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Checks & Balances in the Bayou State: Louisiana's Constitutional Balance of Power Between the Executive and Legislative Branches During States of Emergency

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**Checks & Balances in the Bayou State: Louisiana’s
Constitutional Balance of Power Between the
Executive and Legislative Branches During States
of Emergency**

*Luke A. Dupré**

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INTRODUCTION

“Governor John Bel Edwards is suing the Louisiana House of Representatives to defend the coronavirus rules they’re attempting to throw out.”¹ Though a casual observer might read this headline and dismiss it as another odd legal occurrence during an unprecedented pandemic, discussion of the system of checks and balances between branches of government during exigent circumstances is not just another part of the *new normal*.² Recent events in Louisiana have brought the subject of emergency governance back into public debate; catastrophic hurricanes, unexpected low temperatures, and flooding have brought crisis and declared states of emergency to burden communities in the Bayou State.³ Popular films dealing with *martial law* and *contingency of government* such as *Designated Survivor* and *Olympus Has Fallen* have filled theatres and online streaming service catalogs.⁴ A recurring theme in such dystopian movies is the need to protect the constitutional balance

1. Matt Houston, *Gov. Edwards suing legislature to defend coronavirus rules*, WAFB NEWS (Oct. 26, 2020, 9:09 PM CDT), <https://www.wafb.com/2020/10/26/look-next-steps-petition-temporarily-end-covid-restrictions-la/> [<https://perma.cc/F4U6-DW3U>].

2. *See id.*

3. *See, e.g.*, La. Exec. Order No. 206-JBE-2021 (Oct. 29, 2021) (Hurricane Delta); La. Exec. Order No. 57-JBE-2021 (Mar. 12, 2021) (severe cold weather).

4. WHITE HOUSE DOWN (Columbia Pictures 2013); *Designated Survivor* (ABC Studios); OLYMPUS HAS FALLEN (Millennium Films 2013).

of power between branches of government while taking expedient measures to protect the public.⁵ In Louisiana, the challenges that the COVID-19 pandemic presented gave rise to a constitutional battleground. The political and legal clash between the executive and legislative branches tested the separation-of-powers doctrine in the Bayou State. This legal quandary deserves the utmost attention from scholars, elected officials, and the public—Louisiana’s republican form of government hangs in the balance.

Louisiana’s constitution requires the separation of powers as a foundational element of valid governance.⁶ This cornerstone echoes James Madison’s concern in *Federalist No. 51* that a government’s greatest challenge is both control of the governed and itself.⁷ Madison wrote that

[i]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.⁸

Though Louisiana’s bayous are inhabited by more *feu follet*⁹ than angels, Madison’s advice still rings true. The nature of the separation of powers doctrine in Louisiana is ripe for discussion. Scholars should attend to the legislature’s recent attempt to rescind the governor’s executive order—

5. See, e.g., WHITE HOUSE DOWN (Columbia Pictures 2013); *Designated Survivor* (ABC Studios); OLYMPUS HAS FALLEN (Millennium Films 2013).

6. See LA. CONST. art. II, § 2.

7. THE FEDERALIST NO. 51 (James Madison).

8. *Id.*

9. *Feu follet* (fool’s fire) is a term in Cajun folklore for the glowing apparition known elsewhere as “will-of-the-whisp.” Interpreted culturally as a ghost or spirit sometimes named “Lutin,” this mischievous or evil spirit is also presented in some communities as the ghost of an unbaptized baby. Staff Writer, *The bayou’s dirty little secret: ‘Cajun Justice’ basks in mystique*, THE TIMES OF HOUMA/THIBODEAUX (June 15, 2012), <https://www.houmatimes.com/blogs/the-bayous-dirty-little-secret-cajun-justice-basks-in-mystique/> [<https://perma.cc/7AZ3-4LFC>]; Janet McConnaughey, *The Loup Garou, the Feu Follet and the Cauchemar: In the Bayou, They Still Indulge in Spirits*, L.A. TIMES (Dec. 20, 1985, 12:00 AM PT), <https://www.latimes.com/archives/la-xpm-1985-12-20-ss-5198-story.html> [<https://perma.cc/CH2H-PNBK>].

which triggered a state of emergency granting him sweeping authority—by a statutorily authorized one-house petition.¹⁰

Executive orders issued during emergencies are almost routine in Louisiana¹¹—a state plagued by hurricanes and other extreme weather events. As Governor John Bel Edwards attempted to rein in the spread of the coronavirus, the mandates and restrictions imposed on Louisianans became a source of dissent and outcry amongst some portions of the public.¹² Tensions began to rise between the Governor and members of the Louisiana state legislature, which called for greater legislative input in emergency rulemaking and public health policy decisions.¹³ In October 2020, the Louisiana House of Representatives issued a petition to the Governor attempting to end the state of emergency pursuant to a provision within the Louisiana Health Emergency Powers Act (LHEPA).¹⁴ This provision allows for the termination of a state of emergency by a petition signed by a majority of either house within the legislature.¹⁵ Governor Edwards refused to comply with the petition, asserting that the law allowing for such a measure was unconstitutional.¹⁶ A careful search of

10. *Petition to Terminate State of Public Health Emergency*, LA. H. REP. (Oct. 23, 2020), https://house.louisiana.gov/H_Misc/Press_Rel/PDF/1023_2020_Petition%20to%20Terminate%20State%20of%20Public%20Health%20Emergency.pdf [<https://perma.cc/C5L2-2PRH>].

11. *See, e.g.*, La. Exec. Order No. 175-JBE-2021 (Sept. 13, 2021) (heavy rainfall), La. Exec. Order No. 165-JBE-2021 (Aug. 26, 2021) (Hurricane Ida).

12. Sam Karlin, *Are Louisiana's coronavirus restrictions canceled? Governor, AG Disagree on GOP petition*, THE ADVOCATE (Oct. 24, 2020, 8:43 PM), https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_bf078b14-1632-11eb-a4c3-ab60064bed02.html [<https://perma.cc/TK2C-DQKK>].

13. *Id.* At the time of the signing of the petition, Louisiana had been in a state of emergency for over seven months. *Petition to Terminate State of Public Health Emergency*, *supra* note 10.

14. The term *petition* is a term of art throughout this Comment. It references the language of the statute discussed *infra* Part I.B.

15. Houston, *supra* note 1; LA. REV. STAT. § 29:768(B) (2023); *Petition to Terminate State of Public Health Emergency*, *supra* note 10.

16. Houston, *supra* note 1. Governor Edwards issued a press release stating that

the law being used is blatantly unconstitutional. Louisiana's constitution doesn't allow only one chamber of the legislature to overturn a public health emergency, and, even if it did, the petitioners did not properly consult the public health experts from the Louisiana Department of Health. . . . Multiple people, including the author of the legislature's petition and many of its signers, have acknowledged the law's unconstitutionality in both public and private conversations.

Id.

state constitutional precedent reveals no prior situation that resembles the issue at hand.¹⁷ For the first time, the executive branch took the legislative branch to the judiciary.¹⁸

Judge William Morvant of Louisiana's 19th Judicial District Court¹⁹ rendered a judgment declaring that the LHEPA provision allowing for the petition was unconstitutional.²⁰ The district court did not rule on the other, non-constitutional arguments Governor Edwards made—namely that the legislature failed to meaningfully consult with the public health authority as required by statute.²¹ The House of Representatives appealed to the Louisiana Supreme Court.²² The state's highest court was unable to rule on the constitutionality of the provision due to the district court's improper sequence of ruling on constitutionality before ruling on all other facts at

17. The author conducted a careful search utilizing various databases and found no judicial review of the application of the petition provision contained within the LHEPA or the Disaster Act. The Louisiana Supreme Court considered the nature of the question giving rise to “novel” issues of law. *Edwards v. La. State Legis.*, 315 So. 3d 213, 215 (La. 2020). The pleadings of the parties also lack citation to any judicial application of the relevant statute. Professor John Devlin of the LSU Paul M. Hebert Law Center concurs with the methodology of the executed search. Interview with John Devlin, Professor of Law, Paul M. Hebert Law Center, Louisiana State University (Jan. 26, 2023).

18. A diligent search of Louisiana judicial opinions and history has yielded no other litigation between the governor in his official capacity and the legislature as a quasi-judicial entity. Barriers abound such as the capacity to be sued as well as jurisprudence on procedural capacity. *See* LA. CIV. CODE arts. 42, 926(A)(6) (2023). *See also, e.g.*, *Roberts v. Sewerage and Water Bd. of New Orleans*, 634 So. 2d 341 (La. 1994); *Chisom v. Edwards*, No. 86-4075, 2012 WL 13005340 (E.D. La. Aug. 6, 2012).

19. The 19th Judicial District is the proper venue because all suits against the State of Louisiana or against officers of the state who act by power of their office must be instituted in “the judicial district in which the state capitol is located” LA. REV. STAT. § 13:5104(A) (2023).

20. *Edwards*, 315 So. 3d at 214. Louisiana Revised Statutes § 29:768(B) is the portion of the LHEPA at issue and is discussed throughout this Comment.

21. Louisiana Revised Statutes § 29:768(B) requires that any house wishing to terminate a state of emergency do so “in consultation with the public health authority” Whether the House of Representatives engaged in meaningful consultation with the Louisiana Department of Health is a contested point in the litigation. *See* *Petition for Declaratory Judgement and Injunctive Relief* at 17, *Edwards*, 315 So. 3d 213 (No. 2020-CA-1407).

22. The Louisiana Supreme Court has sole appellate jurisdiction over cases in which a law is declared to be unconstitutional. LA. CONST. art. V, § 5(D); *see* *La. Municipal Assn. v. State*, 893 So. 2d 809, 842 (La. 2005).

issue.²³ The Louisiana Supreme Court vacated the district court's final judgment in its entirety.²⁴ The district court was then faced with numerous exceptions filed by Governor Edwards, most notably a declinatory exception which urged that the case was moot.²⁵ The district court's ruling was appealed to the Louisiana First Circuit, which dismissed the suit based on several procedural exceptions.²⁶ The case has only been given appellate judicial review on procedural grounds, and only the 19th Judicial District Court was able to have the case in a proper procedural posture for an examination of the merits of the constitutional arguments made by the parties.

The Louisiana judiciary has yet to discuss or resolve the attendant constitutional query on the merits.²⁷ Therefore, the question of whether the Louisiana Constitution of 1974 permits the legislature to utilize a one-house legislative petition to terminate or modify emergency powers delegated to the governor persists as an issue of first impression, implicating important aspects of Louisiana's constitutional framework and the state's police power.²⁸ A definitive answer to this question would grant

23. *Edwards*, 315 So. 3d at 214.

24. *Id.*

25. *Edwards v. La. State Legis.*, No. 2021-CW-0950, 2021 WL 4592740 (La. Ct. App. 1st Cir. Oct. 6, 2021) (vacating the district court's judgment as moot).

26. *Id.* Though this analysis treats the litigation as one "case," it was actually more complex. Governor Edwards sought declaratory judgment on the petition's constitutionality as well as an injunction against the Louisiana state legislature, the Louisiana House of Representatives, and Clay Schexnayder (who for procedural purposes is the conduit through which the legislature was being sued). *See* Petition for Declaratory Judgement and Injunctive Relief, *supra* note 21, at 3. Since the constitutionality of a statute was involved, the attorney general intervened pursuant to Article IV, § 8 of the Louisiana Constitution. Lastly, the legislative parties sought a temporary restraining order and preliminary injunction as plaintiffs in reconvention prohibiting the Governor from issuing another emergency declaration as plaintiffs in reconvention. *See* Petition for Temporary Restraining Order and Preliminary Injunction at 4, *Edwards*, 315 So. 3d 213 (No. 2020-CA-1407). *See also Edwards*, 315 So. 3d at 214 (for the proposition that the case was unable to be adjudicated on the merits).

27. *See* discussion *supra* text accompanying notes 19–26.

28. The need for a clear answer to this issue is also significant because funding from the Federal Emergency Management Agency hinges on contract-like agreements between Louisiana's governor and the President during declared emergencies, which could be impacted by legislative termination. Interview with Matthew Block, Executive Counsel to the Governor, Office of the Governor of Louisiana (Oct. 10, 2021).

the people of Louisiana a constitutionally sound separation-of-powers doctrine, providing clarity during the Bayou State's ever-frequent states of emergency. An examination of the arguments in *Governor John Bel Edwards v. Louisiana State Legislature, et al.*, as well as a previously unexamined doctrine, leads to a finding that under Louisiana's constitution, a statutorily authorized one-house legislative petition terminating a public health emergency declaration is permissible. An assessment of the constitutional requirements of the separation-of-powers doctrine, the inherent powers of the legislative and executive branches, the non-delegation doctrine, the constitutionality of the legislative veto, and the procedural requirements of bicameralism and presentiment affirms this finding, which public policy further supports. Though the Louisiana Supreme Court was unable to make a definitive statement on the matter, a compelling argument exists for the constitutionality of the LHEPA petition provision. Legislative revisions could, however, render the provision more in line with the need for a proper balance between the co-equal branches and the necessity of flexible utility during states of emergency. Louisiana's penchant for natural disasters and the COVID-19 public health crisis necessitates a stable norm of governance during calamities. The state must resolve this issue before the next storm rolls in.

Part I of this Comment introduces the pertinent provisions within the Louisiana Constitution of 1974 that provide for the relevant powers and duties of the legislative and executive branches.²⁹ This Part will also provide a survey of jurisprudence regarding the non-delegation doctrine in Louisiana and the necessity of emergency powers. The enactment of the LHEPA, including the relevant text within Louisiana Revised Statutes § 29:768, will be presented as well. Part II briefly explains the events giving rise to the litigation between the executive and legislative branches to present a factual situation that accentuates the various problematic aspects of the petition process. Part III creates an analytical framework to assess the constitutionality of Louisiana Revised Statutes § 29:768 and conducts an independent examination of whether this provision conforms to the demands of the Louisiana Constitution of 1974. This analysis is chiefly divided into two themes: whether the legislature has the *power* to rescind a state of emergency and whether the operative mechanism the legislature adopted conforms with the *procedural* demands of the current state constitution. Part IV provides suggestions for legislative revision, which includes helpful changes supported by public policy and notions of each branch's proper duties. Lastly, Part V concludes that a one-house

29. The Louisiana Constitution of 1974 is Louisiana's current state constitution.

legislative petition is not prohibited by Louisiana's constitution and provides encouragement for the future.

I. CONSTITUTIONAL FOUNDATIONS & PREPARING FOR EMERGENCY

The architecture of Louisiana's system of government is composed of both foundational pillars and decorative motifs. The passage of time has created a legal scaffolding, which stands ready to maintain the state government during times of crisis.³⁰ The Subparts that follow outline several relevant points of state law, such as the constitutional allocations of power to each branch, the non-delegation doctrine as a jurisprudential development of the separation-of-powers doctrine, and the passage of emergency law statutes by the Louisiana legislature. A proper understanding of these central reference points is vital to forming a solution as well as constructing a linear argument that contains the correct context. The scales of the balance of power in Louisiana have made much progress since the governorship of Huey P. Long.³¹

A. *Constitutional Allocations of Authority*

Article IV, § 5 of the Louisiana Constitution of 1974 generally vests power in the executive branch and imposes a duty upon the governor to carry out state and federal laws.³² This Article also gives the governor

30. See discussion *infra* Part I.D.

31. See John Devlin, *Toward A State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1234, 1235 (1993). Due to his extreme consolidation of power within state government, many contemporaries and historians of Governor Huey Long have long considered him to have wielded almost absolute executive power, which interfered with other branches of government. See, e.g., Edward F. Haas, *Huey Long and the Dictators*, 47 J. LA. HIST. ASS'N 133, 133–40 (2006).

