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EXECUTIVE ORDERS AND GUBERNATORIAL AUTHORITY TO REORGANIZE STATE GOVERNMENT*

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This essay considers the extent and limits of the power of a newly elected governor of New York State to reduce the size of government by executive action. To do this, we explore the nature and use of executive orders for reorganization and in emergencies, both in the states generally, and in New York. We find that the New York governorship, generally regarded as one of the strongest in formal powers, is in fact less empowered in this area than the office in many other states.

One leading aspirant for the governorship, Andrew Cuomo, has indicated an intention to “eliminate 20 percent of the state’s more than 1,000 agencies, authorities, commissions and the like,” and to create a high level reorganization commission toward this end.1 After examining the experience with and legal basis for gubernatorial reorganization authority in New York and other states, we conclude that there may be some limited opportunity for

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a governor to act on his own authority in this area. In general, however, we concur that, at a minimum, statutory authority is required to achieve thorough restructuring of state government. Adopting a statute on the model currently in force in New Jersey would maximally empower the governor to achieve substantial state government reorganization in New York.

I. EXECUTIVE ACTION TO ALTER THE STRUCTURE OF NEW YORK STATE GOVERNMENT REQUIRES A STATUTORY OR CONSTITUTIONAL BASIS

Unlike the national government, which under the U.S. Constitution is one of limited, delegated powers, “state governments[,] acting through their state legislatures[,] are presumed to have broad, residual, almost plenary governmental power” except insofar as these are limited by state constitutions. But these powers are vested in legislatures and do not extend to state executives, who must find a constitutional or statutory basis for their actions.

It is therefore universally the case in American separation of powers systems that the formal power to adopt public policy is with the legislature. In New York, the governor’s constitutional role in policymaking is defined with reference to the legislature. The state constitution provides that “the governor shall communicate by message to the legislature at every session the condition of the state, and recommend such matters to it as he or she shall judge expedient.” He or she may call both houses into a special session for which he or she defines the agenda. And after legislative action, the governor is required to “expedite all such measures as may be resolved upon by the legislature, and shall take care that the laws are faithfully executed.” There is an executive veto in New York, but it may be overridden by a vote of two-thirds of the members elected to each legislative house. The veto itself was originally conceived as a means of correcting errors, and only over time

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4 N.Y. CONST. art. IV, § 3.
5 Id.
6 N.Y. CONST. art. IV, § 7.
evolved to a tool with which the governor could contest legislative policy choices.\(^7\) It is the intent of the New York State constitution that the governor have no “pocket veto,” that is, that he or she not be able to block the legislature’s will by inaction, so long as it remains in session.

The governor’s power in budgeting, carved from legislative prerogative through twentieth century constitutional change, in accordance with the goals of the progressive reform movement,\(^8\) was further extended by the state’s high court in recent years.\(^9\) In contrast, the power to issue executive orders, not explicitly given in the state constitution, has been interpreted in the courts in a manner far less generous to the executive.

The power is based on the provision that “[t]he executive power shall be vested in the governor,” which was added to the New York State constitution in 1821 in apparent emulation of the vesting clause in the United States Constitution.\(^10\) There has been considerable controversy regarding the degree to which the United States President is independently empowered by the vesting clause.\(^11\) However, the state’s leading contemporary constitutional historian, Peter Gailie, wrote in 1991 that “[t]he question of whether the phrase executive power confers on the governor powers or simply the title has not occasioned the same controversy in New York as it has at the national level.”\(^12\)

In *Rapp v. Carey*, in 1978, the New York Court of Appeals overturned, for lack of constitutional or statutory basis, Governor Hugh Carey’s executive order requiring public employees to refrain from certain political and business activities, and file financial disclosure forms.\(^13\) This was the first time such an action was taken by the state’s high court.\(^14\) In taking this action, Gailie found, the

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\(^2\) See infra Part II.


\(^4\) Compare N.Y. Const., art. IV, § 1. with U.S. Const. art. II, § 1.


\(^8\) One of Governor Carey’s executive orders had been overturned in a lower court in 1977.
Court of Appeals “narrowed the range of executive orders, claiming that the executive may not ‘go beyond state legislative policy and prescribe a remedial device not embraced by the policy.’”\textsuperscript{15} Germiane to the potential use of executive orders to deal with a fiscal emergency, the court two years later in \textit{Oneida County v. Berle} struck down the use of an executive order to impound local assistance funds.\textsuperscript{16}

In later decisions, however, the Court of Appeals sought to distinguish particular circumstances, and thus moderate the effect of this \textit{Rapp v. Carey} language. Over Republican objection, it allowed Governor Mario Cuomo’s executive order, using state agencies to establish voter registration programs, saying that “[i]t is only when the executive acts inconsistently with the legislature, or usurps its prerogatives, that the doctrine of separation is violated.”\textsuperscript{17} Similarly, just over ten years later in \textit{Bourquin v. Cuomo}, the court allowed the creation, by another Cuomo executive order, of a not-for-profit entity to represent customers in utility rate setting proceedings as an alternative way to achieve legislative authority already granted.\textsuperscript{18}

