

Rethinking the Federal Emergency Powers Regime

DAVID LANDAU*

Emergency has assumed central importance in the United States legal system. In 2019, President Trump declared an emergency at the southern border after Congress declined to fund his wall; critics responded with legal challenges and proposed reforms to the statute he invoked, the National Emergencies Act (NEA). Emergency powers have also played a key role during the COVID-19 pandemic. This Article conducts a comprehensive survey of emergency powers in the United States. It shows that the NEA is only one among many grants of authority presidents can call upon in a crisis, alongside other emergency schemes, specially delegated statutory power, non-emergency statutes, and inherent executive authority. It argues that the United States' fragmented emergency powers scheme raises not only well-known risks of overreach—presidents abusing emergency authority to gain power or erode democracy, but also less appreciated risks of underreach—where presidents are unwilling or unable to deal adequately with a crisis. These risks are not distributed evenly across types of crises, and events like the pandemic, where several of President Biden's major initiatives have been struck down by the Supreme Court, highlight the kind of emergency for which the risk of underreach is most acute. Finally, the Article draws on emergency clauses found around the world to lay out a reform agenda more ambitious than those currently circulating in Congress, which would tackle both overreach and underreach. It would combine broader, more coherent grants of power with productive forms of congressional and judicial control.

TABLE OF CONTENTS

I. INTRODUCTION	604
II. CONCEPTUALIZING EMERGENCY POWERS	608
A. <i>The Fear of Abusive Overreach</i>	610
B. <i>The Schmittian View—Legally Unconstrained Emergency Power</i>	613
C. <i>An Alternative Perspective—Power with Accountability</i>	616
III. A MAP OF FEDERAL EMERGENCY POWERS IN THE UNITED STATES ...	619
A. <i>The National Emergencies Act of 1976</i>	620

* Mason Ladd Professor and Associate Dean for International Programs, Florida State University College of Law. I would like to thank Rosalind Dixon and Mark Tushnet for helpful comments on prior versions of this Article, and Margaret Zinsel, Gavin Sitkoff-Vuong, and Salome Garcia for excellent research assistance.

B. <i>Fragmented Federal Emergency Power</i>	624
1. <i>Other Emergency Schemes</i>	624
a. <i>The Insurrection Act</i>	625
b. <i>The Stafford Act</i>	626
c. <i>The Public Health Service Act</i>	626
2. <i>Nonemergency Emergency Powers</i>	628
C. <i>Ex Post, Tailored Emergency Power</i>	630
D. <i>Inherent Executive Authority and the Youngstown Framework</i>	632
IV. AN ANALYSIS OF UNITED STATES EMERGENCY POWERS: ABUSIVE OVERREACH AND UNDERREACH	638
A. <i>The Risk of Overreach</i>	638
1. <i>Abuse of the NEA</i>	639
2. <i>Other Routes to Overreach</i>	645
B. <i>The Risk of Underreach</i>	647
1. <i>Fragmentation, Gaps, and Judicial Deference During Emergencies</i>	649
2. <i>Federalism, Fragmentation, and Underreach During Emergencies</i>	654
V. REFORMING THE EMERGENCY POWERS REGIME	658
A. <i>The ARTICLE ONE Act and Congressional Voice</i>	658
B. <i>The Coverage of the NEA</i>	661
1. <i>Other Emergency Schemes and the NEA</i>	662
2. <i>Different Types of Emergencies</i>	664
3. <i>Non-Emergency Powers and the NEA</i>	665
C. <i>The Extent of Power</i>	667
D. <i>Cuing More Productive Judicial Review</i>	671
VI. CONCLUSION	676

I. INTRODUCTION

Today, emergency is a more important concept in United States law than it has been in a long time. Consider two examples.

In 2019, President Trump invoked the National Emergencies Act (NEA) of 1976 to declare a national emergency at the Southern border and divert funding for construction of a wall, after Congress repeatedly failed to provide it.¹ Critics

¹ See Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019); Quinn Scanlan & Roey Hadar, *Democrats Will Not Agree to Any Funding for US-Mexico Border Wall: Senator Jeff Merkley*, ABC NEWS (Dec. 23, 2018), <https://abcnews.go.com/Politics/democrats-agree-funding-us-mexico-border-wall-senator/story?id=59977718> [<https://perma.cc/WVV6-J9WM>]

decried the move as a sham and raised both legal and political challenges.² The move also sparked a bipartisan, but thus far unsuccessful, effort to reform the NEA.³

Since 2020, the COVID-19 pandemic has sparked emergency declarations at both the federal and state level. The federal government invoked many of the major emergency framework statutes to deal with the crisis: emergencies were declared under the NEA, the Stafford Act, and the Public Health Service Act.⁴ Despite this plethora of declarations, the Trump and Biden Administrations have also relied on nonemergency grants of power for pandemic initiatives—travel bans from foreign countries, mask requirements on airplanes and public transportation, eviction bans for renters, and vaccine mandates for employees of larger businesses and healthcare workers, for example.⁵ The travel bans attracted virtually no judicial scrutiny despite their long duration; in contrast, the eviction ban and employer vaccine mandate were blocked by the Supreme Court.⁶

These two examples demonstrate an important point. Unlike ninety percent of countries,⁷ the United States has no explicit constitutional clause triggering a special emergency powers regime, and it has only a few provisions arguably granting emergency powers, most prominently that allowing suspension of habeas corpus “when in Cases of Rebellion or Invasion the public Safety may require it.”⁸ But the United States has developed an extensive, yet fragmented,

(discussing how Congress failed to reach a budget funding deal for the U.S.–Mexico border in 2018).

² See *Sierra Club v. Trump*, 929 F.3d 670, 675–76 (9th Cir. 2019).

³ H.R. 5314, 117th Cong. § 531 (2021); Jack Goldsmith & Bob Bauer, *Emergency Powers Reform Within Grasp*, LAWFARE (Nov. 17, 2021), <https://www.lawfareblog.com/emergency-powers-reform-within-grasp> [<https://perma.cc/8R6X-H45Q>].

⁴ Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020); Letter from Donald J. Trump, President of the U.S., to Chad F. Wolf, Acting Sec’y, Dep’t of Homeland Sec., Steven T. Mnuchin, Sec’y, Dep’t of the Treasury, Alex Azar, Sec’y, Dep’t of Health & Hum. Servs. & Pete T. Gaynor, Adm’r, Fed. Emergency Mgmt. Agency (Mar. 13, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/letter-president-donald-j-trump-emergency-determination-stafford-act> [<https://perma.cc/7SPL-HC2E>]; *Determination That a Public Health Emergency Exists*, PUB. HEALTH EMERGENCY (Jan. 31, 2020), <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx> [<https://perma.cc/F2RB-MQJ5>].

⁵ See *infra* Part IV.B.

⁶ *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021) (eviction moratorium); *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 666 (2022) (vaccine mandate in workplaces).

⁷ Christian Bjørnskov & Stefan Voigt, *The Architecture of Emergency Constitutions*, 16 INT’L J. CONST. L. 101, 105 n.12 (2018).

⁸ U.S. CONST. art. I, § 9, cl. 2; see also *id.* art. I, § 8, cl. 11 (giving Congress power to declare war); *id.* art. I, § 8, cl. 15 (giving Congress power to regulate “calling forth the Militia”); *id.* art. IV, § 4 (giving federal government a duty to protect states against “Invasion” or “domestic Violence”).

emergency regime at the statutory level, which runs alongside a deeply ambiguous and contested vein of inherent executive authority.⁹ This regime has not been holistically described and therefore remains both understudied and misunderstood. The NEA is one piece of this regime, but it coexists with many other types of statutory power, found both inside and outside formal declarations of emergency.¹⁰

Contemporary work on emergencies in the United States falls into two camps. Mainstream thought is motivated primarily by fear of the effect of emergency powers and seeks above all else to reduce the risks posed by presidents engaging in abusive overreach of those powers.¹¹ A second, revisionist view, associated mainly with Posner and Vermeule, argues that legal constraint on emergencies is doomed to failure and that legally unconstrained executive power during emergencies is a good thing.¹²

The argument of this Article is that both positions miss the mark. The mainstream view emphasizes the (very real) problem of presidents engaging in abusive overreach of emergency power but gives short shrift to the possibility that the design of the regime may cause (borrowing a term from recent work by Pozen and Scheppele) “underreach,” or a failure to marshal adequate emergency power to deal with a serious crisis.¹³ The revisionist view, likewise, fails to spot the important role that legal constraints can place on presidents during some types of crises; indeed, the possibility that the law may place too much constraint on presidential responses during crises rather than too little.

The fragmentation of United States emergency powers statutes, and their complex interaction with presidential claims of inherent executive power, create substantial risks of both overreach and underreach. For some kinds of crises, and some actions, there is likely to be little if any legal restraint on presidential response. During wars or after terrorist attacks, a combination of extremely broad delegations from old and new statutes, inherent executive authority, and limitations on justiciability are likely to leave few concerns about presidents

⁹ See *infra* Part IV.

¹⁰ See *infra* Part III.

¹¹ See *infra* Part II.

¹² See, e.g., Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1636, 1641 (2009) [hereinafter Posner & Vermeule, *Crisis Governance*]; ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 7 (2010) [hereinafter POSNER & VERMEULE, *EXECUTIVE UNBOUND*]; ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 6 (2007) [hereinafter POSNER & VERMEULE, *TERROR IN THE BALANCE*].

¹³ David E. Pozen & Kim Lane Scheppele, *Executive Underreach, in Pandemics and Otherwise*, 114 AM. J. INT’L L. 608, 609 (2020) (defining underreach as “a national executive branch’s willful failure to address a significant public problem that the executive is legally and functionally equipped to address”).

having inadequate authority and plenty of worry about the abusive wielding of power.

Yet for other kinds of crises, the risk of underreach is much greater. The COVID-19 pandemic demonstrates a context where presidents can rely on less *ex ante* emergency authority, where Congress in a politicized environment has been stingier with the new delegated powers it has granted, and where presidents can make few credible claims of inherent constitutional authority. In that environment, President Biden has sought to fill gaps in the regime by stretching (often nonemergency) statutes to impose measures like the eviction ban and vaccines mandates; the majority of the Supreme Court, in response, has refused to give the Administration greater deference because of the crisis context, and has struck several of these attempts down.¹⁴ The fragmented nature of emergency authority during the pandemic has also interacted with the United States' federal system to give presidents political incentives to dodge responsibility for action (or inaction), instead allowing them to shift blame to state and local governments.¹⁵ Because many types of emergencies share key characteristics with the pandemic, one would expect variants of underreach to plague United States emergency responses in the future.

This Article makes several contributions. After summarizing existing thought on emergency powers in Part II, Part III provides what I believe is the first modern, comprehensive map of the United States' emergency powers regime, which brings out its complex and fragmented nature. Part IV contains the second contribution of this Article: an analysis of this regime, which shows that it raises substantial risks of underreach, as well as overreach, at least for many types of emergencies and many kinds of actions presidents may take during those emergencies.¹⁶ A major challenge of the United States system is its unevenness—for some crises, presidents will likely have too much unrestrained power; for others, too little.

Finally, Part V uses this analysis to outline reforms to the federal emergency powers regime, one which takes both overreach and underreach seriously. The starting point is the recent reform proposal to the NEA, the ARTICLE ONE Act.¹⁷ The Act aims to improve political oversight by providing that declarations of national emergency will terminate unless approved by Congress within thirty days.¹⁸ The ARTICLE ONE Act, however, is only a very partial

¹⁴ See, e.g., *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021) (eviction moratorium); *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 666 (2022) (private employer vaccine mandate).

¹⁵ See, e.g., Jacob Knutson, *Trump Blames "Blue States" for High Coronavirus Cases in U.S.*, AXIOS (Sept. 16, 2020), <https://www.axios.com/2020/09/17/trump-coronavirus-deaths-toll-blue-states> [<https://perma.cc/LX6J-X4WU>].

¹⁶ See *infra* Part IV.

¹⁷ S. 764, 116th Cong. § 1 (2019).

¹⁸ *Id.* § 201(c)(1).

response to overreach, given that many exercises of emergency power are found outside the NEA,¹⁹ and it does nothing at all about underreach.

For a more holistic approach, I draw on the constitutional emergency clauses found around the world for inspiration. These clauses, at their best, combine broad grants of power with two forms of robust but carefully calibrated forms of oversight, political and judicial. To combat underreach, reformers should broaden grants of authority, and perhaps even move towards general grants of power, so as to create more flexibility to deal with unpredictable emergencies. Political oversight should stem from mechanisms like those found in the ARTICLE ONE Act; however, by bringing the fragmented sources of emergency power together this oversight would apply to a broader spectrum of authority, and not just the relatively few powers currently found in the NEA. Finally, the text of the NEA should reorient judicial review to focus on two questions: whether the situation meets the threshold of gravity for a declaration of emergency, and whether measures taken are directly related to a crisis and proportional responses to it. While far from a panacea, these reforms would potentially move the United States towards a more coherent and effective emergency powers regime.

II. CONCEPTUALIZING EMERGENCY POWERS

The literature on emergency powers, both in the United States and comparatively, is vast. My goal here is to situate the major themes within which United States emergency powers have been discussed. In general terms, scholars have identified four different approaches to emergency powers. A first, which Gross calls “business as usual,” makes no accommodation for emergencies, and merely states that governments should tackle them with whichever ordinary powers they have at hand.²⁰ A second model Gross calls “extralegal”: it bears some similarities to the business-as-usual model in that government is given no formal emergency power. But officials can break the law in exceptional circumstances, and then seek popular ratification of their acts, in the name of public necessity.²¹

A third and fourth model deal with variants of what Gross calls “accommodation,” where the legal order authorizes formal powers to deal with a crisis.²² The third model, which one might call “constitutional accommodation,” involves formal emergency clauses granting exceptional

¹⁹ See *supra* note 4 and accompanying text.

²⁰ Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1043 (2003).

²¹ *Id.* at 1099.

²² *Id.* at 1058.

powers.²³ While the United States lacks such a clause and has only a few provisions that could plausibly be read as granting emergency powers, the vast majority of extant constitutions do have formal emergency clauses.²⁴ Finally, in a fourth model, which one might call “legislative accommodation,” Congress grants the executive statutory powers to deal with an emergency.²⁵ These are often delegated after a crisis has arisen and thus involve powers that are tailored to deal with a given crisis.²⁶

These are sometimes seen as mutually exclusive models of emergency, but they are probably better conceptualized as modes that can easily coexist in a given legal system, at different times and contexts. The United States, for example, has combined elements of all of these models, as we will explore in more detail in the next Part.²⁷ There has been an element of business-as-usual throughout United States history, reflected for example in famous Supreme Court decisions like *Ex parte Milligan*.²⁸ In early United States history, the main justification of emergency actions had much in common with the extralegal model—presidents like Jefferson argued that they could act outside the positive law, and perhaps even against it, in cases of grave public necessity and then seek public ratification for their actions.²⁹

Nonetheless, the main modern models of emergency in the United States focus on accommodation. In the United States, this accommodation has occurred largely through means other than the formal constitutional text, in part through judicial interpretation but largely through the granting of statutory powers. Many of these powers are *ex post* and tailored to the characteristics of particular crises. However, the United States also has standing, *ex ante* emergency powers found in three different kinds of statutes: (1) the NEA, (2) other emergency statutes such as the Stafford Act, Insurrection Act, and Public Health Service Act, and (3) other nonemergency statutes that nonetheless seem intended largely for crisis use.³⁰ The prevalence of standing, *ex ante* statutory powers is perhaps the most interesting aspect of the United States model of emergency and combines elements of different forms of accommodation. It is statutory rather than constitutional, and yet it is an *ex ante* set of powers that

²³ OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 37 (2006).

²⁴ Bjørnskov & Voigt, *supra* note 7, at 105 n.12.

²⁵ GROSS & NÍ AOLÁIN, *supra* note 23, at 66. They also describe “interpretive accommodation,” where judges give officials latitude. *See id.* at 72.

²⁶ *See* John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT’L J. CONST. L. 210, 216–17 (2004).

²⁷ *See infra* Part I.

²⁸ *See* GROSS & NÍ AOLÁIN, *supra* note 23, at 89–91; *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 119–21, 125 (1866).

²⁹ Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1392–94 (1989).

³⁰ *See infra* Part III.

attempts to anticipate an emergency, in the same way as the constitutional emergency clauses found around the world.

In the remainder of this Part, I discuss the two attitudes towards emergency power that are most prevalent in the current United States literature: (a) pervasive fear of presidents abusing their emergency powers to undermine democracy, and (b) a revisionist view associated with Carl Schmitt, which asserts that legal constraints on presidential emergency powers are largely irrelevant.³¹ Both of these framings capture important aspects of reality, but they are incomplete. The first overemphasizes the risk of abusive overreach and ignores the contrasting threat that the federal government might not have enough power to tackle a genuine crisis—the threat of underreach. The second captures a reality that responses to emergency are fundamentally political and elastic, but it overlooks the role that legal constraints can play during many types of crises. In contrast to these two dominant framings, I develop a distinct perspective—or rather, rediscover an older perspective—that emphasizes the importance of law on shaping both overreach and underreach during an emergency. It is important to make sure that executive emergency power is controlled, but also important to ensure that it is muscular enough to serve its purpose.

A. The Fear of Abusive Overreach

A dominant strain of United States thought on emergencies emphasizes their dangers. This line of scholarship focuses on a set of overlapping threats posed by the granting and use of emergency power, particularly by the chief executive. First, presidents may distort the separation of powers, concentrating excessive power in the executive and undermining the proper role of other branches of government.³² Second, emergency powers might be used to trample individual rights, and might do so in ways that courts are unable or unwilling to stop.³³ Third, emergency powers might seep into the ordinary legal system, causing long-run distortions that impact the rule of law.³⁴ Extensive powers granted in

³¹ See *infra* Part II.B.

³² See, e.g., Gross, *supra* note 20, at 1029–30 (“[S]eparation of powers and federalism are likely to be among the first casualties when a nation needs to respond to a national emergency.”).

³³ See David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2567 (2003) (“It is in times of crisis that constitutional rights and liberties are most needed, because the temptation to sacrifice them in the name of national security will be at its most acute.”); Patrick A. Thronson, *Toward Comprehensive Reform of America’s Emergency Law Regime*, 46 U. MICH. J.L. REFORM 737, 786–87 (2013) (arguing that the current regime risks “utterly engulfing individual freedoms and civil society through ever more aggressive expansions of executive emergency powers”).

³⁴ See Gross, *supra* note 20, at 1092.

the PATRIOT Act and elsewhere after 9/11, for instance, have largely remained in place despite the sunset clause originally included in the Act.³⁵

Fourth, and finally, in the extreme case emergency powers may become a route for the undermining or even implosion of democracy. The most noted example is Weimar Germany between the two World Wars, where the government was forced to resort extensively to both a constitutional emergency clause and specially delegated emergency powers to deal with an unstable economic and social situation.³⁶ Eventually, these tools were used by the Nazi regime to extinguish the democratic order from within.³⁷ There are also some modern examples of this dynamic—in countries like Turkey and Hungary, emergency declarations have been used by authoritarian leaders to consolidate power and marginalize the opposition.³⁸

Scholars and policymakers in the United States have responded to this threat by seeking to minimize avenues of potential abuse. One possibility, recommended by Gross, is to eschew either legislative or constitutional accommodation as much as possible, and instead to rely on a truly rare, extralegal power to violate the law, but only where done in a public, transparent fashion.³⁹ Gross argues that this emphasis on extra-legality will help to prevent the damage that accommodation may otherwise do to the legal system.⁴⁰ Ackerman prefers a constitutional emergency clause, where the main check on executive emergency power is political.⁴¹ Ackerman argues for periodic congressional votes to renew emergencies, which require ever more stringent supermajorities to continue—a mechanism he calls the “supermajoritarian escalator.”⁴² Cole rejects the emphasis of both Gross and Ackerman on political checks, and instead highlights the role of judicial review—he argues that courts are capable of checking significant abuses, especially if one steps back from individual cases and considers systemic outcomes.⁴³ The sharp disagreements

³⁵ See, e.g., Sharon Bradford Franklin, *Rethinking Surveillance on the 20th Anniversary of the Patriot Act*, JUST SEC. (Oct. 26, 2021), <https://www.justsecurity.org/78753/rethinking-surveillance-on-the-20th-anniversary-of-the-patriot-act/> [<https://perma.cc/GSQ5-J97U>].

³⁶ See, e.g., CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 37–38 (Transaction Publishers 2002) (1948).

³⁷ *Id.* at 59–60.

³⁸ See Zafer Yılmaz, *Erdoğan's Presidential Regime and Strategic Legalism: Turkish Democracy in the Twilight Zone*, 20 SE. EUR. & BLACK SEA STUD. 265, 266 (2020), <https://doi.org/10.1080/14683857.2020.1745418> [<https://perma.cc/FCW5-7HS4>]; Kim Lane Scheppele, *Orban's Emergency*, VERFASSUNGSBLOG (Mar. 29, 2020), <https://verfassungsblog.de/orbans-emergency> [<https://perma.cc/NA32-K88M>].

³⁹ See Gross, *supra* note 20, at 1023–24.

⁴⁰ See *id.* at 1099.

⁴¹ Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1047–49 (2004).

⁴² *Id.* at 1047.

⁴³ See Cole, *supra* note 33, at 2566–68; David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1761–75 (2004) (arguing that

between these scholars suggest the difficulty of envisioning effective checks on the abuse of emergency powers, but they share a basic perspective that emphasizes avoiding abusive overreach.

More specific work on the design of the federal emergency powers regime has been dominated by this same kind of fear. A litany of scholars, commentators, and politicians have called for reforms to the NEA, particularly after President Trump declared his “wall emergency” in early 2019.⁴⁴ This work has called for reducing the number of standing powers activated by the Act to remove dangerous grants,⁴⁵ overhauling the most frequently invoked power under the NEA, the International Emergency Economic Powers Act (IEEPA),⁴⁶ and most importantly increasing oversight over the NEA by having the emergency terminate after a brief time unless extended by passage of a congressional law.⁴⁷ A series of bills introduced in Congress, beginning with the ARTICLE ONE Act, have sought the same basic goals, focusing particularly on enhanced congressional oversight.⁴⁸ As one report concluded after summarizing proposed reforms to the NEA and other aspects of the emergency powers regime: “Putting sensible limits on executive discretion is the only way to ensure that emergency powers do not kindle an emergency for our democracy.”⁴⁹

This focus on abuse of emergency powers is sensible in many respects. But this work also threatens to shade into what Posner and Vermeule have called “tyrannophobia”: an irrational fear of excessive executive power that comes at

Ackerman’s proposal fails to confront the limitations of the political process in emergency settings).

⁴⁴ See, e.g., Elizabeth Goitein, *The Law Governing National Emergencies Needs Fixing*, BRENNAN CTR. FOR JUST. [hereinafter Goitein, *Needs Fixing*], <https://www.brennancenter.org/our-work/analysis-opinion/law-governing-national-emergencies-needs-fixing> [<https://perma.cc/472V-UKWW>] (Feb. 12, 2020); Goldsmith & Bauer, *supra* note 3; Elizabeth Goitein, *Good Governance Paper No. 18: Reforming Emergency Powers*, JUST SEC. (Oct. 31, 2020) [hereinafter Goitein, *Reforming Emergency Powers*], <https://www.justsecurity.org/73196/good-governance-paper-no-18-emergency-powers/> [<https://perma.cc/R2U3-4CNM>]; Samuel Weitzman, *Back to Good: Reforming the National Emergencies Act*, 54 COLUM. J.L. & SOC. PROBS. 365, 370–73 (2021).

⁴⁵ See Goitein, *Needs Fixing*, *supra* note 44 (arguing that some NEA powers “seem more suited to a dictatorship than a democracy”); Goitein, *Reforming Emergency Powers*, *supra* note 44 (“Some laws that do not require an emergency declaration (or even use the word ‘emergency’) may nonetheless be viewed as a type of emergency power, because they confer extraordinary powers that are clearly intended for use in extraordinary circumstances. In fact, some of the president’s most potent powers fall into this category.”).

⁴⁶ ANDREW BOYLE, BRENNAN CTR. FOR JUST., CHECKING THE PRESIDENT’S SANCTIONS POWERS: A PROPOSAL TO REFORM THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT 11 (June 2021), <https://www.brennancenter.org/media/7754/download> [<https://perma.cc/8U7B-BPUD>]; Goitein, *Reforming Emergency Powers*, *supra* note 44.

⁴⁷ See, e.g., Goldsmith & Bauer, *supra* note 3.

⁴⁸ S. 764, 116th Cong. § 203(b)(1) (2019).

