
NEW YORK UNIVERSITY
JOURNAL OF LAW & LIBERTY

EMERGENCY POWERS AND STATE LEGISLATIVE CAPACITY DURING THE COVID-19 PANDEMIC

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Justice Louis Brandeis famously asserted that "one of the happy accidents of the federal system" is that states may "serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country."[1] The governmental responses to the COVID pandemic, especially with regard to quarantines, lockdowns, and mask mandates, have largely been undertaken by states and localities. Given the significant differences which exist among the states in their constitutional systems, political dynamics, and economic circumstances, it is no surprise that the states' responses to

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[1] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

COVID have differed dramatically. These differences afford an opportunity to examine, among other things, how the different institutional structures of the states have influenced the way state governments have responded to the emergency.

This article focuses on one aspect of the differences across the states' responses to COVID: pushback against the use of "emergency powers" granted to governors by state legislatures to respond to the pandemic. These emergency powers raise questions about the permissible scope of delegation to the executive branch at the state level. Although scholarly attention to the nondelegation doctrine at the state level is sparse, there is a general consensus that the nondelegation doctrine is more robust at the state level than it is at the national level.[2] In a few prominent cases in Michigan and Wisconsin, the states' highest courts invalidated emergency orders using nondelegation-type reasoning. Part I of this article describes these cases.

These decisions might lead one to conclude that the best hope for constraining emergency powers lies with state courts and state nondelegation doctrines. This article, however, focuses on state legislatures as counterweights to powerful state executives wielding emergency power. Part II of this article explains the reasons for this focus. State courts have been of limited use in curtailing governors' emergency powers, and state legislatures are better institutions for ensuring the democratic accountability of the use of such powers.

Part III focuses on a handful of states as case studies in legislative resistance against (or complicity in) the use of emergency powers to respond to the COVID pandemic. After briefly describing the reasons for the selection of cases, this part describes how, in each state, executives relied on old laws, creatively applied to the circumstances

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[2] *See, e.g.,* Jason Iuliano and Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619 (2017) (arguing that the nondelegation doctrine is actually robust at the state level). For a different view, however, see Joseph Postell, *The Nondelegation Doctrine After Gundy*, 13 N.Y.U. J L. & LIBERTY 280 (2020); Joseph Postell and Randolph May, *The Myth of the State Nondelegation Doctrines*, 74 ADMIN L. REV. (forthcoming 2022) [hereinafter *The Myth of the State Nondelegation Doctrines*].

of the pandemic, to take wide-ranging action in response. It also discusses whether state legislatures challenged the use of these powers, and if so, how they did so and how successful their efforts were.

Part IV discusses the takeaways from the survey in Part III. It argues that state legislatures can promote democratic legitimacy and limit the use of such emergency powers, but only if they are properly equipped to do so. In particular, state legislatures should expand the duration of their legislative sessions and put limits on the duration of emergency declarations. Many states have already taken these measures. Part IV argues that further measures are probably needed to refine the scope of emergency powers. It proposes sunsetting emergency statutes to prevent the use of old and outdated laws for emergencies not envisioned by the legislatures that enacted them. It also advocates for legislative veto provisions not only on emergency declarations themselves, but also on specific orders issued by executive officials. More broadly, Part IV argues that state legislative capacity needs to be expanded to empower state legislatures to take on these responsibilities.

I. NONDELEGATION CANONS AND THE STATE COURTS' RESPONSES TO COVID RULES

In two states, Michigan and Wisconsin, state courts invalidated the executive orders on nondelegation grounds. However, in both cases, the conventional nondelegation doctrine was not employed to strike the statutes granting these emergency powers. At most, the courts in Michigan and Wisconsin limited the discretion these statutes granted by refusing to construe them as authorizing the kinds of emergency orders issued by the state governors. This more limited use of the nondelegation doctrine at the state level, as a canon of construction, should not be surprising, since at both the federal

and state levels this is how the nondelegation doctrine has been applied historically.[3]

A. MIDWEST INSTITUTE OF HEALTH, PLLC V. GOVERNOR (MICHIGAN)

In Michigan, Governor Whitmer issued a series of executive orders declaring a state of emergency in March and April of 2020, relying on two sources of statutory authority: the Emergency Powers of the Governor Act of 1945 (EPGA) and the Emergency Management Act of 1976 (EMA).[4] *Inter alia*, these orders prohibited healthcare providers from performing nonessential procedures while the orders were in effect.[5] Three healthcare providers (as well as a man whose knee surgery was cancelled as a result of the order) challenged the orders, claiming that they violated the Michigan Constitution.

The Michigan Supreme Court addressed the use of each statute separately, finding that neither supported the Governor's orders. With regard to the EMA, the Court held that the Governor's authority to reissue emergency orders expired after April 30, 2020, because the statute limited the duration of those orders without legislative authorization. The Act authorized the declaration of emergency for up to 28 days, after which time both houses of the state legislature must approve an extension. When the Michigan legislature refused to extend the Governor's order past April 30, 2020, the Governor simply rescinded and redeclared the same state of emergency, circumventing the statute.[6]

The Court unanimously agreed that the EMA did not authorize the redeclaration of emergency on April 30, resting on basic principles of statutory construction. If the Governor were able to

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[3] Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000); *The Myth of the State Nondelegation Doctrines*, *supra* note 2.

[4] Midwest Inst. of Health, PLLC v. Governor of Mich. (*In re* Certified Questions from the U.S. Dist. Court), 958 N.W.2d 1, 6 (Mich. 2020).

[5] *Id.* at 7.

[6] *Id.* at 9-10.

redeclare the same state of emergency when the 28-day period elapsed, the Court reasoned, this "would effectively render the [statute's] 28-day limitation a nullity."[7] Upholding the April 30 order would require the Court to distort one of the statute's core features, essentially rendering it mere surplusage. The Court reached this conclusion rather easily.

