LEGISLATURES WANT TO UNLOCKDOWN, BUT COURTS HOLD THE KEY: RESOLUTION OF EXECUTIVE AND LEGISLATIVE DISPUTES IN CORONAVIRUS TIMES

Brian Friery[*]

INTRODUCTION

"I've never felt (as) helpless, as a business owner."[1] That is what Phil Anglin, a Michigan pub owner, had to say about his situation in the spring of 2020.[2] This was around the time that Governor Gretchen Whitmer extended the state's lockdown provisions by vetoing the state legislature's 2020 Senate Bill No. 858, An Act to Amend 1976 PA 390 ("S.B. 858"), through which the legislature "sought to reopen Michigan businesses subject to precautionary measures recommended by the Centers for Disease Control and Prevention."[3] Anglin is just one of many Michigan small business owners who fears for his business' future amidst the economic backlash that coronavirus and state executives' responses to the pandemic have brought. A June 2020 survey found that one in seven Michigan small business owners worried that their businesses would not "survive the pandemic."[4] The Michigan Supreme Court decided in October 2020 that the statutes Governor Whitmer relied on to extend a state of emergency and her authority in times of emergency were invalid.[5] Still, the dispute as to what actions Governor Whitmer may take in response to the coronavirus pandemic is likely far from over.[6]

---

*J.D. Candidate, Notre Dame Law School, Class of 2022; B.A. in Political Science, The Pennsylvania State University, 2019. Special thanks to Professor Samuel Bray for his guidance with this Note.

1. Taylor DesOrmeau, *Only 28% of Michigan Businesses 'Positive' They'll Survive Coronavirus*, MLIVE (May 8, 2020), https://www.mlive.com/public-interest/2020/05/only-28-of-michigan-businesses-positive-theyll-survive-coronavirus.html.

2. *Id*.

3. House of Representatives & Senate v. Governor, 960 N.W.2d 125, 132 (Mich. Ct. App. 2020), *rev'd in part sub nom*., 949 N.W.2d 276 (Mich. 2020).

4. Paula Gardner, *Six of Seven Michigan Small Businesses Don't Expect to Regain Lost Sales*, BRIDGE MICH. (June 4, 2020), https://www.bridgemi.com/business-watch/six-seven-michigan-small-businesses-dont-expect-regain-lost-sales.

5. Steven H. Hilfinger, *Michigan Supreme Court Decision Spurs Widespread Changes to Government COVID-19 Response: Update for Week of October 9, 2020*, NAT'L L. REV. (Oct. 9, 2020), https://www.natlawreview.com/article/michigan-supreme-court-decision-spurs-widespread-changes-to-government-covid-19.

6. *See id.* (stating that Governor Whitmer said the Michigan Supreme Court's decision would not effect changes for twenty-one days, and that she "also filed a motion asking the Supreme Court to delay the Opinion's effective date until October 30th to 'enable an orderly transition to manage this ongoing crisis.'"). Further,

Michigan is just one of many states that has a conflict between its legislative and executive branches. Pennsylvania and Wisconsin have also had coronavirus cases decided by their states' highest courts.[7] Pennsylvania's supreme court decided in favor of the executive, while Wisconsin's top court decided in favor of the legislature.[8] The differences in these decisions can be attributed to a multitude of factors, including that different states have different constitutions and statutes in place, different states have different public policy interests, and different states have different political interests at play within their local political spectrums and state courts.[9]

This Note will examine the efforts of the Pennsylvania, Wisconsin, and Michigan legislatures to end state executive-mandated lockdowns in the wake of coronavirus. Section I provides background information. First, Part A describes the conflict in Pennsylvania, where the state's highest court held in *Wolf v. Scarnati* that the state legislature lacked the power to unilaterally "overturn the Governor's Proclamation of Disaster Emergency."[10] Next, Part B shifts to Wisconsin, where the state's supreme court decided in *Wisconsin Legislature v. Palm* that Emergency Order 28, which banned travel and closed nonessential businesses, was illegal.[11] That order was promulgated by the state's Department of Health Services ("DHS") secretary-designee, Andrea Palm.[12] Finally, Part C moves to Michigan, where the Michigan Supreme Court held in *In re Certified Questions From the United States District Court, Western District of Michigan, Southern Division*, that Governor Whitmer "lacked the authority to declare a 'state of emergency' or a 'state of disaster' under the EMA [Emergency Management Act] after April 30, 2020, on the basis of the COVID-19 pandemic" and that "the EPGA [Emergency Powers of Governor Act] cannot continue to provide a basis for the Governor to exercise emergency powers."[13]

Section II looks at commonalities between the courts' decisions. It argues that fundamentally, all of the cases boil down to whether and when legislative approval is needed to continue a state of emergency. Further, this Section contends that the emergency powers granted by the Pennsylvania, Wisconsin, and Michigan legislatures were all meant to vest the executive with powers only for limited periods of time. At the expiration of those periods, the state legislatures were supposed to have the power to extend or terminate states of emergency. As such, the courts should have all held against the executives. Finally, Section III argues that although the courts should have held against the executives, state legislatures should be clear as to when extended powers they grant to executives are meant to expire absent legislative

Attorney General Dana Nessel "announced that in response to the Supreme Court's opinion her office would no longer enforce the Governor's Executive Orders through criminal prosecution." *Id.* Conflicts also continue between the executive and legislature over mask mandates. *Id.*

7. *See infra* Part I.A–B.

8. *See id.*

9. *See* Paul Crowe, *PA Supreme Court Decides in Favor of Governor Wolf in Straight Party Line Vote on Ending Emergency* Declaration, ERIE CNTY. REP. (July 2, 2020), https://eriecountyreport.com/pa-supreme-court-decides-in-favor-of-governor-wolf-in-party-line-vote-on-ending-emergency-declaration/.

10. 233 A.3d 679, 707 (Pa. 2020).

11. 942 N.W.2d 900, 904–05 (Wis. 2020).

12. *Id.* at 905.

13. 958 N.W.2d 1, 31 (Mich. 2020).

approval. Although some lockdown conflicts have been settled since this Note was written in late 2020 and early 2021, litigation will likely continue with new lockdown responses to COVID variants. As a result, the issues this Note covers and its call for clear legislation remain relevant.

I. BACKGROUND

Many state constitutions do not include executive emergency power clauses.[14]

Rather, state executives often rely on legislative acts to broaden their powers in times of emergency.[15] Pennsylvania, Wisconsin, and Michigan's supreme courts all decided cases based on the scope of the authority that state legislatures gave to governors in times of emergency. Those cases are analyzed below.

A. Pennsylvania

The Constitution of the Commonwealth of Pennsylvania does not contain an emergency executive powers clause.[16] However, on March 6, 2020, Governor Wolf relied on Title 35 Pennsylvania Consolidated Statutes Section 7301(c) to proclaim a state of emergency.[17] That statute states, in relevant part:

> A disaster emergency shall be declared by executive order or proclamation of the Governor upon finding that a disaster has occurred or that the occurrence or the threat of a disaster is imminent. The state of disaster emergency shall continue until the Governor finds that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist and terminates the state of disaster emergency by executive order or proclamation, but no state of disaster emergency may continue for longer than 90 days unless renewed by the Governor. *The General Assembly by concurrent resolution may terminate a state of disaster emergency at any time. Thereupon, the Governor shall issue an executive order or proclamation ending the state of disaster emergency.*[18]

On June 3, 2020, Governor Wolf extended the state of emergency for another ninety days.[19] Six days later, the Pennsylvania General Assembly resolved to end the disaster emergency with House Resolution 836, A Concurrent Resolution Terminating the March 6, 2020, Proclamation of Disaster Emergency issued under

14. *See generally* PA. CONST.; WIS. CONST.; MICH. CONST.

