

## GOVERNORS' EMERGENCY POWERS IN LIGHT OF COVID-19<sup>†</sup>

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*The crux of the case is the principle that the Governor has only those powers delegated to him by the Constitution and the statutes.*

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*Under our system of distribution of powers with checks and balances, the purposes of the executive order[,] however desirable, may be achieved only through proper means.<sup>1</sup>*

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<sup>1</sup> Rapp v. Carey, 375 N.E.2d 745, 750-51 (N.Y. 1978).

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#### I. INTRODUCTION: EVOLUTION OF GUBERNATORIAL POWER AND SEPARATION OF POWERS

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

[T]he Americans went far beyond anything the English had attempted with Magna Carta or the Bill of Rights. They aimed to make the gubernatorial magistrate a new kind of creature, a very pale reflection indeed of its regal ancestor. They wanted effectively to eliminate the magistracy's chief responsibility for ruling the society—a remarkable and abrupt departure from the English constitutional tradition.

....

The powers and prerogatives taken from the governors were given to the legislatures, marking a revolutionary shift in the traditional responsibility of government.<sup>2</sup>

Even after the adoption of the United States Constitution, the states continued to evolve their governmental arrangements on a path separate from that established quite permanently in the federal constitution.<sup>3</sup> Over the years, through the acquisition of constitutional veto, budget and appointment powers, together with a wide variety of statutorily-delegated powers and responsibilities,

<sup>2</sup> Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 915–16 (1993); see also Robert F. Williams, *Evolving State Legislative and Executive Power in the Founding Decade*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 43, 50 (1988).

<sup>3</sup> See James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819, 821–22, 824 (1991).

state governors have been transformed into extremely powerful executives.<sup>4</sup> In fact, in a deeply-researched analysis, Professor Miriam Seifter concluded: “[I]n the past century, and especially in recent decades, most governors have gained a spate of powers that eclipse not only their Founding-era authority, but also the domestic powers of modern Presidents.”<sup>5</sup>

Beyond such generalizations, however, because of the wide variety of the states’ specific governmental arrangements,<sup>6</sup> it is necessary to evaluate legal questions about state separation of powers on a *state-specific* rather than a *general* basis.<sup>7</sup> For example, the New Jersey Supreme Court recognized its state constitution as establishing a strong-governor model in resolving a separation of powers case.<sup>8</sup> By contrast, the California Supreme Court alluded to its constitution’s strong-legislature model in upholding legislative rather than gubernatorial appointments to an important administrative board.<sup>9</sup> These sorts of assessments of the specific characteristics of a state’s constitutional structure can be an important element of, first, legislative decisions about how to share powers with governors<sup>10</sup> and, second, judicial decisions about the constitutional validity of such legislative decisions.<sup>11</sup>

An important general perspective on gubernatorial powers is the fact that, in contrast to state constitutional *rights* matters, where federal constitutional rights are the supreme law of the land, federal *separation of powers* doctrines are not binding on the states.<sup>12</sup> Dean Robert Schapiro has pointed this out, noting that “interpreting state constitutions in lockstep with federal separation of powers law would not further the cause of uniformity. Because federal doctrine . . . does not apply to the states, only one body of separation of powers law will

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<sup>4</sup> See Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 494, 498–99 (2017); see, e.g., John T. Buckley, *The Governor from Figurehead to Prime Minister: A Historical Study of the New York State Constitution and the Shift of Basic Power to the Chief Executive*, 68 ALB. L. REV. 865 (2005) (charting the 200-year development of the governor’s role in New York from figurehead to powerful executive).

<sup>5</sup> *Id.* at 487.

<sup>6</sup> See Jonathan Zasloff, *Taking Politics Seriously: A Theory of California’s Separation of Powers*, 51 UCLA L. REV. 1079, 1084–85, 1149–50 (2004).

<sup>7</sup> See ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 270–71 (2d ed. 2023).

<sup>8</sup> *Comm’ns Workers of Am. v. Florio*, 617 A.2d 223, 231 (N.J. 1992).

<sup>9</sup> See *Marine Forests Soc’y v. Cal. Coastal Comm’n*, 113 P.3d 1062, 1077–80 (Cal. 2005); see also Zasloff, *supra* note 6, at 1110–19; WILLIAMS & FRIEDMAN, *supra* note 7, at 271.

<sup>10</sup> See Zasloff, *supra* note 6, at 1090, 1093.

<sup>11</sup> See Henretta, *supra* note 3, at 834–35.

<sup>12</sup> See Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 92–93 (1998).

exist. . . . Federal law provides no constitutional floor.”<sup>13</sup> So it is clear, although often these points are not recognized,<sup>14</sup> that a state’s separation of powers doctrine should not depend on either any other state’s view or even on federal constitutional doctrine!<sup>15</sup> States like New York must determine their own separation of powers law.

States, which do not have to follow federal doctrine on legislative delegations of power to executive agencies or governors,<sup>16</sup> have exhibited a wide range of approaches to this separation of powers question.<sup>17</sup> These approaches are, of course, crucial to framing and evaluating legislative delegations of emergency powers to governors.<sup>18</sup> An earlier study concluded that New York applied a “strict” view of both standards and safeguards for delegations.<sup>19</sup> Importantly, the more recent of the cases cited relied on a Rehnquist concurrence concerning federal constitutional doctrine!<sup>20</sup>

States seem to apply two distinct approaches to evaluating legislative delegations of authority to administrative agencies and governors: formal or functional.<sup>21</sup> The formal approach relies on strict definitions of *legislative* and *executive power* with “strong substantive separations between the branches of government.”<sup>22</sup> This approach is criticized as yielding “mechanical” outcomes, but at least it yields “bright-line rules.”<sup>23</sup> Professor Rebecca Brown continued:

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<sup>13</sup> *Id.* at 93–94; see also Hon. Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1548 (1997) (setting forth three differences between state and federal courts’ operations to show varied interpretations of state constitutions).

<sup>14</sup> Many states do, although they are not required to, rely on federal separation of powers doctrines. See James A. Gardner, *The Positivist Revolution that Wasn’t: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109, 111 (1998); Lawrence Friedman, *Unexamined Reliance on Federal Precedent in State Constitutional Interpretation: The Potential Intra-State Effect*, 33 RUTGERS L.J. 1031, 1054 (2002).

<sup>15</sup> See Friedman, *supra* note 14, at 1031.

<sup>16</sup> See Schapiro, *supra* note 12, at 93.

<sup>17</sup> Cases are collected in Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1171–72 (1999). A dated, but still useful study is Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 579–80 (1994).

<sup>18</sup> See Rossi, *supra* note 17, at 1190–91.

<sup>19</sup> See Greco, *supra* note 17, at 581 n.74; *infra* notes 102–05 and accompanying text.

<sup>20</sup> See *Boreali v. Axelrod*, 517 N.E.2d 1350, 1360 (N.Y. 1987) (Bellacosa, J., dissenting) (citing *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring)).

<sup>21</sup> See WILLIAMS & FRIEDMAN, *supra* note 7, at 270.

<sup>22</sup> Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1523–24 (1991).

<sup>23</sup> See *id.* at 1524–26.

