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Localist Administrative Law

ABSTRACT. To read the voluminous literature on administrative law is to inhabit a world focused almost exclusively on federal agencies. This myopic view, however, ignores the wide array of administrative bodies that make and implement policy at the local-government level. The administrative law that emerges from the vast subterranean regulatory state operating within cities, suburbs, towns, and counties has gone largely unexamined.

Not only are scholars ignoring a key area of governance, but courts have similarly failed to develop an administrative jurisprudence that recognizes what is distinctive about local agencies. The underlying justifications for core administrative law doctrines at the federal level, such as deference to agency expertise and respect for separation of powers, must be adapted for local contexts in which mayors can sit on city councils, agencies may operate with few clear procedural constraints, and ordinary citizens can play a direct role in determining policy.

To remedy these gaps in the literature and the doctrine, this Article makes three contributions. First, it offers a detailed descriptive account of local administration, outlining domains of local agency action, the governmental structures that define those agencies, and practical details of local agency operation. The Article then draws from this empirical grounding to identify particularly salient factors that can more transparently inform judicial review of a variety of local agency actions, from statutory interpretation to substantive policymaking to enforcement and licensing. These factors include the particular and varied nature of local-government structures, the tension between informality and procedural legitimacy within local administration, the mottled interplay of public and private spheres in local governance, and local agency expertise that reflects local knowledge.

This localist perspective, finally, has direct relevance to core scholarly debates in both local-government law and administrative law. An understanding of local administration adds a layer of internal complexity to questions of local-government authority and identity, reorienting discussions about democratic accountability and experimentalism. It likewise holds the promise of deepening administrative jurisprudence with a perspective that reaches across the entire range of our vertical federalism. In short, the world of local agencies opens a window for the study of an important, yet underappreciated, set of institutions. Calling attention to these agencies will ultimately foster a new discourse about administrative law for local-government scholars and a broader understanding of governance for scholars of administrative law.

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INTRODUCTION

In the waning days of Mayor Michael Bloomberg's administration, the New York City Department of Health and Mental Hygiene promulgated a regulation that would have limited sales based on the portion size of so-called "sugary" drinks.[1] This effort was the best-known—and arguably the most controversial—of a long series of public-health rules from the agency that included smoking restrictions, a ban on trans fats, and a mandate for listing calorie counts in restaurants.[2] Before the portion-limit regulation could take effect, however, the New York state courts invalidated it on grounds seemingly familiar to any scholar of administrative law: separation of powers and the nondelegation doctrine.[3]

What is distinctive about this controversy is not that the judiciary found that an administrative agency had overstepped its bounds; that much is relatively banal, although not without its problems in this particular case.[4] It is, rather, that the relevant agency promulgating the rule at issue was part of a *local* government.

In legal scholarship, administrative law is almost always synonymous with *federal* administrative law.[5] The institutional frameworks, doctrinal questions, and theoretical concerns that drive the voluminous literature on administrative law almost exclusively take the alphabet soup of federal executive-branch agencies, acting pursuant to statutes enacted by Congress and overseen by Article III courts, as the reigning paradigm. The preoccupations and prescriptions of

1. 24 RULES OF THE CITY OF N.Y. § 81.53 (2013), *invalidated by* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 16 N.E.3d 538 (N.Y. 2014); *see also* Pekham Pal, *History, Governmental Structure, and Politics: Defining the Scope of Local Board of Health Power*, 84 FORDHAM L. REV. 769, 790-96 (2015) (reviewing the portion-cap litigation).

2. *See* Paul A. Diller, *Local Health Agencies, the Bloomberg Soda Rule, and the Ghost of Woodrow Wilson*, 40 FORDHAM URB. L.J. 1859, 1864-65 (2013). The most recent chapter in this ongoing public-health campaign has been a push to require menus to warn of particularly high-salt foods. *See* William Neuman, *New York City Can Enforce Salt Warnings on Menus, Court Says*, N.Y. TIMES (May 26, 2016), http://www.nytimes.com/2016/05/27/nyregion/new-york-city-can-enforce-salt-warnings-on-menus-court-says.html [http://perma.cc/KQ9L-RPA2].

3. *See Hispanic Chambers of Commerce*, 16 N.E.3d at 549.

4. *See infra* Section IV.B.1. The fact that one ground of decision in the case was nondelegation does distinguish it from run-of-the-mill federal administrative law. *See infra* Section IV.B.2.

5. *See, e.g.*, William Funk, *Beyond Casebooks, Beyond Treatises: Administrative Law Readers*, 9 ADMIN. L.J. AM. U. 361, 364 (1995) (book review) (noting—and lamenting—that the three leading administrative law anthologies were "devoted exclusively to *federal* administrative law").

mainstream administrative law accordingly flow from this institutional and regulatory context.[6]

This myopic federal focus obscures a massive, submerged, and surprisingly vibrant domain of administration that exists at the local-government level. Nested within the tens of thousands of cities, suburbs, towns, and counties that span the country is a vast panoply of local agencies with significant front-line regulatory responsibility. These agencies work in policy domains as varied as economic regulation, public health, land use, policing, environmental protection, education, public benefits, and consumer welfare.[7] It is no exaggeration that almost every area of local governance operates through myriad zoning boards, education departments, police commissions, motor vehicle bureaus, social-service agencies, and similar institutions. If, as the introduction to a leading casebook on local-government law puts it, three core relationships have traditionally defined the field—those "between cities and higher levels of government, between neighboring cities, and between cities and the people who live within their boundaries"[8]—then local administration represents a crucial fourth relationship—between and among institutions *within* local governments.

Political scientists, economists, and scholars of public management have long grappled with the interplay between bureaucracy and democracy at the

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6. There is a body of *state* administrative law scholarship that has produced notable contributions. *See, e.g.*, MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW (4th ed. 2014); Michael Asimow, *The Fourth Reform: Introduction to the Administrative Law Review Symposium on State Administrative Law*, 53 ADMIN. L. REV. 395 (2001); Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297 (1986); Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the* Chevron *Doctrine*, 39 MCGEORGE L. REV. 977 (2008); Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551 (2001); Aaron Saiger, Chevron *and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555 (2014). As will be explored throughout the Article, this state-level administrative law can help explicate the contours of local-government practice, but the Article will focus on federal-local distinctions for the sake of clarifying contrast. *See infra* text accompanying notes 66-74.

Before the rise of the modern administrative state, sub-federal institutions unsurprisingly were more central to conceptions of administration, as the prominence of two turn-of-the-century non-federal cases involving challenges to tax assessments—*Londoner v. City & County of Denver*, 210 U.S. 373 (1908); and *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915)—in the canon of administrative law suggests. *Cf.* Ronald A. Cass, *Models of Administrative Action*, 72 VA. L. REV. 363, 367-70 (1986) (discussing *Londoner* and *Bi-Metallic* as canonical polestars of models of administration that parallel adjudication and legislation).

7. *See infra* Section III.A.

8. GERALD E. FRUG, RICHARD T. FORD & DAVID J. BARRON, LOCAL GOVERNMENT LAW: CASES AND MATERIALS vi (5th ed. 2010).

local level.[9] Yet legal scholars have been oddly absent from this discourse, paying too little attention to the inner workings of local government in general[10]—and even less to the important arena of local agency practice[11]—despite the voluminous literature on administrative law and practice that predominates at the federal level. This is unfortunate, because the administrative state that exists at the local-government level—one might call it the administrative city-state—is every bit as worthy of scholarly examination as its more familiar federal counterpart.[12]

When one turns the lens on the metaphorical microscope, what does local administration actually look like? It is difficult to generalize, given the number and variety of local agencies, but several themes emerge. First, as noted, local agencies reflect the breadth of the work of local governments. Agencies are involved in the delivery of core local services, such as education, policing, and sanitation, often the functions most closely identified with local governments.[13] But it is easy to forget that local governments also exercise significant regulato-

9. *See infra* Part I.

10. Much of the literature on local-government law falls into two broad categories. In the first, paralleling Frug, Ford, and Barron's typology, *see* FRUG, FORD & BARRON, *supra* note 8, scholars focus on transsubstantive determinants of local legal identity. This strand of the literature tends to examine issues such as authority, autonomy, boundaries, incorporation, and the like. A second category focuses on specific areas of policy concern, such as land use, education, policing, public benefits, and the like. Although both of these strands of the literature are important, this Article argues for a more explicitly institutionalist approach, because questions of internal governmental structure matter at the local level no less than at the federal level. *See infra* Part I.

11. Paul Diller's work on local public-health agencies is a rare (and excellent) recent exception. *See* Diller, *supra* note 2; *see also* Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219 (2014).

Local administrative law was once not quite as obscure a field of inquiry. In the early 1960s, Bernie Burrus published a slim but insightful book on local administration, seeking (it turned out, sadly, in vain) to spark a broader discourse about the subject. *See* BERNIE R. BURRUS, ADMINISTRATIVE LAW AND LOCAL GOVERNMENT (1963); *see also* Max A. Pock, *Administrative Law and Local Government*, 43 TEX. L. REV. 123, 123 (1964) (reviewing BURRUS, *supra*). In addition to Burrus's now largely forgotten volume, Harry Wallace, the respected former Dean of Indiana Law School, published more than one edition of his casebook on the subject, with the final edition appearing in 1972. *See* LEON HARRY WALLACE, LOCAL ADMINISTRATIVE LAW: CASES AND MATERIALS (1972).

12. In essence, local agency practice *is* local governance. As Niels Ejersbo and James Svara have argued, "[b]ureaucracy constitutes the core organizational capacity of local governments to carry out the government's work of enforcing laws, implementing policies, and delivering services." Niels Ejersbo & James H. Svara, *Bureaucracy and Democracy in Local Government*, *in* THE OXFORD HANDBOOK OF URBAN POLITICS 152, 152 (Karen Mossberger, Susan E. Clarke & Peter John eds., 2012).

13. *See* Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 85-86 (1998) (discussing the most common local services).

ry authority, delegated from the state government or under "home rule."[14] Local agencies, for example, set the rules and oversee the functioning of many aspects of the built environment—through zoning, subdivision rules, building and housing codes, and similar statutory regimes. They also regulate significant aspects of local economies, including wage and hour rules, workplace conditions, and antidiscrimination requirements. And an increasingly important aspect of local regulation involves the environment. Much of local agencies' work across policy areas happens through licensing,[15] but local agencies also engage in traditional direct regulation.[16]

If this is what local agencies do, what can be discerned about the legal and institutional contexts in which they operate? Local agencies are not simply junior-league counterparts to federal agencies. While there are some local governments—particularly in larger cities such as New York—that have surface resemblance to the federal three-branch paradigm, most have distinctly different structures.[17] For example, many local governments have little or no formal separation of powers, with lawmaking authority often vested in a unified legislative-executive body. The "mayor" in these jurisdictions, if there is one, is just another council member. Even for those local governments that have a recognizable independent chief executive, that executive's ability to directly oversee

14. David Barron and Gerald Frug have argued that the scope of local authority is not a Manichean all-or-nothing divide between empowerment and disability, but rather a more subtle interplay of both. *See* GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION (2008). Frug and Barron tend to ignore a third source of authority and limitation at the local-government level, deriving from the federal government's local role. *See* Nestor M. Davidson, *Leaps and Bounds*, 108 MICH. L. REV. 957, 965 (2010) (reviewing FRUG & BARRON, *supra*); *see also* Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007) (exploring the role of federal authority at the local level).

15. When Bernie Burrus set out to explicate the then-state of local administrative law in the 1960s, he chose licensing as his paradigm example. *See* BURRUS, *supra* note 11, at 41-71. The use of franchise authority is another prominent regulatory strategy at the local level. *See* Olivier Sylvain, *Broadband Localism*, 73 OHIO ST. L.J. 795, 828-29 (2012) (discussing local cable franchise agreements as a form of regulation).

16. *See infra* Section III.A.1.

17. *See* Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 341 (1993) ("Local government is strikingly different from other levels of government, and not simply because local governments are territorially smaller. Local government organization does not abide by the 'plain vanilla' model characteristic of state or federal government: a single legislative body with general lawmaking powers over a broad jurisdiction with democratic accountability to the residents of that jurisdiction. Instead, specialization, fragmentation, overlap, and boundary change are pervasive characteristics of our local government structure . . . ." (footnote omitted)).

agencies is often circumscribed.[18] And many local agencies are subject to quite limited electoral accountability, reporting to the state or entirely lacking a relevant, direct electoral mechanism of any sort.[19]

While some local agencies, moreover, are well staffed and operate as formally as any federal agency, local administration tends to work more informally. Indeed, the precise procedural requirements binding local agencies are often surprisingly murky.[20] Local agencies also often operate at the edge of a blurry line between governmental action and public participation. Community engagement in zoning regulation, school board decisions, police review commissions, and other examples of the blending of public and private underscore the breadth of citizen participation in local agency work that is uncommon at the federal level.[21] And local-government functions can be entirely privatized, including some administration. All of these variations inform this Article's first aim—providing a descriptive foundation to understand the nature and work of local administration.

Shifting from this empirical grounding to doctrinal questions, this Article argues that these features of local agency context and practice should shape a new, distinctly localist administrative jurisprudence.[22] Courts—and it is mostly state courts that review local agency action—engage in judicial review across a variety of contexts, from statutory interpretation, to substantive agency policymaking, to policing the bounds of procedural regularity.[23] When they do, they should attend to four particularly salient aspects of the local context.

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18. Many mayors, for example, entirely lack appointment and/or removal power over the heads of local administrative agencies. *See infra* text accompanying notes 168-171.

19. Indeed, the fact that local agencies answer both to their own local governments and to the state is a distinctive feature of local administration. *See* Diller, *supra* note 2, at 1867-83.

20. Many local agencies are not bound by state Administrative Procedure Acts, although that does not mean that they are entirely free from procedural constraints. *See infra* text accompanying notes 188-193. As a result, local agencies have been a particular flashpoint for due process concerns. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); Londoner v. City & Cty. of Denver, 210 U.S. 373 (1908).

21. This is not to ignore the influence of private actors on federal agencies, which is a recurring concern in the discourse on agency capture and independence. *See* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 551-64 (2000). Rather, it is to highlight the porous line between public and private as a particularly prominent local feature.

22. Administrative law generally encompasses questions such as the authority and structure of agencies, procedural requirements for agency action, the general validity of agency decisions, and judicial review of agency actions. In explicating the contours of a localist administrative law, this Article focuses on judicial review as a first step, but the insights developed are relevant to other aspects of administrative law. *See infra* Section V.C.

23. Judicial review of local agencies parallels federal administrative law in the sense that litigants challenge rulemaking, administrative adjudication, enforcement decisions, and other ac-

First, rather than importing federal—or even state—administrative law norms wholesale, courts should be clear-eyed about the doctrinal implications of local governmental structure and the complex nature of delegated authority for local agencies.[24] Courts should consider, for example, whether limits on executive oversight militate against deference, or whether the absence of separation of powers in a local government might change the nature of the nondelegation doctrine. Similarly, the fact that many local agencies have two layers of oversight—by their local and state governments—may mitigate concerns about capture, corruption, and faithless agents. In these and many other ways, the details of local governmental structure matter for judicial review.[25]

Second, courts should be sensitive to the contexts for formality and informality in the work of local agencies. In most instances, as with the approach that courts take when scaling deference in reviewing federal administration,[26] formality should be accorded judicial respect. Where an agency has acted through legislatively prescribed procedure or adopted careful processes of its own, with substantial evidence when appropriate, that should merit deference, all other things being equal. On the other hand, more so than at the federal level, there are contexts where the relative informality of local practice, particularly to the extent that such informality reflects community involvement, may be consistent with norms of considered judgment.[27]

Third, courts should be attentive to the role of private parties and the community in local administration. The scope of private involvement—both within traditionally governmental entities and through privatization—can be a rationale for the kind of vigorous nondelegation doctrine seen in local administrative law (by stark contrast to federal law). But the porous line between public and private at the local level can also weigh in favor of a more pragmatic approach to nondelegation, so long as that approach is undertaken with appropriate caution.[28]

Finally, reviewing courts should take a nuanced view of local agency expertise. In some contexts, this is as straightforward as crediting local technical experts, as with the New York City Department of Health and Mental Hygiene, a nationally recognized leader in public health. In other contexts, however, agen-

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tions. Specific context matters procedurally and substantively, but the framework in this Article identifies common themes that can shape that review across contexts.

24. Many factors that shape local administrative law are grounded in state laws that at times do not clearly distinguish state and local institutions. *See infra* Sections III.B, III.C.1.

25. *See infra* Section IV.A.1.

26. *See*, *e.g.*, United States v. Mead Corp., 533 U.S. 218, 230-31 (2001).

27. *See infra* Section IV.A.2.

28. *See infra* Section IV.A.3.

cies serve less as a repository of technical expertise and more as a mediating body to channel local input and knowledge. This is still valuable expertise, but of a different sort than the kind of scientific or industry-specific knowledge with which courts credit federal agencies.[29]

Beyond jurisprudence, a final aim of this Article is to begin to illuminate ways in which the intersection of localism and administration has deep relevance for the literature in each domain. For scholars of local-government law, focusing on the work of agencies adds a layer of institutional depth to longstanding debates balancing local authority, community, democracy, and experimentalism against concerns about parochialism and exclusion.[30] For administrative law scholars, adding an understanding of local administration to debates that are largely focused on the federal level complicates questions of the institutional predicates for administrative legitimacy, but also holds promise for developing a more coherent administrative law across the entire range of our vertical federalist system.[31]

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The Article proceeds as follows. Part I begins as prologue, explaining in more depth the significance of the scholarly gap at the intersection of administration and local governance. Part II then turns to the largely federal predicates—structural, doctrinal, and conceptual—that animate mainstream administrative law and theory, to lay a comparative foundation. Part III shifts to the local, outlining the nature, function, and varied governmental-structural context of local agencies. Part IV builds on this empirical grounding to frame a jurisprudence of administrative law that foregrounds what is distinctive about local practice, illustrating its impact through two examples: reasonableness review and the nondelegation doctrine. Finally, Part V returns to the theoretical lacunae at the intersection of localism and administration, exploring implications for legal theory. This exercise holds important lessons about institutional structure, judicial oversight, and agency process in the administrative state that cannot be learned solely from studying the federal government, with significant consequences for our understanding of administrative legitimacy and, more broadly, the nature of governance.

I. A DOUBLE LACUNA: LOCAL/ADMINISTRATION

To situate this Article, it is important to recognize that there is a missing focus on the institutions of administration in local-government legal scholarship

29. *See infra* Section IV.A.4.

30. *See infra* Section V.A.

31. *See infra* Section V.B.

and a corresponding missing focus on localism in administrative law scholarship. This double lacuna weakens both fields.

In local-government law, two broad themes tend to define the literature. First, legal scholars have long focused on questions of local legal authority and identity. In this vein, scholars have fruitfully explored the nature and limits of local autonomy, primarily in the context of the local-state relationship, but also in terms of the horizontal intergovernmental context in which local governments operate.[32] As a conceptual matter, much of this scholarship engages with the nature of community and democracy in local governance, balancing those values with the risks of parochialism, externalities, and exclusion.[33]

A second strain in the local-government literature focuses less on legal identity and more on particular policy domains prominent at the local level. In this vein, scholars have engaged at times with administrative law in specific areas such as public health,[34] land use,[35] and public benefits,[36] but there has been

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32. Thus, not only the state-local relationship—in scholarship on topics such as home rule and local legal identity—but also the legal determinants of interlocal relationships and regionalism are prominent areas of exploration. *See, e.g.*, Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763 (2002); Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190 (2001). A notable sub-theme of this focus on local authority and autonomy is local-government scale, including important work on local borders, *see, e.g.*, Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115 (1996); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994), and the related area of annexation and dissolution practices, *see, e.g.*, Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364 (2012). Another notable aspect of local legal autonomy involves the question of the immunity of local officials. *See* Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409 (2016). For further discussion of local authority, autonomy, and legal identity, see *infra* Section III.B.1.

33. *See, e.g.*, Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118 (2014); Frug, *supra* note 13.

34. *See, e.g.*, Diller, *supra* note 11 (exploring in depth the structural and procedural predicates for local innovation in public health).

35. *See, e.g.*, Adam J. MacLeod, *Identifying Values in Land Use Regulation*, 101 KY. L.J. 55 (2012) (discussing administration and judicial review in land-use regulation); Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591 (2011) (outlining contemporary land-use regulatory practice and arguing for cabining its increasingly individualized nature).

