

ARTICLE

STATE LEGISLATIVE VETOES: AN UNWELCOME RESURGENCE

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ABSTRACT

Legislatures are having their moment. From the independent state legislature theory, to the major questions doctrine, to the potential scrapping of the Chevron doctrine, to efforts to constrain popular initiatives, legislative power today seems to be, or at least seeks to be, ascendant. At the state level, one example of the expansion of legislative power is the reinvigoration of legislative veto mechanisms. Legislative vetoes allow legislative branch actors to nullify duly authorized executive branch actions without enacting new laws.

Forty years ago, the U.S. Supreme Court's decision in INS v. Chadha invalidated the federal legislative veto as an unconstitutional end-run around the lawmaking requirements of Article I of the U.S. Constitution. But this decision had no binding effect on state legislative veto mechanisms. Today, legislative vetoes persist in many states, and efforts to enhance these mechanisms have surfaced specifically in response to the COVID-19 pandemic.

During the COVID-19 pandemic, state legislatures sought heightened legislative veto authority on matters of public health. The pandemic presented public health authorities throughout the country with unprecedented challenges. But little did public health officials anticipate that one challenge would come in the form of legislative pushback against the deployment of public health expertise, as state legislators in many states objected to mask mandates, vaccination campaigns, and other public health measures undertaken by state agencies. Legislatures in several states either stripped public health agencies of some of their discretionary powers or imposed additional hurdles on the exercise of these powers. Many other states have contemplated similar retrenchments.

In inviting closer examination of state legislative veto mechanisms, this Article argues that these mechanisms suffer from several anti-democratic defects. Specifically, these mechanisms erode the legitimacy of legislative power, inhibit transparency in governance, prevent formation of customized administrative policies, and threaten to skew the balance of the separation of powers beyond traditional constitutional parameters. Legislation during the COVID-19 pandemic provides a dramatic example of these democratic flaws inherent to the legislative veto, but state legislative vetoes could also hobble other public policy areas. It thus is time for additional attention to the place of the legislative veto in state government.

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I. INTRODUCTION

Now in the third century after the Founding, America continues to adjust the contours of the separation of government powers, a central feature of representative democracy. Across the nation today, states are engaged in political and judicial battles over the scope and degree of authority appropriately allotted to the legislative and executive branches of government. These battles are part of a contemporary trend: an effort to shift government authority to the legislative branch at both the federal and state levels.

This enhancement of legislative power has taken several forms in recent years. Foremost have been various efforts to rein in the bureaucratic arms of federal and state governments. Whether through the creation of additional administrative oversight processes by the legislature,¹ the U.S. Supreme Court's

¹ *Separation of Powers: Legislative Oversight*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-legislative-oversight.aspx> [<https://perma.cc/CQ7A-LGQS>] (last updated Nov. 17, 2022) [hereinafter *Separation of Powers*]. Over the last thirty years, state legislatures have designed entities, structures, and procedures intended to advance administrative oversight. *Id.* These legislative creations

recent pronouncement of the “major questions doctrine,”² efforts to reinvigorate the non-delegation doctrine,³ or the potential abandonment of the *Chevron* doctrine of judicial deference to agency interpretation,⁴ the impetus is the same: a claim that agency discretion and bureaucracy have run amok, requiring a structural response. Even the recent assertion of the “independent state legislature theory” in the context of federal elections exemplifies the current movement to enhance the power of legislatures vis-à-vis other government institutions.⁵ And efforts in selected states to constrain the popular initiative

exhibit differing characteristics and occur in a variety of contexts. *Id.* For example, lawmakers have fashioned staff agencies and special committees with the purpose of appraising agencies’ conduct. *Id.* Additionally, they have constructed standing committees that perpetually oversee agency activity. *Id.*

² The “major questions doctrine” essentially disallows agencies from using regulatory power when both “the underlying claim of authority concerns an issue of ‘vast “economic and political significance”” and “Congress has not clearly empowered the agency.” Kate R. Bowers & Daniel J. Sheffner, *The Supreme Court’s “Major Questions” Doctrine: Background and Recent Developments*, CONG. RSCH. SERV. 1, 1 (2022). The doctrine arose in full flower in the U.S. Supreme Court’s 2022 decision in *West Virginia v. EPA*, 597 U.S. 697 (2022). In that case, the Supreme Court deployed the “major questions doctrine” to narrow the Environmental Protection Agency’s asserted regulatory power under the Clean Air Act. *Id.* at 724–35. Because the agency had interpreted that statute to authorize it to limit carbon dioxide emissions in a way that would implicate important policy questions, and because the agency had been unable to demonstrate explicit congressional delegation of such authority, the Court concluded that the agency had exercised its delegated power impermissibly. *Id.*

³ The non-delegation doctrine prohibits the delegation of legislative authority to any other body besides the legislative branch itself. *Nondelegation Doctrine*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/nondelegation_doctrine [<https://perma.cc/FQZ9-EW5V>]. Although this principle receives frequent judicial consideration, federal courts almost always have found that congressional delegations to federal agencies have not given away legislative power. But in recent years, federal courts have seemed willing to apply the non-delegation doctrine more forcefully. For instance, in 2015, the United States Court of Appeals for the D.C. Circuit saw the issue as a “close[] question.” *Jarkesy v. S.E.C.*, 803 F.3d 9, 18 (D.C. Cir. 2015). Then, in a parallel case in 2022, the Fifth Circuit concluded that Congress *had* violated the non-delegation doctrine in granting certain discretionary authority to the Securities and Exchange Commission. *See Jarkesy v. S.E.C.*, 34 F.4th 446 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (June 30, 2023). The principle also was paramount in 2019 when the U.S. Supreme Court ultimately held that the federal Sex Offender Registration and Notification Act did not contravene the doctrine. *Gundy v. United States*, 139 S. Ct. 2116 (2019). The Supreme Court agreed to hear an appeal of the Fifth Circuit *Jarkesy* case during its October 2023 Term.

⁴ The *Chevron* doctrine, named for the Supreme Court’s decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), is being openly reconsidered in the Supreme Court’s October Term 2023. *See Amy Howe, Supreme Court Likely to Discard Chevron*, SCOTUSBLOG (Jan. 17, 2024), <https://www.scotusblog.com/2024/01/supreme-court-likely-to-discard-chevron/> [<https://perma.cc/DL3N-NJC3>].

⁵ Although the independent state legislature theory is not new, it resurfaced as particularly significant in the political aftermath of the 2020 presidential election. *See Michael T. Morley, The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 502–04 (2021). Later, in February 2022, the North Carolina Supreme Court considered the theory while rejecting the state legislature’s 2021 districting maps as “partisan gerrymanders” that “substantially infringe upon plaintiffs’ fundamental right to equal voting power.” *See Harper v. Hall*, 868 S.E.2d. 499, 559 (N.C. 2022). The court found the North Carolina legislature’s assertion of the independent state legislature theory unpersuasive, declaring the following: “[The argument that] gerrymandering claims are categorically nonjusticiable because reapportionment is committed to the sole discretion of the General Assembly—is flatly inconsistent with our precedent interpreting and

processes that since the Progressive Era have provided a check on legislative authority echo this trend.⁶

One embodiment of the effort to enhance legislative power at the expense of administrative agencies has arisen in response to the COVID-19 pandemic and its political aftermath. During the pandemic, public health orders and regulations designed to prevent the spread of the COVID-19 virus prompted resistance in certain segments of the population. Some politicians deemed these orders and regulations excessively restrictive or manifestations of government overreach.⁷ The result was a spate of political and social backlash in certain quarters, prompting some legislatures to look for ways to neuter or weaken public health agencies and to increase legislative oversight and control of the executive branch.

Against this backdrop, the legislative veto has reappeared as a potential and potent legislative branch tool. Although, at the federal level, the legislative veto has been a dead letter since 1983, when the Supreme Court deemed it unconstitutional in *INS v. Chadha*,⁸ Congress quickly developed partial workarounds,⁹ and analogous legislative veto mechanisms have persisted in many state systems.¹⁰ Meanwhile, notwithstanding occasional commentary,¹¹

applying constitutional limitations on the General Assembly's redistricting authority." *Id.* at 533. In affirming the North Carolina decision, the U.S. Supreme Court similarly found the independent state legislature theory inconsistent with the notion of judicial review. *See Moore v. Harper*, 600 U.S. 1, 37 (2023).

⁶ For example, in mid-2023 legislative leaders in Ohio called a special election to urge voters to impose additional hurdles on the citizen initiative process permitted under the Ohio Constitution. Although voters rejected this effort, some legislators have expressed an intent to try again. *See, e.g., Andrew J. Tobias, Republicans, Conservatives Point Fingers within "Yes" Coalition after State Issue 1 Goes Down in Flames*, CLEVELAND.COM (Aug. 11, 2023), <https://www.cleveland.com/news/2023/08/republicans-conservatives-point-fingers-within-yes-coalition-after-state-issue-1-goes-down-in-flames.html>? [https://perma.cc/58AG-DE28]. Other states have also contemplated restricting their citizen initiative processes; "similar proposals failed even worse [in 2022] in two more conservative states, Arkansas and South Dakota." *Id.*

⁷ For example, a CNN article from 2021 described various negative responses by Republicans in the U.S. House of Representatives to a reimposed mask mandate. *See Annie Grayer, Daniella Diaz & Melanie Zanona, House Republicans Revolt over Reimposed Mask Mandate*, CNN (July 28, 2021), <https://www.cnn.com/2021/07/28/politics/republican-reaction-covid-mask-congress/index.html> [https://perma.cc/9T7U-NPDL]. Specifically, the article cited derogatory quotes by these Representatives in response to the rule. *See id.* For example, Representative Byron Donalds from Florida referred to the reimposed mask rule as "stupid." *Id.* Similarly, Representative Lauren Boebert of Colorado threw her mask at a staffer on the House floor, explaining her defiance with the following assertion: "If we cede our freedoms here, there is no chance for the people that I represent back home." *Id.*

⁸ 462 U.S. 919, 959 (1983) (finding the one-house legislative veto unconstitutional).

⁹ *See infra* II.B (describing a post-*Chadha* approximation of the legislative veto contained in the federal Congressional Review Act of 1996).

¹⁰ *See infra* II.C.2 (describing two-dozen states with a legislative veto).

¹¹ *See, e.g., Derek Clinger & Miriam Seifter, Unpacking State Legislative Vetoes* 4 (Univ. of Wis. Legal Stud. Rsch. Paper No. 1788, 2023) ("offer[ing] two primary findings. *First*, state legislative veto systems are widespread but varied . . . *Second*, legislative vetoes' prevalence nationwide belies a more complicated legal story"); Marc D. Falkoff, *The Legislative Veto in Illinois: Why JCAR Review of Agency Rulemaking Is Unconstitutional*, 47 LOY. U. CHI. L.J. 1055, 1076 (2016) (suggesting that "legislative review of proposed rules seem consonant with

very little scholarship explores the state legislative veto's democratic implications. Because of recent efforts to enhance or reinvigorate this mechanism at the state level, the legislative veto deserves renewed attention.

This Article furthers this discussion in three steps. Part II provides context on the legislative veto, beginning with a short description of forms the veto can take, followed by a summary of its history at both the federal and state levels. This state history is followed in Part III with a description of recent efforts triggered by COVID-19 to increase the availability of the legislative veto. Part IV then argues that the legislative veto undermines the proper balance of powers in state democracies and therefore ought not to be promoted.

Part IV begins with the observation that a legislative veto lacks the very democratic pedigree necessary to legislative legitimacy and uses that observation to discredit justifications often propounded in support of the legislative veto. It then identifies a transparency problem common to many state legislative vetoes. The problem derives from the sweeping breadth of many of these mechanisms. This breadth stands in striking contrast to the typically narrow and targeted legislative veto provisions that had existed at the federal level before *Chadha*. This blunderbuss approach typical of state legislative veto powers, in which all state agency actions are subject to review by some component of the legislative branch, ignores the complexities of the modern administrative state and often conceals the legislature's micromanagement of state agencies. Finally, it describes additional dangers that arise when a legislative veto is enshrined in a state constitution, producing particularly wide-reaching, long-lasting, and unanticipated impacts on the separation of powers.

II. A BRIEF HISTORY OF THE LEGISLATIVE BRANCH'S USE OF THE LEGISLATIVE VETO TO CONTROL THE EXECUTIVE BRANCH

Before addressing the hazards of the legislative veto, it is worth discussing the variety of legislative veto mechanisms that exist and their operation and pedigree. Although the U.S. Supreme Court ruled that the federal legislative veto was unconstitutional forty years ago,¹² the mechanism persists in many states.¹³ Even in the states where courts have held analogous measures unconstitutional under their state constitutions, the legislative veto could reappear through state constitutional amendments.

the values of democratic participation, because the final decision about whether rules go into effect will be made by the elected representatives of the people rather than by the executive branch appointees.”); MICHAEL BERRY, *THE MODERN LEGISLATIVE VETO: MACROPOLITICAL CONFLICT AND THE LEGACY OF CHADHA* 211 (2016) (placing examples in the context of how “[o]ne of the virtues of federalism is that states can experiment with different policies and learn from one another.”).

¹² See *INS v. Chadha*, 462 U.S. 919, 959 (1983).

¹³ See *infra* Part II.C.2 (identifying twenty-four states that currently possess some form of legislative veto).

