

# EXECUTIVE UNILATERALISM AND INDIVIDUAL RIGHTS IN A FEDERALIST SYSTEM

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## ABSTRACT

Presidents have a wide array of tools at their disposal to unilaterally influence public policy, without the direct approval of Congress or the courts. These unilateral actions have the potential to affect a variety of individual rights, either profitably or adversely. Governors too can employ unilateral directives for similar purposes, often impacting an even wider range of rights. In this Article, we collect all executive orders and memoranda related to individual rights issued between 1981 and 2018 at the federal level, and across the U.S. states, to analyze their use over time. We find that chief executives of all kinds are more likely to issue unilateral directives that expand individual rights if they are Democratic or liberal and when there is a public appetite for rights advancement. Furthermore, governors issue more rights-related directives when they view Presidents as likely to be restrictive or inactive on individual rights.

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## INTRODUCTION

Though political observers and stakeholders lauded the Obama administration for its unprecedented advancements for transgender rights,<sup>1</sup> President Trump steadily worked to reverse these policies during his tenure in office.<sup>2</sup> Obama issued executive actions broadening antidiscrimination protections of transgender persons in areas spanning employment, housing, and health care.<sup>3</sup> Trump, on the other hand, subsequently ordered his agencies to propose new rules curtailing rights in these same areas.<sup>4</sup> For instance, he reinstated a ban on transgender individuals serving in the military.<sup>5</sup> In denouncing the Obama administration’s policy, Trump’s 2017 memorandum stated:

Until June 2016, the Department of Defense (DoD) and the Department of Homeland Security (DHS) . . . generally prohibited openly transgender individuals from accession into the United States military and authorized the discharge of such individuals. Shortly before President Obama left office, however, his Administration dismantled the Departments’ established framework by permitting transgender individuals to serve openly in the military,

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<sup>1</sup> Sue Fulton, President of the LGBT rights group Service Members, Partners, Allies for Respect and Tolerance for All, said in 2016 that “[t]he Obama administration will go down in history as one of the most significant for LGBT Americans.” Emma Margolin, *With Transgender Military Ban Lifted, Obama Cements Historic LGBT Rights Legacy*, NBC NEWS, <https://www.nbcnews.com/feature/nbc-out/transgender-military-ban-lifted-obama-cements-historic-lgbt-rights-legacy-n600541> [<https://perma.cc/VE3C-667K>] (June 30, 2016, 2:45 PM).

<sup>2</sup> See Selena Simmons-Duffin, *‘Whiplash’ of LGBTQ Protections and Rights from Obama to Trump*, NPR (Mar. 2, 2020), <https://www.npr.org/sections/health-shots/2020/03/02/804873211/whiplash-of-lgbtq-protections-and-rights-from-obama-to-trump> [<https://perma.cc/A4US-NRNX>].

<sup>3</sup> See *Fact Sheet: Obama Administration’s Record and the LGBT Community*, WHITE HOUSE: OFF. PRESS SEC’Y (June 9, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/09/fact-sheet-obama-administrations-record-and-lgbt-community> [<https://perma.cc/8NTK-LSCX>].

<sup>4</sup> See Simmons-Duffin, *supra* note 2.

<sup>5</sup> Adam Edelman, *Trump Bans Transgender People Serving in the Military*, NBC NEWS, <https://www.nbcnews.com/politics/donald-trump/trump-announces-ban-transgender-people-serving-military-n786621> [<https://perma.cc/B8XB-NPJM>] (July 26, 2017, 5:15 PM).

authorizing the use of the Departments' resources to fund sex-reassignment surgical procedures, and permitting accession of such individuals after July 1, 2017. . . .

. . . .

I am directing the Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 . . . .<sup>6</sup>

Such tit-for-tat executive policymaking over individual rights was not an isolated incident: in the same year, the Trump administration reversed Obama-era guidelines that allowed transgender students to use restroom facilities of their choice.<sup>7</sup> In announcing this change, the White House stated that “policy regarding transgender bathrooms should be decided at the state level.”<sup>8</sup> Accordingly, many governors assumed the mantle of protecting transgender rights in their states through unilateral directives.<sup>9</sup>

Connecticut Governor Dannel Malloy signed a pair of executive orders in 2017, in direct response to these federal restrictions.<sup>10</sup> One order reaffirmed state non-discrimination policies based on sexual identity in public facilities, while asking the Department of Education to develop guidance “that allow[ed] student’s access to school facilities in a manner consistent with a student’s gender identity or expression.”<sup>11</sup> A few months later, Malloy signed another order mandating that the Connecticut military prohibit policy or action “that discriminates against service members in enlistments, promotion, or any other aspect of their service, on the basis of their gender identity

<sup>6</sup> Memorandum on Military Service by Transgender Individuals, 2017 DAILY COMP. PRES. DOC. 587 (Aug. 25, 2017).

<sup>7</sup> Faith Karimi & Emanuella Grinberg, *Trump’s Reversal on Transgender Bathroom Directive: How We Got Here*, CNN (Feb. 23, 2017, 8:44 AM), <https://www.cnn.com/2017/02/23/health/transgender-bathrooms-trump-q-and-a/index.html> [<https://perma.cc/AZX6-AX54>].

<sup>8</sup> *Id.*

<sup>9</sup> See Kathleen Megan, *Malloy Signs Executive Order to Strengthen Protection of Transgender Students*, HARTFORD COURANT (Feb. 24, 2017, 10:07 AM), <https://www.courant.com/education/hc-trump-transgender-bathrooms-20170223-story.html> [<https://perma.cc/QBK7-XBTX>]; Caroline Cournoyer, *Amid LGBT Bathroom Debate, Virginia Governor Orders State Contractors Not to Discriminate*, GOVERNING (Jan. 9, 2017), <https://www.governing.com/topics/mgmt/Virginia-Governor.html> [<https://perma.cc/K29W-BUZQ>]; Anne Blythe & Abbie Bennett, *Cooper: ‘Transgender People Are Not Prevented from the Use of Public Facilities’*, NEWS & OBSERVER, <https://www.newsobserver.com/news/politics-government/state-politics/article179565026.html> [<https://perma.cc/8VH7-2NP3>] (Oct. 19, 2017, 11:49 AM).

<sup>10</sup> See Conn. Exec. Order No. 56 (Feb. 23, 2017), <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Others/Governor-Dannel-P-Malloy--Executive-Order-No-56.pdf> [<https://perma.cc/WFN5-LGPB>]; Conn. Exec. Order No. 60 (July 26, 2017), <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Others/Governor-Dannel-P-Malloy--Executive-Order-No-60.pdf> [<https://perma.cc/786K-VX8G>].

<sup>11</sup> Conn. Exec. Order No. 56, *supra* note 10.

or expression.”<sup>12</sup> In Virginia, Terry McAuliffe likewise issued an executive order in 2017 that extended non-discrimination policies in state employment to include gender identity and sexual orientation.<sup>13</sup> Roy Cooper penned a similar order in North Carolina.<sup>14</sup> Despite these governors being proactive in expanding transgender rights, some have remained silent on the matter.<sup>15</sup> Based on these noticeable state-to-state differences, Eliza Byard, from the Gay, Lesbian & Straight Education Network, insightfully espoused the view that “no child in America should have their rights subject to their ZIP code.”<sup>16</sup>

Altogether, these episodes demonstrate the power of chief executives—both Presidents and governors alike—to unilaterally influence individual rights. Since unilateral directives, like executive orders, are viewed as having the force of law in a variety of contexts, they serve as potentially potent vehicles for change.<sup>17</sup> So why do some Presidents and governors use unilateral actions to advance individual rights, while others pursue more dormant or restrictive paths? Are there any consistent, systematic differences between how members of different *parties* utilize these tools? The remainder of this Article seeks to answer this question.

To do so, we first present background information on unilateral directives at both the federal (Part I) and state (Part II) levels. Presidents commonly use both executive orders and memoranda to instruct agencies on policy implementation.<sup>18</sup> Though the former has the force of law, Presidents since Reagan have used both tools to systematically advance their policy goals and augment executive power.<sup>19</sup> Governors likewise have a variety of unilateral tools at their disposal, but executive orders are uniformly wielded across the fifty states for similar purposes.<sup>20</sup> In Parts I and II, we define these unilateral powers, describe their functions and constitutional

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<sup>12</sup> Conn. Exec. Order No. 60, *supra* note 10.

<sup>13</sup> Va. Exec. Order No. 61 (Jan. 5, 2017), [http://digitool1.lva.lib.va.us:1801/webclient/StreamGate?folder\\_id=0&dvs=1608519913904~690](http://digitool1.lva.lib.va.us:1801/webclient/StreamGate?folder_id=0&dvs=1608519913904~690) [<https://perma.cc/M54E-6H6E>].

<sup>14</sup> N.C. Exec. Order No. 24 (Oct. 18, 2017), <https://files.nc.gov/governor/documents/files/EO24-Policies%20Prohibiting%20DiscriminationHarassment%26Retaliation%20in%20State%20EmploymentServicesContracts.pdf> [<https://perma.cc/JP4S-Q5YQ>].

<sup>15</sup> *See, e.g., Gov. LePage Stops Rules for Protecting Transgender Students*, NEWS CTR. ME. (Feb. 5, 2016, 5:28 AM), <https://www.newscentermaine.com/article/news/local/gov-lepage-stops-rules-for-protecting-transgender-students/97-35316200> [<https://perma.cc/FVB2-442G>].

<sup>16</sup> Carrie Johnson, *What's Next for Transgender Rights Lawsuits with School Guidance Rescinded*, NPR (Feb. 23, 2017), <https://www.npr.org/2017/02/23/516858583/whats-next-for-transgender-rights-lawsuits-with-school-guidance-rescinded> [<https://perma.cc/B8UB-3KFR>].

<sup>17</sup> William G. Howell, *Introduction: Unilateral Powers: A Brief Overview*, 35 PRESIDENTIAL STUD. Q. 417, 426 (2005).

<sup>18</sup> *See id.* at 417; PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 59–61 (2d ed. 2002) (describing the use of the executive order as a tool for controlling agency policymaking).

<sup>19</sup> *See* COOPER, *supra* note 18, at 116–19.

<sup>20</sup> *See* Margaret R. Ferguson & Cynthia J. Bowling, *Executive Orders and Administrative Control*, 68 PUB. ADMIN. REV. (SPECIAL ISSUE) S20, S27 (2008).

origins, and provide examples of how they have been historically used to influence individual rights.<sup>21</sup>

Part III then considers what factors might influence the use of unilateral directives related to individual rights.<sup>22</sup> We survey the extensive literature on presidential unilateralism to develop theoretical expectations on when chief executives should employ these directives based on various political factors. We expect Presidents and governors who are from the Democratic Party (and who are liberal) to issue more rights-related directives, given this party's stance on protecting marginalized groups. Based on ideas of descriptive representation, we also expect female and minority executives to actively protect rights through unilateral actions. We go on to argue that chief executives should be better positioned to employ these directives when there is greater public support for themselves and for advancing rights. Finally, as the opening examples suggest, we expect to observe the dynamics of federalism in this context. That is, governors should be particularly driven to unilaterally protect individual rights when Presidents are poised to promote restrictive or inactive policies. Conversely, less unilateral action is needed in the states if the current President stands to promote rights across the nation.

We test these expectations by examining presidential executive orders and memoranda in Part IV and gubernatorial executive orders in Part V. We collect and categorize all such unilateral directives issued between 1981 and 2018, based on eleven different individual rights categories. We present descriptive data and use regression analyses to evaluate our theory-driven expectations. Liberal and Democratic chief executives across the federalist system issue more unilateral directives related to individual rights—as we expected.<sup>23</sup> Higher public approval, particularly from liberals and moderates, also corresponds to a greater reliance on rights-related directives.<sup>24</sup> Contrary to expectations, public conservatism actually appears to motivate executives to take more care in unilaterally protecting rights, when these rights are perhaps most vulnerable.<sup>25</sup> We find little evidence, however, that women and non-white governors are active champions of individual rights through unilateral means.<sup>26</sup>

In the specific area of civil rights, public salience and positive feelings towards African Americans appear to be important drivers of unilateral activity.<sup>27</sup> Negative feelings towards women and the gay community, on the other hand, can incentivize greater protections.<sup>28</sup> Lastly, governors tend to issue more executive orders advancing civil rights when a Republican or conservative President is in the White House,

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<sup>21</sup> See *infra* Parts I, II.

<sup>22</sup> See *infra* Part III.

<sup>23</sup> See *infra* Sections IV.B, V.B.

<sup>24</sup> See *infra* Sections IV.B, V.B.

<sup>25</sup> See *infra* Sections IV.B, V.B.

<sup>26</sup> See *infra* Section V.B.

<sup>27</sup> See *infra* Sections IV.B, V.B.

<sup>28</sup> See *infra* Sections IV.B, V.B.

particularly when the issue is salient.<sup>29</sup> Thus, these state officials seemingly rise to the call to guard individual rights when these rights are the most vulnerable to hostile or inactive federal policies.<sup>30</sup> We conclude by summarizing these findings while also discussing the broader implications of individual rights and executive unilateralism in our separation of powers system.<sup>31</sup>

## I. BACKGROUND ON PRESIDENTIAL UNILATERAL DIRECTIVES

We begin our exploration with presidential power. In this Part, we introduce the concept of executive unilateralism and discuss its origins from the U.S. Constitution.<sup>32</sup> We then describe two of the most prominent unilateral tools in the President's arsenal: executive orders and memoranda. We define these powers, detail their functions, and give examples of their use in the realm of individual rights over time.

### A. Constitutional Origins of Unilateral Power

Scholars generally classify Presidents as having two types of powers at their disposal: formal and informal powers.<sup>33</sup> The former is rooted in the Constitution and the latter is not.<sup>34</sup> Instead, informal powers are based on individual characteristics, like bargaining and management styles, or by nature of the office, such as Presidents' visibility and public appeals.<sup>35</sup> While some scholars advocate that informal sources are the most important for presidential prerogatives,<sup>36</sup> recent and resurgent scholarly attention has elevated formal powers to the fore.<sup>37</sup> These powers come in two main varieties: explicit and inherent powers.<sup>38</sup> Many have long been aware of those presidential powers explicitly mentioned in the Constitution, including the ability to veto laws, appoint individuals to the bureaucracy and bench, make treaties, and grant pardons.<sup>39</sup> Powers inherently derived from ambiguous constitutional language, however, have become increasingly important for augmenting presidential authority over time.<sup>40</sup>

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<sup>29</sup> See *infra* Section V.B.

<sup>30</sup> See *infra* Section V.B.

<sup>31</sup> See *infra* Conclusion.

<sup>32</sup> See generally U.S. CONST. art. II (laying out the powers of the presidency).

<sup>33</sup> See, e.g., RICHARDE. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* 10 (1960) (distinguishing Presidents' formal powers from their powers of persuasion).

<sup>34</sup> See *id.*

<sup>35</sup> See Howell, *supra* note 17, at 420–21 (describing the presidential power to bargain, negotiate, and convince).

<sup>36</sup> See, e.g., NEUSTADT, *supra* note 33, at 10 (“[D]espite [the President’s] status he does not get action without argument. Presidential *power* is the power to persuade.”).

<sup>37</sup> See Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 *PRESIDENTIAL STUD. Q.* 850, 850–51 (1999).

<sup>38</sup> See Louis Fisher, *Holding the President Accountable to Constitutional Limits*, 2014 *UTAH L. REV.* 793, 793–97.

<sup>39</sup> U.S. CONST. art. I, § 7, cl. 3; *id.* art I, § 2.

<sup>40</sup> See Moe & Howell, *supra* note 37, at 854–56.

Notably, the unitary executive theory advances Presidents' reliance on inherent powers.<sup>41</sup> Based on constitutional provisions stating "executive Power shall be vested in a President of the United States,"<sup>42</sup> as well as that Presidents shall "preserve, protect, and defend the Constitution"<sup>43</sup> and "take Care that the Laws be faithfully executed,"<sup>44</sup> the unitary executive theory advocates that Presidents have sole control over the executive branch and the ability to independently interpret the Constitution.<sup>45</sup> Presidents have used this theory to justify a myriad of controversial actions, including the removal of executive branch officials, centralizing control over agency activities, and signing statements. Though some argue that the unitary executive originated at the Constitutional Convention,<sup>46</sup> others purport Reagan as being the first President to systematically embrace this theory as a justification for a variety of these actions,<sup>47</sup> notably unilateral actions.

Unilateral powers are distinct from other tools of the presidency because they allow Presidents to act first and act alone.<sup>48</sup> Such unique features afford them opportunities to influence public policies without the explicit approval from the other branches of government.<sup>49</sup> Presidents can set the agenda with these actions, thereby placing the burden of response elsewhere.<sup>50</sup> Congress, plagued with collective action problems, and the courts, who must wait for affected parties to bring suit, both can face difficulties when directly responding to unilateral action.<sup>51</sup> Studies of unilateralism generally focus on unilateral directives, or written statements directing executive branch agencies in policy implementation.<sup>52</sup> We follow suit. Executive orders and memoranda are the two primary vehicles by which Presidents formally command agencies—as reviewed below.

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<sup>41</sup> STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3–4* (2008).

<sup>42</sup> U.S. CONST. art. II § 1, cl. 1.

<sup>43</sup> *Id.* art. II § 1, cl. 8.

<sup>44</sup> *Id.* art. II § 3, cl. 5.

<sup>45</sup> See *THE FEDERALIST* No. 70, at 355 (Alexander Hamilton) (Ian Shapiro ed., 2009); see also CALABRESI & YOO, *supra* note 41, at 3 (Hamilton commenting on how many at the time believed the executive being one who needed "energy").

<sup>46</sup> See CALABRESI & YOO, *supra* note 41, at 3.

<sup>47</sup> Ryan J. Barilleaux & Christopher S. Kelley, *Introduction: What Is the Unitary Executive?*, in *THE UNITARY EXECUTIVE AND THE MODERN PRESIDENCY* 1, 2 (Ryan J. Barilleaux & Christopher S. Kelley eds., 2010).

<sup>48</sup> See Howell, *supra* note 17, at 421.

<sup>49</sup> See *id.* at 418–19.

<sup>50</sup> See *id.* at 425–26.

<sup>51</sup> See Moe & Howell, *supra* note 37, at 858.

<sup>52</sup> See, e.g., CALABRESI & YOO, *supra* note 41, at 28 (stating that the authors' examination of historical unilateralism is limited to "veto messages, signing statements, legislative proposals, and statements regarding previously enacted legislation").

### B. Presidential Executive Orders

Executive orders are written directives issued by Presidents providing instructions to executive branch agencies and officials on how to implement or interpret the law.<sup>53</sup> They are generally viewed by the courts as having the force of law, as long as they do not explicitly violate statutes or the Constitution.<sup>54</sup> Following the passage of the Federal Register Act of 1936, all executive orders must be published in the *Federal Register*.<sup>55</sup> Dating back to George Washington, Presidents have used them for an array of purposes,<sup>56</sup> including to form, abolish, or restructure agencies,<sup>57</sup> delegate authority,<sup>58</sup> create policy initiatives,<sup>59</sup> respond to economic or foreign crises,<sup>60</sup> initiate or guide rulemaking,<sup>61</sup> manage public lands,<sup>62</sup> coordinate agency activity,<sup>63</sup> and govern civil service personnel<sup>64</sup> and policies.<sup>65</sup> Executive orders are often utilized by Presidents to pursue policies that are salient to them, certain constituencies, or the general public.<sup>66</sup>

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<sup>53</sup> JOHN CONTRUBIS, CONG. RSCH. SERV., RL95-722A, EXECUTIVE ORDERS AND PROCLAMATIONS 1 (1999).

<sup>54</sup> See COOPER, *supra* note 18, at 70.

<sup>55</sup> Federal Register Act of 1935, Pub. L. No. 74-220, § 5, 49 Stat. 500, 501 (codified as amended at 44 U.S.C. § 1505).

<sup>56</sup> See Gerhard Peters & John T. Woolley, *Executive Orders*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/node/323876> [<https://perma.cc/3CXE-B2FA>] (last visited Mar. 15, 2021); N.J. HIST. RECS. SURV. PROJECT, LIST AND INDEX OF PRESIDENTIAL EXECUTIVE ORDERS: UNNUMBERED SERIES, 1789–1941, at 1–2 (Clifford L. Lord ed., 1943) (collecting presidential actions arguably considered executive orders today)

<sup>57</sup> See, e.g., Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (Oct. 8, 2001) (establishing the Department of Homeland Security).

<sup>58</sup> See, e.g., Exec. Order No. 11,108, 28 Fed. Reg. 5,183 (May 22, 1963) (delegating authority to the Secretary of Agriculture).

<sup>59</sup> See, e.g., Exec. Order No. 13,506, 74 Fed. Reg. 11,271 (Mar. 16, 2009) (developing policy for education of girls and women in technical fields).

<sup>60</sup> See, e.g., Exec. Order No. 13,235, 66 Fed. Reg. 58,343 (Nov. 16, 2001) (emergency response to the World Trade Center attacks).

<sup>61</sup> See, e.g., Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 4, 1993) (requiring cost-benefit analysis for government regulations).

<sup>62</sup> See, e.g., Exec. Order No. 12,996, 61 Fed. Reg. 13,647 (Mar. 25, 1996) (managing the National Wildlife Refuge System).

<sup>63</sup> See, e.g., Exec. Order No. 13,937, 85 Fed. Reg. 45,755 (July 24, 2020) (coordinating actions of the Department of Health and Human Services grant program for affordable insulin and epinephrine medication).

<sup>64</sup> See, e.g., Exec. Order No. 13,832, 83 Fed. Reg. 22,343 (May 9, 2018) (prioritizing hiring of military spouses in civil service).

<sup>65</sup> See, e.g., Exec. Order No. 11,056, 27 Fed. Reg. 10,017 (Oct. 11, 1962) (assigning certain permissions to federal salary determinations).

<sup>66</sup> See *What Is an Executive Order?*, AM. BAR ASS'N (Oct. 9, 2020), [https://www.americanbar.org/groups/public\\_education/publications/teaching-legal-docs/what-is-an-executive-order/](https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order/) [<https://perma.cc/G3BP-W3UD>].