36. *See, e.g.*, Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121 (2000) (examining a shift in administrative structure following welfare reform in the mid-1990s toward vesting front-line agency actors with increasing discretion).

almost no scholarship that has attempted to knit these insights together across the range of substantive local domains.[37]

As valuable as this macroscale local governance and individual policy area focused literature is, the *internal* institutions of local governance should also matter for scholars of local government.[38] The same questions of governmental structure and organization that are the staple of so much of the legal literature on administrative law and separation of powers at the federal level are worthy of exploring within the confines of local governments. Scholarship on federal separation of powers and administrative law takes as a foundation, albeit frequently implicit, that structure is critically important to understanding the nature of federal governance and that agency practice should inform administrative jurisprudence. Those same concerns should be equally relevant at the local level.

There has been some engagement in the legal literature with the nature of mayoral power, as part of bringing questions of internal structure to the larger debate about the authority and efficacy of local governments.[39] Other scholars have examined the link between the structure of local governance generally and fiscal or other specific policy outcomes.[40] And recent work has begun to apply insights from positive political theory to questions of local-government law, highlighting local institutional dynamics and allocation of authority.[41] This

37. In arguing for a transsubstantive focus on internal institutions at the local-government level, this prologue should not be read to dismiss scholarship that engages with local administrative structure in particular subject-matter contexts. Rather, this is to argue for transsubstantive engagement with local internal structure and administrative law in particular, similar to the transsubstantive work on federal and state administration.

38. This assertion echoes David Schleicher's argument that scholars of local government should be more attentive to emerging trends in economics and political science. *See* David Schleicher, *Local Government Law's "Law and ___" Problem*, 40 FORDHAM URB. L.J. 1951 (2013) (decrying the absence of engagement with the urban agglomeration economics and positive political science literature in local-government legal scholarship).

39. *Compare, e.g.*, Clayton P. Gillette, *Can Municipal Political Structure Improve Fiscal Performance?*, 33 REV. BANKING & FIN. L. 571, 576-82 (2014) (arguing for the value of a strong-mayor system in fiscal affairs), *with* Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2555-64 (2006) (arguing that even strong mayors are subordinate to the limits of local authority). *See generally* Schragger, *supra*, at 2546 (noting that "almost nothing has been written about the mayoralty in the legal literature").

40. *See* Clayton P. Gillette & David A. Skeel, Jr., *Governance Reform and the Judicial Role in Municipal Bankruptcy*, 125 YALE L.J. 1150 (2016) (examining the causes and consequences of the fragmentation of local budget authority in the context of judicial oversight of municipal bankruptcy).

41. *See, e.g.*, David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1699-1717 (2013) (analyzing the interaction of law, politics, and procedure in urban land use); *see also* David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23

scholarship, however, largely focuses on political leadership and not on the agencies and other internal institutions that perform much of the actual work of local governments.[42] No one could reasonably suggest that the institutional context of federal law is irrelevant—indeed, much of the scholarship of administrative law at the federal level proceeds from precisely the opposite assumption.[43]

The absence of deep engagement by legal scholars with the internal functioning of local governments is all the more striking when compared to the literature in political science, economics, public management, and urban affairs. That scholarship has long sought to develop frameworks for assessing links between structure and policy outcomes. Across several disciplines, a new institutionalist perspective has emerged that has focused intently on local governance. In political science, for example, there is a body of empirical and theoretical literature that seeks to categorize and understand the consequences of the varieties of local-government structure.[44] Similarly, in new institutional economics, scholars have examined internal public agency function.[45] And a prominent vein of the public administration literature takes as its point of departure that the structure of the institutions of local governance is significant.[46] There is no need here to rehearse this interdisciplinary institutional literature in depth—suffice it to say (for the moment) that in closely cognate fields, scholars recog-

J.L. & POL. 419, 423-26 (2007) [hereinafter Schleicher, *No Partisan Competition*] (exploring the role of law in local electoral dynamics); Kenneth A. Stahl, *The Artifice of Local Growth Politics: At-Large Elections, Ballot-Box Zoning, and Judicial Review*, 94 MARQ. L. REV. 1 (2010) (analyzing the effect of structure in local politics on municipal economic growth).

42. At least one local-government-law casebook does include a brief discussion of local administration, although noting the dearth of scholarship in the area. *See* LYNN A. BAKER, CLAYTON P. GILLETTE & DAVID SCHLEICHER, LOCAL GOVERNMENT LAW: CASES AND MATERIALS 777-79 (5th ed. 2015).

43. Calls for an "institutional turn" have been made in other areas of legal scholarship. *See, e.g.*, PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS (2013); Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 96 (2015) (arguing for an "'institutional turn' towards the predicted political behavior of legislatures, bureaucrats, and executive politicians" in property theory).

44. *See, e.g.*, Victor S. DeSantis & Tari Renner, *City Government Structures: An Attempt at Clarification*, *in* THE FUTURE OF LOCAL GOVERNMENT ADMINISTRATION: THE HANSELL SYMPOSIUM 71 (H.G. Frederickson & J. Nalbandian eds., 2002).

45. *See, e.g.*, Oliver E. Williamson, *Public and Private Bureaucracies: A Transaction Cost Economics Perspective*, 15 J.L. ECON. & ORG. 306 (1999) (analyzing how public bureaucracies compare to private bureaucracies in handling sovereign transactions).

46. *See, e.g.*, Kimberly L. Nelson & James H. Svara, *Form of Government Still Matters: Fostering Innovation in U.S. Municipal Governments*, 42 AM. REV. PUB. ADMIN. 257, 257 (2012) (noting that the "form of government remains an important variable to consider when investigating local-government management and performance").

nize that the internal structures of local governance matter as a theoretical and practical matter.[47]

On the other hand, if the internal workings of cities, suburbs, counties, and towns should matter to legal scholars, so too should doctrine matter to institutionalists in other academic disciplines. Scholars examining local governance in political science, economics, public management, and other fields too often proceed without sufficient recognition of legal constraints. Indeed, the argument that Gerald Frug and David Barron have made about interdisciplinary misunderstanding of the mottled nature of the authority of local governments—that urban theorists need a better understanding of actual local legal identity—holds equally true for the comprehension by scholars in other fields of the legal landscape of the internal dimension of local governance.[48] How does delegation of authority work within local governments? What limits do courts impose on the ability of local governments to promulgate regulations? What kinds of procedural norms are required for agency actions to survive judicial scrutiny? Again, this is the ordinary work of federal administrative law, but all too often ignored at the local-government level.

The case for focusing on local governments for scholars of administrative law is easier to articulate, but no less compelling. Mainstream administrative law, as noted,[49] has attended somewhat to state-level agency action and judicial review, but has almost entirely ignored the sub-state level as an independent arena worthy of study. Most law school courses titled "Administrative Law" are, in fact, courses on "Federal Administrative Law," with the general exception of segments on procedural due process under the Fourteenth Amendment.[50] Most scholarship in administrative law is federal in its focus as well.[51]

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47. *But see* Charles R. Shipan & Craig Volden, *Policy Diffusion: Seven Lessons for Scholars and Practitioners*, 72 PUB. ADMIN. REV. 788, 793 (2012) (noting that policy diffusion studies ignore "decisions made by executive agencies").

48. *See* FRUG & BARRON, *supra* note 14, at 12-23 (arguing that the interdisciplinary discourse on urban policy lacks an appreciation of the legal foundation for local power).

49. *See supra* note 6.

50. The *Londoner*/*Bi-Metallic* due process distinction arose from challenges to state and local administrative processes. *See supra* note 6. While it is true that some casebooks deal more broadly with state administrative law, *e.g.*, ASIMOW & LEVIN, *supra* note 6, examples of deep engagement with sub-federal administration are outliers.

51. The footnote necessary to substantiate this claim would run for volumes, but suffice it to say that even a casual glance at the work product of the Association of American Law Schools (AALS) Section on Administrative Law (or any similar shorthand for administrative law scholars) would reinforce that the predominance of work is on federal agencies and the federal institutional context. This is so internalized by most administrative law scholars that it is common to see the federal government assumed to be *the* administrative state. *See, e.g.*, Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*,

Including a local perspective in that scholarship would fulfill two imperatives, one unifying and one grounded in the value of understanding institutional pluralism. As to highlighting continuity in administrative law, adding localism to administrative scholarship would allow for the exploration of common themes in new institutional settings, shedding light on a set of longstanding debates to which we will be turning momentarily. At the same time, however, this additional layer would provide new grounds to complicate longstanding assumptions about the implications of federal structure and practice.[52]

II. A FEDERAL BASELINE FOR A VERTICAL COMPARATIVE PERSPECTIVE

To understand what is distinctive about local administration, it is useful to lay down a comparative baseline with a brief overview of the federal paradigm. This Part accordingly starts with the structural predicates for mainstream administrative law's federal focus and then turns to the jurisprudential themes that have emerged from those predicates.[53]

A. The Structural Predicates of Administrative Law's Federal Focus

The reigning preoccupations of administrative law have settled into a rough stasis around certain core debates—however contentious they may remain—about the nature of agency decision making, the tenor of judicial review, executive oversight, and other aspects of administrative legitimacy. These concerns will be explored in depth below as they pertain to administrative jurisprudence.[54] But before turning to doctrine, it bears noting that the essential insti-

115 COLUM. L. REV. 1985, 1986 & n.9 (2015) (citing only the federal paradigm to argue that "our form of government is, importantly, administrative government"). Even scholarship that purports to broaden the focus beyond the federal government often reverts back to the federal paradigm. *See, e.g.*, Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953 (2014) (discussing the role of state interest groups in shaping federal regulations).

52. These arguments will be spelled out in more detail below. *See infra* Section V.B.

53. As discussed below, *see infra* text accompanying notes 66-74, this Section frames the baseline for a comparison between federal administration and local administration as a way of highlighting contrasts between these two levels of our federal system, acknowledging that state administrative law provides an intermediate institutional layer. To frame the contrast between the local and the federal is not to ignore the importance of the states—or the reality that much of "local" administrative law is inextricably intertwined with state-level law and institutions, but rather to highlight the absence of any sustained engagement with local administration as such in the contemporary administrative law literature.

54. *See infra* Section IV.B.

tutional assumptions that undergird these mainstream administrative law debates derive from the federal-government context. These institutional assumptions may be obvious, and we need not tarry long to catalogue them in detail, but they all too often simply go unacknowledged as a baseline paradigm for our understanding of administrative law.

The first, most basic, structural assumption is the familiar three-branch structure of the federal government. Thus, administrative law is understood as the domain of agencies within the federal executive branch, operating under Article II authority. Scholars have long debated the extent to which certain agencies do or should operate independently of the President,[55] and even in the context of central cabinet agencies, the legitimacy of direct presidential control over the regulatory state remains controversial.[56] But from the perspective of democratic accountability and executive oversight, there is no question that mainstream administrative law assumes that there is a single, elected executive overseeing a recognizable executive branch.

Mainstream separation of powers principles also understand agencies to be operating under express or implied delegations from Congress.[57] This is foun-

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55. These agencies are considered "independent" in the sense of enjoying statutory limitations on the President's powers, with respect to either the appointment of inferior officers or the removal of relevant agency heads. *See, e.g.*, Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 4 n.16 (2013) (presenting several characterizations of agency independence).

56. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 485-92 (2003) (arguing that presidential control is the "dominant" model of administrative oversight); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 686-87 (2016) (surveying the literature on federal executive oversight of the administrative state and arguing for reorienting administrative law to better cabin this oversight). *Compare, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (defending presidential control of federal administration), *with, e.g.*, Kevin M. Stack, *The President's Statutory Powers To Administer the Laws*, 106 COLUM. L. REV. 263 (2006) (arguing that the President only has the authority to direct agency action when expressly authorized by statute), *and* Peter L. Strauss, *Foreword: Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 704-05 (2007) (arguing that "in ordinary administrative law contexts, where Congress has assigned a function to a named agency subject to its oversight and the discipline of judicial review, the President's role—like that of the Congress and the courts—is that of overseer and not decider"). On debates about the unitary executive at the federal level, see generally HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 446-48 (2006), which discusses judicial and scholarly views on the unitary executive; and STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008), which advocates unitary executive theory.

57. Congressional oversight of administrative agencies is another important theme in the literature and in practice. *See generally* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006) (discussing the various means by which Congress influences administration).

dational to so much of the structure of agency authority and informs a variety of doctrines of judicial review, such as the calibration of levels of deference and the all-but-toothless federal nondelegation doctrine.[58] Likewise, federal constitutional principles of limited and enumerated powers inform, at least at the margins, the scope of authority that can be granted from Congress to agencies. As a practical matter, however, the outer bounds of Congress's authority have rarely been meaningfully tested since the New Deal.[59]

As with these formal predicates, functional perspectives on administrative law likewise often default to the basics of the federal agency paradigm as well. Thus, federal agencies such as the EPA, OSHA, or the SEC are assumed to have a certain technical expertise, grounded in the work of relatively well-resourced, sophisticated staff.[60] Conversely, these agencies are seen as perennially at risk of capture by regulated industries operating within the scope of national politics.[61] This is a fairly basic point, but one that too often goes without noting.[62]

From a procedural perspective, finally, federal agencies share a unified grounding for the variety of their actions, provided by the Administrative Procedure Act (APA).[63] Federal agencies have a range of policymaking options for undertaking administrative action—including formal and informal rulemaking, sub-regulatory guidance, formal and informal adjudication, and enforcement actions. All of these forms of administrative action are broadly constrained within a common and fairly clear statutory (and administrative common law)

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58. *See infra* Section IV.B.

59. There are pockets of jurisprudence that set some very broad outer boundaries under the banner of the constraints of federalism, the limits of the Commerce Clause, or the like, *see, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012); Printz v. United States, 521 U.S. 898 (1997), but given the breadth of federal regulation, these outer boundaries are rarely approached. In some sense, the federal government and local governments share a conceptual kinship as governments of supposedly limited and delegated authority—unlike the states—but as a practical matter, limits to authority are much more of a salient reality for local governments than such limits have been for the federal government since the New Deal.

60. *See, e.g.*, Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. Rev. 1271, 1286 (2008) (noting that "[a]dministrative agencies' superior experience and expertise in particular regulatory fields" is a common justification for judicial deference).

61. *See, e.g.*, Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 Geo. L.J. 1337 (2013) (arguing that the commonness of regulatory capture provides normative support for executive review of agency action).

62. The geographic scope of federal administration is also generally taken as a given, and not much usually turns on this fact for federal agencies. By contrast, of course, the geographic boundedness and fragmentary nature of local governance is salient for local agencies. *See infra* Section III.B.2.

63. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

framework.[64] There are variations, to be sure, but the basic procedural terms share a well-understood and routinized vocabulary.[65]

There is an intermediate governmental level to consider between the relative uniformity of federal administrative law and, as we shall see momentarily, the tremendous variety found at the local level.[66] As scholars have noted, several of the structural constitutional features underlying federal administration doctrine can be different at the state level.[67] Unlike Article III judges, for exam-

64. *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1386 n.2 (2004) ("[The APA] provides a common default framework, one that contemplates nearly all of the categories [of administrative action], that guides almost every agency in at least some contexts. Centralized White House review of agency activity likewise tracks at least some of the categories identified here. As such, one can talk sensibly about a standard set of policymaking forms as a matter of practice."). Administrative common law refers to the body of practice that has become standard on top of the framework of the APA. For example, the APA does not speak to what public reporting is required for rulemaking, but agencies generally keep records given the nature of judicial review. *See generally* Gillian E. Metzger, *Foreword: Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293 (2012) (describing and defending the existence of administrative common law).

65. At the local level, the line between public and private can be relatively permeable—generally and in administrative practice—compared to the federal level. *See infra* Sections III.C.2, IV.A.1. Tensions over private involvement in administration are not entirely foreign to federal administrative law, however, as the jurisprudence on private nondelegation makes clear. *See, e.g.*, Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666 (D.C. Cir. 2013) (holding that a statute requiring the Federal Railroad Administration to develop standards jointly with Amtrak, a private entity, constituted an unconstitutional private delegation), *rev'd*, 135 S. Ct. 1225 (2015) (finding that Amtrak is a governmental entity); *see also* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (holding that a delegation of regulatory power to coal producers and miners violated the Fifth Amendment).

66. *See, e.g.*, Pappas, *supra* note 6, at 984 (surveying the extent and possible drawbacks of *Chevron*-style deference to state agencies); Saiger, *supra* note 6, at 557-59 (same); *see also* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION 1258-61 (4th ed. 2007). And this is not to say that state-level administrative law parrots federal law by any means. The literature on state-level variations makes clear that norms of deference and other core principles differ at the state level and among the states.

    One could also shift vertically in the other direction and add international administrative law to the comparative exercise, *see* Eleanor D. Kinney, *The Emerging Field of International Administrative Law: Its Content and Potential*, 54 ADMIN. L. REV. 415, 417-27 (2002), but the institutional structures that influence doctrinal concerns at the supranational level make comparison with the local difficult.

67. *See* Rossi, *supra* note 6, at 554-60; Saiger, *supra* note 6, at 560-70. Much of the work on *state* administrative law takes a comparative perspective similar to the federal-local contrast in this Article, examining the foundational features of federal structure and the consequences of state variations from these features, and a similar literature on differences—and similarities—between the federal APA and the range of state APAs. *See, e.g.*, Bonfield, *supra* note 6; *see also* Jim Rossi, *Politics, Institutions, and Administrative Procedure: What Exactly Do We Know from the Empirical Study of State Level APAs, and What More Can We Learn?*, 58 ADMIN. L. REV. 961 (2006) (discussing the institutional context for state level APAs).

ple, not all state judges are appointed and serve for life. Rather, many state judges are elected, face mandatory retirement, or are subject to other forms of political accountability.[68] Many states, moreover, have multiple sources of executive authority beyond the governor. State officials, including the lieutenant governor, the attorney general, and a variety of other state-level authorities, are independently elected in some states, rather than chosen by the chief executive.[69] And state legislatures can play a different role than Congress, some meeting much less frequently, for much less time, and also subject to much greater turnover (for better or worse).[70] There are, of course, other state-level structures—as well as aspects of state statutory law—that differ from the federal paradigm, although states at a sufficiently broad remove tend to resemble more closely the federal structure than local governments.[71] Moreover, it is important to acknowledge that many "local" administrative structures are inextricably bound up in state law and institutions.[72]

Despite the relevance of the states to local administration, this Article is framed primarily around the federal-local contrast for several reasons. First, the parsimony of the contrast (and comparison) with the federal is more clarifying than attempting to map the range of local variations against fifty states—the comparative configurations are almost endless, although worthy of further exploration.[73] Next, a federal-local juxtaposition helps to isolate and illustrate what is distinctive about the local, even if that tends to elide intermediate similarities at the state level for the sake of clarity. And, finally, notwithstanding the importance of state practice, federal predicates still generally set the terms of mainstream administrative law discourse about judicial review, agency process, mechanisms of accountability, concerns about capture, and similar core questions.[74]

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68. Saiger, *supra* note 6, at 561-62. As Saiger notes, this arguably makes some state judges at least partially a "political branch." *Id.* at 561 (citing Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1249-54, 1277-82 (2012)).

69. Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1433 tbl.4 (2008) (charting the variety of state executive officials that are elected separately from governors); William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2449-68 (2006) (discussing the practice and implications of independent state attorneys general).

70. *See* Rossi, *supra* note 6, at 555-57.

71. As with local governments, there are structural and practical commonalities between state and federal administrative practice.

72. *See infra* Section III.C.1 (discussing the varied application of state APAs to local agencies).

73. *See infra* Section V.C.

74. Hopefully, adding local administration to the discourse can reinforce the importance of state administration as well.

B. (Federal) Themes in the Administrative Law Discourse

If a very familiar federal structure undergirds much of our understanding of administration, an equally familiar set of jurisprudential and theoretical concerns flows from that structure. Generally speaking, mainstream administrative law—particularly in the context of judicial review of agency action—revolves around a core set of formal and functional arguments. Common formal grounds for structuring judicial review derive from the basic implications of separation of powers principles, including explicit or implicit legislative delegation. Functional arguments for judicial deference are more varied, but the most prominent balance a tension between technical expertise and agency accountability against concerns about capture, myopia, and agency insulation.[75]

Within the federal sphere, administrative law for the bulk of the twentieth century could aptly be described as a quest for legitimacy. For a half-century or more after the New Deal, as the federal administrative state grew, the exercise of governmental power by bureaucratic actors—as opposed to those more directly accountable to the voters—stood in need of justification. This need was particularly salient with respect to agencies whose statutory mandates were written in broad and open-ended terms. The Supreme Court abandoned the nondelegation doctrine as a basis for invalidating statutes sometime after 1935[76] and instead embraced a string of increasingly lenient frameworks—most notably the "intelligible principle" test. These frameworks allow Congress, in essence, to confer quasi-legislative power on agencies within broad limits.[77] It would be fair to describe much of administrative law—including, notably, the APA—as an elaborate substitute mechanism for enforcing the values that previously underlay the nondelegation doctrine.[78]

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75. *See generally* Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437 (2003) (describing the various models of administrative law in the United States and assessing the emerging responses to regulatory fatigue aimed at rejuvenating administrative agency processes).

