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PUBLIC HEALTH EMERGENCIES AND STATE CONSTITUTIONAL QUALITY

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I am pleased and privileged to contribute to this Festschrift in honor of Professor Robert Williams. No legal scholar has contributed more to the cause of enhancing the profile of state constitutionalism and state constitutional law than Bob Williams. He has advanced the field immeasurably, through his teaching, his scholarship, his mentorship of many law professors in this field —including this author,— and his role in leading the peerless state constitutional law lecture, given annually and destined for the pages of this law review.[1] Many of us have been ever shaped by his approach to this field, one which looks at not only judicial interpretation of state constitutions—a topic which became much in vogue after the publication of Justice William J. Brennan's famous 1977 Article, State Constitutions and the Protection of Individual Rights,—[2] but at the deep structure and broad elements of state constitutionalism. With Bob Williams's leadership and encouragement, many are focusing anew on matters of federalism and of state constitutional design.[3] It is within this latter tradition that I offer this Article.

As I write this, we are in the midst of a historic era in American regulatory law, one in which state government officials have

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1. I had the good fortune to give this lecture in 2012. *See generally* Daniel B. Rodriguez, *The Political Question Doctrine in State Constitutional Law*, 43 RUTGERS L.J. 573 (2013).

2. *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

3. *See, e.g.*, JAMES A. GARDNER & JIM ROSSI, NEW FRONTIERS OF STATE CONSTITUTIONAL LAW: DUAL ENFORCEMENT OF NORMS 1–2 (2011); SANFORD LEVINSON, FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 29 (2012); JEFFERY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 2 (2018).

implemented draconian restrictions on individual and business behavior, all under the rubric of the state police power and accompanying statutes that authorize aggressive state governmental action.[4] *As disputes over the government's legal authority to impose severe regulations continue to work their way through the courts,*[5] *commentary will grow over the merits of particular decisions. Moreover, there have already been valuable contributions to the discussion of how best to frame these legal challenges under the rubric of Jacobson v. Massachusetts, the seminal 1905 case that addressed the balance to be struck between public health actions under the police power and civil liberties.*[6] *My focus here is not on this constitutional adjudication, either in the particulars of the disputes or in the general approach courts should follow in resolving these controversies. Rather, I want to look at this issue from a structural perspective, asking how best to think about constitutional and institutional design given the challenges raised by the most remarkable health emergency presented by coronavirus disease 2019 ("COVID-19").*[7] *Consider this Article as a thought experiment, one that looks at how we might redesign state constitutions to enable government to respond most effectively to these kinds of emergencies.*

4. For examples of these early and most significant COVID-19 sheltering orders, see generally, e.g., EXEC. OFFICE OF THE GOVERNOR OF ILL., COVID-19 EXEC. ORDER NO. 8, EXECUTIVE ORDER IN RESPONSE TO COVID-19 (2020), https://www2.illinois.gov/IISNews/21288-Gov._Pritzker_Stay_at_Home_Order.pdf; OFFICE OF THE GOVERNOR OF THE STATE OF N.Y., EXECUTIVE ORDER NO. 202.6, CONTINUING TEMPORARY SUSPENSION AND MODIFICATION OF LAWS RELATING TO THE DISASTER EMERGENCY (2020), https://www.governor.ny.gov/news/no-2026-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency.

5. *See, e.g.*, *In re* Certified Questions from U.S. Dist. Ct., W. Dist. Of Mich., S. Div., No. 161492, 2020 WL 5877599, at *3 (Mich. Oct. 2, 2020); Martinko v. Whitmer, No. 20-CV-10931, 2020 WL 3036342, at *1 (E.D. Mich. June 5, 2020); Friends of Danny Devito v. Wolf, 227 A.3d 872, 876 (Pa. 2020); Binford v. Sununu, No. 217-2020-CV-00152, 2020 LEXIS 20, at *3–5 (N.H. Super. Ct. Mar. 25, 2020).

6. 197 U.S. 11, 25–27 (1905); *see*, *e.g.*, *infra* text accompanying note 29.

7. *See CDC COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://covid.cdc.gov/covid-data-tracker/#cases (last visited Sept. 9, 2020).

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I. STATE CONSTITUTIONAL QUALITY AND THE POLICE POWER PRISM

In his wonderful 2009 monograph, *The Law of American State Constitutions*, Professor Williams sets the context of this survey and analysis of state constitutional law by probing questions concerning the history and functions of state constitutions in our American system.[8] He usefully frames the central questions around the origins, functions, and quality of these documents.[9] Particularly insightful is his discussion of state constitutional quality.[10] Quality in state constitutions matters, he maintains, and so we can fruitfully compare the efficacy of these constitutions as mechanisms of governance.[11] They are notably, as Alan Tarr explains, "instruments of government rather than merely frameworks for government."[12] And we can use, I would suggest, as bases of evaluation and of comparison the success of these "instruments of government."[13]

8. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 1–12 (2009).
9. *Id.* at 9.
10. *Id.* at 30–34.
11. *See id.* at 20.
12. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 132 (1998). Williams takes from this apt description the idea that the "changing conceptions of state constitutional function . . . . from framework to framework plus instruments reflects the rough and evolving dichotomy between core, or framework-oriented provisions, and policy-oriented provisions." WILLIAMS, *supra* note 8, at 23.
13. *See* Daniel B. Rodriguez, *State Constitutional Theory and its Prospects*, 28 N.M. L. REV. 271, 280, 302 & n.175 (1998).

Lest the reader less steeped in the modern literature on state constitutionalism regard these claims about state constitutional quality as more or less obvious, it is important to recognize Williams's framing as novel, even radical. Legal scholars had long eschewed attention to state constitutions as distinctive legal documents sourced in meaningful political culture, instead seeing them as statutory, not resilient, and too often crammed with trivia.[14] Not properly constitutional, comes the claim!

There are many things to say in response to these influential claims, and Williams, I, and others have said our peace in various fora,[15] but one particularly germane argument is how state constitutional structure can and should facilitate instruments of governance adequately responsive to public health emergencies. It is this: The state constitutions' acknowledgement of the police power and, correlatively, the foundational principle that state constitutions are documents of limit rather than grant, means that the success or failure of state governance can be assessed meaningfully by measuring the ways in which workable governmental mechanisms are created and supported by the terms and structure of state constitutions *qua* constitutions.[16] Other matters—about the desirability of one or another state constitutional provision or, to point to even more of a red herring, about the connection between these documents and unique political culture—are quite simply less important. The workability of the state constitution—its *quality*, to come back to Bob Williams's framework—is truly the point of the enterprise.[17]

The challenge states face, for which careful attention to constitutional design and performance is warranted, is how best to articulate the scope and limits of this police power. In one sense, the police power can be expressed as a tautology: The government has broad authority to take all necessary action in the face of a public health

14. *See*, *e.g.*, James Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 776–77, 819–20 (1992).

