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ARTICLES

JUDICIAL REVIEW IN TIMES OF EMERGENCY: FROM THE FOUNDING THROUGH THE COVID-19 PANDEMIC

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[O]f course, Korematsu *was wrong . . . . But you are kidding yourself if you think the same thing will not happen again.*

– Justice Antonin Scalia[1]

INTRODUCTION

In the immediate wake of the assassination of President Abraham Lincoln and just ten days after newly sworn-in President Andrew Johnson issued an order calling for a military trial of the alleged conspirators in Lincoln's killing, the government brought the accused before a tribunal composed of nine military officers at the Old Arsenal Penitentiary in Washington, D.C.[2] The President's order empowered the commission to set its own rules of procedure.[3] By the ensuing rules, a majority vote of the officers could sustain a guilty verdict, a two-thirds majority vote could sustain a death sentence, and the only avenue for appeal was to seek a pardon from the President.[4]

Appearing for the prosecution, Representative John Bingham—who one year later would serve as primary drafter of the Fourteenth Amendment—argued that the due process guarantee set forth in the Fifth Amendment to the Constitution was "only the law of peace, not of war."[5] "[I]n war," he asserted, "it must be, and is, to a great extent, inoperative and disregarded."[6]

Counsel for the accused conspirators argued that they deserved a jury trial in a proper court of law. Specifically, Maryland Senator Reverdy Johnson argued that fundamental liberties are "more peculiarly necessary to the security of personal liberty in war than in peace. All history tells us that war, at times, maddens the people, frenzies government, and makes both regardless of constitutional limitations of power. Individual safety,

[1] Justice Antonin Scalia, Statement at University of Hawaii School of Law (Feb. 3, 2014), *quoted in* Debra Cassens Weiss, Scalia: Korematsu Was Wrong, but 'You Are Kidding Yourself' If You Think It Won't Happen Again, A.B.A. J. (Feb. 4, 2014, 1:05 PM), https://www.abajournal.com/news/article/scalia_korematsu_was_wrong_but_you_are_kidding_yourself_if_you_think_it_won [https://perma.cc/D6YQ-CRND].

[2] Amanda L. Tyler, Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay 174–75 (2017) (detailing procedures and proceedings).

[3] Id. at 175.

[4] Id.

[5] Id. at 175–76.

[6] Id. at 176; see also Gerard N. Magliocca, American Founding Son: John Bingham and the Invention of the Fourteenth Amendment 89–98 (2013) (detailing the arguments of Bingham and others in relation to the applicability of the U.S. Constitution in times of war).

at such periods, is more in peril than at any other."[7] It followed, in his view, that only members of the United States military could be tried by a military commission. Given that the courts were open and operating in the District, he contended, the defendants were entitled to a jury trial with the full panoply of procedural protections set forth in the Bill of Rights.[8]

But Bingham was not finished. Bingham also cited as legal sanction for the military trials President Lincoln's earlier declarations of martial law and suspension of habeas corpus that had followed under legislation enacted by the United States Congress in 1863.[9] More generally, during wartime, he contended, "the rights of each citizen, as secured in time of peace, must yield to the wants, interests, and necessities of the nation."[10]

As every armchair Civil War historian knows, Bingham's arguments prevailed on that occasion. The military commission proceeded to convict all eight defendants on various conspiracy-related charges,[11] sentencing four to death, three to life terms, and one to a six-year prison term.[12] Days later, on July 7, 1865, the government hanged the four given capital sentences.[13] This happened despite the filing by one of the condemned, Mary Surratt, of an overnight habeas petition reiterating Senator Johnson's arguments, which was thwarted by the personal intervention of President Johnson.[14]

Just one year later and with the Civil War effectively over, in *Ex parte Milligan*, the Supreme Court of the United States rejected the notion that military courts could try civilians in states "where the courts are open and their process unobstructed."[15] In so doing, the Court rebuffed the government's argument that the Bill of Rights constituted "peace provisions" that "like all other conventional and legislative laws and enactments, are silent amidst arms, and when the safety of the people becomes the supreme law."[16] Instead, *Milligan* championed the following

[7] Magliocca, supra note 6, at 94.

[8] Id.

[9] Id. at 95–96.

[10] Id. at 96.

[11] These included the charge of traitorously conspiring to commit murder, a crime not codified in federal law but one that had been announced by the military officers for the case at hand. Id. at 98–99.

[12] Id. at 99–102.

[13] Frank J. Williams & Nicole J. Benjamin, Military Trials of Terrorists: From the Lincoln Conspirators to the Guantanamo Inmates, 39 N. Ky. L. Rev. 609, 629 (2012).

[14] Tyler, supra note 2, at 177.

[15] Ex parte Milligan, 71 U.S. (4 Wall.) 2, 31–32, 121 (1866).

[16] Id. at 20 (replicating government's argument).

proposition: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."[17]

It is an inspiring passage. But the track record over the course of American history seems to suggest otherwise. More often than not, Bingham's arguments have prevailed when courts have reviewed government actions taken during times of war and emergency. Whether the courts expressly say the Constitution means something different in such times, or say the political branches deserve extra deference during such emergencies, or say that during such times the judiciary should stay its hand entirely, the result has been the same: For all practical purposes, the United States Constitution has meant something different in times of emergency. Whether deferring to President Lincoln's blockade at the start of the Civil War,[18] a state's suspension of creditors' remedies during the Great Depression,[19] or President Roosevelt's evacuation and mass incarceration of Japanese Americans in the West during World War II,[20] the Supreme Court has regularly permitted the political branches wide discretion to manage national emergencies, even in ways that would be viewed as flouting the Constitution during peacetime. All of this has been exacerbated, moreover, by the ever-expanding conceptions of war and emergency more generally.[21]

It follows that studying emergencies has the potential to tell us something both about the judicial role and the Constitution itself. This is because such a study implicates a range of questions, including whether the Founding document, despite expressly accounting for the potential for war and emergency, is a compact the meaning of which turns on the state

[17] Id. at 120–21. For more on *Milligan* and the trial of the Lincoln conspirators, see Martin S. Lederman, The Law(?) of the Lincoln Assassination, 118 Colum. L. Rev. 323, 394–457 (2018).

[18] The Prize Cases, 67 U.S. (2 Black) 635, 670–71 (1863).

[19] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 416, 447–48 (1934).

[20] See, e.g., Hirabayashi v. United States, 320 U.S. 81, 83, 85–89, 104–05 (1943); Korematsu v. United States, 323 U.S. 214, 215–18 (1944).

[21] See, e.g., Mary L. Dudziak, War Time: An Idea, Its History, Its Consequences 5, 136 (2012) (exploring how the concept of wartime has expanded dramatically over the course of American history, particularly in the hands of politicians); Sanford Levinson, Constitutional Norms in a State of Permanent Emergency, 40 Ga. L. Rev. 699, 737 (2006) (exploring similar trends). This Article sometimes refers to "wars and emergencies"; to be clear, however, this Article conceives of wars as one subset of emergencies.

of national security.[22] That is, was Bingham correct that it means something different in times of crisis versus when the country is at peace? And what of the judicial role? Does it differ depending on such circumstances?

Although Bingham's arguments most often have prevailed historically, there have been a handful of Supreme Court decisions, like *Milligan*, pushing back on the idea that the political branches deserve extensive deference to manage crises. Consider, in addition to *Milligan*, *Youngstown Sheet & Tube Co. v. Sawyer* (*The Steel Seizure Case*), in which the Supreme Court told President Truman that he could not seize the country's steel mills that were about to strike during the height of the Korean War.[23] The result is unsettled terrain, with many of the larger questions about the Constitution and judicial role in times of emergency having never been fully resolved.[24] Instead, well over two hundred years into our constitutional experiment, debates rage on as to the proper roles of the judiciary and our Founding document during such times.[25]

With the COVID-19 pandemic and the extensive litigation it has spurred targeting regulation of conduct deemed dangerous to public health, there is a new chapter to add to the mix. And it is a very interesting one. In several cases, an emerging Supreme Court majority has applied

[22] There are many wartime powers noted in the Constitution. See, e.g., U.S. Const. art. I, § 8, cl. 11 (empowering Congress "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"); id. cls. 12–14 (empowering Congress "[t]o raise and support Armies," "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government and Regulation of the land and naval Forces"); id. cl. 15 (empowering Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"); id. § 9, cl. 2 (referencing the power to suspend habeas corpus).

[23] Youngstown Sheet & Tube Co. v. Sawyer (*The Steel Seizure Case*), 343 U.S. 579, 588–89 (1952).

[24] As explored below, *Milligan* and other examples of Supreme Court decisions that do not defer to the political branches have often come in the waning days of—or even after—the relevant emergency. See infra text accompanying notes 60–67.

[25] For a small selection of some of the relevant literature on point, see, e.g., Saikrishna Bangalore Prakash, The Sweeping Domestic War Powers of Congress, 113 Mich. L. Rev. 1337 (2015); Sanford Levinson & Jack M. Balkin, Constitutional Dictatorship: Its Dangers and Its Design, 94 Minn. L. Rev. 1789 (2010); Sanford Levinson, Constitutional Norms in a State of Permanent Emergency, 40 Ga. L. Rev. 699 (2006); Bruce Ackerman, The Emergency Constitution, 113 Yale L.J. 1029 (2004); Laurence H. Tribe & Patrick O. Gudridge, The Anti-Emergency Constitution, 113 Yale L.J. 1801 (2004); Michael Stokes Paulsen, The Civil War as Constitutional Interpretation, 71 U. Chi. L. Rev. 691 (2004); Mark Tushnet, Defending *Korematsu*?: Reflections on Civil Liberties in Wartime, 2003 Wis. L. Rev. 273; John Hart Ely, War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath (1993).

increasingly rigorous scrutiny to government regulations predicated upon public health, most notably where such rules have intersected with the exercise of religion, but also in the areas of property rights and separation of powers. It has done so, moreover, often in the context of its so-called "shadow docket"[26]—its emergency application docket that fast-tracks cases to the Court without the benefit of full briefing and argument. This being said, a Court majority has also deferred to government decisions made in the context of the pandemic in several other contexts, including when reviewing abortion and prison policies.

All the same, the Court's propensity to be so active of late invites a revival of the debates over the role of the Constitution in times of emergency and the attendant role of the judiciary during the same. On one view, the Constitution means something different during times of emergency, insofar as the political branches effectively enjoy broader discretion to manage the country through such crises. On another view—and one that has controlled in some recent COVID-19-era decisions by the Supreme Court—any emergency context should not factor into how the Court assesses the constitutionality of government action. An example of this view may be found in Justice Gorsuch's recent opinion voting to override a governor's order setting capacity restrictions on religious worship to halt the spread of COVID-19.[27] There, he wrote, "[e]ven in times of crisis—perhaps *especially* in times of crisis—we have a duty to hold governments to the Constitution."[28]

This Article explores the role of judicial review during times of emergency, spanning American history up to and including the Court's

[26] I believe the term originated with William Baude, Foreword: The Supreme Court's Shadow Docket, 9 N.Y.U. J.L. & Liberty 1, 5 (2015). The rise of orders in such cases has been explored in detail by Stephen Vladeck. See, e.g., Stephen I. Vladeck, The Solicitor General and the Shadow Docket, 133 Harv. L. Rev. 123, 152–53 (2019). There is a debate over the appropriateness of the term "shadow docket," but I will employ it here given that these are cases often without full briefing and argument in which, as the cases discussed below in Part II demonstrate, the Court has sometimes rendered highly consequential rulings that are not always clearly supported by existing precedent. This Article puts to the side the debate over whether the Court should be so active in this posture and whether it should be establishing new substantive law in these cases. Nonetheless, I tend to join camp with those who are critical of the Court on both fronts. See, e.g., id. at 156–60; see also Stephen Vladeck, The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic (forthcoming 2023) (arguing that the Court's use of the shadow docket is fundamentally inconsistent with its role in the judicial process and risks serious long-term institutional harm to the Court).

[27] S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021).

[28] Id. at 718 (statement of Gorsuch, J.).

recent orders made in the context of the pandemic. It also surveys debates on either side of the competing visions of the Constitution and the judicial role during emergencies. Finally, the Article suggests that even if one has significant concerns over the processes by which the current Supreme Court has decided some of the recent pandemic cases and/or the underlying merits of the decisions rendered by the Court, there is much to welcome in recent opinions positing that emergencies do not automatically diminish the individual rights protections in the Constitution or, for that matter, the judicial role. All the same, the Article concludes by critiquing the inconsistency in the Court's approach to its role during the pandemic. Further, it suggests that it is not so much a desire to revive the judicial role in times of emergency that is driving the searching review we have witnessed in some of the pandemic cases, but instead the proverbial tail that wags the dog. In short, many of the Justices seem far more driven by the particular merits of the cases than a consistent approach to judicial review in times of emergency. A better approach would transcend the merits of any given context to embrace a model of judicial review that remains consistent regardless of the underlying merits and, most of all, the existence—or not—of any kind of emergency.

I. JUDICIAL REVIEW IN TIMES OF EMERGENCY: THE HISTORICAL RECORD

The Supreme Court has long deferred to the political branches in times of war and emergency, with a few notable exceptions. This Part highlights many of the Court's key decisions, revealing that it is the rare exception that witnesses the Court apply rigorous judicial scrutiny in such times.

A. The Long Track Record of Deference

Let us begin with *Martin v. Mott*, decided by the Court in 1827 and stemming from the War of 1812.[29] The issue before the Court involved whether individuals could contest their conscription as militia men following a declaration by President Madison that a British invasion was

[29] 25 U.S. (12 Wheat.) 19, 20 (1827). I have skipped over the infamous Sedition Act of 1798, which punished publication of "any false, scandalous, and malicious writing" against the United States government or its officials because the Supreme Court never ruled on its constitutionality. Geoffrey R. Stone, Civil Liberties in Wartime, 28 J. Sup. Ct. Hist. 215, 217, 219 (2003). All the same, note that the law was supported as an emergency measure and vigorously enforced, leading to the convictions of persons for criticizing the government. See id. at 217. The Supreme Court declared the law unconstitutional by the "court of history." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

imminent.[30] Madison had invoked his authority under the 1795 Calling Forth Act (also known as the Enforcement Act), which provided:

> [W]henever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the state, or states, most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion . . . .[31]

Mott declined to report for duty after the New York Governor, following Madison's proclamation, issued orders.[32] Mott was fined and refused to pay, resulting in the seizure of his goods.[33] He then sued to recover the same, winning in state court.[34] His luck did not last.

Writing for the Supreme Court, Justice Story emphasized that there was "no ground for a doubt" on the question whether Congress could delegate the authority to repel invasions to the President.[35] The governing statute, the Court held, limited the powers delegated to the President; it was, Justice Story wrote, "confined to cases of actual invasion, or of imminent danger of invasion."[36] "[T]he question arises," he continued, "by whom is the exigency to be judged of and decided?"[37] He answered: "We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons."[38] This followed for several reasons, not the least of which was the need to ensure "[a] prompt and unhesitating obedience to . . . command of a military nature."[39] For good measure, Justice Story added that the President might rely upon sensitive information in acting.[40]

The Court's deference to the executive branch was extensive. Justice Story opined that under the statute, the President "is necessarily constituted the judge of the existence of the exigency in the first instance,"

[30] *Martin*, 25 U.S. (12 Wheat.) at 20.
[31] Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424.
[32] *Martin*, 25 U.S. (12 Wheat.) at 22.
[33] Id. at 23.
[34] Id. at 23, 27.
[35] Id. at 29.
[36] Id.
[37] Id.
[38] Id. at 30.
[39] Id.
[40] See id. at 31.

a judgment from which "[t]he law does not provide for any appeal."[41] The only remedy available for abusing the power "as well as for all other official misconduct," Justice Story wrote, "is to be found in the constitution itself"—presumably a reference to the impeachment power, or perhaps, as he mentioned in the next sentence, "the frequency of elections."[42]

The Civil War witnessed more judicial deference to a wartime President. In 1863, in what are known as the *Prize Cases*, the Court addressed whether the President had the authority to declare a blockade during the window after hostilities had commenced but before Congress formally recognized the War.[43] Specifically, Lincoln took office in March 1861, and hostilities began on April 12, 1861, with the firing by Confederate troops on Fort Sumter.[44] Lincoln formally declared blockades on April 27 and 30, 1861, respectively, covering nine southern states.[45] Meanwhile, Congress was out of session, and although Lincoln called for a special session, he did not actually invite Congress back until July 4, 1861.[46] Thus, it was not until summer that Congress enacted a host of legislation backing up the President's actions to date.[47] At issue in the *Prize Cases* was the Union's seizure of four ships as prizes that had crossed the blockade before Congress acted.[48] Realizing the gravity of the issues before it, the Court devoted twelve days of oral argument to the cases.[49]

Writing for five Justices, Justice Grier noted that under the law of war, or "*jus belli*" (which, the Court said, "is governed and adjudged under the law of nations"), the right to prize and capture of neutral vessels followed from the existence of a war de facto where the neutral party has "knowledge or notice" of the blockade.[50] But the Virginians whose property had been seized did not believe they were subject to the law of

[41] Id.
[42] Id. at 32.
[43] The Prize Cases, 67 U.S. (2 Black) 635, 665–66 (1863).
[44] See Thomas H. Lee & Michael D. Ramsey, The Story of the *Prize Cases*: Executive Action and Judicial Review in Wartime, *in* Presidential Power Stories 53, 56 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).
[45] *The Prize Cases*, 67 U.S. (2 Black) at 666; Lee & Ramsey, supra note 44, at 57.
[46] Lee & Ramsay, supra note 44, at 56–58.
[47] Id. at 59.
[48] Id. at 63.
[49] Id. at 67.
[50] *The Prize Cases*, 67 U.S. (2 Black) at 635, 665–66.

war; instead, they argued that their rights under the U.S. Constitution protected their property.[51]

Defending the captures, Richard Henry Dana argued that a declaration of war by Congress was unnecessary.[52] As he put it, "[w]ar is *a state of things*, and not an act of legislative will."[53] The Court effectively agreed. Although, the majority wrote, the President alone "has no power to initiate or declare a war," if war is made by another party, he is "bound to resist force by force . . . without waiting for any special legislative authority."[54]

In dissent, Justice Nelson argued that the Constitution vested the decision whether to enter a state of war in the "war-making power of the Government"—namely, Congress.[55] Justice Nelson did not disagree that the President could meet force with force (he noted Congress had delegated the President the authority to do so in the Calling Forth Act), nor did he question that a war existed "in a material sense."[56] But, he argued, the President could not lay claim to broader war powers based on a unilateral declaration of a state of war.[57] Instead, "Congress alone can determine whether war exists or should be declared; and until they have acted, no citizen of the State can be punished in his person or property."[58]

There are many moving parts in the *Prize Cases*; the key point for present purposes is this: Although it is not clear what the Court would have done had Congress not by then ratified the President's actions,[59] and the Court declined to abstain from deciding the case despite being urged to do so,[60] the decision granted considerable deference to the President to

[51] Lee & Ramsay, supra note 44, at 68.

[52] *The Prize Cases*, 67 U.S. (2 Black) at 650, 659–60; Lee & Ramsay, supra note 44, at 67.

[53] *The Prize Cases*, 67 U.S. (2 Black) at 659.

[54] Id. at 668.

[55] Id. at 688–89 (Nelson, J., dissenting).

[56] Id. at 690–91; see Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424 ("An Act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions . . . .").

[57] *The Prize Cases*, 67 U.S. (2 Black) at 693 (Nelson, J., dissenting).

[58] Id. at 693; see also id. ("This great power . . . cannot be delegated or surrendered to the Executive."). The dissent therefore argued that the vessels and cargo should be restored to their original owners. See id. at 698–99.

[59] Justice Grier did not say whether the fact that Congress ratified the President's actions influenced his position. See id. at 670–71 (majority opinion) (noting that Congress had ratified the President's actions but declining to "admit[] that such an act was necessary"). For more details of the case and the arguments presented, see Lee & Ramsey, supra note 44, at 67–80.

[60] A government lawyer argued that the Court should not disturb the prize court's rulings lest the Court become an "ally of the enemy." *The Prize Cases*, 67 U.S. (2 Black) at 645–46 (replicating counsel's argument).

invoke broad war powers after a unilateral declaration of need. Further, the Court permitted the President to designate who would be treated as belligerents under the law of war, including persons previously classified as citizens and whom the President declared to be traitors. As the Court put it:

> Whether the President in fulfilling his duties, as Commander in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.[61]

The result was a sweeping affirmation of broad presidential power in times of war.

During the War, the Court also ruled that it had no power to issue a writ of habeas corpus to a military commission, ducking an important case that raised questions about the propriety of trying civilians by military tribunals.[62] Copperhead Clement Vallandigham had given a prominent speech decrying the Union's approach to the War and taking particular aim at "King Lincoln."[63] His actions violated General Order Number 38, proclaimed by Union General Burnside in Ohio, that outlawed "declaring sympathies" for the rebel cause.[64] After his conviction by a military tribunal, Vallandigham unsuccessfully sought a writ of habeas corpus in federal court.[65] In the meantime, Lincoln ordered him sent beyond enemy lines into the Confederacy.[66] Vallandigham then sought relief in the Supreme Court, where the Court unanimously "refused" certiorari to review his claims on the basis that his petition asked it to review on appeal the judgment of a military tribunal, a body over which Congress had not

[61] Id. at 670.

[62] Ex parte Vallandigham, 68 U.S. (1 Wall.) 243, 248 (1864).

[63] See William H. Rehnquist, All the Laws but One: Civil Liberties in Wartime 63–66 (1998). Among other things, Vallandigham also promoted slavery. See id. at 65.

[64] Headquarters, Dep't of the Ohio, Gen. Orders, No. 38 (Apr. 13, 1863), *in* 5 The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies, ser. II, at 480 (1899) [hereinafter Official Records]. Burnside was very busy during this period quashing speech, also reportedly ordering that the *Chicago Times* not be circulated. See 1 Gideon Welles, Diary of Gideon Welles, Secretary of the Navy Under Lincoln and Johnson 321 (1911).

[65] Rehnquist, supra note 63, at 67.

[66] Id.

given the Court appellate jurisdiction.[67] Given that military trials of civilians had been authorized by Secretary of War Edwin Stanton in 1862,[68] the Court's reluctance to take up the merits of Vallandigham's case, for the time anyway, ceded yet more ground to the Executive to manage the war as it saw fit.[69] (As will be explored below, an important bookend to *Ex parte Vallandigham* came in the case of *Ex parte Milligan*.)

If we then skip ahead to the early twentieth century, we find a Court once again strongly disinclined to second-guess the exercise of police power in times of emergency. Two cases from the century's first decade underscore the point and show that judicial deference extended beyond the context of war. First, there is *Jacobson v. Massachusetts*.[70] There, the Court faced the question whether Massachusetts could prosecute individuals for refusing to be vaccinated against smallpox.[71] In an opinion by Justice Harlan, the Court upheld the mandate, rejecting arguments that it violated the privileges and immunities of citizens and deprived persons of due process and equal protection.[72] (The Court likewise rejected the broader argument that the mandate was against "the spirit of the Constitution."[73]) The law did not have any exceptions, save for children where a physician certified that a child was unfit for vaccination.[74] The Court's reasoning was sweeping:

[67] *Ex parte Vallandigham*, 68 U.S. (1 Wall.) at 253–54 (holding that the Court had no jurisdiction to review a decision of the military tribunal).

[68] War Dep't, Order Authorizing Arrests of Persons Discouraging Enlistments (Aug. 8, 1862), *in* 2 Official Records, supra note 64, ser. III, at 321, 321–22 (authorizing arrest and trial of anyone "engaged, by act, speech, or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or in any other disloyal practice against the United States"); see also War Dep't, Gen. Orders, No. 141 (Sept. 25, 1862), *in* 2 Official Records, supra note 64, ser. III, at 587–88 (similar proclamation by President Lincoln).

[69] Early in the War, Chief Justice Taney rebuked President Lincoln's unilateral suspension of habeas corpus. See Ex parte Merryman, 17 F. Cas. 144, 145 (C.C.D. Md. 1861) (No. 9,487). But Taney did so in his capacity as a circuit judge. For extensive details of *Ex parte Merryman*, see Tyler, supra note 2, at 159–67; Brian McGinty, The Body of John Merryman: Abraham Lincoln and the Suspension of Habeas Corpus 85–94 (2011); Jonathan W. White, Abraham Lincoln and Treason in the Civil War: The Trials of John Merryman 38–42 (2011). It is an interesting question what the full Court might have done had it taken up the matter.

[70] 197 U.S. 11 (1905). Justices Brewer and Peckham dissented without opinion. Id. at 39 (Brewer & Peckham, JJ., dissenting).

[71] Id. at 12–13 (majority opinion).

[72] Id. at 29–30.

[73] Id. at 14.

[74] Id. at 12.

> [I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, 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.[75]

Embracing a deference model, the Court posited: "It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine . . . ."[76] In so doing, the Court underscored that any other holding could lead to "disorder and anarchy."[77] And although the case did not involve a religion-based challenge to the mandate in question, the sweeping language in the opinion suggests that such a claim would not have altered the Court's calculus.

Then, in its 1909 decision in *Moyer v. Peabody*, the Court held that an action for damages could not lie against a governor and his subordinates based on arrests made in quashing a local insurrection.[78] Writing for the Court, Justice Holmes found irrelevant allegations that the plaintiff had been arrested and held for several months on the governor's orders in the absence of probable cause and without any kind of process.[79] To the contrary, the Court held that so long as the governor had the authority under the state constitution to put down the insurrection, he possessed the power to order arrests "not necessarily for punishment, but . . . by way of precaution to prevent the exercise of hostile power."[80] The Court concluded in exceptionally broad terms: "When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment."[81]

With the onset of World War I, we find a highly deferential Court, particularly in the context of the First Amendment. Consider the

[75] Id. at 29.
[76] Id. at 30.
[77] Id. at 26.
[78] 212 U.S. 78, 85–86 (1909).
[79] Id. at 82–84.
[80] Id. at 84–85.
[81] Id. at 85; see also id. ("Public danger warrants the substitution of executive process for judicial process.").

Espionage Act of 1917[82] and the Sedition Act of 1918,[83] both of which included provisions targeted at disloyal wartime speech. The government enforced both laws aggressively. As Geoffrey Stone has noted, "[t]he Department of Justice prosecuted more than 2,000 individuals for allegedly disloyal or seditious expression in this era, and in an atmosphere of fear, hysteria, and clamor, most judges were quick to mete out severe punishment to those deemed disloyal."[84] When these issues made their way to the Supreme Court, in a number of decisions "the Court consistently upheld the convictions of individuals who had agitated against the war and the draft."[85] To take one example, the Court upheld Joseph Gilbert's conviction for obstructing the draft based upon his statement that the United States was "stampeded into this war by newspaper rot to pull England's chestnuts out of the fire."[86] In another well-known case involving the prosecution of someone for circulating pamphlets urging draft resistance, *Schenck v. United States*, Justice Holmes argued that the First Amendment should receive less protection in times of war.[87] Specifically, he posited, "[w]hen 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."[88] Justice Holmes subsequently stepped back from this position, but for the time, it controlled.[89]

[82] Act of June 15, 1917, ch. 30, tit. I, § 3, 40 Stat. 217, 219. Note the similarities to the Sedition Act of 1798. See supra note 29 (discussing 1798 Act).

[83] Act of May 16, 1918, ch. 75, § 3, 40 Stat. 553; Stone, supra note 29, at 227.

[84] Stone, supra note 29, at 226. Stone notes that Judge Learned Hand proved the exception, questioning the constitutionality of the Espionage Act as targeting political speech. See id.

