

# MEASURING STATE CAPTURE

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How do we know when an executive branch actor is captured or is at risk of capture? And what is the risk that other branches of government could be captured? In this project, we offer a critical review of regulatory—or industry-related—capture that we use to build a concept of state capture that extends beyond agency-specific accounts and incorporates both the structures and processes of governing, while centering our examination on the public. We use state-level data on campaign finance, lobbying, industry size, ethics, and transparency to measure the degree to which the fifty state executive, legislative, and judicial branches are at risk of capture by the dominant industries in the state. We then test our measures of risk against policies that departed so far from public opinion that scholars suspect capture may have been at play. Finally, we discuss judicial review of agency action in the face of suspected capture. Courts should use a heightened level of scrutiny where risk of capture is high. However, we also point out that elected judges—particularly those who run for re-election—are vulnerable to the same pressures that legislators endure when it comes to the risk of influence via campaign finance. In those cases in which a judge’s campaign financing is dominated by the industry affected by the agency action or statute, the judge should recuse. And policymakers concerned about judicial capture should create a narrow presumption for litigants to remove the case to federal court.

Introduction.....	1142
I. State Capture as a Concept.....	1148
A. Studying Capture Across Time and Disciplines .....	1148
B. How Others Have Conceptualized State Capture .....	1152
1. A Regulated Entity and Intent.....	1152
2. Superior Organizational Capacity .....	1152
3. Durability of Bias and Control Over Decision- Making .....	1153
4. The Public .....	1153
5. Capture in Contrast to Principles of Democracy.....	1154
6. Capture as a Matter of Degree .....	1155

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	C. Dimensions of Capture .....	1156
II.	Reconceptualizing State Capture: Structure, Processes, and Outcomes .....	1157
	A. Including the Public in Considerations of Capture .....	1158
	B. A Structure-Process-Outcome Framework .....	1158
	C. Who Can Be Captured? Political Actors and Their Roles .....	1162
III.	Operationalizing Risk of State Capture .....	1164
	A. Influence, Obligation, and Power .....	1165
	B. Infiltration and Reliance .....	1168
	C. Ethics Constraints .....	1169
	D. Transparency and Visibility .....	1171
	E. Measuring Outcomes of State Capture .....	1175
IV.	Data Analysis .....	1175
	A. Latent Trait Model Measuring Risk of Capture .....	1176
	B. Distinguishing Between Observationally Equivalent Policy Divergence .....	1180
V.	Toward a Jurisprudence of State Capture .....	1183
	Conclusion .....	1185

#### INTRODUCTION

In the early weeks of the COVID-19 pandemic, California Governor Gavin Newsom issued Executive Order N-33-20 ordering residents of California to stay home “except as needed to maintain continuity of operations of essential critical infrastructure sectors.”<sup>1</sup> Item 15 in the section titled “Industrial, Commercial, Residential, and Sheltering Facilities and Services” declared the following category of workers to be essential: “[w]orkers supporting the entertainment industries, studios, and other related establishments, provided they follow COVID-19 public health guidance around physical distancing.”<sup>2</sup> The entertainment industry was not considered a critical infrastructure sector in the initial shutdown order in March 2020.<sup>3</sup> Between the first and second executive orders, what made the governor decide that the show must go on?

Of course, the entertainment industry is a major player in the political economy of California. Entertainment and digital media alone support 740,000 jobs in California—a large share of the 17,660,900 employees in

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1. *Essential Workforce*, CAL. ALL, 1 (Apr. 28, 2020), <https://files.covid19.ca.gov/pdf/EssentialCriticalInfrastructureWorkers.pdf> [<https://perma.cc/6HYW-4EEY>].

2. *Id.* at 23.

3. Cal. Exec. Ord. No. N-33-20 (Mar. 4, 2020), <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf> [<https://perma.cc/G5B5-4J4Q>].

the nonfarm employment sector.<sup>4</sup> The industry produces revenues in the tens of billions of dollars each year.<sup>5</sup> And lobbying disclosures reveal that the “big six” Hollywood studios were busy lobbying the governor for industry-friendly policies during an otherwise strict lockdown. For example, Netflix tripled its quarterly average lobbying spending in 2020, and the studios and their employees have also contributed handsomely to political campaigns in the state.<sup>6</sup> While this entertainment industry largesse may or may not explain the governor’s decision, it was interesting enough for the media to report on it after the policy change.

Consider another example. In February 2021, Texas suffered a historic winter storm.<sup>7</sup> Oil and gas pipes froze, as did some clean energy transmission, and the power grid failed.<sup>8</sup> The failure resulted in blackouts to nine million Texans and close to 700 excess deaths over the same time period of the previous year.<sup>9</sup> After the storm, fifty-two percent of Texans surveyed said that policymaking failures were a “major factor” in the negative impacts that followed the freeze.<sup>10</sup>

4. Kevin Smith, *California’s Creative Economy Supports 2.68 Million Jobs, Study Says*, L.A. DAILY NEWS (Feb. 12, 2020), <https://www.dailynews.com/2020/02/12/californias-creative-economy-supports-2-68-million-jobs-study-says>; *California Unemployment Rate Improves to 7.5 Percent in August 2021*, EMP. DEV. DEP’T, STATE OF CAL. (Sept. 17, 2021), <https://www.edd.ca.gov/newsroom/unemployment-august-2021.htm> [<https://perma.cc/3CHY-XJHL>].

5. David Ng, *LA Region’s ‘Creative Economy’ Produced 457,400 Jobs in 2016, Driven by Hollywood Rebound*, L.A. TIMES (May 22, 2018), <https://www.latimes.com/business/hollywood/la-fi-ct-otis-creative-economy-report-20180522-story.html>.

6. Lee Fang, *Hollywood Deployed Lobbyists to Win Exemption to Strict California Lockdown*, INTERCEPT (Dec. 11, 2020), <https://theintercept.com/2020/12/11/hollywood-covid-filming-california-lockdown/> [<https://perma.cc/BH9G-GJFS>] (“Netflix and its employees gave \$135,950; Walt Disney and Co. and its employees gave \$183,999; Paramount and its employees gave \$119,308; Sony and its employees gave \$27,961; Comcast-NBCUniversal and its employees gave \$251,588; and Warner Bros. and its employees gave \$77,050.”).

7. Peter Aldhous, Stephanie M. Lee & Zahra Hirji, *The Texas Winter Storm and Power Outages Killed Hundreds More People Than the State Says*, BUZZFEED NEWS (May 26, 2021), <https://www.buzzfeednews.com/article/peteraldhous/texas-winter-storm-power-outage-death-toll> [<https://perma.cc/KS2J-77XM>].

8. *Id.*

9. *Id.*; Neena Satija & Aaron Gregg, *Texas’ Chief Energy Regulator Fiercely Defended Fossil Fuels After Historic Blackouts. She Also Profits from Oil and Gas.*, WASH. POST (Mar. 19, 2021), <https://www.washingtonpost.com/business/2021/03/19/texas-chief-energy-regulator-fiercely-defended-fossil-fuels-after-historic-blackouts-she-also-profits-oil-gas/> [<https://perma.cc/6DKW-6G5D>].

10. Rachel White, *Texans Blame Variety of Factors for Severity of Winter Storm, Support Reform Attempts*, UT NEWS (Apr. 2, 2021), <https://news.utexas.edu/2021/04/02/texans-blame-variety-of-factors-for-severity-of-winter-storm-support-reform-attempts/> [<https://perma.cc/XYP4-LUD8>].

In the aftermath of the storm, several members of the Public Utility Commission (PUC) resigned.<sup>11</sup> The U.S. House of Representatives held hearings, including one at which Christi Craddick, head of the Texas Railroad Commission (TRC), testified.<sup>12</sup> Craddick and her father, a state representative, own hundreds of acres of West Texas land and profit handsomely from natural gas extraction on that land.<sup>13</sup> Texas ethics rules do not ban regulators from having financial interests in the industries that they oversee.<sup>14</sup> Perhaps unsurprisingly, at the hearing, Craddick declared that “these [gas pipeline] operators were not the problem. The oil and gas industry was the solution.”<sup>15</sup> In fact, oil and gas operations had also failed during the storm, including two that pay Craddick to extract on the family’s land.<sup>16</sup> What’s more, some analysts say that natural gas failures were an important reason for the blackouts.<sup>17</sup>

The Texas legislature, which meets for no more than 140 days and only in odd-numbered years,<sup>18</sup> responded to the failures with a handful of bills, including SB3, which is on the desk of the governor as of this writing.<sup>19</sup> Because the energy industry is an important source of campaign finance for many Texas state legislators, some changes to SB3 during its

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11. Aldhous, Lee & Hirji, *supra* note 7.

12. Associated Press & WFAA Staff, *Texas Officials, Leaders Testify to Congress About Winter Power Failure*, WUSA9 (Mar. 24, 2021), <https://www.wusa9.com/article/news/politics/national-politics/congress-questions-texas-officials-power-grid-failure/507-39f26510-4c86-4653-9037-f5a8d932676e>.

13. Satija & Gregg, *supra* note 9.

14. *Id.*

15. *Id.*

16. *Id.*

17. Erin Douglas, *Texas Largely Relies on Natural Gas for Power. It Wasn't Ready for the Extreme Cold*, TEX. TRIB. (Feb. 16, 2021), <https://www.texastribune.org/2021/02/16/natural-gas-power-storm/> [<https://perma.cc/W5FJ-FAYA>] (“Failures across Texas’ natural gas operations and supply chains due to extreme temperatures are the most significant cause of the power crisis that has left millions of Texans without heat and electricity during the winter storm sweeping the U.S.”); Jeremy Schwartz, Kiah Collier & Vianna Davila, “*Power Companies Get Exactly What They Want*”: *How Texas Repeatedly Failed to Protect Its Power Grid Against Extreme Weather*, PROPUBLICA (Feb. 22, 2021), <https://www.propublica.org/article/power-companies-get-exactly-what-they-want-how-texas-repeatedly-failed-to-protect-its-power-grid-against-extreme-weather> [<https://perma.cc/S5NZ-9GCE>] (“Citing preliminary figures from ERCOT that show natural-gas-fired power plants performed worse than those fueled by other types of energy during this year’s power crisis, energy experts say producers and distributors of that fossil fuel played a major role in the catastrophe.”).

18. *Frequently Asked Questions: How Often Does the Legislature Meet?*, TEX. HOUSE OF REPRESENTATIVES, <https://house.texas.gov/resources/frequently-asked-questions/> [<https://perma.cc/G7BJ-RP92>] (last visited Oct. 2, 2021).

19. See Tom Kleckner, *UPDATE: Texas Legislative Response to Winter Storm Leaves Some Doubting*, RTO INSIDER (June 1, 2021), <https://www.rtoinsider.com/articles/20291-update-texas-legislative-response-to-winter-storm-leaves-some-doubting> [<https://perma.cc/7968-2G3V>].

drafting raised concerns that the new law would benefit industry at the expense of the public.<sup>20</sup> For example, SB3 requires the weatherization of pipes, but the scope was narrowed to include only those pipes that the TRC—the agency run by Craddick, who profits when the industry profits—deems to be part of critical infrastructure.<sup>21</sup>

Suppose a legal challenge is filed against the bill. How should a judge interpret claims that the law is harmful to the public good—that regulatory agencies have been captured and that legislators are more concerned about campaign contributions from industry than public health? One popular justification for judicial oversight of the executive branch, particularly during the expansion of administrative common laws in the 1960s and 1970s, is that courts can help correct for capture.<sup>22</sup> But how do we know when an outcome is the product of capture as opposed to other, more benign forces? In this study, prepared as part of a symposium on public law in the states, we seek to provide conceptual clarity about capture, guidance on how to measure state capture, and a discussion of how our jurisprudence can address capture.

In short, state capture is the degree to which industry steers government actors' policy agenda and decisions in a way that benefits private actors rather than the public, particularly when industry dominance is repeated or durable.<sup>23</sup> State capture varies across time and space, but it is distinguishable from other aspects of malfeasance, such as bribery, by its duration.<sup>24</sup> Scholars have long analyzed state capture,<sup>25</sup> though they often leave it under-defined. Many of their perspectives are missing two aspects of capture that we think are important: (1) extension beyond agency-based accounts and (2) delineation of the governing structures and

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20. *See id.*

21. Erin Douglas & Mitchell Ferman, *Texas Legislature Approves Bills to Require Power Plants to "Weatherize," Among Other Measures to Overhaul Electric Grid*, TEX. TRIB. (May 30, 2021), <https://www.texastribune.org/2021/05/26/texas-power-grid-reform-legislature/> [<https://perma.cc/K2R7-58PV>]. *See also* Satija & Gregg, *supra* note 9; Miles Reynolds, Tab R. Urbantke & Lauren Freeland, *Texas Adopts Grid Weatherization & Securitization Measures*, HUNTON ANDREWS KURTH (June 22, 2021), <https://www.huntonak.com/en/insights/texas-adopts-grid-weatherization-and-securitization-measures.html> [<https://perma.cc/K2R7-58PV>].

22. Thomas Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CASE W. RESV. L. REV. 1039, 1043 (1997).

23. *See* Barry M. Mitnick, *Capturing "Capture": Definitions and Mechanisms*, in HANDBOOK ON THE POLITICS OF REGULATION 34, 34 (David Levi-Fleur ed. 2011).

