STATE LEGISLATIVE VETOES AND STATE CONSTITUTIONALISM

Miriam Seifter*

Recent scholarship persuasively argues that state constitutional law should be grounded in state-centered reasoning, not federal imitation. That approach, compelling at the 10,000-foot level, also requires development through examples closer to the ground. This symposium Article uses legislative vetoes—arrangements in which legislators can override executive action without passing new laws—to explore the practice and adjudication of state structural constitutionalism.

The first surprise about state legislative vetoes is that they exist at all. Legislative vetoes have been a dead letter at the federal level since the Supreme Court's decision in INS v. Chadha *forty years ago. State courts, it turns out, have also overwhelmingly rejected legislative vetoes. But the mechanisms live on in some states due to constitutional amendments, statutes that have not been litigated, and occasional evasion of court rulings. The resulting state legislative vetoes sometimes serve as powerful forces in state governance or entrenchment mechanisms for gerrymandered legislatures. They are also a variegated rather than monolithic category, involving different powers and actors across the country and over time. In all of these ways, legislative vetoes help us see the practice of state constitutional structure as negotiated, evolving, and complex.*

Turning from practice to doctrine, the state case law shows the operation—and value—of a state-centered approach, even when state and federal constitutional provisions are superficially similar. State courts could simply lockstep with Chadha *on the ground that state and federal constitutions alike make law through bicameralism and presentment and distribute power among three branches. But many state courts have made greater use of context and realism, extending their reasoning beyond formalist (or functionalist) horizontal classifications of power as legislative, executive, or judicial.*

Building on that foundation, this Article argues that Chadha*'s holding will often be correct at the state level, but for different reasons. Horizontal classifications alone do not capture when and why legislative vetoes are problematic. Review rooted in state constitutions' commitment to democracy can complete the explanation of why state courts have rejected legislative vetoes, especially vetoes by mere legislative committees. Policymakers, advocates, and proponents of constitutional amendments can all participate in steering legislative oversight away from anti-democratic designs.*

Of course, none of this—neither the nuances of practice nor the doctrinal distinctiveness—would be apparent if we think of legislative vetoes only through existing federal frames. Ultimately, the underappreciated story of state legislative vetoes underscores the importance of studying the states on their own terms.

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Introduction

As more attention turns to state constitutions, scholars and jurists widely agree on an important point: State courts should develop a state-centered jurisprudence rather than lockstepping with federal constitutional law.[1] This idea has strong roots in the state constitutional law

[1] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 503 (1977) (urging state courts to "step into the breach" as federal courts became less protective of individual rights); Jeffrey S. Sutton, Who Decides? States as Laboratories of Constitutional Experimentation 8 (2021) (noting the benefits of varied approaches to structuring government); *see* Robert F. Williams, The Law of American State Constitutions 25 (2009) (describing the distinct functions and traditions of state constitutions, and arguing that state constitutions are different in kind from their federal counterpart); *see also The Promise and Limits of State Constitutions*, Brennan Ctr. for Just. (Feb. 8, 2024), https://www.brennancenter.org/events/promise-and-limits-state-constitutions [https://perma.cc/P65T-UUNZ] (hosting an event focused on the interpretation of state constitutions and their role in guarding civil rights and civil liberties).

literature[2] and has gained momentum in recent years.[3] In the area of the state constitutional structure in particular, the "remarkable gap" between "the ways in which the states and the national government have come to arrange their governments"[4] has yielded recognition that "focusing on the US Constitution's answers to these questions" is a mistake.[5]

At the 10,000-foot view, this insight seems indisputable. Still, giving it meaning requires attention closer to ground. This symposium Article analyzes state legislative vetoes—arrangements in which legislators can reject otherwise final executive action without passing new laws—to explore the possibilities of a state-centered approach to constitutional structure.

Forty years ago, the U.S. Supreme Court's decision in *INS v. Chadha* rejected the federal legislative veto as unconstitutional.[6] States have taken a different and more complex path. State courts to consider the question have overwhelmingly rejected state legislative vetoes, though often without relying on *Chadha*'s reasoning.[7] Interestingly, those decisions have not spelled the end of legislative vetoes. State legislatures and constitutional drafters continue to experiment with legislative vetoes due to constitutional amendments, occasional evasion of judicial decisions, and unlitigated statutes and practices.[8] Analyzing these developments has descriptive, doctrinal, and normative payoffs.

Descriptively, this Article underscores that the practice of state constitutional structure is negotiated, evolving, and complex. State-level actors have neither followed federal practice nor remained static in their own arrangements. And the state legislative veto is a variegated category of mechanisms, not a carbon copy of the federal archetype. State legislative interest in legislative vetoes has increased recently, both

[2] *See* Hans A. Linde, *The State and the Federal Courts in Governance: Vive La Différence!*, 46 Wm. & Mary L. Rev. 1273, 1273–74, 1276–82 (2005) (discussing the differences between state and federal courts, and the distinctive role of state courts); Brennan, *supra* note 1, at 491.

[3] *See, e.g.*, Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 72 Duke L.J. 545 (2023) (discussing the distinctive features and aims of the separation of powers in state constitutions); Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 Colum. L. Rev. 1855, 1857–58 (2023) (identifying and endorsing state-centered approaches to rights adjudication).

[4] Sutton, *supra* note 1, at 8.

[5] *Id.* at 1.

[6] 462 U.S. 919, 928 (1983).

[7] *See* L. Harold Levinson, *The Decline of the Legislative Veto: Federal/State Comparisons and Interactions*, 17 Publius: J. Federalism 115, 124–26 (1987) (tracing state court decisions regarding the legislative veto); *see infra* Part II.

[8] For a study of the rise and tallies of state legislative vetoes, see Derek Clinger & Miriam Seifter, Unpacking State Legislative Vetoes 9 (2023).

as a response to the COVID-19 pandemic[9] and as the fruition of more longstanding deregulatory efforts.[10] In the most concerning versions, the legislative veto aligns with antidemocratic tactics seen elsewhere in state legislatures, and may become a way for an entrenched (and often gerrymandered) legislative leadership to consolidate its power.[11]

Today, legislative vetoes can play a consequential role in state governance. Consider a few examples. In Wisconsin, the legislature's Joint Committee for the Review of Administrative Rules has come to wield strong transsubstantive influence. Although the committee formally relies upon a statutory power to "suspend" agency decisions,[12] and although state case law has held that an indefinite suspension would be unconstitutional,[13] the committee has leveraged the timing of suspensions to operate as a functional veto power on topics from K-12 vaccination requirements[14] to elections[15] to "conversion therapy"[16] to short-term

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9 Numerous states added new, subject-specific legislative veto powers in response to the pandemic. *See, e.g.*, 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, 24–25 (2023) (discussing developments including the creation of special state legislative commissions to oversee emergency response activities, and legislative authority to act by concurrent resolution to terminate a state of emergency or rescind orders from governors and state health officials).

10 The American Legislative Exchange Council has been active in this effort. *See, e.g.*, *Expedited Suspension and Legislative Repeal of Harmful Rules Act*, Am. Legis. Exch. Council (Aug. 9, 2020), https://alec.org/model-policy/expedited-suspension-and-legislative-repeal-of-harmful-rules-act [https://perma.cc/YM9Q-MZBW]. For the organization's discussion of related efforts, see Lee Schalk, *ALEC Leads on Regulatory Reform*, Am. Legis. Exch. Council (July 17, 2020), https://alec.org/article/alec-leads-on-regulatory-reform [https://perma.cc/XD58-LEDR], and Gretchen Baldau & Jakob Haws, *States Removing Regulatory Roadblocks*, Am. Legis. Exch. Council (Aug. 18, 2022), https://alec.org/article/states-removing-regulatory-roadblocks [https://perma.cc/9C5W-X9AN].

11 For a discussion of antidemocratic action in state legislatures, see, for example, Michael Wines, *If Tennessee's Legislature Looks Broken, It's Not Alone*, N.Y. Times (Apr. 14, 2023), https://www.nytimes.com/2023/04/13/us/tennessee-house-republicans.html [https://perma.cc/MX6D-ACTU]; Miriam Seifter, *Countermajoritarian Legislatures*, 121 Colum. L. Rev. 1733, 1735 (2021) [hereinafter Seifter, *Countermajoritarian*]; Jacob M. Grumbach, Laboratories Against Democracy (2022).

12 Wis. Stat. § 227.26(im) (2024).

13 *See* SEIU v. Vos, 946 N.W.2d 35, 58–59 (Wis. 2020).

14 Molly Beck, *Republicans Blocked a Meningitis Vaccine Requirement for 7th Graders. What's Behind the Decision and What It Means for Parents*, Milwaukee J. Sentinel (Mar. 13, 2023, 6:59 PM), https://www.jsonline.com/story/news/politics/2023/03/09/wisconsin-republicans-block-7th-grade-meningitis-vaccine-requirement/69986756007 [https://perma.cc/BCV2-5HA9].

15 Corrinne Hess, *Republican Legislators Suspend Election Rule Allowing Clerks to Fill in Missing Information on Absentee Ballot Envelopes*, Milwaukee J. Sentinel (July 21, 2022, 6:00 AM), https://www.jsonline.com/story/news/politics/elections/2022/07/21/wisconsin-republicans-suspend-rule-letting-clerks-fix-absentee-ballots/10108723002 [https://perma.cc/4JZ7-7CWE].

16 Mitchell Schmidt, *Assembly Republicans Continue Blocking State Board's Efforts to Ban 'Conversion Therapy' in Wisconsin*, Wis. State J. (Mar. 15, 2023), https://madison.com/news/

rental properties.[17] Indeed, the legislative veto has become a frequent and potent tool in recurring conflicts between the GOP-controlled legislature and Democratic governor, even though the veto's existence is invisible to most state residents.[18]

Wisconsin is a dramatic example, but it is not alone. A few years ago in Michigan, a rules-review committee controlled by a gerrymandered legislative majority leveraged its ability to delay rules to prevent the Secretary of State's proposed election-related rules from taking effect until after the 2022 election.[19] That occurred even though Michigan case law, too, deems a flat legislative veto unconstitutional.[20] In Illinois, the Joint Committee on Administrative Rules (JCAR) played an influential role in setting pandemic policy for the state, striking down an emergency rule from the state Department of Public Health that required masks in K-12 schools.[21] Years earlier, former Governor Rod Blagojevich's impeachment and conviction was based in part on his resistance to a JCAR veto of a Medicaid rule.[22] In Pennsylvania, the legislature attempted a joint resolution to end the governor's COVID-19

local/govt-and-politics/assembly-republicans-continue-blocking-state-boards-efforts-to-ban-conversion-therapy-in-wisconsin/article_d90c2134-988d-5c9c-aedf-b654b72673fa.html [https://perma.cc/MC5C-4RXB].