[85] Id. at 228 (first citing Schenck v. United States, 249 U.S. 47, 52–53 (1919); then citing Frohwerk v. United States, 249 U.S. 204, 210 (1919); then citing Debs v. United States, 249 U.S. 211, 217 (1919); then citing Abrams v. United States, 250 U.S. 616, 624 (1919); then citing Schaefer v. United States, 251 U.S. 466, 482 (1920); then citing Pierce v. United States, 252 U.S. 239, 252–53 (1920); and then citing Gilbert v. Minnesota, 254 U.S. 325, 333 (1920)). Stone labels the Court's performance during this period as "simply wretched." Id. (quoting Harry Kalven, Jr., A Worthy Tradition: Freedom of Speech in America 147 (1988)).

[86] See id. at 228 (detailing Gilbert's case).

[87] 249 U.S. at 49, 51–52.

[88] Id. at 52; see also id. ("We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done.").

[89] Specifically, Justices Holmes and Brandeis became dissenters in subsequent cases. See Stone, supra note 29, at 228 & n.86.

To be sure, during this period, there existed "scant judicial precedent on the meaning of the First Amendment."[90] And in the decades that followed, the Supreme Court overruled its World War I First Amendment decisions. These decisions nonetheless stand out as examples of the Court's proclivity for extreme deference to war hysteria—even when it comes to core civil liberties protected by the Bill of Rights.[91]

In addition to the First Amendment cases, the Court upheld the draft in 1918[92] and concluded in 1919 that a prohibition on liquor traffic was subsumed within Congress's war powers.[93] The Court's deference continued even after the end of fighting, when it upheld a law enacted after the armistice that fixed rental prices in the District of Columbia and permitted tenants to stay in properties beyond lease expiration dates. In that case, *Block v. Hirsh*, Justice Holmes held for a five-Justice majority that the government could exercise expanded powers to meet the emergency at hand—and by emergency, he meant the war.[94] In so doing, he wrote that "a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect."[95] (Four dissenters asked in response: "If such exercise of government be legal, what exercise of government is illegal?"[96]) It was not until 1924 that the Court finally said the government could no longer control rents in the District under the auspices of wartime needs.[97]

[90] Geoffrey R. Stone, Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism 159 (2004).

[91] For additional discussion of this period, see Zechariah Chafee, Jr., Freedom of Speech in War Time, 32 Harv. L. Rev. 932, 962–73 (1919); Rehnquist, supra note 63, at 170–83.

[92] See Selective Draft Law Cases, 245 U.S. 366, 388–89 (1918). For more details, see Matthew C. Waxman, The Power to Wage War Successfully, 117 Colum. L. Rev. 613, 644–49 (2017).

[93] See Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146, 161 (1919); see also Dakota Cent. Tel. Co. v. South Dakota, 250 U.S. 163, 181, 183 (1919) (upholding the government's takeover of telephone, telegraph, radio, and marine cable communications systems).

[94] 256 U.S. 135, 156–57 (1921).

[95] Id. at 154 (upholding the "emergency legislation"); see also id. at 158 ("[W]e are not prepared to say that the suspension of ordinary remedies was not a reasonable provision of a statute reasonable in its aim and intent.").

[96] Id. at 161 (McKenna, J., dissenting). Justice McKenna also posited: "It is asserted, that the statute has been made necessary by the conditions resulting from the 'Imperial German war.' . . . [O]ther wars . . . did not induce the relaxation of constitutional requirements nor the exercise of arbitrary power." Id. at 160.

[97] See Chastleton Corp. v. Sinclair, 264 U.S. 543, 548 (1924).

Another common tactic employed by the Court during and following World War I was that of delay. Thus, for example, the Court delayed hearing any major case that could have led to the break-up of U.S. Steel until after the war.[98] The Court also waited until after the armistice to hear a challenge to the President's decision to take over the railroads during the war.[99] Putting everything together, the author of the notion that ours is a "*fighting* constitution,"[100] Charles Evans Hughes, was amply supported in his observation that "the Great War . . . furnish[ed] the occasion for decisions of the Supreme Court sustaining [the war power] in its broadest scope."[101]

As noted, judicial deference in times of crisis has not been limited to the war context. Another example is found in *Home Building & Loan Ass'n v. Blaisdell*, decided by the Court in 1934 in the midst of the Great Depression.[102] The case involved the question whether the Contracts Clause limited the power of states to impose new terms on existing mortgages.[103] Specifically, Minnesota enacted a law in 1933 that permitted debtors to miss payments under certain conditions without penalty during the Depression.[104]

The Court upheld the law against challenge. Writing for the majority, Chief Justice Hughes invoked a line from one of his earlier speeches, positing that the power to wage war "is [the] power to wage war successfully" and analogizing the war context to an emergency like the Depression.[105] In *Blaisdell*, he had the votes to implement his idea that

[98] See United States v. U.S. Steel Corp., 251 U.S. 417, 436 (1920). For details, see Melvin I. Urofsky, The Great War, the Constitution, and the Court, 44 J. Sup. Ct. Hist. 251, 259 (2019).

[99] See N. Pac. Ry. v. North Dakota, 250 U.S. 135 (1919). The railroads were promised compensation under the scheme. See Urofsky, supra note 98, at 261.

[100] Charles E. Hughes, War Powers Under the Constitution, 40 A.B.A. Ann. Rep. 232, 248 (1917).

[101] Charles Evans Hughes, The Supreme Court of the United States: Its Foundation, Methods and Achievements, an Interpretation 104 (1928).

[102] 290 U.S. 398 (1934).

[103] Id. at 415–16. The Clause prohibits states from enacting any laws that "impair[] the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1.

[104] *Blaisdell*, 290 U.S. at 415–18. For more details of the context, including explanation as to how mortgages were structured very differently at the time versus today, see Levinson, supra note 25, at 723–25.

[105] *Blaisdell*, 290 U.S. at 426 (speaking of the power "to meet [an] emergency"). For more discussion of the connection between the speech and the *Blaisdell* decision, see Waxman, supra note 92, at 673–77; see also Hughes, supra note 100, at 238 (reprinting Hughes's speech in which he coined the phrase, "The power to wage war is the power to wage war

the Constitution must be accommodating in emergencies, lest a rigid interpretation undermine the larger Lincolnian objective of preserving the Union.[106] In his earlier speech, Chief Justice Hughes had taken aim at *Ex parte Milligan* (explored below) as too rigid and insensitive to the circumstances at hand.[107] He had also said that "the legislature may meet public emergencies by action that ordinarily would go beyond its constitutional authority."[108]

To be sure, in *Blaisdell*, Chief Justice Hughes walked his earlier views back some. For example, he observed that an "[e]mergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved."[109] And, he added, "even the war power does not remove constitutional limitations safeguarding essential liberties."[110] But he limited the latter observation to constitutional provisions that "are specific, so particularized as not to admit of construction," citing by way of example the number of senators each state is allocated in Congress.[111] "But," he continued, "where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details."[112] Because the Court interpreted the Contracts Clause as giving it such leeway, *Blaisdell* granted wide discretion to the police power to

successfully"). Note that President Roosevelt stated in his 1933 Inaugural Address that to fight the Depression he would ask for "broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe." Franklin D. Roosevelt, Inaugural Address (Mar. 4, 1933), *in* 2 The Public Papers and Addresses of Franklin D. Roosevelt 11, 15 (Samuel I. Rosenman ed., 1938). At the Minnesota Supreme Court, Justice Olsen concurred in *Blaisdell*, comparing the Depression to a "flood, earthquake, or disturbance" that had deprived "millions of persons in this nation of their employment and means of earning a living for themselves and their families." Blaisdell v. Home Bldg. & Loan Ass'n, 249 N.W. 334, 340 (Minn. 1933) (Olsen, J., concurring), *aff'd*, 290 U.S. 398 (1934).

[106] G. Edward White has written that the decision witnessed the Court facing a "crisis in adaptivity." G. Edward White, The Constitution and the New Deal 211–15 (2000).

[107] See Waxman, supra note 92, at 628 (citing Charles E. Hughes, War Powers Under the Constitution, 40 A.B.A. Ann. Rep. 232, 245–46 (1917)).

[108] Hughes, supra note 101, at 222.

[109] *Blaisdell*, 290 U.S. at 425.

[110] Id. at 426.

[111] Id.

[112] Id.; see also Waxman, supra note 92, at 633 (further exploring this aspect of Chief Justice Hughes's opinion); Levinson, supra note 25, at 727–30 (criticizing Chief Justice Hughes's approach in this section of the opinion).

address economic crises, albeit with an underlying assumption that the circumstances were only temporary.[113]

Writing for four dissenters, Justice Sutherland argued that there were other things states could do to counter the Depression's effects on the economy. More broadly, he took issue with what he viewed as the majority's watering down of the Contracts Clause because of the surrounding circumstances: "If the provisions of the Constitution," he wrote, "be not upheld when they pinch as well as when they comfort, they may as well be abandoned."[114] The Court's role in these cases, he contended, was not to defer to a legislature but instead, "[t]he only legitimate inquiry we can make is whether [the law] is constitutional. If it is not, its virtues, if it have any, cannot save it . . . ."[115]

Next, we come to examples of just how far judicial deference can go in wartime: the World War II-era Japanese American cases. The issues before the Court in these cases concerned the legality of military regulations issued under the auspices of President Roosevelt's infamous Executive Order ("EO") 9066, which he announced a little over two months after the Japanese attack on Pearl Harbor.[116] The regulations, which ordered curfews, evacuations, registration, and ultimately detention of persons of Japanese ancestry, together led to the mass incarceration of approximately 120,000 Japanese Americans from the western United States, over 70,000 of whom were United States citizens.[117] It was through the evacuation and registration orders that the military funneled Japanese Americans to assembly centers, from which

[113] As Sanford Levinson has noted, *Blaisdell* reserved an important role for the judiciary: "It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends." Levinson, supra note 25, at 734 (quoting *Blaisdell*, 290 U.S. at 442); see also Hughes, supra note 100, at 241 (observing that certain questions, like the scope of permissible delegation by Congress to the executive, "always remain[] judicial question[s]").

[114] *Blaisdell*, 290 U.S. at 483 (Sutherland, J., dissenting).

[115] Id.

[116] For extensive discussion of these events and cases, see Tyler, supra note 2, at 211–12, 222–43; see also, e.g., Peter Irons, Justice at War (1983). For discussion of how Prime Minister Winston Churchill became the driving force behind shutting down Great Britain's program for interning disaffected citizens, see Amanda L. Tyler, Courts and the Executive in Wartime: A Comparative Study of the American and British Approaches to the Internment of Citizens During World War II and Their Lessons for Today, 107 Calif. L. Rev. 789, 813–18, 823–26 (2019).

[117] Tyler, supra note 2, at 211. The citizenship numbers would have been higher had then-existing naturalization laws not discriminated based on race, a practice that ended in 1952. See Immigration and Nationality Act, Pub. L. No. 82-414, § 311, 66 Stat. 163, 239 (1952).

they were sent to so-called "relocation camps" all over the West. The average detention lasted almost three years.[118]

As Roosevelt's War Department moved toward adopting these policies—without any individualized suspicion, criminal charges or trials, or, for that matter, any factual basis to believe that disloyalty was a problem[119]—several government officials flagged constitutional concerns. To take but one example, Attorney General Francis Biddle maintained that "[u]nless the Writ of Habeas Corpus is suspended, I do not know of any way in which Japanese born in this country and therefore American citizens could be interned."[120] Biddle and others expressed these views to senior War Department officials and the President himself—all to no avail.[121] Meanwhile, to bolster EO 9066 and the War Department's actions, Congress enacted legislation criminalizing violations of regulations issued under EO 9066.[122]

A handful of cases made their way to the Supreme Court. First, there was *Hirabayashi v. United States* in 1943.[123] Gordon Hirabayashi, a student at the University of Washington and a natural-born citizen, violated a curfew order and refused to register as part of a process that would inevitably lead to his detention in the camps.[124] Once prosecuted, he argued that Congress had delegated too much authority to the military and its orders unconstitutionally discriminated on the basis of race and ethnicity.[125]

The resulting unanimous opinion combined a disinclination to get involved with unbounded support for the pernicious assumptions that proved the impetus for the military policies. Thus, Chief Justice Stone began, "it is not for any court to sit in review of the wisdom of [the Executive's] action or substitute its judgment for theirs."[126] Indeed, to

[118] Tyler, supra note 2, at 227–28.

[119] The lack of evidence is widely documented, including in a congressionally commissioned study and report issued in 1982. See Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied 28 (1982); see also infra Subsection III.B.4.

[120] Morton Grodzins, Americans Betrayed: Politics and the Japanese Evacuation 257 (1949) (quoting Letter from Francis Biddle, U.S. Att'y Gen., to Leland Merritt Ford, Member, U.S. House of Representatives (Jan. 24, 1942)).

[121] Tyler, supra note 2, at 223. For details and discussion of the constitutional problems with the mass incarceration of Japanese Americans, see id. at 222–43.

[122] See 18 U.S.C. § 1383 (1970) (repealed 1976).

[123] 320 U.S. 81 (1943).

[124] Id. at 83–84.

[125] Id. at 89.

[126] Id. at 93.

underscore the measure of deference it believed due, the Court invoked Chief Justice Hughes's famous statement that the war power is "the power to wage war successfully."[127] (The Court also relied on, among others, *Martin v. Mott* and the *Prize Cases*.[128]) It followed, the Court held, that Hirabayashi's claims failed:

> The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant.[129]

To top everything off, the Court added: "We cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry."[130] In so concluding, the Court emphasized that it had yet to hold that the Fifth Amendment encompasses an equal protection component.[131]

Among those joining the opinion were several Justices known as champions of civil liberties. This coalition included Justice Douglas, who concurred and wrote that "[p]eacetime procedures do not necessarily fit wartime needs."[132] The group also included Justice Murphy, who argued that "[i]t does not follow . . . that the broad guaranties of the Bill of Rights and other provisions of the Constitution protecting essential liberties are suspended by the mere existence of a state of war."[133] He went on,

[127] Id. In his blistering assessment of *Hirabayashi* and related cases including *Korematsu v. United States*, 323 U.S. 214 (1944), Eugene Rostow responded, "[t]he war power . . . is the power to wage war, not a license to do unnecessary and dictatorial things in the name of the war power." Eugene V. Rostow, The Japanese American Cases—A Disaster, 54 Yale L.J. 489, 530 (1945).

[128] *Hirabayashi*, 320 U.S. at 93 (first citing The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862); and then citing Martin v. Mott, 25 U.S. (12 Wheat.) 19, 29 (1827)).

[129] Id. at 101.

[130] Id. The Court commented here on the fact that Japanese Americans have not "assimilat[ed] as an integral part of the white population." Id. at 96. The Court did not rule on Hirabayashi's challenge to the registration order, holding that its affirmance of his conviction for the curfew violation sustained his resulting sentence. Id. at 105.

[131] Id. at 100. The Court did not so hold until 1954 in *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

[132] *Hirabayashi*, 320 U.S. at 106 (Douglas, J., concurring).

[133] Id. at 110 (Murphy, J., concurring).

however, to join the Court's opinion in light of the "critical military situation which prevailed on the Pacific Coast area in the spring of 1942."[134]

Then there was *Korematsu v. United States*. Writing for six Justices, Justice Black, an oft-championed defender of civil liberties, upheld Fred Korematsu's conviction for violating an evacuation order that also would have led directly to his detention.[135] Korematsu challenged the military orders as unconstitutional delegations of executive and judicial powers.[136] He also argued that the orders unconstitutionally targeted persons for non-criminal purposes and were the product of invidious discrimination.[137] The Court disagreed and declined yet again to "reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained."[138] Continuing, the Court observed: "We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety . . . ."[139] Here, the Court cited various government reports suggesting that portions of the Japanese American population were indeed disloyal.[140] (Never mind, as Justice Robert Jackson wrote in dissent, that no factfinding had taken place in the lower courts.[141])

Although opining that "[c]ompulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions," the Court nonetheless held that "when . . . our shores are threatened by hostile forces, the power to protect must [prevail]."[142] The Court emphasized that "we are dealing specifically with nothing but an

[134] Id. at 112.
[135] Korematsu v. United States, 323 U.S. 214, 215–16, 219 (1944).
[136] Id. at 217–18.
[137] Id. at 218–19, 223.
[138] Id. at 218.
[139] Id. (quoting Hirabayashi v. United States, 320 U.S. 81, 99 (1932)).
[140] Id. at 219 & n.2.
[141] Id. at 245 (Jackson, J., dissenting).
[142] Id. at 219–20 (majority opinion).

exclusion order."[143] All the same, Justice Black added that "hardships are part of war."[144]

Several opinions followed. First, Justice Frankfurter concurred and declared that the Court's holding should not be read as "approval of that which Congress and the Executive did. That is their business, not ours."[145] And one of the dissenters, Justice Jackson, suggested that the Court should have ducked the case rather than decide it, positing that "[i]n the very nature of things, military decisions are not susceptible of intelligent judicial appraisal."[146] Justice Jackson added that the "chief restraint upon those who command [the war power], in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history."[147]

Then, two dissenters argued that the government had overstepped. Justice Owen Roberts's main concern was that the scheme to which Korematsu had been subjected "was but a part of an over-all plan for forceable detention" that was unconstitutional.[148] Justice Murphy labeled the entirety of the military regulations the product of "the ugly abyss of racism."[149] Continuing, he wrote: "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."[150] He went on to challenge the majority's factual assertions and observe how the many months of delay that preceded the evacuation orders undermined the government's assertions regarding the need for such policies.[151] Putting everything together, he concluded that the military's regulations were the product of "misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices."[152] Finally, Justice Jackson moved beyond his justiciability concerns to dissent as well, complaining that if the orders before the Court

[143] Id. at 223.
[144] Id. at 219.
[145] Id. at 225 (Frankfurter, J., concurring).
[146] Id. at 245 (Jackson, J., dissenting).
[147] Id. at 248.
[148] Id. at 232 (Roberts, J., dissenting). Justice Roberts referred to the camps as "concentration camp[s]." Id. at 226, 230, 232.
[149] Id. at 233 (Murphy, J., dissenting).
[150] Id. at 234 (quoting Sterling v. Constantin, 287 U.S. 378, 401 (1932)).
[151] Id. at 241.
[152] Id. at 239.

were constitutional, "then we may as well say that any military order will be constitutional and have done with it."[153]

Korematsu has now been overruled, *sort of*. The Supreme Court did so in dictum in the 2018 decision in *Trump v. Hawaii* (*The Travel Ban Case*).[154] But that case, too, is emblematic of the same deference that controlled in *Korematsu*. There, the Court upheld the President's authority to suspend entry of persons from predominantly Muslim countries based on expansive executive assertions about national security.[155] In so doing, the Court rejected calls for a "searching inquiry" into the basis of the Executive's actions:

> [P]laintiffs' request for a searching inquiry into the persuasiveness of the President's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere [of foreign policy and national security]. "Whether the President's chosen method" of addressing perceived risks is justified from a policy perspective is "irrelevant" . . . .[156]

In addition, *Hirabayashi* remains unquestioned in the Supreme Court reports.[157]

There was one final installment in the Japanese American cases, *Ex parte Endo*.[158] I have written extensively about the case elsewhere.[159] Suffice to say that *Endo* presented the Supreme Court with the clear opportunity to rule on the constitutionality of the mass detention of Japanese Americans and the Court balked, holding instead that a narrow interpretation of the military regulations governing detention should control and dictating that all so-called "loyal" detainees were entitled to their freedom.[160] Although the case is enormously significant for having directly led to the closing of the camps,[161] the Court undercut any precedential value of its decision by sidestepping all the constitutional

[153] Id. at 245 (Jackson, J., dissenting).

[154] See 138 S. Ct. 2392, 2423 (2018) ("*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'" (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting))).

[155] Id.

[156] Id. at 2409 (citations omitted).

[157] For discussion of the significance of this fact, see Eric L. Muller, *Korematsu*, *Hirabayashi*, and the Second Monster, 98 Tex. L. Rev. 735, 736, 751–53 (2020).

[158] 323 U.S. 283 (1944).

[159] See, e.g., Tyler, supra note 116, at 841–45, 849–50.

[160] 323 U.S. at 297.

[161] See Tyler, supra note 2, at 236–37.

issues before it and emphasizing that Endo was not in military custody (suggesting that it may have come out differently in such circumstances).[162]

There are many other examples one can find of judicial deference during wartime. For example, the Supreme Court handed down decisions during the height of the Cold War in which it upheld loyalty oaths for public employees (who also had to disclaim communism)[163] along with laws banning members of the Communist party from working at public schools.[164] There was also the Court's decision in the fast-tracked case of *Ex parte Quirin* to uphold the trial by military commission of a United States citizen early in World War II.[165] In *Quirin*, the Court decided that it was both fair game to try the citizen before a military tribunal and to do so for violating the law of war.[166] (The so-called "Nazi saboteurs" in that case, a group that included at least one citizen, had sneaked in the United States bent on committing sabotage on behalf of the German enemy.[167]) *Quirin* accordingly held that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because [it is] in violation of the law of war" and expressly held that any such punishment stands "distinct from the crime of treason."[168] In so doing, as is discussed further below, the Court both minimized the sweep of an earlier precedent and set the stage for a recognition of broad detention authority that it would recognize later during the war on terrorism.

B. The Exceptions: More Rigorous Judicial Review

The Court has not, however, followed an unyielding practice of deference to the political branches in times of war and crisis. There are exceptions, explored below. As we will see, however, many—though not all—of the exceptions to the deference model warrant caveats, leaving the

[162] See *Endo*, 323 U.S. at 298 ("[N]o questions of military law are involved.").

[163] Garner v. Bd. of Pub. Works, 341 U.S. 716, 720 (1951).

[164] Adler v. Bd. of Educ., 342 U.S. 485, 493 (1952); see also Dennis v. United States, 341 U.S. 494, 516–17 (1951) (upholding the prosecution of leaders of the American Communist Party under the Smith Act); Stone, supra note 29, at 236–37 (discussing *Dennis*); see also id. at 239 (noting that the Court overruled *Dennis* in 1969).

[165] 317 U.S. 1, 48 (1942). For extensive discussion of the background, procedural history, and decision in *Quirin*, see Tyler, supra note 2, at 253–60.

[166] 317 U.S. at 27–28, 37–38.

[167] Id. at 21.

[168] Id. at 37–38.

dominant narrative of judicial review in times of emergency as one of deference.

As already noted, a prominent exception is *Ex parte Milligan*.[169] The case was an outgrowth of the trial of various civilians, including Lambdin Milligan, a lawyer and former candidate for governor of Indiana, before a military commission in Indiana for a range of charges relating to their Copperhead activities and support of the Confederacy during the Civil War.[170] The charges included "violat[ing] the laws of war," conspiracy, inciting insurrection, and disloyal practices.[171] Many of the charges could not be grounded in existing federal criminal statutes enacted by Congress but were announced in the first instance by the commission.[172] The commission set its own procedures and the punishments issued often far exceeded what federal law authorized civilian courts to issue in analogous cases.[173] (In this respect, it functioned similarly to the commission that tried the Lincoln conspirators.)

Military officers convicted Milligan and sentenced him to death in December 1864.[174] Days before he was to be hanged, President Johnson commuted his sentence to life imprisonment.[175] Meanwhile, Milligan filed a habeas petition in the lower federal courts challenging his conviction. Reviewing the case on appeal, the Supreme Court made no mention of *Vallandigham* and held that the law of war could not be applied to "citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."[176] In such areas, the Court held, civilians must be tried before regular courts and given the full panoply of constitutional rights relating to criminal procedure, including a jury trial.[177] The Court rejected

[169] 71 U.S. (4 Wall.) 2 (1866). Recognizing the importance of the case, the Court heard more than six days of oral argument. See Rehnquist, supra note 63, at 118.

[170] *Milligan*, 71 U.S. (4 Wall.) at 6–7; Rehnquist, supra note 63, at 89.

[171] *Milligan*, 71 U.S. (4 Wall.) at 6.

[172] Id.

[173] See Rehnquist, supra note 63, at 85–88 (noting by its rules, the tribunal required only a two-thirds majority vote for a death sentence).

[174] See id. at 100–02.

[175] Id. at 104.

[176] *Milligan*, 71 U.S. (4 Wall.) at 121. Early in the Civil War, Chief Justice Taney rebuked President Lincoln's unilateral claim to the power to suspend habeas corpus in *Ex parte Merryman*. 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9,487). Taney wrote alone as circuit judge, however, and therefore did not speak for the whole Court. For extensive discussion of *Merryman*, see Tyler, supra note 2, at 160–67.

[177] *Milligan*, 71 U.S. (4 Wall.) at 119 ("[I]t is the birthright of every American citizen when charged with crime, to be tried and punished according to law.").

the government's argument that the Bill of Rights constituted "peace provisions" that "like all other conventional and legislative laws and enactments, are silent amidst arms, and when the safety of the people becomes the supreme law."[178] Then, in an oft-quoted passage, the Court declared: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."[179] The opposite proposition, the Court declared, would lead "directly to anarchy or despotism."[180] Finally, the majority posited that "*within* the Constitution" the government has "all the powers granted to it, which are necessary to preserve its existence," rejecting the proposition that addressing the war required extra-constitutional actions.[181]

A concurring opinion by Chief Justice Chase joined by three Justices would have permitted Congress to authorize the military trial of civilians and therefore disagreed with just about every aspect of the core of the majority's holding.[182] Although the Chief Justice made clear that "[w]here peace exists the laws of peace must prevail," in his view, Congress could change that.[183] Further, he wrote,

> Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns.[184]

Then, taking a page from *Martin v. Mott*, Chief Justice Chase opined:

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[178] Id. at 20, 120–21.

[179] Id. at 120–21. In another passage, Justice Davis wrote for the Court: "The importance of the main question presented by this record cannot be overstated; for it involves the very framework of the government and the fundamental principles of American liberty." Id. at 109.

[180] Id. at 121.

[181] Id. (emphasis added); see also id. at 123 (declaring the jury trial right "a vital principle[] underlying the whole administration of criminal justice" that "cannot be frittered away on any plea of state or political necessity"). The Court also rejected the argument that the existence of a nationwide suspension had somehow rendered the trial legal. Suspension, the Court held, only legalizes detention; it has no bearing on the propriety of military versus civilian courts, nor does it legitimate the denial of standard constitutional protections in the criminal process. Id. at 124–26. For more discussion of this aspect of *Milligan*, see Tyler, supra note 2, at 173–74.

[182] See *Milligan*, 71 U.S. (4 Wall.) at 139 (Chase, C.J., concurring).

[183] Id. at 140.

[184] Id. at 139.

> Congress is but the agent of the nation, and does not the security of individuals against the abuse of this, as of every other power, depend on the intelligence and virtue of the people [in office] . . . and upon the frequency of elections, rather than upon doubtful constructions of legislative powers?[185]

In other words, although Congress had not authorized the tribunal that tried Milligan, had it done so, Milligan's conviction would have been constitutional.[186]

Just how significant is *Milligan* as precedent? It is hard to say. *Milligan* was not decided as the war waged on in any real sense. Confederate General Robert E. Lee formally surrendered to Union General Ulysses S. Grant at Appomattox Court House on April 9, 1865. *Milligan* was argued in March 1866, and the decision came down in April of that year.[187] Although some other Confederate generals took their time to follow Lee's example and President Johnson did not officially declare an end to the war until August 20, 1866, for all practical purposes, the war was over when the Supreme Court decided *Milligan*. Indeed, the majority opinion freely acknowledged as much. "During the late wicked Rebellion," the opinion reads, "the temper of the times did not allow that calmness in deliberation and discussion so necessary" to resolve the case.[188] But, it continued, "[*n*]*ow* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment."[189] Accordingly, it is not entirely clear that one can list *Milligan* as a true wartime/emergency decision.

Further, in the World War II decision *Ex parte Quirin*, the Supreme Court distinguished *Milligan* to the point that very little of it remained. For example, *Quirin* emphasized that Milligan "had never been a resident of any of the states in rebellion" and had "not be[en] a part of or associated with the armed forces of the enemy."[190] Thus, Milligan himself could not

[185] Id.

