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### The Bound Executive: Emergency Powers During the Pandemic

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# THE BOUND EXECUTIVE: EMERGENCY POWERS DURING THE PANDEMIC

*Tom Ginsburg & Mila Versteeg\**

July 26, 2020

*Emergency governance, we are often told, is executive governance. Only the executive branch has the information, decisiveness, and speed to respond to crises, and so the executive is not capable of being effectively constrained by other branches. Ordinary checks and balances, then, are believed to effectively disappear during a crisis. Referring to the classic theorist of emergency rule, conventional accounts describe crisis governance as “Schmittian” and “post-Madisonian,” characterized by an unbound executive that faces few, if any, legal constraints.*

*This Article interrogates these propositions using evidence from how countries around the world have responded to the 2020 global pandemic. It presents data from an original and global survey of over one hundred countries to evaluate the nature of emergency powers during the pandemic. The survey captures, for each country, the legal basis for the country’s pandemic response as well as the extent to which there has been judicial or legislative oversight, and whether the central pandemic response has encountered pushback from subnational units.*

*This Article finds that, contrary to this conventional wisdom, courts, legislatures and subnational governments have played important roles in constraining national executives. Courts have played three different roles: (1) they have insisted on procedural integrity of invocations of emergency; (2) they have engaged in substantive review of rights restrictions, balancing rights against public health concerns; and (3) they have in some cases demanded that government take affirmative steps to combat the COVID-19 virus and its effects. Legislatures have likewise played an active role in providing oversight and, in*

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*many cases, in producing new legislation that responds to the current crisis. Subnational governments, too, have pushed back against central authorities, engaging in valuable checks and balances that shaped the appropriate response. Taken together, these findings suggest that, in the current crisis, emergency governance has been closer to the Madisonian ideal of strong checks and balances than to Schmittian accounts of an unbound executive.*

*This Article considers the implications of these findings for theories of emergency governance, arguing that the conventional theories are based on one particular type of crisis—a national security crisis—and therefore their insights are ill-suited to other kinds of emergencies, such as a pandemic. It develops a typology of crises and conceptualizes how different kinds of emergencies require different modes of crisis governance. Specifically, in crises like a pandemic—in which information is dispersed, the crisis is slow-moving, and local governments are needed to implement the crisis response—the executive is structurally more bound than in national security crises. This Article further defends the role of institutional checks and balances during emergencies, arguing that they are likely to produce more legitimate and reasoned responses than the executive acting alone. This is especially important in situations in which it is not clear what the optimal response is, and for which different societies may have legitimate differences over how to balance protective measures against civil liberties. For many crises, then, emergency governance should be Madisonian, not Schmittian.*

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## I. INTRODUCTION

Never before have the world's democracies simultaneously experienced such a major contraction of civil liberties as during the pandemic of 2020. Around the world, democratic governments have taken steps that were unimaginable just a few months ago, severely restricting freedoms that citizens normally take for granted. Among the extraordinary measures to fight the novel coronavirus (COVID-19) are nationwide stay-at-home orders, military-enforced curfews, suspended religious services, cellphone monitoring, the suspension of schools and other government services, restricted travel, and the censoring of news.<sup>1</sup> These measures appear to be widely supported by publics in many countries;<sup>2</sup> yet, they have also spurred concerns about their

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<sup>1</sup>See, e.g., Joseph J. Amon & Margaret Wurth, *A Virtual Roundtable on COVID-19 and Human Rights with Human Rights Watch Researchers*, 22 HEALTH & HUMAN RIGHTS 399 (2020).

<sup>2</sup>Adam Chilton, Kevin Cope, Charles Crabtree & Mila Versteeg, *Red and Blue America Agree that Now Is the Time to Violate the Constitution*, THE ATLANTIC (Mar. 25, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/coronavirus-america-constitution/608665/>; see generally Darren W. Davis & Brian D. Silver, *Civil liberties vs. Security: Public Opinion in the Context of the Terrorist Attacks on*

constitutionality,<sup>3</sup> about the possible erosion of civil liberties,<sup>4</sup> and about their long-term effects on democratic governance.<sup>5</sup>

More generally, the pandemic response has produced massive debates about the role of government power during times of crisis, one of the oldest topics in constitutional and political theory.<sup>6</sup> It is conventional wisdom that emergencies require massive delegation of power to the executive, which is the only branch of government with the information, decisiveness, and speed to respond to crises.<sup>7</sup> Therefore, the executive cannot be effectively constrained by the other branches of government, and may even need to operate outside the law entirely. Checks and balances that ordinarily constrain constitutional governance thus cease to exist during times of crisis. While the view, associated most prominently with Carl Schmitt, has numerous critics, it remains popular, with high-profile proponents such as Eric Posner and Adrian Vermeule, who articulate a theory of an “unbound executive” in a number of books and law review articles.<sup>8</sup> Posner and Vermeule characterize crisis governance as “Schmittian” and “post-Madisonian,” because they believe that the Madisonian scheme of checks and balances, wherein different branches and levels of government have the incentives to keep each other in check, fails to operate under such circumstances.<sup>9</sup> (Note that because Posner and Vermeule’s concerns are actually

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*America*, 48 AM. J. POL. SCI. 28-46 (2004) (documenting public support for human rights violations in to context of 9/11); DARREN W. DAVIS, *NEGATIVE LIBERTY: PUBLIC OPINION AND THE TERRORIST ATTACKS ON AMERICA* (2007).

<sup>3</sup> See, e.g., Joshua Matz, *The Coronavirus Is Testing America’s Commitment to People’s Constitutional Rights*, THE ATLANTIC (Apr. 20, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/coronavirus-jails-constitutional-rights/610216/>; *We the People, in Order to Defeat the Coronavirus*, N.Y. TIMES (May 1, 2020), <https://www.nytimes.com/2020/05/01/opinion/coronavirus-civil-liberties.html>.

<sup>4</sup> See *COVID-19 Guidance*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, <https://www.ohchr.org/EN/NewsEvents/Pages/COVID19Guidance.aspx>; *Protecting Human Rights amid COVID-19 Crisis*, UNITED NATIONS (Apr. 9, 2020), <https://www.un.org/en/un-coronavirus-communications-team/protecting-human-rights-amid-covid-19-crisis>.

<sup>5</sup> Rachel Kleinfeld, *Do Authoritarian or Democratic Countries Handle Pandemics Better?*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Mar. 31, 2020), <https://carnegieendowment.org/2020/03/31/do-authoritarian-or-democratic-countries-handle-pandemics-better-pub-81404>; Kenneth Roth, *How Authoritarians are Exploiting the COVID-19 Crisis to Grab Power*, N.Y. REV. BOOKS (Mar. 31, 2020), <https://www.nybooks.com/daily/2020/03/31/how-authoritarians-are-exploiting-the-covid-19-crisis-to-grab-power/>.

<sup>6</sup> For early theorizing on the role of government in protecting liberty and security see Benjamin Franklin, *Pennsylvania Assembly: Reply to the Governor* (November 11, 1755) in 6 THE PAPERS OF BENJAMIN FRANKLIN 238 (Yale University Press 1963) (“Those who would give up essential Liberty, to purchase little temporary Safety, deserve neither Liberty nor Safety.”); THOMAS HOBBS, *THE ELEMENTS OF LAW, NATURAL & POLITIC* (Oxford University Press 2008) (1640); Thomas Jefferson, *Letter from Thomas Jefferson to John B Colvin* (20 September 1810) in 11 THE WORKS OF THOMAS JEFFERSON 146 (The Knickerbocker Press ed. 1905) (“The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.”); JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* ch. IX (New York Liberal Arts Press 1952) (1690).

<sup>7</sup> See *infra* Part II.A.

<sup>8</sup> See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2011) [hereinafter POSNER & VERMEULE, *EXECUTIVE UNBOUND*]; ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE* (2007) [hereinafter POSNER & VERMEULE, *TERROR IN THE BALANCE*]; see also *infra* notes 30–33 and surrounding text.

<sup>9</sup> See, e.g., POSNER & VERMEULE, *EXECUTIVE UNBOUND*, *supra* note 8, at 10. Madison set out his scheme of checks and balances in the Federalist 51, noting that “members of each department should be as little dependent as possible on those of the others” and that “the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and

different from those of Carl Schmitt, we characterize this view as “neo-Schmittian” in the remainder of this Article).

This Article presents data from an original global survey and uses these data to evaluate claims about the nature of emergency powers in light of crisis governance in the 2020 pandemic. Our survey documents, for each country, the legal basis for the pandemic response as well as the extent to which there has been judicial oversight, legislative involvement, and whether the executive’s pandemic response has encountered pushback from subnational units. The survey allows us to evaluate whether and to what extent checks and balances have remained in place during the current crisis.

This Article’s key finding is that, in many countries, checks and balances have remained robustly in place during the current health crisis, and that governance has been decidedly Madisonian. Perhaps most surprising is that, in over half of the democracies we surveyed, courts have played a visible role in monitoring the executive. There are three broad bases for judicial interventions in the pandemic response. First, courts have scrutinized whether proper procedures are followed and that the emergency response is rooted in law. Courts in the United States, Israel, Kosovo, Ecuador, the Czech Republic, Lesotho, El Salvador, Romania, Pakistan, and Uganda are among those that have become involved in the pandemic response on procedural grounds.<sup>10</sup> Second, some courts have engaged in substantive rights review, with the goal of ensuring that the restrictions on rights are necessary, proportional and equally applied. Among others, we have seen courts in the United States, Germany, Italy, France, Malawi, South Africa, Zimbabwe, Slovenia, Ecuador, Pakistan, and Kenya balance individual rights against public health considerations.<sup>11</sup> Third, we see some courts demanding that the executive take action, especially in contexts where the national executive fails to adequately respond to the pandemic. This type of judicial review is not available in the United States, where it is widely accepted that government inaction cannot be a source of constitutional violations, but many other countries recognize that omissions can give rise to liability. Notably, we see courts demanding action in countries as diverse as Brazil, the Philippines, Zimbabwe, Nepal, and India.<sup>12</sup> Of course, the fact that courts attempt to monitor executive power does not mean that they actually succeed. Court orders can be defied, and implementation might be lacking, especially when courts dictate complex policy responses.<sup>13</sup> Nonetheless, the fact that many courts have involved themselves in the pandemic policy response is an indication that executive power has not been entirely unbound, and that judicial oversight has remained in place.

Legislatures, too, have played an active role in responding to the crisis, devising quick legislative solutions to the unfolding crisis but also providing authority and oversight. Notably, in roughly two-thirds of countries in our survey, legislatures have passed brand new legislation to respond to the pandemic. Most of the legislatures that passed new legislation have also attempted to provide safeguards against abuse by making these new laws specific to the current crisis and temporary in nature.<sup>14</sup> They have further amended existing laws and, in some cases, established parliamentary

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personal motives to resist encroachments of the others” and that “[a]mbition must be made to counteract ambition.” See THE FEDERALIST NO. 51 (1788) (James Madison).

<sup>10</sup> See *infra* Part IV.A(i).

<sup>11</sup> See *infra* Part IV.A(ii).

<sup>12</sup> See *infra* Part IV.A(iii).

<sup>13</sup> See *infra* notes 208–209 and surrounding text.

<sup>14</sup> See *infra* Part IV.B.

oversight committees to monitor the response. Even though legislatures have not been on the frontlines of accountability as much as courts, the claim that they are unable to play a part in crisis governance is not supported by recent evidence.

Finally, in a number of countries, subnational governments and local officials have played an important role in fighting the pandemic, sometimes even when they lack the formal authority to do so. Specifically, in a number of countries, subnational authorities have been more aggressive than national governments, demanding greater restrictions for their particular localities; and in some places, they have pushed back against national leaders who have been perceived as over-reaching. Existing theories of emergency powers are mostly silent on the role of subnational governments; yet, our findings suggest an important role for vertical checks and balances in crisis governance.

These findings call for revisiting conventional accounts of emergency powers. While existing accounts purport to apply to crisis governance *in general*, they appear to be based on one particular type of crisis: a national security crisis. Some of the core insights from the literature, therefore, are ill-suited to other kinds of crises, such as natural disasters or pandemics. While a pandemic undoubtedly constitutes a crisis, it is far from clear that crisis governance should be the same in a pandemic as in a national security crisis. A key difference is that, during a pandemic, information is highly dispersed and there is no need for secrecy in formulating the response. Under these circumstances, courts and legislatures may see no need to defer to the executive; to the contrary, they may possess some institutional advantages in dictating (part of) the response. Another important difference is the potential role for subnational governments: since local officials often have better information on health risks and are needed to implement any response, they are important actors in pandemic crisis governance. These differences notwithstanding, little to none of the vast literature on emergency powers differentiates among different types of crises.

This Article seeks to fill this gap in the literature. It develops typology of crises and argues that a pandemic requires a different mode of governance; namely, one in which different branches formulate the crisis response together through cooperation, contestation, and dialogue, and in which subnational governments take part in formulating the response.<sup>15</sup> This, indeed, is what we have observed in most democracies during the 2020 pandemic. This Article further argues that such checks and balances are normatively desirable.<sup>16</sup> A response formulated as a result of a back and forth between different branches and levels of government is likely to be more well-reasoned and seen as more legitimate. What is more, judicial review, legislative oversight and subnational engagement can help to identify blind spots in emergency response, and therefore reduce the risk of major error. These actors have different epistemic bases and distinct institutional advantages. Courts are institutionally well equipped to demanding well-reasoned justifications and to identify individual interests that may suffer as a result of collective policies. Legislatures provide distinct advantages as arenas for policy debate and serve as the ultimate locus of democratic legitimacy. And subnational governments are uniquely able to calibrate policies to local needs, conditions, and preferences. Their involvement is especially important in a crisis where the optimal response is unclear because the nature of the “enemy” is largely unknown. Indeed, different societies may have legitimate differences over the optimal balance among health needs, economic goals and civil

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<sup>15</sup> See *infra* Part II.C.

<sup>16</sup> See *infra* Part VI.

liberties. In such a situation, the best response is likely one that reflects input from multiple authorities.

The remainder of this Article is organized as follows. Part II.A reviews the classic problem of emergency regimes, focusing particularly on the neo-Schmittian view, as articulated most prominently in the writings of Posner and Vermeule. Part II.B reviews the legal mechanisms for unbinding the executive during crises. It observes that there are two broad models for granting additional powers to the executive during crises: one in which the constitution contemplates emergency rule, and another in which legislation provides the main source of power. Yet for both models, it is possible for checks and balances to stay in place. Part II.C argues that core insights from the existing literature are based on one particular kind of crisis: the national security emergency. It conceptualizes different types of crises, and how their nature might favor or disfavor involvement of particular government institutions.

Part III describes our research methods and presents basic descriptive findings from our global survey of 106 countries. It shows that, although most of the countries surveyed have constitutional provisions allowing for a state of emergency, only a minority invoked them during the current crisis. Instead, most countries found that ordinary legislation provided sufficient legal basis for a response. It also shows that Madisonian checks and balances have stayed in place during the pandemic. Legislatures have been actively involved in 64% of the countries we surveyed. Likewise, courts have been directly involved in the pandemic response in 55% of the democracies we surveyed (and 41% of all countries). And there has been resistance to uniform national responses from subnational units in 34% of the countries in our sample. Perhaps most notably, 82% of the countries surveyed have seen either legislative involvement *or* judicial enforcement *or* resistance from subnational units. Taken together, these findings suggest that crisis governance during the pandemic has been Madisonian, not Schmittian.

Part IV goes deeper to provide more detail on the quality and intensity of the constraints imposed upon the executive. It draws on our survey to provide illustrations of judicial involvement, dialogue between the legislature and executive, and pushback by subnational governments. It lays out, in some detail, the different roles that courts have played. It also provides a qualitative assessment of the different ways in which legislatures and subnational units have involved themselves in the pandemic response.

Part V explores the difference between democracies and autocracies. One consistent fear about emergency power is that it will lead to executive aggrandizement and an erosion in civil liberties and democracy. Although our overall findings that Madisonian checks and balances have remained robust in many places are encouraging, there is no doubt that in some systems, the pandemic response *has* led to an abuse of powers. Notably, countries that have experienced abuses have something in common: they were already prone to repression and authoritarianism. To analogize to the human body, one might consider these countries to have “co-morbidities,” the presence of other conditions that weaken the host and render it vulnerable to the virus. Part V.A draws on the literature on democratic erosion to examine the countries that have witnessed abuse, and explains the co-morbidities that in our view led these results to be overdetermined. We speculate that the general features that predict authoritarian demise seem to correlate with the few cases of



democratic backsliding that we have observed. Part V.B provides a normative lens to assess whether emergency responses are likely to facilitate such abuse.

Part VI uses the empirical insights on the pandemic response to develop a more general account on the nature of crisis governance during a pandemic. We note that, although it is too early to draw any final conclusions about the impact of checks and balances on the quality of the pandemic response, our findings suggest an important role for courts, legislatures and subnational units. It argues that, not only has the Madisonian system operated, but that it may be normatively desirable, as institutional checks and balances are likely to produce more legitimate and reasoned responses that would any single institution acting alone. It also notes that emergency governance is not fundamentally different from ordinary governance in this regard, and emergency regime designers should celebrate, not shy away from, robust institutional checks and balances. Part VII concludes.

## II. EXECUTIVE POWER AND EMERGENCIES

### A. *The Unbound Executive*

Discussions of emergency power canonically begin with Carl Schmitt, whose theorizing of the state of exception as the core of sovereignty remains a touchstone to this day.<sup>17</sup> Schmitt's jurisprudential thinking placed the state of exception at the very center of analysis, beginning with his work on the Roman dictatorship.<sup>18</sup> Schmitt celebrated the Roman model, in which the Senate could authorize the appointment a dictator who would hold all powers for the period of six months, with the goal of preserving the constitutional order.<sup>19</sup> He initially identified this as a commissarial model of dictatorship, to be distinguished from the "prerogative" dictator who could transform the legal order.<sup>20</sup> The Roman model is one in which law constrains power by having separate rules for ordinary times and for states of exception. In his later work, however, Schmitt came to emphasize the inevitability of political decision in this scheme, and he attacked liberal legalism for what he saw as a naïve view that law could control politics.<sup>21</sup> Schmitt's position was that even if law purports to constrain the powers of government, during times of crisis, there is always someone who must decide to invoke the state of exception as a discretionary matter.<sup>22</sup> This is a claim that law runs out under certain conditions.

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<sup>17</sup> CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (George Schwab. trans., 1976); CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., 2005) (1922) [hereinafter SCHMITT, *POLITICAL THEOLOGY*].

<sup>18</sup> CARL SCHMITT, *DIE DIKTATUR* (Michael Hoelzl & Graham Ward trans., 2014) (1922); for a discussion *see* ANDREAS KALYVAS, *DEMOCRACY AND THE POLITICS OF THE EXTRAORDINARY: MAX WEBER, CARL SCHMITT, AND HANNAH ARENDT* 89 (2008); JOHN MCCORMICK, *CARL SCHMITT'S CRITIQUE OF LIBERALISM: AGAINST POLITICS AS TECHNOLOGY* 147–56 (Cambridge: Cambridge University Press, 1997); *THE CHALLENGE OF CARL SCHMITT* (Chantal Mouffe ed., 1999).

<sup>19</sup> *See* John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CON. L. 210, 212 (2004).

<sup>20</sup> *See generally* SCHMITT, *supra* note 18, at 1–20.

<sup>21</sup> SCHMITT, *POLITICAL THEOLOGY*, *supra* note 17, at 7 (“[Whether] the extreme exception can be banished from the world is not a juristic question.”).

<sup>22</sup> SCHMITT, *POLITICAL THEOLOGY*, *supra* note 17, at 1 (“Sovereign is he who decides on the state of exception”).

Schmitt's primary concerns were different than our own, but his observation that emergency power is effectively unconstrained has often been repeated since. In a famous book written in the wake of WWII, Clinton Rossiter examined the growth of emergency power in the United States and other democracies, arguing that constitutional dictatorship was inevitable.<sup>23</sup> As he put it "[n]o sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself."<sup>24</sup> A constitutional dictator can break the law and assume legislative and judicial power if needed.<sup>25</sup> Unlike a fascist dictatorship, however, a constitutional dictatorship is temporary and has the ultimate goal of preserving the constitutional order. Rossiter therefore set out a number of criteria to ensure that the dictatorship remains within constitutional boundaries, such as a requirement of necessity and temporal limits on emergency rule. Notably, he believed that the decision to institute a constitutional dictatorship should ideally not be taken by the dictator itself, although Rossiter also acknowledged that this is not always possible. Rossiter's main example of an exemplary constitutional dictator was Abraham Lincoln, who granted himself dictatorial powers, but ultimately restored constitutional order.<sup>26</sup>

Rossiter was also well-known for his edited collection of the Federalist Papers, in which James Madison laid out the baseline theory of American government as a system of checks and balances. As Madison put it in Federalist 51, liberty is best secured through a system of checks and balances among departments, along with federalism. Power divided mean that ambition could check ambition, and liberty would be sustained.<sup>27</sup> This Madisonian vision was precisely what Rossiter sought to preserve through temporarily suspending it.

In recent years, from a very different political perspective, the Italian philosopher Giorgio Agamben has taken up the neo-Schmittian mantle to argue that we are in a state of permanent emergency, which law cannot constrain.<sup>28</sup> Agamben thus accepts Rossiter's positive claim that emergency has become normalized, but adopts Schmitt's view that it reflects extra-judicial governance. We have succumbed already: fear and the need for urgent action lead us to defer to government, which for its part greedily exploits the opportunities presented by crisis. (Indeed, Agamben's fear of emergency power led him, bizarrely, to decry the coronavirus as a "supposed pandemic" and suggested that emergency measures were "absolutely unwarranted.")<sup>29</sup>

These arguments, coming from theorists on both the political right and left, proceed at a general level and do not address the separation of powers *per se*. In a number of influential books and law review articles, Eric Posner and Adrian Vermeule consider the constitutional implications of some of Schmitt's views, arguing that in times of emergency, the executive becomes "unbound."<sup>30</sup> Their

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<sup>23</sup> CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP 306 (1948).

<sup>24</sup> *Id.* at 314.

<sup>25</sup> *Id.* at 7 ("The government meets the crisis by assuming more powers and respecting fewer rights.").

<sup>26</sup> DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY 37 (2006) (discussing Rossiter).

<sup>27</sup> THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961).

<sup>28</sup> GIORGIO AGAMBEN, STATE OF EXCEPTION (Kevin Attell trans., Chicago: Chicago University Press 2005).

<sup>29</sup> See Anastasia Berg, *Giorgio Agamben's Coronavirus Cluelessness*, CHRON. HIGHER. ED (Mar 23, 2020), <https://www.chronicle.com/article/Giorgio-Agamben-s/248306>.

<sup>30</sup> See POSNER & VERMEULE, EXECUTIVE UNBOUND, *supra* note 8; POSNER & VERMEULE, TERROR IN THE BALANCE, *supra* note 8; Eric Posner & Adrian Vermeule, *Emergencies, Tradeoffs, and Deference*, in CIVIL RIGHTS AND SECURITY (David Dyzenhaus ed. 2017); Eric Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605 (2003); Eric Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the*

claim was developed in the context of the United States' responses to the September 11 terrorist attacks and the 2008 financial crisis, but the basic idea generalizes to other countries as well.<sup>31</sup> In essence, they argue that when faced with an emergency, the judicial and legislative branches will delegate massive amounts of power to the executive, abdicating powers and rendering Madison's vision void. The reason that emergency begets delegation is simple necessity. According to Posner and Vermeule, the executive is "the only organ of government with the resources, power, and flexibility" to balance civil liberties against security in the face of an emergency.<sup>32</sup> Thus, "[p]olitical conditions and constraints, including demands for swift action by an aroused public, massive uncertainty, and awareness of their own ignorance leave rational legislators and judges no real choice but to hand the reins to the executive and hope for the best."<sup>33</sup> The claim is not only descriptive, but also normative: Posner and Vermeule believe that an "Unbound Executive" is the best way to ensure a swift and decisive crisis response.

