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EMERGENCY POWERS DURING A VIRAL PANDEMIC

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The Covid-19 pandemic has prompted an extraordinary government response. Beginning in the spring of 2020, at a time when there was no vaccine or cure, governments took emergency measures to stop the spread of a disease that has killed (at the time of this writing) more than 930,000 Americans and infected millions more.[1] States imposed lockdowns on economic and social life, including severe restrictions on individual liberties and business

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[1] Centers for Disease Control and Prevention, Trends in Number of COVID-19 Cases and Deaths in the US Reported to the CDC, by State/Territory, https://covid.cdc.gov/covid-data-tracker/#trends_totaldeaths (last visited Feb. 24. 2022).

activity.[2] The federal government flooded the economy with trillions of dollars in spending and assistance, poured resources into medical care and scientific research, and regulated interstate and international travel. Initially, the courts adopted a deferential approach toward "politically accountable officials with the background, competence, and expertise to assess public health," as Chief Justice John Roberts wrote in May, 2020.[3]

This Essay examines the constitutionality of the federal government's emergency measures during the second year of the pandemic. By Spring 2021, vaccines funded by the federal government became widely available and treatments started to appear. The Supreme Court deployed more extensive review of state and federal policies.[4] But most importantly, this Article will argue, the Biden Administration adopted measures designed to inhibit the virus' spread based on weak to non-existent legal authority. Executive power that might justify emergency actions during national security or foreign policy crises does not provide similar support for expansive claims of authority over domestic affairs. With national security and foreign affairs, the Constitution vests exclusive policymaking power in the federal government, and, during emergencies, in the Presidency. With domestic affairs, such as public health, the Constitution recognizes the primary authority of the

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[2] *See* Brett Milano, *Restricting civil liberties amid COVID-19 pandemic*, The Harvard Gazette, March 25, 2020, *available at* https://news.harvard.edu/gazette/story/2020/03/new-restrictions-on-civil-liberties-during-coronavirus/ (discussing how one in five Americans had been asked by state and local officials in certain states to stay home); *see, e.g.*, New York Exec. Order No. 202.7, "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency," March 18, 2020, *available at https://www.nysac.org/files/EO%20202_7.pdf*.

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

[4] Cf. id. with S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716-17 (2021) (Roberts, C.J., concurring in partial grant of application for injunctive relief).

states, with Washington, D.C. playing a specialized, supporting role. The fate of the Biden Administration's ban on evictions and vaccine mandate illustrate this fundamental difference in emergency powers.

This Essay proceeds in three parts. Part I examines the Biden Administration's effort to ban evictions nationwide. It argues that the executive branch could not claim authority under the Public Health Services Act to pre-empt all landlord-tenant contracts throughout the United States. Even if the statute were read to do so, a moratorium could well violate the Constitution's restriction on the federal government's enumerated powers. Part II examines the Biden Administration's use of the Occupational Health and Safety Act to require most employers in the United States to adopt vaccine mandates for their employees. It argues that Congress did not delegate to the executive branch the authority to pursue public health policies through a workplace safety law. And, like the eviction moratorium, if the statute did grant the executive branch such sweeping power, it could violate the limited grant of Article I powers. Part III addresses the question of emergency power. It explains why the Constitution's recognition of a power in the Presidency to respond to crises and emergencies does not extend beyond national security and foreign affairs to domestic problems.

I. PRESIDENT BIDEN'S EVICTION MORATORIUM LACKS EXECUTIVE AUTHORITY

Government responses to the Covid-19 pandemic initially followed federalism's division of authority between Washington, D.C. and the states. States exercised their police powers to limit economic activity, travel, schools and businesses, and the conduct of individuals.[5] The federal government closed the nation's borders,

[5] *See* Haffajee, Rebecca L. and Mello, Michelle M., "Thinking Globally, Acting Locally – The U.S. Response to Covid-19," The New England Journal of Medicine, May 28, 2020, *available at* https://www.nejm.org/doi/full/10.1056/NEJMp2006740. During

regulated interstate movement, and poured money and resources into the economy.[6] It enacted a series of laws that sent trillions of dollars not only to state and local governments, but directly to businesses closed by state lockdowns or by the resulting economic depression and to employees thrown out of work.[7] Federal health and scientific agencies conducted research and disseminated information to state and local governments.[8] Perhaps most

March 2020, all fifty states issued executive orders declaring some version of an emergency, disaster, and/or a public health emergency/disaster. By April 2020, thirty-three states and dozens of localities issued stay-at-home orders, including instructing nonessential businesses and schools to close, and issuing social-distancing recommendations in public spaces. *See, e.g.* Executive Department State of California, Proclamation of a State of Emergency, March 4, 2020, *available at* https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf.

[6] *See* Proclamation No. 9994, 85 Fed. Reg. 15337 (March 13, 2020), suspending certain foreign travel, instituting federal quarantines for individuals travelling from foreign nations, pursuant to the Public Health Service Act, and permitting polices to streamline acquisition of personal protective equipment; *see also* Coronavirus Preparedness and Response Supplemental Appropriations Act, Pub. L. 116-123, 134 Stat. 146 (March 6, 2020), providing $8.3 billion in supplemental funding for research and development of vaccines, prevention, preparedness, and response measures, supported state and local health agencies, medical supplies, low-interest loans affecting small business, and protection for Americans abroad. *See also* Families First Coronavirus Response Act, Pub. L. 116-127, 134. Stat. 178 (March 14, 2020), providing funding for domestic nutrition assistance, tax credits, Covid-19 testing, emergency family and medical leave, and unemployment compensation.

[7] *See id.*; *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116–136, 134 Stat. 281 (hereinafter the "CARES Act"), passed on March 27, 2020, the CARES Act provided economic relief for small businesses to meet payroll and expenses, authorized the Small Business Administration to guarantee paycheck protection loans, provided technical assistance to minority businesses, and gave low-interest loans for mid-sized and other critical businesses.

[8] *See, e.g.*, Centers for Disease Control and Prevention, "An Approach for Monitoring and Evaluating Community Mitigation Strategies for COVID-19," https://www.cdc.gov/coronavirus/2019-ncov/php/monitoring-evaluating-community-mitigation-strategies.html (updated Nov. 13, 2020).

importantly, federal agencies spurred rapid development of the vaccines that became available in the winter and spring of 2021.[9]

But the primary authority to set public health policy remained with the states, which often followed federal advice but did not have to. This pattern followed the Constitution's basic structure, which grants the federal government only limited, enumerated powers while reserving to the states all else. As public health does not appear in Article I, Section 8's list of federal powers, we presume that it remains within the police power of the states.[10] The most consequential national initiatives relied upon powers that affected public health but did not directly seize its control from the states.[11] Thus, the large federal expenditures relied upon the spending and taxing powers, the limits on travel were justified by Washington, D.C.'s control over international and interstate commerce, and scientific research grew out of the national government's right to create its own agencies under the Necessary and Proper Clause.[12]

One area, however, where the federal government went beyond its limited powers was in creating measures that imposed nationwide regulation on individual conduct. First, the Trump and Biden Administrations suspended the right of landlords to evict tenants under state law. The program did not begin as an assault on the structure of the Constitution. In March 2020, Congress suspended the right of landlords to evict tenants for 120 days as part of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), whose central provisions created approximately $2.08 trillion in economic stimulus and involved the largest supplemental

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[9] *See* Simi V. Siddalingaiah, Cong. Rsch. Serv., IN11560, Operation Warp Speed Contracts for COVID-19 Vaccines and Ancillary Vaccination Materials (updated March 1, 2021).

[10] U.S. Const. amend. X.

[11] *See supra* notes 5-6.