15. *See*, *e.g.*, Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927, 927 (1993); Daniel B. Rodriguez, *The Inscrutable (Yet Irrepressible) State Police Power*, 9 N.Y.U. J.L. & LIBERTY 662, 662 (2015) [hereinafter *State Police Power*]; Daniel B. Rodriguez, *State Constitutionalism and the Domain of Normative Theory*, 37 SAN DIEGO. L. REV. 523, 525 (2000). *See generally* WILLIAMS, *supra* note 8.

16. *State Police Power*, *supra* note 15, at 662, 666–69.

17. *See* WILLIAMS, *supra* note 8, at 93 (describing state constitutions as "established tools of lawmaking or policymaking . . . within the legal technology of the states."); *see also* JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS at v (1950) (emphasizing the importance of functional analysis).

emergency.[18] Such a conception is heartening to state officials who would take bold steps without waiting for a legislative delegation; however, it is febrile as a legal principle in that it does not make clear what power the government lacks and how such authority is bounded. More useful is to see the police power as the instantiation of the broader principle that state governments can act without the imprimatur of the legislature if they are doing so in order to protect the health, safety, and welfare of the general public.

Elsewhere I have described the state police power as irrepressible, as an essential and more or less coherent fulcrum for state governance.[19] This is not an original insight, as it has undergirded earlier constitutional theorists, from Thomas Cooley[20] to Ernst Freund[21] and, more recently, to Howard Gillman,[22] Randy Barnett,[23] and others interested in the origin stories of American constitutionalism. But my modest contribution in this earlier Article, and other work on state constitutionalism more generally, is to look at the function and quality of state constitutions through the prism of the necessarily broad powers and responsibilities assigned to state governments.[24] Despite the relentless march toward a national polity—demarcated at remarkable moments, such as the Progressive and Populist eras, the New Deal, the Civil Rights revolution, and the rise of national security constitutional imperatives that require ubiquitous national action—we still task our state and local government officials with a durably wide swatch of duties and functions, including education, law enforcement, housing and occupational licensing, and, yes, the protection of our public health.[25] The state police power has never truly waned in significance for governmental roles and responsibilities, and the COVID-19 crisis illustrates why it is perhaps more important now than ever.

18. *See* ERNST FREUND, THE POLICE POWER, PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 5–7 (1904); *State Police Power*, *supra* note 15, at 677.

19. *See State Police Power*, *supra* note 15, at 664.

20. *See* THOMAS M. COOLEY & VICTOR H. LANE, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH RESTS UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 572–74 (7th ed. 1903).

21. *See* FREUND, *supra* note 18, at 5–7.

22. *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 10 (1993).

23. *See* Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 430–31, 433 (2004).

24. *State Police Power*, *supra* note 15, at 665.

25. *See, eg.*, *id.* at 662, 677.

The idea of the police power is best understood along two dimensions: the authority to act and the practical ability to act. Considered as a whole, and in the midst of the present crisis, the state governments' responses to these challenges have been hobbled by difficulties along both these dimensions.

Consider first the matter of authority. The *Jacobson* decision is the lodestar case concerning the balance between a state's public health emergency powers and the preservation of civil liberties.[26] It is a meaningful precedent but has emerged in recent COVID-19-related constitutional litigation as more of a morass than as a source of clarification for judges.[27] From one perspective, *Jacobson* is merely an acknowledgment that civil liberties are not unlimited in times of health crisis, preserving the ability and responsibility of courts to protect civil liberties under ordinary standards of review.[28] From another perspective, *Jacobson* gestures in at least an implicit way to a kind of suspension model of constitutional adjudication.[29] Not so far in this direction as the argument rejected by the Civil War-era Supreme Court in *Ex Parte Milligan*,[30] but *Jacobson* indicates in a way that is familiar to comparative constitutional scholars that there will be times when ordinary constitutionalism will give way to emergency imperatives.[31]

The stakes of this disagreement are not merely theoretical. Lawyers for disgruntled businesses and individuals have insisted that governors have overreached, sacrificing civil liberties in order to implement severe restrictions neither reasonably related nor "narrowly tailored" to the circumstances at hand.[32] This claim does not deny that there is a robust police power but views these powers as requiring the government to do more than invoke its emergency powers, to tie these powers to plausible

26. *See* Wendy E. Parmet, *Rediscovering* Jacobson *in the Era of COVID-19*, 100 B.U. L. REV. ONLINE 117, 119 (2020); *see also* Jacobson v. Massachusetts, 197 U.S. 11, 24–26 (1905).

27. Parmet, *supra* note 26, at 118–19.

28. *See, e.g.*, *id.* at 124; Lindsay F. Wiley & Steve Vladeck, *COVID-19 Reinforces the Argument for "Regular" Judicial Review—Not Suspension of Civil Liberties—In Times of Crisis*, HARV. L. REV. BLOG (Apr. 9, 2020), https://blog.harvardlawreview.org/covid-19-reinforces-the-argument-for-regular-judicial-review-not-suspension-of-civil-liberties-in-times-of-crisis/.

29. Parmet, *supra* note 26, at 127.

30. 71 U.S. 2, 126–27 (1866) (rejecting the argument for suspension of *habeas corpus* rights for an Indiana civilian, despite an ongoing war).

31. Michael Dorf, *Lock Us Down; Suspend Habeas; Save the Nation*, VERDICT (Mar. 15, 2020), https://verdict.justia.com/2020/03/15/lock-us-down-suspend-habeas-save-the-nation.

32. *See, e.g.*, Geller v. de Blasio, No. 20cv3566, 2020 WL 2520711, at *4 (S.D.N.Y. May 18, 2020).

science and, further, to use mechanisms least restrictive of civil liberties.[33]

The problem at the heart of these disputes lies not in the *Jacobson* case—a case that involved one particular public health response, a mandate to vaccinate[34]—but in the difficulty in finding internal limits to the police power. The question of whether the government has overreached can be considered, as has conventionally been emphasized, with resort to the magnitude of the interference with one or another civil liberty—like the ability to attend a church or to operate a small business for economic survival.[35] This question will be nearly impossible to answer, as it involves a tradeoff between two incommensurate values, with the understandable thumb on the scales in favor of life over liberty and treasure. But it can be considered in a different way, and that is by resorting to the sense or senselessness of the government's decision as a means of effectively addressing the emergency.

