investments in the future (e.g., the operation of schools).

¹²¹ “[T]he three most magnificent works of Rome, in which the greatness of her empire is best seen, are the aqueducts, the paved roads and the construction of the sewers.” THE ROMAN ANTIQUITIES OF DIONYSIUS OF HALICARNASSUS, bk. 3, ch. 67 (Earnest Cary, Trans. 1939).

urban bridges and the transcontinental railroads reflect the nineteenth-century power of the United States.¹²² The interstate highway system is perhaps the crown jewel of successful governance during the American Century.¹²³ No wonder, then, that scholars sometimes use infrastructure quality as a key measure of state capacity.¹²⁴

It's an article of faith for national politicians from both political parties that the federal government is responsible for American infrastructure. During the first Trump administration, "Infrastructure Week" came and went repeatedly, with sniping from both sides about why so much infrastructure has fallen into disrepair.¹²⁵ The Biden Administration backed the giant Infrastructure Investment and Jobs Act (IIJA) and crowed about how it would get America building again.¹²⁶ Yet the construction, maintenance, and operation of U.S. infrastructure is overwhelmingly a state and local responsibility.¹²⁷ Funding it is too, although to a lesser degree.¹²⁸

Outside of post offices, military bases, some dams, and a few other odds and ends, the federal government owns almost no public infrastructure.¹²⁹ Federal spending on infrastructure mostly consists of grants to the states, which then build roads, trains, and the like.¹³⁰ A majority of this money, including

¹²² See generally JON C. TEAFORD, *THE UNHERALDED TRIUMPH: CITY GOVERNMENT IN AMERICA, 1870–1900* (1984) (discussing the influence of various infrastructure projects on the structure of city communities).

¹²³ See *History of the Interstate Highway System*, FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., <https://www.fhwa.dot.gov/interstate/history.cfm> [<https://perma.cc/2B4J-P4KN>] (Aug. 8, 2023) ("The Interstate System has been called the Greatest Public Works Project in History.").

¹²⁴ Cingolani, *supra* note 42, at 104–05.

¹²⁵ Katie Rogers, *How 'Infrastructure Week' Became a Long-Running Joke*, N.Y. TIMES (May 22, 2019), <https://www.nytimes.com/2019/05/22/us/politics/trump-infrastructure-week.html> [<https://perma.cc/R5SB-AP7S>]; Emily Cochrane & Eileen Sullivan, *The Many Times It's Been 'Infrastructure Week' in Washington*, N.Y. TIMES (Apr. 1, 2020), <https://www.nytimes.com/2020/04/01/us/politics/coronavirus-infrastructure-week-timeline.html> [<https://perma.cc/P28Y-9GAW>].

¹²⁶ *Fact Sheet: The Bipartisan Infrastructure Deal*, THE WHITE HOUSE (Nov. 6, 2021), <https://biden.whitehouse.archives.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal/> [<https://perma.cc/7RQJ-K66G>]; Brian Naylor & Deirdre Walsh, *Biden Signs the \$1 Trillion Bipartisan Infrastructure Bill into Law*, NPR (Nov. 15, 2021), <https://www.npr.org/2021/11/15/1055841358/biden-signs-1t-bipartisan-infrastructure-bill-into-law> [<https://perma.cc/Y9US-QXUW>].

¹²⁷ James McBride, Noah Berman & Anshu Siripurapu, *The State of U.S. Infrastructure*, COUNCIL ON FOREIGN RELS. (Sep. 20, 2023), <https://www.cfr.org/background/state-us-infrastructure> [<https://perma.cc/JKW7-UNBA>].

¹²⁸ *Id.*

¹²⁹ See THE WHITE HOUSE, *A GUIDEBOOK TO THE BIPARTISAN INFRASTRUCTURE LAW FOR STATE, LOCAL, TRIBAL, AND TERRITORIAL GOVERNMENTS, AND OTHER PARTNERS 3* (2022), <https://biden.whitehouse.archives.gov/wp-content/uploads/2022/05/BUILDING-A-BETTER-AMERICA-V2.pdf> [<https://perma.cc/3PRG-3TSY>] ("After all, most of the building will actually be done by state, Tribal, and local government partners."). Almost all public civic infrastructure is owned by state and local governments. Chris Edwards, *Who Owns U.S. Infrastructure?*, CATO INST. (June 1, 2017), <https://www.cato.org/tax-budget-bulletin/who-owns-us-infrastructure> [<https://perma.cc/YVS5-TSQT>].

¹³⁰ McBride et al., *supra* note 127.

under the IIJA, is dispensed to governments according to formulas based on congressional judgments of government size and need, depending on the category, with little reference to specific projects or goals.¹³¹ A smaller amount comes in the form of discretionary grants (of which the IIJA included more than usual) that require states and localities to apply for funds.¹³² The federal government also pays for a variety of programs that directly loan money or otherwise enhance credit for state and local governments.¹³³

The vast majority of infrastructure projects are managed and run by state and local governments.¹³⁴ Federal officials may retain authority over how to spend discretionary federal dollars and to set spending formula. And federal regulations, especially the National Environmental Policy Act (and related laws), apply to state projects getting federal money, which affects both design choices and costs.¹³⁵ Nonetheless, construction and operation remains in the hands of state and local officials.¹³⁶ Private entities—especially utilities, including energy providers and cable television—supply several important categories of infrastructure.¹³⁷ Even there, however, the chief regulators of private infrastructure are state and local entities.¹³⁸

¹³¹ *Funding*, FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., <https://www.fhwa.dot.gov/bipartisan-infrastructure-law/funding.cfm> [<https://perma.cc/B9EC-Q6MA>] (Sep. 3, 2025); *A User Guide to the Bipartisan Infrastructure Law (BIL)*, BLUEGREEN ALL. (Jan. 27, 2023), <https://www.bluegreenalliance.org/site/a-user-guide-to-the-bipartisan-infrastructure-law-bil/> [<https://perma.cc/YBS5-EJCD>].

¹³² See CAL. SENATE OFF. OF RSCH., INFRASTRUCTURE INVESTMENT AND JOBS ACT: TRANSPORTATION OVERVIEW 6–9 (2021), <https://sor.senate.ca.gov/sites/sor.senate.ca.gov/files/IIJA%20Transportation%20Overview%20-%20SOR-FINAL.pdf> [<https://perma.cc/LLY3-25VJ>] (describing an increase in discretionary grants).

¹³³ See CONG. BUDGET OFF., CONG. OF THE U.S., FEDERAL SUPPORT FOR FINANCING STATE AND LOCAL TRANSPORTATION AND WATER INFRASTRUCTURE 12–14 (2018), <https://www.cbo.gov/system/files/2018-10/54549-InfrastructureFinancing.pdf> [<https://perma.cc/SRM7-VZZK>] (describing different credit programs).

¹³⁴ Edwards, *supra* note 129.

¹³⁵ Robert Poole, *Growing Agreement That Government Regulations Are Driving Up the Costs of Vital Infrastructure*, REASON FOUND. (Mar. 31, 2022), <https://reason.org/commentary/growing-agreement-that-government-regulations-are-driving-up-the-costs-of-vital-infrastructure/> [<https://perma.cc/JGU2-GH69>].

¹³⁶ Edwards, *supra* note 129.

¹³⁷ That said, private ownership of critical infrastructure is not as extensive as some claim. See Paul Rosenzweig, *Turns Out It Is Not 85 Percent*, LAWFARE INST. (June 2, 2022), <https://www.lawfaremedia.org/article/turns-out-it-not-85-percent> [<https://perma.cc/KGA9-S2AE>].

¹³⁸ See Daniel A. Lyons, *Federalism and the Rise of Renewable Energy: Preserving State and Local Voices in the Green Energy Revolution*, 64 CASE W. RES. L. REV. 1619, 1625–28 (2014) (discussing state regulation of energy). For more on federalism in the energy sector, see generally Matthew R. Christiansen & Joshua C. Macey, *Long Live the Federal Power Act's Bright Line*, 134 HARV. L. REV. 1360 (2021).

In any event, the federal government is not the primary financier of infrastructure. State and local governments, in fact, invest larger dollar amounts.¹³⁹ In part, that's because most federal money requires state and local contributions.¹⁴⁰ But it's also because the federal government prioritizes capital spending—leaving states and local governments to fend for themselves for maintenance and operations. Here's a snapshot (albeit one that antedates the IIJA):¹⁴¹

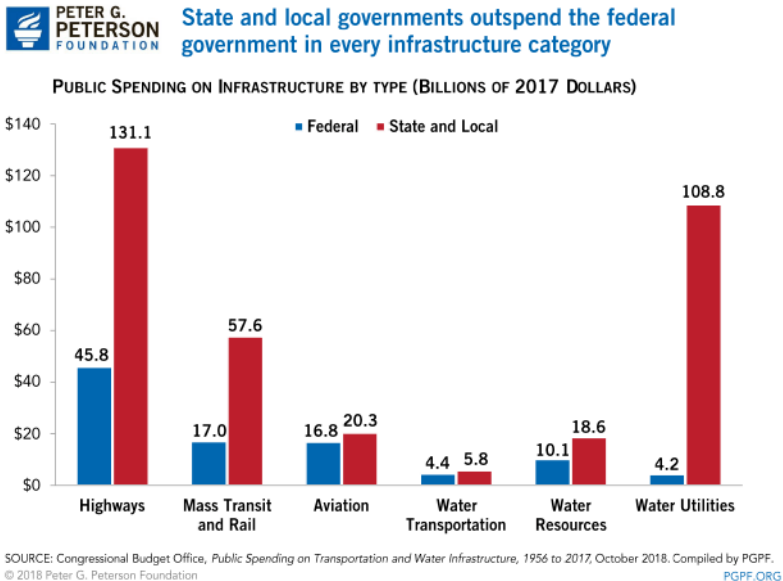


Figure 3

Core federal infrastructure policy explicitly aims to enhance state and local autonomy. Building infrastructure requires borrowing—governments need to spread project costs over time.¹⁴² That's why the most longstanding and crucial federal law promoting state and local infrastructure is the income tax ex-

¹³⁹ And that's just for categories of infrastructure in which the federal government has gotten interested. Many other categories of infrastructure—consider, for example, school buildings—involve little federal money. VICTORIA JACKSON & NICHOLAS JOHNSON, CTR. ON BUDGET & POL'Y PRIORITIES, AMERICA'S SCHOOL INFRASTRUCTURE NEEDS A MAJOR INVESTMENT OF FEDERAL FUNDS TO ADVANCE AN EQUITABLE RECOVERY 1 (2021), <https://www.cbpp.org/sites/default/files/5-17-21sfp.pdf> [<https://perma.cc/T8VZ-9FKU>] (“The federal government plays a small but significant role in funding public school operations and programs designed to even out disparities in student opportunity But no comparable federal program addresses the disparities in financing school construction and maintenance . . .”).

¹⁴⁰ *Id.*

¹⁴¹ *State and Local Infrastructure Spending: A Closer Look*, PETER G. PETERSON FOUND. fig.2 (June 17, 2020), https://www.pgpf.org/chart-archive/0275_infrastructure_spending_by_category [<https://perma.cc/5PNV-BWTA>].

¹⁴² SCHLEICHER, IN A BAD STATE, *supra* note 33, at 26–27.

emption for interest on municipal bonds.¹⁴³ The exemption, which has existed as long as there has been an income tax, allows state and local governments to borrow at lower rates.¹⁴⁴ Without this policy, or something like it, it would be much harder for state and (especially) local governments to access credit and thus make investments, depriving them of the autonomy to decide which infrastructure to invest in.

Whether American infrastructure is in bad shape is a subject of substantial debate. The American Society of Civil Engineers gives American infrastructure a report card, most recently grading it at C.¹⁴⁵ Others dispute this, arguing large parts of American infrastructure are just fine (and that the engineers are just a pro-construction group, not a neutral arbiter).¹⁴⁶ Some claim that infrastructure is overbuilt in many American cities and towns, with maintenance obligations serving as a source of long-term fiscal stress, especially for cities (like Detroit, for example) whose populations have declined from their postwar peak.¹⁴⁷

That said, there is broad agreement that United States does not produce high-quality infrastructure at the rate of peer countries—and that substantial investment in some categories of infrastructure could yield very substantial returns.¹⁴⁸ You only need to look at the huge amount of high-speed rail that has been built in Europe or Asia and compare it to the debacle of the California high-speed rail project and the absence of high-speed rail on the highly trafficked Boston-to-Washington corridor.¹⁴⁹ Alternatively, you can compare the huge expansions of subways from China to London to Paris to the few subway stops that have been added in New York City since the 1930s.¹⁵⁰ Or you can

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 61, 159–60.

¹⁴⁵ AM. SOC'Y OF CIV. ENG'RS, A COMPREHENSIVE ASSESSMENT OF AMERICA'S INFRASTRUCTURE 3 (2025), <https://infrastructurereportcard.org/wp-content/uploads/2025/03/Full-Report-2025-Natl-IRC-WEB.pdf> [<https://perma.cc/AXW5-ZBDS>].

¹⁴⁶ Charles Lane, Opinion, *No, America's Infrastructure Is Not 'Crumbling'*, WASH. POST (Apr. 6, 2021), https://www.washingtonpost.com/opinions/no-americas-infrastructure-is-not-crumbling/2021/04/06/ab97cc50-9554-11eb-a6d0-13d207aadb78_story.html [<https://perma.cc/V9C8-NQX7>].

¹⁴⁷ See Charles Marohn, *The More We Grow, the Poorer We Become*, STRONG TOWNS (Aug. 22, 2018), <https://www.strongtowns.org/journal/2018/8/22/the-more-we-grow-the-poorer-we-become> [<https://perma.cc/QD93-23UW>] (“Infrastructure is a [l]iability, [n]ot an [a]sset.”).

¹⁴⁸ See Eric Van Nostrand, *Infrastructure Investment in the United States*, U.S. DEP'T OF TREASURY (Nov. 15, 2023), <https://home.treasury.gov/news/featured-stories/infrastructure-investment-in-the-united-states> [<https://perma.cc/FUR6-2JPY>] (“Two well-documented facts characterize infrastructure investment in the United States: it has fallen in recent decades and reversing that decline would deliver meaningful economic benefits.”).

¹⁴⁹ Michael Molitch-Hou, *The Rest of the Industrialized World Has High-Speed Rail, Why Can't the U.S.?*, ENGINEERING.COM (Mar. 22, 2019), <https://www.engineering.com/story/the-rest-of-the-industrialized-world-has-high-speed-rail-why-cant-the-us> [<https://perma.cc/CUP6-XSDN>].