\textbf{II. REORGANIZATION POWER IN NEW YORK RESIDES WITH THE LEGISLATURE, EXCEPT . . . ?}

Empowering governors as state chief executives in accord with the then emerging corporate model, and concomitantly restructuring state bureaucracies to be accountable to them, was a principle element of the Progressives’ agenda at the turn of the twentieth century; there was a growing movement for administrative reform in the state.\textsuperscript{19} The context for this effort was the rapid and seemingly chaotic growth in the size of the government. The number of state entities grew from 39 in 1894 to 152 by 1914.\textsuperscript{20} The per capita cost of government increased from

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\textsuperscript{15} Galie, supra note 12, at 99.
\textsuperscript{16} Oneida Cnty. v. Berle, 49 N.Y.2d. 515, 519 (1980).
\textsuperscript{17} Clark v. Cuomo, 66 N.Y.2d. 185, 189 (1985).
\textsuperscript{20} Terrence A. Maxwell, \textit{The Executive Branch, in Oxford Handbook of New York State
Although modest efforts were taken by the administrations of Governors Charles Evans Hughes, William Sulzer, and Martin Glynn, the first major administrative overhaul of state government was attempted at the 1915 Constitutional Convention. The resulting constitution was defeated at the polls for reasons unrelated to administrative restructuring.22 However, its recommendations were later taken up by Governor Alfred Smith, who served as a delegate to the 1915 convention.23

Governor Smith’s push for reorganization began immediately after he took office in 1919 with the creation of the Reconstruction Commission on Retrenchment and Reorganization.24 The Commission’s final report included many of the recommendations of the 1915 Constitutional Convention.25 With some bipartisan support, the statutory reforms recommended by the Commission were passed during Governor Smith’s first term.26 Those proposed in three constitutional amendments failed, however, and Governor Smith left office when he lost his bid for reelection in 1920.27

When he was elected again in 1922, Smith resumed his efforts to achieve state government reorganization.28 By 1925, he had achieved the passage of two of the three previously proposed constitutional amendments.29 Thereafter, some of the more controversial issues—relating to a smaller number of single-headed departments—found their way into legislation. New York’s reform efforts later served as a model for other state governments.30 Importantly, all of these seminal changes were achieved through specific constitutional amendments or legislative action. None arose as the result of general reorganization authority vested in the governor.

An analysis of experience with reorganization in the forty-eight contiguous states of the United States between 1900 and 1985

GOVERNMENT AND POLITICS (Gerald Benjamin ed.) (forthcoming).
21 Id.
23 Id.
25 Id.
26 Id. at 111.
27 Id.
28 Benjamin, supra note 22, at 100.
29 Id.
30 Id. at 100; CARO, supra note 24, at 139–42.
concluded that the major efforts are likely to occur on a twenty-five year cycle, “when long-wave [economic] declines and rationalistic rhetoric coincide with institutions that encourage access to the governmental agenda.”31 Another study, published in the early 1990s, found that “[a]ttempts to overhaul the executive branch of state governments have occurred in five waves.”32 Interestingly, “incremental adjustments to the status quo—‘nibbling away’ at problems in one or several agencies at a time—may be sufficient to greatly reduce the possibility a state will pursue a comprehensive reorganization.”33

A detailed review of the New York experience confirmed that state government reorganization efforts are cyclical. Additional institutional structures are created to achieve the goals of newly elected leaders, or under pressure for response to particular policy concerns. (It is often easier to achieve changed objectives through new organizations, than to redirect the priorities of established ones. It is also symbolically more powerful.) Then when the disorder becomes too great, or countervailing fiscal constraints come to dominate the policy landscape, often with newly elected leadership, an effort at retrenchment through reorganization emerges.34 That is, pressures for restructuring derive from all governors’ interest in enhancing the management abilities of their office as well as the pressures that come to bear upon them from relatively more “inefficient” governments. Governors respond to these pressures based upon the enabling resources at their disposal to overcome the obstacles that they face in their political environment.35

Governor Nelson Rockefeller made one of the most thorough efforts at state government reorganization in the last half century. In connection with this effort, he sought, but did not obtain, general authority to implement the report prepared for him by his Secretary, William Ronan.36 Some but not all of the reorganization

34 Benjamin, supra note 22, at 95–96.
35 Berkman & Reenock, supra note 33, at 798.
36 Henrik N. Dulée, The Budget Process and the New York State Constitution, 12 NYSBA
Rockefeller sought was achieved through distinct legislative action or constitutional amendment.

There is thus no ambiguity in the location of authority in New York’s legislature to reorganize the executive branch. Even in the context of the major reorganization of state government achieved in 1925, as article V, section III of the state constitution indicates, New York left this power with the legislature:

Subject to the limitations contained in this constitution, the legislature may from time to time assign by law new powers and functions to departments, officers, boards, commissions or executive offices of the governor, and increase, modify or diminish their powers and functions. Nothing contained in this article shall prevent the legislature from creating temporary commissions for special purposes or executive offices of the governor and from reducing the number of departments as provided for in this article, by consolidation or otherwise.\(^37\)

Moreover, the understanding that constitutional or statutory change is needed to relocate this power is confirmed by the attempt to make such a change in the 1967 State Constitutional Convention, the product of which failed at the polls. Article 6.6 of the proposed 1967 Constitution provided that:

The legislature may establish, reorganize, or abolish the departments and agencies of the state, except as otherwise provided in this constitution. The governor may also exercise such powers by submitting plans for such purposes to the legislature in regular session on or before the first day of February in any year, and every such plan shall become effective as law on the date specified therein unless either the senate or assembly, within sixty calendar days of such submission, by resolution of a majority of the members elected thereto, has disapproved the same.\(^38\)

There may, however, be one significant exception. In an earlier attempt to constrain the size of New York’s government in connection with the aforementioned 1925 reorganization, the major departments and agencies were named in the constitution and

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\(^{37}\) N.Y. Const. art 5, § 3.

