

Gubernatorial Emergency Powers

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For centuries, American state governance saw a steady, pragmatic expansion of gubernatorial emergency powers, establishing the governor as the primary crisis manager in the federal system. This tradition reached its zenith during the COVID-19 pandemic when all fifty governors deployed sweeping emergency measures. Yet this unprecedented exercise of executive power triggered an equally unparalleled legislative backlash. Many state legislatures systematically stripped governors of emergency authorities that had evolved over generations. This Article argues this was not a thoughtful recalibration but a shortsighted and constitutionally suspect overcorrection. To make that argument, the Article distinguishes structural disablements, which paralyze response capacity, from principled constraints, which enhance accountability without dismantling response capacity.

First, the Article demonstrates that executive emergency authority was the product of deliberate accumulation over two centuries. Second, the recent legislative “reforms” function predominantly as structural disablements, violating core separation of powers principles by enabling legislative micromanagement via mechanisms like the legislative veto. In some states, gerrymandered, minoritarian legislatures used these structural disablements to subvert the will of statewide majorities and create a mismatch between institutional capacity and crisis demands.

Finally, the Article proposes a better path centered on principled constraints. States should reject arbitrary termination powers in favor of mechanisms like automatic legislative sessions and direct democratic review. This approach respects separation of powers while keeping emergency governance tethered to the will of the statewide majority.

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INTRODUCTION

Powerful tornadoes touch down and tear across communities in Kentucky, leveling homes, schools, places of worship, and business corridors for miles. One particularly violent storm cell causes a dam to breach, which threatens thousands of homes located below the dam's spillway. The morning after the storms, the Kentucky governor quickly reacts by declaring a disaster emergency in numerous counties. Recovery efforts require coordination of federal, state, and local resources to protect human life and prevent further economic devastation in the area. Due to recent changes in law, the governor has thirty days to execute the disaster response unless the legislature convenes and authorizes an extension of the governor's declaration of emergency.¹ Without a continuing declared disaster, the state's response—and federal assistance—will stall.² Will Kentucky's part-time legislature be able or willing to return to convene and approve an extension?³

The recent shift in emergency powers from governors to legislatures in this and many other states highlights an inflection point. This shift encompasses sixteen states⁴ representing approximately forty-three percent

1. In Kentucky, a governor's orders or other directives related to a disaster declaration expire thirty days from the date the governor signs the proclamation, unless the legislature approves an extension. KY. REV. STAT. ANN. § 39A.090 (West 2021).

2. A governor may request a Presidential disaster declaration under the Stafford Act when state and local response capabilities are overwhelmed. 42 U.S.C. § 5170; 44 C.F.R. § 206.36(a) (2026). Although not required by the statute itself, FEMA guidance makes an active state disaster declaration a practical necessity for receiving federal aid, creating a powerful incentive for gubernatorial action. *How a Disaster Gets Declared*, FEMA, <https://www.fema.gov/disaster/how-declared> [<https://perma.cc/U2E8-H6Z4>]. Federal tax law adds another incentive. Since 2017, personal casualty loss deductions have required a federally declared disaster. INTERNAL REVENUE SERV., PUBLICATION 547: CASUALTIES, DISASTERS, AND THEFTS 4 (2025). A newly enacted law, effective in 2026, will expand this tax relief to losses in state-declared disasters, likely increasing pressure on governors to issue such declarations. Martha Waggoner, *Congress Passes Act Allowing Tax Relief When a State Declares Disaster*, J. ACCT. (July 14, 2025), <https://www.journalofaccountancy.com/news/2025/jul/congress-passes-act-allowing-tax-relief-when-a-state-declares-disaster> [<https://perma.cc/J52Q-XBSL>].

3. See KY. CONST. § 36.

4. Fifteen states enacted laws restricting gubernatorial authority: Arkansas, Florida, Kansas, Kentucky, Idaho, Indiana, Montana, New Hampshire, New York, North Dakota, Ohio, Pennsylvania, Tennessee, Texas, and Utah. Maggie Davis et al., *Emergency Powers and the Pandemic: Reflecting on State Legislative Reforms and the Future of Public Health Response*, 21 J. EMERGENCY MGMT. 19, 21 fig.1 (2023). In Michigan, a court reduced the governor's powers at the legislature's behest. This Article's count of fifteen states includes only direct legislative retractions, but Michigan is included in any overall discussion about gubernatorial powers being shifted toward legislatures. Changes to these powers varies significantly within the group. See Paul A. Diller, *Governors Slightly More Bound? A Critique of the Uniform Law Commission's Model Public-Health Emergency Authority Act*, 112 KY. L.J. 675, 688–89 (2024).

of the U.S. population.⁵ The restrictions fall into two broad categories: (1) structural limitations like arbitrary time limits on emergency declarations (some as brief as ten days) and requirements for legislative approval of extensions; and (2) substantive prohibitions on specific actions like closing businesses, restricting religious gatherings, or modifying firearm regulations during emergencies.⁶

These changes represent a shortsighted and constitutionally suspect transfer of power that dismantles the state executive's capacity for swift, coordinated action and shifts it to legislative bodies inherently ill-suited for crisis management. This creates a mismatch between institutional design and emergency demands; it is not a principled rebalancing of power. The overcorrection, often driven by minoritarian legislatures, implicates public safety and core state constitutional principles of separation of powers and effective governance. A better approach would ensure that state executives and legislatures can exercise their pre-pandemic powers under pre-existing separation of powers principles built into each state's constitution (and also remove any barriers to legislative involvement). Rather than shifting emergency powers away from governors, this approach respects executive institutional capacity to respond to crises and honors legislative input to achieve democratic legitimacy.

Modern gubernatorial emergency powers have ancient roots. When the first states were but colonies, some person or institution was entrusted with the authority and responsibility to protect the public welfare in response to unusual threats or extreme risks. This notion was rooted in concepts going back to ancient Rome and carried forward through the medieval Church and European monarchies to the British Crown and its colonial agents. But American colonists rebelling against the Crown detested colonial governors who abused their positions and authority. When fashioning their state "executives," the framers of the first state constitutions constructed mostly hollow executive institutions with little power—and that little power was often only derived from and dependent on the legislative power.

Despite their initial relative impotence, early state executives regained or expanded on executive powers in subsequent constitutional revisions.⁷ Even

5. Census data was analyzed using the list of impacted states. See U.S. CENSUS BUREAU, U.S. DEP'T OF COM., APPORTIONMENT POPULATION AND NUMBER OF REPRESENTATIVES BY STATE: 2020 CENSUS (2021), <https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/apportionment-2020-table01.pdf> [<https://perma.cc/4DFY-UZFA>].

6. See *infra* Section II.B.2.

7. See, e.g., G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 87 (1998) ("The New York Constitution inaugurated the second wave of state constitution-making . . . with a substantially enhanced executive.").

the earliest constitutions that initially divested the executive of most powers in favor of the legislative branch swiftly changed course.⁸ As time passed, states further retooled their constitutions to rebalance powers among the branches of government, and legislatures granted specific emergency powers to governors. State executives maintained and even augmented their role in leading their states through emergencies as protectors of public safety and welfare.⁹ These enhanced emergency powers tracked an overall “fundamental shift” to strong American governors that rival or surpass the power of modern Presidents.¹⁰ Some states embedded their governors’ authority directly in their constitutions, while other states articulated specific duties and powers through statute.¹¹

More recently, governors employed their emergency powers to deal with natural disasters,¹² the opioid crisis,¹³ and public health emergencies like the COVID-19 pandemic.¹⁴ Through exercising these powers, governors can limit the movement of persons within a certain disaster area, reallocate state or federal dollars to pay for immediate response needs, and suspend or even

8. See *id.* at 89–90 (observing the strengthening of gubernatorial powers by the time of the federal constitutional convention in 1787 and the “striking enhancement of gubernatorial power in the Massachusetts Constitution,” which became the “primary model”).

9. See Jeffrey Locke & Lauren Dedon, *The Role of State Emergency Powers in Curbing the Opioid Epidemic: A Case Study in Lessons Learned*, 51 ARIZ. ST. L.J. 629, 636 (2019).

10. Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 487–88 (2017) (noting this “fundamental shift” of governors from “virtually powerless figureheads” to executives with powers eclipsing even those of modern Presidents, including reorganization of the executive branch, regulatory review, and the line-item veto).

11. See *infra* Sections I.B, I.C.

12. E.g., WRAL Staff, *Gov. Stein Declares State of Emergency Ahead of Wednesday’s Winter Storm*, WRAL NEWS (Feb. 18, 2025), <https://www.wral.com/weather/gov-stein-declares-state-of-emergency-ahead-of-winter-storm-feb-2025> [<https://perma.cc/9A5L-CS6P>]; Alex Suckow, *Gov. Beshear Declares State of Emergency for Kentucky Ahead of Torrential Rain*, WLKY (Feb. 14, 2025), <https://www.wlky.com/article/beshear-state-of-emergency-kentucky-rain-flooding/63800905> [<https://perma.cc/GZL4-G4SY>].

13. Lauren Dedon, *Governors Continue to Use Emergency Powers to Address the Drug Overdose Epidemic*, NAT’L GOVERNORS ASS’N (Mar. 7, 2024), <https://www.nga.org/news/commentary/governors-continue-to-use-emergency-powers-to-address-the-drug-overdose-epidemic> [<https://perma.cc/2B9N-6E4B>].

14. E.g., Press Release, N.C. Dep’t of Pub. Safety, Governor Cooper Declares State of Emergency to Respond to Coronavirus COVID-19 (Mar. 10, 2020), <https://www.ncdps.gov/news/press-releases/2020/03/10/governor-cooper-declares-state-emergency-respond-coronavirus-covid-19> [<https://perma.cc/PV6X-4CPR>]; Press Release, Governor Phil Murphy, Governor Murphy Declares State of Emergency, Public Health Emergency to Strengthen State Preparedness to Contain the Spread of COVID-19 (Mar. 9, 2020), <https://dspace.njstatelib.org/server/api/core/bitstreams/e323f683-ed5d-4b77-91d7-8e0ca7e0d5ee/content> [<https://perma.cc/6353-YCSR>].

create temporary laws.¹⁵ Many of these powers had never been used in the ways that governors used them in the COVID-19 response.¹⁶

It was this most recent example—whether through a fractious political environment, the enduring nature and severity of the emergency, or for these and other reasons—that demonstrated both the continuing need for strong executive action and the need for reflection on how states divide power among the branches of government in times of longstanding emergencies. The emergency responses to the COVID-19 pandemic became politicized across all levels of government in the United States, which deeply affected public perception, intergovernmental relations, and the effectiveness of mitigation and vaccination efforts.¹⁷ Many state legislatures sought—and in some instances succeeded—to reallocate power from the executive branch to their own.¹⁸ In the most extreme deployment of this approach, a legislature initiated amendment of the state’s constitution to accomplish this power transfer.¹⁹ But are these power shifts good for the public, and were democratic principles undermined to achieve them?

During the height of the pandemic, scholars focused on many aspects of governors’ use of emergency powers and related public health emergency powers.²⁰ As the COVID-19 crisis escalated and governors issued far-

15. See, e.g., FLA. STAT. § 252.36 (2021).

16. Richard Briffault, *State of Emergency: COVID-19 and Separation of Powers in the States*, 2023 WIS. L. REV. 1633, 1643 (cataloging the “sweeping and unprecedented measures” taken by governors).

17. See C. Dominik Güss et al., *The Politics of COVID-19: Differences Between U.S. Red and Blue States in COVID-19 Regulations and Deaths*, 5 HEALTH POL’Y OPEN 1, 2 (2023), <https://doi.org/10.1016/j.hopen.2023.100107> [<https://perma.cc/8C8H-E9CA>] (suggesting that politicization of COVID-19 mitigation strategies played a role in death rates across the United States); see also John Kerr et al., *Political Polarization on COVID-19 Pandemic Response in the United States*, 179 PERSONALITY & INDIVIDUAL DIFFERENCES 1, 3–7 (2021) (comparing perceptual differences of coronavirus risk and of trust in medical experts based on liberal or conservative political views).

18. Sophie Quinton, *More States Rein in Governors’ Emergency Powers*, STATELINE (June 17, 2021), <https://stateline.org/2021/06/17/more-states-rein-in-governors-emergency-powers> [<https://perma.cc/4VRF-LKCW>]; Davis et al., *supra* note 4, at 20–21.

19. In Pennsylvania, the legislature went furthest, using the constitutional amendment process to permanently strip emergency powers after failing to override gubernatorial vetoes through normal legislative channels. Marc Levy & Michael Rubinkam, *Pennsylvania Voters Impose New Limits on Governor’s Powers*, ASSOCIATED PRESS (May 19, 2021), <https://apnews.com/article/pennsylvania-health-coronavirus-pandemic-government-and-politics-f5ce447986a26cca310a6639de37b5ce> [<https://perma.cc/83AF-HGM3>].

20. Lainie Rutkow, *An Analysis of State Public Health Emergency Declarations*, 104 AM. J. PUB. HEALTH 1601, 1602–03 (2014). Not every state has a public health emergency law. *Id.* at 1603. In states that authorize both types of powers separately, public health emergency powers

reaching orders, legal commentators interrogated the broad emergency powers wielded by state executives and the meaningfulness of checks from the other branches.²¹ These inquiries addressed both doctrinal and normative questions about the separation of powers, nondelegation principles, and the rule of law in times of crisis. The consequences of gubernatorial exercises of emergency powers were particularly visible in litigation involving religious liberty, equal protection, due process, and economic liberty—areas where courts often applied varying standards of review. Others have highlighted the emergence of a legislative backlash, with dozens of states pursuing statutory “reforms” to alter the balance of emergency authority.²² Collectively, this body of scholarship reveals a fundamental tension between the need for swift, decisive action during public health emergencies and the state constitutional commitment to separation of powers and interbranch checks. But where states have transferred emergency powers from state executives to legislatures, the tension has not resolved.²³

In states where this shift has occurred, future emergency responses may be less effective and more susceptible to political gamesmanship. Policymakers should examine these shifts in power to determine whether they serve citizens’ best interests. As statewide-elected officials, governors must respond to the concerns of all citizens, which may conflict with the prerogatives of legislatures, especially those that are gerrymandered and minoritarian. Seizing or blocking executive power—particularly when done at the hands of minoritarian state legislatures—should be viewed as anti-democratic and something that should be scrutinized by courts for potential

can vary and not directly implicate gubernatorial power. Discussion of public health emergency powers is outside the scope of the Article except to the extent they are subsumed into general emergency powers of the governor.

21. Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against “Suspending” Judicial Review*, 133 HARV. L. REV. F. 179, 188–94 (2020) (arguing against the “suspension principle” of judicial review); Kelly J. Deere, *Governing by Executive Order During the COVID-19 Pandemic: Preliminary Observations Concerning the Proper Balance Between Executive Orders and More Formal Rule Making*, 86 MO. L. REV. 721, 778 (2021) (arguing that state legislatures should exercise their authority to pass legislation where immediate action is unnecessary, but noting that most governors have existing meaningful checks on their emergency powers); Josh Blackman, *The “Essential” Free Exercise Clause*, 44 HARV. J.L. & PUB. POL’Y 637, 756–60 (2021) (suggesting methods by which state legislatures could reassert their institutional role in the COVID-19 response).

22. See James G. Hodge, Jr. & Jennifer L. Piatt, *COVID’s Counterpunch: State Legislative Assaults on Public Health Emergency Powers*, 36 BYU J. PUB. L. 31, 34–40 (2021).

23. This Article provides the first historical analysis of gubernatorial emergency powers and the practical and constitutional problems associated with their post-COVID legislative curtailment. Future empirical research could test whether these practical effects on emergency response frequency and effectiveness have been realized.

separation of powers violations and other constitutional parameters. Where constitutional amendments have been pursued, courts should enforce strict compliance with procedural requirements to preserve the integrity of true majority rule.

Besides the continued policing of constitutional spheres of power, the Article proposes solutions to some of the criticisms that were lodged against governors acting in the pandemic response. Rather than wholesale dismantling of executive emergency authority, this Article offers mechanisms that preserve gubernatorial agility while enhancing democratic accountability. These include automatic emergency legislative sessions to ensure lawmakers convene without creating procedural barriers, enhanced reporting requirements that increase transparency without creating decisional bottlenecks, and targeted legislative review mechanisms that allow modification of specific orders without dismantling entire emergency frameworks. These solutions respect the complementary strengths of both branches—executive speed and coordination paired with legislative deliberation and oversight—while avoiding the dysfunction created by current legislative overreach. Policymakers should strive for a smoother, more robust effectuation of checks and balances instead of altered procedures that suit legislatures' near-term political goals. The Article suggests that legislatures and executives adhere to regular legislative processes set forth in the state's constitution.²⁴ Provide legislatures the opportunity for input on a state's emergency response, but do not permit them to reduce core executive power and enhance their own when doing so impairs the ability of the state to meet the demands of the emergency.

Courts also play their role in reviewing executive actions, and they may be called on to hear disputes between the two political branches in states where emergency powers have been shifted from governors to legislators. Courts should not avoid these disputes when they raise important structural constitutional concerns. Rather, courts should evaluate the history and importance of emergency powers as a core gubernatorial power and executive branch functional superiority when deciding contests between legislatures and state executives.

Before proceeding, methodological challenges—existing in most state constitutional analysis—should be noted. First, examining emergency powers across fifty states risks oversimplification. Each state has developed its own unique legal framework through distinct constitutional provisions,

24. When legislatures attempt to use regular legislative processes to control the constitutional amendment process, courts should scrutinize these attempts both procedurally and substantively. *See infra* note 353 and accompanying text.

statutory schemes, and judicial interpretations.²⁵ While this Article identifies broad patterns based on comprehensive research, readers should recognize that specific observations may not apply uniformly across jurisdictions. Second, emergency powers encompass responses to diverse crises—from natural disasters to public health emergencies to civil unrest. Each crisis type presents unique challenges and may warrant different governmental responses. The Article acknowledges these varied contexts and that optimal emergency response frameworks may differ based on the nature of the threat.

Beyond limitations on scope, the Article does not intend to suggest that governors should wield unchecked authority or that every governor exercising such authority does so benevolently. The federal experience with expanded presidential emergency powers—including recent concerns about unchecked executive action—offers important cautionary lessons that apply equally at the state level. As scholars have argued in analyzing executive-legislative dynamics, unchecked executive authority can undermine democratic governance through actions that circumvent deliberative processes.²⁶ However, analyses of federal power should not be generalized to the states without a deep understanding of their unique constitutional traditions and structures.²⁷ With their plenary legislative power, divided

25. The diverse views on governors' emergency powers may be tied to fundamental differences in states' approaches to executive power. This variation reflects long-established patterns in gubernatorial authority that scholars have systematically categorized as either robust or constrained through institutional limitations. Joseph A. Schlesinger, *The Politics of the Executive*, in *POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS* 207, 207–37 (Herbert Jacob & Kenneth N. Vines eds., 1965); THAD KOUSSER & JUSTIN H. PHILLIPS, *THE POWER OF AMERICAN GOVERNORS* 7–8 (2012); see also Margaret R. Ferguson, *State Executives*, in *THE OXFORD HANDBOOK OF STATE AND LOCAL GOVERNMENT* 319, 326–28 (Donald P. Haider-Markel ed., 2014); VIRGINIA GRAY ET AL., *POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS* 235–74 (11th ed. 2018).

26. See, e.g., Josh Chafetz, *The Chadha Presidency*, 115 *GEO. L.J.* (forthcoming 2026) (manuscript at 3–5), <https://ssrn.com/abstract=5360131> [<https://perma.cc/4G3S-TBTU>] (critiquing the expansion of presidential unilateralism and the weakness of congressional checks); Paul A. Diller, *Emergency Rule: A New Paradigm for State and Local Governance?*, 50 *FORDHAM URB. L.J.* 723, 724–25 (2023) (examining the “rising use of emergency power” and arguing that while necessary for crises, its expanded use raises normative concerns about democracy that require new legal guardrails). While these scholars correctly identify the dangers of undefined executive authority, this Article argues that the specific form of the recent legislative backlash—transferring operational control to minoritarian legislatures rather than imposing principled constraints—exacerbates rather than solves any potential democratic deficit.

27. Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 *DUKE L.J.* 545, 565–66 (2023) (rejecting Madisonian theory as conceptual origin for separation of powers in state constitutions). Notably, approximately forty state constitutions contain an express, textual affirmation of the doctrine of separation of powers, unlike the Federal Constitution. John Devlin,

(rather than unitary) executives, and mostly popularly elected judges, states' structural constitutional differences guard against unchecked authority.²⁸ Moreover, judicial-legislative unwillingness to check the executive should not be confused with lack of opportunity to do so.

This Article does not dispute the necessity of checking executive power. The tension between effective crisis response and democratic accountability is real and deserves careful treatment. But not every legislative response to gubernatorial emergency authority serves accountability. This Article defines two categories of legislative action. *Structural disablements* are schemes that paralyze the executive's emergency capabilities and the state's capacity: arbitrary "kill switches" that terminate emergencies automatically, legislative vetoes that bypass constitutional presentment, and categorical prohibitions on specific emergency actions. *Principled constraints* are reforms that enhance accountability without diminishing response capacity: automatic legislative sessions, robust executive-legislative consultation requirements, and targeted legislative review. The first set of mechanisms does not merely check the executive—it disables the state's ability to function in a crisis. The second set holds the executive accountable while preserving the institutional capacity emergencies require. The COVID-era changes, as Parts II and III demonstrate, are overwhelmingly *structural disablements* dressed in the language of *principled constraints*. The error lies not in their desire to constrain the governor, but in their choice of mechanism—substituting the necessary speed and unity of the executive with the inertia and fragmentation of the legislature at the precise moment when decisiveness is most required.

On the behavioral point, criticism abounds of governors of all political stripes and how they have employed their emergency powers to infringe on

Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions, 66 TEMP. L. REV. 1205, 1236–37 (1993). This textual difference has led some state courts to infer a more formalist or rigid approach to separation of powers compared to federal doctrine, though interpretations vary. Marshfield, *supra*, at 574; ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 269 (2d ed. 2023) (observing a split in state courts on whether express statements mandate more strict state constitutional separation of powers doctrine).

28. Marshfield, *supra* note 27, at 578. Many state constitutions authorize a plural executive with multiple independently elected statewide officers (the "unbundled executive"), which is a key difference from the federal unitary executive model. Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1415–18 (2008); Seifter, *supra* note 10, at 526. The existence of these independently elected officers (e.g., attorneys general, secretaries of state) creates an intra-branch system of checks and balances. William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 (2006). This structural distinction inherently weakens arguments that legislative actions restricting gubernatorial authority violate a singular vision of executive power. Devlin, *supra* note 27, at 1227–28.

constitutional rights.²⁹ The Article does not seek to defend or affirm any particular governor's actions. Concerns about executive power—particularly if left unchecked—are legitimately raised, especially at the present moment. Certainly, most emergencies demand swift executive action, but as some emergencies evolve into more complex scenarios of greater duration, legislatures must have the opportunity to weigh in as they do in the ordinary course. The distinction between *principled constraints* and *structural disablements* runs through the rest of the Article. Legitimate legislative oversight enhances accountability while preserving crisis response capacity; legislative overreach creates governance gaps by prioritizing partisan advantage over public safety.

Part I traces gubernatorial emergency powers from colonial origins through the modern era, demonstrating that the executive's role as primary crisis manager evolved through centuries of practical experience with disasters, rebellions, and pandemics. This historical foundation—overlooked in contemporary debates—reveals that the COVID-19 response represented not executive overreach but the culmination of deeply rooted American governance traditions.³⁰

Part II documents how the COVID-19 pandemic triggered a litigious and legislative assault on gubernatorial emergency powers. For the first time in American history, over a dozen state legislatures—many controlled by gerrymandered minorities—systematically stripped their governors of emergency authorities that had evolved over centuries. This Part reveals how partisan disagreement over pandemic policy transformed into permanent structural changes that will hamper future emergency responses.

Part III demonstrates why these structural disablements violate core constitutional principles and threaten effective emergency response. It argues that replacing executive discretion with legislative micromanagement creates a mismatch between institutional capacity and crisis demands, while often empowering minoritarian legislatures to act against the statewide popular will.

Part IV proposes a constructive path forward. Rather than the wholesale dismantling of executive authority, it offers principled constraints that

29. See, e.g., Kevin Schmidt & Thomas Kimbrell, *Unlawful Actions for Good*, YALE J. ON REGUL. (Nov. 21, 2024), <https://www.yalejreg.com/nc/unlawful-actions-for-good-by-kevin-schmidt-and-thomas-kimbrell> [https://perma.cc/V85M-CTRD]; Charles F. McElwee, *States Respond to Governors' Covid-Era Emergency Powers*, REALCLEAR POL'Y (Dec. 3, 2021), https://www.realclearpolicy.com/articles/2021/11/19/states_respond_to_governors_covid-era_emergency_powers_803938.html [https://perma.cc/LTL4-W6UH].

30. The constraints of article length do not permit an even richer review of the origins and evolution of these powers.

preserve gubernatorial agility while enhancing democratic accountability. These solutions—ranging from automatic legislative sessions to direct democratic review for prolonged crises—respect the complementary strengths of both branches while avoiding the dysfunction created by the recent legislative overreach.

I. THE HISTORICAL ROOTS AND DEVELOPMENT OF GUBERNATORIAL EMERGENCY POWERS

Governors did not begin their American existence with significant powers—emergency or otherwise. This Part traces how governors transformed from colonial-era figureheads³¹ into modern crisis managers equipped with comprehensive statutory authorities.

A. Colonial Notions of Emergency Powers

Colonial American conceptions of emergency powers drew from millennia of Western political thought spanning from Roman antiquity through English constitutional development. From the Roman Republic's temporary dictatorships³² through medieval doctrines of necessity³³ to

31. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 136–37, 149 (1969).

32. The Roman Republic's temporary dictatorship, created for swift and decisive actions during crises, provided the foundational Western model of emergency powers. John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210, 211–12 (2004); Marc de Wilde, *The Dictator's Trust: Regulating and Constraining Emergency Powers in the Roman Republic*, 33 HIST. POL. THOUGHT 555, 558–64 (2012); see also OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 19 n.10 (2006) (observing how Romans concentrated the power of the state in a single person in times of emergency). Alexander Hamilton referenced this model approvingly when arguing for a “vigorous executive.” THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

33. Medieval Europe adapted the Roman concepts through canon law's principle of *necessitas non habet legem* (“necessity has no law”) and Thomas Aquinas's influential framework, which justified derogation from human law during “supreme necessity” while maintaining fidelity to divine and natural law. Marc de Wilde, *Emergency Powers and Constitutional Change in the Late Middle Ages*, 83 LEGAL HIST. REV. 26, 29–35 (2015). By the thirteenth and fourteenth centuries, jurists had developed precise doctrines requiring genuine threats, urgent circumstances, evident necessity, and temporary application as prerequisites for legitimate emergency powers. *Id.*

English struggles over prerogative power,³⁴ societies have grappled with balancing crisis response against constitutional constraints. This accumulated wisdom—that emergencies demand swift, centralized action—became embedded in colonial governance, even as colonists increasingly resented its application by royal governors. This complex inheritance of Roman republicanism, medieval constitutionalism, and English struggles over prerogative would shape colonial conceptions of the proper scope and limits of emergency powers.