⁴⁹ Goitein, *Reforming Emergency Powers*, *supra* note 44.

the expense of other goals.⁵⁰ It threatens to lose track of why democracies have emergency powers in the first place. Ackerman emphasizes the “reassurance” function that declarations of emergency play.⁵¹ But the most important function of emergency powers is real and not psychological: governments gain exceptional powers during emergency because the concentration of authority, and maybe even limitations on rights, serve important functions within the constitutional system. Put another way, emergency powers are not an unwanted pest that constitutional democracies tolerate. They are an essential part of those constitutional systems, helping to ensure their health and even survival. In this sense, we should worry not only about the possibility of executives abusing their emergency powers (overreach), but also about the possibility of them being unwilling or unable to bring enough power to bear to resolve the crisis (underreach).⁵²

B. The Schmittian View—Legally Unconstrained Emergency Power

In a series of works, Posner and Vermeule have offered a radically revisionist perspective to the dominant view’s pervasive fear of executive overreaching. They derive a “Schmittian” take on emergencies, which they base on the German theorist Carl Schmitt and distinguish from a traditional, Madisonian take, which emphasizes legal restraints imposed by other branches of government on the executive.⁵³

Posner and Vermeule’s analysis of emergency has both a descriptive and normative component. Descriptively, they argue that legal constraints imposed by the other branches plays a relatively small role in controlling emergencies.⁵⁴ During a crisis, legislatures will delegate generous amounts of authority to the executive.⁵⁵ These delegations will not only be extensive, but also contain ambiguous standards that presidents can stretch to claim even more power.⁵⁶ In the immediate aftermath of a crisis, legislatures may engage in some bargaining with the executive branch, but they will have little interest in imposing real limits, and thus statutes will be very favorable towards the executive.⁵⁷ Likewise, courts will act only as “marginal participants” in limiting executive

⁵⁰Eric A. Posner & Adrian Vermeule, *Tyrannophobia*, in *COMPARATIVE CONSTITUTIONAL DESIGN* 317, 318, 320 (Tom Ginsburg ed., 2012).

⁵¹Ackerman, *supra* note 41, at 1037.

⁵²*See generally* Pozen & Scheppele, *supra* note 13.

⁵³Posner & Vermeule, *Crisis Governance*, *supra* note 12, at 1614–15.

⁵⁴*Id.* at 1642–54.

⁵⁵*See, e.g., id.* at 1637–38.

⁵⁶*Id.* at 1645.

⁵⁷*Id.* at 1647 (“The basic pattern is that the executive asks to take three steps forward; Congress, pushing back somewhat, has no choice but to allow it to take two.”).

power.⁵⁸ Some cases or issues may not be justiciable at all; even in justiciable cases, courts will be deferential, especially early in a crisis.⁵⁹

The main checks on emergency power during an emergency will thus be based on politics and public opinion, rather than law.⁶⁰ And in the aftermath of an emergency, public opinion will tend to favor extensive exercises of presidential power.⁶¹ Posner and Vermeule note that emergencies often create a rally around the flag effect, causing “genuine solidarity” on political issues and also “ersatz solidarity” that leads political elites to align with what they perceive to be the dominant view.⁶²

Normatively, Posner and Vermeule suggest that the absence of legal constraint during emergencies is a positive thing.⁶³ They challenge the argument that accommodating emergencies automatically corrodes the legal system or leads to a ratchet effect where rights violations increase over time.⁶⁴ More broadly, they argue that the relative absence of legal constraint on executive power during a crisis helps to ensure that presidents have sufficient authority to meet the emergency.⁶⁵ A “rule of law” critique of executive emergency power, which argues that executives wield too much unchecked power, rests on an “outdated,” Madisonian conception of the state.⁶⁶

The Posner and Vermeule revisionist view of emergencies captures much that is important. Normatively, it highlights the important need that presidents have to marshal sufficient power to meet a crisis. Descriptively, it highlights empirical regularities that accompany at least some forms of emergency, where a confluence of events support aggressive forms of executive action. This is likely to be true after a major terrorist attack or during a war.

But Posner and Vermeule overplay the extent to which major legal constraints fall away during crises. Legislative and judicial constraints may be more likely to remain strong during some kinds of emergencies as opposed to others. Ginsburg and Versteeg conduct a global survey of national responses to COVID-19 and find surprisingly widespread involvement of both legislatures

⁵⁸ *Id.* at 1654.

⁵⁹ Posner & Vermeule, *Crisis Governance*, *supra* note 12, at 1656–57.

⁶⁰ See POSNER & VERMEULE, EXECUTIVE UNBOUND, *supra* note 12, at 208.

⁶¹ Posner & Vermeule, *Crisis Governance*, *supra* note 12, at 1614.

⁶² *Id.* at 1651.

⁶³ POSNER & VERMEULE, TERROR IN THE BALANCE, *supra* note 12, at 6.

⁶⁴ See Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 610 (2003).

⁶⁵ See POSNER & VERMEULE, TERROR IN THE BALANCE, *supra* note 12, at 4–5 (reframing emergencies as a “political and constitutional success”).

⁶⁶ Eric A. Posner, *Rule-of-Law Objections to the Lender of Last Resort*, in CONSTITUTIONS IN TIMES OF FINANCIAL CRISIS 39, 46–48 (Tom Ginsburg, Mark D. Rosen & Georg Vanberg eds., 2019).

and courts.⁶⁷ Legislatures often passed new laws in response to the crisis, but they also carried out oversight and sometimes restricted presidential power.⁶⁸ Courts have been active in many jurisdictions, striking down presidential overreach and sometimes even issuing decisions requiring that executives take more assertive action.⁶⁹

Ginsburg and Versteeg point out that both political and legal context might be heavily affected by the type of emergency and distinguish several different varieties, including: wars, terrorist attacks, natural disasters, financial crises, and pandemics.⁷⁰ The pandemic might offer a set of characteristics that results in a particularly high level of constraint. Unlike a war or terrorist attacks, the policies taken in response to the pandemic were primarily domestic rather than international, and in areas where federalism constraints in the United States are likely to have significant bite. The political context may also have led to less of a rally around the flag effect or movement towards consensus in favor of decisive action than other crises, particularly in the United States but perhaps also in other countries around the world. Finally, like some but not all forms of crisis, the pandemic has been a long-lasting, relatively chronic event, and much research suggests that courts and other forms of control become more assertive as a crisis drags on.⁷¹

Thus, a pandemic may be indicative of the kind of context where constraints imposed by other branches are likely to be particularly robust. But many other forms of emergency share at least some features with a public health crisis. Natural disasters also involve primarily domestic action in contexts where ordinary authority is shared with the subnational levels of government. Financial crises or economic disasters may also involve significant political divisions in terms of response, mitigating against the achievement of consensus about executive action. Even terrorist threats, as the post-9/11 context suggests, can become chronic events, and over time legislatures, courts, and the public may become more skeptical of executive power. In short, the high level of constraint observed after the pandemic is unlikely to be aberrational.

The normative implications of this point are interesting. On the one hand, it indicates that we should be more concerned than Posner and Vermeule about

⁶⁷ Tom Ginsburg & Mila Versteeg, *The Bound Executive: Emergency Powers During the Pandemic*, 19 INT'L J. CONST. L. 1498, 1500–01 (2021).

⁶⁸ *Id.*

⁶⁹ See generally, e.g., S.T.F., ADPF 690, Relator: Min. Alexandre de Moraes, 08.06.2020, 54, Diário da Justiça Eletrônico [D.J.e], 19.3.2021 (Braz.), <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADPF690cautelar.pdf> [<https://perma.cc/P9ZA-ANVD>] (requiring that the government publish accurate statistics regarding COVID-19); BRAZILIAN FED. SUP. CT., CASE LAW COMPILATION COVID-19 26 (Oct. 2020), https://portal.stf.jus.br/hotsites/agenda-2030/assets/img/case_law_compilation_covid19.pdf [<https://perma.cc/GZJ8-KZJC>].

⁷⁰ Ginsburg & Versteeg, *supra* note 67, at 1509–13.

⁷¹ See, e.g., Posner & Vermeule, *Crisis Governance*, *supra* note 12, at 1656 (“At the level of constitutional law, . . . courts tend to defer heavily to the executive in times of crisis, only reasserting themselves once the public sense of imminent threat has passed.”).

the possibility that United States presidents may be too constrained during emergencies. In some political contexts, legislatures may be unwilling to delegate enough power and courts may read existing grants of authority too narrowly. As we will see below in Part IV, that offers a fair read of some aspects of the federal response to the pandemic. On the other hand, the right response is not to somehow restore legally unconstrained presidential power. Abusive overreach is itself a serious concern, and one that has been borne out by aspects of both pre-pandemic and pandemic policies.

C. An Alternative Perspective—Power with Accountability

Emergencies raise dueling risks. There is a very real prospect of overreach of some forms of emergency power, borne out by recent United States history. Presidents might declare an “emergency” in situations where one is factually unwarranted, in order to achieve other goals, as President Trump did with his “wall” emergency on the southern border.⁷² Legislatures may delegate too much unconstrained power, as critics alleged was the case after 9/11.⁷³ Even non-emergency statutes may be abused: consider recent, aggressive and largely unfettered use of statutory power to impose bans on travel from foreign countries, both before and during the pandemic.⁷⁴ Finally, presidents may in some contexts make aggressive and largely unchecked claims of “inherent” authority to take dubious actions; consider the Bush Administration’s discourse after 9/11 on issues like torture and wiretapping, even after being provided with extensive statutory authority.⁷⁵

However, borrowing from Pozen and Scheppele, underreach of emergency power is also a significant concern.⁷⁶ Pozen and Scheppele use the term underreach to refer to a very specific problem—political leaders intentionally refusing to take adequate action to respond to a crisis.⁷⁷ Surveying responses to the pandemic, they find evidence of this form of intentional underreach during the Trump Administration in the United States and the Bolsonaro Administration in Brazil.⁷⁸ From a regime-centered perspective, one might adopt a broader definition of underreach, to encompass any situation where federal governments are unwilling or unable to develop an adequate response to a crisis.

⁷² See *infra* Part IV.A.1.

⁷³ See, e.g., David Cole, *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. CHI. L. REV. 1329, 1347 (2008) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007)).

⁷⁴ See 8 U.S.C. § 1182(f). For discussion of recent uses, see *infra* Part III.B.2.

⁷⁵ See *infra* Part III.D.

⁷⁶ Pozen & Scheppele, *supra* note 13, at 609.

⁷⁷ *Id.*

⁷⁸ *Id.* at 612.

The design of an emergency powers regime could contribute to this problem in different ways. Most obviously, it could provide inadequate power, or excessive constraint, hampering the response of a willing president. In the face of such a design, presidents might themselves be unable to formulate necessary policies, or be blocked by courts or other institutions if they attempt to do so. More subtly, a weak or fragmented design of emergency power could contribute to underreach by blurring lines of authority, allowing governmental officials to claim that they are unable to act even when they probably could. This may be a particular problem in countries like the United States, where authority is distributed among multiple layers of government in ways that are often unclear to the public. I analyze these problems in more depth in Part IV below.⁷⁹

An older tradition of United States scholarship is more alive to this potential for underreach than the bulk of more recent work. Writing shortly after the end of World War II, Clinton Rossiter offered a theory of crisis government that he provocatively called “constitutional dictatorship,” which focused on the ways in which democratic constitutional systems had managed recent crises, particularly the two world wars and the Great Depression.⁸⁰ Rossiter asserted that a democratic government can and must be “strong enough to maintain its own existence without at the same time being so strong as to subvert the liberties of the people it has been instituted to defend.”⁸¹ Looking at comparative experience, he found that this balance was fragile and could easily fail—broad delegation of legislative powers, coupled with largely unchecked constitutional emergency powers, had helped to bring down the Weimar regime in Germany.⁸² But he also found glimpses, looking at Great Britain, France, and even the United States, of ways in which the necessary balance might hold.⁸³ Indeed, there are different ways to achieve it: Great Britain had relied on extraordinary delegations of legislative power;⁸⁴ France more on the constitutional emergency invocation of a state of siege.⁸⁵ Rossiter found the United States to be a “unique” case—it clung more “tenaciously” to regular constitutional forms than the other systems, but also utilized sets of fragmented and ad hoc emergency authority that changed from crisis to crisis, and relied in no small part on presidential “personalities” rather than on institutional design.⁸⁶ The United States had muddled through a series of crises without a clear model of emergency.

⁷⁹ See *infra* Part IV.B.2.

⁸⁰ ROSSITER, *supra* note 36, at 209.

⁸¹ *Id.* at 3.

⁸² See *id.* at 73.

⁸³ *Id.* at 104, 204–05, 209.

⁸⁴ See *id.* at 204–05; see also JOHN EAVES, JR., EMERGENCY POWERS AND THE PARLIAMENTARY WATCHDOG: PARLIAMENT AND THE EXECUTIVE IN GREAT BRITAIN, 1939–1951, at 12 (1957) (arguing that Parliament played its oversight function effectively).

⁸⁵ ROSSITER, *supra* note 36, at 104.

⁸⁶ *Id.* at 209–10.

Rossiter draws several important lessons from his survey. He calls for a model of emergency that is separated from periods of normalcy, in which there are clear provisions for the termination of the emergency and return to normalcy.⁸⁷ Borrowing from a series of historical models starting with the Roman dictatorship, he also calls for a separation between the acts of triggering and terminating an emergency and the execution of power during that emergency.⁸⁸ Presaging Justice Jackson in his *Youngstown* concurrence a few years later, Rossiter argues that the same actor who will wield power during an emergency should not be able to conjure one into being.⁸⁹

Increasingly, the shape of modern constitutional emergency clauses around the world follows the basic outlines identified by Rossiter. The vast majority of constitutional orders around the world—ninety percent—include a constitutional emergency clause.⁹⁰ Over the course of the twentieth century, an increasing percentage have provided for political checks that avoid excessive concentration in the executive, usually by providing that legislative approval must be obtained to initiate or continue an emergency, and/or that the legislature has power to terminate the emergency.⁹¹ Constitutions also tend to provide a role for judicial review, often by explicitly listing the rights that may be restricted in an emergency or by providing that only certain enumerated rights may be restricted.⁹² At the same time as they attempt to obtain accountability, modern constitutional emergency clauses are quite muscular: they tend to give presidents broad authority to enact measures necessary for meeting a crisis, rather than limiting them to exercising only a few enumerated powers. The reason for such a design is that emergencies are multifaceted and unpredictable. For the same reason, many constitutions leave the conditions under which an emergency may be triggered open, rather than limiting them to only a few listed occurrences.⁹³

As Rossiter observed many years ago, the United States offers a peculiar twist on these global norms.⁹⁴ It is in the small minority of countries globally

⁸⁷ *Id.* at 300, 303.

⁸⁸ *Id.* at 299, 305.

⁸⁹ *Id.* at 299–300; see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634, 652 (1952) (Jackson, J., concurring).

⁹⁰ Bjørnskov & Voigt, *supra* note 7, at 105 n.12.

⁹¹ *Id.* at 109 (noting that fifty-six percent of constitutions require an emergency declaration to be ratified by another body, with thirty-nine percent providing for legislative approval, and that 35.9% of constitutions either terminate after a set time or require legislative approval for extension).

⁹² See *id.* at 110–11.

⁹³ See *id.* at 108 tbl.1.

⁹⁴ See ROSSITER, *supra* note 36, at 209 (noting the peculiarity of the United States adherence to normal constitutional rule in times of emergency).

without a constitutional emergency clause.⁹⁵ However, the United States does have a developed statutory emergency regime. At the heart of that regime is the NEA, a statute passed in the 1970s that aimed to impose coherence and accountability on presidential exercises of emergency power.⁹⁶ The NEA coexists with many other sources of emergency power, both statutory and constitutional, which tend to overshadow the NEA itself. This fragmented system, as I will show in the next two Parts, is costly—it facilitates patterns of both overreach and underreach, depending in part on the type of emergency and type of power at issue in any given case. The response to both problems, I argue in Part V, is a regime that more closely approximates the emergency clauses found around the world today, albeit probably at a statutory rather than a constitutional level.

III. A MAP OF FEDERAL EMERGENCY POWERS IN THE UNITED STATES

This Part aims to draw a map of the major grants of emergency power held at the federal level in the United States. It identifies four distinct pots of power: (a) the NEA, (b) other standing statutory powers, whether or not labelled as emergency powers, (c) tailored, *ex post* powers granted after a crisis has arisen, and (d) inherent executive power. The overarching theme is fragmentation, both at the level of power and control. In some areas, presidents hold vast and nearly unchecked power; in others, the extent of claimable emergency power seems relatively slight and filled with gaps. Thus, the extent of power that presidents can claim depends heavily on the type of emergency and the type of action they seek to take.

Because this Article focuses on the present, I omit discussion of the extra-legal prerogative tradition associated with John Locke, which was familiar to the founders and important in early United States history.⁹⁷ This led to a notion of emergency in which the Constitution did not accommodate emergency powers, but instead leaders had the ability to act extra-legally in cases of grave necessity and have their actions judged and potentially ratified by Congress, the courts, or the people after the fact.⁹⁸ Jefferson was a leading proponent of this view, but it also influenced many others including Andrew Jackson and (more

⁹⁵ GROSS & NÍ AOLÁIN, *supra* note 23, at 37 (noting that, unlike many systems, the United States Constitution is devoid of an explicit grant of emergency power); Bjørnskov & Voigt, *supra* note 7, at 101 (noting that over ninety percent of constitutions do contain an explicit provision for emergency government).

⁹⁶ L. ELAINE HALCHIN, CONG. RSCH. SERV., 98505, NATIONAL EMERGENCY POWERS 8, 11 (2021) (describing the mechanisms by which the NEA regulated declarations of national emergencies and related Congressional oversight).

⁹⁷ Lobel, *supra* note 29, at 1389.

⁹⁸ *See id.* at 1389–90.

ambiguously) Lincoln.⁹⁹ Nonetheless, despite an isolated dissent by Justice Jackson in *Korematsu*¹⁰⁰ and some scholarly effort at revival,¹⁰¹ the extra-legal tradition has few clear echoes in modern practice.

A. *The National Emergencies Act of 1976*

The closest thing the United States has to a framework statute that governs emergencies is the National Emergencies Act of 1976, a Watergate era statute alongside others, like the War Powers Resolution, that aimed to rebalance power between the executive and Congress after President Nixon's resignation.

The NEA was preceded by years of intensive study within Congress, which held hearings and commissioned a series of reports.¹⁰² The law was viewed by its proponents as significant—a solution to a burgeoning problem of executive overreach and lack of accountability during crisis.¹⁰³ The proponents of the law observed that four states of emergency remained in effect, sometimes decades after the facts constituting their occurrence had ceased, including a Great Depression banking emergency and an emergency stemming from the (undeclared) Korean War.¹⁰⁴

More broadly, the proponents of the law argued that chief executives since the F.D.R. presidency had acquired an “enormous—seemingly expanding and never-ending—range of emergency powers,” one that indeed was “virtually unlimited” in scope.¹⁰⁵ Perhaps even more ominously, proponents argued that the problem was a hidden one—the public was largely unaware of the problem, Congress played little role in overseeing executive action, and the courts had done nothing to rein executives in.¹⁰⁶ Those proposing the law sought to remedy a consequent gap in accountability.

Congress responded to these perceived problems by passing the NEA. First, the Act automatically terminated all extant states of emergency within two years.¹⁰⁷ Second, it provided a framework for any future declarations. All such

⁹⁹ See, e.g., John Yoo, *Jefferson and Executive Power*, 88 B.U. L. REV. 421, 434 (2008); DANIEL FARBER, *LINCOLN'S CONSTITUTION* 158 (2003); Abraham D. Sofaer, *Emergency Power and the Hero of New Orleans*, 2 CARDOZO L. REV. 233, 245–46 (1981).

¹⁰⁰ See generally *Korematsu v. United States*, 323 U.S. 214 (1944) (Jackson, J., dissenting).

¹⁰¹ See GROSS & NÍ AOLÁIN, *supra* note 23, at 110–13; Gross, *supra* note 20, at 1097.

¹⁰² See generally STAFF OF S. SPEC. COMM. ON NAT'L EMERGENCIES AND DELEGATED EMERGENCY POWERS, 93D CONG., *A BRIEF HISTORY OF EMERGENCY POWERS IN THE UNITED STATES* (Comm. Print 1974). For a broader list of the Committee's publications, see HALCHIN, *supra* note 96, at 8 n.47.

¹⁰³ See S. REP. NO. 93-549, at 6 (1973) (noting the vast, nearly unlimited power granted to presidents by emergency statutes).

¹⁰⁴ *Id.* at iii, 7–8.

¹⁰⁵ *Id.* at 6.

¹⁰⁶ *Id.*

¹⁰⁷ 50 U.S.C. § 1601.

declarations, as well as measures taken during the emergency, needed to be transmitted to Congress and expenditures also reported to Congress every six months.¹⁰⁸ All declarations of emergency automatically terminated on the one-year anniversary of when they were declared, unless the President proclaimed by that date that the emergency would continue in effect.¹⁰⁹ Finally, and most significantly, Congress could terminate any declaration of emergency by concurrent resolution, or in other words by approval of both houses of Congress, without any possibility of a presidential veto.¹¹⁰ Congress was to convene to discuss such a resolution for any extant state of emergency every six months.¹¹¹

The model adopted in the NEA emphasized legislative oversight. Unfortunately, the main tool in the law was gutted after the Supreme Court's 1983 *Immigration & Naturalization Service v. Chadha* decision.¹¹² *Chadha* held that all forms of legislative veto were unconstitutional.¹¹³ After *Chadha*, the concurrent resolution procedure could no longer be used; the NEA was amended in 1985 to provide that Congress could only terminate an emergency by joint resolution, which required passage by both houses as well as presentment to the President for possible veto.¹¹⁴ Post-*Chadha*, the congressional control provisions of the NEA added little to default congressional powers.¹¹⁵ Likewise, while the Act required the President to report declarations of authority to Congress and gave Congress a duty to regularly consider whether they should remain in effect, Congress has not usually held the debates required under the law.¹¹⁶

Equally important are the various things, often part of a formal emergency clause in other countries, which were not contained in the NEA. While the Act envisioned a significant role for the Congress in monitoring executive emergency powers,¹¹⁷ it said nothing about the judicial role. The Act itself is

¹⁰⁸ *Id.* §§ 1621(a), 1641(c). The President also needs to “specif[y] the provisions of law under which he proposes that he, or other officers will act.” *Id.* § 1631.

¹⁰⁹ *Id.* § 1622(d).

¹¹⁰ *Id.* § 1622(a). This position was reached after the Ford Administration rejected an alternative proposal—requiring congressional authorization of emergencies after six months. Weitzman, *supra* note 44, at 369, 395–96.

¹¹¹ 50 U.S.C. § 1622(b).

¹¹² *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983) (Powell, J., concurring).

¹¹³ *Id.* at 959–60 (“The Court’s decision, based on the Presentment Clauses, Art. I, § 7, cls. 2 and 3, apparently will invalidate every use of the legislative veto.”).

¹¹⁴ Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99–93, § 801, 99 Stat. 405, 448 (1985); 50 U.S.C. § 1622(a)(1).

¹¹⁵ See Richard H. Pildes, *The Supreme Court’s Contribution to the Confrontation Over Emergency Powers*, LAWFARE (Feb. 19, 2019), <https://www.lawfareblog.com/supreme-courts-contribution-confrontation-over-emergency-powers> [<https://perma.cc/L9PR-EJL8>].

¹¹⁶ Lobel, *supra* note 29, at 1415–16.

¹¹⁷ See, e.g., 50 U.S.C. § 1622(b) (describing congressional termination); *id.* § 1641 (describing requirement of congressional notification).

written in cryptic terms that provide no insight into what an emergency is: “With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency.”¹¹⁸ Nor does it settle whether such an emergency can be declared at the discretion of the President, or instead is subject to justiciable standards.

Further, the Act makes no attempt to define the powers utilized by the President during an emergency or to place any substantive limits on those powers. The roughly 123 or so possible powers granted to the President are instead found in various statutes, passed at different times, which allow the President to take certain actions during a “national emergency.”¹¹⁹ These are fragmented in terms of both subject matter and importance. According to a careful study by the Brennan Center, most of these statutes have never been used.¹²⁰ They run the gamut from the relatively mundane—the President is authorized to waive certain requirements governing disposal of garbage at sea¹²¹—to the extremely alarming—authorizing the closure or commandeering of means of public communication and broadcasting if the President “deems it necessary in the interest of national security or defense.”¹²² Overall, a survey of these powers suggests no sense of systemization, but instead a haphazard list of delegated powers, passed by Congress at different times to treat different discrete problems. Oddly as well, some powers found in the NEA can also be tapped without a declaration of national emergency.¹²³

Since its passage, the NEA has been used many times—seventy-one declarations by one count, of which approximately forty emergencies remain in

¹¹⁸ *Id.* § 1621(a).