15. *See Wolf*, 233 A.3d 679; *Wisconsin Legislature*, 942 N.W.2d 900; *In re Certified Questions*, 958 N.W. 2d 1.

16. *See generally* PA. CONST.

17. *See Wolf*, 233 A.3d at 684.

18. *Id.* at 684–85 (quoting 35 PA. CONS. STAT. § 7301(c) (2020)) (emphasis in original).

19. *Id.* at 685.

the hand and Seal of the Governor, Thomas Westerman Wolf ("H.R. 836").[20] The General Assembly relied on Section 7301(c) of the Pennsylvania Constitution and article I, section 12 of the Constitution of the Commonwealth of Pennsylvania to reach its resolution.[21] Article I, section 12 states, "No power of suspending laws shall be exercised unless by the Legislature or by its authority."[22]

Accordingly, the Secretary of the Senate wrote to Governor Wolf, "'I am notifying you of the General Assembly's action and the directive that you issue an executive order o[r] proclamation ending the state of disaster emergency in accordance with this resolution and 35 Pa.C.S. § 7301(c).'"[23] Later, "[o]n June 11, 2020, Senate President Pro Tempore Joseph B. Scarnati, III, Senate Majority Leader Jake Corman, and the Senate Republican Caucus . . . filed a Petition for Review in the Nature of a Complaint in Mandamus in the Commonwealth Court, seeking to enforce H.R. 836."[24] In response, Governor Wolf "filed in [the Supreme Court of Pennsylvania] an Application for the Court to Exercise Jurisdiction Pursuant to Its King's Bench Powers and/or Powers to Grant Extraordinary Relief. On June 17, 2020, [the Supreme Court of Pennsylvania] granted King's Bench jurisdiction and stayed the Commonwealth Court proceedings."[25]

The case ultimately turned on whether presentment was needed.[26] Pennsylvania's constitution provides:

> Every order, resolution or vote, to which the concurrence of both Houses may be necessary, except on the question of adjournment, shall be presented to the Governor and before it shall take effect be approved by him, or being disapproved, shall be repassed by two-thirds of both Houses according to the rules and limitations prescribed in case of a bill.[27]

The court then went through the three exceptions to this presentment rule.[28] The first is that "[a]ny concurrent resolution 'on the question of adjournment' need not be presented to the Governor."[29] That exception was not in dispute in this case.[30] The next exception "is a concurrent resolution proposing a constitutional amendment."[31]

20. *See id.* (citing H.R. 836, 2020 Gen. Assemb., Reg. Sess. (Pa. 2020)).
21. *See id.* at 686; *see also* 35 PA. CONS. STAT. § 7301(c) (2021).
22. PA. CONST. art. I, § 12.
23. *Wolf*, 233 A.3d at 686.
24. *Id*.
25. *Id.*
26. *See id.* at 687.
27. *Id.* (citing PA. CONST. art. III, § 9).
28. *See Wolf*, 233 A.3d at 687.
29. *Id.* at 688 (citing PA. CONST. art. III, § 9).
30. *See id.*
31. *Id.*

Neither party argued that this exception applied, either.[32] However, the Senate argued that the third exception applied to this situation.[33] As the court explained:

> The third exception to presentment is not explicitly delineated, but rather inheres in the structure of our Charter. The presentment requirement in Article III, Section 9 applies only to matters governed by constitutional provisions concerning the legislative power. In other words, it is perfectly manifest that the orders, resolutions, and votes which must be so submitted to the Governor are, and can only be, such as relate to and are a part of the business of legislation. Although no provision of the Constitution explicitly withdraws non-legislative resolutions from the requirement of presentment, such resolutions involve only internal affairs of the legislature.[34]

The senators argued that "neither the Governor's Proclamation nor H.R. 836 had legal effect, and, thus, H.R. 836 should not be subject to presentment."[35] The court decided that the Proclamation had legal effect because it at least "allow[ed] the Governor to exercise powers granted to him by the General Assembly upon the declaration of a disaster emergency."[36] The court then determined that H.R. 836 had legal effect even though it did not require the commonwealth to spend money and did not authorize the General Assembly to take action.[37] The court reasoned that "the purported distinction between requiring the government affirmatively to act and prohibiting the government from taking an action is no distinction at all."[38]

Next, the court reasoned that because H.R. 836 needed to be presented to the governor and it was not, the General Assembly's actions amounted to an unconstitutional legislative veto.[39] The court concluded that despite the Resolution's language that "[t]hereupon [the General Assembly resolving to terminate a state of disaster emergency], the Governor shall issue an executive order or proclamation ending the state of disaster emergency," the fact that an executive order was necessary after a congressional resolution to terminate a state of disaster emergency meant that the executive still had an opportunity to veto the resolution.[40]

Finally, the senators argued that the Emergency Management Services Code, which contains Pennsylvania Constitution Section 7301(c), was an unconstitutional delegation of legislative power.[41] In opposition, the court held that the governor's proclamation had the "force of law," but was not a law itself, so it did not violate the

32. *See id.*
33. *See id.* at 690.
34. *See id.* at 688 (internal citations omitted).
35. *See id.* at 690.
36. *Id.*
37. *Id.* at 691.
38. *Id.*
39. *See id.* at 694.
40. *See id.* at 685, 695–96.
41. *Id.* at 703–04.

nondelegation doctrine.[42] Therefore, the governor's disaster emergency was allowed to continue, and H.R. 836 did not have the force of law.

B. Wisconsin

Similar to Pennsylvania's constitution, Wisconsin's constitution does not contain an emergency executive powers clause.[43] Rather, "on March 12, 2020, Governor Evers issued Executive Order 72 'Declaring a Health Emergency in Response to the COVID-19 Coronavirus.'"[44] That order:

> Proclaimed that a public health emergency existed in Wisconsin; designated DHS as the lead agency to respond to the emergency; directed DHS to take "all necessaryand appropriate measures to prevent and respond to incidents of COVID-19 in the State"; suspended administrative rules that the DHS Secretary thought would interfere with the emergency response and increase the health threat; authorized the Adjutant General to activate the National Guard to assist in responding to the emergency; directed all state agencies to assist in responding to the emergency; proclaimed "that a period of abnormal economic disruption" existed; and directed the Department of Agriculture, Trade, and Consumer Protection to guard against price gauging during the emergency.[45]

Then, DHS Secretary-designee Andrea Palm took action. She:

> [I]ssued Emergency Order 12 on March 24, 2020, "under the authority of Wis. Stat. § 252.02(3) and (6) and all powers vested in [her] through Executive Order #72, and at the direction of Governor Tony Evers[.]" Palm's Emergency Order 12 ordered "[a]ll individuals present within the State of Wisconsin . . . to stay at home or at their place of residence" with certain delineated exceptions. It remained in effect until April 24, 2020.[46]

