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EMERGENCY POWERS FOR GOOD

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ABSTRACT

Emergency powers are widely, and justly, criticized as threats to the rule of law. In the United States, forty-three declared emergencies give the executive vast authority to exercise power unencumbered by standard legal and procedural requirements. A long tradition of executive use of emergency powers to erode civil liberties amplifies fears of executive overreach.

Yet this, we argue, is only part of the picture. We examine how emergency powers can be used for good. We argue that under certain limited conditions, political actors can legitimately invoke emergency

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powers to transform public policy. In addition to widely accepted requirements of crisis severity, transparency, and time limits, we argue that broad consensus and a reformulated non-discrimination requirement are essential to the proper use of emergency powers for societal transformation.

We analyze recent high-profile exercises of emergency powers by the U.S. executive to fund a wall on the southern border and to forgive billions in student debt, as well as the European Union's (EU) extraordinarily frequent and broad use of emergency powers in the last three years in response to COVID-19 and Russia's Ukraine invasion. We conclude that the U.S. measures fail under our normative framework, while the EU measures offer a promising template for the transformative use of emergency powers.

TABLE OF CONTENTS

INTRODUCTION	4
I. TWO APPROACHES TO EMERGENCY POWERS	13
A. <i>Defining Emergencies</i>	13
B. <i>Emergency Powers Constrained—The Existing Framework</i>	15
C. <i>Transformative Emergency Powers—Our Framework</i>	21
1. <i>Broad Consensus</i>	24
2. <i>Non-Discrimination and the Vulnerable</i>	30
II. TRANSFORMATIVE EMERGENCY POWERS IN THE UNITED STATES	33
A. <i>The Border Wall</i>	34
B. <i>Student Loans</i>	37
III. THE EU AND TRANSFORMATIVE EMERGENCY POWERS	41
A. <i>The EU Emergency Framework</i>	43
B. <i>Economic Stabilization and Recovery</i>	47
1. <i>Doubling EU Spending</i>	49
2. <i>Collective Borrowing</i>	51
C. <i>Energy</i>	55
D. <i>The EU Measures: Emergency Powers for Good?</i>	60
CONCLUSION	69

INTRODUCTION

Emergency powers have a bad reputation. And rightly so. Executives have often used emergencies to circumvent the standard democratic or legal process.¹ They often last beyond the immediate crisis for which they are declared.² In weak democracies and authoritarian regimes, emergency powers have been used to justify government violence, silence opposition, suppress information, and consolidate government authority.³

For example, during the COVID-19 pandemic, governments in China, Thailand, Cambodia, Venezuela, Bangladesh, Turkey, and Hungary, among others, persecuted journalists, opposition activists, healthcare workers, and other critics of the official response to the pandemic.⁴ And even in strong democracies, the COVID-19 emergency triggered widespread restrictions on a broad array of rights and entitlements, from freedom of movement to education.⁵

1. See, e.g., Anna Lührmann & Bryan Rooney, *Autocratization by Decree: States of Emergency and Democratic Decline*, 53 COMPAR. POL. 617, 617-20 (2021).

2. See *id.* at 617-18.

3. See Davis Stasavage, *Democracy, Autocracy, and Emergency Threats: Lessons for COVID-19 from the Last Thousand Years*, 74 INT'L ORG. E1, E2 (Supp. 2020); Lührmann & Rooney, *supra* note 1, 617-20; Ruairidh Brown, *Emergency Powers and Authoritarian Shift, in COVID-19 AND INTERNATIONAL POLITICAL THEORY: ASSESSING THE POTENTIAL FOR NORMATIVE SHIFT* 21, 25-26 (2022); Mert Arslanalp & T. Deniz Erkmen, *Mobile Emergency Rule in Turkey: Legal Repression of Protests During Authoritarian Transformation*, 27 DEMOCRATIZATION 947, 948, 950 (2020).

4. See Kenneth Roth, *How Authoritarians Are Exploiting the COVID-19 Crisis to Grab Power*, HUM. RTS. WATCH (Apr. 3, 2020, 3:59 PM), <https://www.hrw.org/news/2020/04/03/how-authoritarians-are-exploiting-covid-19-crisis-grab-power> [<https://perma.cc/CDN8-4VGE>]; see also Daniel Hegedüs, *Orbán Uses Coronavirus to Put Hungary's Democracy in a State of Danger*, THE GERMAN MARSHALL FUND, <https://www.gmfus.org/news/orban-uses-coronavirus-put-hungarys-democracy-state-danger> [<https://perma.cc/AV62-ZJ7D>].

5. See Seraphine F. Maerz, Anna Lührmann, Jean Lachapelle & Amanda B. Edgell, *Worth the Sacrifice? Illiberal and Authoritarian Practices During Covid-19* 1 (The Varieties of Democracy Inst., Working Paper No. 110, 2020) (surveying the responses of 143 countries to the COVID-19 pandemic and assessing them for compliance with democratic standards, finding that “while most violations of democratic standards for emergency measures during the Covid-19 pandemic occurred in autocracies, also some democracies are affected,” and reasoning that “[t]his suggests that authoritarian and illiberal practices, even if temporary, become more prevalent during times of crises”); see also Katerina Linos, *Organizational Rights in Times of Crisis*, 88 U. CHI. L. REV. 729, 730-31 (2021) (reviewing ADAM CHILTON & MILA VERSTEEG, *HOW CONSTITUTIONAL RIGHTS MATTER* (2020)). See generally Adam Chilton, Kevin L. Cope, Charles Crabtree & Mila Versteeg, *Support for Constitutional Rights During*

The United States currently has 148 distinct statutory provisions giving the executive extraordinary emergency powers covering public health, land management, federal employees, asset seizure, control and transfer, criminal prosecution, detention, and international relations.⁶ To date, U.S. presidents have declared seventy-nine national emergencies under the National Emergencies Act of 1976 and related authorities.⁷ A staggering forty-three of those emergencies remain in force, including ones originally declared decades ago.⁸ They provide a deep pool of authority for the executive to act without the burden of standard legal process and requirements.

Democratic and Republican presidential administrations alike have used emergency powers to sustain practices that raise difficult separation of powers and individual liberties questions. Not long ago, the Trump administration relied on emergency authority to build a wall along the southern U.S. border to keep migrants out.⁹ And President Biden invoked emergency powers to unilaterally forgive student loans, an effort the Supreme Court has for now thwarted.¹⁰

It is no surprise, then, that scholarly treatments of emergencies have largely focused on identifying and critiquing their corrosive impact on democratic governance and individual rights.¹¹ The

Crisis: Evidence from the Pandemic, AM. J. COMPAR. L. (forthcoming 2024) (manuscript at 4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3591270 [<https://perma.cc/A4PQ-YFKN>] (measuring public support for pandemic-related rights restrictions in six countries).

6. *A Guide to Emergency Powers and Their Use*, BRENNAN CTR. FOR JUST. (Feb. 8, 2023), <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use> [<https://perma.cc/W46C-LRAR>].

7. *Declared National Emergencies Under the National Emergencies Act*, BRENNAN CTR. FOR JUST. (Mar. 27, 2024), <https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act> [<https://perma.cc/77JJ-W68B>].

8. *Id.*

9. *See infra* Part II.A.

10. *See infra* Part II.B; *Biden v. Nebraska*, 143 S. Ct. 2355, 2364-65 (2023).

11. Although sovereigns have used emergency powers throughout history, extensive scholarly preoccupation with emergency powers is a relatively recent phenomenon. *See* OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 2 (2006) (“[P]rior to al Qaeda’s attacks in New York, Washington, and Pennsylvania, violent crises and emergencies and their implications for legal systems had not attracted much attention in legal scholarship.”). There were of course notable precursors, with Carl Schmitt’s early twentieth-century theory of the exception informing much of the newer wave of emergency scholarship. *See* Oren Gross, *The Normless and Exceptionless Exception: Carl*

excesses of 9/11 reinvigorated scholarly interest in—and heavy criticism of—emergency powers.¹² After 9/11, new systemic crises gave rise to accusations of (primarily) executive overreach. American, European, and global crises—including the 2008 financial crisis,¹³ the EU debt crisis,¹⁴ mass influxes of migrants,¹⁵ global health crises,¹⁶ and the war in Ukraine¹⁷—sparked largely critical efforts to evaluate emergency powers in national and global governance. A key tenet of those critiques has been the incompatibility of certain exercises of emergency powers with democratic

Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy, 21 CARDOZO L. REV. 1825, 1826-27, 1829 (2000). Nevertheless, theorists observed that emergency powers, or the state of exception, had been "an invisible topic in legal theory" before the September 11 attacks. *See, e.g.*, Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 872 (1991); GROSS & NÍ AOLÁIN, *supra*, at 2.

12. *See, e.g.*, GROSS & NÍ AOLÁIN, *supra* note 11, at 2-3; GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2024); ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY AND THE COURTS 10-13 (2007); ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 11 (2010); Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063, 1066 (2020); Martha Minow, *The Constitution as Black Box During National Emergencies: Comment on Bruce Ackerman's Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*, 75 FORDHAM L. REV. 593, 599-600 (2006); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1029-31 (2004); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1801 (2004).

13. *See, e.g.*, David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1415-17 (2014); *see also* John C. Coffee, Jr., *What Went Wrong? An Initial Inquiry into the Causes of the 2008 Financial Crisis*, 9 J. CORP. L. STUD. 1, 2-3 (2009).

14. *See, e.g.*, Edoardo Chiti & Pedro Gustavo Teixeira, *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis*, 50 COMMON MKTS. L. REV. 683 (2013).

15. *See, e.g.*, Katerina Linos & Elena Chachko, *Refugee Responsibility Sharing or Responsibility Dumping?*, 110 CALIF. L. REV. 897, 918-21 (2022); Bruce Ackerman, *No, Trump Cannot Declare an 'Emergency' to Build His Wall*, N.Y. TIMES (Jan. 5, 2019), <https://www.nytimes.com/2019/01/05/opinion/no-trump-cannot-declare-an-emergency-to-build-his-wall.html> [<https://perma.cc/9LYJ-RGY9>].

16. *See, e.g.*, Maerz et al., *supra* note 5, at 1; CHRISTIAN KREUDER-SONNEN, EMERGENCY POWERS OF INTERNATIONAL ORGANIZATIONS 152-54 (2019) (analyzing emergency responses to the H1N1 virus); J. Benton Heath, *Pandemics and Other Health Emergencies*, in OXFORD HANDBOOK ON THE INTERNATIONAL LAW OF GLOBAL SECURITY 587-88 (Robin Geiss & Nils Melzer eds., Oxford Univ. Press 2021); Julian Arato, Kathleen Claussen & J. Benton Heath, *The Perils of Pandemic Exceptionalism*, 114 AM. J. INT'L L. 627, 628 (2020).

17. *See, e.g.*, Elena Chachko & Katerina Linos, *Ukraine and the Emergency Powers of International Institutions*, 116 AM. J. INT'L L. 775, 776-77 (2022).

principles like separation of powers, democratic accountability and oversight, due process, and transparency.¹⁸

The sordid history of emergency powers in the emergence of Nazi Germany and Carl Schmitt's writings, widely criticized for exhorting tyranny, has haunted the study of emergency powers and inextricably linked them to authoritarian rule.¹⁹ Similar approaches in the United States, including Clinton Rossiter's proposal to enact a "Roman-style commissarial dictatorship during times of emergency" to prepare for nuclear war, have been just as controversial.²⁰

We argue that the critical view of emergency powers misses a big part of the picture. Emergency powers can be used in constructive ways that promote public goods. In some cases, invoking emergency powers is the only viable way to break deadlock and enact long overdue reforms.²¹

We focus on a subset of emergency measures we call transformative emergency measures. Transformative emergency measures are ones that fundamentally alter the status quo that preceded the emergency. While they address the emergency on some level, their impact is broader by design. They are intended to move public policy in a new direction. It is these transformative efforts that create the biggest opportunities for good, but they are also openings for abuse. Our inquiry, therefore, does not center on typical applications of emergency powers that aim to restore a community to its pre-emergency state. For example, a lockdown can help government authorities prevent the transmission of a deadly virus and, in so doing, promote the public good. But a lockdown is temporary and reversible. It is not a transformative measure.

One goal of our Article is descriptive. We show that in the United States, the president often uses emergency powers to enact policies

18. See *supra* note 12.

19. See Gross, *supra* note 11, at 1826-27, 1829; CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5-7 (George Schwab trans., 1985) (1922); see also MICHAEL HEAD, *EMERGENCY POWERS IN THEORY AND PRACTICE: THE LONG SHADOW OF CARL SCHMITT* 1-2, 7 (2016); David Dyzenhaus, *Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?*, 27 *CARDOZO L. REV.* 2005, 2006-07, 2009 (2006); Mark Tushnet, *Meditations on Carl Schmitt*, 40 *G.A. L. REV.* 877, 877-79 (2006).

20. See Christopher Kutz, *Torture, Necessity and Existential Politics*, 95 *CALIF. L. REV.* 235, 267 (2007) (citing CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* (1948)).

21. See, e.g., Chachko & Linos, *supra* note 17, at 776-78.

that go far beyond what is necessary to thwart an immediate threat or return to the status quo ante. This is true for numerous national security and trade measures,²² but also, crucially, for recent predominantly domestic policy actions,²³ including President Trump's border wall,²⁴ President Trump's energy supply emergency measures,²⁵ and President Biden's debt forgiveness program.²⁶

Similarly, we show that the EU is increasingly interpreting articles in its founding treaties as residual emergency authority and then using this authority to accomplish goals that are not strictly related to the emergency at hand. In response to COVID-19 and the war in Ukraine, the EU relied on emergency powers, notably Article 122 of the Treaty on the Functioning of the European Union (TFEU),²⁷ to centralize health, finance, and energy policies that were previously the prerogative of member states.²⁸ What is more remarkable, however, is that the EU also used emergency powers to effectively double the EU budget, speed up the fight against climate change, invest in digital transformations, expand the reach of EU central institutions, and start major transfer programs from northern to southern states.²⁹

22. See, e.g., Chachko, *supra* note 12, at 1066, 1068-69; Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097, 1103-04 (2020).

23. Daniel A. Farber, *Exceptional Circumstances: Immigration, Imports, the Coronavirus, and Climate Change as Emergencies*, 71 HASTINGS L.J. 1143, 1147-50 (2020).

24. See *infra* Part II.A.

25. Shortly before the COVID-19 crisis, the Trump administration asserted there was an energy emergency and invoked multiple energy statutes as well as the Defense Production Act to shore up coal plants. Exec. Order No. 13,902, 85 Fed. Reg. 26595 (May 1, 2020). Prominent environmental law scholars Sharon Jacobs and Ari Peskoe criticized this move, arguing that these statutes were designed to address true emergencies like storms or sabotage, rather than manufactured emergencies. See SHARON JACOBS & ARI PESKOE, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM, ENERGY EMERGENCIES VS. MANUFACTURED CRISES: THE LIMITS OF FEDERAL AUTHORITY TO DISRUPT POWER MARKETS (2019), <https://eelp.law.harvard.edu/2019/06/energy-policy-in-the-age-of-emergency-governance-new-white-paper-from-sharon-jacobs-and-ari-peskoe/> [<https://perma.cc/F6MF-KPHZ>]. They followed the traditional framework, in which long-term transitions, including energy transitions, are to be addressed through ordinary, rather than emergency, procedures. See *id.*

26. See *infra* Part II.B.

27. Consolidated Version of the Treaty on the Functioning of the European Union art. 122, 2012 O.J. (C 326) 47 [hereinafter TFEU]; see also Elena Chachko & Katerina Linos, *The Ukraine War at One: A Silver Lining*, 5 REVUE EUROPÉENNE DU DROIT (2023), <https://geopolitique.eu/en/articles/the-ukraine-war-at-one-a-silver-lining/> [<https://perma.cc/AQ8R-65-DM>].

28. See *infra* Parts III.A-C.

29. See *infra* Part III.

Our other goal is normative. The last two decades have seen ambitious and frequent applications of transformative emergency powers across major crises and jurisdictions, yet the available emergency power normative framework is a poor fit for assessing them. We therefore develop a new theoretical and legal framework for analyzing transformative emergency measures. We contrast our framework with traditional frameworks that view restoring the status quo ante as the only legitimate objective of emergency power.³⁰

A large literature in international, comparative, and domestic law emphasizes that emergency measures must be (1) invoked only following a severe crisis, (2) procedurally transparent and time limited, (3) necessary and proportional to the emergency, and (4) non-discriminatory.³¹ Emergency powers should not, under the traditional framework, be leveraged to achieve broader policy goals unrelated to the emergency.³²

We argue instead that there exist narrow circumstances in which societal transformations can be appropriately achieved through emergency powers. These circumstances are comparable to “constitutional moments,”³³ moments of “appeals to the common good, ratified by a mobilized mass of ... citizens expressing their assent through extraordinary institutional forms.”³⁴ Of consequence here is Bruce Ackerman’s admonition that the type of high constitutional politics exercised during constitutional moments “should be permitted to dominate the nation’s life only during rare periods of heightened political consciousness.”³⁵ Our framework limits legitimate use of transformative emergency powers to instances of severe exogenous crises affecting the polity that generate political mobilization toward reform.

Allowing for transformative uses of emergency powers requires a modification of the traditional framework. In our view, the

30. *See infra* Part I.C.

31. *See infra* Part I.B.

32. *See infra* Part I.B.

33. *See* Bruce A. Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453, 489 (1989).

34. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013, 1022 (1984).

