

STUDENT NOTES

On the Precipice: Democracy, Disaster, and the State Emergency Powers That Govern Elections in Crises

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INTRODUCTION

At 6 a.m. on September 11, 2001, New York City polls opened, and the city's 3.7 million registered voters began casting ballots in the mayoral primary.¹ Within hours, the face and fate of the city lay transformed. When American Airlines Flight 11 struck the World Trade Center's North Tower at 8:46 a.m., windows shattered at neighboring 1 World Financial Center, where voters stood in poll lines.² Minutes after United 175 hit the South Tower, the Executive Director of the New York City Board of Elections tried to reach Governor George Pataki, only to be told that the Governor's location was unknown.³ On the ground, poll workers began scrambling; some quickly tallied votes while others rushed for safety, abandoning voting machines altogether.⁴ Police officers stationed at polls re-deployed to Lower Manhattan.⁵ Election officials began to unilaterally close polls.⁶ On Long Island, elections Commissioners shuttered their locations, citing a New York statute that enables officials to delay an election when "fire, earthquake, tornado, explosion, power failure, act of sabotage, enemy attack or [an]other disaster" depresses turnout to below 25% of registered voters.⁷

Lawyers for the Board of Elections petitioned New York Supreme Court Justice Steven Fisher, who was in charge of overseeing the 2001 election, to stop the election.⁸ Fisher did so, via oral order, despite having no mandate beyond his appointment to "handle all citywide election-related issues."⁹ Shortly before noon, Governor Pataki issued an Executive order, halting the election statewide.¹⁰ His order marked the first postponement of a New York City primary after voting had already started.¹¹ The attack rendered at least seven polling locations in

1. Christopher Drew, *Elections Board Tries to Avert Chaos, Half-Heartedly to Some*, N.Y. TIMES (Sept. 5, 2001), <https://perma.cc/49VG-2NSL>.

2. *See Primary Day Today*, N.Y. TIMES (Sept. 25, 2001), <https://perma.cc/RU55-2PXB>; Karen Howlett, *CIBC Regroups After Sept. 11 Devastation*, GLOBE AND MAIL (Dec. 21, 2001), <https://perma.cc/JB7Q-FLAW>; M. Mindy Moriotti, *A Primary Interrupted: September 11, 2001 New York Primary Halted by Terrorist Attack*, ELECTIONONLINE (Sept. 9, 2021), <https://perma.cc/T77J-YPJD>; Steven McCurry, *Primary Day, September 11, 2001, One World Financial Center (Photograph)*, at GOTHAM GAZETTE (Sept. 1, 2003), <https://perma.cc/S5MP-M9ZK>.

3. Jerry H. Goldfeder, *Could Terrorists Derail a Presidential Election?*, 32 FORDHAM URB. L. J. 101, 103 (2005).

4. Stephanie Saul, *Primary Elections Called to a Halt*, NEWSDAY (Sept. 11, 2001), at W22.

5. *Id.*

6. ERIC A. FISCHER, DAVID C. HUCKABEE, KENNETH R. THOMAS & L. PAIGE WHITAKER, CONG. RSCH. SERV., RL32654, SAFEGUARDING FEDERAL ELECTIONS FROM POSSIBLE TERRORIST ATTACK: ISSUES AND OPTIONS FOR CONGRESS 8 (2004).

7. N.Y. ELEC. LAW § 3-108 (McKinney 2014); FISCHER ET AL., *supra* note 6, at 8; CONG. RSCH. SERV., RL32654, SAFEGUARDING FEDERAL ELECTIONS FROM POSSIBLE TERRORIST ATTACK: ISSUES AND OPTIONS FOR CONGRESS 8 (2004).

8. Goldfeder, *supra* note 3, at 103; FISCHER ET AL., *supra* note 6, at 8.

9. FISCHER ET AL., *supra* note 6, at 8. Prior to the election, Fisher was expected to resolve disputes over vote counting and ballot impounding. *See* Drew, *supra* note 1.

10. N.Y. COMP. CODES R. & REGS. tit. 9, § 5.113 (2001).

11. Adam Nagourney, *A Day of Terror: The Elections; Pataki Orders Postponement Of Primaries Across State*, N.Y. TIMES (Sept. 12, 2001), <https://perma.cc/VBP5-859F>.

Lower Manhattan unusable¹² and cut power and electricity to the Board of Elections' office for weeks.¹³

In the days after September 11, 2001—and in the face of unimaginable trauma—the election's postponement was not top of mind. But Governor Pataki and Judge Fisher's actions did not go unnoticed. On September 12, 2001, at least one publication asked: "Can judges and governors simply call off elections?"¹⁴ Judge Fisher had no statutory authority to halt the election.¹⁵ He did so on the grounds that neither police nor Board of Election officials were present at poll sites—both necessary conditions for an election.¹⁶ Governor Pataki did have statutory backing. Under New York Executive Law Article 2-B, the Governor may "temporarily suspend specific provisions of any statute. . . during a state disaster emergency,"¹⁷ and Pataki cited as much, suspending Section 8-100 of the state's Election Law.¹⁸ What constituted an emergency was, quite literally, the Governor's to define. As the same Article set forth, a "state disaster emergency" is a "period beginning with a declaration by the governor that a disaster exists."¹⁹ The only precondition for this declaration was the Governor's finding that a "disaster has occurred."²⁰ While there is no debate over whether the attacks on September 11th constituted a disaster, they laid bare the confusion emergency begets and the sweeping powers a singular executive holds in emergency times over a process—elections—that, in theory, epitomizes the voices of many, not one.

Almost twenty years after September 11th, in the days after the 2020 election, President Trump attempted to impose the power of his office onto states across the country. The President publicly blasted secretaries of state and privately phoned election officials who were certifying ballots.²¹ He exerted pressure across the federal government too, telling DOJ officials to "just say the election was corrupt [and] leave the rest to me"²² and drafting an Executive order that

12. *Primary Day Today*, N.Y. TIMES (Sept. 25, 2001), <https://perma.cc/6YBH-7X2X>.

13. FISCHER ET AL., *supra* note 6, at 9.

14. *How Do You Cancel an Election?*, SLATE (Sept. 12, 2001), <https://perma.cc/CJZ5-2CCB>.

15. According to Douglas Kellner, a Democratic commissioner on the New York City Board of Elections on September 11, 2001, election commissioners consulted "the judges assigned to election duty in our office," who stated that they had "no authority" to cancel the election. See M. Mindy Moretti, *A Primary Interrupted: Sept. 11, 2001 Primary Halted by Terrorist Attack*, ELECTIONLINE (Sept. 8, 2021), <https://perma.cc/T77J-YPJD>. Indeed, judges are entirely absent from the two authorities most frequently cited in relation to the election postponement on September 11, 2001. See N.Y. ELEC. LAW § 3-108 (McKinney 2014); N.Y. EXEC. LAW, ch.18, art. 2-B, § 29-A.

16. FISCHER ET AL., *supra* note 6, at 9.

17. N.Y. EXEC. LAW, ch.18, art. 2-B, § 29-A (McKinney 2022).

18. N.Y. COMP. CODES R. & REGS. tit. 9, § 5.113 (2001).

19. N.Y. EXEC. LAW, ch.18, art. 2-B, § 20-2(b) (McKinney 2022).

20. *Id.* § 28.

21. Tom Hamburger, Kayla Ruble, David A. Fahrenthold & Josh Dawsey, *Trump Invites Michigan Republican Leaders to Meet Him at White House As He Escalates Attempts to Overturn Election Results*, WASH. POST (Nov. 19, 2020), <https://perma.cc/W6N6-Y62A>.

22. Matt Zapotosky, Rosalind S. Helderman, Amy Gardner & Karoun Demirjian, 'Pure Insanity': How Trump and His Allies Pressured the Justice Department to Help Overturn the Election, WASH. POST (June 16, 2021), <https://perma.cc/TA5N-3VQC>.

instructed the Secretary of Defense to seize voting machines across the country.²³ While President Trump's post-election meddling may have suggested the President holds some power over the administration of federal elections, Trump's failure to re-write the results paints a more complete and accurate picture. The execution and oversight of federal elections is decentralized, resting primarily with the states and secondarily with the courts and Congress.²⁴ In 2020, all three acted as effective bulwarks against presidential incursion. Local election officials re-counted and certified ballots.²⁵ State officials, often secretaries of state, certified election results.²⁶ The courts repeatedly ruled against President Trump in over fifty suits filed on his or the Republican Party's behalf.²⁷ And Congress eventually counted each state's electoral votes, naming Joe Biden the country's forty-sixth President. Despite the fanfare that surrounds them in the wake of elections, presidents have little authority over U.S. election administration. The vast majority of power over this process rests at the state level with governors, secretaries of state, and other election officials.

Since democracy's naissance, elections have been its guardian. And since the dawn of humanity—or even earlier—there have been emergencies: natural disasters, pandemics, terrorism. The two have inevitably intersected, and states have accounted for this contingency. At least forty-seven states have statutes prescribing permissible actions should an emergency affect an election.²⁸ Some of these actions are limited in scope—an election board moving a polling place—while others are more expansive.²⁹ In Indiana, for example, the Election Commission can broadly “adopt emergency rules to administer an election in a way not specified by the election code.”³⁰ Most states also delegate express emergency powers to their Governor during emergencies.³¹ These powers, while not specific to elections, enable Governors to suspend statutes, issue orders, or impose regulations. The sweeping, often unchecked, nature of emergency powers emphasizes the acute tension between elections and emergencies.

23. Betsy Woodruff Swan, *Read the Never-Issued Trump Order That Would Have Seized Voting Machines*, POLITICO (Jan. 21, 2022), <https://perma.cc/49XZ-8Y7A>.

24. U.S. CONST. art. I, § 4.

25. *See More Than 250 Audits Confirm Accuracy and Integrity of Michigan's Election*, MICH. DEPT. OF STATE (Mar. 2, 2021), <https://perma.cc/VJ3D-FQQ5>; Tom Vanden Brook & Jeffrey Schweers, *How States Prevent Election Fraud: Time to Count Votes 'Is Not a Sign of Misconduct or Chaos'*, USA TODAY (Nov. 10, 2020), <https://perma.cc/E5M2-XSPK>.

26. *See* Kate Brumback, *Georgia Secretary of State Certifies Election for Joe Biden*, PBS (Nov. 20, 2020), <https://perma.cc/2T7H-G5H7>; Madeline Carlisle, *As Key States Certify Their Results, Donald Trump's Path to Challenge Election Results Rapidly Narrows*, TIME (Nov. 24, 2020), <https://perma.cc/33A2-ALZT>.

27. For a comprehensive list of litigation related to the 2020 election and the resolution of these suits, see *Litigation in the 2020 Election*, AM. BAR ASS'N (Oct. 27, 2022), <https://perma.cc/5FFT-E4SL>.

28. *See, e.g.*, ALASKA STAT. § 15.15.060(a); IOWA CODE § 47.1; LA REV. STAT. § 18:401.1.

29. For example, in Minnesota, local election officials can “designate a new polling place” in an emergency. In South Carolina, by contrast, the Governor may, in an emergency, “declare a new time and date for an election.” MINN. STAT. § 204B.175; S.C. CODE ANN. § 7-13-1170.

30. IND. CODE § 3-6-4.1-16 (2021).

31. *See, e.g.*, N.M. STAT. ANN. § 12-10-4; TENN. CODE ANN. § 58-2-107(e)(1); MINN. STAT. § 12.32.

Elections are structured transfers of power, shrouded in procedural safeguards and oversight. They epitomize democracy's participatory core—each ballot carries equal weight. Emergencies are decidedly less egalitarian. They are not foreseeable or easily governed; they carry no clear rulebook and, most critically, they are ill-suited to democratic inputs. While elections rely on the voices of many, emergencies demand centralized decision-making. Emergency powers are correspondingly concentrated, designed to enable one individual to rapidly respond to unpredictable circumstances. As a result, election-related emergency powers rest at a crossroads: they are both necessary to preserve the cornerstone of our democratic process in times of crisis and uniquely ripe to undermine democracy through their abuse.

This note explores this tension. In so doing, it examines the current landscape of state-level, election-related emergency powers and ways such powers have been utilized and could be utilized to shape American elections. Existing literature on emergency powers falls into two broad buckets: federal and state. This note is among the latter—and lesser explored—category. Academic writing on state emergency powers has taken many forms, with authors examining state executives' use of emergency powers during protests,³² during pandemics,³³ and during “enemy attacks.”³⁴ Some authors have concentrated on more constitutional questions, examining the constitutional basis for gubernatorial emergency power³⁵ and debating the separation of legislative and executive authority at the state-level during crises.³⁶ Collectively, this scholarship focuses on state emergency powers, but not on said powers' intersection with elections.

A separate set of scholarship concerns election emergencies. Led by Michael Morley, this literature has contemplated the postponement of federal elections on emergency grounds,³⁷ the impact of terrorism and natural disasters on elections,³⁸ and the ways in which pandemics have spurred election emergencies.³⁹ This critical literature focuses primarily, however, on federal, constitutional questions that surround elections in times of crisis. This note seeks to remedy a gap in

32. See Karen Pita Loo, *When Protest is the Disaster: Constitutional Implications of State and Local Emergency Power*, 43 SEATTLE U. L. REV. 1 (2019).

33. See Avi Weiss, *Binding the Bound*, 121 COLUM. L. REV. 1853 (2021); Tom Ginsburg & Mila Versteeg, *The Bound Executive: Emergency Powers During the Pandemic*, 19 INT'L J. CONST. LAW 1498 (2021).

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

35. See F. David Trickey, *Constitutional and Statutory Bases of Governors' Emergency Powers*, 64 MICH. L. REV. 290 (1965).

36. See William Rice, *States & the Separation of Powers in Times of Emergency*, GEO. PROJECT ON STATE AND LOCAL GOV'T POL'Y & L., <https://perma.cc/U5VS-949T>.

