

OUT-OF-STATE EXECUTIVES

QUINN YEARGAIN[†]

Abstract

In more than half of the states in the country, when the governor steps across state lines, they might be temporarily ceding power to their lieutenant governor. In the governor's absence, the acting governor is largely free to do as they want—sign legislation, issue pardons, fill vacancies in state government, convene the legislature into session, and even initiate criminal investigations.

As litigants challenge actions by putative acting governors in court, state courts have interpreted the meaning of the word "absence" to arrive at one of two different tests. First, the "physical absence" rule automatically devolves near-total power to the successor upon any absence from the state. Second, the "effective absence" rule devolves power only upon a meaningful absence. Yet these tests are inherently flawed. The "physical absence" rule is absurd, but easy to apply, while the "effective absence" rule is clearly logical, but difficult to apply. Far too many courts have never handed down binding opinions on these questions, leaving state governments to operate under norms and informal practices.

In this Article, I argue that gubernatorial absence provisions are incapable of reform and ought to be repealed. I conducted a fifty-state survey of state constitutions, statutes, caselaw, and attorney general opinions, and a content analysis of thousands of actions taken by acting governors. Based on this analysis, I conclude that acting governors' purported exercises of power are significant, that the legality of these exercises is undertheorized, and that the attempts by state courts to interpret these provisions have produced inescapably flawed jurisprudence.

Moreover, there are grave harms of leaving these provisions untouched as partisan polarization deepens and democratic norms degrade. A putative acting governor representing a different faction or party than the elected governor could trigger a constitutional crisis upon the mere physical absence of the governor, which state courts may even back up. With these harms front and center, courts or statutory workarounds cannot salvage absence provisions. While depriving an out-

[†] 1855 Professor of the Law of Democracy and Associate Professor of Law, Michigan State University College of Law. Thank you to Daniel Rosenbaum for edits and suggestions, and to the staff of the *Wayne Law Review* for their hard work and diligence.

of-state governor of their power may have made sense in the eighteenth or nineteenth centuries, doing so in an era of air travel and unprecedented communications technology is not just anachronistic—it is dangerous.

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INTRODUCTION

Storms knocked out power for several thousand Oklahomans on June 17, 2023,¹ and power outages lasted for several days thereafter,² causing a crisis for the state as it endured blistering temperatures, with daytime heat indices of over 100 degrees.³ The ongoing emergency ordinarily would have resulted in the Governor declaring a state of emergency,⁴ which would have activated the state's Emergency Operations Plan,⁵ suspended certain vehicle restrictions to expedite the restoration of power,⁶ and triggered the state's Emergency Price Stabilization Act to prevent price gouging.⁷ However, Governor Kevin Stitt was unable to declare an emergency.⁸ He was in France, attending the Paris Air Show, and lost the ability to exercise his power as Governor the moment that he left the state.⁹

1. Josh Dulaney, *Crews Assessing Damage After Powerful Oklahoma Storms*, OKLAHOMAN (June 18, 2023, at 18:29 CT), <https://www.oklahoman.com/story/news/2023/06/18/oklahoma-storms-caused-hundreds-of-thousands-of-power-outages/70334461007/> [<https://perma.cc/JM4D-M47T>].

2. See THE ASSOCIATED PRESS, *Power Outages Continue Across the Southern U.S. As A Heat Wave Grips Texas*, NPR (June 20, 2023, at 01:23 ET), <https://www.npr.org/2023/06/20/1183149235/power-outages-continue-across-the-southern-u-s-as-a-heat-wave-grips-texas> [<https://perma.cc/8C8G-X76T>] (“About 165,000 customers around the city still had no power Monday as crews scrambled to repair more than 700 broken poles and downed wires . . .”).

3. See Audrey Goodson, *Expert Shows Ways to Stay Safe After Heat Advisory Issued for Parts of Oklahoma*, KOCO-TV News (June 20, 2023, at 07:48 CT), <https://www.koco.com/article/oklahoma-heat-advisory-hot-temperatures-precautions/44264335> [<https://perma.cc/ZA85-8ZBC>].

4. See Jordan Fremstad, *Gov. Stitt Addresses Emergency Declaration Confusion After France Trip*, NEWS9 (June 23, 2023, at 22:29 ET), <https://www.news9.com/story/64965b72bfb26707288bac8d/gov-stitt-addresses-emergency-declaration-confusion-after-france-trip> [<https://perma.cc/YWT9-F3ZR>] (discussing that the state of emergency was “delayed”).

5. OKLA. DEP’T OF EMERGENCY MGMT., STATE OF OKLAHOMA EMERGENCY OPERATIONS PLAN iii (2019).

6. See, e.g., Okla. Exec. Order No. 2022-34 (Dec. 21, 2022), <https://www.sos.ok.gov/documents/executive/2058.pdf> [<https://perma.cc/LR8N-UFWZ>] (suspending “requirements for size and weights permits of oversized vehicles”; “requirements for licensing/operating authority as required by the Oklahoma Corporation Commission” and the Oklahoma Tax Commission; and federal regulations promulgated by the Federal Motor Carrier Safety Administration following severe winter storms).

7. OKLA. STAT. ANN. tit. 15, § 777.4(A) (West 1999) (prohibiting any person from selling “any goods, services, dwelling units, or storage space” at a price “more than ten percent above” the regularly charged price during a declared emergency).

8. Fremstad, *supra* note 4.

9. See Dale Denwalt, *Stitt, Pinnell Out of State as Public Calls for Emergency Declaration*, OKLAHOMAN (June 20, 2023, at 12:04 CT), <https://www.oklahoman.com/story/news/politics/government/2023/06/20/tulsa-power->

Since the ratification of the Oklahoma Constitution in 1907, it has provided that, upon the Governor's "removal from the State," the "said office, with its compensation, shall devolve upon the Lieutenant Governor for the residue of the term or until the disability shall be removed."¹⁰ "Removal from the state" is an antiquated phrase, and most commonly refers to a permanent relocation from the state,¹¹ but its usage in the Oklahoma Constitution has consistently been interpreted by state courts as temporarily devolving power to the lieutenant governor upon a governor's temporary absence, briefly promoting the lieutenant governor to acting governor during that time.¹² However, Lieutenant Governor Matt Pinnell was also out of the state, attending the annual conference of the Republican Lieutenant Governors Association.¹³

As a result, gubernatorial power devolved upon the next in line: Greg Treat, the President Pro Tempore of the Oklahoma Senate.¹⁴ Treat was notified that he was Acting Governor in the early afternoon of June twentieth, some hours after he had technically assumed the role.¹⁵ Once Governor Stitt discovered Treat's status as Acting Governor, he issued a

outages-governor-kevin-stitt-emergency-declaration-paris-air-show/70337709007/
[<https://perma.cc/LT4Y-PZ38>].

10. OKLA. CONST. art. VI, § 16.

11. See, e.g., MONTGOMERY H. THROOP, A TREATISE ON THE LAW RELATING TO PUBLIC OFFICERS AND SURETIES IN OFFICIAL BONDS § 424, at 413 (New York, J. Y. Johnston Co. Law Book Publishers 1892) ("In this country, the constitution or the statutes of the United States, and of each of the states, contain special provisions, requiring certain officers to be residents of their districts, or of the state, as the case may be; and declaring that such an officer forfeits his office, by a removal from the district or the state."); FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS §§ 437-39, at 280-81 (Chicago, Callaghan & Co. 1890) ("... a permanent removal from the district represented will be deemed an abandonment of the office and a vacancy will result.").

12. *Ex parte Crump*, 135 P. 428, 434 (Okla. Crim. App. 1913) ("Much stress is put upon the word 'removal,' as used in section 16, and counsel for respondent contend that the meaning of this word as used contemplates the permanent removal of the Governor from the state. We cannot agree with this contention. The word 'removal,' as used in section 16, and the word 'absent,' as used in section 15, are convertible terms.").

13. Randy Krehbiel, *Stitt Downplays Storm Absence*, TULSA WORLD, June 24, 2023, at A1, A3.

14. See OKLA. CONST. art. VI, § 15 ("If, during a vacancy of the office of Governor, the Lieutenant Governor shall be impeached, displaced, resign, die or be absent from the State, or become incapable of performing the duties of the office, the president, pro tempore, of the Senate, shall act as Governor until the vacancy be filled or the disability shall cease[.]").

15. Denwalt, *supra* note 9.

press release asking Treat to sign an executive order declaring a state of emergency,¹⁶ which Treat had already done by that time.¹⁷

The delay in issuing the declaration, as well as the fact that Treat was not timely notified that he was acting governor, prompted policymakers in the state to recommend changes to the state's succession procedure.¹⁸ Oklahoma Attorney General Gentner Drummond pointed out that the delay in activating the Emergency Price Stabilization Act potentially exposed residents to what would have been otherwise illegal price gouging, and urged the adoption of a law "to require better communication between high level officials in the line of succession."¹⁹ Treat later introduced legislation to do so,²⁰ but it did not end up passing before the conclusion of the legislature in 2024.²¹

Oklahoma's drama is not unique—not in general, and certainly not in recent memory. On October 5, 2021, Idaho Governor Brad Little left the state to attend a meeting in Texas. Earlier in the year, when Little was briefly out of the state, Lieutenant Governor Janice McGeachin issued an executive order banning mask mandates.²² Accordingly, as Little left for

16. *Governor Stitt Calls on Pro Tem Treat to Declare State of Emergency in Ten Oklahoma Counties*, OKLAHOMA.GOV (June 20, 2023), <https://oklahoma.gov/governor/newsroom/newsroom/2023/june2023/governor-stitt-calls-on-pro-tem-treat-to-declare-state-of-emerge.html> [https://perma.cc/2UP7-J3FP].

17. Okla. Exec. Order No. 2023-18 (2023); Krehbiel, *supra* note 13, at A3 ("Treat later expressed irritation that the Governor's Office released a statement by Stitt, urging Treat to sign the order, after Treat had already done so.").

18. Max Bryan, *Bill Would Strengthen Communication Between Governor and Line of Succession*, PUB. RADIO TULSA (Jan. 20, 2024, at 13:41 CT), <https://www.publicradiotulsa.org/local-regional/2024-01-20/bill-would-strengthen-communication-between-governor-and-line-of-succession> [https://perma.cc/9MNT-DAX4].

19. Press Release, Okla. Att'y Gen. Gentner Drummond, Drummond Announces Price Gouging Statute in Effect for Eastern Oklahoma, Calls for Reforms of Emergency Response Procedures (June 20, 2023), <https://oklahoma.gov/oag/news/newsroom/2023/june/drummond-announces-price-gouging-statute-in-effect-for-eastern-o.html> [https://perma.cc/A2NS-ZJFT] (noting that "the declaration was delayed for so many days").

20. Bryan, *supra* note 18.

21. S. 1860, 59th Leg., Reg. Sess. (Okla. 2024).

22. Kelcie Moseley-Morris et al., *Idaho Lt. Gov. McGeachin Issues Order Terminating Public Agency Mask Mandates*, IDAHO CAP. SUN (May 27, 2021, at 11:14 ET), <https://idahocapitalsun.com/2021/05/27/idaho-lt-gov-mcgeachin-issues-order-terminating-public-agency-mask-mandates/> [https://perma.cc/L9H6-ZEMW]. Perhaps inspired by McGeachin's move, in 2021, when Governor Stitt was out of Oklahoma, a group of far-right state legislators urged Lieutenant Governor Matt Pinnell, then-Acting Governor, to ban vaccine mandates. See *Oklahoma Lawmakers Ask Lt. Gov. Pinnell to Ban COVID-19 Vaccine Mandate for Health Care Workers*, KOCO NEWS (July 28, 2021, at 18:42 CT), <https://www.koco.com/article/oklahoma-lawmakers-ask-lt-gov-pinnell-to->

Texas, he wrote a letter to McGeachin, explaining that his time out of the state “will be brief and will not at all hinder my ability to perform any official duties,” and that he was “not aware of any official business that will require your services in an acting Governor capacity.”²³ McGeachin nonetheless claimed power. She issued an executive order purporting to ban COVID-19 “vaccine passports” and barred state agencies from requiring proof of vaccination as a condition of employment,²⁴ and attempted to activate and send the Idaho National Guard to the border.²⁵ Little disputed McGeachin’s claim of authority,²⁶ and upon his return, revoked the executive order.²⁷ The Idaho Attorney General’s office subsequently issued a written opinion concluding that, while the Idaho Constitution devolves power to the Lieutenant Governor upon the Governor’s “absence from the state,”²⁸ whether it does so automatically, and even during a brief absence, was “a close question.”²⁹ As such, when Little left the state in the future, he did not let McGeachin know, prompting her to accuse him of “violat[ing] the state constitution[.]”³⁰

ban-covid-19-vaccine-mandate-for-health-care-workers/37159862

[<https://perma.cc/HL7F-V9X7>].

23. Clark Corbin, *Idaho Gov. Challenges McGeachin's Attempt to Governor While He's Out of State*, IDAHO CAP. SUN (Oct. 7, 2021, at 13:41 ET), <https://idahocapitalsun.com/2021/10/07/idaho-gov-challenges-mcgeachins-attempts-to-govern-while-hes-out-of-state/> [<https://perma.cc/6WL6-ZGBV>].

24. Idaho Exec. Order No. 2021-13 (Oct. 5, 2021), *repealed by*, Idaho Exec. Order No. 2021-14 (Oct. 6, 2021).

25. Carma Hassan & Josh Campbell, *Idaho's Governor Accuses Lieutenant Governor of Attempting to Deploy National Guard to Border Without Authorization*, CNN (Oct. 6, 2021, at 15:05 ET), <https://www.cnn.com/2021/10/06/politics/idaho-national-guard-brad-little-janice-mcgeachin> [<https://perma.cc/XK5L-FLVY>]; Keith Ridler, *Idaho Governor, Lieutenant Spar over COVID-19 Vaccine*, ASSOCIATED PRESS (Oct. 6, 2021, at 01:47 ET), <https://apnews.com/article/immigration-joe-biden-brad-little-idaho-mexico-673488ba46977c8c744f550eefbe9161> [<https://perma.cc/6Z94-NKHT>].

26. Brad Little (@governorbradlittle), FACEBOOK, *I am in Texas performing my duties as the duly elected Governor of Idaho, and I have not authorized the Lt. Governor to act on my behalf.* (Oct. 5, 2021, at 17:47 ET), https://www.facebook.com/story.php?story_fbid=414932983337521&id=100044624670367&rdr [<https://perma.cc/8MUS-BDU2>].

27. Idaho Exec. Order No. 2021-14 (Oct. 6, 2021).

28. IDAHO CONST. art. IV, § 12.

29. Letter from Brian Kane, Idaho Chief Deputy Att’y Gen., to Laurie Lickley, Idaho House Rep., at 1 (Oct. 7, 2021), *printed in* LAWRENCE G. WASDEN, IDAHO ATTORNEY GENERAL’S ANNUAL REPORT, OPINIONS, CERTIFICATES OF REVIEW, AND SELECTED ADVISORY LETTERS FOR THE YEAR 2021, at 302 (2021), <https://www.ag.idaho.gov/content/uploads/2022/11/2021-Annual-Report.pdf> [<https://perma.cc/KGC5-5Q8C>] [hereinafter Kane Letter].

30. *McGeachin Says Gov. Little Violated State Constitution When He Left for Nashville*, CBS2 NEWS (May 24, 2022, at 20:59 ET), <https://idahonews.com/news/local/mcgeachin-says-gov-little-snubbed-her-as-he-heads-to-conference> [<https://perma.cc/87HA-A2YM>].

Across the country, more than half of all state constitutions do not allow their governors to exercise power outside of the state.³¹ The text of these provisions varies from state to state, but it is common enough for a constitution to provide that, upon the “absence from the state or other disability of the governor, the powers, duties and emoluments of the governor shall devolve upon the lieutenant governor for the remainder of the term or until the disability is removed.”³² Provisions like these date back to the earliest state constitutions,³³ in an era in which traveling governors could not remain in contact with capitols to manage the affairs of their states.

The continued operation of automatic succession provisions has frequently been treated in public discourse as a state-specific idiosyncrasy, a historical relic, or an amusing oddity.³⁴ True enough, some acting governors have used their powers to engage in meaningless exercises of pomp and circumstance—like inaugurating the “Great Navy of the State of Nebraska” and commissioning admirals.³⁵ But far too often, temporary

In the 2022 Republican primary for Governor, McGeachin—with Donald Trump’s endorsement—challenged Little for renomination, but he easily defeated her, which effectively put an end to the occasional power struggle when she left office in 2023. *See* James Dawson, *Idaho Gov. Brad Little Wins GOP Primary over Trump’s Pick, Lt. Gov. Janice McGeachin*, NPR (May 18, 2022, at 12:30 ET), <https://www.npr.org/2022/05/17/1099313555/idaho-governor-primary-election-results-trump-mcgeachin-little> [<https://perma.cc/JF6G-DNFR>].

31. *See infra* Table I.

32. *See, e.g.*, MO. CONST. art. IV, § 11(a).

33. *See, e.g.*, MASS. CONST. pt. 2, ch. 2, § 2, art. III (1780) (“Whenever the chair of the governor shall be vacant, by reason of his death, or absence from the commonwealth, or otherwise, the lieutenant governor, for the time being, shall, during such vacancy, perform all the duties incumbent upon the governor . . .”).

34. *See, e.g.*, Daniel C. Vock, *Rules for Out-of-Town Governors Could Cause Headaches for Potential VP Pick*, ROUTE FIFTY (July 24, 2024), <https://www.route-fifty.com/management/2024/07/rules-out-town-governors-could-cause-headaches-potential-vp-pick/398303/> [<https://perma.cc/8JJH-H5DQ>]; Betsy Z. Russell, *Lt. Gov. Brad Little Served as Acting Governor 373 Times*, SPOKESMAN-REV. (June 5, 2017), <https://www.spokesman.com/stories/2017/jun/05/lt-gov-brad-little-served-acting-governor-373-time/> [<https://perma.cc/9475-KGW6>]; *Acting Governor’s Priority: Call Mom*, TAHOE DAILY TRIB. (June 29, 2007), <https://www.tahoedailytribune.com/news/acting-nevada-governors-priority-call-mom/> [<https://perma.cc/6EQP-JJRG>].

35. In 1931, when Governor Charles Bryan was out of the state, Lieutenant Governor Ted Metcalfe commissioned several hundred “Nebraska admirals.” *Acting Governor Names ‘Admirals’ to His Staff*, OMAHA WORLD-HERALD, Aug. 3, 1931, at 1. Later that year, the Lieutenant Governor distributed these commissions under the faux authority of the “Great Navy of the State of Nebraska.” *State’s ‘Navy’ Commissions Bestowed by Metcalfe*, OMAHA BEE-NEWS, Oct. 20, 1931, at 13. Governors of Nebraska continue to commission admirals. *See Admiralship Request*, GOV. JIM PILLEN: OFF. GOVERNOR,

succession has played out with real stakes. Governors have more than occasionally failed (or refused) to timely notify their successors upon leaving the state,³⁶ or have been inaccessible upon leaving the state,³⁷ which has sometimes caused delays in responding to emergencies or disasters.³⁸ Upon assuming power, acting governors have not hesitated to sign or veto legislation,³⁹ appoint officials,⁴⁰ call the legislature into session,⁴¹ issue pardons or paroles,⁴² and initiate both formal and informal investigations.⁴³

The responses to these attempted seizures of power have been lackluster. On occasion, the actions of putative acting governors have been

<https://governor.nebraska.gov/admiralship-request> [<https://perma.cc/B77Z-Z3UL>] (last visited May 30, 2025).