[186] Congress wasted little time in responding by authorizing military tribunals to do just that. For details, see Amanda L. Tyler, Suspension as an Emergency Power, 118 Yale L.J. 600, 652–55 (2009). The Supreme Court never confronted the question whether congressional authorization of military trials changed the constitutional calculus.

[187] Rehnquist, supra note 63, at 118, 128.

[188] *Milligan*, 71 U.S. (4 Wall.) at 109.

[189] Id.

[190] Ex parte Quirin, 317 U.S. 1, 45 (1942).

be classified as an unlawful combatant or "enemy belligerent" within the law of war, unlike the saboteurs in *Quirin*. Further, *Quirin* read *Milligan*'s "statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it"[191]—effectively limiting *Milligan*'s precedential value to its specific factual context. The Court also questioned the precedential value of *Milligan* in an important war on terrorism case discussed below.

World War II did, however, witness several decisions in which the Court rebuked government incursions on civil liberties despite the wartime context. This includes several decisions holding that the government could not target individuals solely for allegedly disloyal speech or actions.[192] Perhaps the most noteworthy was the Court's dramatic reversal of course between its decisions in *Minersville School District v. Gobitis* in 1940[193] and *West Virginia State Board of Education v. Barnette* in 1943.[194] After saying one thing at the doorstep of the war in *Gobitis*,[195] the Court held three years later in *Barnette* that the government could not force children to pledge allegiance to the flag.[196] In an oft-quoted passage, *Barnette* declared: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."[197] (Of course, within a few short years, the Court handed down several problematic Cold War-era First Amendment decisions, discussed above.[198])

There is also the Court's 1946 decision in *Duncan v. Kahanamoku*, which held unlawful the government's declaration of martial law in the Hawaiian Territory during the war.[199] In so doing, the Court vacated the convictions of two United States citizen-civilians who had been tried by

[191] Id.

[192] See, e.g., Taylor v. Mississippi, 319 U.S. 583, 589–90 (1943); Baumgartner v. United States, 322 U.S. 665, 666, 676–77 (1944); Hartzel v. United States, 322 U.S. 680, 683, 687 (1944).

[193] 310 U.S. 586 (1940).

[194] 319 U.S. 624 (1943).

[195] Writing for the Court in *Gobitis* over only one dissent, Justice Frankfurter posited that national unity advanced by forcing schoolchildren to say the pledge was "the basis of national security." 310 U.S. at 595.

[196] 319 U.S. at 642.

[197] Id.

[198] See supra text accompanying notes 163–64.

[199] 327 U.S. 304, 324 (1946).

military commissions for embezzlement and assault.[200] *Duncan* rejected outright the notion that such questions should be immune from judicial review.[201] As Chief Justice Stone observed in a concurring opinion, "executive action is not proof of its own necessity, and the military's judgment here is not conclusive that every action taken pursuant to the declaration of martial law was justified by the exigency."[202] (Notably, this was the same Chief Justice Stone who only three years earlier had written for the Court and deferred extensively to the military in *Hirabayashi*.)

Writing for the Court in *Duncan*, Justice Black opined that martial law represents the "antithesis" of our system of "[c]ourts and . . . procedural safeguards."[203] Applying rigorous scrutiny to the asserted need for martial law in Hawaii during the war, he found the government's case wanting:

> [M]ilitary trials of civilians charged with crime, especially when not made subject to judicial review, are so obviously contrary to our political traditions and our institution of jury trials in courts of law, that the tenuous circumstance offered by the Government can hardly suffice to . . . permit[] such a radical departure from our steadfast beliefs.[204]

At the same time, Justice Black distinguished the "well-established power of the military to exercise jurisdiction over members of the armed forces," as well as "enemy belligerents, prisoners of war, or others charged with violating the laws of war."[205] And just like that, although relying heavily on *Milligan*, the Court cited *Quirin* as good law, further calling into question the sweep of *Milligan* as precedent.[206] (In so doing, the Court also referenced *Moyer v. Peabody* as good law.[207])

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[200] Id. at 309–10, 324.

[201] Id. at 316–17.

[202] Id. at 336 (Stone, C.J., concurring).

[203] Id. at 322 (majority opinion).

[204] Id. at 317. Justice Black added that "[c]ourts and their procedural safeguards are indispensable to our system of government." Id. at 322.

[205] Id. at 313–14. Justice Black also excepted the situation in which the military establishes tribunals "as a part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function." Id. at 314.

[206] See id. at 322 (citing Ex parte Quirin, 317 U.S. 1, 19 (1942)).

[207] See id. at 314 & n.10 (citing Moyer v. Peabody, 212 U.S. 78 (1909)) (observing, among other things: "[n]or need we here consider the power of the military simply to arrest and detain civilians interfering with a necessary military function at a time of turbulence and danger from insurrection or war").

Duncan did not reach any constitutional issues, instead basing its holding upon a narrow reading of the Hawaiian Organic Act and concluding that the Act had not authorized the displacement of civil law on the Islands any more than absolutely necessary.[208] It is therefore questionable how significant a precedent the decision is. This being said, it stands as a rebuke of government assertions of wartime necessity. Indeed, Chief Justice Stone noted that the record clearly showed that, even as early as February 1942, "the civil courts were capable of functioning, and that trials of petitioners in the civil courts no more endangered the public safety than the gathering of the populace in saloons and places of amusement, which was authorized by military order."[209] That hardly sounds like deference.

For their part, the dissenters in *Duncan* argued that the majority was engaged in Monday-morning quarterbacking. As Justice Burton, joined by Justice Frankfurter, saw things:

> For a court to recreate a complete picture of the emergency is impossible. That impossibility demonstrates the need for a zone of executive discretion within which courts must guard themselves with special care against judging past military action too closely by the inapplicable standards of judicial, or even military, hindsight.[210]

Further, in a nod to the potential importance of the timing of *Duncan*, the dissent asked rhetorically whether the Court would have enjoined the trials in real time, suggesting it would not have done so.[211] History suggests the dissent was likely right on this score.[212]

Perhaps the most significant rebuke of an executive in wartime came during the Korean War in the *Steel Seizure Case*.[213] The cases involved the question whether President Truman could unilaterally respond to the likely impending strike of American steel workers or lockout by steel management by seizing the steel mills to keep them running.[214] Doing so, the President argued, was critical to support the war effort as well as the

[208] Id. at 314–15, 324.

[209] Id. at 337 (Stone, C.J., concurring).

[210] Id. at 343 (Burton, J., dissenting); see id. at 340 (observing that "[t]he Islands were a white-hot center of war ready to burst into flames").

[211] Id. at 357.

[212] See, e.g., Ex parte Quirin, 317 U.S. 1 (1942), discussed *supra* at text accompanying notes 165–68.

[213] Youngstown Sheet & Tube Co. v. Sawyer (*The Steel Seizure Case*), 343 U.S. 579 (1952).

[214] Id. at 582.

burgeoning nuclear arms race.[215] Based on *Martin v. Mott* and the *Prize Cases*, one could have predicted that Truman would come out on top. But he did not. When the steel companies sued the President in federal district court, they obtained a preliminary injunction.[216] After a brief stop at the U.S. Court of Appeals for the D.C. Circuit, where it obtained a stay, the government next sought review before judgment in the Supreme Court.[217] Less than two weeks after the district judge ruled against the government, the Supreme Court heard oral arguments on the merits of Truman's actions.[218]

Justice Robert Jackson apparently returned from the Justices' conference on the case to report to his law clerks that "the President got licked."[219] Multiple opinions resulted (no doubt due to the rushed decision), and the Court members announced the decision in a series of statements totaling two and a half hours.[220] Writing for the Court, Justice Black held that the President did not have authority to do what he did, rejecting the notion that such authority could be implied from the aggregate of executive powers granted in the Constitution.[221] As he phrased things, "[t]his is a job for the Nation's lawmakers, not for its military authorities."[222]

In a now-famous concurrence, Justice Jackson agreed that the President had acted *ultra vires*.[223] In his view, "[t]he purpose of the Constitution was not only to grant power, but to keep it from getting out of hand."[224] A rule that would grant the Executive free reign here would disserve the constitutional framework and the Founding generation's concern that "emergency powers would tend to kindle emergencies."[225] (For good measure, Justice Jackson reminded the reader of the Founding

[215] Id. at 582–83.

[216] Id. at 584.

[217] Id.

[218] Id.

[219] CivicsLiteracyProject, User Clip: #7 Rehnquist on "got licked," C-SPAN (May 27, 2020), https://www.c-span.org/video/?c4878018/user-clip-7-rehnquist-got-licked [https://perma.cc/25C4-RNC5].

[220] Joseph A. Loftus, Black Gives Ruling; President Cannot Make Law in Good or Bad Times, Majority Says, N.Y. Times, June 3, 1952, at 1, 23.

[221] *The Steel Seizure Case*, 343 U.S. at 587–88.

[222] Id. at 587.

[223] See id. at 655 (Jackson, J., concurring in the judgment and opinion of the Court); see also id. at 652 (arguing that "emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them").

[224] Id. at 640.

[225] Id. at 650.

generation's disdain for King George III's exercise of his prerogative powers.[226])

Three dissenters chided their colleagues for having their heads in the sand. "Those who suggest that this is a case involving extraordinary powers," they wrote, "should be mindful that these are extraordinary times."[227] The dissent viewed what Truman had done as no different than the exercise of other "protective" powers available to a president in wartime, including the power to dispatch troops ahead of a declaration of war by Congress.[228] Further, in their view, the fact that Truman had notified Congress of what he planned to do, and that Congress had done nothing in response, was close enough to congressional approval.[229]

The *Steel Seizure Case* is noteworthy for second-guessing a wartime president in the midst of war and rejecting his assertions about his needs to prosecute the same. But the Court's decision to grant the Executive no leeway here is also somewhat curious. As one of my students once put it, why is it that when the Court finally decided to enforce the Bill of Rights aggressively during wartime, it did so to protect property rights, as opposed to individual liberty?[230] Regardless, the decision stands in considerable tension with the deference model that had long controlled in wartime. Why?

There are many possible reasons, one of which could be that with the onset of the Cold War, many Court members understood war to take on a new and boundless dimension such that the Court itself should evolve too. Justice Jackson's opinion suggests that this concern weighed heavily on his mind. (Perhaps his time in Nuremberg also influenced his thinking.) In all events, the decision handed a wartime President a major loss. In its wake, moreover, the Court took a much more protective line on First Amendment speech rights during the Vietnam War.[231]

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[226] See id. at 641.

[227] Id. at 668 (Vinson, C.J., dissenting).

[228] See id. at 685.

[229] Id. at 675–77.

[230] It is worth noting that here, the Court did not put the seizures off the table; the Court merely said that the power to order the seizures rested with Congress. Justice Douglas defended the Court's opinion by writing that although he recognized putting the relevant decision to Congress could lead to delay due to the wheels of legislation turning slowly, maybe that was the entire point in writing a constitution that vested most of the war-making power in that body. See id. at 633 (Douglas, J., concurring); see also Ely, supra note 25, at 3–5 (arguing that this is precisely what the Founding generation had in mind).

[231] See, e.g., Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (narrowing the scope of speech for which one may be prosecuted to that which is likely to incite "imminent lawless action");

Fast-forward to the war on terrorism. Many cite the post-September 11, 2001, decisions in *Hamdi v. Rumsfeld*[232] and *Boumediene v. Bush*[233] as noteworthy rebukes of a wartime executive. For different reasons, the story is somewhat more complicated. First, take *Hamdi*. As the case came before the Court, the Executive claimed the right to hold a United States citizen captured in Afghanistan, who was allegedly fighting with the Taliban, as a so-called "enemy combatant" on American soil for as long as the war on terrorism lasted and without any hearing.[234] A fractured Court rebuked the Executive's most sweeping arguments, yes. But in the end, it largely gave the President a win.

Justice O'Connor wrote for a plurality and delivered the Court's judgment. On the one hand, she relied on the *Steel Seizure Case* for the proposition that "[w]e have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[235] Further, she posited that Hamdi was entitled to a hearing to challenge his classification as an enemy combatant.[236]

On the other hand, Justice O'Connor concluded that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant."[237] As I have explored at considerable length in other work, this proposition flies in the face of the core purpose of the Suspension Clause.[238] Whether or not one agrees with this conclusion, once the dust settled after *Hamdi*, the Executive had won most of what it sought. Under the plurality opinion, the government was left with extremely broad authority to detain United States citizens for asserted national security purposes without criminal trial and without a suspension of habeas corpus. The only limitations on that power put in place by *Hamdi* constituted a hearing, which, as envisioned by the plurality, could occur

Bond v. Floyd, 385 U.S. 116, 137 (1966) (holding that public office may not be denied to one opposed to the draft); Healy v. James, 408 U.S. 169, 187 (1972) (holding that a student organization that in part advocated for violence could not be denied recognition by a public university for that alone); see also Stone, supra note 29, at 243–44 (listing other examples).

[232] 542 U.S. 507 (2004) (plurality opinion).

[233] 553 U.S. 723 (2008).

[234] *Hamdi*, 542 U.S. at 510–11 (plurality opinion).

[235] Id. at 536.

[236] Id. at 526–27.

[237] Id. at 519.

[238] See generally Tyler, supra note 2, at 163, 183 (discussing the English Habeas Corpus Act, which required timely trial on criminal charges or release of those detained, and its influence on the Suspension Clause); Amanda L. Tyler, The Forgotten Core Meaning of the Suspension Clause, 125 Harv. L. Rev. 901, 998, 1005 (2012) (same).

before a military tribunal, include hearsay evidence, and put all the relevant burdens on the detainee.[239] Further, in her opinion, Justice O'Connor relied upon *Quirin* as superseding *Milligan* to hold that the law of war may be applied to a citizen detained or tried on domestic soil.[240] To the extent that *Milligan* is inconsistent with this proposition, she wrote, it is not the most recent and controlling precedent—*Quirin* is.[241] There was no mention in her opinion of *Milligan*'s grand rhetoric about the "birthright" of every American being a jury trial.[242]

Boumediene v. Bush is not that different, at least in terms of its real-world impact. It involved the question whether non-citizen detainees in the war on terrorism held at the United States Naval Base at Guantanamo Bay, Cuba, had a constitutional right to challenge the legality of their detentions.[243] Writing for five Justices, Justice Kennedy held yes. Going further than what the *Hamdi* Court had provided the citizen-detainee there, Justice Kennedy held that the detainees have the right under the Suspension Clause to challenge their classification as enemy combatants before an Article III court, not merely a military tribunal.[244] But Justice Kennedy offered little guidance to the lower courts in the opinion as to how those hearings should unfold. Post-*Boumediene*, the D.C. Circuit (where all relevant habeas cases have landed on appeal) has failed to order the release of a single detainee. There have been releases and transfers of

[239] See *Hamdi*, 542 U.S. at 533–34, 538 (plurality opinion).

[240] See id. at 522–23.

[241] See id. Justices Scalia and Stevens dissented. In their view, because there was no applicable suspension of habeas corpus in place, the government's only options were to charge Hamdi with a crime or let him go. See id. at 573–75 (Scalia, J., dissenting, joined by Stevens, J.).

[242] With the addition of Justice Thomas, who would have granted the Executive everything for which it asked in the case, a Court majority also rejected the argument advanced by Hamdi that the Non-Detention Act ("NDA"), which barred the imprisonment or detention of citizens "except pursuant to an Act of Congress," prohibited his detention separate and apart from his constitutional arguments. See id. at 517 (plurality opinion). The NDA was enacted to rebuke the mass incarceration of Japanese Americans during World War II and prevent something similar from happening again. See Pub. L. No. 92-128, 85 Stat. 347 (1971) (codified in scattered sections of the U.S. Code); 18 U.S.C. § 4001(a) (2000). The *Hamdi* plurality concluded that the 2001 Authorization of Use of Military Force, under which the government claimed the authority to detain Hamdi, triggered the NDA's exception. 542 U.S. at 517 (plurality opinion); see also Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)).

[243] Boumediene v. Bush, 553 U.S. 723, 732 (2008).

[244] Id. at 732, 786.

Guantanamo detainees, but not on account of any order of the D.C. Circuit (and only a single one from a district court order).[245]

* * *

As this broad survey has revealed, over the course of American history, more often than not, judicial review of executive actions in the midst of wartime and emergencies has been marked by extensive deference to the executive and/or a judicial reluctance to engage with such matters. There have been exceptions—the *Steel Seizure Case* and some First Amendment decisions. But they are just that—*exceptions*. A betting person would predict that in most confrontations between an emergency executive and civil liberties, when the dust settles, the executive will prevail.

At least that was the case until the COVID-19 pandemic.

II. JUDICIAL REVIEW DURING THE COVID-19 PANDEMIC

In late 2019 into early 2020, COVID-19, an infectious disease caused by the SARS-CoV-2 virus, spread rapidly, launching a global pandemic.[246] Before long, significant portions of the United States were sheltering in place under government orders. Mask mandates and capacity limitations governing gatherings and businesses followed. Even with vaccines being developed at record speed, it was not until 2021 that significant vaccination began in the United States. By the onset of winter 2021–2022, over 800,000 deaths from COVID-19 had been recorded in

[245] A judge on the U.S. District Court for the District of Columbia ordered the release of a detainee in the fall of 2021 over the opposition of the government. See Spencer S. Hsu, Judge Rules Afghan Held in Guantánamo Illegally, Wash. Post, Oct. 22, 2021, at A1. Later, the government repatriated the Afghan. See Carol Rosenberg, U.S. Repatriates Afghan Whose Guantánamo Detention Was Unlawful, N.Y. Times (June 24, 2022), https://www.nytimes.com/2022/06/24/us/politics/guantanamo-afghan-prisoner-released.html [https://perma.cc/99JX-EEFH]. Cf. Esmail v. Obama, 639 F.3d 1075, 1077–78 (D.C. Cir. 2011) (Silberman, J., concurring) (remarking on the "infinitely greater downside risk to our country, and its people, of an order releasing a detainee who is likely to return to terrorism" as explanation for why he "doubt[s] any of [his] colleagues will vote to grant a petition if he or she believes that it is somewhat likely that the petitioner is an al Qaeda adherent or an active supporter").

[246] The World Health Organization declared COVID-19 a global pandemic on March 11, 2020. WHO, WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020), https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 [https://perma.cc/N6GZ-NLWA].

the United States alone, far more than the total estimated deaths in the country from the 1918 flu epidemic.[247]

A range of lawsuits challenging various government orders addressing the pandemic followed, with a significant number making their way to the Supreme Court on an expedited basis through its emergency, or "shadow," docket.[248] Given the Court's long track record of deferring to the political branches in times of emergency, one would have predicted that few such challenges to government orders issued in the name of public health during this trying time would succeed. Such a prediction would have been wrong.

This Part walks through the areas in which the Court has confronted regulations issued and accommodations made or not made in the face of the pandemic. As will be shown, although the Court has been surprisingly active in certain contexts, it has not been consistent.

A. Religious Worship

We begin with an area in which the Court moved away from a deferential role during the pandemic. Specifically, as the pandemic has continued, the Court has taken an increasingly active role in second-guessing government orders that imposed various limitations upon religious worship. Initially, the Court rebuffed such challenges, albeit over the recorded dissents of four Justices. Take the May 29, 2020, order in *South Bay United Pentecostal Church v. Newsom*.[249] The case involved a challenge to the California governor's order setting temporary capacity limitations for public gatherings, including a specific limitation on places of worship. The order required a limit on attendance to twenty-five percent of building capacity or a maximum of one hundred attendees.[250]

[247] Julie Bosman, Amy Harmon, Albert Sun, Chloe Reynolds & Sarah Cahalan, Covid Deaths in the United States Surpass 800,000, N.Y. Times (Dec. 15, 2021), https://www.nytimes.com/2021/12/15/us/covid-deaths-united-states.html [https://perma.cc/VV6Q-P78U]; Shu Ting Liang, Lin Ting Liang & Joseph M. Rosen, Covid-19: A Comparison to the 1918 Influenza and How We Can Defeat It, 97 Postgrad Med. J. 273 (2021). Researchers believe that the reported statistics significantly undercount COVID-19 deaths. See, e.g., Cecelia Smith-Schoenwalder, Analysis: Half of Global Coronavirus Deaths Unreported, U.S. News (May 6, 2021, 1:10 PM), https://www.usnews.com/news/health-news/articles/2021-05-06/analysis-half-of-global-coronavirus-deaths-unreported [https://perma.cc/44GT-TJXS].

[248] The posture of these cases raises special issues because the merits come wrapped up in traditional equitable questions about whether a stay is warranted or not. As explored below, more often than not, however, the Court's decisions seem to have been largely merits-driven.

[249] 140 S. Ct. 1613 (2020).

[250] Id. at 1613 (Roberts, C.J., concurring in denial of application for injunctive relief).

When a church sought temporary injunctive relief, arguing that the law discriminated against places of worship in violation of the First Amendment, the Court declined to give it.

Joining Justices Ginsburg, Breyer, Sotomayor, and Kagan in denying relief, Chief Justice Roberts observed that at the relevant point in time, there was "no known cure, no effective treatment, and no vaccine" for COVID-19.[251] Likewise, he noted, "[b]ecause people may be infected but asymptomatic, they may unwittingly infect others."[252] Noting that injunctive relief is only appropriate where "'the legal rights at issue are indisputably clear' and, even then, 'sparingly and only in the most critical and exigent circumstances,'" he did not believe that the church had met its burden for three reasons.[253] First, "[s]imilar or more severe restrictions apply to comparable secular gatherings," which he defined as lectures, concerts, and other events in which "large groups of people gather in close proximity for extended periods of time."[254] Second, the "dynamic and fact-intensive" nature of the issues before the Court came during a time when government officials "are actively shaping their response to changing facts on the ground."[255] Finally, relying on *Jacobson v. Massachusetts*[256] and other precedents, Chief Justice Roberts observed that the political branches are entrusted with protecting "[t]he safety and the health of the people,"[257] and the courts should grant "especially broad" latitude to such branches when acting "in areas fraught with medical and scientific uncertainties."[258]

Justice Kavanaugh, joined by Justices Thomas and Gorsuch, dissented.[259] His principal disagreement with the Chief Justice turned on what constituted comparable settings for purposes of California's capacity limitations. In Justice Kavanaugh's view, comparable settings included not just concert and theater venues, but also secular "factories,

[251] Id.

[252] Id.

[253] Id. (quoting Stephen M. Shapiro, Kenneth S. Geller, Timothy S. Bishop, Edward A. Hartnett & Dan Himmelfarb, Supreme Court Practice § 17.4, at 17-9 (11th ed. 2019)).

[254] Id. (contrasting "dissimilar activities" such as "grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods").

[255] Id. at 1613–14.

[256] 197 U.S. 11 (1905).

[257] *S. Bay Pentecostal*, 140 S. Ct. at 1613 (quoting *Jacobson*, 197 U.S. at 38).

[258] Id. (quoting Marshall v. United States, 414 U.S. 417, 427 (1974)).

[259] See id. at 1614 (Kavanaugh, J., dissenting from denial of application for injunctive relief, joined by Thomas & Gorsuch, JJ.).

offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries," which were not subject to the same limitations under government order.[260] In the dissent's view, this under-inclusiveness rendered the order discriminatory against religious worship. It therefore could only survive judicial scrutiny if its distinctions satisfied strict scrutiny—if they were "'justified by a compelling governmental interest' and 'narrowly tailored to advance that interest.'"[261] In his view, "[t]he State . . . has substantial room to draw lines, especially in an emergency. But as relevant here, the Constitution imposes one key restriction on that line-drawing: The State may not discriminate against religion."[262] Opining that the State's order did just that, he would have granted the church relief.

Two months later, in *Calvary Chapel Dayton Valley v. Sisolak*,[263] the Court again denied injunctive relief to a church challenging capacity limitations, 5-4. Justice Alito's dissent observed that the Nevada order prohibiting houses of worship from admitting more than fifty persons, while separately permitting casinos and other facilities to admit up to fifty percent of their maximum occupancy, discriminated against religion.[264] This followed, he argued, because casinos raise the same, if not more, public health concerns as houses of worship.[265] It did not matter that certain other secular facilities, like museums and zoos, did not enjoy the same fate as casinos under the State's order.[266] In Justice Alito's view, if any comparable secular facility was permitted greater capacity under the relevant order, then houses of worship were being disfavored.[267] Nor, in his view, was any deference owed to the state executive:

[260] Id.

[261] Id. (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531–32 (1993)).

[262] Id. at 1615.

[263] 140 S. Ct. 2603 (2020).

[264] Id. at 2604–05 (Alito, J., dissenting from denial of application for injunctive relief, joined by Thomas & Kavanaugh, JJ.).

[265] For example, Justice Alito noted that fifty percent capacity at Las Vegas casinos could encompass "thousands of patrons, and the activities that occur in casinos frequently involve far less physical distancing and other safety measures" than those purportedly taken by the petitioning church. Id. at 2605.

[266] Id. at 2606.

[267] Justice Alito noted that bowling alleys were also given preferential treatment. See id. at 2605.

> For months now, States and their subdivisions have responded to the pandemic by imposing unprecedented restrictions on personal liberty, including the free exercise of religion. This initial response was understandable. In times of crisis, public officials must respond quickly and decisively to evolving and uncertain situations. At the dawn of an emergency—and the opening days of the COVID-19 outbreak plainly qualify—public officials may not be able to craft precisely tailored rules. Time, information, and expertise may be in short supply, and those responsible for enforcement may lack the resources needed to administer rules that draw fine distinctions. Thus, at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules . . . .
>
> But a public health emergency does not give Governors and other public officials *carte blanche* to disregard the Constitution for as long as the medical problem persists. As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.[268]

After highlighting the passage of four months since the governor's initial declaration of a state of emergency, Justice Alito concluded that the order could not satisfy the application of strict scrutiny.[269] (He also emphasized that *Jacobson* did not involve any religious freedom claims and was therefore inapposite as precedent.[270])

Justice Gorsuch also dissented from the denial of injunctive relief, arguing that the case was "simple" and that "there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel."[271] Justice Kavanaugh in turn complained that, once again, his colleagues were permitting a law to stay in effect that applied different rules to religious worship than to secular counterpart activities without the required "compelling reason."[272] He likewise observed that although

[268] Id. at 2604–05.

[269] See id. at 2605.

[270] Id. at 2608. Justice Alito separately concluded that there were free speech problems with the order. Id. at 2605.

[271] Id. at 2609 (Gorsuch, J., dissenting from denial of application for injunctive relief).

[272] Id. at 2609, 2612 (Kavanaugh, J., dissenting from denial of application for injunctive relief) ("[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." (quoting Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 884 (1990))). Justice Kavanaugh

state and local governments enjoy broad authority to manage the pandemic, COVID-19 "is not a blank check" permitting discrimination against religion:

> There are certain constitutional red lines that a State may not cross even in a crisis. Those red lines include racial discrimination, religious discrimination, and content-based suppression of speech. This Court's history is littered with unfortunate examples of overly broad judicial deference to the government when the government has invoked emergency powers and asserted crisis circumstances to override equal-treatment and free-speech principles. The court of history has rejected those jurisprudential mistakes and cautions us against an unduly deferential judicial approach, especially when questions of racial discrimination, religious discrimination, or free speech are at stake.[273]

By November 2020, the tide had turned and suddenly the dissenters held sway. One major factor in the shift came with the replacement of Justice Ginsburg by Justice Barrett, who joined the prior dissenters down the line. Thus, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, she joined the four dissenters to enjoin regulations issued by New York's governor setting strict limits on attendance at religious services in areas designated as high risk for transmission of COVID-19.[274] The majority cited the fact that the governor's orders permitted higher capacities in so-called "essential" businesses, such as stores, and unlimited capacity in other non-essential facilities in zones posing lesser risks as demonstrating the law was not neutral toward religious worship, on which it placed very strict attendance caps in both zones.[275]

The lack of neutrality called for the application of strict scrutiny. Although the Court agreed that "[s]temming the spread of COVID-19 is unquestionably a compelling interest," it concluded the regulations were not narrowly tailored and therefore violated the Free Exercise Clause of

added that "no precedent suggests that a State may discriminate against religion simply because a religious organization does not generate the economic benefits that a restaurant, bar, casino, or gym might provide." Id. at 2614.

