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COVID’s Counterpunch: State Legislative Assaults on Public Health Emergency Powers

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ABSTRACT

Amid the most impactful health crisis in over a century, COVID’s “counterpunch” entails aggressive efforts by numerous state legislatures to diminish state and local public health emergency powers. It is an incredulous movement facially supported by a need to appropriately balance economic interests and rights with communal health objectives. At its political core, however, is a “power grab” by legislatures to free their constituents from extensive emergency powers (e.g., social distancing, assembly limits, and business closures). Never mind the fact that these interventions, when used effectively and constitutionally, save lives and reduce morbidity. Public health agents and activists are understandably concerned about diminutions of their express and discretionary emergency powers. Yet affirmative and strategic uses of existing legal remedies examined in this brief commentary may blunt the impact of these legislative proposals.

TABLE OF CONTENTS

I. INTRODUCTION	32
II. STATE LEGISLATIVE ASSAULTS ON PUBLIC HEALTH POWERS.....	34
Table 1 – Select State “COVID Counterpunch” Legislation.....	35
III. STRATEGIC LEGAL RESPONSES TO OFFSET PUBLIC HEALTH LIMITS	41
Figure 1 – Strategic Legal Responses to State Statutory Limits of PHE Powers.....	42
A. National Security Priorities	42
B. Federal Preemption.....	43
C. Interstate Commerce Powers	44

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D. Federal Spending Conditions	45
E. Constitutional Violations	46
F. Emergency Waivers	48
G. Executive Actions	48
IV. CONCLUSION.....	49

I. INTRODUCTION

The COVID-19 pandemic is unquestionably the greatest public health threat most Americans have ever faced. As of September 1, 2021, the U.S. documented over 39.5 million infections and nearly 644,000 deaths.¹ U.S. average life expectancy has dropped by over a year due largely to the pandemic.² The highest annual increase in the U.S. death rate ever recorded (16%) occurred in 2020, exceeding even that of the 1918–1919 pandemic.³ Widespread health disparities on racial, ethnic, and socioeconomic lines have been exposed. Millions have lost their jobs, businesses, or livelihoods. Most schools and universities closed for months. Over 120,000 children lost one or more of their primary caregivers during the pandemic.⁴ Long-term physical and mental health impacts among Americans are beyond accurate measure.

While epidemiologic trends and rates of national immunizations are improving, the pandemic is not over.⁵ Infections are on the rise in select states as many remain unvaccinated by choice or due to lack of access. The highly contagious Delta variant⁶ surged across the nation as unvaccinated children returned to classrooms where masks were optional

1. *COVID-19 Dashboard: Global Deaths*, JOHNS HOPKINS CORONAVIRUS RES. CTR., <https://coronavirus.jhu.edu/map.html> (last visited Oct. 1, 2021).

2. ELIZABETH ARIAS ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, VITAL STATISTICS RAPID RELEASE: PROVISIONAL LIFE EXPECTANCY ESTIMATES FOR JANUARY THROUGH JUNE, 2020 (2021), <https://www.cdc.gov/nchs/data/vsrr/VSRR10-508.pdf>.

3. Denise Lu, *How Covid Upended a Century of Patterns in U.S. Deaths*, N.Y. TIMES (Apr. 23, 2021), <https://www.nytimes.com/interactive/2021/04/23/us/covid-19-death-toll.html>.

4. Daniel Victor, *Over 120,000 American Children Have Lost a Parent or Caregiver to Covid-19, Study Says*, N.Y. TIMES (Oct. 7, 2021), <https://www.nytimes.com/2021/10/07/health/covid-deaths-children-parents-caregivers.html>.

5. Andis Robeznieks, *Coronavirus Herd Immunity Will Take Team Effort, Says Dr. Fauci*, AM. MED. ASS'N (Feb. 22, 2021), <https://www.ama-assn.org/delivering-care/public-health/coronavirus-herd-immunity-will-take-team-effort-says-dr-fauci>.

6. *Delta Variant: What We Know About the Science*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 26, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>.

in many states.⁷ As the pandemic lingers on, Americans are fatigued by months of public health restrictions. They seek a return to normalcy seemingly even at the risk of direct harms to themselves or others. Multiple state governors are obliging these sentiments. Social distancing measures and business closures are lifting. Limits on assemblies are dissipating, especially among religious institutions. Mask mandates are falling as bans emerge in some states. Vaccine requirements and passports are prohibited in multiple jurisdictions.

As explored in Part II, state legislatures are also appeasing constituent interests, especially in more conservative jurisdictions. Aligned legislative efforts collectively aim to diminish public health emergency (PHE) powers of state and local agencies.⁸ Some legislatures are attempting to wrest control from executive agencies through emergency oversight committees. Several bills limit the duration of emergency declarations and set automatic limitations on public health actions. Governing legislative bodies at state and local levels in Utah, for example, can terminate executive emergency orders.⁹ Public health powers to close or sanction specific businesses, limit religious gatherings, require masks, or implement social distancing are specifically curtailed. In multiple jurisdictions, local PHE measures depriving individuals of constitutional rights or liberties would be subject to strict scrutiny. A bill in New Hampshire disallows the emergency suspension of any civil liberty guaranteed under federal or state constitutions.¹⁰

COVID's legislative "counterpunch" is ostensibly supported by expressed needs to appropriately balance economic interests and rights with communal health objectives. At its core, however, are political, denialist ploys by legislators to free voters from PHE powers perceived as unwarranted despite saving countless lives and significantly reducing morbidity during the pandemic. Protecting the public's health, at least for some, seems secondary to promoting individual self-interests.