76. *See supra* Section II.A (discussing nondelegation at the federal level).

77. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (permitting broad delegation of legislative authority under the "intelligible principle" standard); *see also* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001) (same); Mistretta v. United States, 488 U.S. 361 (1989) (same). *But see* Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607 (1980) (plurality opinion) (using the canon of constitutional avoidance to read a broad congressional delegation narrowly); Kent v. Dulles, 357 U.S. 116 (1958) (same).

78. *See, e.g.*, Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331-37 (2000) (describing pervasive techniques of statutory interpretation used by courts in administrative law cases to enforce the underlying values of the nondelegation doctrine).

As delegation retreated into the background, other doctrines, primarily at the constitutional level, arose as proxies for legitimation.[79] The Court, for example, imposed limits on the ability of Congress to vest itself with the power to appoint[80] and remove[81] certain agency officials as well as to override agency action through legislative resolutions that failed to conform to the requirements of bicameralism and presentment.[82] Conversely, the Court affirmed Congress's authority to insulate some agencies from direct presidential control by limiting the President's power to remove inferior agency officers.[83] The separation of powers landscape this constitutional settlement created eventually became clear: Congress was free to vest agencies with broad policymaking discretion and a mix of rulemaking, investigatory, prosecutorial, and adjudicative authority, and could shelter some agency heads from direct presidential control, so long as Congress did not unduly enlarge its own power at the expense of the other two branches in the process.

With this approach by the Court, the task of vindicating the accountability and rule-of-law values associated with the nondelegation doctrine largely fell to procedural legislation and executive oversight. The major landmark in this regard was the enactment of the APA. This framework statute was a lawyerly reaction to the explosion of regulatory activity during the New Deal.[84] The APA was designed to impose procedural regularity on federal agencies while subjecting their final actions to a presumption of judicial review under standards largely borrowed from earlier judicial practice. Presidents have likewise sought to introduce uniformity and centralization to the administrative process

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79. There is a separate line of arguably more robust federal cases that involves the delegation of adjudicatory, rather than legislative, authority. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).

80. *See, e.g.*, Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 275-77 (1991); Buckley v. Valeo, 424 U.S. 1, 140 (1976) (per curiam).

81. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 726 (1986).

82. *See* INS v. Chadha, 462 U.S. 919, 951-52 (1983).

83. *See* Morrison v. Olson, 487 U.S. 654, 691-93 (1988) (upholding a "good cause" statutory standard for the removal of an inferior officer); Wiener v. United States, 357 U.S. 349, 356 (1958) (upholding a statute that insulated commissioners from presidential removal); Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935). *But see* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 492 (2010) (invalidating a statutory system that provided for two levels of "good cause" removal restrictions).

84. *See, e.g.*, Ronald M. Levin, *Administrative Procedure Legislation in 1946 and 1996: Should We Be Jubilant at This Jubilee?*, 10 ADMIN. L.J. 55, 63 (1996) (underlining the comparatively apolitical "lawyerly concerns that underlay the original APA"); Jerry L. Mashaw, *Small Things Are Like Reasons Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 24 (2001) (describing the APA as the statutory reaction to a perceived "administrative absolutism" (citing Roscoe Pound, *Administrative Law: Its Growth, Procedure, and Significance*, 7 PITT. L. REV. 269, 280 (1941))).

through executive orders, most notably Executive Order 12,866 and its successors, which channel major proposed rules to the White House for "regulatory impact analysis," including cost-benefit review.[85]

Below the constitutional level, courts have policed bureaucratic legitimacy, although courts and commentators debate the appropriate standard (or, in APA terms, "scope"[86]) of judicial review. The APA, offering only a laundry list of standards of review in § 706(2), was of little help.[87] In 1984, the Supreme Court in *Chevron* announced the now-routine two-step method for reviewing agency interpretations of statutes: the clear meaning of the statute controls, but agencies get wide deference for reasonable interpretations in the absence of statutory clarity.[88] Alongside *Chevron*, courts from the 1960s onward attempted to promote transparency and rationality of the administrative process by strengthening the APA's "arbitrary and capricious" standard, often in the form of "hard-look" review of discretionary agency judgments.[89]

There are, of course, many other important themes in the jurisprudence of federal administrative law, including the procedural due process "revolution" of the 1970s,[90] the tightening of reviewability doctrines such as standing in the 1980s and 1990s,[91] and the inquiry into "preemption by regulation" in the twenty-first century.[92] However, at the federal level, it is safe to say that the basic dynamic of challenging and then reinforcing administrative legitimacy, as well as tensions over attempts to control administrative processes and results through presidential oversight and judicial review, have yielded a rough settle-

85. *See, e.g.*, Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

86. 5 U.S.C. § 706 (2012).

87. *See id.* § 706(2)(A)-(F).

88. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

89. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). The Supreme Court also set outer boundaries on judicial imposition of procedures in federal administration under the *Vermont Yankee* doctrine. *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 543-44 (1978) (holding that courts may not layer procedural requirements on agencies not specified in statutes or rules unless constitutionally required or in extremely compelling circumstances).

90. *See Vt. Yankee*, 435 U.S. 519 (rejecting judicial efforts to impose more onerous procedural requirements than required by statute).

91. *See* Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 453 (2015).

92. *See, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861, 866 (2000) (holding that a Department of Transportation airbag safety standard preempted a common law "no airbag" tort suit). For a general discussion of administrative procedural trends, see Stewart, *supra* note 75, at 441-43.

ment across a number of doctrinal areas. These themes recur, but often in quite unfamiliar ways, in the local context.

III. LOCAL ADMINISTRATION: DOMAIN, CONTEXT, AND PRACTICE

The arena of local-government administration displays some of the same characteristics as the federal paradigm, but there are also crucial differences between the two contexts.[93] Local administration involves a vast infrastructure of agency action that exists within local governments of all types, from the largest cities to the smallest towns. As one scholar has argued, it is in the "uncharted continent of administrative practice we might loosely call 'the individual versus the metropolitan bureaucrat' . . . that the average citizen makes his most frequent contacts with the administrative process."[94] Providing a clear picture of this uncharted continent presents an empirical challenge. Multiply the vast number of local governments—nearly 90,000 such entities, depending on the method of counting[95]—by the variety of local agencies, and it is unsurprising that there has been so little systematic empirical engagement with local administration. What Max Pock lamented fifty years ago sadly remains true today: "Information upon actual local practices is largely based upon secondary sources, since primary data will obviously have to await some future Kinsey report on the behavior of local bureaucracies."[96]

Even without that report, however, it is possible to describe in broad-brush terms the basic terrain of local agencies. This Part thus begins with a discussion of the regulatory domains of local administration and the institutional forms through which that administration occurs. It then turns to the varied governmental-structural contexts in which local agencies operate. Finally, it outlines aspects of the fine-grained texture of local agency practice. As will become clear, the world looks very different when one shifts from the Federal EPA to, say, the Dayton Board of Zoning Appeals.

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93. Again, for the sake of clarity and parsimony, this contrast elides the complicating intermediary of the states.

94. Pock, *supra* note 11, at 123.

95. *See generally* Gov't Div., Bureau of the Census, *2002 Census of Governments, Volume 1: Government Organization, Number 1: Government Organization*, U.S. DEP'T COM. (2002), http://www.census.gov/prod/2003pubs/gc021x1.pdf [http://perma.cc/FD98-KCK7]; *State Court Sites*, ST. & LOC. GOV'T ON NET, http://www.statelocalgov.net/50states-courts.cfm [http://perma.cc/9AUC-Y9YE].

96. Pock, *supra* note 11, at 124.

A. The Regulatory Domains and Forms of Local Administration

1. The Breadth of Local Agency Action

One significant reason for the invisibility of local administration may be a long-standing tendency to discount the actual breadth of local regulatory authority and activity.[97] This view is decidedly mistaken.[98] While local governments may not have the full range of power enjoyed by the states and federal government, there are a number of policy areas where local governments have long exercised significant regulatory authority through the auspices of local agencies.[99] A prime example is land use control and the regulation of the built environment. Rules in nearly every local jurisdiction set the acceptable terms not only of use—residential, commercial, industrial, and the like—but also of building height, setbacks, materials, fire protection, energy use, waste treatment, and myriad other minutiae.[100] Even Houston, which famously lacks a

97. *See, e.g.*, Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1059-60 (1980) (arguing that "our highly urbanized country has chosen to have powerless cities, and that this choice has largely been made through legal doctrine"); *id.* at 1062-67; *cf.* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257, 2267-76 (2003) (describing contemporary views of local authority); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 15-18 (1990) (acknowledging long-standing traditional assumptions about local formal powerlessness, but arguing that, functionally, "local governments have wielded substantial lawmaking power and undertaken important public initiatives").

98. *See* Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 484 (2009) ("Cities have always played a more significant regulatory role than most commentators appreciate, though this role has been muted in the last century as federal and state governments have expanded and the great industrial cities have declined.").

99. Local agencies also engage in a wide variety of activities that are *not* regulatory in any meaningful sense, most notably providing services and public benefits. *See infra* text accompanying notes 116-123. But that is by no means all that they do, and the regulatory functions that local agencies undertake remain relatively underexplored.

100. Local-government land-use regulation in the United States pre-dates the Founding, *see* John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1259-81 (1996), and was a feature of local governance throughout the nineteenth century, *see* STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 182-85 (2011). Land use became much more prominent a force as an exercise of local regulatory authority in the first quarter of the twentieth century. *See* BANNER, *supra*. Starting with Los Angeles in 1908, cities and other local governments across the country embraced comprehensive zoning and related regulatory regimes, *id.*, a trend that accelerated after the Supreme Court validated the constitutionality of the practice in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

zoning code, still regulates development through parking and lot size requirements, as well as a long-standing subdivision code.[101]

While much of the basic substance of land use and building law is governed directly by local legislation, in many instances, the details of regulatory choices are delegated to administrative bodies with interchangeable names such as the "Board of Zoning Appeals" or "Board of Adjustment" or the "Planning and Zoning Commission" and the like.[102] These boards can have the authority to draft and revise comprehensive plans and, in some jurisdictions, even determine substantive zoning rules.[103] In many instances, zoning boards approve subdivisions, evaluate what are known as "special permits" or special exceptions, and grant variances from the application of the zoning code. This may not involve formal rulemaking, but generally does reflect the exercise of delegated legislative authority with a great deal of discretion in individual instances.[104]

Public health is another arena of significant local regulation that is often carried out through agencies.[105] As with land use and the built environment, the regulation of public health has been a core municipal function in the United States since the earliest cities had to grapple with challenges like cholera, typhus, typhoid, and tuberculosis that spread through densely settled communities.[106] Contemporary local governments have developed significant regulatory

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101. *See* Michael Lewyn, *How Overregulation Creates Sprawl (Even in a City Without Zoning)*, 50 WAYNE L. REV. 1171, 1173-89 (2004); Bernard H. Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71, 72-76 (1970).

102. *See generally* Jerry L. Anderson, Aaron E. Brees & Emily C. Reninger, *A Study of American Zoning Board Composition and Public Attitudes Toward Zoning Issues*, 40 URB. LAW. 689, 691 (2008) (describing the history of U.S. zoning boards and the results of a study investigating whether they "fail to represent a real cross-section of the community"). Although, as with all local administration, the nature of the relevant agencies varies across local governments, the structure of most zoning boards derives from either the Standard State Zoning Enabling Act (SSZEA) or the State City Planning Enabling Act (SCPEA), two model ordinances promulgated by the U.S. Department of Commerce in the 1920s. *Id.* at 692-93.

103. *Id.* at 693-94 (noting that although in most jurisdictions these commissions serve an advisory role, in some jurisdictions their rules are binding, as with zoning for local governments in Connecticut, or require legislative override to avoid adoption, as in Kentucky or Indiana).

104. *See* STEWART E. STERK & EDUARDO M. PEÑALVER, LAND USE REGULATION 31-44 (2011); *see also* MacLeod, *supra* note 35, at 57-85 (surveying standards of review in land-use regulation and myriad contexts in which delegated authority is exercised).

105. *See* Diller, *supra* note 2, at 1862-66 (detailing the role of delegated regulatory activity in local-government public-health efforts). *See generally* LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT (2d ed. 2008) (describing the powers and duties of different levels of government with respect to public-health law).

106. *See, e.g.*, EDWIN G. BURROWS & MIKE WALLACE, GOTHAM: A HISTORY OF NEW YORK CITY TO 1898, at 789-90 (1999); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION

infrastructures to address issues such as infectious disease, food-borne illnesses, health-related environmental conditions, local medical services, and emergency responses.[107] Structurally, local health departments can be independent or operate as part of a state health department, and boards of health oversee the overwhelming majority of local health departments.[108] Most of these local agencies serve specific jurisdictions, although more than a quarter of these local agencies operate on a regional basis.[109]

There are many other areas of local regulation that similarly operate through an administrative infrastructure. Local governments have long been involved in regulating aspects of the local economy, although they have faced significant constraints in that exercise given the mobile nature of capital.[110] Local governments—often controversially—set standards for taxis, restaurants, contractors, and a variety of other small businesses; again, they do so through licensing commissions and other bodies.[111] The movement to increase the minimum wage highlights local regulation of employment conditions, with Seattle, for example, recently opting for a phased-in $15 per hour standard.[112] Local environmental law is a rapidly expanding and important field, as much as we

IN NINETEENTH-CENTURY AMERICA 204-17 (1996); Edward P. Richards, *Public Health Law as Administrative Law: Example Lessons*, 10 J. HEALTH CARE L. & POL'Y 61, 64 (2007) (discussing the long history of municipal public-health regulation); Richard H. Shryock, *The Early American Public Health Movement*, 27 AM. J. PUB. HEALTH 965, 967-70 (1937).

107. *See* Eileen Salinsky, *Governmental Public Health: An Overview of State and Local Public Health Agencies*, NAT'L HEALTH POL'Y F. 14-16 (Aug. 18, 2010), http://www.nhpf.org/library/background-papers/BP77_GovPublicHealth_08-18-2010.pdf [http://perma.cc/K6ED-PB52].

108. *See* Justeen K. Hyde & Stephen M. Shortell, *The Structure and Organization of Local and State Public Health Agencies in the U.S.: A Systematic Review*, 12 AM. J. PREVENTIVE MED. S29, S31-S33 (2012).

109. *See* Salinsky, *supra* note 107, at 10.

110. *See generally* Matthew Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & C.R. L. REV. 371, 375-82 (2008) (describing local regulatory efforts); Schragger, *supra* note 98 (describing a broad array of local-government policies that regulate local economic conditions, including minimum wage, living wage, labor ordinances, as well as anti-chain and anti-big box store zoning).

111. *See, e.g.*, John Donnelly & Sons, Inc. v. Outdoor Advert. Bd., 339 N.E.2d 709 (Mass. 1975); Greater N.Y. Taxi Ass'n v. N.Y.C. Taxi & Limousine Comm'n, 36 N.E.3d 632 (N.Y. 2015).

112. Kirk Johnson, *Seattle Approves $15 Minimum Wage, Setting a New Standard for Big Cities*, N.Y. TIMES (June 2, 2014), http://www.nytimes.com/2014/06/03/us/seattle-approves-15-minimum-wage-setting-a-new-standard-for-big-cities.html [http://perma.cc/Q2VZ-3FN3]. The Seattle ordinance, for example, provides a complex schedule of minimum wage and rate requirements that will be administered and enforced by the city's Office of Labor Standards and Department of Finance and Administrative Services. *See* SEATTLE, WASH., CODE ch. 14.19 §§ 045, 100 (2015); Valerie Hughes & Aurora Janke, *Seattle Releases Proposed Administrative Rules for $15 Minimum Wage*, 22 WASH. EMP. L. LETTER 1 (2015).

tend to think of environmental regulation through the lens of the EPA.[113] Consumer welfare has also been a significant focus of municipal regulations, even drawing targeted preemption efforts at the national level.[114] And many local governments have developed their own civil rights law, at times more protective than states and the federal government, covering additional protected classes or expanding available remedies.[115] These sketches barely begin to exhaust the list of the robust direct regulatory apparatus of local governments.

The provision of public benefits is another important area of local administration.[116] Local agencies are deeply involved as the interface between recipients and the government, whether the actual public benefits are funded locally or at the state or federal level. As with the federal Social Security Administration, a perennial mainstay of administrative law scholarship,[117] local departments handle a wide variety of benefits, including welfare, job training, and housing.[118] In all of these areas, there is a body of local administrative practice, complete with standards of evidence for benefits, rules on denial, and the rest of the panoply of procedural and substantive rules that inevitably govern such transfers.

As increasingly significant as local regulation may be, the provision of public services has historically been central to local-government identity, more so

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113. John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365, 413-16 (2002).

114. *See* Jonathan L. Entin & Shadya Y. Yazback, *City Governments and Predatory Lending*, 34 FORDHAM URB. L.J. 757, 770-82 (2007) (exploring local efforts to regulate "predatory lending" and the conflict between them and state and federal preemption); Susan Block-Lieb, *Consumer Financial Protection, Inclusion, and Education: Connecting the Local to the Global*, *in* LAW BETWEEN BUILDINGS: EMERGENT GLOBAL PERSPECTIVES ON URBAN LAW (Nisha Mistry & Nestor M. Davidson eds., forthcoming 2017) (discussing the role of cities in consumer financial protection).

115. *See* Barron, *supra* note 97, at 2352-57; *see also* Stacy Laira Lozner, Note, *Diffusion of Local Regulatory Innovations: The San Francisco CEDAW Ordinance and the New York City Human Rights Initiative*, 104 COLUM. L. REV. 768 (2004) (describing local antidiscrimination ordinances in San Francisco and New York City).

116. *See* Diller, *supra* note 36.

117. *See, e.g.*, Joseph McGlew-Castañeda, Comment, *The Record or the Whole Record?: A Recommendation for the Social Security Administration Regarding the Introduction of New Evidence in Review of Disability Claims*, 65 ADMIN. L. REV. 1015 (2013).

118. *See, e.g.*, Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 FORDHAM URB. L.J. 1559, 1563 (2001) (discussing the role of local governments in administering the Temporary Assistance for Needy Families welfare-to-work program); Gordon Cavanaugh, *Public Housing: From Archaic to Dynamic to Endangered*, 14 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 228 (2005) (noting the importance of federal-local relationships in the affordable housing realm).

than at other levels of government.[119] Education garners nearly forty percent of local budgets nationwide, while police and fire protection, utilities, and health and hospitals are also significant local services.[120] As with direct regulation and public benefits, the infrastructure of local-government service provision often operates through agencies and oversight boards.[121] These include not only the boards of education that are the locus of so much controversy within local governments,[122] but also police and fire commissions, boards of water, library committees, and countless others.[123] We may rarely pause to wonder why—and what it means—that police officials can be called "Commissioners" (Gotham City's Commissioner Gordon is perhaps the most famous fictional example),[124] but, of course, a commissioner implies a commission, which is administrative.[125]

119. *See* Frug, *supra* note 13 (noting that local public services may provide a major incentive for locating in certain cities).

120. *See* TAX FOUND., FACTS AND FIGURES ON GOVERNMENT FINANCE 263 tbl.F5 (38th ed. 2004) (indicating that thirty-eight percent of municipal spending in 2002 was on education).

121. In some contexts, like telecommunications, franchise authority is an important source of regulatory oversight, *see* Sylvain, *supra* note 15, at 828-29, and that authority can involve agency action, *see, e.g.*, *Local Franchise Authority Contact Information*, VERIZON, http://www.verizon.com/support/consumer/tv/fiostv/annual-notices/local-franchise-authority-contact-information [http://perma.cc/6S98-CFNX] (listing local franchise authority contacts for customer complaints).

122. *See, e.g.*, Natalie Gomez-Velez, *Urban Public Education Reform: Governance, Accountability, Outsourcing*, 45 URB. LAW. 51, 69-70 (2013).