¹¹⁹ BRENNAN CTR. FOR JUST., A GUIDE TO EMERGENCY POWERS AND THEIR USE (2019), https://www.brennancenter.org/sites/default/files/2023-02/2019_09_EmergencyPowers.pdf [<https://perma.cc/4RND-PQ7W>]; see also JENNIFER K. ELSEA, JAY B. SYKES, JOANNA R. LAMPE, KEVIN M. LEWIS & BRYAN L. ADKINS, CONG. RSCH. SERV., R46379, EMERGENCY AUTHORITIES UNDER THE NATIONAL EMERGENCIES ACT, STAFFORD ACT, AND PUBLIC HEALTH SERVICE ACT 4 (2020) (identifying 117 sections of the U.S. Code). The Brennan Center finds that thirteen additional statutes can be activated in circumstances where Congress declares a national emergency. *Id.* at 5 n.38.

¹²⁰ See BRENNAN CTR. FOR JUST., *supra* note 119.

¹²¹ 33 U.S.C. § 1902(b).

¹²² 47 U.S.C. § 606(c). This provision has been the target of recent reform efforts. See, e.g., H.R. 8659, 116th Cong. (2020); S. 4646, 116th Cong. (2020).

¹²³ An example is a set of provisions allowing the President to adjust statutory pay raises and comparability conditions, during either a declared “national emergency” or where there are “serious economic conditions affecting the general welfare.” 5 U.S.C. §§ 5303(b)(1), 5304. Presidents have routinely invoked these provisions in executive orders setting federal employee pay rates, but they have relied on the “serious economic conditions” trigger rather than a declaration of “national emergency.” See Brennan Ctr. for Just., *5 USC 5303b and 5304a*, SCRIBD (Dec. 5, 2018), <https://www.scribd.com/document/394939719/5-USC-5303b-and-5304a#> [<https://perma.cc/5YVK-B47D>].

effect.¹²⁴ However, by far the most common use of the Act has been to carry out a single statute—the International Emergency Economic Powers Act (IEEPA).¹²⁵ IEEPA gives the President broad powers to levy foreign sanctions in the event she finds an “unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.”¹²⁶ The Act grants powers to place financial sanctions on foreign governments or foreign nationals, to order that those sanctions be adhered to by United States individuals or companies, to draft regulations implementing a sanctioning regime, and to impose civil and criminal penalties for noncompliance.¹²⁷

One report finds that sixty-five of the seventy-one declarations of emergency since passage of the NEA were solely or primarily about activating IEEPA.¹²⁸ Many of these declarations aimed at prohibiting some or all transactions with a given foreign country and their nationals (i.e., North Korea and Venezuela) while others targeted more nebulous problems such as drug trafficking, international terrorist organizations, or groups seeking to interfere in United States elections.¹²⁹ IEEPA was intended by Congress to be a true emergency power, more limited in scope than prior presidential exercises under predecessor statutes, but it has instead become a “routine foreign policy tool.”¹³⁰

Other invocations of emergency power run the gamut from the relatively trivial to the undoubtably grave. The Trump Administration declared an emergency at the southern border, primarily to divert funds appropriated for other uses to the construction of a border wall: this action, as we shall see below, was successfully challenged in some courts, and the emergency was revoked by President Biden.¹³¹ Two major events of the past several decades also prompted declarations of national emergency. The first was the terrorist attacks of 9/11, which led to two declarations of emergency by the George W. Bush Administration, both of which remain in effect. One order focused primarily on IEEPA,¹³² while the other altered a number of provisions dealing with military

¹²⁴ See BOYLE, *supra* note 46, at 3; HALCHIN, *supra* note 102, at 11–12. The Congressional Research Service has similar numbers—sixty-two emergencies, of which thirty-seven remain in effect. HALCHIN, *supra* note 102, at 11–12.

¹²⁵ BOYLE, *supra* note 46, at 3.

¹²⁶ 50 U.S.C. § 1701(a).

¹²⁷ *Id.* §§ 1702–1705.

¹²⁸ BOYLE, *supra* note 46, at 3.

¹²⁹ CHRISTOPHER A. CASEY, IAN F. FERGUSON, DIANNE E. RENNACK & JENNIFER K. ELSEA, CONG. RSCH. SERV., R45618, *THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE* 48–51 tbl.A-1 (2020).

¹³⁰ BOYLE, *supra* note 46, at 3 (noting an average of 1.5 IEEPA declarations per year).

¹³¹ See *infra* notes 253–70 and accompanying text; see also Proclamation No. 9844, 84 Fed. Reg. 4949, 4949 (Feb. 15, 2019); Proclamation No. 10,142, 86 Fed. Reg. 7225, 7225 (Jan. 20, 2021).

¹³² See Exec. Order No. 13,224, 66 Fed. Reg. 49,079, 49,079 (Sept. 23, 2001).

spending, personnel, and promotion.¹³³ The second event was the COVID-19 pandemic, which led the Trump Administration to promulgate a declaration of national emergency on March 13, 2020.¹³⁴ The declaration interacts with a separate declaration of “public health emergency” issued by the Secretary of Health and Human Services, and its primary effect was to allow the potential waiver of certain rules governing Medicare, Medicaid, and other programs during the pandemic.¹³⁵

Some major events—such as the financial crisis of 2008—did not prompt invocation of the NEA at all.¹³⁶ Few of the statutory powers activated by declaration of a “national emergency” would seem to be useful during a financial crisis. And even in many cases where it was applied—9/11 and the pandemic, for example—it did not constitute the major thrust of the response. After 9/11, the government relied much more heavily on new legislation such as the USA PATRIOT Act, as well as on claims of inherent executive authority.¹³⁷ During the pandemic, the government mainly used both new legislative powers given by Congress and other “emergency” powers found outside of the NEA.¹³⁸

B. *Fragmented Federal Emergency Power*

One goal of the NEA was to unify emergency power under a single framework. Despite that goal, the Act coexists with many other forms of emergency power. First, the NEA applies only to statutes that are triggered by a declaration of “national emergency”; many federal emergency powers are left outside its reach.¹³⁹ Second, much governmental action during recent emergencies has relied on permanent grants of power.¹⁴⁰

1. *Other Emergency Schemes*

There are several important emergency schemes found outside the NEA that are subject to different procedural requirements.

¹³³ See Proclamation No. 7463, 66 Fed. Reg. 48,199, 48,199 (Sept. 14, 2001).

¹³⁴ See Proclamation No. 9994, 85 Fed. Reg. 15,337, 15,337 (Mar. 13, 2020).

¹³⁵ *Id.*

¹³⁶ See *infra* notes 400–01 and accompanying text.

¹³⁷ See *infra* notes 179–81, 230 and accompanying text (discussing the PATRIOT Act and inherent executive power).

¹³⁸ See 42 U.S.C. § 247d(a) (allowing the executive to declare a public health emergency under the Public Health Service Act).

¹³⁹ 50 U.S.C. § 1621(a). The Act also has some explicit cutbacks. See 50 U.S.C. § 1651.

¹⁴⁰ See *infra* Part III.B.2.

a. *The Insurrection Act*

A potentially sweeping cluster of emergency powers falls under the umbrella of the Insurrection Act. This statute governs the historically important role of presidents to call upon the militia to repress invasions, insurrections, or efforts to block enforcement of United States laws.¹⁴¹ The Constitution’s first militia clause gives Congress the ability to regulate calling upon the militia to carry out these functions,¹⁴² but Congress in a series of laws since 1792 has delegated these powers to the President, with varying degrees of limitation.¹⁴³ The first law required a federal judge to certify that conditions were met,¹⁴⁴ but subsequent laws dropped this condition, and modern versions of the statute allow the President to deploy the regular armed forces, as well as the militia, for these purposes.¹⁴⁵

The current version of the statute does not require the President to declare an emergency of any type, but merely to issue a proclamation to insurgents to disperse by a certain time.¹⁴⁶ The law gives the President broad discretion to deploy troops under three different sets of conditions.¹⁴⁷ For example, the President can deploy troops whenever she “considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings,” among other circumstances.¹⁴⁸

¹⁴¹ Joseph Nunn, *The Insurrection Act Explained*, BRENNAN CTR. FOR JUST. (Apr. 21, 2022), <https://www.brennancenter.org/our-work/research-reports/insurrection-act-explained> [<https://perma.cc/9NE8-YMMA>] (explaining how the Insurrection Act has been invoked by numerous presidents throughout history).

¹⁴² U.S. CONST. art. I, § 8, cl. 15 (giving Congress power “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”).

¹⁴³ Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 152–53 (2004).

¹⁴⁴ President Washington sought and received such a declaration during the Whiskey Rebellion of 1794. *See id.* at 160–61.

¹⁴⁵ 10 U.S.C. §§ 252, 253.

¹⁴⁶ *See id.* § 254.

¹⁴⁷ *See id.* §§ 251, 252, 253 (laying out three scenarios in which the President can deploy federal troops related to insurrections).

¹⁴⁸ *Id.* § 252; *see also id.* § 253 (permitting the President to deploy troops to suppress “any insurrection, domestic violence, unlawful combination, or conspiracy” if it hinders the laws of the United States or a state such “that any part or class of its people [are] deprived of a [constitutional] right[,]” or if it “opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws”).

b. *The Stafford Act*

The Stafford Act of 1988 is aimed primarily at natural disasters.¹⁴⁹ The Act gives the President certain powers during situations of “emergency” or “major disaster,” and thus does not fall inside the scope of the NEA, even though it is obviously an emergency powers statute.¹⁵⁰ Declaration of a “major disaster” requires a request from the governor of an affected state or chief executive of an affected tribe, and may not be undertaken unilaterally by the President.¹⁵¹ An “emergency” in contrast can potentially be declared unilaterally by the President in circumstances where the federal government has “primary responsibility for response,” although this too is normally decreed at the behest of a governor or chief executive of a tribe.¹⁵²

The resulting powers are wide-ranging and include a presidential ability to appoint a coordinating official, to provide assistance and provide essentials like food and medicine, provision of housing units, military assistance for cleanup and restoration of services, and emergency loans to affected local governments.¹⁵³ The President can also direct the Department of Defense to have the military carry out emergency work, such as cleanup and restoration of essential services, for short periods even before making such a declaration.¹⁵⁴ Some commentators have noted that the Stafford Act may give a President far more unilateral power than is commonly realized, in part given ambiguities in the meaning of federal “primary responsibility.”¹⁵⁵ In practice, however, the controversy over the scope of unilateral presidential emergency power under the Stafford Act has remained largely theoretical.

c. *The Public Health Service Act*

As we have seen during the COVID-19 pandemic, the scope of emergency power during a health-related emergency is particularly fragmented. Under the Public Health Service Act, the Secretary of Health and Human Services has the power to issue a “public health emergency” after finding either that “a disease or disorder presents a public health emergency,” or that “a public health emergency, including significant outbreaks of infectious diseases or bioterrorist

¹⁴⁹ 42 U.S.C. § 5121(a)–(b).

¹⁵⁰ *Id.* § 5122(a)(1) (defining “emergency”); *id.* § 5122(2) (defining “major disaster”).

¹⁵¹ ELSEA, SYKES, LAMPE, LEWIS & ADKINS, *supra* note 119, at 20–21.

¹⁵² 42 U.S.C. § 5191(a)–(b) (allowing unilateral declaration where “the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority”).

¹⁵³ See ELSEA, SYKES, LAMPE, LEWIS & ADKINS, *supra* note 119, at 23–32 tbl.2; see also Sean McGrane, Note, *Katrina, Federalism, and Military Law Enforcement: A New Exception to the Posse Comitatus Act*, 108 MICH. L. REV. 1309, 1324–25 (2010).

¹⁵⁴ 42 U.S.C. § 5170b(c).

¹⁵⁵ See, e.g., ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* 25–26 (2011).

attacks, otherwise exists.”¹⁵⁶ The declaration unlocks money from a public health emergency fund, which can be spent for designated purposes and also triggers a series of other powers, such as the allowance of telemedicine and the waiver of certain infectious disease reporting requirements.¹⁵⁷

The Secretary, upon declaring that a state of public health emergency exists or finding that there is a “credible risk” of such an emergency, can also provide for immunity from liability for the “manufacture, testing, development, distribution, administration, or use of one or more covered countermeasures.”¹⁵⁸ This has been used during the pandemic for a range of products, including vaccines and antiviral medications.¹⁵⁹ The Secretary under similar conditions—either a declaration of a public health emergency or a finding of a “significant potential” for such a declaration—may make a separate declaration allowing for approval of various products on an “emergency use” basis.¹⁶⁰ These emergency use authorizations (EUAs) have become a central component of the United States’ pandemic response, allowing for the initial approval of vaccines, drugs, and other supplies.¹⁶¹ Finally, in some cases, both a declaration of a public health emergency and another declaration are necessary to unlock statutory powers. Waivers of Medicaid and Medicare rules under section 1135 of the Social Security Act, which have been widely used during the pandemic on issues like provider enrollment, telehealth, and treatment facility requirements, necessitate a finding of both a public health emergency and either a Stafford Act declaration or an NEA national emergency declaration.¹⁶²

Interestingly, major crises often lead to invocation of several of these emergency schemes. During the COVID-19 pandemic, the federal government

¹⁵⁶ 42 U.S.C. § 247d(a).

¹⁵⁷ See *id.* § 247d; ELSEA, SYKES, LAMPE, LEWIS & ADKINS, *supra* note 119, at 37–38 tbl.3 (listing powers unlocked by declaring a public health emergency); 42 U.S.C. § 247d-6e(a) (“Upon the issuance by the Secretary of a declaration under section 247d-6d(b) of this title, there is hereby established in the Treasury an emergency fund designated as the ‘Covered Countermeasure Process Fund.’”).

¹⁵⁸ 42 U.S.C. § 247d-6d(b)(1).

¹⁵⁹ For a list of COVID-19 related declarations of immunity, see *Public Readiness and Emergency Preparedness (PREP) Act*, ADMIN. FOR STRATEGIC PREPAREDNESS & RESPONSE, <https://aspr.hhs.gov/legal/PREPact/Pages/default.aspx> [<https://perma.cc/4WFN-E4B2>].

¹⁶⁰ See 21 U.S.C. § 360bbb-3(a)–(b).

¹⁶¹ For a list of COVID-19 related EUAs, see *Emergency Use Authorization*, FDA, <https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/emergency-use-authorization#covid19euas> [<https://perma.cc/A5TZ-THY2>] (May 12, 2023).

¹⁶² 42 U.S.C. § 1320b-5(g); CTR. FOR MEDICAID & MEDICARE SERVS., COVID-19 EMERGENCY DECLARATION BLANKET WAIVERS FOR HEALTH CARE PROVIDERS 1 (2022), <https://www.cms.gov/files/document/covid-19-emergency-declaration-waivers.pdf> [<https://perma.cc/K34T-ZH27>].

has made public health emergency declarations, Stafford Act declarations, and national emergency declarations simultaneously.¹⁶³

2. *Non-Emergency Emergency Powers*

To a significant degree, federal responses during crises also depend on permanent, nonemergency statutes that are redeployed for emergency use. Consider section 361(a) of the Public Health Service Act, which allows the Surgeon General, with approval from the Secretary of Health and Human Services to “make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases” into the United States or between states.¹⁶⁴

Notably, this section does not require a declaration of emergency—it may be used at any time. But it has played a critical role during the pandemic. The Secretary promulgated regulations delegating his regulatory authority to the Center for Disease Control and Prevention (CDC) in the event of “inadequate local control.”¹⁶⁵ The CDC in turn has promulgated rules requiring masks to be worn on “conveyances” and at “transportation hubs,” including buses, ships, trains, airplanes, and airports.¹⁶⁶ It issued orders stopping the sailing of cruise ships, and later creating a framework of requirements under which sailing of cruise ships could resume.¹⁶⁷ Finally, the CDC issued several orders limiting or prohibiting evictions during the pandemic, which at times were also ordered or extended by congressional statute.¹⁶⁸ The eviction ban was challenged by realtors, landlords, and others as an improper use of the authority delegated by section 361(a), and eventually the Supreme Court sustained the challenge, as discussed further below.¹⁶⁹

Another example is provided by presidential power to ban immigration. Section 212(f) of the Immigration and Nationality Act allows the President to suspend entry of any immigrant or nonimmigrant “aliens or any class of aliens” whenever she finds that their entry “would be detrimental to the interests of the

¹⁶³ See *supra* note 4 and accompanying text.

¹⁶⁴ 42 U.S.C. § 264(a).

¹⁶⁵ 42 C.F.R. § 70.2 (2020).

¹⁶⁶ Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8025, 8025–29 (Feb. 3, 2021).

¹⁶⁷ No Sail Order and Suspension of Further Embarkation, 85 Fed. Reg. 16,628, 16,628–31 (Mar. 24, 2020); Framework for Conditional Sailing and Initial Phase COVID-19 Testing Requirements for Protection of Crew, 85 Fed. Reg. 70,153, 70,153 (Nov. 4, 2020).

¹⁶⁸ Temporary Halt in Residential Evictions in Communities with Substantial or High Transmission of COVID-19 to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43,244, 43,244 (Aug. 6, 2021); Consolidated Appropriations Act, 2021, Pub. L. No. 116–260, § 502, 134 Stat. 2078, 2078–79 (2020) (extending eviction moratorium by statute).

¹⁶⁹ See generally *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021); *infra* Part IV.B.1.

United States.”¹⁷⁰ The ban lasts for such period as the President “shall deem necessary.”¹⁷¹ At the start of the Trump presidency, this provision was used to impose the ban on entry of foreigners from a specified list of countries that was sometimes dubbed the “Muslim ban.”¹⁷² During the pandemic, it has been used several times, for example to impose on ban on entry of many foreigners coming from European countries and specified other countries that lasted from March 11, 2020 until October 25, 2021.¹⁷³ More recently, the power was also used to impose a ban on travel from certain African countries after discovery of the omicron variant in November 2021, although that ban was lifted at the end of December 2021.¹⁷⁴ As the Supreme Court observed in its decision upholding Trump’s 2017 ban, section 212(f) “exudes deference” to the President.¹⁷⁵ Indeed, the Court noted that it was “questionable” whether the statute even required the President to explain her reasoning.¹⁷⁶

There are also hybrid statutes that seem half-in, half-out of emergency frameworks. For instance, the Occupational Safety and Health Administration (OSHA) has broad rulemaking authority to enact rules “reasonably necessary or appropriate to provide safe or healthful employment and places of employment.”¹⁷⁷ Proposed rules must follow procedures specified in the Occupational Health and Safety Act of 1970,¹⁷⁸ as well as the notice and comment procedures provided for in the Administrative Procedure Act.¹⁷⁹ However, the Occupational Health and Safety Act also provides for an “emergency temporary standard”: this does not expand the agency’s rulemaking authority but does allow for an emergency procedure which bypasses normal requirements and takes effect immediately upon publication.¹⁸⁰ This emergency procedure was used to promulgate the Biden Administration’s test or vaccine mandate on larger businesses, which was also stayed by the Supreme Court.¹⁸¹

¹⁷⁰ 8 U.S.C. § 1182(f).

¹⁷¹ *Id.*

¹⁷² Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,209–10 (Mar. 6, 2017); *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018) (noting that the executive order has been referred to as a “Muslim ban”).

¹⁷³ Proclamation No. 9993, 85 Fed. Reg. 15,045, 15,045–46 (Mar. 11, 2020) (imposing ban); Proclamation No. 10,294, 86 Fed. Reg. 59,603, 59,604 (Oct. 25, 2021) (revoking ban).

¹⁷⁴ Proclamation No. 10,315, 86 Fed. Reg. 68,385, 68,385–86 (Nov. 26, 2021); Proclamation No. 10,319, 87 Fed. Reg. 149, 149–50 (Jan. 3, 2022) (revoking ban).

¹⁷⁵ *Trump v. Hawaii*, 138 S. Ct. at 2408–09.

¹⁷⁶ *Id.* at 2409.

¹⁷⁷ 29 U.S.C. § 652(8).

¹⁷⁸ *See generally id.* § 655.

¹⁷⁹ *See generally id.*; 5 U.S.C. § 553(b)–(e) (explaining notice and comment procedures).

¹⁸⁰ 29 U.S.C. § 655(c).

¹⁸¹ For prior uses, see SCOTT D. SZYMENDERA, CONG. RSCH. SERV., R46288, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA): COVID-19 EMERGENCY

C. Ex Post, Tailored Emergency Power

Many important powers during recent crises have been expressly delegated by Congress after the crisis has arisen, a phenomenon that is common in other countries and which Ferejohn and Pasquino call the “legislative model” of emergency powers.¹⁸² Powers delegated during a crisis are often very broad, although there is evidence that members of Congress engage in some negotiation to limit powers somewhat, or to expand oversight.¹⁸³ The partisan composition of the Congress at the time of the crisis may make some difference to the scope of the delegation, although work has suggested that partisan factors are dampened in the aftermath of a major crisis.¹⁸⁴

The delegation of power through passage of major statutes after a crisis is not a new phenomenon. During the Civil War, President Lincoln initially took a series of actions unilaterally, but Congress eventually ratified the President’s actions and granted him new powers.¹⁸⁵ Likewise, President Roosevelt during the Great Depression declared a banking holiday after taking office by repurposing powers under the World War I era Trading with the Enemy Act; he then requested and received from Congress immediate passage of the Emergency Banking Act, which gave the President broad authority over the banking system, as well as moving the country (temporarily) off the gold standard.¹⁸⁶

Special delegated authority has played a key role in recent crises. After 9/11, the Bush Administration requested passage of the USA PATRIOT Act as a key part of the strategy for combatting terrorist groups.¹⁸⁷ The initial proposal was for an extremely broad delegation; the final product was narrower, created more opportunities for oversight, and included a sunset clause after four years.¹⁸⁸ Nonetheless, it vastly expanded the scope of presidential authority across different areas. The law provided extensive new powers of federal surveillance and search, in some cases without traditional safeguards like warrants or notification. It also expanded powers of detention in immigration matters, weakened traditional rules surrounding the secrecy of grand juries, and created

TEMPORARY STANDARDS (ETS) ON HEALTH CARE EMPLOYMENT AND VACCINATIONS AND TESTING FOR LARGE EMPLOYERS 19 tbl.A-1 (2022).

¹⁸² Ferejohn & Pasquino, *supra* note 26, at 216–17.

¹⁸³ Posner & Vermeule, *Crisis Governance*, *supra* note 12, at 1646–48.

¹⁸⁴ *See id.* at 1651–52.

¹⁸⁵ *See, e.g.,* FARBER, *supra* note 99, at 138; David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1140 (2006).

¹⁸⁶ Roger I. Roots, *Government by Permanent Emergency: The Forgotten History of the New Deal Constitution*, 33 SUFFOLK U. L. REV. 259, 262–68 (2000).

¹⁸⁷ Beryl A. Howell, *Seven Weeks: The Making of the USA PATRIOT Act*, 72 GEO. WASH. L. REV. 1145, 1152 (2004).

¹⁸⁸ Posner & Vermeule, *Crisis Governance*, *supra* note 12, at 1648.

new crimes.¹⁸⁹ The Administration was also able to receive congressional authorizations for the use of military force involving Al Qaeda and Iraq, as well as supportive laws regulating detention of enemy combatants and trial by military commission.¹⁹⁰

Tailored, delegated power also played an important role after the 2008 financial crisis. The government initially used Depression era laws to bail out troubled financial institutions.¹⁹¹ But it later achieved passage of the Emergency Economic Stabilization Act of 2008, which gave the Treasury Department authority to use up to \$700 billion to buy assets of troubled financial institutions.¹⁹² Passage of the law was a torturous process; it initially failed in Congress, with destabilizing effects on financial markets, before being passed in amended form.¹⁹³ The initial version of the legislation expressly immunized the actions of the Treasury from judicial review or other oversight; final versions provided for some possibilities of judicial review, created nonjudicial oversight mechanisms, and added provisions limiting executive compensation.¹⁹⁴ Still, the scope of delegation was expansive, and the Treasury was able to repurpose the original plan, which was to buy toxic assets held by financial institutions, to instead buy preferred stock.¹⁹⁵ The money was also later used to bail out automakers, using the statute's broad definition of financial institutions.¹⁹⁶

The story of delegated authority is a little different during the COVID-19 pandemic. Congress has passed six major pieces of legislation, beginning in March 2020, dealing with aspects of the pandemic.¹⁹⁷ The major thrust of those laws was to provide over \$5 trillion dollars of funding.¹⁹⁸ The laws increased federal unemployment benefits, as well as creating the Paycheck Protection Program administered by the Small Business Administration, which provided

¹⁸⁹ Howell, *supra* note 187, at 1178–205.