1. Charter Provisions for Emergency Authority

Early colonial charters anticipated the need for emergency action. Massachusetts' 1620 Charter empowered the "principal Governor" to exercise martial law³⁵ during rebellions and act "according to the good Discretions" when ordinary lawmaking proved impossible.³⁶ Similar

34. *Id.* at 44–45; *see also* GAINES POST, STUDIES IN MEDIEVAL LEGAL THOUGHT: PUBLIC LAW AND THE STATE 1100–1322, at 273 (1964). English emergency powers transformed from limited wartime measures to permanent royal prerogatives, prompting Locke to articulate a theory permitting extra-legal executive action for public good. de Wilde, *supra* note 33, at 51–52, 59; *see also* JONATHAN SCOTT, ENGLAND'S TROUBLES: SEVENTEENTH-CENTURY ENGLISH POLITICAL INSTABILITY IN EUROPEAN CONTEXT 58 (2000); Clement Fatovic, *Constitutionalism and Contingency: Locke's Theory of Prerogative*, 25 HIST. POL. THOUGHT 276, 277–88 (2004); JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 137 (Cambridge Univ. Press 1988) (1690).

35. Martial law is commonly understood as the temporary supplanting of civil authorities with military ones in time of extreme crisis. *See* JOHN MABRY MATHEWS, PRINCIPLES OF AMERICAN STATE ADMINISTRATION 439–46 (1917) (discussing historical examples of governors' declaration of martial law). The U.S. Supreme Court has held that individual states have the power to declare martial law in *Luther v. Borden*, 48 U.S. 1, 45–46 (1849). Governors have historically used (and abused, in some cases) their power to declare martial law in response to violent civil unrest or natural disasters. Joseph Nunn, *Martial Law in the United States: Its Meaning, Its History, and Why the President Can't Declare It*, BRENNAN CTR. FOR JUST. (Aug. 20, 2020), <https://www.brennancenter.org/our-work/research-reports/martial-law-united-states-its-meaning-its-history-and-why-president-cant> [https://perma.cc/8KVP-H6YJ].

36. *The Charter of New England: 1620*, AVALON PROJECT, https://avalon.law.yale.edu/17th_century/mass01.asp [https://perma.cc/PAF2-KYM8]. The later Charter of Massachusetts appointed the first governor and empowered the "Chiefe Comaunders, Captaines, Governors, and other Officers" to resist intrusions and take other actions for the "special defense" of the colony." *The Charter of Massachusetts Bay: 1629*, AVALON PROJECT, https://avalon.law.yale.edu/17th_century/mass03.asp [https://perma.cc/F3YG-SAQY].

provisions appeared in Maryland,³⁷ Pennsylvania,³⁸ and other colonies,³⁹ which established a key pattern: emergency authority resided in a single executive who could act when deliberative bodies could not convene. The legal foundation was a flexible framework derived from royal commissions,⁴⁰ specific charter clauses,⁴¹ and English common law traditions of prerogative power.⁴² Colonial courts generally upheld these overlapping

37. *The Charter of Maryland: 1632*, AVALON PROJECT, https://avalon.law.yale.edu/17th_century/ma01.asp [<https://perma.cc/WC5K-WNKY>] (authorizing emergency ordinances when “sudden accidents” prevented legislative assembly).

38. *Charter for the Province of Pennsylvania-1681*, AVALON PROJECT, https://avalon.law.yale.edu/17th_century/pa01.asp [<https://perma.cc/XJF5-MMXC>] (granting William Penn power during “emergent occasion[s]”).

39. See, e.g., *Grant of the Province of Maine: 1639*, AVALON PROJECT, https://avalon.law.yale.edu/17th_century/me02.asp [<https://perma.cc/7S4X-4JZJ>] (permitting “fitt and wholesome Ordinances” when ordinary lawmaking impossible); *Charter of Carolina: June 30, 1665*, AVALON PROJECT, https://avalon.law.yale.edu/17th_century/nc04.asp [<https://perma.cc/6YN2-B3ME>] (permitting ordinances for peace-keeping and preservation of government when lawmaking impossible); *The Concession and Agreement of the Lords Proprietors of the Province of New Caesarea, or New Jersey, to and With All and Every the Adventurers and All Such as Shall Settle or Plant There - 1664*, AVALON PROJECT, https://avalon.law.yale.edu/17th_century/nj02.asp [<https://perma.cc/9HBJ-CYGE>] (permitting governor to convene legislature early if “necessity shall require”). Charters in Delaware, New Hampshire, New York, South Carolina, and Virginia did not touch upon powers related to emergencies. See generally *Colonial Charters, Grants and Related Documents*, AVALON PROJECT, https://avalon.law.yale.edu/subject_menus/statech.asp [<https://perma.cc/PM3X-JG62>] (compiling colonial charters and grants across the original American colonies).

40. See LEONARD WOODS LABAREE, *ROYAL GOVERNMENT IN AMERICA: A STUDY OF THE BRITISH COLONIAL SYSTEM BEFORE 1783*, at 95–102, 107 (1930) (discussing the nature of royal commissions and instructions, including the power to execute martial law); JACK P. GREENE, *NEGOTIATED AUTHORITIES: ESSAYS IN COLONIAL POLITICAL AND CONSTITUTIONAL HISTORY* 93–96, 99 (1994) (same). Royal commissions granted governors broad discretionary authority to maintain the “peace, welfare, and good government,” which was interpreted expansively during crises. See, e.g., *Commission to Francis Bernard as Governor of New Jersey, 1758*, reprinted in EVARTS BOUTELL GREENE, *THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA* 226, 228, 230–31 (1898). Commissions typically authorized governors to declare martial law and take all necessary measures to preserve order. See, e.g., *Commission to Sir William Berkeley as Governor of Virginia (1641)*, reprinted in 1 *THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA* 96 (William Waller Hening ed., 1822) (granting power to “exercise martial law, in cases of rebellion or mutiny”); LABAREE, *supra*, at 107.

41. See 1 CHARLES M. ANDREWS, *THE COLONIAL PERIOD OF AMERICAN HISTORY: THE SETTLEMENTS* 429–31 (1934); MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* 48–52 (2004).

42. See Joseph H. Smith, *Administrative Control of the Courts of the American Plantations*, 61 COLUM. L. REV. 1210, 1234–36 (1961).

authorities and granted governors substantial discretion in defining and responding to emergencies.⁴³

2. Colonial Emergency Powers in Practice

During the colonial era, governors exercised emergency powers primarily through military force to quell rebellions, manage public health crises, and maintain order. For example, they suppressed uprisings like Bacon's Rebellion (1676),⁴⁴ and, during revolutionary tensions, declared martial law in Massachusetts⁴⁵ and Virginia.⁴⁶

Public health crises prompted the most systematic use of emergency authority. Massachusetts enacted the first formal quarantine law in 1647⁴⁷ to combat smallpox outbreaks, building on practices dating to the 1620s. Over a century later, the Massachusetts governor facilitated mass inoculation programs of Bostonians.⁴⁸

By the eve of the American Revolution, colonial emergency powers had evolved into a sophisticated but contested system of executive authority. This experience revealed a fundamental tension: how to preserve executive

43. This common law foundation proved particularly significant when governors faced novel threats not contemplated in their formal instructions. See GREENE, *supra* note 40, at 198–201. Colonial legislatures occasionally codified emergency powers in riot acts and militia laws, though these often merely formalized existing gubernatorial mandates. See, e.g., *Primary Source: An Act for Preventing Tumultuous and Riotous Assemblies*, ANCHOR (2009), <https://www.nc.anchor.org/anchor/primary-source-act> [<https://perma.cc/NL6E-VAUE>]; LABAREE, *supra* note 40, at 392–94. The overlapping legal sources created a flexible framework allowing governors substantial discretion. See BERNARD BAILYN, *THE ORIGINS OF AMERICAN POLITICS* 72–75 (1968).

44. *Bacon's Rebellion in Virginia in the Years 1675 & 1676*, VA. MUSEUM OF HIST. & CULTURE, <https://virginiahistory.org/learn/bacons-rebellion-virginia-years-1675-1676> [<https://perma.cc/NPW9-K2GA>]. In Virginia in 1676, Governor William Berkeley faced an armed uprising led by Nathaniel Bacon. Berkeley suppressed the rebellion and had twenty-three of its leaders hanged. *Id.*

45. Thomas Gage, *A Proclamation*, LIBR. OF CONG. (June 12, 1775), <https://tile.loc.gov/storage-services/service/rbc/rbc0001/2017/2017gen60912/2017gen60912.pdf> [<https://perma.cc/9MKV-K3QT>].

46. *Lord Dunmore's Proclamation of 1775*, AM. BATTLEFIELD TR., <https://www.battlefieldtr.org/learn/primary-sources/lord-dunmores-proclamation-1775> [<https://perma.cc/XVV4-KY5X>].

47. Adam Klein & Benjamin Wittes, *The Long History of Coercive Health Responses in American Law*, LAWFARE (Apr. 13, 2020), <https://www.lawfaremedia.org/article/long-history-coercive-health-responses-american-law> [<https://perma.cc/XUJ2-5JBU>].

48. Per-Olof Hasselgren, *The Smallpox Epidemics in America in the 1700s and the Role of the Surgeons: Lessons to Be Learned During the Global Outbreak of COVID-19*, 44 WORLD J. SURGERY 2837, 2839 (2020). This represents one of the few documented instances where a colonial governor directly intervened to implement a public health measure, though even here Governor Bernard worked through medical professionals rather than issuing quarantine orders himself. *Id.*

authority sufficient for crisis response while preventing tyrannical concentration of power. This colonial legacy shaped both the initial American rejection of strong executives and the eventual recognition that emergency authority remained essential.

B. Early State Constitutions and Laws Through the Early American Republic

The first state constitutions created executives with strictly limited powers.⁴⁹ Indeed, the first governors were “relatively impotent and dominated by the legislature.”⁵⁰ Nevertheless, states’ experiments with a weakened executive proved short-lived,⁵¹ as practical governance demands led to gradual restoration of executive authority.⁵² The rise in governors’ reputations and status did not necessarily yield broad enhancements to governors’ emergency powers. But it did set the stage for governors as institutions in state government who could effectively lead in the face of crisis.

49. See Maurice S. Culp, *Executive Power in Emergencies*, 31 MICH. L. REV. 1066, 1068 (1933) (“[A]ny idea of a power or prerogative by virtue of any law or custom of England was definitely abandoned.”).

50. *Id.* Legislative bodies in more than half the states selected, either in theory or in practice, these early governors. See Quinn Yeagain, *Democratizing Gubernatorial Selection*, 14 NE. U. L. REV. 1, 13–14 (2022).

51. See WOOD, *supra* note 31, at 432–33; Marshfield, *supra* note 27, at 565–66. States that waited to produce their first constitutions provided some affirmative powers to their executives, and those that initially emasculated their governors decided to restore some vestiges of executive power. See JACK N. RAKOVE, *ORIGINAL MEANINGS* 250 (1996) (“The evisceration of executive power was the most conspicuous aspect of the early state constitutions . . .”); Seifter, *supra* note 10, at 495.

52. The initial skepticism of strong state executives gave way in later periods as legislatures became the target for reforms due to decreasing trust in legislative power and recognition that stronger chief executives could achieve greater effectiveness and efficiency in government. See TARR, *supra* note 7, at 118–22 (describing the increasing faith in executive power and the movement to enhance the autonomy and powers of governors, so that they could better check legislative abuses); see also Seifter, *supra* note 10, at 495; Allan R. Richards, *The Traditions of Government in the States*, in *THE FORTY-EIGHT STATES: THEIR TASKS AS POLICY MAKERS AND ADMINISTRATORS* 40, 45 (1955) (“As [President] Jackson fought with the Congress and the Supreme Court, the chief executive became the champion of the people in the eyes of the people. . . . [T]he movement to strengthen the governor’s role gained momentum.”).

1. The First State Constitutions

The first state constitutions (1776–1790) sharply limited gubernatorial power in reaction to royal abuses.⁵³ Maryland's 1776 constitution restricted the governor to thirty-day embargoes and required immediate legislative convening.⁵⁴ Virginia permitted the governor's militia mobilization only with Privy Council approval.⁵⁵ Massachusetts in 1780 granted more extensive military powers though still subject to legislative oversight.⁵⁶ Pennsylvania's radical 1776 constitution eliminated the governor entirely and instead vested limited emergency powers in a twelve-member council.⁵⁷ These first state constitutions explicitly prohibited martial law over civilians. Maryland's constitution stated that "no person, except regular soldiers, mariners, and marines . . . ought . . . to be subject to or punishable by martial law."⁵⁸

State constitutions took divergent approaches to habeas corpus during emergencies. Pennsylvania's 1790 constitution included a carefully qualified suspension provision that was effective when public safety required.⁵⁹

53. These founding documents established a foundational American principle: emergency powers must be constitutionally constrained, even during genuine crises. *See generally* WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* (Rita Kimber & Robert Kimber trans., 2001) (broadly discussing the political theory behind state constitutions after the American Revolution); Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911 (1993) (discussing how the framework of the American Constitution originated in early state constitutions).

54. MD. CONST. of 1776, § XXXIII, https://avalon.law.yale.edu/17th_century/ma02.asp [<https://perma.cc/4RB8-K3LN>].

55. VA. CONST. of 1776, <https://encyclopediavirginia.org/primary-documents/the-constitution-of-virginia-1776/> [<https://perma.cc/EL9D-SPYY>].

56. MASS. CONST. of 1780, pt. 2, ch. II, § I, art. VII, <https://press-pubs.uchicago.edu/founders/documents/v1ch1s6.html> [<https://perma.cc/GFV7-XLFH>].

57. PA. CONST. of 1776, § 20, https://avalon.law.yale.edu/18th_century/pa08.asp [<https://perma.cc/792S-CZM5>].

58. MD. CONST. of 1776, Declaration of Rights § XXIX, https://avalon.law.yale.edu/17th_century/ma02.asp [<https://perma.cc/YJK6-NGJL>]. Massachusetts included nearly identical language. MASS. CONST. of 1780, pt. 1, art. XXVIII, https://press-pubs.uchicago.edu/founders/documents/bill_of_rightss6.html [<https://perma.cc/GFV7-XLFH>].

59. PA. CONST. of 1790, art. IX, § XIV, <https://www.paconstitution.org/texts-of-the-constitution/1790-2> [<https://perma.cc/FW2F-UMAU>] ("That all prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."). This represented an early explicit acknowledgment that emergency circumstances might justify suspending constitutional protections.

Georgia's 1777 constitution took a slightly different approach in declaring the universal availability of habeas corpus.⁶⁰

Maryland's constitution uniquely authorized governors to impose quarantines for plague prevention, recognizing public health as requiring executive authority.⁶¹

While these early constitutions constrained executive emergency authority, practical experience soon demonstrated the inadequacy of such limitations for effective governance.

2. Evolving Gubernatorial Powers in the Early Republic

The initial failures of the weak-executive model led to the emergence of a counter-model in states that recognized the need for a more energetic and independent executive. New York in 1777 pioneered stronger executive authority in creating a popularly elected governor.⁶² Following the turmoil of its own early experiment with legislative dominance, Pennsylvania in 1790 reversed course and established a strong governor with veto power and authority to convene the legislature in special session.⁶³

In the Early Republic, gubernatorial "emergency power" was a composite derived from multiple authorities: public health quarantines (the least

60. GA. CONST. of 1777, art. LX, https://avalon.law.yale.edu/18th_century/ga02.asp [<https://perma.cc/3GJB-UAXS>].

61. MD. CONST. of 1776, § XXXIII, https://avalon.law.yale.edu/17th_century/ma02.asp [<https://perma.cc/2HDG-36CN>].

62. PETER J. GALIE & CHRISTOPHER BOPST, *THE NEW YORK STATE CONSTITUTION* 8 (2d ed. 2012) ("The New York Constitution of 1777 provided for the strongest executive in the American states, giving him the longest term with re-eligibility, direct popular election, and a share with the judiciary in the veto power.").

63. See WILLIAMS & FRIEDMAN, *supra* note 27, at 66–69.

controversial),⁶⁴ militia command,⁶⁵ and martial law (the most extreme).⁶⁶ The newly adopted federal system created new tensions, particularly over militia control,⁶⁷ as demonstrated during the Whiskey Rebellion (1794), when Pennsylvania Governor Thomas Mifflin contested federal authority before ultimately cooperating.⁶⁸

Governors responded to various crises with differing approaches. During slave revolts like Nat Turner's Rebellion (1831), Virginia Governor John Floyd mobilized massive military force and called for restrictive laws

64. The power to impose quarantines to prevent the spread of infectious disease was one of the oldest and least controversial forms of emergency power derived from the state's inherent "police power"—its fundamental responsibility to protect the health, safety, and welfare of its citizens. In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the Supreme Court listed "quarantine laws" and "health laws of every description" as within the reserved police powers of the states. Justice Story unequivocally places quarantine and health laws within the acknowledged "police power" of the states, separate from, but sometimes intersecting with, the federal commerce power. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 473, 518 (1833); see also Klein & Wittes, *supra* note 47.

65. The state militia served as the principal tool available to early American governors for enforcing state authority and responding to crises of public order. Robert Leider & Gregory Maggs, *Calling Forth Clause*, U.S. CT. OF APPEALS FOR THE ARMED FORCES, <https://www.armfor.uscourts.gov/ConfHandout/2023ConfHandout/Leider5MilitiaClause1CallingForth.pdf> [<https://perma.cc/VA7K-TCHG>]. The early state constitutions uniformly designated the governor as the commander-in-chief of their respective state's military forces. See *id.* This power was deemed essential for fulfilling the core executive functions of repelling invasions, suppressing insurrections, and ensuring the laws were faithfully executed. See *id.*

66. While the U.S. Constitution contains no specific provision for the imposition of martial law, nearly every state constitution has included language authorizing the governor to declare it. E.W. Killam, *Martial Law in Times of Civil Disorder*, 37 LAW & ORD. 44, 44-47 (1989), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/martial-law-times-civil-disorder> [<https://perma.cc/Q2N7-Y7UC>].

67. The new federal framework granted Congress the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions," U.S. CONST. art. I, § 8, cl. 15, and made the President the commander of the militia "when called into the actual Service of the United States." *Id.* at art. II, § 2, cl. 1. Congress quickly acted on this new authority, passing the Militia Acts of 1792 and 1795, which gave the President the legal power to call up state militias to enforce federal law, suppress rebellions, or repel invasions. *Militia Act of 1792*, GEORGE WASHINGTON'S MOUNT VERNON, <https://www.mountvernon.org/education/primary-source-collections/primary-source-collections/article/militia-act-of-1792> [<https://perma.cc/8CWS-TCN3>].

68. *The Whiskey Rebellion*, GEORGE WASHINGTON'S MOUNT VERNON, <https://www.mountvernon.org/george-washington/the-first-president/whiskey-rebellion> [<https://perma.cc/N2EZ-PJ8L>]; *Governor Thomas Mifflin*, PA. HIST. & MUSEUM COMM'N (Aug. 26, 2015), <https://www.phmc.state.pa.us/portal/communities/governors/1790-1876/thomas-mifflin.html> [<https://perma.cc/7HSJ-JD6Y>].

targeting Black religious expression.⁶⁹ The Dorr Rebellion (1842) saw Rhode Island's governor declare martial law to preserve the existing government against a rival claim to legitimacy.⁷⁰ Public health responses varied widely—from governmental paralysis during Philadelphia's 1793 yellow fever epidemic to proactive quarantine measures by New York governors.⁷¹ Natural disasters initially prompted limited state response and some congressional assistance,⁷² but events like the New Madrid earthquakes (1811–1812)⁷³ and the Great New York Fire (1835)⁷⁴ led to gubernatorial advocacy for federal aid and state-funded reconstruction, which marked the birth of government-led disaster response.

However, the trajectory toward stronger gubernatorial power was not driven solely by functionalist concerns about administrative efficiency. It was also shaped by a shifting political economy and a growing distrust of legislative supremacy. The revolutionary era's initial faith in unchecked

69. *Death or Liberty: Gabriel, Nat Turner and John Brown*, LIBR. OF VA., <https://www.lva.virginia.gov/events/exhibitions/death-or-liberty#nat-turner> [<https://perma.cc/4XAJ-PTMQ>]; *Proclamation Concerning Nat Turner by Governor Floyd, September 17, 1831*, EDUC. AT LIBR. OF VA., <https://www.lva.virginia.gov/collections/educator-resources/online-classroom/stc/entries/proclamation-concerning-nat-turner-by-governor-floyd-september-17-1831> [<https://perma.cc/9UBS-PWK3>]; *Excerpts from Governor John Floyd's Message to the General Assembly (December 6, 1831)*, ENCYCLOPEDIA VA., <https://encyclopediavirginia.org/primary-documents/excerpts-from-governor-john-floyds-message-to-the-general-assembly-december-6-1831> [<https://perma.cc/4RJZ-EK2H>].

70. *Dorr Rebellion Timeline*, R.I. DEP'T OF STATE, <https://www.sos.ri.gov/divisions/civics-and-education/for-educators/themed-collections/dorr-rebellion-timeline> [<https://perma.cc/LXZ6-MZFG>]; Justin Shatwell, *Thomas Wilson Dorr and the People's Constitution*, HUMANITIES, Fall 2024, <https://www.neh.gov/article/thomas-wilson-dorr-and-peoples-constitution> [<https://perma.cc/EUQ3-MH8H>].

71. Ryan P. Langton, *Philadelphia Under Siege: The Yellow Fever of 1793*, PA. CTR. FOR THE BOOK (Spring 2022), <https://pabook.libraries.psu.edu/literary-cultural-heritage-map-pa/feature-articles/philadelphia-under-siege-yellow-fever-1793> [<https://perma.cc/8NQ7-G2Q7>]; Robb Haberman, *John Jay and the Yellow Fever Epidemics (Part 1)*, COLUM. UNIV. LIBRS. (Mar. 17, 2020), <https://blogs.library.columbia.edu/jayprint/2020/03/17/john-jay-and-the-yellow-fever-epidemics-part-1> [<https://perma.cc/5UF5-8FDK>].

72. Early American disasters were viewed as “Acts of God” with responses largely left to local communities. See PATRICK S. ROBERTS, *DISASTERS AND THE AMERICAN STATE: HOW POLITICIANS, BUREAUCRATS, AND THE PUBLIC PREPARE FOR THE UNEXPECTED* 21 (2013). Congress passed ad hoc relief bills, first for the Whiskey Rebellion (1789), then Portsmouth's 1802 fire. *Id.* Without permanent bureaucracy, governors relied on timely congressional action. *Id.* at 27.

73. Brian Burnes, *Historic Earthquakes Accounts Guide Modern First Responders*, FLATLAND KC (Aug. 31, 2024), <https://flatlandkc.org/sustainability/historic-accounts-guide-modern-earthquake-response> [<https://perma.cc/Z4X8-ELWK>].

74. Daniel Levy, *The Great Fire of 1835 Helped Create Modern New York City*, TIME (Mar. 11, 2022), <https://time.com/6155326/great-fire-new-york-city-manhattan-history/> [<https://perma.cc/X44E-PUDZ>].

legislatures quickly curdled into a fear of “democratic despotism,” where majoritarian assemblies threatened property rights and legal stability.⁷⁵ Commercial interests viewed these majoritarian excesses as threats to contract rights and economic stability. In response, constitutional framers in states like New York and Massachusetts deliberately reconstructed the governorship.⁷⁶ No longer seen merely as a vestige of royal tyranny, the independent executive—armed with veto power—was reimagined as a necessary guardian of the public interest (in terms of preserving property and commercial stability) against the volatility and factionalism of the legislature.⁷⁷

By the mid-nineteenth century, governors had evolved from constitutionally constrained figures into increasingly central crisis managers, wielding powers that revolutionary predecessors had sought to eliminate.⁷⁸ This transformation reflected pragmatic adaptation to governance demands while maintaining the principle that emergency powers must operate within constitutional constraints. This trajectory—from paralysis to proactive management—demonstrates an important learning curve. Governors were expanding the scope of their emergency duties beyond purely military or police actions to include the complex challenge of managing health threats. The foundations laid during this period—the constitutional frameworks, the precedents of executive action, and the ongoing tension between liberty and security set the stage for significant expansion of gubernatorial emergency powers in the Civil War era and beyond.

75. See WOOD, *supra* note 31, at 403–13, 451–52 (describing the post-1776 disillusionment with state legislatures and the rise of “elective despotism”). “Democratic despotism” was a term often used by propertied classes to describe legislative responsiveness to populist demands for debtor relief and paper money. *Id.* at 404.

76. *Id.* at 433–34.

77. *Id.* at 430–38 (discussing the revision of the state constitutions and the structural move to strengthen the executive’s independence and veto power to check legislative abuses); see also SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 67–68 (2015) (discussing earlier founding-era debates, including some Framers’ view of a vigorous, unitary executive as “essential” to the “protection of property” and the security of liberty against “faction” and “anarchy”).

78. Governors and local officials maintained their involvement in responding to emergencies, but they would turn to Congress for financial assistance, and Congress was increasingly willing to supply it. See ROBERTS, *supra* note 72, at 36 (noting the increasing requests for a “greater variety of aid” by the early twentieth century).

C. Expanding Modern Emergency Gubernatorial Powers

1. From the Civil War to the Second World War

The period from the Civil War⁷⁹ to World War II witnessed expansion of gubernatorial emergency powers through violent labor conflicts, catastrophic disasters, pandemics, and economic collapse.⁸⁰ Reconstruction normalized military governance,⁸¹ while Progressive Era reforms expanded authority through new regulatory agencies and powers.⁸²

Major labor conflicts—including The Great Railroad Strike (1877),⁸³ Homestead Strike (1892),⁸⁴ Pullman Strike (1894),⁸⁵ and Colorado Coalfield

79. The Civil War ushered in a great expansion of the federal government's power over matters once considered primarily reserved for states, and this extended to the power to administer disaster relief. *Id.* at 29.

80. Constitutional law scholars during this period began systematic analysis of emergency powers doctrine. The “great police power treatise writers of the late nineteenth and early twentieth centuries” increasingly recognized that constitutional frameworks needed to accommodate expanded executive authority while maintaining democratic limitations. *See* DANIEL B. RODRIGUEZ, *GOOD GOVERNING: THE POLICE POWER IN THE AMERICAN STATES* 254–55 (2024). This scholarly development created intellectual foundations for the more extensive emergency powers that would emerge during the world wars and economic depression.

81. *See* WILLIAMS & FRIEDMAN, *supra* note 27, at 109–11. Military governors during the Reconstruction-era exercised total martial law authority backed by the U.S. Army, which was not subject to normal constitutional review. *See, e.g., Ex parte McCordle*, 74 U.S. 506, 513–14 (1868) (validating congressional withdrawal of the Supreme Court's jurisdiction). Federal intervention lasted indefinitely—until Congress determined states had met readmission requirements.

82. *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 882–83, 923–94 (2021) (discussing the adoption of initiative, referendum, and recall procedures in some states, which represented a foundational shift towards popular sovereignty that underscored the democratic basis of state power). The popular election of governors, along with development of direct democracy tools, contributed to a perception of their inherent representativeness. *See* Marshfield, *supra* note 27, at 565–66 (noting that state constitutions evolved to position the governor as a direct representative of the people, distinct from the legislature); John A. Fairlie, *The State Governor*, 10 MICH. L. REV. 370, 372 (1912) (observing that the direct election of governors transformed the office into the only one representing the entire state, providing a unique claim to popular sovereignty).