The consequences of these legislative machinations may seem dire. Public health agents and activists are understandably concerned about legislative diminutions of express and discretionary powers in emergencies when their rapid execution is needed most. These fears may

7. Tina Hesman Saey, *Schools Are Reopening. COVID-19 Is Still Here. What Does That Mean for Kids?*, SCIENCE NEWS (Aug. 16, 2021), <https://www.sciencenews.org/article/coronavirus-covid-kids-schools-reopening-cases>.

8. See *infra* Table 1.

9. S.B. 195, 2021 Gen. Sess. (Utah 2021).

10. H.B. 440, 2021 Reg. Sess. (N.H. 2021).

be well-placed given the unabashed intention of legislators to directly curb or oversee emergency authorities.

All is not lost, however. Most of these bills have not been enacted. Others were successfully vetoed. Even among those that become law, affirmative and innovative uses of existing legal remedies may derail their intended impacts. As examined in Part III, a series of strategic challenges grounded in federal powers, constitutional law, and state-based executive options¹¹ may effectively defy assaults on state and local emergency powers spurred by the pandemic. Ultimately, PHE authorities may be compromised, but not crushed.

II. STATE LEGISLATIVE ASSAULTS ON PUBLIC HEALTH POWERS

As the pandemic raged across the U.S. beginning in February 2020, governors declared emergencies and implemented unprecedented measures to lessen disease spread. Stay-at-home or shelter-in-place orders, limitations on gatherings, business closures, travel restrictions, and mask mandates dominated state and local responses.¹² Many of these emergency efforts were challenged initially by individuals and businesses in court.¹³ As emergency declarations extended into 2021, additional objections arose across state legislatures intent on restricting PHE powers.

As of September 1, 2021, at least 300 bills or resolutions concerning legislative oversight of executive emergency actions have been introduced in forty-six states, Guam, and Puerto Rico.¹⁴ Eighteen states have seen at least one or more of these bills enacted.¹⁵ Bills introduced elsewhere

11. See *infra* Table 1.

12. See, e.g., Sarah Mervosh et al., *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> (“[A]t least 316 million people in at least 42 states, three counties, 10 cities, the District of Columbia and Puerto Rico are being urged to stay home.”); Lawrence O. Gostin, *Universal Masking in the United States: The Role of Mandates, Health Education, and the CDC*, 324 J. AM. MED. ASS’N 837, 837 (2020) (“As of July 27, 2020, statewide orders mandating face coverings in response to COVID-19 had been issued in 31 states and the District of Columbia.”).

13. James G. Hodge, Jr. et al., *COVID’s Constitutional Conundrum: Assessing Individual Rights in Public Health Emergencies*, 88 TENN. L. REV. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802045.

14. *Legislative Oversight of Emergency Executive Powers*, NAT’L CONF. OF STATE LEGIS. (Oct. 28, 2021), <https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx> (cataloging bills/resolutions in 2021 “that relate to legislative oversight of governors’ or executive actions during the COVID-19 pandemic or other emergencies.”).

15. *Id.* These bills or resolutions have been enacted or adopted in Alaska, Arkansas, Connecticut, Florida, Idaho, Indiana, Kansas, Kentucky, Montana, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Utah, and Wyoming. *Id.*

targeted public health powers in other ways.¹⁶ As selectively illustrated in Table 1 below, these legislative proposals cover an array of topics limiting state or local PHE authorities.

Table 1 – Select State “COVID Counterpunch” Legislation

State Bill No. & Intro. Date	Key Provisions Inhibiting State or Local Public Health Emergency Powers	Status (as of 9/1/21)
Alabama <u>SB 184</u> (2/3/21)	<ul style="list-style-type: none"> Prevents county health officers during emergencies from issuing orders for the control of an epidemic/disease outbreak if the state health officer has issued a statewide order to control/prevent/minimize the epidemic/outbreak 	Pending action; considered “dead”
Arizona <u>SB 1719</u> (2/3/21)	<ul style="list-style-type: none"> Requires the governor to convene the state emergency council every 14 days after declaring a statewide emergency to avoid automatic termination of the order 	<u>Vetoed</u> on 7/9/21
Florida <u>SB 1924</u> (3/10/21)	<ul style="list-style-type: none"> Requires localities to prove that any PHE measures depriving constitutional rights/liberties, statutory rights, or property meet strict scrutiny Allows the governor/legislature to invalidate local orders at any time if they are determined to be unnecessarily restrictive Establishes automatic expiration of local orders after 10 days unless extended by the local governing body; after expiration, similar orders may not be issued in response to the same emergency 	Failed. <u>Companion bill passed</u> on 5/3/21

16. See, e.g., H.B. 186, 32d Leg., Reg. Sess. (Alaska 2021) (prohibiting proof of COVID-19 vaccination), S.B. 58, 151st Gen. Assemb., Reg. Sess. (Del. 2021) (limiting COVID-19 isolation/quarantine powers); H.S.B. 162, 89th Gen. Assemb., Reg. Sess. (Iowa 2021) (prohibiting mask mandates); H. 283, 2021 Leg., Reg. Sess. (Vt. 2021) (prohibiting proof of vaccine/medical intervention).