36. See, e.g., Sean Golonka et al., *Who's Governor When Lombardo's Away? Still Lombardo, Says Administration*, NEV. INDEP. (Sept. 28, 2023, at 10:39 ET), <https://thenevadaindependent.com/article/whos-governor-when-lombardos-away-still-lombardo-says-administration> [<https://perma.cc/5PWH-TD6E>]; *Cooper's Out-of-State Travel Leaves Lieutenant Governor in the Dark*, WRAL NEWS (Oct. 2, 2017, at 19:24 ET), <https://www.wral.com/story/cooper-s-out-of-state-travel-leaves-lieutenant-governor-in-the-dark/16989774/> [<https://perma.cc/J4K2-NQ3X>]; Bill Simmons, *Wilson Was Acting Governor, But He Didn't Know It*, JONESBORO SUN, Sept. 15, 1987, at 13; *Governor Bryan Regrets Acting Chief "Snubbed"*, OMAHA WORLD-HERALD, July 30, 1931, at 8.

37. See, e.g., Charles Bullard, *Branstad Not Governor When Ray Gone, Miller Says*, DES MOINES REG., Jan. 3, 1980, at 3 (reporting that, when tornados hit North-Central Iowa, Governor Robert Ray "could not be reached in Romania until after 9 p.m." while on a "State Department-sponsored trip", and Lieutenant Governor Terry Branstad, "who was playing softball in Forest City, could not be contacted until shortly before 10 p.m.").

38. See *id.*

39. See, e.g., Dean Pohlenz, *Lt. Gov. Warner Vetoes Bill on Wheat Utilization*, LINCOLN EVENING J., Apr. 4, 1951, at 1 ("Lt. Gov. Charles Warner, acting in the absence from the state of Gov. Val Peterson, Wednesday vetoed L.B. 1, the wheat utilization bill."). But see 1951–52 Neb. Op. Att'y Gen. 110, 113–14 (concluding that "the act of the Lieutenant Governor, the veto and return by him of the bill of the Legislature, was a nullity").

40. See, e.g., *Game Commission Choices Win Approval*, TWIN FALLS NEWS, Dec. 10, 1938, at 7 (discussing that Acting Governor Charles Gossett appointed members of the Idaho Fish and Game Commission when Governor Barzilla Clark left the state).

41. *Legislative Call Issued Officially by Lt. Gov.*, MONROE NEWS-STAR, Sept. 7, 1950, at 1.

42. See, e.g., *Full Pardon Given to Ray Sandlovich*, EVENING ST. J. (Lincoln, Neb.), Apr. 23, 1920, at 1; *Gov. Russell and Lt. Gov. in Clash Over Two Pardons*, NATCHEZ DEMOCRAT, Nov. 12, 1922, at 1.

43. See, e.g., *Laxalt Calls Jury: Sawyer Brands Rival's Move 'Reprehensible'*, NEV. ST. J., Nov. 29, 1965, at 1, 3 ("Lt. Gov. Paul Laxalt, acting within two hours after his political rival Gov. Grant Sawyer left the state, yesterday ordered a state grand jury to be impaneled to investigate the Nevada Highway Department."); *Kelly to Call Light Rate Parley*, BOS. DAILY GLOBE, Dec. 30, 1937, at 1, 13 (reporting that Acting Governor Francis E. Kelly would "direct requests to the managements of 29 Bay State electric lighting companies to send representatives to a conference" the following day where he would "ask that each company mark down its rates").

challenged, usually in court, and have frequently been upheld as constitutional.⁴⁴ In a few states, constitutional convention delegates or state legislatures have proposed constitutional amendments that altogether write out automatic succession provisions⁴⁵ or impose minimum-day requirements for a "vacancy" to exist.⁴⁶

Yet far too often, nothing happens at all. Gubernatorial "absence" provisions remain in many state constitutions, frequently without any formal judicial interpretation, informal interpretation in state attorney general opinions, or discussion in legal literature.⁴⁷ Accordingly, many fundamental questions about these provisions remain unanswered. Does "absence from the state" refer to a "pure physical absence from the state of any distance or duration"?⁴⁸ Or does it refer to an "effective absence," where power conditionally devolves depending on the length of the governor's absence and where they are?⁴⁹

On the relatively rare occasions when courts have attempted to answer these questions, they have split, with some favoring the "physical absence" rule and others holding that any absence must be "effective" to devolve power.⁵⁰ But in the absence of consistent formal authority on these questions, statutes, attorney general opinions, and informal practices have established the precedent in many states.⁵¹ Accordingly, when a governor leaves the state, clouds loom over their absence. Governors have modified their own behavior, sometimes refusing to leave the state⁵² (or doing so

44. See *infra* Section III.A.

45. See, e.g., ARK. CONST. amend. VI, § 4 (amended 2016); KY. CONST. § 84 (amended 1992).

46. ALA. CONST. art. V, § 127 ("absent from the state over twenty days"); MONT. CONST. art. VI, § 14(2) ("absent from the state for more than 45 consecutive days").

47. But see Ira H. Lurvey, *Absent Officials: No Carte Blanche for Successors*, 15 J. PUB. L. 324, 329–37 (1966); Basile J. Uddo, "Who's in Charge"? *The Louisiana Governor's Power to Act in Absentia*, 29 LOY. L. REV. 1, 6–11 (1983); David B. Lloyd, *In re Governorship: Curbing Mike Curb—Constitutionally*, 7 HASTINGS CONST. L.Q. 831, 850–54 (1980); Richard H. Abramson, Note, *Brown v. Curb: The Lieutenant Governor's Powers When the Governor Is Outside the State*, 68 CAL. L. REV. 796, 807–11 (1980); Calvin Bellamy, *Presidential Disability: The Twenty-Fifth Amendment Still an Untried Tool*, 9 B.U. PUB. INT. L.J. 373, 382–86 (2000); Richard H. Hansen, *Executive Disability: A Void in State and Federal Law*, 40 NEB. L. REV. 697, 717–20 (1961); see also Noel T. Dowling, *Executive Disability*, 1 N.H. B.J. 14, 16–18 (1959) (discussing state constitutional executive-disability claims generally).

48. Kane Letter, *supra* note 29.

49. *Id.*

50. See *infra* Section III.A.

51. See *infra* Section III.A.

52. See, e.g., *Treen Won't Leave State When Freeman Could Veto*, DAILY ADVERTISER (Lafayette, La.), Apr. 8, 1980, at 5 ("Gov. Dave Treen says he won't travel out of state at any time when another elected official could sign or veto bills passed by the Legislature.").

furtively⁵³) out of fear of what their lieutenant governor will do in their absence.⁵⁴

During a governor's physical absence from the state, disputes over which official is lawfully exercising power could easily prompt a state constitutional crisis.⁵⁵ The actions taken by acting governors have historically encompassed virtually all aspects of a governor's power.⁵⁶ In a time of growing—and all too frequently, violent—ideological and partisan polarization, it is not difficult to imagine an acting governor weaponizing an absence to seize power. And, while state courts would hopefully reject truly inflammatory actions by acting governors, the rise of “movement judges” with extreme ideological commitments does not necessarily guarantee that the most egregious power plays would actually be shut down.⁵⁷

In this Article, I argue that the mere absence of a governor from their state should not be treated as a vacancy—and that state constitutions should be amended to make this clear. To support this argument, I conduct an original historical survey of gubernatorial-absence provisions, review how courts and executive branch actors alike treat them, and discuss historical developments that have motivated caselaw and formal constitutional development.

53. See, e.g., Bryan Anderson, ‘Nonexistent’ Relationship Prompts Call for Law Requiring More Communication Between Cooper and Robinson, WRAL NEWS (Sept. 21, 2022, at 11:40 ET), <https://www.wral.com/story/no-information-sharing-no-hand-shake-and-no-invitation-to-governor-s-mansion-lt-gov-robinson-describes-nonexistent-relationship-/20485758/> [<https://perma.cc/C33P-VUZZ>] (noting that, when North Carolina Governor Roy Cooper left the state in 2022 to watch the UNC-Chapel Hill basketball team participate in the Final Four tournament, he did not advise Lieutenant Governor Mark Robinson of his absence).

54. E.g., Zeke Miller & Seung Min Kim, *NC Gov. Cooper Opted out of Harris VP Vetting, in Part Over Worry About GOP Lieutenant: AP Sources*, ASSOCIATED PRESS (July 29, 2024, at 21:42), <https://apnews.com/article/harris-cooper-vice-president-vetting-9ff2a5abf9f4191e5ccb2d52e57b06a3> [<https://perma.cc/BAT8-4MT8>] (discussing that, in 2024, when Cooper withdrew himself from consideration as Kamala Harris’s running mate, he cited his concern over leaving control of the state to Robinson).

55. See, e.g., JEANNIE M. WHAYNE ET AL., *ARKANSAS: A NARRATIVE HISTORY* 249–50 (2d ed. 2013) (describing Reconstruction-era incident in which the Lieutenant Governor of Arkansas, believing the Governor was out of the state, raced to the capitol to assume power, but arrived to learn that the Governor had arrived first).

56. E.g., Abramson, *supra* note 47 (“In *Brown v. Curb*, the supreme court held that article V, section 10 of the California Constitution permits a Lieutenant Governor to exercise complete gubernatorial power, including the power to make judicial appointments, during the Governor’s physical absence from the state.”).

57. See Robert L. Tsai & Mary Ziegler, *Abortion Politics and the Rise of Movement Jurists*, 57 U.C. DAVIS L. REV. 2149, 2159 (2024) (defining a “movement jurist” as “someone who is socially embedded in movement-aligned networks outside of the formal legal system and is willing to use a judge’s tools of the trade in the service of a movement’s goals”).

I begin in Part I by outlining the basics of gubernatorial succession and laying out the survey of absence provisions. I categorize the different types of provisions and show their adoption (and rejection) by states over the last two-and-a-half centuries. Then, in Part II, I outline the exercises of authority undertaken by putative acting governors, including signing and vetoing legislation, convening state legislatures, granting clemency, and appointing and removing officials. Finally, in Part III, I argue that the legal system has failed to adequately respond to power plays by acting governors. I review the two main interpretations of gubernatorial-absence provisions that state courts have adopted—the “physical absence” and “effective absence” rules—and argue that each is inherently flawed. Here, I further argue that attempted statutory fixes, like mandatory notification provisions, do little to ameliorate the flaws of automatic succession, and that state constitutional amendments remain the only viable option.

I. GUBERNATORIAL SUCCESSION AND ABSENCES

Unplanned vacancies are inevitable when forming a government, which is why state constitutions establish processes for filling both temporary and permanent vacancies.⁵⁸ More than that, however, constitutions also define what vacancies are and when they occur.⁵⁹ In some instances, like a death, resignation, or involuntary removal from office following impeachment, the existence of a vacancy might be clear enough. But not always.⁶⁰ Responding to some of these inherent uncertainties, over time, some state constitutions include provisions that

58. See, e.g., MASS. CONST. pt. 2, ch. 2, § 2, art. III (1780).

59. See, e.g., ALA. CONST. art. V, § 127 (“absent from the state over twenty days”); MONT. CONST. art. VI, § 14(2) (“absent from the state for more than 45 consecutive days”).

60. For example, following the 1946 Georgia gubernatorial election, Governor-elect Eugene Talmadge died, triggering what was commonly known as the “three governors” controversy. See Lucian Emery Dervan, *Georgia’s Noble Revolution: Three Governors, Two Armies, the Georgia Supreme Court, and the Gubernatorial Election of 1946*, 15 J.S. LEGAL HIST. 167, 168–75 (2007) (describing the events of the controversy in detail); see, e.g., Scott E. Buchanan, *Three Governors Controversy*, NEW GA. ENCYCLOPEDIA (Oct. 5, 2021), <https://www.georgiaencyclopedia.org/articles/government-politics/three-governors-controversy/> [https://perma.cc/9KPT-MJ3Q] (referring to the events as the “three governors controversy”). The outgoing Governor, Ellis Arnall, claimed the right to hold over in office; Talmadge’s son, who technically placed second in the election by virtue of write-in votes, was ostensibly elected by the legislature to serve as Governor; and the newly elected Lieutenant Governor claimed that he was entitled to act as Governor as the designated successor. Dervan, *supra*. The legal questions, therefore, involved whether there was a vacancy in the first place and who was entitled to act as Governor. *Thompson v. Talmadge*, 41 S.E.2d 883, 889 (Ga. 1947). The Georgia Supreme Court ultimately held that Arnall held over as Governor while the dispute was under review, and that Lieutenant Governor Melvin Thompson was the lawful successor. *Id.* at. 889–90.

temporarily bar a governor from office upon the passage of an impeachment resolution,⁶¹ allow a mentally or physically disabled governor to be suspended,⁶² or devolve power when the governor leaves the state.⁶³

In this Part, I explore the landscape of gubernatorial absences. I begin in Section A by briefly laying out the process of gubernatorial succession—including the common successors and causes of succession. Then, in Section B, I present a comprehensive fifty-state survey of the current provisions for gubernatorial succession in the event of the governor's physical absence from the state and how those provisions have developed historically.

A. The Process of Gubernatorial Succession

A vacancy in the office of governor, whether temporary or permanent, triggers the state constitution's process for gubernatorial succession. Vacancies can be permanent, entitling the successor to serve either the remainder of the term or until a special election can be held, or temporary, and merely allow the successor to act as governor until the cause of the vacancy is removed.⁶⁴ Permanent vacancies can be caused by death, resignation, removal after impeachment, or relocation from the state.⁶⁵ The causes (and resolution) of temporary vacancies vary depending on the state, but commonly include absences from the state, suspension after impeachment (but before conviction or acquittal), or a physical or mental disability.⁶⁶

61. See, e.g., TEX. CONST. art. IV, § 16(c) (providing that, in the event of “the impeachment of the Governor,” the Lieutenant Governor acts as Governor); TEX. CONST. art. XV, § 5 (“All officers against whom articles of impeachment may be preferred shall be suspended from the exercise of the duties of their office, during the pendency of such impeachment.”). The Texas House of Representatives most recently activated this provision in 2023 when they impeached Attorney General Ken Paxton. Zach Despart & James Barragán, *Texas AG Ken Paxton Impeached, Suspended from Duties; Will Face Senate Trial*, TEX. TRIB. (May 27, 2023, at 20:09), <https://www.texastribune.org/2023/05/27/ken-paxton-impeached-texas-attorney-general/> [https://perma.cc/8574-DJ9X].

62. See William E. Raftery, *Gubernatorial Removal and State Supreme Courts*, 11 J. APP. PRAC. & PROCESS 165, 169–81 (2010) (surveying modern state constitutional practices of devolving power upon “disability” of the governor).

63. See, e.g., HAW. CONST. art. V, § 4 (“In the event of the absence of the governor from the State . . . such powers and duties shall devolve upon the lieutenant governor during such absence[.]”).

64. See, e.g., *supra* note 32 and accompanying text.

65. See, e.g., *supra* note 59 and accompanying text.

66. See, e.g., COLO. CONST. art. IV, § 13(5) (“In the event the governor . . . is suffering from a physical or mental disability, the powers and duties of the office of governor . . . shall, until the . . . disability ceases, temporarily devolve upon the lieutenant governor[.]”).

When a vacancy occurs, power devolves to the designated successor. Today, the most common successor is the lieutenant governor.⁶⁷ As of the time of writing,⁶⁸ forty-three states have elected lieutenant governors.⁶⁹ In four other states, the presiding officer of the state senate is the designated gubernatorial successor,⁷⁰ and in three others, the elected secretary of state is.⁷¹

Historically, though, lieutenant governors were relatively uncommon.⁷² Instead, the state senate president was the most common successor.⁷³ Over the nineteenth and twentieth centuries, more states created lieutenant governors.⁷⁴ Though the office was originally elected independently from the governor, since the mid-twentieth century, most states transitioned to “team-ticket” elections, beginning with New York.⁷⁵ Nonetheless, the identity of successors further down the line still reflect vestiges of the past system and parallels with the scheme of presidential succession under the Presidential Succession Act.⁷⁶ In the event of a lieutenant-gubernatorial vacancy, most states designate either the state senate president or state house speaker as next in line.⁷⁷

The need for a successor *beyond* the lieutenant governor arises more frequently than might be expected, because state constitutions have historically made it difficult to fill lieutenant-gubernatorial vacancies.⁷⁸ As originally written, the typical succession provision in a state constitution provides that “the powers and duties of the office” devolve upon the

67. Quinn Yeargain, *Democratizing Gubernatorial Succession*, 73 RUTGERS UNIV. L. REV. 1145, 1164–67 (2021) [hereinafter Yeargain, *Democratizing Gubernatorial Succession*].

68. In 2022, Arizona voters adopted Proposition 131, which amended the state constitution to create a Lieutenant Governor for the first time in the state’s history. Stacey Barchenger, *Arizona Will Elect Its First Lieutenant Governor in 2026. What to Know About the Role*, ARIZ. REP. (Sept. 21, 2023, at 06:00 MT), <https://www.azcentral.com/story/news/politics/arizona/2023/09/21/arizona-will-elect-its-first-lieutenant-governor-in-2026-what-to-know/70848159007/> [https://perma.cc/8PP3-TCW3]. A lieutenant governor will be elected on a team-ticket with the governor at the 2026 gubernatorial election. *Id.*

69. Yeargain, *Democratizing Gubernatorial Succession*, *supra* note 67, at 1146–47.

70. *Id.* at 1155.

71. *Id.* at 1173.

72. *Id.* at 1164.

73. *Id.* at 1155–56.

74. *Id.* at 1164–67.

75. Quinn Yeargain, *One Vote, Two Winners: Team-Ticket Gubernatorial Elections and the Need for Further Reform*, 75 U. MIA. L. REV. 751, 757–61 (2021) [hereinafter Yeargain, *Team-Ticket Gubernatorial Elections*].

76. 3 U.S.C. § 19(b).

77. See Quinn Yeargain, *Recasting the Second Fiddle: The Need for a Clear Line of Lieutenant Gubernatorial Succession*, 74 S.C. L. REV. 53, 76–79 (2022) [hereinafter Yeargain, *Lieutenant Gubernatorial Succession*].

78. *Id.* at 60–66.

lieutenant governor.⁷⁹ When confronted with this sort of provision, most state supreme courts emphasize that the constitution does not devolve the *office* to the lieutenant governors, but rather the "powers and duties."⁸⁰ As a result, even in the event of a permanent gubernatorial vacancy, the lieutenant governor may technically remain as lieutenant governor while merely *acting* as governor.⁸¹ In such a case, no lieutenant-gubernatorial vacancy exists.⁸² Over time, many of these provisions were rewritten, and now make clear that the lieutenant governor becomes governor in the event of a permanent vacancy.⁸³ Still, in many states, a governor might nominally be the "acting" governor.⁸⁴

During a temporary vacancy, it is clear that the person exercising gubernatorial power is only the acting governor. This raises other questions, though. Can an acting governor exercise the full scope of gubernatorial power? Can an acting governor exercise the powers of two separate offices? Is an acting governor compensated as though they are the sitting governor?

