STATES OF EMERGENCY: COVID-19 AND SEPARATION OF POWERS IN THE STATES

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No event in recent years has shone a brighter spotlight on state separation of powers than the COVID-19 pandemic. Over a more than two-year period, governors exercised unprecedented authority through suspending laws and regulations, limiting business activities and gatherings, restricting individual movement, and imposing public health requirements. Many state legislatures endorsed these measures or were content to let governors take the lead, but in some states the legislature pushed back, particularly—albeit not only—where the governor and legislative majorities were of different political parties. Some of these conflicts wound up in state supreme courts.

This Essay examines the states' response to the COVID-19 pandemic through the prism of the separation of powers. After considering the actions governors took and the sources of their authority, it focuses on the principal state court decisions concerning the separation of powers questions arising out of the pandemic. Although governors lost a handful of high-profile decisions, they did quite well overall. Courts often read their powers broadly and rejected challenges to their authority. State judicial analysis in these COVID-19 powers conflicts involved close attention to the specific language of state constitutions and statutes, as well as reliance on doctrines used by federal courts. The Essay then reviews some of the state legislative responses—new laws and proposed constitutional amendments—to gubernatorial power. It concludes by considering what the pandemic experience tells us about state separation of powers, the mix of distinctive state arguments and federal analogies in state court analysis, and the role of partisanship in these disputes.

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INTRODUCTION

Scholarly examination of state constitutional law has expanded beyond its initial focus on civil rights, civil liberties, and equal protection to address the institutions and structures of state government.[1] Recent work has considered the rise of state governors,[2] the plural executive,[3] elected judiciaries,[4] legislative procedure,[5] the uncertain representativeness of state legislatures,[6] and distinctive state approaches to the separation of powers.[7]

No event in recent years has shone a spotlight on state separation of powers and institutional conflict more than the COVID-19 pandemic. Over a more than two-year period, governors exercised unprecedented authority through suspending laws and regulations,[8] limiting business activities[9] and gatherings,[10] restricting individual movement,[11] and imposing burdensome public health

1. *See, e.g.*, Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 DUKE L.J. (forthcoming 2023).

2. *See, e.g.*, Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483 (2017).

3. *See, e.g.*, William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446 (2006).

4. *See, e.g.*, JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA (Harvard Univ. Press 2012).

5. *See, e.g.*, Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 ALB. L. REV. 1629 (2018–19).

6. *See, e.g.*, Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733 (2021).

7. *See, e.g.*, JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 145–231 (Oxford Univ. Press 2022) (discussing various states' approaches to executive power).

8. *See, e.g.*, *In re Recall of Inslee*, 508 P.3d 635, 641 (Wash. 2022).

9. *See, e.g.*, *Casey v. Lamont*, 258 A.3d 647, 651–52 (Conn. 2021).

10. *See, e.g.*, *Kelly v. Legis. Coordinating Council*, 460 P.3d 832, 837 (Kan. 2020).

11. *See, e.g.*, Maggie Davis, Lauren Dedon, Stacey Hoffman, Andy Baker-White, David Engleman & Gregory Sunshine, *Emergency Powers and the Pandemic: Reflecting on State Legislative Reforms and the Future of Public Health Response*, 21 J. EMERGENCY MGMT. 19, 19–20 (2023).

requirements.[12] Many state legislatures endorsed these measures or were content to let governors take the lead,[13] but in some states they pushed back, particularly—albeit not only—where the governor and the legislative majority were of different political parties.[14] Some of these conflicts wound up in state supreme courts.[15]

This Essay examines the states' response to the COVID-19 pandemic through the prism of the separation of powers. Part I begins by looking to the governors, providing a brief overview of the actions they took and the sources of their authority. Part II turns to the courts, analyzing the principal state court decisions that considered separation of powers questions arising out of the governors' pandemic responses. Although governors lost a handful of high-profile decisions that have already received scholarly attention,[16] they did quite well overall. Courts often read their powers broadly and rejected challenges to their authority.[17] State judicial analysis in these COVID-19 powers conflicts involved both close attention to the specific language of state constitutions and statutes, and reliance on doctrines used by federal courts. Part III then looks at some of the state legislative responses—new laws and proposed constitutional amendments—to the breadth of gubernatorial power revealed by the pandemic. The Essay concludes by considering what the pandemic experience tells us about state separation of powers, the mix of distinctive state arguments and federal analogies in state court analysis, and the role of partisanship in these disputes.

I. COVID-19 AND THE GOVERNORS

COVID-19 was the first time that the governors of all fifty states used their emergency powers to respond to the same emergency.[18] The actions they took

12. *Id.* at 28–29.

13. *See, e.g.*, *Fox Fire Tavern, LLC v. Pritzker*, 161 N.E.3d 1190, 1197–98 (Ill. App. Ct. 2020).

14. *See* Davis, Dedon, Hoffman, Baker-White, Engleman & Sunshine, *supra* note 11, at 26, 28.

15. *See, e.g.*, *Wis. Legislature v. Palm*, 942 N.W.2d 900 (Wis. 2020).

16. *See, e.g.*, Seifter, *supra* note 6, at 1780–84 (critiquing *Wisconsin Legislature v. Palm*, 942 N.W.3d 900 and *In re Certified Questions from the U.S. Dist. Ct.*, 958 N.W.2d 1 (Mich. 2020)); Lindsay F. Wiley, *Democratizing the Law of Social Distancing*, 19 YALE J. HEALTH POL'Y L. & ETHICS 50, 100 (2020) (describing *Wisconsin Legislature v. Palm* as "arguably the most notorious decision in the pandemic to date"); Wendy E. Parmet, *The COVID Cases: A Preliminary Assessment of Judicial Review of Public Health Powers During a Partisan and Polarized Pandemic*, 57 SAN DIEGO L. REV. 999, 1014 (2020) (describing *Wisconsin Legislature v. Palm* as "[p]erhaps the most contentious case").

17. *See, e.g.*, *Elkhorn Baptist Church v. Brown*, 466 P.3d 30, 44 (Or. 2020).

18. Davis, Dedon, Hoffman, Baker-White, Engleman & Sunshine, *supra* note 11, at 19–20.

were sweeping in scope and extensive in impact.[19] Across the country, governors issued executive orders directing non-essential businesses and schools to close; determining which businesses were essential and which were non-essential; limiting the capacity of those businesses allowed to open; telling people to stay at home and, when in public, to maintain their distance from others; restricting the size of gatherings; barring non-emergency medical treatments; mandating people use facial coverings; and, in some states, requiring certain employees to be vaccinated.[20] Many gubernatorial directives went beyond public health per se and addressed some of the broader implications of the pandemic. Governors revised election law rules to reduce crowding in polling places,[21] changed tax filing deadlines, authorized virtual meetings, and implemented moratoria on evictions or cut-offs of utility service.[22] In some states, governors exercised the

19. *See, e.g.*, Stephanie Reed, Note, *Long COVID Side Effects: States Rethink Separation of Powers*, 19 J. HEALTH & BIOMEDICAL L. 143, 146 (2022) (noting that there was "more emergency executive action in the two years of peak pandemic than many states saw in two decades").

20. *See, e.g.*, Maggie Davis, Christine Gentry & Trudy Henson, *Calling Their Own Shots: Governors' Emergency Declarations During the COVID-19 Pandemic*, 12 CONLAWNOW 95, 101–05 (2020); Davis, Dedon, Hoffman, Baker-White, Engleman & Sunshine, *supra* note 11, at 20, 28. Some governors also issued executive orders *prohibiting* local government mask mandates. *See, e.g.*, *Abbott v. Harris Cnty.*, 672 S.W.3d 1, 5 (Tex. 2023).

21. *See* Dakota Foster, Note, *On the Precipice: Democracy, Disaster, and the State Emergency Powers that Govern Elections in Crises*, 13 J. NAT'L SEC. L. & POL'Y 141, 167–75 (2022).

22. *See, e.g.*, Cal. Exec. Order N-40-20 (Mar. 30, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/03/3.30.20-N-40-20.pdf [https://perma.cc/FB3Q-5AWL] (changing certain tax, fee, and other deadlines); Colo. Exec. Order D 2020 031 (Apr. 6, 2020), https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20031%20Evictions%20and%20Foreclosures.pdf [https://perma.cc/PFX9-2ZSK] (limiting evictions, foreclosures, and public utility disconnections; waiving interest on delinquent tax payments); Mass. Governor Order Suspending Certain Provisions of the Open Meeting Law (Mar. 12, 2020), https://www.mapc.org/wp-content/uploads/2020/05/Executive-Order-Suspending-Certain-Provisions-of-the-Open-Meeting-Law-3-12-20-1.pdf [https://perma.cc/RC4L-CL7H] (permitting remote meetings of public bodies); Mich. Exec. Order 2020-118 (June 11, 2020), http://www.legislature.mi.gov/documents/2019-2020/executiveorder/pdf/2020-EO-118.pdf [https://perma.cc/C569-U8ND] (providing temporary relief from certain eviction-related requirements and temporarily prohibiting the removal or exclusion of a tenant or mobile home owner from their residential premises); Mich. Exec. Order 2020-154 (July 17, 2020), https://www.legislature.mi.gov/documents/2019-2020/executiveorder/pdf/2020-EO-154.pdf [https://perma.cc/AM73-95DW] (authorizing remote meetings of public bodies); N.Y. Exec. Order 202.55 (Aug. 5, 2020), https://www.governor.ny.gov/sites/default/files/atoms/files/EO_202.55.pdf [https://perma.cc/87BR-PYGK] (extending certain tax deadlines); Tenn. Governor Exec. Order No. 16 (Mar. 20, 2020), https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee16.pdf [https://perma.cc/L7E4-8SDJ] (authorizing remote meetings); Utah

full police power of their states.[23] To be sure, there was some partisan distinction in the gubernatorial response. States with Democratic governors tended to act sooner, do more, and maintain restrictions longer than states with Republican governors.[24] Nevertheless, at the height of the pandemic, virtually every person and activity in every state was affected by some form of gubernatorial action.[25]

The legal basis for gubernatorial action was largely statutory. To be sure, most state constitutions vest executive power in the governor, charge the governor with the duty of faithful execution and enforcement of state law, designate the governor as the commander-in-chief of the state's military forces with authority to suppress insurrection or repel invasion, or authorize the governor to call the legislature into emergency session.[26] But state constitutions as a rule do not expressly authorize broad executive action during an emergency.[27] The few that do explicitly address emergencies provide for legislative authorization of emergency executive action.[28]

Nearly all states have some law authorizing the governor to declare an emergency and to take extraordinary unilateral actions during the emergency.[29] Indeed, many states have two emergency statutes—a general emergency law and one more specifically keyed to public health emergencies. The general emergency measure is often older. In many states, it was enacted in response to

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Governor Exec. Order No. 2020-005 (Mar. 18, 2020), https://rules.utah.gov/wp-content/uploads/Utah-Executive-Order-No.-2020-5.pdf [https://perma.cc/G8EN-TS7G] (authorizing remote meetings of public bodies).

23. *See, e.g.*, Daniel H. Bromberg, *California Constitutional Law: The Emergency Police Power*, 57 U.S.F. L. REV. 23 (2022) ("When asked whether the Governor could order water rationing under the [Emergency Services Act], the Attorney General answered that the Governor could do so during a state of emergency 'if the purpose . . . is to protect the order, safety, health, and general welfare of the society'—that is, an exercise of the police power.").

24. *See* John Kincaid & J. Wesley Leckrone, *Partisan Fractures in U.S. Federalism's COVID-19 Policy Responses*, 52 STATE & LOC. GOV'T REV. 298, 302 (2020); William M. Myers & Davia Cox Downey, *COVID-19 Policy Executive (In)Action in Florida and Michigan*, 67 WAYNE L. REV. 47, 51–52 (2021).