32. LA. CONST. art. IV, § 5(A). Under the federalist system of the American government, states are permitted to have whatever system of balance between the branches that they choose, so long as it does not conflict with the Guarantee Clause of the Constitution of the United States. U.S. CONST. art. IV, § 4: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.” The petition mechanism does not seem to violate this clause, as that mechanism does not alter the structure of Louisiana's government. The petition mechanism simply rescinds powers that were delegated to the governor pursuant to Louisiana Revised Statutes § 29:768; it does not provide for

“other powers and [the ability to] perform other duties authorized by [the] constitution or provided by law.”³³ The Louisiana constitution vests the legislative power in the state legislature and grants this body various other powers in Article III.³⁴ State constitutional law scholars have long viewed the legislature as the prime seat of power within the constitutional framework of state government and view the plenary authority it wields as almost making the branch omnipotent.³⁵ The only constraints upon its action are those imposed by the state’s constitution; even then, these are typically procedural in nature.³⁶ The primacy of the legislature within the context of constitutional prohibition is best evidenced by the presumption of constitutionality of any exercise of legislative power.³⁷

When assessing whether the legislature lacks the power to do a certain act, one must begin with the presumption that the legislature has a certain power and look for an explicit limitation within the state constitution to the contrary.³⁸ The Louisiana judiciary has consistently applied this strong presumption.³⁹ Specifically, the Louisiana Supreme Court has proclaimed that provisions of the state constitution are “not grants of power, but instead are limitations on the otherwise plenary power of the people exercised through the legislature.”⁴⁰ Therefore, to hold legislation as invalid under the constitution, “it is necessary to rely on some particular constitutional provision that limits the power of the legislature.”⁴¹ To rebut

a structural change that would render the government anything other than a republic. Because the Louisiana Constitution of 1974 is the sole authority on this issue, the United States Constitution has no bearing on the matter. *See Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 125 (1912) (declaring that the federal government cannot regulate the balance of power within the branches of state government as long as that government is republican in nature); *see also* ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* 100 (2d ed., The Michie Company 1993).

33. LA. CONST. art. IV, § 5(K).

34. *See generally* LA. CONST. art. III.

35. WILLIAMS, *supra* note 32, at 691–92.

36. *Id.* at 692. An example of a procedural limitation would be Article III, § 2(4) of the Louisiana Constitution, which prescribes the amount of time legislators have to introduce bills after regular sessions begin.

37. *Carver v. La. Dep’t of Pub. Safety*, 239 So. 3d 226, 230 (La. 2018).

38. WILLIAMS, *supra* note 32, at 691–92.

39. *Carver*, 239 So. 3d at 230; *State Civ. Serv. Comm’n v. Dep’t of Pub. Safety Dir.*, 873 So. 2d 636, 640 (La. 2004).

40. *Krielow v. La. Dep’t of Agric. and Forestry*, 125 So. 3d 384, 388 (La. 2013) (citing *World Trade Ctr. Taxing Dist. v. All Taxpayers, Prop. Owners*, 908 So. 2d 623, 632 (La. 2005)).

41. *Id.*

the presumption in favor of constitutionality, one must surmount the high burden of finding a constitutional provision that explicitly conflicts with legislative action. Finally, Article II, § 2 of the Louisiana Constitution commands the separation of the powers of government between its branches by stating that no one branch shall “exercise power belonging to either of the others.”⁴² This subtle yet clear provision is the basis for the non-delegation doctrine—a highly important aspect of the constitutionality of any shift of power from the legislative to the executive branch.

B. The Non-Delegation Doctrine

The non-delegation doctrine is another facet of the constitutionality of legislation. By delegating authority to agencies of the executive branch, the legislature can allow experts and specialized units of government to carry out state law and public policy.⁴³ However, there are limitations. Simply put, because Article II, § 2 of the Louisiana Constitution commands that the powers allocated to the three branches of government be separate and that no branch may wield the powers of another,⁴⁴ the legislature cannot divest itself of legislative power or grant unbridled authority to the executive branch to determine what the law shall be.⁴⁵ The Louisiana Administrative Procedure Act (LAPA) is the state’s overarching statutory framework that governs how agencies execute the legislative will.⁴⁶ The procedural and due-process safeguards found within the LAPA are crucial to assuring proper use of delegated power.⁴⁷ Legislative oversight of rulemaking and carefully drafted organizing acts are other

42. LA. CONST. art. II, § 2.

43. For example, the Louisiana Department of Wildlife and Fisheries, through its secretary, has the authority to promulgate rules for the conservation of wildlife. *See* LA. REV. STAT. §§ 36:602–36:605 (2023).

44. *Id.*

45. *State v. Miller*, 857 So. 2d 423, 430 (La. 2003). In the United States, the delegation doctrine arose from theoretical notions of the separation of powers, which the Framers of the U.S. Constitution espoused. One such notion was John Locke’s doctrinal assertion that “[t]he power of the legislative [body] . . . can be no other than what the positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands.” JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT* 45 (C.B. McPherson ed., Hackett Publ’g Co. 1980) (1690).

46. LA. REV. STAT. §§ 49:950–49:954.1 (2023).

47. *See generally* Brandee Ketchum & Andrew Olsan, *Louisiana Administrative Law: A Practitioner’s Primer*, 68 LA. L. REV. 1313, 1320 (2008).

such safeguards.⁴⁸ The emergency provisions at play in this inquiry are delegations of power to the governor to utilize the state's administrative agencies and its general police power to handle dire situations.⁴⁹ During states of emergency, however, the executive branch has the authority to bypass the LAPA's requirements.⁵⁰

The development of the non-delegation doctrine in Louisiana has led to a clear set of standards and principles upon which the constitutionality of a delegation of power is assessed. In *Schwegmann Brothers Giant Super Markets v. McCrory*, the Louisiana Supreme Court stated that a distinction must be made between delegations of purely legislative authority, which are always impermissible, and delegations of ministerial or administrative authority, which are allowed.⁵¹ The court promulgated three elements for determining whether a legislative delegation of power is within constitutional confines, which preserves the equal powers of the branches of government.⁵² In *State v. All Pro Paint & Body Shop, Inc.*, the Court reaffirmed *Schwegmann*, which held that a delegation of authority to an administrative agency is constitutionally valid "if the enabling statute (1) contains a clear expression of legislative policy, (2) prescribes sufficient standards to guide the agency in the execution of that policy, and (3) is accompanied by adequate procedural safeguards to protect against abuse of discretion by the agency."⁵³ These adequate procedural safeguards exist to protect against the executive branch's potential abuses of discretion.⁵⁴

The last relevant aspect concerning delegation is the amount of authority maintained by the legislature to oversee executive action undertaken pursuant to statutory authorization. The Louisiana legislature's oversight over the executive administrative agencies' activities pursuant to legislatively delegated power is much greater in scope than the oversight that the federal Congress exercises.⁵⁵ The legislature has delegated authority to committees in both houses, requiring a majority vote of only

48. Devlin, *supra* note 31, at 1226–30.

49. See LA. REV. STAT. § 29:761 (2023); see also discussion *infra* Part III.B.

50. See LA. REV. STAT. §§ 49:950–49:974 (2023).

51. *Schwegmann Bros. Giant Super Mkts. v. McCrory*, 112 So. 2d 606, 613 (La. 1959).

52. See *State v. All Pro Paint & Body Shop*, 639 So. 2d 707, 711 (La. 1994). This case affirms the use of the *Schwegmann* test for future assessments.

53. *Id.*; see also *State v. Miller*, 857 So. 2d 423, 430 (La. 2003) (applying the analysis given in *Schwegmann*).

54. *Miller*, 857 So. 2d at 430.

55. *La. Dep't of Just. v. Edwards*, 233 So. 3d 76, 80 (La. Ct. App 1st Cir. 2017); cf. *INS v. Chadha*, 462 U.S. 919 (1983) (wherein the United States Supreme Court set the limits of legislative modification of agency action).

one committee of one chamber to withhold consent and block executive actions.⁵⁶ The legislative veto of executive action in Louisiana is not only sanctioned but is expressly permitted.⁵⁷

C. Emergency Powers: A Necessary Evil

Every state government has recognized the need for provisions within law that establish contingency procedures and limitations on the government during times of emergency.⁵⁸ Governments establish these emergency laws under the rationale that the government's interest in self-preservation and public safety "supersede[] its normal functions" because of the need to guard civil liberties.⁵⁹ Typically, these laws attempt to balance the need for quick action and the preservation of democracy without compromising the constitutional balance of power between the branches of government.⁶⁰ The locus of these emergency powers is typically the governor, whom the legislature gives broad authority to mitigate the effects of temporary emergencies and disasters.⁶¹ Emergency powers usually require a triggering mechanism such as a declaration of a

56. See LA. REV. STAT. § 18:401.3 (2023) (emergency election plans); *id.* § 18:135.1 (shortened period for voter registration); *id.* § 49:950 (oversight committee disapproval of most proposed rules).

57. *Edwards*, 233 So. 3d at 80.

58. Maggie Davis et al., *Calling Their Own Shots: Governors' Emergency Declarations During the Covid-19 Pandemic*, 12 CONLAWNOW 95, 97 (2020). The U.S. Supreme Court recognized the Tenth Amendment's reservation of the police power to state governments and the public health emergency implications of this reservation in *Jacobson v. Commonwealth of Massachusetts*, stating that although this court has refrained from any attempt to define the limits of that [Tenth Amendment] power, yet it has distinctly recognized the authority of a State to enact quarantine laws and 'health laws of every description[]' According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.

Jacobson v. Commonwealth of Mass., 197 U.S. 11, 25 (1905).

59. Mitchell F. Crusto, *State of Emergency: An Emergency Constitution Revisited*, 61 LOY. L. REV. 471, 507 (2015) (citing Scott P. Sheeran, *Reconceptualizing States of Emergency Under International Humans Rights Law: Theory, Legal Doctrine, and Politics*, 34 MICH. J. INT'L L. 491, 498–500 (2013)).

60. See, e.g., MICH. CONST. art. IV, § 39 (1963); FLA. CONST. art. II, § 6 (1968); WASH. CONST. art. II, § 42 (1889).

61. Davis et al., *supra* note 58, at 98.

state of emergency or a declaration of a disaster.⁶² However, absolute discretion is not normally given to governors to determine when emergency executive power should cease—states are hesitant to grant such unlimited power.⁶³

Louisiana is no stranger to emergency or disaster declarations.⁶⁴ Emergency declarations are declared subsequent to an event that presently imperils the state in a very critical way.⁶⁵ These declarations are issued to trigger states of emergency and protect property, public health, and safety, while disaster declarations are a type of declaration that deem certain areas to be in a state of disaster and in need of remediation and mitigation.⁶⁶ Typically, disaster declarations take place after extreme weather events while emergency declarations may occur before, during, or after any type of large event that threatens a large portion of the public, such as severe cold weather or a pandemic.⁶⁷ Due to Louisiana's climate and geography, which elicits around two hurricanes per year and seasonal flooding, the state legislature created a dual statutory framework for delegating emergency powers to the governor based on either a natural disaster or a public health emergency.⁶⁸ During the COVID-19 pandemic, Governor

62. *Legislative Oversight of Executive Emergency Powers*, NAT'L CONF. OF STATE LEGIS. (June 14, 2022), <https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx> [<https://perma.cc/2CXM-SEVG>].

63. All states provide mechanisms for governors to continue emergency declarations for additional periods as required by the emergency. Many states specify protections to avoid abuse. In Maryland, for example, a joint resolution issued by the General Assembly can end a state of emergency. Davis et al., *supra* note 58, at 100.

64. Hurricanes and other weather events typically cause states of emergency in Louisiana yearly. *E.g.*, La. Exec. Order No. 175-JBE-2021 (Sept. 13, 2021) (heavy rainfall). A state of emergency existed in Orleans Parish for a period of over 12 years following Hurricane Katrina. Interview with Matthew Block, *supra* note 28.

65. *See* 42 U.S.C. § 5122.

66. *Id.*; LA. REV. STAT. § 29:766 (2023). These declarations are also trigger mechanisms for federal assistance.

67. For example, post-storm hurricane declarations are typically disaster declarations in conjunction with FEMA emergency declarations, while declarations due to the ongoing COVID-19 pandemic have been emergency declarations. *See, e.g.*, La. Exec. Order No. 57-JBE-2021 (Mar. 12, 2021) (emergency due to severe cold weather).

68. The statute shaping the powers of the executive branch to administer to weather related emergencies as well as most other emergencies is the Louisiana Homeland Security and Emergency Assistance and Disaster Act. LA. REV. STAT.

John Bel Edwards declared and extended states of emergency to issue sweeping emergency rules to combat the transmission of the virus.⁶⁹ Compared to other state provisions, Louisiana's constitutional provisions grant the governor limited emergency powers.⁷⁰ One illustration of these limitations is the governor's inability to utilize the powers of commander in chief of the state national guard to impose martial law.⁷¹

The theory underlying the ability of an emergency to create a permissible imbalance in government is stated best by the Latin maxim *quod necessitas cogit, defendit*, meaning “[w]hat necessity compels, it justifies.”⁷² The law tolerates temporary imbalance within the branches of state government for the preservation of the state.⁷³ Authority and deference shift toward the executive due to the need for swift decision-making as well as that branch's traditional functions regarding the preservation of order and the execution of the law.⁷⁴ This need for swift, centralized action causes broad authority to shift to the executive for short periods, as it is difficult to govern by legislative committee.⁷⁵ Though the power of the legislature does not diminish during these periods, restraints allowing for legislative and public input such as rulemaking procedures

§ 29:721 (2023). However, a specific framework exists for emergencies affecting public health: the LHEPA. *Id.* § 29:760. This analysis addresses the legislative petition provision in the LHEPA specifically, though the language in this statute was taken verbatim from the Disaster Act, which contains the same provision. *See id.* §§ 29:768(B), 29:724(B). Thus, an assessment of the constitutionality of Louisiana Revised Statutes § 29:768(B) is, by operation, also an assessment of § 29:724(B). For a discussion of Louisiana's hurricane history, see DAVID ROTH, LA. HURRICANE HIST., <https://w2.weather.gov/media/lch/events/lahurricanehistory.pdf> [<https://perma.cc/BF2H-TWJ8>] (last visited Feb. 2, 2023).

69. Petition For Declaratory Judgment and Injunctive Relief, *supra* note 21, at 8; *see also* discussion *infra* Part II.A. The substance and effect of these actions is not taken up in this Comment.

70. Matthew S. Belser, *Martial Law After the Storm: A Constitutional Analysis of Martial Law and the Aftermath of Hurricane Katrina*, 35 S. UNIV. L. REV. 147, 203 (2007).

71. LA. CONST. art. XII, § 2 (“The military shall be subordinate to the civil power.”); Belser, *supra* note 70, at 207.

72. *Quod necessitas cogit, defendit*, BLACK'S LAW DICTIONARY (8th ed. 1999).

73. John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 I. CON. 210, 233–35 (2004).

74. *See generally* *The Exercise of Emergency Powers in Developments in the Law, The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1284, 1286–93 (1972).

75. *Id.* at 1293.

are suspended.⁷⁶ Though storms and floods have battered Louisiana for centuries,⁷⁷ the Bayou State had never faced a long-term emergency situation like COVID-19 under its current emergency powers framework.⁷⁸ Now that the theory underlying emergency provisions is understood, the constitutional authority for such laws should be set out as well.

