

THE (LOCAL) PROSECUTOR

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The rise of the reform prosecutor has led to a backlash. Many states have sought to circumvent the power of reform prosecutors, others to sanction them, and some to replace them with unelected appointees. These efforts have been met with resistance and, in some instances, with legal challenges. Resolving those challenges may prove difficult because local prosecutors straddle three distinct axes within state governments: the horizontal divide between its branches, the vertical divide between the state government and its local subdivisions, and the constitutional divide between constitutional and statutory offices. This Essay exposes the significant state variation in the legal classification of prosecutors along these divides, and it explains how that variation not only complicates the legal status of prosecutors within any particular state, but also prevents the formation of a shared understanding of what role the local prosecutor plays in state government. Such an understanding is of increasing importance as the enormous discretion delegated to prosecutors and the deepening partisan divides within states suggest that intense battles over the role of the prosecutor are likely to continue.

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INTRODUCTION

A battle is brewing over the office of the local prosecutor.¹ Prosecutors have long occupied a central role in the criminal justice system.² But in recent years, they have also become a flashpoint in national debates over criminal justice reform. On the one hand, a growing number of prosecutors have run for office on platforms of reform, promising to use the power of their office in less punitive ways.³ On the other hand, efforts to limit or circumvent prosecutorial discretion are escalating at the state level, including a groundswell of bills aimed at curtailing the authority of locally elected prosecutors or replacing them with state appointees.⁴ Both the election of reform candidates and the state-level pushback have generated significant national attention.⁵ As a result, the local prosecutor has become a controversial and sometimes polarizing actor.

The debate thus far has centered on the wisdom and legality of these developments. Can prosecutors establish policies of categorical nonenforcement, and should they?⁶ Should state officials restrain or

1. In this Essay, we use the term “local prosecutor” to refer to the official who is charged with the primary responsibility to bring felony charges in a clearly defined geographic area within a state. This definition excludes prosecutors with statewide jurisdiction, such as attorneys general, as well as prosecutors who bring only misdemeanor or municipal code violation prosecutions, such as city attorneys. *See* Carissa B. Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1549 (2020) (adopting the same terminology).

2. *See* Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 741 (1996).

3. The precise terms of these promises differ—including promises to seek cash bail less often, charge fewer juvenile defendants as adults, and even decline charges under certain circumstances—but they are all aimed at reducing the footprint of the criminal justice system. *See infra* notes 18–20.

4. *See infra* Section I.B.

5. *See, e.g.*, David Weigel, *Down the Ballot, Liberal Reformers Take Over the Criminal Justice System*, WASH. POST (Sept. 5, 2018, 6:17 PM), <https://www.washingtonpost.com/politics/2018/09/05/down-ballot-liberal-reformers-take-over-criminal-justice-system/>; J. David Goodman, *With an Array of Tactics, Conservatives Seek to Oust Progressive Prosecutors*, N.Y. TIMES (Aug. 12, 2023), <https://www.nytimes.com/2023/08/12/us/conservatives-progressive-district-attorneys.html>.

6. *See, e.g.*, Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1252–53 (2011); W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 175 (2021); Zachary S. Price, *Faithful Execution in the Fifty States*, 57 GA. L. REV. 651, 657–58 (2023).

sanction how prosecutorial discretion is exercised, and in what manner?⁷ On both sides then, the focus is on what local prosecutors do. But largely overlooked is a more basic question: what exactly *is* the office of the local prosecutor? Are they state officials that serve the executive branch, or judicial officers under the auspices of the court system? Are they state officers assigned to a specific local jurisdiction, or are they local officials who have been delegated the authority of the state? Do they possess constitutional authority outside of the reach of the state legislature, or are their powers entirely defined by state statutes? Everyone seems to agree that the role of the local prosecutor is changing—either because of the actions of the prosecutors themselves or the escalating state response. Yet there is little agreement—and indeed little clarity—surrounding what exactly they are changing from.

This is not just an academic question. Rather, we believe it is central to assessing the escalating battles over the prosecutors. Partisan differences may be driving much of the conflict. But the underlying positions in the debate revolve around competing visions of the prosecutor's role in state government. In defending their policies and actions, local prosecutors emphasize the constitutional standing of their office and assert that their primary accountability is to the local electorate.⁸ In justifying their restrictions, state officials construe local prosecutors as ordinary state officials subject to legal power of the state legislature and the supervisory authority of executive officers.⁹ Both sides assert a different view of the local prosecutor's standing in the structure of the state. As the legal battle over prosecutors unfolds, some resolution of this question seems unavoidable.

But if this basic question—what is the local prosecutor?—looms beneath the battle, then the likelihood of a simple resolution seems remote. That is because neither law nor history provides a clear answer—or even a single answer—to this basic question. Local prosecutors, we argue, straddle many of the traditional divides in state government: executive and judicial, state and local, constitutional and statutory. Moreover, classifications tend to be volatile, sometimes varying tremendously between states and across time. This does not mean that answers cannot be provided for a particular state at a specific time. But it does suggest a national conversation on local prosecutors, especially one premised on a nationwide understanding of their role, will be of limited utility. At the same time, given the partisan nature of these battles

7. See Tyler Q. Yeargain, Comment, *Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials*, 68 EMORY L.J. 95, 99 (2018).

8. See *infra* notes 68–71.

9. See *infra* notes 63–64 and accompanying text.

and the immense discretion that prosecutors enjoy, we doubt that any political resolutions today will necessarily survive the partisan battles of tomorrow.

In outlining the conceptual uncertainty of local prosecutors, we do not offer any simple prescriptions about how the local prosecutor *should* be conceptualized. Indeed, we are unconvinced that there is an inherently correct classification. Instead, we offer some thoughts about why these disputes are occurring, pointing to excessive delegations of discretion to prosecutors over the past few decades and a recent deepening of partisan divides within states. Moreover, we suggest that these disputes are fraught in large part because a baseline conceptualization of the local prosecutor is lacking. It may be that resolving today's debates over what local prosecutors are *doing* will require us to arrive at a consensus on what they *are*. Or, it may be that the longstanding disagreements about what prosecutors *are* can be attributed to the inevitable disputes that arise with respect to what they *do*. In either case, our point is to identify and explore the ambiguity surrounding the office of the local prosecutor.

This Essay proceeds in three parts. Part I describes recent developments—specifically the rise of the “reform prosecutors”¹⁰ and the three different forms of state backlash we have seen in response. It also provides examples of how classic legal frameworks—the separation of powers, the distinction between state and local governments, and the interplay of constitutional provisions and statutes—have appeared in the battles over local prosecutors.

Part II outlines how the various prosecutorial preemption efforts are based on different underlying assumptions about the legal standing of the local prosecutors. In so doing, this Part reveals the uncertain state of the law with respect to each of these assumptions.

Part III discusses how excessive delegations by legislatures to prosecutors and deepening partisan divides have contributed to the current battles. Indeed, we believe that the combination of these factors

10. We use the term “reform prosecutor” in this Essay, rather than “progressive prosecutor,” because some of the most high-profile members of the movement have rejected the label “progressive” and because there are disagreements about which prosecutors’ policies are sufficiently progressive to deserve the label. *See, e.g.*, Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707, 711 (2020) (“Kim Foxx, speaking at this Symposium, stressed that she does not see herself as a progressive prosecutor.”); Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, 119 MICH. L. REV. 1365, 1372–73 (2021) (reviewing EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* (2019)). *See also* Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1416–17 (2021) (discussing the lack of agreement about the meaning of the term “progressive prosecutor”).

is largely responsible for the present turmoil in the states. Part III then explains why these factors and the ambiguity discussed in Part II indicate that we are unlikely to arrive at a national resolution about the proper role of the local prosecutor, and that any resolutions in particular states may not prove durable.

I. REFORM PROSECUTORS AND STATE BACKLASH

A push for criminal justice reform in the early 2010s thrust local prosecutors into the national spotlight.¹¹ As reform-oriented candidates began to win elections and to implement new policies, a backlash against those policies developed. This Part briefly describes the rise of “reform” prosecutors and the emerging state backlash. In particular, it classifies that backlash as taking three different forms: circumvention, sanctions, and takeovers. Finally, it catalogs the role that various legal frameworks have played in the battles between reform prosecutors and their antagonists.

A. *The New Reform Prosecutors*

Everyone seems to be talking about prosecutors. Local prosecutors have long sought the public’s attention, either in hopes of winning reelection or in their pursuit of higher office. But in recent years, an increasing number of prosecutors have become focus of *national* attention: Alvin Bragg in New York,¹² Kim Foxx in Chicago,¹³ Aramis

11. See, e.g., Daniel Marans, *Black Activist Starts Group that Aims to Elect Progressive Prosecutors*, HUFFINGTON POST (Feb. 15, 2018, 1:35 PM), https://www.huffingtonpost.com/entry/black-activist-elect-progressive-prosecutors_us_5a85b64ee4b0058d55670e4f [https://perma.cc/C2AJ-LCE6]; Matt Ferner, *George Soros, Progressive Groups to Spend Millions to Elect Reformist Prosecutors*, HUFFINGTON POST (May 12, 2018, 7:00 AM), https://www.huffpost.com/entry/george-soros-prosecutors-reform_n_5af2100ae4b0a0d601e76f06 [https://perma.cc/4GWX-HEG3].

12. See Ty Roush, *Who Is Alvin Bragg? NYC Prosecutor Who May Charge Trump Has Gone After Bannon, Weinstein, NYPD*, FORBES (Mar. 18, 2023, 3:25 PM), <https://www.forbes.com/sites/tyleroush/2023/03/18/who-is-alvin-bragg-nyc-prosecutor-who-may-charge-trump-has-gone-after-bannon-weinstein-nypd/amp/> [https://perma.cc/8BEZ-AKTG]; Corinne Ramey & James Fanelli, *Trump Indictment Places Manhattan DA Alvin Bragg in Spotlight*, WALL ST. J. (Mar. 30, 2023, 6:56 PM), <https://www.wsj.com/articles/trump-probe-places-manhattan-d-a-alvin-bragg-in-spotlight-8bf038bb>.

13. See Leon Neyfakh, *Big Wins for Black Lives Matter*, SLATE (Mar. 16, 2016, 11:01 AM), <https://slate.com/news-and-politics/2016/03/the-prosecutors-in-the-tamir-rice-and-laquan-mcdonald-cases-lose-their-primary-races.html> [https://perma.cc/9R33-EPPJ]; Curtis Black, *Where Does Criminal Justice Reform Stand One Year After Kim Foxx Elected?*, CHI. REP. (Dec. 7, 2017),

Ayala¹⁴ and Andrew Warren in Florida,¹⁵ Larry Krasner in Philadelphia,¹⁶ and Chesa Boudin in San Francisco.¹⁷

One thing that ties these prosecutors together is their connection to national movements for criminal justice reform. In recent years, public discussion has begun to focus on the office of the local prosecutor as a vehicle for reform. As a result, reform organizations have begun to endorse and bankroll candidates who promise to pursue less aggressive enforcement tactics or even decarceral policies.¹⁸ Although the idea of

<http://www.chicagoreporter.com/where-does-criminal-justice-reform-stand-one-year-after-kim-foxx-elected/> [https://perma.cc/9X77-56LA].

14. See Jordan Smith, *The Power to Kill: What Happens When a Reform Prosecutor Stands Up to the Death Penalty*, INTERCEPT (Dec. 3, 2019, 8:31 AM), <https://theintercept.com/2019/12/03/death-penalty-reform-prosecutors/> [https://perma.cc/92EH-BL8V].

15. See *Action Needed: Andrew Warren to Chair Democrats' New Criminal Justice Reform Task Force*, FLA. ACTION COMM. (Sept. 21, 2021), <https://floridaactioncommittee.org/call-to-action-andrew-warren-to-chair-democrats-new-criminal-justice-reform-task-force/> [https://perma.cc/6JJ2-JK7K].