17 Ali Teske, *Panel Suspends Rule Regulating Pool Standards at Wisconsin Rental Properties*, Wis. L.J. (May 4, 2022), https://wislawjournal.com/2022/05/04/panel-suspends-rule-regulating-pool-standards-at-wisconsin-rental-properties [https://perma.cc/38AD-FNAV].

18 While this Article was in production, the Wisconsin Supreme Court decided *Evers v. Marklein*, 8 N.W.3d 395 (Wis. 2024), holding unconstitutional a legislative veto over executive branch spending decisions. The *Marklein* decision does not directly address the JCAR veto discussed above, which awaits further litigation. *See* Order, Evers v. Marklein, No. 2023AP2020-OA (Wis. July 5, 2024) (directing parties to brief whether the court should grant review of that issue). For further discussion of *Marklein*, see *infra* text accompanying notes 66, 91.

19 *See* Beth LeBlanc, *Benson's Bid to Make Permanent Absentee Voter Rules Draws Opposition*, Detroit News (Nov. 28, 2021, 11:30 PM), https://www.detroitnews.com/story/news/politics/2021/11/28/jocelyn-benson-permanent-absentee-voter-rules-michigan-draws-opposition/8641586002 [https://perma.cc/VBJ5-VLDC] (recounting Republican opposition to the proposed rules).

20 *See* Blank v. Dep't of Corr., 611 N.W.2d 530, 535–36 (Mich. 2000).

21 *See* Joint Committee on Administrative Rules, Ill. Gen. Assembly, *February 15, 2022 Meeting Minutes* 5, https://www.ilga.gov/commission/jcar/Minutes/20220215_February%2015,%202022.pdf [https://perma.cc/9RPX-665G] (considering emergency rules issued by the Illinois Department of Health titled "Control of Communicable Diseases"); *see also* Andrew Adams, *Mask Mandate for Illinois Schools Rejected by State Legislative Oversight Committee*, State J. Reg. (Feb. 17, 2022, 8:31 AM), https://www.sj-r.com/story/news/politics/state/2022/02/15/illinois-school-mask-mandate-rejected-legislative-committee/6801441001 [https://perma.cc/BU6S-4B5H].

22 *See generally* Marc D. Falkoff, *The Legislative Veto in Illinois: Why JCAR Review of Agency Rulemaking Is Unconstitutional*, 47 Loy. U. Chi. L.J. 1055, 1059 (2016) (highlighting the constitutional concerns raised by the legislative veto and Governor Blagojevich's refusal to recognize the JCAR's authority to suspend or prohibit rules).

emergency declaration, was rebuffed by the state supreme court, and then succeeded in securing constitutional amendments to authorize such resolutions.[23] Even when a veto is on less salient topics—like when Connecticut's veto process required a rewrite of standards for honey and maple syrup producers,[24] or when the New Jersey legislature rejected changes to civil service exams[25]—it can form an important channel of state-level power, and in turn, an important site in national policymaking.[26]

Doctrinally, this Article reveals that state courts have already begun to develop a jurisprudence of their own. Nearly all states to consider the question have answered that strong-form legislative vetoes are unconstitutional, but they have not generally followed *Chadha*'s reasoning in lockstep.[27] Instead of simply likening committee vetoes to lawmaking that requires bicameralism and presentment, state courts have relied on alternative or additional theories rooted in their understanding of the text and structure of state constitutions, often attentive to context and practical consequences.[28] The differences in the state and federal case law are especially intriguing for state constitutionalism given that, at least on the surface, the most relevant constitutional provisions—tripartite structure and bicameralism and presentment requirements—are present in both the state and federal documents.

Normatively, this Article argues that the state decisions offer a generally attractive view of state constitutionalism. For one, to the extent they interpret provisions similar to those in the federal constitution, they resonate with Justice Goodwin Liu's vision of state courts serving as sources of interpretive pluralism on common questions.[29] Indeed, they show why the oft-criticized *Chadha* decision might be right for different reasons—due to representational deficits rather than power

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23 *See infra* Section II.C.

24 *See Regulation – 2021-007B*, Conn. Gen. Assembly, https://www.cga.ct.gov/aspx/CGARegulations/CGARegulations.aspx?Yr=2023&Reg=2021-007&Amd=B [https://perma.cc/MCS9-L27R].

25 *See* Commc'ns Workers of America v. N.J. Civ. Serv. Comm'n, 191 A.3d 643, 648–50 (N.J. 2018).

26 *See, e.g.*, Michael Wines, *As Washington Stews, State Legislatures Increasingly Shape American Politics*, N.Y. Times (Aug. 29, 2021), https://www.nytimes.com/2021/08/29/us/state-legislatures-voting-gridlock.html [https://perma.cc/CT5U-2TE8] (collecting examples).

27 *See* Clinger & Seifter, *supra* note 8, at 26–30 (describing state court decisions involving strong-form legislative vetoes).

28 *See infra* Part II.

29 *Cf.* Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. Rev. 1307, 1312 (2017) ("This redundancy in interpretive authority—whereby state courts and federal courts independently construe the guarantees that their respective constitutions have in common—is one important way that our system of government channels disagreement in our diverse democracy.").

definitions alone. And such representational deficits are especially problematic under state constitutions, which go further than the federal Constitution in expressing their commitment to democracy. The state democratic commitment is incompatible with statutes that empower mere committees or legislators to veto executive action.

Understanding state case law on legislative vetoes remains important today. Many states have not yet considered the constitutional question, and six states have amended their constitutions to authorize some form of legislative veto after adverse court decisions, leaving open questions about how to interpret those amendments.[30] Moreover, the fluid nature of state lawmaking means that even states with precedent against legislative vetoes may still see new variations that require adjudication. For all of these reasons, a theory of the state constitutional status of legislative vetoes has value.

Part I begins by chronicling the rise, evolution, and variety of state legislative vetoes. Drawing on recent coauthored work, the discussion highlights the similarities and differences among state mechanisms as well as a culture of frequent revision. It also flags aspects of some state mechanisms unfamiliar to the federal dialogue, including legislative vetoes that can rescind already-operative regulations, that confer decisionmaking power to a few individuals within a legislature, and that allow legislative committees to block executive branch expenditure of already appropriated funds.

Turning from practice to doctrine, Part II analyzes the legislative veto's journey through state courts. On the surface, the jurisprudence might seem to be an example of state courts lockstepping with federal law. But a closer look reveals that, rather than echoing *Chadha*'s particular formalism,[31] most state courts have based their holdings on distinctive aspects of state constitutions, of state legislative vetoes, or both. This jurisprudence thus stands in opposition to recent state case law (and criticisms thereof) that inaptly parrot federal tropes.[32] Most compellingly, the state jurisprudence contains the seeds of a framework

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[30] *See infra* Part I.

[31] *See, e.g.*, E. Donald Elliott, I.N.S. v. Chadha*: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 Sup. Ct. Rev. 125, 126 ("Chief Justice Burger's formalistic opinion for the Court . . . came as a shock."); Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 Cornell L. Rev. 430, 468 (1987) (collecting literature).

[32] *Cf.* Bulman-Pozen & Seifter, *supra* note 3 (describing "methodological lockstepping"); Aaron Saiger, *Derailing the Deference Lockstep*, 102 B.U. L. Rev. 1879, 1888 (2022) (arguing that states should be skeptical before embracing federal critiques of administrative deference that are rooted in understandings of federal judicial power and federal administrative law).

that attends not only to interbranch limits, but also to the state constitutional democracy principle.

Part III defends this state-centered approach, and especially the democratic focus of some state jurisprudence. It explores what factors make a state legislative veto mechanism unconstitutional, and what attributes put related legislative oversight mechanisms on firmer footing. It also explains how principles of democracy can guide the design of legislative veto schemes in states that have passed constitutional amendments to authorize them.

I
The Rise and Design of Legislative Vetoes

A. Origins and Evolution

Legislative vetoes proliferated in federal legislation in the 1970s,[33] consistent with the deregulatory (or regulatory reform) zeitgeist of the time.[34] If the problem was too much regulation or government by bureaucracy, the argument went, the solution was greater legislative control.[35] Although a proposal to amend the APA to include an across-the-board legislative veto failed,[36] statute-specific vetoes multiplied rapidly.[37] The *Chadha* decision, as described further below, brought the federal legislative veto to an abrupt end.

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33 *See* Barbara Hinkson Craig, Chadha: The Story of an Epic Constitutional Struggle 36 (1988) (describing the "explosive growth" of legislative vetoes). These were not the very first legislative vetoes; congressional review of executive action has precursors dating to colonial days, *see* Michael J. Berry, The Modern Legislative Veto: Macropolitical Conflict and the Legacy of Chadha 20 (2016), and dispositive legislative vetoes were enacted as part of 1930s reorganization legislation, *see id.* at 22–24.

34 Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1369–70 (1977) (observing that "attacks on government have been renewed with special fervor," and that, accordingly, the legislative veto was "receiving special attention"); Craig, *supra* note 33, at 43–44 (describing dynamics underlying accounts of "bureaucratic excesses").

35 Antonin Scalia, *The Legislative Veto: A False Remedy for System Overload*, Reg.: AEI J. on Gov't & Soc'y (Dec. 6, 1979), at 19, https://www.aei.org/publication/the-legislative-veto-a-false-remedy-for-system-overload [https://perma.cc/NM2M-CWX3] (stating that "[t]he current movement for regulatory reform has given new popularity to the legislative veto," and describing—but questioning—veto proposals' purpose as "a means of 'getting control of the bureaucracy'").

36 *See* Bruff & Gellhorn, *supra* note 34, at 1370.

37 *See* Irwin B. Arieff, *Congress and Government 1980: Overview*, CG Almanac Online Edition (1981) https://library.cqpress.com/cqalmanac/document.php?id=cqal80-1174791 [https://perma.cc/U7BW-PDVS].