Because it is the most prominent articulation of the neo-Schmittian view, we focus on Posner and Vermeule's argument in some depth. They take aim at Madisonian checks and balances that are normally in place: judicial review and legislative oversight. Let us start with judicial review. Posner and Vermeule argue that courts will and should defer to the executive when faced with an emergency. According to Posner and Vermeule, responding to emergencies requires speed. Yet, by their nature, courts are slow: judicial review always involves a time lag after emergency measures are taken, which means that courts will often face a *fait accompli*.<sup>34</sup> Responding to emergency also requires secrecy, especially when faced with threats to national security.<sup>35</sup> Court proceedings, however, are usually open, rendering judges ill-equipped to ensure much-needed secrecy. Courts are also rigid, while responding to an emergency requires flexibility.<sup>36</sup> Finally, they note that courts lack the political legitimacy to second guess the executive during a time of crisis.<sup>37</sup> Indeed, Posner and Vermeule rightly observe that in the United States, courts have a long record of deferring to the executive in times of emergency.<sup>38</sup> This may occur because there is no clear grounds on which to review actions already taken, but also because courts know that, by their nature, they do not have the same abilities to gather and assess information that the executive

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*Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613 (2009) [hereinafter Posner & Vermeule, *Crisis Governance*]; Eric Posner & Adrian Vermeule, *Emergencies and Democratic Failure*, 92 VA. L. REV. 1091 (2006); Eric Posner & Adrian Vermeule, *Emergencies and Political Change: A Reply to Tushnet*, 56 STAN. L. REV. 1593 (2004); Eric Posner & Adrian Vermeule, *Originalism and Emergencies: A Reply to Lawson*, 87 B.U. L. REV. 313 (2007); Eric Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865 (2007); see also Adrian Vermeule, *Emergency Lawmaking after 9/11 and 7/7*, 75 U. CHI. L. REV. 1155 (2008); Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, 75 FORDHAM L. REV. 631 (2006).

<sup>31</sup> Eric A. Posner, *The Executive Unbound, Pandemic Edition*, LAWFARE BLOG (Mar. 23, 2020), <https://www.lawfareblog.com/executive-unbound-pandemic-edition>.

<sup>32</sup> POSNER & VERMEULE, TERROR IN THE BALANCE, *supra* note 8, at 4–5.

<sup>33</sup> Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHICAGO L. REV. 1613, 1614 (2009) [hereinafter Posner & Vermeule, *Crisis Governance*]

<sup>34</sup> Posner & Vermeule, *Crisis Governance*, *supra* note 30, 1654–55.

<sup>35</sup> POSNER & VERMEULE, TERROR IN THE BALANCE, *supra* note 8, at 4.

<sup>36</sup> POSNER & VERMEULE, TERROR IN THE BALANCE, *supra* note 8, at 5.

<sup>37</sup> Posner & Vermeule, *Crisis Governance*, *supra* note 30, at 1659.

<sup>38</sup> Posner & Vermeule, *Crisis Governance*, *supra* note 30, at 1656; POSNER & VERMEULE, TERROR IN THE BALANCE, *supra* note 8, at 89; see also Samuel Issacharoff, & Richard Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime*, 5 THEORETICAL INQ. L. 1, 2 (2004) ("When courts have upheld the government's actions, they have done so only after a judgment that Congress, as well as the executive, has endorsed the action.").

branch has. Deferral then, is a deliberate strategy on part of the courts, at least while the crisis rages.

Legislatures likewise defer to the executive. According to Posner and Vermeule, legislators know that they are ill-suited to take emergency action. Among the legislature's institutional disadvantages, Posner and Vermeule list "lack of information about what is happening," a "lack of control over the police and military" and an "inability to act quickly and with one voice."<sup>39</sup> Notably, legislative deferral does not mean that the executive will lack a statutory basis for emergency measures. Instead, it means that legislatures will not attempt to legislate during a crisis, but instead act beforehand by passing open-ended legislation that can be activated when an emergency arises, allowing the executive substantial discretion in the response.<sup>40</sup> According to Posner and Vermeule, this practice also explains why unauthorized executive actions are rare.<sup>41</sup> The practice of passing vague legislation *ex ante* ensures that there is always a formal statutory basis for the executive action, but that this can be accomplished without the legislative branch having to substantively involve itself in crisis governance.<sup>42</sup>

Posner and Vermeule are less explicit about vertical checks and balances between the national government and subnational units. But at various points, they seem to suggest that, at times of emergency, power should flow from the sub-national level to the national level.<sup>43</sup> This insight is in line with their basic argument that emergencies require a swift and decisive response by a single actor—the national executive. (Indeed, as we will elaborate below, the potential role of local officials in crisis governance has not generally been recognized in the literature).

Posner and Vermeule ultimately argue that, at least in the U.S., the phenomenon of the unbound executive is not limited to times of emergency. They believe that modern government bears little resemblance to the Madisonian scheme of checks and balances laid out in the U.S. Constitution. With the rise of the administrative state, and the complexities of modern governance, checks and balances have become largely formal. Instead, they observe massive delegations of power to the executive, which in their conception can be bound only by political restraints. They characterize the actual system of government in the United States as Schmittian, rather than Madisonian. In short, they see emergency not as an exceptional situation, but rather as paradigmatic of modern governance in a separation of powers system. As they summarize, "[l]egislatures and courts . . . are continually behind the pace of events in the administrative state; they play an essentially reactive and marginal role, modifying and occasionally blocking executive policy initiatives, but rarely taking the lead. And in crises, the executive governs nearly alone, at least so far as law is concerned."<sup>44</sup>

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<sup>39</sup> POSNER & VERMEULE, *TERROR IN THE BALANCE*, *supra* note 8, at 47.

<sup>40</sup> *Id.* at 47.

<sup>41</sup> *Id.* at 48.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 16 (during emergencies "power should move up from the states to the federal government.").

<sup>44</sup> POSNER AND VERMEULE, *EXECUTIVE UNBOUND*, *supra* note 8, at 4 (arguing that "the legally constrained executive is now a historical curiosity").

Neo-Schmittian accounts have generated much criticism over the years, as did Schmitt himself.<sup>45</sup> Stephen Holmes believes that Schmitt is really articulating a theory of authoritarian rule.<sup>46</sup> Ulrich Preuss argues that his theory ultimately privileges the armed forces and those who control them.<sup>47</sup> Mark Tushnet argues that in modern constitutional orders, the process of identifying the state of exception involves multiple actors, so that one might say it is the constitution itself that is sovereign.<sup>48</sup> David Dyzenhaus draws on the resources of common law constitutionalism to argue that Schmitt's choice between legal constraint and emergency action is a false one. Positing what he calls a "middle ground of legality," he argues that emergency actions must be done in a way that restricts basic rule of law values.<sup>49</sup>

Posner and Vermeule have likewise encountered many opponents, especially regarding their normative claim that legislators and courts *should* defer to the executive during crisis.<sup>50</sup> Many scholars believe that unbinding the executive in times of crisis invites an abuse of powers. One worry is that when the executive is given special powers to curtail civil liberties in response to an emergency, these restrictions will become the new normal.<sup>51</sup> Another concern is that the special powers that flow to the executive during emergencies might lead the holder of executive power to take over the system entirely, endangering constitutional democracy. Indeed, Posner and Vermeule believe that "post-Madisonian" government in the U.S. is in fact Schmittian, although they dismiss the idea of an authoritarian executive, chiefly because they believe that the executive remains subject to political constraints.<sup>52</sup> Yet, for many, this image of an overly powerful executive operating in a system with few checks and balances is antithetical to the essence of a constitutional

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<sup>45</sup> See, e.g., Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy*, 21 CARDOZO L. REV. 1825, 1828 (2000); see generally Peter C. Caldwell, *Controversies over Carl Schmitt: A Review of Recent Literature*, 77 J. MOD. HIST. 357 (2005) (reviewing criticisms).

<sup>46</sup> STEPHEN HOLMES, *THE ANATOMY OF ANTI-LIBERALISM* (1993); see also Gross, *supra* note 45, at 1825–30 (considering whether Schmitt "sought to facilitate the destruction of liberalism and democracy" through his theory of the exception).

<sup>47</sup> Ulrich Preuss, *Political Order and Democracy: Carl Schmitt and His Influence*, in *THE CHALLENGE OF CARL SCHMITT* 157–65 (Chantal Mouffe ed., 1999).

<sup>48</sup> Mark Tushnet, *Meditations on Carl Schmitt*, 40 GA. L. REV. 877, 880 (2006).

<sup>49</sup> David Dyzenhaus, *Constituting the Enemy: A Response to Carl Schmitt*, in *MILITANT DEMOCRACY* 45 (Andras Sajo, ed., 2004) ("There is the middle ground of legality—the constitutional values of the rule of law—which the majority relied on despite their own pull towards constitutional positivism."); see also DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 35 (2006) ("[T]he judicial record largely supports Schmitt's claims, albeit not through the idea that the rule of law has no place in an emergency, but through the idea that only a formal or wholly procedural conception of the rule of law is appropriate for emergencies.").

<sup>50</sup> Saikrishna B. Prakash & Michael D. Ramsey, *The Goldilocks Executive*, 90 TEX. L. REV. 973, 1000 (2012) (challenging that "checks on the Executive are counterproductive because they cause the Executive to pursue suboptimal policies" and that "checks on the Executive yield no benefits because... executive tyranny is chimerical"); David Cole, *Are We Stuck with the Imperial Presidency?*, N.Y. REV. BOOKS (Jun. 7, 2012), <https://www.nybooks.com/articles/2012/06/07/are-we-stuck-imperial-presidency/> (arguing for reviving checks and balances).

<sup>51</sup> See, e.g., DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003).

<sup>52</sup> POSNER & VERMEULE, *TERROR IN THE BALANCE*, *supra* note 8, at 54 (observing that a first term president will want to seek re-election and a second-term president will want to leave a legacy); see also Daryl Levinson, *Empire Building in Constitutional Law*, 118 HARV. L. REV. 915, 926 (observing that "[d]emocratic representatives lack the direct, selfish incentives of dictators to aggrandize the wealth or power of government" because they "have no obvious personal incentive to engorge governmental coffers since, absent the most blatant forms of corruption, they derive no immediate benefit from money flowing through the treasury...").

democracy. Bruce Ackerman, for example, shares Posner and Vermeule's view that executive power is largely unconstrained, but believes this puts the American republic in grave peril.<sup>53</sup> For these reasons, scholars have proposed that courts *should* exercise judicial oversight<sup>54</sup> and that legislatures should not simply defer to the executive even in times of crisis.<sup>55</sup>

Posner and Vermeule's empirical assumptions have likewise been challenged. In the United States, many scholars agree with Posner and Vermeule that courts tend to be deferential during a national security crisis. While courts may insist on statutory authorization, they do not typically engage in substantive rights review during crises.<sup>56</sup> Yet, the claim that U.S. governance is permanently Schmittian has encountered substantial criticism. A number of scholars, including Rick Pildes, Sai Prakash, Michael Ramsay, and Aziz Huq, have all argued that Posner and Vermeule understate the efficacy of legal checks and balances and the extent to which the executive is constrained by law.<sup>57</sup>

### B. *Legal Bases for Emergency Powers*

How does the executive become unbound? Or how is it that the executive amasses extraordinary powers in times of emergency? Posner and Vermeule assume that, during emergencies, the ordinary constitutional framework formally stays in place, but that in practice, there will be massive delegation to the executive by the other branches of government. Their account describes the United States; yet, in many countries, there is another way in which the executive can become empowered during an emergency, which by invoking a special constitutional emergency regime. These regimes have developed and spread precisely to advance Rossiter's idea of a "constitutional dictator," who gains special powers to preserve the constitutional order without changing it.<sup>58</sup>

Because our account is comparative, this Part will describe these two different models: one in which the constitution contemplates emergency rule, and the other in which legislation provides the main source of power. Both models provide the executive with additional powers during crisis, and both are potentially vulnerable to abuse. At the same time, under each of these models, it is possible for other branches to check the executive, and so they have implications for our empirical examination.

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<sup>53</sup> BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 72 (2010).

<sup>54</sup> See, e.g., GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004).

<sup>55</sup> Bruce Ackerman, *The Emergency Constitution*, 113 *YALE L. J.* 1029, 1068 (2003).

<sup>56</sup> See Issacharoff & Pildes, *supra* note 38, at 2 ("When courts have upheld the government's actions, they have done so only after a judgment that Congress, as well as the executive, has endorsed the action."); cf. Cass R. Sunstein, *Minimalism at War*, 2004 *SUP. CT. REV.* 47 (2004) (observing that U.S. courts have taken a minimalist approach towards judicial review during times of crisis).

<sup>57</sup> Aziz Huq, *Binding the Executive (by Law or by Politics)*, 79 *U. CHI. L. REV.* 777, 782–83 (2012) ("[T]he realists PV underestimate the extent to which legal rules and institutions play a pivotal role in the production of executive constraint."); Richard A. Pildes, *Law and the President*, 125 *HARV. L. REV.* 1381, 1402 (2012) ("Posner and Vermeule do not actually present much evidence at all, let alone convincing evidence, for their descriptive claim that modern presidential power is largely unconstrained by law"); Prakash & Ramsey, *supra* note 50, at 996 ("There is little doubt that the prospect of judicial review and release had an *in terrorem* effect on the Executive Branch.").

<sup>58</sup> ROSSITER, *supra* note 23, at 306.

1. *Constitutional Emergency Powers.* Over 90 percent of all constitutions today include clauses allowing for the declaration of a state of emergency.<sup>59</sup> Once invoked, the government can rule by decree and take extraordinary actions that would not be normally permitted. Most notably, a state of emergency usually allows the government to “derogate” from some rights, meaning that these rights are formally suspended as required by the emergency. It might further allow the executive to assume powers that usually belong to other state organs, including those of provinces or regions.<sup>60</sup>

Yet, most modern constitutions not only accommodate emergency rule, but simultaneously seek to constrain the use of emergency powers. The reason is that emergency powers are potentially prone to abuse, a concern that has informed the design of regimes of exception since the Romans. James Madison argued that, “perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad.”<sup>61</sup> There are numerous historical examples of this prediction coming to pass. Brian Loveman’s magisterial study of Latin America traces two centuries of such behavior, in which autocrats have invoked emergency powers to dissolve parliament, suspend the constitution, and rule without constraints.<sup>62</sup> Indira Gandhi’s 1975 declaration of emergency in India led to the targeting of her political opponents for detention and torture.<sup>63</sup> Benito Mussolini’s first act as Prime Minister of Italy in 1925 was to demand emergency powers, which he then deployed against his political enemies.<sup>64</sup> And the Reichstag Fire in Germany provided the impetus for Adolf Hitler to acquire plenary powers through the Enabling Act of 1933.<sup>65</sup>

To prevent potential abuse, most constitutional emergency regimes build in safeguards against abuse by insisting upon checks and balances. Notably, 60 percent of constitutions in force (and 73 percent of democratic constitutions) require parliament to declare the state of emergency.<sup>66</sup> Many further stipulate that during the state of emergency, parliament cannot be dissolved.<sup>67</sup> In some places, the constitution cannot be amended during an emergency, reflecting the idea that the ultimate goal of a state of emergency is to preserve the constitutional order, and not to change it.<sup>68</sup> In addition, many constitutions also set an automatic expiration date for emergency powers,

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<sup>59</sup> Data on file with authors; see also Christian Bjørnskov & Stefan Voigt, *The Architecture of Emergency Constitutions*, 16 INT’L J. CON. L. 101, 101 (2018).

<sup>60</sup> See, e.g., Constitution of India, art. 356 (1950) (India).

<sup>61</sup> ARTHUR SCHLESINGER, *THE IMPERIAL PRESIDENCY* ix (1973) (quoting Letter from Madison to Jefferson, May 13, 1798).

<sup>62</sup> BRIAN LOVEMAN, *THE CONSTITUTION OF TYRANNY: REGIMES OF EXCEPTION IN SPANISH AMERICA* (1993); see also Arend Lijphart, *Emergency Powers and Emergency Regimes: A Commentary*, 18 ASIAN SURV. 401, 401 (1978) (suggesting that the use of emergency regimes is a widespread cause for the breakdown of democracy).

<sup>63</sup> GYAN PRAKASH, *EMERGENCY CHRONICLES: INDIRA GANDHI AND DEMOCRACY’S TURNING POINT* (2018) (describing the emergency and arguing for its continuing effects in India today).

<sup>64</sup> ROBERT PAXTON, *THE ANATOMY OF FASCISM* 128 (2004).

<sup>65</sup> *Id.* at 107.

<sup>66</sup> Data on file with authors. Democratic constitutions are those that operate in countries with a Polity2 score of greater than 5.

<sup>67</sup> La Constitution (Constitution), art. 16 (1958) (Fr.) Constitución Española de 1978 (Spanish Constitution of 1978), art. 16, 116 (1978) (Spain).













<sup>68</sup> See, e.g., Constituição da República Portuguesa (Constitution of the Portuguese Republic), art. 289 (1976) (Port.) (“No act involving the revision of this Constitution shall be undertaken during a state of siege or a state of emergency.”); see generally Ferejohn & Pasquino, *supra* note 19, at 210–12.

and mandate parliamentary approval for extending emergency rule.<sup>69</sup> Such requirements are particularly important because they ensure that emergency rule is subject to legislative oversight, is not used to undermine the constitution itself, and is limited in duration. Constitutions further seek to prevent abuse by enumerating a limited set of circumstances that allow an emergency to be declared. The most common causes are war or foreign aggression, (found in 48% of constitutions with emergency provisions), internal security (37%), general danger (26%) or a natural disaster (14%).<sup>70</sup> Thus, while constitutional emergency regimes allow the executive to assume additional powers, they rarely authorize a truly unbound executive.

Abuse of constitutional emergency powers can further be reined in through judicial review. We acknowledge that the traditional image of a state of emergency is one where the “constitutional dictator” assumes all power, and in which rights are suspended and therefore not enforced. Even so, there is no doubt that courts can scrutinize whether emergency power was properly invoked and whether the required constitutional procedures were followed.<sup>71</sup> Indeed, some constitutions explicitly build in judicial oversight of emergency powers.<sup>72</sup> What is more, international human rights bodies have recently clarified that any restrictions on rights imposed during emergency rule (referred to as “derogations” in international human rights law) need to be necessary, proportional, and justified by an important public goal, thus satisfying the same requirements as rights limitations placed in ordinary times.<sup>73</sup> This insight opens the door for courts to review the necessity and proportionality of restrictions on rights, even if there has been a derogation.

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<sup>69</sup> See, e.g., Το Σύνταγμα της Ελλάδας (Constitution of Greece), art. 48 (1975) (Greece) (“1... The resolution of Parliament determines the duration of the effect of the imposed measures, which cannot exceed fifteen days.... 3... The duration of the measures mentioned in the preceding paragraphs may be extended every fifteen days, only upon resolution passed by the Parliament which must be convoked regardless of whether its term has ended or whether it has been dissolved.”); see also Konstytucja Rzeczypospolitej Polskiej (Constitution of the Republic of Poland), art. 232 (1997) (Pol.); Constitución Española de 1978 (Spanish Constitution of 1978), art. 116 (1978) (Spain); Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany), art. 151.2 (1949) (Ger.).

<sup>70</sup> Data from Comparative Constitutions Project on file with authors. It is worth noting that only few constitutions explicitly mention public health as a ground for declaring a constitutional emergency, which might have been an obstacle to using emergency powers in the current crisis. Examples of constitutions that do reference public health include: Constitution de la République Centrafricaine (Constitution of the Central African Republic), Art. 19 (2016) (Cent. Afr. Rep.); Azərbaycan Respublikasının Konstitusiyası (Constitution of the Republic of Azerbaijan), art. 112 (2009) (Azer.); Constitución Política de la República de El Salvador de 1983 (Constitution of the Republic of El Salvador, 1983), art. 29 (1983) (El Sal.);             (Constitution of the Federal Democratic Republic of Ethiopia), art. 93 (1994) (Eth.); Constitución Política (Political Constitution), art. 187 (1982) (Hond.).

<sup>71</sup> For an argument that courts should review declarations of emergency, see ALAN GREENE, PERMANENT STATES OF EMERGENCY AND THE RULE OF LAW: CONSTITUTIONS IN AN AGE OF CRISIS (2018).

<sup>72</sup> Constitución Política de Colombia (Political Constitution of Colombia), Art. 214.6 (2005) (Colom.) (“The Government will send to the Constitutional Court on the day following their promulgation the legislative decrees issued under the powers mentioned in the above articles so that the Court may decide definitively on their constitutionality. Should the government not comply with the duty of transmitting the decrees, the Constitutional Court will take its office and immediately render its opinion [of the decrees].”); see also Constitución de la Republica del Ecuador 2008 (Constitution of the Republic of Ecuador 2008), art. 436.8 (2008).

<sup>73</sup> Compare Human Rights Committee, General Comment 29, Art. 4 (2001), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, U.N. Doc. CCPR/C/21/Rev.1/Add.11 at 3, 4 (2001) (describing derogations) with Human Rights Committee, General Comment 27, Art. 12 (Sixty-seventh session, 1999), CCPR General Comment No. 27: Article 12 (Freedom of Movement), U.N. Doc. CCPR/C/21/Rev.1/Add.9 at 11, 14 (1999) (describing limitations). For a discussion in light of the current pandemic, see OHCHR & Human Rights Committee,



Not all constitutions include clauses allowing for a state of emergency. One notable example is the U.S. Constitution, which does not recognize a general “state of emergency,” although it allows Congress may suspend the writ of habeas corpus “when in Cases of Rebellion or Invasion the public Safety may require it” and “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”<sup>74</sup> These provisions, however, have rarely been invoked, and in any case, they do not envision special powers for the President, but for Congress (to suspend habeas corpus) and the military (during martial law). Indeed, it is likely that the framers believed that the Constitution granted sufficient ordinary powers to the President and the states to deal with emergencies.<sup>75</sup> Countries like Japan, Belgium, and Sweden likewise do not have constitutional emergency clauses.

2. *Statutory Authorization.* Even when a constitutional emergency regime does exist, this does not necessarily mean it has to be invoked during an emergency. Executives can be granted additional powers through ordinary legislation, which may be sufficient to address the crisis. John Ferejohn and Pasquale Pasquino have called this the “legislative model” of crisis governance.<sup>76</sup> Such legislative delegation allows the executive to deploy additional powers that she does not normally possess, including restricting the exercise of rights. Rights are not absolute, and rights restrictions are usually permitted as long as they are necessary to accomplish some other important goal, use a proportional means to accomplish the stated goal, and based in law.<sup>77</sup> Indeed, the rights provisions in most modern constitutions have limitation clauses that allow necessary restrictions to accommodate urgent public needs.<sup>78</sup>

Ferejohn and Pasquino argue that, compared to the constitutional emergency regimes, this model has certain features that can rein in potential abuse, because ordinary checks and balances continue to operate.<sup>79</sup> First, it necessarily ensures legislative involvement, because the legislature has to designate the additional powers that will be granted to the executive.<sup>80</sup> Second, and perhaps more importantly, because the ordinary constitutional framework stays in place, executive actions are subject to judicial review.<sup>81</sup> That means that courts can review whether the restrictions on constitutional rights are indeed necessary and proportional, as well as properly authorized.

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*Address Derogations During Covid-19*, INTERNATIONAL JUSTICE RESOURCE CENTER (Apr. 29, 2020), <https://ijrcenter.org/2020/04/29/ohchr-human-rights-committee-address-derogations-during-covid-19/>.

<sup>74</sup> The Constitution of the United States of America, art. 1, sec. 8.15 & 9.2 (U.S.).

<sup>75</sup> CHRIS EDELSON & LOUIS FISHER, *EMERGENCY PRESIDENTIAL POWER: FROM THE DRAFTING OF THE CONSTITUTION TO THE WAR ON TERROR* 15 (2013) (observing that one “would marvel at how much Presidents have spun out of so little” in terms of the formal power granted to the President and that “this observation applies with even more force to emergency presidential power—the Constitution does not expressly grant any such power to the president.”).