123. The proliferation of local commissions and boards historically was a Progressive Era reform response to urban corruption and part of a home-rule movement that privileged the image of urban governance as neutral "administration" in contrast to politicized (and often ethnically politicized) local democratic regimes. One strand of the movement for municipal reform in the Progressive Era thus sought to insulate local administration from ordinary politics. This inspired advocacy for city managers as a reform movement, with impetus from the National Municipal League, but also to various "good government" internal oversight mechanisms. *See* Barron, *supra* note 97, at 2291, 2300-09.

124. *See* Bill Finger & Bob Kane, *The Case of the Chemical Syndicate*, DETECTIVE COMICS 27 (May 1939) (introducing the characters of "Bat-man" and Gotham City's Commissioner Gordon).

125. *See* Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 95 (2016) ("Police departments are agencies, and as such should have to abide by the same constraints that govern other agencies."); *see also* Gillette & Skeel, *supra* note 40, at 1188-89 (discussing the authority of the Detroit Board of Police Commissioners over "policies, rules, and regulations for the police department," budget approval, and initial selection of candidates for police chief).

2. *The Ubiquity and Variety of Local Agencies*

If the domains of local administration are broad, so too are the institutional forms through which that administration occurs. As with local government writ large, there is great variety to local agencies' form and function.[126] At the federal level, although there is some variation across agency types, there are a few primary models. Agencies headed by a secretary or similar unitary head (think the Department of Housing and Urban Development, the Department of the Interior, the Department of Commerce, or the Small Business Administration) and commissions (such as the SEC, the FTC, the FCC, the FEC, etc.) describe the majority of federal agencies. It is true that there are relatively large federal bureaucracies and some quite small ones,[127] and much other variation in institutional details, but certain basic agency forms cover most of the administrative law ground at that level.

The local level, however, yields quite a menagerie of departments, boards, bureaus, commissions, and other institutions. Some of these local agencies are highly professional, with significant staff and recognizable, politically accountable administrators. Some, however, can resemble community meetings as much as they do public agencies, with the locus of gravity on locally appointed citizens or residents fulfilling a civic duty, but not otherwise formalized in any systematic, Weberian bureaucratic sense. To peruse the website of almost any local government, large or small, is to encounter this array of internal departments, partially independent bodies, and largely citizen-staffed commissions.[128]

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126. *See* Jason J. Czarnezki, *New York City Rules! Regulatory Models for Environmental and Public Health*, 66 HASTINGS L.J. 1621, 1623-24 (2015) (cataloging a range of specific local regulatory tools such as bans, education, information, infrastructure, standard-setting, mandates, and economic disincentives across several policy domains).

127. The Department of Homeland Security, for example, has nearly 170,000 employees, whereas the Department of Education manages with a workforce of fewer than four thousand. *See* U.S. OFFICE OF PERS. MGMT., PPA-02502-6/2016, SIZING UP THE FEDERAL EXECUTIVE BRANCH: FISCAL YEAR 2015, at 7 (2016).

128. There are, moreover, forms of administration that are distinctly local, or at least largely unseen in the federal discourse on administrative law. The inquest is one example. As Paul MacMahon recently argued, the inquest is a "quasi-judicial" (administrative) proceeding, often used by local governments, under the direction of a coroner, to investigate suspicious deaths. *See* Paul MacMahon, *The Inquest and the Virtues of Soft Adjudication*, 33 YALE L. & POL'Y REV. 275, 276 (2015). Like much local administration, inquests utilize some adjudicative features, but their verdicts are intended to determine facts rather than result in direct coercive outcomes. Thus, not only does Las Vegas hold lessons for architecture, *see* ROBERT VENTURI, DENISE SCOTT BROWN & STEVEN IZENOUR, LEARNING FROM LAS VEGAS: THE FORGOTTEN SYMBOLISM OF ARCHITECTURAL FORM (1977), the city (or really Clark County,

To provide some concrete examples, beginning at one extreme, New York City has some fifty distinct departments with agency heads appointed by the Mayor.[129] Beyond these mayoral departments, there are numerous commissions, committees, boards, and tribunals that exercise significant authority—such as the Taxi and Limousine Commission (TLC), which regulates tens of thousands of cabs, commuter vans, limousines, and other vehicles for hire;[130] the Campaign Finance Board (CFB), an independent city agency that works on election issues;[131] the New York City Housing Authority (NYCHA), a federally funded local agency that provides housing to hundreds of thousands of residents; the Conflicts of Interest Board (COIB), whose work is reflected in its name;[132] and many, many others.[133]

There is always a tendency toward exceptionalism when it comes to New York City, but it turns out that the panoply of departments, agencies, and commissions that do the work of the Big Apple's government are not that dissimilar from many smaller local governments.[134] The City of Boulder, Colorado is a small community that might seem to occupy the opposite end of this spectrum. Even Boulder, with population of just under one hundred thou-

which houses Las Vegas) has now also produced a legal proceeding lauded for innovation, *see* MacMahon, *supra*, at 306-09.

129. In addition to operations that primarily form the internal functioning of the city (like human resources), these departments address a range of public functions that include environmental protection, public health, education, social services, fire, police, and corrections. *See NYC Organizational Chart*, OFF. MAYOR, http://www1.nyc.gov/assets/home/downloads/pdf/reports/2014/NYC-Organizational-Chart.pdf [http://perma.cc/QC8A-R3RT].

130. The TLC has been involved in its own fair share of regulatory controversy in recent years. *See, e.g.*, Greater N.Y. Taxi Ass'n v. N.Y.C. Taxi & Limousine Comm'n, 988 N.Y.S.2d 5 (App. Div. 2014) (upholding the TLC's regulations on the "Taxi of Tomorrow" from challenges based on the scope of delegated authority and the separation of powers).

131. *See* N.Y.C. CAMPAIGN FIN. BOARD, http://www.nyccfb.info [http://perma.cc/DU6L-CTED].

132. New York City's COIB is currently chaired by Columbia Law professor—and local-government scholar—Richard Briffault. *See Board Members*, N.Y.C. CONFLICTS INT. BOARD, http://www.nyc.gov/html/conflicts/html/about/board.shtml [http://perma.cc/9K5N-K7BR].

133. On an annual basis, moreover, "the more than 500 administrative law judges (ALJs) in New York City's administrative tribunals hear and decide over a million cases." David B. Goldin & Martha I. Casey, *New York City Administrative Tribunals: A Case Study in Opportunity for Court Reform*, 49 JUDGES' J. 20, 20 (2010).

134. Although not directly a survey of local administrative employment, it is telling that as of 2013, local governments employed just under fourteen million of the nearly twenty-two million public employees across the nation, as compared to just under six million state employees and just under three million federal employees. *See* U.S. CENSUS BUREAU, G13-ASPEP, ANNUAL SURVEY OF PUBLIC EMPLOYMENT & PAYROLL SUMMARY REPORT: 2013, at 2 (2014).

sand,[135] has an array of local agencies covering the entire range of the city's activities.[136] The city has numerous core departments and divisions, covering everything from human resources and planning to police to licensing, as well as boards, authorities, and commissions that cover housing, open space, land use, human rights, and other policy areas.[137] A similar picture emerges of a broad swath of local governments, at least those of general jurisdiction.[138] Miami-Dade County, a city-county government, has twenty-five separate departments and a number of independent authorities and "trusts" beyond that.[139] And Parker, Texas, a suburb of Dallas, population 3,600, has fourteen departments and three boards and commissions.[140] In short, most cities, suburbs, and even small towns turn to an internal apparatus of agencies to operate, no less so than do the states and the federal government.[141]

B. The Structural Context of Local Administration

If local administration covers a broad range of policy arenas and institutional forms, a second salient dimension to local administration is that these

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135. *See Community Facts*, U.S. CENSUS BUREAU, http://factfinder.census.gov/bkmk/table/1.0/en/DEC/10_SF1/GCTPH1.CY10/0500000US08013 [http://perma.cc/3ZJG-RKRB].

136. Boulder has a council-manager form of government, with the city manager responsible for hiring agency heads. *See Government*, CITY BOULDER, COLO., http://bouldercolorado.gov/government [http://perma.cc/T6AY-MA7J].

137. *Id.*

138. The array of departments, divisions, boards, commissions, and other agencies apply to general jurisdiction local governments. As noted *infra* Section III.B.1, some local agencies are independent, functionally and structurally, of their local governments of general jurisdiction. School boards, for example, in some localities are independent entities with no direct oversight or control by particular local governments. *See* Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495, 500-01 (2010).

139. *See County Departments*, MIAMI-DADE COUNTY, http://miamidade.gov/wps/portal/Main/departments [http://perma.cc/TG33-U4EF].

140. *See* CITY PARKER, http://www.parkertexas.us/ [http://perma.cc/F9MB-VH3X].

141. It bears noting that the scale and resources of the relevant local government can be important in terms of understanding the nature and work of local agencies, although there is sufficient variation that it is important not to over-generalize. Agencies in cities such as New York, with a current budget of over $82 billion, *see Fiscal Year 2017 Expense and Contract Budget Resolutions*, N.Y.C. COUNCIL (2016), http://www1.nyc.gov/assets/omb/downloads/pdf/adopt16-expreso.pdf [http://perma.cc/2P9V-54WS], will no doubt have relatively far greater resources than agencies in small, suburban communities, but the scale of the problems facing major cities will tend to be calibrated differently than those facing other local governments. Perhaps the more salient distinction, then, is not between larger and smaller local governments, but between those in a relatively healthy economic position and those cities, such as Detroit and Flint, Michigan, facing persistent economic challenges, regardless of scale.

agencies operate within local-government structures that are distinct not only from their federal government counterpart but also from state government structures. Here as well, it is hard to generalize, as there is tremendous institutional diversity at the local level, and local structures can vary dramatically from each other. Indeed, government structure gets more complex and divergent the lower one goes on the putative federalist hierarchy. Local governments are not the smallest matryoshka doll nestled within increasingly larger state and federal counterparts, with the classic tripartite structure repeated in miniature. Instead, local governments tend to subdivide or combine functions in many ways.

Relevant local structural distinctions can be cataloged along three dimensions. The first two parallel the traditional domain of local-government scholarship: the vertical relationship of local governments and their parent states (and the federal government) and the horizontal dynamics of how local governments interact with each other. The third dimension is less explored in the literature, yet is arguably most important for local administrative law: how power and structure interact within the bounds of individual jurisdictions.

1. The Vertical Dimension: The State-Local Relationship

Local governments have traditionally been viewed as "creatures of the state," with their creation, boundaries, powers, and termination subject to the will of the state.[142] Students of local government know that the landscape of local autonomy and oversight is much more complicated.[143] Most states grant

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142. *See* Briffault, *supra* note 97, at 6-11. Local governments are generally classified as municipal corporations and quasi-corporations. *See* 1 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 1:21 (3d ed. 2010); Laura D. Hermer, *Municipal Home Rule in New York: Tobacco Control at the Local Level*, 65 BROOK. L. REV. 321, 328-30 (1999). Municipal corporations include cities or other local political entities created by state charter, often voluntarily organized by local residents. *See* OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW § 6, at 22 (3d ed. 2009). Quasi-corporations such as counties, however, are generally established by states to act as administrative agents to serve state needs and interests. *Id.* § 6, at 20-23. Most states have a variety of both municipal and quasi-corporations, and all are structurally regulated by state law. 1 MCQUILLIN, *supra*, § 1:21, at 23.

143. Formally, states delegate plenary power to local governments through the state constitution, statutes, or a combination of both. RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 331 (7th ed. 2009). The "Home Rule" movement sought to give local governments initiative over local affairs under a general grant of authority rather than individualized delegations for specific purposes and to immunize local governance from state interference in certain legislative areas. *See* FRUG, FORD & BARRON, *supra* note 8, at 167. Frug, Ford, and Barron call these dual—but separate—objectives "Home Rule Initiative," *id.* at 167-91, and "Home Rule Immunity," *id.* at 191-223.

Home rule grants were originally referred to as "*imperium in imperio*," or a government within a government. *See* BRIFFAULT & REYNOLDS, *supra*, at 332; *see also* City of St. Louis v.

some version of "home rule" to their local governments, although they do not treat all localities equally. Some states provide more power to larger localities, for example, than to the smaller ones. Moreover, the types of powers that states grant to local bodies varies among states and within states, as does the degree of independence granted to local bodies to be free from state interference.[144] As Gerald Frug and David Barron have argued, local authority does not have a unitary valence, but rather is a complex mix of empowerment and disability flowing from the states.[145] And courts further shape the degree of protection and autonomy offered to local legislative action.[146]

Turning from local government writ large to the administrative realm, local agencies can be relatively independent of state oversight, elected by local residents, or subject to direct state control. As Paul Diller has noted in the context of public health, some local agencies are responsible to multiple principals, primarily their local government of general jurisdiction and the state.[147] Some "local" agencies, moreover, are actually state agencies that operate entirely within a particular local context, not answerable in any direct democratic way to the local government of general jurisdiction.[148] And, across the range of local

W. Union Tel. Co., 149 U.S. 465, 468 (1893). Local authority has been subject to a rule of statutory interpretation still employed that limits local-government power, known as "Dillon's Rule" after Judge John Dillon's canonical treatment. 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS (5th ed. 1911); *see* BRIFFAULT & REYNOLDS, *supra*, at 314-17; *see also* Barron, *supra* note 97, at 2285; Erin Adele Scharff, *Powerful Cities?: Limits on Municipal Taxing Authority and What To Do About Them*, 91 N.Y.U. L. REV. 292, 301-03 (2016). In reaction to the limitations of Dillon's Rule, some states moved to a system of legislative home rule, granting local governments presumptive power to act absent specific state legislation. *See* BRIFFAULT & REYNOLDS, *supra*, at 333-34; *see also* City of New Orleans v. Bd. of Comm'rs, 640 So. 2d 237, 242-43 (La. 1994). Further complicating this picture of local authority and state control are doctrines of preemption (outright preemption, express preemption, implied preemption, and field preemption) that may justify invalidating certain local actions where there are conflicts between state and local law. *See* BRIFFAULT & REYNOLDS, *supra*, at 422-45; FRUG, FORD & BARRON, *supra* note 8, at 223.

144. For example, Washington State has created a tiered system of municipalities: "first class cities, second class cities, towns, and code cities"—and "there are some important differences with respect to the power and authority of the city government" depending on which class the city falls into. ASS'N OF WASH. CITIES & MUN. RESEARCH & SERVS. CTR. OF WASH., MAYOR & COUNCILMEMBER HANDBOOK 3, 4 (Oct. 2015).

145. *See generally* FRUG & BARRON, *supra* note 14 (examining the mix of empowerment and legal disability across large U.S. cities).

146. *See supra* note 143.

147. *See* Diller, *supra* note 2, at 1867-83.

148. *See* Aaron Saiger, *Local Government as a Choice of Agency Form*, 77 OHIO ST. L.J. 423 (2016). Saiger argues that local governments are themselves a form of state agency. *See generally id.* Saiger's argument helpfully clarifies the state-level perspective on the delegation of state authority and underpinnings of democratic accountability that span elected bodies and admin-

administration, some agencies have not only local and state principals, but also federal involvement, obtaining their authority, funding, and governing rules from multiple sources.

To give a concrete example, consider the nature of public housing authorities (PHAs), entities that provide public housing and administer other housing subsidies, such as housing vouchers.[149] PHAs are typically created by the state or at least are established pursuant to state law, but are funded and closely regulated by the U.S. Department of Housing and Urban Development. Despite this federal and state involvement, PHAs are typically constituted within a specific local service area and have formal and informal (and, at times, quite fraught) relations with their local governments of general jurisdiction.[150] PHAs, in short, are agencies operating at the local level that nonetheless have a legal identity reflecting a mix of federal, state, and local elements. Many other local agencies present similar vertical authority variations. Emerging from this, then, is an overall picture of authority informed by federalism and state oversight but with a certain amount of space for local autonomy and independence for particular agencies.

2. *The Horizontal Dimension: Local Fragmentation*

Turning to the horizontal plane, local governments are not only numerically vast,[151] but also tremendously varied, divided broadly between local governments of general jurisdiction and specialized local governments.[152] General jurisdiction local governments differ in name and powers—from cities and

istrative agencies at the local level, but ignores important distinctions between the nature of plenary local governments and more specialized bodies. To view local governments of general jurisdiction as indistinguishable from state administrative agencies is to privilege state-level democratic institutions to the exclusion of local representation.

149. *See* Cavanaugh, *supra* note 118, at 230-33.

150. PHA Board Members, for example, may be appointed by a mayor or a local legislative body, even if PHAs operate quasi-independently of city control. *See* James Charles Smith, *Managing the Risks of Natural Disasters in Public Housing*, *in* AFFORDABLE HOUSING AND PUBLIC-PRIVATE PARTNERSHIPS 219, 221 (Nestor M. Davidson & Robin Paul Malloy eds., 2009) ("Notwithstanding the lack of a strong tether to state government, PHAs are unavoidably members of distinct local communities, necessitating that they forge and maintain relationships with local governments. Thus, each PHA has a long-term contractual relationship with the local government within whose boundaries it operates.").

151. *See* Gov't Div., Bureau of the Census, *supra* note 95, at v (reporting that in 2002 there were more than eighty-seven thousand local-government units in the United States).

152. *See id.*

counties to towns, villages, and other forms.[153] Specialized local jurisdictions include a wide array of education districts, transit authorities, utility districts, and many others.[154] In the New York metropolitan area, for example, there are "31 counties, 783 municipalities and [over a thousand] school, housing, fire and other special service districts."[155]

Not only are local governments horizontally and functionally fragmented, but these fragments can align themselves across formal local (general jurisdiction) boundaries as well. For example, a transit agency or a water district can encompass several cities.[156] Or several fragments also can lie within a single local jurisdiction; for example, several school districts can lie within a single city.[157] As a result, citizens can interact with multiple local governments in the course of a single day, covering where they work, send their children to school, shop, escape for recreation, sleep at night, and more.

Horizontal fragmentation tends to generate local intergovernmental competition as well as the opportunity for cooperation. Local governments paradigmatically compete on the interlocal level, for mobile residents in the classic

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153. In the United States, there are approximately 3,000 counties or county equivalents; 16,500 towns or townships; and 20,000 cities. *See* BRIFFAULT & REYNOLDS, *supra* note 143, at 10-12 (citing Census 2002 and 2007 data).

154. Nadav Shoked has helpfully added to the standard taxonomy of local forms by identifying what he describes as the "quasi-city," which is an entity that operates as traditional cities do, but is technically a special district. *See* Nadav Shoked, *Quasi-Cities*, 93 B.U. L. REV. 1971 (2013).

155. *Part 6: Our Government Institutions Are Failing To Make the Hard Decisions the Region Needs*, *Fragile Success: Taking Stock of the New York Metropolitan Region*, REGIONAL PLAN ASS'N (Apr. 2014), http://fragile-success.rpa.org/c/6.html [http://perma.cc/LD9W-48JD].

156. For instance, the Los Angeles County Metropolitan Transportation Authority (LACMTA) directly services most of the county's eighty-eight cities. *See Bus and Rail System*, L.A. COUNTY METROPOLITAN TRANSP. AUTHORITY (2016), http://media.metro.net/riding_metro/maps/images/system_map_2016-0520.pdf [http://perma.cc/Z6KU-5BDB] (showing the LACMTA bus and rail line routes); *Incorporated Cities*, COUNTY L.A., http://www.lacounty.gov/government/about-la-county/incorporated-cities [http://perma.cc/W32X-CAW2] (noting that Los Angeles County has eighty-eight cities); *see also Overview*, L.A. COUNTY METROPOLITAN TRANSP. AUTHORITY, http://www.metro.net/about/agency/mission [http://perma.cc/6T54-97QF] (noting that the LACMTA serves nearly one-third of the state's residents). The North Jersey District Water Supply Commission likewise provides water to thirteen municipalities. *See Contracting Municipalities*, N.J. DISTRICT WATER SUPPLY COMMISSION, http://www.njdwsc.com/index.aspx?NID=118 [http://perma.cc/2M5U-RMQ4].

157. *See generally* Saiger, *supra* note 138 (discussing how periodically redrawing school district boundaries could mitigate inequality between nearby school districts within a locality); Richard Payerchin, *Multiple School Districts Present in Lorain City Limits*, MORNING J. (Mar. 14, 2010, 12:01 A.M.), http://www.morningjournal.com/article/MJ/20100314/NEWS/303149970 [http://perma.cc/X7M7-YRHH].