37. Michael T. Morley, *Postponing Federal Elections Due to Election Emergencies*, 77 WASH. & LEE L. REV. ONLINE 77 (2020) [hereinafter Morely, *Postponing Federal Elections*].

38. Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terror Attacks*, 67 EMORY L.J. 545 (2018); Steven F. Huefner, *Withstanding Election Day Terrorism*, ELECTION L. @ MORITZ (July 19, 2004), <https://perma.cc/FKF5-M7NJ>.

39. Michael T. Morley, *Election Emergencies: Voting in Times of Pandemic*, 79 WASH. & LEE L. REV. (forthcoming 2022).

scholarship by examining the role and potential effect of *state* emergency powers on *elections*.⁴⁰

This note is structured in six parts. It begins, in Part I, by setting the legal stage. Part I surveys the legal ambiguities and principles that surround (1) modifications to federal elections (including the *Purcell* principle), and (2) state emergency powers. Part II then delves into the general elements and mechanics of state emergency powers, from defining such powers to invoking them. From these generalities, the note turns to specifics. Part III scrutinizes existing state emergency powers, examining the scope and substance of general and election-specific emergency powers. Part IV traces the emergencies that have historically precipitated the use of these powers—and contemplates the circumstances under which they could be invoked in the future. Part V moves from abstract to applied, looking at the use of state emergency powers across three states during the 2020 election: Florida, Texas, and California. Part VI probes the larger picture, analyzing what the current landscape of state emergency statutes, their use, and their legal interpretation means for U.S. democracy. The note concludes by considering the persistent threat state emergency powers may pose to election integrity.

Historically, governors have exercised election emergency powers to safeguard our most valuable democratic instrument—elections—when natural or man-made crises would threaten it. Following the COVID-19 pandemic and the 2020 election, however, the potential to abuse these powers demands examination.

PART I: MODIFYING ELECTIONS AND STATE EMERGENCY POWERS IN LAW

Federal elections lie at a legal crossroads. And elections conducted in an emergency lie at an even more precipitous intersection of federal statutes, state laws, constitutional mandate, and fundamental rights. As set out in the Constitution and statute, both the states and the federal government have roles in election administration. While these roles are explicit in text, the specifics of their application are the subject of immense debate—not just among academics, but also between various levels and institutions of government.⁴¹

Americans' inalienable right to vote checks this friction.⁴² Regardless of state and federal actions or any dissonance between them, elections must enable Americans to exercise their fundamental right to vote. Emergencies that threaten

40. One recent piece of scholarship addresses the legal challenges surrounding state emergency powers and elections, but this piece narrowly focuses on the *Purcell* principle. See Andrew Vazquez, *How the Supreme Court Degraded Voting Rights Protections During the COVID-19 Pandemic and Opened the Door for Abuse of State Power*, 48 *FORDHAM URB. L. J.* 967 (2021).

41. Adam Liptak & Nick Corasaniti, *Supreme Court to Hear Case on State Legislatures' Power Over Elections*, *N.Y. TIMES* (June 30, 2022), <https://perma.cc/RE5V-E6MX>; Debates over the independent state legislature doctrine and the unitary executive encapsulate this tension. See Michael T. Morley, *The Independent State Legislature Doctrine*, 90 *FORDHAM L. REV.* 501 (2021).

42. This right is not absolute. The Constitution, state laws, and federal statutes limit voter eligibility on grounds that include age, nationality, immigration status, and on the basis of felony convictions and incarceration. See, e.g., U.S. CONST. amend. XXVI; 18 U.S.C. § 611; NEB. REV. STAT. §§ 29-2264.

this right complicate an already complex legal landscape. They also acutely capture the aforementioned state and federal tensions; in emergencies, state executives unilaterally alter the law, which can lead to adjudication in federal courts and conflicts with federal statutes.

A. *Legal Background: Modifying Elections*

Under Articles I and II of the Constitution, the states and Congress make the rules when it comes to elections; the Constitution expressly empowers state legislatures to determine the “Times, Places and Manner of holding Elections for Senator and Representatives”⁴³ with the caveat that “Congress may at any time by Law make or alter such Regulations.”⁴⁴ The Twelfth Amendment affirms states’ centrality, stating: “The Electors shall meet in their respective states and vote by ballot for President and Vice-President. . . they shall make distinct lists of all persons voted for. . . and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States.”⁴⁵

In 1845, Congress exercised this power by passing the Presidential Election Day Act (codified at 3 U.S.C. §§ 1-2), establishing a uniform election day for Presidential elections: “the Tuesday next after the 1st Monday in November.”⁴⁶ In 1876, Congress took further action, making “the Tuesday next after the 1st Monday in November” election day for Congressional elections as well (codified at 2 U.S.C. §7).⁴⁷ While these statutes created our modern election day, legal ambiguity could still arise when voting occurred before and after this day, as it would when elections were unexpectedly disrupted, early ballots were cast, or no majority candidate emerged.

Congress attempted to remedy some of this ambiguity, although its solution was more abdication than resolution. Through statute, Congress passed the responsibility of dealing with elections that spill over election day to state legislatures, authorizing state legislatures to act when states fail to “make a choice on the day prescribed by law”⁴⁸ in Presidential elections or “fail[] to elect at the time prescribed by law” in Congressional races.⁴⁹ The Courts have been left to otherwise resolve conflicts over early, late, and emergency voting.

In one such case in 1997, the Supreme Court endorsed voting before election day in federal elections—what we now refer to as early voting—provided voting

43. U.S. CONST. art. I, § 4 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”); *see also* U.S. CONST. art. II, § 1 (empowering states to appoint their presidential electors).

44. U.S. CONST. art. I, § 4.

45. U.S. CONST. amend XII.

46. Presidential Election Day Act, ch. 1, 5 Stat. 721 (codified at 3 U.S.C. §§ 1-2).

47. 2 U.S.C. § 7; *see Morley, supra* note 37, at 180.

48. 3 U.S.C. § 2.

49. 2 U.S.C. § 8(a).

is not “concluded as a matter of law before the federal election day.”⁵⁰ The Court’s ruling in *Foster* established that voting could begin, but not conclude, before election day.⁵¹ Over forty states now permit in-person early voting.⁵² While the Supreme Court sanctioned early voting, its opinion in *Foster* raised other questions. Justice Souter noted, for example, that “this case thus does not present the question whether a State must always employ the conventional mechanics of an election,” suggesting that there could be circumstances under which irregular mechanisms were permissible.⁵³ The Court in *Foster* also refused to “isolat[e] precisely what acts a State must cause to be done on federal election day,” affirming both the states’ agency and the Court’s own hesitancy to impose uniformity.⁵⁴

Fifteen years before the Supreme Court’s ruling in *Foster*, federal courts wrestled with voting *after* federal election day. In *Busbee v. Smith*, the courts more explicitly opened the door for emergency-driven modifications to federal election procedures, including election postponements (i.e., elections after national election day).⁵⁵ *Busbee* arose out of Georgia’s redistricting process following the 1980 Census.⁵⁶

After the 1980 Census, Georgia’s legislature re-allocated the state’s population, drawing new district lines.⁵⁷ As a covered jurisdiction under Section 5 of the Voting Rights Act, Georgia needed preclearance from the Department of Justice before using the new lines.⁵⁸ In September 1981, however, the state formally adopted the new lines without receiving Department of Justice approval as mandated under Section 5.⁵⁹ In February 1982, the Department objected to Georgia’s plan, sparking a legal challenge.⁶⁰

Six months later, a three-judge panel ordered Georgia to redraw some of its districts.⁶¹ Georgia did so, passing a new map, which the Department of Justice and the panel approved in late August.⁶² Although the Department signed off on Georgia’s new map, it argued that Georgia’s delays in adopting the map “would impact unfairly on black voters of the Atlanta area” were Georgia to adhere to its

50. *Foster v. Love*, 522 U.S. 67, 72 (1997) (holding that “if an election does take place, it may not be consummated prior to federal election day”).

51. *Id.*

52. See *Early In-Person Voting*, THE NAT’L CONF. OF STATE LEGISLATURES (Jan. 17, 2022), <https://perma.cc/WMB7-SSPW>.

53. *Love*, 522 U.S. at 72.

54. *Id.*

55. *Busbee v. Smith*, 549 F. Supp. 494, 521 (D.D.C. 1982).

56. *Id.* at 498.

57. *Id.*

58. *Jurisdictions Previously Covered by Section 5 at the Time of the Shelby County Decision*, DEPT. OF JUSTICE, (Nov. 29, 2021), <https://perma.cc/NF6S-P24A>.

59. Robert A. Holmes, *Reapportionment Politics in Georgia: A Case Study*, 45 *PHYLON* 179, 184 (1984).

60. *Id.* at 185.

61. *Id.* at 185.

62. *Id.* at 186.

normal election schedule—a primary on August 31 and the general election on November 2.⁶³ The panel agreed, imposing new primary and general election dates with the general election date falling, critically, after national election day.⁶⁴

Georgia challenged the court's decision, contending that the adjustment violated the nation's laws regarding a uniform election day (2 U.S.C. § 7).⁶⁵ Thus arose a direct conflict between two statutes—2 U.S.C. § 7 and the Voting Rights Act. The court's resolution suggests election day is less than absolute. In its ruling, the D.C. District Court tossed out Georgia's objections to the new election dates, holding states could depart from 2 U.S.C. § 7's requirements for a national federal election day "under exigent circumstances."⁶⁶ The Supreme Court affirmed the District Court's ruling, accepting the lower court's interpretation that "a state may postpone the election until the earliest practicable date" when "exigent circumstances arising prior to or on the date established by section 7 preclude holding an election on that date."⁶⁷

Busbee thus established the flexibility of America's uniform election day. While *Busbee* centered on the obstacles that other statutes and litigation can pose to election timing, the *Busbee* court explicitly referenced the interplay between 2 U.S.C. § 7 and emergencies. Judge Edwards noted, "Congress did not expressly anticipate that a natural disaster might necessitate . . . [an election's] postponement, yet no one would seriously contend that section 7 would prevent a state from rescheduling its congressional elections under such circumstances."⁶⁸ In acknowledging that "[2 U.S.C.] section 8 creates an exception to section 7's absolute rule in a limited class of case[s]," the Court made clear that circumstances giving rise to a "failure to elect at the time prescribed by law" provided license to deviate from the country's prescribed election day.⁶⁹

In 1993, over a decade after *Busbee*, Georgia again reckoned with 2 U.S.C. § 7 and "exigent circumstances." In the state's 1992 general election (held on national election day), neither Senatorial candidate received a majority of the vote, prompting a run-off election three weeks later.⁷⁰ The candidate who won the plurality of the general election votes lost the run-off and subsequently challenged its legality, arguing the run-off violated 2 U.S.C. § 7.⁷¹ The district court, relying on *Busbee*, held that "[a] plurality outcome in the general election is similar to an election postponed due to natural disaster or voided due to fraud in that each is contemplated, yet beyond the state's ability to produce."⁷² Perhaps most

63. *Busbee v. Smith*, 549 F. Supp. 494, 521 (D.D.C. 1982).

64. *Id.* at 522.

65. *Id.*

66. *Id.* at 524.

67. *Id.* at 525.

68. *Id.* at 526.

69. *Id.*

70. *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821, 823 (N.D. Ga. 1993).

71. *Id.*

72. *Id.* at 830.

importantly, the court defined the parameters of an “exigent circumstance” giving rise to a delayed election as a circumstance in which an election may originally be contemplated but the results of which are ultimately “beyond the state’s ability to produce,”⁷³ and the court concluded that 2 U.S.C. § 8 “permit[s] states to prescribe different times for elections when they experience a legitimate failure to elect due to exigent circumstances after making an honest attempt to do so.”⁷⁴

Therefore, over the past thirty years, the courts have determined both that early voting is permissible—provided that voting continues until election day—and, more critically, that elections may legally be held after election day, should broadly defined exigent circumstances necessitate. As such, the courts have endorsed postponed or delayed elections in certain contexts, laying the legal groundwork for emergency-driven election changes.

B. Legal Background: The Purcell Principle

Although the rulings in *Foster*, *Busbee*, and *Public Citizen* suggest emergencies can be grounds for modification of an election’s timing, altering the time of an election represents only one type of change in election administration. Many state statutes permit broader procedural changes—to poll locations, ballot counting, ID requirements, and more—when emergencies occur (*supra* Part II). Procedural changes in election administration close to election day often face legal challenges.⁷⁵ Court rulings on these changes and challenges can face legal scrutiny too.⁷⁶

When it comes to elections, there is a tendency against modification.⁷⁷ After all, changes to an election’s administration could confuse voters, compromise accuracy, or bias the results. The Supreme Court has partially endorsed such thinking with the *Purcell* principle, which prohibits court-driven modifications to election procedures close to an election.⁷⁸ In applying the *Purcell* principle, the Court has repeatedly noted such alterations could complicate the election’s

73. *Id.*

74. *Id.* at 831.

75. *See, e.g.*, *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020); *Curtin v. Virginia State Bd. of Elections*, 463 F. Supp. 3d 653 (E.D. Va. 2020); *Arctic Village Council v. Meyer*, No. 3AN-20-07858 CI, 2020 WL 6120133 (Alaska Super. Oct. 05, 2020).

76. *Veasey v. Perry*, 574 U.S. 951 (2014); *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 206 L. Ed. 2d 452 (2020); *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

77. *See Purcell* 549 U.S. at 4 (“Faced with an application to enjoin operation of voter identification procedures just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures. Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”); *see also* Supreme Court discussions of “party raiding” in *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973) (“[A] State may have a legitimate interest in seeking to curtail ‘raiding,’ since that practice may affect the integrity of the electoral process.”).