However, on the second question, involving the EPGA, the Court was more divided. It concluded, with three of the Court's seven justices writing in dissent, that the EPGA was unconstitutional in its entirety because it "stands in violation of the nondelegation doctrine." [8] To reach that conclusion, the Court identified three factors that inform its approach to nondelegation questions: 1) "[t]he scope of the delegation," 2) "the durational scope of the delegated power," and 3) "the adequacy of the standard fashioned by the Legislature[.]"[9]

The Court found that the scope of the delegation was "remarkably broad," encompassing "a substantial part of the entire police power of the state."[10] The EPGA's delegation of emergency power was also of "indefinite duration," the Court concluded, unlike the EMA which required legislative extension beyond the 28-day period.[11] This factor, in the Court's words, means that the statute "authorizes indefinite exercise of emergency powers for perhaps months – or even years," a fact which "considerably broadens the scope of authority conferred by that statute."[12]

After explaining that the EPGA delegated vast police power authority to the governor, and for an indefinite duration, the Court proceeded to analyze "the constitutionality of the standards, or

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[7] *Id.* at 10.
[8] *Id.* at 16.
[9] *Id.* at 17–19 (internal citations omitted).
[10] *Id.* at 20.
[11] *Id.* at 21.
[12] *Id.* at 21.

legislative direction to the executive branch, set forth in the EPGA," in light of the other factors.[13] The Court identified two statutory terms as problematic: the power to "promulgate *reasonable* orders," that the Governor "considers *necessary* to protect life and property."[14] The Court concluded that neither of these terms—neither "reasonable" nor "necessary"—could be read to supply "genuine guidance to the Governor as to how to exercise the authority delegated to her by the EPGA."[15] Perhaps, the Court suggested, the vagueness of the terms "reasonable" and "necessary" is not, by itself, sufficient to render the law unconstitutional. But the EPGA is no ordinary law. It "delegates power of immense breadth and is devoid of all temporal limitations."[16] The combination of these factors renders the law unconstitutional.

Although a bare majority of the Court's justices reached this conclusion about the unconstitutionality of the EPGA, Justice Viviano wrote in concurrence to explain that he would not have decided the question of the law's constitutionality. In his view, the EPGA should be construed not to authorize the Governor's emergency orders, because the statute requires "public safety" to be imperiled.[17] According to Justice Viviano, "public health" and "public safety" are distinct legal terms, and the EPGA does not extend authority over emergencies related to "public health." Because the statute did not authorize the Governor's orders, Justice Viviano maintained, it was unnecessary to proceed to the constitutional question.

In sum, the Michigan Supreme Court concluded that one of the two statutes on which the Governor relied violated the nondelegation doctrine. This was a remarkable decision in part because it marked the first time in decades that the Michigan

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[13] *Id.* at 21.
[14] *Id.* at 22 (emphasis in original).
[15] *Id.* at 23.
[16] *Id.* at 24.
[17] *Id.* at 34.

Supreme Court invalidated a statute on nondelegation grounds.[18] However, only a bare majority of the justices reached that conclusion, one of whom only did so reluctantly, preferring to rest on a construction of the statute that rendered the emergency order unlawful.

B. WISCONSIN LEGISLATURE V. PALM (WISCONSIN)

In a similar sequence of events, the Wisconsin Supreme Court invalidated Emergency Order 28, issued by Andrea Palm, the head of the state's Department of Health Services (DHS), in April 2020.[19] Though some read the decision as a nondelegation decision, the Court's reason for invalidating the rule was narrower, focusing on procedural and statutory rather than constitutional issues.

In this case, *Wisconsin Legislature v. Palm*, the state's governor, Tony Evers, instructed Palm to issue Emergency Order 28 pursuant to authority granted in Chapter 252 of the Wisconsin Statutes, which authorizes Wisconsin's DHS to "promulgate and enforce rules or issue orders to prevent the introduction of communicable diseases into the state." This authority includes the power to "close schools and forbid public gatherings in schools, churches, and other places to control outbreaks," as well as open-ended power to "authorize and implement all emergency measures necessary to control communicable diseases."[20]

By a bare 4-3 majority, the Wisconsin Supreme Court determined that Executive Order 28 was invalid for two reasons. First, it was a rule subject to the state's Administrative Procedure Act's rulemaking procedures. Rules are matters of general application, and Executive Order 28 covered "all persons in Wisconsin at the time it was issued

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[18] *See The Myth of the State Nondelegation Doctrines*, *supra* note 2.
[19] Wis. Legislature v. Palm, 942 N.W.2d 900 (Wis. 2020).
[20] Wis. Stat. § 252.02.

and it regulates all who will come into Wisconsin in the future."[21] Because the order was not promulgated in compliance with the state's rulemaking procedures, the Court concluded that it was illegal.

Although it was not necessary to proceed once the Court determined that Executive Order 28 was not promulgated in accordance with procedural requirements for rulemaking, the Court nevertheless addressed a second question: does Executive Order 28 exceed the authority granted to DHS by Chapter 252 of the Wisconsin Statutes? To this second question, the Court responded affirmatively. Admittedly, the provision authorizes DHS to implement "all" measures "necessary" to control disease, terms which suggest that the agency's authority is vast. However, according to the Court, DHS's order went beyond even this vast authority, prohibiting all forms of travel and requiring all individuals, even those not suspected of being infected, to stay at home.[22] If the Court were to uphold this expansive interpretation of the agency's authority, it would arguably run afoul of the nondelegation principle. As the Court put it, "[w]e cannot expansively read statutes with imprecise terminology that purport to delegate lawmaking authority to an administrative agency."[23] Thus, the Court concluded that DHS had not only failed to comply with state law's rulemaking procedures, but it had also transgressed legal limitations on DHS's authority to limit the spread of communicable diseases. Although two Justices concurred, arguing for a stricter interpretation of the nondelegation doctrine that would imperil the language of Chapter 252 itself,[24] that argument did not persuade a majority of the members of the Wisconsin Supreme Court.

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[21] *Palm*, 942 N.W.2d at 910.
[22] *Id.* at 916.
[23] *Id.* at 917.
[24] *Id.* at 927.

