NOTE

PARTISAN EMERGENCIES

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Executive emergency powers are tantalizingly effective. They allow presidents to bypass congressional gridlock, do away with procedural safeguards, and act decisively with minimal oversight. But there is a risk that these exceptional powers may become a norm of domestic governance. This Note theorizes a problem of "partisan emergencies," declared by a president despite significant disagreement about the factual existence of an emergency. One example is President Trump's declaration of an emergency after Congress refused to fund his border wall. Other examples stem from Democrats calling on President Biden to declare an emergency to address issues like climate change and reproductive health. Congress, initially relying on a legislative veto to terminate such declarations, must now muster a supermajority if it disagrees with them. At the heart of the scheme is the National Emergencies Act, outlining how a president can declare a "national emergency" and what powers he unlocks by doing so without imposing a definition of the term. This Note surveys the judiciary's recent treatment of emergency powers, positing that while courts are willing to engage in means-ends review about how an executive uses emergency powers, they are not willing to engage in the factual question of whether an emergency exists at all. This Note then argues that the judiciary must be willing to engage with this question to effectively rein in dubious invocations of emergency power. To do so, the courts should treat the term "national emergency" as one capable of statutory interpretation, rather than one posing an intractable political question.

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"[J]udicial deference in an emergency or a crisis does not mean wholesale judicial abdication."[1]

INTRODUCTION

With partisan feuds at a high and congressional functionality at a low,[2] it is tempting for presidents to rely heavily on executive power to implement their policy agendas. An effective way to do so is by declaring a national emergency, allowing a president to "trigger[] executive powers or relax[] otherwise applicable requirements or restrictions."[3] One scholar describes declaring a national emergency as a "master key" that unlocks a treasure trove containing nearly 150 additional grants of statutory power.[4] President Trump relied on the declaration of a national

[1] Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 74 (2020) (Kavanaugh, J., concurring).

[2] Aaron Zitner, U.S. Grapples with Political Gridlock as Crises Mount, Wall St. J. (Oct. 11, 2023, 8:12 AM), https://www.wsj.com/politics/national-security/u-s-grapples-with-political-gridlock-as-crises-mount-be179aca.

[3] Jennifer K. Elsea, Jay B. Sykes, Joanna R. Lampe, Kevin M. Lewis & Bryan L. Adkins, Cong. Rsch. Serv., R46379, Emergency Authorities Under the National Emergencies Act, Stafford Act, and Public Health Service Act (2020), https://crsreports.congress.gov/product/pdf/R/R46379 [https://perma.cc/V4KS-CMPV].

[4] Mark P. Nevitt, Is Climate Change a National Emergency?, 55 U.C. Davis L. Rev. 591, 616 (2021).

emergency to secure funding for a southern border wall after Congress refused to grant it.[5] In subsequent years, some Democrats called on President Biden to declare a national emergency to circumvent congressional inaction on climate change, while others looked to emergency powers as a means of protecting abortion access in the wake of *Dobbs v. Jackson Women's Health Organization*.[6] Indeed, President Biden did rely on the COVID-19 emergency declaration in his attempt to address the student loan debt crisis, before the Supreme Court rejected this use of power in *Biden v. Nebraska*.[7]

Presidential use of emergency power is not new. While the executive lacks explicit emergency authority under the Constitution,[8] statutory emergency powers have existed since the founding of the nation.[9] These powers are important and perhaps even essential for responding to complex crises in the modern age. And, in many ways, presidents have exercised restraint in their use of the broad swath of powers that are available to them—at least when it comes to domestic policy.[10] Of the eighty-seven states of national emergency that have been declared in the past forty-five-year period, all but eight were issued to impose economic sanctions on foreign actors under the International Emergency Economic Powers Act ("IEEPA") or related sanctions laws.[11] But recent trends

[5] Proclamation No. 9844, 84 Fed. Reg. 4949, 4949 (Feb. 15, 2019).

[6] Tarini Parti, Biden Is Pressed to Declare Emergencies After Climate, Abortion Setbacks, Wall St. J. (July 20, 2022, 4:12 PM), https://www.wsj.com/articles/biden-faces-pressure-to-declare-emergencies-after-climate-abortion-setbacks-11658318400; Myah Ward, Biden Faces Calls to Declare Climate Emergency as He Heads to Maui, Politico (Aug. 20, 2023, 7:00 AM), https://www.politico.com/news/2023/08/20/biden-climate-emergency-hawaii-00111973 [https://perma.cc/P8ZH-6BTS].

[7] 143 S. Ct. 2355 (2023).

[8] Saikrishna Bangalore Prakash, The Imbecilic Executive, 99 Va. L. Rev. 1361, 1391 (2013) (describing how Article II does not confer emergency authority, but instead creates an "impotent" executive who relies on statutory delegations of power).

[9] See Examining Potential Reforms of Emergency Powers: Hearing Before the Subcomm. on the Const., C.R. & C.L. of the H. Comm. on the Judiciary, 117th Cong. 3 (2022) [hereinafter Potential Reforms of Emergency Powers Hearing] (statement of Elizabeth Goitein, Co-Director, Liberty and National Security Program, Brennan Center for Justice) (stating that "since the founding of the nation, Congress has been the primary source of the president's emergency powers").

[10] See generally Declared National Emergencies Under the National Emergencies Act, Brennan Ctr. for Just., https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act [https://perma.cc/Q32Y-J2VD] (last updated Mar. 14, 2025) (listing declared emergencies of which the vast majority have been in the international or foreign affairs context).

[11] Id.

signal a risk that these exceptional powers may become a go-to strategy of domestic governance, particularly with the rise of what this Note conceptualizes as "partisan emergencies."[12]

The term "partisan emergency" refers to situations when presidents unilaterally declare an emergency despite significant disagreement along party lines over the most fundamental factual question: whether an emergency exists at all. President Trump's declaration of a national emergency to fund the border wall, in the face of congressional opposition, marked a clear example of this. So too would any invocation of emergency powers to protect abortion access. These differ from the more traditional crises such as wars, pandemics, natural disasters, or other physical attacks on American interests, although the scope of even these traditional emergencies is not closed off from this debate.[13] Indeed the COVID-19 pandemic, at a certain point, could be categorized as a partisan emergency.[14] Recent decisions offer insight into the current philosophy of judicial review in times of crisis[15] but leave open questions regarding the proper role for courts in policing executive overreach. The current discussion surrounding the issue of emergency declarations focuses exclusively on the need for Congress to step in.[16] This Note provides an alternative ground to limit executive power in the event Congress is

[12] See Amy L. Stein, Domestic Emergency Pretexts, 98 Ind. L.J. 479, 479 (2023) (discussing the use of "questionable domestic emergencies to achieve unrelated policy goals").

[13] Cf. The Prize Cases, 67 U.S. (2 Black) 635 (1863) (involving parties' dispute over what constitutes war and who gets to decide the existence of it).

[14] J. Clinton, J. Cohen, J. Lapinski & M. Trussler, Partisan Pandemic: How Partisanship and Public Health Concerns Affect Individuals' Social Mobility During COVID-19, Sci. Advances, Jan. 6, 2021, at 1, 1.

[15] See generally Amanda L. Tyler, Judicial Review in Times of Emergency: From the Founding Through the COVID-19 Pandemic, 109 Va. L. Rev. 489 (2023) (tracing the philosophy of judicial review over time with a helpful discussion on the recent pandemic years).

[16] Congress has introduced bipartisan legislation to change the National Emergency Act to give it more teeth in limiting emergency declarations, but nothing has passed both houses to date. See, e.g., Limiting Emergency Powers Act of 2023, H.R. 121, 118th Cong.; ARTICLE ONE Act, S. 764, 116th Cong. (2019). A Senate hearing in May 2024 saw experts testify on the need for changes to the current statutory scheme. Restoring Congressional Oversight Over Emergency Powers: Exploring Options to Reform the National Emergencies Act: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affs., 118th Cong. (2024) [hereinafter Restoring Congressional Oversight Hearing]. Academic scholarship also centers on changes to the statutory scheme. See, e.g., GianCarlo Canaparo & Paul J. Larkin, Heritage Found., The Constitution and Emergencies: Regulating Presidential Emergency Declarations 3 (2023); Samuel Weitzman, Back to Good: Restoring the National Emergencies Act, 54 Colum. J.L. & Soc. Probs. 365, 405 (2021); Stein, supra note 12, at 515.

unable or unwilling to rise to the occasion, outlining why and how a court should approach the task of interpreting the term "national emergency" as used in the National Emergencies Act ("NEA").