In most states, acting governors are empowered to act just as the governor would be.⁸⁵ Their designation as merely "acting" does not usually deprive them of gubernatorial power.⁸⁶ Depending on the acting governor's original office (i.e., the office they hold that puts them in the

79. See, e.g., CAL. CONST. of 1849, art. V, § 17; KAN. CONST. of 1859, art. I, § 11.

80. See, e.g., *State ex rel. Murphy v. McBride*, 70 P. 25, 26 (Wash. 1902).

81. See *id.*

82. See Richard H. Hansen, *Executive Disability: A Void in State and Federal Law*, 40 NEB. L. REV. 697, 707-09 (1961).

83. See, e.g., PA. CONST. art. IV, § 13 ("In the case of the death, conviction on impeachment, failure to qualify or resignation of the Governor, the Lieutenant Governor shall become Governor for the remainder of the term and in the case of the disability of the Governor, the powers, duties and emoluments of the office shall devolve upon the Lieutenant Governor until the disability is removed.").

84. Yeagain, *Lieutenant Gubernatorial Succession*, *supra* note 77, at 93-95.

85. See, e.g., *In re Comm'n on the Governorship of Cal.*, 603 P.2d 1357, 1364 (Cal. 1979) (holding that "[t]he command that the Lieutenant Governor 'act as Governor' during the Governor's absence places upon the Lieutenant Governor complete, albeit temporary, responsibility for '[the] supreme executive power of the State' and for '[seeing] that the law is faithfully executed'" (citations omitted); *People ex rel. Holmes v. Babb*, 111 N.E.2d 316, 317 (1953) (holding that the acting governor "is the executive authority of the State"); *State ex rel. Weeks v. Olson*, 259 N.W. 83, 85 (N.D. 1935) ("Neither the Constitution nor statutes limits the powers or duties which devolve upon the acting governor, in case of the death, impeachment, resignation, failure to qualify, absence from the state, removal from office, or the disability of the governor.").

86. See, e.g., discussion *supra* Introduction. There are some exceptions. In New Hampshire, for example, the Attorney General has suggested that an acting governor "should act only where it is necessary to do so." 1987 N.H. Op. Att'y Gen. 1, 8. "Any matter which is other than ceremonial or which does not require immediate action should be deferred until the Governor returns." *Id.*

line of succession in the first place), they may be required to surrender that office's power while acting as governor. Some states bar their lieutenant governor from simultaneously serving as acting governor and presiding over the state senate.⁸⁷ Similarly, though some states have seen state senate presidents acting as governors while simultaneously holding onto their legislative powers,⁸⁸ these exercises of power are harder to unpack. Historically, state courts have allowed a state senate president acting as governor to sign a bill in their capacity as state senate president, as required by their state constitution or legislative rules, and then a second time in their capacity as acting governor to bring it into law.⁸⁹ A secretary of state acting as governor can likewise exercise both their own office's powers and those of the governor, too.⁹⁰ However, courts and attorneys general have raised serious separation-of-powers concerns in the modern era when a legislator simultaneously acts as an executive branch official, or vice versa.⁹¹

87. See, e.g., Letter from Alan I. Gilbert, Minn. Solic. Gen., to Kimberly Slay Holmes, Gen. Couns. to Gov. Mark Dayton (Dec. 21, 2017), <https://www.scribd.com/document/367701963/Attorney-General-Lori-Swanson-s-advisory-opinion> [<https://perma.cc/EF99-J3FW>] (explaining that “[t]he simultaneous discharge of executive and legislative branch functions” by the Senate President becoming Lieutenant Governor “implicates the incompatibility doctrine, as well as principles of separation of powers”); Kevin M. Abel, *The Constitutional Mandate That the Lieutenant Governor Presides over the Senate*, 27 OKLA. CITY U. L. REV. 645, 658 (2002) (noting that in some states, “[t]he Senate President’s right to preside is not abrogated when the Governor is temporarily absent from the state and the Lieutenant Governor provisionally acts as the Governor”).

88. Jason A. Cabrera, Note, *The Right and Wrong Ways to Reform the Gubernatorial Absence Provision of the New Jersey Constitution*, 44 RUTGERS L.J. 271, 298–300 (2014) (describing common practice of state senate presidents in New Jersey acting as governor while continuing to serve in the State Senate); Yeagain, *Democratizing Gubernatorial Succession*, *supra* note 67, at 1171–72 (describing 1895 situation in Delaware in which the acting Governor attempted to vote in the State Senate for a U.S. Senator).

89. See, e.g., *Simon v. State*, 111 S.W. 991, 992–93 (Ark. 1908).

90. See, e.g., *Soto v. Superior Court*, 949 P.2d 539, 541–42 (Ariz. Ct. App. 1997) (holding that the Secretary of State, while acting as Governor, can exercise the powers of both offices and canvass votes for a statewide election); *Olcott v. Hoff*, 181 P. 466 (Or. 1919) (holding that the Secretary of State, while acting as Governor, can exercise two votes on the State Board of Control). These decisions have not been handed down without controversy. See *id.* at 474 (McBride, C.J., concurring) (arguing that the dual exercise of power caused “the public [to] lose[] the safeguard that was intended by the Constitution”).

91. See, e.g., *Lawless v. Jubelirer*, 789 A.2d 820, 831 (Pa. Commw. Ct. 2002) (holding that the Pennsylvania Constitution requires the President Pro Tempore of the State Senate to “vacate his seat” when becoming Governor, but not Lieutenant Governor); Travis Lynch, *The Problem with the Lieutenant Governor: A Legislative or Executive Position Under the Separation of Powers Clause*, 84 MISS. L.J. SUPRA 87, 104–11 (2015) (summarizing caselaw regarding the constitutionality of lieutenant governors’ attempted exercises of legislative power).

Finally, acting governors are commonly compensated for their time as governor with a prorated share of the governor's salary,⁹² which is one of the aspects of gubernatorial succession that attracts the most public attention.⁹³ For example, when Woodrow Wilson was Governor of New Jersey, his pay was docked while he was out of state in 1911, campaigning for the Democratic nomination for President.⁹⁴ Historically, governors have been compensated much more generously than lieutenant governors,⁹⁵ providing acting governors with an incentive to nickel-and-dime the state treasury for their tenure as governor, however brief it was.⁹⁶ Claims for salary—whether formal lawsuits or simply informal requests—also provided a backdoor way of litigating whether the putative acting governor actually *was* acting as governor.⁹⁷ Today, some states have adopted statutory provisions that automatically compensate acting governors for their service.⁹⁸

B. Absence from the State

Today, the constitutions in twenty-eight states expressly devolve gubernatorial power to the designated successor during at least some gubernatorial absences from the state.⁹⁹ The most common type of provision, used in twenty-one state constitutions, specifies that, during the governor's "absence from the state," the lieutenant governor acts as governor. Another three specifically provide that during a governor's

92. See, e.g., *State ex rel. Chatterton v. Grant*, 73 P. 470, 475–76 (Wyo. 1903); *Clifford v. Heller* 63 N.J.L. 105, 110–11 (N.J. 1899); *State ex rel. Sadler v. La Grave*, 45 P. 243, 245 (Nev. 1896); *Chadwick v. Earhart*, 4 P. 1180, 1181 (Or. 1884).

93. Mike Ward, *When Governor's Away, a Stand-in Gets Paid*, AUS. AM.-STATESMAN, Feb. 23, 1992, at B1 ("Nearly \$105,000 was spent on fill-in chief executives between 1981 and 1991, enough to pay the governor's salary for more than a year, according to state documents."); Wayne W. Weidie, *State Has Its Own Salary Situation*, CLARKSDALE PRESS REG., Feb. 4, 1989, at 5A.

94. *Edwards to Dock Gov. Wilson \$800*, JERSEY J., May 25, 1911, at 1.

95. See, e.g., COUNCIL OF STATE GOV'TS, *THE BOOK OF THE STATES 1978–1979*, 130 (1978) (comparing salaries of governors and lieutenant governors).

96. John Corlett, *More About Charley Gossett And Salary He May Not Get*, IDAHO DAILY STATESMAN, Apr. 18, 1941, at 2 ("If, perchance, Charley Gossett doesn't get paid for being governor of Idaho while Gov. Chase A. Clark is in Washington, he'll become the martyr to the cause of underpaid lieutenant governors.").

97. See, e.g., Richard H. Hansen, *Executive Disability: A Void in State and Federal Law*, 40 NEB. L. REV. 697, 719 (1961) (noting that the lieutenant governor, who claimed to be acting governor, "claimed the governor's salary for the[] periods" in which the governor was out of the state, triggering litigation).

98. See, e.g., IDAHO CODE § 67-805 (1977); LA. STAT. ANN. § 49:201 (1996).1; N.M. STAT. ANN. § 8-1-1(B) (1971); N.C. GEN. STAT. § 147-11.1(f) (1961).

99. See *infra* Table 1.

“temporary absence,” the lieutenant governor exercises the powers of governor.¹⁰⁰ Three others require a lengthier gubernatorial absence to devolve power: “more than twenty days” in Alabama,¹⁰¹ “more than 45 consecutive days” in Montana,¹⁰² and a “continuous absence” in South Dakota.¹⁰³ While several state constitutions have historically devolved power upon the governor’s “removal from the state,”¹⁰⁴ the Oklahoma Constitution is the only one that currently uses that phrase in the context of a governor’s absence.¹⁰⁵ Finally, twenty-two constitutions do not expressly devolve gubernatorial power during an absence from the state. These different provisions, as well as the states that currently have them, are detailed below in Table 1.¹⁰⁶

100. *See infra* Table 1.

101. ALA. CONST. art. V, § 127.

102. MONT. CONST. art. VI, § 14(2).

103. S.D. CONST. art. IV, § 6.

104. *See, e.g.*, VA. CONST. of 1902, art. V, § 78.

105. OKLA. CONST. art. VI, § 16.

106. However, even in the absence of an explicit textual provision requiring that gubernatorial power transfer when the governor leaves the state, other legal mechanisms may still do so. *See, e.g.*, ME. REV. STAT. tit. 37-B, § 742(1)(A) (2025) (“If the Governor is temporarily absent from the State or is otherwise unavailable, the next person in the State who would act as Governor if the office of the Governor were vacant may, by oral proclamation, declare the fact that a civil emergency exists or appears sufficiently imminent to activate emergency plans in any or all areas of the State.”); *id.* tit. 38, § 547 (2025) (same). The Washington Constitution defines the causes of disability only as “removal, resignation, death or disability,” WASH. CONST. art. III, § 10, yet since 1890, the Governor has been statutorily required to “notify the lieutenant governor” of their absence, and “during such absence the lieutenant governor shall perform all the duties of the governor.” Act of Feb. 25, 1890, ch. 20, § 6, 1889 Wash. Sess. Laws 627, 629 (codified at WASH. REV. CODE ANN. § 43.06.040 (West 2025)). Finally, as discussed *infra* Section III.A.2, though state officials and some citizens have attempted to invoke “disability” provisions to trigger a temporary gubernatorial vacancy in the event of an absence, courts have largely rejected these efforts. *See, e.g.*, Raftery, *supra* note 62, at 184–88.

Table 1: Gubernatorial Absence Provisions by States

Provision	Example	No.	States
"Absence" or "absent"	"When the Governor shall be absent from the State . . . the Lieutenant Governor shall discharge the duties of said office until the Governor be able to resume his duties[.]" ¹⁰⁷	21	AZ, CA, CO, CT, HI, ID, MA, MI, MS, MO, NE, NV, NH, NJ, NM, NY, NC, TX, VT, WI, WY
"Temporary absence"	"When the governor is temporarily absent from the state, the lieutenant governor shall act as governor." ¹⁰⁸	3	AK, LA, SC
Continuous absence	"If the governor shall be absent from the state over twenty days, the secretary of state shall notify the lieutenant governor, who shall enter upon the duties as governor[.]" ¹⁰⁹	3	AL, MT, SD
"Removal from the state"	"In case of. . . removal from the State [of the Governor] . . . the said office, with its compensation, shall devolve upon the Lieutenant Governor for the residue of the term or until the disability shall be removed." ¹¹⁰	1	OK
None	n/a	22	AR, DE, FL, GA, IL, IN, IA, KS, KY, ME, MD, MN, ND, OH, OR, PA, RI, TN, UT, VA, WA, WV

107. MISS. CONST. art. V, § 131.

108. LA. CONST. art. IV, § 19.

109. ALA. CONST. art. V, § 127.

110. OKLA. CONST. art. VI, § 16.

Today, fewer than half of state constitutions *automatically* devolve gubernatorial power when the governor leaves the state.¹¹¹ Historically, far more states did so. In the early nineteenth century, three-fourths of states provided that, in the event of a governor's "absence" from the state, power transferred to their designated successor.¹¹² Several states with absence provisions included a now-antiquated exception, which allowed the governor to "continue to be commander-in-chief" when out of the state and "at the head of a military force."¹¹³

But beginning in the 1850s, as states rewrote their constitutions (sometimes for the first time since joining the Union¹¹⁴), and as new states were admitted, the percentage of state constitutions with "absence" provisions decreased.¹¹⁵ Several states that underwent constitutional rewrites in the 1850s—Indiana, Iowa, and Ohio—eliminated their provisions altogether.¹¹⁶ During the same period of time, and later, during Reconstruction-era state constitutional conventions, other states switched from "absence" to "removal" language.¹¹⁷ Few states ever switched to

111. See *supra* Table 1.

112. Virginia's 1776 and 1830 constitutions and West Virginia's 1863 constitution went even further, devolving gubernatorial power if the governor left the "seat of Government." VA. CONST. of 1776, pt. 2, ¶ 9; VA. CONST. of 1830, art. IV, § 5; W. VA. CONST. of 1863, art. V, § 6. State constitutions have historically required the governor, along with other statewide officers, to maintain a residence and to keep their offices at the state capitol, see Ashley Faulker, Note, *The Governor's Mansion is a House, Not a Home: Requiring Executives to Live at the Seat of Government*, 123 W. VA. L. REV. 645, 650–62 (2020) (surveying state requirements for gubernatorial residence), but other than Virginia and West Virginia, none has devolved power if the governor leaves the capitol.

113. ARK. CONST. amend. VI, § 4 (added 1926); CAL. CONST. of 1849, art. V, § 17; CAL. CONST. of 1879, art. V, § 16; MICH. CONST. of 1850, art. V, § 12; MICH. CONST. of 1908, art. VI, § 16; NEV. CONST. art. V, § 18; N.Y. CONST. of 1777, art. XX; N.Y. CONST. of 1921, art. III, § 6; N.Y. CONST. of 1846, art. IV, § 6; N.Y. CONST. of 1894, art. IV, § 6; N.Y. CONST. of 1938, art. IV, § 5; S.C. CONST. of 1778, art. VIII; WIS. CONST. of 1848, art. V, § 7.

114. Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS: J. FEDERALISM 57, 63–68 (1982).

115. See *infra* Figure 1.

116. Contrast IND. CONST. of 1816, art. IV, § 17 ("absence from the State"), with IND. CONST. art. V, § 10, and IOWA CONST. of 1846, art. IV, § 18 ("absence from the State"), with IOWA CONST. art. IV, § 17, and OHIO CONST. of 1802, art. II, § 12 ("absence from the State"), with OHIO CONST. art. III, § 15.

117. Contrast ARK. CONST. of 1864, art. VI, § 23 ("absence from the State"), with ARK. CONST. of 1868, art. VI, § 10 ("removal from the State"), and MD. CONST. of 1776, art. XXXIV ("absence of the Governor"), with MD. CONST. of 1851, art. II, § 7 ("removal from the State"), and MO. CONST. of 1820, art. VI, § 16 ("absence from the State"), with MO. CONST. of 1865, art. V, § 14 ("removal from the State"), and S.C. CONST. of 1790, art. II, § 5 ("absence from the State"), with S.C. CONST. of 1865, art. II, § 9 ("removal from the State"), and VA. CONST. of 1830, art. IV, § 5 ("absence of the governor from the seat of government"), with VA. CONST. of 1850, art. V, § 9 ("removal from the state"). Some of

having an "absence" provision from not having one at all, though Mississippi did from its 1832 to 1868 constitutions,¹¹⁸ and after controversy over gubernatorial succession in 1919, Oregon did so by a 1920 constitutional amendment.¹¹⁹

Beginning in the 1960s and 1970s, as states convened constitutional conventions to modernize their governmental institutions, some started altering their "absence" provisions.¹²⁰ Voters in twenty-three states with absence provisions were proposed new constitutions or revised executive branch articles from 1960 to the present, representing thirty-one proposed rewrites in total, the results of which are summarized in Table 2 below:

these changes were brief. Arkansas's 1874 constitution and Missouri's 1875 constitution both reverted back to "absence" provisions. ARK. CONST. of 1874, art. VI, § 12; MO. CONST. of 1875, art. V, § 16.

118. Contrast MISS. CONST. of 1832, art. V, § 17 (no absence provision), with MISS. CONST. of 1868, art. V, § 17 ("absent from the State").

119. The controversy was borne out of the 1919 decision by the Oregon Supreme Court in *Olcott v. Hoff*, 181 P. 466 (Or. 1919), that the Secretary of State, upon becoming Acting Governor, could collect both offices' salaries and hold two votes on the Board of Control. See discussion *supra* note 90. Accordingly, in 1920, Oregon voters approved a change to the state constitution's gubernatorial succession provision, which overturned the holding in *Olcott* and required a special election to fill a gubernatorial vacancy. OR. CONST. art. V, § 8 (amended 1920); BEN W. OLCOTT, OR. SEC'Y OF STATE, PROPOSED CONSTITUTIONAL AMENDMENTS AND MEASURES (WITH ARGUMENTS) TO BE SUBMITTED TO THE VOTERS OF OREGON AT THE SPECIAL GENERAL ELECTION, FRIDAY, MAY 21, 1920, at 15-16 (1920). The amendment also adopted a requirement that gubernatorial power devolve to the Secretary of State upon the Governor's absence from the state, which did not exist in the state's original constitution, see OR. CONST. art. V, § 8 (1857), but this change was undiscussed in the voter pamphlet. See OLCOTT, *supra*, at 15-16.