The delegates to the Constitutional Convention of 1973 granted the state legislature the broad duty and power to create statutory provisions providing for continuity of government during catastrophic events.⁷⁹ Louisiana Constitution Article XII, § 11 mandates that the legislature

provide for orderly and temporary continuity of state government, in periods of emergency, until normal processes of government can be reestablished in accordance with the constitution and laws of the state; and, except as otherwise provided by this constitution, for the prompt and temporary succession to the powers and duties of public offices when incumbents become unavailable to perform their functions.⁸⁰

The legislature fulfilled this duty by enacting the Louisiana Homeland Security and Emergency Assistance and Disaster Act (the Disaster Act) and the LHEPA, both of which serve to satisfy the first clause within Article XII, § 11.⁸¹

76. LA. REV. STAT. § 49:953.1 (2023).

77. ROTH, *supra* note 68.

78. Press Release, Office of the Governor, Gov. Edwards Orders Statewide Mask Mandate, Closes Bars to On Premises Consumption as COVID-19 Continues to Spread Across Louisiana (July 11, 2020) (on file with the Office of Governor John Bel Edwards).

79. See LA. CONST. art. XII, § 11; OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973 432–33 (1973).

80. LA. CONST. art. XII, § 11. This section furthers a constitutional amendment passed in the national defense conscious 1960s. See Act No. 505, 1962 La. Acts. The original language was restricted to enemy attacks. *Id.*

81. The intention of the framers of the Louisiana Constitution of 1974 was that only catastrophic events that almost completely disestablish the whole branches of government would qualify as “periods of emergency.” 12 RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: COMMITTEE DOCUMENTS 432–37 (1974). Thus, assertions that the LHEPA and the Disaster Act might benefit from having been promulgated pursuant to this authority are specious at best. The framers were also concerned with the limitation of the use of this provision due to its ability to usurp other provisions of the Constitution. *Id.* at 436. An amendment Delegate Jenkins offered would have restricted the application of the amendment to instances of enemy attack. *Id.* at 434. To allow

D. The Legislature's Enactment of Laws Granting Emergency Powers

The executive branch has historically commanded the authority to deal with crisis situations in Louisiana.⁸² The current framework for emergency executive authority is located in Title XXIX of the Louisiana Revised Statutes.⁸³ The two pieces of relevant legislation within Title XXIX that derive authority from the constitutional demand contained in Louisiana Constitution Article XII, § 11 are the Disaster Act and the LHEPA.⁸⁴ These two acts give sweeping authority to the governor.⁸⁵ Though the Disaster Act and its predecessors have been used quite often to govern during natural disasters and their aftermath,⁸⁶ it was not until 2003 that the legislature enacted the major public health emergency powers provisions that the Councils of States Government had drafted.⁸⁷

The LHEPA grants the governor broad power to maneuver the state through public health emergencies.⁸⁸ Prior to the LHEPA, the legislature had enacted the more general Disaster Act, which granted the governor a

for a more flexible response, the committee overseeing the provision voted against the amendment 34 to 67. *Id.* at 436. Interestingly, the committee also referenced “resolutions, concurrent resolutions and other things of this nature” that could be used by the legislature to address emergency needs. *Id.* “Other things of this nature” could be construed to include a petition.

82. This lineage traces back to colonial times. 1 RUDOLPH MATAS, HISTORY OF MEDICINE IN LOUISIANA 199 (John Duffy ed. 1958). Though the phrase “executive branch” might not fully represent the system of government at the time. Interestingly, during a smallpox epidemic in 1778 the Spanish colonial governor submitted a decree to isolate the ill on the other side of the Mississippi River. *Id.* This decree was still nevertheless submitted to the Cabildo (a quasi-legislative body) and to the people to approve. *Id.*; see also *Foret v. Bd. of Levee Comm'rs of the Orleans Levee Dist.*, 125 So. 437, 438 (La. 1929) (demonstrating the governor's authority under the Louisiana Constitution of 1921 to cut a levee to reduce flooding).

83. See generally LA. REV. STAT. § 29 (2023).

84. The respective bills are La. H.B. 942 (2003) (enacted) (the Disaster Act) and La. S.B. 908 (2003) (enacted) (the LHEPA).

85. LA. REV. STAT. § 29:761(A)(2) (2023) (granting the governor the authority to suspend all rulemaking procedures for state regulations); *id.* § 29:724 (granting authority to the governor to evacuate any area within the state and to utilize all the assets of the state and local governments).

86. *E.g.*, La. Exec. Order No. 57-JBE-2021 (Mar. 12, 2021) (emergency due to severe cold weather).

87. Brief of the Attorney General Defending the Constitutionality of La. R.S. 29:768(B) at 2, *Edwards v. La. State Legis.*, 315 So. 3d 213 (La. 2020) (No. 2020-CA-1407).

88. LA. REV. STAT. §§ 29:760–29:771 (2023).

similar scope of authority to that currently granted under the LHEPA and retained the same language describing the legislature's ability to end a gubernatorially declared emergency.⁸⁹ Under the guidance of Governor Mike Foster, the legislature passed the LHEPA with almost unanimous support.⁹⁰ The legislative findings within Act 1206 of the 2003 Regular Session state that the justification for the legislation was that the government has a duty to

do all that is reasonable and necessary to protect the health and safety of its citizens; because new and emerging dangers, including emergent and resurgent infectious diseases and incidents of civilian mass casualties, pose serious and immediate threats . . . and because emergency health threats, including those caused by bioterrorism, may require the exercise of extraordinary government powers and functions, the state must have the ability to respond, rapidly and effectively, to potential or actual public health emergencies.⁹¹

Interestingly, the language concerning differing branches of government received no legislative attention.⁹²

As a whole, the LHEPA provides a framework for responding to statewide public health emergencies, giving sweeping emergency rulemaking powers to the executive branch with temporal limits allowing

89. *See id.* §§ 29:724(B), 29:768.

90. Senate Bill 908, which later became Act 1206, passed the House 103–1–1 and the Senate 36–0–3. The bill was amended and sent back to the Senate after the House rejected initial Senate amendments. Off. J. H.R. State of La., 29th Reg. Sess. at 20 (La. 2003).

91. S.B. 908, 2003 Leg., 29th Reg. Sess. (La. 2003) (enacted as Act 1206). Interestingly, during the Louisiana Constitutional Convention of 1973, the committee discussing Article XII, § 11 worried that these statutes may be used arbitrarily and tyranny might set in, perhaps in the form of a dictatorship. In defense of this provision, the drafters stated that the legislature could pass statutes to deal with emergency situations which would be reviewable by both the Louisiana and federal courts. 12 RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: COMMITTEE DOCUMENTS, *supra* note 81, at 432–37.

92. *Hearing on S.B. 908 Before the H. Comm. on Judiciary*, 2003 Leg., 29th Reg. Sess. (La. 2003), https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2003/JUN/0618_03_JU [<https://perma.cc/2VZX-GP4Q>] (last visited June 26, 2022) (on file with the Louisiana House of Representatives' video archive). Legislators, mainly Representative Walsworth, seemed much more concerned about the state health department's authority and citizens' privacy rights than with any other item addressed by the bill. *See id.* All amendments that took place had no effect on the petition process.

for extensions, such as the need for an emergency proclamation, to be renewed every 30 days.⁹³ Louisiana Revised Statutes § 29:768 reads as follows:

(A) The state of public health emergency shall continue until the governor finds that the threat of danger has passed or the disaster or emergency has been dealt with to the extent that the emergency conditions no longer exist and terminates the state of public health or emergency by executive order or proclamation, but no state of public health emergency may continue for longer than thirty days unless renewed by the governor.

(B) *The legislature, in consultation with the public health authority, by a petition signed by a majority of the surviving members of either house, may terminate a state of public health emergency at any time.* This petition terminating the public health emergency may establish a period during which no other declaration of public health emergency may be issued. Thereupon, the governor shall issue an executive order or proclamation ending the state of public health or emergency.⁹⁴

The framework is simple. The statute purports to grant either the legislature or the governor the ability to end a state of emergency that has been proclaimed pursuant to the LHEPA.⁹⁵ Louisiana Revised Statutes § 29:768 details the length of a possible state of emergency and the methods by which it may be ended.⁹⁶ Subsection (A) allows the governor to terminate a state of emergency, while subsection (B) grants a corresponding power to the legislature.⁹⁷ The requirement that terminations may only occur “in consultation with the public health authority” mirrors the requirement imposed on the executive branch when proclaiming a state of emergency.⁹⁸ Aside from the consultation requirement, the section as a whole is an almost-verbatim copy of the mechanism by which states of emergency under the Disaster Act are terminated.⁹⁹ However, no precedent exists concerning the application of

93. LA. REV. STAT. § 29:766 (2023).

94. *Id.* § 29:768 (emphasis added).

95. *See id.*; *see also id.* § 29:766.

96. *Id.* § 29:768.

97. *See id.*

98. *Id.*; *see id.* §§ 29:766–29:767.

99. *Id.* § 29:724.

Louisiana Revised Statutes § 29:768(B).¹⁰⁰ Later attempts to modify the provision have failed and are discussed later in this Comment.¹⁰¹

II. THE STORM ROLLS IN: COVID-19 AND THE RESPONSE OF LOUISIANA'S LEADERSHIP

The conditions of the COVID-19 pandemic caused state leaders across the nation to operate in a crisis that they had not previously operated in a state of emergency without a traditional natural disaster.¹⁰² The saga of Governor John Bel Edwards's response to the pandemic and the Louisiana state legislature's reactions to those measures led to a contemptuous dispute over the proper role of the respective branches in mitigating the crisis. The state's police power was wielded with force—force that at times was unpopular.¹⁰³ Though the constitutionality of Louisiana Revised Statutes § 29:768(B) is purely a legal question, the facts surrounding the litigation inform the ways in which the balance of power exists in practice rather than theory.

A. *The Pandemic Session: The 2020 Second Extraordinary Session*

Every occurrence of emergency, governmental powers and contingency government has a precondition, whether it be military invasion or natural disaster.¹⁰⁴ Louisiana's geography makes it distinctly ripe for natural disasters, which limit an emergency to a physical area.¹⁰⁵ However, an unprecedented pandemic and heightened partisan tensions

100. See Houston, *supra* note 1.

101. See discussion *infra* Part IV.

102. See, e.g., Press Release, Office of the Governor of Iowa, Gov. Reynolds issues a State of Public Health Disaster Emergency (Mar. 17, 2020), <https://governor.iowa.gov/press-release/gov-reynolds-issues-a-state-of-public-health-disaster-emergency> [<https://perma.cc/KT8Q-JJWL>].

103. See Blake Paterson, *Gov. John Bel Edwards plans to add COVID-19 vaccine to Louisiana's required school shots list*, THE ADVOCATE (Dec. 5, 2021, 11:40 AM), https://www.theadvocate.com/baton_rouge/news/coronavirus/article_bac60228-55f2-11ec-9aa8-9f1313b9091b.html [<https://perma.cc/9JZU-U6GG>].

104. Davis et al., *supra* note 58, at 98.

105. Many of the deadliest tropical storms and hurricanes to ever hit the United States have struck Louisiana. These include Hurricane Andrew in 1992, Hurricane Camille in 1969, Hurricane Betsy in 1965, Hurricane Audrey in 1957, the August Hurricane of 1940, the September Hurricane of 1915, the Cheniere Caminanda Hurricane of October 1893, the Isle Dernieres Storm of 1856, and the Racer's Storm of 1837. Hurricane Audrey alone had the highest modern death toll in the United States, with 526 lives lost in Cameron Parish alone. ROTH, *supra* note 68.

brought forth circumstances out of which the novel issue of the balance of power between the executive and legislative branches in prolonged emergency situations would arise.¹⁰⁶

Louisiana reported its first case of COVID-19 on March 9, 2020.¹⁰⁷ On March 11, 2020, the Governor signed an executive order, Emergency Proclamation Number 25 JBE 2020, which declared a statewide public health emergency pursuant to his power under the LHEPA.¹⁰⁸ This order suspended certain laws, created public health based restrictions, authorized agencies to conduct certain actions, empowered local officials to create certain protocols and restrictions, and provided travel warnings.¹⁰⁹ On March 13, 2020, Governor Edwards limited public gatherings to 250 people and closed all public schools until mid-April.¹¹⁰ Nine days later the Governor reduced gatherings to “no more than ten people.”¹¹¹ At the peak of state imposed restriction, a “Stay-At-Home” order was given under Emergency Proclamation Number 33 JBE 2020, which closed all state offices to the public and directed all individuals to stay home unless they were engaged in an “essential activity.”¹¹² Later, though the number of active coronavirus cases began to decline and the state began to recover from some of the economic woes the transmission of the virus caused, Governor Edwards maintained the restrictions and

106. See discussion *infra* Part II.B.

107. La. Exec. Dep’t Proclamation No. 25-JBE-2020, *Public Health Emergency – COVID-19* (Mar. 11, 2020), <https://gov.louisiana.gov/assets/Proclamations/2020/modified/25-JBE-2020-Public-Health-Emergency-COVID-19.pdf> [<https://perma.cc/PF3J-G24J>].

108. *Id.*

109. *Id.*

110. La. Exec. Dep’t Proclamation No. JBE-2020-27, *Additional Measures for COVID-19 Public Health Emergency* (Mar. 13, 2020), <https://gov.louisiana.gov/assets/ExecutiveOrders/No.27-Additional-Measures-Covid-19-Public-Health-Emergency.pdf> [<https://perma.cc/V9L4-XTKW>]; La. Exec. Dep’t Proclamation No. 33-JBE-2020, *Additional Measures for COVID-19 Stay at Home* (Mar. 22, 2020), <https://gov.louisiana.gov/assets/Proclamations/2020/33-JBE-2020-Public-Health-Emergency.pdf> [<https://perma.cc/S9L2-5HTY>].

111. The speed at which restrictions were heightened here lends support to the notion that a governor should have the ability to rapidly respond to emergencies. However, it is the limitations on this ability that are later contested. These orders progressively restricted public access to state buildings, imposed restrictions on private businesses, created or suspended certain procedural rights, closed certain categories of facilities and public-accessible locations, mandated that masks to be worn by most residents, and extended certain government-imposed payment deadlines. See La. Exec. Dep’t Proclamation No. 33-JBE-2020, *supra* note 110.

112. *Id.*

effects of his previous mandates out of what he believed to be an abundance of caution.¹¹³

The measures were controversial and led to public disagreement as to the Governor's limited ability to impose such orders as well as political disagreement for both partisan and nonpartisan reasons.¹¹⁴ Although many individual citizens filed suits challenging the Governor's emergency proclamations, "neither the Louisiana legislature nor either of its houses . . . sought to challenge the Governor's response to COVID-19 in court."¹¹⁵ On September 21, 2020, a majority of the members of the legislature signed a petition calling for an extraordinary session to address the Governor's authority to act pursuant to the Disaster Act and the LHEPA.¹¹⁶ Perceiving months-long, statewide mandates as essentially lawmaking, members of the Louisiana legislature demanded that the Governor ease certain restrictions or adopt a piecemeal approach to the emergency situation and allow certain legislative officers a "seat at the table."¹¹⁷ According to House Majority Leader Blake Miguez, many members of the legislature felt as though the initial need for quick action had subsided and that Governor Edwards was stepping into legislative territory.¹¹⁸ The Governor refused to allow legislative input, arguing that

113. Press Release, Office of the Governor, Gov. Edwards: Louisiana Will Keep Current Phase Two Restrictions, Including Mask Mandate and Bar Closures, Through August 28 to Continue to Slow the Spread of COVID-19 (Aug. 4, 2020), <https://gov.louisiana.gov/index.cfm/newsroom/detail/2621> [<https://perma.cc/K9AS-P7VM>].