35. *Id.*

transformative measures we discuss go beyond what is strictly necessary and proportional to address a given emergency.³⁶ Others have tried to shoehorn some of the measures we examine through the traditional framework to explain, for example, why hundreds of billions in clean energy investments are necessary and proportional responses to the COVID-19 crisis.³⁷ We take a different route, one that eschews the creation of a fiction of proportionality and allows for more transparent analysis of transformative measures for what they are.

We propose an alternative to necessity and proportionality: broad consensus that safeguards the vulnerable. Our requirement of broad consensus is intended to ensure that even when time is tight, fear is heightened, and legal authorities allow for unilateral action, a wide range of interests are consulted. When progressive and conservative leaders, minority and majority representatives, and other diverse voices stand together to support extraordinary measures, these are more likely to be superior in quality and to be perceived as such relative to unilateral action.³⁸

However, even emergency measures that enjoy broad support may target a specific vulnerable group.³⁹ To address this concern, we build on the existing normative framework's non-discrimination requirement, which prohibits overt discrimination based on suspect classifications like race, religion, and nationality.⁴⁰ Our framework also requires investigating whether emergency actions have disparate impact on other vulnerable groups—such as geographically isolated communities—that might not otherwise benefit from anti-discrimination protections. Call it non-discrimination(+).⁴¹

36. See *infra* Part I.B.

37. See, e.g., *Opinion of the Legal Service: Proposals on Next Generation EU*, ST9062/20 (June 24, 2020), <https://data.consilium.europa.eu/doc/document/ST-9062-2020-INIT/en/pdf> [<https://perma.cc/VC8J-2FUK>] (judging an unprecedented EU stimulus plan in response to COVID-19 lawful under the traditional proportionality framework) [hereinafter NGEU legal opinion].

38. See *infra* Part I.C.1.

39. See, e.g., Eric A. Posner & Adrian Vermeule, *Emergencies and Democratic Failure*, 92 VA. L. REV. 1091, 1101 (2006) (giving post-9/11 security policy as an example of emergency measures that targeted vulnerable groups, such as immigrants and Arab-Americans).

40. See *infra* note 83 and accompanying text.

41. See *infra* Part I.C.2.

In short, our normative claim is that emergency measures that (1) are invoked following a severe crisis, (2) are procedurally transparent and time limited, (3) involve broad political consensus, and (4) comply with a strengthened non-discrimination requirement should be upheld even if they are not proportional to the emergency and in fact transform a society instead of simply returning it to the status quo ante.

We then apply our framework to key recent uses of emergency powers in the United States—President Trump’s border wall and President Biden’s student loan forgiveness plan.⁴² We argue that the use of emergency powers was transformative in both cases and that both uses fail to pass muster under our proposed framework.⁴³ Our framework offers an alternative to the Supreme Court’s fraught reasoning in *Biden v. Nebraska*, which invalidated President Biden’s plan based on the controversial major questions doctrine.⁴⁴

However, there are measures that do in fact pass our exacting test. We assess a broad range of EU emergency measures in the areas of finance and energy against our framework’s standards and conclude that many transformative EU measures meet them.⁴⁵ The emergency bailout of the automotive industry in 2008 by President George W. Bush, with broad bipartisan support, similarly meets our framework’s criteria.⁴⁶

Importantly, our framework does not supplant the existing framework. It is an additional step for measures that fail the existing framework because they transform public policy for the long run in ways that are not directly related to the emergency. The existing framework will continue to apply a necessity and proportionality requirement to typical emergency measures like restrictions of speech, assembly, and personal liberty.

As we select which cases to analyze, we focus on difficult ones.⁴⁷ It is easier to justify the use of emergency power when the exercise

42. See *infra* Part II.

43. See *infra* Part II.

44. 143 S. Ct. 2355, 2375 (2023); see *infra* Part II.B.

45. See *infra* Table 3.

46. See *infra* notes 114-23 and accompanying text.

47. See Katerina Linos & Melissa Carlson, *Qualitative Methods for Law Review Writing*, 84 U. CHI. L. REV. 213, 225-26 (2017) (explaining why cases that are unlikely to fit a theoretical framework a priori are more convincing).

of this power is specifically outlined in a statute, constitution, or treaty. We instead focus on examples in which there is no clear delegation of authority, leaving policymakers to rely on broad and ambiguous delegations or residual emergency powers.

Our argument also has important scope conditions: it cannot apply to authoritarian regimes.⁴⁸ We instead focus on stable democracies with strong judiciaries because our framework requires a robust system of checks and balances and presupposes limits on executive power.⁴⁹ Our framework excludes measures that usher in authoritarian rule by eliminating the fundamental democratic elements of a system, such as the regular holding of free and fair elections.

We are not sanguine about the many examples of harms and executive overreach the exercise of emergency powers has produced across history—in authoritarian regimes, struggling democracies, and established democracies alike.⁵⁰ We worry, however, that this focus on actual and potential abuses causes us to overlook the transformative nature of some emergencies and their potential to trigger necessary reform. We analyze how emergency powers can, under limited conditions, be appropriately used not only to return a society to the status quo before the emergency but also to bring about societal transformations.⁵¹ The lessons from this analysis could inform future emergency policies in a world in which the frequency of large-scale crises is alarmingly on the rise,⁵² and the

48. See Katerina Linos, *How to Select and Develop International Law Case Studies: Lessons from Comparative Law and Comparative Politics*, 109 AM. J. INT'L L. 475, 485 (2015) (explaining how scope conditions strengthen theoretical claims by specifying the circumstances in which they hold true).

49. Cf. Emilie M. Hafner-Burton, Laurence R. Helfer & Christopher J. Fariss, *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 INT'L ORG. 673, 673 (2011) (empirically reviewing derogations from Human Rights Treaties worldwide from 1976 onward and identifying the contexts in which these emergency procedures to safeguard fundamental rights are appropriately used).

50. See Elizabeth Goitein, *Emergency Powers: A System Vulnerable to Executive Abuse*, BRENNAN CTR. FOR JUST. (Dec. 15, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/emergency-powers-system-vulnerable-executive-abuse> [<https://perma.cc/3CN3-BZAE>] (giving an example of emergency power abuse in the United States); see also Lührmann & Rooney, *supra* note 1, at 618, 626-27, app. at 3-4 (giving examples of sixty countries who have declared states of emergency and experienced democratic decline).

51. See *infra* Part III.B.

52. See, e.g., Council Regulation 2016/369 of 15 March 2016 on the Provision of Emergency Support within the Union, 2016 O.J. (L 70) 1 (EU) (“The impact of both man-made and

legal and policy infrastructure for addressing them is constantly lagging.⁵³

Part I elaborates our theory and defends it. We distill the core elements of the existing normative and legal framework for determining when an exercise of emergency powers is legitimate and lawful. We then contrast this existing framework with our proposed framework and outline its four elements. Part II applies our novel framework to President Trump’s construction of a border wall and President Biden’s student debt forgiveness plan. Part III applies our framework to a set of extraordinary recent EU emergency measures in the areas of finance and energy. A brief conclusion follows.

I. TWO APPROACHES TO EMERGENCY POWERS

A. *Defining Emergencies*

Before we can ascertain what it means to exercise emergency powers “for good,” we must first explain what we mean by “emergency powers.” A common view of emergency powers maintains that they are exercised to temporarily enhance executive power during unexpected crises that “are moving too fast for [the legislature] to respond.”⁵⁴ Constitutions often anticipate the need for such powers by creating a pressure valve of sorts, to be released when “an urgent threat to the state or regime” necessitates “the delegation of powers

natural disasters within the Union is increasingly severe. This is linked to a number of factors, such as climate change, but also to other contributing external factors and circumstances which are unfolding in the Union’s neighbourhood.”); *Cascading Global Crises Threaten Human Survival and the SDG Roadmap Is the Way Forward*, U.N. DEP’T OF ECON. & SOC. AFFS., <https://www.un.org/en/desa/cascading-global-crises-threaten-human-survival-and-sdg-roadmap-way-forward> [<https://perma.cc/M36J-SMW5>] (“The climate crisis, the COVID-19 pandemic and an increased number of conflicts around the world have placed the 17 Sustainable Development Goals (SDGs) in jeopardy.”); *Confronting Planetary Emergencies—Solving Human Problems*, OECD (Oct. 9, 2020), <https://www.oecd.org/naecl/confronting-planetary-emergencies/> [<https://perma.cc/F55W-MW5V>] (“The COVID-19 epidemic has shown how a health emergency can provoke severe economic consequences across the planet. The deep interconnectedness and interdependence of global systems means that any local crisis can rapidly scale up to contribute to planetary environmental, social, economic, and political emergencies.”).

53. See *Emergency Powers: Overview*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/bolster-checks-balances/executive-power/emergency-powers> [<https://perma.cc/F9X5-6NQW>].

54. *Id.*

to a president, or to some other constitutional authority, to issue decrees, to censor information, and to suspend legal processes and rights.”⁵⁵

The United States Constitution does not explicitly address emergencies at all, except in allowing for the suspension of the writ of habeas corpus “when in Cases of Rebellion or Invasion the public Safety may require it.”⁵⁶ Nevertheless, the constitutional structure of the United States allows for the exercise of emergency powers by granting a broad pool of executive power to the president and naming him commander in chief. For example, the president has long been deemed to possess the power to repel an invasion,⁵⁷ and recent executive branch interpretations have extended the president’s power to use force to combat a variety of far less immediate threats to U.S. interests.⁵⁸ The National Emergencies Act of 1976 adopts a declaratory approach to emergencies by entrusting the president with the authority to declare national emergencies based on little but his discretion.⁵⁹ A presidential declaration then activates a variety of statutes.⁶⁰ As we have seen, Congress has given the executive ample statutory emergency authority across many subject matter areas.⁶¹

Emergency powers, then, are exceptional authorities that derogate from standard legal process to address an extraordinary set of circumstances.

55. John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT’L J. CONST. L. 210, 210 (2004).

56. U.S. CONST. art. I, § 9, cl. 2; see, e.g., Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 602 (2009).

57. See, e.g., Michael D. Ramsey, *The President’s Power to Respond to Attacks*, 93 CORNELL L. REV. 169, 173 (2007).

58. See, e.g., Curtis A. Bradley, *President Obama’s War Powers Legacy*, 110 AM. J. INT’L L. 625, 625, 627 (2016).

59. 50 U.S.C. § 1621(a) (“During the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency. Such proclamation shall immediately be transmitted to the Congress and published in the Federal Register.”).

60. See, e.g., *id.* § 1621(b).

61. See *supra* note 7 and accompanying text.

B. Emergency Powers Constrained—The Existing Framework

Emergency powers carry an inherent risk of opportunistic application and abuse. A would-be authoritarian, or even a well-meaning Hamiltonian president, could easily declare emergencies citing real or perceived threats that should in fact be handled with regular tools.⁶² For these reasons, a well-developed framework exists in the domestic, international, and comparative literature for constraining the exercise of emergency powers.

Before proceeding to our framework, we elaborate on four core elements of the traditional normative framework for evaluating exercises of emergency powers: (1) severe crisis, (2) clear procedure, involving, at minimum, an emergency declaration and time limits, (3) necessity and proportionality, and (4) non-discrimination. This distillation mirrors the application of the emergency framework to recent crises, including terrorism and the COVID-19 pandemic, by leading human rights practitioners.⁶³

The traditional analysis of emergency powers begins by requiring a severe crisis.⁶⁴ Under international human rights law, a particularly high degree of threat, or severity, is necessary for states to lawfully derogate from human rights obligations.⁶⁵ Even then, some rights, such as freedom from torture, can never be suspended.⁶⁶ Article 4(1) of the International Covenant on Civil and Political Rights (ICCPR), which governs derogation of treaty rights in times of emergency, defines a public emergency as a situation that

62. See POSNER & VERMEULE, *THE EXECUTIVE UNBOUND*, *supra* note 12, at 208.

63. See, e.g., Fionnuala Ní Aoláin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism), *Rep. of the Special Rapporteur on the Human Rights Challenge of States of Emergency in the Context of Countering Terrorism*, ¶ 3, U.N. Doc. A/HRC/37/52 (Mar. 1, 2018), (emphasizing that “[i]t is generally recognized that some terrorist acts ... can ... activate the threshold of emergency under both national and international law, subject to the requirements of legality, proportionality and non-discrimination.”); see also Off. of the U.N. High Comm’r for Hum. Rts., *Emergency Measures and COVID-19: Guidance* (Apr. 27, 2020), at 1 (noting that exceptional measures taken to address the COVID-19 health emergency that restrict human rights “must meet the requirements of legality, necessity and proportionality, and be non-discriminatory”).

64. *Rep. of the Special Rapporteur on the Human Rights Challenge of States of Emergency in the Context of Countering Terrorism*, *supra* note 63, ¶ 7.

65. *Id.*

66. *Id.* ¶ 41.

“threatens the life of the nation and the existence of which is officially proclaimed.”⁶⁷ An invasion by a foreign power is the most classic example of an emergency that meets this threshold. For example, the Russian invasion of Ukraine placed the very existence of that country in peril, allowing the Ukrainian government to suspend many civil liberties.⁶⁸ Very few non-military crises, including grave natural disasters, epidemics, severe internal unrest, and severe economic crisis, could perhaps also pass this exacting test of threatening the life of the nation.⁶⁹

Both international and domestic law also allow for emergency powers to be invoked to address less severe crises that fall short of a “threat to the life of [a] nation.”⁷⁰ Nevertheless, they, too, impose a severity threshold. For example, one key emergency statute in the United States, the International Emergency Economic Powers Act (IEEPA), sets as a precondition for its activation the existence of “any unusual and extraordinary threat ... to the national security, foreign policy, or economy of the United States.”⁷¹

Apart from severity, the traditional approach emphasizes that emergency measures must be procedurally transparent, beginning with a formal declaration.⁷² A public declaration helps ensure government accountability and enables oversight. The public at large, as well as other domestic and international institutions, are

67. International Covenant on Civil & Political Rights art. 4(1), Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171; *see also* European Convention for the Protection of Human Rights & Fundamental Freedoms art. 15(1), Nov. 4, 1950, 213 U.N.T.S. 221 (parallel provision allowing the suspension of rights in “time of war or other public emergency threatening the life of the nation”); Organization of American States, American Convention on Human Rights art. 27(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (allowing rights to be suspended “in time of war, public danger, or other emergency that threatens the independence or security of a State Party”).

68. *See, e.g.*, Chachko & Linos, *supra* note 17, at 776-78.

69. *See generally* David Kretzmer, *State of Emergency*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2021); U.N. Hum. Rts. Comm., General Comment No. 29: Article 4: Derogations During a State of Emergency, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) [hereinafter UNHRC GC 29], <https://www.refworld.org/legal/general/hrc/2001/en/30676> [<https://perma.cc/7SGB-J9YC>].

70. UNHRC GC 29, *supra* note 69, ¶ 5.

71. 50 U.S.C. § 1701(a); *see also* Chachko, *supra* note 12, at 1093-99.

72. *See, e.g.*, Ní Aoláin, *supra* note 63, ¶ 21 (“An uncontroversial principle governing the use of emergency powers is that the existence of an emergency and the modification of legal regulation affecting the exercise of human rights be public and notified.”).

put on notice that the government has chosen to depart from normal procedures.

Emergency powers must also be time-limited. Sunset clauses are commonplace in ordinary times but especially important in the emergency context.⁷³ Sunset clauses constrain emergency power expansions and force reconsideration when more information is available and normalcy returns.⁷⁴ By putting an expiration date on emergency measures, sunset clauses force decision makers to revisit and debate whether those measures are still needed after a crisis stabilizes.⁷⁵ To summarize: the traditional approach requires time-limited measures in response to a severe, declared emergency.

A third key requirement of the traditional approach is necessity of the emergency response and proportionality of the emergency measures to the emergency. The principle of proportionality limits emergency measures to those “strictly required by the exigencies of the situation.”⁷⁶ It mandates not only that an emergency measure be genuinely related to the serious threat but also that it be the least harmful means to address this threat.⁷⁷ The interrelated requirements of necessity and proportionality can be found most

73. See, e.g., Sharon B. Jacobs, *Agency Genesis and the Energy Transition*, 121 COLUM. L. REV. 835, 879 (2021) (noting some particularly draconian laws requiring every agency to sunset after a certain number of years unless explicitly reauthorized); see also Sharon B. Jacobs, *Crises, Congress, and Cognitive Biases: A Critical Examination of Food and Drug Legislation in the United States*, 64 FOOD & DRUG L.J. 599 (2009) (discussing food and drug law emergencies).

74. See Antonios Kouroutakis & Sofia Ranchordás, *Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies*, 25 MINN. J. INT’L L. 29, 34-35 (2016).

75. See, e.g., *id.* at 35.

76. See *Derogation in Times of Public Emergency*, U.N. OFF. ON DRUGS & CRIME, <https://www.unodc.org/e4j/en/terrorism/module-7/key-issues/derogation-during-public-emergency.html> [<https://perma.cc/8CHE-ZMZW>].