78. *Purcell*, 549 U.S. at 1-2 (vacating a Ninth Circuit injunction that blocked a new Arizona voter identification law from taking effect and holding that the Ninth Circuit’s decision to intervene “just weeks before an election” could confuse voters, depress turnout, and complicate election administration).

administration or confound its voters.⁷⁹ Since election emergencies often involve court orders, the *Purcell* principle is a critical legal consideration. Unlike with *Foster*, *Busbee*, and *Public Citizen*, however, *Purcell* applies to court action—not state action—and it inhibits deviations from statutory norms rather than permitting them.⁸⁰

During Wisconsin’s 2020 primary, the *Purcell* principle’s power in emergencies was on display. On April 7, 2020—less than one month after the World Health Organization declared a global pandemic—Wisconsin was set to hold its Democratic primary for the 2020 presidential election.⁸¹ Due to the pandemic, Wisconsin’s voters requested unprecedented numbers of absentee ballots, overwhelming the state’s election administrators.⁸² Citing a “backlog of over 21,000 absentee ballot applications” and the anticipated disenfranchisement of thousands of Wisconsites who made a “timely” absentee ballot request, U.S. District Judge William Conley ordered the state to extend its deadline for absentee voting until April 13.⁸³ His order, issued on April 2, would have effectively prolonged the election by six days. The Republican National Committee sought an emergency stay from the Supreme Court.⁸⁴ In a 5-4 decision, the Supreme Court stated Conley’s decision “fundamentally alter[ed] the nature of the election,” thereby contradicting the *Purcell* principle.⁸⁵ In dissent, Justice Ginsburg noted the irony underlying the majority’s *Purcell* application:

Nevermind that the District Court was reacting to a grave, rapidly developing public health crisis. If proximity to the election counseled hesitation when the

79. *Id.*; See, e.g., *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring) (“This Court has repeatedly stated that federal courts ordinarily should not enjoin a state’s election laws in the period close to an election, and this Court in turn has often stayed lower federal court injunctions that contravened that principle.”); *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring) (“[F]or many years, this Court has repeatedly emphasized that federal courts ordinarily should not alter state election rules in the period close to an election.”); *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S.Ct. 1205 (2020).

80. The cases discussed in subsection A predated *Purcell* (2006). It is unlikely, however, that the *Purcell* holding would have affected their outcomes. All three concerned elections’ timing, which might not have strictly fallen under *Purcell*, as it governs modifying an election’s procedures and regulations. Whether or not an election’s date is procedural would be at issue. Were dates indeed procedural, then *Busbee* could face a *Purcell* challenge, provided that there was insufficient time between the Court’s order and election day.

81. Amy Gardner, *Federal Judge Declines to Postpone April 7 Presidential Primaries in Wisconsin*, WASH. POST (Apr. 2, 2020), <https://perma.cc/LF27-TUCM>; WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19 - 11 March 2020, WORLD HEALTH ORG. (Mar. 11, 2020), <https://perma.cc/C2QY-BDZK>.

82. See *Executive Summary* to WISCONSIN ELECTIONS COMMISSION, APRIL 7, 2020 ABSENTEE VOTING REPORT (2020), <https://perma.cc/FGG8-UZBS>.

83. See *Democratic Nat’l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 976, 962 (W.D. Wis. 2020). Under the Order, all absentee ballots received by April 13 would be counted. *Id.*

84. *Emergency Application for Stay to the Supreme Court*, *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205 (May 20, 2020) (No. 3:20-cv-00249-wmc).

85. *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020).

District Court acted several days ago, this Court's intervention today—even closer to the election—is all the more inappropriate.⁸⁶

The *Purcell* principle's frequent invocation suggests that the Courts' ability to remedy election-related emergencies through last-minute procedural changes is limited. As the most significant election law cases of the 21st century suggest, courts may adjudicate the Voting Rights Act,⁸⁷ campaign financing,⁸⁸ and even the methods for recounting presidential election ballots,⁸⁹ but they are constrained in altering the procedures of elections themselves. As this note will discuss below, statutes also suggest executives—rather than courts or legislatures—are empowered decision-makers during election crises.⁹⁰

The legal backdrop to our modern election emergency landscape is paramount, both in helping to clarify what actions may be permissible and in helping establish the Courts' own limitations in remedying election emergencies (*Purcell*). Despite statutes prescribing a national election day, exigent circumstances may justify postponing an election. And despite traditional notions that courts will safeguard democratic institutions in crises, the courts have little ability to protect the fundamental right for all persons to vote when emergencies disrupt an election's administration.⁹¹ These legal realities, combined with executives' expansive power in emergencies, leave elections open to manipulation on emergency grounds.

C. Legal Background: State Emergency Powers

Emergency powers have been the subject of legal debate throughout U.S. history.⁹² The bulk of this debate has centered on presidential emergency powers, most prominently in *Youngstown Sheet & Tube v. Sawyer*.⁹³ But *Youngstown* concerned presidential authority in emergencies rather than that of state executives.⁹⁴ State emergency powers, the subject of this note, have garnered less attention from the nation's highest court.

86. *Id.* at 1210-11.

87. See *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021); *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

88. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

89. See *Bush v. Gore*, 531 U.S. 98 (2000).

90. *Infra* Sec. III.

91. *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

92. See *e.g.*, Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215 (2002) (emergency powers in wartime); *The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power*, 96 HARV. L. REV. 1102 (1983) (IEEPA); Jim Rossi, *State Executive Lawmaking in Crisis*, 56 DUKE L.J. 237 (2006) (state lawmaking in emergencies); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565 (2003) (judicial review).

93. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

94. *Youngstown Sheet*, 343 U.S. at 585 ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here.").

In the early Twentieth century, the Court issued two seminal rulings on the issue in *Moyer v. Peabody* (1909) and *Sterling v. Constantin* (1932).⁹⁵ *Moyer*, which stemmed from the Colorado Labor Wars, concerned the multi-week imprisonment of a union leader without arrest or conviction.⁹⁶ Colorado's governor, who declared a "state of insurrection" to quell labor unrest, contended that his emergency powers allowed for this suspension of personal liberty.⁹⁷ The Court agreed. In a powerfully deferential opinion, Justice Holmes seemed to give the governor a *carte blanche*, writing:

When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process.⁹⁸

Twenty years later, in *Sterling*, the Supreme Court placed some limits on gubernatorial emergency action.⁹⁹ After the Texas Railroad Commission limited oil production across Texas in the early 1930s, oil producers refused to cap their wells.¹⁰⁰ In the ensuing conflict, Governor Ross Sterling declared martial law and then ordered National Guardsmen to shutter defiant wells.¹⁰¹ The Court made no objection to Governor Sterling's use of emergency powers, holding "the executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. *His decision to that effect is conclusive.*"¹⁰²

The Court did, however, grant judicial review over the decision, rejecting Sterling's assertion that the "courts may not review the sufficiency of facts upon which martial law is declared" and that the "courts may not control by injunction the means of enforcing martial law."¹⁰³ Instead, Justice Hughes gave the courts a clear role, writing: "[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."¹⁰⁴ In reviewing Governor Sterling's use of martial law, the Court sided with oil producers, holding that there was "no military necessity which, from any point of view, could be taken to justify the action of the Governor in attempting to limit complainants' oil production, otherwise lawful."¹⁰⁵

95. *Moyer v. Peabody*, 212 U.S. 78 (1909); *Sterling v. Constantin*, 287 U.S. 378 (1932).

96. *Moyer*, 212 U.S. at 82.

97. *Id.*

98. *Id.* 85.

99. *Sterling v. Constantin*, 287 U.S. 378 (1932).

100. *Sterling*, 287 U.S. at 389-90.

101. *Id.* at 386-88.

102. *Id.* at 399 (emphasis added).

103. *Id.* at 393.

104. *Id.* at 401.

105. *Id.* at 403.

In the 1970s, federal courts again considered state emergency powers, offering the first parameters for their judicial review. Following a racially-charged police shooting in 1971, the mayor of Asheville, North Carolina declared a state of emergency.¹⁰⁶ Victor Chalk, a resident of the city, was stopped for a curfew violation and subjected to a search; he would later contend the search was illegal because it was “triggered by the mayor’s overbroad and unlawful restrictions” and that there was “insufficient threat to public safety to allow the mayor to impose the restrictions that he did.”¹⁰⁷ The Fourth Circuit, which upheld the mayor’s use of emergency powers, noted that “attempting to precisely define under what specific conditions each of the authorized restrictions might be imposed would destroy the ‘broad discretion’ necessary for the executive to deal with an emergency situation.”¹⁰⁸ It did, however, assert the judiciary’s role in regulating such discretion, holding that “the courts cannot prevent abuse of power, but can sometimes correct it.”¹⁰⁹

The Fourth Circuit then offered an informal standard for judicial review of state officials’ emergency power declarations. In assessing state officials’ invocation of emergency powers, the Court in *Chalk* held that “the declaration of a state of emergency and the restrictions imposed pursuant to it must appear to have been reasonably necessary for the preservation of order.”¹¹⁰ The Court proceeded to cabin the scope of its review, limiting it to “a determination of whether the [state official’s] actions were taken in good faith and whether there is some factual basis for his decision that the restrictions he imposed were necessary to maintain order.”¹¹¹ Subsequent federal courts have cited *Chalk* in adopting a limited and deferential judicial review of state executives’ emergency measures.¹¹²

Scheuer v. Rhodes, decided three years after *Chalk*, qualified state executives’ carte blanche in this arena. In its opinion, the Supreme Court found that the District Court “erroneously accepted as a fact the good faith of the Governor” and further complained that “there was no opportunity afforded petitioners to contest the facts assumed in that conclusion.”¹¹³ The Court’s determination that “a declaration of emergency by the chief executive of a State is entitled to great

106. *United States v. Chalk*, 441 F.2d 1277, 1278 (4th Cir. 1971).

107. *Id.* at 1280.

108. *Id.* (citing *Sterling v. Constantin*, 287 U.S. 378, 398 (1932)).

109. *Id.* at 1280.

110. *Id.* at 1281.

111. *Id.*

112. *See Smith v. Avino*, 91 F.3d 105, 109 (11th Cir. 1996) (quoting *Chalk*, 441 F.2d at 1281) (holding that “governing authorities must be granted the proper deference and wide latitude necessary for dealing with the emergency. From prior decisions involving natural disasters, both of the judges in the district court gleaned the proper approach in such matters: when a curfew is imposed as an emergency measure in response to a natural disaster, the scope of review in cases challenging its constitutionality ‘is limited to a determination whether the [executive’s] actions were taken in good faith and whether there is some factual basis for the decision that the restrictions . . . imposed were necessary to maintain order’”).

113. *Scheuer v. Rhodes*, 416 U.S. 232, 249-50 (1974).

weight, but it is not conclusive¹¹⁴ suggests that gubernatorial emergency declarations are subject to some scrutiny. The Court did not, however, offer any further guidance in drawing this line.

Most rulings on state emergency powers and gubernatorial action, particularly in the election context, land in state courts. This was particularly true around the COVID-19 pandemic, where numerous state courts ruled on their governor's use of emergency powers.¹¹⁵ Many of these suits were not election-specific, focusing instead on small business restrictions, public health mandates, and religious exemptions.¹¹⁶ As these rulings were tied to state-specific statutes, their precedential power is limited.

Questions about executive emergency power, popularized during the pandemic, were not novel in state courts, but their historical intersection with elections has been rare. One case, *In Re Farrow*, challenged Pennsylvania Governor, Thomas Ridge's, use of emergency powers to extend election filing deadlines following a winter storm.¹¹⁷ Other pre-COVID examples, however, are uncommon. Instead, cases on state executive emergency powers have concerned everything from a governor's use of his emergency powers to declare prison overcrowding an emergency¹¹⁸ to disputes over the timing of an emergency declaration following a volcano's eruption¹¹⁹ and a local government's controversial appropriation of dump trucks, under emergency authorization, after a devastating storm.¹²⁰

Collectively, deference towards exercise of discretionary powers—albeit with established judicial review—appear to undergird federal court rulings on state emergency powers. At the federal level, existing judicial opinions display a strong deference toward executives' choices in crises, a fact that may reflect equally on the courts and on state emergency statutes, which are inherently deferential. State courts, for their part, have adopted diverse positions on gubernatorial

114. *Id.* at 250.

115. *See* California (Newsom v. Superior Court, 278 Cal. Rptr. 3d 397, 400 (Cal. Ct. App. 2021)), Michigan (Midwest Institute of Health v. Governor No. 161492, 2020 WL 5877599 (Mich. Oct. 2, 2020)), Kansas (Butler v. Shawnee Mission Sch. Dist. Bd. of Educ., 502 P.3d 89 (Kan. 2022)), Kentucky (Cameron v. Beshear, 628 SW 3d 61 (Ky. 2021)), Minnesota (Free Minnesota Small Business Coalition et. al vs. Tim Walz, Ramsey County District Court File No. 62-CV-20-3507 (Minn. 2021)), and Pennsylvania (Wolf v. Scarnati, 660 Pa. 19, 29(2020)).

116. *See, e.g.*, Complaint for Plaintiffs, Looney v. Newsom, No. SCRDCVCV20-0195809-000 (Super. Ct. Shasta Cnty. Sept. 14, 2020) ; Complaint for Plaintiffs, Kemp v. Bottoms, No. 2020-CV-338387, 2020 WL 4036827 (Ga. Super. July 16, 2020); Complaint for Plaintiffs, Pritzker v. Board of Education of Hutsonville CUSD #1, No. 2020-MR-000557 (Ill. Cir. Sangamon Cnty.); Sophie Quinton, *GOP Lawsuits Restrain Governors' COVID-19 Actions*, PEW RSCH. CTR. (Nov. 17, 2020), <https://perma.cc/9Z7Q-EAZD>.