114. Roby Chavez, *Tensions rise among lawmakers, parents as Louisiana debates vaccine mandates in schools*, PBS (Dec. 8, 2021, 1:47 PM EDT), <https://www.pbs.org/newshour/nation/tensions-rise-among-lawmakers-parents-as-louisiana-debates-vaccine-mandates-in-schools> [<https://perma.cc/FR6D-VXF5>]. This is relevant because it is what caused the call for the 2020 Second Extraordinary Session of the Louisiana Legislature. *Proclamation*, LA. H. REP. (Sept. 21, 2020), <https://legis.la.gov/legisdocs/202ES/call.pdf> [<https://perma.cc/5XZT-7UKA>].

115. Petition For Declaratory Judgment and Injunctive Relief, *supra* note 21, at 8.

116. *Proclamation*, *supra* note 114. This reference is to a petition used to "call" an extraordinary session of the legislature pursuant to Article III, § 2(B) of the Louisiana Constitution, which is not to be confused with the petition to terminate a state of emergency under Louisiana Revised Statutes § 29:728(B).

117. Interview with Blake Miguez, Representative of District 49, Louisiana House of Representatives (July 25, 2022); Interview with Philip DeVillier, Representative of District 41, Louisiana House of Representatives (Oct. 29, 2021).

118. Interview with Blake Miguez, *supra* note 117.

the treatment of emergency situations was within the purview of the executive branch.¹¹⁹

During the 2020 Second Extraordinary Session, members of both houses of the legislature introduced bills to prohibit Governor Edwards from restricting certain freedoms citizens held before the pandemic.¹²⁰ To accomplish this, the conservative members of the legislature attempted to restrict the emergency powers of the governor under the LHEPA.¹²¹ The only legislation that passed both houses and modified the unilateral authority of the governor's emergency powers was House Bill 4, which required input from legislative officers to renew states of disaster or public health emergencies.¹²² This Bill passed on a party-line vote of 63–27 in the House and 23–13 in the Senate.¹²³ On October 23, 2020, the legislature sent this Bill to Governor Edwards for approval or veto.¹²⁴ The Governor vetoed the measure.¹²⁵ Though the Louisiana legislature had the opportunity to convene in a “veto session” to override the Governor's veto of House Bill 4, the members declined to do so due to the concern that, though there were enough members in favor of the petition to have it

119. Press Release, Office of the Governor, Gov. Edwards Takes Action in Court to Defend Life-Saving COVID-19 Mitigation Measures (Oct. 26, 2020), <https://gov.louisiana.gov/index.cfm/newsroom/detail/2763> [<https://perma.cc/Y58U-TBRJ>].

120. Bills were introduced concerning items such as the ability to visit the elderly in nursing homes and the ability of religious worship services to continue. H.B. 99, 29th Leg., 2nd Extra Sess. (La. 2020); H.B. 9, 29th Leg., 2nd Extra Sess. (La. 2020).

121. *Proclamation*, *supra* note 114. Bills with competing mechanisms for oversight of the executive branch concerning emergency rulemaking were brought to the floor for debate. They are briefly discussed in this Comment. *See* discussion *infra* Part IV.

122. *See* H.B. 4, 29th Leg., 2nd Extra Sess., at 2 (La. 2020).

123. *HBS Final Passage HB 4 by Wright*, LA. STATE LEGIS. (Oct. 2, 2020, 11:07 AM), <https://legis.la.gov/Legis/ViewDocument.aspx?d=1190489> [<https://perma.cc/FZ5L-TM2M>]; *HBS 3rd Reading and Final Passage Subject to Call HB 4 by Wright*, LA. STATE LEGIS. (Oct. 20, 2020, 4:38 PM), <https://legis.la.gov/Legis/ViewDocument.aspx?d=1193570> [<https://perma.cc/NZN8-MXFE>].

124. Letter from Gov. John Bel Edwards to La. House Speaker Clay Schexnayder (Oct. 27, 2020) (on file with author). It is doubtful that the conservative legislators wishing to override this veto would have had the votes required to do so. Interview with Philip DeVillier, *supra* note 117.

125. Letter from Gov. John Bel Edwards to La. House Speaker Clay Schexnayder, *supra* note 124.

signed, there were not enough votes among Republicans for a veto override.¹²⁶ Thus, the LHEPA's petition provision remains unchanged.¹²⁷

B. Governor John Bel Edwards v. Louisiana State Legislature

On the last day of the 2020 Second Extraordinary Session, 65 members of the Louisiana House of Representatives signed a petition pursuant to Louisiana Revised Statutes § 29:768(B) purporting to terminate the public health emergency and suspend the Governor's ability to proclaim, renew, or extend any public health emergency for seven days.¹²⁸ The petition also compelled the Governor to "issue an executive order or proclamation terminating Proclamation Number 134 JBE 2020."¹²⁹ Proclamation Number 134 JBE 2020 was the renewal and continuation of the initial proclamation triggering a state of emergency because of the COVID-19 pandemic.¹³⁰ The petition was the House of Representatives's response to the then-eight-month state of emergency, which signing members viewed as requiring a less unitary response.¹³¹

Members of the House of Representatives delivered the petition terminating the state of emergency to the Governor on October 23, 2020.¹³² The Governor refused to comply with the petition and filed a petition for injunctive relief in Louisiana's 19th Judicial District Court against the Louisiana House of Representatives on October 26, 2020.¹³³ The matter proceeded to a hearing before Judge William Morvant.¹³⁴ After several rulings and a denial of the legislature's request for a writ of mandamus, the parties stipulated that the court should "try the permanent injunction

126. LA. CONST. art. II, § 18(C); Interview with Blake Miguez, *supra* note 117.

127. See LA. REV. STAT. § 29:768 (2023).

128. *Petition to Terminate State of Public Health Emergency*, *supra* note 10. The "petition" instrument mentioned throughout this Comment is a term of art used by the legislature to describe the mechanism by which the Disaster Act and the LHEPA emergency powers may be rescinded—it should not be confused with "petition" referring to a pleading in court. See discussion *infra* Part III.E.

129. *Id.*

130. La. Exec. Dep't Proclamation No. 134-JBE-2020, *COVID-19 Public Health Emergency Renewal of Phase 3 of Resilient Louisiana* (Oct. 8, 2020), <https://gov.louisiana.gov/assets/Proclamations/2020/134-JBE-2020-COVID-19-Public-Health-Emergency.pdf> [<https://perma.cc/7ZUT-VS3F>].

131. Interview with Blake Miguez, *supra* note 117. See also *Petition to Terminate State of Public Health Emergency*, *supra* note 10, at 2.

132. *Petition for Declaratory Judgment and Injunctive Relief*, *supra* note 21, at 10.

133. See *id.* at 1–5.

134. *Edwards v. La. State Legis.*, 315 So. 3d 213 (La. 2020).

and declaratory judgment action as it relates to the constitutional issues only”¹³⁵ The fact that the district court ruled on the constitutionality of the statute before ruling on other elements affected the Louisiana Supreme Court’s ability to resolve the question on its merits.¹³⁶ At the conclusion of the hearing, the district court rendered judgment declaring Louisiana Revised Statutes § 29:768(B) unconstitutional.¹³⁷ The district court did not take up Governor Edwards’ non-constitutional claims, namely that the legislature failed to meaningfully consult with the public health authority as required by that same statute.¹³⁸

The Louisiana Supreme Court’s *per curiam* response was simple: since the district court did not rule on all issues of fact and claims before ruling on the constitutionality of Louisiana Revised Statutes § 29:768(B), the declaration that the statute violated Louisiana’s Constitution was premature.¹³⁹ Thus, the Court opined:

While we acknowledge this case presents some novel issues which are important to the citizens of our state, we find it is unwise to depart from this bedrock principle of orderly statutory interpretation. Rather, it is critical a case must reach this court in the proper procedural posture to warrant our review of a ruling on constitutionality.¹⁴⁰

The Louisiana Supreme Court then remanded the case to the district court for a ruling on the meaningful-consultation provision and vacated the district court’s judgment.¹⁴¹ The district court ruled that the issue presented within the case was moot, and the legislative parties appealed.¹⁴² The Louisiana First Circuit then rendered a decision on October 6, 2021, which

135. *Id.* at 214 (citation omitted).

136. *Id.*

137. *Id.*

138. *Id.* at 215.

139. *Id.* Specifically, Governor Edwards asserted that the members of the House of Representatives failed to consult meaningfully with the Louisiana Department of Health. *Id.*

140. *Id.* (citing *Matherne v. Gray Ins. Co.*, 661 So. 2d 432 (La. 1995)).

141. *Id.* Justice Weimer would have heard the case on the merits. He found that the issue was very important and that the issue would be ripe enough for the court’s consideration due to the non-factually dependent analysis required by the case at that stage. *See Edwards v. La. State Legis.*, 2020-CA-1407 (Weimer, J., dissenting) (unpublished *per curiam* opinion).

142. *Edwards v. La. State Legis.*, No. 2021-CW-0950, 2021 WL 4592740, at *1 (La. Ct. App. 1st Cir. Oct. 6, 2021) (vacating the district court’s judgment as moot).

dismissed the action as moot for multiple reasons and vacated the judgment of the district court.¹⁴³ Because the litigation is essentially over, it is unlikely that the question will ever get a definitive resolution on the merits due to the various exceptions that may be raised each time litigation between the governor and the legislature occurs concerning the process by which one house of the legislature might terminate an executive order.¹⁴⁴

III. THE FORECAST: ASSESSING THE CONSTITUTIONALITY OF LOUISIANA REVISED STATUTES § 29:768(B)

The litigation in *Governor John Bel Edwards v. Louisiana State Legislature, et al.* produced only one legal discussion on the merits of the issue of constitutionality—a discussion which focused solely on the points of law raised by the parties at the district court level at the pleading stage.¹⁴⁵ This issue, which strikes at the very heart of the balance of power within Louisiana’s state government, warrants more legal review. A significant question remains as to the constitutionality of the one-house legislative petition contained within Louisiana Revised Statutes § 29:768(B), authorizing the legislature to end a state of emergency proclaimed pursuant to the LHEPA. The similarity between the termination language in the LHEPA and the Disaster Act makes that question even more significant.¹⁴⁶ Louisiana’s geographic susceptibility to natural disasters renders determinations concerning who wields the powerful forces of government once emergency provisions are triggered

143. *Id.* The appellate court ruled that the various forms of relief sought by each of the parties could not be granted by any court due to the time-limitation based termination of 134 JBE 2020, and, thus, the issue was moot. *Id.* Because the order that the legislature sought to terminate and the governor sought to protect was no longer in force, no judicial entity could afford relief to the parties. Every request for relief was found to be moot, and the appellate court also found that the trial court had no jurisdiction to enter judgement against either party. The district court’s judgment was vacated, and the suit was dismissed. *Id.*

144. There are many exceptions that could be filed by both the initial plaintiff as well as the plaintiff in reconvention in this suit, such as the ability of the Louisiana state legislature or one house thereof to be sued as a juridical person and the ability to terminate a state of emergency which the statute itself purports to unilaterally terminate (rendering the litigation moot). *See* LA. REV. STAT. § 29:768(B) (2023); LA. CODE CIV. PROC. arts. 731–43, 925–27 (2023).

145. *Edwards*, 315 So. 3d at 214; Transcript of District Court Hearing at 98–102, *Edwards v. La. State Legis.*, C-700923 (Nov. 12, 2020) (on file with William Morvant).

146. *See* discussion *supra* Part I.D.

in need of a clear answer.¹⁴⁷ This Part assesses the constitutionality of the LHEPA's petition provision through the lenses of both power and process. First, it reviews constitutional demands related to constitutionally allocated authority, such as the presumption of constitutionality, the inherent powers of both the legislative and executive branches, the proper apportionment of the state police power, the non-delegation doctrine, and the constitutionality of the legislative veto in Louisiana. These constitutional requisites must be complied with for the Louisiana legislature to have the constitutional *power* to rescind the governor's order by petition. The examination then turns to the constitutional demands of bicameralism and presentment, which must not be violated for the *process* of the operative petition mechanism—that it be from one house without the signature of the governor—to be constitutionally permissible.

A. An Analytical Framework to Analyze the Constitutionality of Louisiana Revised Statutes § 29:768.

A proper examination of a statute's constitutionality begins with the construction of a proper analytical framework.¹⁴⁸ The Louisiana Supreme Court has established standards for such an inquiry.¹⁴⁹ All statutory enactments “are presumed constitutional, and every presumption of law and fact must be indulged in favor of legality.”¹⁵⁰ Further, statutes enacted for a public purpose, such as the LHEPA, carry a presumption that is *especially forceful*.¹⁵¹ This presumption places a “heavy burden” on the party challenging constitutionality to prove that the language of the statute

147. Local government systems are allowed by statute, through the same mechanism, to terminate states of emergency that a parish president or mayor declares. LA. REV. STAT. § 29:737(C) (2023). Thus, the answer to this question impacts every local government in the state of Louisiana.

148. See Maxwell O. Chibundu, *Structure and Structuralism in the Interpretation of Statutes*, 62 U. CIN. L. REV. 1439, 1440 (1994).

149. Louisiana state law is the arbiter of constitutionality in this assessment. This assumes that one does not make the argument that the unbridled exercise of emergency power by the executive constitutes a violation of the Guarantee Clause of the United States Constitution. *Id.* This reference is also meant to clarify that federal jurisprudence like *INS v. Chadha* has no bearing on separation-of-powers issues within Louisiana's state government. See generally *INS v. Chadha*, 462 U.S. 919 (1983).

150. *Carver v. La. Dep't of Pub. Safety*, 239 So. 3d 226, 230 (La. 2018).

151. *Id.* The LHEPA was passed to “do all that is reasonable and necessary to protect the health and safety of [Louisiana's] citizens.” LA. REV. STAT. § 29:761(A) (2023). This language is indicative of a very significant public purpose.

renders it unconstitutional¹⁵² because it conflicts with a specific provision within the Constitution.¹⁵³ Courts have also characterized this burden as a clear-and-convincing standard.¹⁵⁴ This burden is on the plaintiff to show unconstitutionality not only by statutory interpretation, but also by factual application: “the challenger must establish that no set of circumstances exists under which the Act would be valid.”¹⁵⁵ However, “[a] constitutional limitation on the legislative power may be either express or implied.”¹⁵⁶ Thus, any plaintiff challenging the constitutionality of a statute enacted for a public purpose has a heavy burden.¹⁵⁷

A plaintiff’s ability to surmount the strong presumption of constitutionality turns on whether any provision of the Louisiana Constitution conflicts with this exercise of legislative action.¹⁵⁸ There are numerous constitutional principles that may invalidate a statute.¹⁵⁹ These may be procedural, such as those mandating how a bill must pass to become a law, or substantive, such as the limitation that no branch shall exercise the powers of another.¹⁶⁰ One logical mode of analyzing constitutional power and its implementation is to first ask whether the actor in question—the governor—has the articulated, delegated, or

152. *Hite v. Larpernter*, 923 So. 2d 140, 145 (La. Ct. App. 1st Cir. 2005).

153. *City of New Orleans v. La. Assessors’ Ret. & Relief Fund*, 986 So. 2d 1, 12 (La. 2007), quoting:

[A] party challenging the constitutionality of a statute must point to a particular provision of the constitution that would prohibit the enactment of the statute, and must demonstrate clearly and convincingly that it was the constitutional aim of that provision to deny the legislature the power to enact the statute in question.

154. *Carver*, 239 So. 3d at 230; *Hite*, 923 So. 2d at 145.