¹⁵⁰ Jonathan English, *Derailed: The Postwar End of New York City Subway Expansion*, 47 J. URB. HIST. 832, 833 (2021); Angie Schmitt, *China's Investment in Subways Puts the U.S. to Shame*, STREETS BLOG USA (Jan. 18, 2018), <https://usa.streetsblog.org/2018/01/18/chinas-investment-in-subways-puts-the-u-s-to-shame> [<https://perma.cc/CTT7-7B5V>]; Kate Duffy & Abby Wallace, *Lon-*

look at disasters like the failure to replace lead pipes and to expand sewer systems to accommodate new housing.¹⁵¹ Or at the relative quality of American and international airports.¹⁵²

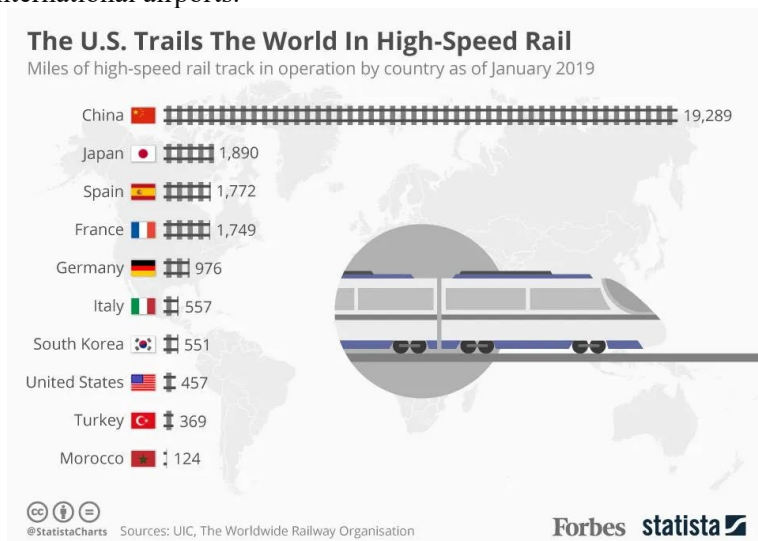


Figure 4

don's \$25 Billion Railway, Which Took 23 Years to Build, Hits 100 Million Passenger Journeys Since Opening in May. One Station Is Big Enough to Fit the City's Tallest Skyscraper Inside, BUS. INSIDER (Feb. 5, 2023), <https://www.businessinsider.com/london-railway-elizabeth-line-train-years-build-uk-crossrail-station-2022-3> [<https://perma.cc/C934-UB73>]; Jennifer Leigh Parker, *The New Paris Métro Is Coming, and It's a Very Big Deal*, FORBES (Nov. 22, 2023), <https://www.forbes.com/sites/jenniferleighparker/2023/11/22/the-new-paris-metro-is-coming-and-its-a-very-big-deal/?sh=164f85903184> [<https://perma.cc/GR6M-457N>].

¹⁵¹ Erik D. Olson, Valerie Baron, Dr. Matthew McKinzie & Susan Lee, *Finding Lead Water Pipes: New NRDC Map Shows the Hot Spots in Every State*, NRDC (Sep. 15, 2024), <https://www.nrdc.org/resources/lead-pipes-are-widespread-and-used-every-state> [<https://perma.cc/8WVQ-KHG2>]; *Fact Sheet: Biden-Harris Administration Announces New Action to Protect Communities from Lead Exposure*, THE WHITE HOUSE (Nov. 30, 2023), <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2023/11/30/fact-sheet-biden-harris-administration-announces-new-action-to-protect-communities-from-lead-exposure/> [<https://perma.cc/2VZW-RBFD>]; see Robert C. Ellickson, *Zoning and the Cost of Housing: Evidence from Silicon Valley, Greater New Haven, and Greater Austin*, 42 CARDOZO L. REV. 1611, 1658 (2021) ("A town's decision to refuse to provide sanitary sewers can be the cornerstone of its exclusionary land use policy."). See generally Nathan A. Cummings, Note, *Septic Shock: Wastewater Infrastructure, Urban Growth, and Local Exclusion*, 41 YALE L. & POL'Y REV. 170 (2022) (discussing how a failure to build sewers is used, often strategically, by communities as a reason not to allow housing construction).

¹⁵² See Adam Minter, Opinion, *Why Are American Airports So Awful?*, BLOOMBERG (Oct. 5, 2016), <https://www.bloomberg.com/view/articles/2016-10-05/why-are-american-airports-so-awful> [<https://perma.cc/Q6DH-6B47>] (considering the reasons behind the declining quality of American airports). It is worth noting that a number of American airports have seen big improvements in recent years. Alex Fitzpatrick, *America's Airports Are Suddenly Pretty Good Now*, AXIOS, <https://www.axios.com/2023/03/27/americas-airports-are-suddenly-pretty-good-now> [<https://perma.cc/S6E6-K3TV>] (Apr. 1, 2023) (discussing improvements but noting "U.S. airports overall leave a lot to be desired compared to their global peers").

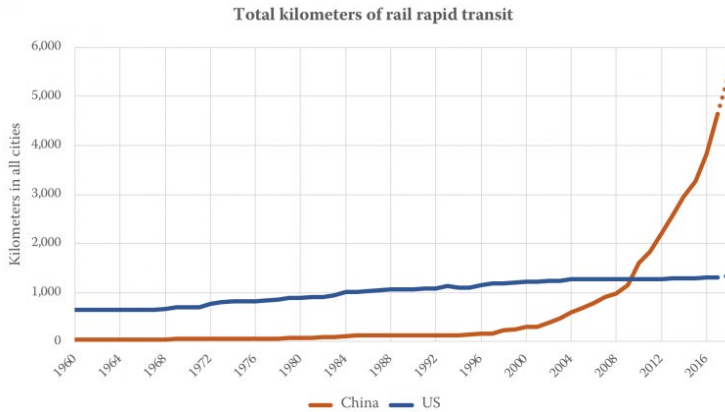


Figure 5

More pressingly for state capacity, infrastructure in the United States is *wildly* expensive. Zach Liscow and Leah Brooks found that the cost of building a mile of inter-state highway has increased very substantially over time, in ways that cannot be explained by increasing wages or materials costs.¹⁵³ These costs far outstrip costs around the world and also vary substantially across the country.¹⁵⁴ Why? Their leading suggestion is an increase, since the 1970s, in the power of “citizen voice,” or the ability of project opponents to exploit legal and political tools to insist on expensive mitigation (making roads wigglier, reducing noise, etc.) and to slow things down.¹⁵⁵

Similarly, the cost of building trains in the United States is systematically higher than in other countries, as the Marron Institute’s *Transit Costs Project* has demonstrated.¹⁵⁶ The Institute has shown, too, that there is extra premium for costs in New York City.¹⁵⁷ The cost differential is *enormous*. The Second Avenue Subway in New York City, per kilometer, was eight to twelve times as expensive to build as the international average, and many multiples of the cost

¹⁵³ Brooks & Liscow, *Infrastructure Costs*, *supra* note 87, at 1.

¹⁵⁴ Zachary Liscow, *Getting Infrastructure Built: The Law and Economics of Permitting*, 39 J. ECON. PERSPS. 151, 152 (2025).

¹⁵⁵ *Id.* at 158.

¹⁵⁶ See generally GOLDWYN ET AL., *supra* note 87 (overviewing train building costs across countries).

¹⁵⁷ *Id.* at 13; see also Romic Aevaz, *Eno Releases Major Report on U.S. Transit Costs and Project Delivery*, ENO CTR. TRANSP. (July 30, 2021), <https://enotrans.org/article/eno-releases-major-report-on-u-s-transit-costs-and-project-delivery/> [<https://perma.cc/6UME-VJ5G>] (“When including the disproportionately expensive projects in New York City, the U.S. tunneling premium rises to 250 percent. Construction timelines are also longer for U.S. transit projects—tunneled projects take nearly 18 months longer to build, while those with minimal tunneling take an average of six months longer to construct.”); Tracy Gordon & David Schleicher, *High Costs May Explain Crumbling Support for US Infrastructure*, URB. INST. (Mar. 31, 2015), <https://www.urban.org/urban-wire/high-costs-may-explain-crumbling-support-us-infrastructure> [<https://perma.cc/GBA2-GP56>] (“America is #1 (in expensive rail projects).”).

in other rich cities like Paris and Berlin.¹⁵⁸ The Transit Cost Project's theory for why this is the case is that American transit agencies lack sufficient in-house capacity to plan transit projects; lack interest in how construction is done abroad; and are internally divided due to politics and labor organizations, leading to excessive building.¹⁵⁹ That is, the leading theory about why it costs so much to build subways in America is that state agencies lack state capacity.

C. Property and Contract Rights

Two of the defining traits of a capitalist economy are secure property rights and enforceable contracts.¹⁶⁰ Naturally, scholars consider the security of property rights and capacity to enforce contracts as key variables for understanding state capacity.¹⁶¹

At a basic level, property and contract rights are *very secure* in the contemporary United States. The Constitution bars governments from taking property without compensation (and the Supreme Court has been expanding the strength of this commitment).¹⁶² It also protects contracts against state impairment.¹⁶³ The Property Rights Alliance ranks the United States as the country with the fourteenth most secure property rights, roughly comparable with other rich European, Asian, and North American countries.¹⁶⁴

But the definition of those rights is chiefly a state responsibility. As any first-year law student knows, the primary bodies of contract and property law are state common law and state statutory law.¹⁶⁵ State power is not exclusive—federal interventions from the Federal Arbitration Act to the estate tax help define contract and property law.¹⁶⁶ And, as noted above, the U.S. Constitution

¹⁵⁸ GOLDWYN ET AL., *supra* note 87, at 13.

¹⁵⁹ *Id.* at 13–18.

¹⁶⁰ E.g., SAM DE MUIJNCK, EXPLORING ECON., CAPITALISM—A SUMMARY 2, <https://www.exploring-economics.org/media/uploads/2024/06/21/capitalism-a-summary.pdf> [<https://perma.cc/4LB9-H2WA>].

¹⁶¹ See generally *id.* (citing several sources).

¹⁶² U.S. CONST. amend. V. For discussions of the Supreme Court's recent takings clause jurisprudence, see generally Rebecca Hansen & Lior Jacob Strahilevitz, *Toward Principled Background Principles in Takings Law*, 10 TEX. A&M L. REV. 427 (2023); Aziz Z. Huq, *Property Against Legality: Takings After Cedar Point*, 109 VA. L. REV. 233 (2023).

¹⁶³ U.S. CONST. art. I, § 10 (“No [s]tate shall . . . pass any . . . [l]aw impairing the [o]bligation of [c]ontracts . . .”).

¹⁶⁴ SARY LEVY-CARCIENTE & LORENZO MONTANARI, PROP. RTS. ALL., INTERNATIONAL PROPERTY RIGHTS INDEX 9 (2024), <https://internationalpropertyrightsindex.org/> [<https://perma.cc/C9QL-QTKV>].

¹⁶⁵ See Thomas Tandy Lewis, *Supreme Court and Contract Law*, EBSCO INFO. SERVS. (2023), <https://www.ebsco.com/research-starters/law/supreme-court-and-contract-law> [<https://perma.cc/Z7DB-G3H3>] (contract law); Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 74 n.1, 82–83 (2005) (property law).

¹⁶⁶ See Jay A. Soled & Mitchell M. Gans, *Asset Preservation and the Evolving Role of Trusts in the Twenty-First Century*, 72 WASH. & LEE L. REV. 257, 282–88 (2015) (discussing the influence of

limits state authority to break contracts and seize property. But more incremental changes in the security, enforceability, and meaning of property and contract rights come from state and local governments.

The permissible use of real property is also a matter of state and local law. Local governments play the central role in regulating land use through tools like zoning, building codes, subdivision requirements, and historic preservation, among others.¹⁶⁷ State governments devolved these powers to local governments, though they have since seized some control back, both during the “quiet revolution” of the 1970s and during recent preemption efforts.¹⁶⁸ But the federal government has been a small player.¹⁶⁹

And land use policy is in crisis. Restrictions on building housing (and building densely) have created an affordability crisis, increasing the cost of housing across whole metropolitan areas, creating endemic homelessness, creating precarity, and reducing economic growth.¹⁷⁰ Federal officials from both parties, including two Presidents, have determined that state and local regulations are the primary reason for high housing costs and internal displacement.¹⁷¹

Sometimes even state officials forget that they are in charge of contract and property law. Consider a recent fight over an appointment to the New York Court of Appeals. In 2022, after a substantial and serious debate, the New York State Senate rejected Governor Kathy Hochul’s appointment of Hector LaSalle. The debate was almost entirely over criminal law, labor law, and social issues.¹⁷² That is strange. The most important thing the New York Court of

the estate tax on reforms of the rule against perpetuities, and more generally how changes in tax law influence the trust law).

¹⁶⁷ David Schleicher, *How Land Use Law Impedes Transportation Innovation*, in EVIDENCE AND INNOVATION IN HOUSING LAW AND POLICY 38, 44 (Lee Anne Fennell & Benjamin J. Keys eds., 2017).

¹⁶⁸ Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L.J. 79, 82, 137 (2019); John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823, 828 (2019).

¹⁶⁹ See SOLOMON GREENE & INGRID GOULD ELLEN, URB. INST., BREAKING BARRIERS, BOOSTING SUPPLY: HOW THE FEDERAL GOVERNMENT CAN HELP ELIMINATE EXCLUSIONARY ZONING 6 (2020), <https://www.urban.org/sites/default/files/publication/102963/breaking-barriers-boosting-supply.pdf> [<https://perma.cc/EH96-AG9R>] (“The federal government has played a limited role . . .”). That said, there are plenty of good ideas for how it could do more. See e.g., *id.* at 8–10; EMILY HAMILTON, MERCATUS CTR. AT GEO. MASON UNIV., OPPORTUNITIES FOR BETTER FEDERAL HOUSING POLICY: HOW THE BIDEN ADMINISTRATION AND CONGRESS CAN IMPROVE HOUSING AFFORDABILITY 3–7 (2021), <https://www.mercatus.org/research/policy-briefs/opportunities-better-federal-housing-policy-how-biden-administration-and> [<https://perma.cc/MZA9-3GYM>] (suggesting improving housing affordability through federal funds and promoting federal-level zoning reform).

¹⁷⁰ See David Schleicher, *Exclusionary Zoning’s Confused Defenders*, 2021 WIS. L. REV. 1315, 1323–33 (reviewing literature).

¹⁷¹ *Id.* at 1318–19.

¹⁷² Peter Sterne, *The Inside Story of the Fight Against Hector LaSalle*, CITY & STATE N.Y. (Mar. 20, 2023), <https://www.cityandstateny.com/politics/2023/03/inside-story-fight-against-hector-lasalle/384162/> [<https://perma.cc/3GBF-46ZQ>]; Rebecca C. Lewis, *Examining Hector LaSalle’s Complex Judicial*

Appeals does is help determine the content of New York's vaunted commercial and contract law. Sophisticated domestic firms pick New York law to govern forty-six percent of non-merger commercial contracts.¹⁷³ New York is also the most frequent forum selected to hear any disputes.¹⁷⁴ About half of all sovereign debt contracts are governed by New York law—a point brought home by the “sovereign debt trial of the century” over the meaning of Argentina’s “*pari passu*” bond covenant.¹⁷⁵ That is to say, a huge amount of the country’s, and indeed the world’s, economic activity is governed by New York’s contract law. But during a raucous public debate over the future of the New York Court of Appeals, no one in New York politics even mentioned the effect the nomination would have on, say, the ability of sovereign governments around the world to raise money—or about the future of New York City as a financial capital.