[12] *See* Sabri v. United States, 541 U.S. 600, 124 S. Ct. 1941, 1942, 158 L. Ed. 2d 891 (2004); United States v. Comstock, 560 U.S. 126, 130 S. Ct. 1949, 1951, 176 L. Ed. 2d 878 (2010).

appropriation in American history.[13] This initial version of the eviction moratorium did not attempt to reach all landlord-tenant contracts, which are governed by state law.[14] Instead, the CARES Act limited its moratorium only to those within the federal nexus of properties, those that received funds from federal housing programs or were financed by federally backed loans.[15]

States remained free to enact broader limits on eviction on their own. Landlord-tenant relations fall under property law, which regulates the rights of the property owner, and contract law, which governs the terms of its rental. Both fall within the police powers of the states. In defending the proposed Constitution from Anti-Federalist critics, Publius wrote in Federalist No. 17 that the national government would regulate "commerce, finance, negotiation and war" while the states would continue to control "[t]he administration of private justice between the citizens of the same State, the supervision of agriculture and all other concerns of a similar nature, all those things in short which are proper to be provided for by local legislation."[16] During the Great Depression, for example, states suspended the obligation of property owners to make mortgage payments.[17] The Supreme Court even turned aside a contracts clause claim against the moratorium on the ground that the emergency circumstances of the Great Depression justified the state's authority to override the terms of all mortgage contracts.[18]

Expiration of the moratorium four months later caused the Trump Administration to resort to unauthorized steps to keep

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[13] CARES Act, *supra* note 7.

[14] See id.

[15] 134 Stat. 492-94.

[16] The Federalist No. 17, at 105-06 (Alexander Hamilton) (Jacob E. Cooke ed. 1961).

[17] David C. Wheelock, Federal Reserve Bank of St. Louis *Review*, November/December 2008, *90*(6), pp. 569-583, *available at https://files.stlouisfed.org/files/htdocs/publications/review/08/11/Wheelock.pdf*.

[18] *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 447-48.

tenants in their homes. In July 2020, the Centers for Disease Control and Prevention (CDC) issued a blanket moratorium on evictions and expanded it beyond the statutory program to include all properties in the nation.[19] Although Congress approved the regulation, it did so for only one month.[20] Nevertheless, the CDC – this time under the Biden Administration – re-issued its blanket moratorium which lasted, with multiple extensions, until July 31, 2021.[21]

Landlords' groups successfully challenged the CDC's extensions of the moratorium. On June 29, 2021, in *Alabama Ass'n of Realtors v. HHS,* a majority of the Supreme Court Justices took the view that the CDC "exceeded its statutory authority by issuing a nationwide eviction moratorium."[22] As Justice Kavanaugh wrote: "In my view, clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31."[23] Nonetheless, Justice Kavanaugh provided a fifth vote to allow the moratorium to expire on its own terms. Kavanaugh allowed the CDC to carry the moratorium forward for roughly one month, until July 31, in order to give Congress the opportunity to act. On this occasion (unlike 2020), Congress failed to act. In the meantime, the Biden Administration assured the Court that the government would not issue another eviction moratorium order.[24]

Nonetheless, President Biden gave the CDC permission to issue a new moratorium that did not differ in any legally significant way

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[19] 85 Fed. Reg. 55292 (2020).

[20] Consolidated Appropriations Act, 2021, Pub. L. 116–260, §502, 134 Stat. 2078–2079.

[21] 86 Fed. Reg. 8020 (2021); *id.* at 16731; *id.* at 34010.

[22] Alabama Assn. of Realtors v. Department of Health and Human Servs., No. 20A169 (U.S. S.Ct. June 29, 2021).

[23] Id.

[24] In its June 2021 extension of the moratorium, the government declared that "CDC does not plan to extend the Order [beyond July 31, 2021]." See Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 34,010, 34,013 (June 28, 2021); Letter from Acting Solicitor General Elizabeth Prelogar to Clerk of Court Scott Harris at 1 (June 24, 2021), Ala. Ass'n of Realtors v. U.S. Dep't of Health & Human Servs., No. 20A169.

from the one the Supreme Court majority had found to be illegal. In an August 3, 2021 order, the CDC issued a new eviction moratorium. It repeated the argument that it could regulate landlord-tenant relationships under Section 361(a) of the wartime Public Health Service Act of 1944.[25] That provision states:

> The Surgeon General, with the approval of the [Secretary of Health and Human Services], is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.[26]

The Biden Administration took the view that it was authorized to enter the field of landlord-tenant relations because the eviction moratorium was an "other measure." This is obviously mistaken. The "and other measures" language is just a catch-all for actions, like "inspection, fumigation" and the eradication of other diseased items, that Congress did not specifically enumerate. The canon of statutory interpretation known as *eiusdem generis* holds that an ambiguous item in a list should be understood to have the same character as the items of a list.[27] As the Supreme Court has explained, "where general

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[25] 58 Stat. 703, 42 U. S. C. §264(a).
[26] Id.
[27] *Ejusdem Generis*, Black's Law Dictionary (11th ed. 2019).

words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by preceding specific words."[28] More concretely, if your spouse sends you to the grocery store for eggs, milk, and "anything else you need," a reasonable interpreter does not have authority to buy a Tesla.

On its reading of the statute, CDC's powers would be limitless: it could shut down the entire country indefinitely if it considered that action necessary to halt the spread of a communicable disease – like seasonal flu or the measles. The courts immediately recognized that Congress had not delegated anything like such authority to CDC (even assuming Congress could constitutionally have done so).[29] The Biden Administration's reading of the law would amount to the transfer of all of Congress's powers to the CDC, and even more. Why wait for Congress to authorize Covid relief funds when the CDC could just remove money from the Treasury directly? Why fight over an infrastructure bill when CDC could just order roads and bridges to be built? Why not let CDC decide whether to increase enforcement of immigration rules at the border and set trade rules too? As the U.S. Court of Appeals for the Sixth Circuit held in a July 23 opinion, if CDC's interpretation were correct, the agency would have "near-dictatorial power for the duration of the pandemic, with authority to shut down entire industries as freely as [it] could ban evictions."[30] The court refused to read the statute as authorizing CDC to '"sweep' constitutional traditions 'into the fire.'"[31]

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[28] *See, e.g.*, Circuit City Stores v. Adams, 532 U.S. 105, 114-15 (2001).

[29] Andrew Ackerman and Brent Kendall, "National Eviction Moratorium Thrown Out by Federal Judge," The Wall Street Journal (updated May 5, 2021, 6:59PMEST). https://www.wsj.com/articles/federal-judge-invalidates-national-eviction-moratorium-11620231572?mod=article_inline.

[30] Tiger Lily, LLC v. U.S. Department of Housing and Urban Development, 5 F.4th 666, 672 (6th Cir. 2021).

[31] Id. at 670.

But the Biden Administration was ready and willing to sweep constitutional traditions into the fire. Not only did it have to grapple with the substantive problems with its reading of the Public Health Services Act, but it also had to explain why it was not defying the Supreme Court decision of July. In its modified August 3, 2021 order, the Administration claimed it was not in conflict with the federal courts because it narrowed the scope of its moratorium. Rather than a blanket, nationwide order, the Administration claimed that its order met the Supreme Court's order by applying the moratorium only to counties "experiencing substantial or high levels of community transmission levels" of the coronavirus.[32] As U.S. District Court Judge Dabney Friedrich observed, this allegedly narrower regulation still applied to 91 percent of all U.S. counties.[33] Other than that fact, the new moratorium mirrored the one that five Justices had found beyond the executive's powers.

It should have come, therefore, as no surprise that the Supreme Court would strike down the August 3 moratorium. The Court held the moratorium beyond the Public Health Service Act on three grounds.[34] First, it found that Section 361(a)'s authorization of "other measures" to contains the spread of an infectious disease could only involve "inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of contaminated animals and articles," as set out in the second sentence of the provision.[35] Second, the Court found that the moratorium violated its new clear statement rule that requires "Congress to speak clearly when authorizing an

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[32] *See* Temporary Halt in Residential Evictions in Communities with Substantial or High Transmission of COVID-19 to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43,244, 43,245 (Aug. 6, 2021).