State Bill No. & Intro. Date	Key Provisions Inhibiting State or Local Public Health Emergency Powers	Status (as of 9/1/21)
Indiana <u>SB 48</u> (1/4/21)	<ul style="list-style-type: none"> Limits orders or actions concerning communicable diseases issued by local health boards/officers to 14 days unless approved by the county/city executive; prevents issuance of similar unapproved orders Requires pre-approval of such orders by the county/city executive regarding mask wearing or social distancing related to COVID-19 	Inactive
Michigan <u>SB 1253</u> (12/3/20)	<ul style="list-style-type: none"> Prevents state or local health directors from restricting capacity at houses of worship during an epidemic emergency Limits state health director emergency orders to 28 days, requiring approval by both legislative houses for extension Allows businesses required to close to continue operating if they comply with each health/safety precaution required of open businesses 	<u>Vetoed</u> on 12/30/20
Missouri <u>HB 308</u> (1/6/21)	<ul style="list-style-type: none"> Exempts houses of worship from social distancing requirements in any order, rule, or regulation related to preventing the spread of infectious diseases issued by local health authorities or state departments of health or other departments 	Back on formal calendar on 5/6/21
Montana <u>HB 121</u> (1/6/21)	<ul style="list-style-type: none"> Redefines “quarantine” & “isolation” to include only persons known to be infected with or exposed to a communicable disease De-authorizes local health boards from adopting necessary regulations for control of communicable diseases, sanitation in public & private buildings, etc., replacing this with the ability to merely propose such regulations for adoption by the local governing body 	Signed by governor on 4/16/21

State Bill No. & Intro. Date	Key Provisions Inhibiting State or Local Public Health Emergency Powers	Status (as of 9/1/21)
Ohio <u>SB 22</u> (1/26/21)	<ul style="list-style-type: none"> Creates a legislative health advisory committee with oversight authority over emergency actions taken by the governor or state agencies Limits emergency declarations to 90 days, subject to extensions adopted by concurrent resolution of the legislature Empowers the legislature to rescind/invalidate administrative orders/rules promulgated in response to the emergency 	<u>Vetoed on 3/23;</u> passed 3/24/21; effective 6/23/21
S. Carolina <u>HB 3126</u> (1/12/21)	<ul style="list-style-type: none"> Prevents state or local governments from accepting federal funds to enforce federal vaccine or mask mandates to minimize the spread of COVID-19 or other infectious diseases 	Pending action
Tennessee <u>SB 1573</u> (2/11/21)	<ul style="list-style-type: none"> Prevents business classifications into essential & nonessential categories to allow some to remain open & others to close 	Signed by governor on 5/11/21
Texas <u>SB 1025</u> (3/18/21)	<ul style="list-style-type: none"> Reserves to the legislature power over operation/occupancy of businesses during a declared disaster/emergency, as well as renewal of declaration Limits the governor's power to waive or suspend laws, including the Emergency Management & State of Emergency provisions Preempts local disaster declarations unless they are expressly authorized via a proclamation/executive order issued by the governor 	Pending action
Utah <u>SB 195</u> (2/16/21)	<ul style="list-style-type: none"> Limits the duration of state or local emergency orders & allows the legislature or local governments to terminate respective orders Prohibits limits on religious gatherings that are more restrictive than other similar gatherings during emergencies Requires the governor to provide advance notification during a long-term emergency before taking certain actions 	Signed by governor on 3/24/21

Some bills automatically subject public health actions to increased legislative or judicial review. Others set express durational limits on emergency declarations or empower legislative or other oversight bodies to extend or overturn emergency orders. Legislatures in some states seek to restrict public health officials from imposing certain limitations on assemblies in houses of worship during epidemics or outbreaks. Other proposals prevent public or private entities from mandating vaccinations as a requirement of employment, school attendance, or venue entry, as well as to obtain business services.

Considerable legislative influence has been exerted through entities like the American Legislative Exchange Council (ALEC), which circulated its draft “Emergency Power Limitation Act”¹⁷ in late 2020. Among other provisions, the draft act requires public health measures to pass strict scrutiny, limits emergency declarations to thirty days, and automatically terminates emergency orders in certain circumstances.¹⁸ As evinced in Table 1, these denialistic objectives are interlaced throughout multiple state bills.

A polarized political climate animates legislative maneuvers in some states.¹⁹ From the onset of the pandemic, Michigan’s Democratic Governor Gretchen Whitmer instituted an aggressive series of emergency response measures. In May 2020, President Donald Trump rebuked her publicly (labeling her at one point “half-Whitmer”) and called for Michigan’s “liberation.”²⁰ The state’s Republican-dominated legislature introduced several bills designed to strip emergency powers from the governor and Michigan’s Department of Health and Human Services. Governor Whitmer vetoed multiple bills²¹ but also faced judicial challenges that ultimately impacted her emergency powers.²²

17. *Emergency Power Limitation Act*, AM. LEGIS. EXCH. COUNCIL (Jan. 8, 2021), <https://www.alec.org/model-policy/emergency-power-limitation-act/>.

18. *Id.*

19. Trip Gabriel, *State Lawmakers Defy Governors in a Covid-Era Battle for Power*, N.Y. TIMES (Apr. 22, 2021), <https://www.nytimes.com/2021/02/22/us/politics/republicans-democrats-governors-covid.html>.

