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Examining Executive Authority During Public Health Emergencies: Challenges to COVID-19 Executive Orders & Implications for Future Public Health Policy

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EXAMINING EXECUTIVE AUTHORITY DURING PUBLIC HEALTH EMERGENCIES: CHALLENGES TO COVID-19 EXECUTIVE ORDERS & IMPLICATIONS FOR FUTURE PUBLIC HEALTH POLICY

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INTRODUCTION

Two months after the first cases of COVID-19 were detected in Wuhan, China, state governments faced the threat of an unprecedented public health emergency caused by an unknown pathogen, and uncertainty about the efficacy of containment measures.[1] After the WHO announced that COVID-19 had become a pandemic, the Trump Administration declared a National Emergency and issued a travel ban on March 13, 2020.[2] Subsequently, counties in New York and Washington began issuing stay-at-home orders, followed by California's state wide order.[3] Governors began issuing executive orders to combat rising infection rates and an alarming number of outbreaks, with increasingly severe restrictions imposed as more data emerged about transmission.[4] By May 2020, most states had issued emergency orders ranging from travel bans, to stay-at-home orders, to wide-spread school and business closures.[5] Deriving authority from state emergency management and public health statutes, governors have relied heavily on executive orders and emergency declarations to contain the spread of the virus.

As the pandemic persists, both private parties and state legislators have become increasingly hostile to the prolonged use and renewal of general emergency powers. The long-term nature of many of these executive orders has led to controversies about the extent to which governors can act unilaterally to mandate public health measures and restrict personal freedoms, and legal challenges have been inundating the courts for over a year. These claims have ranged from First, Second, and Fourteenth Amendment violations, to state constitutional claims alleging separation of powers violations and facially invalid emergency management statutes. Critics of state government action have also initiated legislative reforms that seek to fortify separation of powers doctrine and increase legislative oversight of gubernatorial authority.

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This paper focuses specifically on challenges to the exercise of executive power (1) where state constitutions do not specify the scope of executive powers or define legislative checks during a public health emergency; (2) where state disaster management statutes do not indicate whether a "disaster" includes a public health emergency or pandemic; and (3) where state governors face politicized resistance to their emergency authority and attacks from their own legislators. In looking at the implications of these challenges, this paper does not suggest that judicial review of executive power should be limited or suspended during a public health emergency. Nor does it

[1] A Timeline of COVID-19 Developments in 2020, American Journal of Managed Care (Jan. 1, 2021) https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020 (Last accessed Mar. 28, 2021).
[2] *Id.*
[3] *Id.*
[4] NATIONAL GOVERNORS ASSOCIATION, *State COVID-19 Emergency Orders,* https://www.nga.org/state-covid-19-emergency-orders/ (last visited December 30, 2020).
[5] NATIONAL COUNCIL OF STATE LEGISLATURES, *State Quarantine and Isolation Statutes* (Aug. 8, 2020), https://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx (last visited December 18, 2020); THE COUNCIL OF STATE GOVERNMENTS, *COVID-19 Resources for State Leaders: Executive Orders*, https://web.csg.org/covid19/executive-orders/ (last visited January 5, 2021).

suggest that amending statutory frameworks for emergency response is an inherent threat to executive authority.

Instead, it explores opportunities to strengthen current constitutional and statutory frameworks and prevent the over-politicization of future public health response. I consider the historical trend of politicizing and leveraging a crisis to push an ideological agenda with much broader implications than the public health emergency at stake. The trend demonstrates that reactionary, politicized backlash often displaces preventative reform, which *should* take place after a crisis subsides to improve public health governance for the next crisis. This analysis of legal challenges and legislative reform, through a lens of partisanship and politicization, presents a way to look beyond the current political moment and explore how states can maintain an effective balance of power, while also making public health policy less susceptible to politicization.

Part I provides an overview of the constitutional and statutory frameworks that define executive powers during disasters and highlights emergency management and public health laws that have generated legal controversies and legislative reforms across the country.

Part II analyzes efforts to curtail executive emergency powers through the courts and legislatures, as well as shifting standards of judicial review that may impact deference granted to state governments during public health emergencies.

Part III investigates the hyper-politicized response to executive action during the COVID-19 pandemic, and the historical roots of partisan or ideological backlash during public health emergencies, and the implications of the political moment on future public health policy.

Part IV explores strategies for mitigating public health risks that arise as a result of the politicization of crisis, and opportunities to create more effective governance structures based on lessons learned from the COVID-19 pandemic.

PART I: THE CONSTITUTIONAL AND STATUTORY BASIS OF EXECUTIVE AUTHORITY DURING PUBLIC HEALTH EMERGENCIES

> "In preservation of the people's inherent right to liberty, the Framers of the United States Constitution devised a system of separate and distinct powers among the three branches of government… [and] the concentration of governmental power presented an extraordinary threat to individual liberty: 'The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, . . . may justly be pronounced the very definition of tyranny.'"[6]

State constitutions have evolved significantly over the past 200 years. Just as the federal Constitution emphasizes the importance of the three branches of government and maintaining a separation of powers, modern-day state constitutions have all embraced a separation of powers doctrine in some form. These provisions often favor the legislature in terms of balance of power, reflecting historical fears of monarchy and a single, consolidated power.[7] However, emergency powers are one area where governors have been granted substantial, temporary powers, with varying degrees of legislative checks beyond the separation that is constitutionally mandated. Many lawsuits challenging abuse of executive authority during COVID-19 have alleged separation of powers violations, as well as violations of the non-delegation doctrine.

A. The Statutory Basis of Executive Emergency Authority

All states have some variation of an emergency or disaster declaration act,[8] many of which were drafted in the 1950s in response to the Cold War and the need for local civil defense.[9] Within this context, disaster management statutes included provisions on commandeering property, suspending the sale and distribution of certain goods, appropriating funds for disaster relief, and allowing the executive to suspend certain rules and regulations to allow for rapid military response.[10] Subsequently, some states amended their statutes after the Federal Emergency Management Agency was established in 1979, and later added specific nuclear attack provisions.[11] After September 11th, many states also incorporated specific provisions related to the threat of

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[6] *Fabick v. Evers,* No. 2020AP1718-OA, WL 1201478 **11 (Wis. March 31, 2021) (Grassl Bradley, J., concurring) (quoting The Federalist No. 47, at 298 (James Madison)).

[7] Daniel B. Rodriguez, *Public Health Emergencies and State Constitutional Quality,* RUT. U. L. REV. 1238 (2020).

[8] THE NETWORK FOR PUBLIC HEALTH LAW, *Emergency Declaration Authorities Across All States* (June 16, 2015) https://www.networkforphl.org/wp-content/uploads/2020/01/Emergency-Declaration-Authorities.pdf (last visited Jan. 8, 2021).

[9] The Historical Context of Emergency Management, at 3. https://booksite.elsevier.com/samplechapters/9780750685146/02~Chapter_1.pdf

[10] Benjamin Della Rocca, Samantha Fry, Masha Simonova, Jacques Singer-Emery, *State Emergency Authorities to Address COVID-19,* Lawfare Blog (May 4, 2020) https://www.lawfareblog.com/state-emergency-authorities-address-covid-19#Massachusetts.

[11] The Historical Context of Emergency Management, 7 (Last Accessed Mar. 15, 2021) https://booksite.elsevier.com/samplechapters/9780750685146/02~Chapter_1.pdf; https://www.nlm.nih.gov/dis_courses/us_response/resources/disaster_legislation_timeline.pdf.

terrorism.[12] Powers granted in these statutes reflect a wide range of potential disasters and varying levels of authority to suspend or modify existing laws and procedures. Depending on the state, these include the power to (1) declare an emergency and issue emergency orders; (2) rescind, amend, or suspend regulations, statutes, and rules as necessary to contain the disaster; and (3) appropriate funds.[13]

While there are legislative reforms pending in over 30 states, at the beginning of the pandemic, only six states had explicit legislative checks on the governor's ability to issue executive orders,[14] while 24 states required a legislative joint resolution to extend an order.[15] Thirteen states were silent as to whether the legislature could terminate a declaration or executive order.[16] Most of these emergency statutes were not designed to account for the particularities of public health emergencies, and vague statutory definitions have created uncertainty about whether pandemics constitute a "disaster" or "emergency." Many of these acts emphasize "public safety," but may not explicitly mention public health, natural-born diseases, or pandemics; those that do include public health emergencies rarely define what they entail.[17]

To supplement general disaster laws, 35 states have codified public health emergency acts that designate powers during a public health crisis.[18] During the COVID-19 pandemic, many governors issued executive orders pursuant to both their emergency management laws as well as public health emergency powers, while others acted solely under general emergency management authority. Although governors have invoked emergency powers for public health emergencies in the last few decades to respond to Ebola and H1N1, among others, the COVID-19 pandemic has highlighted the ambiguity in state law surrounding unilateral action and legislative oversight, which has become the source of many challenges to gubernatorial authority. Variations in state statutory frameworks for emergency response are highlighted below, with a particular focus on states where governors have faced legal challenges to their use of executive power.

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[12] Wendy K. Mariner, George J. Annas & Wendy E. Parmet, *Pandemic Preparedness: A Return to the Rule of Law*, 1 DREXEL L. REV. 341, 343 (2009).

[13] THE COUNCIL OF STATE GOVERNMENTS, *The Book of States 2019*, http://knowledgecenter.csg.org/kc/system/files/4.5.2019.pdf (last visited Dec. 15, 2020).

[14] NATIONAL COUNCIL OF STATE LEGISLATURES, *Legislative Oversight of Executive* Orders (Jan 8, 2021) https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx (last visited Jan 12, 2021).

[15] Nicholas Birdsong, *Balancing Legislative and Executive Powers in Emergencies,* NATIONAL CONFERENCE OF STATE LEGISLATURES 28 LegisBrief (July 2020) https://www.ncsl.org/Portals/1/Documents/legisbriefs/2020/JulyLBs/Executive-Powers-in-Emergencies25.pdf.

[16] *Id.*

[17] Evan D. Anderson and James G. Hodge, *Emergency Legal Preparedness Among Select US Local Governments*, Disaster Med Public Health Preparedness (2009) https://pubmed.ncbi.nlm.nih.gov/19797962/ (last visited Oct. 29,2020).

[18] THE NETWORK FOR PUBLIC HEALTH LAW, *Emergency Declaration Authorities Across All States* (June 16, 2015) https://www.networkforphl.org/wp-content/uploads/2020/01/Emergency-Declaration-Authorities.pdf (last visited Jan. 8, 2021); Lainie Rutkow, *An analysis of state public health emergency declarations*, 104 (9) AM. J. PUB. 1601-5 (2014) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4151908/.