[33] Alabama Association of Realtors v. U.S. Department of Health and Human Services, 2021 WL 3577367, at *3, ___ F.Supp.3d ___ (D.D.C. 2021).

[34] *See Ala.bama Ass'ociation of Realtors v. U.S. Dep'artment of Health and Human Serv.ices,* 594 U.S. ___, slip op. at 5 (2021).

[35] *Id.*

agency to exercise powers of 'vast economic and political significance.'"[36] Here, the executive branch claimed Congress not only had given it authority over 80 percent of the country, involving an activity worth billions of dollar, but in an area "that is the particular domain of state law: the landlord-tenant relationship."[37] Third, the Court found that the government's claim to authority contained no limiting principle: "It is hard to see what measures this interpretation would place outside the CDC's reach."[38] By the Court's account, the Biden Administration could also require free grocery delivery, free computers, and free high-speed internet because it believed it "necessary" to stop the spread of the virus. Only Congress, the Court held, could authorize such measures.[39]

II. ABUSE OF REGULATORY GOALS AND ARTICLE I POWERS

The Biden Administration's defeat on the eviction moratorium did not deter it from building another sweeping mandate on similarly shaky legal foundations. In this case, the government sought to expand its vaccine mandate beyond government officials, military personnel, and contractors to all workplaces.[40] The Biden vaccine mandate represented a bold use of the powers of the federal government. But even though adopted in the name of public health, and in the midst of a viral pandemic,[41] this measure too undermines the constitutional balance of powers between the branches of the federal government and between the national and state

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[36] Id. at 6, citing Utility Air Regulatory Group v. EPA, 573 U. S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U. S. 120, 160 (2000)).

[37] Id. at 6.

[38] Id.

[39] Id.

[40] *See* COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402 (Nov. 5, 2021)

[41] US Department of Labor issue emergency temporary standard to protect workers from coronavirus, OSHA National News Release (November 4, 2021), *available at https://www.osha.gov/news/newsreleases/national/11042021.*

governments. Congress has not vested the President with the power to govern every workplace in the nation, and even if it had, such a grant of sweeping authority would violate the principles of federalism.

No statutory provision explicitly grants the federal government the authority to require vaccination of all Americans or all workers in the nation. Instead, the Biden Administration claimed the authority under workplace safety laws.[42] On November 5, 2021, the Occupational Safety and Health Administration (OSHA) ordered employers with 100 or more employees to require a mandatory Covid vaccination policy.[43] The rule required that any workers who refused vaccination would have to submit to weekly Covid testing and wear a face mask at work.[44] OSHA promulgated the regulation as an Emergency Temporary Standard (ETS) under the Occupational Safety and Health Act, which allowed it to bypass the normal rulemaking procedures.[45] Administrative Procedure Act rules would have required an extended period of public notice and comment on a proposed OSHA regulatory standard – a period that could have taken OSHA years.[46] The ETS, however, goes into effect immediately on publication. Employers who do not comply with the

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[42] In November 2021, a Senior Biden Administration Official said that the "new Emergency Temporary Standard is well within OSHA's authority under the law and consistent with OSHA's requirements to protect workers from health and safety hazards." *See* Background Press Call on OSHA and CMS Rules for Vaccination in the Workplace, The White House (November 3, 2021), *available at* https://www.whitehouse.gov/briefing-room/press-briefings/2021/11/04/background-press-call-on-osha-and-cms-rules-for-vaccination-in-the-workplace/

[43] *See supra* note 40.

[44] *Id*.

[45] 29 U.S.C. § 655(c)(1).

[46] 5 U.S.C. § 553; On average, OSHA takes seven years to issue rules, OSHA Procedures For Issuing Guidance Were Not Adequate and Mostly Not Followed, U.S. Department of Labor Office of Inspector General (March 28, 2019), *available at* https://www.oig.dol.gov/public/reports/oa/2019/02-19-001-10-105.pdf.

ETS face enforcement actions by OSHA, including fines of up to $14,502 for each "serious" violation.[47] The Administration estimates that this action will result in the vaccination of about 80 million private sector employees.[48]

Unlike the eviction moratorium, the vaccine mandate did not rely upon the broad language of the Public Health Services Act. Instead it drew upon the authority provided by the Occupational Safety and Health Act, which authorizes the Secretary of Labor "to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce."[49] These standards require "conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment."[50] Existing OSHA standards regulate sanitation, air quality, hazardous materials, and protective equipment, among other workplace issues.

Although the differences between the CDC and OSHA regulations are significant, both raise the question whether the Administration has exceeded the scope of the authority that Congress has delegated to the administrative agencies. In substance, reviewing courts will ask whether Biden can order a measure of this magnitude and impact without seeking specific congressional approval. And the OSHA order should run into the same statutory and constitutional problems that afflicted the CDC order.

First, the OSHA order will have to overcome the Court's nascent major questions doctrine. As we saw with the eviction moratorium, the Court has raised doubts about whether Congress would grant

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[47] *See* Memorandum for Regional Administrators, U.S. Department of Labor, Occupational Safety and Health Administration (January 13, 2022), *available at* https://www.osha.gov/memos/2022-01-13/2022-annual-adjustments-osha-civil-penalties.

[48] *See supra* note 43.

[49] 29 U.S.C. § 651(b)(3).

[50] Id. at § 652(8).

sweeping authority over the economy and society to the agencies without a clear statement in statutory language. "We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance,'" the Court emphasized in *Alabama Realtors*.[51] As the Fifth Circuit held in staying the regulation, the vaccine mandate uses a workplace safety law in a way that "imposes nearly $3 billion in compliance costs, involves broad medical considerations that lie outside of OSHA's core competencies, and purports to definitely resolve one of today's most hotly debated political issues."[52] Here, the Administration seeks to use a workplace safety law to require the vaccination of approximately two out of every three adult Americans.[53] If the eviction moratorium case is any guide, the Supreme Court will look suspiciously on any Biden effort to bootstrap an unrelated law into a mandate to regulate public health nationwide – even in the midst of a dangerous pandemic.

Second, even if the major questions doctrine did not apply, the OHSA statute cannot bear the Biden Administration's reading. OSHA promulgated the ETS through a "fast track" procedure provided under the OSH Act.[54] OSHA has used this procedure only sparingly in the past, and on those occasions its efforts have not stood up well in court. Before Covid, OSHA had issued only nine ETSs, of

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[51] Alabama Association of Realtors v. U.S. Department of Health and Human Services, 594 U.S. ___, slip op. at 6 (2021) (citing Utility Air Regulatory Group v. EPA, 573 U. S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U. S. 120, 160 (2000)).

[52] BST Holdings, L.L.C. v. Occupational Safety and Health Administration, 17 F.4th 604, 617 (5th Cir. 2021).

[53] *Supra* note 42.

[54] *Supra* note 41.

which six were challenged.[55] Of these six, the courts overturned four and partially vacated a fifth.[56] In a successful 1984 challenge to an asbestos ETS, a reviewing court found that OSHA was not justified in "resort[ing] to the most dramatic weapon in [its] enforcement arsenal."[57]

Normal procedure under both the foundational Administrative Procedure Act and the OSH Act calls for the agency to give public notice of a proposed rule and to provide for a period of public comment on the proposal.[58] The thinking behind this policy is that, because Congress typically delegates much of its lawmaking power to the agencies, their rulemaking practices should emulate the deliberative process by which Congress enacts legislation. Notice and comment procedures are designed to improve the quality of agency rules by subjecting them to careful public scrutiny by those who will be regulated by them, and to contribute to their legitimacy, because interested constituencies will have had ample opportunity to influence the outcome.

