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## Domestic Emergency Pretexts

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## Domestic Emergency Pretexts

AMY L. STEIN\*

*Whereas emergencies used to be the exception to the rule, they now seem to be the norm. Wildfires, hurricanes, flooding, and contagious diseases dominate our daily lives. Although these are not the traditional types of military emergencies of our past, these non-wartime emergencies can trigger some of the same emergency powers. And with their use comes some of the same concerns about abuses of such emergency powers. Much ink has been spilled analyzing the tradeoffs associated with necessary emergency powers and frequent abuses in the context of foreign threats—resulting in reduced privacy, civil liberties, and freedoms.*

*This Article is not here to rehash that debate, but to shift our focus from the use of emergencies to address foreign threats to the use of emergencies to address domestic ones. Importantly, despite mounting evidence cautioning against the abuse of emergency powers, public actors have expanded their use from foreign contexts to domestic contexts. Specifically, public actors have used domestic emergencies as pretext for several unrelated actions impacting marginalized communities, limiting environmental protections, abolishing low-income housing, and even restricting abortion rights.*

*Although both foreign and domestic threats are subject to manipulation to be marketed as “emergencies,” the frequency and proliferation of domestic threats lend themselves to particular scrutiny. To aid in this effort, this Article identifies several instances where public actors are using both legitimate and questionable domestic emergencies to achieve unrelated policy goals. It argues that emergency actions that can be classified as domestic should be designated as such. Recognizing this critical distinction may allow for enhanced scrutiny that is lacking when challenging emergency actions related to national security. Domestic emergency actions, in contrast, may be less deserving of deference, be less susceptible to secrecy claims, and be easier to demonstrate as disconnected from the actual emergency at hand. It sets forth strategies to prevent, remedy, and penalize such abuses, recognizing that emergency powers were intended to be used sparingly. When every day presents a new emergency, we run the risk of living under perpetual emergency powers and perpetual abuses.*

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#### INTRODUCTION

“Emergencies’ have always been the pretext on which the safeguards of individual liberty have been eroded – and once they are suspended it is not difficult for anyone who has assumed such emergency powers to see to it that the emergency will persist.”<sup>1</sup> Friedrich Hayek was speaking in the context of a pathway of “alternative arrangements” to remedy the defects of government in 1979,<sup>2</sup> but his sentiments on emergency pretexts continue to resonate today. The twenty-first century, and the last few years in particular, have been rife with emergencies. The world has been battling a novel and contagious coronavirus (COVID-19), killing over 6,618,579 people worldwide and over 1,075,245 people in the United States alone, creating a public health emergency.<sup>3</sup> One response to the pandemic was to shut down many nonessential sectors of the economy,<sup>4</sup> leading to an economic emergency—triggering trillions in congressional stimulus and relief.<sup>5</sup> At the same time, decades of racial tensions came to a head with the murder of George Floyd by

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1. FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY, VOLUME 3: THE POLITICAL ORDER OF A FREE PEOPLE* 124 (Univ. Chi. Press 1979).

2. *Id.* at xiii.

3. *WHO Coronavirus (COVID-19) Dashboard*, WORLD HEALTH ORG., <https://covid19.who.int/> [<https://perma.cc/HH86-XXJ9>].

4. See Dante Chinni, *Data Shows the Costs of Year-Long Economic Shutdown*, NBC NEWS (Mar. 7, 2021, 10:21 AM), <https://www.nbcnews.com/meet-the-press/data-shows-costs-year-long-economic-shutdown-n1259900> [<https://perma.cc/Z9YJ-59LT>].

5. Coronavirus Aid, Relief, and Economic Security Act, 15 U.S.C. §§ 9001–9141 (2020); American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (2021).

Minneapolis police officers,<sup>6</sup> resulting in a combination of peaceful protests and violent riots across all fifty states.<sup>7</sup> Rioters stormed the U.S. Capitol building to deter Vice President Pence from certifying now-President Biden's election victory, some with murderous intent—the first breach in twenty-three years and the first major breach since 1814.<sup>8</sup> And this is all occurring against a backdrop of a climate emergency as increases in anthropogenic greenhouse gas emissions are continuing to propel the world into warmer temperatures,<sup>9</sup> increase the intensity of natural disasters,<sup>10</sup> and cause a variety of other detrimental impacts.<sup>11</sup> In fact, after legislation that included substantial climate provisions looked unlikely to pass the Senate,<sup>12</sup> nine Senate Democrats on the Select Committee on the Climate Crisis<sup>13</sup> and sixty House Democrats<sup>14</sup> even urged the White House to declare a “climate emergency” to unlock

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6. Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020, 6:49 AM), <https://time.com/5847967/george-floyd-protests-trump/> [<https://perma.cc/DC86-UPE2>].

7. Helier Cheung, *George Floyd Death: Why US Protests Are So Powerful This Time*, BBC NEWS (June 8, 2020), <https://www.bbc.com/news/world-us-canada-52969905> [<https://perma.cc/K9VN-F9UK>].

8. Amy Sherman, *A History of Breaches and Violence at the US Capitol*, POLITIFACT (Jan. 6, 2021), <https://www.politifact.com/article/2021/jan/07/history-breaches-and-violence-us-capitol/> [<https://perma.cc/GK5K-H84T>]; see also House Select Committee, January 6 Hearings (June 2022); Ashley Parker, Carol B. Leonnig, Paul Kane & Emma Brown, *How the Rioters Who Stormed the Capitol Came Dangerously Close to Pence*, WASH. POST (Jan. 15, 2021 9:56 AM), [https://www.washingtonpost.com/politics/pence-rioters-capitol-attack/2021/01/15/ab62e434-567c-11eb-a08b-f1381ef3d207\\_story.html](https://www.washingtonpost.com/politics/pence-rioters-capitol-attack/2021/01/15/ab62e434-567c-11eb-a08b-f1381ef3d207_story.html) [<https://perma.cc/ZX9W-6B39>].

9. See generally INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014 SYNTHESIS REPORT SUMMARY FOR POLICYMAKERS 2 (2014), [https://www.ipcc.ch/site/assets/uploads/2018/02/AR5\\_SYR\\_FINAL\\_SPM.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf) [<https://perma.cc/MMP5-SJHR>].

10. See generally *The Impact of Climate Change on Natural Disasters*, NASA EARTH OBSERVATORY (Mar. 30, 2005), [https://earthobservatory.nasa.gov/features/RisingCost/rising\\_cost5.php](https://earthobservatory.nasa.gov/features/RisingCost/rising_cost5.php) [<https://perma.cc/C9F7-RUGU>].

11. See Noah S. Diffenbaugh & Marshall Burke, *Global Warming Has Increased Global Economic Inequality*, 116 PNAS 9808, 9808 (2019), <https://www.pnas.org/content/pnas/116/20/9808.full.pdf> [<https://perma.cc/WVJ7-DNX8>]; Charlotte Laufkötter, Jakob Zscheischler & Thomas Frölicher, *High-Impact Marine Heatwaves Attributable to Human-Induced Global Warming*, 369 SCI. MAG. 1621, 1621 (2020).

12. See Tony Romm, Jeff Stein & Ashley Parker, *Biden Eyes Climate Emergency Declaration as Democrats Demand Swift Action*, WASH. POST (July 19, 2022, 8:36 PM), <https://www.washingtonpost.com/climate-environment/2022/07/18/biden-climate-emergency-manchin/> [<https://perma.cc/UD8N-B78Z>] (Manchin indicates that he will not support climate provisions of the Build Back Better Bill).

13. Letter from Senate Democrats to President Biden (July 20, 2022), [https://www.merkley.senate.gov/imo/media/doc/Climate%20Emergency%20Letter\\_FINAL.pdf](https://www.merkley.senate.gov/imo/media/doc/Climate%20Emergency%20Letter_FINAL.pdf) [<https://perma.cc/TU78-QR35>].

14. Letter from House Letter Democrats to President Biden (July 20, 2022), <https://blumenauer.house.gov/sites/evo-subsites/blumenauer.house.gov/files/evo-media-document/2021-07-20%20Climate%20Emergency%20Declaration%20Letter.pdf> [<https://perma.cc/YE9K-U9DA>].

a number of statutory emergency powers. Ultimately, it was only the reversal of one senator's support that forestalled this executive emergency climate action.<sup>15</sup>

The law responds to these emergencies in predictable ways, providing governmental actors considerable leeway to respond in an expeditious and effective manner. And rightly so. Actual emergencies demand special treatment. The law has long recognized exceptions,<sup>16</sup> superpowers,<sup>17</sup> waivers,<sup>18</sup> and other tools<sup>19</sup> that apply only in times of emergency. In many cases, these emergency provisions are critical to remedy the situation.<sup>20</sup> Without these provisions, critical and timely responses might be hindered by procedural red tape, countless bureaucratic hurdles, or sluggish congressional action.<sup>21</sup>

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15. See Press Release, Senator Joe Manchin, Manchin Supports Inflation Reduction Act of 2022 (July 27, 2022), <https://www.manchin.senate.gov/newsroom/press-releases/manchin-supports-inflation-reduction-act-of-2022> [<https://perma.cc/KTR7-L83T>].

16. See U.S. CONST. art. I, § 9, cl. 2 (recognizing the suspension of habeas corpus in rebellion or invasion when public safety requires it).

17. See 7 U.S.C. § 5712(c) (allowing the President to forbid or limit agricultural exports during a national emergency or wartime); 19 U.S.C. § 1318 (recognizing the President's power to authorize the Secretary of the Treasury to permit duty-free importation on supplies during an emergency).

18. See 42 U.S.C. § 6393(a)(2)(A) (allowing the President to waive a comment period on proposed regulations under the Energy and Policy Conservation Act during an emergency affecting national security); 40 U.S.C. § 905 (allowing the Administrator of General Services to waive procedures for providing notice to local government and potential purchasers before purchase or sale of urban real estate during a national emergency); see also David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COL. L. REV. 265 (2013).

19. For example, the International Emergency Economic Powers Act (IEEPA) grants the President authority to impose economic sanctions on persons and entities during national security emergencies. 50 U.S.C. § 1702. The IEEPA can be used to freeze all U.S.-based assets of persons or groups suspected to have ties to national security threats. See Andrew Boyle, *Checking the President's Sanction Powers*, BRENNAN CTR. FOR JUST. (June 10, 2021), <https://www.brennancenter.org/our-work/policy-solutions/checking-presidents-sanctions-powers> [<https://perma.cc/RFK8-965H>].

20. See Maya Parthasarathy, *Hurricanes Can Prompt a "State of Emergency" Too*, BUSTLE (Oct. 7, 2016), <https://www.bustle.com/articles/188285-what-does-state-of-emergency-mean-for-hurricanes-its-been-declared-in-multiple-states-so-far> [<https://perma.cc/S8SU-X24M>] (explaining how federal and state declarations of emergencies during hurricanes better enable a coordinated disaster response). In Florida, during a state of emergency, people are prohibited from price gouging. See Fla. Stat. 501.160 (2021).

21. See *Emergency Powers*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/bolster-checks-balances/executive-power/emergency-powers> [<https://perma.cc/QW3K-78SF>] (explaining that emergency powers aim to enhance executive power during crises that need immediate resolution instead of waiting for Congress's response); Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, ATLANTIC (2019), <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/> [<https://perma.cc/7R2A-ZJG4>] ("The premise underlying emergency powers is simple: The government's ordinary powers might be insufficient in a crisis, and amending the law to provide greater ones might be too slow and cumbersome.").

Unfortunately, emergencies also create opportunities for malfeasance.<sup>22</sup> Emergencies can cast shadows around legal principles such as rule of law,<sup>23</sup> accountability,<sup>24</sup> due process,<sup>25</sup> and public participation.<sup>26</sup> As many other scholars have lamented, those imbued with these special emergency powers often find themselves with unique opportunities to act without traditional oversight,<sup>27</sup>

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22. See, e.g., Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1005 (2004) (citing Machiavelli (“it should never be necessary to resort to extra-constitutional measures . . . or if the practice is once established of disregarding the laws for good objects, they will in a little while be disregarded under that pretext for evil purposes.”)).

23. The President can unilaterally declare a “national emergency,” which unlocks powers like limiting electronic communications within the U.S. or freezing American bank accounts, and the president has the power to deploy troops domestically even without a declaration of emergency. Goitein, *supra* note 21. The President can even suspend the laws prohibiting human biological and chemical agent testing during an emergency. *Id.* The International Covenant on Civil and Political Rights, American Convention on Human Rights, and the European Convention on Human Rights all have provisions allowing states to derogate their obligations to human rights during emergencies. See OFF. U. N. HIGH COMM’R FOR HUM. RTS., HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS, AND LAWYERS 853–55 (2003), [https://resourcecentre.savethechildren.net/pdf/human\\_rights\\_training\\_manual.pdf/](https://resourcecentre.savethechildren.net/pdf/human_rights_training_manual.pdf/) [<https://perma.cc/86RH-X8NG>].

24. See IMF: *Scant Transparency for COVID-19 Emergency Loans*, HUM. RTS. WATCH (Mar. 30, 2021, 12:01 AM), <https://www.hrw.org/news/2021/03/30/imf-scant-transparency-covid-19-emergency-loans#> [<https://perma.cc/3TFL-4WVT>] (arguing IMF emergency loans given to countries during the COVID-19 pandemic lacked safeguards to ensure the funds would not be used for improper purposes).

25. See *Korematsu v. United States*, 323 U.S. 214, 245–46 (1944) (Jackson, J., dissenting) (arguing that the Court allowing Japanese internment to proceed is a “construction of the due process clause that . . . is a far more subtle blow to liberty than the promulgation of the order itself”); Beverly E. Bashor, *The Liberty/Safety Paradigm: The United States’ Struggle to Discourage Violations of Civil Liberties in Times of War*, 41 W. ST. U. L. REV. 617, 633 (2014) (stating the Bush administration used congressional grant of power through Authorization for Use of Military Force to detain suspected terrorists in Guantanamo Bay without formal charges). *But see* *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (holding that due process required “a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention”); *United States v. Bishop*, 555 F.2d 771, 777 (10th Cir. 1977) (“[T]he power to declare a national emergency does not destroy the Fifth Amendment requirement of due process.”).

26. See Jason Alexander Rood, *Public Participation in Emergency Management* (2012) (M.P.S. thesis, Portland State University) (arguing that the centralized control of FEMA “leaves little room for policy code termination within states and cities, [and] in turn this disengages creative and pragmatic local problem solving”).

27. See, e.g., Matthew H. Ormsbee, *Pioneering Presidents: The Legal Quandary of Presidential Warfighting*, 2020 U. ILL. L. REV. ONLINE 261, 265 (2020) (explaining that Presidents’ decisions to conduct drone strikes and cyberattacks are “routinely justified” without congressional oversight).

procedural constraints,<sup>28</sup> or a termination point.<sup>29</sup> Until recently, most of this analysis surrounds restriction of civil liberties in response to wartime emergencies.<sup>30</sup> Scholars made substantial contributions to exposing such abuses in the aftermath of 9/11.<sup>31</sup> More recent work has focused on public health emergencies, often with concentration on the proper judicial standard of review.<sup>32</sup> As Hayek and others have noted, once emergency powers have been unleashed, however, it can be quite difficult to put them back in the bottle.<sup>33</sup>

This Article focuses on a different aspect of this abuse: the use of domestic emergencies as pretexts to achieve some other unrelated end.<sup>34</sup> It is particularly concerned with government actors that either manufacture an emergency or seize upon an actual emergency to achieve ends that were otherwise stymied during non-emergency periods. These are precisely the arguments being advanced by parties that challenged President Biden's Occupational Safety and Health Administration's

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28. See William Michael Treanor, *The War Powers Outside the Courts*, 81 IND. L.J. 1333, 1335 (2006) (stating that Presidents may take military action before receiving congressional authorization in certain cases, such as to rescue U.S. citizens abroad).

29. See Scheppelle, *supra* note 22, at 1003 (describing that the United States' reaction to 9/11 was not the "declaration of a sudden emergency that has gradually abated," but rather, an ongoing use of war power that has continued years after the attack). This approach is not unique to 9/11; the United States has extended emergency rule beyond the conclusion of military actions since the Civil War. See, e.g., Jill Elaine Hasday, *Civil War as Paradigm: Reestablishing the Rule of Law at the End of the Cold War*, 5 KAN. J.L. & PUB. POL'Y 129, 136 (1996) (explaining that Congress continued emergency rule for thirteen years after the last battle of the Civil War).

30. See Geoffrey R. Stone, *Civil Liberties v. National Security in the Law's Open Areas*, 86 B.U. L. R. 1315, 1316 (2006); Mitchell F. Crusto, *State of Emergency: An Emergency Constitution Revisited*, 61 LOY. L. REV. 471 (2015); Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273 (2003).

31. See, e.g., Harvey Gee, *National Insecurity: The National Security Defense Authorization Act, the Indefinite Detention of American Citizens, and a Call for Heightened Judicial Scrutiny*, 49 J. MARSHALL L. REV. 69 (2015); Bashor, *supra* note 25; Terry McDermott, *Waterboarding of Detainees Was so Gruesome That Even CIA Officials Wept*, L.A. TIMES (Jan. 22, 2020, 7:38 PM), <https://www.latimes.com/world-nation/story/2020-01-22/ksm-waterboarding-guantanamo-testimony> [<https://perma.cc/MS3Z-NU3F>].

32. See Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179 (2020); see also Ilya Somin, *The Case for "Regular" Judicial Review of Coronavirus Emergency Policies*, REASON: THE VOLOKH CONSPIRACY (Apr. 15, 2020, 4:16 PM), <https://reason.com/volokh/2020/04/15/the-case-for-normal-judicial-review-of-coronavirus-emergency-policies/> [<https://perma.cc/C3AH-QVRC>] ("[I]mposing normal judicial review on emergency measures can help reduce the risk that the emergency will be used as a pretext to undermine constitutional rights and weaken constraints on government power even in ways that are not really necessary to address the crisis.").

33. HAYEK, *supra* note 1; *A Guide to Emergency Powers and Their Use*, BRENNAN CTR. FOR JUST. (June 9, 2022), <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use> [<https://perma.cc/EKF6-MLYC>].

34. Although many of the emergency powers Congress provides to the Executive and agencies were created to respond to wartime conditions, this Article focuses on non-wartime emergencies and those capable of definition as a "domestic emergency." See *infra* Part II.A.

regulations requiring federal workers to provide proof of vaccination as “nothing more than a pretext for increasing the number of vaccinated Americans”<sup>35</sup> and parties challenging President Biden’s Secretary of Education’s reliance on emergency statutory authorities in the Higher Education Relief Opportunities for Students (HEROES) Act of 2003 to forgive \$400 billion in debt as “a pretextual reliance on the fading pandemic to justify mass debt cancellation.”<sup>36</sup> Arguably, when presidents demand agency use of emergency loopholes to avoid compliance with environmental regulation,<sup>37</sup> when governors block access to abortions to purportedly save medical equipment for COVID patients,<sup>38</sup> and when mayors who have regularly failed to eliminate low-income housing suddenly succeed during a pandemic,<sup>39</sup> all in the “name of an emergency,” abuses can be easily masked. Yet who would dare question a response to an emergency? We have been conditioned to applaud leaders who respond to emergencies with decisive action. But we need to exhibit a bit more restraint before wholesale acceptance of anything labeled as an “emergency action.” This is particularly troubling because marginalized communities lacking resources to challenge such actions often bear the brunt of such practices.<sup>40</sup> Although both private<sup>41</sup> and public sector actors can take advantage of emergencies, this analysis focuses on abuses by government actors.

Unfortunately, identifying situations where the government may be using emergencies as a cover is not the difficult part. The difficulties lie in substantiating such past events and in preventing such future abuses. Nevertheless, this Article attempts both. Part I provides some historical context of questionable uses of

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35. In Re: Occupational Safety and Health Administration, Interim Final Rule: COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402 (Nov. 5, 2021) [https://www.supremecourt.gov/DocketPDF/21/21A247/205640/20211218002842314\\_SCOTUS%20Stay%20Request%20-%20OSHA.pdf](https://www.supremecourt.gov/DocketPDF/21/21A247/205640/20211218002842314_SCOTUS%20Stay%20Request%20-%20OSHA.pdf) [<https://perma.cc/G8YD-72NQ>].

