

Hoist the Yellow Flag and Spam[®] Up: The Separation of Powers Limitation on Hawai‘i’s Emergency Authority

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I. INTRODUCTION

In its various iterations—Kingdom, Republic, Territory, and State—Hawai‘i’s government has a long and storied experience responding to public health emergencies.¹ For example, over the past two centuries, the

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¹ See, e.g., Robert C. Schmitt and Eleanor C. Nordyke, *Death in Hawai‘i: The Epidemics of 1848-1849*, 35 HAWAIIAN J. HIST. 1 (2001) (estimating that 10,000 residents, more than 10 percent of the population at the time, died during a series of measles, whooping cough, dysentery, and influenza outbreaks); Doug Herman, *Shutting Down Hawai‘i: A Historical Perspective on Epidemics in the Islands*, SMITHSONIAN MAG. (Mar. 25, 2020), <https://www.smithsonianmag.com/history/shutting-down-hawaii-historical-perspective-epidemics-islands-180974506/> (Detailing successive “epidemics in waves: cholera (1804), influenza (1820s), mumps (1839), measles and whooping cough (1848–49) and smallpox (1853). These led King Kamehameha V, in 1869, to establish a quarantine station on a small island off Honolulu. Leprosy arrived around that time and led the kingdom, under pressure from Western advisors, to quarantine those suspected of being

government has imposed strict quarantine regulations and required sequestration of incoming travelers to guard against smallpox;² transported people afflicted with Hansen's disease to isolation in Kalaupapa, Moloka'i;³ and burned down large portions of downtown Honolulu in response to an outbreak of bubonic plague.⁴ Hawai'i's government has also dealt with its share of emergencies unrelated to public health: it imposed years of martial law after the attack on Pearl Harbor,⁵ and has responded to tsunamis,⁶

infected (predominantly Native Hawaiians) on the island of Moloka'i[.]"); Robert C. Schmitt and Eleanor C. Nurdyke, *Influenza Deaths in Hawai'i, 1918-1920*, 33 HAWAIIAN J. HIST. 1, 101 (1999) ("Largely forgotten today, the worldwide influenza pandemic of 1918-1920 killed more than 21 million persons, including at least 675,000 Americans and more than 2,300 people just in Hawai'i. . . . The pandemic received surprisingly little attention at the time and has been largely ignored by many historians until quite recently. This relative indifference to the pandemic was especially marked in Hawai'i.") (footnote omitted).

² See *Gibson v. The Steamer Madras* (Madras), 5 Haw. 109, 117 (Haw. Kingdom 1884); *In re Chow Bick Git*, 4 Haw. 385, 396 (Haw. Kingdom 1881) (recognizing the authority of "His Majesty in Privy Council" to adopt regulations requiring quarantine to combat the spread of smallpox); *Territory v. Araujo*, 21 Haw. 56, 58-59 (Haw. Terr. 1912) (recognizing limited authority of an agency to adopt rules for agricultural quarantine as long as that agency stays within delegated authority); *Peterson v. Carter*, 6 Haw. 283, 286 (Haw. Kingdom 1881) (steamship owner liable for expenses of passengers landed under Kingdom smallpox quarantine regulations).

³ *In re Segregation of Lepers*, 5 Haw. 162, 164-66 (Haw. Kingdom 1884) (analyzing the requirement in the Hawai'i Civil Code that allowed the Kingdom's Board of Health to "remove" infected persons to either Kalawao on Moloka'i, or Kaka'ako on O'ahu).

⁴ See *Wong Chow v. Transatlantic Fire Ins.*, 13 Haw. 160, 161-62 (Haw. Terr. 1900) (noting "[t]he bubonic plague broke out in Honolulu on December 12, 1899. A number of cases occurred in Chinatown, which was in an insanitary condition, and several in other parts of the city. Chinatown, consisting of fifteen blocks, bounded by the Nuuanu stream and Kukui, Nuuanu, Marine and Queen streets, was placed in quarantine by the Board of Health, and to maintain the quarantine the local militia was placed on duty. . . . In the early part of January the Board adopted fire as a means of disinfection and thereafter from time to time until the 20th of that month burned a number of buildings. . . . The Fire Commissioner caused the fire to be started by and under the supervision of the Honolulu Fire Department on the morning of the 20th of January. The fire, having been so started, accidentally spread to Kaumakapili Church in the same block and thence through nearly all the blocks in Chinatown to the water front, including the store of the plaintiffs, which was several blocks from where the fire started."); see also *Leialoha v. Wolter*, 21 Haw. 624, 627 (Haw. Terr. 1913) (rejecting claim of adverse possession because the property had been quarantined for bubonic plague, and later fenced off after the "great fire of 1900").

⁵ See *Duncan v. Kahanamoku*, 327 U.S. 304, 307 (1946) ("The following events led to the military tribunals' exercise of jurisdiction over the petitioners. On December 7, 1941, immediately following the surprise air attack by the Japanese on Pearl Harbor, the Governor of Hawaii by proclamation undertook to suspend the privilege of the writ of habeas corpus and to place the Territory under 'martial law.'). See generally HARRY N. SCHEIBER, JANE L. SCHEIBER, *BAYONETS IN PARADISE: MARTIAL LAW IN HAWAII DURING WORLD WAR II* (2016).

hurricanes,⁷ volcanic eruptions,⁸ and even a report of inbound nuclear missiles (fortunately, a false alarm).⁹ As a result of these experiences, the Hawai‘i Supreme Court has a long history of considering legal questions related to the power of government to plan for and respond to emergencies, which recognized government’s substantial power, with a few inherent limitations. But until 2014, when the Hawai‘i legislature adopted a comprehensive structural overhaul, Hawai‘i’s emergency response statutes and organization were a patchwork of scattered provisions that did not conform to modern emergency management and response practices.¹⁰ The statutory update continued the longstanding delegation of an overwhelming amount of authority to the governor (and mayors, in the case of local events) to respond to emergencies.¹¹

The law’s first major test has been a very dramatic one. The COVID-19 worldwide pandemic erupted in full in March 2020,¹² and Hawai‘i

⁶ See *Tsunami*, CITY & CNTY. OF HONOLULU (Jun. 23, 2020), <https://www.honolulu.gov/site-dem-sitearticles/35781-tsunami.html> (“Hawaii has had a long history of deadly tsunami impacts. Tsunamis are a series of very dangerous, large, long ocean waves. . . . Since 1946, more than 220 people have died in the State of Hawaii, including 6 on Oahu.”).

⁷ See Jason Daley, *Why Hawaiian Hurricanes Are So Rare*, SMITHSONIAN MAG. (Aug. 23, 2018), <https://www.smithsonianmag.com/smart-news/why-are-hawaiian-hurricanes-so-rare-180970116/>.

⁸ See Maya Wei-Haas, *Hawaii volcanoes, explained*, NAT. GEOGRAPHIC (Jan. 10, 2019), <https://www.nationalgeographic.com/science/earth/reference/hawaii-volcanoes-explained/> (listing notable eruptions).

⁹ See Celia Kang, *Hawaii Missile Alert Wasn’t Accidental, Officials Say, Blaming Worker*, N.Y. TIMES (Jan. 30, 2018), <https://www.nytimes.com/2018/01/30/technology/fcc-hawaii-missile-alert.html>.

¹⁰ HAW. REV. STAT. § 127A-1 (2019). The purpose of the law “is to update and recodify Hawaii’s emergency management laws to conform with nationwide emergency management practices.” Conf. Comm. Rep. No. 129-14 (Haw. 2014) (H.B. No. 849, H.D. 2, S.D. 2, C.D. 1, at 1 27th Leg., Reg. Sess.). The statute repealed the statutes on Disaster Relief, and the Civil Defense Emergency Act. *Id.*

¹¹ See HAW. REV. STAT. § 127A-13 (2019) (describing governor or mayors’ delegated powers in declared emergencies).

¹² COVID-19 is “the respiratory disease caused by the novel coronavirus SARS-CoV-2. As of April 6, 2020, over 330,000 cases have been confirmed across the United states, with over 8,900 dead. The virus is ‘spreading very easily and sustainably’ throughout the country, with cases confirmed in all fifty states, the District of Columbia, and several territories.” *In re Abbott*, 954 F.3d 772, 779 (5th Cir. 2020) (footnotes and citations omitted); see also *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (“COVID-19 [is] a novel severe acute respiratory illness that has killed thousands of people in California and more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others.”); see also *Elkhorn Baptist Church v. Brown*, 466 P.3d 30, 34 (Or. 2020) (“As we all

Governor David Ige exercised his statutory authority to issue a declaration of emergency by proclamation on March 4, 2020.¹³ The emergency proclamation and, thus far, twelve supplemental proclamations,¹⁴ collectively suspended a wide range of statutes, ordered activities deemed “nonessential” to stop or be limited, imposed a two-week self-quarantine on interisland, mainland, and international travelers, effectively shut down one of the main engines of the Hawai'i economy—tourism—and compelled most residents to remain at home as much as possible.¹⁵ The March 4, 2020 proclamation declared that the emergency would terminate on April 29, 2020, but as the public health crisis appeared to grow and continue, subsequent supplemental proclamations purported to extend the termination date, at latest count to October 31, 2020.¹⁶

Even though legal challenges to similar emergency restrictions have developed in other jurisdictions,¹⁷ Hawai'i's courts have not dealt with many objections to the governor's exercise of these emergency powers.¹⁸ Perhaps because it is mostly predictable how a court would analyze a challenge to emergency powers under the U.S. Constitution. The leading

know, a novel coronavirus was first detected in late 2019, and it has spread rapidly across the globe, killing hundreds of thousands of people.”).

¹³ See OFF. OF THE GOVERNOR, STATE OF HAW., EMERGENCY PROCLAMATION FOR COVID-19 (2020).

¹⁴ See OFF. OF THE GOVERNOR, STATE OF HAW., THIRTEENTH PROCLAMATION RELATED TO THE COVID-19 EMERGENCY (2020). All of the Governor's proclamations are available at <https://governor.hawaii.gov/covid-19/>.

¹⁵ See *id.* at 5–8.

¹⁶ See *id.* at 32.

¹⁷ See, e.g., *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613; *In re Abbott*, 954 F.3d at 779; *Elkhorn Baptist Church*, 466 P.3d at 34; *Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa. 2020). For a thorough list of coronavirus-related litigation, see *Lawsuits about state actions and policies in response to the coronavirus (COVID-19) pandemic, 2020*, BALLOTPEDIA, [https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020](https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020).

¹⁸ As of this writing, there have been two lawsuits filed in the Hawai'i federal court. Several Hawai'i residents, under the name “For Our Rights,” sued the Hawai'i Governor and Attorney General in the U.S. District Court for the District of Hawaii, asserting the governor's emergency declaration automatically expired, among other claims. See *Complaint, For our Rights v. Ige*, Civ. No. 1:20-cv-00268 (D. Haw. June 9, 2020) (available at “*New Complaint (Hawaii)–Governor's Covid Emergency Orders Are Past Their Pull Date*,” <https://www.inversecondemnation.com/inversecondemnation/2020/06/new-complaint-hawaii-governors-covid-emergency-orders-are-past-their-pull-date.html>). A second lawsuit alleged right-to-travel, equal protection, and due process claims. See *Complaint for Declaratory and Injunctive Relief, Carmichael v. Ige*, Civ. No. 1:20-cv-00273 (D. Haw. June 15, 2020) (available at “*New (Hawaii) Complaint: Coronavirus Orders Violate Right To Travel, Equal Protection, Due Process (And More)*,” <https://www.inversecondemnation.com/inversecondemnation/2020/06/new-hawaii-complaint-.html>).

U.S. Supreme Court case about the power of government to protect the public health, *Jacobson v. Massachusetts*,¹⁹ upheld the state's vaccine requirement, concluding that a person's liberty could be limited by reasonable regulations designed to protect "the safety of the public."²⁰ The Court based its reasoning on public "self-defense," noting that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."²¹ Even though the power cannot be exercised in "an arbitrary, unreasonable manner."²² *Jacobson* affirmed the very low floor for most constitutional challenges to exercises of police power generally, and exercises of such power in emergencies specifically.

In this article I examine whether Hawai'i law might compel a different analysis. Most state emergency power statutes, like Hawai'i's, contain internal limitations on delegated emergency power. I argue that Hawai'i's statute contains a single major check on the executive's delegated authority: the "automatic termination" provision, under which an emergency proclamation terminates by law the sixtieth day after it was issued, or when the governor or mayor issues a "separate" proclamation, whichever comes first.²³ This provision is an essential limitation on the power of the executive, with the only real question being whether that limitation will be enforced by the courts. Despite the statute's clear limitation on power, I conclude that the circumstances in which a court would sustain a challenge to the governor's or a mayor's power as a matter of Hawai'i law are very limited, and that the primary remedy which a court will likely recognize is a political one. It should not be so, however. Under existing precedents, there are at least two ways in which a court might analyze this limitation. This article examines the prominent narrative threads that have emerged from Hawai'i's judicial history of adjudicating claims arising out of public health crises, quarantines, and emergencies, as a way of comparing the directions a court might take.

This brings me to the title of this article, and its reference to Spam® (the canned luncheon meat, not annoying unsolicited email)²⁴. When emergencies loom, Hawai'i residents are known to stock up on essentials

¹⁹ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

²⁰ *Id.* at 28.

²¹ *Id.* at 27.

²² *Id.* at 28.

²³ See HAW. REV. STAT. § 127A-14(d) (2019) ("A state of emergency and a local state of emergency shall terminate automatically sixty days after the issuance of a proclamation of a state of emergency or local state of emergency, respectively, or by a separate proclamation of the governor or mayor, whichever occurs first.").

²⁴ See *Spam*, FED. TRADE COMM'N: CONSUMER INFORMATION (2011), <https://www.consumer.ftc.gov/articles/0038-spam> (defining spam as "[u]nwanted commercial email").

like toilet paper, rice, and Spam[®].²⁵ If the courts are reluctant to enforce the sole limitation on executive power in the statute, then all that is left is to stock up on Spam[®], keep vigilant, and hold political officials accountable. This means identifying the shortcomings in the present law and clarifying the statute at the earliest possible opportunity. This is what the article ultimately proposes. The alternative is rule by indefinite executive decree as the COVID-19 emergency starkly illustrates, a result that Hawai‘i’s emergency response statute plainly rejects.

Section II provides background about the inherently limited power of the government to undertake extreme measures without triggering judicial intervention. Section III details Hawai‘i’s statutory delegation of emergency powers to the governor and county mayors, while section IV analyzes the sole major check on that power, the automatic termination of emergency declarations which ends a declaration when the governor or mayor issues a “separate” declaration, or sixty days has passed. Section V examines the two main narrative threads that emerged from the Hawai‘i Supreme Court’s decisions about public health emergencies and other exercises of the police power. I conclude with a few observations and suggestions. My purpose here is not to assert what the government’s response to particular emergencies should be—or whether the response to the ongoing COVID-19 emergency is scientifically correct²⁶—but only to highlight and identify areas in which the legislative and judicial analysis could be more meaningful and transparent, as a way of suggesting how Hawai‘i’s law can be improved for the next emergency.

II. LIMITS ON EMERGENCY POWERS—THREE CONSTITUTIONS

Before analyzing how government authority to prepare and respond to emergencies has been delegated and distributed, I ask a more fundamental

²⁵ See Tiffany Hill, *Hawaii’s Emergency Preparedness Store*, HONOLULU MAG. <http://www.honolulumagazine.com/Honolulu-Magazine/October-2013/Honolulu-Are-you-prepared-for-hurricanes-nukes-earthquakes-and-tsunamis/Hawaiiis-Emergency-Preparedness-Store/> (“Most people buy cases of Spam and bottles of water at Times and bags of charcoal for their hibachis at Costco, but for those who want to go above and beyond FEMA’s recommendations, there’s a one-stop shop in Waipio that sells everything one needs to endure a disaster, for months.”).

²⁶ But see A. Kam Napier, *Pupu Platter: Hawaii’s Covid policies, as science, wouldn’t pass an ethics review*, PAC. BUS. NEWS (Oct. 16, 2020), <https://www.bizjournals.com/pacific/news/2020/10/16/hawaii-covid-policies-potentially-unethical.html> (“Globally, a vast medical experiment is underway, a hodgepodge of public health interventions imposed without consent, improvised during a live pandemic to see what works. And it wouldn’t pass ethical muster at a single university where actual science is conducted.”).

question: what limits exist on such power? After all, the very nature of an emergency suggests something extraordinary and unusual, and indeed some courts have stated that the constitution and the rights it recognizes are “curtailed” in an emergency.²⁷ I start with the proposition that this is incorrect. While emergencies may require rapid and unusual responses as governments react to evolving situations, the usual rules constraining the exercise of power does not grow during an emergency, nor are private rights curtailed or limited. As the U.S. Supreme Court recognized in *Home Building and Loan Association v. Blaisdell*,²⁸ an emergency “does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved.”²⁹ The Court noted that “the [U.S.] Constitution was adopted in a period of grave emergency.”³⁰ The Constitution was designed to work equally well in “normal” times as in trying times.³¹ As the Court stated:

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the states were not determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.³²

By providing that “this chapter shall not be construed as conferring any power or permitting any action which is inconsistent with the Constitution and laws of the United States,” Hawai‘i’s emergency preparation and

²⁷ See *In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020) (“The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some ‘real or substantial relation’ to the public health crisis and are not ‘beyond all question, a plain, palpable invasion of rights secured by the fundamental law.’” (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905))).