117. *In re Farrow*, 754 A.2d 33 (Pa. Commw. Ct. 2000) (holding that Pennsylvania's governor issued a valid executive order to extend an election filing deadline after a severe winter storm because he properly executed his legitimate statutory powers to declare an emergency and extend the filing deadline).

118. *Cal. Correctional Peace Officers' Ass'n v. Schwarzenegger*, 77 Cal. Rptr. 3d 844 (Cal. Ct. App. 2008).

119. *Cougar Bus. Owners Ass'n v. State*, 647 P.2d 481 (Wash. 1982).

120. *State ex rel. Mo. Hwy. & Transp. Comm'n v. Pruneau*, 652 S.W.2d 281 (Mo. Ct. App. 1983).

emergency powers.¹²¹ These varied outcomes may also be a product of the differing emergency statutes adopted in each state.

PART II: EMERGENCIES IN STATUTE

Before delving into the specifics of state emergency power statutes, it is critical to first understand how these powers originated, how they are invoked, and under which circumstances they apply. Each of these considerations, in turn, hinges on the definition of “emergency.”

A. A Brief History of State Emergency Statutes

Gubernatorial emergency powers have various origins. Many states’ emergency statutes stemmed from World War I when governors first began thinking about national defense.¹²² Others, such as Texas’ and Louisiana’s emergency statutes (The Texas Disaster Act of 1975; The Louisiana Disaster Act of 1993) were born out of natural disasters.¹²³ Massachusetts, for its part, modeled its emergency statute (The Massachusetts Civil Defense Act of 1950) on a federal law, the Federal Civil Defense Act of 1950, which had national security motivations rooted in the Cold War.¹²⁴ Often, as these legislative histories make plain, state emergency statutes were reactive, not proactive, legislation. Legislatures, responding to natural or international events, felt compelled to better equip their states to face future crises.

This approach is consistent with the impact of disasters over time at the national level. After Pearl Harbor, the government reformed intelligence collection practices;¹²⁵ after Hurricane Katrina, President Bush re-structured FEMA;¹²⁶ and after 9/11, Congress passed legislation establishing the Department of Homeland Security and creating the Office of the Director of National Intelligence.¹²⁷ Disasters, in short, motivate change. Changes crafted with past events in mind, however, can be ill-equipped for anticipating and responding to

121. *Compare, e.g.*, In re Certified Questions from U.S. Dist. Ct., 958 N.W.2d 1 (Mich. 2020) (ruling by the Michigan Supreme Court on Governor Whitmer’s use of emergency powers during the pandemic), with *Newsom v. Superior Ct.*, 278 Cal. Rptr. 3d 397 (Cal. Ct. App. 2021) (ruling by California’s 3rd District Court of Appeal on Governor Newsom’s use of emergency powers during the pandemic).

122. *See, e.g.*, *California Emergency Council History*, CAL. EMERGENCY MGMT. AGENCY (2007), <https://perma.cc/VHY7-FCTY> (explaining the state legislature created a predecessor to the California Emergency Council during WWI).

123. The Texas Disaster Act of 1973, which predated the 1975 Act, focused on storms and other natural hazards. *See* COASTAL ZONE INFO. CTR., PICTORIAL ATLAS OF TEXAS COASTAL HAZARDS (1977), <https://perma.cc/6GC4-78WH>. For Louisiana, see La. Stat. Ann. §§ 29:721–739 (1993).

124. Bruce Mohl, *Baker’s Emergency Authority a Bit Fuzzy*, COMMONWEALTH MAG. (May 22, 2020), <https://perma.cc/B8FQ-E7NW>.

125. Roberta Wohlstetter, *Pearl Harbor: Warning and Decision*, Stanford University Press (1962); David Binder, *Idea for Creating a C.I.A. Grew Out of Pearl Harbor*, N.Y. TIMES (Dec. 26, 1974), <https://perma.cc/VLT2-LWD7>.

126. Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295 (2006).

127. Homeland Security Act of 2002, Pub. L. No. 107-296 (2002); Intelligence Reform and Terrorism Prevention Act, Pub. L. No. 108-458, tit. I, 118 Stat. 3688 (2004).

future events, particularly those beyond conception. State emergency power statutes are no exception. Although intentionally broad—and thus adaptable—in nature, these statutes’ origins undergird their design. Emergencies that were inconceivable to the authors of these statutes have not been accounted for in the statutes’ text. As such, many of the threats facing the country today, such as executive power grabs, go beyond the natural disasters and foreign attackers these authors contemplated.

B. Declaring an Emergency

In times of emergency, governors reign dangerously supreme. In a democracy, of course, no person is supposed to reign at all, but states across the country permit governors to do so in crises—and often have little recourse to check this power. In forty-three states, only the governor may declare a state of emergency; in the remaining seven (Nevada, Oklahoma, Missouri, Alabama, North Carolina, West Virginia, New Hampshire), the legislature holds this power too.¹²⁸ Forty-one states allow governors to declare such emergencies with little or no legislative input.¹²⁹ In most cases, what constitutes an emergency (explored in greater depth below) is for the governor alone to decide. As such, state emergency statutes almost uniformly hold that the determination and declaration of an emergency rests at the governor’s discretion.

While these state statutes vary, executive authority holds constant. In Idaho, an emergency occurs when the governor determines as much (“finds a disaster has occurred or that the occurrence or the threat thereof is imminent”).¹³⁰ While Idaho’s legislature can terminate the declared emergency at any time through a joint resolution, other states have few, if any, checks. Vermont, where the governor declares an emergency and may exercise corresponding emergency powers for “as long as the Governor determines the emergency to exist,” is one such state.¹³¹ Hawaii, likewise, grants its executive broad discretion. Its governor “may declare the existence of a state of emergency. . . if the governor finds that an emergency or disaster has occurred or that there is imminent danger or threat of an emergency or disaster in any portion of the State.”¹³² Hawaii’s statute emphasizes that the governor alone is the “sole judge of the existence of the danger, threat, or circumstances giving rise to a declaration of a state of emergency in the State.”¹³³ Declaring an emergency, in sum, is often unilateral, diverging from the United States’ more traditional system of checks and balances.

128. Nick Murray, *Scoring Executive Emergency Power in All Fifty States*, ME. POL’Y INST. (2022), <https://perma.cc/KFD2-J9JC>.

129. Dan McConchie, *Limit Governors’ Emergency Powers*, WALL ST. J. (Apr. 30, 2020), <https://perma.cc/VR63-QGGA>.

130. IDAHO CODE § 46-1008(2) (2022).

131. VT. STAT. ANN. tit. 20, § 9 (2022).

132. HAW. REV. STAT. § 127A-14(a) (2020).

133. *Id.* § 127A-14(c).

C. Defining an Emergency

Emergency declarations and the statutory powers that they unlock turn on the definition of emergency. Emergency is a vague term, yet its elements are well-recognized. Emergencies are unanticipated—in occurrence, scale, or both. They are grave, involving the loss of life or property, and they often demand urgency in response. Most emergencies are readily apparent—we know them when we see them.¹³⁴ These emergencies, however, are the least troublesome from a state emergency powers perspective. Self-evident emergencies are the emergencies that legislatures had in mind when they crafted emergency statutes. These are the emergencies that necessitate centralized authority and swift, unburdened executive action.

The attacks of September 11, 2001, Hurricane Katrina, and the COVID-19 pandemic all exemplify such clear-cut emergencies. More complicated, however, are the situations of lesser urgency and loss that rest on the line between true emergency and mere complexity. In these latter circumstances, optimal governance may not require unchecked executive action, yet the nature of state emergency statutes puts that decision in the hands of governors themselves.

As discussed above, most state laws empower governors to determine what constitutes an emergency. The term emergency is often not, itself, defined, furthering governors' already ample discretion. Legislatures' choice to opt for ambiguity over precision is a deliberate one. After all, narrowly defining "emergency" would contradict the very purpose of emergency statutes by limiting governors' ability to respond to the unexpected. A tradeoff thus exists: ambiguity and gubernatorial discretion or precision and gubernatorial constraint.

Some states have chosen to reduce gubernatorial agency by more precisely defining emergency. Even these definitions, however, are vague. In Connecticut, for example, emergency is defined, but broadly so.¹³⁵ Under the state's statutes, a "serious disaster, enemy attack, sabotage or other hostile action" or the possibility thereof constitutes an emergency.¹³⁶ Other states like Georgia have statutes that are both strangely precise and entirely indeterminate.¹³⁷ In Georgia, an "impending or actual enemy attack" counts as an emergency, as does the oddly-specific "pandemic influenza."¹³⁸ In Pennsylvania, statute defines "disaster-emergency" in detail, and then proceeds to state that the governor may declare a "disaster emergency" upon finding that a disaster has occurred or is imminent.¹³⁹ Thus, in Pennsylvania, the statutory parameters of "emergency" have marginal function.

134. The difficulties associated with defining emergency are reminiscent of the Supreme Court's lengthy challenges in defining obscenity. Justice Stewart's famous "I know it when I see it" approach to obscenity is comparable to modern attempts at defining emergency. *See* *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

135. *See* CONN. GEN. STAT. § 28-9(a) (2022).

136. *Id.*

137. *See* GA. CODE ANN. § 38-3-51(a) (2021).

138. *Id.*

139. *See* 35 PA. CONS. STAT. § 7301 (2021); 35 PA. CONS. STAT. § 7102 (2021).

California and Illinois' statutes are the most exacting with their definitions of emergency, but both still leave room for gubernatorial discretion. In California, an emergency may arise from:

Conditions of disaster or of extreme peril to the safety of persons and property within the state caused by conditions such as air pollution, fire, flood, storm, epidemic, riot, drought, cyberterrorism, sudden and severe energy shortage, plant or animal infestation or disease, the Governor's warning of an earthquake or volcanic prediction, or an earthquake, or other conditions. . .¹⁴⁰

The statute's use of "such as," implies other unlisted conditions could qualify as emergencies. Its subsequent reference to "other conditions" supports this interpretation. Illinois' Emergency Management Agency Act defines emergencies as "disasters of unprecedented size and destructiveness," resulting from explosions (atomic or otherwise), sabotage (external or "from within"), or "fire, flood, earthquake, telecommunications failure, or other natural or technological causes."¹⁴¹ "Disaster" is the operative word, and the statute defines it more fully as the:

Occurrence or threat of widespread or severe damage, injury or loss of life or property resulting from any natural, technological, or human cause, including but not limited to fire, flood, earthquake, wind, storm, hazardous materials spill or other water contamination requiring emergency action to avert danger or damage, epidemic, air contamination, blight, extended periods of severe and inclement weather, drought, infestation, critical shortages of essential fuels and energy, explosion, riot, hostile military or paramilitary action, public health emergencies, cyber incidents, or acts of domestic terrorism.¹⁴²

While Illinois' definition of emergency has the concreteness that other statutes lack, it is unclear how much more constrained Illinois' governor would be in practice than, for example, Maine's governor, who can simply declare an emergency "whenever a disaster or civil emergency exists or appears imminent."¹⁴³ It could be easier to challenge an emergency declaration in Illinois by arguing that the stated emergency does not fit into one of the aforementioned categories but, despite enumerating so many specific disasters, the statute still implements general language (i.e. "including but not limited to") such that Illinois' governor likely retains meaningful discretion.

In short, the majority of statutory definitions of emergency offer little constraint on what governors may treat as emergencies.¹⁴⁴ When few checks exist in

140. CAL. GOVERNOR CODE § 8558(b) (West 2018).

141. 20 ILL. COMP. STAT. 3305/4 (2021).

142. *Id.*

143. ME. STAT. tit. 37-B, § 742(A) (2021).

144. States statutes thus contrast with other domains of law where emergency can be defined in more exacting terms. Contract law offers one such example. Force Majeure clauses are commonplace in contracts and generally delineate what counts as an "act of God" in highly specific terms.

statutory language, they can often be found in other institutions. Such is not always the case with state emergency powers, including those around elections, many of which are not subject to legislative approval or terminable through legislative veto.

PART III: STATE EMERGENCY POWERS

This note contemplates two types of state emergency powers: general executive emergency powers and election-specific emergency powers. States can employ both at the same time. General executive emergency powers give the governor expansive authority to suspend statutes, issue orders, and take other executive actions during crises. Election-specific emergency powers authorize officials, including but not limited to governors, to modify various elements of an election's administration during crises.

A. General Executive Emergency Powers

Having established the immense agency that governors wield in both defining and declaring an emergency, it is critical to discuss the actual powers that such declarations unlock. While gubernatorial emergency powers vary by state, they are uniformly sweeping in scope. The National Conference of State Legislatures groups these powers into three discrete categories: (1) the power to suspend statutes and issue orders, (2) the power to suspend regulatory statutes related to state business and issue orders, and (3) the power to suspend rules and regulations and issue orders.¹⁴⁵ Fourteen states fall into the first category; twenty-two fall into the second; twelve states fall into the third.¹⁴⁶ Idaho, discussed above, has a prototypical statute: the governor can both suspend laws that would “prevent, hinder, or delay necessary action in coping with the emergency” and issue orders with the “force and effect of law.”¹⁴⁷

Many of these powers either have no expiration date or have an expiration contingent on the governor's signature. Over a dozen states do not limit a declared emergency's duration.¹⁴⁸ In other states, governors alone can terminate a declared emergency.¹⁴⁹ In Vermont, Washington, Wyoming, and Virginia, these statutory grants overlap such that an emergency could continue indefinitely at the governor's discretion.¹⁵⁰

Based on the statutory frameworks laid out above, governors can, in theory, unilaterally declare emergencies, exercise broad emergency powers for an indefinite period of time, and unilaterally end emergencies. Traditionally, state legislatures have

145. *Election Emergencies*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 1, 2020), <https://perma.cc/YEK9-Q4SW>.