Take as one concrete example the requirement of social distancing.[36] This requirement, which most agree comes with a palpable public health benefit,[37] can work under many different scenarios. It is of benefit to those vulnerable but thus far uninfected and it can be enforced easily and efficaciously by law enforcement authorities, given the eyeball test—that is, the fact that six feet looks like six feet. Moreover, it can be tied clearly to scientific advice.[38] We see as I write this in mid-summer government authorities working with private businesses and other organizations such as schools to ensure that appropriate distancing is maintained in order to cabin contagion.[39] And thus it is not surprising that these restrictions, which are undoubtedly intrusive, have not been commonly challenged on the grounds of governmental overreach.

33. Dorf, *supra* note 31 (assessing federal power to implement a lockdown).

34. Jacobson v. Massachusetts, 197 U.S. 11, 12 (1905).

35. Parmet, *supra* note 26, at 125–26.

36. Dena Bunis & Jenny Rough, *List of Coronavirus-Related Restrictions in Every State,* AARP (Sept. 10, 2020), https://www.aarp.org/politics-society/government-elections/info-2020/coronavirus-state-restrictions.html; *State Data and Policy Actions to Address Coronavirus*, KFF (Aug. 18, 2020) https://www.kff.org/health-costs/issue-brief/state-data-and-policy-actions-to-address-coronavirus/.

37. *See* Bunis & Rough, *supra* note 36; *State Data and Policy Actions to Address Coronavirus*, *supra* note 36.

38. *Social Distancing*, CENTER FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (last updated July 15, 2020).

39. Bunis & Rough, *supra* note 36.

By contrast, a number of challenges have been brought against restrictions on social gathering in the context of religious worship.[40] Here the claim is that religious liberty is being traded off unacceptably for a certain improved protection of public health. These claims do not dispute the science, although the argument is made that other, better tailored precautions—disinfecting, enforced social distancing, etc.—can and should be undertaken to ensure that the religious gathering can continue even in the of face this health emergency.[41] In the setting of these lawsuits, the government's police power does not expand or contract by its own terms. Rather, as the courts since the *Jacobson* decision 115 years ago have clarified, the central issue is not the power *qua* power, but the delineation of limits as civil liberties are invoked as checks on this power.[42]

A more sensible strategy, one which would aim in the balancing and line-drawing project, would be a clearer definition of what authority the state government has through the police power.[43] Does it have the power to truly suspend civil liberties in order to implement an urgent public health strategy? Could it, for instance, concede that religious liberty is being circumscribed by limiting the size of gatherings or prohibiting gatherings altogether, but insist that the urgent and temporary quality of this restriction is justified by the moment? Such a conception of governmental power is not wholly unknown—although, as has been pointed out recently, this is not the holding of *Jacobson* or any other case involving the state police power.[44]

However, the circumstance of a virulent infectious disease might, by analogy, sustain this invocation of a suspension power, if and insofar as we can better define its basis and its scope through constitutional drafting. Or we might augment the general statement of the government's police power by making clearer the connection between this power and the requirement that the government ground its decision in

40. *See* David Crary, *More US Churches Sue to Challenge COVID-19 Restrictions*, U.S. NEWS & WORLD REP. (Aug. 13, 2020, 8:13 PM), https://www.usnews.com/news/us/articles/2020-08-13/more-us-churches-sue-to-challenge-covid-19-restrictions.

41. *See, e.g.*, Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2606 (2020) (Alito, J., dissenting); Legacy Church, Inc. v. Kunkel, No. CIV 20-0327 JB\SCY, 2020 WL 1905586, at *10 (D. N.M. Apr. 17, 2020); On Fire Christian Church Inc. v. Fischer, 453 F. Supp. 3d 901, 911 (W.D. Ky. 2020); First Pentecostal Church of Holly Springs v. City of Holly Springs Miss., No. 3:20CV119 M-P, 2020 WL 197381, at *3–4 (N.D. Miss. Apr. 24, 2020); First Baptist Church v. Kelly, No. 20-1102-JWB, 2020 WL 1910021, at *9 (D. Kan. Apr. 18, 2020).

42. Parmet, *supra* note 26, at 124.

43. As I have observed elsewhere, "[t]he main safeguards of individual liberty in light of this state police power are structural." *State Police Power*, *supra* note 15, at 683.

44. Parmet, *supra* note 26, at 131–32; Wiley & Vladeck, *supra* note 28.

scientific facts. This perhaps seems like a mere gilding of the lily. After all, ought not we assume that the government always bases its decision to protect health, safety, and welfare on the best objective information? But by making this connection between governmental judgment and data-driven, evidence-based decision-making, we can hopefully come to the matter of constitutional rights and the balance between public health and liberty with more confidence that the government has asserted its authority based upon solid science and not on other, more disfavored considerations.

This is, to be sure, a somewhat unusual perspective on constitutional drafting, as we do not have many analogies from our United States Constitution to support a vision of a constitution that obligates the government to ground its decisions in more scientific rationales and reasoning. On the other hand, we have ready analogies from federal and state statutes. A whole range of regulatory statutes, such as the National Environmental Policy Act, require the government to be scientific and scrupulous in making assessments based upon data and evidence.[45] Why could not we expect our state constitutions, and specifically the police power, to hard-wire such an obligation into this crucial authority?

As the COVID-19 crisis illustrates, the question is not merely the available authority, but the capacity of government to carry out its functions. It is about the institutions and the resources available to enable it to tackle these extraordinary dilemmas. I want to go beyond a "good government" bromide. This is about what we should expect from our state constitutional framework. We should expect state constitutions to create and facilitate the work of government in effectively addressing public health emergencies. These expectations flow from our best understanding of the police power. The scope of the government's authority under this awesome power is connected to our faith in the efficacy of state governance institutions and our ability to build and support these institutions in order to protect our health, safety, and welfare. This is constitutive of the quality of the state constitutions, as Professor Williams frames it in his discussion.[46]

Is this a general point about all constitutions? Not necessarily. The public's fascination with the musical *Hamilton* and its subject[47] can blind

45. *See, e.g.*, National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (2018).

46. *See* WILLIAMS, *supra* note 8, at 30–34.