155. *Krielow v. La. Dep’t of Agric. and Forestry*, 125 So. 3d 384, 397 (La. 2013) (citing *State v. Powdrill*, 684 So. 2d 350, 357 (La. 1996)). *See also La. Assessors’ Ret. & Relief Fund*, 986 So. 2d at 12–13:

[The Supreme Court of Louisiana] must construe a statute so as to preserve its constitutionality when it is reasonable to do so. In other words, if a statute is susceptible of two constructions, one of which would render it unconstitutional, or raise grave constitutional questions, the court will adopt the interpretation of the statute which, without doing violence to its language, will maintain its constitutionality.

156. *La. Assessors’ Ret. & Relief Fund*, 986 So. 2d at 12.

157. *Carver*, 239 So.3d at 230.

158. *Id.* *See also* Interview with Thomas C. Galligan, Dean Emeritus & Professor of Law, Paul M. Hebert Law Center, Louisiana State University (July 26, 2022).

159. Interview with Thomas C. Galligan, *supra* note 158.

160. LA. CONST. art. III, § 15; *id.* art. II, § 2.

inherent power to take the action at issue and then to decide whether the actor has complied with prescribed, inherent, or basic procedural requirements found in the state constitution.¹⁶¹ To place this into the context of a more linear analysis, there are two questions one must ask: (1) whether the legislature has the *power* to rescind the governor's executive order; and then (2) whether the *process* by which they have allowed for that rescission is constitutional as well.¹⁶² Any constitutional defect contained in a statute will render it unconstitutional.¹⁶³ Thus, if a constitutional analysis indicates that any portion of Louisiana Revised Statutes § 29:768(B) is unconstitutional, the provision as a whole will be unconstitutional.¹⁶⁴ The law stands as a house of cards—if any constitutional demand is not met, the law will fall.¹⁶⁵ The nature of the question presented denotes the constitutional requirements to be examined. The concepts of the separation of powers doctrine—containing the inherent powers of the respective branches and the branch wielding the police powers of the state—the delegation doctrine, and the legislative veto each define and limit constitutional power.¹⁶⁶ The constitutional demands of bicameralism and presentment must also be met for the procedural aspect of the petition to be constitutional. Each of these requirements are discussed in turn.¹⁶⁷

Aside from the jurisprudential aspects of this inquiry, core concepts of constitutionalism serve as guideposts toward an appropriate exegesis.¹⁶⁸ Scholars of state constitutional law discourage conclusions derived from *negative implications*.¹⁶⁹ This means that state constitutions should be

161. Interview with Thomas C. Galligan, *supra* note 158.

162. *Id.*

163. *See* Roy v. Edwards, 294 So. 2d 507, 511 (La. 1974).

164. Interview with Thomas C. Galligan, *supra* note 158. This assumes a facial challenge. *Id.* The subject of the severability of this provision and the effect of that severance are addressed later in this Comment. *See infra* Part III.C.3.

165. *Id.*

166. *See* discussion *infra* Parts III.B & C.

167. Arguments concerning Louisiana Revised Statutes § 29:768(B) and its severability from the rest of the LHEPA are not directly addressed in this Comment, though the legislature's counterargument does bear on the issue under consideration.

168. Interview with Thomas C. Galligan, *supra* note 158. This is a point of constitutional interpretation espoused by U.S. Associate Justice Stephen Breyer. *Id.*

169. WILLIAMS, *supra* note 32, at 485. This should be distinguished from the Louisiana jurisprudence favoring *expressio unius et exclusio alterius*, a doctrine of statutory construction “which teaches us that when the legislature specifically enumerates a series of things, the legislature's omission of other items, which

interpreted in light of the legislature's power, and where the authorization of one action exists explicitly, one should not draw from that explicit language the exclusion of all other related non-explicitly authorized actions.¹⁷⁰ Analysis of the text of the constitution itself should be coupled with the intent of the framers of the document, whose clear expression should not yield to unnecessary interpretation.¹⁷¹ Emergency situations may justify broader interpretations of the government's ability to infringe upon the civil liberties of citizens, but no emergency may be used as justification for impermissible seizures of power within the government itself.¹⁷² Some commentators, such as former federal Judge John Minor Wisdom of the Eastern District of Louisiana, advocate for stronger scrutiny against alteration of government function during times of emergency when constitutional norms are involved.¹⁷³

In total, apart from the legal aspects of this examination, the rule of law would be best served by an interpretation that strikes a balance between the scholarly aspirations of a true and proper separation of powers structure and the need for a structure that recognizes and reflects the need for expediency in decision making during states of emergency. Temporary imbalance is to be permitted in times of crisis but only to an extent.¹⁷⁴ A detailed examination of Louisiana law reveals that a one-house legislative action by petition that effectively overrides an executive order is constitutionally permissible.¹⁷⁵

could have been easily included in the statute, is deemed intentional." La. Hosp. Ass'n v. State, 168 So. 3d 676, 687 (La. Ct. App. 1st Cir. 2014).

170. WILLIAMS, *supra* note 32, at 485.

171. State constitutional history, both in drafting and convention journals, is a very important aspect of constitutional interpretation. Aside from the plain meaning of the text, "original intent" is a very strong interpretive methodology for determining the scope of a given provision. WILLIAMS, *supra* note 32, at 500; *see also* L. Harold Levinson, *Interpreting State Constitutions by Resort to the Record*, 6 FLA. STATE U. L. REV. 567, 568–71 (1978).

172. *See* Crusto, *supra* note 59, at 514.

173. *Dombrowski v. Pfister*, 227 F. Supp. 556, 569–71 (E.D. La. 1964) (Wisdom, J., dissenting). Judge Wisdom was a federal district and appellate court judge from Louisiana.

174. *See* Crusto, *supra* note 59, at 514.

175. The focus of this analysis is not the factual dispute underlying *Edwards v. Louisiana State Legislature* but the constitutionality of the statute involved. *Edwards v. La. State Legis.*, 315 So. 3d 213 (La. 2020). Whether the legislature failed to "meaningfully consult" with the public health authority as required by statute is not under consideration in this Comment.

B. Separation of Powers: The Inherent Powers of the Branches

The concept of independent branches of government holding certain powers has roots much older than the government of the Bayou State.¹⁷⁶ In general, the goal of a separation-of-powers framework is to prevent the consolidation of power by one branch of government through the use of a system of checks and balances.¹⁷⁷ Many systems also utilize an arrangement of allocated and enumerated powers amongst differing branches.¹⁷⁸ After achieving statehood, Louisiana adopted its Constitution of 1812, which provided for the three branches of government in its Article I and commanded that “[n]o person or Collection of persons, being one of those departments, shall exercise any power properly belonging to either of the others; except in the instances hereinafter expressly directed or permitted.”¹⁷⁹ Every version of the state’s constitution, except the “Carpet Bag” Constitution of 1868, has commanded the same.¹⁸⁰ The Louisiana Law Institute specifically recognized the need to leave the substance of these articles unchanged in its *projet* for the Constitution of 1954 because one of the main thrusts of the constitutional revision was “to redress the

176. Montesquieu’s concept of the separation of powers profoundly influenced the formation of the Constitution of the United States, which in turn served as a model for the Kentucky Constitutions of 1792 and 1799. See BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS*, Book XI, ch. VI (Thomas Nugent, trans. 1949) (1731); LOUISIANA LAW INSTITUTE, 1 *PROJET OF A CONSTITUTION FOR THE STATE OF LOUISIANA WITH NOTES AND STUDIES* 50 (1954) [hereinafter LOUISIANA LAW INSTITUTE, 1 *PROJET*]. The foundational articles of Kentucky’s constitution inspired the Louisiana Constitution of 1812. See CECIL MORGAN, *THE FIRST CONSTITUTION OF THE STATE OF LOUISIANA* 9 (1975).

177. Systems of checks and balances are distinct from the general idea of the separation of powers. *Checks and balances* are the equalizing instruments by which the branches are able to curb the power and actions of the other. See Crusto, *supra* note 59, at 507.

178. *Id.*

179. LA. CONST. art. I, § 2 (1812).

180. LOUISIANA LAW INSTITUTE, 2 *PROJET OF A CONSTITUTION FOR THE STATE OF LOUISIANA WITH NOTES AND STUDIES* 49–51 (1954) [hereinafter LOUISIANA LAW INSTITUTE, 2 *PROJET*]. See also LOUISIANA LAW INSTITUTE, 1 *PROJET*, *supra* note 176, at 279. The Louisiana Constitution of 1954 was revised to omit “or Collection of persons” for stylistic reasons. See LOUISIANA LAW INSTITUTE, *THE PROJET OF A CONSTITUTION FOR THE STATE OF LOUISIANA* 28 (1950). Other stylistic changes of Article II took place as well, though the language remained unaltered from 1852 to 1868. *Id.* See also W.R. FISH, *JOURNAL OF THE CONVENTION FOR THE REVISION AND AMENDMENT OF THE CONSTITUTION OF THE STATE OF LOUISIANA* 35 (1874).

present overwhelming power of the Louisiana executive.”¹⁸¹ This focus is instructive, as the Louisiana Constitution of 1974 repromulgated many of the same articles with respective balance-of-power implications.¹⁸²

Constitutional power is of paramount importance.¹⁸³ An analysis of the inherent powers and limitations of the executive and legislative branches further supports a finding that the petition mechanism the LHEPA utilizes is constitutionally permissible. The question presented here is whether the governor has the inherent authority to maintain a state of emergency outside of a statutory framework delegating powers to the executive branch. To place this into the context of the litigation in *Edwards v. Louisiana State Legislature*, the question is whether the legislature, through its inherent authority, may end a state of emergency the governor proclaimed, or if that emergency proclamation should stand pursuant to the inherent power of the executive. The following analysis addresses the competing capabilities and limitations of the executive and legislative branches of Louisiana’s state government to govern during emergencies. The examination then shifts to a careful analysis of the delegation doctrine and the constitutional confines that might be breached or expanded in an emergency setting.¹⁸⁴

1. The Inherent Powers of the Legislative Branch

As the Louisiana Supreme Court opined in *Krielow v. Louisiana Department of Agriculture and Forestry*, “[I]t is axiomatic that the legislature is vested with the sole law-making power of the State.”¹⁸⁵ With little exception, the Louisiana state legislature has the power to decide what the law shall be.¹⁸⁶ This power is plenary, meaning that it is without limit unless another provision within the Louisiana Constitution itself expressly prohibits so.¹⁸⁷ Thus, the state judiciary has given different

181. LOUISIANA LAW INSTITUTE, 2 PROJET, *supra* note 180, at 47.

182. *Id.*

183. Interview with Thomas C. Galligan, *supra* note 158.

184. *See* discussion *infra* Part III.C.

185. *Krielow v. La. Dep’t of Agric. and Forestry*, 125 So. 3d 384, 388 (La. 2013); LA. CONST. art. III, § 1(A).

186. *See* LA. CONST. art III, § 1; *State v. Alfonso*, 753 So. 2d 156, 160 (La. 1999).

187. *Polk v. Edwards*, 626 So. 2d 1128, 1132 (La. 1993). This plenary power is the opposite of the delineations of power Congress has within the federal Constitution; in that document, all provisions are *grants* of power to the Congress, and the unenumerated powers are *reserved* by the states. *Id.* “The powers of the United States Congress are specifically delineated in the United States

treatment to Louisiana's constitution.¹⁸⁸ The Louisiana Supreme Court has always treated review of actions taken by the legislature with much greater deference than it has given to the executive.¹⁸⁹ The power wielded by the legislature is primarily exercised "through consideration and passage of legislative instruments,"¹⁹⁰ though legislative power may be exercised in a variety of ways, including oversight and review of executive branch action and administrative rule making, among other functions.¹⁹¹

The quality of power central to the inquiry at hand is the police power of the state, which is undoubtedly the power most closely associated with the statutory provisions for emergency situations enacted in both the LHEPA and the Disaster Act.¹⁹² Louisiana's judiciary has refined this power to mean "a power inherent in every sovereignty to govern men and things . . ."¹⁹³ The Louisiana Supreme Court's ruling in *Polk v. Edwards* proclaimed that the police power of the state belongs to the Louisiana state legislature alone: "Although the legislature may delegate the exercise of

Constitution. Conversely, the Louisiana Legislature, as with the legislatures of the other states of the Union, has all powers which have not been denied it by the state constitution." *Id.* (citing *In re Am. Waste & Pollution Control Co.*, 588 So. 2d 367 (La. 1991); *Swift v. State*, 342 So. 2d 191, 194 (La. 1977)); see also P. RAYMOND LAMONICA & JERRY G. JONES, *Legislative Law and Procedure* § 2:1, in 20 LOUISIANA CIVIL LAW TREATISE (2d ed. 2021).

188. To attack the constitutionality of legislative action, an opponent must establish more than the mere proposition that the constitutionality of the legislation is fairly debatable. The opponent must establish clearly and convincingly that the constitutional aim was to deny to the legislature the power to enact the legislation. *La. Recovery Dist. v. All Taxpayers*, 529 So. 2d 384, 388 (La. 1988). This is compared to *Louisiana Hospital Association v. State*, where the standard used to assess the emergency powers of the governor did not include any inherent powers and only considered whether he complied with statutory law. *La. Hosp. Ass'n v. State*, 168 So. 3d 676, 687 (La. Ct. App. 1st Cir. 2014).

189. *La. Recovery Dist.*, 529 So. 2d at 388; *La. Hosp. Ass'n*, 168 So. 3d at 687.

190. See also LAMONICA & JONES, *supra* note 187, § 2:1.

191. See LA. REV. STAT. § 49:968 (2023). These also include "state budget and related interim budget activities; audit of fiscal records of the state and political subdivisions; 'sunset' review of administrative agencies; interim study and investigation of issues or agency organization; determination of member qualification, elections, and expulsion . . . and provision for legislative reapportionment." *Id.* (footnotes omitted).

192. The Disaster Emergency Act's purpose "warrant[s] the exercise of the State's police power" to the governor to respond to disasters. *State v. Pearson*, 975 So. 2d 646, 652 (La. Ct. App. 5th Cir. 2007). The LHEPA does the same. See LA. REV. STAT. § 761(A) (2023).

193. *Yoes v. St. Charles Par. Council*, 400 So. 2d 260, 261 (La. Ct. App. 4th Cir. 1981).

police power, the power belongs to the state and its delegation can be recalled, abrogated, or modified.”¹⁹⁴ Therefore, it would stand to reason that any exercise of the police power by any branch of government could be terminated or modified by the legislative branch. This argument is even stronger in the emergency powers context due to the legislature’s duty and right in Article XII, § 11 to provide a process of governance during crisis.¹⁹⁵ Indeed, the governor’s constitutional recourse in times of emergency has always been to “convene the [l]egislature at the seat of government, or, if that should have become dangerous from an enemy, or *epidemic*, at a different place.”¹⁹⁶ The spirit and essence of the state constitution, thus, seems to prefer the legislative branch to the executive branch on almost all emergency matters. It stands to reason that the Louisiana legislature has almost omnipotent authority to deal with emergency powers.

2. *The Inherent Powers of the Executive Branch*

The next topic of consideration is whether the inherent powers of Louisiana’s chief executive could serve as authorization for the maintenance of a state of emergency after proclamation pursuant to the LHEPA or the Disaster Act. When the executive branch acts, it is not afforded the same presumption of constitutionality as the legislature.¹⁹⁷ Indeed, the executive branch is subject to an inverse presumption: since the state constitution grants powers to the executive branch rather than providing only limitation, the executive must be able to point to specific grants of power within the constitution when challenged.¹⁹⁸ The governor has a constitutional duty to “see that the laws [of Louisiana] are faithfully executed” and Louisiana Constitution Article IV, § 5 grants him or her the authority to ensure this.¹⁹⁹ This broad grant of power has a *prima facie* limitation: the executive branch cannot create law; it may only carry out the law the legislature enacts.²⁰⁰ This same limitation is expressly laid out

194. *Polk v. Edwards*, 626 So. 2d 1128, 1142 (La. 1993). The exercise of the police power by the executive is a concept distinct from that of the exercise of delegated legislative power.