²⁸ *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934).

²⁹ *Id.* at 425; see also *Ex parte Milligan*, 71 U.S. 2 (1866).

³⁰ *Blaisdell*, 290 U.S. at 425.

³¹ See *id.* at 448–50.

³² *Id.* at 425–426; see also *Wis. Legislature v. Palm*, 942 N.W.2d 900, 917 (Wis. 2020) (“As the United States Department of Justice has recently written in a COVID-19-related case raising constitutional issues, ‘There is no pandemic exception . . . to the fundamental liberties the Constitution safeguards. Indeed, ‘individual rights secured by the Constitution do not disappear during a public health crisis.’ These individual rights, including the protections in the Bill of Rights made applicable to the states through the Fourteenth Amendment, are always in force and restrain government action.” (citing *Temple Baptist Church v. City of Greenville*, No. 4:20-cv-64-DMB-JMV, 2020 WL 1932929 (N.D. Miss. April 14, 2020), ECF No. 6)).

response statute expressly recognizes the inherent constitutional limitations on governmental power, even power to respond to an emergency.³³

But which constitution? I suggest there are three constitutions in play. First, the U.S. Constitution, which, in the absence of invidious discrimination or infringement on a protected right, sets a very low bar for constraining the power of state and local governments, even in non-emergency times.³⁴ The rational basis test erects a formidable wall for anyone challenging an exertion of government power to respond to circumstances the government decides require a drastic response. *Miller v. Schoene* is the case most responsible for this because the decision is viewed as holding that police power measures that are arguably more compelling (or, more accurately, more immediate) than run-of-the mill regulations do not offend due process.³⁵ There, the government was seeking to eradicate a fungus that threatened an important part of the state's economy.³⁶ While that certainly seems more pressing than, say, a zoning ordinance, under the rational basis test the courts are not supposed to qualitatively weigh the asserted government purpose or the means chosen to advance it.³⁷ In *Miller*, Virginia ordered the destruction of otherwise unthreatened cedar trees without compensation because they could carry a disease harmful to nearby apple trees.³⁸ The important government interest there was the preservation of the apple trees over the cedar trees—a choice the state was entirely free to make, unrestrained by the due process clause.³⁹ The Court concluded the destruction order was a valid exercise of the police power, and courts

³³ See HAW. REV. STAT. § 127A-1(c) (2019) (“It is the intent of the legislature to provide for and confer comprehensive powers for the purposes stated herein. This chapter shall be liberally construed to effectuate its purposes; provided that this chapter shall not be construed as conferring any power or permitting any action which is inconsistent with the Constitution and laws of the United States, but, in so construing this chapter, due consideration shall be given to the circumstances as they exist from time to time. This chapter shall not be deemed to have been amended by any act hereafter enacted at the same or any other session of the legislature, unless this chapter is amended by express reference.”).

³⁴ See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394, 414 (1915) (holding that prohibition of the operation of existing brickyards in some but not all parts of a city was not a due process violation. In “the absence of a clear showing” of improper purpose, the courts “must accord good faith” to the government’s claim it barred brickyards as a police power measure.).

³⁵ *Miller v. Schoene*, 276 U.S. 272, 280–81 (1929).

³⁶ *Id.* at 278.

³⁷ *Id.* at 280.

³⁸ *Id.* at 278.

³⁹ *Id.* at 280 (noting that the power of the government to prefer one interest “over the property interest of [another], to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.”).

should not question too vigorously the government's assertion that the action was needed.⁴⁰ The government's power was not enhanced by virtue of the emergency, and this was—unusual circumstances aside—a rather typical exercise of police power.⁴¹

The second constitution to limit the government's power is the Hawai'i Constitution. Although due process and equal protection claims under the Hawai'i Constitution are not reviewed under the overwhelmingly low rational basis test as their federal constitutional counterparts,⁴² Hawai'i's courts have been nonetheless reluctant to enter the fray too deeply, especially during an ongoing crisis. In addition to its individual rights provisions, the Hawai'i Constitution also contains safeguards in its separation-of-powers structure,⁴³ under which Hawai'i's courts have avoided resolving a narrow bandwidth of legal claims on the grounds that they involve political questions—that is, the Hawai'i Constitution delegates resolution of these legal questions to a branch other than the judiciary.⁴⁴

The third constitution is what has been labeled the “popular constitution” that exists, unwritten, in the broader culture.⁴⁵ I call this the “playground constitution,” embodying rules that a broad swath of the populace believes are part of the legal canon, and which often contain a grain of accuracy but do not capture the nuance of the actual legal rules. For example, “finders keepers, losers weepers,”⁴⁶ and possession being “nine-tenths of the law.”⁴⁷

⁴⁰ *Id.* at 281.

⁴¹ *Id.* (“We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law; or whether they may be so declared by statute.” (citing *Hadacheck*, 239 U.S. at 411)).

⁴² See *infra* notes 155–72 and accompanying text.

⁴³ HAW. CONST. art. III, § 1 (“The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States.”); HAW. CONST. art. V, § 1 (“The executive power of the State shall be vested in a governor.”); see *Alakai Na Keiki, Inc. v. Matayoshi*, 127 Hawai'i 263, 275, 277 P.3d 988, 1000 (2012) (“We recognize that “[t]he separation of powers doctrine is not expressly set forth in any single constitutional provision, but like the federal government, Hawaii's government is one in which the sovereign power is divided and allocated among three co-equal branches.” (citing *Haw. Insurers Council v. Lingle*, 120 Hawai'i 51, 69, 201 P.3d 564, 582 (2008))).

⁴⁴ See, e.g., *Tr. of Off. of Hawaiian Affs. v. Yamasaki*, 69 Haw. 154, 173, 737 P.2d 446, 457 (1987) (concluding that claim that Office of Hawaiian Affairs was entitled to a certain percentage of ceded lands trust funds was a political question).

⁴⁵ See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES—POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

⁴⁶ See *Finders, keepers*, WIKIPEDIA, https://en.wikipedia.org/wiki/Finders,_keepers (“Finders, keepers is an English adage with the premise that when something is unowned or abandoned, whoever finds it first can claim it. This idiom relates to an ancient Roman law of similar meaning and has been expressed in various ways over the centuries. Of particular

In the emergency context, I have observed that playground constitutional limitations on government’s emergency powers are often treated as greater than the actual limitations as adjudicated by the courts for decades.⁴⁸ My point here being that whatever limits may exist on the power of government in emergencies—either in positive law or the public perception—the courts are generally deferential to assertions of government power, and have been overwhelmingly deferential to assertions of emergency power.

With these concepts in mind, I next examine the powers the legislature has delegated to the governor under Hawai‘i’s emergency management statutes.

III. EMERGENCY POWERS IN HAWAI‘I

Hawai‘i’s emergency management statutes, substantially revised in 2014, delegate to the governor extraordinarily muscular powers.⁴⁹ Although the statute recognizes that the existence of an emergency does not allow actions “inconsistent with the Constitution and laws of the United States”⁵⁰—the

difficulty is how best to define when exactly something is unowned or abandoned, which can lead to legal or ethical disputes.”) (footnote omitted).

⁴⁷ See Transcript of Oral Argument at 59, *Rodrigues v. F.D.I.C.*, 2012 WL 1945497 (U.S. Dec. 3, 2019) (No. 18-1269) (“JUSTICE SOTOMAYOR: I’m sorry, counsel. It makes no sense. Possession is nine-tenths of the law, I was taught as a child, even before I was a lawyer. So, possession has some state law consequences.”).

⁴⁸ See, e.g., Jim Breslo, *Are State Shutdown Orders Constitutional?*, THE AM. SPECTATOR (Mar. 30, 2020), <https://spectator.org/are-state-shutdown-orders-constitutional/> (“Neither the governor nor the mayors have the authority to suspend the state constitution, regardless of the emergency. According to Meuser, a sweeping ban prohibiting people from leaving their homes is a clear overreach. ‘If you do not have probable cause to determine that a person has the virus, you cannot deprive them of their liberties,’ he said. ‘You cannot deprive them of their ability to attain and maintain property, which is a job.’”); Bad Legal Takes (@BadLegalTakes), TWITTER (June 16, 5:32 AM), <https://twitter.com/BadLegalTakes/status/1272736324206784512> (“I will no longer wear a mask inside any business. It’s unconstitutional to enforce. Let’s make this bullshit stop now! Who’s with me?”); see also u/GibsonYeats, REDDIT (May 22, 2020), https://www.reddit.com/r/badlegaltakes/comments/got5x2/the_constitution_doesnt_apply/ (posting a screenshot of a twitter exchange by Cliff Maloney (@LibertyCliff) and Jonathan Rash (@EthanAllenHaw): “I don’t know who needs to hear this, but there is no ‘pandemic clause’ in the Constitution allowing local, state, or federal government to suspend any of your rights.”).

⁴⁹ See HAW. REV. STAT. ch. 127A (2019); see also HAW. REV. STAT. §§ 125-1–2 (2019) (delegating to the governor the power to declare an emergency when circumstances “imperils the availability of public commodities . . . or which results in any substantial interruption of commerce to or within the State[.]” and allowing the governor to take over commerce).

⁵⁰ HAW. REV. STAT. § 127A-1(c) (2019) (“This chapter shall be liberally construed to

statute contains few other internal limitations, and a review of its provisions reveals the assignment of an overwhelming amount of power and discretion in the state governor both during a declared emergency, and in other times.

The legislature delegated to “the governor or mayor, as applicable” all emergency powers, and allowed the governor (or county mayors) to further delegate powers to “governmental, private-sector, and nonprofit agencies and organizations, officials, officers, employees, and other individuals[.]”⁵¹ The statute deems these powers delegated to state (or county, as applicable) emergency management agency directors “[u]nless otherwise directed by the governor or mayor,” and may be further delegated by them to others.⁵² For example, the statute allows the governor to declare a state of emergency if an “emergency or disaster” either has occurred or may soon occur.⁵³ The statute defines “emergency” very broadly:

“Emergency” means any occurrence, or imminent threat thereof, which results or may likely result in substantial injury or harm to the population or substantial damage to or loss of property.⁵⁴

But the statute also vests in the governor the sole discretion to apply this definition: the governor alone has this power to determine that an emergency exists, and to declare a state of emergency.⁵⁵ Nor may any other official or agency other than the governor (or the mayor in a local emergency) issue a proclamation of an emergency.⁵⁶ The executive’s discretion is virtually unassailable: the governor is the “sole judge of the existence of the danger, threat, or circumstance giving rise to a declaration of a state of emergency” in the state or a county.⁵⁷

What are those powers? The statute first delegates to the governor broad powers, even without any declaration of an emergency. The governor “may

effectuate its purposes; provided that this chapter shall not be construed as conferring any power or permitting any action which is inconsistent with the Constitution and laws of the United States, but, in so construing this chapter, due consideration shall be given to the circumstances as they exist from time to time.”).

⁵¹ *Id.* § 127A-11(a).

⁵² *Id.* § 127A-11(b).

⁵³ *Id.* § 127A-14(a).

⁵⁴ *Id.* § 127A-2. The statute also defines “disaster” as “any emergency, or imminent threat thereof, which results or may likely result in loss of life or property and requires, or may require, assistance from other counties or states or from the federal government.” *Id.*

⁵⁵ *Id.* § 127A-2 (defining a “state of emergency” as “an occurrence in any part of the State that requires efforts by state government to protect property, public health, welfare, or safety in the event of an emergency or disaster, or to reduce the threat of an emergency or disaster, or to supplement the local efforts of the county.”).

⁵⁶ *Id.* § 127A-11(a)(1).

⁵⁷ *Id.* § 127A-14(c); *see also id.* § 127A-2.

exercise” the following powers as part of her emergency management function:

- Prepare plans, identify emergency workers, train and prepare, create emergency logos, and the like.⁵⁸
- Take over and use public property.⁵⁹ Provide for its repair, insurance, renovation, or replacement if damages.⁶⁰
- Receive and expend money.⁶¹
- Acquire—by agreement or involuntarily by an exercise of eminent domain—the ownership or use of “materials and facilities[.]” free of the usual public procurement rules.⁶²
- Execute contracts.⁶³
- Protect public utilities.⁶⁴
- “Restrict the congregation of the public in stricken or dangerous areas or under dangerous conditions.”⁶⁵
- Evacuate the civilian population on a “non-compulsory” basis.⁶⁶
- Order government agencies to enforce the law, and act to promote public functions such as medical, fire, police, rescue, construction, housing, and similar operations.⁶⁷
- Modify the hours of government business.⁶⁸

The statute’s enumeration of powers for non-emergency times ends with a broad catch-all provision: the governor may take “any and all steps necessary or appropriate to carry out the purposes of this chapter notwithstanding that those powers in section 127A-13(a) may only be exercised during an emergency period.”⁶⁹ County mayors are delegated similarly broad powers within their respective counties.⁷⁰ About the only limitation on the governor’s authority is an express—but limited and

⁵⁸ *Id.* § 127A-12(a) (1)–(5).

⁵⁹ *Id.* § 127A-12(b)(5).

⁶⁰ *Id.* § 127A-12(b)(17).

⁶¹ *Id.* § 127A-12(b)(7).

⁶² *Id.* § 127A-11(b)(8).

⁶³ *Id.* § 127A-12(b)(11).

⁶⁴ *Id.* § 127A-12(b)(13).

⁶⁵ *Id.* § 127A-12(b)(14).

⁶⁶ *Id.* § 127A-12(b)(15).

⁶⁷ *Id.* § 127A-12(b)(16).

⁶⁸ *Id.* § 127A-12(b)(18).

⁶⁹ *Id.* § 127A-12(b)(19).

⁷⁰ *See id.* § 127A-12(c).

subject to restrictions—carve-out for “[m]edia access” in closed “emergency areas.”⁷¹

In an actual declared emergency, the power of the governor and mayors expands dramatically:

- Require the “quarantine or segregation of persons who are affected with or believed to have been exposed to any infectious, communicable, or other disease that is, in the governor’s opinions, dangerous to the public health and safety[.]”⁷²
- Requisition and take over property.⁷³
- Suspend laws such as licensing laws, quarantine laws, “and laws relating to labels, grades, and standards[.]”⁷⁴
- “Suspend any law that impedes or tends to impede or be detrimental to the expeditious and efficient execution of, or to conflict with, emergency functions, including laws which by this chapter specifically are made applicable to emergency personnel[.]”⁷⁵ This includes the power to suspend laws regulating the ability of out-of-state utilities to operate in the state.⁷⁶
- Take over emergency response from local control.⁷⁷
- Require evacuation of the civilian population.⁷⁸
- Take over or regulate the market to “prevent hoarding, waste, or destruction of materials, supplies, commodities, accommodations, facilities, and services, to effectuate equitable distribution thereof[.]”⁷⁹

⁷¹ See *id.* § 127A-12(d) (“Media access shall be permitted in emergency areas closed pursuant to this section; provided that the designated emergency management authority for the affected area has determined that media access is reasonable and safe and does not hinder ongoing response and recovery activities. Media access shall be limited to duly authorized representatives of any news service, newspaper, radio station, television station, or online news distribution network.”).

⁷² *Id.* § 127A-13(a)(1).

⁷³ See *id.* § 127A-21 (2019) (noting that the governor or mayor may “requisition and take over any materials, facilities, or real property or improvements”). Other jurisdictions refer to this as “commandeering.” See, e.g., CAL. GOV’T CODE § 8572 (West 2020) (“In the exercise of the emergency powers hereby vested in him during a state of war emergency or state of emergency, the Governor is authorized to commandeer or utilize any private property or personnel deemed by him necessary in carrying out the responsibilities hereby vested in him as Chief Executive of the state and the state shall pay the reasonable value thereof.”).

⁷⁴ HAW. REV. STAT. § 127A-13(a)(2).

⁷⁵ *Id.* § 127A-13(a)(3).

⁷⁶ *Id.* § 127A-13(a)(4).

⁷⁷ *Id.* § 127A-13(a)(5).

⁷⁸ *Id.* § 127A-13(a)(7).

