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Emergency Rule: A New Paradigm for State and Local Governance?

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EMERGENCY RULE: A NEW PARADIGM FOR STATE AND LOCAL GOVERNANCE?

*Paul A. Diller**

Introduction	723
I. State and Local Emergency Rule Since 2020.....	725
II. Implications of Emergency Rule for Local Governance	730
A. Prior Local Emergencies: The Example of State Takeovers	731
B. Emergency Rule Curtails Public Input in Local Policymaking	733
III. Potential Paths Forward	738

INTRODUCTION

The Covid-19 pandemic has brought to the fore the use of emergency powers at the federal, state, and local levels.¹ At the federal level, emergency powers have been used for decades under a smorgasbord of statutes, but the pandemic has provided a reason for presidents to use them in new ways.² At the state level, emergency laws

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1. Note on terminology: moving forward I will use “Covid” rather than Covid-19 to refer to the novel coronavirus caused by SARS-CoV-2.

2. See Mark P. Nevitt, *Is Climate Change a National Emergency?*, 55 U.C. DAVIS L. REV. 591, 616–25 (2021) (reviewing presidential use of the National Emergencies Act since its passage in 1976); Mark Nevitt, *Climate Security Insights from the COVID-19 Response*, 98 IND. L.J. 815, 836–39 (2023) (reviewing the Trump Administration’s invocation of three emergency statutes in 2020 with respect to Covid); *id.* at 837 (noting that the emergency declaration in March 2020 for Covid was the first time since the Stafford Act’s passage in 1988 that a president had invoked the law for a public health emergency); see also Kim Lane Scheppele, *Small Emergencies*, 40 GA. L. REV. 835, 836 (2006) (“American presidents have been quite indiscriminate when it comes to emergencies—declaring them day in and day out in a variety of forms.”); Margery Smelkinson & Leslie Bienen, *Enough With the Backdoor Policymaking. It’s Time to End the COVID Public Health Emergency*, USA TODAY (Sept. 1, 2022),

have long existed but were previously used for shorter periods, often only in parts of the state, and most commonly for natural disasters and civil disorder.³ Similarly, at the local level, mayors have long had access to emergency powers, but generally used them sparingly, such as for hurricanes, snowstorms, and riots.⁴

This Essay will explore the rising use of emergency power at the state and local levels, focusing mostly on the latter, and its implications for local democracy and arguments about local government structure. Part I is primarily descriptive, reviewing the ways in which emergency power has been used since 2020 at the state and local levels, mostly due to the Covid pandemic but also for other reasons.⁵ Part II then compares this new form of emergency rule at the local level to prior examples of states using “emergency managers” to guide cities through fiscal crisis, arguing that post-2020 emergency rule is fundamentally different insofar as it is locally authorized.⁶ Part II further explores some of the normative concerns raised by the increased use of emergency rule at the state and local levels — most notably, the lack of a formal process for public input on rules that regulate individual and entity conduct in significant ways.⁷ Particularly at the local level, the increased use of emergency rule contradicts one of the

<https://www.usatoday.com/story/opinion/2022/09/01/keeping-covid-19-public-health-emergency-serious-downsides/7866780001/?gnt-cfr=1> [https://perma.cc/JPS8-SCEF] (arguing that the Biden administration has maintained the public health emergency for Covid as a “backdoor” means of economic and health care reform).

3. See Kelly J. Deere, *Governing by Executive Order During the COVID-19 Pandemic: Preliminary Observations Concerning the Proper Balance Between Executive Orders and More Formal Rule Making*, 86 MO. L. REV. 721, 729–30 (2021) (noting that, before Covid, “[m]ost typically,” governors used emergency powers for natural disasters such as hurricanes, tornadoes, and wildfires). Before 2020, a not-insignificant number of governors had declared statewide emergencies in response to the opioid epidemic. See NAT’L GOVS. ASS’N, WHITE PAPER: USING EMERGENCY DECLARATIONS TO ADDRESS THE OPIOID EPIDEMIC: LESSONS LEARNED FROM STATES 3 (2018), <https://www.nga.org/wp-content/uploads/2018/09/09-11-18-Issue-Brief-HSPS-Opioids-and-Emergency-Declarations.pdf> [https://perma.cc/UR8D-EX9L] (noting that, as of 2018, eight states — Alaska, Arizona, Florida, Maryland, Massachusetts, Pennsylvania, South Carolina, and Virginia — had declared opioid emergencies).

4. See, e.g., Howard D. Swanson, *The Delicate Art of Practicing Municipal Law Under Conditions of Hell and High Water*, 76 N.D. L. REV. 487, 487–88 (2000) (discussing Grand Forks’ use of emergency powers during the Red River flood of 1997); Roger A. Nowadzky, *Lawyering Your Municipality Through a Natural Disaster or Emergency*, 27 URB. LAW. 9, 9–10 (1995) (discussing the 1993 flooding emergency in Des Moines, Iowa).

5. See *infra* Part I.

6. See *infra* Part II.

7. See *id.*

longstanding justifications for home rule and local government: that cities and counties, as smaller governmental entities closer to the people, can be better fora for participation in self-governance. Finally, Part III charts some ways forward, speculating as to how the continued use of emergency rule may play out in the years ahead and what could be done to rein it in.⁸

I. STATE AND LOCAL EMERGENCY RULE SINCE 2020

Mostly beginning in March 2020, governors around the country invoked emergency powers to a degree never quite seen before in their responses to the Covid pandemic. The governors of all 50 states declared statewide states of emergency or similar by March 15, 2020.⁹ Mayors as well as county executives also declared states of emergency in March 2020.¹⁰ Many of these states of emergency persist through the time of this Essay's writing, almost three years later.¹¹ New York City, for instance, remains in a Covid-related state of emergency uninterrupted for 34 months and counting, with Mayor Eric Adams most recently renewing the emergency in five-day increments.¹²

The widespread use of emergency rule since March 2020 may have ushered in a new era of executive officials using emergency powers more frequently and for more issues, perhaps because legislators and voters became desensitized to its use.¹³ In Oregon, for instance, both major parties' candidates for governor in 2022 pledged to declare a

8. *See infra* Part III.