Palm followed that order with Emergency Order 28, which directed people in Wisconsin, with few exceptions, to stay at home with the risk of punishment "by up to 30 days imprisonment, or up to $250 fine, or both."[47] Palm relied on "'the authority vested in [her] by the Laws of the State, including but not limited to [Wisconsin Statute Section] 252.02(3), (4), and (6).'"[48] The order, which was set to

42. *Id.* at 704.
43. *See generally* WIS. CONST.
44. Wisconsin Legislature v. Palm, 942 N.W.2d 900, 905 (Wis. 2020).
45. *Id.* at 905–06 (quoting Wis. Exec. Ord. No. 72 (Mar. 12, 2020)).
46. *Id.* at 906 (quoting Wis. Emergency Ord. 12 (Mar. 24, 2020)).
47. *Id.* (quoting Wis. Emergency Ord. 28 (Apr. 16, 2020)).
48. *Id.* at 900 (quoting Wis. Emergency Ord. 28 (Apr. 16, 2020)).

expire on May 26, 2020, imposed various other restrictions on individuals in Wisconsin.[49]

On April 21, 2020, the Wisconsin Legislature "filed an Emergency Petition for Original Action" with the Supreme Court of Wisconsin.[50] The legislature argued that when issuing Emergency Order 28, "Palm did not follow rulemaking procedures that were required by Wis. Stat. § 227.24."[51] First, the court had to determine whether Order 28 made a rule.[52] Under Wisconsin Statute Section 227.01(13):

> "Rule" means a regulation, standard, statement of policy, or general order of general application that has the force of law and that is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency. "Rule" includes a modification of a rule under s. 227.265.[53]

Relying on precedent from *Citizens for Sensible Zoning, Inc. v. Department of Natural Resources, Columbia County*, the court restated its interpretation of what a rule is:

> (1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency as to govern the interpretation or procedure of such agency.[54]

Using this definition, the court stated that "[t]he order regulates all persons in Wisconsin at the time it was issued and it regulates all who will come into Wisconsin in the future."[55] Therefore, the court determined that Order 28 was a "'general order of general application.'"[56] This made it a rule under Wisconsin Statutes Section 227.01(13) and, therefore, it needed to be promulgated under "the rulemaking procedures of Wis. Stat. § 227.24."[57]

While addressing Palm's assertions that she had broad powers from various statutes, the court "employ[ed] the constitutional-doubt principle."[58] In doing so, it "disfavor[ed] statutory interpretations that unnecessarily raise[d] serious

49. *Id.* (quoting Wis. Emergency Ord. 28 (Apr. 16, 2020)).

50. *Id.* at 907.

51. *Id.* at 908.

52. *Id.*

53. *Palm*, 942 N.W.2d at 908 (quoting WIS. STAT. § 227.01 (2020)).

54. *Id.* at 909–10 (quoting Citizens for Sensible Zoning, Inc. v. Dep't of Nat. Res., Columbia Cnty., 280 N.W.2d 702, 707 (Wis. 1979)).

55. *Id.* at 910.

56. *Id.*

57. *Palm*, 942 N.W.2d at 914.

58. *Id.* at 912.

constitutional questions about the statute under consideration."[59] The court went on to explain that the legislature could not delegate its law-making power to administrative agencies without "'adequate standards for conducting the allocated power.'"[60] The court reasoned:

> The people consent to the Legislature making laws because they have faith that the procedural hurdles required to pass legislation limit the ability of the Legislature to infringe on their rights. These limits include bicameralism and presentment, Wis. Const. art. V, § 10, quorum requirements, Wis. Const. art. IV, § 7, and journal and open door requirements, Wis. Const. art. IV, § 10.[61]

Accordingly, "Palm's Emergency Order 28 [was] declared unlawful, invalid, and unenforceable."[62]

C. Michigan

Similar to Pennsylvania and Wisconsin's constitutions, the Constitution of Michigan does not include an emergency executive powers clause.[63] In response to the coronavirus pandemic, Governor Whitmer "issued Executive Order (EO) No. 2020-04, declaring a 'state of emergency' under the EPGA and the EMA."[64] Subsequently, Governor Whitmer issued executive orders forcing people in Michigan to stay at home and, under EEO 2020-17 (issued on March 20, 2020), forbidding "medical providers from performing nonessential procedures."[65] On April 1, the governor "issued EO 2020-33, which declared a 'state of emergency' under the EPGA and a 'state of emergency' and 'state of disaster' under the EMA."[66] Later, she "requested that the Legislature extend the state of emergency and state of disaster by 70 days, and a resolution was adopted, extending the state of emergency and state of disaster, but only through April 30, 2020."[67] On April 30, Governor Whitmer issued executive orders that ended "the declaration of a state of emergency and state of disaster under the EMA."[68] However, subsequently, "she issued EO 2020-67, which provided that a state of emergency remained declared under the EPGA. At the same time, she issued EO 2020-68, which redeclared a state of emergency and state of disaster under the EMA."[69] Healthcare providers who "were prohibited from performing nonessential procedures while EO 2020–17 was in effect and a patient

59. *Id.*
60. *Id.* at 913 (quoting Martinez v. Dep't of Indus., Lab.& Hum. Rel., 479 N.W.2d 582, 586 (Wis. 1992)).
61. *Id*. at 912.
62. *Id*. at 918.
63. *See generally* MICH. CONST.
64. *In re* Certified Questions from the U.S. Dist. Ct., W.D. Mich., S. Div., 958 N.W.2d 1, 6 (Mich. 2020).
65. *Id.* at 6.
66. *Id.*
67. *Id.* at 6–7.
68. *Id.* at 7.
69. *Id.*

who was prohibited from undergoing knee-replacement surgery" sued "the Governor, the Attorney General, and the Director of the Michigan Department of Health and Human Services" in federal court.[70]

The United States District Court for the Western District of Michigan then sent two questions to the Michigan Supreme Court for it to interpret certain aspects of Michigan law.[71] First, the Michigan Supreme Court addressed the question of "whether, under the EMA or the EPGA, the Governor has had the authority after April 30, 2020, to issue or renew any executive orders related to the COVID-19 pandemic."[72] The relevant part of the EMA stated:

> The governor shall, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emergency exists. The state of emergency shall continue until the governor finds that the threat or danger has passed, the emergency has been dealt with to the extent that emergency conditions no longer exist, or until the declared state of emergency has been in effect for 28 days. *After 28 days, the governor shall issue an executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an extension of the state of emergency for a specific number of days is approved by resolution of both houses of the legislature*.[73]

The legislature never approved an extension of the state of emergency.[74] Although Governor Whitmer terminated the state of emergency and state of disaster after twenty-eight days, she immediately proclaimed new ones.[75] The court reasoned that the legislature probably did not intend to allow the governor to unilaterally proclaim new states of emergency and disaster upon expiration of previous ones, as "[t]o allow such a redeclaration would effectively render the 28-day limitation a nullity."[76]

The court next addressed the governor's argument that disallowing the governor's redeclaration of states of emergency and disaster amounted to a legislative veto.[77] The court quickly dismissed the governor's argument, stating:

> These provisions impose nothing more than a durational limitation on the Governor's authority. The Governor's declaration of a state of emergency or state of disaster may only endure for 28 days absent legislative approval of an extension. So, if the Legislature does

70. *Id*.
71. *Id.*
72. *Id.*
73. *Id.* at 9 (quoting MICH. COMP. LAWS § 30.403 (2021).
74. *Id.*
75. *Id.*
76. *Id.* at 10.
77. *Id.* at 11.