120. See *infra* Table 2.

*Table 2: Proposed Modifications to Gubernatorial Absence Provisions
(1960–present)*

Type of revision	Ratifying states	No.	Rejecting states	No.
Elimination of automatic succession during absences	IL (1970), KY (1992), VA (1971), MD (1970), ND (1996), UT (1980)	6	AR (2002), KY (1966), NM (1969), ND (1972, 1980, 1986, 1988), OR (1970)	8
Succession only during “continuous” absences or absences of specified lengths	MT (1972), SD (1972)	2	AR (1970, 1980)	2
Succession during “temporary” absences	LA (1974), SC (1972)	2	ID (1970)	1
No change	CT (1965), HI (1968, 1978), MI (1963), RI (1986), CA (1974), CO (1974), NC (1971)	8	NY (1967), UT (1974)	2

While constitutional (or article) rewrites that proposed less dramatic change to absence provisions were far more likely to receive voter approval than the more significant changes, it is difficult to extrapolate too much from this. First, stipulating that constitutional convention records are flawed,¹²¹ even in the states with more dramatic proposals to absence

121. Maureen E. Brady, *Uses of Convention History in State Constitutional Law*, 2022 WIS. L. REV. 1169, 1174–78 (noting that the production of many state constitutional records were “delayed”; some proceedings were “secret” and produced no written records; many state constitutional conventions “were simply documented poorly” in “sometimes-skeletal journal[s]”; and remarks were sometimes manipulated during and after the fact).

provisions, formal records and popular media accounts include comparatively little discussion about the changes to gubernatorial absences.¹²² To the extent that constitutional conventions or state legislatures altered executive branch articles, far greater attention was focused on other, more immediately salient provisions.¹²³ Second, the rejected constitutions were frequently voted down for reasons that had little to do with the structural changes that they proposed—much less about absence provisions specifically.¹²⁴

Outside of those more global changes—like wholesale constitutional rewrites or redrafted executive branch articles—some states contemplated more targeted changes to their constitutional procedures for gubernatorial succession. This article has already surveyed some of the conditions that precipitated changes, like uncertainty over whether a gubernatorial successor is “governor” or merely “acting governor” upon ascending to the role,¹²⁵ or whether a governor is “disabled” to the point of causing a vacancy.¹²⁶ A concern that bubbled up during the height of the Cold War, and again after the September 11 terrorist attacks, was what to do when the constitutional line of succession ran out, either in the event of a mass-casualty event brought on by nuclear war or terrorism¹²⁷—or by sheer

122. See, e.g., CLAY MYERS, OR. SEC’Y OF STATE, VOTERS’ PAMPHLET: DEMOCRATIC PARTY PRIMARY NOMINATING ELECTION: MAY 26, 1970, at 10 (1970) [hereinafter 1970 OREGON VOTER PAMPHLET] (statement of committee) (omitting change from summary in voter pamphlet). But see ILL. CONST. CONVENTION, PROPOSED 1970 CONSTITUTION FOR THE STATE OF ILLINOIS: OFFICIAL TEXT WITH EXPLANATION 9–10 (1970) [hereinafter PROPOSED 1970 ILLINOIS CONSTITUTION] (noting, in an annotated guide to the proposed constitution, that a “section eliminates as a cause of gubernatorial ‘disability’ a short absence by the Governor from the State”).

123. See 1970 OREGON VOTER PAMPHLET, *supra* note 122, at 10 (summarizing proposed changes to executive branch article); PROPOSED 1970 ILLINOIS CONSTITUTION, *supra* note 122, at 2, 4 (same); Patrick Condon, *Four N.D. Measures Create Little Controversy*, FORUM (Fargo, N.D.), June 6, 1996, at A1, A14 (same); Douglas L. Parker, *Hopefuls Dial for Votes*, SALT LAKE TRIB., Nov. 4, 1980, at 1, 2 (same).

124. See, e.g., Robert W. Meriwether, *The Proposed Arkansas Constitution of 1970*, 50 NEB. L. REV. 600, 621 (1971) (summarizing reasons for failure of 1970 Arkansas constitution); Calvin R. Ledbetter, Jr., *The Proposed Arkansas Constitution of 1980*, 60 ARK. HIST. Q. 53, 70–74 (2001) (summarizing reasons for failure of 1980 Arkansas constitution); Lindy High, *New Gem Constitution Defeated by Electorate*, IDAHO STATESMAN, Nov. 4, 1970, at 11; *New Constitution, 19-Year Vote Lose*, CAP. J. (Salem, Or.), May 27, 1970, at 1; see also Charles R. Adrian, *Trends in State Constitutions*, 5 HARV. J. ON LEGIS. 311, 328–31 (1968) (discussing outcomes of constitutions proposed in the 1960s).

125. See *supra* notes 77–83 and accompanying text.

126. Raftery, *supra* note 62, at 169–81.

127. Eric R. Daleo, *State Constitutions and Legislative Continuity in a 9/11 World: Surviving an “Enemy Attack,”* 58 DEPAUL L. REV. 919, 930–41 (2009).

coincidence.¹²⁸ Some state legislatures and constitutional conventions proposed discrete amendments to voters that filled in some of these details.¹²⁹

In a handful of instances, individual amendments proposed changes to absence procedures. In 1972, a group of voters formed Oregonians to Reform Gubernatorial Succession and initiated a constitutional amendment to reform the succession procedures in the state constitution.¹³⁰ The group's proposal modified the order of succession (and the eligibility of officials to serve as governor) and abolished the absence provision.¹³¹ The 1984 New Hampshire Constitutional Convention successfully proposed a small change to the absence procedure, which specified that an out-of-state governor retained "the power and authority to transact [official] business" when outside of the state.¹³² And in two states—Arkansas (2016) and Rhode Island (1992)—voters approved discrete amendments that eliminated succession procedures.¹³³

The number of states with absence provisions has decreased since the mid-twentieth century. In 1950, slightly more than two-thirds of state constitutions automatically devolved gubernatorial power upon the governor's "absence" from the state.¹³⁴ Since then, that number has declined to slightly more than half, as depicted in Figure 1 below:

128. In 1947, Oregon Governor Earl Snell, as well as State Senate President Marshall Connett and Secretary of State Robert Farrell, the two officials immediately in line to succeed the governor, were on a plane that crashed. Kami Horton, *75 Years Ago, A Plane Crash Changed Oregon Politics*, OR. PUB. BROAD. (Oct. 28, 2022, at 08:00 ET), <https://www.opb.org/article/2022/10/28/75-years-ago-a-plane-crash-changed-oregon-politics/> [<https://perma.cc/L87F-FE9Q>]. State House Speaker John Hall was subsequently sworn in as Governor. *Id.* This is the only such instance of a double (or, in this case, triple) vacancy occurring. *Id.*

129. Daleo, *supra* note 127, at 930–41.

130. *Petition Seeks to Bar Schools' Property Tax Use*, OREGONIAN, July 7, 1972, at 1; CLAY MYERS, OR. SEC'Y OF STATE, STATE OF OREGON VOTERS' PAMPHLET: GENERAL ELECTION, NOVEMBER 7, 1972, at 31 (1972), <https://digitalcollections.library.oregon.gov/nodes/view/24539> [<https://perma.cc/B4FH-WNET>] [hereinafter 1972 OREGON VOTER PAMPHLET].

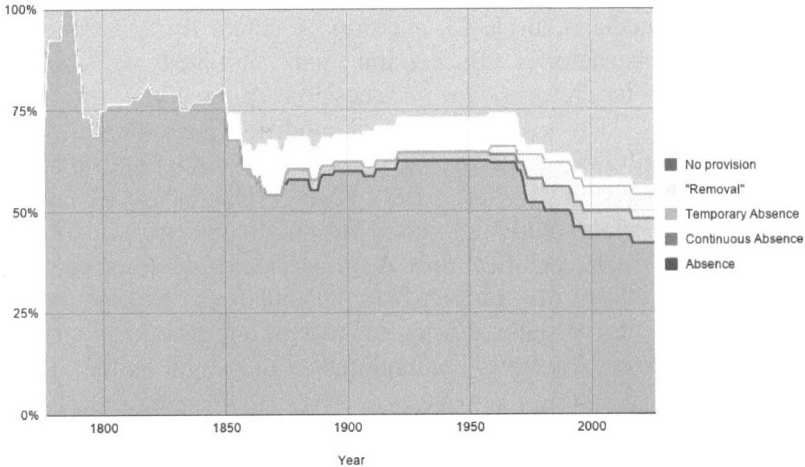
131. See 1972 OREGON VOTER PAMPHLET, *supra* note 130, at 31; OR. CONST. art. V, § 8a.

132. N.H. CONST. pt. II, art. 49 (amended 1984).

133. ARK. CONST. amend. 96 (added 2016); R.I. CONST. art. IX, § 9 (amended 1992).

134. See *infra* Figure 1.

Figure 1: Percentage of States with Different Gubernatorial Succession Provisions



II. ACTING GOVERNORS' EXERCISES OF GUBERNATORIAL POWER

The devolution of gubernatorial power to the designated successor—whether the lieutenant governor, secretary of state, state senate president, state house speaker, or whomever else—was not just a theoretical exercise. Those officials, designated by their constitutions as acting governors, were entitled to act. And many did.

In this Part, I identify some of the common exercises of these powers. To build the historical corpus for this Part, I conducted a content review of caselaw and archived newspapers to identify some of the salient or striking examples of how acting governors exercised power. I organize these powers into five categories, each of which I explore in a separate section: (a) signing or vetoing legislation; (b) convening state legislatures; (c) granting clemency; (d) appointing or removing state officials; and (e) other executive action.

A. Signing or Vetoing Legislation

Every state constitution in effect today allows the governor to sign or veto legislation; almost all also allow the governor a line-item veto.¹³⁵ And, like the U.S. Constitution, state constitutions require that action be

135. Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171, 1175 (1993).

taken on legislation presented to the governor within a set period of time, which may vary depending on whether the legislature is in session.¹³⁶ Acting governors routinely sign or veto legislation while exercising gubernatorial power.¹³⁷ Most of the time, these actions are hardly controversial—even in states where the governor and lieutenant governor are elected separately, or where an official outside the governor's office is acting as governor.¹³⁸ And, where an acting governor might take a different view of legislation than the governor, they will frequently abstain from going rogue.¹³⁹

On occasion, however, acting governors exercise their own judgment. In 1951, Nebraska Lieutenant Governor Charles Warner served as acting governor while Governor Val Peterson was out of the state for several days.¹⁴⁰ In the hours before Peterson returned to the state, Warner vetoed a bill that would have imposed a new tax on wheat and used the proceeds to fund research and marketing, much to the chagrin of the bill's sponsor.¹⁴¹ Lieutenant Governor Thelma Stovall, acting as governor in 1978 when Governor Julian Carroll was on a vacation to South Carolina, vetoed the state legislature's resolution that purported to rescind its

136. Table 3.16: *Enacting Legislation: Veto, Veto Override and Effective Date*, BOOK OF THE STATES: COUNCIL OF STATE GOV'TS (2023), <https://bookofthestates.org/tables/2023-3-16/> [<https://perma.cc/G9NQ-TN3K>].

137. See, e.g., Adam Beam, *Lt. Gov. Kounalakis Becomes First Woman to Sign Bill into State Law in California*, L.A. TIMES (Mar. 31, 2022, at 16:31 PT), <https://www.latimes.com/california/story/2022-03-31/first-woman-to-sign-bill-into-state-law-in-california> [<https://perma.cc/4ZUY-8J9W>].

138. See, e.g., Press Release, Gov. Phil Murphy, Acting Governor Scutari Signs Bill Establishing Design Professional Self-Certification Program (Aug. 22, 2024), <https://www.nj.gov/governor/news/news/562024/20240822f.shtml>

[<https://perma.cc/496H-F9S9>]; Press Release, Gov. Gretchen Whitmer, Lt. Governor Gilchrist Signs Bipartisan Bills Reforming Michigan's Juvenile Justice System (Dec. 12, 2023), <https://www.michigan.gov/whitmer/news/press-releases/2023/12/12/gilchrist-signs-bipartisan-bills-reforming-michigans-juvenile-justice-system>

[<https://perma.cc/TCC8-6RCE>]; Press Release, Gov. Gavin Newsom, Acting Governor Eleni Kounalakis Signs Legislation to Support State's COVID-19 Preparedness (Mar. 2, 2023), <https://www.gov.ca.gov/2023/03/02/acting-governor-eleni-kounalakis-signs-legislation-to-support-states-covid-19-preparedness/> [<https://perma.cc/86JT-95QQ>].

139. See, e.g., *Vermont's Viet Bonus Bill Hanging Fire*, PORTLAND PRESS HERALD, EVENING EXPRESS, Mar. 29, 1968, at 22 ("House Speaker Richard Mallary [acting as governor] says although he would like to sign the Vietnam veterans bonus bill, he does not want to take advantage of Gov. Philip H. Hoff's absence.").

140. Pohlenz, *supra* note 39, at 1.

141. *Id.*

ratification of the Equal Rights Amendment,¹⁴² which won her national attention.¹⁴³

Once the governor acts on a piece of legislation, it cannot later be undone.¹⁴⁴ In 1907, the Acting Governor of Arkansas signed a proposed piece of legislation, but did not return it to the legislature or file it with the Secretary of State.¹⁴⁵ The Arkansas Supreme Court unanimously rejected the subsequent challenge to the bill's enactment, concluding that, "[w]hen, in token of approval, [the governor] signs it, intending it to become a law, then it has become a law, and that is the end of his power over it."¹⁴⁶

The reverse occurred in 1981, where an acting governor attempted to sign something that the *de jure* governor had effectively vetoed, and that effort was rejected, too.¹⁴⁷ Nebraska Lieutenant Governor Roland Luedtke used his authority as President of the Nebraska Legislature to pass a bill and later as Acting Governor to reinforce his own authority to bring it into law.¹⁴⁸ When a vote on passage of a piece of banking legislation tied in the legislature, 24-24, Luedtke used his power as presiding officer to break the tie, enabling the bill's passage.¹⁴⁹ In turn, Governor Charles Thone refused to sign the bill and returned it to the legislature, concluding that Luedtke's vote was unlawful and that the bill had not passed.¹⁵⁰ But when Thone left the state shortly thereafter, Luedtke purported to sign it into law.¹⁵¹ The Nebraska Supreme Court ultimately held that the bill had not been properly enacted—both because the Lieutenant Governor could not vote on legislation, and because Thone's original return of the bill to the legislature prevented Luedtke from later acting on it.¹⁵²

142. Ray Cohn, *Stovall to Get Chance to Veto ERA Rescission*, SUNDAY HERALD-LEADER (Lexington, Ky.), Mar. 19, 1978, at 1.

143. Bill Osinski, *Mrs. Stovall is the Woman of the Hour in ERA Fight*, COURIER-J. (Louisville, Ky.), Mar. 30, 1978, at 1, 2.

144. See 1 SUTHERLAND STATUTORY CONSTRUCTION § 16:2 (7th ed.) ("After a bill has been signed into law, the discretionary powers of the governor with respect to it are at an end.")

145. *Powell v. Hays*, 104 S.W. 177, 179 (Ark. 1907).

146. *Id.* at 181-82.

147. *Court Test Waits for Bank Bill*, GRAND ISLAND INDEP., June 2, 1981, at 5.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Ctr. Bank v. Dep't of Banking & Fin. of State*, 313 N.W.2d 661, 663-64 (Neb. 1981). Three of the seven justices in *Center Bank* signed onto an opinion concurring in the result, and agreeing that "when the Governor returned [the bill] to the Legislature . . . the Legislature was required to reconsider the bill if it was to become law," but disagreeing with the conclusion as to the Lieutenant Governor's voting powers. See *id.* at 664 (Krivoshia, C.J., concurring in the result, and in part dissenting).

B. Convening State Legislatures

Of course, the power of an acting governor to sign or veto legislation is entirely contingent on the existence of pending legislation. Any governor leaving the state with an ounce of foresight (or a scintilla of doubt about their successor's good faith) has a strong incentive to clear their desk of pending bills before departing,¹⁵³ leaving the acting governor with little to do. Accordingly, the acting governor might attempt to produce such legislation—or at least raise the salience of their favored issues—by calling a special session of the state legislature.¹⁵⁴ State constitutions generally grant the governor the power to convene the state legislature, either generally or for a specified purpose.¹⁵⁵

Acting governors seeking to flex their authority have frequently attempted to call special sessions.¹⁵⁶ Kentucky has seen some of the most aggressive action by acting governors in this respect.¹⁵⁷ In 1935, while Governor Ruby Laffoon was in Washington, D.C., Lieutenant Governor Happy Chandler convened a special session for the purpose of adopting a law requiring political party nominations to be made by primaries, not

153. For that reason, in both the 1951 Nebraska and 1978 Kentucky examples, observers suggested that the actions taken by the acting governors were coordinated with, or at least not actively disapproved by, the *de jure* governors. Pohlenz, *supra* note 39, at 1 (noting that the legislative sponsor of a bill vetoed by the putative acting governor observed: "A lot of people are going to wonder why [the Governor] didn't arrange to have this matter taken care of before he left And it is curious he should be absent just when this thing came up"); Thomas J. Sheeran, *Acting Governor Vetoes Bill Rescinding ERA Ratification*, MESSENGER (Madisonville, Ky.), Mar. 20, 1978, at 1 (noting that "[t]he Carroll Administration has denied [Governor] Carroll left the state to enable Mrs. Stovall to veto the resolution").

154. Naturally, the governor must actually be out of the state when the call is issued, a lesson that Washington Lieutenant Governor Victor Meyers learned in 1938. *See State ex rel. Meyers v. Reeves*, 78 P.2d 590, 590 (Wash. 1938). Meyers, who was out of state from April fourteenth to nineteenth, returned to the state and wrote out a call for a special session. *Id.* He attempted to file the call with the Secretary of State on April nineteenth, but no one was in the office to receive the call. *Id.* He tried again the next morning, but when he did so, Governor Clarence Martin had been back in the state for *eight minutes*, thereby depriving him of his power to act. *Id.* The Washington Supreme Court relied on the Governor's physical presence in the state to avoid far more challenging questions as to whether Meyers would have been entitled to act at all. *See id.* at 593 (Robinson, J., concurring) (arguing that the Secretary of State was the Acting Governor until Martin returned); *see also id.* (Geraghty, J., concurring) (arguing that the Governor did not surrender his powers upon leaving the state lines).

155. E. Lee Bernick, *Special Sessions: What Manner of Gubernatorial Power?*, 26 ST. & LOCAL GOV'T REV. 79, 80 (1994).

156. *See, e.g., infra* notes 162–69.

157. *See, e.g., Chandler Calls for Special Session: Aim of Action Is Passage of Primary Law*, KY. POST, Feb. 6, 1935, at 1.

conventions.¹⁵⁸ Laffoon immediately returned to the state and attempted to revoke the call.¹⁵⁹ However, the Kentucky Court of Appeals¹⁶⁰ held that once the Governor “convene[d] the General Assembly in extraordinary session . . . [n]o continuing duty exists and there is no implied power to retract.”¹⁶¹ Chandler ultimately got his way. The legislature passed a mandatory primary election law, which Laffoon signed after losing the court battle.¹⁶² Forty years later, Lieutenant Governor Thelma Stovall called a special session while the Governor was out of the state to reduce a variety of state taxes,¹⁶³ which she had apparently waited months for an opportunity to do.¹⁶⁴

At the same time, the state legislature must be independently willing to go along with the session call for it to produce any action.¹⁶⁵ If the leaders of the legislature refuse to do so, they could simply refuse to conduct any business.¹⁶⁶ In 1908, Arkansas State House Speaker Allen Hamiter called a special session of the legislature while acting as governor in the absence of Governor Xenophon Pindall, who himself was acting as Governor in his capacity as State Senate President.¹⁶⁷ Upon his return to the state, Pindall attempted to revoke the proclamation, and suggested that the matter would be decided by the courts,¹⁶⁸ but the revocation proved unnecessary and no litigation followed. Though some members of the state legislature showed up for the special session, even if for their own

158. *Id.*

159. *Chandler Calls Extra Session; Laffoon Thinks He Can Revoke It: Governor Is on Way Back to Frankfort*, COURIER-J. (Louisville, Ky.), Feb. 7, 1935, at 1, 2.

160. At the time, the Kentucky Court of Appeals was the state’s court of last resort.

161. *Royster v. Brock*, 79 S.W.2d 707, 711–12 (Ky. Ct. App. 1935).

162. *Run-Off Primary Becomes Law as Laffoon Signs*, SPRINGFIELD SUN (Springfield, Ky.), Feb. 28, 1935, at A1, A12.

