Grassroot Institute of Hawaii
POLICY BRIEF, JANUARY 2021

Lockdowns Versus Liberty

How Hawaii's Experience in 2020-21 Demonstrates the Need to Revise the State's Emergency Powers

By Malia Hill

GRASSROOT INSTITUTE OF HAWAII

Letter from the President

It is a sobering experience to sit ringside at a significant moment in history. As we have watched the COVID-19 pandemic unfold over the past year, we have witnessed a great conflict arise between individual liberty and the safeguarding of public health.

Future historians will no doubt have plenty to say about how different countries, states and municipalities handled these competing concerns. Already, we have seen dozens of legal challenges arise from the lockdowns and closures of businesses. In due time, perhaps a consensus will emerge about where the balance should be struck between fundamental freedoms and the need to preserve public health in a pandemic.

For those of us in the midst of it, our responsibility is to shape this conversation from the standpoint of our "on the ground" experience. For future generations, the impact of business closures, gathering restrictions and rules about hiking and swimming will be academic. For us, they are all too real.

Given this perspective, the question a think tank dedicated to individual liberty must ask is not, "How can we keep this from happening again?" We certainly hope that the people of Hawaii will never experience another global pandemic, but there is no way to guarantee that the state will never be faced with another health crisis on this scale.

Rather, the question we must ask is, "How can we handle these crises better in the future?" In other words, what have we learned from the COVID-19 pandemic and the state of Hawaii's response? And how can we put those lessons into action so that future crises can be dealt with more effectively while placing a lower burden on individual freedoms?

In this report, "Lockdowns Versus Liberty," we detail the Hawaii governor's COVID-19 orders and their implications for the fundamental freedoms of Hawaii residents. The governor does not have the power to suspend constitutional rights during an emergency, but the state government does possess broad powers to deal with emergencies in ways that can affect something as basic as your ability to go to work or walk in the park.

During the first days of the pandemic, many people wondered if the courts would step in to limit the broad emergency actions of the governor and mayors. However, it soon became clear that a reactive approach to the defense of freedom is flawed. As this report demonstrates, one major lesson from the COVID-19 experience is that the courts are not the best route to ensure that the government response is limited and measured from the very start of the emergency.

The COVID-19 lawsuits will undoubtedly go on for years to come – and may eventually produce some interesting and surprising new precedents – but during an emergency period, the courts are reluctant to second-guess the actions of a governor or mayor who is responding to a crisis.

The best approach would be to set forth before the next crisis new guidelines for dealing with an emergency that address competing health and liberty concerns. By drawing on the experience of the COVID-19 lockdowns, we can identify the areas most in need of reform.

The Grassroot Institute of Hawaii has analyzed Hawaii's emergency management statute and outlined a new approach to handling emergencies that affect public health. The goal is to retain the government's flexibility in responding to an emergency while adding certain checks and balances on that power. Foremost among them is the addition of a legislative check on the governor's ability to indefinitely extend emergencies. In addition, there must be internal checks on the breadth of emergency action so that government restrictions on fundamental freedoms remain narrowly tailored to achieve a specific, rational purpose.

A system of checks and balances has always been the cornerstone of the defense of freedom in the United States. In The Federalist Papers, James Madison wrote at length on the fact that constraints on those who govern are the primary guarantee of liberty and guard against despotism. As another Founding Father, John Adams, put it: "Power must never be trusted without a check."

In its current form, Hawaii's emergency management laws allow for the extensive exercise of unchecked power. This is not a problem that can be fully addressed through the courts. The proper set of checks and balances, as outlined in this report, can be added only through legislative action. Moreover, the impetus for such change must come from the people, through their elected representatives.

The pandemic and lockdown have demonstrated the inadequacy of our state's current emergency powers law to deal with a public health emergency of this scope. Fortunately, we can take what we have learned from this experience and put it to good use.

If we work together, we can ensure that Hawaii is better prepared to handle future emergencies via reforms that will protect public health without infringing upon our fundamental freedoms.

Mahalo and aloha,

Keli'i Akina

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Executive Summary

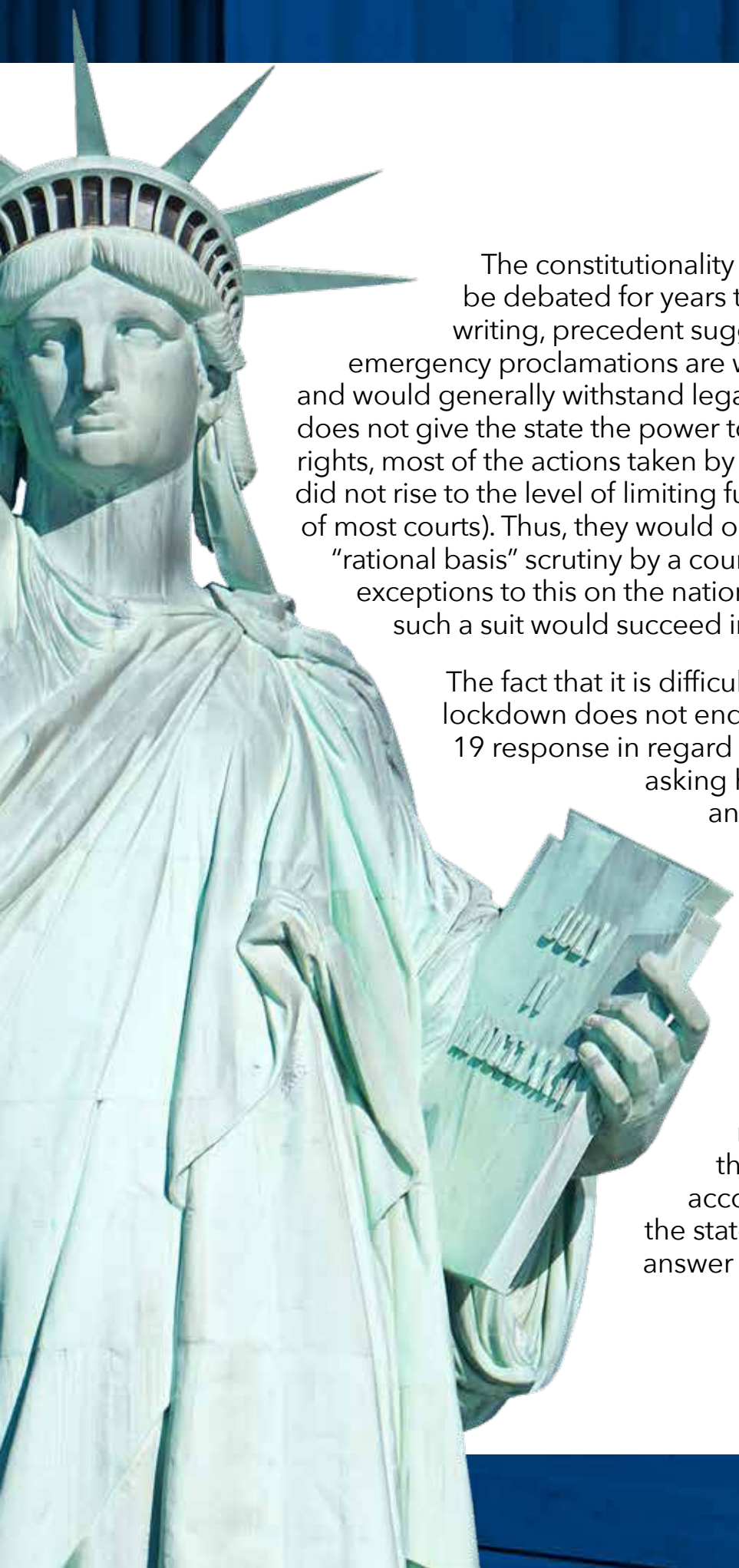
The COVID-19 pandemic and the accompanying lockdown have raised significant questions about civil liberties in Hawaii. At no other time in recent history have average citizens been so aware of the limits of their constitutional freedoms and the state's ability to limit ordinary activities. As a result, many have asked whether the lockdowns are legal, whether they infringe upon constitutional rights, and whether there is any remedy available to businesses or individuals who feel they have been injured by the lockdown.

Our view is that Hawaii should amend its emergency management statute and follow other states by limiting executive power and putting an end to the possibility of perpetual lockdown. An emergency period should be subject to a thirty-day limit, after which legislative approval would be required to extend it. In addition, the legislature should have the power to end the emergency period at any time by concurrent resolution.

The Hawaii Legislature should further safeguard our rights and liberties by passing a privacy law and amending the emergency management statute to preserve government transparency, individual liberties, due process, and the balance of powers.

As it stands, Hawaii's response fell within the state's emergency management law, which is extremely broad. Not only does it give the governor wide latitude to respond to an emergency, but the statute's sixty-day limit on an emergency period has no teeth.

As of late December 2020, the governor of Hawaii has issued eighteen separate proclamations dealing with the COVID-19 emergency. As in many other states, the governor's directives have included the closing of schools and "non-essential" businesses, stay-at-home orders, restrictions on gatherings, recommendations on mask-wearing, and quarantining travelers.



The constitutionality of the lockdowns is likely to be debated for years to come. However, as of this writing, precedent suggests that the governor's emergency proclamations are within the state's police powers and would generally withstand legal scrutiny. While an emergency does not give the state the power to infringe upon constitutional rights, most of the actions taken by the state during the lockdown did not rise to the level of limiting fundamental rights (in the eyes of most courts). Thus, they would only be subject to a minimal "rational basis" scrutiny by a court. While there have been a few exceptions to this on the national level, it remains unlikely that such a suit would succeed in Hawaii.

The fact that it is difficult to sue one's way out of the lockdown does not end the discussion of the COVID-19 response in regard to civil liberties. It is still worth asking how to preserve privacy and civil liberties during an emergency like the coronavirus pandemic.

By deferring to the executive's power in an emergency, courts have demonstrated that they see the state COVID-19 response as a political matter, not a judicial one. Thus, for those looking to create more accountability and transparency in the state's emergency response, the answer lies in political action.