77. See, e.g., Ní Aoláin, *supra* note 63, ¶ 48 (“The measures taken must be the least intrusive possible to achieve their objective.”).

clearly in prominent international sources.⁷⁸ There exist certain parallel requirements in some areas of U.S. domestic law.⁷⁹

In practice, however, governments are afforded very significant discretion to pick emergency measures and very rarely told that they were required to pick a less burdensome alternative.⁸⁰ The European Court of Human Rights (ECtHR), for instance, has used its margin of appreciation jurisprudence to allow for a very broad range of government restrictions in times of emergency, with only a handful of decisions striking down these measures.⁸¹

Non-discrimination is the final major element of the traditional approach to the exercise of emergency powers. Domestic and international law on emergencies limit the worst cases of discrimination but, at the same time, give broad leeway to governments to take extensive emergency measures with potential disparate impact on already disadvantaged groups.⁸² For example, the ICCPR provision on discrimination during emergencies precludes emergency government action that involves discrimination “solely on the ground of race, colour, sex, language, religion or social origin.”⁸³ The

78. See, e.g., UNHRC GC 29, *supra* note 69, ¶¶ 2-4 (noting that the principle of proportionality under article 4, paragraph 1 of the ICCPR requires that emergency measures be “limited to the extent strictly required by the exigencies of the situation,” and that this requirement “relates to the duration, geographical coverage and material scope” of emergency measures); see also Kretzmer, *supra* note 69, at 25-26 (noting that under the principle of proportionality, “it is not sufficient for [a state] to show that some form of preventive detention is strictly required by the exigencies of the situation; it must also show that use of this form of detention is required in each particular case in which it is employed”).

79. See, e.g., Michael B. Gerrard, *Emergency Exemptions from Environmental Laws*, in *LAW IN THE TIME OF COVID-19* 82 (Katharina Pistor ed., 2020) (explaining that emergency exemptions to New York’s State Environmental Quality Review Act (SEQRA) need to be “directly related to the emergency” and cause “the least change or disturbance, practicable under the circumstances,” among other requirements).

80. See, e.g., Kretzmer, *supra* note 69, at 27 (discussing three exceptional cases in which the ECtHR held that national measures were too intrusive to meet the necessity and proportionality standard).

81. See, e.g., Richard Smith, *The Margin of Appreciation and Human Rights Protection in the ‘War on Terror’: Have the Rules Changed before the European Court of Human Rights?*, 8 *ESSEX HUM. RTS. REV.* 124, 125, 147-50 (2011) (noting that the ECtHR has allowed “war on terror” arguments to broaden the margin of appreciation granted to states in many cases, while also holding the line in other contexts, especially with respect to non-refoulement).

82. See Tom Hadden, *Human Rights Abuses and the Protection of Democracy During States of Emergency*, in *DEMOCRACY, THE RULE OF LAW AND ISLAM* 111, 118 (Eugene Cotran & Adel Omar Sherif eds., 1999).

83. International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171.

word “solely” here has been widely criticized as giving governments a wide berth to implement policies that are not facially discriminatory but disproportionately harm minorities.⁸⁴

U.S. domestic non-discrimination law is fraught and diffuse. Although constitutional non-discrimination law retains some force,⁸⁵ statutory non-discrimination requirements such as those incorporated in the Civil Rights Act and the Voting Rights Act have lost much of their bite.⁸⁶ Nevertheless, Supreme Court decisions that upheld government emergency restrictions that implicated race, nationality, or religion have been widely criticized. Consider the famous instance of the U.S. Supreme Court’s decision in *Korematsu v. United States*,⁸⁷ or the more recent example of President Trump’s travel ban that precluded the entry into the United States of individuals from a number of predominantly Muslim countries.⁸⁸ In his opinion for the court in *Trump v. Hawaii*, Chief Justice Roberts remarked that “*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution.”⁸⁹ Yet this did not alter Chief Justice Roberts’s conclusion regarding the facially neutral third version of the travel ban, although it clearly disadvantaged Muslim communities.⁹⁰

84. See, e.g., Hadden, *supra* note 82, at 118.

85. See, e.g., *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141, 2175 (2023) (holding that use of race as a criterion in college admissions decisions violates the Fourteenth Amendment’s Equal Protection Clause).

86. See, e.g., Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1569-70, 1578-80 (2019) (discussing disparate impact law under the Voting Rights Act); Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 912 (2005) (considering judicial hostility to disparate treatment claims under Title VIII of the Civil Rights Act, and noting that “judges and juries ... believe discrimination is largely a thing of the past”). *But see, e.g., Bostock v. Clayton Cnty.*, 590 U.S. 644, 682-83 (2020) (holding that Title VII prohibits an employer from discriminating against an individual on the basis of sexual orientation).

87. 323 U.S. 214, 223-24 (1944); see also Shane Darcy, *The Rights of Minorities in States of Emergency*, 9 INT’L J. ON MINORITY & GRP. RTS. 345, 360-63 (2002) (discussing more recent applications of the non-discrimination principle to assess emergency measures, including the imprisonment of Catholics in Northern Ireland in the 1970s and the application of the PATRIOT Act to detain scores of Arab and Muslim Americans following September 11).

88. *Trump v. Hawaii*, 585 U.S. 667, 711 (2018).

89. *Id.* at 2423 (quoting *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)).

90. See *id.* at 2421.

Liberal commentators often see the existing non-discrimination standard for emergencies as appropriate or, if anything, overly deferential to governments.⁹¹ Conservative commentators instead have argued for looser application of non-discrimination rules during emergencies. For example, Adrian Vermeule and Eric Posner argue that strict or non-deferential scrutiny of measures that single out minorities, even if appropriate in ordinary times, is inappropriate in emergency times.⁹²

To summarize: the adoption of emergency measures in the traditional framework requires that a severe emergency exist, that this emergency is declared, and that measures to address the emergency be temporary, necessary and proportional to the emergency, and non-discriminatory. Broad-ranging empirical research suggests that stable democracies with strong judicial oversight tend to follow these principles, unless they are faced with extreme violence.⁹³ They follow this approach to buy time and reduce domestic censure when responding to crises.⁹⁴ By complying with these elements, they provide the public with reassurance that they are acting promptly, while also signaling that rights suspensions are lawful and temporary.⁹⁵

The traditional approach to emergency powers is fundamentally conservative, not transformative. Emergency powers on this view should only be used to protect the existing legal and political order against an extraordinary—under some definitions, even an existential—threat and revert things to the way they were prior to the emergency. “Rights are to be restored, legal processes resumed, and ordinary life taken up again.”⁹⁶ Under this traditional approach to emergencies, emergency powers should not be used to achieve

91. See, e.g., David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, in *CIVIL RIGHTS AND SECURITY* 115, 115-16 (David Dyzenhaus ed., 2016) (critiquing the detention policies implemented in the United States after September 11).

92. Posner & Vermeule, *Emergencies and Democratic Failure*, *supra* note 39, at 1091, 1104-05, 1128 (“We argue that even if the *Carolene Products* theory justifies strict scrutiny of targeted or facially discriminatory laws during normal times, it does not justify strict scrutiny of such laws passed in response to emergencies.”).

93. See Hafner-Burton et al., *supra* note 49, at 675-76.

94. See *id.* at 680.

95. See *id.*

96. Ferejohn & Pasquino, *supra* note 55, at 210-11.

broader policy goals only tangentially related to the emergency at hand.

C. Transformative Emergency Powers—Our Framework

We argue, by contrast, that emergency powers may also be used appropriately not just to preserve a legal and social system as it existed prior to the emergency. Rather, emergency powers could legitimately have a creative, constructive function under certain conditions. They may serve to prepare the system for the next emergency through reforms aimed at expanding institutional capacity and launching ambitious new policies, building on lessons from the emergency.

Our approach supplements rather than replaces the traditional framework. That is, we take no issue with, and do not discuss further, measures that meet the traditional requirements. For example, we do not discuss the many health-related measures that governments around the world implemented in response to the COVID-19 pandemic for the protection and preservation of their communities.⁹⁷ Instead, we argue that there may be some exercises of emergency power that are not, strictly speaking, necessary or proportional to a specific emergency but are nevertheless appropriate and legitimate. We propose an additional, very narrow path towards the justification of using emergency powers in furtherance of transformative aims.

Step one in our argument is that crises are opportunities for policy reform. Crises focus attention on both new and longstanding problems that worsen ever so slightly each year. They force leaders to reconsider whether maintaining the status quo is adequate, or whether the time for reform has arrived.⁹⁸ Crises can also help build

97. See *The Covid-19 Crisis: A Catalyst for Government Transformation?*, OECD (Nov. 10, 2020), <https://www.oecd.org/coronavirus/policy-responses/the-covid-19-crisis-a-catalyst-for-government-transformation-1d0c0788/> [<https://perma.cc/7725-9D97>].

98. See, e.g., Andrew MacIntyre, T.J. Pempel & John Ravenhill, *East Asia in the Wake of the Financial Crisis*, in *CRISIS AS CATALYST: ASIA'S DYNAMIC POLITICAL ECONOMY* (Andrew MacIntyre, T.J. Pempel & John Ravenhill eds., 2008) (collection of essays about how the financial crisis in East Asia in 1997-1998 triggered wide ranging policy reforms); OECD, *supra* note 97; Arjen Boin & Paul 't Hart, *From Crisis to Reform? Exploring Three Post-COVID Pathways*, 41 POL'Y & SOC'Y 13, 13-15 (2022); cf. Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT'L L. 359, 397 (2013) (arguing that

consensus in otherwise divided systems that continue with dysfunctional status quo policies for fear that any effort at renegotiation will disintegrate the polity.

Politicians on both sides of the Atlantic have expressed this intuition in various ways.⁹⁹ This insight resonates especially in an era in which increasingly frequent and grave natural and man-made disasters are met by governments unable to act promptly, stymied by polarization and gridlock.¹⁰⁰ It is for this reason that we find the underlying assumption of the traditional emergency powers framework too limiting. We disagree with the assumption underpinning the traditional model that the only appropriate aim for emergency powers is to restore a society to its status quo before the crisis.

Step two in our argument is that emergency powers are extraordinary and can easily be abused. They should not replace the regular democratic decision-making process as a default policy making mechanism. Indeed, one major critique of circumventing the standard constitutional and legal process through emergency powers is that the allure of enhanced power exercised with substantially fewer institutional and legal hurdles would ultimately supplant the regular democratic process and displace its baked-in system of checks on power, as wanting as that system may already be.¹⁰¹ We therefore share with the traditional framework an assumption that emergency measures should be reserved for actual emergencies. The applicability of our framework hinges on the existence of truly extraordinary circumstances that require urgent attention. Our framework does not apply to transformative policies

crises that require the executive to devise innovative legal interpretations drive legal policy development).

99. See JEAN MONNET, MEMOIRS 417 (Richard Mayne trans., 1978) (“I have always believed that Europe would be built through crises, and that it would be the sum of their solutions.”); Viveca Novak, *Bum Rap for Rahm*, FACTCHECK.ORG (Jan. 13, 2011), <https://www.factcheck.org/2011/01/bum-rap-for-rahm/> [<https://perma.cc/J2G9-KQPY>] (quoting former White House Chief of Staff and Chicago Mayor Rahm Emmanuel: “You never want a serious crisis to go to waste. And what I mean by that is an opportunity to do things that you think you could not do before.”). See generally Linos, *Organizational Rights in Times of Crisis*, *supra* note 5.

100. Cf. David Landau, *Can Constitutions Fix Party System Breakdowns? A Skeptical View*, in CONSTITUTIONALISM AND A RIGHT TO EFFECTIVE GOVERNMENT? 225, 227-29 (Vicki C. Jackson & Yasmin Dawood eds., 2022).

101. See Ackerman, *supra* note 12, at 1056-57.

enacted in normal times. Rather, we ask whether transformative policies enacted as a by-product of necessary emergency action are legitimate.

As in the traditional framework, under our framework an emergency measure must be implemented following a severe emergency and must follow transparent procedures, including a declaration and time limits. While these elements are the same in both the traditional and the proposed framework, their rationales are slightly different. In the traditional framework, emergency measures have sunset clauses so that they end when the emergency ends.¹⁰² In our framework, emergency measures have sunset clauses so that their effects can be evaluated. Just like pilot programs whose results must be evaluated before they are continued and expanded (or instead discontinued), so transformative emergency measures must be time-limited, to avoid entrenching them as the new status quo by default. In addition, we expect time limits would help reach broad consensus more easily. By limiting the duration of emergency powers upfront, hesitant stakeholders can more easily be brought on board. Similarly, non-discrimination is a key element of both the traditional and the proposed framework.¹⁰³

The biggest difference between our framework and the traditional framework is that we replace necessity and proportionality with a consensus requirement. We also propose a more robust non-discrimination condition—call it non-discrimination(+)—compared to the existing framework. In the paragraphs below we explain our rationale. But first, Table 1 below contrasts the traditional approach with our framework.

102. See Ní Aoláin, *supra* note 63, ¶ 21.

103. *Id.* ¶ 3.

Table 1. The Existing Emergency Framework vs. Emergency Powers for Good

Existing Framework: Emergency Powers Constrained	Proposed Framework: Emergency Powers for Good
Severe crisis	Severe crisis
Clear procedure (declaration and time limits)	Clear procedure (declaration and time limits)
Necessity and proportionality	Broad consensus
Non-discrimination	Non-discrimination(+)

1. Broad Consensus

By definition, transformative emergency measures are not necessary and proportional to the emergency. We can of course stretch these concepts beyond recognition to make the traditional theory fit, but we take a different approach. We expand the traditional framework by replacing the necessity and proportionality requirements with a different requirement: broad consensus.

Emergency powers in many countries allow for rapid action without broad political consensus.¹⁰⁴ In the United States, as we have seen, the president often exercises emergency powers unilaterally, without specific congressional direction or guidance and without necessarily accommodating the preferences of the opposing party. Our framework instead requires broad support for transformative emergency measures with representation of both minority and majority voices and different government institutions.

Seeking out broad consensus should improve the quality of emergency decisions. Diverse voices can help bring various alternatives to the table and flag unanticipated consequences. Support for emergency measures across different institutions and the political spectrum signals that the measure is unlikely to unduly concentrate power in the hands of an authoritarian executive. The deliberation

104. See generally *infra* Part III.

process itself contributes to decision-making transparency and external oversight.

This emphasis on broad consensus aligns with recent research on the evolution of international organizations. Daugirdas and Linos have shown that even institutions initially designed as flexible networks tend to expand their membership and formalize their structures over time.¹⁰⁵ They argue that this expansion and formalization often leads to more effective governance by facilitating interactions with diverse stakeholders and improving decision-making processes.¹⁰⁶ Our framework's focus on broad consensus in emergency powers reflects a similar recognition of the benefits of inclusive deliberation.

Furthermore, when diverse leaders stand behind a novel and unusual policy, the policy has a greater likelihood of being more easily accepted and implemented. Consensus-seeking also serves as a proxy for the motivations of the proponents of a certain emergency measure.¹⁰⁷ An aspiring authoritarian attempting to leverage an emergency to consolidate power is less likely to seek broad support and compromise to persuade and harness the support of rival political actors.¹⁰⁸

An additional benefit of this condition is that it is relatively easy to apply compared to amorphous proportionality and necessity calculations. It is comparatively easy to ascertain whether the consensus seeking criterion is met: either the opposition or key members thereof actively support the emergency measure at the time it is introduced, or they do not. This can be less subjective than having courts determine, often long after the emergency begins, whether the measures were necessary and proportional.

The intuition of broad consensus as an indicator of the legitimacy of emergency action is reflected in Bruce Ackerman's "super-majoritarian escalator."¹⁰⁹ Ackerman proposed that preventive

105. Kristina Daugirdas & Katerina Linos, *Back to Basics: The Benefits of Paradigmatic International Organizations*, 14 HARV. NAT'L SEC. J. 181, 237-38 (2023).

106. *Id.*; see also Kristina Daugirdas & Katerina Linos, *Are International Organizations Obsolete?*, 20 INT'L ORG. L. REV. 263 (2023) (explaining the importance of these formal processes to build consensus in response to forceful critiques of international bodies).

107. See *supra* note 3 and accompanying text.

108. See *supra* note 3 and accompanying text.

109. See Ackerman, *supra* note 12, at 1047-49.

detention should be permissible in emergencies, as long as ever-growing legislative majorities approve of this.¹¹⁰ He noted that at least one jurisdiction, South Africa, had a version of such a super-majoritarian provision in place.¹¹¹ Ackerman was criticized from the left for expanding the possible applications of emergency measures,¹¹² and from the right for internal inconsistencies and technical problems with his proposal.¹¹³ The core insight is nevertheless worth developing: broad support for emergency measures may, under some conditions and with additional safeguards, legitimize transformative emergency action.

To be sure, the presence of broad consensus across the political spectrum would often lead to the adoption of ordinary legislation to enshrine transformative policies in response to an emergency. If this happens, that policy would likely no longer be deemed an emergency measure under most definitions because it would follow the standard lawmaking process rather than displacing or circumventing it.

However, there may be circumstances in which the leaders of various parties and institutions agree on the necessity of a particular emergency response and nevertheless bypass the traditional legislative process. In our next section, we present dozens of examples from the European Union in the last three years. These examples were relatively straightforward to identify because in each case the EU explicitly stated that it was relying on extraordinary emergency authority available in the EU treaties rather than acting through the standard EU lawmaking process. But there are U.S. examples as well.

One such example is the automakers bailout during the 2008 financial crisis. On December 19, 2008, President Bush announced that seventeen billion in funds allocated under the Troubled Asset Relief Program (TARP) for the stabilization of the U.S. economy in the wake of the financial meltdown would be used to bail out two of

110. *Id.* at 1047 (“Continuation should require an escalating cascade of supermajorities: sixty percent for the next two months; seventy for the next; eighty thereafter.”).

111. *Id.* at 1055.

