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## Answering the Call: A History of the Emergency Power Doctrine in Texas and the United States

P. Elise McLaren  
*St. Mary's University School of Law*

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## COMMENT

### ANSWERING THE CALL: A HISTORY OF THE EMERGENCY POWER DOCTRINE IN TEXAS AND THE UNITED STATES

P. ELISE McLAREN\*

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## I. INTRODUCTION

“The angel of death has been abroad throughout the land. You may almost hear the beating of his wings.”<sup>1</sup> John Bright’s 1855 speech to the British House of Commons in which he passionately called for an end to the Crimean War<sup>2</sup> echoes an enduring sentiment in times of emergency, one of inevitability and vulnerability—feelings inherent in crisis. Thus, the essence of emergency—uncertainty, incalculability, and necessity<sup>3</sup>—is difficult to prepare for and impossible to predict.

Historically, courts have struggled to maintain the federalist structure in times of crisis,<sup>4</sup> and understandably so. Both the preservation of the Union and protection of Americans who comprise the Union—including their most basic rights—are principles the United States was founded on.<sup>5</sup> The conflict between these interests is evidenced by courts’ indecisiveness when faced with questions regarding emergency powers. Decisions adjudicating emergency power, whether belonging to the states or the federal government, highlight the catch-22 innate in the separation of powers.<sup>6</sup> On one end of the spectrum, the government offers individuals utmost freedom from authoritarianism with very little humanitarian aid or protection from

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1. See Arthur L. Goodhart, *Lincoln and the Law*, 50 A.B.A. J. 433, 434 n.5 (1964) (quoting SELECTED SPEECHES OF THE RIGHT HON. JOHN BRIGHT, M.P., ON PUBLIC QUESTIONS WITH AN INTRODUCTION BY JOSEPH STURGE 155 (Ernest Rhys ed., London, J.M. Dent & Co. 1907)) (transcribing Judge John Bright’s speech given, on February 23, 1855, to the House of Commons in opposition to the Crimean War).

2. Goodhart, *supra* note 1.

3. See John Fabian Witt, *A Lost Theory of American Emergency Constitutionalism*, 36 LAW & HIST. REV. 551, 553 (2018) (reciting the Lieber view that emergency power turns on “the principle of necessity”).

4. See discussion *infra* Section III (discussing the development of the federalist structure and examples of times of crisis).

5. See U.S. CONST. pmb. (“[I]n Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . .”).

6. See discussion *infra* Sections II, III (balancing the Americans’ interests against the government’s interests).

domestic or foreign threat;<sup>7</sup> while alternatively, the government may exercise an indefinite scope of power, but offers individuals swift action and protection.<sup>8</sup> Are our choices confined by polarity? Does a “maybe” option exist?<sup>9</sup>

Emergency powers certainly exist,<sup>10</sup> despite courts’ disjunct and incomplete reasoning as to their scope and purpose. Since the inception of modern constitutional law, courts were asked to decide what powers are granted to the federal and state governments in times of crisis and what circumstances lead to designation of a crisis.<sup>11</sup> The courts have shown us the answer to this question is inconsistent at best and highly politicized at worst. In 1934, Justice Hughes wrote: “While emergency does not create power, emergency may furnish the occasion for the exercise of power.”<sup>12</sup> Just one decade later, Justice Black contradicted the 1934 Court in his interpretation: “Compulsory exclusion . . . [.] except under circumstances of direst emergency and peril, is inconsistent with [the Constitution]. But when under conditions of modern warfare . . . [.] the power to protect must be commensurate with the threatened danger.”<sup>13</sup> Justice Hughes denied the conjuring of new, or extrapolating of existing powers, while Justice Black indicated emergency powers exist to an unknown extent “under circumstances of *direst emergency and peril* . . . .”<sup>14</sup>

These diverging opinions of the validity of emergency powers imbedded in American government demonstrate the confusion associated with crises powers. Legal scholars have likewise produced a variety of proposed

7. See discussion *infra* Section III.B (discussing a perceived imbalance between the people and their rulers).

8. See discussion *infra* Section III.G (describing a president’s exercise of power during extraordinary times in the Cold War era).

9. See Wayne McCormack, *Emergency Powers & Terrorism*, 185 MIL. L. REV. 69, 73, 141 (2005) (“[C]onvass[ing] the options available for a general answer to the question of emergency powers, considering answers of ‘Yes,’ ‘No,’ and ‘Maybe.’”).

10. See discussion *infra* Section III (clarifying emergency power during times of war, disease, terrorist attacks, and pandemics).

11. See Witt, *supra* note 3, at 551 (beginning an analysis of emergency power in the United States with those powers allowed to the government after the close of the Civil War and the inception of reconstruction).

12. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934).

13. See *Korematsu v. United States*, 323 U.S. 214, 219–20 (approving discriminatory action under martial law in the aftermath of the Pearl Harbor attack), *overruled by* *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

14. *Id.* at 220 (emphasis added).

solutions to the emergency powers problem.<sup>15</sup> Other scholars would reject the doctrine entirely, as their belief directs that its potential for misuse outweighs any utility.<sup>16</sup>

Both state and federal governments have benefitted from the use of emergency powers in times of war,<sup>17</sup> economic downturn,<sup>18</sup> natural disaster,<sup>19</sup> and most recently, pandemic.<sup>20</sup> The benefits of governmental aid were realized despite later criticism that such an exercise was unnecessary, exaggerated, or worse, unconstitutional.<sup>21</sup> Additionally, emergency powers have been instituted at differing intervals throughout the course of an emergency. While some legislation is anticipatory in nature,<sup>22</sup> other legislation is entirely reactionary.<sup>23</sup>

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15. See McCormack, *supra* note 1029, at 141 (exploring Professor Bruce Ackerman's "supermajoritarian escalator" suggestions and Professor Oren Gross's "informed public" proposal).

16. See Ana Jabauri, *State of Emergency: A Shortcut to Authoritarianism*, 2020 J. CONST. L. 121, 123 (2020) (arguing the government should not be permitted to overstep constitutional bounds under the guise of a state of emergency regardless of any perceived necessity); see also McCormack, *supra* note 9, at 138 (discussing Professor David Cole's belief that times of crisis demand heightened protection for individual liberty and Professor Mark Tushnet's grievances regarding normalization of emergency power doctrine).

17. See Witt, *supra* note 3, at 575 (designating the Civil War as the inception of national debate over emergency powers and necessity); Dennis O'Rourke, *War Powers*, 8 GEO. WASH. L. REV. 157, 164 (1939).

18. See Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 416 (1934) (responding to mortgage moratoriums); John T. Fitzimmons, *Constitutionality of Emergency Legislation*, 2 KAN. CITY L. REV. 72, 72 (1934) (discussing emergency legislation during the Panic of 1837).

19. See Hope Lewis, *Human Rights and Natural Disaster—The Indian Ocean Tsunami*, 33 HUM. RTS. 12, 12 (2006) ("But governments . . . are also obligated—legally, politically, and morally—to undertake recovery efforts . . ."); Richard Curry, *Hurricane Katrina Litigation*, 37 ST. B. TEX. ENV'T. L.J. 73, 73 (2006) (discussing potential government accountability for damages caused by a hurricane).

20. See Josh Gerstein, *Major Shift at Supreme Court on Covid-19 Orders*, POLITICO (Nov. 26, 2020, 2:05 AM), <https://www.politico.com/news/2020/11/26/supreme-court-religion-covid-barrett-440808> [<https://perma.cc/PLK7-8DQK>] (analyzing the Supreme Court's rulings on challenges to COVID-19 restrictions); Memorandum from the Attorney General William Barr on Balancing Public Safety with the Preservation of Civil Rights to Assistant Attorney General for Civil Rights and all United States Attorneys, U.S. DEP'T OF JUST. (Apr. 27, 2020), <https://www.justice.gov/opa/page/file/1271456/download> [<https://perma.cc/7QXR-Z6HJ>] (recognizing COVID-19 restrictions imposed tremendous burdens on citizens' daily lives).

21. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (abrogating *Korematsu v. United States*, 323 U.S. 214 (1944)).

22. See Food Control Act & the D.C. Rents Act, ch. 80, § 1, 41 Stat. 297 (1919) (enacting protections for consumers in anticipation of supply shortages).

23. See Minnesota Mortgage Moratorium Act, 1933 Minn. Laws 514 (enacting a grace period for mortgagors as a response to economic depression).

Historically, crisis legislation conferred some power to administrative agencies to regulate or protect members of society, giving rise to claims of government overreach.<sup>24</sup> Thus, at both the federal and state level, American government has a well-defined scope, but it is not equipped for flexibility based on the extremity of the circumstances.

## II. A BRIEF DISCUSSION OF ENLIGHTENMENT PHILOSOPHY

First, an understanding of constitutional theory is necessary to better evaluate the societal struggle between individual autonomy and public cooperation. American values and goals are deeply rooted in the history of the American Revolution and the founding of the United States.<sup>25</sup> Even before the American experiment, philosophers in Europe imagined a government wherein the people govern themselves or otherwise consent to their government by a sovereign entity.<sup>26</sup> Their writings inspired thinkers for centuries and served as a foundation for modern ideas about government, civil rights, and cultural psychology.<sup>27</sup>

### A. *Thomas Hobbes and the Social Contract*

Thomas Hobbes theorized that, in order to avoid a cruel and violent “state of nature,” a sovereign (ideally an absolute monarch) and its subjects should agree to a contractual relationship based in reason.<sup>28</sup> Further, Hobbes theorized that such an implicit contract would result from rational

24. See Jabauri, *supra* note 16 (providing a general structure for checks and balances in times of emergency).

25. See *infra* notes 48–49 and accompanying texts (equating our capacity for self-governance with the American Revolution).

26. Alex Tuckness, *Locke's Political Philosophy*, STAN. ENCYC. PHIL. (Nov. 9, 2005), <https://plato.stanford.edu/entries/locke-political/> [<https://perma.cc/8DNH-XA49>] (“Locke is more interested in describing the occasions when the people take power back from the government to which they have entrusted it.”); Sharon A. Lloyd & Susanne Sreedhar, *Hobbes's Moral and Political Philosophy*, STAN. ENCYC. PHIL. (Feb. 12, 2002), <https://plato.stanford.edu/entries/hobbes-moral/> [<https://perma.cc/QR76-FFUD>] (“Hobbes is famous for his early and elaborate development of what has come to be known as ‘social contract theory’ . . .”).

27. See Isaak I. Dore, *Deconstructing and Reconstructing Hobbes*, 72 LA. L. REV. 815, 849 (2012) (relating Hobbesian philosophy to modern methods of governing and stating “justice and right begin only where law exists”).