25. For a discussion of aggressive emergency actions by Republican governors in red or purple states, see Joseph Postell, *Emergency Powers and State Legislative Capacity During the COVID-19 Pandemic*, 15 N.Y.U. J.L. & LIBERTY 628, 640–41 (discussing actions of Republican governors in Alabama and Arizona). For contrasting normative assessments of gubernatorial emergency actions while agreeing on their extraordinary scope, compare Ricardo N. Cordova, *Lockdowns and Lost Liberties: Nevada's Experiment in One-Man Rule*, 49 N. KY. L. REV. 41 (2022), with Bromberg, *supra* note 23.

26. *See* F. David Trickey, *Constitutional and Statutory Bases of Governors' Emergency Powers*, 64 MICH. L. REV. 290, 290–92 (1965).

27. *See id.* at 292.

28. *See, e.g.*, N.M. CONST. art. IV, § 2 (providing for "disaster emergency procedure"); OR. CONST. art. X-A (providing for "catastrophic disaster").

29. *See, e.g.*, WIS. STAT. § 323.10 (2021–22).

wars, natural disasters, the Cold War, or civil defense concerns.[30] The public health emergency law may be newer; some of these laws were enacted as a response to the post-9/11 anthrax scare and other concerns about biohazards.[31] Although they may grant different powers and impose different conditions or restrictions on gubernatorial action, the emergency laws often overlap in scope. And where the general emergency law provided broader powers subject to fewer limits, governors were not reluctant to use them in tandem with the more targeted public health emergency law.[32] These laws also employ varying definitions of "emergency"—or "public health emergency" or "disaster" or "catastrophic disaster"—with the term triggering gubernatorial emergency power sometimes only vaguely defined, or focused on a list of specified disasters.[33]

Most importantly, many of these laws and the emergency measures that they authorize—such as evacuations and quarantines—implicitly assume that an emergency arises from a natural or man-made disaster that is both territorially focused on a specific area of the state and of limited duration.[34] Many, albeit not all, state emergency laws place a time limit on gubernatorial emergency powers unless the legislature agrees to an extension.[35] COVID-19, however, affected not just a specific area but the entire state and could be spread by those who were asymptomatic as well as by those visibly ill. Moreover, with waves of new infections following the mutation of new variants, the pandemic went on for more than two years—long past any termination date on a governor's statutory emergency powers.[36]

COVID-19, thus, posed multiple challenges to the legal and institutional infrastructure of state emergency regulation. Some of the issues were statutory: Did state laws that by their terms were written to address fires, floods, earthquakes, or similar disasters apply to a pandemic? Did laws authorizing the isolation or quarantine of individuals infected or thought to be infected also authorize measures like business shutdowns, stay at home orders, and mask

30. *See* Foster, *supra* note 21, at 156.

31. *See* Reed, *supra* note 19, at 145 n.12.

32. *See* Kelly J. Deere, *Governing by Executive Order During the Covid-19 Pandemic: Preliminary Observations Concerning the Proper Balance Between Executive Orders and More Formal Rule Making*, 86 MO. L. REV. 721, 732–33 (2021).

33. *See, e.g.*, WIS. STAT. § 323.02(6), (16) (2021–22); OR. CONST. art. X-A.

34. *See* Davis, Dedon, Hoffman, Baker-White, Engleman & Sunshine, *supra* note 11, at 19.

35. *See* Deere, *supra* note 32, at 733–34; Davis, Gentry & Henson, *supra* note 20, at 99–100.

36. *See* Gilad Abiri & Sebastián Guidi, *The Pandemic Constitution*, 60 COLUM. J. TRANSNAT'L L. 68, 83–85 (2021) (discussing the tension between the time limits in emergency laws and the "open temporality of pandemics").

mandates applicable to the entire population, including the many uninfected?[37] Other issues sounded in a constitutional register: If a fair reading of state emergency laws sustained a broad grant of powers to a governor, was that an unconstitutional delegation of legislative authority? If the statutory grant of emergency authority was subject to an expiration date unless the legislature agreed to a renewal, could the governor extend these emergency powers by simply declaring a new emergency? Did legislative efforts to curtail gubernatorial emergency powers unconstitutionally trench on the executive branch?

In most states, either these issues did not arise, or, if litigated, they were resolved without action by the state's highest court.[38] But in more than a dozen states over a roughly three-year period, the state supreme court was called on to address the scope of gubernatorial emergency power and the authority of other state institutions to limit that power.[39] In several states, the high courts heard multiple COVID-19 powers cases.[40] Some of the challenges to gubernatorial authority were raised by individuals or businesses affected by COVID-19 executive orders.[41] In other cases, state officials—legislative leaders, the

37. *See, e.g.*, Wiley, *supra* note 16, at 58–61 (noting that public health emergency laws contemplated the limited isolation of infected individuals, not broader social distancing requirements or limits on gatherings or movement).

38. In addition to state supreme court cases, state intermediate appellate courts issued COVID-19 powers decisions that were summarily affirmed by their state supreme courts. *See, e.g.*, *Newsom v. Super. Ct. of Sutter Cnty.*, 63 Cal. App. 5th 1099, 1105 (Ct. App. 2021); *Kravitz v. Murphy*, 260 A.3d 880, 885–86 (N.J. Super. Ct. App. Div. 2021). *See also T & V Assocs., Inc. v. Dir. of Health & Hum. Servs.*, No. 361727, 2023 WL 4277882, at *6–11 (Mich. Ct. App. June 29, 2023) (applying an earlier Michigan Supreme Court COVID-19 decision dealing with the non-delegation doctrine).

39. *See Casey v. Lamont*, 258 A.3d 647, 651 (Conn. 2021); *Abramson v. DeSantis*, No. 20-646, 2020 WL 3464376, at *1 (Fla. June 25, 2020); *Holcomb v. Bray*, 187 N.E.3d 1268, 1273–74 (Ind. 2022); *Kelly v. Legis. Coordinating Council*, 460 P.3d 832, 834 (Kan. 2020) (per curiam); *Beshear v. Acree*, 615 S.W.3d 780, 786–87 (Ky. 2020); *Desrosiers v. Governor*, 158 N.E.3d 827, 831–32 (Mass. 2020); *In re Certified Questions from the U.S. Dist. Ct.*, 958 N.W.2d 1, 6 (Mich. 2020); *Grisham v. Reeb*, 480 P.3d 852, 855–56 (N.M. 2020); *State v. Riggin*, 959 N.W.2d 855, 857–58 (N.D. 2021); *Ritter v. State*, 520 P.3d 370, 381–82 (Okla. 2022); *Elkhorn Baptist Church v. Brown*, 466 P.3d 30, 34–36 (Or. 2020); *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 876–77 (Pa. 2020); *Abbott v. Harris Cnty.*, 672 S.W.3d 1, 11–12 (Tex. 2023); *In re Recall of Inslee*, 508 P.3d 635 (Wash. 2022).

40. For more COVID-19 powers decisions, see *Butler v. Shawnee Mission Sch. Dist. Bd. of Educ.*, 502 P.3d 89 (Kan. 2022); *Cameron v. Beshear*, 628 S.W.3d 61 (Ky. 2021); *Grisham v. Romero*, 483 P.3d 545 (N.M. 2021); *Wolf v. Scarnati*, 233 A.3d 679 (Pa. 2020); *Corman v. Acting Sec'y of the Pa. Dep't of Health*, 266 A.3d 452 (Pa. 2021); *Fabick v. Evers*, 956 N.W.2d 856 (Wis. 2021); *Tavern League of Wis., Inc. v. Palm*, 957 N.W.2d 261 (Wis. 2021).

41. *See, e.g.*, *Desrosiers*, 158 N.E.3d at 832 & n.5; *Casey*, 258 A.3d at 652; *Riggin*, 959 N.W.2d at 857; *Friends of Danny DeVito*, 227 A.3d at 876; *Elkhorn Baptist Church*, 466 P.3d at 35.

legislature itself, or the state attorney general—took the lead in seeking to curb the governor.[42] Most, but not all, of the challenges brought by private citizens were rebuffed; the other branches of government did somewhat better. These cases are the focus of the next Part.

II. COVID-19 EMERGENCY POWERS IN STATE COURTS

The state COVID-19 powers cases raised three sets of separation of powers issues: statutory interpretation, the scope of constitutionally permissible legislative delegation to the governor, and the constitutionality of actions taken by the legislature or legislative actors to limit gubernatorial emergency authority.[43] In many cases, statutory and constitutional questions were intertwined. The statutory interpretation issues generally focused on whether COVID-19 was a "disaster" or "emergency" within the meaning of the relevant state emergency law or whether the governor's action fell within the scope of the powers granted by the statute. Governors won most of these cases, with a handful of exceptions discussed below. The results in the constitutional cases were more mixed. Most delegation doctrine challenges were rejected, although concerns about the scope of legislative delegation cropped up in many opinions. Courts divided over the authority of the legislature to limit gubernatorial powers.

A. Statutory Interpretation

1. DEFINING "DISASTER"

The most common statutory interpretation question was whether the governor could use emergency authority in a state where the occurrence triggering statutory emergency powers did not include a term like "disease" or "epidemic." In Connecticut, for example, the governor could proclaim a "civil preparedness emergency" in the event of "serious disaster, enemy attack,

42. *See, e.g.*, *Wis. Legislature v. Palm*, 942 N.W.2d 900, 904–05 (Wis. 2020) (holding the Secretary-designee of the Department of Health Services failed to abide by the Wisconsin Legislature's emergency rule procedures); *Holcomb*, 187 N.E.3d at 1273–74 (holding the Indiana General Assembly could not enact a law to overrule the Governor's emergency order); *Cameron*, 628 S.W.3d at 66 (dissolving an injunction against the General Assembly's emergency order pursuant to the Attorney General's challenge).

43. Gubernatorial COVID-19 emergency actions, of course, triggered many other federal and state constitutional questions including, but not limited to, the First Amendment, the Second Amendment, due process, equal protection, and takings. This Essay is limited to the assessment of state supreme court determination of separation of powers issues.

sabotage or other hostile action or in the event of the imminence thereof."[44] The emergency statute did not define "serious disaster."[45] However, another provision of state law defined "major disaster" as "any catastrophe including, but not limited to, any hurricane, tornado, storm, high water, wind-driven water, tidal wave, earthquake, volcanic eruption, landslide, mudslide, snowstorm or drought, or, regardless of cause, any fire, flood, explosion or man-made disaster."[46] Plaintiffs made an *ejusdem generis* argument that given the statute's detailed focus on weather conditions, seismic activity, fire, and explosion—and its lack of any reference to disease or contagion—COVID-19 was not a "major disaster" within the meaning of the statute.[47] Drawing from the "including, but not limited to" language in the text, legislative history, other statutes, and its assessment that "it would be absurd for the statutory scheme to be interpreted such that the governor could declare a civil preparedness emergency for an event such as a snowstorm, but not for the worst pandemic that has impacted the state in more than one century,"[48] the Connecticut Supreme Court concluded that COVID-19 was a serious disaster within the meaning of the emergency statute.[49]

The Massachusetts Supreme Judicial Court similarly rejected an *ejusdem generis* argument that the emergency trigger in that state's Civil Defense Act (CDA)—"the occurrence of any disaster or catastrophe resulting from attack, sabotage or other hostile action; or from riot or other civil disturbance; or from fire, flood, earthquake or other natural causes"[50]—excluded the pandemic or "a health crisis generally."[51] Plaintiffs bolstered their argument by noting that the state also had on the books a Public Health Act (PHA) that deals specifically with the protection of state residents against public health emergencies such as dangerous diseases.[52] However, the PHA provided the governor with more

44. *Casey v. Lamont*, 258 A.3d 647, 657 (Conn. 2021) (quoting CONN. GEN. STAT. § 28-9(a) (1959)).

45. *Id.* at 655.

46. *Id.* (quoting CONN. GEN. STAT. § 28-1(2) (1959)) (emphasis omitted).

47. *Id.* at 655–56.