A. *Defining the Legislative Veto*

The concept of the “legislative veto” encompasses a family of procedural mechanisms, all of which allow a legislature to reserve power to itself to nullify an agency’s interpretation and administration of statutes after those statutes have become law.¹⁴ For purposes of this Article, a legislative veto means any legislative action outside of lawmaking that nullifies actions or rules proposed or adopted by the executive branch. Before serving on the Supreme Court, Justice Stephen Breyer described the legislative veto as having three necessary components: “[a] statutory delegation of power to the executive,” “[a]n exercise of that power by the executive,” and “[a] power reserved by the [legislature] to nullify that exercise of [executive] authority.”¹⁵

One version of the legislative veto is the “one-house veto.” This mechanism exists when the legislature, via action by only one of the two legislative houses and without approval by the chief executive, may nullify an agency action or regulation.¹⁶ For example, the Impoundment Control Act of 1974¹⁷ enabled a single house of Congress to block presidential decisions deferring the expenditure of appropriated funds.¹⁸ The Federal Election Campaign Act Amendments of 1976¹⁹ also created a one-house veto when it permitted either house of Congress to reject the Federal Election Commission’s proposed regulations.²⁰

The legislative veto also can emerge in the form of a “two-house veto,” in which both legislative houses must jointly agree to override an agency determination but without regard for the chief executive’s viewpoint.²¹ One prominent example is the War Powers Resolution, which authorized Congress to force the president to withdraw American troops from a particular territory if both the House and Senate agreed to this course of action via a concurrent resolution.²² The Motor Vehicle and School Bus Safety Amendments of 1974 also contained a two-house veto related to the Commerce Department’s development of motor vehicle occupant restraint systems.²³

¹⁴ See BARBARA H. CRAIG, *THE LEGISLATIVE VETO: CONGRESSIONAL CONTROL OF REGULATION 1–2* (Routledge 2019) (1983).

¹⁵ Stephen Breyer, *The Legislative Veto After Chadha*, 72 *GEO. L.J.* 785, 785–86 (1984).

¹⁶ See Theodore Olson, *After the Legislative Veto: Restoring the Separation of Powers*, AM. ENTER. INST. (July 1, 1983), <https://www.aei.org/articles/after-the-legislative-veto-restoring-the-separation-of-powers/> [<https://perma.cc/NK7C-79HT>].

¹⁷ Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93–344, 88 Stat. 297 (1974), *codified at* 31 U.S.C. § 1301.

¹⁸ See LOUIS FISHER, *CRS REPORT FOR CONGRESS: LEGISLATIVE VEToes AFTER CHADHA 3* (2005).

¹⁹ Pub. L. No. 94–283, 90 Stat. 475 (1976).

²⁰ See James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 *IND. L.J.* 323, 326 (1977).

²¹ Olson, *supra* note 16.

²² See *id.*

²³ National Traffic and Motor Vehicle Safety Act of 1966, sec. 109, § 125(d), Pub. L. No. 93–492, 88 Stat. 1482, 1483 (1974). These amendments permitted both the House and the Senate

Other legislative veto mechanisms do not require action by any legislative house. Instead, some legislative veto provisions allow an individual committee alone to nullify an agency's rule or regulation.²⁴ Committee vetoes are not always predicated on the disapproval of just one committee, however.²⁵ Sometimes, several committees (or a joint committee) must concur to veto an agency action or rule.²⁶

While the above are several common types of legislative vetoes, the procedure does not always fit neatly into a simple category. Sometimes, these categories blend, resulting in legislative vetoes that are an amalgamation of several types. For instance, one type of legislative veto fuses house and committee action.²⁷ Discussion of the legislative veto should recognize the variety and complexity that the term embraces. For the purposes of this Article, a legislative veto encompasses any legislative action short of lawmaking that nullifies actions or rules proposed or adopted by the executive branch.

B. *The Legislative Veto at the Federal Level*

This Article focuses on state legislative vetoes. But state legislative vetoes cannot be understood without a basic awareness of the rise and fall of the legislative veto in the federal system.

1. *The Rise of the Federal Legislative Veto*

The legislative veto has existed in some form for many years. Congress recognized the possibility of a federal legislative veto as "an acceptable tool" as early as the 1850s.²⁸ By that time, Congress had begun passing

to pass a concurrent resolution disapproving of a federal motor vehicle safety standard promulgated by the Secretary of Commerce; such a resolution would then prevent that standard from becoming effective.

²⁴ See Joseph Cooper & Patricia A. Hurley, *The Legislative Veto: A Policy Analysis*, 10 CONG. & PRESIDENCY 1, 7–8 (1983) ("For example, the Water Resources Research Act of 1964 (P.L. 88-370) authorizes the secretary of the Interior Department to make arrangements with educational institutions, private firms, etc., for research on water problems. However, no appropriations can be made to finance an arrangement until it has been submitted to both houses for sixty days, and then only if neither the Senate nor the House Committee on Interior and Insular Affairs has disapproved it.").

²⁵ See *id.*

²⁶ See *id.* at 8 (For instance, a 1976 appropriations act "prohibits the expenditure of funds made available to the Forest Service for moving or closing either a forestry regional office or forest boundaries unless the Appropriations and Agriculture Committees of both the House and the Senate approve.").

²⁷ See *id.* ("An example of a mixed veto is contained in the Small Reclamation Projects Act of 1956 (P.L. 84-984), [which] allows the Interior Department secretary to negotiate contracts for small reclamation and irrigation projects subject to approval of the appropriate committees in the House and Senate, but allows the full House or Senate to override committee objections.").

²⁸ Christopher Brough, *Law: The Continuing Significance of the Legislative Veto*, 50 PRESIDENTIAL STUD. Q. 451, 456 (2020).

certain simple or concurrent resolutions that lacked presidential approval.²⁹ As Congress began passing more of these resolutions, Attorney General Caleb Cushing in 1854 spoke to whether such resolutions could bind the executive branch.³⁰ While Cushing opined that the executive branch could not be forced to submit to such resolutions, he introduced one permissible circumstance: when a previously enacted law had “subjected [the executive branch] to the direct action of [a separate resolution of either house in Congress].”³¹ In other words, as long as Congress had passed and the President had approved a law that authorized such veto-like power, Cushing thought that power was constitutionally acceptable.

Following this notable example of an executive branch official acquiescing to the removal of power from the executive branch, Congress in the early 1900s occasionally adopted simple or concurrent resolutions that imposed mandatory requirements upon the executive branch.³² Though not a “veto” that nullified an executive branch action, these measures were a precursor of legislative directives short of lawmaking that constrained administrative action. For instance, in 1903 Congress passed legislation authorizing either the House or Senate to pass a simple resolution that would require the Secretary of Commerce and Labor to conduct special investigations and draft reports.³³ Similarly, in 1905, Congress utilized concurrent resolutions to force the Secretary of War to engage in certain investigations.³⁴ These resolutions foreshadowed subsequent legislative vetoes.

Many scholars trace the modern legislative veto to 1932, when the legislative appropriations act for fiscal year 1933 granted President Hoover authority to restructure executive departments but preserved a congressional veto power as a condition of that delegation of authority.³⁵ The Act allowed the president “to transfer, to consolidate, and to redistribute by executive order any executive agencies or functions,” with those executive orders then subject to legislative review, which allowed either the House or the Senate to invalidate the executive order.³⁶ From this foundation, the legislative veto slowly

²⁹ Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 L. & CONTEMP. PROBS. 273, 276–77 (1993) (quoting 6 Op. Att’y Gen. 680, 681 (1854)).

³⁰ *See id.*

³¹ *Id.* at 277.

³² *See id.*

³³ *See id.*; *see also* An Act to Establish the Department of Commerce and Labor, Pub. L. No. 57-87, § 8, 32 Stat. 825, 829 (1903) (“[The Secretary of Commerce and Labor] shall also from time to time make such special investigations and reports as he may be required to do by the President, or by either House of Congress, or which he himself may deem necessary and urgent.”).

³⁴ Fisher, *supra* note 29, at 277 (these investigations focused on issues related to various waterways); *see also* An Act Making Appropriations for the Construction, Repair, and Preservation of Certain Public Works on Rivers and Harbors, and For Other Purposes, Pub. L. No. 58-215, § 2, 33 Stat. 1117, 1147 (1905).

³⁵ *See* Breyer, *supra* note 15, at 786; *see also* Act of June 30, 1932, ch. 314, § 407, 47 Stat. 382, 414.

³⁶ CRAIG, *supra* note 14.

began to grow in prominence, until it occupied an important position in the federal administrative state.³⁷

After 1960, Congress included legislative vetoes more frequently in federal statutes.³⁸ The legislative vetoes affected many regulatory arenas, as legislative vetoes specific to particular agencies or actions infiltrated a multitude of policy areas, including arms sales, trade agreements, student loans, and consumer protection, to name a few.³⁹ Implementation of a veto mechanism further accelerated during the 1970s and 1980s, when some form of legislative veto appeared in many more congressional delegations.⁴⁰ Indeed, between 1973 and 1983, Congress enacted at least forty-seven legislative veto provisions.⁴¹ These veto mechanisms were targeted to a specific agency and even a specific action, rather than being generally applicable to all agencies and their rulemaking, as has been typical in the state context discussed below.⁴² However, the legislative veto's rise at the federal level abruptly collapsed in 1983, when the Supreme Court invalidated the procedure in *INS v. Chadha*.⁴³

2. *The Chadha Decision*

The legal question in *Chadha* was whether, in light of the separation of powers principles embedded in the federal Constitution, a legislative veto overstepped the particular authority allotted to each branch of government and permitted the legislative branch to encroach impermissibly upon the executive branch.⁴⁴ The case concerned the immigration status of a Kenyan-born East Indian individual named Jagdish Chadha, who had lawfully entered the United States under a student visa, but who had stayed beyond the period permitted by that visa.⁴⁵ Because of the nature of the visa, Chadha's legal permission to remain in the United States expired in 1972, after which he became subject to deportation.⁴⁶ But the Attorney General suspended Chadha's deportation under section 244(c)(1) of the Immigration and Nationality Act,⁴⁷ which delegated to the Attorney General precisely this authority to suspend a deportation.⁴⁸ However, pursuant to section 244(c)(2) of the Act, the House of Representatives reviewed and rejected the Attorney General's suspension order, voting to override—or “veto”—the Attorney General's suspension of

³⁷ See *id.*; see also Cooper & Hurley, *supra* note 24, at 1.

³⁸ See Cooper & Hurley, *supra* note 24, at 1.

³⁹ See *id.*; see also CONG. RSCH. SERV., STUDIES ON THE LEGISLATIVE VETO (1980).

⁴⁰ See Brough, *supra* note 28, at 457 fig.1.

⁴¹ See *id.* fig.2.

⁴² See *infra* text accompanying notes 109–123.

⁴³ See 462 U.S. 919, 958 (1983).

⁴⁴ See *id.*

⁴⁵ See *id.* at 923.

⁴⁶ See *id.*

⁴⁷ 8 U.S.C. § 1254(c)(1).

⁴⁸ See *Chadha*, 462 U.S. at 925.

Chadha's deportation.⁴⁹ The House vote, in the form of a simple resolution, did not require either Senate concurrence or presentment to the president for approval.⁵⁰ Rather, section 244(c)(2) granted power to Congress to exercise a "one-House" legislative veto.⁵¹ Mr. Chadha then challenged in court the constitutionality of the legislative veto power in section 244(c)(2).⁵²

Writing for the Court, Chief Justice Burger concluded that this federal legislative veto violated the separation of powers by providing a pathway around the Constitution's lawmaking requirements of both bicameralism and presentment.⁵³ The Court determined that because of the "legislative character" of the Immigration and Nationality Act's veto provision, exercise of such a power must follow the constitutional lawmaking procedure.⁵⁴ Since the Immigration and Nationality Act's legislative veto allowed a single house of Congress to pass a resolution overriding an executive branch decision, without the approval of the other house and without the president's signature, the legislative veto provision functioned as a "shortcut" around the bicameralism and presentment requirements.⁵⁵ Such a deviation disregarded boundaries established to maintain the separation of federal powers and therefore violated the Constitution.⁵⁶

In dissent, Justice White contested the majority's application of separation of powers principles.⁵⁷ Following the nineteenth-century view of Attorney General Cushing, Justice White argued that the veto imposed no shortcut around established lawmaking processes and did not violate bicameralism and presentment mandates because it was implemented via an appropriately enacted statute and allowed Congress only to "negative what an Executive department or independent agency has proposed."⁵⁸ In his view, the veto failed to significantly reshape the separation of powers, because it served largely as a defensive mechanism rather than a tool to increase legislative power.⁵⁹ Even though Justice White recognized that "a legislative check on an inherently executive function" would require a distinct constitutional analysis, he believed that because the *Chadha* veto involved the Attorney General's exercise of a congressionally delegated authority, it did not intrude on an inherently executive function, and therefore satisfied separation of powers principles.⁶⁰ He worried that invalidating the legislative veto mechanism would have a

⁴⁹ See *id.* at 926; 8 U.S.C. § 1254(c)(2).

⁵⁰ See *Chadha*, 462 U.S. at 927–28; 8 U.S.C. § 1254(c)(2).

⁵¹ See *Chadha*, 462 U.S. at 925 n.2; 8 U.S.C. § 1254(c)(2).

⁵² *Chadha*, 462 U.S. at 928.

⁵³ See *id.* at 954–55.

⁵⁴ See *id.* at 952.

⁵⁵ See *id.* at 958.

⁵⁶ See *id.* at 959.

⁵⁷ See *id.* at 967 (White, J., dissenting).

⁵⁸ *Id.* at 980.

⁵⁹ See *id.* at 989.