\(^{38}\) N.Y. Const. Convention, Proposed Constitution, art. VI, § 6 (1967).
limited to twenty in number. Among these was an Executive Department that was to serve as “an umbrella, or omnium gatherum” for a large number of units. This effectively created a loophole that allowed the re-proliferation of departments, bypassing the letter and spirit of the constitutional limit.

Under current law, the Executive Department is headed by the Governor and includes under its umbrella: the Division of the Budget; the Division of Military and Naval Affairs; the Office of General Services; the Division of State Police; the Division of Parole; the Division of Housing; the Division of Alcoholic Beverage Control; the Division of Human Rights; the Division of Veterans’ Affairs; the Division of Homeland Security and Emergency Services (Newly Reorganized); and the Office for Technology. Together, these have 13,019 employees, 6.63% of the state workforce. Including those named, Andrew Cuomo’s New NY Agenda finds within the Executive Department “at least 75 administrative units, almost all frozen in statute, including 18 commissions, 18 offices, 14 divisions, 13 councils, 8 boards, 2 cabinets, an agency, and a committee.” It continues, “[p]redictably, the practice of lumping a potpourri of agencies into a single department has resulted in inefficient groupings of unrelated activities that interferes with departments’ efforts to achieve flexibility in administration, complicates their ability to perform core agency functions, and promotes inefficiency and waste.”

As head of the Executive Department, according to the above cited executive law, “[t]he governor may establish, consolidate, or abolish additional divisions and bureaus.” Though most of the entities in the Executive Department are established by law, it may be worth exploring whether in this exceptional area, where the governor’s power derives from both his or her general role as chief executive and specific role as department head, intent may be found to extend his or her power to reorganize to existing units within it.

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39 The twenty department limit was retained, but departmental specification by name was eliminated by constitutional amendment in 1961. See ROBERT B. WARD, NEW YORK STATE GOVERNMENT 181 (2006).

40 BENJAMIN, HORNER, KAENNY & NORDEN, supra note *.

41 GALIE, supra note 12, at 112.


43 BENJAMIN ET AL., supra note *, at 85.

44 CUOMO, supra note 1, at 66 (citations omitted).

45 Id. (citations omitted).


47 BENJAMIN ET AL., supra note *, at 85.
In such compelling circumstances as the recent need to fill a vacancy in the Lieutenant Governorship during a fiscal emergency, or in pursuit of desired political or policy ends where clear legislative authority was not forthcoming, governors in New York have sought to seize upon ambiguities in the law to find a basis for actions they wish to take. But for any major initiative, this would be an invitation to litigation with the outcome uncertain. In fact, a recently published leading text on state constitutional law uses examples drawn from two of the New York cases mentioned above as illustrative of inconsistent, and therefore unpredictable, reaction in state high courts to such initiatives, previously summarized.

III. RECENT NEW YORK GOVERNORS’ USE OF EXECUTIVE ORDERS

To further understand the executive order power in New York we examined both the use of such orders by recent governors during their first year in office, and sought to categorize orders currently in force by function and administration of origin. Additionally, we took a particular look at orders used to address emergency situations and to impact local government.

A. First Year Executive Orders

All governors, upon assuming office, continued all executive orders of preceding administrations by executive order, while also ordering an internal review of them. Governor Spitzer issued an executive order eliminating all previous orders, except ones specifically listed, as did Governor Paterson. Earlier governors repealed previous orders only when they sought to supersede them.

From Governor Carey forward, each governor has set up Judicial Nominating Committees via executive order to vet potential judicial appointees. With the exception of Governor Wilson, who served only briefly, all governors have issued executive orders in their first year to specify ethical guidelines or procedures for state officials and

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48 Id.
49 WILLIAMS, supra note 3, at 304–65.
50 A database of all executive orders issued by New York Governors since Nelson Rockefeller was compiled in connection with the research for the Reinvent Albany report and is separately available in electronic format. See BENJAMIN ET AL., supra note *, at 86.
51 Id.
52 Id.
employees subject to gubernatorial authority.\textsuperscript{53}

With the exception of Governor Pataki, all governors have issued orders advancing women’s issues in state government. With the exception of Governors Carey and Pataki, all issued orders in their first year advancing minority group causes or status in state government. In the last three democratic administrations, at least one of these orders has taken the form of advancing women and minority-owned businesses in some manner.\textsuperscript{54}

Governors tend to focus their initial orders on prominent issues on which they campaigned. For instance, a substantial portion of George Pataki’s first year orders addressed decreasing regulation and rules, increasing privatization, and getting tough on crime. Immediately upon taking office, Elliot Spitzer issued numerous orders that sought to increase government transparency and introduce higher ethical standards for state officials. Hugh Carey issued many early orders pertaining to health policy, mental health policy, and the operation of nursing homes.\textsuperscript{55}

