The Powers of the Governor in Times of Emergency

April 25, 2023
2023 Warren M. Anderson Series

The Powers of the Governor in Times of Emergency

April 25, 2023

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12:00 p.m. **Welcome; Introductions**
Hon. Leslie E. Stein (ret.) ’81 — Director, Government Law Center at Albany Law School
Prof. Leonard M. Cutler — Director of the Study of Government and Politics, Chair of the Political Science Department, and Professor of Political Science at Siena College

12:05 p.m. **Panelist Remarks**
Prof. Robert F. Williams — Distinguished Professor of Law Emeritus and former Director of the Center for State Constitutional Studies at Rutgers University
Peter Kiernan, Esq. — Chair of the Law Revision Commission, Senior Counsel at Venable, LLP, and former Counsel to New York State Governor David A. Paterson
Mylan Denerstein, Esq. — Partner in the New York Office of Gibson, Dunn & Crutcher, LLP, and former Counsel to New York State Governor Andrew M. Cuomo

12:30 p.m. **Discussion**

12:50 p.m. **Q&A**

1:00 p.m. **End of Program**
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Speaker Biographies

LEONARD M. CUTLER is Director of the Study of Government and Politics, Chair of the Political Science Department, Professor of Political Science, and Pre-law Advisor at Siena College. He serves on the Advisory Board of the Government Law Center at Albany Law School. Dr. Cutler has taught at Siena College since 1970. In addition, he has served as Director of Intergovernmental Affairs in the New York State Senate (1973–1994), Adjunct Professor of Public Law at the Nelson Rockefeller Graduate School of Public Affairs (1975–1990), and at the New York State Division of Criminal Justice Services Office of Legal Services (1995–2006). He graduated from The New School for Social Research in 1970 with a PhD in Political Science and Government.

MYLAN L. DENERSTEIN is a litigation partner in the New York office of Gibson, Dunn & Crutcher, LLP. Ms. Denerstein is co-chair of the Public Policy Practice Group and a member of the Crisis Management, White Collar Defense and Investigations, Financial Institutions, Labor and Employment, Securities Litigation, and Appellate Practice Groups. In 2022, Ms. Denerstein was appointed to serve as the independent NYPD Monitor to oversee the court ordered reform process. Previously, Ms. Denerstein has served in a wide variety of roles as in government, including as Counsel to the New York State Governor, as an Executive Deputy Attorney General in the New York Attorney General’s Office, and as Deputy Commissioner for Legal Affairs for the New York City Fire Department. In addition, Ms. Denerstein served as a federal prosecutor in the U.S. Attorney’s Office for the Southern District of New York, prosecuting complex securities, money laundering and organized crime cases, and then as Deputy Chief of the Criminal Division. Ms. Denerstein graduated from Columbia Law School in 1993. She is licensed to practice law in New York State.

PETER J. KIERNAN is Chair of the Law Revision Commission. He was appointed to this role by New York State Governor David A. Paterson in December 2010. He is also Senior Counsel at Venable, LLP. Mr. Kiernan has had a long history of public service in government. He served as Counsel to Governor Patterson from 2008 through 2010. He was counsel to the deputy mayor for finance of the City of New
York, chief counsel to the New York State Senate Minority, and served in the administration of Governor Mario Cuomo. He also served as a trustee on the Citizen’s Budget Commission. At the New York law firm of Edwards Angell Palmer & Dodge, Mr. Kiernan specialized in public finance. He graduated from Cornell Law School in 1968. He is licensed to practice law in New York State, the District of Columbia, the United States District Court for the Eastern District of New York, the U.S. District Court for the Northern District of New York, and the U.S. District Court for the Southern District of New York.

ROBERT F. WILLIAMS is Distinguished Professor of Law Emeritus at Rutgers University. He is an expert in state constitutional law and was the Director of the Center for State Constitutional Studies at Rutgers. He has been the Legislative Advocacy Director and Executive Director of Florida Legal Services, Inc., an International Legal Center Fellow in Kabul, Afghanistan, and a reporter for the Florida Law Revision Council’s Landlord-Tenant Law Project. In addition, he served as a legislative assistant to Florida Senator D. Robert Graham; a staff attorney with Legal Services of Greater Miami, Inc.; and a law clerk to Chief Judge T. Frank Hobson of the Florida Second District Court of Appeals. His publications include *The Law of American State Constitutions* (Oxford University Press, 2009) and *State Constitutional Law, Cases and Materials* (Fifth Edition; Carolina Academic Press 2015). Mr. Williams graduated with honors from the University of Florida School of Law in 1969. He is licensed to practice law in Florida, New Jersey, and the United States Supreme Court.

About the Warren M. Anderson Legislative Series

The Warren M. Anderson Legislative Series, held annually since 1992, features experts who address major legal and policy issues pending before New York State government. The series is named in honor of WARREN M. ANDERSON ‘40, a distinguished alumnus of Albany Law School. He served in the New York State Senate for 36 years working with six governors. He was the longest-serving majority leader of the Senate, holding that position from 1973 to 1988. He was best known for working to bail out New York City from its fiscal crisis in the mid-1970s. He also was responsible for establishing the state’s Tuition Assistance Program which helped fund the education of thousands of New York college students.
legislature may provide by law that such prisoners may voluntarily perform work for nonprofit organizations. As used in this section, the term “nonprofit organization” means an organization operated exclusively for religious, charitable, or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual. This section shall not be construed to prevent the legislature from providing that convicts may work for, and that the products of their labor may be disposed of to, the state or any political division thereof, or for or to any public institution owned or managed and controlled by the state, or any political division thereof. (Formerly §29. Renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 3, 1953; November 5, 1963; November 6, 2001.)

[Reprieves, commutations and pardons; powers and duties of governor relating to grants of]

§4. The governor shall have the power to grant reprieves, commutations and pardons after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations, as he or she may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Upon conviction for treason, the governor shall have power to suspend the execution of the sentence, until the case shall be reported to the legislature at its next meeting, when the legislature shall either pardon, or commute the sentence, direct the execution of the sentence, or grant a further reprieve. The governor shall annually communicate to the legislature each case of reprieve, commutation or pardon granted, stating the name of the convict, the crime of which the convict was convicted, the sentence and its date, and the date of the commutation, pardon or reprieve. (Formerly §5. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 6, 2001.)

[When lieutenant-governor to act as governor]

§5. In case of the removal of the governor from office or of his or her death or resignation, the lieutenant-governor shall become governor for the remainder of the term.

In case the governor-elect shall decline to serve or shall die, the lieutenant-governor-elect shall become governor for the full term.

In case the governor is impeached, is absent from the state or is otherwise unable to discharge the powers and duties of the office of governor, the lieutenant-governor shall act as governor until the inability shall cease or until the term of the governor shall expire.

In case of the failure of the governor-elect to take the oath of office at the commencement of his or her term, the lieutenant-governor-elect shall act as governor until the governor shall take the oath. (Formerly §6. Renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 8, 1949; November 5, 1963; November 6, 2001.)

[Duties and compensation of lieutenant-governor; succession to the governorship]

§6. The lieutenant-governor shall possess the same qualifications of eligibility for office as the governor. The lieutenant-governor shall be the president of the senate but shall have only a casting vote therein. The lieutenant-governor shall receive for his or her services an annual salary to be fixed by joint resolution of the senate and assembly. In case of vacancy in the offices of both governor and lieutenant-governor, a governor and lieutenant-governor shall be elected for the remainder of the term at the next general election happening not less than three months after both offices shall have become vacant. No election of a lieutenant-governor shall be had in any event except at the time of electing a governor. In case of vacancy in the offices of both governor and lieutenant-governor or if both of them shall be impeached, absent from the state or otherwise unable to discharge the powers and duties of the office of governor, the temporary president of the senate shall act as governor until the inability shall cease or until a governor shall be elected.

In case of vacancy in the office of lieutenant-governor alone, or if the lieutenant-governor shall be impeached, absent from the state or otherwise unable to discharge the duties of office, the temporary president of the senate shall perform all the duties of lieutenant-governor during such vacancy or inability.

If, when the duty of acting as governor devolves upon the temporary president of the senate, there be a vacancy in such office or the temporary president of the senate shall be absent from the state or otherwise unable to discharge the duties of governor, the speaker of the assembly shall act as governor during such vacancy or inability.

The legislature may provide for the devolution of the duty of acting as
The Constitution of the State of New York

governor in any case not provided for in this article. (Formerly §§7 and 8. Renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 6, 1945; November 3, 1953; November 5, 1963; November 6, 2001.)

[Action by governor on legislative bills; reconsideration after veto]
§7. Every bill which shall have passed the senate and assembly shall, before it becomes a law, be presented to the governor; if the governor approve, he or she shall sign it; but if not, he or she shall return it with his or her objections to the house in which it shall have originated, which shall enter the objections at large on the journal, and proceed to reconsider it. If after such reconsideration, two-thirds of the members elected to that house shall agree to pass the bill, it shall be sent together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by two-thirds of the members elected to that house, it shall become a law notwithstanding the objections of the governor. In all such cases the votes in both houses shall be determined by yeas and nays, and the names of the members voting shall be entered by yeas and nays, and the names of the members voting shall enter on the journal of each house respectively. If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him or her, the same shall be a law in like manner as if he or she had signed it, unless the legislature shall, by their adjournment, prevent its return, in which case it shall not become a law without the approval of the governor. No bill shall become a law after the final adjournment of the legislature, unless approved by the governor within thirty days after such adjournment. If any bill presented to the governor contain several items of appropriation of money, the governor may object to one or more of such items while approving of the other portion of the bill. In such case the governor shall append to the bill, at the time of signing it, a statement of the items to which he or she objects; and the appropriation so objected to shall be separately reconsidered. If on reconsideration one or more of such items be approved by two-thirds of the members elected to each house, the same shall be part of the law, notwithstanding the objections of the governor. All the provisions of this section, in relation to bills not approved by the governor, shall apply in cases in which he or she shall withhold approval from any item or items contained in a bill appropriating money. (Formerly §9. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 6, 1945; November 3, 1953; November 5, 1963; November 6, 2001.)

[Departmental rules and regulations; filing; publication]
§8. No rule or regulation made by any state department, board, bureau, officer, authority or commission, except such as relates to the organization or internal management of a state department, board, bureau, authority or commission, shall be effective until it is filed in the office of the department of state. The legislature shall provide for the speedy publication of such rules and regulations, by appropriate laws. (New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

ARTICLE V
OFFICERS AND CIVIL DEPARTMENTS

[Comptroller and attorney-general; payment of state moneys without audit void]
Section 1. The comptroller and attorney-general shall be chosen at the same general election as the governor and hold office for the same term, and shall possess the qualifications provided in section 2 of article IV. The legislature shall provide for filling vacancies in the office of comptroller and of attorney-general. No election of a comptroller or an attorney-general shall be had except at the time of electing a governor. The comptroller shall be required: (1) To audit all vouchers before payment and all official accounts; (2) to audit the accrual and collection of all revenues and receipts; and (3) to prescribe such methods of accounting as are necessary for the performance of the foregoing duties. The payment of any money of the state, or of any money under its control, or the refund of any money paid to the state, except upon audit by the comptroller, shall be void, and may be restrained upon the suit of any taxpayer with the consent of the supreme court in appellate division on notice to the attorney-general. In such respect the legislature shall define the powers and duties and may also assign to him or her: (1) supervision of the accounts of any political subdivision of the state; and (2) powers and duties pertaining to or connected with the assessment and taxation of real estate, including determination of ratios which the assessed valuation of taxable real property bears to the full valuation thereof; but not including any of those powers and duties reserved to officers of a county, city, town or village by virtue of sections seven and eight of article nine of this constitution. The legislature shall assign to him or her no administrative duties, excepting such as may be incidental to the performance of these functions, any other provision of this constitution to the contrary notwithstanding. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 3, 1953; November 8, 1955; November 6, 2001.)

[Civil departments in the state government]
§2. There shall be not more than twenty civil departments in the state government, including those referred to in this constitution. The legislature may by law change the names of the departments referred to in this constitution. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 2, 1943; November 3, 1959; November 7, 1961.)

[Assignment of functions]
§3. Subject to the limitations contained in this constitution, the legislature may from time to time assign by law new powers and functions to departments, offices, 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. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 7, 1961.)

[Department heads]
§4. The head of the department of audit and control shall be the comptroller and of the department of law, the attorney-general. The head of the department of education shall be The Regents of the University of the State of New York, who shall appoint and at pleasure remove a commissioner of education to be the chief administrative officer of the department. The head of the department of agriculture and markets shall be appointed in a manner to be prescribed by law. Except as otherwise provided in this constitution, the heads of all other departments and the members of all boards and commissions, excepting temporary commissions for special purposes, shall be appointed by the governor by and with the advice and consent of the senate and may be removed by the governor, in a manner to be prescribed by law. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 7, 1961.)

[Section 5, which abolished certain offices, was repealed by amendment approved by vote of the people November 6, 1962.]

[Civil service appointments and promotions; veterans' credits]
§6. Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive; provided, however, that any member of the armed forces of the United States who served therein in time of war, and who, at the time of such member’s appointment or promotion, is a citizen or an alien lawfully admitted for permanent residence in the United States and a resident of this state and is honorably discharged or released under honorable circumstances from such service, shall be entitled to receive five points additional credit in a competitive examination for original appointment and two and one-half points additional credit in an examination for promotion or, if such member was disabled in the actual
SECTION 20

Natural and man-made disasters; policy; definitions

Executive (EXC) CHAPTER 18, ARTICLE 2-B

§ 20. Natural and man-made disasters; policy; definitions. 1. It shall be the policy of the state that:

a. local government and emergency service organizations continue their essential role as the first line of defense in times of disaster, and
that the state provide appropriate supportive services to the extent necessary;

b. local chief executives take an active and personal role in the development and implementation of disaster preparedness programs and be vested with authority and responsibility in order to insure the success of such programs;

c. state and local natural disaster and emergency response functions be coordinated using recognized practices in incident management in order to bring the fullest protection and benefit to the people;

d. state resources be organized and prepared for immediate effective response to disasters which are beyond the capability of local governments and emergency service organizations; and

e. state and local plans, organizational arrangements, and response capability required to execute the provisions of this article shall at all times be the most effective that current circumstances and existing resources allow.

2. As used in this article the following terms shall have the following meanings:

a. "disaster" means occurrence or imminent, impending or urgent 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, disease outbreak, air contamination, terrorism, cyber event, blight, drought, infestation, explosion, radiological accident, nuclear, chemical, biological, or bacteriological release, water contamination, bridge failure or bridge collapse.
b. "state disaster emergency" means a period beginning with a declaration by the governor that a disaster exists and ending upon the termination thereof.

c. "municipality" means a public corporation as defined in subdivision one of section sixty-six of the general construction law and a special district as defined in subdivision sixteen of section one hundred two of the real property tax law.

d. "commission" means the disaster preparedness commission created pursuant to section twenty-one of this article.

e. "emergency services organization" means a public or private agency, voluntary organization or group organized and functioning for the purpose of providing fire, medical, ambulance, rescue, housing, food or other services directed toward relieving human suffering, injury or loss of life or damage to property as a result of an emergency, including non-profit and governmentally-supported organizations, but excluding governmental agencies.

f. "chief executive" means:

(1) a county executive or manager of a county;

(2) in a county not having a county executive or manager, the chairman or other presiding officer of the county legislative body;

(3) a mayor of a city or village, except where a city or village has a manager, it shall mean such manager; and

(4) a supervisor of a town, except where a town has a manager, it shall mean such manager.

g. "Disaster emergency response personnel" means agencies, public
officers, employees, or affiliated volunteers having duties and responsibilities under or pursuant to a comprehensive emergency management plan.

h. "Emergency management director" means the government official responsible for emergency preparedness, response and recovery for a county, city, town, or village.

i. "incident management team" means a state certified team of trained personnel from different departments, organizations, agencies, and jurisdictions within the state, or a region of the state, activated to support and manage major and/or complex incidents requiring a significant number of local, regional, and state resources.

j. "executive level officer" means a state agency officer with the authority to deploy agency assets and resources and make decisions binding a state agency.

k. "third party non-state resources" means any contracted resource that is not owned or controlled by the state or a political subdivision including, but not limited to, ambulances, construction crews, or contractors.
SECTION 28

State declaration of disaster emergency

Executive (EXC) CHAPTER 18, ARTICLE 2-B

§ 28. State declaration of disaster emergency. 1. Whenever the
governor, on his own initiative or pursuant to a request from one or
more 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.

2. Upon declaration of a disaster arising from a radiological
accident, the governor or his designee, shall direct one or more chief
executives and emergency services organizations to:

(a) notify the public that an emergency exists; and

(b) take appropriate protective actions pursuant to the radiological emergency preparedness plan approved pursuant to sections twenty-two and twenty-three of this article. The governor, or his designee, shall also have authority to direct that other actions be taken by such chief executives pursuant to their authority under section twenty-four of this article.

3. 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.

4. 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 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.

5. The legislature may terminate at any time a state disaster emergency issued under this section by concurrent resolution.
SECTION 29-A

Suspension of other laws

Executive (EXC) CHAPTER 18, ARTICLE 2-B

§ 29-a. Suspension of other laws. 1. Subject to the state constitution, the federal constitution and federal statutes and regulations, the governor may by executive order temporarily suspend specific provisions of any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster.
2. Suspensions pursuant to subdivision one of this section shall be subject to the following standards and limits:

a. no suspension shall be made for a period in excess of thirty days, provided, however, that upon reconsideration of all of the relevant facts and circumstances, the governor may extend the suspension for additional periods not to exceed thirty days each;

b. no suspension shall be made which does not safeguard the health and welfare of the public and which is not reasonably necessary to the disaster effort;

c. any such suspension order shall specify the statute, local law, ordinance, order, rule or regulation or part thereof to be suspended and the terms and conditions of the suspension;

d. the order may provide for such suspension only under particular circumstances, and may provide for the alteration or modification of the requirements of such statute, local law, ordinance, order, rule or regulation suspended, and may include other terms and conditions;

e. any such suspension order shall provide for the minimum deviation from the requirements of the statute, local law, ordinance, order, rule or regulation suspended consistent with the disaster action deemed necessary; and

f. when practicable, specialists shall be assigned to assist with the related emergency actions to avoid needless adverse effects resulting from such suspension.

3. Such suspensions shall be effective from the time and in the manner prescribed in such orders and shall be published as soon as practicable in the state bulletin.
4. The legislature may terminate by concurrent resolution executive orders issued under this section at any time.
AN ACT to amend the executive law, in relation to the termination of certain executive powers; to amend chapter 23 of the laws of 2020 amending the executive law relating to issuing by the governor of any directive necessary to respond to a state disaster emergency, in relation to the effectiveness thereof; and providing for the repeal of certain provisions upon expiration thereof

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative intent. Chapter 23 of the laws of 2020 was adopted during uncertain times, during the beginning of the national awareness of the COVID-19 virus and its first detection in New York. Responding to the virus was declared a public health emergency by the US Centers for Disease Control and there was the threat of widespread transmission in the United States. At the time it was not known that New York State would become one of the epicenters of the pandemic, how long the pandemic would last, or the toll that it would take on the people of the state. In the face of uncertain and unprecedented times, the legislature enacted chapter twenty-three in order to take action to combat an unknown and unprecedented problem, and in case the governor needed additional powers to deal with the quickly evolving situation. Much has been learned about the COVID-19 virus in the last year. The legislature finds that there has been progress in the fight against the virus with

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

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the approval and distribution of multiple vaccines in recent months. With increased knowledge including the means of transmission, prevention and treatment of the COVID-19 outbreak and additional time to reflect, the legislature finds and declares that the governor is adequately equipped with his previously existing emergency powers and with the authorization to continue existing directive extension and modification powers to deal with the situation. The legislature therefore declares that it is time to restore the pre-pandemic balance of power of the governor and legislature, and to continue to move forward with the response and recovery while maintaining the authority of public-health focused directives taken by the Governor, with reasonable limitations, during the possibly waning days of the pandemic.

§ 2. 1. As used in this section, "public health directive related to managing the COVID-19 pandemic", means a directive certified in the sole discretion of the commissioner of health to address the spread and/or reduction of the COVID-19 virus, facilitate vaccine distribution or administration, or require the use of face coverings. Such certification shall include a detailed explanation of how such directive will address the spread and/or reduction of the COVID-19 virus, facilitate vaccine distribution or administration, or require the use of face coverings and shall also be contained within the notice required to be made by the governor pursuant to paragraphs a and b of subdivision 2 of this section.

2. Any directive previously issued pursuant to chapter 23 of the laws of 2020 in effect at the time of the repeal of such chapter shall be permitted to continue for 30 days from the effective date of this chapter notwithstanding the repeal of chapter 23 of the laws of 2020 and following the expiration of such 30 day period, any extensions or modifications of such directives shall be subject to the following provisions:

a. The governor may extend or modify any directive, by executive order, that has been issued and remains in effect on the effective date of this act for additional 30 day increments in a manner provided for in this section, provided that the purpose of extending or modifying the directive is to issue a public health directive related to managing the COVID-19 pandemic.

b. No later than 5 days prior to the extension or modification of such a directive, the governor shall notify including via electronic means the relevant committee chairs in the assembly and senate and the speaker of the assembly and temporary president of the senate of his or her intent to extend or modify any directive, and shall include therewith the certification required by subdivision 1 of this section, to describe the need for extension or modification of such directive and the threat to the public health or safety that requires the extension or modification. If the governor certifies that the extension or modification of such a directive is necessary to address any exigent circumstances that address an imminent threat to public health or safety, he or she shall provide such certification required by the commissioner of health as provided in subdivision 1 of this section as soon as possible, but in any event, prior to the issuance of an extension or modification of such a directive. The governor shall provide an opportunity to comment on any such directive by the relevant committee chairs, which comments may be received after the issuance of the directive and shall not affect the validity thereof.

c. No later than 5 days prior to the extension or modification of a directive only explicitly affecting specific municipalities, the gover-
nor shall notify including via electronic means the relevant executive leaders of such municipalities and such municipal legislature of his or her intent to extend or modify any such directive, and shall include therewith the certification required by subdivision 1 of this section to describe the need for extension or modification of such directive and the specific threat to the public health or safety that requires the extension or modification. If the governor certifies that the extension or modification of such a directive is necessary to address any exigent circumstances that address an imminent threat to the public health or safety, he or she shall provide such certification required by the commissioner of health as provided in subdivision 1 of this section, as soon as possible but in any event, prior to the issuance of an extension or modification of such a directive. The governor shall provide an opportunity to comment on any such directive by such executive leaders and legislatures, which comments may be received after the issuance of the directive and shall not affect the validity thereof.

d. No directive shall be modified pursuant to this section unless such modification is solely for the purpose of altering the numeric amount or percentage of individuals, businesses, vaccination locations or providers or administrators, or other entities impacted by a directive, or placing additional restrictions or reducing existing restrictions related to testing, quarantine, social distancing, air quality or filtration, or mask requirements, for any entity located in the state, including but not limited to modification of individuals eligible for vaccination or modification of limits on the seating capacity of a business to operate during a state of emergency.

e. No directive shall be extended or modified to the extent that such directive prohibits the adoption by any municipality of this state a local executive order within such municipality's existing power except where such an order conflicts with any executive order issued by the state.

f. No directive may be extended or modified more than once unless the governor has responded, including electronically, to any comments provided by the chairs of any relevant committee or relevant municipal entities pursuant to this section which have been received within 5 days of the time required for such notice pursuant to paragraph b of this subdivision, and which may be attested to in the notice by the governor to the relevant chairs and the leaders as provided in paragraph b of this subdivision, which shall be deemed sufficient for purposes of the effectiveness of such directive.

g. The legislature may terminate by concurrent resolution executive orders issued under this section at any time.

h. Directives shall be effective from the time and in the manner prescribed in such orders and shall be published as soon as practicable in the state bulletin and as provided in this section.

