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CRISIS GOVERNANCE OF THE BORDER: THE LAW AND POLITICS OF IMMIGRATION EMERGENCY

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ABSTRACT

In the United States, law and politics around immigration are increasingly framed in terms of emergency, with claims of a perpetual crisis at the border necessitating extraordinary measures. Presidents now routinely invoke express emergency or quasi-emergency powers provided under statute, or, when operating under ordinary legal authority, frame their actions in terms of emergency. States, meanwhile, increasingly sue the federal government to block measures they argue are creating or exacerbating a crisis within their own respective borders, or take immigration enforcement into their own hands. Emergency measures, moreover, often prove a one-way ratchet, effectively making permanent what were initially justified as temporary restrictions.

This Article explores the emergence of a new norm of crisis governance at the border. The Article surveys theories of emergency power to provide a larger context for the United States' increasing reliance on a paradigm of emergency to address immigration. It then explains how this paradigm increasingly dominates law, politics, and policy around immigration, focusing on four controversial measures from the Trump and Biden administrations: the 'Muslim Ban'; the construction of the Border Wall; Remain in Mexico; and the suspension of asylum during COVID-19. The Article concludes by explaining how the ascendence of crisis governance can serve as a

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pretext for continued immigration restrictions, unnecessarily undermine protections for migrants, and prevent the adoption of more measured and constructive responses to the actual challenges and opportunities posed by shifts in migration. Further, the more that a narrative of emergency takes hold, the more entrenched and normalized modes of crisis governance in this area will become.

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INTRODUCTION

Today, immigration is the battleground for some of the most intense legal and political conflicts in the United States. While immigration restrictions have ebbed and flowed over time, the latest shift towards more aggressive federal immigration enforcement dates to the 1980s and has been supported to varying degrees by both major political parties. But the shift accelerated

over the last decade with the rise of rightwing populism and the election of Donald Trump in 2016.

Law and politics around immigration are increasingly framed in terms of emergency. Stories of migrants from Central and South America streaming across the U.S.-Mexico border dominate headlines, a narrative amplified by migrants fleeing from other parts of the world.[1] While migration has historically fluctuated based on cyclical labor flows, multiple factors help drive mass migration today, including climate change, violence and civil unrest, and food insecurity and other economic hardship.[2] There is, moreover a growing disconnect between the legal framework for migration, which distinguishes those who meet the narrow international legal definition of refugee because they are fleeing persecution on an enumerated ground,[3] and the growing number of migrants—sometimes referred to as "crisis" or "survival" migrants[4]—who flee for other reasons.[5] In the United States, the system of asylum—which offers legal protection to those who meet the refugee definition and manage to reach the United States—serves as a magnet for much of the anti-immigration backlash and has proven particularly vulnerable to attack. [6] Shifts in migration often appear unexpected, unpredictable, and out of control, thus contributing to a narrative of crisis.[7] This, in turn, increases the appeal of emergency as a framework and tool of governance.[8]

This is not the first time that claims of emergency have been used to restrict immigration. After World War I, for example, politicians seized on economic instability, public safety concerns, and rising xenophobia to enact a harsh anti-immigrant agenda.[9] In 1921, Congress enacted the Emergency Quota Act,

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1. *See, e.g.*, Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L.J. 609, 610 (2017) ("From African and Middle Eastern migrants crossing the Mediterranean in rickety vessels, to Central American children and families at the southern *U.S. border, to Afghans and Iraqis aiming for Australian shores in overcrowded ships, stories of exodus and influx abound.").

2. *See, e.g.*, ALEXANDER BETTS, SURVIVAL MIGRATION: FAILED GOVERNANCE AND THE CRISIS OF DISPLACEMENT 2 (2013).

3. The 1951 Refugee Convention limits protection to individuals who fear that they will be targeted for serious mistreatment on account of their race, religion, nationality, political opinion, or membership in a particular social group and whose government is cannot or will not protect them against such harm. *See* U.N. Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954).

4. Susan Martin, Sanjula Weerasinghe & Abbie Taylor, *What is Crisis Migration*?, 45 FORCED MIGRATION REV. 5, 5 (2014).

5. Ramji-Nogales, *supra* note 1, at 611–12.

6. To qualify for asylum, an individual most demonstrate persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R.§ 208.13(a) (2025). Even if an applicant satisfies the requirements for asylum, the Attorney General retains discretion to grant or deny asylum. *See* Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 159-160 (1993).

7. Ramji-Nogales, *supra* note 1, at 611.

8. Governance can be defined as "a government's ability to make and enforce rules, and to deliver services," *see* Francis Fukuyama, *What is Governance?* 3 (Center for Global Development, Working Paper No. 314, 2013), https://perma.cc/R84P-AS77, or "the exercise of political power to manage a nation's affairs," *see* IMF, *The Role of the Fund in Governance Issues – Review of the Guidance Note – Preliminary Considerations – Background Notes* (Feb. 8, 2017) (citation omitted), https://perma.cc/Z3TC-JBEX.

9. Joshua Zeitz, *Another Time a President Used the "Emergency" Excuse to Restrict Immigration*, POLITICO (Apr. 22, 2020, 10:10 AM), https://perma.cc/9SKE-BF3Z.

sharply reducing the number of immigrants permitted to enter the country, capping immigration from any particular country at 3 percent of the total number of people who emigrated from there in 1910.[10] Three years later, in the Immigration Act of 1924,[11] Congress expanded on these restrictions and made them permanent, moving the benchmark year back to 1890, before the immigrant population shifted from northern, Protestant Europeans to Catholics and Jews from southern and eastern Europe, who were seen as undermining the character of the nation.[12] The quota system would remain in force for over forty years, underscoring how "emergency" measures—driven by a toxic mix of economic insecurity, public fear, and racism—can become entrenched.

Today, a paradigm of emergency helps drive U.S. immigration policy in several ways. Presidents invoke express emergency powers provided by statute, rely on quasi-emergency authorities that grant broad discretion to restrict immigration under specified circumstances, or simply invoke ordinary legislation while framing the particular policy response in terms of emergency. States, meanwhile, sue the federal government to block measures they say are exacerbating an immigration emergency or to compel more aggressive enforcement of immigration law; states also now increasingly act unilaterally in the name of an immigration crisis.[13]

Republicans, in particular, have relied heavily on a framework of emergency at both the national and state levels. When Republicans controlled the White House under President Trump, for example, the executive invoked emergency authority to build a border wall and to restrict asylum. After Democrats regained control of the White House under President Biden, predominantly Republican or "red" states weaponized claims of a border crisis to challenge federal immigration policy and to prevent any moderation of restrictions. The Biden administration, however, also relied on claims of emergency in managing the border, mostly to maintain immigration restrictions (*e.g.*, by continuing COVID-19-based restrictions on asylum), although, in at least one circumstance, to ease them (*e.g.*, by releasing asylum seekers from custody to prevent overcrowding at detention facilities). And predominantly Democratic or "blue" states and cities, confronting the growing budgetary costs of rising migration—a situation exacerbated by red states bussing large numbers of migrants to blue states[14]—are increasingly echoing concerns voiced by red states. Indeed, as the 2024 presidential election campaign

10. Emergency Quota Act of 1921, Pub. L. No. 67-5, § 2(a), 42 Stat. 5, 5 (1921).
11. Immigration Act of 1924, Pub. L. 68-139, § 11, 43 Stat. 153, 159 (1924).
12. Zeitz, *supra* note 9.
13. *See* Kate Huddleston, *Manufactured State Immigration Emergencies as State Vigilantism*, 11 TEX. A & M L. REV. ARGUENDO 13, 15 (2024) (describing the use of state emergency authority by Texas and other states "to create a parallel immigration enforcement system," leading to, *inter alia*, the arrest and imprisonment of thousands of noncitizens and the deployment of National Guard troops to the border in exceess of federal levels).
14. J. David Goodman, Keith Collins, Edgar Sandoval & Jeremy White, *Bus by Bus, Texas' Governor Changed Migration Across the U.S.*, N.Y. TIMES (July 23, 2024), https://perma.cc/V4JU-MGPW.

shows, Democrats at the national level are also increasingly embracing a hard-line on immigration to address concerns about a border crisis and their political vulnerability on the issue,[15] suggesting the degree to which the frame of emergency is becoming entrenched across the political spectrum.

A framework of emergency has proven attractive for several, overlapping reasons. Claims of emergency can in some instances unlock greater powers by providing additional legal authority for executive action. Such claims also help enable government officials to evade restrictions, including those prohibiting religious discrimination (for example, by helping cloak the motive of religious animus in determining admission to the country), and to evade statutory and regulatory requirements governing the treatment of asylum seekers. Even when a declaration or finding of emergency is not legally required, however, the language of emergency can provide an organizing force for executive action. It also tends to trigger judicial deference, although in some instances, courts have resisted justifications based on an immigration emergency. Claims of emergency, moreover, help command federal dollars, suggesting the role financial motives play.

Congressional inaction has increased the appeal of governing through unliteral executive action, which in turn incentivizes the executive to employ a crisis narrative to justify its actions. Congress has repeatedly failed to enact comprehensive reform or to otherwise seek solutions that attempt to balance competing concerns about increased migration with the obligation to maintain protections for those fleeing persecution or to address the plight of the millions of undocumented migrants in the United States. Even popular reforms, including providing a pathway to citizenship for "Dreamers" (children who were brought to the United States without documentation), remain stalled in a quagmire of degenerating political polarization and legislative dysfunction. Indeed, Republican opposition to proposed legislation to substantially strengthen border security—which would have provided additional money to detain and deport immigrants, restrict asylum, and give the U.S. Department of Homeland Security (DHS) new emergency authority to shut down the border if daily average migrants crossing unlawfully reach a certain level—underscores just how fractured the politics around immigration has become.[16]

Juxtaposed against these roadblocks, presidential reliance on a frame of emergency—whether legal or political or both—is an increasingly attractive immigration policymaking tool. When, for example, Congress refused to provide new emergency authority to shut down the border, President Biden issued an executive order closing the U.S.-Mexico border to migrants, including asylum seekers, who seek to cross between ports of entry when the

15. Jazmine Ulloa & Zolan Kanno-Youngs, *On Immigration, Harris and Democrats Walk a Delicate—and Harder—Line*, N.Y. TIMES (Aug. 26, 2024), https://perma.cc/ZJ2U-BEEZ.

16. *See* Priscilla Alvarez, *Biden seizes on tougher border measures as he tries to fend off Trump attacks*, CNN (Jan. 27, 2024), https://perma.cc/CLS5-MD99.

number of crossings reach specified levels.[17] Although President Biden relied on a broad delegation of legislative authority rather than a legal claim of emergency, he framed the action in terms of the language of emergency, as a temporary measure to address the "crisis" at the southern border.[18] Such measures, moreover, have often proven a one-way ratchet, effectively making permanent what were initially justified as temporary restrictions, a dynamic that often characterizes the invocation of emergency action generally.[19]

Indeed, the primary significance of framing the state of immigration as a "crisis" or "emergency" may be as great in terms of its effect on the public, media, and political discourse as on the law. As scholars have observed, misinformation and propaganda about immigration and asylum—spread by alt-right media sources and embraced by the national Republican party—has helped shape perceptions of an immigration crisis and transform U.S. politics, particularly since Trump's election in 2016.[20] This increasingly toxic discourse contributes to a politics of emergency that helps drives legal responses to the border and to immigration policy more generally. At time of writing, with Donald Trump's election to a second term as president—and his promise upon taking office again to declare a national emergency, enlist the assistance of the military, and pursue mass deportations of undocumented immigrants[21]—the framework of an immigration emergency is on the verge of becoming even more pronounced, normalized, and entrenched.

To be sure, the growing reliance on a law and politics of emergency is not limited to immigration. Claims of an immigration emergency also reflects broader trends evidenced in responses to challenges like terrorism, climate change, COVID-19, and even the federal debt ceiling.[22] As Robert Tsai has observed, "[i]n an age characterized by extreme partisanship, institutional gridlock, and technological manipulation of information, it has become exceedingly easy and far more tempting for a President to invoke extraordinary

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17. Proclamation 10773–Securing the Border, 2024 DAILY COMP. PRES. DOC. 4 (June 3, 2024).

18. Remarks on Border Security and an Exchange With Reporters, 2024 DAILY COMP. PRES. DOC. 3 (June 4, 2024).

19. *See, e.g.*, GIORGIO AGAMBEN, STATE OF EXCEPTION 2 (KEVIN ATTELL TRANS., UNIV. CHICAGO PRESS 2005); Anil Kalhan, Gerald P. Conroy, Mamta Kaushal, Sam Scott Miller & Jed S. Rakoff, *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 COLUM. J. ASIAN L. 93, 125 (2006) (describing how emergency detention laws have become a "permanent part of India's democratic experiment").

20. *See, e.g.*, YOCHAI BENKLER, ROBERT FARRIS & HAL ROBERTS, NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS 132 (2018); *see also* MARISA A. ABRAJANO & ZOLTAN HAJNAL, WHITE BACKLASH: IMMIGRATION, RACE, AND AMERICAN POLITICS (2017) (examining how immigration is reshaping U.S. politics); JOHN SIDES, MICHAEL TESLER & LYNN VAVRECK, IDENTITY CRISIS: THE 2016 PRESIDENTIAL CAMPAIGN AND THE BATTLE FOR THE MEANING OF AMERICA (2019) (discussing the impact of the politics of immigration on the 2016 election).

21. Charlie Savage & Michael Gold, *Trump Confirms Plans to Use the Military to Assist in Mass Deportations*, N.Y. TIMES (Dec. 16, 2024), https://perma.cc/T462-GB7B.

22. *See, e.g.*, Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1549 (2009) (describing how the growing tendency "to view counterterrorism only through the lens of emergency power exaggerates the importance of high-speed rights-security trade-offs, and obscures the range of trade-offs any security decision-making structure must confront—including regular trade-offs between strategy and tactics.").

power by ginning up exigencies."[23] In that sense, immigration is part of a larger story of growing unilateral executive action in response to legislative gridlock and other challenges to governance in the United States today.

Yet, in other respects immigration is unique given the varied way claims of emergency are now routinely wielded in this space, the degree to which a framework of emergency is becoming normalized in public and political discourse, and the degree to which its overuse can distort policymaking in this area. Immigration also underscores how claims of emergency, even when not formally necessary to unlock greater legal authority, can nonetheless empower the executive in a context of where the executive already has broad statutory discretion and where constitutional protections, including prohibitions against discrimination based on race or nationality and guarantees of due process, remain weak.[24] Immigration, moreover, surfaces the underlying question of why a frame of emergency is used at all: is political rhetoric necessary even when legal claims of emergency are not?; is law operating in furtherance of political rhetoric, or, are both forces at play?; and how might the drivers of a narrative of emergency extend beyond immigration to other vulnerable or disfavored populations that lack protections within the political process?

The Article does not contest whether immigration truly constitutes an "emergency" for the United States; nor does it attempt the difficult, if not impossible, task of defining emergency as a legal or political matter. While important, those questions are not central to the inquiry here. Instead, the Article focuses on the increasing reliance on a frame of emergency and how this frame is contributing to a new norm of crisis governance of the border.

Part I surveys theories of emergency power to provide a larger context for the United States' increasing reliance on an emergency paradigm to address immigration. Part II explains how the frame of emergency increasingly drives U.S. immigration law and policy (whether explicitly or implicitly) by focusing on four controversial measures from the Trump and Biden administrations: the Muslim Ban; the construction of the Border Wall; Remain in Mexico; and the suspension of asylum under Title 42 during the COVID-19 pandemic. Part III describes how this form of crisis governance operates across the branches of the federal government and between the federal government and the states. The Article concludes by identifying some broader implications for U.S. immigration law and policy, the protection of migrants, and the law of emergency itself.

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23. Robert L. Tsai, *Manufactured Emergencies*, 129 YALE L.J. 590, 590 (2020).

24. *See* Cecillia D. Wang, *Ending Bogus Immigration Emergencies*, 129 YALE L.J. 620, 621 (2020) ("President Trump's immigration policies have demonstrated more clearly than ever before that when U.S. Presidents are permitted to speak in terms of 'emergency' and security 'threats' with plenary executive authority, they create deep and long-lasting harms to U.S. communities, due process, and the rule of law.").

I. THEORIES AND MODALITIES OF EMERGENCY POWER

Countries frequently resort to emergency powers in response to political upheaval, natural disasters, public health crises, terrorism, and other exigencies. Countries exercise these powers through a variety of mechanisms. In some instances, they rely on express grants of emergency authority in their constitutions or statutes; in others, they invoke broad legislative delegations of authority, citing the need for extraordinary measures to respond to extraordinary circumstances. Countries vary too in the range of criteria and procedures for issuing and terminating an emergency declaration, the scope of emergency authority, and the limits, if any, on its use.[25] The literature on emergency powers offers insights into the shifting dynamics around U.S. immigration law and policy and the normalization of crisis governance of the border.