Introduction

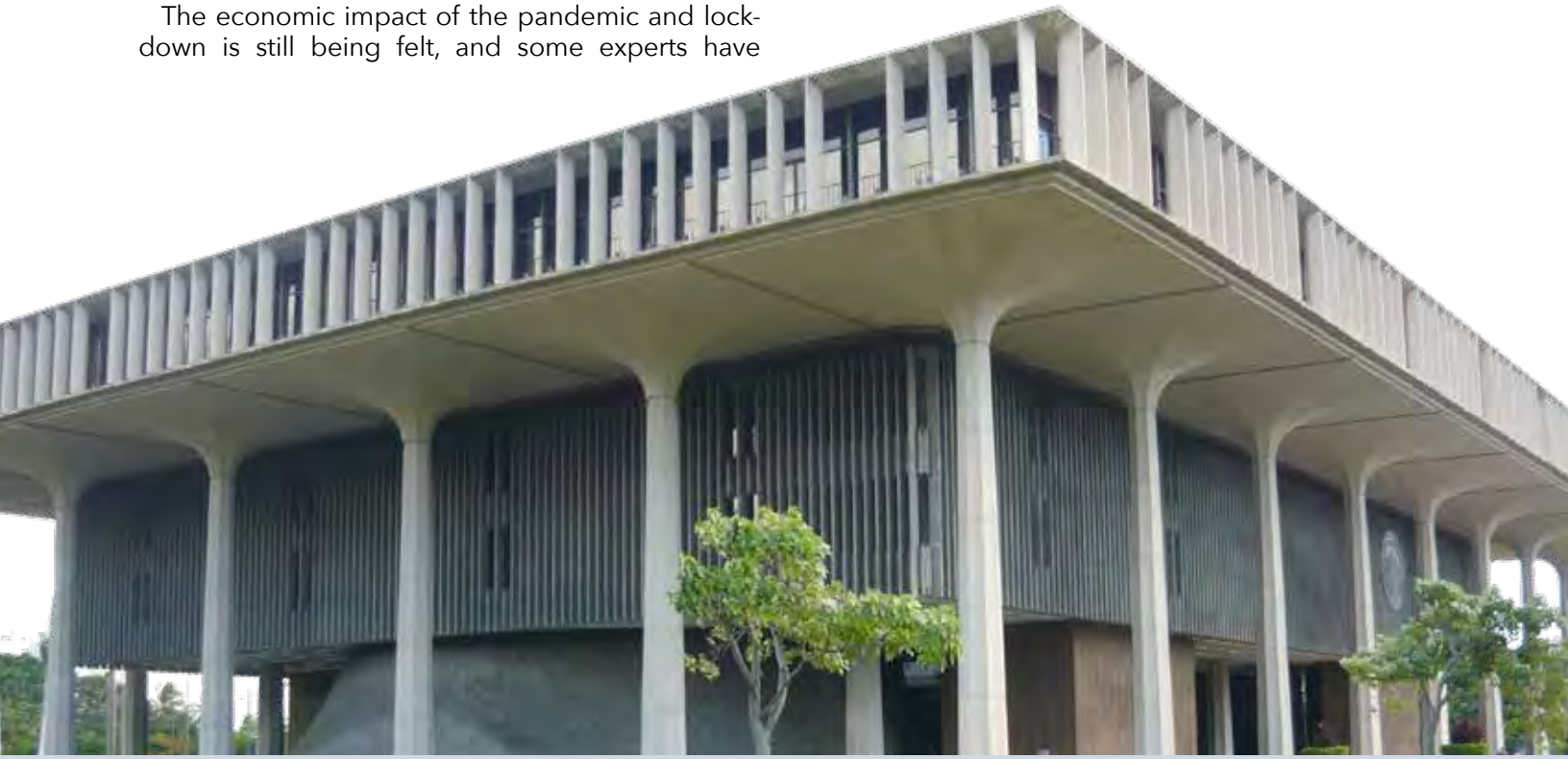
The COVID-19 pandemic has achieved something only dreamed of by generations of constitutional law scholars: It has made the general public aware of the scope and limitations of their constitutional rights. Perhaps at no other point in American history has the average citizen experienced such sudden and sweeping restrictions on his or her daily life. By late March 2020, most states had enacted some form of lockdown order closing all "non-essential" businesses and requiring individuals to stay home except for specific purposes.

As of November 2020, Hawaii, in particular, has seen fifteen separate proclamations that outline the state's response to the pandemic and define the bounds of the lockdown. As in many other states, the governor's directives included the closing of schools and "non-essential" businesses, stay-at-home orders, restrictions on gatherings, recommendations on mask-wearing, and quarantining travelers.

The economic impact of the pandemic and lockdown is still being felt, and some experts have estimated that it will take years for Hawaii's economy to recover. However, measuring the impact on civil liberties and privacy is more complicated. As with the economic question, it may be a question of time.

As of this writing, we have yet to return to the pre-pandemic status quo in terms of individual freedoms. One might posit that the long-term effect of the state pandemic response on our conception of privacy and individual rights will depend heavily on the tenure of some of those measures. In addition, we must wrestle with the divide between what is truly unconstitutional and what may be experienced as an infringement on one's rights but remains legally permissible.

Before analyzing the impact of the state's COVID-19 response on civil liberties, it may be helpful to lay out the timeline and boundaries of those measures.



Governor Ige's Proclamations on COVID-19

The Early Response: Proclamation One through the Second Supplemental Proclamation

In Hawaii, Governor David Ige issued his first emergency proclamation[1] on March 5, 2020. Citing the health and safety concerns raised by COVID-19, the governor utilized his broad powers under Hawaii's emergency management statute[2] to suspend a series of state laws; invoke price controls on certain items like food, hand sanitizer, and medical supplies; and activate the major disaster fund.

On March 16, Governor Ige issued a supplemental emergency proclamation,[3] in which he cited the ten confirmed COVID-19 cases in Hawaii at the time and restated the emergency situation. He then went on to invoke the state's emergency powers statute to suspend or modify multiple state statutes for the purpose of increasing the state's emergency preparedness and facilitating the response to unemployment claims. Of special note is the fact that the March 16 proclamation also suspended the state's open records act[4] and sunshine laws[5]—though it did urge boards to "consider reasonable measures to allow public participation consistent with social distancing practices."[6]

While the first emergency proclamation set the end of the emergency period as April 29, the supplemental proclamation extended it to May 15.

The economic impact of the pandemic and lockdown is still being felt, and some experts have estimated that it will take years for Hawaii's economy to recover.

On March 21, the governor issued another supplementary emergency proclamation[7] instituting a mandatory fourteen-day self-quarantine for all persons entering the state. Violators of the quarantine rule would be subject to a fine of not more than $5,000, imprisonment of not more than one year, or both. This proclamation extended the emergency period through May 20.

Full Lockdown: The Third through Seventh Supplemental Proclamations

Two days later, the governor issued another supplemental proclamation.[8] Citing the state's seventy-seven confirmed COVID cases and the possibility of the virus's catastrophic effect on the state, Governor Ige reaffirmed his previous proclamations and issued the state's first stay-at-home order. Invoking the emergency powers statute, specifically, §§ 127A-12(a)(5), 127A-12(a)(14), 127A-13(a)(1), and 127A-13(a)(7), the governor declared that "all persons within the State of Hawaii are ordered to stay at home or in their place of residence" and were allowed to leave only to fulfill critical roles, conduct essential activities, or engage in essential businesses. While outside their residence, individuals were ordered to comply with social distancing recommendations as much as possible. This stay-at-home directive was to begin on March 25 and expire on April 30.

The third supplemental proclamation included a list designating essential business activities that were permitted to continue operating despite the lockdown. The proclamation incorporated those sectors identified as critical infrastructure by the U.S. Department of Homeland Security,[9] anything designated essential by the director of the Hawaii Emergency Management Agency, as well as a list of other businesses that would be considered "essential" for the purpose of the proclamation.

These "essential" businesses were healthcare services and facilities; stores that sell groceries and medicine; food, beverage, cannabis production, and agriculture (including animal rescues and kennels); educational institutions (for the purpose of "implementing appropriate learning measures" while maintaining social distancing); organizations that provide charitable and social services (such as food

banks); media; gas stations and businesses needed for transportation (including auto supply and bike shops); financial institutions; hardware and supply stores; critical trades; mail, post, shipping, logistics, delivery, and pick-up services (this included services like grocery or food delivery in addition to postal services); laundry services; restaurants for consumption off-premises; stores that provide supplies to work from home; suppliers to essential businesses and operations for essential businesses and operations (everything from IT equipment to food additives and firearms); transportation; home-based care and services; residential facilities and shelters; professional services (including lawyers, accountants, insurance companies, and real estate services); child care services for employees exempted by this order; manufacture, distribution, and supply chain for critical products and industry; critical labor union functions; hotels and motels; funeral services; and government functions.[10]

The March 23 order listed eight activities permitted outside one's residence. These included things like traveling to the airport, traveling to take care of vulnerable persons, walking pets, getting outdoor exercise (including swimming and surfing), and getting goods or services from one of the aforementioned essential businesses.

Finally, the order proscribed gatherings of more than ten people, outlined social distancing requirements, and closed all public gathering places, including gyms, movie theaters, playgrounds, bowling alleys, concert halls, social clubs, arcades, zoos, and museums.

Violation of any provision of the proclamation was designated a misdemeanor under Hawaii's emergency management law, section 127A-29. In this proclamation, the emergency relief period was declared through April 30.

The next supplementary proclamation[11] was issued more than a week later, on March 31. This proclamation instituted a mandatory fourteen-day quarantine for inter-island travelers, with the exception of those performing necessary functions or traveling for the purpose of medical or health care. The proclamation affirmed the previous proclamations and set the termination date for the emergency period as April 30.

On April 16, Governor Ige issued the next supplementary proclamation.[12] The order affirmed its predecessors and cited 540 COVID-19 cases and nine deaths in the state. After references to the World Health Organization, the Centers for Disease Control, and Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases and a leading member of the White House Coronavirus Task Force, on the efficacy of face coverings in preventing the spread of the virus, the governor "encouraged" all individuals in Hawaii to wear "a cloth face covering."

This proclamation also introduced new limitations on outdoor activities. For example, if not in the same family or residential unit, only two people were allowed in a boat for recreational purposes, and boats were directed to remain twenty feet away from each other. Hikers were likewise restricted to groups of two (when not in a family/residential group) and told to remain twenty feet from other hikers. The same limitations were applied to individuals fishing or gathering on state land. All state beaches were closed, "except when transiting across or through beaches to access the ocean waters for outdoor exercise purposes."[13]

The prohibitions on using the beach except to transit to the water for swimming, surfing, or the like caused some confusion, as it was unclear how long one would be permitted to stand on the beach in preparation for—or recovery from—that exercise.[14]

Businesses that were allowed to remain open were directed to enforce the six-foot social distancing rules put forth in the previous proclamation. The proclamation put forth additional guidelines on the use of hand sanitizer, limiting occupancy, requiring customers to wear face coverings, posting signage about health and safety, and allowing for remote access and pick-up/delivery services.

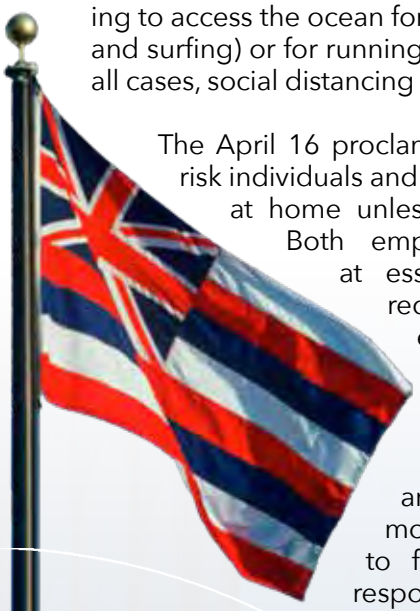
The April 16 proclamation also invoked the emergency powers law to suspend any residential evictions for failure to pay rent or lease or related reasons.[15] The proclamation took effect on April 17, and the emergency relief period was said to continue through April 30.

Additional state laws and regulations were modified or suspended to facilitate the emergency response and assist the vulnerable.

The next supplementary proclamation was issued on April 25.[16] This lengthy order restated and reaffirmed the executive orders flowing

from the previous five emergency proclamations as well as the proclamations themselves.

An attempt was made to clarify the rules regarding beach closures by stating that "no person shall sit, stand, lie down, lounge, sunbathe, or loiter on any beach or sandbar in Hawaii,"[17] except when transiting to access the ocean for exercise (e.g., swimming and surfing) or for running, jogging, and walking. In all cases, social distancing was still required.