To that end, Presidents have employed these orders to engage with individual rights. They are commonly adopted to create agencies,<sup>67</sup> councils, or task forces promoting diversity or economic opportunity for certain groups of individuals.<sup>68</sup> For instance, President Obama issued an executive order establishing the White House Council on Women and Girls to “increase the participation of women in the science, engineering, and technology workforce” and “to address issues of special importance to women and girls.”<sup>69</sup> In another order, he acknowledged the historical mistreatment of Native Americans and thereafter created the White House Council on Native American Affairs, designed “to support tribal self-governance” and “increase the impact of Federal resources and create greater opportunities to help improve the quality of life for Native Americans.”<sup>70</sup> Presidents have likewise promoted policy initiatives through unilateral directives for similar purposes.<sup>71</sup> President Clinton, for instance, issued an executive order to expand employment opportunities for individuals with disabilities.<sup>72</sup> Every President since Carter has signed an executive order advancing Historically Black Colleges and Universities.<sup>73</sup>

Patterns of unilateral activity in other rights-related realms have also transcended presidencies. Franklin D. Roosevelt first issued an executive order prohibiting discrimination in federal defense agencies and contractors on the basis of “race, creed, color, or national origin” and created the Committee on Fair Employment Practice to enforce it.<sup>74</sup> This policy was expanded under Truman and Eisenhower to include all federal contractors, with greater enforcement.<sup>75</sup> Similar non-discrimination orders were accompanied by requirements for federal contractors to promote affirmative action hiring under Kennedy, who likewise established the President’s

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<sup>67</sup> See William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095, 1101–02 (2002) (noting that Presidents often create agencies when Congress cannot).

<sup>68</sup> See, e.g., Exec. Order No. 8,802, 6 Fed. Reg. 3,109 (June 27, 1941) (creating the Fair Employment Practices Commission to target racial discrimination); Exec. Order No. 13,647, 78 Fed. Reg. 39,539 (July 1, 2013) (creating the White House Council on Native American Affairs); Exec. Order No. 13,506, 74 Fed. Reg. 11,271 (Mar. 16, 2009).

<sup>69</sup> See Exec. Order No. 13,506, 74 Fed. Reg. at 11,272.

<sup>70</sup> Exec. Order No. 13,647, 78 Fed. Reg. at 39,541.

<sup>71</sup> See, e.g., Exec. Order No. 13,163, 65 Fed. Reg. 46,563 (July 28, 2000).

<sup>72</sup> *Id.*

<sup>73</sup> See Exec. Order No. 12,232, 45 Fed. Reg. 53,437 (Aug. 12, 1980) (President Carter); Exec. Order No. 12,320, 46 Fed. Reg. 46,107 (Sept. 17, 1981) (President Reagan); Exec. Order No. 12,677, 54 Fed. Reg. 18,869 (April 28, 1989) (President George H.W. Bush); Exec. Order No. 12,876, 58 Fed. Reg. 58,735 (Nov. 4, 1993) (President Clinton); Exec. Order No. 13,256, 67 Fed. Reg. 6,823 (Feb. 14, 2002) (President George W. Bush); Exec. Order No. 13,532, 75 Fed. Reg. 9,749 (Mar. 3, 2010) (President Obama); Exec. Order No. 13,779, 82 Fed. Reg. 12,499 (Mar. 3, 2017) (President Trump).

<sup>74</sup> Exec. Order No. 8,802, 6 Fed. Reg. 3,109, 3,109 (June 27, 1941).

<sup>75</sup> Exec. Order No. 10,308, 16 Fed. Reg. 12,303 (Dec. 3, 1951); Exec. Order No. 10,479, 18 Fed. Reg. 4,899, 4,899, 4,901 (Aug. 18, 1953).

Committee on Equal Employment Opportunity.<sup>76</sup> Lyndon B. Johnson transferred the responsibility for enforcing these non-discrimination and affirmative action policies to the Secretary of Labor, while also expanding coverage to sex.<sup>77</sup> George W. Bush broadened protections to encompass faith-based and community organizations,<sup>78</sup> while Obama included sexual orientation.<sup>79</sup>

Not all executive orders related to individual rights are used to expand them, however. While some Presidents, like Kennedy and Obama, established collective bargaining rights for federal employees through executive order,<sup>80</sup> others such as Carter, Reagan, and George H. W. Bush issued exemptions limiting these rights.<sup>81</sup> Relatedly, Trump completely revoked Obama's order creating additional labor-management forums.<sup>82</sup> Overall, executive orders can expand or contract individual rights. However, they are not the only means by which Presidents can unilaterally affect rights.

### C. Presidential Memoranda

Like executive orders, memoranda are presidential directives providing agency instruction.<sup>83</sup> They have been used by Presidents since Lincoln, for similar purposes as those for executive orders stated above.<sup>84</sup> Unlike executive orders, however, memoranda are not required to be published in the *Federal Register*.<sup>85</sup> They consequently are not always readily accessible for public record.<sup>86</sup> Furthermore, the legal status of memoranda is ambiguous at best.<sup>87</sup> The courts have not explicitly ruled that these directives have the force of law, as they have done for executive orders.<sup>88</sup> Though

<sup>76</sup> Exec. Order No. 10,925, 26 Fed. Reg. 1,977 (Mar. 8, 1961).

<sup>77</sup> Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965); Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 13, 1967).

<sup>78</sup> Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 16, 2002).

<sup>79</sup> Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014).

<sup>80</sup> See, e.g., Exec. Order No. 10,988, 27 Fed. Reg. 551 (Jan. 19, 1962); Exec. Order No. 13,522, 74 Fed. Reg. 66,203 (Dec. 14, 2009).

<sup>81</sup> See, e.g., Exec. Order No. 12,171, 44 Fed. Reg. 66,565 (Nov. 19, 1979) (President Carter exempting agencies from newly passed federal employee rules); William C. Zifchak, *Collective Bargaining in the Reagan Era: A Management Perspective*, 1 HOFSTRA LAB. & EMP. L.J. 1, 2–3 (1983) (discussing President Reagan's laissez-faire approach to collective bargaining); Exec. Order No. 12,818, 57 Fed. Reg. 48,713 (Oct. 23, 1992) (President H. W. Bush allowing government contractors to opt out of joining unions).

<sup>82</sup> Exec. Order No. 13,812, 82 Fed. Reg. 46,367 (Oct. 4, 2017).

<sup>83</sup> See COOPER, *supra* note 18, at 135–38.

<sup>84</sup> See, e.g., Memorandum to General George B. McClellan on Potomac Campaign (Dec. 1, 1861), *reprinted in* 5 COLLECTED WORKS OF ABRAHAM LINCOLN 34–35 (Roy P. Basler, Marion Dolores Pratt & Lloyd A. Dunlap eds., 1953) (discussing military strategy).

<sup>85</sup> COOPER, *supra* note 18, at 122–23.

<sup>86</sup> *Id.* at 123 (noting that some Presidents have published some of their memoranda, but there is no formal system for disseminating them or organizing them).

<sup>87</sup> See *id.* at 121, 156.

<sup>88</sup> See *id.* at 157–58.

their legal implications may be less clear, memoranda are still frequently used to advance and retract individual rights.

For instance, Reagan issued a memorandum promoting initiatives related to Historically Black Colleges and Universities.<sup>89</sup> Clinton signed several memoranda on employment opportunities for individuals with disabilities.<sup>90</sup> Obama created a Working Group on the Intersection of HIV/AIDS, Violence Against Women and Girls, and Gender-Related Health Disparities.<sup>91</sup> Presidents often use executive orders and memoranda interchangeably, both in name and in practice.<sup>92</sup> Memoranda are sometimes employed in conjunction with executive orders, allowing the President to simultaneously pursue policy change in a variety of ways. Obama, for example, signed in the same year an executive order advancing fair pay for federal contractors<sup>93</sup> and a memorandum requesting the Department of Labor to propose a rule requiring contractors to provide data on employee compensation.<sup>94</sup>

Memoranda have been utilized much more regularly to engage with other types of individual rights. Presidents, like Clinton and Obama, provided relief to immigrants,<sup>95</sup> while others, notably Trump, restricted immigration and deprived protections for undocumented individuals.<sup>96</sup> Obama issued a memorandum advancing the human rights of LGBTQ individuals abroad through foreign assistance, immigration policies, and the United States' responses to international violations.<sup>97</sup> Trump, on the other

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<sup>89</sup> See Memorandum on Historically Black Colleges and Universities, 2 PUB. PAPERS 871 (July 24, 1987).

<sup>90</sup> See, e.g., Memorandum on Renewing the Commitment to Ensure that Federal Programs Are Free from Disability-Based Discrimination, 2 PUB. PAPERS 1467 (July 26, 2000); Memorandum on Employing People with Significant Disabilities to Fill Federal Agency Jobs that Can Be Performed at Alternate Work Sites, Including the Home, 2 PUB. PAPERS 1468 (July 26, 2000).

<sup>91</sup> See Memorandum on Establishing a Working Group on the Intersection of HIV/AIDS, Violence Against Women and Girls, and Gender-Related Health Disparities, 1 PUB. PAPERS 20,277 (Mar. 30, 2012).

<sup>92</sup> COOPER, *supra* note 18, at 120, 131–32.

<sup>93</sup> Exec. Order No. 13,673, 79 Fed. Reg. 45,309 (July 31, 2014).

<sup>94</sup> Memorandum on Advancing Pay Equality Through Compensation Data Collection, 1 PUB. PAPERS 20,751 (Apr. 8, 2014).

<sup>95</sup> See, e.g., Memorandum on the Eligibility of Aliens for Food Stamps, 2 PUB. PAPERS 1331 (Aug. 22, 1996) (ensuring that alien immigrants would continue to receive food stamps during pending eligibility determinations); Memorandum on the Response to the Influx of Unaccompanied Alien Children Across the Southwest Border, 1 PUB. PAPERS 635 (June 2, 2014) (advocating for unified effort to ensure housing and medical care would be provided to unaccompanied child immigrants).

<sup>96</sup> See, e.g., Memorandum on Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System, 2019 DAILY COMP. PRES. DOC. 1 (Apr. 29, 2019) (proposing regulations establishing a fee for asylum applications and barring asylum seekers from receiving employment authorization prior to granting of approval).

<sup>97</sup> Memorandum on International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons, 2 PUB. PAPERS 1524 (Dec. 6, 2011).

hand, banned transgender persons from military service.<sup>98</sup> Memoranda have likewise been used to influence other areas of individual rights related to fair housing,<sup>99</sup> affirmative action,<sup>100</sup> religious expression,<sup>101</sup> victims' rights,<sup>102</sup> and environmental justice.<sup>103</sup>

## II. BACKGROUND ON GUBERNATORIAL UNILATERAL DIRECTIVES

The President is not the only executive with the power to unilaterally influence public policy. Governors, too, use unilateral actions, most notably executive orders, in a wide range of areas that include individual rights.<sup>104</sup> In this Part we provide details on gubernatorial executive orders by first tracing their origins from state constitutions. We then describe their functions and provide examples of how they have been used to influence citizens' rights. Along the way, we highlight differences in this power across states and make comparisons to the federal level.

### A. Constitutional Origins of Gubernatorial Power and Unilateralism

Like the federal level, state constitutions establish separation of powers systems with distinct bases of power, divided amongst three branches of government. Early governors were weak relative to their legislative counterparts, given the general distrust of executive power by states traumatized by their colonial pasts.<sup>105</sup> By the

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<sup>98</sup> Memorandum on Military Service by Transgender Individuals, 2017 DAILY COMP. PRES. DOC. 1 (Aug. 25, 2017).

<sup>99</sup> See, e.g., Memorandum on the Civil Rights Working Group, 2 PUB. PAPERS 1430 (Aug. 4, 1994) (creating a Civil Rights Working Group to supplement the previously created Fair Housing Council).

<sup>100</sup> See, e.g., Memorandum on Affirmative Action, 2 PUB. PAPERS 1114 (July 19, 1995) (calling for an update to affirmative action protocol to accommodate requirements laid out by the Supreme Court).

<sup>101</sup> See, e.g., Memorandum on Religious Expression in Public Schools, 2 PUB. PAPERS 1083 (July 12, 1995) (reiterating what religious activities individual students may engage in while at school, including non-disruptive prayer, reading their Bible while not receiving instruction, and attending after-school events).

<sup>102</sup> See, e.g., Memorandum for the Director of the Office of Personnel Management on Guidebook for Victims of Domestic Violence, 2 PUB. PAPERS 1978 (Nov. 4, 1998) (directing the preparation of a guidebook for federal agencies detailing response strategies for departments and providing resources for federal employees who were victims of domestic violence).

<sup>103</sup> See, e.g., Memorandum on Environmental Justice, 1 PUB. PAPERS 241 (Feb. 11, 1994) (directing agencies that receive federal funding to adhere to nonracially discriminatory practices, requiring federal agencies to conduct analysis of their actions on minority and low-income communities, and requiring a community comment period for all actions involving National Environmental Policy Act assessments).

<sup>104</sup> See *infra* Section II.B.

<sup>105</sup> Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 493 (2017).

turn of the twentieth century, however, the power dynamics shifted.<sup>106</sup> States began granting governors more expansive powers, in response to growing dissatisfaction with legislatures and rampant corruption.<sup>107</sup> Though their power varies from state to state, many governors have similar policymaking abilities as the President. Gubernatorial powers are generally separated into formal and informal tools, the latter of which is attributed to their increasing prominence in state and national politics.<sup>108</sup> In the case of the former, state constitutions grant governors many familiar tools, such as traditional vetoes and appointments, as well as some not granted to the President, like the line-item veto.<sup>109</sup>

Governors have likewise embraced unilateral powers but to varying degrees. Some use proclamations in similar ways as the President, for general pronouncements of policy.<sup>110</sup> Others wield them for alternative tasks such as to declare disaster emergencies<sup>111</sup> or to designate the agenda of legislative sessions.<sup>112</sup> In some states, governors rely extensively on administrative orders to manage the executive branch.<sup>113</sup> Though not every governor deploys proclamations or administrative orders, every single one of them has the power to issue executive orders.<sup>114</sup>

Like the President, some governors—like those in California, Connecticut, and Maine—derive this authority implicitly from constitutional clauses endowing executive power broadly or from their own version of the Take Care Clause.<sup>115</sup> Unlike the

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<sup>106</sup> *Id.* at 496–97.

<sup>107</sup> *Id.* at 496.

<sup>108</sup> E. Lee Bernick, *Gubernatorial Tools: Formal vs. Informal*, 41 J. POL. 656, 657–58 (1979).

<sup>109</sup> See Seifter, *supra* note 105, at 499.

<sup>110</sup> See, e.g., Jim Justice, Proclamation Declaring Christmas Eve as Full-Day State Holiday for Public Employees (Dec. 10, 2019), <https://governor.wv.gov/Documents/2019%20Proclamations/2019-Holiday-Proclamation.pdf> [<https://perma.cc/9Y5A-PS4K>] (establishing one-time work policy).

<sup>111</sup> See, e.g., Greg Abbott, Disaster Proclamation Issued for 30 Texas Counties in Anticipation of Tropical Depression Harvey Making Landfall (Aug. 23, 2017), <https://gov.texas.gov/news/post/Disaster-Proclamation-Issued-For-30-Texas-Counties-in-Anticipation-Of-Tropical-Depression-Harvey-Making-Landfall> [<https://perma.cc/952G-JD4D>].

<sup>112</sup> See, e.g., Neb. Exec. Order No. 17-04 (July 6, 2017), <http://govdocs.nebraska.gov/docs/pilot/pubs/eofiles/17-04.pdf> (asking the legislature to consider paring down the Nebraska Administrative Code from 7,500,000 words by eliminating redundant language).

<sup>113</sup> *Compare Archives for Admin Orders*, OFF. GOV. MIKE DUNLEAVY, <https://gov.alaska.gov/admin-orders/> [<https://perma.cc/EFT5-KGSE>] (last visited Mar. 15, 2021) (listing approximately forty administrative orders issued since 2016), with *Executive Orders of the 29th Legislature*, ALASKA STATE LEGISLATURE, <http://www.akleg.gov/basis/Law/EO/29> [<https://perma.cc/MYF7-UHPT>] (last visited Mar. 15, 2021) (showing Executive Order 118, issued in January 2016, as the most recent of its type).

<sup>114</sup> Heather Perkins, *State Executive Branch*, in *THE BOOK OF THE STATES 2019*, at 102, 112 tbl.4.5 (2019), <http://knowledgecenter.csg.org/kc/system/files/4.5.2019.pdf> [<https://perma.cc/7RC2-S8P3>].

<sup>115</sup> See *Regarding Executive Order B-54-79*, 63 Op. Cal. Att’y Gen. 583 (1980); CONN. CONST. art. IV, § 12; ME. CONST. art. V, pt. I, §§ 1, 12; see also U.S. CONST. art. II, § 3.

President, however, some state constitutions explicitly grant governors the power to issue executive orders for specific purposes like disaster declarations,<sup>116</sup> reorganization,<sup>117</sup> or calling special sessions.<sup>118</sup> Some state legislatures have likewise passed statutes explicitly authorizing gubernatorial executive orders for limited purposes, such as disaster declarations and other emergency powers in Indiana.<sup>119</sup> In Louisiana, governors are granted general and broad authority to issue an executive order through a statute stating: “The authority of the governor to see that the laws are faithfully executed by issuing executive orders is recognized.”<sup>120</sup>

Akin to orders on the federal level, gubernatorial executive orders are viewed as having the force of law by some state courts, such as in South Carolina.<sup>121</sup> Many other judiciaries have acknowledged the legal authority of executive orders in a more limited manner, by qualifying its force of law in the cases of only implementing a specific statute, when authorized by statute or the constitution,<sup>122</sup> or on matters related to the executive branch.<sup>123</sup>

### *B. Functions of Gubernatorial Executive Orders*

Regardless of these differences, all state governors regularly use executive orders for administrative and policy purposes. Governors, like Presidents, can specifically employ orders in ways that impact individual rights. Many of these orders are used to create commissions, task forces, and committees on issues related to diversity and economic or employment opportunities. For example, Jim Folsom Jr. in Alabama created the Governor’s Office of Minority Affairs in 1994.<sup>124</sup> Arizona Governor Fife Symington issued a string of executive orders in 1993 that established committees on the Employment of People with Disabilities, Non-traditional Employment for Women, and Violence Against Women as well as the Office of Americans with Disabilities to help implement the federal Americans with Disabilities Act (ADA).<sup>125</sup>

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<sup>116</sup> *E.g.*, COLO. CONST. art. VIII, § 3, cl. 2.

<sup>117</sup> MD. CONST. art. II, § 24.

<sup>118</sup> *Id.* art. II, § 16.

<sup>119</sup> *E.g.*, IND. CODE § 10-14-3-13 (2020).

<sup>120</sup> LA. STAT. ANN. § 49:215 (2020).

<sup>121</sup> *See Drummond v. Beasley*, 503 S.E.2d 455, 458 (S.C. 1998) (implying that executive orders do carry the force of law in asserting that a veto message did not because it was not issued as an executive order).

<sup>122</sup> *See, e.g.*, *Werner v. Zazyczny*, 681 A.2d 1331, 1336 (Pa. 1996).

<sup>123</sup> *See Kilpatrick v. Indus. Claim Appeals Off.*, 356 P.3d 1008, 1015–16 (Colo. App. 2015).

<sup>124</sup> Ala. Exec. Order No. 25 (Aug. 8, 1994), <https://digital.archives.alabama.gov/digital/collection/executive/id/346/rec/28> [<https://perma.cc/JSS8-4869>].

<sup>125</sup> Ariz. Exec. Order No. 93-12 (July 7, 1993), <https://azmemory.azlibrary.gov/digital/collection/execorders/id/2029/rec/11> [<https://perma.cc/F3GD-UX87>]; Ariz. Exec. Order No. 93-13 (July 1, 1993), <https://azmemory.azlibrary.gov/digital/collection/execorders/id/2030/rec/11> [<https://perma.cc/SB6U-5FDL>]; Ariz. Exec. Order No. 93-14 (July 10, 1993), <https://azmemory.azlibrary.gov/digital/collection/execorders/id/2031/rec/11> [<https://perma.cc/57UX>].

Other states, such as Washington and Minnesota, likewise issued executive orders to enforce the ADA.<sup>126</sup>

Governors commonly issue executive orders on non-discrimination in state employment and contractors. Similar to the federal level, they often call for non-discrimination “based on race, color, age, gender, ethnicity, sexual orientation, religion, creed, ancestry, national origin, disability, veteran’s status (including Vietnam-era veterans), or background,” and affirmative action, as Deval Patrick of Massachusetts did in his 2007 order.<sup>127</sup> State executive orders have also covered a wider assortment of rights than federal ones. For instance, the Kansas governor signed an order establishing a Bill of Rights for Veteran Employment,<sup>128</sup> while Massachusetts established an affirmative action program for Veterans.<sup>129</sup> In 2018, New York Governor Andrew Cuomo promulgated executive orders establishing a process for restoring voting rights to formerly incarcerated individuals,<sup>130</sup> specifying privacy policies for state employees,<sup>131</sup> and calling for regulations to ensure female employees have access to contraceptive services.<sup>132</sup> Illinois Governor Pat Quinn advanced orders on pregnancy discrimination and freedom of speech protections for state employees in 2015.<sup>133</sup>

Furthermore, some governors use executive orders to promote victims’ rights, as did New Mexico Governor Bill Richardson when he created an alliance to evaluate the delivery of services to victims by state and local agencies and make recommendations to improve the protection of victim rights in the state.<sup>134</sup> Other common areas of

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-A7V2]; Ariz. Exec. Order No. 93-19 (Oct. 1, 1993), <https://azmemory.azlibrary.gov/digital/collection/execorders/id/2036/rec/11> [<https://perma.cc/4PTJ-BCEL>].

<sup>126</sup> Wash. Exec. Order No. 93-03 (Feb. 24, 1993), [https://www.governor.wa.gov/sites/default/files/exe\\_order/eo\\_93-03.pdf](https://www.governor.wa.gov/sites/default/files/exe_order/eo_93-03.pdf) [<https://perma.cc/V8XS-YVKK>]; Wash. Exec. Order No 93-04 (Apr. 30, 1993), [https://www.governor.wa.gov/sites/default/files/exe\\_order/eo\\_93-04.pdf](https://www.governor.wa.gov/sites/default/files/exe_order/eo_93-04.pdf) [<https://perma.cc/5EEN-B7RB>]; Minn. Exec. Order No. 96-9 (June 12, 1996), <https://www.leg.mn.gov/archive/execorders/96-09.pdf> [<https://perma.cc/3BTQ-4WBT>].

<sup>127</sup> Mass. Exec. Order No. 478 (Jan. 30, 2007), <https://www.mass.gov/doc/executive-order-478-mass-register-1072/download> [<https://perma.cc/84HD-7R8T>].