⁶⁰ See *id.* at 1002.

dramatic impact on the federal bureaucracy, observing that the *Chadha* decision would invalidate statutory vetoes then embodied in over two hundred laws.⁶¹

3. *The Federal Implications of Chadha*

Although Justice White worried about the immediate effect of the *Chadha* decision, the short-term impact was more modest. True enough, after the Court's 7-2 decision, the federal legislative veto as a formal mechanism was dead.⁶² However, Congress then designed new mechanisms to circumvent the *Chadha* ban and continue to allow significant legislative control over how federal agencies exercised their delegated authority.⁶³ For example, Congress replaced several invalidated legislative veto provisions with requirements that specific agency actions be subject to approval (or disapproval) by a joint resolution, a measure that involves both bicameralism and presentment.⁶⁴ Meanwhile, Congress enacted laws providing that agencies must report and wait for approval from various committees before certain agency rules go into effect.⁶⁵ While such provisions technically comply with the holding of *Chadha*, they arguably function as something close to a legislative veto.⁶⁶

The Congressional Review Act of 1996 ("CRA")⁶⁷ constitutes perhaps the most significant example of a veto-like mechanism.⁶⁸ More than a decade after the *Chadha* decision, Congress developed the CRA to "approximate a legislative veto as closely as *Chadha* would allow."⁶⁹ Specifically, the CRA resembles the legislative veto in that the CRA facilitates the rapid nullification of administrative rules.⁷⁰ Essentially, the CRA provides a method by which Congress can more speedily consider and act upon proposed legislation (structured under the CRA as a joint resolution, which must be passed by

⁶¹ See *id.* at 967.

⁶² See *id.* at 959 (majority opinion).

⁶³ See Brough, *supra* note 28, at 452.

⁶⁴ E.g., Fisher, *supra* note 29, at 286 (describing how Congress substituted a joint resolution of disapproval for legislative vetoes in the District of Columbia Home Rule Act and in procedures regarding federal pay increases, among other circumstances); Department of Transportation and Related Agencies Appropriations Act, 1985, Pub. L. No. 98-473, § 131, 98 Stat. 1945, 1974 (1984); Foreign Assistance and Related Programs Appropriations Act, 1986, Pub. L. No. 99-190, § 135(e), 99 Stat. 1291, 1322 (1985).

⁶⁵ See Fisher, *supra* note 29, at 288.

⁶⁶ See *id.* at 286–88.

⁶⁷ 5 U.S.C. § 801–808 (1996). Congress passed the CRA in 1996 as a component of the Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, 110 Stat. 847, 868 (1996).

⁶⁸ See Jody Freeman & Matthew C. Stephenson, *The Untapped Potential of the Congressional Review Act*, 59 HARV. J. ON LEGIS. 279, 281 (2022).

⁶⁹ Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL'Y 187, 197 (2018).

⁷⁰ See *id.* at 197–98; see also Freeman & Stephenson, *supra* note 68, at 281 ("The CRA . . . authorizes special fast-track procedures for Congress to pass a joint resolution disapproving an agency rule.").

both houses and presented to the President) that would reverse agency rules or actions.⁷¹ Under the CRA, an agency must send a report on a potential new rule to Congress and to the Comptroller General.⁷² Upon receiving that report, if Congress decides that the regulation qualifies as a “major rule,” that regulation will not go into effect until after a sixty-day waiting period, during which Congress may consider the rule and decide whether to reject it by passing a “joint resolution of disapproval.”⁷³ Significantly, the CRA expedites the typically long and labored process of congressional response to executive action by disallowing amendments to the joint resolution of disapproval, preventing motions to postpone its consideration, capping debate time at ten hours, and preemptively eliminating the possibility of a Senate filibuster.⁷⁴ Even though the CRA permits rapid legislative disapproval, similar to a legislative veto, it differs from the veto by complying with constitutional law-making requirements. Under the CRA, the House and the Senate must adopt the exact same version of the resolution, and then present it to the President for approval.⁷⁵ Thus, the CRA still complies with the Constitution’s bicameralism and presentment requirements, striking a compromise between the often-laborious “deliberative process” of typical lawmaking and the “quick-acting legislative veto.”⁷⁶

In *Chadha*’s immediate aftermath, many observers reflected on the implications of the decision at the federal level, as well as on the role and legitimacy of the legislative veto in the American legal system.⁷⁷ But the questions raised by *Chadha* remain significant today. Not only do substitutes for the legislative veto continue to exist at the federal level,⁷⁸ but because *Chadha* applied only to the federal system, it left states to address whether their own legislative vetoes were valid under their respective state constitutions. Although the *Chadha* Court’s reasoning has influenced state courts that have considered this state constitutional question,⁷⁹ the constitutionality and policy implications of state legislative vetoes remain important today. These mechanisms continue to appear in a variety of forms, reshaping legislatures’ authority with respect to agencies and fundamentally impacting the operations of state democracies themselves.

⁷¹ 5 U.S.C. § 801(a)(3)(B); see also Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, 45 HARV. J.L. & PUB. POL’Y 773, 779 (2022).

⁷² 5 U.S.C. § 801(a)(1)(A); see also Walker, *supra* note 71, at 780.

⁷³ 5 U.S.C. § 801(a)(3); see also Walker, *supra* note 71, at 780.

⁷⁴ See Larkin, *supra* note 69, at 202; 5 U.S.C. § 802(d)(2).

⁷⁵ See Larkin, *supra* note 69, at 197–98; see 5 U.S.C. §§ 801–802.

⁷⁶ Larkin, *supra* note 69, at 197–98.

⁷⁷ See generally Jessica Korn, *The Legislative Veto and the Limits of Public Choice Analysis*, 109 POL. SCI. Q. 873 (1994) (asserting flaws in Justice White’s pro-veto dissent); Dennis DeConcini & Robert Faucher, *The Legislative Veto: A Constitutional Amendment*, 21 HARV. J. ON LEGIS. 29 (1984) (arguing in favor of the veto because it would fix the trajectory of American democracy by realigning government with the original theory behind the federal Constitution).

⁷⁸ See *supra* notes 63–76 and accompanying text; Brough, *supra* note 28, at 458.

⁷⁹ See Falkoff, *supra* note 11, at 1085.

C. The Legislative Veto in the States

Befitting our federal system, each state has taken its own, often divergent approach to the legislative veto. Not directly controlled by the Supreme Court's decision in *Chadha*, the state legislative veto lives on in a number of states. Before discussing the current status of veto powers in individual states, however, it is helpful to summarize the history of these state legislative vetoes.

1. The History of State Legislative Vetoes

When Congress enacted the first modern legislative veto in the 1930s, it spurred states to implement similar provisions.⁸⁰ Despite this common starting point, however, no singular story exists regarding how states developed and implemented the legislative veto.⁸¹ After Kansas enacted the first state legislative veto in 1939, other states experimented with various “permutations” of the veto or veto-like mechanisms in subsequent years.⁸² A pre-*Chadha* report by California's Assembly Office of Research revealed the varying state regulatory review powers as of 1979:

Twelve state legislatures have only advisory powers with regard to regulation review. Six legislatures have the power to disapprove proposed regulations, several are empowered to nullify existing regulations, 11 legislatures can modify regulations and several others have a combination of these powers. Nine state legislatures have authorized a review committee to disapprove or suspend rules during an interim period.⁸³

However, like their federal counterparts, state legislative vetoes experienced a number of attacks in the early 1980s.⁸⁴ As a result of the intensifying anti-veto sentiment, state courts increasingly weighed in on the matter.⁸⁵ To date, at least twelve state courts or attorneys general have at one point determined that their state legislative veto is unconstitutional.⁸⁶ That more state

⁸⁰ BERRY, *supra* note 11, at 211.

⁸¹ *See id.* at 218; *see also* L. Harold Levinson, *The Decline of the Legislative Veto: Federal/State Comparisons and Interactions*, 17 PUBLIUS: J. FEDERALISM 115, 118–22 (1987) (detailing the tumultuous history of the legislative veto's adoption and discontinuation across multiple states).

⁸² BERRY, *supra* note 11, at 211; *see also* Levinson, *supra* note 81, at 119–21 (describing states' varying adoption of “specific provisions for one- or two-house nullification, or for committee suspension, of the agencies' actions”).

⁸³ Manuel P. Hernandez, *Review of Administrative Regulations: The Experience of Other States, the Federal Government, and Options for California*, CAL. ASSEMBLY OFF. OF RSCH. (1979), https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1537&context=caldocs_assembly [<https://perma.cc/YAG9-WXY9>].

⁸⁴ *See Separation of Powers*, *supra* note 1.

⁸⁵ *See* Falkoff, *supra* note 11, at 1083–84 (citing state court rulings).

⁸⁶ *See id.* Falkoff describes the actions of these twelve states in further detail, stating: “Five of these states had by statute authorized joint-resolution vetoes: Alaska, West Virginia, New

courts have not weighed in on the question is perhaps partly a result of the fact that any governor's administration is likely to be reluctant to bring a legal challenge to the use of the veto, out of concern that a state legislature inclined to do so could retaliate against the administration in a variety of ways. It is perhaps also a reflection of the fact that in many cases agencies will recalibrate or adjust their actions in the face of the mere threat of a legislative veto, as discussed in Part IV below.⁸⁷ Without the actual (rather than merely threatened) use of the veto, no legal claim about the veto's constitutionality would arise.

Most state courts that have considered the legislative veto's constitutionality have invalidated the mechanism.⁸⁸ The concerns animating invalidation resemble the line of reasoning articulated by the Supreme Court in *Chadha*. The same fear—that the veto ignores required lawmaking procedures and thereby disregards the separation of powers—appears throughout these state court decisions.⁸⁹

Several examples illustrate the state courts' reasoning behind invalidation. In 1980, the Alaska Supreme Court invalidated the state legislature's power to veto agency action through concurrent resolution because this power violated the presentment requirement of the Alaska constitution's prescribed lawmaking process.⁹⁰ Two years later, the New Jersey Supreme Court similarly decided that a legislative veto by means of a concurrent resolution violated the separation of powers by allowing the legislature to overstep into executive territory and omitting the presentment requirement.⁹¹ In 1984, the

Jersey, Kansas, and Missouri. Two of the states in which the legislative veto was deemed unlawful had authorized one-house vetoes by statute: Oklahoma and Pennsylvania. A one-house veto was also ruled unlawful in a third state, Massachusetts, though in the context of pending rather than enacted legislation. And five states had authorized legislative committee vetoes: New Hampshire, Kentucky, Oregon, Michigan, and West Virginia (which also allowed a veto of agency rulemaking by joint resolution)." *Id.* at 1084 (citations omitted); *see also* Clinger & Seifter, *supra* note 11, at 25.

⁸⁷ *See infra* notes 193–197 and accompanying text.

⁸⁸ Falkoff, *supra* note 11, at 1083; *see also* Clinger & Seifter, *supra* note 11, at 25; *Separation of Powers*, *supra* note 1.

⁸⁹ Falkoff, *supra* note 11, at 1085.

⁹⁰ *State v. A.L.I.V.E. Voluntary*, 606 P.2d. 769, 772 (Alaska 1980) ("The question presented by this case is whether the legislature can exercise its legislative power without following these enactment provisions. In our view the answer must be in the negative, for otherwise they would serve no purpose."). By contrast, in dissent, Chief Justice Boochever, joined by Justice Connor, argued that the Alaska legislative veto did "not violate the principle of separation of powers" and did "not unconstitutionally encroach on the power of the executive." *Id.* at 786 (Boochever, C.J., dissenting). They claimed the majority employed "fallacious" reasoning by "equating regulations with laws." *Id.* at 780. According to the dissent, laws and regulations instead differ at a fundamental level, meaning that constitutional requirements such as bicameralism and presentment do not even apply to regulations in the first place. *See id.* This difference, in part, justifies sidestepping such requirements by using the legislative veto, they argued. *See id.*

⁹¹ *Gen. Assembly of State of N.J. v. Byrne*, 448 A.2d. 438, 439 (N.J. 1982) ("We hold that the legislative veto provision . . . violates the separation of powers principle . . . by excessively interfering with the functions of the executive branch. The Legislature's power to revoke at will portions of coherent regulatory schemes violates the separation of powers by impeding the

Kentucky Supreme Court described the legislative veto as an “encroachment” by the legislative branch into both the executive and judicial domains.⁹² Separation of powers concerns held so much weight in some states that even when a veto controlled a legislative agency rather than an administrative agency (a factual circumstance not present in *Chadha*), this capability still infringed upon lawmaking mandates and violated the state constitution.⁹³

Several decades ago, Idaho produced a rare example of a state court upholding a legislative veto.⁹⁴ The Idaho Supreme Court’s 1990 decision in *Mead v. Arnell*⁹⁵ (although since partially overruled on other grounds) allowed a state legislative veto exercised by concurrent resolution, i.e., without presentment to the governor, to stand. Although the Idaho Supreme Court acknowledged the same separation of powers concerns articulated in *Chadha* and in other state decisions,⁹⁶ the court nevertheless concluded that the legislative veto before it did not violate the lawmaking and presentment mandates of the Idaho Constitution.⁹⁷ The legislative veto was constitutional because the statute establishing the veto had been passed according to appropriate lawmaking processes.⁹⁸ Furthermore, the court considered and rejected arguments that the veto blurred the lines between the legislative, executive, and judicial powers. To justify this conclusion, the court noted that the state constitution did not explicitly grant regulatory authority to executive agencies in the first place.⁹⁹

Executive in its constitutional mandate to faithfully execute the law. The legislative veto further offends the separation of powers by allowing the Legislature to effectively amend or repeal existing laws without participation by the Governor. This process also contravenes the Presentment Clause requirement . . .” (citations omitted)).

⁹² Legis. Rsch. Comm’n by Prather v. Brown, 664 S.W.2d 907, 919 (Ky. 1984) (“The adoption of administrative regulations necessary to implement and carry out the purpose of legislative enactments is executive in nature and is ordinarily within the constitutional purview of the executive branch of government. We conclude that . . . the plan and the rules for providing legislative or LRC review of proposed regulations as those statutes are presently written . . . are a legislative encroachment into the power of the executive branch.” (citations omitted)).