112. See Cole, *supra* note 91, at 117.

113. See Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, 75 *FORDHAM L. REV.* 631, 640 (2006).

America's largest automakers.¹¹⁴ Before this moment, both President Bush and Treasury Secretary Paulson had repeatedly stated that they did not believe they had the authority to use TARP funds to bail out car manufacturers absent further congressional authorization.¹¹⁵ This is because the Emergency Economic Stabilization Act of 2008, of which TARP was a key element, was designed to bail out "financial institutions," not car companies.¹¹⁶ The White House pushed for legislation.¹¹⁷ The House passed a bailout bill, but the Senate voted it down.¹¹⁸ While Democrats were keen to bail out the auto industry, many Republicans opposed this measure as a giveaway to the United Auto Workers.¹¹⁹

It would require great creativity in interpreting the Emergency Economic Stabilization Act of 2008 to argue that President Bush's emergency bailout of the car industry was authorized by statute.¹²⁰

114. David M. Herszenhorn & David E. Sanger, *Bush Approves \$17.4 Billion Auto Bailout*, N.Y. TIMES (Dec. 19, 2008), <https://www.nytimes.com/2008/12/19/business/worldbusiness/19iht-20autoB.18826530.html> [<https://perma.cc/S3QT-YY58>].

115. Alexander Nye, *The Rescue of the US Auto Industry, Module E: Emergency Assistance for Chrysler Financial*, 4 J. FIN. CRISES 222, 227-28 (2022).

116. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343 § 3(5) (2008); see also PHILIP A. WALLACH, TO THE EDGE: LEGALITY, LEGITIMACY, AND THE RESPONSES TO THE 2008 FINANCIAL CRISIS 115-16 (2015) (noting the statutory interpretation problems with the auto bailout, and explaining that while bailing out the financial arms of the car companies was likely permissible, "helping GM and Chrysler themselves was ... illegal"); Gary Lawson, *Burying the Constitution Under a TARP*, 33 HARV. J.L. & PUB. POL'Y 55, 71-72 n.78 (2010) (critiquing President Bush's extension of TARP funds to car companies as "a claim that if the President considers something important for the country, the President can do it whether or not Congress authorizes it by statute," and noting that "for eight years many people complained about an imperial presidency, but I have not heard one peep out of anyone in the legal academy decrying this simply outlandish assertion of presidential authority"); Todd Zywicki, *The Auto Bailout and the Rule of Law*, 7 NAT'L AFFS. 66, 72 (2011) (concluding that "the use of TARP funds to bail out GM and Chrysler most likely violated the law").

117. HENRY M. PAULSON, JR., ON THE BRINK: INSIDE THE RACE TO STOP THE COLLAPSE OF THE GLOBAL FINANCIAL SYSTEM 222-28 (2010).

118. *Id.*

119. See WALLACH, *supra* note 116, at 113; see also Associated Press, *G.O.P. Senators Oppose Auto Bailout*, N.Y. TIMES (Nov. 16, 2008), <https://www.nytimes.com/2008/11/17/business/17auto.html> [<https://perma.cc/LS5R-3TWP>]. Indeed, twenty-six Republican House members contested the legality of President Bush's move, noting that "Congress never voted for a federal bailout of the automobile industry, and the only way for TARP funds to be diverted to domestic automakers is with explicit congressional approval." See Zywicki, *supra* note 116, at 73 (noting related challenges in subsequent bankruptcy proceedings).

120. See Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343 § 3(5) (2008) (defining financial institutions and not car companies).

Yet, we argue that it is an example of consensus emergency action that would pass muster under our normative test despite the absence of statutory authorization. This is because while there were not enough votes for legislation to support the bailout and make specific authorizing legislation possible, there was significant consensus across institutions and political parties in support of the auto bailout.¹²¹ Republican President Bush, Democratic House Speaker Pelosi, Democratic Senate Majority Leader Reid, and Democratic President-elect Obama were all supportive of using the funds in this extraordinary way.¹²²

In other words, we argue that in some cases, as in the auto bailout example, duly enacted legislation may not be the only acceptable expression of broad political support for emergency-related measures. Bipartisan legislation—or any legislation at all—may be unattainable for a variety of reasons. The reasons may be a need for urgency, which does not leave time for the standard legislative process to be exhausted, a preference by legislators to shirk responsibility by letting the executive act on its own and absorb any subsequent backlash, or a desire to avoid entrenching extraordinary and potentially coercive emergency policies in primary legislation with the status and symbolism that such action entails.¹²³

We argue instead that clear evidence of agreement across political fault lines and institutions creates a presumption that transformative emergency action is normatively appropriate. We note that this element of our framework is procedural and trans-substantive. It does not depend on our belief that taxpayer money should or should not have been used to save jobs in Detroit. It also does not depend on the success or failure of the auto bailout program years later. Instead, it hinges on the fact that a Republican president, the Democratic leaders of both Houses of Congress, and a Democratic president-elect all believed at the time, in December 2008, amidst great uncertainty, that this was the best course of action.¹²⁴ Such

121. See WALLACH, *supra* note 116, at 114.

122. *Id.*

123. Scholars have posited that a similar incentive system leads to congressional inaction in matters related to national security and foreign affairs. See, e.g., Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 VA. L. REV. 395, 406-07 (2020).

124. See WALLACH, *supra* note 116, at 114.

moments will be rare and highly unusual. We do not mean for the narrow path that our framework opens to replace ordinary legislation. But we do slightly expand, under certain conditions, the scope of permissible emergency action.

Our consensus requirement echoes another highly influential framework for assessing executive action based on how that action is situated in relation to one specific political institution: Congress. This is, of course, Justice Jackson's famous *Youngstown* concurrence.¹²⁵ Justice Jackson maintained that the president gets the highest degree of deference if he acts pursuant to a congressional delegation.¹²⁶ If Congress is silent and the president has independent constitutional Article II power to act on the matter, the president may still win.¹²⁷ But if Congress explicitly objected to the action, the president only wins if he has *exclusive* Article II constitutional power over a particular matter.¹²⁸ The Supreme Court has recognized exclusive Article II presidential powers in a very small category of cases to date.¹²⁹

The *Youngstown* framework has parallels with the broad consensus element of our framework. In *Youngstown*, the degree of agreement across institutions—Congress and the executive—matters for determining the constitutionality of presidential action.¹³⁰ Under our framework, the degree of consensus around emergency measures matters for assessing their legitimacy. The precise level of consensus necessary in each case may vary, much like the degree of congressional support or acquiescence under *Youngstown*. But under both frameworks, stronger agreement among political institutions about the propriety of a certain measure means stronger justification for upholding that.

125. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1951) (Jackson, J., concurring).

126. *Id.* at 635.

127. *Id.* at 637.

128. *Id.* at 637-38.

129. *See, e.g., Zivotofsky v. Kerry*, 576 U.S. 1, 17 (2015).

130. *See supra* notes 126-28 and accompanying text.

2. *Non-Discrimination and the Vulnerable*

Broad consensus is not the only novel test an emergency measure must pass under our framework. The final way in which our framework differs from the traditional approach concerns non-discrimination. We add to the traditional non-discrimination test a proviso that any transformative emergency measures adopted under our framework not harm the least advantaged. Under both the traditional test and our test, disparate treatment of protected groups is prohibited.¹³¹ But as we move from ordinary emergency measures, whose goal is to restore a society to the status quo ante, to transformative emergency measures,¹³² we must amend the non-discrimination framework in the standard emergency regime. The standard emergency framework envisions and protects against particular types of harms emergency measures may cause. Its main concern is measures that deprive individuals and groups of core civil liberties, as well as discrimination based on traditional suspect classifications such as race, ethnicity, or religion. It envisions detentions, suspension of protests, excessive use of force against individuals, and suppression of free expression, to name a few potential effects of emergency measures. These are harms we must safeguard against under any normative framework for assessing emergency measures.

Yet these types of harms are not necessarily the only ones implicated in transformative emergency measures. When a government uses an emergency to switch energy sources, shut down an industry, implement a radical technological transformation, or dramatically reallocate assets and liabilities, we are not primarily worried that members of an ethnic minority will be detained, subjected to direct deprivation of property, or harmed in a similar way. The traditional normative framework for evaluating emergency measures continues to apply to limit recourse to such emergency measures and weed out instances of discrimination narrowly understood—that is, discrimination based on suspect classifications without proper justification.¹³³

131. See *supra* Table 1 (noting our change to non-discrimination(+)).

132. See, e.g., *supra* notes 21-29 and accompanying text.

133. See *supra* notes 39-41 and accompanying text.

Instead, the main worry with transformative emergency measures is that a coalition that meets our consensus test will externalize the costs of an otherwise beneficial public policy by placing the costs of the new measure on a concentrated few. Such externalities may include, for example, the devastation of local industries to facilitate modernization, like the EU has sought to do by using emergency measures to shift its economy toward greater sustainability and green energy.¹³⁴ Or they may involve uneven distribution of responsibility for hosting migrants during a migration crisis.¹³⁵ Examples abound.

To illustrate this point, consider two paradigmatic situations in which discrete groups may be disproportionately harmed by transformative emergency measures: (1) during emergency measures which disfavor an entire industry, and (2) when emergency measures force a specific geographic community to carry the brunt of the costs for the implementation of transformative emergency measures. Should we safeguard against such harms in articulating a normative theory of transformative emergency powers?

John Hart Ely's theory and related political process theories originally developed to justify judicial review are illuminating here.¹³⁶ Ely famously maintained that searching judicial review of legislation is appropriate, among other conditions, when an action is directed "against discrete and insular minorities" that evoke prejudice, making the standard political process an unreliable mechanism for protecting them.¹³⁷ Such concerns are not as salient when it comes to disfavored industries. It is easy to see why the standard political process, even in emergencies, leaves ample room

134. See European Commission, *Enabling Framework for Renewables*, EUR. COMM'N, https://energy.ec.europa.eu/topics/renewable-energy/enabling-framework-renewables_en [<https://perma.cc/2BJX-WRYP>].

135. See, e.g., Dominik Hangartner, Elias Dinas, Moritz Marbach, Konstantinos Matakos & Dimitrios Xefferis, *Does Exposure to the Refugee Crisis Make Natives More Hostile?*, 113 AM. POL. SCI. REV. 442, 445-46 (2019); Melissa Carlson, Laura Jakli & Katerina Linos, *Refugees Misdirected: How Information, Misinformation, and Rumors Shape Refugees' Access to Fundamental Rights*, 57 VA. J. INT'L L. 539, 545 (2018); Melissa Carlson, Laura Jakli & Katerina Linos, *Rumors and Refugees: How Government-Created Information Vacuums Undermine Effective Crisis Management*, 62 INT'L STUD. Q. 671, 671 (2018).

136. See, e.g., Aileen Kavanagh, *Comparative Political Process Theory*, 18 INT'L J. CONST. L. 1483, 1484, 1488 (2020).

137. JOHN H. ELY, *DEMOCRACY AND DISTRUST* 76-77, 153 (1980).

for industries to lobby majorities to keep subsidizing them long past the moment when their usefulness to society has expired. Our broad consensus requirement will make it even less likely that an industry will be unfairly disfavored. A host of legal rights, modes of redress, resources and access provide industries with ample tools to defend their interests in the face of unwanted transformation enacted through emergency action. We therefore do not need to add much to protect them.

When it comes to a geographically insulated community or ethnic minority that is excluded from the traditional political process, and perhaps unduly feared or vilified during the emergency, the Ely and traditional non-discrimination frameworks apply more straightforwardly. It is this group that our non-discrimination(+) safeguard will seek to protect.

Let us think, for example, about the Roma community in Europe—Europe’s largest (and also most vilified) minority.¹³⁸ It is very easy to see how in a time of emergency, a large supermajority might agree to take measures that would unduly burden their civil liberties. A targeted anti-Roma measure would not survive the traditional test. However, a policy in which toxic waste associated with a new nuclear plant is placed in areas near Roma encampments might not appear facially discriminatory and thus might survive the traditional test.

Moreover, unlike the Roma, other communities that live near borders, near energy facilities, near waste facilities, or are otherwise harmed by a transformative emergency measure may not be already protected by a version of discrimination law that focuses on suspect classifications. They may not be religiously, ethnically, racially, or otherwise distinct, and thus may not have an obvious claim for protection under traditional non-discrimination frameworks. We are departing from the traditional definition only in suggesting that non-discrimination in times of transformative emergency may require paying attention to disparate impact, rather than just disparate treatment.

138. See Katerina Linos, Laura Jakli & Melissa Carlson, *Fundraising for Stigmatized Groups: A Text Message Donation Experiment*, 115 AM. POL. SCI. REV. 14, 15 (2021); see also ANA BRACIC, *BREAKING THE EXCLUSION CYCLE: HOW TO PROMOTE COOPERATION BETWEEN MAJORITY AND MINORITY ETHNIC GROUPS* 3, 12 (2020).

In short, non-discrimination remains a key criterion for our framework, even though its application will be different. In our version, unlike the standard international law emergency framework, the non-discrimination(+) requirement will seek to ensure that the most vulnerable groups are not uniquely harmed.

To conclude, we are presenting a new, additional pathway through which emergency measures can be justified. In some cases, transformative measures are badly needed and easier to agree upon in emergencies than in ordinary times. However, we have introduced important safeguards to prevent the abuse of this mechanism: cross-ideological and cross-institutional consensus, as well as increased protection of disfavored minorities.

* * *

Thus far, we have identified the need for a new normative framework for emergency powers that allows for (some) measures that transform society instead of focusing on preservation and restoring things to the status quo ante. But what does this look like in practice? How does our framework apply to major recent exercises of arguably transformative emergency measures? In the following parts, we analyze examples from the United States and the European Union and evaluate them under our framework. Spoiler alert: in Part II, we find that the U.S. measures—President Biden’s student debt forgiveness program and former President Trump’s use of emergency powers to build a border wall—fail our framework. By contrast, our analysis in Part III of a series of recent transformative EU measures concludes that they offer a template for how transformative emergency measures should be adopted.

II. TRANSFORMATIVE EMERGENCY POWERS IN THE UNITED STATES

The United States currently has forty-three emergencies in place that trigger presidential emergency powers under 148 distinct statutory provisions.¹³⁹ Most of these emergencies have been declared in response to challenges predominantly related to foreign

139. See *A Guide to Emergency Powers and Their Use*, *supra* note 6.

policy and national security.¹⁴⁰ While we recognize that the distinction between foreign and domestic policy is far from sharp,¹⁴¹ foreign and security policy is not the focus of our framework, which is primarily designed to address emergency measures that transform domestic policy. We therefore focus here on two recent examples of transformative presidential use of emergency powers to address predominantly domestic concerns. We use examples from both Democratic and Republican administrations.

A. *The Border Wall*

In 2019, after one of the longest partial government shutdowns in U.S. history, Congress passed the 2019 Consolidated Appropriations Act.¹⁴² The Act denied President Trump's request for 5.7 billion dollars to fund the construction of a wall along the southern border.¹⁴³ Congress allocated only about a quarter of that amount to fund limited pedestrian fencing along the Rio Grande.¹⁴⁴

Unsatisfied by this outcome,¹⁴⁵ President Trump declared a national emergency that required the use of the armed forces at the southern border under the National Emergencies Act.¹⁴⁶ He then invoked emergency authority under 10 U.S.C. § 2808 to authorize eleven border wall construction projects on the southern border and to divert military assets for this purpose.¹⁴⁷ Section 2808 allows the Secretary of Defense, during war or a declared emergency that requires the use of armed forces, to “authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such

140. See *Declared National Emergencies Under the National Emergency Act*, *supra* note 7.

141. See, e.g., Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 MICH. L. REV. 55, 58, 64 (2023).

142. See Consolidated Appropriations Act, Pub. L. 116-6, 133 Stat. 13 (2019).

143. Susan Cornwell & Richard Cowan, *House Passes Bill Rejecting Trump's Border Wall Emergency*, REUTERS (Feb. 26, 2019, 7:02 PM), <https://www.reuters.com/article/idUSKCN1QF0FX/> [<https://perma.cc/4EZQ-ZR3X>].

144. Consolidated Appropriations Act § 230(a).

145. *Remarks by President Trump on the National Security and Humanitarian Crisis on Our Southern Border*, WHITE HOUSE (Feb. 15, 2019), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-national-security-humanitarian-crisis-southern-border/> [<https://perma.cc/L55E-76ZT>].

146. See Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019).

147. See *id.*

use of the armed forces.”¹⁴⁸ The Trump administration diverted 3.6 billion dollars from ongoing military construction projects to fund the border wall.¹⁴⁹

Congress did not acquiesce in this executive exercise of emergency powers. It twice attempted to end the national emergency, but President Trump invoked his veto, and Congress failed to garner the votes necessary to override it.¹⁵⁰ The policy was met with sharp criticism from other stakeholders, including California, Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, Virginia, and Wisconsin.¹⁵¹ Extensive litigation ensued. The Ninth Circuit Court of Appeals affirmed the district court’s ruling against the administration. The Supreme Court ultimately vacated the judgment after President Biden came into office and discontinued this program.¹⁵²

How does wall funding fare under our framework? Few exercises of emergency power can produce a result as indisputably permanent and transformative as a physical barrier on a national border. The wall is the physical expression of a policy hostile to migration that seeks to keep migrants out.

The use of emergency authority to construct the border wall met our framework’s procedural requirements. President Trump declared an emergency at the southern border and announced the concrete emergency steps he had planned to take. Under the National Emergencies Act, presidential emergency declarations sunset automatically after one year unless the president renews them, and Congress may terminate emergencies at an earlier point as well.¹⁵³ The time-limitation element of our framework is therefore satisfied. It is worth pointing out, however, that at least according to the Ninth Circuit Court of Appeals, the president’s use of emergency authority in this case failed to meet the substantive

148. 10 U.S.C. § 2808(a).

149. *See* *Sierra Club v. Trump*, 977 F.3d 853, 862 (9th Cir. 2020), *cert. granted, vacated sub nom.* *Biden v. Sierra Club*, 142 S. Ct. 56 (2021) (mem).