> nothing, as it did here, the Governor is obligated to terminate the state of emergency or state of disaster after 28 days. A durational limitation is not the equivalent of a veto.[78]

The court further reasoned that the time limit did not veto executive action, as it merely "limited the amount of time the Governor can act independently of the Legislature in response to a particular emergent matter."[79] Therefore, the court concluded that Governor Whitmer lacked "the authority under the EMA to renew her declaration of a state of emergency or state of disaster based on the COVID-19 pandemic after April 30, 2020."[80]

The court then considered the question of whether the EPGA authorized the governor's subsequent state of emergency after April 30, 2020.[81] The court reasoned that because one of the conditions that allowed a governor to proclaim a state of emergency and use her emergency powers is a time "when public safety is imperiled,"[82] the most reasonable way to read it was the way the governor read it when issuing her orders.[83]

Next, the court considered the federal district court's question of "whether the EPGA and/or the EMA violate the Separation of Powers and/or the Nondelegation Clauses of the Michigan Constitution."[84] Michigan's constitution provides:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.[85]

The court reasoned that the EPGA is very broad in its scope, giving the governor the power to proclaim orders "to protect life and property or to bring the emergency situation within the affected area under control."[86] The court decided that the Act gave the governor police power, which is typically legislative.[87] The court then considered the duration of the governor's granted authority.[88] Because the only durational limit to the delegated authority was "until a 'declaration by the governor that the emergency no longer exists,'"[89] the court concluded that "under the EPGA,

78. *In re Certified Questions*, 958 N.W.2d at 11.
79. *Id.*
80. *Id*.
81. *Id.*
82. *Id.* at 12 (quoting MICH. COMP. LAWS § 10.31 (2020)).
83. *Id.* at 16.
84. *Id.* at 7.
85. *Id.* at 16 (quoting MICH. CONST. art. 3, § 2).
86. *Id.* at 20 (quoting MICH. COMP. LAWS § 10.31 (2020)).
87. *Id*.
88. *Id.* at 16.
89. *Id.* (quoting MICH. COMP. LAWS § 10.31 (2020)).

the state's legislative authority, including its police powers, may conceivably be delegated to the state's executive authority for an indefinite period."[90]

Then, the court considered the "standards of delegated power," stating: "When the scope of the power delegated 'increases to immense proportions . . . the standards must be correspondingly more precise.'"[91] The court determined that many of the EPGA's limits were based on "reasonableness," which was not much of a limit at all.[92] Further, it found that the word "necessary" did not add many restrictions.[93] Given this lack of constraints, the court found the EPGA to be unconstitutional because it "purports to delegate to the executive branch the legislative powers of state government—including its plenary police powers—and to allow the exercise of such powers indefinitely. As a consequence, the EPGA cannot continue to provide a basis for the Governor to exercise emergency powers."[94]

II. COMPARISON OF THE STATE SUPREME COURT DECISIONS

The Pennsylvania, Wisconsin, and Michigan supreme courts all decided their cases on some common grounds. Statutory interpretation and bicameralism factored into all three of the decisions. Ultimately, the issue all three of these courts had to decide was whether the executive and legislature had to agree for emergency powers to take effect or extend in duration. Although the courts considered different facts, statutes, and state constitutions, they all should have decided against their executives.

A. Common Issues

The Supreme Court of Pennsylvania decided *Wolf* on the basis of presentment, concluding that the legislature could not unilaterally end the governor's state of disaster emergency. In doing so, it considered its state constitution, which requires, with some exceptions:

> Every order, resolution or vote, to which the concurrence of both Houses may be necessary, except on the question of adjournment, shall be presented to the Governor and before it shall take effect be approved by him, or being disapproved, shall be repassed by two-thirds of both Houses according to the rules and limitations prescribed in case of a bill.[95]

90. *Id.* at 21.

91. *Id.* at 22 (quoting Synar v. United States, 626 F. Supp. 1374, 1386 (D.D.C. 1986)).

92. *Id*.

93. *Id.* at 22–23.

94. *Id.* at 31.

95. PA. CONST. art. III, § 9. The exceptions are concurrent resolutions "on the question of adjournment," concurrent resolutions proposing constitutional amendments, and concurrent resolutions not "concerning the legislative power." Wolf v. Scarnati, 233 A.3d 679, 687 (Pa. 2020).

The statute Governor Wolf relied on to declare a state of disaster emergency reads, "The General Assembly by concurrent resolution may terminate a state of disaster emergency at any time. Thereupon, the Governor shall issue an executive order or proclamation ending the state of disaster emergency."[96]

The plain reading of this statute appears to require the governor to proclaim an end to a state of disaster emergency immediately after the General Assembly resolves to end a state of disaster emergency. However, the Supreme Court of Pennsylvania determined that the Constitution of Pennsylvania required presentment.[97] That determination is not without controversy, however. The Constitution of Pennsylvania requires "every order, resolution, or vote to which the concurrence of both Houses *may* be necessary" to be presented to the governor.[98] The use of the word "may" appears to mean that some joint resolutions might not need to be presented to the governor.

Further, Justice Dougherty argued in his concurring and dissenting opinion that the "only reasonable" way to read Section 7301(c) of the Pennsylvania Constitution is to avoid presentment.[99] In reading this statute to be an unconstitutional attempt to forgo the presentment requirement, the part that Governor Wolf relied on to continue his state of disaster emergency cannot be salvaged.[100] Pennsylvania's constitution does not allow for a court to sever a statute that the legislature cannot be presumed to have passed without the "void provision."[101] As the majority held that presentment of H.R. 836 was necessary, a finding, based on a plain reading of the statute, that the statute is meant to curtail the presentment requirement would require the entire statute to be void. If the statute were void, the governor would have no power to declare a disaster emergency since the provision of Section 7301(c) that states: "A disaster emergency shall be declared by executive order or proclamation of the Governor upon finding that a disaster has occurred or that the occurrence or the threat of a disaster is imminent" would be void with the rest of the statute.[102]

The statutory interpretation the Supreme Court of Pennsylvania used in finding Section 7301(c) to require presentment is in opposition to the statutory interpretation the Michigan Supreme Court used in *In re Certified Questions*. There, after finding

96. 35 PA. CONS. STAT. § 7301(c) (2021).

97. *See Wolf*, 233 A.3d at 707.

98. PA. CONST. art. III, § 9 (emphasis added).

99. *Wolf*, 233 A.3d at 707–08 (Dougherty, J., concurring in part, dissenting in part).

100. *Id.* at 712 (stating, "To recognize the legislature's intent in this regard is to effectively answer the question of severability: because the legislature operated under the assumption it could end a state of disaster emergency without presentment, and the majority of this Court now reaches the opposite conclusion, 'it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one[.]'" (quoting PA CONS. STAT. § 1925 (2021)).