24. *See* Daniel Carpenter & David A. Moss, *Introduction*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 1, 18 (Daniel Carpenter & David A. Moss eds., 2014) [hereinafter Carpenter & Moss, *Introduction*].

25. *See* Joel S. Hellman, Geraint Jones, Daniel Kaufmann & Mark Schankerman, *Measuring Governance, Corruption, and State Capture: How Firms and Bureaucrats Shape the Business Environment in Transition Economies* 3 (World Bank Inst., Working Paper No. 2312, 2000).

processes underlying the risk of capture. We build a theory of capture that addresses these oversights.

First, much of the literature on capture focuses on *regulatory* capture and excludes any discussion of capture in other branches of government.<sup>26</sup> This oversight causes scholars to miss indirect ways that capture of one branch can exacerbate capture in another branch—especially in the executive branch. We know that a captured agency may drag its heels in implementing statutory mandates.<sup>27</sup> But it is also true that a captured legislature will not conduct oversight when an agency crafts regulation at the behest of an industry, even when the public clearly wants a different outcome.<sup>28</sup> Similarly, a captured judiciary will be more likely to uphold regulations that are contrary to the public's will if the regulations benefit the judges' patrons (this is especially true when judges are elected in a privately-financed campaign system).<sup>29</sup>

Second, analytical leverage can be gained by thinking of capture in terms of the essential elements of governing: governing structures and governing processes. Structures vary across branches of government, but they include selection criteria, available resources, tenure requirements, and employment qualifications. When a special interest group captures the structure of a government actor, it can control who sits at the table, how many resources are available to enforce the law, and other important aspects of both social and economic regulation. By contrast, processes are those things done in the process of governing, which can include how information is collected, how priorities are chosen, and how decisions are made—in other words, the decision rules internal to a body of government, as well as the presence of transparency, information collection and filtering, oversight, and accountability. We argue that a captured process may result in less public access to decision-making, lower priority for public interest agenda items, and/or weaker oversight and accountability mechanisms.

In some domains, it may be easier for special interest groups to capture the structure of government. For example, consider the election of state legislators. Legislatures control their own procedures (subject loosely to constitutional requirements), so any changes made to their processes may not be durable. However, controlling *who is elected* can be outcome-determinative for special interests. Similarly, if an industry-friendly candidate wins the governorship, industry cronies may be appointed to the

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26. *Id.*

27. See generally Rachel Augustine Potter, *Slow-Rolling, Fast-Tracking, and the Pace of Bureaucratic Decisions in Rulemaking*, 79 J. POL. 841 (2017).

28. Kenneth Lowande & Rachel Augustine Potter, *Congressional Oversight Revisited: Politics and Procedure in Agency Rulemaking*, 83 J. POL. 401 (2021).

29. Cf. J. Jonas Anderson, *Court Capture*, 59 B.C.L. REV. 1543, 1549–50 (2018) (discussing capture of Article III judges).

highest levels of leadership to undermine the regulatory power of agencies while erecting barriers to entry for an industry's competitors.

In other domains, capturing the processes of government may be easier. Consider a situation in which those at the top of an agency are skeptical of special interest groups, while civil servants are happy to work with them—natural resources regulation in an oil state with a Democratic governor, for instance. The special interests may attempt to gum up the decision-making processes in order to deter unfriendly regulations or delay them in anticipation of a future in which the party that favors their business returns to hold the government.

A strong theory of capture must therefore include special interest pressures on all branches of government and account for varying channels of influence. Refining the theory of capture in this way has important empirical implications, not just in the number of potential variables at play but also in distinguishing outputs of capture that feed into the risk of capture in the first place. An added complication is the fact that capture is a latent construct, meaning that it is unobservable. A proper empirical analysis thus requires us to “measure around it.” In this paper, we use state-level data on executive, legislative, and judicial branches of government, as well as campaign finance, lobbying, industry dominance, and transparency laws to inform our empirical project.

We measure capture in two stages. In the first stage, we run a latent trait model to measure the *risk* of capture. Our model suggests that both structural and procedural features of state institutions can predict capture, though not always how we might expect. For example, the sheer size of a state's economy (as measured by the number of jobs) poses more of a risk of capture than the lack of a direct statutory ban on the revolving door.<sup>30</sup> On the other hand, independent freedom of information monitoring predictably mitigates the risk of capture, while laws that require two-party consent to record public officials predictably enhance that risk.<sup>31</sup>

In our second stage, we test our most discriminating variables against two measures of policy divergence—where social and economic policy outcomes diverge from public opinion in each state. We find that even where this gap is large, only about half of the most predictive variables that explain policy divergence are present in our latent model to predict capture risk. This suggests that a combination of latent trait analysis and regression analysis can be useful to both scholars and judges who wish to disambiguate policies that are far from public preferences as a result of capture and policies that diverge from public preferences for other, more democratically acceptable, reasons. Only the former would be appropriately reviewed as potentially resulting from capture.

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30. See *infra* Section IV.A.

31. See *infra* Section III.D.

Our Essay proceeds as follows. Part I discusses the literature on capture. While voluminous, we note that very little scholarship has taken a comprehensive view of capture's domains, and none has analyzed its relationship to governmental structure and process as such. In Part II, we describe the structure, process, and outcomes framework and its relationship to capture. In Part III, we move to measuring, or operationalizing, the concept of capture that we develop in the first two parts. We briefly describe our fifty-eight input variables and the categories of influence, obligation, and power; infiltration and reliance; ethics constraints; and transparency and visibility they represent. We present our data analysis in Part IV and discuss the implications of our findings for state-level jurisprudence in Part V.

### I. STATE CAPTURE AS A CONCEPT

"We cannot measure unless we know first what it is that we are measuring."<sup>32</sup> Thus, we begin with a careful formulation of the concept of capture, including its domains. A good concept will aid observers in distinguishing between the phenomenon of interest and similar, but distinct, phenomena, such as influence and bribery.<sup>33</sup> We are, of course, not the first scholars to engage state capture as a concept. However, with the exceptions of Mitnick and Carpenter, described below, surprisingly few scholars have focused on concept formation itself when studying capture.<sup>34</sup> In this Part, we briefly summarize the general approaches taken by scholars studying capture and conclude with a critique of these accounts.

#### *A. Studying Capture Across Time and Disciplines*

Scholarship around state capture has ebbed and flowed for over a century and across the globe. With a lens turned toward the United States, progressives of the 1910s and 1920s wrote widely about regulatory capture. Perhaps most famously, former professor and then-presidential candidate Woodrow Wilson said, "If the government is to tell big business men how to run their business, then don't you see that big business men .

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32. Giovanni Sartori, *Concept Misformation in Comparative Politics*, 64 AM. POL. SCI. REV. 1033, 1038 (1970).

33. See John Gerring, *What Makes a Concept Good? A Criterial Framework for Understanding Concept Formation in the Social Sciences*, 31 POLITY 357, 357-58 (1999).

34. See generally Mitnick, *supra* note 23; Daniel Carpenter, *Detecting and Measuring Capture*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT, *supra* note 24, at 57 [hereinafter Carpenter, *Detecting and Measuring Capture*].

. . . must capture the government, in order not to be restrained too much by it?”<sup>35</sup>

Half a century later, skeptics of the science of public administration argued that capture leads to under-regulation.<sup>36</sup> These critiques took the form of case studies such as Ralph Nader’s *Unsafe at Any Speed*, which traced the ability of the auto industry to undermine its regulation by the National Highway Transportation Safety Administration.<sup>37</sup> The result was an under-provision of public safety for drivers, pedestrians, and anyone who breathes in exhaust.<sup>38</sup>

The 1990s and early 2000s saw great scholarly interest in governance around the world, particularly by World Bank economists and their collaborators examining regulatory capture after the fall of the Soviet Union.<sup>39</sup> This was the age of “good governance toolkits,” and scholars focused on the relationship between capture and policy outcomes.<sup>40</sup> During this same era, other scholars worked to identify the key moving parts related to corruption and capture.<sup>41</sup>

Several themes run throughout this literature. Foremost, many authors were skeptical of independent, technocratic, and apolitical administration without strong guardrails. Consider arguments by James Q. Wilson. Wilson argued that administrators are just people and are susceptible to pressure like all humans experiencing cross-pressures.<sup>42</sup> Others documented the risks and instances of forces outside of government manipulating their own regulation by the government, sometimes with great success, sometimes only around the margins.<sup>43</sup>

Another theme of this literature is the varied disciplinary approaches to concepts of capture. For example, economists writing about regulatory capture often proceeded not from a model of governance but instead from an auction model in which private interests compete for their preferred

35. WOODROW WILSON, *THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE* 201–02 (1913).

36. See, e.g., RALPH NADER, *UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE* (1965).

37. See generally *id.*

38. See *id.*

39. See, e.g., Hellman, Jones, Kaufmann & Schankerman, *supra* note 25.

40. See *id.* at 3–4.

41. See, e.g., Daniel Kaufmann, Sanjay Pradhan & Randi Ryterman, *New Frontiers in Diagnosing and Combating Corruption*, WORLD BANK: PREM NOTES, no. 7, Oct. 1998.

42. See JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 370–71 (1989).

43. See, e.g., NADER, *supra* note 36, at 297, 305; WILSON, *supra* note 35, at 81–88; SUSAN ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY* 1–4 (1978); SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* 7–12 (2d. ed. 2012).

policies.<sup>44</sup> These auction models assume that an industry's preferred policies center on protective regulations that erect barriers to entry and stifle competition.<sup>45</sup> Methodologically, many economists use a simple model of regulatory capture in order to gain theoretical leverage.<sup>46</sup> Achieving this leverage required leaving key aspects of regulation in a "black box."<sup>47</sup> A smaller literature exists in economics that addresses cross-branch influence and capture. This work builds on George Stigler's concept of the iron triangle: (1) industry, (2) regulators of that industry, and (3) congressional committees that oversee the regulators.<sup>48</sup> In Stigler's model, industry interacts with its regulators and the committees overseeing the regulators in order to achieve the goals described above.<sup>49</sup>

Scholars in other disciplines open up the structural and procedural details inside the black box in their work on capture. For scholars in political science and public administration, capture—and it's almost always regulatory capture—is an inherent risk of principal-agent relationships, particularly the legislature-agency relationship.<sup>50</sup> These scholars focus on the procedural and, occasionally, structural and personnel matters that incentivize bureaucrats to be more or less responsive to political principals and industry lobbyists.<sup>51</sup>

From the other side of the regulatory relationship, others analyze the pressure group environment in which the policymakers operate, measuring the number, types, and costs of interest group attempts to control policy, whether or not capture actually results. Most of the discussion of "capture" in this literature focuses on interest group strategies and tactics and how

44. See, e.g., George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 12 (1971); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 171, 172 (1983); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211–12 (1976); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 343–47 (1974). In these accounts, the administrators have no particular ethical commitments or professional pressures outside of whatever information problems they may be trying to solve.

45. Daniel Carpenter & David A. Moss, *Section I: Failures of Capture Scholarship*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT, *supra* note 24, at 23; Richard A. Posner, *The Concept of Regulatory Capture: A Short, Inglorious History*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT, *id.* at 49, 52.

46. See Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL'Y 203, 206 (2006).

47. *Id.* at 204.

48. Mitnick, *supra* note 23, at 42.

49. See Stigler, *supra* note 44, at 11–12; Peltzman, *supra* note 44, at 214.

50. Mitnick, *supra* note 23, at 35–36.

51. See, e.g., Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873, 875, 886 (2007) (modeling the incentives for bureaucrats to shirk).

groups exploit procedural features of agency policymaking.<sup>52</sup> A related, extensive, and cross-disciplinary literature explores how—and whether—these groups attempt to influence the statutes that the agencies implement through legislative lobbying and campaign finance activities.<sup>53</sup>

Legal scholarship, the fire hose of normative ideas, has prescribed structural and procedural interventions to help align government outputs with public preferences, regardless of the flood of industry inputs agencies may receive. Examples abound, though we highlight only a few. In response to Stigler’s “iron triangle” argument—that industry interacts with regulators and congressional committees to achieve friendly regulation<sup>54</sup>—Richard Stewart wrote a lengthy history of the “traditional model” of administrative law and its expansion in an effort to reduce the size of the administrative state and, failing that, reduce discretion among administrators.<sup>55</sup> Stewart highlights administrative discretion as the key bogeyman of scholars of a “crude[]” model of regulatory capture.<sup>56</sup> In critics’ telling, administrative discretion is usurped by industry to steer the agency toward industry’s aims.<sup>57</sup> He offers several more subtle mechanisms to explain “industry orientation.”<sup>58</sup>

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52. See, e.g., Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 128–30 (2006); see Alexander Bolton, Rachel Augustine Potter & Sharece Thrower, *Organizational Capacity, Regulatory Review, and the Limits of Political Control*, 32 J.L. ECON. & ORG. 242, 268 (2015); Rachel Augustine Potter, *Slow-Rolling, Fast-Tracking, and the Pace of Bureaucratic Decisions in Rulemaking*, 79 J. POL. 841, 841, 845 (2017).

