AGENCY GENESIS AND THE ENERGY TRANSITION

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Commentators and policymakers frequently propose new government agencies in response to novel or intractable problems. New agencies can refocus public attention on the problems they regulate. They can attract new talent and bypass calcified or captured channels. But they are also costly, and there is no guarantee that they will be more successful than their predecessors.

This Article examines agency genesis at the state level. In the process, it expands recent thinking about the administrative separation of powers to the states. At the federal level, setting up agency rivalries within the executive branch can be an effective tool for mitigating presidential power. But new state agencies have sometimes enhanced, rather than countered, gubernatorial authority.

State energy policy offers a compelling context in which to explore questions about agency genesis. Energy-agency creation in the states is a story of addition, beginning with public utility commissions in the early 1900s and culminating in the contemporary creation of new boards and bodies to manage the transition to a just, low-carbon energy economy. Drawing on the political science and public administration literatures, this Article explains the observed patterns of energy-agency creation and analyzes their effects on state energy governance. It offers prescriptions for managing multiple agencies in the same policy domain. And it cautions that the allure of agency genesis should not preclude reform of existing institutions.

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INTRODUCTION

Creating new agencies is a tempting solution to new or intractable problems. Legal scholars are especially fond of prescribing new regulatory entities. Consider the following examples: Andrew Tutt recommends a new expert regulator modeled after the FDA to screen algorithms before they

can be put into use.[1] Arti Rai and Stuart Benjamin advocate a new entity in the executive branch to promote innovation across federal agencies.[2] Cristina Rodríguez calls for a new, independent agency with authority over aspects of immigration policy.[3] Glen Staszewski proposes a Federal Inaction Commission to police agency delay.[4]

Policymakers appear equally enthusiastic about new agencies and offices, especially as a response to perceived government failure. Congress created the Consumer Financial Protection Bureau (CFPB) in the wake of the subprime mortgage crisis of 2008 to protect American consumers from Wall Street's excesses.[5] The Office of Homeland Security emerged as a promised safeguard of American well-being in the days following the 9/11 terrorist attacks.[6] President Richard Nixon established the EPA in response to growing public awareness of environmental degradation (and as part of his effort to rebrand himself as the "environmental candidate") in the early 1970s.[7] More recently, reflecting their different approaches to climate and energy policy, then-presidential candidate Joe Biden proposed the creation of a new Environmental and Climate Justice division within the DOJ,[8] while President Donald Trump reestablished the Arctic Energy Office within the Department of Energy (DOE).[9] Other candidates in the 2020 presidential race proposed a raft of new agencies, including a Department of Peace and a Department of Cybersecurity.[10]

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1. Andrew Tutt, An FDA for Algorithms, 69 Admin. L. Rev. 83, 122 (2017).

2. Stuart Minor Benjamin & Arti K. Rai, Fixing Innovation Policy: A Structural Perspective, 77 Geo. Wash. L. Rev. 1, 6 (2008).

3. Cristina M. Rodríguez, Constraint Through Delegation: The Case of Executive Control over Immigration Policy, 59 Duke L.J. 1787, 1791 (2010) (contending that a new, independent agency should set visa policy).

4. Glen Staszewski, The Federal Inaction Commission, 59 Emory L.J. 369, 372 (2009).

5. See David A. Hyman & William E. Kovacic, Why Who Does What Matters: Governmental Design and Agency Performance, 82 Geo. Wash. L. Rev. 1446, 1485–86 (2014) (explaining the creation of the CFPB in the wake of the 2008 financial crisis).

6. See Dara Kay Cohen, Mariano-Florentino Cuéllar & Barry R. Weingast, Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates, 59 Stan. L. Rev. 673, 684 (2006) (explaining the creation of this office immediately after the attacks and before the creation of the larger DHS).

7. Richard J. Lazarus, Senator Edmund Muskie's Enduring Legacy in the Courts, 67 Me. L. Rev. 239, 240 (2015).

8. Umair Irfan, We Asked Joe Biden's Campaign 6 Key Questions About His Climate Change Plans, Vox (Oct. 22, 2020), https://www.vox.com/21516594/joe-biden-climate-change-covid-19-president (on file with the *Columbia Law Review*).

9. Press Release, U.S. Dep't of Energy, U.S. Department of Energy Announces Establishment of Office of Arctic Energy (Sept. 17, 2020), https://www.energy.gov/articles/us-department-energy-announces-establishment-office-arctic-energy [https://perma.cc/B7QU-P4EH].

10. Courtney Bublé, 2020 Democrats Have Plans to Add New Federal Agencies, Gov't Exec. (Aug. 20, 2019), https://www.govexec.com/oversight/2019/08/2020-democrats-have-plans-add-new-federal-agencies/159311 [https://perma.cc/WLY8-RYLF].

Certainly, agency genesis is an arresting way for politicians to signal attention to an issue. But when is it the best approach to managing new problems? And when is it mere window dressing?[11]

The phenomenon of agency genesis is poorly understood and has never been the subject of scholarly treatment in its own right. This Article begins to remedy that deficit. It does so by exploring the phenomenon within a single domain: that of state energy agencies. State energy regulation is a fruitful context in which to investigate agency genesis and its implications for several reasons. First, unlike environmental regulation, food safety regulation, and other areas where the federal government has preempted broad swaths of state authority, much of energy regulation remains within state control. The extent of state regulatory authority over energy has produced considerable innovation in administrative structures governing electricity, natural gas, and related areas.

Second, the proliferation of state energy agencies has followed a remarkably stable path. State creation of energy agencies occurred in waves over the past century, beginning with the advent of public utility commissions (PUCs) in the early part of the twentieth century and culminating in the recent creation of climate- or energy transition–specific bodies.[12] This permits more informed theorizing about the motivations for agency genesis.

Notwithstanding these general trends, the diversity across states enables useful comparisons. Some states have delegated significant planning, education, and coordination functions to their state energy offices, for example.[13] Others have created separate siting agencies for energy infrastructure.[14] One state, Colorado, recently created an Office of Just Transition to work with communities disproportionately impacted by the shift away from fossil fuels.[15]

Investigating agency genesis also has important lessons for energy law and policy. It is past time for energy scholars to turn more serious attention to administrative arrangements. Energy commentators have focused significant attention on the question of whether monopolistic provision of energy services yields better outcomes than market competition.[16] Meanwhile, the question of whether a single regulator or multiple regulators

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11. One scholar of government reorganization has concluded that agency genesis as a solution to policy challenges is "largely ineffective, and often has significant unintended negative consequences on the efficiency and effectiveness of government." B. Guy Peters, Government Reorganization: A Theoretical Analysis, 13 Int'l Pol. Sci. Rev. 199, 199 (1992).

12. See infra section I.A.

13. See infra notes 89–95 and accompanying text.

14. See infra section I.A.3.

15. Colo. Rev. Stat. § 8-83-503 (2020) (establishing an Office of Just Transition).

16. See generally William Boyd, Public Utility and the Low Carbon Future, 61 UCLA L. Rev. 1614 (2014) [hereinafter Boyd, Public Utility] (suggesting ways in which traditional monopoly regulation can promote electricity decarbonization); David B. Spence, Can Law Manage Competitive Energy Markets?, 93 Cornell L. Rev. 765 (2008) (considering how to

can better superintend private sector arrangements and implement public sector policy remains unexplored. This omission is surprising, especially since the relationship between regulator and regulated entity was originally such a strong driver of theory in the field.[17]

This Article refocuses attention on the regulatory side of the energy equation. It builds on the newly vital literature on state administrative law by examining and questioning the law and policy of energy-agency genesis in the states. In doing so, it investigates how insights from the public administration, political science, and administrative law literatures on state government play out on the ground within a single policy domain.

This Article has two major aims. First, it brings the question of agency genesis into sharp focus. Commentators have spilled much ink on the question of internal agency structure.[18] But such treatments rarely address agency genesis head-on. By tackling the question of agency genesis directly, and by situating the theory in the context of a rich case study, this Article contributes to a more nuanced understanding of state administrative law dynamics and their effect on policy output. This Article also puts agency genesis in context, focusing on new agencies as members of regulatory ecosystems in which both coordination and friction are key to understanding policy dynamics. In this way, it adds dimension to the literature on the administrative separation of powers,[19] which has thus far

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balance the tradeoffs that come with increased competition in energy markets); David B. Spence, Naïve Energy Markets, 92 Notre Dame L. Rev. 973 (2017) (questioning the fervor with which some have pursued market competition in its idealized form); Joseph P. Tomain, The Past and Future of Electricity Regulation, 32 Env't L. 435 (2002) (arguing in favor of increasing competition between energy providers in the states); Jacqueline Lang Weaver, Can Energy Markets Be Trusted? The Effect of the Rise and Fall of Enron on Energy Markets, 4 Hous. Bus. & Tax L.J. 1 (2004) (examining the impact of market manipulation on enthusiasm for increased competition).

17. See Boyd, Public Utility, supra note 16, at 1636–51 (narrating the rise of the "public utility" concept and PUCs and collecting sources). For the canonical treatment of this relationship in administrative law more broadly, defending the architectural choices of the New Deal agencies and noting the connection between private and public forms of institutional organization, see generally James M. Landis, The Administrative Process (1938).

18. For a sampling of recent treatments, see generally Brian D. Feinstein, Designing Executive Agencies for Congressional Influence, 69 Admin. L. Rev. 259 (2017) (suggesting design changes to agencies that would maximize legislative control); Jacob E. Gersen, Designing Agencies, *in* Research Handbook on Public Choice and Public Law 333 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (surveying the work of positive political theory on agency design); Kristin E. Hickman, Symbolism and Separation of Powers in Agency Design, 93 Notre Dame L. Rev. 1475 (2018) (expressing skepticism about judicial refashioning of agency design through severance remedies); Ganesh Sitaraman & Ariel Dobkin, The Choice Between Single Director Agencies and Multimember Commissions, 71 Admin. L. Rev. 719 (2019) (arguing that single-director agencies are preferable to multimember commissions).

19. See generally Sharon B. Jacobs, The Statutory Separation of Powers, 129 Yale L.J. 378 (2019) [hereinafter Jacobs, Statutory Separation of Powers] (emphasizing the separation of statutory powers among federal agencies); Jon D. Michaels, An Enduring,

taken federal agencies as its subject, by exploring relationships between multiple state agencies with related mandates.

This Article's second major aim is to provide an institutional analysis of the energy transition. Much existing scholarship on the transition focuses on its substance, giving less weight to questions about the institutions that will administer it.[20] But structure and substance are not so easily compartmentalized.[21] New agencies can shift power dynamics in favor of a state governor, thereby either increasing the rate at which decarbonization occurs or setting up roadblocks (depending on gubernatorial preference). New administrative bodies set up to advocate for particular perspectives can heighten the influence of previously underrepresented stakeholders in key regulatory proceedings. Moreover, increasing the number of state energy agencies can enhance the expertise available to tackle problems such as the rapid build-out of renewable energy infrastructure, compensation for the early retirement of fossil-fuel plants, and the more robust integration of demand-side resources into utility planning.

Understanding the particular dynamics of state administrative government in this context is all the more vital because state governments are

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Evolving Separation of Powers, 115 Colum. L. Rev. 515, 529–51 (2015) [hereinafter Michaels, An Enduring, Evolving Separation of Powers] (focusing on political appointees, members of the civil service, and members of the public as the key actors in the administrative separation of powers); Jon D. Michaels, Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers, 91 N.Y.U. L. Rev. 227 (2016) (same). For additional relevant literature, see Neal Kumar Katyal, Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within, 115 Yale L.J. 2314, 2322–42 (2006) (identifying internal checks and balances within the executive branch); Gillian E. Metzger, The Interdependent Relationship Between the Internal and External Separation of Powers, 59 Emory L.J. 423, 442–47 (2009) [hereinafter Metzger, Interdependent Relationship] (emphasizing ways in which the constitutional separation of powers can reinforce intra-executive branch checks).

20. See generally John C. Dernbach, Legal Pathways to Deep Decarbonization: Lessons from California and Germany, 82 Brook. L. Rev. 825 (2017) (offering examples of laws the United States might adopt to achieve decarbonization goals); Hari M. Osofsky, Jacqueline Peel, Brett McDonnell & Anita Foerster, Energy Re-Investment, 94 Ind. L.J. 595 (2019) (proposing corporate and security law changes to shift patterns of energy investment); Melissa Powers, An Inclusive Energy Transition: Expanding Low-Income Access to Clean Energy Programs, 18 N.C. J.L. & Tech. 540 (2017) (advocating expanded planning, partnership, and investment strategies for making clean energy options more accessible). For articles that do give weight to questions about institutions, however, see Hari M. Osofsky & Hannah J. Wiseman, Hybrid Energy Governance, 2014 U. Ill. L. Rev. 1, 5–12 (analyzing overlapping federal, state, local, and private energy governance regimes); Shelley Welton, Grasping for Energy Democracy, 116 Mich. L. Rev. 581, 602–34 (2018) [hereinafter Welton, Grasping for Energy Democracy] (exploring options for more direct democratic input into energy transition decisionmaking); Shelley Welton, Public Energy, 92 N.Y.U. L. Rev. 267, 313–28 (2017) (advocating more widespread public operation of electric utilities).

21. On the relationship between form and regulatory output, see, for example, Alejandro E. Camacho & Robert L. Glicksman, Reorganizing Government: A Functional and Dimensional Framework 2 (2019) [hereinafter Camacho & Glicksman, Reorganizing Government] ("We proceed on the premise that institutional structures can significantly influence the fate of regulatory programs.").

now on the front lines of electricity decarbonization. Behemoths like California are leveraging their considerable economic and regulatory might to banish carbon from their economies.[22] Even states with less well-established track records of environmental regulation, including Colorado,[23] Nevada,[24] and New Jersey,[25] are taking ambitious actions to mitigate carbon emissions from electricity generation. In total, fifteen states and jurisdictions have announced efforts to achieve electricity-sector carbon neutrality by midcentury.[26] Energy-agency dynamics in these states offer clues about how their transitions will unfold.

This Article proceeds as follows. Part I offers a descriptive history of state-energy-agency creation, beginning with the rise of PUCs in the Progressive Era.[27] It then charts two subsequent waves of energy-agency genesis: the creation of state energy offices and siting boards beginning in the 1970s, and the more recent emergence of climate- and energy transition–specific bodies. This Part also tells a positive story of these waves, drawing on the public administration and political science literatures for insights into how and why new structural forms appear and diffuse across state lines.

Part II explores the law and policy of state agency genesis. After setting out the legal mechanics of agency creation in the states, it proposes a normative framework for evaluating new agency creation. There are significant benefits to creating new agencies and offices to tackle new problems, among them the vigor of new agency actors, the signaling function

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22. For an overview of California's strategies, see Michael Colvin, How to Decarbonize California's Economy Without Breaking the Bank, EDF: Energy Exch. (June 25, 2019), http://blogs.edf.org/energyexchange/2019/06/25/how-to-decarbonize-californias-economy-without-breaking-the-bank [https://perma.cc/7TYQ-9UKZ].

23. In addition to its goal of carbon-free electricity by 2050, Colorado seeks to reduce statewide greenhouse gas emissions to ninety percent below 2005 levels by the same date. U.S. Climate All., 2019 State Factsheets: Colorado (2019), https://static1.squarespace.com/static/5a4cfbfe18b27d4da21c9361/t/5d8e51cbee8f446c5857a542/1569608140582/USCA_2019+State+Factsheet-CO_20190924.pdf [https://perma.cc/7XXH-AYGD].

24. Nevada's goal is to become carbon neutral by 2050. U.S. Climate All., 2019 State Factsheets: Nevada (2019), https://static1.squarespace.com/static/5a4cfbfe18b27d4da21c9361/t/5d8e52bd98ac8952cb360222/1569608382779/USCA_2019+State+Factsheet-NV_20190924.pdf [https://perma.cc/GT9U-DKBC].

25. New Jersey has rejoined the Regional Greenhouse Gas Initiative (RGGI), a cooperative carbon cap-and-trade scheme made up of states in New England and the Mid-Atlantic region. See Welcome, Reg'l Greenhouse Gas Initiative, https://www.rggi.org [https://perma.cc/4NN9-MY7K] (last visited Oct. 25, 2020).

26. See David Iaconangelo, 100% Clean Energy Group Launches, with Eyes on Coronavirus, E&E News: Energywire (Apr. 2, 2020), https://www.eenews.net/energywire/stories/1062762687 (on file with the *Columbia Law Review*). For a detailed description of state targets and deadlines, see Sophia Ptacek & Amanda Levin, Race to 100% Clean, Nat'l Res. Def. Council (Dec. 2, 2020), https://www.nrdc.org/resources/race-100-clean [https://perma.cc/4BKT-9BMD].

27. The term "energy" is broad and can encompass oil and gas regulation as well as transportation fuels. This Article focuses on electricity agencies.

of agency creation, the efficiency advantages of bypassing antiquated structures, and enhanced administrative checks and balances. But the framework does not ignore the drawbacks of agency multiplicity, which include resource costs and coordination challenges. This Article does not take an ultimate position on reform versus reorganization of state energy agencies or of bureaucracy in general.[28] Instead, it highlights the advantages and drawbacks of each approach in a way that can inform the decisions of state policymakers and other stakeholders.

Part III describes the present moment in energy regulation and explains how the energy transition may exacerbate classic critiques of PUCs. Finally, Part IV applies the framework from Part II to assess how states' architectural choices affect their abilities to meet the decarbonization challenge. Creation of new administrative bodies to complement PUCs has benefits. In addition to the classic advantages of vitality, signaling, and friction, some newer state energy agencies—especially state energy offices, but also siting boards and climate councils—can facilitate public participation and boast particular administrative strengths in planning and coordination that many PUCs lack. Nevertheless, new agencies are expensive, can take time to establish themselves, and make policy coordination more challenging. State agency creation might also result from political jostling for position and control rather than good governance inclinations.

Part IV concludes by proposing guidelines for managing energy-agency multiplicity. But enthusiasm for "the new" risks overshadowing debates about reinvention or restructuring of existing agencies. Part V therefore suggests opportunities for reforming state PUCs as either an alternative or complement to agency genesis.

I. STATE ENERGY ADMINISTRATION

For a long time, PUCs operated as the sole energy agencies in the states.[29] From the inception of electricity systems until the energy crisis of the 1970s, regulation was bilateral. Monopoly electric utility companies were on one side, and the commissions were on the other. Beginning in the 1970s, however, states began to create additional agencies with responsibilities for energy regulation.

Section I.A describes the evolution of state energy agencies from the advent of energy regulation during the Progressive Era through the present day. Section I.B explores how theories of state agency design and

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28. For a comparable approach, see Camacho & Glicksman, Reorganizing Government, supra note 21, at 8 (professing no interest in "'essentializing' interjurisdictional relations" and emphasizing that "[a]llocational and structural choices will largely be context-specific").

29. Many states also have oil, gas, and mineral regulators. But they are bracketed here because their task is to regulate the extraction of fossil fuels rather than the production, transportation, and use of energy.

policy replication from the public administration and political science literatures can help explain the observed patterns.

A. *Generative Periods of State Energy Administration*

During the early part of the last century, states created PUCs to regulate electric and gas utility companies.[30] These energy regulatory agencies operated alone until the 1970s, when many states established energy offices to engage in statewide energy planning and management of energy grant programs. A few also created siting boards to deal separately with the environmental and other impacts of siting energy infrastructure. Most recently, several states have diversified their energy-agency ecosystems by creating special administrative bodies to advance decarbonization goals and to ensure a more just energy transition.

1. *State Public Utility Commissions.* — State PUCs were "experiments" of the Progressive Era in the early part of the twentieth century—experiments that endured.[31] These commissions go by a variety of names, including Public Service Commissions and Corporation Commissions,[32] but their core duties are similar. The commissions regulate "public utilities"—businesses that offer essential services like electricity, gas, and water.[33] These utility service providers were seen as natural monopolies that could operate more efficiently if they had exclusive rights to serve customers within assigned territories.[34] Strong regulators were therefore needed to ensure that monopoly utilities did not take advantage of the lack of competition to charge extortionist rates.

Commissions oversee the entry and exit of utilities in the marketplace and regulate utility rates to ensure that they are "just and reasonable" and

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30. See Boyd, Public Utility, supra note 16, at 1640 ("Beginning with New York and Wisconsin in 1907, regulation by state commission spread rapidly across the country . . . . Ten years later, twenty-four states had enacted public utility legislation. By 1930, every state but Delaware had a public utility statute . . . ." (footnote omitted)).

31. Id. at 1646–47 ("The broad concept of public utility advanced by progressives and legal realists thus embodied a pragmatic approach to competition and markets in an era of rapid industrial change . . . ."); see also Marshall J. Breger & Gary J. Edles, Established by Practice: The Theory and Operation of Independent Federal Agencies, 52 Admin. L. Rev. 1111, 1116 (2000) ("Throughout the Progressive Era and the New Deal, a multitude of new agencies were established using the ICC as their prototype.").

32. For a full list of Commissions, see Regulatory Commissions, Nat'l Ass'n of Regul. Util. Comm'rs, https://www.naruc.org/about-naruc/regulatory-commissions [https://perma.cc/H45J-PQE2] (last visited Oct. 25, 2020).

33. As William Boyd chronicles, during this period, "public utility was seen as a common, collective enterprise aimed at managing a series of vital network industries that were too important to be left exclusively to market forces." Boyd, Public Utility, supra note 16, at 1635.

34. See Paul L. Joskow, Regulation of Natural Monopoly, *in* 2 Handbook of Law and Economics 1227, 1229 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

not discriminatory or preferential.[35] Essentially, commissioners seek to approximate what competitive rates for utility products and services would be. In most states, PUCs also grant certificates for the construction of new utility infrastructure (including power plants and power lines), oversee the siting of that infrastructure, and superintend longer-term utility planning.[36] Each of these tasks in isolation, and certainly in combination, gives commissions a crucial role to play in determining the mix of generation technologies that utilities will use to satisfy customer demand.

State commissions are not identical. Commission names vary from state to state.[37] So too does the source of their authority. In several states, the commission is established by the state constitution, while in others it is a statutory creation.[38] Some state commissioners are elected. Others are appointed.[39] Commissions also vary in terms of their organization. For example, some state commissions include offices of consumer counsel within the commission, while in other states, these offices are housed within the state Attorney General's office or elsewhere.[40] But these commissions share one common attribute: Since their genesis, they have

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35. See Eric Filipink, Nat'l Regul. Rsch. Inst., Serving the "Public Interest"—Traditional vs Expansive Utility Regulation 11–12 (2009), https://pubs.naruc.org/pub/FA864C03-DC7D-B239-9E29-4D68D1807BE4 [https://perma.cc/KB6K-TSYF] (citing Charles F. Phillips, Jr., The Regulation of Public Utilities: Theory and Practice 132 (3d ed. 1993)).

36. See Miles Keogh, Nat'l Ass'n of Regul. Util. Comm'rs, A Thrill Packed Introduction to State Public Utility Commissions 9, 19 (2010), https://www.epa.gov/sites/production/files/2016-03/documents/a_thrill_packed_introduction_to_state_public_utility_commissions.pdf [https://perma.cc/8ZKS-JWJA] (transcript available at EPA, An Overview of State Public Utility Commissions (PUCs) for State Environment and Energy Officials (2010), https://www.epa.gov/sites/production/files/2016-03/documents/transcript_-_state_public_utility_commission_overview_for_energy_and_environment_officials.pdf [https://perma.cc/J4GB-R5EE]).

37. Compare Regul. Comm'n of Alaska, http://rca.alaska.gov/RCAWeb/home.aspx [https://perma.cc/UH5A-TPQC] (last visited Oct. 25, 2020) (Regulatory Commission of Alaska), with Ariz. Corp. Comm'n, https://www.azcc.gov [https://perma.cc/P5VH-CK3C] (last visited Oct. 25, 2020) (Arizona Corporation Commission), and Del. Pub. Serv. Comm'n, https://depsc.delaware.gov [https://perma.cc/GR7E-7AAF] (last visited Oct. 25, 2020) (Delaware Public Service Commission). For a full list of state utility commissions, see Regulatory Commissions, supra note 32.

38. See Miriam Seifter, Understanding State Agency Independence, 117 Mich. L. Rev. 1537, 1556 (2019) [hereinafter Seifter, Understanding State Agency Independence] ("The choice to constitutionalize an office has usually corresponded to its perceived import.").

39. See Danielle Sass Byrnett & Daniel Shea, Nat'l Council on Elec. Pol'y, Engagement Between Public Utility Commissions and State Legislatures 2 (2019), https://www.ncsl.org/Portals/1/Documents/energy/NCSL_NARUC_Engage_Leg_PUCs_34251.pdf [https://perma.cc/8R4G-PSCE] (observing that commissioners are elected by the public in eleven states).

40. Michael Murphy & Francine Sevel, Nat'l Regul. Rsch. Inst., The Role of Utility Consumer Advocates in a Restructured Regulatory Environment 9 (2004), https://pubs.naruc.org/pub/FA8626E1-0000-871D-4660-18F3E7238C8A [https://perma.cc/8KL2-45SZ] (describing the different positions of consumer advocates in state government and noting that more than half the states have an independent consumer advocate office).

remained the dominant actors in state electricity policy.[41] Another commonality is that, like many other regulatory agencies established during the Progressive Era, PUCs enjoy a degree of independence from a state's political leadership—especially from the state governor—and reflect the deep faith in the idea of expert administration championed by James Landis and others.[42]

Over time, stakeholders and commentators have subjected PUCs to a variety of criticisms.[43] The classic critique is that PUCs are too easily captured by the industries they regulate. According to this critique, utility companies engage in successful rent-seeking behavior at commissions, lining their own pockets at the expense of ratepayers.[44] Marver Bernstein argued that commissions become more susceptible to industry influence over time, and that, as they age, "they tend to relate their goals and objectives to the demands of dominant interest groups in the economy."[45] George Stigler concurred two decades later that "regulation is acquired by the industry and is designed and operated primarily for its benefit."[46] While there have been critiques of the capture theory, including that its force is exaggerated,[47] that the theory is oversimplified,[48] and that the

41. See Joel B. Eisen, Emily Hammond, Jim Rossi, David B. Spence & Hannah J. Wiseman, Energy, Economics and the Environment: Cases and Materials 83 (5th ed. 2020) ("[T]oday most utility regulation begins with a provision . . . that designates the enterprises to be regulated and the type of regulatory powers that may be exercised over them. State regulatory control is exercised by a specialized agency of government, which . . . may be a PSC or a PUC.").

42. See Landis, supra note 17, at 23–24 ("With the rise of regulation, the need for expertness became dominant; for the art of regulating an industry requires knowledge of the details of its operations . . . ."); see also Marver H. Bernstein, Regulating Business by Independent Commission 27, 51 (1955) ("[T]he [independent] commission seemed more promising than the executive departments with respect to the development of a high degree of expertness and the capacity to handle difficult and technical regulatory problems.").

43. A substantial debate took place in the 1970s about the origins of PUCs, with some arguing in favor of public interest motivations, others that commissions addressed market failures associated with monopoly, and still others that utilities supported state public utility regulation as a response to what was seen to be less generous regulation by municipalities. See George J. Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3, 3 (1971) (describing the debate and its major participants).

44. See, e.g., Barry G. Rabe, Statehouse and Greenhouse: The Emerging Politics of American Climate Change Policy 55 (2004) (noting that the Texas PUC "was widely perceived as a classic model of a 'captured' regulatory body" in the 1970s due to its eagerness to meet utility demands and absence of "concern for providing mechanisms for citizen or environmental group input"); James W. Fesler, The Independence of State Utility Commissions, II, 3 J. Pol. 42, 65–66 (1941) ("Utility commissions naturally tend to stress the judicial functions to the neglect of their function of protecting the consumer.").

45. Bernstein, supra note 42, at 92.

46. Stigler, supra note 43, at 3.

47. Chris Carrigan & Cary Coglianese, George J. Stigler, "*The Theory of Economic Regulation*", *in* The Oxford Handbook of Classics in Public Policy and Administration 287, 292–93 (Martin Lodge, Edward C. Page & Steven J. Balla eds., 2015).

48. Id. at 294.

empirical evidence Stigler offered is insufficient,[49] the basic premise that regulated industries can influence their regulators, sometimes to excess, is so accepted today that "it all seems rather obvious"[50] and has become a "ground norm" in the assessment of regulation.[51]

The second critique of PUCs is related to the first: Commissions frequently do not live up to the ideal of expert bodies. Because commissioners lack the inherent qualifications, or the expert staffs and other resources to substitute for them, some argue, PUCs cannot act as successful counterweights to utilities, which have significant informational advantages.[52] Commissions' frequently broad responsibilities regulating electric, gas, water, and transportation utilities (among others) make it difficult if not impossible to procure commissioners with subject-matter expertise in each of the areas they regulate. Moreover, in eleven states, commissioners are elected by popular vote.[53] While public selection of commissioners can avoid cronyism, it may also yield commissioners whose experience is political rather than technical. Indeed, across all commissions, the most common previous work experience is that of a state legislator.[54] Moreover, the Administrative Law Judges (ALJs) who decide some commission cases in the first instance are lawyers by training and may lack substantive expertise.[55] In fact, as one former commissioner observed, "It is generally lawyers who make the arguments, conduct the examination and cross-examination of witnesses, write and apply the procedural rules, and ultimately write decisions."[56]

Expert staff can compensate for expertise gaps at the commissioner and ALJ levels, but many commissions have limited resources in this

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49. Id. at 293–94.

50. Id. at 292. On the critiques of capture theory, see Stefan H. Krieger, An Advocacy Model for Representation of Low-Income Intervenors in State Public Utility Proceedings, 22 Ariz. St. L.J. 639, 654–55 (1990) [hereinafter Krieger, An Advocacy Model] (noting that the life cycle theory "falls short as an historical predictor of actual agency behavior" but remains a "useful conceptual and pedagogical metaphor").

51. William J. Novak, A Revisionist History of Regulatory Capture, *in* Preventing Regulatory Capture: Special Interest Influence and How to Limit It 25, 25–48 (Daniel Carpenter & David A. Moss eds., 2013). Novak argues that while capture theory itself may be a creature of the early twentieth century, a broader awareness of "private coercion in a democratic republic" remains helpful in analyzing regulatory arrangements. Id. at 25–26.

52. This might be the case in states where commissioners are elected rather than appointed, for example (although even appointed commissioners may lack expertise in the subject matter they oversee).

53. These states are Alabama, Arizona, Georgia, Louisiana, Mississippi, Montana, North Dakota, Nebraska, New Mexico, Oklahoma, and South Dakota. See John Dunbar, Nice Work if You Can Get It: Political Patronage Rules in State Utility Commissions, Ctr. for Pub. Integrity (Nov. 17, 2005), https://publicintegrity.org/inequality-poverty-opportunity/nice-work-if-you-can-get-it [https://perma.cc/7A4Y-7R23] (last updated May 19, 2014).

54. See id.

55. See Ashley C. Brown, The Overjudicialization of Regulatory Decisionmaking, Nat. Res. & Env't, Fall 1990, at 20, 21.

56. Id. at 22.

regard. A 2017 report by the National Regulatory Research Institute, an arm of the National Association of Regulatory Utility Commissioners (NARUC), observed that PUCs around the country face both increasing legislative demands and shrinking resources.[57] Low salaries contribute to a dearth of technical expertise on commission staff.[58] The authors also flagged an absence of professional staff development and continuing education as particularly harmful in an era of rapid energy system evolution.[59]

Third, some accuse PUCs of excessive judicialization.[60] While PUC proceedings do not involve the same degree of "motions practice" as judicial trials, most rely to some extent on exhibits, witness testimony, and cross-examination to surface the facts and arguments in a given case.[61] There are typically also various motions filed by parties to seek intervention, to adjust deadlines, and to review both interim and final commission decisions.[62] Many commissions assign adjudicatory matters to an ALJ in the first instance, creating a tiered system of internal review that further extends the time and complexity of proceedings.[63] In the succinct words of an early critic, "Regulatory commissions take too long in disposing of contested rate filings or license applications."[64]

The fourth critique follows from the third, asserting that commission rules and procedures create barriers to access for stakeholders with limited resources. Environmental groups, consumer groups, local governments, community groups, labor organizations, and many others with a stake in the outcome of PUC proceedings may struggle to gain access to them or

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57. Ken Costello & Rajnish Barua, Nat'l Regul. Rsch. Inst., Report No. 17-02, Evaluation of Public Regulation Commission Staffing and Budget Allocation, at iv (2017), https://www.nmlegis.gov/publications/Studies_Research_Reports/Evaluation%20of%20Public%20Regulation%20Commission%20Staffing%20and%20Budget%20Allocation%20-%20May%202017.pdf [https://perma.cc/3VMT-EWZV].

58. Id. at v (identifying an empty electrical engineer position at New Mexico's Public Resource Commission that had proved difficult to fill due in part to low compensation).