\textbf{B. Executive Orders in Force in 2010}

We found one hundred and twenty executive orders in force in 2010.\textsuperscript{56} A plurality of these were issued by David Paterson, the incumbent governor, but more than a quarter originated with Mario Cuomo, and one was first issued by Nelson Rockefeller. There are no orders originally issued by Hugh Carey currently in force.\textsuperscript{57}

Issuing procedural directives was the most common use of executive orders. Rescinding or affirming previous orders was the second most frequent use of this power. For just under a third of the orders, the function was to create a situation of relative permanency in the state bureaucracy, that is to: create a new position or office (12); create a continuing regulatory commission (13); create a continuing advisory board, council, or task force (20); make an appointment to a state position (1); or reorganize a state agency or department (1). Most staffing for entities created by executive order came from existing positions in state government.\textsuperscript{58}

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Id.
\item For a table summarizing each, see \textit{id.} at 166–81.
\item Id.
\item Id. at 87.
\end{enumerate}
\end{footnotesize}
New York State law provides for emergency response to “Natural and man-made disasters” defined as the occurrence or imminent threat of wide spread or severe damage, injury, or loss of life or property resulting from any natural or man-made causes, including, but not limited to, fire, flood, earthquake, hurricane, tornado, high water, landslide, mudslide, wind, storm, wave action, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, radiological accident, nuclear, chemical, biological, or bacteriological release, water contamination, bridge failure or bridge collapse.\footnote{N.Y. EXEC. LAW § 28(1) (McKinney Supp. 2011).}

Local governments are specified as the first line of defense and action in disaster response. But the law also provides that if the governor, “on his own initiative or pursuant to a request from one or more [local] chief executives, finds that a disaster has occurred or may be imminent for which local governments are unable to respond adequately, he shall declare a disaster emergency by executive order.”\footnote{N.Y. EXEC. LAW § 28(1) (McKinney 2010).}

The governor’s authority under the law extends to defining the disaster, determining (in up to six month increments) the duration of the state response, and seeking federal assistance for which he or she may provide state matching funds, without appropriation, at his or her discretion:

The executive order shall include a description of the disaster, and the affected area. Such order or orders shall remain in effect for a period not to exceed six months or until rescinded by the governor, whichever occurs first. The governor may issue additional orders to extend the state disaster emergency for additional periods not to exceed six months.\footnote{Id. § 28(3).}

Whenever the governor shall find that a disaster is of such severity and magnitude that effective response is beyond the capabilities of the state and the affected jurisdictions, he shall make an appropriate request for federal assistance available under federal law, and may make available out of any funds provided under the governmental emergency fund

\footnote{N.Y. EXEC. LAW § 20(2)(a) (McKinney Supp. 2011).}
or such other funds as may be available, sufficient funds to provide the required state share of grants made under any federal program for meeting disaster related expenses including those available to individuals and families.\textsuperscript{62}

Historically, declarations of emergency have most commonly been issued in response to natural disasters. However, governors have occasionally extended the definition to deal with unique circumstances.

Governor Pataki’s eighty-seventy executive order declared a disaster due to an August 1998 “fire [that] inflicted severe and extensive damage to the 126-year-old Central Synagogue, located at 643 Lexington Avenue, New York, New York, a New York City and national landmark, and the oldest temple in New York State in continuous use by one Jewish congregation” during Rosh Hashanah and Yom Kippur, leaving the congregation with no building in which to worship on the holidays.\textsuperscript{63} In this case, Pataki simply “authorized the New York State Armory at 643 Park Avenue, New York, New York (the ‘Armory’) to be used by the congregation’s members and guest worshipers during the High Holy Days.”\textsuperscript{64} He went on to extend this declaration four times. It finally expired in early 2000 (presumably when the Temple was restored).\textsuperscript{65}

Governor Carey’s Executive Order 46, issued in 1977, declared a natural gas shortage emergency, and invoked unspecified emergency powers in the New York constitution and laws of the state (not citing Executive Law 2-B), which he delegated to a commissioner to ration natural gas.\textsuperscript{66} Governor Carey’s ninety-fifth executive order, issued on February 16, 1980, found that the lack of adequate transportation, resulting in excessive delays for spectators at the Olympic Games at Lack Placid, constituted an emergency.\textsuperscript{67} The governor not only ordered the state to provide additional transportation, but also called for the suspension of laws, regulations, and the like that might conflict with the efforts.\textsuperscript{68} As with most declarations of emergency, he stated that the situation constituted a threat to the general welfare, public order, and

\textsuperscript{62} Id. § 28(4).
\textsuperscript{63} N.Y. Exec. Order No. 87, 9 N.Y. COMP. CODES R. & REGS. tit. 9, § 5.87 (1998).
\textsuperscript{64} N.Y. Exec. Order No. 87.1, 9 N.Y. COMP. CODES R. & REGS. tit. 9, § 5.87 (1999).
\textsuperscript{66} N.Y. Exec. Order No. 46, 9 N.Y. COMP. CODES R. & REGS. tit. 9, § 3.46 (1977).
\textsuperscript{67} N.Y. Exec. Order No. 95, 9 N.Y. COMP. CODES R. & REGS. tit. 9, § 3.95 (1980).
\textsuperscript{68} Id.
One commentator, troubled by shortcomings in the governmental response to events such as Hurricane Katrina, has argued for the recognition that “presumptive executive power to respond to interstate crisis” are “inherent to the executive.” Such a power, however, is not now found in New York law. Hypothetically, a newly elected governor could issue an executive order declaring the state’s fiscal condition to be a “manmade disaster” under the Executive Law, and then seek to downsize state government under the broad discretionary powers given in the law to deal emergencies. There is some precedent for dealing with fiscal problems by executive order, albeit in a more focused manner. Governor Carey’s aforementioned impoundment of local assistance funds by executive order is one example. Another is Governor Pataki’s very first executive order, freezing state hiring at “all agencies, departments, divisions, commissions, bureaus and all other entities over which [he had] executive power” in the face of “a substantial projected budget deficit.” As noted, the first action was overturned by the courts. The second was well within the governor’s power as chief executive.