A. *Models of Emergency Power*

From a political theory perspective, the lodestar for emergency powers in a constitutional democracy remains the state of exception, although today the state of exception exists more in theory than reality. Historically, the state of exception treated the concentration of power in a leader as a lawful means of governance amid perceived exigencies.[26] Scholars trace the origins of this concept to the Roman Republic, which provided in its laws for giving an individual "absolute power" in time of crisis, "not to subvert but to defend the republic, its constitution, and its independence."[27] Modern conceptions of the state of exception, often associated with the German political theorist Carl Schmitt, accept the idea that constitutional democracies will inevitably confront grave crises that require them to suspend existing legal rules and adopt measures that would be prohibited in normal times.[28] Schmitt defined the sovereign as the one who determines the exception and therefore decides when a particular exigency demands operating outside the normal rules and system of governance.[29]

The premise underlying the state of exception—that a nation will inevitably suspend normal rules to confront a crisis—has persisted in various forms over time. In his 1948 book, *Constitutional Dictatorship: Crisis Government in the Modern Democracies*,[30] Clinton Rossiter examined the increasing

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25. Christian Bjørnskov & Stefan Voigt, *The Architecture of Emergency Constitutions*, 16 INT'L J. CONST. L. 101, 106–11 (2018).

26. Frederick M. Watkins, *The Problem of Constitutional Dictatorship*, PUBLIC POLICY 324, 335 (1940); *see also* Sanford Levinson & Jack Balkin, *Constitutional Dictatorship: Its Dangers and Designs*, 94 MINN. L. REV. 1789, 1798 (2010).

27. CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 16 (1948).

28. CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 6–7 (George Schwab trans., MIT Press 1985) (1922).

29. *Id.* at 5–7 ("[The sovereign] decides whether there is an extreme emergency as well as what must be done to eliminate it. Although he stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in it's entirety.").

30. ROSSITER, *supra* note 27.

entrenchment of emergency power in the United States and other western democracies. Rossiter described how these democracies adopted a new form of dictatorship in response to the monumental challenges posed by the Great Depression and World War II, which he contrasted with what he termed "unconstitutional" dictatorship.[31] More recently, Sandy Levinson and Jack Balkin—armed with the perspective of the post-war expansion of the national security state and America's response to 9/11—elaborated on the theory of constitutional dictatorship.[32] In a constitutional dictatorship, they argue, broad legislative, executive, and judicial powers are conferred on the dictator, but those powers remain subject to procedural and substantive limitations that are set forth in advance.[33] These powers, however, are unhindered by important legal checks, such as those that would allow aggrieved persons to quickly commence an action to hold decisionmakers accountable.[34] Government actors are thus endowed with essentially unreviewable discretion to set policy and execute it immediately with the force of law.[35]

Other commentators have likewise recognized that states will continue to take exceptional measures in response to a range of crises but have argued in favor of evaluating those actions after the fact. Oren Gross, for example, argues that trying to confine state responses to emergencies to a framework of legality will end up bending and distorting legal rules.[36] Instead, he argues, it is better to acknowledge that states will respond through extralegal measures provided that they openly and publicly acknowledge the nature of their actions.[37] It would then be up to the people, including through their elected representatives in the legislature, to decide how to respond to such extralegal actions.[38]

Today, the regulated emergency, rather than state of exception, is the most common emergency powers paradigm. As Kim Scheppele has explained, "the Schmittian conception of the state of exception is no longer considered an acceptable frame of response for many [nations]," especially in Europe, given "the catastrophe of [the] Weimar [Republic], the rise of fascism, the experience of communism, and the history of total wars in the twentieth century."[39] For many countries, past experiences with abuses of emergency power have reinforced the importance of placing limits on its exercise. In a system providing for a regulated emergency, a country's constitution permits the creation of a state of emergency; but the constitution also seeks to

31. *Id*. at 4.
32. Levinson & Balkin, *supra* note 26.
33. *Id*. at 1805–07.
34. *Id*. at 1805.
35. *Id*. at 1808.
36. *See* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1022 (2003).
37. *Id*. at 1023, 1097 ("Going completely outside the law in appropriate cases may preserve, rather than undermine, the rule of law in a way that constantly bending the law to accommodate emergencies will not.").
38. *Id*. at 1023.
39. Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1003 (2004).

maintain control over the emergency in multiple respects, including over who possesses the authority to declare the emergency, the conditions under which it may be declared, the scope of authority that may be exercised in time of emergency, and how long the state of emergency should last.[40] As Scheppele notes, "[i]t has now become a matter of standard constitutional drafting practice to constitutionally regulate states of emergency within the constitution, so that the state of emergency—like the idea of war itself—has become an idea filled with legality."[41]

The "business as usual" model offers a competing approach to emergency government. This model maintains that emergencies should be addressed through ordinary statutory and textual frameworks. David Dyzenhaus, for example, has argued that states should commit to governing through law in an emergency.[42] According to Dyzenhaus, instead of acting outside the law, liberal democracies should instead seek to accommodate emergencies within a framework of legality.[43] Amanda Tyler has similarly argued that disagreements on whether an emergency requiring exceptional measures actually exists, the lack of any clear start or end date for a given emergency, a historical lack of self-policing by the political branches, and a long history of overreaction by the executive to emergencies, counsel in favor of a business-as-usual model.[44]

Yet, despite the promise of continued normalcy under a business-as-usual model, government officials may still be given wide, even potentially extraordinary, powers without the express invocation of a state of exception or explicit grant of emergency authority, through broad delegations of legislative power to the executive and limitations on judicial review of executive action. Government officials may, alternatively, rely on the language and policy of emergency to justify extraordinary measures taken under ordinary legislation—a dynamic the emergency powers literature, with its focus on formal measures, tends to overlook. A context like immigration in the United States is ripe for the various modes of governing through emergency, given the long history of the "plenary power" doctrine and judicial deference to the political branches.[45] Thus, the lines between the business-as-usual and

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40. International law increasingly provides a source of constraint in regulated emergencies. *See* Oren Gross, '*Once More into the Breach*': *The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT'L L. 437, 440-42 (1998) (discussing attempts to provide a framework for the regulation of emergencies under the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights).

41. Scheppele, *supra* note 39, at 1079.

42. David Dyzenhaus, *The Compulsion of Legality*, *in* EMERGENCIES AND THE LIMITS OF LEGALITY 33, 33 (Victor V. Ramraj ed., 2008).

43. *Id*. at 33.

44. *See* Amanda L. Tyler, *Judicial Review in Times of Emergency: From the Founding Through the COVID-19 Pandemic*, 109 VA. L. REV. 489, 561–72 (2023). Tyler argues, for example, that presidents are typically concerned with resolving emergencies, instead of ensuring that their emergency response complies with the Constitution. *Id*. at 568–69.

45. *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 465-83 (2009) (discussing the history of judicial deference to immigration policies); Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1671 (2007) ("The history of

regulated emergency models often blur, and the scope of powers to respond to a crisis—and the restrictions imposed on them—may depend less on formal categories than on the often highly contextual way in which that power is wielded and constrained in practice.[46] The language of emergency, moreover, can shape the exercise of legal power even where government actors are operating under an ordinary, non-emergency statutory framework.

B. *Emergency Power in the United States*

More than ninety percent of constitutions in the world today contain express provisions addressing a state of emergency.[47] This suggests that emergency constitutions are now the rule rather than the exception.[48] In this regard, the United States is often viewed as an outlier, as its constitution contains only a handful of clauses pertaining to specific exercises of emergency authority, such as the provision in Article I for the suspension of habeas corpus.[49] Further, some of the most celebrated passages in Supreme Court history perpetuate the notion of a constitutional culture hostile to emergency powers.[50]

In fact, however, the United States employs a wide range of emergency powers through legislation. Today, the president has access to emergency powers contained in over 120 statutory provisions.[51] Moreover, most of the emergencies declared since Congress in 1976 enacted the National Emergencies Act (NEA)[52] remain in effect, even though the NEA was enacted to curb and regulate the use of such powers.[53] Although Congress nominally retains a role under the

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immigration jurisprudence is a history of obsession with judicial deference."); *see also* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1096 (2009) (arguing that U.S. administrative law, including U.S. immigration law, is essentially "Schmittian" because it allows federal agencies to operate outside the constraints of administrative procedure and meaningful judicial review during emergencies).

46. Scholars have made similar observations about emergency powers in other contexts. *See, e.g.*, AGAMBEN, *supra* note 20, at 10 (noting that the development of the state of exception in the West "is independent of its constitutional or legislative formalization"); Arianna Vedaschi, *COVID-19 and Emergency Powers in Western European Democracies: Trends and Issues*, VERFASSUNGSBLOG (May 5, 2021), https://perma.cc/ES53-ATKG (describing the different ways European countries utilized (or did not utilize) emergency powers in addressing COVID-19); Anil Kalhan, *Constitution and "Extraconstitution": Colonial Emergency Regimes in Postcolonial India And Pakistan*, *in* EMERGENCY POWERS IN ASIA: EXPLORING THE LIMITS OF LEGALITY 89, 92 (Victor V. Ramraj & Arun K. Thiruvengadam eds., 2012) (noting that that while emergency powers have been employed in both constitutional and extraconstitutional ways in post-colonial India and Pakistan, "the basic results have in some respects been strikingly similar").

47. Bjørnskov & Voigt, *supra* note 25, at 106 (fig. 1).

48. *Id.* at 106.

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

50. *See, e.g.*, Ex parte Milligan, 71 U.S. 2, 107, 120 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace . . . .").

51. Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, THE ATLANTIC (Jan./Feb. 2019), https://perma.cc/72V6-TSER.

52. National Emegencies Act, § 201(a), 90 Stat. 1255 (1976).

53. *Hearing on Never Ending Emergencies—An Examination of the National Emergencies Act Before the Subcomm. on Econ. Dev., Pub. Bldgs., and Emergency Mgmt. of the H. Comm. of Transp. and Infrastructure*, 118th Cong. 7 (2023) (statement of Elizabeth Goitein, Sr. Dir., Liberty and Nat'l Sec. Program, Brennan Ctr. for Soc. Just. at N.Y.U.), https://perma.cc/W7JD-9F5F. As Goitein notes, "[t]he average length of emergencies has been close to a decade, with 29 emergencies lasting even longer." *Id.*

NEA in managing emergencies declared by the president, it can only terminate a presidential emergency declaration through a joint resolution signed by the president.[54] In practice, congressional limitations on emergencies have proven largely toothless.[55] Meanwhile, Congress has continued to create broad and undefined delegations of emergency authority.[56] As Stephen Vladeck has underscored, national security scholars have been warning for years against "Congress's systematic over-delegation of authority to the President to respond to a surprisingly broad array of real or invented (or, at least, overblown) crises."[57]

If the United States is atypical in its reliance on statutory powers to address emergencies, it is so only in the extent of that reliance. As John Ferejohn and Pasquale Pasquino note, even advanced democracies that possess constitutional powers to address emergencies do not necessarily employ them and instead often tackle emergencies through ordinary legislation.[58] While such legislation can provide far-reaching authority to the executive and may be enacted for temporary periods, it "remains ordinary within the framework of the constitutional system [because] it is an act of the legislature working within its normal competence."[59] In this respect, the United States should not be seen as an outlier due to the lack of an emergency clause in its constitution. To the contrary, the proliferation of statutory powers to address emergencies demonstrates a creeping reliance on such powers across a range of areas.

Complex, high-stakes challenges like terrorism, climate change, and global pandemics have led states to rely increasingly on emergency measures in response. They have contributed to what Jerry Dickinson has described as a state of "indefinite emergency" that has "effectively normalized crisis

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54. 50 U.S.C. § 1622(a)(1). Initially, Congress could terminate a national emergency with a concurrent resolution, but Congress amended the National Emergencies Act in 1985 to add this joint resolution requirement to make the act compliant with the Supreme Court's ruling in *INS v. Chada*, 462 U.S. 919 (1983), which ruled that a legislative veto should be considered an exercise of legislative power and, as such subject to the bicameralism and presentment requirements. *See* L. ELAINE HALCHIN, CONG. RESEARCH SERV., CRS REP. NO. 98-505, NATIONAL EMERGENCY POWERS 11 (updated Nov. 19, 2021), https://perma.cc/DUS7-VQ7Z.

55. The only time Congress terminated an emergency pursuant to the NEA was in 2023, when President Biden ended the COVID-19 emergency by signing H.J. Res. 7 into law. *Hearing on Never Ending Emergencies—An Examination of the National Emergencies Act before the Subcomm. on Econ. Dev., Pub. Buildings, and Emergency Mgmt. of the H. Comm. Of Transp. and Infrastructure*, 118th Cong. 6 (May 24, 2023) (statement of Soren Dayton, Dir. of Governance, Niskanen Center), https://perma.cc/VY3A-WXSZ.

56. *See* Goitein, *supra* note 51; Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1418–19 (1989); Stephen I. Vladeck, *The Separation of National Security Powers: Lessons from the Second Congress*, 129 YALE L.J. F. 610, 611 (2020) ("From the National Emergencies Act (NEA) to the Insurrection Act; from the Trade Expansion Act of 1962; to the International Emergency Economic Powers Act; and from the 2001 Authorization for Use of Military Force (AUMF) to the 2002 AUMF in Iraq, federal law today delegates a staggering amount of power to the President" to address real or perceived crises" (internal footnotes omitted)).

57. Stephen I. Vladeck, *The Separation of National Security Powers: Lessons from the Second Congress*, 129 YALE L.J. F. 610, 611 (2020).

58. John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210, 215 (2004). One example is the adoption of counterterrorism legislation by various European nations. *Id.*

59. *Id.*

government" through a combination of public fear and desire for urgent measures.[60] The stress and vicissitudes of the democratic process—where government officials facing reelection must reckon with an anxious and perhaps angry electorate—increase incentives to err on the side of treating challenges through the prism of emergency.[61] And while the politics of emergency may be formally distinct from emergency's legal mechanisms, it can both incentivize the executive to act through expansive interpretations of its legal authority and help it to resist external constraints on it.[62]

In the United States, immigration is increasingly framed in terms of the law and language of emergency. This framing, moreover, reflects a heightened vulnerability to political manipulation and growing signs of becoming permanent. The next Part discusses how a range of measures designed to restrict immigration, strengthen enforcement, and limit asylum demonstrate the normalization of crisis governance of the border.

II. BORDER EMERGENCIES

Attempts to restrict migration to the United States increasingly draw upon the law and language of emergency. In some instances, the president relies on explicit or quasi-emergency powers under federal statutes; in others, the president relies on ordinary legislative authority but frames the actions as emergency responses. Individual states also increasingly rely on claims of emergency, whether to oppose efforts by the executive to moderate prior immigration restrictions, to compel the executive to enforce federal immigration law more aggressively across the board (rather than, for example, to prioritize removing certain noncitizens over others), or to themselves assert greater control over the enforcement of immigration law.

While courts have often sustained claims of emergency by the executive and encouraged the weaponization of emergency by states, particularly through the granting of nationwide injunctions to maintain maximalist restrictions on immigration, they have also sometimes resisted such claims. The varied responses by courts to requests for emergency relief provide a more complex picture than the conventional one of judicial deference to emergency administration;[63] they also reflect the degree to which the emergency framework is now used as a pretext and immigration policy has become politicized.

The four examples below illustrate how claims of emergency can drive public debate, litigation and the battel for control over immigration policy. The first—the Muslim Ban—represents a form of what Tally Kritzman-Amir

60. Jerry Dickinson, *Reviving Liberal Constitutionalism with Originalism in Emergency Powers Doctrine*, 12 J. NAT'L SECURITY L. & POL'Y 203, 210 (2022).

61. David Cole, *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. CHI. L. REV. 1329, 1345 (2007).

62. Levinson & Balkin, *supra* note 26, at 1848.

63. Desirée LeClercq, *Judicial Review of Emergency Administration*, 72 AM. U. L. REV. 143, 155 (2022).

and Jaya Ramji-Nogales have characterized as a nationality ban, whereby national origin, often informed by race and/or religion, is used to restrict immigration in a discriminatory manner.[64] The remaining three examples— the Border Wall, Remain in Mexico, and Title 42—focus on restricting entry across the U.S. southern border and, in particular, on curtailing legal protections afforded asylum seekers. Together, they represent a weaponization of the legal and political construct of emergency that has contributed to a new norm of crisis governance of the border.

A. *The Travel Ban (or Muslim Ban)*

President Trump repeatedly demonstrated his willingness to use the law and politics of emergency to restrict immigration. While Trump's attention later shifted primarily to restricting migration across the U.S.-Mexico border, his initial focus centered also on curtailing the entry of Arab and Muslims to the United States, which he tied to a risk of "radical Islamic terrorism."[65] As a presidential candidate, Trump had called for a "total and complete shutdown of Muslims entering the United States."[66] One week after taking office, President Trump issued an executive order (E0-1) suspending the entry of nationals from seven Muslim-majority countries, citing a need to "detect[] individuals with terrorist ties" and those who may "bear hostile attitudes" toward America's values.[67] Trump cited his broad power over immigration, including the authority provided under section 212(f) of the Immigration and Nationality Act (INA) to suspend the entry of any foreign nationals if the president determines such entry is "detrimental to the interests of the United States."[68] The statute triggering this authority does not require that the president issue a formal declaration of emergency,[69] and it has historically been employed "as a tool in bilateral disputes and foreign-affairs disputes."[70] Section 212(f) can, however, also be viewed as a form of quasi- or "pseudo-

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64. Tally Kritzman-Amir & Jaya Ramji-Nogales, *Nationality Bans*, 2019(2) U. ILL. L. REV. 563 (2019).

65. BENKLER ET AL., *supra* note 20, at 105–06.

66. Jenna Johnson, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering the United States*,' WASH. POST (Dec. 7, 2015), https://perma.cc/5EEKBD7D. Although the Muslim Ban was not a border restriction in the narrow sense because it applied to people who are flying to the United States rather than people arriving at ports of entry at the southern border or crossing by land in the border region, it relied on similar narrative of a crisis posed by newcomers that warranted exceptional measures.