150. H.R.J. Res. 46, 116th Cong. (2019); 165 CONG. REC. H2799, H2814-15 (2019); S.J. Res. 54, 116th Cong. (2019); 165 CONG. REC. S5855, S5874-75 (2019).

151. *See* *Sierra Club*, 977 F.3d at 853.

152. *See id.*

153. 50 U.S.C.A. §§ 1622(b), (d) (West).

requirements for the exercise of emergency power under the National Emergencies Act.¹⁵⁴

But President Trump's use of emergency powers to fund the border wall fails other tests in our framework. To start, there are reasons to question President Trump's claim that chronic, years-long migration challenges along the southern border constitute an emergency. It is far from clear that the president's actions here satisfied the severity requirement of both the traditional emergency framework and our own. This was not a response to a sudden exogenous shock.

Crucially, the border wall measures resoundingly fail our consensus test. In fact, their enactment represented the opposite of consensus-seeking. Congress denied the president's initial request to fund the border wall.¹⁵⁵ After President Trump declared the emergency, Congress—not known for asserting itself in other contexts in which the president has relied on emergency powers extensively¹⁵⁶—twice voted to terminate the program, only to be vetoed by the president.¹⁵⁷ Use of emergency authority in this case also drew active opposition from at least nine states that took legal action.¹⁵⁸ This instance of emergency power use was therefore confrontational through and through. Under our framework, then, it cannot be seen as a legitimate exercise of transformative emergency powers.

President Trump's invocation of emergency powers to fund the border wall also raises questions under the fourth prong of our framework, namely, non-discrimination(+). Importantly, in this analysis, we only account for the most vulnerable within U.S. borders and not migrants and asylum seekers trying to make their way in by illegally crossing the border with Mexico.

States, local communities, and private landowners all argued that the Trump administration's use of emergency powers in this case

154. See *Sierra Club*, 977 F.3d at 879, 881, 891.

155. *Id.* at 862.

156. See, e.g., Bradley, *supra* note 58, at 627; Chachko, *supra* note 12, at 1068; Ingber, *supra* note 98, at 397.

157. See *supra* note 150 and accompanying text.

158. See *Sierra Club*, 977 F.3d at 853. We can think of scenarios in which an action would not be deemed to have failed the consensus requirement because of opposition from nine states out of fifty when there is sufficient agreement from other political actors.

uniquely burdened border communities where its program would fund construction projects.¹⁵⁹ Yet the claims of some states and NGOs suing the administration did not sound in the kinds of discrimination concerns that our framework safeguards against. For example, some state petitioners, like New York and Virginia, argued that they had lost tax revenue and sustained economic injuries as a result of the administration diverting funds from military construction programs within their territory to build the border wall.¹⁶⁰ And both state and NGO plaintiffs asserted a variety of harms due to the environmental damage that wall construction by the federal government would likely cause, especially because such construction is not subject to local environmental and safety requirements.¹⁶¹

Even if Trump's use of emergency powers had survived the fourth prong of our framework, it ultimately fails for lack of consensus. Our standard is meant to be exacting. Therefore, failure to meet one element disqualifies the transformative use of emergency powers in this case.

B. Student Loans

In 2022, the Biden Administration used emergency authority to forgive 430 billion dollars in student loans, citing the hardship to borrowers as a result of the COVID-19 pandemic.¹⁶² The move had widespread implications, as it affected approximately forty-three million borrowers.¹⁶³ It is doubtful that permanent loan forgiveness was needed to address the immediate harms of the COVID-19 emergency. Loan forgiveness is therefore better understood as an effort by the Biden Administration to leverage the emergency to address the separate problem of mounting student debt in the United States. We thus classify the Biden loan forgiveness program

159. See *Examining the Effect of the Border Wall on Private and Tribal Landowners: Hearing Before the Subcomm. on Border Security, Facilitation and Operations: Hearing Before the Subcomm. on Border Sec., Facilitation & Operations of the Comm. on Homeland Sec.*, 116th Cong. 36 (2020) (statement of Jim Chilton, private citizen).

160. *Sierra Club*, 977 F.3d at 871-72.

161. See *id.* at 866-67, 873.

162. See *Biden v. Nebraska*, 143 S. Ct. 2355, 2364-65 (2023).

163. See *id.* at 2362.

as a transformative exercise of emergency power that should be evaluated under our framework.

Title IV of the Higher Education Act of 1965 governs federal financial aid programs like student loans.¹⁶⁴ It authorizes the Secretary of Education to cancel or reduce loans under certain conditions.¹⁶⁵ The Higher Education Relief Opportunities for Students Act of 2003, known as the HEROES Act, further allows the Secretary to forgive loans.¹⁶⁶ In particular, the HEROES Act allows the Secretary to waive or modify student loans as he deems necessary “in connection with a war or other military operation or national emergency.”¹⁶⁷ The Act was passed in the immediate aftermath of 9/11 out of concern for those affected by the attack and its implications, especially service members.¹⁶⁸

When COVID-19 struck, the President declared a national emergency, and the Trump Administration initially invoked this authority to suspend loan repayment and interest accrual for all federally held student loans.¹⁶⁹ The Biden Administration then went much further. It cancelled up to ten thousand dollars of debt per borrower under a certain level of income.¹⁷⁰ Other borrowers qualified for up to twenty thousand dollars in loan cancellation.¹⁷¹

Like in the case of the wall, six states challenged the Biden measure in court. The Supreme Court ultimately held in *Biden v. Nebraska* that the Biden Administration lacked authority to cancel student loans altogether, as the statute only allowed for modification of loans.¹⁷² The Court invoked the major questions doctrine, which requires explicit statutory authorization for an action with

164. See 20 U.S.C. §§ 1070(a), 1071(a).

165. See, e.g., 20 U.S.C. § 1087.

166. 20 U.S.C. § 1098bb(a)(1).

167. *Id.*

168. *Biden*, 143 S. Ct. at 2363.

169. Katie Lobosco, *Trump Allows Borrowers to Suspend Student Loan Payments for Two Months*, CNN (Mar. 20, 2020, 1:43 PM), <https://www.cnn.com/2020/03/20/politics/student-loan-payments-suspend-coronavirus/index.html> [<https://perma.cc/AAG8-ZSQ8>].

170. Waiver Granted Under the Heroes Act in Response to the COVID-19 Pandemic, 87 Fed. Reg. 61512, 61514 (Oct. 12, 2022) (to be codified at 34 C.F.R. pts. 674, 682, 685).

171. *Id.*

172. *Biden*, 143 S. Ct. at 2375.

significant economic or societal import, to strike down this application of emergency powers.¹⁷³

Biden v. Nebraska has already become the subject of extensive criticism. Scholars viewed it as yet another misguided application of the ill-defined major questions doctrine.¹⁷⁴ The decision is at odds with the Court's practice of giving heavy deference to executive action grounded in emergency authority (frequently in the national security context).¹⁷⁵ As a doctrinal matter, there is truth to the argument that the Court again strayed from its precedents and took another step toward transforming the major questions doctrine into an all-purpose judicial deregulatory instrument applied to scrap programs the Supreme Court majority dislikes.¹⁷⁶

Our framework provides a different basis for justifying the outcome of *Biden v. Nebraska*—striking down the emergency student loan forgiveness measure. Under our framework, such transformative use of emergency powers requires a substantial effort at securing multistakeholder consensus. The student loan emergency measure was, to a large degree, a unilateral move that advanced a progressive agenda over vocal opposition from congressional Republicans.¹⁷⁷ What is more, the legal stance of the executive branch under the Trump Administration was that the president lacked authority to forgive student loans under the HEROES Act.¹⁷⁸ When the Biden Administration came into office, that legal opinion

173. See *id.* at 2373.

174. See, e.g., Christine Kexel Chabot, *Appropriating Major Questions*, YALE J. ON REGUL. NOTICE & COMMENT (July 5, 2023), <https://www.yalejreg.com/nc/appropriating-major-questions-by-christine-kexel-chabot/> [<https://perma.cc/D7AQ-U56V>]; Jed H. Shugerman & Jodi L. Short, *Major Questions About Presidentialism: Untangling the "Chain of Dependence" Across Administrative Law*, B.U. SCH. L. (Working Paper No. 3607, 2023), https://scholarship.law.bu.edu/faculty_scholarship/3607 [<https://perma.cc/WZ9V-HXCC>]. For general critiques of the major questions doctrine, see generally Elena Chachko, *Toward Regulatory Isolationism? The International Elements of Agency Power*, 57 U.C. DAVIS L. REV. 57 (2023); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1011 (2023); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 262-63 (2022).

175. See Chachko, *supra* note 174, at 67.

176. See *id.* at 106.

177. See, e.g., Collin Binkley, *House GOP Passes Resolution Overturning Student Loan Cancellation; Biden Vows Veto*, ASSOCIATED PRESS (May 24, 2023, 5:52 PM), <https://apnews.com/article/student-loans-debt-cancellation-forgiveness-biden-congress-ebc6a1cbc98a3fb587c8a8acff35a92a> [<https://perma.cc/XWA9-D4XW>].

178. See *Biden*, 142 S. Ct. at 2364.

was rescinded and reversed, greenlighting the secretary of education's exercise of emergency power to cancel student debt.¹⁷⁹ This is further evidence of the measure's fraught and unilateral nature.

The loan forgiveness emergency measure likely passes our test's fourth prong. One could argue that cancelling loans harms the poorest, because they are unlikely to have any access to college and therefore no loans to cancel.¹⁸⁰ However, this general theoretical argument does not apply straightforwardly to the Biden loan forgiveness program. This is because the Biden plan contains particularly progressive elements, such as the cancellation of up to twenty thousand dollars for Pell Grant recipients.¹⁸¹ Indeed, econometric studies comparing the Biden plan to alternatives find that while better targeting of loan forgiveness would have been ideal, this plan too would have contributed to the reduction of inequality.¹⁸²

Table 2 below summarizes our claims to clarify why neither President Trump's wall nor President Biden's emergency student loan program pass muster as appropriate uses of transformative emergency power under our framework.

179. *Compare* Memorandum from R. Rubinstein to B. DeVos, p. 8 (Jan. 12, 2021), *with* Notice of Debt Cancellation Legal Memorandum, 87 Fed. Reg. 52943, 52945 (Aug. 30, 2022).

180. *See* BEN W. ANSELL, *FROM THE BALLOT TO THE BLACKBOARD: THE REDISTRIBUTIVE POLITICAL ECONOMY OF EDUCATION* 43 (2010) (explaining why public financing for primary and secondary education tends to be progressive, but this may not hold true for tertiary education).

181. *See* Waiver Granted Under the Heroes Act in Response to the COVID-19 Pandemic, 87 Fed. Reg. 61512, 61514 (Oct. 12, 2022) (to be codified at 34 C.F.R. pts. 674, 682, 685).

182. *See* Prasad Krishnamurthy, *Forgiving Student Loans: Progressivity, Inequality, and Welfare* 4-5 (Mar. 27, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4436493 [<https://perma.cc/P27D-7WWY>].

Table 2. Assessment of U.S. Emergency Measures

Proposed Framework: Emergency Powers for Good	The Wall	Student Loans
Severe crisis	X	✓
Clear procedure and time limits	✓	✓
Consensus	X	X
Non-discrimination(+)	✓	✓

III. THE EU AND TRANSFORMATIVE EMERGENCY POWERS

This Part applies our framework to recent EU emergency practice. It analyzes the ways in which the EU has used emergency powers to accomplish transformative goals in response to the COVID-19 pandemic and the Russian invasion of Ukraine. We focus on two main policy areas: economic stabilization and recovery, and energy policy. We selected these policy areas because they capture the vast majority of cases in which the EU has expressly invoked emergency powers under its founding treaties to transform public policy. EU emergency authorities have also been used to address bottlenecks in health equipment,¹⁸³ terrorism,¹⁸⁴ and forest fires,¹⁸⁵ but we do not focus on these instances because they more clearly meet traditional necessity and proportionality requirements.

Our contribution here is twofold. First, we examine a broad range of very recent emergency authorizations. This contrasts with a legal literature that often focuses on older crises or violence and is at best field-specific, analyzing finance separately from energy and other

183. See *The EU's Response to the COVID-19 Pandemic*, EUROPEAN COUNCIL, <https://www.consilium.europa.eu/en/policies/coronavirus-pandemic/> [<https://perma.cc/5MFE-4W8C>].

184. See *The EU's Response to Terrorism*, EUROPEAN COUNCIL, <https://www.consilium.europa.eu/en/policies/fight-against-terrorism> [<https://perma.cc/36Y6-JH36>].

185. EUROPEAN COMMISSION, *The EU's 2021-2027 Long-Term Budget and Next Generation EU: Facts and Figures* 9, 35 (2021), <https://op.europa.eu/en/publication-detail/-/publication/d3e77637-a963-11eb-9585-01aa75ed71a1/language-en> [<https://perma.cc/93MC-HR2V>].

policy areas.¹⁸⁶ Second, we analyze EU emergency authorizations under our new normative framework. Existing legal justifications of each EU measure focus on how it was necessary and proportional to the emergency.¹⁸⁷ We instead argue that when COVID-19 is used to effectively double the EU budget, invest hundreds of billions to fight climate change, and transfer hundreds of billions from northern to southern EU states, it is only fair to speak of a transformation.¹⁸⁸ We nevertheless argue that, by and large, the use of transformative emergency powers in this way was justified under our framework.

The EU examples offer a model for the exercise of emergency powers that—we argue—could square even transformative emergency responses with democratic governance and rule of law ideals. Quite obviously, however, the EU is a unique creature in the global landscape. It is not a state but a transnational organization. Its institutions do not align neatly with traditional separation of powers ideas familiar from the domestic context. And it operates in a distinctive geopolitical context. Acknowledging this, we nonetheless argue that EU emergency governance shares much in common with how federal governments operate during emergencies. And in any case, our framework is broad enough to allow for the assessment of the emergency actions of different national governments, and even transnational governance systems that mimic national governments.

186. See *supra* notes 12-17 and accompanying text.

187. See, e.g., NGEU legal opinion, *supra* note 37, at 54 (“The exceptionality of the measures requires also an assessment of their appropriateness for the economic situation they intend to address.... During the discussions ... delegations have raised the issue of the necessity and the proportionality of the overall volume and specific allocations of resources [T]he Council enjoys a wide margin of discretion when deciding about the content of the measures under Article 122(1) TFEU. In this particular case, that margin of discretion may be exercised in the light of the detailed assessment of the recovery needs resulting from the COVID-19 crisis.... On this basis, the figures proposed by the Commission do not appear disproportionate in relation to the unprecedented character of the crisis and to the extraordinary size of its consequences as laid down in the referred Commission assessment.”).

188. See EUROPEAN COMMISSION, *supra* note 185.

A. *The EU Emergency Framework*

The EU has faced a series of major crises since the 2007 adoption of the latest major constitutional reform of the Union, the Treaty of Lisbon.¹⁸⁹ The crises include the 2008 global financial crisis,¹⁹⁰ the 2015 migration crisis,¹⁹¹ COVID-19,¹⁹² and, most recently, the Russian invasion of Ukraine.¹⁹³ Each crisis required an extraordinary joint response that strained the common foundations of the European Union.¹⁹⁴ EU-wide measures were necessary to avoid financial collapse, to accommodate hundreds of thousands of Middle Eastern migrants and asylum seekers and then millions of displaced Ukrainians, to wean the EU off Russian energy, and to avoid a deep recession after COVID-19.¹⁹⁵

A strong collective response was not a foretold conclusion. Indeed, as recently as 2023, some commentators suggested that systemic crises, populist backlash, and Brexit portended the unraveling of the Union.¹⁹⁶ And even key participants in the EU decision-making

189. The Lisbon era began in 2009, with the entry into force of the latest major restructuring of the EU constitutional foundations, the Treaty of Lisbon. Merjin Chamon, *The Use of Article 122 TFEU: Institutional Implications and Impact on Democratic Accountability*, EUR. PARL. 9 (Sept. 2023), [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/753307/IPOL_STU\(2023\)753307_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/753307/IPOL_STU(2023)753307_EN.pdf) [<https://perma.cc/GB7W-SUPV>].

190. See Anu Bradford, Stavros Gadinis & Katerina Linos, *Unintended Agency Problems: How International Bureaucracies are Built and Empowered*, 57 VA. J. INT'L L. 159, 205-08 (2018) (discussing the European Union's challenges, and its centralizing response to the financial crisis that began in 2008); see also Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CAL. L. REV. 327 (2013) (discussing how diverse countries and organizations responded to the financial crisis by increasing political control over independent agencies).

191. See Elena Chachko & Katerina Linos, *Europe Can Show the United States and Canada How to Share Responsibility for Asylum Seekers*, JUST SECURITY (2023) Elena Chachko & Katerina Linos, JUST SEC. (Apr. 24, 2023), <https://www.justsecurity.org/86098/europe-can-show-the-united-states-and-canada-how-to-share-responsibility-for-asylum-seekers/> [<https://perma.cc/SRA3-K4Y6>] (comparing the EU's response to the 2015 migration crisis to US and Canadian responses).

192. Katerina Linos & Kristina Daugirdas, *The Future of International Organizations*, BORDERLINES, at 12:00-15:00 (May 22, 2023), <https://www.law.berkeley.edu/podcast-episode/the-future-of-international-organizations/> [<https://perma.cc/N52Y-JRDY>] (comparing international organization responses to different health crises).