47. *See* Dan Webster, *"Hamilton" Musical a Success Even off the Stage*, SPOKESMAN REV. (July 10, 2020), https://www.spokesman.com/7blog/2020/jul/10/hamilton-musical-success-even-stage/.

us to the fact that the great Mr. Hamilton did not get everything he wanted from the grand bargain among the principal stakeholders in our founding period.[48] It is a familiar point that the U.S. Constitution was not configured by the framers as an unalloyed instrument for broad regulatory power at every turn.[49] Let us not make the mistake of viewing our constitutional tradition through a 2020 lens, especially in the midst of a pandemic. As Daniel Elazar notes: "[i]t is not unfair to say that the federal constitution could emphasize individualism and the marketplace precisely because the founders could count upon the state constitutions to emphasize community and commonwealth."[50] State constitutions are distinct from the U.S. Constitution, in no small part because they are viewed by "We the People" as practical instruments for governing effectively, especially in matters where our public health, safety, and welfare are at issue. So the assessment of their success, and also their failure, should be tied closely to such practical considerations.

The COVID-19 crisis has required, and continues to require, bold leadership and action at the state level. Coordination among the states and strong interventions by the federal government are critical to tackle this emergency; however, the burden has fallen on the shoulders of the fifty states to undertake general and targeted regulatory strategies to contain the spread of the virus.[51] Somewhat paradoxically, this infectious disease, which obviously knows no geographical boundaries, has required decisive action by states acting individually, and within the structure of their constitutional rules and regimes.[52]

The matter of authority is, while an essential element in this equation, not all that difficult to wrap our heads around. The police power, as ancient and modern commentators alike have stressed, is the power to act in order to protect the health, safety, and welfare of its citizens.[53] There are, to be sure, assertions of authority that fall closer to the line of appropriate versus inappropriate police powers—think, for example, of the government making policy to redistribute wealth on the argument that such actions are necessary to ensure that economic equality, and thereby citizen welfare, is improved. However, when we are

48. On Hamilton and executive power, see generally Jeremy D. Bailey, *The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton*, 102 AM. POL. SCI. REV. 453 (2008); Broadus Mitchell, *Alexander Hamilton, Executive Power, and the New Nation*, 17 PRESIDENTIAL STUD. Q. 329 (1987).

49. *See generally* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1994).

50. DANIEL J. ELAZAR, THE AMERICAN CONSTITUTIONAL TRADITION 169 (1988).

51. *See* Bunis & Rough, *supra* note 36.

52. *Id.*

53. *See* Parmet, *supra* note 26, at 122–23.

dealing with crises involving the public's health, we can be confident that a state's constitution gives its government wide latitude to act in order to protect health against infection and contagion.

When viewed through the lens of state constitutional structure, it is hard to imagine crafting language that makes clearer the contours of the government's police powers generally and their connection to public health and its protection. The challenge, then, is not one of better drafting, of creating a more prolix—and, in that sense, more limiting—definition of health, safety, and welfare for the purposes of the police power. Rather, the challenge is two-fold and it is, I argue, essentially this: First, we must nest this awesome power in a normatively compelling and tractable conception of the state government's role and responsibilities. What functions does the police power serve in creating citizen expectations of their government and trust that the state will act in their best interest, with health, safety, and welfare squarely in mind? Second, constitutional structure must effectively shape institutions and governance mechanisms to ensure that public officials can carry out their responsibilities. The police power ought not be understood as merely permission to act, but as reflecting an understanding that the government will act well and that its choices will be workable—even if, as is inevitable, the government will not always succeed in its intended purpose.

In this Part, I have looked at state constitutions and the police power from a fairly high level of generality. In the next Part, I want to drill down a bit further and look at the ways in which the dilemmas, emergent and persistent, facing state governments in confronting public health emergencies can be alleviated, though certainly not cured, by careful attention to constitutional structure and to an aspiration of state constitutional quality.

II. STATE POLICE POWER AND A FUNCTIONING REGULATORY SYSTEM

In public health emergencies, we expect more of our state governmental officials than merely giving it the old college try. That is to say that we expect our constitutional system to enable state governments to create the conditions for successful public policy. This was surely the impetus behind our original state constitutions creating the office of the governor—save for Pennsylvania, initially—[54] and giving the governor

54. Paul Leicester Ford, *The Adoption of the Pennsylvania Constitution of 1776*, 10 POL. SCI. Q. 426, 446 (1985).

meaningful powers, despite the grave fear arising out of their collective experience with King George.[55] Likewise, the creation of municipal governments under the rubric of home rule was, at least in part, a means by which state governments could respond effectively to the exigencies of an increasingly complex policy environment and growing demands by the states' citizens.[56] So *form* yes, but *function* especially.

In the context of public health emergencies, this means at least the capacity of government to collect data, to analyze the data collected through proper techniques, and, especially, to draw upon scientific expertise. As early as the late nineteenth century and into the next century, when influenza and smallpox emerged as serious crises, state public health officials looked to scientists to inform public policy.[57] In *Jacobson*, the Supreme Court acknowledged that the courts would have a more limited role in superintending the policy process, even when constitutional liberties were in issue, because of the more promising intervention of scientists and the appropriate humility of non-expert courts.[58] But it is striking that, in both the early and later legal controversies, the expectations that state government would look to science first in tackling public health challenges and that the law would take a subordinate role were prominent and persistent.[59]

Also essential to an effective regulatory apparatus is the operation of an administrative scheme that will facilitate rapid governmental action. Governors acting in the COVID-19 crisis have often adverted to their public health agencies as mechanisms for developing and implementing public health responses.[60] This is not surprising given that here, as elsewhere in public policy, implementation requires bureaucracy, local knowledge, and front-line energy and efforts. But what is gratifying is that these institutions were more or less available for use when these

55. *See* WILLIAMS, *supra* note 8, at 236–42, 304–06; *see also* JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 97–136 (2006) (providing a historical understanding of state constitutional separation of powers).

56. *See generally David* J. *Barron*, *Reclaiming Home Rule,* 116 HARV. L. REV. 2257, 2290 (2005).

57. *See generally* Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53 (2007) (discussing the history of law and infectious diseases).

58. *See* Jacobson v. Massachusetts, 197 U.S. 11, 23–25 (1905).

59. *See id*. *See generally* Batlan, supra note 57.