<sup>76</sup> Ferejohn & Pasquino, *supra* note 19, at 216–17.

<sup>77</sup> ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* (2010); AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* (2012); *PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES* (Vicki C. Jackson & Mark Tushnet eds., 2017).

<sup>78</sup> *See, e.g.*, Costituzione della Repubblica Italiana (Constitution of the Republic of Italy), art. 16 (1947) (It.) (“Every citizen has the right to reside and travel freely in any part of the country, except for such general limitations as may be established by law for reasons of health or security. No restriction may be imposed for political reasons.”); Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany), art. 11 (1949) (Ger.).

<sup>79</sup> Ferejohn & Pasquino, *supra* note 19, at 216–17, 236–37.

<sup>80</sup> *Id.* at 217, 236.

<sup>81</sup> *Id.* at 236–37.

Legislation that authorizes additional powers for the executive during crises can be passed in anticipation of a crisis (*ex ante*) or when a crisis presents itself (*ex post*). *Ex ante* legislation allows the executive to assume additional powers if and when an emergency presents itself. For Posner and Vermeule, it is this type of legislation that epitomizes legislative deferral, as legislatures are not actively involved during a crisis. But of course, the extent to which the executive is actually bound depends on whether safeguards are built into such legislation. One option, used in some countries, is to require the legislature to declare the emergency that activates the legislation. Another option is to include an automatic expiration date, whereby the laws automatically cease to apply unless the emergency is extended by the legislature. In this vein, Bruce Ackerman has proposed that emergency legislation should include a super-majoritarian escalator, whereby the legislation has an automatic expiration date, unless ever-increasing majorities in the legislature vote to maintain the emergency.<sup>82</sup> Such safeguards, if adopted, can ensure legislative involvement and rein in the unbound executive.

Emergency legislation can also be passed *ex post*, granting the executive additional powers as needed. An advantage of this approach is that it ensures legislative involvement in the actual emergency and might allow tailoring to the specific needs of the crisis at hand. Yet, hastily drafted legislation adopted in the face of a crisis might also be problematic, especially when it stays on the books after the crisis ends. Indeed, many scholars are particularly concerned about this type of legislation. As Lord Hoffman famously put it in a U.K. House of Lords decision holding a newly anti-terror statute to be a violation of the European Convention of Human Rights, “[t]he real threat to the life of the nation... comes not from this terrorism but from laws such as these.”<sup>83</sup> Again, much will depend on how the legislation drafted. If the law is specific to a particular crisis, it reduces the risk that it will be used in future and possibly dissimilar (or even non-emergency) situations. And when the legislation includes a sunset clause, it reduces the risk that restrictions will stay in place permanently.

3. *Extra-Legal Action.* Of course, emergencies can also spur unauthorized executive action. One strand of literature has argued that it might actually be preferable for executives to act without clear legal basis. The key idea here is that because emergency actions often require the curtailment of civil liberties and entail delegation of extraordinary powers to the executive, it is best if we do not condone these actions as legal, but rather evaluate them after the emergency has passed.<sup>84</sup> These scholars also believe that courts should refrain from ruling on emergency measures in the heat of a crisis, as any decision upholding them might legitimize highly problematic uses of emergency powers. An often-cited illustration is the *Korematsu* decision, in which the U.S. Supreme Court, in the midst of WWII, held that it was constitutional to detain Japanese-Americans.<sup>85</sup> Thus, according to this view, it is best to see executive action during emergency as “extra-legal”: perhaps necessary in the moment, but not based on law, and to be condemned

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<sup>82</sup> Ackerman, *supra* note 55, at 1047.

<sup>83</sup> *A v. Secretary of State for the Home Department* [2004] U.K.H.L. 56; [2005] 2 A.C. 68, at 97.

<sup>84</sup> Oren Gross, *Chaos and Rules: Should Responses to Violent Crisis Always be Constitutional?*, 112 YALE L. J. 1011, 1090 (2003); Mark Tushnet, *Defending Korematsu? Reflections on Civil Liberties in Wartime*, 2003 WISC. L. REV. 273 (2003).

<sup>85</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

afterwards if excessive. The core idea here is that checks and balances might have to be temporarily suspended, but resume in full force once the emergency has passed.

It is also not uncommon during an emergency for the executive to act first, and then to look for some form of legal authorization (be it statutory or based on the constitutional emergency regime) later. A genuine emergency may not allow the executive to come up with a well thought out legal scheme, and a valid legal basis might be found later. In such cases, the actions are not necessarily illegal or extra-legal, but there might be some initial uncertainty over their precise legal basis.

### *C. Types of Emergencies*

One problem with the existing literature is that, although it theorizes about crisis governance in general, many of the key claims appear to be based on one particular type of emergency, namely a national security crisis, such as an invasion or domestic insurrection. This was the challenge that motivated the Romans to design the dictatorship; it was a central problem motivating Schmitt in Weimar Germany; and it led Posner and Vermeule to tackle the problem during the war on terror.<sup>86</sup>

The current pandemic, however, has made clear that emergencies come in many different forms, with implications for the locus of institutional response. Indeed, it is possible that the argument that only the executive has the requisite information and ability to act with speed and decisiveness may not hold for emergencies outside of the national security context. For the most part, however, this point has not been recognized by the existing literature.

Table 1 lists four particularly common types of crises: national security crises, financial crises, natural disasters, and pandemics. It describes how they differ on salient features on the nature of the crisis (their source, their speed, and how information on their danger is distributed) as well as about the nature of the response (whether there is a need for a uniform response, whether there is a need for secrecy, and how the tools to respond to the crisis are distributed).

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<sup>86</sup> POSNER & VERMEULE, *TERROR IN THE BALANCE*, *supra* note 8, at 17–18; SCHMITT, *POLITICAL THEOLOGY*, *supra* note 17, at 9–10; *see also* GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME - FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004).

**Table 1: Typology of Crises**

	<i>National Security</i>	<i>Financial Crisis</i>	<i>Natural Disaster</i>	<i>Pandemic</i>
<i>Source</i>	Violent actors	Regulatory failure	Nature	Nature
<i>Speed of crisis onset</i>	Fast	Fast	Fast	Slow
<i>Duration of crisis</i>	Variable	Variable	Short	Enduring
<i>Distribution of information on danger</i>	Concentrated	Concentrated	Decentralized	Decentralized
<i>Need for uniform response across territory</i>	High	High	Low	Depends, but generally low
<i>Need for secrecy</i>	High	Low	Low	Low
<i>Distribution of tools for response</i>	Concentrated	Concentrated	Decentralized	Decentralized

Let us begin with the national security crisis, which has been the basis for most conventional accounts of emergency governance. The source of this type of crisis is violent actors (be they terrorists or a foreign military) and events are typically fast-moving. There is usually need for a uniform response and a need for secrecy in formulating the response to keep it from the enemy. What is more, in such crises, the national-level executive branch will have access to unique information in the form of intelligence resources and capability assessments. This concentration of information, both at the center of government and in one branch thereof, makes it very difficult for other branches or subnational actors to second-guess executive decisions, as Posner and Vermeule argued.<sup>87</sup> It is for this reason that scholars like Posner and Vermeule believe that such crises require an unbound executive.

The second type of crisis, a financial crisis, is similar to a national security crisis in many ways. One difference is that there is less of a need for secrecy given that there is no outside enemy from which the response strategy needs to be hidden (although there still may need to be some secrecy vis-à-vis markets, but that is outside the scope of our analysis). But most importantly, financial crises typically require a highly technical response by central banks and ministries of finance. Further, these actors must address issues that touch on the economy as a whole. As a result, the response will likely be concentrated in the executive branch and central bank, as other government actors are unlikely to possess the necessary expertise to take appropriate action. It is for this reason

<sup>87</sup> POSNER & VERMEULE, *TERROR IN THE BALANCE*, *supra* note 8, at 170 (“Congress defers to the executive during emergencies because it agrees that the executive alone has the information and the means necessary to respond to imminent threats.”).

that many have observed that courts tend to be fairly deferential to the executive during financial crises, and it is hard to imagine a role for subnational actors.<sup>88</sup> Indeed, Posner and Vermeule treat financial crisis and national security crises as similar: both require an unbound executive.<sup>89</sup>

Now, consider natural disasters and pandemics. Of course, these two types of crises are not identical. Specifically, a pandemic may be slow-building in ways that are not true of earthquakes or other natural disasters. Furthermore, pandemics last much longer than a typical natural disaster, often manifesting in multiple waves.<sup>90</sup> Nonetheless, these two kinds of crises share distinct characteristics that have important implications for response governance. Neither natural disasters nor pandemics are manmade, meaning that there is no outside enemy other than mother nature herself. More importantly, natural disasters and pandemics differ from national security and financial crises in that information on the dangers is not concentrated but dispersed. In a pandemic in particular, information must be aggregated from thousands of health care providers. Furthermore, the quality of government information, both about the nature of the challenge and possible responses, may be no better than that in the private sector. Universities, foundations, pharmaceutical companies and other actors have expertise that likely exceeds that of government agencies themselves, and interact with each other in a complex informational ecosystem. As a result, local officials and private actors may have information superior to that held by the central executive.

Because of these features, the executive is structurally more “bound” in a health crisis or a natural disaster than in a national security crisis. When information is not centrally concentrated and there is no need for secrecy, courts and legislatures may not see the rationale for deferring to the executive branch, as they themselves have access to the same information as the executive. In fact, they may believe that they possess institutional advantages that will aid the crisis response. Implementation of a health response requires coordination of a broad set of actors, including hospitals, insurance companies, drug companies, logistics firms, and local emergency responders. These actors are not under the hierarchical control of the executive branch. Motivating them requires persuasion and coordination, and it is not clear that the executive branch has a comparative advantage in doing so vis-à-vis legislatures. While there is certainly an important role for a national government—coordinating vaccine development and distribution, for example—the technical knowledge required may very well lie outside of government itself, which makes it less obvious that the executive alone is to respond. Thus, in a natural disaster or pandemic, a uniform, concentrated response by the executive is less critical than for a national security crisis or financial crisis.

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<sup>88</sup> John Ferejohn, *Financial Emergencies*, in CONSTITUTIONS IN TIMES OF FINANCIAL CRISIS 18, 23 (Tom Ginsburg et al. eds., 2019); Tom Ginsburg et al., *Introduction: Liberal Constitutions during Financial Crises*, in CONSTITUTIONS IN TIMES OF FINANCIAL CRISIS 1, 7 (Tom Ginsburg et al. eds., 2019) (questioning that courts will step up in times of economic crisis); Georg Vanberg & Mitu Gulati, *Financial Crises and Constitutional Compromise*, in CONSTITUTIONS IN TIMES OF FINANCIAL CRISIS 117, 141–42 (Tom Ginsburg et al. eds., 2019) (courts will defer to the executive when facing an economic crisis); *but see* Mark D. Rosen, *Legislatures and Constitutions in Times of Severe Financial Crisis*, in CONSTITUTIONS IN TIMES OF FINANCIAL CRISIS 71 (Tom Ginsburg et al. eds., 2019) (arguing for active legislative role in financial crisis); Mila Versteeg, *Can Rights Combat Economic Inequality?*, 133 HARV. L. REV. 2036, 2039–40 (2020) (describing how some courts have used social rights to strike down austerity policies).

<sup>89</sup> Posner & Vermeule, *Crisis Governance*, *supra* note 30, at 1614.

<sup>90</sup> *See, e.g.*, JOHN M. BARRY, THE GREAT INFLUENZA 51 (2004) (describing multiple waves of Spanish flu over two years).

The dispersed nature of information, along with the need to implement programs on the ground, empowers lower level actors. Natural disasters are typically concentrated in a particular part of a country, as is true of most health crises (although COVID-19 is exceptional in this regard). This means that local governments possess superior information about the challenges as well as the tools necessary to respond. In a pandemic, subnational units are also crucial in implementing the crisis response, and in providing information to the central government. This role empowers them to potentially take independent action, perhaps even in defiance of the central government. This is especially true in federal systems, in which states typically have independent law-making powers in the area of public health. Federalism makes policy implementation complex, uneven and uncertain even under ordinary circumstances and such challenges are exacerbated during times of crisis.<sup>91</sup> In a pandemic, states can refuse to implement emergency orders that they perceive as particularly draconian or impose stricter measures than the national government if they deem the national response insufficient. The same might be true in non-federal (unitary) countries: because provinces, municipalities and cities are needed to implement the response, they are empowered to resist the national response.<sup>92</sup>

We recognize that our typology is not perfectly clean, and that one type of crisis can bleed over into another type. For example, a natural disaster or pandemic might lead to severe economic consequences and even a financial crisis. In addition, certain types of national security crises, including the war on terror, may actually implicate local governments and thus be susceptible of similar implementation problems.<sup>93</sup> And some aspects of a pandemic might be more like a financial crisis, in that they require a technical response (vaccine development offers an example). But the distinctions as to the speed and duration of the crisis, and the information structure of the challenge, *do* invite normative consideration as to which government actor or combination of actors is best positioned to respond. It is far from clear that the national executive ought to be the lead actor in every emergency.

The distinct nature of slow-developing crises like pandemics was recently highlighted by the Nobel-prize winning philosopher Amartya Sen, who, drawing on his important work on famines, distinguishes between wars and “social calamities” and argues that a pandemic is a social calamity.<sup>94</sup> Sen notes that “[t]ackling a social calamity is not like fighting a war which works best when a leader can use top-down power to order everyone to do what the leader wants — with no need for consultation.” Instead, he argues that what is needed to deal with social calamity like a pandemic “is participatory governance and alert public discussion.”<sup>95</sup> Sen observes that a

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<sup>91</sup> Kenneth Wiltshire, *Federalism and Policy Implementation*, OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS 1 (2020).

<sup>92</sup> On the difference between federalism and decentralization, see Sujit Choudhry & Nathan Hume, *Federalism, Devolution and Secession: from Classical to Post-conflict Federalism*, in RESEARCH HANDBOOK ON COMPARATIVE CONSTITUTIONAL LAW 356, 358 (Rosalind Dixon & Tom Ginsburg eds., 2010).

<sup>93</sup> *But see* William Stuntz, *Local Policing after the Terror*, 111 YALE L.J. 1637 (2002); Matthew Waxman, *National Security Federalism in the Age of Terror*, 61 STAN. L. REV. 289, 295 (2012) (discussing vertical distribution of powers after 9/11).

<sup>94</sup> Amartya Sen, *Listening as Governance*, SIXTEEN (Apr. 10, 2020), <https://sixteens.fr/2020/04/10/listening-as-governance-by-amartya-sen/>; see also AMARTYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION 78–85 (1983) (government failure in famine response).

<sup>95</sup> Sen, *supra* note 94.

pandemic affects different groups of citizens differently, and that addressing their diverse needs is “much aided by a participatory democracy, in particular when the press is free, public discussion is unrestrained, and when governmental commands are informed by listening and consultation.”<sup>96</sup> Sen is not explicitly focused on checks and balances or the relative roles of different branches of government; but his analysis further highlights how crisis governance should be different in a pandemic than in a national security crisis. National security is the ultimate “public good” which is provided uniformly to all within a territory.<sup>97</sup> Decision-making naturally requires a certain amount of centralization. Public health, in contrast, requires the delivery of services across a vast array of different areas, with much tailoring to local conditions. There is no reason to think a single national response is likely to be ideal, but instead, the particular needs of different parts of the population ought to be taken into account. Building upon Sen, it is reasonable to think that doing so requires involvement by different branches of government as well as local officials, rather than an unbound executive. Part IV returns to this theme and develops a normative account on crisis governance during pandemics.

### III. A GLOBAL SURVEY OF THE PANDEMIC RESPONSE

The pandemic of 2020 provides an opportunity to interrogate the literature’s assumptions about emergency governance. To that end, this Article presents original data on the pandemic response, and the extent to which different government actors have been involved in it, in over one hundred countries. This Part describes our data collection efforts and presents global patterns in the data. The next Part presents a more in-depth analysis of the different ways in which courts, legislatures and subnational units have involved themselves in the pandemic response.

#### A. A Global Dataset

To systematically survey checks and balances in the pandemic, we compiled a global dataset on the legal response to COVID-19. Specifically, it collects information for some 106 countries and their pandemic responses through mid-July 2020. For each country, we first identified the formal legal basis for the COVID-19 response: i) whether the country declared an emergency under the constitution; ii) whether it relied on legislation, either new or old; or iii) whether the executive acted without clear any legal authorization whatsoever. We next documented whether constraints have been imposed on the executive by the legislature, the judiciary, or subnational units.

For the legislature, we asked whether it had been involved in the pandemic response either by declaring a state of emergency or by passing new legislation. If a state of emergency was declared, we coded whether the legislature was involved in declaring and/or extending the state of emergency beyond its initial expiration date. If new legislation was passed, we coded whether it was i) specific to the current crisis, and ii) whether it has an automatic expiration date. We also documented whether there was an *ongoing* role for the legislature, which we assumed to be the case if i) the legislature had to extend the state of emergency, or ii) the legislature passed temporary legislation that would have to be re-activated upon expiration, or iii) there was some formal parliamentary oversight of the executive’s pandemic response. For courts, we documented

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<sup>96</sup> *Id.*

<sup>97</sup> Tyler Cowen, *Public Goods*, LIBR. ECON & LIBERTY, <https://www.econlib.org/library/Enc/PublicGoods.html>.

whether they had issued any decisions scrutinizing the country's pandemic measures. If courts were involved, we next consulted and analyzed these cases in a qualitative matter. For sub-national units, we coded i) whether sub-national units had independent powers to set their own pandemic response, ii) whether they were involved in creating or implementing the national response, and iii) whether they had resisted the national government.<sup>98</sup>

Ours is not the only data collection effort relating to pandemic policies and civil liberties. A number of existing initiatives by the International Center for Non-Profit Law, by the Center for Civil and Political Rights, and by the University of Oxford Blavatnik School of Governance code the specific measures that countries have taken, how stringent they are, and how they have affected civil liberties.<sup>99</sup> Other novel databases focus on the postponement of elections,<sup>100</sup> whether and how courts proceedings have been affected<sup>101</sup> and whether and how parliamentary proceedings have been affected.<sup>102</sup> Our data collection effort, however, differs from these other projects. While some of the existing efforts do document whether a state of emergency has been declared, they do not clarify in detail the legal basis of the state of emergencies (notably, sometimes a health emergency can be declared under public health legislation, rather than the constitution).<sup>103</sup> And to our knowledge, ours is the only attempt to systematically document judicial, legislative and subnational involvement in the pandemic response.

A team of research assistants at the University of Chicago Law School, the University of Virginia Law School and Harvard Law School answered a set of standardized questions for each country. All research assistants either graduated from law school or are currently in law school. All the Latin America memorandums were written by native or fluent Spanish-speakers, while French-speaking countries were covered by native or fluent French-speakers. For most other countries, we had to rely on English language sources. Yet, considering the political salience of the COVID-19 lockdowns, we found that there were always multiple sources describing the events in English, and we therefore believe that language barriers did not constitute a significant obstacle to our research. Only in a small number of cases were we unable to answer some of the questions, and in those cases, we simply left the questions unanswered.

Most countries' legal responses were easy to classify, but we faced occasional judgement calls. In some cases, it was not always clear what to count as legislation. This was the case for countries

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<sup>98</sup> All the country questionnaires on which our data are based are available from the authors upon request.

<sup>99</sup> *Coronavirus Government Response Tracker*, BLAVATNIK SCHOOL OF GOVERNMENT OF THE UNIVERSITY OF OXFORD, <https://www.bsg.ox.ac.uk/research/research-projects/coronavirus-government-response-tracker>; *COVID-19 Civic Freedom Tracker*, INTERNATIONAL CENTER FOR NOT-FOR PROFIT LAW, <https://www.icnl.org/covid19tracker/>; *States Of Emergencies in Response To The Covid-19 Pandemic*, CENTER FOR CIVIL AND POLITICAL RIGHTS, <https://datastudio.google.com/u/0/reporting/1sHT8quopdfavCvSDk7t-zvqKIS0Ljiu0/page/dHMKB>.

<sup>100</sup> *Global Overview of Covid-19 Impact on Elections*, INT'L IDEA (Mar. 18, 2020), <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>.

<sup>101</sup> See e.g., Matt Pollard, Mathilde Laronche & Viviana Grande, *COVID-19 Symposium: The Courts and Coronavirus (Part II)*, OPINIO JURIS (Apr. 3, 2020), <http://opiniojuris.org/2020/04/03/covid-19-symposium-the-courts-and-coronavirus-part-ii/>.

<sup>102</sup> Ittai Bar-Siman-Tov, *Parliamentary Activity and Legislative Oversight during the Coronavirus Pandemic - A Comparative Overview*, B. ILAN U. FAC. L. RES. PAPER NO. 20-06 (2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3566948](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3566948).

<sup>103</sup> For an analysis, see Alejandro Cortés-Arbeláez, *Pandemic and States of Emergency: A Comparative Perspective*, INT'L J. CONST. L. BLOG (May 22, 2020), <http://www.iconnectblog.com/2020/05/pandemic-and-states-of-emergency-a-comparative-perspective/>.



that used a special type of executive order: a “decree law” that is passed by the executive, but that later would have to be ratified by parliament. We found that this approach was taken in Italy, Greece, Portugal, Morocco, and Tunisia.<sup>104</sup> Because parliamentary approval is ultimately required, we coded this as legislation, and thus a legislative response to the emergency. Another question concerned countries that invoked their constitutional emergency regimes, but where the details of the emergency regime are worked out in legislation, typically an organic law. Since such organic laws are mandated by the Constitution and widely considered to be distinct from ordinary legislation, we coded this as a constitutional response, not a legislative one. We also had to make judgment calls about the scope of legislative involvement. We decided to focus only on the main response to curb the virus (in most countries this entails some form of lockdown). This meant that if the legislature had been involved merely in the passing economic stimulus packages, we did not code this as the passing of new legislation. Note that, with this decision, we actually understate the degree of legislative involvement, as many legislatures have passed economic stimulus legislation in response to the pandemic.

Another judgement call concerned the question what kind of cases to treat as judicial oversight. The current pandemic raises a whole host of legal issues, in many different realms. We decided to only focus on judicial decisions that directly scrutinize the government’s pandemic response. To illustrate, a ruling by a court in India which held that “a lockdown in these unprecedented times, is not a legal basis for termination or repudiation of a contract,” was not counted as a case of judicial oversight over the pandemic response.<sup>105</sup> We likewise excluded cases in which criminal courts are involved in sentencing those who violate lockdown orders.<sup>106</sup> We further excluded cases by international courts.<sup>107</sup> We also only coded a country as having judicial involvement if the court actually invalidated or modified (parts of) the pandemic response or ordered the government to take certain actions. Thus, we do not include instances in which courts declare cases inadmissible or uphold pandemic measures. Following this rule, we excluded a case from Chile in which the Constitutional Tribunal upheld the government’s decision not to release those prisoners that were convicted of crimes against humanity.<sup>108</sup> Yet, if courts upheld laws or emergency declarations, but nonetheless ordered the government to take certain actions, we coded these as instances of judicial

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<sup>104</sup> لعام المغربية المملكة دستور (Constitution of the Republic of Tunisia), art. 70, §2 (2014) (Tunis.); 2011 (Constitution of the Kingdom of Morocco of 2011), art. 81 (2011) (Morocco); Το Σύνταγμα της Ελλάδας (Constitution of Greece), art. 44 (1975) (Greece); Costituzione della Repubblica Italiana (Constitution of the Republic of Italy), art. 77 (1947) (It.).

<sup>105</sup> Tushar Behl, *How the Bombay High Court Is Changing Force Majeure Amid COVID-19*, JURIST (May 14, 2020), <https://www.jurist.org/commentary/2020/05/tushar-behl-force-majeure-india-covid19/>.