This Note proceeds in three Parts. Part I provides a high-level overview of emergency powers under the NEA and discusses why Congress is currently ill-equipped to respond to abuses of national emergency declarations. Part II turns to three distinct questions that courts can ask when reviewing an executive declaration of national emergency.[17] First, courts can ask whether an emergency existed at the time of invocation or whether it persisted at the time of the use of executive power. Second, courts can ask whether the means the executive used to respond to an emergency violate any constitutional restrictions, notably in the separation of powers or First Amendment realms. Finally, courts can ask whether the executive invoked emergency powers as a pretext to deal with an unrelated social problem. This Note argues that while courts have recently been more comfortable with and willing to ask the second question, they have shied away from asking the first and third questions—often invoking the political question doctrine to avoid them.[18] With this taxonomy in mind, Part III then advances the argument that being able to meaningfully engage with the factual existence of an emergency will be an important tool if Congress remains unable to rein in an active executive who invokes emergency powers for partisan reasons.

I. OVERVIEW OF THE NATIONAL EMERGENCIES ACT AND CONGRESSIONAL FAILURE TO REIN IN EXECUTIVE POWER

In the early 1970s, the United States had been in a state of permanent emergency for forty years and had seen various enlargements of executive power under the guise of emergency.[19] Congress convened the bipartisan

[17] This analytical framework mirrors that proposed in an amicus brief filed in *Biden v. Nebraska*. See Brief of Amicus Curiae the Protect Democracy Project in Support of Respondents, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (Nos. 22-506 & 22-535).

[18] See infra Part II.

[19] Top of mind was the involvement in Cambodia and Vietnam without congressional approval. To Terminate Certain Authorities with Respect to National Emergencies Still in Effect, and to Provide for Orderly Implementation and Termination of Future National Emergencies: Hearing on H.R. 3884 Before the S. Comm. on Gov't Operations, 94th Cong. 14 (1976) (statement of Sen. Charles McC. Mathias) ("My own interest in the question of emergency powers developed out of our experience in the Vietnam War and the incursion into Cambodia."); see also Harold C. Relyea & L. Elaine Halchin, Cong. Rsch. Serv., 98-505,

Senate Special Committee on the Termination of the National Emergency to analyze the issue.[20] Its name stems from the fact that when it was created, Congress was aware of only one active emergency declaration.[21] It turns out there were four.[22] In its 1973 report, the Committee wrote that even though there was no need for the emergency declarations to continue, the President was not obliged to end them and possessed enough power under emergency statutes to "rule the country without reference to normal constitutional processes."[23] As a result of this committee's report and public pressure, Congress sought to rein in the use of open-ended and opaque emergency powers. To that end, it passed the National Emergencies Act of 1976.[24] The clear purpose of the Act, "evident in every facet of the legislative history, was to place limits on presidential use of emergency powers."[25]

Yet as of March 2025, there exist fifty-one active national emergency declarations under the National Emergencies Act, with the oldest stretching back to President Carter's original invocation in 1979—a longer and more extensive "permanent emergency"[26] than those prior to the NEA.[27] The average emergency declaration has lasted a decade, with many lasting longer.[28] One scholar noted how "America is now—and has been since the First World War—virtually always in a state of emergency, one way or another."[29] To see why the NEA has been largely ineffective at reining in executive emergency declarations, it is essential to look at the statutory scheme it imposed, Congress's dereliction of duty, and a Supreme Court decision that curtailed its effectiveness.

The National Emergencies Act established procedural "formalities"—though important formalities—that the executive must follow when

National Emergency Powers (2021), https://fas.org/sgp/crs/natsec/98-505.pdf [https://perma.cc/6G7H-87JW] (describing the history of the use of national emergency proclamations).

[20] S. Res. 9, 93d Cong. (1973).

[21] Restoring Congressional Oversight Hearing, supra note 16, at 5 (statement of Elizabeth Goitein, Senior Director, Liberty and National Security Program, Brennan Center for Justice).

[22] S. Rep. No. 93-549, at III (1973).

[23] Id.

[24] 50 U.S.C. §§ 1601–1651.

[25] Potential Reforms of Emergency Powers Hearing, supra note 9, at 5 (statement of Elizabeth Goitein, Senior Director, Liberty and National Security Program, Brennan Center for Justice).

[26] Sanford Levinson, Constitutional Norms in a State of Permanent Emergency, 40 Ga. L. Rev. 699, 737 (2006).

[27] Brennan Ctr. for Just., supra note 10.

[28] Id.

[29] Kim Lane Scheppele, Small Emergencies, 40 Ga. L. Rev. 835, 836 (2006).

seeking to draw on many statutory emergency powers.[30] Among other things, it eliminated or modified some of the nearly 500 statutory grants of emergency authority that Congress had enacted between 1933 and 1973.[31] It also imposed a requirement that the President publish declarations of a national emergency in the Federal Register, noting specifically which powers he intends to use and which statute provides them.[32] It further mandated that the President update Congress every six months on the expenditures related to the emergency powers and provided that each emergency would end after one year unless the executive extended the declaration.[33] Crucially, it provided Congress with the ability to fast-track legislation to reject the President's declaration and the authority being sought through a concurrent resolution that did not require presentment to the President.[34] Finally, it required Congress to meet every six months while an emergency declaration was in effect to "consider a vote" on whether to end the emergency.[35]

One thing the NEA did not do, however, was specify what "national emergency" means. An early House draft of the bill gave the President the authority to declare an emergency when he found it "essential to the preservation, protection and defense of the Constitution or to the common defense, safety, or well-being of the territory or people of the United States."[36] This language was removed, though, because the Senate Committee on Government Operations ultimately decided it was "overly broad."[37] Instead, the NEA looked to the various other statutes that confer executive authority during emergencies, such as the Defense Production Act and the Stafford Act, to impose the necessary definition. These statutes, however, have expansive, vague, and deferential definitions themselves.[38] The Stafford Act, for example, defines an emergency as any instance where "in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save

[30] Relyea & Halchin, supra note 19.

[31] S. Rep. No. 93-549, at 6–7 (1973).

[32] National Emergencies Act, Pub. L. No. 94-412, § 201, 90 Stat. 1255, 1255 (1976) (codified at 50 U.S.C. § 1621).

[33] Id. §§ 202, 401 (codified at 50 U.S.C. §§ 1622, 1641).

[34] Id. § 202 (codified as amended at 50 U.S.C. § 1622).

[35] Id. § 202(b) (codified at 50 U.S.C. § 1622(b)).

[36] National Emergencies Act, H.R. 3884, 94th Cong. § 201(a) (1975).

[37] S. Rep. No. 94-1168, at 3 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2288, 2289.

[38] Potential Reforms of Emergency Powers Hearing, supra note 9, at 6 (statement of Elizabeth Goitein, Senior Director, Liberty and National Security Program, Brennan Center for Justice).

lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States."[39] While the Committee stated that the NEA was "not intended to enlarge or add to Executive power," in the forty-eight years since its enactment, many of the provisions in the NEA have not served as a meaningful check.[40]

A crucial reason is Congress's failure to exercise its intended role as that check on executive power. Given the "periodic meeting" clause that states Congress must meet every six months to determine the necessity of continuing emergencies, Congress should have met over ninety times since the enactment of the NEA. Yet prior to 2019, Congress had introduced only one resolution to terminate an emergency declaration, and the President terminated the emergency before any vote was necessary.[41] Litigants have attempted to argue that congressional failure to comply with the periodic meeting clause should be remedied by an automatic termination of the declared emergency.[42] The U.S. Court of Appeals for the First Circuit rejected this argument, holding that "Congress intended to impose upon itself the burden of acting affirmatively to end an emergency" rather than allowing it to be inferred by silence.[43] Silence is the usual congressional response to an executive's emergency declaration, and this holding closed off a potential solution to never-ending acquiescence. Indeed, rather than actively engage with invocations, the typical approach sees Congress "quickly adjust[] to the 'new normal' emergency state."[44] The bipartisan termination of the COVID-19 emergency in 2023 represented the first time in the nearly fifty years since the NEA came into effect that Congress successfully terminated an emergency declaration—and that was with a President willing to sign it into law.[45]

[39] 42 U.S.C. § 5122.

[40] S. Rep. No. 94-1168, at 3.

[41] See Tamara Keith, If Trump Declares an Emergency to Build the Wall, Congress Can Block Him, NPR (Feb. 11, 2019, 5:00 AM), https://www.npr.org/2019/02/11/693128901/if-trump-declares-an-emergency-to-build-the-wall-congress-can-block-him [https://perma.cc/GRE5-7K9T].

[42] Beacon Prods. Corp. v. Reagan, 814 F.2d 1, 4 (1st Cir. 1987).

[43] Id. at 4–5.

[44] Nevitt, supra note 4, at 619.

[45] The Associated Press, Biden Ends COVID National Emergency After Congress Acts, NPR (Apr. 11, 2023, 4:34 AM), https://www.npr.org/2023/04/11/1169191865/biden-ends-covid-national-emergency [https://perma.cc/JZH5-UZHU]; Elizabeth Goitein (@LizaGoitein), X (Apr. 11, 2023, 9:00 AM), https://x.com/LizaGoitein/status/1645773834526547968 [https://perma.cc/5QFN-G7JJ].