83. During the Great Railroad Strike, governors in Maryland, Pennsylvania, and Illinois deployed state militias and requested federal troops, resulting in violent confrontations with strikers. *See* PRISCILLA MUROLO & A.B. CHITTY, *FROM THE FOLKS WHO BROUGHT YOU THE WEEKEND: A SHORT, ILLUSTRATED HISTORY OF LABOR IN THE UNITED STATES* 106 (2001); ROBERT V. BRUCE, *1877: YEAR OF VIOLENCE* 231–32 (Elephant Paperbacks 1989) (1959).

84. Pennsylvania Governor Robert E. Pattison dispatched thousands of National Guard soldiers and declared martial law. PAUL KRAUSE, *THE BATTLE FOR HOMESTEAD, 1880–1892: POLITICS, CULTURE, AND STEEL* 3–4, 349–51 (1992).

85. Illinois Governor John Peter Altgeld sympathized with striking workers and refused to deploy the National Guard, which led to federal involvement culminating in President Cleveland

War (1913–1914)⁸⁶—established precedents for gubernatorial use of military force in civil disturbances.

This robust use of executive force was not merely a reaction to immediate unrest, but the result of a deliberate constitutional recalibration supported by commercial elites. As industrial capitalism consolidated, business interests—seeking to insulate the state from the corruption and unpredictability of the “mob of legislators”—championed a stronger governor as a necessary check on legislative radicalism.⁸⁷ Commercial elites found it vastly more efficient to lobby a single, veto-wielding executive than to negotiate with a fractured assembly, which led to constitutional reforms in key states like Pennsylvania and New York fortifying the gubernatorial veto and centralized command over the National Guard.⁸⁸ The resulting transformation of the militia into the modern National Guard provided governors with a reliable instrument to enforce “public order”—a mandate that, in practice, frequently meant breaking strikes and protecting corporate property. By shifting military authority from local militias—who often fraternized with strikers—to a professionalized state guard under the governor’s direct control, these reforms ensured the executive possessed the necessary coercive power to protect capital and restore order during industrial disputes.⁸⁹ Thus, the emergence of the strong governor was not merely a functionalist evolution

sending federal troops to break the strike. *See* ALMONT LINDSEY, *THE PULLMAN STRIKE: THE STORY OF A UNIQUE EXPERIMENT AND OF A GREAT LABOR UPHEAVAL* 258–61, 308–11 (1942).

86. This is perhaps the most extreme use of gubernatorial emergency powers at the time when National Guard forces—ordered into service by the governor—fired on and burned a strikers’ camp. THOMAS G. ANDREWS, *KILLING FOR COAL: AMERICA’S DEADLIEST LABOR WAR* 238, 269–75 (2008).

87. *See* ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877–1920*, at xiii, 10–12 (1967) (describing the nineteenth-century “island communities” and the “search for order” amidst industrial chaos); WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 19–26 (1996) (explaining the “well-regulated society” and the *salus populi* legal maxim).

88. *See, e.g.*, PA. CONST. of 1874, art. IV, § 15, <https://www.paconstitution.org/texts-of-the-constitution/1874-2> [<https://perma.cc/RKC7-HM9W>] (requiring a two-thirds vote of *all* members elected to override a veto, rather than members present); N.Y. CONST. of 1894, art. IV, § 9, https://history.nycourts.gov/wp-content/uploads/2019/01/Publications_1894-NY-Constitution-compressed.pdf [<https://perma.cc/D92H-SC3V>] (strengthening the governor’s veto power); *see also* JERRY COOPER, *THE RISE OF THE NATIONAL GUARD: THE EVOLUTION OF THE AMERICAN MILITIA, 1865–1920*, at 47–49 (1997) (detailing how business interests supported the National Guard movement to ensure a reliable force for strike duty).

89. *See* BRUCE, *supra* note 83, at 170–71 (detailing the failure of the local Pittsburgh militia to fire on strikers and the subsequent deployment of “outsider” troops); Militia Act of 1903, ch. 196, 32 Stat. 775 (federalizing and professionalizing the National Guard); *Moyer v. Peabody*, 212 U.S. 78, 85 (1909) (holding that the governor’s declaration of a state of insurrection is “conclusive” and that he is the “final judge” of the necessity for detention).

for disaster management; it was a structural consolidation of power deemed necessary to maintain economic order in a turbulent industrial society.

Administrative consolidation within state executive branches, while not specific to emergencies, further augmented and broadened gubernatorial power.⁹⁰ These institutional innovations enabled a systematic crisis response beyond temporary military intervention.⁹¹ Natural disasters like the Johnstown Flood (1889),⁹² Galveston Hurricane (1900),⁹³ and San Francisco Earthquake (1906)⁹⁴ forced governors beyond law enforcement into comprehensive crisis management—coordinating relief, managing resources,

90. See Quinn Yeargain, *Administrative Capacity in Direct Democracy*, 57 U.C. DAVIS L. REV. 1347, 1379, 1381 (2023) (observing that the “Short Ballot” movement and related reforms “had the practical effect of strengthening governors” by transferring appointment power from the electorate to the chief executive coupled with reorganization and consolidation of the administrative state); Seifter, *supra* note 10, at 496–98 (describing the Progressive Era drive for “greater effectiveness and efficiency in government” that led states to reorganize fragmented boards and commissions into centralized departments under the governor’s direct supervision).

91. See LESLIE LIPSON, *THE AMERICAN GOVERNOR: FROM FIGUREHEAD TO LEADER* 50–51, 68 (1939) (chronicling the reorganization movement that sought to “infuse rationality into the executive branch” and integrate fractured state agencies into a unified structure under the governor’s control to ensure administrative effectiveness and accountability).

92. The flood killed over 2,200 people and destroyed the local government, necessitating significant state intervention. Governor James A. Beaver declared martial law and dispatched the Pennsylvania National Guard to manage order and lead recovery. See *The Great Johnstown Flood – May 31, 1889*, PA. HIST. & MUSEUM COMM’N (Aug. 26, 2015), <https://www.phmc.state.pa.us/portal/communities/documents/1865-1945/johnstown-flood.html> [<https://perma.cc/C67W-XVEW>]; Nathan Daniel Shappee, *A History of Johnstown and The Great Flood of 1889: A Study of Disaster and Rehabilitation* 443–57 (1940) (Ph.D. dissertation, University of Pittsburgh), https://digitalarchives.powerlibrary.org/papd/islandora/object/papd%3Aacacc-jtf_1036 [<https://perma.cc/54FH-9S6P>].

93. The hurricane, the deadliest natural disaster in U.S. history, claimed an estimated 6,000 lives and submerged the entire island city under a storm surge of nearly sixteen feet. Mary G. Ramos, *Galveston’s Response to the Hurricane of 1900*, TEX. ALMANAC, <https://www.texasalmanac.com/articles/galvestons-great-hurricane> [<https://perma.cc/TC6L-GA GG>]. As in Johnstown, the existing municipal government proved utterly incapable of managing the crisis, and the Texas Governor assumed direct control of the state’s disaster response. See GARY CARTWRIGHT, *GALVESTON: A HISTORY OF THE ISLAND 183–85* (1991); see also Randolph B. Campbell, *Joseph Draper Sayers: Governor of Texas and Political Leader*, TEX. ST. HIST. ASS’N (Nov. 30, 2022), <https://www.tshaonline.org/handbook/entries/sayers-joseph-draper> [<https://perma.cc/FK3W-LL2D>].

94. The earthquake and subsequent firestorm presented a complex and massive crisis that exposed the dangers of uncoordinated and overlapping emergency authority. See PHILIP L. FRADKIN, *THE GREAT EARTHQUAKE AND FIRESTORMS OF 1906: HOW SAN FRANCISCO NEARLY DESTROYED ITSELF* 147–48, 174–75 (2005). California Governor George Pardee declared a bank holiday (in effect placing a moratorium on debts), called the state legislature into special session, and mobilized the state militia to assist with the massive relief effort. *Id.* at 82–84, 99; GORDON THOMAS & MAX MORGAN WITTS, *THE SAN FRANCISCO EARTHQUAKE* 191–92 (1971).

and rebuilding infrastructure—and laid the groundwork for modern emergency management.

In contrast, the Spanish Flu pandemic (1918–1919) saw minimal gubernatorial intervention, as local authorities imposed restrictions and other measures—a sharp contrast to future pandemic responses.⁹⁵ But World War I expanded gubernatorial powers through state defense councils that coordinated federal-state mobilization and civil liberties enforcement.⁹⁶ The Great Depression prompted unusual economic interventions, including bank holidays and mortgage moratoria, with the Supreme Court establishing that emergency powers remained subject to constitutional limits.⁹⁷ These powers established a lasting precedent for expanded gubernatorial authority in times

95. JOHN M. BARRY, *THE GREAT INFLUENZA: THE STORY OF THE DEADLIEST PANDEMIC IN HISTORY* 389–91 (2004). Local officials—not governors—imposed targeted closures, banned gatherings, and shuttered churches/schools. City and federal officials and business owners jointly voted to close “all places of public amusement.” Dartunorro Clark, *San Francisco Had the 1918 Flu Under Control. And Then It Lifted the Restrictions.*, NBC NEWS (Apr. 25, 2020), <https://www.nbcnews.com/politics/politics-news/san-francisco-had-1918-flu-under-control-then-it-lifted-n1191141> [<https://perma.cc/A29T-N3V9>].

96. *See generally* WILLIAM J. BREEN, *UNCLE SAM AT HOME: CIVILIAN MOBILIZATION, WARTIME FEDERALISM, AND THE COUNCIL OF NATIONAL DEFENSE, 1917–1919* (1984) (detailing states’ preparation for war and the mobilization of state councils to coordinate with federal efforts). The Council of National Defense requested all state governors create State Defense Councils in April 1917. *Id.* at 8–9; INFO. SERVS. OFF., DEF. CIV. PREPAREDNESS AGENCY, *SIGNIFICANT EVENTS IN UNITED STATES CIVIL DEFENSE HISTORY LISTED CHRONOLOGICALLY, 1916–1974*, at 1 (Feb. 7, 1975), <https://irp.fas.org/agency/dhs/fema/cd-chron.pdf> [<https://perma.cc/B53E-KJ9P>]. These councils organized state resources and coordinated military, industrial, and agricultural mobilization. *See, e.g.*, *FIRST ANNUAL REPORT OF NORTH CAROLINA COUNCIL OF DEFENSE* 1 (1918), <https://babel.hathitrust.org/cgi/pt?id=nc01.ark:/13960/t2795cg1t&seq=8> [<https://perma.cc/RMY7-Q6MZ>]. Governors gained expanded powers through their authority over budgets and through civil liberties enforcement via anti-sedition laws, and executive resistance to their termination complicated demobilization of these powers. *See* Kim Lane Scheppele, *North American Emergencies: The Use of Emergency Powers in Canada and The United States*, 4 INT’L J. CONST. L. 213, 221 (2006) (discussing President Wilson’s veto of attempts to repeal his emergency powers).

97. During the Great Depression, governors significantly expanded their emergency powers (frequently legitimized by later legislative ratification) in declaring bank holidays and mortgage moratoria even before federal intervention. *See* Culp, *supra* note 49, at 1066, 1066 n.3. The Supreme Court upheld governors’ actions when limited and temporary. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 439 (1934). *Compare* *Sterling v. Constantin*, 287 U.S. 378, 389–90, 398–99, 403–04 (1932) (recognizing broad scope of the governor’s authority but ultimately finding governor’s oil well closures to be unjustified), *with* *Moyer v. Peabody*, 212 U.S. 78, 82, 85 (1909) (concluding no consequence for governor who imprisoned union leader during labor unrest). *See also* F. David Trickey, Comment, *Constitutional and Statutory Bases of Governors’ Emergency Powers*, 64 MICH. L. REV. 290, 300–01 (1965) (observing that *Moyer* likely led to numerous state courts refusing to review good-faith measures employed by governors to cope with public emergencies).

of crisis and further contributed to the shaping of the governor's primary role in state emergency management.⁹⁸

By World War II, governors had transitioned from nineteenth-century figureheads into primary crisis managers equipped with military, administrative, economic, and coordination powers established through decades of emergency response. This transformation was neither uniform nor uncontested—the Spanish Flu pandemic revealed the limits of gubernatorial authority, while Supreme Court decisions maintained constitutional boundaries even during the depths of the Great Depression. Yet the cumulative effect of these developments was profound. Shedding any vestiges of historical constraints, governors emerged as the central crisis managers in American federalism, equipped with both the legal authority and administrative capacity to respond to emergencies of great scale and complexity. The institutional foundations, legal precedents, and operational frameworks established during this period would prove their worth as the nation faced the even greater challenges of global warfare and Cold War confrontation that lay ahead.

2. World War II Through the Cold War Era

During World War II, gubernatorial emergency powers were not supplanted but were instead reoriented to serve the national war effort. Governors, using their authority to manage the home front, acted as the chief administrators of federal programs like civil defense and rationing within their states.⁹⁹ They also exercised independent emergency powers, such as creating state guard units to replace federalized National Guard units, to address unique state-level security needs and crises that arose from the national mobilization.¹⁰⁰ This period also saw an acceleration of the broader trend of administrative consolidation, as the demands of total war necessitated a more unified and professionalized state executive branch capable of managing complex logistical and regulatory tasks.¹⁰¹

98. See Trickey, *supra* note 97, at 290, 299 (observing that state constitutions and statutes confer “extremely broad public emergency powers” upon governors to cope with natural disasters and civil disorder).

99. First War Powers Act of 1941, Pub. L. No. 77-354, 55 Stat. 838; Second War Powers Act of 1942, Pub. L. No. 77-507, 56 Stat. 176.

100. See, e.g., *The National Guard Is Off to War: Who Will Protect Us Now?*, OR. SEC’Y OF ST., <https://records.sos.state.or.us/ORSOSWebDrawer/RecordView/11705134> <https://perma.cc/MXE2-44BA> (archive beginning on page 153).

101. See Seifter, *supra* note 10, at 497–98 (discussing the “centralization of state executive branches” taking hold in the postwar era).

Cold War concerns drove systematic emergency planning reform starting in the 1950s.¹⁰² The federal government's concern with nuclear war and planning for the continuity of government in the event of enemy attack increasingly involved state and local governments.¹⁰³

An interstate compact authorized mutual aid and disaster assistance, but primarily addressed military threats.¹⁰⁴ Eventually, policymakers recognized the need for a comprehensive emergency-response system designed for consistency and cooperation across various levels of government.¹⁰⁵ By 1969 the federal government began funding state disaster planning.¹⁰⁶

Spurred largely by these growing concerns, in 1971, the Office of Emergency Preparedness (now FEMA—the Federal Emergency Management Agency) commissioned the Council of State Governments (“CSG”) to create a “disaster project” to assist states with disaster planning.¹⁰⁷ The CSG’s “Example State Disaster Act” of 1972 revolutionized gubernatorial emergency powers by shifting from military-focused to “all-hazards” planning.¹⁰⁸ The Act formalized declaration procedures, created emergency management divisions within governors’ offices, and granted broad authority to employ state resources and commandeer private property during emergencies.¹⁰⁹ This model incentivized states to update their laws

102. Consequently, the federal government urged citizens to prepare for attack. *President Kennedy Talks to Americans About the Need for Build Bomb Shelters*, HISTORY, <https://www.history.com/this-day-in-history/kennedy-urges-americans-to-build-bomb-shelters> (May 28, 2025) [<https://perma.cc/UC42-TXRS>].

103. Eric R. Daleo, *State Constitutions and Legislative Continuity in a 9/11 World: Surviving an Enemy Attack*, 58 DEPAUL L. REV. 919, 931 (2009).

104. See *Interstate Civil Defense and Disaster Compact*, BALLOTPEDIA, https://ballotpedia.org/Interstate_Civil_Defense_and_Disaster_Compact [<https://perma.cc/HPD7-RDDL>]. States adopted the compact by codifying its provisions into statute.

105. *Id.*

106. 1 OFF. OF EMERGENCY PREPAREDNESS, EXEC. OFF. OF THE PRESIDENT, DISASTER PREPAREDNESS 9 (1972) [hereinafter 1 OFF. OF EMERGENCY PREPAREDNESS].

107. See generally 1–3 OFF. OF EMERGENCY PREPAREDNESS, EXEC. OFF. OF THE PRESIDENT, DISASTER PREPAREDNESS (1972) (identifying federal efforts to evaluate and improve state disaster preparedness in the early 1970s).

108. See 2 OFF. OF EMERGENCY PREPAREDNESS, EXEC. OFF. OF THE PRESIDENT, DISASTER PREPAREDNESS 3 (1972) [hereinafter 2 OFF. OF EMERGENCY PREPAREDNESS]. The Example State Disaster Act broadened the definition of “disaster” from Cold War concerns to an “all-hazards” approach, which allowed the same plans and resources to apply to various crises, and required clear gubernatorial declaration procedures. *Id.*

109. *Id.* at 11. The Act identified the Governor as having “paramount power to direct the overall disaster program,” use “all available resources” of the state and political subdivisions, and commandeer personal property. *Id.* at 4, 10. This formalized previously un-codified gubernatorial authority and linked state declarations to federal assistance. See 1 OFF. OF EMERGENCY PREPAREDNESS, *supra* note 106, at 168–70.

and became adopted widely by states,¹¹⁰ thereby establishing the modern statutory framework for emergency management.¹¹¹

While the theoretical basis for a streamlined executive was established earlier by the Progressive Era, the perceived permanence of global conflict (the Cold War) provided the practical necessity and political impetus for state governments to finally infuse order and system into their complex administrative branches through consolidation. With centralization came even greater emphasis on governor's responsibilities,¹¹² including in the context of emergency response.

3. The Modern Era: From Natural Disasters to Twenty-First Century Threats

Gubernatorial emergency powers underwent a transformation from the 1970s through the twenty-first century. The shift from ad hoc response to comprehensive emergency management systems altered federal-state relations. Implicit constitutional powers gave way to explicit statutory delegations.¹¹³

Prior to this modern era, gubernatorial emergency powers were not well-defined, and were often viewed as deriving implicitly from a governor's constitutional designation as chief executive and commander-in-chief of state military forces.¹¹⁴ The authority to act in a crisis was often justified as an

110. See, e.g., *Disaster Preparedness and Assistance Legislation: Hearing on H.R. 7690 and Related Bills Before the Subcomm. on Water Res. of the H. Comm. on Pub. Works*, 93d Cong. 227 (1973) (statement of Hon. A.R. Schwartz, Member, Tex. S. and National Legis. Conf. Comm. on Intergovernmental Rels.).

111. See 2 OFF. OF EMERGENCY PREPAREDNESS, *supra* note 108, at 9.

112. LIPSON, *supra* note 91, at 68.

113. See Scheppele, *supra* note 96, at 214 (observing that until the 1970s, emergency powers in the United States were generally understood and justified as common law rather than constitutional functions).

114. See Trickey, *supra* note 97, at 291 (noting every state constitution designates the governor as commander-in-chief of state military forces and almost all charge the governor with faithful execution of the laws); 2 OFF. OF EMERGENCY PREPAREDNESS, *supra* note 108, at 4. This Article does not address inherent or implicit gubernatorial powers, which deserves separate and further treatment. State courts have generally held that common clauses vesting governors with executive or "supreme" executive power or imposing the duty to faithfully execute the laws do not add to delineated powers except where implied powers are necessary to execute powers expressly given. See Culp, *supra* note 49, at 1072–73 (noting that even "strict construction[ist]" courts that do not generally accept implied powers of a governor do permit the exercise of implied powers necessary to effectuate express powers); MATHEWS, *supra* note 35, at 80 ("The courts have almost uniformly held that the governor has little or no inherent executive power under these [constitutional] provisions."). See *infra* note 343 and accompanying text for brief mention of the "vesting" debate.

inherent function of the executive, drawing on English common law traditions rather than explicit constitutional or statutory text.¹¹⁵ The 1970s marked an inflection point. At the federal level, growing concern over the executive branch's use of undeclared and seemingly perpetual states of emergency prompted legislative reckoning.¹¹⁶ This culminated in the passage of the National Emergencies Act (NEA) of 1976,¹¹⁷ which sparked parallel state reforms.

Beginning in the 1970s, state legislatures across the country began enacting comprehensive emergency services statutes, such as California's Emergency Services Act (CESA) of 1970.¹¹⁸ In defining gubernatorial powers, legislatures paradoxically expanded them by creating a legal "toolbox" of extraordinary powers—suspension of laws,¹¹⁹ reallocation of funds,¹²⁰ and commandeering of private property¹²¹—that a governor could now unlock with a simple proclamation.

The declaration power became central: broad statutory triggers would allow governors to unlock standby authorities including suspending statutes,

115. *See supra* Section I.A.

116. S. REP. NO. 93-549, at iii (1973) (reporting on Senate investigation that found four such perpetual emergencies still in effect, one dating back to 1933).

117. National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601–51). This landmark statute formalized the President's emergency powers, established procedural requirements for their invocation, and provided a mechanism for congressional termination. *See id.*

118. *See, e.g.*, CAL. GOV'T CODE § 8558(b) (West 2023) ("[C]onditions of disaster or of extreme peril to the safety of persons and property"); *see also* N.Y. EXEC. LAW § 28 (McKinney 2021) (disaster "has occurred or may be imminent" for which local governments are unable to respond adequately).

119. *See, e.g.*, N.Y. EXEC. LAW § 29-a (McKinney 2021) (authorizing suspension of statutes if compliance "would prevent, hinder, or delay action necessary to cope" with the emergency). Courts have interpreted this suspension power as effectively granting legislative-like powers. *See In re Certified Questions from U.S. Dist. Ct., W. Dist. of Mich., S. Div.*, 958 N.W.2d 1, 16–25 (Mich. 2020).

120. Governors are frequently authorized to spend state funds and use all available state resources to cope with the emergency, often bypassing the standard legislative budget and appropriations process. *See Legislative Oversight of Emergency Executive Powers*, NAT'L CONF. OF ST. LEGISLATURES (Sept. 22, 2023), <https://www.ncsl.org/about-state-legislatures/legislative-oversight-of-emergency-executive-powers> [<https://perma.cc/LL7K-J5XN>] (describing how governors may expend state funds to cope with a disaster, sometimes requiring a financing plan or a special legislative session). This authority can be virtually unlimited—except by the amount of available funds and the duration of the declared emergency—with few formal mechanisms for legislative pre-approval or oversight, allowing the executive to direct vast financial resources by decree. *See, e.g.*, CAL. GOV'T CODE § 8645 (West 2025).

121. *See, e.g.*, LA. STAT. ANN. § 29:724(D)(4) (2023) (authorizing the governor to commandeer or use private property).

bypassing appropriations processes, and commanding all state agencies.¹²² The Stafford Act reinforced this by making gubernatorial declarations an unstated prerequisite for federal aid.¹²³

Modern crises tested these expanded powers. The 1992 Los Angeles riots demonstrated cooperative federalism when state resources proved insufficient, which led to the deployment of federal troops and the California National Guard.¹²⁴ Hurricane Katrina in 2005 exposed catastrophic failure when systemic breakdown of the cooperative federalism model occurred as the disaster obliterated local government infrastructure and incapacitated state response capabilities.¹²⁵

Long-term crises required adaptation of governors' emergency powers. The AIDS epidemic prompted state policy innovation when federal leadership lagged.¹²⁶ The crisis forced states to confront fundamental questions of public health law and led to the creation of laws to protect the confidentiality of test results and to criminalize behaviors of people living with HIV.¹²⁷ Similarly, the more recent opioid epidemic saw eight state governors¹²⁸ activate emergency powers between 2014 and early 2018 to overcome regulatory barriers and increase access to treatment.¹²⁹ Unlike traditional short-term natural disasters like hurricanes or wildfires, the opioid crisis presented a long-term, ongoing public health challenge, which

122. See NAT'L CONF. OF ST. LEGISLATURES, *supra* note 120.

123. See *supra* note 2.

124. As violence escalated following the acquittal of police officers in the Rodney King beating, California Governor Wilson declared an emergency and mobilized 2,000 (eventually 6,000) National Guard troops. Jesse Singal, *Gov. Pete Wilson, The L.A. Riots: 15 Years After Rodney King*, TIME, https://content.time.com/time/specials/2007/la_riot/article/0,28804,1614117_1614084_1614519,00.html [<https://perma.cc/G64E-B78X>]. Recognizing that state forces were overwhelmed, Governor Wilson formally requested federal assistance. President George H.W. Bush invoked the Insurrection Act on May 1, 1992. Proclamation No. 6427, 57 Fed. Reg. 19359 (May 1, 1992).

125. H.R. REP. NO. 109-377, at 1 (2006).

126. Governor Cuomo established an AIDS Task Force in 1983. Establishing an Interagency Task Force on Acquired Immune Deficiency Syndrome (AIDS), N.Y. Exec. Order No. 15, N.Y. COMP. CODES R. & REGS. tit. 9, § 4.15 (1983). California led in AIDS-related spending and policy experimentation. Stephen Colbrook, *Clandestine Networks and Closeted Bureaucrats: AIDS and the Forming of a Gay Policy Network in California*, 34 J. POL'Y HIST. 60, 62 (2022).

127. See S. 239, 2017-2018 Leg., Reg. Sess. (Cal. 2017) (modernizing California HIV criminalization laws).

128. LAUREN DEDON, NAT'L GOVERNORS ASS'N, USING EMERGENCY DECLARATIONS TO ADDRESS THE OPIOID EPIDEMIC: LESSONS LEARNED FROM STATES 4 (2018); Locke & Dedon, *supra* note 9, at 635.

129. See Dedon, *supra* note 13.

prompted some states to evaluate and affirm that emergency powers were the most appropriate tool for this type of sustained response.¹³⁰

The half-century from roughly 1970 to 2020 remade the American governor into the nation's primary crisis manager. The federal and state statutory frameworks erected in the 1970s, designed to bring order to the response to discrete disasters like riots and hurricanes, proved remarkably adaptable to the protracted, society-wide challenges of the twenty-first century. Today, state governments must lead in disaster response and recovery, as the federal government explicitly recognizes states as "closest to those impacted by incidents."¹³¹ This principle of federalism in emergency management reflects both constitutional structure and practical necessity, positioning governors as primarily responsible for protecting their citizens during crises while coordinating with federal resources and neighboring states. This concentration of power, however, created a latent constitutional tension between executive expediency and legislative oversight. It was this fully developed framework of maximal executive authority that would soon be deployed to its fullest extent and would ignite a fierce backlash and a subsequent legislative movement to retract the very powers that had been expanding for half a century.

II. THE ZENITH OF GUBERNATORIAL EMERGENCY POWERS DURING THE COVID-19 PANDEMIC AND THE RESULTING BACKLASH

On the eve of the COVID-19 pandemic, governors possessed statutory authority to suspend laws, commandeer private property, restrict movement, mandate public health measures, reallocate budgets, and coordinate government resources—powers unimaginable to their 18th and 19th-century predecessors.¹³² This expansion in governors' emergency powers occurred

130. See Locke & Dedon, *supra* note 9, at 638.

131. See Daleo, *supra* note 103, at 924 (internal quotation marks and citation omitted); see also U.S. DEP'T OF HOMELAND SEC., NATIONAL RESPONSE FRAMEWORK 7 (4th ed. 2019), https://www.fema.gov/sites/default/files/documents/NRF_FINALApproved_2011028.pdf (discussing the tiered response to emergencies as "federally supported, state managed, and locally executed").