Tieboutian sense,[158] but also for mobile capital,[159] and, in contemporary conflicts over economic development, for the amenities that will attract particular types of industries and workers, like the technology sector.[160] Much of this competition is not only local, but increasingly international as well, particularly for global cities.[161] On the other hand, some scholars have emphasized the obverse of this competition, highlighting incentives and structures for interlocal cooperation as a counterbalance to the Darwinian view of localism.[162] Both interlocal competition and the mechanisms of interlocal cooperation are evident in—indeed, are often instantiated through—the work of local agencies. These dynamics of local fragmentation and mismatching governance scale can generate regulatory gaps as well as administrative overlap.[163]

3. The Internal Dimension: Structure Within Local Governments

A third dimension, most important to the project of understanding the nature of local administration, is the tremendous *internal* institutional variation within local governments. To begin, separation of powers among the executive and legislative branches can be lessened, different, or entirely absent in local governments.[164] The prevailing view, at least as a formal matter, is that separa-

158. *See* Aaron J. Saiger, *Local Government Without Tiebout*, 41 URB. LAW. 93, 96-102 (2009) (summarizing Tieboutian localism as a model predicated on residential mobility).

159. *See* Schragger, *supra* note 98, at 488-506 (arguing that the phenomenon of mobile capital is central to the political economy and legal nature of local governance).

160. *See, e.g.*, Michael Bloomberg, *Cities Must Be Cool, Creative and in Control*, FIN. TIMES (Mar. 27, 2012), http://www.ft.com/content/c09235b6-72ac-11e1-ae73-00144feab49a [http://perma.cc/9W44-8FWH] ("I have long believed that talent attracts capital far more effectively and consistently than capital attracts talent. The most creative individuals want to live in places that protect personal freedoms, prize diversity and offer an abundance of cultural opportunities. A city that wants to attract creators must offer a fertile breeding ground for new ideas and innovations."); *see also* Nestor M. Davidson & Sheila R. Foster, *The Mobility Case for Regionalism*, 47 U.C. DAVIS L. REV. 63, 100-02 (2013) (discussing metropolitan regional efforts to compete for mobile residents on the basis of local amenities).

161. *See generally* SASKIA SASSEN, THE GLOBAL CITY: NEW YORK, LONDON, TOKYO (2d ed. 2001) (chronicling how cross-border competition and collaboration have been vital to the development of global cities).

162. *See, e.g.*, Gillette, *supra* note 32, at 238-46 (outlining local governments' incentive to cooperate and the legal structures available to facilitate that cooperation); Clayton P. Gillette, *The Conditions of Interlocal Competition*, 21 J.L. & POL. 365, 367-73 (2005).

163. *Cf.* William W. Buzbee, *The Regulatory Fragmentation Continuum, Westway and the Challenges of Regional Growth*, 21 J.L. & POL. 323, 340-48 (2005) (offering a typology of regulatory fragmentation at the regional scale).

164. Although the Guarantee Clause provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government," the enforcement of the clause has

tion-of-powers principles simply do not apply at the local-government level.[165] As the Rhode Island Supreme Court has stated, "[S]eparation of powers doctrine is a concept foreign to municipal governance."[166] Justifications range from the "mere"-ness of local governments, to the idea that checks and balances are unnecessary at the local level, to the empirical observation that states have the legal-structural latitude to choose not to separate out executive from judicial and legislative functions in local governments.[167]

At the local level, there is a wide variety of executive structures: there may be a mayor who is directly elected by residents or, instead, is selected by the city council; a mayor sitting on the city council or barred from it; a mayor who can or cannot veto legislation; or a city council elected at large or by districts or in a mixed manner. Although executive oversight and the "unitary executive" are prominent themes in current federal administrative law scholarship,[168] many local governments simply have no elected chief executive officer. It is quite common for local governments, for example, to have a legislative branch like a city council and to have a "city manager" or another similar official appointed by the council as the executive—so-called "council-manager" governments.[169]

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been held to be a political question. Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1188 (1999) (citing U.S. CONST. art. IV, § 4). Therefore, any separation of powers principles at the state or local level derive primarily from state constitutional law.

States vary widely in interpreting their separation-of-powers clauses, many limiting delegation more strictly than the federal government. Most state constitutions—thirty-five at the last count—"contain a strict separation of powers clause" that "divides power between the various branches" *and* "instructs that one branch is not to exercise the powers of any of the others." *Id.* at 1190, 1193. Five states have a "general separation of powers clause [that] simply divides the powers of government into three branches." *Id.* at 1191. Ten have no explicit provision but the courts infer separation of powers "from the allocation of powers to each of the branches of government." *Id.*

165. Separation of powers concerns, despite formal statements to the contrary, inform the jurisprudence of local administrative law. *See* Pal, *supra* note 1, at 810-13.

166. Moreau v. Flanders, 15 A.3d 565, 579 & n.16 (R.I. 2011) (citing a range of cases supporting this principle); *see also* Ghent v. Zoning Comm'n, 600 A.2d 1010, 1012 (Conn. 1991) ("The constitutional [separation-of-powers] provision applies to the state and not to municipalities, which are governed by charters and other statutes enacted by the legislature."); Poynter v. Walling, 177 A.2d 641, 645 (Del. Super. Ct. 1962); Tendler v. Thompson, 352 S.E.2d 388, 388 (Ga. 1987); Willsey v. Newlon, 316 N.E.2d 390, 391 (Ind. 1974); Bd. of Cty. Comm'rs v. Padilla, 804 P.2d 1097, 1102 (N.M. 1990).

167. *See Moreau*, 15 A.3d 565.

168. *See supra* note 56 and accompanying text.

169. Jacob Alderdice, *Impeding Local Laboratories: Obstacles to Urban Policy Diffusion in Local Government Law*, 7 HARV. L. & POL'Y REV. 459, 466 (2013). A single state can have local governments with a variety of forms—for example, South Carolina by statute permits a "council" form of government, a "mayor-council" form of government, and a "council-manager" form

Indeed, one study indicated that versions of the "mayor-council" model with an elected executive are much less common than council-manager or similar forms that have no formal separation of powers.[170] Thus for the majority of local governments, the executive branch is housed within the legislative branch. Even for local governments with a recognizable chief executive, whether mayoral or otherwise, many such chief executives have quite limited, or even no, formal appointment and removal power over the heads of administrative agencies.[171]

Legislatively, there is relatively little partisan competition at the local-government level compared to federal and state bodies,[172] and legislative responsiveness to administrative agency action can be swift.[173] The lack of local partisanship is often touted as a decided advantage of local government pragmatism.[174] As a result, local agencies often operate in environments in which the political economy of oversight is less about partisan proxy battles, as so often occurs at the federal level,[175] and instead is more focused on perennial questions of bureaucratic responsiveness and efficiency. Likewise, when agencies act contrary to their delegated authority, the machinery of local legislation can react much more quickly than that at the federal level could.[176]

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of government. FORMS AND POWERS OF MUNICIPAL GOVERNMENT: AN ELECTED OFFICIAL'S GUIDE FROM THE MUNICIPAL ASSOCIATION OF SOUTH CAROLINA, MUN. ASSOCIATION S.C. 2 (2012), http://www.masc.sc/SiteCollectionDocuments/Administration/Forms%20and%20Powers2.pdf [http://perma.cc/HP4A-FPQV]; *see also* Alderdice, *supra*, at 466-70 (discussing the consequences of variations in local structure).

170. H. George Frederickson, Gary A. Johnson & Curtis Wood, *Type III Cities*, *in* THE FUTURE OF LOCAL GOVERNMENT ADMINISTRATION: THE HANSELL SYMPOSIUM (H. George Frederickson & John Nalabandian eds., 2002).

171. *See* Gillette, *supra* note 39, at 580-81 (discussing limits on executive authority to appoint and remove); Schragger, *supra* note 39, at 2549 (discussing common limitations on local executive authority over local agencies).

172. *See generally* Schleicher, *No Partisan Competition*, *supra* note 41 (analyzing the relatively uncontested nature of local elections).

173. *See* Diller, *supra* note 11, at 1266-67 (noting that because local legislatures are generally unicameral, overriding executive resistance can be much easier than in bicameral state and federal legislatures).

174. *See, e.g.*, BENJAMIN R. BARBER, IF MAYORS RULED THE WORLD: DYSFUNCTIONAL NATIONS, RISING CITIES 92 (2013); BRUCE KATZ & JENNIFER BRADLEY, THE METROPOLITAN REVOLUTION: HOW CITIES AND METROS ARE FIXING OUR BROKEN POLITICS AND FRAGILE ECONOMY 3-4 (2013).

175. *See generally* Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849 (2012) (describing the legitimacy problems posed by deference to agency decisions based upon political—as opposed to substantive—reasons).

176. *See* Diller, *supra* note 11, at 1266-67.

And, peculiarly, the functional distinction between legislative and administrative entities can blend, particularly in smaller local governments.[177] Although this approach has not been widely adopted across the states as a doctrinal matter, at least some courts review individualized determinations by local legislative bodies as though the relevant action was actually "quasi-judicial."[178] Functionally, this converts a legislative body into an administrative agency for purposes of judicial review.[179]

Acknowledging all of this rich empirical variety, it is possible to tie a general typology of local-government forms to patterns of administrative structure. Niels Ejersbo and James Svara have usefully mapped the relationship between local administrators and local political structures,[180] connecting the main forms of local government—such as strong mayor and council-manager—to different types of local bureaucracies.[181] In general, local governments with stronger chief executives tend to use agencies less for policy innovation and more for traditional functions of administrative implementation, but council-manager cities tend to place much more extensive independent authority in agency policymaking.[182]

Shifting, finally, to the structure of accountability, local agencies, unlike federal agencies, can have dual oversight by their local governments of general jurisdiction as well as by the state. This state-level oversight can come indirectly through the state's oversight of the local government in which a local agency operates or, in some cases, directly from the state in the case of agencies that have a local ambit but are not embedded within local governments of general jurisdiction.[183] Not all agencies operating at the local level, however, are accountable to the local governments with which they may share a geographic jurisdiction. Some types of "local" governments—notably special-purpose dis-

177. *See* Kenneth A. Stahl, *Reliance in Land Use Law*, 2013 BYU L. REV. 949, 1000-04 (discussing the "*Fasano*" doctrine). For example, in land use, it is common for local legislative bodies to make highly individualized determinations about particular parcels, rather than jurisdiction-wide rules, which has generated judicial concern. *See* ROBERT C. ELLICKSON ET AL., LAND USE CONTROLS: CASES AND MATERIALS 331-61 (4th ed. 2013) (discussing contexts in which courts review land-use legislation with relatively greater scrutiny).

178. *See* ELLICKSON ET AL., *supra* note 177.

179. *Id.*

180. *See* Ejersbo & Svara, *supra* note 12.

181. *Id.* at 157-58.

182. *See id.* at 158-59 (discussing the role of chief administrative officers in these forms of government).

183. *See* Diller, *supra* note 2, at 1867-83.

tricts—have no direct electoral accountability mechanism at the local level.[184] The boards or other governing bodies of many special-purpose authorities are often state-appointed, even when their formal jurisdiction is a given locality.[185] And some special-purpose entities have no recognizable electoral accountability mechanism whatsoever.[186]

In sum, local governance presents a kaleidoscopic quilt of structural features—vertical, horizontal, and internal—many of which have valence for the authority and operations of local agencies and deep relevance for a jurisprudence of localist administrative law.

C. The Granular Texture of Local Agency Action

Finally, moving from the regulatory arena and structural context to operational details of administration, what might be particularly distinctive about how local agencies act on a day-to-day basis, compared to the federal paradigm? Two elements seem particularly salient in distinguishing local administration: the relative informality of agency process evident at the local level and the permeability of the line between public and private within local agencies.[187]

1. Formality and Informality in Local Agency Action

In terms of how local agencies operate, it is clear that there is a tremendous range of formality and informality. As a legal matter, the latitude granted to local agencies to design and institute their own procedures varies widely. Scholars have long explored the variance between the federal APA—the statute that

184. Conversely, at the local level, as with many states, direct democracy can play a role in responding to administrative agency work in a way that is unknown to federal administrative law. *See infra* Section III.C.2. If one long-standing legitimacy concern in administrative law scholarship has been the inability of the political process to respond to principle-agency problems between legislative direction and executive implementation, then (for better or worse) initiatives and referenda may be an alternative means of oversight.

185. *See* Lisa M. Card, *One Person, No Vote? A Participatory Analysis of Voting Rights in Special Purpose Districts*, 27 T. JEFFERSON L. REV. 57, 59 (2004); Sara C. Galvan, *Wrestling with MUDS To Pin Down the Truth About Special Districts*, 75 FORDHAM L. REV. 3041, 3050 (2007).

186. *See* George W. Liebmann, *The New American Local Government*, 34 URB. LAW. 93, 112 (2002) (noting that "[m]ost special districts have appointive boards or boards designated by participating local governments").

187. It bears acknowledging again here that in many areas of local authority—and hence local administration—there tend to be some mix of purely local institutions, state institutions that operate at the local level, and hybrid state-local entities. *See supra* Section III.B. For the sake of simplicity, this Section focuses primarily on purely local administrative entities, but I will return below to some variations that play out with other forms of local agency.

sets the basic parameters of federal administrative action, however broadly[188] – and the myriad state APAs.[189] But at least state APAs provide a modicum of uniformity at the state level, with the state APA applying directly to the work of local-government agencies in some states, at least in some circumstances.[190]

Many local agencies, however, operate without any similar mandatory overarching legislative procedural guidance. In nearly half the states, local agencies do not fall within the ambit of the relevant state APA.[191] Some states

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188. *See generally* Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207 (2015) (describing agency and judicial interpretations and implementations of the APA).

189. *Cf.* Rossi, *supra* note 6 (discussing empirical knowledge about state APAs).

190. States that apply their state APAs to local-government agencies, at least in some circumstances, include Hawaii, *see* Bush v. Haw. Homes Comm'n, 870 P.2d 1272, 1277 (Haw. 1994); Maryland, *see* Donocam Assocs. v. Wash. Suburban Sanitary Comm'n, 489 A.2d 26, 30 (Md. 1985); North Dakota, *see* Falcon v. Williams Cty. Soc. Serv. Bd., 430 N.W.2d 569, 571 (N.D. 1988); Oregon, *see* City of Wood Vill. v. Portland Metro. Area Local Gov't Boundary Comm'n, 609 P.2d 379, 381 (Or. Ct. App. 1980); South Carolina, *see* Brown v. James, 697 S.E.2d 604, 608-09 (S.C. Ct. App. 2010); Tennessee, *see* Hoback v. City of Chattanooga, No. E2011-00484-COA-R3-CV, 2012 WL 2974762, at *4 (Tenn. Ct. App. July 20, 2012); Virginia, *see* Conner v. Commonwealth, No. 0380-08-1, 2008 WL 2964365, at *1 (Va. Ct. App. Aug. 5, 2008); Wisconsin, *see* Citizens for Sensible Zoning, Inc. v. Dep't of Nat. Res., 280 N.W.2d 702, 706 (Wis. 1979); and Wyoming, *see* Sheridan Planning Ass'n v. Bd. of Sheridan Cty. Comm'rs, 924 P.2d 988, 990 (Wyo. 1996).

191. These include Alabama, *see* U.S. Bank Nat'l Ass'n v. Coop. Dist. of Spanish Fort, No. 11-0401-WS-M, 2011 WL 3810266, at *3 (S.D. Ala. Aug. 26, 2011); Arizona, *see* ARIZ. REV. STAT. ANN. § 41-1001 (2014); California, *see* Allen v. Humboldt Cty. Bd. of Supervisors, 34 Cal. Rptr. 232, 235 (Dist. Ct. App. 1963); Connecticut, *see* Edwards v. Code Enf't Comm., 534 A.2d 617, 620 (Conn. App. Ct. 1987); Delaware, *see* DEL. CODE ANN. tit. 29, § 10102 (2002); Florida, *see* Young v. Dep't of Cmty. Affairs, 625 So. 2d 831, 837 (Fla. 1993) (Barkett, C.J., concurring); Georgia, *see* LaFave v. City of Atlanta, 373 S.E.2d 212, 214 (Ga. 1988); Idaho, *see* Gibson v. Ada Cty. Sheriff's Dep't, 72 P.3d 845, 847 (Idaho 2003); Illinois, *see* Bethune v. Larson, 544 N.E.2d 49, 53 (Ill. App. Ct. 1989); Iowa, *see* Bogue v. Ames Civil Serv. Comm'n, 368 N.W.2d 111, 114 (Iowa 1985); Louisiana, *see* Hayden v. New Orleans Baton Rouge S.S. Pilots Fee Comm'n, 707 So. 2d 3, 9-10 (La. 1998); Massachusetts, *see* United Food Corp. v. Alcoholic Beverages Control Comm'n, 376 N.E.2d 833, 836 (Mass. 1978); Minnesota, *see* Cty. of Hennepin v. Civil Rights Comm'n of Minneapolis, 355 N.W.2d 458, 460 (Minn. Ct. App. 1984); Mississippi, *see* Watkins v. Miss. Bd. of Bar Admissions, 659 So. 2d 561, 572 (Miss. 1995); Missouri, *see* State *ex rel*. Young v. City of St. Charles, 977 S.W.2d 503, 504-05 (Mo. 1998); Montana, *see* N. 93 Neighbors, Inc. v. Bd. Cty. Comm'rs, 137 P.3d 557, 563 (Mont. 2006); New Jersey, *see* Tibbs v. Bd. of Educ. of Township of Franklin, 276 A.2d 165, 170 n.1 (N.J. Sup. Ct. 1971); New Mexico, *see* Mayer v. Pub. Emp. Ret. Bd., 463 P.2d 40, 41 (N.M. Ct. App. 1970); New York, *see* 1777 Penfield Rd. Corp. v. Morrison-Vega, 498 N.Y.S.2d 653, 655 (App. Div. 1986); North Carolina, *see* Cunningham v. Catawba Cty., 493 S.E.2d 82, 84 (N.C. Ct. App. 1997); South Dakota, *see* Armstrong v. Turner Cty. Bd. of Adjustment, 772 N.W.2d 643, 652 (S.D. 2009); Utah, *see* Davis Cty. v. Clearfield City, 756 P.2d 704, 706-07 (Utah Ct. App. 1988); Vermont, *see In re* Maple Tree Place, 594 A.2d 404,

and local governments have specific statutes that similarly create general procedural obligations specifically for local governments.[192] That leaves a tremendous range of procedural discretion at the local level as a baseline matter.[193]

Another aspect of informality in local administration is the reality that much of the work of local agencies is carried out by front-line officials who exercise significant discretion in daily contact with local residents.[194] Michael Lipsky famously described this as "street-level bureaucracy,"[195] with police officers, teachers, social workers, and other local service providers exercising significant delegated authority to implement policy.[196] Much more so than at the federal level, then, the daily work of local administration is embodied in a distributed web of officials interacting directly with the public.

Given the frequent lack of clear structural requirements akin to an overarching APA framework—at least for some local agencies—and the significant discretion possessed by so many front-line agents, procedural due process has been a particular legal concern in local administration. This has been especially (but by no means only) true in the context of administrative adjudication, but

406 (Vt. 1991); and West Virginia, *see* Sw. Cmty. Action Council, Inc. v. Huntington Human Relations Comm'n, 371 S.E.2d 70, 72 (W. Va. 1988).

In some states, ostensibly local agencies with state-wide responsibility are covered by their state APAs. *See, e.g.*, Fisher v. Hous. Auth. of Omaha, 334 N.W.2d 636, 639 (Neb. 1983). And state legislatures are free to single out specific agencies for inclusion by statute in the coverage of a state APA, which occasionally happens. *See, e.g.*, Morgan v. Comm. on Benefits, 894 P.2d 378, 382-83 (Nev. 1995).

192. *See, e.g.*, Action All. of Senior Citizens of Greater Phila., Inc. v. Phila. Gas Comm'n, 6 Pa. D. & C.3d 144, 149 (1977) ("Adopted in late 1968, the Local Agency Law is the counterpart at the municipal level to the Administrative Agency Law . . . .").

193. Of course, even the federal APA has left a broad range of procedural discretion to agencies since its inception, and courts have continued an older tradition of developing administrative common law within—and beyond—the APA's broad categories. *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 130-38 (1998); *see also* Magill, *supra* note 64 (discussing the discretion federal agencies have to choose policymaking procedural frameworks).

194. Like federal and state officials, local officials engage in a wide variety of tasks that do not directly implicate administrative law, such as agency management and the ministerial implementation of programs. But the line between implementation or management and administration can be indistinct, and acts that appear to be routine can embody significant discretion. *See* Diller, *supra* note 11; *see also* Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721 (2014) (arguing for the application of administrative law principles to law enforcement).