The April 16 proclamation encouraged high-risk individuals and those who were ill to stay at home unless seeking medical care. Both employees and customers at essential businesses were required to wear face coverings inside the business and while waiting to enter it.

Additional state laws and regulations were modified or suspended to facilitate the emergency response and assist the vulnerable. Six separate exhibits were appended to the proclamation to address issues as varied as face coverings and child care rules. Finally, a new date of May 31 was set as the end of the emergency relief period.

On May 5, Governor Ige issued his next emergency proclamation.[18] Citing the state's count of 625 cases and seventeen deaths, the governor restated all prior proclamations and orders. Much of the proclamation was dedicated to addressing statutory or regulatory requirements that were to be eased or modified in response to the pandemic. However, the attachments to the proclamation included two items of note.

Exhibit G of the May 5 proclamation listed certain businesses and operations that would be permitted to open as of May 7, provided they complied with social distancing and health/safety guidelines. The businesses listed were non-food agriculture, such as nurseries and landscapers; auto dealerships; car washes; pet groomers; observatories and support facilities (e.g., telescopes); retail and repair services, such as florists, watch repair, and apparel; and shopping malls (though common areas, food courts, dining areas, arcades, and the like would remain closed). The attachment noted that Honolulu City and County had additional restrictions for certain businesses and that Maui County would not allow retail, repair shops, or malls to reopen.

Exhibit H of the May 5 proclamation provided new guidance on the suspension of open records and sunshine law requirements that had been set forth in the March 16 proclamation. The new guidelines required a good faith attempt to comply with transparency requirements, though deadlines for open records requests were suspended and actions taken by boards remained valid even if attempts to use technology for public observation and comment failed.

The emergency period was set to expire on May 31, 2020.

The Slow Reopening: Supplemental Proclamations Eight through Twelve

The next proclamation was issued on May 18.[19] It again restated and reaffirmed prior proclamations, with a few amendments. The stay-at-home order was now modified to put the state in a reopening phase called "Act with Care," though citizens were instructed to stay at home except to engage in certain permitted activities.

Exhibit G of the proclamation set forth the state's phased opening guidance on when specific businesses would be allowed to open, and under which conditions. With the exception of "large venues, bars and clubs," every other business and operation listed was permitted to be open, either with physical distancing and "safe practices" or with adjusted "safe practices" alone.

A new end date for the emergency relief period was set, with the period now set to expire on June 30.

The next proclamation was issued on June 10.[20] In this proclamation, Governor Ige

cited the state's 685 COVID-19 cases and seventeen deaths, then went on to restate all prior proclamations and executive orders.

The June 10 proclamation did not include the stay-at-home/safer-at-home order, as the state remained in the "Act with Care" phase of reopening, which permitted certain, limited activities outside the home. However, limitations on travel and other activities remained in place.

The June 10 proclamation set forth an expiration date of June 16 for the mandatory self-quarantine for interisland travelers, but also stated that hosts would be required to report any guests who broke self-quarantine rules. Moreover, those under self-quarantine were prohibited from renting motor vehicles. Violations for both hosts and those providing rental vehicles would be treated as misdemeanors—with the same penalties as other violations of the lockdown requirements.

The proclamation set a new period for the emergency relief period, expiring on July 31.

With just two weeks to go before the expected reopening of Hawaii on July 31, the governor issued another proclamation that would extend the emergency period yet again. The tenth supplementary emergency proclamation was issued on July 17.[21]

The July 17 proclamation referenced a total of 1,300 documented COVID-19 cases and twenty-three deaths and restated all prior proclamations. The most significant portion of the proclamation was reserved for the mandatory fourteen-day quarantine and health screenings for all visitors to Hawaii. Hosts and providers of car-sharing services continued to be legally responsible for enforcing/ensuring quarantine for guests and users. Provisions for the creation of a mandatory health and travel form as well as a health screening were put in place: Anyone entering the state would be required to comply with a thermal screening and fill out the form (as well as undergo the quarantine) or be guilty of a misdemeanor.

Rules regarding which businesses would be allowed to operate—and under which restrictions—remained unchanged. The date for the end of the emergency period was reset to August 31.

The July proclamation was followed by Governor Ige's eleventh supplementary proclamation, issued on August 7. In contrast to previous proclamations, the August 7 one was comparatively short and focused on interisland travel. The order elaborated on the mandatory fourteen-day self-quarantine for all persons traveling between islands, with a special provision for those performing critical infrastructure tasks, who were permitted to break quarantine to carry out those tasks, subject to compliance with previous guidance on safe practices and protective gear.[22]

On August 20, less than two weeks later, Governor Ige issued the next COVID proclamation.[23] After noting a surge in diagnoses, with 5,800 documented COVID cases in the state (and forty-five deaths), the governor restated most of the provisions put in place in his tenth and eleventh proclamations. The state remained under the "Act with Care" order, with the same limits on business operations. The mandatory fourteen-day self-quarantine for visitors and interisland travelers remained in place, though the August 20 proclamation created the "Enhanced Movement Quarantine" (EMQ), a program that allowed resorts and hotels to create agreements with the counties to allow participating travelers to move freely in EMQ zones (such as beaches), provided the travelers and resorts complied with certain safety, health, and monitoring conditions. Among these was a requirement that participating travelers voluntarily agree to electronic monitoring and to waive certain health privacy protections.

The end of the emergency period was reset to September 30, 2020.

Bringing Back Tourism: Supplemental Proclamations Thirteen through Seventeen

On September 23, Governor Ige restated the emergency yet again in his thirteenth supplemental COVID-19 proclamation.[24] In the proclamation, the governor noted that the number of COVID-19 cases and deaths had more than doubled since the last proclamation, standing

The result (of the many emergency proclamations) has been a complex mesh of rules and restrictions that have left many Hawaii residents puzzling over the layers of state and county regulations in order to find out what is allowed, when, and where.

at 11,500 documented cases and 120 deaths as of September 22.

The September 23 proclamation largely echoed its predecessors but did include a few changes. Rules for travelers to the state were changed to allow a self-quarantine exemption, effective October 15, 2020, for travelers who could provide written confirmation of a negative COVID-19 test administered by an approved facility within seventy-two hours of the final leg of departure. The interisland travel quarantine was similarly modified so as to allow counties to adopt a negative test exception process for interisland travelers. A new enforcement clause stated that the proclamation should not be construed to create a private right of action to enforce any rules or requirement related to the proclamation—nor did it impose any ministerial duty upon a non-judicial public officer, bind the officer to a specific course of action, or prevent them from exercising discretion in the performance of their duties.

The new expiration date for the emergency relief period was set at October 31, 2020.

The next supplementary proclamation was issued on October 13, 2020.[25] The only major change to previous orders related to travelers to the state and the negative test exemption, now applicable to anyone aged five or older. Counties were empowered to require a subsequent COVID test after the arrival of those travelers at the county's expense. The emergency period was reset to expire on November 30, 2020.

The next supplementary proclamation was dated November 16[26] and included a slight change to the statewide mask mandate, directing that, "all persons in the state shall wear a face covering over their nose and mouth when in public," in accordance with further directives set out in exhibit J.[27] The proclamation also included additional directives for operators of hotels to develop a health and safety plan and additional details on the exceptions to the mandatory 14-day self-quarantine for travelers to Hawaii (including the negative test exemption). The new deadline for the emergency was set at December 31, 2020.

In response to a surge of mainland COVID-19 cases, Governor Ige issued an additional proclamation on November 23, 2020.[28] The new proclamation required travelers to Hawaii to have a negative COVID-19 test from an approved testing provider prior to departure in order to qualify for the 14-day self-quarantine exception. The proclamation went on to restate the language of its predecessor and did not change the end date for the emergency period.

The most recent emergency proclamation (as of this writing) was issued on December 16.[29] In it, the governor shortened the mandatory self-quarantine period for travelers to Hawaii and for interisland trav-

HAWAII'S ARBITRARY LOCKDOWN RULES

elers from fourteen to ten days. In addition, the state's eviction moratorium was extended until February 14, 2021 and the temporary suspension on vehicle safety certifications was lifted. The new end date for the emergency period was reset to February 14, 2021.

It should be noted that this breakdown only covers the governor's lockdown orders. However, these are not the only orders that Hawaii residents are required to follow. Emergency orders at the county level, issued by the different county mayors, put additional requirements on local residents and businesses, such as mask mandates, curfews, limitations on store capacity, and so on. The result has been a complex mesh of rules and restrictions that have left many Hawaii residents puzzling over the layers of state and county regulations in order to find out what is allowed, when, and where.[30]

As will be discussed in the following pages, the structure of the state emergency powers law envisions cooperation between the mayors and the governor in responding to an emergency. Moreover, in his emergency orders, Governor Ige invoked the emergency powers statute to require approval for any county-level emergency order, rule, or proclamation. Thus, any consideration of the legality of the mayors' or Governor's orders returns to general principles of constitutionality and the specifics of the state emergency powers statute.

HAWAII'S ARBITRARY LOCKDOWN RULES

Lockdown Versus "Rights": Why the Lockdown Was Constitutional (Initially)

From the very beginning of the lockdown, experts assured the public that the governor did not have the ability to infringe on their constitutional rights in an emergency.

Concerns that the government enjoys special powers due to the health emergency were addressed with reference to a U.S. Supreme Court decision from nearly a century ago. In *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), the Court dealt directly with a declared emergency and noted:

> Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.[31]

It may seem counterintuitive to declare that "emergency does not create power." After all, we do refer to the ability to enforce a lockdown as an exercise of the "police power." Moreover, the actions taken by the governor in response to the COVID-19 emergency do appear to be extraordinary and not something that would be allowed in normal times. Thus, from a practical perspective, it appears that the existence of an emergency period does give the executive greater power.

However, that is all it is—an appearance of greater power based on one's personal experience. The powers exercised by the governor in the COVID-19 proclamations were powers that existed before the pandemic arose. They were outlined by the legislature via statute and have been exercised before in other emergency situations. There is no greater power in an emergency because the power to take strong measures to preserve health and safety has always existed.

Emergency or not, the state is still constrained from violating civil liberties. In the famous quote from Blaisdell, the Court was simply stating that an emergency does not create a situation where the government is now permitted to exceed its existing powers; i.e., it cannot suspend civil rights. Any state action, whether executive or legislative, is limited by the bounds of the Constitution, which does not change for an emergency. In other words, your civil liberties are safe during a pandemic.

But this does come with an important caveat: The broad shutdown and stay-at-home orders that were enacted across the country in Spring 2020 would likely be considered a constitutional exercise of the state's police powers. In fact, courts generally grant the government wide latitude to deal with an emergency like the COVID-19 pandemic. A very different U.S. Supreme Court decision, *Jacobson v. Massachusetts,* 197 U.S. 11 (1905), upheld the state's ability to require vaccination for the public good.[32]

If mandatory vaccination is permissible, it is difficult to imagine that lesser infringements—such as the curtailing of public events, closing of public places, and even mass quarantine—would be considered an unconstitutional violation of civil liberties.

The power of the government to order a statewide lockdown has the same origin as the power to require occupational licenses, building permits, and speed limits. These are all expressions of the police power and recognized as legal ways to preserve public health and safety.