60. The governors' executive orders in California, Wisconsin, and Illinois highlight this response. *See, e.g.*, EXEC. DEP'T OF THE STATE OF CAL., EXECUTIVE ORDER N-33-20 (2020), https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf; OFFICE OF THE GOVERNOR, EXECUTIVE ORDER #90 (2020), https://evers.wi.gov/Documents/COVID19/EO090-DeclaringPublicHealthEmergency.pdf; EXEC. OFFICE OF THE GOVERNOR OF ILL., *supra* note 4, at 1–2.

circumstances emerged with full force. True, states were vexed in the moment by the under-availability and expense of key medical and personal protective equipment.[61] But the institutions nonetheless were usually in place for seeking and ultimately securing help and for facilitating the public and private initiatives necessary for progress in tackling this relentless virus.[62]

This was true to a meaningful degree as well of local law enforcement institutions, those critical to enforcing state edicts.[63] These were and continue to be matters of great delicacy and complexity, made even more so after the tragic killing of George Floyd and the pressures of the Black Lives Matter and Defund the Police movements.[64] It is too early to say much knowledgably about the scope of enforcement with respect to various restrictions. By impression and anecdote, it does seem fines and other mechanisms of enforcement were not extensive. With respect to personal mobility in particular, the difficulty of checking and stopping individuals, credibly assessing their explanations, and imposing discipline that would be implemented when questioned in, say, a court, raise obstacles seemingly insurmountable. All that said, the difficult question raised by restrictions that are expected to continue for long periods of time is how best to enforce these restrictions where voluntary compliance based upon general acceptance or fear-based acquiescence is wanting. As we continue to think through reforms of our schemes of policing in a world in which systemic racism and police brutality has been brought into ever sharper relief, we should think about what mechanisms can and should be created in order to assure that public health strategies, including orders and edicts, are successfully implemented.

Related to the matter of law enforcement is the utility of courts and dispute resolution mechanisms in a period in which many private and public organizations are adjusting to restrictions on their functioning. In

61. *See* Andrew Allen, *US State Collaborate on PPE Procurement*, SUPPLY MGMT. (May 11, 2020), https://www.cips.org/supply-management/news/2020/may/us-states-collaborate-on-ppe-procurement/.

62. *See id.*

63. *See, e.g.*, Shant Shahrigian, *N.Y. State Government Takes Bigger Role in Enforcing COVID-19 Rules in NYC, Other Hot Spots*, DAILY NEWS (Oct. 4, 2020, 11:46 AM), https://www.nydailynews.com/news/politics/ny-andrew-cuomo-covid-enforcement-20201004-gkd7eazmhzhn5pom4p4elspj5e-story.html.

64. Tara Law, *Nationwide Protests Haven't Caused a COVID-19 Spike (So Far.) Here's What We Can Learn from That*, TIME (June 30, 2020, 2:40 PM), https://time.com/5861633/protests-coronavirus/; Benjamin Siegel, *Why Protesters Want to Defund the Police After George Floyd's Death*, ABC NEWS (June 9, 2020, 5:01 AM), https://abcnews.go.com/Politics/protesters-defund-police-george-floyds-death/story/?id=71123610.

the early months of the crisis, courts rather suddenly shut down in-person proceedings.[65] They adjusted—or, more accurately, are still adjusting—to a new normal in which key elements of both the criminal and justice system function through remote, technology-enabled processes.[66] This is one of the cruel aspects of this kind of public health emergency, that is, just when our courts are needed in order to negotiate difficult circumstances by resolving disputes and protecting the rule of law, they are forced to adapt in their functioning, including postponing certain proceedings and changing their ways of working. This crisis has illustrated the need for careful contingency planning to ensure that our courts can carry out their responsibilities. The predicament is particularly vexing in state court systems, given the especially heavy burdens and therefore the relatively greater resource challenges, as well as the existence of fifty different state judicial systems; economies of scale and collaboration will therefore be, as a practical matter, limited.

Developing greater capacity in our judicial systems is an important priority in preparing properly for public health emergencies, and state constitutions can play a role in that effort. They can, unlike the U.S. Constitution, delineate more thoroughly best practices for courts—or, perhaps at a more sensible level of generality, the responsibilities of courts in the criminal, civil, and administrative contexts, and how these responsibilities are tied to particular functions. To be sure, the matter of resources and jurisdiction will rightly remain statutory. But considering how state constitutions uniquely create systems of positive rights and, with them, responsibilities on the part of government to follow through on these rights through affirmative action,[67] it seems not too much of a stretch to ensure that the state judicial system is capable of functioning successfully, even under circumstances of burden and stress.

We need not canvass all of the important governmental institutions in the state to make the point that the measure of the success of a state constitution in dealing effectively with emergencies, including public

65. *See Covid-19 Forces Courts to Hold Proceedings Online*, ECONOMIST (June 14, 2020), https://www.economist.com/international/2020/06/14/covid-19-forces-courts-to-hold-proceedings-online.

66. *As Courts Restore Operations, COVID-19 Creates a New Normal*, US CTS. (Aug. 20, 2020), https://www.uscourts.gov/news/2020/08/20/courts-restore-operations-covid-19-creates-new-normal.

67. *See*, *e.g.*, EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 11 (2013); Helen Hershkoff, *Foreword: Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799, 802 (2002); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1135–36 (1999); Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893 (1989).

health emergencies, is the ability of the relevant governance institutions to confront and tackle the most difficult challenges. It is necessary that government plan for the worst; and it is important to see the state constitution, through its police powers, as conferring not only authority to act on an urgent basis, but also a responsibility to configure governmental institutions in order to best deal with these exigencies. Preparation is essential, and the structure of state constitutions is one critical element of this preparation.

III. INFERNAL INTERNAL DILEMMAS

Public health emergencies by their nature require sustained and consistent effort from the top of the governmental pyramid. While my focus in this Article is on state governments, there is undoubtedly a central role that the United States government must play in coordinating and implementing an appropriate response to a health crisis that truly knows no borders or boundaries. And while our system of federalism and separate states makes consistent, comprehensive responses difficult to say the least, it remains imperative that state governments speak with a clear voice when it comes to developing and implementing responses, and in its communication with their citizenry.

In this light, it is not at all surprising, and indeed has been reassuring, that state governors have by and large led the efforts at responding forcefully to the COVID-19 challenges.[68] They have been both implementers and communicators in chief. And while citizens have quarreled at times with particular gubernatorial actions,[69] a key theme of this crisis has been the energetic voice and actions of governors, making rapid decisions on behalf of their government.

That said, these schemes of decision-making face two important internal challenges, both of which are the product of state constitutions and the structure of authority, accounting, as always, for the differences among these constitutions in our U.S. system.

The first challenge is the separation of powers within state government. Bob Williams has written extensively about separation of powers in state constitutionalism, pointing out that "by contrast to the federal Constitution, [state constitutions] often provide an express,

68. *See* Bunis & Rough, *supra* note 36.