48. *Id.* at 656 (emphasis omitted).

49. *Id.* at 659. The Kentucky Supreme Court also applied the canon against absurd results in *Beshear v. Acree*, 615 S.W.3d 780 (Ky. 2020). The court dismissed an argument that a statutory provision defining an "emergency" as an incident or situation that poses a major threat to public safety "*which a local emergency response agency determines is beyond its capabilities*" limits the governor's authority to declare a state of emergency on his own. *Id.* at 794–95 (quoting KY. REV. STAT. ANN. § 39A.010(12) (West 2021) (effective July 15, 2014 to February 1, 2021)). The court found that it would "produce an absurd result" if the statute were read to require the governor to consult with local agencies in all of the state's 120 counties. Given the need for "a prompt and effective response" to an emergency, requiring such extensive consultation "strains rational understanding." *Id.* at 803–04.

50. MASS. GEN. LAWS ch. 639, § 5 (2017).

51. *Desrosiers v. Governor*, 158 N.E.3d 827, 837 (Mass. 2020).

52. *Id.* at 835. *See* MASS. GEN. LAWS ch. 111, § 104 (2022).

limited authority than the CDA did.[53] The court concluded that, in light of the CDA's "general purposes . . . 'to protect the public peace, health, security, and safety,'" the "'other natural causes'" language easily applies to the pandemic.[54] As "neither the PHA nor the CDA contains language precluding the Governor from acting under the CDA when faced with a public health emergency, the PHA does not preclude the Governor from acting under the CDA in relation to the COVID-19 pandemic."[55] The Oregon Supreme Court similarly rejected an argument that the narrower grant of emergency authority in the state's public health emergency law limited the governor's emergency powers under the general emergency statute.[56]

The same effort to use *ejusdem generis* to exclude COVID-19 from the statutory trigger for gubernatorial emergency powers was also made, and also rejected, in the Pennsylvania Supreme Court.[57] The Keystone State's Emergency Code defines "disaster" as a "man-made disaster, natural disaster or war-caused disaster," with "natural disaster" in turn defined as multiple weather-caused or seismic events or "fire, explosion or other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life."[58] Plaintiffs argued that because "viral illness" is not comparable to the disasters specifically listed, it is not a "catastrophe" within the meaning of the statute.[59] The court rejected the *ejusdem generis* argument, first, because there was not sufficient commonality among the specific disasters in the definition to create the general nature or class for *ejusdem generis* to apply; and second, and more importantly, because narrowing the definition of "natural disaster" was inconsistent with what the court found to be the legislature's intention to give the governor "the necessary powers to respond to exigencies involving vulnerability and loss of life."[60]

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53. *Desrosiers*, 158 N.E.3d at 837–38.

54. *Id.* at 837 (quoting MASS. GEN. LAWS ch. 639, § 5 (2017)).

55. *Id.* at 838. Implicitly recognizing that the "natural causes" language and the specific public health emergency provisions of the PHA had some force after all, the court cautioned that not every public health matter, even those resulting from "natural causes," would support a CDA emergency. The court found that the PHA was primarily geared to address local public health emergencies, but that the COVID-19 pandemic "created a situation" that required the statewide action available only under the CDA. *Id.* at 839.

56. *See Elkhorn Baptist Church v. Brown*, 466 P.3d 30 (Or. 2020).

57. *See Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 888 (Pa. 2020).

58. *Id.* at 887 (citing 35 PA. CONS. STAT. § 7102 (2020)).

59. *Id.* at 887–88.

60. *Id.* at 889. Other courts more succinctly disposed of the argument that COVID-19 was not a "disaster" or "emergency" within the meaning of the state emergency statute. *See, e.g.*, *Abramson v. DeSantis*, No. 20-646, 2020 WL 3464376 (Fla. June 25, 2020) (concluding that "a pandemic is a 'natural emergency' within the meaning" of the statute); *Beshear v. Acree*, 615 S.W.3d 780, 801–02 (Ky. 2020) (applying "plain language" analysis to determine the COVID-19 pandemic falls within

2. Scope of Emergency Powers

With a handful of exceptions noted in the next Section, state supreme courts consistently found that actions taken by governors—or by other state officials such as the secretary of health acting at the governor's direction—fell within the broad scope of gubernatorial emergency powers, even when they involved such sweeping and unprecedented measures as limits on mass gatherings,[61] business shutdowns and limits on business capacity,[62] bans on indoor dining,[63] suspension of open meetings requirements,[64] and suspension of the ability of landlords to evict tenants.[65] Courts sustained the authority of governors to engage in arguably "legislative" activity, such as determining which businesses provide essential services—and thus can remain open—while those engaged in what the governor or secretary determined were non-essential had to close.[66] Gubernatorial imposition of criteria and timetables for the phased reopening of businesses and activities was also generally upheld.[67]

Unlike the issue of whether COVID-19 constituted a statutory "disaster," which occasionally triggered extended judicial discussion, there was generally little debate over whether the sweeping powers asserted by governors fell within the statutory grants. In considering the question of "whether business restrictions, in particular, are within the scope of the Secretary of Health's authority under the [Public Health Emergency Response Act]," the New Mexico Supreme Court quickly determined that business restrictions authority "further the PHERA's purposes of ensuring a coordinated response to a public health emergency."[68] The Kentucky Supreme Court rejected the argument of the state attorney general—who belonged to the opposite party of the governor—that some form of heightened scrutiny should be applied to the governor's actions and, instead, found (with one minor exception) that the extensive restrictions on businesses and gatherings imposed by the governor were all "reasonably

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the statutory emergency triggers of "biological" or "etiological" hazards); *In re Recall of Inslee*, 508 P.3d 635, 643–44 (Wash. 2022) (holding that although "pandemic" was not one of the enumerated reasons—"public disorder, disaster, energy emergency, or riot"—permitting Washington's governor to declare an emergency, the legislature intended a broad construction of "disaster" and construing that term "to exclude a worldwide pandemic would be strained and absurd").

61. *See, e.g.*, *Kelly v. Legis. Coordinating Council*, 460 P.3d 832, 837–39 (Kan. 2020).

62. *See, e.g.*, *Casey v. Lamont*, 258 A.3d 647, 660–61 (Conn. 2021); *Beshear*, 614 S.W.3d at 789–90, 805; *State v. Riggin*, 959 N.W.2d 855, 857 (N.D. 2021); *Friends of Danny DeVito*, 227 A.3d at 879, 885.

63. *See Grisham v. Romero*, 483 P.3d 545, 548 (N.M. 2021).

64. *See In re Recall of Inslee*, 508 P.3d at 641–42.

65. *Id.* at 640–41.

66. *See, e.g.*, *Desrosiers v. Governor*, 158 N.E.3d 827, 831–32 (Mass. 2020).

67. *Id.*

68. *Grisham v. Reeb*, 480 P.3d 852, 864 (N.M. 2020).

designed to contain the spread of a highly contagious and potentially deadly disease."[69] The Pennsylvania Supreme Court easily determined that the governor's statutory authority to "[c]ontrol ingress and egress to and from a disaster area" included the power to shut businesses even in counties where cases of COVID-19 had not yet been recorded.[70] Pointing to the virus's long incubation period, its spread through person-to-person contact, and the many asymptomatic carriers, the court concluded that "any location (including Petitioners' businesses) where two or more people can congregate is within the disaster area."[71] More generally, the court held that the governor's "expansive emergency management powers" extended to the closure of businesses.[72]

B. Statutory Limits on Executive Power

1. SUCCESSIVE EMERGENCIES

The most significant statutory COVID-19 powers rulings against governors arose in states in which the statutory grant of emergency powers was time-limited unless the legislature authorized a renewal. If the legislature did not authorize a renewal, could the governor find that emergency conditions continued to exist which would support a new declaration of a state of emergency?

In Michigan, the Emergency Management Act (EMA) authorized the governor to declare a "state of disaster" or "state of emergency" and to exercise emergency powers for twenty-eight days, at which point the emergency authority would lapse unless both houses of the legislature approved an extension of the authority.[73] Governor Whitmer's initial declarations were renewed by the legislature, but when the latest extensions lapsed on April 30, 2020, the legislature—controlled by the opposite party—refused to renew her emergency authority.[74] She then issued one executive order terminating the states of disaster and emergency under the EMA and a second executive order re-declaring a state of emergency and disaster under the Act, which she subsequently repeated after that twenty-eight-day statutory period had expired.[75] The Michigan Supreme Court unanimously concluded that unless an extension is approved by the legislature, the governor can declare a state of emergency or state of disaster

69. *Beshear v. Acree*, 615 S.W.3d 780, 829 (Ky. 2020).

70. *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 888–90 (Pa. 2020) (quoting 35 PA. CONS. STAT. § 7301(f)(7) (2014)).

71. *Id.* at 889–90.

72. *Id.* at 890.

73. MICH. COMP. LAWS §§ 30.403(3)–(4) (2023).

74. *In re Certified Questions from the U.S. Dist. Ct.*, 958 N.W.2d 1, 9 (Mich. 2020).

75. *Id.* at 6–7, 7 n.2.

only once and that she lacks the authority "to *redeclare* the same state of emergency or state of disaster and thereby avoid the Legislature's limitation on her authority."[76]

A similar scenario played out in Wisconsin, where the emergency statute gives the governor extraordinary powers for sixty days, after which that authority expires unless renewed by a joint resolution of the legislature.[77] On March 12, 2020, Governor Evers issued an executive order declaring that COVID-19 created a "public health emergency" under the statute.[78] When that order expired on May 11, 2020, the legislature—as in Michigan, controlled by the opposite party—declined to extend it,[79] but the governor issued additional executive orders finding that the COVID-19 pandemic continued to constitute a public health emergency.[80] A closely divided Wisconsin Supreme Court held that the "plain meaning" of the sixty-day limit, bolstered by statutory history of the law, is that the "duration-limiting language" of the emergency statute "forbids the governor from declaring successive states of emergency on the same basis as a prior state of emergency."[81] The court expressly linked the "expansive" scope of the governor's emergency powers to the durational limit, determining "it makes sense that the legislature would allow the executive branch to exercise emergency powers *only* on a temporary basis."[82]

Unlike in Michigan, three justices of the Wisconsin court dissented on the question of whether the governor can re-declare an emergency.[83] As with the Wisconsin majority, the Wisconsin dissenters determined the issue was one of statutory interpretation, but for them the key statutory language was the public health emergency statute's definition of "public health emergency" as "the occurrence or imminent threat of an illness or health condition that . . . [i]s believed to be caused by . . . a novel or previously controlled or eradicated biological agent" which also "creates a significant risk of substantial future harm to a large number of people."[84] Looking to both the dictionary and Wisconsin case law, the dissenters contended that a "new and concerning spike in infections" tied to concerns about the threat of new widespread exposures from

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76. *Id.* at 10–11. *See also id.* at 50, 56 (McCormack, C.J., concurring in part and dissenting in part).

77. WIS. STAT. § 323.10 (2021–22).

78. Wis. Exec. Order No. 72 (Mar. 12, 2020), https://evers.wi.gov/Documents/EO/EO072-DeclaringHealthEmergencyCOVID-19.pdf [https://perma.cc/4ETM-RL9C].

79. *Fabick v. Evers*, 956 N.W.2d 856, 859 (Wis. 2021).

80. *Id.*

81. *Id.* at 867–68.

82. *Id.* at 867 (emphasis added).

83. *Id.* at 891 (A. Bradley, J., dissenting).