State legislative vetoes followed a parallel track through the time of the *Chadha* decision.[38] Aside from adoption in Kansas and Michigan in the 1930s and 1940s,[39] the bulk of uptake came in the deregulatory era of the 1970s and 1980s.[40] In 1978, the National Conference of State Legislatures "strongly recommend[ed]" that state legislatures adopt legislative review of agency rules in a form "as strong as the constitution of each state allows," a move NCSL viewed as important to legislatures "reasserting their legislative prerogatives."[41] But that view did not last long. As Harold Levinson has observed, even "[b]y early 1981 . . . a different mood was apparent."[42] When preparing the prominent 1981 revision of the Model State Administrative Procedure Act, "the Commissioners on Uniform Laws . . . rejected proposals to incorporate a legislative veto system," and the final version included only a burden-shifting power.[43] A few state courts had also declared their state legislative vetoes unconstitutional prior to *Chadha*, making *Chadha* "consistent with a trend that was already well under way in the states."[44]

The *Chadha* decision itself—seismic at the time,[45] one of the most significant constitutional decisions of its era,[46] and still a staple of administrative law casebooks[47]—changed the federal landscape by

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[38] For prior studies of state legislative vetoes, see 53 The Council of State Governments, The Book of the States, 95–102 (Audrey S. Francis et al. eds., 21st ed. 2021); Lyke Thompson et al., Checks and Balances in Action: Legislative Oversight Across the States (Levin Ctr. Wayne L. 2019); Berry, *supra* note 33; Falkoff, *supra* note 22, at 1084–91; Edward H. Stiglitz, *Constitutional Folk Theories as a Guide to Constitutional Values? The Case of the Legislative Veto*, 48 J. Legal Stud. 45 (2019); Jerry L. Anderson & Christopher Poynor, *A Constitutional and Empirical Analysis of Iowa's Administrative Rules Review Committee Procedure*, 61 Drake L. Rev. 1, 16–25 (2012); Jason A. Schwartz, N.Y.U. Sch. of L. Inst. for Pol'y Integrity, 52 Experiments with Regulatory Review: The Political and Economic Inputs into State Rulemaking (2010); Levinson, *supra* note 7.

[39] *See* Levinson, *supra* note 7, at 118–20; 1939 Kan. Sess. Laws ch. 308.

[40] Michael Berry, *Empowering Legislatures: The Politics of Legislative Veto Oversight Among the U.S. States*, 27 J. Legis. Stud. 418, 421(2021); Levinson, *supra* note 7, at 118–20.

[41] Nat'l Conf. of State Legislatures, Restoring the Balance 9 (1978).

[42] Levinson, *supra* note 7, at 131.

[43] *Id.* at 131.

[44] *Id.* at 128.

[45] That is how contemporary commentators captured it. *See, e.g.*, Mark L. Rosenberg, *The World After Chadha: Can Congress Still Control the Agencies?*, 30 Fed. Bar News & J. 395, 395 (1983) ("The Supreme Court's decision . . . sent shock waves through the Washington community.").

[46] Craig, *supra* note 33.

[47] *See, e.g.*, Kristin E. Hickman et al., Federal Administrative Law, Cases and Materials (4th ed. 2023); Gary Lawson, Federal Administrative Law 115–24 (6th ed. 2012); Stephen G. Breyer et al., Administrative Law and Regulatory Policy: Problems, Text, and Cases 91–97 (9th ed. 2022); Todd D. Rakoff et al., Gellhorn and Byse's Administrative Law, Cases and Comments 881–93 (13th ed. 2023). For casebook discussion extending to state legislative vetoes, see Michael Asimow & Ronald M. Levin, State and Federal Administrative Law 483–88 (5th ed. 2020).

declaring the legislative veto unconstitutional, but left the states free to experiment. The case involved Congress's one-house veto of an Attorney General decision that would have suspended certain individuals' deportations.[48] Deep dives into *Chadha* are available elsewhere;[49] for purposes of this Article, four points help frame the contrast with state-level legislative vetoes and related state jurisprudence.

First, the *Chadha* decision was part of the Court's formalist turn, relying upon the syllogism that because Congress cannot make law without bicameralism and presentment, and because the veto was akin to lawmaking, it failed constitutional scrutiny.[50] Second, while it is possible to overstate the "conventional wisdom"[51] that *Chadha* had significant practical effect,[52] the *Chadha* decision was sweeping in its reach: It rejected wholly the one-house veto, and a decision soon after rejected the two-house veto.[53] Third, because *Chadha* focused on these federal exemplars, it did not evaluate the extensive array of variations now in play in the states.[54] And fourth, decades of commentary before and after *Chadha*—debating the legislative veto along criteria of democracy, the rule of law, and good government—has similarly been stunted by inattention to state variations.

B. *The Variety of State Legislative Vetoes*

So what did states come up with? This Section shows that legislative vetoes are a variegated category, not a single mechanism, and that their design in the states has not been static. States have structured their legislative vetoes and related tools in a range of ways, typically unlike the arrangement at issue in *Chadha*. States have also frequently revisited and revised those designs. Building on a recent coauthored survey of legislative vetoes, this Section offers highlights on similarities across states, key differences among states and between state and federal models, and changes over time.

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48 INS v. Chadha, 462 U.S. 919, 923 (1983).

49 *See* Craig, *supra* note 33; Elliott, *supra* note 31; Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 Harv. J. on Legis. 1 (1984).

50 *See Chadha*, 462 U.S. at 952–59; Elliott, *supra* note 31.

51 Curtis A. Bradley, *Reassessing the Legislative Veto: The Statutory President, Foreign Affairs, and Congressional Workarounds*, 13 J. Legal Analysis 439, 449 (2021).

52 *See* Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 L. & Contemp. Probs. 273, 273 (1993) (arguing that *Chadha* had a limited practical effect); Bradley, *supra* note 51, at 457 (describing how Congress responded to *Chadha* with alternative mechanisms).

53 *See* Process Gas Consumers Grp. v. Consumer Energy Council of Am., 463 U.S. 1216 (1983).

54 One exception lies in footnote 9 of the opinion, which blesses the "report and wait" model that delays the effective date of administrative rules but does not include a veto power. *See Chadha*, 462 U.S. at 935 n.9 (citing Sibbach v. Wilson, 312 U.S. 1 (1941)).

1. The Big Picture

Much of the activity in state legislative vetoes has occurred in the context of agency rulemaking. In our recent survey *Unpacking State Legislative Vetoes*, Derek Clinger and I identify fifteen states as currently authorizing a strong-form legislative veto power in the rulemaking context, allowing a legislative entity to reject a rule that the executive branch had approved.[55] Seven of these states use a two-house veto, which requires the agreement of both legislative chambers to veto a rule.[56] The other eight are committee veto states, which allow a legislative committee to veto a rule.[57] Six of the fifteen states have amended their constitutions specifically to authorize legislative vetoes,[58] typically in response to adverse judicial decisions.[59] In the others, as discussed in Part II, the veto's constitutionality is in doubt.[60]

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55 These states are Arkansas, Connecticut, Georgia, Idaho, Illinois, Iowa, Louisiana, Montana, Nevada, New Jersey, North Carolina, North Dakota, Ohio, South Dakota, and Wisconsin. *See* Clinger & Seifter, *supra* note 8 (citing Ark. Const. art. 5, § 42; Ark. Code Ann. § 10-3-309; Conn. Const. art. 2; Ga. Code § 50-13-4(f); Idaho Const. art. III, § 29; Idaho Code § 67-5291; 5 Ill. Comp. Stat. CH 100/5-115; Iowa Const. art. III, § 40; Iowa Code § 17A.8(9); La. Stat. Ann. § 49:969; Mont. Code Ann. § 2-4-412(1)(b); Nev. Const. art. 3, § 1(2); Nev. Rev. Stat. §§ 233B.060(2), 233B.067; N.J. Const. art V, § 4, par. 6; N.C. Gen. Stat. §§ 143B-30.1; N.D. Cent. Code § 28-32-18; Ohio Rev. Code Ann. § 106.02; S.D. Codified Laws §§ 1-26-4.9, 1-26-4.7 (reversion procedure), 1-26-4.3; Wis. Stat. § 227.19(5)(dm)).

56 These states are Georgia, Idaho, Iowa, Louisiana, Montana, New Jersey, and Ohio. Clinger & Seifter, *supra* note 8, at 10. No states currently provide for a one-house veto, though at least two states have done so in the past. *See* Falkoff, *supra* note 22, at 1084 (describing prior one-house vetoes in Oklahoma and Pennsylvania).

57 These committees consist of Arkansas's Administrative Rules Subcommittee of the Arkansas Legislative Council, Connecticut's Legislative Regulation Review Committee, Illinois's Joint Committee on Administrative Rules, Nevada's Legislative Commission and its Subcommittee to Review Regulations, North Carolina's Rules Review Commission, North Dakota's Administrative Rules Committee, and South Dakota's Interim Rules Review Committee. Clinger & Seifter, *supra* note 8, at 12 n.45.

58 These states are Arkansas, Connecticut, Idaho, Iowa, Nevada, and New Jersey. Ark. Const. art. 5, § 42; Conn. Const. art. 2; Idaho Const. art. III, § 29; Iowa Const. art. III, § 40; Nev. Const. art. 3, § 1(2); N.J. Const. art V, § 4, par. 6. Two additional states, South Dakota and Michigan, expressly authorize suspension of rules between legislative sessions. S.D. Const., art. III, § 30; Mich. Const. art. IV, § 37. The South Dakota Legislature's sessions last only forty working days in odd-numbered years and thirty-five working days in even-numbered years, meaning that the legislature is most often in recess or in between sessions. Clinger & Seifter, *supra* note 8, at 15 n.57. The contrast between those states demonstrates the need for state-specific context in interpreting such powers: South Dakota's legislature is typically in recess or between sessions, while Michigan's meets throughout the year, see Mich. Comp. Laws § 24.245a, making South Dakota's suspension power a more sustained grant of constitutional authority in practice.

59 *See infra* Section II.C.

60 *See infra* Parts II and III.

A number of states authorize lesser legislative interventions into agency rulemaking. In nine states that lack strong-form vetoes[61] and six states that also have a strong-form veto,[62] legislative entities can temporarily delay or suspend a rule while the legislature considers legislation to block or amend it—a technique that sometimes can functionally achieve a veto. Other states allow legislative entities only to object to rules.[63] And eight states authorize only advisory legislative oversight of agency rules[64] or do not elaborate a formal oversight role.[65]

The rulemaking context has formed the core of legislative veto activity, but states have attempted other types of legislative vetoes as well. Some states have tried to give legislative entities a strong-form veto power to reject the expenditure of appropriated funds.[66] State courts have emphatically rejected most of those efforts. Another area of legislative veto activity pertains to emergencies; during the COVID-19 pandemic, some state legislatures authorized concurrent resolutions or legislative committee votes to end emergency declarations.[67]

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61 Ala. Code § 41-22-23(b)(4); Mich. Comp. Laws § 24.245a(7); Minn. Stat. § 14.126; N.H. Rev. Stat. Ann. § 541-A:13(VII)(b)-(c); Okla. Stat. tit. 75 § 308(A); 71 Pa. Cons. Stat. § 745.7; S.C. Code Ann. § 1-23-120(D); Tenn. Code Ann. § 4-5-215; Va. Code Ann. §§ 2.2-4014, 2.2-4015.