69. *See, e.g.*, *Federal Lawsuit Against Gov. Pritzker Moving Forward*, ABC 20 NEWS CHANNEL (Sept. 28, 2020), https://newschannel20.com/news/local/federal-lawsuit-against-gov-pritzker-moving-forward.

textual affirmation of the doctrine of separation of powers."[70] Moreover, this doctrine has often tilted in favor of legislative power, reflecting the Founders' concern with executive power following American independence.[71]

In configuring the state police powers, the evidence is limited of what state constitutional framers thought about the allocation of these powers within the constitutional system. Does the proper invocation of the police power require state legislative action especially or do we accord to the governor broad authority to act under the rubric of this constitutional authority in times of emergency? A full exegesis of this issue lies beyond this Article. However, it is important to note that the absence of clarity with regard to this legislature versus governor question leaves ambiguous the question of whether the governor has overstepped her bounds in issuing strong restrictions on individuals and businesses in this public health crisis.

The few disputes presently being litigated on this particular matter of separation of powers provide little confidence that the courts will settle this issue in an illuminating way. For example, the order by Governor J.B. Pritzker of Illinois to shut down various non-essential businesses and limit individual travel has been challenged on the grounds that he overstepped executive authority entirely derivative of statutes which have configured certain administrative powers in times of emergency.[72] And, further, the claim is that there is no inherent power of executive action in such circumstances under the police power.[73] The case remains pending at the time of this writing.

The lack of constitutional clarity is a serious problem, and while the ideal is collaboration between the legislature and the governor, with the blessing of the courts if necessary, the reality is much messier than that.

70. WILLIAMS, *supra* note 8, at 237; Robert F. Williams, *Evolving State Legislative and Executive Power in the Founding Decade*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 43, 44–45 (1988).

71. *See* WILLIAMS, *supra* note 8, at 235–6. Gordon Wood describes the impetus behind the structure of governmental powers in the Founding era constitutions: "The powers and prerogatives taken from the governors were given to the legislatures, marking a revolutionary shift in the traditional responsibility of government." Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 916 (1993).

72. See the ongoing litigation in Bailey v. Pritzker, No. 3:20-cv474-GCS, 2020 WL 3498428, at *1–2, 6 (S.D. Ill. June 29, 2020). *See also generally* Bailey v. Pritzker, No. 2020-CH-06 (Ill. 4th Cir. Ct. July 2, 2020) (granting relief in response to Plaintiff's motion for summary judgment).

73. *See Bailey*, 2020 WL 3498428, at *2 (4th Cir. July 2, 2020) (finding that "Defendant had no Illinois constitutional authority as Governor to restrict a citizen's movement or activities and/or forcibly close business premises . . . .").

Governors have invoked their police powers to implement their bold directives; and they have presented to the people the quite plausible thought that the very nature of this raging pandemic requires decisive and quick action by the chief executive and therefore necessarily action without waiting for the legislature.[74] However compelling this claim is, the ambiguity latent in the police power suggests that we should be more manifest and intentional in structuring the police power of the executive and the legislative branches in our state constitutions. Otherwise, we will continue to be vexed as new emergencies arise with the question of who should be able to act, when, and whether or not unilaterally.

Another infernal internal dilemma flows from the distribution of powers within state government. That is, what is the relationship between the state and local governments with respect to public health emergencies? At one level, this question is easy enough to answer. We need a comprehensive state response to health emergencies so as not to allow the conditions to become further perilous as individuals, and therefore infections, travel. Moreover, the states have an interest in the welfare of their citizens wherever they reside and wherever they travel. And so, it is important for the state government, acting through the governor and the legislature, to speak with a coherent voice. No state has insisted, or could plausibly insist, that the response to an infectious disease is to decentralize governmental action and leave it to, say, municipalities, to develop their own separate responses.

On the other hand, states benefit from the expertise that can and does exist at the local level. And municipal governments—cities, townships, and counties—can contribute to public health policy in unique ways. For example, a city that lies along the coast will be in a comparatively better position to deploy local law enforcement to enforce beach closures; and cities with large retail establishments or meatpacking factories will be able to develop and implement specific strategies to tackle outbreaks that impose a burden on members of the local community and threaten the wider state citizenry unless the problem is quickly confronted and resolved. At bottom, local governments need coordination and guidance from the top; and the state government needs the active, meaningful, and well-intentioned cooperation from local

74. Governors have urged this need for quick action in the "whereas" clauses of their executive orders. *See, e.g.*, EXEC. DEP'T OF THE STATE OF CAL., *supra* note 60, at 1; EXEC. OFFICE OF THE GOVERNOR OF ILL., *supra* note 4, at 1; OFFICE OF THE GOVERNOR OF THE STATE OF N.Y., *supra* note 4.

governments in order to ensure that state action is successfully implemented.[75]

In the midst of the COVID-19 crisis, we have seen ruptures emerge with respect to state and local collaborations. Some of these ruptures are the function of state constitutional architecture of legal culture. For example, there have emerged serious disagreements in states that have experienced a high level of infection and mortality overall, with special suffering in particular areas of the state. The governors of Georgia and Texas have insisted that local governments lack any serious prerogatives to take additional or in any way different steps in dealing with the crisis.[76] The Mayor of Atlanta has pushed back hard on these statements and, at present, this matter has not been definitively resolved.[77] Nor has it been resolved in Texas, where a number of large cities—Houston, San Antonio, and Austin most prominently—have proposed to go slower on reopening and have recommended other adjustments.[78] Florida, too, has had state-local conflicts,[79] as has Arizona, although there appears to be a political agreement among the two largest counties, Maricopa, Pima, and the state, that the governor will allow these counties to implement some additional requirements, such as mandatory masks.[80]

75. INSTITUTE OF MEDICINE, THE FUTURE OF PUBLIC MEDICINE 191–99 (Committee for the Study of the Future of Public Health, et al. eds., 1988), https://www.ncbi.nlm.nih.gov/books/NBK218218/pdf/Bookshelf_NBK218218.pdf.

76. Steve Almasy & Pierre Mielhan, *Georgia Governor and Atlanta Mayor at Odds Over Coronavirus Guidelines*, CNN: POL. (July 10, 2020, 7:39 PM), https://www.cnn.com/2020/07/10/politics/georgia-governor-atlanta-mayor-covid/index.html; Valeria Olivares, *Texas' Big-City Mayors Ask Gov. Greg Abbott for Power to Impose Face Mask Rules*, TEX. TRIB.: CORONA VIRUS IN TEX. (June 16, 2020, 5:00 PM), https://www.texastribune.org/2020/06/16/texas-mayors-greg-abbott-face-masks/.

77. James Doubek, *Atlanta Mayor Defends Legal Face-Off with Georgia's Governor Over Masks*, NPR (July 28, 2020, 5:28 PM), https://www.npr.org/sections/coronavirus-live-updates/2020/07/28/896206417/atlanta-mayor-defends-legal-face-off-with-georgias-governor-over-masks.