C. THE LIMITED SCOPE OF THE STATE NONDELEGATION DOCTRINE

In sum, in two states—Michigan and Wisconsin—state courts struck down executive orders for exceeding the legal limits on the powers of the executive branch. Yet, neither instance should bring one to conclude that the best means of constraining state executives' emergency powers run through the judiciary. The Wisconsin Court's decision relied largely on procedural grounds or an alternative construction of the statute, with only two justices indicating a willingness to call the statutory provision itself into question. In Michigan, one of the two statutes in question was struck down for violating the nondelegation doctrine, but the other was upheld. That statute rests authority for continuing emergency orders with the state legislature, and for good reason: both reason and history indicate that the state legislatures are the best defenses against the executive branch's expansive use of emergency power.

II. NEW TRICKS FROM OLD LAWS

One common feature of the states' varying responses to the COVID-19 pandemic is the reliance on vague legal provisions that were enacted long ago, for different purposes than those to which state officials put them in 2020. This is a common feature of modern law in the regulatory state. As Philip Wallach writes, agencies frequently use existing statutes for novel purposes that were not envisioned by the legislatures that initially enacted them, teaching old laws new tricks.[25]

Putting old statutes to new uses raises significant tradeoffs. On the one hand, legislatures are increasingly incapable of reaching the consensus needed to legislate effectively on complex policy

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[25] Philip Wallach, *When Can You Teach an Old Law New Tricks?*, 16 N.Y.U. J. LEG. & PUB. POL'Y 689 (2013).

questions. Standing committees have been eroded, depriving legislatures of expertise. Political polarization incentivizes conflict over bargaining and compromise. In this environment, reinterpreting old statutes to apply to new problems may seem like a second-best substitute for legislative adaptation of policy to new circumstances.

However, as Wallach explains, there are downsides to teaching old laws new tricks. Most significantly, the practice weakens the rule of law by putting executive officials, applying open-ended grants of legal authority, in the place of lawmakers themselves. In Wallach's words, "if these reinterpretations become too extreme they threaten to drain statutory text of its meaning, leaving the interpreter effectively unconstrained."[26] In other words, if old statutes can simply be reinterpreted to apply to new problems, problems which have little connection to those which the original law addressed, the executive who interprets and applies the law becomes effectively the legislator who updates the law to address new problems.

This difficulty is especially acute when the laws are drafted at greater and greater levels of generality. In such circumstances, the legislative process may itself become obsolete. Once enough time has passed, theoretically, legislatures will have enacted enough statutes to address almost every possible future exigency. There will be no need for new statutes. Legislatures, in such a scenario, would shift to other tasks such as oversight of the administration and the setting of fiscal policy. Executive officials would take over the lawmaking responsibilities.

In addition, time is another variable that increases the threat of adapting old laws to new circumstances. As Jonathan Adler and Christopher Walker argue, "[w]ithout regular legislative activity, agencies are forced to get more creative with stale statutory mandates to address new problems and changed circumstances."[27]

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[26] *Id.* at 691.

[27] Jonathan Adler & Christopher Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1937 (2020) [hereinafter *Delegation and Time*].

Using these "stale" provisions, they assert, "raises distinct concerns about whether delegation is consistent with democratic governance." [28] In situations where "decades pass between the enactment of statutes delegating authority to agencies and the exercise of that authority, there is a risk that the delegated authority will be used for purposes or concerns that the enacting Congress never considered."[29]

Under the theory of American constitutionalism, elected representatives in legislatures reflect the sense of the majority, and their enactments translate majority consent into law. Using older statutes for purposes that these legislatures never envisioned threatens this system by circumventing this legislative process.

Admittedly, this also means that those who *administer* the laws can, by creatively reinterpreting them, reflect current public opinion rather than the old, obsolete coalition that originally enacted the law. For instance, one could argue that applying the provisions of the Clean Air Act to greenhouse gas emissions allows the law to reflect current public opinion, which cares more about climate change than smog, more faithfully. However, updating laws through "bureaucratic repurposing" circumvents the "deliberation and approval – and accompanying political accountability – that an elected legislature plays in our constitutional system," according to Adler and Walker.[30]

In short, the use of emergency powers in response to the COVID-19 pandemic displays the problems that characterize the use of old laws to meet new circumstances, particularly the democratic deficits of relying on old legislatures driven by old coalitions to address new issues. Rather than incentivizing the bargaining and compromise necessary to overcome "the hurdles to passing new legislation," teaching old laws new tricks displaces legislative politics for

[28] *Id.* at 1944.
[29] *Id.* at 1945.
[30] *Id.* at 1946 n.84.

administrative interpretation and reduces the need to reach accommodation in our polarized political climate.[31]

Moreover, in many cases the delegation itself may be "based on a prior Congress' preferences that no longer command popular support." [32] In these cases, administrators will not be updating statutes to reconcile them to current public opinion, but will be imposing their authority against the wishes of the public. These considerations are especially acute in emergency situations, where executive officers can appeal to necessity to encourage compliance with unpopular orders.

State courts can police the outer boundaries of statutory delegations, perhaps limiting the worst excesses of updating old laws to meet new circumstances—as the examples of Michigan and Wisconsin suggest. However, the limited effect of those two cases suggests that only state legislatures, by becoming more organized, proactive, and assertive in the use of their authority, can ensure that state governments' responses to emergencies are consistent with the judgment of the public. As the next Part of this article indicates, most of the authority that state executives used to address the pandemic was enacted decades ago, and for very different purposes. In some states, however, legislatures used their power to limit executive authority and take responsibility for the policy response to the pandemic. Examining these cases will help us to understand how to incentivize legislatures to do so even further.

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[31] This is a point insightfully made by Adam White, *The APA and the Decline of Steady Administration*, L. & LIBERTY (Aug. 25, 2021) [https://perma.cc/PJU9-A9A3] ("Each time Congress empowered agencies to make new laws and policies unilaterally, it channeled future political energy into those agencies, reducing all of the hydraulic forces that are needed to force Congress itself to do the harder work of deliberating and compromising on new legislation. Many future presidents would announce that 'if Congress won't act, I will,' but the reverse also seems true: because presidents can act, congressmen won't.").