D. Monopoly on Legitimate Use of Violence

Max Weber famously defined a state as a compulsory political entity with a monopoly on the legitimate use of physical force or violence.¹⁷⁶ A state’s ability to maintain that monopoly against outside challengers has, for scholars, served as a central measure of a state’s capacity.¹⁷⁷

On one level, the U.S. government is responsible for sustaining a monopoly on the legitimate use of violence. If someone tried to set up a separate polity not subject to federal law and defended that territory with an armed force—as happened when Southern states seceded from the Union—it would be up to the Army to reestablish authority. But in the normal course, the prevention of

Legacy, CITY & STATE N.Y. (Jan. 17, 2023), <https://www.cityandstateny.com/politics/2023/01/examining-hector-lasalles-complex-judicial-legacy/381894/> [https://perma.cc/4GMK-CYXD].

¹⁷³ Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies’ Contracts*, 30 CARDOZO L. REV. 1475, 1478 (2009).

¹⁷⁴ *Id.*; Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2073–74 (2009).

¹⁷⁵ Joseph Cotterill, Opinion, *Choose Your Own Adventure, Sovereign Debt Trial of the Century Edition*, FIN. TIMES (Feb. 8, 2013), <https://www.ft.com/content/9e2f2925-b009-3d62-ba54-98c46ee802f0> [https://perma.cc/FLC3-QV3R]; Zijia Song, *How a New York Bill Could Help Fix the Sovereign Debt Crisis*, BLOOMBERG (June 6, 2023), <https://www.bloomberg.com/news/articles/2023-06-06/how-a-new-york-bill-could-help-fix-the-sovereign-debt-crisis?embedded-checkout=true> [https://perma.cc/DL99-379Q]; Sebastian Grund, *Restructuring Argentina’s Sovereign Debt: Navigating the Legal Labyrinth*, COLUM. L. SCH.: BLUE SKY BLOG (Dec. 3, 2019), <https://clsbluesky.law.columbia.edu/2019/12/03/restructuring-argentinas-sovereign-debt-navigating-the-legal-labyrinth/> [https://perma.cc/5J9U-Y42H].

¹⁷⁶ Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 78–79 (H.H. Gerth & C. Wright Mills eds. & trans., 1946).

¹⁷⁷ See Daron Acemoglu, James A. Robinson & Rafael J. Santos, *The Monopoly of Violence: Evidence from Colombia*, 11 J. EUR. ECON. ASS’N 5, 6 (2013) (noting that state capacity is generally thought to depend on the state having a “monopoly of the legitimate use of physical force within a given territory”) (emphasis omitted).

private violence is mostly a state and local responsibility. State and local governments spend more than four times as much as the federal government on police, more than twelve times as much on corrections, and three times as much on courts.¹⁷⁸ There are 1.2 million state and local full time and civilian law enforcement agents (including 780,000 sworn agents), and only slightly more than 130,000 federal law enforcement agents.¹⁷⁹

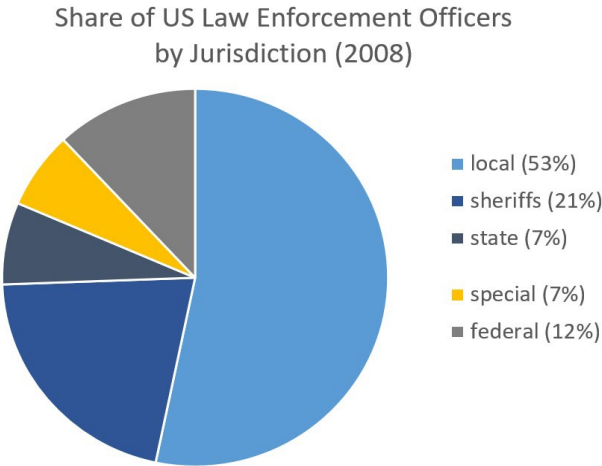


Figure 6¹⁸⁰

Similarly, prosecution and imprisonment are mostly state and local responsibilities. In 2023, there were 1.5 million people in state prisons and local jails but only 200,000 in federal prisons and jails, as shown by this chart created by the Prison Policy Initiative.¹⁸¹

¹⁷⁸ *Criminal Justice Expenditures: Police, Corrections, and Courts*, URB. INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-back-grounds/criminal-justice-police-corrections-courts-expenditures> [<https://perma.cc/N9PC-4GVG>].

¹⁷⁹ See BROOKS, *supra* note 113, at 1 (providing that there were 136,815 full-time federal law enforcement officers); ANDREA M. GARDNER & KEVIN M. SCOTT, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2018—STATISTICAL TABLES 1 (2022), <https://bjs.ojp.gov/media/67846/download> [<https://perma.cc/3NEQ-9ATV>] (providing that there were 1,214,000 full-time state and local law enforcement officers, of which 788,000 were sworn agents). Note that comparisons come from different years—2018 for state and local, 2020 for the federal government.

¹⁸⁰ Figure six was produced by Daniel Bier. *How Many Cops Are There in the United States? (2018 Update)*, SKEPTICAL LIBERTARIAN (Aug. 4, 2018), <https://blog.skepticallibertarian.com/2018/08/24/how-many-cops-are-there-in-the-united-states-2018-update/> [<https://perma.cc/5V9B-D58G>].

¹⁸¹ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POL’Y INITIATIVE (Mar. 14, 2024), <https://www.prisonpolicy.org/reports/pie2024.html> [<https://perma.cc/CTW6-BXP3>].

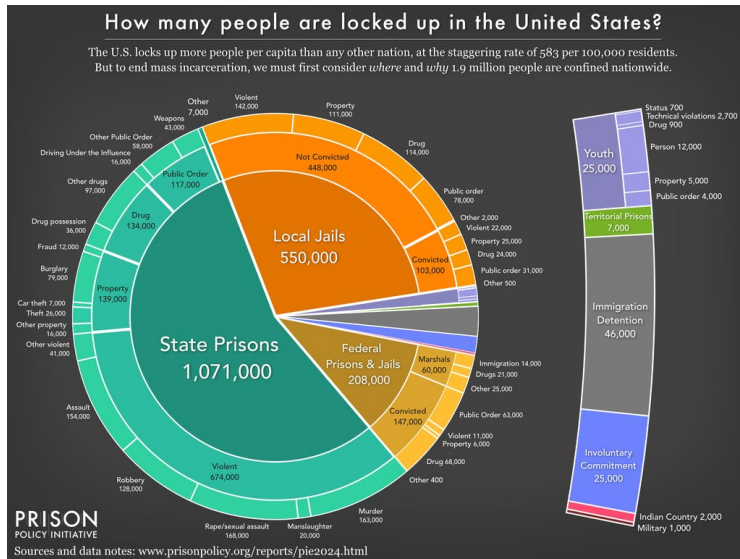


Figure 7

Precise cross-national comparisons are hard, but it is clear that there is far more inter-personal violence in the United States than there is in other countries. The homicide rate in the United States is six times higher than the rate across the European Union, and the gun homicide rate is twenty-three times higher.¹⁸² That's not a product of higher overall crime rates. As Franklin Zimring and Gordon Hawkins have shown, the United States does not have an unusual rate of property crime.¹⁸³ It's mostly a story about guns, inter-personal violence, and resources devoted to police. Notably, restrictions on firearm ownership (and the lack thereof) are primarily state based, although the invigoration of the Second Amendment means that many such laws have been limited or invalidated.¹⁸⁴ The number of police officers on the street seems to af-

¹⁸² Warren Fiske, *Gun Homicides 22 Times More Frequent in U.S. Than European Union*, AUSTIN AM. STATESMAN (Dec. 5, 2022), <https://www.statesman.com/story/news/politics/politifact/2022/12/05/gun-homicides-rates-us-european-union-fact-check/69697014007/> [<https://perma.cc/492P-D8WV>].

¹⁸³ See Zack Beauchamp, *America Doesn't Have More Crime Than Other Rich Countries. It Just Has More Guns*, VOX, <https://www.vox.com/2015/8/27/9217163/america-guns-europe-homicide-rates-murder-crime> [<https://perma.cc/4PKH-GYZL>] (Feb. 15, 2018) (discussing Zimring's & Hawkins' study); FRANKLIN E. ZIMRING & GORDON HAWKINS, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA* 27–29 (1997) (comparing property crimes across countries).

¹⁸⁴ See generally Jacob D. Charles, *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 MICH. L. REV. 581 (2022) (discussing state legislation securing gun rights); Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013) (discussing the long history of stricter gun regulation in cities).

fect crime rates; funding and where officers are allocated is largely a state and local responsibility.¹⁸⁵

At the same time, the costs of the American criminal justice system are far higher than in other countries.¹⁸⁶ Police kill far more Americans than police do in other wealthy countries.¹⁸⁷ And we imprison far, far, far more people, due both to our higher crime rates and our harsher punishments.¹⁸⁸ What fuels mass incarceration? The decisions of local prosecutors—the most powerful actors in the criminal justice system—as John Pfaff has argued.¹⁸⁹

The local nature of criminal justice even impedes the development of public knowledge about crime in America. Law enforcement responsibilities are scattered among more than 17,000 different agencies—roughly two-thirds of all officers are employed by local police departments and another seventeen percent in county sheriff’s offices.¹⁹⁰ Given the radical decentralization of law enforcement, basic data on the number of crimes committed annually—a key “state” responsibility if there ever was one—is not easily available in the United States, a stark contrast with other countries.¹⁹¹

E. Public Services

State capacity scholars often use the ability of the state to supply social welfare services to the poor and out-of-luck as a measure of state capacity.¹⁹² In the United States, those services are primarily supplied by states and locali-

¹⁸⁵ Matthew Yglesias, *The Police Are in the Wrong Places*, SLOW BORING (Mar. 18, 2024), <https://www.slowboring.com/p/the-police-are-in-the-wrong-places> [<https://perma.cc/D83W-BWQD>]. Where officers are located is partly determined by local governments and partly by the very existence of local governments. *Id.* Rich suburban areas have many officers, but not so much crime; reallocating them could, in theory, reduce crime rates. *Id.* But where suburbs are independent governments, they have no reason to reallocate their officers across jurisdictional lines (even if they’d have the power to under agreements with other local governments). Further, Monica Bell argues that police play an important role in securing segregation between governments. Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 705–09 (2020).

¹⁸⁶ Amelia Cheatham & Lindsay Maizland, *How Police Compare in Different Democracies*, COUNCIL ON FOREIGN RELS. (Mar. 29, 2022), <https://www.cfr.org/backgroundunder/how-police-compare-different-democracies> [<https://perma.cc/NX74-CZHG>].

¹⁸⁷ *Id.*

¹⁸⁸ See generally JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017) (overviewing the causes of mass incarceration in America).

¹⁸⁹ *Id.* at 1–15.

¹⁹⁰ DUREN BANKS, JOSHUA HENDRIX, MATTHEW HICKMAN & TRACEY KYCKELHAHN, U.S. DEP’T OF JUST., *NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA 3–5* (2016), <https://bjs.ojp.gov/content/pub/pdf/nsleed.pdf> [<https://perma.cc/HG5D-P5PT>].

¹⁹¹ Yes, the New FBI Data Is Poor Quality. But We’ve Always Needed Better, VERA INST. JUST. (Oct. 12, 2022), <https://www.vera.org/news/yes-the-new-fbi-data-is-poor-quality-but-weve-always-needed-better> [<https://perma.cc/3V74-JZD5>].

¹⁹² Skocpol, *supra* note 42, at 18.

ties.¹⁹³ Their role here is not as dominant as it is in other policy domains: providing services is expensive, and the federal government's superior fiscal capacity makes it the natural financier of America's safety net. Three of the biggest social welfare programs—Medicare, Social Security, and Social Security Disability Insurance—are paid for and implemented by the federal government exclusively.¹⁹⁴

Yet the states administer social welfare programs that dispense hundreds of billions of dollars each year.¹⁹⁵ The biggest-ticket item by far is Medicaid, the joint federal-state program that provides health-care services for about ninety-five million people—nearly thirty percent of the population.¹⁹⁶ Overall, Medicaid (together with the Children's Health Insurance Program, which extends coverage to children in low-income families) amounts to thirty percent of total state expenditures—almost half as much as total state spending on education.¹⁹⁷ Roughly two out of every three Medicaid dollars come from the federal government, with the precise amount varying by state.¹⁹⁸ But the states are entirely responsible for the program's implementation. They exercise their authority in highly divergent ways, often pursuant to broad "experimental" waivers, with state-specific rules governing eligibility, enrollment, benefits, cost-sharing, and payment rates.¹⁹⁹ And they consistently struggle with program administration—assuring an adequate number of providers, overseeing the quality of nursing homes, and preventing financial chicanery.²⁰⁰

¹⁹³ See THOMAS GAIS & R. KENT WEAVER, THE BROOKINGS INST., STATE POLICY CHOICES UNDER WELFARE REFORM 1–3 (2002), <https://www.brookings.edu/wp-content/uploads/2016/06/pb21.pdf> [https://perma.cc/R6DL-5E9B] (writing that the 1996 federal welfare reform law has provided states with flexibility to create their own welfare policies and strategies).

¹⁹⁴ Elizabeth Williams, Anna Mudumala, Robin Rudowitz & Alice Burns, *Medicaid Financing: The Basics*, KAISER FAM. FOUND. (Jan. 29, 2025), <https://www.kff.org/medicaid/issue-brief/medicaid-financing-the-basics/> [https://perma.cc/7KFW-GEKN].

¹⁹⁵ MICHAEL D. TANNER, CATO INST. HANDBOOK FOR POLICYMAKERS, POVERTY AND WELFARE 1 (2022), <https://www.cato.org/cato-handbook-policymakers/cato-handbook-policymakers-9th-edition-2022/poverty-welfare> [https://perma.cc/ELB5-BYVR].

¹⁹⁶ Bradley Corallo & Sophia Moreno, *Analysis of National Trends in Medicaid and CHIP Enrollment During the COVID-19 Pandemic*, KAISER FAM. FOUND. (Apr. 4, 2023), <https://www.kff.org/coronavirus-covid-19/issue-brief/analysis-of-recent-national-trends-in-medicaid-and-chip-enrollment/> [https://perma.cc/A7ND-THJ5].

¹⁹⁷ Williams et al., *supra* note 194.

¹⁹⁸ *Id.*

¹⁹⁹ Nicholas Bagley, *Are Medicaid Work Requirements Legal?*, 319 JAMA 763, 763 (2018); Mary Agnes Carey, *Study Finds Wide Variation in Medicaid Programs*, COMMONWEALTH FUND (Apr. 18, 2007), <https://www.commonwealthfund.org/publications/newsletter-article/study-finds-wide-variation-medicaid-programs> [https://perma.cc/YE94-8WL5].