The border wall emergency declaration is a more apt example of the severe risk presented when Congress tries to terminate an emergency but finds itself unable to do so. As discussed above, when the NEA became law, it included a provision that allowed Congress to fast-track legislation that would terminate an executive's invocation of emergency authority through a concurrent resolution. This was important because it allowed a simple majority in either chamber to terminate the emergency through the so-called "legislative veto." However, the Supreme Court decided in 1983 that such legislative vetoes violated the Constitution and struck down a statutory provision similar to the NEA's in *Immigration & Naturalization Service v. Chadha*.[46] Then-Judge Breyer noted at the time that this formalistic decision had important "balance of power consequences."[47] Indeed, four years later, he authored an opinion noting how the legislative veto in the NEA was unconstitutional under *Chadha* before reviewing whether this clause was severable from the rest of the statute.[48] Ultimately, in that case the severability question was moot: in the years since *Chadha*, Congress had amended the NEA to require a joint resolution to terminate a national emergency.[49] Rather than a one-house solution as originally intended, terminating an emergency now comes with a requirement of passage in both houses of Congress and presentment to the President for his signature.[50]

This change directly undermined Congress's ability to challenge executive invocations of power and allowed President Trump to veto a joint resolution to terminate the border wall emergency. While both parties came together to reach the majority needed to pass the joint resolution, they were unable to muster the supermajority needed to defeat the presidential veto.[51] Due to the executive veto power, the border wall emergency declaration remained in effect until President Biden terminated it on his first day in office.[52] In his declaration, President Biden specifically stated that the original declaration was "unwarranted," but by

[46] 462 U.S. 919, 959 (1983).

[47] Stephen Breyer, The Legislative Veto After *Chadha*, 72 Geo. L.J. 785, 785 (1984).

[48] *Beacon Prods.*, 814 F.2d at 3.

[49] Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, § 801, 99 Stat. 448, 448 (1985).

[50] See 50 U.S.C. § 1622(a)(1).

[51] Eric Beech, Trump Vetoes Measure to End His Emergency Declaration on Border Wall, Reuters (Oct. 15, 2019, 10:54 PM), https://www.reuters.com/article/world/us/trump-vetoes-measure-to-end-his-emergency-declaration-on-border-wall-idUSKBN1WV06O/.

[52] Proclamation No. 10142, 86 Fed. Reg. 7225 (Jan. 20, 2021).

that point, the Department of Defense had already spent billions of dollars and entered into binding contracts for the border wall project that outlasted the termination of the emergency.[53]

Under this current status quo—investing the executive with the tools to unilaterally declare emergencies and divesting Congress of the power to effectively stop it—the judiciary is the final branch that can serve as a check on overreach.

II. QUESTIONS THAT SHAPE JUDICIAL REVIEW OF EMERGENCY INVOCATIONS

This Part looks to recent judicial decisions to determine how the courts view their role in times of declared emergencies. What emerges is a picture of a judiciary that is largely deferential to executive authority during these times of emergency, but that does not totally abdicate from reviewing executive actions. The Supreme Court is most willing to step in when the invoked authority goes "too far," to borrow the helpful language from another doctrine.[54] In the words of Justice Gorsuch, there is a "particular judicial impulse to stay out of the way in times of crisis. But if that impulse may be understandable or even admirable in other circumstances, we may not shelter in place when the Constitution is under attack. Things never go well when we do."[55] In the spirit of this tension between deference and activism, it is helpful to look at what the judiciary *does not* do, just as much as it is to look at what it *does* do.

A. Does an Emergency Exist at All?

The Supreme Court has never entertained a challenge to the statutory interpretation of "national emergency" under the NEA.[56] Lower courts

[53] Id. at 7225; see 50 U.S.C. § 1622(a)(C) (stating that termination of an emergency shall not affect "any rights or duties that matured or penalties that were incurred prior to such date"); Perla Trevizo & Jeremy Schwartz, Records Show Trump's Border Wall Is Costing Taxpayers Billions More Than Initial Contracts, ProPublica (Oct. 27, 2020, 12:00 PM), https://www.propublica.org/article/records-show-trumps-border-wall-is-costing-taxpayers-billions-more-than-initial-contracts [https://perma.cc/R99F-QF72].

[54] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[55] Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring).

[56] See Jennifer K. Elsea, Cong. Rsch. Serv., LSB10267, Definition of National Emergency Under the National Emergencies Act 1 (2019), https://crsreports.congress.gov/product/pdf/LSB/LSB10267 [https://perma.cc/9LQT-MGMX]; see also John Yoo, The Courts Won't Stop Trump's Emergency Declaration or His Border Wall, L.A. Times (Jan. 11, 2019, 6:12 PM),

have also shied away from engaging with the factual question of whether an emergency exists as a threshold question. This avoidance is partly because not many parties litigate this issue, as most crises have objective grounding in verifiable events squarely within the authority of the executive.[57] No one tried to deny the existence of an emergency in March 2020, for example, when COVID-19 first hit. Yet even when parties challenge the factual existence of an emergency, courts have often relied on the political question doctrine to avoid weighing in on the definition of "emergency" under other statutes.[58] They chose to take this route over the traditional role as interpreters of statutory language to avoid impinging on "the flexibility necessary" for the executive to respond to crises.[59]

Most relevant to the discussion at hand is the U.S. District Court for the District of Columbia's decision in *Center for Biological Diversity v. Trump*, in which the court invoked the political question doctrine in response to a challenge to President Trump's border wall emergency declaration.[60] The court noted that, prior to its case, "*no* court ha[d] ever reviewed the merits of such a declaration" under the NEA.[61]

In this case, the plaintiffs—environmental organizations, property owners on the southern border, and a Native American nation—argued that President Trump acted *ultra vires* in declaring an emergency and empowering the Secretary of Defense to fund the border wall.[62] One of the complaints stated that "no colorable emergency within the meaning of

https://www.latimes.com/opinion/op-ed/la-oe-yoo-national-emergency-border-wall-20190111-story.html ("The Supreme Court has never overturned a national emergency declaration.").

[57] See Brennan Ctr. for Just., supra note 10 (reflecting the consistent use of emergency declarations mostly in the foreign relations, rather than domestic, context).

[58] See, e.g., Martin v. Mott, 25 U.S. (12 Wheat.) 19, 31 (1827) ("The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it."); United States v. Amirnazmi, 645 F.3d 564, 579 (3d Cir. 2011) ("Mindful of the heightened deference accorded the Executive in this field, we decline to interpret the legislative grant of [emergency] authority parsimoniously.").

[59] United States v. Spawr Optical Rsch., Inc., 685 F.2d 1076, 1080 (9th Cir. 1982) ("Wary of impairing the flexibility necessary to such a broad delegation, courts have not normally reviewed 'the essentially political questions surrounding the declaration or continuance of a national emergency' . . . ." (quoting United States v. Yoshida Int'l, Inc., 526 F.2d 560, 579 (C.C.P.A. 1975))).

[60] 453 F. Supp. 3d 11, 30 (D.D.C. 2020).

[61] Id. at 31.

[62] Id. at 26.

the NEA exist[ed] to invoke the statute."[63] The government moved for summary judgment for failure to state a claim and want of subject matter jurisdiction. The court found that two plaintiffs lacked standing before turning to the question of whether the complaint posed a justiciable question.[64] It ultimately found that it lacked subject matter jurisdiction, writing, "[Plaintiff's] claim raises one obvious question: was the President correct that a national emergency exists at the southern border? The trouble is that this is a quintessential political question."[65]

The political question doctrine "occupies an odd status" in the federal judiciary, as the Supreme Court has dismissed only three cases on political question grounds since the 1930s, while lower courts—particularly the D.C. Circuit—rely on it more frequently.[66] As articulated in an early case, a political question arises when one of the following circumstances is present: the Constitution clearly commits the issue to a political branch, there is a "lack of judicially discoverable and manageable standards" for resolving a question, it is impossible to answer a question without an inherently nonjudicial "policy determination," it is impossible to answer without disrespecting the other branches of government, there is an "unusual need" to unquestioningly adhere to a previously made political decision, or there is the potentiality of embarrassment from different departments answering the same question differently.[67]

In *Center for Biological Diversity*, the district court found three of these circumstances present. First, it noted the fact that the proclamation related to "national security or foreign policy," areas that are "'rarely proper subjects for judicial intervention,' since the Constitution commits those issues to the Executive and Legislative Branches."[68] While not going so far as to say the Constitution clearly removes judicial review of all questions relating to these issues, the court found it important that the

[63] Complaint for Declaratory & Injunctive Relief at 37, *Ctr. for Biological Diversity*, 453 F. Supp. 3d 11 (No. 19-cv-00720).

[64] *Ctr. for Biological Diversity*, 453 F. Supp. 3d at 29–30.

[65] Id. at 31.