In contrast, advocates of the “functionalist” approach urge the Court to ask a different question: whether an action of one branch interferes with one of the core functions of another. . . . The functionalist view follows a different strand of separation-of-powers tradition from that of the formalists: the American variant that stresses not the independence, but the interdependence of the branches.<sup>24</sup>

These background perspectives will hopefully shed light on the issues surrounding gubernatorial emergency powers, both constitutional and statutory. Further, they should be relevant to before-the-fact legislative delegations and after-the-fact constitutional considerations by the judiciary.<sup>25</sup> Certainly, the COVID-19 pandemic caused great strain on these legal relationships and required the states to develop new law in this context.<sup>26</sup> The pandemic tested the separation of powers doctrines of COVID-19 hotspot states, such as New York.<sup>27</sup>

## II. SURVEY OF GOVERNORS' CONSTITUTIONAL AND STATUTORY EMERGENCY POWERS

All states grant their governors the power to declare at least some type of disaster or emergency,<sup>28</sup> but the authority to respond and the scope of the emergency response varies among the states.<sup>29</sup> The authority these governors derive from such declarations or grants by legislatures involves an expansion of gubernatorial powers and a retraction of the legislatures' powers, each to different extents.<sup>30</sup> However, governors cannot grant themselves authority beyond what is initially delegated to them,<sup>31</sup> and legislatures maintain some

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<sup>24</sup> *Id.* at 1527–28.

<sup>25</sup> See Greco, *supra* note 17, at 568.

<sup>26</sup> See generally 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 (2021).

<sup>27</sup> See *Tracking Coronavirus in New York: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/us/new-york-covid-cases.html> [<https://perma.cc/QU6M-TXFG>] (March 23, 2023).

<sup>28</sup> See *Governors: Powers and Authority*, NAT'L GOVERNORS ASS'N, <https://www.nga.org/governors/powers-and-authority/> [<https://perma.cc/BLN9-22M2>].

<sup>29</sup> See *id.*

<sup>30</sup> See *Legislative Oversight of Emergency Executive Powers*, NAT'L CONF. STATE LEGISLATURES, <https://www.ncsl.org/about-state-legislatures/legislative-oversight-of-emergency-executive-powers> [<https://perma.cc/RJ3H-GVBM>] (Sept. 26, 2022).

<sup>31</sup> See *id.*

authority to create limits on emergency powers.<sup>32</sup> Despite these general concepts, states differ in (I) where the governor derives their emergency powers; (II) which contingencies or types of emergencies permit declarations of a state of emergency and activate gubernatorial powers; (III) the scope of their powers during an emergency; and (IV) the retained oversight powers the legislature may exact upon the governor during such emergency.<sup>33</sup>

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

Among the states, the authority to exercise emergency powers is derived from differing bodies of law.<sup>34</sup> The origin of these powers can be found in constitutions, in statutes, and in case law.<sup>35</sup> Few states have express constitutional provisions relating to the governor's authority during a disaster emergency.<sup>36</sup> However, even if they do, the authority described is either extremely vague or quite limited.<sup>37</sup> While all states have at least some statutes granting their governor some powers during an emergency, forty-two of the states' highest courts have not yet resolved the question of whether the authority was constitutionally delegated.<sup>38</sup>

Table 1 summarizes the granting authority of these emergency powers for each state with references.<sup>39</sup> Datasets from the Council of State Governments and the Policy Surveillance Program were used to initially compile where governors' powers are derived from in each state and the location of such granting language.<sup>40</sup> These sources were then cross-referenced and updated in Table 1 to confirm the granting language of gubernatorial authority and where the authority comes from (i.e., constitution, statute, or case law) for each

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<sup>32</sup> See *id.*

<sup>33</sup> See *infra* Sections II.A, II.B, II.C, II.D.

<sup>34</sup> See 53 COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 116–17 (2021), <https://www.nga.org/wp-content/uploads/2022/10/CSG-book-of-the-states-2021.pdf> [<https://perma.cc/6S3W-XD5L>] (summarizing where governors receive authority to issue executive orders during, among other circumstances, varying states of emergency); *infra* Table 1.

<sup>35</sup> See 53 COUNCIL OF STATE GOV'TS, *supra* note 34, at 116–17; *infra* Table 1.

<sup>36</sup> See *infra* Table 1.

<sup>37</sup> See discussion *infra* Section II.A.1.

<sup>38</sup> See *infra* Table 1.

<sup>39</sup> See *id.*

<sup>40</sup> For the source used to organize the table, see 53 COUNCIL OF STATE GOV'TS, *supra* note 34, at 116–17. For the sources used to identify state provisions and language not otherwise cited within the table itself, see Kelly Thompson & Gregory Sunshine, *Emergency Suspension Powers*, POL'Y SURVEILLANCE PROGRAM (June 21, 2017), <https://lawatlas.org/datasets/emergency-powers> [<https://perma.cc/ZDA6-JR59>].

state. Thereafter, a Westlaw search was conducted to determine whether a state high court has determined the constitutionality of gubernatorial emergency powers. Table 1 provides citations to example cases where found.<sup>41</sup>

### 1. The Few States with Constitutional Provisions Regarding Gubernatorial Emergency Powers

State constitutional provisions charge governors with “faithful execution and enforcement of state law” and designate to them certain executive powers.<sup>42</sup> Thus, because the executive branch is notably in a better position than the legislative branch to respond to crises, it is sometimes implied that these broad constitutional provisions confer some exigent legislative police powers on the governor.<sup>43</sup> However, despite governors’ frequently conclusory references to the authority vested in them by their state constitution,<sup>44</sup> there are only a few states that do have specific or express constitutional provisions for gubernatorial emergency powers.<sup>45</sup> Oregon has the most comprehensive constitutional scheme regarding the governor’s powers.<sup>46</sup> Oregon’s Constitution permits the governor to declare an emergency upon a “catastrophic disaster,” utilize general and lottery funds despite their legislatively-derived purpose, and, vaguely, to “manage the immediate response to the disaster.”<sup>47</sup> While many states have constitutional provisions regarding “continuity of government,” these apply in extreme circumstances and are almost never invoked in state emergencies.<sup>48</sup> For example, the Colorado governor’s constitutional emergency powers are extremely limited in scope; they only allow the governor

<sup>41</sup> See *infra* Table 1. Note that some searches of state law did not reveal cases resolving the question of whether their governor’s authority was constitutionally delegated.

<sup>42</sup> See F. David Trickey, *Constitutional and Statutory Bases of Governors’ Emergency Powers*, 64 MICH. L. REV. 290, 290–92 (1965).

<sup>43</sup> See *id.* at 290.

<sup>44</sup> See, e.g., N.Y. Exec. Order No. 4.1, 9 N.Y. Comp. Codes R. & Regs. tit. 9, § 9.4.1 (2021); Ky. Exec. Order No. 2021-386 (June 11, 2021), [https://governor.ky.gov/attachments/20210611\\_Executive-Order\\_2021-386.pdf](https://governor.ky.gov/attachments/20210611_Executive-Order_2021-386.pdf) [<https://perma.cc/BX9S-QFCM>].

<sup>45</sup> See, e.g., Cal. Exec. Order No. N-25-20 (Mar. 12, 2020), <https://www.library.ca.gov/wp-content/uploads/GovernmentPublications/executive-order-proclamation/40-N-25-20.pdf> [<https://perma.cc/J96P-YHKN>]; Idaho Exec. Order No. 2020-07 (Apr. 7, 2020), <https://gov.idaho.gov/wp-content/uploads/2020/04/eo-2020-07.pdf> [<https://perma.cc/SP6L-NLYJ>].

<sup>46</sup> See OR. CONST. art. X-A, §§ 1–6.

<sup>47</sup> *Id.* §§ 1–2.

<sup>48</sup> See Eric R. Daleo, *State Constitutions and Legislative Continuity in a 9/11 World: Surviving an “Enemy Attack”*, 58 DEPAUL L. REV. 919, 920, 941–42 (2009); see also *infra* Section II.D.

to declare a “disaster emergency” and “designate a temporary meeting location for the general assembly.”<sup>49</sup> For the purposes of Colorado’s Constitution, a “[d]isaster emergency’ means the occurrence or imminent threat of widespread or severe damage, injury, illness, or loss of life or property resulting from an epidemic or a natural, man-made, or technological cause.”<sup>50</sup>

Interestingly, Pennsylvania recently enacted a constitutional provision to limit the governor’s authority to issue orders coinciding with emergency declarations.<sup>51</sup> The amendment now provides that the General Assembly may statutorily limit how the governor may manage the disaster; the disaster may only be in effect for twenty-one days, unless the General Assembly extends the declaration by concurrent resolution; and that the governor may not issue any emergency declarations that are based on “*same or substantially similar facts and circumstances* without the passage of a concurrent resolution.”<sup>52</sup> Thus, even state constitutions that have expressly provided or referenced gubernatorial emergency powers are vague and limited in scope.