- Suspend existing state holidays and establish others.⁸⁰
- Adjust the hours for voting.⁸¹
- “Assure the continuity of service by critical infrastructure facilities, both publicly and privately owned, by regulating or, if necessary to the continuation of the service thereof, by taking over and operating the same[.]”⁸²
- If, “in the governor’s opinion,” state law is not adequate, the governor may regulate or prohibit of weaponry, items used in creating explosives, anything “particularly capable of misuse” or “obstructive of law enforcement, emergency management, or military operations” including intoxicating liquor and the liquor business. The governor may seize and require forfeiture of these items.⁸³

As in the previous section, mayors are delegated similarly broad powers within their respective counties.⁸⁴

IV. AFTER THE HARD STOP: “SEPARATE,” OR “SUPPLEMENTAL?”

The only systemic check on the governor’s emergency authority is process-based and temporal. A declared state of emergency automatically terminates no more than sixty days after proclamation.⁸⁵

⁷⁹ *Id.* § 127A-13(a)(8).

⁸⁰ *Id.* § 127A-13(a)(9).

⁸¹ *Id.* § 127A-13(a)(10).

⁸² *Id.* § 127A-13(a)(11).

⁸³ *Id.* § 127A-13(a)(12).

⁸⁴ *See id.* § 127A-13(b)(1)–(5). The statute also establishes broad immunity from civil liability for the state, counties, “[a]ny owner or operator of a public utility or critical infrastructure facility,” and private or nonprofit organizations, for death, injury, or property damages as the result of affirmative acts, or omissions, undertaken or not undertaken in the course of exercising emergency response duties. *Id.* § 127A-9(a). In short, no civil lawsuits. That section also exempts “[m]embers of the United States Army, Air Force, Navy, Marine Corps, or Coast Guard on any duty or service performed under or in pursuance of an order or call of the President of the United States or any proper authority, and the National Guard from any other state ordered into service by any proper authority” from criminal and civil liability. *Id.* § 127A-9(c); *see also id.* § 127A-20 (2019) (granting immunity from civil liability for negligence to private shelters who house people without compensation during an emergency or disaster).

⁸⁵ *Id.* § 127A-14(d) (2019). Requisitions of property are also subject to the requirement to provide compensation, but that is not an immediate check on the power, only an after-the-fact obligation to make a property owner whole. The Hawai’i statute, like similar provisions in other jurisdictions, expressly recognizes the obligation of the state to compensate property owners whose property is taken over:

As the major legal limitation on the governor's power, the termination provision is arguably the most important part of the statute. If the majority of other jurisdictions are any indication, the time limitation is a critical feature of the delegation of emergency power, because most jurisdictions impose some time limitation or other structural check on the emergency powers of the executive, even though a handful of jurisdictions such as Michigan establish no time limit at all.⁸⁶ Arizona and Oregon, for example,

Whenever the governor or mayor requisitions and takes over any property or the temporary use thereof, the owner, or other person entitled thereto, shall be paid as compensation for the property or use, such sum as the governor or mayor determines to be fair and just, within twenty days after it has been requisitioned and taken; provided that the compensation for temporary use may be paid in monthly or lesser installments.

Id. § 127A-22(a); *see also* CAL. GOV'T CODE § 8572 (West 2020) ("the state shall pay the reasonable value thereof"). This section conflicts with both the U.S. and Hawai'i Constitutions' just compensation clauses because it limits the compensation to a sum the governor or mayor determines to be fair and just. Property owners are entitled to just compensation, a value that is determined by the courts, not the other branches. The U.S. Supreme Court has expressed the separation-of-powers rule that the legislature has no power to dictate how much compensation is paid for a taking. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893) (determining that although a "legislature may determine what private property is needed for public purposes . . . the question of compensation is judicial."). "Just" compensation means the "full and perfect equivalent for the property taken[.]" not an amount that the executive officer determines is fair. *Id.* at 326. The follow-on subsection, in which a property owner is penalized for objecting to the governor or mayor's determination of fair compensation by being entitled to only 75 percent of the offer, is even more constitutionally infirm. *See* HAW. REV. STAT. § 127A-22(b) (2019) ("If any person is unwilling to accept, as full and complete compensation for the property or use thereof, the sum determined by the governor or mayor, the person shall be paid seventy-five per cent of the sum determined by the governor or mayor. The person shall also be entitled to sue the State or county for such additional sum as, when added to the sum already received by the person, the person may consider fair and just compensation for such property or use, in the manner provided by chapter 661 for actions against the State and any other applicable chapter for actions against the county.). The statute also seems to run afoul of the requirements of the eminent domain code, which allows immediate possession of property only after the deposit of estimated compensation and the issuance of an order by the court. *See id.* §§ 101-28, -29. Section 127A-21(b), however, assumes that compensation shall be provided. *Id.* § 127A-21(a) (providing for service of notice on the owner or occupier of requisitioned property, "provided further that whenever all persons entitled to compensation for the property have not been served in the manner aforesaid, the governor or mayor shall publish a notice of the requisition at the earliest practicable date."). The same time limit governing emergency proclamations also applies to property requisitions, which "terminate automatically" no later than sixty days after the declaration is issued, or the governor or mayor issues a separate proclamation. *See id.* § 127A-21(b).

⁸⁶ *See* MICH. COMP. LAWS § 10.31(2) (2020) (emergency proclamation or declaration "may be amended, modified, or rescinded, in the manner in which they were promulgated,

have no express time limitations but vest power in the governor or the legislature to decide when an emergency has ended. For example, some states split authority between the governor and the legislature, with the governor initially having discretion and with the statutes making clear that the power then devolves from the governor to the legislature.⁸⁷ An approach taken by some other jurisdictions makes clear in their emergency management statutes the need for separation of powers, and that the legislature has an essential role in emergency management and response, particularly as a short-term crisis stretches on.⁸⁸ This demonstrates that

from time to time by the governor during the pendency of the emergency, but shall cease to be in effect upon declaration by the governor that the emergency no longer exists"); MISS. CODE ANN. § 33-15-11(18) (2020) ("The Governor shall review the need for continuing the declaration of emergency impact area at least every thirty (30) days until the emergency is terminated, and shall proclaim the reduction of the emergency impact area or termination of the declaration of emergency impact area at the earliest date or dates possible."); N.C. GEN. STAT. § 166A-19.20(c) (2020) ("A state of emergency declared pursuant to this section shall expire when it is rescinded by the authority that issued it."). *See also* VA. CODE ANN. § 44-146.17 (2020).

⁸⁷ *See* ARIZ. REV. STAT. ANN. § 26-303F (2020) ("The powers granted the governor by this chapter with respect to a state of emergency shall terminate when the state of emergency has been terminated by proclamation of the governor or by concurrent resolution of the legislature declaring it at an end."); OR. REV. STAT. § 401.204(1)-(2) (2020) (declaring "[t]he Governor shall terminate the state of emergency by proclamation when the emergency no longer exists, or when the threat of an emergency has passed[,] and "The state of emergency proclaimed by the Governor may be terminated at any time by joint resolution of the Legislative Assembly."); *Elkhorn Baptist Church v. Brown*, 466 P.3d 30, 44 (Or. 2020) ("The Governor's emergency powers under ORS chapter 401 are not limited to a specific number of days. Instead, they continue until the state of emergency is terminated.").

⁸⁸ *See, e.g.,* CAL. GOV'T. CODE § 8630(b)-(d) (West 2020) ("Whenever a local emergency is proclaimed by an official designated by ordinance, the local emergency shall not remain in effect for a period in excess of seven days unless it has been ratified by the governing body. (c) The governing body shall review the need for continuing the local emergency at least once every 60 days until the governing body terminates the local emergency. (d) The governing body shall proclaim the termination of the local emergency at the earliest possible date that conditions warrant."); GA. CODE ANN. § 38-3-51(a) (2020) ("No state of emergency or disaster may continue for longer than 30 days unless renewed by the Governor. The General Assembly by concurrent resolution may terminate a state of emergency or disaster at any time. Thereupon, the Governor shall by appropriate action end the state of emergency or disaster."); IND. CODE § 10-14-3-12(a) (2020) ("The state of disaster emergency continues until the governor: (1) determines that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist; and (2) terminates the state of disaster emergency by executive order or proclamation. A state of disaster emergency may not continue for longer than thirty (30) days unless the state of disaster emergency is renewed by the governor. The general assembly, by concurrent resolution, may terminate a state of disaster emergency at any time."); N.H. STAT. ANN. § 4:45II(a) (2020) (establishing a 21-day limit for declarations of emergencies, but providing that the governor may "renew a declaration of a state of emergency as many times

Hawai‘i is a part of an overwhelming majority of states that have concluded these rule-by-decree emergency powers of executive officers should be granted only for a very limited time and should not be open-ended.⁸⁹ Thus,

as the governor finds is necessary to protect the safety and welfare of the inhabitants of the this state[.]” but also recognizing that the legislature “may terminate a state of emergency by concurrent resolution adopted by a majority vote of each chamber” that terminates the governor’s power to renew a declaration (but not to declare a “new emergency”)); NEV. REV. STAT. § 414.070 (2020) (“Any such emergency or disaster, whether proclaimed by the Governor or by the Legislature, terminates upon the proclamation of the termination thereof by the Governor, or the passage by the Legislature of a resolution terminating the emergency or disaster.”); N.M. STAT. ANN. § 12-10A-5 (West 2020) (public health emergency declaration terminates automatically after 30 days, “unless renewed by the governor after consultation with the secretary of health”); N.D. CENT. CODE § 37-17.1-05 (2019) (“A disaster or emergency must be declared by executive order or proclamation of the governor if the governor determines a disaster has occurred or a state of emergency exists. The state of disaster or emergency shall continue until the governor determines that the threat of an emergency has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist.”); 35 PA. CONS. STAT. § 7301(c) (2020) (“The state of disaster emergency shall continue until the Governor finds that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist and terminates the state of disaster emergency by executive order or proclamation, but no state of disaster emergency may continue for longer than 90 days unless renewed by the Governor. The General Assembly by concurrent resolution may terminate a state of disaster emergency at any time. Thereupon, the Governor shall issue an executive order or proclamation ending the state of disaster emergency.”); 30 R.I. GEN. STAT. § 30-15-9 (2020) (“The state of disaster emergency shall continue until the governor finds that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist and terminates the state of disaster emergency by executive order or proclamation, but no state of disaster emergency may continue for longer than thirty (30) days unless renewed by the governor. The general assembly, by concurrent resolution, may terminate a state of disaster emergency at any time.”); S.D. CODIFIED LAWS § 34-48A-5 (2020) (limiting governor’s emergency powers to six months, with renewals of additional periods left to the governor’s discretion); TEX. GOV’T CODE ANN. § 418.014 (2020) (limited a state of disaster to 30 days “unless renewed by the governor” or terminated by the legislature “at any time”); UTAH CODE ANN. § 53-2a-206 (LexisNexis 2020) (providing a 30-day limit “unless extended by joint resolution of the Legislature, which may also terminate a state of emergency by joint resolution at any time”); W. VA. CODE ANN. § 15-5-6(b) (LexisNexis 2020) (“Any state of emergency or state of preparedness, whether proclaimed by the Governor or by the Legislature, terminates upon the proclamation of the termination by the Governor, or the passage by the Legislature of a concurrent resolution terminating the state of emergency or state of preparedness: *Provided*, That in no case shall a state of preparedness last longer than thirty days.”); WIS. STAT. ANN. 323.10 (West 2020) (“A state of emergency shall not exceed 60 days, unless the state of emergency is extended by joint resolution of the legislature. A copy of the executive order shall be filed with the secretary of state. The executive order may be revoked at the discretion of either the governor by executive order or the legislature by joint resolution.”).

⁸⁹ One can see why, since emergency power is very extensive and shortcuts many of the usual democratic checks on power. Pretty soon, everything becomes an “emergency.” See

although process-based, Hawai'i's time limit serves as an essential democratic check on arrogation of executive power by emphasizing that the delegation to the governor from the people via the legislature is muscular, but very temporary. And that once the delegation automatically terminates, absent a separate declaration setting forth separate reasons, the authority to declare and manage emergencies reverts to the legislature.

Courts have not been presented with many opportunities to interpret these types of time limits. But recently, the Oregon Supreme Court in *Elkhorn Baptist Church v. Brown* considered the scope of the governor's emergency powers and mostly avoided a ruling on whether the Oregon governor's emergency orders responding to COVID-19 were subject to the state's time limitations on public health and "catastrophic disaster" emergencies.⁹⁰ Oregon statutes delegate to the governor certain powers in emergencies, and other more limited powers in "public health" emergencies. The governor's power in emergencies is not subject to any express time limitations, while in public health emergencies, by contrast, the power is limited to no more than twenty-eight days.⁹¹ In her emergency declarations in response to COVID-19, Oregon's governor invoked her general emergency powers, and not her public health emergency powers, to limit the size of public gatherings. The governor's orders restricted these activities for longer than twenty-eight days. Several churches challenged the emergency orders, asserting the emergency orders were subject to the time limitation applicable to public health emergencies, because, well, this is a public health emergency.⁹²

The Oregon Supreme Court disagreed, concluding that the governor invoked her general emergency powers, and even though the COVID-19 emergency is a public health emergency (generically), the governor's orders were not implemented under the public health emergency statute.⁹³ The governor could choose which power to exercise. Consequently, the

Catherine Padhi, *Emergencies Without End: A Primer on Federal States of Emergency*, LAWFARE (Dec. 8, 2017), <https://www.lawfareblog.com/emergencies-without-end-primer-federal-states-emergency>.

⁹⁰ *Elkhorn Baptist Church v. Brown*, 466 P.3d 30, 30–52 (Or. 2020).

⁹¹ Compare OR. REV. STAT. § 401.192(4) (2020) (providing that emergency powers continue until emergency is terminated), with OR. REV. STAT. § 433.441(5) (2020) (providing that public health emergency powers expire "no more than 14 days after the date of the public health emergency is proclaimed unless the Governor expressly extends the proclamation for an additional 14-day period").

⁹² *Elkhorn Baptist Church*, 466 P.3d at 51 ("Plaintiffs acknowledge that, in her first executive order regarding the coronavirus pandemic, the Governor declared a state of emergency pursuant to ORS 401.165, described above.").

⁹³ *Id.*

governor's emergency orders were not subject to any time limitations.⁹⁴ The court recognized that public health emergencies are limited to twenty-eight days and concluded that the legislature intended that if such an emergency continues for more than twenty-eight days, the governor may declare a state of emergency and invoke her broader powers.⁹⁵ The governor's public health emergency power is considered an additional tool, not a separate or subordinate one.⁹⁶ In other words, by adopting the public health emergency option, the legislature did not intend to curb the governor's general powers to declare and respond to emergencies.⁹⁷ The court similarly rejected the church's argument that the governor's emergency declarations were subject to the thirty-day time limitation on "catastrophic disaster" powers in the Oregon Constitution, because the governor had not expressly invoked such powers.⁹⁸ Again, the governor could have invoked these powers but has the discretion to not do so.⁹⁹ The COVID-19 emergency may be a catastrophic disaster, but the governor need not formally have invoked her catastrophic disaster powers. The court also concluded that the lack of a time limit in the general emergency statute¹⁰⁰ did not run afoul of the thirty-day limitation in the Oregon Constitution, because the governor's powers under the statute are not as extraordinary, and thus, she could be delegated those powers without any time limitation.¹⁰¹

But in dicta, the court viewed the statutory twenty-eight-day and constitutional thirty-day time limits as hard stops on the separate emergency response powers delegated under the public health crisis statute and Article X-A of the constitution, unless extended under the applicable provision.¹⁰² The court recognized the purpose of these limitations as curbing the "extraordinary nature" of the powers exercised by the governor.¹⁰³ This recognizes that the delegation of power to the governor is truly temporary,

⁹⁴ *Elkhorn Baptist Church*, 466 P.3d at 46 ("One of the reasons that the ORS chapter 433 emergency statutes were enacted was to give the Governor an option for responding to a public health emergency by taking a step short of declaring a state of emergency under chapter 401.").

⁹⁵ *Id.* at 47.

⁹⁶ *Id.* at 52 ("As we have explained, the Governor's orders were issued pursuant to ORS chapter 401, and they are not subject to the time limit in chapter 433.").

⁹⁷ *See id.*

⁹⁸ *Id.* at 49–51 (citing ORE. CONST. art. X-A, § 6(1)).

⁹⁹ *Id.* at 50 ("The powers granted by Article X-A are extraordinary, and the Governor may reasonably decline to invoke them.").

¹⁰⁰ OR. REV. STAT. § 401.192(4) (2019) (providing that emergency powers continue until emergency is terminated).

¹⁰¹ *Elkhorn Baptist Church*, 466 P.3d at 49–51.

¹⁰² *Id.* at 50.