Massachusetts

In Massachusetts, Governor Baker's original executive order[19] cited both the Civil Defense Act of 1950 (CDA) and MASS. GEN. LAWS ch. 17, § 2A (public health emergency) to assert the governor's authority over the sale of food and goods and the power to mandate quarantines. The CDA lists dozens of disasters for which executive emergency functions can be deployed, including enemy attack, nuclear radiation exposure, and natural disasters. It also includes disasters that "endanger[] the health, safety, or property of people," but does not explicitly mention public health or pandemic.[20] Massachusetts is one of the states that also has a public health emergency statute, which grants the public health commissioner certain powers in the event that the governor declares an emergency impacting public health.[21] The commissioner's powers are limited to enacting procedures that would ensure the continuation and enforcement of essential public health services.[22] The Department of Public Health also has general powers over vaccination and inoculation schemes, as well as medical supply distribution. However, the commissioner must seek approval from the Governor and the Public Health Council. Neither the CDA nor the Public Health Emergency Act include a provision that allows for legislative veto power or termination of an order by joint resolution.[23]

Michigan

Michigan Governor Gretchen Whitmer declared the state's first COVID-related emergency pursuant to two statutes: the Emergency Management Act (EMA) of 1976 and the Emergency Powers of the Governor Act (EPGA) of 1945. Unlike Massachusetts, the EMA's definition of "disaster" includes epidemics and imposes a durational limit to a declared disaster.[24] After 28 days, the Governor is required to terminate the disaster through executive order or proclamation unless she receives explicit permission to extend it through legislative joint resolution.[25] The EPGA provides a broader definition of disaster: "in times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled."[26] After proclaiming a disaster under the EPGA, the governor "may promulgate reasonable orders, rules, and regulations

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[19] MASS. EXEC. ORDER NO. 591: *Declaration of a State of Emergency to Respond to COVID-19* (Mar. 10, 2020); MASS. GEN. LAWS ch. 639, § 5; MASS. GEN. LAWS ch.17, § 2A.
[20] MASS. GEN. LAWS ch. 639, § 5.
[21] MASS. GEN. LAWS ch.17, § 2A.
[22] *Id.*
[23] See also Kentucky statutory framework: Similarly, Kentucky does not specify a means for the legislature to terminate a state of emergency through joint resolution. However, the Kentucky Senate passed a law in early 2020 that allows the General Assembly to terminate a state of emergency if the Governor has not already done so "before the first day of the next regular session of the General Assembly. (S.B. 150, Legis Sess. (K.Y. 2020)). Kentucky also provides a more specific list of disasters covered by the statute, including "all major hazards…mass-casualty or mass-fatality emergencies; other…biological….hazards; or other disaster or emergency occurrences; or catastrophe; or other causes;…and in order to protect life and property of the people of the Commonwealth, and to protect public peace, health, safety, and welfare."(KY. REV. STAT. ANN. § 39A.100).
[24] MICH. COMP. LAWS. § 30.403.
[25] MICH. COMP. LAWS. § 30.403.
[26] MICH. COMP. LAWS. § 10.31(1)(1).

as he or she considers necessary to protect life and property."[27] A public health state of emergency under this act lasts for up to 60 days, renewable for an additional 30 days through legislative resolution.[28]

Pennsylvania

In Pennsylvania, Governor Tom Wolf issued the state's first disaster declaration during the pandemic on March 6, 2020, pursuant to his powers under the Emergency Management Services Code (EMSC).[29] A state of disaster or emergency can last for up to 90 days unless it is renewed by the Governor, and the General Assembly has the power to terminate the declaration through concurrent resolution.[30] The statute also grants the Governor power to suspend provisions of regulatory statutes, orders, or rules if "strict compliance….would in any way prevent, hinder, or delay necessary action in coping with the emergency."[31] Pennsylvania also has a Public Health Emergency Measures statute, which applies: "In the case of an actual or suspected outbreak of a contagious disease or epidemic due to an actual or suspected bioterrorist or biohazardous event."[32] The powers granted to the Governor in consultation with the Secretary of Health are limited to isolation and quarantine orders.

Wisconsin

Governor Tony Evers issued three emergency declarations pursuant to Wisconsin's general emergency management statute, which allows for a 60-day state of emergency and does not explicitly require legislative approval to extend the order.[33] Under Wisconsin law, "disaster" includes a "severe or prolonged, natural or human-caused, occurrence that threatens or negatively impacts life, health, property, infrastructure, the environment, the security of this state or a portion of this state…"[34] The statute includes reference to public health emergencies, which are classified by "the occurrence or imminent threat of an illness or health condition.[35] Wisconsin also codifies the public health department's authority to respond to emergency, granting extremely broad powers that include the ability to close schools and ban public gatherings, as well as create and enforce rules and orders necessary to respond to the emergency.[36]

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[27] *Id.*
[28] MICH. COMP. LAWS. § 10.125(5).
[29] PA. EXEC. ORDER: *Proclamation of Disaster Emergency,* (Mar. 6, 2020).
[30] 35 PA. CONS. STAT. § 7301 (a)(c).
[31] 35 PA. CONS. STAT. § 7301(f)(1).
[32] 35 PA. CONS. STAT. § 2140.301.
[33] WIS. STAT. ANN. § 323.10.
[34] WIS. STAT. ANN. ch.323 § 02(6).
[35] The statute includes a number of stipulations, and emergency must meet all of the following criteria: "(a) Is believed to be caused by bioterrorism or a novel or previously controlled or eradicated biological agent; (b) Poses a high probability of any of the following: 1. A large number of deaths or serious or long-term disabilities among humans. 2. A high probability of widespread exposure to a biological, chemical, or radiological agent that creates a significant risk of substantial future harm to a large number of people."
[36] The public health department may: "promulgate and enforce rules or issue orders for guarding against the introduction of any communicable disease into the state, for the control and suppression of communicable diseases, for the quarantine and disinfection of persons, localities and things infected or suspected of being infected by a communicable disease and for the sanitary care of jails, state prisons, mental health institutions, schools, and public

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These four states exemplify common variations in state emergency management statutes. For example, Governors Baker and Whitmer invoked both general emergency management statutes as well as public health statutes as the basis of their authority. However, Massachusetts does not specify whether there is legislative authority to modify or terminate an executive order, whereas Michigan requires a joint resolution to extend a declaration under either statute. There is also a wide range of durational limits on an emergency: from Massachusetts, where there is no specified duration, to Pennsylvania's 90-day limit, to Michigan, where the Governor must terminate her own emergency after only 28-days.

The Pennsylvania public health law narrowly construes the governor's authority to act in an emergency and specifies that the authority extends only to isolation and quarantine mandates. Similarly, the Massachusetts public health law limits the public health commissioner's powers to ensuring that regular public health services continue to operate during the emergency. In comparison, Wisconsin explicitly grants powers to its public health department that extend well-beyond quarantine. In terms of explicit reference to pandemics, Wisconsin includes public health emergencies as a disaster covered by the general emergency law, and Michigan's Emergency Management Act mentions "epidemics." In states where the law distinguishes between natural and human-made disasters, including Michigan and Massachusetts, it is unclear if "natural" disasters cover infectious diseases.

The inclusion or absence of statutory provisions have paved the way for numerous legal challenges rooted in separation of powers doctrine and abuse of authority. These provisions include the governor's power to create, amend, or rescind rules or regulations; the legislature's power to override emergency declarations; the statutory definition of disaster; and specific parameters (duration, degree, and scope) placed on executive powers.

PART II: LEGAL CHALLENGES AND LEGISLATIVE REFORM TO CURTAIL EXECUTIVE EMERGENCY POWERS

Governors are facing significant challenges to their powers due to the prolonged nature of the pandemic and lack of specificity in state constitutions and emergency laws. COVID-19 has lasted far longer than other public health crises in recent memory, such as the H1N1 epidemic or Ebola.[37] Those emergencies raised controversies over the constitutionality of quarantine, as well as H1N1 vaccine rollouts—neither of which had long-term, sweeping economic impacts, nor did they trigger large numbers of legal challenges that impacted states or business sectors. This has not been the case during the COVID-19 pandemic, where governors have contended with a much

buildings and connected premises. Any rule or order may be made applicable to the whole or any specified part of the state…[and] may authorize and implement all emergency measures necessary to control communicable diseases." WIS. STAT. ANN. ch. 252, § 02.

[37] Melissa Markey, Montrece M. Ransom, and Gregory Sunshine, *Ebola: A Public Health and Legal Perspective*, 24(2) MICH. STATE. INT. L. REV. 433-447.

wider range of unprecedented restrictions to combat the virus and have faced similarly broad legal challenges. The following section focuses on judicial review of state action, and specific cases where governors have faced constitutional and statutory challenges to their executive authority.

A. Judicial Review During Public Health Emergencies: Jacobson v. Commonwealth

Throughout the last century, courts have relied on the standard of judicial review outlined in *Jacobson v. Commonwealth of Massachusetts*, which weighs the public good with protection for individual liberties during a public health emergency. In upholding a mandatory vaccination requirement during the smallpox epidemic, the *Jacobson* court held that executive orders during a public health crisis must "have a 'real or substantial relation' to the crisis and…must not represent 'plain, palpable' invasions of clearly protected rights."[38] Although *Jacobson* was decided prior to modern tiers of judicial scrutiny, Justice Harlan's opinion stressed that the state should be able to take actions that are generally reasonable and reflect the urgency required during public health emergencies.[39] "In every well-ordered society… the rights of the individual in respect to his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand."[40] Justice Harlan also emphasized that reasonableness and the non-arbitrary nature of executive or legislative action should be considered in the context of the public health emergency, and noted that state police powers should rely on recommendations from boards of health to inform their prevention strategies.[41]

Although *Jacobson* challenged a mandatory vaccination scheme on Fourteenth Amendment grounds, courts have applied its precedent in a wide range of cases.[42] During the COVID-19 pandemic in particular, Justice Harlan's opinion has been interpreted in a variety of ways.[43] While uncertainty remained about the transmission of COVID-19 early in the pandemic, *Jacobson* allowed judges to defer to executive orders that were broad and restrictive because of the severity of the pandemic. For certain First Amendment challenges involving the Free Exercise Clause, courts sometimes noted that *Jacobson* did not give absolute power to state actors during an emergency, and that an executive order "might be exercised . . . in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons."[44]

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[38] *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (U.S. 1905)
[39] Wendy E. Parmet, *Rediscovering Jacobson in the Era of COVID-19,* 100 B.U. L. Rev. Online 117, 125 (2020), Northeastern University School of Law Research Paper No. 377-2020.
[40] *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 at 29.
[41] Parmet, *supra* note 38, at 125; *Jacobson*, 197 U.S. 11 at 27.
[42] See Fifth Circuit interpretation of *Jacobson* in *In re Abbott*, 956 F.3d 696, 711 (5th Cir. 2020), compared to *Roberts v. Neace*, 958 F.3d 409, 412 (6th Cir. 2020).
[43] Parmet, *supra* note 38, at 128; Lindsay F. Wiley and Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 Harv. L. Rev. F. (2020).
[44] *Jacobson*, 197 U.S. 11 at 28.

But on the whole, the Court has found a real or rational relation to the public health crisis posed by COVID-19, even when heightened scrutiny has been triggered.[45]

B. The Implications of Leaving Jacobson Behind

Prior to the Supreme Court's First Amendment decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, most churches alleged disparate treatment of their religious gatherings compared to secular activities under the First Amendment Free Exercise Clause.[46] A few challenges also argued that certain orders deserved heightened scrutiny because they were not content neutral.[47] Although there is generally a heightened standard of scrutiny for free exercise violations which are not generally applicable, the courts have been willing to balance this against the *Jacobson* framework for a state's public health interest and been unwilling to apply strict scrutiny.[48] In particular, courts were likely to deny relief when expert testimony justified an order's treatment of comparable activities, rather than finding motivation in the "substantive content of those activities."[49] Before October 2020, lower courts relied on two Supreme Court decisions, *South Bay United Pentecostal Church v. Newsom* and *Calvary Chapel Dayton Valley v. Sisolak*, to deny preliminary injunctions based on protecting public health interests under *Jacobson*.[50]

However, in November 2020 the Court decided *Roman Catholic Diocese of Brooklyn v. Cuomo* and enjoined the enforcement of Governor Cuomo's order imposing occupancy limits on religious gatherings. Executive Order 202.68 placed a ten-person occupancy limit on worship services in the red zone but did not place any limits on essential businesses. In an orange zone, worship services were limited to 25 people, while both essential and non-essential businesses did not have restrictions.[51] Plaintiffs, a Catholic Church and synagogue, challenged restrictive occupancy limits on religious services in certain "zones" conditioned on current rates of transmission.[52] The plaintiffs sought to enjoin the order's enforcement while seeking appeal of the district court's decision.