⁹³ See *Commonwealth v. Sessoms*, 532 A.2d 775, 782 (Pa. 1987) (“To summarize, we need not invalidate Section 2155(c) as written so long as the . . . presentment requirement is followed with respect to rejection resolutions and the guidelines adopted by the Commission, a legislative agency, do not exceed the constitutional limitations applicable to the legislature generally . . . Because the present guidelines were not adopted according to this scheme, however, but were the product of a rejection resolution that was not presented to the Governor . . . they must be declared to be of no force at all.”). In dissent, Justice Larsen argued that a legislative veto via concurrent resolution did not violate constitutional parameters. See *id.* at 788 (Larsen, J., dissenting). Because passing the resolution did not involve “legislative purpose or effect,” that resolution “neither enact[ed] or repeal[ed] a law.” *Id.* Without any creation or removal of a law, then, the legislative veto failed to violate constitutional requirements. See *id.*

⁹⁴ One other state high court has upheld a legislative veto applicable to only one agency. *Albany Surgical, P.C. v. Ga. Dep’t of Cmty. Health*, 602 S.E.2d 648 (Ga. 2004).

⁹⁵ 791 P.2d. 410 (Idaho 1990), *partially overruled on other grounds* by Idaho State Athletic Comm’n v. Off. of the Admin. Rules Coordinator, No. 51211, 2024 WL 314960 (Idaho Jan. 29, 2024).

⁹⁶ See *id.* at 414.

⁹⁷ See *id.* at 418–19.

⁹⁸ See *id.* at 418.

⁹⁹ See *id.* at 417.

Instead, because these agencies' regulatory authorities arose only by delegation from the legislature and failed to comprise an essential component of the enforcement power, a caveat or reservation of legislative authority expressed within the legislative delegation did not violate the separation of powers.¹⁰⁰

In these respects, the Idaho decision was quite similar to Justice White's dissenting opinion in *Chadha*. In particular, Justice White and the *Mead* majority both emphasized that legislative vetoes often occur in the context of statutorily delegated legislative power.¹⁰¹ Put differently, legislatures can only veto an agency's rules when legislatures gave that agency the power to create those rules in the first place. The argument is that because the veto arises in the midst of delegated power, rather than in the context of power directly bestowed to the executive branch by the constitution itself, the legislative veto does not undermine the separation of powers.¹⁰²

Even though the Idaho Supreme Court upheld this legislative veto, the court's reasoning left open the possibility that in a future case the court could invalidate a legislative veto applied either to agencies that have been granted direct constitutional enforcement power, or to a regulatory area deemed crucial to executive branch enforcement authority. Thus, despite a different outcome, the Idaho Supreme Court's *Mead* decision in some ways still acknowledged much of the reasoning of other jurisdictions, as well as that of the *Chadha* decision itself.

Notwithstanding the anti-legislative veto approach adopted by most state courts that have considered the issue, the state legislative veto has not disappeared. For one, the veto mechanism has never been challenged in some states.¹⁰³ Furthermore, in some states where courts had invalidated a legislative veto, the legislature responded by proposing a constitutional amendment or a different statutory mechanism seeking to reestablish some sort of similar legislative oversight authority.¹⁰⁴ Between 1976 and 2014, thirteen states proposed constitutional amendments that attempted to create legislative power over agency rulemaking.¹⁰⁵ The logic of course is clear: if the state constitution

¹⁰⁰ See *id.* at 417–18.

¹⁰¹ Compare *id.* at 417 (“Rule making that comes from a legislative delegation of power is neither the legal nor functional equivalent of constitutional power. It is not constitutionally mandated; rather it comes to the executive department through delegation from the legislature. This Court, as noted, has consistently found the executive rule making authority to be rooted in a legislative delegation, not a power constitutionally granted to the executive.”), with *INS v. Chadha*, 462 U.S. 919, 980 (1983) (White, J., dissenting) (“The power to exercise a legislative veto is not the power to write new law without bicameral approval or presidential consideration. The veto must be authorized by statute and may only negative what an Executive department or independent agency has proposed.”).

¹⁰² See *Mead*, 791 P.2d at 414.

¹⁰³ These states include Georgia, Illinois, Louisiana, North Carolina, North Dakota, Ohio, and South Dakota (among states that have an existing legislative veto mechanism). Clinger & Seifter, *supra* note 11, at 32; see also *supra* text accompanying notes 86–87.

¹⁰⁴ BERRY, *supra* note 11, at 218–22.

¹⁰⁵ See *id.* at 218.

itself provides the mechanism, veto opponents can no longer raise constitutional objections to it.

In many states, legislators have also sought greater administrative oversight via modification of their state Administrative Procedure Act (“state APA”).¹⁰⁶ Between 2002 and 2012, several states took this statutory approach, including Virginia, South Dakota, Michigan, Nevada, Georgia, and Illinois.¹⁰⁷ Of course, any such statutory measures creating a legislative veto would not supplant state supreme court decisions that had declared the legislative veto unconstitutional. However, in states where the state high court has yet to speak, amending the state APA provides an easy means of creating or enlarging a legislative veto power.

2. *Pre-COVID-19 Status of State Legislative Vetoes*

Thus, notwithstanding its constitutional vulnerability, the legislative veto remains an important—and growing¹⁰⁸—power in many state systems. Based on data collected by the University of Wisconsin State Democracy Research Initiative, twenty-four states currently possess a legislative veto power.¹⁰⁹ Most state legislative veto mechanisms, regardless of whether they are created via a state APA section, a constitutional provision, or otherwise, have traditionally been structured as a generalized authority, applicable to the whole class of state administrative rulemakings. Following the COVID-19 pandemic, however, the ensuing resurgence of interest in the legislative veto has also included occasional efforts to create targeted vetoes applicable only to specific agencies or regulations.

a. Legislative Veto Mechanisms in State APAs. In a notable departure from the federal Administrative Procedure Act, various state APAs include some form of the legislative veto. Moreover, these APA legislative veto mechanisms differ dramatically from those employed in the federal context before *Chadha*.¹¹⁰ At the federal level, legislative veto power had typically been reserved to Congress on a case-by-case basis, tied to a specific agency’s particular uses of congressionally delegated authority.¹¹¹ By contrast, states have largely chosen not to enact individual statutes containing a legislative veto

¹⁰⁶ *See id.* at 222.

¹⁰⁷ *See id.* Legislators in Colorado and Rhode Island proposed similar modifications. *See id.*

¹⁰⁸ *See* Clinger & Seifter, *supra* note 11, at 2, 30.

¹⁰⁹ *See id.* at 4, 6, 14–16 (Veto powers in nine of these states are what the authors classify as “suspension” powers, which only temporarily nullify a proposed executive branch action, but which in some states can be extended indefinitely or “deployed to function” as permanent vetoes). For another recent analysis of state legislative veto powers (as part of a broader analysis of legislative oversight mechanisms), see generally Lyke Thompson & Marjorie Sarbaugh-Thompson, *Checks and Balances in Action: Legislative Oversight Across the States*, LEVIN CTR. WAYNE L. (2019), https://www.levin-center.org/wp-content/uploads/2021/11/Accessible-CUS-Full-Report-07-08-19_updated-2021.pdf [<https://perma.cc/CS9T-F9HR>].

¹¹⁰ BERRY, *supra* note 11, at 211–12.

¹¹¹ *See id.* at 212.

for some specific agency action.¹¹² Instead, they have incorporated directly into their state APAs a general veto provision, widely applicable to a host of agency actions.¹¹³

Several examples illustrate the breadth of legislative veto powers contained within state APAs. For instance, North Dakota's general legislative veto statute provides that the administrative rules committee, which sits within the legislative branch, "may find that all or any portion of a rule is void if that rule is initially considered by the committee not later than the fifteenth day of the month before the date of the administrative code supplement in which the rule change is scheduled to appear."¹¹⁴ This language entails a general veto power over a rule of any subject matter promulgated by any state agency; it is not a tailored veto limited to a specific agency or specifically identified type of regulation.

Another example is the Illinois state code, which provides that if a specified legislative branch joint committee:

determines that the adoption and effectiveness of a proposed rule . . . would be objectionable under any of the standards for the Joint Committee's review . . . and would constitute a serious threat to the public interest, safety, or welfare, the Joint Committee may issue a statement to that effect[.]¹¹⁵

If such statement is issued, the proposed rule will not go into effect absent a withdrawal of that statement or an overriding joint resolution.¹¹⁶ Once again, the Joint Committee's power is not limited to a specific area of public administration.¹¹⁷

As these examples illustrate, state APAs are one source of legislative veto authority, and that authority often broadly applies to a sweeping variety of regulatory arenas. However, state APAs have not been the sole sources of legislative veto authority, as several states have also amended their constitutions to include a veto mechanism.

b. State Constitutional Provisions Creating Legislative Veto Authority. As noted, a legislative veto is now enshrined within the constitutions of several states, including New Jersey and Idaho.¹¹⁸ These provisions secure the legislative veto against constitutional attack. Like their state APA counterparts, these constitutional allocations also provide for a generalized legislative veto power: both states' constitutions grant their state legislatures sweeping authority to veto executive branch rules of any kind.

¹¹² *See id.*

¹¹³ *See id.*

¹¹⁴ N.D. CENT. CODE ANN. § 28-32-18 (West 2011).

¹¹⁵ 5 ILL. COMP. STAT. ANN. 100 / 5-115 (West 2005).

¹¹⁶ *See id.*

¹¹⁷ *See id.*

¹¹⁸ N.J. CONST. art. V, § 4; IDAHO CONST. art. III, § 29. Connecticut, Iowa, and Nevada also have constitutional provisions creating a legislative veto. *See BERRY, supra* note 11, at 222.

New Jersey's constitutional provision traces to 1992, when a constitutional amendment restored a legislative veto authority following the New Jersey Supreme Court's invalidation of this mechanism.¹¹⁹ As amended, the New Jersey Constitution declares:

The Legislature may review any rule or regulation to determine if the rule or regulation is consistent with the intent of the legislature as expressed in the language of the statute which the rule or regulation is intended to implement. . . . If the agency does not amend or withdraw the existing or proposed rule or regulation, the Legislature may invalidate that rule or regulation, in whole or in part, or may prohibit that proposed rule or regulation, in whole or in part, from taking effect by a vote of a majority of the authorized membership of each House in favor of a concurrent resolution providing for invalidation or prohibition, as the case may be, of the rule or regulation.¹²⁰

By incorporating language such as "any rule or regulation," this provision bestows upon the legislature a power to nullify rules across all areas of regulatory policymaking.¹²¹ Because no limiting language coexists with this additional grant of power, the legislature may intervene in any agency decision across a broad range of regulatory and policy matters.

Following a 2016 ballot proposition requiring voter approval, Idaho also amended its constitution to directly create a legislative veto power.¹²² This new provision provides:

The legislature may review any administrative rule to ensure it is consistent with the legislative intent of the statute that the rule was written to interpret, prescribe, implement or enforce. After that review, the legislature may approve or reject, in whole or in part, any rule as provided by law. Legislative approval or rejection of a rule is not subject to gubernatorial veto under section 10, article IV, of the constitution of the state of Idaho.¹²³

This provision, like New Jersey's, essentially creates a generalized legislative veto authority over all state agencies and their regulations.

Thus, these two examples of state constitutions containing legislative veto provisions do so in broad strokes. Because these and analogous provisions

¹¹⁹ *Comm'ns Workers of Am. v. N.J. Civ. Serv. Comm'n*, 191 A.3d 643, 648, 660–61 (N.J. 2018) (describing the history of the legislative veto in New Jersey); *State v. Byrne*, 448 A.2d 438, 439 (N.J. 1982) (finding the legislative veto unconstitutional).

¹²⁰ N.J. CONST. art. V, § 4.

¹²¹ *Id.*

¹²² *2016 General Election Proposed Constitutional Amendment*, IDAHO SEC'Y STATE'S OFF., <https://sos.idaho.gov/elect/inits/2016/amend.html> [<https://perma.cc/K6MW-ZP8M>]; see also IDAHO CONST. art. III, § 29.

¹²³ IDAHO CONST. art. III, § 29.

in other state constitutions would be immune from judicial scrutiny, they remain an attractive option for legislative veto advocates. Indeed, a generalized constitutional amendment has surfaced as one response to alleged regulatory overreach concerning the COVID-19 crisis. In addition, as discussed in Part III below, some states have turned to a more aggressive variety of specific legislative veto devices in the wake of the COVID-19 pandemic.

III. STATE LEGISLATIVE VETOES IN THE AFTERMATH OF COVID-19

COVID-19 tested the operation of many government institutions and processes. It also led to renewed interest in the legislative veto as a means of constraining state agencies. When the COVID-19 crisis prompted many strict and emergency executive actions across the country, political responses to curb such actions ensued.¹²⁴ These responses included debate regarding the appropriate allocation of power among the executive, legislative, and judicial branches of state governments.¹²⁵ In some form, these battles for power are still continuing, but they have already highlighted the reemerging significance of the state legislative veto today.

Since the pandemic, many state legislatures have attempted to curb the authority of their public health agencies. These legislative responses have been numerous and geographically diverse. In 2020, at least twenty-eight state legislatures (and some territories) proposed over 100 bills or resolutions seeking to circumscribe gubernatorial authority or executive spending during state-wide emergencies.¹²⁶ In 2021 and 2022, the focus became greater legislative control, particularly by increasing legislative involvement in and oversight of the executive branch during emergencies.¹²⁷ In 2021 alone, at least forty-seven states (and some territories) initiated over 300 bills or resolutions aimed toward this goal.¹²⁸ Many of these proposals carried over into 2022, when at least thirty-six states (and Puerto Rico) considered similar proposals, five of which became law.¹²⁹ In the first nine months of 2023, at least twenty-nine states had initiated more than 100 such measures.¹³⁰ All of these

¹²⁴ See *infra* notes 126–155 and accompanying text; see also Maggie Davis, Lauren Dedon, Stacey Hoffman, Andy Baker-White, David Engleman & Gregory Sunshine, *Emergency Powers and the Pandemic: Reflecting on State Legislative Reforms and the Future of Public Health Response*, 21 J. EMERGENCY MGMT. 19 (2023), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10170300/> [<https://perma.cc/GUZ3-EWAT>].