16. See Jamil Smith, “Progressive Prosecutors” Are Working Within the System to Change It. How Is That Going?, VOX (July 30, 2021, 12:00 PM), <https://www.vox.com/platform/amp/2021/7/30/22600669/larry-krasner-philadelphia-reform-prosecutors-crime> [https://perma.cc/K67K-XBN5]; *A Conversation with Larry Krasner on Criminal Justice Reform*, INTERCEPT, (Oct. 28, 2021, 1:43 PM), <https://theintercept.com/2021/10/28/larry-krasner-philadelphia-criminal-justice-reform/> [https://perma.cc/NQ2M-KJ5M]; Chris Palmer, Julie Shaw & Mensah M. Dean, *Krasner Dismisses 31 from Philly DA's Office in Dramatic First-Week Shakeup*, PHILA. INQUIRER (Jan. 5, 2018, 12:29 PM), <http://www.philly.com/philly/news/crime/larry-krasner-philly-da-firing-prosecutors-20180105.html>; Mensah M. Dean, *DA Krasner on Lack of Charges in Police Shootings: 'This Ain't Fair, This Is Biased,'* PHILA. INQUIRER (Jan. 12, 2018, 1:03 PM), <http://www.philly.com/philly/news/crime/da-krasner-on-lack-of-charges-in-police-shootings-this-aint-fair-this-is-a-bias-20180112.html>.

17. See *The Future of Police Reform: S.F. DA Chesa Boudin and Rep. Ayanna Pressley*, COMMONWEALTH CLUB (July 23, 2020), <https://www.commonwealthclub.org/events/2020-07-23/future-police-reform-sf-da-chesa-boudin-and-rep-ayanna-pressley> [https://perma.cc/JDF2-PY8N].

18. See NICOLE PORTER, SENT’G PROJECT, TOP TRENDS IN STATE CRIMINAL JUSTICE REFORM, 2018 1 (Jan. 2019) (discussing recent trends in state-level reform “designed to reduce the scale of incarceration”); Press Release, ACLU, 91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds (Nov. 16, 2017, 10:15 AM), <https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> [https://perma.cc/2NC6-CUE3]. See also Jennifer Gonnerman, *Tiffany Cabán's Rebel Campaign in Queens*, NEW YORKER (June 4, 2019), <https://www.newyorker.com/news/news-desk/tiffany-caban-the-public-defender-running-for-queens-district-attorney-and-her-feminist-coalition> (describing how Tiffany Cabán, Queens District Attorney candidate, campaigned not just as a “progressive prosecutor,” but as a “decarceral prosecutor”).

prosecutors working towards reform is not necessarily new,¹⁹ the political salience is. Major media outlets covered these elections, referring to these candidates as a national movement of “reform prosecutors” or “progressive prosecutors.”²⁰

Of course, media coverage of these elections looked different because these candidates *were* different. Rather than appeals based on experience or endorsements,²¹ reform prosecutors campaigned on specific policy platforms.²² Instead of more familiar promises to “get tough on crime,” they vowed to incarcerate less.²³ More importantly, they expressed these commitments with nonprosecution platforms—making explicit policies that were traditionally set outside of the public’s view,²⁴ or decided on a case-by-case basis.²⁵ For example, when Rachael Rollins won the Democratic nomination to be the local prosecutor in Boston, she released a list of crimes that, if elected, she would not prosecute.²⁶ The list included disorderly conduct, shoplifting, some drug possession charges, and certain other low-level, nonviolent offenses.²⁷

19. See Jeffrey Toobin, *The Milwaukee Experiment*, NEW YORKER (May 4, 2015), <https://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment> (profiling Milwaukee District Attorney John Chisholm).

20. See Dylan Hayre, *How to Reform Criminal Justice, When Prosecutors Hold the Power*, WBUR: COGNOSCENTI (July 19, 2017), <http://www.wbur.org/cognoscenti/2017/07/19/prosecutors-reform-criminal-justice-dylan-hayre> [<https://perma.cc/XM53-EBWC>]; Meg Reiss, *America’s New Breed of Prosecutors*, CRIME REP. (July 24, 2017), <https://thecrimereport.org/2017/07/24/americas-new-breed-of-prosecutors/> [<https://perma.cc/ET85-6B5S>].

21. See Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 602–03 (2014) (providing empirical information about the campaign rhetoric of pre-progressive campaigns).

22. See Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 748 (2020) (identifying this difference in campaign tactics).

23. See Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 42–55 (2017).

24. See Lauren M. Ouziel, *Prosecution in Public, Prosecution in Private*, 97 NOTRE DAME L. REV. 1071, 1084–107 (2022).

25. Green & Roiphe, *supra* note 22, at 754.

26. Maria Cramer, *DA Candidate Rachael Rollins Hailed Nationally, but Locally Her Plan Not to Prosecute Petty Crimes Alarms Some*, BOS. GLOBE (Sept. 12, 2018, 9:46 PM), <https://www.bostonglobe.com/metro/2018/09/12/candidate-ailed-nationally-but-locally-her-plan-not-prosecute-petty-crimes-alarms-some/pyQX8MT4iWpyJ8XMi6SsFO/story.html>.

27. Jamila Hodge & Seleeke Flingai, *What Happened When Boston Stopped Prosecuting Nonviolent Crimes*, VERA (Apr. 2, 2021), <https://www.vera.org/news/what-happened-when-boston-stopped-prosecuting-nonviolent-crimes> [<https://perma.cc/J26K-M5PB>].

As these candidates were elected, they began not only to implement those policies,²⁸ but also to speak out against various conservative policies enacted by state legislatures. Working through national organizations such as Fair and Just Prosecution, reform prosecutors issued joint statements pledging to work toward the elimination of the death penalty,²⁹ as well as condemning various laws including those that criminalize transgender healthcare,³⁰ prohibit abortion,³¹ and restrict voting rights.³² In making these statements, reform prosecutors took politically progressive stances on a number of hotly contested political issues, signaling that they would use their discretion to further those progressive goals. Put differently, reform prosecutors eagerly waded into political debates and, more generally, behaved as political actors.³³

B. The State Backlash

Unsurprisingly, the rise of reform prosecutors has not gone unnoticed. In fact, a state backlash ensued. Since 2018, more than thirty-four bills have been introduced in at least sixteen states seeking to undermine the authority and discretion of local prosecutors.³⁴ At the same

28. *See id.*

29. *See* Fair & Just Prosecution, Joint Statement from Elected Prosecutors Pledging to Work Towards the Elimination of the Death Penalty (Mar. 3, 2022), <https://fairandjustprosecution.org/wp-content/uploads/2022/02/FJP-Death-Penalty-Joint-Statement-2022.pdf> [<https://perma.cc/M3A4-89NN>].

30. *See* Fair & Just Prosecution, Joint Statement from Elected Prosecutors and Law Enforcement Leaders Condemning the Criminalization of Transgender People and Gender-Affirming Healthcare (May 9, 2023), <https://www.fairandjustprosecution.org/staging/wp-content/uploads/2021/06/FJP-Trans-Criminalization-Joint-Statement.pdf> [<https://perma.cc/NWG8-9TY8>].

31. *See* Fair & Just Prosecution, Joint Statement from Elected Prosecutors, (June 24, 2022), <https://fairandjustprosecution.org/wp-content/uploads/2022/06/FJP-Post-Dobbs-Abortion-Joint-Statement.pdf> [<https://perma.cc/34B5-JHHM>].

32. *See* Fair & Just Prosecution, Joint Statement from Elected Prosecutors and Law Enforcement Leaders: Newly-Enacted Voting Restrictions and Criminal Penalties Put Our Democracy at Risk—We Must Act Now to Protect the Right to Vote (June 2021), <https://www.fairandjustprosecution.org/staging/wp-content/uploads/2021/06/FJP-Voting-Rights-Joint-Statement-June-2021.pdf> [<https://perma.cc/2K6T-JSAT>].

33. To be clear, there is a long tradition of prosecutors behaving as political actors. *See generally* Carissa Byrne Hessick, Ronald F. Wright & Jessica Pishko, *The Prosecutor Lobby*, 80 WASH. & LEE L. REV. 143, 167–68 (2023) (recounting the political science literature documenting prosecutor lobbying).

34. A report issued in the beginning of 2023 documented “at least 28 preemption bills [that] have been proposed in 16 states to undermine anti-carceral uses of prosecutorial discretion” in the “past three state legislative sessions.” JORGE CAMACHO, NICHOLAS GOLDROSEN, RICK SU & MARISSA ROY, LOC. SOLS. SUPPORT CTR., PREEMPTING PROGRESS: STATES TAKE AIM AT LOCAL PROSECUTORS 3 (2023), <https://static1.squarespace.com/static/5ce4377caeb1ce00013a02fd/t/63cf18da2a1300367>

time, governors have spoken out and taken action—from executive orders that circumvent prosecutorial discretion³⁵ to efforts to remove specific prosecutors from office.³⁶

State responses generally fall into three categories: circumvention, sanctions, and takeovers. The first—circumvention—seeks to bypass the discretion of local prosecutors by granting prosecutorial authority to other governmental actors.³⁷ A 2021 law passed by the Tennessee legislature, for example, authorizes the state attorney general to petition a court to appoint a special prosecutor if a local prosecutor declines to press charges.³⁸ Some state circumvention efforts elevate the role of local law enforcement agencies, as was the case in a pair of bills in Missouri and Virginia allowing sheriffs and police chiefs to refer cases directly to the state attorney general for prosecution.³⁹

In some instances, state circumvention is being pursued not simply to increase prosecutions, but rather to engineer specific partisan outcomes. Thus, when the Black Lives Matter protests erupted across the nation in the summer of 2020, state legislatures in Ohio,⁴⁰ Tennessee,⁴¹ and Pennsylvania⁴² proposed circumvention bills that narrowly applied to criminal charges related to protest activities. At the same time, South Carolina introduced a bill stripping local prosecutors of the ability to prosecute police conduct involving “great bodily injury” or “unexpected death”—granting exclusive jurisdiction over those cases to the state

cfec952/1674516705430/ProsecutorialDiscretion2023.pdf. Since then, at least six additional bills have been introduced in Georgia, Texas, Mississippi, and Missouri, which we document below. *See infra* notes 54–57.

35. *See* Jack Healy, *Arizona Governor Says Prosecutors Cannot Enforce Abortion Law*, N.Y. TIMES (June 23, 2023), <https://www.nytimes.com/2023/06/23/us/arizona-governor-prosecutors-abortion-law.html>.

36. *See* Alexandra Berzon & Ken Bensinger, *Inside Ron DeSantis’s Politicized Removal of an Elected Prosecutor*, N.Y. TIMES (Mar. 11, 2023), <https://www.nytimes.com/2023/03/11/us/politics/desantis-andrew-warren-liberal-prosecutor.html>; Lauren Sforza, *DeSantis Suspends Democratic State Attorney Monique Worrell for ‘Neglect of Duty,’* THE HILL (Aug. 9, 2023, 9:47 AM), <https://thehill.com/homenews/state-watch/4145142-desantis-suspends-democratic-state-attorney-for-neglect-of-duty/> [<https://perma.cc/YU35-G3N6>].

37. *See, e.g.*, S.B. 165, 122d Gen. Assemb., 2d Reg. Sess. (Ind. 2022).

38. H.B. 9071, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021).

39. H.B. 541, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019) (authorizing the attorney general to prosecute referrals from local law enforcement agencies if the local prosecutor declines to press charges); S.B. 563, 2022 Gen. Assemb., Reg. Sess. (Va. 2022) (same).