101. PA CONS. STAT. § 1925 (2021). The complete statute reads:

The provisions of every statute shall be severable. If any provision of any statute or the application thereof to any person or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or circumstances, shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent. *Id.*

102. 35 PA. CONS. STAT. § 7301(c) (2021)).

that the EPGA was unconstitutional because of the immense powers it granted to the executive,[103] the court looked to the issue of severability.[104] The *In re Certified Questions* court looked at the legislature's intent in passing the EPGA, which was "to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster."[105] The court concluded that taking away the unconstitutional provision of the Act, which gave the governor "the power 'to protect life and property,'" amounted to no delegation to the governor to "control . . . persons and conditions" unless that power were used "to 'bring the emergency situation within the area under control.'"[106] Therefore, such a severance would contravene the legislature's intent to give the governor broad power in times of emergency, so the EPGA had to be declared "unconstitutional in its entirety."[107]

Thus, the Supreme Court of Pennsylvania and the Michigan Supreme Court decisions have an initial difference. Pennsylvania's highest court was willing to look past the plain meaning of the statute under consideration—which was to give the governor broad powers in times of emergency, subject to Congress' power to end a state of disaster emergency—to find the statute constitutional with a presentment requirement despite likely legislative intent to the contrary. On the other hand, Michigan's highest court—upon finding that the statute it considered was unconstitutional—looked at legislative intent and found the statute to be unsalvageable. The approaches to legislative concurrence and vetoes will be discussed further in Part C.

Another common issue across multiple cases was nondelegation. In the Michigan Supreme Court's case, the court explicitly reviewed its issue against a nondelegation backdrop and found that the EPGA unconstitutionally granted the governor legislative powers.[108] The Supreme Court of Wisconsin similarly held that the delegation of legislative power to the executive was unconstitutional given its lack of constraints upon the executive.[109] The Supreme Court of Pennsylvania was an outlier on the nondelegation issue, holding that there were adequate safeguards in place to check the governor, stating that "[b]road discretion and standardless discretion are not the same thing."[110] Such a wide grant of legislative power without the legislature's retained power to end a state of disaster emergency brings up constitutional concerns, as it effectively allows a governor to continue his time of extended power indefinitely unless a supermajority of the General Assembly overrides him.[111] Nondelegation is discussed more in Part B.

103. *In re* Certified Questions from the U.S. Dist. Ct., W.D. Mich., S. Div., 958 N.W.2d 1, 24 (Mich. 2020).

104. *Id.* at 24–25.

105. *Id.* at 25 (quoting MICH. COMP. LAWS § 10.32 (2021).

106. *Id*.

107. *See id.* at 25.

108. *Id.* at 24.

109. Wisconsin Legislature v. Palm, 942 N.W.2d 900, 913 (Wis. 2020).

110. Wolf v. Scarnati, 233 A.3d 679, 705 (Pa. 2020).

111. *See* Mark Chenoweth, *When the Wolf at the Door is Your Governor*, FORBES (July 2, 2020, 5:00 AM), https://www.forbes.com/sites/markchenoweth/2020/07/02/when-the-wolf-at-the-door-is-your-

The final similar issue across the Pennsylvania, Wisconsin, and Michigan high court cases is the legislative veto. The Supreme Court of Pennsylvania held that skirting presentment to the governor to end a state of emergency amounted to an unconstitutional legislative veto.[112] However, the dissent argued that a legislative veto should not be banned per se.[113] In *Palm*, the Supreme Court of Wisconsin's majority opinion did not explicitly consider the issue of a legislative veto,[114] but one of the dissenting justices reasoned:

> If rulemaking is understood as establishing a check on how a law is prospectively understood, that could be justified as retaining the legislature's constitutional prerogative to determine the state's public policy. But if rulemaking morphs into subjecting executive branch enforcement of enacted laws to a legislative veto, that turns our constitutional structure on its very head.[115]

The Michigan Supreme Court considered the limit on the length of a governor's state of emergency or state of disaster to simply be a durational limit and not a legislative veto.[116] Legislative veto questions must be decided on the basis of whether provisions that are, in form, legislative vetoes must be held invalid per se, or if there are constitutional ways to have, in effect, legislative vetoes. If requiring legislative action for executive power to be in effect is held constitutional, that holding must be squared with the fact that such a framework is more restrictive than a provision requiring the legislature to affirmatively act to end the governor's extended powers.[117] The legislative veto will be explored more fully in Part C.

governor/#62804a7d5927 ("[I]f the statute under which the governor declared an emergency really allows him to enjoy legislative power that the legislature cannot take back without his permission, then that statute is unconstitutional."). *See also Wolf*, 233 A.3d at 716–17 (Saylor, C.J., dissenting) ("It also seems to me to be quite unlikely that the Legislature would have conferred such a broad delegation of emergency powers upon the Governor while apprehending that the contemplated legislative oversight was subordinate to a gubernatorial veto, thus affording the executive the ability to require a supermajority vote.").

112. *Wolf*, 233 A.3d at 694.

113. *Id.* at 715 (Saylor, C.J., dissenting) ("I believe that the present context presents a compelling case that legislative vetoes should not be regarded as being *per se* violative of separation-of-powers principles.").

114. *See* Wisconsin Legislature v. Palm, 942 N.W.2d 900 (Wis. 2020).

115. *Id.* at 964 (Hagedorn, J., dissenting).

116. *In re* Certified Questions from the U.S. Dist. Ct., W. Dist. of Mich., S. Div., 958 N.W.2d 1, 11 (Mich. 2020) ("[C]ontrary to the Governor's argument, the 28-day limitation in the EMA does not amount to an impermissible 'legislative veto.'").

117. *See* Olafur Olafsson, *Constitutionality of Legislative Approval of Rules*, 74 MICH. BAR J. 290, 291 (1995) ("Logically, the veto power is subject to all the arguments set forth against the suspension power and raises additional concerns. By the same logic, if a legislative veto is unconstitutional, an affirmative approval requirement is even more objectionable, since it stays the executive hand more completely by a combination of defiance and legislative inaction. Still, approval is merely a more pervasive and extreme version of the veto, not a major change in imposing the legislative will on the executive branch.").

B. Nondelegation

Despite arguments that the nondelegation doctrine is not "historical[ly] justifi[ed]" and is "largely forgotten,"[118] the scope and validity of the nondelegation doctrine have been under debate for hundreds of years.[119] Centuries of nondelegation jurisprudence provide principles too ingrained in American law to ignore. In *Wayman v. Southard*, the United States Supreme Court, in an opinion written by Chief Justice Marshall, held that state legislatures did not have authority to regulate proceedings relating to federal writs of execution within their boundaries.[120] Rather, Congress had delegated the exclusive authority to set procedures to federal courts.[121] The Court held that Congress had the power to administer justice and had constitutionally delegated that power to the federal courts.[122] The Court further argued that the power to administer justice implied upon federal courts the "power to set the necessary procedures to" administer justice.[123] Chief Justice Marshall set limits on the power to delegate, however, stating: "It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."[124] The Chief Justice continued:

> The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.[125]

Thus, although the Supreme Court recognized the right to delegate some power in *Wayman*, it did so with the understanding that there were limits and Congress could not delegate its essential powers to another branch.[126]

The principle that the legislative power may not be transferred to another branch was reiterated in the most modern United States Supreme Court case to consider

118. Julian Davis Mortenson & Nicholas Baglet, *There's No Historical Justification for One of the Most Dangerous Ideas in American Law*, ATLANTIC (May 26, 2020), https://www.theatlantic.com/ideas/archive/2020/05/nondelegation-doctrine-orliginalism/612013/.