Interestingly, Governor Carey issued no executive orders in 1975 in the course of seeking to manage the New York City fiscal crisis, nor has any other governor in recent years attempted to use this power broadly to address the periodic state fiscal difficulties of varying magnitude. The resulting resistance in the legislature and then the courts, on serious separations of powers grounds, would likely add to, rather than diminish, crisis conditions in the state.

D. Executive Orders and Local Government

There is some record in other states of executive orders being recognized in the courts as “the basis for substantive law” that affected local government. Governors’ executive orders impacting local government in New York, however, have in general been incidental, informational, or advisory, but rarely directive. Orders declaring emergencies direct state agencies to work with local

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69 Id.
71 See supra note 16 and accompanying text.
73 Oneida Cnty. v. Berle, 49 N.Y.2d. 515, 519 (1980); see supra note 16 and accompanying text.
authorities, which are, as previously noted, responsible in the first instance for responding to them. Governor Pataki issued executive orders to implement the Memorandum of Agreement regarding the New York City Watershed between that city and upstate host communities for its reservoir in the Catskills.\footnote{N.Y. Exec. Order Nos. 51, 57, 9 N.Y. COMP. CODES R. & REGS. tit. 9, §§ 5.51, 5.57 (1997).}

Emulating the approach of several predecessors, Governor Spitzer created commissions to study local government and property tax reform by executive order.\footnote{N.Y. Exec. Order Nos. 11, 22, 9 N.Y. COMP. CODES R. & REGS. tit. 9, §§ 6.11, 6.22 (2007–08).} More recently, Governor Patterson established a Task Force on Public Employee Retirement Health Care Benefits to consider, as part of its work, the benefits of employees of localities outside New York City.\footnote{N.Y. Exec. Order No. 15, 9 N.Y. COMP. CODES R. & REGS. tit. 9, § 7.15 (2009) (This order directed all political subdivisions to cooperate with the taskforce as it carried out its work, but that group was not given any authority to regulate or change how local governments provide health care benefits to their employees.).}

Another Patterson order set out state policy regarding bottled water, encouraged “[p]ublic entities not subject to this Order, including local governments and school districts . . . to review their policies and practices concerning the use of bottled water for the purpose of achieving goals similar to those of this Executive Order.”\footnote{N.Y. Exec. Order No. 18, 9 N.Y. COMP. CODES R. & REGS. tit. 9, § 7.18 (2009).}

Under article V, section 1 of the state constitution, the legislature must assign to the State Comptroller the “supervision of the accounts of any political subdivision of the state.”\footnote{N.Y. CONST. art. V, § 1.} It has done so in article 3 of the General Municipal Law.\footnote{N.Y. Gen. Mun. Law §§ 33–34 (McKinney Supp. 2011).} Additionally, usually at the local request in accordance with constitutional home rule provisions, the state under specific circumstances has intervened by law to provide assistance, oversee, or even take temporary control of the finances of particular localities (e.g., New York City, Yonkers, and Buffalo).\footnote{N.Y. CONST. art. IX, § 2(b)(2).}

Again, hypothetically, one or more local chief executives might request a gubernatorial declaration of emergency in response to extreme local fiscal stress. There is no existing mechanism, however, for local leaders to collectively request such a declaration to deal generally with the derivative local dimensions and consequences of New York State’s fiscal crisis (e.g., property tax burden, state mandates upon local governments).
IV. WHAT CAN REORGANIZATION ACHIEVE?

Advocates of reorganization generally argue that it will bring greater economy, efficiency, effectiveness, accountability, and management capacity on the executive side, enhanced legislative capability for oversight, and improve public understanding of state government. For example, in 1959, Secretary to the Governor William Ronan identified eight areas of benefit from the “Proposed Reorganization of the Executive Branch of New York state government.”82 They were:

1. Reduction in the number of State agencies, thus facilitating communication, coordination and control . . . .
2. Elimination of duplication and overlap of services and reduction of overhead costs by grouping similar functions under a single agency . . . .
3. More effective discharge by the Governor of the responsibilities with which the Constitution charges him and which the people expect their Chief Executive to fulfill.
4. Clarification of lines of authority, thus identifying and placing responsibility for program results.
5. Assignment of the management of all State funds to the Executive Branch of Government under an officer responsible to the Chief Executive . . . .
6. Provision for review of administrative decisions affecting private rights, by independent boards and review units within departments.
7. Facilitation of legislative review of Executive branch performance through simplification of State government organization.