²⁰⁰ See generally *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015) (resolving whether providers could sue state Medicaid administrators for low payment rates that threatened access); OFF. OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUM. SERVS., CMS SHOULD TAKE FURTHER ACTION TO ADDRESS STATES WITH POOR PERFORMANCE IN CONDUCTING NURSING HOME SURVEYS (2022), <https://oig.hhs.gov/documents/evaluation/3002/OEI-06-19-00460-Complete%20Report.pdf> [https://perma.cc/QZP3-N83E] (concluding that most nursing homes failed to adequately

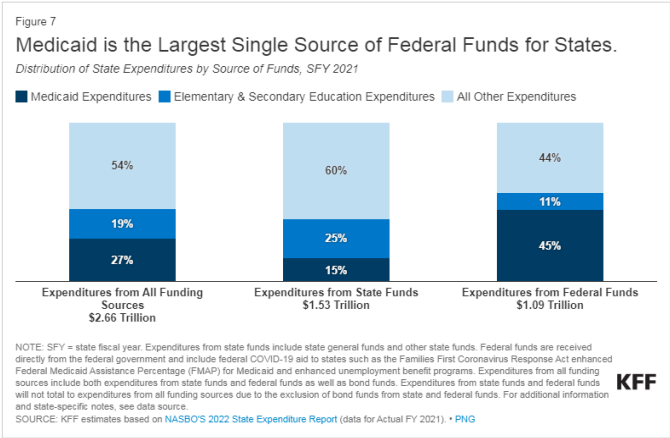


Figure 8

The story is much the same with unemployment insurance. In a typical year, state unemployment agencies channel about \$40 billion in benefits to state residents.²⁰¹ Their capacity to administer unemployment programs came into sharp focus during the pandemic when they faced a massive surge in claims. Thinly staffed and struggling with antiquated computer systems, the agencies proved unable to prevent paying out an estimated \$163 billion in fraudulent claims.²⁰² But the capacity problems predated the pandemic. From 2013 to 2015 in Michigan, for example, broken computer code led to 40,000 people being falsely accused of defrauding the unemployment insurance system, with people facing bills as high as \$100,000.²⁰³ Similar stories about overmatched state unemployment agencies abound.²⁰⁴

follow protocols for state surveys); Ashvin Gandhi & Andrew Olenski, *Tunneling and Hidden Profits in Health Care* (Nat'l Bureau of Econ. Rsch., Working Paper No. 32258, 2024), <https://www.nber.org/papers/w32258> [<https://perma.cc/S45D-Z6JV>] (documenting dubious accounting practices at nursing homes).

²⁰¹ *Budget Basics: Unemployment Insurance Explained*, PETER G. PETERSON FOUND. (Oct. 6, 2022), <https://www.pgpf.org/budget-basics/budget-basics-unemployment-insurance-explained> [<https://perma.cc/RA9B-A4MN>].

²⁰² Katia Dmitrieva, *U.S. Watchdog Says \$163 Billion in Covid Payouts Could Be Fraud*, BLOOMBERG (Mar. 17, 2022), <https://www.bloomberg.com/news/articles/2022-03-17/u-s-watchdog-says-163-billion-in-covid-payouts-could-be-fraud> [<https://perma.cc/5VT2-HGXB>].

²⁰³ E.g., Rachel Kohl, *Automated Stategraft: Faulty Programming and Improper Collections in Michigan's Unemployment Insurance Program*, WIS. L. REV. FORWARD 43, 44–45 (2024), https://wlr.law.wisc.edu/wp-content/uploads/sites/1263/2024/04/Kohl_Automated-Stategraft.pdf [<https://perma.cc/TWU6-3WK80>].

²⁰⁴ See, e.g., Nick Gwyn & Jenna Gerry, *Unemployment Insurance System Unprepared for Another Recession*, CTR. ON BUDGET & POL'Y PRIORITIES (Apr. 18, 2023), <https://www.cbpp.org/research/economy/unemployment-insurance-system-unprepared-for-another-recession> [<https://perma.cc/U3DD-4YXG>] (analyzing the failure of unemployment insurance systems across states).

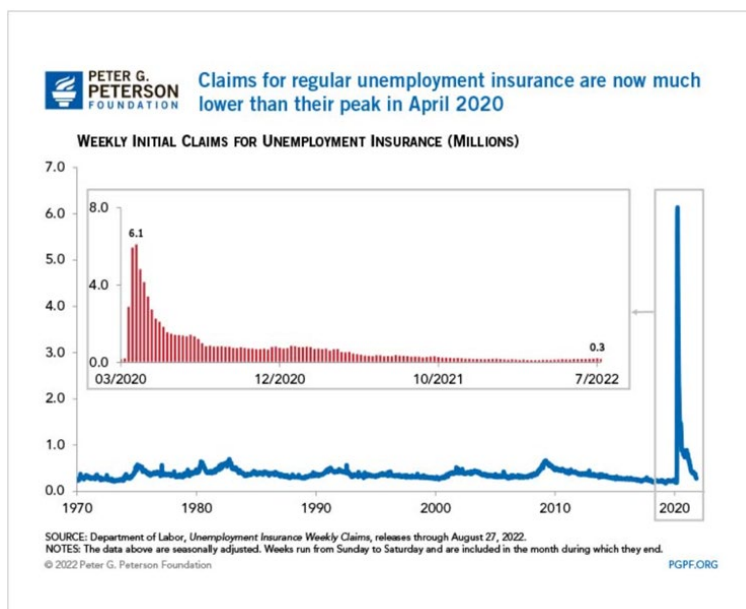


Figure 9

The list of spending programs that states administer is long. Under the Supplemental Nutrition Assistance Program, or SNAP, for example, the states disperse more than \$115 billion a year in food vouchers to more than twenty-two million households.²⁰⁵ States spend more than \$30 billion under the Temporary Assistance for Needy Families Program, or TANF, for cash assistance, child care, pre-K and Head Start programs, and more.²⁰⁶ The states carry out school lunch and breakfast programs for low-income students.²⁰⁷ And on and on.

Localities get in on the game, too, especially when it comes to housing and health care. Local public housing authorities issue \$30 billion in Section 8 vouchers every year and are supposed to guarantee—with very mixed suc-

²⁰⁵ CTR. ON BUDGET & POL'Y PRIORITIES, POLICY BASICS: THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP) 1, 6 (2024), <https://www.cbpp.org/sites/default/files/policybasics-snap-6-9-22.pdf> [https://perma.cc/5PEM-PZKB]; LAURA WHEATON, LINDA GIANNARELLI, SARAH MINTON & ILHAM DEHRY, URB. INST., HOW THE SENATE BUDGET RECONCILIATION SNAP PROPOSALS WILL AFFECT FAMILIES IN EVERY US STATE 1–2 (2025), <https://www.urban.org/sites/default/files/2025-07/How-the-Senate-Budget-Reconciliation-SNAP-Proposals-Will-Affect-Families-in-Every-US-State.pdf> [https://perma.cc/Q9LZ-H4Q7] (22.3 million households).

²⁰⁶ *TANF and MOE Spending and Transfers by Activity, FY 2021*, OFF. OF FAM. ASSISTANCE, U.S. DEP'T OF HEALTH & HUM. SERVS. (June 23, 2025), <https://acf.gov/ofa/data/tanf-and-moe-spending-and-transfers-activity-fy-2021#:~:text=Listen,MOE%20funds%20on%20basic%20assistance> [https://perma.cc/H2F5-8JVL].

²⁰⁷ *National School Lunch Program: Feeding the Future with Healthy School Lunches*, FOOD AND NUTRITION SERV., U.S. DEP'T OF AGRIC., <https://www.fns.usda.gov/nsfp> [https://perma.cc/HWN2-LZP7].

cess—that rental units are up to code.²⁰⁸ And roughly one-sixth of the nation’s hospitals are public, with localities running the lion’s share.²⁰⁹ Those hospitals typically take on a much higher proportion of low-income and uninsured patients than private hospitals.²¹⁰ Municipal governments operate seven percent of the mental health facilities in the United States.²¹¹ They likewise run many emergency homeless shelters, public health clinics, and substance abuse counseling programs.²¹²

* * *

Personnel, infrastructure, protection of legal rights, public safety, and social welfare—in all of these areas, state and local governments play a key if not a completely dominant role. If you care about state capacity, that’s where you have to look.

III. WHAT’S WRONG WITH STATE AND LOCAL GOVERNMENT CAPACITY?

Most complaints about limited state capacity are quite specific. Transit agencies rely too much on consultants; police are understaffed and undertrained; government tech is both antiquated and expensive. But these specific complaints are downstream from broader trends. If these complaints have force—and they often do—why don’t politicians and agency heads adopt changes that improve matters? Wouldn’t making things better make them more popular?

The contemporary American state capacity literature has an answer. But that answer is about national political institutions and federal laws. Low-quality governance, the answer goes, is the result of party polarization, gerrymandering, the filibuster, the difficulty legislating in a bicameral Congress, or veto points in the legislative process. Or it is down to federal procedural rules

²⁰⁸ HUD Announces the Availability of \$30.3 Billion for Housing Authorities to Provide Affordable Housing, U.S. DEP’T OF HOUS. & URB. DEV. (Apr. 13, 2023), <https://archives.hud.gov/news/2023/pr23-076.cfm> [<https://perma.cc/JY4B-TQFV>].

²⁰⁹ Mark Duggan, Atul Gupta, Emilie Jackson & Zachary S. Templeton, *The Impact of Privatization: Evidence from the Hospital Sector* 53 tbl.1 (Nat’l Bureau of Econ. Rsch., Working Paper No. 30824, 2023), https://www.nber.org/system/files/working_papers/w30824/w30824.pdf [<https://perma.cc/2ZRG-9GP5>].

²¹⁰ *Id.* at 38.

²¹¹ SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., DEP’T OF HEALTH & HUM. SERVS., NATIONAL MENTAL HEALTH SERVICES SURVEY (N-MHSS): 2020, DATA ON MENTAL HEALTH TREATMENT FACILITIES 33 (2021), https://www.samhsa.gov/data/sites/default/files/reports/rpt35336/2020_NMHSS_final.pdf [<https://perma.cc/BBT8-48HQ>].

²¹² *Emergency Shelters Grants Program Requirements*, DEP’T OF HOUS. & URB. DEV. EXCH., <https://www.hudexchange.info/programs/esg/esg-requirements/> [<https://perma.cc/W7GS-QD95>]. See generally NAT’L ASS’N CNTY. & CITY HEALTH OFFS., 2022 NATIONAL PROFILE OF LOCAL HEALTH DEPARTMENTS (2022), <https://www.naccho.org/resources/lhd-research/national-profile-of-local-health-departments> [<https://perma.cc/C64B-6VPN>] (providing data on American health departments).

like the National Environmental Policy Act as well as a rash of 1970s innovations that increased litigation and scrutiny of federal administrators.²¹³

We agree that these are problems. But, as we argued above, explanations for the lack of state capacity should be linked to the institutions that carry out the day-to-day business of the “state.” In the United States, that means the explanations should be linked to the distinctive challenges confronting states and localities—not to the federal government. Those distinctive challenges include (but are by no means limited to) the nationalization of American politics, the decline of local media, the cyclicity of state and local budgets, and hyperactive proceduralization. Some of these are old problems, some are new, but all have gotten worse over time. As a result, state and local politicians have misplaced electoral incentives and a limited practical ability to perform better. The lack of public accountability yields a concomitant withering of state capacity.

A. Politics and Press

The central fact about state and big city local elections is that they are comprehensively nationalized. The leading determinant of which party wins state and local elections—whether it is for state legislator, county district attorney or whatever else—is which party won that district in national elections.²¹⁴ In the jargon, state and local elections are “second order.”²¹⁵

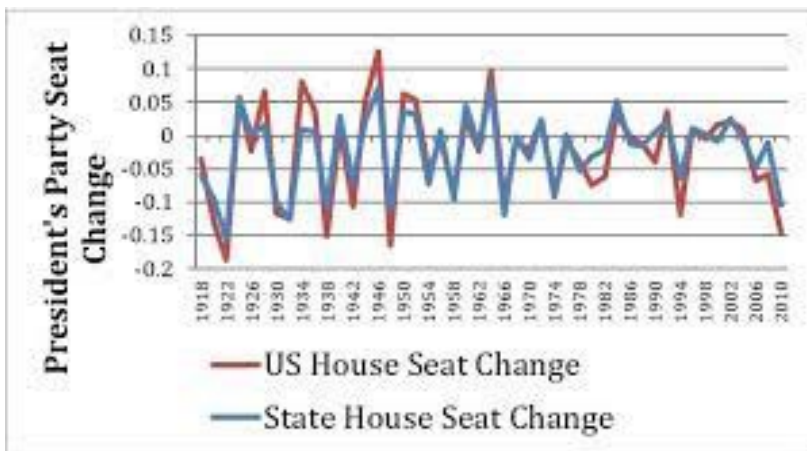


Figure 10

²¹³ See Reuel Schiller, *Administrative Law: Historical Origins of America's Administrative Exceptionalism*, 1 THE JUDGES' BOOK 5, 8 (2017) (commenting that, in the 1970s, courts began hearing numerous cases about rulemaking procedures, transforming rulemaking to become adversarial).

²¹⁴ Schleicher, *Federalism and State Democracy*, *supra* note 27, at 772.

²¹⁵ *Id.* at 765; see also STEVEN ROGERS, ACCOUNTABILITY IN STATE LEGISLATURES 3 (2023) (noting that Congressional turnover tightly corresponds to changes in state legislatures). Figure 10 was produced by Steve Rogers.

It is hard to overstate how large this effect is. The correlation between state legislative voting and congressional voting is extremely high.²¹⁶ Overwhelmingly, it is national politics—the latest Trump scandal, the inflation rate, the war in Gaza—that determine which party wins state legislative seats, even though state legislatures have little control over policies affecting these issues.²¹⁷ Some gubernatorial races and a few very high-profile mayoral races buck the trend. That’s why we sometimes see governors from parties that are generally unpopular in their states, like Democrat Andy Beshear in Kentucky or Republican Phil Scott in Vermont.²¹⁸ Nonetheless, as Daniel Hopkins put it in his brilliant book on the topic, we live in an “[i]ncreasingly United States.”²¹⁹ The problem has only gotten worse in recent decades.²²⁰

Does that mean that state politicians take wildly unpopular stances, knowing that their electoral fate depends on national trends and not their performance? Not necessarily. As Chris Warshaw and Devin Caughey show, state policy has, over very long periods of time, crept closer to majoritarian positions on most issues.²²¹ But the absence of strong electoral pressures means that the process of getting to majority opinion can take decades. More relevant to our argument, accountability for the actual performance of government—including the day-to-day implementation of government programs and the construction and maintenance of needed infrastructure—is sorely lacking.

That’s an unhealthy state of affairs. As political scientists have argued for decades, contested partisan elections encourage legislators to produce attractive policy because doing so will burnish the party brand.²²² In the absence of

²¹⁶ ROGERS, *supra* note 215, at 2.

²¹⁷ Schleicher, *Federalism and State Democracy*, *supra* note 27, at 767.

²¹⁸ See Russell Berman, *Why Deep-Red Kentucky Re-elected Its Democratic Governor*, THE ATLANTIC (Nov. 7, 2023), <https://www.theatlantic.com/politics/archive/2023/11/kentucky-governor-race-beshear-cameron/675908/> [<https://perma.cc/2H2T-3UJA>] (discussing why Beshear succeeded in largely Republican Kentucky). Even Gubernatorial voting has become more national over time. HOPKINS, *supra* note 27, at 37–47.

²¹⁹ HOPKINS, *supra* note 27, at 1.

²²⁰ *Id.* at 38–48.