163. Richard Whitt, *Mrs. Stovall Calls Special Session of Legislature*, COURIER-J. (Louisville, Ky.), Nov. 18, 1978, at 1, 2 (“‘I was concerned about whether I was smart enough or wise enough to do it. I thought about it and decided I was,’ [Stovall] added.”).

164. Frank Ashley, *Special Session Bombshell Plotted for Months: Mrs. Stovall Waited ‘on Pins and Needles,’* COURIER-J. (Louisville, Ky.), Nov. 19, 1978, at A1, A24.

165. See, e.g., Scott Bauer, *Wisconsin Legislature Rejects Governor’s Special Session on Child Care Workforce*, PBS WIS. (Sept. 20, 2023), <https://pbswisconsin.org/news-item/wisconsin-legislature-rejects-governors-special-session-on-child-care-workforce/> [<https://perma.cc/8MNG-9LV2>] (“Republicans in the Senate and Assembly convened the session as required by law, but adjourned less than a minute later after taking no action. It’s a familiar show in Wisconsin, as Evers has called 12 previous special sessions that have largely gone this way.”).

166. *Id.*

167. *Hamiter Says it Will Meet Pindall Says It Will Not: Proclamation Was Revoked*, ARK. DEMOCRAT, May 15, 1908, at 1.

168. *Id.*

amusement,¹⁶⁹ nothing ultimately took place.¹⁷⁰ Neither chamber had a quorum to conduct business, and both were adjourned *sine die*.¹⁷¹

C. Granting Clemency

For much of American history, governors have had the unilateral authority to grant clemency—in the form of pardons, commutations, or reprieves—without receiving the approval of an independent board.¹⁷² Accordingly, given the relative ease with which pardons could be granted, they have frequently been one of the actions that acting governors could take in a short period of time. Regardless of who issued them, pardons have long been controversial.¹⁷³

In 1922, Mississippi Governor Lee Russell was out of the state for six hours to attend a Tennessee–Mississippi A&M college football game.¹⁷⁴ In the middle of Russell’s absence, Lieutenant Governor Homer Casteel issued two pardons.¹⁷⁵ As a newspaper contemporaneously reported, Casteel requested “pardon blanks” from Russell’s secretary and was refused, so Casteel “then procured, in some manner, a blank form and had two pardons typewritten.”¹⁷⁶ The Secretary of State refused to accept them until the Attorney General advised that Russell was out of the state.¹⁷⁷

169. 64 *Representatives and 24 Senators Assure Gov. Pindall of Their Support*, ARK. DEMOCRAT, May 17, 1908, at 1 (“While there are few who will openly admit that they will attend the session for the purposes set forth in the call, there are those who admit that they will be on hand to see what is to be done and likely participate in the initial proceedings.”).

170. *See Senators Dispersed*, ARK. DEMOCRAT, May 18, 1908, at 6.

171. *Legislature Adjourns*, SPRINGDALE NEWS (Springdale, Ark.), May 22, 1908, at 1.

172. Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardon Power from the King*, 69 TEX. L. REV. 569, 604–05 (1991).

173. *See, e.g., Bruce Schreiner, Too Many Pardons? Kentucky Lawmaker Wants a Limit After Former Governor Gave over 600 on His Way Out*, ASSOCIATED PRESS (Feb. 14, 2024, at 16:13 ET), <https://apnews.com/article/kentucky-legislature-gubernatorial-pardons-9980b0ed5eb5e8cd5d98ac235367366a> [<https://perma.cc/D3TE-6ZAH>]; *Outgoing Mississippi Governor Haley Barbour Under Fire After Pardoning 4 Killers*, NBC NEWS (Jan. 10, 2012, at 16:24 ET), <https://www.nbcnews.com/id/wbna45938284> [<https://perma.cc/6ERT-WS6Y>].

174. *Montgomery v. Cleveland*, 98 So. 111, 111 (Miss. 1923) (noting stipulation that, on November 11, 1922, “the Governor of Mississippi, Hon. Lee M. Russell, left the city of Jackson, about twelve-thirty a.m. for Memphis, Tenn., and was out of the State of Mississippi from about six o’clock a.m. November 11, 1922, until about twelve o’clock noon November 11, 1922”); *While Gov. Russell Crosses State Boundary, Lt.-Gov. Casteel Issues Pardons*, HATTIESBURG AM., Nov. 11, 1922, at 1, <https://www.newspapers.com/image/1125953915/> [<https://perma.cc/6VV9-JYCM>].

175. *Gov. Russell and Lt. Gov. in Clash over Two Pardons*, NATCHEZ DEMOCRAT, Nov. 12, 1922, at 1 [hereinafter *Russell–Casteel Clash*].

176. *Id.*

177. *Id.*

Meanwhile, Russell raced back to Mississippi to the small town of Horn Lake, "where he established temporary headquarters and formally announced his presence within the state and directed no action be taken on any orders that might have been issued."¹⁷⁸

Casteel's pardons were controversial not just because of their timing, but also who their beneficiaries were: two Black inmates who were convicted of serious crimes.¹⁷⁹ When state officials refused to honor the pardons, Casteel sought a writ of habeas corpus on their behalf.¹⁸⁰ During the litigation, he was represented by Woods Eastland—one of the state's most prominent attorneys, and the father of future U.S. Senator James Eastland, an ardent segregationist.¹⁸¹ Though the relationship between Russell and Casteel deteriorated during the litigation, Casteel apparently "regard[ed] the governor's bristling hostility as a rather huge joke."¹⁸² Casteel further said "I can't see why he is so peeved at me for doing exactly the same thing he did so often while he was in the lieutenant-governor's office."¹⁸³ Russell apparently resolved to never leave the state again,¹⁸⁴ but in 1923, he briefly did, enabling Casteel to pull the same move again.¹⁸⁵ The Mississippi Supreme Court ultimately upheld the pardons.¹⁸⁶

While few clemency stories were quite so dramatic, many were high-profile events that attracted significant media attention. Acting governors have signed stays of executions, commutations, outright pardons in high-

178. *Russell Hastens Back*, NATCHEZ DEMOCRAT, Nov. 12, 1922, at 1.

179. *Russell-Casteel Clash*, *supra* note 175, at 1 ("The pardons were issued to Horace Hoskins, sent up from Leflore county in 1918 on a conviction for rape and given a life term and Walter Cleveland, sentence for life from Sunflower county in 1908 on a charge of murder.").

180. *Casteel to Ask for Habeas Corpus Writ*, JACKSON DAILY NEWS, Nov. 17, 1922, at 4.

181. *Id.*

182. *Id.*

183. *Lt. Governor's Power Soon Is to Be Decided*, HATTIESBURG AM., Jan. 1, 1923, at 1 [hereinafter *Lieutenant Governor's Power*]; see also *Acting Governor Russell Hands out Two Pardons*, VICKSBURG POST, July 19, 1917, at 8 (noting that, while Governor Theodore Bilbo was out of the state, "Acting Governor Russell's first official act was to pardon H. A. Davis and J. B. Hannah, the first from Oakley farm, and the second from the Waynesboro limestone plant").

184. *Lieutenant Governor's Power*, *supra* note 183, at 1.

185. *Lt-Gov., Casteel Races to Jackson to Pardon Welborn; Russell Off*, HATTIESBURG AM., Sept. 7, 1923, at 2. Russell went to southern Mississippi and was briefly in New Orleans to purchase a train ticket back to Jackson. *Id.* Accordingly, Curtis Green, the state commander of the American Legion, alerted Casteel to that fact so that he could pardon Sharp Welborn, an ex-servicemember. *Id.* Casteel, the Secretary of State, and Green raced to complete the pardon before Russell entered the state. They ultimately beat him by eight minutes. *Id.*

186. *Montgomery v. Cleveland*, 98 So. 111, 115 (Miss. 1923).

profile murder cases¹⁸⁷ and for excessively sentenced inmates,¹⁸⁸ and, less honorably, issued clemency to political allies.¹⁸⁹ One acting governor issued a pardon to someone whom he personally represented when he was an attorney.¹⁹⁰ These pardons frequently received condemnation from newspapers,¹⁹¹ and sometimes triggered investigations, which seem to have been motivated more by outrage than actual allegations of impropriety.¹⁹²

The controversy motivated the de jure governors to challenge the acts of clemency, by refusing to honor them or by attempting to recall them. Though properly issued pardons cannot be revoked, some courts have refused to honor pardons for failure to fully comply with the procedures required by the state constitution or statutes.¹⁹³ This enabled de jure

187. *Executive Conflict Saves Negro's Neck: Murphree Commutes Sentence While Conner Absent*, COM. APPEAL (Memphis, Tenn.), Oct. 25, 1934, at 20; Pat Crow, *Nigh Signs Pardon for Killer While Hall Is Out of State*, TULSA WORLD, Nov. 18, 1974, at 1.

188. *Full Pardon Given to Ray Sandlovich*, LINCOLN ST. J., Apr. 23, 1920, at 1 (noting that Acting Governor issued pardon for a defendant sentenced to "two years in the penitentiary for receiving and selling stolen automobiles" where the county attorney had "promised" a recommendation of "clemency in the form of a fine instead of imprisonment," but the judge had rejected the recommendation); see also *Acting Governor to Save Newcomb*, SEATTLE POST-INTELLIGENCER, Aug. 29, 1913, at 3 (noting that Acting Governor issued commutation for death row inmate following statutory change abolishing death penalty).

189. *M'Call Is Busy While Gov'nor Hastens Home*, PARAGOULDS SOLIPHONE, Oct. 30, 1925, at 1 (noting that one of the pardons went to a former member of the Board of Control).

190. *Doubtful Clemency*, PUEBLO CHIEFTAIN, Feb. 21, 1922, at 4.

191. Editorial, *The "Pardoning" Governor*, TACOMA NEWS-TRIB., Oct. 12, 1923, at 18 (observing that the Acting Governor "had set himself up above the governor and the courts of the state and merely waited for an opportunity to act"); Editorial, *The Pardon*, LINCOLN WEEKLY ST. J., Apr. 28, 1920, at 4 ("The declaration of Lieutenant Governor Barrows that he had been waiting for an opportunity to pardon a convicted criminal and that he gloried in what he did, causes one to turn to the state constitution to see just how far such an act of treachery to the chief executive is authorized by the fundamental law.").

192. *Franklin Jury Fails to Indict*, CINCINNATI ENQUIRER, Jan. 28, 1960, at 1 ("The Franklin County Grand Jury today failed to return any indictments in the controversy surrounding executive clemency granted by Thelma Stovall as acting governor."); *No Evidence of Bad Faith Revealed in Kirk Case*, W. NEB. OBSERVER, Feb. 19, 1920, at 9 (noting that the Nebraska State Bar Commission issued a report, "relative to its investigation of the release of Beryl C. Kirk from the state penitentiary on a 'furlough' signed by State Senator Bushee, then acting governor," in which it found "no evidence to support the charges of bad faith or other misconduct on the part of attorneys or state officials involved in the case").

193. See, e.g., *Horton v. Gillespie*, 279 S.W. 1020, 1025 (Ark. 1926) (refusing to honor pardon where Acting Governor did not comply with state statute requiring him to attest that the pardon "was granted by me without application being made to me by an attorney or paid representative of" the pardoned man); *Nelson v. Hall*, 285 S.W. 386, 387-88 (Ark. 1926) (same). But see *In re Hooker*, 87 So.3d 401, 414 (Miss. 2012) (holding that a "facially valid pardon, issued by the governor, . . . may not be set aside or voided by the

governors to re-arrest the improperly pardoned prisoners.¹⁹⁴ And where the act of clemency is less than a full pardon or commutation—for example, a conditional pardon or a suspended sentence¹⁹⁵—it can be revoked by future executive action.¹⁹⁶

D. Appointing or Removing Officials

Under state constitutions and statutes, governors have significant authority to make appointments to fill vacancies, as well as concomitant power to remove officials, either at their pleasure or for specified misconduct.¹⁹⁷ Given the high number of state agencies, boards, bureaus, commissions, departments, and other entities, it seems statistically inevitable that multiple vacancies in gubernatorially appointed positions will exist when an acting governor is serving. Acting governors have exercised their powers here, too.¹⁹⁸

The most famous appointment by an acting Governor—which attracted national media attention, a landmark California Supreme Court

judicial branch, based solely on a claim that the procedural publication requirement of Section 124 was not met, or that the publication was insufficient”).

194. *Will Re-Arrest Men Pardoned by Acting Governor*, WORLD NEWS, (Roanoke, Va.) Jan. 12, 1926, at 4 (noting that, following the Arkansas Supreme Court’s decisions in *Gillespie* and *Hall*, the Governor would order the re-arrest of the pardoned inmates).

195. *Bilbo Seeks to Even Terms of Sentences*, YAZOO HERALD, Dec. 3, 1929, at 1 (noting that, following Lieutenant Governor Bidwell Adam’s decision to suspend the sentence of one man involved in a four-person robbery, Governor Theodore Bilbo suspended the sentences of the other three men and ordered the first man to be returned to prison).

196. *See Pope v. Wiggins*, 69 So.2d 913, 917–18 (Miss. 1954) (holding that a governor may revoke a suspended sentence or conditional pardon).

197. *See* Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537, 1570–71 (2019) (“Roughly half the states have caselaw stating that [gubernatorial] removal decisions are unreviewable or reviewed with substantial deference.”).

198. *E.g.*, John Robertson, *Luna Fills 13 State Positions*, ALBUQUERQUE J., July 22, 1994, at A1, A12 (in which the Lieutenant Governor “used his authority as acting governor to make 13 state appointments,” including to the State Human Rights Commission, Environmental Improvement Board, Commission on Indian Affairs, and Chiropractic Examiners Board, as well as the Director of the State Parks and Recreation Division); *Acting Governor Appoints 20 to State Boards*, JONESBORO SUN, Apr. 10, 1987, at 1, 2 (in which the Acting Governor “appointed 20 people to state boards and commissions,” including the State Cemetery Board, Board of Electrical Examiners, Health Services Commission, State Labor Board, Oil and Gas Commission, State Board of Optometry, State Podiatry Examining Board, Pollution Control and Ecology Commission, and State Board of Veterinary Medical Examiners); ‘Gov.’ *Musa Appoints Welfare Commissioner*, OR. DAILY J., July 23, 1963, at 1 (in which the Acting Governor appointed a member of the State Public Welfare Commission); *Shreveport Man Named on State Board*, SHREVEPORT TIMES, Nov. 10, 1942, at 2 (in which the Acting Governor appointed two members of the State Board of Public Welfare).

case,¹⁹⁹ and a prediction that a new phrase inspired by the Acting Governor's name would enter the political lexicon²⁰⁰—occurred when Lieutenant Governor Mike Curb made a nomination to a state appellate court during Governor Jerry Brown's absence.²⁰¹ Brown left the state to testify before the U.S. Senate.²⁰² During his absence, Curb attempted to nominate Judge Armand Arabian to the Court of Appeal for the Second District.²⁰³ Under the California Constitution, gubernatorial nominees to state courts are sent to the Commission on Judicial Appointments, which confirms or rejects the nomination.²⁰⁴ When Brown returned, he recalled Arabian's nomination.²⁰⁵ Litigation before the California Supreme Court resulted in a mixed verdict for Brown.²⁰⁶ The court held that Curb was entitled to make the nomination in Brown's absence, but Brown was also empowered to revoke Arabian's appointment before the Commission on Judicial Appointments had taken action on it.²⁰⁷ The decision was handed down as Brown was running for President, challenging Jimmy Carter for the 1980 Democratic presidential nomination, and empowered Curb to attempt similar moves when Brown left the state.²⁰⁸

Curb's actions were far from unique, though few acting governors have ever pulled off a significant appointment in the governor's absence. In 1951, New Mexico Democrats allegedly plotted to take advantage of Governor Edwin Mechem's absence to fill a vacancy on the state's elected Corporation Commission, but the acting governor refused to go along with it.²⁰⁹ And in the first decade of Utah's statehood, Acting Governor Aquila Nebeker, a Democrat, attempted to appoint former judge Orlando Powers

199. Abramson, *supra* note 47, at 796.

200. Robert Wagman, *What Lieutenant Governors Think About*, MOBILE PRESS, Sept. 7, 1981, at 5 ("In California, the stormy relationship between Gov. Jerry Brown, a liberal Democrat, and Lt. Gov. Mike Curb, a conservative Republican, has even added a new term to the political lexicon: 'curbing,' which occurs when the lieutenant governor becomes acting governor during his superior's absence from the state and then proceeds to actually act.").

201. Abramson, *supra* note 47, at 797.

202. *Id.*

203. *Id.*

204. CAL. CONST. art. VI, § 16.

205. Abramson, *supra* note 47, at 797.

206. *In re Comm'n on the Governorship of Cal.*, 603 P.2d 1357 (Cal. 1979).

207. *Id.* at 1360, 1365–66.

208. Jack Germond & Jules Witcover, *Jerry Brown, Political Hostage*, ARIZ. DAILY STAR, July 7, 1979, at 6. Prior to the resolution of the lawsuit, Curb wanted to arrive at an agreement with Brown in which the Governor would "let him appoint Republican judges and members of local and state fair boards, and for Brown 'to assign to me what he would assign for a lieutenant governor of his own party.'" *Id.*

209. Will Harrison, *Demo Plot to Name Commissioner Fails*, SANTA FE NEW MEXICAN, Dec. 12, 1951, at 1, 8.

to fill a vacancy in the U.S. Senate during the absence of Republican Governor Heber Wells, but the effort failed when Powers declined the appointment.²¹⁰ Following the death of U.S. Senator Richard Neuberger in 1960, Oregon Governor Mark Hatfield allegedly refused to leave the state until he had filled the vacancy, lest State Senate President Walter Pearson appoint Neuberger's widow to the seat in Hatfield's absence.²¹¹

Removing officials, though, is extremely uncommon. Though acting governors have suggested that they might fire members of the governor's staff,²¹² these suggestions have not been seriously acted on.²¹³ Taking advantage of a gubernatorial absence to terminate at-will officers would simply result in the governor restoring those upon their return, and removing other offices for cause could initiate lengthy litigation²¹⁴—so there is little advantage to attempting to do so.

E. Other Executive Action

Outside of their classic constitutional powers, governors have a variety of additional powers. Depending on the state, a governor may sit on a state board with significant policymaking authority, have sprawling authority to issue executive orders, or even initiate investigations of alleged misconduct.²¹⁵ As such, when an acting governor exercises the office, they, too, have those powers. In many ways, these exercises are the exact reason that state constitutions have gubernatorial-absence provisions, and ensure that, regardless of where the de jure governor is, matters of state will be handled by someone close to home.²¹⁶ Acting

210. *Powers Drops Bauble: Bid Gov. Nebeker's Senatorship Good-Bye*, SALT LAKE TRIB., Sept. 22, 1900, at 8.

211. *Appointment Still Secret*, Albany Democrat-Herald, Mar. 12, 1960, at 1.

212. See, e.g., *Open Capitol Revolt Is Seen*, OKLA. NEWS, Apr. 12, 1932, at 2 (“[Acting Governor Robert] Burns leveled his guns on [Governor William] Murray’s office force, threatening to fire R. D. McManus, Murray bodyguard, and others of the governor’s personal staff ‘for loafing on state pay’ when the traveling executive left the state.”).

213. Cf. *Gov. Wilson Transfers Top Clinton Aide*, JONESBORO SUN, Apr. 10, 1987, at 1, 2 (reporting that the Acting Governor ostensibly demoted then-Governor Bill Clinton’s chief of staff to liaison to the state Transportation Commission, yet admitted “that there was a sense of jest to his letter reassigning her”).