In austere times, the economy argument becomes paramount; reorganization of state government is advanced primarily as a means to reduce governmental costs.83 The findings of scholarly research, however, do not provide consistent support for this idea. For example, work published by Kenneth J. Meier in 1980, based upon reorganization experience in sixteen states, showed that the commonsense presumptions of governors inheriting complex—some

82 State of New York, supra note 36, at 1393–94.
83 See, e.g., Cuomo, supra note 1, at 71.
would say chaotic—bureaucratic arrangements notwithstanding, large-scale reorganization “rarely accounts for significant reductions in employment or expenditures.”

Meier found that “only three [states] showed a statistically significant long-term decline in employment while none showed a significant short-term decrease. None of the short- or long-term reductions in expenditures were statistically significant.” James K. Conant’s paper on the twenty-two comprehensive state reorganization efforts between 1965 and 1987 also found minimal support for the notion that reorganization efforts stemmed the growth of employment and expenditures. Of the states Conant reviewed, only one, Iowa, had any success in producing such an outcome. Conant later summarized: “On the basis of existing studies on this topic, neither employment reductions nor net reductions in state spending are likely to result from a reorganization initiative.”

In contrast, in another multistate study, employing different measures and methodology and completed more than a decade later, investigators did find that comprehensive reorganization resulted in lower rates of growth (but not decline) in numbers of state government employees. Berkman and Reenock found that the twenty-three states that undertook comprehensive reorganization between the years 1952 and 1992 “on average, experience[d employment] growth rates 1.65% smaller than states that have not reorganized comprehensively.”

Of course, as suggested by the goals of the Rockefeller-era effort in New York summarized above, reorganization might produce positive outcomes for state governments other than cost control or reduction. Conant and others found that reorganization has made the executive branch more accountable to the governor by

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85 Id. at 410. Note that Meier’s dependent variable was the decline in the rate of change in average increases the state had been experiencing in recent years.
87 Id. at 897. Importantly, Conant attributes the absence of a decline in employment and expenditures to the political costs of instituting layoffs, the addition of new programs in years after reorganization, and the reinvestment of changes in some areas to support other underfunded programs. Id.
89 Berkman & Reenock, supra note 33, at 809.
90 Id.
91 See supra Part II.
expanding gubernatorial appointment powers, reducing the number of executive branch agencies, and consolidating them within larger departments organized by function. Berkman and Reenock reported that, on average, comprehensive reorganization results in one hundred and fifty consolidated agencies or departments. Moreover, earlier studies also fail to account for potential savings for local governments produced by reorganization. But the preponderance of evidence suggests the need to avoid claims of large potential fiscal gains from state government reorganization, lest expectations be elevated to levels that cannot be realized.

V. MODELS FOR GUBERNATORIAL REORGANIZATION AUTHORITY

The “legislative veto,” a practice later declared unconstitutional at the national level in Immigration and Naturalization Service v. Chadha, was first used in the Reorganization Act of 1939 to give the president temporary authority to restructure the national government. This practice reverses the familiar separation of powers arrangement, under which the legislative branch passes laws subject to executive veto, which may be overridden. Ordinarily, if the executive fails to act within a specified time, a measure passed by the legislature becomes law. Under the legislative veto, authorized nationally by statute and now in the states by constitutional provision or statute, an executive-proposed reorganization takes effect unless it is disapproved by one or both legislative houses within a specified time period. That is, change occurs if the legislature does nothing. However, if the legislature acts to block the reorganization, there is no executive override.

Governor-initiated reorganization is a relatively new phenomenon in the American states. It was first suggested for state government in 1948 in the fifth edition of the National Municipal League’s Model State Constitution. Section 5.06 of the sixth edition of this model constitution reads:

The legislature shall by law prescribe the functions, powers

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92 Conant, supra note 86, at 897.
93 Berkman & Reenock, supra note 33, at 809.
and duties of the principal departments and of all other agencies of the state and may from time to time reallocate offices, agencies and instrumentalities among the principal departments, may increase, modify, diminish or change their functions, powers and duties and may assign new functions, powers and duties to them; but the governor may make such changes in the allocation of offices, agencies, and instrumentalities, and in the allocation of such functions, powers and duties, as he considers necessary for efficient administration. If such changes affect existing law, they shall be set forth in executive orders, which shall be submitted to the legislature while it is in session and shall become effective, and shall have the force of law, sixty days after submission, or at the close of the session, whichever is sooner unless specifically modified or disapproved by a resolution concurred in by a majority of all members.

New Hampshire was the first state to adopt this model through legislation passed in 1949. Alaska, admitted to the union in 1958, included executive reorganization authority on this model in its first constitution. A 1977 study identified seven states where the governor had constitutional authority to reorganize, with an additional nine states providing it through legislation.