36. Complaint at 13–19, *Nebraska v. Biden*, No. 4:22-cv-01040 (E.D. Mo. Sept. 29, 2022).

37. Exec. Order No. 13,927, 85 Fed. Reg. 35,165 (June 4, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-06-09/pdf/2020-12584.pdf> [<https://perma.cc/C6EY-WCPJ>].

38. Exec. Order No. GA-09, (Mar. 22, 2020), [https://gov.texas.gov/uploads/files/press/EO-GA\\_09\\_COVID-19\\_hospital\\_capacity\\_IMAGE\\_03-22-2020.pdf](https://gov.texas.gov/uploads/files/press/EO-GA_09_COVID-19_hospital_capacity_IMAGE_03-22-2020.pdf) [<https://perma.cc/TE9E-6T5T>].

39. See generally *Catanzaro v. Welden*, 188 F.3d 56 (2d Cir. 1999).

40. See Benjamin C. Carpenter, *A Solution Hidden in Plain Sight: Closing the Justice Gap by Applying to Legal Aid the Market Incentives That Propelled the Pro Bono Revolution*, 25 CHAP. L. REV. 1, 4 (2021) (“Over 60 million Americans each year remain unable to obtain legal representation for their civil legal needs. Indeed, despite a thirty-year focus on pro bono, the United States still ranked 109th out of 128 countries in access to civil justice in 2020.”).

41. See Danielle Kurtzleben, Jim Zarroli, Laura Sullivan, Cheryl W. Thompson, Bill Chappell, Graham Smith & Pallavi Gogoi, *Here’s How the Small Business Loan Program Went Wrong in Just 4 Weeks*, NPR (May 4, 2020, 11:14 AM), <https://www.npr.org/2020/05/04/848389343/how-did-the-small-business-loan-program-have-so-many-problems-in-just-4-weeks> [<https://perma.cc/7ZMY-UPDN>] (stating big companies like Shake Shack, Ruth’s Chris Steak House, and the Los Angeles Lakers received PPP loans during the COVID-19 pandemic despite small businesses being their intended recipients).



emergency powers in response to national security concerns regarding foreign threats. Part II then demonstrates the troublesome expansion of governmental actors using such emergency powers as pretexts to achieve other ends in response to domestic threats. It first defines the contours of domestic threats and then focuses on two primary methods of capitalizing on emergencies: emergencies as a shield to prevent implementation of disfavored policies and emergencies as swords to achieve implementation of favored policies. Part III identifies proposals to prevent, remedy, and penalize governmental use of emergencies as pretexts for nonemergent ends. Such efforts are imperative as emergencies continue to morph from foreign to domestic threats. Developing a method for distinguishing between actual and fabricated emergencies is critical for ensuring the legitimacy of such actions. With closer scrutiny and examples of accountability, public officials may think twice before politically profiting from the misfortunes of their country.

### I. A HISTORY OF EMERGENCY PRETEXTS IN RESPONSE TO FOREIGN THREATS

Emergencies seem to bring out the best and the worst in people. While some of the most impressive displays of compassion,<sup>42</sup> community,<sup>43</sup> and selflessness of neighbors are exhibited during emergencies,<sup>44</sup> we also see some reprehensible

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42. During the COVID-19 pandemic, many volunteered their time and efforts to aid the elderly who felt increasingly isolated from their loved ones, including one man who serenaded retirement home residents from outside the facility, and a college student in Nevada who organized “shopping angels” to collect food and other supplies for the elderly. Mark Brennan, Dana Winters & Pat Dolan, *We’re All First Responders Amid Coronavirus, Armed with Kindness, Compassion, and Empathy*, USA TODAY (May 8, 2020), <https://www.usatoday.com/story/opinion/2020/03/24/coronavirus-pandemic-demands-kindness-compassion-empathy-column/2898413001/> [<https://perma.cc/UZ67-KCZH>].

43. In the aftermath of 9/11, first responders from across the nation went to New York City to aid in the response. Alexandra Kukulka, *Communities Come Together After a Mass Tragedy, but the Sentiment Doesn’t Always Remain*, CHI. TRIBUNE (Sept. 10, 2020, 4:46 PM), <https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-sept-11-then-and-now-st-0911-20200910-ybkgt5y5fjettlbtjdfnmzx434-story.html> [<https://perma.cc/R75A-8MZB>].

44. After Hurricane Katrina, more than 1.1 million volunteered to help the Gulf Coast, more than fifty-one million pounds of food were distributed through Catholic Charities of New Orleans, and Southern Baptist Convention volunteers purified more than 21,000 gallons of water. FACT SHEET: WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES (May 29, 2008), [https://georgewbush-whitehouse.archives.gov/government/fbc/NOLA\\_FACT\\_SHEET\\_FINAL.pdf](https://georgewbush-whitehouse.archives.gov/government/fbc/NOLA_FACT_SHEET_FINAL.pdf) [<https://perma.cc/K97E-YTAS>]; Catholic Charities USA, *At One-Year Anniversary, Catholic Charities Agencies Continue to Help Katrina, Rita Victims Address Ongoing Needs*, RELIEFWEB (Aug. 25, 2006), <https://reliefweb.int/report/united-states-america/one-year-anniversary-catholic-charities-agencies-continue-help-katrina> [<https://perma.cc/9N95-CDBG>]; Sarah Eekhoff Zylstra, *How Southern Baptists Trained More Disaster Relief Volunteers than the Red Cross* (Nov. 17, 2017), <https://www.thegospelcoalition.org/article/how-southern-baptists-trained-more-disaster-relief-volunteers-than-the-red-cross/> [<https://perma.cc/U8XT-JFUX>]. During the COVID-19 pandemic, animal shelters saw huge increases in adoptions of furry friends. Brittany Wong, *18 Actually Good Things That Happened in 2020*, HUFFPOST (Dec. 31, 2020), [https://www.huffpost.com/entry/good-things-happened-2020\\_1\\_5feb660fc5b6ff7479847494](https://www.huffpost.com/entry/good-things-happened-2020_1_5feb660fc5b6ff7479847494) [<https://perma.cc/S2AA-4S4M>].

abuses<sup>45</sup> and opportunistic behaviors.<sup>46</sup> Traditionally, it was thought that an effective emergency response required flexibility.<sup>47</sup> More recently, however, scholars have been increasingly critical of the sweeping unchecked authority granted to the President and lawmakers in times of emergency.<sup>48</sup> Most scholars who have explored emergency action have focused on presidential use in response to war-related national security emergencies.<sup>49</sup> As such, this first Part provides some historical grounding of the types of national security emergencies that may have been used by both the executive and the legislative branches as pretexts to accomplish other goals.

### A. Executive Pretexts

Vague constitutional requirements that the President act in the “national interest” are not constraints on emergency power in the liberal tradition. The Jeffersonian position implicitly argues that reading the Constitution to provide for broad emergency power in the executive is unwise, because it would inevitably lead to vast assertions of executive power unjustified by actual emergencies. As Justice Jackson more recently noted, “[E]mergency powers . . . tend to kindle emergencies.”<sup>50</sup>

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45. See, e.g., Luke Kemp, *The ‘Stomp Reflex’: When Governments Abuse Emergency Powers*, BBC NEWS (Apr. 28, 2021), <https://www.bbc.com/future/article/20210427-the-stomp-reflex-when-governments-abuse-emergency-powers> [<https://perma.cc/PU3H-JGYT>] (“[M]ost intelligence agencies had used the war on terror and ensuing surveillance powers to construct an intrusive, global web of surveillance.”).

46. For example, faced with poor polling projections, Trump suggested that ballot security justified delaying the November 3, 2020, presidential election. *Donald J. Trump: Tweets of July 30, 2020*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/tweets-july-30-2020> [<https://perma.cc/2KEW-HG7H>]; Amy Gardner, Josh Dawsey & John Wagner, *Trump Encounters Broad Pushback to His Suggestion to Delay the Nov. 3 Election*, WASH. POST (July 30, 2020, 8:35 PM), [https://www.washingtonpost.com/politics/trump-floats-idea-of-delaying-the-november-election-as-he-ramps-up-attacks-on-voting-by-mail/2020/07/30/15fe7ac6-d264-11ea-9038-af089b63ac21\\_story.html](https://www.washingtonpost.com/politics/trump-floats-idea-of-delaying-the-november-election-as-he-ramps-up-attacks-on-voting-by-mail/2020/07/30/15fe7ac6-d264-11ea-9038-af089b63ac21_story.html) [<https://perma.cc/8UMX-XZC8>]; Tanasia Kenney, *Gas Shortage Leads to More Than 600 Reports of Price Gouging in Georgia, Officials Say*, MACON TELEGRAPH (May 14, 2021, 1:12 PM), <https://www.macon.com/news/state/georgia/article251412163.html> [<https://perma.cc/QH9P-L34T>] (reporting the rise of price gouging following a fuel shortage in the Southeast after a major pipeline shut down due to a cyberattack).

47. See, e.g., Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 226 (2009); Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183 (2018).

48. See, e.g., Huq, *supra* note 47; Stein, *supra* note 47.

49. See, e.g., Francis P. Sempa, *The Wartime Presidency*, 26 T.M. COOLEY L. REV. 25, 44 (2009) (“Nor do I think that the Constitutional difficulty plagued him. The Constitution has not greatly bothered any wartime President. That was a question of law, which ultimately the Supreme Court must decide. And meanwhile—probably a long meanwhile—we must get on with the war.”) (emphasis omitted).

50. Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1396–97 (1989).

Many scholars have made much work of the constitutional sources of emergency presidential powers.<sup>51</sup> “[P]roponents of the emergency powers doctrine have tended to place its constitutional source somewhere within the war power provisions of the Constitution, positing that emergency is a subset of war, or that ‘war’ itself means emergency.”<sup>52</sup> But emergency powers also stem from statute, with both sources of emergency power receiving broad deference in the name of national defense.<sup>53</sup>

In light of this broad authority, it should come as no surprise that abuses can follow. From World War I<sup>54</sup> to World War II<sup>55</sup> to the 9/11 attack on the World Trade Center,<sup>56</sup> scholars have documented abuses of executive power in the name of

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51. U.S. CONST. art. I, § 8; *see infra* notes 50–51.

52. Roger I. Roots, *Government by Permanent Emergency: The Forgotten History of the New Deal Constitution*, 33 SUFFOLK U. L. REV. 259, 271 (2000).

53. *See, e.g.*, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–29 (1936) (embracing national security exceptionalism for presidents acting in the name of foreign affairs or national security); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Perpich v. Department of Defense*, 496 U.S. 334, 354 n.28 (1990) (quoting with approval *Curtiss-Wright’s* assertion of extraconstitutional power in foreign affairs); *Webster v. Doe*, 486 U.S. 592, 605–06 (1988) (citing *Curtiss-Wright* in support of the President’s broad role in foreign affairs); *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 50 (1st Cir. 1999) (quoting with approval *Curtiss-Wright’s* observations about extraconstitutional power in foreign affairs), *aff’d on other grounds sub nom. Crosby v. National Foreign Trade Council*, 120 S. Ct. 2888 (2000).

54. *See* Geoffrey R. Stone, *Civil Liberties v. National Security in the Law’s Open Areas*, 86 B.U. L. REV. 1315, 1319 (2006) (explaining how the Wilson administration sought to aggressively prosecute critics of WWI and communists in general through the Espionage Act of 1917).

55. *See, e.g., id.* at 1321–22 (explaining how President Roosevelt signed the executive order allowing Japanese internment against the counsel of FBI Director J. Edgar Hoover, and the Attorney General); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the exclusion of Japanese Americans from the West Coast Military Area); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (holding that curfews against members of a minority group were constitutional when the nation was at war with the country from which that group’s ancestors originated); *Yasui v. United States*, 320 U.S. 115 (1943) (holding the same). *But see ex parte Endo*, 323 U.S. 283 (1944) (holding U.S. government could not continue to detain a citizen who was “concededly loyal” to the United States); *The National Emergency as Pretext for Compulsory Health Insurance*, *JAMA* 116(4):310-311 (1941) (“A determined drive is on by health insurance fanatics to capitalize on the opportunity now presented by the emergency [World War II].”).

56. *See, e.g., Top Ten Abuses of Power Since 9/11*, ACLU, <https://www.aclu.org/other/top-ten-abuses-power-911> [<https://perma.cc/QJ68-8448>] (citing governmental abuses of power since the increased surveillance after the 9/11 attacks, including warrantless wiretapping, the abuse of the Patriot Act to spy on ordinary citizens, and seemingly arbitrary no-fly lists); Eric A. Posner, *Deference to the Executive in the United States after September 11: Congress, the Courts, and the Office of Legal Counsel*, 35 HARV. J. L. & PUB. POL’Y 213, 215 (2012) (U.S. government “engaged in immigration sweeps, detained people without charges, used coercive interrogation, and engaged in warrantless wiretapping of American citizens.”); *Hamdi v. Rumsfeld*, 542 U.S. 507, 510–11 (2004); *see also A Guide to Emergency Powers and Their Use*, BRENNAN CTR. FOR JUST. (Sept. 4, 2019), [https://www.brennancenter.org/sites/default/files/2019-10/2019\\_10\\_15\\_EmergencyPowers\\_FULLL.pdf](https://www.brennancenter.org/sites/default/files/2019-10/2019_10_15_EmergencyPowers_FULLL.pdf) [<https://perma.cc/CMQ5-68HV>] (President Trump invoked the 9/11 state of

national security.<sup>57</sup> Some of these executive orders, such as President Truman's now famous *Youngstown* attempt to seize steel mills,<sup>58</sup> have been criticized for overstepping the constitutional bounds of the executive.<sup>59</sup> Others, such as President Roosevelt's internment of Japanese Americans<sup>60</sup> and President Bush's waterboarding and torture of prisoners at Guantanamo Bay,<sup>61</sup> have been criticized for curtailing civil liberties in response to a foreign threat.<sup>62</sup>

Courts generally have been deferential to such presidential actions, hesitant to question the legitimacy of actions taken in the name of national security.<sup>63</sup> Perhaps

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emergency in 2017 to fill a chronic shortage in Air Force pilots).

57. See Jonathan Manes, *Secret Law*, 106 GEO. L.J. 803 (2018); Geoffrey R. Stone, *National Security v. Civil Liberties*, 95 CAL. L. REV. 2203, 2208 (2007); Neal Devins, *Congress, Civil Liberties, and the War on Terrorism*, 11 WM. & MARY BILL RTS. J. 1139 (2003); Shoba Sivaprasad Wadhia, *Business as Usual: Immigration and the National Security Exception*, 114 PENN. ST. L. REV. 1485, 1489 (2010); Francis Cardinal George, *Civil Liberties vs. National Security: The Enduring Tension*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 219 (2005).

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

59. See Edward T. Swaine, *The Political Economy of Youngstown*, 83 S. CAL. L. REV. 263, 314–15 (2010).

60. Exec. Order No. 9066, 3 C.F.R. 1092 (1943) (authorizing the Secretary of War to prescribe military areas); Stone, *supra* note 54, at 1319–20 (“On February 19, 1942, President Franklin D. Roosevelt signed Executive Order 9066, which authorized the Army to designate military areas from which any persons may be excluded. Although the words ‘Japanese’ or ‘Japanese American’ never appeared in the Order, it was understood to apply only to persons of Japanese ancestry.”); *Korematsu v. United States*, 323 U.S. 214, 216–17 (1944).

61. Terry McDermott, *Waterboarding of Detainees Was so Gruesome That Even CIA Officials Wept*, L.A. TIMES (Jan. 22, 2020, 7:38 PM), <https://www.latimes.com/world-nation/story/2020-01-22/ksm-waterboarding-guantanamo-testimony> [<https://perma.cc/Z3DH-S4P4>]. Authorization for Use of Military Force (AUMF) allowed the President to “use all necessary and appropriate force against those nations . . . he determines planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States.” Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. (2001). Such force included the detention of those deemed to be enemy combatants. See *Hamdi*, 542 U.S. at 518 (“We conclude that detention of individuals falling into the limited category [of enemy combatants], for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”).

62. Thomas P. Crocker, *Torture, with Apologies*, 86 TEX. L. REV. 569, 572 (2008); Stone, *supra* note 57, at 2205; Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 25 (2002); Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 285 (2001).

63. See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”); *Dennis v. United States*, 341 U.S. 494, 516 (1951) (holding the Smith Act, which forbade attempts to “advocate, abet, advise, or teach” the destruction of the U.S. government, did not violate the First Amendment); *Korematsu*, 323 U.S. 214 at 246 (Jackson, J., dissenting), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (“[T]he Court

this is because it could be argued that the actions taken, although extreme and often unjustified, were substantially related to the foreign threats at hand.<sup>64</sup> Although presidential treatment of Japanese Americans was abhorrent, a direct line could be drawn to the bombing of Pearl Harbor by the Japanese during World War II.<sup>65</sup> Similarly, although presidential treatment of the Afghan and Pakistani prisoners at Guantanamo Bay violated many constitutional protections,<sup>66</sup> a direct line could be drawn to the attack on the World Trade Center by the Taliban.<sup>67</sup>

But the existence of substantial connections does not lessen the likelihood that the emergencies also served as pretexts to accomplish other goals during wartime. As others have documented, although the alleged purpose of the Sedition and Espionage Acts passed during WWI was to “protect the nation from spies,” it also “had the ulterior motives of curbing the trade union movement and stifling dissent.”<sup>68</sup> Similarly, “[p]olitics certainly played a role in Roosevelt’s thinking” in ordering Japanese internment as 1942 was an election year, and “[b]ecause of the attack on Pearl Harbor, public opinion strongly urged the President to focus American military force on the Pacific.”<sup>69</sup> Roosevelt preferred to engage Europe first, so Japanese internment “was, in part, a way to pacify those” who wished to focus on the Pacific theater.<sup>70</sup>

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for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”); Eric K. Yamamoto, Maria Amparo Vanaclocha Berti & Jaime Tokioka, “Loaded Weapon” *Revisited: The Trump Era Import of Justice Jackson’s Warning in Korematsu*, 24 *ASIAN AM. L.J.* 5, 44–45 (2017) (“Unconditional [court] deference to the government’s . . . invocation of emergency . . . has a lamentable place in our history, . . . bending our constitutional principles merely because an interest in national security is invoked. . . . We have learned from experience that it is often where the asserted interest appears most compelling that we must be most vigilant in protecting constitutional rights.”) (quoting *Hassan v. City of New York*, 804 F.3d 277, 306–07 (3d Cir. 2015)).

64. See *infra*, notes 65–67.

65. See Stone, *supra* note 54, at 1319–20.

66. See Emanuel Margolis, *National Security and the Constitution: A Titanic Collision*, 81 *CONN. BAR J.* 271, 272 (2007) (explaining how the Bush administration denied the constitutional right of habeas corpus to Guantanamo Bay detainees); *Guantánamo Bay: 14 Years of Injustice*, AMNESTY INTERNATIONAL UK (May 18, 2020, 05:41 PM), <https://www.amnesty.org.uk/guantanamo-bay-human-rights>; *The Guantánamo Docket*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html> [<https://perma.cc/ZZ2Q-FGPM>] (Sept. 23, 2022).

67. See *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, [https://govinfo.library.unt.edu/911/report/911Report\\_Exec.htm](https://govinfo.library.unt.edu/911/report/911Report_Exec.htm) [<https://perma.cc/U8XC-HC9D>] (explaining that the Taliban provided al Qaeda and leader of the 9/11 attacks, Osama Bin Laden, sanctuary); *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004) (explaining that the 9/11 attacks were carried out by al Qaeda and the Taliban was known to support al Qaeda).

68. Nancy Murray & Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons from History*, 87 *MASS. L. REV.* 72, 75–76 (2002).

69. Stone, *supra* note 54, at 1322

70. *Id.*

In this same vein, other scholars and courts have suggested that such actions were nothing more than thinly veiled prejudice that discriminated against races and ethnicities,<sup>71</sup> including the post-Pearl Harbor action targeting Japanese Americans and the 9/11 action targeting Arab Americans.<sup>72</sup> These arguments are made stronger by public racist remarks by sitting presidents.<sup>73</sup> Although this is but a small sample of executive actions that could be described as pretextual, it is enough to demonstrate the difficulties of parsing between potentially valid and pretextual responses to foreign threats.

