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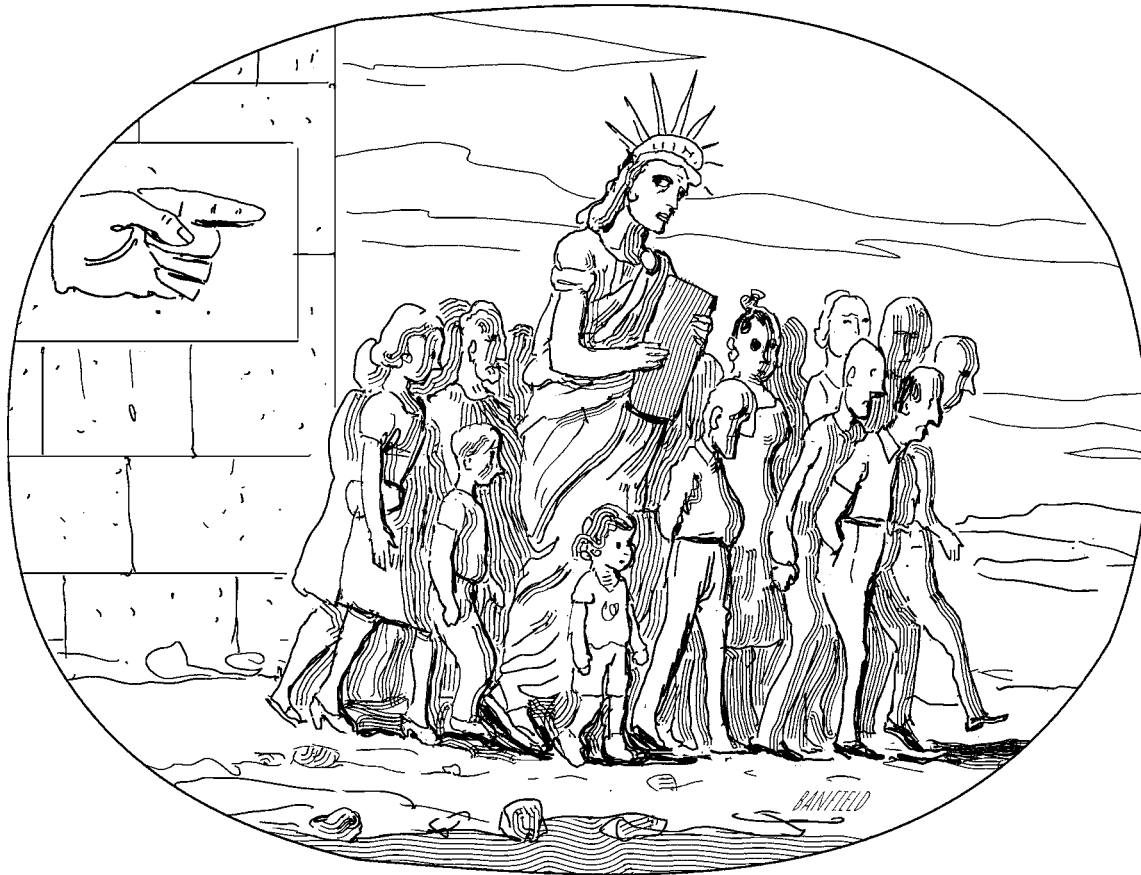
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Book Review by Joseph M. Bessette

COVID AND THE CONSTITUTION

Who Governs?: Emergency Powers in the Time of COVID, edited by Morris Fiorina.
Hoover Institution Press, 314 pages, \$29.95



OF NECESSITY, EMERGENCIES ARISE in human affairs and governments must confront them. Because emergencies, according to Merriam-Webster, are “unforeseen combination[s] of circumstances” that “call for immediate action,” they present a special challenge for republics, which, by their very nature, rule by laws enacted through the (often slow) deliberations of representative institutions. This presents two large problems. First, because laws are general rules that govern society, they may prove insufficient for, or even a hindrance to, confronting the challenges of a true emergency. Second, because law-making is a slow process, legislative institutions may simply be incapable of dealing with the exigencies at hand in a timely fashion. It is no surprise, then, that when emergencies arise the executive power of the state dominates, or simply supersedes, the legislative power; and the rule of law may give way to the personal discretion of the executive. As John Locke famously argued in his *Second Treatise of Government*, “This Power [of the Executive] to act according to discretion, for the publick

good, without the prescription of the Law, and sometimes even against it, is that which is called *Prerogative*.”

