

COVID-19 POLICY EXECUTIVE (IN)ACTION IN FLORIDA AND MICHIGAN

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I. INTRODUCTION

In recent years, policy scholars have been concerned with the significance of inaction in policy. Traditionally, public policy is the main tool by which governments maintain civic order, make provision for the delivery of public services, and respond to real-world problems. Given the myriad of social, economic, domestic, and international issues that might possibly need to be addressed at any given time, the political agenda is often overwhelmed, leaving an opportunity for inaction (or non-decisions) to take precedence in some issue areas.¹ Issue definition and politics will matter greatly in the development of public policy, and some political actors, particularly in federal systems, may use inaction (non-decisions) to avoid committing necessary resources, or to appease some ideological base.² This research considers the consequences of political inaction that can occur in the policymaking process and applies this concept to how executive actors in Florida and Michigan used their authority to address the COVID-19 pandemic in 2020.

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1. See Peter Bachrach & Morton S. Baratz, *Decisions and Nondecisions: An Analytical Framework*, 57 AM. POL. SCI. REV. 632 (1963); see also FRANK R. BAUMGARTNER & BRYAN D. JONES, *THE POLITICS OF INFORMATION: PROBLEM DEFINITION AND THE COURSE OF PUBLIC POLICY IN AMERICA* (2015).

2. Allan McConnell & Paul 't Hart, *Inaction and Public Policy: Understanding Why Policymakers 'Do Nothing'*, 52 POL'Y SCIS. 645 (2019).

II. INACTION AS PUBLIC POLICY

Public policy scholarship has always focused on the purposeful intervention by government in social processes³ and has been variously described as whatever governments choose to do or not do.⁴ The COVID–19 pandemic provides an important lens to assess government activity in the face of such changing and ambiguous circumstances. The complexity and uncertainty brought on by crises⁵ test government’s ability to use public policy effectively because the circumstances are rarely anticipated⁶ and because of the reality that government decisions are impacted by the action or inaction of other governments.⁷ Despite these challenges, governments are expected to minimize the impact of a crisis, increase their capacity to respond, and coordinate efforts to manage the response through effective public policy.⁸

The connective tissue that runs through studies of public policy generally, and government responses to crises specifically, is the concept of action. The purposeful choice to do nothing in the face of clear need is easily understood as negligent, irresponsible, and evidence of ineptness that economists have defined as the cost of inaction.⁹ Some political systems, such as those featuring separation of powers and federalism, impose or facilitate structural inaction by increasing the opportunities for successful veto-playing.¹⁰ These barriers to action can be overcome through institutional innovation that facilitates formal coordination

3. See, e.g., PETER DELEON, *ADVICE AND CONSENT: THE DEVELOPMENT OF THE POLICY SCIENCES* (1998); Rik Peeters, *Responsibilisation on Government’s Terms: New Welfare and the Governance of Responsibility and Solidarity*, 12 *SOC. POL’Y & SOC’Y* 583 (2013).

4. THOMAS R. DYE, *UNDERSTANDING PUBLIC POLICY* (12th ed. 2012).

5. Nathan Bennett & G. James Lemoine, *What VUCA Really Means for You*, *HARV. BUS. REV.*, Jan.–Feb. 2014, at 27; BOB JOHANSEN, *GET THERE EARLY: SENSING THE FUTURE TO COMPETE IN THE PRESENT* (2007).

6. Peter Ho, *Governance at the Leading Edge: Black Swans, Wild Cards, and Wicked Problems*, *CIV. SERV. COLL.* (Apr. 1, 2008), <https://www.csc.gov.sg/articles/governance-at-the-leading-edge-black-swans-wild-cards-and-wicked-problems> [http://web.archive.org/web/20210506041422/https://www.csc.gov.sg/articles/governance-at-the-leading-edge-black-swans-wild-cards-and-wicked-problems]; JOHN L. PETERSEN, *OUT OF THE BLUE: HOW TO ANTICIPATE BIG FUTURE SURPRISES* (1999).