146. *Id.*

147. IDAHO CODE § 46-1008 (2022).

148. These states included: Washington, Oregon, Nevada, Wyoming, Arizona, North Dakota, Nebraska, Oklahoma, Missouri, Virginia, West Virginia, Massachusetts, and Vermont. Legislatures are updating and revising these statutes as they make post-COVID reforms. *See* Murray, *supra* note 128.

149. *Id.*

150. Murray, *supra* note 128.

endorsed this broad delegation of authority, liberally granting emergency power to the governor. More states authorize the governor to single-handedly declare an emergency than require a joint legislative declaration. More states allow the governor to suspend statutes than to only suspend rules. And many states offer only one recourse for ending a state of emergency: a gubernatorial resolution. Executive emergency powers, in short, are expansive. They are also distinct from the election-specific emergency powers that governors also hold.

B. Election-Specific Emergency Powers

In addition to the general gubernatorial emergency powers available in emergencies, almost every state has passed laws governing permissible changes to *election administration* in the case of an emergency.¹⁵¹ These election-specific emergency powers focus on what exactly government officials, usually governors or secretaries of state, can do to affect an election that occurs during an emergency.¹⁵²

While reading about these statutes in the abstract is simple, the context and terms of their execution are highly complex—and bear greatly on their treatment in both the courts of law and public opinion. A governor may wield these statutes to facilitate or impede voting; she may invoke them months before an election or hours before; with their invocation, she may advantage a political party or remain entirely neutral; and she may utilize these powers during the height of a crisis, or in its distant aftermath.

Each state's statutes are different but may share similar features—multiple states allow voters to request replacement ballots during emergencies, others allow officials to suspend voter ID laws or delay voter registration deadlines.¹⁵³ Many of these statutes are seemingly innocuous. In Maine, for example, the secretary of state may provide additional ballots if counties run out during an emergency.¹⁵⁴ Other statutes, however, provide election officials with robust authority to change fundamental elements of the election's administration—often with few specifications and few safeguards.¹⁵⁵

Many election-specific emergency powers are broad, giving officials the ability to conduct elections as they see fit. In California, for example, the secretary of state may “establish the procedures and guidelines for voting in the event of a natural

151. *Election Emergencies (Table 1)*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 1, 2020), <https://perma.cc/WQ6H-SRT3>.

152. *Id.* Some of these statutes are contained in states' emergency or disaster acts, which also contain general gubernatorial emergency powers, but most reside in the state election code.

153. *Election Emergencies (Table 1)*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 1, 2020), <https://perma.cc/WQ6H-SRT3>.

154. ME. STAT. tit. 21-A, § 604 (2021).

155. See e.g. FL. STAT. § 101.733 (enabling the governor to delay and reschedule an election); LA. R.S. § 18:401.1 (allowing the governor to suspend an election if there is a pending emergency); 26 OKL. STAT. § 22-104 (permitting the Secretary of State to prescribe vote-counting procedures in an emergency).

disaster or other state of emergency.”¹⁵⁶ What exactly constitutes “procedures” or “guidelines” is unclear, but the mandate itself is evident. Likewise, in Kentucky, the governor can establish “a different time or place for holding elections,” while in Indiana, the state election commission may implement a court order to “administer an election in a manner not authorized by this [election code].”¹⁵⁷ While “time” and “place” are fairly self-explanatory, the “manner” of an election could refer to any facet thereof. Could officials decide that an election’s plurality winner has been elected instead of conducting a run-off? Or might they mandate universal absentee voting?

Maryland likewise falls into the category of states whose officials have imprecise yet expansive authority to alter election procedures. Under Maryland election code, the governor may “specify alternate voting systems” in an emergency, connoting the discretion to broadly alter voting practices.¹⁵⁸ Modifications could include changes to the ballot, as in Oklahoma, where the secretary of the state election board can both make “any changes to the ballot format necessary”¹⁵⁹ and prescribe the procedures for counting ballots.¹⁶⁰

These broad mandates, which could see officials amending everything from ballots themselves to the ways in which they are cast, are available with the stroke of a pen and could radically re-shape the course of an election. No additional safeguards accompany these statutes’ open-ended, undefined terms. In an era where election integrity and administration is increasingly political, there is evident danger in permitting such expansive action—in some cases under the directive to simply “uphold the integrity of an election.”¹⁶¹ Whether integrity survives or withers under these statutes will be a question of time, but their ripeness for abuse is facially assured.

Other states have more narrowly tailored their statutes, giving officials authority over specific elements of election administration like election postponements. A Texas statute allows the governor to accelerate an election when an “emergency [so] warrants,” moving the election forward so that it falls before federal election day (in violation of the Supreme Court’s ruling in *Foster*).¹⁶² Delaware, Florida, Hawaii, and Idaho, conversely, all have statutes akin to that of Louisiana, which holds that the governor may “suspend or delay any qualifying of candidates, early voting, or elections.”¹⁶³ Delaying a federal election would be subject to legal scrutiny under 2 U.S.C. § 7, but as *Busbee* established, an exigent circumstance¹⁶⁴ would likely overcome such a challenge. The Louisiana statute quoted

156. CAL. ELEC. CODE § 19104(a)(1) (West 2018).

157. KY. REV. STAT. ANN. § 39A.100(1)(k) (West 2022); IND. CODE ANN. § 3-6-4.1-16 (2021).

158. MD. CODE ANN., ELEC. LAW § 8-103 (West 2020).

159. OKLA. STAT. tit. 26, § 22-102 (2021).

160. *Id.* § 22-104.

161. W. VA. CODE § 3-1A-6(e)(1) (2022).

162. TEX. ELEC. CODE ANN. § 41.0011 (West 2021).

163. LA. STAT. ANN. § 18:401.1(B) (2021); *see also* DEL. CODE ANN. tit. 15, § 7550 (2021); FLA. STAT. § 101.733 (2021); HAW. REV. STAT. § 11-92.3 (2021); IDAHO CODE § 34-106(1)(C) (2022).

164. *Busbee v. Smith*, 549 F. Supp. 494, 524 (D.D.C. 1982); *see also* Morley, *supra* note 37.

above distinguishes between an election “delay” and a “suspension,” suggesting that suspension could go beyond mere postponement. An election’s suspension without recourse for a new election would, however, face constitutional hurdles under the Fourteenth and Twenty-Sixth Amendments.

Emergencies permit changes to poll locations as well. Across the country, states allow officials to establish new polling places—sometimes without notice. In Florida, the “supervisor of elections” can “establish . . . an additional polling place,” which may fall outside the original precinct.¹⁶⁵ In Louisiana, the secretary of state can “relocate” polling places¹⁶⁶ and in Ohio the board of elections can both move polling places and add new ones.¹⁶⁷ Under Kansas’s emergency statutes, election officers do not need to provide notice when changing poll locations, a seemingly counterintuitive choice during an emergency when so much is already uncertain.¹⁶⁸ Emergency poll locations play by different rules too. In Montana, for example, emergency polling places are exempt from state election code requirements and “survey procedures.”¹⁶⁹

As these emergency poll location statutes establish, some voters may cast their ballots in new ways during emergencies, creating a clear juxtaposition between state emergency statutes and the *Purcell* principle’s underpinnings. Under *Purcell*, court-prescribed changes to an election’s administration near election day, even in emergencies, are taboo since concerns about voter confusion predominate.¹⁷⁰ States, per their statutes, appear to have fewer qualms about these changes or about any corresponding confusion, even when an election supervisor, rather than a federal judge, is making modifications.

Wisconsin offers just one such example. During Wisconsin’s 2020 primary, Milwaukee closed 175 of its 180 poll locations, yet the Supreme Court—citing *Purcell*—overturned a lower court order that would have expanded access to the polls through a number of administrative changes.¹⁷¹ Were Wisconsin to have a statute that permits officials to add poll locations (like Ohio) or expand absentee voting (like Indiana), then Wisconsin election officials may well have successfully implemented the modified procedures struck down in *Republican National Committee v. Democratic National Committee*. Voters, for their part, would have been no more confused whether a court or a statute altered the election’s administration. In short, although both court-mandated procedural changes and procedural changes authorized under emergency statutes could be identical and have identical effects on voters, the legal grounds on which both rest are entirely

165. FLA. STAT. § 101.74 (2022).

166. LA. STAT. ANN. § 18:401.2 (2021).

167. OHIO REV. CODE ANN. § 3501.18 (West 2022).

168. KAN. STAT. ANN. § 25-2701(d)(1) (2021).

169. MONT. CODE ANN. § 13-3-211 (2021).

170. See *supra* sec. I(B).

171. Vazquez, *supra* note 40, at 994.

different, proving critical in actually affecting change during an election emergency.¹⁷²

States' election-specific emergency powers, which range from narrow to broad in scope, can remedy the election-related challenges that emergencies beget—a role which courts are ill-equipped to play on constitutional grounds. Yet these powers carry inherent risks. Few constraints govern their use, allowing for the possibility that deployment of these powers, rather than the circumstances giving rise thereto, will constitute the actual emergency.

PART IV: EMERGENCIES IN PRACTICE AND POSSIBILITY

The paradox of state emergency powers stems, in part, from the sweeping, unchecked authority that governors wield in emergencies. This power is both necessary to govern in an emergency and antithetical to democracy's traditional checks-and-balances. Constraining executive power could lessen the efficacy of an emergency response—but leaving it unchecked risks gubernatorial overreach or even abuse. When emergencies are governors' alone to define and declare, the only boundary on abuse can be the boundaries of emergency.

Many types of emergencies have affected elections, leading governors or other state officials to invoke emergency powers. Natural disasters, terror attacks, and pandemics are the most traditional such emergencies.

A. *Natural Disasters*

Mother nature pays little heed to the ballot box. Hurricanes, blizzards, fires, tornados, and tsunamis have long interfered with elections. From Maine's 1952 snowstorm to Hurricane Katrina in 2005, weather events are an established source of emergency.¹⁷³ Since hurricane season and election season intersect, the east coast has frequently dealt with weather-driven election emergencies. Hurricane Sandy devastated New York and New Jersey on October 29, 2012, only one week before the 2012 presidential election. Both governors declared a state of emergency and both states modified election procedures, including via executive order.¹⁷⁴ Since Sandy, Hurricane Matthew (2016) and Hurricane Michael (2018) have caused extensive damage and corresponding procedural modifications.¹⁷⁵

Weather-related election emergencies are perhaps the most tangible type of emergency. The emergency is readily apparent, and the barriers to election administration are well-established. Terror attacks and pandemics are slightly less predictable and more varied in impact.

172. These differing legal grounds stem from the *Purcell* principle, which the courts have repeatedly invoked to inhibit court-prescribed election modifications close to election day. *See* Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020); *Merrill v. Milligan*, 142 S. Ct. 879 (2022).

173. Vazquez, *supra* note 40, at 988.

174. Morley, *supra* note 38, at 563-64.

175. William Wan, *Florida Voter Registration Extended to Next Week After Hurricane Matthew*, WASH. POST (Oct. 12, 2016), <https://perma.cc/9EH3-WGRE>; Fla. Exec. Order No. 18-283 (2018).

B. *Terror Attacks*

On September 11, 2001 terrorists attacked on New York's Democratic primary day. Before and since then, terrorism has interfered with U.S. election administration. In June 2013, Massachusetts held a special election to fill John Kerry's Senate seat. Weeks earlier, terrorists detonated explosives at the Boston Marathon.¹⁷⁶ Around 3 p.m. on Marathon Monday, police rushed to Boston's John F. Kennedy Library, where separate explosions were reported and later confirmed by the city's Police Commissioner.¹⁷⁷ Police closed off the library and declared it a crime scene.¹⁷⁸ While police eventually concluded that an unrelated mechanical fire caused the explosions, the library's closure complicated the state's special election.¹⁷⁹ The library, a designated polling place and a crime scene, could not open to the public for voting.¹⁸⁰ The governor could not move the poll location absent a statewide emergency, which did not exist when election day arrived.¹⁸¹ Fortunately, police concluded their investigation right before the election started, salvaging the district's otherwise helpless voters.¹⁸²

C. *Pandemics*

In 1918, the United States held a midterm election in the midst of the Spanish Flu pandemic. As the flu spread from the east to west coast, thousands died and, as with COVID-19, the country shut down.¹⁸³ Polling places moved outdoors, voters wore masks, and precincts scrambled to find healthy election officials.¹⁸⁴ States and localities altered election procedures, either with the courts' permission or at the discretion of election administrators.¹⁸⁵ A little over a century later, the United States held its second pandemic election. All fifty governors declared an emergency following the COVID-19 pandemic's onset in March 2020.¹⁸⁶ States subsequently adopted a variety of emergency election statutes and regulations, altering electoral processes to account for the health crisis.¹⁸⁷

176. John Eligon & Michael Cooper, *Blasts at Boston Marathon Kill 3 and Injure 100*, N.Y. TIMES (Apr. 15, 2013), <https://perma.cc/86B4-UPXB>.

177. J.K. Trotter, *What Happened at Boston's JFK Library?*, ATLANTIC (Apr. 15, 2013), <https://perma.cc/5Y3Z-RAQR>.

178. James Vaznis, *At First, Fire at JFK Library Heightened Fears*, BOSTON GLOBE (Apr. 16, 2013, 9:46 AM), <https://perma.cc/WRV4-6Q3V>.

179. *Id.*

180. Jessica Huseman, *Who Has Emergency Authority Over Elections? Nobody's Quite Sure.*, PROPUBLICA (Apr. 6, 2020), <https://perma.cc/E5VM-YGYA>.

181. *Id.*

182. *Id.*

183. Morley, *supra* note 39, at 9-10.

184. Morley, *supra* note 39, at 9-10.

185. Morley, *supra* note 39, at 11-12.

186. Sophie Quinton, *More States Rein in Governors' Emergency Powers*, PEW: STATELINE (June 17, 2021), <https://perma.cc/UN7E-Y2BT>.