In an extreme deviation from prior cases, the per curiam opinion granted relief after finding that the plaintiffs' First Amendment claims were likely to prevail.[53] The Court pointed to the order's non-neutral language that required them to apply strict scrutiny, and relied on a plurality opinion from the 1970s to note that First Amendment deprivations are always an irreparable harm

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[45] See *Ill. Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020).
[46] See *Andrew Wommack Ministries, Inc v. Polis*, No. 20-CV-02922-CMA-KMT, 2020 WL 5810525 (D. Colo. Sept. 29, 2020); see also *Calvary Chapel of Bangor v. Mills*, No. 1:20-cv-00156, (D. Me. May 9, 2020); see also *Robinson v Murphy*, No. 2:20-CV-5420-CCC-ESK, (D.N.J. Sept. 25, 2020).
[47] See *Ramsek v. Beshear*, No. 3:20-CV-00036-GFVT, 2020 WL 3446249 (E.D. Ky. June 24, 2020) (holding that the executive ban on protests was content-neutral because it applied to all public gatherings, not just political rallies, but that the plaintiff was still entitled to preliminary injunction because the order was not narrowly tailored enough for a First Amendment claim).
[48] See *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020); see also *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020).
[49] *Harvest Rock Church, Inc. v. Newsom*, No. 20-55907, 2020 WL 5835219 (9th Cir. Oct. 1, 2020).
[50] *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020).
[51] *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020).
[52] *Id.*
[53] *Id.*

to congregants who are prevented from attending in-person services.[54] The Court also found that the restrictions were excessively severe and not narrowly tailored, and due to the plaintiffs' outbreak records and compliance with safety standards, did not find that it would be against public interest to enjoin the enforcement of the restrictions.[55] Notably, the opinion did not mention *Jacobson* in discussing the standards for judicial review.

In a concurring opinion, Justice Gorsuch criticized the majority's failure to protect First Amendment rights in its prior COVID-19 cases, and expressly noted that, "Rather than apply a nonbinding and expired concurrence from *South Bay*, courts must resume applying the Free Exercise Clause. Today, a majority of the Court makes this plain."[56] Justice Gorsuch points to the Court's earlier willingness to exercise deference because of the unknowns about COVID-19 transmission, as well as their inclination to cite to *Jacobson* as the litmus test for judicial standards during a pandemic.[57] He took the opportunity to criticize courts for consistently misinterpreting the *Jacobson* ruling on appropriate deference and judicial review, which he says: "involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction."[58] He also noted that the plaintiff in *Jacobson* had alternate means to vindicate his right to "bodily integrity," whereas congregants deprived of their right to free exercise of religion would have no alternative to in-person worship.[59] He states that Governor Cuomo's restrictions were neither narrowly tailored, nor the least restrictive means to combat transmission, and said: "the State has effectively sought to ban all traditional forms of worship in affected "zones" whenever the Governor decrees and for as long as he chooses."[60]

In Justice Kavanaugh's concurrence, similar to his *Calvary Chapel* dissent, he contrasted the heightened severity of the New York restrictions with those at stake in *South Bay* and *Calvary Chapel*, and the fact that the New York order treats "houses of worship significantly worse than some secular businesses" but failed to justify this discriminatory treatment.[61] "Judicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised."[62]

In dissent, Justices Breyer, Kagan, and Sotomayor cited to the district court's finding that the order was grounded in science and treated worship services more favorably than comparably risky gatherings.[63] The Justices also accepted the justification for targeting communal places where respiratory droplets from singing or talking are more likely to transmit the virus.[64] "The nature of the epidemic, the spikes, the uncertainties, and the need for quick action…mean that the State has

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[54] *Id.* at 67-68 (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).
[55] *Id*. at 66, 68.
[56] *Id*. at 70.
[57] See *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020); see also *Elim Romanian Pentecostal Church and Logos Baptist Ministries v Pritzker*, No. 20-1811 (7th Cir. June 16, 2020).
[58] *Roman* Catholic, 141 S. Ct. at 63, 66.
[59] *Id.* at 71.
[60] *Id.*
[61] *Id.*
[62] *Id.* at 74.
[63] *Id.* at 76.
[64] *Id.* at 78.

countervailing arguments based upon health, safety, and administrative considerations that must be balanced against the applicants' First Amendment challenges."[65]

In a separate dissent, Justices Sotomayor and Kagan reiterated the court's deviation from its prior decisions in *South Bay* and *Calvary Chapel*, and argued that the rule applied in those cases should have been applicable here.[66] They also noted that in prior cases, the orders treated secular and religious activities in the exact same manner, whereas the New York order granted *favorable* treatment to houses of worship compared to their counterparts. "Justices of this Court play a deadly game in second guessing the expert judgment of health officials about the environments in which a contagious virus, now infecting a million Americans each week, spreads most easily."[67] They also expressed criticism of the idea that mentioning religion, even without disparate restrictions, triggers strict scrutiny.[68] "The Constitution does not forbid States from responding to public health crises through regulations that treat religious institutions equally or more favorably than comparable secular institutions, particularly when those regulations save lives."[69]

More recently, in April 2021 the Supreme Court decided *Tandon v. Newsom*, which enjoined California's restrictions on at-home religious exercise and cited *Roman Catholic* for the proposition that the state must show that the religious activity is more dangerous than comparable activities, "even when the same precautions are applied."[70] The impacts of *Roman Catholic* and *Tandon v. Newsom* are currently limited to First Amendment cases alleging violations of the free exercise clause, and *Jacobson* remains the binding precedent for public health deference because these recent decisions are not full and final.[71] However, many courts are treating *Roman Catholic* and *Tandon* as precedential, and the *South Bay* judgments has been vacated and returned to the Ninth Circuit for reconsideration in light of *Tandon*. These decisions may also impact other categories of COVID-related restrictions if plaintiffs argue that less deference should be granted for infringements on fundamental rights, even those that do not fall under the free exercise clause.[72] *Roman Catholic* has already been cited in recent freedom of expression challenges, including tattoo parlors closed under stay-at-home orders.[73] Courts in these cases have generally cited to *Jacobson* and applied rational basis review in deference to the state's interest in controlling the virus, and it remains to be seen how *Roman Catholic* and *Tandon* may be applied in the future.

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[65] *Id.*
[66] *Id.* at 79.
[67] *Id.*
[68] *Id.* at 80.
[69] *Id.* at 81.
[70] *Tandon v. Newsom*
[71] Amy Howe, *Justices revive religious groups' attempts to block COVID-related restrictions in Colorado, New Jersey*, SCOTUS Blog, Dec. 15. 2020. https://www.scotusblog.com/2020/12/justices-revive-religious-groups-attempts-to-block-covid-related-restrictions-in-colorado-new-jersey/. See *High Plains Harvest Church v. Polis* 141 S. Ct. 527 (2020); see also *Robinson v. Murphy*, No. 20A95, 2020 WL 7346601 (U.S. Dec. 15, 2020).
[72] "Jacobson's standard affords States enduring a society threatening epidemic the discretion reasonably to restrict constitutional protections so long as the regulations have a "real or substantial relation" to protecting the public health and safety, and the restraint is not "beyond all question, a plain, palpable invasion of the rights secured." *Delaney v. Baker*, 2021 BL 2738 at*30 (D. Mass. Jan. 06, 2021) (quoting *Jacobson* 197 U.S. at 29, 31).
[73] See *Mitchell v. Newsom*, No. CV208709DSFGJSX, 2020 WL 7647741 at *4 (C.D. Cal. Dec. 23, 2020) (rejecting plaintiff's use of *Roman Catholic* to argue that neutrally-applicable restrictions were not subject to the strict scrutiny required for Governor Cuomo's order targeting the Ultra-Orthodox Jewish community)

C. *Legal Challenges to Abuse of Executive Emergency Authority*

As questions emerge about shifting standards of judicial review, private parties and lawmakers continue to file challenges to statutes that grant governors the power to declare and renew emergencies and suspend or modify related rules and regulations. Most claims alleging failure to follow normal administrative procedures have been dismissed on the grounds that emergency management acts generally allow temporary suspension of these procedures.[74] Other challenges argue that the statutes themselves constitute an impermissible delegation of legislative authority.[75] In states that have one or more statutes that might be relevant in a pandemic, plaintiffs have argued that the executive did not act pursuant to the appropriate statute.

Some lawsuits filed by legislators have been framed as partisan disputes about pandemic response, which have been exacerbated by a polarizing election year. While there are trends that show Republican Legislators and conservative lobbying groups undermining Democratic Governors, this wave of legal and legislative attacks can also be seen as part of a broader conservative advocacy agenda for smaller government and less state interference.

Legal challenges to executive emergency powers from private parties

Private parties challenging executive authority have alleged constitutional rights violations as well as abuse of constitutional and statutory power.[76] In Massachusetts, as noted above, Governor Baker issued orders under the Civil Defense Act (CDA); these orders have faced multiple constitutional and statutory challenges. In *Desrosiers v. Governor*, business owners alleged personal constitutional violations, but also argued that the orders constituted an improper use of the CDA and violated the separation of powers doctrine in the Massachusetts Declaration of Rights.[77] Plaintiffs argued that the CDA "vests the Governor with specified emergency powers only in the event of 'immediate and specific cataclysmic events of limited duration,'" which did not include COVID-19.[78] They further argued that the Public Health Act (PHA), which is intended to protect residents "from disease dangerous to the public health," barred action under the CDA.[79] The Governor cited *Jacobson* and the wide latitude that is granted to the executive during a public health emergency. Additionally, the Governor argued that the legislature had the power to terminate emergency declarations but refused to do so, which further strengthened his assertion

[74] See *Free Minn. Small Bus. Coal. v. Walz*, No. A20-0641, 2020 BL 199740 (Minn. Ct. App. May 26, 2020) (finding that emergency executive orders are issued under the Minnesota Emergency Management Act, which authorizes governors to make, amend, and rescind orders without complying with normal administrative procedures).

[75] See *Wolf v. Scarnati*, 233 A.3d 679, 687 (Pa. 2020); see also *In re Certified Questions From United States Dist. Court, W. Dist. of Michigan, S. Div.*, No. 161492, 2020 WL 5877599 (Mich. Oct. 2, 2020).

[76] Other challenges from private parties include cases heard by the Wisconsin Supreme Court struck down the department of public health's earliest social distancing orders in May 2020 on administrative procedure grounds. See *Wisconsin v. Palm*, 391 Wis. 2d 497 (2020). Wisconsin courts have since upheld Governor Evers' subsequent executive orders, despite numerous legal challenges regarding his decision to extend 60-day orders multiple times.[76] See *Lindoo v. Evers*, Case No. 20 CV 219 County Circuit Court Oct. 2020.

[77] *Desrosiers v. Governor*, 158 N.E.3d 827, 835 (2020).

[78] MASS. GEN. LAWS ch. 639, § 5.