§ 3. (a) Within 15 days of the effective date of this section all current suspensions and directives authorized pursuant to executive orders 202 and 205 of 2020 and this act shall be posted on the website for the office of the governor in a searchable format, and shall include, but not be limited to:

(i) the disaster emergency that such suspension and directives pertain to;

(ii) the subject category or area affected;

(iii) a summary of the provisions suspended or modified;

(iv) the order's expiration date;

(v) the entity responsible for enforcing such provisions; and
(vi) in the case of a directive extended or modified pursuant to the
provisions of this act, the need for extension or modification of such
directive and the threat to the public health or safety that requires
the extension or modification.
(b) Such website shall be updated upon the issuance of every suspen-
sion or directive pursuant to this act.
(c) Every thirty days, such website shall also be updated with
responses to written comments or information requests from relevant
committee chairs or municipal government entities received pursuant to
the provisions of this act.
§ 4. Section 4 of chapter 23 of the laws of 2020 amending the execu-
tive law relating to issuing by the governor of any directive necessary
to respond to a state disaster emergency, is amended to read as follows:
§ 4. This act shall take effect immediately and [sections one and]
section two of this act shall expire and be deemed repealed [April 30,
2021] immediately, provided however, any directive issued pursuant to
this chapter in effect at the time of such repeal shall be permitted to
continue for 30 days from the date of such repeal, unless further
extended as provided in section 2 of the chapter of the laws of 2021
amending the executive law relating to the termination of certain execu-
tive powers; to amend chapter 23 of the laws of 2020 amending the execu-
tive law relating to issuing by the governor of any directive necessary
to respond to a state disaster emergency, in relation to the effective-
ness thereof; and providing for the repeal of certain provisions upon
expiration thereof. Nothing contained herein shall be construed to
diminish or repeal any statutory or regulatory authority to exercise
emergency powers that existed prior to the enactment of this act.
§ 5. Section 28 of the executive law is amended by adding a new subdi-
vision 5 to read as follows:
5. The legislature may terminate at any time a state disaster emergen-
cy issued under this section by concurrent resolution.
§ 6. Severability. If any provision of this act, or the application
thereof to any person or circumstances, is held invalid or unconstitu-
tional, that invalidity or unconstitutionality shall not affect other
provisions or applications of this act that can be given effect without
the invalid or unconstitutional provision or application, and to this
end the provisions of this act are severable.
§ 7. This act shall take effect immediately, provided that, section
two of this act shall expire and be deemed repealed upon the termination
of the state of emergency declared pursuant to executive order 202 of
2020.
AN ACT to amend the executive law, in relation to the termination of certain executive powers; to amend chapter 23 of the laws of 2020 amending the executive law relating to issuing by the governor of any directive necessary to respond to a state disaster emergency, in relation to the effectiveness thereof; and providing for the repeal of certain provisions upon expiration thereof

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative intent. Chapter 23 of the laws of 2020 was adopted during uncertain times, during the beginning of the national awareness of the COVID-19 virus and its first detection in New York. Responding to the virus was declared a public health emergency by the US Centers for Disease Control and there was the threat of widespread transmission in the United States. At the time it was not known that New York State would become one of the epicenters of the pandemic, how long the pandemic would last, or the toll that it would take on the people of the state. In the face of uncertain and unprecedented times, the legislature enacted chapter twenty-three in order to take action to combat an unknown and unprecedented problem, and in case the governor needed additional powers to deal with the quickly evolving situation. Much has been learned about the COVID-19 virus in the last year. The legislature finds that there has been progress in the fight against the virus with the approval and distribution of multiple vaccines in recent months. With increased knowledge including the means of transmission, prevention and treatment of the COVID-19 outbreak and additional time to reflect, the legislature finds and declares that the governor is adequately equipped with his previously existing emergency powers and with the authorization to continue existing directive extension and modification powers to deal with the situation. The legislature therefore declares

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.
that it is time to restore the pre-pandemic balance of power of the
governor and legislature, and to continue to move forward with the
response and recovery while maintaining the authority of public-health
focused directives taken by the Governor, with reasonable limitations,
during the possibly waning days of the pandemic.
§ 2. 1. As used in this section, "public health directive related to
managing the COVID-19 pandemic", means a directive certified in the sole
discretion of the commissioner of health to address the spread and/or
reduction of the COVID-19 virus, facilitate vaccine distribution or
administration, or require the use of face coverings. Such certif-
ication shall include a detailed explanation of how such directive will
address the spread and/or reduction of the COVID-19 virus, facilitate
vaccine distribution or administration, or require the use of face
coverings and shall also be contained within the notice required to be
made by the governor pursuant to paragraphs a and b of subdivision 2 of
this section.
2. Any directive previously issued pursuant to chapter 23 of the laws
of 2020 in effect at the time of the repeal of such chapter shall be
permitted to continue for 30 days from the effective date of this chap-
ter notwithstanding the repeal of chapter 23 of the laws of 2020 and
following the expiration of such 30 day period, any extensions or
modifications of such directives shall be subject to the following
provisions:
a. The governor may extend or modify any directive, by executive
order, that has been issued and remains in effect on the effective date
of this act for additional 30 day increments in a manner provided for in
this section, provided that the purpose of extending or modifying the
directive is to issue a public health directive related to managing the
COVID-19 pandemic.
b. No later than 5 days prior to the extension or modification of such
directive, the governor shall notify including via electronic means
the relevant committee chairs in the assembly and senate and the speaker
of the assembly and temporary president of the senate of his or her
intent to extend or modify any directive, and shall include therewith
the certification required by subdivision 1 of this section, to describe
the need for extension or modification of such directive and the threat
to the public health or safety that requires the extension or modifica-
tion. If the governor certifies that the extension or modification of
such a directive is necessary to address any exigent circumstances that
address an imminent threat to public health or safety, he or she shall
provide such certification required by the commissioner of health as
provided in subdivision 1 of this section as soon as possible, but in
any event, prior to the issuance of an extension or modification of such
directive. The governor shall provide an opportunity to comment on
any such directive by the relevant committee chairs, which comments may
be received after the issuance of the directive and shall not affect the
validity thereof.
c. No later than 5 days prior to the extension or modification of a
directive only explicitly affecting specific municipalities, the gover-
nor shall notify including via electronic means the relevant executive
leaders of such municipalities and such municipal legislature of his or
her intent to extend or modify any such directive, and shall include
therewith the certification required by subdivision 1 of this section to
describe the need for extension or modification of such directive and
the specific threat to the public health or safety that requires the
extension or modification. If the governor certifies that the extension
or modification of such a directive is necessary to address any exigent circumstances that address an imminent threat to the public health or safety, he or she shall provide such certification required by the commissioner of health as provided in subdivision 1 of this section, as soon as possible but in any event, prior to the issuance of an extension or modification of such a directive. The governor shall provide an opportunity to comment on any such directive by such executive leaders and legislatures, which comments may be received after the issuance of the directive and shall not affect the validity thereof.

d. No directive shall be modified pursuant to this section unless such modification is solely for the purpose of altering the numeric amount or percentage of individuals, businesses, vaccination locations or providers or administrators, or other entities impacted by a directive, or placing additional restrictions or reducing existing restrictions related to testing, quarantine, social distancing, air quality or filtration, or mask requirements, for any entity located in the state, including but not limited to modification of individuals eligible for vaccination or modification of limits on the seating capacity of a business to operate during a state of emergency.

e. No directive shall be extended or modified to the extent that such directive prohibits the adoption by any municipality of this state a local executive order within such municipality's existing power except where such an order conflicts with any executive order issued by the state.

f. No directive may be extended or modified more than once unless the governor has responded, including electronically, to any comments provided by the chairs of any relevant committee or relevant municipal entities pursuant to this section which have been received within 5 days of the time required for such notice pursuant to paragraph b of this subdivision, and which may be attested to in the notice by the governor to the relevant chairs and the leaders as provided in paragraph b of this subdivision, which shall be deemed sufficient for purposes of the effectiveness of such directive.

g. The legislature may terminate by concurrent resolution executive orders issued under this section at any time.

h. Directives shall be effective from the time and in the manner prescribed in such orders and shall be published as soon as practicable in the state bulletin and as provided in this section.

§ 3. (a) Within 15 days of the effective date of this section all current suspensions and directives authorized pursuant to executive orders 202 and 205 of 2020 and this act shall be posted on the website for the office of the governor in a searchable format, and shall include, but not be limited to:

(i) the disaster emergency that such suspension and directives pertain to;

(ii) the subject category or area affected;

(iii) a summary of the provisions suspended or modified;

(iv) the order's expiration date;

(v) the entity responsible for enforcing such provisions; and

(vi) in the case of a directive extended or modified pursuant to the provisions of this act, the need for extension or modification of such directive and the threat to the public health or safety that requires the extension or modification.

(b) Such website shall be updated upon the issuance of every suspension or directive pursuant to this act.
(c) Every thirty days, such website shall also be updated with responses to written comments or information requests from relevant committee chairs or municipal government entities received pursuant to the provisions of this act.

§ 4. Section 4 of chapter 23 of the laws of 2020 amending the executive law relating to issuing by the governor of any directive necessary to respond to a state disaster emergency, is amended to read as follows:

§ 4. This act shall take effect immediately and [sections one and] section two of this act shall expire and be deemed repealed [April 30, 2021] immediately, provided however, any directive issued pursuant to this chapter in effect at the time of such repeal shall be permitted to continue for 30 days from the date of such repeal, unless further extended as provided in section 2 of the chapter of the laws of 2021 amending the executive law relating to the termination of certain executive powers; to amend chapter 23 of the laws of 2020 amending the executive law relating to issuing by the governor of any directive necessary to respond to a state disaster emergency, in relation to the effectiveness thereof; and providing for the repeal of certain provisions upon expiration thereof. Nothing contained herein shall be construed to diminish or repeal any statutory or regulatory authority to exercise emergency powers that existed prior to the enactment of this act.

§ 5. Section 28 of the executive law is amended by adding a new subdivision 5 to read as follows:

5. The legislature may terminate at any time a state disaster emergency issued under this section by concurrent resolution.

§ 6. Severability. If any provision of this act, or the application thereof to any person or circumstances, is held invalid or unconstitutional, that invalidity or unconstitutionality shall not affect other provisions or applications of this act that can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this act are severable.

§ 7. This act shall take effect immediately, provided that, section two of this act shall expire and be deemed repealed upon the termination of the state of emergency declared pursuant to executive order 202 of 2020.
As state managers, Governors are responsible for implementing state laws and overseeing the operation of the state executive branch. As state leaders, Governors advance and pursue new and revised policies and programs using a variety of tools, among them executive orders, executive budgets, and legislative proposals and vetoes. As chiefs of the state, Governors serve as the intergovernmental liaison to the federal government on behalf of the state.

Governors carry out their management and leadership responsibilities and objectives with the support and assistance of department and agency heads, many of whom they are empowered to appoint. A majority of Governors have the authority to appoint state court judges as well, in most cases from a list of names submitted by a nominations committee.
Although Governors have many roles and responsibilities in common, the scope of gubernatorial power varies from state to state in accordance with state constitutions, legislation, and tradition, and Governors often are ranked by political historians and other observers of state politics according to the number and extent of their powers. Ranking factors may include the following.

- Qualifications and tenure
- Legislative—including budget and veto—authority
- Appointment sovereignty
- Clemency authority

Although not necessarily a ranking factor, the power to issue executive orders and take emergency actions is a significant gubernatorial responsibility that varies from state to state.

Qualifications And Tenure

Qualifications

States, commonwealths, and territories vary with respect to minimum age, U.S. citizenship, and state residency requirements for gubernatorial candidates and office holders. The minimum age requirement for Governors ranges from no formal provision to age 35. The requirement of U.S. citizenship for gubernatorial candidates ranges from no formal provision to 20 years. State residency requirements range from no formal provision to 7 years.
Term Limits

Gubernatorial terms are four years in every state, commonwealth, and territory, except for New Hampshire and Vermont which have two-year terms. All Governors, with the exception of Virginia’s, may succeed themselves, although they may be limited to a specific number of consecutive or total terms.

For state by state information on gubernatorial qualifications, see “The Governors: Qualifications for Office” (Table 4.2, The Book of the States 2021, source: The Council of State Governments).

For state by state information on gubernatorial term limits, see NGA’s Governors Roster, and “Constitutional and Statutory Provisions for Number of Consecutive Terms of Elected State Officials” (Table 4.9, The Book of the States 2021, source: The Council of State Governments).

Vacancies/Succession

In the event of a vacancy in office, the lieutenant Governor is the designated official who succeeds the Governor in 49 states and territories (in two of which—Tennessee and West Virginia—the president/speaker of the Senate and lieutenant Governor are one and the same). In the remaining 5 states and the Commonwealth of Puerto Rico, officials designated to succeed the Governor include the secretary of state and leader of the senate.

For state by state information on succession, see “The Governors” (Table 4.1, The Book of the States 2021, source: The Council of State Governments). For more information on lieutenant Governors and other executive branch officials, see the Appointment Power section below.

Impeachment

All states except Oregon provide for the impeachment of Governors. As in the case of the federal government, the impeachment process starts with the lower body of the legislature and the trial is conducted by the upper body in every state but Alaska—where the process is reversed, and Nebraska, which has a unicameral legislature charged with the full impeachment process. In most cases, impeachment requires a majority of members, while conviction generally requires a two-thirds or other special majority.

Should a Governor be impeached, the lieutenant Governor serves as acting Governor in the vast majority of states. For state by state information on impeachment, see “Impeachment
Provisions in the States” (Table 4.8, The Book of the States 2021, source: The Council of State Governments). For more information on lieutenant Governors, see the Appointment Power section below.

Governors play three broad roles in relation to state legislatures. First, they may propose legislation and convey policy priorities, often through a State of the State address. Second, they may be empowered to call special legislative sessions, provided in most cases that the purpose and agenda for the sessions are set in advance. Third, and more familiarly, Governors coordinate and work with state legislatures in:

- approval of state budgets and appropriations;
- enactment or vetoing of state legislation;
- confirmation of executive and judicial appointments; and
- legislative oversight of executive branch functions.

Legislative Role

Approval Of State Budgets And Appropriations

Governors develop and submit annual or biennial budgets for review and approval by the legislature. In a number of states, commonwealths, and territories, Governors also have “reduction”—most often referred to as “line-item”—veto power that can be used for the removal of appropriations to which they object. These tools allow Governors and their budget staff to play a strong role in establishing priorities for the use of state resources. For state by state information on gubernatorial budget making and line-item veto power, see “The Governors: Powers” (Table 4.4, The Book of the States 2021, source: The Council of State Governments).

Enactment Of Legislation

Governors often use State of the State messages to outline their legislative platforms, and many Governors prepare specific legislative proposals to be introduced on their behalf. In addition, state departments and agencies may pursue legislative initiatives with gubernatorial approval. Executive branch officials often are called to testify on legislative proposals, and Governors and other executive branch leaders will seek to mobilize public opinion and interest groups in favor of or opposition to specific legislative proposals.
Every legislative bill that is passed by the state legislative body is presented to the Governor for signing. State laws prescribe how much time the Governor is allotted to sign or veto proposed legislation following transmittal. Legislation may go into effect without the Governor’s signature after a statutorily mandated time has elapsed. Different rules may apply depending on whether the state is in a regular legislative session, post legislative-adjournment, or if the state is in special session.

Governors may use their role as party leaders to encourage support for legislative initiatives, and along with department heads and staff, may seek to influence the progress of legislation through regular meetings with legislators, legislative officials, and other stakeholders.

Veto Power

All 50 state Governors have the power to veto whole legislative measures. In a large majority of states, a bill will become law unless it is vetoed by the Governor within a specified number of days, which vary among states. In a smaller number of states, bills will die (pocket veto) unless the Governor formally signs them, also within a specified number of days. Other types of vetoes available to the Governors of some states include “line-item” (by which a Governor can strike a general item from a piece of legislation), “reduction” (by which a Governor can delete a budget item), and “amendatory” (by which a Governor can revise legislation). Legislatures may override vetoes, usually by a supermajority vote.

For state by state information about veto powers, see “The Governors: Powers” (Table 4.4, The Book of the States 2021, source: The Council of State Governments) and “Enacting Legislation: Veto, Veto Override and Effective Date” (Table 3.16, The Book of the States 2021, source: The Council of State Governments).

Confirmation Of Appointments

Many gubernatorial appointments require legislative confirmation. For additional information, see the Appointment Power section below as well as “Selected State Administrative Officials: Methods of Selection” (Table 4.10, The Book of the States 2021, source: The Council of State Governments).

Legislative Oversight

https://www.nga.org/governors/powers-and-authority/#:~:text=As%20chiefs%20of%20the%20state,they%20are%20empowered%20to%20appoint.
Governors interact with their legislatures to help ensure that their priorities, goals, and accomplishments are accurately presented and positively received during oversight hearings and other legislative activities that address and evaluate executive branch implementation of legislatively mandated programs and services.

**Appointment Power**

**Gubernatorial Appointments – Overview**

Most Governors have broad authority to nominate officials to serve in state executive branch positions—many of whom will be included in the Governor’s advisory committee, known as the “cabinet.” Governors may be empowered as well to make appointments to state judgeships. Frequently, these appointments are subject to confirmation by one or both houses of the state legislature. While often pro forma in nature, the confirmation process with respect to executive branch appointments can be used by legislatures to expand their influence on Governors and their policies. Accordingly, many Governors consult with key legislators before making formal nominations.

For state by state information on the methods of selecting state officials, see “Selected State Administrative Officials: Methods of Selection” (Table 4.10, The Book of the States 2021, source: The Council of State Governments).

**Boards And Commissions**

The roles played by boards and commissions vary considerably by state and by program. In some states appointed boards have the primary responsibility for individual programs and agencies and are responsible for the selection of department and agency heads. This is particularly true in the field of education, but boards still retain responsibility for a broad range of other programs in fields such as labor, transportation and health and human services.

In many states the members of these boards are named or nominated by the Governor. And in many of these cases, board members are subject to confirmation by one or both houses of the legislature.

Other boards play more limited regulatory or advisory roles. In most states boards oversee the licensing and regulation of numerous professions and business areas. In other states they advise the Governor on areas of importance such as the environment and economic development.
While the elimination and/or consolidation of boards and commissions is a common focus of
government efficiency and government reorganization initiatives, they still play a prominent
role in state government, providing opportunities to address the concerns of special interests
and to reward political supporters.

Executive Branch Positions Independently Selected

A large number of states provide for the independent selection of certain executive branch
positions. Most noteworthy among these positions are lieutenant Governor, secretary of
state, attorney general, and treasurer.

The position of lieutenant Governor exists in the overwhelming majority of states, where the
position is most often filled by popular statewide election and jointly with the Governor,
although in a small number of cases the role of lieutenant Governor is assigned by state law
to another position in either the executive or legislative branch (e.g., secretary of state or
leader of the senate). The positions of secretary of state, attorney general, and treasurer are
all subject to statewide popular election in the majority of states, and at least one of the three
is elected in most of the remaining states. Governors in five states—Alaska, Hawaii, New
Hampshire, New Jersey, and Wyoming—appoint the state attorney general.

Governors generally have limited authority in the appointment of state comptrollers and pre
and post audit department heads. Governors’ appointment powers are also limited with
regard to the heads of state education and higher education agencies. The education
department head is independently elected statewide in 14 states and is appointed—
independent of gubernatorial approval—by a board or agency head in 20 states and two
territories. In most states and territories, the higher education head is appointed by a board
independent of gubernatorial approval.

A number of states also provide for the statewide election of one or more other department
heads, among them public utility regulators and the heads of agriculture, labor, and natural
resources departments.

As with Governors, other statewide elected positions may be subject to age, citizenship, and
state residency requirements, as well as term limits.

For state by state data on the joint election of Governors and lieutenant Governors, see “The
Governors” (Table 4.1, The Book of the States 2021, source: The Council of State
Governments).

For state by state information on the methods of selecting state officials, see “Selected State
Administrative Officials: Methods of Selection” (Table 4.10, The Book of the States 2021,
source: The Council of State Governments).

For state by state information on eligibility requirements for state officials, see “Constitutional and Statutory Provisions for Number of Consecutive Terms of Elected State Officials” (Table 4.9, The Book of the States 2021, source: The Council of State Governments).

Cabinets

Governors are charged by their state constitutions with responsibility to see that the laws are faithfully executed by the many people and organizations that comprise the executive branch. Day-to-day administrative responsibilities are delegated to state agencies supervised by the Governor. State cabinets, which serve as advisory councils to the nation's Governors, generally are made up of officials appointed by the Governor to head state departments and agencies, and in some cases top-level staff in the Governor's immediate office. In most states the cabinet fulfills two functions:

- advises the Governor on the development of policy; and
- serves as a vehicle for the Governor or senior staff to convey priorities to gubernatorial appointees and address cross-agency issues or concerns.

In a number of states, Governors have created sub-cabinets to bring together agencies to address issues such as the needs of children.

Forty-four states and all of the commonwealths and territories have cabinets and/or sub-cabinets. Cabinets themselves may have their origin in law, tradition, and/or the Governor's discretion. Cabinet membership may be a product of appointment to a specific office or be subject to selection by the Governor. Cabinet size, and the frequency of cabinet meetings and formality and extent to which a Governor uses his or her cabinet for advice and assistance, varies among the states, commonwealths, and territories.

For state by state information on cabinets, see “State Cabinet Systems” (Table 4.6, The Book of the States 2021, source: The Council of State Governments).

Clemency Power

Clemency is an umbrella term that refers to several mechanisms that allow for the remittance of consequences of a committed crime. Virtually every state constitution authorizes the Governor or a board of pardons to grant clemency, although terminology, procedure, and
structure may vary greatly from state to state. Generally, clemency authorities refer to the following executive powers:

- A pardon is an official nullification of legal consequences for a crime. The granting of a pardon by the Governor or formal pardons board may restore civil rights for services to the state, such as the right to vote, the right to bear arms, or the ability to serve in the military.

- Commutation shortens an individual's sentence. If a commutation shortens an individual's sentence to time served, it results in that individual's release. Upon release, an individual whose sentence is commuted may remain on community supervision or may be released without ongoing supervision.

- A reprieve suspends an individual's sentence or temporarily delays the imposition or resumption of a sentence, including for an individual with a death sentence.

## Executive Orders & Regulatory Authority

Understanding how state constitutions and statutes specify characteristics of the executive branch—as well as the legislative branch and judicial branch—is important and may help mitigate separation of powers disputes. Although scope varies in each state, governors generally possess broad executive authority to act within their states. These authorities are excised through executive orders or proclamations and the state regulatory process.

### Executive Orders

The authority for Governors to issue executive orders is found in state constitutions and states as well as case law or is implied by the powers assigned to state chief executives. Governors use executive orders—certain of which are subject to legislative review in some states—for a variety of purposes, among them to:

- trigger emergency powers and related response actions during natural disasters, weather events, energy crises, public health emergencies, mass casualty events, and other situations requiring immediate attention;

- create advisory, coordinating, study, or investigative committees or commissions;

- create or reorganize state agencies, boards, and commissions;

- address executive branch management and administrative issues such as regulatory reform, environmental impact, hiring freezes, discrimination, and intergovernmental coordination; and
• other actions within the Governor's executive authority, including announcing/establishing gubernatorial priorities and initiatives.

Depending on state authorities, Governors may also issue an executive order or proclamation to declare special elections to fill vacancies in certain elected offices. For state by state information on the power of Governors to issue executive orders, see “Gubernatorial Executive Orders: Authorization, Provisions, Procedures” (Table 4.5, The Book of the States 2021, source: The Council of State Governments).

Regulatory Authority

The executive branch executes laws passed by the state legislatures, with state agencies, departments, or boards often instructed to promulgate rules and regulations to implement those laws. Legislative review processes for rule promulgations vary widely among the states. In many states, Governor's offices have set up processes to coordinate and oversee these rule promulgations to ensure that the rules adopted by the departments and agencies reflect the Governor's priorities and philosophy.

Emergency Powers & Disaster Response

As chief executive, Governors are responsible for ensuring their state is adequately prepared for emergencies and disasters of all types and sizes. Most emergencies and disasters are handled at the local level, and few require a presidential disaster declaration or attract worldwide media attention. Yet Governors must be as prepared for day-to-day events—tornadoes, floods, power outages, industrial fires, and hazardous materials spills—as for catastrophes on the scale of the COVID-19 pandemic, Hurricane Katrina, or the September 11 terrorist attacks. States focus on four stages of disaster or emergency management:

• Prepare
• Prevent
• Respond
• Recover

These components afford a useful rubric for thinking about the cycle of disasters and emergencies and for organizing recommendations for state action. During an emergency, the Governor also plays a key role in communicating with the public during an emergency, providing advice and instructions and maintaining calm and public order.
Emergency Powers

Gubernatorial emergency powers, generally activated through the implementation of a state declaration of emergency or disaster, provide Governors avenues to enhance capabilities, coordination, and collaboration across state and local agencies. They also give states flexibility to respond to exigent circumstances, including the reallocation of state and federal funds. Further, emergency declarations allow Governors to temporarily modify their state’s statutory, regulatory, and legal framework to respond to the changing nature of an emergency more quickly.

Although statutory schemes vary, all states give the Governor the authority to declare one or more types of emergencies, including a disaster emergency or a public health emergency. State laws specify how these legal declarations are made, durational limitations, legislative involvement, and other potential constraints. In some cases, the necessary response to a disaster is beyond the capacity of state and local governments. A state may petition the President to declare a major disaster. The declaration of a major disaster triggers a variety of federal programs depending on the scope of the disaster and the type of losses experienced.

National Guard

When National Guard units are not under federal control, Governors are the commanders and chief of state militias with the responsibility to protect the safety of the states’ citizens. The National Guard may be deployed for active duty by a Governor to help respond to domestic emergencies, such as riots or mass casualty incidents, and disasters, such as hurricanes, floods, and earthquakes. Governors exercise control through the state adjutants general.
Governing by Executive Order During the Covid-19 Pandemic: Preliminary Observations Concerning the Proper Balance Between Executive Orders and More Formal Rule Making

Kelly J. Deere*

ABSTRACT

As the United States entered 2021, almost all fifty states were still operating under a state of emergency due to COVID-19 more than nine months later. Governors using emergency powers provided to them under their respective emergency disaster statutes and state constitutions continued to govern their state by executive order. These executive orders have had significant impacts on citizens’ everyday lives including stay-at-home orders, limits on non-essential gatherings, non-essential business closures and moratoriums on evictions. And these emergency orders have been opposed at almost every turn from citizens gathering in public protest shouting “Liberate Michigan,” to constitutional legal challenges to these orders. Even with three promising vaccines receiving emergency authorization at the time of this article’s submission, it will be months or longer before life returns to normal. Therefore, it becomes incumbent to ask the question whether governors should continue to wield this emergency power

*Clinical Assistant Professor of Law, Rutgers University School of Law. I would like to thank George Morton for his thorough research on many aspects of this piece. I am grateful to Beth Stephens and Robert Williams for their honest assessment, mentorship and comments throughout the writing of this article. A special thanks to Amy Widman for her support and advice. Andrew Hoy provided invaluable help in getting this article ready for submission. And thank you to the Missouri Law Review editors for their keen observations, thoughtful comments and valuable edits. This work was made possible from the generous support of the Rutgers Law School Endowment for Faculty Research.
or whether state legislatures and/or state agencies should take on more responsibility. In answer to this question, this article concludes that governors should use executive orders in some measure as long as COVID-19 is being transmitted in their communities but not for all areas. Since COVID-19 is a highly contagious disease and is difficult to contain, governors need to be able to quickly and nimbly issue orders to curb transmission as long as there is a reasonable check on their power to do so. However, state legislatures and/or state agencies should enact emergency statutes or regulations following the more formal rule making process in areas that do not require immediate action such as requiring facial coverings in public spaces. This article draws its conclusion by examining three key areas. First, most governors have a meaningful check on their emergency powers from both the judiciary and the state legislature. Second, governors and litigants can learn from prior cases to ensure executive orders do not single out a group or unnecessarily burden another. Third, since some states have had success in enacting emergency regulations, statutes or guidelines concerning COVID-19, more states should follow suit.
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APPENDIX A ........................................................................ 792
I. INTRODUCTION

Between March 2020 and June 2020, Michigan Governor Gretchen Whitmer issued more than 130 executive orders concerning the COVID-19 pandemic.\(^1\) Colorado Governor Jared Polis issued about 115 executive orders and New Jersey Governor Phil Murphy issued over fifty in the same span.\(^2\) Even those state governors that used executive orders more sparingly still issued a fair number with the Idaho Governor signing twenty executive orders and Missouri Governor signing fifteen.\(^3\) These executive orders significantly affected citizens’ everyday lives including requiring its citizens to stay-at-home, limiting gathering sizes and mandating the wearing of facial coverings in public spaces.\(^4\) Many of these executive orders required non-essential businesses to shut their physical locations.\(^5\) With most Americans at home and many out of work, governors or state public health officials issued executive orders with wide-ranging economic consequences such as placing a moratorium on evictions and banning a shut-off of utilities.\(^6\) Some citizens, businesses and even some state legislatures did not simply accept these orders, but rather gathered in protest or legally challenged the orders as violating their constitutional rights.\(^7\) But unlike most other emergencies in recent memory such as hurricanes, wildfires or even 9/11, COVID-19’s reach goes beyond a city, county, state or even region. COVID-19 is not simply an American problem but has found its way to all corners of the globe.\(^8\) In late fall of 2020, the pandemic virtually exploded with cases rising practically everywhere across the United States.\(^9\) And with COVID-19 stretching into 2021 and beyond, governors continue to issue executive orders concerning the pandemic as the disease has evolved and more highly transmissible variants threaten to undermine vaccination efforts.\(^10\) Indeed, as of May 1,

Emergency executive orders do not go through the same rulemaking process as a statute passed by the legislature or even a state regulation that is required to go through the state’s administrative procedure act.\footnote{See Michael S. Herman, Gubernatorial Executive Orders, 30 RUTGERS L.J. 987, 989–90 (1999).} Over more than a year into the pandemic, most governors had largely used executive orders to curb transmission as well as take aggressive economic action over the past year.\footnote{See COVID-19 Reopening and Reclosing Plans, supra note 11. As of May 1, 2021, only Alaska, Wisconsin and Michigan did not have a current COVID-19 state of emergency. Id.} But should they? And if so to what extent?

Part I of this article examines the nature of state executive orders and how they are used in emergency situations. As shown through Appendix A, the article examines the various state emergency disaster statutes and the types of legislative limits on governors’ powers. Part II provides background of the COVID-19 pandemic and how executive orders have played a defining role during this time. In Part III, the article reviews the litigation landscape surrounding emergency executive orders during the pandemic. Specifically, the article looks at recent civil rights challenges to certain types of executive orders. The article also reviews challenges by government officials such as the state legislature or governor concerning the statutory process for declaring an emergency or the constitutional validity of the statute itself. In Part IV, the article surveys four states’ approach to the pandemic through 2020. And finally, Part V evaluates whether governors should use emergency executive orders where the pandemic is likely to go on for longer than a year. This article argues that governors should be able to quickly respond in some measure as long as COVID-19 is being transmitted in the communities but not for all areas. For those areas where there is a long-term ongoing response to COVID-19, the state legislature should pass an emergency or temporary statute, or a state agency should promulgate regulations to address a particular concern. Likewise, the state legislature may need to step in when the governor is not doing enough.
II. EXECUTIVE ORDERS AND STATE EMERGENCY DISASTER
STATUTES

In most every state constitution, the governor is vested with the chief
directive power of the state and is commander in chief. While in the
to increase in power and responsibilities, governors garner
greater powers and their responsibilities have significantly increased.
For example, governors have “longer terms in office, increased veto power, and stronger budgetary authority.”
During non-emergency times, governors are responsible for executing the state laws
and managing the state administrative branch. One of the governor’s most
important duties is to submit an annual budget for review and approval by
the state legislature. Governors also have the power to appoint executive
officers in the state agencies and in their cabinet. And, as an important
check on the legislative branch, all fifty state governors have the power to
veto “whole legislative measures.” In a state of emergency, most
governors have much broader powers. They exercise these powers
through emergency executive orders in order to prepare and respond to
disasters of all sizes and shapes.