9. *See* Ally J. Levine, *State by State, COVID-19 Grinds U.S. to a Halt*, REUTERS (Mar. 24, 2020), <https://www.reuters.com/graphics/HEALTH-CORONAVIRUS-USA/0100B5LQ46H/index.html> [<https://perma.cc/S7LS-D427>].

10. *See* Michael Levenson, *Local and State Officials Unlock Sweeping Powers to Fight Coronavirus*, N.Y. TIMES (Mar. 14, 2020), <https://www.nytimes.com/2020/03/14/us/national-state-emergency.html> [<https://perma.cc/6YHX-XLCQ>] (discussing the “county executives and mayors across the country who have declared states of emergency”).

11. *See States' COVID-19 Public Health Emergency Declarations*, NAT'L ACAD. FOR STATE HEALTH POL'Y (Mar. 21, 2023), <https://nashp.org/states-covid-19-public-health-emergency-declarations/> [<https://perma.cc/MV6Y-SPNG>] (listing eight states with some sort of statewide emergency or disaster order still in effect).

12. *See* N.Y.C. Exec. Order No. 307 (Jan. 10, 2023), <https://www.nyc.gov/office-of-the-mayor/news/307-003/emergency-executive-order-307> [<https://perma.cc/X7RM-5B3U>].

13. *Cf.* GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., Univ. Chicago Press 2005) (arguing that the state of exception, which was meant to be a provisional measure, became in the course of the twentieth century a normal paradigm of government).

state of emergency for homelessness.¹⁴ Indeed, within one day of taking office in January 2023, Governor Tina Kotek declared a state of emergency in the most populous parts of the state due to homelessness, to last up to one year.¹⁵ The recently elected governor of Hawaii, Josh Green, also proclaimed a homelessness emergency early in his tenure.¹⁶

Even with the threat of the Covid pandemic waning in the public consciousness and with President Joe Biden declaring in September 2022 that “the pandemic is over,”¹⁷ many jurisdictions, including some states, declared emergencies for the “triple-demic” of Respiratory Syncytial Virus (RSV), influenza, and lingering Covid beginning in the fall of 2022.¹⁸ These emergencies followed several emergencies declared earlier in the year for mpox,¹⁹ the disease formerly known as

14. *See Would Declaring a State of Emergency for Homelessness Make a Difference?*, NEWS REV. (Oct. 18, 2022), https://www.nrtoday.com/townnews/politics/would-declaring-a-state-of-emergency-for-homelessness-make-a-difference/article_3ea6d4ab-6c47-52de-bb44-5874c55fa91f.html [<https://perma.cc/J5JT-VJ9P>].

15. Or. Exec. Order No. 23-02 (Jan. 10, 2023), <https://www.oregon.gov/gov/eo/eo-23-02.pdf> [<https://perma.cc/4FVM-G4QJ>].

16. Haw. Proclamation Relating to Homelessness (Jan. 23, 2023), <https://governor.hawaii.gov/wp-content/uploads/2023/01/2301116.pdf> [<https://perma.cc/8C6H-WZWC>].

17. *President Joe Biden: The 2022 Sixty Minutes Interview* (CBS television broadcast Sept. 18, 2022), <https://www.cbsnews.com/news/president-joe-biden-60-minutes-interview-transcript-2022-09-18/> [<https://perma.cc/VLV5-Z23M>].

18. *See, e.g.*, Or. Exec. Order No. 22-23 (Nov. 14, 2022), https://www.oregon.gov/gov/eo/eo_22-23.pdf [<https://perma.cc/X4VS-4TXT>] (declaring state of emergency due to RSV, influenza, Covid, “and other respiratory viruses”); Or. Exec. Order No. 22-24 (Dec. 7, 2022), https://www.oregon.gov/gov/eo/eo_22-24.pdf [<https://perma.cc/4BVU-X29C>] (expanding declaration of emergency from Nov. 14 due to “surge in respiratory infections”); Press Release, Orange County, Cal., Health Care Agency, County Health Officer Issues Declaration of Health Emergency and Proclamation of Local Emergency (Oct. 31, 2022), <https://www.ochealthinfo.com/press/county-health-officer-issues-declaration-health-emergency-and-proclamation-local-emergency> [<https://perma.cc/TX84-7M2P>] (noting that the “County Health Officer today issued a Declaration of Health Emergency . . . due to rapidly spreading virus infections” and “[a]dditionally, a Proclamation of Local Emergency has been declared”).