195. *See* MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (2010).

196. *Id.*; *see also* Steven Maynard-Moody & Shannon Portillo, *Street-Level Bureaucracy Theory*, *in* THE OXFORD HANDBOOK OF AMERICAN BUREAUCRACY 252 (Robert F. Durant ed., 2010).

is an issue in individualized determinations more broadly.[197] One of the most iconic cases in the so-called due process revolution, *Goldberg v. Kelly*,[198] involved the procedures for distributing welfare promulgated by the New York City Department of Social Services.[199] This constitutional response was, at least in part, a reaction to the lack of clear statutory or administrative common-law procedures at the local level. This lack of clarity is not unique to local administration by any means, but resonant at that level nonetheless.

2. *The Local Permeability of Public and Private*

A second distinction for local administration is the relative permeability of the line between public and private in the work of many agencies. This permeability echoes, at a micro-institutional level, tension over the question whether local government as a whole should be considered purely public or should continue to reflect aspects of the private corporation that was the predecessor of many types of local governments.[200] This conceptual divide was evident, for example, in early attempts by the Supreme Court to define a realm of traditional governmental functions for purposes of Tenth Amendment immunity from federal regulation for local governments, an endeavor the Court eventually abandoned as too difficult.[201] But it has also emerged in a variety of other, more prosaic contexts in which municipal actions are contested and the scope of local sovereignty is at issue.[202] This is hardly surprising, given that one strain of the

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197. *See* Michael Asimow, *Due Process in Beverly Hills 90210: Separation of Functions in Local Government*, 28 ADMIN. & REG. L. NEWS, Summer 2003, at 27; *see also* Londoner v. Denver, 210 U.S. 373 (1908).

198. 397 U.S. 254 (1970).

199. *Id.* at 258-60.

200. *See* GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 38-45 (1999); *see also* HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870 (1983).

201. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), *overruling* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).

202. This public/private tension has long been an undercurrent in the jurisprudence of local authority and identity, and remains contested in a number of doctrinal areas implicating municipal law. *See* Hugh D. Spitzer, *Realigning the Governmental/Proprietary Distinction in Municipal Law*, 40 SEATTLE U. L. REV. 173, 181-203 (discussing confusion over the governmental/proprietary distinction in controversies over "legislative grants of municipal authority, government contracts, torts, eminent domain, adverse possession, zoning, and governmental tax exemptions"); *see also* Janice C. Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 IOWA L. REV. 277 (1990).

historical origins of local-government identity in the United States was corporate.[203]

For local agencies, this public/private divide plays out over two dimensions: the privatization of local functions as well as the infusion of private actors in the work of public agencies. To begin, the contracting out of services has long been a controversial but common feature of local-government operation.[204] Privatization generally involves services more than agencies focused on regulatory or licensing activities,[205] but there are some local functions that shade into more traditional administration. These can include, for example, enforcement in areas such as tax arrears and child support, as well as the development of regulations, as is common in some areas of land use, even if those regulations are subsequently publicly adopted.[206]

Even where functions have not been entirely privatized, many local agencies have structural and functional involvement with both private parties and with the public at large, more so than most federal agencies. For example, many local commissioners or board members are local residents who act as part-time appointees.[207] Zoning board members might serve a few nights a month at the same time that they are also maintaining a real estate business; school board members might have children in the school district, but otherwise have no professional involvement in education; police review commissions are often staffed by prominent civilians from the community; other examples abound.[208]

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203. *See* FRUG, *supra* note 200 (recounting the history of ambiguities over the public/private divide in U.S. local governments).

204. *See, e.g.*, Konno v. Cty. of Haw., 937 P.2d 397, 400, 410 (Haw. 1997) (voiding a contract between the county and a private landfill company on state constitutional grounds). *See generally* GARY J. MILLER, CITIES BY CONTRACT: THE POLITICS OF MUNICIPAL INCORPORATION (1981) (describing so-called "Lakewood Plan" cities that contract for minimal services).

205. Prominent areas include police and fire safety, transportation, and human resource functions. *See* George A. Boyne, *Bureaucratic Theory Meets Reality: Public Choice and Service Contracting in U.S. Local Government*, 58 PUB. ADMIN. REV. 474, 478-79 (1998).

206. In land use and building codes, for example, smaller and less resourced local governments often adopt off-the-shelf private codes. *See, e.g.*, John R. Nolon, *Land Use for Energy Conservation and Sustainable Development: A New Path Toward Climate Change Mitigation*, 27 J. LAND USE & ENVTL. L. 295, 304 (2012) (explaining that "[m]ost states and municipalities that adopt energy codes" use a private code promulgated by an international-standards organization).

207. *See, e.g.*, Kristin Knudsen Latta, *The Role of Non-Lawyers on Administrative Tribunals: What Lay Members Think About Law, Lawyers, and Their Own Participation in Alaska's Mixed Administrative Tribunals*, 31 ALASKA L. REV. 37 (2014).

208. That this is a common feature of many local agencies is evident in the ethics concerns that potential conflicts of interest in local governance perennially raise. *See* Patricia E. Salkin, *Crime Doesn't Pay and Neither Do Conflicts of Interest in Land Use Decisionmaking*, 40 URB. LAW. 561 (2008).

While many local administrative entities, like community boards, involve the participation of ordinary people, many local agencies that do not have that formal involvement are still quite close to day-to-day life and often involve resident input in direct ways.[209] Local citizens testify actively at (or have formally recognized authority in) school boards, zoning reviews, police commissions, and the like. And administrative processes at the local level at times formally require consultation with or involvement by neighborhood-level committees or boards.[210] All of this brings community perspectives directly into administration. This is not to argue that local bureaucracies are inherently responsive to local concerns.[211] As anyone who has ever applied for a building permit knows, local agencies can be distant, bureaucratic, and insulated. But, as a structural matter, the interface between public and private in local administration can be decidedly porous.

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Taking a step back, then, this empirical overview highlights some distinctive aspects of local administration, recognizing the often-unheralded breadth of local regulatory, adjudicatory, and enforcement activity. Local agencies exist in a variety of governmental-structural contexts that can vary significantly from the federal paradigm. Likewise, the relative informality of many local agencies can be troubling by creating space for inequity without a baseline or firm standard, as well as by risking divergence in the exercise of discretion. However, this informality can also hold benefits for local residents by fostering more direct input into administration. And the perennial ambiguity about the public/private divide in local governance opens channels for responsiveness while creating concerns about expertise, corruption, and parochialism. All of this must be accounted for both in administrative jurisprudence and in the scholarly discourse, to which we turn in the next two parts.

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209. Another variation on the public role in local governance arises from instances in which local governments grant community members formal roles such as veto power over certain development rights. These "neighbor consent" provisions generated a jurisprudential muddle going back to the era before zoning was widespread, *see* Washington *ex rel.* Seattle Title Tr. Co. v. Roberge, 278 U.S. 116 (1928); Thomas Cusack Co. v. City of Chi., 242 U.S. 526 (1917); Eubank v. City of Richmond, 226 U.S. 137 (1912), and direct community decision making remains a fact in some localities.

210. *See* Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323 (2014) (describing sub-local institutions down to the neighborhood level); *see also* Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 508 (1997) (examining innovations in sublocal institutions such as "enterprise zones, tax increment finance districts, special zoning districts, and business improvement districts" that "provide for a variety of territorially based differences in taxation, services, or regulation within individual cities").

211. Although local agencies may hold some promise in that regard. *See infra* Section V.A.

IV. LOCALIST ADMINISTRATIVE LAW

Administrative law broadly covers a variety of legal questions, including agency authority and structure, procedural requirements for administration, the basic validity of agency decisions, and judicial review.[212] Even as administrative law scholarship has fruitfully begun to focus on agency activity outside the litigation context,[213] judicial review of a variety of agency actions, from statutory interpretation to substantive policymaking to procedural regularity, remains a focal point of the literature. Accordingly, this Part homes in on a jurisprudential framework for judicial review of local agency action, although the insights are relevant to the more general corpus of administrative law.[214]

A localist jurisprudence of judicial review would elevate and render more transparent four themes, even as it continued to address more generic questions endemic across administrative law.[215] First, it would grapple substantively with the distinctive nature of the local governmental structure at issue. It would likewise seek to bolster procedural regularity where appropriate, but recognize that informality may have a place to play in local administration. It would also be transparent about anxieties that private involvement raises in local administration, where relevant. And it would take a nuanced approach to administrative expertise in this context. This Part works through these factors to limn a broad formalist and functionalist framework for courts to craft a transsubstantive local administrative law.

To illustrate how these factors would influence doctrine, the Part then gives two specific examples. First, on the question of the appropriate level of deference when courts review local statutory interpretation or substantive policymaking, the recent New York City soda portion case illustrates where local-government structure and local agency expertise should have taken a more prominent role. Likewise, the nondelegation doctrine at the local level takes on

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212. *See* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 2 (7th ed. 2011).

213. *See* Nestor M. Davidson & Ethan J. Leib, *Regleprudence—at OIRA and Beyond*, 103 GEO. L.J. 259 (2015); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010); Stack, *supra* note 51.

214. *See infra* Section V.C.

215. It is worth noting that state courts that review local agency actions are, in practice, a mix of state and "local" courts. As Ethan Leib has explored, although state court systems are nominally unified, some state judges associate their work more with the local rather than with the state. *See* Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 902, 907 (2013) (exploring how "local courts as instrumentalities of local governments" approach statutory interpretation distinctly from federal or state courts and explaining the ways in which a judge may be "localist"); *see also* Annie Decker, *A Theory of Local Common Law*, 35 CARDOZO L. REV. 1939, 1956-66 (2014) (arguing for a theory of distinctly "local" courts).

a new hue in light of local administration—with an example drawn from among the many in agency interpretation of land-use statutory standards—highlighting the idiosyncrasy of the surprisingly robust application of the doctrine at the local level.

A. A Jurisprudence for Judicial Review of Local Agency Action

As challenging as it is to generalize about the practice and context of local agency work,[216] it is equally difficult to coalesce the current jurisprudence of local administrative law across the many domains in which it arises—regulatory, adjudicatory, enforcement, licensing, and otherwise. By contrast, whatever variations are evident in the body of law that has emerged from the judicial review of federal administration, that jurisprudence at least begins with common constitutional, statutory, and institutional underpinnings.[217]

That said, as with the empirics of local administration, it is possible to discern some themes in the case law as a point of departure, to the extent that courts even treat local agencies as distinctive.[218] As courts review local agency action, for example, it would be fair to note an undertone of skepticism in some of the case law,[219] as much as courts do at times evince respect for the work of agencies.[220] This could reflect concerns about bureaucracy undermining de-

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216. *See supra* Part III.

217. *See supra* Section II.A.

218. Some of the case law involving local agencies simply proceeds as though the level of government is immaterial, *see, e.g.*, Cty. of Knox *ex rel.* Masterson v. The Highlands, L.L.C., 723 N.E.2d 256 (Ill. 1999), and this may be appropriate in some circumstances. This Section argues that there are important elements of local practice that may bear out in the case law. This is not to argue that more general questions of administrative legitimacy shared by the judicial review of an agency at any level of government, in terms of rationality, process, and the like, are not equally relevant. Rather it is to argue that, in addition to this baseline of legitimacy, there is value in interrogating what might be distinctive about a particularly local context.

219. *See, e.g.*, Bullitt Fiscal Court v. Bullitt Cty. Bd. of Health, 434 S.W.3d 29, 38 (Ky. 2014) (declining to defer to a county public-health agency's interpretation of its governing statute); Schulmann Realty Grp. v. Hazlet Twp. Rent Control Bd., 675 A.2d 645, 649 (N.J. Super. Ct. App. Div. 1996) (declining to defer to a rent control board because "the interpretation of an ordinance constitutes a purely legal matter for which an administrative agency has no particular skill superior to a trial court"); Langer v. Raymond, 699 N.Y.S.2d 831, 833 (App. Div. 1999) (Mercure, J., dissenting) ("Although a zoning board's construction of the governing zoning ordinance is generally to be afforded 'great weight and judicial deference,' no such deference is required where the question is one of pure legal interpretation." (citations omitted)).

220. There are many contexts in which courts currently accord deference or at least weight to local agency expertise or substantive judgment. *See, e.g.*, Bontrager Auto Serv., Inc. v. Iowa City Bd. of Adjustment, 748 N.W.2d 483, 490-97 (Iowa 2008) (deferring to a local agency

mocracy, skepticism about the capacity and expertise of local agencies, the fraught nature of local parochialism, and the perils of overly strong private involvement in local governance, or even the risk of corruption (as an extreme version of administrative capture). In some contexts, skepticism may well be warranted, and in others, it will be more appropriate for courts to accord respect to the work of local agencies. Regardless, courts should be explicit when that skepticism influences doctrine and when instead deference is due. In doing so, they should be transparent about what is distinctive about the nature of the specific local agency at issue.[221]

This Section provides some guideposts for that more explicit judicial engagement with structure, process, democratic legitimacy, and local expertise. To be clear, this framework for a transsubstantive local administrative jurisprudence is not meant to be an argument for a *uniform* body of law. The point is to surface and clarify what is distinctive about local administration, rather than to simplify the judicial task. This Section accordingly outlines four particularly salient factors that courts should consider.

1. *Recognizing the Implications of Local Structure*

If the overriding reality of local administration is one of institutional pluralism,[222] some aspects of local structure can have a direct bearing on how courts should approach local administrative law. For example, assumptions about executive oversight inform a number of aspects of the judicial review of agency action. If courts use that oversight as a ground for deference, they should interrogate the actual structure of any given local government. Where there is a clear line of authority from a recognizable local chief executive, processes of democratic accountability can serve as a reasonable, if imperfect, undergirding for authority delegated to local agencies.[223] But the absence of direct electoral

on the question of impairment of neighborhood property values); Somers Assocs., Inc. v. Gloucester Twp., 575 A.2d 20, 30-31 (N.J. Super. Ct. App. Div. 1990) (deferring to an administrative interpretation of an ambiguous ordinance).

221. Transparency is, itself, a contested value in governance, despite the prominence of sunlight rationales. *See* Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 ADMIN. L. REV. 617, 624-32 (2010). The argument here is for a specific kind of transparency: courts should explicitly and self-consciously acknowledge the project of local administrative law and articulate the practical and normative assumptions that might inform its doctrines. It is admittedly aspirational that that kind of transparency might help courts and scholars refine the jurisprudence once it is acknowledged.

222. *See supra* Section III.B.

223. One irony about local politics is that mayors and other local executives tend to bear the blame for actions taken by local administrators over whom they have no formal or functional control. The alignment of accountability and control was a primary argument that former

feedback if there is no mayor or similar executive with accountability for agency action may suggest that some agencies deserve greater judicial scrutiny.

To complicate matters further, the fact that some local agencies have a dual structure of oversight—from the local government of general jurisdiction and from the state[224]—might mitigate judicial concerns about faithless agency. Such dual delegation can mean that the work of local agencies is scrutinized and held accountable by multiple principals. In this way, perhaps ironically, the very limitations of local power inherent in state oversight can be an institutional reason for judicial minimalism.

Similarly, the functional combination of executive and legislative branches in a single body in many local governments—the absence of formal separation of powers—can change how courts evaluate delegation. If an executive agency is really just a part of a unified local-governmental structure, then concerns about the clarity of legislative direction may take on a different cast, with ambiguous delegations subject to more immediate legislative oversight. Indeed, local legislative bodies (city councils, county boards, and the like) can be directly engaged with the work of the agencies that are part of their hierarchies. And local legislative bodies may exercise both legislative and administrative functions, which can inform how courts approach the administrative side of that functional equation.[225]

There are potentially as many variations to these kinds of structural complications as there are local governments.[226] The point here is relatively simple:

Mayor Bloomberg made in seeking oversight of the New York City Panel for Educational Policy (formerly the Board of Education). *See* Robert Kolker, *Mr. Ed*, N.Y. MAG. (May 3, 2004), http://nymag.com/nymetro/news/crimelaw/columns/classaction/n_10284/ [http://perma.cc/5MFP-8NE7].

224. *See* Diller, *supra* note 2, at 1868-77.

225. In *Anderson v. Peden*, for example, the Oregon Supreme Court, in upholding a county board's exercise of discretion, noted that the board had both legislative and administrative roles, reasoning that the exercise of administrative discretion was thus not without political accountability. 587 P.2d 59, 66 (Or. 1978) (en banc).

226. In the soda portion cap case, for example, a group of local government and administrative law professors argued that the differences between New York City and New York State militated against the application of state-level separation-of-powers and nondelegation doctrine in this context. *See* Brief for Paul A. Diller et al. as Amici Curiae in Support of Respondents-Appellants at 6, N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 16 N.E.3d 538 (N.Y. 2014) (APL 2013-00291) ("Even assuming arguendo that *Boreali* remains good law at the state level, there is no reason why *Boreali* ought to apply, ipso facto, to local agencies."). The argument was echoed by the dissent in the case. *See N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, 16 N.E.3d at 558 (Read, J., dissenting) ("To my knowledge, before today we have never applied the *Boreali* separation-of-powers doctrine outside the context of state legislative delegations to state agencies under the state constitution.").

courts should resist false parallels to higher levels of government, where structural realities may be very different.[227] Instead, courts should be clear where norms of administrative legitimacy require formal or functional predicates and then test those assumptions against the actual structures in place. As they do, litigants will begin to craft their arguments accordingly, and a more sophisticated and clearer jurisprudence of local internal structure will emerge.

2. *Calibrating Procedural Regularity*

A second foundation for a localist administrative law would involve calibrating deference around the procedural realities of local agencies. As discussed above, the level of formality that attaches to local-government agency action can vary significantly, and the institutional constraints that define that process are likewise quite diverse.[228] Local agencies have been criticized both for being so informal as to lack "law" altogether,[229] and, conversely, as being too rigid and formalistic, applying a set of standards and rules without deviation.[230] At both ends of the normative spectrum, local agencies are seen to lack the capacity for nuance or, worse, to be unable to make reasoned and considered judgments in the first place.

These critiques may have real purchase in some local contexts, and clearly procedural due process has an important role to play as a floor in administrative adjudicatory contexts and similar individualized determinations.[231] But the critique and the variability suggest, perhaps obviously, that reviewing courts

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227. In grappling with local structure, there are actually two false equivalences that courts should avoid. The first, as discussed above, is the risk of too quickly equating the familiar institutional structures of federal administrative agencies with a local government structure that can vary significantly. The second and subtler elision is to fail to disaggregate the local from the state. This is conceptually challenging, given the prevalence of the creature-of-the-state view of local governments, even in states with strong home rule. But state norms around separation of powers and executive oversight can be just as inappropriate to apply to local governments as federal norms.

228. *See supra* Section III.C.

229. New York City administrative courts, for example, have been praised for their "informality" and "flexibility," which in turn are seen as assisting "self-represented parties." Goldin & Casey, *supra* note 133, at 27; *cf., e.g.*, Gissel v. Sehdeva, 413 So. 2d 1370, 1371 (La. Ct. App. 1982) (noting the "informality of city court procedure"); Bosley v. Prudential Ins. Co. of Am., 135 P.2d 479, 480 (Okla. 1943) (observing that the state legislature and courts have protected the more liberal pleading rules in city courts and for justices of peace).

230. *Cf.* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385 (1992) ("[I]nformal rulemaking . . . has not evolved into the flexible and efficient process that its early supporters originally envisioned. During the last fifteen years the rulemaking process has become increasingly rigid and burdensome.").

231. *See supra* notes 197-199 and accompanying text.

should pay particular attention to the care and procedural depth with which an agency has approached the work at issue. This reflects the suggestion from the Supreme Court, in *United States v. Mead Corp.*,[232] that one potentially important tool to calibrate the level of deference due to a federal agency is the level of formality with which an agency chooses to act.[233]

Mead involved a challenge to a letter issued by the United States Customs Service that changed the classification of import duties on the company's famous day planners.[234] In finding that the Customs Service's letter rulings were not entitled to *Chevron* deference,[235] the Court emphasized that an agency stands a better chance of getting either binding deference, or even the less binding respect accorded under *Skidmore* deference,[236] the more the agency action at issue followed procedural formality.[237] Thus formality would echo Congress's conferral of delegated authority and the agency's choice to exercise that authority.[238] The more casual an agency pronouncement, the less likely the agency is to be taking action carrying the force of law and, thus, less deserving of deference.[239]

Technical formality in the *Mead* sense is not a perfect proxy for thorough process, thoughtfulness, or any other indicia of legitimacy in administrative work. And predicates for strong deference at the federal level, such as an explicit or implicit legislative choice to rest lawmaking authority in an agency, or greater relevant technical knowledge, may be lacking in many local-government contexts. However, abstracting away from the specific federal context in which *Mead* arose, there is much to the proposition that the more seriously an agency at any level of government signals that it has undertaken its administrative task, the more a court should give credence to the result. This is a matter of logic, on one level; but there is a formal aspect to this criterion for deference bounded in the legitimation that can derive from notice, comment, and other indicia of traditional administrative formalism.[240]

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232. 533 U.S. 218 (2001).