62 Iowa Code §§ 17A.4(8), 17A.8(9); Mont. Code Ann. § 2-4-305(9); N.C. Gen. Stat. § 150B-21.3(b1)-(b2) (giving the suspension power to the legislature instead of the Rules Review Commission); S.D. Const. art. 3, § 30; S.D. Codified Laws § 1-26-38. In addition, North Dakota has a contingency plan that will authorize the legislature to temporarily suspend rules if the state supreme court strikes down the legislative veto. Clinger & Seifter, *supra* note 8, at 14 (citing 2001 N.D. Laws, Ch. 293, §§ 13, 36).

63 *See* Clinger & Seifter, *supra* note 8, at 21–23 (describing states with legislative objection requirements and legislative objections which shift the burden of proof to the agency during legal action).

64 These states are Alaska, Arizona, Delaware, Kansas, Maine, Missouri, Nebraska, New York, Oregon, and Texas. *See* Clinger & Seifter, *supra* note 8, at 23–24 (citing Alaska Stat. § 24.05.182; Ariz. Rev. Stat. §§ 41-1047, 41-1048; Del. Code. Ann. tit. 29 § 10212; Kan. Stat. Ann. § 77-436(c)-(d); Me. Stat. tit. 5, § 8072; Neb. Rev. Stat. §§ 84-907.10, 84-948; N.Y. Legis. Law §§ 87-88; Tex. Gov't Code Ann. § 2001.032). Four of these states—Alaska, Kansas, Missouri, and Oregon—previously had statutes that authorized legislative vetoes of agency rules, but each state's supreme court struck down the relevant statute. *Id.* at 25 n.106 (citing State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980); State *ex rel.* Stephan v. Kan. House of Representatives, 687 P.2d 622 (Kan. 1984); Mo. Coal. for Env't v. Joint Comm. on Admin. Rules, 948 S.W.2d 125 (Mo. 1997); Gilliam Cnty. v. Dep't of Env't Quality, 849 P.2d 500 (Or. 1993), *rev'd on other grounds sub nom.*, Or. Waste Sys., Inc. v. Dep't of Env't Quality, 511 U.S. 93 (1994), *reaffirmed on remand*, 876 P.2d 749 (Or. 1994)).

65 These states are California, Hawaii, Indiana, Massachusetts, Mississippi, New Mexico, and Rhode Island. *See* Clinger & Seifter, *supra* note 8, at 24.

66 *See, e.g.*, McInnish v. Riley, 925 So. 2d 174, 176 (Ala. 2005). Most recently, the Wisconsin Supreme Court held, in a 6-1 ruling, that "empowering a legislative committee to block the expenditure of appropriated funds exceeds the legislative power and intrudes upon the executive branch's authority to execute the law." Evers v. Marklein, 2024 WI 31, ¶ 20, 412 Wis. 2d 525, 551 (2024).

67 *See* Clinger & Seifter, *supra* note 8, at 38–41; Davis et al., *supra* note 9.

2. *Key Variables*

Not all of the fifteen strong-form legislative vetoes or nine additional suspension processes are crafted in the same way. I flag here key differences that are likely to affect legal and normative analysis.

First, and most important, the identity and composition of the legislative veto entity varies in ways that affect its representativeness. In eighteen of the twenty-four veto and suspension states, a committee alone wields the power.[68] As Parts II and III describe further, giving statewide authority to a small number of individuals who are neither chosen by a majority of the electorate nor responsible to someone who is raises distinctive concerns not present in *Chadha*.

Moreover, within those committees, states structure membership differently. All such committees ensure representation from both legislative chambers,[69] but they differ greatly in representation of legislative minority caucuses. Connecticut and Illinois laws require membership on the committees to be divided equally among the political parties,[70] while South Dakota and Iowa laws effectively prohibit supermajority membership from the same party.[71] In contrast, Arkansas, Nevada, North Carolina, and North Dakota do not require representation of the minority party on the veto committees.[72]

Second, states vary as to the scope of statewide power the veto confers. In the regulatory review context, some states allow only for

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68 These states are Alabama, Arkansas, Connecticut, Georgia, Illinois, Iowa, Michigan, Minnesota, Montana, Nevada, New Hampshire, North Carolina (subject to the caveat in note 44), North Dakota, Pennsylvania, South Carolina, South Dakota, Virginia, and Wisconsin. Clinger & Seifter, *supra* note 8, at 7 n.21.

69 These are joint committees either made up of members from both chambers or made up of members who have been appointed by a joint committee or by the leaders of both chambers.

70 Clinger & Seifter, *supra* note 8, at 7–8 (citing Conn. Gen. Stat. § 4-170; 25 Ill. Comp. Stat. 130/1-5(a)) and highlighting how Montana had a similar provision until recently: Mont. Code Ann. § 5-5-211).

71 *Id.* at 8 n.24 (citing Iowa Code § 17A.8; S.D. Codified Laws § 1-26-1.1).

72 While Nevada's majority and minority caucuses agreed to split membership evenly, the legislative minorities in Arkansas, North Carolina, and North Dakota have had little or no representation on the veto committees. *See Legislative Commission: Members*, Nev. Legislature (2021–2022), https://www.leg.state.nv.us/App/InterimCommittee/REL/Interim2021/Committee/1896/Members [https://perma.cc/7C62-FCZN]; *Legislative Commission's Subcommittee to Review Regulations: Members*, Nev. Legislature (2021–2022), https://www.leg.state.nv.us/App/InterimCommittee/REL/Interim2021/Committee/1925/Members [https://perma.cc/4JQ4-8URW]; *Administrative Rules Subcommittee: Roster*, Ark. Gen. Assembly (2021–2022), https://www.arkleg.state.ar.us/Committees/Detail?code=040&ddBienniumSession=2021%2F2021R [https://perma.cc/FRF6-8Q66]; *Administrative Rules Committee: Members*, N.D. Legislature (2021–2022), https://www.ndlegis.gov/assembly/67-2021/committees/interim/administrative-rules-committee [https://perma.cc/5Z2B-2DLY].

the veto of proposed rules, while most allow the veto (or suspension) of already operative rules.[73] This expands the veto power substantially, allowing the veto holder to pick and choose among potentially long-standing rules, each with reliance interests attached. Outside of the regulatory context, some states have authorized legislative entities to make narrow decisions, like approval or rejection of a particular building project,[74] while outlier Wisconsin has inserted legislative-committee vetoes into a wide array of executive branch decisions.[75]

Third, states vary as to the transparency of their legislative veto process. I bracket, initially, the fact that an average voter likely knows little about legislative vetoes or who wields them, such that the process is unlikely to be transparent in a way that translates to voter accountability.[76] Even for stakeholders inclined to follow along, states vary in the accessibility and predictability of their processes, including whether or not they provide publicly available information about the committee's substantive work and the timelines for its decisions.

On timelines, states vary as to the length of their decision-making process—and whether they establish a timeline at all. Among strong-form veto states, some identify a one- or two-month review period after which proposed rules take effect if not rejected by the committee; some states specify timelines but seem to make them extendable; and others have no specified timetable for committee action.[77]

The manipulable timing of suspensions is especially significant. The longer (or more malleable) the timing of a suspension, the more it can function like a strong-form veto. Most states have a relatively short delay period of weeks or months, but some states allow longer delays. The 2010 Model State Administrative Procedure Act delays a rule until adjournment of the subsequent regular legislative session unless the legislature adopts legislation to amend or disapprove the rule, which could last over a year.[78] Iowa has adopted this standard for its legislature's delay power, though the state's legislative sessions are relatively

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73 *See* Clinger & Seifter, *supra* note 8, at 9, 14, 18, 21, 23.

74 *See infra* Part II.

75 *See* Wis. Legis. Fiscal Bureau, Joint Committee on Finance: Informational Paper #78, at 25–36 app. V, https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2021/0078_joint_committee_on_finance_informational_paper_78.pdf [https://perma.cc/2PKY-PDPB] (listing 125 approval powers of the Joint Committee on Finance as of 2021).

76 *Cf.* David Schleicher, *Federalism and State Democracy*, 95 Tex. L. Rev. 763, 768 (2017); Miriam Seifter, *Gubernatorial Administration*, 131 Harv. L. Rev. 483, 500 (2017) (describing studies showing that because governors and presidents are more visible actors, people blame them for decisions they did not make or lack authority to make).

77 *See* Clinger & Seifter, *supra* note 8, at 12–14.

78 Revised Model State Admin. Proc. Act, § 703(d) (Unif. L. Comm'n 2010).

short.[79] Wisconsin is notable for having a suspension period that the statute says can be extended indefinitely.[80] As for public information, the rule review committees make varying levels of information available on their websites, from sparse notations to streaming or recorded meetings[81] to digestible summaries of committee actions.[82]

II
Legislative Vetoes in the Courts: A State-Centered Jurisprudence

This Part analyzes the journey of state legislative vetoes through state courts—over fifty cases in total. In so doing, it highlights distinctive state approaches to distribution of powers questions.

As noted, state court decisions bear a superficial resemblance to *Chadha* in that they have almost unanimously rejected strong-form legislative vetoes.[83] But there is more to the state jurisprudential story. Most state courts have not lockstepped with *Chadha*'s reasoning. State courts have relied in whole or in part upon different theories of the distribution of powers, of democracy, and of their state constitutional text. In addition, because states have presented their courts with more legislative-veto variants, states have had the opportunity to explore the boundaries of their tests and theories, creating a richer body of decisional law.

At the same time, the state experience emphasizes that state courts are often not the last word on a constitutional question. Some states have responded to adverse judicial rulings with constitutional amendments or statutory adjustments. And some legislative vetoes in practice exceed the limits that courts have set, reflecting a regime of underenforcement or outright law-flouting.[84]

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[79] Iowa Code § 17A.8; *see also* Iowa Code § 2.10 (establishing when legislators' per diem expenses end as the 100th calendar day in an even-numbered year and the 110th calendar day in an odd-numbered year). Iowa's legislature can also delay a rule for a separate seventy-day period to allow for more time to study the rule. Iowa Code § 17A.4(8).