78. Cassandra Pollock & Juan Pablo Garnham, *Texas City and County Leaders Ask Gov. Greg Abbott for Authority to Implement Local Stay-at-Home Orders*, TEX. TRIB.: CORONA VIRUS IN TEX. (June 29, 2020, 4:00 PM), https://www.texastribune.org/2020/06/29/texas-coronavirus-stay-at-home-harris-dallas/.

79. Aaron Leibowitz et al., *Amid Confusion, DeSantis Says Local Governments Can "Go Beyond" His COVID-19 Order*, MIA. HERALD (Arp. 2, 2020, 6:44 PM), https://www.miamiherald.com/news/coronavirus/article241720381.html.

80. *See* Lois Beckett, *Arizona Governor Backtracks on Mask Rules as Covid-19 Cases Surge*, GUARDIAN (June 17, 2020, 9:59 PM), https://www.theguardian.com/us-news/2020/jun/17/arizona-coronavirus-covid-19-governor-mayors; *see also* Joshua Bowling et al., *Cities from Scottsdale to Surprise Require Face Masks in Public; Maricopa County Mandate Covers the Rest*, AZCENT.: HEALTH (June 17, 2020, 7:26 PM), https://www.azcentral.com/story/news/local/arizona-health/2020/06/17/gov-doug-ducey-gives-cities-authority-mandate-face-masks-public/3210588001/; Caitlin Schmidt, *Pima County Approves Mask-Wearing Ordinance, but Without Enforcement*, TUCSON (June 20, 2020), https://tucson.com/

In addition to these conflicts between governors and mayors,[81] there has been pushback from businesses to the assertion of municipal authority to require more of a business than do other municipalities. During the imposition of shutdown orders on businesses in California, for example, Elon Musk on behalf of Tesla, Inc., challenged the severe restrictions imposed by Alameda County in California's bay area, claiming that his company was facing different restrictions in counties where his factories were doing business.[82] The gravamen of his complaint was that these localities were required to act equally, that is, uniformly with respect to business functioning.[83] While they were permitted to enact county-specific policies, like Alameda and at least five other Northern California counties did as early as mid-March,[84] under the California Constitution, local governments could not impose what amounted to a patchwork quilt of different rules and regulations.[85]

These internal dilemmas, separation of powers, and state-local conflicts are ubiquitous; the challenges are not unique to public health emergencies. Yet the consequences of these structures are especially great, and can be even grave, when there is a necessity, as here, for certainty and coherence in the governments' response. State constitutions should be structured in a way that makes clear ex ante what is the best distribution of authority and of function in such emergencies.[86] And, ideally, state constitutional law should follow principles that facilitate the good, urgent work of governmental

news/local/pima-county-approves-mask-wearing-ordinance-but-without-enforcement/article_658f21f7-df39-5340-bb0d-7652ece58bec.html.

81. *See generally* David A. Graham, *Governors Are Passing the Coronavirus Buck to Mayors*, ATLANTIC (June 18, 2020), https://www.theatlantic.com/ideas/archive/2020/06/covid-preemption-reversals/613210/.

82. Complaint, Tesla, Inc. v. Alameda County, Cal., No. 4:20-cv-03186 (N.D. Cal. May 9, 2020).

83. *Id.*

84. *See Resources Regarding Coronavirus and COVID-19*, CAL. ST. ASS'N OF COUNTIES, https://www.counties.org/carousel/resources-regarding-coronavirus-and-covid-19 (last visited Oct. 6, 2020) (providing access to individual counties' orders under "County COVID-19 Pages, Dashboards and Health Officer Orders").

85. *See* Complaint, *Tesla*, No. 4:20-cv-03186 (including Tesla's assertion that the county's restrictions violate article 11, section 7 of the California Constitution).

86. The larger question that this raises is the scope of local governments' police powers, a question that is nested in the debate about municipalities' home rule authority. *See* CLAYTON P. GILLETTE & LYNN A. BAKER, LOCAL GOVERNMENT LAW 225–28 (2d ed. 1999); Daniel B. Rodriguez, *State Supremacy, Local Sovereignty: Reconstructing State/Local Relations Under the California Constitution*, *in* CONSTITUTIONAL REFORM IN CALIFORNIA 401–403 (Bruce E. Cain & Roger G. Noll eds., 1995).

institutions at all stages and levels. The controversies we are seeing in the COVID-19 crisis suggest that there are distinct improvements that can and should be made.

IV. MECHANISMS OF INTERSTATE COLLABORATION

Public health crises of the kind represented by COVID-19 will be especially difficult to control in the American context because of the borderless character of the virus and the impossibility of any given state arresting the contagion through specific state actions. Moreover, some states will be harder hit than others, generally or at a given moment in time, and therefore the burdens will be experienced unequally. The necessity of a strong federal response to deal with this COVID-19 crisis has been emphasized by many; certainly bold national strategies are essential and all to say here about this is that such strategies will implicate state constitutions only insofar as they will occasionally trump state prerogative through the ordinary route of supremacy.

Let us focus on a separate dimension, the capacity and opportunities for states to confront some of the virus's challenges through coordinated interstate action.

The U.S. Constitution limits some strategic action by the states through the Compact Clause.[87] Article I, Section 10 provides that "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State."[88] Since *Virginia v. Tennessee* in 1893,[89] this clause has been read as limiting interstate compacts only when they have the effect of increasing the political power of states in relation to the federal government.[90] While there could conceivably be instances in which compacts developed in order to control the contagion of infectious diseases might impact national power, this argument is an implausible tactic and does not describe well at all the compacts that states have entered into in recent months to support their individual strategies with greater collaboration and resources.[91] Ultimately, the

87. U.S. CONST. art. 1, § 10, cl. 3.

88. *Id.*

89. 148 U.S. 503, 519 (1893).

90. *See, e.g.*, Texas v. New Mexico, 482 U.S. 124, 134 (1987) (enforcing a compact between two states on water rights); Cuyler v. Adams, 449 U.S. 433, 439–40 (1981) (discussing the scope of the Compact Clause).

91. *See, e.g.*, Press Release, Rockefeller Found., Governors of Six States Announce Major Bipartisan Compact for Three Million Rapid Antigen Tests (Aug. 4, 2020), https://www.rockefellerfoundation.org/news/governors-of-six-states-announce-major-bipartisan-compact-for-three-million-rapid-antigen-tests/; Aziz Huq, *States Can Band Together to Fight the Virus – No Matter What Trump Does*, WASH. POST (Apr. 15, 2020, 7:23 PM), https://www.washingtonpost.com/outlook/2020/04/15/states-coronavirus-agreements-reopen/.