¹⁹⁰ See, e.g., Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107–243, 116 Stat. 1498; Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2600.

¹⁹¹ Randall G. Guynn, *The Global Financial Crisis and Proposed Regulatory Reform*, 2010 BYU L. REV. 421, 435–36.

¹⁹² Emergency Economic Stabilization Act of 2008, Pub. L. No. 110–343, 122 Stat. 3765.

¹⁹³ See Guynn, *supra* note 191, at 434–35; Alex Planes, *The Worst Day in Dow History and the Law that Made It Possible*, MOTLEY FOOL (Sept. 29, 2013), <https://www.fool.com/investing/general/2013/09/29/the-worst-day-in-dow-history-and-the-law-that-made.aspx> (on file with *The Ohio State Law Journal*).

¹⁹⁴ See Posner & Vermeule, *Crisis Governance*, *supra* note 12, at 1626, 1631, 1661–62.

¹⁹⁵ *Id.* at 1626–28.

¹⁹⁶ See *id.* at 1633–34.

¹⁹⁷ For summaries of major legislation, see *Here's Everything the Federal Government Has Done to Respond to the Coronavirus So Far*, PETER G. PETERSON FOUND. (Mar. 15, 2021), <https://www.pgpf.org/blog/2021/03/heres-everything-congress-has-done-to-respond-to-the-coronavirus-so-far> [https://perma.cc/R533-4KQV].

¹⁹⁸ *Id.*

forgivable loans to small businesses.¹⁹⁹ They focused primarily on economic aspects of the crisis rather than on expanding regulatory power over public health. The CDC and the Food and Drug Administration (FDA) have relied primarily on existing statutory authorizations to respond to the pandemic, rather than new powers.²⁰⁰ Throughout, many of the regulatory decisions (shut down orders, mask mandates, etc.) have been dealt with by state and local governments, with the CDC playing a hortatory role through the issuance of guidelines.

D. Inherent Executive Authority and the Youngstown Framework

Alongside this wealth of statutory emergency authority stands a set of vaguely identified claims to inherent power by the executive. These claims are often rooted in broad grants of power found in Article II, particularly the Commander in Chief Clause, the Vesting Clause, and the Take Care Clause.

To some degree, the tradition of identifying inherent executive power goes back to the founding period. Hamilton, for instance, famously drew on the distinction between the vesting clauses in Article I and Article II—the former grants Congress “all legislative powers herein granted,” while the latter grants the President “the executive power”—to argue that the Constitution meant to invest the President with broad executive powers outside the strict scope of Article II.²⁰¹ The position was contested at the time and remains deeply controversial.

During the antebellum period, however, presidential claims to inherent authority were not the dominant strain in United States constitutional thought and were eclipsed by the Lockean prerogative tradition. The Lincoln presidency served as a transition. Lincoln took several unprecedented, unilateral actions after the surrender of Fort Sumter in April 1861, when Congress was out of session.²⁰² He called up the militia, ordered a blockade of southern ports, closed the United States mail to secessionist publications, and vastly expanded the size of the United States military, even paying private citizens to help with recruiting.²⁰³ Most famously, Lincoln suspended habeas corpus between Philadelphia and Washington, allowing him to detain presumptive southern sympathizers without charge.²⁰⁴

¹⁹⁹ *Id.*

²⁰⁰ *See infra* Part III.B.1.c & III.B.2.

²⁰¹ U.S. CONST. art. I, § 1; *id.* art II, § 1; *Early Perspectives on Executive Power*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artII-S1-C1-3/ALDE_00013792/ [<https://perma.cc/NJX8-ZUXW>].

²⁰² FARBER, *supra* note 99, at 116.

²⁰³ *Id.* at 116–17.

²⁰⁴ *See id.* at 117.

The suspension power is found in Article I, arguably suggesting that only Congress, and not the President, holds it.²⁰⁵ This was the position taken by Chief Justice Taney in the *Ex Parte Merryman* case.²⁰⁶ Lincoln argued the suspension, even if not in accordance with the Constitution, was justified by dire necessity—in his address at the opening of the special congressional session he called for in July 1861, he famously asked, whether “all the laws *but one* . . . were to go unexecuted, and the government itself go to pieces, lest that one be violated?”²⁰⁷ However, Lincoln also argued that the suspension was legal, so the question of extralegal necessity was not squarely presented.²⁰⁸ He adopted a pragmatic read of the Constitution, noting that the Suspension Clause was clearly intended for a “dangerous emergency,” including cases where Congress was prevented from assembling, and that in such a case it made little sense to prevent the President from activating the clause unilaterally, at least as a temporary measure.²⁰⁹

The modern theory of extensive, inherent Article II emergency power is largely a creation of the twentieth century. One of its sources is Teddy Roosevelt’s theory of the stewardship presidency: the President has a duty to act for the people and is capable of doing so unless affirmatively prohibited from doing so by the Constitution.²¹⁰ In so conceptualizing the presidency, Roosevelt rejected the view that the President was paralyzed from acting unless she could point to an affirmative grant of constitutional authority.²¹¹

The most important modern case on the scope of inherent executive authority during a crisis is the *Youngstown* case, occasioned by President Truman’s decision to seize steel mills during a threatened strike in 1952, at the height of the undeclared Korean War.²¹² Truman argued that the seizure was necessary during what he labelled an “emergency” in order to prevent a stoppage of production that would have threatened the war effort.²¹³ In a 6–3 decision, the Court rejected Truman’s authority to carry out the seizure.²¹⁴ The majority decisions reflect a view that Congress had not only failed to authorize such a seizure, but had affirmatively rejected the option, among other reasons by considering and failing to authorize it during passage of the Taft-Hartley Act.²¹⁵

²⁰⁵ See U.S. CONST. art. I, § 9, cl. 2.

²⁰⁶ *Ex parte Merryman*, 17 F. Cas. 144, 144, 148 (C.C.D. Md. 1861) (No. 9487).

²⁰⁷ FARBER, *supra* note 99, at 158.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 159.

²¹⁰ THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 352–53 (Hermann Hagedorn ed., 1926); see also DANIEL P. FRANKLIN, EXTRAORDINARY MEASURES: THE EXERCISE OF PREROGATIVE POWERS IN THE UNITED STATES 48 (1991).

²¹¹ See FRANKLIN, *supra* note 210, at 48.

²¹² See generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

²¹³ Exec. Order No. 10,340, 17 Fed. Reg. 3139 (Apr. 8, 1952).

²¹⁴ See generally *Youngstown*, 343 U.S. 579.

²¹⁵ *Id.* at 586.

In the face of this implied congressional prohibition, the Truman Administration lacked sufficient authority to conduct a seizure under Article II. Truman's lawyers pointed to three major provisions of the Constitution—the Commander in Chief Clause, the Vesting Clause, and the Take Care Clause—but the majority rejected all of them.²¹⁶ The Commander in Chief Clause, Justice Black's majority opinion held, did not reach so far beyond the theater of war itself.²¹⁷ The Vesting Clause and Take Care Clause limited the President's authority to execute a congressional policy "in a manner prescribed by Congress," not having "a presidential policy be executed in a manner prescribed by the President."²¹⁸ In his concurrence, Justice Jackson added a resounding rejection of the theory that the Vesting Clause imbued the President with broad, extratextual powers: "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image."²¹⁹

Jackson's concurrence has been the most famous and influential of the *Youngstown* opinions.²²⁰ In it he develops a tripartite scheme for evaluating presidential exercises of power. First, where Congress has expressly or impliedly authorized presidential action, that authority is at its "maximum," for the President is effectively wielding the authority of the federal government as a whole.²²¹ Second, where Congress has been silent on an issue, unilateral presidential action subsists in a "zone of twilight."²²² The flexible nature of the separation of powers might make presidential action in such circumstances constitutional, but the issue is likely to depend on "the imperatives of events and contemporary imponderables rather than on abstract theories of law."²²³ Third, where Congress has expressly or impliedly prohibited the President from acting, then presidential power is at its "lowest ebb," for the President can only rely on "his own constitutional powers minus any constitutional powers of Congress over the matter."²²⁴ Presidential exercises of power in such circumstances can only be sustained by "disabling the Congress from acting upon the subject," an enterprise that Jackson says must be "scrutinized with caution."²²⁵ Jackson found Truman's steel seizure to be firmly in the third category, and along with

²¹⁶ *Id.* at 587, 646.

²¹⁷ *See id.* at 587.

²¹⁸ *See id.* at 588.

²¹⁹ *See id.* at 634, 641 (Jackson, J., concurring).

²²⁰ *See, e.g.,* David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155, 204 (2002).

²²¹ *Youngstown*, 343 U.S. at 634–35 (Jackson, J., concurring).

²²² *Id.* at 637.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 637–38.

the majority found the scope of exclusive presidential authority insufficient to sustain it.²²⁶

Particularly relevant are the discussions of the seizure as an example of presidential emergency power. The dissenting opinion written by Chief Justice Vinson suggested that presidential emergency power was fundamentally different from authority during “more tranquil occasions.”²²⁷ At minimum, Vinson argued, the President had authority to act immediately during an emergency to prevent “collapse of the legislative programs.”²²⁸ Vinson’s opinion suggested undefined, if temporary, emergency powers arising from the Take Care Clause and other sources, where presidential power would rise to meet the gravity of the emergency.²²⁹

Justice Jackson’s concurrence relied partly on comparative constitutional law to reject Vinson’s argument. Jackson noted legitimate disagreement in a survey of European legal systems on the topic of explicit emergency powers, which suggested recent events were “inconclusive as to the wisdom of lodging emergency powers somewhere in a modern government.”²³⁰ However, based on a comparison between the fall of the Weimar German constitution and the French state of siege, he also argued that to be compatible with liberty, the power to authorize or control emergency powers had to be lodged in a different institution than the executive charged with executing emergency powers.²³¹ Thus, Vinson and Truman’s argument of undefined emergency power was rejected.

Youngstown left many key questions open, but it is a crucial signpost.²³² Notably, the prevailing approach in Justice Jackson’s concurrence did not close the door on inherent authority during emergencies; it merely rejected the position that these powers were undefined and not subject to congressional or judicial control. Justice Jackson’s concept of a “zone of twilight” created a possibility for flexible executive action subject to a pragmatic, contextual analysis; moreover, constitutional grants like the Commander in Chief Clause might have more bite in a case more connected to the theater of war.

Youngstown limits and guides assertions of inherent executive power. One effect is to push such assertions towards areas such as military action and the exercise of foreign affairs. There, statements such as Justice Sutherland’s (in)famous dictum in the *Curtiss-Wright* case that the President possesses a “very delicate, plenary and exclusive power . . . as the sole organ of the federal

²²⁶ *Id.* at 640.

²²⁷ *Youngstown*, 343 U.S. at 667, 703 (Vinson, C.J., dissenting).

²²⁸ *Id.* at 703.

²²⁹ *See id.* at 702.

²³⁰ *Id.* at 652 (Jackson, J., concurring).

²³¹ *See id.* at 652 (“[P]arliamentary control made emergency powers compatible with freedom.”).

²³² *See* Adler, *supra* note 220, at 212.

government in the field of international relations,”²³³ as well as policy reasons and limitations on justiciability, bolster presidential assertions of authority. Consider one of the leading subsequent cases on emergency powers, *Dames & Moore v. Regan*, where Justice Rehnquist’s opinion had little trouble concluding that Presidents Carter and Reagan had unilateral power, in order to end the Iran hostage crisis, to make an executive agreement that transferred Iranian assets, as well as dismissing and transferring pending claims against Iran to an international tribunal.²³⁴ While Rehnquist found that some of the actions were explicitly authorized by IEEPA, others—especially the dismissal and transfer of claims—were not.²³⁵ Yet Rehnquist found support for presidential action in the history of international claims settlement by United States chief executives, as well as in the emergency context of the events, which necessitated a rapid, centralized, and secretive response.²³⁶

Assertions of similar powers in other contexts, such as economic crises or many issues in domestic affairs, are more difficult to sustain. Perhaps Franklin Roosevelt had suggested he possessed such authority during the Great Depression, although he ultimately relied on extensive powers granted by Congress rather than inherent authority.²³⁷ Nixon surely suggested such authority in the events surrounding Watergate (“[w]hen the president does it, that means it is not illegal”), but those assertions were widely rejected in popular discourse, and of course Nixon resigned in disgrace under threat of impeachment.²³⁸

Several of the oft-cited nineteenth century precedents involving inherent executive emergency power dealt with domestic events well outside of the context of armed conflict, but those cases amount to less than meets the eye. *In re Neagle*, for example, upheld the President’s ability to order protection for a Supreme Court justice without explicit congressional authority;²³⁹ as Monaghan has argued, the result of this case probably stands for a limited “protective power” housed in the presidency.²⁴⁰ *In re Debs* held that the President had power to seek an injunction to break up the famous Pullman strike of 1894, but

²³³ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

²³⁴ *Dames & Moore v. Regan*, 453 U.S. 654, 672 (1981).

²³⁵ *Id.* at 675, 677.

²³⁶ *See id.* at 680–81.

²³⁷ *See* Franklin D. Roosevelt, *First Inaugural Address* (Mar. 4, 1933), in 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 15 (1938); Posner & Vermeule, *Crisis Governance*, *supra* note 12, at 1669–70.

²³⁸ *See* ‘I Have Impeached Myself’: Edited Transcript of David Frost’s Interview with Richard Nixon Broadcast in May 1977, GUARDIAN (Sept. 7, 2007), <https://www.theguardian.com/theguardian/2007/sep/07/greatinterviews1> [<https://perma.cc/4RSR-R98A>].

²³⁹ *In re Neagle*, 135 U.S. 1, 67 (1890).

²⁴⁰ *See* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 65–66 (1993).

the basis of the Court's decision was the congressionally delegated authority to use the militia and armed forces to enforce federal law.²⁴¹

In contrast, the contested scope of inherent executive authority over foreign affairs and deployment of military power remains great. Perhaps the most dramatic assertions occurred in the George W. Bush Administration after the 9/11 attacks. Bush had little trouble obtaining very broad delegations of authority after the attacks. Nonetheless, the Administration also made sweeping assertions of inherent authority, including powers to detain enemy combatants, to try detainees using extraordinary procedures and by military commission, to carry out interrogations regardless of constraints in federal law, and to conduct warrantless surveillance unauthorized even by the procedures Congress blessed after 9/11.²⁴² A few of those claims were eventually reviewed and limited by the Supreme Court.²⁴³ But many were never tested, in part due to limitations on justiciability.

Similarly, presidents of both parties have continued to make broad claims about the ability to deploy the United States military abroad,²⁴⁴ despite constitutional authority given to Congress, such as the declaration of war clause, and despite the text of the War Powers Resolution, which requires the President to withdraw troops within ninety days unless given express congressional authorization.²⁴⁵ Again, barriers to justiciability are one relevant factor, along with background understandings of the separation of powers. Some careful scholarship has claimed that presidents in fact possess considerably less

²⁴¹ *In re Debs*, 158 U.S. 564, 599–600 (1895). For discussion on *In re Debs*, see Vladeck, *supra* note 143, at 183–85.

²⁴² See Memorandum from Jay S. Bybee, Assistant Att'y Gen., Off. of Assistant Att'y Gen., on Standards for Conduct of Interrogation Under 18 U.S.C. §§ 2340-2340A to Alberto R. Gonzales, Couns. to the President (Aug. 1, 2002); Tracey Maclin, *The Bush Administration's Terrorist Surveillance Program and the Fourth Amendment's Warrant Requirement: Lessons from Justice Powell and the Keith Case*, 41 U.C. DAVIS L. REV. 1259, 1304–05 (2008); Alberto R. Gonzales, Legal Authorities Supporting the Activities of the National Security Agency Described by the President 13–14 (Jan. 19, 2006), <https://www.justice.gov/sites/default/files/olc/opinions/2006/01/31/nsa-white-paper.pdf> [<https://perma.cc/VY7F-GT33>]; Mil. Order, 66 Fed. Reg. 57,833, 57,833 (Nov. 13, 2001); Jennifer K. Elsea, *Presidential Authority to Detain "Enemy Combatants,"* 33 PRESIDENTIAL STUDS. Q. 568, 594–98 (Sept. 2003).

²⁴³ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 509, 533 (2004) (holding that detainees had to be given process); *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006) (holding that the President lacked authority to conduct trials by military commission).

²⁴⁴ Memorandum Opinion for the Attorney General from Caroline D. Krass Re: Authority to Use Military Force in Libya 28–31 (Apr. 1, 2011) (concluding that the President has “independent authority” to deploy troops abroad “for the purpose of protecting important national interests” unless such an engagement constitutes a “war”); Letter and Attached Memorandum from Joseph E. Macmanus and Elizabeth L. King Re: United States Activities in Libya 25 (June 15, 2011) (“U.S. military operations are distinct from the kind of ‘hostilities’ contemplated by the Resolution’s 60 day termination provision.”).

²⁴⁵ See War Powers Resolution, Pub. L. No. 93–148, 87 Stat. 555 (1973).

authority than presidents often assert under the Commander in Chief Clause when operating in Justice Jackson's third category, but these claims have had limited impact on actual practice.²⁴⁶

In short, claims of inherent executive power run alongside delegated statutory powers found in the NEA and elsewhere as a core component of the United States emergency powers regime. The flexible, pragmatic, and ultimately vague standards for assessing these claims threaten to destabilize the system, allowing the President to claim a residuum of centralized authority that is difficult to check. But claims of inherent executive authority do not have equal force across all types of emergencies—sometimes the President can plausibly claim a large amount of such power, but sometimes, even in a deep crisis, little such authority would seem to be available.

IV. AN ANALYSIS OF UNITED STATES EMERGENCY POWERS: ABUSIVE OVERREACH AND UNDERREACH

This Part uses the map constructed above to analyze problems in the federal emergency powers regime. I start with the prototypical problem of abusive overreach—presidents seizing emergency power in contexts where it is inappropriate or using emergency power as a pretext to centralize power or harm the democratic order. This is a true problem, but its risks in the United States may be overstated. There seems to be relatively little risk that statutory emergency powers found in the NEA will be subject to substantial forms of overreach. The bigger risks of overreach stem from other sources—statutory emergency powers found elsewhere and inherent executive power. Unfortunately, some of these risks are harder to reach via statutory design.

Next, I consider the risks that the United States's emergency powers regime will lead to underreach, where presidential powers prove insufficient to meet a crisis. This is a less appreciated risk, but one that is quite substantial when facing some kinds of crisis, including the current pandemic. Certain features of the United States constitutional structure, like federalism, likely exacerbate these risks, along with the fragmentation of the emergency powers regime.

A. *The Risk of Overreach*

Virtually all recent scholarship on emergency powers foregrounds the risks posed by its overuse or misuse to a democratic order. These risks come in

²⁴⁶ See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 726–27 (2008); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 944–50 (2008); Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 933, 935 (2007).

different flavors. Emergency powers can be undertaken when there is no true emergency to allow leaders to carry out other goals under the pretext of a crisis. Even during a true emergency, leaders might seek to seize powers that they do not truly need or might use those powers in ways not related to the crisis. In the extreme, the declaration of a state of emergency might be used to erode or destroy the democratic order itself. Even absent these extreme threats, there are subtler risks, such as the possibility that facially temporary measures might become a part of the permanent legal order.²⁴⁷

1. *Abuse of the NEA*

The history of the NEA showcases relatively little evidence of such abuse. Some commentators have highlighted the frequent use of IEEPA as a potential problem.²⁴⁸ Moreover, declarations of emergency activating IEEPA have often persisted for years.²⁴⁹ The powers given to the President under IEEPA are quite broad and have been described as “ripe for potential abuse.”²⁵⁰ But for the most part, IEEPA has been frequently invoked for good reason: there has been a litany of foreign policy crises conducive to its use. Most uses have been in situations where there was a broad, bipartisan consensus in favor of action.²⁵¹

Certainly, there have been some potentially abusive uses of IEEPA. For example, the Trump Administration declared a national emergency in 2020 to impose sanctions on the International Criminal Court (ICC) because of its investigations of actions by U.S. actors in Afghanistan and Israeli actors in Palestine.²⁵² These included asset freezes and visa cancellations of investigators, as well as harsh restrictions on doing business with United States actors.²⁵³ The declaration provoked international pushback and was reversed by President Biden shortly after taking office.²⁵⁴ Trump also threatened to deploy IEEPA in 2019 to impose tariffs on Mexico in retaliation for its alleged failure to control the flow of migrants at the border, despite the fact that IEEPA does

²⁴⁷ Gross, *supra* note 20, at 1089–96.

²⁴⁸ See BOYLE, *supra* note 46, at 3.

²⁴⁹ CASEY, FERGUSON, RENNACK & ELSEA, *supra* note 129, at 48–51 tbl.A-1.

²⁵⁰ Peter Harrell, *The Right Way to Reform the U.S. President’s International Emergency Powers*, JUST SEC. (Mar. 26, 2020), <https://www.justsecurity.org/69388/the-right-way-to-reform-the-u-s-presidents-international-emergency-powers/> [<https://perma.cc/6PUJ-T2MD>].

²⁵¹ *Id.*

²⁵² Exec. Order No. 13,928, 85 Fed. Reg. 36,139, 36,139 (June 11, 2020); *Statement of ICC Prosecutor, Fatou Bensouda, Respecting an Investigation of the Situation in Palestine*, INT’L CRIM. CT. (March 3, 2021), <https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine> [<https://perma.cc/S37U-MGTD>].

²⁵³ Exec. Order No. 13,928, 85 Fed. Reg. at 36,140–41.

²⁵⁴ Exec. Order No. 14,022, 86 Fed. Reg. 17,895, 17,895 (Apr. 1, 2021).

not grant explicit authority to impose tariffs.²⁵⁵ The plan was never implemented after the US and Mexico reached an agreement.²⁵⁶

The frequency of activation of IEEPA through the NEA may not show abuse of the Act but rather something else: that IEEPA is not an emergency power, but rather an ordinary instrument of United States foreign policy.²⁵⁷ If so, it may make sense to remove it from the umbrella of the NEA altogether.²⁵⁸ Separate treatment may also make it easier to address some of the potential flaws in the law: for example, the lack of adequate due process rights for targets or those affected by sanctions.²⁵⁹ However, forms of abuse like those in the Trump Administration may be especially difficult to stamp out, given the discretion that inevitably attends exercises of foreign policy. The decision to sanction the ICC seems like a clear misuse of IEEPA's sanctioning power, but the Trump Administration argued that it was needed to protect United States troops and officials.²⁶⁰

The most dramatic—and probably best-known—abuse of emergency powers in recent years was the Trump Administration's February 15, 2019, declaration of national emergency to divert money to construction of the wall at the southern border. The initial proclamation of emergency invoked the NEA by saying that the situation at the southern border was a "border security and humanitarian crisis that threatens core national security interests," and referencing "sharp increases" in the number of migrants.²⁶¹ The proclamation invoked 10 U.S.C. § 2808, which says that upon a declaration of national emergency, the "Secretary of Defense, without regard to any other provision of law, may undertake military construction projects . . . not otherwise authorized by law that are necessary to support such use of the armed forces," by diverting funds appropriated for other military construction uses.²⁶² A fact sheet submitted along with the declaration mentioned two other, non-emergency

²⁵⁵ See, e.g., Fred Barbash, *Use of Emergency Declaration to Impose Tariffs on Mexico Is Legally Questionable, Scholars Say*, WASH. POST (June 4, 2019), https://www.washingtonpost.com/world/national-security/use-of-emergency-declaration-to-impose-tariffs-on-mexico-is-legally-questionable-scholars-say/2019/06/04/f9b60004-86ed-11e9-a870-b9c411dc4312_story.html [<https://perma.cc/A7E8-AGNC>]; Scott R. Anderson & Kathleen Claussen, *The Legal Authority Behind Trump's New Tariffs on Mexico*, LAWFARE (June 3, 2019), <https://www.lawfareblog.com/legal-authority-behind-trumps-new-tariffs-mexico> [<https://perma.cc/DN4Q-ZGSS>].

²⁵⁶ William Alan Reinsch, Beverly Lobo, Catherine Tassin de Montaigne & Jack Caporal, *The U.S.-Mexico Tariff Threat Has Passed, for Now*, CTR. FOR STRATEGIC & INT'L STUD. (June 11, 2019), <https://www.csis.org/analysis/us-mexico-tariff-threat-has-passed-now> [<https://perma.cc/K9T3-3HD5>].

²⁵⁷ See Harrell, *supra* note 250; BOYLE, *supra* note 46, at 3.

²⁵⁸ BOYLE, *supra* note 46, at 20.

