
**ORDINARY POWERS IN EXTRAORDINARY TIMES:
COMMON SENSE IN TIMES OF CRISIS**

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INTRODUCTION

The U.S. Constitution was written, debated, ratified, and implemented in the shadow of crisis. The country was birthed in war. In the aftermath of ratification, opponents of the Constitution could have precipitated a civil war that would have jeopardized the survival of the fledgling national government.¹ Throughout the founding era, any number of European powers were perceived to pose a serious threat of invasion.² Well into the 1800s, especially in certain northeastern states, substantial homegrown support for realignment with England persisted; the possibility of an internal rebellion in those areas was quite real.³ Individuals interested more in power than politics hatched plans to break off parts of the country into their own empires.⁴ Given the view of human nature widely held by the founders,⁵ these possibilities could not have come as a surprise to most of them. It would be astonishing if a constitution adopted under such conditions did not consider and accommodate these potential crises.

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¹ See DAVID J. SIEMERS, RATIFYING THE REPUBLIC: ANTIFEDERALISTS AND FEDERALISTS IN CONSTITUTIONAL TIME 39-40 (2002).

² See THE FEDERALIST NO. 24, at 133-34 (Alexander Hamilton) (photo. reprint 2002) (E.H. Scott ed., 1898).

³ See Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1, 45 & n.184 (1999).

⁴ See 3 PAGE SMITH, THE SHAPING OF AMERICA: A PEOPLE'S HISTORY OF THE YOUNG REPUBLIC 503-06 (1980).

⁵ See generally Steven G. Calabresi & Gary Lawson, *Foreword: Two Visions of the Nature of Man*, 16 HARV. J.L. & PUB. POL'Y 1 (1993) (contending that Madison's writings reflected the view that man was "narrow" and "self-regarding").

A good portion of the Constitution is, as one might expect, devoted to war. Of the seventeen clauses in Article I, Section 8 that define the substantive legislative jurisdiction of Congress, six deal exclusively with wartime and military matters,⁶ and several more were written with an eye toward war.⁷ Nonetheless, few constitutional provisions provide special rules for crisis governance. The availability of habeas corpus may be suspended “when in Cases of Rebellion or Invasion the public Safety may require it.”⁸ States, which normally may not engage in war, can do so when “actually invaded, or in such imminent Danger as will not admit of delay.”⁹ And the United States may, “on Application of the Legislature, or of the Executive (when the Legislature cannot be convened),” use federal assets to protect states from “domestic Violence.”¹⁰

Thus, although there are references aplenty in the Constitution to war, invasion, rebellion, and treason, there are few legal rules specifically tailored to the various emergencies the nation might face. Instead, more general provisions deal with such crises by allocating authority to Congress to raise revenue,¹¹ appropriate funds,¹² declare war,¹³ raise and fund the military,¹⁴ make rules to govern the military,¹⁵ and grant letters of marque and reprisal and regulate captures during wartime;¹⁶ to the states and Congress to appoint and train the militia;¹⁷ to the President and the Senate to make treaties, including treaties of peace and alliance;¹⁸ and to the President alone to execute

⁶ U.S. CONST. art. I, § 8, cls. 11-16 (defining Congress’ power to declare war and to raise, support, and regulate the military and militia).

⁷ For example, the taxing power, *see id.* art. I, § 8, cl. 1, specifically identifies “the common Defence” as one of the permissible purposes of taxation. The power to borrow money, *see id.* art. I, § 8, cl. 2, is largely a wartime provision, though nothing in the clause limits its application to wartime.

⁸ *Id.* art. I, § 9, cl. 2.

⁹ *Id.* art. I, § 10, cl. 3.

¹⁰ *Id.* art. IV, § 4.

¹¹ *Id.* art. I, § 8, cls. 1-2.