### B. Legislative Pretexts

In addition to executive actions, Congress has long used the looming threat of war to pass broad legislation that infringed on civil liberties protected by the Bill of Rights. As others have recognized, “emergencies are a good time to make bad law.”<sup>74</sup> And Congress has a tendency to make such laws swiftly. Although using emergencies to expedite laws is sometimes necessary, it also eliminates some of the

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71. See, e.g., Kaelyne Yumul Wietelman, *Disarming Jackson’s (Re)Loaded Weapon: How Trump v. Hawaii Reincarnated Korematsu and How They Can Be Overruled*, 23 ASIAN PAC. AM. L.J. 43, 55 (2019) (Both *Korematsu* and *Trump v. Hawaii* are “categorical exclusionary orders on the basis of race and religion.”); “*Korematsu* left a loaded weapon for this Supreme Court to use: the mask of national security to hide racial and religious animus.” *Id.* at 69.

Judge Ambro then highlighted how that passive judicial stamp of approval sacrificed fundamental freedoms and led later to national regret: “The World War II relocation-camp cases and the Red scare and McCarthy-era internal subversion cases are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.”

Yamamoto et al., *supra* note 63, at 44 (quoting *Hassan v. City of New York*, 804 F.3d 277, 307 (3d Cir. 2015)).

72.

In the two weeks following the attacks, over 500 people were either arrested or detained, and thousands of resident aliens were asked to submit to ‘random questioning,’ almost all of them Arabic or Middle Eastern. In several cases, Arab-Americans spent weeks in jail, suspected, as some see it, merely for being Arabs.

Liam Braber, *Korematsu’s Ghost: A Post-September 11th Analysis of Race and National Security*, 47 VILL. L. REV. 451, 452–53 (2002).

73. See, e.g., Colby Itkowitz, *Trump Again Uses Racially Insensitive Term to Describe Coronavirus*, WASH. POST (Jun. 23, 2020, 8:05 PM), [https://www.washingtonpost.com/politics/trump-again-uses-kung-flu-to-describe-coronavirus/2020/06/23/0ab5a8d8-b5a9-11ea-aca5-ebb63d27e1ff\\_story.html](https://www.washingtonpost.com/politics/trump-again-uses-kung-flu-to-describe-coronavirus/2020/06/23/0ab5a8d8-b5a9-11ea-aca5-ebb63d27e1ff_story.html) [<https://perma.cc/MKS6-6XK7>] (describing how President Trump referred to COVID-19 as “kung flu” and “the China flu” during a June 2020 speech).

74. Robert H. Thomas, *Evaluating Emergency Takings: Flattening the Economic Curve*, 29 WM. & MARY BILL RTS. J. 1145, 1146 (2021).

traditional checks and balances across the political parties. For example, in response to World War II, Congress passed the First War Powers Act, an act that gave Roosevelt substantial power.<sup>75</sup> It was signed just ten days after it was introduced to Congress.<sup>76</sup> Similarly, Congress pushed through the Patriot Act just forty-five days after 9/11.<sup>77</sup> Although not the only infringements,<sup>78</sup> below are a few examples of how Congress has used national security emergencies to justify intrusions into free speech and privacy.

*Weakened First Amendment Rights.* Congress has passed many laws in the name of national security that restricted speech rights of U.S. citizens. As one example, the Sedition Act of 1798 allowed the deportation, fining, or imprisonment of those found threatening or publishing “false, scandalous and malicious writing” against the U.S. government.<sup>79</sup> Although there was concern of a French invasion and infiltration of enemy spies, the Act also adversely impacted the Federalists’ rival party, the Republicans, who garnered support from immigrants and published particularly venomous attacks on the Federalist administration.<sup>80</sup>

Congress again restricted First Amendment rights through the Espionage Act of 1917 during World War I and as the Red Scare began to grip the nation.<sup>81</sup> Under the Act, citizens could not obtain or circulate information that related to national defense with the intent to use such information against the United States.<sup>82</sup> The constitutionality of the Act was upheld in *Schenck v. United States* when Charles Schenck was charged with violating the Act for circulating flyers opposing the draft.<sup>83</sup> The Court created the “clear and present danger” standard, allowing freedom of speech to be limited in certain instances—one of which was wartime.<sup>84</sup>

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75. Kim Lane Scheppele, *Small Emergencies*, 40 GA. L. REV. 835, 850 n.64 (2006).

76. *Id.*

77. *Surveillance Under the Patriot Act*, ACLU, <https://www.aclu.org/issues/national-security/privacy-and-surveillance/surveillance-under-patriot-act> [<https://perma.cc/Q4XP-XMYR>].

78. *See, e.g.*, Margolis, *supra* note 66, at 272 (Bush administration suspended habeas corpus for Guantanamo Bay detainees); Murray & Wunsch, *supra* note 68, at 74 (Lincoln suspended habeas corpus during the Civil War, even ignoring the Supreme Court’s ruling prohibiting such an action).

79. *Alien and Sedition Acts (1798)*, NAT’L ARCHIVES, <https://www.archives.gov/milestone-documents/alien-and-sedition-acts> [<https://perma.cc/P8EH-PQZ9>]. The Act also made U.S. citizenship harder to obtain, enabled the government to deport citizens of an enemy state during wartime, and enabled the President to deport noncitizens suspected of treason even in the absence of war. *Id.*

80. *See Alien and Sedition Acts*, HISTORY (NOV. 9, 2009) <https://www.history.com/topics/early-us/alien-and-sedition-acts> [<https://perma.cc/U8XF-ZJN5>].

81. *See* David Asp, *Espionage Act of 1917*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1045/espionage-act-of-1917> [<https://perma.cc/Q3H9-F2NB>] (Aug. 2022).

82. *Id.*

83. 249 U.S. 47, 49 (1919).

84. *Id.* at 52 (“When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”).

Just one year later, Congress passed an amendment to the Espionage Act with another Sedition Act that criminalized speaking, publishing, or writing “any disloyal, profane, scurrilous, or abusive language” about the U.S. government during wartime.<sup>85</sup> The Supreme Court upheld this Act, further solidifying the government’s power to curtail the freedom of speech while the United States is at war.<sup>86</sup>

*Weakened Privacy Protections.* Congress has also used national security threats to pass laws that intrude upon the privacy of U.S. citizens. Although not the first time,<sup>87</sup> perhaps the most notable example was Congress’ response to the terrorist attack of 9/11 with passage of the Patriot Act.<sup>88</sup> Many scholars have criticized the sweeping nature of this law and the freedom it provides the government to infringe on basic liberties in the name of national security.<sup>89</sup> The Act limits procedural safeguards for government acquisition of citizens’ personal information and allows the government access to “phone and e-mail records, financial information, and lists of Internet sites visited.”<sup>90</sup> Additionally, it allows for “Sneak & Peek” searches where law enforcement can delay notification of secret searches of citizens’ homes—an allowance likely at odds with the Fourth Amendment.<sup>91</sup>

National security threats have similarly been used to justify increased surveillance measures.<sup>92</sup> The terrorist attacks of 9/11 resulted in such an increase.<sup>93</sup> Some even refer to such surveillance as the “Stalker Complex,” where big data and intelligence agencies “benefit[] through profit and control from the use of emergency powers and responses for surveillance, such as anti-terrorism surveillance measures post 9/11 or

85. *The Act of 1918*, THIRTEEN, [https://www.thirteen.org/wnet/supremecourt/capitalism/sources\\_document1.html](https://www.thirteen.org/wnet/supremecourt/capitalism/sources_document1.html) [<https://perma.cc/PD2A-3EFE>].

86. *Abrams v. United States*, 250 U.S. 616, 623–24 (1919).

87. *See, e.g.*, Stuart Taylor, Jr., *The Big Snoop: Life, Liberty, and the Pursuit of Terrorists*, THE BROOKINGS ESSAY (Apr. 29, 2014), <http://csweb.brookings.edu/content/research/essays/2014/big-snoop.html#> [<https://perma.cc/G394-YJ99>] (explaining that the Church Committee investigation into domestic surveillance that was prompted by the Watergate Scandal in the 1970s revealed that the CIA and FBI were wiretapping, bugging, and harassing citizens, some of whom were Supreme Court justices and government officials, all supposedly for information relating to national security threats).

88. 8 U.S.C. § 1701.

89. *See, e.g.*, Christopher P. Raab, *Fighting Terrorism in an Electronic Age: Does the Patriot Act Unduly Compromise Our Civil Liberties?*, 4 DUKE L. & TECH. REV. 1 (2006).

90. *Id.* at 8.

91. Michael F. Dowley, *Government Surveillance Powers under the USA Patriot Act: Is It Possible to Protect National Security and Privacy at the Same Time – A Constitutional Tug-of-War*, 36 SUFFOLK U. L. REV. 165, 181 (2002). Less than one percent of these “Sneak & Peeks” were related to terrorism in 2010. Noel Brinkerhoff, *Less than 1% of Patriot Act’s “Sneak and Peek” Delayed Notice Warrants are Used Against Terrorism*, ALLGOV (Oct. 28, 2014) <http://www.allgov.com/news/top-stories/less-than-1-of-patriot-acts-sneak-and-peek-delayed-notice-warrants-are-used-against-terrorism-141028?news=854657> [<https://perma.cc/QU44-A64V>].

92. Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 3 (2008).

93. *See, e.g.*, Jamie S. Gorelick, John H. Harwood II & Heather Zachry, *Navigating Communications Regulation in the Wake of 9/11*, 57 FED. COMM. L.J. 351, 353 (2005).



new wide-spread tracking and monitoring capabilities using GPS or Bluetooth during Covid-19.”<sup>94</sup> The balance is difficult, as “[s]ome contend that the government—usually the Executive—must have wide discretion to meet the existential threat posed by global terrorism, while others decry any infringement on civil liberties aimed at enhancing national security as an abandonment of the core values that security measures are designed to protect and foster.”<sup>95</sup>

Given both executive and legislative use of national security-related emergencies as pretext for weakening civil liberties like free speech and privacy, the question is whether these pretexts and deference can be confined to the national security realm or whether government use of pretexts has bled into *non-wartime* domains. Even the most ardent proponents of the executive emergency powers have had difficulty showing how the Constitution contemplates its operation in the utter and total absence of war.<sup>96</sup> For example, President Roosevelt’s crisis regime was, in essence, a quest for “a doctrine that analogized the Depression to a wartime battlefield.”<sup>97</sup> The next Part focuses on government use of these domestic emergencies as a pretext to accomplish unrelated ends.

## II. A TROUBLING EXPANSION FROM FOREIGN TO DOMESTIC EMERGENCY PRETEXTS

Unfortunately, the use of an emergency to justify actions is not limited to situations where foreign threats loom large. Domestic emergencies also are plentiful. From natural disasters like floods, hurricanes, and wildfires to economic emergencies like recessions and the home mortgage crisis, we find ourselves, even in non-wartimes, in vulnerable situations.<sup>98</sup> And the closer you look, the more you see examples of bad actors, both private and public, trying to capitalize on a domestic emergency to justify other actions.

Private actors have abused the legal system by using emergencies as pretexts to unlock special legal protections and concessions in the contexts of evictions,<sup>99</sup>

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94. Luke Kemp, *The ‘Stomp Reflex’: When Governments Abuse Emergency Powers*, BBC (Apr. 28, 2021), <https://www.bbc.com/future/article/20210427-the-stomp-reflex-when-governments-abuse-emergency-powers> [<https://perma.cc/MZW3-YZAB>].

95. J. David Pollock, *Administrative Justice: Using Agency Declaratory Orders in the Fight to Staunch the Financing of Terrorism*, 33 CARDOZO L. REV. 2171, 2172 (2012).

96. See, e.g., Mark C. Rahdert, *Double-Checking Executive Emergency Power: Lessons from Hamdi and Hamdan*, 80 TEMP. L. REV. 451, 454 (2007) (stating that the Constitution did not contemplate executive emergency powers in the modern world where using war as a pretext may be arbitrary when the “nation [is] more or less continuously involved in armed conflict somewhere on the globe”).

97. Roger I. Roots, *Government by Permanent Emergency: The Forgotten History of the New Deal Constitution*, 33 SUFFOLK U. L. REV. 259, 270–71 (2000) (quoting PETER H. IRONS, *THE NEW DEAL LAWYERS* 54 (1982)).

98. For a discussion of vulnerability and our dependence on others for recovery, see MARTHA FINEMAN, *THE VULNERABLE SUBJECT: ANCHORING EQUALITY IN THE HUMAN CONDITION* (2011); MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004).

99. See, e.g., *Ashford.com, Inc. v. Crescent Real Estate Funding III, L.P.*, No. 14-04-00605-CV, 2005 WL 2787014, at \*3 (Tex. App. Oct. 27, 2005) (“Ashford suggests that Crescent knew there was no real threat posed by the asbestos and, therefore, the ‘emergency’

extraordinary relief in legal proceedings,<sup>100</sup> and child custody.<sup>101</sup> Workplace discrimination has been the historical hot spot for pretextual claims, with hundreds of cases having been filed against private employers for allegedly using a host of reasons as pretexts for racial and gender discrimination in wrongful termination suits.<sup>102</sup> But private actors do not have a monopoly on such abuse.

Government actors also have taken actions in the name of an emergency that are similarly problematic. If questionable employment decisions are the poster child for private sector pretexts, questionable searches by police officers would be the public sector equivalent. As just one example, although the Fourth Amendment prohibits unreasonable search or seizure,<sup>103</sup> the Supreme Court has authorized warrantless searches of personal property in “emergency” circumstances.<sup>104</sup> Even within this emergency exception, a spectrum arises, as emergencies can threaten life<sup>105</sup> or merely destruction of evidence.<sup>106</sup> Many of these actions take place on an individual basis,<sup>107</sup> with accusations of police officers using various actions as pretexts for warrantless stops or searches.

This Part looks beyond private pretexts in workplace discrimination and police pretexts in criminal law to reach other public governance actors. Specifically, it identifies examples of government officials using emergency powers to accomplish domestic policy goals that could not be achieved using nonemergency measures. Government actors enjoy largely unbridled freedom to characterize any situation as an “emergency,” but also use authentic emergencies to accomplish unrelated agenda items. Particular attention is given to those actions with a track record of documented intent to achieve such a goal, as well as actions that were previously thwarted when attempted using nonemergency powers and only accomplished when cloaked in an emergency. As such, three criteria are used to identify such examples: (1) a public

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justification for the lockout was merely a pretext.”).

100. *See* *Lola Cars Int’l Ltd. v. Krohn Racing, LLC*, C.A. Nos. 4479-VCN, 4886-VCN, 2010 WL 3314484, at \*21 n.251 (Del. Ch. Aug. 2, 2010) (“Specifically, Krohn Racing argues that Lola used ‘phony emergencies’ as a pretext for requesting extraordinary injunctive relief . . . .”); *see also* *Stamps v. State*, No. 2260, 2017 WL 695371, at \*5 (Md. Ct. Spec. App. Feb. 22, 2017) (alleging the prosecutor used a family emergency as a pretext to obtain more time to prepare for trial).

101. *See* *Johnson v. Melback*, 612 P.2d 188, 194 (Kan. Ct. App. 1980) (“Emergency jurisdiction must be denied, however, when it is invoked as a pretext in order to reopen a custody controversy.”)

102. *See, e.g.,* *Witherspoon v. Brennan*, 449 F. Supp. 3d 491, 504–05 (D. Md. 2020). An advanced search on Westlaw for “pretext” and “emergency” resulted in over 100 results, the majority of which were wrongful termination claims.

103. U.S. CONST. amend. IV.

104. *See* John F. Decker, *Emergency Circumstances, Police Responses, and Fourth Amendment Restrictions*, 89 J. CRIM. L. & CRIMINOLOGY 433, 451–53 (1999).

105. *See* *Warden v. Hayden*, 387 U.S. 294, 298–99 (1967).

106. *See* *Schmerber v. California*, 384 U.S. 757 (1966); *Vale v. Louisiana*, 399 U.S. 30 (1970).

107. *See, e.g.,* *State v. Boisselle*, 448 P.3d 19, 21 (Wash. 2019) (“We hold that the officers’ warrantless search of Boisselle’s home was a pretext for a criminal investigation because the officers had significant suspicions of criminal activity, the officers’ entry was motivated by the desire to conduct an evidentiary search, and there was no present emergency.”).

actor identified a domestic “emergency” that required a response and triggered emergency powers, (2) the emergency response addresses a domestic agenda item previously unattainable (by blocking progress of others or by advancing one’s own agenda), and (3) the action fails to demonstrate a close connection to the emergency at hand.

This Part discusses the challenges of classifying a threat as domestic or foreign, defending the importance of doing so despite the challenges. It then proceeds to provide some examples of public actor use of emergencies as pretexts to achieve domestic policy goals. These examples can be further divided into two types: those that use the emergency as a shield to defensively block others from achieving their goals and those that use the emergency as a sword to offensively accomplish other goals. Each of these is discussed below.

### *A. Classification Challenges: Foreign or Domestic Threats?*

Not all emergencies are created equal. To treat them as such runs the risk of allowing powers intended for rare and unexpected events to bleed over into more mundane and long-standing problems. I previously argued for a distinction between acute and chronic emergencies<sup>108</sup> and am now adding another layer to consider—foreign or domestic threats. Domestic threats that can be easily verified firsthand pose no problems. Decades of emergency response measures for domestic emergencies, like natural disasters, and millions of dollars in direct aid demonstrate the importance of emergency powers to respond to some domestic threats.<sup>109</sup> But as domestic threats become more diffuse, individualized, and commonplace, the more vulnerable they become to an abuse of emergency powers.

At first blush, a domestic threat is merely one that does not involve an external, foreign threat. Foreign threats may include military forces from other sovereign nations taking hostile or threatening action, foreign governments sending threatening messages, foreign efforts to gather sensitive personal data on Americans, or terrorist activities.<sup>110</sup> Domestic threats, on the other hand, do not have a readily identifiable enemy. The threats stem from more amorphous or self-initiated sources—an illness, a natural disaster, or a social situation of our own creation.<sup>111</sup>

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108. Stein, *supra* note 47, at 1245.

109. See *History of Emergency Preparedness*, U.S. NUCLEAR REGUL. COMM’N, <https://www.nrc.gov/about-nrc/emerg-preparedness/history.html> [https://perma.cc/7V8X-CX94] (June 8, 2021); Leanne Fuller, *SBA Approves Millions of Dollars for Kentucky Tornado Survivors, Deadline for Physical Damage Approaching*, WPSD LOC. 6 (Jan. 31, 2022), [https://www.wpsdlocal6.com/news/sba-approves-millions-of-dollars-for-kentucky-tornado-survivors-deadline-for-physical-damage-approaching/article\\_7fbb0f70-82ed-11ec-9043-a3ee18088a72.html](https://www.wpsdlocal6.com/news/sba-approves-millions-of-dollars-for-kentucky-tornado-survivors-deadline-for-physical-damage-approaching/article_7fbb0f70-82ed-11ec-9043-a3ee18088a72.html) [https://perma.cc/UT8V-WT2Y]; Susan Montoya Bryan, *US approves \$2.5B in Fire Aid for New Mexico Victims*, AP NEWS (Sept. 30, 2022) <https://apnews.com/article/wildfires-fires-new-mexico-business-congressa1c482f16a2d306cb9edfd9612992273> [https://perma.cc/L2VN-28N3]; A Guide to Emergency Powers and Their Use, BRENNAN CTR. FOR JUST. (Dec. 5, 2018), <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use> [https://perma.cc/5ZQB-B577] (June 9, 2022).