[66] Richard H. Fallon Jr., Political Questions and the Ultra Vires Conundrum, 87 U. Chi. L. Rev. 1481, 1482 (2020). But see Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019) (holding that partisan gerrymandering poses a nonjusticiable political question). See also Stephen I. Vladeck, The New National Security Canon, 61 Am. U. L. Rev. 1295, 1325 (2012) (discussing the political question doctrine's application in national security cases).

[67] Baker v. Carr, 369 U.S. 186, 217 (1962).

[68] *Ctr. for Biological Diversity*, 453 F. Supp. 3d at 31 (quoting Haig v. Agee, 453 U.S. 280, 292 (1981)).

subject matter of the declaration reached beyond purely domestic affairs. Second, the court stated that it found no manageable judicial standards to address the question of whether events rose to the level of a national emergency declaration. It stated that Congress intentionally left this decision up to the executive, providing "no guidance to help courts assess whether a situation is dire enough to qualify as an 'emergency.'"[69] The court explicitly rejected the plaintiffs' argument that defining emergency was purely a matter of statutory interpretation, differentiating the term "emergency" from that of "genocide," which—while politically charged—has a clear legal definition.[70] Finally, it held that any standard the court *could* impose would require it to make inappropriate policy choices.[71] With these circumstances backing the conclusion that the plaintiff's complaint raised a political question, the court dismissed all of the claims from the NEA.[72]

In *California v. Trump*, the U.S. District Court for the Northern District of California also heard arguments that no emergency existed to warrant President Trump's declaration.[73] There, a coalition of sixteen states sued for injunctive relief, which the court ultimately denied.[74] The court did not, however, invoke the political question doctrine to avoid weighing in on the arguments. Rather, it focused on interpreting the additional statutes that President Trump relied on to build the wall instead of the NEA itself.[75] After deciding that the plaintiffs brought strong arguments that the use of reallocation of funds was not based on "unforeseen military requirement[s]," the court still held that they did not meet their burden of showing likelihood of injury without an injunction.[76] While not as directly avoidant as the District Court for the District of Columbia, the *California v. Trump* court still took an end-run around interpreting the definition of "national emergency" under the NEA.

[69] Id. at 33.

[70] Id. at 32 (discussing *Al-Tamimi v. Adelson*, 916 F.3d 1, 11 (D.C. Cir. 2019)).

[71] Id. at 33 ("Whether a crisis reaches the point of a national emergency is inherently a subjective and fact-intensive inquiry. Any standard that the Court chose would require it to make 'integral policy choices' about this country's national security, immigration, and counterdrug policies.").

[72] Id. at 54.

[73] 379 F. Supp. 3d 928 (N.D. Cal. 2019), *aff'd*, 963 F.3d 926 (9th Cir. 2020).

[74] Id. at 935–36.

[75] Id. at 937.

[76] Id. at 946–47, 959.

As a case of first impression and a district court opinion, the holding in *Center for Biological Diversity* does not close off future challenges to the factual existence of an emergency. The Northern District of California's willingness to engage—at least somewhat—with the "Gordian knot" of emergency executive powers in such a context indicates that other courts may treat the issue differently.[77] Indeed, in the same decision that held the legislative veto to be invalid, the Supreme Court held that "[r]esolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications."[78] At the moment, however, the question of the factual existence of an emergency under the NEA has not been treated as a justiciable question capable of review in the courts.

B. Did the Executive Branch Cross Constitutional Lines?

While courts have not second-guessed an executive declaration of emergency, they have certainly questioned whether the executive otherwise acted improperly. There are two main means for courts to do so: asking whether the power the executive used falls outside his statutorily granted authority,[79] or asking whether the power violates any independent constitutional safeguards.[80] In recent years, the Supreme Court has been willing to engage with both questions, but arguably subjects executive practices to varying degrees of review depending on the circumstances.[81] Some members of the Court have also been inconsistent in their view of the judiciary's role.[82] While recent

[77] Id. at 937.

[78] Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 943, 959 (1983).

[79] United States v. Spawr Optical Rsch., Inc., 685 F.2d 1076, 1081 (9th Cir. 1982) ("Although we will not address these essentially-political questions, we are free to review whether the actions taken pursuant to a national emergency comport with the power delegated by Congress.").

[80] *California v. Trump*, 379 F. Supp. 3d at 942 ("[E]ven where executive officers act in conformance with statutory authority, the Court has an independent duty to determine whether authority conferred by act of the legislature nevertheless runs afoul of the Constitution." (citing Clinton v. City of New York, 524 U.S. 417, 448 (1998))).

[81] See Tyler, supra note 15, at 586 (discussing how the Court views its role differently depending on the nature of the right being violated, with civil liberties representing the most important issue to the Court).

[82] Compare Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2615 (2020) (Kavanaugh, J., dissenting) (stating that "[t]he court of history . . . cautions us against an unduly deferential judicial approach" in times of crisis), with Andino v. Middleton, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring) (discussing why there should not be "second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and

scholarship more thoroughly analyzes the use of means-ends review in the COVID-19 era,[83] this piece provides a very brief overview of its potential in the context of partisan emergencies. Four recent Supreme Court decisions were selected to demonstrate the current philosophy of review: *National Federation of Independent Business v. Department of Labor*[84] and *Alabama Ass'n of Realtors v. Department of Health & Human Services*[85] for the separation of powers issue, and *Roman Catholic Diocese of Brooklyn v. Cuomo*[86] and *Tandon v. Newsom*[87] for the independent constitutional safeguards issue.

National Federation of Independent Business saw a majority of the Court vote to halt Occupational Safety and Health Administration ("OSHA") regulations that would require employers with more than one hundred employees to impose vaccination requirements or weekly testing, in addition to mandatory masking at the office.[88] The Supreme Court viewed its role as determining whether, in the language of the lower court opinion, the Department of Labor's "broad assertions of administrative power" stemmed from "unmistakable legislative support," focusing on the need to preserve the separation of powers concerns at the heart of the Constitution.[89] The Court stated that the regulations addressed broad issues of public health rather than specific issues of workplace safety. The majority held that "[a]lthough COVID-19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most."[90] Because of this distinction, and the fact that the statutory grant of authority to OSHA provided it the power to regulate only *workplace* risks, the Court found the agency's authority invalid using the major questions doctrine and upheld the Fifth Circuit's injunction of the regulations.[91] The joint dissent, however, believed the decision went too far, seeing the Court act

expertise to assess public health and is not accountable to the people" (quoting S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring))).

[83] See, e.g., Tyler, supra note 15.

[84] 142 S. Ct. 661 (2022) (per curiam).

[85] 141 S. Ct. 2485 (2021) (per curiam).

[86] 141 S. Ct. 63 (2020) (per curiam).

[87] 141 S. Ct. 1294 (2021) (per curiam).

[88] 142 S. Ct. at 662–63.

[89] Id. at 664 (quoting In re MCP No. 165, 20 F.4th 264, 268 (6th Cir. 2021) (Sutton, C.J., dissenting)). Justice Gorsuch characterized this as asking the question, "Who decides?" Id. at 667 (Gorsuch, J., concurring).

[90] Id. at 665.

[91] Id. at 664–65.

"outside of its competence and without legal basis."[92] This more deferential view comported with historical treatment of emergency powers,[93] indicating a belief that it is not up to the judiciary to decide the appropriate response to novel crises, but this argument was not persuasive to the majority.

In the same term, the Supreme Court decided *Alabama Ass'n of Realtors*. As in *National Federation of Independent Business*, the Court relied on the major questions doctrine to invalidate an executive agency's intent to use expansive power due to the presence of an emergency. Here, the plaintiffs challenged a Centers for Disease Control and Prevention ("CDC") program that imposed a nationwide eviction moratorium for any tenants living in areas experiencing high transmission of COVID-19.[94] The Court's ultimate rationale came down to the fact that the statute the CDC invoked provided an insignificant "wafer-thin reed" on which to base these "powers of 'vast "economic and political significance."'"[95] While leading to a similar outcome, this decision represents a slightly different circumstance than *National Federation of Independent Business*, because Congress was more directly involved with the tenant relief plan, and the Court had previously given the executive agency a longer leash in implementing the scheme.[96] When it reached the Court this second time, it was more apparent that Congress no longer supported the program[97] and that COVID-19 no longer posed as much of a threat. Rather than suggesting the Court will take an active role in scrutinizing all invocations of statutory emergency power, *Alabama Ass'n of Realtors* indicates a middle-of-the-road approach—the Court will step in after a certain point, after some period of deference.

This deference-up-to-a-point followed by stringent review is also apparent in the religious liberties context. In *Roman Catholic Diocese of Brooklyn*, the Court enjoined New York's governor from imposing attendance restrictions at religious services in areas with high COVID-19

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

[93] Tyler, supra note 15, at 496–513.

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

[95] Id. at 2489 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[96] Id. at 2486–88 (describing how Congress had reauthorized the policy and how the Court had previously been influenced by the sunset provision).