20. Kevin Liptak, *Trump Tweets Support for Michigan Protesters, Some of Whom Were Armed, as 2020 Stress Mounts*, CNN (May 1, 2020), <https://www.cnn.com/2020/05/01/politics/donald-trump-michigan-gretchen-whitmer-protests/index.html>.

21. Dave Boucher, *Whitmer Vetoes Bill that Would Strip Emergency Powers, Imperils \$370 Million in Aid*, DETROIT FREE PRESS (Mar. 24, 2021), <https://www.freep.com/story/news/politics/2021/03/24/whitmer-vetoes-emergency-powers-bill-370-million-aid/6985082002/>.

22. See *infra* Part III.G., *Executive Actions*, and text accompanying note 71.

Not all legislative actions to limit executive powers are partisan. In New York, Democratic lawmakers acted to constrain former Democratic Governor Andrew Cuomo's emergency powers after news sources indicated that his administration had not provided complete information in reporting nursing home-related deaths.²³ In Ohio, the Republican-dominated state legislature severely challenged Republican Governor Mike DeWine via Senate Bill 22.²⁴ Governor DeWine vetoed the bill on grounds that it would "jeopardize[] the safety of every Ohioan," and "handcuff[] Ohio's ability to confront crises."²⁵ He disdained how limitations on isolation and quarantine powers would inhibit the State Health Department's responses to threats of bioterrorism and deadly communicable diseases like Ebola.²⁶ Still, on March 24, 2021, Ohio's legislature overrode Governor DeWine's veto a day after it was issued.²⁷ "No branch of government," concluded state Representative Cindy Adams, "should have unlimited control over the livelihoods of Ohioans."²⁸

Resonating sentiments in Ohio, formal messaging supporting COVID-19 counterpunch legislation is often framed via the need to (1) correct power imbalances among legislative and executive branches or (2) protect economic and other freedoms against wanton infringements. Adopting ALEC's approach, Florida's proposed Senate Bill 1924 required strict scrutiny review of emergency measures infringing constitutional rights and fundamental liberties. A state legislative committee analyzing the bill cited the 2020 concurring opinion of U.S. Supreme Court Justice Neil Gorsuch arguing that "[g]overnment is not free to disregard the First Amendment in times of crisis."²⁹ Though this specific bill ultimately

23. Jesse McKinley & Luis Ferré-Sadurní, *Cuomo Faces Revolt as Legislators Move to Strip Him of Pandemic Powers*, N.Y. TIMES (Mar. 5, 2021), <https://www.nytimes.com/2021/02/17/nyregion/cuomo-nursing-homes-deaths.html>.

24. See *supra* Table 1.

25. Mike DeWine, *Statement of the Reasons for the Veto of Substitute Senate Bill 22* (Mar. 23, 2021), https://content.govdelivery.com/attachments/OHOOD/2021/03/23/file_attachments/1732100/SB%2022%20Veto%20Message.pdf

26. *Id.*

27. *Ohio General Assembly Overrides Veto of Senate Bill 22*, OHIO HOUSE OF REPRESENTATIVES (Mar. 24, 2021), <https://ohiohouse.gov/members/cindy-abrams/news/ohio-general-assembly-overrides-veto-of-senate-bill-22-105815>.

28. *Id.*

29. PRO. STAFF OF THE COMM. ON CMTY. AFFS., FLA. SENATE, SB 1924 BILL ANALYSIS & FISCAL IMPACT STATEMENT 6–7 (2021), <https://www.flsenate.gov/Session/Bill/2021/1924/Analyses/2021s01924.ca.PDF> (quoting *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring)).

failed, a companion bill passed on May 3, 2021.³⁰ In addition to banning vaccine passports, the enactment requires that emergency orders be “narrowly tailored to serve a compelling public health or safety purpose.”³¹

Pennsylvania Representative Seth Grove supported limitations on emergency powers for economic reasons, suggesting that lives had been lost “either through the virus itself or through the actions of the government, eviscerating entire industries.”³² After Wisconsin Governor Tony Evers issued a new mask mandate to replace one the legislature repealed, state Senator Julian Bradley tweeted on February 4, 2021, that “Dictator [Evers] didn’t waste any time ignoring the will of the Legislature just like he continues to ignore state statute.”³³

State governors are treading precariously through these legislative waters. As noted, some like Governors Whitmer and DeWine have vetoed legislation. However, Montana Governor Greg Gianforte and Utah Governor Spencer Cox have signed their state legislatures’ respective bills³⁴ despite resulting limitations on PHE powers. In Kentucky, state lawmakers introduced several bills restricting Democratic Governor Andy Beshear’s emergency powers. After three bills were passed over his veto, he sued to declare them unconstitutional. On February 3, 2021, a county circuit court judge temporarily blocked legislation that (1) set a thirty-day limit on gubernatorial executive orders and (2) allowed businesses to remain open under certain circumstances despite one of the orders. In support of its decision, the court surmised the legislation could “undermine any effective enforcement of public health standards.”³⁵ After several months, Kentucky’s Supreme Court allowed the laws to finally take effect on August 21, 2021.³⁶

30. S.B. 2006, 2021 Leg., Reg. Sess. (Fla. 2021).

31. *Id.* at 30.

32. Mark Scolforo, *Voters to Get Final Say on Limiting Governor Disaster Powers*, A.P. (Jan. 27, 2021), <https://apnews.com/article/primary-elections-constitutions-pennsylvania-coronavirus-pandemic-elections-ac02cc217c10b1eccc7ef0260ed7256>.