[273] Id. at 2614–15.

[274] 141 S. Ct. 63, 65–66 (2020) (per curiam). The Court's opinion also applied to a companion case, *Agudath Israel of America v. Cuomo*. Under the governor's order, in so-called "red" zones, no more than ten persons were permitted to attend a religious service. In "orange" zones, up to twenty-five persons (but no more) could attend a religious service. Id.

[275] Id. at 66.

the First Amendment.[276] In the majority's view, the restrictions ordered by the governor, in addition to being "much tighter than those adopted by many other jurisdictions hard-hit by the pandemic," were "far more severe than has been shown to be required to prevent the spread of the virus."[277] Here, the Court relied upon findings from the district court that no outbreaks had occurred at the plaintiff church since its reopening and observed that other "less restrictive rules" could "minimize the risk to those attending religious services."[278] The majority concluded: "Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten."[279]

Justice Gorsuch wrote separately to underscore that "[g]overnment is not free to disregard the First Amendment in times of crisis."[280] Any deference owed to orders issued at the outset of the pandemic, he added, was no longer appropriate given the "prospect of entering a second calendar year living in the pandemic's shadow."[281] "Even if the Constitution has taken a holiday," Justice Gorsuch opined, "it cannot become a sabbatical."[282] Further, he cautioned against "a particular judicial impulse to stay out of the way in times of crisis."[283] As he put it, "we may not shelter in place when the Constitution is under attack. Things never go well when we do."[284]

Also concurring, Justice Kavanaugh recognized that "the COVID-19 pandemic remain[ed] extraordinarily serious and deadly."[285] It followed, he wrote, that courts "must afford substantial deference to state and local authorities about how best to balance competing policy considerations

[276] Id. at 67.

[277] Id.

[278] Id.

[279] Id. at 68. The per curiam opinion separately rejected the argument that improving conditions had rendered the matter effectively moot, noting the "constant threat" that the relevant areas could again fall under tight restrictions on capacity. See id. at 68–69. The State's position in the case was not helped by the fact that government officials had made statements "targeting the 'ultra-Orthodox [Jewish] community.'" Id. at 66 (quoting Agudath Israel of Am. v. Cuomo, 980 F.3d 222, 229 (2d Cir. 2020) (Park, J., dissenting)).

[280] Id. at 69 (Gorsuch, J., concurring).

[281] Id. at 70.

[282] Id.

[283] Id. at 71.

[284] Id. Justice Gorsuch reiterated the limitations Justice Alito had noted respecting *Jacobson* as precedent. Id.

[285] Id. at 73 (Kavanaugh, J., concurring).

during the pandemic."[286] "But," he added, "judicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised."[287]

Finding himself now in the minority, Chief Justice Roberts acknowledged that the capacity limits for houses of worship were severe—they permitted only ten or twenty-five people, depending on the relevant zone—but he believed it unnecessary for the Court to decide the petition in light of the governor's revisions to the relevant regulations, which had loosened the capacity restrictions.[288] He also challenged the notion that his fellow dissenters were "cutting the Constitution loose during a pandemic,"[289] observing that instead, "[t]hey simply view the matter differently after careful study and analysis reflecting their best efforts to fulfill their responsibility under the Constitution."[290]

Two additional dissents followed. Joined by Justices Sotomayor and Kagan, Justice Breyer cited the factual findings of the district court that distinguished the risks posed by religious gatherings with respect to the operation of essential businesses, like grocery stores and banks.[291] Citing scientific and medical experts, he noted that "the risk of transmission is higher when people are in close contact with one another for prolonged periods of time, particularly indoors or in other enclosed spaces"—as, for example, when congregating for religious services.[292] Further, he argued, the courts should grant "broad" discretion to elected officials acting where "the need for action is immediate, the information likely limited, the making of exceptions difficult, and the disease-related circumstances rapidly changing."[293]

Joined by Justice Kagan, Justice Sotomayor also challenged the majority's classification of certain businesses as comparable to religious worship.[294] Better comparisons in her view included lectures, concerts, and other gatherings that bring together people in close proximity for extended time periods, all of which were governed by similar or more

[286] Id. at 74.
[287] Id.
[288] Id. at 75 (Roberts, C.J., dissenting).
[289] Id. (quoting Justice Gorsuch's concurring opinion).
[290] Id.
[291] Id. at 76 (Breyer, J., dissenting, joined by Sotomayor & Kagan, JJ.).
[292] Id. at 78.
[293] Id.
[294] See id. at 79–80 (Sotomayor, J., dissenting, joined by Kagan, J.).

severe restrictions.[295] Concluding, she observed, "Justices of this Court play a deadly game in second guessing the expert judgment of health officials about the environments in which a contagious virus, now infecting a million Americans each week, spreads most easily."[296]

As the months went on, although the Court also declined to grant relief in a case involving the shuttering of Kentucky schools in December 2020,[297] with the new year and the launch of vaccines against COVID-19 in the United States, government orders limiting religious gatherings came under increasing skepticism at the high court. Two cases out of California illustrate the point. First, *South Bay United Pentecostal Church v. Newsom* returned to the Court in February 2021.[298] At this point, the church challenged California's ban in certain areas of all indoor worship services, its twenty-five percent capacity limitation on indoor worship services in other areas, and its ban on singing and chanting during indoor services.[299] The Court enjoined the State from enforcing the first prohibition while leaving the latter two regulations in place for the time being.[300] Justices Thomas and Gorsuch would have granted the church all of the relief sought.[301] And Justice Alito almost went as far.[302] Chief Justice Roberts and Justices Kavanaugh and Barrett were the only Justices to vote for the Court's split-the-baby outcome. Writing for himself, the Chief Justice reiterated that "significant deference" is owed to government actors managing public health but believed that a total ban on indoor worship was the product of "insufficient appreciation or consideration of the interests at stake."[303] "Deference, though broad," he

[295] Id. at 79.

[296] Id. Justice Sotomayor also argued that any statements made by the governor directed at a particular religion were irrelevant, noting that President Trump's extensive record of anti-Muslim remarks were given no weight by the Court in *Trump v. Hawaii*. See id. at 80.

[297] See Danville Christian Acad., Inc. v. Beshear, 141 S. Ct. 527, 528 (2020). The relevant governor's order was set to expire any day and, on its face, applied "equally to secular schools and religious schools." Id. at 527. Justices Alito and Gorsuch dissented from the denial of application to vacate stay. See id. at 528 (Alito, J., dissenting); id. at 528–30 (Gorsuch, J., dissenting). Also in December, the Court remanded a case out of Colorado for reconsideration in light of *Roman Catholic Diocese of Brooklyn*. See High Plains Harvest Church v. Polis, 141 S. Ct. 527, 527 (2020). Justices Breyer, Sotomayor, and Kagan dissented. Id.

[298] 141 S. Ct. 716 (2021).

[299] Id. at 716.

[300] Id.

[301] See id.

[302] See id.

[303] Id. at 716–17 (Roberts, C.J., concurring in the partial grant of application for injunctive relief).

wrote, "has its limits."[304] Further, he noted, it is because judges have life tenure that "the Constitution . . . entrusts the protection of the people's rights to the Judiciary."[305]

Arguing in favor of granting broader relief, Justice Gorsuch reiterated ground he had covered before. He challenged the relevant regulations as not neutral (noting, for example, that hairstylists and manicurists were given greater leeway, and that music, film, and television studios might be free of the singing ban) and viewed the State's justifications as predicated upon overgeneralizations about how individuals worship.[306] As for deference, Justice Gorsuch recognized that "[o]f course [the Justices] are not scientists," but, he noted, the pandemic "crisis" had entered its second year and a second round of major religious holidays.[307] It followed that no longer could the State "defend extreme measures with claims of temporary exigency, if it ever could."[308] Justice Gorsuch then added: "Even in times of crisis—perhaps *especially* in times of crisis—we have a duty to hold governments to the Constitution."[309]

The Court's partial grant of relief in the case triggered a fiery dissent from Justice Kagan. She opened by stating that "Justices of this Court are not scientists. Nor do we know much about public health policy."[310] Nonetheless, in what she viewed as an "alarming" turn of events, the Court had taken it upon itself to override "the judgments of experts about how to respond to a raging pandemic."[311] She believed that the State's regulations were neutral with respect to religion, citing examples of what she deemed the most closely comparable facilities and events that remained banned under California's regulations, such as concerts, political meetings, and movies.[312] She also relied heavily on scientific testimony in the district court distinguishing the risks posed by religious

[304] Id. at 717.

[305] Id. Justice Barrett concurred in the result, emphasizing the uncertainty of the existing record in the case. See id. (Barrett, J., concurring in the partial grant of application for injunctive relief, joined by Kavanaugh, J.).

[306] See id. at 717–20 (statement of Gorsuch, J., joined by Thomas & Alito, JJ.). Curiously, Justice Alito joined Justice Gorsuch's opinion in full, despite issuing a separate statement saying that he was not prepared to grant the church the entirety of the relief that it sought. See id. at 716 (mem.).

[307] Id. at 718, 720 (statement of Gorsuch, J., joined by Thomas & Alito, JJ.).

[308] Id. at 720.

[309] Id. at 718.

[310] Id. at 720 (Kagan, J., dissenting, joined by Breyer & Sotomayor, JJ.).

[311] Id.

[312] Id. at 721.

worship from those posed by, for example, shopping in retail stores.[313] Criticizing the Court for "treating unlike cases, not like ones, equivalently," Justice Kagan called the pandemic "the worst public health crisis in a century" and predicted that the Court's "foray into armchair epidemiology cannot end well."[314]

By the time the second California case came to the Court in April 2021, the Chief Justice had switched camps. In *Tandon v. Newsom*, a Court majority enjoined operation of state-ordered capacity limits on in-home religious gatherings.[315] The fact that the State permitted retail stores, hair salons, movie theaters, and restaurants greater capacities doomed its case, as did the lower court's apparent failure to conclude that such activities posed lesser risks of spread of the disease.[316] Writing for the same three dissenters, Justice Kagan again challenged the comparisons as inapt ("the law does not require that the State equally treat apples and watermelons") and challenged the assertion that lower court findings did not support the State's distinctions between different activities.[317]

As a review of these cases shows, by Spring 2021, the Court routinely applied strict scrutiny to limitations on religious worship during the pandemic and increasingly concluded that such limitations no longer survived such scrutiny. But the Court was not solely active in the context of religious worship.

B. Eviction Moratoriums

To address the staggering economic fallout from the pandemic, both localities and the federal government adopted various measures, including declaring moratoriums on evictions. These too ran into trouble in the Supreme Court.

The first such application came to the Court in June 2021. It pertained to the issuance of a nationwide eviction moratorium by the Centers for

[313] Id.

[314] Id. at 722, 723. Justice Kagan included an especially biting passage in a footnote, where she noted that "no court with any sense of modesty" could label California's regulations more severe than necessary to combat the pandemic given that at that time "California's hospitals [we]re near capacity, and over 3,500 state residents [had] perished from the virus" in the prior week alone. Id. at 722 n.2.

[315] 141 S. Ct. 1294, 1296 (2021) (per curiam).

[316] Id. at 1297. The state's order limited such gatherings to three households. Id.; see also id. at 1296 (positing that government regulations that "treat *any* comparable secular activity more favorably than religious exercise" trigger strict scrutiny).

[317] Id. at 1298 (Kagan, J., dissenting, joined by Breyer & Sotomayor, JJ.).

Disease Control and Prevention ("CDC").[318] A group of realtors challenged the order, arguing that it exceeded the CDC's authority. Four Justices (Thomas, Alito, Gorsuch, and Barrett) would have granted the realtors the relief that they sought—namely, to vacate a stay of the district court's order holding the moratorium unlawful.[319] But Justice Kavanaugh explained that with the moratorium ending "in only a few weeks," he thought it better to let things stand, even though he agreed that the CDC's order exceeded its authority.[320] Delay, he wrote, "will allow for additional and more orderly distribution of the congressionally appropriated rental assistance funds."[321]

By August, the needle had moved. First, in *Chrysafis v. Marks*, by a vote of 6-3, the Court enjoined the application of Part A of New York's COVID Emergency Eviction and Foreclosure Prevention Act.[322] As the Court majority described it, Part A permitted a tenant to self-certify that they are suffering financial hardship.[323] In such cases, Part A "generally precludes a landlord from contesting that certification and denies the landlord a hearing."[324] Such a scheme, the majority wrote, "violates the Court's longstanding teaching that ordinarily 'no man can be a judge in his own case' consistent with the Due Process Clause."[325]

Justice Breyer, joined by Justices Sotomayor and Kagan, dissented. He noted that the law being challenged was only slated to remain in effect for less than three weeks.[326] Further, he did not believe the landlords' position to be "indisputably clear," the required standard for the Court to award injunctive relief in the case's posture.[327] This was true, in his view, because the law merely delayed a landlord's ability to seek an eviction (and even then, only for the few remaining weeks and subject to several

[318] See Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2320, 2320 (2021).
[319] Id. at 2320.
[320] Id. at 2320–21.
[321] Id. at 2321 (Kavanaugh, J., concurring).
[322] 141 S. Ct. 2482, 2482 (2021).
[323] Id.
[324] Id.
[325] Id. (quoting In re Murchison, 349 U.S. 133, 136 (1955)). The Court's order noted that another New York law, the Tenant Safe Harbor Act, provided another avenue of relief to tenants experiencing financial hardship due to the pandemic. See id. at 2482–83.
[326] Id. at 2483 (Breyer, J., dissenting from grant of application for injunctive relief, joined by Sotomayor & Kagan, JJ.).
[327] Id.

exceptions).[328] As he also noted, New York was in the process of distributing some two billion dollars in federal tenant assistance and allowing those payments to be distributed would avoid unnecessary evictions.[329] Finally, channeling the Chief Justice's concurrence in the first round of *South Bay United Pentecostal Church*, the dissent stressed the importance of affording New York "'especially broad' latitude 'to act in areas fraught with medical and scientific uncertainties.'"[330] Stressing that the state legislature "does not enjoy unlimited discretion" in responding to the pandemic, the dissent nonetheless emphasized the body was "responsible for responding to a grave and unpredictable public health crisis," which tipped the scales in the State's favor in its view.[331]

Just weeks later, the CDC's moratorium returned to the high court. The realtors leveled the same challenge to the scope of the CDC's statutory authority to issue a nationwide moratorium on evictions in areas especially hard hit by the pandemic where tenants could make a showing of financial hardship.[332] Because a majority of six Justices believed the realtors were "virtually certain to succeed on the merits" on appeal, the Court granted their application to enforce the realtors' win in the district court.[333]

Relevant to the majority was the fact that Congress had initially enacted an eviction moratorium at the outset of the pandemic applicable to properties with federal ties.[334] When it expired, the CDC issued a broader nationwide moratorium, backed by criminal penalties on violators.[335] Congress then stepped in to extend the CDC's order for one month at the end of 2020, after which the CDC again acted to extend the moratorium via administrative order, relying on a provision in the Public Health Service Act, extending it several times in the months that followed.[336]

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[328] Id.

[329] Id. at 2484. Although much of this reasoning reflected a similar approach taken by Justice Kavanaugh in *Alabama Ass'n of Realtors* just weeks earlier, Justice Kavanaugh voted with the majority in this case.

[330] Id. (quoting Marshall v. United States, 414 U.S. 417, 427 (1974)).

[331] Id.

[332] Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486 (2021) (per curiam).

[333] Id.

[334] See id.

[335] Id.

[336] Id. at 2487. See 58 Stat. 703 (codified as amended at 42 U.S.C. § 264(a)). The relevant provision, dating back to 1944, states:

The problem in the majority's view was that the CDC had acted "in reliance on a decades-old statute that authorizes it to implement measures like fumigation and pest extermination" and "[i]t strain[ed] credulity" to read the statute to permit the far more consequential action taken by the CDC in its moratorium order.[337] This followed for several reasons. First, the Court believed that the statute was best read to permit only limited interventions by the CDC akin to those listed in the second part of the statutory passage—namely, measures that directly prevented "the interstate spread of disease by identifying, isolating, and destroying the disease itself" as opposed to measures that indirectly may or may not impact the spread of the disease.[338] Second, the Court relied on precedent for the proposition that if Congress meant to authorize the exercise of powers with such "vast 'economic and political significance,'" it would have been far more clear.[339] (This argument would return in January 2022 when the Court reviewed another agency's regulation establishing a nationwide employer vaccine and testing and masking requirements.[340]) Troubled by what it viewed as the CDC's limitless reading of the governing statute, the Court cited *Youngstown Sheet & Tube Co. v. Sawyer* (*The Steel Seizure Case*) and highlighted that the Court there had been unmoved by arguments that such measures were "necessary to avert a national catastrophe," where Congress had likewise declined to authorize the action in question.[341]

> The Surgeon General, with the approval of the [Secretary of Health and Human Services], is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.

Id.

[337] Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486 (2021) (per curiam).

[338] Id. at 2488.

[339] Id. at 2489 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)). In addition, the Court noted that the moratorium "intrudes" into an area that is typically the domain of state law—another reason it believed Congress should speak to such circumstances specifically. Id.

[340] See infra notes 345–76.

[341] Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021) (per curiam) (quoting 343 U.S. 579, 582 (1952)).

The same three Justices dissented. Justice Breyer questioned the conclusion that the CDC had acted unlawfully, particularly given that its order only applied in regions with "skyrocketing rates" of COVID-19 infections driven by the then-dominant Delta variant.[342] Further, the dissent read the Public Health Service Act to give the CDC expansive authority to address matters that it determines are essential to combatting the spread of disease outbreaks.[343] To underscore the severity of the ongoing pandemic, Justice Breyer included a graph showing a dramatic uptick in COVID-19 cases and deaths in recent weeks and cited estimates reporting that over thirty-eight million Americans had contracted the disease, while over 629,000 had died at that point.[344] He likewise noted the heightened contagiousness of the Delta variant and the fact that areas covered by the CDC moratorium had transmission rates on par with those witnessed in the winter of 2020, before vaccines. Putting everything together, the dissenters did not believe it appropriate to enjoin the moratorium, especially where the lower courts had divided, the Court had not received full briefing and argument, and the criteria for summary emergency orders were not met.

C. Vaccine Mandates and Testing and Masking Requirements

With the arrival of COVID-19 vaccines in 2021, vaccination requirements in various settings followed. Two sets of cases came to the Court as a result: (1) those involving mandates issued for specific settings by local authorities that did or did not include religious exemptions; and (2) those involving mandates and/or testing and masking requirements issued by the federal government. The two categories raise distinct issues.

1. Local Mandates

Two early applications for emergency relief from local vaccine mandates made little headway at the Court. In August 2021, Justice Barrett declined to grant relief with respect to an application made by students challenging a vaccine mandate adopted by Indiana University

[342] Id. (Breyer, J., dissenting, joined by Sotomayor & Kagan, JJ.).

[343] Id. at 2491. The dissent argued the first sentence of the relevant provision in the Public Health Services Act granted the CDC such power and nothing in the second sentence should be read to limit that authorization. Id. at 2491–92.

[344] Id. at 2493.

without referring the matter to the entire Court.[345] The mandate in question included a religious exemption.[346] Justice Sotomayor next declined to act on an application from school employees challenging New York City's vaccine mandate, which also had a religious exemption. She too declined to refer the matter to the whole Court.[347]

Next, the Court received emergency applications in two cases involving vaccine mandates in healthcare settings without religious exemptions. The lack of exemptions prodded some Justices to argue that relief was warranted, though as of this writing, not enough to command five votes. First, in October 2021, over the dissents of three Justices, the Court declined to grant relief to an emergency application brought by healthcare workers seeking religious exemptions to Maine's vaccination requirement for healthcare settings.[348] Justice Barrett, joined by Justice Kavanaugh, concurred, stating she believed the decision whether to grant extraordinary relief was linked to the decision whether to review the merits of a case.[349] Given the case involved a question of first impression, she thought it better to wait before acting.[350]

Justice Gorsuch, joined by Justices Thomas and Alito, dissented, focusing on the law's exemptions for medical reasons.[351] Where a law includes exceptions for some purposes but not religious reasons, Justice Gorsuch argued, it is not neutral with respect to religion.[352] The lack of neutrality warranted strict scrutiny and, he argued, Maine's law failed

[345] Andrew Chung, Students Can't Block Indiana University Vaccine Mandate—U.S. Supreme Court's Barrett, Reuters (Aug. 12, 2021), https://www.reuters.com/world/us/supreme-courts-barrett-rejects-indiana-university-students-vaccine-mandate-2021-08-12/ [https://perma.cc/S7BU-BJN3]. The students asserted a due process right to bodily integrity akin to that advanced in *Jacobson*. Klaassen v. Trs. of Ind. Univ., 7 F.4th 592, 593 (7th Cir. 2021). For the circuit court opinion upholding the mandate against such a challenge, see id.

[346] *Klaassen*, 7 F.4th at 592.

[347] See Andrew Chung, U.S. Supreme Court's Sotomayor Allows New York School Vaccine Mandate, Reuters (Oct. 2, 2021), https://www.reuters.com/world/us/us-supreme-courts-sotomayor-lets-new-york-school-vaccine-mandate-remain-2021-10-01/ [https://perma.cc/WSU7-PW2R]; Associated Press, New York's COVID Vaccine Mandate Takes Effect For School Teachers and Staff, NPR (Oct. 4, 2021), https://www.npr.org/2021/10/04/1043157681/nyc-school-staff-vaccinated [https://perma.cc/ANP2-W462] (stating that New York's COVID-19 vaccine mandate has a religious exemption).

[348] Does 1–3 v. Mills, 142 S. Ct. 17, 17 (2021).

[349] Id. at 18 (Barrett, J., concurring in the denial of application for injunctive relief).

[350] Id.

[351] See id. at 19–20 (Gorsuch, J., dissenting from the denial of application for injunctive relief, joined by Thomas & Alito, JJ.).

[352] Id. at 19.

because the same reasons advanced against religious exemptions also applied to medical exceptions.[353] Notably, the dissent did not question that curtailing the spread of COVID-19 constituted a compelling state interest.[354] But, Justice Gorsuch wrote, "I would acknowledge that this interest cannot qualify as such forever."[355] (Here, he highlighted the newly widely available vaccines and better treatments, with more on the horizon.) He concluded by observing that "[i]f human nature and history teach anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency."[356]

Two months later, the Court again declined to intervene to halt a vaccination requirement for healthcare workers from going into effect in New York.[357] Noting the law included an exemption for medical reasons, but not religious, the same three Justices dissented.[358] Writing for himself and Justice Alito, Justice Gorsuch reiterated many of his same arguments from the Maine case.[359] He also lent weight to statements in the record by government officials suggesting animosity toward religion.[360] For dramatic flair, Justice Gorsuch quoted extensively from *West Virginia State Board of Education v. Barnette* and criticized the Court's tendency in emergencies to "t[ake] the view that the collective [is] more important than the individual—and that the demands of an impending emergency were more pressing than holding fast to the timeless promises of our Constitution."[361]

When the New York case returned to the Court on a petition for certiorari some months later, the Court declined review over the objection of the same three Justices.[362] Writing for the dissenters, Justice Thomas stressed the importance of the question whether the existence of a medical exemption triggered strict scrutiny and demonstrated the requirement's

[353] Id. at 20–22.
[354] Id. at 20–21.
[355] Id. at 21.
[356] Id.
[357] Dr. A v. Hochul, 142 S. Ct. 552, 552 (2021).
[358] Id. (Gorsuch, J., dissenting from the denial of application for injunctive relief, joined by Alito, J.).
[359] See id. at 555, 557. Justice Thomas also noted he would have granted relief. Id. at 552.
[360] Id. at 552–55, 558 (Gorsuch, J., dissenting from the denial of application for injunctive relief, joined by Alito, J.).
[361] Id. at 558 (citing Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 596 (1940)); see id. at 558–59.
[362] Dr. A v. Hochul, 142 S. Ct. 2569, 2569 (2022).

lack of neutrality toward religion.[363] More generally, he added, the Court should seize the opportunity to resolve the question and "consider it after full briefing, argument, and deliberation."[364] This, he argued, would permit the Court to decide the issue "before the next crisis forces us again to decide complex legal issues in an emergency posture."[365] Once again, however, the dissenters did not carry the day, and the Court permitted the vaccine mandate to remain in place.

From here, the battleground shifted to federally adopted vaccination requirements.

2. Federal Mandates and/or Testing and Masking Requirements

When scrutinizing federal requirements relating to COVID-19 vaccination, the story is more complicated. With respect to two cases decided in January 2022 involving federal vaccine mandates, neither involved questions pertaining to religious freedom. Instead, both cases turned on how much authority Congress had delegated (and, in the view of some Justices, *could* delegate) to the executive branch to combat a pandemic.

First, there was *Biden v. Missouri*.[366] The case involved a challenge to a November 2021 regulation issued by the Secretary of Health and Human Services requiring participating facilities that receive funding through the Medicare and Medicaid programs to ensure that their staff, unless qualifying for an exemption on medical or religious grounds, be vaccinated against COVID-19.[367] The Court, 5-4, stayed a lower court's injunction of the regulation, permitting it to go into effect. Chief Justice Roberts and Justice Kavanaugh joined Justices Breyer, Sotomayor, and Kagan in concluding that the regulation fell squarely within the Secretary's broad authority to administer the Medicare and Medicaid programs. As the Court wrote, "[o]ne such function [of the Secretary]—perhaps the most basic, given the Department's core mission—is to ensure that the healthcare providers who care for Medicare and Medicaid

[363] Id. at 2570 (Thomas, J., dissenting from the denial of certiorari, joined by Alito & Gorsuch, JJ.).

[364] Id. at 2571.

[365] Id.

[366] 142 S. Ct. 647 (2022) (per curiam).

[367] Id. at 650 (citing Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61555 (Nov. 5, 2021)).

patients protect their patients' health and safety."[368] Quoting the statute, the majority added, "Congress authorized the Secretary to promulgate, as a condition of a facility's participation in the programs, such 'requirements as [he] finds necessary in the interest of the health and safety of individuals who are furnished services in the institution.'"[369]

Finally, chiding the dissent for its narrow view of the Secretary's authority, the Court noted that the regulation at issue was well in keeping with legions of other regulations that the Secretary has long issued related to patient health and safety.[370] In the Court's view, the case boiled down to these simple propositions: "The challenges posed by a global pandemic do not allow a federal agency to exercise power that Congress has not conferred upon it. At the same time, such unprecedented circumstances provide no grounds for limiting the exercise of authorities the agency has long been recognized to have."[371]

Writing for the four dissenters, Justice Thomas read the same statutory language in far more limited fashion, arguing that Congress had only authorized the Secretary to issue regulations related to the "administration" of the Medicare and Medicaid programs.[372] More generally, the dissent invoked two principles to shore up its view that Congress needed to be clearer in vesting the authority claimed by the Secretary in the agency. First, "[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[373] And second, "we expect Congress to use 'exceedingly clear language if it wishes to significantly alter the balance

[368] Id.