## 2. Statutorily Derived Authority Is Widespread, but Few Have Resolved These Statutes’ Constitutionality

All states have at least some statutory provision describing the powers of the governor during an emergency.<sup>53</sup> Typically, governors issuing executive orders during declared disasters or emergencies will cite to both the declaration of a state of emergency and the statute granting them the authority to make the order.<sup>54</sup> Despite gubernatorial inferences that the constitution and laws of the state vest in them the authority to issue emergency declarations or orders, state high courts review whether such powers are constitutionally

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<sup>49</sup> COLO. CONST. art. VIII, § 3(2).

<sup>50</sup> *Id.* § 3(4).

<sup>51</sup> *See* *Cnty. of Butler v. Governor of Pa.*, 8 F.4th 226, 230 (3d Cir. 2021) (“There also have been changes on the legal front. An amendment to the Pennsylvania Constitution and a concurrent resolution of the Commonwealth’s General Assembly now restricts the Governor’s authority to enter the same orders.”).

<sup>52</sup> *See* PA. CONST. art. IV, § 20 (emphasis added).

<sup>53</sup> *See infra* Table 1.

<sup>54</sup> *See, e.g.*, N.J. Exec. Order No. 105 (Mar. 19, 2020), <https://www.nj.gov/infobank/eo/056murphy/pdf/EO-105.pdf> [<https://perma.cc/X2LE-TNY9>].

delegated.<sup>55</sup> Only eight state high courts have resolved questions of whether these statutes comport with their state's constitution.<sup>56</sup>

*a. Resolving Statutory Authority via the Nondelegation Doctrine*

Legal challenges to gubernatorial emergency powers are often premised on the nondelegation doctrine.<sup>57</sup> This doctrine stands for the principle that the legislative branch may not delegate its constitutional legislative power to any other actor, including the executive branch.<sup>58</sup> A study reviewing federal and state nondelegation litigation between 1940 and 2015 found, *inter alia*, that state courts heard a greater amount of such cases and invalidated statutes more often than federal courts.<sup>59</sup>

The eight states that have resolved the constitutionality of statutory delegation of gubernatorial emergency powers have—for the most part—described the authority as permissible.<sup>60</sup> In *State v. Riffin*, an illustrative case, a cosmetologist challenged the North Dakotan governor's executive order, which temporarily closed hair salons during the onset of the COVID-19 pandemic.<sup>61</sup> While the Supreme Court of North Dakota acknowledged that their legislature was forbidden from delegating its legislative powers, it “may delegate powers which are not exclusively legislative and which the

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<sup>55</sup> See, e.g., *Ritchie v. Polis*, 467 P.3d 339, 342 (Colo. 2020); see also *People v. Chavez*, 605 P.2d 401, 412 (Cal. 1980) (“[J]ust as the United States Supreme Court bears the ultimate judicial responsibility for determining matters of federal law, this court bears the ultimate judicial responsibility for resolving questions of state law, including the proper interpretation of provisions of the state Constitution.”); Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 201–02 (1998).

<sup>56</sup> See *infra* Table 1.

<sup>57</sup> See Randolph J. May, Opinion, *The Non-Delegation Doctrine Is Alive and Well in the States*, REGUL. REV. (Oct. 15, 2020), <https://www.theregreview.org/2020/10/15/may-nondelegation-doctrine-alive-well-states/> [<https://perma.cc/PSC6-H6QW>] (also noting that state nondelegation challenges typically invoke federally-developed principles); see also Rossi, *supra* note 17, at 1191–1201; Greco, *supra* note 17, at 578.

<sup>58</sup> See Daniel E. Walters, *Decoding Nondelegation After Gundy: What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, 71 EMORY L.J. 417, 419 (2022).

<sup>59</sup> See Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 635–39 (2017) (finding that eighty-five percent of studied nondelegation cases were heard in state courts).

<sup>60</sup> See *Newsom v. Super. Ct.*, 278 Cal. Rptr. 3d 397, 410 (Ct. App. 2021); *Ritchie*, 467 P.3d at 345; *Casey v. Lamont*, 258 A.3d 647, 665 (Conn. 2021); *Beshear v. Acree*, 615 S.W.3d 780, 813 (Ky. 2020); *Desrosiers v. Governor*, 158 N.E.3d 827, 840 (Mass. 2020); *Worthington v. Fauyer*, 440 A.2d 1128, 1141 (N.J. 1982); *State v. Riffin*, 959 N.W.2d 855, 862–63 (N.D. 2021); *Wolf v. Scarnati*, 233 A.3d 679, 707 (Pa. 2020). *But see, e.g., Abbott v. City of El Paso*, 668 S.W.3d 800, 808, 817 (Tex. App. 2023) (“Like our sister courts that have considered these same arguments, we do not agree that the Disaster Act grants the Governor the broad authority he claims.”) (collecting cases).

<sup>61</sup> See *Riffin*, 959 N.W.2d at 857–58.

Legislature cannot conveniently do because of the detailed nature.”<sup>62</sup> The court noted that the relevant inquiry to differentiate “between a delegable and non-delegable power” should be “whether the power granted gives the authority to make a law or whether that power pertains only to the execution of a law which was enacted by the Legislature”;<sup>63</sup> “[t]he power to [merely] ascertain . . . facts” and render the law operable “is not [such] an unconstitutional delegation of” authority.<sup>64</sup> Because North Dakota’s gubernatorial emergency power law stated a purpose for their governor’s authority upon an emergency, “detailed guidelines as to how [such] power is to be implemented,” and limited the governor’s power, the law was a constitutional delegation of power.<sup>65</sup>

Though not fully resolving constitutional questions of or completely abrogating gubernatorial emergency powers, some state courts have found such statutes unconstitutional.<sup>66</sup> Michigan’s Supreme Court held one statute delegating their governor emergency powers to “promulgate *reasonable* orders, rules, and regulations as he or she considers *necessary* to protect life and property” as unconstitutional.<sup>67</sup> The court articulated the principle that “as the scope of the powers conferred upon the Governor by the Legislature becomes increasingly broad, in regard to both the *subject matter* and their *duration*, the *standards* imposed upon the Governor’s discretion by the Legislature must correspondingly become more detailed and precise.”<sup>68</sup> Because the court found “*reasonable*” and “*necessary*” in the statute to be illusory standards, it was an unconstitutional delegation of legislative power.<sup>69</sup> Some courts in Texas have reached similar conclusions, holding that statutory provisions allowing the governor to suspend laws are unconstitutional.<sup>70</sup>

*b. Dodging Constitutional Questions Regarding Gubernatorial*

<sup>62</sup> *Id.* at 862 (quoting *Cnty. of Stutsman v. State Hist. Soc’y*, 371 N.W. 321, 327 (N.D. 1985)).

<sup>63</sup> *Riggin*, 959 N.W.2d at 862 (quoting *Cnty. of Stutsman*, 371 N.W.2d at 327).

<sup>64</sup> *Riggin*, 959 N.W.2d at 862 (quoting *Cnty. of Stutsman*, 371 N.W.2d at 327).

<sup>65</sup> *See Riggin*, 959 N.W.2d at 862–63.

<sup>66</sup> *See, e.g.*, *Midwest Inst. of Health, PLLC v. Governor of Mich.*, 958 N.W.2d 1, 24 (Mich. 2020).