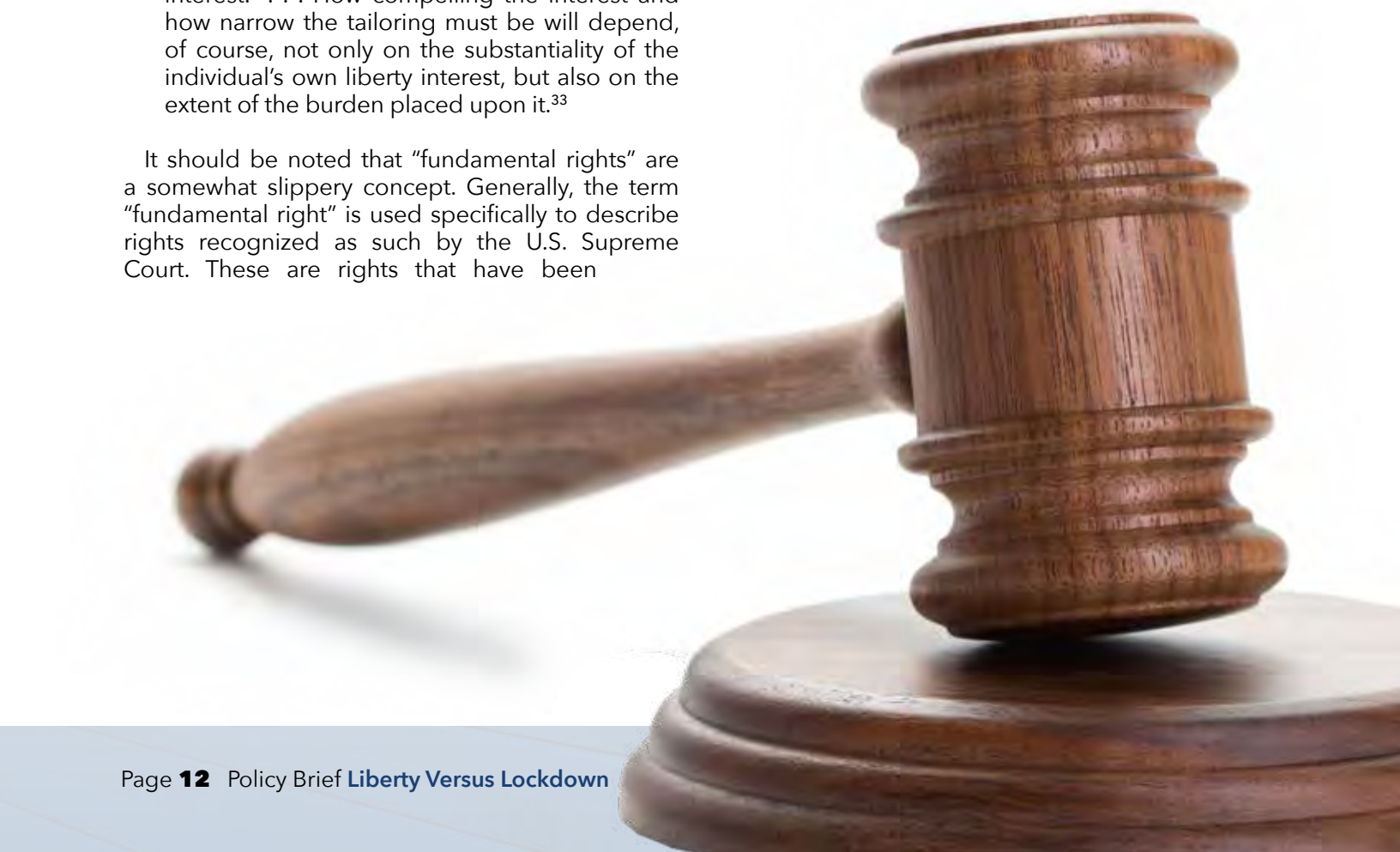
How Courts Determine Whether a Government Action Has Gone Too Far

Whether a government action is a constitutional exercise of the state's police power comes down to the standard used by a court to review that action. When the state action limits a fundamental right–such as speech and the press–it has to pass the highest level of judicial scrutiny. As Chief Justice Rehnquist explained in *Washington v. Glucksberg,* 521 U.S. 702 (1997), the state must have a "compelling interest" in intruding on those rights and choose the least intrusive way of doing so:

> The dual dimensions of the strength and the fitness of the government's interest are succinctly captured in the so-called "compelling interest test," under which regulations that substantially burden a constitutionally protected (or "fundamental") liberty may be sustained only if "narrowly tailored to serve a compelling state interest." . . . How compelling the interest and how narrow the tailoring must be will depend, of course, not only on the substantiality of the individual's own liberty interest, but also on the extent of the burden placed upon it.[33]

It should be noted that "fundamental rights" are a somewhat slippery concept. Generally, the term "fundamental right" is used specifically to describe rights recognized as such by the U.S. Supreme Court. These are rights that have been identified in the Constitution and Bill of Rights (i.e., speech, the press, free exercise of religion, etc.) or found to exist as part of the Fifth Amendment's Due Process Clause. Fundamental rights that have been recognized by the Court–but are not listed in the Constitution–include things like interstate travel, procreation, privacy, voting, and marriage. It is important to note that the state can still put limits on fundamental rights, such as laws on obscene speech. However, any state action that limits a fundamental right is subject to the compelling interest test.

When the government action in question does not involve a fundamental right, courts use a lower level of scrutiny to weigh its constitutionality. This standard is not only lower than the "compelling interest" described above–it is much lower.



When it comes to many of the actions proscribed by the governor's lockdowns—especially those that touch on business and property—courts don't look for narrow tailoring and compelling interests. Instead, they use "rational basis" review, which asks if the government's action is "rationally related" to any "legitimate" government aim. In *Williamson v. Lee Optical,* 348 U.S. 483 (1955), the Supreme Court even noted that a government action doesn't need to be wise or sensible to pass a rational basis review. How logical a law might be in achieving its objectives is more of a political question (meaning that it is the territory of elected officials and the people who put them there) than a judicial one: "But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[34]

Certainly, there is a case to be made that Governor Ige's proclamations have had an impact on personal liberties.

The bounds of rational basis review are so loose that legal scholars have debated the extent to which it has become functionally meaningless, with courts deeming any law or regulation constitutional so long as the government can point to some government interest at stake. Georgetown Professor Randy Barnett has argued that the rational basis approach embraced in Lee Optical allows for unchecked legislative power to intrude on liberty:

The modern rational basis approach adopted by the Warren Court in Lee Optical represents a judicial abdication of its function to police the Constitution's limits on legislative power. It accomplished this by combining its formalist irrebuttable presumption of constitutionality with a judicially invented distinction between economic and personal liberties found nowhere in the Constitution.[35]

Certainly, there is a case to be made that Governor Ige's proclamations have had an impact on personal liberties. The problem comes in the fact that the loss of liberty is felt personally, but not found in the law. There is no amendment in the state or federal constitution that directly addresses a right to go to work, attend your grandmother's funeral, or sit on the beach. In ordinary times, we do not think of these things as worthy of discussing in the language of rights and liberties—possibly because they seem so self-evident.

However, a pandemic is not an ordinary time. It is an emergency. Therefore, it is worth examining the statute that enabled the governor to issue the emergency proclamations and dramatically constrain the activities of Hawaii residents.

Hawaii's Emergency Powers Law: How Governor Ige Created the Lockdown

The scope of the emergency powers held by the Hawaii executive is summed up in section 127A-12 of the Hawaii Revised Statutes, which lists a broad series of actions allowable by the governor or mayor in relation to emergency management, then ends with a general power to "Take any and all steps necessary or appropriate to carry out the purposes of this chapter notwithstanding that those powers in section 127A-13(b) may only be exercised during an emergency period."

It should be noted that section 127A-5 gives the mayor of each county "direct responsibility for emergency management within the county,"[36] and that section 127A-12 applies largely to mayors, includes a subsection of powers specifically for mayors, and allows the governor to support requests from a mayor for assistance in responding to an emergency.

What is an emergency, and how do we determine if the situation exists to grant the executive such broad powers?

The next section, 127A-13, covers additional powers that may be exercised by the governor during an emergency period. This includes requiring quarantines; proscribing conduct, conditions, or acts that could be considered a danger to health and safety; suspending laws that conflict with emergency functions; and regulating or taking over "critical infrastructure facilities." The same section also gives mayors similar powers to suspend county laws.

But what is an emergency, and how do we determine if the situation exists to grant the executive such broad powers? As section 127A-14 explains, an emergency exists when the governor or mayor says it does. Section 127A-14(a) declares, "The governor may declare the existence of a state of emergency in the State by proclamation 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."

The term "emergency" is defined broadly under the statute, encompassing "any occurrence, or imminent threat thereof, which results or may likely result in substantial injury or harm to the population or substantial damage to or loss of property."[37] While there is no doubt that the COVID-19 pandemic—especially as understood at the time of the first proclamation—posed a threat that could result in substantial harm to Hawaii's population, one can see how this definition can also fit a wide range of potential threats and hazards.

As for who judges that something rises to the level of an emergency, again, that is solely at the discretion of the governor—or the mayor, in the case of a local emergency: "The governor or mayor shall be 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 or a local state of emergency in the county, as applicable."[38]

PHOTO BY ASSOCIATED PRESS

Finally, lest anyone doubt that the emergency powers statute was intended to give broad license to the governor and mayors to do as they see fit under an emergency proclamation, there is this directive under the "Policy and Purpose" section of the emergency management statute:

> It is the intent of the legislature to provide for and confer comprehensive powers for the purposes stated herein. This chapter shall be liberally construed to effectuate its purposes; provided that this chapter shall not be construed as conferring any power or permitting any action which is inconsistent with the Constitution and laws of the United States, but, in so construing this chapter, due consideration shall be given to the circumstances as they exist from time to time.[39]

As the statement of legislative intent indicates, there is little in the emergency management statute that constrains the governor's powers during an emergency period. While there is an automatic termination clause declaring that the state of emergency will end sixty days after the proclamation or with the issuance of a separate proclamation, there is no follow-up condition or consequence if an emergency exceeds the sixty-day mark.[40]

As Governor Ige's proclamations on the COVID-19 emergency demonstrate, there is nothing in the statute that prevents the extension of an emergency period merely by incorporating previous declarations in a new emergency proclamation.[41] The question then arises as to whether it is technically possible for an emergency period to be extended indefinitely under Hawaii law.

One could make the case that the inclusion of the sixty-day termination clause indicates that the legislature never intended the governor and mayors to be able to continuously extend an emergency. After all, if the legislature wanted the governor to have unchecked control over the length of an emergency period, it would have made more sense not to include the termination clause at all. However, such a reading would have to overcome the statement of legislative intent that instructs judges to interpret the statute in favor of the governor's actions and contend with the lack of any legislative check or consequence for exceeding the sixty-day period.[42]

What Is "Liberty" in a Lockdown?

Thus we find ourselves at an impasse. An emergency (including the COVID-19 pandemic) does not give the state special powers. Emergency proclamations are not allowed to infringe on our fundamental rights. However, as a practical matter, our conception of what "liberty" entails does not necessarily end with the Bill of Rights.

The growing dissatisfaction with the lockdown in Hawaii, the petitions to allow residents to return to work, and the complaints about seemingly arbitrary rules put forth in the name of public health (e.g., the difference between illegally standing on the beach and legally walking toward the water) all point to the fact that the common understanding of liberty and freedom encompass actions that do not fall easily into the "fundamental" freedoms that are protected by strict scrutiny.

Is there a view of legislative and executive powers that would limit both to better fit the popular[43] and expansive view of "rights"?

