Exploring Intra-State Tensions in Government Responses to COVID-19

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Abstract: Research and attention to federalism has vastly increased due to the COVID-19 pandemic. While political polarization has largely been used as a scapegoat to explain the U.S. policy response to the pandemic, federalism has also been credited and blamed for the policy response and has played an important role in providing avenues for conflict. This article explores intra-state conflict stemming from COVID-19. We utilize ten exploratory cases to identify three distinct but interrelated patterns of conflict that emerged within U.S. states, focusing on tensions between the executive and legislative branches, between bureaucratic officials and the legislature, and between state and local governments. We then examine a series of questions regarding the implication of these conflicts, focusing on the issuance of executive orders, the responses undertaken by officials who disagreed with and sought to push back against these orders, and the ways that inter-branch and inter-governmental disagreements about these orders were resolved.

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Scholars of federalism and intergovernmental relations have analyzed a number of facets of government responses to COVID-19 (e.g., Kettl 2020; Jacobs 2021). Some scholars have addressed issues of comparative federalism and levels of cooperation and conflict between national and subnational governments in federal systems, both in the U.S. and elsewhere (Rocco, Beland, and Waddan 2020; Benton 2020). Scholars of American federalism have paid particular attention to understanding and recounting the conflicts that emerged along partisan lines between Presidents Donald Trump and Joe Biden and state officials of the opposite party regarding the boundaries, responsibilities, and constitutionality of government officials' responses to the ongoing crisis (Bowling, Fisk, and Morris 2020; Gordon, Huberfeld, and Jones 2020; Halpern 2020). Less attention has been paid to conflicts within state governments, with some exceptions. These include scholarship that has addressed conflicts between local and state governments, and other work that has begun the process of understanding conflicts within state governments in certain areas, particularly the tensions between public health and economic interests (Lin and Meissner 2020; Knauer 2020). Nevertheless, understanding conflict surrounding the exercise of state executive power remains understudied, and this is our focus in this article.

We rely on executive orders, legislative records, court cases, and news accounts in ten key states to investigate various questions about intra-state conflict stemming from COVID-19. First, what executive orders were issued in response to COVID-19, and who issued these orders? Second, what, if any, inter-branch conflict emerged in response to those orders at the state level? Third, when conflict occurred over issuance of executive orders, how did officials (both elected and administrative) respond by utilizing formal mechanisms to demonstrate their disagreement? Fourth, to what degree were these mechanisms of pushback ("pushback actions") successful in mitigating executive power? And finally, what conclusions can we reach about the specific

circumstances associated with executive power being able to withstand efforts to limit or overturn it, or, on the other hand, what caused pushback actions to be successful?

We advance several conclusions based on our analysis of intrastate conflict in ten key states. First, we note that executive orders were promulgated primarily by governors but also by state public health officials under the explicit auspices of the governor and were issued to an extent and on a range of subjects virtually unprecedented in the history of the United States. The conflicts spawned from the issuance and execution of these orders took three main forms: executive-legislative, bureaucratic-legislative, and executive-local government. The type of responses to executive orders from legislatures and local governments (a term that herein pertains to municipalities, special districts, and any sublevel governments) ranged widely, and included the use of existing statutory tools to limit executive and bureaucratic emergency power, as well as the threat and use of newly proposed statutory limitations, constitutional amendments, and/or the filing of lawsuits. We find that these efforts to meaningfully limit the power of executive orders were mostly unsuccessful, but in over half of the states we observe, legislators did achieve some degree of success, generally by limiting the duration and effect of the orders. Finally, we discuss some of the possible reasons why efforts were successful in some states in overturning or limiting the effect and duration of executive orders.

Studying intrastate conflict in the U.S. federal system regarding COVID-19 is important because much of the policy responses to the pandemic have been undertaken at the state level by governors and appointed agency directors through the auspices of emergency powers. Many of these powers, while granted for short periods of time through executive order, had not been applied for a public health emergency in the past. Some research is beginning to suggest that some governors may have acted outside of the scope of constitutionally granted rights to the

executive, which may be, in part, responsible for the rise in contentious executive-legislative interactions. Regardless of the potential to question the constitutionality of emergency actions taken by executive order, the pandemic has also given rise to hotly contested political disputes, as the policymaking emphasis oscillated between a public health and economic crisis.

Federalism, COVID-19, and Conflict

While scholars have analyzed conflict over COVID-19 in federal systems across several dimensions, limited research has focused specifically on intra-state conflicts, i.e., between branches and levels of government within states. To date, research has included discussions of state preemption of local governments, resiliency in local governments, the ways in which states have delegated enforcement responsibility, and the ways in which some local or state governments have coordinated and cooperated with others (Dzigbede, Gehl, and Willoughby 2020; McDonald, Goodman and Hatch 2020; Weissert et al. 2021; Curley and Federman et al. 2021; Curley, Harrison, and Federman 2021). However, intra-state conflict remains understudied, and therefore we focus here on outlining some of the areas in which federalism has been addressed in the context of COVID-19 from that perspective.

To understand the reason that so much conflict exists even in this context, we must turn to the literature that describes how pronounced political polarization has been in the context of the U.S. COVID-19 policy response, which draws tension from economic and public health policy priorities. Kincaid and Leckrone (2020) argue that the U.S. utilizes a state-led dual federalism approach that recognizes the limits of constitutional authority and permissible actions across different levels of government. The interaction of a state-led dual federalism approach and political polarization has created opportunities for tension and conflict to emerge (Kincaid and

Leckrone 2020). One might consider the role of cooperative federalism (see recent work from Secchi and McDonald 2019; Abrams et al. 2018) where national and sub-national actors work together to address an issue. However, more recent research speaks to the fact that uncooperative federalism can be activated by political polarization (Lin 2020), making it more challenging for different levels of government to work together. Political polarization under this approach can create policy vacuums that lead to the adoption of policies that become politicized (Milosh et al. 2020), such as mask mandates and stay-at-home orders. In fact, the United States has been found to be the most polarized among advanced economies (Mordecai and Connaughton 2020). The implications of this polarization have even been found to affect public perceptions of which level of government holds policymaking responsibility to address the crisis (Jacobs 2021).