By March 2020, the COVID-19 virus, which had originated in Wuhan, China, in late 2019, had begun spreading rapidly in the United States. Authorities quickly recognized that COVID was likely to become a serious health problem and that COVID cases could potentially overwhelm the nation’s hospital system. At the national level, the Trump Administration had already declared a public health emergency on January 31 and restricted travel into the United States from China. Under the American federal system, however, it is the states, and not the national government, that possess a general “police power” to protect the public health and safety. The states, in turn, may delegate such powers to local governments and their officials, even unelected ones.

AS MORRIS FIORINA RECOUNTS IN THE first words of a new collection of essays he’s edited, *Who Governs?: Emergency Powers in the Time of COVID*, “On March 16,

2020, six San Francisco Bay area counties and the City of Berkeley issued shelter-at-home orders, shutting down much of the regional economy and imposing restrictions on personal behavior, arguably including liberties guaranteed by the US Constitution.” Fiorina, the Wendt Family Professor of Political Science at Stanford University, a senior fellow of Stanford’s Hoover Institution, and, in his own words, “a political scientist committed to democratic governance,” reacted with “surprise and a bit of shock.” These drastic orders, which amounted to “essentially dictatorial powers,” had been issued not by the elected governor of the state, by the state legislature, or even by county boards of supervisors, but by appointed local health officials. Nonetheless, just three days later, Governor Gavin Newsom issued his own stay-at-home orders, and “[b]y the end of March,” writes another contributor, “thirty-two states had stay-at-home orders in effect.”

Who Governs? includes, in addition to Fiorina’s preface and conclusion, eight contributions from a total of ten authors with Fiorina



himself coauthoring two of these eight. With the exception of two Ph.D. students and one “advanced law student” (now graduated), all the other contributors are political scientists working in academia. The most valuable parts of *Who Governs?* are its systematic compilation and clear presentation of key information on the use of emergency powers by state and local officials to attempt to combat the spread of COVID-19 and its documentation of the pushback by some legislatures, courts, and sheriffs to the severe restrictions on human freedom promulgated by governors and, often, by local authorities. With the exception of New York University law professor John Ferejohn’s opening chapter on “Emergency Powers” and Fiorina’s conclusion on “COVID Restrictions and Democratic Governance,” it is largely a descriptive volume, and it excels at that task.

AT THE END OF HIS PREFACE, FIORINA clearly delineates the kinds of issues that are off limits. First, the authors “make no attempt to evaluate the efficacy of the health restrictions imposed by state executive orders.” This means, for example, that no author here asks whether the severe restrictions imposed in Governor Newsom’s California were more effective at protecting public health than the much less severe restrictions imposed in Governor Ron DeSantis’s Florida. It is well documented elsewhere, for example, that if you adjust COVID death rates for age, California and Florida look comparable. (Indeed, outside of footnotes and the names of court cases, DeSantis is mentioned only twice. The first time, he is lumped together with President Trump and Texas Governor Greg Abbott for “adopt[ing] increasingly dismissive attitudes toward COVID as the pandemic wore on, often trivializing the severity of the illness or the efficacy of proposed public health measures.” The second time, he merits a paragraph describing his efforts to order the reopening of schools and to prohibit local governments and private businesses from requiring proof of vaccination “as a condition of service.”)

Second, and relatedly, the authors make no attempt to compare “estimates of the health benefits of emergency orders” with “the estimated economic, educational, mental health, and other costs they imposed.” As Fiorina pointedly asks, “Were [the restrictions imposed for dealing with COVID] worth it when situated in the larger socioeconomic context? This volume does not attempt to answer such questions.”

As the first brief mention of DeSantis in the book shows, despite Fiorina’s claim that *Who Governs?* takes no position on the effec-

tiveness of the various public health measures, many of the contributors make little effort to disguise their own views that the more restrictive the shutdowns, and the sooner they were imposed, the better. Consider this summary by Didi Kuo of Stanford’s Freeman Spogli Institute for International Studies of California’s anti-COVID efforts:

California was one of the first states to formulate a pandemic response.... California’s governor, Gavin Newsom, declared a state of emergency on March 2, 2020, and issued statewide stay-at-home orders on March 19, only days after the Bay Area counties had issued theirs. Over the course of the first eighteen months of the pandemic, California at times did relatively well in its management of the pandemic. California—and the Bay Area in particular—was praised as a success story given its combination of evidence-based policy formulation and trust in science.

Absent from this very positive account is any evidence that California’s quite aggressive approach more effectively slowed the spread of COVID than did less aggressive policies elsewhere, any assessment of the collateral health-care costs of the shutdowns (see below), or any analysis of the shutdowns’ impact on the California economy and on basic civil liberties.