132. See Ann O'M. Bowman & James H. McKenzie, *Managing a Pandemic at a Less than Global Scale: Governors Take the Lead*, 50 AM. REV. PUB. ADMIN. 551, 552 (2020) (noting governors' evolution from "structurally weak" to "strengthened substantially" with increased gubernatorial duties and responsibilities). The general authority of states to take actions like quarantine, isolation, and other measures was well-established heading into the pandemic. See Maggie Davis et al., *Calling Their Own Shots: Governors' Emergency Declarations During the COVID-19 Pandemic*, 12 CONLAWNOW 95, 95 (2020). The Tenth Amendment reserves police

incrementally as legislatures added to the gubernatorial toolkit with each successive crisis: labor controls for industrial unrest, infrastructure powers for natural disasters, medical intervention authorities for public health crises, homeland security capabilities for terrorist threats, and fiscal tools for economic upheaval. The modern governor had become, in essence, a crisis manager-in-chief,¹³³ wielding quasi-legislative and quasi-judicial powers that could reshape society during declared emergencies.

While this evolution in power created more capable and responsive state governments, it simultaneously concentrated authority in the hands of governors, setting the stage for the ultimate test when a novel coronavirus emerged in late 2019. Governors deployed the full range of their accumulated emergency powers in ways that touched every aspect of citizens' lives. This unprecedented exercise of executive authority would provoke equally unparalleled resistance and lead many states to retract powers that had evolved for generations.¹³⁴

At the outset of COVID-19, national leadership was absent, and governors were forced to fill the gap.¹³⁵ For the first time in history, all fifty governors issued emergency declarations in response to the same incident.¹³⁶ Governors then wielded these powers in ways that touched most facets of everyday

powers to the states, and the U.S. Supreme Court had previously blessed states and their governors using extremely broad powers to enact "reasonable regulations" to protect public health and safety. *See* U.S. CONST. amend. X; *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905).

133. *See* Bowman & McKenzie, *supra* note 132, at 552 ("[G]overnors have become the center of the state system, poised atop the state's political and governmental hierarchy.") (citations and internal quotations omitted). When a serious emergency arises, be it a natural disaster or a human-caused event, residents of a state turn to their governor for both reassurance and solutions. *Id.*

134. The description of gubernatorial emergency powers on an ascendant tack throughout history is not intended to suggest a one-way ratcheting of executive authority. *See* Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 610 (2003) (critiquing the "emergency ratchet account" as "implausible").

135. *See, e.g.,* Rebecca Bratspies, *This Great Catastrophe: Bungling Pandemics from 1918 to Today*, 30 MICH. ST. INT'L L. REV. 189, 198 (2022) (noting the lack of national leadership and instead the federal response that "minimized the crisis, blaming rather than supporting stricken states"); Philip Rucker & Robert Costa, *Commander of Confusion: Trump Sows Uncertainty and Seeks to Cast Blame in Coronavirus Crisis*, WASH. POST (Apr. 2, 2020), https://www.washingtonpost.com/politics/commander-of-confusion-trump-sows-uncertainty-and-seeks-to-cast-blame-in-coronavirus-crisis/2020/04/02/fc2db084-7431-11ea-85cb-8670579b863d_story.html (repeating Trump's comment that "I take no responsibility at all" and his tweet that "the complainers should have been stocked up and ready long before this crisis hit").

136. *See* Davis et al., *supra* note 4, at 19–20.

life.¹³⁷ While many legislatures initially supported governors' approaches, others soon mounted opposition. In states with politically divided executive and legislative branches, opposition hardened into formal action—and in sixteen states, succeeded.¹³⁸ This appears to be the first instance in U.S. history of a significant group of states transferring emergency powers from executives to legislatures, marking the end of the long arc of expanding gubernatorial emergency power.¹³⁹

A. *Maximalist Gubernatorial Emergency Powers at the Outset of the Pandemic*

Governors and state health officials deployed emergency powers to confront abnormal pandemic-related challenges.¹⁴⁰ Unlike prior geographically limited and finite natural disasters, the COVID-19 pandemic demanded sustained, statewide interventions.¹⁴¹ Before examining how governors responded to COVID-19 in their states, it is worth understanding how the federal-state dynamic shaped governors' responses.¹⁴² The President consistently downplayed the threat,¹⁴³ initially enabled in part by the CDC's inadequate testing program.¹⁴⁴ Without sufficient testing capacity to track viral spread, combined with federal minimization of the threat, neither federal

137. Briffault, *supra* note 16, at 1634, 1643 (cataloging the various measures taken by governors). Governors acknowledged the burden that stay-at-home and other orders would place on citizens when announcing the restrictions. *See, e.g.*, Randy Ludlow & Max Filby, *Coronavirus: Governor Orders Ohio Bars, Restaurants to Shut Down*, COLUMBUS DISPATCH (Mar. 15, 2020), <https://www.dispatch.com/story/news/columns/the-daily-briefing/2020/03/15/coronavirus-governor-orders-ohio-bars/1518025007> (“These are tough decisions. We’re inconveniencing people and making people’s lives change, but we’ve got to save lives. Everything we’re doing is to save lives. . . . We’re taking tough steps.”).

138. *See supra* note 4 and accompanying text.

139. *See supra* Parts I & II (tracing the history of emergency powers from the Roman Republic through the modern American era).

140. Lawrence O. Gostin & Lindsay F. Wiley, *Governmental Public Health Powers During the COVID-19 Pandemic: Stay-at-Home Orders, Business Closures, and Travel Restrictions*, 21 JAMA 2137, 2137–38 (2020); *see also* Davis et al., *supra* note 4, at 19.

141. Locke & Dedon, *supra* note 9, at 634; *see also* Lainie Rutkow & Jon S. Vernick, *Emergency Legal Authority and the Opioid Crisis*, 377 NEW ENG. J. MED. 2512, 2513 (2017) (“These declarations and their accompanying powers give states flexibility to respond to exigent circumstances, including by reallocating state funds, managing property, and mandating collaboration among public health and law-enforcement agencies.”).

142. Wendy E. Parmet, *The COVID Cases: A Preliminary Assessment of Judicial Review of Public Health Powers During a Partisan and Polarized Pandemic*, 57 SAN DIEGO L. REV. 999, 1003 (2020) (“[A] story . . . of missteps, misinformation, [and] polarization.”).

143. *Id.* at 1002–03; *see also* Bowman & McKenzie, *supra* note 132, at 552.

144. *See* Parmet, *supra* note 142, at 1004.

nor state governments—nor the public at large—implemented preparatory measures, including stockpiling critical supplies.¹⁴⁵ President Trump explicitly eschewed a leading role for the federal government at first and infamously declared to governors that procuring personal protective equipment (PPE) was the states’ responsibility and that the federal government was “not a shipping clerk.”¹⁴⁶ This pitted states against each other and against hospitals in counterproductive competition for scarce resources.¹⁴⁷

By mid-March 2020, governors faced few viable options. Testing remained woefully inadequate, PPE was scarce, and the nation lacked a coherent response.¹⁴⁸ For the first time in U.S. history, all governors declared emergencies responding to the same crisis.¹⁴⁹ Some governors who had authority to declare a public health emergency (PHE) did so.¹⁵⁰ With containment strategies failing and no vaccines or effective therapeutics available, governors turned to the only remaining mitigation tool: social distancing.¹⁵¹ Governors implemented this set of comprehensive

145. *Id.*

146. Quint Forgey, *‘We’re Not a Shipping Clerk’: Trump Tells Governors to Step Up Efforts to Get Medical Supplies*, POLITICO (Mar. 19, 2020), <https://www.politico.com/news/2020/03/19/trump-governors-coronavirus-medical-supplies-137658> [<https://perma.cc/V67V-5FPT>]; see also Bowman & McKenzie, *supra* note 132, at 552 (noting that “the executive leadership of the two levels of government did not necessarily move in a coordinated or even complementary way”).

147. See Jeanne Whalen et al., *Scramble for Medical Equipment Descends into Chaos as U.S. States and Hospitals Compete for Rare Supplies*, WASH. POST (Mar. 24, 2020), <https://www.washingtonpost.com/business/2020/03/24/scramble-medical-equipment-descends-into-chaos-us-states-hospitals-compete-rare-supplies>.

148. See Parmet, *supra* note 142, at 1005–06.

149. See Davis et al., *supra* note 4, at 19–20; Lindsay F. Wiley, *Democratizing the Law of Social Distancing*, 19 YALE J. HEALTH POL’Y L. & ETHICS 50, 69 (2020) (“To slow the spread of the coronavirus pandemic, all fifty governors . . . exercised broad powers available to them under public health statutes and emergency declarations to alter the operations of businesses and other organizations and to restrict the movement of individuals.”).

150. Thirty-eight states adopted various provisions of the Model State Emergency Health Powers Act, which had been developed in response to the 2001 terrorist and bioterrorist attacks. See James G. Hodge, Jr. et al., *State Public Health Emergency Powers in Response to COVID-19*, 113 AM. J. PUB. HEALTH 275, 276 (2022) (describing thirty-eight states as having a public health emergency law). Only thirteen states formally declared public health emergencies (PHEs) in response to the pandemic, and four states declared both PHEs and general emergencies. *Id.*

151. See Parmet, *supra* note 142, at 1006; Wiley, *supra* note 149, at 66–67. Social distancing seemed like a novel concept at the outset of the pandemic despite having appeared in public health literature since the 2000s. While the Tenth Amendment reserves power to the states to implement social distancing measures regardless of federal competence, the lack of a coordinated national strategy forced governors to exercise this authority mostly in a vacuum. See U.S. CONST. amend. X.

interventions to “flatten the curve” of exponentially growing COVID cases.¹⁵² Ultimately, forty-three governors issued stay-at-home orders,¹⁵³ and nearly all states closed schools, restricted businesses and gatherings, and mandated masks.¹⁵⁴ While critics denounced these measures as “lockdowns,”¹⁵⁵ all governors’ orders included exemptions for essential activities.¹⁵⁶ Social distancing had never been effectuated by governors (or anyone else) on such a scale.¹⁵⁷

Governors also took aggressive measures to address supply shortages.¹⁵⁸ They suspended non-essential medical and dental procedures to reduce the demand for scarce protective equipment.¹⁵⁹ Some conservative governors controversially suspended abortion services, but courts largely enjoined these restrictions, which were subsequently lifted.¹⁶⁰ Governors also controlled

152. See Parmet, *supra* note 142, at 1006 (noting that the approach of using social distancing orders “was widely viewed by public health experts to be the only way of ‘flattening the curve’”).

153. See Bowman & McKenzie, *supra* note 132, at 553; *States That Issued Lockdown and Stay-at-Home Orders in Response to the Coronavirus (COVID-19) Pandemic*, 2020, BALLOTPEDIA, [https://ballotpedia.org/States_that_issued_lockdown_and_stay-at-home_orders_in_response_to_the_coronavirus_\(COVID-19\)_pandemic_2020](https://ballotpedia.org/States_that_issued_lockdown_and_stay-at-home_orders_in_response_to_the_coronavirus_(COVID-19)_pandemic_2020) [https://perma.cc/DJE8-KWZF]. Seven governors refrained from formal mandates but encouraged residents to stay home voluntarily. *Id.*

154. See Wiley, *supra* note 149, at 74–75. Governors closed non-essential businesses to the public and exempted only “essential” or “life-sustaining” sectors such as healthcare, food and agriculture, home repair, and critical manufacturing. *Id.*; see also Lindsay K. Cloud et al., *A Chronological Overview of the Federal, State, and Local Response to COVID-19*, in ASSESSING LEGAL RESPONSES TO COVID-19, at 10, 12 (Scott Burris et al. eds., 2020) (noting that forty-seven states and the District of Columbia issued various orders to close non-essential businesses).

155. See, e.g., NORBERT J. MICHEL & DAVID R. BURTON, HERITAGE FOUND., THE COST OF CORONAVIRUS SHUTDOWN ORDERS 1 (Apr. 20, 2020), <https://www.heritage.org/sites/default/files/2020-04/BG3489.pdf> [https://perma.cc/P7GY-GHTK].

156. See Parmet, *supra* note 142, at 1007.

157. See Kelly J. Deere, *Doing More with Less: State Public Health Emergency Powers Post-Pandemic*, 17 ST. LOUIS U. J. HEALTH L. & POL’Y 85, 91 (2023).

158. See Scott Burris et al., *Summary of Findings and Recommendations*, in ASSESSING LEGAL RESPONSES TO COVID-19, *supra* note 154, at 4.

159. Davis et al., *supra* note 132, at 102–03.

160. See Rachel Rebouché, *Assuring Access to Abortion*, in ASSESSING LEGAL RESPONSES TO COVID-19, *supra* note 154, at 117–18. Republican states often deemed abortion procedures non-essential while Democratic states deemed it essential, and the ensuing legal battles were often intertwined with political and ideological motivations. See Kenny Mok & Eric A. Posner, *Constitutional Challenges to Public Health Orders in Federal Courts During the COVID-19 Pandemic*, 102 B.U. L. REV. 1729, 1759–61 (2022); John Kincaid & J. Wesley Leckrone, *Partisan Fractures in U.S. Federalism’s COVID-19 Policy Responses*, 52 ST. & LOC. GOV’T REV. 298, 301 (2020). See generally James G. Hodge, Jr. et al., *Legal “Tug-of-Wars” During the COVID-19 Pandemic: Public Health v. Economic Prosperity*, 48 J.L. MED. & ETHICS 603 (2020) (discussing the issues that arose in the cases where views on individual rights collided with government orders).

PPE distribution and sale,¹⁶¹ facilitated donations,¹⁶² increased production capacity,¹⁶³ and formed interstate compacts to acquire supplies.¹⁶⁴

Governors' social distancing and mask orders served a dual purpose: beyond reducing transmission, they indirectly conserved PPE and other supplies by reducing overall demand on the healthcare system. By implementing comprehensive non-pharmaceutical interventions (NPIs) aimed at slowing viral transmission, governors sought to reduce infections, hospitalizations, and deaths, which would lessen the strain on healthcare systems and demand for PPE.¹⁶⁵

Additional emergency measures included the suspension of statutory and regulatory barriers.¹⁶⁶ Governors and state health officials mobilized healthcare workers by expanding scopes of practice, granting liability protection, redirecting medical resources, and restricting price gouging.¹⁶⁷ Governors also combined emergency powers with clemency powers to release some incarcerated persons to de-densify correctional institutions.¹⁶⁸ They also created moratoria on evictions and utility shut-offs, which would keep affected persons in their homes rather than forcing displacement or overcrowding.¹⁶⁹ In essence, governors' emergency declarations and executive orders attempted to keep people apart by restricting non-essential movement and activities.¹⁷⁰

161. See Davis et al., *supra* note 132, at 102–03.

162. *Id.*

163. *Id.* at 103.

164. See Bowman & McKenzie, *supra* note 132, at 553; Lindsay F. Wiley, *Federalism in Pandemic Prevention and Response*, in *ASSESSING LEGAL RESPONSES TO COVID-19*, *supra* note 154, at 66; Daniel J. Mallinson, *Cooperation and Conflict in State and Local Innovation During COVID-19*, 50 AM. REV. PUB. ADMIN. 543, 544 (2020).

165. See Davis et al., *supra* note 4, at 20; Wiley, *supra* note 149, at 66 & n.70.

166. See Davis et al., *supra* note 4, at 20.

167. *Id.*

168. See, e.g., Andy Beshear, Governor of Ky., Exec. Order No. 2020-267 (Apr. 2, 2020), https://governor.ky.gov/attachments/20200402_Executive-Order_2020-267_Conditional-Commutation-of-Sentence.pdf [<https://perma.cc/HYX8-AJ8Q>] (issuing conditional commutations to vulnerable incarcerated persons).

169. See Emily A. Benfer et al., *COVID-19 Housing Policy: State and Federal Eviction Moratoria and Supportive Measures in the United States During the Pandemic*, 33 HOUS. POL'Y DEBATE 1390, 1393 (2023); NAT'L GOVERNORS ASS'N, MEMORANDUM ON STATE UTILITY DISCONNECTION MORATORIUMS AND UTILITY AFFORDABILITY 1 (2021), <https://www.nga.org/publications/memorandum-on-state-utility-disconnection-moratoriums-and-utility-affordability> [<https://perma.cc/RJ7X-LW3F>]; Davis et al., *supra* note 4, at 20.

170. Davis et al., *supra* note 4, at 20 (observing that the governors' actions "enabled a robust response by facilitating the flow of people and resources to where they were needed most"). "Research has shown that nonpharmaceutical interventions implemented by governors and health

These actions reflected extreme efforts to manage resources and mitigate the crisis within their states, stepping into a vacuum left by the absence of federal leadership.¹⁷¹ The federal government provided some support but fell far short of meeting the most pressing needs.¹⁷² States were repeatedly left to shoulder the burden mostly alone. While Congress passed relief measures in March 2020, it failed to address needs for testing, contact tracing, and supported isolation that would have enabled states to manage the pandemic less disruptively.¹⁷³ The President grew increasingly hostile toward business closures and gathering limitations, and prematurely pushed governors to “open up” their states despite inadequate infrastructure.¹⁷⁴ States were left to somehow build the infrastructure for testing, tracing, and disease surveillance required by White House reopening guidelines.¹⁷⁵ This pattern of shifting responsibility—and blame¹⁷⁶—to states forced governors to fill federal voids.¹⁷⁷

officials effectively mitigated the spread of the pandemic by reducing population movement and preventing COVID-19 incidence, hospitalization, and death.” *Id.*

171. See Yanbai Andrea Wang & Justin Weinstein-Tull, *Pandemic Governance*, 63 B.C. L. REV. 1949, 1978 (2022).

172. See, e.g., Orion Rummler, *U.S. Nearly Empties Medical Supplies Stockpile to Fight Coronavirus*, AXIOS (Apr. 8, 2020), <https://www.axios.com/2020/04/09/coronavirus-stockpile-medical-usa>.

173. Wiley, *supra* note 149, at 75–76.

174. See WHITE HOUSE & CTRS. FOR DISEASE CONTROL AND PREVENTION, OPENING UP AMERICA AGAIN (2020), <https://trumpwhitehouse.archives.gov/openingamerica/> [<https://perma.cc/78TB-KL2B>].

175. See Wiley, *supra* note 149, at 78–79.

176. The President antagonized governors by publicly criticizing their pandemic response and instigating noncompliance with and rejection of mitigation measures. See, e.g., Ben Collins & Brandy Zadrony, *In Trump’s ‘LIBERATE’ Tweets, Extremists See a Call to Arms*, NBC NEWS (Apr. 17, 2020), <https://www.nbcnews.com/tech/security/trump-s-liberate-tweets-extremists-see-call-arms-n1186561> [<https://perma.cc/SQJ6-EFW3>]; Michael D. Shear & Sarah Mervosh, *Trump Encourages Protest Against Governors Who Have Imposed Virus Restrictions*, N.Y. TIMES, <https://www.nytimes.com/2020/04/17/us/politics/trump-coronavirus-governors.html> (Apr. 29, 2020).

177. See Michael D. Shear et al., *Inside Trump’s Failure: The Rush to Abandon Leadership Role on the Virus*, N.Y. TIMES, <https://www.nytimes.com/2020/07/18/us/politics/trump-coronavirus-response-failure-leadership.html> (Sept. 15, 2020) (noting White House efforts “to shift responsibility for leading the fight against the pandemic . . . to the states”); Michael D. Shear, *Inside the Failure: 5 Takeaways on Trump’s Effort to Shift Responsibility*, N.Y. TIMES, <https://www.nytimes.com/2020/07/18/us/politics/trump-coronavirus-failure-takeaways.html> (Sept. 9, 2020) (“The president’s . . . pressure on states to get their economies going again left governors and state officials scrambling to address a leadership vacuum that complicated their efforts to deal with the virus.”).

As states succumbed to pressure to ease restrictions in mid-spring 2020, COVID cases and deaths surged,¹⁷⁸ which prompted many governors to reimpose restrictions and mask mandates.¹⁷⁹ The President's refusal to wear masks publicly undermined public health guidance and politicized a basic protective measure.¹⁸⁰ The federal government not only failed to support states' most pressing needs, but the President also actively impeded cooperation, pressured premature reopenings, and undercut governors' efforts to sustain public compliance with mitigation measures.¹⁸¹

When vaccines became available in late 2020 and early 2021, governors pivoted to using their emergency powers to: expand health professionals' scopes of practice and authorize other health professionals to administer COVID-19 vaccines;¹⁸² establish mass vaccination sites; deploy National Guard units to assist with staffing shortages; and create priority distribution systems for vulnerable populations.¹⁸³ As COVID-19 vaccines became more readily available, some governors implemented vaccination incentives and mandates.¹⁸⁴

Throughout 2021 (and even into 2022), some governors continued to use emergency powers to address evolving pandemic challenges.¹⁸⁵ As new variants emerged, governors reimposed mask mandates for state employees,

178. See Ka-Ming Tam et al., *Influence of State Reopening Policies in COVID-19 Mortality*, 12 SCI. REPS. 1677, 1679 (2022) (noting sharp increase in cases and deaths in aggressively reopening states); see also Lauren Leatherby & Rich Harris, *States That Imposed Few Restrictions Now Have the Worst Outbreaks*, N.Y. TIMES (Nov. 19, 2020), <https://www.nytimes.com/2020/11/19/world/states-that-imposed-few-restrictions-now-have-the-worst-outbreaks.html> (analyzing data showing surging COVID cases in states that failed to maintain containment efforts or implement basic mask mandates).

179. See Wiley, *supra* note 149, at 80 (noting the “utter abdication of responsibility by the President and the Senate majority” caused state and local governments to focus on sparing hospitals during the second half of 2020).

180. See BRIAN K. GRODSKY, *THE DEMOCRACY DISADVANTAGE: HOW POPULISM IMPEDES DEMOCRACIES AND GALVANIZES AUTHORITARIANISM IN THE FACE OF DISASTER* 162–63 (2024); Bratspies, *supra* note 135, at 232–33.

181. See Kincaid & Leckrone, *supra* note 160, at 304.

182. See Davis et al., *supra* note 4, at 21–22.

183. E.g., *Maryland National Guard Administers More Than 100K COVID-19 Vaccines*, MD. MILITARY DEP'T: MD. NAT'L GUARD (Apr. 3, 2021), <https://news.maryland.gov/ng/2021/04/03/maryland-national-guard-administers-more-than-100k-covid-19-vaccines> [<https://perma.cc/VET3-TM7Q>]; see also Tara Sklar, *Implementation and Enforcement of Quality and Safety in Long-Term Care*, in *ASSESSING LEGAL RESPONSES TO COVID-19*, *supra* note 154, at 145.

184. See Davis et al., *supra* note 4, at 20.

185. Other governors deliberately did not do this, and some used their powers to override local mandates. See, e.g., William M. Myers & Davia Cox Downey, *COVID-19 Policy Executive (In)Action in Florida and Michigan*, 67 WAYNE L. REV. 47, 56 (2021) (characterizing the Florida Governor's “purposeful ideological inaction”).

healthcare workers, and school personnel, though these faced extensive legal challenges.¹⁸⁶ Governors also used emergency powers to address ongoing healthcare staffing crises by extending temporary licensing provisions, authorizing out-of-state healthcare workers, and maintaining expanded scopes of practice.¹⁸⁷ As federal pandemic unemployment benefits expired, some governors used emergency authorities to extend eviction moratoria and provide additional economic relief.¹⁸⁸ Others used their powers to mandate COVID-19 safety protocols in schools, including mask requirements, testing programs, and quarantine procedures—decisions that became increasingly controversial and politically charged.¹⁸⁹

Governors, despite federal dysfunction, initially enjoyed widespread support for their leadership during the early months of the pandemic.¹⁹⁰ Public opinion favored governors who more aggressively managed their state's response to the pandemic, and governors received substantially higher approval ratings than the President.¹⁹¹ However, tensions escalated in many states as frustrated citizens and businesses chafed against prolonged mitigation orders and state legislatures grew increasingly hostile toward governors' extended use of emergency powers.¹⁹²

B. The Resistance to and Retraction of Gubernatorial Emergency Powers

To be clear, much of the legislative concern was well-founded. Governors' use of emergency powers had very deep and broad impacts on citizens' everyday lives.¹⁹³ The COVID-19 emergency stretched from weeks into

186. See, e.g., Y. Tony Yang et al., *State Mask Mandate Bans for Schools: Law, Science, and Public Health*, PEDIATRICS, Jan. 2022, at 1, 1.

187. See Davis et al., *supra* note 4, at 20; Margaret Ziemann et al., *How Governor Directives Changed Health Workforce Flexibility in Response to the COVID-19 Pandemic*, 138 PUB. HEALTH REP. 78S, 79S (2023).

188. See Benfer et al., *supra* note 169, at 1401–02.

189. See Wendy E. Parmet & Faith Khalik, *Judicial Review of Public Health Powers Since the Start of the COVID-19 Pandemic: Trends and Implications*, 113 AM. J. PUB. HEALTH 280, 280–281 (2023).

190. Deere, *supra* note 21, at 789; Bowman & McKenzie, *supra* note 132, at 555.

191. See DAVID LAZER ET AL., COVID STATES PROJECT, THE STATE OF THE NATION: A 50-STATE COVID-19 SURVEY 4 (2020); Deere, *supra* note 21, at 789; Bowman & McKenzie, *supra* note 132, at 555.

192. See Deere, *supra* note 21, at 758–59.

193. For example, unemployment reached nearly 15% in April 2020. Press Release, U.S. Bureau of Labor Stat., Employment Situation News Release (May 8, 2020), https://www.bls.gov/news.release/archives/empstat_05082020.htm [<https://perma.cc/7VNG-6ZD7>]. Additionally,

months, and then years. While thousands assembled to protest across the country—mostly in violation of governors’ orders¹⁹⁴—it was only a matter of time before frustration and pressure began to build and burst into challenges in two different forums where gubernatorial emergency powers were curbed: state courts and state legislatures.

This retraction of gubernatorial emergency powers affected a group of sixteen states, representing approximately forty-three percent of the entire U.S. population.¹⁹⁵ The pushback flared up nearly everywhere, as litigants filed around 1,000 lawsuits to challenge governors’ mitigation efforts and public health orders.¹⁹⁶ But lawsuits resulted in permanent loss of emergency powers (beyond COVID-19) in just one case. Legislative changes—and in one case, a constitutional amendment¹⁹⁷—were primarily responsible for reducing governors’ emergency powers. This Article focuses on these states

the social distancing restrictions and closures took a toll on individuals’ finances and psyches. See JULIANA HOROWITZ ET AL., PEW RSCH. CTR., A YEAR INTO THE PANDEMIC, LONG-TERM FINANCIAL IMPACT WEIGHS HEAVILY ON MANY AMERICANS 5 (2021), https://www.pewresearch.org/wpcontent/uploads/sites/20/2021/03/PSD_03.05.21.covid_impact_fullreport.pdf [<https://perma.cc/5QAS-FL6E>] (finding that 49% of U.S. adults said their family’s financial situation was worse than it was before the pandemic); *Anxiety and Depression: Household Pulse Survey*, NAT’L CTR. FOR HEALTH STAT. (Oct. 3, 2024), <https://www.cdc.gov/nchs/covid19/pulse/mental-health.htm> [<https://perma.cc/UM4B-WXN7>].