59. Id. at iv–v.

60. See, e.g., Brown, supra note 55, at 20 (noting that, although commission dockets are dominated by legislative-type matters, their judicial-style process limits information flow through evidentiary strictures and prohibitions on ex parte communications); Fesler, supra note 44, at 42 ("Utility commissions have, in fact, grown more and more judicial in attitude . . . .").

61. See NAACP Env't & Climate Just. Program, Action Toolkit Module 3: Engaging Your Utility Company & Regulators 12–15, https://www.naacp.org/wp-content/uploads/2014/03/Module-3_Engaging-Your-Utility-Company-and-Regulators_JEP-Action-Toolkit_NAACP.pdf [https://perma.cc/2H5Z-SN4T] (last visited Oct. 25, 2020) (outlining the stages of the regulatory process).

62. Id.

63. See, e.g., Colo. Rev. Stat. § 40-6-109 (2020) (explaining the assignment of public utility cases to administrative law judges); Administrative Law Judges Division, Pub. Serv. Comm'n of W. Va., http://www.psc.state.wv.us/scripts/Directory/alj.cfm [https://perma.cc/K3NX-9ZX2] (last visited Oct. 25, 2020) (listing Commission ALJs and describing their responsibilities).

64. Roger C. Cramton, Some Modest Suggestions for Improving Public Utility Rate Proceedings, 51 Iowa L. Rev. 267, 268 (1966).

to present their arguments at a point in the process and in a format that would ensure meaningful consideration. As Stefan Krieger notes, there was minimal interest in participation in PUC proceedings prior to the 1970s because economies of scale in power production kept prices low.[65] As prices rose, however, individual ratepayers and consumer groups increasingly sought to make their voices heard in commission proceedings.[66] Environmental organizations and concerned members of the public also began to intervene regularly as the environmental impacts of power production became better understood.[67] But the virtual (or sometimes actual) requirement that parties be represented by legal counsel, arcane procedural rules, and the holding of hearings in a centralized location within the state all pose barriers to such participation.[68]

While state offices of consumer counsel (OCCs) address some concerns about stakeholder participation in public utility proceedings by raising ratepayer interests, a plethora of issues remain. OCCs typically focus on a narrow band of consumer interests.[69] Most commonly, their focus is on keeping prices low.[70] Many more complex stakeholder interests are simply not within OCC mandates. These include consumer interests in increased autonomy through distributed energy generation, interests in environmental protection and energy justice, and nonutility producer interests such as those of solar service companies and energy efficiency providers.[71]

The four primary critiques of state PUCs still resonate, despite the partial restructuring of the electric and natural gas industries. In the early 1990s, the Federal Energy Regulatory Commission (FERC) sought to increase competition in the wholesale supply of natural gas and then electricity by requiring pipelines and transmission lines to carry competitors'

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65. Krieger, An Advocacy Model, supra note 50, at 639. It is also worth noting that before the 1970s and the rise of environmental organizations, concern about the environmental consequences of power production had not yet produced the coalitions that would come to target electricity regulatory proceedings. See Cary Coglianese, Social Movements, Law, and Society: The Institutionalization of the Environmental Movement, 150 U. Pa. L. Rev. 85, 91–94 (2001).

66. Krieger, An Advocacy Model, supra note 50, at 643–44.

67. See, e.g., David B. Spence, Regulation and the New Politics of (Energy) Market Entry, 95 Notre Dame L. Rev. 327, 330–31 (2019) (compiling and reporting data on nongovernmental organizations' participation in siting proceedings).

68. See Brown, supra note 55, at 21 ("[T]he costs involved in litigating are high enough that only parties with very large stakes in the outcome will ever undertake serious intervention.").

69. Colorado's Office of Consumer Counsel is typical in this regard. Its website identifies its purpose as "advocating for consumers when utilities seek to raise their rates." About the OCC, Colo. Dep't of Regul. Agencies Off. Consumer Couns., https://occ.colorado.gov/about-occ [https://perma.cc/83XX-5NTE] (last visited Oct. 25, 2020).

70. See Sharon B. Jacobs, The Energy Prosumer, 43 Ecology L.Q. 519, 554–55 (2016) [hereinafter Jacobs, The Energy Prosumer] (explaining the limitations in consumer counsel office mandates).

71. Id.

products on fair terms.[72] This led to more entrants into the wholesale supply business, leading FERC to relax regulation in areas where there was sufficient competition to discipline prices.[73] It also led to the creation of regional wholesale energy markets where retail utilities can purchase power.

Several states opted for comparable restructuring at the retail level. These states required monopoly utilities to distribute competitors' retail gas and electricity on their systems, again on fair terms. This gave end-use customers a choice of electricity and gas providers.[74] Even though state commissions in restructured states no longer set the retail rates for the gas and electricity products themselves, they now oversee competitive markets and enforce compliance by competitive providers with laws and regulations.[75] The commissions also perform their traditional regulatory functions for the transportation and distribution of those products. This includes overseeing the operations of the monopoly distribution utilities in their states.[76] In addition, commissions with siting and planning oversight responsibilities continue to exercise them.[77] In restructured states, utility planning obligations are sometimes referred to as procurement planning, as opposed to resource planning, to indicate that the utilities may be purchasing their gas or electricity rather than sourcing it from their own affiliates.[78]

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72. Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 75 FERC ¶ 61,080 (Apr. 24, 1996), https://www.ferc.gov/sites/default/files/2020-05/rm95-8-00v.txt (on file with the *Columbia Law Review*) (increasing competition in power generation by requiring transmission providers to offer the same prices and terms to all customers); Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, 59 FERC ¶ 61,030 (Apr. 8, 1992), https://www.ferc.gov/sites/default/files/2020-05/rm91-11-000.txt (on file with the *Columbia Law Review*) (increasing competition in natural gas extraction and sale by requiring transportation providers to to offer the same prices and terms to all customers).

73. Eisen et al., supra note 41, 683–85.

74. On electricity restructuring at the retail level, see id. at 769. On retail gas restructuring, see Natural Gas Explained: Natural Gas Customer Choice Programs, U.S. Energy Info. Admin., https://www.eia.gov/energyexplained/natural-gas/customer-choice-programs.php [https://perma.cc/Y6HP-645U] (last updated Oct. 2, 2020).

75. See, e.g., Lisa M. Quilici, Danielle S. Powers, Gregg H. Therrien, Benjamin O. Davis & Olivia A. Prieto, Concentric Energy Advisors, Retail Competition in Electricity: What Have We Learned in 20 Years? 16 (2019), https://ceadvisors.com/wp-content/uploads/2019/07/AEPG-FINAL-report.pdf [https://perma.cc/69TC-3LVM] (describing state regulators' role in restructured electricity markets).

76. See id.

77. See, e.g., Elise N. Zoli, Power Plant Siting in a Restructured World: Is There Light at the End of the Tunnel?, 16 Nat. Res. & Env't 252, 252 (2002) (noting that the California Energy Commission was responsible for siting power plants both before and after restructuring).

78. See Rachel Wilson & Bruce Biewald, Synapse Energy Econ., Best Practices in Electric Utility Integrated Resource Planning: Examples of State Regulations and Recent

2. *State Energy Offices.* — For a long time, PUCs were the only electricity regulators in the states. The next generative period for state energy agencies did not occur until the 1970s, when oil price shocks led to acute fears about adequate energy supply.[79] At the federal level, there were calls for consolidated executive control over the energy system and energy planning that culminated in the creation of the DOE in 1977.[80] As explained elsewhere, this was an incomplete victory for President Jimmy Carter in that Congress divided authorities between the new Department and an independent FERC.[81] Thus, key energy regulatory powers remained in an agency with at least some independence from the chief executive.

Many states also created stand-alone energy offices between 1973 and 1977 by legislation or executive order.[82] Like state PUCs, these offices vary in form and in responsibilities. But each administers federal grant programs for energy efficiency and conservation, and indeed this was a primary justification for their creation.[83] One condition of these federal grants was that states engage in annual energy planning, and energy offices oversee this process as well.[84]

Creation of state energy offices was also related to the growing interest in gubernatorial reorganization of state government during this period. James Conant documents twenty-two state executive reorganizations from

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Utility Plans 8 (2013), https://www.raponline.org/wp-content/uploads/2016/05/rapsynapse-wilsonbiewald-bestpracticesinirp-2013-jun-21.pdf [https://perma.cc/5E6B-F5BK].

79. See Daniel Yergin, The Prize: The Epic Quest for Oil, Money, and Power 607–08 (1991).

80. Jacobs, Statutory Separation of Powers, supra note 19, at 383.

81. Id.

82. See infra Appendix. Other states also created energy offices of some form, even if these were not stand-alone. See Alfred R. Light, Federalism and the Energy Crisis: A View from the States, 6 Publius 81, 87 (1976) ("In response to a question posed by the National Governors' Conference Energy Project in October 1974, 41 of 49 responding state and territorial governments reported that their jurisdictions had 'comprehensive' energy offices.").

83. See Jonas J. Monast & Sarah K. Adair, A Triple Bottom Line for Electric Utility Regulation: Aligning State-Level Energy, Environmental, and Consumer Protection Goals, 38 Colum. J. Env't L. 1, 18 (2013) (noting that state energy offices may administer programs to incentivize consumer investment in energy efficiency or renewable energy programs); see also In re Pub. Serv. Co. of Colo., No. 06I-448E, 2007 WL 2297358, at *9 (Colo. P.U.C. July 24, 2007) (observing that the Governor's Energy Office "stated that energy conservation and [demand-side management] are part of its core values and that its mission, in part, is to advance those issues . . . and to ensure that they stay front and center").

84. U.S. Dep't of Energy, State Energy Program: Operations Manual 6 (2017), https://www.energy.gov/sites/prod/files/2017/06/f34/SEP-ops-manual_0720.pdf [https://perma.cc/D7GU-THXR]; see also 2 C.F.R. §§ 200.100–200.521 (2020) (establishing the administrative requirements, cost principles, and audit requirements for Federal Awards).

the period 1965 to 1987.[85] Of the above-referenced states,[86] only New Mexico's Energy, Minerals, and Natural Resources Department emerged directly from a reorganization.[87] But one of the core principles driving these reorganizations—the idea that increased executive control of administrative activity would improve government—motivated the creation of energy offices as well.[88] Certainly, the creation of new energy agencies subject to gubernatorial control shifted some of the power over state energy policy from state legislatures and the PUCs to the governor's mansion.

Today, state energy offices oversee a broad portfolio of functions, with responsibilities varying by state. Energy offices frequently work to coordinate and advance state energy plans as well as legislative and gubernatorial priorities.[89] They might also propose legislation and executive actions.[90] Energy offices in some states gather energy data and information on energy consumption and in other specialized areas.[91] They may also engage in public education and outreach.[92] In states that have restructured their energy systems at the distribution level by allowing providers to compete for customers, energy offices can oversee consumer education and outreach about these programs. Rhode Island's legislature, for

85. James K. Conant, In the Shadow of Wilson and Brownlow: Executive Branch Reorganization in the States, 1965 to 1987, 48 Pub. Admin. Rev. 892, 894 (1988) [hereinafter Conant, In the Shadow of Wilson and Brownlow].

86. See supra note 82 and accompanying text.

87. See N.M. Legis. Council Serv., Government Restructuring Task Force: Final Report 2010, at 47 (2010), https://www.innovations.harvard.edu/sites/default/files/opex/documents/New%20Mexico%20Government%20Restructuring%20Task%20Force%20Report.pdf [https://perma.cc/Y95E-DCFK].

88. See Conant, In the Shadow of Wilson and Brownlow, supra note 85, at 892–93. The 1937 Brownlow Committee's report concluded, for example, that a thriving democracy required "a responsible and effective chief executive as the center of energy, direction and administrative management." The President's Comm. on Admin. Mgmt., Report of the Committee with Studies of Administrative Management in the Federal Government 3 (1937).

89. Rhode Island's Office of Energy Resources, for example, must "[d]evelop and put into effect plans and programs to promote, encourage, and assist the provision of energy resources for Rhode Island in a manner that enhances economic well-being, social equity, and environmental quality." 42 R.I. Gen. Laws § 42-140-3(1) (2020).

90. One example is Delaware's State Energy Office, which may "[r]ecommend legislative or other initiatives" to support energy conservation initiatives. Del. Code tit. 29, § 8053(c)(3) (2020).

91. For example, California's Energy Commission undertakes "a continuing assessment of trends in the consumption of electrical energy" and collects "forecasts of future supplies and consumption of all forms of energy." Cal. Pub. Res. Code § 25216(a)–(b) (2020). South Carolina's Energy Office "collect[s] currently published and publicly available energy data and provide[s] energy information clearinghouse functions" in the state. S.C. Code Ann. § 48-52-420(10) (2020).

92. The purpose of Utah's Office of Energy Development is to "advance energy education, outreach, and research, including the creation of elementary, higher education, and technical college energy education programs." Utah Code § 63M-4-401(3)(c) (2020). Alaska's Energy Authority promotes "conservation, energy efficiency, and alternative energy through training and public education." Alaska Stat. § 44.83.080(17) (2020).

example, tasked the state Office of Energy Resources with developing consumer-disclosure forms for installation of distributed solar.[93] Some state energy offices also intervene in PUC proceedings, either as of right or at the discretion of the Commission.[94] They may also participate in federal energy regulatory proceedings or otherwise engage with federal regulators.[95]

Gubernatorial priorities shape the actions of energy offices. Even where statutes set office mandates, the offices may skew de facto toward executive preferences in implementation of their duties day-to-day. For example, due to a reauthorization fight at the state legislature that resulted in a compromise between senate Republicans and Democrats, the Colorado Energy Office's statutory mandate is broad. In addition to promoting energy efficiency and clean energy, including by promoting the state renewable energy standard, the office must promote "[t]raditional energy sources such as oil and other petroleum products, coal, propane, and natural gas."[96] Nevertheless, on its website, the Office defines its mission as "[r]educ[ing] greenhouse gas emissions and consumer energy costs by advancing clean energy, energy efficiency and zero emission vehicles to benefit all Coloradans."[97] The exercise of this kind of discretion in implementation is not unusual. Broad statutory charges offer significant flexibility to prioritize particular elements of those charges.[98] It is

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93. Ryan M. Belmore, Rep. Ruggiero Pleased with New Consumer Protection Effort for Solar Customers, What's Up Newp (Oct. 1, 2019), https://whatsupnewp.com/2019/10/rep-ruggiero-pleased-with-new-consumer-protection-effort-for-solar-customers [https://perma.cc/6FDN-VTWM]. The Rhode Island House passed a resolution "respectfully requesting" that the Energy Office create these forms. H.R. 5991, 2019 Gen. Assemb., Jan. Sess. (R.I. 2019).

94. See, e.g., Delta-Montrose Elec. Ass'n v. Tri-State Generation & Transmission Ass'n, No. 18F-0866E, 2019 WL 467998, at *1 (Colo. P.U.C. Jan. 30, 2019) (noting that the Colorado Energy Office has the statutory authority to intervene as of right in PUC proceedings).

95. See, e.g., ISO New England Inc., Order Denying Waiver Request, Instituting Section 206 Proceeding, and Extending Deadlines, 164 FERC ¶ 61,003, app. A (July 2, 2018), https://www.iso-ne.com/static-assets/documents/2018/07/er18-1509-000_7-2-18_order_deny_waiver_request.pdf [https://perma.cc/R94P-S9B2] (identifying the Maine Governor's Energy Office as an entity that filed "interventions, protests and/or comments"); see also Taylor Curtis, Aaron Levine & Kurt Johnson, Nat'l Renewable Energy Lab'y & Telluride Energy, State Models to Incentivize and Streamline Small Hydropower Development 12–14 (2017), https://www.nrel.gov/docs/fy18osti/70098.pdf [https://perma.cc/5MRX-Y3KP] (identifying the Colorado Energy Office as the point of contact for the implementation of a pilot program on small hydropower siting under a Memorandum of Understanding between the State of Colorado and FERC).

96. Colo. Rev. Stat. § 24-38.5-102(1)(a)(IV) (2020).

97. About Us, Colo. Energy Off., https://energyoffice.colorado.gov/about-us [https://perma.cc/A5KX-BXAC] [hereinafter Colorado About Us] (last visited Oct. 25, 2020).

98. Thus, Western Resource Advocates, a nonprofit organization in Colorado, argued in a PUC proceeding that the Colorado Energy Office had not specified "how it will balance its broad statutory charges with its singular statutory charge of protecting the environment

predictable that a state governor, who appoints the head of state energy offices in most cases, would thereby exert greater control over how mandates are executed.[99]

3. *Energy Infrastructure Siting Boards*. — During this same era, many states also created separate siting boards.[100] Depending on the state, the siting of energy infrastructure can be either a local or state responsibility, or the responsibility can be shared.[101] Where statewide permission is required, either in the form of a Certificate of Public Convenience and Necessity (an authorization to proceed) or in the form of approval of a particular site for the infrastructure, states vest this authority either in the PUC or in a separate body.[102]

A primary driver for creating separate siting boards was environmental. During this period, states were increasingly focused on environmental protection, and many created state environmental agencies and passed or amended environmental protection statutes following the establishment of the federal EPA.[103] As states increasingly recognized the environmental impacts of new, large power plants and other energy infrastructure, they required review of those impacts by government regulators.[104] Nuclear plants were of particular concern. For example, one of the impetuses for the 1974 creation of the California Energy Commission, which also has

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in the context of this proceeding." Black Hills Colo. Elec., LLC, No. 19A-0660E, 2020 WL 837749, at *8 (Colo. P.U.C. Feb. 12, 2020) (internal quotation marks omitted) (quoting WRA Petition for Leave to Intervene at 14, *Black Hills Colo. Elec.*, No. 19A-0660E).

99. Sometimes these broad mandates can create tensions that energy offices must balance. See, e.g., Pub. Serv. Co. of Colo., No. 17A-0462EG, 2018 WL 2933532, at *25 (Colo. P.U.C. June 6, 2018) (Moser, Comm'r, dissenting) (implying irony in the Colorado Energy Office's opposition to portions of a settlement that would have kept amounts spent on demand-side management relatively low "despite the fact that reducing energy costs for consumers is one of its key components to its mission and vision" [sic]).

100. While several boards were created during this period, states continued to create *separate* siting bodies over the ensuing decades. For example, the New Hampshire Energy Facility Site Evaluation Committee was created in 1990. Overview, N.H. Site Evaluation Comm., https://www.nhsec.nh.gov/overview/index.htm [https://perma.cc/GQ4X-5UB8] (last visited Oct. 25, 2020).

101. For a survey of state approaches as they relate to wind energy infrastructure, see Jaclyn Kahn & Laura Shields, State Approaches to Wind Energy Facility Siting, Nat'l Conf. of State Legislatures (Sept. 2, 2020), https://www.ncsl.org/research/energy/state-wind-energy-siting.aspx [https://perma.cc/KL6T-7T2T].

102. For a listing of states that have created separate siting bodies, see infra Appendix.

103. See JoyAnna Hopper, Environmental Agencies in the United States: The Enduring Power of Organization Design and State Politics 8–9 (2020) (describing the calculations of various states during this period in deciding whether to create a new, separate environmental agency or to continue to house environmental functions in existing departments).

104. See Daniel P. Selmi, Themes in the Evolution of the State Environmental Policy Acts, 38 Urb. Law. 949, 954 (2006) (observing that, by 1975, many states had adopted their own versions of the federal National Environmental Policy Act to require review of the environmental impacts of major state actions).

responsibility for siting energy facilities, was concern about proposed nuclear plants in the state.[105]

Twelve states have some type of separate siting office or agency.[106] Arizona created its siting committee in 1971 to mitigate siting delays, in part by creating a centralized review process,[107] as well as to minimize effects on the environment and citizens' quality of life.[108] An additional goal was to enable participation by "interested and affected individuals, groups, county and municipal governments and other public bodies" in siting decisions.[109] To this end, there is public representation on the siting board, and the board holds meetings open to the general public as part of its decisionmaking.[110]

Similarly, Connecticut created its Siting Council in 1972 following passage of the Public Utility Environmental Standards Act.[111] The state's goal in creating the Council was to balance the "environment and ecology of the state" with more traditional energy infrastructure goals, such as low-cost energy.[112] The Connecticut Council too includes members of the public alongside members from government.[113]

New York boasts the nation's newest siting office, the Office of Renewable Energy Siting, established in 2020 to streamline the siting of renewable energy facilities in order to meet state decarbonization goals.[114] This office,

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105. K.K. DuVivier, The Superagency Solution, 46 McGeorge L. Rev. 189, 197–98 (2014).

106. See infra Appendix. Some of these are formally nested within the state PUC, but are independent in their operations. For example, the Arizona Power Plant and Transmission Line Siting Committee is located within the state Corporation Commission but operates independently from it. See Arizona Power Plant, Ariz. Corp. Comm'n, https://www.azcc.gov/arizona-power-plant/line-siting-committee [https://perma.cc/T72V-Y32R] (last visited Oct. 25, 2020). For similar examples, see Ky. Rev. Stat. Ann. § 278.702 (West 2020) (stating that the Kentucky State Board on Electric Generation and Transmission Siting is "attached to the Public Service Commission for administrative purposes"); Mass Gen. Laws Ann. ch. 164, § 69H (West 2019) (describing the Massachusetts Siting Board as "an energy facilities siting board within the department, but not under the supervision or control of the department").

107. See Arizona Power Plant, supra note 106. Similarly, the New Hampshire Site Evaluation Committee was created "to provide one stop shopping for regulatory review and permitting of newly proposed large energy facilities." NH Site Evaluation Committee, Soc'y for the Prot. of N.H. Forests, https://forestsociety.org/advocacy-issue/nh-site-evaluation-committee [https://perma.cc/6UZX-J7AW] (last visited Oct. 25, 2020).

108. Act of Apr. 16, 1971, ch. 67, sec. 1, 1971 Ariz. Sess. Laws 179, 180 (codified as amended at Ariz. Rev. Stat. §§ 40-360 to 40-360.13 (2020)).

109. Id.

110. Ariz. Rev. Stat. §§ 40-360.01, 40-360.04.

111. Conn. Siting Council, About Us, Ct.gov, https://portal.ct.gov/CSC/Common-Elements/Common-Elements/Connecticut-Siting-Council—Description [https://perma.cc/S3QJ-93E3] (last visited Oct. 25, 2020).

112. Conn. Gen. Stat. § 16-50g (2020).

113. Id. § 16-50j.

114. Robert Walton, New York Becomes First State to Establish Renewables Siting Office in an Effort to Speed Up Deployment, Util. Dive (Apr. 7, 2020), https://www.utility

the first of its kind, explicitly prioritizes the siting of renewable energy infrastructure at speed so that the state can meets its goal of seventy-percent renewable electricity by 2030.[115] The office could become a model for other states, especially those that have also set ambitious clean energy or renewable energy goals.

4. *Energy Transition Agencies.* — The latest wave of state-energy-agency creation began in the early 2000s and is ongoing. Concerns about climate change and the resulting desire to decarbonize state energy economies characterize the current movement. The wave is not as uniform as those described above. Many of these new institutions are coordinating bodies that pull their membership from the leadership of existing state agencies. Some of the new administrative bodies are task forces or other less formal institutions. Others are offices within the executive branch. With respect to substance, some states combine climate and energy transition mandates within a single body while others emphasize one or the other. And in a nod to the fraught and sometimes partisan character of the energy transition debate, a few states have even created administrative bodies that double down on fossil energy production. These design choices, too, are a product of the climate and energy transition movement, albeit reactionary ones.

First, some states have created climate councils or other bodies whose broader mandates include energy. The Maine Climate Council, for example, has an Energy Working Group tasked with evaluating and recommending actions to mitigate climate emissions for the state's energy sector and to increase energy system resilience in the face of anticipated climate impacts.[116] New Mexico's interagency Climate Change Task Force, established by executive order in 2019, has a mandate to consider renewable energy generation.[117] Wisconsin's Task Force on Climate

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dive.com/news/new-york-becomes-1st-state-to-establish-renewables-siting-office-in-an-effo/575591 [https://perma.cc/98GJ-RXED].

115. Id.

116. See State of Me., Governor's Off. of Pol'y Innovation & the Future, Energy Working Group, Maine.gov, https://www.maine.gov/future/initiatives/climate/climate-council/energy [https://perma.cc/2CNN-4YBS] (last visited Oct. 25, 2020). The Group is currently working on the issues of grid planning and load flexibility, clean energy supply, renewable fuels, and energy financing. Id. The council includes representatives from the Governor's Energy Office, the Public Utilities Commission, the Office of the Public Advocate, the Maine Department of Labor, local governments, the state legislature, stakeholders (including local utilities, consumer groups, and environmental groups), as well as subject-matter experts from state universities and elsewhere. State of Me., Governor's Off. of Pol'y Innovation & the Future, Maine Climate Council Energy Working Group Membership List 1, https://www.maine.gov/future/sites/maine.gov.future/files/inline-files/EnergyWG_MemberList_191223.pdf [https://perma.cc/2TFD-QF2D] (last visited Oct. 30, 2020).

117. N.M. Exec. Order No. 2019-003 (Jan. 29, 2019), https://www.governor.state.nm.us/wp-content/uploads/2019/01/EO_2019-003.pdf [https://perma.cc/N3XV-PB7C] [hereinafter New Mexico Executive Order].

Change, created by executive order in 2019, must make recommendations to create a clean energy economy in the state.[118]

Other states have created or reinvented energy offices to respond to climate risks. Then-Governor Bill Ritter transformed Colorado's Energy Office in 2007 when he tasked it with promoting renewable energy and energy efficiency.[119] Rhode Island transformed its state energy office into a freestanding Office of Energy Resources in 2006.[120] Other states have embraced reorganization as a strategy to refocus existing administrative resources on new challenges, with or without expanded substantive agency mandates.[121] In January 2020, Kansas Governor Laura Kelly announced a plan to move the Kansas Energy Office out of the Kansas Corporation Commission (the state's PUC equivalent) and transform it into a separate, independent agency.[122] At the same time, Governor Kelly intends to expand the office's responsibilities to include energy planning, policy development, and stakeholder outreach.[123]

Another state response to climate change has been to merge energy and environmental agencies, putting them under a single directorate. Arkansas, Connecticut, Kentucky, Massachusetts, Nebraska, and Oklahoma

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118. Wis. Exec. Order No. 52 (Oct. 17, 2019), https://docs.legis.wisconsin.gov/code/register/2019/766B/register/executive_orders/eo_52/eo_52 [https://perma.cc/5KMW-N9DW] [hereinafter Wisconsin Executive Order 52]. The task force, established by executive order in 2019, is chaired by the Lieutenant Governor and composed of state agency leaders as well as representatives from business, agriculture, utility companies, organized labor, tourism, Native Nations, and higher education. Id.

119. The office originated in 1977, when it was called the Office of Energy Conservation. Two Hills Acct. & Consulting for Colo. Energy Off., State Energy Program Performance Audit—November 2014, at 1 (2014), https://leg.colorado.gov/sites/default/files/documents/audits/1346p_state_energy_program_performance_audit_november_2014.pdf [https://perma.cc/HF6G-VYNK].

120. Rhode Island Energy Resources Act, 42 R.I. Gen. Laws § 42-140-2 (2020). Similarly, Governor Gretchen Whitmer established Michigan's Office of Climate and Energy within the Department of Environment, Great Lakes, and Energy in 2019. See About EGLE and Energy, Mich. Dep't of Env't, Great Lakes & Energy, Off. of Climate & Energy, https://www.michigan.gov/climateandenergy/0,4580,7-364-85452—,00.html [https://perma.cc/4KGZ-XVCH] (last visited Nov. 20, 2020).

121. Missouri transferred the State Energy Division from the Department of Economic Development to the Department of Natural Resources in 2019. Bryce Gray, Missouri DNR Will Soon Have New Oversight of State Energy Policy—A Development Some Are Treating with Caution, St. Louis Post-Dispatch (Mar. 30, 2019), https://www.stltoday.com/business/local/missouri-dnr-will-soon-have-new-oversight-of-state-energy-policy-a-development-some-are/article_f56ad878-4194-5eb2-abd3-5202e1c0aeb3.html (on file with the *Columbia Law Review*). The move was accomplished by executive order (in Missouri, the legislature has sixty days to respond to such moves, but it did not object within that time). Id.

122. Press Release, Kan. Off. of the Governor, Governor Kelly Announces Reorganization of Energy Office (Jan. 28, 2020), https://governor.kansas.gov/governor-kelly-announces-reorganization-of-energy-office [https://perma.cc/SU8S-6XX7].

123. Id. The press release from the Governor's office is careful to emphasize renewable energy and energy efficiency goals, noting its commitment to a "sustainable and balanced energy future." Id.

have all effected such mergers, as has the District of Columbia.[124] In some cases, these moves appear intended to bring environmental and climate considerations to the fore in energy planning and decisionmaking. In others, the motivation may have been the reverse: to elevate energy concerns above environmental ones.[125]

Not all states have embraced the energy transition wholeheartedly. North Carolina's governor established the North Carolina Energy Policy Council in 2014 to support an "all-of-the-above" energy strategy.[126] And Colorado's legislature recently expanded its Energy Office's mandate to include promotion of fossil-fuel generation alongside renewable energy and energy efficiency.[127] In 2011, Utah's governor created the Governor's Office of Energy Development, whose purpose is to deliver "high value results" to the "state's economy."[128] Similarly, Indiana's 21st Century Energy Policy Development Task Force, which is composed of members of the legislature plus gubernatorial appointees, is tasked with preserving "reliable, resilient, and affordable electric service" for state residents.[129]

Finally, a few states are creating energy transition–specific bodies whose primary task is to ensure that the transition is just and equitable. The Colorado Legislature created the Office of Just Transition within the Department of Labor and Employment in 2019.[130] The office's mission is to ensure a smooth transition for "coal-dependent" communities as Colorado moves away from fossil-fuel generation and towards its goal of one-hundred-percent renewable energy by 2040.[131] An advisory committee will

124. See infra Appendix.

125. In a statement on her move to combine Oklahoma's Energy and Environment Offices by executive order in 2013, Governor Mary Fallin commented that "[s]trong energy policy is strong environmental policy." Joe Wertz, Q&A: Oklahoma's New Secretary of Energy and Environment, NPR: StateImpact Okla. (Sept. 12, 2013), https://stateimpact.npr.org/oklahoma/2013/09/12/qa-oklahomas-new-secretary-of-energy-and-environment [https://perma.cc/2FZ8-HQ37] (internal quotation marks omitted). When the new director of the merged office, Michael Teague, was asked whether his early meeting with energy-industry officials rather than environmental representatives reflected the office's priorities, he agreed that "it does reflect the governor's priorities." Id.

126. N.C. Dep't of Env't Quality, Energy Policy Council Report 2 (2016), https://files.nc.gov/ncdeq/Energy%20Mineral%20and%20Land%20Resources/Energy/Energy%20Policy%20Council/Energy%20Policy%20Council%20Report%20March%202016.pdf [https://perma.cc/4WWN-3BPH].

127. As discussed above, however, because Colorado and its dominant electric utilities have committed to carbon-neutral generation by midcentury, the lion's share of the Office's work remains focused on renewable generation and energy efficiency. See supra notes 96–97 and accompanying text.

128. Utah Governor's Off. of Econ. Dev., 2019 Annual Report 48 (2019), https://business.utah.gov/wp-content/uploads/2019/10/utah-goed-2019-annual-report.pdf [https://perma.cc/7JWH-22J3].

129. Ind. Code § 2-5-45-7 (2020).

130. See Act of May 28, 2019, ch. 323, 2019 Colo. Sess. Laws 2987 (codified at Colo. Rev. Stat. §§ 2-3-1203, 8-83-501 to -506 (2020)) (appropriating about $155,000 for implementation of the Act).

131. Id.

develop a "just transition" plan for submission to the governor and legislature regarding benefits to coal-transition workers and grants to coal-transition communities.[132]

In a related approach, New Mexico has established new advisory committees to help distribute energy transition funds to affected communities. An existing agency—the Economic Development Department—will distribute the actual funds,[133] however, new committees in each affected community will advise the department on fund expenditures.[134] New Mexico's Energy Transition Act specifies that, of the three conveners of these committees, each must be from the affected community, one should come from each major political party, and one should represent the Navajo Nation.[135] Participants must include members from each affected local government, at least one member representing displaced workers, and at least four members representing diverse economic and cultural perspectives of the community.[136]

B. *The Logic of State Administrative Design*

This section explains the evolution of state energy architecture by drawing on the public administration literature on state government organization and the political science literature on policy diffusion. The public administration literature's explication of broader waves of state government organization and reorganization provides the backdrop for this Part's observed changes in state energy structures over time. The political science literature suggests an additional explanation for the synchronicity observed in state-agency genesis: that states are more inclined to adopt reforms piloted by peer states.