40. H.B. 723, 133d Gen. Assemb., Reg. Sess. (Ohio 2020).

41. H.B. 8004, 111th Gen. Assemb., 2d Extraordinary Sess. (Tenn. 2020).

42. S.B. 438, 2021 Gen. Assemb., Reg. Sess. (Pa. 2021).

attorney general instead.⁴³ Indeed, the South Carolina bill shows that circumvention is being pursued not only to bypass nonprosecution decisions, but also to limit a local prosecutor's ability to pursue charges. More recently, Tennessee passed a law stripping local district attorneys of their jurisdiction over postconviction challenges in capital murder cases, giving those cases to the state's attorney general.⁴⁴

To be clear, some states already had circumvention laws on their books before the rise of the reform prosecutor.⁴⁵ It was such a law that empowered Florida Governor Rick Scott to remove dozens of death penalty cases from Orlando prosecutor Aramis Ayala.⁴⁶

If circumvention seeks to undermine local prosecutorial discretion, another category of state responses seeks to sanction prosecutors directly for specific policies or practices. A law passed by Iowa in 2021, for example, withholds all state funds from a local prosecutor's office that has any policy limiting prosecutions, including "informal guidance" that "discourages the enforcement of state, local or municipal laws."⁴⁷ Civil and criminal penalties are also being considered. A bill in Illinois authorizes private suits against local prosecutors who categorically refuse to enforce specific laws,⁴⁸ while another in Minnesota authorizes criminal charges against any prosecutor who fails to prosecute every felony case in which there is probable cause.⁴⁹

Local prosecutors are also facing removal.⁵⁰ When Andrew Warren in Florida signed a pledge with ninety other prosecutors against criminal charges for abortion-related offenses, Governor Ron DeSantis suspended him from office for his "open defiance of the Florida legislature."⁵¹ More recently, DeSantis removed another prosecutor, Monique Worrell, claiming that she was not aggressive enough in charging cases and

43. S.B. 1241, 123d Gen. Assemb., Reg. Sess. (S.C. 2020).

44. See Sam Stockard, *Judge Overturns Republican-Backed Law Shifting Death Penalty Challenges to State Attorney General*, TENN. LOOKOUT (July 20, 2023, 6:01 AM), <https://tennesseelookout.com/2023/07/20/judge-overturns-republican-backed-law-shifting-death-penalty-challenges-to-state-attorney-general/> [https://perma.cc/G8NR-R6UX].

45. See Yeagain, *supra* note 7, at 108–09.

46. *Id.* at 109. Ayala was in the first wave of reform prosecutors elected in 2016. See *supra* notes 11–19.

47. S.F. 342, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); IOWA CODE § 27B.5 (2023).

48. H.B. 1914, 102d Gen. Assemb., Reg. Sess. (Ill. 2022).

49. S.F. 3478, 2022 Gen. Assemb., 92d. Sess. (Minn. 2022).

50. For an overview of how prosecutors may be removed in different states, see Meighan R. Parsh, Comment, *Dueling Discretion: The Imperfect Mechanisms for Removing Elected Prosecutors*, 102 N.C. L. REV. (forthcoming Jan. 2024).

51. Fla. Exec. Order No. 22-176 (Aug. 4, 2022), <https://www.flgov.com/wp-content/uploads/2022/08/Executive-Order-22-176.pdf>.

seeking sentencing enhancements.⁵² The Pennsylvania House of Representatives impeached Larry Krasner, the prosecutor for the County and City of Philadelphia.⁵³ Georgia recently enacted legislation that makes it easier to remove local prosecutors,⁵⁴ and Texas is considering similar measures.⁵⁵

Circumvention and sanctions redefine the traditional role of the local prosecutors. But perhaps even more radical are efforts to replace local prosecutors entirely. A growing number of states are opting for “takeovers” that would substitute locally elected prosecutors with ones appointed by the state. Even more concerning is that these takeovers narrowly target specific jurisdictions. In 2023, Mississippi created a new judicial district within the city of Jackson in which judges and prosecutors will be appointed by state officials.⁵⁶ Similarly, Missouri legislators pursued a bill that would authorize the governor to appoint a special prosecutor to take over the prosecution of several felony offenses in the City of St. Louis.⁵⁷ The bill, which was widely acknowledged to be an attack on St. Louis prosecutor Kimberly Gardner, led Gardner to resign,⁵⁸ stating that she did so in order to protect the ability of her

52. See Patricia Mazzei & Frances Robles, *DeSantis Suspends Second Elected Prosecutor in Florida*, N.Y. TIMES (Aug. 9, 2023), <https://www.nytimes.com/2023/08/09/us/desantis-orlando-prosecutor.html>.

53. See Keeanga-Yamahtta Taylor, *Larry Krasner and the Limits of “Law and Order,”* NEW YORKER (Nov. 16, 2022), <https://www.newyorker.com/news/the-political-scene/larry-krasner-and-the-limits-of-law-and-order>. The legislature eventually suspended impeachment proceedings after a state court ruled that the articles of that decision. See Chris Palmer, *GOP Lawmakers Want the Pa. Supreme Court to Reconsider the Case for Impeaching Philly DA Larry Krasner*, PHILA. INQUIRER (July 26, 2023, 4:27 PM), <https://www.inquirer.com/crime/pennsylvania-gop-legislators-supreme-court-overturn-ruling-philadelphia-da-20230726.html> [https://perma.cc/Y87P-HLL2].

54. H.B. 231, 158th Gen. Assemb., Reg. Sess. (Ga. 2023); S.B. 92, 158th Gen. Assemb., Reg. Sess. (Ga. 2023).

55. S.B. 648, 88th Leg., Reg. Sess. (Tex. 2023); S.B. 378, 88th Leg., Reg. Sess. (Tex. 2023); H.B. 1350, 88th Leg., Reg. Sess. (Tex. 2023); H.B. 125, 88th Leg., Reg. Sess. (Tex. 2023).

56. See H.R. 1020, 2023 Gen. Assemb., Reg. Sess. (Miss. 2023); Omar Jimenez & Devon M. Sayers, *Mississippi Governor Signs Bill Expanding State Control over Jackson’s Judicial System and Policing*, CNN (Apr. 21, 2023, 4:35 PM), <https://www.cnn.com/2023/04/21/us/jackson-mississippi-judicial-system/index.html> [https://perma.cc/7V6E-AGDF].

57. See H.B. 301, 102d Gen. Assemb., 1st Reg. Sess. (Mo. 2023); Rebecca Rivas, *House Passes Bill to Allow for State Takeover of Missouri Prosecutor Offices*, MO. INDEP. (Feb. 9, 2023, 11:14 AM), <https://missouriindependent.com/2023/02/09/house-passes-bill-to-allow-for-state-takeover-of-missouri-prosecutor-offices/> [https://perma.cc/XKK7-B92Z].

58. *Kim Gardner’s Resignation Letter*, ST. LOUIS AM., https://www.stlamerican.com/news/local_news/kim-gardners-resignation-

constituents to choose their local prosecutor going forward.⁵⁹ The fact that these takeover efforts are narrowly tailored to disenfranchise voters in Jackson and St. Louis—cities with large percentages of Black voters—has not been lost among residents.⁶⁰ There have also been similar efforts to deploy the state police in Jackson⁶¹ and take over the local police department in St. Louis.⁶²

In short, the rise of reform prosecutors has led many states to reconsider the basic structure of the local prosecutor’s office. Some of these efforts target specific prosecutors and pursue particular outcomes. Yet the manner in which states are responding is also reshaping the role and authority of local prosecutors more generally, as well as their relationship with the state and their constituents.

C. Framing the Local Prosecutor

The battles between local prosecutors and state officials revolve around competing views of the role and standing of their office. On the one hand, reform prosecutors emphasize their constitutional authority and local accountability. On the other hand, state efforts to circumvent or constrain local prosecutors portray them as infringing upon the separation of powers and failing to defer to superior state officials, such as the governor or the attorney general. Put differently, reform prosecutors and their antagonists have invoked different legal frameworks to buttress their side in the argument.

letter/article_ff115c4a-ead7-11ed-8ff1-0b3f1030927a.html [https://perma.cc/6B3V-TK32] (May 4, 2023).

59. See, e.g., Casey Tolan, *A Proposed ‘Takeover’ Has Sparked a Battle for Power in One of America’s Blackest Big Cities*, CNN (Feb. 27, 2023, 1:58 PM), <https://www.cnn.com/2023/02/27/us/jackson-mississippi-capitol-criminal-justice-invs/index.html> [https://perma.cc/QZ8M-FEQD].

60. *Id.*

61. See S.B. 2343, 2023 Gen. Assemb., Reg. Sess. (Miss. 2023); Jimenez & Sayers, *supra* note 56. In addition to Mississippi, Texas has considered a takeover of the Austin Police Department by the state’s Department of Public Safety. See Russell Falcon & Kevin Clark, *How Would a Texas DPS Takeover of Austin Police Department Work? Here’s a Breakdown*, KXAN AUSTIN, <https://www.kxan.com/news/texas-politics/gov-greg-abbott-moves-closer-to-transferring-control-of-austin-police-department-to-texas-dps/> [https://perma.cc/8VYG-LRJM] (Dec. 22, 2020, 5:25 PM).

62. See H.B. 702, 102d Gen. Assemb., 1st Reg. Sess. (Mo. 2023). The St. Louis Police Department had been taken over by the state in the nineteenth century and was only returned to local control in 2012. Jack Suntrup, *Missouri House Approves State Takeover of St. Louis Police Department; Senate Next*, ST. LOUIS POST-DISPATCH (Mar. 7, 2023), https://www.stltoday.com/news/local/metro/missouri-house-approves-state-takeover-of-st-louis-police-department-senate-next/article_3b33395e-a7cb-5f22-9773-710ec0d5c9fb.html [https://perma.cc/DXR8-DET9].

Perhaps the most visible of these frameworks is the separation of powers. In criticizing nonprosecution policies, state officials have argued that local prosecutors are usurping the power of the legislature to define criminal laws. For example, Governor DeSantis's executive order suspending Andrew Warren was replete with language about the separation of powers, namely that "policies of presumptive non-enforcement . . . [are] tantamount to rewriting Florida criminal law,"⁶³ and "usurp[] the exclusive role of the Florida Legislature to define criminal conduct."⁶⁴ Similarly, in upholding Governor Scott's decision to strip prosecutor Aramis Ayala of jurisdiction over death-eligible cases, the Florida Supreme Court too placed their decision on separation of powers grounds. "[A]dopting a 'blanket policy' against the imposition of the death penalty," the court held, was "tantamount to a functional veto of state law" and thus intruded on the power of the legislature.⁶⁵

For their part, local prosecutors have also invoked the separation of powers when pushing back against state actions. Several prosecutors in Georgia have filed a lawsuit challenging the constitutionality of that state's new commission to discipline and remove local prosecutors. They argue that, because the Georgia Constitution places district attorneys in the state's judicial branch, the commission violates the constitutional separation of powers.⁶⁶ In addition, some have pushed back against the idea that nonenforcement decisions implicate the legislative power. For example, the two justices who dissented in the Ayala case characterized Ayala's categorical decision not to seek the death penalty operated as an exercise in prosecutorial discretion, rather than an intrusion on legislative power.⁶⁷

Another framework that has appeared in the battles between local prosecutors and state officials is the distinction between state and local officials. When Tennessee's legislature passed legislation removing postconviction challenges to capital murder convictions from local district attorneys and assigning them to the state's attorney general,

63. See Fla. Exec. Order No. 22-176, at 4 (Aug. 4, 2022), <https://www.flgov.com/wp-content/uploads/2022/08/Executive-Order-22-176.pdf> (ordering the removal of a state attorney).

64. *Id.* at 7.

65. *Ayala v. Scott*, 224 So. 3d 755, 758 (Fla. 2017) (quoting *Johnson v. Pataki*, 691 N.E.2d 1002, 1007 (N.Y. 1997)).

66. Jeff Amy, *Georgia Prosecutors Are Suing to Strike Down a New State Law That Undermines Their Authority*, AP, <https://apnews.com/article/georgia-prosecutors-lawsuit-commission-0f9593225ac0a5caf4de8d457907ae71> [https://perma.cc/9HXY-QC6G] (Aug. 2, 2023, 12:32 PM).