This idea can find some support in an early U.S. Supreme Court opinion that examines the possibility that some acts are simply beyond the authority of the legislature. In *Calder v. Bull*, 3. U.S. (3 Dall.) 386 (1798), Justice Samuel Chase posited that the only things a legislature is empowered to do are those to which the people presumably gave consent. Thus it follows that any acts that would be far in excess of reasonable consent are in excess of the legislature's conceivable powers, an example being the power to give one party's property to another.

"It is against all reason and justice for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it," Chase wrote.[44]

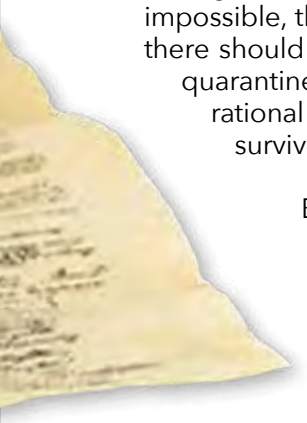
Barnett believes that Chase's argument is often miscategorized as a natural rights one. While natural rights are implicit in the discussion of powers, this is more an appeal to the presumed consent of the governed.[45] To (grossly) expand that analysis from legislatures in the late eighteenth century to executive actions in the twenty-first, we could ask whether the people would have ever contemplated giving the legislature and the governor such broad powers to constrain the activities of the healthy population of the state (indeed, of the entire population) for an indefinite period.

Political Problem: Why Lockdown Lawsuits Usually Fail

There is no question that some people feel that something fundamental was lost in the broad directives of the governor's emergency proclamations. This does not mean, however, that there is an easy route to dismantling the coronavirus lockdown via the courts. While a scattering of court victories in other states provide a template for how to challenge the lockdown, recent precedent suggests that it would be difficult to sue our way out of Hawaii's COVID-19 restrictions.

So far, courts are as likely to uphold lockdown orders as they are to overturn them. In other words, we are not as free as we think we are. Until the Hawaii Supreme Court or U.S. Supreme Court decides otherwise, the police powers of the state do, in fact, appear to include the ability to enforce mass quarantines of the healthy, shut down businesses, prohibit hiking in large groups, enforce the wearing of masks, and much more. Of the dozens of lawsuits filed against COVID-19 lockdown orders across the U.S., few have succeeded in persuading a court that the orders infringe on rights or exceed the state's power. Most of those that did succeed on a "rights" argument challenged a restriction on a fundamental right, such as the closure of gun shops.

This may change as more lawsuits find their way through the judicial system. It is unlikely, but not impossible, that an appellate court may decide that there should be a limit to the length or extent of a quarantine of the healthy. However, under the rational basis test, the lockdown orders have survived the first many months of challenges.



Businesses forced to close under the lockdown orders may face an even more difficult path to a successful suit than those challenging the restriction of a fundamental right. One of the most notable attempts to challenge the lockdown and stop the closure of businesses thus far was a Pennsylvania case that petitioned the state supreme court to end Governor Tom Wolf's regulation of "non-essential" businesses. The Pennsylvania Supreme Court rejected the claim.[46] The U.S. Supreme Court then declined to grant a stay of the governor's executive order (with neither comment nor recorded dissent), and the petition for certiorari was denied in October.[47]

Similarly, efforts by businesses to recoup their losses from an involuntary shutdown will also face an uphill battle. Though we may see some variation based on the facts in individual cases, lawsuits seeking remuneration based on the idea that the proclamations constituted a "government taking" of property under the Fifth Amendment are likely to fail.

In the situation created by the coronavirus lockdowns, there is no question of an exercise of eminent domain or a physical taking of property by the government. Thus, the question is whether the temporary closure of certain businesses as part of the response to the COVID-19 threat constitutes a regulatory taking.

While COVID-related takings lawsuits are likely to continue for years, and the results may vary according to the particular facts involved, such suits are unlikely to be broadly successful. In Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), the U.S. Supreme Court agreed that a government action that deprived owners of "all economically beneficial or productive use" of their property required compensation.[48] However, in a different case, the Court specifically stated that this was not the case for a "temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."[49] Again, in certain circumstances, a business might be able to make a case that the COVID-19 restrictions created a special hardship that led to a more permanent loss of property. But this is a limited argument that isn't likely to help most businesses affected by the shutdown.

One can debate whether the governor has a moral responsibility for the failure of so many businesses, or whether the wholesale closure of businesses and distinctions made between "essential" and "non-essential" were arbitrary or socially damaging. But again, as Lee Optical demonstrates, those are likely to be treated as political questions. As far as the courts are concerned, the lockdown doesn't need to be logical so long as the state can make a connection between the public health and the regulations.

Already, the U.S. Supreme Court has rejected a challenge to California's regulation of church attendance during the COVID-19 pandemic, with Chief Justice Roberts stating that the judiciary should be loath to intervene in emergency decision-making: "Where those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people."[50]

A dash of skepticism and a willingness to demand more "reason" in "rational basis analysis" isn't enough to support the hope that the Hawaii Supreme Court would strike down any element of the governor's COVID proclamations.

However, it is not certain that the Supreme Court would not strike down a governor's COVID-19 emergency order given the right set of facts. In issuing an emergency injunction against New York Governor Andrew Cuomo's limitations on religious gatherings, the majority noted a conflict between the restrictions placed on businesses and those placed on houses of worship in the same area, suggesting a possible First Amendment violation.[51] In his concurrence, Justice Neil Gorsuch cast doubt on how long the "emergency" justification can be used and added:

> Why have some mistaken this Court's modest decision in Jacobson for a towering authority that overshadows the Constitution during a pandemic? In the end, I can only surmise that much of the answer lies in a particular judicial impulse to stay out of the way in times of crisis. But if that impulse may be understandable or even admirable in other circumstances, we may not shelter in place when the Constitution is under attack. Things never go well when we do.[52]

Thus, the door has not completely shut on the possibility of a court decision that overrules the lockdown orders. Amidst the many decisions upholding the various lockdown orders across the nation, there have been two significant victories for those who see the shutdowns and stay-at-home decrees as an infringement of their fundamental rights.

In *County of Butler v. Wolf,* No. 2:20-cv-677 (W.D. Pa. Sept. 14, 2020), Judge William Stickman of the U.S. District Court for the Western District of Pennsylvania struck down several elements of the Pennsylvania COVID-19 response as unconstitutional. In his decision, the judge ruled that the limits on gathering sizes violated the First Amendment right of assembly, that the stay-at-home orders and closures of businesses violated the Fourteenth Amendment's Due Process Clause, and that the closure of non-essential businesses violated the Equal Protection Clause of the Fourteenth Amendment.

In the decision, Judge Stickman wrote directly about how the orders violated the right of movement and right to earn a living–thus employing a more expansive understanding of fundamental rights, as discussed earlier. The timing of the decision, which was issued many months after the initial emergency period and lockdown, was probably a factor in overcoming the tendency to grant the executive greater leeway in an emergency. In fact, the judge cited both the arbitrary nature of some of the lockdown orders and the lack of a set end date for the orders as a factor in his decision.[53] Stickman ended the decision with a reminder of the principle expressed in *Blaisdell*, that emergencies do not supersede liberty:

> The Constitution cannot accept the concept of a "new normal" where the basic liberties of the people can be subordinated to open-ended emergency mitigation measures. Rather, the Constitution sets certain lines that may not be crossed, even in an emergency. Actions taken by the Defendants crossed those lines. It is the duty of the Court to declare those actions unconstitutional.[54]

For those who see the lockdown as an infringement of our fundamental rights, *County of Butler v. Wolf* suggests a model for a challenge to the lockdown based on due process and the First Amendment. Whether another federal judge will agree with the district court's reasoning remains to be seen–though

Judge Stickman declined to stay his initial order in the case pending the appeal to the U.S. Court of Appeals for the Third Circuit.[55]

A different approach to challenging the lockdowns comes from Michigan, where the state supreme court was asked by the federal district court to weigh in on questions related to the governor's authority to issue new emergency orders after April 30, 2020, the end date of the legislature's extension of the emergency and disaster declarations. Governor Gretchen Whitmer had continued to issue emergency orders under two separate state emergency statutes, having renewed the emergency period following the April 30 deadline.

The court unanimously held that the governor did not have the power to issue or renew executive orders related to the COVID-19 emergency after the April 30 deadline.[56] In addition, a majority held that the governor could not extend the emergency, redeclare it, or otherwise try to circumvent the legislature's deadline under the state's Emergency Management Act, and that the state's Emergency Powers of the Governor Act of 1945 (which Whitmer also relied on in issuing her COVID-19 directives) is 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."[57]

The Michigan decision is a strong refutation of the idea that emergency powers can be extended indefinitely, and its observations on the way in which executive exercise of such emergency powers infringes on the legislature's authority—and upsets the balance of powers—is another promising avenue in challenging emergency statutes themselves. However, it is significant that Michigan's emergency powers law included a provision requiring legislative action to extend the emergency. Hawaii's emergency powers law currently lacks such a provision, leaving it open as to whether the legislature intended to delegate such broad powers to the governor without any meaningful time limit.[58]

Given these challenges, what is the future of an anti-lockdown lawsuit in Hawaii's state courts?

In theory, Hawaii businesses could challenge the arbitrary nature of the classifications between businesses that were allowed to open and those that were closed or subject to higher restrictions as a result of the governor's COVID-19 proclamations. The Hawaii Supreme Court has indicated the need for a slightly higher standard than the loose rational basis applied by the U.S. Supreme Court when evaluating government action. In *Silva v. City and County of Honolulu*, 165 P.3d 247 (Haw. 2007), the Hawaii Supreme Court rejected a distinction between the county and the state as defendants in a tort case (where the county had a more restrictive limitation period), saying it was arbitrary and lacked rational basis. Moreover, the Hawaii Supreme Court has demonstrated a willingness to look beyond the state's rationale for a government action in order to determine if the public good being pursued is truly a public good or merely pretext. In *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 198 P.3d 615 (Haw. 2008), the court expressed a place for skepticism in eminent domain cases, even where the reason for a government taking is a "classic" one like a road, holding that the government's assertions "need not be taken at face value where there is evidence that the stated purpose might be pretextual."[59]