The generative periods for state-level energy agencies follow a logic similar to the observation in the public administration literature that state agency creation occurs in "waves."[137] Stephen Jenks and Deil Wright studied the "presence and proliferation of state administrative agencies" across four decades from 1959 to 1989.[138] They found a significant degree

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132. Colo. Rev. Stat. § 8-83-503. The statute also required utilities retiring coal-generation plants to submit a workforce-transition plan at least six months prior to the retirement. Id. § 8-83-505.

133. Energy Transition Act, ch. 65, § 16(E)–(F), 2019 N.M. Laws 437, 477–79. The department must establish a public planning process in affected communities to include no fewer than three public meetings in that community. Id. § 16(F).

134. Id. § 16(C).

135. Id. § 16(K).

136. Id.

137. Conant, In the Shadow of Wilson and Brownlow, supra note 85, at 892, 898 n.1 (identifying four waves of state agency creation).

138. Stephen S. Jenks & Deil S. Wright, An Agency-Level Approach to Change in the Administrative Functions of American State Governments, 25 State & Loc. Gov't Rev. 78, 80 tbl.1 (1993) (cleaned up).

of overlap in agencies from state to state.[139] Additionally, they determined that similar agencies were created at similar times. For example, in the 1960s at least three quarters of the states created air quality agencies.[140] Many states created small and minority business agencies in the 1980s, with a comparable number creating hazardous waste agencies that same decade.[141] Mining reclamation agencies and public broadcasting systems popped up in the 1990s.[142]

What accounts for these waves? Jenks and Wright offer several hypotheses. First, they speculate that state agencies may be created in response to national policy initiatives and the establishment of cooperative federalism schemes.[143] Second, they suggest that new agencies can be the result of "state executive-based coordination and control efforts."[144] Finally, they postulate that new social concerns in response to changing social and economic conditions can provide the impetus for new administrative bodies.[145]

The pattern of energy-agency creation in the states is consistent with these hypotheses. As the previous section shows, most states created energy offices in the 1970s and 1980s in order to implement federal grant programs, supporting Jenks and Wright's theory that state offices arise in response to federal schemes. The expansion of these energy offices, however, supports their second hypothesis, namely that new agencies can be tools of gubernatorial consolidation and control. And, echoing Jenks and Wright's theory about the importance of social concerns, states have more recently been creating new types of energy agencies, including state siting boards and climate and energy transition offices, in response to public concern about climate change and our energy future.

The similarities in agency creation across states might also be the product of diffusion, a phenomenon discussed primarily in the political science literature.[146] Jack Walker is generally credited with originating the conversation about state policy diffusion with the publication of his seminal article on the topic in 1969.[147] Drawing on the work of Herbert

139. Id. at 79–83.

140. Id. at 80 tbl.1.

141. Id.

142. Id.

143. Id. at 81, 83.

144. Id. at 81. Miriam Seifter highlights this "modern move to centralization" in her work on state administration. Seifter, Understanding State Agency Independence, supra note 38, at 1559 (cleaned up).

145. Jenks & Wright, supra note 138, at 82–83.

146. A 2012 summary of the literature noted that "[o]ver the past 50 years, scholars have published nearly 1,000 research articles in political science and public administration journals about 'policy diffusion.'" Charles R. Shipan & Craig Volden, Policy Diffusion: Seven Lessons for Scholars and Practitioners, 72 Pub. Admin. Rev. 788, 788 (2012).

147. Jack L. Walker, The Diffusion of Innovations Among the American States, 63 Am. Pol. Sci. Rev. 880 (1969). In addition to his theory of diffusion, Walker also posited that

Simon, Walker noted that state decisionmakers frequently "satisfice[]," choosing courses of action that seem satisfactory under the circumstances based on a set of heuristics, or rules of thumb.[148] One of these rules of thumb, Walker suggests, is to look to other states (especially regional "leaders") for ideas about policy innovation.[149]

While the prevalence of diffusion is still subject to some debate, scholars broadly agree on its most likely mechanisms: learning (adoption of policies that have been successful elsewhere), emulation (conforming to norms established by other states), and competition (adoption of policies for a competitive advantage).[150] Diffusion may also be the work of "policy entrepreneurs" who build broad coalitions to support change.[151] Collaborative associations like the National Conference of State Legislatures, the National Association of Governors, and the National Association of Attorneys General can speed and regularize diffusion.[152] These organizations are sources of information and facilitate the exchange of information and knowledge among their members.[153]

The case of state energy agencies supports several of the above ideas about the mechanisms of policy diffusion. Most notably, the history of state-energy-agency creation supports a prominent role for policy entrepreneurs. In the energy context, the two most important national organizations that can serve as conduits of learning are the National Association of Regulatory Utility Commissioners (NARUC) (founded in 1889)[154] and the National Association of State Energy Offices (NASEO) (founded in 1986).[155] These organizations comprise state energy officials and conduct policy research for their members.[156] They provide fora in which state

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states were more likely to be first adopters of innovative policies if they were larger, wealthier, more industrialized, and more urban. Id. at 887.

148. Id. at 889.

149. Id. at 893.

150. See Fabrizio Gilardi, Four Ways We Can Improve Policy Diffusion Research, 16 State Pol. & Pol'y Q. 8, 9 (2016) (summarizing the literature).

151. Barry Rabe stresses the importance of "mezzo-level entrepreneurs" in innovation in climate change policy. Rabe, supra note 44, at 25. Rabe also notes that policymaking is "far more informal" in the states than at the federal level, and that individuals may have easier access to the governor's office, which makes it more likely that policy entrepreneurs may "emerge as the trusted resident expert on a particular topic." Id. at 27.

152. See Walker, supra note 147, at 891, 894 (suggesting that development of state norms is facilitated by "professional organizations and other forms of communication among state administrators").

153. See id. at 894–95.

154. About NARUC, Nat'l Ass'n of Regul. Util. Comm'rs, https://www.naruc.org/about-naruc/about-naruc [https://perma.cc/NS72-6Y5W] (last visited Oct. 25, 2020).

155. About NASEO, Nat'l Ass'n of State Energy Offs., https://www.naseo.org/about-naseo [https://perma.cc/UE9M-GW9Z] (last visited Oct. 25, 2020).

156. See NARUC Center for Partnerships & Innovation, Nat'l Ass'n of Regul. Util. Comm'rs, https://www.naruc.org/cpi-1 [https://perma.cc/LK36-QPMR] (last visited Oct. 25, 2020); Publications, Nat'l Ass'n of State Energy Offs., https://www.naseo.org/publications [https://perma.cc/Z6C5-N5QB] (last visited Oct. 25, 2020).

energy officials can learn about experimentation with administrative form in their sister states.[157] And their reports collect models from around the country that other states can emulate.[158]

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The story of energy-agency genesis in the states raises the larger question of how new agencies come into being. The next Part considers this question. It also presents a framework for analyzing the central query of this Article: When is agency genesis a viable solution to policy concerns, and when might its downsides outweigh any benefits?

II. THE LAW AND POLITICS OF AGENCY GENESIS

This Part explains, first, how new state agencies are created. New agencies can be creatures of state constitutions, statutes, or executive orders. If the first, they owe their creation to the people of the state. If the second, to the legislature. If the last, to the governor. Next, this Part offers a framework for evaluating the costs and benefits of new agency creation.

A. *The Law of State Agency Genesis*

State constitutional and statutory law govern the mechanics of agency creation. Some state constitutions themselves create agencies that may then be modified or disbanded only by constitutional amendment.[159] For example, the Colorado Public Utilities Commission is a creature of the state constitution.[160]

While some state agencies have constitutional pedigree, however, more are created by statute or even by executive order. In some states, legislatures have the sole authority to create agencies.[161] In others, governors have either inherent or delegated authority to reorganize the state

157. See NARUC Center for Partnerships & Innovation, supra note 156; Publications, supra note 156.

158. For example, a 2020 NASEO report documents models of promoting "cleantech" innovation in the states. Sandy Fazeli, Nat'l Ass'n of State Energy Offs., States and Cleantech Innovation 12–23 (2020), https://www.naseo.org/data/sites/1/documents/publications/Tech%20Innovation%20Report%20Final%20Draft%204.pdf [https://perma.cc/454D-6KRK].

159. See Seifter, Understanding State Agency Independence, supra note 38, at 1555–57 (noting, for example, that twenty-eight state constitutions create state boards of education or boards of regents for public universities and that six create wildlife commissions or boards). Most state constitutions also create executive offices other than the governor. Id. at 1552–55.

160. Colo. Const. art. XXV (delegating the regulation of utilities to a Public Utilities Commission but permitting the General Assembly to vest this authority in a different body by statute).

161. See Miriam Seifter, Gubernatorial Administration: Appendices, at app. B (Univ. of Wis. L. Sch. Legal Stud. Rsch. Paper Series, Paper No. 1407, 2017), https://ssrn.com/abstract=2934671 (on file with the *Columbia Law Review*) [hereinafter Seifter, Appendices]. Even in states where governors lack authority to create new agencies, they may sometimes

bureaucracy, including by creating new administrative bodies.[162] Governors might also take steps short of official agency creation by reorganizing personnel within their own offices to create new administrative bodies or to refocus the mandates of existing actors.

Legislatures create agencies by passing statutes to that effect and by delegating authority to the new bodies. These statutes, in nearly every state, are subject to some form of executive veto.[163] In the vast majority of states, governors have line-item veto authority, meaning that they can veto specific provisions of a statute rather than the statute as a whole.[164] Legislators must then overcome these vetoes by either a two-thirds or three-fifths vote, depending on the state.[165] Some states are skeptical enough of new agencies that they have passed legislation requiring that all agencies "sunset" after five years unless the legislature reauthorizes them.[166]

Governors, too, can create agencies in some states. In twenty-seven states, governors possess some form of reorganization authority.[167] In some states, that authority is limited such that it would be difficult for a governor to create a new agency through its exercise. In Arkansas, for example, the governor may only exercise reorganization authority when necessary to comply with federal law or regulations.[168] California's governor may not

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be able to convene less formal bodies that cannot act with the force of law. Id. app. B n.53 (citing the example of Colorado).

162. See Miriam Seifter, Gubernatorial Administration, 131 Harv. L. Rev. 483, 505–07 (2017) [hereinafter Seifter, Gubernatorial Administration] (noting that twenty-seven governors possess some degree of reorganization authority). At the federal level, the President may only engage in administrative reorganization when Congress has authorized it by statute. Congress has done so several times, most recently in the Reorganization Act of 1977 (which was briefly extended but expired in December 1984). Ronald C. Moe, Cong. Rsch. Serv., RL30876, The President's Reorganization Authority: Review and Analysis 4–7 (2001).

163. See Seifter, Appendices, supra note 161, at app. C.

164. Seifter, Gubernatorial Administration, supra note 162, at 508–09; Seifter, Appendices, supra note 161, at app. C.

165. See John Haughey, State-By-State Guide to Gubernatorial Veto Types, CQ (Nov. 14, 2016), https://info.cq.com/resources/state-by-state-guide-to-gubernatorial-veto-types [https://perma.cc/QLP6-AY52].

166. See Brian Baugus & Feler Bose, Mercatus Ctr., Sunset Legislation in the States: Balancing the Legislature and the Executive 3–4 (2015), https://www.mercatus.org/system/files/Baugus-Sunset-Legislation.pdf [https://perma.cc/74HU-NBHV]. At the federal level, recognizing that the creation of new boards and commissions can be a potent tool of executive power, Jack Beermann suggests that Congress could limit this behavior by statute for some period of time at the end of a presidential term to prevent "midnight" agency genesis. Jack M. Beermann, Presidential Power in Transitions, 83 B.U. L. Rev. 947, 1004–05 (2003) (acknowledging the drawbacks of this and other limitations on presidential power during the lame-duck period but concluding that "on balance some restrictions would be desirable").

167. Seifter, Gubernatorial Administration, supra note 162, at 506; Seifter, Appendices, supra note 161, at app. B.

168. Seifter, Appendices, supra note 161, at app. B.

create new administrative powers.[169] And in New Jersey, the governor may not create a "principal department."[170] In other states, gubernatorial reorganizations require legislative ratification (or legislatures may veto their efforts).[171] Notwithstanding these restrictions, executive reorganization authority as a tool of agency creation remains more potent in the states than at the federal level.[172]

That state agencies and offices derive from so many different sources explains in part why multiplicity might occur. The next section offers a framework for evaluating the choice to create new agencies as opposed to reforming existing ones.

B. *Evaluating Agency Genesis and Agency Multiplicity*

And so we return to the question posed at the opening of this Article: When should policymakers create new institutions to address new problems, or problems that have been inadequately dealt with by existing systems? This section provides a framework for evaluating the effects of new agency creation. The framework surfaces key considerations that policymakers should take into account in deciding whether to create a new agency. The framework can also assist citizens in evaluating policymaker choices.

Of course, agency creation comes in different forms. New agencies can assume new responsibilities not previously assigned to administrative

169. Id. (citing Cal. Const. art. V, § 6; Cal. Gov't Code § 12080.2 (2016)).

170. Id. (citing N.J. Stat. Ann. § 52:14C-4 (West 2016)).

171. Id.

172. Presidential reorganization authority lapsed with the expiration of the most recent Reorganization Act in 1984. See Paul J. Larkin, Jr. & John-Michael Seibler, Heritage Found., The President's Reorganization Authority 3 (2017), https://www.heritage.org/sites/default/files/2017-07/LM-210_0.pdf [https://perma.cc/NQJ6-C29A].

bodies or take on existing obligations.[173] They can consolidate responsibilities[174] or decentralize them by breaking off mandates from previously centralized bodies.[175] New agencies might have more focused mandates than existing agencies or be a hodge-podge of authorities.[176] Their authorities may be distinct from or overlap with those of other agencies.[177] They can be subject to direct control by the state executive or more insulated from gubernatorial control. They can be more or less responsive to voters and stakeholder groups.

Variation in agency form complicates the effort to draw broad conclusions about the phenomenon of genesis itself. Moreover, the potential advantages and disadvantages of agency genesis will vary depending on position, perspective, and values.[178] Offering this framework is not intended to minimize the difficulty of estimating the actual advantages or disadvantages associated with each criterion. Some effects—the monetary costs of infrastructure and personnel in particular—will be easier to estimate

173. Compare Act of May 28, 2019, ch. 323, 2019 Colo. Sess. Laws 2987 (codified at Colo. Rev. Stat. §§ 2-3-1203, 8-83-501 to -506 (2020)) (creating the Colorado Office of Just Transition and providing that it shall assume new responsibilities associated with workforce transition in Colorado coal communities), with New York State Announces Passage of Accelerated Renewable Energy Growth and Community Benefit Act as Part of 2020–2021 Enacted State Budget, N.Y. State Energy Rsch. & Dev. Auth. (Apr. 3, 2020), https://www.nyserda.ny.gov/about/newsroom/2020-announcements/2020-04-03-new-york-state-announces-passage-of-accelerated-renewable-energy-growth-and-community-benefit-act-as-part-of-2020-2021-enacted-state-budget [https://perma.cc/AW22-6Z36] (announcing the consolidation of existing environmental review functions within the New York Office of Renewable Energy Siting).

174. For example, the new CFPB consolidated existing consumer-protection authorities into a single agency. Cheryl R. Cooper & David H. Carpenter, Cong. Rsch. Serv., IF10031, Introduction to Financial Services: The Bureau of Consumer Financial Protection (CFPB) 1 (2019), https://fas.org/sgp/crs/misc/IF10031.pdf [https://perma.cc/78KJ-V8PE]. On the potential need for greater consolidation of intelligence services, see Jeremiah Goulka & Michael A. Wermuth, The Law and the Creation of a New Domestic Intelligence Agency in the United States, *in* The Challenge of Domestic Intelligence in a Free Society 105, 106 (Brian A. Jackson ed., 2009).

175. For example, in 1974, Congress split the Atomic Energy Commission's functions between two new agencies: the Nuclear Regulatory Commission and the Energy Research and Development Administration. See John Gorham Palfrey, Energy and the Environment: The Special Case of Nuclear Power, 74 Colum. L. Rev. 1375, 1403 (1974).

176. See Yoon-Ho Alex Lee, Beyond Agency Core Mission, 68 Admin. L. Rev. 551, 558 (2016) (calling the idea of an agency core mission an "outdated model" in part because Congressional delegations are so numerous and varied).

177. See Camacho & Glicksman, Reorganizing Government, supra note 21, at 40–43 (summarizing the literature on the advantages and disadvantages of distinct and overlapping authority).

178. To take just one example, when radio broadcasts were first introduced, legislators "[a]ll agreed that national legislation was required, but they divided on whether to leave the allocation of the airwaves with the Commerce Department or entrust it to a new agency." Daniel R. Ernst, The Shallow State: The Federal Communications Commission and the New Deal, 4 U. Pa. J.L. & Pub. Affs. 403, 410 (2019) (noting that the House of Representatives wanted to give responsibility to an executive department while the Senate majority preferred a bipartisan, independent commission).

than others. By contrast, benefits such as bringing increased visibility to an issue or the "vitality" of new agency staff are much more difficult to weigh. For this reason, policymakers should be wary of status quo bias.

Yet as problematic as it is to measure the effects of agency genesis with any precision, it is more problematic still to ignore them. As Gregory Treverton observes in his evaluation of the benefits and costs of creating a new domestic intelligence agency, even a rough comparison of risks to benefits can help identify areas of disagreement and thus provide a "framework for debate" that may be more productive than "simply a fight over different final conclusions."[179]

The framework proceeds as follows. First, policymakers should consider the need for a new agency. They should begin by questioning whether—and in what ways—existing agencies fall short. They should consider whether a new agency would ameliorate any identified shortcomings, by either replacing or supplementing existing regulatory bodies. As part of this calculus, policymakers might consider whether a new agency would raise a policy domain's profile or whether a new agency's vitality could produce more rapid progress toward statutory goals. For example, a governor who seeks to highlight the importance of social justice and community support during the energy transition may conclude that a new agency or office focused on these aspects of the transition is desirable as a way to draw attention to the issue, to attract regulatory talent, and to make more rapid progress on regulatory programs.

Second, policymakers must face the costs of creating new bureaucratic structures. These include the dollar costs of new personnel and infrastructure as well as transition inefficiencies. Third, policymakers, but also and perhaps especially observers and critics, should consider that new agencies can shift the balance of power among political actors and between members of the public and elected officials. As discussed below, politicians may favor agency creation as a means of increasing their own power over regulation in a given policy domain.[180] Observers should scrutinize agency genesis for such effects. New agencies may also facilitate or complicate public participation in administrative decisionmaking and can make it more or less difficult to hold elected officials accountable.

Fourth, it is crucial to consider new agencies' relations to existing agencies in a given policy area. The framework therefore incorporates insights from the literature on the administrative separation of powers.[181] It asks both what inefficiencies and what benefits can come from conflict, or at least friction, between multiple agencies within the same broad domain.

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179. Gregory F. Treverton, Reorganizing U.S. Domestic Intelligence: Assessing the Options 99 (2008).

180. See infra section II.B.3.

181. See supra note 19.

Finally, policymakers should recognize that it is easier to create institutions than to destroy them. Careful weighing of the advantages and drawbacks of agency genesis is therefore desirable before entrenching administrative bodies. Reform of existing institutions to address any deficiencies is also warranted, either as a complement to or in tandem with agency genesis.

The following sections discuss each of these considerations in more detail.

1. *Shortcomings of Existing Arrangements.* — Agencies are created either to further the political interests of their designers or to achieve public-focused ends.[182] If the latter, the typical justification is that the law and policy generated in the crucible of democratic institutions cannot be implemented effectively by existing agencies. Thus, new bodies may be called for.

A new agency might be favored if no agency with a mandate to consider a particular problem currently exists or if policymakers or the public view an existing agency as weak, dysfunctional,[183] biased,[184] or conflicted.[185] Politicians are more likely to replace agencies when they learn of "visible agency defections and failures" that damage agency reputations.[186] The United Kingdom created a new Food Standards Agency because of dissatisfaction with existing food-safety regulation in the wake

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182. Cf. James K. Conant, Executive Branch Reorganization: Can It Be an Antidote for Fiscal Stress in the States?, 24 State & Loc. Gov't Rev. 3, 5 (1992) [hereinafter Conant, Executive Branch Reorganization] (explaining that executive branch reorganization has been viewed in intellectual traditions both as an "administrative tool" and as a "political" one). Even the public administration literature, however, acknowledges the central role of politics in reorganization decisions. See, e.g., Peri E. Arnold, Reorganization and Politics: A Reflection on the Adequacy of Administrative Theory, 34 Pub. Admin. Rev. 205, 205 (1974) (declaring that "[w]hen we speak of administration, politics stares us in the face").

183. See, e.g., Fred B. Samson & Fritz L. Knopf, Archaic Agencies, Muddled Missions, and Conservation in the 21st Century, 51 BioScience 869, 869, 872 (2001) (proposing the consolidation of existing natural resource agencies in a new Department of Natural Resources whose horizontal, geographic boundaries better conform to ecological provinces).

184. If an agency's culture is seen as both problematic and so ingrained that change would be impossible, a new body may be called for. Goulka and Wermuth propose, for example, that "if one holds the opinion that the FBI or other government agencies have . . . exceeded constitutional or legal constraints that protect civil rights or liberties, a new agency may seem appropriate." Goulka & Wermuth, supra note 174, at 106.

185. See, e.g., Luther J. Carter, Reshuffling the Bureaucracy: Nixon Proposes Pollution Ocean Agencies, 168 Science 1433, 1433–34 (1970) (explaining that most authorities subsequently consolidated in the new EPA and National Oceanic and Atmospheric Administration were previously exercised by agencies also responsible for promoting development activities that caused pollution); Nigel Williams, U.K. Cooks Up Food Standards Agency, 279 Science 472, 472 (1998) (observing that food safety was previously handled by the Ministry of Agriculture, Fishers, and Food, which suffered from a conflict of interest because it served the needs of both food producers and consumers).

186. Johannes Kleibl, The Politics of Financial Regulatory Agency Replacement, 75 J. Pol. 552, 554 (2013).

of outbreaks of "mad cow disease," salmonella, and E. coli.[187] Canada created a new blood-donation agency in the wake of a scandal in which thousands of patients were sickened by tainted transfusions, thereby calling into question the existing administrative arrangements.[188] Similarly, when financial regulators fail to ensure the stability of domestic banking, for example, they are more likely to be replaced.[189] Where statutory mandates still stand, agency termination on its own will not solve the problem, however. In that case, a new agency, unblemished by the failures of its predecessor, may be preferable.

Another reason to create a new agency might be to consolidate dispersed regulatory functions. For example, when President Lyndon B. Johnson created the Environmental Science Services Administration by merging the Weather Bureau and the Coast and Geodetic Survey (and other programs), he wrote to Congress that this would "provide a single national focus for our efforts to describe, understand, and predict the state of the oceans, the state of the lower and upper atmosphere, and the size and shape of the earth."[190]

The following two sections deal in more detail with two specific advantages of new agency creation, each of which responds to the deficiencies or perceived deficiencies of existing regulatory bodies.

a. *Status and Salience.* — New agencies can achieve higher status than existing bodies because of their newness alone or because of their focus.[191] For example, the CFPB, created in 2010 by the Dodd–Frank Act, "succeeded in intensifying the focus on consumer protection in the market for

187. Williams, supra note 185, at 472. One criticism of the existing food-safety agency in the Ministry of Agriculture, Fisheries, and Food was that it was captured by the very food producers it regulated. Id.

188. See Janis Hass, Cost No Object as New Agency Tries to Restore Blood System's Credibility, 160 Canadian Med. Ass'n J. 699, 699 (1999); André Picard, Opinion, Have We Forgotten the Lessons of the Tainted Blood Scandal?, Globe & Mail (Nov. 28, 2017), https://www.theglobeandmail.com/opinion/have-we-forgotten-the-lessons-of-the-tainted-blood-scandal/article37097051 [https://perma.cc/EX7X-CVVC] ("The tainted-blood tragedy left roughly 2,000 recipients of blood and blood products infected with HIV-AIDS and another 30,000 infected with the hepatitis C virus (HCV) . . . . The good news is Canada has a much safer blood system today. Canadian Blood Services is better administered, more transparent and regulated properly.").

189. Kleibl, supra note 186, at 555.

190. Special Message to the Congress Transmitting Reorganization Plan 2 of 1965: Environmental Science Services Administration, 1 Pub. Papers 526, 526–27 (May 13, 1965) [hereinafter 1965 Special Message to the Congress] (emphasizing also that the new agency would be better equipped to see connections across sea, earth, and the upper and lower atmospheres).

191. For example, Senator Edmund Muskie supported the establishment of an Environmental Protection Agency because he felt that uniting all of the programs for pollution control in a single agency would raise the status of environmental protection efforts (which could also lead to greater resources for these efforts). Carter, supra note 185, at 1434.

financial products and services."[192] Similarly, Treasury Secretary John W. Snow argued in favor of a new agency to oversee federal housing-finance programs in part because supervisory offices within existing agencies lacked the "stature" to perform the task effectively.[193] Consolidating existing regulatory functions in a new agency may be seen as "ending [the] orphan status" of a program or set of programs.[194] A nutritionist at King's College London in the United Kingdom welcomed the creation of a new food-safety agency in the 1990s because "it puts food standards on the political agenda."[195]

Agency genesis is a visible act with symbolic impact.[196] As one commentator put it, creation of a new administrative body "serves to dramatize the inauguration of new activity."[197] Certainly, this signaling function was at least a partial motivation for President Nixon's creation of the EPA.[198] Although he considered placing the functions ultimately vested in the EPA in an existing department, President Nixon concluded that it was "politically necessary to create an agency focused solely on environmental matters because 'anything else would not be seen as a fulsome response to the growing public perception that environmental problems were getting out of hand.'"[199] Similarly, it cannot be coincidence that President George W. Bush announced the creation of a new Office of Homeland Security in the

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192. Eric J. Mogilnicki & Melissa S. Malpass, The First Year of the Consumer Financial Protection Bureau: An Overview, 68 Bus. Law. 557, 557, 559 (2013).

193. Stephen LaBaton, New Agency Proposed to Oversee Freddie Mac and Fannie Mae, N.Y. Times (Sept. 11, 2003), https://www.nytimes.com/2003/09/11/business/new-agency-proposed-to-oversee-freddie-mac-and-fannie-mae.html (on file with the *Columbia Law Review*).

194. See Adam J. Levitin, The Consumer Financial Protection Agency 3, 7–8 (Pew Econ. Pol'y Dep't, Fin. Reform Project Briefing Paper No. 3, 2009), https://www.pewtrusts.org/~/media/assets/2009/08/6/pewlevitancfpa.pdf [https://perma.cc/43V5-62U2] (advocating for the consolidation of consumer-protection authorities spread across eleven federal government agencies in a single regulator).

195. Williams, supra note 185, at 472.

196. As Stephen Wilks and Ian Bartle put it, "[P]olitical acts can be purposive and goal orientated, or they can be ritualistic and reassuring." Stephen Wilks & Ian Bartle, The Unanticipated Consequences of Creating Independent Competition Agencies, 25 W. Eur. Pol. 148, 155 (2002).

197. Milton Musicus, Reappraising Reorganization, 24 Pub. Admin. Rev. 107, 108 (1964).

198. Special Message to the Congress About Reorganization Plans to Establish the Environmental Protection Agency and the National Oceanic and Atmospheric Administration, 1 Pub. Papers 578, 579, 585 (July 9, 1970) [hereinafter 1970 Special Message to the Congress] (emphasizing the coordination advantages of consolidating environmental functions in a new agency).

199. Jason Marisam, Duplicative Delegations, 63 Admin. L. Rev. 181, 196 (2011) [hereinafter Marisam, Duplicative Delegations] (quoting Douglas M. Costle: Oral History Interview, EPA (Jan. 2001), https://archive.epa.gov/epa/aboutepa/douglas-m-costle-oral-history-interview.html [https://perma.cc/YQG4-EACV]). Combining agency functions previously spread between multiple bodies may be especially appealing to an executive seeking to consolidate control.

White House a mere nine days after the September 11 attacks.[200] And Stephen Wilks and Ian Bartle argue that the creation of independent competition agencies in Europe was "motivated by a need to reassure and to appear to act."[201]

The signal might be genuine, of course, even if it also carries political benefit. Jenks and Wright suggest that the existence of a state administrative agency tasked with particular responsibilities is an indicator of the significance of those responsibilities for the state.[202] But politicians who create new agencies can still take credit for responding to a crisis, fulfilling campaign promises, or empowering various constituencies, even if the new agency has weak powers or inadequate resources and is therefore unlikely to be effective.[203]

A new agency can also create, expand, or enhance the status of particular constituencies. The creation of new, independent competition agencies in Europe, for example, "populate[d] the policy area with actors (agents) who have their own priorities, interpretations, and influence."[204] This can be especially important when the new agency amplifies voices previously excluded from the debate. Creation of an energy transition office, for example, will empower communities that will be most impacted by a transition away from fossil fuels. Colorado's Office of Just Transition is focused on helping workers transition from coal-related jobs and ensuring that communities whose welfare was or is currently tied to the fossil-fuel economy have "more diversified, equitable, and vibrant" economic futures.[205] Its creation, along with the establishment of a dedicated advisory committee composed of diverse stakeholders, can enhance the political visibility and influence of affected communities.[206] Energy justice offices,

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200. I.M. Destler & Ivo H. Daalder, Advisors, Czars and Councils: Organizing for Homeland Security, Brookings Inst. (June 1, 2002), https://www.brookings.edu/articles/advisors-czars-and-councils-organizing-for-homeland-security [https://perma.cc/J4DG-JDRU]. See generally Anne Joseph O'Connell, The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World, 94 Calif. L. Rev. 1655 (2006) (questioning the effectiveness and effect on democratic values of the ultimate decision to consolidate intelligence functions in the new DHS and Director of National Intelligence).

201. Wilks & Bartle, supra note 196, at 148.

202. Jenks & Wright, supra note 138, at 79.

203. Creation of a new agency might give the public greater confidence in regulators even if the new agency is no more capable than its predecessor. See Kleibl, supra note 186, at 555 ("By terminating the incumbent regulatory agency and replacing it with a new one, governments can send a highly visible signal to the public that they are taking forceful action to resolve the crisis and that the failed supervision regime is being replaced with a new and sound regulatory structure.").

204. Wilks & Bartle, supra note 196, at 148.

205. HB19-1314: Just Transition from Coal-Based Electrical Energy Economy, Colo. Gen. Assembly, https://leg.colorado.gov/bills/hb19-1314 [https://perma.cc/MXX6-EXWZ] (last visited Oct. 26, 2020) (bill summary).

206. The legislation grew out of facilitated discussions between unions and environmental groups. Rachel M. Cohen, The Just Transition for Coal Workers Can Start

none of which have been created to date, could do the same for a broader group of marginalized communities.

b. *Vitality.* — Marver Bernstein argues that new agencies have a "vigor" stemming from the support of politicians and interest groups that is lost over time.[207] Simply adding a new program to an existing agency, this suggests, is unlikely to produce the same kind of vigor as the creation of an entirely new entity. President Johnson seemed to subscribe to this theory when he defended his creation of the new Environmental Science Services Administration by noting that it would "promote a fresh sense of scientific dedication, discovery, and challenge, which are essential if we are to attract scientists and engineers of creativity and talent to Federal employment in this field."[208] Administrative youthfulness can also yield efficiency. In the early years of the Forest Service, "[i]mbued with a strong sense of mission and can-do attitude, the new agency was . . . regarded as the quintessential example of an efficient bureaucracy."[209]

Creation of a new administrative body can boost enthusiasm for its mission more generally. The media, and consequently the public, may pay more attention to an agency at the beginning of its life. Politicians interested in the new institution may provide funding and other resources. For these reasons and others, a new agency can attract high-quality leadership and staff that enhance its expertise advantage.

Another way in which the vitality of a new entity might achieve programmatic advantage is where the new agency can bypass calcified or captured channels.[210] Old institutions may become "fossilized, rigid, bureaucratic, and dominated by distant, visionless, outdated professionals."[211] In describing the politics of change in financial regulation after the crisis of 2007, Daniel Carpenter argues that "[s]tatus quo government agencies with turf to protect—mainly the Federal Reserve"—sought to preclude the creation of a new, independent financial regulator.[212] Carpenter suggests

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Now. Colorado Is Showing How., In These Times (July 24, 2019), https://inthesetimes.com/article/colorado-just-transition-labor-coal-mine-workers-peoples-climate-movement [https://perma.cc/PPG3-A8MP]. Stakeholders pushed for a new office as opposed to a task force or advisory board specifically because they believed it would be stronger. Id.

207. Bernstein, supra note 42, at 80 (finding that "an agency ordinarily begins its administrative career in an aggressive, crusading spirit"); see also Kenneth Culp Davis, Administrative Law 164 (1951) (observing that "[y]oung agencies are dominated by the qualities of youth—energy, ambition, imagination").

208. 1965 Special Message to the Congress, supra note 190, at 527.