84. *Id.* at 883 (A. Bradley, J., dissenting) (quoting WIS. STAT. § 323.02(16) (2021–22)).

the pending reopening of the state's schools constituted a new occurrence.[85] More precisely, they argued that the "occurrence" authorizing the governor's emergency orders was "not the pandemic itself, but conditions that the pandemic has caused" with new conditions constituting a new occurrence.[86] The dissenters also emphasized that the "extreme consequences" of denying the governor emergency powers to deal with the ongoing public health and economic impacts of the pandemic demonstrated that the majority's interpretation of the statute would lead to "absurd or unreasonable results."[87]

2. Administrative Procedure and Agency Deference

In two decisions based on state administrative law, state supreme courts struck down actions of the state's chief health officer for failure to follow proper administrative procedure. In *Wisconsin Legislature v. Palm,*[88] the Wisconsin Supreme Court majority agreed with the legislature that the acting health secretary's "Safer at Home Order"—issued pursuant to the governor's declaration of a health emergency and providing for the closure of non-essential businesses and prohibiting private gatherings of people not part of the same household—was a "rule" issued without following the statutory procedures required for emergency rule-making.[89] The acting secretary contended that her action was an "order" not subject to the rule-making procedure because it was a response "only to a specific, limited-in-time scenario"—the pandemic—rather than "a general order of general application" that, under Wisconsin precedent, was subject to the rule-making procedure.[90] The court concluded that the broad application of the "Safer at Home" directive to everyone in Wisconsin, with possible criminal penalties for violators, meant that it had to be treated as a rule.[91]

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85. *Id.* at 885 (A. Bradley, J., dissenting).

86. *Id.* (A. Bradley, J., dissenting).

87. *Id.* at 887. (A. Bradley, J., dissenting). This Essay focuses exclusively on state supreme court decisions concerning COVID-19 powers disputes, but a number of federal courts also considered whether a governor could re-declare an emergency without legislation after the statutory emergency period lapsed. These courts concluded, as a matter of statutory interpretation, that the relevant state statute permitted successive gubernatorial emergency proclamations if the governor determined that the emergency was continuing. *See, e.g.*, *Denis v. Ige*, 557 F. Supp. 3d 1083, 1097–100 (D. Haw. 2021) (interpreting Hawai'i emergency statute); *Cassell v. Snyders*, 458 F. Supp. 3d 981, 1001–02 (N.D. Ill. 2020) (holding that the Illinois Emergency Management Agency Act gives the governor "authority to issue successive emergency proclamations based on the same, ongoing disaster"); *H's Bar, LLC v. Berg*, No. 20-cv-1134, 2020 WL 6827964, at *5 (S.D. Ill. Nov. 21, 2020).

88. 942 N.W.2d 900 (Wis. 2020).

89. *Id.* at 906–07, 927.

90. *Id.* at 909.

91. *Id.* at 908–14.

The Wisconsin majority also held that even if Acting Secretary Palm's order was exempt from the rule-making procedure, it was beyond the scope of the emergency authority granted to her by the state's public health emergency statutes. Although the statutes grant her broad powers to take "necessary" actions for the "control and suppression of communicable diseases"—including the "quarantine and disinfection" of infected persons and those suspected of being infected—they do not provide expressly for anything as sweeping at the closure of businesses, the prohibition of gatherings, and stay-at-home directives.[92] The court emphasized that in 2011 the legislature had "altered our administrative law jurisprudence by imposing an 'explicit authority requirement' on our interpretations of agency powers."[93] Noting again the possible criminal penalties for violating the order and expressing concern about the potential burden on individual liberties posed by the order, the court relied on the absence of explicit statutory authorization for the secretary's action to invalidate it.[94]

The decision of the Pennsylvania Supreme Court in *Corman v. Acting Secretary of the Pennsylvania Department of Health*[95] also invalidated an acting health secretary's order—in this case mandating individuals wear face coverings while inside Pennsylvania's schools—because the order had not gone through rule-making.[96] The court found that although the relevant statute gave the health department broad authority to adopt "appropriate control measures" for the control and suppression of contagious diseases, it also required the department to act by a properly adopted "rule or regulation."[97] The department contended that its action was supported by a pre-existing regulation that authorized "isolation," "surveillance, segregation, quarantine or modified quarantine of contacts" of a person with a communicable disease or infection "and any other disease control measure the Department . . . considers to be appropriate."[98] In a rare judicial application of *ejusdem generis* to bar a COVID-19 order, the court found that principle limited "other disease control measure" to actions like isolation, quarantine, modified quarantine, surveillance, and segregation.[99] Parsing the definitions of those terms, the court found they "generally are

92. *Id.* at 915–16.

93. *Id.* at 916.

94. *Id.* at 916–18.

95. 266 A.3d 452 (Pa. 2021).

96. *Id.* at 487. The New Mexico Supreme Court addressed the same question of whether a COVID-19 directive could be issued as an order without going through rule-making, but concluded that the state's public health emergency statute enabled the health department to dispense with rule-making and act by order. In so doing, the court relied heavily on the *Palm* dissent. *See Grisham v. Romero*, 483 P.3d 545, 556–58 (N.M. 2021).

97. *Corman*, 266 A.3d at 476–77 (emphasis omitted) (quoting 35 PA. CONS. STAT. § 521.5 (1956)).

98. *Id.* at 464 (emphasis omitted).

99. *Id.*

discrete or targeted in nature and limited in duration," and, so, were quite different from mandatory face coverings.[100] As a result, the masking requirement lacked the necessary regulatory authorization.[101] However, in a nod to continuing executive authority to address contagious diseases, the court noted that "the Department has the power to promulgate a different regulation, or to amend" the existing one to expressly authorize mask mandates, but that it would have to follow the statutorily required procedures to do so.[102]

C. Separation of Powers and Delegation

Given the sweeping orders by governors to suspend pre-existing laws and regulations and to impose new law-like limits on gatherings, draw distinctions between essential and nonessential activities, restrict business and personal movement, and mandate face coverings, it is not surprising that these measures would be challenged on separation of powers grounds as going beyond executive power and trenching on the domain of the legislature. As gubernatorial COVID-19 orders were grounded in statutory grants of emergency powers, the separation of powers question was typically intertwined with delegation doctrine concerns: had the legislature improperly delegated legislative power to the executive? At the federal level, the delegation doctrine has been the subject of increased attention, with some members of the United States Supreme Court voicing skepticism about the long-standing and relatively deferential "intelligible principle" standard.[103] Some commentators have looked to the states, contending that state courts have taken a more restrictive approach that could prove a model for a new federal approach.[104]

However, in the COVID-19 context, most separation of powers and delegation doctrine challenges to executive action—and the statutory

100. *Id.* at 486.

101. *Id.* at 482–83.

102. *Id.* at 484–87. The court also considered and rejected the health department's contention that it ought to defer to the agency's interpretation of its own regulation. Unlike the Wisconsin court, however, the Pennsylvania court did not adopt a broad anti-deference stance but simply determined that the pre-existing regulation was not ambiguous so that deference to the agency's interpretation was not appropriate. *Id.*

103. *See, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2138–41 (2019) (Gorsuch, J., dissenting).

104. *See, e.g.*, SUTTON, *supra* note 7, at 145–231; Gary J. Greco, Survey, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. 567 (1994); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1191–201 (1999); Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619 (2017). A recent article finds that a more restrictive state approach to delegation is largely a "myth." *See* Joseph Postell & Randolph J. May, *The Myth of the State Nondelegation Doctrines*, 74 ADMIN. L. REV. 263 (2022).

authorization for it—failed. In *Beshear v. Acree*,[105] the Kentucky Supreme Court rejected the effort of the state attorney general—a political opponent of the governor[106]—"to adopt a strict separation of powers stance,"[107] and instead applied the United States Supreme Court's often-criticized "intelligible principle" standard.[108] The court found that the statute's goal "to protect life and property of the people of the Commonwealth, and to protect public peace, health, safety and welfare . . . and in order to ensure the continuity and effectiveness of government in time of emergency, disaster or catastrophe" provided an intelligible standard for its grant of authority "to perform and exercise other functions, powers, and duties deemed necessary to promote and secure the safety and protection of the civilian population."[109] The court explained that "[g]iven the wide variance of occurrences that can constitute an emergency, disaster or catastrophe, the criteria are necessarily broad and result-oriented."[110] The standards of protecting life, property, peace, health, safety and welfare "along with the 'necessary' qualifier [in the statute] are sufficiently specific to guide discretion while appropriately flexible to address a myriad of real-world events."[111] The court found that other legal and political checks on the governor—possible judicial challenges to the existence of an emergency, the legislature's statutory authority to terminate the emergency, and the "'ultimate check' of citizens holding the Governor accountable at the ballot box"—alleviated any concern about separation of powers.[112]

Although the Kentucky court cited the authority of the legislature to terminate the emergency as a basis for finding that the broad grant of emergency powers was not an unconstitutional delegation, the court also invoked the constitutionally limited capacity of the legislature to meet—which also meant that the legislature would be unable to terminate the emergency until the start of the following year—as a justification for a broad grant of powers to the governor. As the court explained, the Kentucky constitution provides that the legislature can meet for only thirty legislative days in odd-numbered years and sixty legislative days in even-numbered years, with the odd-year session needing to end by March 30 and the even-year session by April 15.[113] That meant that for

105. 615 S.W.3d 780 (Ky. 2020).

106. Attorney General Cameron became the Republican candidate running against Democratic Governor Beshear in the 2023 general election.

107. *Beshear*, 615 S.W.3d at 808.

108. *Id.* at 811.

109. *Id.* (first quoting KY. REV. STAT. ANN. § 39A.010 (West 2023); then quoting KY. REV. STAT. ANN. § 39A.100(1)(j) (West 2020)).

110. *Id.*

111. *Id.* at 812.

112. *Id.* at 812–13 (quoting *In re Certified Questions of the U.S. Dist. Ct.*, 958 N.W.2d 1, 51 (Mich. 2020) (McCormack, C.J., concurring in part and dissenting in part)).

113. *Id.* at 807.

most of 2020, after COVID-19 struck, the legislature was out of session and lacked the constitutional authority to call itself back into session if it disagreed with the governor's handling of the emergency.[114] In the court's view, "the structure of Kentucky government . . . renders it impractical, if not impossible, for the legislature, in session for only a limited period each year, to have the primary role in steering the Commonwealth through an emergency."[115] In Kentucky, at least, the structure of the state constitution supported a leading role for the governor in addressing the pandemic.[116]

The Supreme Court of Connecticut took a similar approach in finding that the legislature's grant to the governor of the authority to "modify or suspend" any law or requirement whenever the Governor finds the law or regulation "in conflict with the efficient and expeditious execution of civil preparedness functions or the protection of the public health" or when it is "reasonably necessary in the light of the emergency to protect the health, safety and welfare of the people of the state"[117] did not violate the non-delegation doctrine. Citing both federal and Connecticut delegation cases articulating the "intelligible principle" standard,[118] the court found that the statutory grant, while broad, was not "limitless or standardless."[119] The governor's actions would have to be a response to a particular emergency and "reasonably necessary" to address it.[120] Moreover, "given that there are myriad serious disasters that could arise and the actions the governor would be required to take could vary significantly from one serious disaster to another,"[121] a broad grant of power was a proportionate delegation of legislative authority. Like the Kentucky court, the Connecticut court also emphasized the superior institutional capacity of the executive to address an emergency: "it is reasonable for the legislature to conclude that the executive branch of government would be far better suited to respond to a serious disaster with the speed and flexibility needed to protect the public health and

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114. *See id.* at 813.

115. *Id.* at 808–09.

116. In so concluding, the Kentucky Supreme Court also pointed to the provisions of the Kentucky Constitution making the governor the "commander-in-chief" of the state's military affairs, vesting the governor with the "supreme executive power of the commonwealth," mandating that the governor "take care that the laws be faithfully executed," and authorizing the governor—but not the legislature—to convene the legislature "on extraordinary occasions" including at a place other than the state capital "if that should have become dangerous from an enemy or from contagious diseases." *Id.* at 806 (first quoting KY. CONST. of 1891, § 75; then quoting KY. CONST. of 1891, § 69; then quoting KY. CONST. of 1891, § 81; and then quoting KY. CONST. of 1891, § 80).