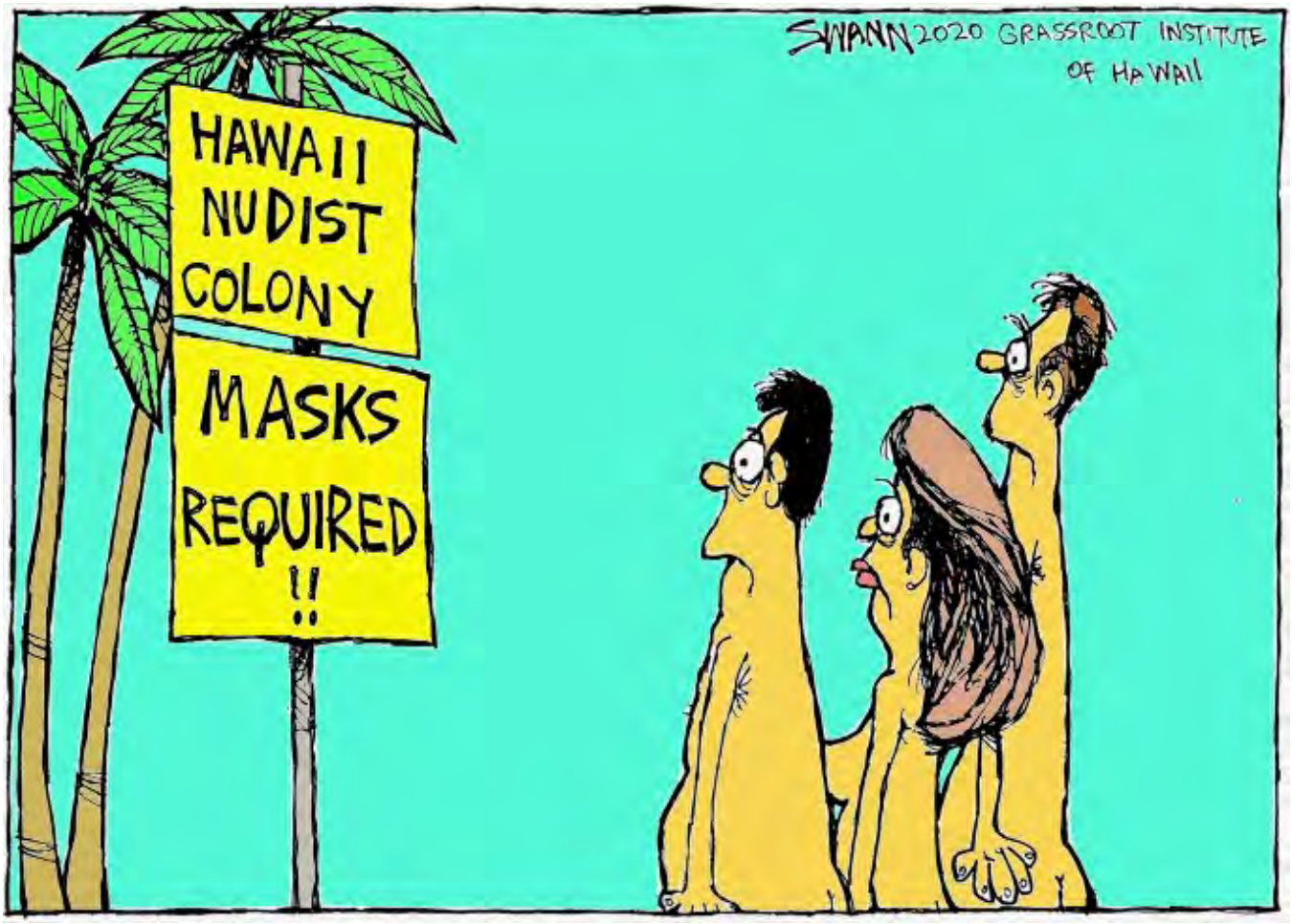
However, a dash of skepticism and a willingness to demand more "reason" in "rational basis analysis" isn't enough to support the hope that the Hawaii Supreme Court would strike down any element of the governor's COVID proclamations. On the contrary, the state court is more likely to show deference to the use of police powers in an emergency. In Mahai v. Suwa, 742 P.2d 359 (1987), the Hawaii Supreme Court upheld a decision from the Hawaii Board of Agriculture that required the slaughter of all cattle on Molokai and a two-year moratorium on ranching as part of an effort to eradicate bovine tuberculosis. With the facts of the case clearly establishing the existence of a health risk that the state was empowered to address, the court rejected the plea of ranchers who wanted to resume activities and kept the ranching moratorium in place. Given the established threat to public health expressed in the governor's coronavirus proclamations, there is no reason to expect that the courts would treat the COVID closures differently.

Pandemics and Privacy

There is one other area of concern that has become more pressing as Hawaii begins to open up: the possibility of state infringements on the right to privacy.

The Hawaii State Constitution places the right to privacy in plain language,[footnote] unlike the vague judicial formulation of the U.S. Constitution that the right is implied by "penumbra, formed by emanations."[60] In spite of this, many of the suggestions for handling the pandemic in a post-lockdown environment tend to require the exposure or release of highly private data—such as one's movements or intimate health details.

Any list of proposed measures to contain the coronavirus that are attended by significant privacy concerns would be incomplete. Between the advances in technology and the effort to find new solutions to curb the spread of the virus, some proposals will inevitably be left out. So far, we have seen proposals for temperature checks, exposure notification apps, contact tracing, facial recognition, using data or online behavior to track exposure or movements, ankle monitors, use of drones to track movement/obedience to quarantine orders,



health screenings, health monitoring, collection of personal information as a requirement for certain activities, travel limitations based on personal status, and more.

Such containment strategies raise several issues. First, they generally require disclosure of highly private information to a third party or to the government. Any such disclosure, if not already problematic on its face from the type of information requested, also has to contend with questions about how this information will be stored, who will be able to access it, and how long it will be held. For example, an app that stores information about your daily movements is highly intrusive, and there are serious privacy implications if this information could be handed over to the government and stored indefinitely.

Second, there is the problem of whether participation in any measure that requires collection of private data is truly voluntary. If use of a contact tracing app is a requirement for employment, for example, then it falls into a complex nexus of employment law and civil liberties. Recall that this isn't just a question of constitutionality. Other laws—like the Americans with Disabilities Act, state and federal laws regarding data privacy, and health privacy laws—may be implicated as well.

At present, there are many voices urging such mandatory measures as a condition of opening the state or operating a business. Thus, we must be vigilant in ensuring that this does not become a slippery slope for the collection and storage of increasingly private information in the name of a broad public health concern.

Finally, there is the question of effectiveness as related to intrusiveness. Consider, for example, temperature checks. While not particularly intrusive, a remote temperature check still contains data that we may not ordinarily want companies—or the government—to collect and retain. When the device measuring temperature is also able to collect other health data, such as heart rate or respiratory data—which is already possible using current technology[61]—the amount of personal data now able to be collected, stored, and accessed at will by the government or third parties becomes alarming. For the first time in human history, it is possible for the government and other third parties to keep and track intimate details of one's health, something that has long been considered highly private information. Once that information is on record and available, it is easy to imagine how it could be accessed and used in relation to things like employment, insurance costs or eligibility, and so on.

To alleviate privacy concerns, use of technology to identify possible COVID-19 carriers should be voluntary, minimally intrusive, not tied to identifying data, and not stored any longer than the two-week incubation period. However, there is little indication that such a system would be particularly useful in containing the virus's spread. Temperature checks are both overly broad (in that they will "tag" and possibly penalize individuals with unrelated conditions) and under-inclusive (in that they are likely to miss the asymptomatic carriers who are said to be responsible for much of the virus's spread).

Given that the reopening period will be a lengthy one, during which the state will struggle to balance public health with the need to resume business, the privacy questions that accompany these containment efforts are likely to remain with us for some time. Moreover, if the experience of the COVID-19 lockdowns persuades policymakers to adopt a more narrow approach to future emergencies, we are likely to see such measures introduced as a first line of response in a future scenario.

If the Problem Is Political, the Solution Must Be Political Too

So what happens now? Is there any recourse for those concerned about the use of the police power to constrain civil liberties during an emergency like the COVID-19 pandemic as it stands now?

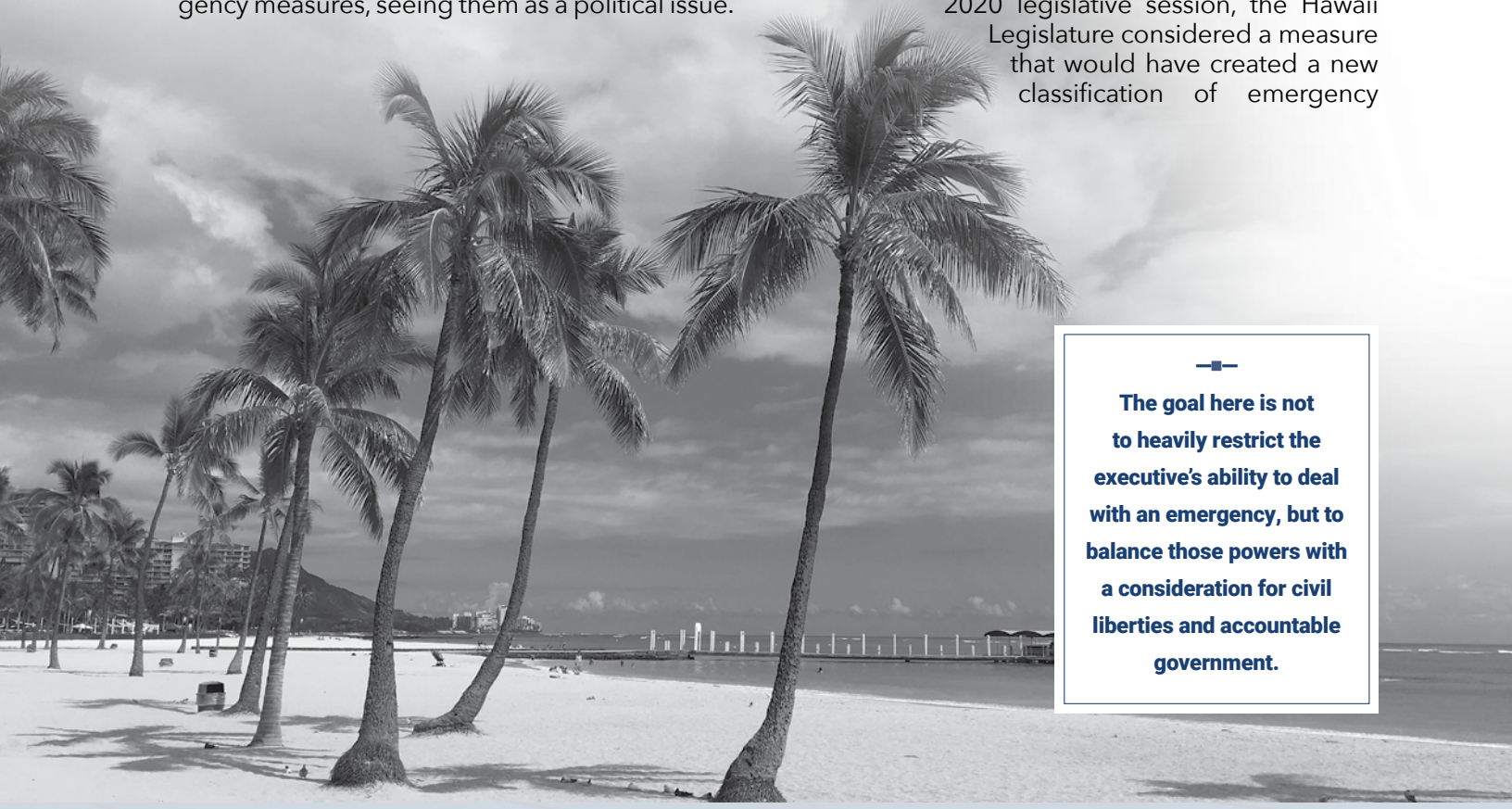
- The lockdowns flow from the police power of the state.
- There is a strong sentiment that personal freedoms have been lost—or remain at risk—as a result.
- It will be difficult to sue our way out of such restrictions. Courts are likely to apply a low level of scrutiny to such measures, so long as they are applied fairly.
- The courts are reluctant to second-guess emergency measures, seeing them as a political issue.

Where does that leave the average citizen who is frustrated with the loss of personal freedom or alarmed at the possibility of seeing his privacy slip away? Moreover, is there anything that can be done to change the government response in a future health emergency?