119. *See Nondelegation Doctrine: A Timeline*, BALLOTPEDIA, https://ballotpedia.org/Nondelegation_doctrine:_a_timeline (last visited Dec. 29, 2021) [hereinafter Non-Delegation Doctrine].

120. *Wayman v. Southard*, BALLOTPEDIA, https://ballotpedia.org/Wayman_v._Southard (last visited Dec. 29, 2021).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* (quoting *Wayman*, 23 U.S. at 42).

125. *Wayman*, 23 U.S. at 46.

126. *See id.* at 1.

nondelegation, *Gundy v. United States*.[127] There, the Court also stated the principle "that a statutory delegation is constitutional as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'"[128] The Court then stated that a statutory delegation may be interpreted "in light of its "purpose[,] factual background[,] [and] context" to find whether there are "sufficiently 'definite' standards."[129] The Court then considered the "context, purpose, and history" of the challenged statute and found that it only gave the attorney general discretion to consider feasibility issues when determining who had to register as a sex offender in his or her state of residence.[130]

As discussed above, the nondelegation issue arose in Pennsylvania with *Wolf*, in Wisconsin with *Palm*, and in Michigan with *In re Certified Questions*. The Wisconsin and Michigan supreme courts held that their executives possessed unconstitutionally delegated power, while the Supreme Court of Pennsylvania held that there was not an illegal delegation of power. In *Palm*, the Supreme Court of Wisconsin applied similar standards to those found in United States Supreme Court jurisprudence, stating, "[a] delegation of legislative power to a subordinate agency will be upheld if the purpose of the delegating statute is ascertainable and there are procedural safeguards to insure that the board or agency acts within that legislative purpose."[131] DHS Secretary-designee Palm relied on an executive order to "create criminal penalties for violations of Order 28."[132] Such lawmaking power without any safeguards is a clear violation of the nondelegation doctrine. Palm asserted powers going beyond the governor's "public health emergency declaration," thus eliminating any safeguards that a durational limitation on the governor's executive order may have imposed.[133] A governor may not delegate power to others within the executive branch to circumvent the nondelegation doctrine.[134]In *In re Certified Questions*, the Michigan Supreme Court considered whether the EPGA unconstitutionally granted the governor legislative powers. The court simplified principles from numerous cases on the nondelegation doctrine to state that "as the scope of the powers conferred upon the Governor by the Legislature becomes increasingly broad, in regard to both the *subject matter* and their *duration*, the *standards* imposed upon the Governor's discretion by the Legislature must correspondingly become more detailed and precise."[135] Because the governor was

127. *See* Non-Delegation Doctrine, *supra* note 119; Gundy v. United States, 139 S. Ct. 2116, 2121 (2019) ("The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government.").

128. *Gundy*, 139 S. Ct. at 2119 (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989)) (internal citation omitted).

129. *Id.* at 2123 (quoting Am. Power & Light Co. v. SEC, 329 U.S. 90, 104–05 (1946)).

130. *Id*. at 2123–24.

131. Wisconsin Legislature v. Palm, 942 N.W.2d 900, 913 (Wis. 2020) (quoting J.F. Ahern Co. v. Wis. State Bldg. Comm'n, 336 N.W.2d 679 (Wis. Ct. App. 1983)).

132. *Id.*

133. *Wisconsin Legislature v. Palm*, WIS. INST. L. & LIBERTY, https://will-law.org/wisconsin-legislature-v-palm/ (last visited Dec. 29, 2021).

134. *Id.*

135. *In re* Certified Questions from the U.S. Dist. Ct., W.D. Mich., S. Div., 958 N.W.2d 1, 20 (Mich. 2020).

given immense power over an indefinite length of time, the words "reasonable" and "necessary" were deemed inadequate limitations on the governor's exercise of legislative power.[136]

The Michigan Supreme Court considered legislative intent, which was spelled out in Section 10.32 of the EPGA:

> It is hereby declared to be the legislative intent to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster. The provisions of this act shall be broadly construed to effectuate this purpose.[137]

The court determined that the EPGA would only stand up to a nondelegation challenge if it were construed to grant the governor power more narrowly than the legislature intended.[138] Because the legislature intended to grant such broad power to the executive under the EPGA, the court held that the EPGA was unconstitutional.[139] Although the duration of powers need not be part of a nondelegation analysis, an otherwise broad delegation of powers may be constitutional with a reasonable duration. The United States Supreme Court has stated that durational limitations could be adequate to allow certain delegations of power, as the Michigan Supreme Court pointed out.[140] With no intelligible principle to limit the governor's lawmaking powers, no durational or other limitations on the governor's exercise of that power, and a clear purpose to grant the governor very broad police power in times of emergency, the Michigan Supreme Court made a well-reasoned decision to hold the EPGA unconstitutional.

Finally, the Supreme Court of Pennsylvania considered the nondelegation doctrine and concluded that the governor's orders did not violate it.[141] The purpose of Section 7301(c) appears to be to give the executive the power to enter a state of disaster emergency, but to require the governor to end the state of disaster emergency if a concurrent resolution of the General Assembly agrees to terminate the state of disaster emergency.[142] The Supreme Court of Pennsylvania, however, decided that the governor's Proclamation and H.R. 836 had legal effect, but the governor's Proclamation was not an actual law, so it did not violate the nondelegation doctrine.[143] Therefore, the court held that the General Assembly had to present H.R. 836 to the governor, but the governor's Proclamation, which had the force of law,

136. *Id.* at 24.

137. *Id.* at 12 (quoting MICH. COMP. LAWS ANN. § 10.32 (West 2020)).

138. *Id.* at 24.

139. *Id.*

140. *Id.* at 11 (quoting Immigr. Naturalization Serv. v. Chadha, 462 U.S. 919, 955 n.19 (1983)) ("Indeed, *Immigration & Naturalization Serv. v. Chadha* . . . itself expressly recognized that 'durational limits on authorizations . . . lie well within Congress' constitutional power.'").

141. Wolf v. Scarnati, 233 A.3d 679, 707 (Pa. 2020).

142. *See id.* at 684 (quoting 35 PA. CON. STAT. § 7301(c) (2020)).

143. *See id.* at 704.

was not an actual law, so it did not violate the nondelegation doctrine.[144] This interpretation goes against the plain meaning of Section 7301(c), which states that "the governor *shall* issue an executive order or Proclamation ending the state of disaster emergency" upon the General Assembly's concurrent resolution to terminate the state of disaster emergency.[145] By holding that there was legal effect to the governor's Proclamation so there was not an exception to Pennsylvania's constitution's presentment requirement at play, the Supreme Court of Pennsylvania took an interpretation of Section 7301(c) that violates the nondelegation doctrine by giving the governor unilateral authority to continue to use the excessive powers that a proclamation of disaster emergency grants him.