[32] *Delegation and Time*, *supra* note 27, at 1945.

III. STATE LEGISLATIVE RESPONSES TO EMERGENCY ORDERS

This Part discusses the state legislatures' responses to the use of emergency orders in a handful of states that serve as valuable case studies. In some states, there was little to no legislative response to executive orders. Only one of these states, California, is included in the survey. The other states examined here featured some variation of political dispute between the governor and state legislature or general assembly, some of which led to legislation constraining the scope of emergency powers to respond to the pandemic.

Due to research constraints and considerations of brevity, this part discusses the legislative responses in a sample of nine states. These states were selected in order to produce a variety of large and small states, to include states from various parts of the country, and to explore how different political and partisan dynamics affect legislative responses. In turn, this Part discusses each case in the set: Alabama, Arizona, California, Kansas, Kentucky, New Hampshire, Ohio, Tennessee, and Texas.

A. ALABAMA

Alabama's Emergency Management Act of 1955 authorizes the governor or the state legislature through joint resolution to declare a state of emergency "when a public health emergency has occurred or is reasonably anticipated in the immediate future."[33] The state of emergency expires 60 days after it is proclaimed, but can be extended either by the governor or by joint resolution of the state legislature. Using this authority, Gov. Kay Ivey issued a series of orders closing schools and state government offices and offering temporary relief from eviction and foreclosure.

The Alabama state legislature has yet to enact legislation curtailing the Governor's emergency powers, though several

[33] Ala. Code § 31-9-8 (2016).

measures have been proposed. The Republican Party has a significant partisan advantage in the Alabama State Legislature, having won 27 of the state's 35 seats in the State Senate in 2018 and 77 of the 105 state House seats in 2018 (members of the state's House and Senate serve four-year terms, so there were no state legislative elections in 2020). Perhaps because the state's governor is also a Republican, there has been less legislative activity aimed at curtailing the governor's emergency powers compared to other heavily Republican states such as Kentucky (see below). The laws that have been proposed focus primarily on the length of the state legislative session, as well as the length of state of emergency declarations. One measure, H.B. 241 (and its companion, S.B. 97), sought to amend the state's emergency law to limit states of emergency to 14 days, to be extended only by joint resolution of the legislature. Another law sought to amend the state's constitution to allow the legislature to call itself into special session during times of emergency. Currently, the state's legislature is in session for only 30 meeting days of each year, and only the Governor can call special sessions of the Alabama Legislature. The state legislature failed to enact any of these proposals into law before the expiration of its last session in May 2021.

B. ARIZONA

Arizona's state legislature consists of a 60-member House of Representatives and a 30-member Senate. The legislature meets annually from January to June. In 2020, Republicans held a narrow majority in the House, while the Senate was evenly divided between Republicans and Democrats. During the 2021 session, Republicans held slim majorities in both chambers.

Arizona Gov. Doug Ducey, a Republican, declared an emergency in March 2020 and repeatedly extended the state of emergency throughout 2021 and into 2022. As with California law, a declaration of emergency grants the governor the ability to exercise essentially any powers granted to the state government. The state's 2020 legislative session was suspended on March 23 and officially adjourned on May 26. In Arizona, the governor may call the state legislature into special session during an emergency, but Gov. Ducey

refused to do so and the legislature could not muster the 2/3 vote necessary to call a special session itself.

In response to the Governor's emergency orders, Republicans in 2021 advanced legislation to reduce the length of emergency declarations; to require the Governor to call a special session when an emergency is declared, to last for the duration of the emergency; and to and require affirmative legislative action to extend an emergency beyond thirty days. The measure, Senate Concurrent Resolution 1003, was passed on party lines, with Republicans in favor, during the 2021 legislative session, but the House passed an amended version, and the Senate voted down the amended version by a narrow margin.[34]

The legislature is currently considering another measure during the 2022 session, Senate Bill 1009, that would limit emergency declarations to 120 days, subject to legislative extension for no more than 30 days per extension. According to the senator who introduced the measure (one of few Republicans who voted against Senate Concurrent Resolution 1003 in the previous session), this bill has the support of Gov. Ducey.[35]

C. CALIFORNIA

Governor Gavin Newsom used the California Emergency Services Act (CESA), enacted in 1970, to issue a string of emergency orders. The Act gives the governor the power to proclaim at his discretion that a state of emergency exists. The statute defines an emergency as "the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property

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[34] Sen. Con. Res. 1003, Reg. 1st Sess. (Ariz. 2021).

[35] Gloria Gomez, *Bill to Limit Arizona Governor's Emergency Powers Was Sparked by Ducey's COVID Orders*, TUCSON SENTINEL (Jan. 25, 2022) [https://perma.cc/ZK4D-KJCE].

within the state," an open-ended definition that essentially leaves the declaration of emergencies to the governor's discretion.[36]

Under CESA, when the governor proclaims a state of emergency, the law triggers broad powers such as the authority to issue regulations, to suspend regulations, and to spend unilaterally from any available fund. Furthermore, CESA states that during a time of emergency "the Governor shall . . . have complete authority over all agencies of the state government and the right to exercise within the area designated all police power vested in the state by the Constitution and the laws of the State of California."[37] The Act also empowers the governor to declare the termination of a state of emergency, at which point the emergency powers cease, but the state legislature can also terminate a state of emergency by concurrent resolution, which does not require the governor's signature.[38]

In May 2021, a state appeals court upheld the legality of Gov. Newsom's use of emergency powers under CESA in the face of legal challenges related to the nondelegation doctrine.[39] An appeal to the California Supreme Court was denied in August 2021.

Perhaps surprisingly, the California state legislature has considered legislation to curtail the governor's emergency powers. An effort to use the legislature's concurrent resolution authority to terminate the state of emergency in late 2020 failed to pass. The most notable of the proposed bills to limit the governor's authority is Senate Bill 448, the Emergency Powers Limitation Act. This law would require any emergency orders to be narrowly tailored and limited in duration and scope. It also opens up judicial review for any person adversely affected by an unlawful order and specifies a series of rights that cannot be infringed through the use of emergency powers. The law failed to receive a vote in the California Legislature's 2021 session. California's legislative session is longer than most

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[36] Cal. Gov. Code, § 8558.
[37] *Id.* § 8627.
[38] *Id.* § 8629.
[39] Newsom v. Super. Ct., 278 Cal. Rptr. 3d 397 (Ct. App. 2021).