[97] Id. at 2486 ("It would be one thing if Congress had specifically authorized the action that the CDC has taken. But that has not happened.").

transmission.[98] The Court applied strict scrutiny to the proposed regulation, noting that there was a mismatch between religious locations and "'essential' businesses," which did not have the same capacity restrictions.[99] While conceding that the judiciary is not composed of public health experts, the Court stated that it has an obligation to step in when proposed regulations tread on clear constitutional protections.[100] The opinion also saw some emphatic concurrences, including one from Justice Gorsuch, who clearly stated that no more judicial deference was due given the "prospect of entering a second calendar year living in the pandemic's shadow."[101] *Tandon* came less than five months later, and indicated even more willingness of the Court to eschew historical deference in times of emergency.[102] This case saw the Court again apply heightened scrutiny to a state's attempt at limiting the size of indoor religious gatherings, ultimately enjoining the state's policy.[103] The majority did not focus on the emergency nature of the regulations, applying a traditional and rigorous First Amendment analysis rather than a "watered down" standard.[104] Justice Kagan wrote a dissent in which she accused the majority of "disregard[ing] law and facts alike," taking particular issue with the Court "impairing '[California's] effort to address a public health emergency.'"[105]

These four cases make clear that the Supreme Court will not allow the existence of a purported emergency to reduce its role in policing executive power—at least in certain contexts and after a certain point. It further becomes clear that there are differing views on how and when the Court should defer to expertise of other branches in times of crisis. Some scholars have stated that the heightened judicial review in these cases actually relates to the issue of whether an emergency exists at all.[106] Because the philosophy apparent in 2021 decisions onward is a departure from the normal deference in times of crisis, "one could surmise that some

[98] 141 S. Ct. 63, 65–66 (2020) (per curiam).
[99] Id. at 66–67.
[100] Id. at 68.
[101] Id. at 70 (Gorsuch, J., concurring).
[102] 141 S. Ct. 1294 (2021) (per curiam).
[103] Id. at 1294, 1296–97.
[104] Id. at 1298 (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993)).
[105] Id. at 1298–99 (Kagan, J., dissenting) (quoting S. Bay Pentecostal Church v. Newsom, 141 S. Ct. 716, 723 (2021) (Kagan, J., dissenting)).
[106] Tyler, supra note 15, at 583.

Justices do not actually believe that the COVID-19 pandemic is a real emergency."[107] Perhaps heightened means-ends scrutiny can serve as a proxy for questioning the continued factual existence of an emergency in a manner better suited to the competency of the judiciary. However, these more scrutinous decisions were handed down after the pandemic had persisted for many months while more deferential review was the norm at the outset.[108]

C. Was the Invocation of Emergency a Pretext?

Numerous challenges to emergency power have centered on an argument that the executive invoked an emergency as a pretext to achieve unrelated ends. The Supreme Court, while drawing on pretext analysis in other circumstances, has not directly responded to these challenges in the emergency powers setting. Multiple amicus curiae briefs in *Biden v. Nebraska* raised pretext arguments as grounds to overturn the Biden Administration's student debt relief program.[109] Justice Kavanaugh referenced one piece in oral argument, inquiring, "a professor says this is a case study in abuse of executive emergency powers. . . . And I want to get your assessment . . . of how we should think about our role in assertion of presidential emergency power given the Court's history."[110] However, none of the decisions ultimately referenced the issue of pretext or the broader role of courts in policing dubious invocations of emergency power.[111]

The pretext argument is grounded in the "faithful execution" language of the Constitution, which some scholars argue independently requires the executive to provide good faith reasons for invoking statutory powers, not

[107] Id.

[108] See, e.g., S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring). Another change between this decision and the others discussed is that Justice Barrett replaced Justice Ginsburg on the Court.

[109] See, e.g., Brief of Michael W. McConnell et al. as Amici Curiae in Support of Respondents at 28, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (Nos. 22-506 & 22-535); Brief of Jed Handelsman Shugerman as Amicus Curiae in Support of Respondents at 10–12, *Biden v. Nebraska*, 143 S. Ct. 2355 (Nos. 22-506 & 22-535).

[110] Transcript of Oral Argument at 60–61, *Biden v. Nebraska*, 143 S. Ct. 2355 (No. 22-506).

[111] *Biden v. Nebraska*, 143 S. Ct. 2355; cf. Jed Handelsman Shugerman, *Biden v. Nebraska*: The New State Standing and the (Old) Purposive Major Questions Doctrine, 2022–2023 Cato Sup. Ct. Rev. 209, 212–18 (arguing that the Court *should* have relied on a pretext analysis rather than the major questions doctrine).

pretexts.[112] For judicial precedent, one amicus brief pointed to the "arbitrary and capricious" doctrine surrounding the Administrative Procedure Act ("APA"), drawing mostly on the recent case of *Department of Commerce v. New York*.[113] In that case, the Supreme Court rejected a proposed change to the census, finding—based on an abnormally extensive record—the "explanation for agency action . . . incongruent with what the record reveals about the agency's priorities and decisionmaking process."[114] Faced with such a drastic situation, where the sole explanation for an agency action was undermined by extensive evidence to the contrary, the Court stated it was "not required to exhibit a naiveté from which ordinary citizens are free."[115]

Yet there are a number of reasons to think that *Department of Commerce v. New York* has limited application to policing pretextual invocations of emergency power. First, the Court noted that its decision represented a narrow departure from the normal belief that "judicial inquiry into 'executive motivation' represents 'a substantial intrusion' into the workings of another branch of Government and should normally be avoided."[116] Second, the Court held that the statutes at issue provided manageable judicial standards to judge the agency action, directly contrasting with the National Security Act, which provided more sweeping authority to the executive agency at issue.[117] Under this logic, the NEA, with its lack of a definition for emergency, arguably does not provide sufficiently manageable standards on which to base a pretext analysis.

Finally, there is the silence on the issue in *Biden v. Nebraska*. Despite the opportunity to invoke a pretext argument to reach the same holding they ultimately did, no members of the Court wrote a single line on it.[118] Instead, the majority turned once more to a separation of powers lens,

[112] Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, Faithful Execution and Article II, 132 Harv. L. Rev. 2111, 2179 (2019).

[113] Brief of Jed Handelsman Shugerman, supra note 109, at 20.

[114] Dep't of Com. v. New York, 139 S. Ct. 2551, 2575 (2019).

[115] Id. (quoting United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)).

[116] Id. at 2573 (quoting Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 n.18 (1977)) (citing Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)).

[117] Id. at 2568 (citing Webster v. Doe, 486 U.S. 592, 600–01 (1988)).

[118] See generally Biden v. Nebraska, 143 S. Ct. 2355 (2023) (not mentioning the word "pretext").

focusing on statutory interpretation and further refining of the major questions doctrine.[119]

For a court's treatment of the pretext argument in the emergency context, we can turn back to *Center for Biological Diversity v. Trump*. There, one plaintiff argued not that President Trump declared an emergency where none existed, but that he declared an emergency as a pretext to circumvent Congress's refusal to fund the border wall.[120] The court summarized the argument as, "[r]ather than ask the Court to decide whether the President was *correct* in declaring a national emergency, [plaintiff organization] asks the Court to consider whether the President's motives were pure in declaring the emergency."[121] The court once again relied on the political question doctrine to avoid deciding that issue, finding no manageable standard existed to settle the validity of an ultimately "discretionary policy" decision.[122] Crucial to the holding was the court's view that the NEA, unlike the APA at issue in *Department of Commerce v. New York*, does not include a narrow exception to the proposition that subjective inquiry into executive intent is an improper judicial role.[123] The court wrote that no precedent supports the proposition "that this exception extends beyond the APA context to *ultra vires* review to allow the Court to second-guess the motives behind declarations of national emergencies."[124] In mandating that a statute provide the basis for such *ultra vires* review, this holding is an implied rejection of the argument that Article II imposes independent requirements for the executive to not act pretextually.

Justice Gorsuch's dissent in *Arizona v. Mayorkas* represents the closest the Supreme Court has come recently to engaging with the concept of pretext in the emergency setting.[125] There, the Supreme Court agreed to stay a district court's order requiring the Biden Administration to terminate an immigration policy based on the COVID-19 crisis.[126] Justice Gorsuch disagreed, writing that "the current border crisis is not a COVID crisis. And courts should not be in the business of perpetuating administrative edicts designed for one emergency only because elected

[119] Id. at 2371, 2374–76.
[120] Ctr. for Biological Diversity v. Trump, 453 F. Supp. 3d 11, 33 (D.D.C. 2020).
[121] Id.
[122] Id. at 33–34.
[123] Id.
[124] Id. at 34.
[125] See 143 S. Ct. 478, 479 (2022) (Gorsuch, J., dissenting).
[126] Id. at 478 (mem.).

officials have failed to address a different emergency. We are a court of law, not policymakers of last resort."[127] Though not commanding close to a majority (it was joined only by Justice Jackson),[128] the sentiment perhaps indicates that pretext is somewhere in the minds of the Justices when they decide if an executive acted within his statutorily granted powers. Indeed, much of the means-ends analysis in the previous Section relates to the courts' determination of how necessary a use of power is in the context of the emergency it was invoked to address. Further, a concern about pretext almost certainly informed the outcome of *Biden v. Nebraska*, even if it did not explicitly make its way into the analysis. However, pretext ultimately runs into hard issues of getting into the mind of the executive and, outside of rare cases like *Department of Commerce v. New York*, is difficult to analyze under clear judicial standards. For these reasons, courts have not applied it in the NEA context and are unlikely to do so going forward.