53. See, e.g., Stephen Ansolabehere, John M. de Figueiredo & James M. Snyder, Jr., *Why Is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSPS. 105, 109 (2003); Sanford C. Gordon, Catherine Hafer & Dimitri Landa, *Consumption or Investment? On Motivations for Political Giving*, 69 J. POL. 1057, 1068 (2007) (finding evidence of investment motivations among corporate executives and reconciling such evidence with findings that donations are surprisingly small given the possible upside); Michael Barber, *Donation Motivations: Testing Theories of Access and Ideology*, 69 POL. RES. Q. 148, 156 (2016) (finding that corporate PACs give to incumbents from both parties, mostly regardless of donor ideology, which supports the idea that corporate donations are to preserve access to the policymakers); Eleanor Neff Powell & Justin Grimmer, *Money in Exile: Campaign Contributions and Committee Access*, 78 J. POL. 974, 975–76 (2016); Zhao Li, *How Internal Constraints Shape Interest Group Activities: Evidence from Access-Seeking PACs*, 112 AM. POL. SCI. REV. 792, 792–93 (2018); Joshua McCrain, *Revolving Door Lobbyists and the Value of Congressional Staff Connections*, 80 J. POL. 1369, 1369–70 (2018); Keith E. Schnakenberg & Ian R. Turner, *Signaling with Reform: How the Threat of Corruption Prevents Informed Policy-Making*, 113 AM. POL. SCI. REV. 762, 764 (2019) (on competing pressures and unintended consequences for constituents of incumbent legislators who want to distance themselves from suspicions that lobbying is corrupt because they lose out on the information lobbyists provide).

54. See Mitnick, *supra* note 23.

55. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1685–87 (1975).

56. *Id.* at 1684–87.

57. *Id.* at 1682–83.

58. *Id.* at 1685–86.

More current research has further complicated the issue of capture, pointing out a conceptual slippage between the way administrative law scholars conceive of capture as both political and industry-driven. Rachel Barkow has helped refocus administrative law scholars' fascination with institutional design considerations on capture by interest groups and not just insulation from political pressures.<sup>59</sup> Another branch of the modern research challenges scholars of capture to take industrial dynamics more seriously. Jim Rossi emphasizes the importance of minimizing excessive concentration of power in the regulatory process as a means to evade capture at the state level<sup>60</sup> and how the design of state administrative procedures can reduce risks of capture—for him, faction and parochialism—in state regulation.<sup>61</sup>

### *B. How Others Have Conceptualized State Capture*

Considering its relatively long history, the scholarship on capture has taken a long time to develop criteria for helping distinguish capture from other phenomena. Herein we describe the concepts and typologies used in the literature about capture. Because the literature is broad, we glean the main requirements of the concept of capture and summarize them. We then briefly explain dimensions of capture and introduce our intervention into the literature.

#### 1. A REGULATED ENTITY AND INTENT

Almost all prior literature that we have found has two relatively obvious requirements: a regulated entity and its intent to influence (and even control) the regulatory process. For example, in his work summarizing economic work on capture, Dal Bó describes regulatory capture specifically in its “broad” sense as “the process through which special interests affect state intervention.”<sup>62</sup>

#### 2. SUPERIOR ORGANIZATIONAL CAPACITY

Other research suggests the importance of resources that translate into an influence on state intervention. Specifically, “special interests” or

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59. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 17–18 (2010).

60. Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 184–85 (1997).

61. Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 554, 556 (2001).

62. Dal Bó, *supra* note 46, at 203.

regulated entities have “superior organizational capacities.”<sup>63</sup> Most concerns about capture are framed as “industry capture,” and so we generally carry that language forward into this project as well. The vast majority of regulated industries are included in the definitions of primary, secondary, or tertiary industry.<sup>64</sup> Primary industries are extractive, secondary industries convert raw materials produced by primary industries into goods, and tertiary industries are the for-profit and not-for-profit service sectors.<sup>65</sup>

### 3. DURABILITY OF BIAS AND CONTROL OVER DECISION-MAKING

Prior work has attempted to distinguish between capture and other phenomena of poor governance by discussing the durability of the bias toward industry and the fact that when a governmental unit is captured by industry, the industry exercises some element of control over the unit and its decisions, at least as it pertains to the industry’s interests.<sup>66</sup> A one-off bribe that affects policy outcomes displays neither control nor durability, both of which are features of capture.

### 4. THE PUBLIC

Moving on from a regulated entity—with intent, resources, control, and durability—several scholars also focus on cost to the public when capture occurs.<sup>67</sup> The injury is not merely procedural in nature. The substantive outcome of the policy is less protective than would be optimal for the public. For example, the regulated entities “secure favorable agency outcomes at the expense of the diffuse public,”<sup>68</sup> and regulation is

63. Nicholas Bagley, Response, *Agency Hygiene*, 89 TEX. L. REV.: SEE ALSO 1, 2 (2010).

64. *What Is a Business?*, BBC, <https://www.bbc.co.uk/bitesize/guides/zrvb9j6/revision/3> (last visited Oct. 18, 2021). While it’s far beyond the scope of our inquiry, note that some scholars argue for a quaternary sector, as well, which is comprised of services. See, e.g., Zoltan Kenessey, *The Primary, Secondary, Tertiary and Quaternary Sectors of the Economy*, 33 REV. INCOME & WEALTH 359, 360 (1987).

65. Some regulated entities may not be part of industry. For example, benefits recipients are regulated in that they have to meet certain requirements in order to access benefits. Because they have a collective action problem that generally prevents them from combining resources in a way that would give them superior organizational capacity, the governmental entities that regulate them are not at risk of capture by the beneficiaries.

66. Mitnick, *supra* note 23, at 35; Carpenter & Moss, *Introduction*, *supra* note 24, at 13 (“[C]apture is the result or process by which regulation, in law or application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself.”).

67. See, e.g., Schnakenberg & Turner, *supra* note 53, at 764.

68. Bagley, *supra* note 63, at 2.

“directed away from . . . the public interest and toward the interests of the regulated industry.”<sup>69</sup>

Although less consistently featured in other authors’ work, Carpenter’s requirements highlight the reason the public matters for observing potential capture.<sup>70</sup> Specifically, not only must we be able to identify the public’s interest, along with industrial interests, but there also must be a difference in their preferences.<sup>71</sup> Without these individually necessary and jointly sufficient conditions, the size of the benefit to industry and cost of the public are not measurable.<sup>72</sup>

##### 5. CAPTURE IN CONTRAST TO PRINCIPLES OF DEMOCRACY

As other scholars have pointed out, good governance and separation of powers concerns can aid as a contrast to the idea of industry capture. Bulman-Pozen and Seifter, for example, define the “democracy principle” across fifty state constitutions as including the people as the source of governing power, the importance of majority rule as opposed to rule by the few, and equal access to and treatment by the government for identified members of the political community.<sup>73</sup> Of note is the extent to which the democracy principle directly contrasts with that of capture, where governing power is situated in the hands of powerful industry or special interests, where there is a difference in policy outcomes, and where treatment prioritizes these special interests above those of the general public’s interest. In Figure 1, we highlight the contrast in expected outcomes for a captured state versus a state fully adhering to the democracy principle.

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69. Carpenter, *Detecting and Measuring Capture*, *supra* note 34, at 61.

70. *See id.* at 60–61.

71. *Id.* at 58–59.

72. *Id.*

73. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 861–64 (2021).



*C. Dimensions of Capture*

Some scholars have explained capture by strategies, types, domains, and mechanisms. For example, *strategies* of capture include *intellectual capture* and *corrosive capture*, defined by Carpenter as an attempt to weaken existing regulations and delay future regulations.<sup>76</sup> While much of the literature on capture focuses exclusively on regulatory capture,<sup>77</sup> a broader look at the state capture breaks the concept into capture by government domains. To be sure, some scholars have included so-called statutory capture in their conceptions, though the subject remains under-explored.<sup>78</sup> Regulatory capture looks different from statutory or judicial capture. Statutory and judicial capture may be even more difficult to observe and distinguish from other forms of governance failures since the legislature and judiciary are subject to fewer transparency requirements in their policymaking processes. Nevertheless, we make our best attempts in the sections that follow to describe capture across domains.

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We offer a different take on the domains and mechanisms of capture. We think that capture of the *structures* of governance (resources, personnel, organization) is likely different from capture of the *processes* of governance (transparency and disclosure, ethics requirements, and general procedural rules). This juncture is one at which fewer scholars have written, at least explicitly. However, they have tended to address one or the other as their foci. For example, Barkow emphasizes institutional design to reduce the risk of capture *ex ante*. Her focus on agency funding sources, employment restrictions, and agency powers is all structural in nature.<sup>79</sup> Bagley and Revesz propose reforms to centralized regulatory review that would help respond to capture when it occurs.<sup>80</sup> These reforms are largely procedural in nature, dealing with information processing and oversight. Bagley, in conversation with Barkow, emphasizes the need for legislative political will and information in order to address agency capture

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76. Daniel Carpenter, *Corrosive Capture? The Dueling Forces of Autonomy and Industry Influence in FDA Pharmaceutical Regulation*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT, *supra* note 24, at 154.

77. See, e.g., Mitnick, *supra* note 23, at 35; Posner, *supra* note 45, at 49.

78. See, e.g., Carpenter, *Detecting and Measuring Capture*, *supra* note 34, at 59. See also Michael E. Shepherd & Hye Young You, *Legislative Capture? Career Concerns, Revolving Doors, and Policy Biases* (unpublished manuscript) (2017), <https://ucrpolicaleconomy.ucr.edu/wp-content/uploads/2018/04/revolvingdoor.pdf> [<https://perma.cc/U9H4-4VVQ>].

79. See Barkow, *supra* note 59, at 42–55.

80. Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1282–83, 1289–90, 1313–14 (2006).

when it occurs.<sup>81</sup> Political will emerges from electoral pressures (structural); and his proposal to gather information results from a well-resourced and well-staffed body housed in the executive branch, another structure.<sup>82</sup>

To preview the rest of our operationalization of capture, we gather data across government agencies that measure aspects of each entity's structure and process. These data reflect two structural aspects of capture and attempts to combat it—(1) influence, obligation, and power; and (2) infiltration and reliance—and two procedural aspects—(1) ethics constraints and (2) transparency. We begin with an explanation of the structure and process model of state capture before turning to our empirical project.

## II. RECONCEPTUALIZING STATE CAPTURE: STRUCTURE, PROCESSES, AND OUTCOMES

In what follows, we build on prior work to provide a comprehensive measure of states' risk of capture. We intend this not as the final say but as a contribution to an ongoing conversation that allows us to wrangle the unwieldy concept of state capture into something operational and actionable.

While prior accounts have thoroughly discussed and sometimes measured structural concerns or procedural aspects of capture from the perspective of strategic private interests, we advocate for a more thorough approach that

- includes the public as a fundamental aspect of capture risk;
- examines capture as a risk along a spectrum yielding different outcomes over time for the governed;
- includes structural and procedural considerations;
- explains how structure and process can be captured across government; and
- deals with both the diagnosis of capture and its remedies.

That is our project here. In the balance of this section, we present and expand upon our definition of capture, and then we present the Structure-Process-Outcome framework and ways capture of structure or process can manifest in different parts of government.

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81. Bagley, *supra* note 63, at 2.

82. *Id.*

*A. Including the Public in Considerations of Capture*

We define state capture as the degree to which a subset of the public—often an industry—steers government actors’ policy agenda and decisions in a way that benefits the industry rather than the broader public, particularly when the industry’s dominance is repeated or durable. Implicit in our definition is a conflict—or at least some difference—between the ideal policy from an industry’s perspective and the ideal policy from the broader public’s perspective. Where an industry and the public have identical preferences, we will not be able to detect capture, even if a government body or government actors are captured. Where industry and the public agree on the best policy, the only injury to the public may be procedural in nature.

*B. A Structure-Process-Outcome Framework*

In 1966, Avedis Donabedian elucidated what has come to be known as the structure-process-outcome framework for examining the production of high- or low-quality outcomes.<sup>83</sup> He pointed to the importance of understanding how health outcomes, his particular focus, were the result of the process of medical care.<sup>84</sup> By process, Donabedian meant “what is actually done in giving and receiving care.”<sup>85</sup> Good processes were more likely to lead to good outcomes.<sup>86</sup> Processes of care, though, are significantly influenced by the structural attributes underlying them.<sup>87</sup> Donabedian defines such structures as the resources, professional capacity, and organizational settings where care takes place.<sup>88</sup>

Thus, regardless of the strength of the process of care, if a hospital is shedding asbestos from its ceilings or fails to have support staff, the outcomes could still be (although are not necessarily) of poor quality. Similarly, good facilities, robust staffing, and other structural components, on their own, may not lead to high-quality outcomes if the process of providing care is poor.<sup>89</sup>

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83. Avedis Donabedian, *Evaluating the Quality of Medical Care*, 44 MILBANK MEM’L FUND Q. 166, 169–70 (1966) [hereinafter Donabedian, *Evaluating*].

84. *Id.* at 169.

85. Avedis Donabedian, *The Quality of Care: How Can It Be Assessed?*, 260 JAMA 1743, 1745 (1988) [hereinafter Donabedian, *Quality*].