209. Robert B. Keiter, Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective, 2005 Utah L. Rev. 1127, 1135.

210. Bernstein argues that "young" regulatory agencies are more likely to seek to avoid capture by the industries they regulate. Bernstein, supra note 42, at 84.

211. Daniel Thursz, Creating New Institutions: Planning with a Payoff, 22 Soc. Work 259, 260 (1977) (identifying the critique before rejecting it as oversimplified).

212. Daniel Carpenter, Institutional Strangulation: Bureaucratic Politics and Financial Reform in the Obama Administration, 8 Persps. on Pol. 825, 831–32 (2010) [hereinafter

that the Federal Reserve did little to protect consumers as an historical matter and began to emphasize consumer protection in its rhetoric only to forestall the creation of an independent consumer-protection body.[213] Congress may thus seek to create new agencies, as James Landis observed during the New Deal, "to avoid the inertia and capture of existing cabinet departments."[214]

A new agency's vitality advantages may, of course, be short-lived.[215] New agencies age, and as they do, they may become susceptible to capture and calcification just like their legacy counterparts. In addition, new agencies are not *always* vital, effective entities. They can take time to reach their full strength.[216] Further complicating the situation, the dichotomy between new and established agencies may not be as stark as Bernstein argues.[217] Even mature agencies have incentives to remain effective in order to preserve their reputations.[218] As William Kovacic argues in his essay about the FTC and other economic regulators, agencies signal quality to outsiders—including courts and legislators—by ensuring that their procedures are sound, that their capabilities are strong, and that their culture is healthy.[219] Thus the magnitude of any vitality advantage will vary in practice.

Carpenter, Institutional Strangulation]. The "status quo" agencies, which Carpenter identifies as the Federal Deposit Insurance Corporation and the FTC in addition to the Federal Reserve, may have been particularly concerned that they would lose budget and personnel to a new consumer agency. Id. at 831–33.

213. Id. at 832–36. These actions, Carpenter suggests, nearly led to the establishment of a consumer-protection bureau within the Federal Reserve rather than the creation of the CFPB as an independent agency. Id. at 837.

214. Kirti Datla & Richard L. Revesz, Deconstructing Independent Agencies (and Executive Agencies), 98 Cornell L. Rev. 769, 777 (2013) (citing Landis, supra note 17, at 26–28).

215. Thursz, supra note 211, at 260 (noting that new institutions quickly assume the pathologies of the hoary institutions they replace).

216. William E. Kovacic, Getting Started: Creating New Competition Policy Institutions in Transition Economies, 23 Brook. J. Int'l L. 403, 414–16 (1997) (citing the FTC's "turbulent beginning" during which it was hamstrung by "insipid leadership").

217. For critiques of the agency life-cycle thesis, see David Martimort, The Life Cycle of Regulatory Agencies: Dynamic Capture and Transaction Costs, 66 Rev. Econ. Stud. 929, 944 (1999) (supporting the basic premise of the life-cycle thesis but identifying variables that could change an agency's trajectory in specific cases); Kenneth J. Meier & John P. Plumlee, Regulatory Administration and Organizational Rigidity, 31 W. Pol. Q. 80, 83 (1978) (observing that the relationship between agencies and political support as well as interest groups is more complicated than Bernstein suggested).

218. See Carpenter, Institutional Strangulation, supra note 212, at 832 (observing that all agencies have an incentive to preserve their reputations as a means of enhancing discretion and autonomy).

219. William E. Kovacic, Creating a Respected Brand: How Regulatory Agencies Signal Quality, 22 Geo. Mason L. Rev. 237, 238–39 (2015) (explaining that investing in reputation pays dividends in deference from judges as well as boosts in budget and powers from Congress).

2. *Costs.* — Second, policymakers should consider the costs of any new institution. There are high administrative costs associated with any new bureaucratic institution.[220] Expenses include the cost of new personnel, new infrastructure and supplies, and training. For the major federal departments, program costs, rather than administrative support costs, make up the majority of agency expenses.[221] Even at these agencies, however, personnel costs make up approximately twelve percent of the budget of federal departments, while acquisition of assets accounts for approximately six percent.[222] In the states, the breakdown can be quite different. The Hawaii Energy Office, for example, spends ninety percent of its budget on personnel costs.[223]

Agency start-up costs are particularly high,[224] and an agency may be less well-equipped to tackle problems at the start of its tenure, notwithstanding the "vitality advantage" discussed above, because it lacks experience and has not yet created problem-solving routines.[225] Jonas Monast and Sarah Adair note that agency reorganization can be disruptive in part because it requires agency actors to "develop new relationships and communication patterns to perform their normal tasks."[226]

Even merging existing agencies can have costly effects, including the costs of enacting new legislation, the potential loss of experienced staff, and disruptions in regulatory operations during the transition.[227] But

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220. See, e.g., Cathy Marie Johnson, New Wine in New Bottles: The Case of the Consumer Product Safety Commission, 50 Pub. Admin. Rev. 74, 75 (1990) (describing the myriad tasks facing the newly created Consumer Product Safety Commission, including the establishment of standard operating procedures for writing regulations); Arthur L. Levine, NASA's Organizational Structure: The Price of Decentralization, 52 Pub. Admin. Rev. 198, 199 (1992) (noting that it often "takes years for a new agency to develop a solid organizational base and to launch major new initiatives"). Cathy Marie Johnson observes that it was not until four years after its creation that the Consumer Product Safety Commission began to implement more sophisticated, proactive processes that led to the prioritization of standards for more hazardous products. Johnson, supra, at 79.

221. The Budgetary Implications of Eliminating a Cabinet Department, CBO, https://www.cbo.gov/content/budgetary-implications-eliminating-cabinet-department [https://perma.cc/4B4W-8FBJ] (last visited Oct. 26, 2020).

222. Id.

223. Off. of the Auditor, State of Haw., Audit of the Hawai'i State Energy Office: A Report to the Governor and the Legislature of the State of Hawai'i 14–15 (2018), https://files.hawaii.gov/auditor/Reports/2018/18-01.pdf [https://perma.cc/ZDX7-J7AS].

224. For example, the new DHS spent considerable time and effort integrating and coordinating the missions of the twenty-two separate agencies placed under its control. Charles Perrow, The Disaster After 9/11: The Department of Homeland Security and the Intelligence Reorganization, 2 Homeland Sec. Affs. 1, 12 (2006). Some employees went without telephones for weeks because there was simply no budget for them. Id. at 11.

225. Johnson, supra note 220, at 74 (emphasizing the importance of "routines, stability, past experience, and incremental changes in organizational decision making").

226. Monast & Adair, supra note 83, at 59.

227. José de Luna Martínez & Thomas A. Rose, International Survey of Integrated Financial Sector Supervision 27–29 (World Bank Pol'y Rsch. Working Paper No. 3096, 2003), https://ssrn.com/abstract=636458 (on file with the *Columbia Law Review*) (basing

merging existing administrative bodies might also create economies, and in fact cost savings are frequently cited as a justification for agency consolidation.[228]

For some, increasing the size of administrative government is unpalatable in any form.[229] For others, bureaucracy is inevitable—even desirable—but expensive or redundant bureaucracy is unwelcome.[230] For those in either camp, the costs of establishing a new agency are enough reason for pause.[231] Costs may be particularly unwelcome when existing institutions could instead be reformed to address concerns. Daniel Thursz advocates caution around "creating new institutions when goals remain unrealized through existing structural arrangements."[232] He offers as an example the Office of Economic Opportunity, the agency created to administer President Johnson's "Great Society" social welfare programs. That agency, in turn, spawned additional new institutions across the country.[233] Thursz suggests that existing welfare agencies, including the Travelers Aid Association, could have been modified to fulfill the same functions. This would have avoided "a virtual reinvention of the wheel by persons who really had no background in this field," wasting "huge sums of money."[234]

3. *Political Considerations.* — It is also important to consider whether creating a new agency will shift the balance of power over regulatory

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conclusions on an examination of fourteen countries that merged financial oversight agencies).

228. Two of the primary recommendations in President Woodrow Wilson's 1887 article, *The Study of Administration*, were to increase efficiency and economy in government. Conant, In the Shadow of Wilson and Brownlow, supra note 85, at 892; see also, e.g., 1965 Special Message to the Congress, supra note 190, at 400 (asserting that creation of the Environmental Science Services Administration in the Department of Commerce by merging existing bodies would produce economies by eliminating overlapping systems and permitting more efficient use of administrative staff); The President Presents Plan No. I to Carry Out the Provisions of the Reorganization Act, 1 Pub. Papers 245, 246 (Apr. 25, 1939) ("It is our responsibility to make sure that the peoples' Government is in condition to carry out the peoples' will, promptly, effectively, without waste or lost motion.").

229. See Nat'l Petroleum Refiners Ass'n v. Fed. Trade Comm'n, 482 F.2d 672, 686 n.15 (D.C. Cir. 1973) (noting that Wilson opposed creation of what would become the Federal Trade Commission "simply on the ground that additional bureaucracy was undesirable *per se*").

230. See, e.g., Alejandro E. Camacho & Robert L. Glicksman, The Trump Administration's Pandemic Response Is Structured to Fail, Regul. Rev. (May 19, 2020), https://www.theregreview.org/2020/05/19/camacho-glicksman-trump-administration-pandemic-response-structured-fail [https://perma.cc/GGQ2-AQ2T] (observing that overlapping authority has resulted in waste).

231. See Thomas W. Joo, Who Watches the Watchers? The Securities Investor Protection Act, Investor Confidence, and the Subsidization of Failure, 72 S. Cal. L. Rev. 1071, 1143 (1999) (rejecting the idea of creating a new agency to regulate holding companies as "cumbersome, costly, and politically distasteful").

232. Thursz, supra note 211, at 259.

233. Id. at 260.

234. Id.

decisionmaking. New agencies can affect the nature and extent of top-down control by political actors as well as the effectiveness of bottom-up influence by stakeholders and other citizens.

Agencies are not mere pawns of the political branches.[235] And yet, by design, agencies are subject to political control. Legislatures exert control over agencies through their initial delegations and subsequently via funding, oversight, and less formal measures.[236] Presidents and governors can control agencies to a greater or lesser extent depending on structure,[237] and executives, like legislatures, use agency creation and design as a tool of political control.[238]

Politicians might favor genesis over reinvention of existing agencies for several reasons. First, they can use agency genesis to signal a high level of support for particular initiatives.[239] Second, they may feel that existing administrative bodies are controlled by competitors. Joel Seligman has suggested, for example, that Senator Carter Glass pushed for creation of the SEC because he was concerned that the FTC "was controlled by . . . New Deal reformers."[240] Third, political will to remake the existing agency may be lacking, especially when employees, regulated entities, and stakeholders have grown familiar with its practices. Or the existing

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235. See Brigham Daniels, Agency as Principal, 48 Ga. L. Rev. 335, 401–11 (2014) (cataloging ways in which agencies can control the elected branches); Gillian E. Metzger, Agencies, Polarization, and the States, 115 Colum. L. Rev. 1739, 1742–43 (2015) (observing that "agencies are not simply pawns in a battle between the two parties or institutional struggle among the political branches of national government").

236. For a summary of the literature on congressional control of the bureaucracy, see Feinstein, supra note 18, at 266–71.

237. For a review of the criteria that make agencies more or less independent from the presidency at the federal level, see generally Lisa Schultz Bressman, The Future of Agency Independence, 63 Vand. L. Rev. 599 (2010) (discussing mechanisms that make so-called "independent" agencies more subject to presidential control); Datla & Revesz, supra note 214 (identifying seven structural indicia of independence); Jennifer L. Selin, What Makes an Agency Independent?, 59 Am. J. Pol. Sci. 971 (2015) (emphasizing statutory provisions that insulate agency decisions from review by political principles).

238. See William G. Howell & David E. Lewis, Agencies by Presidential Design, 64 J. Pol. 1095, 1096–99 (2002) (discussing presidential tools of agency control). Rational choice theorists advise that "[p]olitical institutions are established because organized groups of people seek to achieve certain purposes that can be realized only by creating new institutions or modifying old ones." Alexander Ovodenko & Robert O. Keohane, Institutional Diffusion in International Environmental Affairs, 88 Int'l Affs. 523, 523 (2012).

239. See Carter, supra note 185, at 1433 (suggesting that reshuffles occur due to "new perception of certain national problems or opportunities, shifts in political priorities, and the rise and fall of certain agencies and bureaucrats"); see also Conant, Executive Branch Reorganization, supra note 182, at 5 (citing the political science position that executives seek reorganizations to signal policy priorities and to reassure constituents that their interests are being protected). Indeed, newly elected governors may feel "an obligation to create machinery to implement campaign pledges." Musicus, supra note 197, at 107.

240. Joel Seligman, The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance 97 (1982) (suggesting also that Senator Glass and his allies hoped the SEC would prove a less effective regulator).

agency's current configuration may continue to serve some important function or functions notwithstanding its flaws.

William Howell and David Lewis have drawn attention to presidential creation of agencies as a tool of political influence.[241] They note that, between World War II and 2002, Presidents created over half of new federal agencies unilaterally.[242] In creating these new agencies, they argue, presidents maximized their own control over the new administrative bodies.[243] While emphasizing that "a strong, independent agency is needed"[244] when he established the EPA, for example, President Nixon created an agency most would agree is subject to a significant degree of presidential influence.[245] By contrast, under conditions of divided government when Congress can muster strong majorities, any new agencies are likely to be independent as opposed to executive.[246]

At the state level, too, politicians will typically create new agencies whose structures make them more responsive to those actors' preferences.[247] Miriam Seifter notes the degree of "raw partisanship" on display

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241. Howell & Lewis, supra note 238, at 1096–99.

242. Id. at 1096.

243. Id. Independent commissions are not wholly beyond the reach of presidential influence. But that influence is proportionately less and takes longer to establish. Neal Devins and David Lewis have found that Presidents are less effective than one might think at rapidly appointing partisans to staff independent commissions. Neal Devins & David E. Lewis, Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design, 88 B.U. L. Rev. 459, 460–61 (2008) ("[S]tatutory limits on the President's appointment and removal powers are effective: opposition-party members do not share the President's priorities and Presidents are unable to quickly appoint a majority of commissioners.").

244. 1970 Special Message to the Congress, supra note 198, at 874.

245. For perspectives on EPA politicization, see Richard N.L. Andrews, The EPA at 40: An Historical Perspective, 21 Duke Env't L. & Pol'y Forum 223, 239 (2011) (describing increased politicization of the agency's scientific and rulemaking processes); Madeline June Kass, Presidentially Appointed Environmental Agency Saboteurs, 87 UMKC L. Rev. 697, 700–01 (2019) (arguing that political appointees at the agency exercise undue influence).

246. See David E. Lewis, Presidents and the Politics of Agency Design: Political Insulation in the United States Government Bureaucracy, 1946–1997, at 127 (2003); Patrick Corrigan & Richard L. Revesz, The Genesis of Independent Agencies, 92 N.Y.U. L. Rev. 637, 680 (2017); Roberta Romano, Does Agency Structure Affect Agency Decisionmaking? Implications of the CFPB's Design for Administrative Governance, 36 Yale J. on Regul. 273, 286 (2019) (citing Lewis, supra, and Corrigan & Revesz, supra, at 680); see also Gyung-Ho Jeong, Gary J. Miller & Andrew C. Sobel, Political Compromise and Bureaucratic Structure: The Political Origins of the Federal Reserve System, 25 J.L. Econ. & Org. 472, 486–88 (2009) (explaining the creation of an independent Federal Reserve as the product of compromise between legislators with different preferences).

247. See Seifter, Understanding State Agency Independence, supra note 38, at 1545 (citing the example of Maryland's Democrat-controlled legislature authorizing its Attorney General to sue the federal government without their Republican governor's permission). An even more cynical perspective holds that executive branch reorganizations are undertaken to "reward friends and punish enemies." Conant, Executive Branch Reorganization, supra note 182, at 5. Governors may also manipulate bureaucratic structures to build a record for a presidential run. See Rabe, supra note 44, at 39 (noting

in the design of state agencies and in gubernatorial efforts to control them.[248] Governors will tend to prefer agencies with a single head that they can remove at will.[249] By contrast, legislatures may prefer multimember commissions whose members may only be removed by the governor for cause.[250] The case of PUCs is instructive. Some states elect their utility commissioners directly.[251] In such "plural executive" states, since governors cannot appoint commissioners, they may see creation of companion energy agencies as an especially appealing way to exert control over state energy policy. Even in states where governors appoint commissioners, the appointment power may be less appealing as a tool of influence than agency genesis. Where removal protections exist, governors must wait to appoint sympathetic commissioners until existing commissioners' terms expire.[252] And there is always the risk that a commissioner will act in ways that diverge from the governor's preferences once appointed. Thus, the creation of new agencies whose heads serve at the governor's pleasure offers more certain influence.

The public, too, can see its policy influence wax or wane when a new agency is created. How a new agency shifts the dynamics of political responsiveness and accountability is very much in the details. It depends not only on agency structure, but on whether the new agency replaces or joins an existing agency in the same policy space. Where there are multiple agencies with authority in the same domain, it can be harder to know whom to hold accountable for a particular policy choice. Multiplicity can therefore complicate monitoring (for the legislature as well as for the public).[253] Multiple agencies might also increase the expense to stakeholders of influencing policy by forcing them to lobby several different government entities. But multiple agencies might also increase transparency if

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that Presidents Jimmy Carter, Ronald Reagan, Bill Clinton, and George W. Bush all emphasized their economic records as state governors in their successful White House runs).

248. Seifter, Understanding State Agency Independence, supra note 38, at 1589.

249. An early commentator notes that new governors may find themselves faced with "an inordinate number of agencies often directed by persons not subject to his appointment." Musicus, supra note 197, at 107.

250. Ganesh Sitaraman and Ariel Dobkin argue in favor of single-director agencies over multimember commissions on efficacy and accountability grounds. See Sitaraman & Dobkin, supra note 18, at 724. Meanwhile, it has been argued elsewhere that multimember commissions offer deliberative benefits that can produce better-considered policy. Sharon B. Jacobs, Administrative Dissents, 59 Wm. & Mary L. Rev. 541, 586–90 (2017).

251. Byrnett & Shea, supra note 39, at 2.

252. In Florida, for example, governors may only remove public utility commissioners before expiration of their terms for "malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony." Fla. Const. art. IV, § 7 (applied to public utility commissioners by Fla. Stat. § 350.03 (2020)).

253. See, e.g., Levitin, supra note 194, at 3 (noting that Congress lacked a dedicated monitoring capacity for the consumer-protection functions split between eleven different government agencies prior to the CFPB's creation).

the agencies' interactions with one another make internal discussions more visible.[254]

4. *Interagency Dynamics.* — Multiplicity creates coordination problems and increases the likelihood of interagency conflict. Yet while each of these presents challenges, they can also yield benefits. Agencies that coordinate with peer agencies might be able to accomplish policy aims more effectively than single agencies acting in the same field. [255] And conflict between agencies can be productive if it promotes transparency and stimulates creative thinking.[256]

a. *Coordination.* — Agencies might coordinate their activities in a number of ways. In a 2012 article, Jody Freeman and Jim Rossi offer a typology of agency coordination tools that includes consultation, agreements, joint policymaking, and presidential management of coordination.[257] Jason Marisam observes that agencies can contribute their expertise to one another in a kind of "interagency marketplace."[258] Statutes or executive orders may require coordination, or agencies may engage in it voluntarily.[259] At the federal level, the President sometimes convenes interagency bodies to facilitate this coordination.[260] Such convening may be seen as a weak form of agency genesis because while the new bodies are given important responsibilities, they may have limited resources, narrow mandates, consensus requirements, and little muscle.

If agencies within a given policy domain do not coordinate their activities, they could produce redundant work, at best, and undermine policy, at worst. Dan Walters argues that "the energy transition is like a bridge or a jigsaw puzzle: unless and until all the necessary pieces come together, the project as a whole and the individual pieces themselves are

254. See Musicus, supra note 197, at 109 (observing that "[t]he presence of numerous smaller agencies permits maximum public oversight of administrative operations" as compared with concentrated administrative power).

255. Camacho and Glicksman characterize coordination as concerning "the extent and type of interactions between agencies." Camacho & Glicksman, Reorganizing Government, supra note 21, at 43.

256. On the potential benefits of agency conflict, see Daniel A. Farber & Anne Joseph O'Connell, Agencies as Adversaries, 105 Calif. L. Rev. 1375, 1416–32 (2017).

257. Jody Freeman & Jim Rossi, Agency Coordination in Shared Regulatory Space, 125 Harv. L. Rev. 1131, 1155–81 (2012).

258. Jason Marisam, The Interagency Marketplace, 96 Minn. L. Rev. 886, 886–88 (2012) (describing interagency agreements for the exchange of services under the Economy Act of 1932); see also Jason Marisam, Interagency Administration, 45 Ariz. St. L.J. 183, 189–91 (2013) (describing contributions of expertise by one agency to another).

259. Jason Marisam suggests that Congress, the President, and the Judiciary each have tools available to coordinate agency action and that agencies themselves might coordinate voluntarily. Marisam, Duplicative Delegations, supra note 199, at 198–218.

260. See, e.g., Exec. Order No. 13,514, 74 Fed. Reg. 52,117, 52,124 (Oct. 8, 2009) (requiring agencies to actively participate in the Interagency Climate Change Adaptation Task Force).

of substantially less value."[261] A successful energy transition will require the achievement of complementary goals, oversight of which may be assigned to different regulators. Experts from the National Renewable Energy Laboratory, for example, use policy stacking theory to conclude that adoption of electric-vehicle policies should be staged in order to achieve maximum deployment at the lowest cost.[262] Authority to implement policies such as electric-vehicle incentives, mandates, and interconnection may be delegated to different agencies within a state. Coordinating such policy strategies is complex enough when one agency is tasked with implementation. Where multiple agencies might be working at cross-purposes, they are more difficult still.

b. *Checking and Balancing*. — As scholars have observed, agencies can serve as effective counterweights to one another in a system of administrative checks and balances.[263] In part for this reason, the DOJ resisted consolidation of existing financial agencies into a single entity on the ground that "jurisdictional competition among agencies is an assurance of effective regulation" since "a single agency with responsibility for everything . . . will frequently become highly protective of the firms that it is responsible for."[264] Similarly, when the U.S. intelligence agencies were consolidated and domestic surveillance capabilities were enhanced after September 11, 2001, a set of privacy-protection offices were also established "to counter-balance the new surveillance authority."[265]

Agencies might operate as checks on one another in a variety of ways. One agency might participate in another's rulemaking or adjudicatory proceedings. In Colorado, for example, several state agencies participate regularly as parties in PUC proceedings, including the Colorado Energy Office and the Office of Consumer Counsel, each of which represents a

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261. Daniel E. Walters, Lumpy Social Goods in Energy Decarbonization 9 (June 30, 2020) (unpublished manuscript) (on file with the *Columbia Law Review*).

262. V.A. Krasko & E. Doris, Nat'l Renewable Energy Lab'y, Strategic Sequencing for State Distributed PV Policies: A Quantitative Analysis of Policy Impacts and Interactions 20–21 (2012), https://www.nrel.gov/docs/fy13osti/56428.pdf [https://perma.cc/LYE3-UMM6].

263. Jacobs, Statutory Separation of Powers, supra note 19, at 390, 394. On the benefits of administrative checks and balances more broadly, see generally Katyal, supra note 19 (exploring the effects on presidential power of divisions within the executive branch); Metzger, Interdependent Relationship, supra note 19 (concluding that internal executive branch constraints can supplement and enhance external constraints); Michaels, An Enduring, Evolving Separation of Powers, supra note 19 (explaining how the constitutional separation of powers has evolved to embrace administrative governance).

264. Paul R. Verkuil, Perspectives on Reform of Financial Institutions, 83 Yale L.J. 1349, 1378–79 (1974) (opining, however, that "[t]his faith in agency competition seems misplaced given the current squabbles in these agencies over appropriate regulatory standards" and that "there is no reason to believe that the present multiagency arrangement" was free from undue industry influence).

265. Marc Rotenberg, The Sui Generis Privacy Agency: How the United States Institutionalized Privacy Oversight After 9-11, at 2 (Sept. 2006) (unpublished manuscript), https://ssrn.com/abstract=933690 (on file with the *Columbia Law Review*). At the same time, Congress refused calls to establish a free-standing, independent privacy agency. Id.

different aspect of the public interest.[266] Agencies might also serve as watchdogs for one another, reporting bias, waste, or other improper actions to political actors or to the public. Agencies within the same space can also step in to move policy forward when another agency falters. These redundancies can ensure forward policy motion even when individual agency programs stall. Friction can also be counterproductive, however, as when agencies spend time and resources on conflict with peer agencies.[267] Thus, finding a happy medium of productive friction is an important component of multiple-agency governance.

5. *Stickiness*. — A final point is that agency genesis can result in a patchwork of legacy agencies, not all of which are necessary to accomplish regulatory goals.[268] While agency termination does occur,[269] inertia favors the status quo. New agencies may develop powerful constituencies that would oppose their demise.[270] Where this happens, agency destruction can lead to accusations that state policymakers no longer care about particular constituents served by that agency.[271]

Policymakers should therefore consider carefully the benefits and costs of agency creation before authorizing new entities. They might also consider approaches to retiring existing agencies that have outlived their usefulness. One solution to the problem of institutional perpetuity, albeit a draconian one, is the one devised by Colorado and several other states: Every agency in the state automatically sunsets after a designated period if not affirmatively reauthorized by the legislature.[272]

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Ultimately, conclusions about the relative desirability of creating a new agency versus reforming existing institutions will reflect the way the

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266. The Colorado Energy Office's stated mission is to "[r]educe greenhouse gas emissions and consumer energy costs by advancing clean energy, energy efficiency and zero emission vehicles to benefit all Coloradans." Colorado About Us, supra note 97.

267. See generally Bijal Shah, Executive (Agency) Administration, 72 Stan. L. Rev. 641 (2020) (detailing litigation by executive agencies against their independent counterparts and observing that this litigation can encroach on legislative power as delegated to independent agencies).

268. Jenks and Wright observe that most of the older state agencies that they identify "seldom die, decline, or disappear." Jenks & Wright, supra note 138, at 84.

269. Lewis found that over sixty percent of federal agencies created between 1946 and 1997 were ultimately terminated. David E. Lewis, The Politics of Agency Termination: Confronting the Myth of Agency Immortality, 64 J. Pol. 89, 97–98, 102 (2002). Agencies are especially likely to be eliminated in the face of unfriendly presidents under conditions of unified government. Id.

270. See Musicus, supra note 197, at 108 (noting that new agencies develop "a strong and loyal clientele" and are often "staffed by a well organized professional group," with well-developed working relationships with stakeholders, thus contributing to their enduring nature).

271. See id.

272. See Baugus & Bose, supra note 166, at 3.

evaluator weights the above criteria as well as degrees of confidence about what the future holds. The framework above, however, can assist in evaluating specific agency arrangements. The next Part examines how the framework operates in practice by exploring the example of state energy agencies and the impact of administrative form on state energy transitions.

III. ADMINISTERING THE ENERGY TRANSITION

This Part considers the effects of state agency architecture in the context of the current energy moment. States are on the front lines of the most significant transformation of our energy system since the advent of electric power at the beginning of the last century. Arguably, that transformation began in the 1970s after the 1973 oil crisis underscored the possibility of energy shortage. Programs put in place during that decade encouraged efficiency and conservation, as well as diversification of supply to include renewable technologies.[273] As Part I notes, this shift also produced the federal DOE and enabled the rise of energy departments or offices in the states.

Until recently, however, progress toward a more diverse, more sustainable energy system was slow. The pressing need for transformation suggested by the energy crisis faded as oil from the Middle East began to flow westward once again.[274] The next several decades saw incremental improvements in efficiency and conservation, as well as steady but slow growth in renewable generation portfolios.[275] While a minority of states experimented with more fundamental reforms to energy regulation, including by introducing competition to supply electricity to consumers, most continued to rely on traditional generation, transmission, and distribution systems.[276]

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273. One of the most important was the Public Utility Regulatory Policies Act of 1978 (PURPA). PURPA encouraged energy efficiency policies and renewable generation through guaranteed payments for small renewable generators and incentives such as rate design. For an overview of the statute, see Richard D. Cudahy, PURPA: The Intersection of Competition and Regulatory Policy, 16 Energy L.J. 419, 421–25 (1995).

274. See Paul Sabin, Crisis and Continuity in U.S. Oil Politics, 1965–1980, 99 J. Am. Hist. 177, 185 (2012) (noting that the crisis did not ultimately "alter the American relationship with oil").

275. For a helpful diagram of energy efficiency improvements since 1980, see Steven Nadel, 35 Years of Energy Efficiency Progress, 35 More Years of Energy Efficiency Opportunity, Am. Council for an Energy-Efficient Econ. (June 30, 2015), https://www.aceee.org/blog/2015/06/35-years-energy-efficiency-progress [https://perma.cc/7LQA-YXQX]. For a chart showing domestic renewable energy production levels since 1950, see U.S. Renewable Energy Consumption Surpasses Coal for the First Time in Over 130 Years, U.S. Energy Info. Admin. (May 28, 2020), https://www.eia.gov/todayinenergy/detail.php?id=43895 [https://perma.cc/7YFQ-RBDD].

276. For an updated map of states with restructured electricity markets, see Deregulated Energy States & Markets (Updated 2020), Elec. Choice, https://www.electricchoice.com/map-deregulated-energy-markets [https://perma.cc/MX85-7YGC] (last visited Oct. 25, 2020).

But the pace of energy transformation has accelerated in the last decade. Today, the push for transformation comes not from concern about supply but from the certain knowledge that emissions from fossil-fuel power sources are contributing to the rapid warming of the global climate. Electricity production accounts for more than a quarter of U.S. greenhouse gas emissions.[277] The burning of fossil fuels across sectors (including transportation) is responsible for over ninety percent of U.S. anthropogenic CO_2 emissions.[278] Levels of carbon dioxide in the atmosphere are now higher than 400 ppm—the highest they have been in millennia—and are steadily and rapidly increasing.[279]

The effects of these extraordinarily high levels of atmospheric greenhouse gases are visible everywhere.[280] Wildfires are more frequent and more intense: Such fires have mercilessly devoured large swaths of the Amazon, Australia, Indonesia, western North America, southern Europe, Siberia, and other parts of the world.[281] Elsewhere, flooding, extreme heat, and more powerful storms are climate change's most visible impacts.[282] Moreover, we are only beginning to understand the scale of the effects on

277. Sources of Greenhouse Gas Emissions, EPA, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions [https://perma.cc/D3HB-Z7AV] (last visited Oct. 25, 2020).

278. Energy and the Environment Explained: Where Greenhouse Gases Come From, U.S. Energy Info. Admin., https://www.eia.gov/energyexplained/energy-and-the-environment/where-greenhouse-gases-come-from.php [https://perma.cc/V4AE-4RCE] (last updated Aug. 11, 2020).

279. Graphic: The Relentless Rise of Carbon Dioxide, NASA, https://climate.nasa.gov/climate_resources/24/graphic-the-relentless-rise-of-carbon-dioxide [https://perma.cc/GDX7-MYDY] (last visited Oct. 25, 2020); Trends in Atmospheric Carbon Dioxide, Nat'l Oceanic & Atmospheric Admin., https://www.esrl.noaa.gov/gmd/ccgg/trends [https://perma.cc/EU27-SDPY] (last updated Dec. 8, 2020).

280. See Roger Harrabin, Faster Pace of Climate Change Is 'Scary,' Former Chief Scientist Says, BBC News (Sept. 16, 2019), https://www.bbc.com/news/science-environment-49689018 [https://perma.cc/4NEM-AJN4] (noting in particular that the melting of polar ice has been at the highest end of the range forecast by the Intergovernmental Panel on Climate Change and that models failed to predict events like this summer's European heat wave and slow-moving hurricanes like Hurricane Dorian that devastated the Bahamas); see also Naomi Oreskes, Michael Oppenheimer & Dale Jamieson, Scientists Have Been Underestimating the Pace of Climate Change, Sci. Am.: Observations (Aug. 19, 2019), https://blogs.scientificamerican.com/observations/scientists-have-been-underestimating-the-pace-of-climate-change [https://perma.cc/LA9H-2UKS] (ascribing scientists' tendency to underestimate the severity and imminence of politically salient threats to the perceived need for consensus).

281. Bruce Lieberman, Wildfires and Climate Change: What's the Connection?, Yale Climate Connections (July 2, 2019), https://yaleclimateconnections.org/2019/07/wildfires-and-climate-change-whats-the-connection [https://perma.cc/G8UT-G66J].