15 See Ann O’M. Bowman & James H. McKenzie, Managing a Pandemic at
Less Than Global Scale: Governors Take the Lead, 50 AM. REV. OF PUB. ADMIN. 551, 551 (2020); Miriam Seifter, Gubernatorial Administration, 131 HARV. L. REV. 484, 493 (2017) (arguing that the modern governor “originally created to be powerless
figureheads have emerged as the drivers of state government”). For example, the New Jersey Constitution in 1776 gave little power to the governor and did not even provide
for a separate executive branch. The New Jersey Governor was elected by the upper
branch of the state legislature. Herman, supra note 12, at 988.
16 See ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 303 (2009); Seifter, supra note 15, at 499–515 (outlining a governor’s set of six tools to
control agency action which include directives, centralized regulatory review, reorganization, line-item veto power, privatization and removal of state agency
heads).
17 Governor’s Power and Authority, supra note 14.
18 Id.
19 Id.
20 Id.
21 See generally infra Part I.C.
22 Governor’s Power and Authority, supra note 14.
A gubernatorial executive order is a rule or order issued by the governor. An executive order is usually comprised of three sections. The first section, also known as the “whereas” section, contains the purpose of the order. In this section, the governor articulates the reasons for the order and what she hopes to accomplish by it. The second section contains the authority for issuing the order either from the state constitution or by state statute. And finally, the third section comprises the substance of the actual order. An executive order may be issued immediately and does not need to go through the same formal rule making process as a bill passed by the legislature or a regulation promulgated by a state agency.

Some state constitutions give their governors significant power during an emergency while others are essentially silent. All fifty state constitutions give their governor power to call for a special session of the legislature. Still, most governors rely on emergency powers granted to them by their state legislature through some type of emergency disaster statute. This statutory framework grants to the governor (or in some cases a state health official) the authority to declare a state of emergency

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23 See Friends of Danny Devito v. Wolf, 227 A.3d 872, 892 (Pa. 2020). These executive orders can be broken down into three areas: 1) ceremonial proclamations; 2) directives to subordinate executive officials for execution of their particular duties; and 3) interpretation or implementation of statutory or other law. See Herman, supra note 12, at 994.

24 Herman, supra note 12, at 992.

25 Id.

26 Id.

27 Id. at 992–93.

28 Id. at 994.

29 Id.

30 For example, both the Louisiana and Oregon state constitutions give their governors broad powers. See LA. CONST. art. IV., § 5 (giving the Governor the power “to preserve law and order, to suppress insurrection . . . .”); OR. CONST. art. X-A, § 2 (providing for the governor to “manage the immediate response of the disaster.”). In contrast, in Idaho and South Carolina those powers come only from state statute. See HEATHER PERKINS, THE BOOK OF STATES (Council of State Gov’ts 2019), http://knowledgecenter.csg.org/kc/content/book-states-2019-chapter-4-state-executive-branch [https://perma.cc/F3YF-QC35]; see also Daniel B. Rodriguez, Public Health Emergencies and State Constitutional Quality, 72 RUTGERS L. REV. 1223, 1224 (2020) (offering a “thought experiment . . . at how we might redesign state constitutions to enable government to respond most effectively to [public health] emergencies.”).


32 See Appendix A. I use the term state emergency disaster statute to generally refer to the statutory scheme by which the governor can declare a state of emergency and trigger accompanying powers.
and to issue executive orders to prepare, prevent, respond and recover in connection with the emergency.\textsuperscript{33} Most of these emergency disaster statutes were enacted post World War II with many of them passed in the 1970’s.\textsuperscript{34} One reason for granting governors such broad powers under these statutes is clear: some state legislatures meet “infrequently and often for only a few months each year.”\textsuperscript{35} For example, in March 2020, the New York State Legislature amended the Executive Law to give its Governor additional powers to “issue directives when a state disaster emergency is declared.” It did so because these “changes ensure that the Governor has legal authority to confront these emergencies.”\textsuperscript{36} When a governor declares a state of emergency, he will likely need to state the nature of the emergency, define the specific regions or geographic areas subject to the declaration, the conditions which brought about the emergency, the duration of the emergency, and the authorities responding to it.\textsuperscript{37}

Under many of these emergency disaster statutes, governors have the authority to issue executive orders in response to a natural disaster - including a pandemic.\textsuperscript{38} These orders are enacted swiftly with little warning or notice, much like the emergency these orders seek to address.\textsuperscript{39} Once the emergency is declared, the governor may issue orders immediately.\textsuperscript{40} For most states, their governor’s powers under a state of emergency are broad, giving her the authority to suspend or amend any regulatory statute.\textsuperscript{41} Most of these emergency disaster statutes provide the governor with the power to garner resources to address the emergency.

\begin{footnotes}
\item[33] Id.
\item[34] See generally, PATRICK S. ROBERTS, DISASTERS AND THE AMERICAN STATE 127–45 (2013).
\item[37] See, e.g., CONN. GEN. STAT. § 19a-131a(b)(1) (2020); MICH. COMP. LAWS § 30.403(3) (2020); 35 PA. CON. STAT. § 7301(c) (2020).
\item[38] See Friends of Danny Devito v. Wolf, 227 A.3d 872, 888 (Pa. 2020) (finding that while the PA Emergency Code does not include the word pandemic in its list of catastrophes, it is included as a natural disaster).
\item[39] Bowman & McKenzie, supra note 15, at 553.
\item[40] See Friends of Danny Devito, 227 A.3d at 890.
\item[41] For example, during Hurricane Katrina Governor Blanco in one executive order suspended the laws, rules and regulations concerning medical professionals in order to allow out of state medical personnel to provide immediate care to Louisiana citizens. La. Exec. Order No. KBB 05-33 (Sept. 12, 2005), https://www.doa.la.gov/media/ci5lwdfy/0509.pdf [https://perma.cc/7MJ2-MT9Z].
\end{footnotes}
assemble the national guard, order evacuations and seize property. Some governors have the power to issue orders for the protection of the health, safety and welfare of its people. However, governors do not appear to have the authority to exempt constitutional state requirements during an emergency.

Under an emergency declaration, executive orders give the governor the ability to adapt to an ever-changing situation. As more information becomes known about an emergency, the governor can modify, amend or even rescind an executive order as quickly as she issued one in the first place. For example, on August 3, 2020, New Jersey Governor Phil Murphy issued Executive Order 173, which decreased indoor gatherings from 100 persons to twenty-five persons because many recent infections were the result of larger house party gatherings. In doing so, Governor Murphy rescinded paragraph one of Executive Order 156 issued six weeks earlier which allowed for larger gatherings.

Most state emergency statutes define emergency quite broadly. Most typically, governors have declared a state of emergency in the wake of a natural disaster. For example, Colorado’s emergency statute includes “hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snowstorm, drought, fire, explosion or other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life;” Oregon’s emergency statute includes “fire, explosion, flood, severe weather, landslides or mudslides, drought, earthquake, volcanic activity, tsunamis or other oceanic phenomena, spills or releases of oil or hazardous material as defined in ORE 466.605, contamination, utility or transportation emergencies, disease, blight, infestation, civil disturbance, riot, sabotage, acts of terrorism and war.”

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42 See Maggie Davis et. al., 12 CONLAWNOW 95 (2020); see, e.g., COLO. REV. STAT. § 24-33.5-704 (2020); OR. REV. STAT. §§ 401.68, 401.75 (2020).
43 See, e.g., MISS. CODE ANN. § 33-15-11(c)(4) (2020) (“To perform and exercise such other functions, powers and duties as may be necessary to promote and secure the safety and protection of the civilian population in coping with a disaster or emergency.”); MO. REV. STAT. § 44.100 1(3)(j) (2020) (“Perform and exercise such other functions, powers and duties as may be necessary to promote and secure the safety and protection of the civilian population.”); OKLA. STAT. tit. 63, § 683.9.5 (2020) (“To perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population. . . .”).
44 See Ritchie v. Polis, 467 P.3d 339, 345 (Colo. 2020) (holding that Governor does not have authority under Colorado Disaster Emergency Act to suspend signature requirement on ballot initiative petitions since it is a constitutional requirement).
45 Governor’s Power and Authority, supra note 14.
46 Id.
48 Id.
49 See, e.g., 35 PA. CONS. STAT. § 7102 (2020) (defining natural disaster in the Emergency Code as “[a]ny hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snowstorm, drought, fire, explosion or other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life”); OR. REV. STAT. § 401.025 (2020) (defining emergency as “[f]ire, explosion, flood, severe weather, landslides or mudslides, drought, earthquake, volcanic activity, tsunamis or other oceanic phenomena, spills or releases of oil or hazardous material as defined in ORS 466.605, contamination, utility or transportation emergencies, disease, blight, infestation, civil disturbance, riot, sabotage, acts of terrorism and war”).
of a natural disaster such as a hurricane or a tornado. Recently, state governors in the western part of the United States declared a state of emergency due to uncontrolled wildfires in the area. On the national security front, New York and New Jersey’s governors declared a state of emergency in 2001 in response to the terrorist attacks on September 11. State governors do not respond to emergencies in a vacuum. The federal government takes on a role, but its role is usually secondary to state and local governments. Under the Stafford Act, the U.S. president can declare a federal emergency, but any federal resources are considered to supplement state and local resources. Therefore, the governor’s role during an emergency is of prime importance.

During an emergency, state legislatures typically do not play a significant role in recovery efforts. This article argues that state legislatures should assume a more comprehensive role during a state of emergency. Most state legislatures serve two purposes in an emergency: (1) serving as a check on gubernatorial powers; and (2) providing funds aimed at directly addressing a state of emergency. Yet, state legislatures are not precluded from enacting legislation addressing an emergency and some certainly do even during this pandemic. It would just need the time to do so. Each state legislature has a formal rule making process which often requires multiple steps from a bill’s initial introduction to its final


53 Rossi, supra note 35, at 924.

54 Id.


56 This article argues, in part, that state legislatures should do more in areas less emergent. See infra Part V.C.


58 See generally infra Part IV.A., C.
At a minimum, this process can take days, but it often takes weeks, months or even a year. Moreover, about forty states have part-time legislatures with some state legislatures meeting for only a few months out of the year.

A. Public Health Emergencies

While all fifty states have some type of emergency disaster statute, some state legislatures have included a separate public health emergency component to its disaster statute or passed separate public health emergency legislation. This came about after the terrorist attacks in 2001 and the subsequent anthrax attack, where there were federal and state level efforts to strengthen the public health infrastructure. In 2003, the Centers for Disease Control and Prevention (“CDC”) commissioned public health law experts at John Hopkins and Georgetown Universities to draft what is called the Model State Emergency Health Powers Act (“MSEHPA”). The MSEHPA is a comprehensive model act designed for state legislature contemplation to provide state actors with powers “to detect and contain a potentially catastrophic disease outbreak…” The MSEHPA provides detailed sections on the mechanisms for declaring a public health state of emergency as well as those special powers that accompany such a declaration.

While criticized for failing to provide enough individual protections, a large number of states adopted some parts of the MSEHPA into
restructuring their own public health emergency response.\textsuperscript{67} In all, twenty-four states have incorporated a specific declaration of a state public health emergency with some accompanying public health emergency powers in their laws.\textsuperscript{68} For states declaring a public health emergency, this triggers a certain specific set of emergency powers.\textsuperscript{69}

Public health legal scholar Lindsay Wiley argues that the MSEPHA was not designed with the current COVID-19 pandemic in mind.\textsuperscript{70} Wiley explains “the MSEPHA and the initial legislation it inspired focused predominantly on individually targeted measures to achieve containment – stopping the spread of infection from initial cases (typically transmitted from international travelers) to other people before community transmission becomes widespread primarily through screening, isolation and quarantine of individuals.”\textsuperscript{71} The drafters of the MSEPHA did not likely contemplate a contagion such as COVID-19, which spreads in pre-symptomatic individuals and to some extent asymptomatic individuals often without detection\textsuperscript{72} And as a result, the MSEPHA and the state statutes modeled in part after it failed to incorporate community mitigation efforts such as the wearing of facial coverings and other social distancing measures.\textsuperscript{73}

For those states having a public health emergency statute, the governor is not necessarily precluded from using the more general

\textsuperscript{67} In 2003, thirty-nine states and the District of Columbia enacted or were expected to enact some version of the MSEPHA. Gostin, supra note 63, at 5. Criticisms of the MSEPHA abounded in the civil rights context. In particular, the ACLU criticized the MSEPHA as being “replete with civil liberties problems” including insufficient checks and balances on state executives among other concerns. Model State Emergency Health Powers Act: Q&A on the Model State Emergency Powers Act, AMER. CIV. LIBERTIES UNION, https://www.aclu.org/print/node/24150 [https://perma.cc/BY6P-4F84] (last visited Dec. 1, 2020).

\textsuperscript{68} Rutkow, supra note 62. In 2003, thirty-nine states and the District of Columbia enacted or were expected to enact some version of the MSEPHA. Gostin, supra note 63, at 5.

\textsuperscript{69} See, e.g., N.J. STAT. ANN. § 26:13-3 (West 2020) (providing powers to the health commissioner to respond to public health emergency); N.M. STAT. ANN. § 12-10A-6 (2020) (authorizing secretary of health and secretary of public safety special powers during public health emergency such as utilizing health care facilities for public use and rationing health care supplies).

\textsuperscript{70} See Lindsay F. Wiley, Democratizing the Law of Social Distancing, 19 YALE J. OF HEALTH POL’Y & ETHICS 50, 64 (2020).

\textsuperscript{71} Id. at 64.

\textsuperscript{72} Mark K. Slivka, Is Presymptomatic Spread a Major Contributor to COVID-19 Transmission?, 26 NATURE MED. 1531, 1531–33 (Aug. 17, 2020) (reviewing several COVID-19 case studies found multiple instances of transmission prior to symptom onset though it is difficult to quantify), https://www.nature.com/articles/s41591-020-1046-6#citeas [https://perma.cc/XP2B-KKZ3].

\textsuperscript{73} Wiley, supra note 70, at 66.
emergency disaster statute for her state.\textsuperscript{74} In fact, at least five governors declared a public health emergency along with a broader state of emergency or disaster for COVID-19, and at least one governor issued a general state of emergency instead of a more specific public health emergency.\textsuperscript{75}

\textbf{B. Key Components of State Emergency Disaster Statutes}

During the height of the pandemic in 2020, many state emergency disaster statutes provided that the state of emergency declaration last for a short duration such as fifteen, thirty, forty-five, or sixty days and one for six months.\textsuperscript{76} Indeed, the vast majority of state emergency disaster statutes employ some type of durational limitation.\textsuperscript{77} If the emergency persists, the governors in a few states may renew the declaration.\textsuperscript{78} However, in seven states only the legislature may renew by concurrent resolution.\textsuperscript{79}

\textsuperscript{74} See Wiley, supra note 70, at 90.


\textsuperscript{76} See Appendix A.

\textsuperscript{77} See id.

\textsuperscript{78} Id. The emergency disaster statutes for Alabama, Florida, Mississippi, and New York specifically provide for the governor to renew or extend the emergency. Most other state emergency disaster statutes are silent on the point. \textit{Id.}

\textsuperscript{79} Id. Those seven states or U.S. territories are Alaska, Kansas, Michigan, South Carolina, U.S. Virgin Islands, Washington, and Wisconsin. Alabama provides that either the governor or legislature may extend. \textit{Id.} Oklahoma provides that the legislature must approve the initial public health emergency. \textit{Id.} As discussed more fully in \textit{infra} Part III.B and Part IV, Kansas, Michigan and Wisconsin have all had
a number of states, the emergency declaration stays in place until rescinded or amended.\textsuperscript{80} A majority of state emergency statutes provide the state legislature with authority to terminate an emergency declaration, usually by concurrent resolution.\textsuperscript{81} The New York COVID-19 emergency disaster statute appears to be by itself in providing the legislature with additional authority to terminate emergency executive orders by concurrent resolution.\textsuperscript{82} For state emergency disaster statutes that do not provide the state legislature with any specific authority to extend or terminate emergency declarations, the legislature always has the option to amend or repeal the statute.\textsuperscript{83}

State declarations of emergency often do not go beyond the initial declaration lasting typically just days, weeks or sometimes months.\textsuperscript{84} However, while uncommon, some emergencies last significantly longer. For example, a number of states had declared a state of emergency in response to the Opioid crisis with some of these emergency declarations lasting several years.\textsuperscript{85} And the New Jersey Supreme Court finally held that after “almost twelve years, prison overcrowding was no longer an ‘emergency’ under the Disaster Control Act.”\textsuperscript{86}

hotly contested litigation between the governor and legislature stemming from the legislature’s sole authority to renew the state of emergency.

\textsuperscript{80} Id. The states that do not have a specified durational limitation are Arizona, California, Connecticut, Kentucky, Massachusetts, Missouri, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Puerto Rico, Vermont, Virginia, and West Virginia. Id.

\textsuperscript{81} Id.


\textsuperscript{83} Id.

\textsuperscript{84} See, e.g., Tenn. Exec. Order No. 7 (Mar. 7, 2019), https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee7.pdf [https://perma.cc/L479-8LVN]. For example, on March 7, 2019, Tennessee Governor Bill Lee issued Executive Order No. 7 declaring a state of emergency in response to severe storms, flooding and wind. Id. That executive order lasted for 30 days. Id.

\textsuperscript{85} Jeffrey Locke, et. al., \textit{The Role of State Emergency Powers in Curbing the Opioid Epidemic: A Case Study in Lessons Learned}, 51 ARIZ. ST. L.J. 629, 646–53 (2019). The authors found that Massachusetts and South Carolina Governors issued state of emergencies concerning the Opioid crisis in 2017 and that those emergency declarations were still in effect as of the date of the article’s submission in 2019.

\textsuperscript{86} Herman, \textit{supra} note 12, at 101 (citing County of Gloucester v. State, 623 A.2d 763, 767 (1993)).
C. Ongoing Debate About Executive’s Emergency Powers

At the national level, legal scholars disagree about the extent of an executive’s power during times of crisis.87 Some argue that in a time of crisis both the judicial and legislative branches will delegate significant powers to the executive.88 These scholars believe that the executive, armed with the information and the ability to quickly act, is the only branch that can aptly respond to a crisis.89 This argument stems from the classic Carl Schmitt view of executive authority which finds that even if the law attempts “to constrain the powers of government, during a time of crisis, there is always someone who must decide to invoke the state of exception as a discretionary matter.”90 This view argues that deference from both the judicial and legislative branches is key for the executive’s ability to respond in an emergency.91

Others also argue for a strong executive during a time of emergency but find that the executive should be bound by checks and balances.92 While scholars here recognize that the judiciary and legislature may afford some degree of deference to the executive during an emergency, they find that both of these branches should still play an important role in “constraining national executives.”93 They also argue that the type of emergency may affect the degree of deference the judiciary and legislature afford executives.94 For a national security emergency, courts and legislatures may give the executive a great degree of deference where there

88 See, e.g., Rossi, supra note 35, at 240.
89 ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 15–16 (2007). Posner and Vermeule find that the judiciary and legislative branches are not quick to respond in an emergency. Id.
91 Id.; see also Eric A. Posner & Adrian Vermeule, Accommodating Emergencies, 56 STAN. L. REV. 605, 609 (2003). These scholars recognize that a high degree of deference particularly from the judiciary may lead to executive abuse whereby an executive may be able to hold onto power and squash any legal opponents. Id.
92 Ginsburg & Versteeg, supra note 90, at 8.
93 Id. at 1.
94 Id. at 19–20.
is a need for secrecy, whereas a pandemic emergency requires a broad set of participants such as those from local government, drug companies and hospitals.\textsuperscript{95} Some argue in the context of a pandemic, courts and legislatures may see themselves as helping in the response rather than being in the way.\textsuperscript{96} Similarly, executives have used their emergency powers to respond to natural disasters and other health crises that last a short time and both the judiciary and legislature may often step aside to allow a quick response.\textsuperscript{97} Those emergencies differ significantly from that of a pandemic or other prolonged public health crisis.\textsuperscript{98}

At the state level prior to the pandemic, scholarship was sparse about how broad the governor’s powers should be during a state of emergency.\textsuperscript{99} Clearly, the scholarship is emerging. But the different theories concerning emergency powers of national executives could apply equally as well at the state or sub-national level.\textsuperscript{100} As discussed more in infra Part V, governors require broad emergency powers during the COVID-19 pandemic in order to curb the transmission of the virus. However, these emergency powers should also be subject to some degree of judicial and legislative oversight, so a governor does not overstep her bounds. Judicial and legislative oversight should not amount to active participation in what is considered an executive function during a crisis.\textsuperscript{101}

III. IMPACT AND RESPONSE TO COVID-19 IN THE UNITED STATES

With a federalist system, the United States’ response to the pandemic has been fraught with problems, inconsistencies and occasional successes. To better understand the role of governors, state legislatures and state agencies in this ongoing crisis, this section provides background on COVID-19 and how it first arrived in the United States. Next it looks at

\textsuperscript{95} Id.
\textsuperscript{96} Id. at 20.
\textsuperscript{97} See Appendix A. Indeed, more than thirty state emergency disaster or public health emergency statutes limit the initial declaration of emergency to thirty or sixty days.
\textsuperscript{98} See, e.g., Locke, supra note 85, at 637.
\textsuperscript{99} Professor Rossi argues that there should be a presumption of state executive power during times of crisis. Rossi, supra note 35, at 238–39. Rossi says that the “lack of clarity” concerning the governor’s role in a crisis affects the governor’s ability to properly respond. Id at 276; see generally Seifter, supra note 15 (providing a general overview of the modern gubernatorial regime).
\textsuperscript{100} Rossi, supra note 35, at 273–74. Rossi cites to the scholarship surrounding the argument for a strong federal executive during times of crisis. Id. He argues that the “case for a strong executive at the state level is stronger” than at the national level since civil right remedies are more likely to be in conflict at the national level. Id.
\textsuperscript{101} See Rossi, supra note 35, at 268.
how governors initially responded to the pandemic. And finally, this section describes the impact the pandemic has had on the economy.

A. COVID-19 in the United States

In March 2020, COVID-19, a respiratory disease caused by the newly discovered Coronavirus, shut down much of the United States. While Washington state officially had the first COVID-19 case in January, California was the first state to declare an emergency due to the virus. By March 17, 2020, forty-eight states had declared emergencies due to COVID-19. And by April 7, 2020, forty-two state governors plus the District of Columbia and Puerto Rico had ordered their people to shelter in place. From there, many state governors issued a plethora of executive orders in connection with the COVID-19 pandemic.

In the beginning, COVID-19 was a bit of a mystery, but the CDC indicated that the virus was highly contagious. The virus is transmitted through person to person contact such as touching or shaking hands of an infected individual, inhaling airborne particles of the virus left by an infected individual, or coming into contact with the respiratory droplets of an infected individual. The virus can have a long incubation period whereby an individual may not show symptoms for up to 14 days.

106 Id.
107 Steven Sanché et. al., High Contagiousness and Rapid Spread of Severe Acute Respiratory Syndrome Coronavirus 2, 26 Emerging Infectious Diseases 1470, 1471 (2020).
109 Id.
a significant number of those infected may not show symptoms and otherwise be asymptomatic. This aspect of the disease has made the traditional method of containment difficult at best.

B. Initial Governors’ Response to the Pandemic

To curb the spread of the virus, mitigation measures were put in place to reduce person to person contact. That meant keeping socially distant from one another. For most states, the governors issued shelter in place orders requiring its residents to stay at home other than attending to basic needs such as going to the grocery store, pharmacy or getting some exercise. For the most part, only essential workers were out and about during the stay-at-home orders. Beginning as early as April 20, 2020, states slowly reopened their economies. In April 2020, the CDC along with the White House issued guidelines for “Opening Up America Again.” As of the date of this article, all fifty states had reopened their economies to some extent. Even though states began reopening their economies, restrictions still abounded. A number of states, for example, still limited sizes of mass gatherings, placed restrictions on indoor dining, restricted capacity at fitness centers and bars, as well as kept public schools closed. Many states also had different regions of their state move more

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110 Id.
112 See Wiley, supra note 70, at 72-73.
113 Id.
114 See Mervosh, supra note 105.
118 Id.
119 Lee, supra note 116.
120 Id.

the wearer as well as those around him. Moreover, recent scientific studies suggest that masking may not only protect against infection, but from severe illness.

State governors also issued executive orders to help their state survive the economic devastation that corresponded when businesses were largely closed and citizens were ordered to shelter in place. A number of states issued a moratorium on evictions as well as a moratorium on utility shut-offs, though most of these orders have since expired. Some governors issued orders to provide for income tax extensions as well as to expedite unemployment benefits.

The initial set of stay-at-home and other social distancing executive orders had a positive effect of reducing COVID-19 transmission nationwide, particularly in the New York City area. However, in the...
summer of 2020, the pandemic moved from the NYC metropolitan area to the sunbelt. Florida, Texas and Arizona, as the new hot spots, were criticized by medical experts for reopening their economies too soon. By early fall, the pandemic centered in many of the midwestern states with climbing positivity rates in Iowa, Wisconsin and Illinois. Just in November 2020 alone, the United States recorded four million cases and as of December 1, 2020, COVID-19 had claimed over 268,000 lives. With the surge in cases throughout the United States in the fall, a number of state governors or health officials imposed new or additional restrictions on their citizens to curb the spread of the virus. For example, in mid-November, both New Mexico and Oregon issued stay-at-home orders in an effort to curb the rising number of cases. Curfews were issued in both Ohio and in most parts of California. Still, hospitalizations-fall-for-first-time-in-coronavirus-pandemic-governor-idUSKCN21W2DH [https://perma.cc/66F9-6JK3].


141 Maxouris, supra note 139.


the White House Coronavirus Task Force found that some governors’ actions in the late fall fell short of what was needed to curb further transmission of the virus and asked that local public health officials alert the local population directly. \[144\]

Many state legislatures have passed few bills concerning the COVID-19 pandemic leaving it to their governor or state health official to issue emergency orders concerning the pandemic. \[145\] If anything, as discussed more fully in infra Part III.B., some state legislatures sought judicial intervention to limit their governor from exercising some of her emergency powers. \[146\]

In the late winter and spring of 2021, about eight state legislatures – most notably Kentucky and New York – enacted legislation to limit their governor’s emergency powers. \[147\] In response to pressures from businesses and what can be described as “pandemic fatigue,” the Kentucky legislature passed four bills overriding Governor Beshear’s veto, vastly

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\[145\] State Laws in Response to the Coronavirus (COVID-19) Pandemic 2020, BALLOTPEXA, https://ballotpedia.org/State_laws_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020 [https://perma.cc/LR5M-ZNSQ] (last visited Dec. 6, 2020). For example, more than ten states including large states like Florida and Texas introduced less than 10 bills since the beginning of the pandemic. Id. A few states like Pennsylvania, Minnesota, New Jersey and New York were much more active all introducing more than 300 bills. Id. But these states were certainly the exception. Id.


limiting the governor’s emergency powers. The New York legislature passed a bill revoking then-Governor Cuomo’s additional powers granted to him to manage the pandemic.