According to the 2009 Book of States, governors in thirty-six states currently have power to achieve executive branch reorganization subject to legislative veto. However, our own review found that only twenty-one executives are currently given any significant power to reorganize their states’ bureaucracies, a number similar to that identified by other recent academic work. From our review, we identified six different sets of institutional

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98 See Holland & Luking, supra note 95, at 14.
99 Id. at 14 n.73.
100 Id. at 15, 25 n.124.
102 States listed in The Book of the States as having substantial executive reorganization authority, but in which this authority is not confirmed by our research include: Colorado, Delaware, Georgia, Hawaii, Iowa, Louisiana, Maine, North Dakota, Oregon, Texas, and Utah. Note that we did find some limited authority in Louisiana, where the Governor may create agencies in the executive branch, but these only last for a year unless approved by the legislature. In Georgia, the governor did in the past have reorganization powers, but the legislature repealed them as part of the 1972 Reorganization act. Note also that The Book of the States does not list Pennsylvania, a state in which we found that there are gubernatorial reorganization powers.
103 See, e.g., THE EXECUTIVE BRANCH OF STATE GOVERNMENT: PEOPLE, PROCESS, PLACES 41–42 (Margaret Robertson Ferguson ed. 2006).
arrangements regarding government reorganization, organized in Table I based on the source of and limits upon the governor’s authority, and the nature of and limits upon the legislature’s role. A seventh category includes four states in which the governor has significant power to reorganize, but that could not be encompassed in this rubric. An eighth category, which includes New York, is comprised of the twenty-nine states in which no substantial executive reorganization authority is granted by constitution or law. Categories are arrayed from “Governor Most Powerful” to “Governor Least Powerful.”

104 See infra Table I.
TABLE I: GUBERNATORIAL POWER TO REORGANIZE STATE GOVERNMENT

A. Power Constitutionally Granted; Subject to Two-House Veto (Governor Most Powerful)

Alaska, Maryland, Michigan:
In Maryland, the legislature has fifty days to vote on the executive order, whereas in Alaska and Michigan it has sixty days. Additionally, in Alaska and Michigan there are no restrictive provisions. In Maryland, the governor is prohibited from abolishing or transferring all the functions of any agency or department that was created by the constitution.

B. Power Constitutionally Granted; Subject to One House Veto

Illinois, Kansas, Massachusetts, North Carolina, South Dakota:
In Illinois, Kansas, and Massachusetts, state legislatures have sixty days to exercise the legislative veto. In North Carolina, the deadline is the remainder of the current legislative session. In South Dakota it is ninety days.
North Carolina is the only state in this group where the legislature can amend the governor’s plan.
In North Carolina and Massachusetts, there are no restrictions on the governor’s power. Illinois governors face five restrictions, while those in Kansas and South Dakota each have one.

C. Power Constitutionally Granted with Legislature Having to Act Affirmatively by Legislation

Indiana:
Indiana law, which authorizes the governor to reorganize state agencies, contains four provisions restricting the governor.

106 See ALASKA CONST. art. III, § 23; see MICH. CONST. art. V., § 1.V(2).
107 MD. CONST. art. II, § 24.
108 Note, although the power is constitutionally granted, the legislature followed with an implementing statute further defining the responsibilities and restrictions.
109 ILL. CONST. art. V, § 11; KAN. CONST. art I, § 6(c); MASS. CONST. art. LXXXVII, § 2(a).
110 N.C. CONST. art. II, § 5(10).
111 S.D. CONST. art. IV, § 8.
112 N.C. CONST. art. II, § 5(10).
113 See id.; MASS. CONST. art. LXXXVII, § 2(a).
114 ILL. CONST. art. V, § 11; KAN. CONST. art I, § 6(c); S.D. CONST. art. IV, § 8.
115 IND. CODE § 4-3-6-6 (LexisNexis 2002).
D. Power Based in Statute; Subject to Two-House Veto

New Jersey:
In New Jersey, the legislative veto is by both houses within sixty days. The statute granting the executive power contains six restrictions.

E. Power Based in Statute; Subject to One House Veto

California, Missouri, Vermont:
A legislative house in California and Missouri has sixty days to pass a resolution rejecting a governor’s plan; in Vermont, ninety days are allowed.
The Missouri and Vermont statutes contain only one restrictive provision; California has five.

F. Power Based in Statute, with Affirmative Legislative Action by Both Houses Required

Kentucky, Minnesota, Pennsylvania, Virginia:
There are five explicit statutory restrictions on the governor’s power in Pennsylvania, and one in Virginia.

G. Reorganization Power Not Fitting into Any of the Above Categories

Arkansas, Florida, Montana, Tennessee:
In Arkansas, the governor may initiate reorganization with an executive order only when the reorganization is needed for the state to meet guidelines to participate in federal programs. This power is granted by statute, and both houses of the legislature must act by the end of the legislative session to veto a plan.

Florida has both constitutional and statutory provisions indicating that the governor has some power to reorganize.

116 N.J. STAT. ANN. § 52:14C-7(a) (West 2011).
118 CAL. GOV’T CODE § 12080.5 (West 2005); MO. ANN. STAT. § 26.510 (West 2010).
120 Id. § 2003; MO. ANN. STAT. § 26.540 (West 2001).
121 CAL. GOV’T CODE § 12080.4 (West 2005).
122 PA. STAT. ANN. § 750-6 (West 1990); VA. CODE ANN. § 2.2-131 (2008).
124 Id. § 25-16-201(b).
125 FLA. CONST. art. IV, § 1 (‘The governor shall be the chief administrative officer of the
Nowhere is a specific procedure established describing how the governor may exercise this power. Additionally, Florida law suggests that the legislature has historically led reorganizational efforts in this state.\textsuperscript{126}

The Montana code simply states that “[t]he office of the governor shall continuously study and evaluate the organizational structure, management practices, and functions of the executive branch and of each agency. The governor shall, by executive order or other means within the authority granted to the governor, take action to improve the manageability of the executive branch.”\textsuperscript{127}

The Tennessee governor has the authority to create, consolidate, and abolish divisions within departments created by statute.\textsuperscript{128} The governor may also transfer functions from one department to another, with the exception of functions in the Department of Audit.\textsuperscript{129} Interestingly, all the departments that the legislature creates have termination dates.\textsuperscript{130} Presumably, therefore, the governor could attempt to persuade the legislature not to extend them.