²²¹ DEVIN CAUGHEY & CHRISTOPHER WARSHAW, DYNAMIC DEMOCRACY: PUBLIC OPINION, ELECTIONS, AND POLICYMAKING IN THE AMERICAN STATES 5 (2022). But the effect is quite small. Caughey and Warshaw, perhaps the most optimistic of political scientists about state democratic responsiveness, find that when issues first arrive on the state policy agenda, policy matches majority opinion only about 40% of the time (worse than a coin flip) but three decades later, it matches it 70% of the time. *Id.*

²²² See generally GARY W. COX & MATHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE (2d ed. 2007) (reevaluating the relationships between political parties within the House of Representatives); GARY W. COX & MATHEW D. MCCUBBINS, SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES (2005) (supporting a partisan theory of congressional organization that believes the House of Representatives is organized to advance the interests of the dominant party); D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS

such elections, politicians cater to the interests of the special interests and narrow ideological groups that dominate the low-information, low-turnout primary and non-partisan elections that actually determine who serves in office. That makes them attentive to the fundraisers and lobbyists who can grease the wheels of political advancement.²²³ Sometimes, this results in what Barry Weingast calls “distributive policies”—or “pork barrel” politics—in which district-specific wants are elevated above more general concerns.²²⁴ Sometimes, it just takes the form of graft or waste.

Concentrated interests, whether ideological or profit-seeking, are influential at all levels of politics, as Mancur Olson famously argued.²²⁵ But what marks contemporary state and local politics is the virtual absence of popular mobilization that would supply a counterweight to special interest pressure. If no one is paying attention, producing good policy will not burnish a party brand or an official’s reputation. Politicians have few electoral incentives not to cave to narrow interest-group demands. A brave stand on behalf of the public interest can be a good way to lose your job.

Weak political accountability contributes to poor state capacity. As Timothy Besley and Torsten Persson argue, state capacity requires investments in the quality of the bureaucracy.²²⁶ Politicians must be persuaded to make those investments instead of lavishing state dollars on favored groups or offering policy goodies for organized interests. If good policy does not change electoral outcomes, or help officials climb the greasy pole of politics, why bother investing in good policy? Better to attend to those groups that are paying attention to you.

What accounts for the rise in second-order voting?²²⁷ Hopkins thinks that the decline of local media, especially local newspapers, explains a substantial part of it.²²⁸ Local newspapers have been folding across the country for many years as internet-based companies take their advertising revenue.²²⁹ At the same time, national media is ubiquitous, whether through cable television, the

PROCESS (1991) (arguing that the delegation of congressional power to committees and subcommittees inevitably leads to abandonment of those obligations).

²²³ David Schleicher & Roderick M. Hills Jr., *Local Legislatures and Delegation*, 102 TEX. L. REV. 495, 512 (2024).

²²⁴ Barry R. Weingast, *A Rational Choice Perspective on Congressional Norms*, 23 AM. J. POL. SCI. 245, 246, 249–53 (1979).

²²⁵ See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965) (introducing the theory of collective action).

²²⁶ Besley & Persson, *State Capacity*, *supra* note 65, at 1; Besley & Persson, *The Origins of State Capacity*, *supra* note 65, at 1218.

²²⁷ See Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 400–01 (discussing second-order elections and suggesting that, when the relative roles of government are more distinct, second-order voting is more problematic).

²²⁸ HOPKINS, *supra* note 27, at 196–226.

²²⁹ Danny Hastings, *The Decline of Local Newspapers*, CLOSE UP FOUND. (Dec. 10, 2024), <https://www.closeup.org/the-decline-of-local-newspapers/> [<https://perma.cc/EJF5-MABM>].

internet, or Twitter. When local newspapers fold, split-ticket voting falls.²³⁰ Market actors also seem to think that local media affects state capacity. When local newspapers shut down, governments covered by that paper face higher borrowing costs as lenders become less confident they will be repaid.²³¹

Political parties, election laws, and government structure also contribute.²³² As one of us has argued, elections laws generally ensure we see the same parties up and down the ballot, frustrating efforts to create differentiated party brands at levels where one party is not competitive.²³³ Similarly, election laws do little to encourage voters to make differentiated assessments. Ballots don't say which party is in charge of the relevant level of government and they don't tell you which responsibilities the candidate will have if they are elected.²³⁴ And because primary elections are decided by party members, local minority parties struggle to field candidates who might interest a majority of a jurisdiction's voters.²³⁵ Structurally, too, state executive power is parceled out to a dizzying array of elected officials, from comptrollers to attorneys general to railroad commissioners.²³⁶ Keeping track of all those officials is a practical impossibility for nearly all voters.²³⁷

Finally, the decline of the urban political machines removed one of the largest ballasts for local politics. Voters knew where they stood when it came to machine politicians associated with Tammany Hall or Boss Daley.²³⁸ Voters could choose the machine or their "reform" opponents. It's much harder to figure out what a given city councilmember's position is on some issue or another

²³⁰ Joshua P. Darr, Matthew P. Hitt & Johanna L. Dunaway, *Newspaper Closures Polarize Voting Behavior*, 68 J. COMM'C'N 1007, 1021 (2018). See generally CHARLES ANGELUCCI, JULIA CAGÉ & MICHAEL SINKINSON, *MEDIA COMPETITION AND NEWS DIETS* (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3537040 [<https://perma.cc/E2D4-7QB6>] (studying the effects that televisions have had on newspaper circulation).

²³¹ Pengjie Gao, Chang Lee & Dermot Murphy, *Financing Dies in Darkness? The Impact of Newspaper Closures on Public Finance* 4 (Hutchins Ctr. on Fiscal & Monetary Pol'y, Working Paper No. 44, 2018), <https://www.brookings.edu/wp-content/uploads/2018/09/WP44.pdf> [<https://perma.cc/T5VK-668S>].

²³² HOPKINS, *supra* note 27, at 127–28.

²³³ Schleicher, *City Council Elections*, *supra* note 67, at 447–65; Elmendorf & Schleicher, *supra* note 227, at 405–08.

²³⁴ Elmendorf & Schleicher, *supra* note 227 at 406–08, 409–14.

²³⁵ Schleicher, *City Council Elections*, *supra* note 67, at 425. Many local elections are formally non-partisan, but where voters figure out the party of candidates, it largely determines outcomes. *Id.* Where they can't, it is not clear that voters then are able to assess candidates on the merits. Non-partisan elections remove information from voters about the national party preference of candidates, but do not provide them with useful information about the stances candidates take or way to assess the performance of officials in office.

²³⁶ Schleicher, *Federalism and State Democracy*, *supra* note 27, at 816–17.

²³⁷ ROGERS, *supra* note 215, at 87 (89% of voters cannot identify their state legislators).

²³⁸ See generally Elizabeth Rholetter Purdy, *Political Machines*, EBSCO (2024), <https://www.ebsco.com/research-starters/social-sciences-and-humanities/political-machines> [<https://perma.cc/2LYQ-NLPJ>] (overviewing political machines in the 19th and 20th centuries).

er. And because our local government structures are so divided—we vote for so many offices at so many different levels of government—the information burden on voters is extremely large.

Legislative term limits, which exist in sixteen states, including California and Michigan, exacerbate the problem.²³⁹ Voters are introduced to new legislators so often that party identification becomes their only salient feature. It doesn't help that many state capitals are so far from the population centers that are the natural homes of mass politics (Albany is about 150 miles from New York City; Springfield is roughly 200 miles from Chicago).²⁴⁰ Filipe Campante and Quoc-Anh Do have shown that the more isolated state capitals are from major population centers (and their associated newspapers), the more political corruption there is—and that states with isolated capitals “also seem to spend relatively less, and get worse outcomes, on things like education, public welfare, and health care.”²⁴¹

Whatever its causes, the rise of second-order voting offers a convincing account of some local policy failures. Why do even large jurisdictions adopt land-use policies that harm economic growth and housing affordability? The lack of mass politics means that the loudest voices, NIMBY homeowners, control the process.²⁴² The absence of party competition leads legislatures to devolve into distributive politics, or pork-barrel, norms where every member and neighborhood gets a veto.²⁴³ Why do cities adopt policies that make it so hard to fire under-performing or abusive teachers and cops?²⁴⁴ Because the unions that represent them are influential in low-turnout, often off-cycle, elections.²⁴⁵ And so on.

²³⁹ *The Term-Limited States*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 3, 2023), <https://www.ncsl.org/about-state-legislatures/the-term-limited-states> [<https://perma.cc/XR8C-K5FP>].

²⁴⁰ *Albany, NY*, GLISA, <https://glisa.umich.edu/station/albany-ap/> [<https://perma.cc/7HZA-9FDN>]; *Springfield 1908 Race Riot*, NAT'L PARK SERV. (Jan. 18, 2025), <https://home.nps.gov/spra/planyourvisit/directions.htm> [<https://perma.cc/V6HQ-QT58>] (noting that a National Park Service in Springfield is 200 miles from Chicago).

²⁴¹ Filipe R. Campante & Quoc-Anh Do, *Isolated Capital Cities, Accountability, and Corruption: Evidence from US States*, 104 AM. ECON. REV. 2456, 2458 (2014).

²⁴² Richard D. Kahlenberg, *Minneapolis Saw That NIMBYism Has Victims*, THE ATLANTIC (Oct. 24, 2019), <https://www.theatlantic.com/ideas/archive/2019/10/how-minneapolis-defeated-nimbyism/600601/> [<https://perma.cc/7ZUL-YDFY>].

²⁴³ Schleicher, *supra* note 91, at 1699–717.

²⁴⁴ See Steven Brill, *The Rubber Room*, NEW YORKER (Aug. 24, 2009), <https://www.newyorker.com/magazine/2009/08/31/the-rubber-room> [<https://perma.cc/7CSD-LZKE>] (describing the difficulty of firing teachers); Joe Lancaster, *The NYPD Took 7 Years to Fire This Cop. Then the Union Hired Him*, REASON FOUND. (May 28, 2024), <https://reason.com/2024/05/28/the-nypd-took-7-years-to-fire-this-cop-then-the-union-hired-him/> [<https://perma.cc/RF3C-D8GM>] (describing the difficulty of firing cops).

²⁴⁵ Cf. SARAH F. ANZIA, *TIMING AND TURNOUT: HOW OFF-CYCLE ELECTIONS FAVOR ORGANIZED GROUPS* 126–66 (2014) (finding teacher salaries are higher in jurisdictions with off-cycle elections due to greater influence of teachers unions).

Further, some of the reasons that people worry about the national government's state capacity are more prominent at the state and local level. Gerrymandering, for example, reduces electoral competition in congressional races and creates biases in which party controls Congress.²⁴⁶ Nonetheless, there is substantial competition at the level of Congress as a whole.²⁴⁷ In contrast, state legislatures are way, way more gerrymandered.²⁴⁸ Individual legislators can't lose their seats, and the party in power can't lose control, even if voters turn against them in massive numbers.²⁴⁹ As Miriam Seifter argues, state legislatures are often the least democratically responsive parts of state government.²⁵⁰

B. Budgets

State budgets, unlike the national budget, must balance.²⁵¹ That's in part because of state "fiscal constitutions."²⁵² To be precise, these are elements of state constitutions and state law that require balanced budgets and limit the issuance of debt (both substantive and procedural, like requirements that debt issuance be put to a vote).²⁵³ How much these paper requirements matter is a subject of substantial debate—states have found ways to skirt the rules—but they still seem to have an effect in the aggregate.²⁵⁴

Yet states must balance their budgets for an even more fundamental reason. They can't print money.²⁵⁵ The federal government both borrows in dollars and prints dollars. Unless it chooses to, it can't default.²⁵⁶ And it can run

²⁴⁶ Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 595 (2002).

²⁴⁷ See generally Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002) (responding to Issacharoff's argument that there is a lack of representation for representative positions in government).

²⁴⁸ See Gary D. Brinker, *Effects of Gerrymandering on State Social Policy*, 12 EJOURNAL PUB. AFFS. (2024), https://scholars.fhsu.edu/cgi/viewcontent.cgi?article=1006&context=sociology_facpubs [<https://perma.cc/7LFH-UPTC>] (citing Richard Forgette, Andrew Garner, and John Winkle as saying state legislatures are more vulnerable than Congress to partisan gerrymandering).

²⁴⁹ See Christy DeSmith, *Biggest Problem with Gerrymandering*, HARV. GAZETTE (July 5, 2023), <https://news.harvard.edu/gazette/story/2023/07/biggest-problem-with-gerrymandering/> [<https://perma.cc/DA9V-AJFS>] (observing that gerrymandering causes politicians in safe seats to be less responsive to voter needs).

²⁵⁰ Seifter, *supra* note 28, at 1760–67.

²⁵¹ KIM RUEBEN & MEGAN RANDALL, URB. INST., *BALANCED BUDGET REQUIREMENTS 2* (2017), https://www.urban.org/sites/default/files/publication/94891/balanced-budget-requirements_2.pdf [<https://perma.cc/MM3D-A5RJ>].

²⁵² See Briffault, *supra* note 33, at 910, 927–29 (discussing "fiscal constitution[s]").

²⁵³ *Id.* at 915–18.

²⁵⁴ SCHLEICHER, IN *A BAD STATE*, *supra* note 33, at 183–84 n.49 (reviewing debate).

²⁵⁵ *Id.* at 22–23.

²⁵⁶ See Ethan Wolff-Mann, *Warren Buffett Explains the Simple Reason Why the US Will Never Default on Its Debt*, YAHOO! FIN. (May 5, 2020), <https://finance.yahoo.com/news/warren-buffett-explains-the-simple-reason-why-the-us-will-never-default-on-its-debt-185105213.html> [<https://perma.cc/DA9V-AJFS>].

very large deficits and borrow as much as it wants because of its strong taxing powers and because it can always print more money (though there are costs to doing so). States, in contrast, do not have unlimited borrowing capacity, nor do they print and borrow in their own currencies. And very high levels of taxation may induce people or firms to leave.²⁵⁷

As a result, although federal spending is either a-cyclical or counter-cyclical, state budgets are highly cyclical. When the economy is good, they have more money to spend; when tax revenue declines, they have to cut their budgets.²⁵⁸ That makes for bad macroeconomic policy, as it involves cutting spending or raising taxes when the economy is in recession, which only exacerbates the recession.²⁵⁹ But it is also bad for long-term investments in high-quality governance—rapidly swinging budgets make long-term planning harder. In addition, many states now rely substantially on income tax revenue—which makes their tax systems more progressive, but also introduces variability and cyclicity to their budgets.²⁶⁰

In theory, states could address this problem by saving money in good times. And they do, to some extent.²⁶¹ But the political incentives to create substantial “rainy day” funds are limited. They may soften the cyclicity of state budgets, but they are never big enough to eliminate cyclicity altogether.²⁶²

States could also try to borrow to smooth their budgets. But state and local fiscal constitutions place real constraints on their ability to issue debt.²⁶³ Plus, issuing debt to meet operating expenses is dangerous: states do not know when macroeconomic cycles will turn and cannot withstand heavy indebtedness over long periods of time. That’s why the market punishes states and localities that use debt to cover short-term budget deficits, or that refinance old

cc/3EQ6-6N3M] (quoting former Fed Chair Alan Greenspan as saying “there is zero probability of default”).

²⁵⁷ PRESTON BRASHERS, THE HERITAGE FOUND., IF YOU TAX THEM, THEY WILL RUN: MILLIONS OF AMERICANS FLEE FROM CALIFORNIA AND NEW YORK 2 (2025), <https://www.heritage.org/sites/default/files/2025-03/BG3896.pdf> [<https://perma.cc/XF9G-PZCF>].