[79] *Id.*

that the orders were lawful.[80] Thus, the court considered whether COVID-19 might constitute a "natural cause" covered by the CDA, and whether the stand-alone public health emergency act precluded the governor from taking actions needed to "protect the public peace, health, security and safety, and to preserve the lives and property of the people of the commonwealth."[81]

Analyzing the legislative intent behind both statutes, as well as the plain meaning of "natural cause," the court held that COVID-19 constituted a natural cause that would allow the governor to act pursuant to the CDA.[82] The court also noted the statutes' different purposes and pointed out that the CDA was intended to supplement the Governor's public health powers. The CDA "contemplates the need to prepare for and respond to a serious disaster requiring swift, top-down, coordinated relief efforts," allowing the Governor to act at the magnitude required for a crisis like COVID.[83] Regarding separation of powers, the court found that the Governor acted within the CDA's legislatively-granted powers, citing precedent that a separation of powers violation implies that the executive has interfered with or prevented another branch from exercising its duties.[84] In this case, the Governor exercised valid, delegated powers of a narrow and specific scope, under a statute that allows the legislature to revoke those powers at any time.[85]

More recently, the Wisconsin Supreme Court invalidated three COVID-19 executive orders on March 31, 2021.[86] In *Fabick v. Evers*, a businessman filed a suit against Wisconsin Governor Evers challenging three consecutive executive orders, one of which was a general mask mandate. Governor Evers issued these orders pursuant to Wis. Stat. § 323.10, which authorizes the Governor to issue a state of emergency lasting 60-days, with the possibility of renewal. The legislature may terminate a declaration through joint resolution. Like *Desrosiers v. Baker*, the Wisconsin Supreme Court heard the suit as an original action due to its bearing on future COVID-19 executive orders.[87] The plaintiff argued that the "enabling condition" or "particular illness or pandemic" had not changed since the issuance of the first order, and thus was an abuse of executive power.

The Governor attempted to argue that the recent loss of federal nutrition benefits was a justifiable new condition that allowed him to renew the order. However, the court rejected this argument and in a four-three decision, found two-out-of-three orders unlawful and stated that: "The Governor cannot make an end run around legislative revocation simply by itemizing a previously unidentified justification for the state of emergency."[88] The court also found that the legislature's refusal to terminate an executive order does not inherently mean that the order was lawful, unlike the Massachusetts Supreme Judicial Court which found that this argument weighed in favor of the Governor's authority.[89]

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[80] Brief of Appellee at 46, *Desrosiers v. Governor*, 158 N.E.3d 837 (2020) (No. SJC-12983).
[81] MASS. GEN. LAWS ch. 639, § 5.
[82] *Desrosiers v. Governor*, 158 N.E.3d at 837.
[83] *Id.* at 838.
[84] See *Youngstown Sheet & Tube Co*., 343 U.S. at 635-637, 72 S.Ct. 863 (Jackson, J., concurring).
[85] *Desrosiers v. Governor*, 158 N.E.3d at 841.
[86] *Fabick v. Evers,* No. 2020AP1718-OA, WL 1201478 (Wis. March 31, 2021).
[87] *Id.* at 24.
[88] *Id.* at 25.
[89] *Id.* at 23.

Legal challenges to executive emergency powers from within the legislature

Pennsylvania: Upholding constitutional standards for terminating emergency declarations

Governor Wolf first faced a challenge from private businesses and individuals alleging that his emergency declarations violated both the constitution and emergency statutes.[90] In April 2020, the Pennsylvania Supreme Court denied relief and found that the declarations had been a proper exercise of executive authority issued pursuant to a statute passed by the General Assembly.[91] When Republican lawmakers attempted to terminate a subsequent emergency declaration through concurrent resolution, the Pennsylvania Supreme Court heard the Governor's challenge to their action in *Wolf v. Scarnati*.[92] The State Senate President Pro Tempore, Senate Majority Leader, and Senate Republican Caucus filed a concurrent resolution terminating the Governor's renewed declaration without his approval, arguing that the Emergency Management Services Code (EMSC) allows the General Assembly to overturn an emergency declaration absent presentment.[93]

Pointing to three exceptions to the state constitution's presentment requirement, lawmakers argued that the emergency declaration was a "declaration of fact" rather than a resolution with binding legal effect, and thus did not require the Governor's approval to overturn.[94] Additionally, they argued that requiring the legislature to present a resolution would allow the Governor to suspend normal rules and regulations by consistently renewing emergency declarations, in violation of the non-delegation doctrine.[95] The court held that the constitution did not allow the legislature to act unilaterally to terminate a state of emergency (essentially a legislative veto) through a concurrent resolution, as an emergency declaration did not fall into one of the three constitutional exceptions to constitutional presentment requirement for all actions "that have the *effect of legislating*."[96] The court noted specifically that the lawmakers could not avoid constitutional standards simply by "characterizing the legislation as a delegation of emergency powers," even if the standards seem "cumbersome" under the circumstances.[97]

The court also found that, even if the EMSC grants the Governor temporary power to suspend laws, the delegated powers were constitutionally permissible because of the specific nature of his authority: "The powers delegated to the Governor are admittedly far-reaching, but nonetheless are specific. For example, the Governor can ''[s]uspend the provisions of any regulatory statute if strict compliance with the provisions would in any way prevent, hinder or delay necessary action in coping with the emergency.''[98] The court noted that authority can be conferred, without creating a separation of powers issue, if two basic principles are met: "First, ... the General Assembly must make the basic policy choices, and second, the legislation must include

[90] *Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa.), *cert. denied,* 141 S. Ct. 239 (2020).
[91] *Id.*
[92] *Wolf v. Scarnati*, 233 A.3d 679, 687 (Pa. 2020).
[93] 35 PA. CONS. STAT. § 7301 (a)(c).
[94] *Wolf v. Scarnati*, 233 A.3d at 688-90.
[95] *Id.* at 699.
[96] *Id.* at 692, 702.
[97] *Id.* at 694 (quoting *Chadha*, 462 U.S. at 946).
[98] *Id.* at 705 (quoting 35 PA. CONS. STAT. § 7301(f)).

adequate standards which will guide and restrain the exercise of the delegated administrative functions."[99] Like many other orders facing non-delegation doctrine challenges, the court found that because the emergency code included limits to the Governor's authority to suspend laws, it would be unconstitutional for the legislature to rescind powers they had rightfully delegated to the executive branch.[100]

Michigan: Invalidating state emergency management laws

Not all courts have ruled with such deference to executive authority, as noted above in *Fabick v. Evers*. *Fabick* follows the Michigan Supreme Court's narrow 4-3 decision that invalidated multiple executive orders and found one of the state's emergency management statutes to be unconstitutional. Plaintiffs *In re Certified Questions From United States Dist. Court, W. Dist. of Michigan, S. Div.,* challenged an order that temporarily banned certain medical procedures.[101] They alleged that the Governor abused her executive authority by issuing two consecutive emergency declaration under the Emergency Management Act (EMA) without legislative approval, and also argued that the Emergency Powers of the Governor Act of 1945 (EPGA) was an unconstitutional delegation of legislative authority.[102]

The EMA requires that the Governor terminate an emergency declaration after 28 days unless she receives approval to extend it through a joint legislative resolution.[103] However, in responding to the pandemic, the Governor terminated the first executive order and issued a new order without legislative approval. She argued that the EMA's 28-day limit constituted "an impermissible legislative veto."[104] However, the court rejected this assertion on the grounds that it is constitutionally permissible for the legislature to create durational limits when it delegates specific powers, and subsequently invalidated her post-April 30th orders.[105]

Turning to the validity of the EPGA,[106] the majority rejected the concurrence's conjecture that the EMA's inclusion of "epidemics" should preclude the Governor from acting pursuant to the EPGA during a pandemic, but they nonetheless found the EPGA to be an unconstitutional delegation of authority.[107] "As the scope of the powers conferred upon the Governor by the Legislature becomes increasingly broad, in regard to both the *subject matter* and their *duration*, the *standards* imposed upon the Governor's discretion…must correspondingly become more

[99] *Id.* at 704 (quoting *Protz v. Workers' Comp. Appeal Bd*., 161 A.3d 827, 834 (2017)).
[100] *Id.* at 707.
[101] *In re Certified Questions From United States Dist. Court, W. Dist. of Michigan, S. Div*., No. 161492, 2020 WL 5877599 at *4 (Mich. Oct. 2, 2020).
[102] *Id.* at *3 (Mich. Oct. 2, 2020).
[103] MICH. COMP. LAWS. § 30.403.
[104] *In re Certified Questions From United States Dist. Court, W. Dist. of Michigan, S. Div*., No. 161492, 2020 WL 5877599 at *7.
[105] *Id.* at *7,8.
[106] The EPGA grants the Governor authority to "promulgate orders, rules, and regulations…consider[ed] necessary to protect life and property," but does not mention pandemics, disease, or public health. MICH. COMP. LAWS. § 10.31(1)(1).
[107] *In re Certified Questions From United States Dist. Court, W. Dist. of Michigan, S. Div*., No. 161492, 2020 WL 5877599 at *11,12.

detailed and precise."[108] They noted that, unlike the EMA, the EPGA allows an emergency declaration to continue indefinitely until the governor terminates it, which creates an indefinite delegation of power.[109] The court analyzed the order's wide-ranging restrictions and requirements imposed on business, institutions, and found that the terms "necessary" and "reasonable" were too broadly construed to place effective limits on the scope of executive power.[110]

This ruling set the stage for the subsequent decision in a challenge brought by the Michigan House of Representatives and Senate, which invalidated the Governor's executive orders and affirmed that the EPGA was unconstitutional.[111] The dissenting Justice in both opinions criticized the majority's application of the non-delegation doctrine, arguing that both the State Supreme Court and the US Supreme Court had, before this case, "[up]held every delegation that had some standards to guide the decision-maker's discretion."[112] She noted that the terms "reasonableness" and "necessary" are frequently deemed appropriate standards for a constitutional delegation of power, and the majority substantially deviated from this standard by relying on non-binding precedent.[113]

Implications for the separation of powers

The Pennsylvania and Michigan opinions highlight several concerns about emergency statutes and the balance between executive authority, adequate public health protections, and sufficient legislative accountability mechanisms. First, *Wolf v. Scarnati* demonstrates the court's interpretation of an emergency statute that is silent on the procedural mechanisms required to terminate an executive order. The Pennsylvania court ruled in the Governor's favor and found that normal constitutional protections apply to legislative checks, even during a state of emergency. However, it would be quite easy for a court to arrive at the opposite conclusion and allow the legislature to terminate an order without consulting public health officials or triggering an override vote of a legislative veto. The rulings also suggest that there are risks associated with statutes defining "disaster" in broad terms, versus statutes that explicitly apply to pandemics or public health emergencies. In Massachusetts, the court was willing to interpret "natural cause" to include a pandemic, whereas other courts have refused to accept that a naturally occurring disaster includes pandemic response. In the future, governors may need to consider whether the general emergency statute or the tailored public health statute is a more appropriate grant of executive power.

And finally, the Michigan ruling calls into question the standard by which courts may interpret an acceptable delegation of power. Although not binding on other states, it sets a precedent to allow the terms "reasonable" and "necessary" to signal excessively broad executive powers. The Michigan court's focus on the duration of the emergency is also concerning, noting that "the conferral of indefinite authority accords a greater accumulation of power than does the

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[108] *Id.* at *15.
[109] *Id.* at *16.
[110] *Id.* at *17,18.
[111] *House of Representatives v. Governor,* 949 N.W.2d 276 (Mich. 2020).
[112] *In re Certified Questions From United States Dist. Court , W. Dist. of Michigan, S. Div.,* No. 161492, 2020 WL 5877599 at *43.
[113] *Gundy v. United States,* 139 S. Ct. 2116, 204 L. Ed. 2d 522, reh'g denied, 140 S. Ct. 579, 205 L. Ed. 2d 378 (2019); *House of Representatives v. Governor*, 949 N.W.2d 276 (Mich. 2020).

grant of temporary authority."[114] Some emergency management statutes have durational limits ranging from 28 to 90 days; these limits may be appropriate in some situations, but have not been adequate for COVID-19 response.