Given the extraordinarily divisive policy making environment that surrounds the pandemic, we need to ask questions that explore how political division creates conflict in policymaking. However, here we are most concerned with the ways in which conflict has emerged specifically in response to emergency executive orders, a unique and challenging issue that has yet to be considered to a significant extent by scholarship, perhaps because such an opportunity has not arisen previously. With this approach in mind, three types of conflict are outlined and explored below.

One form of potential conflict resulting from the political polarization surrounding the crisis can occur if different parties control the state legislative and executive branches. Given the elongated use of emergency powers by governors to address COVID-19 and broader political tensions, such a division of power within a state may create conflict. Research on divided government has been connected to gridlock in policymaking (Bowling and Ferguson 2001), with an emphasis of attention given to the federal level (Westmoreland, Bloche, and Gostin 2021).

However, divided government also has implications for actions of state governors in addressing COVID-19 (Riggs and Catalano 2020). This is important because legislators and governors both represent a body of constituents, which means they have independent political interests and may vie for political remuneration or act in self-interest (Bernick and Bernick 2008).

The second form of potential conflict may present itself when a governor delegates decision-making power to the bureaucracy. Public health directors have had a large policymaking role in many states, thereby leading them to receive attention and criticism from the public (Armus 2020). In most policy-making scenarios, bureaucrats have limited political power; moreover, the power they possess generally comes from their ability to bargain and, in specific policy arenas, their particular skills, knowledge, abilities that may contribute to that ability to bargain (Brower and Abolafia 1997; Allison and Zelikow 1971). Agency interests likely intersect with those of the public and leadership of their organization, but agency interests may be mitigated by executives and the implementation process (Meier 1987; Brower and Abolafia 1997; Stillman 2004). These "decision-making tables" in any forum consist of both scientific and technical experts, along with political loyalists and appointees. Conflict exists, particularly within the debate over taking a resource-oriented approach to policy often favored by administrators, as opposed to a broader political approach that considers factors outside of the immediate responsibility, such as electoral concerns, area rewards, and a focus on campaign promises or broader agendas (Lipsky 1980; Meier, Stewart Jr, and England 1991). This conflict is most likely to instigate political tensions between legislative and executive branches, particularly under the condition of divided government.

The last type of conflict stems from governors' (often Republican governors) use of emergency powers to preempt city mayors' (often Democratic mayors) policies (Mallinson

2020). Preemption of local action can limit democratic accountability (Sellers and Scharff 2020). For example, an elected Democratic mayor might have a constituent base that would prefer more aggressive public health policy but is limited by a policy ceiling established at the state level prohibiting local adoption of mask mandates, business closures, mandatory vaccination, or other public health supported policies. This means that there may be a growing tension or conflict between state and local governments.

Case Selection and Comparisons

To identify and explain the conflicts that arise around federalism and intergovernmental relations in the context of COVID-19 in the United States, we look at the pandemic policies of several states, chosen on specific criteria, to identify patterns in these policies and the actions taken in response to them. In order to discuss the conflict related to legislative oversight of the coronavirus executive response, we utilize the National Conference of State legislatures database on "Legislative Oversight of Executive Authority," with a focus on responses that occurred during 2020 (NCSL 2021a). We analyze ten states: Arizona, Florida, Hawaii, Maryland, Massachusetts, Michigan, Nevada, Ohio, Pennsylvania, and Wisconsin, laying out their demographic and political environments, COVID-19 situation, policy response, and background on their response to the crisis. Utilizing case studies is appropriate in this particular instance, as this work is heavily descriptive, exists within a contained and relatively small pool of potential units (fifty states), and provides rich evidence for comparison (Gerring 2004).

Given our interest in understanding how federalism may have led to or created conflict in states' response to COVID-19, we are strategic in our case selection, making sure to vary the partisan composition of the state government and whether the COVID-19 response was

centralized through the governor or decentralized with power transferred to the bureaucracy or local governments. Our case selection is exploratory with an emphasis on representing diversity in characteristics (Seawright and Gerring 2008). We demonstrate below the variation that motivated our case selection. First, we identify the status of divided government across the states. This offers us one important dimension of variation. This breakdown is evident in Table 1, which we use to ensure that we have adequate representation in our cases. We then arrange the states into four categories: divided government (including states having a Republican governor and Democratic legislature as well as states having a Democratic governor and Republican legislature), unified Democratic, and unified Republican.

[Insert Table 1 about here]

Below, we offer additional insight into our categorization scheme. In order to determine the response strategies of each state, we utilize a process-tracing approach to coding executive orders. Process tracing allows for the capturing of events as they unfold (Collier 2011). The iterative nature of this process tracing allowed for learning to occur in the coding process. Meaning, each state's response is nuanced and encompasses a number of alternative language choices, caveats, and policy domains. Given the newly emerging phenomena that is present in the depth of the COVID-19 pandemic and the proliferation of executive policy responses, we use an exploratory and case-oriented process trace (Beach and Pedersen 2019). This process was iterative in that each order has been read and coded a second time after the initial coding process occurred. This was done both to validate and gain insight into the inter-rater reliability of the

initial code. This effort also allowed for the expansion of coding categories as the teams' understanding of the emerging phenomena changed.