110. See, e.g., Exec. Order No. 14,034, 86 Fed. Reg. 31423 (June 11, 2021).

111. Government actors have attempted to characterize prison overcrowding as an

Yet even the term “domestic” may prove clumsy. One can imagine many threats that are not easily classified as foreign or domestic. Climate change is a global threat, but the disaster-related impacts, like floods and hurricanes, will be felt locally.<sup>112</sup> Some scholars have argued that it could be considered a national emergency,<sup>113</sup> but others argue against this classification.<sup>114</sup> As mentioned above, both Democratic and Republican senators have urged President Biden to declare a “climate emergency,” an emergency that the President referred to as “an existential threat to our nation and to the world.”<sup>115</sup> But given that, historically, anthropocentric greenhouse gas emissions primarily stem from the United States and other developed nations, while two of the three top emitting countries today are China and India,<sup>116</sup> would it be classified as a domestic threat or a global one? In contrast, terrorism is often a foreign threat, but ample examples of domestic terrorism exist.<sup>117</sup> Even public actors

“emergency” deserving of an exemption from state environmental review laws. David J. Kirschner, *SEQRA’s Emergency Provision: Exemption or Circumvention?*, 2 HOFSTRA PROP. L.J. 209, 219–20 (1988) (quoting Bd. Of Visitors-Marcy Psychiatric Ctr. v. Coughlin, 465 N.Y.S.2d 312, 313–14 (N.Y. App. Div. 1983) (“[The Court] concluded that the emergency provision was inapplicable because the proposed conversion was a permanent measure, rather than ‘an action immediately necessary on a limited emergency basis,’ and that the requirements of [New York’s State Environmental Quality Review Act] must therefore be met.”)).

112. *Climate Change: Regional Impacts*, UCAR CTR. FOR SCI. EDUC., <https://scied.ucar.edu/learning-zone/climate-change-impacts/regional> [<https://perma.cc/4A48-V2A5>]; Melissa Denchak, *Flooding and Climate Change: Everything You Need to Know*, NAT. RES. DEF. COUNCIL (Apr. 10, 2019), <https://www.nrdc.org/stories/flooding-and-climate-change-everything-you-need-know> [<https://perma.cc/4K7L-WXX6>].

113. *E.g.*, Mark P. Nevitt, *Is Climate Change a National Emergency?*, 55 U.C. DAVIS L. REV. 591, 626–27 (2021); Daniel Farber, *Exceptional Circumstances: Immigration, Imports, Coronavirus, and Climate Change as Emergencies*, 71 HASTINGS L. J. 1143 (2020).

114. *E.g.*, Maryam Jamshidi, *The Climate Crisis is a Human Security, not a National Security, Issue*, 93 S. CAL. L. REV. POSTSCRIPT 36, 37–38 (2019). Climate scientists define a climate emergency entirely different, with a focus on risk and urgency as opposed to foreseeability. *See, e.g.*, Barry Gills & Jamie Morgan, *Global Climate Emergency: After COP24, Climate Science, Urgency, and the Threat to Humanity*, 17 GLOBALIZATIONS 885, 895 (2020), <https://www.tandfonline.com/doi/full/10.1080/14747731.2019.1669915> [<https://perma.cc/D33B-N3LU>].

115. President Biden, Remarks by President Biden on Actions to Tackle the Climate Crisis (July 20, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/07/20/remarks-by-president-biden-on-actions-to-tackle-the-climate-crisis/> [<https://perma.cc/ZV9C-J9WL>].

116. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2022: MITIGATION OF CLIMATE CHANGE 10–11 (Priyadarshi R. Shukla et al. eds., 2022), [https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC\\_AR6\\_WGIII\\_SPM.pdf](https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_SPM.pdf) [<https://perma.cc/WK25-E3CX>]; *see, e.g.*, Johannes Friedrich, Mengpin Ge & Andrew Pickens, *This Interactive Chart Shows Changes in the World’s Top 10 Emitters*, WORLD RES. INST. (Dec. 10, 2020), <https://www.wri.org/insights/interactive-chart-shows-changes-worlds-top-10-emitters> [<https://perma.cc/33ZM-RFU5>].

117. *See, e.g.*, LISA N. SACCO, CONG. RSCH. SERV., DOMESTIC TERRORISM AND THE ATTACK ON THE U.S. CAPITOL (2021); SETH G. JONES, CATRINA DOXSEE, GRACE HWANG & JARED

recognize the difference—and the strength that is concomitant with characterizing a threat as foreign. As is demonstrated below, public actors may try to control the narrative of any emergency by stoking the fear of foreigners as opposed to domestic threats. Defining the three relevant characteristics of emergencies described above may help to thwart such attempts.

One example of such a complication lies in former President Trump's use of emergency powers to justify construction of a border wall between the United States and Mexico,<sup>118</sup> to restrict asylum seekers to stay in Mexico,<sup>119</sup> and to institute a "travel ban" against Muslims.<sup>120</sup> President Trump worked to control the narrative of these actions, consistently stoking the fires of division by framing Mexicans and Muslims as foreign threats.<sup>121</sup> He argued that Americans needed to act swiftly to prevent these foreigners from entering the United States by using border walls and travel restrictions.<sup>122</sup> But Trump's broad assertions about illegal immigration fail to have the same immediacy as other emergencies. And unlike some of the earlier uses of executive power, it is much harder to draw a direct line between the construction of a border wall and any sort of immediate threat from Mexico.<sup>123</sup> Similarly, it is more difficult to directly link a travel ban for Muslims and any inchoate threat from Muslim terrorists.<sup>124</sup> Lower courts struck down Trump's use of emergency funds for the border wall and the asylum restrictions.<sup>125</sup> The Supreme Court dismissed the

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THOMPSON, CTR. FOR STRATEGIC & INT'L STUD., THE MILITARY, POLICE, AND THE RISE OF TERRORISM IN THE UNITED STATES (Apr. 12, 2021), <https://www.csis.org/analysis/military-police-and-rise-terrorism-united-states> [<https://perma.cc/RDQ6-9TU5>]; *What We Investigate: Terrorism*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/investigate/terrorism> [<https://perma.cc/T47F-FBC2>].

118. Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

119. See Migrant Protection Protocols, U.S. DEP'T OF HOMELAND SEC. (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [<https://perma.cc/SAH3-GM34>]; Immigration and Nationality Act § 235, 8 U.S.C. 1225(b)(2)(C); 8 C.F.R. § 235.5 (2021).

120. "The travel ban 'indefinitely suspends the issuance of immigrant and nonimmigrant visas to applicants from the Muslim-majority countries Libya, Iran, Somalia, Syria, and Yemen—plus North Korea and Venezuela.'" Wietelman, *supra* note 71, at 45; see Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,165–67 (Sept. 27, 2017).

121. See Jenna Johnson & Abigail Hauslohner, *'I Think Islam Hates Us': A Timeline of Trump's Comments About Islam and Muslims*, WASH. POST (May 20, 2017, 3:16 PM), <https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/> [<https://perma.cc/2W3M-4LMY>]; Eric Schmitt, David E. Sanger & Glenn Thrush, *A Border Wall to Stop Terrorists? Experts Say That Makes Little Sense*, N.Y. TIMES (Jan. 8, 2019), <https://www.nytimes.com/2019/01/08/us/politics/trump-border-wall-terrorists.html> [<https://perma.cc/833S-52AC>].

122. See Schmitt et al., *supra* 121.

123. See Schmitt et al., *supra* 121.

124. See Hannah Giorgis, *The Faulty Logic in Trump's Travel Ban*, ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/trumps-travel-ban-logic-flaw/579631/> [<https://perma.cc/6MBZ-EZL7>].

125. Sierra Club v. Trump, No. 19-cv-00892-HSG, 2019 WL 2715422, at \*3 (N.D. Cal. June 28, 2019); Sierra Club v. Trump, 929 F.3d 670, 707 (9<sup>th</sup> Cir. 2019); Cap. Area Immigrants' Rts. Coal. v. Trump, 471 F. Supp. 3d 25, 32 (D.D.C. 2020).

appeals as moot after President Biden won the 2020 election and indicated his disapproval of such actions.<sup>126</sup>

But the challenge to the Muslim ban proceeded to the Supreme Court.<sup>127</sup> Even after a lower court struck down Trump's travel ban as pretextual discrimination,<sup>128</sup> the Supreme Court exhibited the substantial deference usually reserved for national security threats to reverse and uphold Trump's modified travel ban.<sup>129</sup> Importantly, although this action could be framed as a domestic immigration issue, the Court accepted the former President framing it as a national security matter, despite repeated incendiary statements by the President toward Muslims.<sup>130</sup>

Given the risks of inarticulate line drawing, why bother? Because not all the cases will be this difficult. And where public actors frame the necessary response as an "emergency," asking whether the threat is foreign or domestic could help determine the degree of discretion afforded to such action. It is also important to those marginalized communities who are particularly susceptible to the use of emergency pretexts. As will be demonstrated below, discrimination, inequality, and social justice are often in tandem with both domestic and foreign emergency pretexts. But whereas marginalized populations are often ill equipped to challenge emergency actions in response to foreign threats,<sup>131</sup> they may have an easier time challenging emergency actions in response to domestic threats.<sup>132</sup> As will be discussed in Part III, such actions may be deserving of less deference, be less susceptible to secrecy claims, and be easier to demonstrate as disconnected from the actual emergency at hand. But first, this Part provides just a few examples of government actors using emergencies as pretextual shields and swords.

### *B. Emergencies as a Pretextual Shield*

There are numerous examples of public actors cloaking their actions under cover of a domestic emergency to defensively block implementation of disfavored policy agendas. This section highlights just two examples where governments use

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126. *Biden v. Sierra Club*, 142 S. Ct. 56, 56 (2021). *See* Termination of Emergency With Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction, 86 Fed. Reg. 7225 (Jan. 20, 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-termination-of-emergency-with-respect-to-southern-border-of-united-states-and-redirection-of-funds-diverted-to-border-wall-construction/> [<https://perma.cc/27V4-THDA>] (“[The border wall] is a waste of money that diverts attention from genuine threats to our homeland security.”).

127. *See* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

128. *Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1148 (D. Haw. 2017). In 2017, the Ninth Circuit similarly embraced judicial vigilance in language that mirrored Judge Ambro's district court opinion. *See* *Hawaii v. Trump*, 859 F.3d 741, 777–79 (9th Cir.), *vacated and remanded* 138 S. Ct. 377 (2017) (rejecting the Trump Administration's contention that “national security” renders an executive order's immigrant restrictions judicially “unreviewable” even if the order transgresses constitutional freedoms); Yamamoto et al., *supra* note 63, at 45.

129. *See* *Trump v. Hawaii*, 138 S. Ct. 2392, 2419–23 (2018).

130. *See id.* at 2417–22.

131. *See* *Carpenter*, *supra* note 40.

132. *See infra* Part III.

emergencies as a pretextual shield to block policies: (1) environmental protections and (2) voting protections.<sup>133</sup>

### 1. Using Emergencies to Shield Against Environmental Protections

As Professor Gerrard has nicely catalogued, there is no shortage of emergency exemptions in our federal environmental statutes.<sup>134</sup> Congress has enabled private parties to apply for waivers during emergencies in most of the environmental statutes, including the Clean Air Act (CAA),<sup>135</sup> the Clean Water Act (CWA),<sup>136</sup> the Endangered Species Act (ESA),<sup>137</sup> and the National Environmental Policy Act (NEPA).<sup>138</sup> The “emergency circumstances” that trigger these exceptions are not always defined, but some focus on imminent or unacceptable hazards to the environment<sup>139</sup> and some even extend to economic emergencies.<sup>140</sup> Some have

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133. This does not suggest shields are the only method. *See, e.g.*, the Connecticut General Assembly passing an emergency certified budgetary bill which appropriated approximately \$77.5 million from the state’s clean energy funds and deposited the money into the Connecticut General Fund. *Colon de Mejias v. Lamont*, 963 F.3d 196, 201 (2d Cir. 2020).

134. “[T]he emergency exemptions in environmental law fall into two broad categories—the generic and the case-specific. The generic exemptions, in turn, come in four types: exemptions from permitting requirements; relaxation of substantive standards; exemptions from, or acceleration of, certain processes; and releases from liability.” The authors contrast this with case-specific exemptions “aimed at specific projects or geographic areas. Examples included congressional declarations of nonnavigability that shield certain areas from Corps of Engineers permitting requirements, and congressional and state legislative declarations that certain projects need not go through the standard environmental review process.” Michael B. Gerrard, *Emergency Exemptions from Environmental Laws After Disasters*, NAT. RES. & ENV’T 10, 10, 13 (2006); *see* Michael B. Gerrard & Brian D. Israel, *Emergency Exemptions from Environmental Laws Applicable to the Coronavirus Pandemic*, ARNOLD & PORTER (Mar. 16, 2020), <https://www.arnoldporter.com/en/perspectives/publications/2020/03/emergency-environmental-laws-coronavirus> [<https://perma.cc/FF8N-9C6X>].

135. Gerrard & Israel, *supra* note 134 (noting CAA waivers where “in the interests of national security, 42 U.S.C. § 7412(i)(4);” where “in the paramount interest of the United States,” 42 U.S.C. § 7418(b)” and 42 U.S.C. § 7606(d); and where there are “imminent” structural dangers. 40 C.F.R. § 61.145(a)(3)).

136. Gerrard & Israel, *supra* note 134 (noting CWA exceptions for “acts of God or war, 33 U.S.C. § 1321(a)(12);” “exigent discharges of oil and hazardous substances, 33 U.S.C. § 1321(c)(2), 40 C.F.R. § 122.3(d);” and emergencies that require “expedited direct action by the Corps of Engineers, 33 C.F.R. § 337.7” and 33 C.F.R. § 325.2(e)(4)).

137. 50 C.F.R. § 402.05(a) (2021).

138. Gerrard & Israel, *supra* note 134.

139. 33 C.F.R. § 325.2(e)(4) (2021) (defining an emergency as one which would “result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken” in an expedited manner).

140. *See, e.g.*, 36 C.F.R. § 215.2 (2014); Melanie Stidham, Gwen Busby & K. Norman Johnson, *The Role of Economic Emergency Situation Determinations in Expediting Fire Salvage*, 38 ENV’T L. REP. NEWS & ANALYSIS 10741, 10742 (2008) (“The revised regulations define an emergency situation as: ‘Emergency situation—A situation on National Forest

encouraged increasing the number of emergency exemptions to prevent environmental laws from obstructing rescue and recovery efforts after emergencies, such as after 9/11 and Hurricane Katrina.<sup>141</sup> After extensive analysis, Professor Gerrard and the American Bar Association cautioned against expanding environmental exemptions, demonstrating their sufficiency in their current form.<sup>142</sup> Although agencies predominantly use their emergency provisions to respond to actual emergencies,<sup>143</sup> there are always exceptions.

Such “emergency circumstances” often are not explicitly defined by the environmental statute, but the corresponding regulations for each provide clues. NEPA regulations allow a federal agency to work with the Council on Environmental Quality (CEQ) to develop “alternative arrangements” where “emergency circumstances make it necessary . . . to control the immediate impacts of the emergency” to avoid the mandated environmental reviews.<sup>144</sup> The most notorious use of this emergency provision was with respect to the Navy’s use of sonar during training exercises.<sup>145</sup> The sonar was predicted to have substantial deleterious effects on over 400 migrating whales and about 8000 other aquatic species.<sup>146</sup> The district court enjoined use of this sonar without preparation of the required environmental impact statement.<sup>147</sup> Although far from being an unexpected emergency,<sup>148</sup> the

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System (NFS) lands for which immediate implementation of all or part of a decision is necessary for relief from hazards threatening human health and safety or natural resources on those NFS or adjacent lands; or that would result in substantial loss of economic value to the Federal Government if implementation of the decision were delayed.” (emphasis added)).

141. “Executive Order 12,114 provid[ing] (in Section 2-5) for exemptions from environmental review requirements for relief action.” Gerrard, *supra* note 134, at 13. The massive cleanup after 9/11 did not include an “[e]nvironmental impact review, advance notice of asbestos removal, source separation, and many other procedures [that] would ordinarily be required for a large demolition project.” *Id.* at 10.

142. See Gerrard, *supra* note 134, at 14 (remarking on the ABA comments concluding “that the risks accompanying blanket exemptions to environmental regulations should not be removed without individual consideration of the dangers at issue,” and that “broad exemptions carry significant costs and risks as well, which deserve individual and serious scrutiny before action is taken to eliminate environmental protections.” The ABA found that thanks to “an ample supply of existing exemptions, the environmental laws have not been a major impediment to recovery and have actually assisted in the systematic assessment of the best courses of action.”).

143. See CONG. RSCH. SERV., EMERGENCY WAIVER OF EPA REGULATIONS: AUTHORITIES AND LEGISLATIVE PROPOSALS IN THE AFTERMATH OF HURRICANE KATRINA (2006).

144. 40 C.F.R. § 1506.12 (2021).

145. See *Nat. Res. Def. Council v. Winter*, 527 F. Supp. 2d 1216, 1238–39 (C.D. Cal. 2008). (“A federal agency may comply with NEPA by completing an [Environmental Impact Statement] EIS, or by issuing an [Environmental Assessment] EA supporting a Finding of No Significant Impact (FONSI). Alternatively, an agency may avoid the requirement to prepare an EIS by adopting mitigation measures sufficient to eliminate any substantial questions over the potential for significant impact on the environment.”).

146. *Id.* at 1221.

147. *Id.* at 1238–39.

148. This has led some scholars to argue for a national security exemption to NEPA. See, e.g., CC Vassar, *NRDC v. Winter: Is NEPA Impeding National Security Interests?*, 24 J. LAND USE & ENV’T L. 279, 282 (2009) (arguing “that the regulation only contemplates unexpected,



Navy's reliance on "national security" was enough to convince the Supreme Court that its use of the emergency provision was warranted.<sup>149</sup> The CEQ, charged with implementing NEPA, issued guidance under the Trump administration that helps expedite use of this emergency exemption.<sup>150</sup>

The ESA regulations similarly allow for "alternative procedures" where "emergency circumstances mandate the need to consult in an expedited manner."<sup>151</sup> ESA regulations state that the emergency provisions apply "to situations involving acts of God, disasters, casualties, national defense or security emergencies, etc."<sup>152</sup> As just one example, President Trump declared an emergency in 2019 to secure funds for a wall on the Mexican-American border.<sup>153</sup> While the legitimacy of this "emergency" was already questionable,<sup>154</sup> the Department of Homeland Security used this national security exemption to bypass ESA requirements while building border fencing over the habitat of several endangered plant and animal species in

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unplanned circumstances that arise independent of agency action" and that NEPA should be amended to add a national security exception); Charles J. Gartland, *At War and Peace with the National Environmental Policy Act: When Political Questions and the Environment Collide*, 68 A.F. L. REV. 27, 29 (2012) (arguing that national defense activities should be exempted from NEPA).

149. See *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 32–33 (2008); Margaret Ann Larrea, *The Emergency Alternative Arrangement Exception to the National Environmental Policy Act: What Constitutes an Emergency? Should the Navy Pin Its Hopes on Noah Webster?*, 61 NAVAL L. REV. 36, 37 (2012).

150. See Emergencies and the National Environmental Policy Act Guidance, 85 Fed. Reg. 60,137, 60,137–38 (Sept. 24, 2020).

151. 50 C.F.R. § 402.05(a) (2022).

152. *Id.*

153. Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019); Justin Sink & Margaret Talev, *Trump Signs Spending Bill and Declares Emergency to Build Wall*, BLOOMBERG (Feb. 15, 2019, 10:40 AM) <https://www.bloomberg.com/news/articles/2019-02-15/trump-intends-to-declare-border-emergency-to-free-up-wall-money?leadSource=verify%20wall> [<https://perma.cc/H455-XABS>].

154. "The DHS [Department of Homeland Security] waiver, supplemented by subsequent amendments and legislation, originates from the Illegal Immigration and Immigrant Responsibility Act's original authorization for the Attorney General to waive two environmental regulations for the expeditious construction of a border fence near San Diego, California." Marshal Garbus, *Environmental Impact of Border Security Infrastructure: How Department of Homeland Security's Waiver of Environmental Regulations Threatens Environmental Interests Along the U.S.-Mexico Border*, 31 TUL. ENV'T L.J. 327, 328–29 (2018).