67. Exec. Order No. 13,769, 82 Fed. Reg. 8977, § 1 (Jan. 27, 2017) (hereinafter "EO-1"). EO-1 suspended the entry of nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen for ninety days. *Id*. at § 3(c), 82 Fed. Reg. at 8978.

68. Exec. Order No. 13,769, 82 Fed. Reg. 8977; *see also* 8 U.S.C. § 1182(f).

69. 8 U.S.C. § 1182(f).

70. Wang, *supra* note 24, at 624 (noting, for example, that President Obama relied on section 212(f) to suspend the entry of individuals involved in violence in Libya in 2016, and that President George W. Bush relied on it to suspend the entry of individuals seeking to frustrate the implementation of the Dayton peace accords in the Balkans in 2001); *see also* Dan Ordorica, Note, *Presidential Power and American Fear: A History of INA* § 212(f), 99 B.U. L. REV. 1839, 1852 (2019) (explaining how 212(f) "became an executive response to complicated foreign policy issues that did not threaten the public safety, but rather seemed beyond Congress's ability to respond efficiently and effectively").

emergency power" to the extent that it represents "an obvious exception to 'business as usual,' given that the entry of aliens into the United States is otherwise closely regulated by the statute."[71] In invoking section 212(f), President Trump exploited the language and threat of emergency,[72] while disregarding the more cabined and constrained uses of the statute as a form of short-term crisis management.

The Muslim Ban prompted immediate political opposition and legal challenges, leading several courts to temporarily enjoin it.[73] In March 2017, Trump issued a second executive order (EO-2) that excluded Iraq from the list of countries from which entry was suspended.[74] Although lower courts again enjoined the order,[75] the Supreme Court partially stayed the injunctions and permitted the ban to remain in effect for foreign nationals who lack any "bona fide relationship with a person or entity in the United States."[76] In September 2017, Trump issued his third executive order (EO-3) that restricted the entry of nationals from eight countries, including two non-Muslim-majority countries (North Korea and Venezuela), and tied the entry restrictions to the way in which each country vetted its respective nationals.[77]

The Supreme Court upheld E0-3 in *Trump v. Hawaii*.[78] The Court ruled that President Trump did not exceed his authority under the INA in light of the broad deference given to presidents in determining whether the exclusion of foreign nationals is in the interests of the United States.[79] The Court also held that Trump did not violate a separate provision of the INA that prohibits discrimination "in the issuance of an immigrant visa because of . . . nationality"[80] by interpreting the scope of that prohibition narrowly.[81] The Court rejected plaintiffs' First Amendment Establishment Clause challenge, emphasizing that judicial inquiry into the reasons for excluding a foreign national should be limited to whether the executive had provided a "'facially legitimate and bona

71. Elizabeth Goitein, *Emergency Powers, Real and Imagined: How President Trump Used and Failed to Use Presidential Authority in the COVID-19 Crisis*, 11 J. NAT'L SECURITY L. & POL'Y 27, 32 (2020).

72. Wang, *supra* note 24, at 623–25.

73. *First Amendment — Establishment Clause — Judicial Review of Pretext — Trump v. Hawaii*, 132 HARV. L. REV. 327, 327–28 (2018).

74. Exec. Order No. 13,780 §§ 1(f)–(g), 82 Fed. Reg. 13209, 13211–12 (Mar. 9, 2017) (hereinafter "EO-2"). The Trump administration maintained that the other countries remained on the list because they were "a state sponsor of terrorism, ha[d] been significantly compromised by terrorist organizations, or contain[ed] active conflict zones." *Id.* § 1(d).

75. *See* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017); Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017).

76. Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017) (per curiam).

77. Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017) ("EO-3"). EO-3, moreover, emphasized the importance of vetting to address "foreign policy, national security, and counterterrorism" concerns, seeking to bolster its legitimacy as a valid (even if extreme) immigration control measure and to deflect the criticism of the prior executive orders for their religious and ethnic bias; *Id.*

78. Trump v. Hawaii, 138 S. Ct. 2392 (2018).

79. *Id.* at 2408.

80. 8 U.S.C. § 1152(a)(1)(A).

81. *Hawaii*, 138 S. Ct. at 2414 (finding that the statute covers only issuances of visas and not determinations of admissibility, which is what EO-3 addresses).

fide' reason for its action."[82] The Court did agree to "look behind" EO-3 to consider President Trump's statements regarding Islam because the government had indicated doing so might be appropriate.[83] But it rejected the argument that the order discriminated on grounds of religion, concluding instead that it could reasonably be seen as a legitimate national security measure.[84] Justices Breyer and Sotomayor filed dissenting opinions vigorously disagreeing with the outcome, each noting that the order was motivated by religious bias and was therefore impermissible.[85]

The Supreme Court's decision in *Trump v. Hawaii* opened the floodgates for the Trump administration's subsequent use of section 212(f) for a range of ordinary immigration policymaking that ran roughshod over immigration statutes.[86] The Trump administration invoked section 212(f) on twenty occasions after the Court's decision.[87] Its invocations of section 212(f) were more sweeping and open-ended than uses of statute by prior administrations, affecting far more people and imposing far greater restrictions.[88] Further, although Trump designated many of these orders as "temporary," most did not seem designed to be limited in duration.[89]

On his first day in office, President Biden rescinded Trump's travel ban, reaffirming principles of "religious freedom and tolerance" while undercutting the security rationale that underlay the ban.[90] President Biden also reversed most of Trump's other section 212(f) orders.[91] Some critics maintain, however, that the Biden administration failed to take adequate steps to reunite families separated by the travel ban or to institute fair and transparent

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82. *Id.* at 2419 (applying *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (upholding the executive's denial of a visa to a Marxist academic)).

83. *Id.*

84. *Id.* at 2423. The Court did formally (and finally) overrule its notorious decision in *Korematsu v. United States*, 323 U.S. 214 (1944), which upheld the executive's internment of Japanese Americans during World War II; it then distinguished *Korematsu* as being decided "solely and explicitly on the basis of race.

85. *Id.* at 2430–31 (Breyer J., joined by Kagan, J., dissenting) (focusing on EO-3's system of exemptions and waivers and finding evidence of religious animus due to the government's failure establish guidance on waivers for consular officers and that only "a miniscule percentage of those likely eligible" were granted visas); *Id.* at 2438–40 (Sotomayor, J., joined by Ginsburg, J., dissenting) (concluding that, based on EO-3's history and background, a reasonable observer would find it was motivated mainly by religious animus and, under a faithful application of the Court's precedents, violated the Establishment Clause and further that the President's national security rationale was mere "window dressing"). As Justice Sotomayor noted, for example, the inclusion of North Korea and Venezuela in the subsequent version of the ban only underscored the anti-Muslim animus: a prior sanctions order already restricted entry of Korean nationals and the ban targeted only a handful of Venezuelan government officials and their immediate family members; *Id.* at 2433 (Sotomayor, J., dissenting). Further, neither North Korean nor Venezuela experienced any drop in visas. Vahid Niayesh, *Trump's travel ban really was a Muslim ban, data suggests*, WASH. POST. (Sept. 26, 2019), https://perma.cc/GSC6-6MVF.

86. STEPHEN H. LEGOMSKY, DAVID B. THRONSON & ANIL KALHAN, IMMIGRATION AND REFUGEE LAW AND POLICY 1, 54 (supp. to 7th ed. 2023).

87. *Id.*

88. *Id.*

89. *Id.*

90. Proclamation No. 10,141, 86 Fed. Reg. 7005 (Jan. 20, 2021).

91. LEGOMSKY ET AL., *supra* note 86, at 54.

refugee vetting procedures.[92] Thus, despite its subsequent repudiation, this emergency measure had at least some residual effect in restricting immigration, even after a change in presidential administrations.

On the campaign trail, moreover, Trump vowed to reinstitute and expand the ban if returned to office,[93] suggesting the degree to which the Muslim Ban—and the anti-Muslim animus that motivated it—has become normalized within the Republican party. In that respect, the ban also served as an ominous sign of a shift from "an immigration system free of national origins discrimination" to the more discriminatory immigration policies of the past.[94] More broadly, Trump's use of section 212(f) demonstrates the degree to which claims of emergency can be wielded to support broad executive authority over immigration and the way in which that authority can become entrenched as a mode of governing. And while Congress has introduced measures to amend or repeal section 212(f), including to constrain the executive's discretion to issue section 212(f) orders, it has not enacted any such legislation.[95]

B. *Border Wall*

President Trump expressly invoked emergency authority to fulfill his campaign pledge to construct a wall along the U.S.-Mexico border. After Congress repeatedly refused to approve most of the requested funding, Trump announced that he would not sign any legislation that did not allocate substantial funds to border wall construction.[96] Budget negotiations reached an impasse, triggering the longest partial government shutdown in U.S. history.[97] The shutdown ended after thirty-five days, with Congress agreeing to allocate only a portion of the amount Trump had requested for wall construction ($1.375 billion of the $5.7 billion requested).[98] Although Trump signed the Consolidated Appropriations Act of 2019 (resolving the budget impasse), he concurrently issued a proclamation under the National Emergencies Act, declaring that "a national emergency exists at the southern border of the United States."[99] An accompanying White House Fact Sheet described how the Trump administration was taking measures to secure additional resources

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92. Maria Sacchetti, *Lawyers Say the Biden Administration is Still Rejecting Some Refugees Once Banned by Trump*, WASH. POST (Feb. 16, 2022, 6:00 AM), https://perma.cc/6WM3-CAWM.

93. Nathan Layne & Tim Reid, *Trump pledges to expel immigrants who support Hamas, ban Muslims from the U.S.*, REUTERS, Oct. 17, 2023 (noting that, if re-elected, Trump indicated he would reinstitute the prior ban and expand it to include individuals who support Hamas).

94. *See*, Tally Kritzman-Amir & Jaya Ramji-Nogales, *supra* note 64, at 567. (explaining that this sentiment has prevailed since the 1965 Immigration and Nationality Act; before that, U.S. immigration policy had discriminated against various groups, including against Asians beginning with the Chinese Exclusion Act of 1882, and then against immigrants from southern and eastern Europe starting with the national origins quotas under the 1924 Immigration Act).

95. LEGOMSKY, *supra* note 86, at 76 (describing legislative proposals).

96. Sierra Club v. Trump, 929 F.3d 670, 677–78 (9th Cir. 2019) [hereinafter *Sierra Club I*].

97. *Id*. at 678.

98. *Id*. at 678–79.

99. Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019) (citing authority to declare an emergency under 50 U.S.C. §§ 1601–1651).

(an additional $8.1 billion, for starters) to construct the border wall, including by transferring $2.5 billion in reprogrammed funds to DHS to support "counterdrug activities."[100] Because there was insufficient money in the existing counterdrug account, the administration also sought to transfer funds pursuant to the Department of Defense (DoD) Appropriations Act of 2019 to backfill the account with funds originally appropriated for other purposes, including military pay and pensions.[101] The administration additionally planned to divert funds for military construction based on the national emergency.[102]

Congress twice tried to terminate the national emergency, passing joint resolutions terminating the emergency in March and September 2019; on both occasions, Trump vetoed the resolutions and Congress failed to override the veto.[103]

The Trump administration's flagrant end-run around Congress prompted legal challenges in multiple jurisdictions, including by individuals, non-governmental organizations, individual states, and members of the House of Representatives. In the most significant challenge, *Sierra Club v. Trump*, the U.S. District Court for the Northern District of California enjoined wall construction[104] and the Ninth Circuit denied a stay pending appeal.[105] In July 2019, however, the Supreme Court granted the federal government's emergency motion for a stay, questioning whether the plaintiffs had stated a cause of action to obtain review of DoD's compliance with its statutory obligations in transferring the funds.[106] The Ninth Circuit ultimately affirmed the district court's rulings invalidating the Trump administration's transfer of funds for wall building, concluding that the transfers violated the Constitution's Appropriations Clause[107] and that the plaintiffs—two environmental organizations[108] and nine states (led by California)—could properly challenge those transfers.[109] But despite multiple court rulings finding wall construction

100. *Sierra Club I*, 929 F.3d at 679. The administration claimed authority to transfer these funds pursuant to 10 U.S.C. § 284.

101. *Id*. at 680–81 (relying on section 8005 of the DoD Appropriations Act).

102. *Id*. at 681–82 (relying on 10 U.S.C. § 2808). The Trump administration, however, did not initially move forward with wall construction under section 2808. Accordingly, litigation challenging the transfer funds under the DoD Appropriations Act to the counterdrug account proceeded first, and litigation over the administration's effort to divert funds for military construction under section 2808 followed later; *See* Sierra Club v. Trump, 977 F.3d 853, 862–63 (9th Cir. 2020) [hereinafter *Sierra Club III*].

103. For the March 2019 resolution, see H.J. Res. 46, 116th Cong. (2019); *see also* 165 Cong. Rec. H2799, H2814–15 (2019) (failed veto override attempt); for the September 2019 resolution, see S.J. Res. 54, 116th Cong. (2019); *see also* 165 Cong. Rec. S5855, S5874–75 (2019) (failed veto override attempt).

104. *See* Sierra Club v. Trump, 379 F. Supp. 3d 883, 928 (N.D. Cal. 2019). This initial ruling addressed construction undertaken pursuant to 10 U.S.C. § 284 using funds transferred under section 8005 of the DoD Appropriations Act. *See id*. at 905.

105. *See Sierra Club I*, 929 F.3d at 677.

106. *See* Trump v. Sierra Club, 140 S. Ct. 1, 1 (2019).

107. *See* Sierra Club v. Trump, 963 F.3d 874, 887 (9th Cir. 2020) [hereinafter *Sierra Club II*] (challenge to transfer of funds pursuant section 8005 of the DoD Appropriations Act to support counterdrug activity under 10 U.S.C. § 284); *Sierra Club III*, 977 F.3d at 888 (challenge to transfer of funds pursuant to 10 U.S.C. § 2808 for military construction).

108. The two plaintiff organizations were the Sierra Club and Southern Border Communities Coalition.

109. *See Sierra Club II*, 963 F.3d at 889; *Sierra Club III*, 977 F.3d at 890.

illegal, the Trump administration took advantage of the Supreme Court's July 2019 emergency stay—and the Court's subsequent refusal the following year to lift the stay after the Ninth Circuit affirmed the district court's ruling on appeal[110]—to race ahead with wall construction before the November 2020 presidential election, including through construction on protected public lands.[111] By the end of Trump's term, the government had built or upgraded hundreds of miles of barriers along the U.S.-Mexico border.[112]

Upon taking office, President Biden terminated the national emergency the Trump administration had relied on to transfer and reprogram funds for wall construction and issued a temporary pause in further wall construction.[113] The Biden administration, however, also sought to vacate the lower court rulings invalidating wall construction due to changed circumstances.[114] And despite Biden's campaign promise to halt all future wall construction, his administration sought not merely to address environmental and safety concerns with existing wall sections, but also to close gaps in the physical barriers along the southwest border—a process that accelerated in the face of growing public concern about the administration's ability to address high levels of migration across the U.S.-Mexico border.[115] In October 2022, for example, the Biden administration announced its intention to rebuild up to twenty miles of border barriers authorized during the Trump administration in Texas's Rio Grande Valley "to deter illegal crossings in areas of 'high illegal entry' into the United States" (albeit not by using reprogrammed DoD funds, as President Trump had sought do).[116] Like the Muslim Ban, the border wall thus demonstrates how the law and politics of emergency can be used to restrict immigration and create pressure to entrench those policies (at least in part) even after a successor administration rescinds any legal claim of emergency and proclaims a break with past practice.

C. *Migrant Protection Protocols (Remain in Mexico)*

The Trump administration also attempted to curtail migration to the United States through the Migrant Protection Protocols (MPP) or Remain in

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110. *See* Trump v. Sierra Club, 140 S. Ct. 1, (2019).

111. Nick Miroff, *Trump Administration in An All-Out Push to Build Border Wall Before Election*, WASH. POST (Sept. 29, 2020, 2:41 PM), https://perma.cc/3UHE-9URV.

112. Quinn Owen, *Biden Administration Working on More Fixes to Trump Border Wall Construction*, ABCNEWS (Dec. 13, 2022, 1:02 PM), https://perma.cc/33FD-P7E3. Most of the construction was upgrades of existing structures. *Id.*

113. Proclamation No. 10,142, 86 Fed. Reg. 7225, 7225–7226 (Jan. 20, 2021).

114. *See* Biden v. Sierra Club, 142 S. Ct. 56 (2021) (vacating the lower court decisions on the transfer of funds pursuant to 10 U.S.C. § 2808); *See also id.* (vacating the lower court decisions on the transfer of funds pursuant to section 8005 of the DoD Appropriations Act and 10 U.S.C. § 284).

115. *See* Quinn Owen, *supra* note 112; *see also The Biden Administration is Quietly Completing Bits of Donald Trump's Wall*, THE ECONOMIST (Oct. 4, 2022), https://perma.cc/UV2C-6HFX.

116. Dep't of Homeland Security, *Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended*, 88 Fed. Reg. 69214 (Oct. 5, 2023); *see also* Eileen Sullivan & Colbi Edmonds, *Biden, the Border, and Why a New Wall is Going Up*, N.Y. TIMES (Oct. 6, 2023), https://perma.cc/46C7-URYC.