194. See Davis et al., *supra* note 132, at 95 (noting high-profile protests against emergency measures at state capitals in April 2020, often violating stay-at-home orders). These “anti-lockdown protests” occurred in nearly every state. See ROUDABEH KISKI, ARMED CONFLICT LOCATION & EVENT DATA PROJECT, A NATIONAL EMERGENCY: HOW COVID-19 IS FUELING UNREST IN THE US 1–2 (2021), https://acleddata.com/system/files/2026-03/ACLED_Report_PandemicUnrestUS_2021Web.pdf [<https://perma.cc/D6KR-VQEJ>]. At these rallies, some protestors chanted “Liberate Michigan” and “Liberate Minnesota” at state capitols, echoing President Trump’s tweets. Deere, *supra* note 21, at 739. Business owners even defied closure orders, sometimes encouraged by the President. Nancy J. Knauer, *The COVID-19 Pandemic and Federalism: Who Decides?*, 23 N.Y.U. J. LEGIS. & PUB. POL’Y 1, 38–39 (2020). These protests highlighted a perceived “lack of consensus on the appropriate response, and the perceived illegitimacy of governors’ orders.” Avi Weiss, Note, *Binding the Bound: State Executive Emergency Powers and Democratic Legitimacy in the Pandemic*, 121 COLUM. L. REV. 1853, 1855 (2021).

195. See *supra* notes 4–5 and accompanying text.

196. See Michelle M. Mello et al., *Judicial Decisions Constraining Health Powers During COVID-19: Implications for Public Health Policy Making*, 43 HEALTH AFFS. 759, 759 (2024); *Lawsuits About State Actions and Policies in Response to the Coronavirus (COVID-19) Pandemic*, BALLOTPEDIA, [https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_\(COVID-19\)_pandemic](https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic) [<https://perma.cc/6Y3B-LGFJ>].

197. See PA. CONST., art. IV, § 20.

where, through pervasive efforts, state executives lost emergency powers in some form.¹⁹⁸

1. Legal Challenges to Emergency Powers

A wave of litigation targeted governors' emergency orders.¹⁹⁹ Courts mostly upheld restrictions unless considered arbitrary or unreasonable.²⁰⁰ However, some court decisions temporarily limited governors' powers during the pandemic without disturbing their underlying authority to act in future emergencies.²⁰¹ For example, Wisconsin's Supreme Court ruled that the health secretary exceeded statutory authority by issuing sweeping orders without legislative approval.²⁰² In Pennsylvania, a federal district court held that the governor's mitigation orders violated due process,²⁰³ but the decision was stayed²⁰⁴ and later vacated on appeal.²⁰⁵ In both cases, governors temporarily lost access to emergency powers because their orders were struck down, but their underlying authority to act in the future remained mostly intact.

198. While the Article examines legislative backlash that is largely driven by Republican-controlled legislatures reacting to Democratic governors (or internal party rifts), the structural principles defended here are institutionally neutral. A Democratic legislature stripping a Republican governor of essential crisis management tools would be equally constitutionally suspect and functionally problematic.

199. James G. Hodge Jr. et al., *COVID's Constitutional Conundrum: Assessing Individual Rights in Public Health Emergencies*, 88 TENN. L. REV. 837, 853–54 (2021). Other scholars have competently and comprehensively analyzed the cases that challenged governors' emergency and public health orders, which were primarily based on theories of violations of due process, equal protection, and nondelegation. See, e.g., Mello et al., *supra* note 196, at 760–64. Litigants also pursued regulatory takings claims, arguing that business closures constituted a compensable taking of property. However, courts generally rejected these theories, finding that valid exercises of the police power to protect public health do not require compensation, even when they cause severe economic loss. See, e.g., *Gonzales v. Inslee*, 535 P.3d 864, 873 (Wash. 2023).

200. See Wiley, *supra* note 149, at 94. Some states developed constitutional rights in response to COVID-era restrictions that impacted religious gatherings and worship. TEX. CONST. art. I, § 6-a; LA. CONST. art. XII, § 17.

201. See Mello et al., *supra* note 196, at 760–64 (analyzing over 100 cases where courts ruled in favor of plaintiffs and against state officials' emergency or public health orders).

202. *Wis. Legislature v. Palm*, 942 N.W.2d 900, 917–18 (Wis. 2020) (invalidating state's pandemic restrictions but not disturbing underlying gubernatorial authority).

203. *Cnty. of Butler v. Wolf*, 486 F. Supp. 3d 883, 918–19, 926–28 (W.D. Pa. 2020).

204. *Cnty. of Butler v. Governor of Pa.*, No. 20-2936, 2020 WL 5868393, at *1 (3d Cir. Oct. 1, 2020).

205. *Cnty. of Butler v. Governor of Pa.*, 8 F.4th 226 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 772 (2022).

That was not the case in Michigan. The state's Supreme Court "dusted off the nondelegation doctrine, which had never been used to strike down an entire statute,"²⁰⁶ and invalidated a law that had granted additional emergency powers to governors over half a century before.²⁰⁷ Specifically, the court held that the Emergency Powers of the Governor Act of 1945 (EPGA) constituted an unlawful delegation of legislative power to the executive branch and was therefore unconstitutional.²⁰⁸ The court found the EPGA granted the governor "remarkably broad" power, akin to the police power typically vested exclusively in the legislature, for an indefinite period without sufficient "intelligible principle," *i.e.*, legislative standards to guide and restrain discretion.²⁰⁹ All Governor Whitmer's executive orders issued pursuant to the EPGA were revoked as an unconstitutional exercise of legislative power.²¹⁰ This stripped her of the ability to use the EPGA as a basis for her emergency orders,²¹¹ and Michigan no longer had a state of emergency due to the COVID-19 pandemic following this ruling.²¹²

Other state supreme courts did not reach the same result.²¹³ At least one study has found evidence of "partisan and ideological influence" in the small number of cases where governors and other officials lost in COVID-19 litigation.²¹⁴ The Michigan Supreme Court's decision was split 4-3, divided entirely along partisan lines when the Republican majority agreed with the Republican-controlled legislature and struck down the Democratic governor's emergency powers.²¹⁵ While partisanship and politics may have influenced some outcomes, governors fared relatively well against the wave

206. Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. 275, 327 (2022).

207. *In re Certified Questions from U.S. Dist. Ct., W. Dist. of Mich., S. Div.*, 958 N.W.2d 1, 16–25 (Mich. 2020).

208. *Id.* at 24.

209. *Id.* at 20, 28–31.

210. *Id.* at 31.

211. *See* Deere, *supra* note 21, at 763.

212. *Id.* at 780.

213. *See, e.g.*, *Beshear v. Acree*, 615 S.W.3d 780, 786, 808 (Ky. 2020) (upholding governor's authority and rejecting nondelegation challenge, finding structure of Kentucky government makes legislative primary role "impractical, if not impossible" during emergencies); *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 885, 892–93 (Pa. 2020) (upholding business closure order as not violating separation of powers doctrine); *Wolf v. Scarnati*, 233 A.3d 679, 704–06 (Pa. 2020) (rejecting Republican state senators' nondelegation argument in part because legislature had made "basic policy choices" in the state's emergency laws).

214. Mello et al., *supra* note 196, at 759.

215. *See* Briffault, *supra* note 16, at 1667.

of litigation.²¹⁶ That was not the case when legislative branches used the legislative process to peel away governors' emergency powers.

2. Legislative Curtailments of Executive Authority

Governors' emergency powers faced greater threats in the legislative arena.²¹⁷ Following an initial collective sense of duty and purpose to protect healthcare systems from becoming overwhelmed,²¹⁸ many legislatures challenged governors by passing bills to expand their oversight of emergency response²¹⁹ and by enacting laws—in some cases by overriding a governor's veto—to remove or limit gubernatorial power.²²⁰

The opposition grew as some legislators and their constituents began to view executives' prolonged use of emergency powers as overreach.²²¹ The concentration of emergency rulemaking power in the hands of governors, without perceived substantive legislative input, raised concerns about democratic legitimacy.²²² Some legislators, as some have argued, believed the statutory framework only allowed them to terminate a state of emergency by concurrent resolution, rather than providing substantive input on specific emergency actions.²²³ Regardless of legislative motivations, this tension was

216. *Id.* at 1640.

217. This Article concentrates on the specific state where laws were enacted to reduce governor's emergency powers. But some states passed laws to enhance the public health emergency response, e.g., by enacting legislation to expand scopes of practice. *See* Davis et al., *supra* note 4, at 21–24; *see also* Pam Greenberg & Matthew Sullivan, *Legislative Actions in Oversight of Executive Emergency Powers*, NAT'L CONF. OF ST. LEGISLATURES (Feb. 28, 2022), <https://www.ncsl.org/about-state-legislatures/legislative-actions-in-oversight-of-executive-emergency-powers> [<https://perma.cc/D7MB-WLYQ>]. While legislatures pushed back on both governors' and public health officials' actions, the Article's focus remains on gubernatorial power and action.

218. *See* Briffault, *supra* note 16, at 1635. In some states, this collaborative approach to pandemic response continued. *See* Davis et al., *supra* note 4, at 20 (“In some cases, cooperation and open communication may have enhanced the effectiveness of a state's whole-of-government approach.”).

219. Davis et al., *supra* note 4, at 20.

220. *See* Michelle M. Mello & Lawrence O. Gostin, *Public Health Law Modernization 2.0: Rebalancing Public Health Powers and Individual Liberty in the Age of COVID-19*, 42 HEALTH AFFS. 318, 320–21 (2023).

221. *Id.* at 319–20 (noting plummeting public support for measures and approval ratings of officials); Greenberg & Sullivan, *supra* note 217.

222. *See* Weiss, *supra* note 194, at 1892.

223. *Id.* at 1872. Of course, nothing prevented legislatures who could convene from passing non-binding resolutions critiquing the state's executive-led COVID-19 response. Moreover, legislatures did attempt to pass a multitude of bills aimed at modifying or curtailing governors'

certainly exacerbated because public health decisions had become intertwined with political and economic impacts.²²⁴

Legislatures actively pursued and passed laws to permanently limit governors' emergency powers during and after the pandemic by introducing over 750 bills during the 2020 and 2021 legislative sessions.²²⁵ This legislative pushback was particularly pronounced in states with government divided between Democratic governors and Republican legislatures.²²⁶ Nearly all states' legislatures proposed such measures,²²⁷ with many succeeding.²²⁸ Following introduction of anti-executive emergency powers legislation in over three dozen states,²²⁹ diminishment occurred to varying

powers with some prevailing but many failing (due to gubernatorial vetoes and the inability to muster enough votes for a veto override). In other words, the democratic lawmaking process worked as intended and as constitutionally structured.

224. See Stephanie Reed, *Long COVID Side Effects: States Rethink Separation of Powers*, 19 J. HEALTH & BIOMEDICAL L. 140, 173 (2022).

225. Davis et al., *supra* note 4, at 20–21; see also Briffault, *supra* note 16, at 1664; Hodge & Piatt, *supra* note 22, at 34–37; Trip Gabriel, *State Lawmakers Defy Governors in a Covid-Era Battle for Power*, N.Y. TIMES, <https://www.nytimes.com/2021/02/22/us/politics/republicans-democrats-governors-covid.html> (Apr. 22, 2021) (discussing thirty-seven states that introduced more than 200 bills or resolutions “to clip” governors’ emergency powers); David A. Lieb, *State Lawmakers Are Pushing to Curb Governors’ Virus Powers*, ASSOCIATED PRESS (Jan. 28, 2021), <https://apnews.com/article/state-lawmakers-governor-coronavirus-7d5710f2d8aa4e659c0ec68400ad3d3c> [<https://perma.cc/952K-3VEF>] (noting state legislators efforts “to curb the authority of governors . . . to impose emergency restrictions such as mask rules and business shutdowns”).

226. Briffault, *supra* note 16, at 1635, 1667; Reed, *supra* note 224, at 172; Deere, *supra* note 157, at 106.

227. At least one organization drafted legislative language to facilitate states’ adoption of measures to curtail gubernatorial emergency powers. *Emergency Power Limitation Act*, AM. LEGIS. EXCH. COUNCIL (Jan. 8, 2021), <https://www.alec.org/modelpolicy/emergency-power-limitation-act> [<https://perma.cc/9P79-F37V>] (proposing model legislation requiring “narrowly tailored” exercise of emergency powers).

228. Seifter, *supra* note 206, at 323; Deere, *supra* note 157, at 96–97. Because this Article focuses on gubernatorial emergency powers, the discussion considers only where legislatures reduced or removed governors’ powers when comparing the pre-pandemic period to post-onset of the pandemic. Scholars have created various taxonomies for understanding these shifts in power, see, for example, Briffault, *supra* note 16, at 1661; Seifter, *supra* note 206, at 323; Deere, *supra* note 157, at 97, but here the central and sole inquiry is whether governors lost any emergency powers at the hands of state legislatures. Accordingly, while many proposed and enacted laws address modifications to public health powers of state and local health officials, these are outside the scope of the Article.

229. See Gabriel, *supra* note 225.

degrees in fifteen states.²³⁰ The limitations fell into two broad categories: structural/procedural changes and substantive restrictions.

Structural and procedural limitations included shortened emergency declaration periods and enhanced legislative oversight. States imposed various time limits on emergency declarations and orders: some as short as ten days (Wyoming),²³¹ others ranging from twenty-one days (Montana)²³² to ninety days (Ohio),²³³ with most requiring legislative approval for extensions.²³⁴ These reforms restricted governors' ability to renew emergencies and specified that governors could not declare multiple emergencies for the same conditions.²³⁵ Legislatures accomplished these structural transfers of executive power—to themselves—through the legislative process set forth in their state constitutions. Other legislatures sought to bypass the governor's traditional gatekeeping authority over special sessions, proposing constitutional amendments or statutes that would allow the legislature to convene itself to address emergencies without a gubernatorial proclamation.²³⁶

In one state, Pennsylvania, the legislature employed the constitutional amendment process it solely controlled to achieve the transfer of power to

230. Davis et al., *supra* note 4, at 21. The judiciary caused the diminishment of the gubernatorial emergency powers in the sixteenth state, Michigan. *See supra* notes 207–212 and accompanying text.

231. H.R. 127, 66th Leg., Reg. Sess. (Wyo. 2021) (limiting orders restricting freedom of movement to 10 days).

232. 2021 Mont. Laws Ch. 504 (H.B. 230) (imposing twenty-one-day limitation on governor's emergency declaration unless extended by both legislative chambers).

233. 2021 Ohio Laws 3 (Sub. S.B. 2022).

234. Other states set forth similar limitations. 2022 Ariz. Legis. Serv. Ch. 220 (S.B. 1009) (West) (limiting emergencies to thirty days, extendable if approved by the legislature); 2022 Va. Acts Ch. 803 (limiting emergencies to forty-five days); TENN. CODE ANN. § 58-2-107(b)(2) (2023) (shortening durational limitation from sixty to forty-five days); 2021 Ark. Acts 403 (S.B. 379) (limiting public health emergencies to sixty days with extensions submitted to legislative council and deemed approved unless vetoed).

235. Briffault, *supra* note 16, at 1661–62.

236. Idaho voters approved constitutional amendment SJR 102, which amended the Idaho Constitution to authorize the president pro tempore of the state Senate and the speaker of the state House to convene a special session of the Idaho State Legislature upon receiving a joint written request from 60% of the members of each chamber. S.J. Res. 102, 66th Leg., 1st Reg. Sess. (Idaho 2022); Kelcie Moseley-Morris, *Idaho Voters Approve Amendment Allowing Legislature to Call Itself Back for Special Sessions*, IDAHO CAP. SUN (Nov. 9, 2022), <https://idahocapitalsun.com/2022/11/09/idaho-voters-approve-amendment-allowing-legislature-to-call-itself-back-for-special-sessions>. Arkansas and Kentucky voters rejected similar approaches in their respective states. Valerie Newberg, *Ballot Measures Impacting State Legislative and Executive Power*, COUNCIL ST. GOV'TS (Nov. 18, 2022), <https://www.csg.org/2022/11/18/ballot-measures-impacting-state-legislative-and-executive-power> [<https://perma.cc/B35Y-L63H>].

itself. The legislature uniquely used the amendment process to overturn a state supreme court decision that had maintained the status quo of separation of powers in that state. In *Wolf v. Scarnati*, Pennsylvania's Supreme Court had considered the Republican-controlled General Assembly's attempt to end Governor Wolf's disaster declaration by passing a concurrent resolution and refusing to present the resolution to the Governor.²³⁷ The court rejected the legislature's attempt to bypass constitutional presentment.²³⁸

Undeterred, the Republican caucuses in the legislature immediately initiated the process to amend the state's constitution and supersede the court's decision.²³⁹ This process, solely controlled by the General Assembly, requires passage of the same joint resolution in consecutive legislative sessions before a proposed amendment is submitted to voters.²⁴⁰ The amendments sought to eliminate the constitution's presentment requirement, to eliminate the governor's power to renew an emergency declaration without affirmative legislative authorization, and to shorten emergency periods to twenty-one days.²⁴¹ Following passage of concurrent resolutions in the legislative session ending in 2020 and in the session starting in 2021,²⁴² the proposed constitutional amendments were submitted to voters in the May 2021 election—an "off-year" municipal primary with typically very low turnout.²⁴³ Voters approved both amendments related to gubernatorial emergency powers by a margin of about 52% to 48%.²⁴⁴ The Pennsylvania

237. 233 A.3d 679, 684–87 (Pa. 2020).

238. *Id.* at 694 ("A legislative veto in the context of a statute delegating emergency powers might be a good idea. It might be a bad idea. But it is not a *constitutional* idea under our current Charter.").

239. *See* S. 1166, 2020 Gen. Assemb., 2021–2022 Reg. Sess. (Pa. 2020).

240. PA. CONST. art. XI, § 1.

241. S. 2, 2021 Gen. Assemb., Reg. Sess. (Pa. 2021). A third amendment was rolled into the resolution and revised the state's declaration of rights to add a prohibition against denial or abridgment of equality of rights based on the race or ethnicity of an individual. *Id.* "Logrolling" of disparate pieces of legislation together into one bill would likely violate many states' constitutional requirements that legislation unify around a single subject. *See, e.g.*, PA. CONST. art. 3, § 3. Logrolling of disparate constitutional amendments into one legislative vehicle is similarly constitutionally suspect and deserves further consideration.

242. S. 1166, 2020 Gen. Assemb., Reg. Sess. (Pa. 2020); S. 2, 2021 Gen. Assemb., Reg. Sess. (Pa. 2021).

243. Charles Thompson, *Turnout Was Low in the Pa. Primary Election, But It Was Way Better than Normal*, PENNLIVE (May 21, 2021), <https://www.pennlive.com/elections/2021/05/turnout-was-low-in-the-pa-primary-election-but-it-was-way-better-than-normal.html>.

244. 2021 *Municipal Primary (Official Returns)*, COMMONWEALTH OF PA. ELECTION RESULTS (May 18, 2021), <https://www.electionreturns.pa.gov/Home/SummaryResults?ElectionID=84&ElectionType=P&IsActive=0> [<https://perma.cc/N5DF-L762>]. The other amendment regarding equality of rights passed by a much wider margin of about 72% to 28%. *Id.*

legislature then employed its newly acquired power to pass a joint resolution and terminate the governor's COVID-19 disaster declaration.²⁴⁵

In other states, new laws similarly increased legislative oversight and termination authority. For example, Kentucky's legislature limited states of emergency to thirty days absent legislative extension, granted itself power to terminate declarations at any time, and required the Attorney General's approval before governors could suspend statutes.²⁴⁶ The legislature enacted the bills creating these changes into law over the governor's veto, and the governor then sued to have the laws declared unconstitutional.²⁴⁷ After a lower court temporarily blocked some aspects of the new laws, the Kentucky Supreme Court later allowed them to take effect.²⁴⁸ New York's legislature revoked powers granted to Governor Cuomo to manage the pandemic and barred new unilateral executive orders.²⁴⁹ Kansas gave a legislative coordinating council authority to review and revoke gubernatorial proclamations and orders.²⁵⁰ Utah required notification by the governor before declaring emergencies or issuing epidemic-related executive orders.²⁵¹ Collectively, these measures imposed sweeping structural limitations on emergency authority, ensuring legislatures maintained a constant veto over executive action.

The second category of legislatively engineered transfers of gubernatorial emergency powers targeted specific actions like restrictions on businesses and First and Second Amendment activities.²⁵² Texas removed executive emergency authority for restricting business operations, making it solely a legislative power.²⁵³ Montana prohibited local governments from restricting access to businesses.²⁵⁴ Idaho prohibited governors from altering any statutory provision, which is a power many states traditionally grant to

245. S. Res. 23, 2021 Gen. Assemb., Reg. Sess. (Pa. 2021); H. Res. 106, 2021 Gen. Assemb., Reg. Sess. (Pa. 2021).

246. H.R. 1, 2021 Leg., Reg. Sess. (Ky. 2021); S. 1, 2021 Leg., Reg. Sess. (Ky. 2021); S. 2, 2021 Leg., Reg. Sess. (Ky. 2021); H.R.J. Res. 77, 2021 Leg., Reg. Sess. (Ky. 2021); *Stivers v. Beshear*, 659 S.W.3d 313, 315–16 (Ky. 2022) (discussing the legislature's moves to curb the governor's powers).

247. *Stivers*, 659 S.W.3d at 316.

248. *Id.* at 317; Bruce Schreiner, *Kentucky Gov Suffers Legal Defeat in Combating COVID Surge*, ASSOCIATED PRESS (Aug. 21, 2021), <https://apnews.com/article/health-coronavirus-pandemic-kentucky-23946cdfad426e66613bc54c82115143> [<https://perma.cc/6K9H-FNTT>].

249. See Blackman, *supra* note 21, at 753–54.

250. S. 40, 2021 Leg., Reg. Sess. (Kan. 2021).

251. S. 195, 2021 Leg., Reg. Sess. (Utah 2021).

252. See Davis et al., *supra* note 4, at 25–28.

253. *Id.* at 26.

254. *Id.*

governors in emergencies.²⁵⁵ Kentucky's legislature ended COVID-19 closures and prohibited future ones except as to businesses' compliance with the "least restrictive" federal guidelines.²⁵⁶ Many new laws were framed as protecting First or Second Amendment rights and precluded emergency orders affecting religious activities or firearms.²⁵⁷ For example, Indiana prohibited greater restrictions on religious organizations and services than those imposed on other essential services.²⁵⁸ Despite no governor attempting to alter firearm regulations, fourteen states passed laws to prevent their governors from modifying firearm regulations during emergencies.²⁵⁹ While not as sweeping as the new structural limitations on gubernatorial emergency powers, these subject-specific restrictions also represent a substantial shift away from the executive branch and to the legislative branch.

The partisan dimensions of this legislative pushback were unmistakable. In states with divided government, Republican-controlled legislatures in Michigan, Pennsylvania, Wisconsin, Kentucky, and Kansas systematically worked to curtail the emergency authorities of Democratic governors.²⁶⁰ This partisan pattern suggests that policy disagreements about the appropriate pandemic response were as influential as constitutional concerns about the separation of powers.

The Uniform Law Commission responded to these state-level conflicts and the patchwork of emergency powers reforms by promulgating the Model Public Health Emergency Authority Act (MPHEAA) in 2023.²⁶¹ This model act attempts to balance executive flexibility during emergencies with legislative oversight by proposing standardized time limits and clear renewal, reporting, and termination procedures.²⁶² Unfortunately, the Act—in its effort to create accountability—introduces impractical timelines,²⁶³ vague

255. *Id.* at 25.

256. H.R. 1, 2021 Leg., Reg. Sess. (Ky. 2021).

257. Davis et al., *supra* note 4, at 25–27; Briffault, *supra* note 16, at 1662–63.

258. S. 263, 122d Gen. Assemb., Reg. Sess. (Ind. 2021).

259. Davis et al., *supra* note 4, at 26–27; Deere, *supra* note 157, at 101. In 2021, Kansas and Montana extended these restrictions. *Id.*

260. Briffault, *supra* note 16, at 1667; Deere, *supra* note 157, at 106–07.

261. Katie Robinson, *Five New Acts Approved at ULC's 132nd Annual Meeting*, UNIF. L. COMM'N (July 26, 2023), <https://www.uniformlaws.org/discussion/five-new-acts-approved-at-ulcs-132nd-annual-meeting> [<https://perma.cc/7WYB-GJP4>].

262. See MODEL PUB.-HEALTH EMERGENCY AUTH. ACT (UNIF. L. COMM'N 2023), <https://www.uniformlaws.org/viewdocument/final-act-167> [<https://perma.cc/Y7G5-84V7>]; Robert Gatter, *The Model Public-Health Emergency Authority Act*, 17 ST. LOUIS U. J. HEALTH L. & POL'Y 55, 66–71 (2023).

263. *E.g.*, MODEL PUB.-HEALTH EMERGENCY AUTH. ACT § 4(f) (UNIF. L. COMM'N 2023), <https://www.uniformlaws.org/viewdocument/final-act-167> [<https://perma.cc/Y7G5-84V7>]

standards,²⁶⁴ and openings for judicial and political interference²⁶⁵ that could undermine effective public health crisis response. The MPHEAA, from this perspective, fails to appreciate the need for speed, discretion, and operational security at the executive level during an emergency. Equally important, the model act also fails to permit direct legislative input on a public-health emergency.²⁶⁶ The Act has received some scholarly²⁶⁷ and public²⁶⁸ criticism, and it has not been advanced in any state's legislature—let alone adopted.²⁶⁹

(prohibiting governor from declaring public-health emergency for at least 15 days after an “identical or substantially similar” expired declaration regardless of reason for order’s expiration).

264. *E.g.*, *id.* § 4(h) (requiring emergency declaration or renewal to be “rationally based on evidence”). The Act omits evidence quantum requirements and conflates this with preventing “arbitrary or capricious” declarations. *Id.* § 4 cmt. 11. These distinct standards—rational basis (constitutional, deferential) versus arbitrary/capricious (administrative, less deferential)—risk ideologically-driven judicial overreach. *See* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 768 (2008) (discussing judicial ideology’s impact on arbitrariness review). State court variations could compound the inconsistencies.

265. Section 10 authorizes judicial review despite extensive COVID-19 litigation against governors’ orders without such specific authorization. MODEL PUB.-HEALTH EMERGENCY AUTH. ACT § 10 (UNIF. L. COMM’N 2023), <https://www.uniformlaws.org/viewdocument/final-act-167> [<https://perma.cc/Y7G5-84V7>]; *see supra* Section II.B (discussing the extensive legal challenges filed to overturn gubernatorial responses to COVID-19). Combined with unclear, potentially less deferential standards and reporting requirements demanding possibly unavailable data, *see supra* note 264, the inclusion of specific authorization to challenge governors’ declarations and orders would likely burden courts with litigation and risks judicial invalidation of necessary public health measures.

266. *See* MODEL PUB.-HEALTH EMERGENCY AUTH. ACT §§ 5, 8 (UNIF. L. COMM’N 2023), <https://www.uniformlaws.org/viewdocument/final-act-167> [<https://perma.cc/Y7G5-84V7>] (permitting termination based on governor’s action/inaction). The prefatory note to the Act states that the ULC was concerned about providing a mechanism for legislatures to *unilaterally* terminate a declaration or order. *Id.* at 2–3. This is a laudable goal, especially in the context of state constitutions that require presentment of legislative actions to the executive. However, in pursuing this goal, the Act omits any involvement of the legislature, even if those legislative actions would have been subject to and proceeded in accordance with state constitutional requirements. This appears to contradict states’ chosen checks and balances systems.

267. *E.g.*, Diller, *supra* note 4, at 690–701.