[80] *See* Clinger & Seifter, *supra* note 8, at 14 n.51.

[81] *See, e.g.*, *ALC-Administrative Rules*, Ark. State Legislature, https://www.arkleg.state.ar.us/Committees/MeetingsPast?code=040&ddBienniumSession=2023%2F2023S1 [https://perma.cc/3HD8-NK3T].

[82] *See, e.g.*, *Administrative Rules Review Committee – Documents*, Iowa Legislature (Aug. 21, 2024, 9:08 PM), https://www.legis.iowa.gov/committees/meetings/documents?committee=705&ga=all&pubType=LU [https://perma.cc/NM3R-ZLXD].

[83] For earlier analyses of this pattern in state court decisions, see Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 Vand. L. Rev. 1167 (1999); Stiglitz, *supra* note 38.

[84] *See* Rossi, *supra* note 83, at 1212 (discussing courts' underenforcement practices).

Section II.A begins by describing methodologies in state legislative veto case law. It highlights that, rather than exclusively espouse the formalism associated with *Chadha*, most state courts consider the practical realities of legislative vetoes in some fashion. Section II.B teases out several different theories that states courts have pursued on the merits. Section II.C discusses state courts as part of an ongoing dialogue, identifying the states in which legislative veto decisions have been overridden by constitutional amendment, states in which adverse decisions prompted compliant revisions, and, in a few instances, states in which adverse decisions have been evaded or ignored.

A. Modes of Reasoning

To begin, state courts have typically not relied upon the formalist reasoning for which *Chadha* has received critique: that lawmaking has a set definition and that anything within that definition must follow the legislative process. Instead, the bulk of state court decisions are more attentive to the effects of a legislative veto, the underlying values it frustrates, or both.

First, many state court decisions consider the impact of the legislative veto on the operation of the state's government—an approach often associated with but not limited to functionalism. This approach is easiest to see in the cases that have held that even temporary delays, suspensions, or advisory processes may violate state constitutions. For example, the Kentucky Supreme Court invalidated a statute authorizing a legislative committee to suspend an agency rule for up to twenty-one months, because even though it was not designated as a veto power, its "practical effect" would thwart regulation and "preven[t] the executive from dealing with emergencies."[85] The Wisconsin Supreme Court has upheld the legislature's ability to temporarily suspend agency rules for a period of at least six months, but has also explained that an indefinite suspension would go too far in circumventing the full lawmaking process.[86] And the Arkansas Supreme Court rejected an ostensibly advisory oversight process (in which a legislative committee designated executive funding requests as consistent or inconsistent with legislative intent) on the ground that, in practice, the oversight was coercive: The

[85] Legis. Rsch. Comm'n By & Through Prather v. Brown, 664 S.W.2d 907, 918 (Ky. 1984).

[86] Martinez v. Dep't of Indus., Lab. and Hum. Rels., 478 N.W.2d 582, 587 (generally upholding a prior version of the temporary suspension power); SEIU, Loc. 1 v. Vos, 946 N.W.2d 35, 59 (Wis. 2020) ("Under *Martinez*, an endless suspension of rules could not stand; there exists at least some required end point after which bicameral passage and presentment to the governor must occur."); Mo. Coal. for Env't v. Joint Comm. on Admin. Rules, 948 S.W.2d 125 (Mo. 1997); Opinion of the Justices, 431 A.2d 783, 789 (N.H. 1981); *Martinez*, 478 N.W.2d at 582; *SEIU, Loc. 1*, 946 N.W.2d at 42.

Department of Finance and Administration had "disapproved of any request that the committee stamped unfavorable."[87]

Even as to strong-form legislative vetoes, state courts have inquired into practical effects or burdens rather than relying on definitions alone. The Kansas Supreme Court, for example, has applied its overarching separation of powers test regarding "interference" between the branches to conclude that a legislative veto of rulemaking excessively arrogated power to the legislature over executive discretion.[88] The New Jersey Supreme Court, albeit in decisions now mooted by constitutional amendment, rejected the intrusiveness of strong-form vetoes[89] but made exceptions for narrow veto powers that posed minimal intrusion.[90]

In addition, even when state courts draw on more formalist ideas about the role of each branch, they have not shied away from also discussing the values their decisions serve rather than relying on definitions or categories alone. Several states rejecting legislative-committee vetoes have expressed concern about the inability of mere committees to represent the "legislative will"[91] or the likelihood that they would be susceptible to special-interest influence.[92]

B. State-Centered Theories

At least twenty states have adverse precedent invalidating legislative vetoes of regulations or spending.[93] In contrast, only one state

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87 Chaffin v. Ark. Game and Fish Comm'n, 757 S.W.2d 950, 956 (Ark. 1988).

88 State *ex rel.* Stephan v. Kan. House of Representatives, 687 P.2d 622, 635 (Kan. 1984).

89 Gen. Assembly v. Byrne, 448 A.2d 438, 444 (N.J. 1982).

90 Enourato v. New Jersey Bldg. Auth., 448 A.2d 449, 451 (N.J. 1982) (reasoning that a process that allowed a legislative veto of leases entered into by the executive branch that required continuing budget appropriations was limited in scope and did not empower the legislature to disrupt exclusive executive branch functions).

91 *Opinion of the Justices*, 431 A.2d at 786, 788; *see also* Evers v. Marklein, 412 Wis.2d 525, 551 (Wis. 2024) ("The veto provisions undermine democratic governance by circumventing the lawmaking process—which requires the participation of the entire legislature—and punting to a committee the controversial and therefore politically costly positions legislators would otherwise need to take.").

92 State *ex rel.* Meadows v. Hechler, 462 S.E.2d 586, 592 (W. Va. 1995).

93 These states are Alabama, Alaska, Arkansas, Colorado, Kansas, Kentucky, Massachusetts, Michigan, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, West Virginia, and Wisconsin. *See* Opinion of the Justices, 892 So. 2d 332 (Ala. 2004); State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980); Chaffin v. Ark. Game and Fish Comm'n, 757 S.W.2d 950 (Ark. 1988); Anderson v. Lamm, 579 P.2d 620 (Colo. 1978); *Stephan*, 687 P.2d at 622; Legis. Rsch. Comm'n By & Through Prather v. Brown, 664 S.W.2d 907 (Ky. 1984); Opinion of the Justices to the Senate, 493 N.E.2d 859 (Mass. 1986); Blank v. Dep't of Corr., 611 N.W.2d 530 (Mich. 2000); Alexander v. State By & Through Allain, 441 So. 2d 1329 (Miss. 1983); Mo. Coal. for Env't v. Joint Comm. on Admin. Rules, 948 S.W.2d 125, 128 (Mo. 1997), *as modified on denial of reh'g* (Feb. 25, 1997); MEA-MFT v. McCulloch, 291 P.3d 1075 (Mont. 2012); People v. Tremaine, 168 N.E. 817 (N.Y. 1929); Advisory Opinion *In re* Separation of

court has directly upheld the constitutionality of a strong-form legislative veto of agency rules.[94] A few other cases have either signaled possible approval of a strong-form veto or allowed exceptions for veto-like schemes that would have minimal impact unless the executive branch assented.[95]

This Section teases out the state-centered theories at work in these opinions. Several ideas recur: that the separation of powers and bicameralism and presentment are not ends in themselves, but ways of ensuring accountable government; that a legislative veto intrudes too far into executive or judicial discretion; and that a legislative veto is inconsistent with specific textual provisions in some state constitutions that provide more limited forms of legislative oversight.

1. Expanding on Legislative Accountability

Like *Chadha*, a number of state court decisions reject the notion that legislators can bind the state without bicameralism and presentment. In explicating this requirement and analyzing the statutes that violate it, however, state courts have expanded more than *Chadha* did on the underlying principles at stake. These state decisions explain the problems that would arise from statewide action by less than the full legislature and are attentive to the need for statewide decisions to be made by an actor accountable to the majority of the people.

In particular, several courts have rejected or expressed skepticism of vetoes on the ground that the veto power was vested in an entity too small to hold such significant statewide power. The New Hampshire

Powers, 295 S.E.2d 589 (N.C. 1982); N.D. Legis. Assembly v. Burgum, 916 N.W.2d 83, 105 (N.D. 2018); Fent v. Contingency Rev. Bd., 163 P.3d 512 (Okla. 2007); *Opinion of the Justices*, 431 A.2d at 783; *Byrne*, 448 A.2d at 438; Gilliam Cnty. v. Dep't of Env't Quality, 849 P.2d 500 (Or. 1993), *rev'd sub nom.* Or. Waste Sys., Inc. v. Dep't of Env't Quality, 511 U.S. 93, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994); State *ex rel.* McLeod v. McInnis, 295 S.E.2d 633 (S.C. 1982); State *ex rel.* Barker v. Manchin, 279 S.E.2d 622 (W. Va. 1981); Evers v. Marklein, 412 Wis.2d 525 (Wis. 2024). At least one other state has indicated that strong-form legislative vetoes would be unconstitutional. *See* Carmel Valley Fire Prot. Dist. v. State, 20 P.3d 533 (Cal. 2001).

[94] *See* Mead v. Arnell, 791 P.2d 410 (Idaho 1990) (upholding a statute that allowed the legislature to veto agency rules contrary to legislative intent with a concurrent resolution but finding that the legislature failed to properly invoke its legislative veto authority by failing to state that the rule was contrary to legislative intent); Idaho State Athletic Comm'n By & Through Stoddard v. Off. of the Admin. Rules Coordinator, 542 P.3d 718, 734 (Idaho 2024) (citing *Mead*, 791 P.2d at 414, 418).

[95] *See* Albany Surgical, P.C. v. Ga. Dep't of Cmty. Health, 278 Ga. 366, 368 (2004) (rejecting a challenge to the constitutionality of agency rulemaking and favorably citing the Idaho Supreme Court's reasoning in *Mead*); Watrous v. Golden Chamber of Commerce, 218 P.2d 498, 507 (Colo. 1950) (approving of a joint resolution in the appropriations context where the ultimate decisions also required the governor's input).