<sup>128</sup> Kan. Exec. Order No. 90-126 (Aug. 23, 1990), <https://kslib.info/DocumentCenter/View/622/EO-90-126?bidId=> [<https://perma.cc/CGS4-YLPP>].

<sup>129</sup> Mass. Exec. Order No. 236 (Dec. 7, 1983), <https://www.mass.gov/executive-orders/no-236-the-governors-advisory-council-for-the-state-office-of-affirmative-action> [<https://perma.cc/JN7H-CBDU>].

<sup>130</sup> N.Y. Exec. Order No. 181 (Apr. 18, 2018), [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Executive\\_Order\\_181.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Executive_Order_181.pdf) [<https://perma.cc/94GS-V2LG>].

<sup>131</sup> N.Y. Exec. Order No. 183 (June 27, 2018), [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_%23183.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_%23183.pdf) [<https://perma.cc/G96J-P7SJ>].

<sup>132</sup> N.Y. Exec. Order No. 184 (July 9, 2018), [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_%23184.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_%23184.pdf) [<https://perma.cc/L32T-TPMH>].

<sup>133</sup> Ill. Exec. Order No. 15-03 (Jan. 9, 2015), <https://www2.illinois.gov/Documents/ExecOrders/2015/execorder2015-3.pdf> [<https://perma.cc/CN88-B3N8>]; Ill. Exec. Order No. 15-13 (Feb. 9, 2015), <https://www2.illinois.gov/Documents/ExecOrders/2015/ExecutiveOrder2015-13.pdf> [<https://perma.cc/LY5D-7CW8>].

<sup>134</sup> *New Mexico Victim Rights Alliance*, DWI RES. CTR., <https://dwiresourcecenter.org/in>

rights-related unilateral action in the states include: protections for the disabled,<sup>135</sup> the creation of Martin Luther King Jr. federal holiday commissions or task forces,<sup>136</sup> anti-ageist guidelines,<sup>137</sup> the prevention of sexual harassment,<sup>138</sup> and other workplace policies related to health and safety,<sup>139</sup> pay equity,<sup>140</sup> and collective bargaining.<sup>141</sup>

Like Presidents, governors can also utilize executive orders to retract or narrow individual rights. For instance, Alabama Governor Fob James ordered state agencies not to grant same-sex marriage licenses in 1996.<sup>142</sup> Jan Brewer in Arizona penned several executive orders restricting immigration and immigrant rights during her tenure in office.<sup>143</sup> In 2015, Bobby Jindal issued an executive order to enforce a Louisiana law punishing those who disturb the peace at funerals.<sup>144</sup> Most state executive orders affecting individual rights, however, expand rather than contract them. Recent gubernatorial unilateral activity in this area has centered around the rights of trans individuals<sup>145</sup> and immigrants,<sup>146</sup> as well as expansions of voting rights.<sup>147</sup>

### III. THEORETICAL EXPECTATIONS AND MODEL PREDICTIONS

As Part I and Part II illustrate, both Presidents and governors use unilateral directives to influence individual rights—mostly to expand these rights but sometimes to restrict them as well.<sup>148</sup> What, then, determines when chief executives rely more or

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dex.php/click-here-to-read-the-victims-rights-alliance-report/ [https://perma.cc/JTE9-MKPU] (last visited Mar. 15, 2021).

<sup>135</sup> See *supra* notes 125–26 and accompanying text.

<sup>136</sup> E.g., Mass. Exec. Order No. 297 (Jan. 18, 1991), <https://www.mass.gov/executive-orders/no-297-martin-luther-king-jr-holiday-commission> [https://perma.cc/A7Y6-B46D].

<sup>137</sup> N.Y. COMP. CODES R. & REGS. tit. 9, § 4.96 (1987).

<sup>138</sup> Wash. Exec. Order. No. 89-01 (Jan. 20, 1989), [https://www.governor.wa.gov/sites/default/files/exe\\_order/eo\\_89-01.pdf](https://www.governor.wa.gov/sites/default/files/exe_order/eo_89-01.pdf) [https://perma.cc/R3JX-676Y].

<sup>139</sup> Va. Exec. Order No. 94 (July 14, 2005), [http://digitool1.lva.lib.va.us:1801/webclient/StreamGate?folder\\_id=0&dvs=1608519804687~384](http://digitool1.lva.lib.va.us:1801/webclient/StreamGate?folder_id=0&dvs=1608519804687~384) [https://perma.cc/4JJS-ZDKD].

<sup>140</sup> N.Y. Exec. Order No. 161 (Jan. 9, 2017), [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_161.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_161.pdf) [https://perma.cc/N337-PLL9].

<sup>141</sup> Del. Exec. Order No. 10 (Sept. 7, 2009), [https://archivesfiles.delaware.gov/Executive-Orders/Markell/Markell\\_EO10.pdf](https://archivesfiles.delaware.gov/Executive-Orders/Markell/Markell_EO10.pdf) [https://perma.cc/UFE7-P659].

<sup>142</sup> Ala. Exec. Order No. 24 (Aug. 29, 1996), <https://digital.archives.alabama.gov/digital/collection/executive/id/388/rec/25> [https://perma.cc/M89C-2EB7].

<sup>143</sup> Ariz. Exec. Order No. 2012-06 (Aug. 15, 2012), <https://azmemory.azlibrary.gov/digital/collection/execorders/id/1943/rec/14> [https://perma.cc/J5L4-5LFN].

<sup>144</sup> La. Exec. Order No. BJ 15-16 (July 25, 2015), <https://www.doa.la.gov/osr/other/bj15-16.htm> [https://perma.cc/D793-JR22].

<sup>145</sup> Ohio Exec. Order No. 2018-12k (Dec. 19, 2018), [https://das.ohio.gov/Portals/0/DASDivisions/CentralServices/pdf/Signed%20EO%202018-12K\\_1.pdf](https://das.ohio.gov/Portals/0/DASDivisions/CentralServices/pdf/Signed%20EO%202018-12K_1.pdf) [https://perma.cc/HW7Y-MDL6].

<sup>146</sup> N.Y. Exec. Order No. 170 (Sept. 15, 2017), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO%20%23170.pdf> [https://perma.cc/3JL5-W3L7].

<sup>147</sup> Iowa Exec. Order No. 7 (Aug. 5, 2020), <https://governor.iowa.gov/sites/default/files/documents/EO%20-%20Voting%20Restoration.pdf> [https://perma.cc/ZRR4-2GCM].

<sup>148</sup> See *supra* notes 69–82, 142–47.



less on unilateral directives to influence individual rights? We seek to answer this question in Part III by delineating our theoretical expectations based on insights gleaned from the existing literature on executive unilateralism, most of which is based on presidential executive orders.<sup>149</sup> We speculate how federal-based theories<sup>150</sup> can apply to the U.S. states and produce additional conjectures based on the uniqueness of these subnational contexts. Specifically, this Part considers how the following factors influence the issuance of rights-related unilateral directives at both the federal and state levels: party and ideology; race and gender; public opinion, approval, and salience; federalism; and other political conditions.

#### *A. Party and Ideology of Chief Executives*

Chief executives' partisan and ideological preferences should be a prime motivator for their unilateral behavior.<sup>151</sup> Though some scholars argue that Presidents of both parties use unilateral directives to advance their policy goals,<sup>152</sup> others find evidence that Democrats issue more executive orders than Republicans given their proclivity for government intervention.<sup>153</sup> We expect to find similar patterns in the case of individual rights. Democrats have long championed the causes of historically marginalized groups in areas including civil, voting, and labor rights.<sup>154</sup> Thus, we expect that Presidents and governors belonging to the Democratic Party should issue more unilateral directives broadening individual rights than Republicans. Even among Democrats, some chief executives are more progressive than others.<sup>155</sup> And so, we expect liberal executives to increase their use of unilateralism

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<sup>149</sup> See *infra* notes 153–89.

<sup>150</sup> See *infra* notes 190–98.

<sup>151</sup> See sources cited *infra* note 153.

<sup>152</sup> KENNETH MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 3–7 (2001); Dennis W. Gleiber & Steven A. Shull, *Presidential Influence in the Policymaking Process*, 45 W. POL. Q. 441, 453 (1992).

<sup>153</sup> MAYER, *supra* note 152, at 88; ADAM L. WARBER, EXECUTIVE ORDERS AND THE MODERN PRESIDENCY: LEGISLATING FROM THE OVAL OFFICE 45 (2006); Brandon Rottinghaus & Adam L. Warber, *Unilateral Orders as Constituency Outreach: Executive Orders, Proclamations, and the Public Presidency*, 45 PRESIDENTIAL STUD. Q. 289, 302 (2015); Gleiber & Shull, *supra* note 152, at 449.

<sup>154</sup> See *Civil Rights Act of 1964*, HISTORY, <https://www.history.com/topics/black-history/civil-rights-act> [<https://perma.cc/74T5-Z7WS>] (Feb. 10, 2020); *Voting Rights Act of 1965*, HISTORY, <https://www.history.com/topics/black-history/voting-rights-act> [<https://perma.cc/BG9E-ZM99>] (Aug. 25, 2020); *New Deal*, HISTORY, <https://www.history.com/topics/great-depression/new-deal> [<https://perma.cc/77WY-RH2H>] (Nov. 27, 2019).

<sup>155</sup> See Jeremy Hobson & Allison Hagan, *A Historical Look at Whether Democrats Can Win by Playing to the Progressive Base*, WBUR (Jan. 6, 2020), <https://www.wbur.org/hereandnow/2020/01/06/progressive-democrats-bernie-sanders-elizabeth-warren> [<https://perma.cc/M62U-UAM4>].

to advocate for individual rights.<sup>156</sup> Though unilateral directives restricting rights are relatively rare, we expect that—when they do occur—they are employed more frequently by Republican and conservative executives.<sup>157</sup> An alternative explanation for the difference we predict might refer to the differences between the originalist and living constitution interpretations of the law, which we attribute respectively to the Republican and Democratic parties.<sup>158</sup>

### *B. Race and Gender of Chief Executives*

Certain descriptive characteristics of chief executives might also explain unilateral activity. This should be especially true among governors, who have been more diverse than Presidents—particularly in recent years.<sup>159</sup> Since theories of executive unilateralism have largely centered around U.S. Presidents, a notoriously homogenous group, we wonder if the gender or race of an executive might actually predict differences in executive policymaking.<sup>160</sup>

There is evidence, however, linking diversity to greater representation in other policymaking choices and not just within the United States. Several studies find that Black legislators are prone to represent the interests of Black constituents through roll call votes.<sup>161</sup> Others find that these legislators are also more likely to respond to the concerns of Black citizens in general, even those residing outside of their districts.<sup>162</sup> In both U.S. federal and state legislative chambers, women legislators

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<sup>156</sup> See *Civil Rights*, DEMOCRATIC NAT'L COMM., <https://democrats.org/where-we-stand/the-issues/civil-rights/> [<https://perma.cc/HZ9J-X7XM>] (last visited Mar. 15, 2021).

<sup>157</sup> See *supra* notes 152–55.

<sup>158</sup> See generally Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019) (surveying the arguments in favor of original intent and more modern approaches to interpreting the law in light of contemporary concerns).

<sup>159</sup> Grace Sparks, *There Has Been Very, Very Little Diversity Among US Governors*, CNN (May 23, 2018, 3:18 PM), <https://www.cnn.com/2018/05/23/politics/racial-diversity-governors/index.html> [<https://perma.cc/Y5D9-RX62>].

<sup>160</sup> David Masci, *Biden Is Only the Second Catholic President, but Nearly All Have Been Christians*, PEW RSCH. CTR.: FACT TANK, <https://www.pewresearch.org/fact-tank/2017/01/20/almost-all-presidents-have-been-christians/> [<https://perma.cc/9XFN-39QH>] (Jan. 20, 2021).

<sup>161</sup> DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK-MAJORITY DISTRICTS 179 *tbl.4.10*, 180 (1999); Christian R. Grose, *Disentangling Constituency and Legislator Effects in Legislative Representation*, 86 SOC. SCI. Q. 427, 428 (2005); Neil Pinney & George Serra, *The Congressional Black Caucus and Vote Cohesion: Placing the Caucus Within House Voting Patterns*, 52 POL. RSCH. Q. 583, 602–03 (1999). *But see* Charles Cameron, David Epstein & Sharyn O'Halloran, *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794, 810 (1996) (“Overall, maximizing the number of minority representatives does not necessarily maximize minority representation, as measured by roll-call voting behavior.”). See generally Katherine Tate, *Black Opinion on the Legitimacy of Racial Redistricting and Minority-Majority Districts*, 97 AM. POL. SCI. REV. 45 (2003).

<sup>162</sup> David E. Broockman, *Black Politicians Are More Intrinsically Motivated to Advance*

are inclined to sponsor legislation related to women's issues.<sup>163</sup> In Argentina, gender quotas increased the number of bills introduced on women's rights.<sup>164</sup> Reserving Village Council seats for female members in India corresponds to greater investment in policies beneficial to women.<sup>165</sup> There is also some evidence linking the race and gender of U.S. federal and state judges to increased representation in their rulings.<sup>166</sup>

Overall, the explanation underlying these empirical findings can be summarized by Jane Mansbridge, who contends that "descriptive representation enhances the substantive representation of [the group's] interests by improving the quality of deliberation."<sup>167</sup> The mechanism by which this occurs (i.e., intrinsically or extrinsically), however, has been the subject of debate amongst subsequent scholars.<sup>168</sup> Regardless, we expect that women and minority governors should more actively employ unilateral actions expanding individual rights, given the implications such actions have for the substantive representation for their respective groups.

### C. Public Opinion, Approval, and Salience

Beyond these preferences and characteristics, an individual executive's relationship with the public is likely another important determinant of when they advance individual rights.<sup>169</sup> In his seminal book on presidential power, Richard Neustadt argued that Presidents' public prestige enhances their bargaining position in Washington.<sup>170</sup> Legislators, who share the electoral fates of chief executives, have incentives to facilitate the agendas of popular Presidents and governors for fear of retribution from their constituents. Accordingly, executives with a higher public approval rating enjoy greater success in achieving their legislative agendas.<sup>171</sup> Presidents in particular can

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*Blacks' Interests: A Field Experiment Manipulating Political Incentives*, 57 AM. J. POL. SCI. 521, 528–29 (2013).

<sup>163</sup> See generally, e.g., Kathleen A. Bratton, *Critical Mass Theory Revisited: The Behavior and Success of Token Women in State Legislatures*, 1 AM. POL. SCI. REV. 97, 103 (2005); Craig Volden, Alan E. Wiseman & Dana E. Wittmer, *Women's Issues and Their Fates in the US Congress*, 6 POL. SCI. RSCH. & METHODS 679 (2018).

<sup>164</sup> See Susan Franceschet & Jennifer M. Piscopo, *Gender Quotas and Women's Substantive Representation: Lessons from Argentina*, 4 AM. POL. SCI. REV. 393, 395, 409 (2008).

<sup>165</sup> See Raghendra Chattopadhyay & Esther Duflo, *Women as Policy Makers: Evidence from a Randomized Policy Experiment in India*, 72 ECONOMETRICA 1409, 1411 (2004).

<sup>166</sup> See, e.g., Allison P. Harris & Maya Sen, *Bias and Judging*, 22 ANN. REV. POL. SCI. 241, 251–52 (2019).

<sup>167</sup> Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes,"* 61 J. POL. 628, 628 (1999).

<sup>168</sup> See Broockman, *supra* note 162, at 521.

<sup>169</sup> See NEUSTADT, *supra* note 33, at 35.

<sup>170</sup> See *id.* at 85.

<sup>171</sup> MATTHEW N. BECKMANN, *PUSHING THE AGENDA: PRESIDENTIAL LEADERSHIP IN U.S. LAWMAKING, 1953–2004*, at 148 (2010); JON R. BOND & RICHARD FLEISHER, *THE PRESIDENT IN THE LEGISLATIVE ARENA* 23–25 (1990); THAD KOUSSER & JUSTIN H. PHILIPS, *THE POWER OF AMERICAN GOVERNORS* 124 (2012). See generally Douglas Rivers & Nancy L. Rose, *Passing*

“go public” on certain issues to place additional pressure on Congress, thus helping their bargaining position and increasing their legislative success.<sup>172</sup>

Beyond Presidents’ legislative agendas, public support is likewise an important constraint for unilateral action. Recent survey data reveals that the public is inherently skeptical of presidential unilateralism<sup>173</sup> and that these actions can lead to negative policy and politician evaluations.<sup>174</sup> Congress can also erode public support for unilateral actions based on their objections.<sup>175</sup> Yet, individuals who approve of the President or align with his policy or partisan preferences are more inclined to support unilateral action.<sup>176</sup> Presidents, consequently, issue more executive orders when holding higher public approval ratings, especially amongst Independents and those outside of their party.<sup>177</sup> We expect this relationship to extend to unilateral actions on individual rights, particularly given their potential to directly impact citizens’ lives.

Moreover, public opinion on specific policies related to individual rights should also motivate unilateralism. Some studies find that Presidents are responsive to public opinion on distinct issues,<sup>178</sup> particularly when they are in the minority party, there are numerous persuadable voters, or polarization amongst the public is low.<sup>179</sup> Others reveal that responsiveness is higher when Presidents simultaneously face lower approval ratings and an election year.<sup>180</sup> Recent survey experiments further

*the President’s Program: Public Opinion and Presidential Influence in Congress*, 29 AM. J. POL. SCI. 183 (1985).

<sup>172</sup> SAMUEL KERNELL, GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP 21 (1986); Brandice Canes-Wrone, *The President’s Legislative Influence from Public Appeals*, 45 AM. J. POL. SCI. 313, 313–14 (2001).

<sup>173</sup> Andrew Reeves & Jon C. Rogowski, *Public Opinion Toward Presidential Power*, 45 PRESIDENTIAL STUD. Q. 742, 747, 749 (2015) [hereinafter Reeves & Rogowski, *Public Opinion*]; Andrew Reeves & Jon C. Rogowski, *The Public Cost of Unilateral Action*, 62 AM. J. POL. SCI. 424, 425 (2018) [hereinafter Reeves & Rogowski, *Public Cost*].

<sup>174</sup> Stephen Ansolabehere & Jon C. Rogowski, *Unilateral Action and Presidential Accountability*, 50 PRESIDENTIAL STUD. Q. 129, 130–31 (2020); Andrew Reeves & Jon C. Rogowski, *Unilateral Powers, Public Opinion, and the Presidency*, 78 J. POL. 137, 148 (2016); Reeves & Rogowski, *Public Cost*, *supra* note 173, at 425.

<sup>175</sup> Dino P. Christenson & Douglas L. Kriner, *Mobilizing the Public Against the President: Congress and the Political Costs of Unilateral Action*, 61 AM. J. POL. SCI. 769, 770 (2017).

<sup>176</sup> Reeves & Rogowski, *Public Opinion*, *supra* note 173, at 754–55; Dino P. Christenson & Douglas L. Kriner, *Constitutional Qualms or Politics as Usual? The Factors Shaping Public Support for Unilateral Action*, 61 AM. J. POL. SCI. 335, 336 (2016).

<sup>177</sup> Christenson & Kriner, *supra* note 176, at 336; Dino P. Christenson & Douglas L. Kriner, *Beyond the Base: Presidents, Partisan Approval, and the Political Economy of Unilateral Action*, 1 J. POL. INSTS. & POL. ECON. 79, 84 (2020).

<sup>178</sup> JEFFREY E. COHEN, THE PRESIDENT’S LEGISLATIVE AGENDA, 1789–2002, 85 (2012); ROBERT S. ERIKSON, MICHAEL B. MACKUEN & JAMES A. STIMSON, THE MACRO POLITY 310 (2002).

<sup>179</sup> B. DAN WOOD, THE MYTH OF PRESIDENTIAL REPRESENTATION 33, 110, 118 (2009).

<sup>180</sup> Brandice Canes-Wrone & Kenneth W. Shotts, *The Conditional Nature of Presidential Responsiveness to Public Opinion*, 48 AM. J. POL. SCI. 690, 691 (2004). *See generally* Brandice

show that individuals are more supportive of unilateral actions that align with their own policy preferences.<sup>181</sup> Building upon this research, we expect public opinion to likewise dictate unilateral behavior related to individual rights. More specifically, chief executives should issue more rights-related directives when there is greater public support for policy change in this area.

Relatedly, we expect governors and Presidents to actively engage in unilateralism pertinent to individual rights when this issue area is highly salient to the public. Presidents are keenly aware of the value of the public's attention and even use public appeals to raise the salience of issues on which they would like Congress to act.<sup>182</sup> Executives can use public salience strategically in unilateral policymaking as well.<sup>183</sup> In a working paper, Jon Rogowski finds that Presidents deploy more unilateral directives in policy areas that are important to the public.<sup>184</sup> Unilateral actions can be a way for executives to show the electorate that they are actively working on the issues it cares most about.<sup>185</sup> To this end, these actions can mobilize voters in ways that are beneficial to Presidents' electoral goals.<sup>186</sup> Thus, they have clear incentives to respond to public opinion on salient issues.<sup>187</sup> For those issues the public cares less about, electoral punishments for presidential inaction or non-responsiveness are less likely.<sup>188</sup> We expect these dynamics to occur in the area of individual rights as well, for both Presidents and governors.

#### *D. Federalism*

State governments are famously known as “laboratories of democracy,”<sup>189</sup> able to try new policies not yet seen on the federal landscape.<sup>190</sup> This concept is rooted in

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Canes-Wrone, Michael C. Herron & Kenneth W. Shotts, *Leadership and Pandering: A Theory of Executive Policymaking*, 45 AM. J. POL. SCI. 532 (2001).

<sup>181</sup> Christenson & Kriner, *supra* note 177, at 83–85.

<sup>182</sup> BRANDICE CANES-WRONE, WHO LEADS WHOM? PRESIDENTS, POLICY, AND THE PUBLIC 1, 3 (2006).

<sup>183</sup> See, e.g., Exec. Order No. 10,730, 22 Fed. Reg. 7,628 (Sept. 24, 1957) (claiming Federal control of the Arkansas National Guard and sending 1,000 paratroopers to escort the Little Rock Nine into their desegregated school after Governor Orval Faubus had previously ordered the Arkansas National Guard to stop them).

<sup>184</sup> Jon C. Rogowski, Unilateral Action, Public Opinion, and Presidential Responsiveness 1–2 (July 22, 2019) (unpublished manuscript), [https://scholar.harvard.edu/files/rogowski/files/unilateral\\_public.pdf](https://scholar.harvard.edu/files/rogowski/files/unilateral_public.pdf) [<https://perma.cc/P5PV-NJXY>].