The initial coding process included the pasting of verbatim text from the executive orders into columns that reflected a category of what were commonly discussed policy issues at the time of coding. The reading of these executive orders led to the inclusion of items that addressed other aspects of government activity, including the suspension of bureaucratic operational rules (i.e., licensing requirements/procedures, rules around work and leave) that may have hindered the response to the pandemic. The initial coding document was established in anticipation of policies related to changing the behavior of businesses and individuals (i.e., stay-at-home orders, gathering bans, business closures). However, there had been less coverage and widespread discussion of the other types of policies. In addition, concepts such as power transfer were noted early on when it was discovered that multiple states had disseminated power to state agencies and local governments, while other states preempted the actions of local governments.

This ongoing approach has thus far resulted in over 1,700 coded state-level executive orders adopted between March 1 and later in the summer of 2020, capturing a large extent of the initial closures of states in response to the COVID-19 pandemic up until and through their first re-openings, while coding continues on orders issued beyond the reopening of states. Of these orders, the vast majority were signed into effect by a governor, while 143 were signed into effect by a public health director or official in a similar position. Only a handful of states had actors outside of a public health director that were responsible for signing into effect their own rule suspensions, including Idaho and Hawaii, which issued orders written by representatives of their respective education agencies, while Kentucky had three orders written by agency directors

outside of the head of the public health agency, and Florida issued orders through a variety of agency channels (Curley and Federman 2020b).

Table 2 offers a way to demonstrate the breakdown of cases selected according to the response strategies. We wanted to ensure that each type of government orientation -- divided or unified -- was represented by the range of COVID-19 executive policy making strategies. On those criteria we selected ten states: Arizona, Florida, Hawaii, Maryland, Massachusetts, Michigan, Nevada, Ohio, Pennsylvania, and Wisconsin. While the majority of these states were randomly chosen, we did intentionally select Florida and Michigan based on the high media coverage of conflict surrounding COVID-19 policymaking.

[Insert Table 2 about here]

Lastly, we wanted to ensure that the cases we selected (bolded and italicized in Table 2) varied in their treatment of local governments. In order to assess this, we coded the orders from the initial closures for the use of words such as local, county, municipality, preemption, and supersedes. The treatment of local governments changes considerably over the life of the pandemic; however, we emphasize the initial treatment of local governments -- which may enable conflict later on as the crisis changes. This allowed us to recognize variation in the types of approaches taken by states. We wanted to ensure that we had representation of states that leaned on preemption, where the state takes precedence, as well as states that delegated some degree of power to local governments. Given that preemption is potentially more likely in some states as opposed to others, we wanted to verify that we had covered the history of preemption use. This is verified in Table 3, where we utilize Terkson and Docter's (2020) paper to understand recent preemption use by states. Further, Table 4 explores the sociodemographic differences and political environment of each case.

[Insert Table 3 about here]

[Insert Table 4 about here]

Findings

To best explicate the important elements of what this extensive collection and coding process can tell us about federalism and conflict, we return to the questions outlined in our introduction. Information about each of these specific cases is available in Supplemental Appendix A; but here we provide an overview of our findings, organized by the specific questions we pose as most important to understanding the dynamics of federalism and conflict. The following sections discuss 1) the types of executive orders issued, 2) types of conflict, 3) pushback actions taken in response to executive orders by other branches of government, 4) successes and failures of pushback actions taken in response to executive orders and their impact on executive power, and 5) the conditions leading to success and failure of pushback responses.

Broadly, we find useful emergent themes around the types of orders and who issues them, along with the conditions that lead to success and failure of pushback actions. The various types of conflict – governor/legislature, bureaucracy/legislature, and state/local – that are present in various states are identified and examples are provided. Pushback actions are found to be similar across our cases, and their successes and failures vary depending on the context of the particular state. Finally, the conditions that may have led to that success or failure are explored, and patterns identified. Again, Supplemental Appendix A provides detailed information on each of the ten cases utilized herein.

Types of Executive Orders Issued

With over 1700 orders issued between the start of the pandemic and the indicated reopenings of all fifty states, we observe orders that run the gamut of policy areas. From mask mandates to Second Amendment rights to a proclamation superseding local orders and allowing the Easter Bunny to ignore a stay-at-home order, nearly every potential policy area is covered. In our cases presented here, we found a variety of orders that pertain specifically to interbranch and intergovernmental relations, including the granting of autonomy to state and local actors, delegation of power to agencies to issue their own orders, and statewide or localized closures of businesses and public areas. In addition, some orders loosened restrictions or granted "maximum flexibility" to local officials to establish policies that are reflective of their communities.

Within these ten cases in particular, but reflective of the country as a whole, we see in these executive orders a focus on public health, education, and regulatory rollbacks. Per Curley and Federman (2020a), we observe an important division between restrictions and suspensions, and characterize orders accordingly. The data also includes orders specifically protecting religious freedoms, freedom of movement, and the purchase and sale of firearms, trends that we see in all fifty states. Finally, it is worth noting that the volume of orders varies across states, as does the issuing agency (Table 2). This variety helps to establish the validity of these cases as a concept proof for the patterns we see emerge throughout the United States over this time period.

Types of Conflict

Across these ten cases, we highlight three primary forms of conflict that emerged from our coding processes, and occur between the legislature and governor, between the legislature and bureaucracy, and between the state and local governments. Of note, we focus here on intra-state and state-local conflicts, as these are the tensions that have been generated most often by

executive orders. While research on federalism may often focus on federal-state conflict, scholars have observed that intra-state and state-local conflict have been particularly relevant over the past several years, particularly in the context of COVID-19 (Goelzhauser and Konisky 2020; Konisky and Nolette 2021).