117. *Casey v. Lamont*, 258 A.3d 647, 664–65 (Conn. 2021) (first quoting CONN. GEN. STAT. ANN. § 28-9(b)(1) (West 2010); then quoting CONN. GEN. STAT. ANN. § 28-9(b)(7) (West 2010)).

118. *Id.* at 664–67.

119. *Id.* at 666.

120. *Id.* at 665.

121. *Id.* at 667.

welfare."[122] Although, unlike the Kentucky legislature, the Connecticut legislature was not subject to a constitutional constraint on its ability to meet, it still would "not [be] in session continuously and would not be well positioned to mount a rapid response to a serious disaster, especially one that develops and evolves quickly or unpredictably, and thus requires an ongoing and agile response."[123] The court also noted that Connecticut's separation of powers jurisprudence emphasized a "tradition of harmony" and the sharing of responsibility for legislating rather than a sharp separation of the branches.[124] The delegation of broad emergency powers was consistent with that tradition.

The high courts of Massachusetts,[125] New Mexico,[126] North Dakota,[127] Oregon,[128] Pennsylvania,[129] and Washington[130] also rejected separation of powers/delegation doctrine challenges, often with relatively brief discussion. The Massachusetts court simply observed that the governor's emergency orders had not "deprive[d] the Legislature of its full authority to pass laws,"[131] and the New Mexico court similarly briefly concluded that the governor's executive order "does not work a fundamental disruption of the balance of powers between the branches of government in the context of this public health crisis."[132] Like other courts, the Oregon Supreme Court held that the governor's broad emergency powers were "limited" because "they must be exercised to address the declared emergency," the governor must terminate the state of emergency when the emergency no longer exists, and the legislature has the power to terminate the emergency at any time by joint resolution.[133]

In Pennsylvania, the delegation doctrine provides that the legislature "must make the basic policy choices" and then "include adequate standards which will

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122. *Id.*

123. *Id.*

124. *Id.* at 662–63.

125. *See, e.g.*, *Desrosiers v. Governor*, 158 N.E.2d 827, 840–41 (Mass. 2020).

126. *See, e.g.*, *Grisham v. Romero*, 483 P.3d 545, 559 (N.M. 2021).

127. *See, e.g.*, *State v. Riggin*, 959 N.W.2d 855, 861–63 (N.D. 2021).

128. *See, e.g.*, *Elkhorn Baptist Church v. Brown*, 466 P.3d 30, 42–44 (Or. 2020).

129. *See, e.g.*, *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 892–93 (Pa. 2020); *Wolf v. Scarnati*, 233 A.3d 679, 703–06 (Pa. 2020).

130. *See, e.g.*, *In re Recall of Inslee*, 508 P.3d 635, 640–41 (Wash. 2022). The separation of powers question in *Inslee* was whether the governor usurped the power of the judiciary to set procedural rules when he limited the ability of landlords to initiate detainer proceedings against tenants during the COVID-19 emergency. The court concluded that authority of the courts was not affected by the governor's action. *Id.*

131. *Desrosiers v. Governor*, 158 N.E.2d 827, 841 (Mass. 2020) (quoting *Opinion of the Justices to the Senate*, 717 N.E.2d 655, 666 (Mass. 1999)).

132. *Grisham v. Romero*, 483 P.3d 545, 559 (N.M. 2021).

133. *Elkhorn Baptist Church*, 466 P.3d at 43.

guide and restrain the exercise of the delegated administrative functions"[134]—which sounds a lot like the federal "intelligible principle" requirement with perhaps a bit more bite.[135] In rejecting a suit brought by the Republican leaders of the state senate to invalidate the emergency statutes relied on by Governor Wolf, the state supreme court easily found that the legislature had made "the basic policy choices" of delegating broad powers—including the challenged power to suspend laws—when it enacted the Emergency Management Services Code. The statutory language authorized the governor to suspend state laws "if strict compliance" with the suspended law "would in any way prevent, hinder or delay necessary action in coping with the emergency."[136] The Pennsylvania court determined that that provided an adequate standard to "guide and restrain" the governor's emergency actions.[137] Although the authority given to the governor was "[b]road," it was not "standardless," with the "scope of the emergency" appropriately determining the extent of the governor's powers under the statute.[138]

The only COVID-19 case in which an emergency powers statute was struck down on separation of powers or non-delegation grounds[139] was the decision of a divided Michigan Supreme Court in *In re Certified Questions from the United*

134. *Wolf*, 233 A.3d at 704 (quoting *Protz v. Workers' Comp. Appeal Bd.*, 161 A.3d 827, 834 (Pa. 2017)).

135. See Richard H. Seamon, *How the U.S. Constitution Connects with COVID-19*, IDAHO STATE BAR: BLOG, https://isb.idaho.gov/blog/how-the-u-s-constitution-connects-with-covid-19/ [https://perma.cc/PBB9-HQW4] (July 8, 2022), for more background on the federal "intelligible principle" standard.

136. *Wolf*, 233 A.3d at 705 (quoting 35 PA. CONST. STAT. § 7301(f)(1) (2014)).

137. *Id.* at 704 (quoting *Protz*, 161 A.3d at 834).

138. *Id.* at 705.

139. In *Wisconsin Legislature v. Palm*, 942 N.W.2d 900 (Wis. 2020), two of the four justices in the majority wrote lengthy concurring opinions that would have also invalidated the governor's action on separation of powers grounds. *See id.* at 919–30 (R. Bradley, J., concurring); *id.* at 930–41 (Kelly, J., concurring). However, the majority opinion itself did not rely on separation of powers or the delegation doctrine. *Accord id.* at 952 (Hagedorn, J., dissenting) ("Some would like to characterize this case as a battle over the constitutional limits on executive power . . . but . . . [n]o party has raised or developed such a claim.").

In *Ritter v. State*, 520 P.3d 370 (Okla. 2022), the Oklahoma Supreme Court struck down the provision of a 2021 Oklahoma law conditioning the authority of the board of education of a local school district to implement a mask mandate on whether the district is located in a jurisdiction under a state of emergency declared by the governor. *Id.* at 376, 382. The court noted that as the governor "has neither constitutional nor statutory authority over the operation of schools," *id.* at 382, the legislation was an "impermissible delegation of authority" to the governor to decide whether a school board could adopt a mask mandate. *Id.* at 380. The decision did not challenge the grant of statutory authority to the governor to declare an emergency, but only the specific provision infringing on local school board authority to decide whether to implement a mask mandate. *Id.* at 380–82.

States District Court,[140] considered in Section II.A's review of statutory interpretation.[141] As previously discussed, in *Certified Questions* the Michigan court held that the governor could not, without legislative approval, redeclare a state of emergency issued under the Emergency Management Act (EMA), which limited a gubernatorial state of emergency to twenty-eight days.[142] However, Michigan, like several other states, had a second emergency statute—the Emergency Powers of the Governor Act (EPGA)—that long predated the EMA[143] and, unlike the EMA, placed no time limit on the governor's exercise of emergency powers.[144] Governor Whitmer invoked the EPGA as well as the EMA in her effort to renew her emergency authority.[145]

A narrow majority of the court, purporting to apply the "intelligible principle" standard,[146] held that the EPGA violated the delegation doctrine

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140. 958 N.W.2d 1 (Mich. 2020). The case began as a suit in federal court by a patient who was unable to obtain knee-replacement surgery because of the governor's COVID-19 order barring health care providers from performing nonessential procedures. The federal district court certified to the Michigan Supreme Court the questions of the governor's authority, under Michigan law, to renew her emergency declarations and whether the emergency laws violated the separation of powers or non-delegation doctrine provisions of the Michigan Constitution. *Id.* at 7.

141. *See id.* at 24; *supra* Section II.A.1. Technically, there were two Michigan decisions holding that a Michigan emergency statute violated the state constitution's separation of powers requirement. The chambers of the state legislature also sued the governor for a declaratory judgment that the emergency law was an unconstitutional delegation. That case reached the state supreme court ten days after the *Certified Questions* decision, which the court relied on in summarily granting the legislature the relief it sought. *House of Representatives v. Governor*, 949 N.W.2d 276 (Mich. 2020).

142. *Certified Questions*, 958 N.W.2d at 11.

143. The EPGA was enacted in 1945 in response to the Detroit race riots of 1943. *Id.* at 13.

144. *See* Emergency Powers of Governor Act 302 of 1945, MICH. COMP. LAWS § 10.31 (2014).

145. *See* Allison R. Donahue, *Whitmer Extends State of Emergency for COVID-19*, MICH. ADVANCE (Sept. 30, 2020, 9:10 AM), https://michiganadvance.com/blog/whitmer-extends-state-of-emergency-for-covid-19/ [https://perma.cc/Y8NZ-R56R].

146. *Certified Questions*, 958 N.W.2d at 18–19, 25–31, 18 n.18, 23 n.20. One member of the majority, Justice Viviano, would have preferred to base the decision on statutory interpretation. In his view, the EPGA addressed only emergencies affecting public safety. The EMA was the statute with jurisdiction over public health emergencies. COVID-19 was a public health emergency, so the governor could not use the EPGA as a basis for her COVID-19 orders. *See id.* at 31–46 (Viviano, J., concurring in part and dissenting in part). The other three justices in the majority disagreed with that reading of the EPGA, as did the three dissenters. *See id.* at 14–16; *id.* at 51 n.1 (McCormack, C.J., concurring in part and dissenting in part). Justice Viviano agreed with the rest of the majority that the EPGA violated the delegation doctrine under what he referred to as the "traditional framework" of the intelligible principle rule, but he also wrote to explain "why, in an appropriate future case, [he] would consider adopting" the more restrictive rule proposed by United States Supreme Court Justice Gorsuch in his dissent in *Gundy*

because it granted the governor "remarkably broad" authority that she had used to implement policies of "sweeping scope, both with regard to the subjects covered and the power exercised over those subjects."[147] The EPGA placed no time limit on the governor other than her determination that the emergency no longer exists,[148] and it provided no standards that would cabin the governor from exercising "pure legislative policymaking power."[149] The majority concluded that the statutory requirements that the governor's actions be "*reasonable*" and "*necessary*" to "protect life and property or to bring the emergency situation within the affected area under control" placed only "a largely (if not entirely) illusory limitation upon the Governor's discretion."[150] As far as the court was concerned, there was "nothing within either the 'necessary' or 'reasonable' standards that serves in any realistic way to transform an otherwise impermissible delegation of *legislative* power into a permissible delegation of *executive* power,"[151] particularly in light of the breadth of the delegated power and its unlimited duration.[152]

D. Other Government Structure Decisions

State supreme courts decided other intragovernmental conflicts growing out of the COVID-19 pandemic. In these cases, the legislature or legislative bodies sought to flex their institutional muscles and curb gubernatorial power, and governors pushed back asserting constitutional or statutory defenses.

In *Wolf v. Scarnati*,[153] the Pennsylvania Supreme Court held that the legislature's effort to terminate the governor's declaration of a state of emergency violated the presentment requirement of the state constitution.[154] Pennsylvania's emergency statute limited a state of emergency to ninety days; authorized the governor to renew the state of emergency for additional ninety-day periods; but also authorized the legislature to terminate a state of emergency

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v. United States, 139 S. Ct. 2116 (2019). *Certified Questions,* 958 N.W.2d. at 47–49 (Viviano, J., concurring in part and dissenting in part).

147. *Certified Questions*, 958 N.W.2d at 20–21.

148. *Id.* at 21.

149. *Id.* at 21–22.

150. *Id.* at 22 (quoting MICH. COMP. LAWS ANN. § 10.31(1) (West 2022)).

151. *Id.* at 24.

152. The three dissenters also applied the "intelligible principle" doctrine and concluded that under both federal and Michigan case law, the EPGA's "reasonable" and "necessary" criteria passed muster. *See id.* at 53–54 (McCormack, C.J., concurring in part and dissenting in part) ("Given the unpredictability and range of emergencies the Legislature identified in the statute, it is difficult to see how it could have been more specific.").