Supreme Court, while concluding that a legislative veto is "not per se unconstitutional,"[96] rejected an arrangement in which the power would be wielded by a quorum of members of house and senate standing committees. The court explained that, among other defects, "[t]his wholesale shifting of legislative power to such small groups in either house cannot fairly be said to represent the 'legislative will.'"[97] The West Virginia Supreme Court worried repeatedly about such an outsized role for "a small number of Committee members,"[98] and the "political" decision-making that would ensue.[99] The Kentucky Supreme Court also objected to a veto power being put "into the hands" of a committee of only seven legislators or a subcommittee thereof.[100] The supreme courts of South Carolina and Montana and the New York Court of Appeals have more broadly treated as axiomatic that legislative committees or their leaders cannot act on the state's behalf.[101] The Alabama Supreme Court found it especially concerning that a legislative committee could reach final decisions without supervision from the executive branch or the participation of the full legislature.[102]

In all of these cases, state courts go beyond rote invocations of the idea that lawmaking requires a legislative process. Rather, they understand state constitutions to require a legislative process that is accountable to the people of the state. The problem with legislative vetoes, and with committee vetoes in particular, is that they directly undermine the state constitutional commitment to legislative accountability. As the Kentucky Supreme Court put it, the purpose of that state's constitution was to rein in the legislature, and "no one could argue" that "a small percentage of the two houses of the General Assembly" could wield the legislative power.[103]

Finally, a few state courts have raised accountability concerns in a different way: They have drawn conclusions from failed efforts to amend state constitutions to authorize legislative vetoes. In Michigan, Missouri, and Alaska, courts have ruled that popular rejection of

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96 *Opinion of the Justices*, 431 A.2d at 788.

97 *Id.*

98 *Barker*, 279 S.E.2d at 632, 635.

99 *Id.* at 632 n.5 (quoting Schubert, *Legislative Adjudication of Administrative Legislation*, 7 J. Pub. L. 134, 157–58 (1958)).

100 *Legislative Rsch. Comm'n*, 664 S.W.2d at 918.

101 *See* MEA-MFT v. McCulloch, 291 P.3d 1075 (Mont. 2012); People v. Tremaine, 168 N.E. 817 (N.Y. 1929); State *ex rel.* McLeod v. McInnis, 278 S.C. 307, 295 S.E.2d 633 (1982).

102 *See* McInnish v. Riley, 925 So. 2d 174, 188 (Ala. 2005).

103 *Legis. Rsch. Comm'n*, 664 S.W.2d at 907, 911.

legislative-veto amendments counsels against reading state constitutions to allow them.[104]

2. *Intrusion into Executive Power*

The most common state alternative to *Chadha*'s bicameralism and presentment theory is that a legislative veto intrudes too far into executive power. Like some critiques of *Chadha* (and then-Judge Kennedy's Ninth Circuit opinion in *Chadha*), several states have concluded that the real problem with a legislative veto is not that the chamber or committee is engaged in a legislative act, but rather that it is encroaching on the prerogatives of the executive branch.[105]

The Kansas Supreme Court, mentioned above, concluded not only that a legislative veto required presentment (citing both *Chadha* and other state court decisions), but also that it violated the state constitution's four-factor test for interbranch interference, such that the veto was an unconstitutional usurpation of executive power.[106] Similarly, the Missouri Supreme Court held that a veto mechanism violated the principle that the legislature's power is confined to enacting laws and does not include executing laws already enacted.[107] In the context of attempts to confer legislative veto power over executive spending, the "overwhelming majority" of courts likewise reject such arrangements on the theory that the legislative role must end after funds have been appropriated.[108]

The West Virginia Supreme Court of Appeals, for its part, invalidated a two-house legislative veto pre-*Chadha* not only on the ground that the legislature must comply with constitutional enactment procedures, but also on the ground that the veto had the character of executive action.[109] The court noted that the unbounded veto power was

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104 *See* Missouri Coal. for Env't v. Joint Comm. on Admin. Rules, 948 S.W.2d 125 (Mo. 1997); Blank v. Dep't of Corr., 462 Mich. 103, 611 N.W.2d 530 (Mich. 2000); State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980).

105 *See, e.g.*, Hickman et al., *supra* note 47; Chadha v. INS, 634 F.2d 408, 432 (9th Cir. 1980) (stating that "horizontal interference with the executive power is egregious in this case, undercutting the second purpose of the separation of powers doctrine, which is to insure efficient administration by the unambiguous assignment of responsibility to specific branches").

106 State *ex rel.* Stephan v. Kan. House of Representatives, 687 P.2d 622, 634–38 (Kan. 1984) (drawing on State *ex rel.* Schneider v. Bennett, 547 P.2d 786 (Kan. 1976)). Other states have drawn upon the Kansas *Bennett* test for interbranch interference. *See, e.g.*, *In re* Okla. Dep't of Transp. for Approval of Not to Exceed $100 Million Okla. Dep't of Transp. Grant Anticipation Notes, Series 2002, 2002 OK 74, 64 P.3d 546; State *ex rel.* McLeod v. McInnis, 295 S.E.2d 633 (S.C. 1982).

107 *See Missouri Coal. for Env't*, 948 S.W.2d at 125, 133.

108 Alexander v. State By & Through Allain, 441 So. 2d 1329, 1341 n.4 (Miss. 1983).

109 State *ex rel.* Barker v. Manchin, 279 S.E.2d 622, 632 (W. Va. 1981). The West Virginia Supreme Court of Appeals reaffirmed its holding in *Barker* in a 1995 decision, *State ex rel. Meadows v. Hechler*, 195 W. Va. 11 (1995).

"comparable to the authority vested in the Governor, as head of the Executive Department"[110] and that the legislature was trying to "step into the role of the executive."[111]

3. Other Separation of Powers Principles

Although the most common separation of powers violation that state courts identify is legislative intrusion into executive functions, a few state courts have identified other separation of powers problems. The Kentucky Supreme Court echoed the theory of Justice Powell's concurrence in *Chadha*: that the apparent legislative veto[112] violated the separation of powers because it was *judicial* in nature.[113] Whereas Justice Powell so concluded based on the small number of people affected by the resolution, the Kentucky Supreme Court focused the legislative commission's task of analyzing whether a regulation complied with the authority and intent of relevant legislation.[114] The court also found the veto problematic on the ground that it allowed the legislature to encroach on the executive.[115]

Finally, in 1990, the Idaho Supreme Court became the first and still only state supreme court to uphold a legislative veto of agency rules, and it too relied on distinct separation of powers considerations.[116] In siding with Justice White's dissent rather than the *Chadha* majority, the court reasoned that agency rulemaking, unlike constitutionally protected forms of executive power, is always subordinate to legislative direction—direction that need not itself comply with bicameralism and presentment.[117]

4. Specific Constitutional Text

Finally, some state courts rest all or part of their reasoning on specific aspects of state constitutional text. The Michigan Supreme Court has come perhaps closest to lockstepping with *Chadha* in rejecting a

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110 *Barker*, 279 S.E.2d at 632 (adding that the dynamic "reverse[d] the constitutional concept of government whereby the Legislature enacts the law subject to the approval or veto of the Governor").

111 *Id.* at 633.

112 Deeming the provision of a veto was itself a functional conclusion—the statute allowed a rule suspension of up to twenty-one months, and the court concluded that this would "have the effect of creating a legislative veto." *See* Legis. Rsch. Comm'n By & Through Prather v. Brown, 664 S.W.2d 907, 918 (Ky. 1984).

113 *Id.* at 917–20; *Chadha*, 462 U.S. at 960 (Powell, J., concurring).

114 *See Legis. Rsch. Comm'n*, 664 S.W.2d at 917–20.

115 *See id.* at 919. The court cited *Chadha* in passing but did not adhere closely to its reasoning or holding. *Id.*

116 *See* Mead v. Arnell, 791 P.2d 410, 417–19 (Idaho 1990).

117 *Id.*

legisative veto over agency rules,[118] but even that decision incorporated state-specific reasoning. Focusing on the state constitution's text, the court drew a negative inference from the document's authorization of more limited legislative suspensions of agency rules adopted between legislative sessions. That limited grant, plus the bicameralism and presentment requirements and the constitution's separation of powers provision, convinced the court that the people of Michigan intended to restrict the legislature's power over agency rulemaking.[119] A concurring justice noted further that, in 1984, Michigan voters rejected a proposed constitutional amendment to give the legislature the authority to veto agency rules.[120]

Like Michigan, several other state supreme courts have relied on interpretation of specific constitutional provisions in rejecting the strong-form legislative veto, working with more extensive constitutional text than the federal document. For example, Alaska's pathmarking pre-*Chadha* decision in *State v. A.L.I.V.E. Voluntary*[121] held, like *Chadha* later would, that a legislative veto violated state constitutional requirements for legislative enactment.[122] But the court also found further textual support for its decision: The state constitution expressly authorized legislative vetoes in two other contexts—one related to the governor's ability to reorganize the executive branch by executive order and the other related to a state commission's ability to change municipal boundaries—but did not authorize a legislative veto for agency rules. The court concluded that this counseled against finding an implied legislative power to veto agency rules.[123]

Finally, the Missouri Supreme Court's rejection of a strong-form veto, discussed above, relied in part on a constitutional provision that expressly recognizes the executive branch's authority to issue regulations. Because that clause did not indicate any legislative involvement in the rulemaking process, the court concluded that the document did not confer such power.[124]

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118 *See* Blank v. Dep't of Corr., 611 N.W.2d 530, 535–37 (finding *Chadha*'s reasoning "persuasive and applicable to the Michigan Constitution").

119 *Id.* at 538.

120 *Id.* at 543 (Markman, J., concurring). The Court also criticized the Idaho Supreme Court's decision in *Mead*, contending that the Idaho Supreme Court "failed to recognize that passing a resolution to override rules promulgated by an executive branch agency is an inherently legislative action," which therefore must comply with the constitution's legislative enactment requirements. *Id.* at 539.

121 606 P.2d at 769.

122 *See id.* at 772.

123 *See id.* at 774–75.

124 *See* Missouri Coal. for Env't v. Joint Comm. on Admin. Rules, 948 S.W.2d 125 (Mo. 1997).

C. Constitutional Actors, Plural

The discussion above reflects that state courts have used their own methodology and their own theories in adjudicating legislative vetoes. But focusing only on courts misses another important dynamic in states. Interpreting the distribution of powers is not an exclusively juricentric affair. Legislators, advocates, constitutional reformers, and voters have all played a role.