268. Kendyl Turner & Jack McPherrin, *The Uniform Law Commission’s Public-Health Emergency Authority Act: A Severe Threat to Democratic Institutions and Individual Liberty*, HEARTLAND INST. (Sept. 25, 2024), <https://heartland.org/publications/the-uniform-law-commissions-public-health-emergency-authority-act-a-severe-threat-to-democratic-institutions-and-individual-liberty> [<https://perma.cc/5VLN-67Z3>]; *Illinois Freedom Caucus: ‘We Have Seen the Wreckage of Governor Pritzker’s Emergency Powers Here in Illinois’*, PRAIRIE ST. WIRE (July 4, 2023), <https://prairiestatewire.com/stories/645131700-illinois-freedom-caucus-we-have-seen-the-wreckage-of-governor-pritzker-s-emergency-powers-here-in-illinois> [<https://perma.cc/ZVH6-9CUB>] (noting an 11-state coalition of state legislature “freedom caucuses” pledging to oppose adoption of the MPHEAA).

269. *Public-Health Emergency Authority Act*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=7a88c160-5910-4e41-9dff->

How many states will consider adopting this model is uncertain, and its creation reflects the national reckoning with emergency governance structures exposed by the pandemic. The MPHEAA is confined to public health emergencies, but because of the serious flaws in its construction and its rejection of the historical need for centralized executive action in all manner of emergencies, the Act would not serve as an acceptable model for restructuring gubernatorial emergency powers.

The legislative pushback against gubernatorial emergency powers was driven by three main concerns that emerged as the pandemic progressed. First, concerns over “one-man rule” and lack of democratic oversight arose from the application of statutes originally designed for short-term natural disasters like hurricanes or floods, not for prolonged public health crises like COVID-19. This mismatch between statutory design and pandemic reality led to concerns about unilateral executive action going unchecked.

Second, institutional marginalization of legislatures fueled resentment and opposition. Governors’ actions became the subject of dozens of lawsuits, sometimes initiated by individual legislators or the legislature itself as an institution. These legal battles were legislative disagreements over COVID-19 mitigation policy, “forcibly ‘outsourced’ to the judiciary” when normal legislative channels seemed blocked.²⁷⁰ Legislatures, feeling excluded from important policy decisions affecting their constituents, became increasingly polarized as lawmakers pursued performative gestures over collaborative governance.²⁷¹

Third, economic and social costs of restrictions generated intense constituent pressure on legislators. Small business closures, unemployment, educational disruptions, and religious restrictions created a groundswell of opposition that legislators could not ignore. The disconnect between governors making economic decisions through mitigation orders and legislatures traditionally controlling economic policy through statute created tensions about the proper scope of emergency powers.

Through both procedural and substantive restrictions, legislatures accomplished what courts largely declined to do: systematic transfer of emergency powers from executive to legislative control. This legislative assault on gubernatorial emergency powers marks a reversal of centuries of evolutionary development. Where practical experience with disasters had

018a850ef3b2 [<https://perma.cc/5KRR-ES9C>] (depicting no introductions or enactments in any state or territory).

270. Weiss, *supra* note 194, at 1881.

271. See Bowman & McKenzie, *supra* note 132, at 558 (observing that “this 2-month period [March-April 2020] was not intergovernmental relations as usual”).

steadily expanded executive emergency authority, political frustration with COVID-19 responses has now sharply contracted it. As Part III demonstrates, these legislative “reforms” represent not thoughtful recalibration but an overcorrection that will sacrifice future emergency response capacity to recent partisan disagreements.

III. THE SHIFT IN GUBERNATORIAL EMERGENCY POWERS: FUNCTIONAL FAILURES AND CONSTITUTIONAL DEFICITS

Consider scenarios unfolding across America in the coming years. In Montana, a drought-fueled wildfire explodes across the Rocky Mountain Front in late August. The governor’s emergency declaration, limited to twenty-one days under post-COVID reforms, enables critical resource deployments and evacuation orders. But wildfires respect no legislative calendar. As the declaration nears expiration, the fire remains only forty percent contained, yet the legislature—comprised of ranchers, small business owners, and other citizens with full-time jobs—cannot gather the necessary quorum for an extension vote. The governor faces an impossible choice: let emergency authorities lapse while homes remain threatened or issue a new declaration that opponents could challenge as violating the prohibition on “substantially similar” emergencies.

In Pennsylvania, a novel respiratory virus emerges at a Philadelphia nursing home in January. The Democratic governor’s emergency powers, now constitutionally limited to twenty-one days without legislative approval, enable rapid contact tracing and targeted quarantine measures. But the Republican-controlled Senate chamber, still focused on COVID-19 restrictions, refuses to extend the declaration. The virus spreads unchecked into surrounding communities while health officials, stripped of emergency authorities, watch helplessly.

These scenarios are not hypothetical worst-case fantasies, but predictable consequences of the legislative restrictions enacted in numerous states following COVID-19. Imposing arbitrary time limits, creating procedural roadblocks, and transferring emergency management from executives to mostly part-time legislatures have transformed emergency declarations from tools of crisis response into political maneuvers. The architects of these changes, focused on shifting power over pandemic policy differences, failed to consider how their handiwork would function when the next tornado touches down or dam breaches—emergencies that demand the very executive agility they sought to dismantle.

This Part examines why the COVID-era changes function as structural disablements, not principled constraints, and why that classification matters

for both functional governance and constitutional principles. The analysis proceeds in three sections. First, it demonstrates how the institutional characteristics that make legislatures valuable in normal governance—deliberation, representation of diverse interests, procedural regularity—become liabilities during fast-moving crises. Second, it shows how these reforms violate separation of powers principles by enabling legislative micromanagement of executive functions and creating unconstitutional legislative vetoes. Finally, it reveals how gerrymandered, minoritarian legislatures have used these reforms to override statewide democratic preferences.

The COVID-era legislative restrictions, enacted in states comprising nearly half the U.S. population, represent the most significant peacetime restriction of state executive emergency powers in American history. This shift, accomplished primarily through legislative action and in one case through constitutional amendment, raises questions about the future of emergency governance.

This Part argues that recent legislative curtailments of gubernatorial emergency powers represent an overcorrection that risks undermining states' capacity to respond effectively to future crises while raising constitutional concerns. Rather than thoughtful recalibration, the transfer of emergency authority appears to be an exercise in policy retaliation. A more prudent path forward requires respecting the distinct institutional capacities of both branches—preserving executive flexibility for rapid response while enhancing, not supplanting, legislative oversight.

A. An Unwise Exchange: Institutional Capacity and the Realities of Crisis Response

Contagions will arise again,²⁷² and natural disasters seemingly happen daily.²⁷³ But governors in many states now have fewer powers to address emergencies.²⁷⁴ This Section first considers the relative strengths and weaknesses of state executive and legislative branches and then turns to pragmatic and political considerations that could impact emergency response.

272. Deere, *supra* note 157, at 87.

273. 2 U.S. GLOB. CHANGE RSCH. PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT, IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES: REPORT-IN-BRIEF 57 (2018).

274. *See* Deere, *supra* note 157, at 87.

1. The Structural Advantages of Executive Leadership

The COVID-era changes in emergency management are structural disablements in the most literal sense: they dismantle the institutional capacity the executive needs to respond to crises. To be sure, executive emergency power carries real risks. A governor with broad emergency authority can act precipitously, impose restrictions that prove unnecessary in hindsight, or extend an emergency declaration past the point of genuine necessity. These risks are not theoretical; instances of each occurred during the COVID-19 response. But the answer to the risks of executive emergency power is not to dismantle the institutional capacity itself. It is to construct *principled constraints* that hold the executive accountable while preserving the ability to act. The COVID-era reforms did not construct viable accountability mechanisms. Instead, they eliminated capacity. Effective emergency management may be inherently political, but it must be deeply practical.

The debate over whether governors or legislatures are better equipped for crisis response often devolves into abstract arguments about executive efficiency versus legislative deliberation. By design and tradition, the state executive is structured for decisive action. The principle of unity of command, recognized since at least Roman times,²⁷⁵ enables governors to act with the decisiveness that emergencies demand.²⁷⁶ Unlike deliberative bodies that must convene, debate, and vote, governors can process information and make decisions within hours or even minutes—a capability that mattered during COVID-19’s exponential spread.²⁷⁷ This agility allows them to adapt to ever-changing situations.²⁷⁸ They are “free from the formal decision-making processes and ideological differences” that slow legislatures.²⁷⁹ When Hurricane Katrina approached the Gulf Coast, governors could immediately mobilize National Guard units, order evacuations, and reallocate resources without awaiting legislative authorization.²⁸⁰ This structural advantage is not merely theoretical but grounded in practical necessity.

Governors command vast administrative apparatuses designed for emergency response.²⁸¹ As states’ chief executives, governors “bring together

275. See *supra* note 32 and accompanying text.

276. See ALAN GREENE, EMERGENCY POWERS IN A TIME OF PANDEMIC 15–17 (2020).

277. See Seifter, *supra* note 10, at 530–31.

278. See Deere, *supra* note 21, at 729.

279. GREENE, *supra* note 276, at 17.

280. CONG. RSCH. SERV., RL33095, HURRICANE KATRINA: DOD DISASTER RESPONSE 2, 13 (2006), <https://www.everycrsreport.com/reports/RL33095.html> [<https://perma.cc/V7LX-LAMU>].

281. See GREENE, *supra* note 40, at 430–32.

state agencies, local entities, and external partners to pursue and achieve solutions that promote public health and safety.”²⁸² State emergency management agencies employ professionals trained in incident command systems with decades of institutional knowledge about all hazards.²⁸³ Public statewide health departments provide real-time epidemiological data and evidence-based recommendations.²⁸⁴ These specialized agencies, under unified executive authority, cannot be replicated in legislative committee structures, making the executive branch more capable of coordinating a statewide response informed by expert assessment. Governors can activate emergency plans, marshal the National Guard, reallocate funds, and strengthen collaboration across agencies.²⁸⁵ This centralized authority with on-hand resources provides flexibility to respond to exigent circumstances.

Most governors also possess a key authority to temporarily suspend laws or regulations that restrain emergency responses.²⁸⁶ This allows for an expeditious response to any disaster by effectively removing bureaucratic barriers to life-saving action.²⁸⁷ Forty-two governors can suspend either statutes or regulations during disasters, with thirty-five able to suspend statutory requirements.²⁸⁸

282. See Locke & Dedon, *supra* note 9, at 646.

283. See ROBERTS, *supra* note 72, at 93–95 (discussing shift towards professionalization of emergency management); Locke & Dedon, *supra* note 9, at 653–54 (explaining states’ use of this command structure for opioid epidemic response).

284. NETWORK FOR PUB. HEALTH L. & NAT’L ASS’N OF CNTY. AND CITY HEALTH OFFS., PROPOSED LIMITS ON PUBLIC HEALTH AUTHORITY: DANGEROUS FOR PUBLIC HEALTH 10 (2021), <https://www.networkforphl.org/resources/proposed-limits-on-public-health-authority-dangerous-for-public-health-3> [<https://perma.cc/S9BT-W8RQ>].

285. See Locke & Dedon, *supra* note 9, at 634–35; James G. Hodge Jr. & Evan D. Anderson, *Principles and Practice of Legal Triage During Public Health Emergencies*, 64 N.Y.U. ANN. SURV. AM. L. 249, 276–77 (2008).

286. See Gregory Sunshine et al., *An Assessment of State Laws Providing Gubernatorial Authority to Remove Legal Barriers to Emergency Response*, 17 HEALTH SEC. 156, 158 (2019) (concluding forty-two governors can suspend statutes or regulations; thirty-five can suspend statutes only). This includes powers such as waiving state law requirements for quick procurement of supplies, authorizing alternative medical care sites, or expanding the healthcare workforce. *Id.*; see also Lance Gable, *Allocation of Scarce Medical Resources and Crisis Standards of Care*, in ASSESSING LEGAL RESPONSES TO COVID-19, *supra* note 154, at 177.

287. See Daniel G. Orenstein, *When Law Is Not Law: Setting Aside Legal Provisions During Declared Emergencies*, 41 J.L. MED. & ETHICS 73, 75–76 (2013).

288. See Sunshine et al., *supra* note 286, at 158. Some governors have broad suspension power, while others are limited to suspending statutes or regulations that would hinder the state’s emergency response. See, e.g., 35 PA. CONS. STAT. § 7301(f)(1) (2014) (specifying Pennsylvania governor can “[s]uspend the provisions of any regulatory statute . . . if strict compliance . . . would in any way prevent, hinder or delay necessary action . . .”); see also Robert F. Williams & Max Sevor, *Governors’ Emergency Powers in Light of COVID-19*, 87 ALB. L. REV. 1167, 1180–81 (2024).

The governor's position in the federal system further reinforces executive primacy in emergency management. The federal government relies on gubernatorial requests for federal disaster declarations,²⁸⁹ thereby recognizing the executive's role as the primary interface between state and federal response. This federal-state partnership depends on clear lines of authority and rapid communication—qualities inherent to unified executive leadership but foreign to multi-member legislative bodies.

The accountability and visibility of gubernatorial action provide key advantages during crises. Citizens look to a single leader for information, reassurance, and direction. Governors become focal points of public attention during an emergency by conducting daily briefings and coordinating public messaging. As “the center of the state system,” governors' visibility creates direct political accountability²⁹⁰—governors who mishandle emergencies face immediate public backlash and electoral consequences, as numerous executives discovered during COVID-19.²⁹¹

However, these institutional advantages that make governors effective crisis responders also create risks for democratic governance and accountability. The sometimes sweeping nature of gubernatorial emergency powers could create opportunities for overreach, including arbitrary restrictions, favors for special interests, or pursuit of political agendas rather than public health, safety, and welfare.²⁹² Centralized decision-making can reduce opportunities for public input and deliberative processes, potentially undermining the perceived legitimacy of emergency orders, especially for long-duration crises.²⁹³ Visibility can become a liability when emergency actions become politicized, particularly in states with divided government.²⁹⁴ This can lead to resistance from legislatures or local governments and impede

289. *See supra* note 2.

290. *See* Bowman & McKenzie, *supra* note 132, at 552; Briffault, *supra* note 16, at 1664; KOUSSER & PHILLIPS, *supra* note 25, at 30. Putting governors at the center of state government has been justified as a means of giving clearer signals and lines of accountability for state policies. *See* Seifter, *supra* note 10, at 534–35 (noting “dynamic” and “energetic” governors who attain visible accomplishments); Scott J. LaCombe, *Measuring Institutional Design in U.S. States*, 102 SOC. SCI. Q. 1511, 1521 (2021) (discussing the movement away from traditional checks and balances and toward accountability).

291. Contrast governors' visibility and accountability with legislators who had political cover and could therefore engage in counterproductive political gamesmanship. Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1784–85 (2021); Weiss, *supra* note 194, at 1875.

292. *See* Hodge & Anderson, *supra* note 285, at 270–71; Mok & Posner, *supra* note 160, at 1735–36.

293. *See* Mello & Gostin, *supra* note 220, at 322; *see also* Weiss, *supra* note 194, at 1860–61.

294. Reed, *supra* note 224, at 171–72.

a coherent response.²⁹⁵ Therefore, while gubernatorial emergency powers serve as tools for rapid crisis response, their effectiveness ultimately depends on how judiciously they are wielded and whether appropriate checks and balances remain in place and are activated to prevent abuse.

2. The Structural Limitations of Legislative Emergency Management

Legislatures pose the most effective check on governors during emergencies.²⁹⁶ For this reason and others, the legislative branch plays an indispensable role in a state's emergency response.²⁹⁷ During normal periods, legislatures exercise oversight—a role that becomes even more important in emergencies.²⁹⁸ This institutional division reflects the framers' understanding that different governmental functions require different structural approaches—executive unity for implementation, legislative deliberation for policymaking.²⁹⁹

In contrast to state executives, state legislatures are built for deliberation, not speed.³⁰⁰ Their intentionally cumbersome processes—committee

295. See Hodge & Piatt, *supra* note 22, at 41.

296. See Jim Rossi, *State Executive Lawmaking in Crisis*, 56 DUKE L.J. 237, 240 (2006) (“The exercise of executive emergency powers is most effectively policed by the state legislature and not courts.”); Deere, *supra* note 21, at 730; Greenberg & Sullivan, *supra* note 217. Further discussion of the nuances of separations of powers in state emergency response appears *infra*.

297. See Daleo, *supra* note 103, at 926 (“Legislatures are also ‘essential’ to the maintenance of a system of checks and balances during, and immediately following, periods of disaster.”); *id.* at 920–21 (noting legislatures’ “critical role in repopulating top government posts (including the governorship), budgeting, lawmaking, and ‘checking’ the executive branch in the delicate system of checks and balances”).

298. *Separation of Powers: Legislative Oversight*, NAT’L CONF. OF ST. LEGISLATURES (Apr. 10, 2025), <https://www.ncsl.org/about-state-legislatures/separation-of-powers-legislative-over-sight> [<https://perma.cc/AQ58-NJYP>].

299. See MATHEWS, *supra* note 35, at 6–7; Marshfield, *supra* note 27, at 551.

300. The process is designed to allow considered thought and development of sound policy and sometimes take considerable time to build consensus among large numbers of politically divergent representatives. See Seifter, *supra* note 291, at 1757–58 (recounting the arguments in favor of legislatures as the deliberative institution); Tom Ginsburg & Mila Versteeg, *The Bound Executive: Emergency Powers During the Pandemic*, 19 INT’L J. CONST. L. 1498, 1534 (2021) (noting that “[l]egislatures provide distinct advantages as arenas for policy debate, and for being the ultimate loci of democratic legitimacy in a representative democracy,” and that consensus can take days, weeks, or months in bodies with wide political divergence); Jan Petrov, *The COVID-19 Emergency in the Age of Executive Aggrandizement: What Role for Legislative and Judicial Checks?*, 8 THEORY & PRAC. LEGIS. 71, 73, 79 (2020) (arguing that legislatures possess “unique institutional features” as a “deliberative forum” for critiquing emergency policies and providing feedback to the executive).

hearings, floor debates, amendment procedures, multiple readings—serve invaluable functions for routine lawmaking but become liabilities in a crisis.³⁰¹ Consider the basic mathematics of legislative action. Forty states maintain part-time legislatures,³⁰² and their citizen-legislators cannot abandon their primary employment for continuous emergency management—assuming that the legislature could lawfully convene either through gubernatorial or legislative-sponsored calls for session.³⁰³ Even full-time legislatures face procedures and calendars that make rapid response impossible,³⁰⁴ as a typical bill could require weeks to navigate the legislative process. During “ordinary times, legislatures meet infrequently,”³⁰⁵ and there is little support for their increased presence during emergencies.

The recently enacted Kentucky law, imposing a thirty-day limit on gubernatorial emergency declarations without legislative extension,³⁰⁶

301. See NETWORK FOR PUB. HEALTH L. & NAT’L ASS’N OF CNTY. AND CITY HEALTH OFFS., *supra* note 284, at 10.

302. *Full- and Part-Time Legislatures*, NAT’L CONF. OF ST. LEGISLATURES (July 28, 2021), <https://www.ncsl.org/about-state-legislatures/full-and-part-time-legislatures> [<https://perma.cc/38RX-9S3J>] (categorizing states based on whether they operate full-time or part-time legislatures); see also Devlin, *supra* note 27, at 1228–29.

303. See *supra* note 236 and accompanying text; Greenberg & Sullivan, *supra* note 217 (noting that “[p]rior to the pandemic, in 14 states only the governor could call a special session”).

304. Even “full-time” legislatures meet for surprisingly few session days each year. See *Comparison of State Legislative Election and Session Dates, 2020*, BALLOTPEdia, https://ballotpedia.org/Comparison_of_state_legislative_election_and_session_dates_2020 [<https://perma.cc/GAA4-GCP6>]; *Legislative Session Length*, NAT’L CONF. OF ST. LEGISLATURES (July 1, 2021), <https://www.ncsl.org/resources/details/legislative-session-length> [<https://perma.cc/VP8R-64XL>]; *2025-2026 House Session Days*, PA. HOUSE OF REPS., <https://www.palegis.us/house/session> [<https://perma.cc/DA4C-6PPK>] (only 79 session days for 2025); *2024 Wisconsin Legislative Session*, BALLOTPEdia, https://ballotpedia.org/2024_Wisconsin_legislative_session [<https://perma.cc/79G2-59SV>] (2024 session lasted just two months); *Session Schedules*, STATESCAPE, <https://www.statescape.com/resources/legislative/session-schedules> [<https://perma.cc/BV5F-YKJC>] (recesses from mid-June to January); *The CA Legislative Session Explained*, COURAGE CAL. INST. (Feb. 17, 2022), <https://couragecaliforniainstitute.org/ca-legislative-session> [<https://perma.cc/V5UP-V6EL>] (multi-month interim recess at end of each year). This creates a “readiness gap”—the period when the legislature cannot conduct official business, such as voting on a governor’s emergency declaration. See Shoshana Weissmann et al., *Checks, Balances, and Emergencies: Tensions Between Emergency Management Acts and Constitutional Governance*, REGUL. TRANSPARENCY PROJECT OF THE FEDERALIST SOC’Y, Nov. 22, 2021, at 1, 2, <https://www.rstreet.org/research/checks-balances-and-emergencies-tensions-between-emergency-management-acts-and-constitutional-governance> [<https://perma.cc/P33L-23SM>] (observing legislative process as too slow for emergencies).

305. Weiss, *supra* note 194, at 1888; see also Rossi, *supra* note 296, at 246 (“Pragmatically, during ordinary times state legislatures meet infrequently and often for only a few months each year. Without a strong executive, a state may not see itself as capable of addressing an interstate crisis at all.”).

306. KY. REV. STAT. ANN. § 39A.090(2)(a) (West 2026).

exemplifies this mismatch between institutional capacity and emergency demands. A tornado, flood, or wildfire does not operate on a legislative calendar. The initial response phase can easily exceed thirty days, and a legislature's inability or unwillingness—whether for practical or political reasons—to convene and grant an extension could paralyze recovery efforts.³⁰⁷ A lapsed disaster declaration would cause the governor to lose flexibility and agency to assist citizens. Federal disaster assistance, with its preference for active state emergency declarations,³⁰⁸ could be jeopardized. Mutual aid agreements might lapse. Coordinating authority at the state's emergency operations center could collapse. Such outcomes would undermine effective emergency governance and likely lead to unnecessary losses. This is not an enhancement of democracy; it is an invitation to dysfunction.

Proponents of these legislative maneuvers advance a facially appealing counterargument: prolonged, society-altering emergency measures, like the restrictions and mandates of the COVID-19 era, are categorically different from traditional short-term disaster responses.³⁰⁹ Such measures, they contend, must have explicit buy-in of the legislature—the people's most direct representatives—to be democratically legitimate.³¹⁰ From this perspective, requiring legislative approval is not about impeding crisis response but about ensuring that policies with wide social and economic consequences receive the democratic sanction that only a legislature can provide.³¹¹

While this argument holds theoretical force, it collapses upon contact with practical reality. The pandemic-era reforms do not create structures for genuine deliberation. Instead, they install all-or-nothing political tripwires—such as arbitrary thirty-day cliffs or simple-majority termination

307. See Blackman, *supra* note 21, at 758–59 (discussing the possibility of a significant disaster inhibiting a legislature's convening and voting to extend a governor's initial emergency proclamation).

308. See *supra* note 2 and accompanying text.

309. Braden Boucek et al., *Checks, Balances, and Emergencies: Tensions Between Emergency Management Acts and Constitutional Governance*, REGUL. TRANSPARENCY PROJECT OF THE FEDERALIST SOC'Y, Nov. 17, 2021, at 1, 5–6; Luke Wake, *Taking Non-Delegation Doctrine Seriously*, 15 N.Y.U. J.L. & LIBERTY 751, 753–54 (2022); *Legislative Actions in Oversight of Executive Emergency Powers*, NAT'L CONF. OF ST. LEGISLATURES (Feb. 28, 2022), <https://www.ncsl.org/about-state-legislatures/legislative-actions-in-oversight-of-executive-emergency-powers?maptype=tile> (“States of emergency were largely envisioned as events that easily rallied consensus and didn’t last long.”).

310. See Boucek et al., *supra* note 309, at 6; Weiss, *supra* note 194, at 1892.

311. Weiss, *supra* note 194, at 1882–83, 1892; Ginsburg & Versteeg, *supra* note 300, at 1511–13.

resolutions—that incentivize brinkmanship over collaboration. They do not ask legislators to debate and refine the substance of emergency responses; they ask legislators to approve or kill the entire legal framework. This transforms the legislature into a chokepoint rather than a deliberative partner, capable of blocking but not refining executive policy choices. The result is not enhanced democratic legitimacy, but the high probability of manufactured paralysis and governance by inaction. Legislatures in some instances traded what they viewed as gubernatorial overreach for automatic kill switches that never require legislatures to take deliberative action in response to executive action.

Beyond logistical constraints of in-person meetings,³¹² legislatures lack the specialized expertise and real-time information necessary for emergency management. While governors receive continuous briefings from emergency management professionals, public health experts, and federal liaisons, legislators must rely on intermittent committee hearings and constituent feedback.³¹³ The technical complexity of modern emergencies—from pandemic modeling to supply chain management—requires specialized knowledge that generalist legislators rarely possess. Centralized executive emergency power is a functional necessity, not an accident. The legislative backlash ignores this reality. As the next section demonstrates, mechanisms like the legislative veto do not restore constitutional balance—they subvert it by violating the separation of powers.

B. A Constitutional Overcorrection Rooted in Political Disagreement

1. The Myth of Unchecked Gubernatorial Power

The legislative push to strip governors of emergency powers is often framed as a necessary corrective to executive overreach and a restoration of

312. During the COVID-19 pandemic, several legislatures struggled even to convene safely, with members refusing to meet in person while lacking infrastructure for remote participation. *See* Briffault, *supra* note 16, at 1664. Some legislatures that did convene became “super-spreader” events, forcing quarantines that further delayed action. *See, e.g.*, Emily Wagster Pettus, *Mississippi Seeing Big Virus Outbreak in State Legislature*, ASSOCIATED PRESS (July 10, 2020), <https://apnews.com/article/11198fc30f1cc29c29c27f62f6a23644> [<https://perma.cc/TX5M-DRRP>]; Ellen Barry, *As State Legislatures Aim to Convene Amid Covid, One Tries a Drive-In*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2021/01/07/us/new-hampshire-drive-in-legislature.html>. These limitations on physical meetings apply equally to other emergencies. Legislatures may not convene during natural disasters that damage infrastructure or cyberattacks that compromise communication systems.

313. *See infra* note 336 and accompanying text.

the separation of powers. However, this narrative mischaracterizes how checks and balances actually functioned during the pandemic and ignores the constitutional problems created by the reforms themselves.

Critics frequently decry the “unchecked” power of governors during the COVID-19 pandemic,³¹⁴ yet the empirical record demonstrates otherwise. Litigants filed over 1,000 lawsuits challenging gubernatorial emergency orders, with courts scrutinizing everything from business closures to gathering limits to mask mandates.³¹⁵ Far from deferring blindly, while governors’ foundational emergency powers escaped courtrooms mostly unscathed, judges did strike down executive orders deemed arbitrary, overbroad, or violative of constitutional rights.³¹⁶ Wisconsin’s Supreme Court invalidated the health secretary’s stay-at-home order.³¹⁷ A federal court in Pennsylvania struck down business closure regimes.³¹⁸ Michigan’s Supreme Court went furthest and invalidated an entire statutory scheme dating to 1945.³¹⁹ Without examining the correctness of these decisions, they at least demonstrate the multitude of courts that did in fact check gubernatorial emergency power.

Legislative opposition proved equally robust, even if it was misguided or produced seemingly unconstitutional outcomes. Lawmakers introduced over 750 bills to curtail emergency powers, with many becoming law over gubernatorial vetoes.³²⁰ That some legislatures failed to override governors’ actions does not signify a failure of the constitutional system; it signifies a failure to build sufficient political coalitions. When legislatures mustered the votes—as in Kentucky, Kansas, and Ohio—they successfully imposed new restrictions. The extensive legislative pushback validated that the system of checks and balances worked as intended; it simply did not always produce the policy outcomes that some legislators desired.