²⁵⁸ HUIXIN BI, CHAITRI GULATI & NORA TRAUM, FED. RSRV. BANK OF KAN. CITY, UNDERSTANDING STATE AND LOCAL GOVERNMENT SPENDING OVER THE BUSINESS CYCLE 10–14 (2023), <https://www.kansascityfed.org/documents/9580/EconomicReviewV108N3BiGulatiTraum.pdf> [<https://perma.cc/4ZUD-TSUF>].

²⁵⁹ SCHLEICHER, IN A BAD STATE, *supra* note 33, at 22–23.

²⁶⁰ Elizabeth McNichol, CTR. ON BUDGET & POL’Y PRIORITIES, Strategies to Address the State Tax Volatility Problem 1–3 (2013), <https://www.cbpp.org/sites/default/files/atoms/files/4-18-13sfp.pdf> [<https://perma.cc/3T8W-BB73>].

²⁶¹ SCHLEICHER, IN A BAD STATE, *supra* note 33, at 22.

²⁶² *Id.*

²⁶³ Richard Briffault, *Courts, Constitutions, and Public Finance: Some Recent Experiences from the States*, in FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY 418, 424 (Elizabeth Garrett, Elizabeth A. Graddy & Howell E. Jackson, eds., 2008).

debt based on depreciating assets (what experts call “scoop and toss”).²⁶⁴ Higher borrowing costs, in turn, make it harder for jurisdictions to fund capital investments.

Still, politicians seeking to get reelected do not want to cut spending or raise taxes during economic downturns. Even during boom times, they would rather spend than save. Their short-term incentives thus push state and local politicians to find creative ways to borrow. The most prominent technique in recent years has been underfunding public pensions. In 2023, the total amount of public pension underfunding was between \$1 and \$1.5 trillion (not counting the unfunded amount of public retiree health benefits), roughly one-quarter the size of overall municipal bond market.²⁶⁵ Legally, “pension debt” is similar to regular debt—pensioners, like bondholders, are protected by state constitutions and the federal constitution’s contract clause.²⁶⁶ But pension debt is different in one key respect: it is not tied to an investment or asset.²⁶⁷ Although a bond is usually used to purchase or build something (a bridge, a car), pension debt is simply a promise to pay—effectively, a promise that puts future taxpayers on the hook to pay the pensions of today’s police officers and firefighters.²⁶⁸ As a result, jurisdictions burdened by substantial pension debt struggle to invest in high-quality government services.²⁶⁹

²⁶⁴ Mike Cherney, *Borrowing Maneuver ‘Scoop and Toss’ Catches Flak*, WALL ST. J. (Dec. 3, 2013), <https://www.wsj.com/articles/DJFDBR0020131203e9c3d8giz> [<https://perma.cc/GF7E-Z3LF>]. It can even raise questions about the tax exemption on municipal debt. For instance, pension obligation bonds, or bonds issued to make payments to pension funds (and, in theory, earn returns from investments) are not tax exempt. See Thomas J. Fitzpatrick IV & Amy B. Monahan, *Who’s Afraid of Good Governance? State Fiscal Crises, Public Pension Underfunding, and the Resistance to Governance Reform*, 66 FLA. L. REV. 1317, 1369 n.306 (2014) (noting that pension obligation bonds were tax exempt prior to 1986, but are not now). Similarly, in the post-2008 period, the City of Chicago was forced to issue a huge number of taxable general obligation because the purposes were beyond what was allowed by the laws governing tax exempt debt. Heather Gillers, Jason Grotto & Patricia Callahan, *The Mayor Points to Progress on Budget Woes, but His Strategy Relies Heavily on Taxable Bonds That Put the City Deeper in Debt.*, CHI. TRIB. (Nov. 8, 2013), <https://apps.chicagotribune.com/bond-debt/taxable-bonds.html> [<https://perma.cc/EDQ7-EMQH>].

²⁶⁵ ANTHONY RANDAZZO & JONATHAN MOOD, EQUABLE INST., STATE OF PENSIONS 2023: NATIONAL PENSION FUNDING TRENDS 4 (2023), https://equable.org/wp-content/uploads/2023/07/Equable-Institute_State-of-Pensions-2023_Final.pdf [<https://perma.cc/SK6L-B4HH>] (underfunded pension liabilities are \$1.49 trillion); see GREGORY SHUMAN & NICHOLAS BRAGDON, LORD ABBETT, MUNICIPAL BONDS: FIVE KEY THEMES FOR TODAY’S MARKET 1 (2024), <https://www.lordabbett.com/content/dam/lordabbett-captivate/documents/insights/022124-Municipal-Bonds-Five-Key-Themes-Todays-Market.pdf> [<https://perma.cc/92H8-QE3W>] (reporting that the municipal bond market stands at \$4 trillion).

²⁶⁶ SCHLEICHER, IN A BAD STATE, *supra* note 33, at 81–86. By pension debt, we mean the underfunded portion of pensions, not pension obligation bonds.

²⁶⁷ *Id.* at 85–86.

²⁶⁸ *Id.* Notably, when governments borrow more money once a bond is due to support the same now-depreciated capital asset, it is called “scoop and toss” and is considered extremely poor fiscal management. All pension debt is scoop and toss, effectively.

²⁶⁹ *Id.*

Cooperative federalism can make this problem worse. One of the fastest growing areas of state spending over the last forty years has been on Medicaid—from 6.9% of state budgets in 1990 to about 16% today.²⁷⁰ The federal government pays for a large majority of Medicaid spending, but not all of it.²⁷¹ Not only does the desire to get matching federal dollars encourage states, on the margin, to spend more on health care and less on bureaucratic capacity. Of greater consequence, state budgets are relatively more fragile when Medicaid consumes a larger portion of state spending. A recession will yield a decline in tax revenue even as demand for Medicaid spending surges. And Congress is pulling back support, leaving states more exposed.²⁷²

Further, state and local governments are paying more for the stuff they buy. Services are labor intensive, not capital intensive (at least until we can hire robot police officers and replace the DMV with AI-powered clerks).²⁷³ In a world where the productivity of capital-intensive sectors increases, but there

²⁷⁰ *Medicaid's Share of State Budgets*, MEDICAID & CHIP PAYMENT & ACCESS COMM'N (Mar. 3, 2020), <https://www.macpac.gov/subtopic/medicaids-share-of-state-budgets/> [<https://perma.cc/M8A5-JZJG>].

²⁷¹ *Id.* To be precise: for the Medicaid population covered before the Affordable Care Act's adoption, the federal government pays a "federal match[]" that varies with the state's average per capita income and ranges from 50% at the low end to about 80% at the high end. Williams et al., *supra* note 194. One strange aspect of this policy is that, although the match rate is higher for poorer states, the overall amount of federal spending is higher in rich states, as they spend much more on Medicaid. For Medicaid beneficiaries enrolled through the ACA's Medicaid expansion, the federal government pays a 90% match. *Id.*

²⁷² See ELIZABETH ZHANG & GIDEON LUKENS, CTR. ON BUDGET & POL'Y PRIORITIES, HARSH WORK REQUIREMENTS IN HOUSE REPUBLICAN BILL WOULD TAKE AWAY MEDICAID COVERAGE FROM MILLIONS: STATE AND CONGRESSIONAL DISTRICT ESTIMATES 1 (2025), <http://cbpp.org/sites/default/files/5-13-25health2-researchnote.pdf> [<https://perma.cc/A3GH-GTUG>] (discussing Medicaid cuts).

²⁷³ Now, this should cause us to ask: why haven't we seen these things? In part, people are skeptical of them. See, e.g., Rod McCullom, *Robot Police Dogs Are on Patrol, but Who's Holding the Leash?*, UNDARK (Sep. 4, 2023), <https://undark.org/2023/09/04/robot-police-dogs/> [<https://perma.cc/HJK3-C9VR>] (describing skepticism about robot police dogs); Sophie Bushwick, *The NYPD's Robot Dog Was a Really Bad Idea: Here's What Went Wrong*, SCI. AM. (May 7, 2021), <https://www.scientificamerican.com/article/the-nypds-robot-dog-was-a-really-bad-idea-heres-what-went-wrong/> [<https://perma.cc/6LZJ-CWVL>] (same). Even uses of technology that clearly reduce negative government-citizen interaction, increase fairness of enforcement and reduce costs, like speed cameras, face substantial opposition. See Tennyson Donyéa, *Speed, Red-light Cameras Could Reduce Racial Disparity in Police Stops, Study Says*, WHYY (July 15, 2022), <https://whyy.org/articles/speed-red-light-cameras-racial-disparity-police-stops/> [<https://perma.cc/Y3RQ-BD3W>] (describing the benefits of speed cameras); Freeman Klopott & Terrence Dopp, *Politicians Hate Traffic Cameras as Much as Everyone Else*, BLOOMBERG (Jan. 15, 2015), <https://www.bloomberg.com/politics/articles/2015-01-15/politicians-hate-traffic-cameras-as-much-as-everyone-else/> [<https://perma.cc/TZ77-YV8P>] (describing popular antipathy to speed cameras). Further, unions of government employees are often skeptical of new technology. Todd Newcombe, *Public Unions and Technology: An Uneasy Relationship*, GOVTECH, <https://www.govtech.com/workforce/public-unions-and-technology-an-uneasy-relationship.html> [<https://perma.cc/FDY8-RBZG>] (describing worker hostility to new technology). But many government services just present very hard cases for automation, like elementary school teachers.

are no comparative increases in human productivity, labor-intensive sectors suffer from what William Baumol famously called the “cost disease.”²⁷⁴ To compete for workers, employers have to pay more to match the higher wages on offer in the sectors that see productivity increases. The result is that slow-growth sectors end up paying relatively larger amounts, over time, for the same amount of output. That’s the cost disease—and there is evidence that it has substantially increased the cost of state and local government services.²⁷⁵ Further, states and cities exacerbate the cost disease by limiting the supply of workers through needlessly stringent occupational licensing regimes and hiring requirements for public workers.²⁷⁶

Finally, the inequality created by federalism and localism saps state capacity. Rich jurisdictions with valuable property will have more resources and less need than poorer jurisdictions.²⁷⁷ The fact that American local governments are often very small—itsself often a product of the desire to hoard resources and exclude on the basis of wealth and race²⁷⁸—means that disparities between jurisdictions can be extreme.²⁷⁹ Although states do some redistribution between local governments, huge inequalities remain. That has consequences for state capacity. Devolving responsibility to deliver government services means devolving responsibility to many local governments that do not have the revenue to invest in capacity. (The same story, to a lesser degree, exists between state governments. States like Massachusetts simply have a lot more to invest in capacity than states like Alabama.)²⁸⁰ Poorer local governments also tend to serve a disproportionate number of low-income people and

²⁷⁴ See generally WILLIAM J. BAUMOL, *THE COST DISEASE: WHY COMPUTERS GET CHEAPER AND HEALTH CARE DOESN’T* (2012) (coining the term “cost disease”).

²⁷⁵ Laurie J. Bates & Rexford E. Santerre, *Does Baumol’s Cost Disease Account for Nonfederal Public-Sector Cost Growth in the United States? A New Test of an Old Idea*, 96 SOC. SCI. Q. 251, 258–59 (2015).

²⁷⁶ See STEVEN TELES, SAMUEL HAMMOND & DANIEL TAKASH, NISKANEN CTR., *COST DISEASE SOCIALISM: HOW SUBSIDIZING COSTS WHILE RESTRICTING SUPPLY DRIVES AMERICA’S FISCAL IMBALANCE* 19–24, 27–31 (2021), <https://www.niskanencenter.org/cost-disease-socialism-how-subsidizing-costs-while-restricting-supply-drives-americas-fiscal-imbalance/> [<https://perma.cc/9JHA-DUMR>] (evaluating how changes in licensing requirements can curb child care and medical access).

²⁷⁷ Brian Highsmith, *The Implications of Inequality for Fiscal Federalism (or Why the Federal Government Should Pay for Local Public Schools)*, 67 BUFFALO L. REV. 407, 410–11 (2019).

²⁷⁸ See JESSICA TROUNSTINE, *SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES* 167–85 (Sara Daskow ed., 2018) (arguing that a desire to concentrate public spending on white areas led to greater suburbanization).

²⁷⁹ Compare, for instance, the difference in tax rates between Bridgeport, CT and nearby Westport, CT. Rich Scinto, *Property Taxes in Every Town: Who Pays the Most, Least in CT?*, PATCH (Sep. 5, 2022), <https://patch.com/connecticut/across-ct/connecticut-property-taxes-every-town-who-pays-most-0> [<https://perma.cc/3LTY-D36W>] (providing that in 2022, Bridgeport has a mill rate of 43, while Westport had a mill rate of 18).

²⁸⁰ Joseph Johns, *State and Local Tax Collections per Capita by State, 2025*, TAX FOUND. (May 13, 2025), <https://taxfoundation.org/data/all/state/state-local-tax-collections-per-capita/> [<https://perma.cc/8G2M-SFGN>].

people of color, meaning that the brunt of the capacity problem falls hardest on them.²⁸¹ Indeed, a big part of the historical appeal of decentralization has been that it perpetuates racial disadvantage.

Put together, many states and cities are under a structural fiscal strain. And this strain amplifies the political pressures discussed above. With an ever-smaller pie to distribute, elected officials have incentives to supply benefits to narrow groups rather than addressing broader demands, and to preserve spending today over making investments in capacity for tomorrow.

C. Procedure and Participation

It is a common refrain in the state capacity literature: Administrative law is so procedurally hidebound that the federal government struggles to get anything done. NEPA compliance is the most salient example, but the rigors of notice-and-comment rulemaking, arbitrariness review, the Freedom of Information Act, the Paperwork Reduction Act, and the Federal Advisory Committee Act have all come in for their share of criticism. The underlying claim is that the legal culture that emerged in the 1970s and 80s dogs us to this day. That culture's faith in courts and procedures now stands in the way of doing things like building green energy or bullet trains.

Yet the literature on "agency ossification" or "the procedure fetish" is inattentive to the extent to which a highly legalistic approach to governance degrades the performance of state and local governments. That's a mistake. State administrative procedures are at least as intense, and often more intense, than their federal counterparts. And the costs of those procedures fall especially hard on the relatively small state and local agencies that are forced to cope with them. If hyper-proceduralism is a problem—and we think it is—it plagues states and localities more than the federal government.²⁸²

Start with the basics. Every state has its own version of the Administrative Procedure Act.²⁸³ Every state has its own version of FOIA.²⁸⁴ Though legislative vetoes are unconstitutional at the federal level under the 1983 Supreme Court case, *Immigration & Naturalization Service v. Chadha*, they are com-

²⁸¹ ARAVIND BODDUPALLI & KIM RUEBEN, TAX POL'Y CTR., STATE AND LOCAL GOVERNMENT REVENUES AND RACIAL DISPARITIES 6–7 (2021), <https://www.urban.org/sites/default/files/publication/103784/state-and-local-government-revenues-and-racial-disparities.pdf> [<https://perma.cc/L8C8-P3K6>].

²⁸² For the leading discussions of local administrative law, see generally Maria Ponomarenko, *Substance and Procedure in Local Administrative Law*, 170 U. PA. L. REV. 1527 (2022); Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564 (2017).

²⁸³ Susan Webb Yackee, *The Politics of Rulemaking in the United States*, 22 ANN. REV. POL. SCI. 37, 40 (2019).