19. *See* Spencer Kimball, *California Declares a State of Emergency Over Monkeypox Outbreak, Following New York and Illinois*, CNBC (Aug. 1, 2022), <https://www.cnbc.com/2022/08/01/california-declares-a-state-of-emergency-over-monkeypox-outbreak.html> [<https://perma.cc/CXA3-96XW>]; *see also* Off. of the Mayor, City of New York, Emergency Exec. Ord. No. 158 (Aug. 1, 2022), <https://www.nyc.gov/assets/home/downloads/pdf/executive-orders/2022/eo-158.pdf> [<https://perma.cc/JM2M-ZSSM>] (declaring a local state of emergency due to monkeypox).

monkeypox.²⁰ In 2022, Mayor Adams declared a state of emergency in New York City to deal with the large influx of migrants crossing the southern border from Venezuela and other countries, in some cases transported to the city by U.S. states that border Mexico.²¹ Also in 2022, Portland, Oregon, Mayor Ted Wheeler declared emergencies with respect to homelessness, post-pandemic cleanup, and gun violence; some of these declarations give him (or another commissioner) more power under Portland's idiosyncratic commission form of government.²² In Los Angeles, newly elected Mayor Karen Bass declared a state of emergency for homelessness on her first day in office.²³ Governors and mayors have also declared emergencies in the last year due to supply chain issues generally, and the baby formula shortage in particular.²⁴ These are just some of what are likely many more examples of local emergency declarations in the last three years that did not relate to natural disasters, weather, or civil disturbances.

20. Press Release, World Health Org., WHO Recommends New Name for Monkeypox Disease (Nov. 28, 2022), <https://www.who.int/news/item/28-11-2022-who-recommends-new-name-for-monkeypox-disease> [<https://perma.cc/YZ6V-R64P>].

21. See N.Y.C. Emergency Exec. Order No. 224 (Oct. 7, 2022), <https://www.nyc.gov/assets/home/downloads/pdf/executive-orders/2022/eo-224.pdf> [<https://perma.cc/G3VY-7WSC>] (declaring emergency due to arrival of “thousands of asylum seekers . . . from the Southern border”). Mayor Adams has since renewed this particular state of emergency several times, in five-day increments. See, e.g., N.Y.C. Emergency Exec. Order No. 282 (Dec. 11, 2022), <https://www.nyc.gov/office-of-the-mayor/news/282-003/emergency-executive-order-282> [<https://perma.cc/H2VC-3YE3>].

22. See Mayor Ted Wheeler, City of Portland, Emergency Declarations, <https://www.portland.gov/wheeler/emergency-declarations> [<https://perma.cc/6FKA-T5LH>] (last visited Mar. 19, 2023) (listing several declarations); Sophie Peel, *Emergency Declarations Give Mayor Ted Wheeler Authority He Doesn't Normally Have in Portland's Form of Government*, WILLAMETTE WEEK (Mar. 3, 2022), <https://www.wweek.com/news/city/2022/03/03/emergency-declarations-give-mayor-ted-wheeler-authority-he-doesnt-normally-have-in-portlands-form-of-government/> [<https://perma.cc/8TWJ-ZN5Y>].

23. See *Mayor Karen Bass Declares a State of Emergency on Homelessness*, OFF. OF MAYOR KAREN BASS (Dec. 12, 2022), <https://mayor.lacity.gov/news/mayor-karen-bass-declares-state-emergency-homelessness> [<https://perma.cc/LW3Y-D93R>]. Interestingly, in the case of this declaration of emergency, the city council approved it unanimously. See Declaration of Local Emergency / Homelessness Crisis, Los Angeles City Council, File No. 22-1545 (Dec. 13, 2022), <https://cityclerk.lacity.org/lacityclerkconnect/index.cfm?fa=ccfi.viewrecord&cfnumber=22-1545> [<https://perma.cc/P7AG-PD2E>] (adopting Mayor Bass' declaration) (last visited Mar. 1, 2023).

24. See Ga. Exec. Order No. 04.14.22.01 (Apr. 14, 2022), <https://gov.georgia.gov/document/2022-executive-orders/04142201/download> [<https://perma.cc/PL3E-NJKD>] (declaring a state of emergency due to global supply chain disruptions); N.Y.C. Emergency Exec. Order No. 98 (May 21, 2022), <https://www.nyc.gov/assets/home/downloads/pdf/executive-orders/2022/eo-98.pdf> [<https://perma.cc/9VQB-9LEY>] (declaring emergency for infant formula shortage).

In addition to the grounds for emergency discussed above, advocates and policymakers have proposed several others: climate change,²⁵ abortion access (particularly after the Supreme Court overturned *Roe v. Wade*²⁶ in *Dobbs v. Jackson Women's Health Organization*²⁷ in late June 2022),²⁸ racism,²⁹ and police violence.³⁰ Based on available evidence, federal, state, and local governments have generally stopped short of formally invoking emergency powers to respond to these issues, but they have come close. Several local governments, for instance, have declared racism a public health “crisis,” thereby signaling an appreciation of the problem without fully unlocking the emergency powers toolkit.³¹

To be clear, the declared state and local emergencies vary significantly in the extent to which they have been the font of significant changes to the pre-existing legal status quo. Some, such as the Covid emergencies, led to a tremendous amount of regulation. Mask mandates and business closures would have been unheard-of at almost any other time in American history, and they were enabled by emergency rule.³² Other declarations of emergency appear to be almost as much about symbolism as they are about substance. Mayor

25. See Nevitt, *supra* note 2.

26. 410 U.S. 113, 164–65 (1973) (holding that a woman’s right to terminate a pregnancy through medical abortion was protected under the Constitution to varying degrees depending on the stage of pregnancy).

27. 142 S. Ct. 2228, 2242 (2022).

28. Yasmeen Abutaleb & Ashley Parker, *White House Debates Declaring Abortion Access a ‘Health Emergency,’* WASH. POST (July 14, 2020), <https://www.washingtonpost.com/politics/2022/07/14/biden-abortion-public-health-emergency/> [<https://perma.cc/Q5CE-QYRN>].

29. Abdullah Shihpar, *Declare Racism a Public Health Emergency*, N.Y. TIMES (Mar. 7, 2021), <https://www.nytimes.com/2021/03/07/opinion/racism-public-health-emergency.html> [<https://perma.cc/7MHA-EG97>].