67. *Ayala*, 224 So. 3d at 760–61 (Pariente, J., dissenting) (citing FLA. STAT. § 921.141(1) (2017)).

opponents criticized the bill as an “an unconstitutional measure stripping people of their ‘right to local control’ over death penalty cases.”⁶⁸ Similarly, Governor DeSantis’s removal of Orlando prosecutor Monique Worrell was described as “a complete slap in the face to Orange and Osceola County residents and another example of Governor DeSantis eroding our local control and democracy.”⁶⁹

The third framework that has featured in the debates over local prosecutors is the interplay between constitutions and statutes. In particular, local prosecutors are relying on the fact that their office appears in state constitutions when challenging state efforts to restrict them. Aramis Ayala, for example, invoked her status as a constitutional officer when challenging Governor Rick Scott’s decision to remove her.⁷⁰ Similarly, Nashville prosecutor Glenn Funk told reporters that “[p]rosecutorial discretion is part of our constitution” in response to proposed state legislation stripping him of jurisdiction over certain cases.⁷¹

It is, perhaps, unsurprising to see these three frameworks appear in the battles over local prosecutors. In invoking these frameworks, prosecutors and state officials are appealing to well-accepted general principles in order to win arguments about narrower and more contested questions of how to best address crime and punishment.⁷² In arguing that local prosecutors who refuse to enforce state laws prohibiting the personal possession of marijuana are violating the separation of powers, for example, state officials need not argue that those marijuana

68. See Stockard, *supra* note 44.

69. Brendan Farrington & Freida Frisaro, *Florida Gov. DeSantis Suspends Another Democratic Prosecutor as He Seeks GOP Presidential Nomination*, AP (Aug. 9, 2023, 6:03 PM), <https://apnews.com/article/desantis-suspends-florida-prosecutor-monique-worrell-45d2f5955b87fb5c0e817d9da9133393> [https://perma.cc/JEG5-WMTU].

70. See Emergency Non-Routine Petition for Writ of Quo Warranto at 3, *Ayala v. Scott*, 224 So. 3d 755 (2017) (SC17-653) (“Florida’s Constitution gives only the elected state attorney authority to decide how best to prosecute these cases. Scott’s intrusion into those prosecutions violates Florida’s Constitution, and this Court should not permit it.”).

71. Yue Stella Yu, *Tennessee Lawmaker Takes Aim at District Attorney Glenn Funk over State Law Enforcement*, TENNESSEAN, <https://www.tennessean.com/story/news/politics/2021/10/26/tennessee-lawmaker-aims-replace-da-glenn-funk-not-enforce-laws/8558177002/> [https://perma.cc/ALW8-7468] (Oct. 27, 2021, 3:15 PM).

72. The idea that disputes can and should be settled according to generally applicable principles, rather than according to policy preferences, is foundational to modern law. See, e.g., Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 107 (1998) (describing “the undesirability of having a rule, principle, or doctrine for one institution that is not applicable to another” as a “meta-doctrine”).

prohibitions are inherently correct. Instead, they can reframe their position as upholding important legal principles and avoid the question of whether the local prosecutor's policy is a better use of limited law enforcement resources.

Of course, invoking a legal framework does not necessarily settle the debate. Implicit in arguments about these frameworks is that the proponent has made the correct classification and that the framework provides an answer to the underlying substantive question. In the next Part, we outline the ways that local prosecutors straddle the traditional divides used in these three legal frameworks. As we show, the office resists simple classifications, thus limiting the utility of these frameworks in settling the debate over the power of the local prosecutor.

II. THE PROSECUTOR'S DILEMMA

As noted above, reform prosecutors have made claims about legal frameworks and structure to defend their decisions. Proponents of state efforts to impose restrictions on prosecutors have done the same. To the extent that challenges to reform prosecutor policies or the backlash against them end up in court, those legal disputes may ultimately turn on determinations of legal frameworks and structure. But despite the national conversation on local prosecutors taking place today, there is no clear, national answer to these structural questions about the office.

This Part explains that the local prosecutor straddles three distinct axes in the organization of state governments: (1) the horizontal divide between its branches; (2) the vertical divide between the state government and its local subdivisions; and (3) the constitutional divide between constitutional and statutory offices. Within the horizontal divide between branches of state governments, prosecutors are at times associated with the executive, and other times with the judiciary. Along the vertical divide between state and local governments, prosecutors are at times treated as state officials and other times as local ones. Even between constitutional and statutory offices, the role and authority of local prosecutors are at times defined by constitutional provisions and other times by state statutes.

A. Horizontal Separation of Powers: Executive vs. Judicial

One framework that repeatedly appears in disputes about reform prosecutors is the separation of powers. In particular, those who criticize reform prosecutors argue that nonprosecution policies violate the

separation of powers because they usurp the legislature's power.⁷³ This characterization is certainly debatable.⁷⁴ But even assuming that reform prosecutors are intruding upon the legislative branch in the way they are exercising prosecutorial discretion, which branch is doing the intruding? Are local prosecutors doing so on behalf of the executive branch? Or are the actions of reform prosecutors another example of judicial overreach? After all, separation of powers is about the balance between the three branches of government. And whether a specific action violates separation of powers principles usually requires an assessment of that action in relation to the powers accorded to each of the branches, especially those specifically granted to one to check the others.

Interestingly, when it comes to prosecutors, the answer to this question is far from clear. The prevailing assumption today appears to be that they are executive officers, and there is certainly support for this view. In Kentucky and Connecticut, for example, the office of the prosecutor is included in the constitutional section on the "Executive Department."⁷⁵ Another six states classify prosecutors as executive officers in case law.⁷⁶ In Alaska, Delaware, Massachusetts, New Hampshire, and South Carolina, prosecutors are addressed in statutory chapters concerning the attorney general.⁷⁷ Indeed, a New Hampshire statute explicitly states that prosecutors "shall be under the direction of the attorney general,"⁷⁸ while the Montana Supreme Court has held that "[n]o duty . . . escape[s] the supervisory powers of the attorney

73. See *supra* notes 63–65 and accompanying text.

74. See, e.g., Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 540–45 (2011).

75. KY. CONST. § 97; CONN. CONST. art. IV, § 27. This is also mirrored in their statutory classification. See KY. REV. STAT. § 15.725 (2023) (code section on prosecutors categorized under statutory title for "Executive Branch"); CONN. GEN. STAT. § 51-276 (code section on prosecutors classified in statutory title for "Courts," but explicitly stating that the "Division of Criminal Justice shall be an agency within the Executive Department").

76. See, e.g., *People v. Parmar*, 86 Cal. App. 4th 781, 797 (Cal. Ct. App. 2001); *People v. Goodspeed*, 22 Cal. App. 3d 690, 705 n.4 (Cal. Ct. App. 1972); *Yau v. Carden*, 23 Haw. 362, 367 (1916); *State v. Williamson*, 853 P.2d 56, 59 (Kan. 1993); *State v. Dedman*, 640 P.2d 1266, 1270 (Kan. 1982); *State v. Lykins*, 406 A.2d 289, 289 (Md. Ct. Spec. App. 1979); *State v. Andrews*, 165 N.W.2d 528, 532 (Minn. 1969); *State v. Langford*, 735 S.E.2d 471, 485 (S.C. 2012); *Pet. of Padget*, 678 P.2d 870, 871 (Wyo. 1984). The Washington Supreme Court also defines the prosecutors as "both a local elected official and an executive officer," which means they fall into either the executive classification here or the "local" classification we describe later. *State v. Rice*, 279 P.3d 849, 857–58 (Wash. 2012).

77. ALASKA STAT. ANN. § 44.23.020(b)(4) (2022); DEL. CODE ANN. tit. 29, § 29-2505; MASS. GEN. LAWS ch. 12, § 12 (2022); N.H. REV. STAT. ANN. § 7:34 (2022); S.C. CODE ANN. § 1-7-320 (2022)

78. N.H. REV. STAT. ANN. § 7:34 (2022).

general.”⁷⁹ Further support for the notion that prosecutors are executive officials can be drawn from the structure at the federal level, where prosecutors serve at the pleasure of the president and operate under the supervision of the attorney general. And although most local prosecutors today are not appointed by state executive officials like the governor or the attorney general,⁸⁰ in the past many were.⁸¹

Under this executive branch framework, prosecutors enforce the criminal laws adopted by the legislature, and they do so before members of the judiciary who adjudicate the cases. The role of the prosecutor is to apply those laws and policies to individual cases, and to do so on a case-by-case basis.⁸² Some view this executive branch role as largely ministerial in nature. Prosecutorial discretion, in this view, is limited to assessing the available evidence and whether that evidence is likely to result in a conviction; it does not contemplate the exercise of case-level discretion as an opportunity to second guess the policy judgments of the legislature.⁸³

But the view that prosecutors should be classified under the judicial branch is equally strong. In fact, far more states formally classify prosecutors as judicial officials than executive. Eighteen states make this classification as a matter of constitutional structure,⁸⁴ six in statutes,⁸⁵ and at least two in caselaw.⁸⁶ Formal classifications aside, the judicial nature

79. *State ex rel. Nolan v. Dist. Ct. of First Jud. Dist.*, 55 P. 916, 917 (Mont. 1899).

80. See Hessick & Morse, *supra* note 1, at 1548.

81. See Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1536–37 (2012). See also Earl H. De Long & Newman F. Baker, *The Prosecuting Attorney: Provisions of Law Organizing the Office*, 23 J. CRIM. L. & CRIMINOLOGY 926, 928–29 (1933) (“In Florida it is provided that the state attorney be appointed by the governor, with the advice and consent of the senate, and his term is set at four years.”).

82. *E.g.*, *Ayala v. Scott*, 224 So. 3d 755, 758–59 (Fla. 2017).

83. See Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 676 (2014).

84. ALA. CONST. art. VI, § 160(a); ARK. CONST. amend. 80, § 20; COLO. CONST. art. VI, § 13; FLA. CONST. art. V, § 17; GA. CONST. art. VI, § VIII; IDAHO CONST. art. V, § 18; ILL. CONST. art. VI, § 19; IND. CONST. art. 7, § 16; IOWA CONST. art. V, § 13; LA. CONST. art. V, § 26; MISS. CONST. art. VI, § 173; N.M. CONST. art. VI, § 24; N.C. CONST. art. IV, § 18; OR. CONST. art. VII, § 17; S.C. CONST. art. V, § 24; TENN. CONST. art. VI, § 5; TEX. CONST. art. V, § 21; UTAH CONST. art. VIII, § 16. In each of these states, the constitutional provision concerning prosecutors is located in an article concerning the judicial branch of the state government.

85. ALA. CODE § 12-17-184 (2022); ARK. CODE ANN. § 16-21-103 (2022); FLA. STAT. § 27.01 (2023); GA. CODE ANN. § 15-18-6 (2022); IND. CODE § 33-39-1-5 (2022); N.C. GEN. STAT. § 7A-61 (2022); OR. REV. STAT. § 8.610 (2022). These code sections are located in chapters and parts concerning the judiciary.

86. *State v. Wharfield*, 236 P. 862 (Idaho 1925); *State ex rel. Crawford v. Carr*, 17 Ohio Law Abs. 449, 450–51 (Ohio Ct. App. 1934).

of the prosecutorial office is also reflected in other provisions. Substitute prosecutors are appointed by the state supreme court in Utah⁸⁷ and Wisconsin.⁸⁸ In Maine, justices of the state supreme court decide the removal of a prosecutor.⁸⁹ Even in the federal system, where it seems uncontroversial to state that prosecutors are members of the executive branch, history suggests that classification was not always so clear.⁹⁰ For example, judges, rather than executive officials, prosecuted individuals involved with the Whiskey Rebellion of 1794.⁹¹

Framing prosecutors as judicial officers, rather than executive ones, is further supported by how the powers and protections of the office have traditionally been construed. On the matter of prosecutorial immunity, for example, courts often hold that prosecutors are “‘quasi-judicial’ in nature,”⁹² and thus have “the same immunity afforded judges when their duties are primarily *judicial*—the filing and vigorous prosecution of criminal charges.”⁹³ It is for this reason—namely that their activities are “intimately associated with the judicial phase of the criminal process”—that prosecutors are entitled to absolute immunity when “initiating a prosecution” and “presenting the State’s case.”⁹⁴

The association of prosecutors with the judiciary could provide a structural defense of categorical non-prosecution policies, rather than case-by-case evidentiary decisions. Judges have long been thought to possess the power to recognize affirmative criminal defenses, even when

87. UTAH CONST. art. VIII, § 16. *See also* MD. CONST. art. V, § 11 (specifying that judges shall appoint a prosecutor if there is a vacancy in the prosecutor’s office or if the prosecutor has been removed).