314. See Ricardo N. Cordova, *Lockdowns and Lost Liberties: Nevada’s Experiment in One-Man Rule*, 49 N. KY. L. REV. 41, 68 (2022) (arguing emergency declaration lasted indefinitely and governor could have skirted legislative termination of the emergency); Andrew D. Cotlar, *Governor Wolf’s Emergency COVID-19 Declarations: Illegal and Unconstitutional?*, 30 WIDENER COMMONWEALTH L. REV. 201, 239, 244 (2020) (arguing courts like the Pennsylvania Supreme Court failed to constrain the governor’s emergency authority); Wake, *supra* note 309, at 780–81 (comparing governors to King Louis XIV because of the appearance of wielding “all police powers of the state”).

315. See Mello et al., *supra* note 196, at 759–60.

316. See *id.* at 764–66.

317. See *supra* note 202 and accompanying text.

318. See *supra* note 203 and accompanying text.

319. See *supra* note 207 and accompanying text.

320. Davis et al., *supra* note 4, at 20.

What critics actually objected to was not the absence of checks but their failure to achieve desired policy outcomes quickly enough. The subsequent changes to law often appear less like principled institutional adjustments and more like political retaliation. Having lost policy battles during the pandemic, some legislatures opted to change the rules prospectively by stripping executives of powers used effectively for generations. But this did not necessarily represent the popular will as reflected in the ultimate check on governors: the ballot box.

Elections are a standard, built-in check in the state constitutional system. State constitutions rely heavily on elections, referenda, and recall mechanisms to ensure popular sovereignty and accountability, particularly over the executive branch.³²¹ As a highly visible statewide official, a governor who mismanages an emergency faces direct electoral consequences or limits on their ability to remain in office. But with very few exceptions, governors who faced the electorate during the COVID-19 pandemic won re-election or triumphed over recall efforts.³²² Constitutional term limits retired eight

321. See Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337, 1342–43 (discussing state constitutions as enabling statewide majorities to choose numerous state executives, adopt referenda and initiatives, and pass upon recall or constitutional amendment measures).

322. In gubernatorial elections from 2021 to 2023, the handling of the pandemic was not a singular, top-line issue in exit polling; rather, voter concerns prioritized the economy, inflation, and cultural flashpoints such as abortion rights and gun control. See, e.g., *What Early Exit Polls Reveal About Virginia Gov. Race, and How It Reflects on Democrats*, PBS NEWS (Nov. 2, 2021), <https://www.pbs.org/newshour/show/what-early-exit-polls-reveal-about-virginia-gov-race-and-how-it-reflects-on-democrats> [<https://perma.cc/V97F-MYPH>] (reporting that COVID-19 was top priority for only thirteen percent of Virginia voters); Karlyn Bowman, *The 2022 Exit Polls: A-Z*, FORBES, <https://www.forbes.com/sites/bowmanmarsico/2022/11/09/the-2022-exit-polls-a-z> (Nov. 10, 2022) [<https://perma.cc/HP6D-9P4B>] (reporting that COVID polled at two percent nationally as a top issue). When COVID-19 policies did determine outcomes, it was typically because mitigation measures had translated into specific local grievances, such as prolonged school closures and mandates in Virginia in 2021 or direct economic disruption caused by strict shutdowns in Nevada in 2022. See Matt Barnum, *Did School Closures Help Youngkin Win Virginia? Yes, a Bit, Analysis Suggests*, CHALKBEAT (Dec. 8, 2021), <https://www.chalkbeat.org/2021/12/8/22814789/youngkin-virginia-election-school-closures> [<https://perma.cc/CFF5-HEKM>]; Jacob Solis et al., *Power, Progress and a Pandemic: Steve Sisolak's Legacy as Nevada Governor*, NEV. INDEP. (Jan. 1, 2023), <https://thenevadaindependent.com/article/power-progress-and-a-pandemic-steve-sisolaks-legacy-as-nevada-governor> [<https://perma.cc/KH96-L3F6>]. Incumbents generally benefited from high approval ratings and partisan base loyalty. Louis Jacobson, *Governors: Escaping Public's Wrath Even as So Many Others Draw Ire*, CTR. FOR POL. (June 16, 2022), <https://centerforpolitics.org/crystalball/governors-escaping-publics-wrath-even-as-so-many-others-falter> [<https://perma.cc/Q3HV-9CHG>]. Recalls, such as the 2021 effort in California

governors from office in 2022 alone, which led to additional opportunity for voters to lodge their support for or opposition to pandemic policies.³²³

Beyond candidate elections, the ballot box provided voters the opportunity to consider measures constraining state executives' emergency powers generally or in specific contexts.³²⁴ Between 2020 and 2023, the electorate in four states directly approved ballot measures limiting gubernatorial emergency powers or protecting religious services during emergencies. Every measure on the ballot passed, with approval ranging from 52% to 79%.³²⁵ These results demonstrate that the state constitutional toolkit already possesses effective mechanisms for popular correction. When voters desired constraints, they enacted them. Regardless of the wisdom or propriety of these measures, their passage proves that the electorate remains capable of

targeting Governor Gavin Newsom, failed to meet the thresholds required to remove an executive mid-term. See Scott Shafer et al., *Gov. Newsom Keeps His Seat as a Majority of California Voters Reject the Recall*, NPR, <https://www.npr.org/2021/09/14/1035848090/california-recall-governor-newsom-results-elder> (Sept. 15, 2021) [<https://perma.cc/9Z2Q-D6XD>].

323. *Gubernatorial Elections, 2022*, BALLOTPEDIA, https://ballotpedia.org/Gubernatorial_elections_2022 [<https://perma.cc/H5MC-ABC8>].

324. State constitutions are characterized by various forms of direct popular governance, including the initiative and referendum. See Bulman-Pozen & Seifter, *supra* note 321, at 1341–42 (observing that direct democracy tools were often adopted in response to dissatisfaction with legislative performance and were conceived to elevate the people above their legislative representatives); Marshfield, *supra* note 27, at 564; WILLIAMS & FRIEDMAN, *supra* note 27, at 315. State constitutions are fundamentally committed to popular sovereignty and political equality, and they rely on these direct mechanisms as core accountability devices. See Bulman-Pozen & Seifter, *supra* note 82, at 926–27 (observing the initiative and referendum to reflect the “structural commitment to popular sovereignty and political equality . . . adopted for the very purpose of constraining legislative power and enabling the people to supersede government officials”); see also Jonathan L. Marshfield, *America’s Misunderstood Constitutional Rights*, 170 U. PA. L. REV. 853, 884 (2022) (noting early state bills of rights as “constitutionaliz[ing] various guarantees that empower the people to directly monitor, control, and even re-create government, as necessary”).

325. The two constitutional amendments in Pennsylvania that limited gubernatorial emergency powers passed by approximately 52% each. See *supra* notes 237–245 and accompanying text. Texas voters passed a proposition by a majority 62% to amend the state’s constitution and prohibit the state or any political subdivision from enacting laws, rules, orders, or proclamations limiting religious services or organizations. Andrew Schneider & Sascha Cordner, *Voters Pass a Constitutional Amendment Banning Suspension of Religious Services*, HOUS. PUB. MEDIA (Nov. 3, 2021), <https://www.houstonpublicmedia.org/articles/news/politics/2021/11/03/412148/voters-approve-reject-constitutional-amendment-banning-suspension-of-religious-services> [<https://perma.cc/QVF2-7AKM>]. Louisiana voters passed a similar amendment with a 79% majority that declared freedom to worship a fundamental right subject to strict scrutiny. Meghan Friedmann, *Louisiana Voters Have Approved 4 Constitutional Amendments. Here’s What That Means*, NOLA.COM (Oct. 15, 2023), https://www.nola.com/news/louisiana-voters-approve-4-constitutional-amendments/article_b2619ac2-6b79-11ee-bc6a-b341a95ea302.html [<https://perma.cc/2SGM-W8AS>].

serving as a check on governors without the need for legislatures to permanently dismantle executive capacity through overreach. In light of these functioning democratic and judicial checks, the subsequent legislative attempts to dismantle executive authority appear not merely unnecessary but, as the next section demonstrates, constitutionally infirm.

2. Separation of Powers Violations

The legislative-induced shifts of emergency powers from governors to legislatures raise separation of powers concerns. But not every form of legislative involvement in emergency response is constitutionally problematic. Legislatures appropriately appropriate funds, conduct oversight hearings, require reports, and modify emergency statutes through ordinary legislation. The constitutional problem is narrower: it arises when legislatures empower committees or supermajorities of legislators to nullify executive action without observing the constitutional process for lawmaking. The Ohio mechanism is paradigmatic. When that state's legislature created a standing committee with power to rescind executive emergency orders,³²⁶ it crossed the line from legitimate oversight into direct administration.³²⁷ This mechanism violates separation of powers by allowing legislators to post-hoc review executive actions without passing new legislation—effectively exercising a legislative veto.³²⁸

326. S. 22, 134th Gen. Assemb., Reg. Sess. (Ohio 2021).

327. See Hodge & Piatt, *supra* note 22, at 47 (critiquing Ohio Senate Bill 22 as crossing a “constitutional boundary” when the legislature created a standing committee to oversee gubernatorial emergency measures).

328. See DEREK CLINGER & MIRIAM SEIFTER, ST. DEMOCRACY RSCH. INITIATIVE, UNIV. OF WIS. L. SCH., UNPACKING STATE LEGISLATIVE VETOES 25–38 (2024) (reporting widespread use of state legislative vetoes and their persistence despite state courts nearly universally striking them down when challenged). The U.S. Supreme Court deemed legislative vetoes to be unconstitutional in *INS v. Chadha*, 462 U.S. 919, 954–55 (1983). While critics of the U.S. Supreme Court's decision in *Chadha* argue that its strict formalism should not bind state governments with distinct constitutional traditions, see, for example, Miriam Seifter, *State Legislative Vetoes and State Constitutionalism*, 99 N.Y.U. L. REV. 2017, 2017–2024 (2024), the core defect remains: these mechanisms allow a single chamber or committee to alter the legal landscape without the constitutionally mandated process of bicameralism and presentment.

Most recently, the Wisconsin Supreme Court expressly adopted *Chadha*'s reasoning to strike down a legislative committee's power to object to or suspend administrative rules, overruling its prior functionalist precedents. See *Evers v. Marklein*, 22 N.W.3d 789, 792, 800 (Wis. 2025) (holding that legislative committee actions altering legal rights without bicameralism and presentment are facially unconstitutional), *overruling* *Martinez v. Dep't of Indus., Lab. & Hum. Rels.*, 478 N.W.2d 582 (Wis. 1992) and *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 946 N.W.2d 35

The core constitutional flaw, which state courts should recognize under their states' own separation of powers doctrines, is that these mechanisms allow the legislature—sometimes just a subpart—to negate executive action and create law without the constitutionally mandated process of bicameralism and presentment. While state constitutions allocate legislative power differently than the federal model—sometimes sharing it directly with the people or permitting alternative enactment procedures—they predominantly maintain structural requirements to ensure democratic accountability and prevent legislative absolutism.³²⁹

In the most recent expressions of the legislative veto, multiple states now permit legislatures to terminate emergency declarations by simple resolution without presentment to the governor.³³⁰ Pennsylvania's legislature attempted this maneuver before resorting to constitutional amendment after the state's high court rejected the veto-bypass as unconstitutional.³³¹ From a functionalist standpoint, such arrangements create institutional paralysis during precisely those moments when decisive action is most urgent. They transform legislators into super-administrators who can micromanage emergency response—a function the constitution reserves to the executive. State courts adjudicating these conflicts have often employed functionalist reasoning to uphold broad gubernatorial authority, precisely because of the executive's superior institutional capacity to manage a crisis. Courts have

(Wis. 2020). While the legislative veto offers a convenient functional check on executive overreach, the *Evers* court correctly recognized that convenience cannot override constitutional architecture. By restoring the requirement of bicameralism and presentment, the court ensures that the check on executive power effectively represents the will of the entire legislative body, rather than a single chamber or committee, and preserves the governor's constitutional role in the lawmaking process. The *Evers* court identified the democratic deficit inherent in the legislative veto, noting that the mechanism allowed as few as four legislators (barely 3% of the body) to block public policy indefinitely. *Id.* at 793.

329. State constitutions distinctively allocate power, often prioritizing popular sovereignty and accountability over the strict Madisonian checking function central to the federal Constitution. See Marshfield, *supra* note 27, at 545–46, 551 (arguing that state separation of powers is designed primarily to “enhance the public’s ability to monitor government” rather than just “pit ambition against ambition”). This distinct tradition includes mechanisms like the initiative, where the people or the legislature can sometimes enact laws without gubernatorial presentment. However, these exceptions are textually specific and generally intended to empower the *electorate*, not to allow a legislative sub-part to unilaterally administer the law. The legislative vetoes criticized here typically lack the popular accountability features that justify such departures from standard lawmaking procedures.

330. Davis et al., *supra* note 4, at 24. Many states authorize legislative termination of emergency declarations via concurrent or joint resolution, but veto-bypass depends on whether state constitutions require gubernatorial presentment. See Williams & Sevor, *supra* note 288, at 1183.

331. See *supra* notes 237–245 and accompanying text.

recognized that legislatures, which often meet infrequently, are functionally ill-equipped for the rapid and flexible response that emergencies demand.³³² Although several legislatures have successfully engineered these bypass mechanisms, courts and policymakers should scrutinize the tactics used to secure them, particularly the use of veto overrides and the manipulation of constitutional amendment processes.

The functionalist perspective also reveals the problem with such legislative checks is not merely procedural; these mechanisms risk undermining the effectiveness that emergency powers are designed to provide. The primary justification for vesting broad emergency authority in the executive is the need for speed and decisiveness in crisis, as only the executive can act with the requisite energy and dispatch.³³³ One state court recognized this in observing that “it is reasonable for the legislature to conclude that the executive branch of government would be far better suited to respond to a serious disaster with the speed and flexibility needed to protect the public health and welfare.”³³⁴ Governors command a unified administrative apparatus, act with dispatch, maintain continuous operational capacity, and possess direct accountability to the electorate for emergency outcomes.³³⁵ Legislative committees, by contrast, suffer from collective action problems, meet intermittently, lack unified command structure, and diffuse accountability among multiple members.³³⁶ This functional paralysis illustrates the core defect of structural disablements. Unlike principled constraints that would require an executive to publicly justify their actions or seek renewal through standard lawmaking processes, mechanisms like the

332. See Briffault, *supra* note 16, at 1649–51 (discussing how state courts frequently employed functionalist reasoning emphasizing the executive’s superior emergency response capacity).

333. See *supra* Section III.A.1. But see Ginsburg & Versteeg, *supra* note 300, at 1498–99 (critiquing the view that only executives have capacity for crisis response).

334. *Casey v. Lamont*, 258 A.3d 647, 667 (Conn. 2021).

335. See, e.g., THE FEDERALIST NO. 70, *supra* note 32 (arguing “[e]nergy in the Executive is a leading character in the definition of good government” and is essential for responding to emergencies); Trickey, *supra* note 97, at 290 (observing the executive as “inherently better able than the legislature to provide this [emergency] response,” which leads to “the center of governmental response . . . usually [in] the governor’s office”).

336. See generally KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963) (suggesting committee outcomes are inherently unstable or arbitrary due to manipulation rather than reflection of true collective will, due to the problem of preference aggregation); R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION (1990) (explaining how committees can be used to avoid blame and limit legislative accountability); Joshua D. Clinton et al., *Influencing the Bureaucracy: The Irony of Congressional Oversight*, 58 AM. J. POL. SCI. 387, 399 (2014) (noting that the legislative committee system does not translate into the ability or willingness to influence policy overall).

legislative veto attempt to sever the executive's operational capacity in real-time. By granting a legislative committee or a single chamber the power to "switch off" an emergency response without the consensus required for passing a law, these reforms do not merely check the executive; they disable the state's constitutional machinery for crisis management.

The nondelegation doctrine provides another lens.³³⁷ While the Michigan Supreme Court's invalidation of the Emergency Powers of the Governor Act represents an outlier position,³³⁸ most emergency statutes contain sufficient standards—requiring actual emergencies, limiting authorized actions to those necessary for response, imposing temporal limits—to satisfy nondelegation principles. Functionalist analysis suggests that emergency delegations should receive more deferential review given the executive's superior institutional capacity to respond to rapidly evolving threats.³³⁹ Courts in Kentucky and Connecticut, for example, have rejected nondelegation challenges by applying flexible, functionalist analysis. They found that broad statutory goals, such as protecting public health and safety, provide a sufficient "intelligible principle" to guide gubernatorial discretion.³⁴⁰ This judicial deference is grounded in the assessment that the executive branch is simply better positioned to handle the fast-moving and unpredictable nature of a disaster than a legislature that is not continuously in session.³⁴¹ Ironically, some legislative reforms may themselves violate nondelegation by improperly delegating legislative power to small committees that can overturn executive orders without full legislative action.³⁴²

Beyond the legislative veto and nondelegation, these power shifts raise deeper questions of encroachment on gubernatorial emergency powers. State constitutions vest "supreme" or some other version of "executive power" in

337. The nondelegation doctrine—prohibiting excessive legislative-to-executive policymaking delegation—constrains administrative discretion more significantly in some states than federally. *See* Wiley, *supra* note 149, at 101–02.

338. *See supra* note 207 and accompanying text.

339. Rigid nondelegation ignores modern agencies' cross-branch functions. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492–93 (1987). Emergencies make functional overlap essential: governors must execute law, promulgate regulations, and adjudicate compliance while maintaining unified command. *See* Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1614–15 (2009) (analyzing functional necessity of broad executive powers during crises).

340. *See* Briffault, *supra* note 16, at 1664–65 (discussing cases where courts upheld broad delegations of authority under the "intelligible principle" standard).

341. *Id.* at 1650–51 (observing state courts' reasoning that legislative session limits make legislative emergency leadership "impractical" or not "well positioned to mount a rapid response").

342. *See* Hodge & Piatt, *supra* note 22, at 46–47.

the governor.³⁴³ While many specific emergency powers are expressed in statute, functionalist analysis focuses less on defining “core” executive power and more on which branch is institutionally competent to act effectively in a crisis.³⁴⁴ The conventional wisdom, frequently endorsed by state courts, is that “[o]nly the executive branch has the information, decisiveness, and speed to respond to crises.”³⁴⁵ Emergency response quintessentially requires attributes unique to the executive: unity of command, continuous availability, rapid decision-making, and direct accountability.³⁴⁶ As one state constitutional framework demonstrates, separation of powers violations occur when actions “defeat or materially impair the inherent functions of another branch.”³⁴⁷ Legislative micromanagement of emergency response does precisely that—it fragments decision-making authority during crises that demand unified command, delays response through procedural requirements, and diffuses accountability that citizens expect from their chief executive.³⁴⁸

By enacting statutes that paralyze the governor’s ability to respond (e.g., while waiting for a part-time legislature to convene), the legislature is not merely channeling executive power but functionally disabling the only branch capable of a timely and coordinated response.³⁴⁹ From this vantage point, a governor who cannot act decisively in emergencies represents a failure of the state’s functional capacity to protect its citizens. This violates what courts have identified as the key separation of powers inquiry: whether the arrangement “prevents the Executive Branch from accomplishing its constitutionally assigned functions.”³⁵⁰ The institutional consequences

343. Fairlie, *supra* note 82, at 370; *see also* Deere, *supra* note 21, at 726; Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1169–75 (2019) (arguing that “executive power” historically referred to the authority to execute laws, not a reservoir of inherent prerogative). While the existence of inherent executive authority may be debated, the functional incapacity of the legislature to *execute* its own laws during a crisis remains a central concern. *See* Briffault, *supra* note 16, at 1650–51.

344. *See* Strauss, *supra* note 339, at 522–23 (suggesting courts observe the impact of “challenged arrangements on the balance of power” rather than strict boundaries).

345. Ginsburg & Versteeg, *supra* note 300, at 1498.

346. THE FEDERALIST NO. 70, *supra* note 32, at 423–24 (favoring a unified executive for its “decision, activity, secrecy, and dispatch”); *see also* Locke & Dedon, *supra* note 9, at 646 (“[G]overnors are positioned to bring together state agencies, local entities, and external partners to pursue and achieve solutions that promote public health and safety.”).

347. *Marine Forests Soc’y v. Cal. Coastal Comm’n*, 113 P.3d 1062, 1067 (Cal. 2005).

348. *See* Wiley, *supra* note 149, at 108–10 (analyzing accountability concerns in emergency governance).

349. *See* Briffault, *supra* note 16, at 1664 (noting the state executive’s “pronounced” “advantage” “to respond quickly and flexibly in a way that legislatures could not”).

350. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977).

extend beyond formal powers—a governor stripped of emergency authority cannot coordinate multi-agency response, cannot adapt to rapidly changing circumstances, and cannot meet citizens’ expectations.³⁵¹ This represents a legislative encroachment on the executive sphere that state courts should invalidate as violative of the foundational structure of state government.

A central question is not only whether these legislative mechanisms cross formal boundaries, but also whether they preserve each branch’s ability to serve its governmental role. Legislative oversight of emergency powers can enhance democratic accountability without undermining effective response. For instance, requirements that governors quickly report emergencies and necessary responses to legislatures coupled with automatic legislative sessions preserve both executive flexibility in crisis and ultimate legislative control over extended emergencies.³⁵² Courts should consider whether challenged provisions maintain this balance—enabling governors to fulfill their core function of protecting public safety while ensuring democratic checks during prolonged emergencies.³⁵³ The constitutional violation occurs when legislative mechanisms so constrain executive action that governors cannot marshal the institutional advantages that make them uniquely suited for emergency response.³⁵⁴

Regardless of the approach, both formalist and functionalist approaches converge on the same conclusion regarding the specific mechanisms at issue here: these structural disablements violate core separation of powers principles. From a formalist perspective, legislative vetoes, committee

351. See KOUSSER & PHILLIPS, *supra* note 25, at 2 (discussing governors’ informal powers and responsibilities).

352. See Antonios Kouroutakis & Sofia Ranchordás, *Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies*, 25 MINN. J. INT’L L. 29, 45–48 (2016) (analyzing temporal limitations as separation of powers safeguards); Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1984–88 (2020) (proposing sunset provisions to address delegation concerns).

353. Where a state legislature has used the constitutional amendment process to transfer emergency powers from a governor to itself (as in Pennsylvania), the court’s role will be more complex. See *supra* Section II.B.2. The availability of judicial review for constitutional amendments is also highly dependent on the state’s constitutional and statutory framework. In states without a citizen initiative process, like Kansas, the legislature is solely responsible for drafting and approving the ballot language. See Richard E. Levy, *Dubious Propositions: Misleading Ballot Language and Constitutional Amendments in Kansas*, 71 U. KAN. L. REV. 643, 651 (2023). This creates a remedial challenge, as courts may lack the clear statutory authority to modify misleading legislative language that they possess when reviewing citizen initiatives, leaving them with the far more drastic options of either enjoining the election or invalidating a popular vote. See *id.* at 706–07. This institutional constraint may make courts more hesitant to intervene, even when a proposal raises significant separation of powers concerns. See *id.* (discussing the lack of a clear remedy for misleading legislative proposals in Kansas).

354. See *supra* Section III.A.1.

overrides, and termination resolutions without presentment violate clear textual requirements of state constitutions that mirror the bicameralism and presentment mandate.³⁵⁵ From a functionalist perspective, these mechanisms impair the executive's ability to protect public safety by fracturing unified command, inserting delay, and diffusing accountability during crises.³⁵⁶ Viewing separation of powers through either lens reveals that legislatures cannot transform themselves into super-executives during emergencies, wielding administrative power while evading constitutional procedures and electoral accountability. State courts should recognize that protecting separation of powers serves not abstract theory but the practical imperative of maintaining a government capable of protecting its citizens when they need it most.³⁵⁷

Adopting an alternative, state-constitutional-based approach to assessing separation of powers violations, such as the "accountability doctrine," would yield a similar result.³⁵⁸ Under this view, unlike the Madisonian federal model that emphasizes internal checks to temper popular majorities, state constitutions deploy separation of powers primarily to enhance the public's ability to monitor government "from the outside."³⁵⁹ Power is organized and separated into discrete departments so that "the public is better equipped to monitor government because responsibility is more isolated."³⁶⁰ Viewing government power as organized in this manner encourages the public to track malfeasance and respond effectively.³⁶¹ In examining the COVID-era power shifts through this lens, we see the governor as a highly visible, statewide elected official who is directly and politically accountable for the crisis response.³⁶² Post-COVID legislative restrictions often transfer authority to a legislative branch that may be less majoritarian (e.g., due to

355. See *State ex rel. Wis. Legislature v. Palm*, 942 N.W.2d 900, 937–40 (Wis. 2020) (Kelly, J., concurring) (applying formalist analysis to invalidate agency emergency orders); see also CLINGER & SEIFTER, *supra* note 328, at 25–29 (documenting state supreme courts' consistent invalidation of legislative vetoes on formalist and other grounds).

356. See *supra* notes 329 & 323 and accompanying text.

357. *Bond v. United States*, 564 U.S. 211, 222 (2011) ("The structural principles secured by the separation of powers protect the individual as well.").

358. See Marshfield, *supra* note 27, at 583, 626.

359. *Id.* at 551. While the federal separation of powers analysis often debates as described earlier in this subsection between a formalist approach (classifying functions rigidly) and a functionalist approach (protecting a dynamic balance of power), state separation of powers arguably should prioritize giving effect to detailed constitutional text and ensuring accountability. *Id.* at 627–28. From this perspective, using federal precedent is often "inapposite because of significant structural differences between state and federal governments." *Id.* at 627.

360. *Id.* at 551.

361. *Id.*

362. *Id.* at 629 n.458; see also *supra* notes 290–92 and accompanying text.

gerrymandering)³⁶³ or institutionally less capable of rapid, unified command during a crisis.³⁶⁴ This transfer risks substituting a highly accountable executive with a less accountable or more diffuse legislative process. Under this doctrine, such a transfer would be deemed violative of the separation of powers not by crossing formal lines or by impeding core functional duties, but by defeating the state constitution's core structural goal: ensuring that the public can clearly identify and hold responsible the branch of government managing the crisis.

Regardless of the analytical framework applied, the conclusion remains the same. These legislative "reforms" fail formally, as they often bypass established procedures like presentment. They fail functionally, by disabling the only branch capable of rapid crisis response. And they fail democratically, by diffusing responsibility from a highly accountable executive to a less-accountable legislature. This convergence across multiple modes of analyzing separation of powers violations underscores the constitutional flaw in these structural disablements.

3. The Countermajoritarian Legislature Problem

The constitutional justification for these structural disablements rests on the premises that legislatures are more democratic and representative institutions and that shifting authority to the legislature restores necessary democratic oversight. However, this premise collapses when scrutinized against the realities of state constitutional design. The transfer of emergency powers to legislatures does not automatically enhance democratic legitimacy; instead, it often dilutes it.

Governors win election by assembling statewide majorities, competing for every vote across urban, suburban, and rural areas. Their electoral incentives align with median voter preferences statewide. Legislators, by contrast, win election from individual districts that may be carefully drawn to create safe seats insulated from competitive pressures.