28. See Lloyd & Sreedhar, *supra* note 26 (noting Thomas Hobbes advocated for a system of government with an absolute ruler whose sovereignty is accepted by the people in exchange for protection from fellow subjects and foreign threats); see also THOMAS HOBBS & TOM GRIFFITH, *LEVIATHAN* 244–54 (Wordsworth ed. 2014) (discussing the role and duties of the sovereign to the public, but noting that when protection ends, so too does the obedience of the people).

thinking individuals on equal footing with one another in a state of nature or a time before the existence of government.<sup>29</sup> In this contract between government and man, individuals sacrifice some independent exercise of free will in exchange for the benefits realized by a centralized government.<sup>30</sup> Namely, centralized government may offer protection, order, and reliability. Over the centuries, however, centralized government has also provided intangible benefits, such as identity.<sup>31</sup>

#### B. *John Locke and the Consent of the Governed*

While Hobbes maintained a relatively pessimistic view of individuals' ability to govern themselves without devolution to anarchy, Locke proposed a more optimistic view.<sup>32</sup> First, Locke believed people have an undeniable ability to govern themselves through the "law of reason."<sup>33</sup> Though ultimately adopting the social contract theory popularized by Hobbes, Locke proposed that legitimate governments are distinguished from illegitimate governments in that legitimate rulers first obtain the explicit consent of the governed.<sup>34</sup> Because legitimate sovereignty requires the governed to give up some autonomy for the benefit of the collective state, Locke maintained that governments not founded on such consent may be permissibly rebelled against.<sup>35</sup> In his discussion of the right of rebellion and its influence on both early and modern ideas about American politics, Professor David C. Williams expresses the idea succinctly, quoting a pamphlet promulgated by the free militia: "*When elected officials break their oath*

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29. See Lloyd & Sreedhar, *supra* note 26 (explaining "social contract theory").

30. See HOBBS, *supra* note 28, at 100–01 ("[I]hat a man be willing . . . to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself.").

31. HOBBS, *supra* note 28, at 168.

32. See Tuckness, *supra* note 26 (noting it was John Locke's belief that an absolute right to self-preservation should be maintained without regard to form of government).

33. See *id.* ("[T]he fundamental law of nature is that as much as possible mankind is to be preserved.").

34. *Id.*

35. See David C. Williams, *The Constitutional Right to "Conservative" Revolution*, 32 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 413, 429 (1997) (identifying a situation where the governed may justifiably resist the sovereign); see also Tuckness, *supra* note 26 (discussing interpretations of "Locke's concept of the state of nature").

*to uphold the Constitution, it is not the patriotic citizen who is in rebellion, but the governing official . . .*"<sup>36</sup>

Despite Locke's insistence that the governed possess an inherent right to participate in, and ultimately control their government, the doctrine of prerogative seemingly muddies the waters.<sup>37</sup> The doctrine allows an executive to participate in lawmaking and bestows it with powers, which may only be exercised in the best interest of the people and with their implied consent or "ratification."<sup>38</sup> The doctrine, as Locke explains it, emulates our contemporary ideas of emergency powers, where courts have validated them: "[P]rerogative can be nothing but the [P]eople's permitting their [R]ulers to do several things, of their own free choice, where the [L]aw was silent, and sometimes too against the direct letter of the law, for the public good; and their acquiescing in it when so done . . ."<sup>39</sup> Has this idea permeated American politics? Is there an implied ability for executives to take action otherwise inconsistent with power reserved to the people or their representatives if done in the interest of the public good? While some scholars would suggest "yes,"<sup>40</sup> others would offer their passionate rejection.<sup>41</sup> The courts have yet to conclusively decide.

The popularity of enlightenment principles and the philosophy of Thomas Hobbes and John Locke led the Framers to incorporate principles of Hobbes's state of nature and Locke's social contract in the Declaration of Independence.<sup>42</sup> Jefferson's claim on behalf of future Americans in separating from English authority is based on a perceived imbalance of the relationship between the rights of individual colonists and

36. Williams, *supra* note 35 (emphasis added) (quoting SKIPP PORTEOUS, FIELD MANUAL OF THE FREE MILITIA § 1.1.4 (1994)) <http://www.patriotresistance.com/Field-Manual-of-the-Free-Militia.pdf> [<https://perma.cc/9DLU-NEBF>] (obeying authority).

37. Tuckness, *supra* note 26.

38. Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 MO. L. REV. 525, 546 n.77 (2007).

39. *Id.* (quoting John Locke, *Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT § 164 (2010) (ebook)).

40. See McCormack, *supra* note 9, at 140–41 (discussing Professor Gross's proposal for popular ratification).

41. See generally Jabauri, *supra* note 16 (offering a slippery slope analysis of emergency powers); see also McCormack, *supra* note 9, at 136–43 (using "yes," "no," and "maybe" in classifying views of emergency powers).

42. See Bruce N. Morton, *John Locke, Robert Bork, Natural Rights and the Interpretation of the Constitution*, 22 SETON HALL L. REV. 709, 714 (1992) (pointing to the philosophies that inspired the principles at play in the constitution).



the sovereign powers of England.<sup>43</sup> Thomas Hobbes concluded, given an imbalance between the protection of the sovereign and the rights of individuals, citizens have a right to rebel against a government that does not protect their interest.<sup>44</sup> That right of rebellion is clearly reflected in Jefferson's Declaration of Independence: when the scales tipped, depriving colonists of their inherent liberties, their obligation of obedience to the English government expired.<sup>45</sup>

C. *Thomas Hobbes, John Locke, and the Constitution*

The government the Framers subsequently built can be understood as an effort to create a permanent system of balance or separation of powers wherein the rights of individuals are concrete and unwavering. The power given to the government is substantial enough to offer protection, but not so substantial as to infringe on fundamental rights belonging to the people.

Much of the legal resistance to emergency power can be attributed to our form of government. Americans sought to balance the liberties inherent in individuals against a need for protection and wellbeing.<sup>46</sup> Accordingly, Americans limited the ability of the federal government to govern.<sup>47</sup> The ideals on which the United States were founded have dominated American politics and culture ever since. Famously in October 1964, then future President Ronald Reagan addressed a Barry Goldwater campaign crowd in Los Angeles, California.<sup>48</sup> He invoked Cold War passions and primal American instincts, addressing the severity of the approaching election:

[T]his idea that government is beholden to the people, that it has no other source of power except to sovereign people, is still the newest and the most unique idea in all the long history of man's relation to man. This is the issue of this election. Whether we believe in our capacity for self-government or whether we abandon the American revolution and confess that a little

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43. See THE DECLARATION OF INDEPENDENCE, paras. 1–2 (introducing the numerous grievances of the colonists against the British sovereignty).

44. See Lloyd & Sreedhar, *supra* note 26 (“[P]olitical obligation ends when protection ceases.”).

45. THE DECLARATION OF INDEPENDENCE, para. 2–28 (U.S. 1776) (identifying the King of Britain's “history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over” the thirteen United States of America).

46. U.S. CONST. pmbl.

47. *Id.*

48. Ronald Reagan, *Address on Behalf of Senator Barry Goldwater: “A Time for Choosing,”* THE AM. PRESIDENCY PROJECT (Oct. 27, 1964), <https://www.presidency.ucsb.edu/node/276336> [<https://perma.cc/L6KN-5TVV>].

intellectual elite in a far-distant capitol can plan our lives for us better than we can plan them ourselves.<sup>49</sup>

President Reagan's expressed sentiments persist in American culture even today, as many insist on governmental restraint even in times of crisis.<sup>50</sup>

By virtue of the Constitution, the government vows loyalty in protection of its citizens,<sup>51</sup> but would a *necessity* to preserve the state of the Union and protect citizens allow occasional intrusion on civil liberties?

Professor Wayne McCormack neatly summarized the struggle when he wrote, Americans must decide how much liberty we “are willing to sacrifice . . . for security.”<sup>52</sup> He argues civil liberties, especially in times of desperation, should not be trusted to the courts to dispense with as they please.<sup>53</sup>

The late Eugene Wambaugh diverges in his reasoning.<sup>54</sup> He argues the power to preserve the Union is “incidental” to other governmental powers when they are not expressly denied by the Constitution.<sup>55</sup> Other scholars echoed these sentiments, maintaining the proposition that the ends justify the means, at least “in all reasonable cases . . . .”<sup>56</sup>

This Comment does not seek to answer whether one preference is superior to another, nor will it suggest a solution to the divide among courts, scholars, and citizens. Rather, this Comment ambitions to explore the disposition of both the Supreme Court of the United States and the Texas Supreme Court in an effort to reconcile and understand their evolving views and the public policy reasons behind them. Additionally, it explores the consequences of categorical decision-making and speculates as to the propriety of our goals in settling the dispute.

While some long for a sense of consistency and predictability from the

49. *Id.*

50. *See, e.g.*, Memorandum from the Attorney General William Barr, *supra* note 20 (reminding United States Attorneys “the Constitution is not suspended in times of crisis” and requiring vigilance “to ensure its protections are preserved” while also protecting public safety).

51. *See, e.g.*, U.S. CONST. art. I, § 10, cl. 1 (denying states certain powers).

52. *See* McCormack, *supra* note 9, at 72–73 (analyzing the evolution of the federal government's ability to wage war since the 9/11 terror attacks).

53. *Id.* at 72.

54. Eugene Wambaugh, *War Emergency Legislation—A General View*, 30 HARV. L. REV. 663, 668 (1917).

55. *Id.*

56. O'Rourke, *supra* note 17, at 163.

courts, I suggest a more realistic goal in the face of unpredictable catastrophe: sustainability.

### III. HISTORICAL USE OF EMERGENCY POWERS IN TEXAS AND THE SUPREME COURT

#### A. *The Adoption of the Constitution as an Emergency*

Prior to the execution of the Constitution, the Articles of Confederation reserved almost absolute sovereignty to each state and failed to promote a system of government conducive to widespread cooperation among states, stifling trade and travel and foregoing widespread protection from foreign enemies.<sup>57</sup> States were offered utmost freedom, which largely meant fending for themselves. The government had no ability to tax, and consequently, no ability to spend.<sup>58</sup> Disorganization, confusion, and ensuing chaos led to the need for more centralization, cooperation, and the federalist structure known today.<sup>59</sup> Due to Americans' distaste for absolutism, the Framers incorporated extensive checks and balances among three branches of government, though the Constitution as adopted would ultimately bestow the federal government with more power than was previously thought appropriate.<sup>60</sup> Additionally, the Framers sought protection of individuals' rights as they subsequently enacted and ratified ten amendments to the Constitution as the Bill of Rights.<sup>61</sup> Under this structure, Americans could be confident in their basic, fundamental

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57. See Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249, 250, 255 (1997) ("The misfortune under the latter system has been, that these principles are so feeble and confined as to justify all the charges of inefficiency which have been urged against it . . .") (quoting THE FEDERALIST NO. 40, at 255 (James Madison) (Edward Mead Earle ed., 1936)); see also Jeremy M. Miller, *It's Time for a New U.S. Constitution*, 17 SW. U.L. REV. 207, 210 (1987) (stating the Articles of Confederation provided individuals more autonomy).