282. See 2 U.S. Glob. Change Rsch. Program, Fourth National Climate Assessment: Impacts, Risks, and Adaption in the United States 30 (rev. 2020), https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf [https://perma.cc/4LRE-J6MP].

our oceans, where warmer temperatures and acidification may lead to a large-scale die-off of sea life.[283]

These changes are already affecting the U.S. economy and culture.[284] Global impacts are even greater. The Economist Intelligence Unit predicts that climate change will shrink the global economy by three percent by 2050 compared with baseline projections.[285] Climate change's effects will also exacerbate social inequality both within countries[286] and across nations.[287]

Eliminating carbon from the U.S. electricity sector will not halt this progression on its own.[288] But while moving to carbon-free electricity is not a sufficient step to avert the worst effects of climate change, it is a necessary one. Such a shift will not only eliminate carbon from power generation, but will also allow us to electrify the transportation sector without increasing emissions. [289] It will support changes to buildings and other infrastructure that reduce emissions from the commercial and residential

283. See Andy Ridgwell & Daniela N. Schmidt, Past Constraints on the Vulnerability of Marine Calcifiers to Massive Carbon Dioxide Release, 3 Nature Geosci. 196, 196 (2010); Carl Zimmer, An Ominous Warning on the Effects of Ocean Acidification, Yale Env't 360 (Feb. 15, 2010), https://e360.yale.edu/features/an_ominous_warning_on_the__effects_of_ocean_acidification [https://perma.cc/6Q4P-E3H8].

284. Alejandra Borunda, Climate Impacts Grow, and U.S. Must Act, Says New Report, Nat'l Geographic (Nov. 23, 2018), https://www.nationalgeographic.com/environment/2018/11/climate-change-US-report0 [https://perma.cc/6XLG-HNYL].

285. The Economist Intel. Unit, Resilience to Climate Change? A New Index Shows Why Developing Countries Will Be Most Affected by 2050, at 2 (2019), http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=Resilience-to-climate-change.pdf&mode=wp&campaignid=climatechange2019 (on file with the *Columbia Law Review*).

286. See S. Nazrul Islam & John Winkel, Climate Change and Social Inequality 3–4 (U.N. Dep't of Econ. & Soc. Affs., Working Paper No. 152, 2017), https://www.un.org/esa/desa/papers/2017/wp152_2017.pdf [https://perma.cc/B255-4ZE5].

287. Froma Harrop, Climate Change Has Minor Winners and Big Losers, RealClearPolitics (July 9, 2019), https://www.realclearpolitics.com/articles/2019/07/09/climate_change_has_minor_winners_and_big_losers_140728.html [https://perma.cc/4RL3-CLGH].

288. The U.S. transportation sector accounts for nearly a third of the country's emissions—about the same fraction as electricity. Industry produces another twenty-two percent, the commercial and residential sectors a combined twelve percent, and the agricultural sector ten percent. Inventory of U.S. Greenhouse Gas Emissions and Sinks, EPA, https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks [https://perma.cc/WX5K-MP3C] (last visited Oct. 26, 2020). As William Boyd has noted, at a global level, halting deforestation is also crucial: Globally, thirteen percent of total carbon emissions through 2017 have come from land use change, and the terrestrial biosphere provides thirty percent of our carbon sink. William Boyd, In Defense of Live Carbon, Legal Planet (May 15, 2019), https://legal-planet.org/2019/05/15/in-defense-of-live-carbon [https://perma.cc/P5FX-H8N4].

289. See Steven Weissman, Effective Renewable Energy Policy: Leave It to the States?, 3 San Diego J. Climate & Energy L. 345, 347 ("A dramatic shift in transportation fuel use may require substituting electricity for gasoline, which will likely increase the demand for electric power. This makes fuel substitution in the power sector all the more crucial.").

sectors.[290] And it will reduce the industrial-sector emissions that come from oil and gas processing and on-site power production.[291]

Federal efforts to eliminate carbon from our electricity system have been muted. Other than the Public Utility Regulatory Policies Act of 1978, which created incentives for small renewable generation projects,[292] Congress has offered almost no *positive* programs addressing the shift to renewable generation and remarkably little direction about what the national fuel mix should look like.[293] In the absence of federal action, the states will continue to drive America's energy transition.

The states have always been of vital importance when it comes to energy policy.[294] In 1935, the Federal Power Act split authority over energy regulation between the state and federal governments, leaving states with the authority to regulate electric and gas utility planning, rates, and energy-facility siting.[295] Within these broad parameters, states have adopted a variety of approaches to energy regulation. Those pursuing greener generation portfolios have experimented with feed-in tariffs,[296] carbon

290. See, e.g., Sherri Billimoria, Leia Guccione, Mike Henchen & Leah Louis-Prescott, Rocky Mountain Inst., The Economics of Electrifying Buildings: How Electric Space and Water Heating Supports Decarbonization of Residential Building 9–10 (2018) (on file with the *Columbia Law Review*) (finding that electrification of building space and water heating "presents a viable pathway to deep decarbonization" given the rapid shift away from coal-fired power generation in the United States).

291. See Colin McMillan, Richard Boardman, Michael McKellar, Piyush Sabharwall, Mark Ruth & Shannon Bragg-Sitton, Joint Inst. for Strategic Energy Analysis, Generation and Use of Thermal Energy in the U.S. Industrial Sector and Opportunities to Reduce Its Carbon Emissions 76–79 (2016), https://www.nrel.gov/docs/fy17osti/66763.pdf [https://perma.cc/JVP2-C9E8] (analyzing options for converting industrial processes to renewable power).

292. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified in scattered titles of the U.S.C.).

293. The 2009 Waxman–Markey legislation that would have put a cap on economy-wide carbon emissions and discouraged high-emitting fossil-fuel power production passed a closely divided House but never received a vote in the Senate. See Amanda Reilly & Kevin Bogardus, 7 Years Later, Failed Waxman-Markey Bill Still Makes Waves, E&E News (June 27, 2016), https://www.eenews.net/stories/1060039422 [https://perma.cc/73K4-JUZB].

294. Because of the absence of coherent federal policy, states are setting energy policy in a virtual federal vacuum. See, e.g., William Boyd & Ann E. Carlson, Accidents of Federalism: Ratemaking and Policy Innovation in Public Utility Law, 63 UCLA L. Rev. 810, 816 (2016) ("Numerous commentators decry the current system for its lack of national coherence, and more than a few have called for a larger federal role in electricity regulation."); Weissman, supra note 289, at 346 ("It is in the states that hope remains for action consistent with our environmental challenges.").

295. See 16 U.S.C. § 824(a) (2018) (defining scope of federal jurisdiction to regulate electricity); see also Steven Ferrey, The Supreme Court's Constitutional "Bright Line": Preempting Authority of 47 of 50 States, 10 Ne. U. L. Rev. 143, 155–58 (2018) (explicating Supreme Court doctrine on the division between federal and state authority over electricity).

296. See, e.g., Vt. Stat. Ann. tit. 30, § 8005a (2020).

pricing,[297] and direct subsidies.[298] Some of the most popular tools, however, are renewable portfolio standards or clean energy standards. These standards are mandates for public utilities operating within a given state to source a certain percentage or amount of their electricity from renewable or "clean" sources (defined state-by-state) by a target date. Iowa was the first state to establish a renewable energy standard in 1983.[299] Currently, twenty-nine states and the District of Columbia have such standards.[300] Eight additional states have voluntary goals.[301]

In the past few years, fourteen states, the District of Columbia, and Puerto Rico have announced one-hundred-percent renewable energy or carbon-free energy standards or goals.[302] These states expect to eliminate carbon from their electricity sectors by mid-century.[303] They, along with states with less ambitious carbon-reduction goals, have important choices to make about how to reduce or eliminate carbon from their electricity systems. They must decide whether to encourage particular low-carbon technologies and what form that encouragement should take. They must choose whether to emphasize large, utility-scale generation, to embrace distributed generation like rooftop solar, or to find a place for each in the energy transition. They must decide how much emphasis to place on reducing or shifting demand for electricity as opposed to constructing supply. And they must facilitate upgrades to the transmission and distribution grids to support all of these efforts.

Regardless of the path states choose, they must navigate certain inevitable tradeoffs of the energy transition. Legislatures and governors will ideally provide broad policy direction through statutes and executive orders, however, agencies will manage the key day-to-day challenges of decarbonization. The three most important types of agency proceedings in this context are planning, siting, and ratemaking proceedings.

First, as Part I notes, in most states, regulators oversee some version of long-term planning by electric utilities. Utilities are required to submit plans detailing how they will meet projected demand over a term of years.

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297. See, e.g., Market-Based State Policy, Ctr. for Climate & Energy Sols., https://www.c2es.org/content/market-based-state-policy [https://perma.cc/8RPW-GXTP] (last visited Oct. 26, 2020).

298. For a comprehensive database of such incentive programs, see Database of State Incentives for Renewables & Efficiency, https://www.dsireusa.org [https://perma.cc/2CAA-NWSV] (last visited Oct. 26, 2020).

299. Iowa: State Profile and Energy Estimates, U.S. Energy Info. Admin., https://www.eia.gov/state/analysis.php?sid=IA [https://perma.cc/4VMS-HWZP] (last updated May 21, 2020).

300. U.S. State Electricity Portfolio Standards, Ctr. for Climate & Energy Sols., https://www.c2es.org/document/renewable-and-alternate-energy-portfolio-standards [https://perma.cc/2ZP8-DUQM] (last updated Nov. 2019).

301. Id.

302. Ptacek & Levin, supra note 26.

303. Id. (identifying deadlines by state).

These plans typically include some mix of utility-owned generation,[304] generation purchased from other entities, and demand-side management.[305] This kind of long-term planning allows regulators to weigh in on a utility's path to decarbonization.[306] Utility commissions define the requirements of these plans consistent with statutory authorizations.[307]

Second, state regulators oversee siting decisions for most types of energy infrastructure.[308] Achieving rapid decarbonization of the electricity sector will require a rapid build-out of renewable generation facilities along with the siting of new transmission lines and associated infrastructure.[309] These proceedings are not without controversy: Opposition from nearby landowners concerned about property values, visual impacts, and other disruptions, as well as from environmental organizations concerned about land use and other environmental impacts are common.

Finally, state regulators oversee the rates that utilities may charge customers for their products and services. The target and degree of regulatory oversight varies depending on the regulatory structure of the state. In traditionally regulated states, utilities submit bundled or unbundled charges for generation (the electricity itself) and distribution to state regulators for approval.[310] In "restructured" or "competitive" states, by contrast, competition in the generation marketplace means that state regulators oversee distribution system charges but allow the market to set rates for the electricity itself.[311] With respect to the energy transition, in traditionally regulated states, utility commissions must decide whether and how to

304. This is true only in traditionally regulated states and restructured states where utilities continue to own at least some generation facilities.

305. Demand response involves customer commitments not to consume a specified amount of energy. Utilities can rely on these commitments to reduce their demand projections. See Sharon B. Jacobs, Bypassing Federalism and the Administrative Law of Negawatts, 100 Iowa L. Rev. 885, 894–900 (2015) (providing an overview of demand response programs).

306. This is true regardless of whether decarbonization is an obligation imposed by law or whether the utility adopts a policy of decarbonization voluntarily.

307. See Wilson & Biewald, supra note 78, at 2 ("[S]tate utility commissions have adopted [integrated resource planning] regulations as part of their administrative rules, or have ordered it to be done as a result of docketed proceedings.").

308. Natural gas pipelines are a notable exception. Under the Natural Gas Act, siting approval for pipelines is vested in the Federal Energy Regulatory Commission. 15 U.S.C. § 717f(c) (2018).

309. See J.B. Ruhl & James Salzman, What Happens When the Green New Deal Meets the Old Green Laws?, 44 Vt. L. Rev. 693, 708 (2020) (estimating that renewable energy capacity will need to increase by a minimum of three to five times the amount being consumed today).

310. See Boyd & Carlson, supra note 294, at 836–37. The transmission component of rates, where unbundled from other charges, is subject to FERC regulation. 16 U.S.C. § 824(a) (2018) (authorizing FERC to regulate "the transmission of electric energy in interstate commerce").

311. See Boyd & Carlson, supra note 294, at 837–38. For an overview of the mechanics of state restructuring, see Joseph P. Tomain, Electricity Restructuring: A Case Study in Government Regulation, 33 Tulsa L.J. 827, 842–43 (1998).

compensate utilities for fossil-fuel plants that retire before the end of their useful lives.[312] They must also decide whether and how utilities should recover the costs of new utility-scale renewable plants, new transmission and distribution lines, advanced grid infrastructure, and demand-side programs.[313]

Each of the three types of proceedings described above (planning, siting, and ratemaking) has historically been the province of the state PUCs. However, some of the critiques of PUCs from Part I are more trenchant still in an era of energy transition. To meet state decarbonization goals, the electric utility industry must not only transform; it must do so quickly. That transformation will transfer wealth from communities and companies invested in the fossil-fuel economy to communities and companies that invest in renewable generation, energy storage, and demand-side management. The transition also raises important questions about energy justice and equity. Because the question of whether new agencies are advantageous turns first on whether existing institutions are adequate, the following subsections will explain why traditional concerns about PUCs may be more trenchant still in the context of the energy transition. The next Part then explores how newer energy agencies can mitigate some of those failures.

A. *Capture*

First, capture in the era of decarbonization takes on a different cast. The potential for massive transformation elevates the stakes for traditional utilities, as well as new merchant generators, and they may redouble their efforts to influence public officials.[314] Capture may be particularly effective in states with elected commissions.[315] In these states, industry actors can

312. See generally Ron Lehr & Mike O'Boyle, Energy Innovation, Depreciation and Early Plant Retirements (2018), https://energyinnovation.org/wp-content/uploads/2018/12/Depreciation-and-Early-Plant-Retirements-Brief_12.3.2018.pdf [https://perma.cc/36R5-8LLK] (explaining how regulator accounting practices can affect coal plant retirements).

313. See generally Ken Costello, Nat'l Regul. Rsch. Inst., New Technologies: Challenges for State Utility Regulators and What They Should Ask (2012), https://pubs.naruc.org/pub/FA8662AC-F265-3C52-7B79-B159C1FBB512 [https://perma.cc/29TS-KBAD] (describing challenges associated with regulator decisions to allow cost recovery for innovative technologies).

314. The Illinois utility Commonwealth Edison recently reached a deferred prosecution agreement over federal charges that it bribed Illinois House Speaker Michael Madigan in exchange for favorable treatment in state legislation, including financial support for its nuclear power plants. Jeff St. John, ComEd Agrees to $200M Fine on Federal Bribery Charge, Greentech Media (July 17, 2020), https://www.greentechmedia.com/articles/read/comed-agrees-to-200m-fine-on-federal-bribery-charge [https://perma.cc/7GE4-NNWR]. A similar bribery charge has been leveled against FirstEnergy in Ohio. Dan Gearino, Inside Clean Energy: Ohio's Bribery Scandal Is Bad. The State's Lack of an Energy Plan May Be Worse, Inside Climate News (July 23, 2020), https://insideclimatenews.org/news/22072020/inside-clean-energy-ohio-bribery [https://perma.cc/9M8H-YLF9].

315. See Byrnett & Shea, supra note 39, at 2 (observing that eleven states elect their public utility commissioners).

pour funds into commissioner election efforts, making it more likely that a candidate supporting industry interests will be elected.[316] In Arizona, for example, the incumbent utility, Arizona Public Service, allegedly spent millions of dollars through third-party groups in 2014 to support two commission candidates who won in a close election.[317] Those candidates subsequently voted as part of a 3-2 majority to consider raising the fees imposed on rooftop solar customers (who many utilities view as a threat to their business model).[318]

Of course, utilities no longer represent fossil-fuel interests in all cases. A growing number of utilities have pledged to divest their portfolios of high-carbon generation.[319] At the same time, the nature of industry has changed.[320] Today, renewable generation companies and trade groups are better organized and have also been active in attempting to influence regulators.[321]

The structural and procedural concerns about capture may linger, however, even as the results produced by captured commissions or commissioners shift. In particular, the dynamics of capture will always favor wealthy, well-organized interests over their more diffuse, under-resourced counterparts.[322]

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316. See generally Troy A. Rule, Buying Power: Utility Dark Money and the Battle over Rooftop Solar, 5 LSU J. Energy L. & Res. 1 (2017) (explaining how Citizens United v. FEC, 558 U.S. 310 (2010), led to a relaxation of campaign finance restrictions that enhance the potential for utility influence over commissioner elections in Arizona and other states).

317. Id. at 9, 12.

318. Id. at 9–10 (describing a vote to consider this issue separately from the larger utility ratemaking proceeding). Arizona Public Service, the utility that had requested the fee increase, ultimately withdrew its proposal after accusing regulators of "political theater." Julia Pyper, APS Proposes to Withdraw Fee Increase for Solar Customers, Greentech Media (Sept. 27, 2015), https://www.greentechmedia.com/articles/read/aps-proposes-to-withdraw-fee-increase-for-solar-customers [https://perma.cc/JC9T-SY49]. Of course, appointed commissioners are not immune to capture. See, e.g., Gavin Bade, Investigation Reveals CPUC Chair Peevey Failed to Disclose Donations from PG&E, Util. Dive (Nov. 13, 2014), https://www.utilitydive.com/news/investigation-reveals-cpuc-chair-peevey-failed-to-disclose-donations-from-p/332691 [https://perma.cc/3JEX-HFGS].

319. See Edward Klump, Dems Want 100% Clean Energy Fast. Can Utilities Get There?, E&E News (Mar. 3, 2020), https://www.eenews.net/stories/1062502239 [https://perma.cc/YB7R-RRXS] (displaying a chart of nineteen utilities with one-hundred-percent carbon-free or clean energy commitments).

320. This transformation is already visible in the rise of the wind and solar industries as major political players in Washington and in state capitols across the nation. It is also visible in the increased voice and visibility of communities, labor organizations, and advocates for energy justice in proceedings at the federal and state levels.

321. Solar industry associations have been particularly effective. See, e.g., Kristi E. Swartz, Solar Industry Is a Top Donor in Georgia PSC Elections, E&E News (Apr. 28, 2014), https://www.eenews.net/stories/1059998355 [https://perma.cc/TVJ8-KUVX] (documenting solar company and industry group donations to Georgia Public Service commissioners' reelection campaigns).

322. For a definitive treatment, see generally Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (2d prtg. 1971) (theorizing that larger

B. *Expertise*

The expertise critique of PUCs also has special resonance in a climate-changed world. This is because the *types* of expertise historically represented within PUCs may not be sufficient to support the energy transition. PUCs rely on both the internal expertise of commissioners and staff as well as the external expertise of parties appearing before them.[323] Internally, PUCs remain most focused on the economic and legal questions that have historically defined their missions.[324] Externally, the concerns about influence by better-organized groups discussed above also resonate when it comes to information availability.

Furthermore, as scholars have noted, confronting climate change is no mere technocratic exercise.[325] It requires choices between the competing values of low prices, environmental protection, reliability, local economic prosperity, and equity to an extent rarely seen over the last century. Traditional kinds of expertise still matter a great deal—we must be able to evaluate a utility's projections for demand on its system and the cost of various resources, for example—but such technical expertise seldom yields an answer about what to *do* with the information gleaned. PUCs must make difficult decisions about whether and how quickly to pursue decarbonization policies, and at what cost. Technical expertise enables them to make such decisions in an informed manner but does not help them navigate hard tradeoffs.

C. *Speed*

Third, the slow pace and formality of PUC decisionmaking is ill-suited to the rapid transitions to low-carbon economies that experts say are necessary to keep global warming below catastrophic levels.[326] The Edison

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groups will be unable to organize effectively to procure common goods because the individual benefit is too low and the organizational costs too high).

323. To take just one example, local governments can provide key expertise to PUCs by explaining how proposals will operate on the ground in their communities. See Kelly Crandall & Jake Duncan, Inst. for Market Transformation, Local Government Engagement with Public Utility Commissions 2 (2019), https://www.imt.org/wp-content/uploads/2019/07/NCEP_Mini_Guide_LocalGovern_Final.pdf [https://perma.cc/SXR3-GV3R].

324. See Inara Scott, Teaching an Old Dog New Tricks: Adapting Public Utility Commissions to Meet Twenty-First Century Climate Challenges, 38 Harv. Env't L. Rev. 371, 375 (2014).

325. See, e.g., Welton, Grasping for Energy Democracy, supra note 20, at 583 (arguing that "climate change obliterates the idea that energy law can continue to be—if it ever was—a value-neutral exercise best left to utilities and their regulatory oversight bodies").

326. See Summary for Policymakers of IPCC Special Report on Global Warming of 1.5°C Approved by Governments, Intergovernmental Panel on Climate Change (Oct. 8, 2018), https://www.ipcc.ch/2018/10/08/summary-for-policymakers-of-ipcc-special-report-on-global-warming-of-1-5c-approved-by-governments [https://perma.cc/J2F7-LGBQ] (prescribing net-zero carbon emissions by 2050 in order to limit warming to 1.5 degrees Celsius and noting that limiting warming by this amount would prevent ten centimeters of sea level rise and mitigate ecosystem loss).

Electric Institute estimates that the average time between rate case filing and a commission decision is approximately ten months.[327] The timeline to approve siting of new renewable energy facilities may be even longer, though this is due largely to the need for local approvals in some states rather than cumbersome processes at state commissions.[328] Similarly, PUC grid-modernization proceedings can take years.[329]

There is, of course, some tension between efforts to speed up decisionmaking and efforts to enhance participation. Governors and other stakeholders may be dissatisfied with the slow pace of PUC action. But "one man's delay is another man's due process."[330] One might defend the judicialization of PUCs as necessary, for example, to ensure that the utility's positions are tested, that stakeholder voices are heard, and that the evidence supporting commission action is sufficient. Even so, while "elements of due process are essential for fairness . . . they do not require a full blown judicialized decisionmaking model to be accrued."[331] As the next Part describes, states are experimenting with streamlined processes in order to speed up decisionmaking associated with the energy transition.

D. *Participation*

Barriers to stakeholder participation in PUC proceedings, while troubling at all times, may be even more problematic in the energy transition. This is in part due to the nature of discussions around the

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327. Edison Elec. Inst., Rate Review Summary 1 (2018), https://www.eei.org/issuesandpolicy/Finance%20and%20Tax/QFU_Rate_Review/2018_Q2_Rate_Review.pdf [https://perma.cc/WE3N-ZJQF]. While the average time to decision was only 7.7 months in 2018, the most recent year for which the Edison Electric Institute has published data, the Institute attributed this reduction to temporary fluctuations rather than any more permanent change in processing timelines. Id.

328. See, e.g., John Funk, After Months of Delay, Ohio Solar Projects Gain Siting Board's Approval, Energy News Network (Apr. 17, 2020), https://energynews.us/2020/04/17/midwest/after-months-of-delay-ohio-solar-projects-gain-siting-boards-approval [https://perma.cc/2CZJ-UW64] (describing the eighteen-month approval process for a solar installation). This is especially true in states where local governments must also approve siting. Local governments, with their limited resources, may quickly become overwhelmed by the work required to site new projects. See, e.g., Dru Schmidt-Perkins, Abell Found., An Opportunity for Maryland to Get Solar Siting Right 10 (2019), https://abell.org/sites/default/files/files/Solar%20Siting%20Report%209_10_19.pdf [https://perma.cc/P5QS-EUB7] (noting that Maryland local governments caused delays in large-scale solar project siting after they were overwhelmed by applications).

329. For example, see the Oregon PUC's distribution grid modernization process, which expects to produce final utility plans by 2024. Or. Pub. Util. Comm'n, UM 2005 Distribution System Planning (2020), https://edocs.puc.state.or.us/efdocs/HAH/um2005hah13311.pdf [https://perma.cc/EJM9-AHLJ].

330. This phrase has been attributed to a witness for the National Association of Manufacturers in a hearing on the potential reorganization of the National Labor Relations Board, as reported by James Landis. See Morton J. Horwitz, The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy 244 (1992).

331. Brown, supra note 55, at 48.

transition itself and in part because of the nature of its effects. With respect to discussions about the energy transition, as noted above, these are conversations rife with tradeoffs that cannot be resolved merely by applying rational principles to sound data. As Shelley Welton has argued, the process of decarbonizing our energy sector raises complex ethical questions.[332] Participation by stakeholders who can raise and argue some of those questions in regulatory proceedings is one way to enhance democratic input into energy decisionmaking.[333]

Another special challenge to participation is that the energy transition affects both stakeholder groups that have become regular participants in PUC proceedings around the country as well as nontraditional stakeholder groups that are less well represented in this forum. These nontraditional stakeholder groups include communities facing job losses due to the transition, existing energy justice communities that fear being left behind once again by a new energy economy, and other individuals affected by climate impacts in their personal or professional lives. While renewable energy industry representatives may easily come up with the funding and other resources required to participate effectively in PUC dockets, individuals and community groups face greater barriers.[334]

Many states already fund a separate office of consumer counsel to represent ratepayer interests in commission proceedings.[335] But these offices frequently represent the traditional, relatively narrow interests of many consumers in keeping rates low.[336] Thus, even where states choose to fund these offices robustly (and many do not),[337] they do not necessarily support the complex interests of the energy justice community, or other communities likely to be most impacted by failures to limit carbon from electricity production and use. Because we live in a world in which the interests at stake in public utility proceedings are no longer confined to those of utilities in keeping returns high and ratepayers in keeping prices low, states need to think more creatively when it comes to providing support for stakeholders in energy decisionmaking.

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332. Welton, Grasping for Energy Democracy, supra note 20, at 583.

333. See id. at 623–24 (outlining a vision of energy democracy as access to process).

334. See, e.g., Olson, supra note 322, at 48, 53 (noting that larger groups are less likely to take collective action than smaller groups).

335. See Murphy & Sevel, supra note 40, at 26 tbl.1.

336. See Jacobs, The Energy Prosumer, supra note 70, at 554–55 (explaining the limitations in consumer counsel office mandates); see also Elin Swanson Katz & Tim Schneider, The Increasingly Complex Role of the Utility Consumer Advocate, 41 Energy L.J. 1, 4 (2020) (describing conflicts between support for policies that benefit consumers with behind-the-meter resources and those who cannot afford such technologies).

337. See, e.g., Chris Hubbuch, Assembly Bill to Boost Ratepayer Advocacy, Streamline Utility Regulation, Wis. St. J. (Jan. 15, 2020), https://madison.com/wsj/news/local/govt-and-politics/assembly-bill-to-boost-ratepayer-advocacy-streamline-utility-regulation/article_fe45fa01-5586-5db2-ba6e-66190d5e7ed7.html (on file with the *Columbia Law Review*) (describing a Wisconsin assembly bill that would direct $900,000 to the Citizens Utility Board, an independent nonprofit organization that represents utility customers).

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The critiques of PUCs, as magnified during the energy transition, suggest that additional administrative bodies to manage and execute that transition alongside the commissions can be beneficial. As Part I describes, some states have placed responsibility for siting energy infrastructure in separate siting boards. In addition, states have tasked energy offices with specifying a direction for overall state energy policy. A few have even created specialized offices to represent the needs of particular communities and individuals who might otherwise be disadvantaged by the transition. The final Part addresses the advantages and disadvantages of assigning some of these tasks to administrative actors outside of the PUC. It emphasizes the value—and challenges—of maintaining an ecosystem of multiple state energy agencies at this particular moment in history.

IV. NAVIGATING THE TRANSITION: RECONFIGURATION AND REFORM

As the historical narrative in Part I suggests, the broad trend in state-energy-agency design has been in the direction of creating new agencies alongside state PUCs to administer energy laws. This Part evaluates that choice in the context of the energy transition that many states are undertaking.

Choices about agency architecture, like all political choices, are messy and contingent. As states experiment with the creation of new energy agencies, they should recognize that new and reorganized agencies "may fail in ways that differ from those that prompted reorganization."[338] The process is one of striving toward an agency ecosystem that better promotes achievement of society's goals than the previous one.

We should not expect that the process of experimentation will itself be comprehensively rational. In a perfect world—or at least an administratively rational one—legislators and governors would sit down and negotiate energy-agency genesis or reorganization based on mutually agreed-upon goals. When they chose to create more than one agency with responsibility for energy administration, they would give serious thought to how best to allocate specific tasks among those agencies based on their forms and incentives.

In the real world, administrative ecosystems result from more haphazard, overlapping decisionmaking by a variety of actors, each with

338. Camacho & Glicksman, Reorganizing Government, supra note 21, at 11; see also Joan B. Aron, The Reorganization Syndrome: The Nuclear Regulatory Case, 5 S. Rev. Pub. Admin. 459, 470 (1982) (observing that creation of the Nuclear Regulatory Commission in 1974 as part of the reorganization of nuclear agency functions in the United States produced "results different from those expected" and that "the unanticipated consequences are easier to identify in retrospect than the expected ones").

their own motivations.[339] Recognizing the impossibility of taking politics out of agency design, this Part focuses less on what a comprehensively rational ecosystem of state energy agencies would look like and more on possibilities for strengthening various existing arrangements in service of the energy transition.

Whether or not particular architectural decisions will prove a boon in the decarbonization era depends on how well they serve functions and goals that PUCs are less well equipped to provide. It will also depend on how effectively multiple agencies can coordinate their actions to ensure that policy is synchronized. But one of the key advantages of multiple agencies in a single domain is the productive friction that such arrangements can offer. Thus, states with several energy agencies should ideally maintain a balance between cooperation and conflict between these bodies.

This Part applies the framework set out in Part II to weigh the advantages and drawbacks of creating new state energy agencies. The first section below suggests ways in which additional energy agencies can harness their newness and more focused mandates to mitigate some of the critiques of PUCs, especially as those weaknesses manifest in proceedings related to decarbonization. Next, it examines the costs and political ramifications of energy-agency genesis. The final section explores ways to temper the downsides of having multiple agencies operating in a single domain. As Part II discusses, these include coordination challenges and the maintenance of productive friction between agencies.

A. *Shortcomings of Existing Arrangements*

The creation of new state energy agencies, including energy offices, siting boards, and climate change or energy transition bodies, can address some of the critiques of PUCs the previous Part discusses. This section considers each in turn. It is also important, however, to consider tensions between these goals. Increasing participation in state-agency proceedings, for example, can slow down decisionmaking. A focus on technocratic expertise might deemphasize the lay expertise that participation by community groups can provide. Such tradeoffs are inevitable in the energy transition in particular and in governance generally.[340] By surfacing them,

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339. While agencies can be sticky once created, their form and number can also shift as politics change. In Kansas in 2009, for example, Governor Kathleen Sebelius abolished the Kansas Energy Council established by her predecessor, citing Council bias and the proliferation of new energy policy bodies in the legislative and executive branches of state government. Tim Carpenter, Energy Council Abolished: Sebelius Acts After Panel Was Given a Year to Right Its Course, Climate & Energy Project (Jan. 2, 2009), http://climateandenergy.org/blog.965.dissolution-of-the-kansas-energy-council-kec?act=view [https://perma.cc/KU9W-V7N9].

340. For a collection of academic work discussing tradeoffs in the context of the energy transition, see Conversations, EnergyTradeoffs.com, https://www.energytradeoffs.com/84-2 [https://perma.cc/NY37-KBA7] (last visited Jan. 30, 2021) (publishing conversations with scholars and experts).

the framework can make institutional decisions that privilege one goal over another more transparent.

1. *Capture*. — New agencies are not themselves immune to capture. As Part II suggests, however, in their early years, new agencies might resist capture by dominant industries to a greater extent than their legacy counterparts. Moreover, depending on their structures and missions, new agencies might be more insulated from capture than PUCs or be susceptible to capture by different groups. While the criticism of public utility capture has focused largely on capture of commissions by the utilities they regulate,[341] energy offices tasked with promoting renewable generation and conservation may be more influenced by renewable energy and energy efficiency companies. Other energy institutions, such as the consumer advocate or offices of energy transition, may advance a single viewpoint by design. While not "capture" per se, these natural affinities with and duty to advocate for particular stakeholders can counter perspectives at a PUC more beholden to traditional utility interests.

Other energy agencies might also serve as checks on or watchdogs for the PUCs. Agency genesis can bolster the administrative separation of powers, a series of internal checks and balances within the bureaucracy that can guard against private influence and perspective dominance. Agency genesis can thus be seen as, in the words of William Novak, part of "the simultaneously mundane and heroic task of attempting to blunt the force of perennial public corruptions and private coercions by simply piling on 'all the checks and balances that human ingenuity can devise.'"[342] Where other agencies intervene in PUC proceedings, they might also blunt capture's effects. William Berry has found that the presence of intervenors in such proceedings can change the incentive structures and information resources of a commission in ways that might mitigate capture.[343]

For an example of how checking by participation might operate in practice, consider the Nevada PUC's investigation into the impacts of renewable energy on Nevada's "electricity rates, environment and economic development" in 2010.[344] This was an investigation to determine how much distributed generation from renewable energy existing distribution systems in the state could support.[345] While ostensibly neutral, the fact of the study suggested skepticism about continued expansion of distributed solar resources.

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341. See Bernstein, supra note 42, at 156 ("The limits of regulatory policy tend to be set by the acceptability of regulatory policies to the dominant parties in interest.").

342. Novak, supra note 51, at 48.

343. See William D. Berry, An Alternative to the Capture Theory of Regulation: The Case of State Public Utility Commissions, 28 Am. J. Pol. Sci. 524, 530–31 (1984).