State agencies have generally issued guidance on COVID-19 but have not promulgated regulations going through the more formal notice and comment rule-making process. Virginia went a different route by promulgating an emergency regulation which was “designed to establish requirements for employers to control, prevent, and mitigate the spread of COVID-19.” The Virginia Department of Labor and Industry posted notice of an emergency meeting to consider establishing workplace safety standards and also opened up a ten-day public comment forum. After

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148 See H.B. 1, 2021 Reg. Sess. (Ky. 2021) (allowing businesses, schools and associations to remain open if their plan meets or exceeds current CDC guidance); H.B. 5, 2021 Reg. Sess. (Ky. 2021) (limiting the authority of governor to temporarily reorganize administrative agencies without legislative approval); S.B. 1, 2021 Reg. Sess. (Ky. 2021) (limiting executive orders concerning in-person meetings to thirty days unless extended by legislature); S.B. 2, Reg. Sess. (Ky. 2021) (requiring state agencies to submit documentation to legislative subcommittee before issuing emergency regulations).


151 See Emergency Temporary Standard, Infectious Disease Prevention: SARSCoV-2 Virus That Causes COVID-19, 16 VA. ADMIN. CODE § 25-220 (July 15, 2020), adopted VA. ADMIN. CODE §§ 25-220-10 et seq. (Jan. 27, 2021). The regulation provided, among other things, social distancing measures, requiring the wearing of facial coverings, access to hand sanitizer and handwashing facilities and increased cleanings. Id. at 2–35.

several iterations in June and July of 2020, the Virginia Safety and Health Codes Board adopted the emergency regulation which took effect on July 27, 2020 after publication in a Richmond newspaper.¹⁵³

IV. JUDICIAL REVIEW

With governors issuing numerous executive orders limiting the size of in-person gatherings, placing a temporary ban on elective surgeries, issuing long-term stay-at-home orders, and placing a moratorium on evictions among other orders, both individuals and groups began to challenge these orders as a violation of their constitutional rights.¹⁵⁴ A few state legislatures unsuccessfully attempted to use their powers under state emergency disaster statutes to terminate their governor’s emergency declaration for COVID-19.¹⁵⁵ The respective governors challenged these actions.¹⁵⁶ There were also several challenges to governors’ statutory authority to declare a state of emergency.¹⁵⁷ Subpart A looks at challenges to certain executive orders in the civil right context and subpart B looks at challenges to the state legislature’s or governor’s authority under their emergency disaster statute on either statutory or constitutional grounds.

A. Civil Rights Challenges to Specific Executive Orders

During the earliest parts of the pandemic, most federal district court judges addressed civil rights challenges to executive orders through the framework of the United States Supreme Court case Jacobson v.


¹⁵³ Reynolds, supra note 152.

¹⁵⁴ See, e.g., Lesley Gool, Executive Orders and Their Challenges During COVID-19, ILL. STATE BAR ASSOC. (Dec. 2020), https://www.isba.org/sections/localgovt/newsletter/2020/12/executiveordersandtheirchallenges [https://perma.cc/2C5F-UKRY]. It should come as no surprise that a number of recent legal scholars have thoroughly recounted and analyzed some of the same cases I set out to describe in Part III. See generally Lindsay Wiley & Stephen Vladeck, Coronavirus, Civil Liberties, and the Courts: The Case Against “Suspending” Judicial Review, 133 HARV. L. REV. F. 179, 179-80 (2020); Wiley, supra note 70; Wendy Parmet, Rediscovering Jacobson in the Era of COVID-19, 100 B.U. L. REV. ONLINE 117 (2020); Farber, supra note 87.


¹⁵⁶ See infra Part III.B.

¹⁵⁷ See infra Part III.B.2.
Massachusetts.\textsuperscript{158} Decided more than one hundred years ago, the United States Supreme Court in \textit{Jacobson} first defined the standard for evaluating emergency measures though not executive orders per se.\textsuperscript{159} In \textit{Jacobson}, the Massachusetts state legislature granted the State Board of Health the authority to issue a regulation requiring all adults to get a smallpox vaccine.\textsuperscript{160} Defendant refused to be vaccinated and was found guilty for violating the health regulation.\textsuperscript{161} The Supreme Court affirmed the guilty verdict and in doing so found that the Court should not infringe on the legislature’s power to decide how best to protect the public.\textsuperscript{162} In fact, the \textit{Jacobson} Court found that the Court’s power to review such legislative action is limited to only those statutes that have “no real or substantial relation to those objects, or is beyond all question, a plain, palpable invasion of rights secured by fundamental law . . .”\textsuperscript{163} Some scholars have raised serious concerns that courts will simply defer to the governor’s emergency orders using the language of \textit{Jacobson} as a two-part test to evaluate the executive order at issue.\textsuperscript{164} In that sense, applying \textit{Jacobson} in the absence of any meaningful review of the order in the civil rights context will eliminate a vital check on the governor’s power.\textsuperscript{165} Those fears may have come to rest.\textsuperscript{166} While the standard of review may not be entirely settled, the Supreme Court’s November 2020 decision in \textit{Roman Catholic Diocese of Brooklyn v. Cuomo} where it applied traditional constitutional analysis and not the \textit{Jacobson} framework to a challenge

\textsuperscript{158} 197 U.S. 11 (1905).
\textsuperscript{159} \textit{Id.} at 25.
\textsuperscript{160} \textit{Id.} at 12.
\textsuperscript{161} \textit{Id.} at 13–14.
\textsuperscript{162} \textit{Id.} at 37–38.
\textsuperscript{163} \textit{Id.} at 31.
\textsuperscript{164} See Wiley & Vladeck, supra note 154, at 182; Parmet, supra note 154, at 31–33; Farber, supra note 87, at 18–20. As discussed more in infra Part V, Wiley, Vladeck, Parmet and Farber raised key early concerns about the level of deference the courts would afford to state government during the COVID-19 emergency and essentially rubber-stamp many of these emergency orders. And perhaps, their early warning signals helped shape some of the judges’ analysis later on. Even prior to the COVID-19 pandemic, at least one scholar raised similar concerns about the suspension of civil liberties during the hurricane Katrina emergency and has argued that judges should use strict scrutiny when government officials violate civil liberties during an emergency. Michael F. Crusto, \textit{State of Emergency: An Emergency Constitution Revisited}, 61 LOY. L. REV. 471, 475-76 (2015).
\textsuperscript{165} See generally \textit{Jacobson}, 197 U.S. 11 (1905).
\textsuperscript{166} As discussed more fully in infra Part V while the recent Supreme Court decision may abate concerns that Courts are suspending judicial review, the decision raises new concerns about whether the judiciary may be usurping the executive’s role in making decisions concerning the public health of its citizens.
under the Free Exercise Clause at a minimum diminishes Jacobson’s relevance in these pandemic cases.167

To understand how the federal courts considered various constitutional challenges to executive orders from the onset of the pandemic through the end of 2020, this article reviewed the most typical executive orders involving: (1) limits or bans on non-essential gatherings; (2) limit or bans on elective surgeries; (3) stay-at-home orders and business closures; (4) moratoriums on evictions; and (5) limits on travel.

1. Ban or Limits on Non-Essential Gatherings

A significant number of federal district courts used the Jacobson framework to uphold executive orders limiting in-person gatherings during the COVID-19 pandemic.168 For example, in Antietam Battlefield KOA v. Hogan, the federal district court denied plaintiffs’ motion for a temporary restraining order enjoining enforcement of their Governor’s executive order limiting gatherings to no more than ten persons.169 Applying Jacobson, the district court concluded that the executive order had a real and substantial relation to the COVID-19 health crisis citing significant evidence in the record.170 Second, the district found that the executive orders were not “plain, palpable invasion of rights secured by the fundamental law” employing traditional constitutional analysis to the second element that the orders were neutral and generally applicable.171


168 See Caroline Mala Corbin, Religious Liberty in a Pandemic, 70 DUKE L.J. ONLINE 1, 4–6 (2020). Professor Corbin explains that the typical standard of review under the free exercise doctrine requires a two-part examination. Id. at 4. First, a court should determine whether the challenged law is both neutral and generally applicable. Id. A law is neutral if it does not specifically target religion and that law is generally applicable “if it applies broadly to the relevant population.” Id. at 9. If the law satisfies both criteria, then it is constitutional and the analysis ends. Id. at 6. If the challenged law is not both neutral and generally applicable, the law is subject to strict scrutiny. Id. at 4. Under strict scrutiny, the law “must be justified by a compelling government interest and must be narrowly advanced to address that interest.” Id. at 6 n. 25 (citing Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531–32 (1993)).


170 Id. at 229. Some of the evidence included that COVID-19 spread easily in large groups, outbreaks have been linked to large gatherings and that the Governor issued the order with the assistance of a public health advisory committee. Id.

171 Id. at 223. The court found that the order was neutral because it proscribes general conduct and did not target conduct due to religious affiliation. Id. at 231. The court also found that the order was generally applicable in that analogous secular activities such as grocery shopping, going to the movies and sporting events are also banned by the order. Id. at 231–32.
Likewise, in *Calvary Chapel of Bangor v. Mills*, the federal district court denied plaintiff’s motion for a temporary restraining order as the plaintiff Church was unlikely to succeed on its free exercise claim.\(^{172}\) Plaintiff challenged the Governor’s executive order, which outlined Maine’s phased reopening and included a provision that “continued [a] prohibition on gatherings of more than ten people.”\(^{173}\) In applying *Jacobson* to the case at hand, the district court concluded it would reach the same result if *Jacobson* was inapplicable, as the executive order likely survives plaintiff’s challenge under the Free Exercise Clause.\(^{174}\)

Reaching a different result, in *Roberts v. Neace*, the Sixth Circuit found the Kentucky Governor’s executive order prohibiting all mass gatherings in April and May 2020 likely violated the Free Exercise Clause of the First Amendment.\(^{175}\) The executive order included a number of exceptions such as airports, train and bus stations and shopping centers and malls.\(^{176}\) However, the Sixth Circuit did not apply *Jacobson* to the facts at hand, but instead applied strict scrutiny to the orders finding that the “exception-ridden” order is not neutral.\(^{177}\) In making this finding, the Sixth Circuit concluded that it could not distinguish those operations exempted from the mass gathering ban such as grocery stores, laundromats, airlines and landscaping businesses.\(^{178}\) Nor was the order the least restrictive means as this order simply banned gatherings altogether.\(^{179}\) In a few other instances where plaintiffs were granted relief from a governor’s executive orders on free exercise grounds, those orders either specifically targeted religious groups or the order was subject to interpretation by law enforcement.\(^{180}\)

In late May 2020, the U.S. Supreme Court in *South Bay Pentecostal Church v. Newsom* (“*South Bay*”) denied the plaintiff church’s emergency motion to enjoin Governor Newsom’s stay-at-home order on free exercise grounds.\(^{181}\)

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\(^{173}\) Id. at 279.

\(^{174}\) Id. at 284. The court also found that the executive order did not likely violate the Free Exercise Clause as it was neutral and generally applicable. *Id.* at 285-86. *See also* Cassell v. Snyders, 458 F.Supp.3d 981, 993–98 (N.D. Ill. 2020) (finding plethora of evidence that executive order was issued to curb spread of COVID-19 under *Jacobson* and alternatively that it would withstand scrutiny under the Free Exercise Clause); Gish v. Newsom, No. EDCV 20-755 JGB (KKx), 2020 WL 1979970, at *5 (C.D. Cal. April 23, 2020) (finding executive order met the two-part *Jacobson* test, and alternatively that the executive order did not violate free exercise clause).

\(^{175}\) Roberts v. Neace, 958 F.3d 409, 413–14 (6th Cir. 2020).

\(^{176}\) Id. at 411.

\(^{177}\) Id. at 413–15. The Sixth Circuit simply cites to *Jacobson* once. *Id.* at 414. It does not incorporate any of that case’s analysis in its decision. *Id.* at 411–16.

\(^{178}\) Id. at 411–12, 16.

\(^{179}\) Id. at 416.

\(^{180}\) 140 S. Ct. 1613 (2020).
The Supreme Court issued its decision without a majority opinion, but with Chief Justice Roberts concurring, and Justice Kavanaugh issuing a dissent joined by Justices Thomas and Gorsuch. While Justice Roberts cited to *Jacobson*, he did not apply the framework, but rather concluded that the specific restrictions on religious organizations in Newsom’s executive order appeared consistent with the Free Exercise Clause as similar restrictions applied to “comparable secular gatherings.” Justice Roberts found that other similar activities such as movie theaters, concerts, and sporting events where large groups of people gather for extended periods of time faced similar restrictions. And in July 2020, the Supreme Court in *Calvary Chapel Dayton Valley v. Sisolak* denied the plaintiff church’s request for relief without a majority opinion. This time no justices concurred, but three dissented. The plaintiff Church challenged the Nevada Governor’s emergency directive limiting indoor religious gatherings and some other businesses to no more than fifty persons. The dissenting justices voiced concern with the comparison group. Rather than focusing on lectures, concerts and museums, the dissents all argued that bars, restaurants and even casinos should be the focus of the comparison.

On November 25, 2020, with the addition of Justice Barrett on the Court, the U.S. Supreme Court in *Roman Catholic Diocese of Brooklyn v. Cuomo* in a per curium opinion enjoined then-Governor’s Cuomo executive order which limited gathering capacity of religious organizations in certain zones to ten or twenty-five people. The case also contained two separate lone concurrences by Justices Gorsuch and Kavanaugh and three separate dissents. Plaintiffs, a Church and a

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181 *Id.*  
182 *Id.* at 1613–14.  
183 *Id.* at 1613 (Roberts, C. J., concurring).  
184 *Id.* (Roberts, C.J., concurring).  
186 *Id.* at 2603-09. Justice Alito filed a dissent which was joined by Justices Thomas and Kavanaugh. *Id.* at 2603 (Alito, J., dissenting). Justice Gorsuch and Justice Kavanaugh both filed separate dissents. *Id.* at 2609 (Gorsuch, J., dissenting) (Kavanaugh, J., dissenting).  
187 *Id.* at 2604 (Alito, J., dissenting).  
188 See, e.g., *id.* at 2607.  
189 See *id.* at 2604; *Id.* at 2609 (Gorsuch, J., dissenting); *Id.* at 2609–10 (Kavanaugh, J., dissenting).  
190 *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68–69 (2020). The Justices fell along similar lines as in the decisions of *South Bay* and *Calvary Chapel Dayton* with the new Justice, Amy Coney Barrett, aligning with Justices Thomas, Alito, Gorsuch and Kavanaugh to make the new majority. See supra notes 181-82, 185-86.  
191 See *Roman Catholic Diocese*, 141 S. Ct. at 75 (Roberts, C.J., dissenting). Justice Breyer’s dissent was joined by Justices Sotomayor and Kagan. *Id.* at 76
synagogue, argued that the executive order violated their constitutional rights under the Free Exercise Clause. The Court found that since the executive order explicitly targets “houses of worship for especially harsh treatment” the order is subject to strict scrutiny. Specifically, it found that the order allowed certain businesses such as acupuncture facilities, campgrounds and garages to function without capacity restrictions while places of worship had ten or twenty-five person capacity restrictions. The Court also noted that these restrictions were more severe than other restrictions that had come before it. Nor was the executive order likely “narrowly tailored to serve a compelling state interest.” While the Court acknowledged that reducing the spread of COVID-19 is “unquestionably” a compelling interest, it found that plaintiffs offered evidence that they followed strict COVID-19 safety protocols and defendant did not provide evidence of an outbreak in either institution. The Court also took issue with the fact that the order limited capacity to only ten or twenty-five persons when many places of worship seat hundreds or thousands of individuals. Noticeably absent in the per curium opinion is any direct reference to the Supreme Court’s two most recent decisions in South Bay and Calvary Chapel Dayton, or the older Jacobson precedent.

The Supreme Court’s decision in Roman Catholic Diocese may have raised more questions than it answered. While the per curium opinion did not apply the Jacobson framework (much less even cite to it), the Court

(Breyer, J., joined by Sotomayor & Kagan, J.J., dissenting). Justice Sotomayor’s separate dissent was also joined by Justice Kagan. Id. at 78 (Sotomayor, J., joined by Kagan, J., dissenting).

192 Id. at 66.
193 Id. at 66–67.
194 Id. at 66.
195 Id.
196 Id.
197 Id.
198 Jacobson v. Massachusetts, 197 U.S. 11 (1905); S. Bay Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020). Justice Gorsuch’s concurrence in Roman Catholic Diocese criticizes Justice Roberts’ concurrence in South Bay arguing that Roberts’ reliance on Jacobson is misplaced. Roman Catholic Diocese, 141 S. Ct. at 70 (Gorsuch, J., concurring). Justice Gorsuch is the only non-dissenting justice to even mention Jacobson, and he does so at length. Id. at 70–72 (Gorsuch, J., concurring). In his dissent, Chief Justice Roberts only mentions Jacobson in response to Justice Gorsuch’s concurrence. Id. at 75–76 (Roberts, C.J., dissenting). He argues that Gorsuch overreacted to Roberts’ one-sentence quotation to Jacobson in South Bay. Id. at 75–76 (Roberts, C.J., dissenting). That same quote was cited positively by Justice Kavanaugh in his concurrence as well as in Justice Breyer’s dissent. Id. at 73, 78. Justice Sotomayor in her dissent took aim at Justice Gorsuch’s non-secular comparisons, arguing that they were not square with the medical examples. Id. at 79 (Sotomayor, J., dissenting)
did not overrule the 115-year precedent or even attempt to limit its application going forward.\footnote{Roman Catholic Diocese, 141 S. Ct. at 70–71 (Gorsuch, J., concurring).} These unresolved issues are evident in the cases coming on the heels of this decision.

These recent cases are a reflection of the Court’s striking omission. About a week after \textit{Roman Catholic Diocese}, the Sixth Circuit in \textit{Commonwealth v. Beshear} denied a preliminary injunction to private religious schools who challenged the Kentucky Governor’s executive order closing all private and public elementary and secondary schools.\footnote{981 F.3d 505, 507 (6th Cir. 2020).} Unlike \textit{Roman Catholic Diocese}, the Sixth Circuit found Governor Beshear’s executive order to be neutral and of general applicability as the order did not single out religious institutions.\footnote{Commonwealth, 981 F.3d at 509. The Sixth Circuit makes it a point to say that it has no need to rely upon either \textit{South Bay} or \textit{Jacobson} in reaching it decision. \textit{Id}. at 510.} But where the executive order specifically mentions houses of worship in its restrictions, other courts post-\textit{Roman Catholic Diocese} applied strict scrutiny.\footnote{See \textit{Calvary Chapel Dayton Valley} v. Sisolak, 982 F.3d 1228, 1234 (9th Cir. 2020); \textit{Agudath Israel} v. Cuomo, 983 F.3d 620, 632–33 (2d Cir. 2020).} The plaintiffs in both \textit{Calvary Chapel Dayton Valley} and in \textit{Roman Catholic Diocese} succeeded in their motions to enjoin enforcement of their Governor’s executive order imposing capacity restrictions on houses of worship.\footnote{Calvary Chapel Dayton Valley, 982 F.3d at 1234; \textit{Agudath Israel}, 983 F.3d at 632–33.} In December, the Ninth Circuit in \textit{Calvary Chapel Dayton Valley} said that \textit{Roman Catholic Diocese} requires it to apply strict scrutiny to the Governor’s executive order which capped religious services at fifty persons while casinos, gyms and bowling alleys, among other secular activities, were only restricted to 50% of fire code capacity.\footnote{This is the same directive plaintiff sought to enjoin back in May 2020 but was unsuccessful \textit{Calvary Chapel Dayton Valley}. 982 F.3d at 1230, 1233.} The Ninth Circuit concluded that the order is not narrowly tailored as there were less restrictive alternatives to the fifty-person cap such as a 50% capacity restriction.\footnote{\textit{Id}. at 1234.} Likewise, the Second Circuit applied strict scrutiny to then-Governor Cuomo’s executive order which also imposed a percentage capacity restriction of 25% or 33% for places of worship in red or orange zones.\footnote{Agudath Israel, 983 F.3d at 632–33. This is the same executive order at issue in the Supreme Court’s decision in \textit{Roman Catholic Diocese}. \textit{Id}. at 631–32. The executive order imposed either a person limit or percentage capacity restriction on places of worship in certain zones. \textit{Id}. at 625–26. The Supreme Court only looked at the fixed capacity limits, not the percentage capacity limits. \textit{Id}. at 636–37. The Second Circuit granted Agudath Israel’s motion to enjoin enforcement of the order but...
In contrast, the plaintiffs in *South Bay Pentecostal Church* did not succeed in their motion to enjoin Governor Newsom’s executive order limiting worship services in certain regions to outdoor gatherings.\(^{207}\) The federal district court also applied strict scrutiny to the Governor’s executive order, but found that the order was narrowly tailored to achieve a compelling state interest.\(^{208}\) The district court distinguished the Ninth Circuit’s decision in *Calvary Chapel Dayton Valley* in that Governor Newsom’s executive order does not treat similar secular activities like restaurants, bars and gyms more favorably.\(^{209}\) In fact, the court concluded that many of these activities with “heightened risk profiles are entirely closed.”\(^{210}\)

It seemed as if the *Jacobson* framework had been abandoned with these three previous decisions. In *Calvary Chapel Dayton Valley*, the Ninth Circuit did not address whether *Jacobson* should be considered in its analysis even though the Governor argued that the *Jacobson* framework applies during this public health crisis.\(^{211}\) The Second Circuit found that any reliance on *Jacobson* is misplaced.\(^{212}\) Further, the federal district court in *South Bay* does not even mention *Jacobson*.\(^{213}\) However, *Jacobson* is alive and well at least according to two recent federal district court opinions each denying plaintiffs’ motion for emergency relief.\(^{214}\) Neither decision concerns a free exercise challenge and both decisions applied rational basis review and alternatively the *Jacobson* framework.\(^{215}\) But their reasons for doing so are clear. Both district courts found that “*Jacobson* is controlling precedent until the Supreme Court . . . tells us otherwise.”\(^{216}\)

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\(^{208}\) Id. at *8.

\(^{209}\) Id. at *11.

\(^{210}\) Id.

\(^{211}\) *Calvary Chapel Dayton Valley*, 982 F.3d at 1231.

\(^{212}\) Agudath Israel v. Cuomo, 983 F.3d 620, 635 (2d Cir. 2020).


\(^{216}\) M. Rae, Inc., 2020 WL 7642596, at *6; Delaney, 2021 WL 42340, at *11 (finding that “until the Supreme Court overrules *Jacobson*, this Court is bound by stare decisis to apply *Jacobson* harmoniously with the precedent developed under the tiers of scrutiny.”).
2. Ban or Limits on Elective Surgical Procedures

Even more complicated are evaluating executive orders that impact a woman’s right to abortion, though all of these decisions predate the Supreme Court decisions in *South Bay, Calvary Chapel Dayton* and *Roman Catholic Diocese*. Within the *Jacobson* framework, the Fifth, Sixth, Eighth and Eleventh Circuits considered whether an executive order prohibiting and/or limiting elective medical procedures for a period of time violates a woman’s right to an abortion with differing outcomes.217 Divided circuit panels in the Fifth and Eighth Circuit vacated their respective district court’s temporary restraining order (“TRO”) allowing the executive orders to continue.218 Those TROs had essentially exempted abortions from the respective Governor’s executive order postponing non-essential surgeries for a period of time due to COVID-19. The Fifth Circuit in *In re Abbott* based its holding on three considerations emphasizing that the district court failed to apply the *Jacobson* standard for evaluating emergency orders to this case.219 It found the executive order easily met both *Jacobson* elements. As to the first *Jacobson* element, the court found that the order helped curb transmission of COVID-19 since restricting the number of medical procedures both reduced hospital capacity and conserved personal protective equipment (PPE).220 As to the second *Jacobson* element, the court found that the executive order did not place an “undue burden” on getting an abortion as set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.221

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218 *Abbott*, 954 F.3d at 778; *Rutledge*, 956 F.3d at 1023.

219 *Abbott*, 954 F.3d at 778–79. The Fifth Circuit also found the district court’s decision patently wrong for declaring that the executive order was an outright ban on abortion instead of applying the *Casey* undue burdens test. *Id.* at 778. And that “the district court usurped the state’s authority to craft emergency health measures.” *Id.* at 787.

220 *Id.* at 787.

221 *Id.* at 786, 791. *Casey* holds that a state may regulate, not ban abortion and in regulating abortion it may not place a “substantial obstacle in the path of a woman seeking an abortion before the fetus retains viability.” Planned Parenthood of Se.
In finding that the order met the *Casey* test, the court emphasized that this was a three week emergency order and not an outright ban on abortion.\textsuperscript{222} Similarly, the Eighth Circuit in *In re Rutledge* found that the district court “failed to meaningfully apply” the *Jacobson* framework as the standard of review.\textsuperscript{223}

The Eleventh Circuit in *Robinson v. Attorney General* reached a different result. Even though the court applied *Jacobson*, it concluded that the state’s public health order, which mandated postponement of all “dental, medical or surgical procedures” was likely in violation of the right to an abortion.\textsuperscript{224} In affirming the district court’s decision, the Eleventh Circuit reading *Jacobson* and *Casey* together found that the state was unlikely to succeed on the merits and recounted significant evidence in the record in support of this conclusion.\textsuperscript{225} The state argued the order was issued to conserve PPE, free up hospital capacity, and reduce social interactions.\textsuperscript{226} However, the clinics still needed PPE to treat these women for ongoing pre-natal visits and pre-abortion examinations and these additional examinations may actually require more PPE.\textsuperscript{227} The evidence also indicated that the number of abortions requiring hospitalizations are quite low.\textsuperscript{228} And finally, there was evidence that banning abortions, even temporarily, would increase, not decrease, social interactions as even an uncomplicated pregnancy involves ten to thirteen prenatal visits.\textsuperscript{229}

Decided a day later, the Sixth Circuit in *Adams & Boyle v. Slatery* similarly concluded that plaintiff health providers would likely succeed on the merits in showing that the state’s emergency executive order banning elective surgical procedures for a period of time violated the Fourteenth Amendment right to an abortion.\textsuperscript{230} As with *Robinson*, the Sixth Circuit had a significant factual record which met both *Casey*’s undue burden test and the *Jacobson* test.\textsuperscript{231} Even though *Jacobson* may no longer be the

\textsuperscript{222} Abbott, 954 F.3d at 790–91.
\textsuperscript{223} Rutledge, 956 F.3d at 1028.
\textsuperscript{224} Robinson, 957 F.3d at 1182.
\textsuperscript{225} Id. at 1182. For example, there was evidence in the record that postponing an abortion would amount to a prohibition as most abortions in Alabama must be performed before the fetus reaches twenty weeks. Id. at 1180. There was also evidence that the order would create logistical challenges for women as well as causing serious harm to a woman’s health. Id.
\textsuperscript{226} Id.
\textsuperscript{227} Id. at 1182.
\textsuperscript{228} Id. at 1181.
\textsuperscript{229} Id. at 1182.
\textsuperscript{230} 956 F.3d at 925.
\textsuperscript{231} Id. at 920–22, 924–27. The Sixth Circuit employed the *Jacobson* test in the alternative saying that “even if *Jacobson*’s more state friendly standard of review is
standard of review here, these decisions would still likely stand. Plaintiffs in both Robinson and Adams & Boyle were able to show a likelihood of success on the merits notwithstanding the federal appellate courts using a standard of review allowing for greater deference to the state.

3. Stay-at-Home Orders and Restrictions on Businesses

Unlike challenges under the Free Exercise Clause and the right to abortion which often requires the order to be subject to heightened scrutiny, most challenges to stay-at-home orders had to pass the rational basis test or in some cases intermediate scrutiny. For example, in McGhee v. City of Flagstaff, the district court applying the Jacobson framework found that the stay-at-home order did not likely violate plaintiff’s substantive due process rights. The court said that the stay-at-home order provided for some exceptions as citizens were able to leave home to exercise, care for family members or friends, work or buy essential goods. While couched within the Jacobson framework, the court made clear that the Governor had significant evidence to support the conclusion that COVID-19 was a public health emergency necessitating the stay-at-home order.