33. Julian Bradley (@SenBradley), TWITTER (Feb. 4, 2021, 1:54 PM), <https://twitter.com/SenBradley/status/1357432335923372033>.

34. *See supra* Table 1.

35. Bruce Schreiner, *Judge Temporarily Blocks New Kentucky Law on COVID-19 Rules*, A.P. (Feb. 3, 2021), <https://apnews.com/article/legislature-frankfort-lawsuits-coronavirus-pandemic-kentucky-1f6d05c93a9f0dc54ec3a6b9bc04b79a>.

36. Bruce Schreiner, *Kentucky Gov Suffers Legal Defeat in Combating COVID Surge*, A.P. (Aug. 21, 2021), <https://apnews.com/article/health-coronavirus-pandemic-kentucky-23946cdfad426e66613bc54e82115143>.

III. STRATEGIC LEGAL RESPONSES TO OFFSET PUBLIC HEALTH LIMITS

Some legislatures seem intent on thwarting or shutting down public health interventions that are proven to reduce morbidity and mortality but also impact economic outcomes and impinge Americans' expectations of their constitutional rights and freedoms. Potential consequences of these concerted legislative actions are alarming. Governors may be estopped from taking effective action. Localities may be preempted from engaging in novel approaches. In future public health exigencies, communities and their residents may suffer excessive disabilities and deaths.

In the throes of the worst public health event in modern history, it almost seems incredulous that legislatures would limit PHE powers. After the 9/11 terrorist attacks and subsequent emergencies, national and state sentiments tended to empower, and not constrain, public health authorities. The COVID-19 pandemic's magnitude and duration have seemingly "flipped the script" in many jurisdictions. Coupled with a dynamic political environment fueled by scientific denialism and distrust of government, legislative factions are poised to stymie PHE responses.³⁷

What some legislators may not see, however, are the inherent weaknesses and limitations of their extant approaches. Figure 1, below, illustrates the array of counterarguments to these legislative machinations grounded in shifting and expanding federal priorities, constitutional boundaries, and extensive executive options. As explicated in preceding sections, while not all of these legal themes may refute specific legislative efforts, PHE powers to repress national crises will prevail.

37. See, e.g., James G. Hodge, Jr. et al., *Legal Interventions to Counter COVID-19 Denialism*, 49 J.L. MED. & ETHICS 677 (2021).

Figure 1 – Strategic Legal Responses to State Statutory Limits of PHE Powers



A. National Security Priorities

Legislative rebukes of state or local public health powers to respond to a national PHE like the COVID-19 pandemic are legally short-sighted. They falsely presume that states will be “calling the shots” in future events. This may be true in purely intrastate emergencies. However, states’ exposed weaknesses in coordinating pandemic responses necessitate stronger federal roles.

While Presidents Trump and Biden have largely taken inapposite approaches to control the pandemic, they both have classified it as a “national security threat,”³⁸ consistent with prior public health crises.³⁹

38. Exec. Order No. 13944, 85 Fed. Reg. 49,929 (Aug. 6, 2020); White House, *National Security Memorandum on United States Global Leadership to Strengthen the International COVID-19 Response and to Advance Global Health Security and Biological Preparedness*, WH.GOV (Jan. 21, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/21/national-security-directive-united-states-global-leadership-to-strengthen-the-international-covid-19-response-and-to-advance-global-health-security-and-biological-preparedness/>.

39. JENNIFER BROWER & PETER CHALK, RAND CORPORATION, *THE GLOBAL THREAT OF NEW AND REEMERGING INFECTIOUS DISEASES: RECONCILING U.S. NATIONAL SECURITY AND PUBLIC HEALTH POLICY* (2003); James G. Hodge, Jr. & Kim Weidenaar, *Public Health Emergencies as*

These pronounced classifications concentrate U.S. international and domestic response efforts.⁴⁰ Under constitutional principles the federal government alone is authorized to address issues of national security. In its 2021 Pandemic Preparedness Plan, the Biden Administration confirmed that “[p]rotecting the United States from threats is a core responsibility of the Federal government” and emphasized the need for “robust national biodefense capabilities” to protect the country against biological threats such as pandemics and bioweapons.⁴¹ Using constitutionally-vested powers to protect the country from threats, the United States plans to transform medical defense and strengthen the public health system.⁴² Greater use of extensive federal powers to quell pandemic or other threats does not completely displace the role of states in protecting the public’s health. Nor should it. However, the supremacy of federal national security interests may negate inconsistent state laws and responses.⁴³

B. Federal Preemption

Coupled with emerging national security priorities are immense federal authorities to preempt conflicting state or local laws, especially in emergencies. When constitutionally invoked and clearly delineated, federal powers override contrary state or local laws. A preeminent example of federal preemptive prowess is evinced through largely uncontested exercises of the Public Readiness and Emergency Preparedness (PREP) Act.⁴⁴ Pursuant to PREP Act declarations during the COVID-19 pandemic,⁴⁵ HHS preempted contravening state-level actions

Threats to National Security, 9 J. NAT’L SEC. L. & POL’Y 81, 87 (2017) (listing infectious diseases/bioterrorism threats previously classified as national security threats or priorities).

40. Hodge & Weidenaar, *supra* note 39, at 82–83.

41. ERIC. S. LANDER & JACOB J. SULLIVAN, AMERICAN PANDEMIC PREPAREDNESS: TRANSFORMING OUR CAPABILITIES 5 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/09/American-Pandemic-Preparedness-Transforming-Our-Capabilities-Final-For-Web.pdf>.