30. Adam A. Davidson, *Managing the Police Emergency*, 100 N.C. L. REV. 1209, 1210 (2022).

31. See Cliff Despres, *Update: 246 Cities, Counties, Leaders Declare Racism a Public Health Crisis!*, SALUD AMERICA! (Sept. 1, 2021), <https://salud-america.org/rising-number-of-cities-counties-are-declaring-racism-a-public-health-crisis/> [<https://perma.cc/YC9Y-FCJ7>] (listing 112 city councils, 16 mayors, 79 county boards, four governors, and five state legislatures, *inter alia*, as having declared racism a “public health crisis”); see also Lilliann Paine et al., *Declaring Racism a Public Health Crisis in the United States: Cure, Poison, or Both?*, 9 FRONTIERS PUB. HEALTH 1, 7 (2021) (discussing, *inter alia*, Washington’s King County’s declaration of racism as a public health crisis in June 2020 and its implications).

32. See, e.g., Or. Exec. Order No. 20-12 (Mar. 23, 2020), https://www.oregon.gov/gov/eo/eo_20-12.pdf [<https://perma.cc/5PAQ-UBME>] (relying on statutory emergency powers to, *inter alia*, prohibit the operation of myriad businesses).

Adams' baby shortage formula emergency executive order, for instance, consisted of 11 "whereas" clauses and only one substantive provision: a prohibition on price gouging for the product while the emergency remained in effect.³³ Even if the order is limited in substance, by declaring an emergency, the executive official can show the voting public that he or she is taking the problem seriously and perhaps receive some helpful press coverage to that effect. An emergency like Covid led to far more regulations than did a baby formula shortage emergency, for instance, likely due to the novelty of the risk posed by Covid as a brand-new disease, the public's willingness to accept interventions, and the perceived widespread nature of Covid's threat early in the pandemic.³⁴

At the state level, legislators and voters have responded to the expansive use of emergency rule in different ways. In some states, legislatures or the voters (through direct democracy) enacted statutory or constitutional changes that constrained the emergency powers of governors and other executive officials.³⁵ Many public health professionals and commentators have referred to this reaction as a "[b]acklash."³⁶ In many of the states that reformed emergency rule, such as Kansas and Kentucky, the legislature was of a different party and sought to constrain the governor.³⁷ These restraints took the form

33. See N.Y.C. Emergency Exec. Order No. 98, *supra* note 24.

34. See BARUCH FISCHHOFF ET AL., ACCEPTABLE RISK 134–39 (1981) (arguing that risks perceived to be familiar are more accepted than risks perceived to be exotic). While serious, a baby shortage formula applied to a much smaller share of the population than the share that felt acutely threatened by Covid at first.

35. See Lauren Weber & Anna Maria Barry-Jester, *Over Half of States Have Rolled Back Public Health Powers in Pandemic*, KHN (Sept. 15, 2021), <https://khn.org/news/article/over-half-of-states-have-rolled-back-public-health-powers-in-pandemic/> [<https://perma.cc/6G2D-29PY>].

36. See, e.g., Lindsay F. Wiley, *Public Health Emergency Reform Is Coming — These Six Principles Should Guide It*, HEALTH AFFS. (Jan. 12, 2021), <https://www.healthaffairs.org/doi/10.1377/forefront.20210105.516753/full/> [<https://perma.cc/5QW7-UFUE>] ("Backlash legislation could hamstring officials for the next stages of the COVID-19 pandemic and tie state governments to the mast for a future crisis decades from now.").

37. See John Hanna, *Kansas Governor Signs Rewrite of Pandemic Management Laws*, AP NEWS (Mar. 24, 2021), <https://apnews.com/article/pandemics-legislature-kansas-legislation-coronavirus-pandemic-d90dd11f7fd490816d87c5aecd78ce2b> [<https://perma.cc/TG4T-3TFQ>]; 2021 Kan. Sess. Laws ch. 7 (amending KAN. STAT. ANN. §§ 48-924–925a (2022)); *After Veto Overrides, Beshear Sues Kentucky Republican Leaders to Maintain Emergency Powers*, WDRB (Dec. 30, 2021), https://www.wdrb.com/news/after-veto-overrides-beshear-sues-kentucky-republican-leaders-to-maintain-emergency-powers/article_5ceb542a-65af-11eb-ac89-5381cd7838ec.html [<https://perma.cc/XZU5-TVDY>]. The Kentucky legislature actually passed three separate laws to limit the governor's emergency powers. See 2021

of time limits on emergency powers and other constraints, some of which could be overridden only with the legislature's approval.³⁸ In Pennsylvania, the legislature referred a constitutional amendment to voters that similarly constrained the governor's emergency powers, which the voters passed in May 2021.³⁹ In some states, such as Ohio, Indiana, and New York, legislatures limited governors of the same partisan affiliation,⁴⁰ sometimes due to other issues such as the nursing home death reporting and sexual harassment scandals in New York under Governor Andrew Cuomo.⁴¹ At the local level, however, there has not yet been any similarly widespread movement to reform emergency powers, perhaps due to the reasons discussed below.

II. IMPLICATIONS OF EMERGENCY RULE FOR LOCAL GOVERNANCE

Regardless of the degree to which the powers are used, if emergency rule has indeed become more normalized since 2020, scholars of local government must reckon with what that might mean at the local level specifically. One of the primary benefits of local governance, to many commentators, is the increased opportunity it provides for resident and citizen involvement in democratic decision-making.⁴² Scholars have

Ky. Acts 14, 17, and 26 (resulting in H.B. 6, 2021 Gen. Assemb., Reg. Sess. (Ky. 2001) and S.B. 1, 2021 Gen. Assemb., Reg. Sess. (Ky. 2001)) (amending KY. REV. STAT. § 39A); *Cameron v. Beshear*, 628 S.W.3d 61, 78 (Ky. 2021) (upholding the legislature's emergency power reform laws against governor's lawsuit claiming that they violated constitutional separation of powers).