[369] Id. (quoting 42 U.S.C. § 1395x(e)(9) (governing hospitals)) (first citing 42 U.S.C. § 1395x(cc)(2)(J) (outpatient rehabilitation facilities); then citing 42 U.S.C. § 1395i–3(d)(4)(B) (skilled nursing facilities); then citing 42 U.S.C. § 1395k(a)(2)(F)(i) (ambulatory surgical centers); and then citing 42 U.S.C. §§ 1396r(d)(4)(B), 1396d(l)(1), 1396d(o) (corresponding provisions in Medicaid Act)); see also id. at 652 (permitting the Secretary to condition funding in hospitals where "the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services" (quoting 42 U.S.C. § 1395x(e)(9))). The Court also concluded that the Secretary properly invoked his authority to issue the regulation as an interim final rule because of his statutory authority and the urgency of the situation. See id. at 651 (permitting an interim final rule where the Secretary has "good cause" (quoting 5 U.S.C. § 553(b)(B))).

[370] See id. at 652–53 ("[T]he Secretary's role in administering Medicare and Medicaid goes far beyond that of a mere bookkeeper.").

[371] Id. at 654.

[372] See id. at 655 (Thomas, J., dissenting, joined by Alito, Gorsuch & Barrett, JJ.).

[373] Id. at 658 (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam)).

between state and federal power.'"[374] Justice Alito also penned a dissent.[375]

Decided on the same day, *National Federation of Independent Business v. Department of Labor*[376] witnessed six Justices halt emergency regulations issued by the Occupational Safety and Health Administration ("OSHA") applicable to most employers with one hundred or more employees in the country. The regulations would have required COVID-19 vaccination of covered employees or else weekly testing combined with mask-wearing in the workplace.[377] The majority posited that OSHA's name suggests that it "is tasked with ensuring *occupational* safety" and empowered to issue standards that are "reasonably necessary or appropriate to provide safe or healthful *employment*."[378] Deeming the regulations addressed instead to "public health more broadly," the majority held that "[a]lthough COVID-19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most."[379] Instead, the Court wrote, COVID-19 poses

> [A] universal risk . . . no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization.[380]

It followed on the Court's view that OSHA may only target *specific* risks related to COVID-19 in the workplace setting, by contrast to its "indiscriminate approach" here.[381]

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[374] Id.

[375] The opening line of Justice Alito's dissent laid bare his views: "I do not think that the Federal Government is likely to be able to show that Congress has authorized the unprecedented step of compelling over 10,000,000 healthcare workers to be vaccinated on pain of being fired." Id. at 659 (Alito, J., dissenting, joined by Thomas, Gorsuch & Barrett, JJ.).

[376] 142 S. Ct. 661, 662 (2022) (per curiam).

[377] Id. at 662–63. Citing authority to issue "emergency temporary standards," the Secretary of Labor had issued the regulations without going through the ordinary notice-and-comment procedures. See 29 U.S.C. § 655(c)(1).

[378] *NFIB*, 142 S. Ct. at 663 (quoting 29 U.S.C. § 652(8)) (citing 29 U.S.C. § 651(b)).

[379] Id. at 665–66.

[380] Id. at 665.

[381] Id. at 666. Justice Gorsuch, joined by Justices Thomas and Alito, added a concurring opinion in which he invoked the "major questions doctrine" and the "nondelegation doctrine"

To underscore their exasperation with the Court's ruling, Justices Breyer, Sotomayor, and Kagan penned a joint dissent. They opened by citing the fact that COVID-19 had by January 2022 killed almost one million Americans and observing that the disease "causes harm in nearly all workplace environments," places in which the typical American worker has "little control, and therefore little capacity to mitigate risk."[382] (The dissent also highlighted that at the time, COVID-19 had killed some 11,000 Americans in the week prior to the decision.[383]) Noting that "most Americans have seen their workplaces transformed" as a result of the pandemic, the dissenters found nothing odd that the "agency charged with ensuring health and safety in workplaces did what Congress commanded it to: It took action to address COVID-19's continuing threat in those spaces."[384]

In the face of what they viewed as an easy case, the dissenters labeled the majority as "[a]cting outside [the Court's] competence and without legal basis."[385] They next quoted Congress's authorization to OSHA, which empowers the latter to "protect employees" from "grave danger" that comes from "new hazards."[386] The dissent also not so subtly repeated OSHA's mandate as calling on it to address both workplace safety and workplace "health."[387] Also relevant, they argued, was the "meticulous detail" with which OSHA had supported its standards and the fact that the regulations permitted testing and masking in lieu of vaccination and included medical and religious exemptions.[388]

It followed on the dissenting view that it did not matter that the threat posed by COVID-19 also existed outside the workplace. If that is the standard, they asked, then why is it that OSHA can regulate risks related to fire, electrical installations, and the placement of emergency exits?[389] In all events, they noted, because in workplaces "more people spend more time together," the disease can spread more easily.[390] Nor was it relevant,

as reasons to require Congress to be clear if it wishes to vest expansive authority in an agency. See id. at 667–68 (Gorsuch, J., concurring, joined by Thomas & Alito, JJ.).

[382] Id. at 670 (Breyer, Sotomayor & Kagan, JJ., dissenting).

[383] Id. at 672.

[384] Id. at 670.

[385] Id.

[386] See id. (quoting 29 U.S.C. § 655(c)(1)).

[387] Id. at 670–71.

[388] Id. at 672. The dissenters also noted that the standards were set to remain in effect for only six months. Id. at 671.

[389] Id. at 673.

[390] Id. at 674.

as the majority seemed to suggest, that Congress's delegation of authority to OSHA occurred fifty years earlier. The critical point, in the dissent's view, was that Congress vested OSHA with the authority to address then-known and unknown dangers as they arise.[391] Finally, the dissenters observed that OSHA had issued regulations governing vaccinations, medical examinations, and face coverings before.[392]

In the end, the case boiled down to two key points in the dissenters' view. First, the rules in question were "at the core of OSHA's authority" and "part of what the agency was built for."[393] Second, it was not for a court to decide the appropriate response to the workplace dangers posed by COVID-19. Instead, that responsibility falls with the "agency with expertise in workplace health and safety, acting as Congress and the President authorized."[394] In such circumstances, they wrote, the Court should have been "wise . . . enough to defer."[395] But, they wrote, "[t]oday, we are not wise."[396]

Two months later, the Court fractured anew over a vaccination requirement—this time for Navy SEALs and other elite Navy Special Warfare personnel. The Court granted a partial stay of a trial court's injunction of the Navy's right to consider vaccination status in operational decisions over the recorded dissent of three Justices.[397] Justice Thomas noted his dissent, and Justice Alito, joined by Justice Gorsuch, issued a dissenting opinion. The latter rehashed many key arguments heretofore raised in other cases—pointing out, for example, that the Navy had treated medical exemptions more generously than religious exemptions and that it was not clear that the Navy's approach was the least burdensome with respect to religious liberty.[398] Justice Kavanaugh did not join his dissenting brethren, choosing instead to concur largely on the basis of the "bedrock constitutional principle" that "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."[399] Thus, although Justice Kavanaugh did not

[391] Id. at 674–75.
[392] Id. at 674.
[393] Id. at 675.
[394] Id. at 676.
[395] Id.
[396] Id.
[397] Austin v. U.S. Navy Seals 1–26, 142 S. Ct. 1301, 1301 (2022).
[398] See id. at 1305, 1307 (Alito, J., dissenting, joined by Gorsuch, J.).
[399] Id. at 1302 (Kavanaugh, J., concurring) (quoting Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988)).

assert that the pandemic context required deference, in his view, the military context did.

D. Areas of Deference

Although the Court has moved over the course of the pandemic toward second-guessing many decisions made by political branches at the state and federal level with respect to managing COVID-19, it has not uniformly departed from the historical model of judicial deference in times of emergency. There are three areas in which the Court has declined—at least to date—to overturn decisions made by political entities as to how best to manage the pandemic: abortion, prisoner rights, and voting rights.

1. Abortion

The first example is abortion. At the onset of the pandemic, the Food and Drug Administration ("FDA") declined to alter its rules governing the dispensation of the two prescription drugs needed for a woman to have a medication abortion in the first ten weeks of a pregnancy. Because of the pandemic, the FDA permitted women to receive physician consultations virtually and to take the relevant prescriptions at home; likewise, it permitted women to obtain one of the drugs, misoprostol, without obtaining it in person.[400] But since 2000, the FDA had required that to obtain the second drug, mifepristone, a woman go to a hospital, clinic, or medical office in person to pick it up.[401] The FDA stuck with this policy during the pandemic despite having loosened its in-person requirements for other serious drugs.[402]

After a group of doctors challenged the continuance of the in-person requirements to obtain mifepristone during the pandemic, the district court held that the FDA's rule posed a "substantial obstacle" to a woman seeking an abortion and therefore violated then-governing Supreme Court precedent, and the court enjoined the regulation.[403] When the matter first came to the Supreme Court in October 2020, the government sought a

[400] See Am. Coll. of Obstetricians & Gynecologists v. FDA, 472 F. Supp. 3d 183, 194 (D. Md. 2020), *order clarified*, No. 20-1320, 2020 WL 8167535 (D. Md. Aug. 19, 2020).

[401] Id. at 190, 192.

[402] Id. at 194.

[403] Id. at 216 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (plurality opinion)).

stay of the lower court's injunction. The Court declined to act, citing an incomplete record and the possibility that the relevant circumstances of the pandemic had evolved; it therefore held the government's motion in abeyance pending an opportunity for the district court to revisit the matter.[404]

Justice Alito, joined by Justice Thomas, dissented. In his view, the Court was being inconsistent. "In response to the pandemic, state and local officials have imposed unprecedented restrictions on personal liberty, including severe limitations on First Amendment rights."[405] But, he wrote, the Court had up to that point chosen to defer in the many cases that had come before it involving religious exercise to the assertions of necessity predicated upon public health.[406] The Court's "hands-off approach" in the early religious worship cases stood in stark contrast, Justice Alito thought, to the district court's approach in this case.[407] This was especially problematic in his view because he believed that the lower court had "*expand*[*ed*]" the right to an abortion while "overrul[ing] the FDA on a question of drug safety."[408]

When the case came back to the Court three months later, by a vote of 6-3, the Justices granted the application for a stay of the district court's injunction of the in-person rule for mifepristone.[409] The majority offered little explanation, but the Chief Justice wrote a brief concurrence in which he noted that he believed a stay appropriate because "courts owe significant deference" to the political branches tasked with managing public health.[410]

Justice Breyer would have denied the application.[411] Justice Sotomayor, joined by Justice Kagan, explained why she too would have allowed the injunction to remain in effect. In her view, it was striking that the FDA had singled out mifepristone as the sole drug it required to be

[404] FDA v. Am. Coll. Of Obstetricians & Gynecologists, 141 S. Ct. 10, 11 (2020).

[405] Id. at 11 (Alito, J., dissenting, joined by Thomas, J.).

[406] See id. at 11–12 ("The free exercise of religion also has suffered previously unimaginable restraints, and this Court has stood by while that has occurred.").

[407] Id. at 11.

[408] Id. at 12. Justice Alito likewise highlighted that the state in which the district court sat, Maryland, had recently opened up indoor restaurant dining, hair salons, and casinos. See id. at 12–13.

[409] FDA v. Am. Coll. of Obstetricians & Gynecologists, 141 S. Ct. 578, 578 (2021).

[410] Id. at 579 (Roberts, C.J., concurring in the grant of application for stay).

[411] Id. at 578.

picked up in person to be later taken at home.[412] Citing the short window that women have to obtain a medication abortion, the danger of visiting a doctor's office during the still very-much-raging pandemic, and the limited number of clinic options available to women (which in turn required women in some cases to travel considerable distances at considerable risk), the dissent viewed the in-person requirement for mifepristone as unquestionably posing an undue burden on a woman's constitutional right to seek an abortion in violation of controlling precedent.[413] Concluding, Justice Sotomayor "agree[d] that deference is due to reasoned decisions of public health officials grappling with a deadly pandemic."[414] But, she wrote, because the government has offered no specific reasoning supporting its decision to single out mifepristone for in-person pick-up, "[t]here simply is no reasoned decision here to which this Court can defer."[415]

2. Prison Conditions

The Court has also been unwilling to override decisions by officials regarding management of the COVID-19 pandemic within penal institutions. In one case involving a geriatric prison in Texas, the Court twice declined to vacate a stay entered by the U.S. Court of Appeals for the Fifth Circuit against an injunction that a district judge ordered after a lengthy trial exploring prison conditions mandating that COVID-19-related safety protocols be put in place. Both times the case came before the Court's emergency docket (in May and November 2020), COVID-19 was spreading like wildfire through the prison, resulting in inmate deaths. The Court's first action was unanimous, albeit with Justice Sotomayor, joined by Justice Ginsburg, issuing a written statement setting forth how, in her view, injunctive relief might be warranted in due course.[416]

When the case returned six months later, the Court again declined to override the Fifth Circuit's stay. Now, Justice Sotomayor dissented, joined by Justice Kagan. (Justice Ginsburg had died in the intervening

[412] Id. at 579 (Sotomayor, J., dissenting from grant of application for stay, joined by Kagan, J.) (noting that the FDA permitted patients to receive opioids at home).

[413] See id. at 581–82 (noting that some "medical offices have dramatically reduced availability during the pandemic," exacerbating matters).

[414] Id. at 584.

[415] Id. at 585.

[416] See Valentine v. Collier, 140 S. Ct. 1598, 1601 (2020) (statement of Sotomayor, J., respecting the denial of application to vacate stay, joined by Ginsburg, J.).

period.) Noting that over forty percent of the prison population had tested positive for the virus and twenty prisoners had died from COVID-19, she argued that the difficult standard for obtaining a stay was met here.[417] The internal prison complaint process that one would normally have to exhaust before going into court,[418] she observed, was so slow and burdensome that it amounted to a dead end.[419] And the conditions at the prison, she wrote, plainly violated the inmates' Eighth Amendment rights against cruel and unusual punishment.[420] Thus, she concluded, judicial intervention was fully warranted in the case.[421]

In the months between the Texas case's return to the Court, the Justices also voted 5-4 to stay a district court's order compelling another prison to alleviate overcrowding and implement CDC guidelines to address the spread of COVID-19 among its inmates.[422] Justices Breyer and Kagan noted their dissent. Justice Sotomayor, joined by Justice Ginsburg, wrote a dissenting opinion in which she took issue with the Court's "extraordinary intervention" to override the district court's detailed factual findings showing the extreme risk posed to inmates by the current prison conditions.[423]

3. Voting Rights

The Supreme Court has also consistently declined to disturb state and local decisions about how to manage elections during the pandemic, whether those decisions were made by state political bodies, election officials, or state courts.

First, in April 2020, the Court had before it a petition to reinstate an injunction ordered by a district court that would have permitted absentee ballots to be mailed after the primary election date, so long as they were received by the deadline that otherwise existed six days later.[424] The Court declined to intervene, 5-4, with the majority emphasizing the long-

[417] Valentine v. Collier, 141 S. Ct. 57, 58 (2020) (Sotomayor, J., dissenting from the denial of application to vacate stay, joined by Kagan, J.).

[418] Under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), inmates must first exhaust "available" administrative remedies.

[419] *Valentine*, 141 S. Ct. at 59–60.

[420] Id. at 60–62.

[421] Id. at 62–63.

[422] Barnes v. Ahlman, 140 S. Ct. 2620, 2620 (2020).

[423] Id. at 2620–21 (Sotomayor, J., dissenting from the grant of stay, joined by Ginsburg, J.).

[424] Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1206 (2020) (per curiam).

standing principle that "courts should ordinarily not alter the election rules on the eve of an election."[425] Writing for the dissenters, Justice Ginsburg observed that the State of Wisconsin had a stay-at-home order in place and yet was proceeding with a major election.[426] The district court's ruling, in her view, had properly addressed the fact that "tens of thousands of voters who timely requested ballots are unlikely to receive them" by election day because of the "late surge in absentee-ballot requests" occasioned by the pandemic.[427] Thus, she complained, "[t]he question here is whether tens of thousands of Wisconsin citizens can vote safely in the midst of a pandemic."[428]

In July, the Court stayed a district court's order compelling the State of Idaho to extend the deadline for accepting ballot-initiative signatures and permit digital collection of signatures in light of the pandemic.[429] Chief Justice Roberts concurred, noting that the district court's order imposed a substantial burden on the State to verify digital signatures.[430] Instead, he argued, states should be afforded "considerable leeway" in running elections to combat potential fraud.[431] Justices Ginsburg and Sotomayor dissented.[432]

As the November 2020 presidential election grew closer, the Court overturned several lower court orders overriding election rules. Take *Andino v. Middleton*, from October 2020, in which the Court granted in relevant part a motion to stay a district court preliminary injunction that in light of the pandemic would have set aside the ordinary rule in South Carolina requiring a witness to an absentee ballot.[433] Concurring, Justice Kavanaugh opined that "a State legislature's decision either to keep or to make changes to election rules to address COVID-19 ordinarily 'should

[425] Id. at 1207 (citing, among others, Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam)).
[426] Id. at 1208 (Ginsburg, J., dissenting, joined by Breyer, Sotomayor & Kagan, JJ.).
[427] Id. at 1209–10.
[428] Id. at 1211.
[429] See Little v. Reclaim Idaho, 140 S. Ct. 2616, 2616 (2020).
[430] Id. at 2617 (Roberts, C.J., concurring in the grant of stay, joined by Alito, Gorsuch & Kavanaugh, JJ.).
[431] Id. at 2616.
[432] See id. at 2618–19 (Sotomayor, J., dissenting, joined by Ginsburg, J.) (emphasizing the challenges presented by running elections during the pandemic and arguing that the initiative sponsor in the case will be irreparably harmed by staying injunctive relief). Two weeks earlier, Justice Sotomayor dissented when the Court declined to intervene to block the State of Florida from banning ex-felons and others with outstanding fines from voting in its upcoming primary. See Raysor v. DeSantis, 140 S. Ct. 2600, 2600 (2020) (Sotomayor, J., dissenting from denial of application to vacate stay, joined by Ginsburg & Kagan, JJ.).
[433] 141 S. Ct. 9, 10 (2020).

not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people.'"[434]

In another case, a district court enjoined the Alabama Secretary of State from enforcing a ban on curbside voting, citing the raging pandemic and arguing that it violated the Americans with Disabilities Act to force populations at high risk from COVID-19 to vote in person. The Court nonetheless granted a stay of the lower court's injunction pending appeal, without explanation.[435] This provoked a fiery dissent from Justice Sotomayor, joined by Justices Breyer and Kagan. She noted, among other things, that the CDC recommended curbside voting and observed that the district court order did not compel any jurisdictions to provide curbside voting, but instead only permitted those that were capable and willing to do so to proceed.[436] Finally, she asserted that "[a]bsentee and in-person voting are different benefits, and voters with disabilities are entitled to equal access to both."[437] Concluding, she quoted one witness before the lower court to chide her colleagues in the majority: "Plaintiff Howard Porter, Jr., a Black man in his seventies with asthma and Parkinson's Disease, told the District Court: '[S]o many of my [ancestors] even died to vote. And while I don't mind dying to vote, I think we're past that—we're past that time.'"[438]

Days later, the Court declined to vacate a stay entered by a federal appeals court of a district court order that would have extended by six days Wisconsin's rule requiring absentee ballots to be in by election day.[439] Several Justices concurred. Among them, Justice Gorsuch complained that the district court had ignored multiple changes that the Wisconsin Elections Commission had instituted to address the pandemic and substituted its own judgment in violation of the Constitution's vesting of management of elections to state legislatures and Congress.[440] He

[434] Id. (Kavanaugh, J., concurring in grant of application for stay) (quoting S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief)). There were no noted dissents in the case.

[435] Merrill v. People First of Ala., 141 S. Ct. 25, 25 (2020).

[436] Id. at 26 (Sotomayor, J., dissenting from grant of stay, joined by Breyer & Kagan, JJ.). Justice Ginsburg passed away in September 2020.

[437] Id. at 27.

[438] Id. (internal quotation marks omitted).

[439] Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 28 (2020).

[440] See id. at 28–30 (Gorsuch, J., concurring in denial of application to vacate stay, joined by Kavanaugh, J.) (citing U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the

added, "[o]ur oath to uphold the Constitution is tested by hard times, not easy ones. And succumbing to the temptation to sidestep the usual constitutional rules is never costless."[441]

Justice Kavanaugh also concurred on several grounds. Once again, he emphasized that "unelected federal judges" do not bear "the responsibility to address the health and safety of the people during the COVID-19 pandemic," nor, he wrote, do federal judges "possess special expertise or competence about how best to balance the costs and benefits of potential policy responses to the pandemic, including with respect to elections."[442]

Justice Kagan dissented for herself and Justices Breyer and Sotomayor. She disputed much of the reasoning set forth in the concurring opinions and acknowledged that "deference is usually due to a legislature's decisions about how best to manage the COVID pandemic."[443] "But," she wrote, "the Wisconsin legislature has not for a moment considered whether recent COVID conditions demand changes to the State's election rules; that body has not even met since April."[444] Further, she wrote, "if there is one area where deference to legislators should not shade into acquiescence, it is election law. For in that field politicians' incentives often conflict with voters' interests—that is, whenever suppressing votes benefits the lawmakers who make the rules."[445] It followed, she argued, that because mail service was significantly delayed by the pandemic, the pandemic raged on deadlier than ever, and voters could not vote in person safely, the district court was right to grant the extension to ensure that every vote is counted.[446] The majority's ruling, she feared, will "disenfranchise citizens by depriving them of their constitutionally guaranteed right to vote."[447]

Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . .")).

[441] Id. at 30.

[442] Id. at 32 (Kavanaugh, J., concurring in denial of application to vacate stay).

[443] Id. at 43 (Kagan, J., dissenting, joined by Breyer & Sotomayor, JJ.).

[444] Id.

[445] Id.

[446] Id. at 44.

[447] Id. at 45. She continued: "The facts, as found by the district court, are clear: Tens of thousands of Wisconsinites, through no fault of their own, may receive their mail ballots too late to return them by Election Day." Id. at 46. This meant that now "they must opt between 'brav[ing] the polls,' with all the risk that entails, and 'los[ing] their right to vote.'" Id. (quoting Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1211 (2020) (Ginsburg, J., dissenting, joined by Breyer, Sotomayor & Kagan, JJ.)).

Previewing where he would land two days later in a pending application coming from Pennsylvania, Chief Justice Roberts concurred in the Wisconsin case to distinguish matters involving "federal intrusion on state lawmaking processes," like the Wisconsin case, and those implicating "the authority of state courts to apply their own constitutions to election regulations," as in Pennsylvania.[448] In other words, he suggested, federal courts should stay their hands with respect to the product of state government decision-making, however the latter process plays out.[449] Several of his colleagues disagreed, but not enough to garner a majority.

The Court's deference to that decision-making therefore sometimes resulted in wider availability of voting. In *Moore v. Circosta*, for example, the Court declined to block an extension of the deadline for receipt of absentee ballots introduced by North Carolina's board of elections.[450] Three Justices would have granted relief (Justices Thomas, Gorsuch, and Alito), with two arguing that as a matter of federal constitutional law, such a decision was exclusively the province of the state legislature (which had made various other modifications to existing voting laws to address the ongoing pandemic).[451]

In its final order before the 2020 presidential election, the Court declined to expedite consideration of the Pennsylvania Supreme Court's decision to extend by three days past election day the deadline for receipt of absentee ballots.[452] Writing for three, Justice Alito expressed his dismay that the Court had not taken up the case earlier to decide the important question whether a state court can alter the election rules established by a state legislature.[453] Four months later, the Court denied certiorari review of the same issues over the objections of the same three Justices, who, while recognizing that the Court's resolution of the question presented would not change the outcome in Pennsylvania of any

[448] Id. at 28 (Roberts, C.J., concurring in denial of application to vacate stay).

[449] Id.

[450] 141 S. Ct. 46, 46 (2020). Newly confirmed Justice Barrett did not vote on the motion.

[451] Id. at 47, 48 (Gorsuch, J., dissenting from denial of application for injunctive relief, joined by Alito, J.).

[452] Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 2 (2020). Justice Barrett did not participate in the case.

[453] Id. at 1–2 (statement of Alito, J., joined by Thomas & Gorsuch, JJ.).

federal races, argued that it was important to resolve the matter for future elections.[454]

* * *

There are other areas in which the Court declined to intervene, effectively deferring to the political branches as how to manage various government operations during the pandemic. These include wrapping up the 2020 Census. In *Ross v. National Urban League*, the Court stayed a district court injunction ordering that the census data collection period be extended due in part to complications raised by the ongoing pandemic.[455] Only Justice Sotomayor dissented.[456]

Overall, as these examples demonstrate, the Court was not uniform in second-guessing government officials during the pandemic; sometimes, the Court focused its scrutiny and lack of deference instead on the lower federal courts. In the end, we find a Court that has exercised rigorous scrutiny of government actions during the pandemic over some claims while exercising deferential review of government regulations with respect to other matters. Before exploring what to make of the distinctions drawn by the Court, the Article next asks whether as a general proposition the recent movement in some contexts toward more rigorous judicial review during emergencies is a good thing.

III. TOWARD A UNIFORM MODEL OF JUDICIAL REVIEW

Writing for the Court in *Boumediene v. Bush*, Justice Kennedy posited that "[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times."[457] He added, "[l]iberty and security can be reconciled . . . within the framework of the law."[458] As explored in Part I, however, the reality is that more often than not—at least until this past year—one could safely predict that when faced with cases bound up in ongoing emergencies—whether wars, great depressions, or other crises—the judiciary would defer to those charged with managing the emergencies. Indeed, this prediction also holds more generally in cases implicating national security. (Think here of *Trump v. Hawaii* (*The Travel*

[454] Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 732 (2021); see id. at 733 (Thomas, J., dissenting from the denial of certiorari); id. at 738 (Alito, J., dissenting from the denial of certiorari, joined by Gorsuch, J.).

[455] 141 S. Ct. 18, 18 (2020).

[456] Id. (Sotomayor, J., dissenting from grant of stay).

[457] 553 U.S. 723, 798 (2008).

[458] Id.

Ban Case), for example.[459]) When it comes specifically to war, the Court has only ever significantly pushed back on presidential assertions in the aftermath of war, with very limited exceptions, the primary ones being *West Virginia State Board of Education v. Barnette* and *Youngstown Tube & Steel Co. v. Sawyer* (*The Steel Seizure Case*), the latter of which involved property, not liberty. That has changed, at least to some extent, during the COVID-19 pandemic. In some cases, the Court has applied strict scrutiny and eschewed any deference despite the ongoing pandemic, with several Justices going so far as to argue that the Constitution and the Court's role do not change in times of emergency. This Part explores whether we should welcome such a potential shift in the Court's jurisprudence as a general proposition, concluding that indeed we should.[460]

A. Possible Approaches to Judicial Review in Times of Emergency

There are many possible approaches to judicial review in times of emergency. Although not intended to be exhaustive, several are outlined below.

1. Deference

As explored above in Part I, there exists a wealth of precedent in the camp supporting the proposition that the judiciary should defer to political actors in times of emergency, the result being a less robust judicial role and less robust constitutional protections. Think of cases like *Hirabayashi v. United States*, *Korematsu v. United States*, and the World War I speech cases.[461] Additional decisions in this camp include *Home Building & Loan Ass'n v. Blaisdell* and *Jacobson v. Massachusetts*, which involved deference to the management of the Great Depression and public health matters. Animating these decisions is the idea that the courts should not stand in the way of those prosecuting a war or managing a pandemic or other crises, lest the courts undermine the government's efforts and second-guess designated experts. One sees this concern in *Hirabayashi*, for example, where Chief Justice Stone cautioned that "it is not for any

[459] 138 S. Ct. 2392, 2421 (2018).

[460] Whether we should read the Court's recent decisions as demonstrating a genuine course-correction in this regard is explored below in Part IV.