193. Chachko & Linos, *supra* note 17, at 775-76, 781-82.

194. *Id.*

195. *Id.*

196. See, e.g., PAUL STEPHAN, *THE WORLD CRISIS AND INTERNATIONAL LAW: THE KNOWLEDGE ECONOMY AND THE BATTLE FOR THE FUTURE* 267 (2023) (including the EU in a list of

process who supported the extraordinary emergency responses expressed surprise at their rapid pace. For example, while describing EU emergency measures in response to Russian energy cut-offs, Czech politician Václav Bartuška remarked that ideas that were “crazy in June ... [were] fringe in July, and ... mainstream in August.”¹⁹⁷ Measures like mandatory EU-wide energy rationing and taxes on windfall energy company profits seemed unimaginable when the Russian military first invaded Ukraine.¹⁹⁸

The EU addressed many of the challenges to its key domestic and geopolitical interests through the exercise of emergency authority. In many cases, the EU relied on Article 122 of the Treaty on the Functioning of the European Union (TFEU).¹⁹⁹ A version of Article 122 existed before the Treaty of Lisbon but was almost never used.²⁰⁰ EU reliance on Article 122 has expanded both qualitatively and quantitatively in the Lisbon era—and especially in the last few years.²⁰¹

Article 122 can be read narrowly or broadly. The narrow reading gives the EU authority to address major natural disasters, energy shortages, and similar emergencies.²⁰² The broad reading treats Article 122 as an all-purpose cross-cutting emergency provision built into the EU’s constitutional structure.²⁰³ Because a key legal question is whether an emergency measure falls within its scope, we present the full text of Article 122 below. It reads:

organizations on track to becoming obsolete); *see generally* JOHN R. GILLINGHAM, *THE EU: AN OBITUARY* (2d ed. 2018).

197. *See* Kim Mackrael & Matthew Dalton, *European Governments Back Broad Intervention in Energy Markets*, WALL ST. J. (Sept. 9, 2022, 12:29 PM), <https://www.wsj.com/articles/europe-holds-emergency-talks-on-energy-market-intervention-11662713678> [<https://perma.cc/6V76-PBC8>].

198. *See generally* Elena Chachko and Katerina Linos, *International Law After Ukraine: Introduction to the Symposium*, 116 AM. J. INT’L L. 124 (2022).

199. Merijn Chamon, *The Rise of Article 122 TFEU: On Crisis Measures and the Paradigm Change*, VERFBLOG (Feb. 1, 2023), <https://verfassungsblog.de/the-rise-of-article-122-tfeu/> [<https://perma.cc/54VE-RXVQ>].

200. *See* TFEU art. 122; Chamon, *supra* note 199.

201. *See infra* Figure 1; *see also* Chamon, *supra* note 199.

202. *See* TFEU art. 122.

203. Paul Dermine, *Article 122 TFEU and the Future of the Union’s Emergency Powers*, EU L. LIVE (Jan. 25, 2024), <https://eulawlive.com/op-ed-article-122-tfeu-and-the-future-of-the-unions-emergency-powers-by-paul-dermine/> [<https://perma.cc/RX9H-AWCV>].

1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.²⁰⁴

We make two theoretically relevant observations about the exercise of emergency powers under Article 122. First, Article 122 abandons the ordinary EU legislative procedures that would otherwise apply. In the ordinary legislative procedure, both the Council and the Parliament need to agree to the Commission's proposal.²⁰⁵ Moreover, whereas the old version of Article 122 required the unanimous agreement of all member states, the new article only requires qualified majority voting. Under EU rules, qualified majority voting means that at least 55 percent of the member states (fifteen of the twenty-seven), representing at least 65 percent of the EU's population, must agree. In short, Article 122 now empowers the EU Commission and a supermajority of member states to act quickly, theoretically over the objection of many member states and of the European Parliament. In practice, however, EU institutions nevertheless sought consensus in all the cases we discuss. They obtained broader support than Article 122 requires, and often unanimity.²⁰⁶

Second, the post-Lisbon version of Article 122 differs from earlier versions in three ways. First, as explained above, it dramatically simplifies the procedure for emergency measures, abandoning the requirement.²⁰⁷ Second, Article 122 now explicitly lists energy

204. TFEU art. 122.

205. See TFEU arts. 293-94.

206. See *infra* Table 3.

207. Compare TEC art. 100, with TFEU art. 122.

supply crises as one of its triggering events. Lisbon anticipated the need for emergency authority in the energy field, perhaps as a lesson from past energy crises that necessitated—and resulted in—emergency EU energy measures.²⁰⁸ While energy-related emergencies thus clearly come within the scope of Article 122, there is less clarity about other issue areas. Third, the current version of Article 122 adds language related to “solidarity between Member States.”²⁰⁹ This could be interpreted as hortatory language, or as language that imposes specific legal obligations on EU member states.²¹⁰

As Figure 1 below indicates, the EU has repeatedly relied on Article 122 TFEU’s emergency authority to accomplish much more than restoring the status quo ante across key policy fields.²¹¹ The EU has used that authority as a foundation for further centralization of power and ambitious policy leaps, from unprecedented collective borrowing and EU-backed unemployment insurance to a new, transformative energy policy.²¹² We next turn to assessing recent EU emergency responses in two areas: post-COVID-19 economic stabilization and energy.

208. In 1977, the EU Council passed a decision that created a mechanism for setting a European Community target for reducing the consumption of primary sources of energy. *See* Council Decision 77/706/EEC, 1977 O.J. (L 292) 9. A subsequent Commission decision elaborated the rules for the implementation of this Council decision. *See* Commission Decision 79/639/EEC, 1979 O.J. (L 183) 1. The EU repealed those measures in 2015, this time invoking Article 122 TFEU. *See* Council Decision 2015/632, 2015 O.J. (L 104) 12.

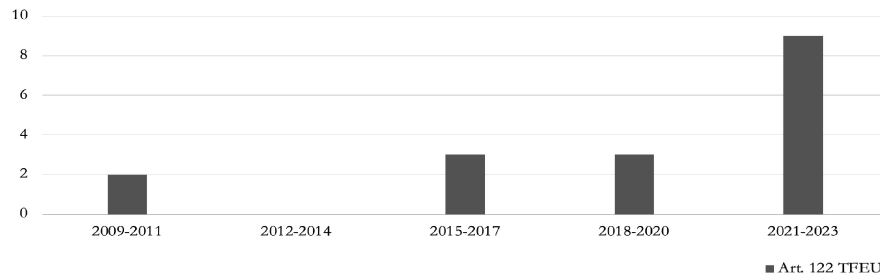
209. TFEU art. 122.

210. Other legal instruments that include the language of solidarity are G.A. Res. 60/209 (Mar. 17, 2006) (identifying solidarity as a fundamental UN goal and declaring December 20 as Solidarity Day), and G.A. Res. 57/265 (Feb. 28, 2003) (establishing the “World Solidarity Fund”). The UN General Assembly’s proposed draft declaration on the rights of peoples and individuals to international solidarity is perhaps the most expansive articulation of this vision. But, to our knowledge, it is within the EU context in the last few years that we have seen the most concrete manifestation of the principle of solidarity, with the European Court of Justice in particular handing down various consequential decisions making this principle legally binding and imposing heavy obligations on reluctant member states. *See, e.g.*, Linos & Chachko, *supra* note 15, at 918-23 (discussing the EU migration solidarity mechanism).

211. *See* Chamon, *supra* note 199 (source of data in Figure 1).

212. *See* Council Regulation 2016/369, *supra* note 52, on the provision of emergency support within the Union, which invoked Article 122 to create a general emergency mechanism for member state cooperation during natural and man-made disasters, and the measures detailed in Table 3 *infra*.

Figure 1. Legal Acts Adopted on the Basis of TFEU Art. 122



Two uses of Art. 122 before 2009

B. Economic Stabilization and Recovery

The damage COVID-19 has wrought prompted groundbreaking innovations in EU budgeting, financial cooperation, and spending. The EU budget has long been a weak link in the process of European integration.²¹³ Traditionally, it paled in comparison to the budgets of member states.²¹⁴ The EU budget typically amounted to around 1 percent of EU Gross National Income (GNI),²¹⁵ while many of its members' public spending is well over 30 percent of their GDPs.²¹⁶

The COVID-19 emergency triggered meaningful innovations in how the EU raises and spends money. While the EU regular budget continues to be governed by the standard EU budget rules and remains relatively small, the EU has introduced substantial extra-budgetary measures that will effectively double its spending in the coming years. These include SURE (Temporary Support to Mitigate Unemployment Risks in an Emergency),²¹⁷ an emergency

213. See Matthew Keep, *A Guide to the EU Budget*, House of Commons Library briefing Paper 06455, 4-5 (May 7, 2021), <https://researchbriefings.files.parliament.uk/documents/SN06455/SN06455.pdf> [<https://perma.cc/GT4K-ZCRU>].

214. See *id.* at 22-23.

215. See *id.* at 4-5.

216. Directorate General for Internal Policies, *EU Budget and National Budgets 1999-2009*, at 6 (2010), https://www.europarl.europa.eu/meetdocs/2009_2014/documents/econ/dv/euandnationalbudgets_euandnationalbudgets_en.pdf [<https://perma.cc/7AL2-KH8X>].

217. See Council Regulation 2020/672, 2020 O.J. (L 159) 1 (establishing “a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak”).

unemployment program enacted during the COVID-19 pandemic that ended in 2022,²¹⁸ and, more significantly, a mammoth stimulus package called NextGenerationEU.²¹⁹ As we explain below, Next-GenerationEU is a temporary instrument designed to stimulate post-pandemic recovery within member states while promoting EU-wide policy goals.²²⁰ EU member states voted unanimously to enact it.²²¹

Not just the size of these programs is extraordinary. For the first time, the EU jointly issued hundreds of billions in debt on capital markets, to be repaid over decades.²²² It then transferred the money, much of it in the form of grants, to member states to help fuel economic recovery from the pandemic.²²³

These transfers involve very significant north-south redistribution.²²⁴ Italy alone is receiving 194.4 billion, including 71.8 billion in grants and 122.6 billion in loans.²²⁵ And much of this spending will facilitate transformation of European societies. To continue with the Italian example, 39 percent of the plan will support climate objectives and 25.6 percent will support digital transformation.²²⁶ However laudable these investments, they seem hard to justify as necessary and proportional to the COVID-19 emergency.

In proposing this idea in May 2020, just months into the COVID-19 pandemic, German Finance Minister Olaf Scholz called it Europe's "Hamiltonian moment."²²⁷ The support of German political

218. SURE facilitated the provision of close to 100 billion euros in financial assistance to member states to help finance measures taken to fight unemployment during the pandemic. The EU financed the program by collectively issuing bonds. See SURE, EUROPEAN COMMISSION, https://economy-finance.ec.europa.eu/eu-financial-assistance/sure_en [<https://perma.cc/DF8Y-2AZS>].

219. See EUROPEAN COMMISSION, *supra* note 185, at 6.

220. See *id.*

221. See *id.*

222. See, e.g., NGEU legal opinion, *supra* note 37 (judging an unprecedented EU stimulus plan in response to COVID-19 to be a lawful invocation of emergency authority, and basing this conclusion on the traditional proportionality framework).

223. See *id.*

224. See Keep, *supra* note 213, at 23.

225. See EUROPEAN COMMISSION, *Italy's Recovery and Resilience Plan*, https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility/italys-recovery-and-resilience-plan_en [<https://perma.cc/W9SP-TYRL>].

226. *Id.*

227. Christakis Georgiou, *Europe's 'Hamiltonian Moment'? On the Political Uses and Explanatory Usefulness of a Recurrent Historical Comparison*, 51 *ECON. & SOC.* 138, 138-39 (2022).

and legal bodies was surprising because Germany widely condemned much less radical measures the EU took in response to the 2008 financial crisis.²²⁸

Another point of comparison is the Marshall Plan.²²⁹ NGEU and the Marshall Plan emerged from different circumstances. NGEU emerged from a Europe seeking greater autonomy, funded by collective EU borrowing, while the Marshall Plan was a U.S.-driven initiative during the Cold War.²³⁰ Despite these differences, the programs share important similarities. They are similar in their huge scale, employ conditional grantmaking, redistribute funds across regions, and shape unique political dynamics. These common features underscore their roles as catalysts for European development and cooperation.²³¹ Crucially, NGEU's conditionality promotes anti-austerity measures and climate-friendly policies, contrasting with the Marshall Plan's emphasis on budget-balancing through reduced public spending. This modern approach positions NGEU as a more suitable template for contemporary global financial institutions like the IMF.²³² Its focus on sustainable growth and environmental consciousness aligns better with current global challenges, offering a model that balances economic development with pressing social and ecological concerns.²³³

1. Doubling EU Spending

The EU regular budget is governed by Multiannual Financial Frameworks (MFFs) each spanning seven years.²³⁴ Every “MFF[] lay[s] down the maximum annual amounts (‘ceilings’) which the EU may spend in different policy fields (‘headings’) over” the MFF

228. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 859/15, May 5, 2020, *translation at* <https://bit.ly/3qMoBcj> [<https://perma.cc/6R69-LY6C>].

229. See Elena Kempf & Katerina Linos, *NGEU: A New Marshall Plan for Europe and a Template for Global Finance*, 119 AJIL Unbound (2024).

230. See *id.* at 1.

231. See *id.*

232. *Id.*

233. See also Elena Kempf & Katerina Linos, *An Ever-Stronger Union: Introduction to the Symposium*, 119 AJIL Unbound (2024) (introducing a symposium on the global implications of Next Generation EU, and emphasizing global finance, climate change, and defense).

234. See EUROPEAN COMMISSION, *supra* note 185, at 6.

period.²³⁵ The annual EU budget then specifies the pre-defined MFF ceilings for each year within the seven-year period.²³⁶

The current MFF, 2021-2027, heralded a dramatic expansion of EU spending.²³⁷ The objective of this increase was to promote economic recovery after COVID-19, but also to realign EU spending to address new priorities such as climate change, migration and border management, and security and defense.²³⁸ Importantly, this expansion was not primarily achieved through the regular EU budget.²³⁹ Rather, the EU enacted a temporary extra-budgetary instrument—NextGenerationEU.²⁴⁰ The key legal basis for Next-GenerationEU was not the standard budgetary provisions of the EU treaties but rather the emergency provision, Article 122 TFEU.²⁴¹ Put together, the 2021-2027 MFF and the NextGenerationEU recovery instrument amount to approximately 2 trillion euros in current prices (1.8 trillion euros in 2018 prices).²⁴²

235. See Ronnie Downes, Delphine Moretti & Scherie Nicol, *Budgeting and Performance in the European Union: A Review by the OECD in the Context of EU Budget Focused on Results*, 2017 OECD J. ON BUDGETING 1, 50 (2017). For example, the 2014-2020 MFF grouped EU expenditures under six main headings: (1) smart and inclusive growth, including sub-headings competitiveness for growth and jobs and economic, social and territorial cohesion; (2) sustainable growth; (3) security and citizenship; (4) global Europe; (5) administration; and (6) compensations. See EUROPEAN COMMISSION, *Multianual Financial Framework 2014-2020 and EU Budget 2014: The Figures* (2013), <https://op.europa.eu/en/publication-detail/-/publication/d2cf202e-f36a-45b2-84e7-1ac6ad996e90> [https://perma.cc/NK7F-EC7N].

236. See EUROPEAN COMMISSION, *supra* note 235, at 7. The MFFs outline separate ceilings for *commitment appropriations* and *spending appropriations*. Commitment appropriations are “legal pledges to provide finance,” like new contracts, for each heading. EUROPEAN COMMISSION, *EU Budget 2013 Financial Report 7* (2014), <https://op.europa.eu/en/publication-detail/-/publication/c025d261-c65d-4a91-a9f9-12c6e6a77c7a/language-en> [https://perma.cc/Y6HC-2WUA]. Payment appropriations are the corresponding estimate for the annual spending ceiling—that is, the ceiling of “cash or bank transfers to the beneficiaries.” *Id.* Appropriations commitments have amounted to around one percent of EU GNI, including in the latest MFF for 2021-2027. See Downes et al., *supra* note 235, at 50.

237. See EUROPEAN COMMISSION, *The 2021-2027 EU Budget-What’s New?*, https://commission.europa.eu/strategy-and-policy/eu-budget/long-term-eu-budget/2021-2027/whats-new_en [https://perma.cc/XH5G-B58F].

238. See EUROPEAN COMMISSION, *supra* note 185, at 11.

239. See EUROPEAN COMMISSION, *supra* note 237.

240. See *id.*

241. See NGEU legal opinion, *supra* note 37, at 68.

242. *Id.* NextGenerationEU consists of a Recovery and Resilience Facility (RRF) in the amount of approximately 724 billion euros, split between grants (~338 billion) and loans (~386 billion). EUROPEAN COMMISSION, *supra* note 185, at 8. The rest is earmarked for other programs (~83 billion euros). *Id.* at 9. The grant component of the RRF is divided among EU countries according to several objective allocation criteria. These include Gross Domestic

The new EU budgetary framework also introduces substantive changes to budgetary priorities. More than 50 percent of the total amount of the 2021-2027 MFF and NextGenerationEU will support EU modernization through investment in research and innovation, climate, the digital economy, and recovery.²⁴³ Specifically, 30 percent of the EU budget will be dedicated to climate change.²⁴⁴ Twenty percent of NextGenerationEU will be invested in “digital transformation.”²⁴⁵ According to the Commission, “[f]or the first time ever, the new & reinforced priorities have the highest share within the long-term budget, 31.9 percent.”²⁴⁶ These goals and proposals may be welcome, and many have applauded them.²⁴⁷ But it is difficult to view these programs as proportional, narrowly tailored responses to the COVID-19 emergency. Instead, they entail deep transformation of European societies.