38. See, e.g., *Cameron*, 628 S.W.3d at 76 (discussing Kentucky Senate Bill 1 that limits gubernatorial declarations of emergency to 30 days unless extended by the legislature).

39. See *Pa. Question 2, Emergency Declarations Amendment*, BALLOTPEdia, [https://ballotpedia.org/Pennsylvania_Question_2_Emergency_Declarations_Amendment_\(May_2021\)](https://ballotpedia.org/Pennsylvania_Question_2_Emergency_Declarations_Amendment_(May_2021)) [https://perma.cc/K43D-P4AV] (last visited Apr. 5, 2023).

40. Carolina Puga Mendoza & Taylor Dixon, *House and Senate Chambers Override Governor's Veto on Power-Limiting Bill*, STATEHOUSE FILE (Oct. 1, 2021), https://www.thestatehousefile.com/politics/house-and-senate-chambers-override-governors-veto-on-power-limiting-bill/article_d0b836ee-94bb-5fe2-878e-a7428933848b.html [https://perma.cc/3JAY-HGQX]; Sub. S.B. No. 22, 134th Gen. Assemb., Reg. Sess. (Ohio 2021); S.B. 5357, 2021–2022 Reg. Sess. (N.Y. 2021).

41. Dan Mangan, *New York Lawmakers Strip Cuomo of Emergency Covid Powers as Sexual Harassment, Death Data Scandals Roil State*, CNBC (Mar. 5, 2021), <https://www.cnbc.com/2021/03/05/new-york-lawmakers-move-to-strip-cuomo-of-emergency-covid-powers.html> [https://perma.cc/4TPX-QHET].

42. See, e.g., Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1128 (2007) (discussing “the communitarian or democracy-building argument . . . [that] promotes home rule because if the unique educational benefits and heightened civic participation that, in its view, only local government can provide and foster,” a view

explained how other forms of emergency rule — namely, state takeovers of local governments — threaten this participatory aspect of local governance. This Part explores that critique and then contrasts more recent forays into emergency rule with those historical examples and the scholarly discussion surrounding them.

A. Prior Local Emergencies: The Example of State Takeovers

The local government law community has thoroughly examined state-imposed emergency managers or boards in cases of local fiscal distress or poor school district performance.⁴³ These emergency managers or “takeover boards” have at times exercised near “dictatorial” powers in an attempt to clean up or restructure cities and school districts.⁴⁴ In one of the most famous instances, in the early 2010s Michigan’s governor appointed an emergency manager to steer Detroit into bankruptcy at a time of severe fiscal crisis.⁴⁵

These state-imposed emergency regimes have been highly controversial. Local government and education law scholars have at times decried their usurpation of local democratic control, as a matter of both political theory and racial justice. Professor Michelle Wilde Anderson, for instance, has referred to state takeovers as “democratic dissolution” and argued that they “sacrifice voter participation and deliberative democracy values, from the empowerment and educative roles of local participation to the public’s trust and respect for local government.”⁴⁶ Professor Richard Schragger has argued that state

supported by, among others, nineteenth-century French commentator Alexis de Tocqueville and Harvard Law Prof. Gerald Frug).

43. Prominent examples include Central Falls, Rhode Island, in which the state appointed a receiver to run the city in the wake of fiscal distress, and the Lawrence, Massachusetts, school district, which has been managed by a state receiver for more than a decade. See Erika Niedowski, *Troubled RI City in Receivership Loses Democracy*, ASSOCIATED PRESS (Jan. 15, 2012), <https://www.sandiegouniontribune.com/sdut-troubled-ri-city-in-receivership-loses-democracy-2012jan15-story.html> [<https://perma.cc/EW9W-534K>]; Felicia Gans, *After 10 Years, Lawrence Wants to Take Back Control of Its Schools. But Commissioner Riley is Showing No Signs of Letting Go of State Receivership*, BOS. GLOBE (Oct. 19, 2021), <https://www.bostonglobe.com/2021/10/19/metro/after-10-years-lawrence-wants-take-back-control-its-schools-commissioner-riley-is-showing-no-signs-letting-go-state-receivership/> [<https://perma.cc/6DJM-8CSX>].

44. See Clayton P. Gillette, *Dictatorships for Democracy: Takeovers of Financially Failed Cities*, 114 COLUM. L. REV. 1373, 1374–79 (2014) (comparing state takeovers of cities to dictatorships and defining “takeover boards”).

45. See generally NATHAN BOMEY, *DETROIT RESURRECTED* (2016).

46. See, e.g., Michelle Wilde Anderson, *Democratic Dissolution: Radical Experimentation in State Takeovers of Local Governments*, 39 FORDHAM URB. L.J. 577, 606 (2012).

takeovers can be “punitive”⁴⁷ and “undermine local self-government.”⁴⁸ In the case of Detroit, a white governor imposed his handpicked emergency manager (albeit a Black man) to run a city with an overwhelming Black majority, in the process sidelining a majority-Black city council and a Black mayor, thus raising serious concerns about perpetuating racial subjugation.⁴⁹ Some scholars, on the other hand, have defended these takeovers as necessary bitter medicine to right a local government’s ship for a more sustainable future.⁵⁰ Recently, professor Adam Davidson has even proposed state-appointed emergency managers to reduce police violence as a way of disrupting the perceived pathologies in state and local law that, in his opinion, have failed to adequately address the problem.⁵¹