<sup>106</sup> See, e.g., Goitsemodimo Kaelo, *BPF Spokesperson Denied Bail by Lobatse High Court*, MMEGI ONLINE (Apr. 18, 2020), <https://www.mmegi.bw/index.php?aid=85276&dir=2020/april/18>.

<sup>107</sup> The Inter-American Court of Human Rights ordered Panama to provide relief to migrants at the border. See Juan Zamorano, *Regional Court Orders Panama to Protect Migrants’ Health*, AP NEWS (May 28, 2020), <https://apnews.com/b0e1f08194363f1aa6564da3c8691f65>. A Spanish group of COVID-19 survivors recently filed a case with the prosecutor’s office of the International Criminal Court accusing the Spanish President of genocide. See A. Alamillos, Carlos Barragán, E. Andrés Pretel & P. Bruni, *Judicializar La Ira: Enfurecidos Por El Covid, Los Ciudadanos Del Mundo Buscan Culpables* [Judicialize the Anger: Enraged by the Covid, the Citizens of the World Seek Guilty], EL CONFIDENCIAL (June 12, 2020), [https://www.elconfidencial.com/mundo/europa/2020-06-12/ciudadanos-enfurecidos-buscan-culpables-covid\\_2635676/](https://www.elconfidencial.com/mundo/europa/2020-06-12/ciudadanos-enfurecidos-buscan-culpables-covid_2635676/).

<sup>108</sup> Cristopher Ulloa, *Tribunal Constitucional de Chile rechaza recurso que buscaba indulto conmutativo a autores de delitos de lesa humanidad* [Constitutional Tribunal of Chile Rejects Appeal Seeking Commutative Pardon for Perpetrators of Crimes against Humanity], CNN (Apr. 14, 2020), <https://cnnespanol.cnn.com/2020/04/14/alerta-chile-tribunal-constitucional-rechaza-recurso-que-buscaba-indulto-conmutativo-a-autores-de-delitos-de-lesa-humanidad/>.

involvement. Examples include a case from Ecuador (discussed below)<sup>109</sup> and one from St. Kitts and Nevis.<sup>110</sup> Likewise, if courts reviewing the pandemic response cause the government to preemptively modify its actions ahead of a ruling, then we do count this as judicial involvement, since in this scenario, courts did impact the pandemic response measures.

Another issue we have to grapple with is that this is an area that is changing rapidly and that many countries have pursued multiple legal strategies. We updated many of the memos as the pandemic response unfolded. All memos are up to date through July 15, 2020. This time period captures the first critical stage during which countries locked down amidst substantial uncertainty and panic over the nature of the new virus, as well as some four months thereafter (though this time period varies from country to country depending on when the virus was first detected and how quickly it was contained if it was).

### *B. Global Exploration of the Pandemic Response*

Exploration of our initial data reveals that a legislative response to the current crisis is most common, though not by much. Specifically, some 52% of the countries surveyed thus far have relied on legislation in their pandemic response. These include major democracies such as Germany, France, the Netherlands, Switzerland, Austria, the U.S, Australia, Belgium, Taiwan, South Korea, South Africa, and Japan, among others. In many cases, this legislation deals with infectious diseases or public health,<sup>111</sup> although countries also use other types of laws on disasters and emergencies.<sup>112</sup>

Although 89% of the countries surveyed have a detailed emergency regime in their constitution, just 43% of the countries with such a regime declared a state of emergency (while 40% of the full sample did). These include Spain, Hungary, the Czech Republic, Hungary, Armenia, and, Sierra Leone, and Senegal, amongst others (notably, 33% of authoritarian regimes did so compared with 42% of democratic regimes, suggesting that invoking the constitution's emergency provisions is not necessarily an authoritarian response). Finally, in ten countries, China, Cuba, Cameroon, Belarus, Saudi Arabia, Sudan, Cambodia, Rwanda, Laos, and Tanzania, the pandemic response was entirely based on executive action, and the formal legal basis for the action was never officially clarified. (In Belarus, the government response has been virtually non-existent, because Alexander Lukashenko, the country's authoritarian strongman, denies the impact of COVID-19 and has stated that "no one really dies of covid-19 alone" and recommending citizens respond with "saunas and vodka."<sup>113</sup>). We coded these cases as consisting of neither a constitutional nor a legislative

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<sup>109</sup> See *infra* note 149 and surrounding text.

<sup>110</sup> *Court orders level playing field from police and ZIZ*, CARIBBEAN NEWS GLOBAL, (May 30, 2020) <https://www.caribbeannewsglobal.com/court-orders-level-playing-field-from-police-and-ziz/>.

<sup>111</sup> See, e.g., Chuanran Bing Fangzhi Fa [Communicable Disease Control Act], art. 58 (Taiwan); 감염병의 예방 및 관리에 관한 법률 [Infectious Disease Control And Prevention Act], art. 47 (South Korea); Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen (Infektionsschutzgesetz-IfSG) [Infectious Disease Protection Act], art 16 (Germany).

<sup>112</sup> See, e.g., Biosecurity Act 2015 (Cth), available at <https://www.legislation.gov.au/Details/C2020C00127> (Australia).

<sup>113</sup> Isabelle Khurshudyan, *Coronavirus is spreading rapidly in Belarus, but its leader still denies there is a problem*, WASH. POST (May 2, 2020), <https://www.washingtonpost.com/world/europe/coronavirus-is-spreading-rapidly-in->

response, but rather as one based on executive action alone. Notably, these are all authoritarian settings.

Our data also allows us to analyze the extent to which there has been legislative oversight, judicial oversight and resistance from subnational units. First, our data reveals that there has been a substantial role for legislatures in managing the pandemic. Legislatures have been directly involved in the pandemic response 64% of the countries we surveyed—either because they had to declare or extend a state of emergency or because they passed new legislation (not including economic legislation). In 75% of the countries that declared a state of emergency under their constitution, the legislature had to either declare or extend the emergency. And in 45% of the countries that used legislation as the basis of their pandemic response, the legislature has drafted new laws to deal with the current pandemic (while 23% of countries that used legislation to respond also amended existing laws). Notably, in 72% of the countries that drafted new legislation, the legislation is specific to the current crisis. Similarly, 72% of countries that drafted new legislation made the new laws temporary. In most cases, the countries that passed COVID-19 specific laws also made them temporary. But a notable exception is Poland, where the new law does not have an expiration date (while conversely, Kenya drafted a pandemic management bill that is temporary but does not specifically single out COVID-19).<sup>114</sup>

Perhaps even more tellingly, legislatures have an *ongoing* involvement in the pandemic response in 52% of the countries we surveyed. (As noted, we treat legislatures as having an ongoing role when they have to extend the constitutional emergency, *or* when they pass temporary legislation that has to be periodically renewed, *or* because there is some sort of parliamentary oversight committee). With respect to this ongoing involvement, there is an important difference between democratic and autocratic regimes: 68% of democratic regimes in our data ensured an ongoing role for the legislature, compared with 30% of autocratic regimes. While these numbers do not reveal much about the quality of legislative engagement, they show at minimum that legislatures have not been sidelined in democratic countries.

Our data also reveals evidence of substantial judicial oversight over the pandemic response. Courts have become directly involved in the pandemic response in 41% of the countries we surveyed. Here we again observe an important difference between democratic and autocratic regimes: courts were involved in the pandemic response in 55% of democracies, compared with 27% of autocracies. Likewise, there has been some resistance from subnational units in 34% of the countries we surveyed (though outright defiance by subnational units is rarer; we found evidence of this in only 12% of cases). We found such resistance in 40% of democracies as compared with 28% of autocracies.

These different types of checks and balances often supplement each other. Notably, in no fewer than 82% of the countries in our data did we observe either legislative involvement *or* judicial enforcement *or* resistance from subnational units. The only democratic countries in our data where

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belarus-but-its-leader-still-denies-theres-a-problem/2020/05/01/a2532ba0-8964-11ea-80df-d24b35a568ae\_story.html.

<sup>114</sup> The Pandemic Response and Management Bill No. 6 (2020), KENYA GAZETTE SUPPLEMENT No. 44 (Kenya), available at <http://www.parliament.go.ke/sites/default/files/2020-04/Pandemic%20Response%20and%20Management%20Bill%2C%202020.pdf>.

the legislature, courts and subnational units have not (yet) exercised active oversight are Australia, Botswana, Jamaica, Switzerland, Peru, and Guyana. Of course, these might be countries in which the government anticipates effective constraints and is therefore already acting in ways that are consistent with the preferences of other branches. But another possibility is that these countries are among those at risk of abuse of executive power. We will return to this latter point in Part V.

If the descriptive claims about an unbound executive were correct, we would have expected to find a relatively low percentage of countries in which such constraints were evident. It is hard to state in the abstract what constitutes a “low” number, and the reader is free to draw her own conclusions from our data. But our qualitative sense is that 82% of all countries does not constitute a low number.

Of course, the numbers presented in this Part do not capture the quality and the intensity of the involvement by courts, legislatures and subnational actors. To illustrate, there are orders of magnitude distinguishing judicial involvement in a country like Germany—which has seen many cases, including some that invalidated parts of lockdown orders to protect fundamental rights---from that in a country like the Philippines, where the Supreme Court’s involvement was limited to the release of prisoners to curb the virus spread in jail<sup>115</sup> Both countries, however, are counted as having judicial involvement in the pandemic response. Likewise, there is substantial difference in legislative involvement between a country like Sweden, where the legislature passed new laws and devised a new oversight mechanism to review emergency regulations<sup>116</sup> and a country like Namibia, where the legislature had to approve and extend the state of emergency, but its role has been described as “rubberstamping” executive action.<sup>117</sup> Both countries, however, formally provide an ongoing role to the legislature to monitor the pandemic response. To give a sense of the nature of the engagement and resistance by other branches, the next Part discusses examples from around the world. While we ultimately leave it to the reader to make up her own mind, we believe that these examples do illustrate that, in many countries, constraints on the executive are meaningful and other branches have played an important role in formulating the pandemic response.

#### IV. CHECKS AND BALANCES IN A PANDEMIC

Our global survey reveals that the overwhelming majority of countries have witnessed at least some attempt by legislatures, courts and subnational units to rein in the executive. This Part analyzes and discusses each of these forms of checks and balances in more detail by providing illustrations from around the world. While our survey does not allow us to evaluate how successful these various institutions have been in producing to an effective pandemic response---whatever that might mean---we believe that these illustrations from around the world indicate that courts, legislatures and subnational governments have taken an active oversight role.

##### A. *Judicial Oversight*

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<sup>115</sup> See *infra* notes 194–195 and surrounding text below.

<sup>116</sup> See *infra* notes 219& 224and surrounding text below.

<sup>117</sup> *In the Name of Covid-19*, NAMIBIAN (May 15, 2020), <https://www.namibian.com.na/91085/read/In-the-Name-of-Covid-19>.

In over half of the democratic countries surveyed, courts were involved in the pandemic response. Here, we analyze some of these cases in some detail and identify several roles that courts can and have already played. Most basically, courts can ensure the procedural integrity of emergency regimes, by ensuring that appropriate steps are taken as outlined in laws and constitutional provisions. Courts can also balance the lockdown measures with constitutional rights and freedoms, which are obviously limited by the measures. Finally, they can make demands for substantive responses from political actors, insisting that they take greater or lesser steps in addressing the pandemic. We take each in turn.

### 1. *Ensuring Procedures are Followed*

One basic role that courts can play is to ensure that procedural requirements are followed. Following our discussion above, on the different formal legal bases of emergency powers, there are two broad varieties of such procedural review. First, when constitutional emergency provisions have been invoked, courts can evaluate whether all the constitutional requirements have been adhered to, such as the rule that the parliament must authorize and extend the use of emergency power. Second, when the response is not rooted in constitutional emergency powers, courts can insist that there must be legal authorization, typically by legislation, to ground measures taken by the executive. In the United States, where courts are widely considered to be deferential during times of crisis, commentators have observed that, when courts *do* get involved, they typically do insist upon legislative authorization for executive action.<sup>118</sup> Regardless of the exact approach, insisting on procedural integrity is the bread and butter of judicial review.

Our survey revealed a number of countries where courts have insisted upon legislative authorization. One example comes from Kosovo. In Kosovo, the initial government prohibition on the movement of people and vehicles was taken by executive decree. The country's Constitutional Court ruled that legislation was required for any "restriction of rights and freedoms."<sup>119</sup> Notably, the court held that declaring a state of emergency under the Constitution was unnecessary, but that limitation on rights had to be based in law.<sup>120</sup> Although the court invalidated the government's lockdown measures, it left them in place until the legislature had time to pass legislation. In Pakistan, the Supreme Court urged the national legislature to pass legislation to deal with the pandemic, as the government could not limit fundamental rights through executive decrees.<sup>121</sup> (Notably, this case reversed an earlier decision, discussed below, in which the court ordered the reopening of businesses on weekends, and came after two justices had tested positive for the virus).<sup>122</sup> In El Salvador, the Constitutional Chamber of the Supreme Court of Justice responded to arrests under the quarantine decree by demanding that Congress and the government provide a

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<sup>118</sup> See, e.g., Issacharoff & Pildes, *supra* note 38; *Youngstown Sheet & Tube Co. v Sawyer*, 343 U.S. 579, 637 (1952).

<sup>119</sup> Constitutional Review of Decision No. 01/15 of the Government of the Republic of Kosovo, of 23 March 2020, available at <https://gjk-ks.org/en/decision/vleresim-i-kushtetutshmerise-se-vendimit-nr-01-15-te-qeverise-se-republikes-se-kosoves-te-23-marsit-2020/> (Kos.).

<sup>120</sup> Kushtetuta E Republikës Së Kosovës (Constitution of the Republic of Kosovo), art. 55 (2008) (Kos.) (Fundamental rights and freedoms guaranteed by this Constitution may only be limited by law.).

<sup>121</sup> Supreme Court of Pakistan Jun. 8, 2020, *Suo Motu Case No. 1 of 2020, Sua Moto Action Regarding Combating the Pandemic of Corona Virus (Covid-19)*, 2, (Pak.) available at [https://www.supremecourt.gov.pk/downloads\\_judgements/s.m.c.\\_1\\_2020\\_08062020.pdf](https://www.supremecourt.gov.pk/downloads_judgements/s.m.c._1_2020_08062020.pdf).

<sup>122</sup> *Id.* at 5–6.

formal legal basis by passing a new law.<sup>123</sup> Likewise, the Romanian Constitutional Court declared unconstitutional fines imposed on those who violate lockdown orders. The government had declared a state of emergency under the constitution; yet, the court held that emergency decrees passed by the executive could not limit fundamental rights; this could only be done through legislation.<sup>124</sup>

Another important example comes from Israel. In response to the pandemic, the Israeli government sought to use cellphone data to track infected people as a way of enforcing quarantines, and the Prime Minister issued an order to this effect, relying on Shin Bet-gathered data to quarantine anyone who came into contact with infected persons. Normally, Shin Bet data can only be used for matters of terrorism and state secrets, extending to “other national security matters” only with the approval of the Secret Services Subcommittee of Parliament.<sup>125</sup> When the cabinet order was challenged, the Supreme Court required legislative authorization and oversight, and suspended the program for several days until the Knesset was able to convene.<sup>126</sup> The regulations then took effect after authorization by the Parliamentary committee. After further challenges from civil liberties groups, the Supreme Court held that the measures could only be taken by legislation.<sup>127</sup> While it allowed monitoring during the interim period while legislation is being passed, it ruled that the government could not use monitoring against journalists who were infected with the disease, for fear of compromising their sources.

Brazilian courts have protected procedural integrity in a number of cases. The country’s president Jair Bolsonaro has become notorious for consistently dismissing COVID-19 as the “little flu,”<sup>128</sup> and urging people to go about their lives, because “more people will die from unemployment than the coronavirus.”<sup>129</sup> To date, the Brazilian President (who himself caught the virus) has not issued nationwide stay-at-home orders, and keeps calling on local and regional authorities to remove their

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<sup>123</sup> Constitutional Chamber of the Supreme Court of Justice of El Salvador, Habeas Corpus, no. 148–2020, Mar. 26, 2020 (El Salv.) available at <http://www.jurisprudencia.gob.sv/PDF/HC148-2020.PDF>.

<sup>124</sup> Bianca Selejan-Gutan, *Romania in the Covid Era: Between Corona Crisis and Constitutional Crisis*, VERFASSUNGSBLOG (May 21, 2020), <https://verfassungsblog.de/romania-in-the-covid-era-between-corona-crisis-and-constitutional-crisis/>. Specifically, the fines violated article 115(6) of the Constitution, which holds that “Emergency ordinances may not be adopted in the field of constitutional laws; they may not affect the status of fundamental institutions of the state, the rights, freedoms and duties stipulated in the Constitution, and the voting rights, and may not envisage measures for the forcible transfer of certain assets into public property.” See *Constitutia Romaniei* (Constitution of Romania), art. 115(6) (1991) (Rom.).

<sup>125</sup> General Security Service Law, 5762-2002, art. 7(b)(6) (Isr.), available at [https://knesset.gov.il/review/data/eng/law/kns15\\_GSS\\_eng.pdf](https://knesset.gov.il/review/data/eng/law/kns15_GSS_eng.pdf).

<sup>126</sup> H CJ 2187/20 *Ben Meir v. Prime Minister*, (Apr. 26, 2020) (Isr.), available at <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts%5C20%5C090%5C021%5Cv43&fileName=20021090.V43&type=2> (published in Hebrew).

<sup>127</sup> *Israeli High Court: Legislation Required to Regulate COVID-19 Mobile Tracking*, THE MEDIA LINE (Apr. 27, 2020), <https://themedialine.org/headlines/israeli-high-court-legislation-required-to-regulate-covid-19-mobile-tracking/>.

<sup>128</sup> Simone Preissler Iglesias, Martha Viotti Beck & Samy Adghirni, ‘Little Flu’ Can’t Hurt Him: Why Bolsonaro Still Shuns Lockdowns, BLOOMBERG (Mar. 30, 2020), <https://www.bloomberg.com/news/articles/2020-03-30-little-flu-can-t-hurt-him-why-bolsonaro-still-shuns-lockdowns>.

<sup>129</sup> Fabio Murakawa, *Bolsonaro: Vai Morrer Muito Mais Gente Por Uma Economia Que Não Anda Do Que Por Coronavirus* [Bolsonaro: Many More People Will Die for a Stagnant Economy than for Coronavirus], VALOR (Mar. 17, 2020), <https://valor.globo.com/politica/noticia/2020/03/17/bolsonaro-vai-morrer-muito-mais-gente-por-uma-economia-que-no-anda-do-que-por-coronavirus.ghtml>.

lockdowns. Indeed, Bolsonaro even fired his popular Health Minister who called for a lockdown and the implementation of World Health Organization standards.<sup>130</sup> Brazilian courts have involved themselves in a number of ways, including ultimately by ordering lockdowns in some regions (we discuss these cases in Section IV.A.3 below). But when Bolsonaro tried to get around legislative approval requirements for some of his executive decrees, the Supreme Federal Tribunal halted this scheme.<sup>131</sup> The Constitution allows the President to issue provisional executive decrees to regulate urgent matters; yet, these need to be approved by Congress within 120 days, or they will be automatically revoked. Bolsonaro asked the country's highest court to lift the legislative approval requirement for 30 days due to the pandemic. The Tribunal, likely unconvinced by the President's sincerity in fighting the pandemic, rejected the President's request, finding that it would be an undue encroachment over Congress' lawmaking powers.<sup>132</sup> Brazilian courts have also intervened to protect the powers of subnational governments. While President Bolsonaro has consistently called upon regions and localities to end their lockdown orders, governors in 25 of 27 states have nonetheless kept them.<sup>133</sup> In response, Bolsonaro launched an attack on state authorities, arguing that they lacked the power to impose such measures independently. The case also eventually reached the Supreme Federal Tribunal, which issued a provisional order recognizing the joint competence of the union, states, and municipalities in the field of public health.<sup>134</sup> Thus, the court confirmed that states and municipalities could order local lockdowns even without the President's consent.

Legality requirements were also at the heart of the complicated decision by the Wisconsin Supreme Court, in which it struck down the state extension of the lockdown order imposed by the Department of Health Services over objections by the state legislature.<sup>135</sup> Although some of the opinion had grand statements about individual liberty, the key issue was one of administrative legality: whether the Department of Health Services had the power to extend the order in defiance of the state legislature. The Supreme Court held that the order, imposed by the Secretary for the Department of Health Services, "confining all people to their homes, forbidding travel and closing businesses exceeded the statutory authority" of the Department and therefore invalidated the order.<sup>136</sup>

In some countries that invoked a state of emergency under the constitution, courts have enforced the procedural requirements of constitutional emergency regimes. In the Czech Republic, a municipal court ruled that the Health Minister's coronavirus regulations restricting free movement

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<sup>130</sup> See Colm Quinn, *Bolsonaro Fires Brazil's Health Minister as Infections Grow*, FOREIGN POLICY (April 17, 2020), <https://foreignpolicy.com/2020/04/17/jair-bolsonaro-brazil-fires-health-minister-mandetta-coronavirus-infections-grow/>.

<sup>131</sup> STF, ADPF 663, Relator: Min. Alexandre de Moraes, 27.3.2020, (Braz.) available at <https://static.poder360.com.br/2020/03/ADPF-663.pdf.pdf>.

<sup>132</sup> *STF Recusa Pedido De Bolsonaro Para Suspender Prazos De MP Durante Crise* [STF Refuses Bolsonaro's Request to Suspend MP Deadlines During Crisis], PODER 360 (Mar. 27, 2020), <https://www.poder360.com.br/coronavirus/stf-recusa-pedido-de-bolsonaro-para-suspender-prazos-de-mp-durante-crise/>.

<sup>133</sup> Jen Kirby, *Jair Bolsonaro Undermined Brazil's Coronavirus Response. Now There's a Political Crisis*, VOX (Apr. 28, 2020), <https://www.vox.com/2020/4/28/21228512/brazil-bolsonaro-coronavirus-moro>.

<sup>134</sup> STF, ADI 6341, Relator: Min. Marco Aurélio, 24.03.2020 (Braz.), available at <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI6341.pdf>.

<sup>135</sup> *Wisc. Legislature v. Palm*, 2020 WI 42 (Wis. 2020).

<sup>136</sup> *Id.* at ¶4.

and retail were imposed illegally. Such measures could only be imposed by the government under the Constitution for a period of thirty days.<sup>137</sup> In this case, the government's emergency measures had expired, and the health minister had simply re-imposed them using public health legislation as a legal basis. The court ruled that measures restricting rights can only be passed using the special procedures set out in the constitution, which require measures to be temporary and subject to parliamentary oversight.<sup>138</sup> Similarly, when President Bukele of El Salvador extended the state of emergency without parliamentary approval,<sup>139</sup> the country's Supreme Court held his declaration to be unconstitutional.<sup>140</sup> The President did so because Parliament had not extended the constitutional emergency regime in its last session, and the state of emergency was about to expire.<sup>141</sup> In extending the state of emergency, Bukele relied on a law that allowed the President to extend the state of emergency when parliament was not in session.<sup>142</sup> The court observed that parliament *was* in session, and further, that it was scheduled to meet in the days before the declaration of the state of emergency under the constitution was set to expire.<sup>143</sup> The court held that the order violated the separation of power scheme set out in the Constitution. Another dramatic example comes from Lesotho, where Prime Minister Thabane declared an state of emergency and "prorogued" parliament, citing the need to ban large public gatherings during the pandemic.<sup>144</sup> Thabane had ulterior motives; when he declared the emergency, Parliament was in the process of passing a constitutional amendment that would allow it remove the Prime Minister upon passing a vote of no confidence (previously, the Prime Minister could dissolve Parliament in response). With Parliament set to pass the amendment and vote him out of office, Thabane used the health emergency to suspend Parliament. Yet the Constitutional Court nullified the prorogation, clearing the way for the embattled Prime Minister's removal. (He was subsequently charged with murdering his estranged wife.)