187. Morley, *supra* note 39, at 20-22.

Natural disasters, terror attacks, and pandemics are emergencies with a precedent.¹⁸⁸ Even with such precedent, however, the scale of all three can vary greatly, potentially affecting each's categorization as a true "emergency." There is a distinction, of course, between a severe thunderstorm and a natural disaster. Emergency declarations and the powers they unlock, however, do not discriminate between evident and questionable emergencies. As such, governors' determinations as to what—beyond the obvious—qualifies as an emergency carries significant weight.

Would a cyberattack that disables part of the power grid constitute an emergency? What about an oil spill? The answer is almost certainly yes to both. Governors have broadly interpreted "emergency," declaring emergencies and citing to state emergency statutes across a variety of contexts. In Pennsylvania, Governor Wolf declared the opioid epidemic a formal emergency.¹⁸⁹ In Wisconsin, Governor Evers proclaimed a state of emergency following the murder of George Floyd.¹⁹⁰ In July 2019, Hawaii Governor David Ige controversially declared an emergency because of protests over the construction of a telescope on Mauna Kea.¹⁹¹ And in January 2019, Jay Inslee declared a state of emergency in Washington after 26 cases of measles were confirmed.¹⁹²

This final example is instructive. Washington's 2019 measles outbreak totaled 87 cases over seven months.¹⁹³ Measles is a well-known disease—a vaccine has existed since the 1960s—and the outbreak was, in the words of a leading Washington epidemiologist "entirely preventable."¹⁹⁴ The elements of an emergency discussed above—urgency, severity, unforeseeability—were not as readily apparent. The outbreak was unanticipated, but it affected fewer than 100 people and was largely contained in one county. Yet Governor Inslee declared an emergency—and so a legal emergency, if not an actual emergency, existed.

To the extent that declared emergencies are the product of real events and gubernatorial discretion, the parameters of emergency are critical. What a governor—and sometimes a legislature—considers an emergency determines what *is* an emergency—and whether or not emergency powers can be invoked. This discretion, exercised around elections, proves complicated. Terror attacks may be clear-cut

188. Even with such precedent, the scale of all three can vary greatly, potentially affecting its categorization as an "emergency." There is a distinction, for example, between a severe storm and a natural disaster.

189. Commonwealth of Pennsylvania Proclamation of Disaster Emergency, *Opioid Crisis Emergency Proclamation* (Jan. 10, 2018) (citing 35 PA. CONS. STAT. § 7101 (2022)), <https://perma.cc/5JPD-ZUCZ>.

190. Wisc. Exec. Order No. 86, *Relating to Declaring a State of Emergency to Provide Safety and Protection to the People of Kenosha and Other Wisconsin Communities* (Aug. 25, 2020), <https://perma.cc/JKJ7-QR83>.

191. Proclamation of the Governor of Hawaii (July 17, 2019), <https://perma.cc/5S96-DGJZ>.

192. Proclamation No. 19-01 of the Governor of Washington (Jan. 25, 2019), <https://perma.cc/3Y7A-YSM5>.

193. *Measles 2019*, WASH. STATE DEP'T OF HEALTH, <https://perma.cc/QDE3-YPP4>.

194. Shamard Charles, *Measles Outbreak in Southwestern Washington Rises to 50 Cases*, NBC NEWS (Feb. 4, 2019), <https://perma.cc/E7J5-LWSZ>.

grounds for emergency, but what about less direct threats? During the 2016 and 2020 elections, Russia conducted a large-scale influence operation to interfere with the elections' outcome.¹⁹⁵ In September 2018, President Trump issued Executive Order 13848, declaring a national emergency regarding foreign interference in U.S. elections.¹⁹⁶ While this emergency has been annually re-authorized,¹⁹⁷ no state has made a comparable declaration. It appears entirely possible, however, that a governor could determine before or during an election that such an emergency exists.

The discretion inherent in emergency declarations means that circumstances well short of true emergencies, such as natural disasters or terror attacks, could be treated as such. Cyber-attacks targeting election infrastructure could escalate into an emergency, but so too could more amorphous threats. During the 2020 election, voting machines were the subject of disproportionate controversy. Could the perceived manipulation of voting machines constitute an emergency? With voting machines, grasping the severity of a problem, attack, or malfunction can be difficult, often requiring specialized knowledge to identify the source and impact of a problem.¹⁹⁸ The uncertainty associated with an attack or glitch of this nature can erroneously affect emergency declarations, leading governors to proclaim an emergency when none exists or fail to rightly identify one as such.

So long as emergency declarations rest with governors, the decision of what constitutes an emergency will also, regardless of precedent or circumstance. And while emergencies are inherently variable events, the powers that they unlock are consistent. The type of emergency that motivates an emergency declaration—be it a tornado or a new strain of COVID-19—does not affect the statutory powers that accompany the declaration. In short, every emergency is different, but the law treats them the same. Thus, sweeping emergency powers conceived with epic disasters in mind can be applied to emergencies of lesser proportion, creating an incongruity between the scale of destruction and the executive power granted to remedy it.

PART V: CASE STUDIES

The 2020 election, conducted in the midst of a global health emergency, tested state emergency powers and raised longer-term questions about the intersection of elections and emergencies. Unique in many regards, voting in 2020 carried added relevance in the state emergency powers context because of the many emergencies—real and imagined—that surrounded it.

195. See NAT'L INTEL. COUNCIL, FOREIGN THREATS TO THE 2020 US FEDERAL ELECTIONS (2021); David Sanger, *Putin Ordered 'Influence Campaign' Aimed at U.S. Election, Report Says*, N.Y. TIMES (Jan. 6, 2017), <https://perma.cc/M259-CB3C>.

196. Exec. Order No. 13,848, 83 Fed. Reg. 46,843 (Sept. 14, 2018).

197. Notice on the Continuation of the National Emergency With Respect to Foreign Interference In or Undermining Public Confidence in United States Elections, THE WHITE HOUSE (Sept. 7, 2022), <https://perma.cc/NTS8-N8QU>.

198. *Voting Machines in America Are Reassuringly Hard to Hack*, ECONOMIST (July 19, 2018), <https://perma.cc/45C6-PADR>.

In the lead up to November 3, 2020—election day—voting districts across the country prepared to conduct elections for local, state, and federal office. Experts projected close races at every level, compounding the sense of uncertainty that the COVID-19 pandemic had already introduced. The pandemic raged throughout primary season and persisted past election day, leading at least 14 states and territories to substantially alter their primaries.¹⁹⁹

National concern was not limited to the pandemic and its effects. In the days before the general election, members of Congress openly discussed President Trump's intentions to "install himself in some kind of emergency way to continue to hold onto office."²⁰⁰ After election day, members or supporters of the Trump administration seemingly undertook active measures to that end, drafting a never-issued Executive Order that authorized the Secretary of Defense to seize voting machines.²⁰¹

At the state level, the election's lead-up and aftermath were fraught with controversy. Political parties took legal aim at gubernatorial action or inaction over pandemic poll access.²⁰² And states took center stage in national debates over absentee voting, voting machine malfunctions, and voter fraud. When the polls closed, secretaries of state and election workers became political targets, entering into a back-and-forth with the White House over election integrity.²⁰³

Although elections are state-centric, these national tensions provide important context about the dual pressures facing state decision-makers—externally from the President and internally from political parties, advocacy groups, and state residents. While state officials must grapple with the emergencies facing their states, they also must contend with the President. Despite holding the nation's most powerful office, the President has an ironically—and intentionally—limited ability to take emergency action around elections. The President still, however, exerts enormous influence in federal elections as the symbolic leader of their national political party, particularly on other party members in office.

The use or restraint of emergency powers in Florida, Texas, and California during the 2020 election highlights both the importance of state emergency powers and their potential for abuse:

199. Collier Fernekes, *The Confusing (and Different) Emergency Powers over Elections in States*, BIPARTISAN POL'Y CENTER (June 5, 2020), <https://perma.cc/6FBS-896H>.

200. Matt Mathers, *Trump Will Use Emergency Powers to Remain in White House if He Loses Election, Says House Majority Whip*, INDEP. (Aug. 3, 2020), <https://perma.cc/NR84-TF6C>.

201. Draft Executive Order (Dec. 16, 2020), available at <https://perma.cc/8DX6-LJYW>.

202. See e.g., Democratic Nat'l Comm. v. Bostelmann, 977 F.3d 639 (7th Cir. 2020); Texas Democratic Party v. Abbott, 978 F.3d 168 (5th Cir. 2020), cert. denied, 208 L. Ed. 2d 562 (2021); Republican Nat'l Comm. v. Newsom, No. 220CV01055MCECKD, 2020 WL 3430243 (E.D. Cal. June 23, 2020).

203. Shane Goldmacher, Nick Corasaniti & Nicholas Bogel-Burroughs, *Secretaries of State in Spotlight as Trump Ratchets Up Attacks to Sow Doubt*, N. Y. TIMES (Nov. 5, 2020), <https://perma.cc/TSD2-2RNZ>.

A. Florida

Due to its frequent hurricanes, Florida has robust legislation on state emergency powers. In an emergency, the governor can delay or reschedule elections, while other officials can do everything from add new polling places to adopt new rules for overseas voters.²⁰⁴ On March 9, 2020, following the outbreak of COVID-19, Florida Governor Ron DeSantis declared a state of emergency.²⁰⁵ Eight days later, Floridians voted in the state's Democratic primary. On the heels of the primary, sixty-seven Florida election county supervisors asked Governor DeSantis to institute emergency changes to election procedures.²⁰⁶ Multiple voting rights organizations filed lawsuits as well, demanding procedural modifications to improve polls' accessibility.²⁰⁷

Despite the supervisors' request that DeSantis act "as soon as possible," Governor DeSantis delayed for weeks. He eventually issued Executive Order 20-149 on June 17, 2020, ten weeks after the initial request for emergency action.²⁰⁸ Citing the Florida Emergency Management Act, Governor DeSantis allowed administrators to expedite mail-in ballot processing, but stopped short of implementing more extensive changes, like additional polling sites or extended early voting, that officials requested.²⁰⁹ The Order seemingly did not cure supervisors' concerns. The president of the Florida Supervisors of Elections Association noted that the organization's recommendations were "substantially different" from Governor DeSantis' order, while the Miami-Dade Supervisor of Elections stated that executive action in June would be "too late" to meaningfully help the state's August Congressional primaries.²¹⁰

Despite having the statutory authority to make emergency modifications to the 2020 election's administration, Governor DeSantis' choice to refrain from substantial alterations offers important insights into the politicized application of emergency powers. Emergency powers are not just a resource, they are also an instrument that governors can wield to political ends. By implementing or not implementing procedural modifications in emergencies, governors' choices

204. FLA. STAT. § 101.698 (2021); FLA. STAT. § 101.71(3) (2021); FLA. STAT. § 101.733 (2021).

205. Fla. Exec. Order No. 20-52, *Emergency Management – COVID-19 Public Health Emergency* (Mar. 9, 2020), <https://perma.cc/DG4D-VDKL>.

206. Anthony Man, *Florida Election Supervisors Make Urgent Plea for Help to Make 2020 Voting Safe*, S. FLA. SUN SENTINEL (May 13, 2020), <https://perma.cc/HAA2-FNPN>; Gary Fineout, *Florida Election Officials Sound the Alarm Ahead of November*, POLITICO (Apr. 7, 2020), <https://perma.cc/L7FL-TULL>; David Smiley & Allison Ross, *DeSantis issues emergency elections order ahead of Florida primary*, TAMPA BAY TIMES (June 17, 2020), <https://perma.cc/5V5P-3EA9>.

207. Press Release, Advancement Project, Civ. Rights Orgs. File Lawsuit to Extend Fla. Primary Election Vote-By-Mail Deadline Amidst COVID-19 Outbreak (Mar. 18, 2020), <https://perma.cc/A8HJ-6FW2>.

208. Fla. Exec. Order No. 20-149, *supra* note 205.

209. *Id.*

210. Press Release, Fla. Supervisors of Elections, Supervisors of Elections Receive Exec. Order (June 17, 2020), <https://perma.cc/3CK4-8CKV>; David Smiley, *Governor Ron DeSantis Issues Emergency Order Ahead of Florida's Primary Elections*, MIAMI HERALD (June 18, 2020), <https://perma.cc/47GH-D8KD>; Smiley et al., *supra* note 206.

exercise power over the electorate, often shaping the ease and accessibility of voting. This dynamic has been on clear display in Florida over the past two years. After doing little to modify election procedures in 2020 during the COVID-19 pandemic, Governor DeSantis took aggressive steps in 2021 and 2022 to shape election procedures and security by both passing a restrictive voting rights bill and establishing Florida's Office of Election Crimes and Security.²¹¹ When Hurricane Ian devastated Florida communities weeks before election day in November 2022, Governor DeSantis issued an emergency order that made voting more accessible in three heavily-Republican Florida counties.²¹² While emergencies are not supposed to discriminate, Florida demonstrates that the application of emergency powers may discriminate on political grounds.

B. Texas

If Florida's decisions around the 2020 election epitomized restraint, Texas' showcased emergency powers closer to their apex. The Texas Election Code lays out the state's election-relevant emergency provisions, but these are more narrow in scope than laws in Florida and elsewhere.²¹³ The governor cannot, for example, move polling places or modify ballots.²¹⁴ Three provisions in Texas Code do, however, provide for expansive executive authority: (1) Texas' governor may move election day forward in an emergency, enabling the state to conduct its election before national election day;²¹⁵ (2) Texas' governor may "suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency" if an emergency so demands;²¹⁶ and (3) Texas' governor may, in an emergency, "issue executive orders, proclamations, and regulations" with the "force and effect of law."²¹⁷

On March 13, 2020, Governor Greg Abbott declared an emergency, activating the above authorities.²¹⁸ Over the next two years, he would issue more than 30 pandemic-related executive orders.²¹⁹ On March 18, Governor Abbott first invoked his emergency powers in an election context, suspending sections of the

211. Kelly Mena, Caroline Kelly & Fredreka Schouten, *Florida Gov. Ron DeSantis Signs Restrictive Voting Bill*, CNN (May 6, 2021), <https://perma.cc/JJF5-4DES>; Press Release, Fla. Governor's Office, Governor Ron DeSantis Signs Bill to Strengthen Florida's Election Integrity (Apr. 25, 2022), <https://perma.cc/6WP2-V8TY>.