7. Christopher M. Weible et al., *COVID–19 and the Policy Sciences: Initial Reactions and Perspectives*, 53 *POL’Y SCIS.* 225 (2020).

8. See JOHANSEN, *supra* note 5.

9. SUDHIR ANAND ET AL., *THE COST OF INACTION: CASE STUDIES FROM RWANDA AND ANGOLA* (2012).

10. GEORGE TSEBELIS, *VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK* (2002).

between levels of governments,¹¹ but federalism in the United States is dominated by state government actors more focused on securing political influence and protecting state autonomy¹² than addressing pressing policy concerns. A key feature of contemporary policy challenges is the persistent problem of working across policy boundaries, which dramatically escalates the risk of inaction by increasing the number of actors involved.¹³ Structural barriers to government activity acknowledge an impasse between those that seek to take action versus those that prefer to do nothing.

The choice by government actors to engage in purposeful inaction may be driven by ideological commitments. A key foundation of contemporary right-wing or conservative ideological thinking is remaking traditional state-civil society relations in order to shift the burden and expectation of action from government to citizens themselves.¹⁴ The justification behind inaction is to maintain appropriate boundaries between the private sphere of individual liberty and those public policies that appropriately serve the public interest.¹⁵ The purposeful decision to ignore emerging risks is legitimized by an ideological mindset that arises from, and can only be resolved through, the natural operation of the market.¹⁶ Ideological inaction is characterized by a denial of the moral, social, or political imperative for the government to act, and instead relies on markets, the community sector, or citizens' use of self-organization strategies to address pressing public problems.¹⁷ Ideological inaction recognizes that a

11. Davia C. Downey & William M. Myers, *Federalism, Intergovernmental Relationships, and Emergency Response: A Comparison of Australia and the United States*, 50 AM. REV. PUB. ADMIN. 526 (2020).

12. Nathalie Behnke & Sean Mueller, *The Purpose of Intergovernmental Councils: A Framework for Analysis and Comparison*, 27 REG'L & FED. STUD. 507 (2017); Ann O'M. Bowman, *Intergovernmental Councils in the United States*, 27 REG'L & FED. STUD. 623 (2017).

13. Chris Ansell et al., *Managing Transboundary Crises: Identifying the Building Blocks of an Effective Response System*, 18 J. CONTINGENCIES & CRISIS MGMT. 195 (2010); CROSSING BOUNDARIES IN PUBLIC MANAGEMENT AND POLICY (Janine O'Flynn et al. eds., 2014).

14. Michael Moran, *Review article: Understanding the Regulatory State*, 32 BRIT. J. POL. SCI. 391 (2002); Stephen Bell & Andrew Hindmoor, *The Structural Power of Business and the Power of Ideas: The Strange Case of the Australian Mining Tax*, 19 NEW POL. ECON. 470 (2013); REMAKING GOVERNANCE: PEOPLES, POLITICS AND THE PUBLIC SPHERE (Janet Newman ed., 2005); SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* (1996); Peeters, *supra* note 3.

15. UDO PESCH, *THE PREDICAMENTS OF PUBLICNESS: AN INQUIRY INTO THE CONCEPTUAL AMBIGUITY OF PUBLIC ADMINISTRATION* (2005); Peeters, *supra* note 3.

16. McConnell & 't Hart, *supra* note 2, at 655.

17. *Id.* at 650

government's decision to do nothing is purposeful and politically desirable.

III. EXECUTIVE UNDERREACH

What can be done when the executive authority deliberately chooses not to act? The United States is a hospitable context for executive inaction or underreach. We define underreach, more formally, as an executive's failure to address a significant public problem that it is legally and functionally equipped to address.¹⁸ Both administrative and constitutional law scholars have considered the wide array of circumstances under which executive and agency authorities can validly decline to enforce a rule or statute.¹⁹ The ability of executive authorities to evade taking action has been abetted through judicial interpretation of constitutional texts. These opinions generally hold that rights cannot be violated unless the government has acted and has no affirmative obligation to protect rights,²⁰ as well as long standing rules that executive nonenforcement decisions are presumptively unreviewable.²¹ There is a voluminous record that demonstrates courts are not friendly venues to spur recalcitrant executives into action.