¹²⁵ See generally Brian Friery, *Legislatures Want to Unlockdown, but Courts Hold the Key: Resolution of Executive and Legislative Disputes in Coronavirus Times*, 48 J. LEGIS. 188 (2021).

¹²⁶ *Legislative Oversight of Emergency Executive Powers*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 22, 2023), <https://www.ncsl.org/about-state-legislatures/legislative-oversight-of-emergency-executive-powers> [<https://perma.cc/5RZF-T6D2>] [hereinafter *Legislative Oversight*].

¹²⁷ See *id.*

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ See *id.* NCSL published the most recent update to this data in September 2023.

proposals would provide in some fashion for “direct legislative involvement in or oversight of certain gubernatorial or executive actions during the COVID-19 pandemic or other emergencies.”¹³¹

In some of these instances, the legislative veto has resurfaced as a possible tool for restraining executive agencies. In each of the first three years following the COVID-19 pandemic, states have introduced proposals that would authorize a legislative veto power.¹³² By 2022, at least eight states proposed some type of legislative veto: Hawaii, Kansas, Minnesota, Montana, New Hampshire, Ohio, Oklahoma, and Utah.¹³³ While not all these states have succeeded in enacting these proposals, at least three had as of September 2023.¹³⁴ The emergence of these proposals demonstrates the legislative veto’s increased attractiveness as part of the legislative branch’s assertion of greater power following the COVID-19 pandemic.¹³⁵

In 2020, Oklahoma attempted to create an exception to its APA, which would have provided that “[e]mergency rules . . . shall not be subject to the provisions of the Administrative Procedure Act” and that such rules could be “disapproved by adoption of a concurrent resolution by a constitutional majority of each chamber of the Legislature.”¹³⁶ While this proposition failed,¹³⁷ the movement towards legislative vetoes in the states continued.

In 2021, more legislative veto propositions arose. Minnesota considered allowing its legislature to “terminate any subsequent order or rule promulgated by the governor directing a specific response to the peacetime emergency.”¹³⁸ Around the same time, Montana modified its APA, allowing the legislature, “by joint resolution, [to] repeal a rule or amendment to a rule.”¹³⁹ And New Hampshire considered a bill that would authorize the legislature to “terminate any emergency order” through a concurrent resolution.¹⁴⁰ Utah joined the trend, successfully passing a statutory amendment that granted the legislature authority to “terminate by joint resolution an order of constraint issued by the department [of health] as described in this section in response to a declared public health emergency.”¹⁴¹ For purposes of this statute, an order of constraint

¹³¹ *Id.*

¹³² *See id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *See* Clinger & Seifert, *supra* note 11, at 38–41.

¹³⁶ S. 1102, 57th Leg., 2d Sess. (Okla. 2020). The Oklahoma APA sets forth regular procedures for emergency rulemaking. *See* OKLA. STAT. tit. 75, § 253 (2023). According to the Oklahoma APA, an emergency rule must generally meet certain standard requirements, including incorporation of an impact statement, transmission to appropriate legislative personnel, and receipt of gubernatorial approval. *See id.* If the proposed amendment had passed, presumably emergency rules could have been implemented without meeting such requirements.

¹³⁷ *Legislative Oversight*, *supra* note 126 (noting “[s]tatus” as “[f]ailed”).

¹³⁸ H.R. 371, 2021 Leg., 92d Sess. (Minn. 2021).

¹³⁹ S. 227, 67th Leg., Reg. Sess. (Mont. 2021); MONT. CODE ANN. § 2-4-412 (West 2021).

¹⁴⁰ H.R. 280, 2021 Leg., Reg. Sess. (N.H. 2021).

¹⁴¹ S. 195, 2021 Leg., Gen. Sess. (Utah 2021); UTAH CODE ANN. § 26B-7-202-3(a) (West 2023).

includes “an order, rule, or regulation issued in response to a declared public health emergency” that meets certain criteria.¹⁴²

Meanwhile, Ohio created a state health oversight and advisory committee and simultaneously passed a statutory legislative veto specifically to rein in state health agencies.¹⁴³ Under this statutory veto provision, the Ohio legislature has the authority to rescind health rules through a concurrent resolution, without obtaining the governor’s signature.¹⁴⁴

Around the same time, Kansas Republicans proposed a legislative veto amendment for their state constitution.¹⁴⁵ This proposed measure would have allowed a bicameral legislative vote to veto a rule without any need for the governor’s approval.¹⁴⁶ Previously, the Kansas Supreme Court had declared the legislative veto constitutionally invalid.¹⁴⁷ However, the state legislature decided to refer a constitutional amendment to the voters; had it passed, it would have added a new provision to Article I of the Kansas Constitution.¹⁴⁸

Both the Ohio and Kansas efforts were specific responses to the COVID-era resentment of robust agency power in the face of a public health emergency. The *Ohio Capital Journal* referred to the new Ohio statute as the “pandemic law,” confirming its enactment as a direct result of the crisis.¹⁴⁹ In the same vein, Kansas Republicans were backing their own legislative veto efforts because of controversy surrounding the pandemic leadership of Democratic Governor Laura Kelly.¹⁵⁰ Kelly had implemented allegedly restrictive COVID-related policies, becoming the first governor to shut down schools for the full year and designing crisis policies that some critics claimed impaired

¹⁴² UTAH CODE ANN. § 26B-7-301-8(a) (West 2023).

¹⁴³ Jake Zuckerman, *New Pandemic Law Takes Effect; Experts Say It Undermines Public Health*, OHIO CAP. J. (June 23, 2021), <https://ohiocapitaljournal.com/2021/06/23/new-pandemic-law-takes-effect-experts-say-it-undermines-public-health/> [<https://perma.cc/W7SY-WEKY>]; *Proposed Limits on Public Health Authority: Dangerous for Public Health*, THE NETWORK FOR PUB. HEALTH L. (May 2021), <https://www.naccho.org/uploads/downloadable-resources/Proposed-Limits-on-Public-Health-Authority-Dangerous-for-Public-Health-FINAL-5.24.21pm.pdf> [<https://perma.cc/8PP9-T94H>]; OHIO REV. CODE ANN. §§ 101.36, 103.65 (West 2023).

¹⁴⁴ Zuckerman, *supra* note 143.

¹⁴⁵ *Checks and Balances: Kansas Proposal Would Create Legislative Veto Over Agency Rules*, BALLOTPEdia (Mar. 16, 2021) [hereinafter *Checks and Balances*], <https://news.ballotpedia.org/2021/03/16/checks-and-balances-kansas-proposal-would-create-legislative-veto-over-agency-rules/> [<https://perma.cc/S4GP-L7UR>].

¹⁴⁶ *See id.*; Dylan Lysen, *Kansas Voters to Decide on a Republican-Backed Limit of the Governor’s Political Power*, KCUR (Sept. 19, 2022), <https://www.kcur.org/news/2022-09-19/kansas-voters-to-decide-on-a-republican-backed-limit-of-the-governors-political-power> [<https://perma.cc/DU92-RXZV>].

¹⁴⁷ *Checks and Balances*, *supra* note 145.

¹⁴⁸ *Kansas Constitutional Amendment 1, Legislative Veto or Suspension of Executive Agency Regulations Amendment*, BALLOTPEdia, [https://ballotpedia.org/Kansas_Constitutional_Amendment_1_Legislative_Veto_or_Suspension_of_Executive_Agency_Regulations_Amendment_\(2022\)](https://ballotpedia.org/Kansas_Constitutional_Amendment_1_Legislative_Veto_or_Suspension_of_Executive_Agency_Regulations_Amendment_(2022)) [<https://perma.cc/8FCV-7PB6>].

¹⁴⁹ *See* Zuckerman, *supra* note 143.

¹⁵⁰ Lysen, *supra* note 146.

businesses more than necessary.¹⁵¹ These executive actions triggered the appeal for a constitutional amendment that would authorize the veto.¹⁵² While the Kansas amendment effort ultimately failed when put before the voters in 2022, the results were close, with 49.5% of voters supporting the proposition.¹⁵³

The legislative veto saga also continued elsewhere in 2022. In that year, Hawaii unsuccessfully considered amending its state code in the following manner:

The Governor, or the legislature by concurrent resolution, may at any time invalidate an order, an ordinance, a proclamation, a rule, or any other measure issued by a political body to address a purported emergency if the Governor or legislature determines that such order unnecessarily restricts a constitutional right, fundamental liberty, or statutory right.¹⁵⁴

Since a concurrent resolution need not receive the governor's approval in Hawaii, such an amendment would amount to a grant of legislative veto power.¹⁵⁵

It remains to be seen how many other similar propositions will arise in the months and years ahead. However, in this moment of legislative ascendancy, more states may soon consider implementing some additional form of a legislative veto. At the very least, the veto may become increasingly significant in public discourse or find its way to more state ballots. Thus, it is important to develop a deeper understanding of the veto's implications for state governments.

IV. THE LEGISLATIVE VETO'S IMPACT ON DEMOCRATIC GOVERNANCE

Proponents of legislative vetoes often claim that they offer a beneficial refinement of democratic processes that restores authority to the most democratically responsive branch of government. Yet, the reality is that legislative

¹⁵¹ See *id.*; see also Stephan Bisaha & Daniel Caudill, *Every School Kid in Kansas Was Just Told to Stay Home Until Fall Because of Coronavirus*, KCUR (Mar. 19, 2020), <https://www.kcur.org/2020-03-19/every-school-kid-in-kansas-was-just-told-to-stay-home-until-fall-because-of-coronavirus> [<https://perma.cc/BSR9-EEZJ>] (“Gov. Laura Kelly on Tuesday ordered all of the state’s schools closed for the remainder of the academic year, taking her most dramatic action yet to stem the spread of COVID-19 in Kansas.”); Titus Wu, *Kansas Governor Reissues COVID-19 Executive Orders; GOP Leaders Revoke Mask Mandate*, TOPEKA CAP.-J. (Apr. 1, 2021), <https://www.cjonline.com/story/news/politics/government/2021/04/01/republican-leaders-overturn-kansas-governor-covid-19-orders-emergency-kema-laura-kelly-mask-mandate/4837708001/> [<https://perma.cc/89QX-JZFL>] (“Leaders of Kansas’ majority-GOP Legislature on Thursday shot down just one of the 13 COVID-19 executive orders that Democratic Gov. Laura Kelly issued in the morning . . . The most contentious order . . . was a statewide mask mandate . . .”).

¹⁵² See *id.*

¹⁵³ See *Ballot Measure Results Across Kansas*, POLITICO (Nov. 26, 2023), <https://www.politico.com/2022-election/results/kansas/ballot-measures/> [<https://perma.cc/T8NL-3ARS>].

¹⁵⁴ H.R. 1921, 31st Leg., Reg. Sess. § 2(c) (Haw. 2022).

¹⁵⁵ See *Resolutions*, LEGIS. REFERENCE BUREAU, <https://lrh.hawaii.gov/par/overview-of-the-legislative-process/types-of-measures-bills-resolutions-messages/resolutions/> [<https://perma.cc/K8CV-FMD5>].

veto undermines democratic values. First, by circumventing the established lawmaking process—a process that is always available to the legislature as a means of responding to agency behavior—legislative vetoes weaken the legitimacy of the legislative branch. Second, the generalized legislative veto powers found in many states today both reduce transparency surrounding the exercise of legislative oversight and lack a standardized approach in circumstances in which, at a minimum, we should expect more specific tailoring. Third, when legislative veto provisions are incorporated directly into state constitutions, they raise additional concerns because of their permanence and the unanticipated spillover effects that can flow from amending a constitution. This Part addresses each of these three types of harm.

A. *Legislative Vetoes Undermine the Legitimacy of Legislative Authority*

Whether citizens amend their state constitution to establish a legislative veto, or state legislatures grant themselves this authority by statute, the result is a significant rebalancing of government power. However, legislative veto mechanisms do more than just *strengthen* the authority of the legislative branch; they also affect—and weaken—the *justification* for that authority. While in one respect these mechanisms bolster legislative power by increasing legislative control over agencies, they also undermine the legitimacy of that power by sidestepping the traditional lawmaking process.

This irony can perhaps best be demonstrated through the theory of legislative supremacy. Legislative supremacy theory argues that the legislature should be “government’s chief policymaker.”¹⁵⁶ Its proponents see the legislature as the preeminent power, taking precedence over the other branches of government, because of its direct accountability to the citizenry.¹⁵⁷ Because of this preeminent role, legislatures are primarily responsible for establishing the nature of legal rights and answering questions about the scope of these rights.¹⁵⁸ Grounding their arguments in theories of both liberal political equality and republican freedom, proponents have concluded that legislative supremacy is the basis of “the most legitimate form of institutional design.”¹⁵⁹

Legislative supremacy has played a particularly powerful role in the American democratic system. Describing the history of the theory in the United States, Professor Earl Maltz wrote that legislative supremacy “embodies one of the most basic premises underlying the American political

¹⁵⁶ John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2405 (2017).

¹⁵⁷ See Aileen Kavanagh, *A Hard Look at the Last Word*, 35 OXFORD J. LEGAL STUD. 825, 829 (2015) (describing the judiciary’s limited position in comparison to the legislature under the legislative supremacy model).

¹⁵⁸ See *id.*

¹⁵⁹ Cormac Mac Amhlaigh, *Putting Political Constitutionalism in Its Place*, 14 INT’L J. CONST. L. 175, 178 (2016) (describing the arguments of legislative supremacy theorists Jeremy Waldron and Richard Bellamy).

system.”¹⁶⁰ Professor Michael Teter extended this assertion, equating legislative supremacy with the separation of powers as “fundamental constitutional doctrines.”¹⁶¹ For most scholars of government, the idea of legislative supremacy comprises a bedrock principle around which American democracy revolves.