III. THE ROLE FOR THE JUDICIARY IN DEFINING "NATIONAL EMERGENCY"

The previous Part sketched a rough outline of how the judiciary currently reacts to challenges of executive emergency authority. While courts shy away from factual questions surrounding the existence of an emergency or the motives the executive has for declaring it, it is clear that the Supreme Court will not do the same when asked to scrutinize the executive's choice of means when using emergency power for domestic policymaking. Perhaps this scrutiny stems from a form of path-dependency—the Court has long been in the business of using means-ends tests to limit executive power.[129] There is ample precedent to draw upon, leading litigants to choose to frame their challenges through this lens.[130] This approach is readily apparent in the religious liberties context,

[127] Id. at 479 (Gorsuch, J., dissenting).

[128] Id. at 478.

[129] For a thorough treatment of the tension between deference and protection of civil liberties in a time of crisis, as well as the use of means-ends review to police it, see generally Cliff Sloan, The Court at War: FDR, His Justices, and the World They Made (2023) (analyzing the Supreme Court during World War II and its inconsistent view of its own role in policing or empowering a zealous executive).

[130] See Alec Stone Sweet, Path Dependence, Precedent, and Judicial Power, *in* On Law, Politics, and Judicialization 112, 113 (Martin Shapiro & Alec Stone Sweet eds., 2002) (arguing "how litigation and judicial rule-making proceeds, in any given area of the law at any

an area where litigants have focused heavily in recent years and found success throughout the pandemic.[131] However, it differs greatly from a pretext challenge, for example, where courts require litigants to first establish that the judiciary even has the power to review the subconscious motivations of a governmental actor.

There are certainly downsides to reinforcing imperfect paths toward judicial review, as well as an inherent absurdity in pretending judges do not account for pretext or the factual realities behind an invocation of emergency power. However, the means-ends tests may be effective in regulating many of the concerns of executive overreach. These tests play to the strength of the Court's institutional capabilities, provide relatively (though not entirely) persuasive analytical routes, and avoid the appearance of directly second-guessing the executive in times of crisis. Further, the Court has recently reached the same result with means-ends tests that the other routes would lead to. COVID-19 showed that the Court can meaningfully check executive power despite the existence of an emergency.

Yet in the specific context of "partisan emergencies," a means-ends test will not on its own prevent an executive from overreaching. The problem with partisan emergencies is often not the means, but the ends—there are hundreds of grants of statutory power that clearly grant extreme measures and are not ripe for attack on the separation of powers lines of *National Federation of Independent Business v. Department of Labor* or *Biden v. Nebraska*.[132] Further, the previous Part showed how means-ends challenges were more successful after the initial shock of an emergency declaration had passed, though it is clear from the border wall example that damage can be done if more immediate steps to curtail a partisan emergency are not taken. With these problems in mind, this Note turns to

given point in time, is fundamentally conditioned by how earlier legal disputes in that area of the law have been sequenced and resolved").

[131] Elizabeth Reiner Platt, Katherine Franke & Lilia Hadjiivanova, Law, Rts. & Religion Project, Colum. L. Sch., We the People (of Faith): The Supremacy of Religious Rights in the Shadow of a Pandemic 7–8 (2021).

[132] Examples of explicitly delegated emergency powers include removing the ban on testing biological or chemical agents on human subjects, closing borders and expelling foreigners, seizing communication channels, seizing production and distribution of goods, and controlling the domestic transportation network. See Never-Ending Emergencies—An Examination of the National Emergencies Act: Hearing Before the Subcomm. on Econ. Dev., Pub. Bldgs. & Emergency Mgmt. of the H. Comm. on Transp. & Infrastructure, 118th Cong., at vii–viii (2023).

whether there is another way for the judiciary to serve as a meaningful check.

Some have argued that a functionalist rereading of *Immigration & Naturalization Service v. Chadha* would allow Congress to use the legislative veto in the context of situations like the border wall declaration.[133] By distinguishing between "[r]egulatory legislative vetoes" and "political legislative vetoes," which the Supreme Court in *Chadha* treated the same, it would be possible for the NEA to go back to the prior practice of using concurrent resolutions to terminate emergencies.[134] Yet, based on the current Court's centering of formalism in the separation of powers context,[135] it is unlikely the Supreme Court would weaken the *Chadha* precedent on functional grounds. Further, that approach would still require congressional action, which, for the sake of analysis, this Note presumes to be a nonstarter. Instead, by turning to their normal role as experts in statutory interpretation rather than invoking the political question doctrine, courts can question whether an emergency exists even under the current statutory scheme.

A. Why: Normative Reasons for Interpretation Over Abdication

There has been robust debate about the extent to which there may be a "judicial obligation" to hear cases that cannot be avoided by resort to the political question doctrine,[136] yet the nuances of this debate are outside the scope of this Note. Two normative points demonstrate why, even if the Constitution does not *obligate* courts to interpret the National Emergencies Act, they should exercise their discretion to do so. First, courts are regularly called on to impose clear meaning out of vague statutory texts. Second, judicial discretion in the name of deference during times of crisis has yielded regrettable results throughout history.

To the first point, courts routinely make sense of vague terms that require dealing with at least some degree of policy sensitivity. In fact, a number of scholars have argued that when Congress passes certain ambiguous statutes, it effectively delegates the task of interpretation to

[133] See Weitzman, supra note 16, at 401–04.

[134] Id. at 404–05.

[135] See Robert L. Glicksman & Richard E. Levy, The New Separation of Powers Formalism and Administrative Adjudication, 90 Geo. Wash. L. Rev. 1088, 1088 (2022).

[136] Curtis A. Bradley & Eric A. Posner, The Real Political Question Doctrine, 75 Stan. L. Rev. 1031, 1040–47 (2023) (providing a thorough summary of the relevant academic debates in the twentieth century).

the courts.[137] Take the Sherman Act as an example.[138] This statute renders illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."[139] Another example is the Racketeer Influenced and Corrupt Organizations Act, an "exceedingly open-textured statute[]" that can be administered "only through the mediation of intricate judge-made doctrines that specify what these laws actually prohibit."[140] In other words, these statutes are comprised of incredibly expansive and ambiguous language, unworkable without judicial engagement with the policy details. Yet they are not considered to pose inherently political questions despite policy ramifications and disagreements between parties about the best approach to them. Instead, courts have drawn on the text and the purposes of these statutes to give them specific legal content.[141]

There are critics of this approach. Judge Andrew Oldham, for example, wrote that "Congress cannot deputize the federal courts—and federal judges cannot accept such congressional delegation—to make standardless policy judgments."[142] Yet regardless of the underlying value of delegating broad interrogatory power to the courts, these examples show that even when the underlying statute is broad or ambiguous, courts have effectively developed the necessary legal content to make them work. Statutory interpretation is squarely within the institutional capacity of the judiciary, and the fact that a statute relates to emergency powers does not change this fundamental truth.

The Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo* reinforces the reality that courts have the ability—and the

[137] Dan M. Kahan, Is *Chevron* Relevant to Federal Criminal Law?, 110 Harv. L. Rev. 469, 469, 495–96 (1996) ("[F]ederal criminal law is most accurately conceptualized as a 'common law-making' regime in which Congress delegates power to courts by enacting incompletely specified statutes."); see Alexander Volokh, Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law, 66 Emory L.J. 1391, 1395–96 (2017) ("[W]hen we talk about the proper scope of federal common law . . . we're also talking about the permissible scope of standardless congressional delegations to federal courts."); see also Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721, 1731 (2002) ("It looks very much as though Congress may delegate legislative authority 'with virtually no legislative standards at all' . . . so long as the delegation runs to the courts." (quoting David P. Currie, The Constitution in the Supreme Court: The Second Century, 1888–1986, at 218 (1990))).

[138] 15 U.S.C. § 1.

[139] Id.

[140] Kahan, supra note 137, at 471–72.

[141] See id. at 472–73.

[142] Andrew S. Oldham, Sherman's March (In)to the Sea, 74 Tenn. L. Rev. 319, 346 (2007).

responsibility—to interpret even ambiguous laws.[143] While dealing with the interpretation of statutes by the administrative state rather than the President himself, this decision shows that the Supreme Court sees an important role for the judiciary in making sense of delegations of power to the executive branch.