¹⁰³ *Id.*

and if the legislature delegates only temporary authority to the governor, the delegation is truly limited, not merely a guideline.¹⁰⁴

The Hawai'i statute is straightforward and leaves little room for a claim of ambiguity: the declaration of an emergency "shall terminate automatically" upon one of two events: sixty days after it is issued, or the governor (or mayor) issues a "separate" proclamation.¹⁰⁵ That this is the sole democratic check on the governor's power suggests the use of "shall" imposes a mandate and a declaration simply evaporates by its own accord on the sixtieth day at the latest, hard stop.¹⁰⁶ The statute, however, should not be read as depriving the governor of authority to respond to a continuing crisis. That would be an absurd outcome because an emergency can certainly last more than sixty days, as the COVID-19 pandemic illustrates. There are two alternatives: the delegated emergency response authority terminates not later than the sixtieth day and returns to the legislature, or the governor can simply issue a new, "separate" declaration of an emergency based on the then-current situation, which would terminate the existing declaration and re-start the sixty-day clock.¹⁰⁷

For whatever reasons, Governor Ige has eschewed that approach, even while tacitly acknowledging the automatic termination limitations. The initial proclamation of the COVID-19 emergency on March 4, 2020 declared the emergency would continue until April 29, 2020 (short of the sixty-day automatic termination date), "or by a separate proclamation, whichever occurs first."¹⁰⁸ But as the public health crisis persisted, instead of issuing new proclamations to respond, the Governor issued a series of follow-on proclamations labeled "Supplemental Proclamations" which referenced the initial proclamation and that "it has become necessary to supplement the Proclamation[.]"¹⁰⁹ For example, the governor's first Supplemental Proclamation declared:

¹⁰⁴ *Id.*

¹⁰⁵ HAW. REV. STAT. § 127A-14(d) (2019).

¹⁰⁶ *See* *Leslie v. Bd. of Appeals of Cnty. of Hawai'i*, 109 Hawai'i 384, 393, 126 P.3d 1071, 1080 (2006) ("As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. The word in ordinary usage means "must" and is inconsistent with a concept of discretion." (quoting BLACK'S LAW DICTIONARY 1375 (6th ed.1990))).

¹⁰⁷ HAW. REV. STAT. § 127A-14(d) (2019) (providing that the governor or mayor may issue "a separate proclamation" which automatically terminates the existing declaration).

¹⁰⁸ *See* OFF. OF THE GOVERNOR, STATE OF HAW., EMERGENCY PROCLAMATION FOR COVID-19 7 (2020).

¹⁰⁹ *See* OFF. OF THE GOVERNOR, STATE OF HAW., SUPPLEMENTARY EMERGENCY PROCLAMATION FOR COVID-19 1 (2020).

NOW, THEREFORE, I, DAVID Y. IGE, Governor of the State of Hawai‘i, determine that an emergency or disaster as contemplated by sections 127 A-2 and 127A-14, Hawaii Revised Statutes (HRS), continues in the State of Hawai‘i, supplement the Proclamation, which otherwise remains in full force and effect, and authorize and invoke the following additional measures under the HRS[.]¹¹⁰

The March 16, 2020 Supplemental Proclamation also extended the disaster emergency relief period beyond the April 29, 2020 termination date to May 15, 2020, beyond the sixtieth day after March 4, 2020 (May 3, 2020) on which the initial Proclamation automatically terminated.¹¹¹ Additional supplemental proclamations extended the emergency relief period to May 20, 2020,¹¹² further to June 30, 2020,¹¹³ again to July 31, 2020,¹¹⁴ then to August 31, 2020,¹¹⁵ to September 30,¹¹⁶ and most recently to October 31,

¹¹⁰ *Id.* at 1. Every succeeding supplemental proclamation issued by the governor have been labeled as “supplemental” proclamations:

WHEREAS, I issued on March 4, 2020, a Proclamation declaring a state of emergency to support ongoing State and county responses to COVID-19; on March 16, 2020, a Supplementary Proclamation suspending certain laws to enable State and county responses to COVID-19; on March 21, 2020, a Second Supplementary Proclamation and Rules Relating to COVID-19 implementing a mandatory self-quarantine for all persons entering the State; on March 23, 2020, a Third Supplementary Proclamation to mandate and effectuate physical distancing measures throughout the State; on March 31, 2020, a Fourth Supplementary Proclamation implementing a mandatory self-quarantine for all persons traveling between any of the islands in the State; and on April 16, 2020, a Fifth Supplementary Proclamation implementing enhanced safe practices and an eviction moratorium; on April 25, 2020, a Sixth Supplementary Proclamation amending and restating all prior proclamations and executive orders related to the COVID-19 emergency; on May 5, 2020, a Seventh Supplementary Proclamation related to the COVID-19 Emergency; in May 29, 2020, an Eighth Supplementary Proclamation related to the COVID-19 Emergency[.]

See, e.g., OFF. OF THE GOVERNOR, STATE OF HAW., NINTH SUPPLEMENTARY PROCLAMATION RELATED TO COVID-19 1 (2020) (emphasis omitted).

¹¹¹ *See* OFF. OF THE GOVERNOR, STATE OF HAW., SUPPLEMENTARY EMERGENCY PROCLAMATION FOR COVID-19 7 (2020).

¹¹² OFF. OF THE GOVERNOR, STATE OF HAW., SECOND SUPPLEMENTARY PROCLAMATION 2 (2020).

¹¹³ OFF. OF THE GOVERNOR, STATE OF HAW., EIGHTH SUPPLEMENTARY PROCLAMATION RELATED TO THE COVID-19 EMERGENCY 34 (2020).

¹¹⁴ OFF. OF THE GOVERNOR, STATE OF HAW., NINTH SUPPLEMENTARY PROCLAMATION RELATED TO THE COVID-19 EMERGENCY 31 (2020).

¹¹⁵ OFF. OF THE GOVERNOR, STATE OF HAW., TENTH SUPPLEMENTAL PROCLAMATION

2020.¹¹⁷ Perhaps an expedient and practical response in light of the evolving situation and changing circumstances, but one that on the whole does not conform to the statute's limitations, or the separation of powers rationale behind the automatic termination requirement.¹¹⁸ The Hawai'i statute adopts a hard stop and there is no express authority for a declaration of emergency to continue longer than sixty days. Indeed, the very notion of "supplemental" declarations seems like an attempt to navigate between the statute's limitation that emergency declarations are effective for no more than sixty days and to contradict the statute's command that "separate" declarations automatically terminate an existing declaration.¹¹⁹ By their nature, the Supplemental Declarations *supplement* the governor's initial March 4, 2020 declaration.¹²⁰ That is, they are dependent, not independent—in other words, subordinate and in addition to—the initial emergency declaration.¹²¹

What about an argument that any difference between a "separate" proclamation and a "supplemental" proclamation is one of form and not substance? After all, if the governor might simply issue a new proclamation declaring an emergency, why shouldn't the governor be able to issue supplemental proclamations that have the same effect? The statute does not

RELATED TO THE COVID-19 EMERGENCY 28 (2020).

¹¹⁶ OFF. OF THE GOVERNOR, STATE OF HAW., TWELFTH PROCLAMATION RELATED TO THE COVID-19 EMERGENCY 31 (2020).

¹¹⁷ OFF. OF THE GOVERNOR, STATE OF HAW., THIRTEENTH PROCLAMATION RELATED TO THE COVID-19 EMERGENCY 32 (2020).

¹¹⁸ *In re Taxes of Johnson*, 44 Haw. 519, 530, 356 P.2d 1028, 1034 (1960) ("[I]t must be supposed that the legislature, in enacting a statute, intended that the words used therein should be understood in the sense in which they are ordinarily and popularly understood by the people, for whose guidance and government the law was enacted[.]"); *see also* HAW. REV. STAT. § 1-14 (2009) ("The words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning.").

¹¹⁹ *See* HAW. REV. STAT. § 127A-14(d) (2019) ("A state of emergency and a local state of emergency shall terminate automatically . . . by a separate proclamation of the governor or mayor.").

¹²⁰ OFF. OF THE GOVERNOR, STATE OF HAW., NINTH SUPPLEMENTARY PROCLAMATION RELATED TO THE COVID-19 EMERGENCY 2 (2020) ("NOW, THEREFORE, I, DAVID Y. IGE, Governor of the State of Hawai'i, hereby amend and restate all prior proclamations and executive orders, and authorize and invoke the following as set forth herein.").

¹²¹ *See* Dist. Council 50, of Int'l Union of Painters & Allied Trades v. Lopez, 129 Hawai'i 281, 290, 298 P.3d 1045, 1054 (2013) ("Applying the ordinary meaning of 'incidental and supplemental' to HRS § 444-8(c), it is apparent that the legislature meant to provide specialty contractors with a limited ability to perform work outside of their licensed specialty area. However, the 'incidental and supplemental' work must not make up the majority of the project, and must instead be 'subordinate' and in addition to licensed work 'of greater importance.'").

define the meaning of “separate,” or give any clue about whether it is sufficient that the governor produce a document that is literally separate (different) from the original proclamation, or requires the governor to issue a new, separate proclamation, in effect rebooting the entire proclamation.¹²² The answer lies in process. The statute supports the separation of powers idea that emergency response is a subject that has not been wholly turned over to the governor, and the legislature—as the general delegate of popular sovereignty—remains an integral part of the response. The governor may have the power to act unilaterally in an emergency, but only for a limited time. After that—absent a new emergency (which might be simply the existing emergency updated to account for whatever circumstances might have changed)—the legislature retains the power to create the law on how to respond to emergencies.

There must be a difference between “supplementing” an existing proclamation and issuing a “separate” declaration because otherwise the sixty-day limitations period after which a proclamation “automatically expires” would be meaningless if a governor could simply infinitely supplement a proclamation, despite that express restriction.¹²³ If the legislature had intended to grant the power to the governor to determine the existence of an emergency indefinitely, there is no doubt that it could have done so in simple terms, and it would not have included the express time limitation in section 127A-14(d).¹²⁴ And if a court were to conclude that

¹²² The term “separate” is used twice in the statute, in section 127A-14(d) (which sets forth the governor’s power to issue emergency proclamations), and in section 127A-21 (which automatically terminates a “requisition” sixty days after a proclamation or “separate proclamation.”). HAW. REV. STAT. § 127A-21(b) (2019). The legislative history sheds no light on the meaning of “separate proclamation,” and it appears the provision was adopted without any debate or discussion of that term or the consequences of automatic termination. Nor does it illuminate the question of how emergency declarations are terminated. The only reference in the Conference Committee Report is that section 127A-14 “[e]stablishes how proclamations are promulgated and terminated consistent with current authority for civil defense proclamations.” See H.R. REP. No. 248-14 (2014).

¹²³ See *Potter v. Haw. Newspaper Agency*, 89 Hawai’i 411, 422, 974 P.2d 51, 62–63 (1999) (“Our rules of statutory construction require us to reject an interpretation of [a] statute that renders any part of the statutory language a nullity.”); *Blair v. Harris*, 98 Hawai’i 176, 179, 45 P.3d 798, 801 (2002) (“Courts are bound to give effect to all parts of a statute, and no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute.” (quoting *Keli’ipuleole v. Wilson*, 85 Hawai’i 217, 221, 941 P.2d 300, 304 (1997))).

¹²⁴ Compare § 127A-14(d) (“A state of emergency and a local state of emergency shall terminate automatically sixty days after the issuance of a proclamation of a state of emergency or local state of emergency, respectively, or by a separate proclamation of the governor or mayor, whichever occurs first.”), with ARIZ. REV. STAT. § 26-303F (2020) (“The powers granted the governor by this chapter with respect to a state of emergency shall

“separate” included “supplemental,” that ruling would not conform to the Hawai'i Supreme Court's admonition that courts should avoid “enlarging” the language of a statute, because “[w]e do not legislate or make laws.”¹²⁵

We cannot change the language of the statute, supply a want, or enlarge upon it in order to make it suit a certain state of facts. We do not legislate or make laws. Even where the Court is convinced in its own mind that the Legislature really meant and intended something not expressed by the phraseology of the Act, it has no authority to depart from the plain meaning of the language used.¹²⁶

The exigencies of the circumstances do not excuse a failure to conform to the statute's express limitations. In times of emergencies it becomes even more important to adhere to the few statutory and constitutional limitations on government assertions of power. The statute envisions the governor responding to extended emergencies by issuing “separate” proclamations, not continuing them indefinitely by supplementation. This is a limitation on the power of the governor that—unlike the storied Pirate Code—is more of an actual rule than a mere guideline.¹²⁷

terminate when the state of emergency has been terminated by proclamation of the governor or by concurrent resolution of the legislature declaring it at an end.”), MICH. COMP. LAWS SERV. § 10.31(2) (LexisNexis 2020) (providing that an emergency proclamation or declaration “may be amended, modified, or rescinded, in the manner in which they were promulgated, from time to time by the governor during the pendency of the emergency, but shall cease to be in effect upon declaration by the governor that the emergency no longer exists”), MISS. CODE ANN. § 33-15-11(18) (2020) (“The Governor shall review the need for continuing the declaration of emergency impact area at least every thirty (30) days until the emergency is terminated, and shall proclaim the reduction of the emergency impact area or termination of the declaration of emergency impact area at the earliest date or dates possible.”), N.C. GEN. STAT. § 166A-19.20(c) (2020), and OR. REV. STAT. § 401.204(1)–(2) (2020).

¹²⁵ State v. Demello, 136 Hawai'i 193, 197, 361 P.3d 420, 424 (2015) (quoting State v. Dudoit, 90 Hawai'i 262, 271, 978 P.2d 700, 709 (1999)).

¹²⁶ *Id.*

¹²⁷ See Mark Tushnet, *The Pirate's Code: Constitutional Conventions in U.S. Constitutional Law*, 45 PEPPERDINE L. REV. 481, 482 (2018) (alteration in original) (“[T]he [pirate's] code is more what you'd call guidelines than actual rules.” (quoting PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (Walt Disney Pictures & Jerry Bruckheimer Films 2003))); see also State v. Rodrigues, 63 Haw. 412, 414, 629 P.2d 1111, 1113 (1981) (“A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.” (quoting Davis v. Burke, 179 U.S. 399, 403 (1900))).

V. TWO NARRATIVES

Despite my conclusion that the statute means what it plainly says—and that as a consequence, the governor’s power to declare an emergency is time-limited and conditioned—I am much less sanguine about whether that limitation will be enforceable in court, and by whom. The Hawai‘i Supreme Court’s rulings reveal two main narrative threads that could help analyze that question. The first is a structural rationale in which the automatic termination provision is acknowledged by the courts as a limitation on the governor’s authority but is one which ultimately cannot be privately enforced in court. The second is a separation of powers approach, under which individuals who are affected by these orders may challenge them in court. Which of these a court views as the more essential will likely determine the outcome.

A. Political Enforcement

Before I discuss how a court might treat the automatic termination limitation, a more general look at how Hawai‘i’s courts consider assertions of government power to respond to public health crises is warranted. The Kingdom of Hawai‘i Supreme Court’s approach in *The King v. Tong Lee*¹²⁸ is the best historical example of how a modern Hawai‘i court would likely treat arguments challenging the reach of government power. Much has changed in the 140 years since *Tong Lee*, but the principles the court announced are enduring threads in both Hawai‘i and federal constitutional law. The Supreme Court of the Kingdom was governed both by Hawai‘i’s common law (which was expressly based on English precedent),¹²⁹ as well as a constitution modeled in many parts on the U.S. Constitution. In short, the court applied what later became known as “rational basis” judicial scrutiny to a claim that a public health crisis existed, and whether the means undertaken was the best (or even a correct) approach to addressing it.¹³⁰ I cite this example simply because it the first case as far as I can tell in which a Hawai‘i court employed the phrase “police power,” and which upheld the

¹²⁸ *The King v. Tong Lee*, 4 Haw. 335 (Haw. Kingdom 1880) (en banc).

¹²⁹ Hawai‘i’s reliance on English law continues to this day. *See* HAW. REV. STAT. § 1-1 (2019) (“The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.”).