Assessing executive underreach requires further elaboration. Executive authorities must be afforded the ability to experiment with different policies; the strength of federal systems is that state governments are able to explore a range of responses to common problems.²² Yet underreach assumes the executive has the legal authority and the state capacity to address a problem but refuses to pursue actions to do so. In the context of the COVID-19 pandemic, the range of policy responses available to state executive authorities included stay-at-home orders, curfews, limitations on large gatherings, mask-wearing requirements, and

18. David E. Pozen & Kim L. Scheppelle, *Executive Underreach, in Pandemics and Otherwise*, 114 AM. J. INT'L L. 608, 609 (2020).

19. Dawn E. Johnsen, *Presidential Non-enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7 (2000); Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337 (2013); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653 (1985).

20. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (describing the U.S. Constitution as a "charter of negative rather than positive liberties").

21. *Heckler v. Chaney*, 470 U.S. 821 (1985).

22. The phrase "laboratories of democracy" comes from Justice Brandeis' dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

testing and tracing programs.²³ Globally, the executive authorities that embraced these aforementioned policy responses have overseen the fewest numbers of cases and deaths and have been lauded for their leadership.²⁴

As of June 21, 2017, executive (gubernatorial) authority in forty-two states explicitly permits the governor to change statutes or regulations during an emergency.²⁵ Governors, in thirty-five states, are explicitly permitted to suspend or amend both statutes and regulations that interfere with an efficient, effective response to an emergency.²⁶ In only eight states²⁷ was no explicit authority given to the governor to change statutes or regulations during a declared emergency. This authority has been used in response to natural disasters, infectious disease emergencies, and the opioid epidemic because, crucially, the powers identified are broad and do not define what constitutes a legal barrier that may burden the state's emergency response.²⁸

Governors across the American states were empowered to meet the COVID-19 threat with broad authority that was in place well before the pandemic began. Unfortunately, the gubernatorial response across states has been defined by partisanship, where Democratic governors acted early to draw citizen attention to the unfolding health crisis, whereas Republican governors waited until President Trump shifted strategy away from denial toward acknowledgement before acting to protect their citizens.²⁹

23. Thomas Hale et al, *Variation in US States' Responses to COVID-19* (Blavatnik Sch. of Gov't, Working Paper No. 2020/034, 2020), https://www.bsg.ox.ac.uk/sites/default/files/2020-12/BSG-WP-2020-034-v2_0.pdf [http://web.archive.org/web/20210505030119/https://www.bsg.ox.ac.uk/sites/default/files/2020-12/BSG-WP-2020-034-v2_0.pdf].

24. Ian Bremmer, *The Best Global Responses to the COVID-19 Pandemic, 1 Year Later*, TIME (Feb. 23, 2021), <https://time.com/5851633/best-global-responses-covid-19/> [<http://web.archive.org/web/20210506053904/https://time.com/5851633/best-global-responses-covid-19/>].

25. Gregory Sunshine et al., *An Assessment of State Laws Providing Gubernatorial Authority to Remove Legal Barriers to Emergency Response*, 17 HEALTH SEC. 156 (2019), available at <https://www.liebertpub.com/doi/10.1089/hs.2018.0126> [<http://web.archive.org/web/20210506054234/https://www.liebertpub.com/doi/10.1089/hs.2018.0126>].

26. *Id.* at 159.

27. These states include Kentucky, Massachusetts, Nevada, New Mexico, Ohio, Vermont, Virginia, and Wyoming. *Id.*

28. *Id.* at 160.