Some of this dialogue proceeds in a conventional way, mirroring a federal-conception of interbranch dialogue: State courts hand down decisions, and lawmakers revise statutes to conform. In Alabama and Kentucky, for example, statutes adopted following adverse precedent dialed back legislative vetoes to make them advisory.[125] In North Dakota, where the state high court struck down a legislative veto over executive expenditures, the state legislature has included a fallback provision in the legislative veto statute for agency rulemaking, alternatively describing that process in advisory terms in the event of an adverse judicial ruling.[126]

But at the state level, there are still more constitutional actors who may shape legislative vetoes. In six states, legislatures have proposed, and voters have approved, constitutional amendments authorizing legislative vetoes. For example, in response to the *Byrne* case, the New Jersey General Assembly unsuccessfully sought voter approval of a constitutional amendment that would have allowed for an expansive legislative veto over agency rules, but successfully received voter approval for a narrower legislative veto mechanism.[127] The voters of Arkansas approved in 2014 an amendment that wiped out the effect of adverse precedent.[128] In Idaho, over two decades after the state's outlier decision in *Mead v. Parnell*, the legislature shored it up by receiving voter approval of a state constitutional amendment explicitly authorizing a two-house legislative veto of agency rules.[129] More recently, after the Pennsylvania Supreme Court held that a resolution to end the pandemic emergency had to be presented to the governor for approval or disapproval (on the

[125] *See* King v. Morton, 955 So.2d 1012 (Ala. 2006); Cameron v. Beshear, 628 S.W.3d 61 (Ky. 2021).

[126] Clinger & Seifter, *supra* note 8, at 14 (citing 2001 N.D. Laws, ch. 293, §§ 13, 36).

[127] *See* Commc'ns Workers of Am. v. N.J. Civ. Serv. Comm'n, 191 A.3d 643, 659–62 (N.J. 2018).

[128] *See* Ark. Const. art. 5, § 42.

[129] *See 2016 General Election Proposed Constitutional Amendments, H.J.R. 5*, Idaho Sec'y of State Election Div., https://sos.idaho.gov/elect/inits/2016/amend.html [perma.cc/5XEB-C3S4]; *Nov 08, 2016 General Election Results*, Idaho Sec'y of State's Off., https://sos.idaho.gov/elect/RESULTS/2016/General/statewide_totals.html [perma.cc/U35C-6DMS].

ground that otherwise it would be an unconstitutional legislative veto under prior case law),[130] Pennsylvania established through constitutional amendment a legislative veto power over emergency declarations.[131] In contrast, the Kansas legislature and others have tried unsuccessfully to get voter approval of constitutional amendments to abrogate court decisions rejecting legislative vetoes of agency rulings.[132]

There is another sense in which state legislative veto practice has not been juricentric: Some state practice involves apparent evasion of judicial rulings. As we explain in *Unpacking Legislative Vetoes*, the operation of vetoes in several states, including Michigan, Montana, and Wisconsin, is difficult to square with the doctrinal limits in those states.[133] Wisconsin case law, for example, draws the line at a six-month suspension of agency rules, but the Wisconsin legislature has enacted a provision authorizing indefinite suspension.[134] To the extent that legislators are not heeding judicial rulings, and advocates are not challenging those evasions in court, judicial doctrine is not the sole source of constitutional meaning. In turn, a wider array of actors would benefit from reflection upon the constitutional boundaries of legislative veto mechanisms.

III
Evaluating State Legislative Vetoes: Lessons for Doctrine and Practice

This Part argues that aspects of the state approaches in Part II are generally appealing. By not reflexively limiting themselves to *Chadha*'s reasoning, states have created space to reflect on why legislative vetoes are problematic. And by often applying pragmatic or functional analyses, state courts have been able to zero in on why some legislative vetoes—especially the committee-vetoes that now predominate—cannot be squared with state constitutional structure.

The heart of the matter is that many existing state legislative veto mechanisms, especially committee vetoes, are undemocratic. As I argue

130 Wolf v. Scarnati, 233 A.3d 679, 698 (Pa. 2020).

131 *See* Sarah Anne Hughes, *Voters Back Curtailing Wolf's Emergency Powers in Win for GOP Lawmakers*, Spotlight PA (May 19, 2021), https://www.spotlightpa.org/news/2021/05/pa-primary-2021-ballot-question-disaster-declaration-results [https://perma.cc/JZ4F-NA34].

132 *See Constitutional Amendment*, Sec'y of State of Kan. (Nov. 8, 2022), https://sos.ks.gov/elections/22elec/2022-General-Election-Constitutional-Amendment-HCR-5014.pdf [https://perma.cc/UVL5-3HFK]; *see also* Jason Alatidd, *Legislative Veto of Regulations Amendment Fails in Closest Vote of Kansas 2022 Election*, Topeka Capital-J. (Nov. 16, 2022), https://www.cjonline.com/story/news/politics/elections/state/2022/11/16/kansas-constitutional-amendment-election-results-veto-fails-closest-vote-2022/69647017007 [https://perma.cc/9FLX-MDC8].

133 *See generally* Clinger & Seifter, *supra* note 8, at 25.

134 *See id.* at 13 n.51, 30.

at greater length elsewhere,[135] state separation of powers analysis should include consideration of democratic impairment—as John Hart Ely put it, whether a process causes "stoppages in the democratic process."[136] Legislative vetoes raise the greatest concern where they subvert the democratic process by wresting statewide policymaking power away from a body that is chosen by or accountable to the majority of the people.[137] Courts should continue to reject them on that basis. And in the states that constitutionally authorize legislative vetoes but do not fully specify their design, attention to their democratic character should inform policy design and legal analysis.

A. From Formalism to Democratic Review: State-Centered Analysis of Legislative Vetoes

Given the presence of bicameralism and presentment provisions and tripartite structure in the state and federal constitutions alike, *Chadha* is a reasonable resource for state courts to consider—But a state-centered jurisprudence helps overcome the two most compelling critiques of *Chadha*, provides a more intelligible set of values for ongoing policy debate, and allows recognition of distinctive aspects of state constitutions.

First, a state-centered approach avoids the *Chadha* opinion's unconvincing definition of legislation, which received widespread critique for its failure to distinguish lawmaking from execution or adjudication or to distinguish congressional actions that require bicameralism and presentment from those that do not.[138] That sort of "wooden formalism" cannot answer why any of those actions is more or less concerning.[139]

In contrast, a democratic lens illuminates that when state legislative vetoes are unconstitutional, as they typically are, it is because they impair state constitutions' commitment to a democratic process in which decisions are made on behalf of and are accountable to the majority of the people. This commitment, and not verbal gymnastics,

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[135] *See* Miriam Seifter, *Foreword: Democracy and the State Distribution of Powers*, Rutgers L.J. [hereinafter Seifter, *Foreword*] (forthcoming 2024) (manuscript on file).

[136] John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 117 (1980).

[137] *See* Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 Yale L.J. 1329, 1331 (2005) (exploring Ely's work as having an anti-entrenchment and majoritarian principle).

[138] *See*, *e.g.*, V.F. Nourse, *Toward a New Constitutional Anatomy*, 56 Stan. L. Rev. 835, 858 (2004) (describing the majority's definition as "overly broad at best and potentially destructive at worst"); Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 Duke L.J. 789, 795–96 (1983) (critiquing the definition).

[139] Nourse, *supra* note 138, at 859 (quoting William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 Geo. L.J. 523, 527 (1992)).

distinguishes legislative vetoes from administrative rulemaking.[140] When legislative vetoes are wielded by a subset of the legislature, they are in the hands of an entity that was not chosen by a majority of the people, does not report to anyone who is, and is not subject to judicial review. Agencies, on the other hand, have leadership that is typically chosen by and accountable to the chief executive, and directly responsive to public input through other means.

Second, a state-centered account, and a democratic lens in particular, can provide a better response to Justice White's dissenting point in *INS v. Chadha*: that some legislative vetoes might be functionally compliant with bicameralism and presentment because all three entities in the lawmaking process—both chambers of the legislature and the chief executive—have weighed in.[141] State-centered democratic review can ask, equivalently, whether all of the representational mandates of lawmaking have occurred. Such a test might allow some arrangements in which material statewide changes will only occur with the support of all three entities.[142] So too might a state-centered test tolerate sunsetting veto agreements, in which the current governor agrees to certain two-house vetoes (say, of emergency declarations) but does not attempt to bind successors, thereby avoiding entrenchment.

Finally, a state-centered approach allows state courts to consider the distinctive aspects of state constitutions. This includes, as state courts have noted, specific provisions in some state constitutions about legislative vetoes or about their underlying subject matter.[143] It also allows courts to consider the many provisions that reflect an intent to rein in state legislatures[144] and constrain legislative procedure.[145]

A state-level approach attentive to whether the veto mechanism impairs democratic accountability offers an especially valuable advance. Democracy is the bedrock of state constitutions.[146] The textual and historical grounding of that commitment are elaborated elsewhere.[147] For purposes of this Article, it bears emphasis that democracy also properly informs the ways that state constitutions distribute power.[148] State con-

140 *See id.* at 862.

141 462 U.S. 919, 980–81 (1983) (White, J., dissenting).

142 *Cf.* Watrous v. Golden Chamber of Comm., 218 P.2d 498, 498 (Colo. 1950).

143 *See supra* Section II.A.3.

144 *See generally* Legis. Rsch. Comm'n By & Through Prather v. Brown, 664 S.W.2d 907 (Ky. 1984).

145 *See* Robert Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 17 Publius 91, 91 (1987).

146 *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859 (2021).

147 *See id.*

148 *See* Seifter, *supra* note 135.

stitutions allocate power among the three branches in ways that prize popular accountability, both as a matter of design and of purpose.[149] Moreover, as Jonathan Marshfield has argued, many state distribution of powers clauses are themselves rooted in a desire for accountability to the public.[150] State courts already widely recognize that separation of powers principles are not an end to themselves but rather are a means of supporting democracy and rights.[151] That insight finds application in the context of state legislative vetoes.

B. Applications

As Part I made clear, state legislative vetoes are a series of smaller design choices, not a monolithic category. A democracy lens reveals three types of problems that regularly afflict their design. Most importantly, legislative vetoes over matters of statewide policy impair democracy when the veto holder is not representative of the state as a whole. That will be true where the veto holder is a mere legislative committee, rather than the full legislature, and may also be true when the legislature itself is the product of a wrong-winner gerrymander. This flaw alone is enough to sink a legislative veto. Second, the greater the scope of the veto holder's authority over state policy, the higher the stakes of democratic impairment. And third, the transparency and predictability of the veto process matter: Processes that are opaque or that manipulate supposedly temporary pauses into permanent vetoes raise greater concern.