[461] See cases cited supra note 85.

court to sit in review of the wisdom of [the Executive's] action or substitute its judgment for theirs."[462]

Also underlying this model is the idea that claims of emergency do not lead to the undoing of legal frameworks. Political philosopher John Brenkman, for example, argues that "[p]olitical systems can be resiliently self-correcting, especially as the public's sense of emergency wanes or the government's claim of necessity is thrown into doubt."[463] For his part, Chief Justice Hughes believed that the Constitution should be viewed as adaptable in wartime. Peacetime, he argued, should trigger a return to normal.[464] In so doing, Chief Justice Hughes suggested that something of a hierarchy of rights should govern in times of emergency, with some rights viewed as absolute and others as adaptable.[465] Thus, in *Blaisdell*, Chief Justice Hughes wrote that emergencies do not permit the government to go beyond "provisions in the Constitution" that are "specific."[466] But, he argued, things are different (as he believed with respect to the Contracts Clause in that case) "where constitutional grants and limitations of power are set forth in general clauses."[467] In his view, when faced with matters involving more "general" provisions, courts should not stand in the way of the war power or the power to manage a depression. More generally, the deferential approach is closely tied to Chief Justice Hughes's refrain that the "power to wage war is the power to wage war successfully."[468]

Inherent in this approach is also a concern that more rigorous second-guessing of political actors in times of emergency could witness such actors ignore a Supreme Court decision and in so doing undermine the legitimacy of the courts. (This same concern likely also animates the "stand down" approach detailed below.) President Roosevelt is said to have declared that he would execute the Nazi saboteurs no matter what the Supreme Court decided in *Ex parte Quirin* with respect to the legality

[462] Hirabayashi v. United States, 320 U.S. 81, 93 (1943).

[463] John Brenkman, The Cultural Contradictions of Democracy: Political Thought Since September 11, at 60 (2007), *cited in* Dudziak, supra note 21, at 118.

[464] See generally Waxman, supra note 92, at 618–22 (exploring Chief Justice Hughes's views at length).

[465] See id. at 618–20; see also Prakash, supra note 25, at 1341–42, 1368 (arguing against a "rigid" Constitution and suggesting a hierarchy of rights in wartime).

[466] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934) ("Thus, emergency would not permit a State to have more than two Senators in the Congress . . . .").

[467] See id.

[468] Hughes, supra note 100, at 238.

of their military trial.[469] There are indications that this may have influenced the Court's handling of the case.[470] Either way, as Alexander Hamilton wrote so many years ago, the courts have "neither force nor will but merely judgment."[471] It follows that respect for its judgments is enormously important to the judiciary's standing in the separation of powers, and if such respect does not follow from the political branches, that standing may be eroded.

A more limited deference model sounding in political accountability would have the courts defer to the political branches only when they act together. Sometimes associated with the work of Samuel Issacharoff and Richard Pildes, the idea is that judicial deference is appropriate when the two political branches act in unison, but not when the executive acts unilaterally.[472] Issacharoff and Pildes argue that traditionally this model best explains what courts have done—namely, during emergencies, they have focused on preserving the institutional structures and processes of decision-making, that is, the "second-order question of whether the right institutional processes have been used to make the decisions at issue, rather than on what the content of the underlying rights ought to be."[473] This is a good thing, they maintain, because it leaves tradeoffs over liberty and security to the institutions that are politically accountable.[474]

2. Stand Down

Another possible model of judicial review in times of emergency is no judicial review at all. The idea is that if the judiciary stays its hand and declines to engage in such cases, it will not create any law at all, therefore leaving government action that pushes or crosses constitutional boundaries lacking judicial imprimatur. The classic example setting out this position is Justice Jackson's dissenting opinion in *Korematsu*. Justice Jackson was deeply critical of the merits of the Court's decision, contending, for example, that "if any fundamental assumption underlies

[469] Roosevelt's Attorney General Francis Biddle recounted that Roosevelt said that he would not hand over the saboteurs "to any United States marshal armed with a writ of habeas corpus. Understand?" Francis Biddle, In Brief Authority 325–31 (1962).

[470] For extensive discussion of *Quirin*, see Tyler, supra note 2, at 253–60.

[471] The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[472] Samuel Issacharoff & Richard H. Pildes, Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime, 5 Theoretical Inquiries in L. 1, 5 (2004).

[473] Id. at 2.

[474] Id. at 5.

our system, it is that guilt is personal and not inheritable."[475] But Justice Jackson also criticized the Court for having taken up the case in the first instance. As he wrote:

> [O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court 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.[476]

Elaborating on the accountability model he had in mind, he continued: "The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history."[477]

Others have picked up the idea, including Mark Tushnet. He argues that the best course for the judiciary during emergencies is to "do nothing and acknowledge that executive officials will exercise extraconstitutional emergency powers."[478] The most famous defender of this idea in a more narrow fashion was, of course, President Lincoln. As Lincoln famously phrased it: "[A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?"[479] Instead of looking to the courts for redress, Tushnet posits that

> Decision-makers can then understand that they should regret that they find themselves compelled to invoke emergency powers. Once the emergency has passed they should not only revert to the norms of

[475] Korematsu v. United States, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting).
[476] Id. at 246.
[477] Id. at 248.
[478] Tushnet, supra note 25, at 299.
[479] Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* 4 The Collected Works of Abraham Lincoln 421, 430 (Roy P. Basler, Marion Dolores Pratt & Lloyd A. Dunlap eds., 1953). Later, however, Lincoln argued that such acts "might become lawful." See Letter from Abraham Lincoln, President, to Albert G. Hodges (Apr. 4, 1864), *in* 7 The Collected Works of Abraham Lincoln 281 (Roy P. Basler, Marion Dolores Pratt & Lloyd A. Dunlap eds., 1953) ("[M]easures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution.").

> legality that were suspended during the emergency, but should do what they can to make reparation for the actions they took.[480]

Tushnet's view is born out of a belief that we are ensnared in an ever-repeating cycle of "the pattern commonly attributed to the civil liberties implications of government policies in wartime: The government acts, the courts endorse or acquiesce, and—sooner or later—society reaches a judgment that the action was unjustified and the courts were mistaken."[481] Further, he contends that the "threat to civil liberties posed by government actions has diminished in successive wartime emergencies."[482] Tushnet also believes that with each emergency, there is a learning exercise that results and leads to the prevention of repeated violations of constitutional norms in future emergencies.[483] As support for this point, Tushnet asserts that the civil liberties violations post-9/11 were not nearly as grave as during earlier wartime periods.[484]

Accordingly, despite acknowledging that history has shown us we should be skeptical of "[t]he ex ante defense of policy-makers [that] assumes that they are doing the best they can to respond in conditions of uncertainty,"[485] Tushnet argues nonetheless that courts should not step into the breach. This is because, as a general proposition, "[i]ncluding emergency powers provisions in a constitution might well be futile, because those powers will be exercised no matter what the constitution says."[486] Tushnet further argues that the risk is too high for exceptional power to become part of the legal order if judges, operating under the pressure of the times, yield and sanction extraordinary exercises of power such that they become acceptable during all times.[487] Finally, Tushnet appeals to history. That history, he writes, "gives little reason to hope that judges will in fact limit emergency powers in light of constitutional norms rather than interpret the constitution to accommodate exercises of emergency powers."[488] So it is better, on the whole, to keep judges out of things altogether.

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[480] Tushnet, supra note 25, at 306–07.
[481] Id. at 287.
[482] Id. at 294–95.
[483] Id. at 294–96.
[484] See id. at 295–97.
[485] Id. at 288.
[486] Id. at 303.
[487] See id. at 304 ("The temporary will be made permanent, threatening civil liberties well beyond the period of the emergency.").
[488] Id. at 305.

3. Differentiate Among Emergencies

One could also imagine a model of judicial review that would differentiate among emergencies. Maybe in war, deference should govern. But in a pandemic or economic crisis, for example, maybe the judiciary should engage in its role just as it would in normal times. If there is something to the idea that pandemics are different than wars, then the Court's recent proclivity for applying strict scrutiny in religious worship cases during the COVID-19 pandemic actually may tell us nothing as a predictive matter about future cases that comes up in the context of war, where the very same Justices applying strict scrutiny in the pandemic context might well revert to a deference model.[489] In all events, the point is that one *might* distinguish between emergency situations, although the Court historically has not done so. (Recall *Jacobson* and *Blaisdell* here.)

There are various reasons why differentiating among emergencies might be appealing, including the fact that there are specific constitutional provisions that apply to certain types of emergencies but not others (think war), the potential institutional advantages or needs of the executive branch that apply only in certain types of emergencies, *et cetera*.

Further, one might also view specific emergencies on a spectrum. At the start of a pandemic, for example, one might believe that extensive deference is appropriate. But over time and, say, with the introduction of vaccines and better treatments, one might think the courts should revert to ordinary practices and discontinue deferring to claims sounding in the need to protect public health and overwhelmed hospitals. Perhaps one might also say the same about war when forces are being drawn down or there are other indications of the tide having turned.

4. An Advisory Role

Yet another option is for the courts to fulfill an advisory role during times of emergency. In this respect, the judiciary can make clear the boundaries of the Constitution in the form of nonbinding opinions. In so doing, courts avoid the risk of seeing their decisions ignored by political actors to the detriment of the judiciary's legitimacy. As Bruce Ackerman has noted, there are examples of this practice to be found in other countries: in France, for example, the Conseil constitutionnel is empowered to issue advisory opinions speaking to whether a president

[489] Specific discussion of whether COVID-19 should be viewed as a lesser emergency than war follows in Section IV.A.

has acted beyond their authority in declaring present circumstances to be an emergency.[490] Although this option is attractive in some respects—it could be said to lessen the social cost of a court pushing back on the executive during an emergency as well as any risks to the court's legitimacy resulting from being ignored—it is too far removed from our existing federal judicial tradition to be explored here.[491]

5. Business as Usual

This option is the most straightforward. The judiciary can treat cases the same whether situated within an emergency context or not. This position rejects the idea that the Constitution means something different in times of emergency. This conclusion derives in part from the fact that the Constitution includes express reference to emergency powers (think of the Suspension Clause and other references to war and insurrection[492]) and was written on the heels of a war for independence. Thus, this model believes, the document contemplated war and emergencies to be addressed within its framework. As explored in Part I, examples of this model do not abound when it comes to Supreme Court precedent, but one can point to *Ex parte Milligan*, *Barnette*, and the *Steel Seizure Case* as emblematic. As *Milligan* phrased the idea: "The Constitution of the United States is a law for rulers and people, equally in war and in peace . . . ."[493]

The business-as-usual model likewise necessarily rejects the idea that the courts should sit on the sidelines during emergencies. Thus, it is not just that the Constitution means the same thing at all times; the judicial role remains constant as well. This model is not swayed by concerns over whether government actors will follow judicial rulings that rebuke their emergency actions, and it follows that it does not shy from interbranch

[490] Ackerman, supra note 25, at 1066–67.

[491] See Correspondence of the Justices (1793), *replicated in part in* Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart and Wechsler's The Federal Courts and The Federal System 50–52 (7th ed. 2015) (establishing the principle that federal courts do not issue advisory opinions). This Article takes our system on its terms. For similar reasons, the Article puts to the side various proposals likely unrealistic under current political circumstances, including those calling for constitutional amendment and special supermajority rules. See, e.g., Ackerman, supra note 25, at 1047–49 (proposing a supermajority escalator with sunsets for exercise of emergency powers).

[492] See, e.g., supra note 22 (citing relevant constitutional provisions).

[493] Ex parte Milligan, 71 U.S. (4 Wall.) 2, 120 (1866). For more on *Milligan* and the trial of the Lincoln conspirators, see Lederman, supra note 17, at 450–53.

friction, even in times of emergency. (Again, think of the *Steel Seizure Case*.) Thus, if the government is acting unlawfully or unconstitutionally, the judiciary should call it out, applying the appropriate level of scrutiny that it would normally apply—emergency or not. Thus, for example, in a case involving racial or religious discrimination, a court should not hesitate to apply strict scrutiny.

B. Judicial Review in Times of Emergency: The Case for Business as Usual

The case for approaching judicial review in times of emergency no differently than in ordinary times is supported by a wealth of considerations.

1. People May Not Agree as to Whether There Is an Emergency

The most powerful way in which the COVID-19 pandemic has revealed the problematic nature of a so-called "emergency constitution" is by underscoring that people may not always agree on the existence of an emergency in the first instance. Indeed, rightly or wrongly, the period through which we have just traveled revealed a genuine divide on the question whether the pandemic was a true emergency. That suggests that defining what is and is not an emergency is much less straightforward than those who promote the idea of an emergency constitution would have us believe.

In the United States, the divide over COVID-19 policies largely tracked the surrounding political landscape. Further, it involved disagreements not just about the question whether COVID-19 presented a real emergency, but also a deep divide over even basic facts. In other words, the determination of whether there was an emergency itself was politicized. In such situations, hard questions result. If it is not possible to obtain broad agreement with respect to the predicate question whether there is a real emergency, who ultimately gets to decide? Politicians? Judges? Someone else? And what measure of deference are such decisions owed? If the decision is outsourced to a particular group, moreover, how exactly will they reach a resolution of the matter? Will precedents be relevant? Or will every situation inevitably be treated as *sui generis*?

COVID-19 also revealed that assigning the question whether something is an emergency to a ruling class of sorts may lead to its own

subset of problems. By way of example, consider the matter of compassionate release as it arose during the pandemic. Under the First Step Act, a prisoner can move for resentencing by first making a request to the Bureau of Prisons and then going to federal district court.[494] Two questions posed by the pandemic involved whether prisoners still had to exhaust administrative remedies before going to court to seek release and, more generally, whether the pandemic warranted an increase in compassionate releases of prisoners.

As things unfolded, there were an enormous number of compassionate releases in 2020–2021, and for many judges the pandemic factored into their decisions.[495] But that was not true for all judges. Indeed, courts were all over the map in addressing both the exhaustion question and the relevance of the pandemic to the ultimate release question.[496] Thus, COVID-19 demonstrated that delegating the decision of whether an emergency exists to a specialized body of government officials—even the federal judiciary—may produce the very same widespread disagreement over the question that occurred among the general population. Indeed, similar disagreements played out in the courts over questions going to the application of the Speedy Trial Act during the pandemic.[497]

[494] See First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239 (amending 18 U.S.C. § 3582(c)(1)(A)); see also generally U.S. Sent'g Comm'n, Compassionate Release: The Impact of the First Step Act and COVID-19 Pandemic (Mar. 2022) (detailing the effect of the First Step Act on compassionate release trends).

[495] U.S. Sent'g Comm'n, supra note 494, at 3 ("Both the number of offenders who sought and the number of offenders who were granted compassionate release dramatically increased in fiscal year 2020, primarily in response to the COVID-19 pandemic.").

[496] See generally id. at 4 (exploring the variance with which U.S. courts handled compassionate release); see also id. ("The likelihood that an offender would receive compassionate release substantially varied by circuit, from a grant-rate high of 47.5 percent in the First Circuit to a low of 13.7 percent in the Fifth Circuit.").

[497] Compare, e.g., United States v. Olsen, 21 F.4th 1036, 1041, 1043 (9th Cir. 2022) (per curiam) (calling the pandemic "extraordinarily serious and deadly" and holding that it warranted halting criminal jury trials due to the "risk" posed to "the health and safety of prospective jurors, defendants, attorneys, and court personnel" (internal quotation marks omitted) (citations omitted)), with id. at 1065, 1067 (Collins, J., dissenting from the denial of rehearing en banc) (positing that "[e]ven in the midst of a pandemic, there are some things that, in a constitutional republic, should be all but unthinkable" and arguing that this includes suspending criminal jury trials). See also id. at 1066 (noting that although the federal courts in the Central District of California had suspended jury trials, the state courts in the same district were conducting criminal jury trials); United States v. Olsen, 494 F. Supp. 3d 722, 731 (C.D. Cal. 2020) (observing that a host of government agencies and businesses were open and that children had returned to in-person schooling).

COVID-19 has also revealed now two-plus years since it appeared that there is likely to be profound disagreement over the question when an emergency is over and things should return to "normal."[498] Once again, moreover, there is the question who decides when an emergency has lapsed. In some respects, this debate is not new. Indeed, decades ago, the Supreme Court said that Congress can declare the nation to be "'at war' for one purpose, and 'at peace' for another."[499]

2. Emergencies No Longer Have Clear Start and End Points

There is another big problem with the proposition that we should understand the Constitution to mean something different in times of emergency. As Justice Kennedy noted in *Boumediene v. Bush* with respect to wartime and the ongoing war on terrorism, "[b]ecause our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury."[500]

But it is not just the ever-present threat of terrorism that has left us with the reality that it is increasingly impossible to draw clear distinctions between wartime and peacetime. As Mary Dudziak has observed, this problem has been with us for some time. Think, for example, of the Cold War. As Dudziak documents, moreover, if one graphs United States military campaign service medals in the twentieth century, almost the entire century is encompassed, suggesting that peacetime is the exception now as opposed to the norm.[501]

All of this is exacerbated by the fact that political actors tend to proclaim the existence of emergencies (including most especially war) for the very purpose of claiming expanded powers.[502] Indeed, the executive

[498] Or a "new normal"?

[499] Lee v. Madigan, 358 U.S. 228, 231 (1959). Note, however, that Justice Douglas there viewed the Court's job as "to determine whether 'in the sense of this law' peace had arrived." Id. at 231.

[500] 553 U.S. 723, 797–98 (2008).

[501] Dudziak, supra note 21, at 29 (replicating graph).

[502] See generally Dudziak, supra note 21 (exploring examples showing how the government has argued for expansive interpretations of the length of wartime as justification for incursions on civil liberties). Dudziak points to, among other places, Justice Douglas's opinion in *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 141 (1948), where he observed that the war power "does not necessarily end with the cessation of hostilities," but "continues for the duration of that emergency." Dudziak, supra note 21, at 38–39. As Dudziak also observes, war has evolved

branch often has a natural incentive to elongate emergencies if that means it gets to keep invoking its emergency powers. (Notably, even as he promoted the idea of a "fighting Constitution," Chief Justice Charles Evans Hughes worried about this practice.[503]) Relatedly, presidents may have incentives to create crises in the first place if it increases their power, a concern raised by many at the Founding.[504] At the least, it seems perverse to give presidents unfettered emergency powers if they have unilateral power to initiate the emergency in the first instance, a point made by Justice Robert Jackson in his *Steel Seizure Case* concurrence.[505]

A comparison here offers interesting perspective. The international law framework carefully limits when and how an emergency may prove justification for altering the rights landscape. Specifically, as Katerina Linos explains,

> An appropriate derogation requires the existence of a threat to the life of a nation, a formal declaration, and a recognition that some rights can never be suspended. Moreover, an appropriate derogation requires that restrictions be lifted when the emergency ends, and, just as a limitation,

over time. Now, she writes, "[a]s war goes on, Americans have lapsed into a new kind of peacetime. It is not a time without war, but instead a time in which war does not bother everyday Americans." Id. at 135.

[503] See Waxman, supra note 92, at 658–59 (observing that Chief Justice Hughes recognized "that war could be used pretextually to advance political and legal agendas and he expected courts to play a checking role"); id. at 660 (noting that Chief Justice Hughes believed after World War I that "reversion to normality was delayed, perhaps for political reasons").

[504] See, e.g., 2 The Records of the Federal Convention of 1787, at 540–41 (M. Farrand ed., 1911) (statement of James Madison) ("The president would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of peace."); cf. Viveca Novak, Bum Rap for Rahm, FactCheck.org (Jan. 13, 2011), https://www.factcheck.org/2011/01/bum-rap-for-rahm/ [https://perma.cc/Y7ZE-6J3N] (noting that at the beginning of the Great Recession, then-White House Chief of Staff Rahm Emanuel emphasized, "You never want a serious crisis to go to waste. And what I mean by that is an opportunity to do things that you think you could not do before").

[505] Youngstown Sheet & Tube Co. v. Sawyer (*The Steel Seizure Case*), 343 U.S. 579, 641–44 (1952) (Jackson, J., concurring) ("But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture."); see also id. at 634 ("That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety."). For examples of how various world leaders used the pandemic to "put in place previously unimaginable reforms," see Katerina Linos, Organizational Rights in Times of Crisis, 88 U. Chi. L. Rev. 729, 745–46 (2021).

> requires that all restrictions be related and proportional to the emergency.[506]

In other words, to go down the path of derogating, or limiting, rights that persons would otherwise enjoy in ordinary times, under the international law framework a formal declaration with a start (and in time, end) date is required. And even with such a system, there are certain rights (for example, the right not to be tortured) that are non-derogable—that is, untouchable—*even* in times of emergency.

But of course we do not have such a system in the United States. Instead of an on/off switch like that embraced by the international law framework, in practice, ours is more like a dimmer switch. And this introduces significant conceptual problems. Indeed, many of the most vociferous supporters of the notion that the Constitution should adapt in times of war, such as Chief Justice Hughes, predicate their arguments on the idea that there must be a clean division between wartime and peacetime, and that the Constitution must revert back to its ordinary operation during latter times.[507] Thus, Chief Justice Hughes spoke in *Blaisdell* only of "temporary restraint[s] of enforcement" of certain constitutional provisions in times of emergency.[508] But if the theory requires an on/off switch that no longer exists, the theory is left without any mooring. (When will the war on terrorism end? Or, as every schoolchild in this country was asking during these last hard years, when, *if ever*, will the COVID-19 pandemic end?)

Further, it is not just that the line between war and peace is fuzzy, but also that, as Matthew Waxman has written, "[t]oday, many of the vast government powers that were in Hughes's era reserved for wartime—and not just military powers but economic regulatory powers, too—have

[506] Linos, supra note 505, at 746 (first citing David Kretzmer, State of Emergency, *in* Max Planck Encyclopedia of Public International Law (2008); then citing Audrey Lebret, COVID-19 Pandemic and Derogation to Human Rights, 7 J.L. & Biosciences 1, 4–6 (2020); and then citing Laurence Helfer, Rethinking Derogations from Human Rights Treaties, 115 Am. J. Int'l L. 20, 23 (2021)).

[507] For details, see Waxman, supra note 92, at 659–61, 675.

[508] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 439 (1933). As Waxman has noted, others along the way have made arguments similar to those advanced by Chief Justice Hughes. Take John Quincy Adams, for example, who argued in 1836 that the "peace power is limited by regulations and restricted by provisions, prescribed within the constitution itself. The war power is limited only by the laws and usages of nations . . . [and] it breaks down every barrier so anxiously erected for the protection of liberty, of property, and of life." 12 Reg. Deb. 4038 (1836) (statement before the House of Representatives), *quoted in* Waxman, supra note 92, at 626.

become normalized; they are now regular features of our peacetime governmental landscape."[509] Add to the mix the fact that the "moment the president declares a 'national emergency'—a decision that is entirely within his discretion—more than 100 special provisions become available to him."[510] Although many of the powers the president may lay claim to under these provisions "tee up reasonable responses to genuine emergencies," some go well beyond that immediate scope.[511] Looking back, before Congress reformed the emergency legislation landscape, a 1973 Senate bipartisan committee identified 470 statutes without time limitations delegating emergency authority to the executive.[512] (470!) The same committee also discovered that multiple presidentially declared emergencies remained outstanding, including a 1933 proclamation by Franklin Delano Roosevelt that suspended all transactions at banking institutions located in the United States and its territories for four days.[513]

The long and short of it is that drawing neat lines between emergencies and "normal" times today is an elusive objective. And if a state of emergency of one kind or the other is our new normal, then why shouldn't the normal constitutional rules apply? And, for that matter, be judicially enforceable?

3. History Does Not Suggest That the Political Branches Will Self-Police

History reveals the downsides inherent when the judiciary stands down or defers to the political branches to the extent that in so doing part of the

[509] Waxman, supra note 92, at 621.

[510] Elizabeth Goitein, The Alarming Scope of the President's Emergency Powers, The Atlantic (Jan./Feb. 2019). Looking at recent events, President Trump "declared more national emergencies than any president in a four-year period." Jacqueline Alemany, Josh Dawsey & Tom Hamburger, Talk of Martial Law, Insurrection Act Draws Notice of Jan. 6 Committee, Wash. Post (Apr. 27, 2022), https://www.washingtonpost.com/politics/2022/04/27/talk-martial-law-insurrection-act-draws-notice-jan-6-committee/ [https://perma.cc/8GA2-DNNX].

[511] Goitein, supra note 510 (noting that some of the powers in question "appear dangerously suited to a leader bent on amassing or retaining power"). "For instance, the president can, with the flick of his pen, activate laws allowing him to shut down many kinds of electronic communications inside the United States or freeze Americans' bank accounts." Id. Further, "[o]ther powers are available even without a declaration of emergency, including laws that allow the president to deploy troops inside the country to subdue domestic unrest." Id.

[512] Senate Hist. Off., Reasserting Checks and Balances: The National Emergencies Act of 1976 (July 1, 2021), https://www.senate.gov/artandhistory/senate-stories/reasserting-checks-and-balances.htm [https://perma.cc/N9RA-A8KU].

[513] Id.; see Proclamation No. 2039, 2 Pub. Papers 24 (Mar. 6, 1933).

reason is grounded in the notion that the political branches will self-police for constitutional compliance. Take President Roosevelt. In the lead-up to his issuance of EO 9066,[514] pursuant to which the government launched the mass incarceration of some 120,000 Japanese Americans, 70,000 of whom were United States citizens, the President was told repeatedly by his Attorney General and other advisors that no detention of citizens could occur without a suspension of the privilege of the writ of habeas corpus.[515] Roosevelt nonetheless issued EO 9066 after he had met with War Department officials telling them to prepare a plan for wholesale evacuation of Japanese Americans, including citizens, from the West Coast. Following the meeting, Assistant Secretary of War McCloy is reported to have said: "We have *carte blanche* to do what we want to as far as the President is concerned."[516]

Attorney General Biddle recalls the President's decision this way:

> I do not think he was much concerned with the gravity or implications [of signing 9066]. He was never theoretical about things. What must be done to defend the country must be done. The decision was for his Secretary of War, not for the Attorney General, not even for J. Edgar Hoover . . . . Public opinion was on their side, so that there was no question of any substantial opposition . . . . Nor do I think that the constitutional difficulty plagued him—the Constitution has never greatly bothered any wartime President. That was a question of law, which ultimately the Supreme Court must decide.[517]

In many respects, this story is not surprising—as Biddle said, a wartime president's primary concern is winning the war.[518] (Biddle, meanwhile, went around giving speeches in 1943 saying that the detention of citizens

[514] 3 C.F.R. § 1092 (1943) (repealed 1976).

[515] See supra text accompanying notes 116–21.

[516] Biddle, supra note 469, at 218 (quoting McCloy); see also Greg Robinson, By Order of the President: FDR and the Internment of Japanese Americans 109 (2001) (noting that Roosevelt defended EO 9066 in Cabinet meetings on the basis that he should defer to military claims of necessity); Kenneth S. Davis, FDR: The War President, 1940–1943, at 424 (2000) (noting more generally Roosevelt's strong inclination to defer to the military in wartime).

[517] Biddle, supra note 469, at 219. Biddle believed that opposition from Stimson would have swayed the President to chart a different course. See Robinson, supra note 516, at 116.

[518] Notably, however, it was Prime Minister Winston Churchill who drove the shutting down of Britain's World War II citizen internment program. For details, see generally Tyler, supra note 2, at 279–80 (outlining Churchill's written criticisms of citizen detention policies towards the end of World War II).

was unconstitutional.[519] He nonetheless oversaw his department defend numerous lawsuits challenging the relevant framework.)