Mexico. Established in January 2019, MPP required that certain non-Mexican nationals arriving by land from Mexico be returned to Mexico to await the results of their removal proceedings (rather than remaining in the United States pending the outcome of those proceedings).[117] In creating MPP, the Trump administration relied on a provision of the INA stating that the attorney general "may" return a noncitizen arriving by land from a foreign territory contiguous to the United States to that territory pending outcome of a removal proceeding.[118] It asserted that it had adopted MPP in response to an immigration surge at the country's southern border and a resulting "humanitarian and border security crisis" that threatened to overwhelm the U.S. asylum system.[119]

After taking office, President Biden sought to terminate MPP.[120] However, two states (Texas and Missouri) sued the administration in the Northern District of Texas, claiming Biden's termination of MPP violated the INA and Administrative Procedures Act (APA).[121] The district court agreed and entered a nationwide injunction preventing the Biden administration from terminating MPP.[122] Both the Fifth Circuit and Supreme Court refused to stay the injunction pending appeal.[123] While its appeal was pending, the Biden administration issued a revised and expanded memorandum justifying the decision to terminate MPP, explaining why the policy's costs outweighed any benefits.[124] In June 2022, the Supreme Court narrowly ruled in favor of the administration and upheld MPP's termination.[125] The Court rejected the states' argument that the INA mandated that the government either detain noncitizens seeking admission (unless they could prove to the examining immigration officer they were "clearly and beyond a doubt entitled to be admitted") or return them to Mexico if it did not detain them.[126]

Although the Biden administration rescinded Remain in Mexico, it adopted alternative policies designed to achieve similar results through its modification of Title 42 policy, discussed below.[127] Remain in Mexico thus illustrates two notable features of crisis governance: first, how assertions of emergency can be wielded to support restrictions on immigration without

117. *See* Biden v. Texas, 142 S. Ct. 2528, 2534–35 (2022).
118. 8 U.S.C. § 1225(b)(2)(C).
119. *See* Biden v. Texas, 142 S. Ct. at 2535. Federal immigration officials reported that they "were encountering approximately 2,000 inadmissible aliens each day." *Id.*
120. *See id*, at 2535–36.
121. *See id*,. at 2536.
122. *See* Texas v. Biden, 554 F. Supp. 3d 818, 857 (N.D. Tex. 2021).
123. *See* Biden v. Texas, 142 S. Ct. at 2537.
124. *See id.*
125. *See id,* at 2548.
126. *See id.* at 2541 (rejecting the states' claim that the discretionary power to return to Mexico is cabined by the separate mandatory detention provision). The Court further found that the administration's second memorandum properly constituted final agency action under the APA and was thus subject to review; it remanded for further consideration of the states' APA claim. *Id.* at 2545, 2548. In December 2022, the district court on remand ruled that that MPP should stay in place pending resolution of the legal challenges. *See* Texas v. Biden, 646 F. Supp. 3d 753, 781 (N.D. Tex. 2022).
127. *See infra* Part II.D.

resort to any emergency authority conferred by law, including through the invocation of a border crisis to rationalize and justify unilateral executive action; and second, how measures undertaken during a purported emergency, like restrictions on asylum, can become normalized and entrenched, even across administrations that seek to differentiate their respective policies.

D. *Title 42*

In March 2020, facing the rapid spread of COVID-19, the U.S. Department of Health and Human Services (HHS) issued an interim final rule pursuant to Title 42 of the Public Health Services Act,[128] empowering the Centers for Diseases Control (CDC) "to prohibit, in whole or in part, the introduction of persons or property" from designated countries or places when the CDC determines such action is required to avert a "serious danger" posed by "the introduction of [a] communicable disease into the United States."[129]

In issuing the rule, HHS concluded that there was "good cause" to dispense with prior notice and comment due to the national emergency posed by COVID-19.[130] Two days later, the CDC director issued an order temporarily barring the entry of certain noncitizens traveling to the United States from Canada or Mexico, including by suspending their right to enter the United States.[131] The CDC extended the interim order multiple times before issuing a final rule in September 2020.[132] In August 2021, the Biden administration, after reviewing the policy, chose to continue it, maintaining it was necessary to protect U.S. citizens and other persons in the United States from COVID-19,[133] until eventually reversing course more than a year into Biden's presidency,[134] a shift that then took another year to take effect due to litigation initiated by red states.

In issuing the initial order, the Trump administration relied on a provision of Title 42 that originated in an 1893 law[135] and was later incorporated into the 1944 Public Health Services Act.[136] As experts have explained, that the provision was never intended to authorize a shadow immigration system that circumvented all other immigration laws to provide for the summary

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128. *See* 42 U.S.C. § 265. This section of law and the orders which stem from it are colloquially known as "Title 42."

129. Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States from Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16559-01, 16560, 16563 (Mar. 24, 2020).

130. *Id*. at 16565.

131. Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060-02, 17061 (Mar. 26, 2020).

132. Huisha-Huisha v. Mayorkas, 560 F. Supp. 3d 146, 158 (D.D.C. 2021) [hereinafter *Huisha-Huisha I*].

133. *Id*. at 158–59.

134. *See* Public Health Assessment and Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 86 Fed. Reg. 42828-02, 42829.

135. *Huisha-Huisha I*, *supra* note 132, at 156.

136. Public Health Service Act, ch. 373, 58 Stat. 682, 704 (1944).

expulsion of noncitizens arriving at the border without valid documents; rather, it was designed to help enforce and supplement existing quarantine authority by preventing new arrivals with infectious diseases—citizens and noncitizens alike—from being released in the country.[137] The Trump administration nevertheless cynically exploited this provision to summarily expel certain noncitizens arriving at the border, including individuals and families seeking asylum and other humanitarian protections.[138] As Lucas Guttentag has explained, the Title 42 order "operate[d] wholly outside the normal immigration removal process and provide[d] no opportunity for hearings or assertion of asylum claims."[139] It also employed "a medical quarantine authorization to override the protections of the immigration and refugee laws through the use of an unreviewable Border Patrol health 'expulsion' mechanism unrelated to any finding of disease or contagion."[140] By the end of 2022, the U.S. government had conducted approximately 2.5 million expulsions under Title 42, including of many migrants who might have been eligible for asylum.[141] As Anil Kalhan observes, the Title 42 order was "widely understood to be a sham, articulated in bad to implement sweeping asylum restrictions that the Trump presidency had not been able to successfully put in place using ordinary immigration law authority."[142]

The intense litigation surrounding the Title 42 policy provides a window into many of the dynamics surrounding crisis governance of the border. In *Huisha-Huisha v. Mayorkas*,[143] a class of asylum-seeking families challenged the CDC's order. In September 2021, the district court entered a preliminary injunction, concluding that the provision of Title 42 on which the government relied (section 265) did not provide for expulsions.[144] On appeal, the D.C. Circuit disagreed with that conclusion,[145] but nonetheless found that section 265 did not override other provisions of federal law barring the expulsion of

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137. Lucas Guttentag, *Coronavirus Border Expulsions: CDC's Assault on Asylum Seekers and Unaccompanied Minors*, JUST SECURITY (Apr. 13, 2020), https://perma.cc/3KKD-9PCC.

138. *Id*. The CDC order applied to individuals who "arrive by land without valid travel documents" and "single[d] out those who seek asylum—and children—to order them removed to the country from which they entered or their home country 'as rapidly as possible.'" *Id*.

139. *Id*.

140. *Id*.

141. James Dobbins and Miriam Jordan, *Will Lifting Title 42 Cause a Border Crisis? It's Already Here*., N.Y. TIMES (Dec. 29, 2022), https://perma.cc/WDW8-CR3G. A significant number of expulsions did, however, involve individuals attempting a repeated crossing. Am. Immig. Council, *Fact Sheet: A Guide to Title 42 Expulsions at the Border* (May 25, 2022), https://perma.cc/7X2C-RD5Z (noting that "nearly half of those expulsions were of the same people being apprehended and expelled back to Mexico multiple times."). Since February 2021, the CDC has exempted unaccompanied minors from Title 42 expulsions. *See id*.

142. Anil Kalhan, *Judicial Illiberalism: How Captured Courts Are Entrenching Trump-era Immigration Policies*, 27 (22) BENDER'S IMMIGRATION BULLETIN 1971, 1976 (Nov. 15, 2022).

143. *Huisha-Huisha I*, *supra* note 132.

144. *Id*. at 154–55. Because the district court concluded that section 265 does not authorize expulsions, it declined to address plaintiffs' alternative arguments that the provision was intended to regulate transportation (and thus applied only to common carriers) or that even if it authorized expulsions, the Title 42 process would nonetheless violate the immigration statutes. *Id*. at 171 n.6.

145. Huisha-Huisha v. Mayorkas, 27 F.4th 718, 727 (D.C. Cir. 2022) [hereinafter *Huisha-Huisha II*] (ruling that the statute's use of "introduction" applied to individuals as well as common carriers, and was not limited to the latter, as the district court had concluded).

individuals to countries where they face a risk of torture or other persecution.[146] The court, moreover, expressed considerable skepticism about the continuing necessity of the Title 42 policy, stating that "March 2022 [is] not March 2020," and that the policy "looks in certain respects like a relic from an era with no vaccines, scarce testing, few therapeutics, and little certainty."[147] The D.C. Circuit remanded plaintiffs' other claims, including whether the CDC's Title 42 order should be voided altogether as arbitrary and capricious under the APA.[148]

Shortly after the D.C. Circuit's ruling, the CDC issued an order terminating the Title 42 policy.[149] In response, twenty-four states sued to enjoin the Biden administration from implementing the termination.[150] The plaintiff states argued in *Louisiana v. CDC* that the order would result in a surge of border crossings and, in turn, a significant increase of illegal immigrants in their respective states.[151] Shortly before the termination order was to go into effect, the U.S. District Court for the Western District of Louisiana ordered the Biden administration to continue the Title 42 policy, finding that the CDC's order did not satisfy the good cause exception to the APA's notice and comment requirement[152] and that the plaintiff states had demonstrated a substantial likelihood of success on their claim that the order was arbitrary and capricious for failing to consider the immigration consequences and related financial harms to the states.[153]

Subsequently, in *Huisha-Huisha*, the district court (on remand) ruled that the Title 42 policy was arbitrary and capricious and invalidated it, citing the CDC's failure to consider less restrictive means, the harm to migrants, and the existence of adequate alternatives (such as processing migrants outdoors, vaccinations, and therapeutics).[154] The district court noted the lack of evidence regarding the policy's continued effectiveness, particularly given that Title 42's suspension of entry covered only approximately 0.1 percent of land border travelers and that millions of other travelers were permitted to cross the border under less restrictive measures.[155] A group of red states moved to intervene in *Huisha-Huisha* and sought a stay of the district court's judgment pending appeal.[156] The states did not attempt to defend the Title 42

146. *Id.* at 730–32.
147. *Id.* at 734.
148. *Id.* at 735.
149. Public Health Determination and Order Regarding Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 87 Fed. Reg. 19941–01, 19941 (Apr. 6, 2022).
150. Louisiana v. CDC, 603 F. Supp. 3d 406, 416 (W.D. La. 2022).
151. *Id.* at 417–20.
152. *Id.* at 435–37 (rejecting, *inter alia*, the CDC's argument that the CDC had insufficient time to undergo the notice-and-comment process before terminating Title 42).
153. *Id.* at 438–39.
154. Huisha-Huisha v. Mayorkas, 642 F. Supp. 3d 1, 21–24 (D.D.C. 2022) [hereinafter *Huisha-Huisha III*]
155. *Id.* at 24. As the district court noted, "[The government's] own data shows that in July 2021 alone, over 11 million people entered from Mexico by land, including over 8.4 million people in cars, buses, and trains." *Id.* (internal quotations omitted) (citations omitted).
156. *See* Arizona v. Mayorkas, 598 U.S. —, 143 S. Ct. 478, 478 (2022) (Mem.).

policy on public health grounds. Instead, they acknowledged they were seeking to preserve the policy as a makeshift immigration control measure to prevent a crisis at the border caused by a large influx of migrants.[157] The D.C. Circuit denied the states' request as untimely.[158]

The Supreme Court, by a 5-4 vote, stayed the district court's ruling and granted the states' certiorari petition on the question of its right to intervene.[159] Justice Gorsuch dissented, emphasizing that even if reasonable minds could disagree on the merits of the states' intervention motion, the public health emergency on which the Title 42 orders were premised "ha[d] long since lapsed," as the states themselves acknowledged.[160] Although Justice Gorsuch did not discount the states' concerns about a crisis at the border, he emphasized that any such crisis was no longer a COVID-19 crisis and that "courts should not be in the business of perpetuating administrative edicts designed for one emergency only because elected officials have failed to address a different emergency."[161]

Before oral argument, the federal government informed the Supreme Court that, in response to pending legislation that would terminate the current national public health emergency, it intended to allow that emergency to expire in May 2023.[162] Following the government's termination of the public health emergency,[163] the Court vacated the D.C. Circuit's order on intervention and remanded with instructions to dismiss the case as moot.[164] Justice Gorsuch issued a separate statement in which he not only repeated his earlier criticism of the Supreme Court's prior granting of a stay, but also attacked the use of emergency power in responding to COVID-19, which he described as perhaps "the greatest intrusion on civil liberties in the peacetime history of this country,"[165] and bemoaned the increasing reliance on emergency decrees generally.[166]

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157. *See id.* at 479 (Gorsuch & Jackson, JJ., dissenting).

158. Order at 2–3, Huisha-Huisha v. Mayorkas, No. 22-5325 (D.C. Cir. 2022) (noting, for example, that states should have known long before that their interests in maintaining the Title 42 policy diverged from the Biden administration's interests).

159. *Arizona*, 143 S. Ct. at 478. The Court also noted, however, that the stay itself did not prevent the federal government from taking any action with respect to the challenged policy. *Id.*

160. *Id.* at 479 (Gorsuch & Jackson, JJ., dissenting).

161. *Id.*

162. *See* Brief for the Federal Respondents at 10–11, Arizona v. Mayorkas, No. 22-592 (D.C. Cir. Feb. 7, 2023). As a result, the CDC order, which was predicated on the underlying declaration of a public health emergency, would expire and the case would become moot. *Id.* at 11–12 ("By its terms, the operative Title 42 order terminates upon 'the expiration of the Secretary of [Health and Human Services'] declaration that COVID-19 constitutes a public health emergency.'" (quoting 86 Fed. Reg. at 42,830)). The separate COVID-19 national emergency declared by the President would also expire on the same date. *Id.* at 11–12.

163. *See* H.J. Res. 7, 118th Cong. (joint resolution terminating the COVID-19 national emergency); U.S. Dep't of Health and Human Servs., *COVID–19 Public Health Emergency* (2023), https://perma.cc/B6NS-98PT (2023) (announcing the end of the public-health emergency underlying the Title 42 orders).

164. Arizona v. Mayorkas, 143 S. Ct. 1312, 1313 (2023).

165. *Id.* at 1314 (Gorsuch, J., concurring) (discussing stay-at-home orders, closures of private businesses and schools, closures of churches, and vaccine mandates).

166. *Id.* at 1316 (noting that, despite passage of the National Emergencies Act in 1976, which was intended to help restrain the use of emergency power, "the number of declared emergencies has only grown in the ensuing years" since the passage of the act).

The Biden administration, however, did not seek a return to the status quo ante, despite its suggestion of a return to normalcy with the resumption of immigration processing under the INA. Instead, the administration adopted a new rule establishing a presumption of asylum ineligibility for individuals who enter the United States at the southern border without first seeking "protection in a country through which they traveled" on their way.[167] It also indicated it would utilize expedited removal procedures to promptly remove those individuals unable overcome the presumption.[168] Such individuals would not only be returned to Mexico or deported to their home countries, but would also be subjected to a five-year ban on lawfully entering the United States.[169] The administration stressed that it was also increasing legal pathways for migrants by allowing individuals to schedule interviews with asylum officers in advance (through a mobile app), expanding regional processing centers, and raising caps on the admission of refugees.[170] Critics, however, maintained that in replacing Title 42, Biden effectively resurrected the controversial Trump-era "transit ban"[171] that was used to deny asylum to individuals who passed through a third country en route to the United States without first applying for protection there,[172] thus undermining asylum protections.[173]

This new rule was immediately challenged. In July 2023, the U.S. District Court for the Northern District of California ruled in favor of the plaintiffs, two non-government organizations that represent and assist asylum seekers, and vacated the rule.[174] The district court held that the rule's creation of a rebuttable presumption of asylum ineligibility contradicted the federal statute authorizing individuals who had physically entered the United States to apply for asylum.[175] The court acknowledged that the new rule did not create a

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167. Circumvention of Lawful Pathways, 88 Fed. Reg. 31314, 31450 (May 16, 2023); *see also* U.S. Dep't of Homeland Sec., *DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes* (Jan. 5, 2023), https://perma.cc/66UJ-EQW9.

168. *Id*.; *see also* 8 U.S.C. 1225(b)(1) (authorizing expedited removal in certain circumstances); Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1963–64 (2020) (rejecting petitioner's Suspension Clause and Due Process challenges to expedited removal).

169. *See* Circumvention of Lawful Pathways, 88 Fed. Reg. at 31314, 31335; *see also* DHS, *supra* note 168.

170. *See* DHS, *supra* note 168.

171. Karen Musalo, *Biden's Embrace of Trump's Transit Ban Violates US Legal and Moral Refugee Obligations*, JUST SECURITY (Feb. 8. 2023), https://perma.cc/6KXU-NRKD.

172. "The United States must also have a formal agreement with the third country." *Id*.