Western states; its 2021 session began in December 2020 and ended in September 2021.

D. KANSAS

Like Kentucky, described below, Kansas is a state with a strong Republican partisan lean and a comfortable veto-proof Republican majority in the state legislature, but a Democratic governor, Laura Kelly. Gov. Kelly relied on the Kansas Emergency Management Act, enacted in 1975, to issue orders prohibiting mass gatherings, closing schools, and placing a moratorium on evictions and foreclosures. Kansas's state legislature meets annually from January to May, but in 2020 the legislature suspended its session effective March 19.

In 2021, the Kansas state legislature passed several measures curtailing the authority of the governor. Most notably, in March, the legislature passed Senate Bill 40, which made changes to the core of the state's Emergency Management Act. The bill limits a state of emergency to 15 days unless ratified by concurrent resolution of the legislature or, if the legislature is out of session, by a majority vote of the state's Legislative Coordinating Council (a committee composed primarily of party leaders that governs the state legislature's committee system).[40] The bill faced numerous challenges and was ruled unconstitutional by several Kansas courts before being upheld by the Kansas Supreme Court in August 2021.

The state legislature also met in special session on November 22 to enact a measure granting exemptions to federal COVID-19 vaccination mandates and granting state unemployment benefits to anyone fired for refusing to get the COVID-19 vaccine. Gov. Kelly signed the measure. The legislature's special session was

[40] Senate Bill 40 followed a measure passed during a special session of the legislature in summer 2020, H.B. 2016, that required the governor to submit any new declaration of a state of disaster emergency to a committee of the state legislature, the State Finance Council.

unprecedented—it was the first time in the state's history that the legislature called itself into special session, which required 2/3 of the members of the state legislature.

E. KENTUCKY

Kentucky's response to the pandemic was affected by unique political dynamics at the state level. Kentucky has a strong Republican partisan lean.[41] However, Andy Beshear, Kentucky's governor, is a Democrat who won a historically narrow victory over Matt Bevin in 2019. Republicans retain a veto-proof supermajority in the Kentucky General Assembly, with 75 of the 100 seats in the Kentucky House of Representatives and 30 of the 38 seats in the Kentucky State Senate. This combination of a divided government, a Republican supermajority in the state assembly, and a governor willing to assert power aggressively almost guaranteed conflict between the governor and the General Assembly.

Adding to these unique political dynamics is a curious feature of Kentucky's state legislature. Kentucky created the Legislative Research Commission (LRC) in 1948 to serve as an arm of the General Assembly. This committee is chaired by the President of the State Senate and the Speaker of the State House, and contains a small number of members of the state assembly from both parties.[42] The LRC was created with the explicit intention to free the state assembly from the influence of the governor and as a means of restoring the Kentucky State Assembly as a co-equal branch of the state government. Until the Kentucky Supreme Court's decision in *Legislative Research Commission v. Brown*, the Kentucky LRC had the power to act on behalf of the state assembly while it was in adjournment and had the power to veto regulations promulgated by

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[41] FiveThirtyEight estimates Kentucky's partisan lean to be R+27.1. *See* Nathaniel Rakich, *How Red Or Blue Is Your State?*, FIVETHIRTYEIGHT (May 27, 2021), [https://perma.cc/7S7K-4NSQ].

[42] KY. GEN. ASSEMB., *Legislative Research Commission* [https://perma.cc/ZW68-Q5LG] (last visited Apr. 8, 2022).

the state's administrative agencies.[43] The LRC still retains some powers to act on behalf of the state assembly when it is not in session.

This is an important feature of Kentucky's political system, because the state assembly is rarely in session. In even-numbered years sessions are limited to a maximum of 60 legislative days (and must end by April 15), and in odd-numbered years sessions are limited to a maximum of 30 legislative days (ending no later than March 30). (The Governor may call the assembly back into session if warranted due to emergency, but Gov. Beshear refused to convene the assembly after the outbreak of COVID-19 in spring 2020.) Thus, the LRC is the only part of the state assembly that can act on behalf of the legislature during most of the calendar year.

As would be expected, the Kentucky General Assembly focused on limiting the governor's power to use emergency orders during its 2021 session. The assembly passed a series of laws limiting the governor's authority, overriding the Governor's veto in most cases. Kentucky S.B. 1 specified that all emergency orders restricting in-person meetings or imposing mandatory quarantine or isolation requirements expire after 30 days, unless extended by the General Assembly. It also authorized the assembly to terminate a declaration of emergency at any time. Kentucky H.B. 1 specifies that businesses, schools, and local governments can remain open and fully operational if they meet or exceed CDC guidelines for safety, regardless of any orders handed down by the governor. Also passing over the Governor's veto was Senate Bill 2, which makes it more difficult for the governor to promulgate emergency regulations, by defining what constitutes an emergency and requiring agencies to provide evidence that an emergency exists before those regulations are approved by the Assembly's Administrative Regulation Review Subcommittee.

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[43] Legislative Research Comm'n v. Brown, 664 S.W.2d 907 (Ky. 1984).

The Kentucky General Assembly also met for a special session in the summer/fall of 2021 and, in that session, enacted Senate Bill 1 and Senate Bill 2, overriding the Governor's veto in both instances. These bills ended statewide mask mandates and vaccine requirements for health care systems. Kentucky's General Assembly, in short, has aggressively pushed back against the Governor's policies when it has been in session.

F. NEW HAMPSHIRE

New Hampshire's state legislature, known as the "General Court," contains the largest lower house of any American state legislature at 400 members. By contrast, the New Hampshire state senate is composed of only 24 members. The Democratic Party held majority control of both chambers of the legislature in 2020 when the state's governor, Republican Chris Sununu, declared a state of emergency in March in response to the outbreak of COVID-19. Gov. Sununu renewed the state of emergency every 21 days, as authorized by state law, until June 2021.