29. Luke Fowler et al., *Pandemics and Partisanship: Following Old Paths into Uncharted Territory*, 49 AM. POL. RSCH. 3 (2021); Cameron Peters, *A Detailed Timeline of all the Ways Trump Failed to Respond to the Coronavirus*, VOX (June 8, 2020), <https://www.vox.com/2020/6/8/21242003/trump-failed-coronavirus-response> [<http://web.archive.org/web/20210506054848/https://www.vox.com/2020/6/8/21242003/trump-failed-coronavirus-response>].

IV. THE COVID-19 RESPONSE IN FLORIDA AND MICHIGAN

In an effort to assess the state and partisan differences in gubernatorial responses to the COVID-19 pandemic, we examine the policy choices of Democratic Governor Gretchen Whitmer of Michigan and Republican Governor Ron DeSantis of Florida throughout the first year of the crisis. Michigan is a state with a Democratic Governor and a Republican Legislature, while Florida is a state whose Governor and Legislature are both Republican. This analysis facilitates a meaningful comparison of how states responded to COVID-19 with respect to differences in partisan gubernatorial or executive control while holding partisan legislative control constant.

For example, states with Democratic Governors and Republican Legislatures, like Michigan, on average, started stay-at-home orders five days earlier, and these orders lasted seventeen days longer than states with all Republican state governments, like Florida.³⁰ Differences also extend to the number of days, on average, until reopening started—twelve days—and the number of days until a mask mandate started—fifty-nine days—on average.³¹ The death rate per 100,000 population through November 30, 2020 was higher—72.7, in Republican controlled states, compared to 71.2 in states with a Democratic governor and Republican legislature.³²

To assess the differences in responses between Michigan and Florida, we identify key executive (in)actions that had the effect of opening or closing activities in their respective states. These include stay-at-home orders, closing and restricting business operations, closing and opening K-12 public schools, mandated quarantines for out-of-state travelers, and face mask requirements.³³

Florida announced its first confirmed case of COVID-19 on March 1, 2020 and Governor DeSantis declared a state of emergency eight days later on March 9, 2020.³⁴ K-12 schools were closed initially on March 13 and

30. John Kincaid & J. Wesley Leckrone, *Partisan Fractures in U.S. Federalism's COVID-19 Policy Responses*, 52 STATE & LOCAL GOV'T REV. 298, 301-02 (2021).

31. *Id.*

32. *Id.*

33. We readily acknowledge that some executive actions are more burdensome than others. Stay-at-home orders apply to all and are the most burdensome, while closing or restricting business operations impact owners and workers disproportionately and customers less so.

34. *Documenting Florida's Path to Recovery from the Coronavirus (COVID-19) Pandemic, 2020-2021*, BALLOTPEDIA, [https://ballotpedia.org/Documenting_Florida%27s_path_to_recovery_from_the_coronavirus_\(COVID-19\)_pandemic,_2020-2021](https://ballotpedia.org/Documenting_Florida%27s_path_to_recovery_from_the_coronavirus_(COVID-19)_pandemic,_2020-2021) [https://web.archive.org/web/20210506060930/https://ballotpedia.org/Documenting_Florida%27s_path_to_recovery_from_the_coronavirus_%28COVID-19%29_pandemic,_2020-2021] (last visited Mar. 5, 2021).

were formally closed for the year on April 18.³⁵ Bars were shut down on March 17 and restaurants were required to shift to take-out or delivery on March 20.³⁶ Travelers from New York, New Jersey, and Connecticut were required to self-quarantine for fourteen days beginning March 23; this order was broadened on March 27 to include Louisiana and any other state with growing numbers of cases.³⁷ A state-wide stay-at-home order was issued on April 3;³⁸ this was the last action taken by Governor DeSantis to stop the spread of COVID-19 in 2020. The state of Florida never issued a state-wide mask mandate.