¹² *See id.* art. I, § 8, cl. 18. For a discussion of the Sweeping Clause as the true source of the spending power, see Gary Lawson, *Making a Federal Case Out of It: Sabri v. United States and the Constitution of Leviathan*, 2003-2004 CATO SUP. CT. REV. 119, 138.

¹³ U.S. CONST. art. I, § 8, cl. 11.

¹⁴ *Id.* art. I, § 8, cls. 12-13; *id.* art. I, § 9, cl. 7; *id.* art. I, § 10, cl. 3. Whenever Congress must act through legislation, the President obviously plays a role – formally through the power of presentment, *id.* art. I, § 7, cls. 2-3, and informally through the duty to recommend legislation, *id.* art. II, § 3. Nonetheless, purely for ease of exposition, when the Constitution vests a power specifically in Congress, I will identify Congress as the body primarily responsible for exercising that power.

¹⁵ *Id.* art. I, § 8, cl. 14.

¹⁶ *Id.* art. I, § 8, cl. 11.

¹⁷ *Id.* art. I, § 8, cl. 16.

¹⁸ *Id.* art. II, § 2, cl. 2; *id.* art. I, § 10, cl. 1.

the laws¹⁹ and command the military.²⁰ Most of these powers exist and function whether or not a crisis is present. The Constitution deals with extraordinary times primarily through ordinary powers.

The Constitution vests these explicit and implicit crisis-management powers in Congress, the President, the President and Senate jointly, and the states. Conspicuously absent is any mention of crisis-management authority in the federal courts. What role does the Constitution envision for federal courts in times of crisis?

The only power the Constitution grants to the federal courts is the “judicial Power,” which is vested in the federal courts by the first sentence of Article III.²¹ Other than Congress’ power to suspend habeas corpus,²² there is nothing in the Constitution expressly distinguishing the “judicial Power” in times of peace from the “judicial Power” in times of war. Does that mean that the Constitution anticipates that courts will play precisely the same role in national governance regardless of circumstances?

Historically, courts have largely deferred to the President and Congress during times of crisis, asserting themselves only after the immediacy of the crisis has dissipated. In a book entitled *Terror in the Balance: Security, Liberty, and the Courts*,²³ Eric A. Posner and Adrian Vermeule defend this traditional deferential judicial role against a wave of academic attacks that urge courts, in the name of protecting civil liberties, to take a more active role in policing legislative and executive responses to crises. According to Posner and Vermeule, “judges deciding constitutional claims during times of emergency should defer to government action so long as there is any rational basis for the government’s position, which in effect means that the judges should almost always defer, as in fact they have when emergencies are in full flower.”²⁴

The authors’ argument is expressly consequentialist. They contend that (1) judges are in a much poorer position than either the executive or Congress to evaluate whether emergency policies make sense; (2) there is no good reason

¹⁹ *Id.* art. II, § 1, cl. 1.

²⁰ *Id.* art. II, § 2, cl. 1.

²¹ *Id.* art. III, § 1. Other clauses grant power to the Chief Justice, *see id.* art. I, § 3, cl. 6 (empowering the Chief Justice to preside at impeachment trials of the President), or authorize federal courts to receive grants of power from Congress, *see id.* art. II, § 2, cl. 2 (authorizing courts of law to receive statutory power to appoint inferior federal officers), but no other clauses give power to the federal courts as an institution. For a compendium of reasons for reading the Article III Vesting Clause as the sole constitutional grant of power to the federal courts, see Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 22-26, and Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 Nw. U. L. REV. 1377 *passim* (1994).

²² U.S. CONST. art. I, § 9, cl. 2.

²³ ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007).