344. Investigation Regarding the Impacts of Renewable Energy on Nevada's Electricity Rates, Environment and Economic Development, No. 10-04008, 2011 WL 1820067, at *1 (Nev. P.U.C. May 3, 2011).

345. Id.

Four individuals from the State Energy Office filed comments, along with its Director.[346] One comment stressed that "[d]istributed generation can potentially expand energy options for Nevada citizens, reduce air pollution emissions, and diversify Nevada's energy portfolio."[347] This comment also noted that "[a]n emphasis on ramping up distributed generation . . . will go a long way to getting Nevada out of our current economic funk."[348] The investigation ultimately showed that increased penetration of distributed generation did not threaten reliability on NV Energy's distribution systems.[349] While it is difficult to link any particular comments to outcomes in regulatory proceedings, it was significant that the Energy Office was able to make its voice heard in the PUC proceeding.

2. *Expertise.* — As Part III discusses, PUC expertise may not be a perfect match for the expertise required to navigate the energy transition.[350] Energy offices and other energy agencies can help to redress any informational deficit by supplementing the PUC's expertise. One way they can do this is by conducting research into specific topics crucial to the energy transition. For example, Hawaii's legislature tasked the Energy Office with studying business models and innovative regulatory approaches for utilities.[351]

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346. See, e.g., Comment Letter from James C. Groth, Dir., Nev. State Off. of Energy, to Rebecca Wagner, Comm'r, Nev. Pub. Utils. Comm'n (June 28, 2010), http://pucweb1.state.nv.us/pdf/aximages/dockets_2010_thru_present/2010-4/2541.pdf [https://perma.cc/L7FB-H4QH] (stating that "I believe I hold the responsibility to conduct and fund this study on behalf of the enormous economic driving opportunity for all Nevadans" [sic]); Comment Letter from Robert C. Nellis, Energy Program Manager, Nev. State Off. of Energy, to Rebecca Wagner, Comm'r, Nev. Pub. Utils. Comm'n (June 25, 2010), http://pucweb1.state.nv.us/pdf/aximages/dockets_2010_thru_present/2010-4/2529.pdf [https://perma.cc/6LC7-RGJP] (commenting that "it is vital to the State of Nevada and its economy that this study be led by the executive branch of the State and not the primary utility"); Comment Letter from Thomas A. Wilczek, Energy Program Manager, Nev. State Off. of Energy, to Rebecca Wagner, Comm'r, Nev. Pub. Utils. Comm'n (June 28, 2010), http://pucweb1.state.nv.us/pdf/aximages/dockets_2010_thru_present/2010-4/2530.pdf [https://perma.cc/ESL9-HUUS] (commenting that "[i]t is of the utmost importance that the Nevada State Office of Energy . . . be allowed to proceed as the lead entity for this Independent Study").

347. Comment Letter from Sean Sever, Energy Outreach Coordinator, Nev. State Off. of Energy, to Rebecca Wagner, Comm'r, Nev. Pub. Utils. Comm'n (June 28, 2010), http://pucweb1.state.nv.us/pdf/aximages/dockets_2010_thru_present/2010-4/2531.pdf [https://perma.cc/HC7L-CDWX].

348. Id.

349. Id.

350. A report from the Lawrence Berkeley National Laboratory on resource planning suggests that "[a]s resource planning problems become more complex, from renewable energy integration to the role and treatment of distributed energy resources[,] state regulatory commissions and energy offices will need to expand and deepen their expertise to inform their decision making." Fredrich Kahrl, Andrew Mills, Luke Lavin, Nancy Ryan & Arne Olsen, The Future of Electricity Resource Planning 5 (2016), https://emp.lbl.gov/sites/all/files/lbnl-1006269.pdf [https://perma.cc/9JRH-QZDW].

351. Haw. State Energy Off., Evaluation of Utility Ownership and Regulatory Models for Hawaii 8 (2019), https://energy.hawaii.gov/wp-content/uploads/2019/06/HI_DBEDT_UtilityModelStudy.pdf [https://perma.cc/7FM8-XG4D].

The Office enlisted private consultants to assist with preparing the final report, published in 2019.[352] The report recommended adopting performance-based rates as the best way to ensure that the state's investor-owned utilities could achieve core policy objectives, including customer cost savings and achieving state clean energy goals.[353] While PUCs might gather information of this sort through rulemakings, these proceedings are subject to the other critiques of PUC action: They are cumbersome, adversarial, and time-consuming; they also present high barriers to participation.

Due to their specialized mandates, energy offices are particularly likely to develop expertise around renewable energy generation and energy efficiency.[354] In states that have articulated renewable energy and energy conservation goals, energy offices can be advocates for those goals, including by reminding the PUC and other government agencies to act in harmony with them.[355]

Part II suggests that new agencies might attract talent due to enthusiasm around their creation. Such surges of new talent might also enhance creative problem-solving. Rhode Island Governor Gina Raimondo suggested this had been the case at state energy agencies when she noted that "new thinking and new people" at these agencies contributed to the state's adoption of renewable energy legislation.[356]

Non-PUC energy agencies can also sharpen and deepen the kinds of localized, distributed expertise available to PUCs by educating the general

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352. See id.

353. Id. at 17. The legislature had originally asked the Energy Office to investigate alternative utility business models, including transitioning the state to cooperative and municipal utility models as well as creating independent distribution systems. Supplemental Appropriations Act of 2016, Act No. 124, sec. 4(7), § 7.1, 2016 Haw. Sess. Laws 254, 283.

354. See, e.g., Haw. Rev. Stat. § 196-71 (2020) (establishing the Hawaii State Energy Office and tasking it with supporting efforts to achieve renewable energy, energy efficiency, and clean transportation goals); 42 R.I. Gen. Laws § 42-140-3 (2020) (tasking the Rhode Island Office of Energy Resources with coordinating energy efficiency and renewable energy plans, among other duties).

355. In Hawaii, for example, the Energy Office has a statutory mandate to work with the public utilities commission and other state agencies to develop and inform policies "to achieve energy efficiency, renewable energy, energy resiliency, and clean transportation goals." Haw. Rev. Stat. § 196-71(b)(1). The legislation also notes that the energy office "shall be the State's primary government entity for supporting the clean energy initiative." Id. § 196-71(c). Government agencies other than utility commissions are also taking note of recommendations from energy offices. See Citizens Coal. v. D.C. Bd. of Zoning Adjustment, 619 A.2d 940, 949 (D.C. 1993) ("The BZA also recognized that the District of Columbia Energy Office 'was of the opinion that the proposed [C]ogeneration [F]acility contributes to the conservation of energy and promotes the energy goals and policies of the District of Columbia.'" (quoting BZA Finding No. 46)).

356. Tim Faulkner, Rhode Island's New Renewable-Energy Laws Address Economy and Climate Change, EcoRI News (Aug. 16, 2017), https://www.ecori.org/government/2017/8/14/new-renewable-energy-laws-address-economy-and-climate [https://perma.cc/84QY-4NWP].

public. Many energy offices are responsible for educating the public about energy conservation and efficiency.[357] Others have broader educational mandates. Florida's Office of Energy, for example, partners with the state's academic institutions to provide educational outreach related to energy and climate change.[358] Georgia's State Energy Program has a similarly broad educational mission that emphasizes the social, environmental, and economic impacts of energy consumption.[359]

Finally, when expertise runs out, representation and accountability can provide alternative forms of legitimacy, and non-PUC energy agencies might offer greater democratic accountability than their commission counterparts. This is because, as executive agencies with a single head, they are subject to direct gubernatorial oversight.[360] If citizens are unhappy with the actions of state energy offices, they can lobby the governor for different policies or vote for a different governor in the next election. Perhaps because of the concerns raised about the efficacy of indirect accountability,[361] however, some state legislatures have gone further by placing members of the public in agency leadership positions.[362]

3. *Speed.* — Additional agencies might speed up tasks associated with the energy transition in several ways. First, as the previous section discusses, state energy offices can provide research to support legislation or executive action on coal plant retirements, new infrastructure, or

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357. See, e.g., Md. Code Ann., State Gov't § 9-2003(1) (West 2020) (tasking the Maryland Energy Administration with providing educational services); Utah Code § 63M-4-401(3)(c) (2020) (tasking the Utah Office of Energy Development with advancing energy education, including by creating elementary, higher education, and technical college energy-education programs).

358. Fla. Stat. § 377.6015(2)(f) (2020).

359. Ga. Code Ann. § 50-23-32(b)(6) (2020).

360. See Shah, supra note 267, at 666 (explaining the argument that independent agency interpretations of statutes should be entitled to less judicial deference because those agencies are less politically accountable as compared with executive agencies); Neal D. Woods & Michael Baranowski, Governors and the Bureaucracy: Executive Resources as Sources of Administrative Influence, 30 Int'l J. Pub. Admin. 1219, 1221 (2007) ("[G]ubernatorial appointment has been the power that has most consistently been found to be related to administrative influence."); see also Seifter, Gubernatorial Administration, supra note 162, at 536 (noting that agencies in the states are associated with the governor's administration). On the distinctions between executive oversight of executive versus independent agencies, arguing that presidents possess more control over independent agency actions than is commonly acknowledged, see Lisa Schultz Bressman & Robert B. Thompson, The Future of Agency Independence, 63 Vand. L. Rev. 599, 600–01 (2010). Lisa Bressman and Robert Thompson admit, however, that presidents can exert *greater* control over executive agencies. See id.

361. See Seifter, Gubernatorial Administration, supra note 162, at 537–38 (noting the limitations of electoral accountability).

362. See, e.g., Mass. Gen. Laws Ann. ch. 164, § 69H (West 2020) (requiring that there be three members of the public on the board, of whom one shall be experienced in environmental issues, one in labor issues, and one in energy issues).

transition justice.[363] These overarching mandates can produce more direct results than waiting for the PUC to develop expertise case-by-case.

Second, separate energy agencies with focused mandates can streamline the siting of new energy infrastructure. Michael Gerrard suggests that "one-stop (or at least few-stop) procedures for major new energy facilities . . . can reduce the hurdles that project developers need to surmount, and at a minimum could help ensure that reviews are conducted simultaneously rather than sequentially."[364]

In New York, the state legislature recently created a new office to expedite approval of new renewable energy projects specifically. The new Office of Renewable Energy Siting, located within the Department of State, consolidates all siting functions for renewable energy projects, including environmental review.[365] One goal of the office is to ensure that siting decisions are "delivered in a timely manner."[366] To that end, the office must "ensure that complete applications are acted upon within one year."[367] Commentators hope that the new office will ease a backlog of applications for renewable energy siting created under the previous siting

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363. Energy offices in many states advise their state governors or legislatures on general energy matters, including by recommending legislation or other legal changes. See, e.g., S.C. Code Ann. § 48-52-420(11) (2020) (tasking the State Energy Office with assisting the Governor's Office and the General Assembly "in assessing the public economic and environmental interest on issues related to energy production, transportation, and use"); Wash. Rev. Code § 43.21F.045(2)(d) (2020) (tasking the State Energy Office with "[d]evelop[ing] energy policy recommendations for consideration by the governor and the legislature"). Offices in several states collect data that can support general energy policymaking. See, e.g., Cal. Pub. Res. Code § 25216.5(d) (2020) (designating the California Energy Commission as the "central repository . . . for the collection, storage, retrieval, and dissemination of data and information on all forms of energy supply, demand, conservation, public safety, research, and related subjects"); N.Y. Pub. Auth. Law § 1854(5) (McKinney 2020) (describing one of the purposes of the New York State Energy Research and Development Authority as the accumulation and dissemination of "information relating to the development and use of new energy technologies and energy conservation technologies").

364. Michael B. Gerrard, Legal Pathways for a Massive Increase in Utility-Scale Renewable Generation Capacity, 47 Env't L. Rep. 10,591, 10,607 (2017).

365. Press Release, N.Y. State Energy Rsch. & Dev. Auth., New York State Announces Passage of Accelerated Renewable Energy Growth and Community Benefit Act as Part of 2020–2021 Enacted State Budget (Apr. 3, 2020), https://www.nyserda.ny.gov/about/newsroom/2020-announcements/2020-04-03-new-york-state-announces-passage-of-accelerated-renewable-energy-growth-and-community-benefit-act-as-part-of-2020-2021-enacted-state-budget [https://perma.cc/AW22-6Z36] [hereinafter NYSERDA, Press Release].

366. Id.; see also Michael Bates, NY Legislation Creates New Siting Process for Renewables, N. Am. Windpower (Apr. 6, 2020), https://nawindpower.com/cuomo-passes-renewable-energy-legislation [https://perma.cc/EW4H-EN69] ("This new law will support a rapid transition to clean renewable energy sources . . . ." (internal quotation marks omitted) (quoting Alicia Barton, President and CEO, N.Y. State Energy Rsch. & Dev. Auth.)).

367. NYSERDA, Press Release, supra note 365. The timeline is even shorter for former commercial and industrial sites. Id. (noting that the timeline for these sites is only six months).

regime, in which most projects took significantly longer to site than the twenty-four-month statutory goal.[368]

Finally, energy offices can collaborate directly with the private sector, think tanks, and national laboratories to move the energy transition forward. For example, Colorado's Energy Office is working with private industry, including auto manufacturers and dealers, to create an electric-vehicle plan for the state.[369] Hawaii's State Energy Office has an explicit statutory mandate to "[e]ngage the private sector to help lead efforts to achieve renewable energy and clean transportation goals through the Hawaii clean energy initiative."[370] It is also partnering with the Rocky Mountain Institute, a nonprofit dedicated to sustainability, on a transportation-electrification project, and is working with the National Renewable Energy Laboratory on energy resource planning software that can model and visualize complex future scenarios.[371] Such partnerships supplement the PUC's work by producing nonutility solutions that speed the energy transition and by creating tools that utilities can implement in support of their own decarbonization efforts.

4. *Participation.* — Finally, additional energy agencies can lower barriers to participation in state energy decisionmaking. Innovative agencies like Colorado's Office of Just Transition make particular stakeholder perspectives the government's business.[372] Like the push to establish offices of consumer counsel, this latest effort to focus government efforts on communities that will be affected by the transition away from fossil fuels will give these communities a greater voice in the policymaking conversation as a whole and potentially in PUC proceedings as well.

Even for groups without a specific government office dedicated to their interests, the establishment of energy offices, as well as climate and energy task forces and councils, can give them more points of access to government officials.[373] In addition to providing direct access to energy

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368. See Keith McShea, Environmental Groups Demand Clean Energy Action from NYS: 'We Can't Afford to Wait', Buff. News (Apr. 22, 2019), https://buffalonews.com/news/local/environmental-groups-demand-clean-energy-action-from-nys-we-cant-afford-to-wait/article_fb6a8ecb-a9cf-5347-a0c8-55e21e9ca21b.html (on file with the *Columbia Law Review*). Bottlenecks and delays resulted in the abandonment of several of these projects. Id.

369. Colorado Energy Office to Present Colorado Electric Vehicle Plan 2020, Colo. Energy Off. (Apr. 23, 2020), https://energyoffice.colorado.gov/press-releases/colorado-energy-office-to-present-colorado-electric-vehicle-plan-2020 [https://perma.cc/Z7SB-94NR].

370. Haw. Rev. Stat. § 196-71(b)(4) (2020).

371. Haw. Clean Energy Initiative, Celebrating 10 Years of Success: Hawaii Clean Energy Initiative 2008–2018, at 5 (2018), https://energy.hawaii.gov/wp-content/uploads/2021/01/HCEI-10Years.pdf [https://perma.cc/6W6F-LGNU].

372. See Colo. Rev. Stat. § 8-83-503 (2020) (creating the Office of Just Transition and tasking it with supporting coal communities in Colorado).

373. For examples of agencies and task forces with public members of their leadership structures, see, e.g., Ind. Code § 2-5-45-3 (2020) (requiring that at least one member of the 21st Century Energy Policy Development Task Force represent ratepayer interests and that

decisionmaking, these agencies can facilitate public participation in PUC proceedings. In California, the Office of the Public Advisor serves as a point of contact for members of the public wishing to participate in meetings, hearings, workshops, and rulemakings at the California Energy Commission.[374] Access to energy offices, task forces, and councils can also enable public influence on PUC proceedings indirectly through the participation of other energy agencies in those proceedings. In fact, one study of twelve PUCs found that proxy advocacy—advocacy by designated governmental actors—was more effective than grassroots advocacy by citizen groups due to proxies' better financial resources and greater technical expertise.[375]

B. *Costs*

The costs of creating a new agency are likely to be easier to calculate than its benefits and are therefore less likely to be ignored by policymakers. Thus this section merely provides a high-end and low-end example of the costs of various state energy agencies. Perhaps unsurprisingly, energy-agency administrative costs vary significantly. The New York State Energy

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several members have specific expertise in advanced energy research, renewable energy technology and deployment, and related areas); Conn. Exec. Order No. 3 (Sept. 3, 2019), https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-3.pdf [https://perma.cc/9C8G-ZJWF] [hereinafter Connecticut Executive Order]; Energy Transition Act Committee, N.M. Dep't of Workforce Sols., https://www.dws.state.nm.us/Portals/0/DM/ETA_Meeting%20Agenda_10292019.pdf [https://perma.cc/CG9G-TPU5] (last visited Oct. 27, 2020) (overviewing the first meeting of New Mexico's Energy Transition Act Advisory Committee); Elizabeth Harball, Walker Names Members of Alaska Climate Leadership Team, Alaska Pub. Media (Dec. 12, 2017), https://www.alaskapublic.org/2017/12/12/walker-names-members-of-alaska-climate-leadership-team [https://perma.cc/DRA2-PHSH]; Members of the Governor's Task Force on Climate Change, Wis. Governor's Task Force on Climate Change, https://climatechange.wi.gov/Pages/Members.aspx [https://perma.cc/BJL5-PMTU] (last visited Oct. 27, 2020); U.P. Energy Task Force Members, Mich. Dep't of Env't, Great Lakes & Energy, https://www.michigan.gov/documents/egle/egle-exec-upetf-members_662090_7.pdf [https://perma.cc/8UFJ-T7P8] (last visited Oct. 27, 2020) (including upper peninsula residents as well as energy experts in Michigan's Upper Peninsula Energy Task Force); see also Camacho & Glicksman, Reorganizing Government, supra note 21, at 9 ("Decentralized decision making, for example, may provide greater opportunities for public participation . . . .").

374. Office of the Public Advisor, Cal. Energy Comm'n, https://www.energy.ca.gov/about/divisions-and-offices/office-public-advisor [https://perma.cc/3AWE-6DDG] (last visited Oct. 27, 2020).

375. William T. Gormley, Public Advocacy in Public Utility Commission Proceedings, 17 J. Applied Behav. Sci. 446, 455 (1981). But William Gormley suggests government funding of grassroots advocacy as a way to ameliorate these disparities and cautions that there can be gaps between proxy and citizen goals. Id. at 456. While consumer advocates press largely for lower rates, citizen groups advocate for environmental protection, against nuclear power, and in favor of community equity, among other positions. Because Gormley was writing in 1981, moreover, he likely failed to capture the increased resources and professionalization of citizen groups in PUC proceedings over the past several decades.

Research and Development Authority (NYSERDA) has total annual expenditures of close to $1.5 billion, of which personnel and administrative costs make up about $71 million.[376] Smaller agencies can be much less costly. When the Colorado General Assembly created the Office of Just Transition, it appropriated $155,758 from the general fund to the Colorado Department of Labor and Employment to hire a director and one other employee to staff the new office.[377]

Not all agency costs are created equal, especially from the perspective of politicians who must persuade stakeholders of the need for new institutions. Some costs may be recovered by assessing surcharges on utility customers, by leveraging federal grant programs, or through other mechanisms, thereby decreasing effects on a state's budget.[378] The lower the amount that must be appropriated from a state's budget, the less of a disincentive cost is likely to present to the establishment of new agencies.

C. *Political Considerations: Mitigating Gubernatorial Control*

Notwithstanding the purposes for which many state energy offices were originally established, today many of these offices engage in planning and policy advancement consistent with gubernatorial priorities. This emphasis, and the consequent increase in state executive authority it produces, parallels the shifts in the separation of energy powers at the federal level. Presidents can use the federal DOE to advance their specific energy visions and priorities.[379] In this way, the DOE can act as a counterweight to the more independent FERC when it comes to shaping federal energy policy.[380] Similarly, state energy offices can press gubernatorial energy priorities in state administrative proceedings, with the private sector, and in civil society.[381]

This trend is consistent with what Seifter describes as the rise of "gubernatorial administration" during the mid- to late twentieth century.[382]

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376. N.Y. State Energy Rsch. & Dev. Auth., Fiscal Year 2020–21 Budget and Financial Plan 13, https://www.nyserda.ny.gov/-/media/Files/Publications/Annual-Reports-and-Financial-Statements/2020-21-Budget-and-Financial-Plan.pdf [https://perma.cc/SG52-HS46] [hereinafter NYSERDA, 2020–21 Budget] (last visited Feb. 12, 2021).

377. Act of May 28, 2019, ch. 323, sec. 3(1), 2019 Colo. Sess. Laws 2987, 2995 (codified at Colo. Rev. Stat. §§ 2-3-1203, 8-83-501–506 (2020)).

378. For example, NYSERDA is funded in part by utility surcharges and in part by a Federal State Energy Plan grant. NYSERDA, 2020–21 Budget, supra note 376, at 3–5.

379. See Jacobs, Statutory Separation of Powers, supra note 19, at 408.

380. Id.

381. "Civil society" is an umbrella term frequently used to denote a range of nongovernmental actors, including community groups, labor unions, NGOs, charitable organizations, faith-based organizations, foundations, and professional associations. See Adam Jezard, Who and What Is 'Civil Society?', World Econ. F. (Apr. 23, 2018), https://www.weforum.org/agenda/2018/04/what-is-civil-society [https://perma.cc/U465-NDJG]. The term is used in that sense here.

382. See Seifter, Gubernatorial Administration, supra note 162, at 498–99.

Seifter argues that state executive reorganizations during this period produced more powerful governorships.[383] As discussed above,[384] the creation of state energy offices is consistent with this narrative. State governors who are frustrated with the decisions of independent PUCs or who simply desire greater control over energy regulation in their states have an incentive to create executive-branch energy offices. This is especially so if those energy offices can exert influence beyond their express statutory responsibilities by serving as coordinating bodies and by exerting influence at state PUCs.

Of course, it is also possible for energy-agency genesis to *weaken* gubernatorial control. As Seifter also notes, during the era of Jacksonian populism in the 1800s, new state agencies and offices subject to direct election diluted gubernatorial power.[385] Similarly, during the early years of the Progressive Era at the turn of the last century, the creation of new, independent commissions to regulate public utilities detracted from gubernatorial power.[386] Likewise, the creation of new energy agencies, boards, and commissions that are either directly elected or otherwise not subject to direct gubernatorial control can weaken the power of the state executive.[387]

In fact, however, state-agency genesis has tended to enlarge rather than restrict gubernatorial authority. While there are advantages to concentrated gubernatorial power, even the staunchest advocates of executive control are in favor of checking mechanisms to prevent the excessive accumulation of governmental authority in a single actor.[388] As Seifter points out, these checks are frequently lacking in the state context.[389]

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383. Id.

384. See supra section II.B.

385. See Seifter, Gubernatorial Administration, supra note 162, at 495–96.

386. Id. at 496.

387. Although PUCs in many states have indicia of independence, Seifter reminds us that we should think differently about independent agencies at the state level. She notes that, unlike their federal counterparts, state courts do not treat "independent agencies" as a distinct category. Seifter, Understanding State Agency Independence, supra note 38, at 1543. State courts' "noncategorical, nonbinary approach" to characterizations of agency independence, she continues, "impedes development of stable norms," and "thus undermin[es] independence overall." Id. at 1544.

388. See, e.g., Steven G. Calabresi & Nicholas Terrell, The Fatally Flawed Theory of the Unbundled Executive, 93 Minn. L. Rev. 1696, 1697 (2009) (noting that the authors are not defending a claim of inherent presidential power to act contrary to statutes duly enacted by the legislative branch); Richard J. Pierce, Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of *The Unitary Executive* by Steven G. Calabresi and Christopher S. Yoo, 12 U. Pa. J. Const. L. 593, 594 (2010) (observing that neither the unitary executive theory of presidential power nor its most faithful adherents imply that the president possesses powers greater than those of the other two constitutional branches).

389. Seifter, Gubernatorial Administration, supra note 162, at 536 (acknowledging that powerful governments can be efficient and productive but cautioning that this may come at the expense of diversity and expertise in state governance, potentially threatening rule-of-

State legislatures uncomfortable with expansion of executive power via agency genesis can push back in a number of ways. First, they could exert greater control over the leadership and mandates of new energy agencies through more detailed statutes. In cases where governors create new energy bodies by using delegated reorganization authority, legislatures can convert them to statutory agencies. A final possibility is for the legislature to create yet more new agencies to counter executive influence. However, because of the concerns Part II raises about the multiplication of agencies, legislatures should consider the first two options before resorting to agency genesis of their own.

D. *Coordination and Conflict*

This section suggests how to manage energy-agency multiplicity in a way that enhances its benefits and minimizes its costs. It focuses on enabling coordination between energy agencies while maintaining productive friction.

1. *Enabling Coordination.* — The transition to decarbonized electricity will require administrative coordination. As William Boyd argues, decarbonization requires hundreds of billions of dollars in investments to modernize the grid and construct new forms of power generation.[390] This investment must be planned and sequenced if it is to yield results.[391]

At the federal level, the OMB coordinates agency policy. Most prominently, OMB's Office of Information and Regulatory Affairs (OIRA) reviews major agency regulations under a cost–benefit framework.[392] As part of this process, the Office solicits comments on agency proposals from other government agencies with an interest in the subject matter. One of OIRA's lesser-known functions is to coordinate a unified regulatory agenda each year made up of the regulatory agendas that each agency is required to submit.[393] In these ways, OIRA monitors regulatory actions across government.

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law values). As Seifter and Bulman-Pozen point out, moreover, state constitutions evince strong commitments to popular sovereignty. Jessica Bulman-Pozen & Miriam Seifter, The Democracy Principle in State Constitutions, 119 Mich. L. Rev. (forthcoming 2021) (manuscript at 21–26), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3658&context=faculty_scholarship [https://perma.cc/U84Z-TZXT]. These would be in tension with a too-powerful executive due to the limitations of electoral accountability as a safeguard of citizens' power. See Seifter, Gubernatorial Administration, supra note 162, at 537–38.

390. See Boyd, Public Utility, supra note 16, at 1618.

391. Id.

392. Lisa Heinzerling, Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House, 31 Pace Env't L. Rev. 325, 330 (2014).

393. Sally Katzen, OIRA at Thirty: Reflections and Recommendations, 63 Admin. L. Rev. 103, 111 (2011) (observing, however, that "the process itself has become more of a paper exercise than an analytical tool").

At the state level, too, coordination is most likely to come from the governor's office, and many states have their own versions of OIRA.[394] Executive, as opposed to decentralized, coordination is perhaps even more advantageous in the states due to individual agencies' limited resources.

Sometimes legislation mandates coordination, even if that coordination is left to the executive branch to implement in practice.[395] In Oregon, for example, the state legislature tasked the Oregon Department of Energy with establishing a system of tradeable renewable energy credits in consultation with the Public Utility Commission.[396] In other cases, governors initiate coordination themselves by creating formal or informal task forces made up of members from the various government agencies with interest in a given policy area. In Rhode Island, for example, Governor Raimondo has sought "to create a single team on the field across departments," including the Office of Energy Resources, Division of Public Utilities and Carriers, Infrastructure Bank and Department of Environmental Management to address overlapping issues related to climate change.[397]

Coordination could also be agency-initiated. Monast and Adair propose that state energy offices serve as coordinators between PUCs and state environmental agencies.[398] They suggest several methods by which such coordination might take place, from information-sharing to staff interaction to testimony by one agency in another's proceedings.[399] State energy offices can offer additional scrutiny of utility resource plans, for example, to make sure that they are taking state renewable energy goals and programs into account.[400] State energy offices might also coordinate

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394. See Seifter, Gubernatorial Administration, supra note 162, at 503–05 (noting that thirty-four states have implemented some version of centralized regulatory review). See generally Jason A. Schwartz, Inst. for Policy Integrity, N.Y.U. Sch. of L., 52 Experiments with Regulatory Review: The Political and Economic Inputs into State Rulemakings 7 (2010), https://policyintegrity.org/files/publications/52_Experiments_with_Regulatory_Review.pdf [https://perma.cc/C7QP-U9TA] (offering a comprehensive comparative snapshot of "state-level regulatory decisionmaking").

395. Rulemaking to Amend, Adopt, and/or Repeal Regulations in Accordance with Senate Bill 300 (2019), No. 19-06008, 2020 WL 3051103, at *12 (Nev. P.U.C. June 3, 2020) ("Coordinate with sister agencies (Governor's Office of Energy, Department of Transportation, Department of Conservation and Natural Resources) to address interdependent efforts . . . .").

396. Or. Rev. Stat. § 469A.130(1) (2019).

397. Faulkner, supra note 356. Governor Raimondo observed that collaboration between these departments produced a large number of renewable energy bills that were then passed by the state legislature. Id.

398. See Monast & Adair, supra note 83, at 19.

399. See id. at 55–58.

400. See, e.g., In re Portland Gen. Elec. Co., No. 10-457, 2010 WL 4807694 (Or. P.U.C. Nov. 23, 2010); In re Pub. Util. Comm'n of Or., No. 10-132, 2010 WL 1445484 (Or. P.U.C. Apr. 7, 2010) (arguing in favor of leaving the costs of interconnection with the utility unless the connection only benefits the facility); In re Pacificorp, dba Pacific Power, No. 08-232, 2008 WL 1904668 (Or. P.U.C. Apr. 24, 2008) (proposing that Pacific Power acquire more

with other energy bodies in the state, including siting boards and climate change or energy transition offices. Energy offices are perhaps best suited among existing energy agencies to coordinate activities across agencies, given their ties to the governor's office and because their mandates tend to be more flexible than those of sister agencies. Some energy offices are even required by statute or executive order to serve this coordinating function.[401] One effect of placing coordination responsibilities in an energy office, however, is that it increases the governor's control over energy policy.

Collaborations might involve not just agencies themselves but also stakeholders. In the 1980s and 1990s, there was great enthusiasm for integration of alternative dispute mechanisms into the regulatory process. Some agencies experimented with negotiated rulemaking, in which agencies invited key stakeholders to provide input at the earliest stages of the rulemaking process.[402] For example, in 1987, the Connecticut Department of Public Utility Control implemented a Collaborative Planning Process that worked in much the same way as negotiated rulemaking.[403] A group of stakeholders, including utility representatives, environmental advocates, and PUC staff, produced consensus-based rate proposals that were then submitted to the PUC for review.[404] The utilities themselves funded technical support for this process.[405] While the Collaborative Planning Process was designed to facilitate negotiation within a single PUC proceeding, it might be expanded to collaborations involving multiple agencies.

Another example was the Washington Utilities and Transportation Commission's creation of a collaborative process on incentives for utility least-cost planning and performance. The Commission formed a Policy Collaborative Group to develop a proposal.[406] The Group included

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renewable resources than called for in the plan submitted and expand its energy efficiency and peak reduction programs).

401. Consider, for example, the Michigan Office of Climate and Energy, which coordinates the activities of state agencies on responses to climate change. Mich. Exec. Order No. 2019-06, § 1(d)(3)(A) (Feb. 20, 2019), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-490039–,00.html [https://perma.cc/43Z8-XA5P]. Similarly, the Nevada Governor's Office of Energy must "[c]oordinate the activities and programs of the Office of Energy with the activities and programs of the Consumer's Advocate and the Public Utilities Commission of Nevada, and with other federal, state and local officers and agencies." Nev. Rev. Stat. § 701-180(5) (2020).

402. See Philip J. Harter, Assessing the Assessors: The Actual Performance of Negotiated Rulemaking, 9 N.Y.U. Env't L.J. 32, 33–39 (2000) (explaining the process and history of negotiated rulemaking).

403. Evan van Hook, Note, Conservation Through Cooperation: The Collaborative Planning Process for Utility Conservation and Load Management, 102 Yale L.J. 1235, 1239–40 (1993).