<sup>185</sup> Gleason Judd, *Showing Off: Promise and Peril in Unilateral Policymaking*, 12 Q. J. POL. SCI. 241, 243 (2017); Rottinghaus & Warber, *supra* note 153, at 290–91.

<sup>186</sup> Myunghoon Kang, *Presidential Unilateral Action as a Tool of Voter Mobilization*, 50 PRESIDENTIAL STUD. Q. 107, 107–13 (2020).

<sup>187</sup> See *id.*

<sup>188</sup> Rogowski, *supra* note 184, at 1–2.

<sup>189</sup> This phrase is based on Justice Louis Brandeis's opinion in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>190</sup> See *id.*

the Tenth Amendment, which grants states all powers not delegated to the federal government.<sup>191</sup> Together, these ideas form the basis for federalism, where political power is divided between central and subnational governments.<sup>192</sup> Though states often create policies in response to federal mandates, such as No Child Left Behind or Medicaid, federalism implies policy entrepreneurship on the part of the states—particularly in the absence of federal leadership.<sup>193</sup> For instance, many New Deal policies, labor laws, and health care reforms at the national level were fashioned after state-led policies.<sup>194</sup> Likewise, California’s pioneering environmental policies, such as regulations on emissions along with cap and trade, have served as the prototype across the country.<sup>195</sup>

Accordingly, we expect governors to consider the prospect of federal policymaking when issuing unilateral directives related to individual rights.<sup>196</sup> Though governors could follow the federal government’s lead in policymaking on individual rights, we instead expect them to fill any voids left by national political actors.<sup>197</sup> That is, governors should more vigorously use unilateral directives to expand rights when federal inaction or restrictiveness is imminent, as they did in the case of transgender rights presented in the Introduction. On the other hand, a strong gubernatorial response is needed less if Presidents are actively committed to individual rights.

#### *E. Other Political Factors*

Finally, there are a number of other political factors that could influence executive unilateralism more generally. One of the most pervasive questions in the executive policymaking literature is whether Presidents and governors use more unilateral directives to bypass an ideologically unfriendly legislature or whether they are constrained by their legislative opponents when exercising this power. Scholarship largely finds that latter. That is, modern Presidents issue fewer unilateral directives under divided government, due to the threat of legislative retaliation for unfavorable executive actions.<sup>198</sup> Relatedly, legislatures with a stronger coalition (e.g., veto-proof

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<sup>191</sup> See U.S. CONST. amend. X.

<sup>192</sup> *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

<sup>193</sup> See Dale Krane, *American Federalism, State Governments, and Public Policy: Weaving Together Loose Theoretical Threads*, 26 PS: POL. SCI. & POL. 186, 188–89 (1993).

<sup>194</sup> See Michael J. Zinner & Edward H. Livingston, *The Massachusetts Health Care Reform Experiment: A Success*, JAMA NETWORK (Oct. 31, 2012), <https://jamanetwork.com/channels/health-forum/fullarticle/2760316> [<https://perma.cc/2FD5-M255>].

<sup>195</sup> See Lou Cannon, *Will More States Follow California on Deal with Automakers?*, LEXISNEXIS (Nov. 4, 2019), <https://www.lexisnexis.com/lexis-practical-guidance/the-journal/b/pa/posts/will-more-states-follow-california-on-deal-with-automakers> [<https://perma.cc/Y2XV-X4FQ>].

<sup>196</sup> See sources cited *infra* note 198.

<sup>197</sup> See sources cited *infra* note 198.

<sup>198</sup> See FANG-YI CHIOU & LAWRENCE S. ROTHENBERG, *THE ENIGMA OF PRESIDENTIAL POWER: PARTIES, POLICIES, AND STRATEGIC USES OF UNILATERAL ACTION* 99–102 (2017); WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL*

majority or low polarization) should be better able to statutorily retaliate against oppositional governors and thus serve as a stronger deterrent for unilateral action.<sup>199</sup> Legislatures with greater institutional resources can more easily punish executives, which should likewise inhibit unilateralism.<sup>200</sup>

Chief executives often pursue more unilateral activity in response to a vulnerable economy, as Nixon and Carter did to impose price controls amidst rising inflation.<sup>201</sup> At the same time, a poor economy might depress public support for presidential action and consequently deter unilateralism.<sup>202</sup> Lastly, governors and Presidents can be strategic about when they engage in more or less unilateral behavior. They might be more reticent to issue directives during election years, given possible public backlash.<sup>203</sup> However, lame-duck executives could be more likely to engage in unilateralism, due to less fear of electoral consequences, and to more aggressively pursue items on their agendas.<sup>204</sup>

#### IV. ANALYSIS OF PRESIDENTIAL DIRECTIVES

Part IV sets out to test these theoretical expectations by analyzing presidential executive orders and memoranda. We describe the procedure we used to collect and code executive directives based on different categories of individual rights. We then present summary statistics and employ regression analyses to more thoroughly test our expectations. Overall, we find that Presidents issue more rights-related directives if they are Democratic or liberal, when they have higher public approval ratings, when the issue is salient to Democratic Presidents' agendas, and when the public polls reflect a greater positive effect for African Americans.

##### *A. Data Collection, Coding, and Summary Statistics*

To analyze presidential directives, we collect data on all executive orders and memoranda issued by Presidents between 1981 and 2018. We begin our analysis in

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ACTION, at xv (2003); Alexander Bolton & Sharece Thrower, *Legislative Capacity and Executive Unilateralism*, 60 AM. J. POL. SCI. 649, 661 (2016); Fang-Yi Chiou & Lawrence S. Rothenberg, *The Elusive Search for Presidential Power*, 58 AM. J. POL. SCI. 653, 660–61 (2014) [hereinafter Chiou & Rothenberg, *The Elusive Search*]; Kenneth S. Lowande, *After the Orders: Presidential Memoranda and Unilateral Action*, 44 PRESIDENTIAL STUD. Q. 724, 738 (2014).

<sup>199</sup> See Michael Barber, Alexander Bolton & Sharece Thrower, *Legislative Constraints on Executive Unilateralism in Separation of Powers Systems*, 44 LEGIS. STUD. Q. 515, 540 (2019); Alexandra G. Cockerham & Robert E. Crew Jr., *Factors Affecting Governors' Decisions to Issue Executive Orders*, 49 STATE & LOC. GOV'T REV. 6, 11 (2017).

<sup>200</sup> See Bolton & Thrower, *supra* note 198, at 661.

<sup>201</sup> See *id.* at 655, 657.

<sup>202</sup> See BECKMANN, *supra* note 171, at 148.

<sup>203</sup> WARBER, *supra* note 153, at 74; see Barber et al., *supra* note 199, at 535–36.

<sup>204</sup> See Bolton & Thrower, *supra* note 198, at 657; Barber et al., *supra* note 199, at 535; William G. Howell & Kenneth R. Mayer, *The Last One Hundred Days*, 35 PRESIDENTIAL STUD. Q. 533, 550 (2005).

the first year of the Reagan administration, given widespread views that he was the first President to systematically employ unilateral directives to assert presidential prerogatives and advance his overall policy agenda.<sup>205</sup> We collect data on memoranda from the *Federal Register*. As previously mentioned, federal law does not mandate that memoranda be made public record.<sup>206</sup> Presidents thus elect to publish some in the *Federal Register* but not others.<sup>207</sup> As such, we search the *Public Papers of the Presidents* to identify unpublished memoranda.<sup>208</sup> Executive orders, on the other hand, are required to be published in the *Federal Register*, and can thus be easily located and cross-checked using both sources.<sup>209</sup>

We read through the content of each executive order and memorandum to code whether it relates to individual rights. Following Emily Zackin's book, *Looking for Rights in All the Wrong Places*, we define rights as "the basis for a justified demand" that "entitle citizens not simply to request particular policies from the government, but also demand that government enact those policies as a matter of obligation."<sup>210</sup> We recognize that rights may come in different forms. Some scholars, for instance, make the distinction between negative and positive rights.<sup>211</sup> The former guard citizens against actions of the government.<sup>212</sup> These are classically guaranteed in the U.S. Constitution through the Bill of Rights,<sup>213</sup> including freedom of speech,<sup>214</sup>

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<sup>205</sup> See Elizabeth D. Brown & John D. Graham, *Leading the Executive Branch: Strategies and Options for Achieving Success*, RAND CORP. 11 (2007), [https://www.rand.org/content/dam/rand/pubs/occasional\\_papers/2007/RAND\\_OP181.pdf](https://www.rand.org/content/dam/rand/pubs/occasional_papers/2007/RAND_OP181.pdf) [<https://perma.cc/7L4Y-9KKQ>]. See generally COOPER, *supra* note 18.

<sup>206</sup> See COOPER, *supra* note 18, at 122–23.

<sup>207</sup> See *id.*

<sup>208</sup> The *Public Papers of the Presidents* is maintained, as part of an online database of presidential documents, by *The American Presidency Project. Public Papers of the Presidents*, NAT'L ARCHIVES, <https://www.archives.gov/federal-register/publications/presidential-papers.html> [<https://perma.cc/8M9T-Y8AS>] (last visited Mar. 15, 2021).

<sup>209</sup> See 1 C.F.R. § 19.3 (2020).

<sup>210</sup> EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES* 37–38 (2013). Zackin further elaborates on her description of rights:

For the purposes of this study, I understand people to have created constitutional rights through the writing and ratification of mandatory constitutional provisions and I use the term "right" to refer to the provisions themselves. To be sure, many advocates of constitutional change argued that higher truths necessitated the creation of the provisions they championed. However, I use the term "right" simply to describe the mandates included in constitutional law, rather than the existence of any normative principle or moral duty. In other words, I am concerned with rights as a form of positive, rather than natural, law.

*Id.* at 38.

<sup>211</sup> *Id.* at 4.

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

<sup>213</sup> See generally U.S. CONST. amends. I–X.

<sup>214</sup> *Id.* amend. I.



protection against unlawful search and seizure,<sup>215</sup> and due process.<sup>216</sup> Many of these same rights are specified across state constitutions as well.<sup>217</sup> Positive rights are those that protect against external threats and usually demand that the government provides citizens with certain services or policies.<sup>218</sup> Mostly found in state constitutions, these rights can include labor rights (e.g., the right to work, unionize, fair wages),<sup>219</sup> the right to an education,<sup>220</sup> and various services or guarantees to underprivileged communities (such as the elderly and poor).<sup>221</sup> Others make a distinction between first and second generation rights—the former being related to civil and political rights (including equality, freedom of expression, rights of accused), while the latter pertains to social and economic rights (including labor rights, housing, and other social welfare benefits).<sup>222</sup> These categories roughly correspond to negative and positive rights, respectively.<sup>223</sup>

We pull executive orders for our sample corpus from the years 1981 to 2018 because that is perhaps the most representative period of the Republican and Democratic parties in the recent past, as well as matches scholarly consensus that President Reagan was the first to systematically wield unilateral powers.<sup>224</sup> Accordingly, we code unilateral directives as being related to individual rights if they have direct implications for any of these broad categories of rights. We also determine whether each directive expands or constricts individual rights. Of the ninety executive orders and sixty-four memoranda issued between 1981 and 2018 relating to individual rights, the majority of them are expansive (81% of rights orders and 91% of rights memoranda) rather than restrictive.

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<sup>215</sup> *Id.* amend. IV.

<sup>216</sup> *Id.* amend. V.

<sup>217</sup> Compare *id.* amend. I, and *id.* amend. IV, with N.Y. CONST. art. I, § 3 (Freedom of Worship; Religious Liberty), and N.M. CONST. art. II, § 10 (Searches and Seizures).

<sup>218</sup> See ZACKIN, *supra* note 210, at 2.

<sup>219</sup> FLA. CONST. art. I, § 6 (right to work).

<sup>220</sup> WYO. CONST. art. I, § 23.

<sup>221</sup> CAL. CONST. art. XVI, § 11 (“The Legislature, or the people by initiative, shall have power to amend, alter, or repeal any law relating to the relief of hardship and destitution, whether such hardship and destitution results from unemployment or from other causes, or to provide for the administration of the relief of hardship and destitution, whether resulting from unemployment or from other causes . . . .”); see also Daan Braveman, *Children, Poverty and State Constitutions*, 38 EMORY L.J. 577, 595–96 (1989) (discussing various state constitutional provisions that attempt to help the poor).

<sup>222</sup> Rotem Litinski, *Economic Rights: Are They Justiciable, and Should They Be?*, AM. BAR. ASS’N (Nov. 30, 2019), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/economic-justice/economic-rights--are-they-justiciable--and-should-they-be/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/economic-rights--are-they-justiciable--and-should-they-be/) [https://perma.cc/349P-SYB5].

<sup>223</sup> *See id.*

<sup>224</sup> *See generally* Mark J. Rozell, *Executive Privilege in the Reagan Administration: Diluting a Constitutional Doctrine*, 27 PRES. STUD. Q. 760 (1997) (discussing how President Reagan regularized the use of executive action for specific goals along party lines).

Furthermore, we assign each directive into at least one of the following categories according to standardized coding schemes: civil rights, labor rights, freedom of expression, freedom of religion, right to bear arms, rights of the accused, freedom of movement (i.e., rights for immigrants), international human rights, voting rights, right to privacy, and other.<sup>225</sup> Figure 1 shows the number of executive orders and memoranda issued between 1981 and 2018 by each of these categories.<sup>226</sup> The majority of individual rights directives involved civil rights, followed by labor rights.<sup>227</sup> Presidents issued forty-five executive orders (46% of rights orders) and forty-five executive memoranda (68% of rights memoranda) in the area of civil rights.<sup>228</sup> There were thirty-three orders (34%) and three memoranda (4.5%) related to labor rights.<sup>229</sup> The other categories received substantially less unilateral attention, all of which contained fewer than ten directives.<sup>230</sup> Of these, the largest areas included freedom of movement (three orders; nine memoranda) and international human rights (nine orders; two memoranda).<sup>231</sup>

**Figure 1: Presidential Directives by Individual Rights Categories**



<sup>225</sup> Since some directives span multiple rights categories, we allow them to be coded as such.

<sup>226</sup> See *infra* Figure 1.

<sup>227</sup> See *infra* Figure 1.

<sup>228</sup> See *infra* Figure 1.

<sup>229</sup> See *infra* Figure 1.

<sup>230</sup> See *infra* Figure 1.

<sup>231</sup> See *infra* Figure 1.

Because civil rights constitute the bulk of rights directives, we divide this category into multiple subcategories, which include: promoting diversity, hate crimes, veterans, equal opportunity/antidiscrimination, disabilities, women, racial minorities, elderly, commemorative, LGBT, and other.<sup>232</sup> Figure 2 shows the number of executive orders and memoranda in each of these subcategories.<sup>233</sup> Directives are more dispersed among the civil rights subcategories, with the most directives being related to racial minorities.<sup>234</sup> Presidents issued twenty-three executive orders (51% of civil rights orders) and thirteen executive memoranda (29% of civil rights memoranda) on minority rights.<sup>235</sup> Relatedly, a substantial number of directives were used to promote diversity and equal opportunity/antidiscrimination policies. Of the directives concerning civil rights, eight executive orders (18%) and nine memoranda (20%) were on diversity, while seven orders (16%) and thirteen executive memoranda (29%) related to equal opportunity/antidiscrimination.<sup>236</sup> Directives pertaining to individuals with disabilities (eight orders and six memoranda) and women (seven orders and eight memoranda) were utilized to a lesser extent.<sup>237</sup>

Figure 3 graphs all executive orders and memoranda on individual rights issued yearly between 1981 and 2018.<sup>238</sup> The number of orders exceeded memoranda for most of this time series, with the exception of periods in the mid-1990s under Clinton and mid-2010s under Obama.<sup>239</sup> These Democratic presidencies were also distinctive for their peaks in overall unilateral rights-based activity (e.g., Clinton in 1994 and 2000 and Obama in 2009).<sup>240</sup> Such actions, conversely, reached notable lows during Republican administrations (e.g., Bush in the early 2000s).<sup>241</sup> Overall though, there is substantial variation across time in the degree to which Presidents relied on these unilateral actions.<sup>242</sup>

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<sup>232</sup> For similar reasons as above, we allow each directive to be assigned multiple subcategories of civil rights if applicable; therefore, these categories are not mutually exclusive.

<sup>233</sup> *See infra* Figure 2.

<sup>234</sup> *See infra* Figure 2.

<sup>235</sup> *See infra* Figure 2.

<sup>236</sup> *See infra* Figure 2.

<sup>237</sup> *See infra* Figure 2.

<sup>238</sup> *See infra* Figure 3.

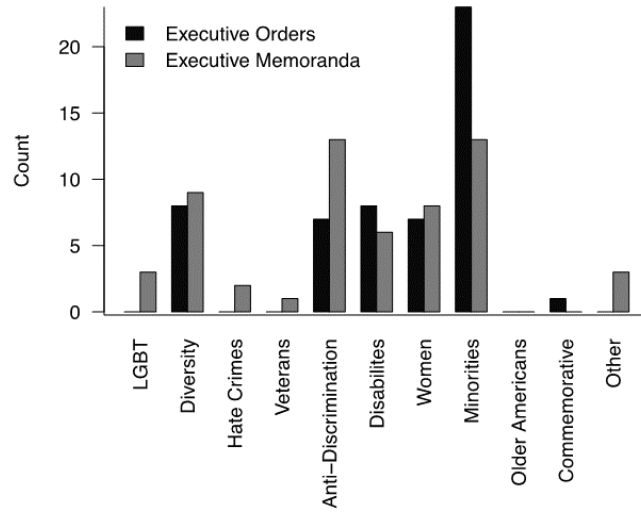
<sup>239</sup> *See infra* Figure 3.

<sup>240</sup> *See infra* Figure 3.

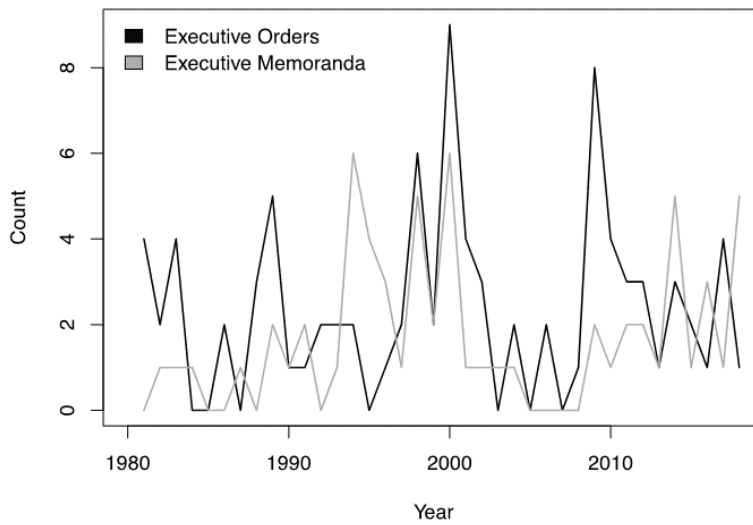
<sup>241</sup> *See infra* Figure 3.

<sup>242</sup> *See infra* Figure 3.

**Figure 2: Presidential Directives by Civil Rights Subcategories**



**Figure 3: Presidential Individual Rights Directives Over Time, 1981–2018**



We further explore this variation in Tables 1 and 2, which show the summary statistics for rights-related executive orders<sup>243</sup> and memoranda,<sup>244</sup> respectively, for each administration. Some Presidents did not use any rights orders (i.e., Reagan between 1984–1985, Clinton in 1995, and George W. Bush in 2003, 2005, and 2007) or memoranda (i.e., Reagan in 1981 and 1985, George H.W. Bush in 1992, and George W. Bush in 2005), while Clinton issued a maximum of nine executive orders in 2000 and six memoranda in both 1994 and 1998.<sup>245</sup> Clinton also utilized more overall directives related to individual rights than any other President, averaging about 3 orders and 3.5 memoranda per year.<sup>246</sup> Trump (2.5 orders and 3 memoranda) and Obama (3.1 orders and 2.1 memoranda) closely followed.<sup>247</sup>

**Table 1: Summary Statistics for Individual Rights-Related Executive Orders by President**

| President        | Years     | Mean  | Std. Dev. | Min | Max |
|------------------|-----------|-------|-----------|-----|-----|
| Ronald Reagan    | 1981–1988 | 1.875 | 1.727     | 0   | 4   |
| George H.W. Bush | 1989–1992 | 2.25  | 1.893     | 1   | 5   |
| Bill Clinton     | 1993–2000 | 3     | 2.976     | 0   | 9   |
| George W. Bush   | 2001–2008 | 1.5   | 1.512     | 0   | 4   |
| Barack Obama     | 2009–2016 | 3.125 | 2.232     | 1   | 8   |
| Donald Trump     | 2016–2018 | 2.5   | 2.121     | 1   | 4   |

**Table 2: Summary Statistics for Individual Rights-Related Memoranda by President**

| President        | Years     | Mean  | Std. Dev. | Min | Max |
|------------------|-----------|-------|-----------|-----|-----|
| Ronald Reagan    | 1981–1988 | 0.5   | 0.535     | 0   | 1   |
| George H.W. Bush | 1989–1992 | 1.25  | 0.957     | 0   | 2   |
| Bill Clinton     | 1993–2000 | 3.5   | 2.07      | 1   | 6   |
| George W. Bush   | 2001–2008 | 0.5   | 0.535     | 0   | 1   |
| Barack Obama     | 2009–2016 | 2.125 | 1.356     | 1   | 5   |
| Donald Trump     | 2016–2018 | 3     | 2.828     | 1   | 5   |

On the other end, both Reagan and George W. Bush signed the least number of memoranda (0.5 per year, each) and orders (1.9 and 1.5 per year, respectively).<sup>248</sup> In

<sup>243</sup> See *infra* Table 1.

<sup>244</sup> See *infra* Table 2.

<sup>245</sup> See *infra* Tables 1, 2.

<sup>246</sup> See *infra* Tables 1, 2.

<sup>247</sup> See *infra* Tables 1, 2.