D. Preventing Government Overreach Through Legislative Reform

Resistance to executive authority has also sparked a wave of legislative reforms aimed at restoring legislative checks on the executive and defining the parameters of emergency powers. Some of these legislative reforms may provide helpful clarification for the future, as time limits on emergency declarations and explicit legislative checks are generally important to maintain a balance of power. 15 legislatures have proposed bills that would allow them to convene an emergency session by two-thirds majority without the prior authorization of the governor, which may be helpful if an emergency vote is required. However, the extreme variation and arbitrary nature of many of these bills reflects that these efforts are less about rational responses to future pandemics, and more about broadly curtailing executive authority and preventing executive agencies from exercising their expertise during a public health emergency. Without additional reforms that ensure legislatures base their decisions on public health data and expertise, some of these reforms have simply created additional bureaucratic barriers and invalidated veto power in states with split-party executive and legislative branches.

There are now legislative efforts pending in almost every state to limit emergency declarations to as little as seven days, which would require governors to continually request extensions. Very few of these proposals allow a governor to renew or extend the initial declaration without providing a justification for the renewal or requiring a joint resolution from the legislature.[115] For example, Pennsylvania Senate Bill 231 would reduce the length of a disaster from 90 days to 30 days, and renewal would require a legislative majority approval.[116] In Kansas, the legislature successfully curbed executive authority by amending the Kansas Emergency Management Act and requiring approval from at least 6 lawmakers on the State Finance Committee prior to proclaiming additional Covid-19 related emergency orders.[117] Legislatures have also addressed statutes that were previously silent on the duration of an emergency, including in Massachusetts, where the House has proposed a 90-day duration for emergencies and the emergency powers of the Public Health Commissioner.[118] Some laws that were not explicit about

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[114] *In re Certified Questions From United States Dist. Court, W. Dist. of Michigan, S. Div.,* No. 161492, 2020 WL 5877599 at *14.

[115] Maryland House Bill 17 – limits state of emergency to 14 days, joint resolution from GA extends emergency for no more than 14 days; orders may not prohibit or limit in-person religious activities or treat them in a disparate manner [Intro: 1.13.2021, pending in House Cmte]; Utah Senate Bill 195 – amends provisions related to emergency powers and public health emergencies. Limits public health emergencies to 30 days [intro: 2.12.2021, PASSED Senate: 2.23.2021 Adopted: 3.24.2021]; Wyoming House Bill 113 – limits duration of any public health order imposed on an area or individual to 30 days, can be extended another 30 days if order has been ratified by Governor and declared under a public health emergency [Intro: 2.5.2021]

[116] S.B. 231 (Pa. 2021-2022).

[117] H.B. 2016, 2020 Spec. Sess. (Ky. 2020); Dough Carder, *Lawmakers Overwhelmingly pass compromise COVID-19 bill*, June 4, 2020, https://www.republic-online.com/news/localnews/lawmakers-overwhelmingly-pass-compromise-covid-19-bill/article316674b8-a6bc-11ea-adce-234f5277801b.html.

[118] H.D. 3270, An act relative to the governor's power to declare an emergency, 192nd Legis. Sess. (Ma. 2021-2022).

whether the executive or legislative branch could terminate a declaration have largely clarified that the legislature can terminate an executive order at any time.[119]

A few legislatures have also proposed bills that explicitly protect individual constitutional rights from infringement by executive orders and regulations. For example, bills have been filed to protect religious services, sale of firearms,[120] and sale of alcohol. Some bills would limit the usage of essential and non-essential business designations. 12 states have proposed legislation that would curtail the Governor's ability to interfere with attending or operating a place of worship.[121] Some bills have also proposed that worship services be designated "essential services" during a disaster.[122]

These legislative efforts have not only been aimed at executive authority but have also attacked the powers granted to public health officials. As of December 2020,legislatures in over 24 states had introduced bills that would curb local public health authority to act autonomously during emergencies.[123] Seven legislatures have proposed amendments to either their public health emergency law or general emergency management law to incorporate "pandemic" or further define public health emergency.[124] For example, in Michigan, an initiative to limit the department of public health to using 28-day emergency orders has been approved by the Senate.[125] The Michigan House and Senate also proposed amendments to the Public Health Code in early 2021, one of which would prohibit local health officials from issuing gathering limitations on religious services and would allow businesses to remain in operation as long as they were in compliance with health guidelines.[126]

The rush to curb executive authority during this pandemic also means that public health emergency laws may reflect epidemiological data that is not relevant to the next one. For example, there are two bills in Michigan that would amend the Public Health Code and local health officials' authority to issue dining, gathering, and venue restrictions during a pandemic.[127] However, these guidelines are based on COVID-19 risks of transmission, these measures may not be as effective for a future virus. A second bill would prohibit local health officials from closing schools or prohibiting certain sporting events unless the epidemic has reached a certain threshold of confirmed cases within a 14-day period. This reflects the current science around COVID-19 which suggests that children face reduced risk of infection, which may not be true in future pandemics.

In addition to pending legislation, two state legislatures have successfully passed constitutional amendments through both the house and senate that limit executive authority during

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[119] BALLOTPEDIA, *Checks and Balances: State lawmakers press for oversight of emergency powers*, (April 13, 2021) https://news.ballotpedia.org/2021/04/13/checks-and-balances-state-lawmakers-press-for-oversight-of-emergency-powers/.

[120] Georgia, Kansas, Texas

[121] Arkansas, Georgia, Kentucky, Maine, Maryland, Michigan, Missouri, Montana, Oregon, Texas, Utah, Wisconsin

[122] Montana and Texas.

[123] Anna Maria Barry-Jester, Hannah Recht, Michelle R. Smith, and Lauren Weber, Pandemic Backlash Jeopardizes Public Health Powers, Leaders, Kaiser Family Foundation (Dec. 15 2020) https://khn.org/news/article/pandemic-backlash-jeopardizes-public-health-powers-leaders/.

[124] See Connecticut House Bill 5653; see also Florida Senate Bill 2006; see also Minnesota House Bill 1515.

[125] https://www.legislature.mi.gov/documents/2019-2020/billintroduced/Senate/pdf/2020-SIB-1253.pdf

[126] H.B. 4268, 101st Legis. Sess. (Mi. 2021-2022).

[127] S.B. 250 , 101st Legis. Sess. (Mi. 2021-2022).

an emergency. For example, Pennsylvania Republican lawmakers introduced and passed Senate Bill 1166 on July 15, 2020.[128] The amendment reduces the duration of an emergency declaration without a legislative concurrent resolution from 90-days to 21-days. It also requires additional specifications in each declaration, including details about the nature of the disaster or emergency, identification of specific areas under threat, and how each threat will be managed. The amendments would also prohibit the governor's power to veto the General Assembly's resolution terminating a declaration. At least 11 states have proposed similar amendments.

Just as legislative reform may have some positive outcomes, there is nothing inherently problematic about constitutional amendments that clarify duties and accountability. As some scholars have argued, "the ambiguity latent in the police power suggests that we should be more …intentional in structuring the police power of the executive and the legislative branches…Otherwise, we will continue to be vexed as new emergencies arise with the question of who should be able to act, when, and whether or not unilaterally."[129] Improving the balance of power alone, without accounting for public health expertise and the types of emergencies we may face in the future, will not be enough to avoid the problems that have exacerbated the COVID-10 pandemic.

PART III: WHEN PANDEMICS ARE POLITICIZED: IMPLICATIONS FOR FUTURE PUBLIC HEALTH RESPONSE

Due to the current political moment, the COVID-19 pandemic has been hyper-politicized and marked by extreme partisan divides about the appropriate response and bounds of authority during a public health emergency. There has been a lot of attention on the partisan nature of challenges to Democratic Governors and unwillingness to comply with public health orders. However, rather than thinking about it solely as partisan backlash led by Republican legislators and encouraged by the Trump Administration, perhaps it is more useful to look beyond the current political moment to the historical roots of politicized responses to public health crises. If policy makers learn from challenges posed to executive authority throughout the last century during times of crisis, new governance structures and public health strategies could potentially override the predictable backlash against government overreach and infringement on individual liberties.

I distinguish between the concepts of partisan and politicized. Partisan response often aligns with a particular political party and impacts behavior—from politicians to individual people. This manifests in disparate levels of compliance with public health measures, and contributes to highly critical, partisan rhetoric in mainstream media that shapes public sentiments about those in power. I argue that partisanship can be a predictable outcome of a public health crisis, which can be exacerbated by various social and political factors like elections or recessions, but the COVID-19 pandemic has created an unprecedent degree of such partisanship.

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[128] In order to appear on the ballot, the amendment must pass both houses in two consecutive legislative sessions; the amendments package passed the General Assembly once in 2020, and so far, a House committee has approved the package in the current session.

[129] Rodriguez, *supra* note 6, at 1239.

On the other hand, politicization of a public health crisis can bleed into a broader ideological thread of reforms towards small government and minimal intervention. This type of "political activism" often means that the legislation pushed through during a pandemic has no bearing on the current public health crisis or those that arise in the future. It is more focused on power than on public health expertise or data and can have long lasting implications for the policies and power structures that are available during the next pandemic.

A. Pandemic Response in The Context of The Current Political Moment

During the COVID-19 pandemic, a particular confluence of events not only exacerbated the severity of the pandemic, but also showed a stark, partisan divide in public health response. Not only did it occur during the last year of the Trump Administration, election politics and a new Supreme Court bench provided a perfect platform for the GOP. Over the past five years, the GOP has initiated legislative reforms stripping power from Democratic governors.[130] While these attacks have been legislative, Republican lawmakers are now able to turn to the judiciary. Many of the same state GOPs are now waging legal challenges to the COVID-19 response, taking the opportunity to further undermine important executive powers that allow urgent response public health crises. Although it is important to maintain judicial review during a state of emergency,[131] there is a risk that increasingly politicized courts and legal challenges will undermine the statutory frameworks that allow executives to control infectious diseases.

Republican lawmakers have challenged Democratic governors in seven out of thirteen states where there is a partisan split across branches.[132] Governors have also faced challenges from Republican lawmakers in states where Democrats control both the executive and the legislative branch. For example, the Supreme Court of New Jersey heard *New Jersey Republican State Committee v Murphy*,[133] where plaintiffs alleged that a proposed debt issuance bill would violate the state constitution's debt limitation clause. The Court ruled that the bill was constitutional under the emergency exception to the debt limitation clause, but also urged lawmakers to craft more explicit legislation in the future to prevent judicial review.[134] In Colorado, the Supreme Court refused to hear a Republican lawmaker's claim alleging that the state's emergency act was

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[130] Tim Lau, *Power Grabs in Wisconsin and Michigan Undermine* Democracy, Brennan Center for Justice (Dec. 3, 2018) https://www.brennancenter.org/our-work/analysis-opinion/power-grabs-wisconsin-and-michigan-undermine-democracy; Russ Feingold, *Republicans are undermining democracy state by* state, THE GUARDIAN (Dec. 9, 2018) https://www.theguardian.com/commentisfree/2018/dec/09/republicans-michigan-wisconsin-strip-power-democrats-undermine-democracy; Perry Bacon, *Five Ways Trump And GOP Officials Are Undermining The Election Process*, FIVETHIRTYEIGHT (Aug. 11, 2020) https://fivethirtyeight.com/features/five-ways-trump-and-gop-officials-are-undermining-the-election-process/.