Like McGhee – but without applying the Jacobson framework – the Pennsylvania Supreme Court in Friends of Danny Devito v. Wolf held that Governor Wolf’s stay-at-home order did not violate plaintiffs’ constitutional rights. In reviewing each of plaintiffs’ constitutional claims, the Pennsylvania Supreme Court used traditional constitutional

the test we should be applying here – rather than the usual Roe and Casey standard – we still think that Plaintiffs are likely to succeed on their constitutional claim.” Id. at 925.

232 Id.

233 Robinson, 957 F.3d at 1182; Adams & Boyle; 956 F.3d at 920–22, 924–27.

234 Henry, 461 F. Supp. 3d at 1254–55 (applying rational basis review); McGhee, 2020 WL 2308479, at *5 (applying heightened level of scrutiny). The most significant challenge to a stay-at-home order came early on in Wisconsin Legis. v. Palm. 942 N.W.2d 900 (2020) discussed at length in infra Part III.B.

235 McGhee, 2020 WL 2308479, at *5–6. In a similar vein, the plaintiff in Henry v. DeSantis alleged constitutional violations including violations under the 14th due process and equal protection clauses. 461 F. Supp. 3d at 1254. That court applying the rational basis test found that the petitioner’s claims failed as the Governor’s stay at home order was issued to slow the spread of COVID-19 which is a legitimate government interest. Id. at 1255.


237 Id. at *3–5.

analysis and did not apply the *Jacobson* framework or cite to *Jacobson* anywhere in its opinion.\(^{239}\)

However, the district court in *Open Our Oregon v. Brown* used the *Jacobson* framework to find that the Oregon Governor’s executive order which closed plaintiffs’ businesses had not violated their constitutional rights.\(^{240}\) And, in the Sixth Circuit case *League of Independent Fitness Facilities and Trainers, Inc. v. Whitmer*, the federal appellate court granted a stay of the district court’s entry of a preliminary injunction prohibiting enforcement of the Governor’s executive order closing fitness facilities for a period of time.\(^{241}\) The Sixth Circuit cited to *Jacobson*, recognizing that the state’s police power to address pandemics should proceed largely without interference from the courts.\(^{242}\) Yet, the federal appellate court applied the traditional constitutional analysis—finding that the executive order met the rational basis test.\(^{243}\)

And at least one stay-at-home order survived intermediate scrutiny.\(^{244}\) In *Altman v. County of Santa Clara*, firearms dealers challenged the California County’s shelter in place order as violating its Second Amendment Right to Bear Arms.\(^{245}\) In *Altman*, the district court found that “it need not decide whether *Jacobson* or the Ninth Circuit’s Second

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\(^{239}\) *Id.* at 896–903. For example, in analyzing Plaintiff, Devito Committee’s claim under the equal protection clause, the Pennsylvania Supreme Court recognized that “while the equal protection clause assures that all similarly situated persons are treated alike, it does not obligate the government to treat all persons identically.” *Id.* at 901 (quoting Commonwealth v. Bullock, 913 A.2d 207, 215 (Pa. 2006)).

\(^{240}\) *Open Our Oregon v. Brown*, No. 6:20-cv-773-MC, 2020 WL 2542861, at *2 (D. Or. May 19, 2020). In almost complete deference to the state’s interest in combating COVID-19, the district court concluded that it “is inclined to side with the chorus of federal courts in pointing to *Jacobson* and rejecting similar constitutional claims . . . .” *Id.*


\(^{242}\) *Id.* at 127.

\(^{243}\) *Id.* at 128–29. The Governor in its brief to the district court provided information citing to the CDC on how indoor facilities are more susceptible to spread of the virus. *Id.* at 128. The Sixth Circuit found this information as a “paradigmatic example of ‘rational speculation’ that fairly support the Governor’s treatment of indoor fitness facilities.” *Id.* at 129.

\(^{244}\) See, e.g., *Altman v. Cnty. of Santa Clara*, 464 F. Supp. 3d 1106, 1111, 1132 (N.D. Cal. 2020).

\(^{245}\) *Id.* at 1111; *but cf.* Conn. Citizens Def. League, Inc. v. Lamont, 465 F. Supp. 3d 56, 72–73 (D. Conn. 2020) (applying intermediate scrutiny in finding that the Governor’s order which had the effect of suspending fingerprinting indefinitely—a necessary requirement for obtaining a gun in Connecticut—likely violated Second Amendment).
Amendment framework applies here because . . . the Court concludes that the order survives under either test.”

In a marked departure from the above cases, the federal district court in *County of Butler v. Wolf* declared that Governor Wolf’s stay-at-home order, which was no longer in effect, violated plaintiffs’ Fourteenth Amendment rights. Foreshadowing Justice Gorsuch’s concurring opinion in *Roman Catholic Diocese*, Judge Stickman found the *Jacobson* framework to be inappropriate for the standard of review saying he would apply “regular” constitutional scrutiny. He struck down this order on the assumption that Governor Wolf would reinstate it and that the state’s compelling interest in curbing the spread of COVID-19 had waned due to the ongoing length of the pandemic. Judge Stickman all but ignored the scientific evidence behind the pandemic including COVID-19’s high transmissibility necessitating the stay-at-home order not just in the Commonwealth but throughout the globe. And he made the leap on his own accord to apply strict scrutiny to plaintiffs’ substantive due process claims even though longstanding precedent applied intermediate scrutiny.

4. Moratorium on Evictions

While a significant number of Americans appreciated their governor’s executive order placing a moratorium on evictions, several dissatisfied landlords challenged these orders. For example, in *Elmsford Apartment Assocs., LLC v. Cuomo*, three residential landlords, challenged then-Governor Cuomo’s executive order temporarily permitting tenants to use their security deposit for rent and placing a moratorium on evictions as violating their rights under the Takings Clause.

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246 *Altman*, 464 F. Supp. 3d at 1125. The district court found that the executive order met the two element *Jacobson* test. *Id.* at 1124. The Court then determined intermediate, not strict scrutiny applied as the order merely regulated the manner of possession as opposed to an outright ban of firearms. *Id.* at 1126, 1128.

247 *Id.* at 899. Judge Stickman detailed at length his reasons for declining to adopt *Jacobson* to this case which included the ongoing nature of the pandemic and the need for an independent judiciary citing Wiley and Vladeck’s article on the suspension doctrine. *Id.* at 899–901 (citing Wiley & Vladeck, supra note 154).

248 See *id.* at 899.

249 *Id.* at 916–18.

250 *Id.* at 916–17; see also Wiley, supra note 70, at 93. Wiley argues that Judge Stickman erroneously applied the incorrect standard of review to plaintiffs’ substantive due process claim as “[e]conomic rights to use one’s property and earn one’s livelihood as one sees fit have been overwhelmingly rejected as a basis for applying strict scrutiny under the U.S. Constitution in the modern era.” *Id.*

and Contracts Clause of the Constitution. Employing traditional constitutional analysis, the federal district court denied plaintiffs’ claims. Similar challenges by landlords in other states where there was an executive order placing a moratorium on evictions likewise failed.

5. Travel Restrictions – Mandatory Self Quarantining

The few challenges to executive orders requiring those entering the state to quarantine have largely been unsuccessful though the courts in these cases often applied different standards of review. For example, in *Bailey Campground Inc. v. Mills*, in-state business owners and out of state individuals challenged the Maine Governor’s executive orders, which prohibited out of state residents from entering the state unless they owned or could rent property as violating their right to travel. While the district court, applying strict scrutiny, found that the Governor’s executive orders burdened Plaintiffs’ right to travel, it found that plaintiffs had not proved that the “measure is not the least burdensome way to serve a compelling interest.” The district court emphasized that the standard of review in this case was governed by the jurisprudence concerning the right to travel, and not the judicial framework in *Jacobson*.

About a month later in *Carmichael v. Ige*, the district court in Hawaii similarly held that plaintiffs were not likely to succeed on their challenge to the Governor’s fourteen-day travel quarantine. Unlike the Court in

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252 *Id.*

253 *Id.* at 156. The district court did not use the *Jacobson* framework in its analysis. See *id.* at 165. Instead, the district court applied the three-factor test in *Penn Central Trans. Co. v. New York City* to determine if the interference with plaintiff’s property constituted a taking. *Id.* (quoting Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 493 (1987)).


256 *Bayley’s Campground*, 463 F. Supp. 3d at 24.

257 *Id.* at 33–34

258 *Id.* at 32.

259 *Carmichael*, 470 F. Supp. 3d at 1146–47.
Bailey Campground, Judge Otake in Carmichael emphasized that the Jacobson framework applied though she applied traditional constitutional analysis to the second element. And in Page v. Cuomo, the district court held that then-Governor Cuomo’s executive order requiring those entering New York to submit to a fourteen-day quarantine did not likely violate plaintiff’s right to travel. However, and more surprisingly, the Page court’s August decision fully embraced the Jacobson framework.

B. Challenges to the Emergency Declaration/Executive Order Process

Not surprisingly, some state governors and legislatures have disagreed on how to best manage the COVID-19 pandemic particularly where the legislature and executive branches were from different political parties. In some hotly contested litigation between state legislatures and governors, the states’ highest courts weighed in on the current process and procedure for declaring, extending and terminating a state declaration of emergency.

1. State Legislative Authority to Terminate or Extend Governor’s Emergency Declaration or Order

The Pennsylvania Supreme Court in Wolf v. Scarnati stepped in during a dispute between the Pennsylvania legislature and the Governor concerning whether the state legislature could through concurrent resolution unilaterally end the state of the emergency without going through the formal process of presenting any such resolution to the governor for signature or veto. The Emergency Management Services Code provides in pertinent part: “[n]o state of disaster emergency may continue for longer than 90 days unless renewed by the Governor. The General Assembly by concurrent resolution may terminate a state of

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260 Id. at 1142–47. Judge Otake applied the Jacobson two-element test to the facts of the case. Id. at 1143. First, she easily concluded that the 14-day quarantine had a real and substantial relation to public health. Id. at 1143. She cited from the record that the incubation period for COVID–19 can be up to 14 days. Id. Second, she found that the fourteen-day quarantine is not a travel ban, but rather a restriction for which one must comply. Id. at 1145. And even assuming the quarantine imposed a burden on travel and applying strict scrutiny, plaintiffs still are not likely to succeed. Id. at 1146.


262 Id. at 366–67.


264 Id. at 684.

265 Id.
disaster emergency at any time.” On June 9, 2020, the Pennsylvania Senate and General Assembly passed a concurrent resolution which ordered the Governor to end the current state of emergency which had been in effect since early March. The concurrent resolution was not presented to the Governor for his signature or veto. The Pennsylvania Supreme Court held that the State Assembly’s concurrent resolution required presentment to the Governor for his signature or veto and without presentment, the resolution was null and void. If the legislative intent behind the Emergency Management Code was to bypass the Governor’s role here, the Code would not have the additional requirement that the Governor terminate the emergency declaration once a resolution had been issued.

Likewise, in *Kelly v. Legislative Coordinating Council*, the Kansas State Legislature through its appointed council attempted to revoke the Governor’s executive order limiting mass gatherings. Within fifteen days of Governor Kelly declaring an emergency due to COVID-19, the legislature, by concurrent resolution, extended the emergency declaration until May 1, 2020 and, among other things, provided for a contingency if the legislature was not in session. A day after Governor Kelly issued an executive order which no longer exempted religious gatherings from the ten-person limit, the legislative coordinating council (“LCC”) voted to revoke it. The Kansas Supreme Court held that the LCC did not have the authority to revoke the order since the concurrent resolution explicitly stated it only had authority to act “following such state finance council action.” The court found that “the step involving the state finance council must occur before the LCC’s challenged authority is triggered.”

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266 Id. at 685 (emphasis in original) (quoting PA. CONS. STAT. § 7301(c) (2016)); see PA. CONS. STAT. § 7301(c) (2016).
267 *Scarnati*, 233 A.3d at 685–86.
268 See id. at 687.
269 Id. at 707.
270 Id.
272 Id. at 836. First, upon application by the Governor, the State Finance Council could authorize a one-time extension of the emergency declaration. *Id.* And second, “following such state finance action”, the Legislative Coordinating Council may terminate a declaration of emergency or revoke an executive order. *Id.* at 836–37.
273 Id. at 837.
274 Id. at 839.
275 Id.
2. Governor or State Health Official’s Statutory Authority to Issue Emergency Declaration or Executive Order

On April 21, 2020, when most of the country was still on lockdown, the Republican controlled Wisconsin State Legislature brought suit against the state’s Secretary of Health for issuing a second stay-at-home order in *Wisconsin Legislature v. Palm* (“Palm”). In *Palm*, a divided Wisconsin Supreme Court held that the second emergency stay-at-home order issued by the top state health official was unenforceable. To be clear, the Wisconsin Supreme Court majority emphasized that its decision in *Palm* was about the “assertion of power of one unelected official” and not about the Wisconsin Governor’s “[e]mergency order or the powers of the Governor.” Indeed, the emergency order before the court, Order 28, issued by the top state health official, was not issued pursuant to the Governor’s public health emergency declaration but rather by Wis. Stat. § 252.02(3). The majority found that Emergency Order 28 was unenforceable for two reasons. First, Order 28 was a rule and as such Palm needed to follow the rule-making procedures for promulgating such a rule, which she did not do. Second, Palm exceeded her authority under Wis. Stat. § 252.02 when she confined people to their homes, restricted travel, and ordered businesses be closed.

In June 2020, the Oregon Supreme Court in *Elkhorn Baptist Church v. Brown* held that the Oregon Governor’s declaration of emergency concerning COVID-19 was proper. The Oregon Supreme Court found that the declaration did not expire under Or. Rev. Stat. Ann. § 401.165 and that the Governor was not required to specifically declare a public health emergency under Or. Rev. Stat. Ann. § 433.441(1) which had a twenty-

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276 Wis. Legislature. v. Palm, 942 N.W.2d 900, 906–07 (Wis. 2020).
277 Id. at 918.
278 Id. at 904–05.
279 Id. at 906. Emergency Order 28 was issued on April 16, 2020 and superseded Emergency Order 12. Id. Emergency Order 12 was issued on March 24, 2020 pursuant to “Wis. Stat. § 252.02(3) and (6) and all of the powers invested in [her] through Executive Order #72, and at the direction of Governor Tony Evers[,]” Id. at 906 (alterations in the original) (emphasis added).
280 Id. at 918.
281 Id.
282 Id. While Palm argued that she was provided broad powers under Chapter 252 of the Wisconsin Statutes to respond to COVID-19 as a communicable disease, the Wisconsin Supreme Court majority was unpersuaded. Id. at 915–16. First, the majority found that since Palm did not follow rule making procedures, there can be no criminal penalties for violation of the order. Id. at 918. Second, her orders went beyond the statutory powers. Id. For example, while Palm had authority to quarantine those infected or suspected to be infected, her order requiring all citizens to stay home exceeded her authority under statute. Id. at 916.
eight day statutory time limit. Plaintiffs’ argued that all of the Governor’s executive orders are no longer enforceable as the situation was really a “public health emergency” and any such declaration would have expired after twenty-eight days. The court explained that the Governor had several avenues for addressing the COVID-19 pandemic under Oregon law. The Oregon Supreme Court found that the Governor had the discretion when faced with a public health emergency to use either statute. It also saw no conflict in the Governor doing so. The court reasoned that “[o]ne of the reasons the ORS chapter 433 emergency statutes were enacted was to give the Governor an option for responding to a public health emergency by taking a step short of declaring a state of emergency under chapter 401.” The Court also found that the two statutes were intended to work together. In fact, Chapter 433 specifically states that nothing in that statute limits the Governor’s ability to declare a state of emergency under Chapter 401.

A few months later, the Michigan Supreme Court was confronted with a similar situation in In re Certified Questions where the Michigan Governor based her declaration of emergency concerning COVID-19 on

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284 Id. at 38, 45, 52.
285 Id. at 38–39. Plaintiffs were a number of churches and churchgoers and later a number of individuals, local officials and businesses owners intervened and filed their own complaint. Id. at 35, 39. Plaintiffs also made an alternative argument that the emergency declaration should have expired after 30 days under Article X-A of the Oregon Constitution. Id. at 39. The court held that the Governor did not invoke the extraordinary powers provided to her under the state constitution in response to a catastrophic disaster. Id. at 51.
286 Id. at 38. The first way is via Or. Rev. Stat § 401.165 which is Oregon’s general emergency disaster statute. Id. at 36. That statute authorizes the Governor to declare a state of emergency and with that declaration the Governor is vested with broad authority including the right to exercise police powers. Id. Or. Rev. Stat. § 401.165 does not have any durational limits, but the Governor is to terminate the state of emergency when it no longer exists. Id. And the legislature may terminate the state of emergency at any time through a joint resolution. Id. A second more limited avenue would be for the Governor to declare a public health emergency under Or. Rev. Stat. § 433.441(1). Id. at 38. As with § 401.165, the public health emergency declaration under § 433.441(1) gives the Governor certain emergency powers but is more limited. Id. at 45. Or. Rev. Stat. § 433.441(1), however, has a statutory durational limitation of twenty-eight days. Id. at 38.
287 Id. at 45.
288 Id.
289 Id. at 46 (emphasis added).
290 See id. at 48.
291 Id. Or. Rev. Stat. § 433.441(4) provides that the Governor who declares a state of emergency under Chapter 401 is authorized to implement any action provided under Chapter 433. Id.
two separate emergency statutes. The Michigan Supreme Court examined the Governor’s authority under both of these statutes: the Emergency Management Act of 1976 (the “EMA”) and the Emergency Powers of the Governor’s Act of 1945 (the “EPGA”).

The context was key in the court’s analysis and decision. On March 10, 2020, Michigan Governor Whitmer declared a state of emergency due to the COVID-19 pandemic under both the EMA and EPGA. And on March 23, 2020, she issued a stay-at-home order. On April 1, 2020, the Governor again issued a state of emergency under the EMA and EPGA and asked the State Legislature in accordance with the EMA to extend the emergency for an additional seventy days. The Legislature extended the state of emergency but only until April 30, 2020. On April 30, 2020, the Governor terminated the state of emergency under the EMA but issued another order stating that the state of emergency was still in effect under the EPGA. She then issued an executive order “redeclaring” the state of emergency under the EMA.

For the first question, the Michigan Supreme Court provided a unified and clear holding that the Governor lacked authority to issue any further executive orders after April 30 under the EMA. The Michigan EMA gives the Governor the authority to declare a state of emergency and also provides that “[a]fter 28 days, the Governor shall issue an executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an extension of the state of disaster for a specified number of days has been approved by both houses of the legislature…” The Michigan high court found that the Governor redeclared an identical emergency to bypass the legislature’s limitation on her authority. The court reasoned that, to give effect to the Governor’s actions here would be tantamount to ignoring the plain statutory language of the EMA in providing the legislature power to limit the Governor’s authority.

293 Id. at 7.
294 Id. at 6.
295 Id.
296 Id. at 6–7.
297 Id. at 7.
298 Id.
299 Id. at 6.
300 Id. at 9 (emphasis added).
301 Id. at 10.
302 Id. On March 31, 2021, the Wisconsin Supreme Court similarly held that Governor Evers exceeded his statutory authority under that state’s emergency disaster statute when he continually reissued emergency declarations notwithstanding the statute’s clear language that the emergency declaration expires after sixty days unless
The second question concerned whether the EPGA was constitutional. In a divided decision, the Michigan Supreme Court held that the EPGA violated the Michigan Constitution because the statute “constitutes an unlawful delegation of legislative power to the executive ...” In doing so, the majority took issue with the broad powers provided to the Governor under the EPGA to “promulgate reasonable orders, rules and regulations that he or she considers necessary to protect life and property.” Having delegated such broad powers to the Governor, the majority looked to see if the EPGA provided sufficient checks on this power. First, the majority found the legislature did not have any check on the duration of the Governor’s emergency declaration under the EPGA. Second, the majority found that the EPGA provided no legislative standard or direction guiding the Governor in exercising these broad powers. Finding no reasonable check on the Governor’s broad powers under the EPGA, the Michigan Supreme Court concluded the statute was unconstitutional. And with the Michigan Supreme Court’s decision, Governor Whitmer went from having two avenues of emergency powers to none.

Hoping to ride the coattails of the Michigan decision, several Kentucky business owners along with the Kentucky Attorney General challenged Kentucky Governor Beshear’s declaration of emergency in Beshear v. Acree. In the November 2020 decision, the Kentucky Supreme Court in a lengthy opinion held that Governor Beshear properly declared a state of emergency and that his authority to issue executive

renewed by the state legislature. See Fabick v. Evers, 956 N.W.2d 856, 860 (Wis. 2021).

303 In re Certified Questions, 958 N.W.2d at 7.
304 Id. at 24.
305 Id. (citations omitted). The court also listed many of Governor Whitmer’s executive orders issued under the EPGA emergency powers including face covering mandates, social distancing orders, business capacity restrictions to name a few. Id. at 20–21.
306 Id. at 17.
307 Id.
308 Id. at 20. In doing so, the majority found the term “reasonableness” to be merely an “illusory limitation upon the Governor’s discretion because the legislature is presumed not to delegate the authority to be unreasonable.” Id. at 22. Likewise, it found the other alleged guiding term “necessary” to be too overbroad to put any reasonable constraints on the governor’s actions. Id.
309 Id. at 22. The dissent argues that there are a number of reasonable checks on the Governor’s emergency powers under the EPGA such as repealing or amending the statute. Id. at 50–51 (McCormick, J., dissenting).
310 Beshear v. Acree, 615 S.W.3d 780, 786 (Ky. 2020). In February 2021, the Kentucky legislature in an attempt to bypass the Kentucky Supreme Court decision passed four bills aimed at vastly limiting the governor’s emergency powers. See Gabriel, supra note 146.
orders did not raise issues of separation of powers or violate the nondelegation doctrine. The court found that Governor Beshear had broad executive powers during times of emergency and even if he did not, the Legislature properly delegated that authority under the state’s emergency disaster statute. First, those executive powers come in part from the state constitution itself which vests the Governor with “supreme executive power of the commonwealth” and providing only the Governor with discretion to call a special legislative session for “extraordinary occasions.” That tilt toward the executive is also underscored by a state legislature that meets only part-time. Indeed, the Kentucky Supreme Court noted that the state legislature meets only sixty days per year in even numbered years and only thirty days in odd numbered years with sessions not extending beyond April 15 and March 30 respectively. In closing the door on the separation of powers argument, the court found that “the structure of Kentucky government as discussed renders it impractical, if not impossible, for the legislature, in session for only a short period of time each year to have a primary role in steering the Commonwealth through an emergency.”

Nor do the emergency powers granted to the Governor by Ky. Rev. Stat. § 39A.010 violate the nondelegation doctrine. The Court distinguished Acree from the Michigan Supreme Court case In re Certified Questions finding that the Kentucky Governor does not have emergency powers of unlimited duration nor is the Kentucky legislature continuously in session ready to accept responsibility for the emergency.

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311 Beshear, 615 S.W.3d at 786.
312 Id. The Kentucky Supreme Court found that Governor Beshear properly declared a state of emergency under KRS 39A.010 which includes biological and etiological hazards such as the COVID-19 pandemic. Id.
313 Id. at 790.
314 Id. at 807.
315 Id.
316 Id. at 808–09.
317 Id. at 809.
318 Id. at 812. The Kentucky legislature in late March 2020 through S.B. 150 placed a durational limitation, albeit a weak one, on Governor Beshear’s state of emergency. Id. S.B. 150 § 3 provided that the Legislative Assembly may declare that the emergency no longer exists on the first day of the next session if the Governor has not already done so. Id. at 812–13. Kentucky’s emergency disaster statute, KY. REV. STAT. § 39A.100 does not have any durational limitation. KY. REV. STAT. § 39A.100. Additionally, the Court also held that the Governor was authorized to issue emergency executive orders under KY. REV. STAT. § 39A and need not promulgate emergency regulations under KY. REV. STAT. § 13A. Beshear, 615 S.W.3d at 787.
State responses to the pandemic have varied significantly. Some states such as New York have actively approached the pandemic on all fronts with the Governor, state legislature and state agencies all taking on a role in the process. Other states such as Florida have taken a more hands-off approach especially toward the latter part of 2020. And in both Michigan and Wisconsin, the Governors and state legislatures have largely been at odds with one another requiring the judiciary to step in on multiple occasions to settle the disputes. Section IV is divided into four subparts where I explain how New York, Florida, Michigan and Wisconsin responded during the COVID-19 pandemic in 2020.

A. New York

As one of the primary hot spots early on in the pandemic, then-New York Governor Andrew Cuomo quickly declared a state of emergency due to COVID-19. On March 20, 2020, Governor Cuomo signed the “New York State on Pause” executive order which, among other things, required all non-essential businesses to close in-office personnel functions, banned non-essential social gatherings of any size and included a ninety-day moratorium on evictions. The Governor stopped short of instituting a state-wide stay-at-home order saying that doing so evoked images of “shooter situations” or “nuclear war.” On April 17, 2020, New York was also one of the first states to order a mask mandate. On April 26, 2020, Governor Cuomo announced a phased approach to reopening New

319 See Gabriel, supra note 146.
321 See Gabriel, supra note 146.
323 Id. See also See N.Y. EXEC. LAW § 29-a (McKinney 2020) (providing governor with authority to temporarily suspend laws and issue directives “necessary to cope with the disaster”).
325 N.Y. Exec. Order 202.17, N.Y. Comp. Codes R. & Regs. tit. 9, § 8.202.17 (April 17, 2020) (ordering that any individual “over age two and able to medically tolerate a face-covering shall be required to cover their nose and mouth with a mask or cloth face-covering when in a public place and unable to maintain, or when not maintaining, social distance”).
York industries and businesses. The reopening was slow lagging behind most of the country though arguably better suited to contain the spread of the virus. In the fall of 2020, as with most states, New York experienced a surge in cases. Rather than issuing state-wide closures or lockdowns, Governor Cuomo established mitigation measures for “clusters” of COVID-19 cases. This executive order came about because of certain “hot spots” of COVID-19 infection in Kings, Queens, Broome, Orange and Rockland counties. As discussed in supra Part III, Subpart A:1., the United States Supreme Court in Roman Catholic Diocese of Brooklyn v. Cuomo found that the executive order, which among other things limited the size of indoor gatherings in certain geographical zones, likely violated plaintiffs’ rights under the Free Exercise Clause.

In July 2020, in an effort to formalize some of Governor Cuomo’s executive orders, the New York State Department of Health issued a series of COVID-19 temporary emergency regulations concerning face-coverings, non-essential gatherings and business operations which lasted through the state of disaster emergency.

As of mid-November 2020, the New York State legislature had introduced nearly 500 COVID-19 related bills. Among those bills enacted, the legislature provided for a moratorium on utility termination of services and a COVID-19 public employee death benefit. In a most


328 Id.


330 Agudath Isreal of Am. v. Cuomo, 983 F.3d 620 (2d Cir. 2020).


332 See N.Y. COMP. CODES R. & REGS. tit. 10 § 66-3.1-3.5. (2020). For example, section 66-3.3 provides that there shall be no non-essential gatherings greater than ten individuals for any reason “unless modified by any Executive Order . . . [for] implementing the phased reopening of New York businesses and the relaxation of social distancing rules by region. Id. § 66-3.3 (emphasis added). These emergency regulations expired on October 6, 2020 and the same emergency regulations were reissued on October 7, 2020. Id.