173. Although U.S. refugee law does potentially allow for the denial of asylum in such circumstances, it requires that the country of transit be "safe"—*i.e*., one where the asylum seeker's life or freedom would not be threatened on the basis of a protected ground (such as their race, religion or nationality) and that the asylum seeker have access to a "full and fair" procedure for determining claims to protection—conditions that are not met by countries through which most asylum seekers pass in traveling to the United States. *Id*. Further, the summary nature of expedited removal proceedings, coupled with the lack of procedural protections afforded to migrants, makes it difficult for asylum seekers to overcome the presumption in practice. *Id*.

174. East Bay Sanctuary Covenant v. Biden, No. 18-cv-06810-JST at 19–20, 30–33 (N.D. Cal. July 25, 2023) (holding the rule is invalid under the APA because it is contrary to law, arbitrary and capricious, and issued without adequate opportunity for public comment).

175. *Id*. at 18–19; *see also* 8 U.S.C. § 1158(a)(1) (any noncitizen who arrives in the United States, "whether or not at a designated port of arrival and . . . irrespective of [their] status, may apply for

categorical ban on asylum (as the Biden Administration argued the Trump administration's Transit Ban had done),[176] but instead created a rebuttable presumption that was subject to several exceptions[177] and could be overcome by showing "exceptionally compelling circumstances."[178] The court nevertheless concluded that those exceptions were riddled with flaws and that the rule placed burdens on asylum seekers that federal law did not permit.[179] The Ninth Circuit granted the government's request for a stay pending appeal, thus leaving the new rule in effect for the time being.[180]

Title 42's use during the COVID-19 pandemic illustrates how claims of emergency—in this case, the express invocation of a public health emergency to unlock sweeping powers—can both serve as a pretext to accomplish other aims (*i.e.*, restricting asylum) and continue long beyond the point of any exigency necessitating its use. One need not agree with Justice Gorsuch's extreme statement about the abuses of emergency powers during COVID-19 to recognize their misuse under Title 42. Title 42, moreover, shows how states can seek to leverage claims of emergency to influence federal immigration policy by seeking and obtaining nationwide injunctions. Additionally, Title 42 illustrates how emergencies can operate as a one-way ratchet by helping pave the way for future restrictions: in this case, for limts on asylum to continue beyond Title 42's expiration and a purported return to business-as-usual at the border. At the same time, the fact that other emergency steps taken in response to COVID-19, such as testing or mask mandates, did not become entrenched but instead sparked significant resistance and potentially weakened the ability of the federal government to combat future public health crises,[181] underscores the particular vulnerability of immigration to arguments justifying emergency measures.

III. CRISIS GOVERNANCE OF THE BORDER

Several closely interrelated factors contribute to crisis governance of the border and suggest why this mode of governance is likely to persist, at least

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asylum."). The statute specified certain exceptions, such as for those who have been convicted of a serious crime; but none of those exceptions was implicated by the rule.

176. Trump's transit ban did contain several exceptions. *East Bay*, No. 18-cv-06810-JST at 6 (describing the exceptions).

177. The rule excepted those authorized to travel to the United States to seek parole based on a DHS-approved parole process; those who presented at a port of entry pursuant to a prior appointment under the DHS scheduling system or who could show it was not possible to access the DHS system for a specified reason; and those who had previously sought asylum in a third country and received a final decision denying that claim. Circumvention of Lawful Pathways, 88 Fed. Reg. 31450 (May 16, 2023).

178. Such circumstances included acute medical emergencies, "imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder[,]" or "severe . . . trafficking in persons." *Id.*

179. East Bay Sanctuary Covenant, 683 F. Supp. 3d at 1038–1041.

180. Order, East Bay Sanctuary Covenant v. Biden, No. 23-16032 1, 1 (9th Cir. 2023).

181. *See, e.g.*, Lauren Weber & Joel Achenbach, *Covid blacklash hobbles public health and future pandemic response*, WASH POST (Mar. 8, 2023), https://perma.cc/9BYL-QKZA (noting how the backlash to measures like lockdowns or testing and mask mandates suggests that the government's power to order emergency health measures may be weaker than before the pandemic).

in some respects, for the foreseeable future. These factors include: the executive's ability to invoke—and at times manipulate—notions of emergency to assert greater power and entrench this power over time; an escalation of federal-state conflicts over control of immigration policy; the judiciary's inconsistency in checking abuses of emergency power combined with its potential to exacerbate a crisis narrative; and growing political polarization that stymies legislative action even on issues that enjoy wide public support, thereby incentivizing unilateral executive action and justifications for policies rooted in the language of emergency.

A. *Emergency Power and the Executive*

As described above, the Trump administration leaned heavily on claims of an immigration emergency in adopting the Muslim Ban, constructing the border wall, and addressing COVID-19.[182] In some respects, the administration merely exploited broad delegations of legislative power—such as the statutory authorization empowering the president to prevent the entry of foreign nationals if deemed "detrimental to the interests of the United States"[183]—in a way that resembled prior exercises of executive authority over immigration.[184] But in addition to wielding these statutory powers more aggressively than prior administrations,[185] the Trump administration's approach was notable in several critical respects.

The Trump administration exploited emergency authorizations to circumvent Congress in a manner that was unusually brazen. For example, in 2019, President Trump invoked the National Emergencies Act,[186] citing a crisis caused by "large-scale unlawful migration through the southern border,"[187] after Congress repeatedly rebuffed his request for additional billions in funding for wall construction—leading to a political stand-off that caused the longest partial government shutdown in U.S. history.[188] And when Trump declared the emergency, he flaunted going around Congress:

> [W]e're going to confront the national security crisis on our southern border . . . not because it was a campaign promise, which it is . . . We haven't been given the walls . . . I went through Congress. I made a deal. I got almost $1.4 billion . . . But I'm not happy with it. . . I could

182. For a discussion of the Trump administration's utilization of emergency power across a range of areas, see Daniel A. Farber, *Exceptional Circumstances: Immigration, Imports, the Coronavirus, and Climate Change as Emergencies*, 71 HASTINGS L.J. 1143, 1143–1176 (2020).

183. 8 U.S.C. § 1182(f).

184. KELSEY Y. SANTAMARIA, CALVIN GIBSON, & HILLEL R. SMITH, CONG. RSCH. SERV., PRESIDENTIAL ACTIONS TO EXCLUDE ALIENS UNDER INA § 212(F) 2 (2020), https://perma.cc/5RMP-9YBY (noting increasing reliance on § 1182(f) by presidents since Reagan).

185. *See id.*

186. 50 U.S.C. §§ 1601–1651.

187. Proclamation No. 9,844, 84 Fed. Reg. 4949 (Feb. 15, 2019).

188. *Sierra Club II*, 963 F.3d 874, 880.

> do the wall over a longer period. I didn't need to do this [declare an emergency]. But I'd rather do it [build the wall] much faster.[189]

Several courts rejected Trump's argument that the emergency proclamation authorized the transfer of funds for wall construction under federal statutes for counter-narcotics enforcement and military construction.[190] In affirming the lower court's injunction against wall construction, the Ninth Circuit framed the case around the Supreme Court's seminal decision on executive power in *Youngstown Sheet & Tube Co. v. Sawyer*,[191] even though President Trump had claimed to be operating pursuant to statutory authority in responding to the purported emergency (as opposed to unilaterally, as in *Youngstown*).[192] Even the Supreme Court, in its brief order granting an emergency stay of the Ninth Circuit's ruling, did not defend Trump's use of emergency authority on the merits, but instead questioned whether plaintiffs had a cause of action to obtain review of the DoD's compliance with federal law in transferring the funds for wall construction.[193]

Trump's anti-immigration policies underscore how the law and politics of emergency is subject to manipulation. Signature policies like the border wall, for example, relied on hyperbolic assertions of a crisis at the southern border through which "criminals, gang members, and illicit narcotics" were pouring into the United States.[194] But the Trump administration's use of Title 42 perhaps best exemplifies this vulnerbility. Even as Trump invoked Title 42 in March 2020 to suspend entry at the U.S. border to prevent the spread of COVID-19,[195] he refused to adopt other measures to address the pandemic during its early and most critical stage, such as fully or effectively utilizing his powers under a range of federal statutes, including the Stafford Act, Social Security Act, and Defense Production Act.[196] Trump, moreover, continued Title 42 restrictions even as he relaxed other travel restrictions and the voluminous cross-border traffic between the U.S. and Mexico returned to pre-pandemic levels.[197]

As Anil Kalhan has noted, "the principal architect of Trump's immigration restrictionist agenda, Stephen Miller, had reportedly been looking for excuses to use [Title 42] long before the COVID-19 pandemic from the earliest days

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189. Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border, 2019 DAILY COMP. PRES. DOC. 2, 5, 8–9 (Feb. 19, 2019), https://perma.cc/3VPP-KSDM.

190. *See supra* notes 107–109 and accompanying text.

191. 343 U.S. 579 (1952).

192. *See Sierra Club II*, 963 F.3d at 890. The court concluded that Trump had exceeded and contradicted not only those statutes but also the Constitution's Appropriation's Clause. *Id.* at 887.

193. *See* Trump v. Sierra Club, 140 S. Ct. 1 (2019).

194. Proclamation No. 9,844, 84 Fed. Reg. 4949 (Feb. 15, 2019).

195. *See supra* text accompanying notes 130–132.

196. Elizabeth Goitein, *Emergency Powers, Real and Imagined: How President Trump Used and Failed to Use Presidential Authority in the COVID-19 Crisis*, 11 J. NAT'L SECURITY L. & POL'Y 27, 47–48 (2020).

197. *Huisha-Huisha III*, 642 F. Supp. 3d 1, 24.

of the Trump presidency."[198] The Trump presidency largely used Title 42 as pretext for pursuing its long-held goals of eviscerating asylum protections—goals it had previously sought to achieve through Remain in Mexico and other policies.[199] Political motivations, rather than scientific evidence or public health considerations, thus drove Title 42 expulsions from the outset.[200]

The Trump administration's initiatives, particularly the Muslim Ban, also underscore how broadly articulated notions of emergency, loosely tethered to threats to national security, can be used to discriminate against disfavored minorities and religions. Statements by Trump and other senior administration officials both before and after the ban's enactment in January 2017 illustrate the degree to which bias against Muslims motivated and pervaded it.[201] Further, subsequent modifications to the initial ban suggested the degree to which such motives could be massaged and concealed to survive a legal challenge under a deferential standard of judicial review. In upholding the ban, the Supreme Court emphasized the breadth of the president's statutory authority to suspend the entry of noncitizens, noting that this authority was not limited to exigencies where it would be difficult for Congress to react promptly but instead included wider power to suspend entry where the president deemed that it was in the interests of the United States.[202] Despite the evidence of anti-Muslim animus, the Court upheld the twice-revised executive order against an Establishment Clause challenge, finding the government had "set forth a sufficient national security justification to survive rational basis review."[203] The Muslim Ban thus underscores how claims of temporary emergency, rooted in unsubstantiated national security threats, can provide a pretext for discrimination based on race and religion, while leading courts to defer to the executive.[204]

The Biden administration's policies, in turn, demonstrate the various ways governing through emergency can persist over time. After taking office, President Biden sought to terminate the most controversial measures of his

198. Kalhan, *supra* note 142, at 1977; *see also* Peter Margulies, *Immigration Law's Boundary Problem: Determining the Scope of Executive Discretion*, 74 HASTINGS L.J. 679, 759–60 (2023) (arguing that the government's broad reading of Title 42 is inconsistent with the commitment to humanitarian protections Congress enshrined in the INA, including the protections against non-refoulement).

199. See, Goitein, *supra* note 196, at 36; *see also,* ANDREW I. SCHOENHOLTZ, JAYA RAMJI-NOGALES & PHILIP G. SCHRAG, THE END OF ASYLUM (2021) (explaining a broader description of the Trump administration's multipronged approach to effectively gut asylum protections).

200. Ilya Somin, *Nondelegation Limits on COVID Emergency Powers: Lessons from the Eviction Moratorium and Title 42 Cases*, 15 N.Y.U. J. L. & LIBERTY 658, 664–65 (2022) (describing the opposition of public health experts within the Trump and Biden administrations to the adoption and continuation of Title 42 expulsions).

201. Trump v. Hawaii, 585 U.S. 667, 731–40 (2018) (Sotomayor, J., dissenting); *see also, e.g.*, ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 235 (2020); Noah Feldman, Opinion, *The Key Word for Travel Ban Is 'Animus,'* BLOOMBERG OPINION (June 4, 2017), https://perma.cc/WC2S-ZT7C; *see also* William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155, 168–69 (2019).

202. *Hawaii*, 585 U.S. at 691.

203. *Id*. at 710.

204. Kritzman-Amir & Ramji-Nogales, *supra* note 64, at 568-69.

predecessor, announcing the end of the Muslim Ban and construction of the border wall. Yet, the Biden administration's own vetting procedures have been criticized for lack of fairness and transparency.[205] Biden also continued summary expulsions under Title 42 long after the COVID-19 threat warranted it, suggesting the degree to which the public health emergency had become a pretext for curtailing asylum.[206] As Ilya Somin has observed, continuing Title 42 provided a way for Biden to address negative public perceptions of disorder at the border and limit the political fall-out of increased migration.[207] And when the Biden administration finally ended Title 42, it replaced it with policies that maintained significant restrictions on asylum to help navigate the increasingly treacherous politics of immigration and to deflect efforts by states to prevent even modest adjustments to the maximalist—and supposedly temporary—restrictions imposed during the initial emergency. Indeed, Biden sought less to challenge or dispel the notion of a crisis at the border than to assert his superior ability to manage it.

The degree to which larger lessons can be drawn about immigration law and policy under the Trump and Biden administrations remains to be seen. Yet, as Daniel Farber notes, "there are reasons to doubt whether future presidents will abandon the use of emergency powers as policymaking tools" in immigration (or elsewhere) given the growing public frustration with Congress's seeming inability to respond adequately to what people view as urgent societal problems.[208] Immigration policy across the two administrations thus suggests a larger dynamic that is likely to continue within the executive branch for the foreseeable future, especially amid heightened political divisions and rising social tensions. Republican administrations—as long as their party continues to be dominated by its powerful anti-immigration wing—will be tempted, if not eager, to invoke express or quasi-emergency powers and the rhetoric of emergency to restrict immigration. Indeed, accounts of Trump's immigration plans if he returns to power—with sweeping bans on entry by people from certain Muslim-majority nations, reimposition of bars on asylum claims under Title 42's public health emergency provision (based on other diseases like tuberculosis), and mass immigration raids, detentions, and deportations inside the United States—suggest the potential for a ratcheting up of the crisis narrative to unprecedented levels.[209] Meanwhile, future Democratic administrations, even as they oppose the most extreme and nakedly xenophobic measures, will likely maintain significant restrictions in the face of continuing political pressure to control migration and in response to attempts by states to wrest control over the

205. Sacchetti, *supra* note 92.

206. The Biden administration sought to end Title 42 expulsions only after the D.C. Circuit rejected its claim that its authority to expel under Title 42 did not override the non-refoulement obligations under immigration law.

207. Somin, *supra* note 200, at 665.

208. Farber, *supra* note 182, at 1175.

209. Jonathan Swan, Maggie Haberman & Charlie Savage, *How Trump and His Allies Plan to Wield Power in 2025*, N.Y. TIMES (Nov. 15, 2023), https://perma.cc/P78Y-J7GE.

direction of immigration policy from the federal government. To varying degrees, both parties will thus likely maintain the framework of a border emergency both to unlock expanded powers and to justify more aggressive enforcement under existing law.

B. *Escalating Federal-State Conflicts Over Immigration*

The growing influence of states over federal immigration policy dates back several decades. In 1996, Congress sought to foster greater state involvement in immigration law enforcement by creating a federal program whereby local officials could be trained and exercise certain immigration officer functions.[210] The legislation also prohibited state or local governments from prohibiting or restricting any governmental entity from sending or receiving information from federal officials regarding the citizenship or immigration status of any individual.[211] Some states, frustrated with what they perceived as lax enforcement at the federal level, increasingly sought to enact immigration measures and assert greater control over immigration enforcement under the banner of immigration federalism.[212] Between 2005 and 2012, states and localities created new enforcement mandates and new penalties based on immigration status.[213] States, for example, required the direct enforcement of federal immigration laws by state police, not only through agreements with the Immigration and Customs Enforcement branch of the DHS but also through independent state action.[214] States additionally enacted laws making the transportation of unauthorized immigrants a state felony, mandating that local police determine the immigration status of suspects, and encouraging citizens to report sightings of undocumented immigrants.[215] Meanwhile, blue states took an opposite approach, enacting "sanctuary laws" to create protected areas from immigration enforcement, provide undocumented immigrant youth with access to higher education, and foster the inclusion and integration of all immigrants into their local communities.[216]

The Supreme Court's 2012 decision in *Arizona v. United States*[217] did not end state efforts to restrict immigration so much as alter its trajectory. In *Arizona*, the Court invalidated on federal preemption grounds provisions of a

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210. Pratheepan Gulasekaram et al., *Anti-Sanctuary and Immigration Localism,* 119 COLUM. L. REV. 837, 845 (2019) (discussing the enactment of section 287(g) of the Immigration Reform and Immigrant Responsibility Act of 1996).

211. *Id.*

212. For discussions of this broader development,*see*, Stella Burch Elias, *Comprehensive Immigration Reform(s): Immigration Regulation Beyond Our Borders*, 39 YALE J. INT'L L. 37, 45–46 (2014); Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673 (2011); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 634 (2008); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57 (2007); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361 (1999).