²⁵⁹ See *id.* at 22–23.

²⁶⁰ See Exec. Order No. 13,928, 85 Fed. Reg. 36,139, 36,139 (June 11, 2020).

²⁶¹ Proclamation No. 9844, 84 Fed. Reg. 4949, 4949 (Feb. 15, 2019).

²⁶² 10 U.S.C. § 2808.

sources of funding.²⁶³ The emergency was extended twice, in February 2020 and January 2021,²⁶⁴ although it was revoked by Biden upon taking office.²⁶⁵

The purpose of the declaration was to do an end-run around Congress. As is well-known, President Trump campaigned on constructing such a wall, but Congress repeatedly failed to appropriate money for its construction.²⁶⁶ In December 2018, the President engaged in a standoff with Congress over this issue, which led to a government shutdown.²⁶⁷ Although Congress had previously negotiated an appropriations bill that did not include funding for the wall, Trump later announced that he would not sign any bill that did not include such funding.²⁶⁸ Approval of a bill with wall funding was initially blocked by a filibuster in the Senate, and (after January 2018) by the now-Democrat controlled House of Representatives.²⁶⁹ The government shut down from December 22, 2018, until January 25, 2019, which was the longest shutdown in United States history.²⁷⁰ President Trump eventually signed a bill with only a

²⁶³ *Fact Sheets: President Donald J. Trump's Border Security Victory*, THE WHITE HOUSE (Feb. 15, 2019), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trumps-border-security-victory/> [<https://perma.cc/WP2T-FQAE>].

²⁶⁴ Continuation of the National Emergency with Respect to the Southern Border of the United States, 85 Fed. Reg. 8715, 8715 (Feb. 13, 2020); *Text of a Notice on the Continuation of the National Emergency with Respect to the Southern Border of the United States*, THE WHITE HOUSE (Jan. 16, 2021), <https://trumpwhitehouse.archives.gov/briefings-statements/text-notice-continuation-national-emergency-respect-southern-border-of-the-united-states/> [<https://perma.cc/S6AR-JTTC>].

²⁶⁵ Proclamation No. 10,142, 86 Fed. Reg. 7225, 7225 (Jan. 20, 2021).

²⁶⁶ Burgess Everett & John Bresnahan, *Congress May Snub Trump on Wall, Risking Shutdown*, POLITICO (June 17, 2018), <https://www.politico.com/story/2018/06/17/trump-border-wall-congress-funding-bill-snob-649563> [<https://perma.cc/TF6C-BCL3>].

²⁶⁷ Natalie Andrews & Kristina Peterson, *U.S. Government Shuts Down Over Border Wall Funding*, WALL ST. J., <https://www.wsj.com/articles/trump-pledges-long-government-shutdown-without-border-wall-funding-11545398044> [<https://perma.cc/Q9Q4-VDMH>] (Dec. 22, 2018).

²⁶⁸ Julie Hirschfeld Davis, *Trump Threatens Shutdown in Combative Appearance with Democrats*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/us/politics/trump-border-wall-government-shutdown.html> [<https://perma.cc/U3G9-9FPC>].

²⁶⁹ Kristina Peterson, *Senate Approves Stopgap Spending Bill to Avert Shutdown*, WALL ST. J. (Dec. 19, 2018), https://www.wsj.com/articles/mcconnell-to-introduce-stopgap-spending-bill-wednesday-11545232919?mod=article_inline [<https://perma.cc/6CJ8-HV4V>]; Andrew Taylor, *Democrats Block Pentagon Bill amid Border Wall Battle*, ASSOCIATED PRESS (Sept. 18, 2019), <https://apnews.com/article/4089515ecc8b43198b2f3bb7062453f6> [<https://perma.cc/BZ59-PK2H>]; Amanda Becker & Richard Cowan, *On First Day in Power, House Democrats Challenge Trump to End Shutdown*, REUTERS (Jan. 3, 2019), <https://www.reuters.com/article/uk-usa-shutdown-idUKKCN1OX09S> [<https://perma.cc/F6P6-Q3TE>].

²⁷⁰ See Andrew Restuccia, Burgess Everett & Heather Caygle, *Longest Shutdown in History Ends After Trump Relents on Wall*, POLITICO, <https://www.politico.com/story/2019/01/25/trump-shutdown-announcement-1125529> [<https://perma.cc/Y6K3-CRGN>] (Jan. 25, 2019); *The Effects of the Partial Shutdown Ending in January 2019*, CONG. BUDGET OFF. (Jan. 28, 2019), <https://www.cbo.gov/publication/54937> [<https://perma.cc/YY4X-W3HS>].

relatively small amount of money (\$1.375 billion) for fifty-five miles of “steel slats,” as well as \$1.7 billion for other measures like border agents.²⁷¹

At the same time as he announced he was signing this bill, Trump declared a national emergency to seek a much larger amount of funding that could be used for a wall.²⁷² In March 2019, both houses responded by passing a joint resolution to block the President’s emergency declaration, with a fair number of Republicans joining Democrats in doing so.²⁷³ However, Trump vetoed the Resolution, and Congress was unable to override the veto.²⁷⁴ Congress again passed a joint resolution to terminate the emergency declaration in September 2019, but the resolution was again vetoed by the President.²⁷⁵ That sequence—the first two times Congress has ever voted to terminate a national emergency under the NEA—illustrates in dramatic fashion the impact of *Chadha*’s ban on legislative vetoes.

There is little question that Trump’s declaration of emergency constituted an abuse. First, it is doubtful the underlying facts constituted a genuine “emergency.” The border situation was not a new issue, although apprehensions did increase around the time the emergency was declared.²⁷⁶ Second, the response was one that would take a long time to carry out—although Trump stated it could be built in two years, experts suggest over ten years would be a more reasonable estimate—and thus more difficult to frame as an emergency

²⁷¹ Li Zhou, *Congress Just Passed a Border Security Deal*, VOX, <https://www.vox.com/policy-and-politics/2019/2/14/18224457/congress-border-security-deal> [<https://perma.cc/N68C-U98J>] (Feb. 14, 2019).

²⁷² Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html> [<https://perma.cc/36MH-FMDV>].

²⁷³ Emily Cochrane & Glenn Thrush, *Senate Rejects Trump’s Border Emergency Declaration, Setting Up First Veto*, N.Y. TIMES (Mar. 14, 2019), <https://www.nytimes.com/2019/03/14/us/politics/senate-vote-trump-national-emergency.html> [<https://perma.cc/M9JY-85LU>].

²⁷⁴ Scott Horsley & Miles Parks, *Trump Vetoes Congressional Effort to Limit Border Wall Funding*, NPR (Mar. 15, 2019), <https://www.npr.org/2019/03/15/703761034/trump-vetoes-congressional-effort-to-limit-border-wall-funding> [<https://perma.cc/8EJH-QVUL>].

²⁷⁵ See Li Zhou, *The Senate Fails to Override Trump’s Veto on Its National Emergency Resolution*, VOX (Oct. 17, 2019), <https://www.vox.com/2019/10/17/20917835/senate-national-emergency-border-wall-trump-veto> [<https://perma.cc/YY8Y-PFA2>]; Jacob Pramuk, *Senate Votes Again to Block Trump’s National Emergency Over the Border but Fails to Get Veto-Proof Majority*, CNBC, <https://www.cnbc.com/2019/09/25/senate-votes-to-block-trump-national-emergency-over-border-wall.html> [<https://perma.cc/4QFX-3J8F>] (Sept. 26, 2019).

²⁷⁶ See U.S. BORDER PATROL, TOTAL ILLEGAL ALIEN APPREHENSIONS BY MONTH (2020), <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Monthly%20Encounters%20%28FY%202000%20-%20FY%202020%29%20%28508%29.pdf> [<https://perma.cc/9XZW-DVMD>] (showing that total border apprehensions increased from 404,142 in fiscal year 2018 to 859,501 in fiscal year 2019).

measure.²⁷⁷ Third, the measure seemed to go against something very near the express will of Congress in an area where Congress has preeminent power, appropriations. One does not need a particularly subtle grasp on Justice Jackson’s *Youngstown* typology to conclude that this case is best analyzed as one where Congress has explicitly prohibited the action at issue (or something close to it), and where the President is unlikely to have sufficient exclusive power to prevail.²⁷⁸

The episode highlighted troubling ambiguities in the NEA. The Act contains no definition of “emergency,” so it is unclear whether the declaration is simply at the discretion of the President. There is limited precedent from other contexts, such as declarations of martial law, for judicial control over whether a set of actions is proportional to a threat actually faced, but not over the declaration itself.²⁷⁹ Also, the drafters of the NEA indicated that they intended to leave the definition of emergency to the underlying statutes that were activated, and not to provide a new definition in the NEA itself.²⁸⁰ However, the underlying statutes triggered by the declaration often contain only very vague substantive standards.

Yet the courts did not simply rubber stamp Trump’s declaration. Many challenges were filed around the country. Some, such as the House’s challenge to the diversion of appropriations, were tied up on standing grounds.²⁸¹ The most advanced set of cases were two challenges filed by civil society groups as well as states against the wall funding in the Federal District Court for the Northern District of California. One case involved the Administration’s proposed use of non-emergency statutory authority to transfer funds—this was

²⁷⁷ Kevin Breuninger, *How Long Will It Take to Build the Border Wall? Years Longer than Trump Claims, Experts Say*, CNBC (Jan. 24, 2019), <https://www.cnbc.com/2019/01/24/experts-say-trumps-border-wall-will-take-longer-than-he-claims.html> [<https://perma.cc/LYB7-2S2S>].

²⁷⁸ Eichensehr supports a *Youngstown* interpretive canon whenever Congress has passed a resolution expressing its will, even if vetoed. See Kristen E. Eichensehr, *The Youngstown Canon: Vetoed Bills and the Separation of Powers*, 70 DUKE L.J. 1245, 1298–99 (2021).

²⁷⁹ See, e.g., *Sterling v. Constantin*, 287 U.S. 378, 398, 403–04 (1932) (finding that the governor of Texas had insufficient cause to declare martial law to seize oil wells); Charles Fairman, *Martial Rule, in the Light of Sterling v. Constantin*, 19 CORNELL L.Q. 20, 33–34 (1933); *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (holding that military tribunals lacked congressional authorization to try civilians during a declaration of martial law in Hawaii).

²⁸⁰ See, e.g., JENNIFER K. ELSEA, CONG. RSCH. SERV., LSB10267, DEFINITION OF NATIONAL EMERGENCY UNDER THE NEA 3 (2019).

²⁸¹ See, e.g., *U.S. House of Representatives v. Mnuchin*, 976 F.3d 1, 14 (D.C. Cir. 2020) (holding that House had standing to challenge expenditures made without its approval), *vacated sub nom.*, *Yellen v. U.S. House of Representatives*, 142 S. Ct. 332 (2021); *El Paso Cnty. v. Trump*, 982 F.3d 332, 338–39 (5th Cir. 2020) (holding that El Paso County lacked standing).

blocked by the Federal District Court and Ninth Circuit Court of Appeals,²⁸² although a stay of these injunctions was granted (and later maintained) by the Supreme Court in a 5–4 vote.²⁸³ The same courts later considered the emergency invocation of § 2808 to transfer funds: again the Federal District Court for the Northern District of California issued a permanent injunction,²⁸⁴ which was affirmed by the Ninth Circuit.²⁸⁵

In its decision, the Ninth Circuit did not consider whether the facts constituted an “emergency,” but it held that the President’s diversions had violated two phrases in § 2808: they were not “military construction projects,” and they were not “necessary to support . . . use of the armed forces.”²⁸⁶ The Court also put weight on its finding that Congress had effectively prohibited the funding twice over, once by refusing to appropriate it and a second time by twice voting to terminate the emergency.²⁸⁷ It concluded that it was ordinarily required to give “great deference” to the executive in times of national emergency, but that that deference had been overcome on the facts of the case.²⁸⁸ The Supreme Court subsequently granted a writ of certiorari from the Ninth Circuit decision, but argument was postponed and the decision vacated after the Biden Administration terminated the emergency.²⁸⁹

These decisions do not tell a straightforward story about the ability of the judiciary to check overreaches under the NEA. Construction went forward despite adverse judgments and was only stopped by the change in administration. The majority on the Supreme Court suggested that challenges to the non-emergency pots of money lacked merit because the challengers lacked a cause of action,²⁹⁰ and they may well have upheld Trump’s actions under the NEA as well. The question of whether the underlying statutes granting emergency powers will be scrutinized, and with what level of intensity, remain deeply unsettled.

There is, at any rate, a more fundamental reason why significant abuse of the NEA is unlikely to emerge: most of the 123 or so grants of statutory authority

²⁸² See *Sierra Club v. Trump*, 929 F.3d 670, 676–77 (9th Cir. 2019); *California v. Trump*, 963 F.3d 926, 931–32 (9th Cir. 2020), *cert. granted*, 141 S. Ct. 618 (2020).

²⁸³ See *Trump v. Sierra Club*, 140 S. Ct. 1, 1 (2019) (granting stay); *Trump v. Sierra Club*, 140 S. Ct. 2620, 2620 (2020) (denying motion to lift stay).

²⁸⁴ See *California v. Trump*, 407 F. Supp. 3d 869, 906 (N.D. Cal. 2019), *aff’d sub nom. Sierra Club v. Trump*, 977 F.3d 853 (9th Cir. 2020), *vacated sub nom., Biden v. Sierra Club*, 142 S. Ct. 56 (2021) (mem.).

²⁸⁵ See *Sierra Club v. Trump*, 977 F.3d 853, 890 (9th Cir. 2020), *vacated sub nom., Biden v. Sierra Club*, 142 S. Ct. 56 (2021) (mem.).

²⁸⁶ *Id.* at 879.

²⁸⁷ *Id.* at 890 (“[W]here, as here, Congress has clung to this power with both hands . . . we can neither pry it from Congress’s grasp.”).

²⁸⁸ *Id.*

²⁸⁹ *Biden v. Sierra Club*, 142 S. Ct. 56, 56 (2021) (mem.).

²⁹⁰ *Trump v. Sierra Club*, 140 S. Ct. 1, 1 (2019).

that can be activated by using the Act seem unlikely to matter all that much. Many, as noted above, are pretty mundane, and most have never been used, although a few provisions have dangerous implications.²⁹¹ There may not be enough power embedded in the Act—especially outside of IEEPA—for the NEA to be a major concern. Trump’s actions in the 2019 emergency were demonstrably an overreach, but probably not a significant threat to the rule of law, and certainly not a threat to the basic underpinnings of democracy.

2. *Other Routes to Overreach*

If substantial abuse of emergency powers is unlikely to emerge from the NEA, from whence would they come? The more likely route would be emergency powers found elsewhere, freshly delegated emergency power, and “inherent” executive authority. Many of the grants of authority found outside of the NEA have more dangerous implications than those found within it.

Take the Insurrection Act, which gives presidents authority to deploy the militia and armed forces within the United States to suppress invasions, insurrections, or to enforce federal or state law.²⁹² Congress has delegated its constitutional authority to the President in ways that are extremely broad. One of its provisions states that such force may be deployed “[w]henver the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings.”²⁹³ Another provision allows the President the power to deploy troops to “take such measures as he considers necessary” to suppress any violence, combination, or conspiracy that obstructs enforcement of federal, and in some cases state law—a clause that gives the President “enormous discretion.”²⁹⁴ Scholars have suggested that even some of the more innocuous statutory schemes, like the Stafford Act, may grant a president extensive unilateral powers (like the deployment of troops) that could be abused.²⁹⁵

Second, Congress during crises has a history of delegating extensive, newly tailored powers to the President, and these delegated powers often become more important than standing emergency powers for tackling the crisis. Above, I examined the new congressional statutes written after 9/11 and the financial

²⁹¹ BRENNAN CTR. FOR JUST., *supra* note 119.

²⁹² Nunn, *supra* note 141.

²⁹³ 10 U.S.C. § 252; *see also id.* § 253 (allowing the President to take the measures “he considers necessary to suppress . . . any insurrection, domestic violence, unlawful combination, or conspiracy”).

²⁹⁴ *Id.* § 253; Mark Nevitt, *Good Governance Paper No. 6 (Part One): Domestic Military Operations—Reforming the Insurrection Act*, JUST SECURITY (Oct. 20, 2020), <https://www.justsecurity.org/72959/good-governance-paper-no-6-part-one-domestic-military-operations-reforming-the-insurrection-act/> [<https://perma.cc/K5FC-6KND>].

²⁹⁵ Vladeck, *supra* note 143, at 191 n.184; RYAN, *supra* note 155, at 25–27.

crisis of 2008.²⁹⁶ One might expect the lawmaking process to limit dangerous delegations of power, but this may not always be so after a serious crisis. The political environment and haste may combine—as they did after 9/11—to produce sweeping delegations of authority, which can easily be misused.²⁹⁷ Unfortunately, there is no easy way to use constitutional or legal design to combat these problems *ex ante*.

Third, during certain types of crises, presidents may be able to draw on a considerable (if contestable) well of inherent authority to support their claims. These claims often play off of some combination of Justice Jackson’s second and third categories from *Youngstown*—cases where Congress has been silent, giving the President a power of initiative in the “zone of twilight,” and cases where the President might claim exclusive authority, such as those implicating the Commander in Chief Clause.²⁹⁸ Many commentators believed that the Bush Administration’s claims of such authority after 9/11 were overreaches, especially when combined with statutes that gave the President extensive—but more limited—authority.²⁹⁹ However, those claims were difficult to test in court or to otherwise limit.

As already emphasized, the plausibility of claims of inherent authority are not evenly distributed across crises. These claims are likely at their zenith in contexts looking like 9/11 and involving military conduct, perhaps particularly with respect to events abroad. The plausibility of these claims in other types of crises like natural disasters, economic crises, and pandemics is probably weaker. Regardless, the specter of inherent authority coexists alongside statutory emergency powers, haunting any effort to utilize statutory design to control presidential exercise of emergency powers.

There are at least two other factors that plausibly impact ease-of-overreach. The first is justiciability: in some areas of law, doctrines like standing and the political question make it difficult even to formulate a challenge in court. The second is deference—statutory schemes may give executive officials extensive and effectively unreviewable discretion, and/or the same result might obtain from background assumptions about the scope of power and judicial review. The most plausible enclaves of abusive overreach may be those where these three factors— inherent authority, justiciability bars, and extreme deference—converge. Consider the use of force by presidents abroad, for instance, or certain areas of immigration policy.

²⁹⁶ See *supra* Part III.C.

²⁹⁷ See, e.g., Howell, *supra* note 189, at 1154–55.

²⁹⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

²⁹⁹ See Vladeck, *supra* note 246, at 935.

B. *The Risk of Underreach*

Emergency powers exist for good reason—during crises, there will often be a need for more centralized, and more rapid, governmental action. Pozen and Scheppele use the term “underreach” to refer to situations where a government fails to undertake an adequate response to a crisis.³⁰⁰ The use of underreach here is broader—the focus is on situations where the government as a whole fails to act in a crisis, whether due to a shortage of will or power. This may interact with the specific problem highlighted by Pozen and Scheppele in complex ways: executives with less clearly established authority, or more fragmented authority, may find it easier and more tempting to deflect responsibility.³⁰¹

The view of the bulk of the scholarship seems to be that underreach is a very unlikely problem. The “neo-Schmittian” work of Posner and Vermeule argues that executives are relatively unconstrained during crises, and certainly unconstrained by legal factors.³⁰² Much of the remaining scholarship is motivated by a fear of governmental power run amok—abusive overreach unchecked by law.³⁰³

A key to understanding underreach is a reiteration of the point about different types of emergencies. There are contexts where it is hard to imagine the President not finding enough emergency power. In emergencies involving war, terrorist attacks, and maybe also internal violence or unrest within the United States, presidents can probably count on Congress to delegate extensive new powers. They can supplement these claims with claims of inherent executive power. A long tradition of scholarship has shown that interpretive accommodation or deference by the judiciary is likely to be forthcoming during this kind of crisis, especially early on.³⁰⁴

But there are other contexts where the landscape looks different. The pandemic offers an example. While Congress has provided significant delegated authority and financial assistance through a series of laws,³⁰⁵ there are clearer limits on the amount of authority Congress will delegate. While there was a relatively strong consensus around financial assistance, many issues involving regulations of individuals—for instance, vaccine mandates, shutdown orders, eviction and foreclosure bans—have been controversial. More generally, the political context during these types of emergencies (with a primarily domestic tinge) may not be as conducive to providing some grants of new authority. The

³⁰⁰ Pozen & Scheppele, *supra* note 13, at 609.

³⁰¹ *Id.* at 609–10.

³⁰² See, e.g., POSNER & VERMEULE, EXECUTIVE UNBOUND, *supra* note 12, at 208.

³⁰³ See Cole, *supra* note 33, at 2568–70 (discussing scholarship on the topic).

³⁰⁴ See, e.g., CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 3–10 (1951); Posner & Vermeule, *Crisis Governance*, *supra* note 12, at 1659.

³⁰⁵ *Here’s Everything the Federal Government Has Done to Respond to the Coronavirus So Far*, *supra* note 197.

rally-around-the-flag effect that tends to accompany major foreign crises may be less marked in crises like a pandemic or financial crisis, so ordinary political polarization may play a bigger role. During these kinds of emergencies, claims of inherent authority are difficult to construct, and neither Presidents Trump nor Biden have sought to construct such arguments during the pandemic. Finally, interpretive accommodation, although still present in the early phases of the emergency, may be much less significant than after a war or terrorist attack. Several cases decided during the pandemic, which are discussed below,³⁰⁶ suggest such a changed legal context.

These weaknesses mean that presidents are more dependent on express, *ex ante* powers. But as analyzed above in Part III, those powers are both ambiguous and extremely fragmented.³⁰⁷ Some relevant power during the current emergency can be found in the NEA, and President Trump declared a state of national emergency at the start of the pandemic.³⁰⁸ But while the NEA unlocked some power, it has not played a starring role. Additional powers were provided by the Secretary of Health and Human Services' declaration of a public health emergency,³⁰⁹ which was necessary to provide liability shields and unlock emergency use authorizations, as well as declarations of emergency and major disaster under the Stafford Act,³¹⁰ which has been used during the pandemic to allow the federal government to provide supplies and other assistance to the states.³¹¹

Yet other federal action during the pandemic has proceeded from laws that are at least formally unconnected to emergency—the eviction ban, as well as orders dealing with cruise ships, airplanes, and public transport all proceeded from a general statute giving the federal government quarantine powers.³¹² The government's three major vaccine mandates likewise depended on a complex welter of laws: (1) the workplace mandate on an emergency procedure for promulgating workplace rules by OSHA;³¹³ (2) the healthcare providers'

³⁰⁶ See *infra* Part IV.B.1.

³⁰⁷ See *supra* Part III.B.

³⁰⁸ Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

³⁰⁹ See *Determination That a Public Health Emergency Exists*, *supra* note 4.

³¹⁰ Letter from Donald J. Trump, *supra* note 4; *Public Health Emergency Determinations to Support an Emergency Use Authorization*, ADMIN. FOR STRATEGIC PREPAREDNESS & RESPONSE, <https://aspr.hhs.gov/legal/Section564/Pages/default.aspx> [<https://perma.cc/4EV2-FYQS>]; *A Public Health Emergency Declaration*, ADMIN. FOR STRATEGIC PREPAREDNESS & RESPONSE, <https://aspr.hhs.gov/legal/PHE/Pages/Public-Health-Emergency-Declaration.aspx> [<https://perma.cc/CWE9-AEG8>].

³¹¹ ERICA A. LEE, BRUCE R. LINDSAY, ELIZABETH M. WEBSTER, CONG. RSCH. SERV., IN11251, THE STAFFORD ACT EMERGENCY DECLARATION FOR COVID-19 3 (2020).

³¹² 42 U.S.C. § 264; Temporary Halt in Residential Evictions in Communities with Substantial or High Transmission of COVID-19 to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43,244, 43,244 (Aug. 3, 2021); No Sail Order and Suspension of Further Embarkation, 85 Fed. Reg. 16,628, 16,628–31 (Mar. 14, 2020).

³¹³ See 29 U.S.C. § 655(c).

mandate on a statute giving the Secretary of Health and Human Services power to promulgate rules to ensure the “health and safety of individuals who are furnished services” within the Medicare and Medicaid programs;³¹⁴ and (3) the mandate for federal contractors on the 1949 Federal Property and Administrative Services Act, which gives the President the power to take measures to promote an “economical and efficient system” in federal contracting.³¹⁵

Does this fragmentation of statutory power facilitate underreach? The answer is yes, for two slightly different reasons. The first is that it places plausible limits on the power the Administration can (successfully) claim during a crisis. The Administration has had to stretch existing statutory grants of power, many of which are not confined to declared emergencies. There are more gaps in what an Administration can do, and more things that it wants to do that may not stand up. The second reason is linked to the first—because the scope of federal authority is unclear, it is easier for the President and other federal officials to deflect responsibility, and to claim a lack of power when they do not wish to act. In the United States context, these claims are made more plausible, and more palatable, by the strength of state and local governments. Fragmentation thus interacts with federalism to increase the likelihood of underreach.