But emergencies arise that call for rapid administrative responses, which may justify a provisional regulation that does not first undergo full notice and comment. Even so, the suspension of the normal rulemaking process is only temporary. An ETS has only a six-month life span, and OSHA is required to begin the full rulemaking process for a permanent standard as soon as it promulgates the ETS. [59] Experience has shown that OSHA rulemaking is an extremely protracted process that can take several

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[55] Scott Szymendera, Cong. Rsch. Serv., CCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA): Covid-19 Emergency Temporary Standards (ETS) and COVID-19on Health Care Employment And Vaccinations and Testing for Larger Employers,, at 19 tbl. A-1 (updated January 26, 2022), *available at* https://crsreports.congress.gov/product/pdf/R/R46288.

[56] *Id*.

[57] Asbestos Info. Ass'n/N. Am. v. OSHA, 727 F.2d 415, 418 (5th Cir. 1984).

[58] 29 U.S.C. § 655(b)(2)–(4).

[59] 29 U.S.C. § 655(c)(3).

years to complete – by which time the emergency has probably passed.[60] Hence the OSH Act permits recourse to a fast-track procedure.

But the law only allows OSHA to use this emergency process under two conditions. First, the employees must be "exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and second, the emergency standard must be "necessary to protect employees from such danger."[61] On the "grave danger" prong, OSHA offers two main defenses: that it is obvious that a pandemic that has killed over 930,000 Americans as of this writing is a grave danger, and that in any case the question whether a "grave danger" to public health exists is not for the judiciary, but for the executive agencies.[62]

But both claims are dubious. The pandemic has been around for quite some time, and it is increasingly difficult to describe it as an emergency.[63] To be sure, the highly contagious Delta and Omicron variants have disappointed earlier expectations that the Covid threat was passing and that life was returning to normal.[64] But widespread levels of vaccination (full or partial), natural immunity and improved

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[60] *See supra* note 45.

[61] Id. at § 655(c)(1).

[62] *See* Response in Opposition to the Applications For A Stay, at 1, 40, BST Holdings, LLC v. Dep't of Lab., 142 S. Ct. 891 (2022), emphasizing that there is "no basis for the Court to second-guess OSHA's judgment."

[63] As of February 2022, twenty-five states and Washington D.C. possess a version of an emergency order based on the Covid-19 pandemic, with seven possessing mask mandates. *See* States' COVID-19 Public Health Emergency Declarations and Mask Requirements, National Academy for State Health Policy (updated January 11, 2022), https://www.nashp.org/governors-prioritize-health-for-all/.

[64] *See* Katherine Bindley, ***Delta Variant Delays New Normal at the Office, Unleashes Fresh Anxieties: 'I Have No Answers***, The Wall Street Journal (August 19, 2021, 2:43PM), https://www.wsj.com/articles/delta-variant-delays-new-normal-unleashes-fresh-anxieties-i-have-no-answers-11629378000; Stephan Kahl, et. al., Omicron Suddenly Upends the World's Return to the Office, Bloomberg (2021), https://www.bloomberg.com/graphics/2021-return-to-office/

availability of treatment are having a perceptible effect.[65] The emergency to which the ETS is addressed may have ceased to be one by the time it is issued.

OSHA's second defense – that the question whether a "grave danger" exists is not one for the judiciary to decide – is indeed consonant with much earlier legal doctrine. Chief Justice John Roberts, e.g., took such a view early in the outbreak in his concurring opinion in the 2020 *South Bay United Pentecostal Church* case, but it is unconvincing in current circumstances.[66] If the courts blindly defer to the agency's judgment, they would be giving it virtually unbounded power to act as it pleases whenever it decides that a public health emergency exists. OSHA could claim such a power by seeking to regulate a social issue by leveraging its authority over the workplace. If OSHA had decided that the AIDS epidemic constituted a "grave danger" in the workplace, could it have ordered employers to require their employees to take weekly tests that identified those who were HIV positive? Could OSHA do so free from judicial review? A similar logic would allow OSHA to require mandatory employee testing for tobacco, alcohol or drug use, on the ground that those habits could pose a harm in the workplace, even as the government's true objective is to reduce their overall use in society.

Courts should be alert to the possibility of abuse when an agency invokes a fifty-year old statute of doubtful relevance to justify a sweeping and unprecedented mandate over the private sector in the name of an "emergency." Nor is judicial deference due to OSHA because it has special expertise as to Covid. Unlike industrial accidents or toxic substances found in the workplace, OSHA has no

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[65] As of February 24, 2022, more than 70% of the US population is in a location with low or medium Covid-19 community levels. *See* Centers for Disease Control and Prevention, U.S. Covid-19 Community Levels by County, (updated Feb. 25, 2022).

[66] *See* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J. concluding that local officials are better suited than the unelected federal judiciary to shape a local, public health emergency response, like placing numeric restrictions in indoor places of worship).

special competence to regulate against a virus that can be caught anywhere.[67] Finally, courts will note that the Biden Administration's appeal to an emergency in the workplace is pretextual. Biden's White House Chief of Staff Ronald Klain tweeted that "OSHA doing this vaxx mandate as an emergency workplace safety rule is the ultimate work-around for the Federal govt to require vaccinations."[68]

But even if the ETS survives the first, "grave danger" test, it would also have to pass the second, "necessity" test. And this too is highly problematic. Widespread vaccination and natural immunity from contagion may already be accomplishing what the ETS is purportedly designed to do.[69] And younger workers who are in good health have a low risk of hospitalization or death from Covid.[70] Is the ETS truly "necessary" to protect them? Likewise, is mandatory vaccination (or weekly testing) "necessary" to protect those in the workplace who have themselves been vaccinated?[71] Biden himself

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[67] Nat'l Fed.of Independent Bus. v. Department of Labor, Occupational Safety and Health Administration, Nos. 21A244 and 21A247, 142 S. Ct. 661 (2022). The Court found that "[p]ermitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization."

[68] Quoted in BST Holdings, 17 F.4th at 612 n. 13.

[69] *See supra* note 64.

[70] Federal data shows that risk of hospitalization and death is significantly lower for those below the age of fifty. *See* Centers for Disease Control and Prevention, *Risk for COVID-19 Infection, Hospitalization, and Death By Age Group* (updated Jan. 31, 2022), *available at https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-age.html*

[71] Dr. Francis Collins, "Latest on Omicron Variant and COVID-19 Vaccine Protection," NIH Director's Blog (December 14, 2021), (noting that "what won't change, though, is that vaccines are the best way to protect yourself and others against COVID-19"), *available at https://directorsblog.nih.gov/2021/12/14/the-latest-on-the-omicron-variant-and-vaccine-protection/.*

has noted that "only one out of every 160,000 fully vaccinated Americans was hospitalized for COVID per day."[72]

As the Fifth Circuit observed, the vaccine mandate is both overinclusive and underinclusive.[73] The proposed ETS may be suited to those who work at close quarters and in confined spaces (like meat processing plants). But it is hard to see how mandatory vaccination can be "necessary" to protect the many employees who now are working regularly from home, or those who work in solitary environments, such as truck drivers or security guards, or those who are young or have already had the disease and so are at much lower risk. Likewise, how can it be a necessary protective measure for an employee who, for medical reasons, would be likely to be injured by being vaccinated? Finally, measures other than vaccination, such as better ventilation or more effective masks, may achieve similar levels of workplace protection while being less intrusive.[74]

On January 13, 2022, a 6-3 per curiam Supreme Court blocked the vaccine mandate on these grounds. In *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*, the Court agreed with the Fifth Circuit, and the dissenting judge in the Sixth Circuit, that OSHA lacked the authority

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[72] Remarks by President Biden on Fighting the COVID-19 Pandemic, The White House (September 9, 2021), *available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/*

[73] *See supra* note 51 at 6.