195. See LA. CONST. art. XII, § 11.

196. LA. CONST. art. V, § 14 (1921) (emphasis added). The current constitution has the same provision, which is placed at Article III, § 2.

197. Interview with Thomas C. Galligan, *supra* note 158.

198. *Crusto*, *supra* note 59, at 514.

199. LA. CONST. art. IV, § 5.

200. *Krielow v. La. Dep’t of Agric. and Forestry*, 125 So. 3d 384, 388 (La. 2013).

in Louisiana Constitution Article IV, § 5(K), which states that “[t]he governor shall have other powers and perform other duties authorized by this constitution or provided by law.”²⁰¹ Aside from these two general clauses, no constitutional authority exists supporting the idea that, through the inherent powers of the Office of Governor of Louisiana, the governor might maintain a state of emergency that the legislature has rescinded.

The Louisiana Supreme Court has only once hinted that the Governor of Louisiana has inherent emergency powers in *Foret v. Board of Levee Commissioners of the New Orleans Levee District*, but that case is distinguishable from the present inquiry.²⁰² In *Foret*, the Court’s recognition of that power was not central to the case under consideration, and the Governor’s action was subsequently ratified by an entire constitutional amendment in the year prior to the Court’s ruling.²⁰³ A much greater examination of gubernatorial emergency power can be found in *Louisiana Hospital Association v. State*, in which the Louisiana First Circuit Court of Appeal implied that the executive branch held no inherent emergency powers.²⁰⁴ The first inquiry in the appellate court’s analysis was whether the legislature had delegated some relevant power to the executive.²⁰⁵ Indeed, it may be that absent statutory authorization, the executive would not be able to promulgate a state of emergency granting extra authority at all.²⁰⁶ A state of emergency is a quasi-legislative reality that, regardless of whether it grants additional statutory effects or opportunities for greater ability, causes the state to subsume a legal status that is different from the status quo.²⁰⁷ A state of emergency is inherently a functional aspect and instrument of an exercise of the police power of the state, which causes certain laws to come into force and effect.²⁰⁸

201. LA. CONST. art. IV, § 5(K).

202. See *Foret v. Bd. of Levee Comm’rs of the Orleans Levee Dist.*, 125 So. 437, 438 (La. 1929).

203. *Id.* In *Foret*, the Governor chose to destroy portions of the levees protecting St. Bernard and Plaquemines Parishes from the floods of the Mississippi River in order to save the City of New Orleans. No statute was cited for this ability. *Id.*

204. *La. Hosp. Ass’n. v. State*, 168 So. 3d 676, 686 (La. Ct. App. 1st Cir. 2014). This case was decided under the Disaster Act, though the scope of powers and analysis of this case would be similar to that used by the LHEPA.

205. *Id.*

206. Interview with Thomas C. Galligan, *supra* note 158. This is because “the broad power to declare an emergency is legislatively delegated.” *Id.*

207. Crusto, *supra* note 59, at 514.

208. See LAMONICA & JONES, *supra* note 187, § 8:1.

After consideration of the Louisiana Supreme Court's ruling in *Polk v. Edwards* and the above conclusion that the police power of the state is invested in the legislature, it is certain that the inherent power of the governor cannot surmount the constitutional, legislative authority to control the police powers of the state.²⁰⁹ Thus, no successful argument can be made that some inherent executive power can prevent the legislature from rescinding or modifying a state of emergency the governor proclaims. This conclusion is not conditioned on whether the one-house petition *process* by which the legislature sought to end the state of emergency is constitutional. The conclusion simply reflects that the legislature has the inherent power to end a state of emergency through its exercise of the police power of the state; however, the qualities and conditions held within the statutory codification of that power—the LHEPA and the Disaster Act—might further complicate the legislature's attempts to do just that.²¹⁰

3. Perceived Internal Contradictions Within Louisiana Revised Statutes § 29:762(B)

Though the inherent authority stemming from the constitutional grants of power to the executive branch may not protect a gubernatorial state of emergency from abrogation or termination by the legislature, it is important to conduct a brief assessment of whether the LHEPA itself contains limiting self-contradictory language. This is because the power to rescind executive authority must still be exercised in accordance with the statute allowing rescission. Louisiana Revised Statutes § 29:768(B) states both that the legislature by petition “may terminate a state of public health emergency at any time” and that after the petition the governor is mandated to “issue an executive order or proclamation ending the state of public health or emergency.”²¹¹ This language complicates the assertion that the legislative branch has unilateral control of the state's police power. If the legislature could unilaterally end the public health emergency by petition, it would not require the governor to act. Indeed, the fact that the LHEPA necessitates the governor taking the final action to end a state of emergency would imply some balance of power on the side of the executive. However, this persuasive characterization cannot defeat the fact that the check allocated to the governor has been *legislatively* apportioned to that office.²¹²

209. See *Polk v. Edwards*, 626 So. 2d 1128, 1132 (La. 1993).

210. This is due to the language of the statute. See discussion *infra* Part III.B.3.

211. See LA. REV. STAT. § 29:768(B) (2023).

212. This check is found in the language of the statute. See *id.*

Assuming *arguendo* the ability of the legislature to validly utilize a petition in the manner that Louisiana Revised Statutes § 29:768(B) contemplates, it is only logical that the legislature, when creating its mechanisms for oversight, might restrict itself to certain methods or require that discretion be left to certain public officials. However, that is not what is occurring in this provision. The LHEPA leaves no discretion to the governor of the Bayou State as written.²¹³ The executive has no choice regarding whether to issue such a rescinding proclamation, and this specious limitation by the legislature is, in reality, a delegation of a statutory duty to an individual in a better position to ensure publication and communication of the proclamation to the public.²¹⁴ Thus, the argument that the language of the petition provision supplies the governor as the true authority within the state of emergency is unpersuasive.

C. Separation of Powers: The Non-Delegation Doctrine

Constitutional power is not an abstract, theoretical concept but rather a precondition for any action by any branch. If the conclusions above are taken as true, the conclusions reflect the principle that when the executive acts, he or she is either acting pursuant to the inherent power Article IV of the Louisiana Constitution vests in the executive or power that the state legislature delegates to him or her.²¹⁵ Given the conclusion that the inherent powers of the governor may not supply to him or her the police power of the state, any exercise of the police power of the state by the executive would be an exercise rooted in legislatively delegated power. When Governor Edwards proclaimed and continuously renewed a state of emergency, he did so pursuant to powers Louisiana Revised Statutes § 29:768(B) delegated to him.²¹⁶ The question then becomes whether it is

213. See discussion *infra* Part III.E. See also LA. REV. STAT. § 29:768 (2023).

214. The argument regarding the “shall issue” phrase of Louisiana Revised Statutes § 29:768(B) made in favor of the Governor’s position, and the rebuttal to that argument noted later is also appropriate here; the rebuttal still prevails. See discussion *infra* Part III.E.

215. This concept mirrors the United States Supreme Court’s holding in the *Steel Seizure Case*, as well as the concurrent opinions of Justices Black, Frankfurter, and Jackson. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Though Louisiana law does not provide categories for dividing gubernatorial action based on the origins of power and standards of review, the similarity between the origins of power of the governor and the President of the United States is noted.

216. Aside from the fact that no inherent powers to do so exist, the strongest indication of this fact is the governor’s admission within the pleadings, as well as the language of the proclamation itself. Petition For Declaratory Judgment and

constitutionally permissible for the legislature to rescind that state of emergency via a one-house legislative petition. A compelling argument exists for an affirmative answer.

1. The Governor Acted Pursuant to Legislatively Delegated Power

A proper categorization of the nature of the governor's state of public health emergency bears on the issue of its effect and ability to rebut attempts to terminate it. Emergency proclamations and executive orders are not interchangeable instruments. Executive orders are mechanisms by which the chief executive directs individuals to carry out and enforce legislation pursuant to the constitutional duty to enforce statutes the legislature enacts.²¹⁷ Emergency proclamations simultaneously implicate the inherent authority of the executive branch to protect the citizens of the state.²¹⁸ However, if the legislature statutorily provides that a state of emergency the governor proclaims may be a triggering mechanism for

Injunctive Relief, *supra* note 21, at 6. *See also* La. Exec. Dep't Proclamation No. 25-JBE-2020, *supra* note 107.

217. John C. Duncan, *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 333–37 (2010); *see also* LA. CONST. art. IV, § 5(A). The policymaking function that the governor might exercise under an executive order is broad but limited in a sense. The ability of the governor to maintain a state of emergency proclaimed under Louisiana Revised Statutes §§ 29:760–29:763 without adhering to the command of an assumedly valid legislative petition mechanism by an executive order, however, is lacking and would constitute a legislative function. Support for this proposition can be found in *Louisiana Department of Justice v. Edwards*, where the Louisiana First Circuit Court of Appeal held that

[t]he Governor has constitutional authority, as chief executive officer of the state, to see that all laws of the state and the United States are faithfully executed, and nothing prohibits the Governor from establishing policy through Executive Orders. However, the limited power of the Governor to issue Executive Orders does not inherently constitute authority to exercise the legislative lawmaking function.

La. Dep't of Just. v. Edwards, 233 So. 3d 76, 80 (La. Ct. App. 1st Cir. 2017).

218. The power would seem to be limited, as the most useful exercise of power to protect the public would not be the police power of the state, which is not included within the inherent power of the governor. *See Polk v. Edwards*, 626 So. 2d 1128, 1142 (La. 1993). However, the Louisiana Constitution of 1974 does name the governor as “commander-in-chief of the armed forces of the state, except when they are called into service of the federal government” and allows him to “call out these forces to preserve law and order, to suppress insurrection, to repel invasion, or in other times of emergency.” LA. CONST. art. IV, § 5(J). This is separate from the concept of martial law.

additional powers granted to the governor to mitigate emergencies, the power exercised is nonetheless legislatively delegated power. Put simply, when the executive proclaims a state of emergency pursuant to a certain statute, the executive both receives the additional temporary grant of power and also submits to the limitations and confines that the statute contains.²¹⁹ This distinction matters because it adds another dimension to the question: when power is delegated to the governor by legislation, the appropriate inquiry may be one analogous to challenges to agency action under Louisiana's framework of the delegation doctrine.²²⁰ In the context of the factual circumstances giving rise to the litigation in *Edwards v. Louisiana State Legislature*, when Governor Edwards issued Emergency Proclamation Number 134 JBE 2020 pursuant to Louisiana Revised Statutes §§ 29:760–29:7663, he also submitted to the limitations set out within that statutory scheme.²²¹ When the executive acts pursuant to statutorily delegated power, he or she cannot simply choose not to comply with the provisions of that act that he or she does not favor.²²² Thus, if power is legislatively delegated, the demands of the legislative branch set forth by statute must be met.²²³

2. *The Delegation of Power Found Within the LHEPA was Proper*

The subpart above operated under the assumption that the numerous powers the LHEPA grants to the governor are individually and collectively within the confines of the scope of authority that the legislature is allowed to grant the executive branch. It also operated under the assumption that no other constitutional balancing mechanism stands in the way. Logic would dictate that the legislature may only rescind what it has the power

219. Interview with Thomas C. Galligan, *supra* note 158. The consequence of the petition action is not that the governor's executive power is encroached. He still may do those things that he previously could pursuant to preexisting statutory authority. *Id.*

220. Interview with John Devlin, Professor of Law, Paul M. Hebert Law Center (Nov. 2, 2021).

221. Brief of the Attorney General Defending the Constitutionality of La. R.S. 29:768(B) at 2, *Edwards v. La. State Legis.*, 315 So. 3d 213 (La. 2020) (No. 2020-CA-1407).

222. *State ex rel. Nicholls v. Shakespeare*, 6 So. 592, 592–98 (1889). Executive officials must “obey the law until the law has been declared null and void by the judicial department of the government.” *Id.* at 596. Executive officials simply lack the power to “defy the law, constitute themselves the judges of its constitutionality, and pronounce upon its validity, when they are charged with its execution.” *Id.*

223. *Id.*

to delegate. Thus, it must be shown that the delegation of power to the governor within the LHEPA conforms with the delegation doctrine under Louisiana law.²²⁴ Louisiana law recognizes a distinct difference between legislative power, which can never be granted to the executive branch, and ministerial or administrative power, which can be delegated to the executive in limited circumstances.²²⁵ Concerning that delegation, the Louisiana Supreme Court stated that it

on numerous occasions has recognized that where an enabling statute expresses a clear legislative policy and contains sufficient standards for the guidance of the administrative official empowered to execute the legislative will, the legislature may delegate to an administrative agency the administrative or ministerial authority to ascertain and determine the facts upon which the law is to be applied and enforced.²²⁶

The Louisiana Supreme Court has enumerated three elements that must be met for a certain delegation of authority to an administrative agency to be constitutionally valid.²²⁷ First, the enabling statute must “contain[] a clear expression of legislative policy”; second, it must “prescribe[] sufficient standards to guide the agency in the execution of that policy”; and third, it must be “accompanied by adequate procedural safeguards to protect against abuse of discretion by the agency.”²²⁸ These adequate procedural safeguards must exist to protect against abuses of discretion.²²⁹ The Court gave its rationale for this test in *State v. All Pro Paint & Body Shop*, where it stated:

[A]pplication of the *Schwegmann* three-prong test ensures the elected members of the Louisiana Legislature retain all legislative

224. This topic is treated with brevity. Though it is an important step on the journey to the conclusion, the scope of this analysis does not entertain an exegesis on whether the powers granted to the governor under the LHEPA are too broad.

225. *State v. All Pro Paint & Body Shop, Inc.*, 639 So. 2d 707, 711 (La. 1994). Under exceedingly limited circumstances, the legislative power may be granted to municipalities through contingent local-option enactments. *Krielow v. La. Dep’t of Agric. and Forestry*, 125 So. 3d 384, 397 (La. 2013). The Louisiana Supreme Court took great pains in *Krielow* to present this as the only exception that may not be expanded to include other grants of legislative power. *Id.*

226. *All Pro Paint & Body Shop*, 639 So. 2d at 713.

227. *Id.* at 711; *see also State v. Miller*, 857 So. 2d 423, 430 (La. 2003).

228. *All Pro Paint & Body Shop*, 639 So. 2d at 712; *see also Miller*, 857 So. 2d at 430.

229. *Miller*, 857 So. 2d at 430.

power by insisting that they, not their delegates in the executive branch, make the difficult policy choices for which they are accountable to the public through the democratic process. Furthermore, by insisting that the enabling statute prescribe not only the legislative policy to be enforced by the agency but also sufficient standards to guide or “canalize” the agency’s execution of the legislative will, the test ensures the statute delegates only administrative or ministerial authority and guards against delegations of unbridled legislative discretion and the danger of “delegation running riot.”²³⁰

Fears of “delegation running riot” and “unbridled legislative authority” made evident by the Court through this rationale are in danger of becoming reality if the powers granted to the executive by the LHEPA were to be both exercised and unconstitutionally delegated.²³¹

The enabling statute of the LHEPA contains a clear expression of legislative policy.²³² The fact that the Louisiana Supreme Court upheld the provisions of an act with a similar purpose, structure, and language when it decided that the Louisiana Hazardous Control Law furthered a reasonable governmental policy goal in *State v. All Pro Paint* supports this conclusion.²³³ In articulating what constituted a clear expression of legislative policy, the Court stated that after the legislature has defined its policy, “the State, acting under its police power to protect the health, welfare and safety of the people, may confer upon administrative officers or bodies the power to adopt the rules and regulations to [execute] the legislative will.”²³⁴ The language of the LHEPA establishes a similar reasonable and definite governmental policy warranting the exercise of the state’s police power to protect the public health, safety, and welfare.²³⁵ It does this by providing a system of emergency and contingency plans to serve the needs of the public at large during emergencies and a method by which the governor might suspend ordinary administrative procedural regulations and statutory requirements.²³⁶

230. *All Pro Paint & Body Shop*, 639 So. 2d at 712.