¹³⁰ *See Tong Lee*, 4 Haw. at 341–43.

upheld the broad authority of government to regulate conduct and economic activity that is even arguably detrimental the public health.¹³¹

In *Tong Lee*, the Kingdom's legislature prohibited the laundry business within a small radius of an intersection (Nu'uanu Avenue and King Street) in downtown Honolulu because "the increasing number of laundries and wash-houses within the limits of the City of Honolulu tend[ed] to the propagation and dissemination of disease."¹³² The regulation was adopted because the wastewater was a vector for disease.¹³³ It just so happened that this radius encompassed Honolulu's "Chinatown," leading to what was probably a well-founded belief that the prohibition was more of an anti-Chinese measure than an action truly designed to protect public health in a neutral or comprehensive way.¹³⁴ After all, the Kingdom only barred laundering for money; the regulation did not limit large-scale private washing operations or generally prohibit the dumping of other wastewater within the radius nor did it prohibit commercial laundries elsewhere on the island or the Kingdom, both of which a measure truly for public's health might likely have included.¹³⁵

Lee challenged the statute as a violation of the due process clause of the Hawaii Constitution.¹³⁶ He asserted his right to use his property (his laundry business and his land), which this statute unreasonably deprived him of without a supportable basis.¹³⁷ If public health was the real reason for this law, Lee argued, it was both too narrow (it did not prohibit all commercial laundries) and was not tailored to the stated purpose (there was no showing that Lee's laundry was unsanitary).¹³⁸ The Supreme Court of the Kingdom easily disposed of this argument:

The authority to enact a law of this character is derived from the inherent power which every sovereign State possesses to protect the life, property and health of its citizens. Says Judge Shaw: "We think it is a well settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property,

¹³¹ See *id.* at 339–40.

¹³² *Id.* at 335.

¹³³ See *id.* at 336–37.

¹³⁴ *Id.* at 335–36; see Eleanor C. Nordyke & Richard K. C. Lee, *The Chinese in Hawaii: A Historical and Demographic Perspective*, 23 THE HAWAIIAN J. HIST. 196, 202 (1989) (noting that the Chinese government imposed restrictions on emigration to Hawai'i due to reports of abuse in policies and mistreatment of Chinese plantation workers).

¹³⁵ *Tong Lee*, 4 Haw. at 338.

¹³⁶ *Id.* at 340.

¹³⁷ See *id.*

¹³⁸ *Id.* at 338.

nor injurious to the rights of the community. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations on their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the Legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient.”

“This is very different from the right of eminent domain; the right of a Government to take and appropriate private property whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power; the power vested in the Legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, or the subjects of the same.”¹³⁹

There is a lot about *Tong Lee* that has not necessarily survived the 140 years since the opinion was issued. The racial undertones, for example.¹⁴⁰ But the police power principle is still a very strong thread, and the court’s holding remains the general approach today:

¹³⁹ *Id.* at 339–40 (citing *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (1851)); *see also id.* at 341 (“Chief Justice Shaw also says: ‘Nor does the prohibition of such noxious use of property (a prohibition imposed because such use would be injurious to the public), although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. . . . But he is restrained, not because the public have occasion to make the like use or make any use of the property, or to take any benefit or profit to themselves from it, but because it would be a noxious use, contrary to the maxim *sic utere tuo ut alienum non laedas*.’”).

¹⁴⁰ Certainly today, if Lee challenged a similar measure, he might have a better chance were he to press an equal protection claim. But he did not, unlike the plaintiffs in two cases that arose later in a similar circumstance. For example, in *Wong Wai v. Williamson*, 103 F. 384 (N.D. Cal. 1900) and *Jew Ho v. Williamson*, 103 F. 10 (N.D. Cal. 1900) the court enjoined enforcement of a San Francisco ordinance that was based on city officials’ belief “that danger does exist to the health of the citizens of the city and county of San Francisco by reason of the existence of germs of the [plague] remaining in the district hereafter mentioned [Chinatown].” *Jew Ho*, 103 F. at 12. San Francisco supported the ordinance by referring to *Mugler v. Kansas*, 123 U.S. 623 (1887) and the city’s police powers. However, that case did not serve as a trump card because the plaintiffs alleged and proved that the ordinance was not reasonably designed to protect the public health, but in actuality targeted racial discrimination: “[t]he evidence here is clear that this is made to operate against the Chinese population only, and the reason given for it is that the Chinese may communicate the disease from one to the other. That explanation, in the judgment of the court, is not sufficient. It is, in effect, a discrimination, and it is the discrimination that has frequently been called to the attention of the federal courts where matters of this character have arisen with respect to Chinese.” *Jew Ho*, 103 F. at 23.

The State, by its Legislature, possesses the right to make such laws as it deems to be wholesome, and the exercise of this power is subject to no review except by the body of society itself, except so far as these laws may be inhibited by the Constitution itself, or be repugnant to its provisions.¹⁴¹

The Supreme Court of the Kingdom of Hawai'i's approach is also consistent with the analysis later employed by the U.S. Supreme Court in what has become the most well-known decision on the power of government to protect the public health. In *Jacobson v. Massachusetts*, the Court distinguished "an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint," with what it labeled "[r]eal liberty."¹⁴² The Court upheld the state's vaccine requirement, concluding:

Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that [p]ersons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State;

....

It is, then, liberty regulated by law.¹⁴³

Individual liberty, the Court concluded, does not include the ability to jeopardize "the safety of the public."¹⁴⁴ The Court based its reasoning on public "self-defense," noting that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."¹⁴⁵ The only limitation being that the government's powers cannot be exercised in "an arbitrary, unreasonable manner," or "go so far beyond what was reasonably required for the safety of the public."¹⁴⁶ Applying this rule, courts generally do not seriously question another branch's conclusions unless some right deemed "fundamental" is also at stake.

Four years after *Tong Lee*, in an advisory opinion in *Segregation of Lepers*,¹⁴⁷ the Supreme Court of the Kingdom of Hawai'i reached a similar

¹⁴¹ *Tong Lee*, 4 Haw. at 342.

¹⁴² 197 U.S. 11, 26 (1905).

¹⁴³ *Id.* at 26–27 (citation omitted).

¹⁴⁴ *Id.* at 28.

¹⁴⁵ *Id.* at 27.

¹⁴⁶ *Id.* at 28.

¹⁴⁷ *Segregation of Lepers*, 5 Haw. 162 (Haw. Kingdom 1884).

conclusion under the Hawaii Constitution. The court answered a request for an opinion posed by the Legislative Assembly about a provision in the Kingdom's Civil Code that allowed the Board of Health to "remove" infected persons to a separate location.¹⁴⁸ This law deemed being afflicted with leprosy to be a crime and allowed confinement of the victims of the disease to two locations in the Kingdom (Kalawao on Moloka'i, and Kaka'ako on O'ahu).¹⁴⁹ The court considered whether confinement was "contrary to the Constitution."¹⁵⁰

The court easily disposed of the first question: "leprosy is not a crime, . . . [i]t is a disease."¹⁵¹ It may be a crime to willingly transmit the disease, but merely having a disease is not a criminal act.¹⁵² The court then considered the constitutionality of the confinement, first noting that in the nearly two decades since its adoption, the law had "not been tested by an application for a writ of habeas corpus, or otherwise. . . ."¹⁵³ That, the court concluded, "may be taken as a general acquiescence by the community in the wisdom of the law."¹⁵⁴ The court considered several provisions in the Kingdom's Constitution similar to provisions in the U.S. Constitution and the modern Hawaii Constitution, such as due process, and a prohibition against deprivations of life, liberty, and property.¹⁵⁵ The court relied on the then-recent decision by the United States Supreme Court in the *Slaughter-House Cases*, which recognized the broad power of government regulate life, liberty, and property in the name of the public health and safety (in other words, the "police power").¹⁵⁶ The Supreme Court of the Kingdom of Hawai'i noted that when the government exercises the police power, it is acting in a sphere of "overruling necessity."¹⁵⁷ The court referred to the maxim, "*salus populi suprema est lex*,"¹⁵⁸ and held that because Hansen's

¹⁴⁸ HAW. CIV. CODE § 302 (1859) ("When any person shall be infected with the smallpox, or other sickness dangerous to the public health, the Board of Health, or its agent may, for the safety of the inhabitants, remove such sick or infected person to a separate house, and provide for him with nurses and other necessities, which shall be at the charge of the person himself, his parents or master, if able, otherwise at the charge of the Government."); see also *In re Kaiahua*, 19 Haw. 218, 219 (1908) (detailing the Territory of Hawai'i's health regulations related to Hansen's disease).

¹⁴⁹ See *Segregation of Lepers*, 5 Haw. at 162.

¹⁵⁰ *Id.* at 163.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*; see HAW. CONST. art. 6 & 14 (1864).

¹⁵⁶ *Segregation of Lepers*, 5 Haw. at 164–65; see *Slaughter-House Cases*, 83 U.S. 36 (1872).

¹⁵⁷ *Segregation of Lepers*, 5 Haw. at 166 (citing Dwaris on Statutes).

¹⁵⁸ *Id.*; see also *Salus Populi Suprema Lex Esto*, MERRIAM-WEBSTER (2020) (translating

disease is capable of being communicated to human beings, it was within the authority of the Kingdom's Legislature to adopt regulations segregating persons afflicted:

As at present advised, we are of the opinion that the law authorizing the segregating and isolating of lepers is not only a wholesome law and constitutional, but that without such a law the result would eventually be that much of our useful population would leave these islands, ships would cease to touch here, our products would fail to find a market abroad, and these fair islands would become a pest-house to be avoided by the whole civilized world.¹⁵⁹

The unstated question left unanswered by the court was whether—and under what circumstances—a court might find that an otherwise valid exercise of the police power might be deemed to be in violation of the Hawai'i Constitution. The court implied that it would give great deference to the legislature's judgment about the necessity of the regulation.¹⁶⁰

In its most recent decision on government power to respond to a health crisis, the Hawai'i Supreme Court employed a similar rationale. In *Mahiai v. Suwa*, the court upheld the State Board of Agriculture's order—responding to an outbreak of bovine tuberculosis—to slaughter all cattle on the island of Moloka'i and to impose a two-year moratorium on ranching.¹⁶¹ The disease had been present in Hawai'i since at least 1933, and the entire island of Moloka'i had been under quarantine for ten years before the court's opinion.¹⁶² But after the Board secured funds from the federal government, it ordered the slaughter of all cattle in order to eradicate the disease.¹⁶³ Ranchers challenged the order, asserting that the governing statute only gave the Board the power to order slaughter of cattle known to be exposed to the disease, not merely those that might have been.¹⁶⁴ The Hawai'i court, employed a rationale which was just recently adopted by the Oregon Supreme Court in *Elkhorn Baptist Church v. Brown*—that the

the Latin phrase to mean "let the welfare of the people be the supreme law.").

¹⁵⁹ *Segregation of Lepers*, 5 Haw. at 166–167.

¹⁶⁰ *See id.* at 166 ("It will be seen from a perusal of the whole Act concerning leprosy that the Legislature regarded this disease as contagious, or capable of being communicated to other human beings. From the best information the Court can obtain, this is a characteristic of this disease. Upon this view of the disease, laws segregating lepers have been enacted in nearly all countries of the world.").

¹⁶¹ 69 Haw. 349, 352–53, 742 P.2d 359, 363–64 (1987).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 356, 742 P.2d at 365–66.

government was not required to choose to exercise a more limited power, and could exercise broader authority.¹⁶⁵

The Hawai‘i court concluded that delegation of the specific authority to order cattle that were actually infected with bovine tuberculosis to be destroyed did not limit the Board’s authority—delegated in a separate statute—to act more broadly and order destroyed any animal that is either infected or exposed to disease.¹⁶⁶ The court also held that the Board was within its authority when it concluded that the cattle had been exposed to bovine tuberculosis.¹⁶⁷ Finally, the court rejected the ranchers’ equal protection challenge.¹⁶⁸ The ranchers claimed that they had been subject to selective treatment because only cattle were ordered destroyed, not other animals on Moloka‘i, most notably the wild animals in an exotic animal park.¹⁶⁹ The court easily disposed of the argument, first noting that all cattle were treated similarly, and that nothing required the Board to treat all animals the same way as cattle.¹⁷⁰ Cattle ranching practices, not the keeping of exotic animals, was the vector for bovine tuberculosis.¹⁷¹ In essence, the court applied the rational basis test and upheld the Board’s order.¹⁷²

As a whole, these decisions tell us that a court applying Hawai‘i law will begin with the presumption that the government’s exercise of emergency power is a reasonable—and thus constitutional—attempt to respond to the circumstances, and will also seek to avoid being put in the position of second-guessing the other branches’ emergency response. But Hawai‘i law does not compel a court to totally defer to executive and legislative judgments and courts should not uphold assertions of power not grounded in ascertainable facts and a degree of actual means-ends tailoring. For example, in a series of more recent decisions, the Hawai‘i Supreme Court exhibited a willingness to put teeth into judicial review of legislation.¹⁷³ The court concluded that under Hawai‘i law, rational basis does not mean “conceivable” basis, and judicial review for “arbitrary and capricious” due process and equal protection challenges under the Hawaii Constitution are subject to more intense judicial scrutiny than their federal constitutional

¹⁶⁵ See *id.*; *Elkhorn Baptist Church v. Brown*, 466 P.3d 30, 44 (2020); see also *supra* text accompanying note 90–101.

¹⁶⁶ *Mahiai*, 69 Haw. at 357, 742 P.2d at 366 (citing HAW. REV. STAT. §§ 142-6, 18 (1986)).

¹⁶⁷ *Id.* at 358–59, 742 P.2d at 366–67.

¹⁶⁸ *Id.* at 361, 742 P.2d at 368.

¹⁶⁹ *Id.* at 360, 742 P.2d at 367–68.

¹⁷⁰ *Id.* at 361, 742 P.2d at 368–69.

¹⁷¹ *Id.* at 361, 742 P.2d at 369.

¹⁷² See *id.* 360–61, 742 P.2d at 368–69.

¹⁷³ See *Silva v. City & County of Honolulu*, 115 Hawai‘i 1, 165 P.3d 247 (2007); *Sierra Club v. Department of Transportation*, 120 Hawai‘i 181, 202 P.3d 1226 (2009).

counterparts.¹⁷⁴ Hawai‘i’s vision of rational basis review is much different, grounded in the actual record, not a conceivable basis.

In *Silva v. City & County of Honolulu*, the court invalidated the different statutes of limitations periods applicable to tort claims against the State, and the counties.¹⁷⁵

We hold that there is no rational basis for the classification scheme effectuated by HRS § 46–72 as it read in 2004. The County offers no rationale for the distinction between the classes, nor can we deduce one. The record on appeal and the legislative history are silent with respect to any budgetary, logistical, or other difference between the County and the state that might justify the unequal treatment of victims of their torts.¹⁷⁶

Similarly, in *Sierra Club v. Department of Transportation*, the court invalidated a facially neutral statute on the basis that it was not a “general” law but a law intended to benefit a known private party.¹⁷⁷ In doing so, the court pushed aside the usual deference courts pay to legislative judgments—including the legislature’s judgment about what it is doing and more importantly why—and held that the legislature’s intent in the statute was to benefit a single private entity. The test, the court concluded, was to measure the statute by its “substance and practical operation.”¹⁷⁸

Sierra Club contends that whether a law is special or general should be determined by its “substance and practical operation, rather than on its title, form or phraseology.”

In contrast, DOT and Superferry argue that Act 2 is a general law that does not violate any provision of the Hawaii Constitution. They argue that the correct test for a general law is whether it creates a rationally based classification and whether the law applies to all members of the class created. For the following reasons, we agree with *Sierra Club*.¹⁷⁹

In other words, the court rejected traditional rational basis review under which a court will uphold a law if there is any conceivable basis to support it.¹⁸⁰ The Hawai‘i Supreme Court’s refusal to absolutely defer to the other branches’ assertions means that even an emergency measure is subject to a harder look than federal law would allow under *Jacobson*.¹⁸¹ Emergency

¹⁷⁴ *Silva*, 115 Hawai‘i at 14, 165 P.3d at 260; *Sierra Club*, 120 Hawai‘i at 199–200, 202 P.3d at 1244–45.

¹⁷⁵ 115 Hawai‘i 1, 165 P.3d 247.

¹⁷⁶ *Id.* at 14, 165 P.3d at 260.

¹⁷⁷ 120 Hawai‘i 181, 202 P.3d 1226.

¹⁷⁸ *Id.* at 199–200, 202 P.3d at 1244–45.

¹⁷⁹ *Id.*

¹⁸⁰ *See id.*

¹⁸¹ *See Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905) (concluding that the only

measures must be backed by ascertainable facts in the record, not mere speculation and conjecture. This is a significant Hawai‘i law departure from classic low-intensity federal judicial review of police power measures.¹⁸²

The same motivation that compels courts to abstain from probing inquiries into the justifications for police powers measures generally—a belief in institutional incompetence, the undemocratic nature of the judiciary, for example—might also drive a court to seek other reasons to avoid serving as the vehicle to curb the other branches’ exercise of statutory emergency powers. Thus, despite the clear limitations imposed by the automatic termination provision, I question whether the courts would be willing to police how the legislature and the governor implement the emergency power.