At its core, the theory prioritizes the legislative branch because of the source of this branch’s authority. Teter explains the doctrine as “the basic premise that the legislature, as the most representative branch of government, should play the leading role in setting national policy.”¹⁶² Expounding further, Teter notes that an appropriate understanding sees legislative supremacy as the idea that “Congress should preside as the primary source of law as a means of ensuring democratic accountability and statutory legitimacy.”¹⁶³ Essentially, the theory argues that the legislature should take center stage on issues of public significance primarily because this branch best represents the desires of the American people.¹⁶⁴

In addition, “procedural virtues” of the legislative branch, such as deliberation, discussion of differing viewpoints, and the prioritization of equality, set lawmaking apart from other aspects of governance.¹⁶⁵ Theorists have even gone so far as to argue that the “‘dignity’ of legislation . . . lies in the political procedure that yields it.”¹⁶⁶

Because of this emphasis on the procedural basis of legislative authority, one implication is that the absence of its democratic foundation inescapably weakens the justification behind legislative preeminence. Ultimately, the strength and the source of legislative power are inseparably intertwined, and one cannot exist without the other. Consequently, the notion of legislative supremacy, premised on the representative character and procedural virtues of the lawmaking process, actually undermines the democratic legitimacy of the legislative veto, because of the veto’s neglect of that very process.

Although legislative veto provisions certainly expand legislative branch power, they do so at the cost of the credibility and legitimacy of that power. Precisely because the legislative veto has circumvented the legitimating rigors of the lawmaking process, and the full support of all the democratically responsive parts of government necessary for enacting legislation, it cannot properly lay claim to a foundation in legislative supremacy. Instead, it is a

¹⁶⁰ Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767, 769 (1991).

¹⁶¹ Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2217 (2013).

¹⁶² *Id.* at 2223.

¹⁶³ *Id.*

¹⁶⁴ *See id.* at 2224.

¹⁶⁵ Eoin Daly, *Legislative Form as a Justification for Legislative Supremacy*, 8 JURIS. 501, 502 (2017).

¹⁶⁶ *Id.* (describing the argument of legislative supremacy theorist Jeremy Waldron).

means for legislators to assume extra-legislative power or, in other words, power to influence government law and policy without the virtues of the regular lawmaking process.

Legislative veto proponents have claimed that the mechanism secures and protects legislative power, a claim that would seem to align with the principles of legislative supremacy. For instance, a desire to “safeguard” legislative power appears in statements by supporters of the 2016 Idaho constitutional amendment creating a legislative veto.¹⁶⁷ Additionally, Kansas legislative veto advocates stated similar reasoning in support of their constitutional amendment.¹⁶⁸ Kansas Attorney General Derek Schmidt stated: “This proposal would check the power of the ever-growing administrative state by making sure the final power to make law rests where it should—with the people’s elected representatives in the Legislature.”¹⁶⁹ Of course, even *without* any legislative veto option, the final power to make law still always resides fully and completely with the legislative branch, so long as it respects the bicameralism and presentment requirements that have always been central to the American legislative process. Nevertheless, the enhancement of legislative preeminence appears to motivate many legislative veto advocates.

However, these arguments are shortsighted and fail to reckon with the full import of the notion of legislative supremacy. Contrary to true legislative supremacy foundations, legislative veto advocates seek to heighten legislators’ power without recognizing the veto’s impacts on the source of that power.¹⁷⁰ One such impact is weakened democratic support for legislative undertakings. Instead of enhancing the representative quality of legislative branch lawmaking, and giving a stronger voice to the public, these mechanisms bypass democratic procedure in two potential ways. First, all but the two-house legislative veto allow legislative policymaking without the complete backing of at least a majority of elected representatives. Second, every form of legislative veto eliminates the process that allows the people’s chosen state governor to decide whether to approve the legislature’s action or to challenge the legislature to rethink it.

In the case of one-house and single-committee legislative vetoes, the device is even more unmoored from its purported foundations in legislative

¹⁶⁷ Nate Sunderland, *What is HJR 5 and Why Should You Care?*, E. IDAHO NEWS (Nov. 7, 2016), <https://www.eastidahonews.com/2016/11/hjr-5-care/> [<https://perma.cc/7WVFV-C5NF>] (summarizing the views of the Idaho legislature, asserting that “some Idaho lawmakers see an amendment as a way to safeguard the right to approve or deny rules”).

¹⁶⁸ *Checks and Balances*, *supra* note 145.

¹⁶⁹ *Id.*

¹⁷⁰ *See, e.g.*, Teter, *supra* note 161, at 2224 (“But why should Congress be the branch that sets national policy? Put simply, democratic theory demands that national policy decisions be made by ‘those popularly chosen to legislate’ and be respected by other governmental actors. In other words, ‘[s]tatutory authority derives from its political source.’ The legislature—elected by and accountable to the people—must be the branch responsible for making national policy. When another branch fails to abide by a constitutional legislative pronouncement, ‘it arrogates the ultimate power to make public policy.’”).

supremacy. It allows binding resolutions to take legal effect without the support of a critical number of legislators, and by extension, without the representation of the mass of citizens who elected those legislators.¹⁷¹ When a legislature can veto agency rulemaking via either a unicameral resolution or a committee resolution, the process simply does not reflect the judgment and deliberation of the full legislative membership.

In addition to the legislative veto's obvious defect of a lack of true democratic representativeness, some versions of the legislative veto can lead to incomplete or defective legislative support. In particular, unicameral or committee vetoes give some legislators grossly disproportionate power and opportunity to influence law and policy, with a distinct possibility that these particularly influential individuals will not be representationally balanced. Among other realities, private sector lobbyists will concentrate their efforts on legislators with the greatest influence over the administrative state at the committee and sub-committee levels of agency review, inevitably further expanding the influence of stakeholders with strong agendas and heightened financial and political capabilities. By dramatically reducing the number of lawmakers needed to achieve a legislative response, while distorting the representative balance of these few lawmakers who hold the effective decision-making power, a legislative veto mechanism risks a dramatic subversion of the ideals of legislative supremacy.

To those who might argue that despite its lack of lawmaking legitimacy, a legislative veto nonetheless enhances legislative supremacy because it grants final lawmaking authority to legislative branch actors who are at least more democratically accountable than a government agency, we note the following. Government agencies can do no more than the legislature has authorized them to do. That authorization is itself subject to judicial review, both to ensure that the legislature has not empowered the agency to do something that the agency lacks the constitutional authority to do (as, for instance, under the nondelegation doctrine in the federal system¹⁷² and analogous doctrines in many state systems¹⁷³), and to ensure that the agency has acted within the bounds of the

¹⁷¹ The single committee veto is most problematic here, as it permits a tiny subset of the legislative chamber to nullify the agency action, without accounting for the preferences of the majority of the legislators and their constituents. But even a one-house veto operates without garnering the support of the critical mass of representatives understood as necessary for robust lawmaking. For instance, in Michigan's bicameral state legislature with 40 state senators and 140 state representatives, a one-house veto could let 21 state senators nullify an agency action while 19 state senators and some substantial majority of the 140 state representatives oppose nullification. In that instance, the constituents represented by the 19 opposing senators and by the majority of the opposing representatives (even though there will be some overlap among these groups of constituents) will have seen their policy preferences ignored in a way that could not occur in regular lawmaking.

¹⁷² See, e.g., *Gundy v. United States*, 139 S. Ct. 2116 (2019).

¹⁷³ See generally Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. 1211 (2022).

authority that the legislature has delegated to it.¹⁷⁴ That legislative decision to delegate authority to an agency is the legislature's moment of legislative supremacy, as well as the moment when the legislature is responsible for setting the bounds of the agency's authority.¹⁷⁵

Provided the agency thereafter acts within the bounds of that legislatively delegated authority—a question best reviewed by the judicial branch—no subsidiary component of the legislature should be allowed to veto the agency action. By definition, the agency is exercising exactly the authority that the legislature, in its proper exercise of lawmaking power, has given the agency. In that sense, the agency action itself possesses full legislative legitimacy, bestowed upon it through the legislative delegation. But if one house of the legislature or one committee of the legislature could then contravene this already fully legitimated agency action, that single house or single committee would then functionally be amending the authority that the legislature has delegated to the agency, and importantly for purposes of this argument, would be amending that authority without the legitimacy of the established lawmaking process. Indeed, it could easily be amending that authority so as to produce a result that could not be produced using the full legislative process. In this critical sense, a legislative veto of an agency action does in fact constitute something that not only is less democratically legitimate than full legislative lawmaking, but also is less democratically legitimate than an agency's use—always judicially reviewable—of legislatively delegated authority.

Even a bicameral resolution that vetoes an agency action cannot be justified on the basis that it ensures that the final lawmaking power “rests where it should,” given that it still excludes the governor from the process. As a popularly elected official, the governor is the people's chosen chief executive, and the only individual specifically necessary to the exercise of the lawmaking power. By definition, binding legislative veto resolutions that lack the governor's approval have less democratic legitimacy, regardless of whether a governor would have supported the decision if given the opportunity, than regular lawmaking that includes presentment to the governor. And by excluding the governor from the process, such legislative vetoes are also less democratically legitimate than is the underlying agency action, undertaken pursuant to a legislative delegation resulting from the lawmaking process, which therefore can lay full claim to a pedigree of legislative supremacy.

Although a lack of executive approval always weakens the democratic foundations that have typically conferred full legitimacy on legislative activity,

¹⁷⁴ This is the essence of a vast corpus of judicial review of agency actions, whether in terms of reviewing the agency's construction of its statutory charge or assessing whether the agency has acted arbitrarily.

¹⁷⁵ Indeed, a state legislature could decide not to delegate any rulemaking authority to its state agencies, and instead to require that agencies propose all regulations to the legislature and wait for the legislature to enact the proposals as law, unless the legislature has specifically provided otherwise. This is what West Virginia has done. See Clinger & Seifter, *supra* note 11, at 20.

an additional concern can arise from excluding the chief executive from the process. When a governor not only is excluded from having a role in approving a legislative veto resolution but also would have specifically chosen *not* to approve that resolution if given the opportunity (a situation becoming *not* more common in the increasingly polarized climate of American politics),¹⁷⁶ the dialogue between the chief executive and the legislature that otherwise is a regular part of the *gubernatorial* veto will not occur. Even bicameral legislative vetoes rarely require the support of a supermajority to become effective. This fact is problematic because most states do require a supermajority to approve a legislative measure that a governor has explicitly rejected using the gubernatorial veto.¹⁷⁷ In that circumstance, the governor is expected to inform the legislature of the reasons for the gubernatorial veto and thereby to invite the legislature to reconsider its own reasons for supporting the measure while working to determine whether to override the governor's veto.

Even in the handful of states that allow a simple majority of both houses to override the gubernatorial veto, this process is procedurally meaningful, inviting a dialogue between the two elected branches of government.¹⁷⁸ But it is entirely absent in every variant of the legislative veto. Thus, the legislative veto bestows a binding effect on policies supported by only a simple majority, in which these policies otherwise would have required either the backing of a supermajority, or at least the reconsidered judgment of a majority after hearing the reasons for the governor's disapproval. Once again, this process disregards the votes of some number of legislative representatives and the voices of those who elected them, all of whom participated in the decision to assign responsibility to the agency; consequently, it undermines the legitimacy and respect of legislative authority.

In short, a legislative veto diminishes the democratic credibility of legislative action generally because it lets some subset of the legislative branch assert control by circumventing the lawmaking process. The reduced representational characteristics of the legislative veto undercut the legitimizing source of legislative power. Principles of legislative supremacy cannot justify a governmental mechanism that fails to rely upon the foundations of that legislative supremacy.

¹⁷⁶ See Gordon Heltzel & Kristin Laurin, *Polarization in America: Two Possible Futures*, 34 CURRENT OP. BEHAV. SCIS. 179, 179 (2020) (noting the “rise of polarization over the past 25 years”).

¹⁷⁷ While not all states require a supermajority to override gubernatorial vetoes, many do. Thirty-six states stipulate a two-thirds approval level; seven mandate three-fifths; and one stipulates a two-thirds margin from both houses together. Only six states allow the legislature to override the governor with a simple majority. *Veto Overrides in State Legislatures*, BALLOTEDIA, https://ballotpedia.org/Veto_overrides_in_state_legislatures [<https://perma.cc/VUL5-KJ86>].

¹⁷⁸ See, e.g., Robert J. McGrath, Jon C. Rogowski & Josh M. Ryan, *Gubernatorial Veto Powers and the Size of Legislative Coalitions*, 40 LEGIS. STUD. Q. 571, 571–73 (2015) (analyzing the varying effects of smaller and larger override requirements on state lawmaking).

B. *Problems of Generalized Legislative Veto Authorities*

Given that most state legislative veto provisions are generally applicable to all state agencies, as discussed in Part II.C.2 above, it is important to recognize that these generalized veto mechanisms produce two additional problems. The first is a reduction of transparency in the exercise of legislative oversight, specifically concerning the legislative branch's choice of when and how to exercise this sweeping veto authority over the executive. The second is a lack of adequate tailoring of the veto to specific legislative delegations of agency authority.

1. *Reduced Transparency in Government*

While legislative veto proponents praise the veto for its ability to rein in agencies and ensure that government actors are more directly accountable to the citizenry, this mechanism is actually more anti-democratic than democratic. Flowing from the same lawmaking defects that the Supreme Court identified in the *Chadha* decision, generalized legislative veto authority facilitates a sort of rogue lawmaking.¹⁷⁹ Such generalized power is not only unmoored from the prototypical checks and balances discussed in Part IV.A, but it also results in less transparency in governmental decision-making. This lack of transparency arises both in how the generalized veto is selectively exercised and in how threats to exercise it can be wielded behind the scenes.

a. The Non-Transparency of Selective Legislative Review. A generalized veto authority gives rise to one non-transparency problem because of its selective exercise. When using this generalized power, legislators essentially engage in a politically significant two-step process. First, legislators determine which agencies warrant review, inevitably narrowing their focus to a select few, given time and capacity constraints. Second, only after narrowing their focus can the legislators then decide which agency actions to actually veto. Public awareness and subsequent legislative accountability generally exist at the second step, but the first step remains largely hidden from the public view.