In some countries, judicial scrutiny is built into the constitutional emergency regime. One example is Ecuador, where the Constitution explicitly requires the Constitutional Court to review the declaration of a state of emergency for its constitutionality.<sup>145</sup> And although the Constitutional Court upheld President Moreno's declaration, it nonetheless issued urgent recommendations and

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<sup>137</sup> *State of Emergency*, MINISTRY OF THE INTERIOR OF THE CZECH REPUBLIC (Mar. 13, 2020) (Czech Rep.), <https://www.mvcr.cz/mvcren/article/state-of-emergency.aspx>.

<sup>138</sup> Aureliusz M. Pedziwol, *COVID-19 restrictions eased in the Czech Republic: 'Long live freedom!'*, DEUTSCHE WELLE (Apr. 27, 2020), <https://www.dw.com/en/covid-19-restrictions-eased-in-the-czech-republic-long-live-freedom/a-53262812>.

<sup>139</sup> Estado de Emergencia Nacional de la Pandemia por COVID-19, Decreto No. 18, Diario Oficial 99, Tomo 427, May 16, 2020 (El Salv.), available at <https://www.diariooficial.gob.sv/diarios/do-2020/05-mayo/16-05-2020.pdf>; see also *El Salvador Supreme Court orders State of Emergency Suspended*, N.Y. TIMES (May 18, 2020), <https://www.nytimes.com/2020/05/18/world/americas/el-salvador-supreme-court-nayib-bukele.html>.

<sup>140</sup> Sala de lo Constitucional de la Corte Suprema de Justicia, Inconstitucionalidad, 63-2020, May 18, 2020 (El Salv.) available at [http://www.jurisprudencia.gob.sv/portal/apls/2020/05/I\\_63-2020.pdf](http://www.jurisprudencia.gob.sv/portal/apls/2020/05/I_63-2020.pdf).

<sup>141</sup> *Id.*

<sup>142</sup> Ley de Protección, Civil, Prevención y Mitigación de Desastres, Decreto No. 777, Diario Oficial 160, Tomo 368, Aug. 18, 2005 (El Salv.), available at <https://proteccioncivil.gob.sv/download/ley-de-proteccion-civil-prevencion-y-mitigacion-de-desastres-2/>.

<sup>143</sup> *Id.*

<sup>144</sup> Peter Fabricius, *Nowhere to Run as Lesotho's Prime Minister Faces An Undignified Exit*, DAILY MAVERICK (Apr. 30, 2020), <https://www.dailymaverick.co.za/article/2020-04-30-nowhere-to-run-as-lesothos-prime-minister-faces-an-undignified-exit/>.

<sup>145</sup> Constitución de la Republica del Ecuador 2008 (Constitution of the Republic of Ecuador 2008), art.166 (2008) (Ecuador).



expressed concerns with some of the proposed measures.<sup>146</sup> Among other things, the Court stressed the state's obligation to guarantee the return of nationals and its obligation to take care of the homeless and vulnerable.<sup>147</sup> It further stated that the state had a duty to keep the constitutional justice system up and running, to maintain checks and balances, and to protect fundamental rights.<sup>148</sup> In doing so, the Court arguably modified the state of emergency declaration. In neighboring Colombia, the Constitutional Court likewise has the power to review emergency decrees taken during a state of emergency. The court approved the initial declaration of the state of emergency by President Duque, and is currently reviewing the 72 emergency decrees passed by the President.<sup>149</sup> (Although the President apparently deliberately avoided the use of emergency powers for some of the more controversial measures, precisely to escape judicial scrutiny).

## 2. *Substantive Rights Review*

Many of the lockdowns imposed by governments around the world entail an obvious limitation of fundamental rights, including freedoms of movement and assembly, and in many cases the freedom of religious worship, free speech, the right to privacy, as well as other fundamental rights. These rights are typically among those for which reasonable limitation is allowed under constitutional rules, but the determination requires balancing the public need with the limitations.<sup>150</sup> In a constitutional democracy, such balancing is the job of courts.

Some courts have used constitutional rights to prevent the imposition of lockdown measures, or to lift them. A dramatic example comes from Malawi, where a High Court prevented the government from imposing a lockdown entirely. The court held that such a lockdown would be unconstitutional because the government had not taken any measures to protect the poor and vulnerable who would suffer disproportionately from the lockdown.<sup>151</sup> By contrast, in Pakistan, the Supreme Court, in a *suo moto* decision,<sup>152</sup> required federal and provincial governments to ease their lockdown restrictions. Specifically, it held that the province of Sindh failed to show a rationale for reopening shops and markets but not shopping malls, and ordered malls to be reopened.<sup>153</sup> In the same decision, it held that the decision by the National Coordination Committee on COVID-19, chaired by the Prime Minister, to close down shops and business on Saturday and Sunday, but not other

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<sup>146</sup> Roger Velez, *Corte Constitucional Hace Exhortos Sobre Estado de Excepción por covid-19* [Constitutional Court Appeals State of Exception for covid-19], EL COMERCIO (Mar 20, 2020), <https://www.elcomercio.com/actualidad/corte-constitucional-exhortos-excepcion-covid.html>.

<sup>147</sup> Andrés Cervantes, *Ecuador – Constitutionalism and Covid-19*, VERFASSUNGSBLOG (May 9, 2020), <https://verfassungsblog.de/ecuador-constitutionalism-and-covid-19/>.

<sup>148</sup> *Id.*

<sup>149</sup> *Corte Constitucional avala el decreto de Estado de Emergencia por el COVID-19*, EL ESPECTADOR (May 20, 2020), <https://www.elespectador.com/coronavirus/corte-constitucional-avala-el-decreto-de-estado-de-emergencia-por-el-covid-19-articulo-920438>.

<sup>150</sup> See *supra* note 77 and surrounding text.

<sup>151</sup> *Malawi Court Indefinitely Bars Virus Lockdown*, NEWS24 (Apr. 28, 2020), <https://www.news24.com/Africa/News/malawi-court-indefinitely-bars-virus-lockdown-20200428>.

<sup>152</sup> Julie Dror Chadbourne, *Never Wear Your Shoes After Midnight: Legal Trends Under the Pakistan Zina Ordinance*, 17 WIS. INT'L L.J. 179, note 468 (1999) (“*Suo moto* refers to an action taken by the court on its own initiative.”).

<sup>153</sup> Supreme Court of Pakistan, May 18, 2020, *Suo Moto Case No. 1 of 2020, Suo Moto Action Regarding Combating the Pandemic of Corona Virus (COVID-19)*, 4, (Pak.) available at [https://www.supremecourt.gov.pk/downloads\\_judgements/s.m.c.\\_01\\_2020\\_18052020.pdf](https://www.supremecourt.gov.pk/downloads_judgements/s.m.c._01_2020_18052020.pdf).

days of the week, violated citizens' right to freedom of trade and business and the right to equal protection of law, as protected by the Constitution.<sup>154</sup>

Courts have also engaged in the balancing of health goals against rights restrictions, and in the course of doing so, have demanded modifications to be made to the pandemic response to better protect rights. Germany has seen a flurry of cases.<sup>155</sup> As a federal system, the German response occurred at both the national and state levels of government. Several of the pandemic response measures by the federal and state governments have been challenged as over-reaching, violating the requirement that the rights limitations are proportional to the health objectives they serve. While most of the challenges were rejected, in several cases the German Constitutional Court forced changes to the pandemic response. In cases involving the cities of Stuttgart and Gießen, for example, it held that citizens' right to protest was preserved, so long as they observed social distancing requirements.<sup>156</sup> The court acknowledged that authorities had discretion under the statutory instruments on whether and how to allow certain gatherings; yet, in the course of exercising that discretion, they were required to take freedom of assembly into account. The Constitutional Court also took issue with a general ban on worship in Mosques, arguing that the particular social distancing measures should be taken into account.<sup>157</sup> These cases demonstrate an ability of courts to balance fundamental rights with health-related measures. As one observer noted, "[w]hile the Court is careful not to question the health-related necessities of the pandemic response, it ensures that rules and their application continues to respect considerations of fundamental right."<sup>158</sup>

The German Court applied its typical proportionality framework in resolving these cases, finding less rights restrictive ways to advance the health goals. We found similar reasoning in other countries. In Bosnia and Herzegovina, the Constitutional Court ruled that measures that required the elderly and children to stay under lockdown "until further notice" constituted age discrimination.<sup>159</sup> Specifically, the court concluded that the requirement was a disproportional infringement on the right to equality, because the government had failed to show that children and the elderly were at an increased risk and had failed to consider measures less restrictive than this blanket rule without a clear expiration date. In South Africa, the Gauteng division of the High Court ruled that some of the lockdown measures were not rationally connected to their intended goal, and therefore unconstitutional. For example, the judgement notes that the government failed to justify why exercise is allowed, but beaches are closed: "to put it bluntly, it can hardly be argued

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<sup>154</sup> *Id.* at 5 (holding that the "restriction put in the minutes of meeting dated 07.05.2020 is contrary to Articles 4, 18 and 25 of the Constitution of the Islamic Republic of Pakistan and thus, is declared to be illegal and accordingly set aside.").

<sup>155</sup> Holger Hestermeyer, *Coronavirus Lockdown-Measures before the German Constitutional Court*, CONSTITUTION NET BLOG (Apr. 30, 2020), <http://constitutionnet.org/news/coronavirus-lockdown-measures-german-constitutional-court>.

<sup>156</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Apr. 15, 2020, No. 1 BvR 828/20 (Ger.), available at [https://www.bverfg.de/e/rk20200415\\_1bvr082820.html](https://www.bverfg.de/e/rk20200415_1bvr082820.html).

<sup>157</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Apr. 29, 2020, No. 1 BvQ 44/20 (Ger.), available at [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/04/qk20200429\\_1bvq004420.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/04/qk20200429_1bvq004420.html).

<sup>158</sup> Hestermeyer, *supra* note 155.

<sup>159</sup> Mirna Sadikovic & Ron Synovitz, *Coronavirus In Court: Bosnia's Age-Based Lockdowns Are Ruled Discriminatory*, RADIO FREE EUROPE RADIAL LIBERTY (Apr. 24, 2020), <https://www.rferl.org/a/coronavirus-in-court-bosnia-s-age-based-lockdowns-are-ruled-discriminatory/30574453.html>.

that it is rational to allow scores of people to run on the promenade but were one to step a foot on the beach, it will lead to infection.”<sup>160</sup>

Even in the United States, where courts are widely perceived to be deferential during crisis, we have seen some substantive rights review. While most lawsuits thus far have failed, some have not. Notably, the Sixth Circuit Court of Appeals held that Kentucky could not prohibit religious gatherings when social distancing guidelines were observed.<sup>161</sup> The Court observed that Governor Andy Beshear’s COVID-19 orders allowed for many “serial exemptions for secular activities [that] pose comparable public health risks to worship services,” including “law firms, laundromats, liquor stores, and gun shops” as long as they “follow social-distancing and other health-related precautions.”<sup>162</sup> But while liquor stores and gun shops could stay open, the orders “do not permit soul-sustaining group services of faith organizations, even if the groups adhere to all the public health guidelines required of essential services and even when they meet outdoors.”<sup>163</sup> As a result, the Court concluded that the COVID-19 orders placed an undue burden on religious services and were therefore unconstitutional. Similarly, on the day before Easter, a federal judge declared unconstitutional the decision of the Mayor of Louisville to ban all Easter celebrations, including drive-through services.<sup>164</sup> (We note that this latter decision was particularly controversial, and the facts on which it based have been contested.)<sup>165</sup>

We have also seen some action by administrative courts and local courts, ruling on local regulations. In Italy, the Council of State (the country’s highest administrative court) supported the annulment of a local ordinance imposed by the city of Messina, which required all citizens wanting to visit the city to register on the city’s website 48 hours in advance, in a move to reduce the number of visitors.<sup>166</sup> The Council of State held that the measure arbitrarily restricted the right to free movement.<sup>167</sup> In France, a local court struck down a 7pm-6am curfew imposed by the mayor of the Parisian suburb of Saint-Ouen-sur-Seine because no good justification was given for the measure.<sup>168</sup> The judge pointed out that the regional government had already taken a range of measures to combat COVID-19, including steps that prevent gatherings at night. As a French commentator observed, the judge is trying ensure that “there’s no escalation of unjustified lockdown measures at a local level.”<sup>169</sup>

In some cases, courts have imposed temporal limits on rights restrictions, arguing that the burden becomes greater the longer they go on. Some nine weeks after France instituted its lockdown, the

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<sup>160</sup> Paul Richardson, *South African Court Declares Lockdown Rules Unconstitutional*, BLOOMBERG (June 2, 2020), <https://www.bloomberg.com/news/articles/2020-06-02/south-african-court-rules-lockdown-rules-invalid-state-says>.

<sup>161</sup> *Maryville Baptist Church, Inc. v. Beshear*, 957 F. 3d 610 (6th Cir. 2020) (per curiam).

<sup>162</sup> *Id.* at 7.

<sup>163</sup> *Id.*

<sup>164</sup> *On Fire Christian Ctr., Inc. v. Fischer*, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020).

<sup>165</sup> Ian Milhiser, *The Controversy over Trump Judge’s Partisan “Religious Liberty” Opinion, Explained*, VOX.COM (Apr. 14 2020), <https://www.vox.com/policy-and-politics/2020/4/14/21218939/trump-judge-justin-walker-religious-liberty-on-fire-partisan-klan> (criticizing opinion).

<sup>166</sup> Costituzione della Repubblica Italiana (Constitution of the Republic of Italy), art. 100 (1947) (It.).

<sup>167</sup> See Gaspard Sebag & Hugo Miller, *Virus Curfew in French Town Blocked in First Rebuke of Lockdowns*, BLOOMBERG (Apr. 8, 2020), <https://www.bloomberg.com/news/articles/2020-04-08/virus-curfew-in-french-town-blocked-in-first-rebuke-of-lockdowns>.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* (quoting Romaric Lazerges, a lawyer with Allen & Overy in Paris).

French Conseil d'Etat required the lifting of bans on religious gatherings, saying they had gone on too long.<sup>170</sup> Temporal limits were also imposed by Slovenia's Constitutional Court, which asked the government to re-examine each week whether the lockdown is still needed.<sup>171</sup>

While most of these cases take the form of balancing the exercise of rights against public health goals, in other cases, courts have prevented the government from exercising overly coercive enforcement. For example, in Zimbabwe, the High Court ruled that security forces must enforce human rights while enforcing the country's lockdown, thus emphasizing that many rights stay in place even during times of crises.<sup>172</sup> It also ordered police to stop harassing journalists covering the crisis.<sup>173</sup> Likewise, the High Court of Kenya ordered the police to stop using excessive force to enforce the dusk to dawn curfew imposed to combat COVID-19 and ordered the Inspector General of the police to issue curfew enforcement guidelines within 48 hours. The order notwithstanding, many have since been killed by the Kenyan police.<sup>174</sup>

### 3. Demanding Action

Courts can also demand that governments take affirmative steps to fight the pandemic to fulfil their constitutional obligations. We should clarify that this is not possible in the United States. U.S. constitutional law doctrine generally holds that rights can only be violated when the government has acted, and that the Constitution does not require the government to take affirmative steps to protect rights.<sup>175</sup> Notably, writing in light of the current crisis, Eric Posner has argued that the inability to bring suits against government inaction is one reason why courts should not involve themselves in the pandemic response.<sup>176</sup> Since American courts are able to adjudicate challenges to government acts, but not omissions, judges' responses will necessarily be unbalanced; protecting those who demand liberty but not vulnerable populations whose lives depend on measures put in place to curb the spread of the virus. Yet, this concern does not apply to most other countries. The vast majority of national constitutions include positive rights, including the right to

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<sup>170</sup> Jean-Marie Guénois, *Déconfinement: le Conseil d'Etat ordonne de lever l'interdiction de réunion dans les lieux de cultes* [Deconfinement: the Council of State orders to lift the ban on assembly in places of worship], LE FIGARO (May 18, 2020), <https://www.lefigaro.fr/actualite-france/deconfinement-le-conseil-d-etat-ordonne-de-lever-l-interdiction-de-reunion-dans-les-lieux-de-cultes-20200518>.

<sup>171</sup> *Last Week in Slovenia: 24 - 30 April, 2020*, TOTAL SLOVENIA NEWS (May 2, 2020), <https://www.total-slovenia-news.com/politics/6153-last-week-in-slovenia>.

<sup>172</sup> Columbus Mavhunga, *Rights Groups Welcome Court Ban on Brutal Zimbabwe COVID-19 Lockdown*, VOICE OF AMERICA (Apr. 15, 2020), <https://www.voanews.com/africa/rights-groups-welcome-court-ban-brutal-zimbabwe-covid-19-lockdown>.

<sup>173</sup> *Covid-19: Zimbabwe Court Orders Police to Stop Harassing Journalists*, BIG NEWS NETWORK (Apr. 21, 2020), <https://www.bignewsnetwork.com/news/264761280/covid-19-zimbabwe-court-orders-police-to-stop-harassing-journalists>.

<sup>174</sup> Rael Ombuor & Max Bearak, *'Killing in the Name of Corona': Death Toll Soars from Kenya's Curfew Crackdown*, WASH. POST (Apr. 16, 2020), [https://www.washingtonpost.com/world/africa/kenya-coronavirus-curfew-crackdown-death-toll/2020/04/15/740a8c4e-79be-11ea-a311-Adb1344719a9\\_Story.Html](https://www.washingtonpost.com/world/africa/kenya-coronavirus-curfew-crackdown-death-toll/2020/04/15/740a8c4e-79be-11ea-a311-Adb1344719a9_Story.Html).

<sup>175</sup> See *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (describing the U.S. Constitution as a "charter of negative rather than positive liberties").

<sup>176</sup> Eric Posner, *You Can Sue to Stop Lockdowns, But You Can't Sue to Get Them. That's Dangerous.*, WASH. POST (May 3, 2020), [https://www.washingtonpost.com/outlook/lockdown-legal-challenges-constitution/2020/05/03/389af052-8aff-11ea-9dfd-990f9dcc71fc\\_story.html](https://www.washingtonpost.com/outlook/lockdown-legal-challenges-constitution/2020/05/03/389af052-8aff-11ea-9dfd-990f9dcc71fc_story.html).

healthcare, the fulfilment of which necessarily requires government action.<sup>177</sup> What is more, in most systems, governments can violate their constitutions' negative rights clauses by failing to prevent rights abuses.<sup>178</sup>

Indeed, we have found a number of cases in which courts have demanded that government and private actors take active steps to combat the pandemic. A series of dramatic cases come from Brazil, where as noted above President Bolsonaro has notoriously dismissed the pandemic threat. As a result of the inaction at the federal level, different Brazilian courts have been asked to impose lockdown orders in cities with precarious public health systems. On April 30, São Luís, in the State of Maranhão, became the first city in Brazil to be placed under a complete lockdown by means of a judicial decision. A local court, at the request of the public prosecutor, declared a lockdown order for a minimum of ten days because city's public health system collapsed, suspending all nonessential activities and limiting public gatherings of any kind.<sup>179</sup> The country's highest court also affirmed a decision by a lower court banning propaganda by the government opposing social distancing, and required the government to provide adequate information about the pandemic.<sup>180</sup> In the opinion, Justice Barroso emphasized that "it is the duty of the Union to adequately inform the public about the circumstances that can endanger their lives, health, and safety," and therefore that the government could not provide misinformation about the virus.<sup>181</sup> Similarly, when the Bolsonaro government stopped publishing comprehensive statistics on COVID-19 cases and deaths,<sup>182</sup> the Supreme Court ordered the government to disclose all available data based on the principle of transparency.<sup>183</sup> And most recently, a federal judge from a district court in Brasília ordered President Bolsonaro to wear a mask in public.<sup>184</sup>

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<sup>177</sup> The right to healthcare is found in some 71 percent of constitutions in force today. See Adam Chilton & Mila Versteeg, *Rights Without Resources: The Impact of Constitutional Social Rights on Social Spending*, 60 J.L. & ECON. 713, 714 (2017).

<sup>178</sup> See LOUIS HENKIN ET AL., *HUMAN RIGHTS 217* (2009) (describing how the negative rights in the ICCPR also entail positive obligations); Frank I. Michelman, *The Protective Function of the State in the United States and Europe: The Constitutional Question*, in *EUROPEAN AND U.S. CONSTITUTIONALISM* 131 (George Nolte ed., 2005) (describing how the state action doctrine is an outlier in comparative perspective).

<sup>179</sup> *Maranhao in Brazil Becomes First Region to Mandate a Complete Coronavirus Lockdown*, ABC NEWS (May 5, 2020), <https://www.abc.net.au/news/2020-05-06/first-brazil-region-goes-into-coronavirus-lockdown/12218480>.

<sup>180</sup> Anthony Boadle, *Bolsonaro Visits Market to Press Need to Keep Brazil Going During Pandemic*, REUTERS (Mar. 29, 2020), <https://www.reuters.com/article/us-health-coronavirus-brazil/bolsonaro-visits-market-to-press-need-to-keep-brazil-going-during-pandemic-idUSKBN21H001>.

<sup>181</sup> Mônica Bergamo, *Barroso Veta Publicidade Do Governo Que Diz Que 'O Brasil Não Pode Parar'* [Barroso Veta, Propaganda of Government, Says "Brazil Can't Stop"], FOLHA DE S. PAULO (Mar. 31, 2020), <https://www1.folha.uol.com.br/colunas/monicabergamo/2020/03/barroso-veta-publicidade-do-governo-que-diz-que-o-brasil-nao-pode-parar.shtml>.

<sup>182</sup> Ernesto Londoño, *Furious Backlash in Brazil After Ministry Withholds Coronavirus Data*, N.Y. TIMES (Jun. 8, 2020), <https://www.nytimes.com/2020/06/08/world/americas/brazil-coronavirus-statistics.html>.

<sup>183</sup> STF, ADPF 690, Relator: Min. Alexandre de Moraes, 8.6.2020, (Braz.) available at <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADPF690cautelar.pdf>. The Public Health Minister reportedly put the statistics back online immediately. Terrence McCoy, *Under Court Order, Brazilian Government Puts Coronavirus Data Back Online*, WASH. POST (Jun. 10, 2020), [https://www.washingtonpost.com/world/the\\_americas/brazil-coronavirus-bolsonaro-case-death-supreme-court/2020/06/10/128f3b1a-ab21-11ea-94d2-d7bc43b26bf9\\_story.html](https://www.washingtonpost.com/world/the_americas/brazil-coronavirus-bolsonaro-case-death-supreme-court/2020/06/10/128f3b1a-ab21-11ea-94d2-d7bc43b26bf9_story.html).

<sup>184</sup> Rodrigo Pedrosa & Larry Register, *Brazil Judge Orders President Jair Bolsonaro to Wear a Face Mask in Public*, CNN (Jun. 24, 2020), <https://edition.cnn.com/2020/06/23/americas/brazil-bolsonaro-coronavirus-mask-intl/index.html>.

Some courts, including the Zimbabwean High Court, have ordered the provision of personal protective equipment (PPE) for healthcare workers.<sup>185</sup> In the same decision, the High Court further ordered the government to set up more testing sites across the country, and to increase the turn-around time for tests.<sup>186</sup> The Indian Supreme Court has likewise ordered the provision of PPE to doctors and healthcare workers.<sup>187</sup>

Courts have also concerned themselves with stranded migrants. The Indian Supreme Court ordered the government to facilitate the return of migrant workers stranded throughout the country to their hometowns.<sup>188</sup> As part of its order, it issued detailed directives on how to bring the migrant workers home.<sup>189</sup> It further ordered the state not to prosecute migrants workers who violate the lockdown because they are trying to reach home as well as to provide migrants with details of employment and benefits schemes.<sup>190</sup> Similarly, the Supreme Court of Nepal ordered the government to facilitate the return of migrant workers stranded abroad.<sup>191</sup> The Court emphasized that the pandemic affected migrant workers disproportionately, and ordered the government to ensure that migrant workers are able to return home.<sup>192</sup> In a different decision, the same court addressed the needs of another vulnerable group, the poor, and ordered the government to develop a plan to ensure the constitutional right of food to those who were affected by the lockdown.<sup>193</sup>

Some courts have demanded the release of prisoners to curb the spread of the virus in prisons. In the Philippines, the Supreme Court on April 20 ordered lower court judges to release prisoners that are at risk of being infected by the novel coronavirus inside the Philippine's overcrowded jails.<sup>194</sup> In response, lower courts released almost ten thousand prisoners to address fears over the spread

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<sup>185</sup> Columbus Mavhunga, *Rights Groups Welcome Court Ban on Brutal Zimbabwe COVID-19 Lockdown*, VOICE OF AMERICA (Apr. 15, 2020), <https://www.voanews.com/africa/rights-groups-welcome-court-ban-brutal-zimbabwe-covid-19-lockdown>.

