The Age of Imperial Governorship?

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Miriam Seifter, *Gubernatorial Administration*, 131 **Harv. L. Rev.** (forthcoming, 2017), available at SSRN.

The idea that state constitutions might provide terrain for comparative analysis that could shed new and important light on the federal Constitution is hardly a new one. But for those of us preoccupied with the study of Article II presidential power, it is hard to imagine a much more powerful illustration of that lesson than Miriam Seifter's fruitful and creative study of what she calls "the modern regime of gubernatorial administration."

Seifter demonstrates that, state variations notwithstanding, contemporary governors frequently enjoy an array of tools to direct administrative governance that, in important respects, presidents would envy. These include reorganization authority, the power to privatize government functions, and greater authority to influence independent state agencies than the President would have over federal counterparts. Governors typically have a more firmly grounded directive power over the policy content of administrative decision making. Moreover, because of overlap in the domains of state and federal regulatory concern, these authorities effectively give governors power to significantly "resist or advance key federal government programs." (P. 19.)

Governors also typically have far greater power than does the President to formally re-tailor the handiwork of the legislative branch. Forty-four states vest governors with line-item veto authority, five of them extending beyond appropriations bills to non-appropriations legislation and eighteen more allowing the veto within appropriations bills to include substantive provisions. Besides exploring these differences, other important parts of Seifter's study explain the daunting complexities that surround the interpretation of separation of powers principles at the state level.

As Seifter explains, the formal gubernatorial powers enumerated above are yet more impactful than their mere recitation implies because they are reinforced by other formal and informal elements of the institutional context in which governors usually operate – weaker legislative oversight, less bureaucratic pushback, and a state media environment poorly equipped to serve a critical watchdog function. There are some distinctive state-level checks, such as the common multiple-executive structure, the fact of federal legal supremacy, and the possibility of friction from referenda and ballot initiatives. Yet, as Seifter explains, the effect of these checks as constraints on gubernatorial maneuvering is uncertain and, in operation, may well offer governors political opportunities, as well as challenges. All told, the "authority and flexibility" (P. 7.) that modern governors enjoy have produced a new state-level "'psychology of government' in which governors understand their office to be a controlling one." (P. 17.)

The penultimate section of the article explores the possible implications of Seifter's findings for a series of hot public law issues – whether states are effective bulwarks against federal overreach, how gubernatorial administration adds nuance to theorizing about the "political safeguards of federalism," identifying the costs and benefits of truly "energetic" executive government, spotting strengths and weaknesses in our institutions of legal and political accountability, and understanding the implications of state-level power for local democracy. Her findings are suggestive on all of them.

If I have any uncertainty about Seifter's account, it is not with regard to her contemporary survey. I wonder only about the conventional view she implicitly accepts about the relationship between state and federal constitutional thinking in 1787. I do not doubt, as she relates, that the drafters who gathered in Philadelphia viewed the weak state governor model enshrined in early state constitutions as a template not to be followed. But in many relevant structural respects, the state constitutions drafted in the decades *following* the Philadelphia Convention still carried forward the constraints

on executive control embedded in the earlier documents. They embraced these constraints notwithstanding the inclusion of executive power vesting clauses, faithful execution of the law requirements, and "opinions clauses" more or less identical to the language of the new federal Article II. The federal drafters may well have intended their use of these words to create a powerful form of unitary executive entirely at odds with gubernatorial models. But as I have argued elsewhere, it seems problematic to imagine that voters in the states who both ratified the federal constitution and adopted their respective state constitutions understood the implications of identical provisions in the two documents in radically disjunctive ways.

History, however, is not the primary focus of Seifter's article. To the extent her historical account is provocative, that fact only confirms the exceptionally generative potential of her work. I observed some years ago that the "powers and competencies" of our states "have grown over two centuries to something the late 18th century could hardly have imagined." That these "powers and competencies" are subject to forms of executive government less constrained than that of the presidency provides grounds for further study that could be hugely illuminating. Many an author, like Professor Seifter, concludes with a note that further pursuit of the issues they are illuminating "can enrich discourse in administrative and constitutional law." (P. 57.) In this case, Seifter urges that such studies can "shine light on costs and benefits of different visions of democracy, bureaucracy, and leadership, and prompt deeper reflection on assumptions of what is possible and desirable in modern administration." (P. 57.) She is not over-claiming. Hers is a rich and rewarding step forward.

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