58. See THE FEDERALIST, at xv (Alexander Hamilton) (John C. Hamilton ed., J.P. Lippincott & Co., 1864) ("The Congress issued pledges for money it had no means to pay, called for soldiers it had no means to support, entered into treaties it could not fulfil . . .").

59. See Smith, *supra* note 57, at 253, 285 ("[A]lthough many of the enumerated powers under the Articles and the Constitution were identical, the general government enjoyed greater enumerated powers under the Constitution than it had under the Articles of Confederation.")

60. See THE FEDERALIST NO. 9, at 48 (Alexander Hamilton) (Edward Mead Earle ed., 1937) ("The regular distribution of power into distinct departments . . . have made their principal progress towards perfection in modern times.")

61. See Smith, *supra* note 57, at 333–35 (discussing the importance of popular sovereignty among the Framers and their incorporation of it in the Bill of Rights).

freedoms, including speech and religion,<sup>62</sup> unreasonable search,<sup>63</sup> and procedural due process.<sup>64</sup>

The Framers imagined a society which must answer to the people it governs, as it is founded on a written social contract between the government and the governed, the Constitution. The Constitution creates an apparent inability for governmental overreaching, and a bottom line for fundamental liberties granted to citizens. Although these principles seem clear, disagreement over the amount of power afforded the government—especially in times of emergency—generated controversy not only at the time of its enactment, but even today.<sup>65</sup> While some argue the Constitution granted a ceiling to governmental power,<sup>66</sup> other scholars, politicians, and judges would argue it created a floor.<sup>67</sup>

Contrasting optimistic enlightenment principles, which inspired the Constitution, the 1876 Texas Constitution, as adopted, was tasked with “shackl[ing]” the government as it recovered from secession and Civil War.<sup>68</sup> Similar to the federal Constitution, separation of powers and the protection of Texans’ fundamental rights reigned.<sup>69</sup> Although Texas’s 1876 Constitution was a visceral reaction to carpetbagging reconstruction-era politics, it installed a similar structure to the federal government by reserving as much power to the people as possible for fear of tyrannical intrusions on civil liberty.<sup>70</sup> Although the constitutional climates between the Texas and federal constitutions differed, each resulted in a government with enumerated rights for both the federal government and for the people.

62. U.S. CONST. amend. I.

63. U.S. CONST. amend. IV.

64. U.S. CONST. amend. V–VIII.

65. See Smith, *supra* note 57, at 331 (rebutting Bruce Ackerman’s contention that ratification of the Constitution was clearly illegal under the Articles of Confederation). See generally McCormack, *supra* note 9 (offering an analysis of differing views of emergency powers).

66. See Jabauri, *supra* note 16, at 135 (arguing emergency powers are not constitutionally permissible and should not be used in the interest of preserving the American “legal system”).

67. See Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1030 (2004) (proposing politicians “consider a more hard-headed doctrine . . . that allows short-term emergency measures but draws the line against permanent restrictions”); see also MICHAEL S. ARIENS, AMERICAN CONSTITUTIONAL LAW AND HISTORY 16 (2d ed. 2016) (using a ceiling and floor analogy to express the Supreme Court Justices’ views on constitutional provisions in *Marbury v. Madison*).

68. Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337, 1339–40 (1990).

69. See *id.* at 1341 (citing THE FEDERALIST NO. 47, at 303 (James Madison) (Edward Mead Earle ed. 1937)).

70. See *id.* at 1339 (“Texans suffered under a corrupt and autocratic regime that featured a carpetbag legislature . . .”).

The authors of the Texas Constitution expressed their intentions in Article I, highlighting both the need for a sovereign government and the need for Texans to exercise individual liberty.<sup>71</sup>

The political climates inspiring the federal and the Texas Constitution affected the respective governments' abilities to react in an emergency, including those fundamental rights protected from governmental intrusion.<sup>72</sup>

#### B. *The Civil War (1861–1865)*

Constitutional questions raised over the Civil War mark the inception of the modern emergency power doctrine.<sup>73</sup> A lawyer and spirited advocate for secession, Lambdin P. Milligan, was arrested facing charges of conspiracy, inciting insurrection, treason, and other miscellaneous war crimes.<sup>74</sup> President Lincoln's attempt to suspend the writ of habeas corpus, and therefore confine Milligan without proving that doing so was lawful, prompted the Supreme Court to issue a unanimous opinion addressing the President's action, taking into consideration its timing in relationship to the Civil War and public emergency.<sup>75</sup> In its opinion, the Court rejects contentions that the Civil War would validate or excuse usurpation of a person's fundamental right to contest the rationale for their imprisonment while judicial redress to accomplish such opposition was actively available.<sup>76</sup>

71. See TEX. CONST. art. I, § 2 (“The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.”). The Texas Constitution establishes a firm position of belief in a citizen as an individual and purports to protect those inherent rights of individual citizens.

72. Notably, the Texas Constitution apportions more fundamental liberties in its Bill of Rights than does the federal Constitution. Compare TEX. CONST. art. I §§ 1–34 (listing thirty-two “great and essential principles of liberty and free government”) with U.S. CONST. amends. I–VIII, XIII–XV, XIX, XXVI (listing thirteen enumerated constitutional rights of the people). Texas promises to protect not only those rights recited in the federal Bill of Rights, but rights such as hunting and fishing, rights of the “unsound mind,” bankrupt persons, liens against homesteads, and more. TEX. CONST. art. I, § 34 (granting hunting & fishing rights); TEX. CONST. art. I, § 15-a (governing people of unsound mind); TEX. CONST. art. XVI, § 50 (providing a homestead protection for property owners).

73. See generally Witt, *supra* note 3 (recounting the history of emergency powers in the United States and its legal development beginning with the American Civil War).

74. Harold H. Burton, *Two Significant Decisions: Ex parte Milligan and Ex parte McCordle*, 41 A.B.A. J. 121, 121 (1955).

75. *Ex parte Milligan*, 71 U.S. 2, 118–21 (1866); 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.”).

76. *Ex parte Milligan*, 71 U.S. at 121.

Justice Davis notes the Constitution does not yield to emergency and active court systems insist on its protection of liberty.<sup>77</sup> Notably, the Court first recognizes the decision implicated a balance of sovereignty against inherent individual rights; a conflict that, Justice Davis writes, was clearly anticipated by the Founders in the drafting of the Constitution.<sup>78</sup> Despite powerful language, which appears to slam a door in the face of emergency powers, the Court reserves the possibility that a crisis requiring the government to assume more power and overcome individual liberties may eventually occur.<sup>79</sup> Justice Davis recites the first guidelines for such an instance and notes that the invasion, depriving persons of constitutionally-granted rights, must be “actual and present[,]” and must “effectually close[] the courts and depose[] the civil administration.”<sup>80</sup> Justice Davis avoids further elaboration of circumstances causing an “effective” closure of the judicial system.<sup>81</sup>

Texas’s secession from the Union required the Texas Supreme Court to later adjudicate the validity of laws created under the Confederate States. In *Jones v. McMahan*,<sup>82</sup> the Texas Supreme Court responded to a challenge of a stay law enacted in 1866.<sup>83</sup> In its unanimous rejection of the law’s legitimacy, Chief Justice Morrill, writing for the court, first recognizes that

77. *Id.*; see John P. Frank, *Ex Parte Milligan v. The Five Companies: Martial Law in Hawaii*, 44 COLUM. L. REV. 639, 639 (1944) (“It is the pledge of the Supreme Court to the people of the United States that the constitutional right of freedom from arrest and punishment at the caprice of the executive branch of the Government, particularly the military, and the right of trial by jury can never be taken away so long as the courts are open and can function.”). Notably, the suspension clause in Article I, § 9, clause 2 of the United States Constitution does allow the Writ of Habeas Corpus to be suspended in times of “rebellion.” U.S. CONST. art. I, § 9, cl. 2. The Court, however, saw the exercise of this power as constitutionally impermissible due to continued operation of the judicial system. *Ex parte Milligan*, 71 U.S. at 120–21.

78. See *Ex parte Milligan*, 71 U.S. at 118–19 (“The founders of our government were familiar with the history of that struggle; and secured in a written constitution every right which the people had wrested from power during a contest of ages.”).

79. See *id.* at 120–21 (rejecting President Lincoln’s attempt to suspend the writ of habeas corpus) (“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.”).

80. *Id.* at 127 (emphasis added) (“If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law . . . to preserve the safety of the army and society . . . [the government] is allowed to govern by martial rule *until the laws can have their free course.*”).

81. *Id.* (briefly describing “necessity” in broad terms).

82. *Jones v. McMahan*, 30 Tex. 719 (1868).

83. *Id.* at 727; see Hans W. Baade, *Chapters in the History of the Supreme Court of Texas: Reconstruction and “Redemption” (1866–1882)*, 40 ST. MARY’S L.J. 17, 63 (2008) (recounting the history of the Texas Supreme Court leading up to *Jones v. McMahan*).

the Texas Constitution, enacted in accordance with the Constitution of the United States, affords protection from governmental interference with the obligations of contracts.<sup>84</sup> Justice Morrill recounts the defendants' argument in support of the stay law, quoting defense counsel's argument for its constitutionality: "the safety of the people is the supreme law."<sup>85</sup> In agreeing with this contention, the court says supreme law is found in the United States and Texas Constitutions; strict compliance with those Constitutions is the ultimate protector of citizens' safety.<sup>86</sup> Thus the "safety of the people" and the Constitution are synonymous, not mutually exclusive as defense counsel suggested.<sup>87</sup> The court goes on to limit emergency powers:

But should the general laws of combustion be suspended because our dwellings are in flames . . . it might be a real benefit to particular parties interested at the time, but there is no system of arithmetic by which we could calculate the injury of even a temporary suspension of these natural laws.<sup>88</sup>

The court and Justice Morrill, in conformity with the U.S. Supreme Court just two years earlier, each passionately rejected the existence of emergency powers and warned of the dangers inherent in them.<sup>89</sup>

### C. *Smallpox (1901–1903)*

Though the disease had been around for tens of thousands of years, an outbreak of Smallpox afflicted the northeastern United States in the early twentieth century.<sup>90</sup> Health officials in Massachusetts sought to control the

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84. *Jones*, 30 Tex. at 731.

85. *Id.* at 735.

86. *See id.* ("The 'supreme law' is the [C]onstitution of the United States and this state, and the safety of the people consists in the faithful performance of each and all their requirements.")

87. *Id.* at 735–36.

88. *Id.* at 736.