<sup>186</sup> *Court Orders Zimbabwe to Protect Medics from the Coronavirus*, EYEWITNESS NEWS (Apr. 15, 2020), <https://ewn.co.za/2020/04/15/court-orders-zimbabwe-to-protect-medics-from-the-coronavirus>.

<sup>187</sup> *Jerryl Banait v. Union of India*, (2020) W.P.(C). Diary No.10795/2020, (India) available at [https://main.sci.gov.in/supremecourt/2020/10795/10795\\_2020\\_0\\_5\\_21591\\_Order\\_08-Apr-2020.pdf](https://main.sci.gov.in/supremecourt/2020/10795/10795_2020_0_5_21591_Order_08-Apr-2020.pdf).

<sup>188</sup> Tahira Mohamedbhai, *India Supreme Court Orders Government to Transport Displaced Migrant Workers Home Within 15 Days*, JURIST (Jun. 10, 2020), <https://www.jurist.org/news/2020/06/india-supreme-court-orders-government-to-transport-displaced-migrant-workers-home-within-15-days/>.

<sup>189</sup> Krishnadas Rajagopal, *Coronavirus Lockdown: Migrant Workers Should Not Be Prosecuted, Says Supreme Court*, THE HINDU (Jun. 9, 2020), <https://www.thehindu.com/news/national/coronavirus-lockdown-migrant-workers-should-not-be-prosecuted-says-supreme-court/article31784841.ece>.

<sup>190</sup> *Id.*

<sup>191</sup> Hardik Subedi, *How Nepal's Supreme Court Upheld Dignity of Migrant Workers Without Diluting COVID Fight*, THE WIRE (Apr. 28, 2020), <https://thewire.in/law/nepal-supreme-court-migrant-workers>.

<sup>192</sup> Benju Lwagun, *For Nepal's Migrant and Daily Wage Workers, Lockdown Is More Dangerous than the Coronavirus*, GLOBAL VOICES (Apr. 19, 2020), <https://globalvoices.org/2020/04/19/for-nepals-migrant-and-daily-wage-workers-lockdown-is-more-dangerous-than-the-coronavirus/>.

<sup>193</sup> Tika R. Pradhan, *Supreme Court Orders Government to Ensure Vulnerable People's Right to Food*, THE KATHMANDU POST (Apr. 1, 2020), <https://kathmandupost.com/national/2020/03/30/supreme-court-orders-government-to-ensure-vulnerable-people-s-right-to-food>.

<sup>194</sup> OCA Circular No. 91-2020, Re: Release of Qualified Persons Deprived of Liberty, Republic of the Philippines Supreme Court, Apr. 20, 2020, (Phil.) available at <http://sc.judiciary.gov.ph/11234/>.

of the virus within the national penitentiary system.<sup>195</sup> In Argentina,<sup>196</sup> India,<sup>197</sup> and Uganda<sup>198</sup> courts likewise ordered the release of prisoners. In the United States, courts have also gotten involved in the issue. (Note that although the U.S. Constitution does not impose positive duties on the government as a general matter, there is an exception for people that are in the government's care, like prisoners).<sup>199</sup> A federal judge in Ohio ordered that at-risk prisoners in Elkton Federal Correctional Institution, where a quarter of inmates tested positive, be moved, and this order was upheld by the U.S. Supreme Court.<sup>200</sup> The New Jersey Supreme Court ruled that prisoners denied a request for COVID-19 release have a right to appeal.<sup>201</sup> Yet, other state courts have refused to intervene.<sup>202</sup>

#### 4. Cases of Inaction

These examples suggest that courts may be willing to insist on legislative oversight, protect rights, and challenge government omissions in a public health context. It is important to note, however, that not every country has seen judicial involvement in crisis governance. In some cases, that might not be a cause for concern, for example because the lockdown measures are proportional and remain unchallenged or because other oversight mechanisms are in place.

But there are also settings where the absence of judicial oversight might indicate an abuse of executive power. In this respect, it is telling that we found that only 27 percent of courts in authoritarian regimes got involved in the pandemic response, compared with 55 percent of courts in democratic regimes. Take the example of Venezuela, where President Maduro declared a state of alarm without consulting parliament, even though this is required by the Constitution.<sup>203</sup> The current state of the rule of law in the country is such is that these constitutional violations are unlikely to be challenged, and even if they were, such challenges are unlikely to succeed.<sup>204</sup>

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<sup>195</sup> *Philippines: Nearly 10,000 Prisoners Released over Virus Fears*, ALJAZEERA (May 2, 2020), <https://www.aljazeera.com/news/2020/05/philippines-10000-prisoners-released-virus-fears-200502095707880.html>.

<sup>196</sup> Sylvia Colombo, *Liberação de presos devido à Covid-19 ameaça lua de mel de Fernández e Argentina* [Release of prisoners due to Covid-19 threatens Fernández and Argentina's honeymoon], FOLHA DE S. PAULO (May 6, 2020), <https://www1.folha.uol.com.br/mundo/2020/05/liberacao-de-presos-devido-a-covid-19-ameaca-lua-de-mel-de-fernandez-e-argentina.shtml>.

<sup>197</sup> *In re: Contagion of Covid 19 Virus in Prisons, Suo Motu Writ Petition (C) No. 1/2020, (India) available at* [https://main.sci.gov.in/supremecourt/2020/9761/9761\\_2020\\_1\\_8\\_21570\\_Order\\_23-Mar-2020.pdf](https://main.sci.gov.in/supremecourt/2020/9761/9761_2020_1_8_21570_Order_23-Mar-2020.pdf).

<sup>198</sup> Alice McCool, *Court Orders Release of Jailed LGBT+ Ugandans After Coronavirus Charges Dropped*, REUTERS (May 6, 2020), <https://www.reuters.com/article/us-health-coronavirus-uganda-lgbt/court-orders-release-of-jailed-lgbt-ugandans-after-coronavirus-charges-dropped-idUSKBN22U2DO>.

<sup>199</sup> *Estelle v. Gamble*, 429 U.S. 97 (1976).

<sup>200</sup> Robert Barnes, *Supreme Court Won't Stop Ohio Order for Prisoners to Be Moved or Released Because of Coronavirus*, WASH. POST (May 26, 2020), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-for-now-will-not-stop-ohio-order-to-identify-prisoners-for-release-because-of-coronavirus/2020/05/26/8b6d458a-9f74-11ea-81bb-c2f70f01034b\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-for-now-will-not-stop-ohio-order-to-identify-prisoners-for-release-because-of-coronavirus/2020/05/26/8b6d458a-9f74-11ea-81bb-c2f70f01034b_story.html).

<sup>201</sup> Colleen O'Dea, *NJ Supreme Court Gives Prisoners Right to Appeal if Turned Down for COVID-19 Release*, NJ SPOTLIGHT (Jun. 5, 2020), <https://www.njspotlight.com/2020/06/nj-supreme-court-gives-prisoners-right-to-appeal-if-turned-down-for-covid-19-release/>.

<sup>202</sup> *See, e.g., Deborah Becker, Mass. High Court Refuses to Release Convicted Prisoners Because of COVID-19*, WBUR (Jun. 2, 2020), <https://www.wbur.org/news/2020/06/02/covid-19-coronavirus-prisoner-release-sjc>.

<sup>203</sup> Jesús María Casal Hernández & Mariela Morales Antoniazzi, *States of Emergency without Rule of Law: The Case of Venezuela*, VERFASSUNGSBLOG (May 22, 2020), <https://verfassungsblog.de/states-of-emergency-without-rule-of-law-the-case-of-venezuela/>.

<sup>204</sup> *Id.*

We also found cases in which courts actively legitimized highly problematic executive action. To illustrate, in the Democratic Republic of Congo, President Félix Tshisekedi declared a state of emergency without consulting parliament, even though the Constitution states that an emergency declaration has to be made by the President “after coordination with the Prime Minister and the Presidents of the two Chambers.”<sup>205</sup> When the President of the Senate contested the emergency declaration before the Constitutional Court, the court simply upheld the emergency declaration.<sup>206</sup> While separation of powers concerns here are mitigated by the fact that Parliament subsequently voted to extend the declaration (as required by the Constitution),<sup>207</sup> the Court ignored an explicitly-stated constitutional rule to grant the executive additional powers.

We should also note that, even in democratic regimes, there is always a question whether and to what extent court decisions will be fully implemented, especially when they require complex actions, such as the increase of testing capacity.<sup>208</sup> Indeed, the ability of courts to protect rights and bring about broader social change is widely contested in the literature.<sup>209</sup> Yet, it is encouraging that, to date, there are few cases in which executives have openly defied courts. Perhaps the most prominent case of defiance comes from El Salvador, where the Supreme Court ordered the release of persons detained for violating the lockdown, but President Bukele announced he would ignore the order.<sup>210</sup> In Slovenia, the Constitutional Court’s decision led the Prime Minister to tweet that “Slovenia unfortunately has the most politically biased Constitutional Court so far” and that “[d]ouble standards mean the death of any institution, especially judicial,” though he has not taken any concrete action to defy the court.<sup>211</sup> Thus far, these kinds of responses appear to be the exception, and not the rule.

### B. Legislative Oversight

Legislatures also have played an important role in overseeing the executive. We note that the mere fact that there is a statutory basis for executive action does not necessarily amount to effective legislative oversight. In many cases, existing public health laws invoked to deal with the pandemic

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<sup>205</sup> Constitution de la République Démocratique du Congo (Constitution of the Democratic Republic of Congo), Art. 85 (2006) (Dem Rep. Congo).

<sup>206</sup> *La Cour constitutionnelle, siégeant en matière d'inconstitutionnalité et de conformité à la Constitution* [The Constitutional Court, Sitting on Matters of Unconstitutionality and the Compliance with the Constitution], URGENT (Apr. 14, 2020), <https://cour-constitutionnelle.cd/2020/04/14/la-cour-constitutionnelle-siegeant-en-matiere-dinconstitutionnalite-et-de-conformite-a-la-constitution/>.

<sup>207</sup> Constitution de la République Démocratique du Congo (Constitution of the Democratic Republic of Congo), Art. 144 (2006) (Dem Rep. Congo).

<sup>208</sup> For a discussion of the complexities of implementing cases that order the government to take action, see SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK (Malcolm Langford et al. eds., 2017).

<sup>209</sup> See GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); S.A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND SOCIAL CHANGE 131 (1974); Adam Chilton & Mila Versteeg, *Courts’ Limited Ability to Protect Constitutional Rights*, 85 U. CHI. L. REV. 293 (2018); Charles Crabtree & Michael Nelson, *New Evidence for a Positive Relationship Between De Facto Judicial Independence and State Respect for Empowerment Rights*, 61 INT’L STUD. Q. 210 (2017).

<sup>210</sup> Chris Stephens, *El Salvador President Defies Supreme Court Order on COVID-19 Detention*, JURIST (Apr. 18, 2020), <https://www.jurist.org/news/2020/04/el-salvador-president-defies-supreme-court-order-on-covid-19-detention/>.

<sup>211</sup> *Last Week in Slovenia: 24 - 30 April, 2020*, TOTAL SLOVENIA NEWS (May 2, 2020), <https://www.total-slovenia-news.com/politics/6153-last-week-in-slovenia>.



had to be stretched to meet the exigencies of the situation. For example, some of the laws invoked authorize governments to order quarantines, but quarantines usually involve a relatively small number of citizens who have been exposed to a disease in a particular geographic location. It is hard to imagine that legislators drafting such laws contemplated the need to lockdown entire countries for an extended period of time. Furthermore, in many cases, the laws are old, and so the *current* legislature may have nothing to do with it. Extreme examples are India and Pakistan, which both relied on a British colonial-era Law on Epidemic Diseases from 1897. In these cases, there was no legislative oversight at all.

In some cases, however, legislative oversight can be built into existing legislation, for example when it is activated only when the legislature declares an emergency or when it establishes some form of parliamentary oversight. To illustrate, in Japan, the Infectious Diseases Act requires that the Prime Minister report the governmental action plans to Congress immediately after a decision is made.<sup>212</sup> Likewise, in Germany, the *Infektionsschutzgesetz* (Infectious Disease Protection Act) allows the government to issue regulations; but these regulations have to be approved by Parliament.<sup>213</sup> And in Liberia, the Senate, upon approving the country's declaration of a state of emergency, created a parliamentary oversight committee to monitor the pandemic response.<sup>214</sup>

Perhaps more meaningfully, legislatures can also enact brand new laws during a crisis. As noted, this has occurred in a little over half of the countries that relied on legislation as the legal basis for their COVID-19 pandemic response. They did so even though in many cases, legislatures and committees were unable to meet in person, or had to greatly modify their traditional practices to avoid being at risk.<sup>215</sup>

Some have worried that emergency legislation passed in the midst of a global pandemic can be overly broad, as in the case of Hungary, where the Parliament voted to allow President Orbán to rule by decree for the foreseeable future.<sup>216</sup> Yet, as mentioned, in the majority of countries that drafted new legislation, it was specific to the current pandemic only and temporary in nature. Expiration dates ensure an ongoing role for the legislature: when the legislation expires, the legislature will have to renew it. The United Kingdom's COVID-19 statute has been held up as a model in this regard, as it is specific to COVID-19 and grants additional executive powers for an 21-day period only.<sup>217</sup> Newly drafted legislation in Belgium, Slovenia, the Philippines, Senegal, and Taiwan also fit this mold.

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<sup>212</sup> Shingata infuruenza tō taisaku tokubetsu sochi hō [Special Measures Act on New Influenza], Act No. 31 of Mar. 14, 2012, art.6, para 6.

<sup>213</sup> See, e.g., *Verordnung zur Beschaffung von Medizinprodukten und Persönlicher Schutzausrüstung bei der durch das Coronavirus SARS-CoV-2 Verursachten Epidemie*, available at: [https://www.juris.de/jportal/cms/juris/media/pdf/corona\\_gesetze/epimpupsabeschv.pdf](https://www.juris.de/jportal/cms/juris/media/pdf/corona_gesetze/epimpupsabeschv.pdf) (a federal regulation promulgated by two executive agencies to address import of certain health care products).

<sup>214</sup> Henry Karmo, *Liberia: Senate Forms Principal Oversight Committee for COVID-19*, FRONT PAGE AFRICA (Apr. 27, 2020), <https://frontpageafricaonline.com/uncategorized/liberia-senate-forms-principal-oversight-committee-for-covid-19/>.

<sup>215</sup> Bar-Siman-Tov, *supra* note 101.

<sup>216</sup> See, e.g., Gábor Halmai & Kim Lane Scheppele, *Orbán is Still the Sole Judge of his Own Law*, *Verfassungsblog* (Apr. 30, 2020), <https://verfassungsblog.de/orban-is-still-the-sole-judge-of-his-own-law/>.

<sup>217</sup> Ronan Cormacain, *Coronavirus Bill: A Rule of Law Analysis (Supplementary Report - House of Lords)* BINGHAM CENTER FOR THE RULE OF LAW (Mar. 25, 2020), at 7, available at

When the pandemic response is based on the constitutional emergency scheme, legislatures are commonly involved in declaring or extending the state of emergency. The majority of democratic constitutions with emergency provisions require the legislature to approve the initial declaration of an emergency and to extend it, thereby placing an important check on gratuitous invocation. Constitutions can further demand legislative oversight over the emergency response. For example, the Portuguese Constitution states that the Assembly of the Republic is responsible for “considering the manner in which a declaration of a state of emergency or a state of siege has been applied.”<sup>218</sup> Neo-Schmittians seem to ignore this step in modern constitutional schemes, but it can be a genuine constraint. Indeed, observers have noted that one of the reasons why Poland did not declare a state of emergency is that it would have ensured ongoing legislative involvement, while this could be avoided by drafting legislation without an expiration date.<sup>219</sup> (The other reason for not using the constitutional emergency scheme is that it would have required the postponing of the presidential elections until 90 days after the emergency ended, and the ruling Law and Justice party correctly believed that its candidate would win if the elections went ahead as planned.)

There are also other creative ways to ensure legislative oversight. Some countries, like France, created special committees to oversee government during COVID-19.<sup>220</sup> In Sweden, an amendment to the Contagious Disease Act ensured that regulations passed under the act had to be approved by Parliament before they could take effect.<sup>221</sup> In Botswana, the constitutional emergency scheme requires all regulations passed by the executive under the Emergency Powers Act (that implements the Constitution) to be approved by Parliament.<sup>222</sup> Likewise, in Italy, the “decree laws” passed by the executive in response to the pandemic had to be passed into law by Parliament within 60 days.<sup>223</sup>

At the same time, we note that the need for a fast response has meant that legislatures have necessarily found themselves playing catch-up. Even in democracies, initial action was sometimes taken without a clear legislative basis and a formal legal basis was only found later. Such scenarios capture what Vermeule calls “gray holes,” and illustrates Posner and Vermeule’s claim that the law sometimes runs out.<sup>224</sup> Take the example of Taiwan, which is seen as a democratic jurisdiction

[https://binghamcentre.biicl.org/documents/84\\_coronavirus\\_bill\\_rule\\_of\\_law\\_scrutiny\\_supplementary\\_report\\_upload.pdf](https://binghamcentre.biicl.org/documents/84_coronavirus_bill_rule_of_law_scrutiny_supplementary_report_upload.pdf).

<sup>218</sup> Constituição da República Portuguesa (Constitution of the Portuguese Republic), art. 161, sec. L (1976) (Port.).

<sup>219</sup> *Emergency, but Not a State of Emergency*, POLAND IN (Mar. 14, 2020), <https://polandin.com/47124167/emergency-but-not-a-state-of-emergency>.

<sup>220</sup> *French Lawmakers to Investigate Where One and a Half Billion Masks Went*, RFI (April 1, 2020) <http://www.rfi.fr/en/france/20200401-where-billion-masks-french-coronavirus-committee-asks>.

<sup>221</sup> Lag om ändring i smittskyddslagen [Law amending the Contagious Disease Act], SFS 2020:241, (Swed.) available at <https://www.lagboken.se/views/pages/getfile.ashx?portalId=56&docId=3937102&propId=5>; *Historisk Krislag Klubbad i Riksdagen* [Historical crisis team clubbed in Parliament], VK (Apr. 16, 2020), <https://www.vk.se/2020-04-16/historisk-krislag-klubbad-i-riksdagen>; Hans Rosén, *Löfven om Krislagen: Ger Oss Verktyg att Agera Snabbt* [The Laws of Crisis Law: Gives Us the Tools to Act Quickly], DAGENS NYHETER (Apr. 7, 2020), <https://www.dn.se/nyheter/sverige/brett-stod-for-ny-krislag-efter-lang-forhandling/>.

<sup>222</sup> Poloko Tau, *Covid-19: Botswana Parliament Endorses 6-Month State of Emergency*, CITY PRESS (Apr. 9, 2020), <https://city-press.news24.com/News/covid-19-botswana-parliament-endorses-6-month-state-of-emergency-20200409>.

<sup>223</sup> Costituzione della Repubblica Italiana (Constitution of the Republic of Italy), art. 77 (1947) (It.).

<sup>224</sup> ERIC POSNER & ADRIAN VERMEULE, EXECUTIVE UNBOUND, *supra* note 8, at 89; Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1095 (2009).

with one of the most effective responses to the virus. Even in Taiwan, the law ran out. The President did not declare a state of emergency under the constitution. Instead, the Legislature passed special legislation, but it was retroactive. It included, in Article 7, a very broad delegation, allowing the government to take whatever measures it found “necessary” to prevent and control the disease.<sup>225</sup> This open-ended, retrospective delegation was used to ban overseas travel, close Taiwanese primary and secondary schools, and allow government use of mobile phone data. While the response was highly effective, and there is no evidence of abuse, it is clear that there was insufficient legal authorization at the outset of the crisis, and that this had to be remedied later.

### C. Subnational Constraints

Another set of constraints on executives comes from local officials. This is particularly true when, as with a global pandemic, the nature of the crisis requires highly localized responses. Unlike 9/11 or the financial crisis of 2008, when national-level measures were paramount, a health pandemic requires mobilization of resources at every level of government, and cannot be treated by one level alone, especially in large countries. President Trump learned this the hard way when he announced in April that only he had authority to determine the timing of re-opening the United States economy for business.<sup>226</sup> Under the U.S. Constitution, that decision lies in fact with state governors, and by early May, Governor Brian Kemp of Georgia announced he was reopening the state, ignoring President Trumps entreaties.

Federalism allows for local variation, and we have seen a range of responses within federal systems. In some federal systems, subnational governments have imposed restrictions where federal governments have failed to act. In the United States, state governments have led the way in imposing stay-at-home orders, while the federal government’s response has been limited to providing funds and organizing supplies. At the same time, we also observe important variation between states. While Georgia Governor Kemp was at the forefront of softening restrictions, other governors have acted aggressively and maintained longer lockdowns than the President would have liked.

Similar events unfolded in Brazil, where state governors and city mayors have led the pandemic response and imposed more restrictive measures than the federal government would have liked. In fact, states and local governments repeatedly ignored calls by President Bolsonaro to remove their restrictions.<sup>227</sup> In Pakistan, Prime Minister Imran Khan refused to impose a national lockdown, saying it would ruin the economy. Yet, within a week, all its provincial governments imposed their

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<sup>225</sup> Ming-Sung Kuo, *A Liberal Darling or an Inadvertent Hand to Dictators: Open-Ended Lawmaking and Taiwan’s Legal Response to the Covid Pandemic*, I-CONNECT BLOG (Apr. 30, 2020), <http://www.iconnectblog.com/2020/04/a-liberal-darling-or-an-inadvertent-hand-to-dictators:-open-ended-lawmaking-and-taiwan’s-legal-response-to-the-covid-pandemic>.

<sup>226</sup> Quint Forgy & Josh Gerstein, *Trump: It’s My Decision, Not Governors’, to Reopen Country*, POLITICO (Apr. 13, 2020), <https://www.politico.com/news/2020/04/13/trump-governors-decision-reopen-183405>.

<sup>227</sup> Jen Kirby, *Jair Bolsonaro Undermined Brazil’s Coronavirus Response. Now There’s a Political Crisis.*, VOX (Apr. 28, 2020), <https://www.vox.com/2020/4/28/21228512/brazil-bolsonaro-coronavirus-moro>.

own lockdowns.<sup>228</sup> In Russia, President Vladimir Putin initially downplayed the threat and did not involve himself in the initial pandemic response, presumably because he sought to isolate himself from any fallout of the crisis.<sup>229</sup> Instead, it was regional and municipal governments that responded.<sup>230</sup> The first region to act was Chechnya: regional President Ramzan Kadyrov ordered “crowded places” to be closed (adding that individuals who violated these restrictions should be killed) and closed the region’s borders.<sup>231</sup> Next, both Moscow and St. Petersburg imposed citywide quarantines. The quarantine restrictions allowed people to go outside exclusively to “seek emergency medical care, shop for food or medicine, go to work, walk pets, or take out the garbage.”<sup>232</sup> A few days later, the Nizhny Novgorod region adopted measures requiring some 3.2 million residents to download barcodes that authorities can use to track their movements outside the home.<sup>233</sup> Moscow later introduced a similar system.<sup>234</sup> As the federal government gradually assumed a more central role in the response, it called some of the regional measures “excessive,” and “unacceptable.”<sup>235</sup> But observers have noted that these criticisms are in tension with Moscow’s overall approach of deferring to regional governments.<sup>236</sup>

Some federal states have witnessed more of a dialogue between the central government and subnational units. Germany offers the best example. German states (Bundesländer) are legally responsible for the pandemic response, as public safety falls within their powers.<sup>237</sup> To coordinate the country’s response, the federal government and the Bundesländer reached an agreement, which set guidelines for lockdown and outlined further measures to be taken by the states.<sup>238</sup> Yet, the

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<sup>228</sup> Madiha Afzal, *Pakistan Teeters on the Edge of Potential Disasters with the Coronavirus*, BROOKINGS (Mar. 27, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/03/27/pakistan-teeters-on-the-edge-of-potential-disaster-with-the-coronavirus/>.