I ask first whether—despite lacking the express delegation to extend or renew an emergency declaration—the governor has the implied power to do so, thus permitting her or him to continue exercising emergency powers past the sixty day automatic termination limit.¹⁸³ By delegating to the governor the power to plan for, react to, and declare an emergency exists, I argue the legislature also impliedly included the related power to extend an emergency declaration when the situation demands it.¹⁸⁴ After all, the

limitation is that the police power cannot be exercised in “an arbitrary, unreasonable manner.”).

¹⁸² See *Lāna‘ians for Sensible Growth v. Land Use Comm’n*, 146 Hawai‘i 496, 463 P.3d 1153 (2020) (overturning an agency’s definition of “potable” water and substituting the court’s own view); *Hawaii Insurers Council v. Lingle*, 120 Hawai‘i 51, 61, 201 P.3d 564, 574 (2008) (holding that fees imposed by a state agency were not “taxes” or “user fees,” but were “regulatory fees” despite the legislature’s claim the exactions were “taxes”); *Cnty. of Hawai‘i v. C & J Coupe Fam. Ltd.*, 119 Hawai‘i 352, 198 P.3d 615 (2008) (concluding that in public use rational basis challenges to exercises of eminent domain, courts must take seriously claims that the stated public use is pretextual to a private benefit, and must not simply accept the government’s claim at face value that a taking is for a public use or purpose).

¹⁸³ See, e.g., GA. CODE ANN. § 38-3-51(a) (West 2014) (“No state of emergency or disaster may continue for longer than 30 days unless renewed by the Governor. The General Assembly by concurrent resolution may terminate a state of emergency or disaster at any time. Thereupon, the Governor shall by appropriate action end the state of emergency or disaster.”); IND. CODE § 10-14-3-12(a) (2009) (“The state of disaster emergency continues until the governor: (1) determines that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist; and (2) terminates the state of disaster emergency by executive order or proclamation. A state of disaster emergency may not continue for longer than thirty (30) days unless the state of disaster emergency is renewed by the governor. The general assembly, by concurrent resolution, may terminate a state of disaster emergency at any time.”); TEX. GOV’T CODE § 418.014 (2009) (limited to thirty days “unless renewed by the governor” or terminated by the legislature “at any time”).

¹⁸⁴ Cf. *In re Kauai Elec. Div. of Citizens Utils. Co.*, 60 Haw. 166, 179–80, 590 P.2d 524,

legislature expressly noted that “[i]t is the intent of the legislature to provide for and confer comprehensive powers for the purposes stated herein,” and consequently, “[t]his chapter shall be liberally construed to effectuate its purposes[.]”¹⁸⁵ That would be consistent with the Hawai‘i Supreme Court’s frequent acknowledgement “that one provision of a comprehensive statute should be read in context of other provisions of that statute and in light of the general legislative scheme.”¹⁸⁶ It would also be consistent with the Hawai‘i Supreme Court’s historically deferential approach to exertions of government authority to protect the public health.¹⁸⁷

A court applying Hawai‘i law could also avoid the contentious problem of appearing to inject itself into an ongoing crisis by concluding that although section 127A-14’s automatic termination requires a hard stop at sixty days, private litigants cannot enforce it. The Hawai‘i Supreme Court has developed a long line of decisions analyzing whether a statutory directive also grants a private right of action to enforce it. Mostly tracking the U.S. Supreme Court’s rationale in these kind of cases,¹⁸⁸ Hawai‘i courts will recognize the ability of a private party to enforce a statute if three factors are met.¹⁸⁹ First, if the plaintiff is a member of the class “for whose especial benefit the statute was enacted.”¹⁹⁰ Second, if the legislature intended to create or deny a private remedy.¹⁹¹ And third, if it is a privately enforceable claim “consistent with the underlying purposes of the

534–35 (1978) (stating that legislative delegation of authority to agency to regulate rates and supervise public utilities necessarily implies the power to grant interim rate increase conditioned on refund provision).

¹⁸⁵ HAW. REV. STAT. § 127A-1(c) (2020); *see also id.* § 127A-1(a)(2) (“To confer upon the governor and upon the mayors of the counties of the State the emergency powers necessary to prepare for and respond to emergencies or disasters. . . .”); *Bishop v. City & Cnty. of Honolulu*, 32 Haw. 111, 116 (Haw. Terr. 1931) (holding that the City and County of Honolulu may undertake actions not expressly delegated by the legislature under a grant of authority to do things “necessary and proper” to carry out the delegated power); *W.C. Peacock & Co. v. Republic of Hawai‘i*, 12 Haw. 27, 39 (Haw. Terr. 1899) (noting that the federal government had all necessary and proper incidental powers over the Territory).

¹⁸⁶ *Kam v. Noh*, 70 Haw. 321, 326, 770 P.2d 414, 417–18 (1989).

¹⁸⁷ *See, e.g., The King v. Tong Lee*, 4 Haw. 335 (Haw. Kingdom 1880) (en banc).

¹⁸⁸ *See Reliable Collection Agency v. Cole*, 59 Haw. 503, 584 P.2d 107 (1978) (first citing *Cort v. Ash*, 422 U.S. 66 (1975); and then citing *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977)).

¹⁸⁹ *See Cnty. of Hawai‘i v. Ala Loop Homeowners*, 123 Haw. 391, 407, 235 P.3d 1103, 1119 (2010) (internal quotation marks omitted) (quoting *Pono v. Molokai Ranch, Ltd.*, 119 Hawai‘i 164, 185, 194 P.3d 1126, 1147 (2008), *abrogated by Tax Found. Haw. v. State*, 144 Hawai‘i 175 (2019)).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

legislative scheme.”¹⁹² The court has viewed the private right to sue expansively, but only for a narrow bandwidth of claims, mostly relating to the environment and agricultural rights.¹⁹³ Even though the first and third factor would cut in favor of a private right of action, I believe that because of the lack of clear expression of legislative intent to allow private litigants to enforce the emergency management statute, there exists a strong possibility the courts would reject private enforcement of section 127A-14(d)’s time limitations because “legislative intent appears to be the determinative factor,”¹⁹⁴ and there is nothing indicating the legislature intended to make this a justiciable issue.

The closely related political question doctrine also could lead a court away from deciding these types of challenges. In *Trustees of Office of Hawaiian Affairs v. Yamasaki*, for example, the Hawai‘i Supreme Court avoided resolving the long-standing question of whether the Office of Hawaiian Affairs was entitled to a fixed 20 percent share of “ceded lands” revenues.¹⁹⁵ Upon annexation by the United States, the Republic of Hawai‘i ceded fee ownership of government lands (also known as “Crown lands”) to be held in trust, with the derived revenue to be used for specified public purposes.¹⁹⁶ When Hawai‘i became a state, the Admission Act noted that the revenue was to be directed for five different purposes.¹⁹⁷ The Office of Hawaiian Affairs was the state agency created to “formulate policy relating to all native Hawaiians and make decisions on the allocation of those assets belonging to them.”¹⁹⁸ The legislature also adopted a statute that required that twenty percent of the ceded lands revenues “shall be expended” by the

¹⁹² *Id.* (internal quotation marks omitted).

¹⁹³ See e.g., *id.*

¹⁹⁴ *Alakai Na Keiki, Inc. v. Matayoshi*, 127 Hawai‘i 263, 285, 277 P.3d 988, 1010 (2012) (internal quotation marks omitted) (quoting *Whitey’s Boat Cruises, Inc. v. Napali-Kauai Boat Charters, Inc.*, 110 Hawai‘i 302, 313, 132 P.3d 1213, 1224 (2006) (holding that the procurement code created a private right of action, but also holding that the plaintiff could not assert a tort claim)). See also *Kaleikini v. Yoshioka*, 128 Hawai‘i 53, 69, 283 P.3d 60, 76 (2012) (statute expressly provided for private enforcement); *Whitey’s Boat Cruises*, 110 Hawai‘i at 313, 132 P.3d at 1224 (no private right to action to enforce state and county permitting statutes and ordinances); *Hungate v. Law Office of David B. Rosen*, 139 Hawai‘i 394, 406, 391 P.3d 1, 13 (2017) (no private right to action to enforce duties under foreclosure statutes); *Haw. Med. Ass’n v. Haw. Med. Serv. Ass’n*, 113 Hawai‘i 77, 85, 148 P.3d 1179, 1187 (2006) (no private right to action for an association to enforce unfair competition statute).

¹⁹⁵ 69 Haw. 154, 737 P.2d 446 (1987).

¹⁹⁶ *Id.* at 159, 737 P.2d at 449.

¹⁹⁷ See Admission Act, Pub. L. No. 86-3, § 5, 73 Stat. 4 (1959).

¹⁹⁸ *Yamasaki*, 69 Haw. at 163, 737 P.2d at 452 (internal quotation marks and brackets omitted) (citation omitted).

agency.¹⁹⁹ Yet it remained unclear what percentages and amounts the Office of Hawaiian Affairs was to receive, resulting in what the Supreme Court called an “unsettled state of affairs regarding funds.”²⁰⁰ The Office of Hawaiian Affairs sued various other state agencies and officials, seeking a declaration that it was entitled to a fixed percentage of the damages the State of Hawai'i had received for illegal sand-mining on a parcel of ceded land on Maui, and revenue from major state-owned properties such as Sand Island, the Honolulu International Airport, and the Aloha Tower complex.²⁰¹

The Hawai'i Supreme Court declined to consider this hot-button issue, concluding that the question was political, because the percentage of revenue which the statute required be “expended” by the Office of Hawaiian Affairs was a requirement without enforceable standards:

Inasmuch as section 10-13.5 simply states “twenty per cent of all funds derived from the public land trust, described in section 10-3, shall be expended by the office, as defined in section 10-2, for the purposes of this chapter,” the task at first sight appears to be one of statutory interpretation. But a closer look at the disputes reveals they do not constitute traditional fare for the judiciary; and if the circuit court ruled on them, it would be intruding in an area committed to the legislature. It would be encroaching on legislative turf because the seemingly clear language of HRS § 10-13.5 actually provides no “judicially discoverable and manageable standards” for resolving the disputes and they cannot be decided without “initial policy determinations of a kind clearly for nonjudicial discretion.”²⁰²

Adjudicating this issue would have forced the Supreme Court into deciding between competing legislative commands, all “couched in all-inclusive terms.”²⁰³ The Court declined to choose winners and losers in what appeared to be an intra-government dispute.²⁰⁴

A recent decision by the Wisconsin Supreme Court—*Wisconsin Legislature v. Palm*—illustrates one way a court could both recognize the limitations on a governor's power, but at the same time avoid enforcing an individual remedy.²⁰⁵ In that case, the legislature sought a declaratory ruling

¹⁹⁹ See HAW. REV. STAT. § 10-13.5 (2020).

²⁰⁰ *Yamasaki*, 69 Haw. at 165, 737 P.2d at 453.

²⁰¹ *Id.* at 166, 737 P.2d at 453.

²⁰² *Id.* at 172–73, 737 P.2d at 457 (1987) (internal brackets omitted) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

²⁰³ *Id.*, at 175, 737 P.2d at 458. A separate statute regarding the airport, for example, directed that “[a]ll moneys received” from rent and other charges “shall be expended” by the Department of Transportation. *Id.* (internal brackets omitted).

²⁰⁴ See *id.*

²⁰⁵ See 942 N.W.2d 900 (Wis. 2020).

that the state's health secretary's COVID-19 emergency order that allowed only businesses deemed "essential" to remain open, shut down "non-essential" travel, and ordered the populace to remain at home.²⁰⁶ The health secretary—not the governor—issued the order, and the order did not rely on the governor's earlier emergency declaration.²⁰⁷ The challengers alleged that the order was a "rule," and could only be promulgated under the rulemaking provisions of Wisconsin law.²⁰⁸ The majority concluded the order was a rule,²⁰⁹ and the health secretary could implement it only after adoption under the rulemaking process.²¹⁰ The majority emphasized the need for transparency, procedural safeguards, and public trust,²¹¹ but also noted that even the governor's powers to react quickly and decisively to emergencies are curbed by a sixty-day limit.²¹² The longer the emergency, the more the time for public input, "[b]ut in the case of a pandemic, which lasts month after month, the Governor cannot rely on emergency powers indefinitely," and that "60 days is more than enough time to follow rulemaking procedures."²¹³ Although the court was not presented with an argument that the health secretary's order was illegal because it had expired, this dicta would suggest a narrow reading of automatic time limits in emergency management statutes such as Hawai'i's.²¹⁴

The other rationale supporting the Wisconsin court's majority was separation of powers. The legislature could delegate its authority, but there must be "adequate standards for conducting the allocated power."²¹⁵ The majority rejected the health secretary's argument that she possessed the broad authority to implement emergency measures to respond to and control communicable diseases, and this grant of power meant that the scope and effects of the order was beyond the authority of the court to

²⁰⁶ *Id.* at 904–05.

²⁰⁷ *Id.* at 906.

²⁰⁸ *Id.* at 907 (citing WIS. STAT. § 227.24 (2019) (noting that emergency orders issued without administrative rulemaking are effective only for 60 days, with extensions up to 120 days)).

²⁰⁹ *Id.* at 910.

²¹⁰ *See* WIS. STAT. § 227.24 (stating that emergency rules remain in effect only for 150 days, unless extended).

²¹¹ *See Palm*, 942 N.W.2d at 913.

²¹² WIS. STAT. § 323.10 (2020) ("A state of emergency shall not exceed 60 days, unless the state of emergency is extended by joint resolution of the legislature. A copy of the executive order shall be filed with the secretary of state. The executive order may be revoked at the discretion of either the governor by executive order or the legislature by joint resolution.").

²¹³ *Palm*, 942 N.W.2d at 914 & n.14 (citing WIS. STAT. § 323.10).

²¹⁴ *See id.*

²¹⁵ *Id.* at 912–13 (internal quotation marks omitted) (quoting *Martinez v. DIHLR*, 478 N.W.2d 582, 585 (Wis. 1992)).

review.²¹⁶ The Wisconsin court's majority narrowly construed the terms in the applicable statute, and concluded that the order "goes far beyond what is authorized in [the statute]."²¹⁷ For example, the statute permits the health secretary to quarantine persons who are infected with communicable diseases, or who are suspected of being infected,²¹⁸ but in the order, the health secretary purported to require all persons in Wisconsin to stay home, with limited exceptions.²¹⁹ This, the court concluded, was "an obvious overreach."²²⁰ The *Palm* majority also cautioned against reading too much into broad introductory statements in statutes, instead noting that "imprecise delegations of power to administrative agencies" should be narrowly construed.²²¹

The remedy adopted by the Wisconsin Supreme Court majority hints at how courts can both acknowledge the limitations on executive authority, but also be very reluctant to interfere during an ongoing crisis by viewing the remedy as essentially political in nature. Although the court held that the legislature possessed standing to challenge the health secretary's order²²² and entered a declaratory judgment declaring the health secretary's order "unlawful, invalid, and unenforceable," the court declined to enter injunctive or other relief.²²³ The majority noted that the court had been considering the arguments for two weeks, and in that time:

[W]e trust that the Legislature and Palm have placed the interests of the people of Wisconsin first and have been working together in good faith to establish a lawful rule that addresses COVID-19 and its devastating effects on Wisconsin. People, businesses and other institutions need to know how to proceed and what is expected of them. Therefore, we place the responsibility for this future law-making with the Legislature and DHS where it belongs.²²⁴

This same theme animated Chief Justice Roberts' concurrence in the only challenge to a COVID-19 order to reach the U.S. Supreme Court so far:

²¹⁶ *Id.* at 918.

²¹⁷ *Id.* at 916.

²¹⁸ *Id.* at 915–16 (citing WIS. STAT. § 252.02(4) (2019)).

²¹⁹ *Id.* at 916.

²²⁰ *Id.*

²²¹ *Id.* at 917 (citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 225 (2012)).

²²² *Id.* at 908 ("The Legislature's claim is grounded in the concept of separation of powers that is inherent in the Wisconsin Constitution. We previously have concluded that petitioners had standing to sue when, as legislators, they claimed that a member of the executive branch invaded the Legislature's core powers. Accordingly, we conclude that the Legislature has standing to proceed on the two claims for which we granted review." (citation omitted)).

²²³ *Id.* at 918.

²²⁴ *Id.*; see also *id.* at 918–19 (Roggensack, C.J., concurring).

The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts “the safety and the health of the people” to the politically accountable officials of the States “to guard and protect.”²²⁵

If the courts will not adjudicate this issue, then what? Petitioning government and voting—not suing—is the only other check on government power.