New Mexico.<sup>155</sup> In 2020, the Department of Homeland Security also issued six environmental waivers to expedite construction of the border wall.<sup>156</sup>

Most recently, former President Trump issued an executive order to facilitate use of such environmental emergency exemptions.<sup>157</sup> On June 4, 2020, President Trump issued Executive Order 13927 to accelerate the nation's economic recovery through infrastructure investments.<sup>158</sup> This order directed agencies to circumvent administrative processes to build transportation and energy infrastructure.<sup>159</sup> Perhaps most notably, such direction would require agencies to circumvent NEPA.<sup>160</sup> President Trump, in Executive Order 13927, expressed concern with “[u]nnecessary regulatory delays . . . keeping millions of Americans out of work and hindering our economic recovery from the national emergency.”<sup>161</sup> Scholars have described an economic state of emergency as “analogous to that presented to justify the invocation and entrenchment of extraordinary powers in relation to national security threats and political conflict.”<sup>162</sup>

But the connection between an economic emergency and the need to weaken environmental protections is more tenuous when there is a track record of prior disdain for such policies. Such was the case with former President Trump. He openly admitted that he had spent the last four years trying to streamline the regulatory process.<sup>163</sup> As recounted by a law firm during the Trump administration:

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155. *See, e.g.*, *Ctr. for Biological Diversity v. McAleenan*, 404 F. Supp. 3d 218, 230 (D.D.C. 2019); Alexandra Kustra, *The Declaration of a National Emergency—More Like a National Emergency for the Environment*, GEO. ENV'T L. REV. ONLINE (Feb. 21, 2019), <https://www.law.georgetown.edu/environmental-law-review/blog/the-declaration-of-a-national-emergency-more-like-a-national-emergency-for-the-environment/> [<https://perma.cc/WU5R-CTSJ>] (“Sixty-two endangered species are at risk of local extinction because the border-wall will prevent them from roaming around in search of food, water, and mates. The fencing will also prevent animals from escaping during wildfires and floods. There are 346 species that would be limited from accessing half of their habitats due to the border wall.”). DHS was not required to follow ESA-mandated processes to comply with President Trump's executive order requiring the “immediate construction of a physical wall.” Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

156. *DHS Issues Six Environmental Waivers to Expedite New Border Wall System Projects Across the Southwest Border*, U.S. CUSTOMS & BORDER PROT. (Mar. 16, 2020, 12:00 PM), <https://www.cbp.gov/newsroom/national-media-release/dhs-issues-six-environmental-waivers-expedite-new-border-wall-system> [<https://perma.cc/JG2N-HVMD>].

157. *See* Exec. Order 13,927, 85 Fed. Reg. 35,165 (June 9, 2020).

158. *Id.*

159. *See id.*

160. *See id.*

161. *Id.*

162. John Reynolds, *The Political Economy of States of Emergency*, 14 OR. REV. INT'L L. 85, 86–87 (2012) (“It bears a similar relation to the concept of the purported common good: temporary abdication of the rights of some is necessary in the greater public interest in order to stabilize and sustain a system seen as indispensable.”).

163. “From the beginning of my Administration [2016], I have focused on reforming and streamlining an outdated regulatory system that has held back our economy with needless paperwork and costly delays.” Exec. Order 13,927, 85 Fed. Reg. 35165.

In August 2017, the White House issued Executive Order 13807, to establish discipline and accountability in conducting environmental reviews of infrastructure projects. Less than a year later, in June 2018, the White House Council on Environmental Quality published an Advanced Notice of Proposed Rulemaking on suggestions for streamlining NEPA review. (See 83 FR 28591 (June 20, 2018).) Proposed rules were published in January 2020, and final rule may be promulgated within weeks. (See 85 FR 1684 (January 10, 2020).) Just last week the U.S. Environmental Protection Agency finalized a rule that would impede the ability of states and tribes to challenge CWA permits for energy pipeline projects. Also controversial is the timing of the EO relative to April 15, 2020, and May 11, 2020, rulings by the U.S. District Court of Montana vacating Nationwide Permit 12, to the extent it authorizes minimal impacts to Waters of the United States from oil and gas pipeline crossings, for failure to fulfill ESA consultation requirements. This decision is currently under appeal to the Ninth Circuit, which on May 28, 2020, struck down an appeal to stay the vacatur.<sup>164</sup>

As such, as soon as Trump was able to use emergency authorities to block environmental protections with which he did not agree, he directed agencies to “take all appropriate steps to use their lawful emergency authorities and other authorities to respond to the national emergency and to facilitate the Nation’s economic recovery” through expedited infrastructure investments.<sup>165</sup> The executive order specifically calls out emergency provisions in NEPA, the ESA, and the CWA, requiring the agency heads to identify those projects eligible for emergency treatment.<sup>166</sup> The Environmental Protection Agency (EPA) responded with a similar memo to facilitate agency use of the emergency loophole.<sup>167</sup> Shielded by a pandemic emergency, the Executive was able to block efforts to take environmental impacts into account, fast-tracking infrastructure projects that might otherwise be stymied by environmental reviews.

Perhaps due to the tenuous connection between the COVID-19 pandemic and altered environmental reviews for transportation infrastructure, these orders have

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164. Sheila McCafferty Harvey, Reza Zarghamee, Mona E. Dajani & Alex Peyton, *President’s Executive Order to Expedite Environmental Reviews of Infrastructure Pushes the Envelope on the Interpretation of Emergency Authorities*, PILLSBURY (June 15, 2020), <https://www.pillsburylaw.com/en/news-and-insights/eo-emergency-powers-infrastructure.html> [<https://perma.cc/QCZ3-2A32>].

165. Exec. Order No. 13,927, 85 Fed. Reg. 35,165.

166. *Id.*

167. See Memorandum from Susan Parker Bodine, U.S. Env’t Prot. Agency to All Governmental and Priv. Sector Partners, COVID-19 Implications for EPA’s Env’t & Compliance Assurance Program (Mar. 26, 2020), <https://www.epa.gov/sites/production/files/202003/documents/oecamemooncovid19implications.pdf> [<https://perma.cc/MS2Z-QG4S>]; Memorandum from David A. Hindin, Dir., Off. of Compliance, U.S. Env’t Prot. Agency to Authorized NPDES Programs and U.S. EPA Regions, Termination of Temp. Advisory for Nat’l Pollutant Discharge Elimination Sys. (NPDES) Reporting in Response to COVID-19 Pandemic (Sept. 15, 2020).

been widely criticized,<sup>168</sup> with environmental plaintiffs swiftly bringing suit.<sup>169</sup> This lawsuit alleged that the CEQ failed to consider and disclose the significant environmental impacts in the required NEPA documents and that it was arbitrary and capricious, inconsistent with NEPA and the Administrative Procedure Act.<sup>170</sup> Sixteen state attorneys even urged President Trump to withdraw the executive order.<sup>171</sup> But it was not until President Biden took office in 2021 that he revoked President Trump's Executive Order 13927 to restore the environmental protections previously in place to help respond to climate change.<sup>172</sup>

## 2. Using Emergencies to Shield Against Voting Rights

Another interesting wrinkle of legislative pretexts concerns voting. Emergencies, particularly those involving natural disasters, often displace minority voters.<sup>173</sup> Instead of passing legislation in the name of an emergency, one could argue that the legislature's failure to pass legislation remedying this situation is pretextual. In these situations, the emergencies were legitimate but resulted in a dilution of voting rights. Although the emergency itself is not the fault of the elected officials, the failure to remedy the negative implications for voters is yet another example of a legislature's response to an emergency that disproportionately impacts marginalized communities.<sup>174</sup> Congress and most states do not have emergency contingency plans for elections, rendering voters unable to obtain or mail absentee ballots when their local polling location is closed.<sup>175</sup> And it is no coincidence that many of the displaced

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168. "Critics believe Trump is using the cover of the pandemic to weaken environmental laws he's long opposed." Jeff Brady, *Trump Waives Environmental Reviews, Citing Pandemic Economic Emergency*, NPR (June 04, 2020, 8:09 PM), <https://www.npr.org/2020/06/04/870098279/trump-waives-environmental-reviews-citing-pandemic-economic-emergency> [<https://perma.cc/K2DM-WQMP>].

169. See *Alaska Cmty. Action on Toxics v. Council on Env't Quality*, No. 20-cv-05199, at ¶¶ 3–5 (N.D. Cal. July 29, 2020) (Bloomberg Law).

170. *Id.* at ¶ 4; see generally Council on Env't Quality, *NEPA Modernization*, TRUMP WHITE HOUSE ARCHIVES, <https://trumpwhitehouse.archives.gov/ceq/nepa-modernization/> [<https://perma.cc/G533-2LVK>].

171. See Letter from Brian E. Frosh et al., Att'ys Gen. to President Donald J. Trump (June 29, 2020), <https://coag.gov/app/uploads/2020/06/Letter-to-President-re-EO-13927-6-29-20.pdf> [<https://perma.cc/MJ43-EQS5>] (arguing that the Trump order is "plainly unlawful and risks further harming the very communities that are already disproportionately affected by the virus and other environmental risks. [They were] also concerned that the Order lacks any guarantee of transparency. It is crucial that agencies allow for prompt public engagement on any projects or actions deemed eligible for emergency review").

172. Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021).

173. Before Katrina, African Americans controlled a majority vote in New Orleans. This is no longer the case. Active voter registration percentages and numbers of voters participating in elections are now lower among African American voters. Jalila Jefferson-Bullock, *The Flexibility of Section 5 and the Politics of Disaster in Post-Katrina New Orleans*, 16 J. GENDER RACE & JUST. 825, 826 (2013).

174. Maya Roy, *The State of Democracy After Disaster: How to Maintain the Right to Vote for Displaced Citizens*, 17 S. CAL. INTERDISC. L.J. 203, 219 (2007).

175. Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters*

populations during natural disasters are those least able to easily find alternative voting locations.<sup>176</sup> Scholars have documented such disenfranchisement, calling for comprehensive plans to preserve the election process during an emergency.<sup>177</sup>

When there is no clear emergency contingency plan,<sup>178</sup> states are forced to either default to the same method used under normal circumstances or adopt a quick-fix, haphazard, error-prone solution. The problems with the first option (defaulting to the norm) are fairly clear—albeit not immediately.<sup>179</sup> After a devastating event, the first focus is not usually an election; rather, agencies like the Federal Emergency Management Agency (FEMA) are worried about getting people clean water and medical care.<sup>180</sup> However, scholars have expressed concern with jurisdictions' lack

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*and Terrorist Attacks*, 67 EMORY L.J. 545, 545 (2018) (“Our electoral system is vulnerable to terrorist attacks, natural disasters, and other calamities that can render polling places inaccessible, trigger mass evacuations, or disrupt governmental operations to the point that conducting an election becomes impracticable. Many states lack ‘election emergency’ laws that empower officials to adequately respond to these crises.”). “Nevertheless, despite the clear dangers, Congress and most states have failed to engage in systematic and coordinated contingency planning for disruptive ‘black swan’ type events.” Anthony J. Gaughan, *Ramshackle Federalism: America’s Archaic and Dysfunctional Presidential Election System*, 85 FORDHAM L. REV. 1021, 1034–35 (2016) (chastising Congress for failing to provide a comprehensive plan for voting during emergencies and finding that only twelve states had filled the federal void with laws permitting the postponement or rescheduling of an election in the event of an emergency).

176. Kristen Clarke & Damon T. Hewitt, *Protecting Voting Rights in the Context of Mass Displacement*, 51 HOW. L.J. 511, 531 (2008).

177. Efforts are being made to improve election emergency preparedness, but national coordination is lacking. See Gaughan, *supra* note 175, at 1043 (“Belatedly, the states have begun to coordinate emergency planning through the establishment of the National Association of Secretaries of State Task Force on Emergency Preparedness for Elections. But a congressional role in emergency planning is essential. As Goldfeder recommends, Congress should take the initiative by ‘establishing a national response to a national emergency, rather than leaving the constitutional crisis to be “managed” by the various states.’”) (footnotes omitted); see also Andrew Hammond, *On Fires, Floods, and Federalism*, 111 CALIF. L. REV. (forthcoming 2023) (detailing how to adjust U.S. welfare programs for the climate crisis).

178. State emergency law is “an uneven patchwork.” Developments in the Law, *Voting and Democracy*, 119 HARV. L. REV. 1176, 1183 (2006). “Most states have succession laws addressing the incapacitation of the governor and other top officials. A few states go further and outline provisions for postponing elections during an emergency. For instance, Louisiana law explicitly gives the governor emergency powers to suspend elections temporarily.” *Id.* at 1182–83.

179. In the moments following a crisis, the first question on the minds of most Americans does not likely “concern constitutionality or government legitimacy.” Developments in the Law, *supra* note 178, at 1178. Those in charge choose the nation’s response to the attack, and those responses are best entrusted to elected leaders to make such decisions. *Id.*

180. See Lawrence A. Palinkas et al., *A Rapid Assessment of Disaster Preparedness Needs and Resources during the COVID-19 Pandemic*, INT’L J. ENVIRO. RES. PUB. HEALTH (2021) (describing government responses to natural disasters).

of preparedness<sup>181</sup>—once we get past the more immediate problems—in assuring citizens are able to exercise their fundamental right to vote.<sup>182</sup>

In choosing the second option (adopting a quick fix), the government opens itself up to heightened scrutiny regarding its motives. It is here that elected officials, content with the status quo, can use emergencies that hinder the ability to vote as pretexts for blocking efforts by others to strengthen voting rights. And it is no coincidence that those most impacted are often minorities disproportionately affected by natural disasters.<sup>183</sup> Similar patterns emerged for vulnerable voters after both Hurricane Katrina and COVID-19. Hurricane Katrina hit Louisiana six months before the 2006 election, destroying nearly 300 of the 442 polling locations in New Orleans.<sup>184</sup> Despite the emergency situation posed by Hurricane Katrina, the Louisiana legislature failed to act to ensure voting rights for all displaced persons.<sup>185</sup> According to one scholar, minority voting power would collapse if Louisiana held a post-Katrina election with the pre-Katrina voting laws.<sup>186</sup> Despite two emergency sessions following Hurricane Katrina,<sup>187</sup> the Louisiana legislature was only able to pass “modest and uncontroversial” voting reforms.<sup>188</sup> The legislature refused to proceed with other voting reforms, including a proposal that would have allowed displaced residents to vote early at selected offices of the registrar outside of Orleans Parish.<sup>189</sup> Although the reform was considered a relatively uncontroversial precursor to more far-reaching proposals preferred by some lawmakers and civil rights groups,

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181. Clarke & Hewitt, *supra* note 176 (“In order to have the most meaningful impact, jurisdictions throughout the country should, well in advance of a natural or unnatural disaster, carefully study and adopt those reforms that would ensure access for all eligible voters in the context of mass displacement.”).

182. *Id.* (“The concept of emergency preparedness needs to be expanded to include steps that should be taken by jurisdictions to protect civil rights in the face of natural and unnatural disasters.”).

183. Aneesh Patnaik, Jiahn Son, Alice Feng & Crystal Ade, *Racial Disparities and Climate Change*, PRINCETON STUDENT CLIMATE INITIATIVE (Aug. 15, 2020), <https://psci.princeton.edu/tips/2020/8/15/racial-disparities-and-climate-change> [<https://perma.cc/SF4S-2WDK>].

184. William P. Quigley, *Katrina Voting Wrongs: Aftermath of Hurricane and Weak Enforcement Dilute African American Voting Rights in New Orleans*, 14 WASH. & LEE J. CIV. RTS. & SOC. JUST. 49, 59 (2007).

185. *Id.* at 56–66.

186. Damian Williams, *Reconstructing Section 5: A Post-Katrina Proposal for Voting Rights Act Reform*, 116 YALE L.J. 1116, 1122 (2007). Yet the legislature continued to use an “inadequate pre-Katrina voting plan” as the benchmark for comparison with its emergency voting reforms, causing even the most minimal of changes to appear ameliorative. *Id.* “A covered jurisdiction could therefore enact reforms that, despite improving existing laws, stopped far short of providing minority voters with the realistic opportunity to maintain their voting strength.” *Id.*

187. “[T]he Governor convened two emergency sessions of the Louisiana State Legislature—one in November 2005, and one in February 2006—to consider new voting procedures for the post-disaster elections.” *Id.* at 1130.

188. *Id.* at 1131 (explaining that the two reforms would achieve a bare minimum of suspending the annual voter canvass and empowering the Secretary of State to formulate a logistical plan for post-disaster voting).

189. *Id.* at 1132–33.

the legislature, *voting along party and racial lines*, rejected the provision.<sup>190</sup> This was particularly troublesome given public comments from some Louisiana legislators prior to the hurricane reflecting their positions against expanded voting rights for disenfranchised citizens.<sup>191</sup> Efforts to block voting rights proved difficult before the hurricane, but shielded by a hurricane emergency, some legislators could continue to prevent implementation of disfavored voting protection policies.<sup>192</sup>

A similar pattern occurred with respect to COVID-19. More slow-moving than a hurricane, but disruptive in different ways, the pandemic's March 2020 onset fell just eight months before the November 2020 presidential election. As the nation locked down to cripple the virus, those most vulnerable were faced with difficult voting conditions.<sup>193</sup> Mail-in ballots, a satisfactory voting device for over a century,<sup>194</sup> suddenly became the linchpin of a political strategy to disenfranchise voters.<sup>195</sup> Although voting rights have not always been a hotly contested partisan issue,<sup>196</sup> Republicans during the COVID-19 pandemic resisted expanding mail-in voting for the 2020 presidential election citing concerns over voting fraud.<sup>197</sup> Although fraud by mail-in ballot is more common than fraud during in-person voting,

190. *Id.* (noting that Marc Morial, the former Mayor of New Orleans and president of the National Urban League, stated that this rejection was “tantamount to an act of disenfranchisement,” adding “I think it’s an act that borders on being a 21st century poll tax”).

191. Quigley, *supra* note 184, at 65–66 (“You can have phantom voters under this piece of legislation,” said Rep. Peppi Bruneau, R-New Orleans, a long-time opponent of expanding voting rights for African Americans. Sen. Jay Dardenne, R-Baton Rouge, opposed the bill in the Senate because he was worried about fraud.”).

192. Section 5 of the Voting Rights Act now provides additional oversight for changing voting rules, requiring Louisiana and other “covered jurisdictions” to preclear all changes in their voting laws with either the Department of Justice or a special three-judge district court in Washington, D.C., before the changes take effect. Williams, *supra* note 186, at 1120.

193. *What Democracy Looks Like: Protecting Voting Rights in the US During the COVID-19 Pandemic*, HUMAN RIGHTS WATCH (Sept. 22, 2020), <https://www.hrw.org/report/2020/09/22/what-democracy-looks/protecting-voting-rights-us-during-covid-19-pandemic> [<https://perma.cc/KL6H-AS97>].

194. Olivia B. Waxman, *Voting by Mail Dates Back to America’s Earliest Years. Here’s How it’s Changed Over the Years*, TIME (Sept. 28, 2020, 8:17 PM), <https://time.com/5892357/voting-by-mail-history/> [<https://perma.cc/ADG2-Z79Y>].

195. William Saletan, *Early Voting Is Secure. So Why Are Republicans Against It?*, SLATE (July 9, 2021, 5:47 AM), <https://slate.com/news-and-politics/2021/07/republican-early-voting-opposition-not-fraud-suppression.html> [<https://perma.cc/5DQJ-2U8Y>]; *Voting by Mail and Absentee Voting*, MIT ELECTION LAB (Mar. 2021), <https://electionlab.mit.edu/research/voting-mail-and-absentee-voting> [<https://perma.cc/LR97-SCEG>].

196. Thirty of thirty-two Republicans in the Senate approved the Civil Rights Act of 1965 and in 2006 “all [seventeen] Republicans who are still in the Senate in 2022 voted to reauthorize the bill.” Glenn C. Altschuler, *Republicans Must Stop Sabotaging Voting Rights*, HILL (Jan. 30, 2022, 8:30 AM), <https://thehill.com/opinion/campaign/591963-republicans-must-stop-sabotaging-voting-rights> [<https://perma.cc/B98U-CUH2>].