[74] The CDC found that using a face mask or respirator in indoor public settings was associated with lower odds of acquiring COVID-19, with the lowest among persons wearing an N95/KN95 respirator, followed by wearing a surgical mask. *See* Centers for Disease Control and Prevention, *Effectiveness of Face Mask or Respirator Use in Indoor Public Settings for Prevention of SARS-CoV-2 Infection — California, February–December 2021* (February 11, 2022). Further, OSHA has noted that one of the "most cost-effective solution(s)" to reduce COVID-19 without relying on worker behavior is increasing ventilation rates in the workplace. *See* U.S. Dep't of Labor, OSHA, *Guidance on Preparing Workplaces for COVID-19* (2020), at 12.

to require the Covid vaccine for employees.[75] First, the Court applied the same rule of construction it used in *Alabama Association of Realtors* to find that the OSHA statute did not "speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[76] The majority curtly observed that imposing a broad health measure qualified as an exercise of broad authority, which the OSHA statute's limitation to "occupational" health and safety standards did not meet.[77] Unlike regular workplace safety measures, the Court reasoned, a vaccine cannot be reversed after the work day ends. The Court also found important the lack of any historical examples of similarly broad public health regulations. "This 'lack of historical precedent,' coupled with the breadth of authority the Secretary [of Labor] now claims, is a 'telling indication' that the mandate extends beyond the agency's legitimate reach," the Court concluded.[78]

The Court did not close the door completely on OSHA's ability to require vaccines in specific workplaces. The majority conceded that OSHA could implement a regulation targeted to workplaces such as scientific research labs working on the Covid virus or employment in tight quarters.[79] But in its broader vaccine mandate, the government failed to follow OSHA's limits by imposing "a general health measure, rather than an *occupational* health or safety standard."[80]

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[75] Nat'l Fed. of Independent Bus. v. Department of Labor, Occupational Safety and Health Administration, Nos. 21A244 and 21A247, 142 S. Ct. 661 (2022).

[76] Id. at 665 (quoting Ala. Assn of Realtors v. Dep't of Health and Human Servs, 594 U.S. ___, 141 S. Ct. 2485, 2489 (2021)).

[77] Id. at 665.

[78] Id. at 666 (quoting Free Enterprise Fund v. Public Company Accounting Oversight Bd., 561 U.S. 477, 5050 (2010)).

[79] *Id.* at 666.

[80] Id. at 666 (quoting 29 U.S.C. 655(b)).

Even if the vaccine mandate had fallen within OSHA, the Biden Administration's use of the law would still violate fundamental Constitutional principles. The Constitution's grant of limited, enumerated powers to the national government does not include the right to regulate either public health or all business in the land. Under Article I, Section 8 of the Constitution, Congress enjoys the authority to "regulate Commerce with foreign Nations, and among the several States."[81] It also has the power to tax and spend for the general welfare.[82]

But the Constitution's grant of limited, enumerated powers to the federal government does not include public health or pandemics. Properly read, the Commerce Clause gives Washington, D.C. a supporting, role in confronting the pandemic. It can bar those who might be infected from entering the United States or traveling across interstate borders, reduce air and road traffic, and even isolate whole states.[83] Our federal system reserves the leading role over public health to the states – as it does it does to most areas of public life, such as crime and justice, public safety, family relations, property, contracts, and accidents.[84] States possess the "police power" to regulate virtually all activity within their borders.[85] As the Supreme Court has recognized, safeguarding public health and safety presents the most compelling use of state power.[86] Only the states can impose

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[81] U.S. Const. art. I, § 8, cl. 3.

[82] Id. at cl. 1.

[83] See, e.g., 42 U.S.C. § 264(a-d)(authorizing the Surgeon General to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession).

[84] *See* Gibbons v. Ogden, 22 U.S. 1, 51, 6 L. Ed. 23 (1824 (finding "it is of the essence of sovereignty to control and regulate all common rights").

[85] Id.

[86] Jacobson v. Commonwealth of Massachusetts, 25 S. Ct. 358, 366, 49 L. Ed. 643 (1905) (describing how public safety and health are matters that do not ordinarily concern the federal government, and "they depend, primarily, upon such action as the state").

quarantines, close businesses and schools, and limit intra-state travel. Democratic governors in California, New York, and Illinois imposed the lockdowns,[87] and only they can decide whether to mandate universal vaccination too.

Congress can control commerce that crosses state lines, and even the "channels and instrumentalities" of interstate commerce, such as transportation and communication networks.[88] But the Interstate Commerce Clause, properly read, cannot turn into a general police power to regulate everything and everyone in the country. The Biden's Administration can claim that the Supreme Court has allowed Congress to also regulate purely intrastate activity that, when aggregated, affects the national markets. In *Gonzales v. Reich*, a 6-3 majority of the Supreme Court used such a theory to justify the federal criminal ban on the possession of marijuana, even if grown, never bought or sold, and given instead as a gift (as occurred in that case in the City of Berkeley, naturally).[89] Even though the individual gift of pot did not involve interstate commerce, the Court reasoned, aggregating all sale and gifts of small amounts of marijuana taken together would affect interstate markets.[90] Under this erroneous reading of the Commerce Clause, Congress could reach every business and force the vaccination of all workers; in fact, it could force the vaccination of all Americans.

That limitless theory of federal power has failed to persuade a majority of the Supreme Court. Even in *NFIB v. Sibelius*, the Roberts Court held that the Affordable Care Act could not require every

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[87] State of California Exec. Order. N-33-20 (March 19, 2020); New York Exec. Order No. 202.7, Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency (March 18, 2020); Illinois Exec. Order 2020-10, Executive Order in Response to COVID-19 (March 20, 2020).

[88] United States v. Lopez, 514 U.S. 549, 558 (1995).

[89] 545 U.S. 1 (2005).

[90] Id. at 2-3.

American to buy health insurance.[91] "The power to regulate commerce presupposes the existence of commercial activity to be regulated," Chief Justice Robert wrote for a majority of five conservative Justices.[92] "If the power to 'regulate' something included the power to create it, many of the provisions in the Constitution would be superfluous."[93] Justice Clarence Thomas has called for the end of the Commerce Clause's reach to purely intrastate activity. As he wrote in concurring in *United States v. Lopez*, which struck down the Gun Free School Zones law: "This test, if taken to its logical extreme, would give Congress a 'police power' over all aspects of American life. Unfortunately, we have never come to grips with this implication of our substantial effects formula. Although we have supposedly applied the substantial effects test for the past 60 years, we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power."[94] It is not difficult to see Justices Samuel Alito, Neil Gorsuch, Amy Coney Barrett, and Brett Kavanaugh agreeing. Even though Chief Justice Roberts ultimately upheld Obamacare, he still agreed that the Commerce Clause had limits.[95]

Consistent with the Constitution, the Biden Administration instead could rely less on command and more on persuasion. Article I of the Constitution provides that Congress has the power to tax and spend to "provide for the common Defence and general Welfare of the United States." The federal government can encourage vaccination by using its spending and taxing powers, rather than compulsion and sanction. It has often used the offer of federal grants to convince – or perhaps bribe – states to bring their education, health

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[91] 567 U.S. 519 (2012).
[92] Id.
[93] Id. at 550.
[94] 514 U.S. 549, ___ (1995) (Thomas, J., concurring).
[95] 567 U.S. 519, 554-55.

care, and welfare policies into national uniformity.[96] The spending power already has provided the nation's most effective weapon in fighting the pandemic – federal funds paid for the development of the vaccines and their distribution throughout the country.[97] Washington, D.C. has paid for medical equipment and supplies, supported the budgets of state and local governments, and propped up the economy.[98] Rather than pay people not to work, Washington, D.C. could pay people to get vaccinated instead. Biden could reward states that mandate vaccines or create programs to expand their availability. But he should seek to persuade, even bribe, rather than using direct command to overcome the contrary views of 80 million Americans as to how best to protect their health.[99]

III. PRESIDENTIAL POWER IN TIME OF EMERGENCY

Rather than misreading the law, the Biden Administration could have argued that evolving forms of Covid have created a new national emergency, and that the President has the constitutional power to respond to that emergency even without authorization from Congress. Article II of the Constitution grants the "executive power" to the President. Those who drafted and ratified the Constitution would have understood that phrase to include an ability

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[96] *See, e.g. id.*; *see also* James L. Buckley, *How Congress Bribes States to Give Up Power*, The Wall Street Journal (Dec. 25, 2014, 4:01PM), *available at* https://www.wsj.com/articles/james-l-buckley-how-congress-bribes-states-to-give-up-power-1419541292.