The literature and debate surrounding state takeovers of local government institutions is useful and informative in identifying and discussing what can be lost when local governance is supplanted, but is in many ways separate from this Essay’s focus. The emergency powers addressed here do not necessarily involve any direct or specific delegation from the state. Rather, mayors or other executives claim power that would usually vest in the city council or administrative agencies absent such a claim.⁵² In other words, this Essay’s primary focus is the horizontal, rather than vertical, transfer of power. This focus implicates the internal structures of local government law, often erected by city charters, that distribute power within the local government.⁵³

47. Richard C. Schragger, *Citizens Versus Bondholders*, 39 FORDHAM URB. L.J. 787, 801 (2012).

48. Richard C. Schragger, *Democracy and Debt*, 121 YALE L.J. 860, 879 n.80 (2012).

49. See Lora Krsulich, Note, *Polluted Politics*, 105 CALIF. L. REV. 501, 509 (2017) (“[E]mergency manager laws exacerbate existing racial inequalities.”); Reynolds Farley, *The Bankruptcy of Detroit: What Role Did Race Play?*, 14 CITY & CMTY. 118, 119 (2015) (discussing Governor Rick Snyder’s appointment of Kevyn Orr, “an African American bankruptcy lawyer,” and noting that “[g]iven the history of racial conflict, it would have been provocative had the governor turned over control of Detroit to a white man or woman”).

50. See Gillette, *supra* note 44, at 1420–45 (arguing that emergency managers and takeover boards can subvert the ability of interest groups to obtain disproportionate benefits in the fragmented decision-making of local governments, and that they may create positive, lasting structural changes to local government).

51. See Davidson, *supra* note 30, at 1209–10.

52. *But see infra* note 59 and accompanying text.

53. See generally Nestor M. Davidson, *Local Constitutions*, 99 TEX. L. REV. 839 (2021).

B. Emergency Rule Curtails Public Input in Local Policymaking

Cities usually make generally applicable, legally operable rules that regulate the behavior of public and private actors two ways: enacting ordinances or promulgating administrative regulations.⁵⁴ Charter amendments may also create legally operable rules, although that method is less common and depends upon the state and local practice.⁵⁵ Moreover, in some cities, voters may approve ordinances and charter amendments through the initiative process, sometimes after a referral by the city council.⁵⁶ All of these processes generally allow at least some public notice, debate, and the possibility for amendments to initial proposals that take public feedback into account. Residents and other concerned members of the public, including business owners and operators, can testify at city council meetings with respect to ordinances and council-referred initiatives; they may also call, email, and send letters to their council members and the mayor directly. Similarly with respect to administrative rulemaking, residents and other concerned members of the public, including businesses and other corporate entities, may submit comments on proposed new rules.

As a means of putting legally operable rules into effect, emergency rulemaking is completely different from council ordinance-making and administrative rulemaking. There is no process for formal public input. Lobbyists well-connected to the mayor's office may know that a rule is coming and contact the office, but those who are less connected have no way of receiving formal notice. A mayor or health commissioner might float proposed rules in the media or with members of the city council, but may also simply just announce them.⁵⁷ Once announced,

54. See Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1288–89, App. 2 (2014) (reviewing modes by which local jurisdictions banned smoking in the workplace).

55. See Davidson, *supra* note 53, at 869 (noting that charters can contain “an odd assortment of other provisions” and can “provide an alternative procedural focus for legal change when more straightforward legislative routes do not appear feasible”).

56. See, e.g., WILSONVILLE, OR., CITY CHARTER § 2.400 (“The *initiative* and referendum powers reserved to legal voters of municipalities by . . . the Constitution of the State of Oregon and the power to enact and amend municipal charters reserved to legal voters of municipalities and towns by . . . the Constitution of the State of Oregon shall be exercised as provided [herein].”).

57. Taking a state-level example, when ruling Oregon by emergency decree in spring 2020, Governor Kate Brown crafted her plans to reopen the state after initially ordering widespread business closures in consultation with “business leaders in specific industries.” Michael Russell, *Read Oregon Governor Kate Brown's Plan for Reopening Restaurants, Bars, Breweries and More During Coronavirus Pandemic*, OR. LIVE (May 7, 2020), <https://www.oregonlive.com/coronavirus/2020/05/read-oregon-gov-kate-browns-plan-for-reopening-restaurants-bars-breweries-and-more-during-coronavirus->

there is no further process of getting feedback before the rule goes into effect, although the more delayed an order's implementation date, the more time for constituents to contact the mayor and other officials.⁵⁸

In some instances, it is unclear if the city or county council even has the authority to overrule emergency orders. Some local health departments, for instance, claim that their powers come directly from the state, rather than having been redelegated by the local government they serve.⁵⁹ If these arguments are correct, then only the state legislature, rather than the elected officials of the local government the health department serves, has the authority to override their orders. If the health commissioner or mayor alone can exercise emergency powers, then emergency rule is effectively one-person rule.

When it comes to challenging emergency rules legally, the lack of any process deprives a court of the benefit of looking either to the law or rulemaking process for a better understanding of the matter at issue. There is no legislative history, no expertise-informed background statement from an agency, no committee hearings, no notice-and-comment, and no floor debate. At most, a court could look to other communications by the edict-giver, such as comments made at a press conference at which the rule is announced.⁶⁰ From the perspective of

pandemic.html [https://perma.cc/7HDM-APVD]. Who were these unnamed "business leaders in specific industries," and how did Brown choose them for outreach? A Public Records Act request after the fact might reveal the answer to the first question, but, regardless, there was no formal process ahead of time by which members of the public and other business owners and operators could comment on proposed reopening plans.