<sup>67</sup> *Id.* (emphasis added). However, the court did not address the constitutionality of Michigan’s Emergency Management Act, which provided the governor some emergency powers. *See id.* at 9–12.

<sup>68</sup> *Id.* at 20.

<sup>69</sup> *See id.* at 24; *see also* May, *supra* note 57.

<sup>70</sup> *See, e.g.*, *Abbott v. City of El Paso*, 668 S.W.3d 800, 808, 817 (Tex. App. 2023).

*Powers via the Mootness or Standing Doctrines*

Forty-two states have yet to directly confirm whether their constitution does permit their governor to exercise the emergency powers enumerated in their statutes.<sup>71</sup> One observable pattern among those states is that challenges addressing this constitutional question are dismissed for lack of standing or mootness.<sup>72</sup> While standing dismissals appear relatively straightforward,<sup>73</sup> the mootness dismissals are more unique.<sup>74</sup> By the time the challenge to a governor's emergency order reaches a state's appellate court, the emergency order's provisions at issue may be revoked or expired.<sup>75</sup> In *Rivard v. Governor*, following emergency orders during the COVID-19 pandemic, a salon and skin care operator sought, *inter alia*, an injunction to stop the temporary closure of their business.<sup>76</sup> However, the state of emergency in New Hampshire expired by the time it reached the Supreme Court of New Hampshire.<sup>77</sup> Since "a matter is moot when it no longer presents a justiciable controversy because issues involved have become academic or dead," the court concluded the emergency's expiration as mooted the plaintiff's constitutional challenge.<sup>78</sup>

*B. Events Activating Emergency Powers*

The events triggering gubernatorial emergency powers vary between the states.<sup>79</sup> While some states afford their government wide latitude in determining whether an emergency exists to

<sup>71</sup> See *infra* Table 1.

<sup>72</sup> See, e.g., *Munza v. Ivey*, 334 So. 3d 211, 220 (Ala. 2021) (concluding plaintiffs lacked standing); *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993, 999, 1004 (D. Nev. 2020) (dismissing for lack of standing); *Aguila v. Ducey*, No. CV-20-0335-T/AP, 2021 WL 1380612, at \*1 (Ariz. Mar. 24, 2021) (dismissing challenge as moot); *Austin v. Bd. of Educ. of Cmty. Unit Sch. Dist. 300*, No. 4-22-0090, 2022 Ill. App. Unpub. LEXIS 264, at \*7 (Ill. App. Ct. Feb. 17, 2022) (dismissing challenge as moot); see also *infra* Table 1.

<sup>73</sup> See, e.g., *Munza*, 334 So. 3d at 219–20 (holding that plaintiffs "failed to allege [*inter alia*] 'specific concrete facts' that they suffered 'an 'actual . . . injury'" as a result of mask mandates) (first quoting *Ex parte Merrill*, 264 So. 3d 855, 863 (Ala. 2018); and then quoting *Poiroux v. Rich*, 150 So. 3d 1027, 1039 (Ala. 2014)).

<sup>74</sup> See, e.g., *Aguila*, 2021 WL 1380612, at \*1; *Austin*, 2022 Ill. App. Unpub. LEXIS 264, at \*3.

<sup>75</sup> See, e.g., *Aguila*, 2021 WL 1380612, at \*1–2; *Austin*, 2022 Ill. App. Unpub. LEXIS 264, at \*7; *Rivard v. Governor*, No. 2020-0457, 2021 WL 5495533, at \*2 (N.H. Nov. 23, 2021).

<sup>76</sup> *Rivard*, 2021 WL 5495533, at \*1–2.

<sup>77</sup> See *id.* at \*2.

<sup>78</sup> *Id.* (quoting *Londonderry Sch. Dist. v. State*, 958 A.2d 930, 932 (N.H. 2008)).

<sup>79</sup> See NAT'L GOVERNORS ASS'N, *supra* note 28.

authorize the governor's authority,<sup>80</sup> some provide limits to these declarations either by constricting the circumstances in which they occur, or by subsequent legislative approval.<sup>81</sup>

One of the more widespread events that trigger such gubernatorial powers are those relating to "enemy attack" and "continuity of government."<sup>82</sup> During the Cold War Era, states prepared for the worst, and considered questions of how to preserve state government following an enemy attack.<sup>83</sup> The model provision permitted deviation from the constitution by the legislature "where conforming to those requirements would be 'impracticable or would admit of undue delay.'"<sup>84</sup> New York's provision is reasonably broad and unlike many others.<sup>85</sup> Under New York's Constitution, it is the legislature that is empowered to

insure continuity of state and local governmental operations in periods of emergency caused by enemy attack or by disasters (*natural or otherwise*), shall have the power and the immediate duty (1) to provide for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices, and (2) to adopt such other measures as may be necessary and proper for insuring the continuity of governmental operations. Nothing in this article shall be construed to limit in any way the power of the state to deal with emergencies arising from any cause.<sup>86</sup>

However, some states did not adopt continuity of government provisions.<sup>87</sup>

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<sup>80</sup> See *id.* ("Although statutory schemes vary, all states give the Governor the authority to declare one or more types of emergencies, including a disaster emergency or a public health emergency.")

<sup>81</sup> See *id.* ("State laws specify how these legal declarations are made, durational limitations, legislative involvement, and other potential constraints.")

<sup>82</sup> See Daleo, *supra* note 48, at 932–45.

<sup>83</sup> See *id.* at 932.

<sup>84</sup> *Id.* at 935.

<sup>85</sup> See PETER J. GALIE, THE NEW YORK CONSTITUTION 114 (G. Alan Tarr ed., Oxford Univ. Press 2011); see, e.g., *infra* Table 1.

<sup>86</sup> N.Y. CONST. art. III, § 25 (emphasis added).

<sup>87</sup> Daleo, *supra* note 48, at 945–46.

Some states grant their governors broad authority to declare states of emergency and activate their statutory powers.<sup>88</sup> New York is one such state; there, the governor may declare a “state disaster emergency” and, thereby, trigger her emergency powers upon a finding of a “disaster,”<sup>89</sup> which is defined broadly as an:

occurrence or imminent, impending or urgent threat of wide spread or severe damage, injury, or loss of life or property resulting from any natural or man-made causes, *including, but not limited to*, fire, flood, earthquake, hurricane, tornado, high water, landslide, mudslide, wind, storm, wave action, volcanic activity, epidemic, disease outbreak, air contamination, terrorism, cyber event, blight, drought, infestation, explosion, radiological accident, nuclear, chemical, biological, or bacteriological release, water contamination, bridge failure or bridge collapse.<sup>90</sup>

Many other states have also provided broad bases for the declaration of an emergency by including broad language—like New York’s—with some variation.<sup>91</sup>

Some states limit gubernatorial emergency powers either by specifying which events allow for an emergency proclamation<sup>92</sup> or by involving the legislature’s subsequent consent to a declaration.<sup>93</sup> In Wisconsin, although the definition of a *disaster* that gives rise to gubernatorial authority is broad,<sup>94</sup> the statute defines *public health emergency* so that the Department of Health Services may be

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<sup>88</sup> See, e.g., NAT’L GOVERNORS ASS’N, *supra* note 28.

<sup>89</sup> N.Y. EXEC. LAW §§ 20, 29-a (McKinney 2020).

<sup>90</sup> *Id.* § 20(2)(a) (McKinney 2020) (emphasis added).

<sup>91</sup> See, e.g., FLA. STAT. ANN. §§ 252.34(4), 252.36 (LexisNexis 2021) (powers may be activated upon “any occurrence, or threat thereof, whether natural, technological, or manmade, in war or in peace, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property”); 30 R.I. GEN. LAWS §§ 30-15-3(2), 30-15-9 (2021) (Powers may be activated upon the “occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause.”).