The following sections speak to the cases that offer some insight regarding the nature of this conflict. The first form of conflict between the *legislature and governor* is evidenced through the introduction of legislation intended to increase oversight or limit the emergency powers of the governor. This type of conflict is evident in almost all of the cases in this study, though the actions taken in response enjoyed varying success. The second form of conflict takes place between the *legislature and the bureaucracy*. This is more pointedly about the powers and rights granted to agency directors by the governor. This conflict appears more often in states that expressly delegated policy making authority to state agencies and is present in Massachusetts, Ohio, and Wisconsin. The third form of conflict is related to *state and local* interactions. Florida and Arizona demonstrate the most notable conflict between state and local government in our cases, as outlined in the following section.

Actions Taken in Response to Executive Orders

Pertaining to *legislative/governor* conflict, in Ohio, Pennsylvania, Michigan, Maryland, and Florida legislation was passed prior to the end of the 2021 legislative sessions with the intent of limiting gubernatorial power. In most of the states featuring this kind of legislative response – in Ohio Pennsylvania, Michigan, and Maryland – the governor attempted to veto legislative actions that sought to increase legislative control over the executive branch. However, Florida, a unified Republican government state, adopted a legislative response (SB 2006) without a veto. In

two other states, in Arizona (featuring six bills) and Nevada (five bills), legislators tried to adopt measures restraining executive power, but they failed to garner sufficient legislative support to be adopted. Hawaii had legislation under consideration in committee, but the legislative session concluded prior to its discussion. The Massachusetts legislature made a failed effort to minimize executive powers of the state agencies but did not seek the same control over executive orders issued from the governor's office.

Pushback actions stemming from *bureaucratic/legislative conflict* unfolded across multiple states as well. In Maryland, which took a governor-only emergency power approach to addressing COVID-19, the legislature passed, but the governor vetoed, legislation that would have limited both the governor's and agency director's emergency procurement decisions by creating a legislative oversight committee. The Massachusetts legislature largely sought to enact policy that would limit the commissioner of health's power to address the crisis. This included measures limiting the amount of time that the commissioner's orders would be valid and requiring the approval not of the governor but of the legislature. Other legislation in Massachusetts sought to limit the scope of authority granted to the commissioner, by preventing the commissioner from issuing any order that would limit constitutional rights, as that falls under the governor's purview. However, neither of these proposed bills has passed out of committee. Wisconsin's legislature attempted to require legislative approval of public health measures such as stay-at-home orders and gathering bans. This would have limited the power and ability of the executive branch, including any agency directors, to make policy during a public health emergency. However, neither of these bills was adopted, and later bills that set a formal end date to the emergency and created oversight of federal funds either failed or were vetoed.

Pushback as a result of *state/local conflict* occurred in a significant way in two states in this sample, in Florida and Arizona. Florida initially took a very decentralized approach, enabling local governments to propose necessary policies to respond to the crisis. However, this changed over time, leading to a highly restrictive and contentious treatment of local governments, including the complete preemption of local action and instituting enforcement penalties if local governments chose not to comply. The inclusion of enforcement penalties against local governments is most prevalent in regard to banning mask mandates, particularly for schools, and banning vaccine mandates for local governments. Both of these actions, if taken by local governments, would be met with a financial penalty. School districts sought to overturn the mask mandate ban as an overreach of state government, with the school districts' challenge to the state policy initially supported by a court but then successfully appealed and leading to the state policy being allowed to continue.

Arizona similarly demonstrates conflictual relationships with local governments. The legislature banned mask mandates at the local level and for school districts. However, a state judge, in a decision upheld by the state supreme court, ruled this state policy unconstitutional.

Finally, it is useful to note that in our two examples of non-conflict-laden states, Nevada and Hawaii, we see evidence of a more cooperative state-local approach to addressing the crisis, which likely enabled local governments to be more responsive to their local constituents and public health conditions. These two states also have a politically unified legislative and executive branch. However, we do see that Hawaii and Nevada have both considered legislation that would restrict executive powers.

Successes and Failures of Pushback Actions Taken in Response to Executive Orders

Ohio is one state where pushback action was relatively successful, with the passage of legislation intended to limit executive power. Governor Mike DeWine delegated power to only the Department of Public Health, headed by Dr. Amy Acton. Importantly this delegation appears to emphasize a stark difference in the type of order issued by the Public Health Department and the governor, with an emphasis on the agency director being responsible for instituting policies that limit the freedom and mobility of the public. Acton experienced a fair degree of backlash against her policy decisions, with armed protests occurring outside of her home and the Ohio legislature passing a bill that would limit the scope of the director's orders. The Ohio legislature's bill not only constrained Acton's powers but also limited the governor's emergency powers, and would create an oversight committee to review restrictions and limited the amount of time that these orders would stay in effect (Axelrod 2020). Although this legislation was initially vetoed, that veto was later overridden.

In Pennsylvania, Governor Tom Wolf issued a majority of the executive orders regarding COVID-19, but he delegated the responsibility for issuing initial stay-at-home guidance in particular to Department of Health Secretary Rachel Levine, though the Governor did issue orders modifying this guidance. Secretary Levine also issued orders considering commerce and employment, particularly pertaining to mask-wearing in businesses. Both of these policy areas could be considered acutely politically risky, and so it is worth noting that this is where Governor Wolf chose to designate the Health Department and Secretary Levine as the issuing agency and executive. Despite the governor taking on the majority of the policymaking decisions, Levine was still cast in an unfavorable light during the COVID-19 response; with much of the negative commentary targeting her status as an openly transgendered public servant (Armus 2020). Additionally, Governor Wolf was sued by the state's Senate Republicans over the

issued stay-at-home orders. The Pennsylvania Supreme Court ruled in favor of the governor, holding that the legislature could not act unilaterally in an attempt to limit the governor's declaration.