This is but one example.[520] All the same, it reveals an Executive wholly unconcerned with the legal ramifications of a policy that was plainly and tragically unconstitutional. Instead, it was Roosevelt's view that it was for the courts to step in and police the boundaries of constitutional conduct, while it was for him to keep his eyes on the war effort, unconcerned with such matters. The Court did not fulfill this role in *Hirabayashi* and *Korematsu*. *Ex parte Endo* did lead to the closing of the camps[521] (an outcome that was rendered more likely when FDR won reelection in 1944 and therefore had insulation from political blowback), but it did so in a narrow holding that left far too much unresolved constitutional law on the table. In an ideal world, every branch and government actor would internalize our core constitutional values. (Indeed, even if the Court *had* chastised the Executive over EO 9066 and mass incarceration, there would have been no turning back the clock on the tragic effects of those same policies.) As this example underscores, the political branches are especially vulnerable to the pressures of war and national crises and insufficiently sensitive to constitutional considerations during the same.

4. History Also Suggests That Those Managing Crises Will Overreact to Perceived Threats and/or Not Be Fully Transparent with the Judiciary

Another concern is that the government not only will overreact to perceived threats to national security, it will demand deference from the judiciary in the absence of proper foundation. As a general proposition, there is a well-documented tendency for government to overreact and/or adopt policy responses that are poorly designed to deal with national security threats.[522] A prime example is the practice of waterboarding,

[519] See Memorandum from Edward J. Ennis to Charles Fahy, U.S. Solic. Gen. (Jan. 21, 1944) (on file at 2, Box 37, Folder 2, Charles Fahy Papers, Franklin Delano Roosevelt Library) (detailing 1943 speech by Biddle).

[520] Other examples might include the torture of suspects that occurred during the war on terrorism, which was not only illegal, but in the opinion of many leading experts, counterproductive. See infra text accompanying note 523.

[521] See infra note 550 and accompanying text.

[522] See, e.g., Stephen J. Schulhofer, The Enemy Within: Intelligence Gathering, Law Enforcement, and Civil Liberties in the Wake of September 11, at 3 (2002); Stone, supra note 29, at 242 ("[W]e have a long history of overreacting to the perceived dangers of wartime."). But see Richard A. Posner, The Truth About Our Liberties, 12 Responsive Community 4, 4–5 (Summer 2002) (arguing by pointing to, among others, the Cuban Missile Crisis and attack

sanctioned by the Bush Administration's Office of Legal Counsel in the wake of the attacks of September 11, notwithstanding the fact that the consensus of leading intelligence experts is that the fruits of such practices are unreliable.[523]

Further, history has also offered reason for courts to pause before deferring to government assertions made in litigation related to the needs of national security. Again, the events of World War II are instructive. As is now well known—but, more importantly, was also well known at the time—the mass incarceration of Japanese Americans was predicated upon baseless assertions about the needs of national security. Putting to the side the fact that Roosevelt's Attorney General repeatedly opposed mass incarceration as unconstitutional (at least with respect to citizens) and more generally as wholly unnecessary, a report prepared in January for the Chief of Naval Operations by Lieutenant Commander Kenneth D. Ringle concluded that the so-called "'Japanese Problem' has been magnified out of its true proportion" and reported that "the most dangerous" were already in custody or "known" to Naval Intelligence and/or the FBI.[524] This was confirmed by FBI Director Hoover—himself no stranger to robust surveillance—who reported a lack of evidence of disloyal activity sufficient to justify evacuation proposals and held the view that the push for mass incarceration of Japanese Americans was "based primarily upon public and political pressure rather than on factual data."[525]

Nonetheless, the government moved forward with the plan and then, when challenged in court, made sweeping and baseless assertions about the need for the mass incarceration of Japanese Americans in the resulting litigation. This included the government's briefing in *Korematsu*.[526] Initially, two prominent Justice Department lawyers conceded that there existed little evidence to support the government's claims about the threat

on Pearl Harbor that "officials have repeatedly and disastrously underestimated [dangers to the national security]").

[523] See, e.g., Ali H. Soufan with Daniel Freedman, The Black Banners: The Inside Story of 9/11 and the War Against al-Qaeda 423–25, 430–32 (2011). Another example might be found in the World War I speech restrictions. See supra text accompanying notes 82–90.

[524] See Lieutenant Commander K.D. Ringle, U.S. Navy, to Chief of Naval Operations, Report on Japanese Question (Jan. 26, 1942), https://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/r/ringle-report-on-japanese-internment.html [https://perma.cc/273P-LK3B]. Ringle was the Assistant District Intelligence Officer for the Eleventh Naval District in Los Angeles. Id.

[525] Biddle, supra note 469, at 224 (quoting from a memo sent by Hoover to Biddle).

[526] See Irons, supra note 116, at 284–88, 291–92.

posed by Japanese Americans in the West.[527] In so doing, they were swayed by the FBI's conclusions that an infamous report on which the Department was relying included intentional falsehoods.[528] But superiors removed the concessions and cited the very same report.[529] The Court thereafter deferred to the government's claims in *Korematsu* and did not pause over the fact that the trial court below had declined to do any fact-finding for itself. (The dissents of Justices Murphy and Jackson in *Korematsu* highlighted this fact. Justice Jackson, for example, asked: "How does the Court know that these orders have a reasonable basis in necessity? No evidence whatsoever on that subject has been taken by this or any other court."[530])

A more recent example may be found in the *Travel Ban Case*. There, the Trump Administration argued that the Supreme Court should defer to "the President's judgments on sensitive matters of national security and foreign relations," leaving it to him, free of judicial interference, to decide the proper course "to protect the Nation."[531] A majority of the Supreme Court essentially followed this course, upholding the travel ban and holding that "the Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving 'sensitive and weighty interests of national security and foreign affairs.'"[532] The majority likewise cautioned that the judiciary "cannot substitute [its] own assessment for the Executive's predictive judgments" with respect to matters relating to "national security interests."[533] But as Justice Sotomayor's dissent laid bare in excruciating detail, the Court's decision left "undisturbed a policy first advertised openly and unequivocally as a 'total and complete shutdown of Muslims entering the United States' because the policy now masquerades behind a facade of

[527] Id. at 286, 288.

[528] Id. at 280–81, 288.

[529] Peter Irons documents these developments, including the fact that the Justice Department was well aware of the Ringle Report. See id. at 204, 278–92.

[530] Korematsu v. United States, 323 U.S. 214, 245 (1944) (Jackson, J., dissenting); see also id. at 241 (Murphy, J., dissenting) ("[T]here [is] no adequate proof that the [FBI] and the military and naval intelligence services did not have the espionage and sabotage situation well in hand . . . .").

[531] Petition for a Writ of Certiorari at 16, Trump v. Hawaii (*The Travel Ban Case*), 138 S. Ct. 2392 (2018) (No. 17-965).

[532] *The Travel Ban Case*, 138 S. Ct. at 2422 (quoting Holder v. Humanitarian L. Project, 561 U.S. 1, 33–34 (2010)).

[533] Id. at 2421.

national-security concerns."[534] Putting to the side how hard it is to reconcile the *Travel Ban Case* with contemporaneous precedent that holds such statements relevant to and problematic in the First Amendment context,[535] it hardly shores up the Court's legitimacy to defer to a government position that at best looks like Monday-morning quarterbacking and at worst does not pass the straight-face test.

In all events, the point is that the Court has been misled more than once deferring to baseless assertions about the needs of national security. Although some might say that this supports the idea that the courts should simply stay out of the fray during times of emergency, if the courts *are* going to exercise judicial review during emergencies, these examples certainly offer reason to pause before embracing the deference model.

5. We Have Not Learned Enough from the Past

A substantial element to Tushnet's position in favor of the courts standing down during emergencies is the notion that with each episode of overreach in times of emergency, there is a social learning that eventually results and leads to a course-correction such that the government will not repeat past breaches.[536] Others disagree. Justice Brennan, for example, believed that "[a]fter each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along."[537]

A more dramatic rebuke of Tushnet's optimism may be found in a 2014 speech by Justice Scalia in which he observed: "[O]f course, *Korematsu* was wrong . . . . But you are kidding yourself if you think the same thing will not happen again."[538] Justice Scalia's observation is shored up by the fact that *Korematsu*'s author, Justice Black, declined to distance himself from the opinion when interviewed years later. To the contrary, in his

[534] Id. at 2433 (Sotomayor, J., dissenting).

[535] See, e.g., Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm., 138 S. Ct. 1719, 1729–31 (2018) (assigning weight in the First Amendment analysis to the expression of "hostility to a religion or religious viewpoint" on the part of a state commission).

[536] Tushnet, supra note 25, at 294–98.

[537] William J. Brennan, Jr., The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises, 18 Isr. Y.B. Hum. Rts. 11, 11 (1987).

[538] Weiss, supra note 1 (quoting Justice Scalia). Justice Scalia continued by observing that at the relevant time, there was "panic about the war and the invasion of the Pacific and whatnot. That's what happens. It was wrong, but I would not be surprised to see it happen again, in time of war. It's no justification but it is the reality." Id.

memoirs, Justice Black "stoutly maintained that if the circumstances were the same now as they were then, he would do it the same way."[539] As he phrased it, "Yes, given the circumstances, I would still write *Korematsu* the same way."[540]

To be sure, these interjections might be read to suggest that the Court should steer clear of playing any role in such cases as opposed to risk giving its imprimatur on egregious government action. Or, as Bruce Ackerman put it, "[i]f Hugo Black fell down on the job, will his successors do any better?"[541] It is a fair question.

During the war on terrorism, the government did not build mass incarceration camps to detain tens of thousands of persons based solely on their ethnic ancestry. So yes, we have arguably made *some* progress. But in the absence of contemporary judicial rebuke of what happened during World War II—one of the worst and most tragic violations of the Constitution in American history[542]—the precedent of what was done to the Japanese American community remains such that, to borrow from Justice Jackson, future actors may well treat it as a loaded gun—namely, as sanctioning "a policy of mass incarceration under military auspices."[543] We do know that the historic precedent, moreover, altered the political and legal calculus surrounding habeas corpus and suspension going

[539] Mr. Justice and Mrs. Black: The Memoirs of Hugo L. Black and Elizabeth Black 71 (1986).

[540] Id. at 72. Justice Black also said:

> [W]e were in a state of war with Japan . . . . There were fears that California would be infiltrated and taken over by the Japanese. Hysteria was everywhere. Some Japanese people had been attacked on the streets by fearful citizens. The Japanese were distinguishable by their features and were also in danger. Reports were coming in through the press and radio that Japanese planes had been sighted close to New York.

Id. at 71–72.

[541] Ackerman, supra note 25, at 1043. Ackerman's response is to give up on the courts and instead restructure how emergency powers are exercised by the political branches and implement a new hard wiring of limitations on the same. See generally id. (proposing a new framework for addressing emergencies that permits short-term emergency powers but implements political and legal checks to thwart long-term emergency powers).

[542] I suppose some might argue that the government's actions were extraconstitutional and should be treated as such, and presumably accepted as such. To be crystal clear, I categorically reject any such idea as normatively acceptable.

[543] Grodzins, supra note 120, at 374. To be sure, the Court has overruled *Korematsu* in dicta, but it did so only in dicta and both *Hirabayashi* and *Yasui v. United States,* 320 U.S. 115 (1943), have not been overruled. See *Yasui*, 320 U.S. at 115 (vacating and remanding for resentencing with respect to conviction of violating a curfew order, the validity of which the Court never questioned). And there is more generally the historic precedent of what happened. See supra text accompanying notes 154–57.

forward, influencing future government actions in several problematic ways.

For one, there is Congress's enactment of the Emergency Detention Act of 1950, a product of the Cold War and McCarthy-era anti-communism politics. The Act empowered the President to declare unilaterally an "Internal Security Emergency" and then arrest and detain persons—including citizens—based solely on suspicion of a likelihood of future engagement in spying or sabotage on behalf of enemies of the United States. In so doing, Congress expressly provided that it was *not* suspending habeas corpus in passing it, apparently believing such a step to be unnecessary.[544] Although the Emergency Detention Act provoked substantial academic criticism, members of Congress overwhelmingly supported its passage (overriding President Truman's veto of the Act), along with appropriations for building detention centers.[545]

To be sure, Congress eventually repealed the Emergency Detention Act with no president having ever invoked its emergency provisions.[546] In its place, Congress passed the Non-Detention Act, which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[547] But these developments were of no moment in the wake of the terrorist attacks of September 11, 2001, when the government once again detained citizens without trial and in the

[544] Pub. L. No. 81-831, tit. II, § 102, 64 Stat. 1019, 1021 (1950) (repealed 1971) (authorizing the president to arrest and detain "each person as to whom there is reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage"); see id. § 116, 64 Stat. at 1030. Congress passed the Emergency Detention Act as part of the Internal Security Act of 1950, Pub. L. No. 81-831, 64 Stat. 987 (1950) (repealed 1971). Four years earlier, a Justice Department official relied upon the World War II precedent as a basis for arguing that in the event of war with Russia, the same approach could be employed "to detain all Russians and Communists, whether or not American citizens." Memorandum from Theron L. Caudle, Assistant Att'y Gen. for the Crim. Div., to Tom C. Clark, U.S. Att'y Gen., Detention of Communists in the Event of Sudden Difficulty with Russia (July 11, 1946), *microformed on* Papers of the U.S. Commission on Wartime Relocation and Internment of Civilians 3067–75, 3068 (reel 3) (Frederick, Md., Univ. Publ'ns of Am. 1983).

[545] See 96 Cong. Rec. 15725–26 (1950) (reporting Senate vote); 96 Cong. Rec. 15632–33 (1950) (reporting House vote). On the appropriations and aftermath related to the Act, see David Cole, The Priority of Morality: The Emergency Constitution's Blind Spot, 113 Yale L.J. 1753, 1770 (2004). For timely criticism of the Act, see, e.g., Zechariah Chafee, Jr., The Most Important Human Right in the Constitution, 32 B.U. L. Rev. 143, 160 (1952).

[546] See Louis Fisher, Cong. Rsch. Serv., RS22130, Detention of U.S. Citizens 1 (2005) (noting that "[s]ix detention camps were established but never used").

[547] Pub. L. No. 92-128, 85 Stat. 347, 347 (1971) (codified in scattered sections of the U.S. Code); 18 U.S.C. § 4001(a).

absence of a suspension of habeas corpus. As I have explored at considerable length in other work, such a practice—whether applicable to Japanese American citizens detained during World War II or "citizen enemy combatants" in the war on terrorism—is entirely at odds with the core purpose of the Constitution's Suspension Clause.[548] So one might ask, have we learned anything?

6. The Misguided Legitimacy Concern

Another concern underlying calls for a reduced judicial role (and for that matter an adaptable Constitution) in times of emergency is grounded in a fear that a court's rebuke of emergency action by government actors will go unheeded, thereby eroding the judiciary's legitimacy. I have always found this argument curious. To begin, even Lincoln, who strenuously disagreed with the Court's decision in *Dred Scott v. Sandford* (correctly, of course), did not question his obligation to follow a binding court decision. That is, although he certainly defended the position that a president can second-guess court decisions, he did not "deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit."[549]

Building on this example, history calls into question the likelihood of resistance. There is no indication, for example, that President Truman considered ignoring the Court's holding in the *Steel Seizure Case* that

[548] For extensive explication of these points, see Tyler, supra note 2, at 211–76; see also Tom C. Clark, Epilogue to Executive Order 9066: The Internment of 110,000 Japanese Americans 111 (Maisie Conrat & Richard Conrat eds., 1972) ("Despite the unequivocal language of the Constitution . . . that the writ of habeas corpus shall not be suspended, and despite the Fifth Amendment's command that no person shall be deprived of life, liberty or property without due process of law, both of these constitutional safeguards were denied by military action under Executive Order 9066.").

[549] See Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* 4 The Collected Works of Abraham Lincoln 262, 268 (Roy P. Basler, Marion Dolores Pratt & Lloyd A. Dunlap eds., 1953). Lincoln elaborated:

> I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration, in all [parallel] cases, by all other departments of the government . . . . At the same time the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.

Id.

rebuked his unilateral assertion of wartime executive authority, despite the fact that his administration claimed a loss before the Court would be "catastrophic" to the country's war effort.

Well, then, one might ask this counterfactual: Would President Roosevelt have ignored a Supreme Court ruling going the other way in *Hirabayashi* or *Korematsu*? I seriously doubt it. I could be wrong, of course, but consider the context. *Hirabayashi* is a closer call as it came earlier in the war, but *Korematsu* came down the same day as *Endo*, which held the detention in the camps of "loyal" Japanese American citizens unlawful. This was not under the Constitution, recall, but all the same it was a major rebuke of the Executive. Once the White House was tipped off that the decision was coming, it not only got on board, but the Administration got ahead of matters by announcing the closing of the camps the day before the Court handed down *Endo*.[550] So it is frankly hard to imagine that a contrary decision in *Korematsu* would have provoked a constitutional showdown by an angry Executive.

In all events, what if Roosevelt had ignored an unfavorable decision in *Hirabayashi* or *Korematsu*? Recall that Roosevelt had apparently threatened to carry out the executions of the Nazi saboteurs regardless of what the Court held in *Ex parte Quirin*. If the Court had decided that some or all of the military trials carried out in that case were unlawful and Roosevelt had ignored that decision, would we look back today at those events as undercutting the Court's legitimacy? I am skeptical. Instead, I suspect most would look back on a President who damaged his own legacy and, by ignoring a reasoned opinion of the high court, eroded some of the executive branch's legitimacy. Consider another example. Recall that there was massive resistance to the Court's decision in *Brown v. Board of Education* in the South, yet few would say that this recalcitrance

[550] The day before *Endo* came down, Major General Henry C. Pratt issued Public Proclamation No. 21, declaring that as of January 2, 1945, all Japanese American evacuees would be free to return to their homes on the West Coast. Pub. Proclamation No. 21, 10 Fed. Reg. 53–54 (Dec. 17, 1944) (effective Jan. 2, 1945). The Court appears to have delayed announcement of its decision in *Endo* to give the government more time to prepare its response. Supporting this conclusion is an internal Court memorandum sent by Justice Douglas to the Chief Justice in November 1944 asking why, if the entire Court was in agreement that the government was detaining Endo unlawfully, the decision had yet to be announced. See Patrick O. Gudridge, Remember *Endo*?, 116 Harv. L. Rev. 1933, 1935 n.11 (discussing Memorandum from William O. Douglas to Harlan Stone (Nov. 28, 1944) (on file with Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 116, Folder No. 70 O.T. 1944, Endo v. Eisenhower, Certiorari, Conference & Misc. Memos)).

undermined the Court's legitimacy. To the contrary, most celebrate the decision as one of the Court's finest hours.

Returning to *Korematsu*, Bruce Ackerman's assessment of the decision is spot-on: "It is bad law, very bad law, *very*, *very* bad law."[551] Going further, though, there is an argument to be made that the Court's decision actually hurt its legitimacy. (Is this point really that controversial?) To be sure, one might argue that this suggests the Court should never had taken up the case. On the contrary, with *Brown* as a benchmark, I would argue that the Court should have embraced the opportunity in *Korematsu* to stake out a role in policing constitutional limits on discriminatory wartime detention policies that violate the Suspension Clause. Doing so would have only served to enhance the Court's legitimacy.[552]

7. The Sky Is Unlikely to Fall

By the President's telling, a rebuke from the Court with respect to his seizure of American steel mills during the Korean War would have been disastrous. But the Court's decision did not preclude such a seizure; it held only that the Constitution required *Congress* to authorize the takings in question. Congress both before and after had the tools at its disposal to address the situation. In other words, if the seizure truly was imperative to the war effort, the government retained a means of proceeding lawfully.

This is often true. Thus, many other cases in which the Court has deferred to the political branches would not have been disastrous had they come out differently. One might say that about the *Prize Cases*. There, too, Congress could have and maybe should have convened at the outset of the Civil War rather than waiting three months to do so. It could have given Lincoln the legal cover to prosecute the war full-stop from the outset. In all events, in the cases, the Court addressed matters pertaining to a limited window at the start of the Civil War. Had the dissenters' position won out, the only ramification would have been that the shipowners in question could have won their property back, or else compensation. (The latter result followed under an earlier decision that

[551] Ackerman, supra note 25, at 1043.

[552] As Eugene Rostow lamented in the wake of *Hirabayashi* and *Korematsu*: "This was not the occasion for prudent withdrawal on the part of the Supreme Court, but for affirmative leadership in causes peculiarly within its sphere of primary responsibility." Rostow, supra note 127, at 504.

came under the pen of Chief Justice John Marshall, *Little v. Barreme*,[553] who was unmoved by the fact that the capture in that case occurred within the context of a naval war with France.[554]) In this respect, the *Prize Cases* are emblematic of what are very often second-order matters implicated in wartime cases. Further, the dissenting position would have encouraged greater legislative engagement in crucial matters of war going forward—something that is far closer to the war-making framework the Framers had in mind in drafting the Constitution.

Consider the wartime habeas context as well. Had the government been told it could not detain Japanese Americans or suspected citizen enemy combatants during the war on terrorism without a trial, it retained the power to detain anyone it could convict by proper trial of criminal activity. In fact, this is the course the government eventually followed in the case of José Padilla, another citizen enemy combatant held as part of the war on terrorism.[555] And, as Justice Scalia observed in his *Hamdi v. Rumsfeld* dissent, the government also has the power to suspend the privilege in cases of "rebellion or invasion."[556] We know now (and the government knew then), moreover, that the detention of tens of thousands of Japanese Americans during World War II did not advance the war effort. Indeed, the government recruited some of our finest soldiers out of the camps.[557]

To be clear, this is not about courts interjecting themselves into war strategy. As John Hart Ely observed: "[C]ourts have no business deciding when we get involved in combat, but they have every business insisting that the officials the Constitution entrusts with that decision be the ones who make it."[558] In other words, there are some matters that are truly off the table with respect to judicial review. Those are matters that the

[553] 6 U.S. (2 Cranch) 170, 179 (1804) (holding the ship capture unlawful despite the state of war with France).

[554] There, the Court "invalidated the seizure of a foreign ship during the naval war with France, *even though the seizure was on the President's order*, on the ground that the President had thereby exceeded the authorization granted him by Congress." Ely, supra note 25, at 55.

[555] For details, see Padilla v. Hanft, 547 U.S. 1062, 1062–64 (2006) (Kennedy, J., concurring in the denial of certiorari).

[556] 542 U.S. 507, 577–78 (2004) (Scalia, J., dissenting).

[557] For a gripping account of the heroism of Japanese American soldiers during the war, see Daniel James Brown, Facing the Mountain: A True Story of Japanese American Heroes in World War II (2021).

[558] Ely, supra note 25, at 54.

Constitution assigns to the discretion of the political branches.[559] But when it comes to free speech, equality norms, due process, religious freedom, proper functioning of the separation of powers, and many other matters, the Constitution does not assign the political branches unfettered discretion. That is where the courts come in.

To be sure, there indeed may be some emergency-context cases the decision of which could have profound implications. Many of the legal issues raised during the Civil War were of a nature and/or scale unknown during the rest of American history. (I am thinking of the Emancipation Proclamation, among other things.) Thus, I do not categorically claim that judicial decisions could never have drastic consequences during wartime. But more often than not, the sky-will-fall arguments are overblown. Further, a judicial rebuke of one approach by political actors often will not preclude other political actors from achieving the same or similar ends, as in the *Steel Seizure Case*. (And of course, sometimes the merits will support the government's actions, whatever level of judicial scrutiny applied.)[560]

8. The Perils of "Adapting" the Constitution in Emergencies

One final point bears brief discussion. In at least some of the leading cases explored in Part I where the Court has deferred to the political branches in wartime or emergency, it has done so with respect to the proper interpretation of constitutional provisions that are by their very nature emergency provisions. The most obvious example is one about which I have written extensively: the Suspension Clause. That Clause specifically recognizes the emergency power of suspension of habeas.[561] The Founding generation wrote the Constitution against a legal backdrop pursuant to which the privilege of the writ of habeas corpus associated with suspension promised a person who could claim the protection of domestic law that they could not be detained without criminal trial in the

[559] Cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170–71 (1803) ("Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.").

[560] There is also the separate matter of whether the Civil War was *sui generis*, and we should be careful about adopting wholesale separation of powers practices based on examples drawn from that period or practices employed during the same.

[561] See U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

absence of a suspension. Further, the privilege itself was of judicial origins.[562] This context lays bare the problem with arguments that the courts should not be in the business of policing violations of the Suspension Clause in cases like *Hirabayashi*, *Korematsu*, *Endo*, and *Hamdi*. I am thinking not just of scholars who have said as much, but also Justice Frankfurter's assertion in *Korematsu* that reads: "To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours."[563] Respectfully, the entire history of the writ of habeas corpus makes clear that it very much *is* the Court's business if the government evacuates persons into assembly centers for their involuntary forced mass incarceration. To borrow from Eugene Rostow, "[i]t is hard to imagine what courts are for if not to protect people against unconstitutional arrest."[564]

This is one of the problems with notions of an adaptable Constitution. In practice, the theory tends to encompass all provisions—whether emergency or not—under its sweep. (Next, the president will be able to declare war. Oh, wait, the executive already does that.[565]) And then there are the obvious line-drawing problems. Even assuming one agrees that emergency provisions like the Suspension Clause and Declare War Clause should not be "adapted" in wartime (a proposition I hope is not controversial, but maybe it is), how about the Constitution's anti-discrimination principles? Or protection of free speech? Or religious freedom? What makes one constitutional principle less foundational and sacrosanct than another? And what would be left of our constitutional identity were we openly to jettison or water down constitutional norms around equality, free speech, religious freedom, separation of church and state, liberty, etc., in times of emergency?[566] (And, particularly when we

[562] For extensive discussion of the origins of the privilege of the writ of habeas corpus, see generally Tyler, supra note 2, at 14–21.

[563] Korematsu v. United States, 323 U.S. 214, 225 (1944) (Frankfurter, J., concurring).

[564] Rostow, supra note 127, at 511.

[565] See generally Ely, supra note 25, at ix (arguing that Cold War-era decisions to engage militarily have been principally made by the executive, without significant congressional or judicial participation). Cf. Youngstown Sheet & Tube Co. v. Sawyer (*The Steel Seizure Case*), 343 U.S. 579, 642 (1952) (Jackson, J., concurring) ("Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress.").

[566] Speaking to the latter, Sir Edward Coke promoted the Petition of Right before the House of Commons by observing that "the greatest inheritance a man hath is the liberty of his person, for all others are accessory to it." 2 Commons Debates 1628, at 356, 358 (Robert C. Johnson, Maija Jansson Cole, Mary Frear Keeler & William B. Bidwell eds., 1977).

talk about the protection of minorities and/or minority views, why is it okay to jettison these principles if both politically accountable branches choose to violate them versus just one branch?[567] The President and Congress effectively came together to establish the mass incarceration of Japanese Americans during World War II.[568] Did that make it okay?)

At the end of the day, the question remains whether any principled distinction may be drawn among constitutional provisions other than based on levels of generality, as Hughes suggested in his later elaboration of the idea of an adaptable Constitution. And if that is the case, don't we already interpret specific and general clauses of the Constitution differently in the ordinary course? Or, perhaps I should ask, shouldn't we?[569] That is, does Hughes's theory really defend a limited emergency-based idea of an adaptable Constitution, or is the idea a more general approach to constitutional interpretation for all times?

* * *

Geoffrey Stone has argued that in "periods of relative calm, the Court should consciously construct constitutional doctrines that will provide firm and unequivocal guidance for later periods of stress."[570] In contrast to balancing tests (think *Hamdi*[571]) and other "[m]alleable principles," he argues, "[c]lear constitutional rules that are not easily circumvented or manipulated by prosecutors, jurors, presidents, and even Supreme Court Justices are essential if we are to preserve civil liberties in the face of wartime fear and hysteria."[572]

I wholeheartedly agree. And I would add a friendly amendment—specifically, that courts should not just police the Constitution's boundaries and set "firm and unequivocal" lines during periods of calm. They should also stand watch during periods of emergency, applying

[567] Cf. generally Issacharoff & Pildes, supra note 472, at 11–12 (arguing that significance should be given to both political branches coalescing around incursions upon civil liberties).