The state's legislature suspended its legislative session on March 14, 2020, and the session was officially adjourned on June 30, 2020. The legislature normally meets from January through June annually. Legislative resistance to Gov. Sununu's emergency measures did not occur until 2021, largely because of the outcome of the elections in 2020. Republicans won control of both chambers of the state legislature in 2020, a surprising outcome, especially in the House where Republicans gained fifty-seven seats. Although this created a partisan alignment between the state legislature and the governor (who also won reelection in 2020), it set up a political conflict between the more conservative members of the state legislature and Gov. Sununu, who is known as a moderate Republican.

Conflict between the legislature and the governor, in spite of partisan alignment, was a critical theme of the 2021 New Hampshire legislative session. The legislature included in House Bill 2, the state's budget measure, a provision requiring legislative approval after 90 days of a declaration of emergency. It also requires the governor to call a special session of the legislature within that timeframe. The legislature also passed House Bill 187, providing for oversight and a

legislative veto over specific orders promulgated by the state's Department of Health and Human Services.[44] In 2022, the legislature continues to consider legislation limiting the governor's emergency powers, including more legislative veto provisions over specific executive orders.[45]

G. OHIO

Ohio's governor, Mike DeWine, was cheered by many for his proactive and aggressive use of emergency powers in early March, 2020, when the first cases of COVID-19 were confirmed in his state.[46] DeWine declared a state of emergency on March 9, 2020, and then-Director of the Ohio Department of Health, Dr. Amy Acton, issued orders to ban mass gatherings and shut down bars and restaurants. Dr. Acton relied on provisions in Ohio law enacted in 1886 authorizing the state's Department of Health to issue orders necessary to prevent the spread of infectious diseases and impose quarantine and isolation, where necessary.[47]

Veto-proof Republican majorities held control of Ohio's state legislature during its 2020 and 2021 legislative sessions. Governor DeWine is also a Republican. In spite of this partisan alignment, there was plenty of conflict between the legislature and governor during both sessions. As early as May 2020, the legislature considered legislation to limit all orders issued by the Ohio Department of Health to 14 days unless approved by the state legislature's Joint Committee on Agency Rule Review, composed of five members each from the Ohio House and Ohio Senate. Slightly different versions of

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[44] N.H. H.B. No. 187 (2021).

[45] Holly Ramer, *New Hampshire House Votes to Further Limit Governor's Powers*, U.S. NEWS & WORLD REPORT (Jan. 6, 2022) [https://perma.cc/S34D-FWDQ].

[46] Theodore Decker, *As Pandemic Drags on, Only a Shadow Remains of the Mike DeWine We Knew*, COLUMBUS DISPATCH (Sept. 9, 2021) [https://perma.cc/8J9E-4F37].

[47] Jeremy Pelzer, *Here's the Ohio Law Giving Officials the Power to Close Restaurants and Ban Mass Gatherings*, CLEVELAND.COM (Mar. 16, 2020) [https://perma.cc/K37R-XE5Y].

the measure passed both chambers of the Ohio legislature, but the Ohio Senate rejected the bill in late May 2020 during the attempt to reconcile the two versions.[48]

Undeterred, Republican leaders in the Ohio legislature returned in 2021 and passed a similar measure, Senate Bill 22, which prohibits stay-at-home orders and provides for a legislative veto of any health orders or emergency declarations issued by state officials. Gov. DeWine vetoed the bill and was overridden by the legislature, 62-35 in the House and 23-10 in the Senate.[49] Ohio legislators insisted that the measure was necessary to bring about a proper balance between the legislative and executive branches. As a co-sponsor of the measure argued on the floor of the Ohio Senate: "it's time for us to stand up for the legislative branch. It's time for us to reassert ourselves as a separate and co-equal branch of government here in the State of Ohio."[50] The House Majority Floor Leader expressed the same idea that Senate Bill 22 helps "restore . . . an element of checks and balances."[51]

H. TENNESSEE

In Tennessee, Gov. Bill Lee, a Republican, issued orders similar to those that were issued in other states, declaring a state of emergency and requiring Tennesseans to stay at home. However, Tennessee's restrictions were lifted by Gov. Lee relatively early. For instance, in April 2020, Lee issued an executive order reopening gyms, and by September, gathering restrictions were also lifted. Lee also issued an executive order allowing parents to opt-out of any school district mask mandates.

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[48] Jake Zuckerman, *Inside Ohio Republicans' 10-Month War on the State Health Department over COVID-19*, OHIO CAPITAL J. (Mar. 8, 2021) [https://perma.cc/GKT2-Z48T].

[49] Jeremy Pelzer, *Ohio Lawmakers Override DeWine Veto, Pass Limits on Governor's Coronavirus Powers*, CLEVELAND.COM (Mar. 24, 2021) [https://perma.cc/2PGM-AEBF].

[50] *Id.***Error! Hyperlink reference not valid.**

[51] *Id.***Error! Hyperlink reference not valid.**

Gov. Lee's relatively lax policies likely prevented any serious confrontations with the state's General Assembly. However, during a frantic special session in late October, called by the Assembly, the legislature passed an omnibus bill, H.B. 9077. The bill prohibits businesses, schools, and government buildings from imposing vaccine requirements. It also prohibits schools from imposing mask mandates in the absence of "severe conditions," and, even then, such mandates may not exceed 14 days. While Gov. Lee signed the measure, his office indicated during the late hours of the debate over the measure that the measure may be inconsistent with the federal Americans with Disabilities Act and could jeopardize federal funding for the state.[52] State courts have upheld the implementation of H.B. 9077.[53]

I. TEXAS

Texas's Health and Safety Code contains provisions enacted by a 1989 statute titled the "Communicable Disease Prevention and Control Act."[54] The Act authorizes the governor, in conjunction with the Commissioner of the Department of State Health Services (DSHS), to declare a Public Health Disaster, which may continue for up to 30 days and may be renewed once by the Commissioner for an additional 30 days.[55] The Act empowers DSHS to define reportable diseases and to order people who may have a reportable disease to submit to quarantines, as well as undertake contact tracing to identify individuals who may also have been exposed to a communicable disease.[56]

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[52] Jonathan Mattise and Kimberlee Kruesi, *Tennessee Governor's Aide Warned New COVID Law Was Illegal*, AP NEWS (Nov. 19, 2021) [https://perma.cc/Q8RD-67PJ].