Wisconsin's response was very similar to Ohio's, in that state agency directors were largely responsible for restrictions. This means that governors in these states granted the power to the state agency directors with bureaucratic expertise to address COVID-19 how they saw fit. Wisconsin, like Pennsylvania, faced significant backlash against the public health director and against broader state attempts to constrain power. Andrea Palm, then Secretary-Designee of the Wisconsin Department of Health Services, faced backlash against her COVID-19 response. In fact, the Wisconsin Supreme Court ruled against Palm, finding she had acted outside of the scope of her job by adopting certain restrictions. Having served the state of Wisconsin without confirmation for two years, Palm was recently confirmed as the U.S. Deputy Secretary of the Health and Human Services Department.

Lastly, in Michigan, where statute law already required legislative approval to continue an emergency after an initial emergency declaration, the legislature adopted additional legislative oversight mechanisms. Each of these legislative pushback efforts was vetoed by the governor. However, the Michigan legislature was ultimately able to overcome the governor's opposition by relying on particular features of Michigan's indirect initiative process. In Michigan, when supporters of an initiative petition secure a sufficient number of signatures in support of a measure, it is placed before the legislature. Legislators then have two options. They can allow the measure to go to a vote of the people or they can simply approve the measure by a majority vote, in which case it becomes law and without being subject to a gubernatorial veto. Groups and officials in Michigan who sought to limit the governor's emergency powers relied on this

indirect initiative procedure to bypass gubernatorial opposition and bring about the complete repeal of emergency powers granted to the governor in the state of Michigan.

These examples are indicative of a broader trend across the country: the usage of oversight mechanisms, followed by legislative pushback or lawsuits against governors and bureaucrats, including the passage of bills that meaningfully impact how those executives perform their jobs. In many states, some element of legislative or legal pushback was successful. However, in other states, the end result was often a veto or passage of a lesser version of the original legislation or filing a lawsuit.

Conditions Leading to Success/Failure of Pushback Responses

There are a variety of trends observed around the conditions that may lead to the success or failure of a particular style of pushback response. Here, we review several of these trends and elucidate certain patterns that may be of use for future research to explore as predictors of successes or failures. Of course, the cases are limited and therefore the conclusions are also limited, but these patterns and evidence are worth exploring further. Of note, there do appear to be commonalities between those states that were successful in their pushback actions - primarily, that there are elements of ideologically divided government, and that the actions that are eventually successful are at least in part associated with public pressure and attention in that state.

First, in Michigan, a Republican legislature pushed back successfully against a Democratic governor's administration. In this divided partisan political environment, large and vocal protests against the restrictions issued by the governor's administration caught the attention of state legislators, who successfully removed, to a certain extent, a gubernatorial

administration's ability to declare an emergency and limited its powers to address the crisis (Censky 2020; Boucher 2021). Of the states in this sample, Michigan offers the most successful example of a pushback response, the consequences of which may linger long after the pandemic ceases to be at the forefront of the political agenda.

Pennsylvania also had a divided government at the time of pushback attempts, where the strongest attempts by the Republican legislature were vetoed by the Democratic governor, but the legislature nevertheless found a way, by using the state constitutional amendment process, to overcome gubernatorial opposition in some respects. In particular, after a legislative-gubernatorial dispute about limitations on the governor's emergency powers was resolved by the state supreme court in favor of the governor, the legislature crafted a pair of constitutional amendments that were approved by the legislature by a majority vote in consecutive sessions and then ratified by voters in May 2021. These constitutional amendments stipulate that extension of an emergency order beyond twenty-one days requires approval by the General Assembly and that this approval takes the form of passing a concurrent resolution that is not subject to a governor's veto.

There were also successful instances of pushback against bureaucratic or administrative authority, as in Ohio. In that state, the governor delegated power to an administrator, the Director of the Department of Health, thereby moving power further from the legislature. The legislature, from the same party as the governor (Republican) but with a more conservative ideological makeup, passed a bill requiring committee review for Department of Health orders and limiting rulemaking authority. Following a veto of that bill by the governor, the legislature overrode the veto and placed the agency director under authority of both the executive and legislative branches of state government.

Some states lacked conflict almost entirely, such as Hawaii and Nevada, which saw only minimal pushback from state legislators who likely understood that it was unlikely that a bill would be enacted limiting the power of a Democratic governor with a Democratic majority in the state house, further highlighting some key differences between the political parties.

To sum up, these cases demonstrate that in instances of political alignment between the state legislature and executive, there appears to be less inter-branch conflict. Further, while not a revelatory statement, these cases also suggest that divided government, even during an emergency, can be more likely to generate conflict. Finally, it should be noted that when there is an ideological, even if not a partisan, division of government between branches (as in Ohio, where a moderate Republican governor vetoed bills passed by a conservative Republican legislature), this idea may still hold up. One final difference to note here is in the connection to and reaction of the public. For example, in Michigan, public protests were frequent and well-attended, whereas in Ohio the reaction was more muted. This suggests that in a formally politically divided government, the public may put more pressure on legislative actors than in an ideologically divided government. While the end result was relatively similar, in Michigan public opinion helped to shift blame onto the Democratic governor, while in Ohio the focus of the legislature was on the bureaucratic and ostensibly non-partisan administrator.