86. *Id.* at 1745 (“This three-part approach to quality assessment is possible only because good structure increases the likelihood of good process, and good process increases the likelihood of a good outcome.”).

87. Donabedian, *Evaluating*, *supra* note 83, at 169–70.

88. Donabedian, *Quality*, *supra* note 85, at 1745.

89. See Avedis Donabedian, *Twenty Years of Research on the Quality of Medical Care: 1964-1984*, 8 EVAL. & HEALTH PROS. 243, 258–59 (1985).

Donabedian's perspective on measuring quality is helpful in light of our review of previous scholarship and our pursuit of a workable measure of capture. Translating the measure of health care quality to a measure of governing quality, with a particular focus on industry capture, means we must map out what structures and processes are relevant to yield outcomes of importance. In Figure 1, we highlighted the spectrum of outcomes we might expect from different extremes of state capture. Moreover, the structures of governance and the procedures involved in governing have played crucial roles in previous scholars' diagnoses of capture and remedies for it, offering us a solid foundation upon which to build.

Structures of importance for governing, for example, are governors, legislators, and judges, along with their staffs and public administrators. Resources and professional capacity for governing would include the backgrounds and education of these actors, how often they meet, their salaries, and whether they have standing committees and professional staff for legislatures or the size of budgets for agencies. Because of the nature of the democratic setting in which governing takes place, a crucial difference from health care structures is the role of elections. Thus, a key structure for governmental actors is how (and when) they are selected and removed. Additionally, the "public" is an important structural entity, including demographic attributes (e.g., major employers, the interest group environment, population factors) that describe the pool of government and industry workers, as well as the population protected and/or burdened by regulations.

Governing processes are what is actually done while governing. For legislators, processes include writing statutes, holding hearings, and meeting with constituents and other interested actors. Gubernatorial processes include writing executive orders, signing or vetoing legislation, appointing agency leadership, and so on. Agency-level processes involve implementing policies, rulemaking, and delivering programs. Finally, judicial processes include hearing arguments, deciding cases, fostering settlements, writing opinions, etc. Many laws place additional cross-agency, or even cross-branch, procedural constraints on government actors, such as constraining hiring processes or requiring transparency of decision-making.<sup>90</sup>

The nature of the relationship between structures, processes, and outcomes (i.e., the effects on the population) in governing differs significantly from that of medical care. Here we recall our healthcare example, in which asbestos ceilings (structures) influence the provision

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90. See, e.g., Civil Service Act, ch. 27, 22 Stat. 403, 403–04 (1883) (implementing a federal civil service test); WIS. STAT. § 230.05(8) (2019–20) (permitting the director of the Wisconsin Office of Personnel Management to provide personnel services to non-state governmental units); 5 U.S.C. § 553(b) (requiring notices of proposed rulemaking to be published in the Federal Register).

medical care (processes) to impact the potential health of patients (outcomes).<sup>91</sup> If high quality medical care is provided, we might see good health outcomes, even with unsafe facilities. That same high quality of care provision paired with state-of-the-art facilities, however, would be more likely to yield good patient outcomes. Further, we would expect poor processes paired with asbestos ceilings to yield poor outcomes.

Returning to Texas, a winter storm, and the state's power grid, in comparison. The legislative structures governing the state's power grid include the length of the Texas legislative session, the number and qualifications of the legislative staff available, and other legislative characteristics; governing processes in the legislature include the writing and passage of bills and regulations dealing with the issues. Because governing involves checks and balances inherent in state political structures, though, we must consider the interactions between executive, legislative, and judicial branch actors. The governor has the ability to sign or veto legislation, state executive branch agencies typically implement Texas statutes. Moreover, legislatures often determine agency-level structures (e.g., budgets, personnel) and may constrain agency and judicial processes.<sup>92</sup>

Agency structures matter for regulatory and enforcement outcomes. For example, the Federal Election Commission was unable to conduct rulemaking, enforce regulations, or even hold hearings while it lacked a quorum from August 31, 2019, through June 5, 2020, and from July 3, 2020, through December 9, 2020.<sup>93</sup> The lack of a quorum was the result of resignations on the part of commissioners, as well as lengthy back-and-forth negotiations between the Senate and the White House with respect to offering nominations and holding hearings on nominees.<sup>94</sup>

Cross-branch dynamics are not alone in their potential to change structures. Voters have an opportunity to change governing structures at election time by voting in favor of or against an incumbent politician, for example. Importantly, the processes of governing may be more difficult

91. See *supra* notes 83–89 and accompanying text.

92. See, e.g., Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73 (requiring the Supreme Court to have two sessions each year, one commencing the first Monday of February and the other the first Monday of August). Compare Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, § 103(a), 80 Stat. 718 (“The Secretary shall establish by order appropriate Federal motor vehicle safety standards.”), with Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub. L. No. 93-492, § 103(a)(2)(C), 88 Stat. 1477 (1974) (prohibiting the secretary from punishing someone who removes a seat belt interlock or buzzer).

93. R. SAM GARRETT, CONG. RSCH. SERV., R45160, FEDERAL ELECTION COMMISSION: MEMBERSHIP AND POLICYMAKING QUORUM, IN BRIEF 1 (2020).

94. Cf. Arit John, *The Federal Agency That Enforces Campaign Finance Laws Can't Even Meet. Why?*, L.A. TIMES (Aug. 5, 2020, 1:03 PM), <https://www.latimes.com/politics/story/2020-08-05/federal-election-commission-campaign-finance-enforcement>.

for voters to assess, as they are often obscure, and they can be used to keep important choices off the agenda.

Another feature of the structure-process-outcomes framework for governing is that outcomes in one time period can impact the processes of governing for the next (and possibly future) time periods. For example, from the 1940s through the early 1980s, all fifty states passed Administrative Procedure Acts constraining the choices and processes of both future legislatures and state executive branches.<sup>95</sup>

In Figure 2 we sketch this link between these structures, processes, and outcomes in elucidating the risk of state capture. Robust structures and healthy processes are expected to yield outcomes in the public's interest (i.e., the left side of Figure 1), yet because governing is dynamic, we include feedback arrows between each element.

In sum, our seemingly simple definition of capture—the degree to which an industry steers government actors' policy agenda and decisions in a way that benefits the industry rather than the public, particularly when industry dominance is repeated or durable—hides numerous dimensions and requires identification of the relevant political actors, their working environment and motivations, their structures and processes, and differentiation between public and private interests.

Our argument is ambitious in this regard. Our aim is to build a cohesive, yet flexible, framework. Rather than simplify in order to present a theory of capture, we build on prior work to reconsider the flows of structure and process in order to measure the risk of capture and the processes and structures that create it. This should help policymakers better fit remedies to proposed solutions. If we are focused on state governments in their entirety, our lens should be wide and our temporal dimension long: we should ponder structural considerations encompassing all three branches, contemplate procedures in the context of history and democratic governing principles, and weigh outcomes that demonstrate crucial goals such as representation.

As a complement to this broad perspective, though, we can narrow our focus to the possibility of capture within a particular branch or time. If we are concerned with regulatory or statutory capture by powerful industries, for example, we could (as Carpenter argues<sup>96</sup>) zero in on outcomes desired by industry that differ from the public interest and then

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95. Rui J. P. de Figueiredo, Jr. & Richard G. Vanden Bergh, *The Political Economy of State-Level Administrative Procedure Acts*, 47 J.L. & ECON. 569, 570–71 (2004).

96. See Carpenter, *Detecting and Measuring Capture*, *supra* note 34, at 58–60.

trace (i.e., backward map) the governing procedures and structures—including the people—that could lead to these outcomes.

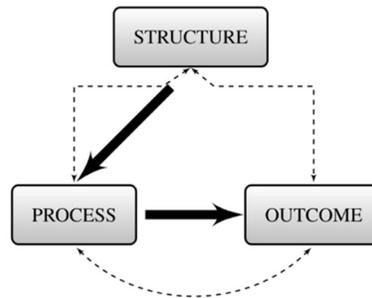


Figure 2. Link Between Structures, Processes, and Outcomes

### C. Who Can Be Captured? Political Actors and Their Roles

The political actors responsible for governing in each state include the array of usual suspects: those individuals who compose the executive, legislative, and judicial branches of government. We briefly consider the role, authority, and composition of each branch.

A state legislature, empowered by its state's constitution, writes laws, delegates authority to and provides funding for agencies, and oversees policy implementation. Although most state constitutions allow state legislatures to define their own rules of operation for each term,<sup>97</sup> there are plenty of key structural features that are fairly constant over time but vary across states, which we explore more thoroughly in Part III.<sup>98</sup>

A judiciary interprets the law and applies it to parties who have cases or controversies before it. It derives its authority from the state constitution. The primary structures of importance in a judiciary are the methods of selection and removal. Judicial processes are largely constrained by the laws of civil and criminal procedure, as well as limited ethics constraints governing recusal. Violations of procedures or errors of law in service of a certain substantive outcome are likely to be appealed to higher courts.

97. State constitutions also allow the legislatures to draw electoral districts, which impacts the structure (personnel) of the legislature. *See generally* PETER S. WATTSON, NAT'L CONF. OF STATE LEGISLATURES, DISTRICTING PRINCIPLES FOR 2010 AND BEYOND 1 (Apr. 30, 2021), <https://www.ncsl.org/research/redistricting/districting-principles-for-2010-and-beyond.aspx> [<https://perma.cc/Z2K6-7E2N>].

98. *See* Peverill Squire, *Measuring State Legislative Professionalism: The Squire Index Revisited*, 7 ST. POL. & POL'Y Q. 211, 213–14 (2007).

State executive branches include two constituent parts for our consideration: a governor and a suite of executive actors and agencies. We focus on three procedural aspects of the chief executive's office. First, a governor can sign or veto legislation. Second, a governor can regulate directly via executive order. Third, a governor, as the chief state executive, helps to direct and supervise agencies. As with the legislative and judicial branches, a governor's authority derives from a state constitution.

For the governor, structural attributes of importance include several shared with other elected officials in the legislature and judiciary. Governors vary from state to state as to the manner in which they carry out these duties.<sup>99</sup>

Finally, executive branch actors and agencies are a sprawling and (mostly) unelected set of policymakers upon whom most of the literature on capture has been focused.<sup>100</sup> As with the other state governing components, there is a great deal of variety from state to state in the type of officials who are elected or appointed.

Whether via the appointed or elected leadership of agencies or via the cadre of professional careerist bureaucrats employed within state agencies, agency officials' primary role is to implement policies.<sup>101</sup> Most executive branch actors derive their authority from statutory law, though dozens of states also allow ballot initiatives that amend the state constitution, which means that the people—or industries capturing the ballot initiative process—can directly affect both structure and process in discrete policy domains.<sup>102</sup>

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In our separation of powers systems, these three branches of government are linked in consequential ways. Legislatures are the primary way to hold executive branches accountable. They can do so *ex ante* (e.g., with delegation choices and funding constraints) or *ex post* (e.g., with

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99. See Yanna Krupnikov & Charles Shipan, *Measuring Gubernatorial Budgetary Power: A New Approach*, 12 ST. POL. & POL'Y Q. 438, 439 (2012).

100. See, e.g., Barkow, *supra* note 59; Bagley & Revesz, *supra* note 80.

101. See, e.g., Ian R. Turner, *Political Agency, Oversight, and Bias: The Instrument Value of Politicized Policymaking*, 35 J.L. ECON. & ORG. 544, 544–45, 566–67 (2019).

102. See John Matsusaka, *Public Policy and the Initiative and Referendum: A Survey with Some New Evidence*, 174 PUB. CHOICE 107, 111–12, 137 (2018) (providing a table of states and initiative types and noting that the limited existing research on ballot initiatives suggests that direct democracy results in policies that are closer to public opinion than policies passed by government). Anecdotal evidence suggests that industry can play a large role in ballot initiatives. See John Myers, *Powerful, Wealthy Interest Groups Keep Tight Grip on California Proposition System*, L.A. TIMES (Nov. 5, 2020), <https://www.latimes.com/california/story/2020-11-05/analysis-ballot-initiatives-system-california-spending>.

oversight hearings).<sup>103</sup> The executive branch takes the policy choices of the legislature and translates them into actions, services, programs, and so forth, which then cycle back into potential new legislative policy changes. Finally, the judicial branch examines executive and legislative branch choices that come before the courts.

This brief consideration of these three branches, each with its own role, power, and resources/structures, along with cross-branch interactions, highlights the limitation of contemplating capture as merely regulatory capture in administrative agencies. Governors, legislators, and judiciaries are similarly at risk.

A passive agency that receives powerful requests from industry to make policy choices in its favor only scratches the surface of possibilities for industry to capture state structures or processes. We argue instead that the structural traits for each branch provide resources for role execution and that these structures can be influenced by outsiders. The roles of the actors within their institutions, in turn, are delineated by a set of processes and procedures where information (e.g., about potential policy problems or outcomes or about constituent needs) plays a crucial role. Processes and information are also dynamic and manipulable by outside actors. Together, the structures and processes of state institutions and actors provide a pathway to particular outcomes: rules written by agencies, executive orders or the reorganization of agencies by governors, statutory and budgetary policies from legislatures and governors, and so on.