88. *State v. Peterson*, 218 N.W. 367, 368 (Wis. 1928).

89. ME. STAT. tit. 30-A, § 257 (2021). *See also* De Long & Baker, *supra* note 81, at 954 (“It is far more generally provided that the power of removal [of prosecuting attorneys] be given to the courts . . .”).

90. Indeed, the history of the federal model reveals more openness to federal prosecutors as judicial officers. Early drafts of the Judiciary Act of 1789, for example, vested the power to appoint the U.S. Attorney General in the Supreme Court, and the power to appoint United States Attorneys with the federal district courts. Stephanie A.J. Dangel, *Is Prosecution a Core Executive Function?* Morrison v. Olson and the Framers’ Intent, 99 YALE L.J. 1069, 1084–85 (1990).

91. *See id.* at 1087.

92. *Brown v. Dayton Hudson Corp.*, 314 N.W.2d 210, 213–14 (Minn. 1981).

93. *Blanton v. Barrick*, 258 N.W.2d 306, 308 (Iowa 1977) (emphasis added). *But see In re McDonald v. Goldstein*, 79 N.Y.S.2d 690, 693 (N.Y. App. Div. 1948) (“The District Attorney is a quasi-judicial officer. He is an officer of the court, but only to the extent that all attorneys are officers of the court. He is not a part of the County Court by virtue of his office. . . . He is not, therefore, endowed with any function of the County Court.”).

94. *Imbler v. Pachtman*, 424 U.S. 409, 430–31 (1976).

there is no statutory authority for those defenses.⁹⁵ Prosecutors' categorical nonenforcement policies are in the same vein—they create an exception for activity that has otherwise been deemed illegal by the legislature.

In showing how the local prosecutor can be understood—and indeed *is* understood—as both an executive and a judicial officer, our claim is not that one classification is superior to the other. Nor is our claim that placing prosecutors in the executive branch, rather than in the judicial branch, diminished their power. The U.S. Supreme Court, for example, has long held that federal prosecutors—who are deemed part of the executive branch—possess significant powers of nonenforcement.⁹⁶ Our point here is simply that the office has historically straddled these two branches in the separation of powers.⁹⁷

The fact that the office straddles two branches can help to explain the different forms that the backlash against reform prosecutors takes in different states. As noted earlier, some states are targeting local prosecutors with gubernatorial removal, special prosecutors appointed by the governor or attorney general, or direct replacement by the attorney

95. See, e.g., *Sorrells v. United States*, 287 U.S. 435, 443–52 (1932) (recognizing the affirmative defense of entrapment). See also *Brogan v. United States*, 522 U.S. 398, 406 (1998) (appearing to recognize an affirmative law enforcement defense based on a treatise, rather than statutory language).

96. See, e.g., *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (stating that “courts are ‘properly hesitant to examine the decision whether to prosecute’” in part out of “concern not to unnecessarily impair the performance of a core executive constitutional function”) (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (stating that “the decision of a prosecutor in the Executive Branch not to indict [is] a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed’”) (quoting U.S. CONST. art. II, § 3); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).

97. Joan Jacoby has explained this dual nature of the prosecutor's office in terms of an evolution of the office over time. She argues that the widespread adoption of elections in the selection of local prosecutors marked a new “separation of powers . . . that moved the prosecutor from the judicial branch of government to the executive.” Joan E. Jacoby, *The American Prosecutor: From Appointive to Elective Status*, PROSECUTOR, Sept.–Oct. 1997, at 25, 25. But whether the move from appointments to elections signified a move from the judiciary to the executive is complicated by the fact that, as Jacoby concedes, the transformation of judges, in those same states, from an appointed to an elected office occurred around the same time. See *id.* (“The position of the local judge changed from appointed to elected which directly helped make the office of the local prosecutor elective.”). See also Ellis, *supra* note 81, at 1531. In any event, even if Jacoby is correct that that the local prosecutor in America transitioned from a judicial office to an executive one, it appears that the transition was never complete.

general.⁹⁸ These actions are consistent with the view that prosecutors are part of the executive branch. The actions taken by the governor and the attorney general simply reflect the supervisory authority that they exercise over their subordinates within the executive branch. Other states remove local prosecutors by turning to the state judiciary. These include removal processes that run through the courts, or special removal proceedings employing judicial commissions, committees made up of judicial appointees, or special prosecutors appointed by judges.⁹⁹ These approaches seem to recognize that local prosecutors are, at the very least, quasi-judicial officials who cannot be sanctioned or removed by the executive branch alone.

At the same time, the traditional separation of powers raises questions about these restrictions on local prosecutors. If, for example, a local prosecutor is impinging on the power of the legislature, it makes little sense that the legislature would feel a removal power that can only be exercised by members of the executive would be sufficient to protect the legislature from overreach by other officials in the executive branch. The same could be said about removal procedures for prosecutors that run through the judicial branch. If the concern is overreach by prosecutors who are part of the judiciary, it hardly seems adequate for the legislature to protect itself from the judicial branch by empowering the courts, which are also part of the judicial branch.

Of course, as explained more fully below,¹⁰⁰ the motivation behind these removal efforts appears to be based more on the partisan makeup of the offices involved, rather than the specific branches where they are located. Thus, the question is not how to best protect one branch against encroachment by another, but rather how to best ensure that the state's dominant political party can maintain control over local prosecutors who have been elected by a political minority. In that case, ensuring that state-level officials can check local officials is all that matters. But if that is the case, then the separation of powers is not doing much work in the contemporary debate over prosecutors. Instead, it is providing a seemingly nonpartisan reason for state-level actors to countermand the wishes of local voters, but without actually ensuring that powers are separated.

98. See *supra* notes 50–59 and accompanying text.

99. See, e.g., N.C. GEN. STAT. § 7A-66 (2022); OHIO REV. CODE ANN. § 309.05 (West 2023).

100. See *infra* Section III.B.

B. Vertical Separation of Powers: State vs. Local

Uncertainty over where the prosecutor's office fits on the horizontal axis between government branches is further compounded by its indeterminate position along the vertical axis between the state government and its local subdivisions. Local prosecutors claim that they are acting on the mandate of the local community that elected them,¹⁰¹ and therefore they are obligated to represent their interests. From the state's perspective, restrictions are necessary and appropriate because local prosecutors are *state* officials, and thus should be beholden first and foremost to the interests and policies of the state government. The question then is: which view best describes the local prosecutor's role? Are they state agents assigned to serve in a particular local jurisdiction? Or are they local officials imbued with the authority of the state?

Constitutional and statutory classifications reveal no national consensus. As noted earlier, approximately twenty state constitutions classify prosecutors as state officials, either within the executive or judicial branch.¹⁰² At the same time, twelve state constitutions address prosecutors in constitutional sections on *local governments*, namely counties.¹⁰³ The picture is even more muddy when statutory classifications are taken into account, given that approximately twenty-three states classify prosecutors in code sections pertaining to counties.¹⁰⁴ Then there is Kansas, which in an interesting twist classifies some of its local prosecutors as state officials and others as county officials.¹⁰⁵

101. See *supra* notes 68–69 and accompanying text.

102. See *supra* notes 75, 84 and accompanying text.

103. See ARIZ. CONST. art. XII, § 3; CAL. CONST. art. XI, § 1b; MICH. CONST. art. VII, § 4; MONT. CONST. art. XI, § 3; NEV. CONST. art. 4, § 32 (classified under article for the “Legislative Department,” but section is titled “county officers”); N.H. CONST. pt. 2d, art. 71; OKLA. CONST. art. XVII, § 2; PA. CONST. art. IX, § 4; VA. CONST. art. VII, § 4; WASH. CONST. art. XI, § 5; W. VA. CONST. art. IX, § 1; WIS. CONST. art. VI, § 4, cl. 1.

104. ARIZ. REV. STAT. ANN. § 11-532 (2023); CAL. GOV'T CODE § 26500 (West 2023); HAW. REV. STAT. § 46-1.5 (2023); IDAHO CODE § 31-2601 (2022); 55 ILL. COMP. STAT. 5/3-9005 (2022); IOWA CODE §§ 331.751–.774 (2023); ME. STAT. tit. 30-A, §§ 251 to 257 (2021); MINN. STAT. § 388.051 (2022); MO. REV. STAT. § 56.010 (2022); MONT. CODE ANN. § 7-4-2712 (2021); NEB. REV. STAT. § 23-1201 (2023); NEV. REV. STAT. §§ 252.010–.190 (2022); N.Y. COUNTY LAW § 18-700 (2022); N.D. CENT. CODE § 11-16-01 (2023); OHIO REV. CODE ANN. §§ 309.01–.18 (West 2022); OKLA. STAT. tit. 19, § 215.16; 16 PA. CONS. STAT. § 1401 (2023); S.D. CODIFIED LAWS § 7-16-1 (2023); UTAH CODE ANN. § 17-18a-201 (West 2022); 24 VT. STAT. ANN. § 361 (2022); VA. CODE ANN. § 15.2-1627 (2023); WASH. REV. CODE § 36.27.020 (2022); W. VA. CODE § 7-4-1 (2022).

105. Six of the state's 105 counties elect “district attorneys,” while the other ninety-nine elect county attorneys. The former are considered state officials, while the

Formal classification aside, the organization and practices of the local prosecutor's office also provides mixed evidence. On the one hand, there is certainly support for the view that local prosecutors are state officials. Local prosecutors are not formally a part of any local government, be it a city or county. Nor do they file criminal charges on behalf of any particular local community, but instead "represent[] the sovereign power of the people of the state, by whose authority and in whose name all prosecutions must be conducted."¹⁰⁶ In this respect, local prosecutors are "local" only in the sense that they are state officials assigned to a particular jurisdiction within the state. After all, in many states they are cast explicitly as the "State's Attorney."¹⁰⁷ And even when other labels are used, such as district attorney, courts often explain that they are nevertheless "attorney of the state" who happens to serve "in a certain district."¹⁰⁸

On the other hand, the selection of local prosecutors provides strong support for their view as local officials. Prosecutors are elected in forty-five states, and in all those states on the basis of counties.¹⁰⁹ In twenty-eight states, one prosecutor is elected for each county.¹¹⁰ In the remaining states, local prosecutors are chosen by judicial districts (or circuits) that may contain more than one county, but still rely heavily on county boundaries to define jurisdictions.¹¹¹ With very few exceptions, states do not split counties in defining these districts.¹¹²

Election eligibility requirements and appointment practices also reflect the local nature of the office. In order to run for the office of prosecutor, a candidate must be an attorney in good standing, as well as a resident of the local community.¹¹³ When no candidate stands for election, local officials appoint someone to serve.¹¹⁴ And when the state provides an option between appointed or elected prosecutors, as is the case in Hawai'i and North Dakota, it is a local electorate that decides

latter are considered county officials. See KAN. STAT. ANN. §§ 19-701-724, 22a-101, 22a-107-09 (2022).

106. *Fleming v. Hance*, 94 P. 620, 622 (Cal. 1908).

107. See, e.g., FLA. CONST. art. V, § 17; ILL. CONST. art. VI, § 19.

108. *State v. Russell*, 53 N.W. 441, 442 (Wis. 1892).