[131] Wiley and Vladeck, *supra* note 42.

[132] Sophie Quinton, *GOP Lawsuits Restrain Governors' COVID-19 Actions*, PEW CHARITABLE TRUST (Nov. 17, 2020) https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/11/17/gop-lawsuits-restrain-governors-covid-19-actions (last visited Jan. 10, 2020); See *Beshear v. Acree*, 2020 BL 438405 at *24, 26 (Ky. Nov. 12, 2020) (reversing Circuit Court restraining order prohibiting enforcement of Governor's executive orders, finding that the lower court had abused its discretion in issuing an injunction and noting that the emergency statute was a constitutionally permissible delegation of power that included a time limit, public notice requirement, and specific, enumerated emergency powers).

[133] *N.J. Republican State Comm. v. Murphy,* 243 N.J. 574 (2020).

[134] *Id.*

unconstitutional and that emergency powers to issue a mask mandate had been improperly delegated to the executive.[135] In Connecticut, Republican minority-leaders forced a formal vote of the committee that could terminate Governor Lamonte's emergency declaration even though they would be out-voted, but did so to publicly voice their opposition to his exercise of executive power.[136] In addition to legal challenges related to executive orders, there have also been at least 12 recall efforts launched against governors, almost all of which were fully or partially related to their pandemic response, including governors who have faced partisan challenges in Michigan, Colorado, Louisiana, Oregon, New Jersey, Minnesota, and Wisconsin.[137]

However, framing the challenges to executive authority as sweeping attacks on Democratic governors does not tell the whole story. Partisanship can also explain flip-flopping of opinion on public health response, where the party line shifts depending on the type of emergency and who is most impacted. The next public health emergency may look vastly different from COVID-19 in terms of transmission, incubation periods, and which populations are most at-risk. If it were a different virus, there may be very different stakeholders advocating for safety measures or challenging restrictions to personal freedoms. For example, during the Zika outbreak, Republicans were more likely to push for a robust public health response because the virus was concentrated in warmer, Southern states and governors had a vested interest in well-funded mitigation efforts.[138]

As COVID-19 spread during the Trump Administration, Democratic governors were more likely to issue sweeping restrictive measures to contain the pandemic, resulting in challenges to their authority. Now under the Biden Administration, there are conservative governors, most recently Governor Abbott of Texas, who are rapidly reopening states while also preempting local attempts to maintain safety measures.[139]

If the partisan nature of public health response during COVID-19 is viewed in isolation, there is a risk that the confluence of events in this moment of time will be seen as the driving force behind noncompliance and resistance to mitigation efforts. Resistance to particular policies and the positions of Democrats and Republicans that were relevant in this pandemic may also unnecessarily influence the type of emergency response we see in the future.

B. Historical Roots of Politicized Responses to Public Health Crises

The partisan nature of legal challenges to COVID-19 executive orders thus far has been seen as a consequence of Republican efforts to undermine Democratic governors and respond to concerns about the economic impacts of long-term shutdowns. However, these reactions could more aptly be seen as a part of a historical trend of politicized resistance to any public health or

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[135] *Neville v. Polis* was refiled in Denver District Court on August 30, 2020.
[136] Mark Pazniokas, *Leaders will vote, if only for the political show, on extending Lamont's emergency powers,* THE CT MIRROR (Sep. 3, 2020) https://ctmirror.org/2020/09/03/leaders-will-vote-if-only-for-the-political-show-on-extending-lamonts-emergency-powers/.
[137] Ballotpedia, *Gubernatorial Recalls* 2020, https://ballotpedia.org/Gubernatorialrecalls#2020.
[138] Singer PM, Willison CE, Greer SL., *Infectious disease, public health, and politics: United States response to Ebola and Zika*, 41(4) J PUB. HEALTH POL'Y 399-409 (Aug. 2020).
[139] https://apnews.com/article/ken-paxton-austin-coronavirus-pandemic-texas-greg-abbott-28815aa87b96899dc720e101f518dade.

social policy intervention that threatens business interests and individual liberties or overextends state police powers.

Over the last 150 years, similar partisan divides have emerged during every public health crisis that threatened the nation, from the cholera epidemic in the 1890s to the Ebola crisis in 2014. When cholera arrived in New York City on steam ships from Europe in 1892, both the state and federal government were forced to set up quarantine sites, and in many cases, the quality of quarantine facilities was dependent on whether passengers were from steerage or "cabin-class."[140] There was also controversy about the Board of Health seizing personal property that had been exposed to typhus or cholera and refusing to compensate the owners. As greater numbers of upper- and middle-class New Yorkers (and American citizens) were forced to quarantine, public opposition to the government's public health measures suggests that "the real threat came not from cholera but from state action, which many believed to be illegal."[141] In particular, the Chamber of Commerce of the State of New York became extremely vocal about state action, and criticized it as being "indecisive [and] ignorant" and "quickly connected cholera to the well-being of the market."[142] The cholera epidemic resulted in controversies about whether state governments should have jurisdiction over quarantine laws, and provoked strong commercial backlash against quarantine measures that would predictably emerge during crisis throughout the 19th Century. There were also lingering questions and a lack of jurisprudence about state police powers infringement on individual liberties during an epidemic. *Jacobson* was decided just a few years later.

Jacobson marked the first time that a mandated vaccination policy made it to the Supreme Court. At the time, the concept of liberty was quite different than it is today, in that people generally accepted that "real liberty requires more than the absence of government,"[143] but it did not come without an anti-government backlash. Although there were active anti-vaccination groups that funded the case, three years after *Jacobson*, the Anti-Vaccination League was founded, with the objective to "abolish oppressive medical laws" and prevent "enlarge[ing] state medicine at the expense of the freedom of the individual."[144]

There was also widespread resistance to a mask mandate issued by the San Francisco Board of Health during the 1918 Spanish Influenza, as well as backlash against people who refused to wear them—"mask slackers"—which included the Mayor of San Francisco.[145] A formal organization, the Anti-Mask League,[146] claimed that "the muzzle is a farce and an outrage against our liberties' and that the city government should "dedicate itself to cleaning up the city instead of

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[140] Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53, 86 (2007).
[141] *Id.* at 86.
[142] *Id.* at 53, 85.
[143] Wendy Parmet, *Rethinking Freedom: Liberty vs. health is a false dichotomy*, INSTITUTE OF ART AND IDEAS (88) (May 5, 2020) https://iai.tv/articles/rethinking-freedom-auid-1531.
[144] *Towards a Twenty-First-Century Jacobson v. Massachusetts*, 121 HARV. L. REV 1820, 1823 (May 2008) https://cdn.harvardlawreview.org/wp-content/uploads/pdfs/a_twenty-first-century_jacobson_v_massachusetts.pdf
[145] The Intersection Of Public Safety, Public Health, And Law, 2020 Txcle-Agl 8-Ii.
[146] Kiona Smith, *Protesting During A Pandemic Isn't New: Meet The Anti-Mask League Of 1918*, FORBES (Apr. 29, 2020) https://www.forbes.com/sites/kionasmith/2020/04/29/protesting-during-a-pandemic-isnt-new-meet-the-anti-mask-league/?sh=3cab754912f9#699a831312f9 (Last accessed Mar. 28, 2021).

implementing 'autocratic rules.'"[147] During the second wave of the pandemic in 1919, over 4,000 people gathered to protest the ongoing mask requirement. Similar to the current disputes between governors and local authorities, the San Francisco Board of Health blamed the resistance on the state board of health's refusal to issue a universal mask mandate and downplay mask effectiveness.[148]

There are some factors which can exacerbate the obvious partisan nature of a public health crisis, demonstrated by the 2014 Ebola outbreak which occurred during a similar political moment and featured familiar partisan divides about the appropriate response and level of government intervention required.[149] "Contrary to the suggestions of Ebola-focused political commentators, although elections may raise the stakes and drive politicians to increasingly partisan rhetoric…the partisan history of public health perception suggests that, at least for the American public, political allegiance trumps support for specific disease policies."[150] While both the CDC and the Obama administration publicly aligned with health officials and downplayed the threat of transmission based on scientific evidence, Donald Trump used his pre-presidency Twitter platform to criticize the government's response to the pandemic, accuse the CDC of lying, demand a West African travel ban, and argue that people exposed to Ebola should not be allowed back in the country because they "must suffer the consequences" of volunteering in "faraway places."[151] Trump was not alone: the outbreak took place during midterm elections, and Senators Ted Cruz and Rand Paul, as well as Governor Rick Perry, took the opportunity to attack the Obama administration's inaction and failure to take Ebola seriously.[152] Polling during the avian flu epidemic and the H1N1 crisis showed that Republicans were statistically more likely to approve of the Bush Administration's response, while Democrats were "nearly twice as likely as to support the vaccine for the influenza strain H1N1 ("swine flu") proposed by the Obama Administration."[153]

While the Ebola panic stirred up by Republicans contributed to increasing fears about immigration,[154] the Democratic-led response to COVID-19 has allowed Republicans and small-government lobbyists to provoke fears about government overreach and infringement on personal freedoms, while underplaying the scientifically backed need for stringent public health measures. In turn, the fractured response and Republican criticism has had a significant impact on compliance with public health measures. [155]

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[147] The Intersection Of Public Safety, Public Health, And Law, 2020 Txcle-Agl 8-Ii.
[148] Kiona Smith, supra note 145.
[149] Steven Hatch, How the Ebola Crisis Helped Launch Donald Trump's Political Career, *Mother Jones* (Apr. 3, 2017) https://www.motherjones.com/politics/2017/04/trump-ebola-tweets/.
[150] Cailin Hong, The Politicization of Disease, PRINCETON PUBLIC HEALTH REVIEW (Dec. 7, 2014) https://pphr.princeton.edu/2014/12/07/the-politicization-of-disease/.
[151] *Id.*
[152] Wade Goodwyn, *In U.S., Ebola Turns From Public Health Issue To A Political One*, NATIONAL PUBLIC RADIO (Oct. 9, 2014) https://www.npr.org/2014/10/09/354890869/in-u-s-ebola-turns-from-a-public-health-issue-to-a-political-one.
[153] Hong, *supra* note 149.
[154] Niskanen Center, Republicans Successfully Politicized Ebola. Can They Do it Again in 2020? (Apr. 22, 2020) https://www.niskanencenter.org/republicans-successfully-politicized-ebola-can-they-do-it-again-in-2020/.
[155] Clinton J, Cohen J, Lapinski J, Trussler M., *Partisan pandemic: How partisanship and public health concerns affect individuals' social mobility during COVID-19*, 7(2) SCI. ADV. (Jan. 2021); Gollwitzer A, et. al., *Partisan*

C. *Politicized Attacks on The Overreach of State Government*

Looking beyond partisanship, a politicized pandemic reaction has the potential to systemically change our governing institutions and shift concentrations of power and resources beyond the context of a public health emergency. The pandemic, or really any crisis, can be used to justify attacks on state governments, especially when there is political will and substantial resources behind business interests and First Amendment rights. For example, in response to waves of New Deal legislation, the American Liberty League (ALL) was formed in 1934 to provide legal representation for those who wanted to challenge the allegedly broad abuse of government authority.[156] ALL identified itself as a bi-partisan organization (often compared to the Modern-day Tea Party), like groups today that claim to be "non-partisan." It was founded by legislators and businessmen who wanted to launch legal challenges and high-profile media campaigns to undermine New Deal legislation.[157] A radio address from one of the founders stated that:

> "The New Deal has sought to destroy the American system of government composed of three coordinate branches and to upset the dual sovereignty as between state and nation which the Constitution provides. [It] represents the attempt….to set up a totalitarian government, one which recognizes no sphere of individual or business life as immune from governmental authority and which submerges the welfare of the individual to that of the government."[158]

One month before the WHO declared COVID-19 a pandemic, similar sentiments were expressed at the Conservative Political Action Conference, where President Trump's top economic advisor said: "What is or could sink the American economy is the socialism coming from our friends on the other side of the aisle."[159] Not only has there been a general, conservative movement against state level restrictions coming directly from the Department of Justice and other administration officials, there is also a significant number of privately financed "non-partisan" organizations which have represented plaintiffs in lawsuits against governors.[160] For example, the New Civil Liberties Alliance (NCLA), a non-partisan, non-profit organization, represents plaintiffs in multiple lawsuits challenging COVID-19 executive orders, including the plaintiffs in *Desrosiers v. Baker*. Their mission statement is to "tame the unlawful power of state and federal agencies and

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differences in physical distancing are linked to health outcomes during the COVID-19 pandemic, 4(11) NAT HUM BEHAV. 1186-1197 (Nov. 2020).