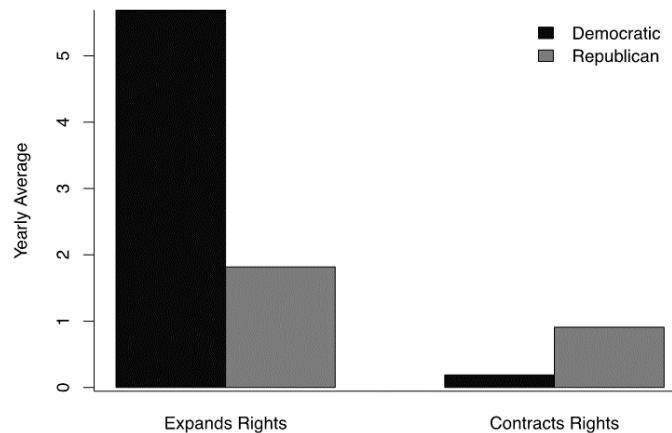
<sup>248</sup> See *supra* Tables 1, 2.

general, Republican Presidents issued fewer rights directives than Democrats, with the exception of Trump.<sup>249</sup> However, when considering the content of these orders, Trump largely falls in line with his Republican predecessors in using more of them to retract rights—such as his 2017 memorandum reinstating the transgender military ban.<sup>250</sup> Likewise, he issued several orders increasing immigration enforcement and restricting immigrant rights.<sup>251</sup> We consider these distinctions more closely in the following section.

### *B. Regression Analysis of Presidential Unilateral Directives*

To begin, we examine the average number of unilateral directives that expand or contract individual rights by presidential party in Figure 4.<sup>252</sup> As expected, Democratic Presidents used more unilateral directives, summed across executive orders and memoranda, to expand rights than Republican Presidents—averaging about five and two directives per year, respectively.<sup>253</sup> On the other hand, Republicans issued more directives to reduce individual rights than Democrats, though this average is low for Presidents of both parties (less than one directive per year).<sup>254</sup>

**Figure 4: Presidential Individual Directives by Presidential Party**



Our model uses an executive's party affiliation as a variable for predicting executive directives and their content. We conduct regression analyses to further examine

<sup>249</sup> See *supra* Tables 1, 2.

<sup>250</sup> See *supra* note 98 and accompanying text.

<sup>251</sup> See *supra* note 96 and accompanying text.

<sup>252</sup> See *infra* Figure 4.

<sup>253</sup> See *infra* Figure 4.

<sup>254</sup> See *infra* Figure 4.

these descriptive differences among parties. Table 3 depicts coefficients and standard errors from negative binomial regression models estimating the effect of presidential party and ideology on the issuance of rights-related unilateral directives.<sup>255</sup> We use three different dependent variables. First, we count the number of directives related to individual rights issued per year (columns 1 and 4). Second, we use the annual number of directives that specifically expand individual rights (columns 2 and 5). Lastly, we aggregate the number of directives that contract rights in columns 3 and 6. To measure presidential policy preferences, we first use an indicator for *Democratic President*, coded as 1 if the President is a Democrat and 0 if he is a Republican. Next, we measure *Presidential Conservatism* by using the DW-NOMINATE ideal point estimates,<sup>256</sup> where positive (negative) values correspond to conservative (liberal) ideologies. Because presidential party and ideology are highly related,<sup>257</sup> we estimate the impact of these two independent variables in separate equations.

The regression results show that being a Democratic President is positively associated with issuing rights-related directives, as represented by the positive and statistically significant coefficient on *Democratic President* in column 1.<sup>258</sup> In other words, Presidents belonging to the Democratic Party issue 2.15 times more unilateral directives related to individual rights than Republicans.<sup>259</sup> This amounts to about three additional directives per year, on average, under Democratic Presidents.<sup>260</sup> The positive effect becomes even stronger when isolating directives that expand individual rights but that effect reverses for those that retract them.<sup>261</sup> In particular, Democratic Presidents are 3.13 times more likely to issue rights-expanding directives but about 79% less likely to use directives for restricting individual rights.<sup>262</sup>

**Table 3: Presidential Individual Rights Directives, Party, and Ideology (No Controls)**

|                      | (1) All Rights    | (2) Expands       | (3) Contracts      | (4) All Rights | (5) Expands | (6) Contracts |
|----------------------|-------------------|-------------------|--------------------|----------------|-------------|---------------|
| Democratic President | 0.77<br>(0.22)*** | 1.14<br>(0.23)*** | -1.58<br>(0.60)*** |                |             |               |

<sup>255</sup> See *infra* Table 3.

<sup>256</sup> See *About the Project*, VOTEVIEW.COM, <https://voteview.com/about> [<https://perma.cc/SVM9-QBT9>] (last visited Mar. 15, 2021) (discussing methodology used to create the dataset map of every congressional roll call). See generally KEITH T. POOLE, SPATIAL MODELS OF PARLIAMENTARY VOTING (2005) (discussing methodology used to analyze roll call voting data).

<sup>257</sup> The correlation between *Democrat President* and *Presidential Conservatism* is -0.98. See *infra* Table 3.

<sup>258</sup> See *infra* Table 3.

<sup>259</sup> See *infra* Table 3.

<sup>260</sup> See *infra* Table 3.

<sup>261</sup> See *infra* Table 3.

<sup>262</sup> See *infra* Table 3.

|                           | (1) All Rights    | (2) Expands       | (3) Con-tracts | (4) All Rights     | (5) Expands        | (6) Contracts      |
|---------------------------|-------------------|-------------------|----------------|--------------------|--------------------|--------------------|
| Presidential Conservatism |                   |                   |                | -0.75<br>(0.19)*** | -0.95<br>(0.21)*** | 0.76 (0.42)*       |
| Constant                  | 1.00<br>(0.16)*** | 0.60<br>(0.17)*** | -0.10 (0.28)   | 1.48<br>(0.11)***  | 1.35<br>(0.12)***  | -1.12<br>(0.32)*** |
| N                         | 38                | 38                | 38             | 36                 | 36                 | 36                 |

Coefficients from negative binomial regression, with robust standard errors clustered by year in parenthesis.

Two tailed tests, \*p < 0.1, \*\*p < 0.05, \*\*\*p < 0.01.

We find similar effects when alternatively examining presidential ideology.<sup>263</sup> Conservative Presidents issue significantly fewer rights and rights-expanding directives, but more rights-restricting ones, than their liberal counterparts.<sup>264</sup> Specifically, for every standard deviation increase in *Presidential Conservatism*, total rights directives decrease by 33% (about two directives), rights-expanding directives drop by 38% (about three), and rights-contracting directives increase by 71% (less than one).<sup>265</sup> Consistent with our expectations, these results reveal that Democratic and liberal Presidents engage in more unilateral activity to advance individual rights compared to other Presidents.<sup>266</sup> When Republicans and conservatives do issue them, they do so restrictively.

We introduce other independent variables that might explain unilateral activity in Table 4.<sup>267</sup> In addition to public approval and opinion (which we will return to later in this section), we also control for divided government, presidential election year, the unemployment rate, and lame-duck Presidents, as well as legislative and executive capacities (as measured by expenditures).<sup>268</sup> Interestingly, we find that Presidents issue fewer rights-expanding orders and more restrictive ones during their final year in office.<sup>269</sup>

<sup>263</sup> See *supra* Table 3.

<sup>264</sup> See *supra* Table 3.

<sup>265</sup> See *supra* Table 3.

<sup>266</sup> See *supra* Table 3.

<sup>267</sup> See *infra* Table 4.

<sup>268</sup> See *infra* Table 4. The *Divided Government* index is scored as 1 if the President and at least one chamber of Congress is from opposing parties and 0 if they are all from the same party. *Presidential Election Year* is measured as 1 in presidential election years (1984, 1988, 1992, 1996, 2000, 2004, 2008, 2012, 2016) and 0 otherwise. The annual unemployment rate is collected from the Bureau of Labor Statistics. See *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/cps/> (last visited Mar. 15, 2021). *Lame Duck* is coded as 1 if the President is in his last year in office and 0 otherwise. Both legislative and executive expenditures are collected from the *Statistical Abstracts of the United States*. See *Statistical Abstracts Series*, U.S. CENSUS BUREAU, [https://www.census.gov/library/publications/time-series/statistical\\_abstracts.html](https://www.census.gov/library/publications/time-series/statistical_abstracts.html) [<https://perma.cc/S7A9-USGS>] (Dec. 19, 2018).

<sup>269</sup> See *infra* Table 4.



None of the other control variables, however, have a statistically significant effect on rights directives, counter to broader studies of unilateralism.<sup>270</sup>

**Table 4: Presidential Individual Rights Directives, Party, and Ideology (Controls)**

|                           | (1) All Rights    | (2) Expands       | (3) Con-tracts    | (4) All Rights     | (5) Expands        | (6) Contracts      |
|---------------------------|-------------------|-------------------|-------------------|--------------------|--------------------|--------------------|
| Democratic President      | 1.02<br>(0.22)*** | 1.21<br>(0.22)*** | -0.50<br>(0.63)   |                    |                    |                    |
| Presidential Conservatism |                   |                   |                   | -0.82<br>(0.17)*** | -0.94<br>(0.17)*** | -0.09 (0.50)       |
| Public Conservatism       | 2.68<br>(0.88)*** | 1.00 (0.91)       | 7.80<br>(1.70)*** | 4.04<br>(3.32)     | 3.07 (3.63)        | -5.24 (9.38)       |
| Presidential Approval     | 0.03<br>(0.01)**  | 0.04<br>(0.01)*** | -0.01<br>(0.03)   | 0.03<br>(0.01)**   | 0.03<br>(0.01)**   | 0.01 (0.02)        |
| Divided Government        | 0.14<br>(0.26)    | -0.06 (0.27)      | 2.18<br>(0.73)*** | 0.16<br>(0.26)     | -0.05 (0.27)       | 15.40<br>(0.66)*** |
| President Election Year   | 0.19<br>(0.26)    | 0.28 (0.26)       | -1.23<br>(0.69)*  | 0.18<br>(0.26)     | 0.26 (0.25)        | -1.74<br>(0.77)**  |
| Unemployment              | 0.07<br>(0.07)    | 0.02 (0.08)       | 0.09<br>(0.17)    | 0.08<br>(0.07)     | 0.02 (0.08)        | 0.27 (0.21)        |
| Lame Duck                 | 0.01<br>(0.30)    | -0.72<br>(0.36)** | 2.46<br>(0.74)*** | 0.03<br>(0.30)     | -0.72<br>(0.35)**  | 3.94<br>(0.98)***  |
| Legislative Expenditures  | 1.33<br>(1.14)    | 1.10 (1.27)       | 4.20<br>(2.38)*   | 1.38<br>(1.18)     | 1.15 (1.31)        | 6.83<br>(3.17)**   |
| Executive Expenditures    | -0.62<br>(0.54)   | -0.33 (0.58)      | -2.79<br>(1.34)** | -0.38<br>(0.61)    | -0.00 (0.64)       | -5.27<br>(2.08)*** |
|                           |                   |                   |                   |                    |                    |                    |
| Constant                  | -13.62<br>(14.21) | -16.68<br>(17.49) | -18.24<br>(25.24) | -21.02<br>(13.94)  | -26.30<br>(16.49)  | -20.30<br>(33.73)  |
| N                         | 38                | 38                | 38                | 36                 | 36                 | 36                 |

Coefficients from negative binomial regression, with robust standard errors clustered by year in parenthesis.

Two tailed tests, \*p < 0.1, \*\*p < 0.05, \*\*\*p < 0.01.

Even when accounting for these alternative explanations in the regression models in Table 4, we find the same effects for presidential party and ideology as before.<sup>271</sup> Though Democratic and liberal Presidents correspond to significant increases in directives that broaden individual rights, we find little impact of these variables on those

<sup>270</sup> See *infra* Table 4.

<sup>271</sup> Compare Table 4, *supra*, with Table 3, *supra*.

that contract rights—as evidenced by the statistically insignificant coefficients on *Democratic President* and *Presidential Conservatism* (columns 3 and 6).<sup>272</sup> This inconsistent effect may be due to the fact that only a small proportion of rights-related directives are actually used restrictively.<sup>273</sup> The public can also play an important role in shaping unilateral activity related to individual rights,<sup>274</sup> which we explore in a variety of ways. To begin, we include the President’s job approval rating (*Presidential Approval*) as a more general measure of his standing with the public.<sup>275</sup> As shown in Table 4, the coefficient for this variable is positive and statistically significant, meaning that Presidents with higher approval may reliably engage in greater unilateral activity on individual rights.<sup>276</sup> In particular, a percentage increase in the President’s job approval rating corresponds to an uptick in all rights and rights-expanding directives by 2–3% and 4%, respectively.<sup>277</sup> *Presidential Approval* does not significantly influence directives that contract individual rights.<sup>278</sup> Consistent with our expectations, Presidents with greater overall political capital appear better positioned to unilaterally advance rights policies.<sup>279</sup>

Next, we roughly measure the public’s preferences for individual rights advancement by including a variable for *Public Conservatism*, collected from the American National Elections Survey (ANES), in Table 4.<sup>280</sup> We expect that Presidents should employ fewer rights directives when the public has a low overall desire for active rights policies, as approximated by greater conservatism.<sup>281</sup> Instead, the results reveal that

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<sup>272</sup> See *supra* Table 4.

<sup>273</sup> See *supra* Table 4.

<sup>274</sup> See, e.g., Rogowski, *supra* note 184, at 31.

<sup>275</sup> *Presidential Approval* is measured by the Gallup Poll and aggregated by year. See *Presidential Job Approval Center*, GALLUP, <https://news.gallup.com/interactives/185273/presidential-job-approval-center.aspx> [<https://perma.cc/L24A-CUGV>] (last visited Mar. 15, 2021).

<sup>276</sup> See *supra* Table 4.

<sup>277</sup> In another analysis (not shown), we compared separate measurements for presidential approval among Democrats, Republicans, and Independents. We find that presidential approval did not differentially affect unilateral activity across these distinct groups.

<sup>278</sup> See *supra* Table 4.

<sup>279</sup> See *supra* Table 4.

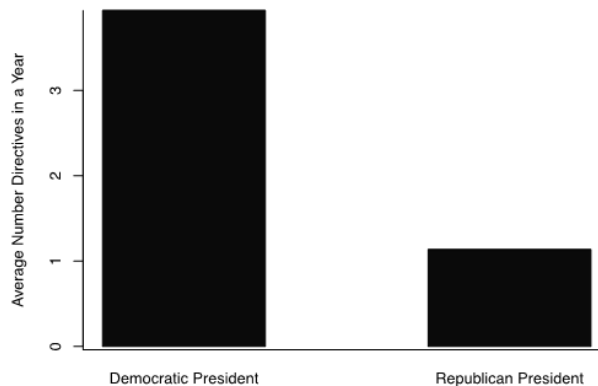
<sup>280</sup> See *supra* Table 4; *Liberal-Conservative Self-Identification 1972–2016*, AM. NAT’L ELEC. STUD., <https://electionstudies.org/resources/anes-guide/top-tables/?id=29> [<https://perma.cc/BV4B-CN89>] (last visited Mar. 15, 2021). The ANES provides respondents with a seven-point scale from extremely liberal to extremely conservative. For example, the post-2016 election questionnaire asked: “We hear a lot of talk these days about liberals and conservatives. Here is a 7-point scale on which the political views that people might hold are arranged from extremely liberal to extremely conservative. Where would you place yourself on this scale or haven’t you thought much about this?” AM. NAT’L ELEC. STUD., 2016 POST-ELECTION QUESTIONNAIRE 42–43, [https://electionstudies.org/wp-content/uploads/2018/11/anes\\_time\\_series\\_2016\\_qnaire\\_post.pdf](https://electionstudies.org/wp-content/uploads/2018/11/anes_time_series_2016_qnaire_post.pdf) [<https://perma.cc/3Z84-EBCK>]. We aggregated responses to the national level. The measure ranges from -1 (liberal) to 1 (conservative).

<sup>281</sup> See Dino P. Christenson & Douglas L. Kriner, *Does Public Opinion Constrain Presidential Unilateralism?*, 113 AM. POL. SCI. REV. 1071, 1076 (2019).

unilateralism is much less responsive to public ideology.<sup>282</sup> That is, Presidents issue more rights directives as public conservatism increases (column 1).<sup>283</sup> Though ostensibly counterintuitive, this effect appears to be driven by directives that contract individual rights (column 3).<sup>284</sup> More specifically, Presidents augment their rights-retracting directives by seventy percent for every one standard deviation increase in public conservatism.<sup>285</sup> The ideology of the public, conversely, does not reliably impact directives that expand individual rights.<sup>286</sup> Thus, upon closer inspection, we find evidence that Presidents are seemingly responsive to public ideology.<sup>287</sup> *Public Conservatism*, however, is just a crude measure of the public's policy preferences towards individual rights.<sup>288</sup> We thus turn to an exploration of civil rights directives, which allows us to utilize more precise estimates of public opinion and salience.

As before, we graph the average number of civil rights directives by presidential party in Figure 5, but we focus exclusively on those that expand rights.<sup>289</sup> On average, Democratic Presidents issue more civil rights directives per year (four) than their Republican counterparts (one).<sup>290</sup> This pattern corresponds with our theoretical expectations and is consistent with our previous findings for individual rights more broadly.<sup>291</sup>

**Figure 5: Presidential Civil Rights Directives by Presidential Party**



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<sup>282</sup> See *supra* Table 4.

<sup>283</sup> See *supra* Table 4.

<sup>284</sup> See *supra* Table 4.

<sup>285</sup> See *supra* Table 4.

<sup>286</sup> See *supra* Table 4.

<sup>287</sup> See *supra* Table 4.

<sup>288</sup> See *supra* note 279 and accompanying text.

<sup>289</sup> See *infra* Figure 5.

<sup>290</sup> See *infra* Figure 5.

<sup>291</sup> See *infra* Figure 5.

Table 5 uses negative binomial regressions to estimate the effects of these and other variables of interest on the number of civil rights directives issued per year. Once again, presidential party and ideology significantly impact the use of these directives, but to an even greater degree than before.<sup>292</sup> The frequency of these directives increases by 268% for Democratic Presidents but decreases by 64% for every standard deviation increase in *Presidential Conservatism*.<sup>293</sup> We also find strong effects from the public, with higher presidential approval correlating with executives passing more civil rights directives.<sup>294</sup> *Public Conservatism*, however, does not appear to influence the occurrence of these directives.<sup>295</sup>

**Table 5: Presidential Civil Rights Directives (Expands) and Salience**

|   | (1)               | (2)                | (3)               | (4)               |
|---|-------------------|--------------------|-------------------|-------------------|
| Democratic President                            | 1.50<br>(0.32)*** |                    | 2.20<br>(0.63)*** | 0.04<br>(0.43)    |
| Presidential Conservatism                       |                   | -1.16<br>(0.24)*** |                   |                   |
| Public Salience                                 | -6.55<br>(7.27)   | -5.04<br>(7.81)    | 13.09<br>(12.83)  | -4.67<br>(6.27)   |
| Presidential Salience                           | 0.22<br>(0.16)    | 0.23<br>(0.16)     | 0.21<br>(0.16)    | -0.35<br>(0.21)*  |
| Democratic President x<br>Public Salience       |                   |                    | -23.41<br>(15.95) |                   |
| Democratic President x<br>Presidential Salience |                   |                    |                   | 0.82<br>(0.20)*** |
| Public Conservatism                             | 1.30<br>(1.36)    | 5.10<br>(4.73)     | 0.22<br>(1.42)    | 1.11<br>(1.38)    |
| Presidential Approval                           | 0.04<br>(0.02)**  | 0.04<br>(0.02)**   | 0.04<br>(0.02)*** | 0.04<br>(0.02)**  |
| Divided Government                              | -0.45<br>(0.41)   | -0.45<br>(0.40)    | -0.58<br>(0.41)   | -0.89<br>(0.42)** |
| Presidential Election Year                      | 0.41<br>(0.39)    | 0.40<br>(0.39)     | 0.38<br>(0.40)    | 0.69<br>(0.26)*** |
| Unemployment                                    | 0.06<br>(0.10)    | 0.07<br>(0.10)     | 0.01<br>(0.11)    | 0.13<br>(0.10)    |
| Lame Duck                                       | -0.78<br>(0.40)** | -0.83<br>(0.38)**  | -0.48<br>(0.60)   | -0.96<br>(0.48)** |

<sup>292</sup> See *infra* Table 5.

<sup>293</sup> See *infra* Table 5.

<sup>294</sup> See *infra* Table 5.

<sup>295</sup> See *infra* Table 5.

|                          | (1)              | (2)             | (3)              | (4)              |
|--------------------------|------------------|-----------------|------------------|------------------|
| Legislative Expenditures | 0.30<br>(1.59)   | 0.42<br>(1.58)  | 0.29<br>(1.61)   | -0.77<br>(1.54)  |
| Executive Expenditures   | -0.93<br>(0.64)  | -0.45<br>(0.72) | -0.91<br>(0.66)  | -0.74<br>(0.67)  |
| Constant                 | 16.55<br>(24.16) | 0.68<br>(23.19) | 16.41<br>(24.61) | 35.76<br>(22.45) |
| N                        | 38               | 36              | 38               | 38               |

Coefficients from negative binomial regression, with robust standard errors clustered by year in parenthesis.

Two tailed tests, \* $p < 0.1$ , \*\* $p < 0.05$ , \*\*\* $p < 0.01$ .

We further examine the role of the public with measures of civil rights salience in Table 5.<sup>296</sup> First, we include a variable measuring the percentage of survey respondents indicating that civil rights is the most important problem facing the nation (*Public Salience*).<sup>297</sup> We likewise measure presidential salience by including a logged count of the number of times the President mentioned civil rights in his State of the Union Address in a given year (*Presidential Salience*).<sup>298</sup> As shown in columns 1 and 2, neither of these variables alone significantly impact civil rights directives.<sup>299</sup> This relationship, however, may be dependent upon the President's policy preferences.<sup>300</sup> Presidents might only be responsive to the public's call for civil rights advancement if they fundamentally believe it to be a desirable policy. Likewise, presidential salience may only lead to more expansive civil rights directives for Democratic Presidents.

We investigate these hypotheses via the interaction term analyzing the combination of *Democratic President* with *Public Salience* and *Presidential Salience* in columns 3 and 4 of Table 5. There appears to be no significant relationship between public salience and being a Democratic President. However, the coefficient on *Democratic*

<sup>296</sup> See *supra* Table 5.

<sup>297</sup> This variable is collected by the Comparative Agendas Project and is aggregated by year. See *United States: Datasets*, COMPAR. AGENDAS PROJECT, <https://www.comparativeagendas.net/us> [<https://perma.cc/D5Y6-MW3P>] (last visited Mar. 15, 2021). Specifically, the Gallup Poll question asks: "What do you think is the most important problem facing the country today?" *Most Important Problem*, GALLUP, <https://news.gallup.com/poll/1675/most-important-problem.aspx> [<https://perma.cc/5B57-3R8C>] (last visited Mar. 15, 2021).