214. Seifter, *supra* note 197, at 1568 (observing that, while “state constitutions and decisional law are much more tolerant of removal restrictions than the federal Constitution,” most “state legislatures have not accepted the invitation to insulate every agency from the governor by granting it tenure protection,” and “state courts have often interpreted those restrictions in ways that favor the governor’s prerogative”).

215. See Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 499–501 (2017) (summarizing gubernatorial power).

216. See, e.g., *In re Governorship of Cal.*, 603 P.2d 1357, 1362 (Cal. 1979) (noting that “the overriding purpose of avoiding a hiatus in the availability of executive power requires

governors have routinely overseen state-level crises, like instances of civil unrest²¹⁷ and natural disasters.²¹⁸ On occasion, however, acting governors have moved too zealously to declare emergencies.²¹⁹

In 1957, during the attempted enrollment of the Little Rock Nine at Little Rock Central High School, Arkansas Governor Orville Faubus left the state, leaving Lieutenant Governor Nathan Gordon in charge.²²⁰ Faubus had previously deployed the Arkansas National Guard to prevent desegregation, only backing down in the face of a federal court order.²²¹ When Faubus left the state shortly thereafter, he left Lieutenant Governor Nathan Gordon in charge.²²² But when Little Rock Mayor Wilson Mann sought assistance, “he never got a satisfactory answer” as to whether Gordon would activate the National Guard to enforce the federal court

that, during the absence, the sole and entire power to act as Governor be transferred to a Lieutenant Governor who is physically within the state”).

217. *Release Three Hostages: Dixon Talks to Rebels, Makes Deal*, DIXON EVENING TEL., Oct. 29, 1952, at 1, 6 (reporting that Acting Governor Sherwood Dixon brokered an agreement during a prison riot); *Bennion Sees Hope for Strike End*, DESERET NEWS (Salt Lake City, Utah), Dec. 18, 1948, at 1 (writing that Acting Governor Heber Bennion, Jr. attempted to resolve a labor strike at the Knneccott Copper Corporation plant); *Earl Long to Be Acting Governor for Three Weeks*, ALEXANDRIA WEEKLY TOWN TALK, Mar. 11, 1939, at 1 (describing how Acting Governor Earl Long “promis[ed] order would be maintained in the Florida parish[es],” as strawberry farmers “arm[ed] in preparation for the beginning of the berry marketing this week-end”).

218. See, e.g., Arren Kimbel-Sannit, *Where Is Greg Gianforte?*, MONT. FREE PRESS (June 15, 2022), <https://montanafreepress.org/2022/06/15/montana-gov-greg-gianforte-overseas-amid-yellowstone-floods/> [<https://perma.cc/9WQU-9RWX>] (reporting that Montana Lieutenant Governor Kristen Juras issued a request for disaster relief during Governor Greg Gianforte’s absence); Charles V. Bagli, *In Trenton, Emergency Puts Senator Back at Helm*, N.Y. TIMES (Dec. 27, 2010), <https://www.nytimes.com/2010/12/28/nyregion/28njgov.html> [<https://perma.cc/M55G-4UTF>] (relaying that Acting Governor Stephen Sweeney “declar[ed] a weather state of emergency” during the absence of Governor Chris Christie and Lieutenant Governor Kim Guadagno); Howard Fischer, *‘Acting’ Governor Tests Her Wings*, ARIZ. DAILY SUN, Aug. 29, 2007, at 2 (writing that Secretary of State Jan Brewer signed an emergency declaration to avoid doubt as to its legality).

219. See, e.g., Tim Orwig, *Mondragon Fights Obscurity as Lieutenant Governor*, EL PASO TIMES, Oct. 28, 1979, at 3 (noting that Acting Governor Roberto Mondragón “declared part of northern New Mexico a disaster area because of flooding that had not yet occurred”); *Reynolds Countermands Olson’s Orders on Guard*, LA CROSSE TRIB., Aug. 27, 1964, at 8 (noting that Lieutenant Governor Jack Olson began to prepare the Wisconsin National Guard for action “in any crisis developing from livestock marketing disturbances,” which Governor John Reynolds “countermanded” while out of the state).

220. *Lt. Gov. Gordon is Governor Today*, DAILY WORLD (Helena, Ark.), Sept. 13, 1957, at 1.

221. WILLIAM HENRY KELLAR, *MAKE HASTE SLOWLY: MODERATES, CONSERVATIVES, AND SCHOOL DESEGREGATION IN HOUSTON* 102 (1999).

222. *Little Rock Police Given Riot Guns*, MIAMI HERALD, Sept. 23, 1957, at 1.

order or Faubus's orders, prompting him to request President Eisenhower to intervene.²²³

However, acting governors have also attempted to exercise their authority to accomplish their own personal goals. In the absence of the governor, acting governors have issued executive orders,²²⁴ attempted to investigate misconduct and solicit information,²²⁵ and have made purchases or signed deals for their own financial benefit.²²⁶ For example, within hours of Nevada Governor Grant Sawyer's absence from the state, Lieutenant Governor Paul Laxalt ordered that a grand jury be impaneled to investigate alleged corruption within the state Highway Department.²²⁷

III. THE INADEQUACY OF THE LEGAL RESPONSE

Acting governors have historically been quite willing to seize—and exercise—gubernatorial power during the claimed “absence” of the

223. *Action Against Mob Leaders Next Step*, *Editor Believes*, TENNESSEAN, Sept. 30, 1957, at 2.

224. See, e.g., Germond & Witcover, *supra* note 208, at 6 (“[Lieutenant Governor Mike Curb] signed an executive order calling for an increase in the lead content of gas for the state, a boon to supply. That one created another flap that reached such a ludicrous point that it had to be determined when Brown's returning plane had entered California air space to decide who had the powers of governor at the moment Curb signed the order.”); John Greiner, *Bernard Gives Industrial Trust New Life*, DAILY OKLAHOMAN, July 25, 1986, at 1 (in which Acting Governor Spencer Bernard signed an executive order re-activating the Oklahoma Industrial, Cultural, and Public Facilities Authority).

225. *Affirmative Action Plans Called For*, DEMING HEADLIGHT, Aug. 12, 1981, at 1 (reporting that Acting Governor Roberto Mondragón “requested in [an] executive order that the public universities file affirmative action plans with the Human Rights Commission”); *Kelly to Call Light Rate Parley: Hurley Secretary Refuses to Act*, BOS. GLOBE, Dec. 30, 1937, at 1, 13 (noting that Acting Governor Francis Kelly ordered representatives of the state's electric companies to convene at a meeting in the governor's office to force a rate reduction); *Murray's 'Sub' Declares War on Governor*, WICHITA BEACON, Apr. 12, 1932, at 1 (writing that Acting Governor Robert Burns requested information from the Governor's cousin, a “National Guard lieutenant colonel and oil field military boss,” about alleged oil company overproduction).

226. *Senators in Demand Zimmerman Explain 'Usurpation of Power,'* CAP. TIMES (Madison, Wis.), Apr. 8, 1943, at 1 (relaying that Acting Governor Fred Zimmerman, the Secretary of State, “sign[ed] an authorization for the purchase of a \$1,297 automobile by the secretary of state's office”); *Nelson T. Levings Rally at Moorhead*, GREENWOOD COMMW., July 27, 1939, at 1 (in which a political opponent accused former Lieutenant Governor Dennis Murphree of “sign[ing] land patents made in favor of his own daughter, his business partners, and close personal friends, and to negro bell boys and chambermaids in the Walthall hotel, where he maintains his private office”).

227. *Laxalt Calls Jury: Sawyer Brands Rival's Move 'Reprehensible'*, NEV. ST. J. (Reno, Nev.), Nov. 29, 1965, at 1; see also NEV. REV. STAT. ANN. § 6.135(1) (authorizing the governor to impanel a grand jury).

governor.²²⁸ The response by state courts and attorneys general has been somewhat underwhelming. Most states do not have binding decisions that define the scope of when a governor is “absent” from the state. Of those that do, they split with two different approaches. First, some jurisdictions have held that any physical absence devolves power. Second, most of the other jurisdictions hold that only “effective” absences do so.

This Part explores the limited guidance that state courts and attorneys general have provided on gubernatorial absence and explains why that guidance is unsatisfying. The physical absence rule produces and incentivizes patently absurd results by allowing successors to take advantage of brief, irrelevant gubernatorial absences. Yet, it adopts a clear bright-line rule that is usually easily applied. The effective absence rule, on the other hand, is intuitive and limits the devolution of gubernatorial power in situations where the governor’s absence meaningfully affects their ability to administer state affairs. Despite this seeming clarity, however, the effective absence rule is impossible to apply. With one exception, no court has determined in a follow-up case when an absence is “effective.”

State legislative efforts—which remain mostly theoretical in the absence of actual reforms—are likewise inherently flawed. State legislative power to define an absence or to limit gubernatorial power in individual instances would likely violate state constitutions’ requirements of separated powers. Even where a legislature could impose such a requirement, it would lack an enforcement process or remedy short of impeachment—which would be available as an option regardless of a statutory requirement.

The best option, though perhaps the least likely option, is formal constitutional amendment. Gubernatorial absence provisions served a purpose in the past, when traveling from state to state was arduous, communications technology was rudimentary, and governors could not stay in touch with their state governments when absent. But these provisions have little purpose today and are best removed from state constitutions.

In Section A, I lay out the two separate approaches that courts (and attorneys general) have adopted: the physical absence rule and the effective absence rule. Then, in Section B, I argue that the only viable solution is constitutional amendment. I critique both the physical absence and effective absence rules, as well as half-baked state legislative interventions.

228. See discussion *supra* section II.

A. Judicial and Informal Interpretations

Over the last two centuries, state supreme courts and attorneys general have arrived at different conclusions as to what “absence” means (and whether an absence otherwise “disables” a governor) and what actions an acting governor can take during such an “absence.” I discuss each of these in a separate subsection.

1. Physical Absence Versus “Effective Absence”

Many of the actions described in the previous section were undertaken based on unofficial understandings about the power of acting governors in the event that the governor physically left the state. There has been comparatively little litigation over what constitutes an “absence,”²²⁹ though attorney general opinions have filled in some of the gaps.²³⁰ When alleged “absences” have actually been litigated, however, authorities have split as to what counts. State supreme courts in Arkansas, California, Connecticut, Mississippi, and Oklahoma have concluded that any physical absence from the state, regardless of how brief, qualifies to devolve power to an acting governor.²³¹ Alternatively, courts in Louisiana, Missouri,

229. Extradition cases provide one of the most obvious contexts in which courts could have answered these questions. Under the U.S. Constitution, the “executive Authority of the State” from which a person was “charged . . . with Treason, Felony, or other Crime” and “fle[d] from Justice” can “Demand” that the person be returned to the state. U.S. CONST. art. IV, § 2, cl. 2. Officials purporting to be acting governor have frequently submitted such requests, but because a person contesting an extradition request bears the burden of proving that the request is unlawful, see John J. Murphy, *Revising Domestic Extradition Law*, 131 U. PA. L. REV. 1063, 1115–16 (1983), state courts have not second-guessed whether the requesting “governor” is entitled to exercise that power. See, e.g., *Krenwinkel v. State*, 232 So.2d 346, 350 (Ala. Crim. App. 1970) (“Without clear and convincing proof to the contrary, we presume that the Governor of Alabama has bona fide verified that the person acting as executive of a sister state is not an imposter or usurper of office.”); *Jaques v. Bray*, 645 P.2d 22 (Colo. 1982) (“It was the appellant’s burden of proof to overcome the presumption that the lieutenant governor was acting pursuant to her authority and was properly exercising the incidents of her office when she signed the governor’s warrant.”). 230. See *infra* notes 253–260 and accompanying text.

231. See *Walls v. Hall*, 154 S.W.2d 573 (Ark. 1941); *In re Comm’n on the Governorship of Cal.*, 603 P.2d 1357 (Cal. 1979); *Bratsenis v. Rice*, 438 A.2d 789 (Conn. 1981); *Montgomery v. Cleveland*, 98 So. 111 (Miss. 1923); *Fitzpatrick v. McAlister*, 248 P. 569, 573 (Okla. 1926); *Ex parte Crump*, 135 P. 428 (Okla. Crim. App. 1913) (any absence). Following the 2016 amendment to the Arkansas Constitution allowing the Governor to exercise power outside of the state, the Arkansas Supreme Court’s decision is of little formal legal relevance. Outside of these states, the most recent opinion from the Michigan Attorney General concurs in the “any absence” rule, 849 Mich. Op. Att’y Gen. 49 (1950), as does 6 N.H. Op. Att’y Gen. 1, 9–10 (1987). A 1961 North Dakota Attorney General

Nebraska, Nevada, and New Jersey have held that an absence must be "effective" to devolve power.²³²

The logic behind the "any physical absence" cases is based on a straightforward, literal reading of what the constitutions say—that is, an absence is an "absence."²³³ The purpose behind such a provision was "to have someone in the state at all times capable of performing the duties and exercising the powers of the office of Governor."²³⁴ Several of the more recent cases acknowledge that the textual provisions were motivated by anachronistic historical practices, but emphasized that it was not the role of the court to alter the constitution itself²³⁵ or to second-guess actions taken by acting governors that were presumed lawful when they were made.²³⁶

Opinion did as well, prior to the 1996 amendment to the state constitution that eliminated absence as a cause of temporary vacancy. 1961 N.D. Op. Att'y Gen. 9, 106.

232. *State ex rel. Warmoth v. Graham*, 26 La. Ann. 568 (La. 1874); *State ex rel. Ashcroft v. Blunt*, 813 S.W.2d 849 (Mo. 1991); *Johnson v. Johnson*, 3 N.W.2d 414 (Neb. 1942); *Sawyer v. First Judicial Dist. Ct.*, 410 P.2d 748 (Nev. 1966); *In re An Act Concerning Alcoholic Beverages*, 31 A.2d 837 (N.J. 1943). New Jersey's "effective absence" rule is unusual in that it requires the de jure governor to actually relieve the acting governor of their powers upon returning to the state. *See id.* at 841 (holding that "the word 'return,' in the circumstances, contemplates that the Governor comes back to the state and advises his pro temporary successor that he is ready to resume his executive powers and duties"). Outside of judicial decisions, attorney general opinions from Colorado, Kentucky, Minnesota, South Carolina (prior to the 1972 amendment to its constitution), and Wisconsin reach the same conclusion. 1909 Colo. Op. Att'y Gen. 62, 62; 75-681 Ky. Op. Att'y Gen. 2-1850, 2-1853; Letter from George T. Simpson, Minn. Att'y Gen., to Sam Y. Gordan, Minn. Lt. Gov. (Dec. 14, 1911), reprinted in George F. Authier, *Simpson Jars Special Session*, MINNEAPOLIS MORNING TRIB., Dec. 14, 1911, at 4 [hereinafter 1911 Minn. Op. Att'y Gen.]; 1915 S.C. Op. Att'y Gen. 49, 53-54; 68 Wis. Op. Att'y Gen. 109 (1979). 233. *Bratsenis*, 438 A.2d at 791 ("The meaning of the word 'absence' is clear.").

234. *Id.* ("The constitutional provisions in question are clear. They evince a purpose of having in the state at all times someone 'capable of performing the duties and exercising the powers of the office of governor.'" (quoting *Walls*, 154 S.W.2d at 577)); *Montgomery*, 98 So. at 113 ("[T]he Constitution contemplated having within the limits of the state at all times a person to exercise the powers and perform the duties of the Governor's office to the end that the public welfare would never be jeopardized by not having some person present who could exercise these powers and duties.").

235. *Governorship of Cal.*, 603 P.2d at 1363 ("We are not persuaded that time or technology compels such a change by judicial fiat."); *Bratsenis*, 438 A.2d at 791 ("It is not . . . the function of this court to rewrite the constitution.").

236. *Governorship of Cal.*, 603 P.2d at 1363 n.6 ("Historical research reveals that in the past 16 years more than 1,400 gubernatorial actions (proclamations, executive orders, pardons and signing of legislation) have been taken by an acting governor while the Governor was physically absent from the state."); *Ex parte Crump*, 135 P. at 433 ("This court judicially knows that from time to time, beginning almost immediately after statehood, the Lieutenant Governor has always been the acting Governor in the temporary absence of the Governor from the state and as such granted pardons, appointed and commissioned officers, including one of the present district judges of this state, issued

Likewise, in the "effective absence" cases, the courts pointed to the logic of their own conclusions. The point of the absence provisions was to prevent situations that "would affect injuriously the public interest."²³⁷ To allow any absence to deprive the governor of power to act would produce absurd results²³⁸ and invite "disgraceful tricks, strifes and exhibitions[.]"²³⁹ It could also deprive the governor of the ability to conduct the state's business while outside of the state's borders, even when specifically statutorily authorized to do so.²⁴⁰ Many of these decisions emphasized the anachronism of holding that *any* absence sapped the governor of power to act, and noted that modern technology and transportation allows the governor to always stay in contact with the affairs of state.²⁴¹ Some of the "any absence" cases acknowledged these arguments, and dismissed them. The effect of imposing an "effective absence" rule would "lead to repeated litigation and uncertainty."²⁴²

However, there are few subsequent applications of the "effective absence" rule. Only the Louisiana Supreme Court handed down a subsequent interpretation of its decision.²⁴³ *State ex rel. Attorney General*

proclamations creating cities of the first class and declaring the results of special elections to relocate county seats, issued and honored requisitions, appointed notary publics, and performed other executive acts, none of which have been questioned until the present time.").

237. *Sawyer*, 410 P.2d at 750 ("Thus in event of a specified official's physical non-presence, the crux of a provision for succession in the event of 'absence' is the state's immediate need for a specific act or function.").

238. *Johnson v. Johnson*, 3 N.W.2d 414, 416 (Neb. 1942) ("In construing a provision of the Constitution, statesmanship should be imputed to the framers thereof, if permissible, rather than absurdity.").

239. *People ex rel. Tennant v. Parker*, 3 Neb. 409, 421-22 (1873) (opinion of Lake, J.).

240. *State ex rel. Ashcroft v. Blunt*, 813 S.W.2d 849, 853 (Mo. 1991).

241. *In re An Act Concerning Alcoholic Beverages*, 31 A.2d 837, 841 (N.J. 1943) ("Under the first view, notwithstanding modern facilities of communication and transportation, the Governor would be absent from the state if he were but to leave it long enough to go to New York or Philadelphia for part of a day or evening to attend a public or private function."); see also *In re Comm'n on the Governorship of Cal.*, 603 P.2d 1357, 1366-67 (Cal. 1979) (Newman, J., concurring) ("That phrases in a constitution were deemed apt for a horse-and-wagon era does not ordain that we eschew sensible, up-to-date analysis of their meaning 130 years later When the Governor is absent from the state is he in fact disabled from performing the duties of his office? Indeed, he is not. Car-to-office, air-to-ground, and ship-to-shore calls are routine; so are conference calls and closed-circuit TV consultation.").

242. *Governorship of Cal.*, 603 P.2d 1357, 1362 ("To require express judicial authorization before the Lieutenant Governor could act as Governor during the Governor's absence or other temporary disability would contravene the purpose of article V, section 10, to prevent gaps in the availability and continuity of the executive power.").