197. Miles Parks, *Why Is Voting by Mail (Suddenly) Controversial? Here’s What You Need to Know*, NPR (June 4, 2020, 5:00 AM), <https://www.npr.org/2020/06/04/864899178/w-his-voting-by-mail-suddenly-controversial-heres-what-you-need-to-know> [<https://perma.cc/6DYB-CMUT>].

it is still rare and not statistically significant.<sup>198</sup> But Republicans also showed resistance to expanding other voting options, like lengthening the time for early voting or making election day a holiday.<sup>199</sup>

Minority voting rights have been under attack since long before emergencies.<sup>200</sup> Gerrymandering, ex-felon disenfranchisement, and weakening of the Voting Rights Acts have exposed long-standing attacks on this constitutional right.<sup>201</sup> But in 2013, the Supreme Court invalidated a provision of the Voting Rights Act that had required governments with a record of racist disenfranchisement to obtain “preclearance” from the DOJ.<sup>202</sup> Unshackled by this DOJ review, this led to a flurry of polling place closures, many of which were in communities made up largely of minorities.<sup>203</sup> Emergencies are just the latest means of accomplishing such goals.

Since the 2020 election, Republicans have moved to establish even stricter voting procedures. One example is Georgia’s election law that sparked national controversy over its negative impacts on minority voters.<sup>204</sup> Georgia’s law requires a driver’s license or state identification number to cast an absentee ballot, a restriction that may be difficult for low-income voters.<sup>205</sup> The bill also limits drop box locations and early voting hours, limiting voting access for those who work multiple jobs, who are often low-income.<sup>206</sup> In 2021 alone, thirty-three laws have been enacted in nineteen states aimed at restricting voting by implementing measures like shortening the window to

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198. *Id.*

199. Saletan, *supra* note 195.

200. *See, e.g.*, Selwyn Carter, *African-American Voting Rights: An Historical Struggle*, 44 EMORY L.J. 859 (1995).

201. *See* Julia Kirschenbaum & Michael Li, *Gerrymandering Explained*, BRENNAN CTR. FOR JUST. (Aug. 10, 2021), <https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained> [<https://perma.cc/5DAA-GC7W>]; Christopher Uggen, Ryan Larson, Sarah Shannon & Robert Stewart, *Locked Out 2022: Estimates of People Denied Voting Rights*, THE SENTENCING PROJECT (Oct. 25, 2022) <https://www.sentencingproject.org/reports/locked-out-2022-estimates-of-people-denied-voting-rights/> [<https://perma.cc/C6Q9-FVPL>]; Gabby Means, *The Latest Threat to the Voting Rights Act: Merrill v. Milligan*, LEAGUE OF WOMEN VOTERS, <https://www.lwv.org/blog/latest-threat-voting-rights-act-merrill-v-milligan> [<https://perma.cc/D65Q-D4WH>] (Dec. 8, 2022).

202. *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

203. Joel Park, *Voting Under Siege: Eight Years of Shelby County v. Holder*, THE LEADERSHIP CONF. ON CIV. AND HUM. RTS. (June 25, 2021), <https://civilrights.org/blog/voting-under-siege-eight-years-of-shelby-county-v-holder/> [<https://perma.cc/DRQ2-TXFM>] (“[S]ince *Shelby*, [thirteen] states closed 1,688 polling location between 2012 and 2018.”).

204. Nick Corasaniti & Reid J. Epstein, *What Georgia’s Voting Law Really Does*, N.Y. TIMES (Aug. 2, 2021), <https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html> [<https://perma.cc/4V7Z-7CUU>]; Fredreka Schouten, *Here’s Why Voting Rights Activists Say Georgia’s New Election Law Targets Black Voters*, CNN, <https://www.cnn.com/2021/03/26/politics/georgia-voting-law-black-voters/index.html> [<https://perma.cc/C8HH-8Z3U>] (Mar. 26, 2021, 8:22 PM); Stephen Fowler, Sam Gringlas & Huo Jingnan, *A New Georgia Voting Law educed Ballot Drop Box Access in Places that Used Them Most*, NPR (July 27, 2022 4:31 PM), <https://www.npr.org/2022/07/27/1112487312/georgia-voting-law-ballot-drop-box-access> [<https://perma.cc/9CZY-8C6D>].

205. S.B. 441, 2021-2022 Leg. Sess. (Ga. 2022).

206. *Id.*



apply for mail-in ballots and limiting the number of mail ballot drop boxes.<sup>207</sup> Senate Republicans have also recently rebuffed Democrats' efforts to reform voting procedures by blocking two voting rights bills that may have counteracted more restrictive state laws.<sup>208</sup> In this way, a legitimate pandemic emergency and calls for "election security" provided cover for weakening voter rights.

In sum, these two examples of blocked environmental protections and blocked voting protections demonstrate how legitimate emergencies can provide opportunities for public actors to drag their feet, waive protections "in the name of an emergency," and fail to act to remedy such weakened protections. Where such weakening was already part of a pre-emergency agenda, the emergencies can serve as convenient pretextual shields.

### *C. Emergencies as a Pretextual Sword*

In addition to defensive uses of domestic emergencies, governments also adopt offensive measures to advance various policy agendas. This section highlights just two examples of using emergencies as pretextual swords: (1) to obtain legislative earmarks and (2) to eliminate undesirable low-income housing. Unsurprisingly, as with emergency actions taken in response to foreign threats, emergency actions taken in response to domestic threats often have disproportionate impacts on marginalized communities.<sup>209</sup> The COVID-19 pandemic provides ample evidence of such activity—in terms of spending, surveillance, and individual liberties.<sup>210</sup> "When Congress expands executive power for purposes of protecting the nation against an emergency—whether real or imagined—that power is often turned against vulnerable, marginalized populations that are easily scapegoated as threats to the state."<sup>211</sup> This section explores both legislative and executive actions that raise suspicions about using emergencies as pretexts.

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207. *Voting Laws Roundup: October 2021*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021> [<https://perma.cc/YT6T-KCJ4>].

208. Jacob Pramuk, *Senate Republicans Block Voting Rights Bills, Join with Two Democrats to Prevent Filibuster Change*, CNBC (Jan. 19, 2022, 12:10 PM), <https://www.cnbc.com/2022/01/19/senate-vote-on-voting-rights-bills-filibuster-rules-change.html> [<https://perma.cc/7UZF-W53T>].

209. Executive branch officials have also used emergencies to obtain assets that have repercussions beyond marginalized communities. *See, e.g.*, Press Release, Florida Governor, Governor Ron DeSantis Announces Military Budget Proposal to Guard Florida's Future (Dec. 2, 2021), <https://www.flgov.com/2021/12/02/governor-ron-desantis-announces-military-budget-proposal-to-guard-floridas-future/> [<https://perma.cc/GX3V-8HVN>]. Note that other states have similar civilian armies.

210. *See infra* Section III.A.1.

211. Geoffrey A. Manne & Seth Weinberger, *Trust the Process: How the National Emergency Act Threatens Marginalized Populations and the Constitution—and What to Do About It*, 44 HARBINGER 95, 98 (2020).

### 1. Using Emergencies to Fund Pet Projects

Emergency pretexts are difficult to discern when analyzing legislation because proposed bills frequently contain provisions that have nothing to do with the original intent of the law. Congress' 2021 \$1.9 trillion COVID-19 relief package is just one example of such a phenomenon, where a law intended to provide relief for those suffering from the pandemic also included a number of unrelated items.<sup>212</sup> For instance, legislators proposed \$480 million for grants to fund activities related to the arts, humanities, libraries, and museums and \$1.25 billion for federal transit capital investment grants with an earmark to provide funding to expand an underground rail project in Silicon Valley.<sup>213</sup> And an earlier proposal strayed even further by including extended tax breaks for the alcohol industry and motor speedways, revised rules for music copyrights, lessened penalties for transportation of water hyacinths, and selection of the next spiritual leader in Tibet.<sup>214</sup> Such actions could be construed as legislators taking advantage of an emergency for their own political ends, or it could be construed as yet another typical day in the U.S. political system, filled with pork barrel spending, logrolling, riders, earmarks, and amendments.<sup>215</sup>

But some examples are particularly egregious. As one example, the first COVID-19 stimulus package also included a bailout for coal companies totaling over \$28 million.<sup>216</sup> Although coal has been the linchpin of our electric grid for over one hundred years,<sup>217</sup> as cleaner and cheaper sources of energy like natural gas have

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212. Rachel Siegel, *What's in Congress's \$1.9 Trillion Covid Bill: Checks, Unemployment Insurance and More*, WASH. POST (Mar. 10, 2021, 5:37 PM), <https://www.washingtonpost.com/business/2021/03/10/what-is-in-the-stimulus/> [<https://perma.cc/VXL4-EASL>].

213. Paul Vigna, *Pork or Economic Boost? Here's What's in the \$1.9T Stimulus Plan*, PENNLIVE (Mar. 14, 2021, 11:48 AM), <https://www.pennlive.com/nation-world/2021/03/pork-or-economic-boost-heres-whats-in-the-19t-stimulus-plan.html> [<https://perma.cc/H6Q3-4B6K>].

214. Mary Clare Jalonick, *COVID-19 Relief and Spending Bill Includes a Lot of Things Not Related to Pandemic*, 9NEWS (Dec. 21, 2020, 10:06 PM), <https://www.9news.com/article/news/nation-world/covid-relief-bill-unrelated-items/507-8eed8154-8404-496c-a201-e86f3436329b> [<https://perma.cc/2E3J-AVPT>].

215. See, e.g., Jason Iuliano, *Eliminating Earmarks: Why the Congressional Line Item Vote Can Succeed Where the Presidential Line Item Veto Failed*, 112 W. VA. L. REV. 947, 954 (2010) ("Over the past thirty years, pork has become a staple in the political diet, and since 1991, the number of earmarks has increased more than tenfold. For the 2009 fiscal year, there were more than 11,000 earmarks totaling \$19.9 billion.").

216. Issaac Scher, *3 Coal Companies With Ties To the Trump Administration Got \$28 Million in Coronavirus Bailout Intended for 'Small Businesses'*, BUS. INSIDER (May 1, 2020, 1:28 PM), <https://www.businessinsider.com/coal-mining-companies-trump-28-million-bailout-2020-5> [<https://perma.cc/6HBZ-N5EM>].

217. Coal became the dominant energy source in the United States in the late 19th century and has historically maintained high consumption (providing more than forty percent of U.S. electricity every year between 1949 and 2011). *U.S. Energy Facts Explained*, U.S. ENERGY INFO. ADMIN. (June 10, 2022), <https://www.eia.gov/energyexplained/us-energy-facts/> [<https://perma.cc/8GEA-FKWM>]; see Sonal Patel, Aaron Larson & Abby Harvey, *History of Power: The Evolution of the Electric Generation Industry*, POWER (Oct. 1, 2022), <https://www.powermag.com/history-of-power-the-evolution-of-the-electric-generation->

become more readily available, coal has been losing its edge.<sup>218</sup> In response, the Trump Administration sought the Department of Energy's (DOE) help in boosting the struggling industry. The DOE needed the approval of the Federal Energy Regulatory Commission (FERC) to do so and FERC blocked President Trump's request to bail out failing coal companies.<sup>219</sup> After being denied by FERC, President Trump encouraged the DOE to continue to explore the issue.<sup>220</sup> The DOE complied, and a leaked proposal included a plan to invoke the DOE's emergency powers under the Federal Power Act to push through the coal bailout.<sup>221</sup> While that emergency plan never came to fruition,<sup>222</sup> the coal companies got their bailout in the end thanks to COVID-19.<sup>223</sup> As such, marginalized communities living near coal plants will continue to bear the brunt of the pollution emitted by the coal plants.<sup>224</sup>

Both of these cases demonstrate legislative attempts to accomplish unrelated goals under cover of emergencies. Whether the legislature is lining the pockets of special interests or bailing out a struggling coal industry, emergencies are there to provide cover.

industry/ [https://perma.cc/VT4X-W4VH].

218. Coal has been nudged out of its place of superiority primarily by natural gas, which became cheaper and more domestically abundant with fracking technologies. Larry Light, *Why Natural Gas Is the Future—Not Coal*, CBS NEWS (Mar. 15, 2017, 6:00 AM), https://www.cbsnews.com/news/natural-gas-coal-future/ [https://perma.cc/2ZFE-QTKB].

219. See SHARON JACOBS & ARI PESKOE, ENERGY EMERGENCIES VS. MANUFACTURED CRISES: THE LIMITS OF FEDERAL AUTHORITY TO DISRUPT POWER MARKETS 20 (2019), http://eelp.law.harvard.edu/wp-content/uploads/Energy-Emergencies-vs-Manufactured-Crises-FINAL.pdf [https://perma.cc/KB4C-NPKN]; Jeff St. John, *FERC Commissioners Agree: No Grid Emergency Exists to Justify Coal, Nuclear Bailout*, GREENTECH MEDIA (June 12, 2018), https://www.greentechmedia.com/articles/read/ferc-commissioners-agree-no-grid-emergency-exists#gs.uAKGntk [https://perma.cc/RBW7-C9CN].

220. See *Statement from the Press Secretary on Fuel-Secure Power Facilities*, THE WHITE HOUSE (June 1, 2018), https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-fuel-secure-power-facilities/ [https://perma.cc/W3WL-483X].

221. The emergency was predicated on a need “to safeguard the Nation’s electric grid and natural gas pipeline infrastructure from current threats.” JACOBS & PESKOE, *supra* note 219, at 23 (quoting the leaked memo).

222. *Id.* at 23–24.

223. See Scher, *supra* note 216.

224. Coal plants are single-handedly responsible for a large proportion of toxic emissions that directly poison local communities in the United States, and these plants are disproportionately affecting communities of color. ADRIAN WILSON, COAL-BLOODED: PUTTING PROFITS BEFORE PEOPLE (Monique W. Morris ed., 2016), https://naacp.org/resources/coal-blooded-putting-profits-people [https://perma.cc/MC55-9CTH]. Thirty-nine percent of people living near coal-fired power plants are people of color. Seventy-eight percent of Blacks live within thirty miles of a coal-fired power plant. Latinx communities, as well as indigenous communities and low-income communities, are more likely to live next to coal-fired plants. Diane Toomey, *Coal Pollution and the Fight for Environmental Justice*, YALE ENV'T 360 (June 19, 2013), https://e360.yale.edu/features/naacp\_jacqueline\_patterson\_coal\_pollution\_and\_fight\_for\_environmental\_justice [https://perma.cc/C78W-QKK5].

## 2. Using Emergencies to Weaken Property Rights

Public officials also use emergencies as pretexts for eviscerating property rights. A particularly fruitful area of inquiry focuses on property law's eminent domain powers under the Takings Clause of the Fifth Amendment. For instance, scholars have addressed the use of emergencies to justify takings without the typical obligation to compensate the owner of the property,<sup>225</sup> and to justify the closure of public aid institutions like hospitals in low-income areas.<sup>226</sup> Courts also force partition sales of tenancy-in-common properties in ways that disproportionately impact minorities.<sup>227</sup>

An interesting line of unappreciated cases relates to pretextual demolition of apartment buildings. By relying on emergency structural concerns, government actors have been able to deprive tenants or owners of a pre-deprivation hearing.<sup>228</sup> Although a few of the cases involve private owners, many of them challenged a governmental entity that ordered the demolition. Regardless, almost all of the courts provide broad deference to those who made the decisions to demolish the buildings swiftly due to emergency circumstances,<sup>229</sup> despite explicit allegations that these actors used the emergency as pretext to evict tenants.<sup>230</sup>

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225. Brian Angelo Lee, *Emergency Takings*, 114 MICH. L. REV. 391 (2015) (noting abuses of eminent domain during emergencies based on necessity doctrines); D. Zachary Hudson, *Eminent Domain Due Process*, 119 YALE L.J. 1280 (2010).

226. Adam Nossiter, *Dispute over Historic Hospital for the Poor Pits Doctors Against the State*, N.Y. TIMES (Dec. 17, 2005), <https://www.nytimes.com/2005/12/17/us/dispute-over-historic-hospital-for-the-poor-pits-doctors-against-the.html> [<https://perma.cc/H9KV-S6Z7>] (“They say Louisiana officials are using the storm as an excuse to achieve the state’s long-sought goal of demolishing Charity, getting millions in federal dollars to build a new hospital, and then moving away from a promise that has long been made to the city’s poor.”). See also Kenneth Brad Ott, *The Closure of New Orleans’ Charity Hospital After Hurricane Katrina: A Case of Disaster Capitalism* (May 2012) (M.A. thesis, University of New Orleans), <https://scholarworks.uno.edu/td/1472> [<https://perma.cc/8ZSX-8U8D>].

227. Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1, 31–36 (2014).

228. *Freeman v. City of Dall.*, 186 F.3d 601 (5th Cir. 1999); *Catanzaro v. Weiden*, 140 F.3d 91 (2d Cir. 1998); *Mitchell v. City of Mansfield*, No. 2020 CA 0067 (Ohio Ct. App. July 14, 2021).

229. *WWBITV, Inc. v. Vill. of Rouses Point*, 589 F.3d 46, 52 (2d Cir. 2009) (ruling condemnation was legal where fire resulted in structural concerns); *Elsmere Park Club, L.P. v. Town of Elsmere*, 542 F.3d 412, 418 (3d Cir. 2008) (upholding a ruling where finding of mold was sufficient for condemnation); *Catanzaro v. Weiden*, 188 F.3d 56, 63 (2d Cir. 1999) (holding that foundation damage was sufficient for condemnation).

230. *Elsmere Park Club, L.P.*, 542 F.3d at 418; *DiLuzio v. Vill. of Yorkville*, 796 F.3d 604, 613 (6th Cir. 2015) (alleging that the mayor “knew that . . . [the] building was not actually in a dangerous condition, but . . . had a secret personal desire to demolish the building and coerce . . . [the plaintiff] to sell that property” and that the mayor “lied (saying that an emergency dangerous condition necessitated quick action) as a pretext for proceeding immediately with the partial demolition, before . . . [plaintiff] could stop him via predeprivation process”).

One particularly troubling example of the result of such deference is found in *Catanzaro v. Weiden*.<sup>231</sup> In that case, plaintiffs alleged that a small city government in New York used a claimed “emergency” to evict low-income residents from a building.<sup>232</sup> The emergency in question was created by a man driving a car into the lower levels of the building.<sup>233</sup> The city officials and hired engineers determined that the structure was unsafe, while an independent engineer hired by the plaintiffs determined the building was structurally sound.<sup>234</sup> Plaintiffs alleged that the mayor disliked the low-income housing in the area—as evidenced by his previous adoption of policies making it more difficult to build low-income housing and public statements expressing that the city houses “too many of Orange County’s poor.”<sup>235</sup> Thus, when the “emergency” situation presented itself, plaintiffs alleged the mayor used his emergency procedure authority to eliminate the housing.<sup>236</sup> The Second Circuit disagreed and afforded great deference to the mayor’s decision, despite plaintiffs’ strong evidence of a “calculated campaign.”<sup>237</sup> But even courts that upheld government condemnation recognized the potential for pretextual abuse by owners, holding that “[w]e cannot apply so much deference as to allow ‘the government [to] avoid affording due process to citizens by arbitrarily invoking emergency procedures.’”<sup>238</sup>

On at least three occasions, courts have been sufficiently skeptical of the circumstances surrounding the “emergency” to have denied motions for summary judgment or qualified immunity, instead, allowing factual development surrounding the validity of the declared emergencies. In the first case, *Burtnieks v. City of New York*, the owner of a building contested the city’s demolition of her building for a structural bulge.<sup>239</sup> In reversing the district court’s summary judgment and remanding, the court held that the outcome may depend on whether a district court “should find that no emergency existed and it would not have been impractical to provide a predeprivation hearing.”<sup>240</sup> In the second case, *Jaber v. City of Akron*, the owner of a building claimed the “deteriorated facade and walls” were pretext for the demolition of the building.<sup>241</sup>

In the third case, *DiLuzio v. Village of Yorkville*, the Sixth Circuit encountered the issue with a claim of qualified immunity by the mayor who demolished the building.<sup>242</sup> Affirming the district court’s denial of qualified immunity, the court acknowledged that it can decide as a matter of law on some of the allegations of pretext, including a “very early call to the demolition contractor . . . before there was

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231. 188 F.3d 56 (2d Cir. 1999).