231. *Id.*

232. The arguments concerning the first two prongs of the *Schwegmann* analysis are treated with brevity, as the constitutionality of the LHEPA as a whole is outside of the scope of this inquiry.

233. *All Pro Paint & Body Shop*, 639 So. 2d at 716.

234. *Id.*

235. See LA. REV. STAT. § 29:761(A)(1)–(2) (2023); *id.* § 29:672.

236. See *id.* § 29:761(A)(1)–(2); *id.* § 29:672.

The specific and enumerated standards carefully articulated by the legislature in enacting the LHEPA satisfy the second prong of the *Schwegmann* test by prescribing sufficient standards to guide the governor and agencies in the execution of the legislature's declared policy. Without discussing these standards at length, an example can be found in the explicit provisions in Louisiana Revised Statutes § 29:765 for tracking the spread of communicable diseases and the ways in which data concerning public health shall be kept. Another example of a procedural safeguard is the set of meticulous definitions, which can be found in Louisiana Revised Statutes § 29:672, that have the effect of limiting gubernatorial discretion.²³⁷ For example, the statutory guidance and limitations of the content and substance of the Health Emergency Plan should be adequate to prevent arbitrary action through executive discretion.²³⁸

3. Procedural Safeguards

The last element of a proper delegation of ministerial power under Louisiana law is the requirement that a statute “is accompanied by adequate procedural safeguards to protect against abuse of discretion by the agency.”²³⁹ In the context of the LHEPA, the petition process appears to fulfill this role. Though thus far this Comment has focused on various arguments for and against the constitutionality of the petition process, this Subpart specifically examines whether the petition, if constitutionally permissible, acts as an adequate procedural safeguard against the executive branch's abuse of discretion.²⁴⁰

237. *Id.* § 29:762.

238. *Id.* § 29:764.

239. *All Pro Paint & Body Shop*, 639 So. 2d at 711 (citing *State v. Barthelemy*, 545 So. 2d 531, 534 (La. 1989); *Adams v. State, Dep't of Health & Hum. Res.*, 458 So. 2d 1295, 1298 (La. 1984); *State v. Union Tank Car, Co.*, 439 So. 2d 377 (La. 1983)). *See Krielow v. La. Dep't of Agric. and Forestry*, 125 So. 3d 384, 397 (La. 2013) (“Moreover, the Legislature did not retain any discretion to review, approve, disapprove or modify the assessment decision reached by the Board.”); *State v. Alfonso*, 753 So. 2d 156, 163 (La. 1999) (delegation lacked “adequate procedural safeguards to protect against an abuse of discretion”).

240. Though this examination is not so broad in scope that it seeks to defend the constitutionality of the entire LHEPA, an argument based on severability might assert that if the provisions for petition found in one portion of the LHEPA—the petition mechanism contained within Louisiana Revised Statutes § 29:768(B)—were to be declared unconstitutional, the other portions of the Act would be unconstitutional as well. Though that may be so, one cannot argue that constitutionality should be found for one provision of law simply out of necessity to save another.

The absence of any mechanism by which the legislature could curtail, modify, or rescind the power granted to the executive during public health emergencies would be constitutionally impermissible.²⁴¹ The Louisiana Supreme Court in previous cases has considered statutes subject to the provisions of the LAPA that allow for judicial review as providing adequate procedural safeguards.²⁴² However, the legislature has enacted legislation exempting the governor from complying with the requirements of the LAPA during declared emergencies.²⁴³ Though this weighs against a finding that the LHEPA contains adequate procedural safeguards, the court in *All Pro Paint* also recognized that legislative review by standing committees may serve as an adequate procedural safeguard.²⁴⁴ In *All Pro Paint*, the statute under consideration contained both judicial review authorized by the LAPA and legislative review authorized by its own statutory provisions; thus, it is unclear if the absence of one of these safeguards would have led to a different outcome.²⁴⁵

Though the LHEPA explicitly exempted the governor from the procedural requirements of the LAPA during emergencies, the legislative petition process is a much greater guard against arbitrary discretion by the executive. In the case of the exercise of the legislative petition found in Louisiana Revised Statutes § 29:768(B), the entire set of delegated powers the legislature grants to the executive is revoked.²⁴⁶ Under these circumstances, the executive branch would still be subject to a high level of legislative oversight during a state of emergency declared under the LHEPA, notwithstanding the exemption from the procedural requirements of the LAPA.²⁴⁷ Thus, if the legislative petition process found within the

241. See *La. Dep't of Just. v. Edwards*, 233 So. 3d 76, 80–81 (La. Ct. App. 1st Cir. 2017).

242. *All Pro Paint & Body Shop*, 639 So. 2d at 720; LA. REV. STAT. §§ 49:950–49:970 (2023); *id.* § 30:2175.

243. See LA. REV. STAT. §§ 49:950–49:974 (2023).

244. *All Pro Paint & Body Shop*, 639 So. 2d at 720.

245. *Id.*

246. See LA. REV. STAT. §§ 29:761–29:770 (2023) for the set of additional powers.

247. One scholar speculates that, perhaps in the context of a state of public health emergency, judicial review concerning the factual plausibility of an emergency situation might alone be a possible safeguard. Interview with Raymond Diamond, Professor of Law, Paul M. Hebert Law Center, Louisiana State University (Oct. 29, 2021). This would be in line with other cases allowing for *post hoc* judicial review for due process concerns during exigent circumstances. *Id.* In the opinion of the author, this safeguard alone would not be adequate because other safeguards before the Louisiana Supreme Court have been found to be inadequate after *post hoc* review. See *Krielow v. La. Dep't of Agric.*

LHEPA were to be considered constitutional, the LHEPA as a whole would contain adequate safeguards against abuse of discretion and would be a constitutionally permissible delegation of power to the executive.²⁴⁸ If the legislature has the power to create this authority, it certainly has the power to take it away by creating a check on that power.

D. Legislative Vetoes Are Constitutional Under Louisiana Law

The last examination of a constitutional requisite that must occur regarding the application of the delegation doctrine to Louisiana Revised Statutes § 29:768(B) is whether a prohibition against legislative vetoes exists under Louisiana law. Now that it has been established that the LHEPA was in fact a proper delegation of power to the executive, the question under consideration is whether the legislature is prohibited from exercising oversight of its own delegated power in the fashion presented in the legislative petition provision, which operates as a legislative veto.²⁴⁹ The petition provision operates as a legislative veto because it attempts to void an executive decision by a means that falls short of the normal statutory amendment process.²⁵⁰ It follows naturally that if the legislature has the ability to delegate its power, it certainly has the ability to rescind that power.²⁵¹ The legislative petition process found within the LHEPA is intended to be this check. In the context of the issue at hand, Louisiana Revised Statutes § 29:768(B) would simply be a codification of the legislature's inherent authority to recall its own delegations of power.

and Forestry, 125 So. 3d 384, 398 (La. 2013). The Court could have used judicial review as a safeguard since it was obviously manifest at that time but declined to note it. *Id.*

248. Though the question of the severability of Louisiana Revised Statutes § 29:768(B) from the whole of the LHEPA was raised in the pleadings of the litigants in *Edwards v. Louisiana State Legislature*, it is not taken up here. However, it is interesting to note that a paradox exists concerning severability's effects within this context. If the petition provision found within the LHEPA were to be deemed unconstitutional for any reason, the entire act would then be unconstitutional unless that provision could be severed. However, if one were to sever the petition provision to preserve the constitutionality of the LHEPA as a whole, the LHEPA would be without its only procedural safeguard and would fail the *Schwegmann* analysis, thus becoming an unconstitutional delegation of power.

249. This inquiry is distinct from legislative attempts to interfere with the inherent powers of the executive branch.

250. See Douglas B. Habig, *The Constitutionality of the Legislative Veto*, 23 WM. & MARY L. REV. 123, 126 (1981).

251. Interview with Thomas C. Galligan, *supra* note 158.

Whether or not a *legislative veto* is constitutional is a matter of state law.²⁵² Though to many readers the phrase *legislative veto* brings to mind the notable case of *INS v. Chadha*,²⁵³ this process is neither favored nor disfavored because of the United States Supreme Court's ruling in that case.²⁵⁴ Compared to the federal constitution, Louisiana's state constitution has very little language that one could take as prohibiting single-house legislative action.²⁵⁵ Indeed, if such a prohibition exists, the enforcement of that prohibition is lacking; the legislature currently has committees comprised of members of a single house that operate without the concurrence of the legislature and have the statutory authority to take action having legal effect.²⁵⁶ Statutes exist that currently allow one chamber to withhold its consent from proposals and block proposed actions.²⁵⁷ Indeed, the legislature already exercises some control over governance during times of crisis through a mechanism that comprises less than a majority of both houses: the Disaster and Emergency Funding Board, which must approve requests to transfer funding and alter the budget.²⁵⁸ This board is comprised of the president of the Senate, the

252. See generally WILLIAMS, *supra* note 32, at ch. 11(E); see also Devlin, *supra* note 31, at 1233–34.

253. *INS v. Chadha*, 462 U.S. 919 (1983).

254. One should not utilize an analogy to the U.S. Supreme Court's ruling in *Chadha*. The federal legislative framework is highly different from Louisiana's framework. As summarized in the brief to the district court by the Solicitor General's Office:

One reason [*Chadha*] held that a single house of Congress lacked such power was because the federal Constitution specifically provided for situations in which Congress could effectively exercise its power through the activity of one house. But the Louisiana Constitution does not contain any such provisions, which do not create the same implication.

Brief of the Attorney General Defending the Constitutionality of the LHEPA, *Edwards v. La. State Legis.* at 4, 315 So. 3d 213 (La. 2020) (No. 2020-CA-1407).

255. *Id.*

256. LA. REV. STAT. § 18:401.3 (2023) (approval of emergency election plans); *id.* § 18:145.1 (allowing for shortened periods for voter registration); *id.* § 49:950 (allowing for oversight committee disapproval of most proposed rules).

257. *Id.* § 49:950.

258. See *id.* § 29:731(C) (“If the governor finds that the demands placed upon these funds in coping with a particular disaster are unreasonably great, with the concurrence of the disaster and emergency funding board, he may make funds available by transferring and expending monies Action pursuant to this Subsection shall be only with the concurrence of the disaster and emergency funding board.”).

speaker of the House of Representatives, and the chairmen of the House Appropriations Committee and the Senate Finance Committee.²⁵⁹

The most potent argument in favor of the constitutionality of the legislative veto under Louisiana law is one that has been discussed previously: the plenary power of the Louisiana state legislature.²⁶⁰ The Louisiana Constitution is the sole limit on legislative action, and the burden of proof for challenging the constitutionality of legislative action is almost insurmountable.²⁶¹ When the standards for judging the constitutionality of legislative action²⁶² are juxtaposed to the legislative monopoly on the exercise of the state's police power—which the Louisiana Supreme Court has held “can be recalled, abrogated, or modified” by the legislature alone—only one conclusion is viable: the legislative veto is not prohibited by Louisiana law.²⁶³

E. The Process Requirements: Bicameralism & Presentment

The procedural aspect of the constitutionality of the LHEPA's petition mechanism requires less articulation than the requisites concerning power. The question of whether the legislature has the power and authority to terminate a state of emergency that the governor declares pursuant to the LHEPA by a one-house petition turns on whether such an instrument would be required to comply with the constitutional requirements for the passage of instruments that intend to have the force and effect of law. The petition process outlined in the LHEPA only requires that a majority of members of either house sign the petition for it to become effective.²⁶⁴ The form and style of the petition are not given,²⁶⁵ and the governor is not given an opportunity to approve or veto the instrument.²⁶⁶ The Louisiana Constitution provides that the legislature may only pass legislation having

259. *Id.* § 29:731(B).

260. *See* discussion *supra* Part III.B.1.

261. *See* discussion *supra* Part III.A.

262. *See id.*

263. *Polk v. Edwards*, 626 So. 2d 1128, 1142 (La. 1993).

264. LA. REV. STAT. § 29:768(B) (2023).

265. It should be noted that Article III, § 4 of the Louisiana Constitution demands certain form requirements which the petition did not reflect, such as an enacting clause. *Petition to Terminate State of Public Health Emergency*, *supra* note 10.

266. LA. REV. STAT. § 29:768(B) (2023). The first clause implicating presentment provides that the petition itself terminates the state of emergency, while the second commands that the governor “shall issue an executive order or proclamation . . .” *Id.* Neither of these clauses allow for discretion or approval by the executive.

the *force and effect of law* through a certain process requiring an affirmative vote of at least a majority of the elected members of *both* houses—bicameralism.²⁶⁷ This same process requires the opportunity for gubernatorial action on bills—presentment.²⁶⁸ These requirements are found in Article III, §§ 15 and 17.²⁶⁹

The Louisiana Constitution recognizes only four legislative instruments: bills, joint resolutions, concurrent resolutions, and other resolutions.²⁷⁰ The legislature may not repeal, abrogate, or enact law outside of the passage of a bill.²⁷¹ Louisiana Revised Statutes § 29:768(B) states that the legislature may terminate a declaration of public health emergency “by a petition signed by a majority of the surviving members of either house.”²⁷² A proper framing of the question of the constitutionality of a one-house legislative petition found in Louisiana Revised Statutes § 29:768(B) is important here. The petition is not a legislative instrument at all.²⁷³ The issue is not whether a petition signed

267. LA. CONST. art. III, § 15:

The legislature shall enact no law except by a bill introduced during that session . . . which shall be processed as a bill. . . . Action on any matter intended to have the effect of law shall be taken only in open, public meeting[s].

. . .

No bill shall become law without the favorable vote of at least a majority of the members elected to each house.

Id. at § 15(A), (G). Legislative procedural limitations in state constitutions are more restrictive than those within the federal constitution and were adopted by state governments throughout the nineteenth century after perceived abuse of legislative processes. WILLIAMS, *supra* note 32, at 692.

268. LA. CONST. art. III, §§ 17–18.

269. *Id.* §§ 15–17.

270. See LAMONICA & JONES, *supra* note 187, § 2:2:

Bills are legislative instruments proposing to amend, enact, or repeal law, other than constitutional provisions. . . . *Joint Resolutions* propose amendments to the state constitution. . . . Resolutions may be either *simple* (to be adopted by one house) or *concurrent* (to be adopted by both houses). Resolutions, except suspensive and certain other concurrent resolutions, do not have the force and effect of law.

271. LA. CONST. art. III, § 15.

272. This is also the same language utilized by the Disaster Emergency Act. See LA. REV. STAT. § 29:724(B)(2) (2023).

273. See LAMONICA & JONES, *supra* note 187, § 3:1. Since the petition is not a legislative instrument, it is not a *matter* under Article III, § 2(A)(3) of the Louisiana Constitution and, thus, does not require passage or discussion in an

by a majority of the House of Representatives could have the effect of law but whether the act of terminating a governor's emergency proclamation can occur *only* by the passage of a bill or resolution and *not* by petition.²⁷⁴ The crux of this analysis concerns the nature of the petition itself and the constitutional constraints of the legislative process.