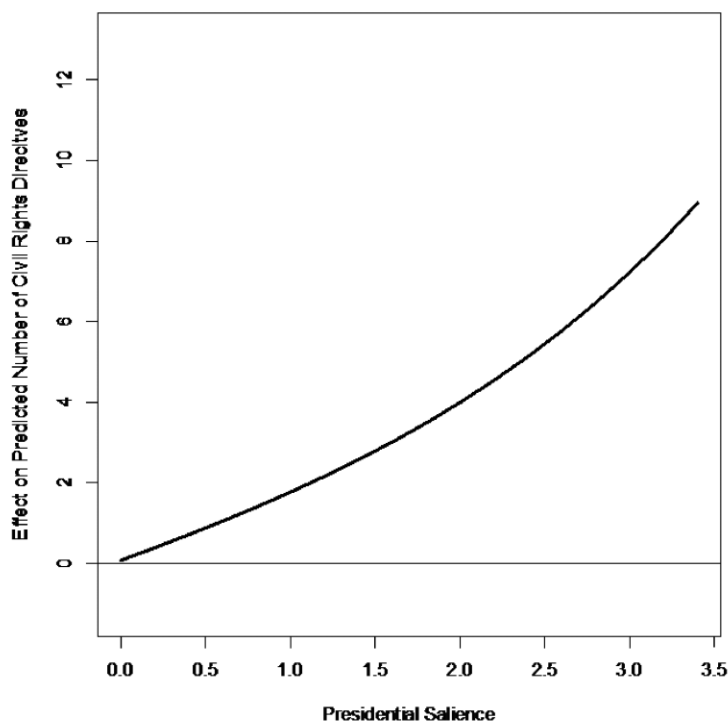
<sup>298</sup> This variable is collected from the Comparative Agendas Project, where they count the number of quasi-sentences mentioned in each President's State of the Union Address (or inaugural speech) by issue area. See *United States: Datasets*, *supra* note 297. Given the skewed nature of the data, we log this count.

<sup>299</sup> See *supra* Table 5.

<sup>300</sup> See, e.g., *Strengthening Civil Rights*, WHITE HOUSE: PRESIDENT BARACK OBAMA, <https://obamawhitehouse.archives.gov/issues/civil-rights> [<https://perma.cc/99EU-8JMB>] (last visited Mar. 15, 2021).

*President x Presidential Salience* is positive and statistically significant, suggesting a conditional relationship does exist.<sup>301</sup> For ease of interpretation, we graphically depict these interactive effects in Figure 6.<sup>302</sup> Specifically, this figure shows the marginal effects of being a Democratic President on the predicted number of civil rights directives (y-axis), at different levels of presidential salience along the x-axis.<sup>303</sup> When salience is low, Democratic Presidents issue no more directives than Republicans.<sup>304</sup> However, as public salience for civil rights increases, the impact of Democratic Presidents becomes positive and statistically significant.<sup>305</sup> When public salience is at its highest, Democratic Presidents issue about nine more directives related to civil rights than Republicans in a given year.<sup>306</sup>

**Figure 6: Marginal Effects of Democratic President on Presidential Civil Rights Directives by Presidential Salience**



<sup>301</sup> We find analogous effects when using *Presidential Conservatism* as an alternative measure for party.

<sup>302</sup> See *infra* Figure 6.

<sup>303</sup> See *infra* Figure 6.

<sup>304</sup> See *infra* Figure 6.

<sup>305</sup> See *infra* Figure 6.

<sup>306</sup> See *infra* Figure 6.

Furthermore, we measure the impact of public opinion on civil rights in Table 6 by using feeling thermometers for under-represented groups.<sup>307</sup> These measures are collected from the ANES survey, which asks a nationally representative selection of Americans how positively their feelings are towards a certain group (i.e., African Americans, women, Hispanic, LGBT individuals) on a scale of 0 to 100, with higher values indicating more positive feelings.<sup>308</sup> On the whole, we find that Presidents seem to be positively responsive to public sentiment towards African Americans.<sup>309</sup> Specifically, annual civil rights directives rise by 42% for every one-point increase in the Black feeling thermometer.<sup>310</sup> A point increase in warmth towards women, on the other hand, depresses unilateral actions related to civil rights by 12%.<sup>311</sup> Thus, Presidents actually issue fewer expansive civil rights directives when the public feels warmly towards women but more when public opinion has soured. There is no statistically significant relationship between the Hispanic or LGBT feeling thermometers and civil rights directives.<sup>312</sup> Taken together, Presidents seem to be responsive towards public feelings on African Americans but use unilateral directives to safeguard civil rights when women are the subject of public scorn.

**Table 6: Presidential Civil Rights Directives  
(Expands) and Feeling Thermometers**

|                   | (1)            | (2)            | (3)            | (4)            |
|-------------------|----------------|----------------|----------------|----------------|
| Black FT          | 0.31 (0.17)*** |                |                |                |
| Women FT          |                | -0.09 (0.04)** |                |                |
| Hispanic FT       |                |                | -0.16 (0.13)   |                |
| LGBT FT           |                |                |                | -0.04 (0.03)   |
| Control Variables | YES            | YES            | YES            | YES            |
| Constant          | -5.05 (28.41)  | 22.29 (21.55)  | -10.81 (33.11) | -39.24 (32.72) |
| N                 | 36             | 38             | 36             | 35             |

Coefficients from negative binomial regression, with robust standard errors clustered by year in parenthesis.

Two tailed tests, \* $p < 0.1$ , \*\* $p < 0.05$ , \*\*\* $p < 0.01$ .

<sup>307</sup> See *infra* Table 6.

<sup>308</sup> See *ANES Continuity Guide*, AM. NAT'L ELEC. STUD., <https://electionstudies.org/sources/anes-continuity-guide/> [<https://perma.cc/9KXX-AKSC>] (last visited Mar. 15, 2021).

<sup>309</sup> See *infra* Table 6.

<sup>310</sup> See *infra* Table 6.

<sup>311</sup> See *infra* Table 6.

<sup>312</sup> We test the interaction terms between *Democratic President* with each of these “feeling thermometers,” and we find that the interaction terms are non-significant, suggesting Democratic Presidents are no more responsive to public sentiment towards these groups than Republicans.

## V. ANALYSIS OF STATE EXECUTIVE ORDERS

How do our theoretical expectations fare when considering unilateralism at the state level? Part V sets out to answer this very question. We first describe our process for collecting and coding rights-related gubernatorial executive orders. Using regression analyses, we test the same conjectures that we did for the federal level (i.e., party and ideology; public approval, opinion, and salience; and other political factors) and others that are specific to the state-level context (i.e., race and gender; federalism).

Overall, our analysis in this Part largely confirms the results for presidential directives.<sup>313</sup> Democratic and liberal governors pen more rights-related executive orders than other executives.<sup>314</sup> Peaks in unilateral activity on individual rights occur when gubernatorial approval is high, particularly amongst liberals and moderates, and when the public views civil rights as important or holds positive feelings towards African Americans. Uniquely, we uncover little evidence that women or minority executives promote substantive representation in the realm of unilateral rights directives.<sup>315</sup> We do, however, find that threats from restrictive Republican Presidents motivate governors to unilaterally guard individual rights.<sup>316</sup>

*A. Data Collection, Coding, and Summary Statistics*

We collect data on executive orders issued by state governors between 1981 and 2018 from a variety of sources, including state registers, online databases, and archival records.<sup>317</sup> Though some states keep a comprehensive collection of their executive orders online (e.g., Massachusetts, Texas), it is common for others to only digitize recent administrations and maintain physical copies of the rest in state archives and libraries (e.g., Nevada).<sup>318</sup> States vary tremendously, however, on how well they manage these records and for which years records exist.<sup>319</sup> In all, we were able to obtain executive orders for forty-six states, but to varying degrees, as shown in Table 7.<sup>320</sup>

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<sup>313</sup> Compare Section V.B, *infra*, with Section IV.B, *supra*.

<sup>314</sup> See *infra* Section V.B.

<sup>315</sup> See *infra* Section V.B.

<sup>316</sup> See *infra* Section V.B.

<sup>317</sup> We took data from the aforementioned data repositories and scored the different orders accordingly.

<sup>318</sup> See, e.g., *Massachusetts Executive Orders*, MASS.GOV, <https://www.mass.gov/massachusetts-executive-orders> [<https://perma.cc/GY5T-4PTL>] (last visited Mar. 15, 2021); *Texas Governors*, LEGIS. REFERENCE LIBR. TEX., <https://lrl.texas.gov/legeLeaders/governors/search.cfm> [<https://perma.cc/FT7S-UBF8>] (last visited Mar. 15, 2021); *Executive Orders*, NV.GOV, [https://gov.nv.gov/News/Executive\\_Orders/Executive\\_Orders/](https://gov.nv.gov/News/Executive_Orders/Executive_Orders/) [<https://perma.cc/XJW8-6MP7>] (last visited Mar. 15, 2021).

<sup>319</sup> Compare *Massachusetts Executive Orders*, *supra* note 318, with *Executive Orders*, *supra* note 318.

<sup>320</sup> See *infra* Table 7.



States such as Kentucky and Arkansas only had executive orders for recent years, while most others had complete records for the entire time frame.<sup>321</sup>

**Table 7: Summary Statistics on Individual Rights Executive Orders by State**

| State          | Year                       | Mean  | Std. Dev. | Min | Max |
|----------------|----------------------------|-------|-----------|-----|-----|
| Alabama        | 1981–2018                  | 0.421 | 0.826     | 0   | 4   |
| Alaska         | 1981–2016                  | 0     | 0         | 0   | 0   |
| Arizona        | 1981–2018                  | 0.737 | 1.131     | 0   | 6   |
| Arkansas       | 2005, 2008–2010, 2015–2018 | 0.125 | 0.354     | 0   | 1   |
| California     | 1981–2015                  | 0.629 | 1.031     | 0   | 4   |
| Colorado       | 1981–2018                  | 0.789 | 1.094     | 0   | 4   |
| Connecticut    | 1981–2018                  | 0.289 | 0.732     | 0   | 4   |
| Hawaii         | 1981–2018                  | 0     | 0         | 0   | 0   |
| Idaho          | 1981–2018                  | 0.605 | 1.079     | 0   | 4   |
| Illinois       | 1999–2018                  | 0.55  | 1.191     | 0   | 5   |
| Indiana        | 1999–2016                  | 0.25  | 0.639     | 0   | 2   |
| Iowa           | 1981–2018                  | 0.184 | 0.393     | 0   | 1   |
| Kansas         | 1981–2018                  | 0.342 | 0.627     | 0   | 2   |
| Kentucky       | 2000; 2007; 2009–2014      | 0.125 | 0.354     | 0   | 1   |
| Maine          | 1981–2018                  | 0.447 | 0.645     | 0   | 2   |
| Maryland       | 1981–2018                  | 0.368 | 0.819     | 0   | 4   |
| Massachusetts  | 1981–2018                  | 1.684 | 1.817     | 0   | 9   |
| Michigan       | 1981–2018                  | 0.658 | 0.909     | 0   | 3   |
| Minnesota      | 1981–2018                  | 0.579 | 1.056     | 0   | 5   |
| Mississippi    | 1981–2018                  | 0.342 | 0.627     | 0   | 2   |
| Missouri       | 1981–2018                  | 0.474 | 0.603     | 0   | 2   |
| Montana        | 1981–2000; 2005–2018       | 0.457 | 0.886     | 0   | 4   |
| Nebraska       | 1981–2018                  | 0.079 | 0.273     | 0   | 1   |
| Nevada         | 1981–2018                  | 0.053 | 0.226     | 0   | 1   |
| New Hampshire  | 1981–2018                  | 0.368 | 0.786     | 0   | 4   |
| New Jersey     | 1990–2018                  | 0.379 | 0.677     | 0   | 2   |
| New Mexico     | 1981–2018                  | 0.632 | 0.998     | 0   | 4   |
| New York       | 1981–2018                  | 1.526 | 2.938     | 0   | 15  |
| North Carolina | 1993–2018                  | 0.692 | 0.97      | 0   | 4   |
| North Dakota   | 1998–2018                  | 0     | 0         | 0   | 0   |

<sup>321</sup> See *infra* Table 7.

| State          | Year                 | Mean  | Std. Dev. | Min | Max |
|----------------|----------------------|-------|-----------|-----|-----|
| Ohio           | 1981–2018            | 1.368 | 2.098     | 0   | 9   |
| Oklahoma       | 1985–2018            | 0.158 | 0.437     | 0   | 2   |
| Oregon         | 1981–1999; 2003–2018 | 0.543 | 0.9       | 0   | 3   |
| Pennsylvania   | 1993–2018            | 1.192 | 1.674     | 0   | 5   |
| Rhode Island   | 1981–2018            | 0.711 | 1.206     | 0   | 6   |
| South Carolina | 1981–2018            | 0.289 | 0.565     | 0   | 2   |
| South Dakota   | 1993–2018            | 0.192 | 0.402     | 0   | 2   |
| Tennessee      | 1995–2018            | 0.125 | 0.338     | 0   | 1   |
| Texas          | 1993–2018            | 0.231 | 0.514     | 0   | 2   |
| Utah           | 1981–2018            | 0.737 | 1.131     | 0   | 5   |
| Vermont        | 1993–2018            | 0.192 | 0.491     | 0   | 2   |
| Virginia       | 1997–2015            | 1.316 | 1.293     | 0   | 4   |
| Washington     | 1981–2018            | 0.684 | 1.093     | 0   | 5   |
| West Virginia  | 1993–2018            | 0.346 | 0.689     | 0   | 2   |
| Wisconsin      | 1981–2018            | 0.658 | 1.214     | 0   | 6   |
| Wyoming        | 1993–2018            | 0.269 | 0.533     | 0   | 2   |

We read and assigned each order to at least one category of individual rights in the same manner as previously outlined for federal directives. We identified 813 gubernatorial executive orders related to individual rights.<sup>322</sup> Differing from the federal level, governors use them almost exclusively to expand rights (99% of all rights orders) rather than restrict them.<sup>323</sup>

As with presidential directives, gubernatorial executive orders concerning individual rights largely pertained to civil rights—as shown in Figure 7.<sup>324</sup> Across the states, governors issued over 600 executive orders during this time frame related to civil rights (78% of all rights orders).<sup>325</sup> Labor is the only other category with over 100 executive orders (132 orders, 15% of all rights orders).<sup>326</sup> Otherwise, governors issued relatively few executive orders within the other individual rights categories.<sup>327</sup>

Figure 8 depicts the number of executive orders issued within the same civil rights subcategories designated in the previous section. Similar to Presidents, governors issued the most civil rights directives in categories related to antidiscrimination (21%), persons with disabilities (24%), women (19%), and racial minorities (22%).<sup>328</sup> Less

<sup>322</sup> See *infra* Figure 7.

<sup>323</sup> See *infra* Figure 7.

<sup>324</sup> See *infra* Figure 7.

<sup>325</sup> See *infra* Figure 7.

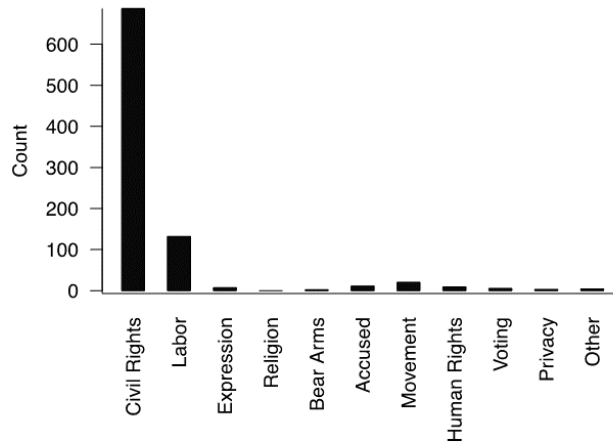
<sup>326</sup> See *infra* Figure 7.

<sup>327</sup> See *infra* Figure 7.

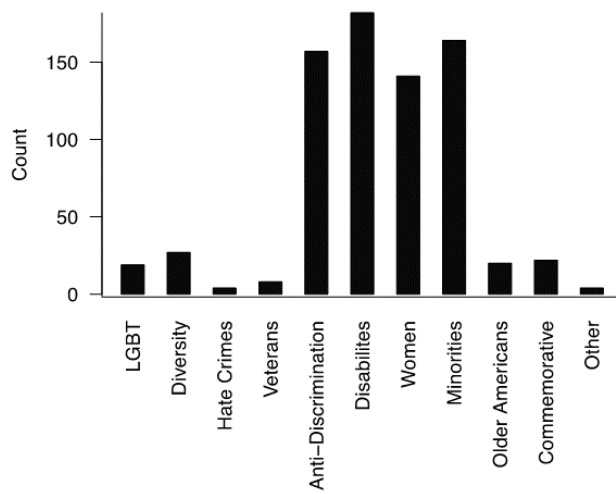
<sup>328</sup> See *infra* Figure 8.

than fifty executive orders were issued in the other categories, amounting to 14% of all civil rights directives.<sup>329</sup>

**Figure 7: Gubernatorial Executive Orders by Individual Rights Categories**



**Figure 8: Gubernatorial Executive Orders by Civil Rights Subcategories**



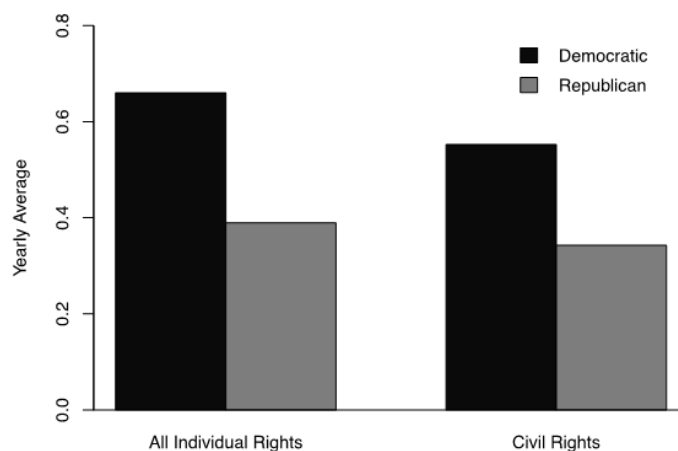
<sup>329</sup> See *infra* Figure 8.

Table 7 shows the summary statistics for executive orders by state.<sup>330</sup> Three states (Hawaii, Alaska, and North Dakota), to our knowledge, did not issue any rights-related orders in the entire time span recorded.<sup>331</sup> New York, Massachusetts, and Ohio governors deployed the most orders, with an average of 1.5, 1.7, and 1.3 per year, respectively, and a maximum of fifteen (2018 under New York Democratic Governor Andrew Cuomo) and nine (1993 under Massachusetts Republican Governor Bill Weld and 1996 under Ohio Republican Governor George Voinovich).<sup>332</sup> We further explore this variation, and how it relates to our variables of interest, in the following section.

### B. Regression Analysis of State Executive Orders

Figure 9 depicts the average number of individual and civil rights executive orders by gubernatorial party.<sup>333</sup> As expected, Democrats relied more on these orders than Republicans.<sup>334</sup> Specifically, Democratic governors issued an average of 0.66 individual rights and 0.55 civil rights orders per year, while these averages were 0.39 and 0.34, respectively, under their Republican counterparts.<sup>335</sup>

**Figure 9: Gubernatorial Rights Executive Orders, by Party**



<sup>330</sup> See *supra* Table 7.

<sup>331</sup> See *supra* Table 7.

<sup>332</sup> See *supra* Table 7.

<sup>333</sup> See *infra* Figure 9.

<sup>334</sup> See *infra* Figure 9.

<sup>335</sup> See *infra* Figure 9.

We further explore the empirical relationship between gubernatorial party and ideology in Table 8 by estimating negative binomial regression models.<sup>336</sup> Here, the unit of analysis is state-year. We include an indicator for whether the governor belongs to the Democratic Party (*Democratic Governor*) in the first and second columns, which amounts to 46% of the observations in the dataset.<sup>337</sup> We use *Gubernatorial Conservatism* in the last two columns.<sup>338</sup> Like Presidents, affiliation with the Democratic Party corresponds to a greater reliance on executive orders related to individual rights.<sup>339</sup> Particularly, Democratic governors increase their use of rights and rights-expanding orders by 69% and 73%, respectively.<sup>340</sup> *Gubernatorial Conservatism*, similarly, decreases these directives by 34–37%. Even when including additional variables in Table 9,<sup>341</sup> we find that the relationship between gubernatorial preferences and unilateral policymaking affecting rights still holds strongly.<sup>342</sup> Additionally, executive orders specifically related to civil rights occur more frequently under Democratic and liberal governors.<sup>343</sup>

**Table 8: Gubernatorial Individual Rights Executive Orders, Party, and Ideology (No Controls)**

|                            | (1) All Rights  | (2) Expands     | (3) All Rights  | (4) Expands     |
|----------------------------|-----------------|-----------------|-----------------|-----------------|
| Democratic Governor        | 0.53 (0.10)***  | 0.55 (0.10)***  |                 |                 |
| Gubernatorial Conservatism |                 |                 | -0.45 (0.16)*** | -0.47 (0.16)*** |
| States Fixed Effects       | YES             | YES             | YES             | YES             |
| Constant                   | -1.09 (0.29)*** | -1.10 (0.29)*** | -0.81 (0.41)**  | -0.80 (0.41)*   |
| N                          | 1,559           | 1,559           | 601             | 601             |

Coefficients from negative binomial regression, with robust standard errors clustered by state-year in parenthesis.

Two tailed tests, \*p < 0.1, \*\*p < 0.05, \*\*\*p < 0.01.

<sup>336</sup> See *infra* Table 8.

<sup>337</sup> See *infra* Table 8.

<sup>338</sup> We use Adam Bonica's ideal estimates for governor ideology, based on campaign contributions. See Adam Bonica, *Mapping the Ideological Marketplace*, 58 AM. J. POL. SCI. 367, 368–69 (2013). Positive (negative) values correspond to greater conservatism (liberalism).

<sup>339</sup> See *infra* Table 8.

<sup>340</sup> Given the rarity of executive orders that retract rights, we omit them in the analysis.

<sup>341</sup> See discussion *infra* notes 392–98 for a description of the control variables.

<sup>342</sup> See *infra* Table 9.

<sup>343</sup> See *infra* Table 9.