[156] Jared A. Goldstein, *The American Liberty League and the Rise of Constitutional Nationalism*, 86 TEMP. L. REV. 287, 288 (2014).

[157] *Id.* at 291.

[158] Jouett Shouse, *The New Deal vs. Democracy*, AMERICAN LIBERTY LEAGUE BULLETIN (radio broadcast July 15, 1936) http://web.mit.edu/21h.102/www/Primary%20source%20collections/The%20New%20Deal/American%20Liberty%20League,%20New%20Deal%20vs%20Democracy.htm.

[159] Abdallah Fayyad, *The Pandemic Could Change How Americans View Government*, The Atlantic (Mar. 19, 2020) https://www.theatlantic.com/politics/archive/2020/03/trump-socialism-and-coronavirus-epidemic/607681/.

[160] Lisa Lerer and Kenneth P. Vogel, *Trump Administration Signals Support for Allies' Fight Against Virus Orders* THE NEW YORK TIMES (Apr. 29, 2020) https://www.nytimes.com/2020/04/29/us/politics/coronavirus-trump-justice-department.html; Kenneth P. Vogel, Jim Rutenberg, and Lisa Lerer, *The Quiet Hand of Conservative Groups in the Anti-Lockdown* Protests**,** THE NEW YORK TIMES (Apr. 29, 2020) https://www.nytimes.com/2020/04/21/us/politics/coronavirus-protests-trump.html.

to foster a new civil liberties movement that will help restore Americans' fundamental rights."[161] In March 2020, NCLA launched its campaign to protect civil liberties and combat government overreach, stating that: "The COVID-19 pandemic has proven to be a threat not only to the health and safety of Americans, but also to our way of life…. As elected leaders and bureaucrats have taken turns trampling civil rights under foot, NCLA has been working overtime to restore the constitutional guardrails on the Administrative State's pandemic response."[162] Some of these lobbying groups have formed as a result of the pandemic, including the Citizen Action Defense Fund, which is actively challenging executive orders in Washington State.[163] Others have been active at the state level for years and are actively supporting challenges with amicus briefs. For example, Americans for Prosperity-WI filed an amicus brief in the lawsuit against Governor Evers' order "Safer at Home."[164] Its mission statement highlights the core values of "separation of powers" and "honoring the legislature and public's role in addressing the crisis, government is more likely to develop the goodwill necessary for successful outcomes."

In addition to private libertarian groups channeling resources into lawsuits, there are also efforts to push state legislation that would severely restrict executive authority. The American Legislative Exchange Council (ALEC) proposed a model law in August 2020, the "Emergency Power Limitation Act, which imposes a "narrowly tailored" requirement to any emergency order and a mandatory expiration of an emergency after seven days.[165] ALEC is not only focused on executive authority but on the legislature's ability to temporarily infringe on personal liberty or impose regulatory burdens on private parties. Its model policy, "Expedited Suspension And Legislative Repeal Of Harmful Rules Act," recommends extensive rulemaking requirements and oversight of legislative action during an emergency.[166]

The language from these model acts has appeared in several state bills, including in Massachusetts. A Massachusetts House Representative, who is also the MA State Chair for ALEC, filed an amendment to the CDA that includes language from ALEC's proposed emergency powers limitation act. It calls for narrowly tailored restrictions and requires state courts to expedite hearing challenges to any orders that infringe on individual liberties. The amendment limits an emergency to 30-days, allows the legislature to vote to terminate any order or decree, and prohibits the Governor from reissuing the same order without proof of "significantly changed circumstances." In the case of changed circumstances, the Governor may reissue the order once for up to three days.[167] There is also a pending amendment that imposes a 90-day limit on all powers granted to the Public Health Commissioner and requires a joint resolution to extend the emergency.[168]

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[161] https://nclalegal.org/about/
[162] *Id.*
[163] https://citizenactiondefense.org/leading-the-fight-for-free-markets-limited-government-and-constitutional-rights/
[164] AFP-WI Amicus Br. Wisconsin Legislature v. Palm No. 2020-765 (Wis. Sup. Ct.)
[165] AMERICAN LEGISLATIVE EXCHANGE COUNCIL, Statement of Principles to Inform Emergency Management Act Reform (adopted August 9, 2020) https://www.alec.org/model-policy/statement-of-principles-to-inform-emergency-management-act-reform/.
[166] AMERICAN LEGISLATIVE EXCHANGE COUNCIL, Expedited Suspension And Legislative Repeal Of Harmful Rules Act (adopted August 9, 2020) https://www.alec.org/model-policy/expedited-suspension-and-legislative-repeal-of-harmful-rules-act/.
[167] H.D. 2064, 192nd Legis. (Ma. 2021).
[168] H.D. 3720, 192nd Legis. (Ma. 2021).

To combat the implications of a politicized pandemic, it is important not to rush legislation based on the fear and uncertainty arising from legal challenges and other reforms. Shaping future public health policy during the height of the crisis itself will not result in effective public health governance and might even prevent meaningful reform if partisan debates about the current pandemic are the driving force behind the legislation.

PART IV: CONSIDERATIONS FOR FUTURE PUBLIC HEALTH RESPONSE

As vaccines become available across the country, it would be prudent for state governments to take stock of lessons learned and create guidelines for the next pandemic, even if it differs vastly from COVID-19. I review three proposed areas of intervention that could mitigate politicized backlash to executive emergency authority and improve future pandemic response.

A. Strengthening Statutory Frameworks for Public Health Response

> "Law is not just one means of specifying a desirable practice but also the primary social tool for generalizing or scaling up practices judged collectively beneficial, forestalling negative behavior, and setting powers, duties, and limitations on public and private entities."[169]

While there have been legislative efforts to limit executive power, as noted in Part II, public health experts have recommended statutory amendments that would increase government accountability while also providing more a more sustainable response framework for future pandemics. A prime example of this is the Model State Public Health Emergency Act (MSPEHA).[170] The Act was drafted in the wake of September 11th with an eye towards bioterrorism, but provisions of the Act have been adopted in over 33 states since 2003.[171] In 2003, the Turning Point Model State Public Health Act (TPMSPHA) built on the original model act but expanded it to include a wider array of public health issues. While critics argue that the model does not adequately curb executive powers and the potential for civil liberties violations, others have pointed out that it is an important first step in creating nation-wide best practices in data collection and emergency response.[172]

With lessons learned from the current pandemic, it may be time to reevaluate this model act with lessons learned from the specifics of a rapidly spreading novel virus. Some states have established task forces to study the impacts of COVID-19 emergency response to determine

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[169] Scott Burris, Lindsay K. Cloud, and Matthew Penn, *The Growing Field of Legal Epidemiology*, J. OF PUB. HEALTH MGMT AND PRAC. (Mar. 1, 2020).
[170] CENTERS FOR LAW AND THE PUBLIC'S HEALTH AT GEORGETOWN AND JOHNS HOPKINS UNIVERSITIES, *The Turning Point Model State Public Health Act* (2003) http://www.publichealthlaw.net/ModelLaws/MSPHA.p.
[171] Joseph Mishel, *The Model State Emergency Health Powers Act: Balancing Public Safety and Civil Liberties*, 1017 SETON HALL SCHOOL OF LAW STUDENT SCHOLARSHIP 1, 5 (2019) https://scholarship.shu.edu/cgi/viewcontent.cgi?article=2019&context=studentscholarship.
[172] *Id.*

practical reforms for future pandemics, rather than relying solely on pushing legislation through.[173] The Uniform Law Commission also launched a committee in early 2020 to explore the effectiveness of a model or uniform public health emergency law that could provide guidelines for states that extend beyond the focus of the TPMSPHA.[174] For example, just as many states have existing parameters around the use of quarantine and isolation, a uniform law could include "similarly specific authorizations and guardrails for compulsory measures to increase social distancing and use of personal protective equipment among the general public, regardless of known infection or exposure, during a declared public health emergency."[175]

Statutory intervention does not come without its problems, as states with partisan divides face barriers to pursuing proactive legislative responses. For example, following the Wisconsin Supreme Court's nullification of the governor's stay-at home-order, the Department of Health Services (DHS) submitted a modified order to the state legislature to take its place.[176] The DHS is not authorized to independently issue its own order, and therefore relies on either executive orders or legislative rulemaking. However, the proposal was shortly withdrawn because the Republican-controlled legislature refused to consider any state-wide mandates, with Governor Evers stating: "The Republicans made it very clear they don't believe a statewide approach is the right way to go at this point in time, and they also don't believe any restrictions are advisable at this time, so that kind of narrows it down…It just doesn't make any sense to spend a lot of time doing something we know isn't going to be successful."[177]

In order to overcome the politicization of future public health emergency, we need to look beyond just legislation. If COVID-19 has been shaped by the narrative that executive overreach during a crisis is inherently dangerous, then there is a need to shape institutions and narratives that will build trust. Instead of thinking about it in terms of "state police powers" and "overreach," which can create fears of violation of individual liberties, there may be ways to frame emergency response as preparedness and prevention to avoid the need for such restrictive orders in the first place.

B. Focusing on Preparedness and Prevention[178]

[173] Jill Krueger, *COVID-19's Impact on State Public Health Laws Requires Careful Deliberation, Not a Rush to Legislate*, NETWORK FOR PUBLIC HEALTH LAW (Mar. 11, 2021) https://www.networkforphl.org/news-insights/covid-19s-impact-on-state-public-health-laws-requires-careful-deliberation-not-a-rush-to-legislate/.

[174] *Id.*

[175] Lindsay F. Wiley, *Democratizing the Law of Social Distancing,* 19 YALE J. HEALTH POL'Y, L. & ETHICS 50, 106 (2020).

[176] Sean Ryan, *Gov. Evers drops Covid-19 rule-making proposal to state Legislature, won't try again*, MILWAUKEE BUSINESS JOURNAL (May 18, 2020) https://www.bizjournals.com/milwaukee/news/2020/05/18/evers-drops-rule-making-proposal-to-legislature.html

[177] *Id.*

[178] The terms "preparedness" and "prevention" often have a technical definition in the public health sector, but I use them informally here to refer to a broad range of strategies that could be implemented both prior to and during a public health emergency.