Ironically, the answer comes from the courts' disinclination to interfere. As they have categorized this as a political question, the answer is primarily a political one.

In short, we must change the laws governing emergency powers in order to change how emergencies are handled.

Already, there have been some efforts to reconsider the state's emergency powers law. During the 2020 legislative session, the Hawaii Legislature considered a measure that would have created a new classification of emergency



The goal here is not to heavily restrict the executive's ability to deal with an emergency, but to balance those powers with a consideration for civil liberties and accountable government.

powers in the case of a health emergency. Introduced in the state senate though a "gut and replace" process, H.B. 2502, 30th Leg. (Haw. 2020) would have given the state Director of Health (on consultation with the governor) broad powers to respond to a declared or potential health emergency. In addition to concerns about privacy and civil liberties, the bill also raised questions about accountability.[62]

In light of the governor's authority under the existing law, the changes envisioned in H.B. 2502 would have done little to address existing concerns about civil liberties. The Hawaii Legislature would be better advised to move in the opposite direction and focus on reforms that would increase the executive's accountability to the public.

As noted above, Hawaii's emergency management statute gives the governor unchecked power to declare and manage emergencies. The statute makes no distinction between health emergencies and other emergencies (such as natural disasters). Though there is a sixty-day termination clause on those emergencies, the termination has no teeth. Nor is the governor required to justify or explain his emergency orders.

Hawaii's experience with the COVID-19 pandemic suggests that the legislature should refine the emergency power law so as to make a distinction between different types of emergencies. After so many months spent in layered county and state regulations, it is clear that there is a need to differentiate a health emergency from other types of emergencies.

Following our experience with the COVID-19 crisis, if one were to introduce five basic principles for dealing with emergencies touching on public health, they would have to be as follows:

1

Restrictions and regulations should be narrowly tailored, with a clear connection between the restriction and the public health aim.

2

We must reinforce the importance of adherence to the standards of due process and protection of individual liberties. The government should bear the burden of proving the necessity and reasonableness of an order that deprives an individual of a constitutional right or shuts down a business.

3

Emergency actions must demonstrate respect for the balance of powers. The legislature should not give the executive an open-ended ability to exercise legislative authority (e.g., via the suspension and alteration of state law, the creation of new laws and crimes, etc.).

4

Government should strive for more—not less—transparency in its decision-making and directives.

5

After a reasonable period of time, emergency directives should be subject to a meaningful "check" on executive power. This can come from the state legislature or—in the case of actions by a mayor—the county council.

With those principles in mind, we can consider a few changes to Hawaii's emergency management statute that could help satisfy concerns about overbroad directives; loss of rights; confusing, overlapping orders on the county level; and endless lockdowns. The goal here is not to heavily restrict the executive's ability to deal with an emergency, but to balance those powers with a consideration for civil liberties and accountable government.

Amend section 127A-14

First, section 127A-14 should be amended to make the automatic termination clause more meaningful. While the clause in itself is unobjectionable, the section must address the possibility of endless proclamations and the lack of any legislative oversight regarding the substance of the emergency measures.

One reason for more clarity in our emergency mandates is to guard against perverse incentives for extending them. For example, the Federal Emergency Management Agency is authorized to reimburse local governments for costs associated with "emergency protective measures" in response to the COVID-19 pandemic."[63] So if Hawaii's emergency periods were being extended simply to make it easier for the state to access those or other special resources, that would be all the more reason to address the lack of a meaningful check on the governor's emergency powers." A perverse incentive to extend an emergency functions as an illiberal barrier to the exercise of personal freedoms. The state should not be able to hold businesses and people's lives in limbo in order to satisfy an accounting requirement or legal loophole.

Hawaii's sixty-day termination clause for emergency periods is echoed by many other states, but typically they have added a requirement of some legislative approval or the ability to end the emergency by proclamation. For example:

- Both Georgia[64] and Indiana[65] put a thirty-day limit on emergencies. In both states, the governor can renew the emergency, but the state legislature has the ability to terminate the state of emergency by concurrent resolution.

- New Hampshire has a similar provision, allowing for the termination of an emergency by concurrent resolution, but the emergency period is limited to twenty-one days.[66]

- New Mexico has a provision specific to public health emergencies, which automatically end after thirty days unless the governor renews the emergency following "consultation with the secretary of health."[67]

- Pennsylvania has a limit of ninety days for an emergency period unless renewed by the governor. As in other states, the state of emergency can be terminated by a concurrent resolution from the state legislature.[68]

- Alaska has a thirty-day limit on emergency proclamations. The emergency period can only be extended by the legislature via concurrent resolution.[69]

- Utah has a thirty-day limit on a state of emergency, unless extended by a joint resolution from the legislature, which also has the ability to end the emergency at any time.[70]

- In the U.S. territory of Guam, the legislature may override the governor's emergency renewals and terminate a public health emergency at any time "upon finding that the occurrence of an illness or health condition that caused the emergency does not or no longer poses a high probability of a large number of deaths in the affected population, a large number of incidents of serious permanent or long-term disability in the affected population or a significant risk of substantial future harm to a large number of people in the affected population."[71]

The experience of Governor Ige's unbounded emergencies, combined with the problem of overlapping county and state restrictions, demonstrates the need to overhaul Hawaii's emergency powers law to reflect the best practices listed above. Hawaii should adopt a similar model, wherein the governor's emergency actions must be affirmed by the legislature after a reasonable period. Hawaii's emergency powers law should be amended so that legislative approval of the governor's emergency proclamation(s) is required at the thirty-day mark. In addition, the Hawaii Legislature should be able to terminate the emergency period at any time via concurrent resolution. A similar provision should be in place for the legislative termination of a mayor's emergency orders, whether via the legislature or the relevant county council.

Rational basis with bite

Second, the statement of broad interpretive latitude in section 127A-1(c) of the Hawaii emergency management statute could be modified slightly to indicate that courts shouldn't give such wide deference to all actions under the emergency management statute. Ideally, this would be part of a larger, more general effort to replace rational basis scrutiny with a slightly higher standard (sometimes termed "rational basis with bite"). It is fortunate that the Hawaii Supreme Court already appears to be moving in this direction, where the government must demonstrate something more than a loose connection between a regulation and the public interest. The legislature could encourage this by ensuring that legislation enabling administrative regulations directs executive agencies to demonstrate a clear, rational connection between a rule and its aims.

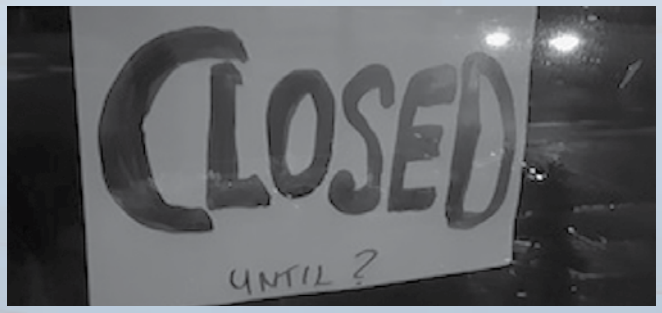
If properly formulated, it might also help to distinguish between types of emergency, thus setting out the limits of executive and administrative power in a pandemic, as contrasted with a natural disaster or other emergency. By creating a legal distinction between health-related emergencies and other emergencies, the legislature could provide more specificity on the conditions and limitations associated with state quarantine actions. In the process, they could take action to protect individual rights and due process by requiring the government to demonstrate the necessity and reasonableness of actions that deprive citizens of liberty or close businesses on a wide scale.

For those who are concerned about the loss of liberties as a result of the coronavirus lockdowns, the answer is in their own hands and at the ballot box.

Protect transparency

In addition, there is a need to protect transparency in emergencies. Yet, it would be unreasonable not to allow the governor latitude to modify the requirements of the sunshine law and open records laws when strict adherence to their terms might endanger public health or overburden government agencies dealing with the emergency.

Ideally, it would be unnecessary to instruct the government that transparency must be preserved and promoted as much as possible during an emergency period. Unfortunately, experience has shown that a positive statement is required. Therefore, the emergency management statute should be amended to clarify the extent to which chapter 92 (relating to Hawaii's sunshine and open records laws) may be limited during an emergency. The model for such an amendment could be found in the revised guidance on transparency issued in Exhibit H of the governor's seventh supplementary proclamation, wherein agencies were instructed to make a good faith effort to comply with the sunshine law (using technology as appropriate) but were not prevented from completing important business if those good-faith efforts failed. Similarly, it is reasonable to relax statutory deadlines for open records requests during an emergency period, but not to suspend the law altogether.



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Address privacy concerns

Finally, we could begin to address the privacy concerns raised by cer-

tain containment "solutions" to the epidemic by enacting legislation that protects privacy, especially regarding the collection and storage of personal data. Not only should the collection of private data pertaining to health or other personal information require consent, but it should not be tied to a means of personal identification, stored indefinitely, or shared with third parties (including the government) without consent or court order.

One hopes that most of these measures will be unnecessary. The COVID-19 pandemic is ongoing, and it will be a long time before we finish evaluating the efficacy of the government response. Already, emerging research suggests that a more limited quarantine approach may be more effective in balancing freedom, economic, and safety concerns.[72] In the future, technological and scientific advances may allow us to adopt a more targeted response to a widespread public health threat like the COVID-19 pandemic.

However, we should not forget the lessons learned in 2020. For those who are concerned about the loss of liberties as a result of the coronavirus lockdowns, the answer is in their own hands and at the ballot box.

Because the courts will defer to political decision makers in a time of emergency, we must interrogate how our elected officials will approach an emergency situation. It is possible to amend the law in order to balance the executive's emergency power, but in the end, it will still come down to the people in charge.

In other words, if Hawaii residents want to ensure that an emergency response is narrowly tailored, rational, and transparent, then they will have to elect those who will help put such guidelines in place.