213. Gulasekaram et al., *supra* note 211, at 884.

214. Burch Elias, *supra* note 212, at 45.

215. Cunningham-Parmeter, *supra* note 212, at 1675. Additionally, states sought to regulate immigration indirectly, for example by limiting immigrants' access to housing and employment. Burch Elias, *supra* note 212, at 45.

216. Burch Elias, *supra* note 212, at 45–46.

217. 567 U.S. 387 (2012).

controversial Arizona statute that allowed state police to make warrantless arrests of individuals suspected of being undocumented immigrants,[218] created a new state misdemeanor for failing to carry or complete an alien registration document as required by federal law,[219] and made it a crime for undocumented immigrants to apply for or to hold employment in the state.[220] The Court stressed the federal government's "broad, undoubted . . . extensive and complex" power over immigration regulation[221] and the traditional understanding of the federal government as a "single sovereign" with responsibility over "a comprehensive and unified system" of immigration designed "to keep track of aliens within the Nation's borders."[222] But the Court declined to invalidate a provision authorizing state law enforcement to determine the immigration status of individuals who were stopped or arrested, noting that such action could be consistent with existing federal legislation encouraging federal-state information-sharing and cooperation in immigration enforcement.[223] The decision thus still left space for state-driven initiatives that operate within the permissible bounds of immigration federalism.[224]

Over the past decade, the absence of congressional legislation, coupled with the rising power of anti-immigration forces within the Republican party, has contributed to increased conflicts between the federal government and states, as well as between states and local governments. Those conflicts, which had been building during the Obama administration,[225] escalated in the Trump years, when Trump adopted a more direct and punitive approach to sanctuary cities, including by attempting to withhold federal funds, blue localities sued and sought nationwide relief.[226] Blue states, meanwhile, sought to enjoin measures like the Muslim Ban and border wall construction.

These battles continued under the Biden presidency but with roles reversed, as red states sued to enjoin Biden's attempt to terminate Title 42 and to prioritize the removal of certain noncitizens, citing the worsening crisis at the border. The effort by red states to obtain nationwide injunctions to

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218. *Id.* at 410.
219. *Id.* at 400, 403.
220. *Id.* at 403, 407.
221. *Id.* at 394–95.
222. *Id.* at 401–02.
223. *Id.* at 411–12, 414–15. And the Court subsequently ruled that a state was permitted to prosecute undocumented workers under a preexisting state law that made it a crime to use a false Social Security number. *Kansas v. Garcia*, 589 U.S. 191, 193 (2020) (holding that the Immigrant Control and Reform Act of 1986 did not "exclude a State from the entire field of employment verification").
224. Gulasekaram et al., *supra* note 211, at 854–55. Further, unlike anti-sanctuary measures adopted by the federal government, which have faced repeated setbacks in court. *Id.* at 842, states measures designed to strengthen immigration enforcement are not vulnerable to anti-commandeering doctrines and can avoid federal preemption if crafted to further existing federal anti-sanctuary policies (such as federal-state information sharing). *Id.* at 855.
225. Red states, for example, obtained a nationwide injunction during the Obama administration blocking Deferred Action for Parents of Americans (DAPA) and expansions to Deferred Action for Childhood Arrivals (DACA). *See* Texas v. United States, 809 F.3d 134, 146–47 (5th Cir. 2015), *aff'd*, 579 U.S. 547 (2016) (per curiam). DAPA and DACA are discussed *infra* at Part III.D.
226. *See, e.g.*, City & Cnty. of San Francisco v. Trump, 897 F.3d 1225, 1244 (9th Cir. 2018). Red states also enacted anti-sanctuary laws targeting sanctuary areas within their respective jurisdictions.

oppose and alter federal immigration policies not only has accelerated,[227] but also taken on new dimensions. In particular, certain states (most notably, Texas), have sought to file suits in a handful of courts with stridently anti-immigration, Trump-appointed judges seemingly predisposed to granting the requested relief.[228] States have relied on claims of a border crisis to support their position and obtain nationwide injunctions. The Supreme Court, in turn, has denied stays of these injunctions pending appeal through its aggressive use of the "Shadow Docket,"[229] helping validate claims of a border crisis and leaving the lower court rulings in place, often for a year or two, before ultimately resolving the challenge.

When, for example, the Biden administration sought to terminate Remain in Mexico, Texas filed suit in a federal judicial division where nearly all cases are heard by a Trump appointee who strongly supported Trump's immigration policies.[230] Although the Supreme Court ultimately ruled in favor of the Biden administration,[231] the nationwide injunction entered by the lower court

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227. *See* Howard Wasserman, '*Nationwide' Injunctions Are Really 'Universal' Injunctions and they are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 340–49 (describing wave of nationwide, universal injunctions across addressing a range of immigration laws, regulations, and policies, including Obama's DAPA and DACA initiatives; Trump's Muslim Ban; Trump's withholding of federal funds to sanctuary cities; Trump's recission of DACA; and Trump's family separation policy (*i.e.*, separating minor children from parents who attempted to unlawfully enter the United States)); *see also, e.g.*, Madison J. Scaggs, Note, *How Nationwide Injunctions Have Thwarted Recent Immigration Policy*, 105 IOWA L. REV. 1447 (2020) (describing the increasing use of nationwide injunctions to halt the immigration policies of political party currently in power). As Professor Wasserman explains, "universal" rather than "national" is the most accurate description of these injunctions, as their central feature describes the (broad) class of people the injunctions cover and not merely its geographic scope (an injunction could be nationwide—applying throughout the United States—but still apply to a limited class of individuals.

228. *See* Kalhan, *supra*, note 142, at 32–35. As Professor Steve Vladeck explains, Texas' four district courts contain 27 divisions; nine of those have a single judge and 10 have only two. As a result, suits filed in certain districts, such as Amarillo, Wichita Falls, and Victoria are certain to go to a single judge. *See* Br. of Professor Stephen I. Vladeck as Amicus Curiae, *United States v. Texas*, No. 22-58, at 5 n. 8, 8 (U.S.), https://perma.cc/77BW-EK48 (arguing that by filing this case in Victoria, "Texas was able to select not just the location for its lawsuit, but the specific federal judge who would decide this case" and that Texas believed—rightly—would enjoin Biden administration policies, such as the guidance on prosecutorial discretion); *see also id.* at 10–11 (arguing that similar considerations explained Texas's decision to file its challenge to Biden's attempt to rescind MPP in Amarillo). At least some of those judges, such as Judge Drew B. Tipton in Victoria, have demonstrated ideological commitment to entrenching Trump-era immigration restrictions. Kalhan, *supra*, note 142, at 32–33. The ability to halt the federal government's immigration policy, moreover, has become a point of pride: Texas Attorney General Ken Paxton, for example, proudly declared that he had filed over ten immigration suits against the Biden administration. *See* Att'y Gen. of Tex., *AG Paxton Again Sues Biden Over Border: New Immigration Rules Drastically Lower "Asylum" Bar, Forming New Incentives for Next Flood of Aliens* (Apr. 28, 2022), https://perma.cc/P3J8-CXDC.

229. *See, e.g.*, STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023). "Shadow docket," a term first coined by Professor William Baude, has become the most common way to describe the range of matters that the Supreme Court addresses outside of its traditional merits docket. William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1, 3–5 (2015) (referencing the "range of orders and summary decisions that defy [the Supreme Court's] normal procedural regularity"). The term has become associated with the Court's increased tendency to address important and controversial issues on an emergency basis—such as by granting or denying injunctions pending appeal—without the benefit of full briefing or argument, and without a decision explaining its reasoning.

230. Ruth Marcus, *Thanks to the Supreme Court, a Federal Judge in Texas is Making Foreign Policy Decisions*, WASH. POST (Aug. 25, 2021, 7:01 PM), https://perma.cc/Y63Y-W6ZN.

231. Biden v. Texas, 597 U.S. 785, 813-14 (2022).

not only remained in effect for nearly a year,[232] but also caused the Biden administration to restart the policy in the meantime,[233] with potentially devastating consequences for tens of thousands of asylum seekers.[234]

Similarly, when DHS Secretary Alejandro Mayorkas issued a memorandum in September 2021 setting forth the Biden administration's guidelines that prioritized certain groups for deportation,[235] Texas and Louisiana sued in the U.S. District Court for the Southern District of Texas to block it,[236] again steering the case to another hand-picked anti-immigration Trump-appointed judge.[237] The states argued that the guidelines violated the INA because Congress mandated that the executive both apprehend and detain certain noncitizens, including those who had been convicted of a crime.[238] Although the case did not directly involve any claim or exercise of emergency authority, states pointed to the influx of migrants to support their argument that the federal government must detain and remove more noncitizens who are unlawfully present in the country and to buttress their showing of irreparable harm necessary to obtain nationwide relief against the enforcement guidelines.[239] Groups supporting the states' challenge argued the guidelines would compound the border crisis by inviting even higher levels of migration.[240] The district court ruled for the plaintiffs, enjoining use of the guidelines throughout the country;[241] both the Fifth Circuit[242] and Supreme Court refused to stay the injunction pending appeal.[243] Although the Supreme Court ultimately rejected the states' suit, concluding that the states lacked standing to

232. *Id*. at 2536–37 (recounting the procedural history).

233. Priscilla Alvarez & Geneva Sands, *'Remain in Mexico' Program Restarts, Fueling Frustration Among Immigration Advocates*, CNN (Dec. 6, 2021, 5:36 PM), https://perma.cc/9RQJ-L4C7.

234. Kalhan, *supra* note 142, at 1976 (noting that under Remain in Mexico, "officials returned tens of thousands of asylum seekers to dangerous conditions in camps across the border in Mexico, where hundreds have been victims of rape, kidnapping, and other violent crimes").

235. Memorandum from Alejandro N. Mayorkas, Sec'y, U.S. Dep't. Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. and Customs Enf't. (Sept. 30, 2021), https://perma.cc/BCW6-KR64 (prioritizing individuals who are: (1) threats to national security (*e.g*., noncitizens suspected of terrorism or terrorism-related activity); (2) threats to public safety (*e.g*., because of "serious criminal conduct"); and (3) threats to border security). *See also* Texas v. United States, 606 F. Supp. 3d 437, 485-86 (S.D. Tex. 2022).

236. *See* Texas v. United States, 606 F. Supp. 3d 437, 449 (S.D. Tex. 2022).

237. Stephen I. Vladeck, *Don't Let Republican 'Judge Shoppers' Thwart the Will of the Voters*, N.Y. TIMES (Feb. 5, 2023), https://perma.cc/4W8Z-VN73.

238. *See* Plaintiffs' Reply in Support of their Motion for a Preliminary Injunction at 3, Texas v. Unites States, 606 F.Supp.3d 437 (S.D.Tex 2021) (No. 6:21-cv-16), 2021 WL 3402716, at *3. In defending the policy, the Biden administration argued that the guidelines in the memorandum are consistent with the existing statutes, which require only that it continue to detain noncitizens already in its custody and do not apply to noncitizens not yet in its custody or otherwise disturb the executive's traditionally broad discretion over the apprehension of noncitizens. *See* 8 U.S.C. §§ 1226(c), 1231(a)(2).

239. *See* Plaintiffs' Motion for a Preliminary Injunction at 12, Texas v. Unites States, 606 F.Supp.3d 437 (S.D.Tex 2021) (No. 6:21-cv-16), 2021 WL 6331026, at *12.

240. Brief of Texas Sheriffs et al. as Amici Curiae in Support of Respondents and Affirmance at 29, United States v. Texas, 599 U.S. 670 (2023) (No. 22-58), 2022 WL 16699300, at *29.

241. Texas v. United States, 606 F.Supp.3d 437, 501 (S. D. Tex. 2022).

242. Texas v. United States, 40 F.4th 205, 213 (5th Cir. 2022).

243. United States v. Texas, 143 S. Ct. 51, 51 (2022) (mem.).

challenge the guidelines, the district court injunction stopped the Biden administration from implementing its deportation priorities policy for more than a year.

States likewise sought to delay and disrupt the ending of Title 42[244] even as they sought to challenge other COVID-19 measures actually aimed at promoting public health, such as mask and vaccine mandates.[245] Further, even after Biden finally ended the program (by terminating the national emergency), Florida sought to block a component of the administration's new policy that authorized releasing certain arriving noncitizens on parole in response to overcrowding in detention facilities.[246] The district court enjoined the new "parole with conditions" policy,[247] citing an "immigration crisis at the Southwestern border" and claiming that Title 42's expiration would create a "surge" of noncitizens seeking to enter the country.[248] Indeed, Biden himself acknowledged that the U.S.-Mexico border would be "chaotic for a while" after the expiration of Title 42, but defended his authority and ability to manage the situation.[249]

These lawsuits reflect a broader effort by certain Republican-led states to challenge Biden administration policies across a range of areas.[250] In one respect, these suits form part of a larger story in which, as William Baude and Samuel L. Bray describe, "States—and often large coalitions of states, all represented by attorneys general from the opposite political party of the President—now file suits challenging any important action taken by the executive branch."[251] But in the immigration context, these lawsuits have a distinctly partisan dimension. Republican-led states increasingly act in coordination with national Republicans and the right-wing media ecosystem to drive the crisis narrative and solidify emergency governance.[252] While the weaponization of a crisis narrative may often be political more than legal, this narrative also can shape doctrine.

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244. *See*, *supra* 153–155 and accompanying text.

245. *See* Kalhan, *supra* note 142, at 1977 (critiquing the "striking" nature of red states' "public health opportunism").

246. Florida v. Mayorkas, 672 F.Supp.3d 1206 (N.D. Fla. 2023).

247. *Id*. at 1216.

248. *Id*. at 1209. The district court had previously ruled that a similar policy was unlawful. *See* Florida v. United States, 660 F.Supp.3d 1239, 1285 (N.D. Fla. 2023) (vacating the "parole plus alternative to detention" policy). The Eleventh Circuit denied a stay of the orders issued in both cases pending appeal. Florida v. United States, Nos. 23-11528, 23-11644, 2023 WL 3813774, at *1 (11th Cir. June 5, 2023).

249. Lolita C. Baldor et al., *Biden: U.S.-Mexico Border Will be 'Chaotic for a While'*, ASSOCIATED PRESS (May 9, 2023, 8:29 PM), https://perma.cc/2XS7-V4LD.

250. *See*, Vladeck *supra* note 237 (noting that Texas Attorney General Ken Paxton has filed 26 lawsuits in two years challenging Biden administration policies). The lawsuits not only challenge Biden immigration policies but also its student loan debt relief program, the Department of Health and Human Services' abortion guidance following the Court's decision in *Dobbs*, and federal Covid vaccination mandates. *Id*.

251. William Baude & Samuel L. Bray, Comment, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 154 (2023).

252. The role of media groups is particularly important. Alt-right media sources like Breitbart not only generate their own immigration stories; they also serve "as a source of stories and authority for other sites on the right and as the center of attention among social media users who share[] content from right-wing sites on Twitter or Facebook." BENKLER ET AL., *supra* note 20, at 109.

In addition to lawsuits, governors of several states including Arizona, Texas, and Florida have declared state-level emergencies or disasters based on migration across their states' respective borders—and the Biden administration's asserted failure to prevent it—to justify increased state enforcement of immigration law.[253] Arizona and Texas have been particularly aggressive in this regard. Beyond their continual use of litigation to challenge federal immigration policy, they have engaged in what Kate Huddleston describes as "state vigilantism,"[254] deploying National Guard troops to the border beyond federal levels[255] and, in the case of Texas, erecting concertina wire along the banks of the Rio Grande and installing a barrier of buoys in the river to deter migration, and then suing to enjoin the federal government from removing them.[256] Texas has characterized the increased flow of undocumented migrants as an "invasion" to provide legal justification for its argument that, because of the federal government's failures to halt illegal immigration, the Constitution permits the state to take enforcement into its own hands. [257] Although the argument lacks textual and historical support, it has helped reinforce the narrative of an immigration crisis that requires and warrants extraordinary measures.

Republican governors in states like Texas and Arizona—supported by a broader right-wing political and media infrastructure—have also bused (and flown) noncitizens into blue cities in large numbers, straining resources and increasing opposition to migration in those jurisdictions.[258] While this policy did not cause the increase in migration, it "amplified and concentrated it," transforming "what otherwise might have been the slow diffusion of migrants from the border to cities and towns across the United States, and direct[ing] it at just a few places."[259] The strategy, moreover, has largely worked: leaders of blue states and cities now increasingly echo red state concerns and embrace a crisis narrative, prompting Democrats to demand stronger border security at the expense of more humanitarian and measured immigration policies.[260] New York Mayor Eric Adams, for example, issued an emergency declaration[261] and

253. Huddleston, *supra* note 13, at 14.

254. *Id.*

255. *Id.* at 15.

256. Adam Liptak, *Supreme Court Backs Biden in Dispute With Texas Over Border Barrier*, N.Y. TIMES (Jan. 22, 2024), https://perma.cc/44SW-MBAK.

257. U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . engage in War, unless actually invaded"); U.S. CONST. art. IV, § 4 ("The United States shall . . . protect each [state] against Invasion."); Greg Abbott, Op-Ed, *Texas has the constitutional right to defend itself from invasion*, N.Y. POST (Feb. 18, 2024, 12:06 PM) (explaining Texas's argument), https://perma.cc/Y43E-2QVR.