42. *Id.* at 7.

43. Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1735–1736 (2011), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2027&context=facpub>. For example, President Biden used his Article II powers to counter states’ bans on school mask mandates. See Sheryl Gay Stolberg and Erica L. Green, *The Biden Administration Will Use a Federal Civil Rights Office to Deter States from Banning Universal Masking in Classrooms*, N.Y. TIMES (Aug. 30, 2021), <https://www.nytimes.com/2021/08/18/us/politics/biden-masks-schools-civil-rights.html>.

44. 42 U.S.C.A. §§ 247d-6d.

45. Declaration Under the [PREP] Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15,198 (Mar. 17, 2020).

related to health care licensures, medical countermeasures, and liability protections. A senior Centers for Disease Control and Prevention (CDC) official confirmed in July 2021 that even as state and local governments rescind their emergency declarations and orders, they must comply with PREP Act requirements “regardless of state laws and regulations,” for as long as the United States remains in a state of emergency.⁴⁶

Some state legislatures seek to challenge federal authorities head on. At the commencement of his term, President Biden issued a series of executive orders directly addressing COVID-19 responses. State counterpunch bills in Montana,⁴⁷ South Dakota,⁴⁸ and Utah⁴⁹ would limit state agency implementation of these or future presidential orders based on a state attorney general’s determination that they curb individual rights or are otherwise constitutionally infirm. The legality of these schemes is specious. To the extent federal orders are lawfully executed during declared national emergencies, they preempt contrary state executive-level legal interpretations. The constitutionality of presidential executive orders may assuredly be contested in federal courts but not solely through state attorney general offices.

C. Interstate Commerce Powers

One clear area of federal prominence and preemptive impacts extends from the constitutional assignment of interstate commerce powers to the national government.⁵⁰ Routine federal powers to regulate interstate commerce are extensive. In declared national emergencies these powers expand further.⁵¹ During the pandemic, the Trump administration arguably under-utilized its commerce authorities to influence state social distancing

46. Margaret Honein, Incident Manager, Ctrs. for Disease Control & Prevention, Dear Colleague Letter (July 2, 2021), https://ncpa.org/sites/default/files/2021-07/07.02.2021_Dear%20colleague_F-signed.pdf.

47. S.B. 277, 67th Leg., Reg. Sess. (Mont. 2021) (signed by the governor on April 23, 2021).

48. H.B. 1194, 96th Leg., Reg. Sess. (S.D. 2021) (inactive).

49. H.B. 415, 2021 Leg., Gen. Sess. (Utah 2021) (signed by the governor on March 23, 2021).

50. *United States v. Lopez*, 514 U.S. 549, 558–559 (1995) (outlining the scope of interstate commerce powers).

51. See JENNIFER K. ELSEA ET AL., CONG. RSCH. SERV., R463789, EMERGENCY AUTHORITIES UNDER THE NATIONAL EMERGENCIES ACT, STAFFORD ACT, AND PUBLIC HEALTH SERVICE ACT 1, 16 (2021), <https://fas.org/sgp/crs/natsec/R46379.pdf>.

measures or other interventions impacting the national economy,⁵² perhaps in deference to state sovereignty.⁵³

In reality, federal commerce authority can be wielded to respond directly to public health threats irrespective of contrary state laws. On September 4, 2020, CDC relied on its interstate disease control regulations to craft an eviction moratorium affecting noncommercial renters.⁵⁴ Millions of renters benefited from this novel application of interstate powers, but counter lawsuits arose quickly. In *Terkel v. CDC*,⁵⁵ a federal district court judge in Texas nullified the order as exceeding federal commerce powers under routine federalism principles. The court largely disregarded that CDC's actions were taken with congressional approval and during a declared federal emergency. On appeal, the U.S. Supreme Court initially allowed CDC's moratorium to stand.⁵⁶ However, on August 26, 2021, it ultimately rejected a renewed version of the moratorium, finding CDC lacked authority to implement the measure.⁵⁷ Despite this setback, the Court expressly acknowledged that further extensions of the federal moratorium would have been justified via direct congressional authorization or new legislation.⁵⁸ Affirmative, future uses of federal interstate commerce powers to control outbreaks of infectious diseases across states are predictable. If validated, opposing state laws inevitably fall away.

D. Federal Spending Conditions

Certain COVID counterpunch bills dictate what state or local public health agencies can and cannot do with specific federal funding. South

52. Morgan Chalfant & Brett Samuels, *Trump Eases Back on Asserting Power over Governors on Reopening*, THE HILL (Apr. 14, 2020), <https://thehill.com/homenews/administration/492837-trump-eases-back-on-asserting-power-over-governors-on-reopening>.

53. Kathleen Hamann & Andrea Cianchette Maker, *Crossing State Lines During the COVID-19 Pandemic: Self-Quarantine Requirements*, NAT'L L. REV. (Apr. 7, 2020), <https://www.natlawreview.com/article/crossing-state-lines-during-covid-19-pandemic-self-quarantine-requirements>.

54. David Bizar & Patrick Kennedy, *Is the CDC's Nationwide COVID-19 Eviction Moratorium Down for the Count?* JD SUPRA (Mar. 19, 2021), <https://www.jdsupra.com/legalnews/is-the-cdc-s-nationwide-covid-19-7768527/>.