109. Hessick & Morse, *supra* note 1, at 1549-50.

110. See *id.* at 1550.

111. See *id.* at 1549.

112. See *id.* at 1554.

113. See *id.* at 1575-76.

114. *Id.* at 1575.

between the two options.¹¹⁵ If they opt for appointments, it is the county officials that makes the selection.¹¹⁶

But the connection between local prosecutors and local governments does not just lie in the fact that they frequently share the same jurisdictional boundaries and are politically accountable to the same electorate. It can also be found in duties and responsibilities that local prosecutors and county governments owe to one another. Local prosecutors in twenty-three states serve as the attorney for the county on civil matters.¹¹⁷ In Arizona and North Dakota, for example, the local prosecutor is not just responsible for “all prosecutions for public offenses” on behalf of the state, they are also the attorney for the county on all civil matters, which includes “[d]efend[ing] all suits brought . . . against the county” and acting “as legal adviser of the board of county commissioners, attend[ing] the meetings thereof when required, and oppos[ing] all claims and actions presented against the county which are unjust or illegal.”¹¹⁸ What is more, it is often the county, and not the state, that is primarily responsible for the funding of the local prosecutor’s office. Though not formally a county department, the salaries and budget of the local prosecutors are commonly appropriated by the county board and from the county coffers.¹¹⁹

History also lends support to viewing prosecutors as local officials. During the colonial era, prosecutors that served the monarchy were often “considered instruments of local rather than central government” given

115. *Id.* at 1551.

116. N.D. CENT. CODE § 11-10-02.3 (2023); *Prosecuting Attorney*, MAUI CNTY. HAW., <https://www.mauicounty.gov/123/Prosecuting-Attorney> [https://perma.cc/C456-M39X].

117. CAL. GOV’T CODE §§ 26520, 26522–24, 26526 (West 2023); IOWA CODE 331.756 (2023); IDAHO CODE § 31-2604 (2022); 55 ILL. COMP. STAT. 5/3-9005 (2022); KAN. STAT. ANN. §§ 19-702, 19-704 (2023); LA. STAT. ANN. § 16:2 (2023); ME. STAT. tit 30-A, § 282 (2021); MICH. COMP. LAWS §§ 49.153, 49.155 (2021); MINN. STAT. § 388.051 (2022); MO. REV. STAT. § 56.070 (2022); MONT. CODE. ANN. § 7-4-2711 (2021); NEB. REV. STAT. § 23-1201 (2023); NEV. REV. STAT. §§ 252.110, 252.160 (2022); N.H. REV. STAT. ANN. § 7:6 (2022); N.M. STAT. ANN. § 36-1-18 (2022); N.D. CENT. CODE. § 11-16-01 (2023); OHIO REV. CODE. ANN. § 309.09 (West 2022); OKLA. STAT. tit. 19, §§ 63, 215.5 (2022); OR. REV. STAT. § 8.690 (2021); S.D. CODIFIED LAWS §§ 7-16-8 to -9 (2023); UTAH CODE ANN. §§ 17-18a-202, 17-18a-501 (2022); WASH. REV. CODE. § 36.27.020 (2022); W. VA. CODE. § 7-4-1 (2022).

118. N.D. CENT. CODE §§ 11-16-01(a), (e), (k) (2023); ARIZ. REV. STAT. ANN. §§ 11-532(A)(1), (4), (9) (2023). *See also Wilson v. County of Marshall*, 257 Ill. App. 220, 224 (1930) (“At common law, the prosecuting attorney has absolute control of criminal prosecutions. In civil actions, the duty of representing the county is likewise imposed upon him, unless imposed upon another by express statutory provision.”).

119. *See, e.g.*, N.D. CENT. CODE § 11-10-11 (2023). *See also De Long & Baker, supra* note 81 (“In almost all of the states where the prosecuting attorney is a county officer, his entire salary comes from the county treasury.”).

their ties to the county courts.¹²⁰ In the nineteenth century, even as the state court system became more centralized,¹²¹ most states preserved the local nature of the office by amending their state constitutions to empower local electorates to select their own prosecutors.¹²²

Interestingly, even when local prosecutors are characterized as state officials, it may not necessarily mean that they are officers within the state government. Rather, it may be based in part on the fact that all local governments are legally “creatures of the state.”¹²³ In *Singh v. Superior Court*,¹²⁴ for example, the California Court of Appeals reasoned that even if local prosecutors are county officers, “considering the nature and purposes of county governments, he is also in a sense a state officer, or, perhaps it would be more correct to say a part of a political organization which is itself an agent of the state.”¹²⁵ To be sure, this construction is useful, as was the case in *Singh*, in determining whether local prosecutors are considered an “executive officer of this state” for the purposes of a state anticorruption law.¹²⁶ But it raises the question of whether the local prosecutor is more appropriately viewed as county officials like sheriffs

120. Joan E. Jacoby, *The Emergence of Local Prosecutors*, PROSECUTOR, July–Aug. 1997, at 25, 27. Indeed, the 1704 Connecticut law, which is “generally recognized as creating the first permanent office of public prosecutor on a colony-wide basis,” directed that such prosecutor be appointed in “every count[ry] . . . by the count[ry] courts, to be [attorney] for the Queen.” Jack M. Kress, *Progress and Prosecution*, 423 ANNALS AM. ACAD. POL. & SOC. SCI. 99, 103 (1976) (emphasis added). The connection to counties may also explain their constitutional status, which we discuss below. As De Long and Baker argue:

It is usually a county office and this fact explains, perhaps, why the prosecutor is so often a constitutional officer. The county is the antique among our local governments, and constitutions tend to establish its officers more rigidly than those of any other local unit. It is also true that constitutions quite often set up the judicial system of the state, and possibly the constitutional dignity of the prosecuting attorney is attributable to the relation of his office to the courts. Again, it may be both reasons, for the county is often the unit of government upon which the machinery of justice is erected.

De Long & Baker, *supra* note 81, at 928.

121. See LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* 205–19 (2009).

122. See Ellis, *supra* note 81, at 1530.

123. *Coleman v. Miller*, 307 U.S. 433, 441 (1939). This is especially true for counties, which are often considered more closely tied to the state government than “municipal corporations” like cities. See Rick Su, *Democracy in Rural America*, 98 N.C. L. REV. 837, 861–62 (2020).

124. *Singh v. Super. Ct. ex rel. Glenn Cnty.*, 185 P. 985 (Cal. Dist. Ct. App. 1919).

125. *Id.* at 985–86.

126. *Id.* at 986.

and clerks—in other words, state officers that are nevertheless primarily accountable to the local electorate.

Ultimately, the answer to this question may not have a single answer. It may be that the office—at certain times or in certain respects—is sometimes a state office and sometimes a local office. The dual nature of the office is on full display in Section 1983 lawsuits. In those suits, courts often must confront the question whether prosecutors are state officers or local officers because while state governments enjoy sovereign immunity, local governments do not.¹²⁷ These cases tell us that prosecutors are, for some purposes, state actors and, for others, local actors. There are various factors that this caselaw points to, including funding, to determine whether a prosecutor is a state or local actor.¹²⁸ The caselaw is quite clear that the answer to the state or local official question depends on the state in question and is not necessarily settled by classifications in state statutes or the state constitution.¹²⁹ Multiple courts have held that, when deciding whether to bring charges, prosecutors act for the state and not their local government.¹³⁰ But when it comes to other decisions, they have been deemed local actors.¹³¹

Again, the point here is not to resolve the question of whether local prosecutors are better understood as state or local officials. Rather, it is to argue that this is another axis in the organization of state government that local prosecutors straddle.

To be sure, resolving this issue may not be strictly necessary in assessing the legality of state efforts to restrict or remove local prosecutors. Absent specific constitutional provisions, states are generally assumed to possess plenary authority over their local governments.¹³² Thus, even if local prosecutors are said to hold a local office, that does not mean such offices are free from state restrictions or

127. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978).

128. See, e.g., *McMillian v. Monroe County*, 520 U.S. 781, 790–92 (1997) (considering funding to determine whether sheriffs, when executing their law enforcement duties, act on behalf of the state or the county).

129. See *id.* at 784–86.

130. E.g., *Baez v. Hennessy*, 853 F.2d 73, 77 (2d Cir. 1988), *cert. denied*, 488 U.S. 1014 (1989) (“When prosecuting a criminal matter, a district attorney in New York State, acting in a quasi-judicial capacity, represents the State not the county.”); *Weiner v. San Diego County*, 210 F.3d 1025, 1028–31 (9th Cir. 2000) (holding that “a California district attorney is a state officer when deciding whether to prosecute an individual”).

131. See, e.g., *Goldstein v. City of Long Beach*, 715 F.3d 750, 755 (9th Cir. 2013) (holding that “California district attorneys act as local policymakers when adopting and implementing internal policies and procedures related to the use of jailhouse informants”).

132. See, e.g., GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 17–19 (1999) (discussing the expansive power that states have over cities).

mandates, especially those adopted by the legislature. Yet the fact that local prosecutors straddle the state-local divide does cast the reasoning for such restrictions in a different light. If the local prosecutor's office is primarily accountable to a local electorate, then reform prosecutors may be right in arguing that their policies simply reflect the will of that electorate in the manner directed by how their offices are structured by state law. In seeking to curb those policies, the state may be justified in arguing that reform prosecutors have gone too far. But that claim would also be one directed at the will of the local electorate as well as the prosecutor, and it would challenge the decentralized structure of most local prosecutor offices today.

The state-local divide may also explain some of the approaches that states have proposed in seeking to restrict local prosecutors. Indeed, many copy the same approaches that states have recently taken outside the criminal justice context to limit the authority of local governments and the political activities of local officials. For example, "punitive preemption" has become more popular in recent years as states have felt the need to impose penalties and sanctions upon local actors.¹³³ Such an approach accounts for the fact that although local governments are legal subdivisions of the state, they are not easily supervised nor directly accountable to state officials. The use of "punitive preemption" against local prosecutors seems to be based on the same logic—that even if local prosecutors are state officials, they operate more like local ones. Thus, circumvention efforts seek to sever the political accountability of local prosecutors to their electorate. Authorizing private causes of action against local prosecutors expands the limited supervisory capacity of the state government over the exercise of prosecutorial discretion. State takeovers seek to eliminate local prosecutors' offices entirely and to replace them more explicitly with a state office under the direct control of the state government.

C. Constitutional Authority: Constitutional vs. Statutory

There is a third way in which local prosecutors complicate our contemporary understanding of the structure of state governments. In those states where prosecutors are constitutional offices, are the power and duties of the local prosecutors immune from legislative control without an explicit amendment to the state constitution? Or, do state constitutions simply dictate that such offices should exist, but leave it up to the legislature to define their precise role in the administration of

133. See Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2002–07 (2018).

justice? In other words, to what degree is prosecutorial discretion a part of the local prosecutor's constitutional standing and thus beyond statutory restrictions?

How, precisely, the constitutional standing of local prosecutors limits state legislative enactments is a complicated question. It would appear that the prosecutor's office could not simply be abolished by statute without a constitutional amendment. And if the constitution provides that local prosecutors are to be elected by the residents of a county or a judicial district, the state legislature is likewise unable to turn the office into an appointed one. Yet it is not clear that the legislature cannot simply direct the local prosecutors to take specific actions in particular situations just by defining the role and duty of the local prosecutor accordingly.¹³⁴

The answer to these questions may depend on *how* a state's constitution addresses the office of the local prosecutor. In many states the office is recognized in the state constitution.¹³⁵ Their duties and responsibilities, however, are often set forth by statute—statutes that can be amended through ordinary law.¹³⁶ The extent to which statutory changes alone can change the fundamental powers of the office may

134. See Newman F. Baker & Earl H. De Long, *The Prosecuting Attorney: Powers and Duties in Criminal Prosecution*, 24 J. CRIM. L. & CRIMINOLOGY 1025, 1026 (1934) (“However, since almost all of the constitutions are silent on this matter of powers and duties, most legislatures are entirely free to deal with the subject.”).