²⁸⁴ *State Public Record Laws*, FOIADVOCATES, <http://www.foiadvocates.com/records.html> [<https://perma.cc/4QXV-H3YW>].

mon at the state level.²⁸⁵ Legislatures in twenty-four states have the right to veto or suspend agency rules, and eleven give legislatures different tools to push back on agency action.²⁸⁶ States also have stricter versions of the non-delegation doctrine, limiting what agencies can do.²⁸⁷

State rulemaking procedures tend to be especially elaborate. Federal agencies, for example, need not hold in-person public hearings when they adopt a rule.²⁸⁸ Not so in the states, where public hearings are required, either as a matter of course or if enough people demand it.²⁸⁹ In California and Minnesota, even guidance documents—not just legislative rules—must pass through notice and comment.²⁹⁰ In Florida, public workshops are required before *proposing* a rule.²⁹¹ In California, every rule has to survive close review by a specialized Office of Administrative Law.²⁹² And states often require agencies to conduct elaborate fiscal and economic analyses before proposing rules.²⁹³

Environmental review is common at the state level. At least sixteen states (as well as Washington, D.C., New York City, and Puerto Rico) have their own “little NEPAs” on the books, some of which are stricter than NEPA.²⁹⁴ Califor-

²⁸⁵ *Immigration & Naturalization Service v. Chadha* was a case heard before the Supreme Court which held that a legislative veto by only one house of Congress was unconstitutional. 462 U.S. 919, 956–57 (1983).

²⁸⁶ DEREK CLINGER & MIRIAM SEIFTER, UNIV. WIS. L. SCH., STATE DEMOCRACY RSCH. INITIATIVE, UNPACKING STATE LEGISLATIVE VETOES 4 (2024), <https://uwmadison.app.box.com/s/hl6eyasw6yrc5i4k9futzi09pk9ofau> [<https://perma.cc/HU79-62SP>].

²⁸⁷ Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 636 n.77 (2017).

²⁸⁸ See 5 U.S.C. § 553 (no public hearing requirement).

²⁸⁹ As a matter of course: see MICH. COMP. LAWS § 24.241 (2024); WASH. REV. CODE § 34.05.325(2) (2025); MASS. GEN. LAWS ch. 30A, § 2 (2024). If a single person demands it: see CAL. GOV'T CODE § 11346.8 (West 2025); FLA. STAT. § 120.54(2)(c) (2025); N.C. GEN. STAT. § 150B-21.2 (2025). If enough people demand it: see 5 ILL. COMP. STAT. 100/5-40 (2023) (25 people); GA. CODE ANN. § 50-13-4 (2025) (25 people); TEX. GOV'T CODE ANN. § 2001.029 (West 2025) (25 people); 8 VA. ADMIN. CODE § 20-11-100 (2025) (25 people); WASH. REV. CODE § 34.05.320 (2025) (25 people).

²⁹⁰ Michael Asimow, Michael J. Levy, Laurine E. Tuleja & Pippin C. Brehler, *Overview of California and Federal Rulemaking Process*, in CALIFORNIA PRACTICE GUIDE: ADMINISTRATIVE LAW Ch. 22-E (The Rutter Group ed., 2024).

²⁹¹ FLA. STAT. § 120.54(2)(c) (2025) (requiring a “public workshop” before a rule is proposed and limiting rules to one subject, among other things).

²⁹² Asimow et al., *supra* note 290.

²⁹³ DIV. OF ADMIN. RULES, N.Y. STATE DEP'T OF STATE, RULE MAKING IN NEW YORK 5 (2012), https://dos.ny.gov/system/files/documents/2021/08/rulemakingmanual_08-21.pdf [<https://perma.cc/NC97-MVSZ>] (requiring extensive impact analyses); TEX. GOV'T CODE ANN. § 2001.024(a) (West 2025) (requiring cost-benefit analysis and additional analysis of economic effects of new rule).

²⁹⁴ CAL. PUB. RES. CODE §§ 21000–21006 (West 2024); CONN. GEN. STAT. §§ 1-1(a) to -1(i) (2025); D.C. CODE ANN. §§ 8-109.01 to -.12 (West 2025); GA. CODE ANN. §§ 12-16-1 to -9 (2025); HAW. REV. STAT. §§ 343-1 to -8 (2024); IND. CODE §§ 13-12-4-1 to -10 (2025); MASS. GEN. LAWS ch. 30, §§ 61, 62H (2024); MD. CODE ANN., NAT. RES. §§ 1-301 to -305 (LexisNexis 2025); MINN. STAT. §§ 116D.01 to -.11 (2024); MONT. CODE ANN. §§ 75-1-201 to -2-220 (2023); Exec. Order No. 215

nia's, for example, requires "feasible mitigation measures" to address environmental harms.²⁹⁵ Massachusetts's and Minnesota's insist on "all practicable means and measures."²⁹⁶ Hawaii's version demands consideration of the project's effects on the "cultural practices of the community."²⁹⁷ A number of little NEPAs also apply to private acts that require permits, certificates, or other types of permission from government.²⁹⁸ For projects that involve both state and federal approvals—which is to say, most projects of any real size—officials have to satisfy both NEPA and its state analog. While opponents of federal NEPA reform sometimes say that we just need more funding to hire more bureaucrats, that's no answer at all at the state and local levels, where fiscal limitations preclude a hiring spree.

Judicial review of agency action is, if anything, more searching in the states. Only about fourteen states have adopted something resembling the *Chevron* doctrine, which once instructed courts to defer to an agency's interpretation of the law that it administers.²⁹⁹ "Among state courts generally, the most prevalent attitude toward deference on issues of law is some version of . . . weak deference."³⁰⁰ The Ohio Supreme Court has even adopted what might be called an anti-*Chevron* rule: "any uncertainty" in legal interpretation "should be construed in favor of the person or entity . . . affected by the law," whatever the agency happens to think.³⁰¹ Although the intensity of substantive review of local agency decision-making "varies dramatically," many state courts apply "a fairly robust form of arbitrariness review that is analogous to the federal 'hard look' standard."³⁰²

(N.J. 1989); N.Y. COMP. CODES R. & REGS. tit. 6, § 617.1 (2024); N.C. GEN. STAT. §§ 113A-1 to -13 (2025); S.D. CODIFIED LAWS § 34A-1-10 (2025); VA. CODE ANN. §§ 10.1-1188 to -1192 (2025); WASH. REV. CODE § 43.21C.030 (2025); WIS. STAT. § 1.11 (2024). *See generally* PATRICK MARCHMAN, DUKE U., NICHOLAS SCH. OF ENV'T, "LITTLE NEPAS": STATE EQUIVALENTS TO THE NATIONAL ENVIRONMENTAL POLICY ACT IN INDIANA, MINNESOTA AND WISCONSIN (2012) (discussing Environmental Policy Acts in three states).

²⁹⁵ CAL. PUB. RES. CODE §§ 21002, 21002.1 (West 2024).

²⁹⁶ MASS. GEN. LAWS ch. 30, § 61 (2024); MINN. STAT. § 116D.02(1) (2024).

²⁹⁷ HAW. REV. STAT. § 343-2 (2024).

²⁹⁸ Patrick J. Rohan & Eric D. Kelly, 5 Zoning and Land Use Controls § 28.02 (2025).

²⁹⁹ Luke Phillips, Comment, *Chevron in the States? Not So Much*, 89 MISS. L. REV. 313, 315 (2020); *see* Aaron Saiger, *Chevron and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 557–58 (2014) (noting that *Chevron* "has not been embraced with enthusiasm or consistency in state administrative law," but also noting "the problem, surely unavoidable, that state courts' recital of deference rules does not seem always to reflect the actual nature of the deference that they provide agencies"). The Supreme Court recently removed *Chevron* deference from federal law. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024).

³⁰⁰ MICHAEL ASIMOW & RONALD LEVIN, *STATE AND FEDERAL ADMINISTRATIVE LAW* 526 (5th ed. 2020).

³⁰¹ *State ex rel. Celebrezze v. Nat'l Lime & Stone Co.*, 627 N.E.2d 538, 544 (Ohio 1994).

³⁰² Ponomarenko, *supra* note 282, at 1531.

Standing doctrine tends to be much looser in the states. Only half have adopted the “injury in fact” standard from *Lujan*, the Supreme Court’s leading standing case, and even some of those states have crafted exceptions for, say, taxpayer standing or for cases of public importance.³⁰³ As a result, a larger range of groups and entities, including state legislatures, are empowered to sue agencies.³⁰⁴ Of perhaps greatest concern, standing rules make it unusually easy to sue cities.³⁰⁵ “Thus, almost any imaginable local decision—to authorize affordable housing, to construct a bike lane, to accommodate the homeless—can, and has, become the subject of a lawsuit,” report Zachary Clopton and Nadav Shoked.³⁰⁶ These lawsuits, they argue, “simply, and blindly, act to fortify the status quo.”³⁰⁷

Some state constitutions even include a right to challenge agency action, including Michigan, South Carolina, and Pennsylvania.³⁰⁸ And the threat of financial penalties for government officials looms especially large in the states. In at least ten state courts, including New York, New Jersey, and Michigan,³⁰⁹ money damages are presumptively available for all constitutional violations—*Bivens* but on steroids.³¹⁰

³⁰³ Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE, AGRIC., & NAT. RES. L. 349, 353 (2015); see also Helen Hershkoff, *State Courts and the Passive Virtues: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1880 (2001) (observing that “the absence of Article III-like language in state constitutions increases the range of governmental action susceptible to judicial scrutiny”) (internal quotation omitted). *Lujan* was a Supreme Court case that interpreted Article III standing to bring suit in federal court. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

³⁰⁴ See *Cooper v. Berger*, 809 S.E.2d 98, 116 (N.C. 2018) (reversing a prior ruling dismissing a Governor’s complaint against a state legislature). See generally *Wolf v. Scarnati*, 233 A.3d 679 (Pa. 2020) (allowing state senators to intervene to challenge the governor’s refusal to terminate the COVID-19 emergency), *superseded on other grounds by constitutional amendment*, PA. CONST. art. I, § 1.

³⁰⁵ Zachary D. Clopton & Nadav Shoked, *Suing Cities*, 133 YALE L.J. 2540, 2540 (2024).

³⁰⁶ *Id.* at 2543.

³⁰⁷ *Id.* at 2547; see also Ponomarenko, *supra* note 282, at 1544 (“[S]tate law almost uniformly permits individuals who are aggrieved by a local agency’s determinations to challenge the agency’s decision in state court.”).

³⁰⁸ PA. CONST. art. V, § 9 (“There shall be a right of appeal . . . from an administrative agency . . .”); see also MICH. CONST. art. VI, § 28 (“All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law.”); S.C. CONST. art. I, § 22 (providing “in all such instances” of rights deprivation “the right to judicial review”).

³⁰⁹ *Katzberg v. Regents of Univ. of Cal.*, 58 P.3d 339, 350 (Cal. 2002); *Widgeon v. E. Shore Hosp. Ctr.*, 479 A.2d 921, 922 (Md. 1984); *Bauserman v. Unemployment Ins. Agency*, 983 N.W.2d 855, 859–60 (Mich. 2022); *Corum v. Univ. of N.C.*, 413 S.E.2d 276, 290 (N.C. 1992); *King v. S. Jersey Nat’l Bank*, 330 A.2d 1, 10 (N.J. 1974); *Dorwart v. Caraway*, 58 P.3d 128, 136 (Mont. 2002); *Mack v. Williams*, 522 P.3d 434, 451 (Nev. 2022); *Brown v. State*, 674 N.E.2d 1129, 1136 (N.Y. 1996); *Zullo v. State*, 205 A.3d 466, 482 (Vt. 2019).

³¹⁰ See *Burnett v. Smith*, 990 N.W.2d 289 (Iowa 2023) (“The states that have considered the issue are nearly equally divided in whether to recognize implied constitutional actions for damages or

Apart from doctrinal differences, judges are elected in more than half the states.³¹¹ And elections require money. By far the most prominent financiers of judicial elections are the business community (for Republicans) and trial lawyers (for Democrats).³¹² Although these groups also wield influence over federal judicial appointments, they jockey at the federal level with a much larger number of interest groups and have to work through the White House. They also can't dangle the implicit threat of de-financing a judge's reelection campaign. These groups' sway over state judges shapes administrative law in ways that are hard to pin down but no less real for that.³¹³ And both business groups and trial lawyers welcome strict judicial review of government action.

State administrative law's most distinctive characteristic may be its resolute commitment to public participation. Every state has an open meetings law on the books.³¹⁴ California's is typical: it establishes a presumption of public access for any multimember governmental body, including state commissions, advisory committees, state boards, city councils, school boards, and boards of supervisors.³¹⁵ Dates and times of any meetings must be posted, together with an agenda.³¹⁶ Private communications about agenda items between a majority of members of the board are prohibited; indeed, to prevent circumvention, even one-on-one communications that enable daisy-chain conversations are prohibited.³¹⁷ In California and in at least a dozen other states, the public is entitled to participate and offer commentary at every meeting.³¹⁸ Other states

whether to decline to recognize such actions.”) (footnote omitted); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971) (finding an implied right of action against federal officials for violations of the Fourth Amendment)

³¹¹ See *Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST. (Aug. 20, 2024), <https://www.brennancenter.org/judicial-selection-map> [<https://perma.cc/86EV-RDWC>] (showing a majority of states feature elections to some extent, when factoring in hybrid election mechanisms).

³¹² See JAMES SAMPLE, ADAM SKAGGS, JONATHAN BLITZER & LINDA CASEY, BRENNAN CTR. FOR JUST., *THE NEW POLITICS OF JUDICIAL ELECTIONS: 2000–2009*, at 3 (Charles Hall ed., 2010), <https://www.brennancenter.org/sites/default/files/legacy/JAS-NPJE-Decade-ONLINE.pdf> [<https://perma.cc/N28E-92HM>] (“The right has brought together big-name groups like the U.S. Chamber of Commerce and National Association of Manufacturers, leaders of corporate giants such as Home Depot and AIG Insurance, and political actors like Karl Rove. Bankrollers on the left tend to be wealthy plaintiffs’ lawyers, who often use state party organizations to hide the extent of their financial backing of a candidate.”).

³¹³ See Saiger, *supra* note 299, at 563 (“[S]cholars have been unable to demonstrate a clear relationship between variables related to the election and retention of state judges and their decisions in cases involving the executive branch.”).

³¹⁴ Judy Nadler & Miriam Schulman, *Open Meetings, Open Records, and Transparency in Government*, SANTA CLARA UNIV., MARKKULA CTR. FOR APPLIED ETHICS (Oct. 23, 2015), <https://www.scu.edu/government-ethics/resources/what-is-government-ethics/open-meetings-open-records-transparency-government/> [<https://perma.cc/5KWH-7VHB>].

³¹⁵ CAL. GOV'T CODE § 54951 (West 2025) (local agencies); *id.* § 11121 (state bodies).

³¹⁶ *Id.* § 54954(a).

³¹⁷ *Id.* § 11122.5; *Id.* § 54952.2.