Florida rescinded its stay-at-home order on May 4 and began opening up under its Phase 1 plan on May 18, which included allowing restaurants and retail establishments to operate up to 50% capacity.³⁹ Phase 2 began on June 5 and allowed retail establishments to operate at full capacity; restaurants and bars could operate at full capacity outdoors while maintaining 50% capacity indoors.⁴⁰ All travel restrictions were rescinded on August 6 and K-12 schools were required to reopen and provide five days of in-person instruction to students beginning on August 31.⁴¹ Phase 3 began on September 25 with only recommendations about social distancing and indoor capacity remaining in place.⁴²

Michigan announced its first confirmed case of COVID-19 on March 10, 2020 and Governor Whitmer declared a state of emergency the same day.⁴³ A state-wide stay-at-home order was issued on March 24 and K-12 schools were closed on April 2.⁴⁴ A mask mandate went into effect on July 10 in indoor spaces and crowded outdoor spaces.⁴⁵ The Michigan Department of Health and Human Services issued an emergency public health order on October 5 replacing many of the restrictions that the Michigan Supreme Court struck down on October 2.⁴⁶ November 18 put

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Documenting Michigan's Path to Recovery from the Coronavirus (COVID-19) Pandemic, 2020-2021*, BALLOTPEDIA, [https://ballotpedia.org/Documenting_Michigan%27s_path_to_recovery_from_the_coronavirus_\(COVID-19\)_pandemic,_2020-2021](https://ballotpedia.org/Documenting_Michigan%27s_path_to_recovery_from_the_coronavirus_(COVID-19)_pandemic,_2020-2021) [http://web.archive.org/web/20210506061220/https://ballotpedia.org/Documenting_Michigan%27s_path_to_recovery_from_the_coronavirus_%28COVID-19%29_pandemic,_2020-2021](last visited Mar. 5, 2021).

44. *Id.*

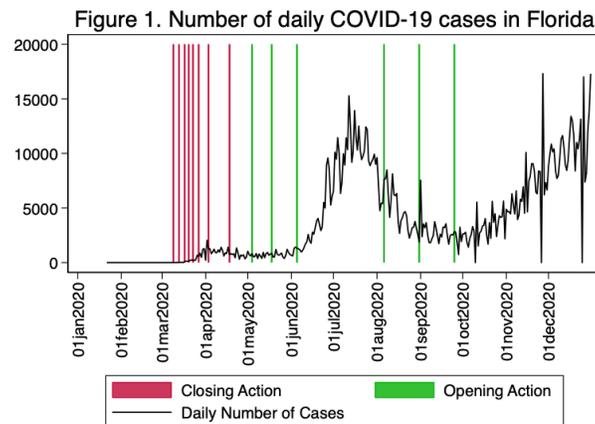
45. *Id.*

46. *In re* Certified Questions from the U.S. Dist. Ct., No. 161492, USDC-WD: 1:20-cv-414 (Oct. 2, 2020).

into effect a three-week pause on indoor dining, as well as limiting college instruction and cancelling events at indoor entertainment venues. This action was extended until December 20.⁴⁷

In terms of reopening actions, Michigan rescinded its stay-at-home order on June 1 and began reopening with restaurants, bars and retail establishments operating at either 50% or 25% capacity, depending on square footage.⁴⁸ Gyms and organized sports were able to resume on September 3 and indoor entertainment venues were able to open with capacity restrictions on September 25.⁴⁹

The respective opening and closing actions of the Governors of Florida and Michigan must be weighed against the rising or falling number of cases of COVID-19 in their respective states. Figures 1 and 2 display daily totals of new cases in Florida and Michigan, respectively. It is immediately clear that the two states had very different experiences with cases throughout 2020.



Florida had low numbers of cases until its reopening phases in May and June, which then resulted in a massive spike in the numbers of cases that never returned to pre-opening levels.⁵⁰ From June 1 through July 31, Florida saw an increase in 413,070 cases or 31.3% of its yearly total number of cases occur during this time frame. Florida's full Phase 3 reopening in late September began a furious climb in cases that eclipsed