135. See ALA. CONST. art. VI, § 160; ARIZ. CONST. art. XII, § 3 (“There are hereby created in and for each organized county of the state the following officers who shall be elected by the qualified electors thereof: . . . a county attorney. . . [who] shall be elected and hold his office for a term of four (4) years beginning on the first of January next after his election”); ARK. CONST. amend. 80, § 20 (“A Prosecuting Attorney shall be elected by the qualified electors of each judicial circuit.”); CAL. CONST. art. XI, § 1(b) (“The Legislature shall provide for county powers, an elected county sheriff, an elected district attorney, an elected assessor, and an elected governing body in each county.”); CONN. CONST. art. XXIII; FLA. CONST. art. V, § 17; GA. CONST. art. VI, § VIII; IDAHO CONST. art. V, § 18; ILL. CONST. art. VI, § 19; IND. CONST. art. VII, § 16; KY. CONST. § 97; LA. CONST. art. V, § 26; ME. CONST. art. IX, § 2; MD. CONST. art. V, § 7; MICH. CONST. art. VII, § 4; MISS. CONST. art. VI, § 174; NEV. CONST. art. IV, § 32; N.H. CONST. pt. 2d, art. 71; N.J. CONST. art. VII, § 2; N.M. CONST. art. VI, § 24; N.Y. CONST. art. XIII, § 13; N.C. CONST. art. IV, § 18; OKLA. CONST. art. XVII, § 2; OR. CONST. art. VII, § 17; PA. CONST. art. IX, § 4; S.C. CONST. art. V, § 24; TENN. CONST. art. VI, § 5; TEX. CONST. art. V, § 21; VT. CONST. ch. II, § 50; WASH. CONST. art. XI, § 5; W. VA. CONST. art. IX, § 1; WIS. CONST. art. VI, § 4.

136. See, e.g., NEV. CONST. art. IV, § 32 (“The Legislature shall have power to increase, diminish, consolidate or abolish the following county officers: County Clerks, County Recorders, Auditors, Sheriffs, District Attorneys and Public Administrators. The Legislature shall provide for their election by the people, and fix by law their duties and compensation.”); CAL. GOV'T CODE § 26500 (West 2023) (“The district attorney is the public prosecutor, except as otherwise provided by law.”). See also Baker & De Long, *supra* note 134, at 1026.

depend on how courts choose to interpret the meaning of the constitutional language.

Courts have tackled this issue in the past. Take for example, *State v. Coubal*,¹³⁷ decided by the Wisconsin Supreme Court in the mid-twentieth century. *Coubal* is noteworthy for two reasons. First, it illustrates that state efforts to compel prosecution are not entirely new. In the early twentieth century, there was much disagreement between states and cities with respect to the prosecution of “vice,” a divide that largely corresponded with the fact that vice was largely associated with Catholic immigrants, many of whom dominated city politics at the local level.¹³⁸ As a result, many legislatures adopted targeted removal provisions for local prosecutors that failed “to perform some particular duty, such as enforcement of the statutes against liquor or gambling.”¹³⁹ *Coubal* concerned a similar statute—a Wisconsin law that required the local prosecutor to institute proceedings to revoke the license of any gambling establishment.¹⁴⁰

Second, *Coubal* specifically reversed a lower court holding that this statute violated the constitutional authority of the local prosecutor because it “divest[s] the district attorney, a constitutional officer, of any discretion or quasi-judicial function inherent in his office.”¹⁴¹ As the Wisconsin Supreme Court explained, even if the “office of the district attorney was created by the constitution . . . [n]o provision has been made in the constitution as to what the duties of the district attorney are to be.”¹⁴² As a result, there was “no basis for holding that his duties in representing the state are not subordinate to legislative direction as to the cases in which he shall proceed.”¹⁴³

California courts have taken a somewhat different approach. They have held that, as a constitutional matter, “the initiation of criminal proceedings is a core, inherent function of the executive branch” and that the public prosecutor “ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek.”¹⁴⁴ These executive powers are, however, not absolute. Instead, they are limited by the legislature’s power to define crimes and set

137. 21 N.W.2d 381 (Wis. 1946).

138. See ROBERT M. FOGELSON, *BIG-CITY POLICE* 41–45, 91 (1977).

139. De Long & Baker, *supra* note 81, at 955.

140. *Coubal*, 21 N.W.2d at 383.

141. *Id.* at 385.

142. *Id.*

143. *Id.*

144. *Steen v. App. Div. of Super. Ct.*, 331 P.3d 136, 142 (Cal. 2014) (quoting *Dix v. Super. Ct.*, 807 P.2d 1063, 1066 (Cal. 1991)). See also *People v. Birks*, 960 P.2d 1073, 1089 (Cal. 1998).

punishments. Consequently, the legislature has the ability to constrain prosecutorial discretion. For example, in recent litigation over the state's three strikes law, which states that prosecutors "shall plead and prove"¹⁴⁵ a defendant's prior convictions in order to increase the punishment for certain crimes, courts interpreted this language as "leav[ing] no discretion for a prosecutor to act on his or her own judgment or opinion," but instead requiring the prosecutor to seek the aggravated punishment for all defendants with qualifying prior convictions.¹⁴⁶ The California courts upheld the statute against constitutional attack on the grounds that it controlled only the punishment imposed for particular crimes, rather than whether those crimes must be prosecuted in the first instance.¹⁴⁷ The former, according to the courts, fell within the legislature's power to define crimes and set punishments, whereas the latter fell within the constitutional powers of the prosecutor.

Other courts also have recognized the constitutional dimensions of a prosecutor's charging authority. For example, the Supreme Judicial Court of Massachusetts held that the state's victims' rights statute could not restrict a prosecutor's power to decline to prosecute a defendant, relying on the state constitution's provision preserving the separation of powers.¹⁴⁸ Notably, the court left open the possibility that such power was not absolute and could be curtailed in situations involving "scandalous abuse of authority" or "egregious misconduct."¹⁴⁹

As these examples show, whether the local prosecutor is a constitutional office can affect the ability of the legislature to limit prosecutorial power through statute alone. But the mere fact that a prosecutor is a constitutional office does not ensure all legislative restrictions are impermissible—the precise framing of a restriction, as well as the courts' background understanding of prosecutorial powers will also factor into litigation about the extent to which state legislatures may circumvent, sanction, or takeover a local prosecutor's office without amending their state's constitution.

III. STRUCTURAL UNCERTAINTY AND THE LOCAL PROSECUTOR

The structural uncertainty discussed above is compounded by two key factors. First, modern legislatures have delegated enormous amounts

145. *Ass'n of Deputy Dist. Att'ys v. Gascón*, 295 Cal. Rptr. 3d 1, 30 (Ct. App. 2022) (quoting CAL. PENAL CODE § 667(f)(1) (West 2022)).

146. *Id.* at 26.

147. *Id.* at 31–36.

148. *See Commonwealth v. Webber*, No. SJ-2019-0366, 2019 WL 4263308, at *1 (Mass. Sept. 9, 2019).

149. *Id.* at *3.

of power to local prosecutors. Second, partisan divides within the states have expanded to pit reform prosecutors against state officials in politically conservative states.

This Part explores how these two factors exacerbate the structural uncertainty of the local prosecutor, and it offers some thoughts about why we should not expect to see a national consensus emerge on the structural uncertainties discussed above.

A. Delegation and Discretion

One reason for the intense battles over prosecutors we are experiencing is that legislatures have delegated enormous amounts of power to those prosecutors. As William Stuntz famously explained, the “pathological politics” of criminal justice have increased the number of broad and overlapping criminal statutes.¹⁵⁰ It is widely recognized that modern criminal codes give local prosecutors a lengthy menu of options in pursuing criminal punishment; it is less often acknowledged that those codes are so broad that prosecutors simply cannot enforce every law as written. Because they do not have the resources to pursue every possible case of every possible crime, modern prosecutors must, as a matter of necessity, engage in some amount of discretionary nonenforcement. In other words, whatever the “law on the books” may be, the “law on the streets” is different, and local law enforcement and local prosecutors determine what the law on the streets will be.¹⁵¹

Most prosecutors keep mum about how they exercise that discretion. They may, for example, make public announcements when they intend to prosecute certain types of crimes more aggressively.¹⁵² But they rarely indicate which laws they will not enforce or will underenforce;¹⁵³ instead, decisions not to prosecute are made in an ad hoc and opaque manner.¹⁵⁴ Reform prosecutors have bucked that trend. They proudly proclaim their underenforcement or nonenforcement policies, claiming that these

150. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001).

151. *Id.* at 508–09.

152. See Sohoni, *supra* note 23, at 37 nn.13–16 (collecting examples).

153. See, e.g., UNIV. N.C. SCH. L. PROSECUTORS & POLS. PROJECT & OHIO STATE UNIV. MORITZ COLL. L. DRUG ENF'T & POL'Y CTR., ENFORCING MARIJUANA PROHIBITIONS: PROSECUTORIAL POLICY IN FOUR STATES 13 (May 2023) (reporting that less than twenty percent of surveyed incumbent prosecutors had publicly announced their office policies on marijuana enforcement).

154. See *supra* notes 24–25 and accompanying text.

policies allow them to focus on more serious crimes and to ameliorate some of the harms of mass incarceration.¹⁵⁵

These nonprosecution or underenforcement policies have triggered much of the state backlash mentioned above. It is, perhaps, unsurprising that the public announcement of nonenforcement policies proved controversial. After all, proclamations about what laws will not be enforced are essentially statements that the laws themselves are flawed, which is a not-so-subtle criticism of the legislature. In addition, to the extent local prosecutors' nonprosecution policies reflect the views of local voters, those views are often not shared by voters elsewhere in the state.

While state officials have roundly criticized the announcement of nonenforcement or underenforcement policies, most appear to recognize the inevitability of prosecutorial discretion. Consequently, the backlash against reform prosecutors has often sought to preserve prosecutorial discretion but to do so in a format that is more consistent with state-level political preferences. Circumvention and takeovers preserve prosecutorial discretion, but they shift discretionary decisions to a different actor, such as the state attorney general or a newly appointed prosecutor. At first glance, sanctions—in particular sanctions that are triggered by nonenforcement or underenforcement policies—appear to attack the very foundation of prosecutorial discretion. But in practice they may instead require prosecutorial discretion to take a certain form—namely, the ad hoc and opaque decisionmaking that has dominated prosecutorial decisionmaking for many decades.

Put simply, state officials are attacking how prosecutorial discretion is being wielded, not the legitimacy of prosecutorial discretion as an institution. Indeed, it is not clear whether state officials could prevail in a frontal attack against prosecutorial discretion not to fully enforce the law in all circumstances. It is not simply that prosecutorial discretion is a practical necessity in light of the structure of modern criminal codes, but there is also case law indicating that prosecutorial discretion has constitutional foundations.¹⁵⁶ Those foundations could prove fatal to efforts that would eliminate prosecutorial discretion all together, such as mandatory enforcement laws.¹⁵⁷

155. See Carissa Byrne Hessick, *Pitfalls of Progressive Prosecution*, 50 *FORDHAM URB. L.J.* 973, 980–82 (2023) (collecting examples).

156. See *supra* note 96.

157. See *supra* notes 144–47 and accompanying text.

B. Partisan Conflict

The enormous amount of discretion delegated to prosecutors is not the only reason for the current battles. Much of the backlash against reform prosecutors can be explained as partisan conflict. Because they are locally elected, prosecutors are often likely to find themselves straddling the fault lines of a state's partisan divide. Indeed, many of the examples of backlash described above are Republican state officials pushing back against Democratic local prosecutors, though Democratic state officials have also taken similar steps against Republican local prosecutors.¹⁵⁸

Partisanship battles are not new territory for prosecutors. The widespread transition to elected prosecutors in the nineteenth century, for example, was driven in large part by complaints about political patronage and partisan misconduct associated with the appointment system.¹⁵⁹ Later, some of the earliest legislative efforts to curtail prosecutorial discretion emerged in response to political conflicts over alcohol, gambling, and other “vice”¹⁶⁰—partisan issues that divided immigrants from natives, Catholics from Protestants, and urban officials from state leaders.¹⁶¹

What these historic developments illustrate is that partisan battles focus on prosecutors because state-level control by one political party often masks more heterogeneous politics within a state. In most states, the state-local divide is also where the partisan divide is most politically salient.¹⁶² Red states chafe against the policies favored by blue cities. Red towns resist the laws adopted by blue states. Representing the state and their local community, prosecutors are more likely than most officials to find themselves facing claims from both ends. Pursuing state policies, they might lose favor from the local electorate. Courting local voters, they might face reprisal from the state. In either case, prosecutors stand

158. See Healy, *supra* note 35 (describing an executive order by Arizona's Democratic governor to strip local prosecutors of jurisdiction over abortion cases).