153. 233 A.3d 679 (Pa. 2020).

154. *Id.* at 712.

by concurrent resolution "at any time."[155] When Governor Wolf's original March 6, 2020 declaration of a state of disaster emergency expired at the beginning of June, he renewed it for another ninety days.[156] Almost immediately thereafter, both chambers of the legislature passed a concurrent resolution to terminate the emergency.[157] When the legislative leadership sued the governor to enforce the resolution, he countersued to have it declared null and void.[158]

Dividing largely on partisan grounds,[159] the supreme court majority determined that the state constitution's requirement that "[e]very order, resolution or vote, to which the concurrence of both Houses may be necessary . . . shall be presented to the Governor and before it shall take effect be approved by him"[160] applied to the emergency-termination resolution. The court explained that the constitution created two exceptions to the presentment requirement—legislative adjournment and proposed constitutional amendments—neither of which applied, and it declined to apply the existing judicially created exception for internal legislative matters, such as procedural rules or investigatory or ceremonial resolutions, to the emergency-termination resolution.[161] According to the court, that exception applied only to matters that do not have "legal effect," that is, do not have "the effect of legislating."[162] In the court's view, much as the governor's orders during the state of emergency had legal effect, terminating those orders would also necessarily have a legal effect.[163] The court analogized the termination resolution to the legislative veto found unconstitutional by the U.S. Supreme Court under the United States Constitution in *Immigration and Naturalization Service v. Chadha*,[164] which had

155. *Id.* at 684–85 (emphasis omitted) (quoting 35 PA. CONS. STAT. § 7301(c) (2020)).

156. *Id.*

157. *Id.* at 685.

158. *See id.* at 686.

159. The majority consisted of four of the court's five Democrats. The two Republicans dissented. The fifth Democrat agreed with the majority's constitutional finding that the presentment requirement applied to an emergency-termination resolution but disagreed with the majority's interpretation of the emergency statute as so providing. He would have found the statutory provision enabling the legislature to terminate the state of emergency by concurrent resolution without presentment to the governor as both unconstitutional and inseverable from the emergency statute, which he would have held unconstitutional. *See id.* at 707–12 (Dougherty, J., concurring in part and dissenting in part).

160. *Id.* at 687 (quoting PA. CONST. art. III, § 9). This provision was subsequently amended to permit legislative adoption of an emergency termination resolution without presentment to the governor. *See* discussion *infra* Section III.A.

161. *See Wolf*, 233 A.3d at 688.

162. *Id.* at 689–90.

163. *See id.* at 692.

164. 462 U.S. 919 (1983).

become part of Pennsylvania's constitutional jurisprudence.[165] As a result, the state constitution required presentment of the termination resolution. Then, applying the constitutional avoidance canon, the court interpreted the emergency powers statute to provide for presentment.[166] Although Republicans controlled a majority in both houses of the Pennsylvania legislature, they lacked the two-thirds vote necessary to overturn a gubernatorial veto of the termination resolution, so the court's decision effectively enabled the governor to renew the state of emergency declaration at will.

A Democratic governor won another, albeit much more limited, state supreme court victory against a Republican legislature in *Kelly v. Legislative Coordinating Council*.[167] Kansas law authorized the governor to declare a state of disaster emergency that would last for only fifteen days unless ratified by concurrent resolution of the legislature.[168] Governor Kelly proclaimed a state of emergency on March 12, 2020, which the legislature, by concurrent resolution, extended to May 1.[169] However, when the governor issued an executive order on April 7 temporarily prohibiting mass gatherings, the Legislative Coordinating Council (LCC)—a body consisting of the legislature's leaders with the statutory "power to represent the legislature when the legislature is not in session"[170]—met and voted on partisan lines to terminate the state of disaster emergency.[171] When the governor sued to nullify the LCC's purported revocation of her order, the state supreme court agreed with her that neither the concurrent resolution extending the emergency nor the statutory grant of power to the LCC enabled it to curb the governor's emergency authority.[172] The governor's victory, however, lasted only until the expiration of the authority granted by the concurrent resolution. The legislature subsequently renewed the state of emergency, with limits on the governor's authority and requirements that another body dominated by the legislature approve certain emergency actions and additional renewals.[173]

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165. *Wolf,* 233 A.3d at 687–88.

166. *Id.* at 694–99.

167. 460 P.3d 832 (Kan. 2020).

168. *Id.* at 835.

169. *Id.* at 836.

170. *Id.* at 839.

171. *See id.* at 837.

172. *Id.* at 838–39.

173. The statute barred the governor from proclaiming a new state of disaster emergency related to COVID-19 during 2020 without an affirmative vote of at least six of the legislative members of the state finance council, a body consisting of eight legislative leaders—six of whom belong to the majority party—plus the governor. *See* H.B. 2016, 2020 Spec. Sess., 2020 Kan. Sess. Laws 5 (Kan. 2020). After additional renewals of the emergency into 2021, the legislature by statute formally revoked all the COVID-19 emergency executive orders as of March 31, 2021, and made any new declaration of a health emergency based on COVID-19 subject to revocation by the legislative coordinating council. KANS. STAT. ANN. § 48-924b (2020).

In Kentucky, as previously discussed, Governor Beshear in 2020 defeated an effort to invalidate his emergency powers on non-delegation grounds.[174] In 2021, the Kentucky legislature came into session and, by overriding the governor's vetoes, enacted a package of measures restricting the governor's ability to take unilateral action during declared emergencies.[175] The governor then sued the legislature for a declaration that the new measures unconstitutionally infringed on his executive powers, and requested a preliminary injunction against their enforcement.[176] The result in *Cameron v. Beshear*[177] was something of a split decision. The Kentucky Supreme Court rejected the attorney general's contentions that the governor lacked standing and that the case was non-justiciable,[178] and it interpreted the language in one of the new statutes—requiring the governor to submit emergency regulations to legislative committee review and the possible determination that the regulations are "deficient"—as nonbinding, leaving the governor "final say over the disposition of any 'deficient' emergency regulations."[179] However, the court rejected the governor's challenge to a new provision that conditions the governor's power to suspend a statute during an emergency on the approval of the attorney general.[180] The court determined that the law did not unconstitutionally trench on the governor's executive authority. The court explained that the power to suspend statutes is legislative, not executive.[181] Moreover, the state constitution created a government structure with "two independently-elected constitutional officers," thereby providing the legislature with "convenient receptacles for the diffusion of executive power"[182] and enabling it to require the governor to share executive authority with the attorney general.

Governor Beshear also challenged a provision requiring him to call the legislature into session every thirty days in order for him to exercise his emergency powers, which he claimed infringed on his exclusive authority under the constitution to call the legislature into special session.[183] The court declined to address the question, finding it had not been adequately briefed by the parties.[184] But that question of whether a legislature could call itself into emergency session was subsequently the focus of a dispute before the Indiana

174. *See Beshear v. Acree*, 615 S.W.3d 780 (Ky. 2020).
175. *Cameron v. Beshear*, 628 S.W.3d 61, 66–67 (Ky. 2021).
176. *Id.* at 67.
177. 628 S.W.3d 61 (Ky. 2021).
178. *Id.* at 68–71.
179. *Id.* at 74–75.
180. *Id.* at 76.
181. *Id.*
182. *Id.* (quoting *Brown v. Barkley*, 628 S.W.2d. 616, 622 (Ky. 1982)).
183. *Id.* at 75.
184. *Id.* at 76.

Supreme Court. That court held that under Indiana's constitution the power to call a special session belongs exclusively to the governor.[185] Although both the Indiana governor and the legislature's leadership were Republicans, conflict over the governor's COVID-19 emergency powers erupted during the 2021 legislative session. The legislature then passed a bill authorizing "a small subset of legislators—eight members from each of the two chambers, known as the Legislative Council—"[186] to pass a resolution calling the legislature into session if the governor had declared a state of emergency with statewide impact, and the council determined it was necessary for the legislature to meet to address the emergency.[187] The governor vetoed the bill, but the legislature overrode the veto.[188] The governor then sued for a declaration that the measure was unconstitutional and an injunction against its enforcement.[189]

The Indiana Supreme Court unanimously agreed with the governor that a legislative session could not be called by a resolution of the council, but instead required a law, and that law would have to be passed by the legislature and presented to the governor[190]—much as the Pennsylvania Supreme Court had held that an emergency-termination resolution had to be submitted to the governor.[191] Moreover, although the legislature could set additional sessions by law, it could do so only when in session; the constitution vested the power to call special sessions exclusively in the governor.[192] For good measure, the court also rejected the legislature's arguments that the governor lacked standing to sue, that the issue was a non-justiciable political question, and that the governor could not hire outside counsel to prosecute the case without the attorney general's approval, which the attorney general had not given.[193] Unlike the Kentucky Supreme Court, the Indiana court determined that "effectively giv[ing]" the attorney general "veto power" over the governor's ability to sue would violate "the Governor's implied power to litigate in executing his enumerated power under the take-care clause."[194]

185. *Holcomb v. Bray*, 187 N.E.2d 1268, 1270 (Ind. 2022). Indiana is one of fourteen states lacking a constitutional provision authorizing the legislature to call itself into special session. In twelve of those states, including Indiana, the governor can call a special session. *See id.* at 1280 n.2.

186. *Id.* at 1274.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 1281.

191. For a discussion of *Wolf v. Scarnati*, see *supra* notes 153–63 and accompanying text.

192. *Holcomb v. Bray*, 187 N.E.2d 1268, 1283–84 (Ind. 2022).

193. *Id.* at 1284–91.

194. *Id.* at 1289.

III. THE LEGISLATURES RESPOND

Over the course of the COVID-19 pandemic and in its wake, many legislatures responded to the breadth of gubernatorial emergency powers and to some of the court decisions sustaining the exercise of those powers by passing new measures trimming executive power. Some of these measures targeted specific types of executive orders, such as limits on businesses and gatherings and mask mandates. Others were more structural, setting up new rules and procedures for legislative oversight of gubernatorial emergency action.

A. Constitutional Amendments

From a state constitutional law perspective, surely the most significant legislative actions involved efforts to amend state constitutions. In Pennsylvania, the legislature moved to overturn *Wolf v. Scarnati* by submitting to the voters two constitutional amendments. The first amendment sought to eliminate *Wolf's* determination that an emergency-termination resolution is subject to the constitution's presentment requirement.[195] The second amendment aimed to eliminate the governor's power to renew without limit an emergency declaration by shortening the emergency period to twenty-one days and barring a renewal unless the legislature affirmatively votes to authorize it.[196] With support for and opposition to the measures dividing on partisan lines, both amendments were approved by the voters by a 52% and 48% margin in a May 2021 election.[197] The Pennsylvania amendments appear to have had broader effects on COVID-19 litigation in that state. Prior to their adoption, the state supreme court had twice emphatically sustained the governor's emergency powers.[198] After the amendments' ratification, the court handed the governor a significant rebuff in the *Corman* decision.[199]

In Kentucky, the legislature also sought to use the constitutional amendment process to overturn an adverse state supreme court decision and

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195. *See Pennsylvania Question 1, Legislative Resolution to Extend or Terminate Emergency Declaration Amendment (May 2021)*, BALLOTPEDIA, https://ballotpedia.org/Pennsylvania_Question_1,_Legislative_Resolution_to_Extend_or_Terminate_Emergency_Declaration_Amendment_(May_2021) [https://perma.cc/C7E3-JKSW] [hereinafter *Pennsylvania Question 1*].

196. *See Pennsylvania Question 2, Emergency Declarations Amendment (May 2021*, BALLOTPEDIA, https://ballotpedia.org/Pennsylvania_Question_2,_Emergency_Declarations_Amendment_(May_2021) [https://perma.cc/9MM6-V39Z] [hereinafter *Pennsylvania Question 2*].

197. *See Pennsylvania Question 1*, *supra* note 195; *Pennsylvania Question 2*, *supra* note 196.