232. *Id.*

233. *Id.* at 58–59.

234. *Id.* at 59.

235. *Id.* at 60.

236. *Id.*

237. *Id.*

238. *Elsmere Park Club, L.P. v. Town of Elsmere*, 542 F.3d 412, 418 (3d Cir. 2008) (citing *Catanzaro*, 188 F.3d at 63).

239. 716 F.2d 982, 989 (2d Cir. 1983).

240. *Id.*

241. No. 1:15-CV-728, 2015 WL 9258617, at \*1 (N.D. Ohio Dec. 18, 2015).

242. 796 F.3d 604 (6th Cir. 2015).

even any visible fire, . . . the demolition of the south building instead of the fire-damaged middle building,” and third-party testimony that the fire chief and state fire marshal did not believe demolition was necessary.<sup>243</sup> The court held that “officials cannot deny citizens due process by falsely invoking an emergency need for quick action.”<sup>244</sup>

In short, all of these cases satisfy the three criteria for domestic emergency pretexts: (1) a public actor identifies a domestic “emergency” that requires a response and triggers emergency powers, (2) the emergency response addresses a domestic agenda item previously unattainable (by blocking progress of others or by advancing one’s own agenda), and (3) the action fails to demonstrate a close connection to the emergency at hand. And upon closer inspection, the opportunistic nature of both legislative and executive actors when faced with domestic emergencies should raise warning signs in a world where such emergencies are becoming more commonplace. The implications may be particularly troublesome for marginalized communities and the environment, neither of which has a dominant voice in such matters.

### III. MINIMIZING PRETEXTS

This Article has set forth both the historical use of wartime emergencies to serve as a pretext for other ends and documented how this practice has expanded in more recent times to domestic emergencies that disproportionately impact marginalized communities and the environment. If the inappropriate use of emergencies as pretexts for other ends is inevitable, or at least commonplace, this last Part explores potential ways to mitigate the adverse effects of such practices. Specifically, it sets forth three concurrent paths that can be pursued to address pretextual emergency actions: (1) prevent pretextual emergency actions, (2) remedy past pretextual emergency actions, and (3) penalize inappropriate use of emergency powers.

#### *A. Prevent Pretextual Emergency Actions*

An obvious first step is to tighten up the emergency power authorities themselves. This can be done in a number of ways, including reigning in the scope of emergency powers and providing more checks on the use of such powers.

##### 1. Restrict Emergency Powers

First, Congress could adjust the scope of executive powers. One obvious concern with adjusting the scope of the executive powers themselves is that the exercise may become purely partisan. Legislators have already worked to expand and contract executive authority in times of emergency in a clear pattern of partisan politics. For instance, Democratic governors who used their emergency powers to close businesses in an effort to control the pandemic received backlash from conservative legislators moving to strip or limit those powers.<sup>245</sup> In 2019, before the COVID-19

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243. *Id.* at 614.

244. *Id.*

245. Sophie Quinton, *Lawmakers Move to Strip Governors’ Emergency Powers*, PEW

pandemic, state governors were given very broad emergency powers. For instance, forty-two states allowed the governor to change statutes or regulations during an emergency and thirty-five allowed the governor to change statutes or regulations that interfere with the response to an emergency.<sup>246</sup> However, legislative chambers in at least twenty-eight states, Guam, and the Virgin Islands introduced bills or resolutions in 2020 that would limit the governors' powers or executive spending during the COVID-19 pandemic or other emergencies.<sup>247</sup> Measures were enacted or adopted in eleven states: Arkansas, Colorado, Hawaii, Kansas, Kentucky, Michigan, Mississippi, Oklahoma, Pennsylvania, and Utah.<sup>248</sup> Both a proposed Kansas bill and an enacted Pennsylvania law limited the length of governor-declared states of emergency, allowing extensions only with legislative approval.<sup>249</sup> And Michigan's legislature passed two bills which enabled the House of Representatives and the Senate to initiate legal action against the governor challenging authority and actions taken during the pandemic.<sup>250</sup>

Efforts to limit state executive emergency powers are seen from both parties.<sup>251</sup> "Republican lawmakers have sought to limit the power of Democratic governors in states such as Kansas, Kentucky, and North Carolina."<sup>252</sup> And some Republican-controlled state legislatures have expanded the powers of their Republican governors to block emergency powers of lower level governing bodies, creating a federalism showdown.<sup>253</sup> "But they also have sought to rein in Republican governors in such

(Jan. 22, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/01/22/lawmakers-move-to-strip-governors-emergency-powers> [<https://perma.cc/A7VH-5PRG>].

246. Gregory Sunshine Kelly Thompson, Akshara Narayan Menon, Nicholas Anderson, Matthew Penn & Lisa M. Koonin, *An Assessment of State Laws Providing Gubernatorial Authority to Remove Legal Barriers to Emergency Response*, 17 HEALTH SEC. 1 (2019). These are reminiscent of environmental emergency waivers. See *supra* at notes 135–137.

247. *Legislative Oversight of Emergency Executive Powers*, NCSL (Sept. 26, 2022), <https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx> [<https://perma.cc/3LUK-PD4U>].

248. *Id.*

249. 40 Kan. Reg. 368 (Mar. 25, 2021); Mark Levy & Michael Rubinkam, *Pennsylvania Voters Impose New Limits on Governor's Powers*, AP NEWS (May 19, 2021), <https://apnews.com/article/pennsylvania-health-coronavirus-pandemic-government-and-politics-f5ce447986a26cca310a6639de37b5ce> [<https://perma.cc/FF24-WQX3>].

250. H.R. 250, 101st Leg. (Mich. 2022); S.R. 114, 101st Leg. (Mich. 2022).

251. David A. Lieb, *Lawmakers Seek Long-Term Limit on Governors' Emergency Power*, AP NEWS (Apr. 10, 2021), <https://apnews.com/article/legislature-coronavirus-pandemic-covid-19-pandemic-term-limits-state-legislature-113b9847aab2df17975d59da92ebf07c> [<https://perma.cc/9TYQ-WAR7>]; see Reid Wilson, *Legislators Go After Governors to Rein in COVID-19 Powers*, HILL (Jan. 29, 2021, 11:57 AM), <https://thehill.com/homenews/state-watch/536479-legislators-go-after-governors-to-rein-in-covid-19-powers> [<https://perma.cc/FS5A-CSD5>].

252. Lieb, *supra* note 251. The Republican-controlled Kentucky legislature moved to reduce Democratic Governor Andy Beshear's power to respond to emergencies. Sophie Quinton, *Lawmakers Move to Strip Governors' Emergency Powers*, PEW (Jan. 22, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/01/22/lawmakers-move-to-strip-governors-emergency-powers> [<https://perma.cc/76SZ-RMPW>].

253. S.B. 2006, 2021 Leg. Sess. (Fla. 2021) (authorizing the governor to invalidate county and city emergency orders that "unnecessarily restrict[] individual rights or liberties").

states as Arkansas, Idaho, Indiana, and Ohio. Some Democratic lawmakers also have pushed back against governors of their own party, most notably limiting the ability of then-New York Governor Andrew Cuomo to issue new mandates.<sup>254</sup> Such efforts should be taken with care, however, as concentrating control over emergency powers in one political party could have the exact opposite effect of providing more checks and balances.

Similarly, state legislators should also be more careful to whom they delegate such extraordinary emergency powers. As one example, states have also muddied the emergency waters with their appointments of emergency managers. Michigan legislators' response to the economic recession of 2007 was to appoint special emergency managers and grant them "broad powers in receivership to rectify the financial emergency and to assure the fiscal accountability of the local government and the local government's capacity to provide . . . necessary governmental services essential to the public health, safety, and welfare."<sup>255</sup> And the emergency managers in Flint, Michigan, were at the epicenter of the Flint water crisis of 2015.<sup>256</sup> In addition to providing emergency managers broad powers, the legislature also shielded them from real accountability. "By practice, emergency managers are untouchable, never having to answer to the citizens they govern, the governing bodies they overtake, and rarely a higher authority. Further, by statute, emergency managers are immune from liability for their decisions as state actors."<sup>257</sup> They can even "contravene local legislative authority by enacting, repealing, and amending local laws at his or her discretion" among other powers.<sup>258</sup> When voters challenged the constitutionality of the appointment of these emergency managers as violating due process, the Equal Protection Clause, and the Voting Rights Act, the Sixth Circuit upheld the appointments as constitutional.<sup>259</sup> As such, legislatures should be more cautious before granting such broad emergency powers to such individuals.

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254. Lieb, *supra* note 251. Interestingly, the Republican-controlled Idaho and Ohio legislatures did the same with Republican Governors Brad Little and Mike DeWine. *Id.* Democrat-controlled New York sought to strip power from Democratic Governor Andrew Cuomo. "Across the country, lawmakers in 37 states have introduced more than 200 bills or resolutions this year to clip the emergency powers of governors . . ." Trip Gabriel, *State Lawmakers Defy Governors in a Covid-Era Battle for Power*, N.Y. TIMES (Feb. 22, 2021), <https://www.nytimes.com/2021/02/22/us/politics/republicans-democrats-governors-covid.html> [<https://perma.cc/E6WD-BVCT>].

255. Sydney L. Hawthorne, *Do Desperate Times Call for Desperate Measures in the Context of Democracy? Michigan's Emergency Manager Law & the Voting Rights Act*, 41 N.Y.U. REV. L. & SOC. CHANGE 181, 192 (2017) (quoting MICH. COMP. LAWS § 141.1549(2) (2016) (emphasis omitted)).

256. Reports demonstrate that the lack of accountability and broad authority provided to the emergency managers were a cause of the water crisis. Prosecutors in Michigan must agree, as criminal charges have been made against nine of the governmental authorities involved, including two emergency managers. Beth LeBlanc, *Here Are Nine Officials Charged in Flint Water Crisis*, DETROIT NEWS (Jan. 14, 2021, 6:55 PM) <https://www.detroitnews.com/story/news/michigan/flint-water-crisis/2021/01/14/nine-michigan-officials-charged-flint-water-crisis/4161106001/> [<https://perma.cc/KN8Q-MUHH>].

257. Hawthorne, *supra* note 255, at 203 (footnote omitted).

258. Hawthorne, *supra* note 255, at 195.

259. *Phillips v. Snyder*, 836 F.3d 707, 710–11 (6th Cir. 2016) (decided eight months after



## 2. Checks and Balances on Executive Power

A second option is for the legislature to impose additional checks and balances on executive power. Although the legislature could provide one bulwark against an overzealous executive, as discussed above, it can also create partisan blocks that work against such checks. And legislative efforts to require a legislative check on executive declarations of emergencies have fallen short.<sup>260</sup> A better approach may be for the legislature to require some additional procedural hurdles prior to executive use. As others have addressed elsewhere, a number of tools can be used to provide a check on the executive before its unbridled use of emergency power.<sup>261</sup> Examples are seen in state actions to temper unilateral gubernatorial action. For instance, Arkansas specifically created a “COVID-19 Rainy Day Fund,” but the funding must be approved by the Speaker of the House of Representatives, the majority and minority party leaders in the House of Representatives, and both the Senate’s President Pro Tempore and the minority party leader.<sup>262</sup> Kansas required the governor to obtain approval from at least six legislative members of the State Finance Committee to declare a state of disaster emergency in 2020.<sup>263</sup>

With these examples in mind, a sliding scale of procedural constraints on presidential national security powers tailored to each national security threat classification might be more appropriate.<sup>264</sup> Whereas arguments for strong procedural constraints on executive power against foreign threats may face

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the state of Michigan declared a state of emergency in Flint).

260. See Steven Aftergood, *Bill Would Require Congressional Approval of “National Emergencies”*, FED’N AM. SCIENTISTS (Nov. 21, 2019), <https://fas.org/blogs/secrecy/2019/11/approval-nat-emergencies/> [<https://perma.cc/H4MA-KQ7G>].

261. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 210–12 (1990) (arguing for the imposition of procedural constraints on the President in the execution of foreign policy initiatives); David Gray Adler, *George Bush and the Abuse of History: The Constitution and Presidential Power in Foreign Affairs*, 12 UCLA J. INT’L & FOREIGN AFFS. 130 (2007) (arguing that the Commander in Chief Clause does not support an assertion of inherent executive power; rather, the President is limited by the Constitution and statutory constraints); Gus H. Buthman, Note, *Signing Statements and the President’s Non-Enforcement Power*, 32 OKLA. CITY U. L. REV. 103, 129 (2007) (arguing that failing to impose procedural constraints on presidential exercise of non-enforcement power would violate the separation of powers doctrine). Another option may be the congressional creation of a review board akin to the Foreign Service Intelligence Courts, which reviews government requests for investigative materials related to foreign intelligence. This could provide petitioners recourse for allegations of improper uses of emergency exemptions. See also the National Emergencies Act (NEA), 50 U.S.C. §§ 1601, 1621–22, 1631, 1641, 1651, which Congress passed in 1976 to provide a check on presidential power during national emergencies, and the subsequent legislative efforts to reform the NEA. See Letter from American Civil Liberties Union, et al., to Nancy Pelosi, Speaker of the U.S. House of Representatives, et al. (Dec. 2, 2022), <https://protectdemocracy.org/wp-content/uploads/2022/12/NEA-Reform-Letter.pdf> [<https://perma.cc/595Q-T8BE>] (urging NEA reform based in part on the ARTICLE ONE Act).

262. ARK. CODE ANN. § 19-5-1267(b)(3) (2022).

263. H.R. 2016, 2020 Leg. Spec. Sess. (Kan. 2020).

264. Stein, *supra* note 47, at 1227–28.

significant resistance, these arguments have much less force against domestic ones. These constraints include requiring the President to make specific findings and taking additional measures such as consultations, reports, or congressional approval or notification before acting on the power.<sup>265</sup> Others have even argued for more readily allowing “extra-record discovery when preliminary signs of pretext strongly suggest ‘bad faith and improper behavior’ by agency decision-makers.”<sup>266</sup> At the very least, legislators could require a finding of a substantial connection between the emergency and the action taken. Such “substantial relationship” language could be drawn from judicial decisions evaluating such connections in the next section.

### *B. Remedy Pretextual Emergency Action*

If legislatures move too slowly to curb such emergency powers before the harm occurs or they are unable to self-legislate in a manner to curb their own pretexts, a second option is to seek judicial remedy. Although they would fail to prevent the abuse in question from occurring, *ex post* judicial sanctions could serve as deterrents of future action. While judicial review remains the most likely opportunity for providing a check on a statutory executive, the lack of a defined deference standard neutralizes the hope that the judiciary will serve as an effective external constraint.<sup>267</sup> As noted earlier, courts provide broad deference to governmental entities acting in the name of emergencies.<sup>268</sup> And although previously discussed in the context of national security,<sup>269</sup> judicial deference to emergency powers is not limited to national security.

For over a hundred years, government actors have taken emergency actions to address public health concerns. But such public health emergencies are also ripe for collisions between emergency measures and civil liberties. Whether we are fighting

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265. *Id.* at 1228–33.

266. Laura Boyer, Comment, *Expanding the Administrative Record: Using Pretext to Show “Bad Faith or Improper Behavior”*, 92 U. COLO. L. REV. 613, 619 (2021).

267. Stein, *supra* note 47, at 1187–90; *see also* *Juliana v. United States*, 947 F.3d 1159, 1174 (9th Cir. 2020) (noting that “not every problem posing a threat—even a clear and present danger—to the American experiment can be solved by federal judges”). *But see* *Nebraska v. Biden*, 52 F.4th 1044 (8th Cir. 2022); *Brown v. U.S. Dept. of Educ.*, No. 4:22-cv-0908-P, 2022 WL 16858525 (N.D. Tex. Nov. 10, 2022). These cases are separate challenges to the Biden Administration’s loan forgiveness program that enjoined (8th Circuit) and vacated (Northern District of Texas) the alleged exceedance of statutory emergency authority before it was effectuated. The U.S. Supreme Court has granted the rare certiorari before judgment and will hear oral arguments in these cases after publication of this Article.

268. *See supra* notes 63–66 and accompanying text.

269. *Id.*

smallpox,<sup>270</sup> yellow fever,<sup>271</sup> bubonic plague,<sup>272</sup> HIV/AIDS,<sup>273</sup> Ebola,<sup>274</sup> SARS,<sup>275</sup> or COVID-19,<sup>276</sup> governments have taken actions to prevent the spread of contagious diseases, often in the form of mandatory vaccinations and mandatory quarantines.<sup>277</sup> Not surprisingly, courts have largely upheld such government actions and found them valid despite their frequent infringement on personal liberties.<sup>278</sup>

Although the COVID-19 pandemic restrictions are fresh in mind at the moment, such controversies are far from new. The seminal public health law case of 1905, *Jacobson v. Massachusetts*, involved a challenge to a Cambridge Board of Health regulation mandating smallpox vaccines during an epidemic.<sup>279</sup> The Supreme Court upheld the mandatory vaccination regulation<sup>280</sup> and recognized the ability of the government to limit individual liberty in the interest of public health.<sup>281</sup>

270. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding a state law authorizing citizens to be vaccinated against smallpox).

271. Wendy E. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 *HOFSTRA L. REV.* 53, 57 (1985) (“In 1796, the federal government enacted the first federal quarantine law in response to a yellow fever epidemic.”).

272. *Jew Ho v. Williamson*, 103 F. 10, 11 (C.C.N.D. Cal. 1900). “[I]t is said that this quarantine discriminates against the Chinese population of this city, and in favor of the people of other races.” *Id.* at 23.

273. Parmet, *supra* note 271, at 54.

274. *Hickox v. Christie*, 205 F. Supp. 3d 579, 584 (D.N.J. 2016) (noting a nurse who cared for Ebola patients in West Africa was stopped and quarantined at Newark Liberty International Airport for approximately eighty hours in violation of “her rights under the Fourth and Fourteenth Amendments to the U.S. Constitution”).

275. See generally Jason W. Sapsin, Lawrence O. Gostin, Jon S. Vernick, Scott Burris & Stephen P. Teret, *SARS and International Legal Preparedness*, 77 *TEMP. L. REV.* 155 (2004).

276. See *In re Abbott*, 954 F.3d 772, 778 (5th Cir. 2020).

277. State quarantine measures have largely been upheld. *E.g.*, *Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 397 (1902); *Ex parte Culver*, 202 P. 661, 663 (Cal. 1921); see also *Greene v. Edwards*, 263 S.E.2d 661, 663 (W. Va. 1980) (recognizing the state’s power to quarantine sick individuals but imposed due process requirements); *Phillips v. City of New York*, 775 F.3d 538, 542–43 (2d Cir. 2015); *Whitlow v. California*, 203 F. Supp 3d 1079, 1084–85 (S.D. Cal. 2016); *Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App’x 348, 356–57 (4th Cir. 2011).

278. “[T]he question of whether there was an emergency justifying quarantine was left totally to the discretion of the board of health, and was therefore unreviewable.” Parmet, *supra* note 271, at n.74 (citing *Board of Health v. Court of Common Pleas*, 83 N.J. 392, 85 A. 217 (1912)). The 1900 bubonic plague led to a government-mandated quarantine in San Francisco that discriminated against persons of Chinese race and nationality. Thomas K. Le, Leah Cha, Hae-Ra Han & Winston Tseng, *Anti-Asian Xenophobia and Asian American COVID-19 Disparities*, 110 *AM. J. PUB. HEALTH* 1371, 1371 (2020) (explaining that the false accusation of a Chinese American man as being the source of San Francisco’s bubonic plague led to widespread xenophobia).

279. 197 U.S. 11, 12 (1905).

280. *Id.* at 24–25 (holding that “this court . . . has distinctly recognized the authority of a State to enact quarantine laws and ‘health laws of every description’” and finding that powers justify “such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety”).