<sup>92</sup> See, e.g., MINN. STAT. § 12.31(2)(a) (2023) (“A peacetime declaration of emergency may be declared *only* when any of the following endangers life and property and local government resources are inadequate to handle the situation . . . .”) (emphasis added).

<sup>93</sup> See, e.g., GA. CODE ANN. § 38-3-51(a) (2023) (stating that the legislature “shall convene at 8:00 A.M. on the second day following the date of such declaration for the purpose of concurring with or terminating the public health emergency”).

<sup>94</sup> See WIS. STAT. §§ 323.02(6), 323.10, 323.12 (2023) (“‘Disaster’ means a severe or prolonged, natural or human-caused, occurrence that threatens or negatively impacts life, health, property, infrastructure, the environment, the security of this state or a portion of this state, or critical systems . . . .”).

designated a lead agency.<sup>95</sup> Ohio greatly limits the triggering of gubernatorial emergency powers by limiting it to highly specific situations, such as an “adulterated consumer product emergency.”<sup>96</sup> States may also provide their legislatures authority to declare states of emergency.<sup>97</sup> In at least seven states, the legislature is permitted to declare a state of emergency and trigger the executive’s emergency powers.<sup>98</sup> Although the governor might declare a state of emergency, some states even provide that their legislatures must concur with the existence of such a disaster in a limited period of time.<sup>99</sup>

### C. *Scope of Authority During Emergencies*

The scope of a governor’s emergency powers varies widely from state to state, and different typologies have developed to classify them.<sup>100</sup> Broadly speaking, legislative delegation of authority to the executive falls into two camps: those with strict nondelegation doctrines, where statutes provide precise and specific standards and agencies “fill in the details”;<sup>101</sup> or those that permit more administrative discretion.<sup>102</sup> According to Edward Stiglitz, about nineteen states maintain strong nondelegation doctrines.<sup>103</sup> As previously discussed, this nondelegation potentially plays a role in how much a governor may constitutionally exact in their emergency orders.<sup>104</sup>

Importantly, state emergency statutes vary in the extent to which their governors are permitted to temporarily change or suspend laws or regulations.<sup>105</sup> A 2019 survey found that forty-two states

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<sup>95</sup> *See id.*

<sup>96</sup> *See* OHIO REV. CODE ANN. § 3715.74 (LexisNexis 2021) (“[I]f the governor has a reasonable basis to believe that one or more units of a consumer product have been adulterated and that further sale or use of the consumer product presents a threat to the public health and safety, the governor may declare an adulterated consumer product emergency and make any of the following executive adulterated consumer product emergency orders . . .”).

<sup>97</sup> *See* NAT’L CONF. STATE LEGISLATURES, *supra* note 30.

<sup>98</sup> *Id.*

<sup>99</sup> *See, e.g.*, CONN. GEN. STAT. § 28-9 (2023); S.C. CODE ANN. § 25-1-440 (2008) (“A declared state of emergency shall not continue for a period of more than fifteen days without the consent of the General Assembly . . .”).

<sup>100</sup> Edward H. Stiglitz, *The Limits of Judicial Control and the Nondelegation Doctrine*, 34 J.L. ECON. & ORG. 27, 31 (2018).

<sup>101</sup> *See id.*

<sup>102</sup> *See id.* at 31–32 (describing states like New York, Florida, and Texas as having the stronger nondelegation regime and states like California and Oregon applying a more permissive approach).

<sup>103</sup> *Id.* at 32.

<sup>104</sup> *See supra* Section II.A.2.b.

<sup>105</sup> *See* Gregory Sunshine, Kelly Thompson, Akshara N. Menon, Nicholas Anderson, Matthew Penn, & Lisa M. Koonin, *An Assessment of State Laws Providing Gubernatorial Authority to*

“explicitly permit the governor to change statutes or regulations during an emergency.”<sup>106</sup> Some states cast a wide net of powers for their governor during an emergency.<sup>107</sup> In New Hampshire, so long as the Constitution and civil liberties found under it are not suspended, the governor may “make, amend, suspend and rescind necessary orders, rules and regulations . . . in the event of a disaster beyond local control.”<sup>108</sup> North Carolina’s emergency powers are similarly broad.<sup>109</sup>

Other states expressly narrow and limit the scope of their governors’ authority during an emergency.<sup>110</sup> Michigan’s governor can only suspend statutes and regulations in an emergency if strict compliance with such rules “would prevent, hinder, or delay necessary action in coping with the disaster or emergency” and “does not . . . suspen[d] . . . criminal process [or] procedures.”<sup>111</sup> South Carolina also provides for the suspension of regulations if strict compliance inhibits disaster response, but limits the governor further to only amendments, issuance, and suspensions of regulations, not statutes.<sup>112</sup> Thus, the scope of state governors’ authority range greatly from temporarily broad changes in legal landscapes to minimal suspensions or amendments of regulatory schemes.

#### *D. Legislative Oversight of Emergency Powers*

Legislative oversight on gubernatorial emergency powers ranges among the states,<sup>113</sup> but these functions have recently come under increased scrutiny.<sup>114</sup> Legislatures typically limit the governor’s

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*Remove Legal Barriers to Emergency Response*, 17 HEALTH SEC. 1, 1 (2019); accord Thompson & Sunshine, *supra* note 40.

<sup>106</sup> Sunshine et al., *supra* note 105, at 3; see also, Thompson & Sunshine, *supra* note 40.

<sup>107</sup> See Sunshine et al., *supra* note 105, at 3; see also Braden Boucek, Daniel Greenberg, Kimberly Hermann, Mithun Mansinghani, Clark Neily, Jon Riches, Luke A. Wake & Shoshana Weissmann, *Checks, Balances, and Emergencies: Tensions Between Emergency Management Acts and Constitutional Governance*, REGUL. TRANSPARENCY PROJECT, Nov. 17, 2021, at 2.

<sup>108</sup> N.H. REV. STAT. ANN. § 4:47 (LexisNexis 2022).

<sup>109</sup> See N.C. GEN. STAT. §§ 166A-19.10, 166A-19.30 (2023) (The governor has powers “[t]o make, amend, or rescind the necessary orders, rules, and regulations within the limits of the authority conferred upon the Governor.”).

<sup>110</sup> See Boucek et al., *supra* note 107, at 7; see also NAT’L CONF. STATE LEGISLATURES, *supra* note 30.

<sup>111</sup> MICH. COMP. LAWS SERV. § 30.405 (LexisNexis 2006).

<sup>112</sup> See S.C. CODE ANN. § 25-1-440 (2008).

<sup>113</sup> NAT’L CONF. STATE LEGISLATURES, *supra* note 30.

<sup>114</sup> 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, 46–47, 50 (2021).

emergency responses by exercising termination powers.<sup>115</sup> Some states, like Idaho or Indiana, provide in statute that their legislatures may, by concurrent or joint resolution, terminate their governor's declaration of a state of emergency.<sup>116</sup> However, other states appear to only permit their governor to terminate a state of emergency before its expiration.<sup>117</sup>

In the wake of COVID-19 executive orders, many states have passed or are considering measures to limit their governors' emergency powers.<sup>118</sup> Returning to Pennsylvania, the state's high court ruled in 2020 that the General Assembly could not, by concurrent resolution, unilaterally terminate the governor's declaration of a state of emergency.<sup>119</sup> In response, Pennsylvanian voters subsequently approved constitutional amendments in 2021 to limit their governor's power and empower their General Assembly to legislate how the executive may respond to emergencies.<sup>120</sup> Kentucky's governor also faced similar restrictions imposed by its General Assembly, "limiting declared states of emergency to thirty days absent extension by the General Assembly; granting the General Assembly the power to terminate a declaration of emergency at any time; and requiring the Attorney General's written approval before the Governor may suspend a statute . . . ."<sup>121</sup>

However, the legality and constitutionality of some of these recent measures to curb gubernatorial powers is questionable.<sup>122</sup> In March 2021, the New York State Legislature passed a law to limit the power

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<sup>115</sup> See Nick Murray, *Scoring Emergency Executive Power in All 50 States*, ME. POL'Y INST. (March 2023), <https://mainepolicy.org/project/emergency-powers-2023-edition/> [<https://perma.cc/Y43H-4YHG>].