333 See State Laws in Response to the Coronavirus (COVID-19) Pandemic, supra note 145.

unusual move, the New York legislature convened a special session between Christmas and the New Year to provide critical economic relief to many of its citizens by passing “one of the most comprehensive anti-eviction laws in the nation.” The ban halted current evictions for sixty days and prohibited landlords from initiating most new evictions until May 1, 2021.

As of December 31, 2020 New York reported a staggering 978,000 positive COVID-19 cases and 38,000 deaths. However, approximately 31,000 of those deaths came in the first three months of the pandemic.

On March 4, 2021 both the New York Times and Wall Street Journal reported that some Cuomo administration staff rewrote a report produced by the state Department of Health to “conceal the pandemic’s true death toll at long-term care facilities.” This scandal coupled with recent sexual misconduct allegations against Governor Cuomo concerning several former female staff members prompted the New York Legislature to limit some of the governor’s emergency powers. The bill which was signed by Governor Cuomo repealed special emergency powers given to the governor by the Legislature about a year earlier to respond to the pandemic. However, the Legislature left in place those emergency powers the Governor had prior to the pandemic as well as current emergency orders that are still in effect.


336 Id.

337 See Ctr. For Sys. Sci. and Eng’g, COVID-19 Dashboard, JOHNS HOPKINS SCH. OF MED. (as of April 28, 2021), https://gisanddata.maps.arcgis.com/apps/dashboards/bda7594740fd40299423467b48e9ecf6 [https://perma.cc/BUA6-3UF8]. New York has the third highest numbers of cases and the most deaths from COVID-19 in the United States. Id.

338 Id.


342 See id.
New Yorkers overwhelmingly supported Governor Cuomo’s management of the COVID-19 pandemic. Governor Cuomo had a 70% approval in April 2020 compared to a national average of 64%, and an approval rating of 53% in February 2021 with a national average of 46%. Even after Governor Cuomo was plagued by a sexual assault scandal and the New York State Legislature repealed some of his emergency powers, 64% of New York democrats said that Cuomo has done a good job providing information during the pandemic.

B. Florida

Florida’s Governor similarly declared a state of emergency concerning COVID-19 early in March, 2020. Taking a different approach than New York, on March 15, 2021, Governor DeSantis barred visitation to nursing homes and set up “Covid-dedicated” health wards for seniors testing positive for COVID and who could not be properly isolated in their current facility. Between March 17th and March 31st, the Governor issued a number of executive orders designed to curb the spread of COVID-19 including, among others, limiting restaurant capacity and banning non-emergency medical procedures. And on April 1, 2020, the

344 Id.
Governor issued a stay-at-home order and said all persons in Florida should limit their activities to obtaining or providing essential services.\textsuperscript{349} Governor Desantis’ efforts to curb COVID-19 transmission were short-lived.\textsuperscript{350} He lifted the stay-at-home order only four weeks later on April 29, 2020, but with limitations as most of Florida entered phase one of Florida’s reopening plan.\textsuperscript{351} Florida was not an initial hot spot, but it opened up its economy more quickly than other states. In July 2020, just after the Governor allowed retail establishments, museums and gyms among other businesses to operate at full capacity, Florida experienced a surge in COVID-19 cases and reported the country’s highest single-day record at the time for positive tests at 15,299.\textsuperscript{352} While still in the midst of the summer surge, Governor DeSantis issued Executive Order 20-244 providing that all of Florida enter phase three of its reopening plan.\textsuperscript{353} In an unusual move, the Governor removed all capacity and other restrictions

on businesses and suspended all fines concerning COVID-19. In other words, individuals and businesses could not be penalized if they violated any COVID-19 restrictions in the state. While some city and local governments may have had certain restrictions in place such as capacity restrictions or a local mask mandate, they were powerless to enforce them. Some Florida counties were not even permitted to maintain some of their local COVID-19 orders. For example, restaurant and bar owners brought suit against Broward County for ordering that these establishments could not serve between midnight and 5 a.m. The federal district court held that Broward County’s order was preempted by Governor DeSantis’ recent order effectively reopening all Florida businesses. The Florida Governor has not issued nor has plans to issue a state-wide mask mandate though a few local counties have mandates. However, since Executive Order 20-244 suspends the collection of fines associated with COVID-19, any local mask mandate is essentially unenforceable.

By the end of 2020, the Florida state legislature had not passed any legislation designed to either curb the transmission of COVID-19 or to provide economic relief to its citizens due to the pandemic. As of December 31, 2020, Florida reported approximately 1.3 million positive COVID-19 cases and 21,700 deaths. Florida had the third highest number of reported positive cases and the fourth highest number of COVID-19 fatalities.

During 2020, Florida citizens have largely disapproved of Governor DeSantis’ handling of the pandemic. His approval rating was just 46% in April 2020, which was significantly below the 64% average for approval for Governors at that time. It further declined to 40% in October 2020 which is 8% below the average for other Governors in October. Even

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354 Id.
356 Id. at *7.
358 Id.
359 As of mid-November 2020, the Florida state legislature passed one bill which declared the Florida State Seminoles the NCAA champions upon default as the NCAA tournament was canceled due to COVID-19 concerns. S.R. 1934, 2020 Reg. Sess. (Fla. 2020).
360 See COVID-19 Dashboard, supra note 337.
361 Id. California and Texas reported higher positive cases and only New York, California and Texas recorded higher total fatalities. Id.
362 See Lazer, supra note 343.
as recently as February 2021, DeSantis’ approval hit a pandemic low of 35%, more than 11% below the national average.\textsuperscript{363} However, in March 2021, Governor DeSantis was praised by some for his handling of the pandemic, particularly his approach in managing long term care facilities during the early part of the crisis.\textsuperscript{364} He has also been commended for reopening the Florida economy more quickly than other states.\textsuperscript{365} Still, others argue that Governor DeSantis did not necessarily manage the pandemic well but rather Florida’s weather and less densely populated areas may have reduced the spread of the virus.\textsuperscript{366}

\textbf{C. Michigan}

As discussed in \textit{supra} Part III, on March 10, 2020, Michigan Governor Gretchen Whitmer declared a state of emergency under two separate emergency statutes – the Emergency Management Act of 1976 ("EMA") and the Emergency Powers of the Governor’s Act of 1945 ("EPGA").\textsuperscript{367} The Governor shortly thereafter ordered that gatherings greater than 250 persons were prohibited and schools were to close on March 16.\textsuperscript{368} Five days later, Governor Whitmer ordered Michigan residents to stay at home.\textsuperscript{369} Within three weeks of the Governor’s initial emergency declaration, there were nearly 10,000 COVID-19 cases and 337 deaths in the state.\textsuperscript{370} On April 1, 2020, Governor Whitmer issued Executive order 2020-33 which expanded her initial emergency declaration.\textsuperscript{371} The Michigan Legislature through Concurrent Senate Resolution 24 approved and extended Governor Whitmer’s emergency

\textsuperscript{363} Id.
\textsuperscript{364} Finley, \textit{supra} note 347.
\textsuperscript{365} Id.
\textsuperscript{371} Id.
declaration until April 30, 2020.\textsuperscript{372} On April 30, Governor Whitmer issued Executive Order 2020-66 which terminated her previous declarations of emergency and then issued Executive Orders 2020-67 and 2020-68 where she redeclared a state of emergency concerning COVID-19 under both the EPGA and EMA respectively.\textsuperscript{373} She did so without legislative approval. The Michigan Legislature instead sought to proceed without renewing the state of emergency by passing Senate Bill 858, which sought to limit the Governor’s initial emergency declaration to fourteen days before needing legislative approval to extend.\textsuperscript{374} Senate Bill 858 also sought to lift the stay-at-home order while introducing social distancing measures and cleaning protocols for opened businesses.\textsuperscript{375}

On May 4, 2020, the Governor introduced the state’s reopening plan but did not lift the stay-at-home order until June.\textsuperscript{376} On May 6, the Michigan state legislature leadership brought suit against Whitmer for exceeding her authority under both the EPGA and EMA and the next day Governor Whitmer vetoed Senate Bill 858.\textsuperscript{377} On May 22, 2020, Governor Whitmer rescinded her previous declarations of emergencies under both the EPGA and EMA and reissued those emergency declarations to reflect the ongoing nature of litigation concerning her authority to issue them.\textsuperscript{378} In the summer of 2020, most Michigan regions entered phase four of the Michigan Safe Start Plan which allowed for some small non-essential


\textsuperscript{375} Id.


gatherings and lower risk businesses to reopen. On July 13, 2020, the Governor issued an order requiring all individuals who leave their home to wear a mask.

As discussed more fully in supra Part III.B, the Michigan Supreme Court in In re Certified Questions found that neither the emergency declaration under the EMA nor the one under the EPGA were valid and enforceable. And on October 12, 2020, the Michigan Supreme Court held that Governor Whitmer’s emergency orders had no effect and urged the Governor and state legislature to work together.

With all of the Governor’s emergency executive orders rescinded, both Michigan state agencies and the state legislature engaged in a flurry of activity to provide some of the basic protections for its citizens that were no longer covered. On October 5, 2020, the director of the Michigan Department of Health and Human Services issued an “Emergency Order Under MCL 333.2252 – Gathering Prohibition and Mask Order.” This public health order was to replace the Governor’s most recent executive order on face coverings and gatherings. On October 15, 2020, the Michigan Department of Labor and Economic Opportunity promulgated emergency rules that clarified that Workers’ Compensation coverage for first responders who test positive for COVID-19 is presumed, replacing previous coverage provided under executive order 2020-128. The state

379 Id. Phase Five allows for larger gathering sizes and for most businesses to reopen. Id.


381 See In re Certified Questions, 958 N.W.2d 1, 31 (Mich. 2020).


384 Id. This order replaces three of the Governor’s executive orders: 2020-153, 2020-160 and 2020-161. Id.

le legislature stepped in with several bills to codify previous executive orders with the Governor, signing six of them as of early November, 2020.\footnote{386} The Michigan State Legislature introduced nearly 200 COVID-19 related bills and resolutions.\footnote{387} Most of the legislative action occurred after the Michigan Supreme Court confirmed that Michigan was no longer under a state of emergency.\footnote{388}

As of December 31, 2020, Michigan had reported 528,600 positive COVID-19 cases and 13,000 deaths.\footnote{389} Governor Whitmer has received high approval ratings for her handling of the pandemic with a 62% approval rating in April, a 56% approval rating in October 2020 and a 52% rating in February 2021, all exceeding the national average.\footnote{390}

In early April 2021, as most of the United States saw a decrease in COVID-19 cases, Michigan experienced a significant surge where it was reporting over 7,000 infections per day—a seven fold increase from February 2021.\footnote{391} Going against health official recommendations, Governor Whitmer did not issue any stay-at-home orders or close down any businesses.\footnote{392} Recognizing that Michigan citizens suffered from pandemic fatigue, she asked that citizens take a two-week pause from in-person dining, high school and sports.\footnote{393} As of May 1, 2021, Michigan’s two week positive case average decreased by 46% to about 4600 new cases per day.\footnote{394}


\footnote{387}See State Laws in Response to the Coronavirus (COVID-19) Pandemic, supra note 145.


\footnote{389}See COVID-19 Dashboard, supra note 337.

\footnote{390}See Lazer, supra note 343.


\footnote{392}Id.

\footnote{393}Id.

D. Wisconsin

On March 12, 2020, Wisconsin Governor Tony Evers declared a public health emergency which was due to expire in sixty days unless extended by the legislature.\footnote{Wis. Exec. Order No. 72 (Mar. 12, 2020), https://evers.wi.gov/Documents/EO/EO072-DeclaringHealthEmergencyCOVID-19.pdf [https://perma.cc/4ETM-RL9C].} On March 24, 2020, the Secretary of Health ordered residents to stay at home in accordance with the Governor’s public health emergency declaration and Wis. Stat. section 252.02(3), also known as the Safer at Home Order.\footnote{Wis. Exec. Order No. 12 (Mar. 24, 2020), https://evers.wi.gov/Documents/COVID19/EMO12-SaferAtHome.pdf [https://perma.cc/HL3W-RKH9].} About two weeks before the public health emergency was set to expire, the Secretary of Health reissued the Safer at Home Order but solely under Wis. Stat. section 252.02(3) and not under the Governor’s emergency declaration.\footnote{Wis. Exec. Order No. 28 (Apr. 16, 2020), https://evers.wi.gov/Documents/COVID19/EMO28-SaferAtHome.pdf [https://perma.cc/XKA7-E3TA].} This new order had the effect of bypassing the need for a legislative resolution to extend the public health emergency.\footnote{Id.} As described more fully in supra Part III.B, the Safer at Home Order was declared unenforceable by the Wisconsin Supreme Court on May 13, 2020, effectively reopening the entire Wisconsin economy.\footnote{Id.} Notwithstanding the Wisconsin Supreme Court’s rulings, Governor Evers continued renewing the state of emergency and both Evers and Secretary Palm continued to issue orders in an effort to curb transmission of the virus.\footnote{Id.} For example, on August 1, 2020, Governor Evers ordered that face coverings required in indoor spaces rather than in a private residence.\footnote{Wis. Gov. Emergency Order No. 1 (Aug. 1, 2020), https://evers.wi.gov/Documents/COVID19/EmO01-FaceCoverings.pdf [https://perma.cc/3DT8-ALSL].} Secretary Palm was not as successful when she...
issued Emergency Order #3 limiting public gatherings in early October, as a Wisconsin appellate court enjoined enforcement of the order. On November 10, 2020, Governor Evers – not the Secretary of Health – issued Executive Order #94 titled “Relating to Actions Every Wisconsinite Should Take to Protect their Family, Friends, and Neighbors from COVID-19.” This advisory recommends that all Wisconsinites should stay home as much as possible due to the surge of COVID-19 positive cases in the state. There is no penalty for failing to comply with this advisory.

In late January 2021, Governor Evers had only a few COVID-19 restrictions in place including the state-wide mask mandate. Looking to repeal the mask mandate, the Wisconsin Legislature passed Concurrent Resolution No. 3 which stated that Governor Evers had no authority to renew the state of emergency due to COVID-19 and that even if he did, the Legislature was using its authority to terminate the emergency declaration by concurrent resolution. This had the effect of ending all of the Governor’s executive orders including the mask-mandate order. Notwithstanding the Legislature’s resolution terminating the emergency declaration, Governor Evers issued a new emergency declaration and a new mask mandate. On March 31, 2021, the Wisconsin Supreme Court

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404 Id.


407 Id.

in *Fabick v. Evers* held that Governor Evers exceeded his authority under the state’s emergency disaster statute for reissuing multiple states of emergency due to COVID-19 when the statutory duration for a state of emergency was sixty days unless extended by the Legislature.\(^{409}\) Like Michigan, Wisconsin no longer has a state of emergency due to COVID-19.\(^{410}\)

As of November 16, 2020, the Republican controlled state legislature had passed only one bill related to the COVID-19 pandemic.\(^{411}\) Governor Evers and the Secretary of Health’s lack of authority to issue community mitigation measures has taken a toll on the state. As the New York Times reported in early November 2020, COVID-19 cases have surged all across the country “but nowhere as quickly as Wisconsin.”\(^{412}\) In the first week of November, Wisconsin reported over 6,000 cases per day.\(^{413}\) The fall surge was attributed in part to the party line division within the state on how to manage the pandemic.\(^{414}\) As of December 31, 2020, Wisconsin reported 520,400 cases of COVID-19 and 5,200 deaths from the disease.\(^{415}\) Governor Evers’s approval rating steadily declined from a high of 56% in April to 41% in October, but jumped to a high of 54% in February 2021 as he fought to maintain the state of emergency and the state’s mask mandate.\(^{416}\)

### VI. ANALYSIS AND RECOMMENDATIONS

With a surge in cases at the time of this article’s submission in March 2021, state governors continued to issue executive orders aimed at curbing the spread of COVID-19, as well as addressing the significant economic challenges.

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\(^{409}\) 956 N.W.2d 856, 869–80 (Wis. 2021).

\(^{410}\) As of May 1, 2021, only Alaska, Wisconsin and Michigan did not have a current COVID-19 state of emergency. See COVID-19 Reopening and Reclosing Plans, supra note 11.


\(^{413}\) *Id*.


\(^{415}\) See COVID-19 Dashboard, supra note 337.

\(^{416}\) See Lazer, supra note 343.
impacts this pandemic has had on their state’s economy. These orders have not been uniformly welcomed with open arms. Individuals, businesses, and religious organizations have protested in the streets against some of the most restrictive social distancing orders and have challenged them in the courts. Therefore, subpart A evaluates whether there are sufficient checks in place on the state executive or if some of those checks are too burdensome on governors. Next, subpart B examines how both governors and litigants can learn from prior cases to better craft executive orders that may avoid some of the constitutional pitfalls. And finally, subpart C looks at how the state legislature or various state agencies could undertake a more active role by enacting emergency statutes or regulations concerning COVID-19.

A. Checks on Governor’s Emergency Executive Order Authority

While the United States saw an unprecedented number of executive orders issued by state governors, its citizens can be reasonably assured that there are enough checks in place against a governor that may have overstepped her bounds. First, a majority of state legislatures can terminate their governor’s declaration of emergency at any time through a concurrent resolution. If the state legislature terminated the emergency declaration, it also terminates the governor’s authority to issue executive orders in accordance with the emergency. Second, the judiciary is providing meaningful review of challenges to executive orders particularly where the order concerns potential civil rights violations.

1. Legislative Oversight and Statutory Limits

Typically, state legislatures have some oversight or ability to limit a governor who oversteps her authority when issuing emergency orders. However, some statutory guardrails are better than others. Perhaps the most balanced form of check on the governor’s emergency powers is the state legislature’s authority to terminate the state of emergency by concurrent resolution. Indeed, about thirty-three state legislatures can terminate a governor’s declaration of emergency and all of the emergency

417 See supra Part II.
418 Id.
419 See supra Part III.
420 See infra Appendix A.
421 See supra Part III.
422 Id.
423 See infra Appendix A.
powers that come with it. A joint resolution terminating an emergency would not be a power likely wielded often as a majority of the state legislature would be needed for its passage. The joint resolution may need to be presented to the governor for her signature. Only a few state legislatures such as the Kansas and Pennsylvania state legislatures have attempted to terminate their governor’s emergency declaration through legislative resolution but failed either because the resolution was not presented for the governor’s signature or because it failed to follow proper procedures. And it may have been for the best as Kansas and Pennsylvania each have an active state of emergency. In contrast, in January 2021, the Wisconsin legislature by concurrent resolution terminated Governor Evers current COVID-19 emergency declaration, only to have Governor Evers reissue a new emergency declaration. While Governor Evers’ intent was to bypass the statutory guardrail...

424 Id. I use the term state legislature to refer to the fifty U.S. states as well as to the District of Columbia and the U.S. territories.

425 See infra notes 427, 429 (explaining that only the Kansas, Pennsylvania and Wisconsin state legislatures passed a legislative resolution to end the state of emergency).

426 See, e.g., Wolf v. Scarnati, 233 A.3d at 707 (finding that the legislature must present the concurrent resolution terminating the state of emergency to the governor). An additional argument could be made that a state legislature cannot use a concurrent resolution to end the emergency without presenting it to the governor for signature or veto since executive orders have the full force of law. See Gen. Assemb. of State of N.J. v. Byrne, 448 A.2d 438 (N.J. 1982) (finding broad legislative veto provision in New Jersey Legislative Oversight Act violated separation of powers doctrine by usurping Governor’s authority under the Presentment Clause of State Constitution).


428 COVID-19 Reopening and Reclosing Plans, supra note 11.

provided by the state’s emergency disaster statute, he was ultimately unsuccessful. For the approximately twenty states or U.S. territories without this type of statutory guardrail, their respective emergency disaster statutes or state constitutions should be amended to include one.

Most state emergency disaster statutes provide for an emergency declaration of a limited duration such as thirty, sixty, or ninety days. Yet a number of these state statutes do not specify who may extend the state of emergency. Some states vest the power to renew with the governor. Unlike an open-ended emergency declaration, these emergency disaster statutes with durational limits provide for some type of regular review of the need for the emergency but that review likely rests with the executive and would not be a check on her power.

Instead of the power to terminate a declaration of emergency, about seven state legislatures are vested with the power to renew a governor’s state of emergency after a certain period of time. It seems as this is not so much a limit on the governor’s power but rather requires active participation by the state legislature in the emergency power process and goes too far in times of emergency. Since state legislatures are known to be sluggish, this process can lead to inaction and the inability to come together resulting in an expired emergency declaration even though the need to continue the emergency is still pressing. Also, this provision can be used for political purposes to thwart activity of the governor from the opposing party. Michigan and Wisconsin are two cases in point. Governor Whitmer, a Democratic governor, sidestepped the state emergency statute’s requirement that she request the legislature’s approval to continue the state of emergency past twenty-eight days knowing she would be thwarted by a predominantly Republican legislature. With the Michigan Supreme Court holding that she did not comply with the statute, her initial emergency declaration expired leaving her without any emergency powers amidst an ongoing crisis. The Democratic Wisconsin Governor, Tony Evers, likewise had his Secretary of Health issue a stay-at-home order under a specific Wisconsin Statute rather than

430 Fabick v. Evers, 956 N.W.2d 856, 869–70 (Wis. 2021). The Wisconsin Supreme Court held that Evers did not have authority to reissue the COVID-19 emergency declarations as the statute only provides for a state of emergency to last for sixty days unless extended by the legislature. Id. at 868–70.

431 See infra Appendix A.

432 Id.

433 Id.

434 Id.

435 Id. Those seven states are Alaska, Kansas, Michigan, Oklahoma, South Carolina, Washington, and Wisconsin. Id.

436 See generally supra Part IV.C.

under his public health emergency declaration as that declaration was set to expire in May and he needed the concurrent resolution of the Republican led legislature to extend the emergency.\textsuperscript{438} As with Michigan, the Wisconsin Supreme Court intervened in the dispute between the executive and legislative branches holding that the Secretary of Health exceeded her authority and declared the stay-at-home order invalid and unenforceable.\textsuperscript{439} In March 2021, the Wisconsin Supreme Court held that Governor Evers did not have the authority to declare a state of emergency in response to COVID-19 once the sixty day durational limitation expired.\textsuperscript{440} Like Michigan, Wisconsin was no longer in a state of emergency as the legislature did not seek to extend it.\textsuperscript{441}

In contrast, during the worst of the pandemic in Pennsylvania, the state legislature did not have the authority to extend an emergency declaration.\textsuperscript{442} The Legislature was limited to terminating a state of emergency by legislative concurrent resolution that also must be presented to the governor for signature or veto.\textsuperscript{443} While the Pennsylvania state legislature adopted a concurrent resolution to end the COVID-19 state of emergency, Governor Wolf vetoed that resolution, and the state assembly did not have the two third majority votes necessary to override the veto.\textsuperscript{444} This is the democratic process at work.\textsuperscript{445}

However, some may argue that the state legislature’s power in many of these emergency disaster statutes gives it little flexibility – it is an all or nothing approach. New York may have a better solution. In New York, the state legislature had both the authority to terminate a state of emergency as well as the authority to terminate a specific emergency executive order.\textsuperscript{446} If the state legislature finds that the governor overstepped his authority in issuing a particular order, it may by concurrent resolution terminate that specific order rather than the entire state of emergency.\textsuperscript{447}

\begin{enumerate}
\item See generally supra Part IV.D.
\item See Wis. Legislature. v. Palm, 942 N.W.2d 900, 906–07 (Wis. 2020).
\item Fabick v. Evers, 956 N.W.2d 856, 859 (Wis. 2021).
\item Id.
\item See infra Appendix A.
\item Id.
\item N.Y. EXEC. LAW § 20-A(4).
\item Id.
\end{enumerate}
In Kentucky, the state legislature went beyond giving itself the power to terminate a resolution or state of emergency: it passed legislation to strip certain emergency powers from its governor.\(^{448}\) Rather than providing for a check on the governor’s emergency powers with respect to closing certain businesses to curb transmission of COVID-19, it usurped those powers by allowing for businesses, schools and associations to remain open as long as their plan meets or exceeds CDC guidance.\(^{449}\) It took away the Governor’s ability to protect its citizens from the ongoing pandemic when closing businesses in response to a highly transmissible variant may be necessary notwithstanding compliance with CDC guidance. And, it is shocking that this part-time legislature that meets either thirty or sixty days per year is required to extend any emergency executive order concerning in-person meetings.\(^{450}\) For a state legislature whose state constitution dictates that it is not to be in session beyond April in any given year, the general assembly cannot feasibly renew executive orders expiring in the summer or fall.\(^{451}\) If a court does not declare this legislation unconstitutional, the Governor will be powerless to employ certain mitigation measures should the need arise, and the part-time state legislature may not be in session to take over for the executive.

Some state legislatures may need to do some statutory cleanup to better integrate their public health statutory scheme with their overall emergency disaster statutory framework. For a number of states, the governors declared both a public health emergency and a general state of emergency.\(^{452}\) For those states, their public health emergency statute may not provide their governor with sufficient emergency powers to respond to the virus.\(^{453}\) Instead of declaring both types of emergencies, governors should have an option to use their full range of emergency powers when confronting a public health emergency. That option should come with the same set of statutory guardrails as with the emergency disaster statute. For other states, such as Wisconsin, the governor was provided with little emergency powers but instead was ordered to direct the Secretary of

\(^{448}\) See H.B. 1, 2021 Reg. Sess. (Ky. 2021) (allowing businesses, schools and associations to remain open if their plan meets or exceeds current CDC guidance); H.B. 5, 2021 Reg. Sess. (Ky. 2021) (limiting the authority of governor to temporarily reorganize administrative agencies without legislative approval); S.B. 1, 2021 Reg. Sess. (Ky. 2021) (limiting executive orders concerning in-person meetings to thirty days unless extended by legislature); S.B. 2, 2021 Reg. Sess. (Ky. 2021) (requiring state agencies to submit documentation to legislative subcommittee before issuing emergency regulations).

\(^{449}\) See Ky. H.B. 1.

\(^{450}\) See Ky. S.B. 1.

\(^{451}\) KY. CONST. § 42.

\(^{452}\) See infra Appendix A.