159. Ellis, *supra* note 81, at 1551–57.

160. See Baker & De Long, *supra* note 134, at 1034–35 (“The enforcement of laws such as those regulating liquor and gambling seems to have been a continual source of worry to legislators. . . . The fact that very large sections of the community often oppose the enactment or enforcement of such statutes has undoubtedly caused many prosecuting attorneys to relax their enforcement of such provisions. This factor accounts for the statutes to be found in several states which declare specifically that it is the duty of the prosecuting attorney to bring proceedings against persons accused of violating the liquor laws.”).

161. See FOGELSON, *supra* note 138, at 40–45.

162. See Rick Su, *Intrastate Federalism*, 19 U. PA. J. CONST. L. 191, 197–205 (2016).

in the middle—sometimes as genuine targets, sometimes as proxies—of the state’s partisan divide.

To be clear, disputes between local prosecutors and state officials can sometimes happen within a party.¹⁶³ For example, in Minnesota, the state Attorney General Keith Ellison took over a high-profile murder case from the reform prosecutor in Minneapolis, Mary Moriarty.¹⁶⁴ Ellison and Governor Tim Walz—both of whom are Democrats—removed the case after Moriarty received significant public criticism for offering the two teenaged defendants in the case a lenient plea offer.¹⁶⁵ Moriarty spoke out against the move, arguing that voters had elected her to bring about criminal justice reform and that Ellison and Walz were “stopping [her] from doing the job [she] was elected to do.”¹⁶⁶ Such intraparty battles are less common, but they highlight the political nature of the reform prosecutor movement. The movement has logged its biggest election successes in challenging other Democrats in primary elections, many of whom had adopted the law-and-order politics that prominent members of the Democratic Party had adopted in the early and mid-1990s.¹⁶⁷

163. The Pennsylvania legislature, which is controlled by Republicans, empowered a Democratic Attorney General, Josh Shapiro, to take on firearms cases in their effort to restrict Philadelphia prosecutor Larry Krasner. Reports indicate that Shapiro explicitly supported the measure and the state legislature’s goals, and it was only with his assurance that the state legislature was willing to act. Shapiro later disavowed the law when he faced political backlash. See Ryan Briggs, *AG Shapiro Distances Himself from Bill to Override Philly DA Krasner on Gun Crimes*, WHY (July 9, 2019), <https://why.org/articles/ag-shapiro-distances-himself-from-bill-to-override-philly-da-krasner-on-gun-crimes/> [<https://perma.cc/RK3L-57JL>].

164. See Jon Collins, *Moriarty Comes to Role of Chief Prosecutor as Former Advocate for the Prosecuted*, MPR NEWS (Jan. 18, 2023, 4:09 AM), <https://www.mprnews.org/story/2023/01/18/moriarty-comes-to-role-as-chief-prosecutor-as-former-advocate-for-the-prosecuted> [<https://perma.cc/AP2D-TNCY>] (“Moriarty’s reform-forward message has led her to be lumped in with a group of so-called ‘progressive prosecutors’ around the country.”).

165. See Peter Cox, *Gov. Walz Assigns Zaria McKeever Case to Ellison After County Offers Plea Deals*, MPR NEWS (Apr. 7, 2023, 7:03 PM), <https://www.mprnews.org/story/2023/04/06/gov-walz-assigns-zaria-mckeever-case-to-ellison-after-county-offers-plea-deals> [<https://perma.cc/DW2H-EGJ8>]; *Minnesota State Executive Offices*, BALLOTPEdia, https://ballotpedia.org/Minnesota_state_executive_offices [<https://perma.cc/S2C7-L5BH>].

166. Liz Sawyer & Kim Hyatt, *Hennepin County Attorney Defends Handling of Teen Murder Case as Family Speaks Out*, MINNEAPOLIS STAR-TRIB. (Apr. 7, 2023, 4:57 PM), <https://www.startribune.com/hennepin-county-attorney-denounces-ags-decision-to-remove-murder-case-victims-family-pushes-back/600265406/> [<https://perma.cc/GH6W-GFPJ>].

167. See Neyfakh, *supra* note 13 (discussing Democratic primary upsets); Stuntz, *supra* note 150, at 509 (describing the law-and-order politics that characterized the 1980s and 1990s).

In short, one reason for the current battles over prosecutors have reached such a fever pitch is that they represent a front on the field of partisan battles (and to a lesser extent, intraparty battles).

C. Reconciling Structural Uncertainty

The persistence of the structural uncertainty surrounding prosecutors suggests that perhaps the problem is not that this uncertainty has persisted, but rather the insistence on a proper classification. In other words, local prosecutors may straddle the traditional divides of state government for good reason. And perhaps legal and political considerations of the prosecutors' role should turn to substantive arguments about particular prosecutorial decisions, rather than structural arguments about the institutional standing of their office.

To be sure, one could easily reach the opposite conclusion. The horizontal and vertical separations of power have long been the foundation for how we categorize and assess governmental power. It may be argued that today's debates simply illustrate the need for doctrinal clarity with respect to prosecutors. Only then can we determine what kind of prosecutorial actions are appropriate, or what kind of state mandates or restrictions are permissible. Only then do we have a neutral framework for assessing these developments outside of partisan terms. The prosecutor's dilemma, from this perspective, is how little effort has been made to concretely define the structural standing of their office in a consistent manner.

But perhaps the problem is not that local prosecutors resist classification. Rather, it might be the insistence on putting governmental offices into discrete and defined boxes, and our use of those boxes to answer questions about institutional role and governance. To be sure, the horizontal, vertical, and constitutional axes define well many state government offices and certainly those at the federal level. But many others have long struggled to fit the mold. These axes are often blurred at the local level, especially in the organization of cities, counties, public authorities, and special districts.¹⁶⁸ Structural uncertainties afflict not only prosecutors, but other longstanding offices like sheriffs.¹⁶⁹ The classifications themselves also obscure the fact that, in the realm of administration, government officials are more likely to work in concert

168. See generally David Schleicher & Roderick M. Hills, Jr., *Local Legislatures and Delegation* 1–18, 33–44 (N.Y.U., Law and Economics Research Paper Series Working Paper No. 23-32, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4368382.

169. See Anthony O'Rourke, Rick Su & Guyora Binder, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1327, 1371–80 (2021).

across organizational divides than within them. In fact, criminal justice is a prime example. A local police officer is likely to have just as close contacts and working relationships with federal and state law enforcement officials, county sheriffs and coroners, municipal and state judges, and local prosecutors and state prison officials than other officials in the municipal government. In this respect, local prosecutors are hardly unique in transcending traditional structural classifications.

Even more important may be the fact that prosecutors have evolved beyond the traditional classification system precisely because that is how we want the prosecutorial authority to be exercised. Prosecutors wield the authority of the state, but we expect them to do so on behalf of a community. They are charged with enforcing the law, but we also expect them to do so with an eye towards serving justice. They represent the people of the state but often exercise their authority with an eye towards the victims and suspects. The prosecutor is both above and beholden to the law, expected to be impartial and empathetic, judged by her tenacity and flexibility. How does any of this fit into a discrete silo or precise chain of command? This is especially true when it appears that the prosecutor exists in large part as the bridge between different components of our criminal justice system, and different segments of the community.¹⁷⁰ Thus, expressly recognizing the multifaceted role of the local prosecutor's office is perhaps more important than insisting on what may be an artificial classification.

Ultimately, the diversity of prosecutorial models across states calls into question any national resolution of the proper role of prosecutors. Because of the differences across states, any doctrinal resolution will inevitably depend on a state-by-state analysis. In other words, although local prosecutors are receiving national attention, it is unlikely that their role will be resolved through a national conversation.

To be sure, many features of today's conflicts have steered local prosecutors onto the national stage, from the involvement of national organizations to the partisan issues involved. But as our analysis shows, there is no national model of how local prosecutors fit into the ordinary structure of state government. Indeed, it is striking how evenly divided the different models are. About half of states classify local prosecutors as state officials, split among the executive and judicial branches.¹⁷¹ About half of states classify them as local officials, who prosecute on behalf of the state but serve their local counties as counselor and

170. See generally Newman F. Baker, *Prosecutor—Initiation of Prosecution*, 23 J. CRIM. L. & CRIMINOLOGY 770, 770–82 (1933). Baker refers to prosecutors as the “‘father confessor’ of the community.” *Id.* at 770.

171. See *supra* notes 75–94 and accompanying text.

officer.¹⁷² About two-thirds of states recognize local prosecutors as constitutional offices.¹⁷³ The others address them solely in statutes and regulations.

The differences across states are further exacerbated by changes to the office over time in any given state. This means that even if the analysis is isolated to a specific state, it may be difficult to identify the underlying model or the changes that are legally significant. Most prosecutors were initially created as appointed positions, but now nearly every state selects them through local elections.¹⁷⁴ Does that shift represent a radical reconceptualization of the role and standing of the prosecutor's office, or simply a minor adjustment to how they are selected? The expansion of criminal sanctions in the twentieth century greatly increased the discretion and power of local prosecutors.¹⁷⁵ Should this expansion be seen as establishing a new baseline, or an unintended consequence that reform prosecutors are rightfully seeking to reverse? How about states in which the local prosecutor is a consolidation of many offices. In Florida, for example, the current prosecutor is a consolidation of an earlier "state attorney . . . appointed by the governor," "prosecuting attorney . . . elected by the people of the counties," and "county solicitor . . . appointed by the criminal court of record."¹⁷⁶ Do we privilege the fact that all of these positions were consolidated into the "state attorney," or the fact that this consolidation only happened after that office became an elective office like the old prosecuting attorneys?

These variations, of course, explain why the state backlash is taking so many different forms—circumvention, sanctions, and takeovers—and is involving executive and judicial officials. In turn, these variations also multiply the different ways the legal issues can be analyzed. Whether a local prosecutor can be impeached by the legislature, removed by the governor or state supreme court, substituted with a special prosecutor or the attorney general, or have her elective office abolished and replaced with a state-appointed post, all depend on different analysis of a local prosecutor's relationship with different aspects of state government. In turn, these relationships derive from some general conceptualization of what a local prosecutor is. And it is that conceptualization that continues to resist a single, concrete formulation.

172. See *supra* note 103.

173. See *supra* note 135.

174. See *supra* note 80.

175. See Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 992–96 (2019).

176. De Long & Baker, *supra* note 81, at 935.

CONCLUSION

Local prosecutors have taken the national stage, as have efforts to curtail their power. The legal conflict over prosecutorial power is playing out, at least in part, against the backdrop of familiar legal frameworks: there are claims that prosecutors (or their adversaries) are violating the separation of powers, and claims about the local or state nature of the office and the constitutional status of the office have appeared as well.

But while debates over the proper role of the prosecutor in criminal justice reform are occurring on a national level, the formal, legal role of prosecutors varies significantly by state. Because the states are so evenly split on how they classify prosecutors within these legal frameworks, a national consensus about how to conceptualize the local prosecutor is unlikely to emerge. To the contrary, the enormous discretion that prosecutors enjoy and deepening partisan divides within the states suggest that these battles are likely to persist. Any resolution of the difficult questions surrounding the appropriate role of the prosecutor will have to occur on a state-by-state basis, and any resolution may not prove durable.

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