In sum, capture can happen across government. Structure or process—or both—can be captured. Where structure and processes are more democratic, then we expect responsive government to regularly deliver outcomes aligned with democratic preferences. And where structure or process of one branch of government is captured, other branches can be indirectly affected.

### III. OPERATIONALIZING RISK OF STATE CAPTURE

Having argued for a cross-branch concept of capture and particular attention to structure and process, we now operationalize state capture by describing available concrete empirical variables that we use to measure a state's vulnerability to capture. We argue that where structure or process are weak or captured, the risk of state capture rises.

Because state capture is often actualized outside of public view, observing the phenomenon directly is difficult. Therefore, our measurement exercise and data analyses involve latent constructs. Latent

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103. E.g., David B. Spence, *Administrative Law and Agency Policymaking: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REGUL. 407, 415–21 (1997).

constructs can be understood as phenomena that cannot be observed directly and therefore are estimated by measuring related variables.<sup>104</sup>

Our conceptualization provides the framework for the observable variables, or manifest traits, we include in our measurement approach. In total, we compile fifty-eight indicators of state capture between 2010 and 2020 from a variety of sources. The institutional features and processes that correspond to state capture can be described in four categories: influence, obligation, and power; infiltration; weak ethics constraints; and transparency and visibility. Within our structure and process framework, variables in the first two categories are more structural in nature, and variables in the latter two categories are more procedural in nature. We discuss them in turn.

### *A. Influence, Obligation, and Power*

Economic actors may want to exert their influence over the lawmaking, regulatory, and regulatory oversight processes. One way to exert influence is to financially support like-minded candidates in the legislature, including those who hold important committee seats.<sup>105</sup> In some states, economic actors can contribute directly to campaigns, and in others they contribute via a PAC or an independent expenditure. This financial support—and the sense of obligation it may create—helps to determine personnel in elected offices; therefore, it is structural in nature. We note that at least thirty-five states hold elections for their judges, including retention and recall elections.<sup>106</sup> In those states, risk of influence and obligation may extend to the judiciary.

Another way industry exerts influence is via lobbying. Lobbyists form relationships with agency officials<sup>107</sup> and elected officials. While lobbying provides an information subsidy, it may also provide an avenue of capture because the industry may exercise an inordinate amount of

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104. For a discussion of latent trait modeling, see Shawn Treier & Simon Jackman, *Democracy as a Latent Variable*, 52 AM. J. POL. SCI. 201 (2008), and Jodie B. Ullman & Peter M. Bentler, *Structural Equation Modeling*, in RESEARCH METHODS IN PSYCHOLOGY (John A. Schinka and Wayne F. Velicer eds., 2d ed. 2013).

105. See, e.g., Alexander Fouirnaies & Andrew B. Hall, *How Do Interest Groups Seek Access to Committees?*, 62 AM. J. POL. SCI. 132 (2018).

106. *How Many States Elect Judges? With More Than 20 Different Selection Systems, That's a Very Complicated Question*, NAT'L CTR. FOR STATE CTS. (Nov. 2, 2020), <https://www.ncsc.org/information-and-resources/trending-topics/trending-topics-landing-pg/how-many-states-elect-judges-with-more-than-20-different-selection-systems,-thats-a-very-complicated-question>.

107. See Rachel Augustine Potter, *Macro Outsourcing: Evaluating Government Reliance on the Private Sector*, J. POL. (forthcoming) (manuscript at 4), <https://www.journals.uchicago.edu/doi/abs/10.1086/716295>.

influence over the policies intended to regulate it.<sup>108</sup> Lobbying influence can result in regulation that is easier for industry to comply with but insufficiently protective of the public.<sup>109</sup> Some of the best-paid lobbyists are retired legislators who maintain close contacts with their former colleagues.<sup>110</sup> Their presence and the information and resources they provide are structural, but their expertise may help them direct the process by which their industries are regulated.

Structural concerns appear another way too. The sheer size and economic power of industry, when combined with the influence and obligation pathways described here, should increase the risk of government capture. When a sizable portion of the constituency<sup>111</sup> or sizable amount of state revenues comes from one or a few industries, obligation is high, as is power.

We measure the risk of influence and obligation by

- the states' limits on direct corporate (union) contributions to candidates (0 to infinity);<sup>112</sup>
- actual level of corporate and union campaign contributions;<sup>113</sup>
- largest percent of total contributions that the governor has received from one industry in the state (0 to 100);<sup>114</sup> and

108. See Maggie Blackhawk, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1151 (2016) (recalling an earlier debate where some believed the electorate needed to be able to provide the legislature with information in the form of advisory referenda but that making those referenda binding would be a step too far).

109. David Orozco, *A Systems Theory of Compliance Law*, 22 U. PA. J. BUS. L. 244, 255–56 (2020).

110. See Jeffrey Lazarus, *Which Members of Congress Become Lobbyists? The Ones with the Most Power. Here's the Data.*, WASH. POST: MONKEY CAGE (Jan. 15, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/15/which-members-of-congress-become-lobbyists-the-ones-with-the-most-power-heres-the-data/> [<https://perma.cc/9KCY-NM8X>].

111. Of course, one industry could employ a majority of workers in a state legislative district, or even a federal House district, though rarely a state. So, the interest of a state's public will almost never perfectly align with the interest of any industry.

112. NAT'L INST. FOR MONEY IN POL., *Campaign Finance Laws Across the Nation: Historical Database of State Campaign Finance Laws: Contribution Limits*, CAMPAIGN FIN. INST. (Apr. 5, 2018), [https://cfinst.github.io/downloads/cfi-laws-database\\_ContribLimits.zip](https://cfinst.github.io/downloads/cfi-laws-database_ContribLimits.zip) [<https://perma.cc/8KD6-PDHZ>].

113. NAT'L INST. FOR MONEY IN POL., *What's On This Website?*, FOLLOWTHEMONEY.ORG (2021) <https://www.followthemoney.org/our-data/whats-on-this-website> (Statewide Office data at [https://www.followthemoney.org/show-me?dt=1&f-fc=2&c-exi=1&c-r-ot=G,O#\[{1|gro=c-r-ot](https://www.followthemoney.org/show-me?dt=1&f-fc=2&c-exi=1&c-r-ot=G,O#[{1|gro=c-r-ot) [<https://perma.cc/85VR-4PDH>]; Legislative Office data at [https://www.followthemoney.org/show-me?dt=1&c-exi=1&c-r-ot=S,H#\[{1|gro=c-r-ot](https://www.followthemoney.org/show-me?dt=1&c-exi=1&c-r-ot=S,H#[{1|gro=c-r-ot); High Court data at [https://www.followthemoney.org/show-me?dt=1&f-fc=2&c-exi=1&c-r-ot=J#\[{1|gro=c-r-ot](https://www.followthemoney.org/show-me?dt=1&f-fc=2&c-exi=1&c-r-ot=J#[{1|gro=c-r-ot) [<https://perma.cc/5NVK-G2TU>]).

114. NAT'L INST. FOR MONEY IN POL., *Show Me: Gubernatorial Contributions by State and General Industry*, FOLLOWTHEMONEY.ORG (2021),

- whether judges campaign for office, including elections, retention elections, and recall elections, or whether they have independent selection or confirmation.<sup>115</sup>

Our results are not sensitive to measures of absolute industry power—they all matter.<sup>116</sup> We measure industry power using

- percent of state workers who are employed in farm and non-farm jobs industry;<sup>117</sup> and
- number of business organizations, firms, and combined number of interest groups.<sup>118</sup>

Finally, one process measure that interacts with influence, obligation, and power is

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[https://www.followthemoney.org/show-me?dt=1&f-fc=2&c-exi=1&c-r-ot=G%2CO&c-r-ot=G#\[{1}gro=s,d-cci](https://www.followthemoney.org/show-me?dt=1&f-fc=2&c-exi=1&c-r-ot=G%2CO&c-r-ot=G#[{1}gro=s,d-cci) [<https://perma.cc/TQ6R-S3VR>] (analyzed by authors).

115. NAT'L CTR. FOR STATE CTS., *supra* note 106.

116. We do note that the raw counts of our industry measures correlate with more risk of capture, but that when we convert the raw counts to ratios over state population, the ratios correlate with less risk of capture. As we discuss below, *infra* Part IV, decisions about model specification should be made with a particular policy environment in mind. Because the choice to use ratios requires a set of choices and assumptions (e.g., is the proper denominator a state's total population, voting age population, size of the legislature or its staff, or something else?), we report raw counts for our analysis, which looks at general outcome metrics of policy divergence. To view results with alternative specifications, see Pamela J. Clouser McCann, Douglas M. Spencer & Abby K. Wood, *Online Appendix*, <https://www.dropbox.com/s/frbqo3hhfs7jgqs/Measuring%20State%20Capture%20-%20ONLINE%20APPENDIX.pdf?dl=0> [<https://perma.cc/YWT7-DYCU>] (last updated Oct. 15, 2021) (reporting results with alternative specifications in Figures 1 and 2).

117. See FED. RSRV. OF ST. LOUIS, ECON. RSCH.: FRED ECON. DATA, <https://fred.stlouisfed.org/tags/series?t=employment%3Boccupation> (last visited Oct. 24, 2021) (using the FRED API (filtering by “employment” and “occupation”) to download and aggregate farm and non-farm employment).

118. Alex Garlick, *Interest Groups, Lobbying, and Polarization in the United States* (2016) (Ph.D. dissertation, University of Pennsylvania), <https://repository.upenn.edu/cgi/viewcontent.cgi?article=4084&context=edissertations>; Alex Garlick & John Cluverius, *Automated Estimates of State Interest Group Lobbying Populations*, HARV.: DATAVERSE (June 2, 2020), [https://dataverse.harvard.edu/dataverse/garlick\\_auto](https://dataverse.harvard.edu/dataverse/garlick_auto); Thomas T. Holyoke & Jeff Cummins, *Interest Group and Political Party Influence on Growth in State Spending and Debt*, 48 AM. POL. RSCH. 455 (2020).

- the state's budget process grade, where a high grade means more transparent and more process oriented and a low grade means less transparent and fewer procedural guardrails.<sup>119</sup>

### B. Infiltration and Reliance

Infiltration is also structural in nature. In addition to influencing who is in government via the influence, obligation, and power variables above, industry ties can also permeate the government, bending it to industry's will. There are several ways this can happen. Former industry executives are appointed to top positions in agencies.<sup>120</sup> Occasionally, agency employees have seats inside the industry offices (e.g., bank regulators).<sup>121</sup> Industry members are regularly appointed to advisory committees and task forces that advise agencies, too.<sup>122</sup> And three structural factors—the presence of term limits, non-professionalized legislatures, and low staff salaries—mean that industry may have more opportunities for infiltration via the electoral process or in lobbying new officials whose staffs may have little subject matter expertise or experience in the legislature. Or, conversely, more professionalized legislatures may have more constant and institutionalized industry access. When the ties between government and industry reach all the way inside the government, former industry players can block or shape regulation from within.

Government can also come to rely heavily on some industries via government contracting and outsourcing, which can involve both structure (resources, including personnel) and process (bidding, for example). Where the government cedes tasks and responsibilities to the private sector, it downsizes its own workforce such that it is much harder for the government to re-centralize the tasks and responsibilities internally. In other words, it relies on government contracting and legal enforcement of

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119. Yue Qiu, Chris Zubak-Skees & Erik Lincoln, *How Does Your State Rank for Integrity?*, CTR. FOR PUB. INTEGRITY (Feb. 2, 2018, 11:15 AM), [https://cloudfront-files-1.publicintegrity.org/apps/2015/10/stateintegrity/State\\_Integrity\\_2015\\_Full\\_Dataset.xlsx](https://cloudfront-files-1.publicintegrity.org/apps/2015/10/stateintegrity/State_Integrity_2015_Full_Dataset.xlsx) [<https://perma.cc/LDT5-MNXV>] [hereinafter Qiu, Zubak-Skees & Lincoln, *CPI Dataset*].

120. All Things Considered, *Former Industry Executives Hold Top Spots in Several Federal Departments*, NPR (Jan. 4, 2019, 4:22 PM), <https://www.npr.org/2019/01/04/682349993/former-industry-executives-hold-top-spots-in-several-federal-departments> [<https://perma.cc/G9SC-93NE>].

121. See, e.g., Jessica Silver-Greenberg & Ben Protess, *Bank Regulators Under Scrutiny in JPMorgan Loss*, N.Y. TIMES (May 25, 2012), <https://www.nytimes.com/2012/05/26/business/regulators-role-at-jpmorgan-scrutinized.html> [<https://perma.cc/Z9FR-ZDFU>] (noting that about forty Federal Reserve and seventy Office of the Comptroller of Currency employees were embedded at J.P. Morgan in 2012).

122. Brian D. Feinstein & Todd Henderson, *Congress's Commissioners: Former Hill Staffers at the S.E.C. and Other Independent Regulatory Commissions*, 38 YALE J. ON REGUL. 175, 182–83 (2021).

those contracts, which resolve slowly, rather than on internal personnel management, to shape program implementation.<sup>123</sup> A government with a high degree of outsourcing is more vulnerable to and reliant upon industry than a government with less outsourcing.