89. *See Ex parte Milligan*, 71 U.S. 2, 121 (1866) (arguing an emergency powers doctrine leads to "anarchy or despotism"); *see also Jones*, 30 Tex. at 736 (expressing the view that emergency does not cause temporary cessation in administration of the constitution). Notably, the Texas Supreme Court in 1868 was comprised entirely of Union-appointed justices; every justice prior to 1866 was replaced as the Union viewed them as "impediments to Reconstruction . . ." *Court History*, TEX. JUD. BRANCH, <https://www.txcourts.gov/supreme/about-the-court/court-history/justices-from-1845-1876/> [<https://perma.cc/LQF3-2HSD>] (listing of justices from 1845–76). In that sense, the 1868 Texas Supreme Court was not reflective of the will of Texans.

90. Note, *Toward a Twenty-First-Century Jacobson v. Massachusetts*, 121 HARV. L. REV. 1820, 1822 (2008).

outbreak by instituting a policy of mandatory vaccinations.<sup>91</sup> Refusal to receive an injection was punished by a five dollar fine.<sup>92</sup> Henning Jacobson refused vaccination, was fined, refused to pay his fine, and criminal charges were brought against him.<sup>93</sup> Jacobson responded to his charges by challenging the validity of compulsory vaccination.<sup>94</sup>

Justice Harlan delivered the opinion of a 7–2 Court, which held mandatory vaccination is within the realm of states’ police powers under the Constitution.<sup>95</sup> Justice Harlan’s opinion completely flips the script on crisis legislation. Rather than focus on a person’s right to refuse medical treatment, the Court’s opinion focuses on the community’s “right to protect itself against an epidemic of disease which threatens the safety of its members.”<sup>96</sup> The state, he says, has the right to appoint officials knowledgeable and qualified to make such decisions, and those decisions, when approved by the legislature, have the force of law.<sup>97</sup> The decision paved the way for widespread authoritative state policy in areas of public health.<sup>98</sup>

Sixteen years later, Texas would try its hand at mandatory inoculation legislation. In *City of New Braunfels v. Waldschmidt*,<sup>99</sup> the Texas Supreme Court was asked whether students had a right to attend public school despite refusal to receive a Smallpox vaccination.<sup>100</sup> The Texas Supreme Court and other courts around the nation have answered analogous questions in the negative.<sup>101</sup> Texas may require public school students to receive vaccines so long as the requirement is

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91. *Id.* at 1822.

92. *Id.* (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 12, 26 (1905)); Ben Horowitz, Comment, *A Shot in the Arm: What a Modern Approach to Jacobson v. Massachusetts Means for Mandatory Vaccinations During a Public Health Emergency*, 60 AM. U.L. REV. 1715, 1719 (2011) (“The statutory penalty for refusing a vaccination was a five dollar fine.”). In 2021, the fine would be about \$150 due to inflation since 1905. *Value of \$5 from 1905 to 2021*, CPI INFLATION CALCULATOR, <https://www.officialdata.org/us/inflation/1905?amount=5> [<https://perma.cc/YGG3-6RDF>].

93. Note, *supra* note 90, at 1822.

94. *Id.*

95. *Jacobson*, 197 U.S. at 28.

96. *Id.* at 27.

97. *Id.* at 28.

98. Horowitz, *supra* note 92, at 1717–18.

99. *City of New Braunfels v. Waldschmidt*, 207 S.W. 303 (1918).

100. *Id.* at 304.

101. L. Beverly Lake, *Freedom to Worship Curiously*, 1 U. FLA. L. REV. 203, 221 (1948).



“reasonable.”<sup>102</sup> Justice Greenwood, writing for the court, cites the United States Supreme Court’s decision in *Jacobson* for the proposition that mandatory inoculation does not infringe on constitutional guarantees to individuals.<sup>103</sup> The Court quotes Justice Harlan’s decision in *Jacobson* at length, including Justice Harlan’s central argument that liberty for all does not exist where such liberty infringes on others’ ability to maintain health and security.<sup>104</sup> The Court maintains that this ability to regulate is reserved to the legislature exclusively, not to the courts or the people individually.<sup>105</sup>

#### D. *World War I (1914–1919)*

In 1914, “[d]ifficulties appeared in the way of peace” and in the form of a global war, unlike any ever seen before.<sup>106</sup> Professor Becker calls the war and its consequences a “laboratory for the twentieth century . . . .”<sup>107</sup> It was. Participating countries recruited, and in many instances compelled, their citizens and resources to battle.<sup>108</sup> The United States did not officially join the war until early 1917, and in anticipation of food shortages, enacted the Food Control Act & the D.C. Rents Act (Lever Act) that summer, preventing price gouging of necessities.<sup>109</sup> Notably, the Act bestowed the president with increased authority to direct the distribution of rations, citing the constitutional permission to wage war as Commander-in-Chief.<sup>110</sup> The Act was also temporary, invoking the emergency of the World War as its justification and included a provision that rendered it ineffective two years

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102. *Waldschmidt*, 207 S.W.3d at 305. The Texas Supreme Court reprimands the Court of Appeals for ruling the vaccination requirement was unreasonable, though no outbreak was threatened in New Braunfels. *See id.* at 304 (“When the case was tried, on November 16, 1916, there was one case of smallpox in New Braunfels . . . .”); *see also* Chester J. Antieau, *The Limitation of Religious Liberty*, 18 FORDHAM L. REV. 221, 231 (1949) (stating mandatory vaccination in public schools has been held constitutional against freedom of religion challenges).

103. *Waldschmidt*, 207 S.W.3d at 304.

104. *Id.* at 304–05 (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 27(1905)).

105. *Id.* at 305.

106. Edward Raymond Turner, *The Causes of the Great War*, 9 AM. POL. SCI. REV. 16, 31, 33 (1915); Annette Becker, *The Great War: World War, Total War*, 97 INT’L REV. RED CROSS 1029, 1033 (2015).

107. Becker, *supra* note 106, at 1032.

108. *See* Becker, *supra* note 106, at 1029 (describing the massive contributions to World War I, including those contributions from nonparticipating nations).

109. Russell Fowler, *World War I and the Constitution*, 54 TENN. BAR J. 25, 25 (2018).

110. *Id.*; The Food Control Act & the D.C. Rents Act, ch. 80, § 1, 41 Stat. 297, 297–98 (1919).

after its enactment.<sup>111</sup> Just two years later, in 1921, L. Cohen Grocery Company challenged the act's constitutionality.<sup>112</sup>

Under the Lever Act, L. Cohen Grocery Co. was assessed criminal charges for selling sugar at an excessive rate.<sup>113</sup> The grocer claimed the Lever Act was unconstitutionally vague, violating principles of due process and separation of powers; courts were to become lawmakers, deciding proper prices for rations.<sup>114</sup> In a unanimous decision, the Supreme Court agreed with the grocer's contentions.<sup>115</sup> Justice White delivered the opinion of the Court, which emphasized congressional inability to transfer lawmaking power to the courts in violation of the Fifth and Sixth Amendments.<sup>116</sup>

Justice Brandeis joined Justice Pitney's concurrence.<sup>117</sup> Though the justices agreed with the result, Justice Pitney explains, the Lever Act does not prohibit selling necessities at excessive prices.<sup>118</sup> His interpretation of the statute is such that price gouging does not fall within the proscribed conduct of Section four of the Act if the individual is not conspiring with others to engage in charging such unreasonable prices.<sup>119</sup> This interpretation may be a testament to the Lever Act's ambiguity and susceptibility to alternate interpretations.

In 1924, the Texas Supreme Court considered wartime measures in *Bell v. Baker*.<sup>120</sup> The Court considered the 1918 Soldiers' and Sailors' Civil Relief Act, a federal statute which tolled the statute of limitations for individuals serving in the military to prevent prejudice due to their preoccupation in a time of war.<sup>121</sup> The Court was asked whether the Act was constitutional in

111. § 122, 41 Stat. at 304.

112. See *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 86–87 (1921) (claiming the act and indictment were vague and broad).

113. Jay R. Herman, Case Comment, *Constitutional Law—Void-for-Vagueness*, 4 SUFFOLK U.L. REV. 920, 922 (1970).

114. *L. Cohen Grocery Co.*, 255 U.S. at 86–87. This principle is commonly referred to as the “void-for-vagueness doctrine.” Herman, *supra* note 113, at 920 (internal quotations omitted).

115. *L. Cohen Grocery Co.*, 255 U.S. at 88.

116. *Id.* at 88, 92.

117. *Id.* at 93.

118. *Id.* at 96 (Pitney, J., concurring).

119. *Id.*

120. *Bell v. Baker*, 260 S.W. 158, 159 (Tex. Comm'n App. 1924, holding approved, judgment adopted).

121. *Id.*; see Howard Cockrill, *Soldiers' and Sailors' Civil Relief Act of 1940*, 27 A.B.A. J. 23, 23 (1941) (discussing the purpose of the 1918 Soldiers' and Sailors' Civil Relief Act).

relation to its control over state courts.<sup>122</sup> Justice Chapman affirmed the Act's validity under the Supremacy Clause of the United States Constitution and the federal government's ability to wage war.<sup>123</sup> The Act thus undoubtedly applied to state courts.<sup>124</sup>

E. *The Great Depression (1929–1940)*

In 1934, the Supreme Court was again confronted with a state of emergency brought on by economic collapse and the ensuing decade of economic depression.<sup>125</sup> The conflict occurred between a Minnesota statute delaying foreclosure proceedings and the Contracts Clause of the federal Constitution.<sup>126</sup> Chief Justice Hughes, writing for the Court, passionately rejects the ability of the judiciary to interfere with legislation despite a recognized emergency because the legislation is temporary and did not destroy the contracts.<sup>127</sup>

In the same year, the Court again considered the role of an emergency when used as an argument preventing enforcement of the Constitution.<sup>128</sup> In *Nebbia v. New York*,<sup>129</sup> a state entity was charged with assigning and enforcing a single, standardized price for milk sales.<sup>130</sup> The owner of a local grocery store, Nebbia, challenged the statute's constitutionality under the Due Process Clause.<sup>131</sup> In a divided 5–4 decision, allowing enforcement of the law as an exercise of emergency power, Justice Owen Roberts recounts the reason and history for enacting the statute.<sup>132</sup> The Court also notes in

122. *Bell*, 260 S.W. at 159.

123. *Id.* at 159–60; Cockrill, *supra* note 121, at 24.

124. *Bell*, 260 S.W. at 160.

125. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 420, 425–27 (1934) (explaining why emergency does not conjure additional governmental power) (using the Contracts Clause to reject government action).

126. *See id.* at 416 (explaining the provision of the Minnesota Mortgage Moratorium law, which allowed the county to use discretion when granting mortgagors more time to make payments and postpone foreclosure); *see also* U.S. CONST. art. I, § 10, cl. 1 (stating governmental interference with the “Obligation of Contracts” is impermissible under the Constitution); *see generally* Fitzsimmons, *supra* note 18 (giving useful background information and offering a philosophical analysis of the opinion).

127. *Blaisdell*, 290 U.S. at 446–48.

128. *Nebbia v. New York*, 291 U.S. 502, 515 (1934).

129. *Nebbia v. New York*, 291 U.S. 502 (1934).