198. *See generally Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa. 2020); *Wolf v. Scarnati*, 233 A.3d 679 (Pa. 2020).

199. *See supra* notes 95–102 and accompanying text.

strengthen its constitutional position, but the effort failed. The Kentucky legislature passed an amendment that authorized the legislature to extend the length of the legislative session and to enable the leaders of the legislature to call a special session,[200] thus overcoming the constitutional impediment to legislative action in an emergency cited by the Kentucky Supreme Court.[201] But the voters rejected the measure by a vote of 54% to 46%.[202] Similar amendments to allow legislative leaders to call special sessions that would enable them to act in emergencies were also submitted to the voters in two other states, with the measure passing in Idaho 52% to 48%,[203] but losing in Arkansas 61% to 39%.[204]

Other state constitutional amendments submitted by legislatures in Republican trifecta states in response to the COVID-19 pandemic dealt with specific controversial elements of some state measures to address the pandemic. Alabama voters approved a measure requiring that any legislation changing the conduct of a general election be implemented at least six months before the next affected general election.[205] Like many other states, Alabama had eased its rules for mail-in and absentee voters and its candidate filing procedures for the November 2020 general election.[206] Texas voters approved state constitutional amendments that prohibit the state or any political subdivision from enacting a law, rule, order, or proclamation that limits religious services or organizations[207]

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200. *See Kentucky Constitutional Amendment 1, Changes to Legislative Session End Dates and Special Sessions Measure (2022)*, BALLOTPEDIA, https://ballotpedia.org/Kentucky_Constitutional_Amendment_1,_Changes_to_Legislative_Session_End_Dates_and_Special_Sessions_Measure_(2022) [https://perma.cc/FA9T-2JHQ] [hereinafter *Kentucky Constitutional Amendment 1*].

201. *See Beshear v. Acree*, 615 S.W.3d 780, 807 (Ky. 2020).

202. *See Kentucky Constitutional Amendment 1*, *supra* note 200.

203. *See Idaho Constitutional Amendment SJR 102, Legislative Authority to Call a Special Session Amendment (2022)*, BALLOTPEDIA, https://ballotpedia.org/Idaho_Constitutional_Amendment_SJR_102,_Legislative_Authority_to_Call_a_Special_Session_Amendment_(2022) [https://perma.cc/UN9L-6RJA]. Support for the measure in the state legislature divided almost entirely on partisan lines. *Id.*

204. *See Arkansas Issue 1, Legislative Authority to Call a Special Session Amendment (2022)*, BALLOTPEDIA, https://ballotpedia.org/Arkansas_Issue_1,_Legislative_Authority_to_Call_a_Special_Session_Amendment_(2022) [https://perma.cc/MX7F-XTSW]. Unlike in Idaho, support for the proposal in the legislature was bipartisan but both outgoing Republican Governor Hutchinson and the Republican nominee to succeed him opposed it. *Id.*

205. *See Alabama Amendment 4, Prohibit Changes to Election Conduct Laws Within Six Months of General Election Amendment (2022)*, BALLOTPEDIA, https://ballotpedia.org/Alabama_Amendment_4,_Prohibit_Changes_to_Election_Conduct_Laws_within_Six_Months_of_General_Elections_Amendment_(2022) [https://perma.cc/XU8N-7XCB]. The amendment passed the legislature on partisan lines and was approved by the voters 80% to 20%. *Id.*

206. *Id.*

207. *See Texas Proposition 3, Prohibition on Limiting Religious Services or Organizations Amendment (2021)*, BALLOTPEDIA,

and that establish the right of residents of nursing or assisted living facilities to receive in-person visits from their designated caregivers.[208] Utah voters rejected a measure submitted by the legislature that would have made it easier for the legislature to modify the state budget and increase appropriations during an emergency.[209]

B. Legislation

In 2021, legislatures in fifteen states passed measures limiting gubernatorial emergency authority, and in twenty-one states new statutory limits were placed on state public health authorities.[210] Most of these laws received gubernatorial approval, but in Kentucky and Ohio enactment entailed overriding gubernatorial vetoes.[211] These COVID-19-inspired laws can be roughly divided into two groups: government structural changes designed to place checks on general executive branch emergency powers and laws targeting some of the specific responses to COVID-19 that became controversial as the pandemic wore on.

Focusing first on the structural changes, some legislatures imposed new, shorter limits on the duration of public health emergencies; barred or limited the renewals of states of emergency without legislative authorization; made it easier for legislatures to terminate emergencies; or explicitly provided that governors could not declare a state of emergency more than once based on the same emergency conditions.[212] Others moved to increase legislative oversight of

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https://ballotpedia.org/Texas_Proposition_3,_Prohibition_on_Limiting_Religious_Services_or_Organizations_Amendment_(2021) [https://perma.cc/59JF-BXSL]. The measure passed 62% to 38%. On March 19, 2020, Governor Abbott had issued an executive order requiring that Texans minimize social gatherings exceeding ten people. He subsequently amended the order to include religious services in the order's definition of "essential services" excepted from the restriction. However, many of the state's urban counties placed restrictions on in-person religious gatherings. *See id.*

208. *See Texas Proposition 6, Right to Designated Essential Caregiver Amendment (2021)*, BALLOTPEDIA, https://ballotpedia.org/Texas_Proposition_6,_Right_to_Designated_Essential_Caregiver_Amendment_(2021) [https://perma.cc/L526-FDVL]. The amendment was a response to a March 2020 order of the Texas Health and Human Services Commission prohibiting non-essential visitors from accessing nursing or assisted living facilities. *Id.*

209. *See Utah Constitutional Amendment A, Emergency Session Appropriation Limits Measure (2022)*, BALLOTPEDIA, https://ballotpedia.org/Utah_Constitutional_Amendment_A,_Emergency_Session_Appropriation_Limits_Measure_(2022) [https://perma.cc/UV4V-U6UL]. The measure enjoyed broad bipartisan support within the legislature but was defeated by the voters 64% to 36%. *Id.*

210. Davis, Dedon, Hoffman, Baker-White, Engleman & Sunshine, *supra* note 11, at 22.

211. *Id.*

212. *See, e.g.*, *id.* at 24–25; Reed, *supra* note 19, at 158–71; *In re Certified Questions from the U.S. Dist. Ct.*, 958 N.W.2d 1, 10–11 (Mich. 2020).

gubernatorial or public health official actions during a public health emergency. These measures included the establishment of new legislative councils or committees entitled to receive notice of emergency actions or authorized to review and revoke health emergency orders.[213] Although some of these new laws were adopted in states like Kansas and Kentucky that had been marked by partisan governor-legislature litigation during the pandemic,[214] others were enacted in red trifecta states like Arkansas, Florida, and Utah that had seen little such conflict.[215]

Other new laws were more specific to actions taken during the pandemic that had generated popular opposition. Their focus was less on governors or executive action per se and more on restricting certain types of government action in a public health emergency. These new laws imposed limits on the ability of states to restrict business activities or freedom of movement,[216] to punish businesses that violate emergency activity restrictions,[217] to order isolation or quarantine,[218] or to require masks[219] or COVID-19 vaccinations.[220] Many were framed as protections of First or Second Amendment rights, such as

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213. Davis, Dedon, Hoffman, Baker-White, Engleman & Sunshine, *supra* note 11, at 24–25.

214. *See* Reed, *supra* note 19, at 176 (noting new restrictions on governors were adopted in seven out of ten states where the governorship and the legislature were controlled by different parties).

215. Davis, Dedon, Hoffman, Baker-White, Engleman & Sunshine, *supra* note 11, at 24–25. New restrictive laws were also adopted in Ohio, a red trifecta state that had intraparty governor-legislature conflict during the pandemic, but not state court litigation. *See, e.g.*, Postell, *supra* note 25, at 648–49; Campbell Robertson, *G.O.P. Revolt in Ohio: Governor Faces Attacks from Within over Shutdowns*, N.Y. TIMES, https://www.nytimes.com/2020/05/07/us/governors-reopening-rebellion.html (May 9, 2020); *Ohio Legislature Overrides DeWine's Veto on Public Health Order Bill*, IDEASTREAM PUB. MEDIA, https://www.ideastream.org/government-politics/2021-03-24/ohio-legislature-overrides-dewines-veto-on-public-health-order-bill [https://perma.cc/BU3J-ZJ9S] (Mar. 24, 2021, 4:38 PM). Postell also notes that in New Hampshire, which in 2020 had a Republican governor and a Democratic legislature, the legislative pushback against gubernatorial emergency powers did not begin until Republicans took control of the legislature in 2021. *See* Postell, *supra* note 25, at 647–48. *Cf.* Katie McKellar, *Why Utah Leaders Didn't Fight (Publicly) over Lifting COVID-19 Restrictions*, DESERET NEWS (Mar. 14, 2021, 11:27 PM), https://www.deseret.com/utah/2021/3/14/22325820/why-utahs-leaders-didnt-fight-publicly-over-lifting-COVID-19-restrictions-balance-of-power-pandemic [https://perma.cc/TS9Y-LLAT] (remarking that conflicts between Utah governor and legislature "hashed out . . . without any major public battles").

216. *See* Davis, Dedon, Hoffman, Baker-White, Engleman & Sunshine, *supra* note 11, at 26–28 (citing laws adopted in Idaho, Kansas, Montana, and Texas).

217. *Id.* at 27 (Arizona).

218. *Id.* (Idaho).

219. *Id.* at 28 (Arkansas, Iowa, North Dakota, and Utah).

220. *Id.* at 28 (Alaska, Arizona, Arkansas, New Hampshire, Ohio, Oklahoma, Tennessee, Utah, and Wisconsin).

precluding orders that would interfere with religious activities or the sale or use of firearms during a declared emergency.[221]

In 2022, many additional bills and resolutions relating to gubernatorial powers and public health emergencies were introduced, but barely a handful of those targeting gubernatorial authority were actually enacted. Of these, the most significant were new limits on the duration of a gubernatorially declared emergency. For example, in Arizona, emergencies are now limited to thirty days, but they can be extended up to 120 days and, if approved by the legislature, even longer.[222] In Virginia, emergencies are now limited to forty-five days.[223] New legislation also focused on gubernatorial duties to keep designated legislative committees informed about emergency actions.[224]

CONCLUSION: THE PANDEMIC THROUGH THE PRISM OF STATE SEPARATION OF POWERS

It will likely be years until we have a real sense of the effect of the pandemic on state constitutional law. But from the perspective of three-and-a-half years after the first COVID-19 cases, three tentative lessons can be drawn.

First, as Miriam Seifter pointed out several years before the pandemic, governors are "the drivers of state government."[225] That was even truer during the pandemic. Governors took unprecedented actions to suspend statutes and regulations, impose obligations, distinguish between essential and non-essential activities, shut down businesses, prohibit gatherings, and close schools.[226] For a period of time—which in most states lasted many months—they effectively wielded the police power of their states. Governors were able to take generally worded statutes—often written for very different, more limited emergencies—and use them as a basis for the exercise of extraordinary powers. And in most of the contested cases, the governors were sustained by state courts.

Governors, of course, have built-in advantages over the legislature in exercising power. The governorship is a single-person office, unlike multi-member legislatures, which in all but Nebraska are bicameral. As Hamilton long ago observed, the first source of "energy in the Executive" is "unity"—"[d]ecision, activity, secrecy, and despatch will generally characterize the proceedings of one [officeholder] in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is

221. *Id.* at 25–27.

222. S.B. 1009, 55th Leg., 2d Sess., 2022 Ariz. Sess. Laws ch. 220.

223. 2022 Va. Acts ch. 803.

224. *See* Davis, Dedon, Hoffman, Baker-White, Engleman & Sunshine, *supra* note 11, at 24–27.