55. *Terkel v. CDC*, No. 6:20-CV-00564, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021).

56. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2320 (2021).

57. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021).

58. *See id.* at *1 ("It would be one thing if Congress had specifically authorized the action that the CDC has taken. But that has not happened."); *see id.* at *4 ("Congress was on notice that further extension would almost surely require new legislation, yet it failed to act in the several weeks leading up to the moratorium's expiration."; "If a federally imposed eviction moratorium is to continue, Congress must specifically authorize it.").

Carolina's legislature, for example, would expressly limit the intake of federal funds to enforce national vaccine or mask mandates.⁵⁹ State preemptive limitations on the receipt of federal funds are legally misguided. Through its conditional spending powers, the federal government can set a litany of constitutional qualifiers for receipt of resources to which states or localities must adhere. Federal and state agents may barter over terms, but the deal is largely one-sided. To the extent the federal government controls the purse, it largely controls the outcomes.

Alignment of federal conditions with state law is inconsequential unless constitutional issues are implicated. Federal authorities cannot require states to engage in unconstitutional measures. Nor can they compel states to accept funds. For example, federal agencies may set specific conditions for receipt of essential resources like COVID-19 vaccines. Since the federal Food and Drug Administration is solely capable of authorizing or approving medical countermeasures, states may arguably feel compelled to accept the terms. Compulsion could constitutionally kill the deal. This realization may have supported President Trump's allowance of wide discretion to states and localities over how and when they distributed federal vaccine allotments. Yet, national authorities have considerable leverage. Within roughly two months of taking office, President Biden clarified that states must open their vaccination registries to all adults by April 19, 2021. Every state and Washington, D.C. did so irrespective of their legal objections.⁶⁰ In late August 2021, the Centers for Medicare and Medicaid Services announced its plans to condition federal reimbursements on the requirement that nursing facilities vaccinate their employees.⁶¹

E. Constitutional Violations

Among the more aggressive moves by state legislatures are their efforts to bootstrap state or local agencies through stronger legislative oversight. They have proposed legislative subcommittees to oversee emergency powers. They would strip state agencies or localities of their

59. H.B. 3126, 124th Gen. Assemb., Reg. Sess. (S.C. 2021).

60. *Who Can Get the Vaccine in Your State?*, N.Y. TIMES (Apr. 19, 2021), <https://www.nytimes.com/interactive/2021/us/covid-19-vaccine-eligibility.html> (indicating all states and Washington, D.C. opened universal adult COVID-19 vaccination eligibility by April 19, 2021).

61. Sharon LaFraniere et al., *Biden Ramps up Virus Strategy for Nursing Homes and Schools, and Urges Booster Shots*, N.Y. TIMES (Aug. 18, 2021), https://www.nytimes.com/2021/08/18/us/politics/biden-schools-nursing-homes-booster.html?campaign_id=2&emc=edit_th_20210819&instance_id=38145&nl=todaysheadlines&rgi_id=7283109.

emergency authorities to respond or require them to meet strict constitutional tests.⁶² In each of these (and other) cases, legislatures exceed their constitutional authority.

Under principles of separation of powers, legislatures craft the laws, executive agencies enforce them, and judiciaries interpret them, especially related to their constitutionality. Legislative bodies can demand regular input or reports from governors or agencies. Yet when a legislature, such as through Ohio Senate Bill 22,⁶³ creates a standing committee to oversee gubernatorial emergency measures, it crosses a constitutional boundary designed to maintain divisions among branches of government. And when Florida's legislature seeks to annul local public health orders deemed to "unnecessarily restrict[] individual rights,"⁶⁴ it does so arbitrarily in violation of substantive due process.

As noted in Part II, Florida legislators passed a bill requiring that emergency orders "be narrowly tailored to serve a compelling public health or safety purpose" and that "any infringement on individual rights or liberties" be reduced "to the greatest extent possible."⁶⁵ Emergency orders thus must survive strict scrutiny via a showing that such interventions (1) are narrowly tailored to serve a compelling government interest and (2) represent the least restrictive means for accomplishing the objective.⁶⁶ This is an exacting constitutional standard with an almost assured outcome: *the government loses*. The problem is that not every infringement of rights or liberties warrants strict scrutiny under judicial precedent. In fact, most do not. Attempts to statutorily displace existing constitutional standards to assess rights violations require Florida courts to set aside their own judgments of appropriate levels of scrutiny. As the final arbiters of constitutional rights, courts cannot be legislatively compelled to do so under separation of powers.⁶⁷

62. *See supra* Table 1.

63. S.B. 22, 134th Gen. Assemb., Reg. Sess. (Ohio 2021) (effective June 23, 2021).

64. S.B. 2006, 2021 Leg., Reg. Sess. (Fla. 2021).

65. *Id.*

66. JAMES G. HODGE, JR., PUBLIC HEALTH IN A NUTSHELL 69 (4th ed. 2021).

67. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) ("Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, as stated in *Holt v. Hobbs*, 574 U.S. 352 (2015); *see also Poertner v. Hess*, 646 S.W.2d 753, 755–56 (Mo. 1983) ("We reject appellants' contention that § 1.100 mandates a method of constitutional construction . . . such a holding would mean that the legislature could statutorily interpret the language of the Constitution. Constitutional interpretation is a function of the judicial, not the legislative, branch.").