<sup>116</sup> See, e.g., *id.*; IDAHO CODE § 46-1008 (2022) ("The legislature by concurrent resolution may terminate a state of disaster emergency at any time."); IND. CODE ANN. § 10-14-3-12 (LexisNexis 2021) ("The general assembly, by concurrent resolution, may terminate a state of disaster emergency at any time.").

<sup>117</sup> See, e.g., WYO. STAT. ANN. § 19-13-104 (2021); WASH. REV. CODE ANN § 43.06.220 (LexisNexis 2019); see also Murray, *supra* note 115.

<sup>118</sup> Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L. J. 275, 323–27 (2022).

<sup>119</sup> See *Wolf v. Scarnati*, 233 A.3d 679, 707 (Pa. 2020).

<sup>120</sup> See Marc Levy & Michael Rubinkam, *Pennsylvania Voters Impose New Limits on Governor's Powers*, AP NEWS (May 19, 2021, 4:59 PM), <https://apnews.com/article/pennsylvania-health-coronavirus-pandemic-government-and-politics-f5ce447986a26cca310a6639de37b5ce> [<https://perma.cc/CDM6-FTJ9>]; see also PA. CONST. art. IV, § 20 (also limiting the issuance of new emergency declarations "based upon the same or substantially similar facts and circumstances without the passage of a concurrent resolution of the General Assembly").

<sup>121</sup> *Stivers v. Beshear*, 659 S.W.3d 313, 315–16 (Ky. 2022).

<sup>122</sup> See Hodge & Piatt, *supra* note 114, at 41–47 (describing the weaknesses in the legislative approaches to counter executive emergency powers during COVID-19).

of the governor,<sup>123</sup> permitting the legislature to “terminate at any time a [governor’s declared] state disaster emergency . . . by concurrent resolution.”<sup>124</sup> This process is like how Pennsylvania—prior to amending its law—attempted to terminate their governor’s powers by a concurrent resolution without executive approval.<sup>125</sup> Thus, New York State’s changes may be constitutionally fraught because it gives the legislature unilateral power to revoke some of the governor’s enumerated powers.<sup>126</sup>

### III. CONCLUSION

The aftermath of the COVID-19 pandemic has challenged many underlying assumptions regarding the powers of state governors during states of emergency.<sup>127</sup> Most states rely on statutes rather than constitutional provisions to spell out a governor’s power to respond to crises as they arise.<sup>128</sup> However, only eight state high courts have ruled on the constitutionality of these widespread delegations of power.<sup>129</sup> Moreover, the events triggering gubernatorial emergency powers, the scope of power a governor wields, and the strength of legislative oversight vary greatly among the states.<sup>130</sup> While some state legislatures have attempted to restrict some of the governor’s emergency powers,<sup>131</sup> state judiciaries will be increasingly tasked with balancing executive efficiency with responsible oversight.<sup>132</sup> Scholars and lawmakers alike should carefully consider the structure of gubernatorial powers in each respective state to prepare for the next existential threat to the continuity of government.

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<sup>123</sup> See N.Y. EXEC. LAW § 28 (McKinney 2021).

<sup>124</sup> *Id.*

<sup>125</sup> *Cf.* Wolf v. Scarnati, 233 A.3d 679, 685–86, 707 (Pa. 2020). The Pennsylvania General Assembly attempted to invoke powers under, *inter alia*, 35 PA. CONS. STAT. § 7301(c) (2023), under a concurrent resolution to unilaterally end the governor’s declaration of a disaster emergency.

<sup>126</sup> Compare Wolf, 233 A.3d at 707, with N.Y. EXEC. LAW § 28.

<sup>127</sup> See Deere, *supra* note 26, at 744.

<sup>128</sup> See *supra* Section II.A.

<sup>129</sup> See *supra* Section II.A.2.

<sup>130</sup> See *supra* Sections II.B, II.C, II.D.

<sup>131</sup> See *supra* Section II.D.

<sup>132</sup> See *supra* Section II.D; see also Hodge & Piatt, *supra* note 114, at 38–39, 47.

**Table 1. Origin of Governor's Emergency Powers, by State**

State	Granting Language	Authority	Constitutional Resolution Status
Alabama	Alabama Emergency Management Act of 1955, ALA. CODE §§ 31-9-1 to -25 (2023).	Statute	<b>Unresolved.</b> See, e.g., <i>Smith ex rel. Smith v. Ivey</i> , 501 F. Supp. 3d 1248, 1263–64 (M.D. Ala. 2020) (finding that the court lacked jurisdiction and the case was moot); <i>Munza v. Ivey</i> , 334 So. 3d 211, 220 (Ala. 2021) (concluding that plaintiffs lacked standing to bring the challenge); <i>Turner v. Ivey</i> , No. SC-2022-0538, 2023 WL 4672503, at *8 (Ala. July 21, 2023) (ruling that plaintiff failed to argue requisite facts in support of her claims).
Alaska	ALASKA STAT. § 26.23.020 (2023).	Statute	<b>Unresolved.</b>

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Arizona	ARIZ. REV. STAT. § 26-303 (LexisNexis 2022).	Statute	<b>Unresolved.</b> See, e.g., <i>Mesa Gofland, Ltd. v. Ducey</i> , 2021 WL 4149722, at *4 (D. Ariz. 2021) (dismissing for failure to state a claim); <i>Aguila v. Ducey</i> , 2021 WL 1380612, at *1 (Ariz. 2021) (dismissing challenge based on the nondelegation doctrine as moot); <i>McGhee v. City of Flagstaff</i> , No. CV-20-08081, 2020 WL 2308479, at *2-4. (D. Ariz. May 8, 2020) (finding that plaintiff failed to establish a likelihood of success on any of his claims).
Arkansas	ARK. CODE. ANN. § 12-75-114 (2021).	Statute	<b>Unresolved.</b>