³¹⁸ *Id.* § 54954.3(a); *Id.* § 11125.7(a); ARIZ. REV. STAT. ANN. § 38-431.01(I) (2025) (Arizona); HAW. REV. STAT. § 92-3 (2024) (Hawaii); MICH. COMP. LAWS § 15.263(5) (2024) (Michigan); 5 ILL.

are more selective, only imposing public participation meeting requirements on, say, school boards.³¹⁹

Laws requiring public participation are at their most intense when it comes to land use.³²⁰ In part, that reflects the influence of the Standard State Zoning Enabling Act, a 1924 model law that many states adopted.³²¹ Under the Standard Act, every “citizen” is entitled to participate in a zoning decision, even if the citizen’s property is not directly affected.³²² Today, state zoning laws are layered on top of open meetings laws, effectively requiring two rounds of public participation for any zoning change.³²³ And it’s not just changes to zoning maps that require public participation. Many states, including those with the worst housing crises, also require a round of public participation when a landowner requests a variance from the local zoning laws.³²⁴ Because zoning restrictions are so tight in many municipalities that much of the existing housing stock is out of compliance, variances are basically necessary for any new construction—meaning that virtually all construction is subject to a public hearing.

The upshot of all this participation is neither ennobling nor democratic. Participants at public hearings tend to be wealthier, older, and whiter (and more likely to own a home) than the median community member.³²⁵ The same dynamic afflicts public participation more generally: those who make their voices heard are not representative. They certainly do not speak for the large number of people—including aspiring homeowners and potential new arrivals—whose lives may be affected by government action. As Anika Singh Lemar has argued, “when it comes to land use decision-making, public participation is utterly dysfunctional—and poor people bear the brunt of that dysfunction.”³²⁶

COMP. STAT. 120/2.06(g) (2023) (Illinois); LA. STAT. ANN. § 42:14(D) (2024) (Louisiana); MONT. CODE ANN. 2-3-103(1)(c) (2023) (Montana); NEV. REV. STAT. § 241.020(3)(d)(3) (2023) (Nevada); 65 PA. CONS. STAT. § 710.1 (2025) (Pennsylvania); S.D. CODIFIED LAWS § 1-25-1 (2025) (South Dakota); VT. STAT. ANN. tit. 1, § 312(h) (2025) (Vermont).

³¹⁹ N.J. STAT. ANN. § 10:4-12 (West 2025); GA. CODE ANN. § 20-2-58 (2025).

³²⁰ Anika Singh Lemar, *Overparticipation: Designing Effective Land Use Public Processes*, 90 FORDHAM L. REV. 1083, 1087 (2021) (“No other local government function, whether budgeting, policing, or education, features or prioritizes public participation to the degree seen in land use law.”).

³²¹ Salim Furth, *A Brief History of Zoning in America—and Why We Need a More Flexible Approach*, MANHATTAN INST. (Aug. 5, 2019), <https://manhattan.institute/article/a-brief-history-of-zoning-in-america-and-why-we-need-a-more-flexible-approach> [https://perma.cc/MVR9-LT7U].

³²² DEP’T OF COM., ADVISORY COMM. ON ZONING, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS 7 n.28 (1924).

³²³ Lemar, *supra* note 320, at 1091.

³²⁴ *See id.* (“Today, in about one-half of states, zoning enabling statutes do not distinguish between zoning and adjustment decisions with respect to public participation requirements.”).

³²⁵ Katherine Levine Einstein, Maxwell Palmer & David M. Glick, *Who Participates in Local Government? Evidence from Meeting Minutes*, 17 PERSPS. ON POL. 28, 29, 37 (2019).

³²⁶ Lemar, *supra* note 320, at 1087.

The point here is not to flog the familiar (yet still underappreciated) point that public participation is not the same as democracy. It's just to observe that, in ways large and small, state government is both more proceduralized and more participatory than the federal government. It's useful to think of that as imposing a tax on government action. The tax may be worth paying if the result is, say, higher-quality or better-informed agency decisions. As with any tax, however, taxing more means getting less. Government resources are not infinite, and time spent on legal compliance is time not spent on other priorities. There's a tradeoff.

Procedural burdens fall especially hard on state and local instrumentalities because the size of the tax associated with any given rule—holding a public hearing, responding to a FOIA request, fending off a lawsuit—is roughly the same across levels of government. But state and local agencies are usually smaller, often much smaller, than their federal counterparts. For them, the effective tax rate of procedural and participatory burdens is higher. And there are more of those procedural and participatory burdens at the state and local level.

IV. WHY ARE PUBLIC THINGS IN THE U.S. SO LOUSY WHEN PRIVATE THINGS ARE SO GREAT?

It is hard to go through life in the United States, especially in our great cities, without experiencing the contrast between the quality of the public and the private. In San Francisco, a tech titan at the cutting edge of artificial intelligence can leave her office and hail a self-driving taxi—a miracle!—only to be driven down a road covered in potholes and lined with tent encampments.³²⁷ In New York, a mogul in the global financial industry might ride to work on a subway system that has barely expanded in the last 100 years and that has repeatedly broken records for history's least cost-efficient capital programs.³²⁸ Although there are some success stories in public services and lots of extremely talented and hard-working public servants, it is hard not to notice that something has gone wrong. As Samuel Hammond puts it:

With a few taps on my phone, I can hail a car, pay my rent, reserve a table for dinner, and share a video with my friends and family. And

³²⁷ Chloe Veltman, *Why Does It Feel So Weird to Ride in a Driverless Car?*, NPR (Oct. 10, 2024), <https://www.npr.org/2024/10/09/nx-s1-5096245/waymo-driverless-cars-san-francisco-austin-atlanta> [<https://perma.cc/JWJ8-4U3C>]; Da Lin, *Tents Return to San Francisco Streets Cleared in Homeless Sweep*, CBS NEWS (Aug. 4, 2024), <https://www.cbsnews.com/sanfrancisco/news/tents-return-san-francisco-streets-cleared-homeless-sweep/> [<https://perma.cc/AZ2D-HS2C>].

³²⁸ See generally English, *supra* note 150 (discussing the stagnation of New York City's subway growth); Skylar Woodhouse, *How NYC's Second Avenue Subway Became the World's Most Expensive Line*, BLOOMBERG (Feb. 23, 2023), <https://www.bloomberg.com/news/articles/2023-02-23/in-nyc-subway-a-case-study-in-runaway-transit-construction-costs> [<https://perma.cc/KW5L-AW8Y>] (overviewing the inefficiencies of New York City's subway construction and quoting various reports).

if anything goes wrong, a chat-based customer service agent is there to help. But if I want to pay my taxes, order a new passport, transfer a property title, or simply have a question answered about a rule or regulation, the experience is much different. There's a good chance I'll need a pen and paper, time to stand in line, and a nine-digit Social Security Number rooted in 1936 technology.³²⁹

Why do we put up with it? The typical explanation gestures toward American exceptionalism—to a supposedly deep cultural distrust of government, perhaps rooted in fears of tyranny. We think that explanation is seriously deficient. In our most *laissez-faire* era at the turn of the last century, public infrastructure in American cities was far better than what was on offer in Britain or Germany—our bridges and waterworks, our libraries and public street lighting, were the envy of the world.³³⁰ And today, many liberal democracies that are much poorer than we are have better public services than we do, with no tyranny in sight. Is the claim that Americans just *prefer* bad infrastructure and subpar administration? Why on earth would you believe that?

We think there is a more parsimonious explanation, one that doesn't rest on claims about some distinctively American penchant for low-capacity government. The explanation is that most public services are provided by state and local governments, and they are beset by challenges that limit their incentives and ability to satisfy voter preferences for high-quality services. The problem is compounded because we—voters and scholars alike—generally ignore state and local governments, so potential solutions don't get the attention they deserve.

If we're right about that, it may explain why concerns about declining U.S. capacity have intensified in recent years. The rise of the internet and broader changes in mass media were a global phenomenon. Across many countries, we have witnessed a decline in local media as well as a concomitant rise in the nationalization of political identity.³³¹ But because the United States has a particularly decentralized “state,” these changes harmed our state capacity in ways that they did not elsewhere. With less pressure coming from ordinary voters, government incentives to perform effectively have declined even as the dividends to catering to narrow groups have increased. A poorly func-

³²⁹ Hammond, *supra* note 12. Hammond notes that this problem is one of the driving forces behind “state capacity libertarianism.” *Id.*

³³⁰ SCHLEICHER, IN A BAD STATE, *supra* note 33, at 54–65.

³³¹ See, e.g., *More Support Needed to Halt Damaging Decline of Local Journalism*, DCMS Committee Warns, UK PARLIAMENT (Jan. 25, 2023), <https://committees.parliament.uk/committee/378/digital-culture-media-and-sport-committee/news/175585/more-support-needed-to-halt-damaging-decline-of-local-journalism-dcms-committee-warns/> [<https://perma.cc/58GD-SKU4>] (discussing the decline of local media in Britain). See generally *Who Killed the Newspaper?*, THE ECONOMIST (Aug. 24, 2006), <https://www.economist.com/leaders/2006/08/24/who-killed-the-newspaper> [<https://perma.cc/Y58X-YBJJ>] (discussing the global decline of newspapers).

tioning government then encourages voters to call for reforms that constrain the government still more.³³²

Other challenges to state capacity are the residue of ideological moments gone by. Major intellectual and social movements of the 1960s and 70s—environmentalism, civil rights, consumer protection—were built on skepticism about large government bureaucracies.³³³ These movements successfully pushed for the adoption of new procedural rules and oversight mechanisms to prevent government officials from ignoring the public interest in heedless pursuit of their goals. A rash of new nonprofit organizations clamored to defend that public interest in court, and courts welcomed the invitation to participate more fully in oversight of governmental administration.³³⁴ The result was to skew outcomes towards those groups with the means to participate and litigate, and to make it harder and more costly for governments to get things done. The hollowing out of state capacity accelerated after the Reagan Revolution, when anti-government attitudes led to a decline in investment in government bureaucracy and a heavier reliance on contracting out.³³⁵

These are trends, not permanent facts about the world. Just as earlier political movements pushed for changes that reduced state capacity, today's political movements and reformers could seek to reverse the decline in state capacity and low-quality public services.³³⁶ Some reforms could aim at the root causes. For instance, the federal government—or state governments—could subsi-

³³² Daryl Levinson makes this point at the level of theory. “Put the other way around, the more confidence we have in our ability to control the state, the more state capacity we will be willing to countenance.” Levinson, *supra* note 59, at 203.

³³³ PAUL SABIN, *PUBLIC CITIZENS: THE ATTACK ON BIG GOVERNMENT AND THE REMAKING OF AMERICAN LIBERALISM*, at xvi (2021).

³³⁴ See William Foster & Gail Fine, *STANFORD SOC. INNOVATION REV.*, *HOW NONPROFITS GET REALLY BIG* 46 (2007), https://ssir.org/articles/entry/how_nonprofits_get_really_big [<https://perma.cc/FN5Q-V68G>] (providing that over 200,000 nonprofit organizations have been formed in the United States since 1970).

³³⁵ See generally *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* (Jody Freeman & Martha Minow eds., 2009) (documenting and analyzing that acceleration).

³³⁶ We are mindful of what Eric Posner and Adrian Vermeule call the “inside/outside” problem, which arises when scholars diagnose structural political problems but suggest reforms that will never be adopted because of the structural political problems they diagnosed. Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745–46 (2013). There are ways around this biting critique, however. As one of us has argued, political entrepreneurs can take advantage of the fact that politics is stochastic. Roderick M. Hills, Jr. & David Schleicher, *Building Coalitions Out of Thin Air: Transferable Development Rights and “Constituency Effects” in Land Use Law*, 12 J. LEGAL ANALYSIS 79, 80 (2020); Schleicher, *supra* note 91, at 1718. Groups that usually lose occasionally win elections—there’s just some randomness to it. Groups that usually lose due to public choice problems can take advantage of their occasional victories to pass reforms that not only win some policy victory, but that change the structure of politics, whether by increasing the power of some groups or by changing the order in which decisions are made. If proposals take this form—the things that outside groups can do when in power to change the game—then they can avoid the “inside/outside” problem. Changes to land use procedure like requiring citywide decision-making or moving decisions to the statewide level might achieve exactly this.

dize local newspapers.³³⁷ Rich individuals or nonprofits could do so as well, as a few have done.³³⁸ Political entrepreneurs could attempt to develop political organizations aimed at building a mass politics around state and local issues—indeed, groups ranging from YIMBY (Yes In My Backyard) to Black Lives Matter have tried to do that.³³⁹ States could push electoral reforms that make it easier for voters to differentiate between the national and local branches of political parties.³⁴⁰

Other reforms could aim to challenge the byzantine proceduralism that is the ideological residue of the 1970s and 1980s. At the federal level, there is substantial interest (though not yet much actual legislation) in reducing the stringency of procedural impediments that are frustrating the pivot to green energy.³⁴¹ For its part, the Supreme Court has recently issued a strident call for deference in cases challenging the sufficiency of environmental reviews under NEPA.³⁴² Similar efforts could be aimed at largely ignored pockets of state administrative law. There has also been some scholarly criticism of the deep ideological commitment, especially on the left, to ever-greater rights to public participation; political entrepreneurs could pick this up in all sorts of ways.³⁴³ Pushing for paying bureaucrats better—or even hiring more legislative staff—is a hard political sell, but is another possibility.

Whatever the right approach may be, our point is that reformers seeking to build state capacity need to think about where to concentrate their efforts. In our view, you won't make much headway in the Beltway. You need to go to Lansing and Hartford, Sacramento and Austin, Los Angeles County and New York City. State capacity—in America at least—is about states and localities.

³³⁷ See Joshua P. Darr, *Government Subsidies to Save Local News*, NIEMANLAB (Dec. 21, 2021), <https://www.niemanlab.org/2021/12/government-subsidies-to-save-local-news/> [<https://perma.cc/6L7T-DSC9>] (laying out the argument for subsidies for local news).

³³⁸ See, e.g., *About Us*, S.F. STANDARD, <https://sfstandard.com/about/> [<https://perma.cc/7EE6-RNR7>] (noting that the paper is financed by “venture capitalist and philanthropist Michael Moritz”); *About Us*, CONN. MIRROR, <https://ctnmirror.org/about> [<https://perma.cc/8MYW-LWR9>] (noting that it is a nonprofit).

³³⁹ See David Schleicher, *Why Can't We Build? Explanations and Reasons for the Building Crisis*, 17 N.Y.U. J.L. & LIBERTY 379, 397 n.89 (2024) (pointing out that politically active groups can choose to be more ideologically driven and focus on a wide range of issues, or be more narrowly-focused).

³⁴⁰ See Elmendorf & Schleicher, *supra* note 227, at 412–24 (suggesting, among other ideas, an “advisory primary regime” which upends the traditional entrenched two-party system).

³⁴¹ See Ruhl & Salzman, *The Greens' Dilemma*, *supra* note 90, at 4–11 (exploring the challenges that outdated legislation, which was designed to add procedural hurdles to building environmentally damaging infrastructure, now poses in developing green energy projects).

³⁴² *Seven Cnty. Infrastructure Coal. v. Eagle County*, 145 S. Ct. 1497, 1508, 1511–12 (2025).

³⁴³ See, e.g., Lemar, *supra* note 320, at 1085–87; Katherine Levine Einstein, David M. Glick & Maxwell Palmer, *Neighborhood Defenders: Participatory Politics and America's Housing Crisis*, 135 POL. SCI. Q. 281, 282–86 (2020) (arguing that increased political participation has helped give rise to a housing shortage).