233. *Id.* at 236.

234. *Id.* at 221.

235. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

236. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

237. *Mead*, 533 U.S. at 229-30.

238. *Id.*

239. *Id.*

240. A reviewing court invoking a *Mead*-like calibration of process for deference would have to take into account the particularly procedural requirements that bind any given local agency, whether from a state APA, a more specific procedural statute, or even the absence of clear guidance. *See supra* notes 191-193 and accompanying text.

That said, there may be some situations in which the work of local administration may be consistent with norms of considered judgment despite the absence of the kind of formality typically accorded at the federal level when agencies seek deference.[241] Where local agencies are functioning more to aggregate and channel local input, rather than solely to reach internal, independent policy conclusions, that information-aggregation process may involve informal consultation or community engagement. This can arise, for example, with some land-use planning, as well as in education and other contexts that break down more familiar conceptions of agency process as notice, input, and reflection at a distance.[242] That is not to excuse resource or similar institutional constraints, but rather to scale what can be expected of local agencies in terms of formality.

The due process revolution has been an important part of the individual adjudicatory aspect of local administration,[243] but the argument here is for a broader calibration of procedural regularity and judicial deference throughout the work of local administration. As with governmental-structural arguments,[244] increased transparency from courts explicitly calibrating deference to procedural normality will generate more litigation arguments, and could therefore improve agencies' procedural practices in the first place.[245]

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241. This is relevant primarily outside of the administrative adjudicatory context. *Cf.* Cass, *supra* note 6, at 367-70 (describing the "bipolar model" of administrative decision making, which distinguishes between process due in adjudications and process due in quasi-legislative rulemakings).

242. At the federal level, the rise of negotiated rulemaking provides echoes of procedural processes that challenge the paradigm of agency call and response removed from more direct involvement of regulated entities. *See generally* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 4 (1997) (offering "a normative vision of *collaborative governance* against which to evaluate proposals for reform" of the ossified rulemaking process).

243. *See generally* Diller, *supra* note 36, at 1188-93 (discussing how individual hearings and their due process protections relate to administrative accountability).

244. *See supra* Section IV.A.1.

245. This feedback loop may generally lead local agencies to adopt more formal procedures across the board, and local agencies will have to resist moving too far toward ossification and away from what is most beneficial about embeddedness in the community. Where informality can be beneficial—for example, in reflecting community voice—that process may nonetheless legitimate the resulting agency action. A similar argument can be made for the value of local knowledge in the expertise with which courts might credit local agencies. *See infra* Section IV.A.4. Procedural formality that fosters predictability and consistency on the one hand and fulsome input on the other may stand in tension, with citizens more removed from agency work the more bureaucratized that work becomes. In responding to a jurisprudence that encourages formality, agencies will have to be careful to manage this tension.

3. Accommodating Public/Private Ambiguities

The jurisprudence of local-government law reflects historical tensions over the nature of local governments as partially public and partially private entities.[246] As discussed above, there are two aspects of the public/private ambiguity in local governance that are particularly relevant to the judicial review of local agency action. The first is privatization: many local-government services are provided by private parties. The second is the reality that for many recognizably public agencies, the line is more permeable in many contexts than is evident in the world of federal administration.[247]

As courts review local agency action, there is a decided undercurrent of concern evident about private involvement in local public administration.[248] This is reflected in questions about the legitimacy of, and ethical dilemmas posed by, citizen involvement with local agencies. It also likely informs the relative absence of deference for many of the more localist administrative structures in areas such as zoning and public education. This skepticism may be appropriate or it may be overdrawn, but it is rarely acknowledged explicitly.[249]

Any assumptions that courts make about the legitimacy of citizen involvement, or even about the relative risk of local corruption compared to other levels of government, should not be implicit. Courts policing the somewhat more porous lines between local government and public involvement in the work of that level of government should, at a minimum, acknowledge that public involvement carries benefits as well as causes for concern, with appropriate procedural and ethical safeguards. The argument here, then, is again primarily one for intentionality in accommodating, where appropriate, the reality of the involvement of the public as private individuals in so much agency work.

4. Reconceptualizing Local Expertise

All of this leads, finally, to the functionalist question of the nature of local agency expertise. Again recognizing the difficulty of generalizing, it is fair to say that some courts tend to denigrate—or outright dismiss—the expertise of local administrative bodies, in contrast to the prevailing norms evident in the

246. *See supra* Section III.C.2.

247. *See supra* Section III.C.2.

248. *See* MacLeod, *supra* note 35, at 69 (noting that in the local land-use regulatory context, reviewing courts "seem worried" that regulators "are acting to promote primarily private interests rather than promoting the common good of the community"); Salkin, *supra* note 208 (discussing conflicts of interest in land-use decision making).

249. *See* MacLeod, *supra* note 35, at 68-69 (noting that in the land-use context, "courts seldom explain why they are employing" a particular standard of review).

judicial review of federal agencies.[250] This judicial skepticism is bound up with an overly narrow view of what that expertise entails.

Local administrative expertise should be understood, more so than at other levels of government, in dual terms. Certainly, for some local agencies, expertise involves the traditional, technical knowledge that federal agencies are thought to have.[251] This is not always the case, of course, as many local agencies have limited resources and lack the independent ability to develop sophisticated technical knowledge. But expert knowledge can be found at the local-government level.

Courts should also understand, however, that local agencies may play a very different role than their federal counterparts—a more explicitly mediating and information-collecting function. As Carol Rose has argued in the context of land-use regulation, one way to understand the role of local governance is as channeling and mediating individual disputes.[252] In this mode, local institutions serve to aggregate local information—about local conditions and the local implications of policy—and ensure that intensely personal preferences are considered in the process.[253]

To be sure, the infusion of public involvement and the diffusion of local authority in agency functioning may make local agencies seem more haphazard in their work. It also exposes local agencies to the critique that they are too close to the people they serve, undermining their impartiality in ways that may be absent in the federal agency context. But their role as information aggregators may also give these agencies access to locally grounded information and a kind of on-the-street accountability that is hard to replicate in federal administrative law.[254]

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250. *See, e.g.*, *In re* Baker v. Vill. of Elmsford, 70 A.D.3d 181 (N.Y. 2009); D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health, 773 N.E.2d 536 (Ohio 2002); Entm't Indus. Coal. v. Tacoma-Piece Cty. Health Dep't, 105 P.3d 985 (Wash. 2005) (en banc); *see also* Pal, *supra* note 1, at 816-17 (discussing expertise in the context of challenges to local public-health policy).

251. *See* Diller, *supra* note 2, at 1892-95 (discussing public health as an arena of "Wilsonian" technical expertise that combines empirical grounding with the "science" of public administration).

252. *See* Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 887-93 (1983) (arguing for a mediation model to describe proceedings for piecemeal changes in local land use).

253. *Id.* at 910 (arguing that "the test of due consideration should be based on popular participation in the steps of a mediation process").

254. Scale matters here, as elsewhere in local administration. *See supra* Section III.B. In large cities, like New York, Los Angeles and Chicago, the ability to mediate local preferences may be less immediate than in smaller communities where the boundaries between agency officials and the community may be more permeable. Even in major urban areas, however, some agencies—in areas such as land use and education—can work through neighborhood-level

This function reflects what may be most attractive about the expertise of local government in an experimentalist mode. It is also potentially democracy enhancing to the extent that local agencies take seriously the role they can play in engaging residents and citizens in issues of local governance.[255] And it brings to bear a localist legitimacy that is distinct from the technical knowledge generally associated with administrative agencies. Zoning panels and school boards may be staffed by realtors and parents, but that can be an important—and valid—perspective on the kinds of local policy questions with which the administrative city-state often grapples.[256]

B. Two Doctrinal Examples

To prove valuable, the framework just laid out should have doctrinal purchase. To illustrate, this Section traces the framework through two of the most common doctrinal touchstones in administrative jurisprudence. First, the level of deference accorded to substantive review of an agency's policy choices is a perennial question that can illustrate, for example, the implications of local-government structure and the distinctive nature of local expertise. Second, the nondelegation doctrine as it applies to local agencies is an area of doctrine that can highlight concerns over the private role in local governance and relative informality. It would be difficult to link cleanly individual features of the framework with a precise jurisprudential taxonomy—given the sheer diversity of local agencies and institutional contexts in which they operate, the lack of a tight hermetic link is hardly surprising. Applying the framework to elevate what is

institutions such as community boards and advisory neighborhood councils, belying larger-scale implications.

255. As with the parallel to *Mead*, in evaluating the accountability that can arise from community involvement, the weight that the Supreme Court gave to the public planning process in *Kelo v. City of New London*, 545 U.S. 469 (2005), is in some ways analogous. There, one critical factor the Court relied on in considering the legitimacy of the exercise of eminent domain for economic development was the quality and extensiveness of the predicate planning exercise. *See id.* at 484-85.

256. One could argue that the elected or even "local" nature of many courts reviewing local agency action might be a ground for less deference to the local knowledge evident in much local administration, to the extent that such courts may have local knowledge and can be accountable. *Cf.* Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1237-54 (2012) (laying out arguments for why the interpretive methods of elected judiciaries should diverge from unelected judiciaries given accountability and competence considerations). However, even if reviewing courts have some accountability, they do not possess the procedural tools to readily seek out and aggregate relevant information beyond the case or controversy before them, nor are they repeat players who can adjust as information changes. For these reasons, as between the expertise of local agencies and the knowledge base of local courts, there are good reasons to prefer the former.

distinctive about local administration is intended rather to start a process of identifying where the core themes can illuminate a path for courts to follow.

1. *Deference and Substantive Review—Localist* Chevron *and* Skidmore

Judicial review often turns on the reasonableness or rationality of agency action (or the substantiality of the evidence supporting it), whether in interpreting ambiguous statutes or making substantive policy. The threshold question is generally what level of deference courts owe to the relevant agency.[257] As scholars have explored, the landscape of deference in state administrative law is much more varied than the relatively uniform paradigm that the Supreme Court has crafted at the federal level.[258] Local administrative law evinces a pattern that appears similarly varied, although part of the challenge in mapping standards for the review of local agencies is the relative absence of any self-conscious acknowledgement of the necessity of articulating localist-sensitive deference norms.[259]

The framework laid out above, however, can guide courts as they calibrate the appropriate level of deference in reviewing statutory interpretation and substantive policy choices by local agencies. Take, for example, the New York Court of Appeals' decision in the soda-portion-cap case that opened this Article.[260] The Court of Appeals took an essentially disdainful approach to deference, raising a number of problems. To begin, the court's majority opinion barely considered what distinguishes New York City's governmental structure and complex local apparatus of separation of powers from state legislative over-

257. *Cf.* Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1153-72 (2012) (arguing for a distinction between the exercise of delegated authority and traditional weight given to agency views). Moreover, although reasonableness or rationality review—or, indeed, even binding deference for agency interpretation of ambiguous statutes under the second step of *Chevron*—seems to evince great variety in terms of articulated standards and details, there is a strong argument that the exercise tends to converge. *See* David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 137 (2010) ("Amid all the chaff of standard of review doctrine, the wheat lies in the reasonableness of the agency's action. In fact, the 'reasonable agency' standard is, increasingly clearly, the standard that courts *actually* apply to all exercises of judicial review of administrative action, no matter what standard they purport to use.").

258. *See* Pappas, *supra* note 6, at 984 ("A survey of the fifty states' equivalents to the *Chevron* doctrine shows an array of different announced standards, ranging from strong deference to an agency interpretation to completely de novo review explicitly discouraging deference."); *see also* sources cited *supra* notes 6, 67.

259. *Cf.* Leib, *supra* note 215, at 920-22 (describing the lack of uniformity with which state courts apply federal law); MacLeod, *supra* note 35, at 72-75 (surveying the widespread confusion across states about the standard for deference in the local land-use regulatory context).

260. *See supra* text accompanying notes 1-3.

sight. The New York City Department of Health and Mental Hygiene was overseen by a mayor who was deeply immersed in the details of what he viewed as one of his signature policy concerns. The Department also exercised delegated authority not only from the city, but also directly from the State of New York. One argument the city made in defending the Department of Health's proposed regulation was that the legislation establishing the agency provided a source of legislative authority that was independent from, and in addition to, whatever delegation had been made under the city's Charter.[261] The court rejected the argument with relatively little discussion, as though this structural proposition was somehow unfathomable.[262] It may have been an overreach by the agency, but it was not an entirely unreasonable position, and the court did not give it the consideration it deserved.

The Court of Appeals likewise denigrated the Department of Health's clear technical expertise and unique understanding of patterns of urban health.[263] Here, one need not even reach the question of how locally grounded the Department is to recognize that even the federal government at times follows the lead of local public-health agencies like the Department.[264] But that expertise is all the more salient, given that public-health agencies have unique insights into how health issues like obesity actually unfold on the ground. None of that expertise—technical or experiential—gained recognition by the Court of Appeals.

Ultimately, then, the court delegitimated what should have been a relatively banal exercise of regulatory discretion. A body of administrative law jurisprudence even minimally sensitive to local context would suggest that some level of deference was warranted in this case—if not some local equivalent to *Chevron*, then at least the respect reflected in *Skidmore* deference. Local authority exercised through the Department of Health—no less than the EPA or OSHA or any federal agency—should have stood.

This is but one example of how a framework of judicial deference sensitive to local context on grounds such as structure and expertise might play out differently. In this case, that structure should have yielded greater deference, but that will not always be the case. It might seem ironic that, after spilling so much ink about the distinctive nature of local administration, this example supports the adoption of a model of deference that resembles federal approaches. However, the outcome does not turn on the aptness of the analogy to feder-

261. *See* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 16 N.E.3d 538, 544 (N.Y. 2014).

262. *Id.*

263. *Id*. at 543.

264. *See* Diller, *supra* note 2, at 1866-67 (noting federal adoption of public-health innovations from the local level).

al agency action, but rather on a clear engagement with the distinctive nature of this particular local agency.[265]

2. *Nondelegation in the Shadow of Local Practice*

This Article's doctrinal framework also illuminates an intriguing puzzle that emerges from the current jurisprudence of local administrative law. At the federal level, it is black-letter law that the nondelegation doctrine has essentially no strength as a meaningful ground of judicial oversight.[266] In the mid-1930s, the Supreme Court decided a pair of nondelegation cases, one involving public delegation,[267] and one involving delegation to private parties.[268] After those cases, the Court essentially got out of the business of policing nondelegation at the federal level.[269]

At the local level, however, nondelegation is still a vibrant doctrine, with significant application.[270] Nondelegation was one issue in the New York City soda-portion-cap case,[271] but state courts generally use nondelegation principles to rein in zoning boards, health departments, and similar entities. Land use is a particularly fertile context. For example, in *Kosalka v. Town of Georgetown*,[272] the Maine Supreme Court heard a challenge to the denial of a conditional use permit by the town's Board of Zoning Appeals, an administra-

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265. That an approach more sensitive to the structure, authority, and expertise of the Department of Health would have yielded an outcome perhaps closer to the paradigm federal appellate review of federal agencies might have been a consequence, but only because the Court of Appeals' approach in the case was so nondeferential in the first place.

266. *See supra* text accompanying notes 76-78; *cf.* Jamelle C. Sharpe, *Judging Congressional Oversight*, 65 ADMIN. L. REV. 183, 203-04 (2013) (noting the breadth of congressional delegation).

267. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

268. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

269. There have been nondelegation claims—both public and private—made to the Court in the decades since *Schechter* and *Carter Coal*, but they have failed. *See* Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989) (citing Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980) (plurality opinion)); *see also* Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225 (2015) (sidestepping a private nondelegation claim by finding Amtrak to be a governmental entity for purposes of a challenge to its role in jointly developing rules for passenger railroad services with the Federal Railroad Administration).

270. This parallels the treatment of nondelegation observed by Jim Rossi and others at the state level: many states explicitly or functionally adopt a stronger form of nondelegation doctrine than do federal courts. *See* Rossi, *supra* note 164, at 1193-95; *see also* Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 578-80 (1994).

271. *See* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 16 N.E.3d 538, 549 (N.Y. 2014).

272. 752 A.2d 183 (Me. 2000).

tive body. The Board's duties included ensuring that conditional uses must "conserve natural beauty,"[273] a standard that most likely would have passed muster at the federal level.[274] To the Maine court, however, this standard provided insufficient guidance, and it was struck down as an unconstitutional delegation from the town to the board.[275] Such decisions are fairly common.[276]

What accounts for this particular disconnect between local and federal administrative law? It is hard to say for certain, but the relative informality of local boards seems to play a role.[277] An even more trenchant explanation may be the permeability of public and private at the local level. Delegating to a zoning board—ostensibly a public agency but often governed, if not entirely staffed, by part-time volunteers[278]—seems to raise judicial anxiety about authority being given to local residents.[279] Legislative standards that might be acceptable when given to a deeply resourced, professionally staffed traditional agency may become more troubling when community members are tasked with the decision making. The strength of the nondelegation doctrine at the local level likewise

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273. *Id.* at 184 (internal quotation marks omitted).

274. *Cf.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) (upholding a delegation to EPA based on the word "requisite").

275. *Kosalka*, 752 A.2d at 187.

276. *See* Josh Eagle, *The Practical Effects of Delegation: Agencies and the Zoning of Public Lands and Seas*, 35 PEPP. L. REV. 835, 836-37 n.3 (2008) (noting the strictness with which courts have approached the delegation of authority to zoning boards, both as a matter of statutory interpretation and under various state constitutional theories, such as due process, equal protection, and separation of powers).

277. It is thus common for judicial review of the output of local agencies to highlight questions of the relevant record and the substantiality of the evidence. *See, e.g.*, Grant's Farm Assocs. Inc. v. Town of Kittery, 554 A.2d 799, 801-03 (Me. 1989) (approving the board's decision because it was supported by substantial evidence).

278. *See supra* text accompanying notes 207-208.

279. *See, e.g.*, Marta v. Sullivan, 248 A.2d 608, 610 & n.3 (Del. 1968) (invalidating a local ordinance "purport[ing] to delegate to neighboring residents an uncontrolled and undefined power to impose a zoning restriction and to limit the use of the property of another," and noting that the ordinance's "evil . . . is accentuated by granting the controlling zoning voice to neighboring residents rather than, as is usual in consent ordinances, to neighboring property owners. Residents would include transients, boarders, visitors, and summer-time tenants."); *see also* GEORGE W. LIEBMANN, THE GALLOWS IN THE GROVE: CIVIL SOCIETY IN AMERICAN LAW 55-57 (1997) (noting that state court hostility to zoning delegations rests on the seemingly private nature of the relevant delegation).

At the federal level, courts have maintained a clear conceptual distinction between public nondelegation (delegation by Congress to agencies) and private nondelegation (delegation to private entities to exercise regulatory authority). Technically, cases involving zoning boards and the like are public nondelegation cases, but the argument here is that the concerns animating private nondelegation may be influencing judicial review in this context.

may be understood to filter concerns about capture through the experience of local corruption.

In judicial review of local agency action, these concerns about the ambiguity of the public/private line may be entirely warranted, but there are also reasons to consider whether they are overstated. This is not to say that police oversight commissions staffed by local citizens or community review boards led by neighborhood activists should raise no concerns about legitimacy. Rather it is that nondelegation should reflect the advantages as well as the risks that public involvement, knowledge, and accountability bring to local agencies. Local administrative nondelegation should not be the same empty doctrine it is at the federal level, by any means. But courts should be more explicit about why they are skeptical and whether that skepticism is necessarily warranted.

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In practice, there are going to be norms of judicial oversight that are common across all levels of government, including basic notice and the opportunity to be heard, the building of a record, and the obligation for rational explanation, among other core values at the heart of any legitimate administrative process. But important differences in the details can emerge at the local level. What Thomas Merrill has described as the "appellate review model" [280] of judicial oversight serves an important legitimating function that will have parallels for federal, state, and local agencies. If there is, then, a spectrum of uniformity and particularity across these levels of government, the framework above somewhat artificially highlights distinctive aspects of local administrative context and practice, so that, over time, courts can develop a jurisprudence that is sensitive to that distinctiveness where appropriate.