To conclude that the Proclamation had "the force of law" without being a law, so it did not violate the nondelegation doctrine, which "forbids entities other than the legislative branch from exercising the 'legislative power,' as those entities do not have 'the power to make law,'" means applying form over substance to a doctrine that regularly looks to the substance of authority delegations.[146] To give the governor the power to make proclamations with the force of law without giving Congress, the lawmaking branch, the ability to take that power away unless the governor agrees to give that power away upon presentment or a supermajority overrides him, goes against the pillar of nondelegation that disallows broad delegations of power without limitations.[147] As the dissent pointed out, the General Assembly delegated to the governor the power to declare an emergency and gave him "an extraordinary set of [legislative] powers" in such a case, but "quite rationally reserved" the ability to decide whether there is actually a disaster emergency and "override the Governor's declaration of an emergency upon the passage of a concurrent resolution."[148]

C. Legislative Concurrence

The highest courts of Pennsylvania, Wisconsin, and Michigan all considered the issue of whether the legislative and executive branches had to concur in decisions to extend or terminate periods of heightened executive power. More narrowly, they all considered the legislative veto, whether it was at play in their respective cases, and whether legislative vetoes should be per se unconstitutional.

Pennsylvania, Wisconsin, and Michigan have adopted similar approaches to the federal government in their legislative veto judgments. The Supreme Court of

144. *See id.* at 707.

145. 35 PA. CONS. STAT. § 7301(c) (2021) (emphasis added).

146. *See Wolf*, 233 A.3d at 704 (citing Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.), 161 A.3d 827, 833 (2017)); *see also* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928) ("In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistence [sic] must be fixed according to common sense and the inherent necessities of the governmental co-ordination."). Such an inquiry into the extent and character of assistance involves the "substance over form" inquiry that is typical of nondelegation-related United States Supreme Court opinions.

147. *See* PA. CONST. art. III, § 9 (requiring a two-thirds vote of both Houses to repass a resolution after the governor disapproves it at presentment).

148. *Wolf*, 233 A.3d at 713 (Saylor, C.J., dissenting).

Pennsylvania adopted the federal approach in *Commonwealth v. Sessoms*,[149] the Supreme Court of Wisconsin applied an approach similar to the federal approach in *Martinez v. Department of Industry, Labor and Human Relations*,[150] and a plurality of the Michigan Supreme Court applied the federal approach in *Blank v. Dep't. of Corrections*.[151]

The federal legislative veto was commonly used from its inception in the 1930s until the early 1980s.[152] It served as an effective way for Congress to check the Executive in order to uphold separation of powers in the face of delegated authority.[153] Debate picked up in the leadup to *Immigration and Naturalization Service v. Chadha*.[154] There, the Supreme Court held that neither house of Congress acting independently or concurrently could "require the Attorney General to deport an alien once the Attorney General, in the exercise of legislatively delegated authority, had determined the alien should remain in the United States."[155] This was due to the Presentment Clauses of Article I of the United States Constitution, which could not be skirted by an act of Congress.[156] The Court did, however, note that some legislative actions do not require presentment:

> Not every action taken by either House is subject to the bicameralism and presentment requirements of Art. I. See *post*, at 2786. Whether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon "whether they contain matter which is properly to be regarded as legislative in its character and effect."[157]

The *Chadha* Court's decision to declare the legislative veto illegal faced early criticism for its "oversimplistic . . . answer to the problem of the legislative veto."[158]

Adopting the *Chadha* reasoning to Pennsylvanian constitutional law, however, also implies an adoption of its exceptions to the presentment requirement which,

149. *Id*. at 688 (citing Commonwealth v. Sessoms, 532 A.2d 778 (Pa. 1987)).

150. *See* Martinez v. Dep't of Indus., Lab. & Hum. Rels., 478 N.W.2d 582, 582–87 (Wis. 1992).

151. *See In re* Certified Questions from the U.S. Dist. Ct., W.D. Mich., S. Div., 958 N.W.2d 1 (Mich. 2020) (citing Blank v. Dep't of Corr., 611 N.W.2d 530 (Mich. 2000) (plurality opinion)).

152. *The Legislative Veto*, LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/article-1/section-7/clause-1-3/the-legislative-veto (last visited Dec. 29, 2021).

153. *Legislative Veto After Chadha: Hearing on the Impact of the Supreme Court Decision in the Case of Immigration and Naturalization Service v. Chadha Which Found the Legislative Veto Unconstitutional Before the H. Comm. on Rules*, 98th Cong. 2 (1984) (statement of Rep. Claude Pepper, Chairman, H. Comm. on Rules).

154. *Legislative Veto Proposals: Hearing on S. 890 and S. 684 Before the S. Subcomm. on Agency Admin. of the S. Comm. on the Judiciary*, 97th Cong. 227 (1981) (statement of the Am. Gas Ass'n) ("While we take no general position on the constitutionality of legislative vetoes, we believe that Congress must be aware that an across-the-board legislative veto will be challenged, and its efficacy will be determined by the courts.") [hereinafter Hearing on S. 890 & S. 684]; *see also* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983). This statement proved to be fortuitous, as *Chadha* was decided just two years later.

155. *Chadha*, 462 U.S. at 921–22.

156. *Id.* at 953–54.

157. *Id.* at 952 (quoting S. REP. NO. 1335, at 8 (1897)).

158. Hearing on S. 890 & S. 684, *supra* note 154, at 3 (quoting former Dean of Harvard Law School, Dean Tribe).

other than what is explicitly in the Constitution, are things that are not substantively legislative.[159] It is strange to consider the governor's proclamation of a state of disaster emergency not a law but an enactment with legal effect while holding the legislature's concurrent resolution to end the emergency to be legislative. The legislature is in the business of lawmaking, and merely suspending an action with legal effect seems to fit the Supreme Court's exception that something not legislative in its character and effect is immune from presentment requirements.[160]

Further, Section 7301(c)'s statement that "no state of disaster emergency may continue for longer than 90 days unless renewed by the Governor"[161] seems to be a clear durational limit allowed by *Chadha*. The limit would be without much force if the governor could simply renew it and require a supermajority to overrule his renewal.

The Supreme Court of Wisconsin rightfully did not put much consideration into the dissent's argument that invalidation of the statutes under consideration may legitimize a legislative veto.[162] Broad delegations of power without any regulation are, for the nondelegation reasons explained above, unconstitutional.

The Michigan Supreme Court also dealt with a challenge that a judicial veto was at play.[163] However, because *Chadha* allows time limits, it quickly dismissed the challenge.[164] The Supreme Court of Pennsylvania should have arrived at the same conclusion, as it is likely that both the Pennsylvania and Michigan legislatures intended to condition extended delegations of authority to the executive on legislative approval.

These cases illustrate the difficulty for legislatures that, for practical reasons, wish to delegate some of their tasks to executives but wish to keep safeguards in place. If legislative vetoes are to be disallowed, time limits seem to be reasonable safeguards against executive overuse of the lawmaking power. Still, the Supreme Court of Pennsylvania was given a case that seemed to clearly place a time limit on the executive's elevated powers, but it concluded that presentment was necessary. Therefore, it seems that the best solution is to be clear in constitutions or statutes when a congress may end extended executive powers. If legislatures hope to have their intent enacted, they may need to be proactive and anticipate executive challenges that will be upheld by courts that align with the opposing executives.

Fundamentally, the Pennsylvania, Wisconsin, and Michigan cases decided whether the legislature and executive needed to be in concurrence to continue an executive's time of elevated powers. "Statutes defining executive authority during an emergency cannot be modified by executive order."[165] That makes them powerful checks on executive power. In the cases above, some statutes limiting power were

159. *See Chadha*, 462 U.S. at 952.