Compact Clause cannot be expected to constrain states from developing cooperate strategies with particular states in order to deal with an epidemic. Indeed, the Federal Constitution contemplates that states will frequently cooperate and collaborate. National intervention will frequently be the last, or at least not the first, resort for problems which present spillovers and externalities, and interstate collaborations are frequent and useful.[92]

State constitutions should be structured to encourage and incentivize such collaborations. That the police power is ubiquitous is at least fortuitous. We can see our state governments as a web of institutions which react not only to the exigencies of intrastate policies, choices, and demands, but also to the needs of citizens of other states. After all, we do not impose severe restrictions in ordinary circumstances on interstate mobility; we do not require passports to travel from one state to another; and we permit American citizens to relocate without major restriction. Thus, states can see their function as assisting their neighbors and coordinating to ensure that the best interests of individuals whose cohort is broader than just those within the state are adequately protected. However tempting it is to view these efforts at lessening friction among states and state policymaking as safeguarded principally, or even solely, by federal authorities and the U.S. Constitution, we should not neglect the incentives and opportunities of state governments to facilitate interstate cooperation through their own initiatives.

The principal challenges to meaningful interstate compacts are the mechanism by which these compacts are created and ultimately enforced. Blackletter law is that state compacts must be created, or at least ratified, by state legislatures.[93] Given the fast-moving nature of state public health emergencies, it is not always possible to secure legislative action, and governors will, as they have in COVID-19, want to rapidly implement collaborative strategies.[94] So, state constitutions can aid these efforts at solving problems by clarifying whether and in what circumstances state legislative action is required. This should be, after

92. *See* PAUL HARDY, INTERSTATE COMPACTS: THE TIES THAT BIND 3–5, 16–18 (1982).

93. *See* JOSEPH F. ZIMMERMAN, INTERSTATE COOPERATION: COMPACTS AND ADMINISTRATIVE AGREEMENTS 43 (2002). On requirements of state interstate compacts generally, see *Interstate Compacts: United States*, LIBR. OF CONGRESS, https://www.loc.gov/law/help/interstate-compacts/us.php (last updated July 24, 2020).

94. *See*, *e.g.*, Roman Battaglia, *State Auditor Unveils New Multi-State Collaboration to Improve COVID-19 Data Accuracy*, DEL. PUB. MEDIA (July 28, 2020), https://www.delawarepublic.org/post/state-auditor-unveils-new-multi-state-collaboration-improve-covid-19-data-accuracy.

all, a solely intrastate matter; it is a big stretch to read the Compact Clause of Article I to mandate such action.

Interstate agreements are always challenging in that they are rather difficult to enforce, at least in the absence of federal intervention.[95] States can generally only resort to exiting the agreement or voicing when their interests are no longer promoted through these compacts.[96] Tit-for-tat is not a stable strategy for ensuring the states remain committed to the collaborations forged through the strategic negotiations of governmental leaders. It therefore falls upon the architects and reformers of state constitutions within the states to develop mechanisms to make defection costly and cooperation durably advantageous.

One of the single most vexing aspects of the COVID-19 crisis has been the continuous movement of individuals within and across states.[97] This is, quite simply, how diseases spread, and perhaps the most serious challenge to a successful governmental strategy at limiting its spread has been, in the absence of a full-scale lockdown, quarantine, or cordon sanitaire, travel by individuals. Instead, state governments have created and enforced travel bans of various sorts.[98] These restrictions take several forms. Presently, the most serious of these edits limit immigration through travel bans or, less intrusively, require quarantine when folks come visiting.[99]

These travel restrictions almost certainly pass legal muster under state law, so long as properly enacted into law. While I am not aware of a state constitution that explicitly affords state government the power to restrict interstate or intrastate travel, presumably state governments can locate this authority in the police power itself. The authority of the states to implement regulations appropriate to protect public health presumably includes the power to limit access to the state. Whatever limits exist on these powers are typically found in federal law, through statute, administrative regulation, or more grandly through the Federal Constitution's right to travel.[100]

In the end, state constitutions should be structured in order to decrease the incentives and the opportunities for state tribalism. This is an ambitious recommendation but need not be naïve. First, collective

95. *See* ZIMMERMAN, *supra* note 93, at 213–14.

96. *Interstate Compacts: United States*, *supra* note 93.

97. *See Travel During the COVID-19 Pandemic*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html (last updated Sept. 8, 2020).

98. *See id.*

99. *See Domestic Travel Restrictions*, KAYAK, https://www.kayak.com/travel-restrictions/united-states (last visited Oct. 6, 2020) (summarizing travel restrictions).

100. *See* Saenz v. Roe, 526 U.S. 489, 498 (1999); Shapiro v. Thompson, 394 U.S. 618, 630–31 (1969); *Edwards* v. *California,* 314 U. S. 160, 181 (1941) (Douglas, J., concurring).

action circumstances and omnibus risk of tit-for-tat strategies can limit state self-aggrandizement, so long as state institutions—including the courts—and the federal government, provide persistent checks on such actions. Moreover, there will be times, and rampant pandemics will certainly be one of those times, in which coordinated state action will be crucial in dealing with a spreading emergency. What we need to know is that our constitutions provide both the authority and the relevant mechanisms to tackle these challenges when they arise.

V. CONCLUSION

This Article has been pitched at a rather high level of generality. I have described some of the ways in which state constitutions, especially when viewed through the lens of our evolving conception of the proper police power, can be improved to enable state institutions to confront emergencies, especially those of the character of COVID-19. More illumination will necessarily require deeper and broader scrutiny of state governmental institutions as well as the web of institutions and powers that exist at the state, national, and local level. Still, I hope it is useful on occasion to pull the lens out and look at our state constitutions from a wider perspective in order to assess whether they are effectively structured to deal with emergencies and the profound challenges such emergencies pose to our governments.

When Professor Williams wisely turned our attention to the matter of state constitutional quality, he surely had in mind, as do I, the question of how state constitutions can effectively promote essential objectives of sound and effective governance.[101] To be sure, state constitutions are aimed at an admixture of values, including representation of citizen voices and the safeguarding of individual rights. But these salutary goals, too, trade on the ambition of state constitutions to be effective vehicles of governance. The police power quintessentially frames this objective. It calls for our public officials to look after us. In emergency times like the ones we are in, we need these protections, and we need our state constitutions to frame and facilitate the crucial work of our government.

101. For a more extensive description of state constitutional objectives, see Daniel B. Rodriguez, *State Constitutional Failure*, 2011 U. ILL. L. REV. 1243, 1248–53 (2011).