Experts note that drafting more emergency laws should not be the primary means for improving future responses to crisis or protecting public health.[179] Preparedness includes building stronger institutions to provide programs and resources that mitigate the impact of restrictive public health response. The current response to COVID-19 has been reactionary and scattered due to lack of preparedness and weak social safety nets that could protect health, homes, and livelihoods. Without broader social safety nets, measures taken with the intent to protect certain communities can be construed as discriminatory treatment causing irreparable harm. Studies also show that people are more likely to comply with restrictive measures if they have proper social and economic support, creating incentives rather than restrictions relying on deterrence and punitive measures.[180]

Prevention includes the development of strong communication strategies to improve transparency and build trust during an emergency. If a government is not able to communicate the rationale behind restrictive public health, there will most likely be public backlash over business closures, job loss, and infringement on personal freedoms. Lindsay Wiley, who has also cautioned against suspending judicial review during public health emergencies, has proposed five central principles that should guide preparedness and prevention and how they should be integrated into public health law reform.[181] These include improving communications and transparency about the justification for mitigation efforts that show a "demonstrated threat of significant risk and a suitable fit between the means and clearly stated ends, [and] include statements of the strategic purpose orders are intended to serve, the scientific understanding on which they are based, and the criteria that will be relied on to determine whether they are working and when they can be lifted."[182]

Wiley also stresses the importance of social protection programs and incentives to compensate for losses that individuals and businesses may be forced to bear in the event of long-term restrictions. This would not only address the inequitable and disparate impacts of a public health crisis,[183] but would also discourage the need for individualized legal challenges to public health mandates. A recent Michigan case challenging a mandatory free testing requirement for workers living in onsite housing on farms and at food processing plants.[184] Employers and a group of six farmworkers challenged the order, arguing that "migrant worker" was a proxy for Latino and should be subjected to strict scrutiny as a suspect class under the Fourteenth Amendment.[185] Plaintiffs argued that forced testing would prevent workers from earning wages if they test positive, and others would resign to avoid testing. The employers also challenged the administrative and economic burden of setting up testing infrastructure when other industries were

[179] Mariner, *supra* note 11, at 343; Scott Burris et al., *The Legal Response to COVID-19: Legal Pathways to a More Effective and Equitable Response,* 27 J. PUB. HEALTH MGMT.& PRAC. (Jan/Feb. 2021).
[180] Mariner, *supra* note 11, at 348.
[181] Lindsay F. Wiley, *Democratizing the Law of Social Distancing,* 19 YALE J. HEALTH POL'Y, L. & ETHICS 50 (2020).
[182] *Id.* at 108-09.
[183] *Id.* at 117.
[184] *Castillo v. Whitmer*, 823 F. App'x 413 (6th Cir. 2020).
[185] *Id.* at 414.

exempt from similar requirements. The Governor justified the order with studies showing the elevated risks of COVID transmission in worker camps and food processing facilities.[186]

The Sixth Circuit denied the motion for preliminary injunction, citing a lack of discriminatory intent or invidious purpose, and found a legitimate public interest in upholding the order. "[I]f consideration of racial data were alone sufficient to trigger strict scrutiny, then legislators and other policymakers would be required to blind themselves to the demographic realities of their jurisdictions and the potential demographic consequences of their decisions."[187] Fear of lost wages and lost income triggered this legal challenge, rather than an aversion to the testing itself, which may not have been the case if states provided adequate compensation schemes and unemployment insurance for those impacted by restrictive measures. While prevention would not resolve all legal challenges, it might diminish the use of the court system for arbitrating personal economic grievances and allow the government to enact effective public health measures.

Prevention may also include improving health care infrastructure and data collection to mitigate the impacts of public health measures when they do occur. Improving data and documentation practices would not only help inform prevention strategies but could also provide reliable evidence for states to use in their justification for public health mitigation efforts. In turn, this would help judges assess the scientific rationale behind an executive order and the implications of a particular policy for the broader public good. Traditionally, judges have relied heavily on CDC guidance and the scientific basis for public health restrictions to decide whether a particular measure sufficiently serves the state's interest.[188] However, this can be difficult with a novel disease like COVID-19 where reliable scientific data is not readily available and the CDC hesitated to issue recommendations that would negatively impact the economy.[189] Many states also lacked the capacity to gather and publish real-time data on the virus.[190] In part, this could have been prevented if states and healthcare institutions had the capacity to collect and disaggregate data, and if there were mechanisms in place for public health experts to share breakthroughs and compare findings in real time.

Data would also allow for judges to use what some scholars call "rational *medical* basis" review, which would ensure that executive orders are assessed through the lens of specific incubation, transmission, and infection characteristics of a particular virus.[191] For example, the Obama Administration implemented Ebola quarantine measures that were based on smallpox incubation, which resulted in restrictions that most likely did not serve the best interest of the state nor the isolated individuals.[192] Yet due to *Jacobson* and absent an alternative, judges upheld the

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[186] *Id.* at 417.
[187] *Id.* at 416 (quoting *Spurlock v. Fox*, 716 F.3d 383, 394 (6th Cir. 2013)).
[188] Lindsey F. Wiley, *Public health law and science in the community mitigation strategy for Covid-19,* 7(1) J. LAW BIOSCI. 1-19 (May 2020).
[189] Charles Piller, *Data secrecy is crippling attempts to slow COVID-19's spread in U.S., epidemiologists warn*, SCIENCE MAGAZINE (July 16, 2020) https://www.sciencemag.org/news/2020/07/us-epidemiologists-say-data-secrecy-covid-19-cases-cripples-intervention-strategies.
[190] *Id.*
[191] Robert A. Gatter, *Reviving Focused Scrutiny in the Constitutional Review of Public Health Measures*, Wash. U. J.L. & Pol'y (forthcoming) Saint Louis U. Legal Studies Research Paper No. 2020-32 (September 10, 2020).
[192] Robert Gatter, *Three Lost Ebola Facts and Public Health Legal Preparedness,* 12 ST. LOUIS U.J. HEALTH L. & POL'Y 191 (2018).

quarantine measures in deference to state public health officials.[193] The rational medical basis approach might allow courts to meaningfully review state action and prevent constitutional rights violations without substituting their own judgement for that of public health experts.

C. *Institutionalizing Public Health Decision-Making in Emergency Response*

Focusing on the balance of power between the executive and the legislature often does not account for other stakeholders involved in emergency response. Integrating public health experts and community members into decision-making should occur well-before an impending crisis. This expertise should also be grounded in reliable research that accounts for the unintended consequences and inequities stemming from some public health policies.

There were attempts to institutionalize public health experts into decision-making processes early-on in the pandemic. 16 states established disparate impact or health equity task forces.[194] Most of the task forces and study committees were convened by legislation or executive order and situated within the Governor's office or public health department. Although most were comprised of state officials and public health experts, some states, including Massachusetts, Michigan, and Vermont, required that representatives reflected community diversity and those who worked in or experienced the disparate impacts of the healthcare system. Almost all the groups were tasked with analyzing or collecting disaggregated socio-economic and race data, and a few were asked for policy recommendations addressing social and economic vulnerabilities that are exacerbated by pandemic policy responses.

However, these taskforces were ad hoc and lacked meaningful power, and many were disbanded after the first wave of executive orders. These efforts could be reinvigorated by initiatives to institutionalize administrative bodies that act independently in times of emergency. Proposals for these independent bodies argue that public trust and compliance might increase if public health measures were issued by a depoliticized agency led by experts and community members,[195] and would reduce friction between the executive and legislative branches in making rapid decisions and wrestling for power during an emergency. This body would be:

> "strategically positioned to provide real-time credible advice to the executive and information to the public… It would replace a legislative delegation of emergency powers to the executive, which conflates the decision to declare an emergency with the decision to use emergency powers."[196]

Others have recommended an advisory committee that is responsible for declaring the end of a state of emergency, rather than relying on a governor to terminate their own executive order

[193] Gatter, *supra* note 189, at 9.
[194] NATIONAL GOVERNORS ASSOCIATION, *COVID Health Equity Tracker* (June 2020) https://www.nga.org/wp-content/uploads/2020/06/COVID-Health-Equity-Tracker.pdf.
[195] Leslie E. Gerwin, *Planning for Pandemic: A New Model for Governing Public Health Emergencies*, 37 AM. J.L. & MED. 128-171, 150 (2011).
[196] *Id.* at 133.

or requiring a legislative joint resolution to overrule the governor.[197] There have also been proposals to provide "statutory authorizations *ex ante*…[to] public health agencies and their leaders--not governors or mayors--to issue compulsory social distancing and face mask orders."[198] While there may be some controversy about which type of policies could be delegated and under what conditions, identifying potential solutions prior to the start of another crisis would prevent elected officials and judges from having to make urgent judgement calls during an emergency without any public health benchmarks.

If states create committees or institutions to improve inclusive decision-making, these advisory bodies should take into account how pandemics disproportionately impact certain communities due to systemic racism and historic inequities in the public health system.[199] One area of study that might be useful for mitigating disparate impacts is legal epidemiology which has been utilized in developing vaccination policies and regulating tobacco.[200] Legal epidemiology looks at the intersection of law and public health policy, and takes into account social determinants of health to identify structural interventions that may unintentionally exacerbate inequities.[201] For example, some states implemented "zones" that have dangerously high rates of infection, and then imposed restrictions based on zip codes. While this strategy may be narrowly tailored and grounded in data, these restrictions often disproportionately impact the mobility and financial security of communities of color.

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[197] William Rice, *States & the Separation of Powers in Times of Emergency*, GEORGETOWN LAW PROJECT ON STATE AND LOCAL GOVERNMENT POLICY AND LAW (Sept. 2020) https://www.law.georgetown.edu/salpal/states-the-separation-of-powers-in-times-of-emergency/.

[198] Wiley, *Democratizing the Law of Social Distancing, supra* note 180, at 112.

[199] NASTAD, *Accountability as a Public Health Response: COVID-19's Impact on Communities of Color*, https://www.nastad.org/sites/default/files/Uploads/2020/covid-accountability.pdf (Accessed Sept. 23, 2020); JOHNS HOPKINS UNIVERSITY, *State COVID-19 Data by Race*: *Racial Data Transparency*, https://coronavirus.jhu.edu/data/racial-data-transparency (Accessed Sept. 22,, 2020).

[200] Scott Burris, Lindsay K. Cloud, and Matthew Penn, *The Growing Field of Legal Epidemiology*, J. OF PUB. HEALTH MGMT AND PRAC. (Mar. 1, 2020).

[201] Scott Burris, *Law in a social determinants strategy: a public health law research perspective*, 126 *Public Health Rep*. 22-27 (2011); The problem with assigning vaccine-eligibility by race or ethnicity centers on the use of those political and social constructs as proxies for all the prejudices and vexed material conditions that render raced bodies as more susceptible to begin with. In effect, it turns "race" into a signifier of innate disease propensity and physical disability. Yet, one may wonder why minorities' lower survival rates could not be more accurately described by referring to homelessness, dense housing, lack of health insurance, inadequate food supplies, or exposure to environmental toxins in the ghettoized geographies that have become such petri dishes of contagion." Patricia Williams, *The Endless Looping of Public Health and Scientific Racism*, COVID-19 POLICY PLAYBOOK: ASSESSING LEGAL RESPONSES TO COVID-19 (Aug. 2020) https://static1.squarespace.com/static/5956e16e6b8f5b8c45f1c216/t/5f4d6578225705285562d0f0/1598908033901/COVID19PolicyPlaybook_Aug2020+Full.pdf.