Discussion and Conclusion

This article provides insight into the presence, or absence, of conflict across ten states: Arizona, Florida, Hawaii, Maryland, Massachusetts, Michigan, Nevada, Ohio, Pennsylvania, and Wisconsin. Such a sample represents 20 percent of the United States, and while we cannot make any conclusive statements about the findings in states outside of our sample, we are able to

discern important patterns and possibilities from this group and address five important questions related to federalism-based conflict during the COVID-19 crisis. These findings offer insight that can help us to understand how states generally have approached issues of federalism during COVID-19. The primary focus of this study has been on three primary forms of conflict relevant to issues of intergovernmental relations and federalism: governor/legislature tensions, legislature-bureaucracy tensions, and state/local government tensions. As a result of executive responses to COVID-19, we observe legislation being introduced to limit powers of the governor, bring the bureaucracy under legislative influence, and place limits on local government authority. The conflicts discussed here are particularly concerning in view of increasing political polarization, an urban-rural divide, and growing discontent of the public. Fueled by the public atmosphere, it is unlikely that contentious policymaking and associated conflict will ease once COVID-19 is no longer the primary emphasis of public attention. In fact, states have increased their use of preemption against local activity, which has limited the ability of cities to respond to local demands.

Identifying these conflicts has important implications not just for COVID-19 but beyond, which we see evidenced in jurisdictional battles over which level of government has the right to implement mask mandates. If a city with a Democratic majority wants to implement a mask mandate, but the majority-Republican state government prohibits this action; those politicians are not able to act in their constituents' desired manner or consistent with preferred interests. Do these actions discredit the role of local government? How can blue localities in red states, and red localities in blue states receive their preferred policy bundles when state power is used to preempt actions taken, despite being granted by way of city charters, by the local government? These and other questions regarding the role of bureaucracy and delegation of emergency powers

will be important issues to consider as we move beyond the pandemic, with many of these executive orders still being issued, fought over in the courts, or debated in state legislatures.

Beyond identifying these three types of conflict, we also observe that while some states chose to limit the governor's ability to delegate power to agencies, other states chose to create oversight mechanisms that bring the legislature information regarding agency actions. Beyond this, some states attempted to pass, or successfully passed, legislation to give the legislature power over the decision making of executive branch agencies, particularly during times of crisis. However, this choice may set a precedent that blurs the lines between the executive and legislative branches. The variety of mechanisms and action to push back against executive orders suggests that perhaps our understanding of power, accountability, and scope within state government requires more thoughtful consideration, as what could once be assumed now appears to be challenged on a regular basis and from multiple angles.

Further, we recognize meaningful changes in how we understand the balance of power within state governments. In particular, conflict surrounding the governor and legislature raises questions as to whether the executive branch, given the growth of the bureaucracy, has become more powerful than state legislatures and whether there needs to be a rebalancing of the authority of these branches. Some legislatures appear to have attempted to bring balance to emergency powers by the creation of oversight committees, while others have utilized legislation requiring time limits on emergency declarations and requiring legislative approval for reissuance. These strategies were conflictual as they resulted in vetoes, multiple attempts to adopt varied legislation, and stemmed from legislature frustration with policy making. We see evidence, as in Michigan, that state legislatures will go so far as to repeal emergency powers granted to the governor. This suggests that, under instances of divided government, policy-making between the

executive and legislative branches may be better served by conflict resolution and collaboration, as opposed to a conflictual relationship. Further, we are left with questions as to how and when an emergency situation turns into an issue meriting legislative treatment.

The primary contribution of this study is to direct attention away from state-federal conflict over COVID, though this is certainly an important area of study, and to highlight the prevalence and importance of political and inter-branch conflict within states and between state and local governments. As shown herein, these conflicts are abundant and take numerous forms. They are resolved, in many cases, by the courts or by the eventual defeat of legislation intended to limit executive power. In the vast majority of cases, executive orders withstood challenges from other officials and branches, establishing new or reaffirming prior precedent for the executive of a state to lead an energy response.

While it may be said that this demonstrates the significant power that can be wielded by the executive branch during emergencies, it is important to also note that in over half of the states in our study, opponents of executive orders enjoyed at least some measure of success in overturning or limiting executive power, additionally demonstrating that the executive branch does not always prevail in conflicts emerging in health emergencies. This study shows the varying strength and utility of the tools that opponents of executive orders draw on in responding to those orders, including existing statutory tools, passage of new legislation, filing lawsuits, or proposing and securing passage of constitutional amendments. In raising and addressing these various questions, this overview of the landscape undertaken in this article reevaluates our current understanding of executive power and portends future conflict over these and similar orders.

Table 1: Case selection matrix

	Democratic Governor	Republican Governor
Democratic State Legislature	CA, WA, OR, NV, CO, NM, IL, VA, NY, NJ, CT, DE, RI, ME, HI	MD, VT, MA
Republican State Legislature	KS, KY, LA, MI, NC, PA, WI	AR, AL, AZ, FL, GA, IA, ID, IN, MO, MS, MT, ND, NE, NH, OH, OK, SC, SD, TN, TX, UT, WV, WY
Split State Legislature	MN	AK

Table 2: State Government Response Type and Unification

Orders issued by:	Divided RG/DL	Divided DG/RL	Unified Republican	Unified Democratic
Governor Only	***MD***, VT	KS, ***MI***, NC, LA	AK*, AR, ***AZ***, GA, IA, IN, MS, MT, NH, ND, NE, OK, SC, SD, TN, UT	CT, DE, IL, ME, MN*, ***NV***, NJ, NY, OR, RI, VA, WA
Governor and Agency	***MA***	KY, ***PA*****,** ***WI***	AL, ***FL***, ID, MO, WY, ***OH***, TX, WV	CA, CO, ***HI*****,** NM

**AK and MN have split state legislatures, and are placed here based on their House majority.*

Table 3: Treatment of Local Governments

	Unified High	Unified Low	Divided High	Divided Low
State policy determines response	AZ		MI	MA
Local government granted some power	FL, OH	NV, HI	WI	PA, MD
Source for high/low preemption: Treskon and Doctor 2020.				