IT IS UNFORTUNATE THAT THE VERY thing that the reader (and the larger public) most wants to know—did the severe restrictions imposed through the exercise of emergency powers by governors from 2020 through 2022 actually promote the broader public good?—was ruled out of bounds from the beginning. And here many *CRB* readers may be struck by an odd omission: the failure of a book issued by the Hoover Institution even to mention the contributions of the two senior fellows at Hoover who perhaps did more than anyone else in the country to advance the debate about the value of COVID restrictions, medical doctors Scott Atlas and Jay Bhattacharya.

Dr. Atlas, a prominent public health expert, served as a special advisor to President Trump on health policy and as a member of the White House Coronavirus Task Force from July through December of 2020. He was specifically brought into the White House to broaden the perspective of decision-makers beyond the narrow focus on slowing the spread of the disease to considering the broader public health effects of the shutdowns and related policies.

Dr. Bhattacharya, who also holds a Ph.D. in economics, was one of the three authors and original signers of the Great Barrington Declaration, issued in the Massachusetts town of the same name on October 4, 2020, by Bhattacharya, Dr. Martin Kulldorff, professor of medicine at Harvard University, and Dr. Sunetra Gupta, a professor at Oxford University. The Declaration decried the “[c]urrent lockdown policies...[for] producing devastating effects on short and long-term public health [by]...lower childhood vaccination rates, worsening cardiovascular disease outcomes, [causing] fewer cancer screenings[,] and [contributing to] deteriorating mental health.” These would lead to “greater excess mortality in years to come, with the working class and younger members of society carrying the heaviest burden.” “Keeping students out of school,” the Declaration continued, “is a grave injustice.” The authors called on policymakers to focus their efforts on “better protecting those who are at highest risk”—a policy they called “Focused Protection.” For the young and healthy, the virus presented little risk. Consequently, schools, restaurants, and businesses should be reopened and “[a]rts, music, sport and other cultural activities should resume.”

JUST FOUR DAYS AFTER THE DECLARATION was released, Dr. Francis Collins, director of the National Institutes of Health (NIH), sent an email to Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases and the chief medical advisor to the president, calling for “a quick and devastating published takedown” of the Declaration. No public dissent would be tolerated from Collins’s and Fauci’s single-minded commitment to shutdowns throughout 2020. No larger public debate was to be permitted: no open discussion of the possible deleterious health effects of the shutdowns themselves, no balancing of the putative benefits of shutdowns in slowing the spread of the disease against the impacts on the economy and on civil liberties. And, of course, there was to be absolutely no acknowledgment of the benefits of natural immunity (nowhere mentioned in *Who Governs?*) in moving the population toward the kind of “herd immunity” that would eventually render the COVID virus a manageable public health problem, like the flu virus.

Fauci, who headed the agency whose very purpose was to combat infectious disease, can, perhaps, be excused for his single-minded devotion to stopping the spread of COVID. Yet when he became the face of the administration on COVID policy, it was surely incumbent on him to broaden his focus to include the po-



tentially damaging health effects of the very anti-COVID policies he pushed. For Collins, however, who directed the NIH with its \$40 billion research budget, there is no excuse at all. One wonders: Did he completely reject the charge by the authors of the Great Barrington Declaration that the lockdowns had major collateral effects on public health? Did the lockdowns not “lower childhood vaccination rates,” “worsen cardiovascular disease outcomes,” lead to “fewer cancer screenings,” and contribute to “deteriorating mental health”? If that’s your position, one might say to him, then make your case. Present your evidence. Encourage a debate among experts of various types. And then present the best evidence and arguments on both sides to the policymakers. But that is not what Collins did, alas. Ultimately, however, it is President Trump and Vice President Pence, who led the White House Coronavirus Task Force, who bear most of the blame for putting Fauci front and center, and thereby failing to assess the larger public health effects and broader societal consequences of the COVID suppression policies.

COLLINS’S CALL FOR “A QUICK AND devastating published takedown” of the Great Barrington Declaration was nothing less than a gross violation of the norms of deliberative decision-making essen-

tial to the proper functioning of representative democracy. This was, after all, a full six months after the crisis had begun. The initial storm had been weathered. The nation’s healthcare system was no longer in danger of crashing. Seroprevalence studies had already demonstrated that the virus was much more widespread in the population than previously thought, and therefore that death rates from COVID were much lower than originally estimated. By any reasonable definition, the crisis had passed.

In his insightful conclusion, Fiorina writes that “[g]iven the plain meaning of ‘emergency,’ a primary role for the executive seems appropriate, but how long that primacy should last raises more questions.” By “plain meaning” Fiorina presumably means something like Merriam-Webster’s “combination of circumstances” that “calls for immediate action.” Following this commonly accepted understanding, when a situation does not demand immediate action it is not a crisis as such but at most a problem, however serious. A problem may become a crisis, as, arguably, the spread of COVID did in the U.S. between January and March of 2020. Or a crisis may become a problem, as COVID did by the summer and fall of 2020. But unless immediate action is required to protect the public from significant harm, the executive—whether a president or

governor—has no justification for overriding the constitutional division of authority that in the national government and every American state vests lawmaking in representative assemblies. And this holds even in states where the legislature was complicit in the executive’s arrogation of power; for representative legislatures—created by and bound to constitutions enacted by the American people—may not simply transfer to executives the fundamental lawmaking authority vested directly in them by these same constitutions.