California	California Emergency Services Act, CAL. GOV'T CODE §§ 8565–74, 8627 (West 2023).	Statute; Case Law	<b>Resolved.</b> See <i>640 Tenth, L.P. v. Newsom</i> , 294 Cal. Rptr. 3d 123, 130 (Ct. App. 2022); <i>Newsom v. Super. Ct.</i> , 278 Cal. Rptr. 3d 397, 410 (Ct. App. 2021) (“We conclude the Emergency Services Act, and specifically section 8627 of the Emergency Services Act, is not an unconstitutional delegation of legislative power.”).
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Colorado	<p>COLO. CONST. art. VIII, §§ 3(2), (4)(a) (“[I]f the governor determines . . . a disaster emergency exists that substantially affects the ability of the state . . . to operate in the city and county of Denver, the governor may issue an executive order declaring a disaster emergency. . . . ‘Disaster emergency’ means the occurrence or imminent threat of widespread or severe damage, injury, illness, or loss of life or property resulting from an epidemic or a natural, man-made, or technological cause.”); Disaster Emergency Act, COLO. REV. STAT. § 24-33.5-704 (2018).</p>	Constitution; Statute	<p><b>Resolved.</b> See <i>Ritchie v. Polis</i>, 467 P.3d 339, 345 (Colo. 2020) (“The Colorado Disaster Emergency Act authorizes the suspension of certain statutes, rules, and regulations, but not of constitutional provisions.”).</p>
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Connecticut	CONN. GEN. STAT. § 28-9 (2005).	Statute; Case Law	<p><b>Resolved.</b> See <i>Casey v. Lamont</i>, 258 A.3d 647, 665, 670 (Conn. 2021) (“Our case law supports the conclusion that § 28-9(b)(1) and (7) is not an unconstitutional delegation of legislative authority . . . § 28-9 sets forth the General Assembly’s policy that, in the event of a serious disaster, the health, safety, and welfare of Connecticut’s residents is of utmost importance. Section 28-9 (b) affords the governor considerable latitude to employ the ‘necessary means’ for accomplishing that policy objective.”) (quoting <i>Norwalk Street Ry. Co.’s Appeal</i>, 37 A. 1080, 1086 (Conn. 1897)).</p>
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Delaware	DEL. CODE ANN. tit. 20, §§ 3115–17 (2017).	Statute	<b>Unresolved.</b>
Florida	FLA. STAT. § 252.36 (2021).	Statute	<b>Unresolved.</b> <i>See Abramson v. DeSantis</i> , No. SC20-646, 2020 WL 3464376 (Fla. 2020) (narrowly discussing how a pandemic constitutes a “natural emergency” and that the governor does have authority under the act to issue executive orders, failing to discuss constitutional questions) (quoting FLA. STAT. § 252.36 (2021)).
Georgia	GA. CODE ANN. § 38-3-51 (2014).	Statute	<b>Unresolved.</b>

Hawaii	HAW. REV. STAT. §§ 127A-12 to -14 (2022).	Statute	<b>Unresolved.</b> <i>See For Our Rights v. Ige</i> , 507 P.3d 531, 537 (Haw. Ct. App. 2022) (limiting question to statutory interpretation regarding the expiration of an emergency order).
Idaho	IDAHO CODE § 46-1008 (2022).	Statute	<b>Unresolved.</b>
Illinois	20 ILL. COMP. STAT. 3305/7 (2021).	Statute	<b>Unresolved.</b> <i>See, e.g., Austin v. Bd. of Educ. of Cmty. Unit Sch. Dist. 300</i> , No. 4-22-0090, 2022 Ill App. Unpub. LEXIS 264 (Ill. App. Ct. Feb. 17, 2022) (dismissing challenge to governor's authority as moot); <i>JL Props. Grp. B, LLC v. Pritzker</i> , 185 N.E.2d 780 (Ill. App. Ct. 2021).

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Indiana	IND. CODE §§ 10-14-3-11 to -12 (2023).	Statute	<b>Unresolved.</b> See, e.g., <i>Yergy's State Rd. BBQ, LLC v. Wells Cnty. Health Dep't</i> , 189 N.E.3d 189 (Ind. Ct. App. 2022) (dismissing case as moot).
Iowa	IOWA CODE § 29C.6 (2023).	Statute	<b>Unresolved.</b> See <i>Riley Drive Ent. I, Inc. v. Reynolds</i> , 970 N.W.2d 289, 291 (Iowa 2022) (affirming dismissal of challenge as moot).
Kansas	KAN. STAT. ANN. §§ 48-924 to -925 (2022).	Statute	<b>Unresolved.</b> See <i>Kelly v. Legis. Coordinating Council</i> , 460 P.3d 832, 839 (Kan. 2020) (declining to resolve a conflict over the governor's powers under § 48-924 to -925).

Kentucky	KY. REV. STAT. ANN. § 39A.100 (LexisNexis 2022).	Statute; Case Law	<b>Resolved.</b> See <i>Beshear v. Acree</i> , 615 S.W.3d 780, 813 (Ky. 2020) (finding that the governor's emergency powers, as enumerated in the act, pass constitutional muster).
Louisiana	Louisiana Health Emergency Powers Act, LA. STAT. ANN. § 29:766 (2020).	Statute	<b>Unresolved.</b>
Maine	ME. REV. STAT. tit. 37-B, § 742 (2021).	Statute	<b>Unresolved.</b> See <i>Gray v. Mills</i> , No. 1:21-cv-00071, 2021 WL 5166157, at *6 (D. Me. Nov. 5, 2021).
Maryland	Maryland Emergency Management Act, MD. CODE ANN., PUB. SAFETY §§ 14-106 to -07 (LexisNexis 2021).	Statute	<b>Unresolved.</b> See <i>Murphy v. Liberty Mut. Ins. Co.</i> , 274 A.3d 412, 442 (Md. 2022).

Massachusetts	Civil Defense Act, ch. 639, § 5, 1950 Mass. Acts 523.	Statute	<b>Resolved.</b> See <i>Desrosiers v. Governor</i> , 158 N.E.3d 827, 835–42 (Mass. 2020) (concluding that governor’s emergency orders did not violate separation of powers); see also <i>Boston Gas Co. v. Dep’t of Pub. Utils.</i> , 441 N.E.2d 746, 752 (Mass. 1982) (“We have recognized that art. 30 does not rigidly demand a total separation between the three branches of government but rather that there is a ‘need for some flexibility in the allocation of functions among the three departments.’”) (quoting <i>Op. of Justices to S.</i> , 376 N.E.2d 810, 822 (Mass. 1978)).
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Michigan	Emergency Management Act, MICH. COMP. LAWS ANN. §§ 30.403, 30.405 (West 2006).	Statute	<b>Unresolved.</b> <i>Midwest Inst. of Health, PLLC v. Governor of Mich.</i> , 958 N.W.2d 1, 10–11, 25 (Mich. 2020) (striking down MCL § 10.31, a statute enumerating the gubernatorial emergency powers, as unconstitutional for violating the nondelegation doctrine but not reaching the same holding for MCL §§ 30.403 and 30.405); <i>H.R. v. Governor</i> , 960 N.W.2d 125, 146–47 (Mich. Ct. App.), <i>rev'd on other grounds</i> , 949 N.W.2d 275 (Mich. 2020).
Minnesota	MINN. STAT. §§ 12.21, 12.32 (2005).	Statute	<b>Unresolved.</b>

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Mississippi	Emergency Management Law, MISS. CODE ANN. §§ 33-15-11, 33-15-31 (2014).	Statute	<b>Unresolved.</b>
Missouri	MO. REV. STAT. § 44.100 (2008).	Statute	<b>Unresolved.</b>

Montana	MONT. CODE ANN. § 10-3-104 (2021).	Statute	<b>Unresolved.</b> See <i>Donald J. Trump for President, Inc. v. Bullock</i> , 491 F. Supp. 3d 814, 834 (D. Mont. 2020) (“find[ing] no reason to conclude that the Montana Legislature's decision to afford the Governor's statutory suspension power a role in the time, place, and manner of Montana's federal elections should not be afforded the same respect. In other words, Governor Bullock's use of the legislatively created suspension power is not repugnant to the constitutional provisions invoked by Plaintiffs”).
Nebraska	NEB. REV. STAT. §§ 81-829.40, 81-829.42 (2019).	Statute	<b>Unresolved.</b>