1. The Nature of the Petition, Bicameralism, & Presentment

A *petition* in the common phrasing is “a written address, embodying an application or prayer from the person or persons preferring it, to the power, body, or person to whom it is presented, for the exercise of his authority”²⁷⁵ This definition seems to imply discretion on the part of the person to whom it is presented, who, in this case, is the Governor of Louisiana. However, interpretations of a single word based on usage cannot usurp interpretations utilizing the language of the statute as a whole.²⁷⁶ In Louisiana Revised Statutes § 29:768(B), the *petition* is given a specific function: it “terminate[s] a state of public health emergency.”²⁷⁷ Thus, its purpose is specific: ending a state of public health emergency that the governor previously declared.²⁷⁸ However, a problem arises when this phrase is read alongside the next phrase: “Thereupon, the governor shall issue an executive order or proclamation ending the state of public health or emergency.”²⁷⁹ This command contained within the statute would present the petition as more than an instrument that simply requests action and as one that both has effects able to terminate a state of

open public meeting. *See* La. Fed'n of Tchrs. v. State, 118 So. 3d 1033, 1057 (La. 2013).

274. In the litigation highlighting this issue, Governor Edwards contended that because the petition was not a legislative instrument susceptible to a vote by both houses, it could not possibly change or enact law because it was not law itself. *Petition for Declaratory Judgment and Injunctive Relief*, *supra* note 21, at 14–15.

275. *Petition*, BLACK'S LAW DICTIONARY (5th ed. 1979).

276. *Backhaus v. Transit Cas. Co.*, 549 So. 2d 283, 289 (La. 1989).

277. LA. REV. STAT. § 29:768(B) (2023).

278. One might assert that the “state of public health emergency” is a legal quality, which comes into existence through an executive proclamation but which is not sustained by it. Thus, the legislature would have granted itself the ability to end such a legal quality via a one-house petition. This assertion is less than practical but holds within it an important nuanced question on the essence of a “state of emergency.”

279. LA. REV. STAT. § 29:768(B) (2023).

emergency on its own volition and that commands the executive to act—without becoming or abrogating the law itself.²⁸⁰

The conclusion that the purpose of the petition is not to repeal or modify law impacts whether the instrument complies with the constitutional requirements for bicameralism and presentment. The petition purports to be a rescinding mechanism for oversight of the powers delegated to the executive branch by the legislature under the LHEPA.²⁸¹ Such an instrument would not need to have the force and effect of law and would not be considered a *bill* for the purposes of legislative procedure.²⁸² If the petition process were to be declared constitutionally permissible, the result of an effective petition would be the cancellation of an executive regulation, which came into existence only by means of legislatively delegated power, not the repeal of Louisiana Revised Statutes § 29:768(B) itself. Assuming the validity of this proposition *arguendo*, the one-house petition to terminate a state of emergency would not be in derogation of the bicameralism requirement found in Article III of the Louisiana Constitution.²⁸³

The requirements for legislative instruments having the effect of law found in Louisiana Constitution Article III, §§ 15 and 17 simply do not

280. During the litigation giving rise to the question at hand, attorneys for the Governor's Office contended that the "shall" language in the Louisiana Revised Statutes § 29:768(B) is simply a recognition of the governor's authority and cited *Murrill v. Edwards* for this proposition. See Petition for Declaratory Judgment and Injunctive Relief, *supra* note 21, at 19. In *Murrill*, the Louisiana First Circuit Court of Appeal held that Article IV, §5(H) of the Louisiana Constitution, which provides that the governor "shall" appoint executive department heads, was not a mandate to appoint but as a recognition of the governor's authority to appoint. *Murrill v. Edwards*, 613 So. 2d 185, 190 (La. Ct. App. 1st Cir. 1992). However, this section is located in Article IV of the Louisiana Constitution, which focuses on the executive branch. The LHEPA is a presumed delegation of power from the legislative to the executive branch and, therefore, should not be treated in the same way.

281. This is simply what the petition *purports* to have the ability to do. For the limited purposes of this subpart, the premises that the delegation contained within the LHEPA is proper, that a statute may authorize one house to have this power, and that the governor's order in this circumstance exercised legislatively delegated powers rather than inherent executive power are assumed *arguendo*.

282. The Louisiana Constitution of 1974 only requires *lawmaking* instruments to comply with the procedural requirements of bicameralism and presentment. LA. CONST. art. III, §§ 15–17.

283. *Id.* § 15.

apply to those instruments that do not seek to possess the force of law.²⁸⁴ These instruments possess the same status as the governor's executive orders, which are also not lawmaking instruments but nevertheless give rise to legal effects.²⁸⁵ In light of the purported nature and effect of the petition process, such an instrument does not seem to be in derogation of the constitutional requirements of bicameralism and presentment. Lastly, it could be argued that the Emergency Clause of the state constitution was intended to allow the legislature to subvert bicameralism and presentment requirements in crises.²⁸⁶ Thus, the petition provision does not violate any of the legislative procedural process limitations found within the Louisiana's constitution.

Now that the constitutional requisites surrounding the dual concepts of power and process have been answered, a conclusion to the issue of this analysis has emerged. The Louisiana state legislature holds the constitutional *power* to rescind or terminate a state of public health emergency that the Governor of Louisiana proclaimed under the LHEPA, and the *process* by which it has chosen to do so—a one-house legislative petition—is constitutionally permissible. This important check on the power of Louisiana's executive stands firm.

IV. PROPOSED REVISIONS

Though Louisiana Revised Statutes § 29:768(B) is constitutional, the statute could be modified to become more in line with principles of good governance. During the 2020 Second Extraordinary Legislative Session, the legislature proposed several solutions in attempts to strike a balance between the desire for legislative input but also the need for a centralized command of state government during declared emergencies.²⁸⁷ The

284. Scholarly writings like those of the Louisiana State Law Institute only refer to items having the effect of law as going through this process. See LOUISIANA LAW INSTITUTE, 2 PROJET, *supra* note 180, at 147.

285. Duncan, *supra* note 217, at 333–37.

286. See discussion *supra* note 81. Indeed, the initial constitutional amendment that serves as the predecessor to the Emergency Clause allowed the legislature to deviate from constitutional requirements “except to the extent that in the judgement of the Legislature so to do would be impracticable or would admit of undue delay.” See Act No. 505, 1962 La. Acts; See also LEE HARGRAVE, THE LOUISIANA STATE CONSTITUTION: A REFERENCE GUIDE 193 (1991).

287. The changes proposed ranged from allowing either house of the legislature to terminate a state of emergency but require the governor receive approval from a majority within both houses to renew a state of emergency, to setting a time limitation and legislatively approved renewal requirement for proclamations that affected at least 50% of the population of the state. H.B. 60B,

following modifications would serve to foster inter-branch cooperation and would serve to provide a reasonable check on the power of the executive that better conforms to the function of the legislative branch.

The petition mechanism should be modified to require the approval of both houses to terminate a state of emergency. This would remedy the perceived bicameral defect within the petition and reflect a more representative choice. However, the termination mechanism should be styled as requiring the approval of a majority of both houses, with the houses not required to act in conjunction. The rationale for this change is that phrases *petition* and *affirmative vote* respectively connote that a single document be used and that the formalities of legislative session or committee meeting are observed. Perhaps the mechanism should receive a different name than “petition,” which as discussed earlier in this Comment typically connotes a request.²⁸⁸ In preparing for unforeseeable calamities, the legislature would be prudent to have a secure electronic ballot system accessible to legislators. Importantly, the options granted to the legislature should be either the ability to terminate *or* modify a state of emergency. At times, modification of a state of emergency might be preferable, such as circumstances where a current state of emergency is required for federal assistance and only a curtailment of authority is sought.

Next, the language of the provision should be changed to clarify that the state of emergency *ends* once a majority of legislators in both houses have voted for its termination. The requirement that the petition be transmitted to an individual for termination to occur serves no purpose other than notification. Notification should be rendered to the governor that this vote is to occur and the results of the vote immediately thereafter. The provision’s language should prohibit the governor from attempting to interfere or influence the process outlined in the section. A prohibition of presence during voting, or, in the extreme, a prohibition from contacting members the day of the vote, may allow for the legislature to avoid

47th Extra. Sess. (La. 2020); H.B. 17B, 29th Leg., 47th Extra. Sess. (La. 2020). One bill proposed a change that would create the ominously titled “Council of State”—which would be comprised of the Governor, Attorney General, Treasurer, Speaker of the House of Representatives, and President of the Senate—and exercise complete control over the status of a state of emergency. H.B. 3B, 29th Leg., 47th Extra. Sess. (La. 2020). Electronic methods for tabulation were also proposed. H.B. 60B, 29th Leg., 47th Extra. Sess. (La. 2020).

288. See discussion *supra* Part III.E.1.

coercion by the executive branch.²⁸⁹ Lastly, it should be clarified that although the votes of the members of the legislature shall constitute a public record, the state-of-emergency termination process should be exempted from the open meetings requirement set forth in Article III, § 15(A) of the Louisiana Constitution of 1974 because emergency situations may dictate that legislators submit their ballots from electronic devices around the state.²⁹⁰ These revisions may provide some shelter from a future litigious storm.²⁹¹

CONCLUSION

If one stays too long in South Louisiana, they might hear the *Hurricane Prayer* prayed at a Catholic Mass each Sunday during hurricane season.²⁹² One phrase in this plea should bring the reader pause: “We live in the shadow of a danger over which we have no control; the Gulf, like a provoked and angry giant, can awake from its seeming lethargy, [and] overstep its conventional boundaries”²⁹³ Though the Gulf of Mexico might be the arbiter of Louisiana’s ever-frequent hurricanes, a force far more consequential lies within the states of emergency that hurricanes annually bring—constitutional power. Much like hurricanes, this constitutional power has the ability to overstep its conventional boundaries as well. The COVID-19 pandemic has exposed unique, unprecedented issues of law that strike at the heart of the proper separation of powers between the branches of Louisiana’s state government.

The Louisiana Constitution of 1974 permits the Louisiana state legislature to utilize a one-house legislative petition to terminate a state of emergency that the Governor of Louisiana proclaims pursuant to the LHEPA. The overarching analysis undertaken above assessed whether the

289. When the executive wields emergency powers, his or her ability to obstruct or become coercive is maximized. Therefore, limitations on emergency powers or interference during the voting process are recommended.

290. To enact this change, a constitutional amendment may be required. *See* *Hainkel v. Henry*, 313 So. 2d 577, 580 (La. 1975) (“[T]he chief constitutional requirement is that action by either house must be taken in an open, public meeting during any such session of the legislature”); LA. CONST. art. III, § 5(A).

291. These same revisions could be made to the Disaster Act’s petition mechanism. *See* LA. REV. STAT. § 29:724(B) (2023).

292. *See Prayers for Protection During Hurricane Season*, CATH. DIOCESE OF ST. PETERSBURG, <https://www.dosp.org/our-faith/prayers/prayers-for-protection-during-hurricane-season/> [<https://perma.cc/A5VZ-ST6D>] (last visited Feb. 5, 2023).

293. *Id.*

legislative branch has the power to take such an action, and, if so, whether Louisiana's constitution permitted the process by which it chooses to terminate the state of emergency. This Comment has presented a review of the statute, which results in an answer in the affirmative to both of those questions. The discussion in Part III found that the legislature, as the prime seat of the state police power, has the authority to rescind statutorily delegated emergency powers, notwithstanding any inherent powers the governor may have.²⁹⁴ Further, the exercise of this authority occurred via a constitutionally permissible process—namely, the petition provision.²⁹⁵ Part IV provided suggestions for legislative revision, which would allow the statute to be less difficult to adhere to during an emergency and further constitutional principles.

The final conclusion of this Comment's analysis supports and furthers specific public policy goals. The purpose of emergency laws in general is to be able to undertake quick action to protect the public; however, the executive branch is bound by the emergency laws granting power unto it and should never have a primary role in shaping the emergency powers it should have.²⁹⁶ The assumption of the unilateral authority to dictate when a state of emergency shall end by the executive is tantamount to the ability to define which delegated faculties the executive has and when he or she might use them.²⁹⁷ Allowing for greater legislative input during emergency situations brings forth the opinions of persons from all parts of the state with more collective and comprehensive views of the situation in their respective districts. Lastly, to disallow a legislative check like the petition mechanism during emergencies would be the antithesis to the system of checks and balances that preserves the balance of power between the branches. The separation-of-powers provisions of the Louisiana Constitution of 1974 are most important in times of disorder and imbalance—the exact qualities of natural catastrophes and pandemics. When the state of Louisiana is weathering a storm or sheltering in place for long periods of time, the first effort should be made to forge ahead and balance the scales while also protecting the safety of the public.

294. See discussion *supra* Parts III.A–D.

295. See discussion *supra* Part III.E.

296. Crusto, *supra* note 59, at 514.

297. Writing on the nature of the powers of the executive branch, Alexander Hamilton stated that the “EXECUTIVE POWER” was broader than the power to simply execute the laws the legislature passed. Reading this, Thomas Jefferson wrote to James Madison: “For [G]od’s sake, my dear Sir, take up your pen . . . and cut him to pieces . . .” 6 THE WRITINGS OF JAMES MADISON 138 n.1 (Gaillard Hunt ed. 1906).

When disaster strikes, it is accompanied by crisis and opportunity. When the public braces for catastrophe and calamity, it often looks to the chief executive to steer the state through uncertain and difficult times; the legislature recognizes this and supplies additional powers to the executive branch to meet this need. However, a check on this power must always be preserved—at any and all cost.²⁹⁸ Though the waters of the Mississippi River are not those of the Tiber, Louisiana should look to the lesson taught by ancient Rome. For nearly 400 years before the fall of the Republic, the people granted a leader emergency powers to govern in times of crisis.²⁹⁹ The most famous of these dictators, Julius Caesar, would make a declaration unheard of at the time—he unconstitutionally proclaimed that the decision regarding when emergency powers would be relinquished would be left to the executive alone.³⁰⁰ This was one of the final acts that transformed the Republic into an Empire—an act that exchanged democracy for rule by the executive alone.³⁰¹ Louisiana has precedent for an autocratic leader consolidating the power of the branches of government into one man.³⁰² History reminds us of Governor Huey Long’s great roar: “I am the constitution around here now”³⁰³ That prospect is not ancient—it was uttered by a governor in modern times.³⁰⁴ When the next storm rolls in from the Gulf, the citizens of the Bayou State have a duty to ensure that the rule of law does not simply wash away yet again.

298. U.S. Supreme Court Justice Charles Evans Hughes dashed the attempts of those attempting to justify violations of the separation of powers doctrine during emergencies:

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency.

Home Bldg. and Loan Ass’n. v. Blaisdell, 290 U.S. 398, 425 (1934).

299. See Marianne Elizabeth Hartfield, *The Roman Dictatorship: Its Character and Its Evolution* 20–22 (Nov. 3, 1982) (Ph.D. dissertation, University of California, Berkeley) (on file with author). See also Becky Little, *How Rome Destroyed Its Own Republic*, HIST. (Aug. 1, 2019), <https://www.history.com/news/rome-republic-augustus-dictator> [<https://perma.cc/T94N-QPNB>].

300. Little, *supra* note 299.

301. *Id.*

302. Haas, *supra* note 31, at 133–36.

303. Jerry P. Sanson, “*What He Did and What He Promised to Do...*”: Huey Long and the Horizons of Louisiana Politics, 47 J. LA. HIST. ASS’N 261, 265 (2006).

304. Huey P. Long was Governor of Louisiana from 1928 to 1932. Haas, *supra*, note 31, at 133–35.