130. *Id.* at 515.

131. *Id.* at 521.

132. *Id.* at 529–30. *But see id.* at 542 (McReynolds, J., dissenting) (“Concededly the Legislature cannot decide the question of emergency and regulation, free from judicial review, but this court should consider only the legitimacy of the conclusions drawn from the facts found.”).

some instances an emergency allows the exercise of sovereignty, which promotes the general welfare despite individuals' property rights.<sup>133</sup> Although Justice Roberts concedes the statute would be violative of constitutional principles as a "general rule," he opens his argument by explaining those rights are "[not] absolute," because if the Union could not overcome them in times of desperation, the "government [could] not exist . . ."<sup>134</sup> Justice Roberts thus expresses willingness to trump individuals' due process rights as necessary to preserve the Union.<sup>135</sup> His argument is reminiscent of John Fabian Witt's elaboration on the Lieber text, preserving the nation "is paramount to all other considerations."<sup>136</sup>

In his dissent, Justice McReynolds satirizes the majority's use of emergency powers, discussing the injustice it promulgates:

What circumstances give force to an "emergency" statute? In how much of the state must they obtain? . . . How many farmers must have been impoverished or threatened violence to create a crisis of sufficient gravity? . . . When emergency gives potency, its subsidence must disempower; but no test for its presence or absence has been offered. How is an accused to know when some new rule of conduct arrived, when it will disappear?<sup>137</sup>

Justice McReynolds's opinion highlights the hypocrisy of the Court during the depression. While the Court condoned standardized milk prices, protecting large production companies,<sup>138</sup> four justices rejected the state's attempt to protect financially vulnerable mortgagors from foreclosure sales.<sup>139</sup>

Meanwhile, a Texas mortgage moratorium law, enacted in response to the economic depression of the 1930s, came under constitutional review in the Texas Supreme Court in 1934.<sup>140</sup> In *Broussard v. Paggi*,<sup>141</sup> the court was

133. *See id.* at 524–25 ("No exercise of the private right can be imagined which will not in some respect, however slight, affect the public . . .").

134. *Id.* at 523.

135. *See id.* at 523 ("But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows . . .").

136. Witt, *supra* note 3, at 553 (internal quotes omitted) (quoting ADJUTANT GEN.'S OFFICE, GEN. ORDER NO. 100, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD art. 5 (1863)).

137. *Nebbia*, 291 U.S. at 548 (McReynolds, J., dissenting).

138. *Id.* at 556.

139. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 483 (1934) (Sutherland, J., dissenting).

140. *Broussard v. Paggi*, 76 S.W.2d 1041, 1041 (1934).

141. *Broussard v. Paggi*, 76 S.W.2d 1041 (1934).

asked to decide whether the moratorium law was unconstitutional under the Contracts Clause of the United States Constitution, Article I Sections 16, 17, and 19 of the Texas Constitution, or the Fourteenth Amendment of the United States Constitution.<sup>142</sup> In synchrony with the Court in *Blaisdell*, Chief Justice Cureton rejected the constitutionality of the moratorium law under the Contracts Clause of the Texas Constitution.<sup>143</sup>

Although both the Texas Supreme Court and the U.S. Supreme Court deny mortgagors emergency protection from foreclosure, the U.S. Supreme Court waives in its treatment of emergency powers. While it allows regulation of industry prices for milk producers, it denies mortgagors forgiveness in times of economic hardship.

#### F. *World War II (1939–1945)*

A governmental conflict of interest again stemmed from the aftermath of the attack on Pearl Harbor on December 7, 1941.<sup>144</sup> As racial tensions mounted against persons of Japanese ancestry, so did overwhelming fear and nationalism. Subsequently, the U.S. Army issued Exclusion Order No. 34, which excluded Japanese persons from a militarized area in California, forcing them to relocate their homes and livelihoods in accordance with the order.<sup>145</sup> Fred Korematsu's purposeful defiance of the exclusion order led the Court to consider whether the perceived threat of Japanese espionage to American national defense would justify discrimination against individuals on the basis of their Japanese heritage.<sup>146</sup> In a 6–3 decision, Justice Black, writing for the Court, deferred to the military's judgment.<sup>147</sup> Relying heavily on *Hirabayashi v. United States*,<sup>148</sup> Justice Black rationalized the discriminatory order as an instance of the military's ability to exercise emergency power: "Nothing short of

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142. *Id.* at 110–11, 76 S.W.2d at 1041.

143. *See id.* at 111, 76 S.W.2d at 1041 (striking down state intervention in foreclosure sales); *see also* Tex. Const. art. I, § 16 ("No . . . law impairing the obligation of contracts, shall be made.").

144. *Korematsu v. United States*, 323 U.S. 214, 215–17 (1944), *abrogated by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

145. *See id.* (reciting the facts and explaining the relevance and purpose Exclusion Order No. 34 serves).

146. Eric L. Muller, *Korematsu, Hirabayashi, and the Second Monster*, 98 TEX. L. REV. 735, 736 (2020).

147. *See Korematsu*, 323 U.S. at 215–17 ("[W]e are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did.").

148. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either.”<sup>149</sup> The “gravest imminent danger,” the Court articulated, was evidence by disloyalty of some Japanese-Americans coupled with an inability to sort the loyal from the disloyal.<sup>150</sup> Justice Black goes to great lengths to separate the order from a pure notion of racial prejudice. He rejects terminology such as “concentration camp,” replacing it with “relocation centers” and noting that racial discrimination must be viewed in light of the danger to the public.<sup>151</sup> The Court ultimately concluded that the extent of the threat was thwarted by the military when it instituted and enforced these exclusionary orders based on racial discrimination.<sup>152</sup> This conclusion was adopted despite the Court’s recognition that the classification based on a person’s heritage is “immediately suspect” and subject to heightened scrutiny.<sup>153</sup> Justice Frankfurter, in his concurrence, cites the source of emergency powers more clearly, indicating that the power and discretion granted to Congress and the military is no less part of the Constitution than the “provisions looking to a nation at peace.”<sup>154</sup> Justice Frankfurter appears to strongly reinforce the idea of emergency powers and finds their origin in the Constitution itself on equal footing with those provisions protecting individual liberty.

It is worthwhile to note that the decision in *Korematsu* generated substantial criticism in dissents by Justice Roberts, Justice Murphy, and Justice Jackson.<sup>155</sup> Though writing separately, the Justices agree that the decision grossly exceeds any discretion granted to the military by the power to wage war, violates *Korematsu*’s constitutional rights, and is rooted in racism.<sup>156</sup> The *Korematsu* decision was eventually abrogated in 2018 by

149. See *Korematsu*, 323 U.S. at 216–18 (comparing the order in *Korematsu* to the curfew order in *Hirabayashi* which was also upheld as a constitutional exercise of power); see also *Hirabayashi v. United States*, 320 U.S. 81, 104 (1943) (condoning the enforcement of discriminatory orders under the government’s ability to wage war and protect the public); Muller, *supra* note 146 (arguing *Hirabayashi* left a legacy just as pernicious as *Korematsu*).

150. See *Korematsu*, 323 U.S. at 216–18 (reasoning some Japanese-Americans were disloyal and those that were loyal could not be distinguished).

151. See *id.* at 223–24 (“[T]he need for action was great, and time was short.”).

152. *Id.*

153. *Id.* at 216.

154. *Id.* at 224 (Frankfurter, J., concurring).

155. See, e.g., *id.* at 225 (Roberts, J., dissenting) (disagreeing with the majority because the “indisputable facts exhibit a clear violation of Constitutional rights”).

156. In the dissenting opinions, all three justices unequivocally agreed that the military greatly exceeded their scope of authority, discriminated based on race, and violated the Constitution.

*Trump v. Hawaii*.<sup>157</sup> Chief Justice John Roberts addresses *Korematsu* as he notes that the dissent has put the case at issue by invoking it in its analysis.<sup>158</sup> Chief Justice Roberts vehemently denies compatibility between the Constitution, the *Korematsu* case, and the immigration statute at issue in *Trump v. Hawaii*.<sup>159</sup> Further, Professor Jamal Greene criticizes the decision based on the prioritization of the protection of national security over fundamental rights of individuals as being on par with *Dred Scott*<sup>160</sup> and *Plessy v. Ferguson*,<sup>161</sup> calling the decision “anticononical.”<sup>162</sup>

Meanwhile, in Texas, the second World War led the Texas Supreme Court to decide whether a district judge’s absence due to wartime orders in the military was a vacation of his office so as to allow the temporary judge compensation for serving in his place.<sup>163</sup> In so deciding, the court illuminates its principles of constitutional interpretation in relationship to times of emergency and times of peace.<sup>164</sup> Justice Sharp writes that the Constitution is a rigid expression of the will of the people;

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Their opinions contain a veritable treasure-trove of stinging rebukes. *See id.* at 226 (Roberts, J., dissenting) (“I need hardly labor the conclusion that Constitutional rights have been violated.”); *id.* at 235 (Murphy, J., dissenting) (“Yet no reasonable relation to an ‘immediate, imminent, and impending’ public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.”) (quoting *United States v. Russell*, 80 U.S. 623, 628 (1871)); *Korematsu*, 323 U.S. at 247 (Jackson, J., dissenting) (“I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority.”).

157. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (expressing an obvious sentiment regarding *Korematsu*). The racial discrimination of *Korematsu* is comparable to some of the United States’ worst intrusions on personal liberty. Jamal Greene, *Is Korematsu Good Law?*, 128 YALE L.J. F. 629, 632 (2018–2019) (placing *Korematsu*’s decision “in the company of other notorious cases such as *Dred Scott v. Sandford*, *Plessy v. Ferguson*, and *Lochner v. New York*”).

158. *Trump*, 138 S. Ct. at 2423.

159. *See id.* (“*Korematsu* has nothing to do with this case. The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority.”); *see also Korematsu*, 323 U.S. at 216–17 (examining the constitutionality of the forced relocation of Japanese-Americans).

160. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

161. *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

162. Greene, *supra* note 157; *see Dred Scott*, 60 U.S. at 454 (holding Petitioner was not a citizen because he was of African slave descent); *Plessy*, 163 U.S. at 551–52 (rejecting the proposition that “social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced” desegregation).

163. *Cramer v. Sheppard*, 167 S.W.2d 147, 148 (1942).

164. *Id.* at 154.

“it is not different at any subsequent time.”<sup>165</sup> The court goes further and appears to reject any circumstances excusing a suspension of the principles of the Constitution, declaring that the Constitution does not give effect to “consequences.”<sup>166</sup> The decision would mark the beginning of a long line of Texas cases denying emergency powers to the government.