243. A subsequent opinion by the Nebraska's Attorney General's office concluded that a five-day absence of the Governor was insufficient to devolve power, but "express[ed] no opinion in respect of the practice of a lieutenant governor to exercise the law-making power

v. *Barrow* was decided three years after the adoption of the effective absence rule. In *Barrow*, the court held that an absence by the Governor for "some four or five weeks" in New York City constituted an effective absence,²⁴⁴ unlike a briefer absence at, say, Pass Christian, Mississippi, which was "within a few hours' run of the Capital" and just across the border.²⁴⁵

Attorney general opinions have also played a role in governing succession provisions and, even in the absence of judicial opinions, have established legal cultures around gubernatorial absences.²⁴⁶ In the early twentieth century, the Colorado and Minnesota attorneys general took the position that an "absence" was an effective absence, not a merely physical one. The Colorado Attorney General's opinion was issued in 1909—not in the face of any looming action, but instead the Governor's request for his full salary on the days when he was out of the state.²⁴⁷ The 1911 opinion by the Minnesota Attorney General was issued on the precipice of the Lieutenant Governor planning to convene the legislature in special session.²⁴⁸ Both opinions established precedent that seems to have preempted significant exercises of gubernatorial power by acting governors.²⁴⁹ In 1915, South Carolina Lieutenant Governor Andrew Bethea, who was requested by voters in the city of Beaufort to order a recall election for two members of city government,²⁵⁰ requested an opinion from the Attorney General before acting. The Attorney General

of a governor during an absence from the state . . . in excess of the five-day interval." 1951—52 Neb. Op. Att'y Gen. 110, 113—14.

244. *State ex rel. Att'y Gen. v. Barrow*, 29 La. Ann. 243, 244 (La. 1877).

245. *State ex rel. Warmoth v. Graham*, 26 La. Ann. 568, 569 (La. 1874).

246. At the outset, I do not profess to comprehensively survey the entire universe of state attorney general opinions. One of the opinions I cite, authored by the Minnesota Attorney General, was (for reasons beyond my understanding) printed in the *Minneapolis Morning Tribune* and not in the official report of attorney general opinions. See 1911 Minn. Op. Att'y Gen., *supra* note 232. It is entirely possible that other opinions exist, have not been formally reported, and yet still have affected the conduct of executive branches.

247. 1909 Colo. Op. Att'y Gen. 62, 62.

248. 1911 Minn. Op. Att'y Gen., *supra* note 246.

249. *But see Rotarians Install Sen. Whitaker as Governor During Pearson Visit*, FORT COLLINS COLORADOAN, May 7, 1947, at 1 (describing 1947 incident in which Acting Governor Homer Pearson, while visiting the Fort Collins Rotary Club, was "kidnapped" by the Club and taken across the state line to Laramie, Wyoming, as part of a "mock abduction," where State Senate President Ed Whitaker was subsequently crowned as Acting Governor).

250. *Bethea Can Not Act in Manning's Place: Attorney General Holds That Lieutenant Governor Is Powerless in Matter of Ordering an Election. Case from Beaufort.*, STATE (Columbia, S.C.), Aug. 25, 1915, at 10 [hereinafter *Bethea Powerless*].

adopted the “effective absence” interpretation,²⁵¹ effectively precluding Bethea’s action.²⁵²

Attorney general opinions have also established new legal cultures in the face of accepted historical practices. In Wisconsin, a long history of acting governors predated the Attorney General’s 1979 opinion embracing the “effective absence” rule. Acting governors had vetoed legislation,²⁵³ issued pardons,²⁵⁴ and took other controversial actions—one even attempted to purchase a car for his office²⁵⁵—but in 1979, the Attorney General concluded that “the Wisconsin Supreme Court probably would construe ‘absence’ . . . as meaning ‘effective absence[.]’”²⁵⁶ Since that point, no lieutenant governor claiming to be acting governor has attempted to take action, and the “absence” provision had been rendered superfluous.²⁵⁷ Likewise, in Iowa, even though the state constitution does not include an “absence” provision,²⁵⁸ lieutenant governors occasionally served as “acting governor” when the governor was outside of the state.²⁵⁹ But in 1980, the Iowa Attorney General issued an opinion concluding that “mere physical absence of the governor from the state unaccompanied by

251. 1915 S.C. Op. Att’y Gen. 49, 53–54.

252. *Bethea Powerless*, *supra* note 250, at 10. However, the adoption of a 1972 constitutional amendment, which limits the power of lieutenant governors to only “act in an emergency” during “the temporary absence of the Governor from the state.” S.C. CONST. art. IV, § 11.

253. *See, e.g., Acting Governor’s Veto Kills Integrated Bar Bill: Measure, Backed by Dean Garrison, Called Threat to Home Rule*, WIS. STATE J., Aug. 14, 1935, at 1.

254. *See, e.g., 50 Prisoners Get Clemency from Dammann: Among Those Pardoned by Acting Governor is Wm. Schroeder*, KENOSHA EVENING NEWS, Nov. 25, 1936, at 3.

255. Rex L. Karney, *Governor Quashes Approval of Order to Purchase Auto*, WIS. STATE J., Apr. 8, 1943, at 1, 2.

256. 68 Wis. Op. Att’y Gen. 109 (1979).

257. *See, e.g., Cliff Miller, McCallum Doesn’t Sit Still: The Lieutenant Governor Is Out to Make His Office Work*, POST-CRESCENT REG’L, Dec. 18, 1994, at 19, 23 (“Modern-day communications technology effectively has repealed the provision. With satellite telephone communications, fax machines and other doodads, the governor is never effectively ‘absent from this state.’”); Jason Calvi, *Wisconsin’s Lieutenant Governor Has Just One Constitutional Job*, FOX6 NEWS MILWAUKEE, (July 21, 2022, at 17:05 CT), <https://www.fox6now.com/news/wisconsins-lieutenant-governor-role-job>

[<https://perma.cc/TEH7-EJEX>] (noting that “an attorney general opinion says the Wisconsin Supreme Court has never weighed what ‘absent from this state’ means”).

258. *See generally* IOWA CONST. art. IV, § 17 (“In case of the death, impeachment, resignation, removal from office, or other disability of the governor, the powers and duties of the office for the residue of the term, or until he shall be acquitted, or the disability removed, shall devolve upon the lieutenant governor.”).

259. *See, e.g., Elthon, 56, Takes Oath as Governor*, CEDAR RAPIDS GAZETTE, Nov. 22, 1954, at 1, 5 (noting that Lieutenant Governor Leo Elthon “was acting governor when [Governor William] Beardsley was absent from the state”).

any health-related disability on his or her part does not authorize the lieutenant governor to assume the powers of the governor."²⁶⁰

2. *Absence as a "Disability"*

The effort to read gubernatorial succession provisions broadly to subsume physical absence into some other cause or a catchall phrase has largely proven unsuccessful. As noted earlier, many state constitutions provide that power transfers in the event of a "disability."²⁶¹ Some state constitutions include the reference to "disability" as a catchall term, including the term after listing causes of vacancies and providing that power transfers in the event of some "other disability."²⁶² Others refer to an "inability to discharge the powers and duties of the said office."²⁶³ Those seeking—in good faith or otherwise—to oust governors from office or to assert their own control in a gubernatorial absence have sought to inflate the scope of these provisions, with limited success.²⁶⁴ In 2008, following the indictment of Illinois Governor Rod Blagojevich, Attorney General Lisa Madigan relied on the Illinois Constitution's "other disability" provision to argue that the Illinois Supreme Court should suspend Blagojevich from office.²⁶⁵ "Disability," she argued, applied to

260. 1980 Iowa Op. Att'y Gen. 550, 555.

261. See *infra* Section I.A.

262. *E.g.*, ALA. CONST. art. V, § 127; ILL. CONST. art. V, § 6(b); IOWA CONST. art. IV, § 17; MO. CONST. art. IV, § 11(a); W. VA. CONST. art. VII, § 16; see also CAL. CONST. art. V, § 10 ("other temporary disability") (emphasis added).

263. *E.g.*, ARK. CONST. amend. VI, § 4; see also ALASKA CONST. art. III, § 12 ("unable to discharge the duties of his office by reason of mental or physical disability"); DEL. CONST. art. III, § 20(a) ("inability to discharge the powers and duties of the office"); IDAHO CONST. art. IV, § 12 ("inability to discharge the powers and duties of his office"); IND. CONST. art. V, § 10(a) ("unable to discharge the powers and duties of the office"); KY. CONST. § 84 ("unable to discharge the duties of his office"); ME. CONST. art. V, pt. 1, § 14 ("unable to discharge the powers and duties of that office because of mental or physical disability"); MD. CONST. art. II, § 6 ("temporarily unable to perform the duties of the Governor's office"); MASS. CONST. amend. art. XCI ("unable to discharge the powers and duties of his office"); MINN. CONST. art. V, § 5 ("unable to discharge the powers and duties of his office"); NEV. CONST. art. V, § 18 ("inability to discharge the duties of the said Office"); N.J. CONST. art. V, § 1, ¶ 7 ("inability to discharge the duties of the office"); N.Y. CONST. art. IV, § 5 ("unable to discharge the powers and duties of the office of governor"); OHIO CONST. art. III, § 15 ("unable to discharge the duties of office by reason of disability"); OKLA. CONST. art. VI, § 16 ("inability to discharge the powers and duties of the office"); TENN. CONST. art. III, § 12 ("unable to discharge the powers and duties of the office"); UTAH CONST. art. VII, § 11(1)(a) ("unable to discharge the duties of office"); VA. CONST. art. V, § 16 ("unable to discharge the powers and duties of his office").

264. *E.g.*, Raftery, *supra* note 62, at 184 (citation omitted).

265. *Id.* (citation omitted).

Blagojevich's situation because "disabled" could mean "unable, unfit, or disqualified."²⁶⁶

State supreme courts in Florida and Kansas likewise declined to interpret the word "disability" in their state constitutions' gubernatorial succession provisions to include absence.²⁶⁷ In *Markham v. Cornell*, the Kansas Supreme Court noted that other state constitutions, which included absence as a cause for a temporary vacancy, influenced the drafters of the Kansas constitution.²⁶⁸ The court noted that, "[h]ad these framers of our constitution intended that absence from the state should be construed as 'other disability' they surely would have put the words 'absence from the state' in our constitution."²⁶⁹

In 1959, Governor LeRoy Collins asked the Florida Supreme Court for an advisory opinion,²⁷⁰ in advance of a monthlong trip to the Soviet Union, regarding whether his "contemplated absence from the State or the United States . . . constitute[s] inability to discharge [his] official duties, or constitute[s] any other cause for devolution of the powers and duties of Governor[.]"²⁷¹ The court held that Collins would retain his power, concluding that while previous constitutions included "absence from the state" as a cause of a temporary vacancy, the state's 1885 constitution did not, and that the word "inability" retained its "ordinary" definition.²⁷²

Several attorney general opinions have reached similar conclusions.²⁷³ In 1921, and again in 1978, the Delaware Attorney General rejected the argument that a mere absence constituted an "inability" to serve as Governor.²⁷⁴ In 1980, the Iowa Attorney General issued an opinion concluding that the words "other disability" in the state constitution were "consistent with either an intent that the concept of disability is broader than absence from the state but nonetheless includes it or an intent that mere absence from the state is not to be a ground for exercise of the

266. *Id.* (citation omitted). However, the Illinois Supreme Court denied the request without comment. *People v. Blagojevich*, No. 107698, 2008 Ill. LEXIS 1822, at *1 (Ill. Dec. 17, 2008).

267. See *Markham v. Cornell*, 18 P.2d 158, 162 (Kan. 1933); *In re Advisory Op. to the Governor*, 112 So.2d 843, 844-46 (Fla. 1959).

268. *Markham*, 18 P.2d at 162.

269. *Id.*

270. Jake Mazeitis, *A Governor's Duty to Ask*, 59 GA. L.R. 1529, 1534-35 (2025).

271. *Advisory Op. to the Governor*, 112 So.2d at 845-46.

272. *Id.* at 847.

273. E.g., Letter from S. D. Townsend, Jr., Del. Att'y Gen., to J. Danforth Bush, Del. Lt. Gov. (Aug. 4, 1921), reprinted in *Raise Issue over Duties of Governor: Absence Doesn't Mean Inability to Serve, Says Atty-Gen. Townsend*, EVENING J. (Wilmington, Del.), Aug. 5, 1921, at 1, 9 [hereinafter 1921 Del. Op. Att'y Gen.]; 78-012 Del. Op. Att'y Gen. 1 (1978); 1980 Iowa Op. Att'y Gen. 550, 555.

274. 1921 Del. Op. Att'y Gen., *supra* note 273; 78-012 Del. Op. Att'y Gen. 1 (1978).

governor's powers by the lieutenant governor."²⁷⁵ Nonetheless, citing the "leading decisions from other jurisdictions," he concluded that "the latter conclusion is correct."²⁷⁶

However, both the Kansas and Florida supreme courts and the Delaware and Iowa attorneys general concluded that, under some circumstances, a gubernatorial absence could qualify as a disability.²⁷⁷ The Kansas Supreme Court explained that, when an absence is so lengthy that it "takes it entirely out of the range of possibility for the governor to exercise any control over affairs of the state," "a situation where the peace and dignity of the state is in danger, or the orderly function of government is threatened."²⁷⁸ Similarly, the Florida Supreme Court noted that "the nature of the conditions attendant upon such absence could possibly constitute inability such as would justify a devolution of the powers and duties of the office."²⁷⁹ Likewise, the 1921 Delaware Attorney General Opinion, published before any court had ruled on the question, perhaps implied that absence from the state *could* present an inability,²⁸⁰ and the 1978 opinion embraced that suggestion from the Florida and Kansas supreme courts.²⁸¹ The 1980 Iowa Attorney General Opinion similarly concluded that, "[i]n an emergency situation in which reasonable efforts to contact the governor have been unsuccessful and the lieutenant governor reasonably concludes that the emergency is such that action must be taken before the governor may be contacted," the Iowa Supreme Court would likely conclude "that the powers and duties of the governor would devolve upon the lieutenant governor for that purpose."²⁸²

B. The Inadequacy of All Options

The litigation over absence provisions has produced a body of frustrating caselaw splintered along two separate rules: the technical absence rule and the effective absence rule.²⁸³ Each, to be clear, holds a

275. 1980 Iowa Op. Att'y Gen. 550, 551.

276. *Id.* at 551.

277. *Markham v. Cornell*, 18 P.2d 158, 164 (Kan. 1933); *In re Advisory Op. to the Governor*, 112 So.2d 843, 847-48 (Fla. 1959); 1921 Del. Op. Att'y Gen., *supra* note 273, at 9; 78-012 Del. Op. Att'y Gen. 1, 4-5 (1978); 1980 Iowa Op. Att'y Gen. 550, 552.

278. *Markham v. Cornell*, 18 P.2d 158, 164 (Kan. 1933).

279. *Advisory Op. to the Governor*, 112 So.2d at 847-48.

280. 1921 Del. Op. Att'y Gen., *supra* note 286, at 9 (noting that the Secretary of State's statement that the Governor was en route to Europe "is not an official determination that the Governor is thereby unable to discharge the powers and duties of his office; nor does such a statement show that he is not discharging the powers and duties of his office").

281. 78-012 Del. Op. Att'y Gen. 1, 4-5 (1978).

282. 1980 Iowa Op. Att'y Gen. 550, 552.

283. *See supra* Section III.A.1.

significant advantage over the other. The technical absence rule is clear, straightforward, and easy to apply in virtually all cases.²⁸⁴ On the other hand, the effective absence rule is inherently logical and comes closest to vindicating the original purpose of absence provisions.²⁸⁵ Where the effective absence rule is fuzzy—e.g., how to determine what constitutes an “effective” absence—the technical absence rule is not.²⁸⁶ Though there will be occasional moments where there is some uncertainty as to who the governor is, those moments will hardly ever matter.²⁸⁷ And where the technical absence rule produces absurd results—e.g., approving the exercise of significant authority by acting governors during only brief gubernatorial absences—the effective absence rule actively disincentivizes such action.²⁸⁸

1. The (Mostly) Workable Absurdity of the Physical Absence Rule

The physical absence rule is manifestly ludicrous. It invites both manipulation by acting governors and litigation over minute details.²⁸⁹ When the governor of the state is outside the legal borders of the state for even a minute, a putative acting governor can take an action entirely contrary to the governor’s wishes: handing down a pardon, signing or vetoing legislation, calling the legislature into special session, issuing an executive order or declaring an emergency, appointing or removing an official, and so on.²⁹⁰

284. See *supra* text accompanying notes 233–36 (describing the benefits of the technical absence rule).

285. See *supra* text accompanying notes 237–41 (describing the benefits of the effective absence rule).

286. Compare *supra* text accompanying notes 242–25 (describing the difficulties with applying the effective absence interpretation) with *supra* text accompanying notes 233–36 (describing the ease of which the technical absence rule may be applied).

287. But see Anna Liz Nichols, *Who Is Michigan’s Acting Governor During the DNC?*, MICH. ADVANCE (Aug. 22, 2024, at 14:35 ET), <https://michiganadvance.com/briefs/who-is-michigans-acting-governor-during-the-dnc/> [<https://perma.cc/96ZR-MX54>] (noting that, during the 2024 Democratic National Convention, Governor Gretchen Whitmer, “as well as the five top officials who succeed her,” were out of the state and it was unclear “who is currently serving as the acting governor of Michigan”).

288. See *supra* Part II (describing actions taken by acting governors); see also *supra* text accompanying notes 248–52 (describing an instance in which the effective absence interpretation precluded action).

289. See, e.g., *supra* text accompanying notes 140–46.

290. See, e.g., *supra* text accompanying notes 22–25 (describing the issuance of executive orders during a brief gubernatorial absence in Idaho), 158–61 (describing the calling of the legislature into a special session during a brief gubernatorial absence in Kentucky), 173–76 (describing the issuing of pardons during a brief gubernatorial absence in Mississippi).

Gubernatorial successors are incentivized, therefore, to plot about what actions they wish to take when governors leave the state—and then to act.²⁹¹ Some institutional realities may disincentivize this behavior, but not in all states.²⁹² Where lieutenant governors are elected on a joint ticket with governors, and depend on the governor for discretionary assignments, acting out of turn might be unwise.²⁹³ But in the states where the two offices are separately elected, the lieutenant governor has an imperative to establish their own political brand.²⁹⁴ Thus, a lieutenant governor's decision to take advantage of a gubernatorial absence to call attention to their pet projects or begin to act on their campaign platform, especially when either involves politically popular issues, has clear upside.²⁹⁵

Litigation over these issues, therefore, can easily get off track. A great deal of litigation involves stipulated facts—e.g., that the governor was outside of the state at the time the putative acting governor acted—which allows the court to focus on either the significance of the absence or the revocability of the action itself.²⁹⁶ In some ways, the ancillary questions, like whether a special session call, once issued, can be constitutionally recalled, are harder to answer.²⁹⁷ These questions involve difficult issues of the nature of executive and legislative powers, including whether a governor's action is squarely “executive.”²⁹⁸ They lack easy or obvious answers, yet are near-exclusively raised in the contexts of manipulation.

On the bright side, however, the physical absence rule can be easily applied by courts in most situations. In the typical case, whether the governor is in or out of the state is knowable—if not generally, then at least at the time that a challenged action was taken.²⁹⁹ This is not to say,

291. Cf. *supra* text accompanying notes 163–64 (describing a Lt. Governor's plot to take action during a brief gubernatorial absence in Kentucky).