A generalized veto power requires legislators to make (and continually remake) a threshold decision about which agencies should receive the bulk of their attention, and with what presumptions. Because the legislative branch has limited time and energy, "opportunity cost" inheres in the choice to supervise any particular agency.¹⁸⁰ Consequently, the legislature and its instrumentalities must make strategic decisions regarding which agencies to scrutinize most heavily.¹⁸¹ Only once a particular agency action is in their sights will

¹⁷⁹ *Accord* INS v. Chadha, 462 U.S. 919 (1983).

¹⁸⁰ Kenneth Lowande, *Who Polices the Administrative State?*, 112 AM. POL. SCI. REV. 874, 876 (2018). While this Article describes congressional oversight specifically, a parallel could presumably be drawn to state legislatures.

¹⁸¹ *See id.*

lawmakers then determine whether that agency action justifies a veto after considering, for instance, whether a particular rule would diverge from the legislature's policy goals or view of the public interest.

Both decisions, namely which agencies to review and what actions to veto, carry political significance. When the second step occurs, it is politically significant: if a legislature vetoes a rule, that decision is public, and it leads to a direct policy consequence, as the rule fails to go into effect. But the first decision also carries political weight. The decision to closely scrutinize one agency, while allowing another agency greater discretion, is a policy choice in its own right.¹⁸² This is particularly the case when the agencies at issue, such as environmental agencies, are tasked with responsibilities that are likely to be politically controversial.¹⁸³ Yet this legislative choice need not be made publicly at all.

The political significance of the legislative choice at the first step is not merely a theoretical concern. Empirical evidence unsurprisingly demonstrates that when legislators possess general supervisory authority over agencies, they disproportionately choose to supervise some agencies over others.¹⁸⁴ In 2012, Professor Jerry Anderson and Christopher Poynor, J.D., studied the effects of the Iowa Administrative Rules Review Committee ("ARRC").¹⁸⁵ Although the AARC lacked true legislative veto authority, it nonetheless had authority to influence agency decision-making through objections and delays.¹⁸⁶ In analyzing the governance impacts of this committee, the researchers found that the committee had discharged its oversight duties disproportionately based upon the "politically sensitive missions" undertaken by varying agencies.¹⁸⁷ Instead of increasing transparency, the legislative intervention thus became a tool to circumvent democratic deliberation and to produce covertly political results. Similar results are likely to arise when full legislative veto powers are generally available to a legislature.

Although transparency usually exists at the second step when legislators decide whether to exercise their veto power, the prior step of which agency to analyze often remains more obscure. The official process of rulemaking is typically publicly available information. For example, Idaho publishes an online index that keeps a record of regulatory action, tracing agency rules all the way back to 1993 and encompassing "all rulemaking activities on each chapter of rules and includ[ing] negotiated, temporary, proposed, pending and final rules, public hearing notices and vacated rulemaking notices."¹⁸⁸

¹⁸² See Jerry L. Anderson & Christopher Poynor, *A Constitutional and Empirical Analysis of Iowa's Administrative Rules Review Committee Procedure*, 61 DRAKE L. REV. 9, 49–50 (2012).

¹⁸³ See *id.*

¹⁸⁴ See generally *id.*

¹⁸⁵ *Id.*

¹⁸⁶ See *id.*

¹⁸⁷ *Id.* at 9.

¹⁸⁸ *Cumulative Rulemaking Index of Idaho Administrative Rules*, IDAHO OFF. OF THE ADMIN. RULES COORDINATOR, <https://adminrules.idaho.gov/cindex/index.html> [<https://perma.cc/9KS2-BA2H>].

Michigan posts status updates regarding pending and effective rules.¹⁸⁹ Other states have similar requirements, at least for regular, non-emergency rulemaking.¹⁹⁰ Thus, when a legislative veto is applied, this official action is also publicly apparent.

However, the first step is not easily monitored. Although selective application of review powers can be studied by researchers, the individual strategic choices legislators are making are typically not very noticeable to the public. While legislative vetoes blocking a proposed rule involve an affirmative action, a decision not to review is a quieter omission. And a decision to review an agency action also may generate little public notice if the veto is not in fact exercised. Even if an astute citizen observed in an administrative bulletin that a certain agency's actions were more frequently up for legislative review, that citizen might not readily know the reason why. Several causes could trigger more frequent or more demanding review. An agency may have created a greater number of rules than other agencies, and thus the larger frequency precipitates more legislative responses. The agency may have a history of performing poorly, causing heightened legislative concern regarding that agency's actions. The rules may have involved a more widespread impact, requiring more demanding review. All these reasons—and presumably many more—are possible factors behind a legislature's decision to scrutinize some agencies more closely than others.

Furthermore, it is not unusual for lawmakers to largely fail to explain their reasoning when engaging in any kind of legislative review.¹⁹¹ In fact, during a study of the actions undertaken by Illinois's legislative review committee, one researcher noted that “with only a few arguable exceptions,” the review committee had “utterly failed to provide reasonable explanations for its conclusions that its actions were necessary to prevent agency rules from going into effect and posing serious threats to the public.”¹⁹² In contrast, the regular lawmaking processes at least aspire to provide multiple transparent opportunities for input from members of the public, typically in the form of committee hearings, as well as open debate and deliberation by the legislators in both public hearings and floor sessions. But in exercising the power of legislative review, lawmakers can pursue their policy agendas more surreptitiously through the process of strategically filtering which agencies to

¹⁸⁹ *Administrative Rules*, MICH. LICENSING AND REGUL. AFFS., <https://www.michigan.gov/lara/bureau-list/moahr/admin-rules> [<https://perma.cc/CUY3-3W9L>].

¹⁹⁰ See generally *Agency Rulemaking Authorized by Law*, JUSTIA, <https://www.justia.com/administrative-law/rulemaking-writing-agency-regulations/> [<https://perma.cc/VV2K-PQ9L>] (first discussing the rulemaking responsibilities of agencies at the federal, state, and local levels, then asserting that “[m]any jurisdictions . . . have separate procedures for [non-emergency] rulemaking, which allows ample time for the public to review and comment on proposed rules”).

¹⁹¹ See, e.g., Marc D. Falkoff, *An Empirical Critique of JCAR and the Legislative Veto in Illinois*, 65 DEPAUL L. REV. 949, 981–84 (2016) (describing the implementation of JCAR's review power in Illinois, even though the General Assembly had implemented limitations on its veto power).

¹⁹² *Id.* at 984.

review most aggressively. Such concealment raises transparency concerns, demonstrating yet another negative effect of the legislative veto on democratic governance and another departure from fundamental principles of sound legislative process.

b. The Non-Transparency of the Implied Threat of a Legislative Veto. Beyond the non-transparency of targeted selectivity in the exercise of generalized legislative veto authority, a legislative veto power undermines transparency by strengthening the impact of the threat of legislative disapproval. The concept that a veto authority may facilitate certain implicit threats is not new.¹⁹³ An implied threat may occur when an agency alters course based on its own expectations and predictions of what the legislature *could* do even though the legislature has not yet acted. Because of this threat, an agency may modify or eliminate proposed regulations.¹⁹⁴ As noted by Professor Donald Elliott, executive agencies often “enter into negotiations at an early stage to ensure that the agency’s proposals will be acceptable, rather than run the risk of suffering a legislative veto later.”¹⁹⁵ For example, in a six-year study of the Michigan legislature, researchers found that the state’s legislative review committee vetoed less than two percent of submitted rules.¹⁹⁶ Nonetheless, the state’s agencies removed almost twenty percent of regulations that, while not directly vetoed, had been tendered for review.¹⁹⁷ Agency leaders could understandably be more wary of having their actions rejected outright than of having to withdraw a proposed action and regroup, living to fight another day with an adjusted proposal that will satisfy those holding the veto power.

While the legislative veto’s implied threat remains unseen by the public, its threat affects agency action in a stronger way than does the threat of a full lawmaking response to agency action. Even though legislatures may force agencies into compliance because of the possibility of subsequent legislation, such coercive power is more attenuated. State lawmaking is a complicated process, with many barriers to completion.¹⁹⁸ First, a bill must be introduced. Then, a series of committee reviews, hearings, and debates follow, a procedure that must be repeated in the second chamber (except in unicameral Nebraska). Finally, if the two chambers can agree on the same content, the bill is presented to the governor.¹⁹⁹ This process means that “legislative proposals . . . rarely follow a smooth path to enactment,” and given that legislators

¹⁹³ See Curtis A. Bradley, *Reassessing the Legislative Veto: The Statutory President, Foreign Affairs, and Congressional Workarounds*, 13 J. LEGAL ANALYSIS 439, 453–56 (2021).

¹⁹⁴ See Michael Berry, *Empowering Legislatures: The Politics of Legislative Veto Oversight Among the U.S. States*, 27 J. LEGIS. STUD. 418, 433 (2021).

¹⁹⁵ E. Donald Elliott, *INS v. Chadha: The Administrative Constitution, The Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 152.

¹⁹⁶ BERRY, *supra* note 11, at 265; Berry, *supra* note 194, at 432.

¹⁹⁷ *Id.*

¹⁹⁸ See generally *Learning the Game*, NAT’L CONF. STATE LEGISLATURES, <https://www.ncsl.org/legislative-staff/civics-education/learning-the-game> [<https://perma.cc/VV7J-54Y4>].

¹⁹⁹ *Id.*

proceed in different ways based on varying factors, the “legislative game” is marked by “unpredictability.”²⁰⁰ Unsurprisingly, agencies will be less likely to base their rulemaking off of possible legislative responses when those responses are unpredictable.

But when a legislature holds the power to veto, the implied threat of a response by the legislature is much stronger. The veto is a faster, more streamlined, and more predictable mechanism than is the lawmaking process. Put differently, while laws face many obstacles to enactment, the legislative veto faces fewer barriers. This streamlined method is exactly why legislators like the legislative veto. When a legislature or its components can veto an agency’s rules, that agency will more likely take into consideration legislative preferences, putting a stronger coercive power in the hands of lawmakers.

The existence of a legislative veto power also can result in the non-transparent, preemptive coercion of state agencies by special interest groups. Because of the veto mechanism’s implied threat, agencies demonstrate heightened reactivity to the political preferences of state legislators, shifting the political calculus of lobbyists whose interests are likely to be affected by regulatory decisions.²⁰¹ Because lobbyists know agencies will now be more attuned to the policy preferences of legislators, lobbyists can take advantage of that fact by seeking to persuade legislators of lobbyists’ viewpoints before any regulatory action is undertaken.²⁰² This political shift opens the door to a source of influence over agencies that is not only hidden from the public (occurring before a regulation is even conceived) but that also facilitates greater dominance by more powerful special interest groups.²⁰³ As special interest groups exercise additional power, the public remains ignorant of the true effect of a never-exercised legislative veto.

Some recent scholarship has suggested that an implied veto threat may not have as much impact as might be supposed; however, even this research admits significant limitations in the underlying studies that support it.²⁰⁴ In particular, these studies focused on the legislative veto at the federal level, where veto powers have been agency specific, not on vetoes in state government, where veto authorities tend to be generalized. Moreover, these studies analyzed the impact of the veto only in the era prior to *Chadha*, when the implicit threat of the veto may have been muted because of the veto’s questionable constitutionality. Additionally, state-level lobbying was a much smaller industry.²⁰⁵ Because of these limitations in the studies and distinctions in the

²⁰⁰ *Id.*

²⁰¹ Elliot, *supra* note 195, at 152.

²⁰² *See id.*

²⁰³ *See id.* at 153.

²⁰⁴ *See, e.g.,* Bradley, *supra* note 193, at 453–56.

²⁰⁵ *See* Clive S. Thomas & Ronald J. Hrebener, *Interest Groups in the States*, in *POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS* 100, 104–05 (Virginia Gray & Russell L. Hanson eds., 2004).

modern context, state agencies today in fact may be quite sensitive to the implicit threat of a legislative veto.

The implied threat creates yet another transparency concern. While the number of actual legislative vetoes exercised is measurable, the breadth and degree of the implied threat is unquantifiable. No one can identify exactly how an agency's awareness of lawmakers' veto power changes that agency's decision-making. Furthermore, this implied threat may exist as a weaker or stronger force depending on several factors. For example, the threat may increase when lawmakers have adopted highly partisan stances on specific issues, or when they possess certain personal characteristics, such as a tendency to act more assertively or passively. However, the implied threat may also be a function of other features of state government: the degree of administrative bureaucrats' risk aversion, the type of policy matters at issue, or even the history of the relationships between the agency and the legislature. By strengthening the legislature's implied threat against agencies without introducing a means to hold the legislature accountable for its impact on agency rulemaking, the legislative veto produces another non-transparency problem in state government.²⁰⁶

2. Lack of Appropriate Tailoring

Whether created by a state's APA, a comparable statute, or a constitutional provision, state legislative veto mechanisms structured as a generalized veto power grant lawmakers control over multiple agencies and across varying policy matters all at once. Even if we were not concerned with the problems described above and instead were supportive of some form of legislative veto, a generalized approach creates its own additional harm to state democracies. Because not all agencies are created equal, and not all areas of administrative governance require the same treatment, a generalized veto does not create an appropriate response to the evolving administrative state.²⁰⁷ Instead, it overlooks peculiarities and contextual factors relevant to individual regulatory arenas, discouraging states from designing appropriately tailored oversight mechanisms.