58. Cf. Deere, *supra* note 3, at 727 ("A [gubernatorial] executive order may be issued immediately and does not need to go through the same formal rule making process as a bill passed by the legislature or a regulation promulgated by a state agency.").

59. The New York City Board of Health, for instance, has argued that it has direct legislative authority to promulgate rules that the city council cannot overrule, although the New York Court of Appeals rejected this premise without directly ruling on a conflict between the two bodies. See *N.Y. Statewide Hisp. Chambers of Com. v. N.Y.C. Dep't of Health & Mental Hygiene*, 16 N.E.3d 538, 543 (N.Y. 2014) (rejecting the Department's "claim that the Board . . . has legislative powers separate and apart from the City Council"); see also Trisha McCauley, *Lawyers Say Barry County Board Has No Authority to Rescind Mask Mandate*, WMMT (Oct. 26, 2021), <https://wwmt.com/news/local/lawyers-say-barry-county-board-has-no-authority-to-rescind-mask-mandate> [https://perma.cc/72PL-XNRH] (reporting that legal counsel for a Michigan county's board of commissioners told the board that it does not "possess statutory authority to overrule or rescind a mask mandate or other emergency orders made by the health officer").

60. See, e.g., *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (noting that plaintiff Agudath Israel "cit[ed] a variety of remarks" made by Governor Cuomo regarding the Orthodox Jewish community's compliance with Covid mandates in challenge in-person worship restrictions under the First Amendment Free Exercise Clause). There is an emerging academic discussion regarding how courts should

upholding the rule against constitutional challenge, this may not be entirely a bad thing. A sparser record provides less evidence of legislative intent for opponents to focus on in litigation; perhaps they cannot find a “smoking gun.” On the other hand, at least in theory, the legislative history of an ordinance or the administrative record for a rule can help establish the legitimate, substantial, or compelling government interest at issue in any particular challenge.⁶¹

Some scholars, such as Professors Roderick Hills and David Schleicher in a forthcoming piece, have argued in favor of strong local executive authority.⁶² In the context of arguing against the state constitutional nondelegation doctrine applying to local governments, Hills and Schleicher argue that local executives should be far more empowered than their state and federal counterparts.⁶³ Such power, according to Hills and Schleicher, is justified by the higher name recognition that mayoral candidates enjoy and the higher turnout that accompanies their races for mayor.⁶⁴ City councilors, by contrast, enjoy very little name recognition and are elected overwhelmingly in races due to partisan imbalance in their districts.⁶⁵ Although Hills and Schleicher do not extend their argument to emergency rule per se, the logic of it does so extend. State courts should let mayors rule by decree

interpret *presidential* executive orders, focusing on the extent to which courts should defer to agency rulemaking based thereon. See Matthew Chou, *Recent Developments, Agency Interpretations of Executive Orders*, 71 ADMIN. L. REV. 555, 559 n.15 (2020) (citing additional recent law review articles on the topic). This discussion may be orthogonally helpful to some of the issues raised in the state and local emergency context, such as whether an agency’s “guidance” issued under the umbrella of a governor’s executive order declaring emergency is consistent with that order. See Paul Diller (aka “dilleradollar”), *The Legal Showdown Over Governor Brown’s Emergency Rules*, PAUL DILLER MUSINGS (May 21, 2020), <https://dilleradollar.wordpress.com/2020/05/21/the-legal-showdown-over-governor-browns-emergency-rules/> [<https://perma.cc/K6U7-M8EV>] (urging the Oregon Supreme Court to examine whether agency “guidance” promulgated pursuant to gubernatorial executive order declaring emergency is subject to any of the constraints of administrative law).

61. See R. Randall Kelso, *United States Standards of Review Versus the International Standard of Proportionality: Convergence and Symmetry*, 39 OHIO N.U. L. REV. 455, 469 (2013) (“Depending on the standard of [United States Supreme Court federal constitutional] review, the governmental interests must be: legitimate or permissible; important, substantial, or significant; or compelling or overriding.”).

62. David Schleicher & Roderick M. Hills, Jr., *Local Legislatures and Delegation*, TEXAS L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4368382 [<https://perma.cc/R79U-9MKX>].

63. See generally *id.*

64. See *id.* at 26.

65. See *id.* at 23.

and if there is blowback, then the city can respond by attempting to overrule or amend.

One (of a few) problems with this argument, however, is that it fails to consider adequately the value of *public input* during the rule or lawmaking process. This input is how the public communicates its concerns about a policy going too far, infringing on perceived rights, creating excess costs, or just otherwise being a bad idea. By the time the blowback to an executive edict manifests itself in terms of a council or voter reaction, it may be too late for some lives and businesses already harmed or even ruined by a policy that the mayor adopted unilaterally with no or little process beforehand.

Consider the example of proof of vaccination requirements for public accommodations, which were popular in the big “blue” (strongly Democratic) jurisdictions in the winter of 2021–22. As I document elsewhere, the vast majority of the two dozen mandatory “vaccine passport” policies were adopted by mayoral or health commissioner decree.⁶⁶ Only a handful were proposed or simply ratified by city council action through an ordinance.⁶⁷ None emerged from the local rulemaking process.⁶⁸ Hills and Schleicher might argue that this is fine because mayors were on the hook for these policies, and if the public really had a problem with them, the respective city councils could or would have intervened to reverse or amend them. But while there was significant resistance in some jurisdictions to proof of vaccination requirements, resistance takes time to build politically.⁶⁹ In the

66. Paul Diller, *Municipal Vaccine Passport Regimes in the United States: A European Import Spreads Widely*, 45 FORDHAM INT’L L.J. 639, 645–46 (2022) (observing that of the 22 city or county proof of vaccination requirements for public accommodations implemented in the United States, mayors or a health officer implemented 20 of them unilaterally, at least initially).