To the second point—that courts *should* engage in this review—one can look to the fact that extensive judicial deference in times of emergency has yielded regrettable, even tragic, results for individual liberties and constitutional norms. Some scholars argue that judicial review has on the whole strengthened our constitutional norms despite some high-profile mistakes.[144] Yet three high-profile mistakes suffice to demonstrate the risk that a too-deferential judiciary poses to the nation.[145] In *Schenck v. United States*, the Supreme Court upheld the criminalization of certain speech during the first World War.[146] In *Korematsu v. United States*, the Supreme Court infamously upheld the internment of Japanese Americans during World War II.[147] In *Dennis v. United States*, it greenlit odious limitations on the freedom of association during the Cold War.[148] While each of these cases reached a departure from constitutional norms as the end result, *Korematsu* has its own warnings for a modern court in terms of extending goodwill to the executive during the course of the litigation.

The government's brief in *Korematsu* cited heavily to a report that contained "material misstatements" regarding the loyalty of Japanese citizens that the government knew to be false.[149] The Justices referenced this flawed report at oral argument, asking how they could possibly second-guess the author, General John L. DeWitt, about what constitutes a "military necessity."[150] Rather than admitting serious concerns about some parts of the report that had been the subject of heated internal

[143] 144 S. Ct. 2244, 2261 (2024) ("Under the APA, it thus 'remains the responsibility of the court to decide whether the law means what the agency says.'" (quoting Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in the judgment))).

[144] David Cole, Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis, 101 Mich. L. Rev. 2565, 2566 (2003).

[145] See Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2615 (2020) (Kavanaugh, J., dissenting) (explaining "[t]he court of history . . . cautions us against an unduly deferential judicial approach" in times of crisis).

[146] 249 U.S. 47, 48–49, 52–53 (1919).

[147] 323 U.S. 214, 215–16, 223–24 (1944).

[148] 341 U.S. 494, 497, 516–17 (1951).

[149] Sloan, supra note 129, at 302–03.

[150] Id. at 309.

debates, the Solicitor General defended the report in "broad and sweeping terms."[151] Over dissents that called into question the existence of a bona fide "military necessity," the majority upheld the internment policy.[152] Justice Douglas later stated that he regretted his vote to affirm the policy and that it "might not have happened if the Court had not followed the Pentagon so literally."[153] His experience reinforces how, even when the executive is confronted with facts that cast doubt on the existence of the exigency it invokes to expand its power, it will not always be honest or transparent. A judiciary willing to push back and dig into executive assertions of emergency is necessary in light of this reality.[154]

For these two normative reasons, courts should be more willing to play their part as statutory interpreters even in times of purported emergency. However, despite the effectiveness of imposing reasonable definitional safeguards on the executive, turning to the judiciary to weigh in on the factual existence of an emergency does not come without risks or downsides. First, judges may themselves disagree about the existence of an emergency and yield widely different results depending on geography or political alignment.[155] In a similar vein, the same partisanship that leads to a questionable emergency invocation may play out in the judiciary as well. A potential analogy is the issue of nationwide injunctions, which some scholars have criticized as undermining public perception of a nonpartisan judiciary.[156] Professor Amanda Frost stated that "when . . . judges in the 'red state' of Texas halt Obama's policies, and

[151] Id. at 309–10.

[152] *Korematsu*, 323 U.S. at 234–35 (Murphy, J., dissenting).

[153] William O. Douglas, The Court Years, 1939–1975: The Autobiography of William O. Douglas 39, 280 (1980).

[154] See Lindsay F. Wiley & Stephen I. Vladeck, Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review, 133 Harv. L. Rev. F. 179, 183 (2020) ("[I]mposing normal judicial review on emergency measures can help reduce the risk that the emergency will be used as a pretext to undermine constitutional rights and weaken constraints on government power even in ways that are not really necessary to address the crisis." (quoting Ilya Somin, The Case for "Regular" Judicial Review of Coronavirus Emergency Policies, Reason: Volokh Conspiracy (Apr. 15, 2020, 4:16 PM), https://reason.com/volokh/2020/04/15/the-case-for-normal-judicial-review-of-coronavirus-emergency-policies/ [https://perma.cc/PG6G-7V67])).

[155] Tyler, supra note 15, at 563 ("[D]elegating 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.").

[156] District Court Reform: Nationwide Injunctions, 137 Harv. L. Rev. 1701, 1702 (2024) (collecting sources).

judges in the 'blue state' of Hawaii enjoin Trump's," it tests the limits of the public's imagination to argue that the federal judiciary is impartial, nonpartisan, and legitimate.[157] In a similar vein, there is a risk that judges who oppose the policies of the party that did not appoint them could invalidate an executive invocation, encouraging litigants to forum shop for a better outcome. This partisan difference, while apparent in the COVID-19 context,[158] can be ameliorated through development of more precedent about the content of the term "emergency." Further, if our statutory interpretive regime achieves its goal, "different judges faced with the challenge of construing a fixed piece of legislative text and history should produce consistent interpretations."[159]

Beyond the risk of inconsistent results, there is a potential risk that the executive would simply ignore the judiciary if the executive viewed the emergency as sufficiently serious. In the early stages of World War II, President Franklin D. Roosevelt threatened to rebuke a Supreme Court decision regarding the military trial of German saboteurs who landed on U.S. soil.[160] President Roosevelt stated that regardless of whether the Supreme Court upheld the constitutionality of the military procedures, he would order the Germans to be shot if they were found guilty.[161] The Supreme Court, which was comprised of seven Roosevelt nominees at the time, upheld the constitutionality of the panel in a decision that has attracted significant criticism over the years.[162]

Avoiding this second risk going forward will depend on how and when the judiciary plays its role. Crucial to extending the doctrine of judicial review of emergencies is recognizing the tightrope walk between deference and judicial integrity in the context of high-stakes national security issues. A too-active judiciary that is willing to second-guess the executive on emergencies that are widely accepted across party lines runs the risk of delegitimizing the branch and sparking unnecessary standoffs with the executive. A too-passive judiciary runs the risk of rubber-

[157] Amanda Frost, In Defense of Nationwide Injunctions, 93 N.Y.U. L. Rev. 1065, 1104 (2018).

[158] Tyler, supra note 15, at 563–64 (discussing district court judges' disparate responses to compassionate release motions during COVID-19).

[159] Joseph A. Grundfest & A.C. Pritchard, Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation, 54 Stan. L. Rev. 627, 629 (2002).

[160] Sloan, supra note 129, at 93.

[161] Id.

[162] Ex parte Quirin, 317 U.S. 1, 3 (1942); Sloan, supra note 129, at 120–22 (discussing contemporaneous and modern critiques).

stamping constitutional violations or allowing exceptional powers to become the norm of domestic governance.

B. When: Because "Partisan Emergencies" Are Different

With this tension in mind, it is important to further refine the situations in which this more active judicial role should be played. There are two separate situations where determining the factual existence of an emergency is important—first when the executive declares an emergency that people fundamentally disagree about, and second when there is a repeated extension of an emergency that has arguably run its course.[163] Further, there are external emergencies that relate to foreign relations (an area squarely in the realm of the executive under the Constitution), and there are internal crises that are more properly viewed as the province of Congress. This Note proposes that the courts should be more willing to immediately and stringently review only "partisan emergency" declarations. The term "partisan emergency" refers to a highly controversial emergency that is invoked to address a purely domestic concern, such as abortion rights or perceived voter fraud. That definition carries two separate analytical prongs: a controversial nature and a domestic focus.

In determining the first prong, controversial nature, a proxy will be whether or not legislation is introduced in Congress to terminate or otherwise challenge the declared emergency. Even if not effective—indeed, such legislation is not likely to be effective[164]—the introduction would signal disagreement about the characterization of a situation as an emergency. No such legislation was introduced to terminate the invocation of the COVID-19 emergency in 2020, for example, while Republicans introduced a preemptive (and ultimately moot) bill to prevent President Biden from declaring climate change a national emergency.[165] At the heart of the concept of "partisan emergency" is the difference in view between political parties—the "pendulum dynamic where the President's party likes his emergency declarations and the party

[163] The emergency declaration following the 9/11 attacks is a prime example of the second category. Cf. Boumediene v. Bush, 553 U.S. 723, 797–98 (2008) ("Because 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.").

[164] See supra Part I.

[165] S. 3998, 117th Cong. (2022).

out of power does not."[166] In the context of these declarations, "Congress is likely to exercise procedural oversight only when it is controlled by the opposite party. That only reinforces the partisan nature and perception of emergency declarations."[167] To avoid the further politicization of emergencies, it is important to have one objectively verifiable definition—as interpreted by the courts if not explicitly stated by Congress—that can guide their invocation.