Chief Justice Alexander dissented, strongly advising the consideration of extenuating circumstances in decisions necessitating adjudication of constitutional provisions.<sup>167</sup> In his view, the Constitution should be construed as an evolving document under which the obvious intention of the people to promote the public interest is of utmost importance.<sup>168</sup>

### G. *The Cold War Era (1945–1990)*

In 1952, the Court was asked to decide whether President Truman had the authority to direct the seizure and operation of the nation’s steel mills in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>169</sup> It is essential to note that President Truman’s executive order was issued in circumstances of an impending strike and anticipated labor shortage, in the midst of the Korean conflict.<sup>170</sup> The mills largely complied with the orders, but filed a lawsuit claiming the President’s action was impermissibly legislative in nature, a duty residing in Congress.<sup>171</sup> Justice Black delivered the opinion of a 6–3 Court, which offered its swift rejection of the order, even as the government contended that the unavailability of steel would “immediately jeopardize our national defense . . . .”<sup>172</sup> Justice Black first explains the power the President used in seizing the mills, if constitutional, must have originated either from the Constitution or a congressional act.<sup>173</sup> The Court finds that Congress took affirmative and inconsistent action in 1947

165. *Id.* at 285, 167 S.W.2d at 154.

166. *Id.*

167. *Id.* at 294, 167 S.W.2d at 159 (Alexander, C.J., dissenting) (“A fundamental canon of constitutional construction . . . is the rule that a construction of a constitutional provision which leads to great public inconvenience or to the sacrifice of great public interests, or to unjust discrimination, or to absurd consequences, will not [be adopted] if the provision is reasonably susceptible of an interpretation which will avoid such consequences . . .”).

168. *Id.*

169. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582–86 (1952) (explaining the constitutional powers of the President).

170. *See id.* at 582 (recounting the context for the President directing the Secretary of Commerce to seize the steel mills).

171. *Id.* at 583.

172. *Id.*

173. *Id.* at 585.



when it opposed an amendment to the Taft-Harley Act, which would have created the power President Truman used in this case.<sup>174</sup> Likewise, justification for the President's action cannot reside in the Constitution. Neither the constitutional designation of the president as Commander in Chief, nor the Article II mandate that the president "take Care that the Laws be faithfully executed," permit the exercise of such power.<sup>175</sup>

Justice Douglas concurs, aptly noting the emergency faced by the nation in an impending labor crisis at a time when steel is needed to aid national defense "did not create power . . ."<sup>176</sup> Notably, he recognizes both the convenience and the duty of the President to act, commenting on the authority and speed the office is capable of and calling President Truman the "trustee" of national security.<sup>177</sup> Justice Douglas did not stop there. He writes that the convenience and righteousness of the order is outweighed by its later potential for abuse should the Court condone his actions.<sup>178</sup> To the Justices, such an expansion of the Constitution is more dangerous than the threat it purports to thwart.

The dissent views the issue in another light. Chief Justice Vinson, Justice Reed, and Justice Minton, in a dissenting opinion written by Chief Justice Vinson, emphasize the danger faced by the public, should steel production cease.<sup>179</sup> The dissent primarily considers the "context" of the exercise of authority before determining whether the authority is in existence by way of the federalist structure, statute, or the Constitution.<sup>180</sup> Considering such context, the Chief Justice warns that readers "should be mindful that these are extraordinary times."<sup>181</sup> Ultimately, the Justices concluded that the context in which President Truman exercised such a power is the same circumstance that made it constitutional; if the President

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174. *Id.* at 586.

175. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586–87 (1952) (internal quotation marks omitted) (quoting U.S. CONST. art. II, § 3).

176. *Id.* at 629 (Douglas, J., concurring).

177. *Id.*

178. *Id.* at 633.

179. *Id.* at 667 (Vinson, C.J., dissenting) (beginning the dissent by stating the reasons for the President's action and the tragedy which would befall the nation were President Truman not to intervene).

180. *Id.*

181. *Id.* at 668.

is unable to protect the nation at times when it is required, then the dissenting Justices wonder who will.<sup>182</sup>

In 1972, the Supreme Court was again conflicted between dire circumstances and individual liberties when it decided whether the subpoena of Senator Mike Gravel's assistant violates Article I of the United States Constitution, under the Speech or Debate Clause.<sup>183</sup> *Gravel v. United States*<sup>184</sup> resulted from Senator Gravel's release of sensitive documents pertaining to U.S. involvement in the Vietnam War, otherwise known as the Pentagon Papers.<sup>185</sup> A federal grand jury sought information in relationship to the release of those documents from Senator Gravel's assistant, Leonard Rodberg.<sup>186</sup> Senator Gravel subsequently intervened in the action and filed motions to quash, asserting privilege in accordance with the Speech or Debate Clause.<sup>187</sup> That clause grants congresspeople protection from restrictions on speech and immunizes them from prosecution for such speech.<sup>188</sup> It reads, "[F]or any Speech or Debate in either House, they shall not be questioned in any other Place."<sup>189</sup>

Writing for the Court in a 5–4 decision for Gravel, Justice White upheld protection for congresspeople and their "aides" under the Speech or Debate clause, assuming the aides are subpoenaed in connection with their duty as an aide to the congressperson.<sup>190</sup> Although President Nixon would "dearly like to silence a man like Senator Gravel," the Court held that potential intimidation of the legislative branch is precisely the rationale behind inclusion of the Speech or Debate Clause in the Constitution.<sup>191</sup> Those acts leading up to a legislative act, or in this case, procurement of the Pentagon Papers, should it be found to be an illegal act, would not be

182. *Id.* at 680.

183. *See generally* *Gravel v. United States*, 408 U.S. 606, 608 (1972) (asserting to require Leonard S. Rodberg "to appear and testify would violate" Senator Gravel's constitutional privilege under the Speech or Debate Clause).

184. *Gravel v. United States*, 408 U.S. 606 (1972).

185. *Id.* at 609; *see also* Lawrence R. Velvel, *The Supreme Court Tramples Gravel*, 61 KY. L.J. 525, 525–26 (1973) ("As part of its war against those who revealed the Pentagon Papers, the government wanted to have a grand jury investigate Gravel's conduct.").

186. *Gravel*, 408 U.S. at 608–09.

187. *Id.*

188. U.S. CONST. art. I, § 6, cl. 1; *see also* Matthew R. Walker, *Constitutional Law—Narrowing the Scope of Speech or Debate Clause Immunity*, 68 TEMPLE L. REV. 377, 377 (1995); Velvel, *supra* note 185, at 526.

189. U.S. CONST. art. I, § 6, cl. 1.

190. *Gravel*, 408 U.S. at 628–29.

191. Velvel, *supra* note 185, at 528–29.

protected under the clause, nor would their release for publication.<sup>192</sup> Notably, the majority does not invoke *N. Y. Times Co. v. United States*,<sup>193</sup> which was decided just one year earlier and upheld protection for freedom of the press despite the Nixon administration's contention that national security was at risk in publication of the Pentagon Papers.<sup>194</sup> Thus, in cases where national security may be at stake, legislators should be offered utmost protection unless their actions to procure information should otherwise be illegal.<sup>195</sup> This decision seemingly attempts to strike a balance between impunity offered to legislators and executive interest in keeping governmental documents classified.

Justices Stewart, Douglas, and Brennan dissented in response to the majority's decision.<sup>196</sup> Justice Stewart's grievance with the majority was primarily with the portion of the Court's decision allowing liability against legislators for the sources of information they procure or receive.<sup>197</sup> He believes the consequences of that decision will be that necessary informants would be unable or unwilling to continue to provide congresspeople with information they need in order to accomplish their goals in drafting and voting on legislation.<sup>198</sup>

Dissenting, Justice Douglas takes an alternative view.<sup>199</sup> He writes that not only should Senator Gravel's actions of reading from the top-secret documents and introducing them into the public record be protected under the First Amendment, but so too should his and the press's actions of

192. *Gravel*, 408 U.S. at 622; see Walker, *supra* note 188, at 384 (differentiating between political acts and official acts); Velvel, *supra* note 185, at 529 (holding "the speech and debate clause is not intended to protect the legislator" but instead "is intended to protect so-called legislative acts from intimidation by the Executive").

193. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

194. *Gravel*, 408 U.S. at 614 ("The [C]onstitution gives to every man, charged with an offence, the benefit, of compulsory process, to secure the attendance of his witnesses. I do not know of any privilege to exempt members of congress from the service, or the obligations, of a subpoena, in such cases." (quoting *U.S. v. Cooper*, 4 U.S. 341, 341 (C.C.D. Pa. 1800) (Chase, J., sitting on Circuit) (internal quotations omitted)); *N.Y. Times Co.*, 403 U.S. at 714.

195. See *Gravel*, 408 U.S. at 619 (focusing on the procurement of the papers, rather than their exposure to the public).

196. *Id.* at 629 (Stewart, J., dissenting); *id.* at 633 (Douglas, J., dissenting); *id.* at 648 (Brennan, J., dissenting).

197. *Id.* at 631 (Stewart, J., dissenting).

198. See *id.* at 630 ("[T]he acquisition of knowledge through a promise of nondisclosure of its source will often be a necessary concomitant of effective legislative conduct, if the members of Congress are properly to perform their constitutional duty.").

199. *Id.* at 633 (Douglas, J., dissenting).

publishing the documents in private.<sup>200</sup> In relying on the First Amendment's protection of speech for his position, he states, "Forcing the press to become the Government's coconspirator in maintaining state secrets is at war with the objectives of the First Amendment."<sup>201</sup> Justice Douglas's dissent rejects any claim to protect the Executive Branch's classified information as fundamental to democracy and federalism, regardless of the circumstances in which that action was taken.<sup>202</sup>

The Texas Supreme Court of the Cold War era followed *Youngstown* suit. Though the court was not asked to answer questions of constitutional law, it expanded notions promulgated by the *Youngstown* decision in deciding whether a life insurance policy would provide benefits for an accidental death.<sup>203</sup> The dispute boiled down to whether the insured was killed during a time of war.<sup>204</sup> The insured was killed in a plane crash in Alaska on military orders to travel there "to open bids for the construction of a United States Army Air Field . . . ."<sup>205</sup>

In holding for the insured, Justice Smedley writes that a time of war exists in some circumstances with or without a formal proclamation from Congress.<sup>206</sup> Obviously, a legal declaration of war and a de facto determination have divergent implications.<sup>207</sup> Though Justice Smedley's decision does not enlighten readers as to whether the court's designation of wartime would apply in cases of constitutional law, his citation to *Youngstown* suggests assent with the Supreme Court precedent during World War II.<sup>208</sup>

#### H. 9/11 and War on Terror (2001–present)

On September 11, 2001, the United States was the target of a series of attacks resulting in what the FBI refers to as "the most lethal terrorist attacks in history . . . ."<sup>209</sup> Subsequently, the federal government has implemented

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200. *Id.*

201. *Id.* at 640.

202. *See id.* at 640–41 (taking a more liberal view of the protections of the First Amendment).

203. *W. Rsv. Life Ins. Co. v. Meadows*, 261 S.W.2d 554, 555 (1953).