Table 4: State Demographic and Political Environment Comparison as of 2019

	AZ	FL	HI	MD	MA	MI	NV	OH	PA	WI
Governor	R	R	D	R	R	D	D	R	D	D
State upper house ratio	16:14 R	23:17 R	24:1 D	32:14 D	34:6 D	20:16 R	13:8 D	24:9 R	29:21 R	19:14 R
State lower house ratio	31:29 R	73:47 R	46:5 D	99:41 D	127:32 D	58:51 R	29:13 D	61:38 R	110:93 R	63:36 R
U.S. House ratio	5:4 D	14:13 R	2:0 D	7:1 D	9:0 D	7:7	3:1 D	12:4 R	10:10	5:3 R
U.S. senators	D/R	R/R	D/D	D/D	D/D	D/D	D/D	D/R	D/R	D/R
POTUS vote history since 1992	6:2 R	5:3 R	8:0 D	8:0 D	8:0 D	7:1 D	6:2 D	4:4	7:1 D	7:1 D
R voter % as of 2017	42	39	28	28	26	38	39	42	41	41
D voter % as of 2017	40	42	50	56	57	45	42	41	46	43
% Age 65+	18	20.9	19	15.9	17	17.7	16.1	17.5	18.7	17.5
% Pop. white	54.1	53.2	21.7	50	71	79.2	48.2	78.4	75.7	80.9
% Foreign born	13.3	20.7	18.5	15.2	16.8	6.9	19.4	4.6	6.9	5.0
% Bachelors	29.5	29.9	32.5	44.8	43.7	28.6	24.2	28.3	31.4	30.1
% In poverty	13.5	12.7	9.3	9	9.4	13	12.5	13.1	12.0	10.4
Median income	$58,945	$55,660	$78,084	$84,805	$81,215	$57,144	$57,598	$56,602	$61,744	$61,747
Pop. density per sq. mile	56.3	350.6	211.8	594.8	839.4	176.8	24.6	28.3	283.9	105.0
FTE state employee per 500 residents	2.9	2.6	7.2	4.6	4.5	3.3	2.9	2.7	3.8	2.8

Note. D indicates Democratic control, R indicates Republican control

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References

Abrams, J., K. Wollstein, and E.J. Davis. 2018. State lines, fire lines, and lines of authority: Rangeland fire management and bottom-up cooperative federalism. *Land Use Policy*, *75*, 252-259.

Allison, Graham T., and Phillip Zelikow. 1971. *Essence of decision: explaining the Cuban missile crisis*. Boston, MA: Little, Brown.

Armus, T. 2020. Pennsylvania governor blasts 'vile acts' against transgender official leading pandemic response. *Washington Post*. July 24. Retrieved from: https://www.washingtonpost.com/nation/2020/07/24/pa-covid-trans-secretary-health/

Axelrod, B. 2020. Ohio House passes amendment to limit Dr. Amy Acton's power; Gov. DeWine vows to veto. *WKYC*. May 6. Retrieved from https://www.wkyc.com/article/news/local/ohio/ohio-house-proposes-amendment-to-limit-dr-amy-actons-power/95-d1fbc236-cdc2-44d5-ad9a-3c1289e11e85

Beach, D. and R.B. Pedersen. 2019. *Process-tracing methods: Foundations and guidelines*. Ann Arbor: University of Michigan Press.

Benton, J. E. 2020. Challenges to federalism and intergovernmental relations and takeaways amid the COVID-19 experience. *The American Review of Public Administration*, *50*(6-7), 536-542.

Bernick, Ethan M., and E. Lee Bernick. 2008. Executive-Legislative Relations: Where You Sit Really Does Matter. *Social Science Quarterly 89*(4): 969–986.

Boucher, D. 2021. Michigan House repeals emergency powers law Gov. Whitmer used to fight pandemic. *Detroit Free Press*. July 21. Retrieved from https://www.freep.com/story/news/politics/2021/07/21/michigan-governor-whitmer-emergency-powers-law/8031378002/

Bowling, Cynthia J., and Margaret R. Ferguson. 2001. Divided Government, Interest Representation, and Policy Differences: Competing Explanations of Gridlock in the Fifty States. *Journal of Politics 63*(1), 182-206.

Bowling, C. J., J. M. Fisk, and J.C. Morris. 2020. Seeking patterns in chaos: Transactional federalism in the Trump administration's response to the COVID-19 pandemic. *The American Review of Public Administration*, *50*(6-7), 512-518.

Brower, Ralph S., and Mitchel Y. Abolafia. 1997. Bureaucratic politics: The view from below. *Journal of Public Administration Research and Theory 7*(2): 305-331.

Censky, A. 2020. Heavily Armed Protesters Gather Again at Michigan Capitol to Decry Stay-At-Home Order. NPR. May 14. Retrieved from https://www.npr.org/2020/05/14/855918852/heavily-armed-protesters-gather-again-at-michigans-capitol-denouncing-home-order

Collier, D., 2011. Understanding process tracing. *PS: Political Science and Politics*, *44*(4), 823-830.

Curley, C., and P. Federman. 2020a. State executive orders: Nuance in restrictions, revealing suspensions, and decisions to enforce. *Public Administration Review, 80*(4), 623-628.

Curley, C. and P. Federman. 2020b. COVID-19 Executive Orders Dataset. Miami, FL: University of Miami [distributor], 2020-11 03. www.covid19eos.net.

Curley, C., N. Harrison, and P. Federman. 2021. Comparing motivations for including enforcement in US COVID-19 state executive orders. *Journal of Comparative Policy Analysis: Research and Practice*, *23*(2), 191-203.

Curley, C., P.S. Federman**,** R.L. Hanson, and E.S. Zeemering. 2021. The State and Local Response to COVD-19: A Microcosm of State-Local Conflict and Cooperation. In R.L. Hanson, and E.S. Zeemering (Eds.), *Cooperation and Conflict between State and Local Government.* Lanham, MD: Rowan and Littlefield.