212. Lori Rozca, *DeSantis Changes Voting Rules for Some Counties Hit by Ian, Sparking Criticism*, WASH. POST (Oct. 13, 2022), <https://perma.cc/AE27-6LES>; Patricia Mazzei, Nicholas Bogel-Burroughs, Frances Robles & Jack Healy, *Hurricane Ian's Staggering Scale of Wreckage Becomes Clearer in Florida*, N.Y. TIMES (Sept. 29, 2022), <https://perma.cc/C5QX-KY8E>; Fla. Exec. Order No. 22-234 (Oct. 12, 2022), <https://perma.cc/3MV5-U3KE>.

213. Tex. Elec. Code § 203.004; Tex. Elec. Code § 31.002; Tex. Elec. Code § 201.054; Tex. Elec. Code § 65.054; Tex. Elec. Code § 129.056; Tex. Elec. Code § 41.0011.

214. Fla. Stat. § 101.71(3); Fla. Stat. § 101.74; Fla. Stat. § 101.733.

215. TEX. ELEC. CODE ANN. § 41.0011 (West 2021).

216. TEX. GOV'T CODE ANN. § 418.016 (West 2021).

217. *Id.* § 418.012 (West 2021).

218. Proclamation of the Governor of Texas (Mar. 13, 2020), <https://perma.cc/WCT4-KLVR>.

219. Executive Orders by Governor Greg Abbott, LEGIS. REFERENCE LIBR. OF TX., <https://perma.cc/8ET8-SYEF>.

Texas Election Code to allow local governments to delay their elections.²²⁰ Two days later, Governor Abbott postponed both statewide primary runoff elections and a scheduled special election for Texas State Senate District 14, shifting them from May 2020 to July 2020.²²¹ As the pandemic worsened, Governor Abbott continued to act. In July 2020, he expanded early voting by suspending portions of the state’s election code.²²² In this same proclamation, Governor Abbott also permitted voters to “deliver a marked mail ballot in person to the early voting clerk’s office prior to and including on election day.”²²³ Fellow Texas Republicans pushed back on Governor Abbott’s July order to extend early voting, potentially affecting his October 2020 emergency proclamation.²²⁴

Weeks before election day in October 2020, Governor Abbott, citing his emergency powers, issued a proclamation to “enhance ballot security.”²²⁵ Governor Abbott’s October 2020 order was far less favorable to voter access—and likely far more advantageous to Republican Party vote counts. Under Governor Abbott’s October 2020 executive order, counties were limited to one mail ballot drop-off location, meaning that voters in Texas’ Harris County—which is both larger than Rhode Island and more populous than Connecticut—had only one drop site.²²⁶ Governor Abbott’s order was rife with references to his emergency powers. He explicitly noted his statutory emergency powers under Section 418.011 of Texas Code, quoting his authority to “issue executive orders hav[ing] the force and effect of law” and to “suspend the provisions of any regulatory statute. . . if strict compliance. . . would in any way prevent, hinder, or delay necessary action in coping with a disaster.”²²⁷ Yet in his public remarks about the order, Governor Abbott did not focus on the health risks motivating his actions, instead emphasizing that “these enhanced security protocols will ensure greater transparency and will help stop attempts at illegal voting.”²²⁸ The governor’s characterization of his election modifications as attempts to address voter fraud again highlights emergency orders’ political coloring.

Within hours of Governor Abbott’s October order, multiple groups filed federal lawsuits, challenging the order’s constitutionality under the 1st and 14th Amendments. One set of plaintiffs, in *Texas League of United Latin American*

220. Proclamation of the Governor of Texas (Mar. 18, 2020), <https://perma.cc/92ZM-478X>.

221. Proclamation of the Governor of Texas (Mar. 20, 2020), <https://perma.cc/BL99-S2T5>; Proclamation of the Governor of Texas (Mar. 16, 2020), <https://perma.cc/P67Y-K3EN>.

222. Press Release, Governor Abbott Issues Proclamation Extending Early Voting Period For Nov. 3rd Election (July 27, 2020), <https://perma.cc/KY6G-PN3Z>.

223. *Id.*

224. Andrew Moore, *New Republican Lawsuit Could Shorten Early Voting*, KCEN-TV (Sept. 24, 2020), <https://perma.cc/G6MJ-EJAX>.

225. Proclamation of the Governor of Texas (Oct. 1, 2020), <https://perma.cc/SYB6-R4F5>.

226. *Governor Abbott Issues Order Limiting Where Eligible Voters Can Drop Off Mail-in Ballots*, ABC NEWS (Oct. 2, 2020), <https://perma.cc/7QSZ-QX5C>. Harris County originally planned to have 11 drop sites. *Id.*

227. Proclamation of the Governor of Texas (Oct. 1, 2020), <https://perma.cc/UW7G-VZ3A>.

228. *Governor Abbott Issues Order Limiting Where Eligible Voters Can Drop Off Mail-in Ballots*, ABC NEWS (Oct. 2, 2020), <https://perma.cc/7QSZ-QX5C>.

Citizens v. Hughs (commonly referred to as *LULAC*), noted Governor Abbott's differential treatment of Texas Election Code 86.0006(a) (a-1) in his two orders.²²⁹ Under Section 86.0006, voters may return absentee ballots in-person at a designated clerk's office on election day; this is the only way for voters to submit an absentee ballot on election day itself.²³⁰ In his July order, Governor Abbott lifted this requirement, allowing people to return ballots before election day.²³¹ In his October order, however, Governor Abbott added a new term to 86.0006 by restricting the ballot drop-offs to only one clerk's office per county.²³²

Prior to Governor Abbott's October order, election officials interpreted 86.006 to allow for multiple pre-designated drop locations across the state.²³³ Texas' Attorney General agreed, noting that "nothing in section 86.006(a-1) overcomes that presumption or otherwise indicates that 'office,' as used in section 86.006(a-1), does not include its plural, 'offices.' Accordingly, the Secretary of State has advised local officials that the Legislature has permitted ballots to be returned to any early-voting clerk office."²³⁴ Governor Abbott thus used his emergency powers to modify the terms of an existing statute—an action that fell within his right so long as inaction would have "prevent[ed], hinder[ed], or delay[ed] necessary action in coping with a disaster."²³⁵

The court, finding no burden on Texans' right to vote, sided with Governor Abbott. In upholding Governor Abbott's October order, the Fifth Circuit stated that the July and October proclamations "must be read together to make sense."²³⁶ Combined, the court noted that the orders expanded "opportunities to cast an absentee ballot in Texas well beyond the stricter confines of the Election Code."²³⁷ Governor Abbott's decision, in the court's eyes, yielded a net improvement when viewed in the aggregate.²³⁸

While the *LULAC* plaintiffs challenged the constitutionality of Governor Abbott's October order on voting rights grounds, a second suit launched on October 5—four days after Governor Abbott issued the order—directly challenged the governor's use of emergency powers. In *Abbott v. Anti-Defamation League Austin*, the plaintiffs argued that Governor Abbott's October order

229. Texas League of United Latin Am. *Citizens v. Hughs*, 978 F.3d 136, 141 (5th Cir. 2020).

230. TEX. ELEC. § 86.006; Texas League of United Latin Am. *Citizens v. Hughs*, 978 F.3d 136, 141-42 (5th Cir. 2020).

231. Press Release, Governor Abbott Issues Proclamation Extending Early Voting Period For Nov. 3rd Election (July 27, 2020), <https://perma.cc/KY6G-PN3Z>.

232. Proclamation of the Governor of Texas (Oct. 1, 2020), <https://perma.cc/UW7G-VZ3A>.

233. Texas League of United Latin Am. *Citizens v. Hughs*, 978 F.3d 136, 141 (5th Cir. 2020).

234. Complaint at 11, Tex. League of United Latin Am. *Citizens v. Abbott*, 493 F. Supp. 3d 548 (W.D. Tex. 2020) (No. 1:20-cv-1006).

235. TEX. GOV'T CODE ANN. § 418.016 (West 2021).

236. *Tex. League*, 978 F.3d at 145.

237. *Id.* at 144.

238. *Id.* at 145 ("The July 27 and October 1 Proclamations—which must be read together to make sense—are beyond any doubt measures that 'make[] it easier' for eligible Texans to vote absentee. How this expansion of voting opportunities burdens anyone's right to vote is a mystery.")

exceeded his emergency authority.²³⁹ Specifically, they contended that the July order “was validly motivated by concerns about the virus,” while the October order “was improperly motivated by concerns about ballot integrity.”²⁴⁰ The Texas Supreme Court disagreed.

The Texas Supreme Court’s unanimous ruling in *Abbott v. Anti-Defamation League Austin* showcased just how thin the guardrails are between emergency powers and their abuse. Holding that the plaintiffs failed to establish that “the October Proclamation exceeds the Governor’s statutory authority,” the Court stated:

If the plaintiffs were correct that each order issued by the Governor during a disaster must be motivated by a desire to alleviate the threat of the pandemic, then the Governor would be powerless to amend or rescind his orders based on other important goals, such as promoting economic welfare, protecting constitutional rights, or ensuring the integrity of elections. He would likewise be incapable of amending an order that may have an undesirable practical consequence unrelated to the disaster. His pandemic orders would operate as a one-way ratchet, moving only in the direction of alleviating the disaster.²⁴¹

The Court thus suggested that the governor could use emergency powers during an emergency to address issues unrelated to the emergency. In fact, the court noted that nothing in Texas’ Code “suggests any limitation on the Governor’s ability to consider valid policy goals” including “ballot integrity” when issuing emergency orders.²⁴² As such, the court seemingly implied that any emergency order issued during an emergency and motivated by a valid policy goal could be legally sound *even if it were not directly related to the emergency at hand*.

This ruling also adopted a net impact perspective similar to that embraced by the 5th Circuit in *LULAC*. Both courts concluded that the net effect of the July and October orders, taken together, benefited voters. However, the October order on its own unilaterally inhibited voting, suggesting that executives can use emergency orders to offset other orders provided that the net outcome is legally sound. This approach does not account for disparate outcomes across diverse groups of people. While the combined effect of multiple orders might have been positive for Texas’ collective population, it was decidedly better for some groups and more harmful to others. Of course, truly neutral modifications are rare—one voting bloc or political party will most always be able to claim some degree of disparate disadvantage. The courts’ net assessment approach to voter impact, however, obscures a normative reality about American elections: when it comes to voting, small populations in specific places can carry outsized weight.²⁴³

239. *Abbott v. Anti-Defamation League Austin*, 610 S.W.3d 911 (Tex. 2020).

240. *Id.* at 918.

241. *Id.*

242. *Id.*

243. See, e.g., *The 20 Counties That Will Decide the Midterms*, POLITICO (July 12, 2022), <https://perma.cc/DH7L-4NGH>.

Following the 2020 election, Texas' majority-Republican legislature attempted—and failed—to pass legislation curtailing gubernatorial emergency powers.²⁴⁴ Months later, Governor Abbott used separate emergency powers to create a state-wide election audit office to improve “election integrity.”²⁴⁵ In September 2021, Texas' legislature successfully enacted sweeping voting legislation that restricts how Texans can vote.²⁴⁶ Today, Texas has some of the most restrictive voting laws in the country. Its COVID-19 state of emergency remains in place.²⁴⁷

C. California

In 2020, Florida, a political swing-state, and Texas, a reliably-Republican state, both had Republican governors and Republican-controlled legislatures. California, by contrast, is a Democratic stronghold with a Democratic governor and legislature. California's use of emergency powers around the 2020 election demonstrates both their bipartisan appeal and their staying power.

In March 2020, upon “find[ing] that conditions of Government Code section 8558(b). . .ha[d] been met” with COVID-19, Governor Newsom declared a state of emergency, citing both “the California Emergency Services Act, and in particular, Government Code section 8625.”²⁴⁸ Two months later, Governor Newsom leveraged his emergency powers in an election context. On May 8, 2020, he issued Executive Order N-64-20, which required local election officials to mail every voter a vote-by-mail ballot regardless of whether they asked for one.²⁴⁹ In issuing the order, Governor Newsom explicitly referred to his emergency authority under the California Emergency Services Act.²⁵⁰ Governor Newsom subsequently issued additional emergency orders expanding poll hours, locations, and ballot-drop offs.²⁵¹

These orders did not go unchallenged. In late May, the California Republican Party tested Governor Newsom's vote-by-mail order in court, arguing that his action “exceeded the scope” of his emergency powers.²⁵² After the California legislature passed AB 860 in June 2020, which hardened Governor Newsom's

244. Daniel Friend, *Texas Legislative Session Ends Without Major Reform to Governor's Emergency Powers*, TEXAN (June 2, 2021), <https://perma.cc/9WZS-EQUW>.

245. Press Release, Off. of the Texas Governor, Governor Abbott Approves Funding To Launch Election Audit Div. Within Texas Sec'y of State's Off. (Nov. 19, 2021), <https://perma.cc/VT6E-EXKX>.

246. J. David Goodman, Nick Corasaniti & Reid J. Epstein, *Texas G.O.P. Passes Election Bill, Raising Voting Barriers Even Higher*, N.Y. TIMES (Nov. 4, 2021), <https://perma.cc/QE3B-6KDC>.