2. *Collective Borrowing*

The EU’s commitment to nearly double its spending in the coming years required it to secure new funding. It did just that in ways that radically increase the EU’s role as an economic player and its control of member states through economic and fiscal policies. The EU embarked on an unprecedented EU-led collective borrowing effort on behalf of member states.²⁴⁸ To finance NextGenerationEU,

Product (GDP) per capita, unemployment levels, and population. RRF funding comes with strings attached. To qualify for RRF support, EU members must submit recovery and resilience plans to the Commission explaining how they intend to spend RRF funds. The Commission reviews and approves the plans prior to disbursing any funds based on pre-determined performance milestones. This Commission process seems thorough, but in the interests of speedy disbursement, it departs significantly from the more rigorous typical processes for the management of EU funds. Indeed, the EU’s own auditors raised important questions about the management of these funds.

243. See EUROPEAN COMMISSION, *supra* note 185, at 11.

244. *Id.*

245. *Id.*

246. EUROPEAN COMMISSION, *Questions and Answers on the Adoption of the EU’s Long-Term Budget for 2021-2027* (Dec. 22, 2020), https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2465 [<https://perma.cc/5KXN-AFGZ>].

247. See, e.g., Stefano Alfonso, Miguel Eiras Antunes, Luca Bonacina, Carlos Boffill & Hilde Van de Vilde, *Futureproofing Europe: How the NextGenerationEU Programme is Inspiring Companies to Transform*, DELOITTE INSIGHTS (July 24, 2023), <https://www2.deloitte.com/xs/en/insights/economy/next-generation-eu-fund.html> [<https://perma.cc/Y6ZL-EWTB>].

248. See *id.*

the Commission undertook to raise funds on the capital markets up to 750 billion euros in 2018 prices (or 806.9 billion in current prices).²⁴⁹ The EU will repay those borrowed amounts by 2058 (or refinance, effectively further extending emergency measures far into the future).²⁵⁰ The EU also expanded its sources of revenue by creating new so-called “own resources”—the EU’s standard sources of revenue that normally fund its budget.²⁵¹

Prior to NextGenerationEU, EU collective borrowing on behalf of member states was very limited. Although the EU created emergency mechanisms like the European Stability Mechanism (ESM)²⁵²—“a lender-of-last resort to members of the currency union”—after the 2008 economic crisis, “a mechanism for (substantial) joint borrowing through” the issuance of collective debt “has been absent to date.”²⁵³ Nor did the EU have “common deposit insurance, common unemployment insurance or other automatic stabilizers.”²⁵⁴

Before 2020, the EU raised funds in the capital markets on a limited scale and used those funds to give “back-to-back loans to its Member States” and non-EU countries to fund short-term projects.²⁵⁵ This began to change in the response to the COVID-19 pandemic. In 2020, to mitigate some of the economic harms created by the pandemic, the EU started borrowing in large volumes for the

249. EUROPEAN COMMISSION, *supra* note 235, at 22.

250. *Id.*

251. See EUROPEAN COMMISSION, *Own Resources*, https://commission.europa.eu/strategy-and-policy/eu-budget/long-term-eu-budget/2021-2027/revenue/own-resources_en [<https://perma.cc/7E44-EFBL>].

252. See EUROPEAN COMMISSION, *EU Budget 2010 Financial Report 7* (2011), <https://op.europa.eu/en/publication-detail/-/publication/ed63b744-002d-491b-8c85-749ece57c071> [<https://perma.cc/GP4T-BWMV>] (“The European Financial Stabilisation Mechanism (EFSM) was created to provide financial assistance to Member States faced with financial difficulties. It allows the Commission to borrow in financial markets on behalf of the Member States. The Commission then lends the proceeds to the beneficiary Member State. All interest and loan principal is repaid by the beneficiary Member State via the Commission. The EU budget guarantees the repayment of the bonds. The Commission fund, backed by all 27 European Union Member States, has the authority to raise up to EUR 60 billion. A separate entity, the European Financial Stability Facility, is authorised to borrow up to EUR 440 billion; however the EU budget is not involved in it.”).

253. See Sebastian Grund & Michael Waibel, *European Safe Assets: Past, Present, and Future*, in *FISCAL FEDERALISM IN THE EUROPEAN UNION* (Alicia Hinarejos & Robert Schütze, eds., 2023).

254. See *id.*

255. See EUROPEAN COMMISSION, *supra* note 185, at 24.

first time. The aim was to finance the EU Instrument for SURE.²⁵⁶ The scale of borrowing has since skyrocketed. And while the EU distributed some of the collectively borrowed funds to member states in the form of loans, it disbursed much of it as grants.²⁵⁷

The SURE model was a major innovation. Of course, the idea of wealthy states using their good credit to borrow cheaply, and then lend these funds to states that find themselves otherwise cut off from capital markets, is not new. The International Monetary Fund has done this for decades, and European governments banded together to do this in the 2008-10 financial crisis.²⁵⁸ But unlike those precedents, SURE did not come with austerity conditions that borrower states had to meet. Indeed, one of the aims of the program was to encourage already heavily indebted governments in southern Europe to keep spending to stimulate their economies.²⁵⁹ Opponents of these measures challenged them not only because they believed the EU had exceeded the powers delegated to it by member states (“*ultra vires*” arguments), but also as violating the “no-bailout” clause in the EU treaties.²⁶⁰

SURE, the first big COVID-19 emergency measure, took the form of loans rather than grants. The next measures were still more ambitious. NextGenerationEU introduced a qualitative and quantitative revolution in EU collective borrowing. First, it allowed funds to be disbursed to member states as grants, not just loans.²⁶¹ Second, as Sebastian Grund and Michael Waibel observe, it positioned the EU to “become one of the largest issuers of bonds in the world.”²⁶² The EU central institutions have emphasized the EU’s advantage in issuing debt on the financial markets as compared to member states.²⁶³ By using the EU budget to guarantee its bonds

256. See NGEU legal opinion, *supra* note 37, at 12.

257. *Id.* at 14-21.

258. See, e.g., Kalin Anev Janse, *How the Financial Crisis Made Europe Stronger*, WORLD ECONOMIC FORUM (Mar. 16, 2016), <https://www.weforum.org/agenda/2016/03/how-the-financial-crisis-made-europe-stronger/> [<https://perma.cc/6YZU-KES9>].

259. See *supra* note 201.

260. See Elena Kempf & Katerina Linos, *Shaming the Court: The German Constitutional Court’s NGEU Reversal* (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4831183 [<https://perma.cc/8S52-MJKE>]).

261. Grund & Waibel, *supra* note 253, at 2.

262. *Id.*

263. *Id.* at 11-12.

and relying on its high credit rating, the EU can receive much more favorable financial terms than many individual member states.²⁶⁴

* * *

The EU's use of Article 122 TFEU as the legal basis for emergency economic interventions through SURE and NextGenerationEU prompted observers to argue that the EU is using emergency authority to advance a common economic policy, even though the competence to develop economic policies rests with the member states under Article 5 of the TFEU.²⁶⁵ Article 122, scholars have argued, is on a path to become a "super competence," leveraged by the EU to centralize policy making in areas traditionally reserved to member states.²⁶⁶

The EU Commission itself—a key beneficiary and advocate for this transformation—acknowledged the radical nature of the shift and dubbed this budgetary framework an "unprecedented response" that "will help repair the economic and social damage caused by the coronavirus pandemic and aid the transition towards a modern and more sustainable Europe."²⁶⁷ "When the EU pools its resources and finances in policy areas such as research and border protection at EU level," the Commission maintained, "it achieves better results than the EU Member States could manage acting on their own. EU action in these policy areas brings EU added value. It therefore makes sense to finance more of such action at EU level."²⁶⁸

The EU Council's internal legal service largely brushed off legal arguments against reliance on Article 122 TFEU emergency authority as a legal basis for NextGenerationEU. The opinion contends that NextGenerationEU satisfied Article 122's key requirements: the existence of an emergency that necessitates an exceptional response, sunset provisions, and proportionality to the

264. See EUROPEAN COMMISSION, *supra* note 235.

265. See TFEU, *supra* note 27, art. 5(1).

266. See Chamon, *supra* note 199.

267. See EUROPEAN COMMISSION, *supra* note 237.

268. See EUROPEAN COMMISSION, *supra* note 185, at 10.

gravity of the emergency.²⁶⁹ The plan was extra-budgetary and temporary, and it set clear timelines for disbursing funds.²⁷⁰

The opinion recognizes that some elements of NextGenerationEU like funding for research and innovation, a civil protection mechanism to prepare for disasters, and a public health program in fact create permanent programs, not emergency interventions.²⁷¹ But it finds that Article 122 TFEU can support these programs as long as some (very loose) link to COVID-19 exists.²⁷² The opinion also finds that Article 122 TFEU emergency measures need not only address the concrete harms of the COVID-19 emergency.²⁷³ They may also fix structural flaws in member state economies and help them become better prepared for the next emergency.²⁷⁴ In other words, the Council's legal advisers paid lip service to the importance of an emergency nexus, but in fact cleared the way for a transformative economic plan with long term effects on EU member state economies as well as the EU institutions' role in charting common economic policy.

C. Energy

The EU leveraged another major recent emergency to revolutionize its energy policy and governance. Russia's invasion of Ukraine accelerated EU efforts to collectively promote energy independence and divest from rogue exporters like Russia. Facing the prospect of Russian supply manipulation, skyrocketing energy prices, and possible winter shortages, the EU even introduced an extraordinary authority to mandate EU-wide emergency energy rationing.²⁷⁵ As Table 3 below illustrates, key legal measures that implemented these policies rely on Article 122 TFEU. And EU member states adopted them either unanimously or by overwhelming majorities. Votes are not always taken or recorded publicly, as we explain below.

269. See NGEU legal opinion, *supra* note 37, at 49.

270. *Id.* at 55.

271. *Id.* at 62.

272. *Id.* at 61-62.

273. *Id.* at 52, 62.

274. Council Regulation (EU) 2022/2576, O.J. (L 335) 1, 22.

275. Council Regulation (EU) 2022/1369, O.J. (L 206) 1, 6.

By way of background, the EU treaties provide for distinct voting procedures by issue area. Some issues require unanimity among the twenty-seven member states in the Council. Most issues are governed by the Ordinary Legislative Procedure, requiring the agreement of parliament, plus a supermajority vote in the Council.²⁷⁶ This supermajority is called qualified majority voting. Under qualified majority voting, only fifteen of the twenty-seven member states, representing at least 65 percent of the EU's population, must vote affirmatively. A recent empirical study of measures passed under the Ordinary Legislative Procedure confirms that in general, measures pass with significantly more agreement than the required minimum.²⁷⁷

Article 122 TFEU has even looser requirements, as it both allows measures to pass with only a qualified majority of member states supporting them, and without the agreement of parliament.²⁷⁸ Article 122 TFEU has another quirk. It is considered a non-legislative legal basis.²⁷⁹ There is extensive and technical debate on what legislative, as opposed to non-legislative, measures are. What is clear is that the EU Council does not have an obligation to publish votes on non-legislative measures, so these will not always be published.²⁸⁰ A further practice in the EU Council is that votes are sometimes not called at all, or are called when a member state is strategically absent, so as to project the appearance of consensus. Most such instances are not widely publicized. Recently, however, major news outlets reported that the Hungarian prime minister stepped out of the meeting to allow for a “unanimous” vote to initiate accession negotiations for Ukraine.²⁸¹ In Table 3 below we report the published information on each of the Article 122 TFEU

276. See TFEU, *supra* note 27, arts. 289, 294.

277. Nicolai von Ondarza & Isabella Stürzer, *The State of Consensus in the EU: What Is the Way Forward in the Debate About Expanding Qualified Majority Decisions?*, STIFTUNG WISSENSCHAFT UND POLITIK COMMENT 1, 3 (Apr. 19, 2024), <https://www.swp-berlin.org/10.18449/2024C16/> [<https://perma.cc/DE8R-9AVP>].

278. TFEU, *supra* note 27, art. 122.

279. See generally Chamon, *supra* note 199.

280. Nicolai von Ondarza & Paul Bochtler, *Public Voting Data of the Council of the EU*, SWP—GERMAN INST. FOR INT'L & SEC. AFF. (2021), <https://doi.org/10.7802/2344> [<https://perma.cc/L3AF-8PHM>].

281. Andrew Higgins, *How Hungary Undermined Europe's Bid to Aid Ukraine*, N.Y. TIMES (Dec. 24, 2023), <https://www.nytimes.com/2023/12/17/world/europe/hungary-ukraine-eu.html> [<https://perma.cc/WA24-NYHP>].

measures, as available. As the table indicates, most measures pass by consensus or by overwhelming majorities, when much less is necessary. That said, for measures, some states recorded no votes, while others recorded objections while voting affirmatively. We present all publicly recorded votes and objections.

Some of the measures were tailored to the energy market emergency and the imminent risk of severe EU-wide shortages due to Russian supply manipulation. For example, in March 2023, the EU instructed member states to voluntarily reduce their gas consumption by 15 percent.²⁸² Extraordinarily, that same regulation granted the EU authority to mandate rationing with some exceptions if voluntary measures proved insufficient to avoid a shortage.²⁸³ The regulation had a sunset clause limiting its application to one year, and it was extended through winter 2024.²⁸⁴ The vast majority of EU member states voted in favor of the original as well as the extending rationing regulations, with only Hungary and Poland opposing.²⁸⁵

Likewise, the EU enacted an automatic market correction mechanism to control excessively high gas prices that triggered soaring inflation.²⁸⁶ At one point in 2022, EU gas prices were up by 1000 percent compared to prices in previous decades.²⁸⁷ The market correction mechanism places temporary automatic caps on prices if certain pre-defined market events occur.²⁸⁸ Like the rationing

282. Council Regulation (EU) 2022/2576, art. 10, O.J. (L 335) 1, 6.

283. Council Regulation (EU) 2022/1369, art. 3, 2022 O.J. (L 206) 1, 6. *See also* Chachko & Linos, *supra* note 17, at 785; Katja Yafimava, *EU Solidarity at a Time of Gas Crisis: Even with a Will the Way Still Looks Difficult*, OXFORD INST. FOR ENERGY STUD. (2023), <https://www.jstor.org/stable/resrep47221> [<https://perma.cc/NE4L-DX2N>].

284. Council Regulation (EU) 2023/706 of Mar. 30, 2023, Amending Regulation (EU) 2022/1369 as Regards Prolonging the Demand-Reduction Period for Demand-Reduction Measures for Gas and Reinforcing the Reporting and Monitoring of their Implementation, 2023 O.J. (L 93) 1, 2.

285. *Hungary and Poland Say No to Extending Gas Consumption Cut*, HUNGARY TODAY (Mar. 29, 2023), <https://hungarytoday.hu/hungary-and-poland-say-no-to-extending-gas-consumption-cut/> [<https://perma.cc/3DFU-SHVA>].

286. Council Regulation (EU) 2022/2578 of Dec. 22, 2022, Establishing a Market Correction Mechanism to Protect Union Citizens and the Economy Against Excessively High Prices, 2022 O.J. (L 335) 45, 47.

287. *A Market Mechanism to Limit Excessive Gas Price Spikes*, EU COUNCIL, <https://www.consilium.europa.eu/en/infographics/a-market-mechanism-to-limit-excessive-gas-price-spikes/> [<https://perma.cc/B6GE-52WD>].

288. European Council Press Release, Energy Prices and Security of Supply: Council

regulation, the market correction regulation includes a sunset clause that limits its duration to one year.²⁸⁹

By contrast, other measures the EU has adopted during the Ukraine emergency have used the war as a jumping off point for reforming EU energy policy and governance for the long run. The war accelerated the promotion of longstanding domestic EU policy goals such as collectivizing energy procurement on the global market and transitioning to green energy to create a more sustainable EU economy. To that end, in April 2022, the EU Commission proposed an ambitious energy plan, REPowerEU, to wean Europe off Russian energy by the end of the decade and diversify EU suppliers.²⁹⁰ One main objective of REPowerEU was to collectivize and centralize EU energy procurement through a collective EU Energy Platform.²⁹¹

This was a leap. Although the EU has competence to regulate certain aspects of internal energy policy under the EU treaties, each member state maintains its right to “determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply.”²⁹² Yet during the Ukraine war, the EU—not individual member states—has led the effort to reduce the bloc’s energy dependence on Russia.²⁹³ And in the long run, REPowerEU could have profound implications for the work distribution between Brussels and member states in the energy field. The Plan emphasized the advantages of the EU working as a union to accomplish the goals of divestment from Russia and energy sustainability faster.²⁹⁴ REPowerEU’s significance is not only institutional. The Plan also advances an

Agrees to Extend Emergency Measures (Dec. 19, 2023).

289. *Id.*

290. *EU Energy Platform*, EUROPEAN COMMISSION, https://energy.ec.europa.eu/topics/energy-security/eu-energy-platform_en [https://perma.cc/EJK9-NV73].

291. *Id.*

292. TFEU, *supra* note 27, art. 194(2); see also Kaisa Huhta, *The Scope of State Sovereignty Under Article 194(2) TFEU and the Evolution of EU Competences in the Energy Sector*, 70 INT’L & COMP. L.Q. 991, 993 (2021).