²⁴ *Id.* at 12.

to think that governmental decisions during emergencies will be systematically biased in an inappropriate fashion; and (3) even when government makes mistakes, there is no assurance that judicial intervention will make things better rather than worse. As they crisply put it:

Our central claim is that government is better than courts or legislators at striking the correct balance between security and liberty during emergencies. Against the baseline of normal times, government does no worse during emergencies By contrast, the institutional structures that work to the advantage of courts and Congress during normal times greatly hamper their effectiveness during emergencies²⁵

Throughout their book, Posner and Vermeule vigorously criticize so-called “civil libertarian”²⁶ scholars – those who urge stricter judicial oversight of governmental emergency action – for making unfounded, or at least unproven, assumptions about the likely skew of governmental decision making, overestimating judicial capacities, ignoring or under-appreciating the need for trade-offs between security and liberty, and frequently making empirical or speculative claims that stray far beyond any remotely plausible expertise that such scholars could claim.

It is always hazardous to describe an argument as unanswerable, but if there is an answer to the main thrust of Posner and Vermeule’s reasoning, I cannot see it. I do not mean by this that all of their conclusions are beyond cavil. One can disagree (as I generally do) with some of their methodological predilections,²⁷ or quibble (as I generally do not) with their specific analyses of such concrete topics as speech regulation²⁸ or coercive interrogation.²⁹ I mean,

²⁵ *Id.* at 6.

²⁶ The label is potentially misleading unless kept in context. Posner and Vermeule define the “civil libertarian” view as holding that “courts should be willing to strike down emergency measures that threaten civil liberties to the same extent that they strike down security measures during normal times; perhaps courts should be even less deferential during emergencies, given that emergencies create new opportunities for taking advantage of the public.” *Id.* at 5. Posner and Vermeule thus use the label “civil libertarian” to describe a particular position regarding *judicial roles* during emergencies, which may or may not correspond well to a “civil libertarian” position regarding *desirable policies* during emergencies. One can be a “civil libertarian” in a policy sense without endorsing an active judicial role in enforcing those policy preferences, just as one can favor legalization of drugs, abortion, or gay marriage without believing that courts should impose legalization if legislatures and executives fail to do so.

²⁷ Posner and Vermeule insist that, although their argument is consequentialist and is often framed in “welfarist” lingo, there is nothing essential to their analysis about welfarism and its baggage concerning social aggregation functions. They suggest that the entire argument could be framed in other terms. *See id.* at 28, 41. But they embrace the idea of interpersonal comparisons, *see id.* at 28, about which I am much leazier than they. *See* Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53, 62 (1992).

²⁸ *See* POSNER & VERMEULE, *supra* note 23, at 230-34.

²⁹ *See id.* at 183-215.

rather, that their overall analytical framework poses precisely the questions that need asking. Once one faces those questions, their broad claims about the likely costs and benefits of judicial intervention in governmental crisis management seem suspiciously like common sense. Oftentimes, common sense is to academics as garlic is to vampires. It is refreshing to see the authors apply it to such a timely topic on such a grand scale.

In Part I of this Essay, I will highlight some of the most intriguing institutional and methodological points that Posner and Vermeule raise, and describe the challenge that they pose to academic orthodoxy. In Part II, I will try to fill a gap that their book deliberately leaves open. Posner and Vermeule offer a historical and consequentialist account of judicial deference to governmental decision making in times of crisis. They *do not* claim that their account – which is also their country’s traditional one – conforms to the Constitution’s original meaning. To the contrary, they suggest that there might be considerable tension between sound institutional allocation of authority and the original constitutional scheme set down in 1788. They note that the basis for judicial deference in emergencies “is not any explicit provision in the Constitution,” but is grounded in “the executive’s institutional advantages in speed, secrecy, and decisiveness.”³⁰ They further suggest that executives have employed those advantages out of necessity rather than constitutional design: “Our original constitutional structure, with a relatively weak presidency, reflects the concerns of the eighteenth century and is not well adapted to current conditions.”³¹

I contend that the institutional allocation of emergency powers that Posner and Vermeule defend so ably on policy grounds is also the best account of the Constitution’s original meaning. The most plausible understandings of the grants of the “judicial Power” to the courts,³² the “executive Power” to the President,³³ and the power to “make all Laws which shall be necessary and proper for carrying into Execution” other federal powers to Congress³⁴ call for precisely the deferential judicial role in crisis management that history has generally produced. While there is no a priori reason to suppose that the Constitution will always conform to common sense, on this particular occasion, the Framers got it right.