247. Press Release, Governor Abbott Renews COVID-19 Disaster Declaration in February 2022 (Feb. 21, 2022), perma.cc/8JAN-T26Z.

248. Proclamation of the Governor of California, *Proclamation of a State of Emergency*, (Mar. 4, 2020), <https://perma.cc/FUQ3-EQ6R>; see also CAL. GOV'T CODE § 8625 (West 2021) (stating the conditions that should be present for an emergency declaration).

249. Cal. Exec. Order No. N-64-20 (May 8, 2020), <https://perma.cc/DXX7-G58E>.

250. *Id.*

251. See Cal. Exec. Order No. N-67-20 (June 3, 2020), <https://perma.cc/QX7H-UKTR>; Cal. Exec. Order No. N-76-20 (Aug. 26, 2020), <https://perma.cc/QJZ4-TYLR>.

252. Complaint for Declaratory and Injunctive Relief, *Republican Nat'l Comm. v. Newsom*, No. 2:20-at-00509 (E.D. Cal. May 24, 2020).

order in statute, the plaintiffs dismissed the federal suit.²⁵³ A separate challenge, brought by Republican members of the State Assembly, yielded greater initial success.²⁵⁴

Assemblymen James Gallagher and Kevin Kiley challenged Governor Newsom's "one-man rule" in state court, arguing that the governor had adopted an expansive and unchecked legislative function during the state of emergency.²⁵⁵ Sutter County Superior Court Judge Sarah Heckman sided with the lawmakers and issued an injunction against Governor Newsom; in her ruling, the Judge noted that the California Emergency Services Act "does not authorize or empower the governor of the state of California to amend statutory law or make new statutory law, which is exclusively a legislative function not delegated to the governor under the CESA."²⁵⁶

California's Third District Court of Appeal reversed the ruling, and California's Supreme Court declined to hear the case. In a unanimous opinion, the Court of Appeal held that the CESA is not an "unconstitutional delegation of legislative power."²⁵⁷ The Court's holding turned, in part, on the legislature's statutory authority to "declare the emergency terminated."²⁵⁸ While the California Assembly's abstract power to end a gubernatorial-declared emergency is uncontested, its ability to assemble the votes needed to do so in practice is far less assured.

Today, California's COVID-19 state of emergency remains active, despite a year-long effort by California Republicans to forcibly end the state of emergency through a legislative resolution.²⁵⁹ No end is in sight. In mid-February 2022, Governor Newsom stated that the crisis was both "endemic" yet had "no end date," prompting renewed questions about what exactly constitutes an "emergency."²⁶⁰ To the extent that "emergency" once contained an element of temporal urgency, the COVID-19 pandemic has disrupted prior norms.

PART VI: EMERGENCY AND DEMOCRACY

The use of emergency powers in Florida, Texas, and California at the intersection of a global pandemic and a presidential election offers important insights about the future of these powers—and their role in our democratic system. Whether they are reformed, co-opted, or judiciously applied, it is clear that state

253. Plaintiffs' Notice of Voluntary Dismissal and Proposed Order, Republican Nat'l Comm. v. Newsom, No. 2:20-cv-01055-MCE-CKD (E.D. Cal. Jun. 22, 2020).

254. Gallagher v. Newsom, No. CVCS200912 (Cal. App. Dep't Super. Ct. 2020).

255. Katy Grimes, *Appellate Court Decision on Kiley/Gallagher Lawsuit Against Governor Newsom's 'One Man Rule'*, CAL. GLOBE (May 5, 2021), <https://perma.cc/4Z9T-FMG3>.

256. Gallagher v. Newsom, No. CVCS200912 (Cal. App. Dep't Super. Ct. 2020).

257. Newsom v. Superior Court, 278 Cal. Rptr. 3d 397, 400 (Cal. Ct. App. 2021).

258. *Id.* at 410.

259. Phil Willon, *Democratic Lawmakers Block GOP Effort to End California Covid-19 State of Emergency*, L.A. TIMES (Mar. 15, 2022), <https://perma.cc/7FT6-AMJ9>.

260. Tom Tapp, *California Not Ready To Lift State Of Emergency; Newsom Sees "No End Date" Yet To Covid Crisis*, DEADLINE (Feb. 18, 2022), <https://perma.cc/N7DZ-BHJN>; Allysia Finley, *The Perpetual Covid 'Emergency'*, WALL ST. J. (Feb. 28, 2022), <https://perma.cc/V849-MKFH>.

emergency powers are as extensive in scope as they are unchecked in application, presenting an evident threat to democratic norms, institutions, and mechanisms.

A. 2020: *The Aftermath*

Following the 2020 election, which every state conducted during a concurrent state of emergency, over twenty state legislatures initiated bills to curb the use of emergency powers around elections.²⁶¹ Various, this legislation capped the length of an emergency, instituted legislative checks on emergency declarations, and limited executive changes to election administration.²⁶² Even though states with Democratic governors were more likely to use emergency powers during the 2020 election, states with Republican governors and legislatures were faster to pass legislation restraining emergency powers.²⁶³ These dynamics suggest that emergency powers have an ideological tilt with Republican controlled states more leery of expansive executive action.

This reform legislation focused, in large part, on broad gubernatorial emergency powers rather than on governors' election-specific emergency powers. In short, it targeted governors' ability to modify and rescind statutes instead of their power to move polling places. This emphasis is unsurprising. Governors' general emergency powers are less defined and more expansive in scope, making them more natural points of emphasis for state legislatures. As the cases of Florida, Texas, and California all demonstrated, governors opted to use their broad emergency powers—not their election-specific powers—to affect elections in 2020. Recent legislative restrictions on these powers, however, may lead governors to turn to election-specific authorities in future years.

The timing of these legislative efforts is worthy of discussion as well. In the wake of the 2020 election and over a year into the pandemic, many states have undertaken reforms. These reforms have been reactive. When governors were invoking emergency powers in real time, legislators had few options for recourse. The courts provided relief in some states, like Michigan, where they put limits on gubernatorial reach, but in many other states, including California, Kentucky, and Connecticut, the courts endorsed the scope of gubernatorial emergency action.²⁶⁴ As an alternative to court action, legislatures with statutory control over

261. Just two states—New York and North Carolina—introduced legislation that would expand state officials' authority over elections in an emergency. See *The Battle Over Election Emergency Powers: Legislative vs. Executive Branches*, NAT'L CONF. OF STATE LEGISLATURES: THE CANVAS (Apr. 30, 2021), <https://perma.cc/24DH-QQMX>.

262. See, e.g., S.B. 1, 2021 Reg. Sess. (Ky. 2021) (codified in KY. REV. STAT. ANN. § 39A); S.B. 2, 2021 Reg. Sess. (Ky. 2021) (codified in KY. REV. STAT. ANN. § 13A); H.B. 1123, 122th LEG., REG. SESS. (Ind. 2021).

263. Zachary Courser & Eric Helland, *State Election Emergencies Modifications During the 2020 General Election* (Claremont McKenna Coll. Pol'y Lab Working Paper, May 2011), <https://perma.cc/K5JD-KN3Y>; *The Battle Over Election Emergency Powers: Legislative vs. Executive Branches*, supra note 261.

264. *Midwest Inst. of Health, PLLC v. Governor of Mich.*, 949 N.W.2d 274 (Mich. 2020); *Newsom v. Superior Ct.*, 278 Cal. Rptr. 3d 397 (Cal. Ct. App. 2021); *Beshear v. Acree*, 615 S.W.3d 780 (Ky. 2020); *Casey v. Lamont*, 258 A.3d 647 (Conn. 2021).

executive emergency powers looked inward. Their attempts to curtail emergency powers through legislative action, however, often ran into partisan barriers. California is case in point. For months, California Republicans have introduced resolutions to end California's COVID-19 state of emergency and terminate Governor Newsom's corresponding emergency powers.²⁶⁵ California Democrats have blocked all such efforts.

Post-facto legislation to amend gubernatorial emergency powers offers one means to control these powers' future use, but this approach is often untenable in an emergency itself. Legislative action or oversight would likely have less political backing during an emergency (where executives are celebrated) were it politically viable at all on partisan grounds. The courts are then left as the ultimate arbiter of emergency powers' scope. But of course it is difficult for legislators to proactively legislate on these powers absent some understanding of where the courts will draw the line between abuse and discretion. This line, too, is always changing because emergencies are inherently unpredictable and ill-suited to uniform treatment. Emergencies precipitate action that is often only conceivable—and thus accounted for or adjudicated—in retrospect. Such a dynamic necessarily complicates efforts to prevent emergency powers' abuse. In many ways, the only abuse that can be prevented is abuse that is conceivable. Failures of imagination succumb to gubernatorial license.

B. Future Threats

Traditionally, emergencies are great unifiers, bringing people together in the face of common adversity. From Hurricane Katrina to the Boston Marathon Bombing, emergencies have forged a collective spirit that cuts across partisan, social, economic, and racial lines. Elections, for their part, have become quite the opposite, fragmenting any collective national unity and carving the country into disparate, warring factions.

The COVID-19 pandemic demonstrated that emergencies do not always bring people together. They too can constitute a bitterly divisive battlefield. Politicization of emergencies is itself nothing new. After September 11, for instance, Mayor Rudy Giuliani purportedly sought to cancel New York's mayoral elections so that he could remain in office.²⁶⁶ Nor is emergencies' intersection with elections a new phenomenon. This note has described their countless interactions, which spurred the very creation of election-specific emergency powers.

What is new, however, is the concern that emergencies could become a political instrument harnessed—through the use of statutory powers intended to protect democracy's most central mechanism—to alter electoral outcomes and so undermine democracy. Elections undergird American governance, and states are the central players in elections—they administer them, write most of the rules, and

265. See Lindsey Holden, *California Democrats Shoot Down GOP Bid to End Gavin Newsom's COVID Emergency Powers*, SACRAMENTO BEE (Mar. 15, 2022), <https://perma.cc/TSN7-D2HK>.

266. J. Edward Moreno, *Giuliani Asked for Post-9/11 Mayoral Election to be Canceled so he Could Stay in Office: Book*, HILL (Feb. 26, 2020), <https://perma.cc/VNC7-KWBV>.

validate the results. Governors, secretaries of state, and election officials have always resided at the nexus between federal elections' national reach and elections' distinctly state-centric character. Today, however, these officials' neutrality has come under clear threat. As election administration has become political, officials have lost their insulation. Increasingly, these officials—from governors to poll workers—are painted as either bulwarks against or enablers of political interference in an election's administration.²⁶⁷

These same officials, particularly governors, exercise the most agency over state emergency powers. The resultant threat is clear: a governor, acting under the auspices of an emergency, could invoke and apply his/her emergency powers to manipulate—rather than protect—an election's integrity and outcome. In the 2020 election, as President Trump bombasted Georgia's officials, this threat became ever less abstract.

Both the substance and legal treatment of state emergency powers, including election-specific emergency powers, make this threat more easily realized. In particular, governors' authority in most states to both determine what constitutes an emergency and how to respond, gives governors expansive agency. And as U.S. elections come under real threat from foreign governments and supposed threat from faulty voting machines and voter fraud, it is conceivable that the very emergency at issue could be the election's administration itself. Elements of an election could, in short, be the grounds under which emergency powers are invoked.

CONCLUSION

Emergencies are wrought with institutional choice. Are unitary executives best equipped to deal with crises?²⁶⁸ Or does empowering these executives beget abuses of power and erode civil liberties? Would a legislative body's response be preferable? Or would it be gridlocked and slow, incapable of decisive action for an amorphous collective good? Although not explored in these pages, emergencies also raise age-old federalism debates: Are federal or state responses preferable in an emergency? Which emergency powers should each level of government hold and how might they interact?

States, for their part, have made these institutional choices, empowering executives to broadly act with few checks. State emergency power statutes reflect that choice. Following the COVID-19 pandemic and the 2020 election, however, legislatures are re-considering existing statutes. As they do so, one path forward may consist of a multi-institutional approach. The best safeguard against an

267. A poll of American election workers conducted in early 2022 found that 20% of election workers planned to resign before the 2024 election. Election workers across the country have pointed to increased threats of violence and a growing pressure to certify election results in favor of a specific candidate or party. See Ruby Edlin & Turquoise Baker, *Poll of Local Election Officials Finds Safety Fears for Colleagues — and Themselves*, BRENNAN CTR. (Mar. 10, 2022), <https://perma.cc/GAS9-QSM2>.

268. See Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83 (2020).

executive's abuse of emergency powers could be the imposition of legislative checks on these powers' use.

Re-asserting states centrality over elections, especially in a charged national environment, is worthy of added consideration too. Since states set most election procedures, states' preparedness and pre-election satisfaction with election administration processes should militate against concerns that procedures themselves could become a cause of crisis. So too could they weigh against an election's postponement under *Public Citizen v. Miller*, where an "exigent circumstance" must be "beyond the state's ability to produce."²⁶⁹ If a state feels confident that voter fraud cannot occur or that its voting machines are bulletproof, then neither is likely to become subsequent grounds for an emergency declaration.

Academic and political discussions of emergency powers have long concentrated on the presidency. The COVID-19 pandemic, the 2020 election, and the January 6th attack on the U.S. Capitol heightened this focus, directing ever-more attention toward the threat that a single person could pose to American democracy. And yet, most of these contemplated threats concern elections. By law, presidents play no role in the execution and certification of American elections. Instead, both the outcome and integrity of elections begins with the choices of voters and then election officials in state-level, individual precincts. Seemingly insignificant actions, like a governor's decision to shift a poll's location after a hurricane, can determine the fate of an election, a state, and a nation. Presidential emergency powers are a natural source of intrigue. Discussions on emergency powers at the state level, particularly around elections, have not received the same attention—and are a vital addition to our national discourse on democracy.

269. *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821, 823 (N.D. Ga. 1993).