To understand the defect of a blunderbuss legislative veto, it is worth a brief recapitulation of several of the key attributes of administrative governance. For one, agency expertise is widely accepted, to some degree or another, as beneficial because it allows a degree of specialization that legislators

²⁰⁶ State agencies, of course, must conduct their decision-making processes pursuant to the procedures established (and always amendable) by their state legislature. These procedures, like the notice-and-comment process that the APA requires of federal agencies engaging in informal rulemaking, generally require public notice of proposed action and an opportunity for public comment on the proposal. *See, e.g.*, MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 304, 306 (UNIF. L. COMM'N 2010).

²⁰⁷ *See generally* DeConcini & Faucher, *supra* note 77, at 35 (noting how “the burdens inherent in governing a complex industrialized society” triggered enhanced administrative power).

themselves simply cannot achieve.²⁰⁸ Because many policy concerns demand that agency personnel develop regulations based on independent and scientific evaluations, the expertise of these administrators is essential.²⁰⁹ Meanwhile, a robust deliberative process is also desirable, given that deliberation can facilitate heightened brainstorming, greater consideration of varied alternatives, and wiser long-term decisions.²¹⁰ While on paper the legislative process is often lauded as deliberative, legislatures can circumvent much of the default legislative process without repercussion. Agencies, in contrast, must follow the established process (typically as set out in the state APA) or risk having their action invalidated.

Additionally, judicial review can ensure that no individual agency creates regulations completely unmoored from the will of the electorate. In some contexts, targeted emergency powers can permit agencies to address unanticipated crises when lagging legislative responses may not effectively respond to time-sensitive issues. In other contexts, administrative speed and efficiency can further aid the administrative process or may be necessary to keep government operations fluid. Because of the breadth of state administrative responsibilities,²¹¹ administrators may become mired in a backlog of issues and demands if they cannot act quickly.

While the above review of beneficial agency attributes is not exhaustive, it provides key examples of some of the higher-priority concerns when structuring administrative authority. However, these attributes must be evaluated collectively. While the ability to exercise independent judgment sets agencies apart and may facilitate decisions based on expertise rather than politics, the desire for judicial and legislative checks and balances counters that value. Put differently, an agency should act confidently based on administrators'

²⁰⁸ See, e.g., Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2023 (2015) (noting how, in the federal context, but presumably with similar parallels to the state context, "the basic concept that the agencies should preside over specialized information is hard-wired into the design of the administrative state").

²⁰⁹ See, e.g., Edward T. Jennings Jr. & Jeremy L. Hall, *Evidence-Based Practice and the Use of Information in State Agency Decision-Making*, 22 J. PUB. ADMIN. RSCH. & THEORY 245, 245 (2012) ("Public policy research has recently begun to examine the concept of evidence-based (EB) public policy, thus far focusing on the ways scientific evidence can be used (or better used) and challenges to incorporating evidence into agency practices.").

²¹⁰ See generally Paul J. Quirk, *Deliberation and Decision Making*, in INSTITUTIONS OF AMERICAN DEMOCRACY, THE LEGISLATIVE BRANCH 314, 314–15 (Paul J. Quirk & Sarah A. Binder, eds., 2005). In the federal context, presumably with parallels to the state context, the author describes deliberation as "a key part of Congress's task." *Id.* at 314. Specifically, the author lays out three arguments justifying the importance of deliberation: the legitimization of policies, the education of the public, and the facilitation of "intelligent decisions." *Id.* at 314–15. Furthermore, the author states that deliberation reduces the potential for mistakes and reveals an "unsatisfactory status quo." *Id.* at 315.

²¹¹ For example, Ohio has thirty-eight state agencies that range in scope. The spectrum of policy matters includes, but is not limited to, mental health services, environmental protection, and insurance. *State Agencies*, Ohio Government, <https://ohio.gov/government/state-agencies> [<https://perma.cc/6VPX-C4K9>].

unique knowledge and skills in their policy arena, yet administrators should not depart from their fundamental mission contained in legislation enacted via democratic procedures. Furthermore, even though intensified deliberation often yields more informed and effective decisions, the need for speed may weigh against deliberations that consume too much time. Despite the utility of each of these attributes, all of them cannot exist simultaneously. Consequently, states should consider which attributes deserve to be weighted more significantly for a given agency's mission.

Thus, even if some form of legislative veto might seem desirable in specific circumstances, a single, generalized legislative veto for all state agencies would not be the appropriate response. Instead, states should at most explore only the middle ground between no legislative veto and a generalized veto, which would differ between agencies and policy matters, as in fact was the case with the several hundred legislative veto mechanisms at the federal level before *Chadha*.²¹² Notably, agencies possess differing priorities and needs. For example, budgetary appropriations often benefit from efficient cooperation between the legislative and executive branches.²¹³ Similarly, agencies that deal with issues of public health may require an ability to respond to a crisis immediately, making timeliness and administrative efficiency essential concerns, and sounding an extra note of caution regarding efforts to rescind their delegated authority without passing a new law. On the other hand, agencies that deal with matters of particularly partisan importance may understandably invite some heightened legislative branch checks and balances, to encourage these agencies to follow the will of the voters and their elected legislators. Agencies focusing on regulatory concerns of widespread or long-term impact would benefit from the greater democratic deliberation of the regular law-making process. Because this balance shifts within different policy arenas, an overly generalized solution is not likely to produce the best policy results. Yet the unfortunate reality during the COVID-19 era was that selective legislative veto measures were promoted in one of the areas for which agency expertise and efficiency is most important.

Other scholars have written about the importance of customized governmental approaches when it comes to other varying administrative needs. For example, Professor David H. Rosenbloom writes that three key approaches to governance are the "managerial," "political," and "legal" styles.²¹⁴ Each approach subscribes to its own unique set of values: the "managerial" style prioritizes customer orientation and cost-effectiveness; the "political" style emphasizes responsiveness, political accountability, and representation; and

²¹² See generally Part II.B.

²¹³ See generally *Enourato v. N.J. Bldg. Auth.*, 448 A.2d. 449 (N.J. 1982) (upholding a specific veto power over building projects and leases where the legislature would have needed to regularly appropriate budgetary funds).

²¹⁴ David H. Rosenbloom, *Public Administrative Theory and the Separation of Powers*, 43 PUB. ADMIN. REV. 219, 219 (1983).

the “legal” style highlights constitutional integrity, procedural due process, and individual rights.²¹⁵ Rosenbloom cogently argues that each approach holds a valuable place within the administrative state because of varying agency and policy needs, and thus he asserts that “it is an administrative fallacy to try to treat all agencies and programs under a universal standard.”²¹⁶

Yet by establishing a generalized legislative veto power, states do just that: treat agencies under a “universal standard” of legislative control, thereby ignoring contextual differences. The legislative veto should not be a one-size-fits-all solution; rather, it offers certain benefits and costs. Proposed benefits of the veto include lessening administrative bureaucracy by speeding up legislative operations.²¹⁷ However, in addition to the costs previously described in Parts III.A and III.B.1 (in terms of undermining legislative supremacy and reducing government transparency), a legislative veto also may undercut agencies’ freedom to act based upon their specialized expertise, rendering them more dependent on legislative branch politicking than on executive branch political accountability.²¹⁸ The veto power also may result in lawmakers enacting less detailed laws in certain scenarios.²¹⁹

Less problematic legislative vetoes therefore require tailoring to particular policy arenas’ high-priority aspects. When quick decision-making is crucial, and the veto is unlikely to interfere with detailed regulatory schemes, the veto may be more benign. However, when long-term effects are implicated, the veto may alter the trajectory of the legislative intent behind the initial delegation of power. When deep partisan divisions surrounding an issue mandate using the full lawmaking process to achieve truly representative results, the veto may endanger the very nature of democratic decision-making. Thus, when states establish only a generalized veto, they disregard these complexities.

C. *Constitutional Amendments: Ripple Effects on Separation of Powers*

We conclude with a brief note about the additional danger of adopting a legislative veto by constitutional amendment. As observed, legislative vetoes not enshrined in a state constitution likely remain vulnerable to a constitutional challenge in many states. Accordingly, veto proponents may often be drawn to seek a constitutional amendment that would remove any constitutional vulnerability. But constitutions should not be treated lightly, and constitutional amendments can evolve in unanticipated and permanent ways. Because of the unique aspects of constitutional law, and the potential

²¹⁵ David H. Rosenbloom, *Reflections on “Public Administrative Theory and the Separation of Powers,”* 43 AM. REV. PUB. ADMIN. 381, 383 (2013).

²¹⁶ Rosenbloom, *supra* note 214, at 225.

²¹⁷ See Elliott, *supra* note 195, at 152.

²¹⁸ See *id.* at 153.

²¹⁹ See Berry, *supra* note 194, at 419–20.

interactions of provisions of the constitution with other components of the legal system, constitutional amendments always call for extra caution. Given the questionable justification for a legislative veto already discussed, in the legislative veto context that caution should mean “do not proceed.”

For instance, when constitutional amendments result from a popular initiative, the amendments bear the imprimatur of direct voter approval. More particularly, when a restructuring of the separation of powers is accomplished through a majoritarian victory at the ballot box, the outcome could carry outsized legal significance in terms of how the state judiciary interprets the separation of powers and in ways that the specific amendment did not contemplate.

An example of this effect appears in the reasoning of the Superior Court of New Jersey in a case decided some thirty years ago. There, the court held that the use of a statutory legislative veto did not violate the separation of powers because after the exercise of the veto, an amendment to the New Jersey Constitution explicitly established a legislative veto authority.²²⁰ Despite the amendment’s inapplicability to the statutory veto in question (because the amendment became effective later), the court reasoned that the amendment served as “a contemporaneous expression by the electorate of the proper allocation of authority between the Legislature and state administrative agencies.”²²¹ In doing so, the amendment indirectly provided “an appropriate guide in the interpretation of the constitutional provisions in effect when [the statutory legislative veto] was enacted.”²²² In other words, even though the amendment was not directly applicable, the court construed it to demonstrate something broader about the view of the people and led the court to uphold the statutory veto at issue. Of course, one could just as easily have argued that until the constitutional amendment was adopted, the state constitution should have been read to create a version of the separation of powers in which a legislative veto was not legitimate. Thus, because the court used the amendment to interpret the electorate’s view of the appropriate balance of government powers, the amendment carried significance beyond its direct legal effect.

As another example of the potential unanticipated effects of a constitutional amendment, consider whether a state constitution legislative veto amendment might empower the state legislature to justify the lawfulness of some action other than a legislative veto itself. For instance, some other legislative resolution, adopted not through the full lawmaking process, might now survive judicial review if in some way it could be tied to legislative branch oversight of agency activity. If the creation of a legislative veto power through a state constitutional amendment leads to greater legislative authority, the result could be an even greater alteration of the separation of powers.

²²⁰ *In re Adoption of Reguls. Governing the State Health Plan*, 621 A.2d. 484, 488–90 (N.J. Super. Ct. App. Div. 1993).

²²¹ *Id.* at 489.

²²² *Id.*

To conclude, the inevitable disruption of the balance of powers that flows from a state constitutional amendment means that a legislative veto amendment could result in an expansion of legislative authority beyond the terms of the specific amendment. Thus, efforts to add veto mechanisms to state constitutions pose additional dangers to state governments.

V. CONCLUSION

This Article has noted the post-COVID-19 uptick in state legislative veto interest, an interest heavily driven by many state legislators' desires to have an easy way to override unpopular public health measures taken by state agencies. This uptick is often part of a more general effort to enhance the relative power of the legislative branch. Of course, if state agency actions are in violation of an agency's statutorily delegated authority, they can be challenged in court. But legislatures find legislative vetoes attractive for situations in which, although the agency is acting fully within its delegated power, some members of the legislature, or one of its components, simply do not like the agency's lawful activity. Legislative veto proponents argue that in these circumstances the legislative branch, as the government's primary lawmaker, is entitled to negate an agency's use of its delegated authority. However, the proper response in these circumstances is for the legislature to pass a new law.

By circumventing the lawmaking process, legislative vetoes undermine the premises on which the legislative branch is respected as the supreme lawmaking branch of government: majority approval by both legislative chambers, followed by approval or veto by the chief executive. Even a bicameral legislative veto cannot claim to reflect the democratic imprimatur that underlies the regular lawmaking process because it still omits presentment to the governor—the single actor in the legislative process elected by all the voters in the state. Unicameral and legislative committee vetoes are even further removed from democratic foundations. Legislative vetoes not only lack democratic legitimacy but also risk weakening the legislative branch's claim to such legitimacy more generally. The more the legislative branch asserts and uses power outside of the established lawmaking processes, the shakier the ground beneath it becomes.

Furthermore, generalized legislative vetoes, by far the most common form in state systems, suffer from the further defect that they obscure the legislative branch's exercise of substantial additional policymaking influence, occurring outside the ordinary legislative process. By contrast, regular lawmaking is much more transparent. To the extent that a generalized legislative veto mechanism permits some legislative branch actors to have greater influence on executive agencies, but without the public accountability of the formal lawmaking process, it significantly alters the traditional separation of powers between these branches. Generalized veto powers also suffer from the

one-size-fits-all defect of treating all agencies alike, despite important differences among agencies.

Not surprisingly, most state courts that have considered the constitutionality of state legislative veto statutes have found them unconstitutional. Obviously, this is not an obstacle to the exercise of a legislative veto authority if the mechanism itself is incorporated into the state constitution. But the problems summarized above argue against adding a legislative veto to a state constitution. Moreover, and finally, adding a veto mechanism to a state constitution raises the additional problem of unanticipated spillover effects, including that a state court might reason that the choice to constitutionalize a legislative veto works a deeper restructuring of the separation of powers.

Accordingly, important reasons exist to decline further enhancement of legislative branch power by establishing legislative veto mechanisms. Contrary to assertions that legislative vetoes enhance democratic accountability, they in fact weaken representative democracy.