67. *Id.* at 646 (noting that two of the 22 were initially approved by a city council, and two others were approved by the council after being implemented first by an executive).

68. *Id.*

69. Many businesses in the borough of Staten Island in New York City, for instance, were loath to comply with the City’s proof of vaccination requirement. Kristin F. Dalton, *NYC Vaccine Mandate: 160 Staten Island Restaurants Receive Warnings for Non-Compliance*, STATEN ISLAND ADVANCE (Dec. 3, 2021), <https://www.silive.com/coronavirus/2021/12/more-than-150-staten-island-restaurants-receive-warnings-for-non-compliance-with-nyc-vaccine-mandate.html> [https://perma.cc/Z8CN-UUBR]. In Boston, protesters objected to the proof of vaccination requirements (along with vaccine mandates for city workers), even demonstrating outside the mayor’s home. Laura Crimaldi & Andrew Brinker, *COVID-19 Vaccine Mandate Begins in Boston Amid Demonstrations by Opponents*, BOS. GLOBE (Jan. 15, 2022), <https://www.bostonglobe.com/2022/01/15/metro/covid-19-vaccine-mandate-begins-boston-amid-demonstrations-by-opponents/> [https://perma.cc/QWG3-7YZX].

meantime, the mayors put their policies in effect with no opportunity ahead of time for public input, and people were excluded from public accommodations and businesses were harmed.⁷⁰

In addition, questions like what the minimum age at which to require proof of vaccination to enter a restaurant, and whether and how religious exemptions should be allowed were logistically complicated and normatively complex.⁷¹ These would have been precisely the kinds of implementation issues on which citizens, residents, business owners, and others should be allowed to testify at a hearing. These questions are inherently value-laden; they are the kinds of questions that can and should be the subject of political bargaining — perhaps even “horse trading” — and not subject only to “expert” guidance, if that is what the mayor even relies on. Instead of any of that taking place, however, a mayor or health commissioner figured these difficult questions out on his or her own, away from public view or process. The inherent and potentially special value of participation in local decision-making, therefore, is largely abnegated by adopting policy this way.

Moreover, in many cities, the city council is less likely to serve as an effective check on the executive. Many city legislatures are at least nominally aligned with the mayor, coming from the same political party. With no formal process ahead of time and a remote likelihood of political pushback, local executives can promulgate policy unilaterally. This creates a soft version of autocracy — in that sense, “caudillo” is an appropriate phrase. If soft autocracy is what local government has to offer these days, the justifications for local governance have changed indeed from the participatory benefits so many have lauded.⁷²

70. There are no academic studies of the issue of which I am aware, but there is industry data and as well as abundant anecdotal evidence. *See, e.g.*, Peter Romeo, *NYC's Vaccine Mandate Has Been a Disaster for Restaurants, Survey Finds*, REST. BUS. (Oct. 28, 2021), <https://www.restaurantbusinessonline.com/operations/nycs-vaccine-mandate-has-been-disaster-restaurants-study-finds> [<https://perma.cc/3PKE-JADD>] (citing industry group survey of 125 city restaurants finding that 76.8% said the rule had cost them business and that 57.6% of those who lost business “characterized the lost income as ‘significant’”). On the exclusion of customers from public accommodations and its potentially disparate impact due to race, ethnicity, and religion, see Paul A. Diller, *Training a Public Accommodations Lens on Vaccine Passports*, 27 LEWIS & CLARK L. REV. 1, 34–43 (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4336771 [<https://perma.cc/C7RW-TMWR>].

71. *See* Diller, *supra* note 66, at 649.

72. *See, e.g.*, Anderson, *supra* note 46 and accompanying text.

III. POTENTIAL PATHS FORWARD

If you accept my proposition that the rise of emergency rule at the local level is problematic, what hope is there that we may see reforms similar to those (sometimes called “backlash”) that we have seen at the state level? Unfortunately, the prospects may be slim in some cities for one of the very reasons that Hills and Schleicher cite: the lack of partisan competition at the local level. In most big, old, Northern and Midwestern cities (and a few on the West Coast), Democrats currently dominate municipal government. It may be less likely, then, for a Democratic city council to attempt to strip power from a mayor’s office they can reasonably safely assume will be in Democratic hands for the foreseeable future. Perhaps on the nonpartisan city councils, which are more common in the newer, Southern and Western cities (particularly the Mountain West and Northwest), partisan rigidity would be less of a hindrance to reform. It is possible that state intervention could play a role, whether through state constitutional amendment, legislation (in states without imperio, constitutional home rule), or through judicial application of the nondelegation doctrine. But these solutions are less than ideal for a localist, because they would be imposed from above.

The ideal solution for a localist concerned with process would be a ground-up movement of charter reform in cities where this can be done by a popular vote or some other inclusive process, like a charter revision commission.⁷³ With enough grassroots support, these processes should allow citizens and residents to constrain their executives if they see fit. Perhaps vaccine passports in the midst of a global pandemic were not the policy to spark such a reaction, but at some point in some place, another use of emergency rule might. Hence, as with state-level reform, the reining in of emergency rule at the local level may occur in scattershot fashion geographically and temporally. What needs to happen first is for more of us to be aware of its increased use and the threat that this poses to local government’s unique ability to involve people in the process of governing at the level closest to home.

73. See Davidson, *supra* note 53, at 900–02 (discussing the process of charter revision).