\(^{453}\) Id.
Health to respond to the emergency.\textsuperscript{454} No doubt state legislatures will also need to contemplate long term reform of their public health emergency statutory framework. One legal scholar has proposed statutory reform to codify the law of social distancing.\textsuperscript{455} As with recent public health emergency reform, this change may be necessary, but it will not come easy. In the meantime, for those few states that do not have a statutory check on their governor’s emergency powers, it may be time for those state legislatures to put one in place.\textsuperscript{456}

2. Sufficient Judicial Review

Early on in the pandemic, some legal scholars raised serious concerns about whether the courts would meaningfully review a constitutional challenge to a governor’s executive order.\textsuperscript{457} And these concerns were certainly justified at the time. As discussed in supra Part III, Subpart A, a number of federal district courts in Spring 2020 applied the century old case \textit{Jacobson v. Massachusetts} finding that they must afford more deferential review to government restrictions concerning COVID-19.\textsuperscript{458} In other words, a number of these courts swapped out traditional constitutional analysis for a more deferential standard during this time of emergency.\textsuperscript{459} However, the majority opinion in the recent Supreme Court \textit{Roman Catholic Diocese of Brooklyn v. Cuomo} does not even cite to \textit{Jacobson}.\textsuperscript{460} It appears likely the \textit{Jacobson} framework is no longer the standard of review in pandemic cases.\textsuperscript{461} The more difficult question is whether courts may still rely on \textit{Jacobson} but to a lesser degree. Indeed, at least two federal district courts post-\textit{Roman Catholic Diocese} confirmed

\begin{verbatim}
\textsuperscript{454} See Wis. Exec. Order No. 72, supra note 395.
\textsuperscript{455} See Wiley, supra note 70, at 60–68. Professor Wiley argues that the legislature should begin to codify the law of social distancing and mask requirements. \textit{Id.} Wiley broadly proposes state legislative reform concerning a governor’s emergency powers should encompass four general principles: 1) the strategic and scientific purpose of the order; 2) a graded range of intervention and classification among businesses and activities, 3) Neutral laws of general applicability; and 4) supportive measures should be put in place. \textit{Id.} at 59.
\textsuperscript{456} Alabama, Delaware, District of Columbia, Illinois, Kentucky, Massachusetts, Mississippi, New Jersey, New Mexico, Ohio, Tennessee, Vermont, Virginia and Wyoming currently do not have any statutory limits on the Governor’s authority to declare and/or extend a state of emergency. \textit{See infra} Appendix A.
\textsuperscript{457} Wiley & Vladeck, supra note 154, at 187 (finding that the “coronavirus pandemic serves to undermine defenses of the ‘suspension’ model grounded in the putatively transitory nature of emergencies.”).
\textsuperscript{458} See generally supra Part III.A and accompanying cases.
\textsuperscript{459} \textit{Id.}
\textsuperscript{460} \textit{Roman Catholic Diocese} of Brooklyn v. Cuomo, 141 S. Ct. 63, 80 (2020).
\end{verbatim}
that *Jacobson* is binding precedent until the U.S. Supreme Court or federal appellate court tells them otherwise. 462 While the law remains far from settled, most decisions fall along a spectrum in how they integrate the *Jacobson* framework to the challenged orders. At one end of the spectrum, some courts applied *Jacobson* rigidly providing a highly deferential review of the governor’s executive orders. 463 While some courts embraced this standard early on in the pandemic, fewer courts since May 2020 have applied so rigid a standard. 464 At the other end of the spectrum, a few courts – most notably the December 2020 Second Circuit decision in *Agudath Israel v. Cuomo* – specifically rejected *Jacobson* as the standard of review. 465 Other courts fell somewhere in between. For those judges more inclined to integrate *Jacobson* into their decision, they reviewed the executive order using the *Jacobson* two element test but apply traditional constitutional analysis to the second element. 466 For other judges, *Jacobson* is more of a lens by which to apply traditional constitutional analysis. 467 Even for those courts that lean more heavily on *Jacobson*, an executive order will not be enforced when the evidence clearly shows that it does not substantially support the government’s interest. 468

As the battle lines have been drawn between Democratic governors and Republican led state legislatures in Pennsylvania, Michigan, Wisconsin and Kansas over how best to manage the COVID-19 pandemic,

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465 Id.

466 See, e.g., *In re Rutledge*, 956 F.3d 1018, 1029–30 (8th Cir. 2020) (applying *Casey* undue burdens test to *Jacobson* second element in finding executive order restricting abortions not likely a violation of right to abortion); Carmichael v. Ige, 470 F.Supp.3d 1133, 1146–47 (D. Haw. 2020) (applying traditional constitutional analysis in *Jacobson* second element in finding that executive order requiring 14-day quarantine did not violate right to travel.).

467 See Farber, supra note 87, at 833, 851–52. Farber argues that the best approach for guidance on how courts should approach judicial review during an emergency may be found in national security cases concerning free speech. Id. In those cases, the government is afforded some deference, but the courts do not abandon “normal constitutional tests.” Id. at 835. Similarly, Parmet argues that “Jacobson helps to set the table. It provides a vital reminder of the context which courts should review public health measures, especially – but not only – during emergencies.” Parmet, supra note 154, at 132–33.

468 See, e.g., Robinson v. Att’y Gen., 957 F.3d 1171, 1176–78 (11th Cir. 2020) (applying the *Jacobson* framework but finding executive order postponing all non-emergency medical procedures including abortion likely violates right to abortion).
their respective state supreme courts have stepped in to make sure neither the executive nor legislative branches have bypassed the statutory mechanisms set forth in their respective emergency statutes. The state supreme courts have universally abided by the process.

Both the judiciary and legislature provide a check on the governor’s power to issue executive orders. After the Supreme Court’s decision in Roman Catholic Diocese, one could easily say that the judiciary has ventured from a check on the executive’s power to usurping some of that function. Roman Catholic Diocese does just that. The Court, armed with less information than the governor, chose to compare houses of worship capacity restrictions with those of liquor stores and acupuncture facilities, whereas Governor Cuomo backed by scientific experts, grouped houses of worship with secular institutions such as movie theaters, concerts, and sports arenas where large groups of people gather for long periods of time. By disregarding Governor Cuomo’s basis for grouping the institutions and substituting its own, the Court went beyond providing a check on executive authority; it decided in lieu of the executive. While there is no doubt that this is Madisonian checks and balances at play, I would argue that the judiciary should not interfere the way it did in Roman Catholic Diocese and defer to the governor more. As some legal scholars have suggested, some degree of deference should be given to the executive during times of emergency, but traditional constitutional analysis should not be abandoned.

In the United States, there is no judicial check on a governor’s failure to act during a state of emergency. A state’s emergency disaster statute may provide the governor with broad powers to act during these times, but it cannot require him to use those powers in a specific manner. Indeed,

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469 See supra Part III.B.
470 Id.
471 Id.
472 Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).
473 Id. at 80 (Sotomayor, J., dissenting).
474 Id. at 79–80.
475 While the New York state legislature repealed the statute that granted Governor Cuomo additional powers during the COVID-19 pandemic, he still maintains the emergency powers he already had under the New York Executive Law and all his current executive orders remain in effect for the next sixty days. See S.B. 5357, 2021-2022 Gen Assemb., Reg. Sess. (N.Y. 2021). Moreover, the basis for the repeal had more to do with allegations of sexual harassment against Governor Cuomo and accusations that Cuomo’s aides manipulating the death count at nursing homes than with Cuomo’s issuance of executive orders. See Goodman & Hakim, supra note 339.
476 See Farber, supra note 87, at 834–35.
477 See Printz v. United States, 521 U.S. 898 (1997) (establishing that neither Congress nor federal regulators have the authority to require state officials to act).
478 Id.
the “choice to act or not to act lies with the [governor].”479 While a religious group may challenge an executive order limiting indoor gatherings, senior citizens cannot ask a court to order the governor to impose a mask mandate or orders its citizens to shelter in place as a means to keep them safe and healthy.480 The underlying premise for this dichotomy lies with the Constitution being a “charter of negative rather than positive liberties.”481 New York and Florida are two examples where the governor has responded to the COVID-19 pandemic differently.482 In New York, as discussed in supra Part IV.A, Governor Cuomo has taken an active approach toward curbing the virus issuing numerous executive orders including a recent one limiting indoor gatherings which was successfully challenged by religious groups before the United States Supreme Court.483 In contrast, Florida Governor DeSantis has not issued a mask mandate nor any recent social distancing restrictions and in fact has an order prohibiting any enforcement of local COVID-19 restrictions.484 Unlike New York religious groups challenging Governor Cuomo’s mass gathering order, no Florida citizen or group can challenge Governor DeSantis’ failure to issue either a mask mandate or an order limiting mass gatherings.485 Certainly, the Florida Legislature can choose to enact legislation, but it cannot be required to do so.486 In non-emergency times Florida citizens, displeased with their elected officials’ actions or lack thereof, can simply vote them out of office.487 However, in times of emergency, citizens do not have the luxury to wait for an election. With Governor DeSantis’ approval rating at 40% in October 2020, 8% below

479 See Rossi, supra note 35, at 268; Eric Posner, You Can Sue to Stop Lockdowns, But You Can’t Sue to Get Them. That is Dangerous, WASH. POST (May 4, 2020), https://www.washingtonpost.com/outlook/lockdown-legal-challenges-constitution/2020/05/03/389af052-8aff-11ea-9df1-990f9dcc71fc_story.html [https://perma.cc/7LUU-67WA]. In this commentary, Posner argues that courts should largely stay out of emergency public health matters because the courts can only respond to challenges to enjoin enforcement of executive orders and not to challenges that government has failed to appropriately enact such orders. Id. He says the result is “one-sided pressure on governors . . . .” Id.

480 Posner, supra note 479. Unlike Posner, I do not advocate that the judiciary stay out of public health emergency matters. Id. Thus far, most courts have come down on the side of the state. Id. Those holdings which find the executive orders likely enforceable certainly balance out the ones finding that they are not. Id.


482 See Opam, supra note 324; see also Finley, supra note 347.

483 See supra Part IV.A.

484 See supra Part IV.B.

485 See Heyman, supra note 481.

486 Id.

487 Id. at 530.
the national average for governors and about 17% below the approval rating for Governor Cuomo, he may very well be voted out of office come the next election.\

B. Lessons Learned Early On

Governors can certainly learn from recent judicial decisions how best to craft an executive order to withstand a constitutional challenge. For executive orders that seek to limit or prohibit non-essential mass gatherings, it is imperative that the order be neutral and generally applicable to better survive a challenge based on the Free Exercise Clause. If it is neutral and generally applicable, that order is subject to rational basis review. Otherwise, the order would be analyzed under strict scrutiny. That means the executive order should not “single” out religious organizations as the Kansas Governor did in one of her executive orders or the New York Governor in the most recent case before the U.S. Supreme Court. Nor should the executive order be so riddled with exceptions to a mass gathering ban that it is no longer generally applicable. The executive order also must not leave it to the discretion of law enforcement to decide “whether a religious person or entity has met the ‘no-more-than-10-inside-unless-impossible’ requirement.” And finally, the governor will want to craft the executive order keeping in mind how such restrictions compare to similar secular gatherings. Governors can also tailor their orders based on latest scientific advancements. Recent scientific data points to COVID-19 transmitting easily in cafes, restaurants, gyms and reducing capacity in those venues to somewhere between 20–30% would significantly reduce infections. Indeed, the New Jersey and New York governors followed the science and capped

488 See Lazer, supra note 343, at 8–10.
490 See Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 694 (2014); see also Corbin, supra note 168, at 6.
491 See First Baptist Church v. Kelly, 455 F.Supp.3d 1078, 1089–90 (D. Kan. 2020) (analyzing an executive order limiting indoor religious services to no more than 10 persons); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020) (analyzing an executive order limiting indoor religious services in certain zones to 10 or 25 persons).
494 David Cyranoski, How to Stop Restaurants from Driving COVID Infections, NATURE (Nov. 10, 2020), https://www.nature.com/articles/d41586-020-03140-4 [https://perma.cc/6CNA-BLZT].
indoor dining and gyms at 25%. This would allow governors to balance the economic interests of these businesses while also curbing transmission.

Litigants also play a role by providing courts with evidence that the executive order does not relate to the requisite level of government interest. Litigants provided such evidence to convince both the Eleventh and Sixth Circuits that their Governor’s executive order restricting or prohibiting elective medical procedures likely violated the constitutional right to abortion. In doing so, the litigants produced evidence that the state’s goal of reducing social interaction, freeing up hospital resources and conserving PPE were contradictory since banning or delaying abortions would result in ongoing pre-natal care which would actually increase hospital resources, PPE and social interactions. And in Roman Catholic Diocese, plaintiffs provided evidence that it had complied with all COVID-19 mitigation measures and that neither the church nor the synagogue has had an outbreak since reopening.

C. Continued Need for Emergency Executive Orders and Greater Role for State Legislatures and State Agencies

Most states have had active states of emergency for COVID-19 since March 2020 for more than a year. COVID-19 is not like other infectious diseases of the past that can be more easily contained with isolation and quarantine of just those infected or exposed. Asymptomatic infection contributes to spreading the disease unknowingly. COVID-19 does not rest, and neither should the governors in response. As with most initial emergencies, most governors quickly responded to COVID-19 by issuing executive orders aimed at curbing transmission though the stay-at-home orders and limits on gatherings were unpopular and negatively impacted the economy. But, fast forward eight months later to November 2020, and the United States’ daily COVID-19 positivity rates, death rates and hospitalizations were at an all-time high. The emergency had not

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496 Robinson v. Att’y Gen., 957 F.3d 1171, 1182 (11th Cir. 2020); Adams & Boyle, P.C. v. Slattery, 956 F.3d 913, 917 (6th Cir. 2020).
497 Robinson, 957 F.3d at 1182; Slattery, 956 F.3d at 920.
499 COVID-19 Reopening and Reclosing Plans, supra note 11.
500 See Wiley, supra note 70, at 68–70.
501 Slivka, supra note 72.
502 See Cloud, supra note 127.
503 Mzezewa & Calahan, supra note 140.
subsided; it had worsened.\textsuperscript{504} And governors began to respond albeit slowly to issuing more restrictive orders in order to slow down the spread of the virus. New Mexico’s department of health issued a two-week stay at home order.\textsuperscript{505} By January 2021, with three thousand U.S. citizens dying every day from COVID-19, response needed to be swift.\textsuperscript{506} While opposition to these restrictions are significant, the majority of Americans supported many of their governor’s restrictive measures.\textsuperscript{507} Even more telling are the approval ratings, with hands-on approach governors (like New York and New Jersey) receiving much higher approval ratings than hands-off governors (like Florida).\textsuperscript{508}

In less emergent areas, more state legislatures and state agencies should enact COVID-19 related statutes or regulations rather than the governor issuing executive orders. Unlike an executive order which is issued quickly, a bill goes through a formal process.\textsuperscript{509} The time that it takes to pass a bill, even one that moves more quickly, allows for revision, reflection and amendment.\textsuperscript{510} For these reasons, certain COVID-19 measures that will be necessary to implement for a longer period of time should be taken up by state legislatures, even those only in session for part of the year.

For example, a requirement for citizens to wear face coverings in public should come out of the legislature via statute or alternatively the state health department via a regulation. The science is clear that facial coverings protect both the wearer and those the wearer encounters.\textsuperscript{511} New Jersey, Pennsylvania and Minnesota had face mask bills introduced but so far none have passed.\textsuperscript{512} Passing these bills would essentially codify their respective Governor’s executive order mandating mask wearing in public. But even more, it would likely alter citizens’ perspective of the mask requirement since it would now come from the formal rule making body.

New York provides a model for states with a full-time or a significant part-time legislature to follow as the New York State Legislature has enacted significant COVID-19 related legislation and the state health

\begin{itemize}
\item \textsuperscript{504} See Cloud, supra note 127.
\item \textsuperscript{505} N.M. Pub. Health Order, supra note 142.
\item \textsuperscript{507} Daniller, supra note 125.
\item \textsuperscript{508} See Lazer, supra note 343.
\item \textsuperscript{509} See Wiley, supra note 70, at 59–60.
\item \textsuperscript{510} Id. at 60.
\item \textsuperscript{511} See Scientific Brief, supra note 130.
\item \textsuperscript{512} Carl Smith, Lawmakers Get Tough with Mask Requirements: Legislative Watch, GOVERNING (Sept. 9, 2020), https://www.governing.com/next/lawmakers-get-tough-with-mask-requirements-legislative-watch.html [https://perma.cc/TF2P-G45A].
\end{itemize}
department has promulgated some emergency regulations concerning social distancing measures. For example, while Governor Cuomo initially issued executive orders providing a moratorium on utilities and evictions, those measures were taken up and passed by the state legislature. As bills, they were introduced, debated and passed by the Senate and Assembly. They were then signed by the New York Governor.

While under difficult circumstances, the Michigan legislature enacted bi-partisan legislation that had been previously covered by Governor Whitmer’s executive orders. And, it did so fairly quickly by passing six bills within three weeks after the Michigan Supreme Court said Governor Whitmer’s executive orders concerning COVID-19 were no longer valid.

Even state agencies can take a larger role by promulgating more formal regulations. The Virginia emergency standard for workplace safety provides a prime example. That standard went through several iterations and provided for public comments. While not expedient, these workplace regulations are less likely to be modified and more likely to have stronger buy-in from employers and citizens alike.

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516 See S.B. S8113A, supra note 515; S.B. S8427, supra note 515.
VII. Conclusion

As we reflect on 2020, it is useful to consider how the majority of state governors used emergency executive orders during this ongoing crisis. Governors needed to act quickly in order to curb the spread of COVID-19. This often took the form of orders to limit gathering sizes, close certain non-essential businesses where there can be significant transmission such as bars and even close schools.\textsuperscript{521} Battling a highly contagious virus, a governor could not simply wait for the state legislature to pass an emergency statute. It takes too long for a state health agency to go through the formal process of issuing an emergency regulation. Neither the legislature nor the judiciary should be involved in the executive order process unless the governor oversteps her bounds. Their role should be one of a “check” and not one of participation. That check is easily met if the legislature can terminate a state of emergency by concurrent resolution and, as of March 2021, about thirty-three states had that authority.\textsuperscript{522} Likewise, the courts should be there to properly balance the urgent need for the governor to curb transmission of the virus with potential constitutional violations. It should not be there to substitute its decision for that of the governor.

\textsuperscript{521} See Wiley, supra note 70, at 69–70.

\textsuperscript{522} See infra Appendix A.
Appendix A contains a chart of some key components of each state’s emergency disaster statute. The first column lists each state/U.S. territory alphabetically. Column two lists the maximum duration of the emergency declaration if applicable. Column three looks at who may extend the declaration of emergency if applicable. Column four lists whether the state legislature has authority to terminate a declaration of emergency.

<table>
<thead>
<tr>
<th>STATE/U.S. TERRITORY</th>
<th>DURATION</th>
<th>WHO MAY EXTEND?</th>
<th>LEGISLATIVE AUTHORITY TO TERMINATE DECLARATION OF EMERGENCY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>60 Days</td>
<td>Governor</td>
<td>N/A</td>
</tr>
</tbody>
</table>

523 Included in this chart are the emergency disaster statutes for the District Columbia, Guam, Puerto Rico and the U.S. Virgin Islands.

524 The information collected in Appendix A for columns two, three and four were gathered by looking at the following statutes which were in effect as of December 31, 2020: ALA. CODE § 31-9-8 (2020); ALASKA STAT. § 26.20.040 (2020); ARIZ. REV. STAT. ANN. § 26-303 (2020); ARK. CODE ANN. § 12-75-107 (2020); CAL. GOV’T CODE §§ 8624, 8629 (West 2020); COLO. REV. STAT. § 24-33.5-704 (2020); CONN. GEN. STAT. § 28-9 (2020); DEL. CODE ANN. tit. 20, § 3115 (2020); D.C. CODE § 7-2306 (2021); Fla. STAT. § 252.36 (2020); Ga. CODE ANN. § 38-3-51 (2020); 10 Guam Code Ann. § 19405 (2019); HAW. REV. STAT. § 127A-14 (2020); IDAHO CODE § 46-1008 (2020); 20 ILL. COMP. STAT. 3305/7 (2020); IND. CODE § 10-14-3-12 (2020); IOWA CODE § 29C.6 (2020); KAN. STAT. ANN. § 48-924 (2020); KY. REV. STAT. ANN. § 39A.100 (West 2020); LA. STAT. ANN. § 29.724 (2020); ME. REV. STAT. tit. 37-B, § 743 (2019); MD. CODE ANN., PUB. SAFETY § 14-107 (West 2020); MICH. COMP. LAWS § 30.403 (2020); MINN. STAT. § 12.31 (2020); MISS. CODE ANN. § 33-15-11 (2021); MO. REV. STAT. § 44.100 (2020); MONT. CODE ANN. § 10-3-505 (2019); NEB. REV. STAT. § 81-829.40 (2020); NEV. REV. STAT. § 414.070 (2020); N.H. REV. STAT. ANN. § 4:45 (2020); N.J. STAT. ANN. § 26:13-3 (West 2020); N.M. STAT. ANN. § 12-10A-5 (2020); N.Y. EXEC. LAW § 29-a (McKinney 2020); N.C. GEN. STAT. § 166A-19.20 (2020); N.D. CENT. CODE § 37-17.1-05 (2019); OKLA. STAT. tit. 63, § 683.9 (2020); OR. REV. STAT. § 401.192 (2020); 35 PA. STAT. AND CONS. STAT. ANN. § 7601(C) (West 2020); P.R. LAWS ANN. tit. 3, § 1942 (2021); 30 R.I. GEN. LAWS § 30-15-9 (2020); S.C. CODE ANN. § 25-1-440 (2020); S.D. CODIFIED LAWS § 34-48A-5 (2020); TENN. CODE ANN. § 58-2-107 (2020); TEX. GOV’T CODE ANN. § 418.014 (West 2019); UTAH CODE ANN. § 53-2A-206 (West 2020); VT. STAT. ANN. tit. 20, § 9 (2020); VA. CODE ANN. § 44-146.17 (2020); V.I. CODE ANN. tit. 23, § 1005 (2020); WASH. REV. CODE § 43.06.220 (2020); W. VA. CODE § 15-5-6 (2020); WIS. STAT. § 323.10 (2019); WYO. STAT. ANN. § 19-13-104 (2020).
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<tr>
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<th>DURATION</th>
<th>WHO MAY EXTEND?</th>
<th>LEGISLATIVE AUTHORITY TO TERMINATE DECLARATION OF EMERGENCY</th>
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<tbody>
<tr>
<td>Alaska</td>
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<td>N/A</td>
<td>N/A</td>
<td>Yes</td>
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<td>60 Days</td>
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<td>Yes</td>
</tr>
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<td>California</td>
<td>N/A</td>
<td>N/A</td>
<td>Yes</td>
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<td>Colorado</td>
<td>30 days</td>
<td>N/A</td>
<td>Yes</td>
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<tr>
<td>Connecticut</td>
<td>N/A</td>
<td>N/A</td>
<td>Yes</td>
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<tr>
<td>Delaware</td>
<td>30 Days</td>
<td>N/A</td>
<td>N/A</td>
</tr>
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<td>District of Columbia</td>
<td>90 days</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
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<td>60 days</td>
<td>Governor</td>
<td>Yes</td>
</tr>
<tr>
<td>Georgia</td>
<td>30 days</td>
<td>N/A</td>
<td>Yes</td>
</tr>
<tr>
<td>Guam</td>
<td>30 days</td>
<td>N/A</td>
<td>Yes</td>
</tr>
<tr>
<td>Hawaii</td>
<td>60 days</td>
<td>N/A</td>
<td>N/A</td>
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<tr>
<td>Idaho</td>
<td>30 Days</td>
<td>N/A</td>
<td>Yes</td>
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<td>30 days</td>
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<td>N/A</td>
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<td>Indiana</td>
<td>30 days</td>
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<td>Iowa</td>
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<td>Kansas</td>
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<td>Legislature</td>
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<td>30 days</td>
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<td>Michigan</td>
<td>28 days</td>
<td>Legislature</td>
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<td>5 days</td>
<td>Executive Council may extend to 30 days.</td>
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<td>Mississippi</td>
<td>30 days</td>
<td>Governor</td>
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<td>Missouri</td>
<td>N/A</td>
<td>N/A</td>
<td>Yes</td>
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<td>Montana</td>
<td>45 days</td>
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<td>N/A</td>
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<td>N/A</td>
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<tr>
<td>New Hampshire</td>
<td>21 days</td>
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<tr>
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<td>N/A</td>
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<tr>
<td>New Mexico</td>
<td>30 days</td>
<td>N/A</td>
<td>No, by governor</td>
</tr>
<tr>
<td>New York</td>
<td>6 Months</td>
<td>Governor</td>
<td>Yes</td>
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<td>STATE/U.S. TERRITORY</td>
<td>DURATION</td>
<td>WHO MAY EXTEND?</td>
<td>LEGISLATIVE AUTHORITY TO TERMINATE DECLARATION OF EMERGENCY</td>
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<td>North Carolina</td>
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<td>N/A</td>
<td>Yes, if Legislature is the authority that declared emergency.</td>
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<td>N/A</td>
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<td>N/A</td>
<td>N/A</td>
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<td>Public Health Emergency must be approved by State Legislature in special session.</td>
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<td>N/A</td>
<td>N/A</td>
<td>Yes</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>90 days</td>
<td>N/A</td>
<td>Yes</td>
</tr>
<tr>
<td>Puerto Rico</td>
<td>N/A</td>
<td>N/A</td>
<td>Legislature shall pass judgment on the content of emergency order.</td>
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<tr>
<td>Rhode Island</td>
<td>30 days</td>
<td>N/A</td>
<td>Yes</td>
</tr>
<tr>
<td>South Carolina</td>
<td>15 days</td>
<td>General Assembly</td>
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<tr>
<td>South Dakota</td>
<td>6 months</td>
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<td>Yes</td>
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<td>Tennessee</td>
<td>30 days</td>
<td>N/A</td>
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<td>Texas</td>
<td>30 days</td>
<td>N/A</td>
<td>Yes</td>
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<tr>
<td>Utah</td>
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<td>Vermont</td>
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<td>N/A</td>
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<td>U.S. Virgin Islands</td>
<td>30 days</td>
<td>Gov. must submit legislation to extend.</td>
<td>N/A</td>
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<td>Washington</td>
<td>30 days</td>
<td>Legislature</td>
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<td>West Virginia</td>
<td>30 days</td>
<td>N/A</td>
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<td>Wisconsin</td>
<td>60 Days</td>
<td>Legislature</td>
<td>Yes</td>
</tr>
<tr>
<td>Wyoming</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
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I. INTRODUCTION: EVOLUTION OF GUBERNATORIAL POWER AND SEPARATION OF POWERS

At the time of the American Revolution, state governors were arguably the most disfavored officials in the newly-emerging state constitutions. According to Gordon Wood, a leading historian of the Revolution:

[T]he Americans went far beyond anything the English had attempted with Magna Carta or the Bill of Rights. They aimed to make the gubernatorial magistrate a new kind of creature, a very pale reflection indeed of its regal ancestor. They wanted effectively to eliminate the magistracy’s chief responsibility for ruling the society—a remarkable and abrupt departure from the English constitutional tradition . . . . The powers and prerogatives taken from the governors were given to the legislatures, marking a revolutionary shift in the traditional responsibility of government.1

Even after the adoption of the United States Constitution, the states continued to evolve their governmental arrangements on a path separate from that established quite permanently in the federal constitution.2 Over the years, through the acquisition of constitutional veto, budget and appointment powers, together with a wide variety of statutorily delegated powers and responsibilities, state governors have been transformed into extremely powerful executives. In fact, in a deeply researched analysis, Professor Miriam Seifter concluded:

[I]n the past century, and especially in recent decades, most governors have gained a spate of powers that eclipse not only their Founding-era authority, but also the domestic powers of modern presidents.3

Beyond such generalizations, however, because of the wide variety of the states’ specific governmental arrangements, it is necessary to evaluate legal questions about state separation of powers on a state-specific, rather than a general basis.4 For example, the New Jersey Supreme Court recognized its state constitution as establishing a strong-governor model in resolving a

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separation of powers case.\(^5\) By contrast, the California Supreme Court alluded to its constitution’s *strong-legislature model* in upholding legislative rather than gubernatorial appointments to an important administrative board.\(^6\) These sorts of assessments of the specific characteristics of a state’s constitutional structure can be an important element of, first, legislative decisions about how to share powers with governors and, second, judicial decisions about the constitutional validity of such legislative decisions.

An important general perspective on gubernatorial powers is the fact that, in contrast to state constitutional *rights* matters, where federal constitutional rights are “supreme law of the land,” federal separation of powers doctrines are not binding on the states. Robert A. Schapiro has pointed this out, noting that “interpreting state constitutions in lockstep with federal separation of powers law would not further the cause of uniformity. Because federal doctrine . . . does not apply to the states, only one body of separation of powers law will exist. . . . [F]ederal law provides no constitutional floor.”\(^7\) So it is clear, although often these points are not recognized,\(^8\) that a state’s separation of powers doctrine should not depend on either any other state’s view or even on federal constitutional doctrine! New York must determine its own separation of powers law.