204. *Id.*

205. *Id.*

206. *Id.* at 557.

207. John Alan Cohan, *Legal War: When Does It Exist, and When Does It End*, 27 HASTINGS INT'L & COMP. L. REV. 221, 222 (2004).

208. *See id.* at 223 (citing *Meadows*, 261 S.W.2d at 557 for the proposition that a formal congressional announcement of a state of war is not necessary for judicial determination of war).

209. *9/11 Investigation*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/history/famous-cases/911-investigation> [<https://perma.cc/A3SY-ZNQT>].

countless policies and other measures aimed at preventing another terrorist attack. Some of those policies have been accused of infringing Americans' personal liberties. One such example is the criminal trial against Javid Iqbal, and Iqbal's subsequent *Bivens* action against the United States.<sup>210</sup> Iqbal, a Muslim Pakistani immigrant was arrested and accused of conspiracy to defraud the United States and fraudulent identification documents in 2001 following the September 11 (9/11) attacks.<sup>211</sup> Iqbal pled guilty to the charges against him, was convicted, incarcerated, and eventually deported.<sup>212</sup> The New York Times, in its article "Justices Turn Back Ex-Detainee's Suit," referred to him as "among thousands of Muslim men rounded up after the [September] 11 attacks."<sup>213</sup>

The case which made its way to the United States Supreme Court out of the eastern district of New York, however, was brought subsequent to that conviction as a *Bivens* action, alleging federal governmental officials, ranging from low-level federal officers to former Attorney General John Ashcroft and former FBI Director Robert Mueller, deprived him of his constitutional rights.<sup>214</sup> Specifically, Iqbal charged the officials with promoting unconstitutional race-based policies in the law enforcement, which led to his separation, designation as a person of "high interest," and torture.<sup>215</sup> On certiorari, the Court was asked two questions: (1) whether Iqbal's claim that governmental officials condoned or supervised unconstitutional conduct could be pled as a *Bivens* claim; and (2) whether the federal officials

210. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

211. *Id.* at 666. See generally Desiree L. Grace, *Supervisory Liability Post-Iqbal: a Misnomer Indeed*, 42 SETON HALL L. REV. 317, 320 (2012) (analyzing *Iqbal's* implications and attempting to resolve confusion among the various interpretations of the case).

212. *Ashcroft*, 556 U.S. at 668.

213. Adam Liptak, *Justices Turn Back Ex-Detainee's Suit*, N.Y. TIMES (May 18, 2009), <https://www.nytimes.com/2009/05/19/us/19scotus.html> [<https://perma.cc/HEE8-HBUT>]; see Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L.J. 379, 383 (2017) (citing IRUM SHIEKH, DETAINED WITHOUT CAUSE: MUSLIMS' STORIES OF DETENTION AND DEPORTATION IN AMERICA AFTER 9/11, at 19 (2011)); OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 16–17 (2003)).

214. Grace, *supra* note 211, at 321.

215. *Ashcroft*, 556 U.S. at 668–69 ("[T]he complaint alleges that respondent's jailors 'kicked him in the stomach, punched him in the face, and dragged him across' his cell . . . subjected him to [invasive] searches . . . and refused to let him and other Muslims pray . . ."). Specifically, Iqbal claimed recovery under the First and Fifth Amendments. *Id.*; Grace, *supra* note 211, at 321–22 (citing *Ashcroft*, 556 U.S. at 662).

could be personally and vicariously liable for that conduct.<sup>216</sup> The Supreme Court issued another 5–4 decision in its response.<sup>217</sup>

First, Justice Kennedy, writing for the Court, held that high-ranking officials such as Mueller and Ashcroft could not be held personally liable for conduct of inferior federal employees.<sup>218</sup> The Court’s opinion rejected Iqbal’s claims on grounds of plausibility.<sup>219</sup> It decided that, even where some of<sup>220</sup> the Plaintiff’s allegations presumed true, his pleadings did not allege that the officials acted with the “discriminatory purpose,” required to sustain an action.<sup>221</sup>

Justice Souter dissented alongside Justices Stevens, Ginsburg, and Breyer.<sup>222</sup> Souter writes that counsel for the federal officials conceded *Bivens* liability, were the facts as pleaded presumed true, and thus liability for subordinates’ actions are not a question the Court was asked; Iqbal is entitled to reliance on that concession.<sup>223</sup> Additionally, the dissent diverges on its answer to the second question, as it accuses the majority of letting its skepticism of the veracity of Plaintiff’s allegations get the better of its decision.<sup>224</sup> Instead, it asserts the applicable standard is that of alleging facts which, when pled and presumed truthful, indicate a “suggesti[on] of illegal conduct,” a standard it believes Plaintiff satisfied.<sup>225</sup>

One scholar praised and lamented the Court’s decision, though almost exclusively for its consequences in civil procedure, rather than its significance as a post-9/11 civil rights action.<sup>226</sup> Some scholars accuse the Court of taking a misstep in issuing the decision, claiming the Court was

216. *Ashcroft*, 556 U.S. at 689 (Souter, J., dissenting).

217. *Id.* at 665.

218. Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 856 (2010) (citing *Ashcroft*, 556 U.S. at 668).

219. *Id.* at 857.

220. The Court’s opinion designates some allegations against the federal officials as unworthy of a presumption of truth, due to their status as being merely “conclusory.” *Ashcroft*, 556 U.S. at 681. *Ashcroft* is largely recognized as a decision that transformed civil procedure rather than a landmark case in emergency power doctrine. Bone, *supra* note 218, at 858. Justice Kennedy quotes *Bell Atlantic Corp. v. Twombly*, and accuses Iqbal and counsel of reciting elements of a formula rather than properly pleading his entitlement to relief. *Ashcroft*, 556 U.S. at 681 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

221. *Ashcroft*, 556 U.S. at 676; Bone, *supra* note 218, at 858.

222. *Ashcroft*, 556 U.S. at 687 (Souter, J., dissenting).

223. *Id.* at 691–92.

224. *See id.* at 696 (“We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be.”) (citing *Bell Atl. Corp.*, 550 U.S. at 556).

225. *Ashcroft*, 556 U.S. at 696 (Souter, J., dissenting) (quoting *Bell Atl. Corp.*, 550 U.S. at 564 n.8).

226. Sinnar, *supra* note 213, at 381–82.

“denying justice to a Muslim immigrant who unsuccessfully challenged the violent conditions of his detention, and . . . crafting a new pleading standard” in the process.<sup>227</sup>

Further, legal scholars claim the FBI and other federal officers implemented policies of unconstitutional discrimination and abuse, though the Court never reached that issue.<sup>228</sup> Some go so far as to wonder whether the decision represents the Court’s coalescing with unconstitutional law enforcement against Muslim-Americans.<sup>229</sup>

Meanwhile, Texas faced similar questions of law in the wake of the 2001 terror attacks. In 2009, the Fifth Court of Appeals determined whether passengers boarding airplanes have a reasonable expectation of privacy in their belongings under the Fourth Amendment.<sup>230</sup> The question arose after drugs were found in James Kjolhede’s suitcase.<sup>231</sup> Justice Morris wrote the court’s opinion, which centered on their recognition that airport security had evolved since the 9/11 attacks.<sup>232</sup> In its analysis, the Court addresses the “totality” of the circumstances, departing from the approach used by Justice Kennedy and the Supreme Court just two months prior.<sup>233</sup> The Fifth Court of Appeals made its position clear in holding Kjolhede had no expectation of privacy in his belongings while traveling.<sup>234</sup> The court quotes the Ninth Circuit Court of Appeals in *United States v. Aukai* writing: “Any subjective belief a person might have that his baggage checked for transport aboard a passenger aircraft may not be searched ‘makes little sense in a post-9/11 world.’”<sup>235</sup> Are the Justices adjusting expectations of civil liberty according to demands for safety, or is it true that the courts would not have extended Fourth Amendment protection to passengers “even

227. Vivek Mittal, *Using Iqbal in Iqbal: Exploiting Arabs, Muslims, and South Asians after September 11*, 15 *ASIAN PAC. AM. L.J.* 114, 115 (2009).

228. *See id.* at 115–17 (documenting how the government used the national emergency to discriminate against racial minorities).

229. *Id.* at 116.

230. *Kjolhede v. State*, 333 S.W.3d 631, 632 (Tex. App.—Dallas 2009, pet. ref’d).

231. *Id.*

232. *Id.* at 633.

233. *Ashcroft v. Iqbal*, 556 U.S. 668, 691–92 (2009) (Souter, J., dissenting); *see Kjolhede*, 333 S.W.3d at 633 (“None of the factors is dispositive; instead, we examine the circumstances surrounding the search in their totality.”) (citing *Smith v. State*, 176 S.W.3d 907, 913 (Tex. App.—Dallas 2005, pet. ref’d)).

234. *Kjolhede*, 333 S.W.3d at 634.

235. *Id.* at 633 (citing *United States v. Aukai*, 497 F.3d 955, 960 (9th Cir. 2007)).

before the attacks of September 11 . . . .”<sup>236</sup> Although the Texas Supreme Court has yet to review the issue, the decision reflects Texan judges’ willingness to alter expectations based on the 9/11 attacks.

### I. *COVID-19 Pandemic (2019–present)*

From the inception of COVID-19-related emergency orders, former Attorney General William Barr warned of the potential for infringement on citizens’ civil liberties.<sup>237</sup> In an official memo, the attorney general called on United States attorneys to monitor statutes and ordinances that conflict with constitutional provisions and act when necessary.<sup>238</sup>

In the fall of 2020, at a Constitution Day event, former Attorney General William Barr again commented on state and local regulations that compromise provisions of the constitution protecting civil liberties.<sup>239</sup> The attorney general expressed his belief that the COVID-19 pandemic has caused the worst human rights violations in American history “[o]ther than slavery, which was a different kind of restraint . . . .”<sup>240</sup> Understandably, this statement garnered widespread criticism.<sup>241</sup>

The Supreme Court has taken an inconsistent position, however. In May 2020, a 5–4 Court rejected an application for injunctive relief over a

236. *Kjølbede*, 333 S.W.3d at 631 (citing *United States v. Place*, 462 U.S. 696, 707 (1983)). Interestingly, *United States v. Place* came to the opposite conclusion. That case held that a ninety-minute period of inspection by narcotic canines was an unreasonable and warrantless seizure, in violation of the Fourth Amendment. *See Place*, 462 U.S. at 710 (concluding that the Fourth Amendment was violated by the seizure of luggage); *see also Kent v. Dulles*, 357 U.S. 116, 125 (1958) (“The right to travel is part of the ‘liberty’ of which the citizen cannot be deprived without due process of law under the Fifth Amendment.”).

237. *See* Memorandum from the Attorney General William Barr, *supra* note 20 (“Now, I am directing each of our United States Attorneys to also be on the lookout for state and local directives that could be violating the constitutional rights and civil liberties of individual citizens.”).