We measure the risk of infiltration by recording the presence (1) or absence (0) of a “cooling off period” for government employees moving into the private sector before they can lobby the government.<sup>124</sup>

Infiltration may also appear in seemingly public-driven processes—for example, the presence of ballot initiatives, which bypass legislative process. This public resource (structure) may predict *more* state capture since industry often places initiatives on the ballot.<sup>125</sup>

We measure reliance several ways:

- Degree of legislative professionalization;
- Presence of term limits;
- Size of legislative staff;<sup>126</sup>
- Ratio of public to private employees;<sup>127</sup> and
- Percent of government spending that is outsourced.

### C. Ethics Constraints

Government ethics rules are designed to set up behavioral guardrails around government officials who may be tempted to do favors for interest groups that would violate their oath of office and obligation to the public.<sup>128</sup> Ethics requirements are often related to process rather than structure.<sup>129</sup> Where these constraints exist, government officials are subject to conflict-of-interest laws and must regularly disclose their finances in order to assist the public in assessing potential conflicts.<sup>130</sup> Ethics rules also govern recusal from administrators and judges overseeing

123. Martha Minow, *Outsourcing Power: Privatizing Military Efforts and the Risks to Accountability, Professionalism, and Democracy*, in GOVERNMENT BY CONTRACT 110 (Jody Freeman & Martha Minow eds., 2009); John D. Donohue, *The Transformation of Government Work: Causes, Consequences, and Distortions*, in GOVERNMENT BY CONTRACT, *id.* at 41; ROBERT D. COOTER, STRATEGIC CONSTITUTION 127–48 (2000).

124. Qiu, Zubak-Skees & Lincoln, *CPI Dataset*, *supra* note 119.

125. *Initiative and Referendum States*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx> [<https://perma.cc/WY73-9WQA>] (last visited Sept. 5, 2021).

126. *Size of State Legislative Staff*, NAT'L CONF. OF STATE LEGISLATURES (May 18, 2021), <https://www.ncsl.org/research/about-state-legislatures/staff-change-chart-1979-1988-1996-2003-2009.aspx> [<https://perma.cc/Y8NW-EE3X>].

127. Potter, *supra* note 107 (data on file with the authors).

128. *E.g.*, Dennis F. Thompson, *Paradoxes of Government Ethics*, 52 PUB. ADMIN. REV. 254, 255–56 (1992).

129. *Id.* at 255, 258.

130. *Id.* at 254, 256.

decisions in which they may have a conflict of interest.<sup>131</sup> Such ethics constraints only loosely govern judges,<sup>132</sup> though the availability of appeal in lower courts may serve as an additional check on judicial ethics decisions.

Whereas the separation of powers and judicial oversight are thought to help constrain government, some governments empower independently funded agencies as internal ethics or electoral watchdogs.<sup>133</sup> Where private interests run the state, they may have less interest in oversight of elections.<sup>134</sup> Independent agencies that oversee elections and ethics more broadly can provide an added layer of constraint that may help to reduce the risk of capture.<sup>135</sup>

We use measures developed by the Center for Public Integrity (CPI).<sup>136</sup>

- The first is a measure of executive and legislative accountability. The measure captures de jure and de facto means by which the governor's (or legislature's) power is limited either internally or across branches; whether the law limits conflicts of interest in the executive branch; and the degree of citizen access to asset disclosure forms.
- Electoral oversight, which is measured by capturing whether an election monitoring entity is independent and external to the elected branches; whether they are empowered to initiate investigations and issue reports independently; whether they can manage their internal affairs independently; and whether the citizens can access the information they produce.
- Recusal rules for all three branches.
- Legal restrictions on gift size to elected officials.

131. MODEL CODE OF JUDICIAL CONDUCT r. 2.11 (AM. BAR ASS'N 2020).

132. See Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543, 544–45 (1994).

133. LIZ HEMPOWICZ, PROJECT ON GOV'T OVERSIGHT, THE BAKER'S DOZEN: 13 POLICY AREAS CRITICAL TO AN EFFECTIVE, ETHICAL, AND ACCOUNTABLE GOVERNMENT 28–29 (2021), [https://docs.pogo.org/report/2021/POGO\\_2021\\_The\\_Bakers\\_Dozen.pdf?mtime=20210217170413&focal=none&\\_ga=2.147530997.338314485.1632675085-1981346232.1632675085](https://docs.pogo.org/report/2021/POGO_2021_The_Bakers_Dozen.pdf?mtime=20210217170413&focal=none&_ga=2.147530997.338314485.1632675085-1981346232.1632675085) [<https://perma.cc/F8ZU-9MA3>].

134. See Dave Levinthal, *How Washington Starves Its Election Watchdog*, CTR. FOR PUB. INTEGRITY (May 4, 2016, 3:50 PM), <https://publicintegrity.org/politics/how-washington-starves-its-election-watchdog/> [<https://perma.cc/L762-5P4E>] (attributing the disarray in the Federal Election Commission to, among other things, “bitter ideological warfare” and “indifference”).

135. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 16–17 (2010).

136. See Yue Qiu, Chris Zubak-Skees & Erik Lincoln, *How Does Your State Rank for Integrity?*, CTR. FOR PUB. INTEGRITY (Feb. 2, 2018, 11:15 AM), <https://publicintegrity.org/accountability/how-does-your-state-rank-for-integrity/> [<https://perma.cc/TQL6-52JH>] [hereinafter Qiu, Zubak-Skees & Lincoln, *CPI Graphics*].

- Legal prohibitions and de facto prevalence of misuse of public funds, cronyism, patronage, and conflicts of interest.<sup>137</sup>

#### D. Transparency and Visibility

Another set of variables concerned with process—transparency and visibility—informs the governed of what the government is doing. Transparency, therefore, enables accountability, largely via making decision processes transparent. Some aspects of state government are less transparent than their federal counterparts,<sup>138</sup> so we think that variation in transparency is particularly important to a measure of capture risk.

Disclosures both by those in office and those aspiring to office facilitate accountability as well. Transparency helps the public ensure that the institutions created to constrain government’s relationship with and reliance upon industry are operative.<sup>139</sup> To that end, disclosures of attempts to influence (via lobbying) and create obligation (via campaign finance) help the public to police the boundaries between industry and government. Similarly, governments make public their procurement process and contracts to varying degrees.<sup>140</sup> And other cross-agency transparency laws that apply to agencies, such as freedom of information or public records laws and open meetings requirements, are meant to avoid and expose backroom deals in administrative agencies.<sup>141</sup>

Even where transparency is strong, will the public receive the information? How robust is the freedom of information in the state? Can journalists get the information that they need, or are there laws hindering their investigations, such as two-party consent to record public officials? Enterprising members of the community can use government websites to glean information. But some states do not provide useful, up-to-date, and easy-to-navigate websites, undermining the transparency of the government’s interactions with industry players.<sup>142</sup> Most community members lack the resources, knowledge, or motivation to study government firsthand and instead rely on information intermediaries, like

137. *See id.*

138. Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 110 (2018).

139. *See* Peter Eigen, *Global Corruption Report 2003*, TRANSPARENCY INT’L 5–6 (Nov. 27, 2002, 3:15 PM), <https://www.transparency.org/en/publications/global-corruption-report-2003-access-to-information> [<https://perma.cc/Q7A3-B3KE>].

140. Qiu, Zubak-Skees & Lincoln, *CPI Dataset*, *supra* note 119 (describing each state’s rankings under the “Procurement” category).

141. *See, e.g.*, 5 U.S.C. § 552(a) (establishing agency requirements for making information available to the public); *see also* WIS. STAT. § 19.31 (2019–20).

142. *See* Michael J. Malbin & Justin A. Koch, *Poor Usability Is Undermining Disclosure: A Report on the Fifty States’ Campaign Finance Websites*, CAMPAIGN FIN. INST. 2–3 (2016), [http://www.cfinst.org/pdf/books-reports/StateDisclosure\\_Usability\\_2016.pdf](http://www.cfinst.org/pdf/books-reports/StateDisclosure_Usability_2016.pdf) [<https://perma.cc/L34Z-PRX2>].

the media.<sup>143</sup> Where state and local journalism is weak, visibility of government capture may be low.<sup>144</sup> Finally, in some states, many residents lack access to high quality and fast internet, again reducing the visibility of government functioning.<sup>145</sup>

Our measures of transparency include the following:

- Extent of campaign finance disclosures required (frequency of disclosures, electronic filing, who must file);<sup>146</sup>
- Law creates an entity to monitor campaign finance;<sup>147</sup>
- Degree to which lobbying expenditures are disclosed in the state, also created by CPI. The measure captures lobbyist registration requirements, expenditures covered, disclosure required, public access to the information, and whether the revolving door is regulated;<sup>148</sup> and
- Extent of procurement transparency (CPI), a measure that is based on constraints on the power of the procurement officer, including mandatory recusal, professional training, competitive bidding, judicial review, and public transparency.<sup>149</sup>

Our measures on the extent of visibility include the following:

- Law provides for Freedom of Information (FOI);<sup>150</sup>
- Law provides for right to appeal a denial or incomplete response to an FOI request;<sup>151</sup>
- Law provides for an independent legal entity to monitor government FOI responses;<sup>152</sup>
- Overall access to information grade;<sup>153</sup>

143. See, e.g., Amy Mitchell, Mark Jurkowitz, J. Baxter Oliphant & Elisa Shearer, *Americans Who Mainly Get Their News on Social Media Are Less Engaged, Less Knowledgeable*, PEW RSCH. CTR. 3–4 (July 30, 2020), [https://www.pewresearch.org/journalism/wp-content/uploads/sites/8/2020/07/PJ\\_2020.07.30\\_social-media-news\\_REPORT.pdf](https://www.pewresearch.org/journalism/wp-content/uploads/sites/8/2020/07/PJ_2020.07.30_social-media-news_REPORT.pdf) [<https://perma.cc/K2VT-KBXS>].

144. See Seifter, *supra* note 138, at 110.

145. Linda Poon, *There Are Far More Americans Without Broadband Access than Previously Thought*, BLOOMBERG: CITYLAB (Feb. 19, 2020, 2:09 PM), <https://www.bloomberg.com/news/articles/2020-02-19/where-the-u-s-underestimates-the-digital-divide> [<https://perma.cc/Z5VY-4X3X>].

146. See NAT'L INST. FOR MONEY IN POL., <https://www.followthemoney.org/> [<https://perma.cc/R7UZ-5UDW>] (last visited Sept. 18, 2021).

147. Qiu, Zubak-Skees & Lincoln, *CPI Dataset*, *supra* note 119.

148. See *id.*

149. *Id.*

150. *Id.* (select “Public Access to Information” tab within dataset).

151. *Id.* (select “Public Access to Information” tab within dataset).

152. *Id.* (select “Public Access to Information” tab within dataset).

153. See Qiu, Zubak-Skees & Lincoln, *CPI Graphics*, *supra* note 136.

- Law requires two-party consent to record public officials;<sup>154</sup>
- Strength of state and local investigative media;<sup>155</sup>
- Percent of state population with broadband access;<sup>156</sup> and
- Evaluation of usability of state government websites with campaign finance information.<sup>157</sup>

Finally, we include some basic institutional and demographic facts of the state as measures of public structures of importance, such as the following:<sup>158</sup>

- Total population per House district;
- Unified government (in a given state-year);
- Effective number of competitive jurisdictions at the state level;
- Ranney index of political competition;<sup>159</sup>
- Independent judiciary;<sup>160</sup>

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154. See generally Jason Sorens, Fait Muedini & William P. Ruger, *U.S. State and Local Public Policies in 2006: A Database*, 8 ST. POL. & POL'Y Q. 309 (2008). To access the complete dataset using this metric, see MICH. STATE UNIV.: INST. FOR PUB. POL'Y & SOC. RSCH. COLL. OF SOC. SCI., *Correlates of State Policy*, <http://ippsr.msu.edu/public-policy/correlates-state-policy> [<https://perma.cc/5CVE-G27Z>] (last visited Oct. 29, 2021). For a description of the dataset, see Matt Grossmann, Marty P. Jordan & Joshua McCrain, *The Correlates of State Policy and the Structure of State Panel Data*, ST. POL. & POL'Y Q.: FIRST VIEW (Aug. 2, 2021), <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/9656491B1AAFD07C22DE159521700CEE/S1532440021000177a.pdf/the-correlates-of-state-policy-and-the-structure-of-state-panel-data.pdf> [<https://perma.cc/2FTJ-RE79>].

155. To access the dataset using this metric, see Eray Turkel, Anish Saha, Rhett Carson Owen, Gregory J. Martin & Shoshana Vasserman, *A Method for Measuring Investigative Journalism, in Local Newspapers*, HARV. DATAVERSE, <https://doi.org/10.7910/DVN/HSZ2QL> [<https://perma.cc/YS8W-X7YT>] (last visited Sept. 28, 2021) (select "Access Dataset").

156. Caroline Tolbert & Karen Mossberger, *U.S. Current Population Survey & American Community Survey Geographic Estimates of Internet Use, 1997-2014*, HARV. DATAVERSE (Dec. 29, 2015), <https://doi.org/10.7910/DVN/UKXPZX/UWZGBX> [<https://perma.cc/7SW2-L6JU>] (select "Access File").