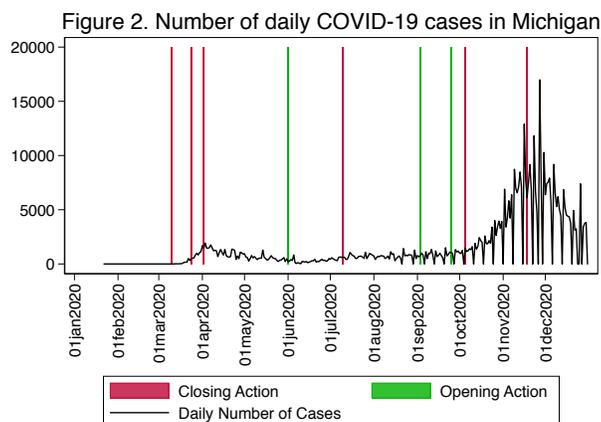
47. BALLOTPEDIA, *supra* note 43.

48. *Id.*

49. *Id.*

50. Ensheng Dong et al., *An Interactive Web-Based Dashboard to Track COVID-19 in Real Time*, 20 LANCET INFO. DIS. 533 (2020), [https://www.thelancet.com/journals/laninf/article/PIIS1473-3099\(20\)30120-1/fulltext](https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(20)30120-1/fulltext) [<http://web.archive.org/web/20210506062840/https://www.thelancet.com/journals/laninf/article/PIIS1473-3099%2820%2930120-1/fulltext>] (last visited Mar. 5, 2021).

the previous highs in July and was still climbing as 2020 ended. From October 1 through December 31, Florida saw an increase in 612,903 cases or 46.4% of its yearly total number of cases. All told, 1,025,973 or 77.7% of Florida's cases occurred after Governor DeSantis took actions to open and keep Florida open even in the face of massive case spread.



Michigan was able to keep its case numbers low throughout most of the year and notably did not observe a spike in cases in the summer after reopening.⁵¹ The massive growth in cases occurred after Michigan's reopening in early fall. From October 1 through December 31, Michigan tabulated an additional 371,837 cases or 73.7% of its entire yearly total.⁵² Importantly, the pause that began in November and was extended through December did result in cases dropping. The vast majority of Michigan's cases came as a result of Governor Whitmer's decision to open up the state in the fall at the Republican legislature's urging; her actions taken during the November wave brought cases back down.⁵³

V. DISCUSSION

We began by discussing the role and need for government to effectively pursue public policy solutions during crises to protect their

51. We speculate that this is, in part, due to the mask mandate that was put into effect in July.

52. See Dong et al., *supra* note 50.

53. Sophie Quinton, *GOP Lawsuits Restrain Governors' COVID-19 Actions*, PEW CHARITABLE TRS. STATELINE (Nov. 17, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/11/17/gop-lawsuits-restrain-governors-covid-19-actions> [<http://web.archive.org/web/20210506063218/https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/11/17/gop-lawsuits-restrain-governors-covid-19-actions>].

citizens. We also acknowledged that the federal system in the United States provides governors with the ability to leverage the system for their own political ends. One such end is purposeful inaction legitimized through an ideological commitment to limit the role of government in providing effective policy responses. Such an ideological commitment is reinforced in the United States legal context since judicial remedies revolve around government action, not inaction. The purposeful decision to act or not is given to the vast majority of governors who have extensive authority to resolve crises, and as noted, this power has been used recently to meet a variety of emergency situations.

The responses of the Republican Governor of Florida and the Democratic Governor of Michigan began similarly by taking a variety of actions to close down their states in order to slow the spread of COVID-19 and protect their citizens. Both governors took steps to begin opening their states, but then reacted very differently when cases began to surge. Two separate, devastating waves hit Florida in the summer and winter months, but Governor DeSantis took no actions to prevent the spread of COVID-19, despite having the power to do so; this was a choice. Governor Whitmer likewise chose to open her state but implemented a mask mandate in the summer to slow the spread. When cases began to spike in November, a series of closing actions were implemented, and by the end of December the number of new cases had plummeted. The actions of Florida's Governor are properly characterized by purposeful ideological inaction, whereas the actions of Michigan's Governor fit the traditional role of using government authority to effectively respond to a crisis.