B. Individual Enforcement

There’s little doubt that a court applying the rule first adopted in *Tong Lee*²²⁶ and applied in countless decisions between then and today²²⁷ would not seriously question the governor’s conclusion that an emergency exists, and in all but the most pretextual circumstances, would defer to the judgment of the governor, even without applying the legislature’s direction that the governor is the “sole judge of the existence of the danger, threat, or circumstances giving rise to a declaration of a state of emergency.”²²⁸ In other words, there is little likely to be gained by challenging the actual need or necessity of a declaration of emergency.²²⁹ Hawai‘i’s courts should, however, examine more closely the means-ends fit between the reasons for action and the tools chosen to respond to an emergency. But even that is a dauntingly high wall for a challenger to overcome and does not directly resolve how—or if—a court would enforce the automatic termination limitation, even if the requirements of the statute are clear. In this section, I argue that the Hawai‘i Supreme Court has demonstrated a willingness to resolve this kind of separation of powers claim.

²²⁵ *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief).

²²⁶ *The King v. Tong Lee*, 4 Haw. 335 (Haw. Kingdom 1880) (en banc).

²²⁷ *See, e.g., State v. Mallan*, 86 Hawai‘i 440, 446, 950 P.2d 178, 184 (1998) (concluding that “where no fundamental rights or suspect classifications are involved, there is a due process violation only if there is no rational basis to sustain the challenged statute” (internal quotation marks omitted) (quoting *Estate of Coates v. Pac. Eng’g*, 71 Haw. 358, 363–64, 791 P.2d 1257, 1260 (1990))).

²²⁸ HAW. REV. STAT. § 127A-14(c) (2020); *see also* HAW. REV. STAT. § 127A-2 (2020) (defining a state of emergency as “an occurrence in any part of the State that requires efforts by state government to protect property, public health, welfare, or safety in the event of an emergency or disaster, or to reduce the threat of an emergency or disaster, or to supplement the local efforts of the county.”).

²²⁹ *See* § 127A-14(c).

Four years after *Tong Lee*²³⁰ recognized the government's broad power to regulate for the public health, the Kingdom of Hawai'i Supreme Court reaffirmed that extensive authority in *Gibson v. The Steamer Madras*.²³¹ The court, however, also concluded that establishing the duration of necessary restrictions was an issue analyzed through a much narrower lens.²³² What became known as the "Madras Affair" was part of a larger controversy involving mass immigration from China to Hawai'i and other places in North America.²³³ The issue presented was whether the government could recover the costs of isolating an inbound ship and its passengers. The *Madras* arrived in Honolulu from Hong Kong, and the captain attested "that there was no sickness on board," but also separately pointed out that he knew "he has smallpox on board[.]"²³⁴ The ship was not formally quarantined.²³⁵ Instead, it was held offshore for nearly two months, during which time several passengers escaped by boat or by swimming ashore.²³⁶ In response, the government posted guards to prevent others from doing the same.²³⁷ A month later, the authorities certified that the ship had not reported any new cases for two weeks.²³⁸ The Board informed the captain that the ship would be granted a landing, upon condition that certain passengers would go into further quarantine, and that the ship indemnify the government for all of the incurred expenses.²³⁹ When the captain balked, the Kingdom's Board of Health brought a libel in admiralty, seeking to recover \$1,742 it had expended in posting guards to prevent passengers on the *Madras* from going ashore.²⁴⁰ In response to the suit for the recovery of the costs of security, the captain asserted he had

²³⁰ *Tong Lee*, 4 Haw. at 335.

²³¹ *Madras*, 5 Haw. 109 (Haw. Kingdom 1884).

²³² *See id.*

²³³ *See* RALPH S. KUYKENDALL, *THE KALAKAUA DYNASTY* 145 (Univ. Haw. Press ed. 1967) ("The Chinese question again forced itself upon the attention of the community in the spring of 1883 when, within a space of six weeks (March 29-May 7), seven steamers brought nearly 3,400 Chinese male immigrants to Honolulu. Five of the steamers came from China and two from San Francisco, but the Chinese on the latter two had been transferred at San Francisco from eastbound trans-Pacific steamers that did not touch at Honolulu. One of the ships, *Madras*, had smallpox on board, but the Hawaiian authorities took prompt and effective measures to prevent the disease from getting on shore.") (footnote omitted).

²³⁴ *Madras*, 5 Haw. at 109 ("Two of the passengers were at that time sick with the said disease, of which fact the master was aware[.]").

²³⁵ *Id.* at 121 (stating "in the case of the *Madras* no quarantine regulations were prescribed to be performed.").

²³⁶ *Id.* at 109–10.

²³⁷ *Id.* at 110.

²³⁸ *Id.* at 112.

²³⁹ *Id.* at 113.

²⁴⁰ *Id.* at 110.

tried to control the escaping passengers, that he had informed the health authorities that several passengers had smallpox, that he hoist a yellow flag (indicating that the ship was in quarantine), and that he asked the authorities to remove the sick passengers to formal quarantine ashore.²⁴¹ Thus, he argued, the ship should not be liable for the costs.²⁴² The court reviewed the Kingdom's quarantine regulations²⁴³ that required the owner of a vessel under quarantine to pay "[a]ll expenses incurred" by the government. The court first noted the "vital necessity" of the quarantine itself:

There can be no question as to the vital necessity of maintaining a strict surveillance over vessels arriving here with dangerous and contagious diseases on board. It is the duty of the State to protect the public health.²⁴⁴

The court recognized that the regulations did not define "quarantine," so it relied on the dictionary definition ("restraint of intercourse" for forty days).²⁴⁵ The Kingdom had the discretion to tailor the length of isolation, either shortening it to account for "the exigencies of any particular case," or lengthening it by imposing "further quarantine."²⁴⁶ The question was whether the Madras was in "quarantine" as the term was used (but not defined) in Hawai'i law.²⁴⁷ The Kingdom's health regulations established the *length* of the quarantine (fifteen days) but did not define the term itself.²⁴⁸ If the government incurred the security costs while the ship was "in quarantine," the ship would be liable.²⁴⁹ But if not, there would be no recovery of cost.²⁵⁰

The court concluded the vessel had not been placed under quarantine by the April 19 declaration.²⁵¹ Yes, some of the crew had been restricted, but the passengers had not been.²⁵² Importantly, the declaration did not establish a specific length of time for the quarantine, although the regulations set the time as fifteen days for crews and passengers on vessels

²⁴¹ *Id.* at 112.

²⁴² *Id.* at 121.

²⁴³ HAW. CIV. CODE § 298 (1859) ("All expenses incurred on account of any person, vessel or goods under any quarantine regulations shall be paid by such person or vessel, or owner of such vessel or goods respectively."); *see also* The Steamer Mee Foo, 6 Haw. 294, 295 (Haw. Kingdom 1881) (concluding that the government could not assert two similar claims for reimbursement for quarantine costs and abating the later-filed action).

²⁴⁴ Madras, 5 Haw. at 115.

²⁴⁵ *Id.* at 116 (citing WEBSTER'S DICTIONARY).

²⁴⁶ *Id.* at 116.

²⁴⁷ *Id.* at 116–17.

²⁴⁸ *Id.* at 120.

²⁴⁹ *See id.* at 119–20.

²⁵⁰ *See id.*

²⁵¹ *Id.* at 121.

²⁵² *Id.*

with smallpox.²⁵³ Even in cases of public health, the ship's owners were entitled to due process: they must have been "made aware of the restraint imposed, and its duration and consequences."²⁵⁴ With such notice, the ship could have decided whether to remain and be subject to whatever conditions may be imposed, or if not, leave:

For instance, if a vessel should arrive here from a port infested with cholera, and a quarantine of twelve months should be established for her, it is quite possible that the vessel might not be willing to submit to it, and, if the nature of her voyage admitted of it, she might return to the port whence she came without undergoing quarantine.²⁵⁵

In sum, the court considered it imperative at the outset for the government to have told the quarantined persons how long the quarantine will last.²⁵⁶ But absent that—and other express conditions of quarantine—the ship could not be held liable for the costs.

If the Madras had been placed in a definite quarantine, and quarantine regulations required her to be watched with guards in patrol boats, or otherwise, during this period, these and whatever expenses were necessarily incurred in maintaining this quarantine would have to be paid by the vessel.²⁵⁷

But the authorities had not informed of the length or conditions of the quarantine, and the vessel was "kept in a state of uncertainty for a period of nearly two months, and all the while the expenses were being incurred."²⁵⁸ If the government had enforced a twenty-one-day quarantine immediately, the expenditure could have been avoided.²⁵⁹ The court concluded that the government's obligation was to act quickly and transparently, and absent that, the ship could not be liable for the costs.²⁶⁰ The court accepted the very real danger of smallpox, but noted that the government's action leaving the ship offshore did not lessen the danger, and indeed confining the passengers on board for two months resulted in spreading the disease on the ship.²⁶¹ In short, the court was willing to examine the tailoring of the government's

²⁵³ *Id.* at 117; *see also* HAW. QUARANTINE R. 2 (1880) ("On the arrival of any vessel at any port of this kingdom having had or still having any person sick of smallpox on board, the vessel shall be detained in quarantine; the sick shall be sent to the quarantine hospital, and the crew and passengers shall be submitted to quarantine for fifteen days.").

²⁵⁴ Madras, 5 Haw. at 117.

²⁵⁵ *Id.*

²⁵⁶ *See id.*

²⁵⁷ *Id.* at 118.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 118–19.

²⁶¹ *Id.* at 118.

measure to the actual dangers faced.²⁶² Chief Justice Judd concluded that the *de facto* quarantine imposed on the Madras was not a “quarantine” as described in the regulations allowing recovery of costs.²⁶³ Thus, the government could not recover all of the expenses it incurred.²⁶⁴ Rather, the Chief Justice allowed one week of expenses as a reasonable amount.²⁶⁵ Justice McCully wrote separately (but also for the entire three-Justice court), concluding that the Board had the authority to quarantine a vessel and its passengers “for so long as is necessary to insure that the ship, crew, passengers and freight bring no contagion or infection into the Kingdom, and that when a time is set it may be extended when it appears that it is necessary for the purpose.”²⁶⁶ The court rejected the government’s argument that the exigent circumstances of a public health emergency meant that the courts must give the government a lot of leeway in applying regulations.²⁶⁷ But keeping the ship from landing passengers and instead keeping it offshore and under guard, meant that it was not “quarantined.”²⁶⁸

The Hawai‘i Supreme Court’s analysis in a much more recent case involving “holdover” agency commissioners might also shed some light for how the court treats private litigation claims involving the distribution of power among other branches of state government. In *Sierra Club v. Castle & Cooke Homes Hawaii, Inc.*, a commissioner on the State Land Use Commission, who had not been approved by the Hawai‘i Senate for a second term, continued to serve until a replacement commissioner was approved.²⁶⁹ The Sierra Club sought to disqualify the holdover commissioner, and to invalidate anything he had done to consider an application for land use approvals for a controversial housing project.²⁷⁰ The Commission rejected the Sierra Club’s objection and approved the

²⁶² See *id.* at 119.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* The owners of The Madras later brought suit—and prevailed—for damages to the ship by the government’s refusal to allow the ship to land, but instead “with force and arms for a period of about fifty-three days from the said 10th day of April, A.D. 1883, to the 4th day of June, A.D. 1883, or thereabouts, prevented and detained the said Madras from coming inside of the said port of Honolulu, from entering at the said Custom House, from landing any of the said passengers in quarantine or otherwise, and during this period of time neglected and refused to establish any quarantine to be performed by the said Madras, though requested to do so by the representatives of the plaintiffs[.]” *Chapman v. Hawaiian Gov’t*, 8 Haw. 653, 654 (Haw. Kingdom 1887).

²⁶⁶ *Madras*, 5 Haw. at 121.

²⁶⁷ See *id.*

²⁶⁸ *Id.*

²⁶⁹ 132 Hawai‘i 184, 320 P.3d 849 (2013).

²⁷⁰ *Id.* at 186, 320 P.3d at 851.

project, with the holdover commissioner casting the deciding vote.²⁷¹ The Hawai'i Supreme Court concluded that the commissioner did not qualify under the statute as a "holdover" member, nor was he a *de facto* commissioner.²⁷² The statute allowed for holdover commissioners, but only if they are "not disqualified."²⁷³ Relying on a popular and law dictionaries' definition of "disqualified," the court concluded that the commissioner had been disqualified by virtue of the Senate's rejection of his nomination for an additional term on the Commission.²⁷⁴ The court rejected the Intermediate Court of Appeals' reasoning that the commissioner was not disqualified by Senate rejection (and could only be disqualified by the two-term limit on commissioners).²⁷⁵ The Supreme Court held that the Senate's authority to reject a commissioner for an additional term would be thwarted if the statute was read as allowing a commissioner to occupy a seat even after the Senate had rejected another term, simply because a new commissioner had not yet been confirmed.²⁷⁶ Otherwise, the Senate's advice and consent power would be diminished, allowing the executive to "bypass the will of the Senate."²⁷⁷ Despite this deciding separation of powers rationale, the court undertook no analysis of whether the holdover requirements were privately enforceable, or even considered such an argument. The Hawai'i Senate was not a party in the litigation.

The *Sierra Club* court also rejected a theory very similar to the idea that the emergency statutes allow the governor to employ supplemental emergency declarations in lieu of "separate" declarations if responding to an emergency that lasts longer than sixty days.²⁷⁸ The Commission in *Sierra Club* argued that allowing a commissioner to continue to serve even

²⁷¹ *Id.*

²⁷² *Id.* at 201, 320 P.3d at 866.

²⁷³ See HAW. REV. STAT. § 26-34(b) (2019) ("Any member of a board or commission whose term has expired and who is not disqualified for membership under subsection (a) may continue in office as a holdover member until a successor is nominated and appointed; provided that a holdover member shall not hold office beyond the end of the second regular legislative session following the expiration of the member's term of office.").

²⁷⁴ *Sierra Club*, 132 Hawai'i at 193, 320 P.3d at 858 ("Therefore, a member who is nominated but rejected by the Senate is 'disqualified' from serving as a holdover member.").

²⁷⁵ *Id.*

²⁷⁶ *Id.* ("Under the ICA's interpretation, the Senate would have no recourse during this time to terminate the member's holdover status despite rejecting the member's nomination for a second term. Yet, if it was the legislature's intent to so restrict its power and to limit the members who could be disqualified from serving as holdovers, the legislature could have simply disqualified any member who had served more than two terms. Instead, the legislature referenced 'subsection (a)' in its entirety to define the way a member is 'disqualified' from serving as a holdover member.").

²⁷⁷ *Id.* at 196, 320 P.3d at 861.

²⁷⁸ See *id.*

after the Senate's rejection of a second term did not infringe on the Senate's advise and consent role because the Senate had already consented to the commissioner's first term, and the holdover period should simply be viewed as an extension of that term, and not a second, independent term.²⁷⁹ The court concluded that in light of the Senate's rejection of a second term, it could not be said that the Senate impliedly consented to the continuing service of the commissioner.²⁸⁰ The Senate's express rejection of a second term rejected any implied consent.²⁸¹ The court determined that the actions of the Commission undertaken while the Senate-rejected holdover remained were void.²⁸²

Applying this rationale to the question of whether a supplemental emergency declaration qualifies as a "separate" declaration under section 127A-14(d) (thus allowing the governor to avoid the automatic termination requirement) should lead a court to conclude that a supplemental declaration does not qualify, and that the governor should either issue a new declaration, or lose authority to act after sixty days. In order for the delegation of emergency response power from the legislature to the governor to be valid under the nondelegation doctrine,²⁸³ the delegation must not be standardless, but must include guidelines for how that power is exercised.²⁸⁴ In section 127A-14, in the delegation of authority to the governor, the legislature provided such guidelines, expressly limiting the governor's power to sixty days, unless the governor issues a new proclamation.²⁸⁵ After that time, and in the absence of a separate declaration (which also has the effect of terminating the prior declaration), the power devolves back to the legislature.²⁸⁶

The Hawai'i Supreme Court also has employed a broad approach to standing and recognizing individual claims overcoming separation of powers claims, especially those based on mandatory government actions. For example, in *Schwab v. Ariyoshi*,²⁸⁷ the court considered whether the legislature improperly adopted a bill by procedures that were alleged to

²⁷⁹ *See id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.* at 206, 320 P.3d at 871.

²⁸³ *See State v. Willburn*, 49 Haw. 651, 426 P.2d 626 (1967) (recognizing the nondelegation doctrine under Hawai'i constitutional law).

²⁸⁴ *See, e.g., In re Application of Kauai Elec. Div. of Citizens Util. Co.*, 60 Haw. 166, 180–81, 590 P.2d 524, 535 (1978) (determining that legislative delegation of authority to agency to regulate rates and supervise public utilities necessarily implies the power to grant interim rate increase conditioned on refund provision).

²⁸⁵ HAW. REV. STAT. § 127A-14(d) (2019).