157. Malbin & Koch, *supra* note 142, at 2–3.

158. To access the dataset using this metric, see Marty P. Jordan & Matt Grossman, *The Correlates of State Policy Project*, INST. FOR PUB. POL'Y & SOC. RSCH., [https://ippsr.msu.edu/sites/default/files/cspp/cspp\\_june\\_2021.csv](https://ippsr.msu.edu/sites/default/files/cspp/cspp_june_2021.csv) [<https://perma.cc/J4N5-T7AE>] (last visited Sept. 28, 2021).

159. *Id.*

160. CPI defines its scoring on this measure as

A 100 score is earned if, when necessary, the judiciary reviews laws and voids illegal or unconstitutional actions. It does not depend on the legislature to initiate a legal review and the court has demonstrated that it is non-partisan. A 50 score is earned if the judiciary independently reviews laws when necessary, but it may be slow to act, unwilling to take on politically sensitive issues, or occasionally unable to enforce its judgments. A 0 score is earned if the

- Judicial oversight of legislature;<sup>161</sup> and
- Judicial oversight of executive.<sup>162</sup>

Of course, we have not lost sight of the structure, process, and outcomes framework, nor of the cross-branch nature of capture. To that end, Table 1 summarizes our variables by structure and process across branches of government. We also include a column for the public since some of the data we use show the structure of the political economy in the state more broadly.

Table 1.

	Governor	Agencies	Legislature	Judiciary	Public
<b>Structure</b>	campaign fin. limits	nepotism ban	campaign fin. limits	campaign fin. limits*	size of industrial sectors
	salaries	salaries	salaries	salaries	income per capita
	revolving door ban	revolving door ban	revolving door ban	recusal rules	size of union orgs
			nepotism ban size of majority unified gov.		unemployment
<b>Process</b>	fin. discl. requirements	fin. discl. requirements	fin. discl. requirements	fin. discl. requirements	
	Prohib. priv. gain	Prohib. priv. gain	Prohib. priv. gain	Prohib. priv. gain	
	elect'l oversight	FOIA	elect'l oversight	elect'l oversight*	

This table situates our main data in the structure and process framework, dividing the variables across branches. Several of the items listed summarize multiple measures in our dataset. For example, we do not measure campaign finance limits broadly; we measure contribution limits, corporate and union contribution bans, and things of that nature. This table

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judiciary fails to review laws passed, does not enforce judgments, or depends on the legislature to initiate reviews.

Qiu, Zubak-Skees & Lincoln, *CPI Graphics*, *supra* note 136 (To view criteria, select category “Legislative Accountability” from drop down menu, select a state, under “Legislative Accountability” tab, select “In practice, when necessary, the judiciary reviews laws passed by the legislature.”).

161. Qiu, Zubak-Skees & Lincoln, *CPI Dataset*, *supra* note 119.

162. *Id.*

explains that we consider those variables to affect the structure (mainly, personnel) in the governor's mansion and legislature, as well as in the judiciary, where judges are elected (marked with \*). We include the public here as well, since industry is part of the public; however, we do not measure any process-related variables for the public.

#### *E. Measuring Outcomes of State Capture*

We take a generalized approach to measuring the outcomes of state capture by looking at the divergence of public policy from public opinion over time. We rely on Caughey and Warshaw's dynamic measures of state policy responsiveness to public opinion on economic and social policy measures across the state<sup>163</sup> with the following provisos: (1) the misalignment of state policy and public opinion is a necessary condition for capture but is not sufficient by itself to determine that a state's policymaking apparatus has been captured;<sup>164</sup> and (2) Caughey and Warshaw's general measure of state-level misalignment<sup>165</sup> likely paints with too broad a brush for determining whether any particular set of policy choices—from COVID exceptions and energy regulation to healthcare and taxes—are the product of capture. In this brief Essay, our modest goal is to provide a general roadmap for scholars and judges who are interested in filtering out benign misalignment from actual capture. We hope that our proof of concept inspires more fine-grained analyses across multiple policy dimensions in future work.

#### IV. DATA ANALYSIS

We conduct our analysis in two stages. First, we analyze all of the conceptual risks of capture that we outline above to identify the structures and processes that are the most likely to create *actual* risk of capture. We then turn to our outcome measure for capture—policy divergence from public opinion—to identify the states that are most vulnerable to capture. In many cases, policy divergence in states that have been captured is observationally equivalent to policy divergence in states with no capture. To distinguish capture from more benign forces, we apply the findings from our first analysis, drawing attention to states where public policy and public opinion are misaligned *and* where the structure and process of state government are at the highest risk of capture.

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163. Devin Caughey & Christopher Warshaw, *Policy Preferences and Policy Change: Dynamic Responsiveness in the American States, 1936–2014*, 112 AM. POL. SCI. REV. 249 (2018).

164. See *supra* Part II.

165. Caughey & Warshaw, *supra* note 163, at 249–50.

*A. Latent Trait Model Measuring Risk of Capture*

We begin with an analysis of the fifty-eight risk factors for capture described across four domains—influence, infiltration, ethics, and transparency—in Part III. In order to identify the extent to which each of these risk factors contributes to the latent risk of capture, we employ a kitchen-sink Bayesian latent trait model.<sup>166</sup> Our model follows the estimation strategy for legislative ideal points whereby the empirical distribution of each variable determines its contribution to the latent risk of state capture.<sup>167</sup> The only model constraints are a set of positive and negative anchors. In the model presented in Figure 3, our negative anchors (i.e., variables that we define as posing less risk of capture) are (1) a legal requirement that campaign finance contributions and expenditures are disclosed, (2) scoring high on the Center for Public Integrity’s report card for public access to information, and (3) strict lobbying disclosure rules. Our positive anchors (i.e., variables that we define as posing a higher risk of capture) are (1) the number of interest groups in each state and (2) an increasing proportion of government contracts that are outsourced to private actors. These anchors are important, and they can affect the results in important ways. In a real-world context, researchers and court experts would need to select and defend anchors that are specific to the policy context, the geography, and time period at issue.

We plot the discrimination parameters for each of our indicators in Figure 3. Positive values suggest that the indicator increases a state’s risk for capture, while a negative value suggests that the indicator mitigates against that risk. According to the model, the size of a state’s economy (the number of jobs, firms, and interest groups) and the professionalization of a state’s legislature (salaries, staff, and length of session) are the strongest contributors to the latent risk of state capture. On the other hand, an independent judiciary, lack of patronage and cronyism, and robust state-level freedom of information practices all contribute to a decrease in the latent risk of state-level capture. Discrimination values near zero suggest that an indicator is not particularly informative of a state’s latent risk for capture. Some indicators with a strong conceptual link to capture do not help discriminate risk of capture, such as gift rules, procurement transparency, and judicial review.

As Figure 3 illustrates, the features of a state’s institutions that predict capture (or lack thereof) are a mix of structure and procedure, and they affect all three branches of government. Several structural features that

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166. For a similar latent trait modeling approach, see Shawn Treier & Simon Jackman, *Democracy as a Latent Variable*, 52 AM. J. POL. SCI. 201, 201–02 (2008).

167. See, e.g., Joseph Bafumi, Andrew Gelman, David K. Park & Noah Kaplan, *Practical Issues in Implementing and Understanding Bayesian Ideal Point Estimation*, 13 POL. ANALYSIS 171, 171–72 (2005).

impact who ultimately serves in government positions are predictive of capture. For example, term limits increase the risk of capture, whereas strong, independent electoral oversight likely helps to prevent capture.<sup>168</sup> Some structural features that prior scholars have pointed to as keys to understanding capture—unified government, low political competition, ballot initiatives, and judicial review<sup>169</sup>—appear to have no predictive relationship to the latent risk of capture. Perhaps most interestingly among structural variables, as a state’s economy grows and as a state’s legislature becomes more professionalized, the risk of capture *increases*. This particular dynamic is not difficult to understand, yet there is no reason *ex ante* to predict that capture would be harder in a smaller and less professionalized government than a larger, more professionalized one.

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168. State legislators have reported that term limits empower lobbyists and special interest groups at the expense of neophyte legislators. *See, e.g.*, Bruce E. Cain & Marc A. Levin, *Term Limits*, 2 ANN. REV. POL. SCI. 163, 178–79 (1999).

169. *See* Matsusaka, *supra* note 102; Qiu, Zubak-Skees & Lincoln, *CPI Dataset*, *supra* note 119; Jordan & Grossman, *supra* note 158.

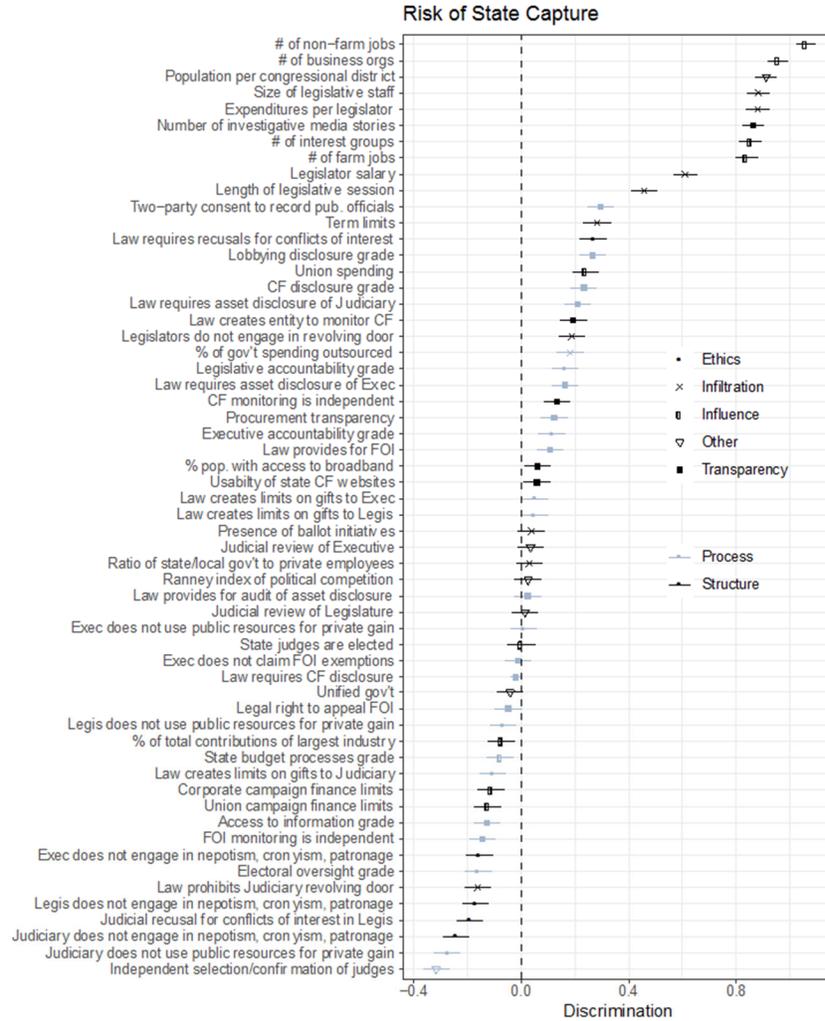


Figure 3. Discrimination Parameter Estimates and Bayesian Credible Intervals for the Latent Indicators of the Risk of State Capture

Although there are fewer procedural variables in the model, several of them are predictive of a higher or lower risk of capture. For example, requiring two-party consent to record public officials (thus limiting transparency) is positively predictive of the risk of capture. On the other hand, strong protections of the public’s access to information with independent FOI monitoring reduce the risk of capture. And of all fifty-eight indicators, an independent judiciary that is subject to strong ethics rules is the single most important feature to mitigate the risk of capture.

Considering the variables from the perspective of the domains of capture—influence, infiltration, ethics, and transparency—the infiltration measures were most important to the analysis. For example, the professionalized legislatures measure described above is an infiltration measure. Some of the ethics features we observe were correlated with the negative anchors, such as judicial ethics related to conflicts of interest and misuse of public funds. Transparency and influence measures are more mixed in their predicted relationship to capture.

These findings highlight both the complex nature of capture and the challenge of properly measuring its preconditions. Our Bayesian latent analysis provides a validity check on predictive models of outcome variables that implicate capture. Because capture is typically unobserved, scholars often assume (with strong *theoretical* support) that capture is the mechanism to explain observed agency actions that deviate from public opinion.<sup>170</sup> Our latent trait analysis identifies indicators that are actually linked to the risk of capture in a way that can bolster future empirical research on state-level capture.

For example, consider a predictive model of the gap between public opinion and agency behavior on social or economic issues. A researcher may model this gap as a function of lobbying rules, union spending, public records accessibility, campaign finance laws, judicial review, or more. This research might then interpret correlations between these predictors and the social policy gap as evidence that a state's political institutions have been captured. Indeed, because capture-avoidance is the motivation behind many lobbying rules, campaign finance laws, union regulations, and judicial norms, and because gaps between political action and public opinion are important markers of capture, this researcher's interpretation may feel quite natural. However, as our latent trait model shows, the interpretation is complicated. Correlations that the researcher estimates between public records accessibility, union spending, and some lobbying rules are likely evidence of capture, whereas correlations related to political competition, gift rules, and campaign finance disclosure are not. We turn to such a model now to illustrate how one might identify when the misalignment of public policy and public opinion should be attributed to capture.