\textit{H. There Is No Explicit Reorganization Power Provided by Constitution or Statute in the Remaining Twenty-Nine States (Governor Least Powerful)}

\section*{VI. MAXIMAL AND TIMELY EMPOWERMENT OF THE NEW YORK STATE GOVERNOR}

\textit{The New NY Agenda} takes the New Jersey law as a model for the statutory authority necessary to allow a newly elected governor to achieve sweeping state government reorganization.\textsuperscript{131} In our rubric, New Jersey law empowers the governor to the fullest extent possible, without rooting his or her reorganization authority in a constitutional source. In substance, it is substantially the same as the constitutional provision, cited above, included in the New York State draft constitution of 1967, written just two years before the

\footnotesize{state responsible for the planning and budgeting of the state.”); Fl. Stat. § 14.202 (West 2009) (authorizing the creation of an Administrative Commission chaired by the governor).
\textsuperscript{126} See, e.g., Fl. Stat. § 11.513 (West 2004) (describing the powers of the Office of Program and Policy Analysis, which conducts reviews subject to the orders of the Legislative Auditing Committee).
\textsuperscript{127} Mont. Code Ann. § 2-7-103 (2009).
\textsuperscript{129} Id. § 4-4-102.
\textsuperscript{131} Cuomo, supra note 1, at 75.}
enactment of the New Jersey statute.\textsuperscript{132} 
According to the summary given in \textit{The New NY Agenda}, New Jersey’s Executive Reorganization Act of 1969 authorizes the Governor to prepare a reorganization plan that calls for the consolidation, transfer or abolition of state agencies, and then submit the plan to the Legislature. The plan takes effect unless, within 60 days, both houses of the Legislature pass a concurrent resolution “stating in substance that the Legislature does not favor the reorganization plan.” Unless voted down by the Legislature, the plan “shall have the force and effect of law.” All laws or parts of laws inconsistent with an adopted “reorganization plan . . . are, to the extent of such inconsistency . . . repealed.”\textsuperscript{133} 

Further examination reveals that the New Jersey governor’s reorganization authority does not reach the office of the state auditor, nor may it compromise civil service protections.\textsuperscript{134} Additionally, a gubernatorial reorganization plan may not provide for:

(1) Creating a new principal department in the Executive branch, abolishing or transferring a principal department or all the functions thereof, or consolidating 2 or more principal departments or all the functions thereof;
(2) Continuing an agency beyond the period authorized by law for its existence or beyond the time when it would have terminated if the reorganization had not been made;
(3) Authorizing an agency to exercise a function which is not expressly authorized by law at the time the plan is transmitted to the Legislature;
(4) Increasing the term of an office beyond that provided by law for the office.\textsuperscript{135} 

We have characterized constitutionally-based gubernatorial reorganization authority as more empowering that that based in statute. However, even if the legislature was amendable to amending the constitution to provide this authority (unlikely in the current political environment), this would not be possible before

\textsuperscript{132} See N.Y. CONST. CONVENTION, PROPOSED CONSTITUTION, art. VI, § 6 (1967).
\textsuperscript{133} CUOMO, \textit{supra} note 1, at 75–76 (quoting N.J. STAT. ANN. §§ 52:14C-7(a), 7(9), 11 (West 2011)).
\textsuperscript{134} N.J. STAT. ANN. §§ 52:14C-3.2, 8 (West 2011).
\textsuperscript{135} \textit{Id.} § 52:14C-4.
Moreover, comparative research based upon the experience of forty states (but not New York) in 2004 to 2005 illustrates that, at least regarding the number of executive orders issued, “the variable for statutory or constitutional authority . . . is not statistically significant.”\footnote{\textit{N.Y. Const.} art. XIX, § 1 (requiring an amendment to the constitution be passed by the legislature and then be reconsidered in the first legislative session after the next election).} In the circumstances, for those who seek thorough, timely reorganization of state government as one major element in addressing New York’s current crisis in governance, statutory action on the New Jersey model is a compelling model.

\section*{VII. Recommendations}

Based upon the research summarized above, the governor newly elected in November 2010 should:

1. Determine whether he wishes to terminate organizational units that now exist entirely on the basis of executive orders by rescinding those orders;
2. Further consider whether he has the authority to eliminate entities within the Executive Department, even if created by statute, by virtue of his combined powers under the law as governor and department head; and
3. Caused to be drafted, introduced, and seriously considered in the legislature a statute giving him authority to reorganize New York State government within a specified period of time, subject to legislative disapproval in both houses by a specified deadline.

\footnote{Margaret R. Ferguson, Unilateral Decision Making in the American Governorship 13 (Feb. 22–25, 2007) (unpublished manuscript) (presented at the 2007 State Politics and Policy Meeting, Austin, Tex.).}