[53] Mariah Timms, *Tennessee's new law on school mask mandates remains temporarily on hold, federal judge says*, TENNESSEAN (Nov. 15, 2021) [https://perma.cc/NP58-74WE].

[54] Tex. Health and Safety Code, § 81.

[55] *Id.* § 81.082.

[56] *Id.* § 81.083.

In addition, a separate chapter of state law, enacted in the "Texas Disaster Act" of 1975, authorizes the governor to take emergency actions in specific circumstances.[57] The Texas Disaster Act defines a disaster as "the occurrence or imminent threat of widespread or severe damage, injury, or loss of life and property resulting from any natural or man-made cause," followed by a non-exhaustive list of specific disasters that includes "epidemic[s]."[58] When the governor declares a disaster and triggers emergency power under the Disaster Act, the governor obtains the power to suspend laws, force evacuation and control the movement of persons, prohibit sales of certain goods such as alcoholic beverages and firearms, and generally issue executive orders and regulations that have the effect of law.[59] A state of disaster continues for 30 days unless rescinded by the governor, who can renew the state of disaster after the 30 days has elapsed.

Texas Gov. Greg Abbott relied on both laws to support a series of emergency orders issued in the spring of 2020. However, for most of the orders, Abbott cited the Texas Disaster Act since it grants much broader authority. Under the Texas Disaster Act, the Texas legislature can "by law" terminate a state of disaster at any time.[60] However, like many other state legislatures, Texas's legislature is in session for limited periods of time: from January to May every odd-numbered year. Consequently, the legislature was not in session between May 27, 2019 and January 12, 2021, during which time Gov. Abbott's emergency orders were issued. Only the governor can trigger a special session of the state legislature in Texas.[61] Because of this, the legislative response to Gov. Abbott's orders in 2020 was nonexistent.

When the state legislature convened in January 2021, however, it considered and ultimately enacted several measures to curtail the

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[57] Tex. Gov. Code, § 418.
[58] *Id.* § 418.004.
[59] *Id.* § 418.012.
[60] *Id.* § 418.014.
[61] TEX. CONST. art. IV, § 8.

scope of emergency power. The most significant of these measures, H.B. 3, authored by Dustin Burrows (R-Lubbock), aimed to prevent the application of the Texas Disaster Act to pandemics by fine-tuning the language of the law to specify the circumstances under which the emergency powers can be invoked. In what might be called a classic case of teaching old laws new tricks, Gov. Abbott had used a law that was necessary to address disasters such as hurricanes and tornadoes to apply to circumstances not envisioned when the law was enacted.

In Texas, however, legislators across the political spectrum are reluctant to rescind emergency powers because of the prevalence of natural disasters such as hurricanes and tornadoes in the state. Furthermore, by the beginning of 2021, Gov. Abbott had pivoted to a much less aggressive stance on emergency measures such as lockdowns and mask mandates. In fact, most of the Governor's actions during the 2021 legislative session were aimed at weakening restrictions imposed by local authorities rather than tightening restrictions. Even still, H.B. 3 passed both chambers of the Texas legislature but died in conference committee as the May 30 deadline ended the legislative session.

IV. STRENGTHENING THE STATE LEGISLATURES

This cursory view of the different state legislative responses to the use of emergency power suggests several lessons for how to empower and incentivize state legislatures to limit emergency power and ensure that the elected representatives in the legislature are making the policies rather than abdicating that responsibility.

A. SESSION LENGTH AND CONVENING REQUIREMENTS

The most pervasive and obvious difficulty encountered by state legislatures inclined to respond to the use of emergency power is the limited duration of state legislative sessions, coupled with the inability of state legislatures to call themselves into session during emergencies. For instance, California law requires the termination of emergency powers after 30 days unless the Governor issues a call for a special session of the state legislature. If this law had been in place

in Kentucky in 2020, Gov. Beshear would have been compelled to call the Kentucky General Assembly into session. In Texas, as well, the legislative pushback would have taken place earlier if the state legislature had been called into special session in 2020.

There is a robust scholarly literature measuring legislative professionalism, and session length is typically considered to be one of the most significant variables contributing to state legislative professionalism.[62] Longer sessions give legislators more time to master the details of state policy and also the rules and procedures of the legislative process. Longer sessions also allow members to develop and deliberate on policies. As the examples discussed above indicate, longer legislative sessions would enable legislators to take more time to consider proposals to limit emergency power, to consider alternative proposals, and to reconcile differences in bills passed by both chambers when necessary.

B. SUNSET

An additional problem indicated by several states' experience, particularly Texas, is the use of old statutes for new purposes. The Texas Disaster Act was enacted to authorize the Governor to force evacuation when faced with the imminent threat of a hurricane or in response to devastation caused by tornadoes. The provisions in the Act empowering Texas's governor to move people is almost certainly tailored to the context of a hurricane landfall. Yet in 2020, provisions of the law were used for very different purposes.

Most of the states' disaster and emergency statutes were passed in the 1950s, 1960s, and 1970s. State legislatures have not been forced to revisit those statutes, and those who did revisit those statutes in

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[62] See, for a small sample, Peverill Squire, *Legislative Professionalism and Membership Diversity in State Legislatures*, 17 LEG. STUD. Q. 69 (1992); Alan Rosenthal, *State Legislative Development: Observations from Three Perspectives,* 21 LEG. STUD. Q. 169 (1996); John M. Carey, Richard G. Niemi, & Lynda W. Powell, *Incumbency and the Probability of Reelection in State Legislative Elections,* 62 J. POLITICS 671 (2000); Peverill Squire, *Measuring State Legislative Professionalism: The Squire Index Revisited*, 7 ST. POLITICS & POL'Y Q. 211 (2007).

response to COVID-19 measures only did so months after the outbreak of the pandemic.