Beyond preferences, the governor's gender and race could also impact her use of these directives, given the established link between descriptive and substantive representation.<sup>344</sup> Figure 10 shows the annual average number of rights executive orders by gender.<sup>345</sup> Contrary to expectations, female governors actually issued fewer individual rights (0.37) and civil rights (0.31) executive orders per year than their male counterparts (0.53 and 0.45, respectively).<sup>346</sup> We find similarly counterintuitive effects when exploring the average number of rights-related orders by the race of the governor in Figure 11.<sup>347</sup> White governors employed an average of 0.52 individual rights and 0.44 civil rights executive orders per year, while non-white chief executives signed an average of 0.43 individual and 0.38 civil rights orders.<sup>348</sup> Overall, female and minority governors do not appear to unilaterally promote substantive representation.<sup>349</sup>

**Table 9: Gubernatorial Individual Rights Executive Orders, Party, and Ideology (Controls)**

|                            | (1) All Rights  | (2) Expands     | (3) All Rights  | (4) Expands     |
|----------------------------|-----------------|-----------------|-----------------|-----------------|
| Democratic Governor        | 0.38 (0.10)***  | 0.40 (0.11)***  |                 |                 |
| Gubernatorial Conservatism |                 |                 | -0.28 (0.16)*   | -0.30 (0.16)*   |
| Female Governor            | -0.24 (0.21)    | -0.26 (0.21)    | -0.28 (0.30)    | -0.30 (0.31)    |
| Non-White Governor         | -0.33 (0.28)    | -0.39 (0.27)    | 0.47 (0.38)     | 0.34 (0.48)     |
| Public Conservatism        | 0.51 (0.25)**   | 0.57 (0.26)**   | 0.78 (0.37)**   | 0.82 (0.37)**   |
| Divided Government         | 0.09 (0.11)     | 0.09 (0.11)     | -0.52 (0.18)*** | -0.50 (0.18)*** |
| Veto Proof                 | -0.52 (0.23)**  | -0.51 (0.23)**  | 0.06 (0.42)     | 0.07 (0.43)     |
| Election Year              | -0.36 (0.12)*** | -0.36 (0.12)*** | -0.23 (0.18)    | -0.25 (0.18)    |
| Previous Election Percent  | -0.01 (0.01)    | -0.01 (0.01)    | -0.01 (0.01)    | -0.01 (0.02)    |
| Term Limited               | -0.30 (0.14)**  | -0.33 (0.14)**  | 0.01 (0.20)     | -0.04 (0.20)    |
| Governor Power             | 0.16 (0.19)     | 0.20 (0.19)     | -0.64 (0.72)    | -0.68 (0.72)    |
| Leg. Staff                 | 0.84 (0.30)***  | 0.84 (0.30)***  | 0.29 (0.65)     | 0.28 (0.66)     |

<sup>344</sup> See *infra* Table 9.

<sup>345</sup> See *infra* Figure 10.

<sup>346</sup> See *infra* Figure 10.

<sup>347</sup> See *infra* Figure 11.

<sup>348</sup> See *infra* Figure 11.

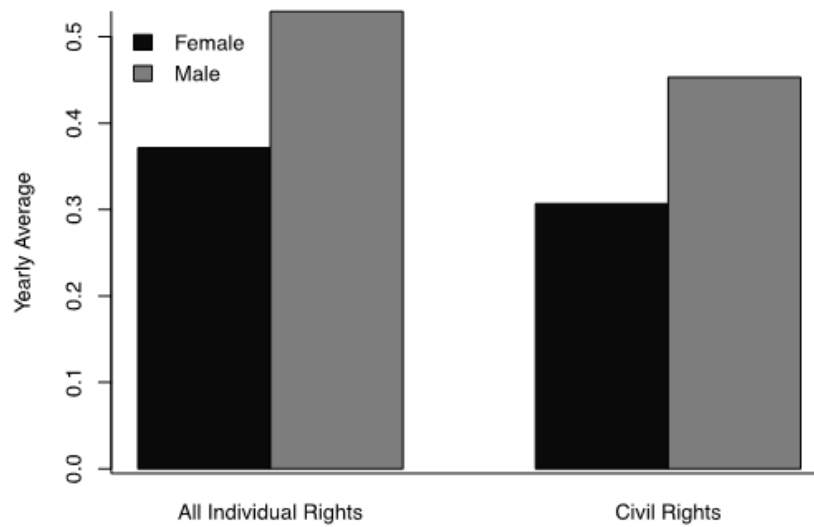
<sup>349</sup> See *infra* Figures 10–11.

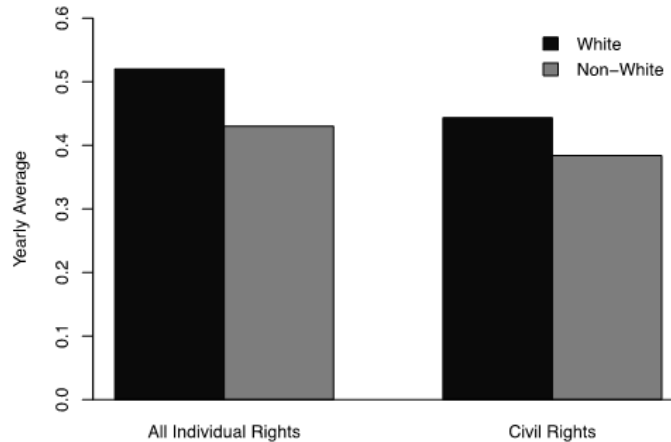
|                      | (1) All Rights | (2) Expands    | (3) All Rights | (4) Expands   |
|----------------------|----------------|----------------|----------------|---------------|
| Leg. Salary          | -0.29 (0.23)   | -0.27 (0.23)   | 0.27 (0.12)**  | 0.28 (0.12)** |
| Unemployment         | 0.03 (0.03)    | 0.03 (0.03)    | -0.09 (0.05)*  | -0.08 (0.05)* |
| States Fixed Effects | YES            | YES            | YES            | YES           |
| Constant             | -4.41 (2.75)   | -4.677 (2.75)* | -1.68 (4.90)   | -1.62 (4.91)  |
| N                    | 1,290          | 1,290          | 548            | 548           |

Coefficients from negative binomial regression, with robust standard errors clustered by state-year in parenthesis.

Two tailed tests, \*p < 0.1, \*\*p < 0.05, \*\*\*p < 0.01.

**Figure 10: Gubernatorial Rights Executive Orders by Gender**



**Figure 11: Gubernatorial Rights Executive Orders by Race**

The analysis in Table 9 confirms these descriptive patterns.<sup>350</sup> *Female Governor* and *Non-White Governor* both have an insignificant coefficient, suggesting that these governors do not more actively pursue rights policies through unilateral actions as compared to their male and white counterparts.<sup>351</sup> These relationships are also insignificant when examining civil rights orders in Table 10 (columns 1 and 2).<sup>352</sup> Next, we investigate whether Democratic governors who are also from one of these under-represented groups are more likely to unilaterally expand civil rights policies by interacting *Democratic Governor* with *Female Governor* (column 3) and *Non-White Governor* (column 4).<sup>353</sup> The latter interaction is insignificant, suggesting that non-white Democratic governors do not engage with more civil rights orders than other governors.<sup>354</sup>

**Table 10: Gubernatorial Civil Rights Executive Orders and Salience**

|                            | (1)            | (2)              | (3)            | (4)               | (5)            |
|----------------------------|----------------|------------------|----------------|-------------------|----------------|
| Democratic Governor        | 0.42 (0.11)*** |                  | 0.47<br>(0.34) | 0.44<br>(0.11)*** | 0.23<br>(0.20) |
| Gubernatorial Conservatism |                | -0.33<br>(0.18)* |                |                   |                |

<sup>350</sup> See *supra* Table 9.

<sup>351</sup> See *supra* Table 9.

<sup>352</sup> See *infra* Table 10.

<sup>353</sup> See *infra* Table 10.

<sup>354</sup> See *infra* Table 10.



|                           | (1)             | (2)                | (3)                | (4)                | (5)                |
|---------------------------|-----------------|--------------------|--------------------|--------------------|--------------------|
| Female Governor           | -0.24 (0.24)    | -0.34 (0.34)       | 0.47<br>(0.34)     |                    | -0.23<br>(0.24)    |
| Dem Gov. x Female Gov.    |                 |                    | -1.15<br>(0.40)*** |                    |                    |
| Non-White Governor        | -0.30 (0.28)    | 0.04 (0.58)        | -0.41<br>(0.27)    | -0.28<br>(0.23)    | -0.27<br>(0.28)    |
| Dem Gov. x Non-White Gov. |                 |                    |                    | -0.80<br>(0.74)    |                    |
| MIP                       | 5.77 (2.61)**   | 3.08 (4.22)        | 5.62<br>(2.62)**   | 5.67<br>(2.61)**   | 3.29<br>(3.70)     |
| Dem Gov. x MIP            |                 |                    |                    |                    | 5.80<br>(4.99)     |
| Public Conservatism       | 0.42 (0.27)     | 0.43 (0.39)        | 0.46<br>(0.27)*    | 0.42<br>(0.27)     | 0.44<br>(0.27)     |
| Divided Government        | 0.09 (0.12)     | -0.41<br>(0.20)**  | 0.12<br>(0.12)     | 0.10<br>(0.12)     | 0.09<br>(0.12)     |
| Veto Proof                | -0.58 (0.21)*** | -0.11 (0.35)       | -0.58<br>(0.21)*** | -0.57<br>(0.21)*** | -0.60<br>(0.21)*** |
| Election Year             | -0.43 (0.13)*** | -0.42<br>(0.20)*** | -0.44<br>(0.13)*** | -0.43<br>(0.13)*** | -0.43<br>(0.13)*** |
| Previous Election Percent | -0.01 (0.01)    | -0.01 (0.02)       | -0.01<br>(0.01)    | -0.01<br>(0.01)    | -0.01<br>(0.01)    |
| Term Limited              | -0.37 (0.15)**  | -0.10 (0.24)       | -0.37<br>(0.15)**  | -0.36<br>(0.15)**  | -0.37<br>(0.16)**  |
| Governor Power            | 0.21 (0.20)     | -0.53 (0.73)       | 0.21<br>(0.21)     | 0.20<br>(0.20)     | 0.19<br>(0.20)     |
| Leg. Staff                | 0.76 (0.32)**   | 0.27 (0.68)        | 0.67<br>(0.31)     | 0.76<br>(0.32)**   | 0.76<br>(0.32)**   |
| Leg. Salary               | -0.27 (0.19)    | 0.09 (0.28)        | -0.23<br>(0.18)    | -0.24<br>(0.18)    | -0.25<br>(0.19)    |
| Unemployment              | 0.04 (0.03)     | -0.08 (0.05)       | 0.04<br>(0.03)     | 0.04<br>(0.03)     | 0.04<br>(0.03)     |
|                           |                 |                    |                    |                    |                    |
| States Fixed Effects      | YES             | YES                | YES                | YES                | YES                |
| Constant                  | -4.71 (2.75)    | -1.28 (5.30)       | -4.29<br>(2.71)    | -4.80<br>(2.74)*   | -4.64<br>(2.77)*   |
| N                         | 1,290           | 548                | 1,290              | 548                | 1,290              |

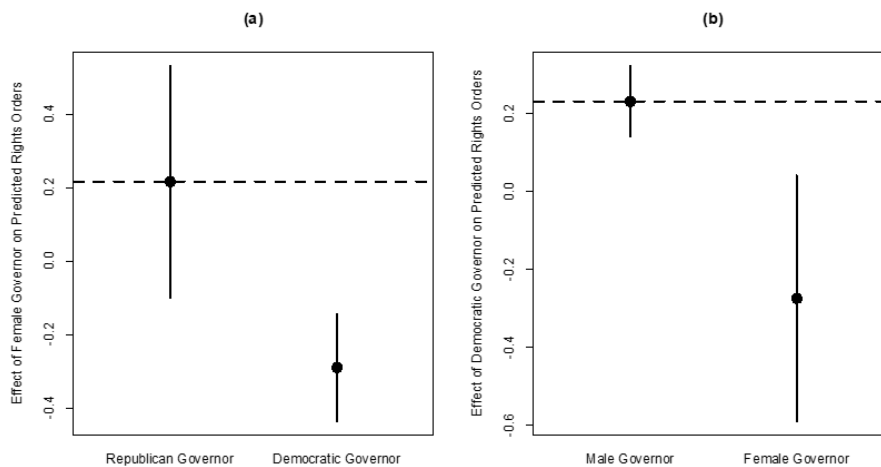
Coefficients from negative binomial regression, with robust standard errors clustered by state-year in parenthesis.

Two tailed tests, \*p < 0.1, \*\*p < 0.05, \*\*\*p < 0.01.

Interestingly, we find a significant interactive relationship between gubernatorial gender and party, but in another unexpected way.<sup>355</sup> We depict the marginal effects of *Democratic Governor* and *Female Governor* in Figure 12.<sup>356</sup> Panel (a) shows the marginal effects of being a female governor on the estimated number of rights-related executive orders issued per year for both Republican governors and Democratic governors.<sup>357</sup> Conversely, panel (b) depicts the marginal effects of being a female governor on rights-related orders for male versus female governors.<sup>358</sup> The effect of gender is most pronounced for Democratic governors but negatively so. Specifically, gender does not influence unilateralism for Republicans, but being female significantly decreases these orders under Democrats. Similarly, Democratic governors do not impact directives for men but strongly depresses them under female administrations. Taken together, being both a woman and a Democrat produces the strongest negative effects on unilateralism related to individual rights.

Similar to the federal level, public conservatism seems to significantly impact rights-related gubernatorial directives. Here, we measure the ideology of the public by aggregated ANES survey data by state-year. As shown in Table 9, governors tend to issue more rights-related executive orders when their states are more conservative, perhaps in an effort to preserve individual rights in moments they are perceived to be most unsafe.<sup>359</sup> In particular, executive orders pertaining to rights grow by 46–127% for every standard deviation increase in public conservatism.

**Figure 12: Marginal Effects of Democratic Governor and Female Governor**



<sup>355</sup> See *supra* Table 10.

<sup>356</sup> See *infra* Figure 12.

<sup>357</sup> See *infra* Figure 12.

<sup>358</sup> See *infra* Figure 12.

<sup>359</sup> See *supra* Table 9.

We further explore responsiveness by estimating the effect of public salience towards civil rights issues on executive orders in this area (Table 10).<sup>360</sup> Here, we find a strong, positive, and statistically significant relationship between salience and civil rights orders.<sup>361</sup> For every one percent increase in respondents identifying civil rights as the most important problem in a given year, governors sign an additional three executive orders related to civil rights.<sup>362</sup> To test whether Democratic governors are more responsive to public salience, we interact these variables in column 5.<sup>363</sup> Unlike the federal directives analysis, we do not find a significant interactive relationship.

Next, we consider whether gubernatorial approval influences the issuance of individual (Table 11) and civil (Table 12) rights orders.<sup>364</sup> We measure gubernatorial approval using data from the Cooperative Congressional Elections Study, available between 2006 and 2018.<sup>365</sup> The results reveal that a governor's approval augments their use of civil rights directives.<sup>366</sup> Though this relationship is positive for both dependent variables, it is only statistically significant for all, not civil, rights-related orders.<sup>367</sup> Specifically, governors issue 4.73 times as many individual rights executive orders for every one percent increase in their approval rating.<sup>368</sup>

**Table 11: Gubernatorial Rights Executive Orders and Gubernatorial Approval**

|                        | (1)          | (2)            | (3)           | (4)          |
|------------------------|--------------|----------------|---------------|--------------|
| Gubernatorial Approval | 1.55 (0.82)* |                |               |              |
| Liberal Approval       |              | 1.01 (0.36)*** |               |              |
| Conservative Approval  |              |                | -0.79 (0.41)* |              |
| Moderate Approval      |              |                |               | 0.97 (0.54)* |

<sup>360</sup> See *supra* Table 10.

<sup>361</sup> See *supra* Table 10.

<sup>362</sup> See *supra* Table 10.

<sup>363</sup> See *supra* Table 10.

<sup>364</sup> See *infra* Tables 11–12.

<sup>365</sup> Respondents were asked, “Do you approve of the way each is doing their job . . . Governor of [State],” and then given the option to strongly approve, approve, disapprove, or strongly disapprove. YOU GOV, QUESTIONNAIRE CCES19\_COMMON 12 (2019), <https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/WOT7O8> [<https://perma.cc/94GT-Q44B>]. We aggregate the respondents who answered strongly approve and approve in each state-year to construct our measure of gubernatorial approval. Shiro Kuriwaki, *Cumulative CCES Common Content*, HARV. DATAVERSE (2020), <https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi%3A10.7910/DVN/II2DB6> [<https://perma.cc/7G8B-6A3P>].

<sup>366</sup> See *infra* Tables 11–12.

<sup>367</sup> See *infra* Tables 11–12.

<sup>368</sup> This calculation was run off-manuscript in a separate data analysis not reported here.

|                      | (1)              | (2)            | (3)             | (4)              |
|----------------------|------------------|----------------|-----------------|------------------|
| Controls             | YES              | YES            | YES             | YES              |
| States Fixed Effects | YES              | YES            | YES             | YES              |
| Constant             | 28.03 (10.48)*** | 23.32 (9.76)** | 23.67 (10.26)** | 26.56 (10.17)*** |
| N                    | 480              | 479            | 480             | 480              |

Coefficients from negative binomial regression, with robust standard errors clustered by state-year in parenthesis.

Two tailed tests, \*p < 0.1, \*\*p < 0.05, \*\*\*p < 0.01.

When analyzing approval among liberals, conservatives, and moderates separately (columns 2–4), we discover differential effects.<sup>369</sup> In particular, governors employ more rights-related orders when liberals and moderates in their state have a more favorable opinion of them but fewer when conservative approval is high.<sup>370</sup> Overall, these results suggest that governors are most sensitive to performance evaluations to those portions of the electorate who care most about rights or who are more critical for their electoral support.<sup>371</sup>

**Table 12: Gubernatorial Civil Rights Executive Orders and Gubernatorial Approval**

|                        | (1)             | (2)            | (3)             | (4)             |
|------------------------|-----------------|----------------|-----------------|-----------------|
| Gubernatorial Approval | 1.24 (0.95)     |                |                 |                 |
| Liberal Approval       |                 | 1.47 (0.39)*** |                 |                 |
| Conservative Approval  |                 |                | -1.53 (0.46)*** |                 |
| Moderate Approval      |                 |                |                 | 1.15 (0.58)**   |
| Controls               | YES             | YES            | YES             | YES             |
| States Fixed Effects   | YES             | YES            | YES             | YES             |
| Constant               | 25.58 (9.70)*** | 20.25 (8.78)** | 17.83 (9.03)**  | 24.53 (9.42)*** |
| N                      | 480             | 479            | 480             | 480             |

Coefficients from negative binomial regression, with robust standard errors clustered by state-year in parenthesis.

Two tailed tests, \*p < 0.1, \*\*p < 0.05, \*\*\*p < 0.01.

Next, we provide a more precise measure of public opinion by examining sentiments toward certain groups.<sup>372</sup> We use the same feeling thermometers as before, but

<sup>369</sup> See *supra* Table 11 and *infra* Table 12.

<sup>370</sup> See *supra* Table 11 and *infra* Table 12.

<sup>371</sup> See *supra* Table 11 and *infra* Table 12.

<sup>372</sup> See *infra* Table 13.

we aggregate them by the respondent's state and year.<sup>373</sup> Similar to the federal level, governors appear to be responsive to public feelings towards African Americans, advancing more executive orders related to civil rights as their states' residents report more favorable opinions of that group.<sup>374</sup> In particular, for every one-point increase in the Black feeling thermometer, governors issue 3% more executive orders.<sup>375</sup> This relationship does not hold across all groups of feeling thermometers, however.<sup>376</sup> Affect for women and Hispanics is not impactful for executive orders on civil rights, while increased warmth towards the LGBT community actually appears to decrease these directives.<sup>377</sup> In the case of the latter, governors may be relying on unilateralism to protect LGBT rights when they are the most exposed to public threats.<sup>378</sup>

**Table 13: Gubernatorial Civil Rights Executive Orders and Feeling Thermometers**

|                      | (1)            | (2)           | (3)          | (4)           |
|----------------------|----------------|---------------|--------------|---------------|
| Black FT             | 0.03 (0.01)**  |               |              |               |
| Women FT             |                | 0.01 (0.01)   |              |               |
| Hispanic FT          |                |               | -0.01 (0.01) |               |
| LGBT FT              |                |               |              | -0.01 (0.01)* |
| Controls             | YES            | YES           | YES          | YES           |
| States Fixed Effects | YES            | YES           | YES          | YES           |
| Constant             | -6.76 (2.99)** | -5.04 (2.82)* | -3.50 (3.02) | -2.14 (3.48)  |
| N                    | 1,129          | 1,252         | 1,255        | 1,108         |

Coefficients from negative binomial regression, with robust standard errors clustered by state-year in parenthesis.

Two tailed tests, \*p < 0.1, \*\*p < 0.05, \*\*\*p < 0.01.

Finally, we assess how federalism might impact state executive orders.<sup>379</sup> Are governors responsive to federal politics when issuing rights-related orders? To answer this question, we first turn to the policy preferences of the President as a proxy

<sup>373</sup> See *infra* Table 13.

<sup>374</sup> See *infra* Table 13.

<sup>375</sup> See *infra* Table 13.

<sup>376</sup> See *infra* Table 13.

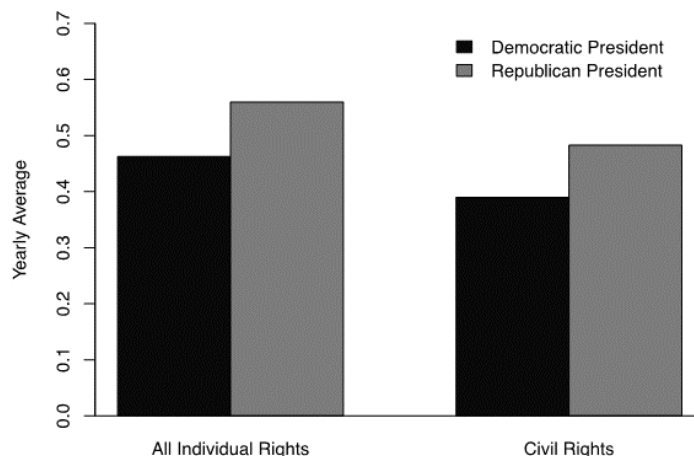
<sup>377</sup> See *infra* Table 13.

<sup>378</sup> See *infra* Table 13; see also sources cited *supra* note 9 and accompanying text.