1. Fragmentation, Gaps, and Judicial Deference During Emergencies

The Biden Administration has had little choice but to rely on a diverse array of statutory authority for its actions during the pandemic, and often to stretch those grants. Consider the eviction ban, which relied on a mix of newly-delegated and existing authority. In the CARES Act of March 2020, Congress enacted an eviction moratorium on certain properties, but this was brief, lasting only until July 24, 2020.³¹⁶ Shortly before the moratorium expired, the CDC issued a broader order preventing most evictions until December 31, 2020.³¹⁷ Congress passed a brief legislative extension of the moratorium until January 31, 2021,³¹⁸ and then the Biden Administration extended the moratorium four

³¹⁴ 42 U.S.C. § 1395x(e)(9).

³¹⁵ See 40 U.S.C. § 101.

³¹⁶ Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116–136, § 4024, 134 Stat. 281, 493–94 (2020); MAGGIE MCCARTY & LIBBY PERL, CONG. RSCH. SERV., IN11516, *FEDERAL EVICTION MORATORIUMS IN RESPONSE TO THE COVID-19 PANDEMIC 1* (2021).

³¹⁷ Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,292 (Sept. 4, 2020).

³¹⁸ Consolidated Appropriations Act, 2021, Pub. L. No. 116–260, § 502, 134 Stat. 1182, 2078–79.

times—until March 31, 2021,³¹⁹ June 30, 2021,³²⁰ July 31, 2021,³²¹ and October 3, 2021.³²² This last extension, which was issued during the height of the summer Delta variant wave, was tailored to apply only to counties with substantial or high transmission.³²³ It was struck down by the Supreme Court in August 2021.³²⁴ Progressive members of Congress subsequently considered extending the ban legislatively, but there was not enough support to proceed.³²⁵

The CDC relied on section 361(a) of the Public Health Service Act, which gives the federal government power to:

make and enforce such regulations as in [their] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the [government] may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in [their] judgment may be necessary.³²⁶

The reach of section 361(a) was expanded during the COVID-19 emergency to issue a series of orders impacting cruise ships, public transportation, and airplanes, among other sectors.³²⁷ In its first order promulgating the eviction ban, the CDC noted that COVID-19 was a “historic threat.”³²⁸ It found that “eviction moratoria—like quarantine, isolation, and social distancing—can be an effective public health measure utilized to prevent the spread of

³¹⁹ Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020, 8020 (Feb. 3, 2021).

³²⁰ Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731, 16,731 (Mar. 31, 2021).

³²¹ Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 34,010, 34,010 (June 21, 2021).

³²² Temporary Halt in Residential Evictions in Communities with Substantial or High Transmission of COVID-19 to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43,244, 43,244 (Aug. 3, 2021).

³²³ *Id.* at 43,250.

³²⁴ *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021).

³²⁵ Katy O’Donnell, *Democrats Rush to Avert Eviction Calamity After Ban Is Blocked*, POLITICO (Aug. 27, 2021), <https://www.politico.com/news/2021/08/27/democrats-press-pelosi-schumer-to-revive-eviction-ban-507002> [<https://perma.cc/HH2L-PX7H>].

³²⁶ 42 U.S.C. § 264(a).

³²⁷ No Sail Order and Suspension of Further Embarkation, 85 Fed. Reg. 16,628, 16,628 (Mar. 14, 2020); Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8025, 8026 (Feb. 3, 2021).

³²⁸ Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,292 (Sept. 4, 2020).

communicable disease” because they “facilitate self-isolation by people who become ill or who are at risk for severe illness from COVID-19,” and they make stay-at-home orders or social distancing guidelines easier to implement.³²⁹

The CDC’s eviction orders spawned a series of legal challenges. Although one federal district court held that the ban was beyond the scope of all federal power because it did not constitute a valid regulation of interstate commerce,³³⁰ most challenges focused on whether it was authorized by section 361(a).³³¹ During the third extension, challengers sought to get the Supreme Court to vacate a stay on an injunction that had been issued against the ban. By a 5–4 vote, the Court refused, although Justice Kavanaugh noted that he believed the CDC had exceeded its statutory power and that he was keeping the law in effect merely because the additional time would allow a more “orderly distribution” of assistance funds authorized by Congress.³³² The ban was reinstated in early August, with the CDC citing the resurgence in COVID-19 cases due to the Delta wave.³³³ The Supreme Court then issued a 6–3 order vacating the stay and effectively ending the eviction ban.³³⁴

The majority held that it was “difficult to imagine” the challengers losing on the merits because the CDC had clearly exceeded the scope of section 361(a).³³⁵ It read the second sentence’s list of specific measures like “inspection, fumigation, disinfection, sanitation,” etc. as informing the proper interpretation of the first sentence: it authorized only measures that constituted a “direct targeting” of spread, not measures like the eviction ban that had an impact “far more indirectly.”³³⁶ The Court also held that since the ban had a “vast ‘economic and political significance’” and interfered with the landlord-tenant relationship usually governed by state law, Congress would need to speak more clearly to authorize the measure.³³⁷ The CDC’s proposed read would give the agency a “breathhtaking” amount of authority.³³⁸

However, to the dissent written by Justice Breyer and joined by Justices Sotomayor and Kagan, the statute plausibly authorized measures like the

³²⁹ *Id.*

³³⁰ *Terkel v. Ctrs. for Disease Control & Prevention*, 521 F. Supp 3d 662, 666–67 (E.D. Tex. 2021).

³³¹ *See, e.g., Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2488–89 (2021).

³³² *Id.* at 2488.

³³³ *Temporary Halt in Residential Evictions in Communities with Substantial or High Transmission of COVID-19 to Prevent the Further Spread of COVID-19*, 86 Fed. Reg. 43,244, 43,244 (Aug. 6, 2021).

³³⁴ *Ala. Ass’n of Realtors*, 141 S. Ct. at 2485, 2490.

³³⁵ *Id.* at 2488–89.

³³⁶ *Id.* at 2488.

³³⁷ *Id.* at 2489 (quoting *Util. Air Regul. Grp. v. Env’t Prot. Agency*, 573 U.S. 302 (2014)).

³³⁸ *Id.* (“It is hard to see what measures this interpretation would place outside the CDC’s reach.”).

eviction ban.³³⁹ The second sentence did not necessarily impose a limit on the first, but merely authorized certain kinds of measures to control spread; at any rate, it included a clause allowing “other measures” to be issued.³⁴⁰ Furthermore, the dissent argued that the equities counselled strongly against the stay, given the spike in COVID-19 cases in recent weeks.³⁴¹ The dissent included a graph showing the recent upturn in cases and noted that the CDC had found that over 433,000 cases and 10,000 deaths could be linked to the lifting of state eviction moratoria.³⁴² Justice Breyer concluded with a plea to defer to the CDC during the emergency, rather than engaging in “second-guessing” of its judgment: “The public interest strongly favors respecting the CDC’s judgment at this moment, when over 90% of counties are experiencing high transmission rates.”³⁴³

The relevance of the emergency context loomed heavily over the case. To the dissent, it counselled a higher degree of deference to the CDC’s measures.³⁴⁴ But the majority gave it little weight, perhaps in part because section 361(a) is not even, formally, an emergency power.³⁴⁵ Whatever deference the Court owed to the CDC’s judgment, the majority suggests, had long since ceased by summer 2021.³⁴⁶

Those disagreements about the relevance of emergency are even more striking in the dispute involving OSHA’s vaccine or test mandate for businesses with more than one hundred employees. Unlike the eviction ban, the vaccine or test mandate was only allowed to come into effect for a nominal period before it was stayed by the Supreme Court.³⁴⁷ Some lower courts had treated supposed constitutional problems, including an argument that the mandate reached beyond the powers of the federal government to regulate commerce.³⁴⁸

But the Supreme Court focused on statutory authorization.³⁴⁹ The 6–3 majority again stated that it expected Congress to speak clearly before authorizing the issuance of a regulation with such widespread effect and political and social significance—what Justice Gorsuch in concurrence called the “major questions” doctrine.³⁵⁰ It also held that the order was not clearly

³³⁹ *Id.* at 2491 (Breyer, J., dissenting).

³⁴⁰ *See Ala. Ass’n of Realtors*, 141 S. Ct. at 2491–92.

³⁴¹ *Id.* at 2492–93.

³⁴² *Id.* at 2493.

³⁴³ *Id.*

³⁴⁴ *See id.* at 2493–94.

³⁴⁵ *See id.* at 2489; BRENNAN CTR. FOR JUST., *supra* note 119.

³⁴⁶ *See Ala. Ass’n of Realtors*, 141 S. Ct. at 2489–90.

³⁴⁷ *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupation Safety & Health Admin.*, 142 S. Ct. 661, 663 (2022).

³⁴⁸ *BST Holdings, L.L.C. v. Occupation Safety & Health Admin.*, 17 F.4th 604, 617 (5th Cir. 2021).

³⁴⁹ *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 665.

³⁵⁰ *Id.* at 665; *id.* at 667 (Gorsuch, J., concurring).

authorized by the Occupational Safety and Health Act because it aimed at a more general danger that swept well outside of the workplace.³⁵¹

To the dissent, however, the emergency context was crucial. Justices Breyer, Sotomayor, and Kagan emphasized that COVID was “a menace in work settings” that therefore constituted a proper use of OSHA’s emergency rulemaking authority because it was “necessary” to deal with a “new hazard[]” that posed a “grave danger.”³⁵² The dissent thus found the regulation to be well within the OSHA statutory scheme;³⁵³ it also held that the majority had erred by issuing the stay because of equitable considerations.³⁵⁴ The dissent emphasized that the Court should defer to the Administration during a “still-raging pandemic”: “When we are wise, we know not to displace the judgments of experts, acting within the sphere Congress marked out and under Presidential control, to deal with emergency conditions. Today, we are not wise.”³⁵⁵

The debate between the majority and the dissent in these pandemic era cases has deeper historical roots. Invocation of “emergency” context as relevant to federal and state legislative and executive action became a theme of Depression era jurisprudence. Lawyers for the Roosevelt Administration emphasized it as a justification for upholding both congressional laws and Roosevelt’s own actions to combat the Depression.³⁵⁶ The arguments made limited headway with the judiciary—the classic phrasing was that although “emergency does not create power, emergency may furnish the occasion for the exercise of power.”³⁵⁷ This ambiguous phrasing, which suggested that emergency did not necessarily expand power but was relevant to its exercise, ran in the background of the early New Deal cases, but it was dropped when the Court changed its jurisprudential position and began upholding virtually all federal exercises of power after 1937.³⁵⁸ The emergency context of these cases was lost because the key shifts were undertaken via permanent changes in interpretation of the commerce clause and other parts of the constitution.³⁵⁹ Particularly outside of a wartime context, federal officials cannot necessarily rely on interpretive accommodation by courts to expand the scope of delegated authority. In that light, the United States’ fragmented emergency powers regime is bound to leave gaps.

³⁵¹ *See id.* at 665–66 (majority opinion).

³⁵² *See id.* at (Breyer, Sotomayor & Kagan, JJ., dissenting).

³⁵³ *See id.* at 674–75.

³⁵⁴ *See id.* at 675–76.

³⁵⁵ *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 676.

³⁵⁶ *See Roots*, *supra* note 186, at 283–84.

³⁵⁷ *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426, 447–48 (1934) (upholding law lengthening of term of mortgages).

³⁵⁸ *Roots*, *supra* note 186, at 286–87.

³⁵⁹ *Id.* at 287. *See generally* Michal R. Belknap, *The New Deal and the Emergency Powers Doctrine*, 62 TEX. L. REV. 67 (1983).

2. *Federalism, Fragmentation, and Underreach During Emergencies*

In addition to being highly fragmented at the federal level, emergency authority over many types of crises is also shared between the federal government and the states. Authority is of course relatively centralized in the federal government during a war of foreign policy crisis, but not necessarily during other types of emergencies.

The pandemic again offers an instructive example. The Administration, through various grants of emergency and non-emergency authority to the CDC and other bodies, has extensive authority over public health, especially during the nationwide spread of a deadly virus. Congress could give the Administration even more authority. But state and local governments also have great power over public health.

Federalism can cast doubt on which powers the federal government can exercise during the emergency. The two cases discussed above—involving the eviction ban and vaccine mandate—are illustrative. One federal district court held that the eviction ban was beyond the scope of federal power under the commerce clause,³⁶⁰ and the Supreme Court's holding relied in part on an argument that the landlord-tenant relationship was primarily and traditionally a concern of state law.³⁶¹ The OSHA vaccine or test mandate raised similar concerns—the Fifth Circuit held that it was beyond the scope of federal commerce power,³⁶² and the Gorsuch concurrence emphasized that state and local governments “possess considerable power to regulate public health,” whereas the scope of federal power is “limited and divided.”³⁶³ To some lower courts, federalism offered a hard constraint on federal authority. To the Supreme Court, it acted like an interpretive canon, preventing the Administration from carrying out consequential policies without a clear statement from Congress.

One can be skeptical of arguments that Congress lacks constitutional power to impose measures like the eviction ban and workplace vaccine or test mandate.³⁶⁴ Regardless, these decisions highlight doubt about the scope of federal power, which influence politics and policymaking. In some contexts, the

³⁶⁰ *Terkel v. Ctrs. for Disease Control & Prevention*, 521 F. Supp. 3d 662, 676 (E.D. Tex. 2021).

³⁶¹ *Ala. Ass'n of Realtors v. Dep't. of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (“The moratorium intrudes into an area that is the particular domain of state law: the landlord-tenant relationship.”).

³⁶² *BST Holdings, L.L.C. v. Occupation Safety & Health Admin.*, 17 F.4th 604, 617 (5th Cir. 2021).

³⁶³ *Nat'l Fed. of Indep. Bus. v. Dep't of Lab., Occupation Safety & Health Admin*, 142 S. Ct. 662, 667 (2022) (Gorsuch, J., concurring).

³⁶⁴ *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (“[W]hen ‘a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.’” (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995))).

President and Administration might be incentivized not to take action, instead opting to allow state and local governments to shoulder the burden.

Although Pozen and Scheppele do not discuss federalism in their piece, it is likely no accident that the two examples they highlight—the United States and Brazil—are both federal countries.³⁶⁵ The strength of state governments in both countries may have been a big part of what allowed the two presidents to follow a strategy of denying the severity of the pandemic and declining to take aggressive actions against it. Consider President Trump, who suggested that the pandemic was being taken too seriously by many citizens, journalists, and officials, stated that he wanted the country fully reopened only a few months after the virus appeared, asserted that people should not allow the pandemic to “dominate” their lives, and refused to wear a mask.³⁶⁶

President Trump’s policymaking matched this discourse, at least to a degree. The President for example resisted and delayed activating the Defense Production Act,³⁶⁷ an oft-invoked law which allows presidents to order production of key items by private companies, and then did so only in a “sporadic and relatively narrow” way.³⁶⁸ Although he imposed international travel restrictions, he declined to impose any domestic travel bans, business closures, or other regulatory measures even at the start of the pandemic.³⁶⁹ Finally, the Administration downplayed testing strategies at the start of the pandemic and prevented CDC efforts to hold public briefings for several months.³⁷⁰

³⁶⁵ See generally Pozen & Scheppele, *supra* note 13, at 608; Daniel Béland, Philip Rocco, Catarina Ianni Segatto & Alex Waddan, *Trump, Bolsonaro, and the Framing of the COVID-19 Crisis: How Political Institutions Shaped Presidential Strategies*, 184 WORLD AFFS. 413 (2021).

³⁶⁶ See, e.g., Gina Kolata & Roni Caryn Rabin, ‘Don’t Be Afraid of Covid,’ *Trump Says, Undermining Public Health Messages*, N.Y. TIMES, <https://www.nytimes.com/2020/10/05/health/trump-covid-public-health.html> [<https://perma.cc/6RTW-4W7A>] (Oct. 8, 2020); Matt Zapotosky, Josh Dawsey, Jose A. Del Real & William Wan, *Trump Administration Pushing to Reopen Much of the U.S. Next Month*, WASH. POST (Apr. 9, 2020), https://www.washingtonpost.com/national/trump-reopen-us-economy/2020/04/09/10d42b4a-7a7b-11ea-9bee-c5bf9d2e3288_story.html [<https://perma.cc/PS2W-K5PR>]; Daniel Victor, Lew Serviss & Azi Paybarah, *In His Own Words, Trump on the Coronavirus and Masks*, N.Y. TIMES (Oct. 2, 2020), <https://www.nytimes.com/2020/10/02/us/politics/donald-trump-masks.html> [<https://perma.cc/98FF-KCZY>].

³⁶⁷ Defense Production Act, 50 U.S.C. §§ 4501–4568.

³⁶⁸ ERICA A. LEE & HEIDI M. PETERS, CONG. RSCH. SERV., IN11470, DEFENSE PRODUCTION ACT (DPA): RECENT DEVELOPMENTS IN RESPONSE TO COVID-19 1, 3 (2020).

³⁶⁹ Charles F. Parker & Eric K. Stern, *The Trump Administration and the COVID-19 Crisis: Exploring the Warning-Response Problems and Missed Opportunities of a Public Health Emergency*, 100 PUB. ADMIN. 616, 620 (2022).

³⁷⁰ See, e.g., William Vaillancourt, *Trump Administration Deliberately Tanked Covid Response for Political Purposes: Report*, ROLLING STONE (Dec. 17, 2021), <https://www.rollingstone.com/politics/politics-news/trump-risked-lives-improve-reelection-hopes-1273420/> [<https://perma.cc/7EGF-X3AJ>].

President Trump's discourse played heavily off of federalism. When states were unable to procure sufficient protective and other supplies early in the pandemic, forcing them to bid against each other for scarce resources, the President blamed states for the problems, saying that the federal government is not a "shipping clerk" and that "Governors [are] supposed to be doing a lot of this work."³⁷¹ When New York asked for more ventilators, Trump responded that the issue was a "two-way street" and that New York could have had enough had they made the order two years ago.³⁷² The Administration also criticized states for maintaining shutdown orders or for reopening too slowly—with Attorney General William Barr threatening legal action by the Department of Justice for states that went too far.³⁷³ The President vacillated over the issue of legal authority on issues like shutdown orders, within twenty-four hours first saying that he had "total" authority over the shutdowns, but then saying instead that "the governors are responsible" and that they "ha[d] to take charge."³⁷⁴ Federalism and ambiguous lines of legal authority allowed Trump to deflect responsibility for (in)action during the pandemic, to blame state and local officials for failures, and to engage in "transactional" relationships where governors were rewarded for supporting presidential policies.³⁷⁵

Brazil has some interesting parallels. President Bolsonaro likewise adopted a discourse that aggressively downplayed the severity of COVID-19, famously deeming it a "little flu."³⁷⁶ Bolsonaro fired his health minister after the minister tried to adopt a more aggressive approach and resisted implementing shutdown orders or vaccine mandates at the federal level.³⁷⁷ His Administration issued rules limiting the ability of businesses to require vaccines for employees,

³⁷¹ Cynthia J. Bowling, Johnathan M. Fisk & John C. Morris, *Seeking Patterns in Chaos: Transactional Federalism in the Trump Administration's Response to the COVID-19 Pandemic*, 50 AM. REV. PUB. ADMIN. 512, 515 tbl.1, 516 (2020).

³⁷² *Id.* at 515 tbl.1.

³⁷³ Alana Wise, *DOJ Would Support Legal Action If Governors' Restrictions Go 'Too Far,' Barr Says*, NPR (Apr. 21, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/21/840262570/barr-open-to-legal-action-if-governors-restrictions-go-too-far> [<https://perma.cc/VL8R-WJUD>].

³⁷⁴ Ben Gittleson & Jordyn Phelps, *Trump's Stunning Reversal on 'Total' Authority Claim Over Governors: Analysis*, ABC NEWS (Apr. 15, 2020), <https://abcnews.go.com/Politics/trumps-stunning-reversal-total-authority-claim-governors-analysis/story?id=70160951> [<https://perma.cc/J7U4-KV32>].

³⁷⁵ *See, e.g.*, Bowling, Fisk & Morris, *supra* note 371, at 514.

³⁷⁶ Nick Paton Walsh, Jo Shelley, Eduardo Duwe & William Bonnett, *Bolsonaro Calls Coronavirus a 'Little Flu.' Inside Brazil's Hospitals, Doctors Know the Horrifying Reality*, CNN (May 25, 2020), <https://www.cnn.com/2020/05/23/americas/brazil-coronavirus-hospitals-intl/index.html> [<https://perma.cc/H3NL-MK7V>].

³⁷⁷ *See* Pozen & Scheppele, *supra* note 13, at 613.

although the Supreme Court suspended them.³⁷⁸ Indeed, the Brazilian Supreme Court has issued several significant decisions that forced the Administration to take action, for example mandating that vaccines be required for foreign visitors.³⁷⁹ But the bulk of responsibility has fallen on state and local leaders, who implemented shutdown orders and similar measures early in the pandemic.³⁸⁰ Like Trump, Bolsonaro at times harshly criticized states for undertaking these measures, calling them “tyrants”³⁸¹ while simultaneously blaming them for high case counts.³⁸² As in the United States, federalism in Brazil helped to construct the incentives that led Bolsonaro to underreach.

Federalism’s impact on underreach in the United States has also been visible during prior crises. Consider Hurricane Katrina, which made landfall on the Gulf Coast in 2005 with catastrophic impacts, and where the governmental response was widely perceived as a failure.³⁸³ Immediately after the disaster, federal officials expected state and local authorities to take the lead on many issues and were waiting for formal requests from them, as is the standard pattern in the Stafford Act.³⁸⁴ State officials were overwhelmed by the scale of the crisis and expected federal authorities to play a more proactive role.³⁸⁵ Wells pointed out that the federal government had many powers that it could have used unilaterally and without waiting for formal requests, but which it was slow to deploy or failed to use at all.³⁸⁶ However, she also notes that the scope or applicability of many of these powers was in need of “clarification.”³⁸⁷ She blames the “rhetoric of federalism” for this problem—it allowed officials at both

³⁷⁸ *Brazil’s Top Court Rules that Companies Can Require Employee Vaccination*, REUTERS (Nov. 12, 2021), <https://www.reuters.com/world/americas/brazils-top-court-rules-that-companies-can-require-employee-vaccination-2021-11-12/> [https://perma.cc/D56R-NRJV].

³⁷⁹ Miriam Berger, *Foreign Travelers to Brazil Must Be Vaccinated, High Court Rules in Challenge to Unvaccinated Bolsonaro*, WASH. POST (Dec. 12, 2021), <https://www.washingtonpost.com/world/2021/12/12/brazil-travel-coronavirus-vaccine-bolsonaro/> [https://perma.cc/54GR-5H9T].

³⁸⁰ Béland, Rocco, Ianni Segatto & Waddan, *supra* note 365, at 427.

³⁸¹ *Covid: Brazil’s Bolsonaro Calls Governors ‘Tyrants’ Over Lockdowns*, BBC NEWS (Mar. 22, 2021), <https://www.bbc.com/news/world-latin-america-56479614> [https://perma.cc/2G6V-X2AC].

³⁸² Vakkas Dogantekin, *Bolsonaro: Governors, Mayors Responsible to Fight Virus*, ANADOLU AGENCY (Aug. 6, 2020), <https://www.aa.com.tr/en/americas/bolsonaro-governors-mayors-responsible-to-fight-virus/1869395> [https://perma.cc/YQ4U-26QY].

³⁸³ See McGrane, *supra* note 153, at 1312.

³⁸⁴ Eric Lipton, Christopher Drew & Scott Shane, *Breakdowns Marked Path from Hurricane to Anarchy*, N.Y. TIMES (Sept. 11, 2005), <https://www.nytimes.com/2005/09/11/us/nationalspecial/breakdowns-marked-path-from-hurricane-to-anarchy.html> [https://perma.cc/M8VK-YS9N]; Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1687–88 (2006); Christina E. Wells, *Katrina and the Rhetoric of Federalism*, 26 MISS. COLL. L. REV. 127, 132 (2006).

³⁸⁵ See Lipton, Drew & Shane, *supra* note 384.

³⁸⁶ Wells, *supra* note 384, at 138–40.