As explained above in Part II, the use of these old statutes to apply to new contexts raises problems of democratic accountability. One solution to this problem is to require state legislatures to revisit these statutes periodically and reauthorize them. Just as congressional reauthorization can serve as a useful means of keeping statutes updated to reflect the current sense of the people, so too can state reauthorization of emergency statutes.[63]

To facilitate this, states could "sunset" their statutes in order to incentivize their legislatures to be attentive to the need to update statutes to accord with current circumstances. However, unless state legislative sessions are extended and state legislative capacity increased, it is unlikely that these positive consequences will be realized. Commonly, in short legislative sessions, there is a flurry of activity to close the session, and the laws passed are often carelessly drafted and not widely read.[64]

C. LEGISLATIVE VETOES

Another significant development in a few of the states surveyed above is the use of legislative veto provisions to require the legislature's permission before embarking on aggressive uses of emergency power. State constitutions are generally more flexible than the federal Constitution in allowing legislative vetoes, and some state legislatures have created commissions or committees composed of legislators to oversee and veto regulations promulgated by the executive branch. Kentucky's Legislative Research Commission is one such example.

Typically, where state legislatures have curtailed emergency power, they have used the concept of a legislative veto to govern the

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[63] *See Delegation and Time*, *supra* note 27, at 1960.

[64] *See* Mark B. Blickle, *The National Sunset Movement*, 9 SETON HALL LEG. J. 209 (1985).

declaration of a disaster or emergency. However, this strategy could be extended to specific orders or measures, the most onerous of which would not take effect unless authorized by the legislature or a committee of members (if the legislature is in adjournment). The reasons in favor of such provisions are obvious: the most restrictive measures should only be undertaken when it is clear that they will promote the public good and that they are supported by the whole community.

D. DELEGATION AND TRANSACTION COSTS: REBUILDING ROBUST STATE LEGISLATURES

All of these suggestions point to a more fundamental proposition: the need for state legislatures to be strengthened and their capacity to be increased. It is noteworthy that almost every major legislative pushback discussed above has focused narrowly on questions involving the extent of emergency declarations, the need for legislative involvement in extending emergencies, and reconvening legislatures in the midst of emergencies. Little attention, to this point, has been paid to the scope of the delegations contained in emergency statutes, which are often tantamount to granting the entire state police power to the executive.[65] Good policy, accountability, and an appropriate balance of power would all be promoted by revisiting these statutes to tailor delegations to the varying circumstances of emergencies and the appropriate powers to address them.

The difficulty is that the work of amending statutes carefully takes great time and effort, as well as staff support. Broad delegations in vague statutes are often the function of the high transaction costs associated with building majority coalitions in legislative bodies, where every representative responds to a different constituency.[66]

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[65] See, for instance, the scope of the delegations in Arizona's and California's emergency statutes, *supra* Section II.

[66] *See* Joseph Postell, *The Politics of Legislative Delegation* (Center for the Study of the Admin. St. Working Paper 19-03, 2019), *available at* [https://perma.cc/DE6B-62FE].

Legislators who spend time in the capitol with their colleagues build trust and have access to professional staff, who can assist with legislative research and can manage these transaction costs more effectively. However, due to the limited resources allocated to legislative staff at the state level and state legislators' relatively short lengths of service, these transaction costs prove difficult to overcome, especially when time constraints operate during shorter legislative sessions.

Based on the limited evidence surveyed in this article, it does not appear that partisanship serves as a disincentive to the reform of emergency powers. In many of the states surveyed, party alignment between the state legislature and the governor did not deter the state legislature from enacting measures limiting emergency powers. This is a helpful reminder that partisanship and political ideology, even in the 21st Century, are not identical. However, without more resources, expertise, and time to build trust and coalitions, legislatures will be less likely to do the difficult work of amending their emergency laws substantively to narrow the powers that can be exercised by governors.

Most state legislatures, unlike the U.S. Congress, are filled with amateurs, who have much less experience and very little staff support. This type of legislature, defined by amateur legislators, made more sense in earlier periods of American history when two factors were present: 1) the states had low population and little urbanization, and 2) the states had relatively weak executive and administrative powers. These factors are no longer present in many of the states that have severe limits on the length of legislative sessions, staff support, and legislators' salaries. Texas is no longer a frontier state in which the legislature only needs to be in session for several months in a two-year span.

Nor does limiting the length of a state legislative session serve the traditional function of limiting the size of the state's government, in an era where executive and administrative capacities in many states have grown so vast. Once a state has established strong executive and administrative powers, limiting the length of a

legislative session does not serve to limit government, but to prevent limits on administrative power.

For these reasons, which apply both to the use of emergency powers during the COVID-19 pandemic and to the ordinary use of administrative power at the state level, defenders of liberty and the rule of law should support efforts to build legislative capacity at the state level.

CONCLUSION

Governments need to be able to exercise emergency powers in responding to extraordinary circumstances. Political theorists, who influenced the writings of the framers of the United States Constitution, such as John Locke, wrote extensively in defense of the use of prerogative power.[67] All governments require, in Locke's words, the "power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it . . . therefore there is a latitude left to the executive power, to do many things of choice, which the laws do not prescribe."[68] The common law long recognized executives' power to act during times of emergency, before states codified disaster and emergency laws beginning in the 20th Century.

Nevertheless, it is important that the use of emergency powers be restrained, as much as possible, by law and be accountable to those on whose behalf they are exercised. Since much of emergency law exists at the state level, the state legislatures must serve as the locus of accountability. State legislatures need to be strengthened so that they can act on behalf of the people they represent to ensure that the prerogative powers wielded by state governors promote the public good, rather than betray it.

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[67] *See* Dave Gowan and Chuck Greif, *Project Gutenberg eBook of Second Treatise of Government, by John Locke*, PROJECT GUTENBURG (Apr. 22, 2003) [https://perma.cc/44TK-5L4Q].

[68] *Id.*