States, which do not have to follow federal doctrine on legislative delegations of power to executive agencies or governors, have exhibited a wide range of approaches to this separation of powers question.\(^9\) These approaches are, of course, crucial to framing and evaluating legislative delegations of emergency powers to governors. An earlier study concluded that New York applied a “strict” view of both standards and safeguards for delegations.\(^10\) Importantly, the more recent of the cases cited relied on a Rehnquist dissent concerning federal constitutional doctrine!\(^11\)

States seem to apply two distinct approaches to evaluating legislative delegations of authority to administrative agencies and governors: formal or functional.\(^12\) The formal approach relies on strict definitions of legislative and executive power with “strong substantive separations


\(^{10}\) Greco, *supra* note 9, at 581 n. 74 (citing Boreali v. Axelrod, 517 N.E.2d 1350, 1353 (N.Y. 1987); In re Levine v. Whalen, 349 N.E.2d 820, 822 (N.Y. 1976)).

\(^{11}\) *See Boreali*, 517 N.E.2d at 1355.

\(^{12}\) WILLIAMS, *supra* note 6, at 238.
This approach is criticized as yielding mechanical outcomes, but at least it yields bright-line rules. Rebecca L. Brown further explains:

In contrast, advocates of the “functionalist” approach urge the Court to ask a different question: whether an action of one branch interferes with one of the core functions of another. . . . The functionalist view follows a different strand of separation-of-powers tradition from that of the formalists: the American variant that stresses not the independence, but the interdependence of the branches.

These background perspectives will hopefully shed light on the issues surrounding gubernatorial emergency powers, both constitutional and statutory. Further, they should be relevant to before-the-fact legislative delegations and after-the-fact constitutional considerations by the judiciary.

II. SURVEY OF GOVERNORS’ CONSTITUTIONAL AND STATUTORY EMERGENCY POWERS

All states grant their governors the power to declare at least some type of disaster or emergency, but the authority to respond and the scope of the emergency response varies between the states. The authority these governors derive from such declarations or grants by legislatures involve an expansion of gubernatorial powers and a retraction of the legislatures’ powers, each to different extents. However, governors cannot grant themselves authority beyond what is initially delegated to them, and legislatures maintain some authority to create limits on emergency powers. Despite these general concepts, states differ in (A) where the governor derives their emergency powers; (B) which contingencies or types of emergencies permit declarations of a state of emergency and activate gubernatorial powers; (C) the scope of their powers during an emergency; and (D) the retained oversight powers the legislature may exact upon the governor during such emergency.

A. Constitutional, Statutory, or Other Granting Authority to Issue Executive Orders During Emergencies

Between the states, the authority to exercise emergency powers is derived from differing bodies of law. The origin of these powers can be found in constitutions, in statutes, and in case law. Table 1 summarizes the granting authority of these emergency powers for each state with references. Few states have express constitutional provisions relating to the Governor’s authority during a disaster emergency. However, even if they do, the authority described is either

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14 Id., at 1524–26.
18 See id.
20 See infra Section II.A.1.
extremely vague or quite limited. While all states have at least some statute granting their governor some powers during an emergency, forty-two of the states’ highest courts have not yet resolved the question of whether the authority was constitutionally delegated.


State constitutional provisions charge governors with “faithful execution and enforcement of state law” and delegate them certain executive powers. Thus, because the executive branch is notably in a better position than the legislative branch to respond to crises, it is sometimes implied that these broad constitutional provisions confer some supplemental legislative police powers upon the governor. However, despite governors’ frequently vague references to the authority vested in them by their state constitution, there are only a few states that do have specific or express constitutional provisions for gubernatorial emergency powers. Oregon has the most comprehensive constitutional scheme regarding the Governor’s powers. Oregon’s Constitution permits the Governor to declare an emergency upon a catastrophic disaster, utilize general and lottery funds despite their legislatively derived purpose, and, vaguely, to “manage the immediate response to the disaster.” While many states have constitutional provisions regarding continuity of government, these apply in extreme circumstances and are almost never invoked in state emergencies. For example, the Coloradan Governor’s constitutional emergency powers are extremely limited in scope; it only allows the Governor to declare a “disaster emergency” and “designate a temporary meeting location for the general assembly.”

Interestingly, Pennsylvania recently enacted a constitutional provision to limit the Governor’s authority to issue orders coinciding with emergency declarations. The amendment now provides that the General Assembly may limit how the Governor may manage the disaster; that the disaster may only be in effect for twenty-one days, unless the General Assembly extends the resolution; and that Governor may not issue any emergency declarations that are based on “same or substantially similar facts and circumstances without the passage of a concurrent resolution.”

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21 See id.
22 See infra Section II.A.2.
24 See id. at 290.
26 See OR. CONST. art. X-A, §§ 1–6.
27 OR. CONST. art. X-A, §§ 1–2.
28 See generally, Eric R. Daleo, State Constitutions and Legislative Continuity in a 9/11 World: Surviving an “Enemy Attack,” 58 DePaul L. Rev. 919 (2009); see infra Section IV.
29 COLO. CONST. art. VIII, § 3(2).
30 See County of Butler v. Governor of Pennsylvania, 8 F.4th 226, 230 (3d Cir. 2021) (“There also have been changes on the legal front. An amendment to the Pennsylvania Constitution and a concurrent resolution of the Commonwealth's General Assembly now restricts the Governor's authority to enter the same orders.”).
Thus, even state constitutions that have expressly provided or referenced gubernatorial emergency powers are vague and limited in scope.

2. Statutorily Derived Authority Is Widespread; Few States Have Resolved These Statutes’ Constitutionality

All states have at least some statutory provision describing the powers of the Governor during an emergency. Typically, governors issuing executive orders during declared disasters or emergencies will cite to both the declaration of a state of emergency and the statute granting them the authority to make the order. Despite gubernatorial inferences that the constitution and laws of the state vest in them the authority to issue emergency declarations or orders, state high courts review whether such powers are constitutionally delegated. Only eight state high courts have resolved questions of whether these statutes comport with their state’s constitution.

i. Resolving Statutory Authority Via the Nondelegation Doctrine

Legal challenges to gubernatorial emergency powers are usually premised on the nondelegation doctrine. This doctrine stands for the principle that the legislative branch may not delegate its constitutional legislative power to any other actor, including the executive branch. A study reviewing federal and state nondelegation litigation between 1940 and 2015 found, inter alia, that state courts heard a greater amount of such cases and invalidate statutes more often than federal courts.

The few states that have resolved the constitutionality of statutory delegation of gubernatorial emergency powers have—for the most part—described the authority as permissible. In State v. Riggin, an illustrative case, a cosmetologist challenged the North Dakotan Governor’s executive order, which temporarily closed hair salons during the onset of

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31 PA. CONST. art. IV, § 20.
32 See Table 1.
34 See, e.g., Ritchie v. Polis, 467 P.3d 339, 342 (Colo. 2020); see also People v. Chavez, 605 P.2d 401, 412 (Cal. 1980) (“[J]ust as the United States Supreme Court bears the ultimate judicial responsibility for determining matters of federal law, this court bears the ultimate judicial responsibility for resolving questions of state law, including the proper interpretation of provisions of the state Constitution.”); Rachel A. Van Cleave, State Constitutional Interpretation and Methodology, 28 N.M. L. REV. 199, 201–02 (1998); supra Section I.
35 See Table 1.
37 See Daniel E. Walters, Decoding Nondelegation After Gundy: What the Experience in State Courts Tells Us About What to Expect When We’re Expecting, 71 EMORY L. J. 417, 419 (2022).
39 See Newsom v. Super. Ct., 278 Cal. Rptr. 3d 397, 410 (Cal. Ct. App. 2021), review denied, (Cal. Aug. 11, 2021); Ritchie, 467 P.3d at 345 (Colo. 2020); Casey v. Lamont, 258 A.3d 647, 656 (Conn. 2021); Beshear v. Acree, 615 S.W.3d 780, 813 (Ky. 2020); Desrosiers v. Governor, 158 N.E.3d 827, 835–42 (Mass. 2020); Worthington v. Fauyer, 440 A.2d 1128, 1140–42 (N.J. 1982); State v. Riggin, 959 N.W.2d 855, 862–63 (N.D. 2021); Wolf v. Scarnati, 233 A.3d 679, 707 (Pa. 2020). But see, e.g., Abbott v. City of El Paso, 2023 WL 2265168, at *11 (Tex. App. 2023) (“Like our sister courts that have considered these same arguments, we do not agree that the Disaster Act grants the Governor the broad authority he claims.”).
the COVID-19 pandemic. While the Supreme Court of North Dakota acknowledged that their legislature was forbidden from delegating its legislative powers, it “may delegate powers which are not exclusively legislative and which the Legislature cannot conveniently do because of the detailed nature.” The court noted that the relevant inquiry to differentiate between delegable and non-delegable powers should be “whether the power granted gives the authority to make a law or whether that power pertains only to the execution of a law which was enacted by the Legislature”; the power to merely ascertain facts and render the law operable is not such an unconstitutional delegation of authority. Because North Dakota’s gubernatorial emergency power law stated a purpose for their Governor’s authority upon an emergency, detailed guidelines on how such power is to be implemented, and limited the Governor’s power, the law was a constitutional delegation of power.

Though not fully resolving constitutional questions of or completely abrogating gubernatorial emergency powers, some state courts have found such statutes unconstitutional. Michigan’s Supreme Court held one statute delegating their governor emergency powers to “promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property” as unconstitutional. The court articulated the principle that “as the scope of the powers conferred upon the Governor by the Legislature becomes increasingly broad, in regard to both the subject matter and their duration, the standards imposed upon the Governor's discretion by the Legislature must correspondingly become more detailed and precise.” Because the court found reasonable and necessary in the statute to be illusory standards, it was an unconstitutional delegation of legislative power. Some courts in Texas have reached similar conclusions, but hold that constitutional provisions prohibiting the Governor’s suspension of laws is expressly prohibited.

ii. Dodging Constitutional Questions Regarding Gubernatorial Powers via the Mootness or Standing DOctrines

Most states have yet to confirm whether their constitution does permit their governor to exercise emergency powers enumerated in their statutes. One observable pattern among those states is that challenges addressing this constitutional question are dismissed for lack of standing or mootness. While standing dismissals appear relatively straightforward, the mootness

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40 959 N.W.2d at 857–58.
41 Id. at 862 (quoting Stutsman Cnty. v. State Hist. Soc’y, 371 N.W. 321, 327 [N.D. 1985]).
42 Riggin, 959 N.W.2d at 862 (quoting Stutsman Cnty., 371 N.W. at 327).
43 Id. at 862–63.
44 Id. at 862–63.
45 See In re Certified Questions from the United States District Court, 958 N.W.2d 1, 24 (Mich. 2020) (emphasis added). However, the court did not address the constitutionality of Michigan’s Emergency Management Act, which also provided the Governor some emergency powers. See id. at 9–12.
46 In re Certified Questions from the United States District Court, 958 N.W.2d at 20.
47 See id. at 24; May, supra note 36.
48 See, e.g., City of El Paso, 2023 WL 2265168, at *10–11.
50 See, e.g., Munza, 334 So. 3d at 218–20 (holding that plaintiffs failed to allege, inter alia, “specific concrete facts” that they suffered an “actual” injury as a result of mask mandates).
dismissals are more unique. By the time the challenge to a governor’s emergency order reaches a state’s appellate court, the emergency order’s provisions at issue are revoked or expired. In Rivard v. Governor, following emergency orders during the COVID-19 pandemic, a salon and skin care operator sought, *inter alia*, an injunction to stop the temporary closure of their business. However, the state of emergency in New Hampshire expired by the time it reached the Supreme Court of New Hampshire. Since “a matter is moot when it no longer presents a justiciable controversy because issues involved have become academic or dead[,]” the court concluded the emergency’s expiration as mooting the plaintiff’s constitutional challenge.

B. Events Activating Emergency Powers

The events that trigger gubernatorial emergency powers vary between the states. While some states afford their government wide latitude in determining whether an emergency exists to authorize the governor’s authority, some provide limits to these declarations either by constricting the circumstances in which they occur, or by subsequent legislative approval.

One of the more widespread events that trigger such gubernatorial powers are those relating to “enemy attack” and “continuity of government.” During the Cold War era, states prepared for the worst, and considered questions of how to preserve state government following an enemy attack. The model provision permitted deviation from the constitution by the legislature “where conforming to those requirements would be ‘impracticable or would admit of undue delay . . . .’” However, some states did not adopt continuity of government provisions.

Some states grant their governors broad authority to declare states of emergency and activate their statutory powers. New York is one such state; there, the Governor may declare a state disaster emergency and, thereby, trigger their emergency powers upon a finding of a “disaster,” which is defined broadly as:

occurrence or imminent, impending or urgent 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, disease outbreak, air contamination, terrorism, cyber event, blight, drought, infestation, explosion, radiological accident, nuclear, chemical, biological, or bacteriological release, water contamination, bridge failure or bridge collapse.

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52 *See Rivard*, 2021 WL 5495533, at *1–2.
53 *See id.* at *2.
54 *See id.* (quoting Londonderry Sch. Dist. v. State, 958 A.2d 930, 932 (N.H. 2008)).
55 *See NAT’L GOVERNOR’S ASS’N*, supra note 16.
56 *See Daleo, supra* note 28, at 932–46.
57 *See id.* at 932.
58 *See id.* at 935.
59 *See id.* at 945–46.
60 N.Y. Exec. Law §§ 20, 28, 29-a (emphasis added).
Many other states have also provided broad bases for the declaration of an emergency by including broad language—like New York’s—with some variation.61

Some states limit gubernatorial emergency powers either by specifying which events that allow for an emergency proclamation or by involving the legislature’s subsequent consent to a declaration. In Wisconsin, although the definition of a “disaster” that gives rise to gubernatorial authority is broad, the statute defines “public health emergency” so that the Department of Health Services may be designated a lead agency.62 Ohio greatly limits the triggering of gubernatorial emergency powers by limiting it to highly specific situations, such as an “adulterated consumer product emergency.”63 States may also provide their legislatures authority to declare states of emergency. In at least seven states, the legislature is permitted to declare a state of emergency and trigger the executive’s emergency powers.64 Although the governor might declare a state of emergency, some states even provide that their legislatures must concur with the existence of such a disaster in a limited period of time.65

C. Scope of Authority During Emergencies

The scope of a governor’s emergency powers varies widely from state-to-state, and different typologies have developed to classify them. Broadly speaking, legislative delegation of authority to the executive falls into two camps: those with strict nondelegation doctrines, where statutes provide precise and specific standards and agencies “fill in the details”; or those that permit more administrative discretion.66 According to Edward H. Stiglitz, about nineteen states maintain strong nondelegation doctrines.67 As previously discussed, these nondelegation regimes potentially impact how much a governor may constitutionally exact in their emergency orders.68

Importantly, state emergency statutes vary in the extent to which their governors are permitted to temporarily change or suspend laws or regulations. A 2019 survey found that forty-two states “explicitly permit the governor to change statutes or regulations during an emergency.”69 Some states cast a wide net of powers for their governor during an emergency. In

61 See, e.g., FLA. STAT. §§ 252.34, 252.36 (powers may be activated upon “any occurrence, or threat thereof, whether natural, technological, or manmade, in war or in peace, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property”); R.I. GEN. LAWS § 30-15-3, 30-15-9 (powers may be activated upon the “occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause . . .”).
62 See WIS. STAT. §§ 323.02, 323.10, 323.12.
63 See OHIO REV. CODE ANN. § 3715.74 (“[I]f the governor has a reasonable basis to believe that one or more units of a consumer product have been adulterated and that further sale or use of the consumer product presents a threat to the public health and safety, the governor may declare an adulterated consumer product emergency and make any of the following executive adulterated consumer product emergency orders . . .”).
64 NAT’L CONF. STATE LEGISLATURES, supra note 2.
65 See, e.g., CONN. GEN. STAT. § 28-9; S.C. CODE ANN. § 25-1-440 (“A declared state of emergency shall not continue for a period of more than fifteen days without the consent of the General Assembly . . .”).
67 See id.
68 See supra Sections I & II.
69 See Gregory Sunshine et al., An Assessment of State Laws Providing Gubernatorial Authority to Remove Legal Barriers to Emergency Response, 17 HEALTH SEC., no. 2, 2019, at 3 (2019), https://www.nga.org/wp-
New Hampshire, so long as the Constitution and civil liberties found under it are not suspended, the Governor may “make, amend, suspend and rescind necessary orders, rules and regulations … in the event of a disaster beyond local control . . . .”70 North Carolina’s emergency powers are also similarly broad, with the exception that statutes within the same act may limit the Governor’s authority.71

Other states expressly narrow and limit the scope of their governors’ authority during an emergency. Michigan’s Governor can only suspend statutes and regulations in an emergency if strict compliance with such rules “would prevent, hinder, or delay necessary action in coping with the disaster or emergency” and does not “suspend criminal process or procedures.”72 South Carolina also provides for the suspension of regulations if strict compliance inhibits disaster response, but limits the Governor further to only amendments, issuance, and suspensions of regulations, not statutes.73 Thus, the scope of state governors’ authority range greatly from temporarily broad changes in legal landscapes to minimal suspensions or amendments of regulatory schemes.

D. Legislative Oversight of Emergency Powers

Legislative oversight on gubernatorial emergency powers ranges among the states, but these functions have recently come under increased scrutiny. Legislatures typically limit the governor’s emergency responses by exercising termination powers.74 Some states, like—Idaho or Indiana—provide in statute that their legislatures may, by concurrent or joint resolution, terminate their governor’s declaration of a state of emergency.75 However, other states appear to only permit their governor to terminate a state of emergency before its expiration.76

In the wake of COVID-19 executive orders, some states have passed or are considering measures to limit their governors’ emergency powers.77 As discussed, in 2021, Pennsylvanian voters approved constitutional amendments to limit their governor’s power.78 Pennsylvania’s amendment now permits the General Assembly to legislate how different types of disaster

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70 N.H. REV. STAT. ANN. § 4:47.
71 North Carolina Emergency Management Act, N.C. GEN. STAT. §§ 166a-19.10 (Governor has powers “[t]o make, amend, or rescind the necessary orders, rules, and regulations within the limits of the authority conferred upon the Governor.”).
72 Emergency Management Act, MICH. COMP. LAWS ANN. § 30.405.
75 See, e.g., ME. POL’Y INST., supra note 74; IDAHO CODE § 46-1008 (“The legislature by concurrent resolution may terminate a state of disaster emergency at any time.”); IND. CODE § 10-14-3-12 (“The general assembly, by concurrent resolution, may terminate a state of disaster emergency at any time.”).
76 See, e.g., ME. POL’Y INST., supra note 74; WYO. STAT. ANN. § 19-13-104; WASH. REV. CODE § 43.06.220.
77 See NAT’L CONF. STATE LEGISLATURES, supra note 17.
emergencies shall be governed and limits the issuance of new emergency declaration “based upon the same or substantially similar facts and circumstances without the passage of a concurrent resolution of the General Assembly . . . .” 79 Kentucky’s Governor also faced similar restrictions imposed by its General Assembly, “limiting declared states of emergency to thirty days absent extension by the General Assembly; granting the General Assembly the power to terminate a declaration of emergency at any time; and requiring the Attorney General's written approval before the Governor may suspend a statute . . . .” 80 Generally, new or proposed state restrictions on gubernatorial emergency orders seek to empower legislatures with greater authority to determine the scope of emergency declarations and increase legislative input or consent for further actions.81

79 See PA. CONST. art. IV, § 20.
80 Stivers v. Beshear, 659 S.W.3d 313, 315–16 (Ky. 2022).


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82 For the source used to organize the table, see COUNCIL STATE GOV’T’S, supra note 19, at 116–17. For the sources used to identify state provisions and language not otherwise cited within the table itself, see, e.g., Thompson & Sunshine, supra note 69.
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Baker, 142 S. Ct. 83 (2021); see also Boston Gas Co. v. Dep’t of Pub. Utils., 441 N.E.2d 746, 752 (Mass. 1982) (“We have recognized that art. 30 does not rigidly demand a total separation between the three branches of government but rather that there is a ‘need for some flexibility in the allocation of functions among the three departments.’”) (citations omitted).

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See Donald J. Trump for President, Inc. v. Bullock, 491 F. Supp. 3d 814, 834 (D. Mont. 2020) (finding “no reason to conclude that the Montana Legislature's decision to afford the Governor's statutory suspension power a
role in the time, place, and manner of Montana's federal elections should not be afforded the same respect. In other words, Governor Bullock's use of the legislatively created suspension power is not repugnant to the constitutional provisions invoked by Plaintiffs.”).

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<td>Unresolved. See Belcher v. State, 508 P.3d 410 (Nev. 2022) (avoiding constitutional question regarding Governor’s emergency closure orders); see also Donald J. Trump for President, Inc. v. Cegavske, 488 F. Supp. 3d 993, 999, 1004 (D. Nev. 2020) (dismissing for lack of standing).</td>
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App. 2023) (striking down Governor delegation of powers for suspending laws as unconstitutional) (“Like our sister courts that have considered these same arguments, we do not agree that the Disaster Act grants the Governor the broad authority he claims.”).

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<td>Wisconsin</td>
<td>WIS. STAT. § 323.12</td>
<td>Statute</td>
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Exploring the Emergency Powers of the Governor in New York State

by Ariel Gougeon

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Introduction

On March 7, 2020, former Governor Andrew M. Cuomo issued his first Executive Order of the COVID-19 pandemic, declaring a statewide disaster emergency. For more than two years, that declaration gave the Governor access to wide-ranging authority to address the ongoing pandemic without the involvement of the Legislature. The extensive use of emergency powers during the first years of the pandemic was perhaps the most notable in recent New York history, but the use of such authority is not uncommon. During her term so far, Governor Hochul has issued—and renewed—multiple Executive Orders declaring disaster emergencies in response to other public health emergencies, natural disasters, and conditions at Rikers Island.

These recent Executive Orders have prompted greater public awareness and scrutiny of the emergency powers of the Governor, revisions to those powers, and calls for further reform. This explainer lays out the statutory and constitutional bases for gubernatorial emergency powers in New York, as well their current limitations.

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Where Do the Governor’s Emergency Powers Come From?

New York State Constitution

The New York State Constitution grants the Legislature the “power and immediate duty . . . to adopt such other measures as may be necessary and proper for ensuring the continuity of governmental operations” during times of emergency caused by “enemy attack or by disasters (natural or otherwise) . . . .” The Constitution does not explicitly grant powers to the Governor in times of emergency. However, the New York State Legislature has passed laws granting the Governor certain powers when deemed necessary to address emergency situations, with limitations.

New York Executive Law

Three provisions of New York Executive Law grant the Governor certain powers in times of emergency.

First, Executive Law § 28 expressly authorizes the Governor to declare a statewide emergency by Executive Order if the Governor determines that a disaster has already occurred or may be imminent and local governments are unable to respond adequately.

Second, Executive Law § 29 authorizes the Governor to direct state agencies to provide assistance, coordinated by the Disaster Preparedness Commission, if the Governor has declared a statewide disaster emergency.

Lastly, Executive Law § 29-a authorizes the Governor to suspend “specific provisions of any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency” during a declared state of emergency “if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster.”

An example of the use of these provisions took place when Governor Kathy Hochul exercised all three emergency powers in anticipation of a severe winter storm in Western New York. Pursuant to Executive Law § 28, Governor Hochul declared a disaster emergency in several Western New York counties on November 17, 2022, because the storm was expected to “create hazardous conditions” which would pose an “imminent danger to public transportation, utility service, public health, and public safety systems.” Pursuant to Executive Law § 29, Governor Hochul directed the implementation of the State Comprehensive Emergency Management Plan and authorized state agencies to assist with the response to the storm as necessary.

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5 See N.Y. Const. art. 3, § 25.
6 As might be expected, these provisions have been under active revision and consideration by the Legislature during the ongoing COVID-19 pandemic. The descriptions of the state of the law in this explainer are accurate as of the time of its publication.
7 See N.Y. Exec. Law § 28.
8 See N.Y. Exec. Law § 29.
9 See N.Y. Exec. Law § 29-a(1).
By the same Order, Governor Hochul suspended or modified various laws and regulations, including sections of the State Finance Law, Vehicle and Traffic Law, Highway Law, and Public Authorities Law, pursuant to Executive Law § 29-a. For example, the Executive Order “temporarily [suspended] or [modified]” State Finance Law § 97-g “to the extent necessary to purchase food, supplies, services, and equipment or furnish or provide centralized services to assist affected local governments, individuals, and other non-State entities in responding to and recovering from” the impacts of the severe winter storm.¹¹

**Limitations on the Governor’s Emergency Powers**

The Legislature has placed some limitations on the emergency powers granted to the Governor under the Executive Law. Importantly, the Governor may not use the powers in an open-ended manner and there are some restrictions on what the Governor may exercise the powers to accomplish.

Executive Orders declaring a state disaster emergency cannot be in effect for a period of greater than six months, but the Governor may extend the emergency in six-month increments.¹² Similarly, any suspension of specific provisions of a statute, local law, ordinance, orders, rules, or regulations can be made only for periods not exceeding 30 days.¹³ The Governor is authorized to suspend the provisions for additional 30-day periods.

In addition, an Executive Order may suspend legal provisions only under certain circumstances. Any suspension, alteration or modification of the requirements of the statute, local law, ordinance, order, rule, or regulation must be a “minimum deviation” from the requirements of the law and must be consistent with the necessity of the action related to the emergency or disaster.¹⁴ Further, the suspension of provisions must “safeguard the health and welfare of the public” and must be reasonably necessary for the disaster effort.¹⁵ The Executive Orders also must specify the statute, local law, ordinance, rule, or regulation to be suspended, including the terms and conditions of the suspension.¹⁶

While the textual limitations found in Executive Law § 29-a have not been used to invalidate an Executive Order as of the time of this writing, several New York courts have found them to operate together to require that Executive Orders suspending laws be read narrowly to ensure that the Order is effecting a “minimum deviation” from the existing law.¹⁷

Finally, the Legislature has created provisions that allow it to override the Governor’s authority during such emergencies.¹⁸ For example, the Legislature retains the power to terminate any

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¹¹ *Id.*
¹² See N.Y. Exec. Law § 28(3).
¹³ See N.Y. Exec. Law § 29-a(2)(a).
¹⁴ See N.Y. Exec. Law § 29-a(2)(e); see, e.g., *Dao Yin v. Cuomo*, 183 A.D.3d 926 (2nd Dep’t, 2020); *Quinn v. Cuomo*, 183 A.D.3d 928 (2d Dep’t, 2020).
¹⁵ See N.Y. Exec. Law § 29-a(2)(b).
¹⁶ See N.Y. Exec. Law § 29-a(2)(c).
¹⁷ See *People v. Demonia*, 74 Misc.3d 752 (County Court, Ulster County 2022); *McLaughlin v. Snowlift, Inc.*, 2021 N.Y. Slip Op. 50503(U) (Supreme Court, King’s County, 2021).
specific Executive Order suspending laws at any time by concurrent resolution.\textsuperscript{19} The Legislature also has the authority to override a Governor’s declaration of a disaster emergency, thereby terminating the emergency and related Executive Orders.\textsuperscript{20} Lawmakers exercised this authority in April 2021, terminating three Executive Orders issued by former Governor Cuomo in response to the COVID-19 pandemic.\textsuperscript{21}

Conclusion

New York Governors have long exercised emergency powers delegated to them by statute to enable the state to rapidly respond to public health emergencies and natural disasters. The use of Executive Orders in recent years has drawn significant public attention, as well as calls for changes in how New York State handles the powers of the Governor in times of emergency.\textsuperscript{22} It is unknown whether lawmakers will take further action in the near future to clarify or limit the Governor’s emergency powers, but it is likely to remain a topic of discussion and debate. As of now, the Governor has broad powers to suspend or modify existing law by Executive Order during a declared disaster emergency, subject to being overridden by a concurrent resolution of Legislature.

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\textsuperscript{19} See N.Y. Exec. Law § 29-a(4).

\textsuperscript{20} See N.Y. Exec. Law § 28(5).