Dzigbede, K. D., S. B. Gehl, and K. Willoughby. 2020. Disaster resiliency of US local governments: Insights to strengthen local response and recovery from the COVID-19 pandemic. *Public Administration Review*, *80*(4), 634-643

Gerring, J. 2004. What is a case study and what is it good for? *American Political Science Review, 98*(2), 341-354.

Goelzhauser, G., and D.M. Konisky. 2020. The State of American Federalism 2019–2020: Polarized and Punitive Intergovernmental Relations. *Publius: The Journal of Federalism, 50*(3), 311-343.

Gordon, S. H., N. Huberfeld, and D.K. Jones. 2020. What federalism means for the US response to coronavirus disease 2019. *JAMA Health Forum 1*(5), e200510-e200510.

Halpern, L. W. 2020. The Politicization of COVID-19. *American Journal of Nursing, 120*(11), 19-20.

Jacobs, Nicholas. 2021. Federalism, Polarization, and Policy Responsibility during COVID-19: Experimental and Observational Evidence from the United States. *Publius: The Journal of Federalism*. *51*(4), 693-719.

Kettl, Donald F. 2020. States divided: The implications of American federalism for COVID-19. *Public Administration Review, 80*(4), 595-602.

Kincaid, John, and J. Wesley Leckrone. 2020. Federalism and the COVID-19 crisis in the United States of America. *Forum of Federations*. Retrieved from http://www.forumfed.org/wp-content/uploads/2020/04/USACOVID1.pdf.

Knauer, Nancy J. 2020. The COVID-19 Pandemic and Federalism: Who Decides? *New York University Journal of Legislation and Public Policy 23*(1).

Konisky, D.M. and P. Nolette. 2021. The State of American Federalism, 2020–2021: Deepening Partisanship amid Tumultuous Times. *Publius: The Journal of Federalism*, *51*(3), 327-364.

Legislative Oversight of Emergency Executive Powers. 2021. Retrieved from National Conference of State Legislatures https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx

Lin, A. C. 2020. Uncooperative Environmental Federalism: State Suits Against the Federal Government in an Age of Political Polarization. *Geo. Wash. L. Rev., 88*, 890.

Lin, Z., and C.M. Meissner. 2020. *Health vs. wealth? public health policies and the economy during COVID-19*. Retrieved from https://www.nber.org/system/files/working_papers/w27099/w27099.pdf

Lipsky, Michael. 1980. *Street-level bureaucracy: Dilemmas of the individual in public services*. New York: Russell Sage Foundation.

Mallinson, D.J., 2020. Cooperation and conflict in state and local innovation during COVID-19. *The American Review of Public Administration*, *50*(6-7), 543-550.

McDonald III, B. D., C.B. Goodman, and M.E. Hatch. 2020. Tensions in state–local intergovernmental response to emergencies: The case of COVID-19. *State and Local Government Review*, *52*(3), 186-194.

Meier, Kenneth J. 1987. *Politics and the bureaucracy: Policymaking in the fourth branch of government*: Thomson Brooks/Cole.

Meier, Kenneth J, Joseph Stewart Jr, and Robert E. England. 1991. The politics of bureaucratic discretion: Educational access as an urban service. *American Journal of Political Science 35* (1): 155-177.

Milosh, M., M. Painter, D. Van Dijcke, and A.L. Wright. 2020. Unmasking partisanship: how polarization influences public responses to collective risk. University of Chicago, Becker Friedman Institute for Economics Working Paper. Retrieved from https://bfi.uchicago.edu/wp-content/uploads/BFI_WP_2020102.pdf.

Mordecai, M., and Aidan Connaughton. 2020. Public opinion about coronavirus is more politically divided in US than in other advanced economies. *Pew Research Center*. Retrieved from https://www.pewresearch.org/fact-tank/2020/10/28/public-opinion-about-coronavirus-is-more-politically-divided-in-u-s-than-in-other-advanced-economies/.

Riggs, Tara, and Michael Catalano. 2020. (S)He who acts first: gendered gubernatorial response to pandemic in divided government. Working paper, Binghamton University. Retrieved via https://orb.binghamton.edu.

Rocco, P., D. Béland, and A. Waddan. 2020. Stuck in neutral? Federalism, policy instruments, and counter-cyclical responses to COVID-19 in the United States. *Policy and Society*, *39*(3), 458-477.

Seawright, J. and J. Gerring. 2008. Case selection techniques in case study research: A menu of qualitative and quantitative options. *Political Research Quarterly*, *61*(2), pp.294-308.

Sellers, Joshua S., and Erin A. Scharff. 2020. Preempting politics: State power and local democracy. *Stan. L. Rev.* 72: 1361.

Stillman, Richard Joseph. 2004. *The American bureaucracy: The core of modern government*: Wadsworth Publishing Company.

Secchi, S., and M. Mcdonald. 2019. The state of water quality strategies in the Mississippi River Basin: Is cooperative federalism working? *Science of The Total Environment*, *677*, 241-249.

Treskon, Mark and Benjamin Docter. 2020. Preemption and its impact on policy responses to COVID-19. *Urban Institute.* Retrieved from https://www.urban.org/sites/default/files/publication/102879/preemption-and-its-impact-on-policy-responses-to-covid-19.pdf

Weissert, C. S., M.J. Uttermark, K.R. Mackie, and A. Artiles. 2021. Governors in control: Executive orders, state-local preemption, and the COVID-19 pandemic. *Publius: The Journal of Federalism*, *51*(3), 396-428.

Westmoreland, Timothy M., M. Gregg Bloche, and Lawrence O. Gostin. 2021. Executive action to expand health services in the Biden administration. *Journal of the American Medical Association, 325*(3): 217-218.