404. Id.

405. Id. at 1241.

406. Puget Sound Power & Light Co., No. UE-910689, 1992 WL 12790160 (Wash. U.T.C. Jan. 14, 1992).

representatives from the local utility, commission staff, the public counsel (which represents the interests of utility customers in the state), the state energy office, a major industrial customer, industrial and cogeneration trade groups, a conservation organization, and a public regional power-planning and conservation council.[407] The utility funded consultants to support all parties to the effort.[408] Ultimately, the Commission adopted aspects of the Group's proposal for decoupling rates from utility revenues and included many of the ideas generated by the collaborative.[409]

There have been serious critiques of negotiated rulemaking, most notably that it is no less time-consuming or costly than the traditional rulemaking process.[410] Even if this is true, however, it does not negate some of the participatory benefits of alternative procedures. State legislatures and PUCs would do well to consider experimentation with participatory mechanisms as a way to bring more voices into debates about the energy transition. Ari Peskoe suggests, for example, that PUCs might convene stakeholders for informal technical or working group sessions to surface views and provide opportunity for dialogue.[411]

Such collaborative processes should be designed, Peskoe cautions, to ensure that particular voices—especially those with greater resources and experience—do not dominate the discussions.[412] One way to mitigate this problem would be to have a relatively neutral party involved in the process who can report on power dynamics.[413] Another would be to provide training and resources to less experienced and less affluent participants. While power dynamics are endemic to human interactions, some of the more pernicious effects of power imbalance might be addressed through these and other design elements.

2. *Maintaining Productive Friction.* — Notwithstanding the benefits of coordination, agencies do not always agree on a course of action. This can be a good thing. Dividing authority within a single domain among multiple agencies can prevent any one government actor from accumulating too much power. The competition that can arise between agencies with

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407. Id.

408. Martin Schweitzer, Mary English, Evelin Yourstone & John Altman, Oak Ridge Nat'l Lab'y, Interactive Efforts to Address DSM and IRP Issues: Findings from the First Year of a Two-Year Study 33 (1993), https://www.osti.gov/servlets/purl/6323022 (on file with the *Columbia Law Review*).

409. Id. at 42.

410. See, e.g., Cary Coglianese, Assessing Consensus: The Promise and Performance of Negotiated Rulemaking, 46 Duke L.J. 1255, 1283–86, 1290–309 (1997) (concluding that negotiated rulemaking neither prevents litigation nor saves time during the rulemaking process).

411. Ari Peskoe, Harvard Env't Pol'y Initiative, Alternative Dispute Resolution at Public Utility Commissions 8 (2017), http://eelp.law.harvard.edu/wp-content/uploads/Alternative-Dispute-Resolution-at-PUCs-Harvard-Environmental-Policy-Initiative.pdf [https://perma.cc/BP36-4KK9].

412. Id. at 9.

413. See id.

overlapping jurisdiction can also make agencies work harder.[414] One way they can do this is by participating in each other's formal proceedings. For example, the Washington State Energy Office and the Public Counsel each raised concerns in a gas-ratemaking proceeding before the Washington Utilities and Transportation Commission that the gas utility was too slow in pursuing methods to reduce the demand for gas.[415] While the Commission ultimately approved the rate plan as proposed, they chastised the utility for their "slow pace" in pursuing demand-side solutions and exhorted them to "proceed deliberately" in incorporating such resources onto their system.[416]

Furthermore, duplication of function can make it more difficult for interest groups to capture the policy field.[417] Agencies can also serve as watchdogs for one another, calling attention to improper influence by regulated industry or others. As Seifter has noted, oversight by civil society at the state level is not as robust as commentators often assume.[418] Therefore, alternative checking mechanisms may be called for. Interagency checks and balances can ameliorate this deficit.

State offices of consumer counsel have served this function for decades by intervening in, and even initiating proceedings, with the goal of keeping customer rates—and the process by which they are set—fair. In *Colorado Energy Advocacy Office v. Public Service Co. of Colorado*, for example, the Advocacy Office alleged that the PUC had improper ex parte contacts with the gas company whose rates were being set in an open proceeding.[419] State attorneys general might also balance PUC perspectives, at least behind the scenes. But the Attorney General's watchdog function is complicated by the fact that it frequently represents the PUC and by the fact that, in most states, its resources, and therefore its ability to monitor and review PUC actions, are limited.

Managing multiplicity means keeping avenues open for agencies to check one another, to consider alternate viewpoints, and to make decisions based on the best data and science available. It means facilitating agency participation in one another's proceedings. And it means tailoring agency mandates so that they overlap where necessary and complement one another where appropriate.

V. REFORM AS AN ALTERNATIVE TO MULTIPLICITY

As suggested above, state PUCs are, in many ways, imperfectly designed to navigate the energy transition. But do these imperfections

414. See Farber & O'Connell, supra note 256, at 1425–26.

415. Wash. Nat. Gas Co., No. UG-931143, 1994 WL 479240 (Wash. U.T.C. July 22, 1994).

416. Id.

417. Farber & O'Connell, supra note 256, at 1427.

418. See Miriam Seifter, Further from the People? The Puzzle of State Administration, 93 N.Y.U. L. Rev. 107, 109–10 (2018).

419. 704 P.2d 298, 300 (Colo. 1985).

require designing around commissions? Certainly, governors may prefer this approach, since it shifts the center of gravity of energy administration toward agencies that are more responsive to gubernatorial preferences. Policymakers, however, should consider energy-agency reform as an alternative to agency multiplication.[420] Agency reform is not nearly as attention-grabbing as agency genesis, and therefore it might be less appealing to politicians seeking to signal commitment to a given policy domain. Nevertheless, in the energy space in particular, reform of state PUCs could avoid many of the problems with agency multiplicity while addressing the concerns motivating agency creation. Where standalone energy offices with significant responsibilities already exist, states should also consider reforming or expanding their responsibilities in lieu of creating still more agencies. Even where new agencies still seem, on balance, the most appropriate alternative, reform of existing institutions could complement that approach. Especially in states that have already created additional bodies, this complementarity should be driving PUC reform.

Agency reform is not a panacea. But in the energy context, the potential for PUCs to serve as effective agents of decarbonization deserves greater scrutiny. William Boyd and Ann Carlson note that some PUCs in traditionally regulated states are using their ratemaking authorities to support decarbonization by, for example, permitting utility recovery of investments in nuclear plants as well as carbon capture and storage.[421] Commissions are also incentivizing the early retirement of fossil-fuel plants by allowing utilities to recover the stranded costs associated with those plants.[422]

PUCs also either possess or can be delegated the power to address many of the environmental and distributional concerns associated with decarbonization. Michael Dworkin and his coauthors suggest in a pair of articles that PUCs have more authority to consider the environmental impacts of utility proposals than is commonly acknowledged.[423] They find

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420. Thursz suggests that, instead of creating new administrative bodies, policymakers should consider ways to use funding "to co-opt, transform, infiltrate, redirect, merge, or redefine existing institutions." Thursz, supra note 211, at 260.

421. Boyd & Carlson, supra note 294, at 815.

422. See, e.g., Justin Gerdes, Colorado May Have a Winning Formula for Managing Early Coal Plant Retirements, Greentech Media (Mar. 25, 2019), https://www.greentechmedia.com/articles/read/colorado-may-have-a-winning-formula-for-managing-early-coal-plant-retiremen [https://perma.cc/JV69-BMFL] (describing the Colorado Public Utility Commission's role in approving utility financing proposals for coal asset retirement).

423. See generally Michael Dworkin, David Farnsworth & Jason Rich, The Environmental Duties of Public Utility Commissions, 18 Pace Env't L. Rev. 325 (2001) (listing commission authority to consider environmental factors by state); Michael Dworkin, David Farnsworth, Jason Rich & Jason Salmi Klotz, Revisiting the Environmental Duties of Public Utility Commissions (2006), 7 Vt. J. Env't L. 1 (2006) [hereinafter Dworkin et al., Revisiting the Environmental Duties of Public Utility Commissions (2006)] (updating the 2001 article).

that in areas such as certification and siting, resource planning, restructuring, and even ratemaking, many states have provided commissions with the tools to consider environmental impacts alongside economic ones.[424]

Even in restructured states, PUCs can use their authority over distribution-system cost recovery to support decarbonization, for example, by incentivizing utility investments in advanced metering infrastructure.[425] Commissions in some restructured states have also effectively established time-of-use pricing, which incentivizes customers to shift their electricity use away from times of peak consumption and thereby defers the need for construction of new power plants.[426]

There is also room in existing delegations for PUCs to prioritize the distributional concerns associated with the energy transition. Some enterprising PUCs are using their leverage over utility cost recovery to attach conditions to rate orders that benefit particular communities. In a rate case for Southern California Edison that permitted the utility to retire the Mojave Generating Station (a coal plant) early, the California PUC required that it spend revenues from the sale of acid rain pollution allowances to help the local Hopi and Navajo communities transition to clean energy alternatives.[427]

Where PUCs do *not* possess sufficient substantive authority to address decarbonization and distributional equity, or where their existing organization and procedures stand as an impediment to participation or make it too easy for incumbent utilities to influence decisionmaking, legislative reforms may address these inadequacies. The subsections below suggest several ways in which states might reform PUCs to mitigate the problems Part II identifies and enhance these agencies' abilities to act as agents of decarbonization and social justice.[428]

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424. Dworkin et al., Revisiting the Environmental Duties of Public Utility Commissions (2006), supra note 423, at 1.

425. See Boyd & Carlson, supra note 294, at 815 ("In states operating under a restructured or hybrid model, . . . we see utility commissions focusing more heavily on the distribution side of the grid, which is the portion of the grid that delivers electricity directly to customers.").

426. See Wilson Gonzalez, Restructured States, Retail Competition, and Market-Based Generation Rates, at C-2, C-7 (2015), https://www.raponline.org/wp-content/uploads/2016/05/appendix-c-smart-rate-design-2015-aug-31.pdf [https://perma.cc/2WQL-S8LL].

427. Alan Ramo & Deborah Behles, Transitioning a Community Away from Fossil-Fuel Generation to a Green Economy: An Approach Using State Utility Commission Authority, 15 Minn. J.L. Sci. & Tech. 505, 518–19 (2014).

428. One relatively simple way to encourage greater attention to decarbonization and the energy transition on state PUCs is to elect or appoint commissioners for whom these goals are a priority. In practice, this may be one of the most effective ways to shift an agency's emphasis and agenda. But because this strategy is political rather than structural, it is not discussed here.

A. *Countering Capture*

Increasing participation in formal and informal PUC processes can mitigate capture, even without the creation of new energy agencies. Jim Rossi notes that "as the number of participants . . . in an administrative process is expanded . . . the amount of monopoly rents powerful interest groups may be able to extract will decrease."[429] More participants can also mitigate the informational advantages of regulated utilities by providing expert evidence of their own.[430]

Reform of commissioner selection and recusal procedures can also counter capture. As discussed above, elected commissions can pose particular problems when it comes to capture due to the potentially corrupting effect of large campaign contributions.[431] Troy Rule therefore recommends that states with elected commissioners implement stricter conflict of interest requirements, forcing commissioners who received considerable financial support from particular entities during their candidacies to recuse themselves from matters involving those entities.[432] Rule is not sanguine that this strategy will successfully eliminate bias, given that "dark money" campaign contributions (those made to third-party organizations) need not be disclosed.[433] But it is a step in the right direction.

B. *Enhancing Expertise*

If PUCs currently lack the right kinds of expertise to navigate the energy transition, state legislatures could provide them with in-house research resources that mirror those created at state energy offices. Some state energy offices are actually just divisions of PUCs. This is true in New Jersey, for example, where the energy division of the PUC is charged with recommending changes to existing rules and mandates in response to market conditions, policy trends, and technology.[434]

More generous intervention rules could also enhance the *external* expertise available to PUCs. Commission rules tend to require the party seeking intervention to explain the specific interests that justify their intervention and why they are well positioned to represent those

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429. Jim Rossi, Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking, 92 Nw. U. L. Rev. 173, 213 (1997).

430. See id. (noting that the amount of data, number of issues raised, and set of possible solutions will increase with more interveners).

431. See supra notes 315–318 and accompanying text.

432. Rule, supra note 316, at 11 (citing to the Supreme Court's decision in Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009), to suggest that such recusal may be required where an entity's support likely impacted the outcome of the election).

433. Id. at 13–15. Rule proposes a judicial remedy instead: clarification that Citizens United v. FEC, 558 U.S. 310 (2010), does not apply to spending by investor-owned utilities due to their quasi-public nature. Id. at 16.

434. See Energy, N.J. Bd. of Pub. Utils., https://www.state.nj.us/bpu/about/divisions/energy [https://perma.cc/9K25-U3UV] (last visited Oct. 27, 2020).

interests.[435] But some states define relevant interests more narrowly than others. In Colorado, the interests affected must be "pecuniary or tangible."[436] By contrast, in New Hampshire the standards for intervention in PUC proceedings are identical to those in judicial proceedings: The commission must decide whether "rights, duties, privileges, immunities or other substantial interests" may be affected by the proceedings.[437] More permissive intervention rules, while creating challenges for commissions in terms of managing proceedings, can also expand the expert and lay views available to commissioners.

PUCs might also convene formal or informal stakeholder groups, as suggested below, to generate ideas and draw on the expertise of those outside government. In Connecticut, for example, stakeholder groups have proposed rules around net energy metering and competitive supply.[438] In Missouri, an Energy Efficiency Advisory Collaborative convened under the auspices of the state Public Service Commission meets annually to generate technical resources for the commission and to share lessons learned from demand-side planning and implementation.[439]

Stakeholder group discussions have advantages over the adversarial presentation of expert views in formal PUC proceedings for several reasons. If these proceedings are conducted earlier in the ratemaking or resource-planning process, nonutility stakeholders can influence the shape of utility proposals as opposed to merely critiquing them. Even where stakeholder processes take the form of settlement conferences, however, they can still lead to modified utility proposals that better take various group interests into account. It may be easier to come to agreement over compromise positions in these processes than in a final commission order that attempts to accommodate various criticisms of a utility rate or plan that is already on the table.

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435. For example, the Public Utility Commission of Texas requires potential intervenors to file a motion establishing that they represent "persons with a justiciable interest which may be adversely affected by the outcome of the proceeding." 16 Tex. Admin. Code § 22.103(b)(2) (2020).

436. Colo. Code Regs. § 723-1-1401(c) (2020).

437. See N.H. Rev. Stat. Ann. § 541-A:32 (2020); N.H. Code Admin. R. Ann. PUC 203.17 (2020). Petitioners must also show that allowing intervention would be "in the interests of justice and would not impair the orderly and prompt conduct of the proceedings." N.H. Rev. Stat. Ann. § 541-A:32(II).

438. Peskoe, supra note 411, at 16. Commissions in Arkansas, Colorado, Nevada, and Rhode Island have taken similar approaches. See id. at 17–20.

439. Missouri Energy Efficiency Advisory Collaborative, Mo. Saves, https://mosaves.com/statewide-energy-efficiency-resources/missouri-energy-efficiency-advisory-collaborative [https://perma.cc/6RNM-Z6WH] (last visited Oct. 27, 2020).

C. *Streamlining Processes*

Legislatures and PUCs themselves have sought to address judicialization concerns by creating streamlined processes. Many of these efforts have focused on the siting of renewable energy infrastructure. Broadly speaking, legislatures and PUCs can streamline siting processes by dedicating more resources to them. They can also "fast track" processes by reducing burdens for applicants or setting deadlines for agency action. Wisconsin streamlined the process for siting wind turbines in 2009.[440] New York's law establishing a new Office of Renewable Energy Permitting also contained several provisions designed to speed up the siting process for renewable energy infrastructure.[441] Other states could adopt similar approaches, which include the development of uniform standards for environmental impacts as well as time limits for permit action,[442] without creating separate agencies to implement them.

Parties before state PUCs also rely on settlement procedures to shortcut lengthy adversarial processes. Increasingly, stakeholders are finding settlement to be an attractive alternative to formalized rulemakings and other adversarial proceedings. Settlement processes have their drawbacks, especially where the agreements are not unanimous,[443] but they have two potential advantages in terms of speed. First, they can bypass cumbersome PUC proceedings, leading to quicker resolution of cases.[444] Second, they can induce promises by utilities to take energy transition–related actions that would have been difficult to secure as part of a more formal proceeding. In Colorado, for example, a 2016 settlement between local utility Xcel Energy, industry (including solar industry groups), and environmental and ratepayer advocates produced an agreement in which Xcel retreated from a request for a fixed monthly grid charge on rooftop solar customers in exchange for a pilot program on time-of-use rates and the expansion of community solar programs.[445]

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440. Act of Sept. 30, 2009, No. 40, sec. 3, 2009 Wis. Sess. Laws 889, 890 (codified in scattered sections of Wis. Stat. (2020)). Act 40 also created a Wind Siting Council to conduct research and advise the PUC on rule content. Edward S. Marion, The Municipal Regulation of Wind Energy in Wisconsin, Nat'l Wind Watch (Apr. 20, 2011), https://www.wind-watch.org/news/2011/04/21/the-municipal-regulation-of-wind-energy-in-wisconsin [https://perma.cc/M2SY-NRZM].

441. See supra text accompanying notes 114–115.

442. Accelerated Renewable Energy Growth and Community Benefit Act, S7508B, pt. JJJ, 2019–2020 Leg., 243d Sess. (N.Y. 2020) (codified at N.Y. Pub. Auth. Law §§ 1900–1905 (McKinney 2020)).

443. See Stefan H. Krieger, Problems for Captive Ratepayers in Nonunanimous Settlements of Public Utility Rate Cases, 12 Yale J. on Reg. 257, 306–08 (1995) (flagging in particular the risk that captive ratepayers will be inadequately represented in such settlements and will face higher costs as a result).

444. Id. at 299–300.

445. See Pub. Serv. Co. of Colo., No. C16-1075, 2016 WL 7048273 (Colo. P.U.C. Nov. 9, 2016) (decision granting motion to approve settlement).

D. *Expanding Participation*

As discussed above, a number of groups with strong interests in the energy transition have traditionally been poorly represented before utility commissions. These include communities whose economies are dependent on fossil-fuel extraction or production as well as communities that will be disproportionately burdened by the effects of climate change.[446] They also include communities that will not benefit from some of the financial advantages of the low-carbon transition, including the advantages associated with rooftop solar, home energy management, and electric vehicles.[447]

Some PUCs are already introducing more opportunities for diverse stakeholder participation and collaboration. New York has been especially proactive in convening stakeholder groups as part of its broad "Reforming the Energy Vision" strategy.[448] In 2015, for example, New York's Department of Public Service issued an order on expanding opportunities for shared distributed renewable generation facilities. In the order, the Commission directed staff to convene a "low-income customer collaborative" process to evaluate barriers to low-income customer participation in such community distributed generation.[449] Five working groups provided a report to the Commission in 2016.[450]

These mechanisms are not widespread, nor are they a silver bullet to address concerns about effective participation.[451] Some collaborative mechanisms are available only to utility participants.[452] Furthermore,

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446. See NAACP Env't & Climate Just. Program, supra note 61, at 7 (observing that "the people who are most impacted by these polluting industries have the least influence over who is making decisions" and offering suggestions for how community justice advocates can participate more effectively in PUC proceedings).

447. See Eric Daniel Fournier, Robert Cudd, Felicia Federico & Stephanie Pincetl, On Energy Sufficiency and the Need for New Policies to Combat Growing Inequities in the Residential Energy Sector, Elementa Sci. Anthropocene, 2020, at 1, 7–9 (forecasting the exacerbation of current inequities due to vehicle electrification and rooftop solar PV).

448. About the Initiative, N.Y. State Dep't of Pub. Serv., http://www3.dps.ny.gov/W/PSCWeb.nsf/All/CC4F2EFA3A23551585257DEA007DCFE2?OpenDocument [https://perma.cc/5AL2-H45W] (last updated May 9, 2018).

449. Policies, Requirements and Conditions for Implementing a Community Net Metering Program, No. 15-E-0082, 2015 WL 4503638, at *17 (N.Y.P.S.C. July 17, 2015).

450. N.Y. Pub. Serv. Comm'n, No. 15-E-0082—Summary of the Collaborative Working Group Reports Regarding Community Distributed Generation for Low-Income Customers 7–58 (2016), https://www3.dps.ny.gov/W/PSCWeb.nsf/ca7cd46b41e6d01f0525685800545955/8a75b07f45e1672485257edd00602d7c/$FILE/15-E-0082%20Low%20Income%20Collaborative%20Report%208-15-16.pdf [https://perma.cc/738L-9C7Y].

451. There is also the risk that too *much* participation can be problematic. Jim Rossi finds that the benefits of increased participation in regulatory proceedings diminish at the margin once certain levels of participation are reached. Rossi, supra note 429, at 213–14. He also argues that expanding participation may be in some tension with the "expertocratic" model of PUC decisionmaking. See id. at 214–15.

452. For instance, the Public Utilities Commission of Ohio's Power Forward Collaborative, a working group of utility stakeholders led by Commission staff whose task is to propose strategies for grid modernization. PowerForward, Ohio Pub. Utils. Comm'n, A

effective participation in formal commission proceedings and even in less formal collaborative proceedings requires a high level of sophistication. Thus, access alone cannot ensure meaningful participation. Krieger notes, for example, that successful commission advocacy requires knowledge of commission composition, configuration of the regulatory environment, and an understanding of the political and social values implicated by the substantive issues at stake.[453] Stakeholders who wish to purchase this expertise rather than develop it themselves must pay the frequently high fees of specialist attorneys.

Another option to expand public input into PUC decisionmaking is the practice of "deliberative polling." [454] The Public Utility Commission of Texas has used this practice to gauge public opinion on policies to expand renewable energy generation in the state.[455] PUC staff arranged for sessions in each major electric utility service territory in Texas during which diverse groups of citizens would read background materials, consider presentations from every sector with an interest in electricity-generation policy, interact with presenters and one another, and ultimately offer their opinions on the future of electricity in Texas.[456] A report from the National Renewable Energy Laboratory credits this deliberative polling with the success of regulatory and legislative measures to promote renewable generation in the state.[457]

CONCLUSION

Agency genesis is a vital but underexplored aspect of administrative law and policy. By providing a general framework for analyzing the choice to create new agencies and by illustrating how it can be adapted to specific cases and policy domains, this Article facilitates more rigorous scrutiny of the phenomenon.

In the case of state energy bureaucracies, the gradual addition of more agencies over time has been a partial response to the critiques of PUCs as captured, insufficiently expert, slow, and noninclusive. These

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Roadmap to Ohio's Electricity Future 36 (2018), https://puco.ohio.gov/wps/wcm/connect/gov/38550a6d-78f5-4a9d-96e4-d2693f0920de/puco+roadmap.pdf?mod=ajperes&convert_to=url&cacheid=rootworkspace.z18_m1hggik0n0jo00qo9ddddm3000-38550a6d-78f5-4a9d-96e4-d2693f0920de-nawqrqj [https://perma.cc/BX6R-9D6V].

453. Krieger, An Advocacy Model, supra note 50, at 648–49.

454. For caution about more direct democratic input in a different context, identifying community heterogeneity and apathy as two impediments to sound "democratized" governance, see John Rappaport, Some Doubts About "Democratizing" Criminal Justice, 87 U. Chi. L. Rev. 711, 739–42, 750–57 (2020).

455. See Rabe, supra note 44, at 56–57 (describing the introduction of "deliberative polling" by the Public Utility Commission of Texas).

456. Id. at 57–58.

457. R.L. Lehr, W. Guild, D.L. Thomas & B.G. Swezey, Listening to Customers: How Deliberative Polling Helped Build 1,000 MW of New Renewable Energy Projects in Texas 9 (2003), https://www.nrel.gov/docs/fy03osti/33177.pdf [https://perma.cc/93BN-39J6].

critiques should be taken especially seriously during the present energy transition when rapid, well-informed, and inclusive decisions must be made to mitigate the worst impacts of global climate change while enhancing equity. But agency genesis may not always be the answer. Reform of existing agencies—notably state PUCs—is equally important.

Even where agency multiplicity is the most appealing option, there are still opportunities to formalize and improve the relationships between agencies and to consider, carefully, how a state's constellation of agencies affects political power and policy output. Ideally, policymakers will avail themselves of opportunities to remake existing energy agencies rather than simply adding to their number. The political economy of institutional design may favor agency genesis, but difficult problems require sustained attention to bureaucratic structure, policy, and process. The need for this less glamorous work persists.

APPENDIX

Alabama	
Utilities commission	Public Service Commission[458]
Freestanding energy office?	No
Designated state energy office within other agency?	Energy Division (in Department of Economic and Community Affairs)[459]
Siting board	No
Climate/transition body	No
Other	
Alaska	
Utilities commission	Regulatory Commission of Alaska[460]
Freestanding energy office?	Alaska Energy Authority[461]
Designated state energy office within other agency?	n/a
Siting board	No
Climate/transition body	No
Other	
Arizona	
Utilities commission	Corporation Commission[462]
Freestanding energy office?	No
Designated state energy office within other agency?	No[463]

458. Created by statute in 1915. See Ala. Code § 37-1-1 (2020).

459. Energy, Ala. Dep't of Econ. & Cmty. Affs., https://adeca.alabama.gov/Divisions/Energy/Pages/default.aspx [https://perma.cc/2QHD-DUU8] (last visited Jan. 30, 2021).

460. Created by statute in 1999. See Alaska Stat. § 42.04.010 (2020). Earlier iterations of the Commission existed beginning in 1960. Commission, Regul. Comm'n of Alaska (May 9, 2018), http://rca.alaska.gov/RCAWeb/AboutRCA/Commission.aspx [https://perma.cc/H2TM-AP87].

461. Created by statute in 1976. See Alaska Stat. § 44.83.020.

462. Created by state constitutional amendment in 1992. See Ariz. Const. art. XV.

463. The Arizona State Energy Program was created in 1975 but terminated in 2015. Ryan Randazzo, Arizona Shutters Energy Program; Remaining Workers Fired, Ariz. Republic (Nov. 2, 2015), https://www.azcentral.com/story/money/business/energy/2015/11/03/arizona-shutters-energy-program-remaining-workers-fired/75063004 [https://perma.cc/NR7H-GF2X]. Some of the office's responsibilities were transferred to the Office of Grants in the Department of Administration. See Energy, Governor's Off. of Strategic Plan. & Budgeting, https://grants.az.gov/programs/energy [https://perma.cc/9GKT-56HQ] (last visited Jan. 30, 2021).

Siting board	Power Plant and Transmission Line Siting Committee (in Corporation Commission)[464]
Climate/transition body	No
Other	
Arkansas	
Utilities commission	Public Service Commission[465]
Freestanding energy office?	Department of Energy & Environment[466]
Designated state energy office within other agency?	n/a
Siting board	No
Climate/transition body	No
Other	
California	
Utilities commission	Public Utilities Commission[467]
Freestanding energy office?	State Energy Resources Conservation and Development Commission (Energy Commission)[468]
Designated state energy office within other agency?	n/a
Siting board	No
Climate/transition body	No
Other	

464. Created by statute in 1971. See Ariz. Rev. Stat. § 40-360.01 (2020). The committee's decisions are subject to review by the Corporation Commission. Ariz. Rev. Stat. § 40-360.07.

465. Created by statute in 1919 as the Arkansas Corporation Commission. See Commission, Ark. Pub. Serv. Comm'n, http://www.apscservices.info/commission-history.asp [https://perma.cc/UX72-HMMK] (last visited Jan. 30, 2021). The Commission was renamed the Arkansas Public Service Commission in 1945. Ark. Code Ann. § 23-2-101 (2020).

466. Created by statute in 2019. See Ark. Code Ann. § 25-43-601.

467. Constitutionally created Railroad Commission's jurisdiction expanded by statute to include electric and natural gas utilities in 1912. CPUC History & Organizational Structure, Cal. Pub. Utils. Comm'n, https://www.cpuc.ca.gov/history [https://perma.cc/T6MT-R9PG] (last visited Jan. 30, 2021). State constitution amended to include jurisdictional expansion in 1974. See Cal. Const. art. XII, § 3.

468. Created by statute in 1974. See Cal. Pub. Res. Code § 25200 (2020).

Colorado	
Utilities commission	Public Utilities Commission[469]
Freestanding energy office?	Colorado Energy Office[470]
Designated state energy office within other agency?	n/a
Siting board	No
Climate/transition body	Office of Just Transition (in Department of Labor & Employment)[471]
Other	
Connecitcut	
Utilities commission	Public Utilities Regulatory Authority (in Deparment of Energy & Environmental Protection)[472]
Freestanding energy office?	No
Designated state energy office within other agency?	n/a
Siting board	Connecticut Siting Council[473]
Climate/transition body	Governor's Council on Climate Change (GC3)[474]
Other	Connecticut Green Bank[475]

469. Created by statute in 1913. History, Colo. Dep't of Regul. Agencies, https://puc.colorado.gov/puchistory [https://perma.cc/5SKR-376C] (last visited Jan. 30, 2021). The state constitution was amended to provide for a Public Utilities Commission, or whatever agency the state legislature may otherwise designate to regulate public utilities, in 1954. See Colo. Const. art. 25. The state legislature codified the structure, jurisdiction, and procedures for the Public Utilities Commission in 1974. See Colo. Rev. Stat. § 40-2-101 (2020).

470. Created by statute in 2008. See Colo. Rev. Stat. § 24-38.5-101. The office was originally created as the Governor's Office of Energy Management and Conservation in 1977. Tim Hoover, Effort Advances to Recast Bill Ritter's "New Energy Economy" Office, Denver Post (Mar. 28, 2012), https://www.denverpost.com/2012/03/28/effort-advances-to-recast-bill-ritters-new-energy-economy-office (on file with the *Columbia Law Review*) (last updated May 1, 2016).

471. Created by statute in 2019. See Colo. Rev. Stat. § 8-83-503.

472. Department of Energy and Environmental Protection created by statute in 2011. See Conn. Gen. Stat. § 22a-2d (2020).

473. Created by statute in 1971. See Conn. Gen. Stat. § 16-50j.

474. Established by executive order in 2019. See Connecticut Executive Order, supra note 373.

475. Created by statute in 1998. See Conn. Gen. Stat. § 16-245n(d).

Delaware	
Utilities commission	Public Service Commission[476]
Freestanding energy office?	No
Designated state energy office within other agency?	Division of Climate, Coastal & Energy (in Department of Natural Resources & Environmental Control)[477]
Siting board	No
Climate/transition body	No
Other	
District of Columbia	
Utilities commission	Public Service Commission[478]
Freestanding energy office?	Deparment of Energy & Environment[479]
Designated state energy office within other agency?	n/a
Siting board	No
Climate/transition body	No
Other	
Florida	
Utilities commission	Public Service Commission[480]
Freestanding energy office?	No
Designated state energy office within other agency?	Office of Energy (in Department of Agriculture & Consumer Services)[481]
Siting board	Siting Coordination Office (in Department of Environmental Protection)[482]

476. Created by statute in 1949. Del. Code tit. 26, § 103 (2020).

477. Division of Climate, Coastal and Energy, Delaware.gov, https://dnrec.alpha.delaware.gov/climate-coastal-energy [https://perma.cc/G4DF-X6RT] (last visited Jan. 30, 2021).

478. Created by federal statute in 1913. History, Pub. Serv. Comm'n of D.C., https://dcpsc.org/About-PSC/About-the-Commission/History.aspx [https://perma.cc/WWZ6-L9V4] (last visited Jan. 30, 2021). Current authority at D.C. Code § 1-204.93 (2020).

479. Created by statute in 2006. See D.C. Code § 8-151.03.

480. Created by statute in 1947. See Fla. Stat. § 350.011 (2020).

481. Office of Energy, Fla. Dep't of Agric. & Consumer Servs., https://www.fdacs.gov/Divisions-Offices/Energy [https://perma.cc/V9RR-H5FX] (last visited Jan. 30, 2021).

482. Siting Coordination Office, Fla. Dep't of Env't Prot., https://floridadep.gov/air/siting-coordination-office [https://perma.cc/K84J-GJQD] (last visited Jan. 30, 2021).

Climate/transition body	No
Other	
Georgia	
Utilities commission	Public Service Commission[483]
Freestanding energy office?	No
Designated state energy office within other agency?	State Energy Program (in Environmental Finance Authority)[484]
Siting board	No
Climate/transition body	No
Other	
Hawaii	
Utilities commission	Public Utilities Commission[485]
Freestanding energy office?	State Energy Office[486]
Designated state energy office within other agency?	n/a
Siting board	No
Climate/transition body	No
Other	
Idaho	
Utilities commission	Public Utilities Commission[487]
Freestanding energy office?	Governor's Office of Energy & Mineral Resources[488]
Designated state energy office within other agency?	n/a
Siting board	No
Climate/transition body	No

483. Created by statute in 1879. See Ga. Code Ann. § 46-2-1 (2020). The commission's jurisdiction was expanded to cover electric utilities in 1907. See History and Mission of the Commission, Ga. Pub. Serv. Comm'n, http://www.psc.state.ga.us/pscinfo/annual_reports/1997-1998annualreport/hismis.htm [https://perma.cc/Z5K9-K3AN] (last visited Jan. 30, 2021).

484. State Energy Program, Ga. Env't Fin. Auth., https://gefa.georgia.gov/state-energy-program [https://perma.cc/3N23-8CTD] (last visited Jan. 30, 2021).