[568] President Roosevelt issued Executive Order 9066, setting the mass incarceration in motion, and Congress enacted Public Law 503, criminalizing violations of the military regulations issued under EO 9066. For details, see Tyler, supra note 2, at 222–31.

[569] See John F. Manning, Federalism and the Generality Problem in Constitutional Interpretation, 122 Harv. L. Rev. 2003, 2006–08 (2009).

[570] Stone, supra note 29, at 243.

[571] In that case, the plurality opinion reached its formula for what kind of hearing Hamdi should receive by balancing his liberty interests against the government's asserted national security interests. See Hamdi v. Rumsfeld, 542 U.S. 507, 528–29 (2004) (plurality opinion).

[572] Stone, supra note 29, at 243.

standard doctrines of judicial review and calling out unconstitutional action where they see it. Any other approach renders Justice Scalia's prediction that we will see another *Korematsu*—both in terms of the precursor events and the Court's failure to act—far from hyperbole.

IV. TAKING STOCK OF THE COURT'S RECENT PANDEMIC RULINGS

With all of this discussion now out of the way, it is time to return to the Supreme Court's recent COVID-19 rulings. There is a lot to unpack from the decisions explored above, both in trying to make sense of them and in measuring them against the principle that the judiciary should not exercise review differently in times of emergency versus in the ordinary course.[573]

As set out above, there have been many examples of the Court and individual Justices applying strict scrutiny to second-guess measures put in place by government officials charged with preserving public health during the pandemic. As the backdrop of history explored earlier underscores, this alone is noteworthy. Why is a Court with a long history of deferring to political branches during times of emergency now so active, so insistent that its role is unchanged in such circumstances? Another notable phenomenon revealed by the above cases is that the Court has not been consistent in its approach in such cases. When it comes to religious worship, property rights, and vaccine regulations, the Court has been increasingly active and concomitantly less deferential to government officials. But, during the same pandemic, when it has come to abortion rights (which, when the pandemic-related cases came before it, were still protected under the *Roe*-*Casey* line), the Eighth Amendment rights of prisoners, and voting rights, the Court has fallen back on well-worn arguments about deference to those who are better suited to manage a public health crisis.

What is going on?

[573] I should be clear here that when this Article refers to emergency, it means it in the global contextual sense, not in reference to the Court's emergency or so-called "shadow" docket. It is also the case that although the fact that the COVID-19-related cases discussed herein all came to the Court via its emergency or "shadow" docket, this Article has largely omitted discussion of this context, exploring instead the more transcendent question of whether such cases, however packaged as they come to the Court, should be reviewed in a deferential posture once the Court reaches their merits. Given that the Court's relevant decisions rarely seem to have turned on the special remedial aspects of its emergency docket, this Article has largely sidestepped discussion of those elements of the cases in analyzing them.

There are several possible explanations. First, given that at least in some cases, the Court has applied strict scrutiny to enjoin certain government policies instituted during the pandemic, it is possible that some or most members of the Court do not believe that the COVID-19 pandemic is a true emergency or some of them believe that the emergency waned with the introduction of vaccines and effective treatments. If correct, the Court's recent decisions tell us nothing about what the Court might do in the context of, say, future wartime. Second, it is possible that at least some Court members wish to change the narrative with respect to how the Court thinks about its own role and the Constitution during times of emergency. Third, it is possible that at least some current Court members are not swayed one way or the other by the existence of the pandemic, but instead are voting based on a merits-based assessment of the case at hand. (Of course, this too might suggest an underlying skepticism over the enormity of the emergency presented by COVID-19.) Each possible explanation is explored below.

A. Is the COVID-19 Pandemic a Real Emergency? (Or, If It Is, Is It Different than War?)

Given how increasingly active some members of the Court have been in the religious-worship cases, the eviction cases, and in some vaccine cases, one could surmise that some Justices do not actually believe that the COVID-19 pandemic is a real emergency. After all, how else might one explain the aggressive nature of judicial review employed by several Justices—and sometimes a majority of Justices—in these cases? As explored above, historically the Court has often deferred to restrictions on speech during wartime, not to mention racial discrimination. Further, the Court has not given a hard look at economic measures that suspend property rights during financial crises. (Consider *Blaisdell* during the Great Depression.[574]) What is different about now? Maybe in some quarters there is skepticism over just how serious an emergency the pandemic was and remains.

To be sure, if some members of the Court do not believe that the pandemic is on par with wartime or the Great Depression, then that would explain why those Justices are engaging in aggressive judicial review of some government policies put in place during the pandemic. With one member of the Court regularly declining to wear a mask on the bench in

[574] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 447–48 (1934).

early 2022 in the face of the new and explosively contagious Omicron variant, perhaps there is something to this idea. But it is hard to imagine that Court members do not think the COVID-19 pandemic represents a true emergency.

The numbers arising out of the pandemic, after all, are staggering. By the end of October 2022, more than one million persons had died from the virus in the United States and just shy of one-hundred million individuals have been infected in this country.[575] Of those who lived through catching the virus, countless are experiencing serious long-term effects.[576] Compare World War I, in which the United States lost 50,000 troops in battle[577]—numbers not even close to what we have witnessed during the pandemic. At the start of the pandemic in 2020, Americans experienced months of lockdowns and shelter-in-place orders unlike anything witnessed in long lifetimes. Students attended school entirely online in some cases for well over a year. Further, the economic upheaval wrought by the pandemic has been devastating to significant proportions of the United States population, including disproportionately impacting low-income communities and persons of color. During the early months of the pandemic, unemployment skyrocketed, small businesses closed in record numbers, and but for government interventions, droves of evictions would have followed. "Dramatic" and "unprecedented" are two words that well describe the period through which we have all been living.[578]

[575] COVID-19 Data Dashboard, Johns Hopkins Univ., https://coronavirus.jhu.edu [https://perma.cc/E5GB-VDYH] (last visited Nov. 2, 2022).

[576] Maxime Taquet et al., Incidence, Co-Occurrence, and Evolution of Long-COVID Features: A 6-Month Retrospective Cohort Study of 273,618 Survivors of COVID-19, 18 PLOS Med., Sept. 28, 2021, at 7, https://doi.org/10.1371/journal.pmed.1003773 [https://perma.cc/SU9V-4MXD].

[577] For details, see, e.g., Robert H. Ferrell, Woodrow Wilson and World War I, 1917–1921, at 3 (1985).

[578] NPR, Harv. T.H. Chan Sch. of Pub. Health & The Robert Wood Johnson Found., The Impact of Coronavirus on Households Across America 1–3 (2020), https://cdn1.sph.harvard.edu/wp-content/uploads/sites/21/2020/09/NPR-RWJF-Harvard-National-Report_092220_Final1-4.pdf [https://perma.cc/67TV-2KAT]; WHO, Int'l Lab. Org., Food & Agric. Org. of the U.N. & Int'l Fund for Agric. Dev., Impact of COVID-19 on People's Livelihoods, Their Health and Our Food Systems (Oct. 13, 2020), https://www.who.int/news/item/13-10-2020-impact-of-covid-19-on-people's-livelihoods-their-health-and-our-food-systems [https://perma.cc/LDC4-R7PU]; see Tracking the Impact of the Coronavirus on the U.S., N.Y. Times, https://www.nytimes.com/live/2020/coronavirus-usa? [https://perma.cc/A6VD-UBTE] (last updated July 1, 2021).

This being said, it is entirely possible that some members of the Court do not equate the pandemic with wartime, and that they might vote differently in that context. To be more specific, it is not clear that a Justice who voted to strike down capacity limitations on religious worship during the pandemic would vote similarly to rebuff limitations on speech or religious freedom ordered in the context of war. Nor is it clear that such a Justice would immediately treat as suspect any race-based distinctions drawn in the context of war.

It is also possible that, as the pandemic has continued, the amount of deference certain Justices have been willing to give the political branches has waned, particularly as COVID-19 vaccines came to be introduced and widely distributed. Perhaps this explains Chief Justice Roberts's shift in the religious worship cases. Early on, he wrote that the Court should defer to the judgment of those managing the pandemic,[579] but as 2021 continued, he joined his colleagues on the side applying strict scrutiny to limitations on religious worship, then took a tough line on eviction moratoriums, and eventually joined the majority in the OSHA case, declaring illegal the nationwide employer regulations relating to vaccination or testing and masking requirements. Such a movement along a spectrum from deference to more rigorous scrutiny would mirror what history has witnessed in the past during wartime. Specifically, although the Court has more often than not deferred to the political branches during times of war (think, for example, of the *Prize Cases*, *Quirin*, *Hirabayashi*, and *Korematsu*), it has moved away from such an approach in the immediate wake of wartime (think of *Milligan* and *Duncan*). Given that by the fall of 2021, vaccination became available to everyone over the age of five, for those Justices who are swayed by the changing conditions, one might expect to see waning deference coincide with what is hopefully a waning pandemic. (This being said, the onset of the Omicron variant and the resulting explosive numbers of new cases and rising deaths that yet again caused hospitals to exceed capacity might have given pause to anyone thinking we were on the other side of the pandemic in early 2022. As the OSHA case highlights, it did not have such an effect on a majority of the Court.)

[579] See, e.g., S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief).

B. Has the Court Changed Its Approach to Emergencies?

It is also possible that some Justices really mean it when they say that the Court has fallen down on the job during emergencies and that the Court's most important role is to guard the Constitution during such times. I am thinking principally here of Justices Gorsuch and Kavanaugh, who in their pandemic-era opinions have regularly criticized the Court's historical record during emergencies. Perhaps these Justices mean to course correct and promote a new approach to judicial review in times of emergency going forward. That is, perhaps they believe that the Court should no longer grant deference to the political branches in such times as a matter of course, but instead should apply otherwise-applicable standards of judicial scrutiny in cases as they come to the courts.

If these Justices really mean what they say, the implications could be significant. It suggests a course correction from many of the decisions explored in Part I above. Under the rigorous scrutiny promoted by Justices Gorsuch and Kavanaugh, one would second-guess the Japanese American mass incarceration (which violated both the Suspension Clause[580] and the equal protection component to the Fifth Amendment[581]), along with a host of wartime First Amendment free speech cases detailed above as well as potentially some of the wartime detention, separation of powers, and property rights cases, to choose just a few examples. Under such a model, going forward we should expect that an emergency context will not alter the rigorous scrutiny owing in any case involving discrimination based on race or religion, or limitations on speech and assembly. This in turn should portend a more robust—and therefore more relevant—role for the courts during emergencies along with greater protections of civil liberties.

Such a shift would move the courts away from what Erwin Chemerinsky and Michele Goodwin have observed as outsized reliance on *Jacobson* in emergency cases.[582] As they document, both the high court and a host of lower courts have leaned heavily on *Jacobson* to apply what is essentially rational basis scrutiny to a range of COVID-19-related

[580] Again, I have explored and defended this assertion extensively in other work. See, e.g., Tyler, supra note 2, at 222; Tyler, supra note 116, at 848–49.

[581] To be sure, this component was not recognized until *Bolling v. Sharpe* in 1954, but it was argued in all the Japanese American cases, and Justice Douglas's law clerk pushed this as a basis for deciding the *Endo* case. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954); see also Tyler, supra note 2, at 403 n.126 (discussing Douglas's clerk's memo in the case).

[582] Erwin Chemerinsky & Michele Goodwin, Civil Liberties in a Pandemic: The Lessons of History, 106 Cornell L. Rev. 815, 833–35 (2021).

restrictions on speech, religion, abortion, and other things, virtually ensuring that the laws and regulations survive judicial scrutiny.[583] In so doing, the courts have ignored the elevated standards of scrutiny that the judiciary has developed in constitutional law since *Jacobson* and fallen instead into the familiar pattern of treating cases differently because of their emergency context.

As should be apparent from above, I do not think that this is a good approach to emergency cases, whether now or at any other time. Instead, like Chemerinsky and Goodwin, I think it would be better for courts to treat such cases as they would absent the emergency context, applying the applicable standard framework of judicial review.[584] It follows that the reliance by several Justices on *Jacobson* and concomitant calls for extensive deference that we have witnessed in some pandemic cases miss the mark. (Think, for example, of the Chief Justice's assertion in *South Bay United Pentecostal Church v. Newsom* that the state officials should be granted "especially broad" latitude in addressing the pandemic[585] or Justice Breyer's invocation of the same standard in *Chrysafis v. Marks*.[586])

This means, for example, the Court should apply strict scrutiny in cases involving actual religious discrimination.[587] More generally, James Madison's vision for the courts should control, emergency or not. As he envisioned things way back in 1789, the "independent tribunals of justice will consider themselves . . . the guardians of [constitutional] rights" and

[583] See id. at 830–33, 836, 838, 844–45, 847.

[584] Id. at 834–35; see also Daniel Farber, The Long Shadow of *Jacobson v. Massachusetts*: Public Health, Fundamental Rights, and the Courts, 57 San Diego L. Rev. 833, 862 (2020) (arguing that courts should apply "normal constitutional tests" during public health emergencies, while "tak[ing] into account the government's need to take immediate precautionary actions under conditions of high uncertainty").

[585] 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (quoting Marshall v. United States, 414 U.S. 417, 427 (1974)).

[586] 141 S. Ct. 2482, 2484 (2021) (Breyer, J., dissenting from grant of application for injunctive relief).

[587] Of course, this presents an important threshold question. Consider, for example, the disagreement in *Roman Catholic Diocese of Brooklyn v. Cuomo*. 141 S. Ct. 63 (2020) (per curiam). The majority believed discrimination was at work, see id. at 66–68, whereas Justice Sotomayor's dissent (which had the better of the argument in my view) pointed out that religious worship is not comparable to other activities in which persons are not together for extended periods of time in close quarters. See id. at 79 (Sotomayor, J., dissenting). In all events, the key point is that it is this jumping off point that is relevant to the question whether strict scrutiny applies, not any supposed emergency context.

"will be an impenetrable bulwark against every assumption of power in the Legislature or Executive."[588]

Justice Kavanaugh is right that the "Court's history is littered with unfortunate examples of overly broad judicial deference to the government when the government has invoked emergency powers and asserted crisis circumstances to override equal-treatment and free-speech principles."[589] And I quite agree with Justice Gorsuch that a Justice's "oath to uphold the Constitution is tested by hard times, not easy ones. And succumbing to the temptation to sidestep the usual constitutional rules is never costless."[590]

Notably, such an approach to judicial review need not necessarily be fatal in all such cases. As Chemerinsky and Goodwin observe, under strict scrutiny, regulations can survive if they are narrowly tailored and serve a compelling government interest.[591] They contend that stopping a wildly contagious and deadly pandemic constitutes a compelling interest. As they write, "[t]he government's burden to justify an infringement of a fundamental right should not change in an emergency, even though the emergency can present the compelling interest sufficient to uphold the government's action."[592]

Regardless of whether one agrees with Chemerinsky and Goodwin on this point, the more important idea is that if certain Justices are pushing the Court to reconsider its approach to judicial review in times of emergency, this marks a shift from the past worth celebrating. Unfortunately, however, it is not at all clear that is what is actually going on in the pandemic cases.

C. Or, Is It All About the Merits?

There is a third option that explains all that is happening at the Court right now, and it is not especially complicated. It is also the most plausible: it is all about the merits.

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[588] Statement of James Madison, 1 Annals of Congress 439 (Joseph Gales ed., 1834); 5 Writings of James Madison 385 (Gaillard Hunt ed., 1904).

[589] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2615 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief).

[590] Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 30 (2020) (Gorsuch, J., concurring in denial of application to vacate stay).

[591] See Chemerinsky & Goodwin, supra note 582, at 835.

[592] Id.; see also Richard H. Fallon, Jr., Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1283 (2007) (explaining the development of modern strict scrutiny doctrine).

Consider the contrast between the way that the Court's members have decided the religious worship cases on the one hand and the abortion, prison conditions, and voting rights cases on the other. Yes, religious freedom is an enormously important right in our constitutional scheme. And when faced with a case involving genuine discrimination against religion, the courts should apply strict scrutiny, emergency or not.[593] But under Supreme Court precedent as it existed when the Court decided the COVID-19 emergency abortion-related motions, a woman also possessed the constitutional right to obtain an abortion without confronting an undue burden on the exercise of that right.[594] Persons also have the right not to be subjected to cruel and unusual punishment, even after they are imprisoned.[595] Finally, with respect to voting rights, the fundamental right to vote is the very hallmark of our democracy.[596] As Justice Ginsburg so eloquently put it in her *Shelby County v. Holder* dissent, voting is "the most fundamental right in our democratic system."[597]

[593] For specific discussion of the Court's treatment of religious freedom in the context of COVID-19 and the argument that the Court has used the emergency docket to expand its understanding of the Free Exercise Clause, see Stephen I. Vladeck, The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause, 15 N.Y.U. J.L. & Liberty 699, 720 (2022).

[594] See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) ("[A]n undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."); Whole Women's Health v. Hellerstedt, 579 U.S. 582, 136 S. Ct. 2292, 2300 (2016); June Med. Servs. v. Russo, 140 S. Ct. 2103, 2113, 2139 (2020) (Roberts, C.J., concurring) (applying the undue burden test as the fifth vote).

[595] See, e.g., Farmer v. Brennan, 511 U.S. 825, 832 (1994) ("The [Eighth] Amendment . . . imposes duties on [prison] officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'" (citation omitted)); see also Brown v. Plata, 563 U.S. 493, 502 (2011) (upholding lower court order mandating lessening of prison population); Taylor v. Riojas, 141 S. Ct. 52, 53–54 (2020) (remanding case dismissed on qualified immunity grounds after holding that an inmate's conditions of confinement violated the Constitution).

[596] Harper v. Va. Bd. of Elections, 383 U.S. 663, 666–67 (1966) (striking down a poll tax as violative of equal protection while referring to the right to vote as "fundamental"); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (calling "the political franchise of voting" a "fundamental political right, because preservative of all rights"); see also Reynolds v. Sims, 377 U.S. 533, 562, 568 (1964) (establishing the one person, one vote principle and declaring that "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized").

[597] 570 U.S. 529, 566 (2013) (Ginsburg, J., dissenting).

So, assuming that the Constitution and judicial role do not change in times of emergency, as several Justices have said in the religious-worship and eviction-moratorium cases, where were their votes to uphold the then-existing right to an abortion when the FDA required women to risk their lives in a raging pandemic to obtain necessary medication for medication abortions?[598] Or to protect geriatric prisoners at extreme risk of death from COVID-19 who were housed in horrifically unsafe prison conditions in the early days of the pandemic? Or to ensure that elderly and infirm individuals would not, to borrow from Mr. Howard Porter, Jr., have to risk "dying to vote" in the middle of an unprecedented global pandemic?[599]

Take, on the one hand, Justice Kavanaugh's opinion in *Calvary Chapel Dayton Valley v. Sisolak*—a case involving restrictions on religious gatherings—in which he asserted that "[t]he court of history . . . cautions us against an unduly deferential judicial approach" in times of crisis.[600] To say that his approach a few months later in *Andino v. Middleton* was different would be putting it mildly. There, the Court effectively upheld South Carolina's rule requiring a witness to an absentee ballot notwithstanding the pandemic.[601] In Justice Kavanaugh's view, this was appropriate for several reasons, including the fact that there should not be "'second-guessing by an "unelected federal judiciary," which lacks the

[598] Given that the Court had agreed to hear a case during the 2021 Term in which a party asked for the overruling of *Roe*, see Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022), and that the Court allowed a ban on abortions after six weeks to remain in effect in Texas during that same time, see In re Whole Women's Health, 142 S. Ct. 701, 701 (2022) (denial of writ of mandamus), it is not surprising that five votes did not emerge for holding that the FDA's decision to loosen restrictions on every other drug save one necessary for medication abortions was problematic. But the *Roe-Casey* line established the undue burden test as precedent and as such, in the context of its emergency docket where the Court should not be making new law, the Justices should have enforced binding precedent if they were serious about applying the same measure of judicial review in a pandemic as in normal times. The Court's decision ultimately to overrule *Roe* and *Casey* in *Dobbs*, 142 S. Ct. at 2279, further suggests that many of the votes in these cases are all about the merits.

[599] Merrill v. People First of Ala., 141 S. Ct. 25, 27 (2020) (Sotomayor, J., dissenting from grant of stay) (quoting Mr. Porter). Further, it is not as though the COVID-19 pandemic raised novel issues in this regard. Courts have long had to offer accommodations to ensure the right to vote is being upheld in the context of volcanic eruptions, hurricanes, and other natural disasters, not to mention wars. See Dakota Foster, A Lurking Threat: State Emergency Powers in Elections, Lawfare (Nov. 2, 2022), https://www.lawfareblog.com/lurking-threat-state-emergency-powers-elections [https://perma.cc/5BJG-PCJ3].

[600] 140 S. Ct. 2603, 2615 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief).

[601] Andino v. Middleton, 141 S. Ct. 9, 9–10 (2020).

background, competence, and expertise to assess public health and is not accountable to the people.'"[602] It is hard to understand why concerns about an "unelected judiciary" carried sway in one case and not the other. Both involved underlying assertions that fundamental rights were being jeopardized by government actions during the pandemic.

To be sure, one might think that the *merits* pointed in different directions in each case. But the merits pose an entirely distinct inquiry from whether the Court should apply the same measure of judicial scrutiny during times of emergency as it does during normal times (that is, whether special deference is owed)—or at least, these considerations *should* pose distinct inquiries. What we see from several Justices in the pandemic cases instead is an approach that conflates their bottom-line view of the merits with the threshold question of whether or not judicial review in times of emergency generally should be deferential. This is not a new phenomenon. As Louis Henkin chronicled decades ago, it has been a common approach by jurists in the analogous context of deciding whether a matter presents a political question.[603] Just as Henkin noted there, such an approach hardly leads to principled judging.

Perhaps the worst offender of all came in the OSHA case, *National Federation of Independent Business v. Department of Labor*.[604] There is no question (or at least I hope there is no question) that as an exercise of its commerce power, Congress could require businesses engaging in interstate commerce to institute vaccination or test and mask requirements for their employees. There is also no question (again, I hope) that Congress can delegate such authority to an executive agency.[605] Thus, the

[602] Id. at 10 (Kavanaugh, J., concurring in grant of application for stay) (quoting S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief)). Justice Kavanaugh suggested a similar approach in Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 32 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay).

[603] See Louis Henkin, Is There a "Political Question" Doctrine?, 85 Yale L.J. 597, 625 (1976).

[604] 142 S. Ct. 661, 664–66 (2022) (per curiam). Some have even equated the decision as returning the Court to the *Lochner* era. See Stephen I. Vladeck, The Supreme Court's Vaccine Mandate Ruling Shows It's Ready to Second-Guess Government Policy, Wash. Post (Jan. 19, 2022), https://www.washingtonpost.com/politics/2022/01/19/supreme-court-vaccines-freedom-osha/ [https://perma.cc/Q3PL-J4WT].

[605] If Congress may not delegate so-called "major questions" to the executive branch, as Justice Gorsuch seemed to suggest in his concurrence, see Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 667–70 (2022) (Gorsuch, J., concurring), then a wealth of statutes delegating major war-making and emergency powers may run into trouble too. Cf. West Virginia v. EPA, 142 S. Ct. 2587, 2608–09 (2022) (explaining that congressional enabling

only issue there was whether Congress had done so properly. It is astounding that six Justices thought not. The statute itself creates an organization to address safety and *health* in the workplace, empowering it to address the same.[606] (Curiously enough, the majority opinion employed italics extensively, yet never italicized the word *health*, used both in the agency name and its statutory marching orders.[607]) Further, as the dissent noted, if the fact that COVID-19 poses a threat also outside the workplace undercuts OSHA's authority to regulate it *within* the workplace, get ready for the return of other commonplace issues, like asbestos, to the workplace.[608] And finally, if the fact that Congress set up OSHA and gave it its marching orders fifty years ago is relevant to the analysis, then one must seriously worry about the ability of the executive branch to manage our national defense and military given that many of the relevant delegations of authority made by Congress are far older.[609] In all events, the OSHA case is explored here at some length to clarify that the vision of judicial review this Article promotes is not the one employed in that case: untethered to the protection of enumerated constitutional rights, beyond anything defensible even in peacetime, and sorely lacking in legal justification more generally. In all events, the decision in that case supports the conclusion that it is the merits—and not a course correcting of the judicial review ship more generally—that is animating the approach of many of the Justices to the pandemic-era cases that have come before the Court.

Going forward, a better approach would seek to apply consistent principles in determining the appropriate level of judicial scrutiny in emergency cases. Such an approach should transcend a judge's personal ideology. The idea calls upon the good judge to be "willing and able to articulate [a principle] as the true basis of decision, *and* to apply it in future cases that are not fairly distinguishable."[610] Along the way, the

legislation delegating "[e]xtraordinary grants of regulatory authority" must clearly authorize the supposedly delegated powers at issue).

[606] See 29 U.S.C. §§ 651(b), 652(8).

[607] *Nat'l Fed'n of Indep. Bus.*,142 S. Ct. at 663.

[608] See id. at 673 (Breyer, Sotomayor & Kagan, JJ., dissenting).

[609] See, e.g., 10 U.S.C. § 12302(a) (formerly 10 U.S.C. § 673) (originally enacted in 1956) (permitting the calling up of the Ready Reserve); 50 U.S.C. § 1431 (originally enacted in 1958) (authorizing the entry into contracts for the national defense).

[610] See David L. Shapiro, Herbert Wechsler—A Remembrance, 100 Colum. L. Rev. 1377, 1379 (2000). Shapiro here describes his understanding of Herbert Wechsler's conception of "neutral principles" as set forth in Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 15 (1959). Whether he accurately captures Wechsler's

judiciary would be better to rid itself of its historic practice of deferring in the name of emergencies to the political branches, choosing instead to exercise its role in the same way no matter the context. This would have the Court members debating out in the open the merits of any case that comes before them—emergency or not—rather than hiding behind constantly shifting models of judicial review that are, at root, actually driven by a Justice's views of the merits.

CONCLUSION

Cicero famously said, "Silent enim leges inter arma,"[611]— in times of war, the laws fall silent. Recent experience suggests that the opposite is true—*at least sometimes*—during a pandemic. This Article has attempted to situate the Supreme Court's recent decisions during the COVID-19 pandemic within historical context to show that the current Court has taken on a much more rigorous role in some cases than it has generally in emergencies past.

Although the Court has not been consistent in its approach to judicial review during the pandemic and has sometimes deferred extensively to the decisions of political actors as to how best to confront the crisis at hand, in a host of cases—including most especially those involving religious freedom claims—a majority has applied strict scrutiny and held various regulations unconstitutional. One may certainly disagree with *how* the Court has applied strict scrutiny in these cases—that is, how the Court had resolved the underlying merits of the decisions. Nonetheless, this Article has tried to show why, as a general matter, the application of normal standards of judicial scrutiny during times of emergency should be viewed as a welcome development. Perhaps the Court's recent decisions on this score suggest we have traveled some distance in rejecting the prosecution's argument at the trial of the Lincoln

intent or not (an intent that has proved fodder for much disagreement among legal scholars over the years), this Article relies on Shapiro's conception of the good judge as quoted in the text. Cf. Malick W. Ghachem & Daniel Gordon, From Emergency Law to Legal Process: Herbert Wechsler and the Second World War, 40 Suffolk U. L. Rev. 333, 335 (2007) (suggesting that "Wechsler's influential post-war jurisprudence [including Neutral Principles] sustained, in some important ways, the wartime practice of subordinating constitutional liberties to the discretionary power of government").

[611] Marcus Tullius Cicero, Pro Milone § IV, ¶ 11 (F.H. Colson ed., MacMillan & Co. 1919) (52 B.C.E.).

conspirators that the Constitution is "only the law of peace, not of war."[612] But we still have a considerable way to go.

[612] Tyler, supra note 2, at 176 (quoting Rep. Bingham's description of the Fifth Amendment's due process guarantee as inapplicable in times of war).