<sup>229</sup> William Heerd & Timothy Kostelancik, *Russia’s Response to Covid-19*, CTR. FOR STRATEGIC & INT’L STUD. (Apr. 10, 2020), <https://www.csis.org/analysis/russias-response-covid-19>; Steven Pifer, *Putin’s not-so-excellent spring*, BROOKINGS: ORDER FROM CHAOS (Apr. 23, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/04/23/putins-not-so-excellent-spring/>.

<sup>230</sup> *Coronavirus in Russia: The Latest News*, THE MOSCOW TIMES (May 12, 2020), <https://www.themoscowtimes.com/2020/05/11/putin-eases-nationwide-virus-lockdown-as-russia-becomes-3rd-most-infected-country-a70240>.

<sup>231</sup> Heerd & Kostelancik, *supra* note 229.

<sup>232</sup> *Id.*

<sup>233</sup> *Russia’s Nizhny Novgorod Unveils Digital Passes to Enforce Virus Lockdown*, THE MOSCOW TIMES (Apr. 2, 2020), <https://www.themoscowtimes.com/2020/04/02/russias-nizhny-novgorod-unveils-digital-passes-to-enforce-virus-lockdown-a69845>.

<sup>234</sup> *Moscow Won’t Require QR Code Coronavirus Lockdown Passes, for Now*, THE MOSCOW TIMES (Apr. 3, 2020), <https://www.themoscowtimes.com/2020/04/03/moscow-wont-require-qr-code-coronavirus-lockdown-passes-for-now-a69855>.

<sup>235</sup> *Id.*

<sup>236</sup> Федеральный закон от О внесении изменений в отдельные законодательные акты Российской Федерации по вопросам предупреждения и ликвидации чрезвычайных ситуаций [Federal Law on Amendments to Certain Legislative Acts of the Russian Federation Regarding Emergency Prevention and Relief], 01.04.2020, № 98-ФЗ (Russ.), available at <http://publication.pravo.gov.ru/Document/View/0001202004010072?index=0&rangeSize=1>.

<sup>237</sup> See Pierre Thielbörger & Benedikt Behlert, *COVID-19 und das Grundgesetz*, VERFASSUNGSBLOG (Mar. 19, 2020), <https://verfassungsblog.de/covid-19-und-das-grundgesetz/>; Sven Jürgensen & Frederik Orłowski, *Critique and Crisis: The German Struggle with Pandemic Control Measures and the State of Emergency*, VERFASSUNGSBLOG (Mar. 19, 2020), <https://verfassungsblog.de/critique-and-crisis-the-german-struggle-with-pandemic-control-measures-and-the-state-of-emergency/>.

<sup>238</sup> *Leitlinien zum Kampf gegen die Corona-Epidemie*, DIE BUNDESREGIERUNG (Mar. 16, 2020), <https://www.bundesregierung.de/breg-de/themen/meseberg/leitlinien-zum-kampf-gegen-die-corona-epidemie-1730942>.

agreement is not legally binding and the pandemic measures implemented by the Bundesländer have therefore varied.<sup>239</sup> Most notable is Bavaria's response: its parliament concluded that the federal infectious disease legislation was not sufficient, and passed its own infectious disease act that is more restrictive.<sup>240</sup> For the most part, however, German states and the federal government have cooperated with each other.

Other federal states, however, have witnessed a mostly national response. For example, in federal Belgium, the national government has led the pandemic response, even though some of its measures fall within the area of competences of the provinces and regions.<sup>241</sup> Indeed, the pandemic appears to have had a unifying effect on the usually divided country: it enabled the country to establish a full-fledged government for the first time in 454 days.<sup>242</sup> The same is true for Italy. In Italy's federal system, health is an area of concurrent powers, which means that local governments have discretion to develop their own response.<sup>243</sup> Yet, in an effort to reduce regional variation, the federal legislature issued decree law 9/2020, which repealed local orders inconsistent with national measures.<sup>244</sup> Also in Switzerland, the Federal Council has taken the lead in the response and temporarily assumed powers normally reserved for the Swiss cantons.<sup>245</sup>

Interestingly, we are also seeing local level resistance in some unitary states. One example is Thailand, where some provincial governors resisted central government directives. Under the country's emergency legislation that was the basis for the government's pandemic response,<sup>246</sup> provinces are designated to supervise and execute the COVID-19 response, which gives them some discretion in what measures they impose; yet, they do not have the power to set their own response.<sup>247</sup> Nonetheless, when the government eased the nationwide lockdown, some governors ignored the new regulations and continued to rely on the prior directives, thus continuing to close

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<sup>239</sup> See Thielböger & Behlert, *supra* note 237; *Regeln, Einschränkungen, Lockerungen*, DIE BUNDESREGIERUNG, <https://www.bundesregierung.de/breg-de/themen/coronavirus/corona-massnahmen-1734724>.

<sup>240</sup> *Landtag beschließt Bayerisches Infektionsschutzgesetz*, BAYERISCHER LANDTAG (Mar. 25, 2020), <https://www.bayern.landtag.de/aktuelles/aus-dem-plenum/landtag-beschliesst-bayerisches-infektionsschutzgesetz/>.

<sup>241</sup> Frédéric Bouhon et al., *L'État Belge Face à La Pandémie de COVID-19 : Esquisse d'un Régime d'Exception*, 2020/1 COURRIER HEBDOMADAIRE DU CRISP 5, 9 (2020).

<sup>242</sup> See Frédéric Bouhon et al., *La Belgique Face au Coronavirus : une Période Extraordinaire au Regard du Droit Constitutionnel*, BEPOLITIX (BLOG DE L'ASSOCIATION BELGE FRANCOPHONE DE SCIENCE POLITIQUE) (Apr. 7, 2020), <https://absp.be/Blog/belgique-coronavirus-droit-constitutionnel/>.

<sup>243</sup> Costituzione della Repubblica Italiana (Constitution of the Republic of Italy), art. 117.3 (1947) (It.).

<sup>244</sup> Arianna Vendaschi & Chiara Graziani, *Coronavirus, Health Emergencies and Public Law Issues*, VERFASSUNGSBLOG (Mar. 6, 2020), <https://verfassungsblog.de/coronavirus-health-emergencies-and-public-law-issues/>; Diletta Tega & Michele Massa, *Fighting COVID 19 – Legal Powers and Risks: Italy*, VERFASSUNGSBLOG (Mar. 23, 2020), <https://verfassungsblog.de/fighting-covid-19-legal-powers-and-risks-italy/>.

<sup>245</sup> See Verordnung 2 über Massnahmen zur Bekämpfung des Coronavirus (COVID-19) (COVID-19-Verordnung 2) [Ordinance 2 on measures to combat the coronavirus (COVID-19) (COVID-19 Ordinance 2)] March 16, 2020, SR 818.101.24, art. 7 (Switz.).

<sup>246</sup> The Thai government mainly relied on the Emergency Decree on Public Administration in Emergency Situation of 2005. See Andrew Harding, *Emergency Powers with a Moustache: Special Powers, Military Rule and Evolving Constitutionalism in Thailand*, in EMERGENCY POWERS IN ASIA: EXPLORING THE LIMITS OF LEGALITY, 294, 294 (Victor V. Ramraj & Arun K. Thiruvengadam eds., 2009).

<sup>247</sup> Phuket, Yala, Narathiwat Placed on Lockdown, THAI PBS WORLD (Mar. 30, 2020), <https://www.thaipbsworld.com/phuket-yala-narathiwat-placed-on-lockdown/>.

businesses and public spaces and banning the sale of alcoholic beverages.<sup>248</sup> Similarly, in Nicaragua, where President Daniel Ortega has downplayed and ignored the virus threat, some local leaders have taken it upon themselves to take action.<sup>249</sup> And in unitary Indonesia, several regional governments passed stricter regulations than the national government, prompting the President to issue a statement that “regional heads should not make policies of their own.”<sup>250</sup>

Japan also offers an example. In this unitary state, the first coronavirus cases were found on the island of Hokkaido, and the prefectural Governor Naomichi Suzuki declared state of emergency there Feb 28, well before Prime Minister Abe announced an emergency in seven other prefectures. Notably, Japanese law does not empower governors to issue legally binding orders; yet the governor issued orders anyway.<sup>251</sup> Three weeks later, Suzuki lifted the (nonbinding) restrictions, but was forced to announce a second state of emergency on April 14.<sup>252</sup> In Colombia, Bogotá Mayor Claudia López resisted President Duque’s decision to allow some construction workers and manufacturers to return to work, prohibiting this in Bogotá,<sup>253</sup> even without the formal authority to do so.<sup>254</sup>

These examples show that emergency response is not simply the province of an unbound central government executive. Subnational units may have different local conditions and political circumstances that motivate their leaders to take steps that are out of sync with those of the national government. In the vast majority of cases, the local responses have been more aggressive; while in only some, they have been more permissive. In either case, they complicate the image of a single central response that is uniform around the country.

The examples further reveal that the constraints imposed by subnational units are not merely political; they can also be legal in nature. Posner and Vermeule argue that the only types of constraints the unbound executive faces are political in nature, in the form of pressure from their constituents.<sup>255</sup> But some of the tools deployed by subnational governments are undoubtedly legal

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<sup>248</sup> *Public Relations of Pathum Thani Confirmed the Governor Did Not Allow the Sale of Liquors*, MATICHON ONLINE (May 3, 2020), [https://www.matichon.co.th/covid19/measure-covid19/news\\_2168434..](https://www.matichon.co.th/covid19/measure-covid19/news_2168434..)

<sup>249</sup> Ismael López Ocampo & Mary Beth Sheridan, *The President Has Vanished; His Wife, The VP, Says the Coronavirus Isn’t A Problem. Nicaragua Declines to Confront A Pandemic*, WASH. POST (Apr. 12, 2020), [https://www.washingtonpost.com/world/the\\_americas/coronavirus-nicaragua-daniel-ortega-missing/2020/04/11/3ad1fafc-79c3-11ea-a311-adb1344719a9\\_story.html](https://www.washingtonpost.com/world/the_americas/coronavirus-nicaragua-daniel-ortega-missing/2020/04/11/3ad1fafc-79c3-11ea-a311-adb1344719a9_story.html).

<sup>250</sup> Marchio Irfan Gorbiano & Ghina Ghaliya, *Turf War Undermines COVID-19 Fight in Indonesia*, THE JAKARTA POST (Apr. 1, 2020), <https://www.thejakartapost.com/news/2020/04/01/turf-war-undermines-covid-19-fight-indonesia-government-jokowi-anies.html>.

<sup>251</sup> Eric Johnston, *What Will Abe’s Amended Law for A National Emergency Mean in Practice?*, THE JAPAN TIMES (Mar. 10, 2020), <https://www.japantimes.co.jp/news/2020/03/10/reference/what-will-japan-emergency-declaration-law-mean/#.XsLMFvNKiRs>.

<sup>252</sup> Toru Saito & Ichiro Matsuo, *Hokkaido and Spporo Declare Fresh Joint State of Emergency*, ASAHI SHIMBUN (Apr. 13, 2020), <http://www.asahi.com/ajw/articles/13293772>.

<sup>253</sup> Richard Emblin, *Mayor Claudia López Challenges Duque’s Easing of Lockdown in Bogotá*, THE CITY PAPER BOGOTÁ (Apr. 22, 2020), <https://thecitypaperbogota.com/bogota/mayor-claudia-lopez-challenges-duques-easing-of-lockdown-in-bogota/24711>.

<sup>254</sup> *Colombia Constitutional Lawyer Explains Who Gets to Decide Easing of Quarantine*, THE CITY PAPER BOGOTÁ (Apr. 27, 2020), <https://thecitypaperbogota.com/news/colombian-constitutional-lawyer-explains-who-gets-to-decide-easing-of-quarantine/24798>.

<sup>255</sup> POSNER & VERMEULE, EXECUTIVE UNBOUND, *supra* note 8, at 25 (“Congress and other institutions are participants in the game of public opinion, and that game is, in the administrative state, the major constraint on the executive.”).

in nature. This is especially true in federal states, where subnational units have a reserve of authority that is constitutionally protected. Nowhere was this clearer than in Brazil, where the Supreme Federal Tribunal clarified that the President could not encroach upon states' powers to impose lockdowns. But even in unitary states, some of the subnational units may be able to find some constitutional cover for their actions. When local authorities bear responsibility for particular policy decisions, they will have some discretion that allows them to shape the response.

We further note that these examples of subnational resistance demonstrate the importance of another important constraint, not usually recognized in theories of emergency power, namely the problem of implementation. This constraint, which has long been recognized by political scientists, is not so much “political” as it is bureaucratic, in that line level actors must be motivated and sometimes persuaded to implement hierarchical commands.<sup>256</sup> There are dozens of considerations that affect the implementation of any particular program response. Even in a country without federalism, local level actors will have to gather information, coordinate the allocation of resources, work across multiple institutions, and obtain cooperation from affected populations. Each of these features can introduce frictions on implementation, and points of resistance that belie the image of a centralized leader taking control in a crisis.<sup>257</sup>

Legal theorists of emergency governance seem to assume a single executive issuing orders that are seamlessly executed by a bureaucratic hierarchy. In practice, such a hierarchical response is elusive. Scholars working on what is called the “new public governance” focus on the general problems of policy implementation, and propose solutions.<sup>258</sup> Most of these emphasize the roles of innovation, collaboration and persuasion to help ensure policies can be implemented effectively. But this in turn suggests that the executive is not unbound at all—instead she is constrained by the need to persuade her colleagues of the value of proposed policies.

## V. AUTHORITARIAN RESPONSES

Not all executives have seen meaningful checks on their power. Outright dictatorships have used the pandemic as an opportunity to enhance their power and crack down on opponents.<sup>259</sup> To illustrate, China used the coronavirus pandemic to arrest major figures of the political opposition in Hong Kong, including 81-year old lawyer Martin Lee and the owner of the last remaining newspaper critical of the government.<sup>260</sup> Cambodia passed a sweeping set of emergency laws,

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<sup>256</sup> See generally JEFFREY L. PRESSMAN & AARON WILDAVSKY, IMPLEMENTATION (3d ed., 1984); ROBERT NAKAMURA AND FRANK SMALLWOOD, THE POLITICS OF POLICY IMPLEMENTATION (1980).

<sup>257</sup> PRESSMAN & WILDAVSKY, *supra* note 256, at 233 (“The traditional opposition of local units to federal control and the appeal to the norm of local home rule are important political realities and accurate reflections of the inherent technical or logistical limitation of central control in large complex political systems.”).

<sup>258</sup> Christopher Ansell, Eva Sorensen & Jacob Torfing, *Improving Policy Implementation through Collaborative Policymaking*, 45 POL. & POL'Y 467 (2017.).

<sup>259</sup> See, e.g., Selem Gebrekid, *For Autocrats and Others, Coronavirus is a Chance to Grab Even More Power*, N.Y. TIMES March 30, 2020, <https://www.nytimes.com/2020/03/30/world/europe/coronavirus-governments-power.html>; Serge Schmemann, *The Virus Comes for Democracy*, N.Y. TIMES April 2, 2020, <https://www.nytimes.com/2020/04/02/opinion/coronavirus-democracy.html>.

<sup>260</sup> Elaine Yu & Austin Ramzy, *Amid Pandemic, Hong Kong Arrests Major Pro-Democracy Figures*, N.Y. TIMES (Apr. 18, 2020), <https://www.nytimes.com/2020/04/18/world/asia/hong-kong-arrests.html>.

exploiting the Coronavirus panic to further silence the press and opposition critics.<sup>261</sup> And in Nicaragua, the government released some 2,800 prisoners to curb the spread of the virus, but excluded all opposition figures that were jailed in connection with the 2018 uprising in the country.<sup>262</sup> The data presented in Part III.B also reveals important differences in the prevalence of judicial and legislative oversight in democratic and autocratic regimes.

These authoritarian responses are perhaps unsurprising. A more pressing concern is whether, in some systems, the pandemic has caused the erosion of constitutional democracy itself. Indeed, a number of commentators have pointed at such risks. Rachel Kleinfeld speculates that authoritarianism may expand if such countries demonstrate superior responses in eliminating COVID-19.<sup>263</sup> Kenneth Roth argues that authoritarians are using the crisis to consolidate power.<sup>264</sup> And Madeline Albright notes that America's languid response may lead to rising authoritarianism.<sup>265</sup> This Part canvasses whether and how the pandemic response has undermined democracy in some countries.

#### A. *Has the Pandemic Eroded Democracy?*

Exhibit A for a case of democratic demise is Hungary, where Parliament passed a law that allows Prime Minister Victor Orbán to rule by decree for the foreseeable future.<sup>266</sup> Orbán can renew his own decrees indefinitely. Parliament can withdraw the delegation, but only with a two-thirds vote. Hungarian commentators have called this the end of the country's democracy, analogizing to Hitler's notorious Enabling Act that effectively ended the Weimar Republic.<sup>267</sup> Among its other features, the law introduces a new crime of distributing fake news during the crisis, which has led to dozens of arrests of government critics.<sup>268</sup> The question, then, is whether the Hungarian case represents an isolated case or is part of a broader trend.

These concerns fit in with a broader literature on democratic erosion that has grown in recent years. Scholars have noted that, globally, democracy appears to be in decline as the number of democratic

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<sup>261</sup> Prashanth Parameswaran, *Cambodia's COVID-19 Response in the Headlines with New State of Emergency*, THE DIPLOMAT (Apr. 13, 2020), <https://thediplomat.com/2020/04/cambodias-covid-19-response-in-the-headlines-with-new-state-of-emergency/>.

<sup>262</sup> *Coronavirus: Nicaragua Moves over 2,800 Prisoners to House Arrest*, AL JAZEERA (May 14, 2020) <https://www.aljazeera.com/news/2020/05/coronavirus-nicaragua-moves-2800-prisoners-house-arrest-200514062155644.html>.

<sup>263</sup> Kleinfeld, *supra* note 5.

<sup>264</sup> Roth, *supra* note 5.

<sup>265</sup> Madeline Albright, *Authoritarianism and the Fight Against Covid*, THE ECONOMIST (May 18, 2020), <https://www.economist.com/by-invitation/2020/05/18/madeleine-albright-on-authoritarianism-and-the-fight-against-the-virus>.

<sup>266</sup> Kim Lane Scheppelle, *Orban's Emergency*, VERFASSUNGSBLOG (Mar. 29, 2020), <https://verfassungsblog.de/orbans-emergency/>.

<sup>267</sup> Gábor Halmai, *How COVID-19 Unveils the True Autocrats: Viktor Orbán's Ermächtigungsgesetz*, I-CONNECT BLOG (Apr. 1, 2020), <http://www.iconnectblog.com/2020/04/how-covid-19-unveils-the-true-autocrats-viktor-orbans-ermachtigungsgesetz/>.

<sup>268</sup> Gábor Halmai & Kim Lane Scheppelle, *Don't Be Fooled by Autocrats!*, VERFASSUNGSBLOG (Apr. 22, 2020), <https://verfassungsblog.de/dont-be-fooled-by-autocrats/>.



countries has fallen each year since 2006.<sup>269</sup> Further, the quality of institutions in long-standing democracies has also been eroding. This process has accelerated as electorates in democratic countries have turned to populist leaders who sometimes seek to undermine judicial independence and rule of law.<sup>270</sup> A related insight from this literature is that the nature of authoritarianism has changed. While in the popular imagination, democracy is likely to die in one quick step, perhaps through a coup or communist revolution, today's authoritarians are far more likely to take power through the ballot box. They then seek remain in power through what Milan Svobik calls incumbent takeover, a gradual entrenchment of their powers.<sup>271</sup> It has further been observed that emergencies often provide a perfect cover for putative autocrats to start dismantling democratic norms.<sup>272</sup> Indeed, one study finds that declarations of emergency correspond to the degradation of democracy.<sup>273</sup>

The question, then, is whether the COVID-19 emergency has accelerated democratic decline. We should note that, at this point, it is too soon to answer this question with certainty. Only time will tell whether democracy might fall victim to the coronavirus in some countries. Nonetheless, based on our global survey, we have some initial observations about the potential impact of the pandemic on democracy.

We have certainly seen some controversial responses to the pandemic in societies that some believe to be at risk of democratic backsliding. India is one such example.<sup>274</sup> In recent years, the government of Prime Minister Narendra Modi has sought to intimidate the media and gradually squeeze the space of civil society to entrench itself in power.<sup>275</sup> When the virus hit, it issued a draconian lockdown order with only four hours' notice, leaving many stranded. The government also tried to get a Supreme Court writ requiring all news stories related to coronavirus to be preapproved in the name of combatting misinformation. The Supreme Court rejected the writ but said news providers should pay attention to government guidance.<sup>276</sup> These events illustrate, however, that the pandemic might accelerate democratic erosion that is already underway.

The Philippines is another example. The Philippines has been a democracy since its "People Power" revolution of 1986 overthrew the dictatorship of Ferdinand Marcos. But the current President, Rodrigo Duterte, is a right-wing populist who has overseen a campaign of extrajudicial killings that has surpassed even the Marcos era. There has been some targeting of political

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<sup>269</sup> See, e.g., TOM GINSBURG & AZIZ HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018); STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018); DAVID RUNCIMAN, *HOW DEMOCRACY DIES* (2018); Larry Diamond, *Facing Up to the Democratic Recession*, 26 J. DEMOCRACY 141 (2015).

<sup>270</sup> See, e.g., WOJCIECH SADURSKI, *POLAND'S CONSTITUTIONAL BREAKDOWN* (2019).

<sup>271</sup> Milan Svobik, *Which Democracies Will Last? Coups, Incumbent Takeovers, and the Dynamic of Democratic Consolidation*, 45(4) BRIT. J. POL. SCI, 715 (2015).

<sup>272</sup> Levitsky & Ziblatt, *supra* note 269, at 92–96 (discussing how potential autocrats use "crises" to justify antidemocratic measures).

<sup>273</sup> Anna Lührmann & Bryan Rooney, *When Democracy has a Fever: States of Emergency as a Symptom and Accelerator of Autocratization*. V-DEM WORKING PAPER SERIES (March 2019) (democracies are 59% more likely to erode under a state of emergency.).

<sup>274</sup> GINSBURG & HUQ, *supra* note 269, at 28–29.