225. Seifter, *supra* note 2, at 487.

226. *See supra* Part I.

increased, these qualities will be diminished."[227] This advantage of the executive was even more pronounced during the COVID-19 pandemic when legislatures were reluctant or unable to meet because of the danger of infection. Governors were able to respond quickly and flexibly in a way that legislatures could not. Moreover, governors were able to command the resources of their state governments. State courts often cited the structural advantages of gubernatorial leadership when governors' emergency actions were challenged.[228] By the same token, as the chief executives of their states, governors were focal points of public attention and could be held accountable for their states' performance.

Although some judges bridled at gubernatorial "one-man rule"[229] and some legislatures eventually challenged gubernatorial actions, what is striking is how little the basic balance of gubernatorial-legislative power has changed since the pandemic, given how gubernatorial emergency power was almost entirely grounded in statutes that legislatures could change. To be sure, a number of states adopted measures shortening the length of emergency periods, requiring legislative consent to extend the emergency, making it easier for the legislature to end the state of emergency, or enhancing legislative oversight of emergency action.[230] However, even these states left in place the basic structure of governors with authority to take the initiative and declare a state of emergency on their own, wield emergency powers for a period of time, and seek extensions of emergency authority. Although in some states particular actions that became controversial during the COVID-19 pandemic have been taken off the table, in most states, most emergency powers remain unaffected. Moreover, most of the state constitutional and statutory modifications to gubernatorial powers were adopted in red states where governors typically were slower to impose restrictive orders and quicker to remove them, or in politically divided states where there had been sharp, partisan governor-legislature conflicts. Fewer changes were adopted in the blue states where governors typically engaged in more extensive emergency actions.

Second, the state judicial consideration of these COVID-19 powers conflicts entailed an intriguing mixture of state-specific and federal-type legal analysis. State constitutional limitations on the timing and length of legislative sessions and the legislature's authority to call itself into special session loomed

227. THE FEDERALIST NO. 70, at 472 (Alexander Hamilton) (Jacob E. Cooke ed., 2010).

228. *See, e.g.*, *Beshear v. Acree*, 615 S.W.3d 780, 807–13 (Ky. 2020); *Casey v. Lamont*, 258 A.3d 647, 663–67 (Conn. 2021). *But cf. Ritter v. State*, 520 P.3d 370, 379 (Okla. 2022) (emphasizing that "the framers of the Oklahoma Constitution intentionally created a weak state chief executive").

229. *See, e.g.*, *Fabick v. Evers*, 956 N.W.2d 856, 870 (Wis. 2021) (R. Bradley, J., concurring).

230. *See* Reed, *supra* note 19, at 158–61.

large in *Beshear v. Acree*[231] in Kentucky and *Holcomb v. Bray*[232] in Indiana. The constitutional independence of the attorney general was critical to the Kentucky Supreme Court in *Cameron v. Beshear*[233] and factored into the conflict in *Holcomb*.[234] The constitutional presentment requirement figured in *Holcomb*[235] and was dispositive in Pennsylvania's *Wolf v. Scarnati*.[236]

Specific state statutory provisions mattered as well. Although governors often seemed to prevail in claiming that their actions were authorized by an emergency statute regardless of how the statute was written, specific provisions like an automatic termination of emergency power mattered and, as in Michigan's *Certified Questions*, were enforced.[237] Whether the state's emergency law set a limit on the governor's emergency powers and required legislative approval to renew;[238] placed no limit on the governor's ability to find that continuing emergency conditions permitted renewal of emergency powers;[239] or set no limit on the duration of emergency powers[240] also mattered. So, too, particular state administrative law doctrines—such as Wisconsin's repudiation of *Chevron*[241] deference and requirement of express statutory authority for administrative action—affected the COVID-19 case law.[242]

On the other hand, for many issues the state courts' legal analysis closely tracked federal court doctrines. Despite the claim by some scholars that the non-delegation doctrine is more vigorously enforced in the states,[243] in all the COVID-19 powers cases in which state supreme courts considered a claim that an emergency law unconstitutionally delegated legislative power to the executive branch, the courts applied either the federal "intelligible principle" standard or something close to it.[244] In every case but one—Michigan's *Certified Questions*—

231. *See supra* notes 105–15 and accompanying text.

232. 187 N.E.3d 1268, 1277–84 (Ind. 2022).

233. *See supra* notes 174–84 and accompanying text.

234. *See Holcomb*, 187 N.E.3d at 1288–89.

235. *Id.* at 1280–84.

236. *Wolf v. Scarnati*, 233 A.3d 679, 706–07 (Pa. 2020).

237. *In re Certified Questions from the U.S. Dist. Ct.*, 958 N.W.2d 1, 9–11 (Mich. 2020). *See also Ritter v. State*, 520 P.3d 370, 379 (Okla. 2022) (emphasizing the constitutional weakness of Oklahoma's governor).

238. *See, e.g.*, *Fabick v. Evers*, 956 N.W.2d 856, 864–70 (Wis. 2021).

239. *See, e.g.*, *Beshear v. Acree*, 615 S.W.3d 780, 786–87 (Ky. 2020).

240. *See, e.g.*, *Elkhorn Baptist Church v. Brown*, 466 P.3d 30, 42–44 (Or. 2020); *Wolf*, 233 A.3d at 684–85, 698.

241. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

242. *See, e.g.*, *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 21, 47–49 (Wis. 2018) (repudiating Wisconsin cases calling for judicial deference to administrative agency conclusions of law, and specifically criticizing *Chevron*).

243. *See* sources cited in *supra* note 104.

244. *See* discussion *supra* Section II.C.

the nondelegation challenge was rejected.[245] Indeed, in many cases, the court deemed the matter worthy of only limited discussion or concluded that standards such as all actions "reasonable" or "necessary" to address the effects of the emergency provided an "intelligible principle" for guiding executive action and did not trench on the legislature's domain.

Similarly, the United States Supreme Court's determination in *I.N.S. v. Chadha* that the legislative veto violates the presentment requirement of the United States Constitution was central to the reasoning of the Pennsylvania Supreme Court in *Wolf v. Scarnati* that the legislature's concurrent resolution to terminate Governor Wolf's state of emergency declaration had to be presented to the governor for his approval.[246] By treating the concurrent resolution akin to a legislative veto that would violate the federal Constitution, the court effectively undid the structure of the Pennsylvania emergency statute, which gave the governor unlimited authority to renew a state of emergency without affirmative legislative approval but provided that formal legislative disapproval could end the emergency.

State court statutory interpretation also resembled federal court practice. In determining whether state emergency statutes encompassed the pandemic, state courts, like federal courts, combined a mix of plain language textualism, use of dictionaries, resort to canons, statutory history, and consideration of legislative intent.[247] The avoidance of absurd results canon received more attention in these cases than today's federal textualists might give it. And there does not seem to have been anything like the United States Supreme Court's nascent major

245. *But cf. Ritter v. State*, 520 P.3d 370, 380–82 (Okla. 2022) (holding the state law conditioning local school board's authority to adopt a mask mandate on the governor's declaration of a state of emergency was an "impermissible delegation of authority" to the governor over local school boards). In *Abbott v. Harris Cnty.*, 672 S.W.3d 1 (Tex. 2023), the Texas Supreme Court expressed concern about the separation of powers/non-delegation doctrine issues that would be raised by a broad reading of the powers given to the governor under the Texas Disaster Act, but concluded that no constitutional issues were raised by the specific action of the governor at issue in the case, which was to prohibit local government face covering requirements. *Id.* at 15–19. The court emphasized that the governor's order was consistent with the statutory goal of a "coherent statewide or regional governmental response to a disaster." *Id.* at 18. The court further emphasized there was nothing "problematic" about the legislature empowering the governor "to control the executive branch of government," including the actions of local executive actors in county government. *Id.* at 19. *Abbott* should be seen as a case about state-local conflict and state power over local government rather than as a case about executive-legislative separation of powers.

246. *Wolf*, 233 A.3d at 687, 693–94.

247. *See Casey v. Lamont*, 258 A.3d 647, 654–62 (Conn. 2021); *Kelly v. Legis. Coordinating Council*, 460 P.3d 832, 839 (Kan. 2020); *Beshear v. Acree*, 615 S.W.3d 780, 800–05 (Ky. 2020); *Desrosiers v. Governor*, 158 N.E.3d 827, 835–39 (Mass. 2020); *Grisham v. Reeb*, 480 P.3d 852, 858–61 (N.M. 2020); *Elkhorn Baptist Church v. Brown*, 466 P.3d 30, 41–49 (Or. 2020); *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 887–90 (Pa. 2020).

questions doctrine. But overall the approach of these state courts to statutory interpretation should seem familiar to students of federal statutory interpretation.

Finally, these COVID-19 powers cases confirm at the state level the point made by Professors Levinson and Pildes that at the federal level "separation of parties" matters at least as much as separation of powers.[248] The states in which legislatures were most likely to challenge the gubernatorial exercise of broad emergency powers and vindicate legislative prerogatives in court were those in which the legislature was controlled by the opposing political party. More specifically, these states—Kansas, Kentucky, Michigan, Pennsylvania, and Wisconsin—all had Democratic governors and Republican legislatures. In Kentucky, the challenge brought by the Republican attorney general to the Democratic governor further reinforced the central role of partisanship in inter-institutional conflicts.

To be sure, there were also some conflicts between Republican governors and Republican legislatures, as indicated by the adoption of post-COVID-19 measures restricting gubernatorial power or bolstering the legislature's emergency role in those red trifecta states.[249] But the Indiana fight over the legislature's ability to call itself into special session appears to have been the only intraparty inter-institutional fight that culminated in a state supreme court decision. Still, the state COVID-19 experience suggests that the Levinson-Pildes thesis may have to be amended to include substantive ideological conflicts within parties along with partisan divides in determining when one branch of government asserts itself against another.

Partisanship also marked the most prominent state supreme court cases, albeit to a lesser degree. The Wisconsin Supreme Court repeatedly divided on partisan lines, with the Republican majority rejecting emergency actions by the Democratic governor or his health secretary.[250] So, too, the Michigan Supreme Court split entirely on partisan lines when it agreed with the Republican legislature that the Emergency Powers of the Governor Act relied on by the Democratic Governor as authorization for her state of emergency declaration was unconstitutional.[251] The Pennsylvania Supreme Court's *Wolf v. Scarnati* decision requiring presentment of the Republican legislature's resolution terminating the emergency proclamation of the Democratic Governor fell out along largely partisan lines, albeit with one of the court's Democrats joining the

248. *See generally* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

249. *See* discussion *supra* Section III.B.

250. *See Wis. Legislature v. Palm*, 942 N.W.2d 900 (Wis. 2020); *Fabick v. Evers*, 956 N.W.2d 856 (Wis. 2021); *Tavern League of Wis., Inc. v. Palm*, 957 N.W.2d 261, 264 (Wis. 2021).

251. *See In re Certified Questions from the U.S. Dist. Ct.*, 958 N.W.2d 1 (Mich. 2020).

Republican dissenters.[252] But the Michigan and Pennsylvania courts sometimes moved past partisanship when the former ruled unanimously that Governor Whitmer could not redeclare a state of emergency under the Emergency Management Act,[253] and the latter invalidated an acting health secretary's order mandating individuals wear face coverings while inside Pennsylvania's schools because the order had not gone through rule-making.[254] And the state supreme court decisions in the partisan governor-legislature conflicts in Kansas and Kentucky were unanimous.

It is difficult to tease out the implications of the pandemic experience for separation of powers in the states from partisan politics, the ideological divide over the appropriate public health response to COVID-19, and broader questions about the proper institutional design for responding to public health or other emergencies. That may be as it should be. Separation of powers questions do not arise and are not resolved in a vacuum but are necessarily intertwined with specific political, ideological, and institutional concerns.

252. *See Wolf v. Scarnati*, 233 A.3d 679 (Pa. 2020).
253. *See Certified Questions*, 958 N.W.2d.
254. *See Corman v. Acting Sec'y Dep't of Health*, 266 A.3d 452 (Pa. 2021).