³⁸⁷ *Id.* at 141.

levels to “easily shift blame,” so that there were no clear lines of responsibility and federal officials could blame states and localities, while those officials in turn pointed the finger at the federal government.³⁸⁸

It is not new to observe that federalism provides political actors with powerful incentives to shift responsibility or blame.³⁸⁹ But the analysis in this section has focused on the way that federalism interacts with ambiguous and fragmented lines of authority during an emergency. The point is that this fragmentation and ambiguity can heighten incentives for federal officials to underreach, by making it more plausible for them to claim an absence of authority and thus to push blame onto subnational political leaders. This problem does not run evenly across all types of emergencies but is likely to be particularly pronounced in situations where legal authority is shared between levels of government and where the extent of federal authority is unclear.

V. REFORMING THE EMERGENCY POWERS REGIME

If the existing regime creates risks of both overreach and underreach, what is to be done? Fortunately, policymakers and academics are giving significant thought to reform. The ARTICLE ONE Act is a useful start, but it deals only with the overreach problem, not the underreach one, and then does so in a way that would have few effects on the concrete exercise of emergency powers.

The better response is to reform the United States’s emergency powers regime so that it looks a little bit more like the emergency clauses found elsewhere in the world, albeit in a statutory rather than constitutional form. This would mean developing a more holistic approach to the NEA, where it would apply to a larger set of emergencies and would grant a greater set of powers than existing legislation. But it would also mean subjecting those more muscular powers to a robust, but reformulated, set of constraints: both political constraints similar to the ARTICLE ONE Act, and a reconfigured scheme of judicial review that focused on the need for the declaration of emergency and the proportionality of measures enacted in response.

A. *The ARTICLE ONE Act and Congressional Voice*

A bill introduced by Senator Mike Lee (R-Utah) in 2019, the ARTICLE ONE Act, proposes important reforms to the NEA.³⁹⁰ Several similar proposals

³⁸⁸ *Id.* at 143.

³⁸⁹ See generally Cherie D. Maestas, Lonna Rae Atkeson, Thomas Croom & Lisa A. Bryant, *Shifting the Blame: Federalism, Media, and Public Assignment of Blame Following Hurricane Katrina*, 38 PUBLIUS 609 (2008); David Landau, Hannah J. Wiseman & Samuel Wiseman, *Federalism, Democracy, and the 2020 Election*, 99 TEX. L. REV. ONLINE 96, 118–19 (2021).

³⁹⁰ S. 764, 116th Cong. (2019).

have been introduced in Congress since, with bipartisan support.³⁹¹ The bills state that national emergencies will terminate automatically within thirty days unless Congress approves the emergency via a joint resolution of approval.³⁹² If Congress were to pass such a resolution, the emergency would be extended for a one-year term, at which time another joint resolution of Congress would be required to extend it further.³⁹³ The President would be unable to reissue a declaration of emergency once it has been terminated.³⁹⁴ The bill would also give Congress some power to amend the declaration (for example by limiting the powers the President is able to invoke during the emergency), and it would increase reporting requirements on the President.³⁹⁵

The bill stemmed from the aftermath of President Trump's "wall" emergency in early 2019.³⁹⁶ It responds to problems of executive overreach created by the emergency powers regime, where the President has unilateral power to declare an emergency, extend it, and exercise emergency powers, precisely the concentration that Justice Jackson warned about in *Youngstown*.³⁹⁷ The bill also reverses some of the loss of congressional power caused by the *Chadha* decision's invalidation of the legislative veto.

The War Powers Resolution attempted to place similar checks (after sixty or ninety days) on presidential uses of force abroad.³⁹⁸ In theory under the Resolution, those uses lapse after that period, unless Congress approves (and the President signs) a joint resolution either declaring war or authorizing hostilities.³⁹⁹ But the War Powers Resolution has been widely panned as ineffective.⁴⁰⁰ Presidents have developed an array of arguments to permit troops to remain in place beyond that point.⁴⁰¹

The reforms to the NEA will likely have more teeth. The War Powers Resolution is written against an ambiguous backdrop of inherent presidential

³⁹¹ See, e.g., H.R. 1720, 116th Cong. (2019); H.R. 9041, 116th Cong. (2021); H.R. 63, 117th Cong. (2021).

³⁹² S. 764, 116th Cong. § 202 (2019).

³⁹³ *Id.* § 202(b).

³⁹⁴ *Id.* § 202(c).

³⁹⁵ *Id.* § 203.

³⁹⁶ See Erica Werner, Seung Min Kim & John Wagner, *Senate on Cusp of Passing Rebuke to Trump on National Emergency Declaration*, WASH. POST (Mar. 13, 2019), https://www.washingtonpost.com/powerpost/pelosi-says-house-wont-consider-senate-gop-alternative-to-nullifying-trumps-emergency-declaration/2019/03/13/8a80e84e-4597-11e9-8aab-95b8d80a1e4f_story.html [<https://perma.cc/LUK3-UZ9U>].

³⁹⁷ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 652 (1952).

³⁹⁸ 50 U.S.C. §§ 1541–1549.

³⁹⁹ *Id.* § 1544(b).

⁴⁰⁰ See, e.g., Alan Greenblatt, *Why the War Powers Act Doesn't Work*, NPR (June 16, 2011), <https://www.npr.org/2011/06/16/137222043/why-the-war-powers-act-doesnt-work> [<https://perma.cc/BZ8V-2AZR>].

⁴⁰¹ Letter and Attached Memorandum from Joseph E. Macmanus and Elizabeth L. King to John A. Boehner on United States Activities in Libya 25 (June 15, 2011).

power under the Commander in Chief Clause (as well as other grants in Article II)—indeed the law says explicitly that nothing in it “is intended to alter the Constitutional authority of the Congress or of the President.”⁴⁰² In many cases, the NEA is invoked in circumstances where inherent claims are more difficult to make, and the President is more reliant on delegated constitutional authority. In those circumstances, the termination is likely to have more effect. Moreover, the first-mover advantage enjoyed by presidents in contexts of international armed conflict, where Congress will often be very reluctant to cut off ongoing operations abroad for a number of reasons, will often be less pronounced in other types of emergencies.⁴⁰³

The proposed reforms also compare reasonably well to foreign constitutional models of emergency power. A growing number of constitutions around the world give the legislature power to declare or continue a declaration of emergency.⁴⁰⁴ Requiring Congress to declare an emergency *ex ante* has real costs, however, since it may slow responses in a situation of genuine crisis. Another possibility would be to require a different kind of actor to sign off on a declaration of emergency. Some systems require a Cabinet to approve such a declaration;⁴⁰⁵ within the United States, some past discussions have suggested prior consideration or approval by a panel of independent actors, such as policy experts.⁴⁰⁶ The former proposal is highly unlikely to add much, however, given that Cabinet ministers rarely break from the President; the latter would threaten to gum up emergency responses by slowing them too much, and at least in some forms might be found unconstitutional. Thus, of the various proposals for increased political accountability, requiring congressional votes to extend emergencies makes the most sense.

The biggest problem with the ARTICLE ONE Act is that most exercises of emergency power would fall outside its ambit. As developed in the preceding Part, the NEA plays only a limited role in governance during crises.⁴⁰⁷ During some major crises, like the 2008 financial crisis, the NEA was not activated at all.⁴⁰⁸ During others like 9/11 and COVID-19, the Act played only a bit part. During emergencies like these, some exercises of authority would be regulated by the new requirements in the Act, while others would be left unregulated—an odd combination with unpredictable results.

⁴⁰² 50 U.S.C. § 1547(d)(1).

⁴⁰³ See Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2677 (2005).

⁴⁰⁴ Bjørnskov & Voigt, *supra* note 7, at 108–09.

⁴⁰⁵ *Id.* at 109 (finding that fourteen percent of constitutions have such a design).

⁴⁰⁶ See, e.g., S. 1630, 112th Cong. § 109 (2011) (proposing concurrence of an independent expert panel for a new category of Stafford Act declaration, a “catastrophic disaster”).

⁴⁰⁷ See *supra* Part III.A.

⁴⁰⁸ See *supra* Part III.A.

The limited impact of the proposal is deepened because in most of its iterations, the ARTICLE ONE Act has excluded IEEPA.⁴⁰⁹ Goldsmith and Bauer reasonably argue that “such an exclusion is appropriate.”⁴¹⁰ IEEPA, by far the most frequently utilized power under the NEA, raises distinct concerns. As noted above, it has become more of a routine foreign policy tool than a true emergency power.⁴¹¹ Congress should plausibly adopt statutory changes to deter likely abuses of IEEPA (such as President Trump’s use of it to sanction the International Criminal Court, or his threat to levy tariffs on Mexico⁴¹²), but the factors motivating those reforms are distinct from those underlying the NEA.⁴¹³ With IEEPA off the table, however, the impact of the ARTICLE ONE Act becomes even more muted—presidents have only declared a non-IEEPA emergency about six times in the forty-seven years since the Act was passed.⁴¹⁴

If the proposal would do relatively little on its own to deter overreach, it would do nothing to treat underreach. If anything, the reform proposal may make the underreach problem worse. The hard termination of every national emergency after thirty days, absent congressional approval, may make it harder for presidents to respond adequately to genuine crises, especially in contexts (like the pandemic) where partisan politics is a significant constraint. It may also distort responses by leading presidents to speed up the clock in order to utilize grants of power before they expire. Thus, while the ARTICLE ONE Act is a useful start to a reform effort, it should be accompanied by a more ambitious set of changes that combat both overreach and underreach.

B. *The Coverage of the NEA*

What constitutes an emergency power? The ARTICLE ONE Act and its relatives would only apply to the NEA, without touching any of the other statutory grants of authority. In a more comprehensive, efficacious reform effort, Congress would give more thought to which grants of authority should be included within the scope of the Act. Some grants of power that are currently there seem like relatively mundane, ordinary instruments of power that should probably be available outside of the context of a national emergency. Arguably, this includes even the most frequently invoked NEA power: IEEPA.⁴¹⁵ Probably more importantly, there are many grants that are inarguably or at least plausibly emergency power found outside the framework of the NEA.

⁴⁰⁹ See, e.g., S. 764, 116th Cong. § 204 (2019).

⁴¹⁰ See Goldsmith & Bauer, *supra* note 3; BOYLE, *supra* note 46, at 20.

⁴¹¹ See BOYLE, *supra* note 46.

⁴¹² The ARTICLE ONE Act proposed that the President lacked power to impose duties or quotas using IEEPA. See S. 764, 116th Cong. § 4 (2019); Exec. Order No. 13,928, 85 Fed. Reg. 36,139 (June 11, 2020); Barbash, *supra* note 255.

⁴¹³ See Goldsmith & Bauer, *supra* note 3.

⁴¹⁴ See BOYLE, *supra* note 46.

⁴¹⁵ See Goldsmith & Bauer, *supra* note 3.

1. *Other Emergency Schemes and the NEA*

Consider what has historically been called the Insurrection Act, which gives the President broad discretion to deploy troops to quell insurrections or remove obstructions to enforcement of state or federal law.⁴¹⁶ Other than requiring the President to issue a proclamation,⁴¹⁷ the law provides few checks on presidential power—there are no limits on duration or requirements for congressional approval, and the statutory standards for when force can be used are broad. There would seem to be little reason to keep the Insurrection Act’s powers outside the framework of the NEA. There have in fact been several proposals to subject the Insurrection Act to greater political and substantive control, after President Trump threatened to use the Act during the Black Lives Matter protests of 2020.⁴¹⁸

A more difficult question is formed by the other kinds of “emergencies” that exist under United States federal law, particularly those found in the Stafford Act (emergency/major disaster) and the “public health emergency” under the Public Health Service Act. There may be good reason to treat different kinds of emergencies differently—a point I return to below. The Stafford Act has some of its own political checks built in, although they are federalism-based rather than separation of powers-based: Governors (and chief executives of tribes) must make a request for all declarations of major disaster, and most declarations of emergency.⁴¹⁹ Moreover, the sheer frequency of use of the Stafford Act (57.1 times per year between 2000 and 2009!) would make it extremely difficult for Congress to exercise an oversight role, and also suggests that the Stafford Act may often be used more as a routine power than a true emergency power.⁴²⁰ That said, there are reasons to move at least some exercises of power under the Stafford Act into the framework of the NEA. As commentators have observed, the Act grants the President some poorly defined powers that might be exercised unilaterally.⁴²¹ Furthermore, once declarations have been made under the Act, there is little control over duration.

⁴¹⁶ 10 U.S.C. §§ 251–255.

⁴¹⁷ *Id.* § 254.

⁴¹⁸ See, e.g., Nevitt, *supra* note 294 (proposing that the President terminate any use after 20 days if Congress has not passed a law approving the activation of the Act); S. 3902, 116th Cong. § 257(c) (2020) (providing cutoff of authority if Congress has not authorized after fourteen days); see also Michael S. Schmidt & Maggie Haberman, *Trump Aides Prepared Insurrection Act Order During Debate Over Protests*, N.Y. TIMES (June 25, 2021), <https://www.nytimes.com/2021/06/25/us/politics/trump-insurrection-act-protests.html> [<https://perma.cc/ND6V-JNUW>].

⁴¹⁹ 42 U.S.C. § 5191; see also *id.* § 5170a.

⁴²⁰ BRUCE R. LINDSAY, CONG. RSCH. SERV., R42702, STAFFORD ACT DECLARATIONS 1953–2016: TRENDS, ANALYSES, AND IMPLICATIONS FOR CONGRESS 1 (2017).

⁴²¹ See RYAN, *supra* note 155, at 25–27.

One possibility, which has been explored in prior legislative proposals but never acted upon, would be to create a new category, such as a “catastrophic disaster,”⁴²² which could be used for the most widespread and damaging natural disasters, where certain thresholds in damages and other criteria had been met. In other words, the “catastrophic disaster” designation would be used for high-profile, widespread events such as Hurricane Katrina, going well beyond the threshold for a “major disaster.” Once such a declaration had been made, the idea would be to imbue the presidency with powers sweeping well beyond those found in a standard Stafford Act declaration. The President might have more flexibility to designate which agencies or personnel should lead a response, more unilateral authority to act without the concurrence of state and local officials, and more ability to waive cost-sharing rules and unlock additional resources.⁴²³ The existing proposals have focused on checking the President’s ability to declare a catastrophe in part by creating an expert panel that must concur in such declarations.⁴²⁴ But the political check embedded in the proposed reform to the NEA—congressional concurrence after some period of time such as thirty days—may make more sense.

A somewhat similar analysis may work with respect to the public health emergency declaration. The designation has been used frequently, although far less often than the Stafford Act—126 times since 2005, with many of those invocations being declarations of the same emergency in different states or continuations of prior emergencies.⁴²⁵ A more refined count suggests about 39 uses, ranging from natural disasters like major hurricanes (Katrina, Irma, Maria, for instance), wildfires, floods, and earthquakes, to pandemic-like events such as H1N1, Zika, and now COVID-19, to widespread problems like the opioid crisis.⁴²⁶ These declarations are made by the Secretary of Health and Human Services, not the President, and they last for ninety days, extendable at the discretion of the Secretary.⁴²⁷ Powers under the declaration of public health emergency are extensive, including access to emergency funds, the ability to hire new personnel, waivers of normal rules in programs like Medicaid and

⁴²² See S. 1630, 112th Cong. § 109 (2011); BRUCE R. LINDSAY & FRANCIS X. MCCARTHY, CONG. RSCH. SERV., R41884, CONSIDERATIONS FOR A CATASTROPHIC DECLARATION: ISSUES AND ANALYSIS 1 (2011); MITCHELL L. MOSS & CHARLES SHELLHAMER, THE CTR. FOR CATASTROPHE PREPAREDNESS & RESPONSE, THE STAFFORD ACT AND PRIORITIES FOR REFORM 14 (2007), <https://www.nyu.edu/content/dam/nyu/brademasCenter/documents/Publications/publications-stafford-act-report.pdf> [<https://perma.cc/7BCK-VJ2J>].

⁴²³ See S. 1630, 112th Cong. § 328 (2011); LINDSAY & MCCARTHY, *supra* note 422, at 5–8.

⁴²⁴ S. 1630, 112th Cong. § 327(b) (2011).

⁴²⁵ *Declarations of a Public Health Emergency*, ADMIN. FOR STRATEGIC PREPAREDNESS & RESPONSE, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/default.aspx> [<https://perma.cc/4G3J-RACW>].

⁴²⁶ *Id.*

⁴²⁷ 42 U.S.C. § 247d(a).

Medicare, and broad liability waivers.⁴²⁸ Currently, there are few effective checks on the exercise of these powers. It may thus be sensible to include declarations of public health emergency within the oversight scheme of the NEA.

2. *Different Types of Emergencies*

The fact that many of the federal government's other emergency schemes should plausibly be brought under the umbrella of the NEA does not mean they should all be incorporated in the same way. Emergencies are heterogenous—they come in different varieties, which each raise a different mix of concerns about overreach and underreach. Some comparative designs reflect this heterogeneity explicitly. The Spanish Constitution includes three different levels of emergency, of varying degrees of gravity—the states of alarm, emergency, and siege.⁴²⁹ The former may be declared by the President alone, while the latter two types require prior approval by Congress.⁴³⁰ The Colombian constitution also provides for three different kinds of emergencies: a state of foreign war, a state of internal commotion, and a state of economic, social, or ecological emergency.⁴³¹ The three differ in procedure, duration, and effects.⁴³² In Canada, a statute—the Emergencies Act—distinguishes between a Public Welfare Emergency, Public Order Emergency, International Emergency, and War Emergency, with different powers and limits.⁴³³

Emergency legislation in the United States already reflects this instinct. The rules governing disasters in the Stafford Act, for instance, look different from those governing public health emergencies. But the NEA itself is a hodgepodge—the provisions activated by it correspond to many different types of emergencies including armed conflicts, natural disasters, public health emergencies, and financial crises, even if they are rarely a complete response to any of them.⁴³⁴ This makes one question whether the uniform approach of the ARTICLE ONE Act is ideal. Reforming the NEA without also amending other, adjacent emergency statutory schemes may have unintended consequences.

For example, many of the provisions activated by the NEA deal with national defense, allowing the President to waive limits on numbers of active military personnel or those serving at particular ranks,⁴³⁵ consolidate or

⁴²⁸ See 42 U.S.C. § 247d(b) (funds); *id.* § 1320b-5 (waivers of rules); *id.* § 247d-6d (liability waivers).

⁴²⁹ C.E., B.O.E. n. 311, Dec. 29, 1978, art. 116, §§ 2–4 (Spain).

⁴³⁰ *Id.*

⁴³¹ CONSTITUCIÓN POLÍTICA DE COLOMBIA arts. 212–15.

⁴³² *Id.*

⁴³³ See Emergencies Act, R.S.C. 1985, c. 22, §§ 5–45 (Can.).

⁴³⁴ See BRENNAN CTR. FOR JUST., *supra* note 119.

⁴³⁵ 10 U.S.C. § 527; *id.* § 603; *id.* § 12006(a); 14 U.S.C. § 3733; 10 U.S.C. § 8103; *id.* § 123(a).

discontinue branches of the military,⁴³⁶ or call up members of the Ready Reserve to active duty for up to twenty-four months.⁴³⁷ These provisions, many of which were invoked after the attacks of 9/11,⁴³⁸ seem closely tied to the use of force abroad, or in other words the issues regulated in part by the War Powers Resolution. The War Powers Resolution gives the President sixty days (extendable for thirty more days) to use force abroad under certain conditions before congressional authorization has been obtained.⁴³⁹ It may make sense to tie those powers granted under the Emergency Powers Act that deal with military force to the timelines found in the War Powers Resolution, rather than to require authorization after thirty days as in the proposed reform. In contrast, the powers found in the Insurrection Act currently allow the President to deploy troops domestically with no time limit on the duration of use.⁴⁴⁰ Proposals for reform of the Insurrection Act unsurprisingly provide that unilateral authority terminate in much less than thirty days.⁴⁴¹

Other powers found under the umbrella of the NEA deal with public health, such as those allowing the President to waive various rules and restrictions.⁴⁴² Activation of these waivers, which have been used during the COVID-19 pandemic,⁴⁴³ requires (i) declaration of either a national emergency or emergency or major disaster under the Stafford Act; and (ii) declaration of a public health emergency.⁴⁴⁴ The powers granted are thus adjacent to those activated using a public health emergency, which as noted can be issued by the Secretary of Health and Human Services acting alone, last for ninety days, and can be renewed indefinitely.⁴⁴⁵ Congress's judgment that public health emergencies endure for a longer timeframe—ninety days—as a default (even absent renewal) may suggest that presidents acting during such emergencies should be able to act unilaterally for a longer period of time than thirty days before seeking congressional approval.

3. *Non-Emergency Powers and the NEA*

Congress might also give thought as to which powers found outside of any emergency regime should be subject to the oversight mechanisms found in the (reformed) NEA. Prior parts of this Article have identified some plausible candidates.

⁴³⁶ 10 U.S.C. § 7063(b).

⁴³⁷ *Id.* § 12302(a).

⁴³⁸ Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001).

⁴³⁹ 50 U.S.C. § 1544(b).

⁴⁴⁰ *See* 10 U.S.C. §§ 253–254.

⁴⁴¹ Nevitt, *supra* note 294 (twenty days); S. 3902, 116th Cong. § 6 (2020) (fourteen days).

⁴⁴² *See* 42 U.S.C. § 1320b-5.

⁴⁴³ *See, e.g.*, Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

⁴⁴⁴ 42 U.S.C. § 1320b-5(g)(1).

⁴⁴⁵ 42 U.S.C. § 247d(a)–(b).

One is the power of federal health authorities to take measures to prevent the spread of communicable diseases, section 361 of the Public Health Service Act, which has been used to support a number of pandemic era measures such as the no-sail order for cruise ships, mask order on public transportation, and the eviction ban that was eventually struck down.⁴⁴⁶ In conjunction with an executive order of the President, they explicitly allow the apprehension and detention of individuals arriving from international destinations or, if already found in the United States, who are reasonably believed to be infected.⁴⁴⁷ The powers are broad, but potentially necessary under grave conditions. What is startling is that they are not currently classified as emergency powers—they can be exercised even without a declaration of emergency and thus used at any time. For at least some of the powers found within section 361—such as the power to detain individuals within the United States—that makes little sense.

An even more striking example is the power under section 212(f) of the Immigration and Nationality Act for the President to suspend entry of any immigrant or nonimmigrant “alien” or “class of aliens” whenever she finds that their entry “would be detrimental to the interests of the United States,” for as long as the President deems necessary.⁴⁴⁸ This is a formidable power, particularly when wielded against a large group of foreigners, as with Trump’s 2017 ban and the various bans put in place during the COVID-19 pandemic. Yet prospects for judicial review are extremely limited and there is currently no congressional control over exercise of the power.⁴⁴⁹

Moving some of what are currently non-emergency provisions under the umbrella of the NEA serves a dual purpose. Most obviously, it increases oversight and establishes more political control over areas that might previously have been particularly susceptible to abusive overreach. But it also may increase the capacity of presidents during true emergencies, and therefore reduce the possibility of underreach. The prior part showed that the Supreme Court during the pandemic was especially wary of the Biden Administration’s efforts to stretch non-emergency grants of power, using the “major questions doctrine” to find that policies like vaccine mandates must be clearly authorized by Congress.⁴⁵⁰ The majority has resisted calls by the dissenters to adopt a higher degree of deference given the crisis context.⁴⁵¹ Reclassifying provisions like

⁴⁴⁶ See, e.g., *id.* § 264; No Sail Order and Suspension of Further Embarkation, 85 Fed. Reg. 16,628, 16,631 (Mar. 24, 2020); Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8025, 8026 (Feb. 3, 2021); Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,297 (Sept. 4, 2020).

⁴⁴⁷ 42 U.S.C. § 264(b)–(d).

⁴⁴⁸ 8 U.S.C. § 1182(f).

⁴⁴⁹ See *Trump v. Hawaii*, 138 S. Ct. 2392, 2409, 2416 (2018).

⁴⁵⁰ *Nat’l Fed’n of Indep. Bus. V. Occupation Safety & Health Admin.*, 142 S. Ct. 661, 667–68 (2022) (Gorsuch, J., concurring).

⁴⁵¹ *Id.* at 675.

section 361 of the Public Health Service Act as designated emergency measures, subject to a regime of congressional oversight, may help in clarifying that Congress intends the measures to be used to tackle major issues and to respond to unforeseen threats. It may in some circumstances cue the judiciary to provide more interpretive deference.