292. See *supra* text accompanying notes 165–71.

293. Yeargain, *Lieutenant Gubernatorial Succession*, *supra* note 77, at 104.

294. Cf. *supra* text accompanying note 209 (describing a Democrat Lt. Governor's attempts to take advantage of a Republican gubernatorial absence).

295. Cf. *supra* text accompanying notes 224–27 (describing attempts by Lt. Governor's to advance their pet projects during gubernatorial absences).

296. See, e.g., *State ex rel. Meyers v. Reeves*, 78 P.2d 590, 590 (Wash. 1938) (holding on the issue of presence rather than the more difficult question of entitlement to act in a gubernatorial absence).

297. See *supra* text accompanying notes 155–62.

298. See *supra* text accompanying notes 87–91.

299. It is, of course, possible that more difficult questions could be raised—e.g., how far a state's jurisdiction extends in air and water—that evade easy resolution. These questions are not easily answered. See Stephen Migala, *UAS: Understanding the Airspace of States*, 82 J. AIR L. & COM. 3, 55–65 (2017) (exploring the level of state jurisdiction over airspace); see generally J. Michael Robbins & Marc J. Herschman, *Boundaries of the Coastal Zone: A Survey of State Laws*, 1 COASTAL ZONE MGMT. J. 305 (1974) (surveying state laws regarding coastal zones). Moreover, in unlikely (but possible) situations in which a

of course, that the acting governor will always have actual knowledge of their status, but rather that they *could*.³⁰⁰

2. *The Infeasible Sensibility of the Effective Absence Rule*

The effective absence rule, on the other hand, is inherently logical. To the extent that the purpose behind absence provisions ensures that a state is never left without a governor, but also ensures that vacancies are only brought about by genuinely disabling events, it serves both goals.³⁰¹ Modern technology and transportation have rendered mere absences insufficient justifications for assuming that a governor is unable to do their job.³⁰² In the past, the lengthy process of traveling from one state to another, much less to Washington, D.C., perhaps justified devolving power when the governor left the state, but no longer.³⁰³

As a practical matter, most states have borders with other states that are regularly traversed. Many metropolitan areas are split into multiple states, and major cities are not uncommonly located near a state border. Indeed, the Governor of Michigan is no farther from Lansing when in Toledo, Ohio, than when in Detroit—and in fact, she is closer to the state capital in Toledo than she would be if visiting Isle Royale National Park in Lake Superior, where there is no cell service. It would make little sense, then, to strip her of executive power merely for stepping across the border into Ohio.

governor repeatedly travels in and out of the state on a single journey, it may be difficult to firmly establish who exercises gubernatorial authority'. See, e.g., 1972 OREGON VOTER PAMPHLET, *supra* note 130, at 32 (describing two-day boat trip by the Governor of Oregon down the Snake River, which makes up Oregon's northeastern border with Idaho, in which gubernatorial power technically transferred eight times); Montgomery v. Cleveland, 98 So. 111, 116 (Miss. 1923) (Anderson, J., dissenting) (describing hypothetical "golf course on the line between Mississippi and Alabama, partly in this state and partly in that," in which the Governor of Mississippi repeatedly steps in and out of the state, such that "now he is [governor] and now he ain't, and now he is and now he ain't, and so on as long as the game goes on").

300. Cf. *supra* text accompanying note 30 (describing a Lt. Governor accusing the Governor of violating the state constitution by not informing her of a gubernatorial absence).

301. See *supra* text accompanying notes 237–41 (describing the benefits of the effective absence rule).

302. See, e.g., *In re Comm'n on the Governorship of Cal.*, 603 P.2d 1357, 1366–67 (Cal. 1979) (Newman, J., concurring) ("That phrases in a constitution were deemed apt for a horse-and-wagon era does not ordain that we eschew sensible, up-to-date analysis of their meaning 130 years later When the Governor is absent from the state is he in fact disabled from performing the duties of his office? Indeed he is not. Car-to-office, air-to-ground, and ship-to-shore calls are routine; so are conference calls and closed-circuit TV consultation.").

303. *Id.*

The rule also prevents manipulation. The states that have adopted effective absence rules have seen far less manipulation of gubernatorial powers by putative acting governors.³⁰⁴ A lieutenant governor seeking to take advantage of an absence would be unable to time their action to an alleged vacancy. Even if an acting governor attempted to act in such a manner, other actors in state government would be justified in refusing to honor the action.³⁰⁵

Yet indeterminacy is also the effective absence rule's key weakness. As courts rejecting the rule have noted, it invites guesswork—and, in turn, litigation.³⁰⁶ Only one court has ever followed up on its original adoption of the effective absence rule to clarify whether it applied.³⁰⁷ There is, as I noted, some value in the indeterminacy to the extent that it limits machinations, but the lack of predictability precludes effective responses to emergency situations.³⁰⁸ In the case of a disagreement between the in-state putative acting governor and the out-of-state *de jure* governor in an emergency, whether the governor's absence is "effective" answers the question of whose order to follow, but there are few ways to speedily resolve that question.³⁰⁹

3. *The Inadequacy of Statutory Fixes*

Constitutionally designated successors, especially those who are elected separately from the governor, frequently complain about a lack of

304. See, e.g., *supra* text accompanying notes 256–57 (describing a lack of actions taken by the Wisconsin Lt. Governor following the adoption of the effective absence interpretation).

305. Cf. *supra* text accompanying notes 174–78 (describing the refusal or reluctance of state actors to follow acting governor instructions).

306. *Governorship of Cal.*, 603 P.2d at 1362.

307. *State ex rel. Att'y Gen. v. Barrow*, 29 La. Ann. 243, 244 (La. 1877). It is also unclear whether that decision, now 150 years old, even holds true today. A four-to-five-week trip by the Governor of Louisiana on official business to New York City is not disabling today the same way that it would have been in 1877. Uddo, *supra* note 47, at 5 (arguing that, while "[m]odern communication and travel technology diminish the importance of the direct holdings of these cases . . . their *spirit* remains very viable") (emphasis in original). And the 1974 Louisiana Constitution's use of "temporary absence" muddies the clarity of the effective absence rule, such that it may be unclear what rule survives today or how it is applied. See *id.* at 3–4 (arguing that the "presumption that" the 1974 constitution "preserved the view of earlier constitutions appears to have been ill-founded").

308. Cf. *Governorship of Cal.*, 603 P.2d at 1362 (noting the importance of having an actor "to prevent gaps in the availability and continuity of the executive power").

309. *Id.*

notice when they are acting governor.³¹⁰ Following high-profile controversies involving gubernatorial absences, a lack of timely notice can become a point of contention, and policymakers occasionally attempt to push through formal notice requirements.³¹¹ But the effect of such a statutory requirement remains unclear.

If the governor were to fail to produce the statutorily required notice, what would happen? The statute certainly would not—and could not—alter the constitutional procedure of gubernatorial succession. Failure to provide notice could plausibly provide sufficient cause for greater legislative scrutiny of the governor's office or removal via impeachment or a recall election.³¹² But most state legislatures are entitled to open investigations or pursue impeachment at their own discretion,³¹³ and cause requirements for recall elections are usually *pro forma*.³¹⁴ To the extent that gubernatorial absences are chronic or disabling to the operations of state government, taking such action would be entirely justified without an accompanying statutory violation.³¹⁵ A statutory notice requirement

310. See, e.g., *supra* text accompanying note 30 (describing a Lt. Governor accusing the Governor of violating the state constitution by not informing her of a gubernatorial absence).

311. Cf. *In re Recall of Inslee*, 451 P.3d 305, 308–09 (Wash. 2019) (rejecting argument that repeated gubernatorial absence from the state when statutorily required notice of absence was provided “constitutes malfeasance, misfeasance, or violation of his oath of office”); ROSS H. GARBER ET AL., OFFICE OF THE GOV. OF S.C., THE CONSTITUTIONAL STANDARD FOR IMPEACHMENT OF A GOVERNOR OF SOUTH CAROLINA 15 (Nov. 2009), <https://www.scstatehouse.gov/Archives/CitizensInterestPage/EthicsCommissionReport/Summary.pdf> [<https://perma.cc/SGC2-FLMY>] (arguing that “a temporary absence from the state, even if a Governor’s location is allegedly unknown, does not rise to the level of an impeachment offense under South Carolina law because it does not subvert South Carolina’s system of government”).

312. Cf. *Recall of Inslee*, 451 P.3d at 308 (noting, in a review of a proposed recall petition, that state law “requires the governor to notify the lieutenant governor of any planned absences,” but “the record does not indicate that Governor Inslee failed to do so”).

313. E.g., *Ingram v. Shumway*, 794 P.2d 147, 152 (Ariz. 1990); *Mecham v. Ariz. House of Representatives*, 782 P.2d 1160, 1161 (Ariz. 1989); *Mecham v. Gordon*, 751 P.2d 957, 962–63 (Ariz. 1988); see also Ala. House of Representatives Judiciary Comm. v. Off. of the Governor of Ala., 213 So.3d 579, 584 (Ala. 2017) (Stuart, J., concurring) (noting that the Alabama House of Representatives “has the authority . . . to provide the rules to govern the consideration of impeachment, which may include an . . . investigation”).

314. David A. Carrillo et al., *California’s Recall Is Not Overpowered*, 62 SANTA CLARA L. REV. 483, 502–04 (2022).

315. Cf. *Recall of Inslee*, 451 P.3d at 308–09 (rejecting argument that repeated gubernatorial absence from the state when statutorily required notice of absence was provided “constitutes malfeasance, misfeasance, or violation of his oath of office”); GARBER ET AL., *supra* note 311, at 15 (arguing that “a temporary absence from the state, even if a Governor’s location is allegedly unknown, does not rise to the level of an impeachment offense under South Carolina law because it does not subvert South Carolina’s system of government”).

might instead have a rhetorical effect to capture the frustration of both state government officials and the public.³¹⁶

Outside of a notice requirement, state legislatures are likely limited to statutorily modify how gubernatorial absences play out. Legislatures could modify the emergency powers provided to an acting governor because those are usually conferred by statute, not the constitution,³¹⁷ but may not be able to modify the governor's core constitutional powers.³¹⁸

4. *The Necessity of Amendments*

Judicial decisions and statutory fixes cannot write words out of a constitution.³¹⁹ Neither can a unilateral declaration by the Governor.³²⁰ Short of a judicial declaration that no governor is ever truly “absent” from the state given modern-day technology—which would, in turn, raise the question of what *would* render a governor “absent”—the best possible answer is to pursue formal constitutional amendment.

Automatic succession provisions are out of step with modern realities and allow for political machinations. Yet any such popular consensus appears to be shallow, and there seems little appetite to actually excise these provisions from state constitutions. Only Arkansas and Rhode Island have presented discrete amendments to remove absence provisions to

316. Cf. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 531–33 (2001) (noting the role of “taking popular symbolic stands” in the expansion of criminal policymaking).

317. See Richard Briffault, *States of Emergency: COVID-19 and Separation of Powers in the States*, 2023 WIS. L. REV. 1633, 1637–40 (2023); see generally Gregory G. Schwab, *Gubernatorial Emergency Powers*, 58 ARIZ. ST. L.J. (forthcoming 2026) (charting development of gubernatorial emergency powers).

318. In a state with a constitution that grants the legislature the power to prescribe the manner in which pardons are issued, see MICH. CONST. art. V, § 14 (granting the legislature to “prescribe[] by law” the “procedures and regulations” for issuing a pardon), it seems possible that the legislature might be able to eliminate the power of acting governors serving for a brief period of time from issuing a pardon, e.g., by imposing a public notice requirement. However, where a state court views the gubernatorial exercise of clemency as a political question, see Jackson C. Smith, Note, *In re Hooker: A Political Question Doctrine Game Change*, 32 MISS. C. L. REV. 531, 553–54 (2014), any such violation might be non-justiciable anyway.

319. But see generally *Slaughter-House Cases*, 83 U.S. 36 (1873) (functionally reading the Privileges or Immunities Clause out of the Constitution); *Luther v. Borden*, 48 U.S. 1 (1849) (functionally reading the Guarantee Clause out of the Constitution).

320. Keshia Clukey (@KeshiaClukey), X, “SCOOP: Traditionally when the Governor goes out of state the Lt. Gov is acting until she’s back, but according to the gov’s office their attorney looked into it and with technology that’s not need[ed]. She’ll remain acting in DC. Fair given the @GovKathyHochul @DelgadoforNY breakup” (Mar. 14, 2025, at 01:39 ET), <https://x.com/KeshiaClukey/status/1900602788221960695> [https://perma.cc/ES6D-69WE].

voters for their approval.³²¹ While proposing a constitutional amendment removing gubernatorial absence provisions may be a low priority for state legislators, much less voters, doing so contributes to what must be seen as a high-priority project: constitutionally entrenching norms.

Even stipulating that there are circumstances in which a governor's absence from their state is so severe as to genuinely prove disabling, absence provisions themselves do little to ameliorate those circumstances without adding additional externalities.³²² Acting governors have routinely launched what functionally amount to miniature coups of their state governments—yet at the same time, confusion over who is entitled to exercise gubernatorial power may routinely deprive states of actual governance.³²³

Striking out absence provisions would certainly not eliminate the lawful resolution of severe gubernatorial absences.³²⁴ As the supreme courts of Florida and Kansas both recognized, even without a specific provision devolving gubernatorial power during physical absences, it is possible that an absence might be so severe as to interfere with the lawful administration of government that it constitutes a “disability” or “inability” to govern.³²⁵ And, as noted earlier, many states have adopted constitutional procedures for determining the existence of a disability.³²⁶ These provisions were specifically written for and geared toward physical or mental disabilities, but they could apply just as easily in the context of a disabling absence from the state.³²⁷ A governor might be physically absent from their state and unable to administer their government—perhaps because they went missing while hiking,³²⁸ were kidnapped and

321. ARK. CONST. amend. VI, § 4 (amended 2016); R.I. CONST. art. IX, § 9 (amended 1992).

322. See Daleo, *supra* note 127, at 930–41 (describing a situation where a governor's absence would be debilitating); see also, e.g., *Montgomery v. Cleveland*, 98 So. 111, 116 (Miss. 1923) (Anderson, J., dissenting) (describing hypothetical “golf course on the line between Mississippi and Alabama, partly in this state and partly in that,” in which the Governor of Mississippi repeatedly steps in and out of the state, such that “now he is [governor] and now he ain’t, and now he is and now he ain’t, and so on as long as the game goes on”).

323. Compare *supra* text accompanying note 22–29 (describing repeated attempts to subvert gubernatorial leadership during absences in Idaho) with *Governorship of California*, 603 P.2d 1357, 1362 (Cal. 1979) (demonstrating the importance of constant gubernatorial authority).

324. See *supra* Section III.A.2.

325. See *supra* text accompanying notes 267–72.

326. See *supra* note 61–63 and accompanying text.

327. See *supra* text accompanying notes 261–82.

328. Ben Smith, *Sanford Goes Missing*, POLITICO (June 22, 2009, at 15:46 ET), <https://www.politico.com/blogs/ben-smith/2009/06/sanford-goes-missing-019268> [<https://perma.cc/UJ2Q-BNE4>] (“The whereabouts of Gov. Mark Sanford have been

held for ransom,³²⁹ or were swept away by an ocean current while swimming.³³⁰ In these situations, the absent governor, just like a governor in a coma, would surely be unable to perform their duties, which would constitute a “disability” or “inability” under their state constitution.³³¹

CONCLUSION

More than half of state constitutions transfer gubernatorial power upon the governor’s absence from the state. These provisions are out of date, invite manipulative behavior, and produce bad law. Though originally justified by the limitations of nineteenth-century travel, gubernatorial absence provisions have long functioned as time bombs for orderly administration of state government. They have provided lieutenant governors, state senate presidents, and other designated successors with guaranteed opportunities to plot, plan, and then act—including through something as individualized as a pardon or something as far-reaching as adopting a new law—and have been anachronisms in state constitutions for nearly a century.

Yet while these provisions are anachronistic, they remain in use. The original historical survey I conducted for this Article reveals the depth of actions taken or attempted by putative acting governors. These acting governors have not hesitated to pick up the governor’s pen and approve or reject proposed laws, appoint or remove officials across the government,

unknown to state officials since Thursday, and some state leaders are questioning who is in charge of the executive office.”). It was eventually revealed that, though Sanford claimed to be hiking the Appalachian Trail, he was in Argentina visiting his mistress, which prompted an ethics investigation. *See generally* S.C. ETHICS COMM’N, COMPLAINT C2010-020: IN THE MATTER OF GOVERNOR MARK SANFORD (Nov. 2009), <https://www.scstatehouse.gov/Archives/CitizensInterestPage/EthicsCommissionReport/Part1ComplaintC2010-020.pdf> [<https://perma.cc/3ZZQ-ZE33>] (reviewing allegations made about Sanford’s use of state resources).

329. *See, e.g.,* Terry Ganey, *Transfer of Power: Authority in Governor’s Absence Is Debated*, ST. LOUIS POST-DISPATCH, Apr. 18, 1991, at C1 (“What if the governor takes a trip to Kurdistan, gets kidnapped and is held hostage? Who’s the governor then? These hypothetical questions were posed by Supreme Court judges to the lawyers before them . . . during arguments on whether the lieutenant governor can act as governor when the governor is out of state.”).

330. *Cf.* MUNGO MACCALLUM & FRANK BONGIORNO, *THE GOOD, THE BAD AND THE UNLIKELY: AUSTRALIA’S PRIME MINISTERS: FROM BARTON TO ALBANESE* 111 (2023) (noting that, in 1967, Australian Prime Minister Harold Holt “unwisely decided to take an early morning swim” while vacationing at Cheviot Beach in the Nepean Peninsula, and after “he plunged into the wild surf [he] was never seen again”); *see also* THE HOLLOWMEN: *A Quiet January* (ABC1 television broadcast, aired Oct. 8, 2008) (“How are my jokes going to work if no one understands Australian history?”).

331. *Cf. supra* text accompanying notes 267–72 (describing instances in which an absence is so severe as to constitute disability).

convene the state legislature in special session, award clemency, and order investigations into ostensibly illegal conduct.

In that light, it is surprising that these provisions endure—yet they do. I have shown that, although some states have excised them from their constitutions, most have not. What is more, many of them lack formal, binding interpretations from their state supreme courts. And where state courts have stepped into the morass, they have been left with bad options. In this Article, I have surveyed the history and caselaw and argued that courts seeking to determine when an “absence” occurs have settled on two tests, neither of which is *both* logical and easily applied. The “physical absence” rule devolves gubernatorial power—automatically and totally—the moment the governor steps across state lines. The rule encourages would-be acting governors to plot, plan, and wait for governors to leave the state. Yet the stakes are clear, and the rule is easily applied. The “effective absence” rule only devolves gubernatorial power if the governor’s absence is “effective.” The rule is obviously intuitive, and surely disincentivizes powerplays. Yet it is nearly impossible to apply—and only one court has ever actually done so in a subsequent case.

Try as they might, without completely reading out the word “absence” from their state constitutions, state courts cannot fix the problems caused by these provisions. These provisions cannot be pruned into workable rules; they must be excised, root and branch. The burden is not on courts, but instead on state constitutional reformers, legislators, and voters to modernize their state constitutions and avoid absence provisions triggering a constitutional crisis.