[97] Chief Warrant Office Allyson E.T. Conroy, Defeat COVID-19's surging counterattack: vaccination is our best weapon, United States Coast Guard (July 26, 2021), *available at* *https://www.uscg.mil/Coronavirus/Information/Article/2707662/defeat-covid-19s-surging-counterattack-vaccination-is-our-best-weapon/*

[98] *See supra* note 6.

[99] *See* Lindsay M. Monte, Household Pulse Survey Shows Many Don't Trust COVID Vaccine, Worry About Side Effects, U.S. Census Bureau, Dec. 28, 2021, *available at* *https://www.census.gov/library/stories/2021/12/who-are-the-adults-not-vaccinated-against-covid.html*.

to respond to unforeseen events, crises, and emergencies – ultimately war. The Founders had witnesses state revolutionary governments where assemblies predominated, governors became dependent, and instability and oppression resulted. To cure this defect, the Federalists unified the executive power of the national government in a single President who can effectively and energetically respond to changing circumstances. "Good government," Hamilton explained in Federalist No. 70, requires "energy in the executive," which is "essential to the protection of the community from foreign attacks" and "the steady administration of the laws."[100] A single executive (rather than a cabinet or council of state) could act with "decision, activity, secrecy, and dispatch," Hamilton explained.

Whether to use such emergency power would depend on the circumstances and the nature of the threat, which almost by definition could not be fully anticipated by Congress. Indeed, the Framers created the federal government and the presidency precisely because they knew that it was impossible to define beforehand the nature of emergencies and crises, and that the better course was to create a body of government with the authority to act as circumstances arose. Because the "circumstances that endanger the safety of nations are infinite," Alexander Hamilton warned in Federalist No. 23, "no constitutional shackles can wisely be imposed on the power."[101]

For much of our history, Presidents have declared national emergencies, even in the absence of legislative authority, to lead the nation in moment of crisis. Thomas Jefferson effectively did so in response to Aaron Burr's effort to raise a rebellion in the Louisiana; Abraham Lincoln declared an emergency, with far more justification, at the start of the Civil War; FDR did so, with far less justification, at the start of his presidency to handle the Great Depression; and Harry

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[100] Federalist No. 70, at 472 (Alexander Hamilton) (Jacob E. Cooke ed.1961).
[101] Federalist No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed.1961).

Truman did so at the start of the Korean War.[102] In 1976, Congress enacted the National Emergency Act in its burst of post-Watergate reforms designed to restrict presidential power. While the new law terminated most existing emergencies, it did not set out any definition of a national emergency or limit the President's ability to declare one.

Reciting the past examples of presidential energy in the face of crisis creates a sharp contrast with the Biden eviction moratorium and vaccine mandate. When it began in spring 2020, the Covid-19 pandemic presented a challenging emergency unlike anything the nation had faced in a century. President Trump declared a national emergency and issued a series of executive orders.[103] Congress responded with a series of measures designed to alleviate the economic suffering of the state lockdowns – including a temporary halt to evictions by property owners who received federal funding.[104] Congress has had ample time since the original onslaught of the pandemic to deliberate over further measures. It in fact authorized

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[102] For discussion, see generally John Yoo, Crisis and Command: A History of Executive Power from George Washington to George W. Bush (2010).

[103] On March 13, 2020, President Trump issued Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, Proclamation 9994. Over the following week, the Executive Office of the President issued several orders prioritizing access to health and medical resources and controlling foreign travel in response to the spread of COVID-19. *See* "***Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus,***" Proclamation 9996 (March 14, 2020); Memorandum Expanding State-Approved Diagnostic Tests, 85 Fed. Reg. 15335, March 13, 2020. "Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19," Exec. Order 13909, 85 Fed. Reg. 16227 (March 18, 2020); "Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19," Exec. Order 13910, 85 Fed. Reg. 17001 (March 23, 2020).

[104] On March 27, 2020, President Trump signed the CARES Act into law. Section 4024 of the CARES Act, which went into effected immediately, imposed a temporary moratorium on evictions and aimed to last for 120 days (through July 24, 2020). *See* Maggie McCarty and David H. Carpenter, Cong. Rsch. Serv (April 7, 2020), *available at* https://crsreports.congress.gov/product/pdf/IN/IN11320.

two limited moratoria on evictions but did not renew them.[105] It could have enacted a vaccine mandate at any time over the last two years; it had the time, after all, to enact the legislation funding vaccine research, production, purchase, and distribution. President Biden cannot claim that emergency circumstances on a par with the Civil War or the onset of the Great Depression exist that justify presidential action at odds with a Congress in full possession of its powers.

In fact, the absence of congressional action should hold far more sway with progressives than it would with conservatives. In the 1952 *Steel Seizure* case, decided during the Korean War, the Court held that President Truman had no independent constitutional authority – despite the threat of the cutoff of the supply of steel for armaments in a wartime emergency – to seize and operate the Nation's privately owned steel mills.[106] Justice Robert Jackson's concurrence in that case warned of the risks of a dictatorship on the German model if the Court acceded to the executive's argument that the existence of a national emergency warranted Truman's action.

Although Biden's action, which denied landlords the right to the rents from their private property, is defended on statutory grounds, it is really on all fours with Truman's. And accepting the *Steel Seizure* reasoning – as progressives usually do, at least when they are out of the White House – Biden's action was as unconstitutional as Truman's was. But Biden committed a worse offense against the Constitution than just claiming an emergency power unsuited to the moment. He also challenged the legitimacy of a coordinate branch of government: the federal courts. It is true that this moratorium on evictions had yet to work its way up the courts. But that should not matter – not only did the lower courts strike down the same order

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[105] *Id.*; *see also* Sarah Ferris, et. al., "Democratic push to extend eviction moratorium fizzles in the House," Politico (July 30, 2021), *available at https://www.politico.com/news/2021/07/30/eviction-battle-house-democrats-501758*.

[106] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

already, but five Justices of the Supreme Court made clear that they believe the moratorium to be unconstitutional. Four Justices -- Clarence Thomas, Samuel Alito, Neil Gorsuch, and Amy Coney Barrett – dissented from the *Alabama Association of Realtors* case that allowed the last moratorium to survive.[107] Justice Kavanaugh agreed, but held off from striking down the moratorium because it was about to expire anyway.[108] The Supreme Court could not issue a clearer signal that it believes an executive order violates the Constitution other than actually striking it down.

The Supreme Court does not have the authority to decide all constitutional questions finally and forever. Each branch has the authority to interpret the Constitution in the course of performing its unique duties. Presidents must decide what the Constitution means when they execute the laws and exercise the veto; Congress should do the same when considers a bill; the Supreme Court interprets the Constitution when it decides cases where a law and the Constitution conflict. President Biden is entitled to hold an interpretation of the law that is at odds with the courts. As President Andrew Jackson declared when he vetoed the bill reauthorizing the Bank of the United States: "The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution."[109] Even though the Supreme Court had already held the bank to be constitutional in the famous case of *McCullough v. Maryland*, "The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges," Jackson declared. And, he emphasized, "on that point the President is independent of both."[110]

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[107] Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2320 (2021).

[108] Id. at 2321.