C. The Extent of Power

Compared to most constitutional emergency clauses found around the world, the NEA reads strangely. It grants a defined, limited set of powers that can be activated upon declaration of a national emergency.⁴⁵² In contrast, the more typical clause includes a general grant of authority that allows an executive to take any action necessary to ameliorate an event qualifying as an emergency, unless specifically restricted from doing so.⁴⁵³ Clauses sometimes require that actions have a “direct” relationship with the emergency or are “necessary” and have the “exclusive” aim of combatting its effects.⁴⁵⁴ Clauses often restrict an executive from restricting some constitutional rights during an emergency or from taking certain other actions, such as levying new taxes or amending the constitutional text.⁴⁵⁵

A general statutory grant of emergency power is less farfetched than it might at first appear. During the twentieth century, some scholars suggested such a statute at the federal level in the United States. Writing in 1960, Smith and Cotter recommended a generic emergency statute after surveying the “confusing array” of emergency statutes found in the United States and documenting “[t]he recurrent trouble which the nation has confronted in taking timely and effective emergency action at the national level.”⁴⁵⁶ They called for a statutory grant of power which could be used during many types of crises, but which would also be subject to regular control by Congress.⁴⁵⁷ Likewise, some states have statutes that include or at least approach such general grants of authority.⁴⁵⁸

⁴⁵² See BRENNAN CTR. FOR JUST., *supra* note 119.

⁴⁵³ See Bjørnskov & Voigt, *supra* note 7, at 110–11.

⁴⁵⁴ See, e.g., CONSTITUCIÓN POLÍTICA DE COLOMBIA arts. 212–13 (measures must be “strictly necessary” to overcome crisis); *id.* at art. 215 (measures must have “direct and specific” relationship with the crisis and “exclusive[]” aim of resolving it); Emergencies Act, R.S.C. 1985, c. 22, § 19 (Can.) (allowing measures “on reasonable grounds . . . necessary for dealing with the emergency”).

⁴⁵⁵ See Bjørnskov & Voigt, *supra* note 7, at 110–11.

⁴⁵⁶ J. MALCOLM SMITH & CORNELIUS P. COTTER, *POWERS OF THE PRESIDENT DURING CRISES* 144–45 (1960).

⁴⁵⁷ *Id.*

⁴⁵⁸ For discussion, see generally Benjamin Della Rocca, Samantha Fry, Masha Simonova & Jacques Singer-Emery, *State Emergency Authorities to Address COVID-19*, *LAWFARE* (May 4, 2020), <https://www.lawfareblog.com/state-emergency-authorities-address-covid-19> [<https://perma.cc/H94X-WB5H>].

The potential advantages of a general clause are significant. Such a clause would go a long way towards remedying the underreach problems identified in the prior part. Emergencies are unpredictable, and a general clause would provide flexibility to meet unforeseen contingencies. A general clause would also clarify that presidents had adequate power to meet declared emergencies. It would make it harder for them to hide behind ambiguous lines of authority and false claims of deference to state or local officials, in cases where presidents sought to avoid taking action. Finally, a broader clause might help to contain the scope of inherent executive authority during emergencies, by demonstrating a congressional effort to occupy the field and thus subject all exercises of executive emergency power to the political and legal oversight scheme found in the Act.⁴⁵⁹

Nor are the disadvantages necessarily as great as they might seem. Judicial review would still be plausible and might ask more productive questions. Courts could potentially determine, as I examine in the next part, whether the facts were grave enough to constitute a genuine emergency and whether measures taken had a sufficiently direct relationship with the crisis.⁴⁶⁰ A statutory delegation of course would also continue to be bound by the rights provision of the constitution, the enumerated powers that limit the scope of congressional power itself, and other constitutional limits like the federal government's inability to "commandeer" state and local officials.⁴⁶¹

A general grant of authority would nonetheless raise serious concerns. In ameliorating risks of underreach, the design would in turn raise risks of overreach: a more muscular emergency provision would be a more tempting object of abuse. The main tool to control this risk would be a more robust set of political controls—the architecture of the clause would need to be rethought. The current design of the NEA, where presidents can declare an emergency, extend an emergency indefinitely, and exercise all power during the emergency,⁴⁶² would be extraordinarily dangerous if presidents were to have broader powers during a crisis. Even the proposed reforms in the ARTICLE ONE Act may not be enough.⁴⁶³ Requiring congressional approval only after

⁴⁵⁹ More precisely, it would move wholly unconstrained exercises of executive emergency power away from Justice Jackson's "zone of twilight" and into his third category of congressional prohibition, where that power is at its nadir. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

⁴⁶⁰ See *infra* Part V.D.

⁴⁶¹ See, e.g., *Printz v. United States*, 521 U.S. 898, 925–33 (1997). For an argument that the prohibition on commandeering even during emergencies is an important protection against tyranny, see David Landau, Hannah J. Wiseman & Samuel R. Wiseman, *Federalism for the Worst Case*, 105 IOWA L. REV. 1187, 1226–36 (2020).

⁴⁶² See 50 U.S.C. §§ 1621–1622.

⁴⁶³ See S. 764, 116th Cong. §§ 202–204 (2019).

thirty days may give presidents too much time to act unilaterally.⁴⁶⁴ Moreover, allowing such approval to serve as a one-year extension of power would be unwise, and more frequent congressional weigh-in (perhaps quarterly) would be needed.⁴⁶⁵ Adoption of a more robust emergency clause would require adopting more robust forms of political control.

A second problem would be the constitutionality of a general emergency statute on separation of powers grounds. Federal courts have not struck down a statute on non-delegation grounds since the New Deal⁴⁶⁶ and some scholars have suggested that the non-delegation doctrine is “interred.”⁴⁶⁷ But recent case law suggests there may be an emerging majority on the Supreme Court interested in reviving the doctrine, likely with a stricter standard than the traditional requirement of an “intelligible principle.”⁴⁶⁸

In October 2020 in a COVID-19 era decision, the Michigan Supreme Court answered a certified question by holding that a general emergency statute delegating power to the governor violated the nondelegation doctrine under the Michigan constitution.⁴⁶⁹ The law allowed the governor to “promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property” during an emergency.⁴⁷⁰ It was used by the governor during the pandemic to promulgate a wide range of measures, including closures of non-essential businesses, requirements to wear face coverings, and requirements to stay at home.⁴⁷¹ The court held that neither the terms “reasonable” nor “necessary” supplied sufficient guidance.⁴⁷² It also emphasized that the law delegated power of an indefinite duration: it was up to

⁴⁶⁴ The Canadian Emergencies Act requires parliamentary approval after *seven* days. Emergencies Act, R.S.C. 1985, c. 22, § 58(2) (Can.).

⁴⁶⁵ See S. 764, 116th Cong. § 202(b) (2019).

⁴⁶⁶ See *A.L.A. Schechter Poultry v. United States*, 295 U.S. 495, 542 (1935) (invalidating statutory provisions on nondelegation principles); *Pan. Refining Co. v. Ryan*, 293 U.S. 388, 430, 433 (1935) (invalidating other statutory provisions of the same statute on nondelegation principles); see also *Gundy v. United States*, 139 S. Ct. 2116, 2120 (2019) (discussing the court’s history of nondelegation cases since the New Deal and holding the statute at issue raised no nondelegation problems).

⁴⁶⁷ See, e.g., Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722–23 (2002).

⁴⁶⁸ See, e.g., *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting); *id.* at 2131 (Alito, J., concurring) (“If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years [to the nondelegation doctrine], I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.”).

⁴⁶⁹ *Midwest Inst. of Health, PLLC v. Governor of Mich.* (*In re Certified Questions from U.S. Dist. Court*), 958 N.W.2d 1, 31 (Mich. 2020).

⁴⁷⁰ MICH. COMP. LAWS § 10.31 (1945).

⁴⁷¹ *In re Certified Questions*, 958 N.W.2d at 20–21.

⁴⁷² *Id.* at 22–24.

the governor to declare an emergency lasting as long as they believed necessary, without any need for legislative action.⁴⁷³

A federal general emergency statute could face similar problems. It is unclear if such a statute could supply enough guidance to construct an “intelligible principle.” Terms such as “reasonable,” “necessary,” or “[d]irectly related” are common parts of other delegations upheld by the federal courts, but such delegations were generally confined to a relatively defined area of action, while a general emergency clause would of necessity apply to many different kinds of crises.⁴⁷⁴ A move by the Supreme Court towards a more stringent standard, such as Justice Gorsuch’s argument in his *Gundy* dissent that executive agencies be confined to a power to “fill up the details,” would be even harder to meet.⁴⁷⁵ As already noted, Congress would, and should, adopt more stringent procedural requirements than the Michigan law, for example requiring congressional approval at regular intervals. But these procedural safeguards may not be enough to cure the inevitable breadth of the delegation.

The concept of a general grant of power is a useful thought experiment, but the problems and constitutional doubts in the United States context may exceed the benefits. If that is so, then there are two paths that would achieve somewhat similar aims. The first is to supplement existing authority with new powers, especially in areas where presidents are unlikely to have much plausible inherent authority. The second response is to broaden some of the grants of authority that do exist.⁴⁷⁶ Consider section 361(a) of the Public Health Service Act, analyzed above,⁴⁷⁷ which gives the executive branch authority to carry out a series of measures to prevent the spread of disease.⁴⁷⁸ The first sentence is written in broad terms—it gives the government power to issue “such regulations as in [their] judgment are necessary” to prevent the spread of disease into the United States, or from state to state.⁴⁷⁹ But the power is seriously qualified, at least according to the Supreme Court, by a second sentence that gives as examples “inspection, fumigation, disinfection, sanitation, pest extermination, destruction

⁴⁷³ *Id.* at 21.

⁴⁷⁴ *See, e.g.,* *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 469, 475, 481 (2001).

⁴⁷⁵ *See Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting). Justice Gorsuch also suggested Congress could delegate authority to make application of a rule “depend on executive fact-finding,” and could assign non-legislative duties to other branches. *Id.* at 2136–37.

⁴⁷⁶ The Canadian Emergencies Act is a useful example: powers are enumerated but written in broad terms that leave fewer gaps than the U.S. *See, e.g.,* Emergencies Act, R.S.C. 1985, c. 22, § 8 (Can.). The Act was recently activated to deal with COVID-related trucking protests. Ian Austen & Dan Bilefsky, *Trudeau Declares Rare Public Emergency to Quell Protests*, N.Y. TIMES (Feb. 14, 2022), <https://www.nytimes.com/2022/02/14/world/americas/justin-trudeau-emergencies-act-canada.html> [<https://perma.cc/3C5T-6M4V>].

⁴⁷⁷ *See supra* Part III.B.1.c.

⁴⁷⁸ 42 U.S.C. § 264.

⁴⁷⁹ *Id.* § 264(a).

of animals or articles.”⁴⁸⁰ The majority in the eviction case suggested that the statute is limited to quarantine-type measures.⁴⁸¹ Congress could take steps to broaden the statute in several different ways, such as (a) giving additional examples of different kinds of action encompassed within the statute, (b) eliminating the specific examples in the second sentence, or (c) adding additional language clarifying that administrative power under the statute is broad and goes beyond quarantine-type measures.

D. Cuing More Productive Judicial Review

Judicial review raises the dueling problems posed by this Article in sharp form. In some kinds of crises, and with respect to some kinds of actions, courts will likely be too deferential, leaving executives with essentially unreviewable power even where abusive overreach is likely. In other areas, courts may not be deferential enough, leaving executives with too little authority to meet a genuine emergency.

One approach is to adjust deference statute by statute in response to historical patterns of under or overuse. Consider section 212(f) of the Immigration and Nationality Act, the statute on which recent presidents have based a series of travel bans.⁴⁸² Largely in response to President Trump’s 2017 ban on entry from specified countries, Democrats in the House of Representatives proposed and approved a bill called the NO BAN Act.⁴⁸³ Inter alia, the proposal would specify that a ban could only be imposed to meet a “compelling governmental interest” and that the government must “narrowly tailor the suspension or restriction, using the least restrictive means, to achieve such compelling government interest.”⁴⁸⁴ The bill would also make clear that affected individuals had the right to judicial review, including via class action.⁴⁸⁵ If the current version of the statute “exudes deference,”⁴⁸⁶ the revised statute might cue far more robust judicial review. While maintaining presidential power to impose a ban, the bill would ask both the Administration and the courts to apply strict scrutiny before undertaking such a measure. If anything, the change may go from an approach that is too deferential to presidential power to one that is too strict. A court applying strict scrutiny in a serious way might render the statute almost impossible to use.

⁴⁸⁰ *Id.*; *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2488 (2021).

⁴⁸¹ *See Ala. Ass’n of Realtors*, 141 S. Ct. at 2487.

⁴⁸² 8 U.S.C. § 1182(f); *see, e.g.*, Proclamation No. 9993, 85 Fed. Reg. 15,045 (Mar. 11, 2020); Proclamation No. 10,315, 86 Fed. Reg. 68,386 (Nov. 26, 2021).

⁴⁸³ H.R. 1333, 117th Cong. (2021).

⁴⁸⁴ *Id.* § 3.

⁴⁸⁵ *Id.*

⁴⁸⁶ *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018).

Without suggesting that a statute-by-statute approach to calibrating review necessarily lacks merit, an alternative approach would cue judicial review within the NEA itself. The NEA currently includes no provisions on judicial review and very little in the way of justiciable language. Yet, again drawing on emergency provisions found elsewhere around the world, the NEA could plausibly stimulate two kinds of judicial review: (1) review of whether the facts are sufficient to constitute an emergency under the statute and (2) review of whether measures taken are directly related to the emergency and proportional to it.⁴⁸⁷ These questions would be more productive than those that are often currently asked by United States courts in emergency cases. In conjunction with the suggestions in the prior section, which called for broadening the substantive scope of emergency grants of power, they would reorient review away from the technical details of whether a given action fell within a specific grant of power and towards more general questions of whether the facts necessitated declaring an emergency and whether the measures undertaken were reasonable responses to emergency conditions.

The NEA currently includes no attempt to define the term “national emergency.” During the passage of the bill, the House of Representatives made some effort to define the term, but the final version excluded any such language.⁴⁸⁸ Members of the Senate committee considering the NEA expressed concern that attempting to define national emergency might actually expand presidential power.⁴⁸⁹ Obviously, a definition could not be limited to one particular type of event. Experience has shown that emergencies come in many forms. But a definition could indicate a threshold of severity through language indicating that an event must pose an “imminent” and “serious” threat to the nation.⁴⁹⁰ A definition could also indicate that an emergency must require extraordinary steps—for example by providing that ordinary legal mechanisms are insufficient to deal with the crisis. Perhaps the definition should also deal with the “unforeseen” nature of an emergency, to differentiate it from chronic or longstanding problems for which the designation would be inappropriate.⁴⁹¹

⁴⁸⁷ For analysis of these forms of review in conjunction with emergencies elsewhere around the world, see Andrea Scoseria Katz, *Taming the Prince: Bringing Presidential Emergency Powers Under Law in Colombia*, 18 INT’L J. CONST. L. 1201, 1216–23 (2020); Colleen M. Flood, Vanessa MacDonnell, Bryan Thomas & Kumanan Wilson, *Reconciling Civil Liberties and Public Health in the Response to COVID-19*, 5 FACETS 887, 887 (2020); Christian Kreuder-Sonnen, *Does Europe Need an Emergency Constitution?*, 71 POL. STUDS. 1, 3–6 (2023).

⁴⁸⁸ See H.R. 3844, 94th Cong. § 1 (1976) (“[President must find] a national emergency is essential to the preservation, protection and defense of the Constitution, or to the common defense, safety, or well-being of the territory or people of the United States.”).

⁴⁸⁹ S. Rep. No. 94-1168, at 3 (1976).

⁴⁹⁰ See Katz, *supra* note 487, at 1217.

⁴⁹¹ See ELSEA, *supra* note 280, at 2.

This kind of language on the meaning of emergency could be useful for political purposes, helping to inform legislative debates. It could also cue courts to exercise at least minimal scrutiny of a declaration of emergency, avoiding sham-like invocations. Consider the Trump wall case. The Ninth Circuit focused its analysis on whether the construction of the wall constituted “military construction” and whether it “require[d] the use of the armed forces” under the statute activated by the NEA.⁴⁹² This rather esoteric question was surprisingly difficult: as the dissent pointed out, the land at issue had been brought under the control of a military fort, even though it was not adjacent to that fort.⁴⁹³

The analysis elided a more glaring problem with the declaration: the situation was not an emergency at all. Illegal border crossings at the southern border were anything but new, as evinced by President Trump’s discourse before entering office.⁴⁹⁴ While there was some increase in crossings during the period when the emergency was declared, it would be difficult to frame this as sufficient in gravity to constitute an authentic emergency.⁴⁹⁵ Simply put, it is unlikely the Trump Administration could show that the situation on the southern border met the imminence, gravity, and unforeseeability requirements necessary to declare an emergency. Even fairly deferential review would have been likely to strike down the declaration.

It would also be worth amending the NEA to add language requiring that measures taken during an emergency be directly related to that emergency and proportional to it. The ideal would be to have courts judge these considerations with some deference, but to invalidate measures in clear cases.⁴⁹⁶ One purpose of a direct relatedness requirement is to ensure that measures actually are taken to respond to the emergency, and not as a pretext to achieve other goals. As an example, think again of the wall emergency. Given that the wall was assessed by experts as taking more than a decade to build,⁴⁹⁷ the measure’s direct relationship with an emergency caused by a surge of entrants at the southern border is dubious.

Proportionality is a slightly more complex concept. There is an immense literature in comparative constitutional law and international human rights law on the formal test for proportionality as a tool of constitutional adjudication;⁴⁹⁸

⁴⁹² *Sierra Club v. Trump*, 977 F.3d 853, 879 (9th Cir. 2020).

⁴⁹³ *Id.* at 902–03 (Collins, J., dissenting).

⁴⁹⁴ See Domenico Montanaro, Danielle Kurtzleben, Scott Horsley, Sarah McCammon & Richard Gonzales, *Fact Check: Donald Trump’s Speech on Immigration*, NPR, <https://www.npr.org/2016/08/31/492096565/fact-check-donald-trumps-speech-on-immigration> [<https://perma.cc/7XV3-XGLW>] (Sept. 1, 2016).

⁴⁹⁵ See U.S. BORDER PATROL, *supra* note 276.

⁴⁹⁶ See, e.g., Flood, MacDonnell, Thomas & Wilson, *supra* note 487, at 891–92.

⁴⁹⁷ Breuninger, *supra* note 277.

⁴⁹⁸ See, e.g., Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3099 (2015) (explaining that proportionality often involves a threefold inquiry, “(a) rationality; (b) minimal impairment; and (c) proportionality as such”).

some recent work has also called for it to play a greater role in United States constitutional law.⁴⁹⁹ But a court would not need to incorporate a formal, structured test to assess the relative fit between an emergency and measures undertaken to respond to it.⁵⁰⁰

The European travel ban in effect between March 2020 and November 2021 is an interesting example.⁵⁰¹ Initially, it would have been easy to find such a measure proportional, since early cases of COVID-19 were found in the UK and EU, and the United States was making a reasonable effort to prevent or at least slow its widespread arrival. Over time, however, the measure made less sense as a response to the pandemic, since huge numbers of cases were already in the United States and so it became unclear how a travel ban could impact spread. Other mitigation measures, such as vaccine requirements, also cut into the rationale for the ban, as did the fact that similar bans were not in place for travel to the United States from other parts of the world, even in periods where they were harder hit. At minimum, by the time the Biden Administration renewed the European travel ban in January 2021,⁵⁰² it was disproportionate. In the formal language of the proportionality test, the ban may not have even had a rational relationship towards the governmental interest of suppressing the pandemic.⁵⁰³ Even if it did, there were less restrictive means to achieve the same ends, and the ban's harms clearly exceeded its benefits.⁵⁰⁴ In a more colloquial phrasing, the fit between the pandemic emergency and the ban became increasingly poor over time.

Direct relatedness and proportionality could also be useful in legitimating measures and thus in combatting underreach. Consider again the Biden Administration's vaccine mandate for employees of larger businesses with more than one hundred employees.⁵⁰⁵ Rather than focusing on the precise scope of the delegation to OSHA, an alternative approach would foreground the measure's relationship to the pandemic and its appropriateness as a response. Using these criteria, the vaccine mandate would probably have fared pretty well. Studies demonstrated that vaccination has a relationship to limiting spread and a significant impact on likelihood of hospitalization and death from COVID-

⁴⁹⁹ See, e.g., *id.* at 3159; Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 131 (2018).

⁵⁰⁰ See, e.g., Jackson, *supra* note 498, at 3099 n.24 (observing that proportionality is sometimes used in a less structured way that focuses "on the reasonableness of the means chosen in light of the nature of the right and the government's justification for its actions").

⁵⁰¹ Proclamation No. 9993, 85 Fed. Reg. 15,045–46 (Mar. 11, 2020).

⁵⁰² See Proclamation No. 10,143, 86 Fed. Reg. 7467–68 (Jan. 25, 2021).

⁵⁰³ See Jackson, *supra* note 498, at 3099.

⁵⁰⁴ See *id.*

⁵⁰⁵ See generally COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021).

19.⁵⁰⁶ Given those metrics, the OSHA vaccine mandate, as well as other mandates covering contractors, healthcare workers, and federal employees, are directly related to the emergency and a proportional response to a pandemic that had killed over one million Americans. An approach that foregrounds proportionality is similar to the dissent's approach in the OSHA mandate case, which emphasized the Administration's well-grounded, expert judgment that the measure was necessary to protect workers.⁵⁰⁷ But it suggests a more coherent framework for weighing these evaluations.

One final note—the role of proportionality here is to assess the relationship between a measure and the facts underlying an emergency.⁵⁰⁸ It is not to carry out its oft-used purpose of limiting or restricting rights in pursuit of other aims of similar importance.⁵⁰⁹ Perhaps such rights limitation is inherent in any use of proportionality, or perhaps in any power exercised during an emergency. Some rights limitation usually occurs through interpretive accommodation by judges, especially early in an emergency.⁵¹⁰ At a formal level, emergency powers restricting rights would seem to require a constitutional emergency clause, such as the one found in many other countries around the world, rather than a merely statutory emergency grant.⁵¹¹ Such a constitutional clause, which could define the rights that could be restricted during an emergency and those which are untouchable, may be desirable, although it would also pose obvious risks.⁵¹²

⁵⁰⁶ See, e.g., *Science Brief: COVID-19 Vaccines and Vaccination*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/fully-vaccinated-people.html> [<https://perma.cc/YA3R-4UT9>] (Sept. 15, 2021).

⁵⁰⁷ See Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupation Safety & Health Admin., 142 S. Ct. 661, 676 (2022) (Breyer, J., dissenting).

⁵⁰⁸ During the pandemic, legal discussion of rights restrictions has been scarce. The main cases have involved limitations on religious services, where prevailing tests focus on intentional religious discrimination, although judicial decisions also suggest proportionality. In a decision issuing a temporary injunction against N.Y. measures limiting attendance at services to ten or twenty-five people, the Court emphasized that similar restrictions had not been issued against essential businesses, even though these were linked to spread of COVID-19. See *Roman Cath. Diocese v. Cuomo*, 141 S. Ct. 63, 66 (2020). The Court also noted that there were less restrictive alternatives, such as tying attendance to the size of the building. *Id.* at 67.

⁵⁰⁹ See, e.g., Greene, *supra* note 499, at 30.

⁵¹⁰ See, e.g., Posner & Vermeule, *Crisis Governance*, *supra* note 12, at 1654–59.

⁵¹¹ See Bjørnskov & Voigt, *supra* note 7, at 110–11 (noting that seventy percent of emergency clauses give government power to suspend certain rights, while twenty-six percent make certain specified rights non-derogable during an emergency).

⁵¹² Mandatory vaccination of a population has been upheld against rights challenges in the past. See *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905). It seems wrong to argue that the challengers of such a law have no implicated rights interest. The interest is adjacent to one suggested by the Supreme Court, for a competent person to refuse treatment. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278–79 (1990). It makes more sense to say that the right to avoid vaccination is outweighed by the social interest in limiting the spread of disease, and thus in protecting the rights and freedoms of others, at least during a pandemic.

VI. CONCLUSION

This Article has examined the United States' "unique" emergency powers regime, focusing on its fragmented character and the way in which it might amplify not just the threat of overreach but also, less intuitively, that of underreach.⁵¹³ It has also offered a set of reform proposals, inspired by constitutional emergency clauses found around the world, that would combine broadened grants of authority with robust and refocused political and judicial oversight. If this reform program were carried out, the result would be to give the United States something a bit closer to the kinds of emergency clauses found elsewhere, albeit at a statutory and not a constitutional level. I leave open the question of whether the country might benefit from a constitutional emergency clause. As noted in the last section, such a clause might do a better job of coping with limitations on rights during emergencies. As well, it might bring greater certainty to the emergency powers regime by clarifying claims of inherent executive power. But these are issues for another day.

⁵¹³ See ROSSITER, *supra* note 36, at 209.