F. Emergency Waivers

Aside from federally driven remedies or those grounded in constitutional challenges, state-based executive agencies have considerable options to bypass adverse legislative proposals and enactments. A primary tool available to most state governors pursuant to emergency declarations is their authority to temporarily waive laws or policies that interfere with or restrain emergency responses.

Gubernatorial waiver authorities do not allow for complete suspension of constitutional rights. Yet, they do include the power to (1) disregard contrary local ordinances, (2) exempt state agency regulations, and (3) set aside restrictive state statutes. Nearly every governor has exercised waiver powers during the COVID-19 emergency, sometimes in contravention of effective public health interventions. When implemented wisely, however, such powers are an invaluable option to authorize real-time responses that might otherwise violate existing state laws.⁶⁸ Some state legislatures seem wise to this possibility and expressly curb gubernatorial waiver authorities.⁶⁹ Most state legislatures, however, fail to address existing waiver “escape clauses” embedded in state emergency laws. Consequently, any bills they pass may essentially be waived later by governors addressing PHEs in real-time. State legislatures could retract gubernatorial emergency waiver authorities entirely, but it would be a death knell for residents facing indeterminable, future public health risks.

G. Executive Actions

Aside from waivers, state and local executive agencies and boards have additional legal levers to counter counterpunch legislative approaches. Many of these proposals are geared toward controlling what agencies can do in “emergencies.” Yet, emergencies are a legal fiction crafted from prior legislative authorities. Avoiding legislative limitations on emergency powers is easily accomplished by circumventing the issuance of emergency or disaster declarations. In essence, some state executives may simply bypass declaring an “emergency” even during crises to avoid legislative limitations built solely into such powers.

As a legal strategy, this appears to be a nonstarter. Every state governor issued some type of formal emergency declaration in response

68. See, e.g., Daniel G. Orenstein, *When Law Is Not Law: Setting Aside Legal Provisions During Declared Emergencies*, 41 J.L. MED. & ETHICS 73, 74–75 (2013).

69. S.B. 1025, 87th Leg., Reg. Sess. (Tex. 2021).

to COVID-19.⁷⁰ Yet, state health and emergency management agencies have multiple other options to respond to public health exigencies. Many existing routine public health powers (e.g., testing, screening, vaccination, treatment) can be effectively implemented in real-time without a declaration. Public health agencies are often legislatively granted distinct authorities to classify enhanced threats outside of formal emergency declarations. When the Michigan Supreme Court stripped Governor Whitmer of her declaratory powers in October 2020, the state health department responded through its independent statutory authority to address “epidemics.”⁷¹ Unlike most states, North Dakota’s legislature passed a bill to partially foreclose this possibility by limiting the state health officer’s authority to (1) issue statewide orders absent a gubernatorial disaster declaration, and (2) cancel or close specific events absent a court order.⁷²

Virtually every state or local health authority also has the capacity to address “public health nuisances,” broadly defined as “a condition, act, or failure to act that unreasonably interferes with the health or safety of the community by endangering life, generating or spreading infectious diseases, or otherwise injuriously affecting the public’s health.”⁷³ Labeling and abating nuisances can invoke specific public health powers assimilating emergency efforts. And while these powers may not carry the imprimatur of emergency interventions, they also do not “trip” limited legislative efforts to curtail executive public health authority.

IV. CONCLUSION

State counterpunch legislative efforts in response to unprecedented emergency declarations and public health powers during the COVID-19 pandemic purportedly seek to protect individual rights and economic interests against unwarranted governmental interventions. In reality, partisan politics underlie attempts to obliterate effective public health measures.

70. NETWORK FOR PUB. HEALTH L., COVID-19 EMERGENCY LEGAL PREPAREDNESS PRIMER 8 (Mar. 29, 2021), <https://www.networkforphl.org/wp-content/uploads/2021/02/Western-Region-Primer-COVID-2-1-2021.pdf>.

71. *MDHHS Issues Emergency Order Designed to Protect the Health and Safety of all Michiganders*, MICH. DEP’T OF HEALTH & HUM. SERVS. (Oct. 5, 2020), <https://www.michigan.gov/coronavirus/0,9753,7-406-98158-541440—,00.html>.

72. S.B. 2124, 67th Leg., Reg. Sess. (N.D. 2021).

73. TURNING POINT MODEL STATE PUBLIC HEALTH ACT § 1–102(36) (2003), <https://law.asu.edu/sites/default/files/multimedia/faculty-research/centers/phlp/turning-point-model-act.pdf>.

To the extent that some bills apply solely to COVID-19 emergency interventions, their direct impacts will terminate as the pandemic wanes. Future effects of broader bills may be minimal as well. Many reflect a legislative prescription for how to respond to future PHEs which will not match the magnitude of the pandemic. COVID-19 interventions are the exception, not the model, for how governors or public health agencies may address lesser threats. Legislative attempts to limit widespread uses of extensive social distancing powers are only purposeful if these powers are used as extensively again. This may be unlikely for public health reasons, not so much political ones.

In the handful of states where these proposals become law, strategic legal responses across different levels of government may curb their impacts. Increasing federal authority and direction for quelling future pandemics may circumvent or preempt conflicting state-based limitations. Courts may determine key legislative provisions are unconstitutional. State-based emergency waivers and executive interventions may obviate attempted constraints. Collectively, these and other legal strategies can derail intended legislative “fixes” for perceived abuses of public health authorities.