281. *Id.* at 29 (holding that “rights of the individual in respect of his liberty may at times,

Even though this opinion is over a century old, it has been relied upon significantly of late to address challenges to public health restrictions during the COVID-19 pandemic.<sup>282</sup> This is because the Supreme Court had noted that such public health measures, like the one requiring vaccination, could be challenged if it “has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.”<sup>283</sup> This would suggest that a public authority seeking to use an emergency for pretext could be struck down as failing to have a “real or substantial relation” to public health or safety. When evaluating potential ethnic discriminatory pretexts associated with Ebola and SARS, courts and scholars echo this sentiment of a substantial connection between the emergency and the action taken.<sup>284</sup> Despite these requirements, very few government actions fail to satisfy the *Jacobson* test.<sup>285</sup> Such deference has continued even when governments act to address non-public health emergencies, with at least one court asking whether the economic action taken is substantially related to the actual emergency.<sup>286</sup>

Even when there is sufficient evidence to allege use of an emergency as a pretext for other ends, courts are hesitant to strike down laws where there is even one possible legitimate non-pretextual reason for the action. For instance, in 2009, Puerto Rico’s legislature declared a fiscal state of emergency and adopted a plan to stabilize

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under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand”).

282. Anthony Sanders, *A Tale of Two Cases and Two Pandemics*, INST. FOR JUST. (Sept. 8, 2022), <https://ij.org/cje-post/a-tale-of-two-cases-and-two-pandemics/> [<https://perma.cc/2J6N-CDRX>] (noting the increased frequency of judicial reliance on *Jacobson* to assess the constitutionality of various pandemic restrictions or requirements since the pandemic began in 2020).

283. *Jacobson*, 197 U.S. at 31.

284. Paul Reidinger, *A Question of Balance: Policing the AIDS Epidemic*, 78 A.B.A. J. 68, 70 (1987) (noting a court’s requirements that “the method it adopts to [to control a contagious disease] . . . must bear some true relation to the real danger”) (citing *Rock v. Carney*, 185 N.W. 798 (Mich. 1921)).

285. Daniel Farber, *The Long Shadow of Jacobson v. Massachusetts: Public Health, Fundamental Rights, and the Courts*, 57 SAN DIEGO L. REV. 833, 851–52 (2020) (noting the overwhelming number of courts upholding state authority after *Jacobson*). *But see* Adams & Boyle, P.C. v. Slatery, 956 F.3d 913, 929–30 (6th Cir. 2020) (denying temporary restrictions on abortion); *Robinson v. Att’y Gen.*, 957 F.3d 1171, 1176, 1182 (11th Cir. 2020) (same). A district court in the Tenth Circuit also struck down such an abortion restriction. *S. Wind Women’s Ctr. LLC v. Stitt*, No. CIV-20-277-G, 2020 WL 1677094, at \*6 (W.D. Okla. Apr. 6, 2020), *appeal dismissed*, 808 F. App’x 677 (10th Cir. 2020).

286. “Thus, a President’s declaration of a national emergency must be confined ‘to a specific set of circumstances which constitutes a real emergency, and for no other purpose.’” *United States v. Tajideen*, 319 F. Supp. 3d 445, 455 (D.D.C. 2018) (quoting H.R. REP. NO. 95–459, at 10 (1977)), *appeal dismissed*, No. 18-3059, 2018 WL 7080502 (D.C. Cir. Dec. 31, 2018); *see also* *Catanzaro v. Weiden*, 188 F.3d 56, 62–63 (2d Cir. 1999) (citing *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 302–03 (1981)) (holding that courts should “accord the decision to invoke the [emergency] procedure some deference” and that concerns arise only when the “emergency procedure is invoked in an abusive and arbitrary manner; therefore, there is no constitutional violation unless the decision to invoke the emergency procedure amounts to an abuse of the constitutionally afforded discretion”).

the economy.<sup>287</sup> The plan authorized involuntary layoffs which, if initiated, could result in up to 40,000 Puerto Ricans being laid off.<sup>288</sup> Labor unions sued the Puerto Rican government alleging, in part, that the government declared the emergency as a pretext to initiate large scale layoffs.<sup>289</sup> The district court, in a cursory holding, determined no pretext existed because “it is unquestionable that Puerto Rico is in a serious financial crisis. The layoffs are simply the method chosen by the government to solve the aforementioned financial crisis.”<sup>290</sup>

Despite this pattern of deference in emergency situations, courts have made clear that emergency power is not absolute. Courts have struck down emergency actions when there was sufficient evidence that such actions were unrelated or unjustified. For example, almost a hundred years ago, in *Sterling v. Constantin*, while the Supreme Court noted that a governor has broad discretion to “promot[e] the security and well-being of its people,”<sup>291</sup> the Court ultimately held that the Texas governor’s orders to shut down oil wells on the grounds of turmoil and insurrection were not justified.<sup>292</sup> More than four decades later, the Court reiterated that “a declaration of emergency by the chief executive of a State is entitled to great weight but it is not conclusive.”<sup>293</sup>

Almost a century later, the courts are still sometimes willing to strike down governmental action that uses emergency as a pretext for achieving other goals. In *Texas League of United Latin American Citizens v. Abbott*, the Western District of Texas struck down the governor’s order limiting locations for absentee voters in the name of election security.<sup>294</sup> Petitioners challenged such limitations as being merely a pretext for burdening vulnerable voters.<sup>295</sup> The court agreed and reasoned this pretext was evinced by the fact that the state authorizes counties to use satellite ballot return centers on Election Day without regard to those ballot security concerns.<sup>296</sup> The court called it “perplexing . . . that the State would simultaneously assert that satellite ballot return centers do not present a risk to election integrity on Election Day but somehow do present such a risk in the weeks leading up to [Election Day].”<sup>297</sup>

Interestingly however, the Fifth Circuit, while applying the *Jacobson* test, found no evidence of pretext when the same Texas Governor issued an executive order

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287. *UAW v. Fortuno*, 677 F. Supp. 2d 530, 533 (D.P.R. 2009), *aff’d*, 633 F.3d 37 (1st Cir. 2011).

288. *Id.*

289. *Id.* at 538. Plaintiffs brought a Contracts Clause claim and a procedural due process claim. *Id.* at 534. The Government argued the layoff plan was required for addressing the financial crisis and served an important governmental interest. *Id.* at 538. Plaintiffs argued that the financial crisis was a false pretext to lay off workers. *Id.*

290. *Id.* at 538.

291. 287 U.S. 378, 398 (1932).

292. *Id.* at 400–01.

293. *Scheuer v. Rhodes*, 416 U.S. 232, 250 (1974) (citing *Sterling*, 287 U.S. at 397–98).

294. 493 F. Supp. 3d 548, 564 (W.D. Tex. 2020).

295. *Id.*

296. *Id.* at 564–65.

297. *Id.* at 565.

limiting elective medical procedures, including abortions.<sup>298</sup> After repeated remands and appeals as this challenge to the executive order made its way through the courts, the court ultimately found that the governor's actions were substantially related to the COVID-19 pandemic and were not a pretextual attack on abortion rights.<sup>299</sup> The governor, arguably once more lenient on abortion,<sup>300</sup> recently signed into law an extremely restrictive anti-abortion law, S.B. 8, that outlaws abortions after just six weeks with no exceptions for incest or rape.<sup>301</sup> Some alleged that the governor's crackdown on abortions was related to his desire to not be labeled a moderate by GOP opponents in the 2022 election.<sup>302</sup> Although hospitals across the country were cancelling elective procedures to preserve hospital resources during the pandemic, restricting time-sensitive abortions—knowing full well that some women would be unable to terminate their pregnancies after enough time had passed—suggested use of the emergency to gain political capital. This action was particularly telling given many other state approaches to non-essential medical procedures that still allowed time-sensitive abortions.<sup>303</sup> The Supreme Court's controversial repeal of *Roe v. Wade* in June 2022 paved the way for Texas to continue its anti-abortion agenda without need to link such actions to emergencies.<sup>304</sup>

Conversely, the Ninth Circuit has held that “[n]otwithstanding the deference accorded to officials exercising summary powers to protect the public, their power to declare an emergency and thus eliminate the constraints of the due process clause is not without bounds.”<sup>305</sup> In another tenant pre-deprivation case, the court held that the rationale for permitting emergency deprivations does not apply “where the officials know no emergency exists, or where they act with reckless disregard of the actual circumstances.”<sup>306</sup> In that case, landlords sued city officials who closed low-income housing in an effort to reduce crime, alleging that the officials did so without pre-deprivation notice or hearing.<sup>307</sup> The city officials invoked their emergency powers, but the plaintiffs also claimed the officials knew no exigent circumstances existed justifying such measures.<sup>308</sup>

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298. *In re Abbott* 956 F.3d 696, 705 (5th Cir. 2020) (converting *Jacobson*'s “arbitrary and oppressive” language into “pretext”).

299. *Id.* at 723–24.

300. Mark Z. Barabak, *Texas Gov. Greg Abbott Signed the Nation's Toughest Abortion Law. Was It Principle or Posturing?*, L.A. TIMES (Dec. 10, 2021, 5:00 AM), <https://www.latimes.com/politics/story/2021-12-10/greg-abbott-texas-abortion-law> [<https://perma.cc/G5W5-VHQ4>].

301. *Id.*

302. *Id.*

303. See Laurie Sobel, Amrutha Ramaswamy, Brittni Frederiksen & Alina Salganicoff, *State Action to Limit Abortion Access During the COVID-19 Pandemic*, KAISER FAM. FOUND. (Aug. 10, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/state-action-to-limit-abortion-access-during-the-covid-19-pandemic/> [<https://perma.cc/QD9Y-CZNX>].

304. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

305. *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1406 (9th Cir. 1989), *overruled by Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996).

306. *Armendariz v. Penman*, 31 F.3d 860, 866 (9th Cir.1994).

307. *Id.* at 865.

308. *Id.*

Interestingly, courts have had no problem reviewing *agency* use of emergency powers using a similar substantial relation analysis. Applying the Administrative Procedure Act (APA), courts have frequently assessed whether EPA's use of emergency authority under the Safe Drinking Water Act (SDWA),<sup>309</sup> the Resource Conservation and Recovery Act,<sup>310</sup> the Federal Insecticide, Fungicide and Rodenticide Act,<sup>311</sup> and even the Magnuson Fishery Conservation and Management Act<sup>312</sup> was arbitrary and capricious. Courts have often found that the agency exceeded its emergency authority where it could not show a rational connection between the emergency and the emergency measures instituted.<sup>313</sup> The water crisis in Flint, Michigan, provides a striking case study for navigating the boundaries of discretion and emergency powers. This is because many of the claims allege that the EPA had not exceeded, but failed to invoke, its emergency powers to protect the residents of Flint.<sup>314</sup>

Courts have even relied on legislative history of the SDWA to find the limits of such emergency powers: “[I]n using the words ‘imminent and substantial endangerment to the health of persons,’ the Committee intends that this broad administrative authority not be used when the system of regulatory authorities provided elsewhere in the bill could be used adequately to protect the public health.”<sup>315</sup> The court proceeded to note that “[n]or is the emergency authority to be used in cases where the risk of harm is remote in time, completely speculative in nature, or *de minimis* in degree.”<sup>316</sup> EPA itself has sometimes even identified abuses by prior administrations.<sup>317</sup>

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309. 42 U.S.C. § 300i(a).

310. 42 U.S.C. § 6973.

311. 7 U.S.C. § 136d(c)(3).

312. 16 U.S.C. § 1801.

313. *E.g.*, *W.R. Grace & Co. v. U.S. E.P.A.*, 261 F.3d 330, 340 (3d Cir. 2001) (revoking EPA's cleanup orders of contaminated aquifers as exceeding their emergency authority); *United States v. Range Prod. Co.*, 793 F. Supp. 2d 814, 824 (N.D. Tex. 2011); *see, e.g.*, *Dow Chem. Co. v. Blum*, 469 F. Supp. 892, 895 (E.D. Mich. 1979) (finding EPA's emergency ban of two herbicides not arbitrary and capricious under FIFRA, 7 U.S.C. § 136d(c)(4)); *Parravano v. Babbitt*, 837 F. Supp. 1034, 1048 (N.D. Cal. 1993) (holding Interior's emergency orders reducing salmon harvest rate was not arbitrary and capricious), *aff'd*, 70 F.3d 539 (9th Cir. 1995).

314. Eric Moorman, “*A Greater Sense of Urgency*”: *EPA's Emergency Authority Under the SDWA and Lessons from Flint, Michigan*, 47 ENV'T'L L. REP. 10786 (2017); *Burgess v. United States*, 375 F. Supp. 3d 796, 800–01 (E.D. Mich. 2019); *In re Flint Water Cases*, 482 F. Supp. 3d 601, 614 (E.D. Mich. 2020).

315. *W.R. Grace & Co.*, 261 F.3d at 339 (citing H.R. REP. NO. 93–1185 (1974), as reprinted in 1974 U.S.C.C.A.N. 6454, 6487–88).

316. *Id.* at 339–40 (quoting H.R. REP. NO. 93–1185 (1974), as reprinted in 1974 U.S.C.C.A.N. 6454, 6488).

317. *EPA Orders Allied BioScience to Stop Selling and Distributing SurfaceWise2*, EPA (July 8, 2021), <https://www.epa.gov/newsreleases/epa-orders-allied-bioscience-stop-selling-and-distributing-surfacewise2> [<https://perma.cc/UC2Q-5ZPM>] (announcing an analogous revocation of an emergency waiver by EPA where one antimicrobial company used the COVID-19 emergency as a pretext for more widespread non-emergency use of its product); 7 U.S.C. § 13.

Although a few scholars have argued that the APA should apply to presidential decisions, we need not go that far to develop greater accountability of executive emergency actions. Instead, for domestic emergencies, courts could adopt an analysis similar to that of the substantial relation analysis from *Jacobson* and its progeny. Although there will still be a risk of attempts to force substantial relations between domestic emergencies and the governmental response, it will provide a clearer and more consistent approach to reviewing such action than exists when reviewing actions related to national security.<sup>318</sup> The domestic nature of the emergencies further supports adopting such a standard, as many of the national security justifications for the extreme deference to executive and legislative actions are absent when dealing with insular emergencies that are often a result of our own making.<sup>319</sup>

### C. Penalize Pretextual Emergency Actions

A less-discussed option is to penalize those officials who used emergency powers as pretexts for accomplishing other goals. Although examples of such penalties on high-level government officials are nonexistent, some states do penalize pretextual use of emergency resources. As just one outdated example, Washington state law provides such a penalty for those who falsely request the use of a party line.<sup>320</sup> “Any person who shall ask for or request the use of a party line on pretext that an emergency exists, knowing that no emergency in fact exists, shall be deemed guilty of a misdemeanor.”<sup>321</sup> Similar laws are in place in Arizona, Illinois, Michigan, South Carolina, and Vermont.<sup>322</sup> Although moot in the age of smartphones, it demonstrates that lawmakers have contemplated penalties for abuse of emergency resources. Similarly, a California law holds a person making a false 911 call liable for the costs of the resulting emergency response.<sup>323</sup> And courts have held individuals liable for the unnecessary emergency resources expended to respond to fake kidnappings.<sup>324</sup>

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318. Wiley & Vladeck, *supra* note 32, at 181–82.

319. See, for example, climate change and its related intensity of natural disasters from a failure to curb greenhouse gas emissions, financial meltdowns from failure to regulate the mortgage rates.

320. WASH. REV. CODE § 70.85.030 (2010). “Party line means a subscribers’ line telephone circuit, consisting of two or more main telephone stations connected therewith, each station with a distinctive ring or telephone number.” *Id.* at § 70.85.010.

321. *Id.* at § 70.85.030.

322. ARIZ. REV. STAT. ANN. § 13-2915 (2006); 2020 ILL. COMP. STAT. 66/0.01–4 (2013); MICH. COMP. LAWS § 750.540a (1952); S.C. CODE ANN. § 16-17-450 (1967); VT. STAT. ANN. tit. 13, §§ 3801–3805.

323. Mia Geoly, *Some States Crack Down on Discriminatory False 911 Reports*, NAT’L CONF. OF STATE LEGISLATURES (Sept. 3, 2021), <https://www.ncsl.org/research/telecommunications-and-information-technology/some-states-crack-down-on-discriminatory-false-911-reports-magazine2021.aspx> [<https://perma.cc/E4U5-5THK>].

324. *E.g.*, Associated Press, *Sherri Papini, California Woman Who Faked Her Kidnapping in 2016, Pleads Guilty to Hoax*, NBC NEWS (Apr. 18, 2022, 5:10 PM), <https://www.nbcnews.com/news/us-news/sherri-papini-california-woman-faked-kidnapping-2016-pleads-guilty-hoa-rcna24901> [<https://perma.cc/38S4-ZTMK>].



Although not a statutory penalty, an important precursor to penalizing government employees would be laws that provide a private right of action and waive sovereign immunity for such claims. As mentioned above, the Michigan legislature passed bills enabling the Speaker of the House of Representatives and the President of the Senate to sue the governor for abuses of power during the pandemic.<sup>325</sup> Michigan citizens similarly filed suit to curb the governor's power during the pandemic.<sup>326</sup> Legal action against a governor abusing power during an emergency could serve to both stop gubernatorial abuse of power and potentially to penalize such abuse if damages could be awarded.<sup>327</sup>

#### CONCLUSION

Too little attention has been focused on the use of domestic emergencies as cover for achieving unrelated policy ends. Government actors enjoy largely unbridled freedom to characterize any situation as an "emergency," but also use authentic emergencies to accomplish unrelated agenda items. They do this through two main approaches—using the emergencies as a shield to hinder compliance with disfavored policies and using the emergencies as a sword to accomplish favored ends. Both approaches are equally troubling. Yet emergency actions often enjoy grand deference from the courts, and marginalized communities lacking resources to challenge such actions often bear the brunt of such practices.

The United States is not alone in being susceptible to using emergencies as pretexts. Thai authorities have been accused of declaring an emergency to quell inconvenient riots<sup>328</sup> and Ugandan authorities have been accused of using the COVID-19 pandemic emergency to harass the LGBTQ+ community.<sup>329</sup> But we could be unique in the way we respond to such domestic uses. Instead of allowing

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325. H.R. Res. 250, 2019–2020 Leg., 2020 Sess. (Mich. 2020); S. Res. 114, 2019–2020 Leg., 2020 Sess. (Mich. 2020); *Legislative Oversight of Emergency Executive Power*, NAT'L CONF. OF STATE LEGISLATURES (June 14, 2022), <https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx> [<https://perma.cc/A8N5-P468>]. The Michigan House and Senate did file suit against Michigan Governor Gretchen Whitmer over her allegedly unlawful extension of the state of emergency and sought a declaratory judgment. Paul Egan, *House and Senate Sue Gov. Gretchen Whitmer over Emergency Powers*, DETROIT FREE PRESS (May 6, 2020, 9:40 AM), <https://www.freep.com/story/news/local/michigan/2020/05/06/republican-whitmer-emergency-powers/5174317002/> [<https://perma.cc/N54E-ZHAE>].

326. *Michigan Residents Sue Governor Whitmer over Coronavirus Pandemic Orders*, REUTERS (Apr. 16, 2020, 11:44 AM), <https://www.reuters.com/article/us-health-coronavirus-usa-michigan/michigan-residents-sue-governor-whitmer-over-coronavirus-pandemic-orders-idUSKCN21Y2IG> [<https://perma.cc/W39A-4UNC>].

327. Complicated issues of sovereign immunity may arise, however, in proposals to sue the Governor.

328. *Thailand: Emergency Decree Pretext for Crackdown*, HUM. RTS. WATCH (Oct. 15, 2020, 11:18 AM), <https://www.hrw.org/news/2020/10/15/thailand-emergency-decree-pretext-crackdown#> [<https://perma.cc/268S-QD2S>].

329. Madlen Davies, *Imprisoned Under the Cover of Covid*, BUREAU OF INVESTIGATIVE JOURNALISM (Nov. 25, 2020), <https://www.globalhealthnow.org/2020-11/pretext-persecution> [<https://perma.cc/FHC7-3RQD>].

pretextual rationales to guide emergency actions, agencies, courts, legislators, and executives can subject themselves to additional constraints prior to exercise of their powers, better document non-pretextual rationales, review such actions for a substantial relationship with an eye toward preventing pretextual actions, and consider imposing penalties. Such actions are particularly important as domestic emergencies continue to be more prevalent. Without concerted efforts to root out emergency pretexts, “[w]hat was an emergency action in one generation will become permissible—even ordinary—in the next.”<sup>330</sup>

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330. Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 29 (2002).