²⁸⁶ *Id.*

²⁸⁷ 58 Haw. 25, 564 P.2d 135 (1977).

have violated the Constitution's requirement that a bill "embrace but one subject."²⁸⁸ The bill—entitled "A Bill for an Act Making Appropriations for Salaries and Other Adjustments, Including Cost Items of Collective Bargaining Agreements Covering Public Employees and Officers"—was intended to "ratify the salary increases" that certain unionized public employees had achieved by collective bargaining with the State.²⁸⁹ The court noted that "various amendments were made" along the way, but that "the title of the bill was not touched or amended."²⁹⁰ The "various amendments" included broadening the scope of the bill to nonunion government employees who were not covered by the collective bargaining agreements.²⁹¹ Thus, the taxpayer plaintiffs argued that the bill "embraced" two subjects: the salaries of unionized government employees, and the salaries of nonunion government employees.²⁹²

The court expressed no hesitation about considering the arguments and concluded that the bill was not contrary to the "one subject" requirement in Article III of the Hawaii Constitution because "[a]ll parts of the bill embrace one general subject, to wit: salaries."²⁹³ Yes, the particular classes of employees covered by the bill had been expanded between introduction and enactment, but government employee salaries "are so connected and related to each other, either logically or in popular under-standing, as to be parts of or germane to that general subject."²⁹⁴ The court held that applying a "liberal construction" of the constitutional requirement meant that as long as the initial title of the bill—making appropriations for salaries "including" union employees—was "in the ordinary mind the general subject of the act," and thus generally related to the subsequent amendments (which simply also included nonunion employees), the bill was constitutionally adopted.²⁹⁵ The court declined to delve too deeply into whether the bill "could have been composed in language which would have been clearer and more precise,"²⁹⁶ and concluded that "[t]he power of the legislature should not be interfered with unless it is exercised in a manner which plainly conflicts with some higher law."²⁹⁷ Thus, the legislature's power to determine the content of a bill and the legislature's discretion to amend

²⁸⁸ *Id.* at 30, 564 P.2d at 139.

²⁸⁹ *Id.* at 27, 564 P.2d at 137.

²⁹⁰ *Id.* at 27, 564 P.2d at 140.

²⁹¹ *Id.* at 27–28, 564 P.2d at 137–38.

²⁹² *Id.* at 30, 564 P.2d at 139.

²⁹³ *Id.* at 33, 564 P.2d at 140.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 34, 564 P.2d at 141.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 39, 564 P.2d at 144.

proposals after introduction, is limited by “some higher law” (the three readings requirement), which requires that if a measure is revised so that the amendment is “dissimilar or discordant” with the original, the reading count must reboot.²⁹⁸ The court did not simply defer to the legislature’s claim that the subject of the bill (in its different iterations) could conceivably be related to the title, but reserved the question for judicial resolution, although with appropriate deference to the legislature’s judgment.²⁹⁹ The court noted that a finding that the title of a bill embraced more than one subject would empower the court to strike it down as unconstitutional if the challenger proves “unconstitutionality beyond a reasonable doubt” by showing that the constitutional infirmity is “plain, clear, manifest, and unmistakable.”³⁰⁰ This same standard should govern a court’s review of an individual’s claim that the governor’s supplemental proclamations violate the automatic termination provision.

Similarly, in *Taomae v. Lingle*, the court expressed no hesitation in enforcing a private claim.³⁰¹ The court confirmed the essential role of the judiciary in the separation of powers structure and held that to give life to the three readings requirement—and more importantly to the vital public participation which the requirement serves—courts must carefully review claims that the legislature failed to follow the required process.³⁰² Understanding that case’s timeline is critical to grasping the court’s rationale. *Taomae* asserted that an amendment to the Constitution proposed by the legislature was not validly adopted because the amendment had not been read three times by each house of the legislature.³⁰³ The State argued the bill had been read three times in both the Senate and the House (indeed, it had been read four times in the House).³⁰⁴ The court noted that the House introduced the bill (“A Bill for an Act Relating to Sexual Assault”) and

²⁹⁸ See *id.* at 33, 564 P.2d at 140 (“These parts are not and cannot be held to be dissimilar or discordant subjects which would render the act unconstitutional.”) (citing *Johnson v. Harrison*, 50 N.W. 923, 924 (Minn. 1894) (“To constitute duplicity of subject, an act must embrace two or more dissimilar and discordant subject that by no fair intendment can be considered as having any legitimate connection with or relation to each other.”)).

²⁹⁹ *Schwab*, 58 Haw. at 33, 564 P.2d at 140.

³⁰⁰ *Id.* at 31, 564 P.2d at 139.

³⁰¹ 108 Hawai’i 245, 118 P.3d 1188 (2005).

³⁰² *Id.* at 255, 118 P.3d at 1198. See also HAW. CONST. art. III, § 15 (“No bill shall become law unless it shall pass three readings in each house on separate days. No bill shall pass third or final reading in either house unless printed copies of the bill in the form to be passed shall have been made available to the members of that house for at least forty-eight hours.”).

³⁰³ *Taomae*, 108 Hawai’i at 254, 118 P.3d at 1197 (citing HAW. CONST. art. III, § 15) (reaffirming that constitutional amendments proposed by the legislature must “be passed ‘in the manner required for legislation.’”).

³⁰⁴ *Id.* at 248–49, 118 P.3d at 1191–92.

over the course of the next month, amended the bill and held readings three times.³⁰⁵ The bill then moved to the Senate. After the first reading there, the Attorney General opined that a statutory amendment alone would not accomplish the goal (to overturn a criminal law ruling by the Supreme Court), and the Constitution also needed to be amended to empower the legislature to define certain terms.³⁰⁶ In response, the Senate amended the bill to “add a constitutional amendment.”³⁰⁷ The amended bill then was read two more times in the Senate and after being sent back to the House was read there an additional time (what the court termed a “final” reading), after which it was placed on the ballot.³⁰⁸ The State argued the bill was valid under Article III, section 15, because the total of seven readings of the bill more than met the “three readings in each house” requirement.³⁰⁹ The state supreme court rejected the argument:

[T]he legislature failed to satisfy the requirement set forth in article XVII, section 3, that a proposed constitutional amendment be passed “in the manner required for legislation” because the constitutional amendment, see §§ 1 and 2 of the bill, did not receive three readings in each house as required by article III, section 15. The plain reading of article XVII, section 3 requires that a proposed constitutional amendment advance through the processes set forth in article III, section 15, including the requirement that “[n]o bill shall become law unless it shall pass three reading in each house on separate days.”³¹⁰

The court held “[i]n this instance, the constitutional amendment included in H.B. 2789, H.D. 1, S.D. 1 received only three readings in total.”³¹¹ The court emphasized the “critical purpose” of the three readings requirement: “full debate,” and “that each house of the legislature has given sufficient consideration to the effect of the bill.”³¹² The court noted that “the bill in its final form, including the constitutional amendment” was read only twice in the Senate and once in the House, and “[t]his was a patent violation of article III, section 15.”³¹³ Because the court exercised original jurisdiction in *Taomae*, it applied *Schwab*’s burden of proof, and concluded:

In light of the foregoing reasons, we also conclude that the failure to give the proposed constitutional amendment three readings in each house on separate

³⁰⁵ *Id.* at 249, 118 P.3d at 1192.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 253, 118 P.3d at 1195.

³⁰⁸ *Id.* at 249–50, 118 P.3d at 1192–93.

³⁰⁹ *Id.* at 253–54, 118 P.3d at 1196–97.

³¹⁰ *Id.* at 254, 118 P.3d at 1197 (citing HAW. CONST. art. III, § 15).

³¹¹ *Id.*

³¹² *Id.* at 255, 118 P.3d at 1198 (citing *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396 (1951) (Jackson, J., concurring)).

³¹³ *Id.* at 254, 118 P.3d at 1197.

days was a plain, clear, unmistakable violation of the constitution beyond a reasonable doubt.³¹⁴

In short, the substantial change in the substance of the bill rendered all prior readings ineffective, and the Hawaii Constitution required a reboot of the process.

These decisions, especially in light of the tighter reading of emergency powers in *Madras*, should overcome any objections that the automatic termination requirement in the emergency response statute is merely an aspirational goal, or a limitation on the governor's power that only can be enforced through political processes.

VI. SUGGESTIONS FOR REFORM

Despite my conclusion that the courts should not be reluctant to enforce the sole democratic check on the executive's emergency powers by maintaining the clear statutory emergency power boundaries between the other two branches, I do not think either of the two possible narrative threads highlighted above presents an obvious answer to whether the time limitation will be enforced by the courts, and if so by whom. This accounts for my lack of confidence that a court considering a claim for private enforcement could be convinced to overcome the judiciary's institutional reluctance to act during a crisis where the environment is rapidly changing, and courts have no institutional or constitutional legitimacy to respond to an emergency other than to enforce the law.³¹⁵ Should that occur, the power is left where it has always been, in the hands of the people and the branch most directly responsive to their influence: the legislature. Of course, what I term the "playground constitution"—the law as the public perceives it to be—must also be considered. After all, the public's compliance with severe and repeated emergency response measures over a long period of time is largely dependent upon voluntarily compliance and ultimately, an acceptance of the legality, necessity, and proportionality of the response.³¹⁶

³¹⁴ *Id.* at 255, 118 P.3d at 1198.

³¹⁵ *See, e.g.,* Wis. Legislature v. Palm, 942 N.W.2d 900, 917 (Wis. 2020).

³¹⁶ *See, e.g.,* A. Kam Napier, *Pupu Platter: Could there be a third Hawaii Covid lockdown?*, PAC. BUS. NEWS (Oct. 23, 2020), <https://www.bizjournals.com/pacific/news/2020/10/23/experts-against-lockdowns.html> ("Lockdowns were always a choice, and lockdowns predicated on case counts were always a disastrous choice. . . . Expecting people to behave perfectly, and punishing them economically when they don't, is absurd."). *Cf.* Josh Campbell, *Trapped in paradise: Breaking quarantine could mean prison time for tourists in Hawaii*, CNN (May 11, 2020), <https://www.cnn.com/travel/article/hawaii-tourist-arrests-quarantine/index.html> ("Roving neighborhood police patrols. Uniformed soldiers manning checkpoints. A vast surveillance

In light of the express limitation on the executive’s unilateral emergency powers in the statute, it should not be a surprise if the public questions the executive’s authority to impose measures after the expiration of the clear statutory period.³¹⁷ Technical legal distinctions and wordsmithing—drawing a distinction between a new and a “supplemental” proclamation, for example—may be rightly perceived as simply ignoring the statutory requirements, leading to a lack of public confidence or trust, and resistance to what otherwise might be acceptable measures.

If nothing else, the COVID-19 public health emergency has dramatically exposed the statute’s flaws. Hawai‘i’s governor—and to some extent the county mayors³¹⁸—is exercising his emergency powers by adopting and enforcing sweeping measures that have in many cases indefinitely and severely limit private contractual rights and the normal operation of the economy, freedom to travel, the usual functioning of government (including government transparency), all for a time longer than section 127A-14 contemplates. Hawai‘i’s statute should be clarified to affirm that sixty days is a hard stop on the governor’s power, after which she must reassess the

network of hotel staff and health department officials on the lookout for anyone breaking quarantine. This isn’t an authoritarian dictatorship. It’s the US state of Hawaii, where officials have been enforcing some of the strictest measures in the country aimed at stopping the spread of the coronavirus.”).

³¹⁷ See, e.g., David Lazer, Matthew A. Baum, Katherine Ognyanova, & John Della Volpe, *The State of the Nation: A 50-State COVID-19 Survey* at 15 (Apr. 2020), <https://kateto.net/covid19/COVID19%20CONSORTIUM%20REPORT%2012%20APPROVAL%20SEP%202020.pdf> (noting Hawai‘i’s “relatively low” public rating that government is “reacting properly”); Andrew Solender, *Governors Who Took Strict Covid-19 Measures Enjoy Highest Approval, Survey Shows*, FORBES (Sep. 15, 2020), <https://www.forbes.com/sites/andrewsolender/2020/09/15/governors-who-took-strict-covid-19-measures-enjoy-highest-approval-survey-shows/?sh=3fff5175340b> (“The bottom of the list also features several governors in Western states, such as Kate Brown (D-Ore.) and David Ige (D-Hawaii), as well as Brad Little (R-Idaho) and Kevin Stitt (R-Okla.), all under 40%.”); see also *With tourism at a standstill, governor says he’s preparing for \$1.5B in cuts to state’s budget*, HAW. NEWS NOW (Apr. 15, 2020), <https://www.hawaiinewsnow.com/2020/04/15/live-governor-outlines-states-covid-response-hawaiis-case-counts-grows/> (“Gov. David Ige made the comments at a news conference Wednesday, during which he was peppered with questions about his administration’s proposed pay cuts of up to 20% for state employees. Ige would not confirm the reports, saying he was still in talks with unions. But when asked whether he could impose the pay cuts unilaterally, he said he could. ‘I do have the authority to enact many different actions in order to continue the operations of the state,’ he said. He added that ‘all options’ for balancing the budget are on the table. Public sector unions have called the proposed cuts draconian and unacceptable.”).

³¹⁸ See, e.g., Jennifer Sinco Kelleher, *Hawaii mayor: Florida man flouting quarantine was ‘covidiot’*, ASSOCIATED PRESS (Apr. 8, 2020), <https://apnews.com/article/d7f739e44fbb2dc07e552d33bb92d9fc>.

necessity. If the courts indeed cannot be convinced to enforce the temporal check on the governor's power during an emergency, the legislature should amend section 127A-14 at the earliest opportunity to clarify that the governor is only delegated the emergency power for a limited time, after which the legislature has an essential role, and that the governor cannot act in derogation of the temporary power by indefinitely extending an emergency proclamation by "supplemental" proclamations.

I suggest these amendments would make the limits of the governor's and the legislature's respective authorities clearer:

§127A-14 State of emergency. (a) The governor may declare the existence of a state of emergency in the State by proclamation if the governor finds that an emergency or disaster has occurred or that there is imminent danger or threat of an emergency or disaster in any portion of the State. The proclamation shall state with particularity the automatic termination date of the state of emergency, which shall be no more than sixty days after the date the proclamation is issued.

(b) A mayor may declare the existence of a local state of emergency in the county by proclamation if the mayor finds that an emergency or disaster has occurred or that there is imminent danger or threat of an emergency or disaster in any portion of the county. The proclamation shall state with particularity the automatic termination date of the local state of emergency, which shall be no more than sixty days after the date the proclamation is issued.

(c) The governor or mayor shall be the sole judge of the existence of the danger, threat, or circumstances giving rise to a declaration of a state of emergency in the State or a local state of emergency in the county, as applicable. This section shall not limit the power and authority of the governor under section 127A-13(a)(5).

(d) A state of emergency and a local state of emergency shall not be effective more than terminate automatically sixty days after the issuance of a proclamation of a state of emergency or local state of emergency, respectively, and all such proclamations shall terminate automatically sixty days after issued. If an emergency continues more than sixty days, the governor or mayor may issue, or by a new, separate proclamation of the governor or mayor setting forth the reasons for issuing the new proclamation, and including a termination date for the state of emergency or local state of emergency, respectively, which shall be no more than sixty day after the new proclamation is issued, whichever occurs first. The governor or mayor may not issue a supplemental proclamation that extends any emergency declaration beyond sixty days from the date of the original proclamation. At any time, by concurrent resolution the legislature may declare that a state of emergency or local state of emergency is terminated.

As under the present statute, the delegation would have a time-limited hard stop. But the legislature's responsibility to check the governor's power will also be made more explicit, as would be the governor's authority to respond to emergencies that last longer than sixty days, provided she explains why it is necessary to do so by rebooting the proclamation process. The suggested amendment would also make clear the legislature's authority to end any emergency declaration at any time. If these suggestions are not deemed worthwhile, the legislature has a host of examples of similar statutory language from other jurisdictions that would work equally well.³¹⁹

VII. CONCLUSION

There is more than sufficient historical precedent for a court today to enforce the temporal limitation on the governor's power under Hawai'i's emergency preparation and response statute. Whether the courts will do so remains to be seen. That being so, the surest avenue to enforce the separation of powers rationale behind the sixty-day hard stop limit on emergency proclamations is to Spam[®] up for now and amend the statute at the earliest opportunity.

³¹⁹ See, e.g., CAL. GOV'T. CODE § 8630(b)–(d) (2020); GA. CODE ANN. § 38-3-51(a) (2014); IND. CODE § 10-14-3-12(a) (2020); NEV. REV. STAT. § 414.070 (2020); N.H. STAT. ANN. § 4:45II(a) (year); N.M. STAT. ANN. § 12-10A-5 (2018); N.D. CENT. CODE § 37-17.1-05 (2019); PA. STAT. § 7301(c) (2020); R.I. STAT. § 30-15-9 (2020); S.D. CODE § 34-48A-5 (2020); TEX. GOV'T CODE § 418.014 (2020); UTAH CODE § 53-2a-206 (2020); W. VA. CODE § 15-5-6(b) (2020).