Thus, this Essay is both complimentary and complementary to Posner and Vermeule’s analysis. Their discussion is not only clear-headed and engaging, it also tracks – albeit unwittingly – sound, originalist constitutional interpretation.

³⁰ *Id.* at 16.

³¹ *Id.* at 56.

³² U.S. CONST. art. III, § 1, cl. 1.

³³ *Id.* art. II, § 1, cl. 1.

³⁴ *Id.* art. I, § 8, cl. 18.

I. COMMON SENSE

The essence of Posner and Vermeule's case for judicial deference to executive – and, to a lesser degree, legislative – decision making in times of crisis rests primarily on two simple but surprisingly under-examined empirical claims: one about the relationship between liberty and security (taking those terms as variables with a potentially large range), and one about comparative institutional competence. Once both premises are accepted – and one must labor to reject either – the bulk of their argument flows quite naturally.

Their first claim – for which they assert no originality³⁵ – is simply that “[b]oth security and liberty are valuable goods that contribute to individual well-being or welfare. Neither good can simply be maximized without regard to the other.”³⁶ It is fashionable in some circles to deny the obvious trade-offs and to insist that more liberty inexorably leads to more security, but that makes about as much sense as the old slogan, “There is no price tag on justice.”³⁷ It is well and fine to be in favor of liberty. As a notorious libertarian, I lean toward the fanatical on the subject myself. However, it is just silly to think that, in every single context, across every single possible dimension of policy, more liberty will always lead to more security. While there can be specific policies that are *defended* as pro-security that in fact exact substantial liberty costs with little or no actual gain in security, it strains plausibility to think that liberty and security will never tug in opposite directions. The trick is first to figure out which policies restrict liberty while promoting security, and then to determine (1) how well they promote security, (2) how much and what kind of liberty they restrict, (3) who bears the burdens and reaps the benefits of the trade-offs, and (4) how one can possibly evaluate policies that benefit some and burden others. Any discussion of real-world security policy that does not face these issues head-on should be dismissed as airy cant.

Once the right questions are asked, one must then determine who is best situated to answer them. That is where Posner and Vermeule's second empirical premise of institutional competence comes into play. They claim that, in modern America, as among executive officials, courts, and academics, executive officials are likely to be in the best position to balance security and liberty in most emergency circumstances.³⁸ There is nothing necessary about

³⁵ POSNER & VERMEULE, *supra* note 23, at 21.

³⁶ *Id.* at 22.

³⁷ I recall seeing a poster to this effect early in my law school days. It grated on me then as it does now. Of course there is a price tag on justice; every dollar spent on justice is a dollar that cannot be spent on food production, pollution control, pet grooming, Pokemon cards, or any other good that someone might value. It is possible that investments in justice may produce more wealth than investments in pet grooming, but that depends entirely on an individual's marginal rate of substitution of those two goods at any particular point in time. Very few people with a grain of common sense will *always* choose to spend every marginal dollar on justice.

³⁸ *See id.* at 31.

this state of affairs. One can imagine situations or observe countries for which this is not true. However, given the design of the institutions of governance in contemporary America, and its history, culture, populace, and network of institutions, executive actors are better situated to identify the gains and losses of security measures during emergencies than either courts or academics. Whether they are likely to make the best trade-offs once they identify these gains and losses depends on what standard of “best” one employs, and that is ultimately a matter of value.