485. Haw. Rev. Stat. § 269-2 (2020).

486. Created by statute in 2019. See Haw. Rev. Stat. § 196-71.

487. Created by statute in 1913. See Idaho Code § 61-201 (2020).

488. Established by executive order in 2016. See Idaho Exec. Order No. 2016-03, 16-12 Idaho Admin. Bull. 21 (Dec. 7, 2016).

Other	
Illinois	
Utilities commission	Commerce Commission[489]
Freestanding energy office?	No
Designated state energy office within other agency?	Office of Energy (in Department of Environmental Protection)[490]
Siting board	No
Climate/transition body	No
Other	
Indiana	
Utilities commission	Utility Regulatory Commission[491]
Freestanding energy office?	Office of Energy Development[492]
Designated state energy office within other agency?	n/a
Siting board	No
Climate/transition body	21st Century Energy Policy Development Task Force[493]
Other	
Iowa	
Utilities commission	Iowa Utilities Board[494]
Freestanding energy office?	No
Designated state energy office within other agency?	Iowa Energy Office (in Iowa Economic Development Authority)[495]
Siting board	No

489. Created by statute in 1913. See Act of June 30, 1913, 1913 Ill. Laws 459 (codified as amended at 220 Ill. Comp. Stat. Ann. 5/2-101 (West 2020)).

490. Office of Energy, Ill. Env't Prot. Agency, https://www2.illinois.gov/epa/topics/energy/Pages/default.aspx [https://perma.cc/ECD8-WM57] (last visited Jan. 30, 2021).

491. Commission given responsibilities over electricity and natural gas in 1913. See I. Leo Sharfman, Commission Regulation of Public Utilities: A Survey of Legislation, 53 Annals Am. Acad. Pol. & Soc. Sci. 1, 3 (1914) (citing Act of Mar. 4, 1913, ch. 76, 1913 Ind. Acts 167).

492. Created by statute in 2013. See Ind. Code § 4-3-23-3 (2020).

493. Created by statute in 2019. See Ind. Code § 2-5-45-2.

494. Iowa Code § 474.1 (2020). Statute granted jurisdiction over the rates and service of public utility companies in 1963. See Act of Apr. 19, 1963, ch. 286, sec. 1, 1963 Iowa Acts 357, 357; History of the Iowa Utilities Board, Iowa Utils. Bd., https://iub.iowa.gov/about-us/history-iowa-utilities-board [https://perma.cc/26AP-74Z3] (last visited Jan. 30, 2021).

495. Iowa Energy Office, Iowa Econ. Dev. Auth., https://www.iowaeda.com/iowa-energy-office [https://perma.cc/RQU2-K7PN] (last visited Jan. 30, 2021).

Climate/transition body	No
Other	
Kansas	
Utilities commission	Corporation Commission[496]
Freestanding energy office?	No
Designated state energy office within other agency?	Kansas Energy Office (in Corporation Commission)[497]
Siting board	No
Climate/transition body	No
Other	
Kentucky	
Utilities commission	Public Service Commission[498]
Freestanding energy office?	No
Designated state energy office within other agency?	Office of Energy Policy (in Kentucky Energy & Environment Cabinet)[499]
Siting board	Electric Generation and Transmission Siting Board (in Public Service Commission)[500]
Climate/transition body	No
Other	
Louisiana	
Utilities commission	Public Service Commission[501]
Freestanding energy office?	No
Designated state energy office within other agency?	Technology Assessment Division (in Department of Natural Resources)[502]

496. Kan. Stat. Ann. § 64-601 (West 2020). The Kansas Legislature first created a PUC by statute in 1911. See Act of Mar. 14, 1911, ch. 238, sec. 1, 1911 Kan. Sess. Laws 417, 417–18.

497. Kansas Energy Office, Kan. Corp. Comm'n, https://kcc.ks.gov/kansas-energy-office [https://perma.cc/3FWM-CWPB] (last visited Jan. 30, 2021).

498. Created by statute in 1934. Act of Mar. 1934, ch. 145, sec. 2, 1934 Ky. Acts 580, 583.

499. Created by statute in 2018. See Act of Mar. 27, 2018, ch. 29, sec. 1, 2018 Ky. Acts 67, 69–70 (codified as amended at Ky. Rev. Stat. Ann. § 12.020 (West 2020)).

500. Created by statute in 2002. See Ky. Rev. Stat. Ann. § 278.702.

501. Created by state constitutional amendment in 1921. La. Const. art. VI, §§ 3–9 (1921) (reaffirmed by Constitution of 1974, La. Const. art. IV, § 21 (1974)).

502. Office of the Secretary: Technology Assessment Division, La. Dep't of Nat. Res., http://www.dnr.louisiana.gov/index.cfm/page/36 [https://perma.cc/387T-XY3W] (last visited Jan. 30, 2021).

Siting board	No
Climate/transition body	Climate Initiatives Task Force (2020)[503]
Other	
Maine	
Utilities commission	Public Utilities Commission[504]
Freestanding energy office?	Governor's Energy Office[505]
Designated state energy office within other agency?	n/a
Siting board	No
Climate/transition body	Maine Climate Council[506]
Other	
Maryland	
Utilities commission	Public Service Commission[507]
Freestanding energy office?	Energy Administration[508]
Designated state energy office within other agency?	n/a
Siting board	Governor's Task Force on Renewable Energy Development & Siting[509]
Climate/transition body	No
Other	

503. Established by executive order in 2020. See La. Exec. Order No. JBE 20-18, 46 La. Reg. 1197 (Aug. 19, 2020).

504. Created by statute in 1913. About MPUC, Off. of the Me. Pub. Utils. Comm'n, https://www.maine.gov/mpuc/about/how_commission_works.shtml [https://perma.cc/DF2C-BFYP] (last visited Jan. 30, 2021). Current authority at Me. Rev. Stat. Ann. tit. 35-A, § 103 (2020).

505. Created by statute in 2007. See Me. Rev. Stat. Ann. tit. 2, § 9 (2020).

506. Created by statute in 2019. See Me. Rev. Stat. Ann. tit. 38, § 577-A (2020).

507. Created by statute in 1910. See Public Service Commission Law, ch. 180, sec. 2, 1910 Md. Laws 338, 342.

508. Created by statute in 1997. See Md. Code Ann., State Gov't § 9-2002 (West 2020). Predecessor Office of Energy Policy established by executive order in 1973. Maryland Energy Administration: Origin & Functions, Md. Manual On-Line, https://msa.maryland.gov/msa/mdmanual/25ind/html/33energf.html [https://perma.cc/7ECZ-DZSF] (last updated Feb. 28, 2020).

509. Established by executive order in 2019. See Md. Exec. Order No. 01.01.2019.09 (Aug. 14, 2019), https://governor.maryland.gov/wp-content/uploads/2019/09/Renewable-Energy-Development-and-Siting-EO-2.pdf [https://perma.cc/B6V2-H2ZE].

Massachusetts	
Utilities commission	Department of Public Utilities[510]
Freestanding energy office?	No
Designated state energy office within other agency?	Department of Energy Resources (in Executive Office of Energy and Environmental Affairs)[511]
Siting board	Energy Facilities Siting Board[512]
Climate/transition body	No
Other	Massachusetts Clean Energy Center[513]
Michigan	
Utilities commission	Public Service Commission[514]
Freestanding energy office?	No[515]
Designated state energy office within other agency?	Office of Climate and Energy (in Department of Environment, Great Lakes & Energy)[516]
Siting board	No
Climate/transition body	Council on Climate Solutions (in Department of Environment, Great Lakes & Energy)[517]
Other	

510. Board of Gas and Electric Light Commissioners established by statute in 1887. See Act of June 8, 1887, ch. 382, sec. 1, 1887 Mass. Acts 992, 992; Paul E. Osborne, Department of Public Utilities History 2 (2016), https://www.mass.gov/files/department-of-public-utilities-history_0.pdf [https://perma.cc/9LXV-6YEU]. Current authority at Mass. Gen. Laws Ann. ch. 25, § 1 (West 2020).

511. About DOER, Mass.gov, https://www.mass.gov/about-doer [https://perma.cc/9AQA-U4GZ] (last visited Jan. 30, 2021).

512. Created by statute in 1973. See Mass. Gen. Laws Ann. ch. 164, § 69H.

513. Created by statute in 2008. See Mass Gen. Laws Ann. ch. 23J, § 2.

514. Railroad Commission authority expanded to electricity in 1909. Michigan Public Service Commission History, Michigan.gov, https://www.michigan.gov/mpsc/0,9535,7-395-93218_93284_94865-505687–,00.html [https://perma.cc/SML9-JW7R] (last visited Jan. 30, 2021). Current authority at Mich. Comp. Laws Ann. § 460.1 (West 2020).

515. Michigan Energy Administration merged into Public Service Commission by executive order in 1986. See Mich. Exec. Order No. 1986-17 (Oct. 30, 1986), https://cdm16110.contentdm.oclc.org/utils/getfile/collection/p16110coll2/id/105068/filename/107944.pdf [https://perma.cc/4W5D-5UDR].

516. Created by statute in 2019. See Mich. Comp. Laws Ann. § 324.99923.

517. Established by executive order in 2020. See Mich. Exec. Order No. 2020-182 (Sept. 23, 2020), http://www.legislature.mi.gov/documents/2019-2020/executiveorder/pdf/2020-EO-182.pdf [https://perma.cc/6X8W-ADW7].

Minnesota	
Utilities commission	Public Utilities Commission[518]
Freestanding energy office?	No[519]
Designated state energy office within other agency?	Energy Division (in Department of Commerce)[520]
Siting board	No
Climate/transition body	No
Other	
Mississippi	
Utilities commission	Public Service Commission[521]
Freestanding energy office?	No
Designated state energy office within other agency?	Energy Division (in Development Authority)[522]
Siting board	No
Climate/transition body	No
Other	
Missouri	
Utilities commission	Public Service Commission[523]
Freestanding energy office?	No

518. Created by statute in 1967 and authority expanded to electric and gas utility rates in 1975. History, Minn. Pub. Utils. Comm'n, https://mn.gov/puc/about-us/history [https://perma.cc/72A8-JMP6] (last visited Jan. 30, 2021). Current authority at Minn. Stat. § 216A.01 (2020).

519. Minnesota Energy Agency created by statute in 1974. John Helland, Minnesota Major Environmental Laws in the 1970's: A Summary from 1969 to 1979, at 9 (1981), https://www.leg.mn.gov/docs/pre2003/other/810456.pdf [https://perma.cc/3B39-KHQY]. Today, the agency's functions are exercised by the Energy Division of the Minnesota Development Authority (see next row).

520. Energy, Minn. Com. Dep't, https://mn.gov/commerce/industries/energy [https://perma.cc/PH8J-DR4M] (last visited Jan. 30, 2021).

521. Created by statute in 1938. See Miss. Code Ann. § 77-1-1 (2020). Commission jurisdiction expanded to electric and gas utilities in 1956. Miss. Pub. Serv. Comm'n, Annual Report Ending June 2017, at 5 (2017), https://www.psc.ms.gov/sites/default/files/Documents/MPSC%202017%20ANNUAL%20REPORT.pdf [https://perma.cc/X99H-JZ4X].

522. Energy & National Resources, Miss. Dev. Auth., https://mississippi.org/services/energy [https://perma.cc/X37R-2426] (last visited Jan. 30, 2021).

523. Created by statute in 1913. See A Century of Service: The PSC Turns 100, Mo. Pub. Serv. Comm'n, https://psc.mo.gov/General/Celebrating_100_Years#:~:text=Formed%20in%201913%2C [https://perma.cc/3BLF-9P9Y] (last visited Jan. 30, 2021). Current authority at Mo. Ann. Stat. § 386.040 (West 2020).

Designated state energy office within other agency?	Division of Energy (in Department of Natural Resources)[524]
Siting board	No
Climate/transition body	No
Other	
Montana	
Utilities commission	Public Service Commission[525]
Freestanding energy office?	No
Designated state energy office within other agency?	Energy Office (in Department of Environmental Quality)[526]
Siting board	No
Climate/transition body	No
Other	
Nebraska	
Utilities commission	Power Review Board (all utilities are publicly owned)[527]
Freestanding energy office?	Department of Environment & Energy[528]
Designated state energy office within other agency?	n/a
Siting board	No
Climate/transition body	No
Other	
Nevada	
Utilities commission	Public Utilities Commission[529]
Freestanding energy office?	Governor's Office of Energy[530]

524. Division of Energy, Mo. Dep't of Nat. Res., https://energy.mo.gov [https://perma.cc/LM6M-U4PX] (last visited Jan. 30, 2021).

525. Created by statute in 1913. See Mont. Code Ann. § 69-1-102 (West 2019).

526. Montana Department of Environmental Quality, Montana.gov, http://deq.mt.gov/Energy [https://perma.cc/SR7T-55Y5] (last visited Jan. 30, 2021).

527. Created by statute in 1963. See Neb. Rev. Stat. § 70-1003 (2020).

528. Created by statute in 2019. See Neb. Rev. Stat. § 81-15,254. The Nebraska Energy Office, which is now part of the Department of Environment and Energy, was founded in 1973. Sadie Erdmann, Nebraska Energy Office 3 (2016), https://neo.ne.gov/info/pubs/pdf/NEOWXevaluation2016.pdf [https://perma.cc/6QVW-BT37].

529. Created by statute in 1919. See Nev. Rev. Stat. § 703-020 (2020).

530. Originally created by statute in 1975. Transferred to Governor's office in 1983. Renamed Nevada Governor's Office of Energy in 2001. Office History, Nev. Governor's Off.

Designated state energy office within other agency?	n/a
Siting board	No
Climate/transition body	No
Other	
New Hampshire	
Utilities commission	Public Utilities Commission[531]
Freestanding energy office?	No
Designated state energy office within other agency?	Energy Division (in Office of Strategic Initiatives)[532]
Siting board	Energy Facility State Evaluation Committee[533]
Climate/transition body	No
Other	
New Jersey	
Utilities commission	Board of Public Utilities[534]
Freestanding energy office?	No
Designated state energy office within other agency?	n/a
Siting board	No
Climate/transition body	No
Other	
New Mexico	
Utilities commission	Public Regulation Commission[535]

of Energy, https://energy.nv.gov/About/Office_History [https://perma.cc/J7LR-DCLB] (last visited Jan. 30, 2021).

531. Created by statute in 1911. See N.H. Rev. Stat. Ann. § 363:1 (2020).

532. Energy Division, N.H. Off. of Strategic Initiatives, https://www.nh.gov/osi/energy [https://perma.cc/RZ5Q-XXKX] (last visited Jan. 30, 2021).

533. Created by statute in 1991. See N.H. Rev. Stat. Ann. § 162-H:3.

534. Created by statute in 1911. See Act of Apr. 21, 1911, ch. 195, 1911 N.J. Laws 374, 374 (codified at N.J. Stat. Ann. § 48:2-1 (West 2020)).

535. The original state Public Service Commission was created and given authority to regulate utilities in 1941. Fred Nathan & Kristina G. Fisher, Think N.M., Rethinking the P.R.C. 9 (2011), https://www.thinknewmexico.org/wp-content/uploads/pdfs/PRCReport.pdf [https://perma.cc/SG4M-9QX2]. The modern Public Regulation Commission was created by state constitutional amendment in 1996. See N.M. Const. art. XI, § 1.

Freestanding energy office?	Energy, Minerals & Natural Resources Department[536]
Designated state energy office within other agency?	n/a
Siting board	No
Climate/transition body	New Mexico Interagency Climate Change Task Force[537]
Other	Community Advisory Committee to advise on distribution of energy transition funds[538]
New York	
Utilities commission	Public Service Commission[539]
Freestanding energy office?	New York State Energy Research & Development Authority[540]
Designated state energy office within other agency?	n/a
Siting board	Office of Renewable Energy Siting (in Department of State)[541]
Climate/transition body	No
Other	
North Carolina	
Utilities commission	Utilities Commission[542]
Freestanding energy office?	North Carolina Energy Policy Council[543]

536. Energy and Minerals Department created by statute in 1977. EMNRD, N.M. Energy, Mins. & Nat. Res. Dep't, http://www.emnrd.state.nm.us/ADMIN/about.html [https://perma.cc/F7LD-94VD] (last visited Jan. 30, 2021). The Energy Department and the Natural Resources Department merged in 1987. N.M. Stat. Ann. § 9-5A-3 (West 2020).

537. Established by executive order in 2019. See New Mexico Executive Order, supra note 117.

538. Created by statute in 2019. See N.M. Stat. Ann. § 62-18-16.

539. Created by statute in 1910. See N.Y. Pub. Serv. Law § 4 (McKinney 2020).

540. Created by statute in 1975. See N.Y. Pub. Auth. Law § 1852 (McKinney 2020); History of NYSERDA, N.Y. State Energy Rsch. & Dev. Auth., https://www.nyserda.ny.gov/About/History-of-NYSERDA [https://perma.cc/A28K-K6EM] (last visited Jan. 30, 2021).

541. Created by statute in 2020. See N.Y. Exec. Law § 94-c(3) (McKinney 2020).

542. Created by statute in 1933. See A Survey of Statutory Changes in North Carolina in 1933, 11 N.C. L. Rev. 191, 245–46 (1933).

543. Created by statute in 1975. See N.C. Gen. Stat. § 113B-2 (2020).

Designated state energy office within other agency?	North Carolina Energy Policy Council (in Department of Environmental Quality)[544]
Siting board	No
Climate/transition body	Climate Change Interagency Council[545]
Other	
North Dakota	
Utilities commission	Public Service Commission[546]
Freestanding energy office?	No
Designated state energy office within other agency?	State Energy Program[547]
Siting board	No
Climate/transition body	No
Other	State Energy Research Center at UND;[548] EmPower North Dakota[549]
Ohio	
Utilities commission	Public Utilities Commission[550]
Freestanding energy office?	No

544. State Energy Program, N.C. Dep't of Env't Quality, https://deq.nc.gov/energy-climate/energy-group/state-energy-program [https://perma.cc/222C-24L3] (last visited Jan. 30, 2021).

545. Established by executive order in 2018. See N.C. Exec. Order No. 80, 33 N.C. Reg. 1103, 1104 (Oct 29, 2018).

546. Created by statutory and constitutional provisions. See N.D. Const. art. 5, § 2; N.D. Cent. Code § 49-01-02 (2020); The Commission: About the Commission, N.D. Pub. Serv. Comm'n, https://www.psc.nd.gov/commission/about/index.php [https://perma.cc/E4PK-BABZ] (last visited Jan. 30, 2021).

547. State Energy Program, N.C. Dep't of Com., https://www.communityservices.nd.gov/renewableenergyprograms/stateenergyprogram [https://perma.cc/5UWB-RVAX] (last visited Jan. 30, 2021).

548. Created by statute in 2019. See N.D. Cent. Code § 15-11-40 (2020).

549. Created by statute in 2007 and made up of representatives from state energy industry. See N.D. Cent. Code § 17-07-01; EmPower North Dakota, N.D. Dep't of Com., https://www.business.nd.gov/energy/EmPowerNorthDakota [https://perma.cc/X2EC-DY42] (last visited Jan. 30, 2021).

550. Jurisdiction of Public Service Commission extended to electric and gas utilities by statute in 1911. Renamed the Public Utilities Commission in 1913. 100 Years and Counting: The History of the PUCO, Ohio Pub. Utils. Comm'n, https://puco.ohio.gov/wps/portal/gov/puco/about-us/resources/history-of-the-puco [https://perma.cc/T35G-ZW2K] (last visited Jan. 30, 2021). Current authority at Ohio Rev. Code Ann. § 4901.02 (2020).

Designated state energy office within other agency?	State Energy Program (in Development Services Agency)[551]
Siting board	Power Siting Board[552]
Climate/transition body	No
Other	
Oklahoma	
Utilities commission	Corporation Commission[553]
Freestanding energy office?	Secretary of Energy & Environment[554]
Designated state energy office within other agency?	n/a
Siting board	No
Climate/transition body	No
Other	
Oregon	
Utilities commission	Public Utility Commission[555]
Freestanding energy office?	Oregon Department of Energy[556]
Designated state energy office within other agency?	n/a
Siting board	Energy Facility Siting Council[557]
Climate/transition body	Interagency Working Group on Climate Impacts to Impacted Communities[558]
Other	

551. State Energy Program (SEP), Ohio Dev. Serv. Agency, https://www.development.ohio.gov/bs/bs_seprogram.htm [https://perma.cc/AG39-45NP] (last visited Jan. 30, 2021).

552. Created by statute in 1972. See Ohio Rev. Code Ann. § 4906.02.

553. Created by state constitution in 1907. See Okla. Const. art. IX, § 15; Oklahoma Corporation Commission History, Okla. Corp. Comm'n, https://oklahoma.gov/occ/about/history.html [https://perma.cc/UL5Z-7J9R] (last updated Nov. 20, 2020).

554. Established by executive order in 2015. See Okla. Exec. Order No. 2015-07, 32 Okla. Reg. 551, 551–53 (Feb. 9, 2015).

555. Jurisdiction of commission extended to electric and gas utilities by statute in 1911. Celebrating More than 150 Years of History, Or. Pub. Util. Comm'n, https://www.oregon.gov/puc/about-us/Pages/History.aspx [https://perma.cc/4SM2-EXLG] (last visited Jan. 30, 2021). Current authority at Or. Rev. Stat. § 757.105 (2020).

556. Created by statute in 1975. See Or. Rev. Stat. § 469.030.

557. Created by statute in 1975. See About the Council, Oregon.gov, https://www.oregon.gov/energy/facilities-safety/facilities/Pages/About-the-Council.aspx [https://perma.cc/9SFL-BEWV] (last visited Jan. 30, 2021). Current authority at Or. Rev. Stat. § 469.450.

558. Established by executive order in 2020. See Or. Exec. Order No. 20-04 (Mar. 10, 2020), https://www.oregon.gov/gov/Documents/executive_orders/eo_20-04.pdf [https://perma.cc/F8F7-3658].

Pennsylvania	
Utilities commission	Public Utility Commission[559]
Freestanding energy office?	No
Designated state energy office within other agency?	Energy Programs Office (in Department of Environmental Protection)[560]
Siting board	No
Climate/transition body	No
Other	
Rhode Island	
Utilities commission	Public Utilities Commission[561]
Freestanding energy office?	Office of Energy Resources[562]
Designated state energy office within other agency?	n/a
Siting board	Energy Facility Siting Board[563]
Climate/transition body	Executive Climate Change Coordinating Council[564]
Other	
South Carolina	
Utilities commission	Public Service Commission[565]
Freestanding energy office?	No
Designated state energy office within other agency?	Energy Office (in Office of Regulatory Staff)[566]

559. Created by statute in 1913. See History, Pa. Pub. Util. Comm'n, https://www.puc.pa.gov/about-the-puc/history [https://perma.cc/D5KG-DYNF] (last visited Feb. 7, 2021). Current authority at 66 Pa. Cons. Stat. § 301 (2020).

560. Energy Programs, Pa. Dep't of Env't Prot., https://www.dep.pa.gov/Business/Energy/pages/default.aspx [https://perma.cc/6PTE-MJJV] (last visited Jan. 30, 2021).

561. While public utilities in Rhode Island have been regulated since the late 1800s, the modern PUC was created by statute in 1981. Agency History, R.I. Pub. Utils. Com'n, http://www.ripuc.ri.gov/generalinfo/history.html [https://perma.cc/JFM2-3GYN] (last updated May 2, 2018). Current authority at 39 R.I. Gen. Laws § 39-1-3 (2020).

562. Created by statute in 2006. See 42 R.I. Gen. Laws § 42-140-2 (2020).

563. Created by statute in 1986. See id. § 42-98-5.

564. Created by statute in 2014. See id. § 42-6.2-1.

565. Created by statute in 1910. History of the Public Service Commission of South Carolina, S.C. Pub. Serv. Comm'n, https://psc.sc.gov/about-us-0/history [https://perma.cc/H4MP-HKNY] (last visited Feb. 26, 2021).

566. The South Carolina Energy Office, Energy.sc.gov, http://www.energy.sc.gov [https://perma.cc/Q383-5QB9] (last updated Jan. 30, 2021).

Siting board	No
Climate/transition body	No
Other	
South Dakota	
Utilities commission	Public Utilities Commission[567]
Freestanding energy office?	No
Designated state energy office within other agency?	Energy Management Office (in Bureau of Administration)[568]
Siting board	No
Climate/transition body	No
Other	
Tennessee	
Utilities commission	Public Utility Commission[569]
Freestanding energy office?	No
Designated state energy office within other agency?	Office of Energy Programs (in Department of Environment & Conservation)[570]
Siting board	No
Climate/transition body	No
Other	
Texas	
Utilities commission	Public Utility Commission[571]
Freestanding energy office?	No

567. Created by statute in 1939. See S.D. Codified Laws § 49-1-8 (2020). But the commission was not given authority over electric and gas utilities until 1975. Leni Healy, History of the South Dakota Public Utilities Commission 8 (2001), https://puc.sd.gov/commission/Publication/PUC%20history.pdf [https://perma.cc/7BKQ-XYDY].

568. Statewide Energy Management, S.D. Bureau of Admin., https://boa.sd.gov/state-engineer/energy-management.aspx [https://perma.cc/TDB2-HQUF] (last visited Jan. 30, 2021).

569. Created by statute in 1919. Valerius Sanford, Tennessee Public Service Commission, Tenn. Encyclopedia (Oct. 8, 2017), https://tennesseeencyclopedia.net/entries/tennessee-public-service-commission [https://perma.cc/W9UJ-MD6M] (last updated Oct. 7, 2019). Current authority at Tenn. Code Ann. § 65-1-101 (2020).

570. Office of Energy Programs, Tenn. Dep't of Env't & Conservation, https://www.tn.gov/environment/program-areas/energy.html [https://perma.cc/H639-64PT] (last updated Feb. 2, 2021).

571. Created by statute in 1975. About the PUCT, Pub. Util. Comm'n of Tex., https://www.puc.texas.gov/agency/about/mission.aspx [https://perma.cc/9HGM-LGVB] (last visited Jan. 30, 2021). Current authority at Tex. Util. Code § 12.001 (2019).

Designated state energy office within other agency?	State Energy Conservation Office (in Office of the Comptroller)[572]
Siting board	No
Climate/transition body	No
Other	
Utah	
Utilities commission	Public Service Commission[573]
Freestanding energy office?	Governor's Office of Energy Development[574]
Designated state energy office within other agency?	n/a
Siting board	No
Climate/transition body	No
Other	
Vermont	
Utilities commission	Public Utility Commission[575]
Freestanding energy office?	No
Designated state energy office within other agency?	Energy Office (in Agency of Administration)[576]
Siting board	No
Climate/transition body	Vermont Climate Council[577]
Other	
Virginia	
Utilities commission	State Corporation Commission[578]

572. State Energy Conservation Office, Tex. Comptroller of Pub. Accounts, https://comptroller.texas.gov/programs/seco [https://perma.cc/7D8A-6H65] (last visited Jan. 30, 2021).

573. Created by statute in 1917. History, Utah Pub. Serv. Comm'n, https://psc.utah.gov/history [https://perma.cc/QX6D-6DNU] (last visited Jan. 30, 2021). Current authority at Utah Code § 54-1-1 (2020).

574. Created by statute in 2011. See Utah Code § 63M-4-401.

575. Created by statute in 1909. See Act of Jan. 20, 1909, No. 116, sec. 1, 1908 Vt. Acts & Resolves 101, 101–02. Current authority at Vt. Stat. Ann. tit. 30, § 3 (2020).

576. Energy Office, Vt. Agency of Admin., https://bgs.vermont.gov/commissioner/energy-environment [https://perma.cc/Z8L3-FNVP] (last visited Jan. 30, 2021).

577. Created by statute in 2020. See Vt. Stat. Ann. tit. 10, § 591 (2020).

578. Created by state constitution in 1902. Preston C. Shannon, The Evolution of Virginia's State Corporation Commission, 14 Wm. & Mary L. Rev. 523, 532–33 (1973); see also Va. Const. art. IX, § 1.

Freestanding energy office?	Department of Mines, Minerals & Energy[579]
Designated state energy office within other agency?	n/a
Siting board	No
Climate/transition body	Clean Energy Advisory Board (for advising on loans or rebates for solar installations in low- and moderate-income neighborhoods)[580]
Other	Various state authorities established to investigate and promote offshore wind energy,[581] nuclear power,[582] solar energy and energy storage,[583] and energy development in southwest Virginia[584]
Washington	
Utilities commission	Utilities and Transportation Commission[585]
Freestanding energy office?	No[586]
Designated state energy office within other agency?	Washington State Energy Office (in Department of Commerce)[587]
Siting board	Energy Facility State Evaluation Council[588]

579. Created by statute in 1984. See Va. Code § 45.1-161.2 (2020). Division of Energy created by statute within the Department of Mines, Minerals and Energy in 1984. See id. § 45.1-390.

580. Created by statute in 2019. See id. § 45.1-395.

581. Created by statute in 2010. See id. § 67-1201.

582. Created by statute in 2013. See id. § 67-1401.

583. Created by statute in 2015. See id. § 67-1501.

584. Created by statute in 2019. See id. § 67-1601.

585. Created by statute as Washington Public Service Commission in 1911. History of the Commission, Wash. Utils. & Transp. Comm'n, https://www.utc.wa.gov/aboutUs/Pages/history.aspx [https://perma.cc/9V5Z-HJXJ] (last visited Jan. 30, 2021). Current authority at Wash. Rev. Code § 80.01.010 (2020).

586. State Energy Office created by statute in 1975. See Act of Mar. 19, 1976, ch. 108, sec. 4, 1975–1976 Wash. Sess. Laws 347, 348–49. It was eliminated in 1996. See Act of Mar. 28, 1996, ch. 186, sec. 1, 1995–1996 Wash. Sess. Laws 720, 720.

587. Washington State Energy Office, Wash. State Dep't of Com., https://www.commerce.wa.gov/growing-the-economy/energy/washington-state-energy-office [https://perma.cc/5YXK-NL5E] (last visited Jan. 30, 2021).

588. Created by statute in 1970. See About EFSEC, Wash. Energy Facility Site Evaluation Council, https://www.efsec.wa.gov/about-efsec [https://perma.cc/JD7W-8VD2] (last visited Jan. 30, 2021). Current authority at Wash Rev. Code § 80.50.010–.904.

Climate/transition body	No
Other	
West Virginia	
Utilities commission	Public Service Commission[589]
Freestanding energy office?	No
Designated state energy office within other agency?	West Virginia Office of Energy (in Department of Commerce)[590]
Siting board	No
Climate/transition body	No [Bill currently pending in House would create Just Transition Office for timber/coal]
Other	Public Energy Authority created to promote mineral development[591]
Wisconsin	
Utilities commission	Public Service Commission[592]
Freestanding energy office?	No
Designated state energy office within other agency?	Office of Energy Innovation (in Public Service Commission)[593]
Siting board	No
Climate/transition body	Office of Sustainability & Clean Energy (in Department of Administration);[594] Governor's Task Force on Climate Change[595]
Other	

589. Created by statute in 1913. History of the Public Service Commission of West Virginia, Pub. Serv. Comm'n of W. Va., http://www.psc.state.wv.us/hist.htm [https://perma.cc/Z2VW-RWGD] (last visited Jan. 30, 2021). Current authority at W. Va. Code Ann. § 24-1-1 to -8-2 (LexisNexis 2020).

590. Created by statute in 2007. W. Va. Code Ann. § 5B-2F-2.

591. Created by statute in 1985. Id. § 5D-1-4.

592. Created as nation's first state utility regulatory commission in 1907. See Our History, Pub. Serv. Comm'n of Wis., https://psc.wi.gov/Pages/AboutPSCW/HistoryAndMission.aspx [https://perma.cc/HT7M-E4RT] (last visited Jan 30, 2021). Current authority at Wis. Stat. § 15.79 (2020).

593. Office of Energy Information, Pub. Serv. Comm'n of Wis., https://psc.wi.gov/Pages/Programs/OEI.aspx [https://perma.cc/HT7M-E4RT] (last visited Jan. 30, 2021).

594. Established by executive order in 2019. See Wis. Exec. Order No. 38 (Aug. 16, 2019), https://evers.wi.gov/Documents/EO%20038%20Clean%20Energy.pdf [https://perma.cc/CRQ6-EF42].

595. Established by executive order in 2019. See Wisconsin Executive Order 52, supra note 118.

Wyoming	
Utilities commission	Public Service Commission[596]
Freestanding energy office?	Wyoming Energy Authority[597]
Designated state energy office within other agency?	n/a
Siting board	Wyoming Industrial Siting Council (in Department of Environmental Quality)[598]
Climate/transition body	No
Other	

596. Created by statute in 1915. About Us, Wyo. Pub. Serv. Comm'n, https://psc.wyo.gov/about-us [https://perma.cc/U7ZW-7HKD] (last visited Jan. 30, 2021). Current authority at Wyo. Stat. Ann. § 37-2-101 (2020).

597. Created by statute in 2019. See Wyo. Stat. Ann. § 37-5-502.

598. Created by statute in 1975. See id. § 35-12-104.