<sup>379</sup> See *supra* Table 13.

for when they should more actively advance individual rights. Figure 13 shows the average number of rights-related orders issued by governors based on the party of the President.<sup>380</sup> Governors deployed more individual and civil rights executive orders under Republican Presidents (0.56 and 0.48 per year), as compared to Democratic ones (0.46 and 0.39 per year).<sup>381</sup> These numbers provide some suggestive evidence that governors unilaterally act to guard rights amid Republican adversaries in the White House.

**Figure 13: Gubernatorial Rights Executive Orders by Presidential Party**



To further evaluate this relationship, we once again turn to regression analyses. We include variables for the current President's party and ideology in Table 14 (all individual rights orders) and Table 15 (civil rights orders).<sup>382</sup> We find inconsistent results and the coefficients are mostly non-significant.<sup>383</sup> In some specifications, presidential conservatism decreases rights-related executive orders issued at the state level.<sup>384</sup> Elsewhere, we find Republican presidencies increase the use of civil rights orders.<sup>385</sup> We suspect, however, that these effects are conditional on salience.

<sup>380</sup> See *infra* Figure 13.

<sup>381</sup> See *infra* Figure 13.

<sup>382</sup> See *infra* Tables 14–15.

<sup>383</sup> See *infra* Tables 14–15.

<sup>384</sup> See *infra* Tables 14–15.

<sup>385</sup> See *infra* Tables 14–15.

**Table 14: Gubernatorial Rights Executive Orders and Federalism**

|                           | (1)           | (2)            | (3)           | (4)           |
|---------------------------|---------------|----------------|---------------|---------------|
| Democratic President      | -0.12 (0.10)  |                | 0.14 (0.11)   |               |
| Presidential Conservatism |               | 0.04 (0.07)    |               | -0.16 (0.08)* |
| Controls                  | NO            | NO             | YES           | YES           |
| States Fixed Effects      | YES           | YES            | YES           | YES           |
| Constant                  | -0.80 (0.32)* | -0.82 (0.32)** | -5.41 (2.83)* | -5.48 (2.83)* |
| N                         | 1,559         | 1,473          | 1,290         | 1,290         |

Coefficients from negative binomial regression, with robust standard errors clustered by state-year in parenthesis.

Two tailed tests, \* $p < 0.1$ , \*\* $p < 0.05$ , \*\*\* $p < 0.01$ .

**Table 15: Gubernatorial Civil Rights Executive Orders and Federalism**

|                           | (1)             | (2)             | (3)          | (4)           |
|---------------------------|-----------------|-----------------|--------------|---------------|
| Democratic President      | -0.19 (0.10)*   |                 | -0.13 (0.13) |               |
| Presidential Conservatism |                 | 0.10 (0.08)     |              | 0.05 (0.11)   |
| Controls                  | NO              | NO              | YES          | YES           |
| States Fixed Effects      | YES             | YES             | YES          | YES           |
| Constant                  | -1.06 (0.38)*** | -1.12 (0.38)*** | -4.29 (2.73) | -4.58 (2.73)* |
| N                         | 1,559           | 1,473           | 1,290        | 1,290         |

Coefficients from negative binomial regression, with robust standard errors clustered by state-year in parenthesis.

Two tailed tests, \* $p < 0.1$ , \*\* $p < 0.05$ , \*\*\* $p < 0.01$ .

To test this expectation, we cross *Democratic President* with *Public Salience* (columns 1 and 2) and *Presidential Salience* (columns 3 and 4) in Table 16.<sup>386</sup> We find significant interaction effects, which we graphically depict in Figures 14 and

<sup>386</sup> See *infra* Table 16.

15.<sup>387</sup> These figures show the marginal effects of Democratic Presidents on gubernatorial executive orders related to civil rights when varying public salience (Figure 14) and presidential salience (Figure 15).<sup>388</sup> Across both Figures, there is no difference in state executive order use under Democratic and Republican administrations.<sup>389</sup> Yet this effect becomes negative and statistically significant as salience increases.<sup>390</sup> That is, Democratic Presidents correspond to fewer gubernatorial executive orders on civil rights but only when the issue is salient to the public and the President.<sup>391</sup> Altogether, these findings suggest that governors pursue fewer unilateral actions to protect civil rights when these rights are less in danger, under potentially supportive Democratic Presidents likely to act on a salient issue. Republican presidencies, on the other hand, could prove to be more harmful to rights and are thus when governors take action.

**Table 16: Gubernatorial Civil Rights Executive Orders, Federalism, and Salience**

|  | (1)             | (2)             | (3)             | (4)          |
|--|-----------------|-----------------|-----------------|--------------|
| Democratic President                         | 0.03 (0.18)     | 0.24 (0.23)     | 0.25 (0.21)     | 0.06 (0.23)  |
| Public Salience                              | 8.65 (3.40)**   | 16.01 (5.58)*** |                 |              |
| Presidential Salience                        |                 |                 | 0.13 (0.08)     | 0.07 (0.08)  |
| Democratic President x Public Salience       | -7.33 (4.60)    | -12.97 (6.81)*  |                 |              |
| Democratic President x Presidential Salience |                 |                 | -0.25 (0.10)**  | -0.11 (0.11) |
| Controls                                     | NO              | YES             | NO              | YES          |
| States Fixed Effects                         | YES             | YES             | YES             | YES          |
| Constant                                     | -1.34 (0.40)*** | -4.06 (2.74)    | -1.29 (0.40)*** | -4.13 (2.70) |
| N  | 1,559           | 1,290           | 1,559           | 1,290        |

Coefficients from negative binomial regression, with robust standard errors clustered by state-year in parenthesis.

Two tailed tests, \*p < 0.1, \*\*p < 0.05, \*\*\*p < 0.01.

<sup>387</sup> See *infra* Figures 14–15.

<sup>388</sup> See *infra* Figures 14–15.

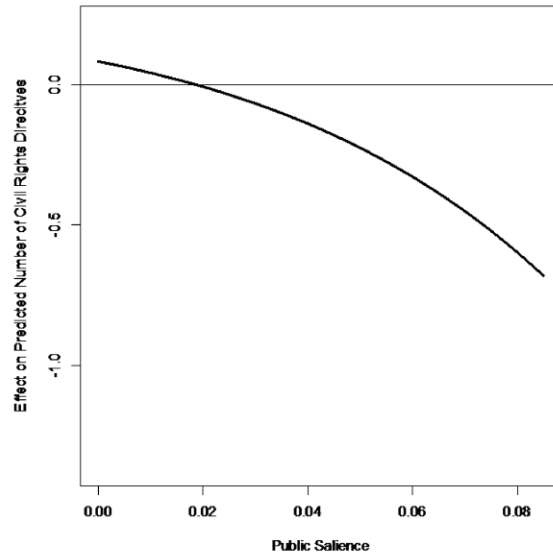
<sup>389</sup> See *infra* Figures 14–15.

<sup>390</sup> See *infra* Figures 14–15.

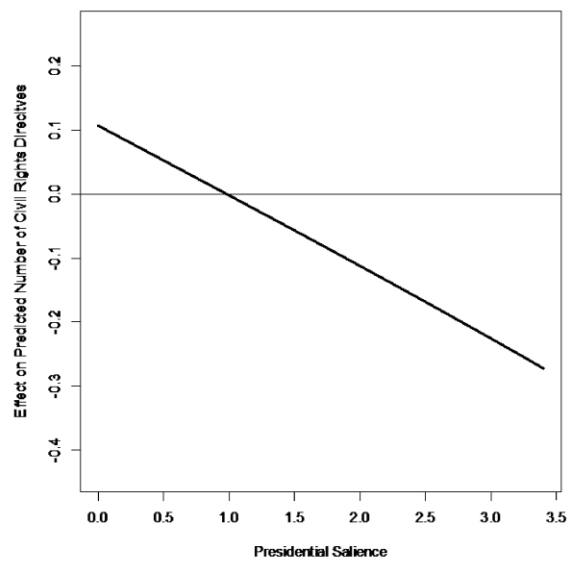
<sup>391</sup> See *infra* Figures 14–15.



**Figure 14: Marginal Effects of Democratic President by Public Salience (State Civil Rights Executive Orders)**



**Figure 15: Marginal Effects of Democratic President by Presidential Salience (State Civil Rights Executive Orders)**



Other findings emerge when analyzing the effects of the control variables. Consistent with previous theories, governors issue fewer rights-related orders when facing legislative opposition, particularly under divided government and veto-proof majorities.<sup>392</sup> They consistently rely less on such unilateralism during gubernatorial election years,<sup>393</sup> suggesting a desire to avoid potentially controversial policies when the stakes are high. Similar to Presidents, governors employ fewer rights-related executive orders in their final year of office, perhaps navigating policymaking carefully in order to protect their legacies or prospects for higher office.<sup>394</sup> When legislatures are high in institutional capacity, as measured by staff and salary, unilateral activity on individual rights spikes.<sup>395</sup> Though surprising, this relationship could depend on governor-legislature alignment.<sup>396</sup> Finally, governors issue fewer executive orders when state unemployment is high—when their political capital might be lower.<sup>397</sup> This relationship, however, is not consistently statistically significant across these models—which means this trend is not constantly appearing in these data.<sup>398</sup> Even

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<sup>392</sup> *Divided Government* is coded as 1 if the governor and either legislative chamber are from opposing political parties and 0 otherwise. *Veto Proof* is coded as 1 if the legislature has a veto-proof majority and 0 otherwise. Both variables are collected from the Klarner dataset. See, e.g., Carl Klarner, *The Measurement of the Partisan Balance of State Government*, 3 STATE POL. & POL'Y Q. 309, 312–16 (2003); Carl Klarner, *State Partisan Balance Data, 1937–2011*, HARV. DATAVERSE (2013), <https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/LZHMG3> [<https://perma.cc/7SNL-2GRA>].

<sup>393</sup> *Election Year* is measured as 1 in a gubernatorial election year in that state and 0 otherwise. For this data, see Carl Klarner, *Governors Dataset*, HARV. DATAVERSE (2003), <https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/PQ0Y1N> [<https://perma.cc/BB35-AGAQ>].

<sup>394</sup> *Term Limited* is coded as 1 if the governor is in her last year in office and cannot run for reelection and 0 otherwise. See *id.*

<sup>395</sup> *Legislative Staff* is the logged number of total staffers per state-year. This data is collected from the National Conference of State Legislatures and is linearly interpolated to fill in missing years. *Size of State Legislative Staff*, NAT'L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/about-state-legislatures/staff-change-chart-1979-1988-1996-2003-2009.aspx> [<https://perma.cc/99WY-LUYR>] (Oct. 2, 2018). *Legislative Salary* is the logged salary of state legislators, in 2018 dollars. *2018 Legislator Compensation Information*, NAT'L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/about-state-legislatures/legislator-compensation-2018.aspx> [<https://perma.cc/YAX2-S4MY>] (Apr. 16, 2018).

<sup>396</sup> See, e.g., Barber et al., *supra* note 199, at 535; cf. Bolton & Thrower, *supra* note 198, at 649–50.

<sup>397</sup> Annual state unemployment rates are collected from the Bureau of Labor Statistics. See *Local Area Unemployment Statistics*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/lau/> [<https://perma.cc/23U8-JYBQ>].

<sup>398</sup> We use a modified version of the Beyle Index to measure Governor Power, based on four indices: gubernatorial tenure potential, budgetary power, appointment power, and veto power. See Thad Beyle, *The Governor's Formal Powers: A View from the Governor's Chair*, 28 PUB. ADMIN. REV. 540, 540–45 (1968). We use linear interpolation to fill in the gaps between available years (1980, 1988, 1994, 1998, 2000, 2001, 2002, 2003, 2005, and 2007).

when controlling for these alternative explanations for unilateral policymaking, our results largely reveal that chief executives are motivated by party, ideology, public opinion, and federalism when deciding when to unilaterally dictate policies on individual rights.

### CONCLUSION

Individual rights are traditionally thought to be protected by the U.S. Bill of Rights, enshrined in state constitutions, and advanced through landmark legislation such as the Civil Rights Act of 1964.<sup>399</sup> Yet there is another forceful, but understudied, impetus for individual rights: executive unilateralism.<sup>400</sup> Chief executives across the U.S. federal system have the power to unilaterally guide executive branch implementation with the stroke of a pen.<sup>401</sup> And these actions do not require the direct assent of legislatures or the judiciary.<sup>402</sup> In this manner, Presidents and governors alike can shape public policies in ways that profoundly impact citizens' rights throughout the country.<sup>403</sup>

Why, and when, do Presidents and governors issue directives affecting the rights of individuals? In this Article, we examined all unilateral directives related to individual rights issued by Presidents and state governors between 1981 and 2018 to answer this question. We conclude that partisanship and ideology largely drive these decisions.<sup>404</sup> Presidents and governors who belong to the Democratic Party issue more directives pertaining to individual rights, on average, than their Republican counterparts.<sup>405</sup> Such behavior largely aligns with the traditional principles of the Democratic Party.<sup>406</sup> In their 2020 national platform, the party affirmed that:

Democrats will protect and promote the equal rights of all our citizens—women, LGBTQ+ people, religious minorities, people with disabilities, Native Americans, and all who have been discriminated against in too many ways and for too many generations. We commit ourselves to the vision articulated by Frederick Douglass of “a Government founded upon justice, and recognizing the equal rights of all.”<sup>407</sup>

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<sup>399</sup> See *supra* text accompanying notes 213–23.

<sup>400</sup> See *supra* text accompanying notes 45, 48–50; CALABRESI & YOO, *supra* note 41, at 3–4.

<sup>401</sup> U.S. CONST. art. II, §§ 1, 3.

<sup>402</sup> See *supra* notes 48–49 and accompanying text.

<sup>403</sup> See *supra* notes 48–49 and accompanying text.

<sup>404</sup> See *supra* Parts IV–V.

<sup>405</sup> See *supra* Parts IV–V.

<sup>406</sup> See *2020 Democratic Party Platform*, DEMOCRATIC NAT'L COMM. 6 (Aug. 18, 2020), <https://democrats.org/wp-content/uploads/sites/2/2020/08/2020-Democratic-Party-Platform.pdf> [<https://perma.cc/D8UF-H47S>].

<sup>407</sup> *Id.*

Even within the Democratic Party, we likewise find that liberal chief executives issue more rights-related directives.<sup>408</sup> Thus, personal beliefs about policy strongly drive executive choices to protect individual rights through unilateral action.<sup>409</sup> Public opinion is also influential in these decisions.<sup>410</sup> In general, Presidents and governors with higher public approval tend to issue more unilateral directives related to individual rights.<sup>411</sup> At the state level, this relationship is mostly driven by the liberal and moderate electorate, likely because they care most about individual rights.<sup>412</sup> High salience and positive feelings towards African Americans strongly motivate directives expanding civil rights, in both federal and state contexts.<sup>413</sup>

Though the vast majority of these directives are aimed at protecting or expanding individual rights, there are some that seek to restrict these rights.<sup>414</sup> As mentioned in the Introduction, Trump issued several unilateral directives curbing the rights of transgender individuals and immigrants.<sup>415</sup> This raises the question of whether chief executives should have free reign in unilaterally impacting individual rights, particularly in a negative manner.

Traditionally, political science scholars have argued that legislatures can serve to constrain executive power.<sup>416</sup> Legislatures can retaliate against Presidents and governors for unfavorable unilateral actions through means such as passing legislation, restricting budgets, and increasing oversight hearings.<sup>417</sup> Consequently, the empirical literature finds that chief executives issue fewer unilateral directives under divided government for fear of legislative retaliation.<sup>418</sup> We find little evidence of this dynamic when examining presidential directives related to individual rights; though we note there could be differential effects when separating out executive orders and memoranda, given the former is much more visible to legislative actors than the latter.

At the state level, we find evidence that governors issue fewer orders related to individual rights when facing legislatures from the opposing party and those with veto-proof majorities that can freely sanction the governor through the statutory process.<sup>419</sup> Though it might be comforting to know that governors can be deterred

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<sup>408</sup> See *supra* note 251 and accompanying text.

<sup>409</sup> See *supra* notes 253–54 and accompanying text.

<sup>410</sup> See *supra* notes 186–88.

<sup>411</sup> See *supra* note 24 and accompanying text.

<sup>412</sup> See *supra* note 24 and accompanying text.

<sup>413</sup> See *supra* notes 307–09, 370–71 and accompanying text.

<sup>414</sup> See *supra* note 4 and accompanying text.

<sup>415</sup> See *supra* notes 4–5 and accompanying text.

<sup>416</sup> See, e.g., Barber et al., *supra* note 199, at 535–36; Bolton & Thrower, *supra* note 198, at 662; Chiou & Rothenberg, *The Elusive Search*, *supra* note 198, at 661–62.

<sup>417</sup> See Barber et al., *supra* note 199, at 524; Bolton & Thrower, *supra* note 198, at 649; Chiou & Rothenberg, *The Elusive Search*, *supra* note 198, at 666.

<sup>418</sup> See, e.g., HOWELL, *supra* note 198, at xv, xvii; Bolton & Thrower, *supra* note 198, at 651; Chiou & Rothenberg, *The Elusive Search*, *supra* note 198, at 666.

<sup>419</sup> See *supra* text accompanying note 390.

from targeting individual rights based on threats from legislative opponents, this finding also means that governors wanting to safeguard rights will face institutional impediments, largely based on partisan politics.

Although we find evidence that chief executives may be responsive to public opinion when unilaterally protecting against individual rights, this raises concerns about the tyranny of the majority. That is, Presidents or governors may only be incentivized to protect individual rights when it is popular amongst the majority of the public. But what about minority opinion? This is a particularly relevant concern for guarding groups finding themselves on the margins of society. Should government officials have a duty to protect vulnerable populations, even when it is unpopular? We do find some evidence that governors and Presidents might protect these populations in some cases.<sup>420</sup> For instance, they tend to issue more civil rights orders when feelings towards women and LGBT individuals are cold, but this finding does not translate across all under-represented groups.<sup>421</sup> We also find evidence that more rights-related orders are issued in response to growing public conservatism, particularly in the states, which might indicate a more hostile environment for the protection of these groups.<sup>422</sup> Future research should more closely examine the conditions under which executives lead or are led by the public when dictating rights policies.

One reassuring finding from our empirical study might be that state governors seem to more actively promote individual rights when these rights are likely to be targeted at the federal level.<sup>423</sup> Specifically, they issue more rights-related directives when the President is conservative or a Republican.<sup>424</sup> These are the times when individual rights are the most vulnerable, either due to inaction or specific policies retracting rights.<sup>425</sup> Taken together, our evidence suggests that many governors are answering the call to decide policies related to individual rights at the state level, as broadcast by the Trump administration.<sup>426</sup>

Yet, this call may be a double-edged sword. Though states are in the position to advance individual rights when the federal government refuses to do so, they likewise can choose to remain inactive or even actively hostile towards these rights.<sup>427</sup> Though states are often viewed as decisive policy laboratories, we see that personal preferences, partisanship, ideology, public opinion, and institutional barriers can all prevent these governments from expanding rights.<sup>428</sup>

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<sup>420</sup> See *supra* text accompanying note 376.

<sup>421</sup> See *supra* text accompanying notes 374–76.

<sup>422</sup> See *supra* Table 9.

<sup>423</sup> See *supra* text accompanying notes 378–90 (regarding federalism).

<sup>424</sup> See *supra* text accompanying notes 381–83.

<sup>425</sup> See *supra* notes 4–9 and accompanying text.

<sup>426</sup> This is possible because states are laboratories of constitutional process. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>427</sup> See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 187–88 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>428</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 480, 485 (1965); *Korematsu v. United*

So, what happens when both Presidents and governors refuse to protect individual rights? The courts have long been a vehicle by which interested persons and groups can challenge governmental policies that infringe upon individual rights.<sup>429</sup> Several of President Trump's unilateral directives related to transgender rights and immigration, for instance, have been the subject of frequent litigation during his term.<sup>430</sup> Moreover, many interest groups have the resources, power, and public platforms to pressure chief executives and other governmental actors to actively advance policies that are friendly to individual rights.<sup>431</sup> Future research should examine how both courts and interest groups might be crucial in nudging executive actors towards unilaterally acting on individual rights, one way or another.

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States, 323 U.S. 214, 216–17, 225–26, 233–34, 242 (1944), *overruled by* Trump v. Hawaii, 138 S. Ct. 2392 (2018); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 591–93 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

<sup>429</sup> See, e.g., *Lawrence*, 539 U.S. at 578 (reversing anti-LGBT jurisprudence established under *Bowers* after two individuals challenged a Texas law).

<sup>430</sup> Alisha H. Gupta, *Transgender People Face New Legal Fight After Supreme Court Victory*, NY TIMES, <https://www.nytimes.com/2020/09/03/us/transgender-supreme-court-healthcare.html> [<https://perma.cc/7K3J-WH78>] (Jan. 26, 2021); Adam Liptak, *Supreme Court to Review 2 of Trump's Major Immigration Policies*, NY TIMES (Oct. 19, 2020), <https://www.nytimes.com/2020/10/19/us/supreme-court-trump-wall-asylum.html> [<https://perma.cc/L6HR-WLSH>].

<sup>431</sup> See generally, e.g., Brief of The American Medical Ass'n, the American College of Physicians & 14 Additional Medical, Mental Health & Health Care Organizations as Amici Curiae in Support of the Employees, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, & 18-107); *Advocacy Impact: 2020 American Psychological Association Advocacy Priorities*, AM. PSYCH. ASS'N, <https://www.apa.org/advocacy/2020-advocacy-priorities.pdf> [<https://perma.cc/GX3P-EZPT>] (last visited Mar. 15, 2021); Allie Bidwell, *NASFAA Signs on to Amicus Brief Supporting Harvard's Holistic Admissions Model*, NAT'L ASS'N STUDENT FIN. AID ADM'RS (Aug. 2, 2018), [https://www.nasfaa.org/news-item/15844/NASFAA\\_Signs\\_on\\_to\\_Amicus\\_Brief\\_Supporting\\_Harvard\\_s\\_Holistic\\_Admissions\\_Model](https://www.nasfaa.org/news-item/15844/NASFAA_Signs_on_to_Amicus_Brief_Supporting_Harvard_s_Holistic_Admissions_Model) [<https://perma.cc/7QEJ-3VSK>]; Alison Frankel, *Snubbing Trump DOJ, Big Law Firms Back Hawaii Amici in SCOTUS Travel Ban Case*, REUTERS (Apr. 3, 2018, 7:29 AM), <https://reuters.com/article/legal-us-otc-travelban-idUSKCN1H91X7> [<https://perma.cc/XFU7-Z6LX>].