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Nevada	NEV. REV. STAT. §§ 414.060, 414.070 (2019) (“During the period when a state of emergency or declaration of disaster exists or continues, the Governor may exercise the following additional powers: . . . [t]o perform and exercise such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population.”).	Statute	<b>Unresolved.</b> See <i>Belcher v. State</i> , 508 P.3d 410 (Nev. 2022) (avoiding the constitutional question regarding governor’s emergency closure orders); see also <i>Donald J. Trump for President, Inc. v. Cegavske</i> , 488 F. Supp. 3d 993, 999, 1004 (D. Nev. 2020) (dismissing for lack of standing).
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New Hampshire	N.H. REV. STAT. ANN. §§ 21-P:35, 4:45, 4:47 (2022).	Statute	<b>Unresolved.</b> See <i>Rivard v.</i> <i>Governor</i> , No. 2020-0457, 2021 WL 5495533 (N.H. Nov. 23, 2021) (dismissing the case as moot following expiration of emergency orders); <i>Freeman</i> <i>v. City of Keene</i> , 561 F. Supp. 3d 22, 35 (D. N.H. 2021) (dismissing the complaint for, <i>inter alia</i> , lack of standing).
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New Jersey	Civilian Defense and Disaster Control Act, N.J. STAT. ANN. §§ 9-33 to -63 (2022).	Statute	<b>Resolved.</b> See <i>Worthington v. Fauver</i> , 440 A.2d 1128, 1140–42 (N.J. 1982) (holding, <i>inter alia</i> , that temporary emergency executive orders are authorized by New Jersey's Disaster Control Act and do not constitute violate constitutional separation of powers); <i>N.J. State Policeman's Benevolent Ass'n v. Murphy</i> , 271 A.3d 333, 339–41 (N.J. 2022) (holding that the Disaster Control Act empowered the governor to issue certain vaccination mandates).
New Mexico	All Hazard Emergency Management Act, N.M. STAT. ANN. §§ 12-10-1 to -21 (2007).	Statute	<b>Unresolved.</b>

New York	N.Y. EXEC. LAW §§ 28, 29-a (McKinney 2021).	Statute	<p><b>Unresolved.</b> See, e.g., <i>In re City of Troy</i>, 166 N.Y.S.3d 285, 286–87 (App. Div. 2022) (showing that parties did not challenge the governor’s authority to issue an executive order during a public health emergency); <i>Hopkins Hawley LLC v. Cuomo</i>, No. 20-cv-10932, 2021 WL 1894277, at *2, *13 (S.D.N.Y. May 11, 2021) (declining to decide a state question regarding state constitutional propriety of the governor’s executive orders); <i>Gallivan v. Cuomo</i>, 143 N.Y.S.3d 816, 828–29 (Sup. Ct. 2021) (dodging a separation of powers question posed by plaintiffs).</p>
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North Carolina	North Carolina Emergency Management Act, N.C. GEN. STAT. §§ 166A-19 to -19.79 (2023).	Statute	<b>Unresolved.</b>
North Dakota	North Dakota Disaster Act, N.D. CENT. CODE § 37-17.1-01 to -29 (2023).	Statute	<b>Resolved.</b> <i>See State v. Riffin</i> , 959 N.W.2d 855, 862–63 (N.D. 2021) (The North Dakota Disaster Act “provides sufficient guidelines for how the delegated power is to be implemented and is not an impermissible delegation of power between the legislative and executive branches.”).
Ohio	OHIO REV. CODE ANN. § 3715.74 (LexisNexis 2021) (for governor declarations of “adulterated consumer product emergenc[ies]”).	Statute	<b>Unresolved.</b>

Oklahoma	Catastrophic Health Emergency Powers Act, OKLA. STAT. tit. 63, §§ 6401–6405 (2023); Emergency Management Act, OKLA. STAT. ANN. tit. 63, §§ 683.8, 683.9 (2013).	Statute	<b>Unresolved.</b> See <i>Ho v. Tulsa Spine &amp; Specialty Hosp.</i> , 507 P.3d 673, 679, 682 (Okla. 2021) (avoiding the larger nondelegation doctrine question regarding governor’s powers).
Oregon	OR. CONST. Art. X-A, §§ 1–5; OR. REV. STAT. ANN. §§ 401.165 to 401.204 (West 2022).	Constitution; Statute	<b>Unresolved.</b> See <i>Elkhorn Baptist Church v. Brown</i> , 466 P.3d 30, 50–52 (Or. 2020).

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Pennsylvania	PA. CONST. art. IV, § 20; 35 PA. CONS. STAT. § 7301 (2014).	Constitution; Statute	<p><b>Resolved.</b> See <i>Corman v. Acting Sec’y of the Pa. Dep’t of Health</i>, 266 A.3d 452, 486–87 (Pa. 2021) (finding, without disturbing the authority of the governor during states of emergency, that “absent a gubernatorial disaster emergency declaration suspending . . . laws governing agency rulemaking . . . , the promulga[tion of] a new disease control measure” must follow lawful procedure); <i>Wolf v. Scarnati</i>, 233 A.3d 679, 707 (Pa. 2020) (“[T]he Governor's purported suspension of law did not violate the non-delegation doctrine.”); <i>Friends of Danny DeVito v. Wolf</i>, 227 A.3d 872, 892–93 (Pa. 2020).</p>
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Rhode Island	30 R.I. GEN. LAWS §§ 30-15-7, 30-15-9 (2021).	Statute	<b>Unresolved.</b> See, e.g., <i>Southwell v. McKee</i> , No. PC-2021-05915, 2022 WL 2352505 (R.I. Super. Ct. June 6, 2022) (dismissing case as moot).
South Carolina	S.C. CODE ANN. § 25-1-440 (2008).	Statute	<b>Unresolved.</b>
South Dakota	S.D. CODIFIED LAWS § 34-48A-5 (2004).	Statute	<b>Unresolved.</b>
Tennessee	TENN. CODE ANN. § 58-2-107 (2022).	Statute	<b>Unresolved.</b>

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Texas	Texas Disaster Act, TEX. GOV'T CODE ANN. § 418.011 to 418.026 (West 2019).	Statute	<p><b>Unresolved.</b> See, e.g., <i>Abbott v. City of El Paso</i>, 668 S.W.3d 800, 808, 817 (Tex. App. 2023) (striking down governor delegation of powers for suspending laws as unconstitutional: “Like our sister courts that have considered these same arguments, we do not agree that the Disaster Act grants the Governor the broad authority he claims”); <i>Abbott v. Harris Cnty.</i>, 672 S.W.3d 1, 17 (Tex. 2023) (“We can avoid this constitutional question by employing, for purposes of deciding this case, a more limited view of the Governor's Disaster Act authority.”).</p>
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Utah	Disaster Response and Recovery Act, UTAH CODE ANN. § 53-2a-209 (LexisNexis 2021).	Statute	<b>Unresolved.</b>
Vermont	VT. STAT. ANN. tit. 20, §§ 8–9 (2021).	Statute	<b>Unresolved.</b> See <i>Hogue v. Scott</i> , No. 20-cv-218, 2021 WL 6050864, at *14–15 (D. Vt. Dec. 21, 2021) (dismissing a constitutional challenge to executive orders for lack of subject matter jurisdiction).
Virginia	Commonwealth of Virginia Emergency Services and Disaster Law of 2000, VA. CODE ANN. §§ 44-146.17 to -146.29:3 (2023).	Statute	<b>Unresolved.</b> See <i>Va. Mfrs. Ass'n v. Northam</i> , 866 S.E.2d 27, 37–38 (Va. Ct. App. 2021) (transferring a constitutional question to Virginia's Supreme Court).

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Washington	WASH. REV. CODE § 43.06.220 (2019).	Statute	<b>Unresolved.</b> See <i>Gonzales v. Inslee</i> , 504 P.3d 890, 901–02 (Wash Ct. App. 2022) (holding that governor proclamation did not violate prohibitions on delegating legislative authority or separation of powers).
West Virginia	W. VA. CODE § 15-5-6 (2023).	Statute	<b>Unresolved.</b>
Wisconsin	WIS. STAT. ANN. §§ 323.10, 323.12 (West 2018).	Statute	<b>Unresolved.</b> See <i>Fabick v. Evers</i> , 956 N.W.2d 856, 862 (Wis. 2021) (“Our inquiry is simply <i>whether the law</i> gives the governor the authority to successively declare states of emergency in this circumstance.”) (emphasis added).
Wyoming	WYO. STAT. ANN. § 19-13-104 (2021).	Statute	<b>Unresolved.</b>