Endnotes

1 *Haw. Emergency Proclamation for COVID-19* (https://governor.hawaii.gov/wp-content/uploads/2020/03/2003020-GOV-Emergency-Proclamation_COVID-19.pdf), Office of the Governor (March 4, 2020).
2 Haw. Rev. Stat. § 127A (2016).
3 *Haw. Supplemental Emergency Proclamation for COVID-19* (https://governor.hawaii.gov/wp-content/uploads/2020/03/2003109-ATG_COVID-19-Supplementary-Proclamation-signed.pdf), Office of the Governor (March 16, 2020).
4 Uniform Information Practices Act, Haw. Rev. Stat. ch. 92F (2016).
5 Public Agency Meetings and Records, Haw. Rev. Stat. ch. 92 (2016).
6 Haw. Supplemental Emergency Proclamation for COVID-19, Office of the Governor ¶ 4(b) (March 16, 2020).
7 *Haw. Second Supplemental Proclamation – COVID-19* (https://governor.hawaii.gov/wp-content/uploads/2020/03/2003152-ATG_Second-Supplementary-Proclamation-for-COVID-19-signed.pdf), Office of the Governor (March 21, 2020).
8 *Haw. Third Supplementary Proclamation – COVID-19* (https://governor.hawaii.gov/wp-content/uploads/2020/03/2003162-ATG_Third-Supplementary-Proclamation-for-COVID-19-signed.pdf), Office of the Governor (March 23, 2020).
9 Cybersecurity and Infrastructure Security Agency, *Identifying Critical Infrastructure During Covid-19* (March 18, 2020, https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19).
10 Haw. Third Supplementary Proclamation – COVID-19, Office of the Governor ¶ I(A) (March 23, 2020).
11 *Haw. Fourth Supplementary Proclamation for COVID-19* (https://governor.hawaii.gov/wp-content/uploads/2020/03/2003248-ATG_Fourth-Supplementary-Proclamation-for-COVID-19-distribution-signed.pdf), Office of the Governor (March 31, 2020).
12 *Haw. Fifth Supplementary Proclamation for COVID-19* (https://governor.hawaii.gov/wp-content/uploads/2020/04/2004088-ATG_Fifth-Supplementary-Proclamation-for-COVID-19-distribution-signed.pdf), Office of the Governor (April 16, 2020).
13 Id. at ¶ I(B)(1).
14 Tom George, *Video on confusion over new Oahu COVID-19 rules goes viral* (https://www.kitv.com/story/42532518/video-on-confusion-over-new-oahu-covid19-rules-goes-viral), KITV News (Aug. 23, 2020).
15 Id. at ¶ II.
16 *Haw. Sixth Supplementary Proclamation Amending and Restating Prior Proclamations and Executive Orders Related to the COVID-19 Emergency* (https://governor.hawaii.gov/wp-content/uploads/2020/04/2004144-ATG_Sixth-Supplementary-Proclamation-for-COVID-19-distribution-signed.pdf), Office of the Governor (April 25, 2020).
17 Id. at ¶ III(C)(1).
18 *Haw. Seventh Supplementary Proclamation Related to the Covid-19 Emergency* (https://governor.hawaii.gov/wp-content/uploads/2020/05/2005024-ATG_Seventh-Supplementary-Proclamation-for-COVID-19-distribution-signed-1.pdf), Office of the Governor (May 5, 2020).
19 *Haw. Eighth Supplementary Proclamation Related to the Covid-19 Emergency* (https://governor.hawaii.gov/wp-content/uploads/2020/05/2005088-ATG_Eighth-Supplementary-Proclamation-for-COVID-19-distribution-signed.pdf), Office of the Governor (May 18, 2020).
20 *Haw. Ninth Supplementary Proclamation Related to the Covid-19 Emergency* (https://governor.hawaii.gov/wp-content/uploads/2020/06/2006097A-ATG_Ninth-Supplementary-Proclamation-COVID-19-distribution-signed.pdf), Office of the Governor (June 10, 2020).
21 *Haw. Tenth Supplementary Proclamation Related to the Covid-19 Emergency* (https://governor.hawaii.gov/wp-content/uploads/2020/07/2007090-ATG_Tenth-Supplementary-Proclamation-for-COVID-19-distribution-signed.pdf), Office of the Governor (June 10, 2020).
22 *Haw. Eleventh Proclamation Related to the COVID-19 Emergency* (https://governor.hawaii.gov/wp-content/uploads/2020/08/2008022-ATG_Eleventh-Proclamation-for-COVID-19-distribution-signed.pdf), Office of the Governor (Aug. 7, 2020).

23 *Haw. Twelfth Proclamation Related to the COVID-19 Emergency* (https://governor.hawaii.gov/wp-content/uploads/2020/08/2008089-ATG_Twelfth-Proclamation-COVID-19- distribution-signed.pdf), Office of the Governor (Aug. 20, 2020).
24 *Haw. Thirteenth Proclamation Related to the COVID-19 Emergency* (https://governor.hawaii.gov/wp-content/uploads/2020/09/2009139-ATG_Thirteenth-Supplementary-Proclamation-for-COVID-19-distribution-signed.pdf), Office of the Governor (Sept. 23, 2020).
25 *Haw. Fourteenth Proclamation Related to the COVID-19 Emergency* (https://governor.hawaii.gov/wp-content/uploads/2020/10/2010095-ATG_Fourteenth-Proclamation-for-COVID-19-distribution-signed.pdf), Office of the Governor (Oct. 13, 2020).
26 *Haw. Fifteenth Proclamation Related to the COVID-19 Emergency* (https://governor.hawaii.gov/wp-content/uploads/2020/11/2011051-ATG_Fifteenth-Proclamation-Related-to-the-COVID-19-Emergency-distribution-signed.pdf), Office of the Governor (Nov. 16, 2020).
27 Exhibit J set out eleven exceptions to the broad mask mandate, such as when eating or drinking, subject to health and safety regulations, when outside and able to maintain six feet of difference from others at all times, etc. It also required businesses or operations to refuse service or admission to anyone not in compliance with the mandate.
28 *Haw. Sixteenth Proclamation Related to the COVID-19 Emergency* (https://governor.hawaii.gov/wp-content/uploads/2020/11/2011098-ATG_Sixteenth-Proclamation-Related-to-the-COVID-19-Emergency-distribution-signed.pdf), Office of the Governor (Nov. 23, 2020).
29 *Haw. Seventeenth Proclamation Related to the COVID-19 Emergency* (https://governor.hawaii.gov/wp-content/uploads/2020/12/2012088-ATG_Seventeenth-Proclamation-Related-to-the-COVID-19-Emergency-distribution-signed.pdf), Office of the Governor (Dec. 16, 2020).
30 Such was the confusion regarding the overlapping county and state regulations that—at the onset of Honolulu's second lockdown in August 2020—it was unclear whether one would be permitted to take a walk in a city park with one's family members. One lawyer told the Grassroot Institute that trying to address the needs of clients on neighbor islands was a near impossibility, thanks to quarantine restrictions on interisland travelers. A popular series by Grassroot Institute cartoonist Dave Swann even lampooned some of the regulatory inconsistencies, such as the fact that drive-through restaurants were allowed, but drive-through car washes were not. For more, see *Swann's page* (https://www.grassrootinstitute.org/dave-swann-cartoons/) on the Grassroot Institute website.
31 Home Building & Loan Ass'n v. Blaisdell et. ux., 290 U.S. 398, 425–426 (1934). Though the quoted portion indicates that the Court rejected the notion that special powers devolved to the government as a result of an emergency, the decision goes on to note that "While emergency does not create power, emergency may furnish the occasion for the exercise of power." As explained above, the powers used by the executive in the COVID-19 emergency were powers that already existed by virtue of the state's ability to preserve health and safety and the exercise of Hawaii's emergency powers statute.
32 It should be noted, however, that there are some who believe that this case would not be decided in the same way today, and that even courts which cite Jacobson in upholding government action use a higher standard of scrutiny than the Court relied on in Jacobson. See Lindsay F. Wiley & Stephen I. Vladeck, Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review, 133 Harv. L. Rev. F. 179 (2020) (arguing that the "suspension model" of review of government actions during a crisis is poorly suited to the COVID-19 crisis and putting forth the case for "ordinary review").
33 Washington v. Glucksberg, 521 U.S. 702, 772 (1997).
34 Williamson v. Lee Optical, 348 U.S. 483, 487–488 (1955).
35 Randy E. Barnett, Judicial Engagement through the Lens of Lee Optical, 19 Geo. Mason L. Rev. 845, 860 (2012).
36 Haw. Rev. Stat § 127A-5(a) (2016).
37 Haw. Rev. Stat § 127A-2 (2016).
38 Haw. Rev. Stat § 127A-14(c) (2016).
39 Haw. Rev. Stat § 127A-1(5)(c) (2016).
40 Haw. Rev. Stat § 127A-14(d) (2016).
41 At present, multiple lawsuits have been filed challenging Governor Ige's more recent orders based on the sixty-day termination clause. Time will tell how successful this argument will be in the face of the court's tendency to defer to the exercise of police powers in the face of a declared emergency.
42 For a detailed analysis of the Hawaii emergency powers statute and the implications of the sixty-day limit, see Robert H. Thomas, *Hoist the Yellow Flag and Spam® Up: The Separation of Powers Limitation on Hawaii's Emergency Authority* (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3632081), 43 U. Haw. L. Rev. ___ (forthcoming 2020).
43 "Popular" in this phrasing refers to a conception of rights more in keeping with a common cultural understanding of American "rights" in contrast to the legal ones. Such a "popular rights" view would encompass concepts like "your right to swing your fist ends at my face" or "finders, keepers."
44 Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798).
45 Barnett, supra note 20, at 846–847.
46 Friends of Danny DeVito v. Wolf, 227 A.3d 872 (Pa. 2020).
47 *Docket for 19-1265* (https://www.supremecourt.gov/docket/docketfiles/html/public/19-1265.html), Supreme Court of the United States (May 5, 2020).

48 Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992).
49 Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 332 (2002).
50 South Bay United Pentecostal Church, et al. v. Newsom, 590 U.S. ____ (2020).
51 Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U.S. ____ (2020)
52 Id. at 5-6.
53 County of Butler v. Wolf, No. 2:20-cv-677, 17–19 (W.D. Pa. Sept. 14, 2020) (explaining the decision to apply "regular" constitutional scrutiny rather than a more deferential standard of review).
54 Id. at 66.
55 Id. (denying defendant's motion to stay the judgment vacating certain portions of the governor's COVID regulations).
56 In re Midwest Institute of Health, PLLC v. Whitmer, No. 161492 (Pa. Oct. 2, 2020).
57 Id. at 48.
58 So far, that has been exactly the response of Hawaii lower courts, which have declined to interpret the state's emergency relief statute in a way that would disallow the governor's many extensions. See Partal v. Ige, Civ. No. 3CCV-20-0000277 (Oct. 15, 2020).
59 C&J Coupe, 198 P.3d 615, 644 (Haw. 2008).
60 Griswold v. Connecticut, 381 U.S. 479, 484 (1965).
61 Ali Abdulelah Al-Naji et al., *Monitoring of Cardiorespiratory Signal: Principles of Remote Measurements and Review of Methods* (https://dx.doi.org/10.1109/ACCESS.2017.2735419), 5 IEEE Access 15776 (2017).
62 The powers granted to the director of health in a declared health emergency under H.B. 2502 included, but were not limited to, closing businesses and schools, enforcing quarantine, requiring contact tracing and health screenings, and any other action deemed necessary to respond to the emergency. The bill died after the House of Representatives disagreed with the Senate's language, and the legislative session ended before a possible conference committee could be selected.
63 *Coronavirus (COVID-19) Pandemic — FEMA Public Assistance (PA) Grant Program for State and Local Governments and Private Nonprofits (PNP) Organizations* (https://dod.hawaii.gov/hiema/rpa-covid-19/), Hawaii Emergency Management Agency (2020).
64 Ga. Code Ann. § 38-3-51(a) (2014).
65 Ind. Code § 10-14-3-12(a).
66 N.H. Rev. Stat. § 4:45, II(a) (2019).
67 N.M. Stat. Ann. § 12-10A-5 (2018).
68 35 Pa. Cons. Stat § 7301(c).
69 Alaska Stat. § 26.23.020 (2010).
70 Utah Code Ann. § 53-2a-206 (2020).
71 10 Guam Code Ann. § 19405(c).
72 See Daron Acemoglu et al., *Optimal Targeted Lockdowns in a Multi-Group SIR Model* (https://www.nber.org/papers/w27102.pdf), NBER Working Paper No. 27102 (June 2020). ("We find that optimal policies differentially targeting risk/age groups significantly outperform optimal uniform policies and most of the gains can be realized by having stricter lockdown policies on the oldest group. [...] Overall, targeted policies that are combined with measures that reduce interactions between groups and increase testing and isolation of the infected can minimize both economic losses and deaths in our model.")

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