1. Representativeness

The problem of representation is the greatest flaw in many state legislative vetoes. Supporters of federal legislative vetoes defended them on the ground that they enhanced representativeness rather than diminished it.[152] Justice White's *Chadha* dissent pressed this point, urging that "the legislative veto . . . ha[d] become a central means by which Congress secures the accountability of executive and independent agencies."[153] On this view, the main virtue of a legislative veto is its

149 *See id.* at 7.

150 *See* Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 72 Duke L.J. 545, 624 (2023).

151 *See* Seifter, *Foreword*, *supra* note 135.

152 *See, e.g.*, Arthur S. Miller & George M. Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 Ind. L.J. 367 (1977).

153 462 U.S. at 967–68 (White, J., dissenting).

ability to ensure that a publicly elected and representative body—the legislature—has eyes on the work of administrative agencies.[154]

But many state legislative vetoes turn this logic upside down. In eight states, legislative vetoes are wielded by committees.[155] And many of those committees appear, by design, unrepresentative of the whole legislative body. To be clear, state legislatures themselves do not always live up to representative ideals[156]—but conferring dispositive power on a subset of their members poses a much starker representational problem.

One variation of this democracy deficit, sufficient for constitutional invalidity, is simply the problem of small numbers, as the courts in Section II.A.4 expressed. In Iowa and South Dakota, the powerful rule review committees consist of only six members, such that a mere four legislators constitute a majority and can exercise the committees' powers.[157] This problem also exists in states with low quorum requirements. In Alabama, for instance, the rule review committee consists of twenty-one members, but only six members are needed to constitute a quorum and exercise the committee's strong objection power.[158]

Partisanship deepens the problem. Some states assign a disproportionately large number of the committee seats to the majority party. In Alabama, for instance, only four of the twenty-one members that make up the rule review committee are statutorily reserved for the legislative minority party.[159] Likewise, in Wyoming, only two of the ten seats on the state's rule review committee are reserved for the legislative minority party.[160] And in some states, like Wisconsin, this disproportionate majority-party power doubles down on a legislative gerrymander, such

154 *See* Miller & Knapp, *supra* note 152; *Chadha*, 462 U.S. at 919 (White, J., dissenting). To be sure, other scholars have doubted that legislative vetoes serve that value, predicting instead that the veto would merely foster back room deals among staffers or lead to less care in initial lawmaking. *See* Scalia, *supra* note 35; *see also* Richard J. Pierce & Sidney A. Shapiro, *Political and Judicial Review of Agency Action*, 59 Tex. L. Rev. 1175, 1209 (1981) ("The most likely effect of an expanded legislative veto will be to enhance the ability of private lobbies to rely upon powerful, solicitous committee members and their minimally accountable staffs to reach otherwise unattainable objectives.").

155 *See supra* Section I.B.

156 *See* Seifter, *Countermajoritarian*, *supra* note 11.

157 Iowa Code § 17A.8; S.D. Codified Laws § 1-26-1.1.

158 Ala. Stat. § 41-22-22.

159 *Id.* § 41-22-3(2); Ala. Code § 29-6-7.1.

160 Wyo. Stat. Ann. § 28-8-102. A 2021 act reduced the committee's membership from thirteen members to ten members; the three eliminated seats had all been reserved for the legislative minority party. *See* H.B. 36, 66th Leg., Gen. Sess. (Wyo. 2021).

that a party loses statewide elections but has a legislative majority and a committee supermajority.[161]

The problems of small size and party overrepresentation can work in tandem. In Kentucky and Vermont, for instance, where the rule review committees consist of four members from each legislative chamber, state law provides that the majority party in each chamber gets three of the four seats, regardless of their share of seats in the legislature.[162]

Finally, legislative vetoes may also pose a disqualifying representation problem when they are created by a gerrymandered legislature as a means of entrenching its already outsized power. Michigan exemplified this problem from 2016 to 2022. During that time, control of the state legislature was affected by what a federal court described as a "political gerrymander of historical proportions" that favored the Republican Party.[163] With the power gained from the gerrymander, Republican legislators controlled the joint rule review committee and gave themselves the power to suspend rules for up to 270 days—a power they later appeared to misuse to delay rules rather than address them through legislation.[164]

2. *Breadth of Statewide Authority*

Another variable across state legislative veto mechanisms is the breadth of statewide authority that they confer upon the veto holder. Three strands of this variable warrant attention: (1) whether the veto holder wields power over a wide range of decisions or only narrow or interim decisions; (2) whether the veto holder can reject only proposed rules or can also rescind existing rules; and (3) whether procedural requirements limit the availability of the veto.[165]

First, wide-ranging policymaking power creates higher stakes than narrow decisions. A useful question, building on Justice White's reasoning, is to ask how much the veto holder can really change without the consent of the governor and both full legislative chambers.

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161 For background on Wisconsin's skewed legislative districts and newly enacted changes, see, for example, Sam Levine & Andrew Witherspoon, *Wisconsin's Extreme Gerrymandering Era Ends as New Maps Come Into Force*, The Guardian (Feb. 25, 2024), https://www.theguardian.com/us-news/2024/feb/25/wisconsin-new-voting-maps-gerrymandering-republicans-democrats [https://perma.cc/YT5M-E7CU].

162 Ky. Rev. Stat. Ann. § 13A.020(1); Vt. Stat. Ann. tit. 3, § 817.

163 League of Women Voters v. Benson, 373 F. Supp. 3d 867, 958 (E.D. Mich. 2019), *vacated sub nom.*, Chatfield v. League of Women Voters, 140 S. Ct. 429 (2019).

164 *See* Clinger & Seifter, *supra* note 8, at 36 n.183 (citing Mich. Comp. Laws § 24.245a(1)(c), (5)–(10)).

165 I identify breadth here as a factor raising the stakes of democracy deficits, but breadth may also affect analyses under more traditional separation of powers grounds by, for example, increasing the extent of interbranch interference.

Arrangements that allow the veto holder alone to occupy the driver's seat on a wide range of regulatory or spending matters raise greater concern than narrow, isolated arrangements. For example, the Vermont Supreme Court upheld a legislative committee's power to approve certain spending cuts when the legislature was out of session and the cuts were needed to avoid a budget deficit.[166] In the 1980s, prior to New Jersey's constitutional amendment, that state's high court distinguished between a permissible, narrow veto over a Building Authority project (which otherwise would have put the legislature on the hook for new appropriations)[167] and an impermissible, broader regulatory veto that allowed the legislature to "revoke at will portions of coherent regulatory schemes."[168]

Second, legislative vetoes are more potent, and thus more concerning, when they include the power to rescind already-operative rules. As noted in Part I, most states allow for some form of veto, suspension, or objection to existing rules, not just proposed rules. Unlike the tight deadline of the Congressional Review Act, which allows for an override procedure within sixty days of a rule's promulgation,[169] no state constitution imposes a time limit on how recent a rule must be for the legislative entity to veto, suspend, or object to it.[170] The rescinded rules may therefore have generated substantial public reliance—yet legislative vetoes do not require analysis of reliance interests or lead to judicial review on that basis.[171]

3. *Transparency and Consistency*

Finally, as Part I indicated, state legislative vetoes vary as to whether they follow predictable timelines and keep accessible records. Transparency is not an unmitigated good.[172] But for legislative vetoes ever to be a permissible part of democratic governance rather than a threat, stakeholders must be able to follow along, and legally imposed timelines must be what they say they are. Iowa is particularly effective

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166 Hunter v. Vermont, 865 A.2d 381 (Vt. 2004).

167 *See Enourato*, 448 A.2d at 452–53. In this regard, the *Enourato* scheme was also less intrusive than statutes that purport to authorize legislative vetoes over already appropriated funds.

168 *Id.* at 401 (citing Gen. Assembly v. Byrne, 448 A.2d 438, 439 (N.J. 1982)).

169 5 U.S.C. §§ 801–08 (2012).

170 Interestingly, the state constitutions in Connecticut and Nevada would authorize the rescission of the existing rules, but the state legislature chose to limit their rule review committee's jurisdiction to proposed rules.

171 *Cf.* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1914 (2020).

172 *See, e.g.*, Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. Legal Analysis 185 (2014).

at educating the public about its rule review process, publishing a feature that highlights the significant rules under review, summarizes the testimony offered in support and opposition to the rules, and explaining the rule review committee's decisions with respect to those rules. In contrast, as Part I noted, other states have quietly transformed temporary suspensions into permanent vetoes. Wisconsin's recently invalided legislative veto allowed an anonymous "pocket veto" power that ended an executive action without attaching any legislator's name to the decision.[173] These practices are difficult to square with state constitutions' democratic commitments.

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State courts have been correct to reject legislative vetoes and to supplement federal doctrine with state-centered reasoning. Understanding the problems of legislative vetoes in terms of their democratic deficits, rather than engaging in wordplay about the nature of lawmaking, is especially helpful in further explaining their constitutional flaws. A democratic lens can also guide state lawmakers in states that have authorized some form of veto, but not specified its traits, or in which the constitutionality of legislative vetoes is not yet settled. Such lawmakers should prioritize representativeness, attend to breadth, and require transparency in any state legislative veto scheme.

Conclusion

This symposium Article has documented that state experimentation with legislative vetoes has been longer lasting and more variegated than the rise and fall of legislative vetoes at the federal level. These state experiments, and their surrounding legal landscape, display a constitutionalism that is negotiated, evolving, and complex.

The case law evaluating these state experiments highlights the benefits of a state-centered separation of powers jurisprudence. State approaches do well to begin with basic tenets of bicameralism, presentment, and separated power familiar from the federal constitution; in doing so, they contribute to ongoing dialogue about the contours of those principles. But state courts have rightly done more. They have rejected state legislative vetoes not simply because of an abstract

[173] *See* Jacob Resneck, *'There's No Transparency': Secretive 'Pocket Veto' in JFC Scuttles Wisconsin Projects*, PBSWisconsin (Mar. 22, 2023), https://pbswisconsin.org/news-item/theres-no-transparency-secretive-pocket-veto-in-jfc-scuttles-wisconsin-projects [https://perma.cc/L5RF-FEBF].

definition of lawmaking, but also because of the constitutional values the vetoes subvert. The expansion of state legislative vetoes can imperil the functional operation of democratic processes that define state constitutions. The first step towards course correction is a willingness to study state institutions and constitutions on their own terms.