[109] Andrew Jackson, Veto Message (July 10, 1832), in 2 Messages and Papers of the Presidents 576, 582 (James Richardson ed., 1896)

[110] Id. See generally John Yoo, Andrew Jackson and Presidential Power, 2 Charleston L. Rev. 111 (2008).

But Presidents have rarely risked direct conflict with the Court, and only for the most important of reasons. Abraham Lincoln, for example, faced this challenge when he lost faith in the Court because of *Dred Scott v. Sanford*, which prohibited Congress from regulating slavery in the territories and held that blacks could never become citizens. Democrats accused Lincoln of inviting chaos by attacking the Supreme Court's logic.[111] Lincoln declared that he would obey the Court in any individual case, but, like Jackson, would not bow to the judicial opinion that justified the decision. "[N]or do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit," Lincoln explained in his First Inaugural Address.[112] Decisions of the Court should receive "very high respect and consideration, in all parallel cases, by all other departments of the government."[113] It might even be worth following erroneous decisions at times because the costs of reversing them might be high. But "if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court," Lincoln argued, "the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal."[114]

Again, the contrast with Biden's Covid orders could not be sharper. Lincoln was willing to challenge the Supreme Court, but only because it had denied Congress's power to limit the spread of slavery. He conceded that he would obey the Court's decision in specific cases, even if he disagreed with its reasons.[115] Today, the

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[111] Michael Stokes Paulsen, Lincoln and Judicial Authority, 83 Notre Dame Law Review, Issue 3 Symposium: Stare Decisis and Nonjudicial Actors, 1227, 1229 (2008) (describing how a crisis ensured following the *Dred Scott* decision and Lincoln's repudiation of it).

[112] Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in Abraham Lincoln, Speeches and writings, 1859-65, at 221 (Donald R. Fehrenbacher, ed., 1989).

[113] *Id.*

[114] *Id.*

[115] *See supra* note 116, at 1238.

question over the eviction moratorium and the vaccine mandate is simply not on a constitutional par with *Dred Scott*. Congress is free to enact a rent moratorium or vaccine mandate, as it had earlier, and the states can as well, as some have. Congress has had plenty of time to consider the matter – it simply has chosen not to use its authority. Responding to the Covid-19 pandemic does not raise questions about slavery, secession, and Civil War. For Biden to invoke a power on par with that of Lincoln in order to redistribute wealth between renters and property owners shows a fundamental loss of constitutional perspective.

If the pandemic represents an emergency, however, President Biden could claim he was acting according to an executive prerogative. In order to analyze the question of the prerogative, we must turn to the political theory of John Locke. In his Second Treatise of Government, John Locke gave birth to the modern separation of powers by dividing the executive from the legislative power. The legislature held the "Supream [sic] Power" to set the rules of conduct, Locke said, while the executive remained subordinate in implementing the laws. Because legislatures could not always remain in session, society requires "a Power always in being, which should see to the Execution of the Laws that are made, and remain in force." [116] Unanticipated threats were to be dealt with by the prerogative. In an emergency, the prerogative allows the executive "to act according to discretion for the public good, without the prescription of the law, and sometimes even against it."[117] Like the

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[116] JOHN LOCKE, TWO TREATISES OF GOVERNMENT §145 (J.W. Gough ed., 3d ed. 1966) (1690). For Locke's development of the separation of powers and the definition of the executive power, see M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 60–61 (1967); W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION 82–99 (1965).

[117] Locke, Two Treatises, at § 160.

federative power, the prerogative operated in a zone that general, antecedent laws could not address. "Many things there are which the law can by no means provide for, and those must necessarily be left to the discretion of him that has the executive power in his hands." The legislature was "too slow for the dispatch requisite to execution." Unlike the royal prerogative, the executive's authority had to be exercised in the public interest and for the common good. The existence of such power still raised the "old question" of how to resolve conflicts between emergency power and the standing laws. To Locke, there were no pre-existing answers to this problem, and there was "no judge on earth" who could resolve it. Defining the executive prerogative's full scope beforehand would be simply impossible.

Legal scholars and historians have long debated whether the Framers understood a Lockean conception of prerogative to be subsumed within the "Executive power" or to be excluded from it. Locke's conception of "the prerogative" includes at least two dimensions: 1) the power to take discretionary actions for the sake of the public good on matters that the law simply does address, and 2) the power to act in an emergency for the sake of preserving the society in a manner contrary to law. The first, the law supplementing form of the prerogative seems less controversial in American practice. In 1807, Thomas Jefferson more boldly claimed that the executive had some power to fill in, or even vary, the details by which a law was to be executed. "If means specified by an act are impracticable, the constitutional [executive] power remains, and supplies them," he wrote. "This aptitude of means to the end of a law is essentially necessary for those who are executive; otherwise the objection that our government is an impracticable one would really be verified."[118]

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[118] Letter of Thomas Jefferson to Governor William H. Cabell (Aug. 11, 1807), in XI THE WRITINGS OF THOMAS JEFFERSON 320 (Albert Ellis Burgh ed., 1907).

The second dimension of the prerogative, the law violating form, is far more controversial. Locke argues that "a strict and rigid observation of the laws may do harm (as not to pull down an innocent man's house to stop the fire, when the next to it is burning)."[119] A private person who performed such an act, Locke argues, should merit a royal pardon. His analogy further suggests that the Executive itself is empowered to destroy private property when such destruction is necessary to prevent a greater harm. An argument based on such prerogative may be thought to have particular appeal to those who have defended a robust conception of Presidential authority over national security and foreign affairs, especially in time of crisis.[120] But even if a presidential prerogative exists in that form, we do not believe that it would encompass domestic actions more than a year after the outbreak of the Covid pandemic.

Any prerogative would not extend to public health because the President's constitutional authority should only extend to national security and foreign affairs. Republican government suffers from an inherent difficulty. Representative, deliberative legislatures have institutional difficulty in anticipating and providing for unforeseen events. The executive is the only branch constantly in being that can act swiftly and decisively to emergency. The challenge is investing the executive with sufficient discretion to handle crisis without veering into a dictatorship. The record of American constitutional practice shows that the executive possesses adequate powers under the Constitution to cope with extreme national emergencies. Ever since Abraham Lincoln's presidency, the nation's emergency powers have rested within the President's Article II powers, not outside it.

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[119] Locke, supa note , at 344.

[120] See, e.g., Robert J. Delahunty & John Yoo, Making War, 93 Cornell L. Rev. 123 (2007).

Lincoln resolved the problem of the prerogative by firmly planting emergency powers within the Constitution. Lincoln surely entertained the idea that he could draw on an extra-constitutional power to preserve the nation. As he wrote in 1864, "Was it possible to lose the nation, and yet preserve the Constitution?" To Lincoln, common sense supplied the answer: "By general law life and limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb." Necessity might justify unconstitutional acts. "I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation."[121]

Lincoln, however, was no dictator. While he used his powers more broadly than any previous President, he was responding to a crisis that threatened the very life of the nation. He relied on his power as Commander-in-Chief to give him control over decisions ranging from military strategy to Reconstruction. Like his predecessors, Lincoln interpreted his constitutional duty to execute the laws, his role as Chief Executive, and his presidential oath as grants of power to use force, if necessary, against those who opposed the authority of the United States. But he refused to believe that the Constitution withheld the power for its own self-preservation. Rather than seek a greater power outside the law to protect the nation, he found it in the Executive Power Clause.

Lincoln domesticated Locke's prerogative. Rather than claim an extra-constitutional power, Lincoln located the President's ability to respond to the greatest threat to the nation's existence in his executive and commander-in-chief powers and his duty to execute the laws. But regardless of whether the prerogative rests within the Constitution or outside of it, American constitutional practice shows that it has been reserved to national security and foreign affairs.

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[121] Lincoln to Hodges, Apr. 4, 1864, in Lincoln, Speeches and Writings, supra note ___, at 586.