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170. Carpenter & Moss, *Introduction*, *supra* note 24, at 13.

*B. Distinguishing Between Observationally Equivalent Policy  
Divergence*

In this Section we present the results of a regression model to illustrate how scholars and judges might carefully filter observations of misalignment between public policy/agency actions and public opinion to better identify cases of capture. Our models are illustrative, not definitive. First, we rely on a general measure of policy divergence between state legislatures and the public in social and economic policy domains. A proper analysis would examine a particular legislative decision or a specific set of agency actions where capture has been alleged. Second, we interpret our findings in broad categories to illustrate the logic of our proposal. A more refined analysis would engage a full set of robustness checks related to the sensitivity of any categorical cutoffs.

We begin by running a stepwise regression to identify the most predictive covariates of policy divergence across our sample of states between 2010 and 2020:

$$Y_{sy} = \alpha_{sy} + \beta^n_{sy} + \varepsilon_{sy}$$

where  $Y_{sy}$  is the state-year gap between public opinion and the ideal point of a state's legislature,<sup>171</sup> and  $\beta^n$  represents the fifty-eight risk factors for capture in Figure 3. Stepwise regression is an iterative process that adds and removes covariates ( $\beta^n$ ) in succession while testing the statistical significance of each combination of variables.<sup>172</sup> We learn two things from our stepwise regressions. First, according to the two models (one on the gap in social policy and one on the gap in economic policy), we need approximately nine or ten of the fifty-eight indicators to reliably predict policy divergence; we do not get more predictive power by adding more variables.<sup>173</sup> Second, the models specifically identify the ten variables that are the most predictive of policy divergence. These variables are listed in Table 2. Although the explanatory variables differ in each model, there are some similarities in the list of predictive covariates. For example, in both models, four of the ten variables that are most predictive of a policy gap are not associated with any risk of capture according to the latent trait

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171. See Caughey & Warshaw, *supra* note 163, at 250.

172. Douglas A. Henderson & Daniel R. Denison, *Stepwise Regression in Social and Psychological Research*, 64 PSYCH. REPS. 251, 252–53 (1989).

173. We confront the bias-variance tradeoff by looking at the error and power of each estimated model. In our stepwise regressions on policy divergence with fifty-eight explanatory variables, the model's error (as measured by the residual sum of squares (RSS), Bayesian information criterion (BIC), and adjusted  $R^2$ ) is minimized around ten variables.

model in Figure 3. And in both models, five of the six remaining predictors are associated with an increased risk of capture (as denoted by ↑).<sup>174</sup>

*Table 2. Ten most predictive explanatory variables among the fifty-eight risk factors in Figure 3: ↑ signifies an increased risk of capture, while ↓ signifies a decreased risk of capture. Gray text signifies that the variable has no effect on the latent risk of capture.*

Gap in <b>social</b> policy	Gap in <b>economic</b> policy
↑ Number of farm jobs	↑ Number of farm jobs
↑ Number of non-farm jobs	↑ Number of non-farm jobs
↑ Number of legislative staff	↑ Amount spent by unions
↑ Legislative salary	↑ Strict lobbyist disclosure
↑ Expenditures per legislator	↑ Two-party consent to record public officials
↓ No nepotism, cronyism, patronage in judiciary	↓ Independent judiciary
Judicial review of Legislature	State law provides for ballot initiatives
Transparency of budget process	Ratio of public to private employees
Legislative gift rules	Audits of legislator asset disclosure
Law prohibits Judiciary revolving door	Law prohibits Judiciary revolving door

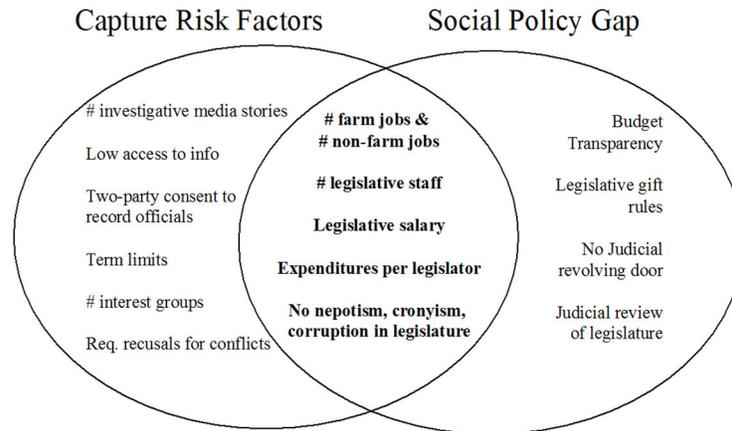
With these two findings—a list of variables associated with the latent risk of capture and a list of variables that are correlated to policy divergence—we can more carefully identify the actual risks of capture in a state’s political and administrative system. Figure 4 provides a conceptual map of how the two analyses fit together, given the data we have used and the anchors we chose for this particular analysis.

To provide a state-specific example using the analysis conducted here, consider the list of states with the largest gap (say, in the top one-third) between the policy preferences of state legislators and the public *that also score* in the top one-third of risk factors that predict this gap. See Figure 5.

Among the seventeen states (one-third) with the largest gap between social and economic policy and public opinion, the risk of capture is not equal. In fact, six of the states with the largest social policy gap do not score in the top one-third on *any* of the risk factors that predict this gap. The same is true for the five states with the largest economic policy gap. There is quite a bit of variation among the remaining states, with less than half scoring in the top one-third of a majority of risk factors and no states scoring in the top one-third of all five risk factors. Thus, while the social policy gap is observationally equivalent (identical to the second decimal point) in Idaho, North Carolina, Texas, and Wisconsin, there is a much higher likelihood that the policy gap in Texas and Wisconsin is the result

174. Very few of these most predictive variables concern agency guardrails. Lobbyist disclosure—which we and other scholars have predicted would reduce capture—correlates to more, rather than less, of a gap between public opinion and economic policy. Other agency guardrails, like transparency of the budget process, do not predict gaps between social policy and public opinion.

of capture than the policy gap in Idaho. And the risk of capture in North Carolina likely falls somewhere in between.



*Figure 4. Conceptual Map Displaying the Determinants of Capture and Social Policy Gap in the Analyses We Present Here. As we argue below, it is the areas of overlap (in boldface) where courts will want to take a careful look for potential capture of state policy.*

In summary, our goal has been to provide a methodological roadmap for understanding when it is appropriate to invoke capture as the cause of policy decisions and agency actions that deviate from public opinion. The purpose of our data demonstration is not to defend regression models with ten explanatory variables or to suggest that a one-third cutoff for the magnitude of a state's policy deviation is the right cutoff. Indeed, a proper analysis will need to be domain-specific and responsive to the machine learning based on the inputs of the researcher. We aim to empirically highlight the fact that capture is not a switch that is either on or off and to illustrate that policy deviations are not all created equally. By identifying the factors that contribute to the latent risk of capture independent of strict model constraints, scholars will be able to better separate the wheat from the chaff when evaluating observationally equivalent behavior that implicates the capture of state government.

*Top one-third gap in Social Policy AND . . .*

All FIVE risk factors	4/5 risk factors	3/5 risk factors	2/5 risk factors	1/5 risk factors	NO RISK factors
—	Florida Texas Wisconsin	North Carolina Ohio	Arizona Missouri Nevada Virginia	Georgia South Carolina	Idaho Maine New Hampshire Rhode Island South Dakota Vermont

*Top one-third gap in Economic Policy AND . . .*

All FIVE risk factors	4/5 risk factors	3/5 risk factors	2/5 risk factors	1/5 risk factors	NO RISK factors
—	Illinois	Connecticut Massachusetts New York	Maine Rhode Island Vermont	Arizona Georgia Hawaii Mississippi Montana	Alabama Arkansas Delaware North Dakota South Carolina

*Figure 5. State Capture as a Scale.* The seventeen states (one-third of fifty) with the largest gap between social and economic policy and public opinion are listed according to the number of risk factors highly present in the state.

## V. TOWARD A JURISPRUDENCE OF STATE CAPTURE

While state capture itself may be unobservable in neat rows of data across space and time, our analysis suggests a way to measure a state's vulnerability to capture of the structures or processes that create public policy. Measuring capture requires breaking the state down into its component parts and discussing the institutions that act on some or all of those parts, the individuals within those institutions, and key processes of governing across states.

Results from measuring and modeling capture in this way can inform the way that judges interpret statutes and decide whether to review agency actions. Courts, by their nature, are counter-majoritarian.<sup>175</sup> That means their decisions may be even further from public opinion on any given issue than those of legislatures or agencies. The size of the gap between the Supreme Court's holdings and public opinion has varied over time.<sup>176</sup> But

175. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962). For a more devastating critique of courts as endorsing and entrenching an undemocratic, counter-majoritarian political system writ large, see Pamela S. Karlan, *The New Counter-majoritarian Difficulty*, CALIF. L. REV. (forthcoming).

176. See generally William Mishler & Reginald S. Sheehan, *The Supreme Court as a Counter-majoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993).

there is no judicial doctrine around public opinion as a decision rule.<sup>177</sup> If anything, a Hamiltonian view of the role of judicial review is to protect rights enshrined in the Constitution against the tyranny of the majority.<sup>178</sup> All of this means that where courts review policies adopted by a captured branch of government, they are not well-equipped to help steer policy back toward the public's preferences, nor should they necessarily have that goal in mind. A measure of the distance between policy and public opinion, like the one we use above, should not guide courts' inquiries into capture. Judges should not give enhanced scrutiny or less deference to policies merely because they depart from the majority of the public's preferences.

However, judges are well-suited to evaluating the extent to which risk factors have contributed to a breakdown in the policymaking process. And as we have shown, it is possible to identify structures and processes that are more likely to lead to capture than others, given a contextually-appropriate set of anchors in the latent model.<sup>179</sup> Where those structures and processes are present, they should trigger a more extensive judicial review of the policy outputs that result *if the outputs also deviate from public opinion*.

In Section II.C, we of course described a third branch of government that can be captured: the judiciary itself. Our model shows that several variables related to the judiciary correlate with capture or the lack thereof. Given the anchors we chose, our model suggests that the most important predictor of low capture is independent selection and confirmation of judges. Elected judges are vulnerable to capture. Where the industry that may have captured the policymaking structures and processes is also the industry donating to judges, we believe that three guardrails should attach. First, judges who received campaign contributions from the industry should have to put into the record their reasons for not recusing should they decline to do so. Second, in the absence of recusal, the appellate court should review the court's decision *de novo*. Third, litigants should presumptively be able to remove their cases to federal court, where judges

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177. The closest the Court may come to incorporating public opinion into judicial holdings is overseeing procedures used by agencies in informal rulemaking, where courts can overturn violations of the statutory requirement that agencies must consider public comment as part of rulemaking. *See* 5 U.S.C. § 553(c) ("After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.").

178. THE FEDERALIST NO. 78 (Alexander Hamilton).

179. This is an area where experts will be useful to factfinders. Experts using this model should be prepared to defend their anchors, particularly where (as here) the model is sensitive to the anchors chosen.

are not elected and thus less likely to feel the same electoral pressures that elected state judges feel.<sup>180</sup>

Does this mean that an industry that prefers federal procedures can forum shop by donating to all judicial campaigns in the state? In theory, yes, it does. Moreover, we know that corporate donors tend to give to incumbents regardless of ideology.<sup>181</sup> A scope restriction triggering recusal and removal may therefore be necessary, such as requiring recusal only where a party who is contesting a statute or regulation or appealing a lower court decision has given contributions above the median contribution to the judge's campaign or makes independent expenditures above the median independent expenditure made in the campaign. This would at least raise the cost to industries of forum shopping where federal procedural rules are more favorable to them and removal is attractive.

#### CONCLUSION

In this Essay, we expand the domain of inquiry into state capture risk in all three branches of government. We have also offered a new lens through which to analyze capture's mechanisms through the structure-process-outcomes framework. Structure and process are distinct entry points for industry hoping to steer policy in its favor.

State capture is a latent concept. To measure it, we measure around it. This, on its own, is a difficult endeavor. But it's made even more difficult by the lack of over-time data we encountered in our search. Rather than declare this the final word on how to measure capture, we offer it as a proof-of-concept for how to use the structure-process-outcomes framework to rigorously analyze risk of capture with data. Any state wanting to assess its own risk of capture should do so with more complete data, over time and with the state's cultural, economic, social, and geographical context in mind. There are many ways to measure the structures and processes at play in good democratic governance, and following the social science tradition (and pitfall) of "looking where the light is," we analyze a small subset of them here. As governments and scholars gather and produce more government data, experts using models like ours will be able to further illuminate the ways that structures and processes can be captured by private interests at the expense of the public interest. That, in turn, will lead to more precise prescriptions about guardrails on state-level democracy.

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180. Because federal judges are also local to industry-dominated political economies, they may have connections to the industry. However, unless a family member works in the industry, it's unlikely that the federal judge's income relies on the industry so much that the federal judge would be a worse option for litigants than the elected state judge.

181. See Barber, *supra* note 53, at 156.