The U.S. Constitution “guarantee[s]...to every State in this Union a Republican Form of Government.” Yet in state after state in 2020 and 2021 (and some into 2022), governors issued dozens, and even hundreds, of executive orders that confined citizens to their homes; closed businesses, public parks, playgrounds, and beaches; shut down sports and cultural events; required vaccinations in order to access certain public accommodations and events; mandated the wearing of masks in public; and shut down places of worship, or drastically limited how many could attend.

WHO GOVERNS? DOCUMENTS IN great detail this rule by executives that characterized COVID decision-making for up to two years, or longer, in

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many states. Governor Gretchen Whitmer of Michigan issued “well over one hundred executive orders” in just the first four months of the pandemic. Governor Andrew Cuomo of New York “issu[ed] some four hundred executive orders.” California’s Governor Newsom was equally assertive, proclaiming a “COVID-19 State of Emergency” every 60 days beginning in March 2020 and not ending until February 2023: three full years of one man exercising, what Fiorina rightly calls on the first page of his preface, “essentially dictatorial powers” that affected nearly all aspects of the lives of the citizens of California. Didi Kuo reports that Newsom often deferred “to unelected public health officials to formulate a COVID response,” thereby pushing the key decisions even farther away from representative decision-making and democratic accountability.

Although in the penultimate chapter University of California, Merced’s Cameron DeHart and Fiorina carefully detail the push-back by state legislatures to executive excesses in the fight against COVID, what is surprisingly missing in this volume is any evaluation of the respective institutional qualities of state legislatures and governors’ offices and how those qualities bear on the capacities of each branch to address a crisis/problem like the COVID pandemic. You might call this a classic political science question. Reviewing the new governing institutions crafted at Philadelphia in the summer of 1787, *The Federalist* defended “a single executive and a numerous legislature.” A single executive would bring the kind of “[d]ecision, activity, secrecy, and dispatch” necessary to protect the nation from its enemies and to effectively administer the laws. A numerous legislature, on the other hand, would be “best adapted to

deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests.”

BY THE SUMMER AND FALL OF 2020, THE need for immediate action to address the COVID pandemic in the United States had passed. This is not to deny that COVID was still a serious public health problem, but legislatures are designed to address problems. They may do so more or less well, but that they don’t always pass the best laws is no justification for ceding their lawmaking authority to executives or public health officials. Through the diversity of their membership and the many access points they provide citizens and groups, legislatures would have been ideally suited to hear from all sides—including the relevant experts—to assess the likely benefits and costs of various policies and make the kinds of trade-offs that were essential to formulating wise policy to address the COVID problem. And while doing so, they would likely have enhanced public confidence in the policies themselves. At their best, legislators deliberate on behalf of their constituents and through their collective action produce policies consistent with the deliberative will of the people themselves.

In his concluding chapter, Fiorina presents a fascinating quotation from the chief health officer of San Mateo County, immediately south of San Francisco on the peninsula that borders the Pacific Ocean on the west and San Francisco Bay on the east. Refusing to follow the lead of his neighboring counties in imposing a new “stay-at-home order” in late 2020, he explained to county residents:

I think these greater restrictions are likely to drive more activity indoors, a

much riskier endeavor. While I don’t have scientific evidence to support this, I also believe these greater restrictions will result in more job loss, more hunger, more despair and desperation..., and more death from causes other than COVID. And I wonder, are these premature deaths any less worrisome than COVID deaths?... I don’t see us (governmental public health) looking at data other than case rates and positivity rates and hospital rates in order to make balanced decisions. When you only look at one thing, you only see one thing.

There is much wisdom in these words of a single dissenting public health official in perhaps the most politically liberal region in the country. Certainly, Anthony Fauci saw only one thing. Francis Collins saw only one thing. Most state and local public health officials saw only one thing. And too many governors saw only one thing. Legislatures, by contrast, typically see many things—sometimes so many things that building a majority proves difficult, if not impossible. How different the politics—and very likely the policies—of COVID would have been had legislatures taken the lead in the summer of 2020. When a crisis demands immediate action, executives of necessity predominate. But, if we are true to the principles of American constitutional government, then when a crisis becomes (just) a problem, no matter how serious, legislatures by right have their day.

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