V. THE LACUNAE REVISITED

In the end, framing a distinctly localist administrative jurisprudence leads back to the value that an exploration of local institutions offers more broadly for legal scholars and the interdisciplinary discourse of local governance.[281] For local-government scholars, foregrounding administration can add a rich dimension to the literature on local authority and identity, complicating questions of local democratic accountability, the valence of local community, and the institutions of local experimentalism. Similarly, for administrative law scholarship, giving local agencies their rightful place can provide new institutional contexts that denaturalize the overly federal focus of extant literature.

280. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011).

281. *See supra* Part I.

This holds promise for an administrative law that reflects all levels of government in our federal system. This Part reviews these implications and then sets out a scholarly agenda moving forward.

A. Administration in the Discourse of Localism

The traditional discourse on localism pivots on a central tension between the benefits and costs of devolution and decentralization. In only slightly reductionist terms, proponents of local legal authority and autonomy emphasize the potential of local governments to reinforce democratic participation and elevate community.[282] Localism, proponents further argue, also tends to lead to more efficient public services, both because local officials can better respond to local preferences,[283] and because governance is disciplined through local residents exercising their right to "exit" through mobility.[284] And a third general benefit associated with empowering local governments is the ability of devolution and decentralization to advance experimentalism.[285] If the fifty laboratories of democracy are beneficial in federalism, the argument goes, surely ninety thousand must provide even more fertile ground for variation, tinkering, and policy diffusion.

The familiar obverse of these arguments focuses instead on the dark side of local authority and autonomy. Thus, local governments, scholars frequently

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282. *See, e.g.,* Frug, *supra* note 97, at 1069 (arguing for the importance of local governance to democracy as popular involvement); Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 20-21 (2010) (presenting the role of minority rule in federalism "in shaping identity, promoting democracy, and diffusing power" (footnotes omitted)); Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009, 2031-33 (2000) (reviewing GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS (1999)) (discussing the potential threat that regionalism poses to the democratic advantages of smaller government).

283. Saiger, *supra* note 158, at 96-102 (describing the argument for localism from allocative efficiency).

284. *See, e.g.*, Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473 (1991); *see also* WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 289-324 (1995).

285. *See, e.g.*, Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1312, 1334-35 (1994) (isolating the local government role in dynamics of experimentalism). *See generally* Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113 (2007) (surveying the landscape of state preemption of local authority); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 267 (1998) (identifying and supporting a shift toward democratic experimentalism, "in which power is decentralized, enabling citizens and other actors to utilize their local knowledge to fit solutions to their individual circumstances").

note, tend to be exclusionary and parochial, undermining the representational interests of those not immediately participating within the boundaries of local democracy.[286] Moreover, smaller jurisdictions tend to generate spillover effects not internalized at the local level.[287] And experimentalism can undermine uniformity.[288] These are very well-rehearsed arguments, to say the least, but we can look at them afresh through the lens of local administration.

1. New Variables for Democracy, Community, and Parochialism

The basic discourse on localism tends to treat "local government" as a unified entity with recourse to electoral politics as the primary mechanism of democratic accountability. Refracted through the practice of local administration, however, basic questions of community, participation, and exclusion provide both new sources of concern—grounded in the ubiquity of local bureaucracy—as well as potential new grounds for optimism.

As to bureaucracy undermining accountability, the concern is clear that the more robust the "administrative state" within any local government, the more Kafkaesque the potential experience of the ordinary citizen. As proverbially hard as it is to "fight city hall,"[289] it is that much more challenging to contend with dozens of local agencies. On the other hand, the fact that the public can be so involved in local agency process can provide new avenues of participation and accountability.[290] Depending on the details of local political participation and the salience of any given agency's domain,[291] it may be difficult to hold

286. *See, e.g.*, Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371 (2001). For a general argument that local governments pose a particularly sharp risk of the failure of Madisonian majoritarianism given their small scale, see CLINT BOLICK, LEVIATHAN: THE GROWTH OF LOCAL GOVERNMENT AND THE EROSION OF LIBERTY (2004).

287. *See, e.g.*, Shelley Ross Saxer, *Local Autonomy or Regionalism?: Sharing the Benefits and Burdens of Suburban Commercial Development*, 30 IND. L. REV. 659 (1997).

288. *See, e.g.*, Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 831 (2008); *cf.* Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 78-80 (2011) (discussing tradeoffs between experimentalism and uniformity).

289. *See* Kenneth W. Starr, Leviathan*: The Federal Republic and the Challenge to Freedom*, 90 CORNELL L. REV. 1639, 1649 (2005) (reviewing BOLICK,*supra* note 286*)* (discussing the longstanding truism that "you can't fight city hall").

290. *See* Pradeep Chandra Kathi & Terry L. Cooper, *Democratizing the Administrative State: Connecting Neighborhood Councils and City Agencies*, 65 PUB. ADMIN. REV. 559 (2005); *cf.* Bressman, *supra* note 56, at 469-92 (critiquing majoritarian models of administrative oversight).

291. The empirics on electoral politics at the local level are less robust than at the state and federal level, but there is evidence to suggest generally lower voter turnout. *Compare, e.g.*, Neal Caren, *Big City, Big Turnout? Electoral Participation in American Cities*, 29 J. URB. AFF. 31, 42 (2007) (reporting an average voter participation rate of twenty-seven percent in thirty-eight

mayors, city council members, and other local elected officials directly accountable for administrative actions. But the centrality of electoral accountability may be tempered by the very blurring of governmental action and public participation in local governance that has traditionally troubled courts, with a variety of alternative means to give voice down to the neighborhood level to citizen concerns.[292]

Another important lesson that administrative practice may hold for the discourse on localism is the possibility for political participation by outsiders to local government. If the accountability grounding for concerns about parochialism is predicated on the reality that non-citizens are disabled from participating in local democracy, administrative process may supply at least a partial remedy. The fact that administrative agencies have broader mechanisms than simply voting may actually temper concerns about lack of representation ("voice" in the classic triad of exit, voice, and loyalty[293]). No outsider to the polity is necessarily entitled to any kind of political representation and generally does not have the right vote in local elections, with only limited exceptions.[294] However, if a regulated entity can build a case before an administrative agency, that entity may get a different hearing than if it tried to navigate the shoals of local politics unfiltered through norms and relatively transparent processes of administration. Given perennial concerns about bureaucracy undermining democracy, it may be an ironic consequence of the breadth of local administration that it can create a space for policy engagement beyond the boundaries of any local government.

2. Experimentalism Refracted Through Administration

As to experimentalism, the limited geographic scope of local agency action—as with localism more generally—might suggest more latitude for innovation. When OSHA or the EPA sets a national rule for an industry, that rule binds the nation, but when a city or county tries (and perhaps fails) to innovate in the regulatory arena, the consequences by definition are, well, localized.

large U.S. city mayoral elections), *with* The United States Election Project, *National General Election VEP Turnout Rates, 1789-Present*, ELECTPROJECT.ORG, http://www.electproject.org/national-1789-present [http://perma.cc/W3WV-MS4Y] (showing federal election turnout rates in recent off-year elections in the mid-thirty to low forty percent range and as high as over sixty percent in recent presidential cycles).

292. *See generally* Shoked, *supra* note 210 (discussing sub-local participation dynamics).

293. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

294. *See* Briffault, *supra* note 17, at 385-89, 396-401 (discussing the general territoriality of the local franchise and cases in which state law has extended the franchise to nonresidents, for example nonresident property owners and taxpayers).

Moreover, when the federal government regulates, there is no functional ability to exit for a regulated entity—short of international migration, of course—or other similar check on the scope of federal administrative reach. But with local agencies, there is the additional discipline of exit. This may factor more or less heavily in some regulatory arenas, depending on the relative mobility of any individual or entity, but it is a potentially significant difference in terms of the latitude that states and courts might give local agencies to innovate in areas of policy uncertainty.

The limited geographic scope of local agencies also cabins the experimental exercise. This is partially just a question of scale, and the same can be said for other sub-local institutions, like business improvement districts and neighborhood advisory councils.[295] But scale here is more complex, given that some local agencies have authority that is coterminous in its geographic scope with the relevant local government of general jurisdiction, but others have a narrower or even a broader (at times regional) field of operations.[296]

Functionally, adding administrative agencies to accounts of local experimentalism adds important texture to our understanding of how policy variation and diffusion actually occurs. Joseph Landau has argued that lower-level agency actors play an unappreciated role in fostering policy innovation at the federal level, having the latitude within the bounds of administrative discretion to offer higher-level officials new ideas and policy options.[297] At the local level, particularly in areas such as public health,[298] a similar dynamic plays out, with a robust infrastructure of local interagency dialogue. Indeed, interlocal cooperation more generally is often facilitated by agency-level interaction, which may be a way to overcome parochial resistance to the loss of policy autonomy that can occur at the level of general jurisdictional leadership.[299] All of this multi-

295. *See* Briffault, *supra* note 210 (exploring the range of sub-local institutions); Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in its Place: Affordable Housing and Geographical Scale*, 40 FORDHAM URB. L.J. 1667 (2013) (arguing for multiple scales in considering dynamics of local exclusion); Shoked, *supra* note 210 (discussing the "micro-local" level of governance).

296. *See supra* Section III.B.2.

297. *See generally* Joseph Landau, *Bureaucratic Administration: Experimentation and Immigration Law*, 65 DUKE L.J. 1173 (2016) (canvassing delegation and agency discretion in the immigration context and arguing that experimentation and creativity by frontline immigration officers can positively influence overall executive action).

298. *See* Diller, *supra* note 11.

299. Agency collaboration has been a theme in the new governance literature, although the literature has not focused on local agencies per se. *See generally* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004) (contrasting a regulatory model of agency that promotes adversarial relations,

plies the promise of local experimentalism while cabining the practical consequences of policy failure.

B. The Place of the Local in Administrative Law

If administrative agency practice and norms provide a new lens to consider debates about localism, local practice can have equal relevance to scholars who focus primarily on federal administrative law. Adding the local to the discourse enables a kind of institutional complexity that can usefully throw core concerns of administrative law into relief. On the other hand, continuity as well as difference—especially continuity that pushes, in Heather Gerken's phrase, "all the way down"[300]—can be instructive for administrative law scholars. Baseline norms in administrative law can be understood not only to transcend particular substantive domains, but likewise to pertain to *all* levels of government.[301]

1. Embracing Institutional Variety

As we have seen, familiar tropes of legitimacy and legality that define administrative law at the federal level can look decidedly different in the context of local administration.[302] The absence of separation of powers, the lack of a unitary executive, the reality of actual independence from the relevant local government for some agencies, and other institutional variations explored above—structural and legislative—suggest that there may be alternative ways to achieve the goals associated with administrative law beyond the conceptual toolkit now present at the federal level. So, too, do the mechanisms of accountability that have developed at the local-government level that emphasize public participation and the immediacy of citizen input, to cite another variation.

This raises a challenge, then, for scholars of administrative law: to what extent are the specific mechanisms of legitimacy that set most of the boundaries of the discourse at the federal level necessary or even sufficient? If there are alternatives, do they suggest more flexibility at the federal level? At a minimum, scholars of administrative law should pay more attention to municipal and other local bureaucracies. They tend to be the part of the overall administrative state that most people encounter most often in their day-to-day lives. But more

mutual distrust, and conflict, with a governance model in which non-hierarchical horizontal relationships help promote mutual interdependence, accountability, and compromise).

300. Gerken, *supra* note 282, at 4.

301. Disaggregating local governments from the states can also carry benefits for scholars of state administrative law, for similar reasons.

302. *See supra* Section II.B.

importantly, core theoretical concerns can take on a very different cast with the menagerie of local agencies.

To give one example, take concerns over administrative capture.[303] Agencies are thought to be vulnerable to an overly close relationship with the entities they regulate, and, at the extreme, this can lead to outright corruption. Localism can cut in multiple ways in outlining a more complex picture of this dynamic. At the local level, exit or even the desire for entrance (local attempts to attract industries, for example) can give greater leverage to many regulated industries in conflicts with local regulators, which might lead to greater risk of capture. And there is also a perennial problem of some regulated entities (although by no means all) possessing greater relative power than local regulators. On the other hand, the particular types of accountability mechanisms that can be a distinctive feature of local administration, such as public participation and the political economy of relatively intense local preferences,[304] may bolster the ability of local regulators to resist capture by outside regulated entities.

Local accountability can give rise more generally to parochialism, another obvious concern for local administration. Given the limited geographical scope of local governments and local political economy, local agencies might treat outsiders in a less favorable manner than insiders. On the other hand, the communitarian strain of localism suggests one ground on which capture might be resisted, with local involvement potentially insulating agencies from developing too close a relationship with regulated entities. This pattern may be evident, for example, in recent controversies over "broadband localism."[305] In a number of communities around the country, private providers have been unable or unwilling to supply high-speed internet. In response, some local governments have created their own network providers—not quite agencies in the traditional regulatory sense, to be sure, but public (or public/private) entities controlled by the local government. In response, private providers have been lobbying states to preempt or remove local authority to invest in this kind of infrastructure.[306] While not a perfect narrative of resistance to capture, this conflict does underscore the ability of local governments to resist the influence of entities that would otherwise have prevented local innovation.

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303. *See* David Freeman Engstrom, *Corralling Capture*, 36 HARV. J.L. & PUB. POL'Y 31, 31 (2013) ("Regulatory capture is an idea at the center of virtually any discussion of the appropriate balance between Congress and administrative agencies.").

304. *Cf.* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2001) (arguing that investment in homes drives local politics).

305. Olivier Sylvain, *Broadband Localism*, 73 OHIO ST. L.J. 795, 795 (2012).

306. *Id.* at 813 (listing the nineteen states where local governments face restrictions in providing local broadband services).

This is just one example of how a standard, long-standing debate in the discourse on administrative law refracts differently when situated in an institutional context far removed from the standard federal paradigm. Many other core debates—about judicial review, the balance of powers, procedural legislation and executive oversight, among others—will similarly yield new insights from institutional variety.

2. *Unifying Administrative Law "All the Way Down"*

Although this Article has emphasized contrasts with the federal administrative paradigm in order to highlight what is distinctly local, there is also clearly a fair amount of conceptual (and doctrinal) continuity across vertical levels of administration on certain irreducible features of the nature of the judicial-agency relationship. Certain principles of rationality and justification as well as procedural norms of notice and the opportunity to participate are inherent in the legal nature of administration. The fine-grained details may look different at the federal, state, and local level, but these principles remain defining features of agency action. Which neighbors get notice of a hearing for a special exception before a board of zoning appeal may be very different than the audience for a notice of proposed rulemaking by the EPA to set national air quality standards. But the idea that a party impacted by an agency action ought to have the chance to weigh in on that action in some form emerges from the same kernel.

There is value in drawing on the variety of structures in localities to think anew about how a variety of institutions—agencies, legislatures, and courts—might do things differently at the federal and state levels, constitutional constraints permitting. Unifying administrative law all the way down to the local level can thus redound to the benefit of legal scholarship on commonalities as well as variations in administrative contexts. As noted at the outset, scholars have done—and continue to do—valuable work that explores administrative law at the state level.[307] That scholarship is instructive as a mid-point between the federal and the local, highlighting some features of state structure and practice that can fruitfully suggest avenues of inquiry at the much more complex sub-state level.[308] That work has been done well, but has not had as much influence as it should on the broader discourse of administrative law. Adding the layer of local administration will hopefully lead back up to the state level to foster a more vigorous dialogue for administrative law scholars who want to con-

307. *See supra* note 6 and accompanying text.

308. Variations in electoral mechanisms for executive branch agents is one example. *See supra* Section III.B.

front long-standing jurisprudential and theoretical questions that have settled into too much of a stasis at the federal level.

C. Toward an Agenda Moving Forward

This Article's exploration of local agencies only skims the surface of a significant and largely unexplored body of administrative practice and jurisprudence reviewing that practice. The Article sets a clear agenda for further work in local administrative law, but there are some particular questions of local agency context and practice that bear particular further examination.

As a threshold matter, if administrative law addresses realms beyond judicial review,[309] it is well worth exploring in more detail whether individual, specific features of local-governmental structure have discernible consequences for agency authority, process, and policymaking that do not lead to litigation.[310] Empirically, for example, do local governments with limited or no separation of powers generate different agency practices, regardless of the reviewing court, than local governments with strong mayors? Does the extent of privatization in any local government have an impact on those administrative structures that remain public? Do local legislatures behave differently in delegating authority to local agencies that are more or less engaged with the community? As noted above, there is an emerging scholarship on distinctly "local" courts within state court systems.[311] Do such courts identifiably vary in their approach to reviewing "their" local agencies? There are many questions about the intersection between particular aspects of local-governmental structure, the work of local agencies, and patterns in the jurisprudence that this Article's framework can help bring to the surface, and these questions bear further examination.[312]

Another vein of future research will be detailing the jurisprudence of particular administrative regimes by specific jurisdiction or by substantive area. An assumption of this Article has been that, as with federal administrative law, a

309. *See supra* notes 212-213 and accompanying text.

310. After all, debates about questions such as the nature of executive oversight of agencies and other individual strands of the structure of administration at the federal level seem as lively as ever. *Compare* Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2045-46 (2015) (discussing the procedural instabilities created by OIRA's "unrestricted and nontransparent opportunities for political oversight and editing of agency technical analyses"), *with* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1840 (2013) (detailing the benefits of OIRA review of agency decision making).

311. *See supra* note 215 and accompanying text.

312. There are a variety of specific administrative doctrines that could be explored at the local level as well. For example, should we understand the finality of agency action that allows judicial review differently at the local level than we do at the federal level?

localist administrative jurisprudence should begin on a transsubstantive basis. Additionally, the Article has assumed that an appropriate starting point is also transjurisdictional — factors that might be theoretically relevant to understanding local administrative praxis are not unique to California, or Missouri, or Maine (let alone to larger or smaller local governments, as a conceptual matter).[313]

Those assumptions, however, are only starting points. One question, then, is whether particular domains of local agency action validly yield meaningful procedural differences that are substantively grounded. Do the dictates, for example, of educational equity demand certain norms of participation that may not be as salient in the arena of, say, land-use regulation? Does the greater degree of federal funding in certain areas of social welfare policy change the terms of procedural fairness that prevail in those areas compared to relatively locally funded services, such as infrastructure? Does the scale of certain regulatory arenas, such as the regionalism evident in clean air policy, militate in favor of certain administrative structures and procedures? Similarly, state-level variation surely matters in practice, and individual states and localities are worthy of in-depth examination across administrative contexts. These, and any number of similar questions, are best answered from a baseline that recognizes certain overarching features of local administrative law, so as to understand whether and why particular idiosyncratic administrative norms make sense.

Finally, this Article's working hypothesis about what is significant about local administrative law can serve as an invitation for engagement with those strands of positive political theory and economics that examine the consequences of specific institutional structures.[314] Some of the work of translation to those discourses is inherent in this Article's proposed jurisprudential framework, of course, but scholars of local government in cognate fields can build on its structural-doctrinal insights to inform work on government form, political process, local democracy, and legitimacy.

CONCLUSION

If, as T.S. Eliot wrote, "the end of all our exploring / [w]ill be to arrive where we started / [a]nd know the place for the first time,"[315] we can now see local governance through a new lens. The jurisprudence of the administrative

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313. On the question of the scale of local governance (as opposed to specific state-level variation), see *supra* Sections III.A and IV.A.

314. *Cf.* Schleicher, *No Partisan Competition*, *supra* note 41 (exploring reasons for the lack of partisan competition in local legislative elections).

315. T.S. ELIOT, *Little Gidding*, *in* COLLECTED POEMS 1909-1962, at 214, 222 (1974).

city-state rightly shares many foundational concerns with its more familiar counterpart in federal (and state) administrative law, most notably a deep focus on bureaucratic legitimacy, primarily through procedural protections and the calibration of the appropriate standard of judicial review. But courts and scholars must begin a more careful examination of what distinguishes administration as practiced by cities, suburbs, counties, towns, and other local governments. In that domain, we see a wide array of governmental structures, agencies that often operate with relatively little procedural formality, a blending of public and private, and agency expertise that can be grounded less in technical knowledge and more in local experience. These are by no means the only salient factors that might shape local administrative law, but they can frame a discourse that can be refined as courts take a more self-conscious approach to the endeavor of reviewing local administration and scholars consider the broader implications of adding the local to the discourse of the administrative state. That evolving exercise will shed new light on administrative law while opening a fundamentally new window into the work of the level of government closest to our daily lives.