293. See Chachko & Linos, *supra* note 17, at 780.

294. European Commission Press Release IP/22/3131, REPowerEU: A Plan to Rapidly Reduce Dependence on Russian Fossil Fuels and Fast Forward the Green Transition (May 18, 2022).

ambitious climate agenda of gradually moving the EU economy toward renewable energy sources.²⁹⁵

In December 2022, the European Parliament and the EU Council reached political agreement on financing REPowerEU and set its implementation in motion.²⁹⁶ The Plan repurposed a preexisting instrument called the Recovery and Resilience Facility (RRF), established as part of NextGenerationEU.²⁹⁷ REPowerEU amended the RRF regulation to implement the divestment, diversification, and sustainability goals of REPowerEU.²⁹⁸ It included guidance and rules that member states should follow to reshape their national “recovery and resilience plans” to incorporate REPowerEU’s objectives.²⁹⁹ In other words, REPowerEU expanded a program that was created to address one emergency (COVID-19) to tackle a different emergency (energy). In the process, it cemented institutional and policy constructs with long term significance for the EU.

The patterns we identify in the EU economic stabilization measures repeat in the Union’s emergency response to the energy crisis the Ukraine war has set off. The EU has built entirely new energy governance mechanisms and reshaped its collective energy policy based on broad, abstract residual emergency authority in Article 122 TFEU and through simplified drafting and voting procedures. Nevertheless, the EU also put in place important safeguards in adopting these measures. They all have sunsets. And they were all adopted after the EU’s central institutions first sought and secured overwhelming support among member states.

295. See Chachko & Linos, *supra* note 17, at 783.

296. See *REPowerEU: Affordable, Secure and Sustainable Energy for Europe*, EUROPEAN COMMISSION, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/repowereu-affordable-secure-and-sustainable-energy-europe_en [https://perma.cc/EE5V-DJ93].

297. Regulation (EU) 2023/435, of the European Parliament and of the Council of 27 February 2023 Amending Regulation (EU) 2021/241 as Regards REPowerEU Chapters in Recovery and Resilience Plans and Amending Regulations (EU) No. 1303/2013, (EU) 2021/1060 and (EU) 2021/1755, and Directive 2003/87/EC, 2023 O.J. (L 63) 1, 19; *The Recovery and Resilience Facility*, EUROPEAN COMMISSION, https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en [https://perma.cc/V87N-CZLA].

298. *Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EU) 2021/241 as Regards REPowerEU Chapters in Recovery and Resilience Plans and Amending Regulation (EU) 2021/1060, Regulation (EU) 2021/2115, Directive 2003/87/EC and Decision (EU) 2015/1814*, at 9, COM (2022) 231 (May 18, 2022).

299. *Id.*

D. The EU Measures: Emergency Powers for Good?

In the paragraphs above, we described emergency measures that permanently change the European landscape. At least for EU champions and progressives, there are many reasons to support these measures. They are wide-ranging, comprehensive instruments that further European integration while advancing a set of progressive long-term policies. But do they pass muster under our normative framework for transformative emergency measures? The analysis below examines how the measures fare under the four elements of our framework: severity, clear procedure and sunset, broad consensus, and non-discrimination(+).

It is easy to see that the severity element is satisfied. Both the COVID-19 emergency, which triggered the financial measures, and the war in Ukraine, which triggered an energy crisis, posed severe threats to public order, health, and safety. The procedural elements were also clearly satisfied. We show in Table 3 below that all the measures had sunset provisions. They were all passed in procedurally transparent ways involving, at the final stage, a vote of the EU Council. In these respects, they satisfy elements of both traditional theories of emergency powers and our theory.

Unlike other advocates of these measures,³⁰⁰ however, we acknowledge that many of these measures were hardly necessary in any traditional sense for addressing the emergencies that bred them. There are hard questions about proportionality as well. The main idea behind NextGenerationEU is that future generations of Europeans would pay (through the year 2058) for expenditures incurred in 2021-2027, not only to save European economies from a deep COVID-19-induced recession but also to move them forward,

300. See NGEU legal opinion, *supra* note 37, at 4. While many EU integration advocates have celebrated these measures on the theory that the end justifies the means, there are dissenting voices. For example, in describing the NextGenerationEU, Martin Nettesheim wrote that “[t]he EU thus becomes a ‘special purpose vehicle’ through which the EU Member States obtain funds without the consent or responsibility of the EU budget legislator. It is sometimes painful, especially for supporters of integration, to observe how the EU pushes aside even the most important constitutional principles when it seems politically opportune to do so.” See Martin Nettesheim, *Legally Feasible, Constitutionally Dubious: Establishing Next Generation Europe on the Basis of EU Secondary Legislation*, VERFBLOG (Dec. 4, 2020), <https://verfassungsblog.de/legally-feasible-constitutionally-dubious/> [<https://perma.cc/S5W2-W5JY>].

practically doubling the EU budget in the process.³⁰¹ The Plan represents acceptance of a hitherto unpopular idea that German taxpayers should be on the hook for Italian spending and investment.³⁰² The COVID-19 and Ukraine crises did not strictly necessitate multi-decade investments in clean energy and innovation, however desirable such investments may be. NextGenerationEU is transformative, not conservative.

We therefore argue that key EU COVID-19 and Ukraine emergency measures adopted under Article 122 TFEU in finance and energy fail the traditional normative framework for assessing emergency powers.³⁰³ One would be hard pressed to argue that the ambitious fiscal and energy reforms the EU passed as emergency responses to COVID-19 and Russia were necessary and proportional in order to restore the EU to the pre-emergency status quo. Instead, we should assess these measures as transformative emergency measures under our proposed normative framework. As we elaborated in Part I, our framework moves away from the necessity and proportionality test in existing understandings of appropriate use of emergency powers. In its place, we propose a consensus requirement and an augmented non-discrimination standard, or as we call it, “non-discrimination(+).”

Table 3 shows that the EU has made extraordinary efforts to reach consensus on every emergency measure adopted under Article 122 TFEU in response to the COVID-19 and Ukraine emergencies. The EU adopted all finance-related measures under Article 122 TFEU by consensus, even though Article 122 TFEU no longer requires unanimity for the adoption of measures under its authority.³⁰⁴ This is no small matter given the monumental significance of these measures in shaping the future of EU fiscal and economic policy, and the willingness of member states to incur debt and

301. See EUROPEAN COMMISSION, *supra* note 185, at 8.

302. See, e.g., EUROPEAN COMMISSION, *supra* note 225.

303. That said, separately, many of the instances of EU emergency action may be justified on the highly progressive principle of solidarity between citizens of different countries. In separate writing, we articulate what a more progressive vision with greater solidarity between states would look like in the context of migration policy. See Linos & Chachko, *supra* note 15.

304. See *infra* Table 3; Chamon, *supra* note 199.

redistribute funds to bolster the economies of the weakest members.³⁰⁵

Likewise, the EU adopted the energy-related measures by consensus or overwhelming majorities. The most “contentious” vote, on the extension of gas-rationing measures as a safeguard against Russian energy manipulation, ended with twenty-four member states voting in favor.³⁰⁶ Only Hungary and Poland voted against, and Italy abstained.³⁰⁷ And gas rationing is not even a transformative measure for our purposes. The measure was necessary to prevent severe energy shortages and arguably proportional to that objective.

Importantly, the EU adopted the Article 122 TFEU energy emergency measures that were in fact transformative unanimously. Such was the case of the solidarity plan for better coordination of gas purchases.³⁰⁸ The EU used a different source of authority—not Article 122 TFEU—to pass the regulation that implemented one of REPowerEU’s key elements.³⁰⁹ But the regulation built on the NextGenerationEU regulation,³¹⁰ which the EU Council had previously adopted under Article 122 TFEU unanimously.³¹¹ The EU’s choice to expand a transformative COVID-19 emergency measure more than a year after first enacting it is evidence of broad and continued agreement around the propriety and legitimacy of the underlying emergency measure.

To summarize, the transformative emergency measures the EU adopted in response to COVID-19 and Ukraine handily clear the consensus requirement under our framework.

305. See *supra* Part III.B; see EUROPEAN COMMISSION, *supra* notes 185 and 218.

306. See *infra* Table 3.

307. *Id.*; Council Regulation (EU) 2023/706 Amending Regulation (EU) 2022/1369 As Regards Prolonging the Demand-Reduction Period for Demand-Reduction Measures for Gas and Reinforcing the Reporting and Monitoring of Their Implementation, EUR. SOURCES ONLINE (2023), <https://www.europeansources.info/record/council-regulation-eu-2023-706-amending-regulation-eu-2022-1369-as-regards-prolonging-the-demand-reduction-period-for-demand-reduction-measures-for-gas-and-reinforcing-the-reporting-and-monitoring/?print> [<https://perma.cc/H9Q2-CQRZ>].

308. See *infra* Table 3; Council Regulation 2022/2576 of 19 Dec. 2022 Enhancing Solidarity Through Better Coordination of Gas Purchases, Reliable Price Benchmarks and Exchanges of Gas Across Borders, 2022 O.J. (L 335).

309. Council Regulation 2022/2576, *supra* note 308.

310. See NGEU legal opinion, *supra* note 37, at 4.

311. See *infra* Table 3.

What about non-discrimination(+)? There is no indication of discrimination based on suspect classification on the face of the EU's Article 122 emergency measures. The measures outline general economic and energy policies. They allocate obligations and rights to member states based on objective criteria like energy consumption and supply and various economic indicators.³¹² Non-discrimination case law and scholarship have long ago established that a government's economic policies, which often disfavor certain sectors while bolstering others, are not discriminatory as such and should enjoy a large degree of deference.³¹³

It should not matter for the non-discrimination analysis that, for example, the EU energy emergency measures impose restrictions on certain industries and favor those related to green energy. As we have argued in Part I, measures that disfavor specific industries are not discriminatory for that reason alone. Industries presumptively have effective means to make sure that their voices are heard by decision makers and their interests accounted for. Consequently, EU measures like the 2022 emergency cap on the revenue of electricity producers to address the Russia-induced energy price crisis are consistent with our framework.³¹⁴ Notably, this measure does not qualify as a transformative emergency measure because it was narrowly tailored to the energy emergency.³¹⁵ So it would survive even the traditional, conservative emergency framework

312. See EUROPEAN COMMISSION, *supra* note 185, at 22.

313. In the U.S., see, famously, *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 488 (1955) (“The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”) (widely understood to stand for deference to economic policy); see also Deborah Hellman, *Two Concepts of Discrimination*, 102 VA. L. REV. 895, 932 (2016) (“[T]he claim of irrationality may arise more frequently than one would think because it is sometimes raised in cases where the more likely explanation for the law is not stupidity, but instead the desire to protect some economic interests over others. But ever since the rejection of the *Lochner* era, courts have been reluctant to closely scrutinize the legislative purposes to insure that they are truly public oriented, thus leaving rationality review to focus on means.”). For an example in the EU, see Case C-348/12 P, *Council v. Mfg. Support & Procurement Kala Naft Co.*, ECLI:EU:C:2013:776, at ¶ 120 (Nov. 28, 2013) (“[T]he [Council] must be allowed a broad discretion in areas which involve political, *economic* and social choices on its part, and in which it is called upon to undertake complex assessments.” (emphasis added)).

314. See *infra* Table 3; Council Regulation 2022/1854 of 6 Oct. 2022 on An Emergency Intervention to Address High Energy Prices, 2022 O.J. (L 261 I).

315. Council Regulation 2022/1854, *supra* note 314, at 11.

and its necessity and proportionality requirement. But this example illustrates our point on discrimination here.

That said, our framework requires a deeper examination not only of suspect classifications on the face of the measures but also of the measures' likely effects, lest they produce disparate impacts on discrete vulnerable groups.³¹⁶ In our view, the transformative EU emergency measures that we examine survive even this more exacting test. There is no evidence that the measures, as such, operate to disfavor vulnerable communities within the EU. In fact, evidence on the implementation of the emergency measures suggests the opposite. For instance, less affluent southern EU member states have disproportionately benefited from NextGenerationEU grants and loans. Greece is the top recipient, followed by Slovakia, Latvia, Portugal, Spain, Lithuania, Cyprus, and Italy.³¹⁷ Germany is the member state that benefited least.³¹⁸

We conclude, therefore, that the transformative measures that the EU adopted in response to COVID-19 and the Ukraine war-induced energy crisis survive our normative framework. They could therefore be appropriately viewed as “emergency powers for good.”

316. *See supra* Part I.B.

317. *See Next Generation EU: A Euro Area Perspective*, EUROPEAN CENT. BANK, https://www.ecb.europa.eu/pub/economic-bulletin/articles/2022/html/ecb.ebart202201_02~318271f6cb.en.html [<https://perma.cc/5U9A-8G83>].

318. *Id.*

Table 3. Assessment of EU Emergency Measures

Proposed Framework: Emergency Powers for Good Energy				
	Severe Crisis	Clear procedure and time limits	Consensus	Non-discrimination (+)
Extension of gas rationing measures Council Regulation (EU) 2023/706	✓	✓	✓ 24-2-1 QMV (Hungary & Poland Against, Italy Abstains)	✓
Solidarity plan for better coordination of gas purchases Council Regulation 2022/2576	✓	✓	✓ No vote - Consensus (Ireland raises question about alignment with other EU rules)	✓
Acceleration of permitting for renewable energy Council Regulation 2022/2577	✓	✓	✓ 26-0-1 QMV (Hungary abstains)	✓
Limits on trading of commodity derivatives to prevent price spikes Council Regulation 2022/2578	✓	✓	✓ 24-1-2 QMV (Hungary Against, Netherlands & Austria Abstain; Germany raises questions)	✓

Cap on revenues of electricity producers and redistribution to electricity customers; mandatory temporary solidarity contribution Council Regulation 2022/1854	✓	✓	✓ 25-2 QMV (Poland and Slovakia Against)	✓
Gas rationing regulation Council Regulation 2022/1369	✓	✓	✓ 25-2 QMV (Poland and Hungary Against)	✓
Measure amending earlier rules on crude oil market disruption Council Decision 2015/632	✓	✓	✓ Unanimous	✓
Establishment of European Financial Stabilisation Mechanism Council Regulation 407/2010	✓	✓	✓ Unanimous	✓

Proposed Framework: Emergency Powers for Good Finance				
	Severe Crisis	Clear procedure and time limits	Consensus	Non-discrimination (+)
Borrowing and lending amendment under European Financial Stabilisation Mechanism ECB Decision 2022/485	✓	✓	n/a	✓
Technical amendment - financial modalities Council Decision 2021/2131	✓	✓	✓ No vote - consensus	✓
European Union Recovery Instrument (NGEU) - 750 billion in EU debt Council Regulation 2020/2094	✓	✓	✓ 27-0 QMV	✓

Support to mitigate Unemployment Risks in an Emergency (SURE) - 100 billion in EU debt for unemployment benefits Council Regulation 2020/672	✓	✓	✓ 27-0 QMV	✓
Activation and Amendment of 2016 Emergency Support Regulation for Covid Council Regulation 2020/521	✓	✓	✓ No vote - consensus	✓
Establishment of European Financial Stabilisation Mechanism Council Regulation 2015/1360	✓	✓	✓ No vote - consensus	✓
Administration of European Financial Stabilisation Mechanism ECB Decision 2010/624	✓	✓	n/a	✓

CONCLUSION

Emergency powers have earned their sordid reputation. We argue, however, that justified suspicion toward the exercise of emergency authority sometimes obscures its constructive potential. Focusing attention on the constructive aspects of emergency responses—which we call “emergency powers for good”—is essential in an era in which large-scale crises become more frequent, and institutional and legal arrangements designed for normal times repeatedly fall short.

The traditional view of emergency powers focuses on preventing abuse. Emergency powers under this view should only be used for the conservative ends of protecting the public order and restoring the status quo ante. We argue, by contrast, that emergency powers can under certain conditions be invoked to accomplish transformative goals and move society forward. Emergencies invite abuse, but they also create opportunities for policy breakthroughs impossible to imagine in normal times.

Our novel framework shares some elements with the traditional constraining approach to emergency powers. For exercises of emergency power to qualify as “emergency powers for good,” they must be adopted through clear and transparent procedures and include time limits to prevent emergency creep. But we offer an alternative to the third element of the traditional framework, which requires that the emergency response be necessary and proportional in relation to the emergency at hand. We argue that emergency responses may appropriately go beyond what is strictly necessary to address a particular emergency and restore the status quo ante if there is broad consensus across political actors and institutions, and if the measures protect the most vulnerable under a heightened non-discrimination standard (“non-discrimination(+”).

Our framework would alter the mode of analysis of transformative emergency measures in existing cases and legal opinions. It provides an alternative justification for the outcome of *Biden v. Nebraska*³¹⁹ that we find much more persuasive than the Supreme Court’s much maligned reliance on the major questions doctrine to

319. 143 S. Ct. 2355 (2023).

invalidate the program. And our framework would make unnecessary the significant legal acrobatics EU legal advisers had to perform to pigeonhole extraordinary emergency measures like NextGenerationEU—a massive economic stimulus plan with far-reaching, long-term consequences—into an existing normative framework centered on necessity and proportionality.³²⁰

Our framework also better fits current patterns of emergency responses than the traditional framework. The literature has long analyzed national security emergencies as the model scenario. However, as governments improvise responses to emergencies ranging from health to energy to finance and migration, rethinking the traditional framework becomes necessary.³²¹ We take the first step toward developing a normative and legal emergency regime that accommodates and allows for better analysis of emergency responses beyond national security.

“Emergency powers for good” might sound incongruous. Yet we show that emergency responses under certain conditions could fill critical gaps in institutional and legal structures and create stronger foundations for addressing future emergencies. The swell of political good will and the sense of urgency that emergencies bring create potential for breakthroughs. The questionable pedigree of emergency powers should not prevent tapping into that potential.

320. *See supra* Part I.B.

321. Tom Ginsburg & Mila Versteeg, *The Bound Executive: Emergency Powers During the Pandemic*, 19 INT’L J. CONST. L. 1498, 1501 (2021).