258. Goodman, *supra* note 14; Muzaffar Chishti and Julia Gelatt, *Busing and Flights of Migrants by GOP Governors Mark a New Twist in State Intervention on Immigration*, MIGRATION POLICY INST. (Sept. 28, 2022), https://perma.cc/PB58-LKYJ.

259. Goodman, *supra* note 14.

260. *Id.* (noting that Texas governor Greg Abbott "appears to have succeeded in his stated aim: to shift the conversation around immigration in the United States, forcing Democrats to demand better border security and President Biden to reverse many of his pledges for a more welcoming immigration policy").

261. Andy Newman & Emma G. Fitzsimmons, *New York Faces Record Homelessness as Mayor Declares Migrant Emergency*, N.Y. TIMES (Oct. 7, 2022). The Governor of New York subsequently

ominously warned that that the rise of asylum seekers seeking refuge in New York City will "destroy" the city, citing the stress migration is placing on housing and other services.[262] Other elected officials in blue states and cities have raised similar fears.[263] Such responses to migration from across the political spectrum have helped accelerate and cement the normalization of crisis governance of the border.

C. *The Value and Limits of Judicial Review*

The role of courts in time of emergency has long been debated. David Cole, for example, has argued that in the United States, the federal judiciary, with its guarantees of independence, is better designed institutionally than the political branches to resist efforts to invoke such powers in a way that is overbroad, pretextual, or discriminatory.[264] History, he notes, is populated with examples where executive decision-making led to widespread abuses in the name of combatting emergency—abuses, moreover, that tended to affect minority groups and immigrants in particular.[265] Amanda Tyler has argued for the continued importance of a meaningful judicial role during emergency, even if the judiciary's past performance has been lacking at times.[266] Others have advanced more intermediate positions. Samuel Isaacharaoff and Richard Pildes, for example, have contended that judges should and in fact do defer when the political branches have worked together in addressing national security emergencies.[267] At the opposite end of the spectrum, Eric Posner and Adrian Vermeule argue that courts should defer to executive decision-making during times of emergency because the executive is best situated to assess the

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issued an emergency declaration as well. *See* Joseph Spector, *Hochul issues emergency order for migrant crisis*, POLITICO (May 9, 2023, 6:57 PM), https://perma.cc/WVN7-AJU6.

262. Emma G. Fitzsimmons, *In Escalation, Adams Says Migrant Crisis 'Will Destroy New York City'*, N.Y. TIMES (Sept. 7. 2023), https://perma.cc/L7BW-PD6N.

263. Steph Solis, Monica Eng, Stef W. Kight, & Caitlin Owens, *Blue state migrant crisis sparks political disaster for Biden*, AXIOS (Sept. 5, 2023), https://perma.cc/W3A8-38MQ.

264. *See* Cole, *supra* note 61, at 1341.

265. *Id*. at 1329 (noting the examples of "incarcerating peace activists for mere speech during World War I; rounding up thousands of foreign nationals on political affiliation charges in the Palmer Raids of 1919-1920; interning approximately 110,000 Japanese-Americans and Japanese immigrants during World War II; targeting millions for loyalty inquisitions, civil sanctions, blacklisting, and criminal punishment based on suspected political affiliations in the Cold War; and rounding up thousands of Arab and Muslim foreign nationals who had no connection to terrorism in the wake of the terrorist attacks of September 11, 2001.").

266. *See* Tyler, *supra* note 44, at 495-96. Aziz Huq, meanwhile, has questioned the claim that courts do, in fact, behave differently in national security emergencies (as compared to non-security emergencies) and, by implication, that ordinary doctrines and rules should be relaxed to confront security threats. Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 271-73 (2009).

267. Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach to Rights During Wartime*, 2 INT'L J. CONST. L. 296, 297 (2004) ("[C]ourts have developed a process-based, institutionally oriented (as opposed to rights-oriented) framework for examining the legality of governmental action in extreme security contexts. Through this process-based approach, American courts have sought to shift the responsibility for these difficult decisions away from themselves and toward the joint action of the most democratic branches of the government.").

necessary trade-offs and balance competing considerations.[268] Noting that fears of executive overreach are overexaggerated while confidence in judges' ability and willingness to prevent any such overreach are misplaced, they argue the executive should be given a free hand in assessing and managing crises.[269]

The increasing reliance on a paradigm of emergency at the border provides a valuable perspective on these questions. Some decisions, such as the D.C. Circuit and D.C. District Court rulings in the Title 42 litigation, illustrate the potential of courts to critically evaluate exercises of emergency power and help prevent their misuse.[270] The District Court's decision enjoining Biden's partial resurrection of Trump's Transit Ban as a replacement for Title 42 offers another example of the judiciary's ability to scrutinize and check executive overreach in responding to a perceived crisis. Other rulings, however, reinforce the tendency of courts to defer to the executive where the executive relies on emergency authorizations (as in the Supreme Court's decision to stay lower court rulings enjoining construction of the border wall) or invokes quasi-emergency powers rooted in broad legislative delegations of authority (as in the Court's decision upholding the Muslim Ban).[271]

Two other factors inform the role of courts in the continuing development of a paradigm of emergency governance. The first is the willingness of lower court judges—effectively hand-picked by red states bent on resisting federal immigration policy and appealing to the party's anti-immigration base—to issue nationwide injunctions predicated on an emergency presented by migration across the U.S.-Mexico border. The second is the Supreme Court's aggressive use of its Shadow Docket by refusing to stay these lower court rulings even if, in some cases, the Court ultimately rejects the states' claims on merits review. The Supreme Court's repeated refusal to stay nationwide injunctions issued by lower courts barring the Biden administration from eliminating Remain in Mexico and implementing immigration enforcement priorities suggests how the judiciary can contribute to the escalation and entrenchment of a crisis narrative.

Thus, while recent legal battles over immigration predicated on claims of emergency serve as a reminder of the judiciary's potential to curtail overbroad uses of executive power and protect vulnerable populations like noncitizens, they also underscore the limitations of relying on courts to play this

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268. David Cole, *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. CHI. L. REV. 1329, 1332 (2008) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS (2007)).

269. *Id*. at 1333.

270. *See Huisha-Huisha II*, 27 F.4th 718, 727 (D.C. Cir. Mar. 4, 2022), *see also Huisha-Huisha II*, 642 F. Supp. 3d 1, 15–28 (D.D.C. Nov. 15, 2022); *supra* text accompanying notes 146–47 & 154–55.

271. The Muslim Ban decision in particular highlights the long history, dating to the Chinese Exclusion Acts of the late nineteenth century, of judicial acquiescence in immigration measures tainted with xenophobia and prejudice. *See* Catherine Y. Kim, *Rights Retrenchment in Immigration Law*, 55 U.C. DAVIS L. REV. 1283, 1324 (2022).

checking function and suggest how courts can instead contribute to the normalization and perpetuation of emergency governance.

D. *Political Polarization and Legislative Gridlock*

Legislative gridlock is another significant factor.[272] Some polls indicate that eighty-two percent of Americans favor some version of comprehensive immigration reform, a term used to describe legislation that combines enhanced border security and a pathway to citizenship for undocumented immigrants.[273] But despite overwhelming public support, Congress has not passed comprehensive immigration reform since 1986.[274] Instead, when Congress acts on immigration, it typically restricts immigration and increases support for enforcement without providing avenues for undocumented immigrants to obtain legal status, responding in constructive and measured ways to shifting migration flows, or addressing the changing needs of the U.S. labor market.

In response to the growth of the undocumented population in the United States,[275] comprehensive immigration reform became part of the political debate in the early 1980s, eventually winning the support of President Reagan.[276] In 1986, Congress enacted the Immigration Reform and Control Act (IRCA),[277] which offered amnesty (under the banner of "legalization")[278] to certain unauthorized immigrants, increased border enforcement, and authorized sanctions against employers who knowingly hired unauthorized immigrants.[279] Approximately 2.7 million unauthorized immigrants gained citizenship under IRCA.[280]

IRCA, however, was the last time Congress passed comprehensive immigration reform.[281] Since IRCA, Congress has primarily focused on restricting immigration and done so thoroughly increasingly draconian means. Congress,

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272. *See* Farber, *supra* note 182, at 1175.

273. Myah Ward, *Biden Is Ignoring Immigration Issues, Voters Say in Poll*, POLITICO (Apr. 19, 2023, 10:12 AM), https://perma.cc/975X-BBC2.

274. *See* Claire Klobucista, Diana Roy, & Amelia Cheatham, *The U.S. Immigration Debate*, COUNCIL ON FOREIGN RELATIONS (June 6, 2023, 1:35 PM), https://perma.cc/ZKW3-E96K.

275. The expiration of the Bracero Program (1942-1964), under which the U.S. government had encouraged Mexican men to come to the United States for short-term work, primarily agricultural labor contracts, coupled with immigration reforms that limited migration from Mexico, helped contribute to this increase. *See* Douglas S. Massey, *The Mexico-U.S. Border in the American Imagination*, 160 PROC. AM. PHIL. SOC'Y 160, 167–69 (2016).

276. President Reagan backed amnesty for undocumented immigrants during his 1984 presidential debate with Walter Mondale, stating, "I believe in the idea of amnesty for those who have put down roots and lived here, even though sometime back they may have entered illegally." NPR Staff, *A Reagan Legacy: Amnesty for Illegal Immigrants*, NPR (July 4, 2010, 2:12 PM), https://perma.cc/4ARU-X5LH.

277. Immigration Reform and Control Act of 1986, Pub. L. 99-608, 100 Stat. 3359 (1986).

278. See Presidential Statement on Signing the Immigration and Control Act of 1986, 2 PUB. PAPERS 1522 (Nov. 6, 1986), https://www.govinfo.gov/content/pkg/PPP-1986-book2/pdf/PPP-1986-book2.pdf; *see also* NPR Staff, *A Reagan Legacy: Amnesty for Illegal Immigrants*, NPR (July 4, 2010, 2:12 PM), https://perma.cc/4ARU-X5LH.

279. Jessica Bolter, *Immigration Has Been a Defining, Often Contentious, Element Throughout U.S. History*, MIGRATION POLICY INSTITUTE (Jan. 6, 2022), https://perma.cc/8JNN-SYHQ.

280. *Id.*

281. Claire Klobucista et al., *The U.S. Immigration Debate*, COUNCIL ON FOREIGN RELATIONS, https://perma.cc/75DB-27HW (June 6, 2023, 1:35 PM).

for example, has expanded the number of crimes that subject noncitizens to removal, provided for summary removal of inadmissible non-citizens, barred unauthorized immigrants from reentering the country for long periods of time, and established income requirements for the sponsor families of immigrants.[282] Congress has also imposed time limitations on asylum applications and required the mandatory detention of certain immigrants.[283] Congress has steadily increased funding for enforcement at the U.S.-Mexico border while approving greater construction of physical barriers to prevent migrants from crossing into the United States.[284] Meanwhile, lawmakers' repeated attempts to enact immigration reform legislation have failed,[285] including legislation popularly known as the DREAM Act, which would have enabled undocumented immigrants to obtain conditional legal status if they came to the United States as children, lived in the country, and satisfied other requirements.[286] Congress came closest to enacting comprehensive immigration reform in 2013, but the proposed legislation,[287] which combined increases in border security with a pathway to citizenship for undocumented immigrants, died in the House after clearing the Senate.[288] The bill's demise has been widely attributed to the surprise defeat of House Majority Leader Eric Cantor (R-Va.) in the 2014 Republican primary. Cantor had supported some immigration reform, and his loss—the first-ever primary defeat of a sitting House majority leader[289]—scared other Republicans from cooperating with Democrats on immigration reform. Cantor's defeat served as a turning point

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282. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Pub. L. No. 104-208, 110 Stat. 3009-546, 587, 627, 675 (1996) (IIRIRA),; Jessica Bolter, *Immigration Has Been a Defining, Often Contentious, Element Throughout U.S. History*, MIGRATION POLICY INSTITUTE (Jan. 6, 2022), https://perma.cc/9Y2H-NCPJ. *See also* The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1276 (1996) (AEDPA) (increasing the government's authority to arrest, detain, and deport noncitizens).

283. IIRIRA, § 301(b)(9)(B), 110 Stat. 3009–576, 33-35; *see also* Eleanor Acer & Olga Byrne, *How the Illegal Immigration Reform and Responsibility Act of 1996 Has Undermined US Refugee Protection Obligations and Wasted Government Resources*, 5 J. MIGRATION AND HUM. SEC. 356, 356 (2017).

284. These increased barriers predated Trump's effort to construct a border wall. *See* Secure Fence Act of 2006, Pub. L. 109-367, 120 Stat. 2638, 2689 (directing DHS to build at least 700 miles of barriers along the U.S.-Mexico border).

285. Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 77–78 (2013) (describing the failures to enact comprehensive immigration reform in 2006, 2007, 2010, and 2013); *see also* Suzanne Gamboa, *Congress Has Failed for More Than Two Decades to Reform Immigration—Here's a Timeline*, NBC NEWS, https://perma.cc/84UN-6EU6 (May 9, 2023, 7:31 AM).

286. *See* Scott Wong and Shira Toeplitz, *DREAM Act Dies in Senate*, POLITICO, https://perma.cc/RC84-543S (Dec. 20, 2010, 8:07 AM). In its final form, the bill would have granted conditional status to individuals who came to the United States before age sixteen; were younger than age 30, lived in the United States for five consecutive years, passed a criminal background check and had a high school diploma or GED equivalent. *Id.*

287. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013); *see also* American Immigration Council, *A Guide to S.744: Understanding the 2013 Senate Immigration Bill* (July 10, 2013), https://perma.cc/R3Y4-YUR9.

288. Yamiche Alcindor & Sheryl Gay Stolberg, *After 16 Futile Years, Congress Will Try Again to Legalize 'Dreamers'*, N.Y. TIMES (Sept. 5, 2017), https://perma.cc/SF29-FRUY.

289. James Hohmann, *5 Takeaways from Cantor Shocker*, POLITICO (June 10, 2014, 11:31 PM), https://perma.cc/5RVJ-V8BW.

in the rightward shift of the Republican Party on immigration[290] and an increasingly sharp partisan divide over immigration.[291] These failed legislative efforts highlight the increasingly toxic politics around increasing immigration due to the Republican party's base and right-wing media organizations mobilizing in opposition to help defeat any proposed reform legislation.[292]

Faced with Congress's continued failure to pass the DREAM Act, President Obama created the Deferred Action for Childhood Arrivals (DACA)[293] and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) programs. Deferred action represents one of many forms of prosecutorial discretion in immigration law.[294] Under DACA, the United States sought to exercise enforcement discretion and not deport individuals who came to the United States as children and met other requirements. [295] DACA was characterized as a temporary fix, and President Obama continued to urge Congress "to act . . . on the DREAM Act" to make it permanent.[296] But when Congress failed to act, Obama expanded DACA, including to allow covered individuals to receive work authorization.[297] Under DAPA, the United States sought to exercise enforcement discretion for undocumented individuals who were parents of a U.S. citizen or lawful permanent resident and who satisfied other requirements.

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290. *See, e.g.,* Seung Min Kim, *Cantor Loss Kills Immigration Reform*, POLITICO, https://www.politico.com/story/2014/06/2014-virginia-primary-eric-cantor-loss-immigration-reform-107697 (June 11, 2014, 12:19 AM); *see also* Arit John, *Eric Cantor's Defeat Killed Immigration Reform Because We Say It Did*, THE ATLANTIC (June 11, 2014), https://perma.cc/F38J-CAX4 ("One take on Eric Cantor's surprise defeat last night is that supporting amnesty will get you booted out of office, meaning immigration reform is now totally, completely, irrevocably six-feet-under dead."). *But see id.* (questioning this widely accepted narrative and noting that Cantor had lost touch with his constituents and was unpopular in his district).

291. BENKLER ET AL., *supra* note 20. (describing the sharp partisan divide on immigration following the collapse of comprehensive immigration reform).

292. *See, e.g.*, Elaine Karmack, *Can Biden Pass Immigration Reform? History Says it Will Be Tough*, BROOKINGS INSTITUTION (June 22, 2021), https://perma.cc/U5F7-4YQT (discussing the failure to the 2007 attempt to enact comprehensive immigration reform).

293. Remarks on Immigration Reform and an Exchange with Reporters, 1 PUB. PAPERS 800 (June 15, 2012), https://perma.cc/5R3E-4V5H.

294. Shoba Sivaprasad Wadhia, *The President and Deportation: DACA, DAPA, and the Sources and Limits of Executive Authority—Response to Hiroshi Motomura*, 55 WASHBURN L.J. 189, 190 (2015) (noting other exercises of discretion, including refraining from serving, filing, or issuing a charging document (*i.e.*, the Notice to Appear), choosing not to appeal a decision by an immigration judge that favors a noncitizen; and choosing to grant a stay of removal or parole). However, such use of prosecutorial discretion—where the administration sets broad enforcement priorities for the enforcement of immigration claims against certain categories of noncitizens—differs from the retail exercise of discretion in individual cases.

295. Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David Aguilar, Acting Cmm'r, U.S. Customs and Border Prot., and John Morton, Dir., U.S. Immigration and Customs Enf't (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf. Individuals were initially eligible for DACA if, for example, they were not older than age 30, had continuously lived in the United States for five years; were present in the United States; were in school, a high school graduate, GED certificate holder, or honorably discharged veteran; and were not convicted of a felony, a significant misdemeanor, multiple misdemeanors, and did not pose a threat to national security or public safety. *Id.*

296. Remarks at Del Sol High School in Las Vegas, Nevada, 1 PUB. PAPERS 65 (Jan. 29, 2013), https://www.govinfo.gov/content/pkg/PPP-2013-book1/pdf/PPP-2013-book1-doc-pg65.pdf.

297. Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Sec., to Leon Rodriguez, Dir., USCIS, et al. 4 (Nov. 20, 2014), https://www.aila.org/File/DownloadEmbeddedFile/57134.

Both DACA and DAPA, however, prompted legal challenges.[298] In 2014, Texas and twenty-five other states sued in the U.S. District Court for the Southern District of Texas[299] and succeeded in blocking DAPA and expansions to DACA from taking effect.[300] President Trump then sought to the terminate the original DACA program,[301] stating that it should have been created through legislation rather than executive action.[302] Several states and other entities sued to keep DACA in force.[303] Following litigation in three circuits,[304] the Supreme Court ruled in *Department of Homeland Security v. Regents of the University of California*[305] that Trump's DACA rescission was invalid on procedural grounds.[306] Ongoing litigation challenging the legality of the original DACA program and whether it is a valid exercise of the executive's enforcement discretion or contravenes Congress's statutory schemes for removal is still pending in the lower courts.[307]

Congress's failure to pass comprehensive immigration reform, particularly for Dreamers,[308] underscores the political challenges surrounding the border

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298. For an overview of this litigation, see Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. Disc. 1, 4 (2015), and Anil Kalhan, *The Strange Career of* United States v. Texas, DORF ON LAW (Apr. 18, 2016), https://perma.cc/GV3E-QGEL.

299. Texas v. United States, 86 F. Supp. 3d 591, 607 (S.D. Tex. 2015) [hereinafter *Texas I*].

300. The district court granted the states' request for a preliminary injunction. *See Texas I*, 86 F. Supp. 3d at 677. The Fifth Circuit denied the U.S. government's request for a stay pending appeal, *see* Texas v. United States, 787 F.3d 733, 743 (5th Cir. 2015), and then affirmed the district court's ruling on appeal; Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015) (ruling that DAPA was a substantive rule granting lawful status to undocumented immigrants and that, as a substantive rule, it had to go through the APA's notice and comment process). An equally divided Supreme Court affirmed in a one sentence order. United States v. Texas, 579 U.S. 547, 548 (2016) (per curiam).

301. Vanessa Romo et al., *Trump Ends DACA, Calls on Congress to Act*, NPR (Sept. 5, 2017, 9:05 AM), https://perma.cc/K9YH-UBPM.

302. *Id.*

303. For a litigation timeline, see Catholic Legal Immigration Network, Inc., *Summary of DACA Litigation and Policy Developments*, https://perma.cc/KN6B-CYTC (last updated Dec. 7, 2020).

304. *See id.* (Litigation proceeded in the D.C., Second, and Ninth Circuits).

305. Dep't of Homeland Security v. Regents of the University of California, 591 U.S. 1, 4 (2020).

306. *Id.* at 1915–16 (concluding that the agency failed to provide a reasoned explanation for its decision to completely rescind DACA, noting that even if DACA's employment provisions were illegal, the agency could have still retained DACA's protection from deportation, but instead concluded, without explanation, that this protection had to be terminated as well).

307. In 2021, the U.S. District Court for the Southern District of Texas ruled that DACA violated the APA and enjoined the program, except as applied to DACA renewals. *Texas v. United States*, 549 F. Supp. 3d 572, 624 (S.D. Tex. 2021) [hereinafter *Texas II*]. The Biden administration attempted to shore up DACA by promulgating final regulations on DACA while the case was on appeal. Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53,152 (Oct. 31, 2022) (to be codified at 8 C.F.R. Pts. 106, 236, and 274a). The Fifth Circuit then partially upheld the district court, but also preserved the temporary stay for current DACA recipients and remanded. *Texas v. United States*, 50 F.4th 498, 508 (5th Cir. 2022). Because the DACA final rule promulgated by the Biden administration did not update the continuous presence requirement, individuals are only eligible for DACA if they have been continuously present in the United States prior to June 15, 2007. 8 C.F.R. § 236.22(b)(2). In September 2023, the U.S. District Court for the Southern District of Texas extended the DACA memorandum injunction to include the DACA final rule. *Texas v. United States*, 691 F. Supp.3d 763, 796 (S.D. Tex. 2023).

308. In 2012, right after DACA was created, a Pew poll found that 63% of Americans supported the president's use of executive power to create the program. Mark Hugo Lopez, et al., *5 Facts About the Deferred Action for Childhood Arrivals Program*, PEW RESEARCH CENTER (August 15, 2014), https://perma.cc/L7J9-LMMM. In 2018, a Gallup poll found that 83% of Americans supported allowing Dreamers to eventually become citizens. *Immigration*, GALLUP (2023), https://perma.cc/RTP4-LHAY

in an era of deepening partisanship and increasing legislative disfunction.[309] While political polarization cuts across many issues, it is especially acute in immigration because of shifts within the Republican party.[310] The rising forces of white ethno-nationalism and xenophobia help explain the rise of Donald Trump and the hard anti-immigration turn in the Republican party.[311] Support for ideas like replacement theory, which posits that immigrants are "invading" the United States and replacing its cultural and ethnic character,[312] have extinguished any remaining hopes of Congress passing comprehensive immigration reform in the foreseeable future.[313] Instead, as Marisa A. Abrajano and Zoltan Hajnal have described, white backlash against immigrants, particularly Latinos, has magnified support for policies that are increasingly punitive.[314] Indeed, Congress has been unable to enact even modest immigration reforms, such as making it easier for asylum seekers to apply for and receive temporary work permits sooner than six months after filing their asylum application, as currently required under federal law,[315] despite significant labor shortages across the United States.[316] Expediting work authorization also would help reduce the financial burdens on cities and states, not only along the border but in other parts of the country as well, such as in the Northeast, where the number of migrants has surged.[317] Some states,

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(last visited Jul. 16, 2023). In 2020, a poll found that 69% of voters support policies that protect DACA recipients from deportation and that 68% of voters want policies that provide a pathway to citizenship while also enhancing border security. Memorandum from Global Strategy Group, on behalf of Immigration Hub and Voto Latino, to Interested Parties, NEW SURVEY – Battleground State Voters Want Balance in Their Approach to Immigration that Included Both Security and Solutions for Dreamers and the Undocumented (April 18, 2023), https://perma.cc/XG9Y-KL9E.

309. For a discussion of political polarization, see, for example, Thomas B. Edsall, *'Gut-Level Hatred' Is Consuming Our Political Life*, N.Y. TIMES (July 19, 2023), https://perma.cc/DF6Q-ZNRL.

310. *See* Don Gonyea, *The GOP's Evolution on Immigration*, NPR (Jan. 25, 2018, 5:00 AM), https://perma.cc/H6ZA-7NRA; *see also* Bolter, *supra* note 282.

311. SIDES, TESLER & VAVRECK, *supra* note 21 (tying Trump's election in 2016 largely to the increase of "identity-based prejudice among white voters").

312. Gabriel Sanchez, et al., *White Nationalism Remains Major Concern for Voters of Color*, BROOKINGS (Mar. 30, 2023), https://perma.cc/U7Z7-WAMC.

313. *See* PRRI Staff, *A Christian Nation? Understanding the Threat of Christian Nationalism to American Democracy and Culture*, PRRI (Feb. 8, 2023), https://perma.cc/AX5G-362E (noting a study showing that "over half of Republicans qualify as either Christian nationalism sympathizers . . . or adherents," who "generally hold less favorable views of immigrants, [and] racial and ethnic minorities"); *see also* Sanchez, et al., *supra* note 313. For a discussion of how constructions of race have contributed to notions of "foreignness" and impacted immigration law over time, see Jaya Ramji-Nogales, *This Border Called My Skin*, *in* RACE AND NATIONAL SECURITY 115-23 (Matiangai V.S. Sirleaf ed. 2023).

314. ABRAJANO & HAJNAL, *supra* note 20.

315. *See* 8 U.S.C. § 1158(d)(2) ("[a]n applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum").

316. *See* Eileen Sullivan, *Why Biden Can't Expedite Work Permits for Migrants*, N.Y. TIMES (Aug. 31, 2023); *see also* Jasmine Garsd, *There's a labor shortage in the U.S. Why is it so hard for migrants to legally work?*, NPR (Aug. 29, 2023), https://perma.cc/F8FB-9KCR. The Biden administration did announce it would accelerate processing times for applications for such permits. *See* Dep't of Homeland Security, *Fact Sheet: The Biden-Harris Administration Takes New Actions to Increase Border Enforcement and Accelerate Processing for Work Authorizations, While Continuing to Call on Congress to Act* (Sept. 20, 2023), https://perma.cc/7N73-7A7P.

317. Ahilan Arulanantham, *Solutions that Work? Analyzing State Employment Authorization for Noncitizens in the US*, JUST SECURITY (Nov. 30, 2023), https://perma.cc/57BQ-ZHJ8 (describing the support for state employment proposals to allow recently-arrived refugees to work temporarily).

moreover, have proposed allowing states to sponsor immigrants themselves to address severe labor shortages, effectively asking the federal government to allow states to operate their own worker programs.[318] Such initiatives, which recognize that migration presents opportunities as well as challenges, could help create a more solution-oriented form of federalism and help address concerns about a border crisis spiraling out of control. But the narrative of a border crisis—and the associated political costs of doing anything that does not further restrict asylum—has helped prevent such reforms from being enacted.

Continued congressional failure to enact immigration reform, meanwhile, has incentivized reliance on unilateral executive action, as illustrated by the creation of DACA and DAPA.[319] Such measures, in turn, have triggered legal challenges by states. Over the course of protracted litigation, DAPA has been blocked and DACA limited. While DHS cannot terminate DACA for existing recipients, it cannot process new DACA applications,[320] and even if it could, individuals would only be eligible for DACA if they have been continuously present in the United States since 2007,[321] thus leaving a new generation of undocumented children outside its protections.[322]

The Biden administration's promulgation of immigration enforcement guidelines similarly demonstrates how a deeply fractured legislature has incentivized unilateral executive action. Those guidelines, as discussed above, prioritize certain groups for deportation, such as those who present a threat to national security, the public safety (*e.g.*, because of "serious criminal conduct"), or border security.[323] In justifying the guidelines, the administration explained that the federal government lacks the resources to apprehend and seek to remove every one of the approximately eleven million undocumented or otherwise removable noncitizens in the United States.[324] It further noted that bipartisan leaders and groups in Congress had tried but failed to pass legislation to provide a path to citizenship

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318. *Id.* This proposal, moreover, would apply not only to recently-arrived refugees but also to undocumented immigrants who have been living in the United States for often long periods of time. *See also id.* (describing another state employment proposal that argues public universities already have legal authority to hire undocumented university students, which would help enable them to fund their education and obtain graduate degrees).

319. Legislative inaction has also incentivized execution from the other side. As described above, Trump's arguments for the border wall, for example, rested on the notion that too many migrants were coming across the U.S.-Mexico border without inspection. Because, in Trump's view, Congress had failed to take adequate action—*i.e.*, by allocating sufficient funds in the federal budget towards wall construction—and because of the degree of popular support for his position, he was justified in acting unilaterally. It should be noted, however, in the case of the border wall, there was prolonged congressional debate and, ultimately, a compromise resolution that Trump then disregarded. *See supra* Part II.B.

320. *See* U.S. Citizenship and Immigration Services, *Consideration of Deferred Action for Childhood Arrivals (DACA)*, https://perma.cc/JSC9-FU58 (last visited July 26, 2023) (click on *Alert: Deferred Action for Childhood Arrivals (DACA) Final Rule Effective Oct. 31, 2022*.).

321. *See* 8 C.F.R. § 236.22(b)(2).

322. Suzanne Monyak, *Cut Off from DACA, New Generation Faces Uncertain Futures*, ROLL CALL (July 12, 2023, 1:33 PM), https://perma.cc/5EH5-LLC2 ("[T]he majority of the nation's approximately 120,0000 undocumented high school graduates this year are not eligible for DACA because of the cutoff date. And by the class of 2025, most graduates will not have been born in time.").

323. *See Guidelines for the Enforcement of Civil Immigration Law*, *supra* note 235.

324. *Id.* at 2.

for undocumented noncitizens, many of whom have been contributing members of their respective communities for years.[325] Although the Supreme Court ultimately denied the challenge to the guidelines on standing grounds in *United States v. Texas*, the Court only addressed prosecutorial discretion in this narrow area of immigration law enforcement.[326] The Court did not resolve larger questions over the exercise of executive discretion, including those raised by DACA, nor did it resolve broader questions around states' continued ability block federal immigration policies through nationwide injunctions or through the remedy of "universal vacatur" under the APA.[327]

If significant segments of the Republican party continue to treat the border as a "symbolic boundary [protecting] the United States [from] a threatening world,"[328] the cycle is likely to persist: legislative gridlock; followed by both unilateral executive action and attempts by states to wrest control over immigration policy; followed by legal challenges in court that often help embed claims of a border crisis rather than dispel them. The cycle will foreclose the various possible reforms that might constructively address shifts in migration, such as providing a pathway to legalization for at least some of the millions of undocumented individuals in the United States, revising immigration laws to take account for the fact that many migrants fleeing today do not fit within the narrow legal definition of refugee, and expediting the process of granting migrants employment authorization so that they can start working more quickly, limit the burden on states and localities, and help address labor shortages. Battles over immigration, moreover, will increasingly take place against the backdrop of a seemingly permanent crisis at the border that inevitably but unnecessarily undermines legal protections for migrants and prevents the United States from adapting to the actual and evolving challenges and opportunities presented by immigration. And the more that blue state governors, mayors, and lawmakers accept this narrative of an immigration emergency, the more entrenched and normalized crisis governance of the border will become.

CONCLUSION

The law and politics of emergency have contributed to the growth of a model of governance of the border, with significant implications for the separation of powers and federalism. This development provides a window into the future of U.S. immigration policy and to some larger challenges facing

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325. *Id*.

326. United States v. Texas, 559 U.S. 670, 679-680 (2023) (citing several reasons for the traditional reluctance of federal courts to entertain challenges to the executive's determination of law enforcement priorities in immigration, including that allowing such challenges would "entail expansive judicial direction of the [Justice] Department's arrest policies" and raise significant separation of powers issues. It also cautioned, however, that a different calculus might exist if the Executive "wholly abandoned its statutory responsibilities to make arrests or bring prosecutions.").

327. Baude & Bray, *supra* note 251, at 180–81.

328. Massey, *supra* note 275, at 160.

the U.S. legal and political system. It also offers a perspective on the study of emergency powers more generally.

Crisis governance of the border illustrates the ways in which claims of emergency can take root even in a country like the United States, without a constitution that provides for the exercise of emergency power (apart from a handful of scattered provisions). In that respect, it reinforces arguments, such as those advanced by Ferejohn and Pasquino, that constitutional democracies, including those with constitutional powers to address emergencies, tend to tackle emergencies through ordinary legislation,[329] as the United States itself has frequently done. But it also shows how claims and constructs of emergency can drive policy even without any invocation of formal emergency authority. In other words, invocations of emergency can operate in multiple ways: to unlock statutory authorizations of enhanced power that explicitly reference situations of emergency (border wall and Title 42); to support reliance on quasi-emergency authorizations that provide for broad delegations of power to the executive during normal times (Muslim Ban); and to justify actions based on ordinary legal authority, like the asylum statute and regulations (Remain in Mexico).

The case studies discussed above further underscore how claims of emergency can be used a pretext for other goals, and that measures taken under the banner of emergency action tend to become normalized over time. Title 42 provides the best example: the Trump administration used this authority to advance its larger goals of gutting asylum protections; the Biden administration continued Title 42 long after any public health rationale justified it, before eventually replacing it with a policy that imposes significant restrictions on asylum under the guise of a return to normalcy; and Trump has threatened to resurrect Title 42 for an more sweeping—and pretextual—use of Title 42 in his second term.

Much of the emergency power literature, moreover, describes the importance of courts as a source of potential resistance to executive overreach, while at the same time acknowledging the tendency of courts to defer to the executive in practice. Litigation over the Muslim Ban, the Border Wall, and Title 42 shows judges playing both roles. Yet it also suggests how courts have helped fuel the growth of crisis governance of the border, whether through district court decisions granting nationwide injunctions in suits by states to maintain maximalist immigration restrictions or by the Supreme Court's use of its Shadow Docket to keep such rulings in place while the lawsuits play out.

Crisis governance of the border, in short, reflects a dynamic process, with multiple actors alternatively claiming and contesting emergencies—a process, moreover, that has accelerated amid increasing political polarization across the branches of the federal government and between the federal

329. *See*, *supra* notes 59-60 and accompanying text.

government and the states, which increasingly fight for control over immigration policy. Meanwhile, vulnerable populations from asylum seekers to Dreamers suffer, and opportunities to address labor shortages and other pressing challenges are sacrificed in the name of cracking down on unlawful immigration.

Countries that govern by emergency, to paraphrase Tolstoy, are each problematic in their own way. [330] In that sense, recent shifts in U.S. immigration law and policy may ultimately reveal as much about the limitations and vulnerabilities of the country's current constitutional framework and political culture as they do about the dangers of emergency power itself.

330. LEO TOLSTOY, ANNA KARENINA 3 (CONSTANCE GARNETT TRANS., BARNES & NOBLE BOOKS 1997) (1878) ("Happy families are all alike; every unhappy family is unhappy in its own way.").