The second prong, the domestic nature of the emergency, is important for practical as well as conceptual purposes. The distinction between domestic and foreign emergency declarations is crucial—the two receive disparate treatment by Congress, and there are fundamental constitutional distinctions in delegated authority between an executive's powers in the foreign affairs space and his powers in the domestic space.[168] Professor Amy Stein articulated this distinction and concern in her recent article, *Domestic Emergency Pretexts*.[169] There, she defined a domestic emergency as one that "does not involve an external, foreign threat."[170] Yet she also realized how this label can be "clumsy," discussing President Trump's travel ban as an emergency that would be better characterized as domestic yet where the Supreme Court allowed the President to frame it as a matter of national security.[171] To avoid such reframing, this Note posits that an important additional characterization to the "domestic" label can be a similarity to areas of power traditionally reserved for the legislature. Student loans, immigration, voting access, and infrastructure projects are all typically within the scope of Congress, not the President. By analyzing the extent to which an emergency declaration overlaps with a traditionally legislative subject matter, the judiciary can better characterize it as either domestic or foreign. An arbitrary distinction that allows an executive to escape judicial review through creative drafting or framing of the narrative would erase any value this proposed approach would have. Adding an objective criterion would make it harder for an executive to circumvent the characterization as domestic.

[166] Canaparo & Larkin, supra note 16, at 12.
[167] Id.
[168] See generally Zivotofsky v. Kerry, 576 U.S. 1 (2015) (discussing the different foreign and domestic implications of whether the President had exclusive power to grant Israel formal recognition).
[169] Stein, supra note 12.
[170] Id. at 496.
[171] Id. at 497–98.

Such a focus on partisan emergencies—controversial declarations surrounding domestic emergency declarations—will help courts avoid implicating the three circumstances found to give rise to a political question in *Center for Biological Diversity v. Trump*, which were a close relation to foreign affairs and national security, a lack of justiciable standards, and a necessity of inherent policy decision-making that the judiciary is not equipped to undertake.[172] The first point is obvious—if the executive invokes his powers to address a domestic crisis, there is no argument that it primarily focuses on an international sphere inapt for judicial review. The second and third points are trickier to avoid implicating, but possible if the court views the question as one of statutory interpretation rather than policymaking. Indeed, congressional research on the topic advanced a possibility that a court may "turn to statutory canons, such as the ordinary meaning doctrine, or to the legislative history of the NEA and related statutes to determine the meaning of national emergency for purposes of the NEA."[173]

C. How: Applying the Principles of Statutory Interpretation to the NEA

This then leads to the important question: If the judiciary were to attempt to define an emergency, how would it do so? Professor Mark Nevitt has one of the few direct answers to this question, which he articulated in his piece advocating for President Biden to declare an emergency to address climate change.[174] His approach models the Congressional Research Service's treatment of the question.[175] It aligns with the ordinary meaning canon, which seeks to understand "what the text would convey to a reasonable English user in the context of everyday communication."[176] First viewing the term under its ordinary meaning, then, an emergency has three characteristics. First, it must be sudden, unforeseen, and of a specific temporal duration—in other words, not a long time coming or a long time lasting. Second, it must be sufficiently grave and pose a severe threat to life and well-being. Finally, it must require an immediate response.[177]

[172] 453 F. Supp. 3d 11, 30–33 (D.D.C. 2020).
[173] Elsea, supra note 56, at 1 (emphasis omitted).
[174] Nevitt, supra note 4, at 620.
[175] See Elsea, supra note 56, at 1–2; Nevitt, supra note 4, at 620.
[176] Marco Basile, Ordinary Meaning and Plain Meaning, 110 Va. L. Rev. 135, 135 (2024).
[177] Nevitt, supra note 4, at 620.

This understanding of the term "emergency" aligns with both legal and ordinary-language dictionaries. According to the *American Heritage Dictionary*, an emergency is "[a]n unexpected situation or sudden occurrence of a serious and urgent nature that demands immediate action."[178] *Black's Law Dictionary* at the time of the NEA's enactment took a similar approach. It defined an emergency as "[a] sudden unexpected happening; an unforeseen occurrence or condition; . . . a sudden or unexpected occasion for action; exigency; pressing necessity."[179] This ordinary meaning and its three-pronged requirement can limit a number of potential declarations in its own right. For many dubious invocations of authority, the ordinary-meaning approach can serve as a meaningful check on the executive's unilateral power to define an emergency. Abortion access, climate change, and student debt burdens, for example, are neither unforeseen nor delineated by any outer boundary or clear end.

The problem with the ordinary-meaning approach is that it provides a relatively superficial definition that sparks a number of second-order questions. What does it mean for an event to present a "severe" threat? Can a rapid escalation of a previously minor but well-recognized problem be considered an "unexpected" condition? For judges that are open to the practice, consulting the legislative history of the NEA may help flesh out the meaning. One of the largest clues from this history stems from the removal of the original definition of emergency. Recall that Congress considered stating that the President could declare an emergency when "essential to the preservation, protection and defense of the Constitution or to the common defense, safety, or well-being of the territory or people of the United States."[180] Yet this language was removed for fear that it would provide too much power to invoke emergency powers in situations that did not warrant them.[181] Another related takeaway from the legislative history is that the NEA was intended to *reduce* rather than *enlarge* executive power.[182] Therefore, any definition that is broader or more expansive than the one Congress chose to remove, or any approach

[178] Emergency, The American Heritage Dictionary 448 (2d college ed. 1991).
[179] Emergency, Black's Law Dictionary (4th ed. 1968).
[180] H.R. 3884, 94th Cong. § 201(a) (1975).
[181] S. Rep. No. 94-1168, at 2–3 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2288, 2289.
[182] Id. at 3 ("The National Emergencies Act is not intended to enlarge or add to Executive power.").

that provides the executive with more power than he had before the enactment of the NEA, would be at odds with the statute's stated goals.

Ultimately, though, courts would not have to impose *the* definition of an emergency, but rather police the outer bounds of a reasonable approach to the term. Statutory interpretation here should focus on setting the floor for what constitutes an emergency, establishing the minimum criteria that suffice to call something an actual, bona fide exigency. It is okay if interpreting the term "emergency" does not render one clear and universally accepted definition—it is enough that courts are able to say something is definitely *not* an emergency as that term was used by Congress.[183]

Central to this idea is the fact that Congress—when drafting the NEA—may have intended to delegate the power to interpret the term "emergency" to the executive. Professor Nevitt thought so, writing that because Congress chose not to define the term, it is "effectively delegating this decision to the President."[184] This lack of definition, in turn, could mean that the courts owe *some* level of deference to the executive's interpretation of the term. It does not mean that courts must take for granted an executive's declaration without any review. Instead, courts should apply the various considerations discussed above to determine whether the executive's use of the term "emergency" reasonably aligned with the term as Congress understood it. Further, the courts should scrutinize the factual assertions underlying an executive assertion of power—something the Supreme Court failed to do in the *Korematsu* case. Requiring an emergency to be grounded in verifiable fact and meet certain objective criteria will provide an essential check on the invocations of power in the first instance.

CONCLUSION

Emergency powers are tantalizingly effective. They allow presidents to bypass congressional gridlock, do away with burdensome procedural safeguards, and act decisively with minimal oversight. Climate change, reproductive health, and gun violence are all pressing issues that require urgent action, so it is tempting to want presidents to use an emergency declaration as a means of getting started. But ultimately, the risk that these

[183] Charles E. Hughes, War Powers Under the Constitution, 40 A.B.A. Ann. Rep. 232, 241 (1917) (stating that certain questions "always remain[] . . . judicial question[s]").

[184] Nevitt, supra note 4, at 625.

emergency powers—which by their nature were designed to be used sparingly to address time-constrained issues—will become a norm of domestic governance is too great to bear. The current use of "permanent emergencies" to declare sanctions on foreign actors is one thing, but for an executive to directly circumvent Congress on matters of domestic affairs is another thing entirely. Particularly troublesome is the threat of an executive seizing voting machines after claiming a factually dubious emergency of voter fraud.[185]

For these reasons, the judiciary can and must play a role in policing "partisan emergency" declarations when they are used to subvert Congress in the specific context of domestic affairs. Means-ends review has a role to play as well, especially given the heightened scrutiny apparent in recent decisions. Yet while this tool is important in the traditional emergency settings, it does not meaningfully check dubious invocations of power in the first instance. Further, questions of pretext are too easy for a competent executive to avoid and put too much weight on unspoken motivations rather than verifiable realities. Instead, courts must be willing to sometimes ask the hard question of whether an emergency, in the sense that Congress had in mind when passing the NEA, exists when the President seeks to invoke emergency power. Such review requires a more active judiciary, but a well-circumscribed exception to the norm of judicial restraint in times of apparent crisis is the lesser evil compared to governance by unchecked executive authority.

[185] Luke Broadwater, Maggie Haberman, Alan Feuer & Michael S. Schmidt, Jan. 6 Panel Examining Trump's Role in Proposals to Seize Voting Machines, N.Y. Times (Oct. 13, 2022), https://www.nytimes.com/2022/02/01/us/jan-6-panel-trump-voting-machines.html.