238. *See* Memorandum from the Attorney General William Barr, *supra* note 20 (commenting interfering statutes should be addressed as “the Constitution is not suspended” during times of crisis).

239. Carrie Johnson, *Barr Criticizes Prosecutors, Makes Incendiary Comments On Slavery And Pandemic*, NPR (Sept. 17, 2020, 4:08 PM), <https://www.npr.org/2020/09/17/914103048/barr-criticizes-prosecutors-makes-incendiary-comments-on-slavery-and-pandemic> [<https://perma.cc/SM2D-CCFT>] (recounting the fallout from former Attorney General William Barr’s inflammatory comments regarding slavery, civil rights, and the competency of officials in the Justice Department).

240. *See id.* (providing the recording of the former attorney general’s comments).

241. *Id.* (“[Congressman] Clyburn] called those comments by Barr among the most ridiculous, tone-deaf[,] and awful things he’s heard.”); Eric Tucker, *Barr under fire over comparison of virus lock-in to slavery*, AP NEWS (Sept. 18, 2020), <https://apnews.com/article/virus-outbreak-michigan-slavery-hillsdale-william-barr-843dcf4c766a1684164e428752939e07> [<https://perma.cc/R7Q4-HGFQ>].



California executive order limiting occupancy in religious buildings.<sup>242</sup> What we know of the majority's decision is limited to the concurrence of Chief Justice John Roberts. Chief Justice Roberts expresses his view that although the order distinguishes between religious gatherings and non-religious gatherings, this particular order is a reasonable restriction in response to a clear threat to human life, so they should defer to the broad police power of the states.<sup>243</sup> He further explains a request for an injunction requires an indisputable justification, and because the Court found the order was a justifiable use of police power, it declined to invalidate the order.<sup>244</sup>

Six months and one Supreme Court Justice replacement later, the Court changed its tune. The Court's decision in November 2020 invalidated former New York Governor Cuomo's executive order limiting occupancy in religious establishments under the Free Exercise Clause and granted injunctive relief to petitioners opposing its enforcement.<sup>245</sup> In *Roman Catholic Diocese of Brooklyn v. Cuomo*,<sup>246</sup> a presently unpublished opinion, the Supreme Court held former New York Governor Cuomo's executive order unconstitutional in yet another 5–4 opinion, written by Justice Breyer.<sup>247</sup> Executive Order 202–68, which limited the number of attendees allowed to attend church services, was found in violation of the Free Exercise Clause since the order imposed stricter regulations on religious establishments.<sup>248</sup> A dissenting opinion by Chief Justice Roberts admonishes the Court for such ruling when, after application to the Supreme Court, former Governor Cuomo revised the order to comport with the Constitution.<sup>249</sup>

242. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring).

243. *See id.* (identifying the significant dangers of COVID-19 and deferring to the state's power under the Constitution).

244. *See id.* at 1613–14 (elaborating on the standards for issuance of an injunction, the scope of the executive order, and the application of similar restrictions on secular activities).

245. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam) (rejecting the constitutionality of New York Executive Order 202-68); *see also* Matt Mathers, *Amy Coney Barrett Plays Key Role in Overturning New York Covid Restrictions on Religious Gatherings*, THE INDEP. (Nov. 26, 2020), <https://www.independent.co.uk/news/world/americas/supreme-court-religious-groups-new-york-covid-restrictions-b1762315.html> [<https://perma.cc/WW4V-EHJU>] (commenting on the Court's inconsistency compared to earlier decisions regarding COVID-19).

246. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam).

247. *Id.* at 65.

248. *Id.* at 67–68.

249. *Id.* at 75 (Roberts, C.J., dissenting).

Texas COVID-era constitutional law has taken a stance similar to that of the November 2020 Court. The Texas Supreme Court ventured into a discussion regarding separation of powers when a state of disaster is declared, as it was during the COVID-19 pandemic.<sup>250</sup> On March 29, 2020, Governor Abbott issued Executive Order GA-13, which limited the ability of trial courts to release accused persons with violent tendencies in response to public fear that jails would release inmates to reduce the risk of COVID-19 outbreaks within correctional facilities.<sup>251</sup> In clarifying the relationship between emergency, necessity, and the Constitution, the Court notes that emergency does not allow constitutional circumvention.<sup>252</sup> Judges filing suit as individuals acting in their professional capacity, rather than a party directly and adversely affected by the order, lack standing to challenge it.<sup>253</sup> Although the court does not ultimately adjudicate the issue of GA-13's constitutionality, it seems to indicate that were a plaintiff to obtain standing, the court would adhere to tenants of constitutional separation of powers because, even in a state of disaster, "[t]he Constitution is not suspended."<sup>254</sup> Notably, the Texas Supreme Court is engaging in *obiter dicta*. While the Texas Supreme Court justices' comments do not have the force of law, they assume facts and circumstances not present in the subject case merely to express judicial opinion.

Seven months later, the Texas Supreme Court again delved into the conflicts between COVID-related legislation and the Constitution.<sup>255</sup> Although ultimately dismissed on jurisdictional grounds, Justice Devine's concurring opinion, again engaged in *dicta* and elaborated on the state of emergency orders enacted pursuant to the pandemic:

The Texas Constitution is not a document of convenient consultation. It is a steadfast, uninterrupted charter of governmental structure. Once this

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250. See *In re Abbott*, 601 S.W.3d 802, 805–06 (Tex. 2020) (orig. proceeding) (per curiam) (discussing Governor Abbott's ability to issue Executive Order GA-13, which suspended the ability of trial courts to make discretionary releases of inmates in accordance with the Texas Code of Criminal Procedure).

251. *Id.* at 805–06.

252. *Id.* at 805 (writing, in the first sentences of the opinion: "The Constitution is not suspended when the government declares a state of disaster. Nor do constitutional limitations on the jurisdiction of courts cease to exist.").

253. *Id.* at 805.

254. See *id.* (focusing on whether the court has the authority and the plaintiffs have standing, rather than whether the order is constitutional under separation of powers principles).

255. *In re Hotze*, No. 20-0430, 2020 WL 4046034, at \*1 (Tex. July 17, 2020).

structure erodes, so does the promise of liberty. In these most atypical times, Texans' constitutional rights have taken a back seat to a series of executive orders attempting to unilaterally quell the spread of the novel coronavirus. But at what cost? . . . We should not, as we've recently said, "abandon the Constitution at the moment we need it most."<sup>256</sup>

Though the court ultimately decided it lacked jurisdiction to issue a writ of mandamus against a state official, Justice Devine appears to agree that the Texas Constitution, and at least some executive orders enacted under Texas Government Code 418, are mutually exclusive.<sup>257</sup>

#### IV. CONCLUSION

Courts' use of emergency powers has largely emulated emergencies themselves: unpredictable, arbitrary, and perturbing. The law is deeply troubled by emergency powers, and courts will generally take great care in their exercise. Texas and federal disposition to questions of national or local emergency can be viewed as largely circumstantial; justices and judges consider the intended benefits of the legislation, the unintended consequences, and some would argue, the public support for the order or statute.<sup>258</sup>

As far as the future for courts and emergency powers, any claimed prediction is clouded with serious doubt. Emergencies are inherently unpredictable, as is our response in handling them. Our role as scholars is not always to act as clairvoyants, but as mediators in understanding our past and present. In writing about the politics of the First World War, Edward Turner wrote: "Man who knows little of the present knows not the future, and must watch in dumb expectation the loom of the universe rush on."<sup>259</sup> The future is uncertain, while our past and present provide necessary context for its embrace.

If one thing is certain, emergency powers are not a fable, nor are they an antiquated notion of early constitutional law; they are a paradox. The

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256. *Id.* (quoting *In re Salon a La Mode*, No. 20-0340, 2020 WL 2125844, at \*1 (Tex. May 5, 2020) (orig. proceeding) (Blacklock, J., concurring)).

257. *See In re Hotze*, 2020 WL 4046034, at \*3 (explaining why many executive orders will "continually escape [their] review").

258. *See* Mark Barnes, *AIDS and Mr. Korematsu: Minorities at Times of Crisis*, 7 ST. LOUIS U. PUB. L. REV. 35, 37 (1988) ("The detention orders and the public support they received were largely the results of wartime panic and of a racism that equated Japanese ancestry with espionage.").

259. Turner, *supra* note 106, at 35.

pendulum of the courts swings from their explicit use to outright denial of their existence.<sup>260</sup> Scholars, judges, legislators, and citizens diverge as to their endorsement or condemnation, and each of them uses sound reasoning in reaching their conclusions.

The use of emergency powers is not always shameful and does not always compromise fundamental principles on which the United States was founded. Nor is it reasonable for the courts to singlehandedly determine whether an emergency exists and condone extra-constitutional legislation. Judges Learned Hand and Robert Jackson likewise expressed fear of courts becoming the gatekeepers of democracy.<sup>261</sup>

Just as John Locke and Thomas Hobbes prophesized, in consenting to government, we sacrifice some rights in the name of the greater good.<sup>262</sup> As such, when the greater good is more difficult to achieve, it requires more sacrifice from its subjects.<sup>263</sup> This give-and-take imagined by enlightenment philosophers is a fluid scale, not an on-off switch.

So long as Americans consider emergency powers in all-or-nothing, black-and-white terms, the courts will remain in power purgatory. Emergency powers have undeniably helped us in the past and predictably will be used for the public good in the future. Similarly, the courts have allowed encroachment on civil liberties in the name of the greater good, although they later reversed course.<sup>264</sup> Judicial denial of the existence of emergency powers and their simultaneous utilization of them is perplexing and dangerous. An alternate standard is necessary, and it should be based on reason, balance, and reached without resort to absolutes.

260. *See* *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) (“an emergency may not call into life a power which has never lived.”(quoting *Wilson v. New*, 243 U.S. 332, 348 (1917)); *see also* *Jones v. McMahan*, 30 Tex. 719, 735 (1868) (“The ‘supreme law’ is the [C]onstitution of the United States and this state . . . .”); *Nebbia v. New York*, 291 U.S. 502, 523 (1934) (“[N]either property rights nor contract rights are absolute . . . .”).

261. McCormack, *supra* note 9, at 72 (first citing *LEARNED HAND, THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 189–90* (Irving Dillard ed., 3d ed. 1960); then citing *Korematsu v. United States*, 323 U.S. 214, 248 (Jackson, J., dissenting) (“[I]he judiciary is not the final bulwark against government repression.”)).

262. *HOBBS*, *supra* note 28, at 168 (“For in the act of our submission consisteth both our obligation and our liberty . . . .”).

263. *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905) (“There are manifold restraints to which every person is necessarily subject for the common good.”).

264. *See, e.g., Korematsu v. United States*, 323 U.S. 214, 214 (1944) (representing an account when the Court condoned encroachment on the People’s rights), *abrogated by Trump v. Hawaii*, 347 U.S. 483 (1954).