160. *See id.*

161. 35 PA. CONS. STAT. ANN. § 7301(c) (2021).

162. *See* Wis. Legislature v. Palm, 942 N.W.2d 900, 964 (Wis. 2020) (Hagedorn, J., dissenting).

163. *In re* Certified Questions from the U.S. Dist. Ct., W.D. Mich., 958 N.W.2d 1, 7 (Mich. 2020).

164. *Id.*

165. *Legislative Oversight of Emergency Executive Powers*, NAT'L CONF. STATE LEGISLATURES (Jan. 8, 2021), https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx.

upheld. Joint or single-house resolutions in state congresses commonly limit executive emergency powers across states not studied in this Note.[166] If legislative vetoes were per se unconstitutional, many states would lose important checks on executive power. Although this Note does not argue that legislative vetoes should be legalized across the board, state legislatures should put thought into whether bicameralism and presentment are more important than limits on executive power. If limits on executives' use of legislative authority are valued more than presentment, perhaps state legislatures should amend their constitutions to allow their congresses to terminate states of emergency without presentment. However, delegations of legislative power may themselves be unconstitutional per se, yet courts allow them. For state supreme courts that wish to adopt the United States Supreme Court's approach to the legislative veto, more thought should be put into Justice Scalia's view that "[s]trictly speaking, there is *no* acceptable delegation of legislative power."[167] Given that view, Pennsylvania's legislature's delegation of legislative power to its governor could be declared per se unconstitutional. Only with a check such as one allowing the legislature to end a state of emergency should broad delegation *possibly* be considered constitutional. It seems that courts may be too quick to overhaul legislative limits on executive power as "legislative vetoes" without considering nondelegation and the deeper separation of powers that is so important to the federal and state governments. Perhaps courts should weigh the benefits and drawbacks of presentment with those of legislative vetoes before declaring either nondelegation or legislative vetoes per se unconstitutional.

III. THE CONGRESSIONAL SOLUTION: CLEAR CONSTITUTIONS AND STATUTES

Pennsylvania's House of Representatives responded to its supreme court's decision to allow the governor to continue the state of disaster emergency by proposing a constitutional amendment to limit the governor's state of disaster emergency to twenty-one days and another amendment that would allow the General Assembly to end a state of disaster emergency.[168] A majority in both houses of the Pennsylvania General Assembly needs to pass the amendments in successive legislative sessions and secure voter approval for the amendments to take effect.[169] Because Pennsylvania put disaster emergency powers in its constitution, it limited the General Assembly's ability to quickly adapt to unfavorable executive and judicial decisions. That is where Michigan might have been more effective with creating legislation that could more easily be molded to specific situations. The EMA, as the Michigan Supreme Court held, adequately limited the duration of the executive's expanded power. If Pennsylvania had not etched its massive delegation of power to

166. *See id.*

167. Mistretta v. United States, 488 U.S. 361, 419 (1989) (Scalia, J., dissenting).

168. Ford Turner, *Pennsylvania House Committee Approves Bill for Constitutional Amendment to Limit Governor's Emergency Declarations to 21 Days*, MORNING CALL (Jan. 13, 2021, 6:03 PM), https://www.mcall.com/news/pennsylvania/capitol-ideas/mc-nws-pa-emergencies-governor-lawmakers-20210113-p77s5ww7mzeofly2vbyvdlen2m-story.html.

169. *Id. See also* PA. CONST. art. XI, § 1.

the governor in its constitution, the legislature could have more easily passed legislation to work around possible adverse judgments.

Ultimately, however, it seems unlikely that the Supreme Court of Pennsylvania would have held time constraints such as the one in Michigan's EMA to be adequate. After all, with an elongated view of what constitutes a legislative veto similar to the dissent's view in Michigan's case, a statute with a time limit might be held unconstitutional. If legislative vetoes are to be looked at so widely, a constitutional amendment to add another exception may be the best option. It remains to be seen whether Pennsylvania's amendments will pass, but such an attempt demonstrates the lengths a legislature must go to in order to avoid repercussions from an adverse executive and judiciary. The issue could have been avoided had the requirement that the governor must announce the termination of a state of disaster emergency been excluded from the Constitution of Pennsylvania. Although it is likely that only a ceremonial role was meant for the executive, ambiguity allowed an executive and a court to construe the words to limit the legislature's ability to suspend elongated powers without the governor's approval. Although overinclusive state constitutions should be avoided,[170] legislatures should constrain their executives and supreme courts from making too much of ceremonial rules such as Pennsylvania's requirement that the governor declare an end to a disaster emergency.

Constitutional clarity may be needed to constrain state supreme courts that are likely to decide issues based on their alignment with their governors. The Supreme Court of Pennsylvania consisted of six Democrats and one Republican, and it sided with its Democratic governor in *Wolf*.[171] The Supreme Court of Wisconsin had a five-to-two conservative leaning that ruled against its Democratic executive in *Wisconsin Legislature*.[172] Finally, the Michigan Supreme Court had a four-to-three Republican-appointed balance at the time of *In re Certified Questions*, corresponding with its holding that invalidated its Democratic governor's expanded powers.[173] Partisan judicial decisions cannot be easily corrected, but the constitution with which courts must abide can constrain them.

CONCLUSION

For Phil Anglin and other small business owners, the lockdowns have been devastating. This Note does not address the multitude of policy arguments for and against lockdowns, but ill-reasoned opinions can have strong effects. There is certainly a place for these policy considerations, and it might lie in legislatures—the

170. Daniel J. Erspamer, *Constitutional Reform Needed to Bring Jobs and Opportunity to Louisiana*, PELICAN INST. PUB. POL'Y (Nov. 5, 2019), https://pelicaninstitute.org/blog/constitutional-reform-needed-to-bring-jobs-and-opportunity-to-louisiana/.

171. *Pennsylvania Supreme Court*, BALLOTPEDIA, https://ballotpedia.org/Pennsylvania_Supreme_Court (last visited Dec. 29, 2021).

172. Laurel White, *Experts: Slimmer Conservative Majority on Wisconsin Supreme Court Could Unite Justices*, WIS. PUB. RADIO (Aug. 4, 2020, 5:35 AM), https://www.wpr.org/experts-slimmer-conservative-majority-wisconsin-supreme-court-could-unite-justices.

173. *Michigan Supreme Court Elections, 2020*, BALLOTPEDIA, https://ballotpedia.org/Michigan_Supreme_Court_elections,_2020 (last visited Dec. 29, 2021).

bodies that created the statutes that were too ambiguous for clear application. As Pennsylvania's congress learned, certainty is often favorable. Certainty is undoubtedly favorable to a legislature when the risks of uncertainty create conflicts, and clearly spelling out exceptions to rules such as presentment is an efficient way to ensure legislative intent is followed. This is particularly true where the intent deals with delegation of congressional powers which threatens constitutional balances of powers.

Anglin is just one example. If legislatures want to avoid undesirable consequences, they should ensure that their intentions are clearly stated in any cases in which they delegate legislative power to another branch of government. Disasters have shown some executives' willingness to expand their powers, often at the loss of individual rights. This issue will likely continue with new COVID strains developing every few months. While judges may not have interpreted all of the cases studied above correctly, legislatures should seek to avoid situations that could take their constituents' rights away by etching their intentions into law.