<sup>275</sup> *Id.*

<sup>276</sup> *Indian Supreme Court Denies Government Request For Prior Censorship Of COVID-19 News*, COMMITTEE TO PROTECT JOURNALISTS (Mar. 31, 2020), <https://cpj.org/2020/03/indian-supreme-court-denies-government-request-for.php>.

opponents, as well as journalists.<sup>277</sup> When the pandemic hit, the country quickly passed legislation providing that anyone who creates, perpetrates, or spreads “false information regarding the COVID-19 crisis on social media and other platforms, such information having no valid or beneficial effect on the population, and are clearly regarded to promote chaos, panic, anarchy, fear, or confusion” will be subject to imprisonment of two months or a fine of up to one million pesos.<sup>278</sup> Just four days after the Act was published, a town mayor was charged by the Philippine National Police under the new crime.<sup>279</sup> And reportedly, the National Bureau of Investigations had summoned more than a dozen people for allegedly spreading fake news about the pandemic.<sup>280</sup> President Duterte has further ordered, with his usual bluster, that if the police and military encounter threats from violators of the lockdown orders, they should simply “shoot them dead”.<sup>281</sup> On the other hand, we have also seen encouraging signs, such as the fact that the Supreme Court intervened to order the release of thousands of prisoners, and that this order was broadly complied with.<sup>282</sup>

One interesting new development is what Professors David Pozen and Kim Lane Scheppele call “executive under-reach.”<sup>283</sup> Certain populist leaders, including President Donald Trump and Jair Bolsonaro of Brazil, have systematically downplayed the virus, using it as an opportunity to attack scientists, the media, and other institutions. In this way, they seek to enhance their control over the political system through denigrating institutions. This phenomenon illustrates that threats to people’s liberty may arise from failures to act as much as from excessive action.

It remains unclear whether democracy will be further eroded in places like India, the Philippines, or Brazil. But it is worth emphasizing that what these countries share in common is that they were already at risk. One way to view the countries most at risk is to analogize to co-morbidities in the medical sphere. A country with a robust and established democracy will not find itself at grave risk. But ones already in the throes of backsliding or populist takeover may see their leaders try to “steepen the curve” so as to accelerate a power grab already in play. And a country that is already in a political crisis might see various players try to exploit the virus to their own advantage.

What are the factors that put a country at risk? The general literature on authoritarian takeover points to several. First, polarized societies are ripe for takeover by charismatic populists, who will

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<sup>277</sup> See Maria Ela L. Atienza et al., *Constitutional Performance Assessment of the 1987 Philippine Constitution*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, (2019), <https://www.idea.int/sites/default/files/publications/constitutional-performance-assessment-1987-philippine-constitution.pdf>.

<sup>278</sup> *Bayanihan to Heal as One Act (Rep. Act No. 11469)*, §6(f) (2020) (Phil.), available at <https://www.officialgazette.gov.ph/downloads/2020/03mar/20200324-RA-11469-RRD.pdf>.

<sup>279</sup> *Cavite Town Mayor Faces Criminal Charges for Fake Reports on COVID-19 Case*, CNN (May 28, 2020), <https://www.cnnphilippines.com/news/2020/3/28/cavite-town-mayor-charges-fake-COVID-19-reports.html>.

<sup>280</sup> Tetch Torres-Tupas, *NBI Summons ‘More Than a Dozen’ People over COVID-19 Social Media Posts*, INQUIRER NET (Apr. 2, 2020), <https://newsinfo.inquirer.net/1252807/nbi-summons-more-than-a-dozen-people-over-covid-19-social-media-posts>.

<sup>281</sup> Lynzy Billing, *Duterte’s Response to the Coronavirus: ‘Shoot Them Dead’*, FOREIGN POLICY (Apr. 16, 2020), <https://foreignpolicy.com/2020/04/16/duterte-philippines-coronavirus-response-shoot-them-dead/>.

<sup>282</sup> See *supra* notes 194–195 and surrounding text.

<sup>283</sup> David E. Pozen & Kim Lane Scheppele, *Executive Underreach, in Pandemics and Otherwise*, AM. J. INT’L L. (forthcoming 2020).

seek to demonize the other side and justify extreme measures to supporters.<sup>284</sup> Second, we know that economic crises and inequality are associated with democratic backsliding.<sup>285</sup> Neighborhood effects matter too: if a country's region is experiencing democratic decline, it increases the likelihood of backsliding.<sup>286</sup> And finally, countries with a history of authoritarianism are more likely to revert than are countries with long periods of democratic stability. According to one study, the best predictor of continued democracy remains the number of years a democracy has already existed.<sup>287</sup> A country that has these underlying conditions—polarization, economic weakness, bad neighborhoods, and a history of instability-- will be more likely to succumb to backsliding during a crisis, as leaders may try to exploit the opportunity to maintain themselves in power. It is these countries that might be most likely to experience democratic erosion during the current crisis.

### B. *Detecting Abuse*

Given the widespread presence of lockdowns and other coercive measures, how would we know if extreme measures needed to fight the coronavirus are genuinely putting a democracy at risk? In this Part, we provide a diagnostic account.

To begin, we acknowledge that it is important to recognize that mere illegality at the moment of response is not a sufficient basis to condemn all measures. Several of the immediate responses to the pandemic involved the exercise of governmental powers that were not legal at the moment they were exercised.<sup>288</sup> We previously discussed the example of Taiwan, where legislation was enacted with retroactive application. Another example is Portugal, where the government initially relied on existing public health legislation, but declared a state of emergency under the Constitution when that legal basis appeared to be insufficient. Scholars have criticized these as analogous to steps taken by dictators such as Hungary's Orbán.<sup>289</sup> But we disagree. It is in the nature of emergencies that the necessary steps are not always contemplated in advance, which means that the requisite powers may not already be authorized in existing law.<sup>290</sup> We believe that, as long as these initial grey holes are swiftly remedied, they do not offer a major cause for concern.

In our view, an assessment should not focus on the formal legality or illegality of measures taken at the moment the crisis hits. That would put too much weight on the presence of mind of prior legislators and constitution-makers to imagine the new crisis. One would not want to condemn a jurisdiction for taking truly necessary steps to preserve itself, simply on the basis of the existing order. Indeed, if we are to limit a government's tools only to those in existence at the time the emergency arises, we are holding today's citizens hostage to the foresight of prior legislators and constitution-makers. Some countries might have an effective legislative framework in place, but others may not. There is no moral reason to let citizens in the latter type of countries suffer

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<sup>284</sup> GINSBURG AND HUQ, *supra* note 269, at 55.

<sup>285</sup> Svolik, *supra* note 271.

<sup>286</sup> Vanessa A. Boese et al., *Deterring Dictatorship: Explaining Democratic Resilience since 1900*, V-DEM INST. (May 2020), [https://www.v-dem.net/media/filer\\_public/7d/8a/7d8acbb5-806a-4ba9-b68c-238bcc352eb9/wp\\_101\\_final.pdf](https://www.v-dem.net/media/filer_public/7d/8a/7d8acbb5-806a-4ba9-b68c-238bcc352eb9/wp_101_final.pdf).

<sup>287</sup> ADAM PRZEWORSKI, *CRISES OF DEMOCRACY* (2019); *see also* Svolik, *supra* note 271.

<sup>288</sup> Kuo, *supra* note 225.

<sup>289</sup> *Id.*

<sup>290</sup> Eric Posner, *Rule of Law Objections to the Lender of Last Resort*, in *CONSTITUTIONS IN TIMES OF FINANCIAL CRISIS* 39, 45 (Tom Ginsburg, Mark Rosen & Georg Vanberg eds., 2019) (dismissing “rule of law objections” as superfluous).

unnecessarily. What *should* give cause for concern, however, is if any initial gap in legal authorization is not cured. In our analysis of our survey, we found some ten countries---China, Cuba, Cameroon, Belarus, Saudi Arabia, Sudan, Cambodia, Rwanda, Laos, and Tanzania---in which the legal basis of the response remains unclear. But notably, none of these are genuine democracies.

At a deeper level, rule of law principles can help us assess the quality of the response, beyond the question of initial legality. We focus on several principles that can be used to evaluate a country's legal response. First, was the response temporally limited? This ancient principle of emergency rule remains a powerful one.<sup>291</sup> We have seen that much of the new legislation that is being passed is temporary. Yet Nigeria, Poland, Hungary, and Russia are all among countries that passed new laws that give the government additional powers but that are not temporarily limited. These cases are potential cause for concern. (Yet, we note that not all legislation without an expiration date is necessarily suspect. To illustrate, a new law in Sweden that grants the national government larger power over school closures does not necessarily raise any concerns over potential abuse. In fact, the Swedish government notoriously refrained from closing schools entirely during the pandemic).

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A second principle is that of judicial and legislative oversight. We have elaborated the powerful and important role these actors have played in many countries during the COVID-19 panic. An emergency scheme that denies the possibility of oversight is one in which the risk of authoritarian backsliding is great. Among the countries that have not have any role for the legislature *or* the courts are Thailand, Zambia, Turkey, and China. These are all either authoritarian or at-risk regimes.

A third principle is whether the response is applied in a non-discriminatory fashion. Enforcement should be applied more or less equally. This is not the case when political opponents of the regime are specifically targeted. Hungary, Bolivia, Cambodia, Turkey and China have seen instances of targeting; but most other countries have not. Where the opposition is targeted, it is evidence of pretextual use of the virus response to achieve other unrelated ends.

These criteria easily allow us to distinguish Hungary, where measures violated all of these rule of law principles, from other countries in which the response conformed to them. It also allows us to say something comparative about the United States, in which heated rhetoric has accused state governors of being fascists or worse for exercising their formidable powers under state emergency statutes. We find that these claims fail easily when applying our test. The pandemic response was led by state governors, who usually acted under prior legislation that had temporal limitations on the extraordinary powers they were granted. There was at least some degree of legislative oversight. And notwithstanding armed protestors converging on many state capitols in the United States, there has been no selective enforcement of restrictions by political affiliation, race or any other salient factor. There are now a series of court challenges around the country, trying to resolve whether state-level prohibitions that prohibit mass gatherings are unconstitutionally burdening

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<sup>291</sup> Rossiter, *supra* note 23, at 15–27.

<sup>292</sup> Lag om tillfällig stängning av verksamheter på skolområdet vid extraordinära händelser i fredstid [on the temporary closure of activities in the school area during extraordinary events in peacetime], SFS 2020:148, (Swed.) *available at* <http://rkrattsbaser.gov.se/sfst?bet=2020:148>.

religious practices, and the analysis turns on whether religion is being singled out, even if unintentionally, for differential treatment.<sup>293</sup> But the fact that these and other cases are going forward, and in some cases have effectively restrained executive response, suggests that there is little immediate risk of democratic backsliding, beyond that which was already present before the current crisis.

We do not, however, have the ability to determine whether or not there are countries that might ultimately see democratic erosion due to factors that were triggered by the pandemic. For example, there is some possibility of a global economic recession, which could give rise to extremist forces that end up eroding democracy in some countries. The highly unequal impact of the virus is likely to exacerbate gaps between rich and poor, which could in turn put pressure on democratic institutions. Yet at this writing we can conclude that the feared wave of erosion caused by the pandemic has not occurred.

## VI. WHAT SHOULD CRISIS GOVERNANCE LOOK LIKE IN A PANDEMIC?

Our empirical findings suggest that, at least in democratic countries, executives have not become “unbound” during this current crisis. Instead, what we observe, in many cases, is ongoing interactions among branches that collectively determines the response. In some cases, these interactions have played out as confrontations, such as when courts impose or remove a lockdown, the legislature refuses to grant certain powers to the executive, or subnational units set their own pandemic response in defiance of the national government. In other cases, such interactions have taken the form of collaboration, such as when legislatures pass new laws in consultation with the executive, courts make minor adjustments to the pandemic response, or when subnational governments are involved in setting the national response.

Regardless of their exact form, these interactions among branches and levels of government represent checks in balances in action, and are decidedly Madisonian. Friction among branches was a key component of Madison’s constitutionalist vision. As he famously noted in the Federalist 51: “the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”<sup>294</sup> But Madisonian checks and balances can also take the form of cooperation and dialogue. For example, Madison envisioned that that political branches and the courts could jointly construct the meaning of the constitution—leading some scholars to describe Madisonian checks and balances as a mechanism for inter-branch dialogue.<sup>295</sup> Finally, Madison emphasized the importance of vertical checks and balances, in the form of federalism. Federalist 51 identified America as a “compound republic” in which “the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate

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<sup>293</sup> Roberts v. Neace, 958 F.3d 409, at 413 (6th Cir. 2020) (“A law might single out religious activity alone for regulation.”).

<sup>294</sup> See THE FEDERALIST NO. 51 (1788) (James Madison).

<sup>295</sup> Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109, 1137 (2006) (describing “coordinate construction” in Madisonian theory as dialogue); see also Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998).

departments” as a result of which “a double security arises to the rights of the people.”<sup>296</sup> Thus, the horizontal and vertical separation of powers are complementary in Madison’s thought.

In many democratic countries, the pandemic response fits this Madisonian framework. When courts insist on legislative authorization for particular steps, they are not only insisting upon the separation of powers scheme set out in the constitution, but also facilitate dialogue between the executive and the legislature. When they tell the government to moderate the pandemic response in light of constitutional rights, or conversely order the government to impose a lockdown, they are contributing to coordinate construction of the constitution. When legislatures involve themselves by enacting new laws, they are playing the Madisonian role of limiting the executive to measures adopted by law. And when subnational governments pressure a national executive to take a more vigorous response or implement their own response, they not only provide valuable information on local conditions to the national government, but also ensure the continued operation of vertical checks and balances.

All of these Madisonian checks can protect both against central executive over-reach, but also against rights abuses that take the form of under-reach.<sup>297</sup> When a government refuses to take action to protect people, it can endanger the right to life, just as a total lockdown infringes on rights to movement. A system of checks and balances among government institutions can help determine the right balance between the individual interest at stake and broader social concerns. Courts have an obvious role to play here, both in protecting rights and also encouraging a sober second look at policies that restrict liberties.<sup>298</sup> But arguments about checks and balances protecting rights are not limited to courts. There is a long line of constitutional scholarship on legislative interpretation of constitutional rights, which suggests that legislators, too, are capable of protecting rights and balancing them against other considerations.<sup>299</sup> Beyond formal institutions, the public, too, has a role to play in helping to determine the scope of constitutional rights, as the literature on “popular constitutionalism” has long emphasized.<sup>300</sup>

Of course, interactions among multiple institutions introduces complexities, as the response may take longer to develop and may be altered a number of times. Yet, the large literature on democratic deliberation suggests that there may be a number of discrete advantages of dialogue and contestation among multiple actors beyond the protection of rights.<sup>301</sup> First, it may produce better

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<sup>296</sup> Though note that Madison’s writing on federalism is more contradictory, and that he became a defender of federalism only in his later work. See Francis R. Greene, *Madison’s View of Federalism in ‘The Federalist’*, 24 PUBLIUS 47 (1994).

<sup>297</sup> Pozen & Scheppele, *supra* note 283.

<sup>298</sup> ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 70 (1962); see also Walter Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401 (1986).

<sup>299</sup> See generally, STEPHEN GARDBAUM *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM* (2013); see also MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 242–44 (2008); Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited*, 5 INT’L J. CONST. L. 391, 417–18 (2007).

<sup>300</sup> LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 106–27 (2004); KEITH WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 110–52 (1999).

<sup>301</sup> Jurgen Habermas, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* (Christian Lenhart & Shierry Weber Nicholson Trans., 1991); Bruce Ackerman, *Why Dialogue?*, 86 J. PHIL. 5 (1989); *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* (James Bohman & William Rehg Eds., 1997).

reason-giving, forced by the and forth between different branches. Second, the fact that multiple branches of government were involved in formulating the response might demonstrate of a consensus among institutions with their own distinct bases of legitimacy.<sup>302</sup> Third, it is possible that any single actor is more likely to wrong, and that when multiple actors are involved, the risk of a colossal mistake is lower. Judicial review and legislative oversight can help to identify blind spots in governmental decision-making, as well as to force careful consideration to ensure that errors are not simply repeated because of inertia.<sup>303</sup>

These arguments apply with perhaps greater force to crisis governance, at least in emergencies like a pandemic or a natural disaster. A pandemic response that reflects the input of multiple branches is likely to be better justified and more well-reasoned.<sup>304</sup> The pandemic has posed many unknowns to policy-makers. The fact that information is widely dispersed, and different parts of the country and population have different needs, means that no single institution is likely to have a monopoly on ideas as to how to resolve a health pandemic. Indeed, there is arguably no single answer to the question of the proper intensity of a lockdown. The balance between freedoms and public health is one on which societies might have legitimate differences, and the disease itself continues to act in unpredictable ways. The best we may be able to hope for, then, is that the response is seen as legitimate, well-reasoned, and avoiding major failure.

While we ourselves do not assert that there is a single universally optimal response to a pandemic, we also believe that a particular society is likelier to come closer to its optimal response through the involvement of multiple branches of government, with an executive that is bound to interact with other branches of government. These branches have different epistemic bases and distinct institutional advantages. Courts are institutionally well equipped to demanding well-reasoned justifications, and to identifying individual interests that may suffer as a result of collective policies. This review of responses taken by executives can ensure that measures are not unduly liberty-restricting, and are publicly justified with evidence. Legislatures provide distinct advantages as arenas for policy debate, and for being the ultimate locus of democratic legitimacy in a representative democracy.<sup>305</sup> And sub-national governments are uniquely able to calibrate policies to local needs, conditions and preferences.

Of course, our defense of the benefits of checks and balances raises the question whether the examples provided earlier in this paper actually reflect significant impact of institutions outside the central executive. While the intensity of engagement surely differs, it appears that in many of the examples given, the involvement by actors outside the executive was substantively meaningful. Take the example of Malawi. After a high court temporarily suspended the government's lockdown for failure to take account of the poor, the government instituted a cash hand out program

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<sup>302</sup> Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)*, 35 OSGOODE HALL L.J. 75 (1997) (legitimacy of institutional dialogues.”).

<sup>303</sup> *Id.*

<sup>304</sup> Andre Bächtiger et al., *The Deliberative Dimensions of Legislatures*, 40 ACTA POLITICA 225 (2005); see also CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 20 (1993) (“[T]he minimum condition for deliberative democracy is a requirement of reasons for governmental action.”).

<sup>305</sup> Nelson W. Polsby, *Legislatures*, in *HANDBOOK OF POLITICAL SCIENCE* 53, 57 (Fred Greenstein & Nelson W. Polsby. eds. 1975) (legislatures as arenas).

for the country's poorest before implementing a lockdown.<sup>306</sup> The court's intervention resulted in important protections for a particularly vulnerable part of the population. Or take the example of Kosovo. After the Constitutional Court struck down the President's lockdown order for not being based on legislation, the government turned to an infectious disease law that had been passed by the legislature to validate its response.<sup>307</sup> One possible interpretation of these events is that the Court merely imposed procedural hurdles. Yet, another take is that legislative involvement was important: it gave the legislature the opportunity to respond and it ensured broad support for the policy, thereby making it more legitimate. Another example is Pakistan, where the provinces took the lead after the central government was hesitant to lockdown.<sup>308</sup> The Supreme Court then intervened to partly relax the lockdown. But as cases continued to grow (and two Supreme Court Justices tested positive) the Court changed track and called on the national government to take the virus seriously and pass legislation to ensure a uniform response.<sup>309</sup> While this response might seem messy, the resulting legislation will likely be seen as legitimate, as it is the result of an extensive back-and-forth between different branches of government.

We of course acknowledge that not all instances of judicial, legislative and subnational involvement are equally meaningful. For example, in some cases, judicial interventions are so modest that they may hardly count as meaningful engagement at all. And there certainly are legislatures whose involvement has been rather limited. Likewise, in some cases, the involvement by other branches has been met with hostility from the executive.<sup>310</sup> But instances of a truly unbound executive have been few and far between, and mostly limited to authoritarian contexts. Whether or not the responses have been ideal as a public health matter, our data shows that at a minimum, there has been widespread involvement from branches other than the national executive. Pandemic governance, then, has been decidedly Madisonian, not Schmittian, in most countries.

## VII. CONCLUSION

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<sup>306</sup> *S v President of Malawi and Others* [2020] MWHC 7, Judicial Review Cause No. 22 of 2020 (High Court of Malawi) (Malawi), available at <https://malawilii.org/mw/judgment/high-court-general-division/2020/7>. However, through another judgment, the court extended the injunction given that the lockdown may result in unrecoverable damages to the poor; see *The State on the application of Kathumba & Ors v. The President & Ors* [2020] MWHC 8, Judicial Review Cause No. 22 of 2020 (High Court of Malawi) (Malawi), available at <https://malawilii.org/mw/judgment/high-court-general-division/2020/8>.

<sup>307</sup> The Constitutional Court of the Republic of Kosovo, Judgment in Case No. KO54/20, Constitutional review of Decision No. 01/15 of the Government of the Republic of Kosovo, of March 23, 2020 (Kos.), available at [https://gjk-ks.org/wp-content/uploads/2020/04/ko\\_54\\_20\\_agj\\_ang.pdf](https://gjk-ks.org/wp-content/uploads/2020/04/ko_54_20_agj_ang.pdf). In a following case, the Supreme Court determined the public health measures taken by the Ministry of Health in the municipalities of Prizren, Dragash and Istog, are fully prescribed and authorized by law, and therefore constitutional. The Constitutional Court of the Republic of Kosovo, Judgment in Case No. KO61/20, Constitutional review of Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health, on declaring the Municipality of Prizren “quarantine zone”; and Decisions [No. 229/IV/2020], [No. 238/IV/2020], [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health on preventing, fighting and eliminating infectious disease COVID-19 in the territory of the Municipalities of Prizren, Dragash and Istog (Kos.), available at [https://gjk-ks.org/wp-content/uploads/2020/05/ko\\_61\\_20\\_agj\\_ang.pdf](https://gjk-ks.org/wp-content/uploads/2020/05/ko_61_20_agj_ang.pdf).

<sup>308</sup> See *supra* note 121 and surrounding text; see also Madiha Afzal, *With a Mix of Pandemic Denialism and Exceptionalism, Pakistan Makes a Cynical Bet on the Coronavirus*, BROOKINGS (Jun. 5, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/06/05/with-a-mix-of-pandemic-denialism-and-exceptionalism-pakistan-makes-a-cynical-bet-on-the-coronavirus/>.

<sup>309</sup> See *supra* note 121 and surrounding text.

<sup>310</sup> See *supra* notes 140–143 and surrounding text.



This Article has used the 2020 pandemic to shed new light on theories of emergency governance. A dominant view is that executive power necessarily expands during a time of crisis, and many fear that this concentration of power will persist even after the emergency is over. Based on our global survey, we find little evidence that courts and legislatures are unable to provide effective constraints on executive power. Courts in particular have been prominent actors, playing a variety of roles: they have insured the procedural integrity of legislative and constitutional schemes; they have assessed pandemic-fighting measures to ensure the proportionality of rights restrictions; and they have demanded that recalcitrant executives take action to protect public health. Legislatures have, in many cases, drafted new laws to respond to the crisis. And local leaders have resisted the approach taken by the central government executive. While it is too soon to fully appreciate the public health impact of this engagement, we believe that it is likely to have moderated executive powers during the pandemic. The picture that emerges, then, is not one of an unbound executive but one of Madisonian constraints, in which governmental institutions interact, both cooperatively and through conflict, in determining as to how to handle a crisis.

Our account of crisis governance extends well beyond the 2020 pandemic. Indeed, many other crises, like natural disasters, climate change, droughts, or famines, share important structural similarities with a pandemic, and our findings might therefore extend to these crises. Accounts of an unbound executive are unlikely to be helpful in understanding how to respond to these situations. To the extent that hurricanes, droughts and pandemics are the modal type of emergency facing countries in an era of climate change, neo-Schmittian theories of emergency power offer a poor description of the ideal institutional response to emergencies.

In one sense, our findings flip the executive unbound argument completely on its head. Following Schmitt in reasoning from an exceptional case, Posner and Vermeule argue that the executive is unbound in general, not only in times of crisis. This is captured by their subtitle, “After the Madisonian Republic.” Surely this claim might have some plausibility if the national security apparatus had taken over vast parts of governmental activity, so that the structure of decision-making across the entire executive branch resembled that found in the security sector. But most policy areas more closely resemble health than national security. They involve complex programs, implemented at multiple levels of government, and the coordination of resources found in both private and public sectors. They involve the aggregation of information from multiple different sources, but without centralized decision-making or hierarchical implementation. Dialogue, persuasion, and iteration are the norm in these areas, and these features of general governance turn out to describe at least some emergencies as well. Madisonian checks and balances, not Schmittian dictatorship, remains the central orienting point for democratic governance in times of crisis as well as in times of calm.