Constitutional text and structure confirm this, in part, by the open-ended nature of its distribution of the foreign affairs power. Many significant foreign affairs powers, such as the authority to develop foreign policy, to communicate with foreign nations, to make non-treaty international agreements, and to break international agreements, are not specifically enumerated in the constitutional text. The Constitution's silence has led some commentators to fall back on extra-constitutional sources, practice, or inferences from the Constitution's structure to support their preferred system for managing foreign affairs.

The Constitution generally does not establish a fixed process for foreign relations decision-making. Rather, it allocates different powers to the president, Senate, and Congress, which allows them to shape different processes depending on the contemporary demands of the international system at the time and the relative political position of the different branches. The basic questions of war and peace remain open even today because the demands of foreign relations are unpredictable and ever changing, while the costs of mistake are so severe. There has been no definitive settlement of the power to make war or the place of treaties in our constitutional system. In essence, previous scholars have sought to articulate a legal order of fixed rules to rectify the disorder of foreign affairs, usually by adopting the template set by our domestic lawmaking system—that is, Congress legislating, the president executing, and the judiciary adjudicating. The unsettled nature of foreign affairs, however, does not arise from a systematic defect in the constitutional regime. The conflict among the branches of government over foreign affairs is not a flaw in constitutional design but is instead its conscious product. The Constitution does not establish a strict, legalized process for decision-making. Instead, it establishes a flexible system permitting a variety of procedures. This not only gives the nation more flexibility in reaching foreign affairs decisions, it gives each of the three branches of government the ability to check the initiatives of the others in foreign affairs. The deepest questions

of American foreign relations law remain open because the Constitution wants it that way.

Thus, if broad executive powers were to exist anywhere, they would exist in foreign affairs, where the limitations of republican government would be most pronounced. And it is here where the Constitution is most vague, hence giving the President the opportunity to act with the most discretion. In contrast, the domestic powers of the government are strictly defined and limited. Article I makes clear that it limits the power of Congress to the powers "herein" enumerated, the most prominent of which are the Commerce Clause and the Taxing and Spending powers. Unlike the "invitation to struggle," in the words of Edwin Corwin,[122] that is the foreign affairs Constitution, the process for enacting legislation is strict and defined. Both Houses of Congress must approve legislation, which must then be signed by the president as required by Article I, Section 7 of the Constitution.

Domestic affairs permit a constitutional design framed to slow down, rather than speed up, federal action. Challenges at home do not tend toward the unforeseen and unprecedented. Domestic issues involve systematic social and economic problems, rather than divining the intentions and countering the actions of international competitors. Sometimes the most difficult problems, such as balancing the federal budget or fixing entitlement programs, can build for decades before they reach a point of crisis. But the costs of inaction are not as high as they are for national security or foreign affairs, nor is there as much likelihood of sudden harms such as a surprise attack. Even sporadic events, such as natural disasters and economic fluctuations, might be predicted and provided for just as with private insurance.

Domestic and foreign affairs also differ in their costs of inaction. With the latter, passivity may allow a sudden attack or a serious

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[122] Edward S. Corwin, The President: Office and Powers 1787-1957, History and Analysis of Practice and Opinion 171 (4th ed. 1957).

foreign setback to occur. With the former, however, passivity may allow for better policy. Inaction gives more time to collect information, consider alternatives, and deliberate on the best policy. As the analysis of rules versus standards suggests, errors will go down with a more flexible decision approach that considers the totality of the circumstances. The trade-off is that gathering more information and considering more alternatives drives decision costs up. Domestic matters can tolerate longer decision-making processes and higher costs because the government has more time to act. Foreign affairs, however, impose more costs on slower decisions because of the harms that can occur to the nation as a whole from a sudden attack or foreign setback.

Second, the Constitution can treat any presidential prerogative in foreign affairs and domestic affairs differently because of federalism. In foreign affairs, the President is the only branch that can respond to a looming threat or emergency. If the executive fails to act, the United States has failed to act. There is no backup system. In fact, Article I, Section 10 of the Constitution does its best to prohibit states from acting in national security affairs. Even when Section 10 permits states to respond when the federal government cannot, such as in cases of imminent danger, the forces available to decentralized states may well prove inadequate to a nation-state level threat.

Domestic affairs give rise to opposite demands. The Constitution's structure recognizes that states provide the default system for addressing social and economic problems. Indeed, the common law of the states provides a universal, background level of regulation in the absence of any federal action. The Constitution's enumeration of Congress's powers in Article I, Section 8 means that federal intervention in any subject is interstitial, specialized, and limited, while state common law is general and universal. This contrast between federal and state law remains the core principle of *Erie Railroad Company v. Tompkins*'s holding that "there is no general

federal common law."[123] Unlike foreign affairs, if the President fails to act to solve a domestic problem, the states can act instead. The states are not constitutionally disabled; rather, the Constitution is biased in favor of state initiative. And the decentralized nature of the federal may in fact lead to superior policy outcomes when facing the type of systematic, persistent problems that characterize domestic affairs.

Prerogative in foreign affairs may also have posed less trouble for the Framers not only because the potential benefits were so great, but because the expected costs would have been lower. The danger in the prerogative is the possibility that a President might convert emergency measures into a permanent authoritarian government. This threat would be less likely with foreign than domestic challenges. Threats from abroad may be more harmful but of shorter duration than those at home. A military danger, even war, could inflict destruction on the nation, but it will be of limited duration—with a beginning and end point—set by the foreign actor, the nature of the attack, and the conclusion of the war. America's longest and most destructive wars, such as the Civil War, World Wars I and II, or even Vietnam and Iraq, have all ended. Although (usually) not involving large-scale hostilities, the long Cold War also came to an end. Even if a President exercises a prerogative to handle such threats to the national security, he will still need Congress's support for any long-term military action because of the legislature's sole control of the power of the purse and the raising of the military.

A prerogative in domestic affairs would threaten the kind of authoritarianism that worried the Framers much more. Domestic challenges tend toward society-wide, persistent problems that do not have set beginnings or endings nor come at the hand of a single opponent. Poverty and crime have been permanent features of the

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[123] Henry J. Friendly, In Praise of Erie—And of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 405-07 (1964).

human condition; no single person or institution is responsible for their existence. Public health insecurity has similar features. Invoking a prerogative to combat such decentralized problems would produce an extraordinary executive power of long duration.

CONCLUSION

This Essay has argued that the Biden Administration's measures to ban evictions and to impose a vaccine mandate went beyond the executive branch's authority. In the case of the eviction moratorium, the Public Health Services Act did not grant executive agencies the power to modify landlord-tenant contracts, and the underlying property rights, nationwide. Instead, the statute engaged in a narrower delegation to HHS to regulate infected or contaminated materials. A grant of a larger power to control all landlord-tenant relations would raise serious constitutional problems, which justified the Supreme Court's decision to read the law narrowly.

This Essay found similar problems with the Biden Administration's vaccine mandate. It argued that the Occupational Safety and Health Act grants OSHA the authority to regulate workplace safety, but that this authority did not act as a "work-around" for the government to achieve a different, nationwide public health policy. Instead, this Essay argues, the Constitution recognizes the ample police powers of the states to adopt public health measures, such as a vaccine requirement. It maintains that if Congress did seek to delegate such broad power to OSHA, it could run afoul of the Constitution's limited enumeration of powers in the national government.

This Essay concluded with a discussion of presidential power. With both the eviction moratorium and the vaccine mandate, the Biden Administration possibly could have argued that the covid pandemic amounted to a national emergency that triggered broad executive power during a crisis. Those who drafted and ratified the Constitution would have understood the "executive power" granted to the President in Article II to include the authority to respond to

unforeseen events, crises, and emergencies. But this Essay concludes that the executive's constitutional authority does not apply to a domestic challenge such as the Covid pandemic, in which the states are fully able to act and the passage of time and change of circumstance has relieved the federal government of the need to act immediately.