In an era of rampant gerrymandering, many state legislatures are deeply countermajoritarian.³⁶⁵ To be clear, the countermajoritarian critique is not partisan in design. In states where Democrats benefit from districting advantages, the same analytic framework would apply: a gerrymandered

363. See *infra* Section III.B.3; Seifter, *supra* note 206, at 318–19 (discussing the “threat to state majoritarian institutions” from “power-stripping in connection with . . . pandemic response”).

364. See *supra* notes 300–05 and accompanying text.

365. See Seifter, *supra* note 291, at 1735.

Democratic majority that stripped emergency powers from a Republican governor elected by a statewide majority would warrant the same skepticism. The critique attacks the mismatch between legislative composition and statewide majority preference, not the party that happens to benefit in any given state. That said, the COVID-era emergency-power restrictions examined here have, in practice, traced a consistent pattern: gerrymandered Republican legislatures curtailing the emergency authority of Democratic governors elected by statewide majorities.

Wisconsin exemplifies this democratic distortion. In 2018, Democratic legislative candidates won 54% of statewide votes but secured only 36% of Assembly seats due to aggressive gerrymandering.³⁶⁶ The same legislature then sought to strip emergency powers from a Democratic governor elected by a clear statewide majority.³⁶⁷ Pennsylvania provides another example. The legislature that manipulated the constitutional amendment process to transfer emergency powers to itself had Democratic candidates with 54% of statewide votes in 2018 but secured only 46% of legislative seats.³⁶⁸ When state legislative redistricting next transpired, control of the House flipped to Democratic control.³⁶⁹ Had this composition been in place several months earlier, it is highly unlikely that the constitutional amendment power grab would have advanced.

Michigan presents another illustration of minoritarian legislative overreach. In 2018, Democratic candidates for the state legislature won 52% of votes cast statewide but secured only 47% of House seats and just 42% of Senate seats due to aggressive gerrymandering.³⁷⁰ This minoritarian legislature then moved to strip emergency powers from Governor Whitmer, who won her 2018 election with 53.3% of the statewide vote. The disconnect is striking: a governor elected by a clear majority had her emergency authorities curtailed by a legislature that did not represent the majority will

366. CHRISTIAN R. GROSE ET AL., USC SCHWARZENEGGER INST. FOR ST. & GLOB. POL’Y, THE WORST PARTISAN GERRYMANDERS IN U.S. STATE LEGISLATURES 3 (2019).

367. See Briffault, *supra* note 16, at 1667.

368. See GROSE ET AL., *supra* note 366, at 3; Briffault, *supra* note 16, at 1667.

369. Stephen Caruso & Katie Meyer, *Democrats Win Control of Pennsylvania State House After Picking Up 12 Seats*, SPOTLIGHT PA (Nov. 16, 2022), <https://www.spotlightpa.org/news/2022/11/pa-governor-election-2022-results-house-democrats-flip-republican-control> [https://perma.cc/7WPW-66SU]; see also Kate Huangpu, *How Did Democrats Keep Their Pa. House Majority During a Red Wave? Redistricting Is Part of the Answer*, SPOTLIGHT PA (Nov. 26, 2024), <https://www.spotlightpa.org/news/2024/11/pennsylvania-house-democratic-majority-election-redistricting> [https://perma.cc/9QJM-ANGB] (noting efforts at creating a majoritarian map of state legislative seats likely led to Democrats retaining a majority in the House despite November 2024 “red wave” election).

370. See GROSE ET AL., *supra* note 366, at 3.

of Michigan voters. The same minoritarian gamesmanship played out in Ohio.³⁷¹ This pattern—minoritarian legislatures constraining majoritarian executives—recurred across states where COVID-19 emergency power battles raged most fiercely.³⁷²

This context is not merely political background; it is constitutionally significant. The separation of powers doctrine intends to diffuse power among co-equal, democratically legitimate branches. When a minoritarian legislature seizes authority from a majoritarian executive, it subverts democratic principles by using a structural advantage to impose its will against the statewide popular will. As Professor Miriam Seifter has argued in a related context, such actions by “countermajoritarian legislatures” should

371. Despite the state’s competitive partisan balance—Trump won Ohio by 8 points in 2020 while Senator Sherrod Brown, a Democrat, won by 7 points in 2018—Republicans held supermajority control of both legislative chambers. *See Ohio Election Results*, N.Y. TIMES (May 15, 2019), <https://www.nytimes.com/interactive/2018/11/06/us/elections/results-ohio-elections.html>; *Ohio Presidential Election Results*, N.Y. TIMES (Nov. 3, 2020), <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-ohio-president.html>; Karen Juanita Carrillo, *Ohio Votes Under “Extreme” Gerrymandering That Favors Republicans*, CTR. PUB. INTEGRITY (Oct. 6, 2022), <https://publicintegrity.org/politics/elections/who-counts/ohio-votes-under-extreme-gerrymandering-that-favors-republicans> [https://perma.cc/H8Q3-WYMC]. In 2020, Republicans won 55% of votes statewide but captured 64% of House seats and 76% of Senate seats. *See Ohio 2020 Election Results*, POLITICO (Mar. 14, 2025), <https://www.politico.com/2020-election/results/ohio> [https://perma.cc/QNE3-ZLSK]. This supermajority then enacted S.B. 22 over Governor DeWine’s veto, creating a legislative committee with power to rescind executive emergency orders—effectively allowing a gerrymandered minority to veto decisions by a statewide-elected executive. *Ohio Legislature Overrides DeWine’s Veto, Allowing Lawmakers to Rescind Health Orders*, STATEHOUSE NEWS BUREAU (Mar. 24, 2021), <https://www.statenews.org/government-politics/2021-03-24/ohio-legislature-overrides-dewines-veto-allowing-lawmakers-to-rescind-health-orders> [https://perma.cc/7ELQ-HH9F].

372. The partisan and democratic legitimacy analysis in this section focuses on legislative composition at the time these emergency power restrictions were enacted. The entrenchment of structural changes by even a temporarily minoritarian legislature can cause lasting damage that persists even if composition later changes to a more majoritarian representation.

Some states have since seen changes—Michigan elected a less gerrymandered legislature in 2022, and Wisconsin’s legislative maps were redrawn in 2024. *See Election Results 2022: Michigan Election Results*, POLITICO (Mar. 14, 2025), <https://www.politico.com/2022-election/results/michigan> [https://perma.cc/L6FA-L5CC]; *Michigan 2022-2024 Redistricting Plan*, PLANSORE, <https://planscore.org/michigan/#!2022-plan-ushouse-eg> [https://perma.cc/GSD2-YEM4]; *Gerrymandering and Wisconsin’s Maps*, WIS. FAIR MAPS COAL., <https://www.fairmapswi.com/wi-maps> [https://perma.cc/SG55-T8FT]. However, the restrictions remain in place. This temporal dynamic reinforces the danger: a transient, gerrymandered majority can entrench more permanent alterations to the separation of powers that are difficult for a subsequent, representative legislature to repeal due to inertia or veto points. *See* Adler & Walker, *supra* note 352, at 1945–46, 1952 (explaining how legislative inertia and veto points entrench the “dead hand” of a past legislative coalition). The relevant question for democratic legitimacy is whether the body that seized the power represented the popular will at the moment of the seizure.

be viewed by courts with deep skepticism, as they invert the democratic principles that state constitutions are meant to uphold.³⁷³ Courts, it turns out, are largely well equipped to employ such skepticism. Professor Jon Marshfield argues that state high courts with statewide popularly elected jurists are “endowed with extraordinary democratic credentials” to more actively police and protect the majoritarian structure of state government.³⁷⁴ The risks of such countermajoritarian legislative power are not merely theoretical but manifest in concrete attempts to circumvent democratic accountability.

The Pennsylvania example illustrates how legislative minorities can manipulate constitutional processes. The Republican-controlled General Assembly passed approximately a dozen bills in 2020 to invalidate or weaken the governor’s and health secretary’s mitigation orders, and the governor vetoed all of them.³⁷⁵ Unable to override the Governor’s vetoes through normal legislative processes,³⁷⁶ Republican legislators exploited their control over the constitutional amendment process. Pennsylvania’s constitution allows the legislature to propose amendments without gubernatorial involvement—a process designed for incremental constitutional change, not partisan policy disputes.³⁷⁷ Legislators placed constitutional amendments on the May 2021 municipal primary ballot, a typically low-turnout election. The amendments passed with roughly 22% of registered voters casting a ballot—a decidedly minoritarian basis for fundamental constitutional change.³⁷⁸

373. Seifter, *supra* note 291, at 1774, 1778–79, 1799.

374. Jonathan L. Marshfield, *American Democracy and the State Constitutional Convention*, 92 FORDHAM L. REV. 2555, 2613–14 (2024); *see also* Bulman-Pozen & Seifter, *supra* note 321, at 1356–59 (discussing why state courts are well positioned to review countermajoritarian legislative actions).

375. *See* Harrison Cann, *Man with a Ban: How Gov. Tom Wolf’s Veto Tally Is Defining His Legacy*, CITY & ST. PA. (May 25, 2022), <https://www.cityandstatepa.com/politics/2022/05/man-ban-how-gov-tom-wolfs-veto-tally-defining-his-legacy/367386> [<https://perma.cc/6XDN-85XB>]; Angela Coulombis & Cynthia Fernandez, *Pennsylvania Enacted 140 Laws in 2020. Just 27 of Them Addressed COVID-19 Pandemic*, GOERIE (Feb. 8, 2021), <https://www.goerie.com/story/news/state/2021/02/08/bickering-eclipsed-law-making-pa-legislature-2020/4412718001> [<https://perma.cc/8Z7F-4SZD>].

376. *See* Cann, *supra* note 375; *e.g.*, H.R. 2787, 204th Gen. Assemb., 2019–2020 Reg. Sess. (Pa. 2020).

377. PA. CONST. art. XI, § 1.

378. Marie Albiges, *Experts Say PA’s 2021 Primary Was Typical, but GOP Lawmakers Are Seizing on Issues*, WHYY (May 19, 2021), <https://whyy.org/articles/experts-say-pa-s-2021-primary-was-typical-but-gop-lawmakers-are-seizing-on-issues> [<https://perma.cc/9NFH-HSVM>]. Manipulation of constitutional amendment processes by state legislatures can lead to minoritarian constitutional change and, in similar contexts, can be demonstrated by the sometimes stark disconnect between a state legislature and its electorate. *See* Levy, *supra* note 353, at 647

Additional procedural concerns arise with this particular constitutional amendment process, which bundled together unrelated amendments when moving through the legislature.³⁷⁹

This countermajoritarian context transforms the narrative about COVID-19 emergency powers. Rather than democratic legislatures checking autocratic governors, the reality often involved gerrymandered legislative minorities obstructing governors implementing policies supported by statewide majorities. Public polling throughout the pandemic showed broad support for many gubernatorial emergency measures, even as legislative minorities successfully curtailed gubernatorial authority.³⁸⁰

When zooming out to the bigger picture, the stripping of executive emergency powers should be seen as part of a larger, documented trend of legislative power grabs.³⁸¹ These actions risk politicizing responses to future crises and creating “democratic illegitimacy”³⁸² by undermining responsiveness, eroding rule of law, and potentially causing public disobedience. They can lead to decisions being made by less majoritarian bodies, such as gerrymandered legislatures, rather than by statewide, popularly elected executives.

When viewed through this wider lens, the legislative assault on gubernatorial emergency powers represents not democratic correction but democratic subversion. Gerrymandered minorities have weaponized procedural rules to strip power from majoritarian executives, creating irony: in the name of preventing “autocratic” governance, minoritarian legislatures have undermined, in some cases, the more democratically legitimate branch of state government. This is not enhanced democracy but its opposite—a form of constitutional hardball that sacrifices both effective governance and popular sovereignty for partisan advantage.

Courts reviewing these power transfers should recognize them for what they are—not legitimate rebalancing of separated powers but anti-democratic

(observing the disconnect regarding the 2022 “Value Them Both” amendment in Kansas and noting the “contrast between the supermajority support for the amendment in both chambers of the Kansas Legislature and its rejection by nearly sixty percent of the popular vote raises questions about whether the Legislature is representative of the broader public”); Levy & Rubinkam, *supra* note 19.

379. See S. 2, 2021 Gen. Assemb., Reg. Sess. (Pa. 2021).

380. See LAZER ET AL., *supra* note 191, at 4, and accompanying text.

381. Seifter, *supra* note 206, at 318–19, 336; STS. UNITED DEMOCRACY CTR. ET AL., A DEMOCRACY CRISIS IN THE MAKING: HOW STATE LEGISLATURES ARE POLITICIZING, CRIMINALIZING, AND INTERFERING WITH ELECTION ADMINISTRATION 11, 14–15 (2021) (discussing primarily power grabs in the election context).

382. Cf. Weiss, *supra* note 194, at 1857 (arguing that entrusting emergency powers solely to a governor risks “democratic illegitimacy”).

entrenchment by legislative minorities seeking to govern against the will of statewide majorities. To do this effectively, courts should jettison their traditional deference to legislatures, which rests on mythical assumptions about legislative representativeness.³⁸³ When legislatures are countermajoritarian, the rationale for deference collapses.³⁸⁴ Courts reviewing emergency powers restrictions should therefore scrutinize with skepticism actions by democratically deficient legislatures, particularly when they transfer power from more representative institutions (governors) to less representative ones (themselves).³⁸⁵

IV. A BETTER PATH: FROM STRUCTURAL DISABLEMENT TO PRINCIPLED CONSTRAINT

The challenge is not to choose between executive efficiency and democratic legitimacy but to design systems that foster both. Although the pre-pandemic status quo was imperfect, and the COVID-19 crisis legitimately exposed the need for greater legislative involvement in long-term emergencies, the answer is not to impose structural disablements. It is principled constraints—the reforms that enhance accountability without impairing the executive’s ability to act in a crisis. This Part proposes four.

Each of the four mechanisms below illustrates what principled constraint looks like in practice. Together, they would preserve the governor’s authority to declare emergencies and lead immediate responses while establishing robust, structured roles for both legislative input and, in prolonged crises, direct popular review. Rather than arbitrary time limits (automatic kill switches) that trigger political cliffs, balanced reforms, including the ones discussed below, would ensure legislative involvement and direct voter input

383. See Seifter, *supra* note 291, at 1771.

384. *Id.* at 1766.

385. This call for heightened judicial scrutiny, while necessary, must also contend with the high bar for invalidating a voter-approved constitutional amendment. Some scholars, for instance, argue that legislatively-referred proposals are entitled to greater judicial deference than citizen initiatives, not less, as they are the product of a co-equal branch of government. Levy, *supra* note 353, at 690–91.

Precedent for such a drastic judicial act is often rooted in specific, outcome-determinative procedural flaws—such as misleading ballot language—that are proven to have “frustrate[d] the will of the voters.” *Id.* at 674. However, the procedural manipulations employed by minoritarian legislatures, such as the strategic use of low-turnout primary ballots to secure passage, function as a defect of the same kind. This form of “constitutional hardball” is analogous to a deceptive ballot summary; both tactics are designed to nullify the true popular voice. See *id.* at 713 (“[I]n constitutional changes the popular voice is the *paramount* act . . .”). Thus, judicial intervention in such cases is not an act of thwarting the popular will, but rather a necessary defense of it.

without sacrificing executive agility. These reforms recognize that while executive unity is paramount during the acute phase of a crisis, the transition to a chronic or long-term recovery phase requires a structured return to deliberative policymaking—a transition best achieved through procedural integration rather than arbitrary termination.

Automatic Emergency Sessions. A substantial majority of state legislatures can call themselves into special session,³⁸⁶ which many did following governors' COVID-19 emergency proclamations.³⁸⁷ But in the remaining states, legislatures should have an opportunity to convene and consider executive action in response to a disaster. A governor's emergency declaration lasting beyond a specified period (e.g., thirty or sixty days) should automatically trigger a special legislative session, ensuring lawmakers have the opportunity to convene without creating logistical or political barriers in states without full-time legislative sessions. To avoid unnecessary costs or empty political exercises, this mechanism could include a provision allowing legislative leadership to waive the session if they consent to the executive's course of action. The session should be strictly confined to addressing the specific emergency declared by the governor and related executive actions to prevent either political branch from abusing the process.

An automatic emergency session respects the need for the executive's initial flexibility while guaranteeing legislative involvement in extended crises. Some states are pursuing constitutional changes to institute this change, while others already enable legislatures to meet once governors

386. *Continuity of Legislature During Emergency*, NAT'L CONF. OF ST. LEGISLATURES (May 27, 2022), <https://www.ncsl.org/about-state-legislatures/continuity-of-legislature-during-emergency> [<https://perma.cc/9DKL-F3N7>].

387. *Changes to State Legislative Session Dates in Response to the Coronavirus (COVID-19) Pandemic, 2020*, BALLOTPEdia (Feb. 14, 2023), [https://ballotpedia.org/Changes_to_state_legislative_session_dates_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020](https://ballotpedia.org/Changes_to_state_legislative_session_dates_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020) [<https://perma.cc/8R6G-RF9M>].

declare emergencies.³⁸⁸ Moreover, other state constitutions already empower their legislatures to convene and declare the emergency themselves.³⁸⁹

Enhanced Reporting and Consultation. Requiring executives to provide regular, detailed justifications for continuing emergencies and specific orders would increase transparency and accountability without creating decisional bottlenecks. These requirements should focus on information flow rather than approval mechanisms that could delay timely responses. Reporting laws do not transgress separation of powers.³⁹⁰ Indeed, access to information is necessary to legislate. Colorado has taken this approach, mandating more reporting to the legislative branch during declared emergencies.³⁹¹ Similarly, a rule asking governors to provide evidence for renewed emergencies (an approach taken by states like Arizona) would likely not impinge on a governor's emergency powers.³⁹²

Targeted Legislative Review. Rather than all-or-nothing votes to terminate states of emergency, legislatures should be empowered to review and modify specific emergency orders after set periods. Legislatures could pass concurrent resolutions, subject to presentment if a state constitutional requirement, rescinding specific restrictions (e.g., business closure orders) while leaving the underlying disaster declaration—and its eligibility for

388. Pre-pandemic, fourteen states allowed only governors to call special sessions. Arkansas, Idaho, and Kentucky sought voter approval for constitutional amendments permitting legislative self-convening. *Legislative Actions in Oversight of Executive Emergency Powers*, *supra* note 309. Arizona proposed requiring governors to call sessions if one-third of each house petitions. *Arizona Proposition 135, Emergency Declarations Amendment (2024)*, BALLOTPEDIA, [https://ballotpedia.org/](https://ballotpedia.org/Arizona_Proposition_135_Emergency_Declarations_Amendment_(2024))

Arizona Proposition 135, Emergency Declarations Amendment (2024) [<https://perma.cc/6D65-ZP22>]. Indiana enacted legislation allowing its General Assembly to convene an emergency session when the governor declares a state of emergency, although the governor successfully challenged it as an unconstitutional usurpation of executive power. *Indiana Supreme Court Rules Only the Governor Can Call a Special Legislative Session*, COUNCIL OF ST. GOV'TS (Aug. 18, 2022), <https://www.csg.org/2022/08/18/indiana-supreme-court-rules-only-the-governor-can-call-a-special-legislative-session> [<https://perma.cc/DZC7-NUFL>].

389. *See Williams & Sevor*, *supra* note 288, at 1180.

390. *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927) (“[T]he power of inquiry, with enforcing process, was regarded and employed as a necessary and appropriate attribute of the power to legislate . . .”).

391. H.R. 20-1426, 72d Gen. Assemb., 2020 Reg. Sess. (Colo. 2020) (enacted) (requiring three annual public meetings between governor's office and legislative committees during disaster emergencies).

392. ARIZ. REV. STAT. ANN. §§ 26-303(G)–(H) (2023) (requiring governor's submission of written report and provisions of briefing to legislative joint committee before renewing public health emergency).

federal aid—intact.³⁹³ This allows targeted policy disagreement without dismantling the entire response framework.

Most states have demonstrated that maintaining or enhancing accountability need not disable crisis response. States like Colorado added transparency requirements through regular public meetings between executive and legislative officials during emergencies.³⁹⁴ Maryland has maintained its emergency framework while requiring detailed reporting that keeps legislators informed.³⁹⁵ While not a COVID-era creation, Connecticut employed a bipartisan legislative committee to review emergency declarations and gradually transition them from unilateral executive orders to legislative codification of select measures, demonstrating a collaborative rather than adversarial approach to sharing emergency powers.³⁹⁶ These states have recognized that effective emergency response requires executive leadership complemented by—not supplanted by—legislative oversight. Their restraint in the face of political pressure provides a model for states that went too far in restricting gubernatorial authority.

Not all legislative restrictions on emergency powers create constitutional concerns. The challenge lies in distinguishing between reforms that balance executive flexibility with democratic accountability and those that handicap crisis response for partisan gain. Overly restrictive frameworks can prevent governments from fulfilling their most basic obligation to protect public safety. Legitimate constraints include things like reasonable time limits (sixty to ninety days) with streamlined extension procedures; clear statutory standards defining qualifying emergencies; transparency requirements ensuring public access to information; and preservation of normal legislative authority to pass modifying legislation. Conversely, problematic overreach includes arbitrary short deadlines (ten to thirty days) that ignore crisis realities; legislative veto mechanisms bypassing constitutional presentment; committee-level termination creating fragmented authority; and categorical prohibitions regardless of emergency type.

The post-COVID restrictions examined here consistently fall into the latter category. They reflect not thoughtful recalibration but institutional retaliation, sacrificing future crisis response capability over pandemic policy differences. Unlike the balanced approaches adopted by some states—which

393. New York permits its state legislature to terminate a specific emergency executive order by concurrent resolution, rather than having to end the entire state of emergency. Deere, *supra* note 21, at 781.

394. See *Legislative Actions in Oversight of Executive Emergency Powers*, *supra* note 309 and accompanying text.

395. H.R. 1003, 442d Gen. Assemb., Reg. Sess. (Md. 2021).

396. H.R. 5047, 2022 Gen. Assemb., Reg. Sess. (Conn. 2022).

enhanced transparency without crippling executive response—these restrictions create governance structures incapable of protecting citizens when they need it most. The positive mechanisms described above would harness the complementary strengths of both branches. The executive would retain necessary agility for crisis management, while the legislature would perform its roles of oversight, deliberation, and representation. This approach respects separation of powers while strengthening, rather than undermining, states’ ability to protect citizens.

Direct Democracy Review for Prolonged Crises. While legislative oversight is appropriate for intermediate policy adjustments, the unique nature of state constitutions offers a more fundamental check for emergencies that extend indefinitely: the statewide initiative or referendum.³⁹⁷ When crises last for an extended duration (e.g., six months), the continued necessity of the state of emergency or its most restrictive measures could be submitted to a binding popular vote.

This mechanism addresses the specific institutional deficits revealed during the pandemic. First, it bypasses the partisan gridlock and gerrymandered distortions of the legislature.³⁹⁸ Unlike a legislative veto, which may allow a minoritarian body to block a statewide majority’s preferred policy,³⁹⁹ a referendum empowers the statewide electorate—the same constituency that elected the governor—to render a verdict.⁴⁰⁰ Second, the timing ensures that the vote is informed by “lived experience.”⁴⁰¹ Initial emergency orders typically must be issued hastily, often without public input. By the six-month mark, however, the exigency should have evolved into a

397. See *supra* note 324 and accompanying text.

398. See Gatter, *supra* note 262, at 81 (anticipating partisanship in the context of public health); Seifter, *supra* note 291, at 1735 (observing, partly due to “strategic gerrymandering,” the “disconnect between popular support and electoral victories in state legislatures”).

399. See Devlin, *supra* note 27, at 1268 (noting problems of electoral accountability in the administrative context when power over state-wide issues is concentrated “in the hands of a few individuals”).

400. See Seifter, *supra* note 206, at 295–96 (likening the statewide vote for or against initiatives to gubernatorial elections and considering both to be “majoritarian institutions” within state government).

401. Cf. Kouroutakis & Ranchordás, *supra* note 352, at 73–74 (arguing for the sunset of temporary de-juridification measures within a normative framework after emergency period has been in effect for period of time).

managed crisis,⁴⁰² and citizens possess the information necessary to evaluate the trade-offs of continued restrictions.⁴⁰³

Functionally, this approach is superior to the automatic kill switches that several legislatures have enacted. Legislative termination resolutions are often constitutionally suspect when they bypass presentment;⁴⁰⁴ however, a referendum is a textually grounded exercise of popular sovereignty available in many states.⁴⁰⁵ Furthermore, unlike the constitutional hardball observed in Pennsylvania—where the legislature used a low-turnout primary to permanently strip executive power via constitutional amendment—a statutory referendum on specific emergency measures is a targeted, policy-level check.⁴⁰⁶ It diffuses partisanship by asking the public to vote on the measures, not the governor, ensuring that long-term restrictions retain the genuine consent of the governed.

The line between structural disablement and principled constraint will not always be cleanly drawn. Some reforms have features of both, and reasonable observers will disagree about how to classify particular mechanisms. But the COVID-era structural changes examined here are not borderline cases. Arbitrary time limits, committee-level kill switches that bypass constitutional presentment, and categorical prohibitions on specific emergency tools sit firmly on one side of the line.

In sum, the mechanisms offered in this Part—automatic sessions, enhanced reporting, targeted review, and direct democratic checks—would harness the complementary strengths of all branches and the public. The executive would retain the necessary agility for immediate crisis management, the legislature would perform its role of ongoing oversight and deliberation, and the people would serve as the ultimate arbiter for prolonged regimes. This holistic approach respects the separation of powers while

402. See Mello & Gostin, *supra* note 220, at 323 (noting that consultation with legislative or public advisory bodies after “three to four months would allow time for initial reactions to an emergency to settle and information to be collected about how well the emergency response is working and the public’s feelings about it”).

403. See Wiley, *supra* note 149, at 58 n.19 (observing “that emergencies do not, and should not, obviate the fact that there is ‘no getting away from the need in a democracy for the people to decide’”) (quoting BONNIE HONIG, EMERGENCY POLITICS: PARADOX, LAW, DEMOCRACY 23 (2009)); Seifter, *supra* note 206, at 323 (“[R]eflecting on the appropriate scope of executive power after a crisis is a good idea.”).

404. See *supra* Section III.B.2.

405. See WILLIAMS & FRIEDMAN, *supra* note 27, at 50 (“Most modern state constitutions are, as noted earlier, themselves products of ‘popular sovereignty’ in that they were proposed by constitutional conventions authorized by the voters, drafted by delegates elected by the voters, and then ratified at a referendum of the voters (the ‘voice of the people’).”).

406. *Id.* at 315 (“The referendum enables the people to target specific enactments they wish to block.”).

ensuring that emergency governance remains tethered to the will of the statewide majority, preventing both executive overreach and legislative obstructionism.

V. CONCLUSION

History has long recognized that emergencies demand the swift, centralized executive action that deliberative bodies cannot match. The COVID-19 pandemic confirmed this wisdom, making the subsequent structural disablements a peculiar overreaction born of partisan frustration. The predictable consequences of the new legislative constraints are serious.

The path forward requires recognizing the complementary roles of the branches of state government: executives provide speed, coordination, and decisiveness, while legislatures provide democratic input, policy refinement, and fiscal authorization. The goal is to design durable institutions that harness both capabilities, not temporary arrangements that disable either branch for partisan advantage.

States can still correct course by rejecting structural disablements in favor of principled constraints—reforms that enhance accountability without sacrificing capability. But if they persist in treating emergency powers as partisan prizes rather than public necessities, they condemn their citizens to bear the consequences when government cannot respond effectively to the next disaster.