The comparative case for preferring executive to judicial actors in emergency times proceeds in several simple steps. Initially, three threshold considerations stack the deck against courts. First, the costs of judicial error – most notably error in wrongly preventing the use of security measures that might prove efficacious – rise dramatically during emergencies.³⁹ It is one thing for courts erroneously to insist upon a warrant in peacetime before government agents can make a drug bust. It is quite another for courts erroneously to insist upon a warrant in wartime before government agents break up a plot to destroy major buildings in New York City. If the potential gains from decisive action rise in times of emergency, so do the potential costs of preventing, or even delaying, that decisive action. Unless one assumes that every single security measure taken during emergencies will needlessly sacrifice liberty for little or no gain in security, there are *prima facie* reasons to be more hesitant about judicial intervention during crisis than during normal times.

Second, in security matters, executive actors have large advantages over courts in information and expertise, just as paleontologists are better situated than judges to evaluate the significance of fossil finds:

If courts were perfectly informed and well motivated, then they might weed out bad emergency policies chosen by irrational or ill-motivated governments. But we just do not have courts of that sort. In particular cases, judges may do better than government at assessing the relative likelihood of threats to security and liberty or the overall costs of particular policies. But this will be wholly fortuitous, and judges who think they have guessed better than government may guess worse instead. Judges are generalists, and the political insulation that protects them from current politics also deprives them of information, especially information about novel security threats and necessary responses to those threats. If government can make mistakes and adopt unjustified security measures, then judges can make mistakes as well, sometimes invalidating justified security measures.⁴⁰

Of course, well-informed people do not invariably make better decisions than poorly informed people; that is why the comparative institutional argument

³⁹ *See id.* at 118-19.

⁴⁰ *Id.* at 31 (footnote omitted).

requires several steps. But at least as a starting point, executive actors have a leg up.

Third, emergencies come in many different shapes and sizes, and there is no good reason to expect the next emergency to be anything like the last. The war against terror is fundamentally different from the war against Communism, which in turn was quite different from the war against Fascism, which itself was quite different from the wars against slavery or British rule. Courts do best when they can rely on templates and guideposts from the past; emergencies make that difficult or impossible. As Posner and Vermeule explain,

In emergencies, then, judges are at sea, even more so than are executive officials. The novelty of the threats and of the necessary responses makes judicial routines and evolved legal rules seem inapposite, even obstructive. There is a premium on the executive's capacities for swift, vigorous, and secretive action.⁴¹

If courts are going to compete with executive actors in the arena of national security, they must have something to counteract the strong informational and experiential advantages of the government's security experts.

One possibility, of course, is that security experts will systematically skew their judgments in predictable and pathological directions that courts can counterbalance. A sizeable portion of Posner and Vermeule's book examines various strands of this kind of argument,⁴² and I will not attempt to canvas their entire discussion here. The general themes that run through their discussion, for which I have a great deal of sympathy, are that arguments of this kind tend to (1) be very conclusory, under-developed, poorly supported empirically, and devoid of plausible mechanisms that would generate a persistent skew; (2) take a "grass is greener" or "nirvana" view of courts as decision-making institutions instead of applying similar suspicions to the capacities and motives of judicial actors; and (3) ultimately rest on value judgments that are not always clearly identified and examined. A few nuggets from this lengthy, rewarding analysis illustrate these broad points.

In response to the claim that governments will frequently deal with emergencies through panicky overreactions that unnecessarily burden liberty in dubious pursuit of security, Posner and Vermeule respond on four levels:

First, fear does not play an unambiguously negative role in decisionmaking. Against the standard view that fear interferes with decisionmaking, we argue that fear has both cognitive and motivational benefits. Second, even if fear did play a negative role, it is doubtful that fear, so understood, has much influence on policy during emergencies, or that it has more influence on policy during emergencies than it does during normal times. Third, even if fear did play a negative role in

⁴¹ *Id.* at 18.

⁴² *See id.* at 59-156.

decisionmaking and played a greater role during emergencies than during normal times, it is doubtful that these effects could be mitigated, at an acceptable cost to national security, through constitutional adjudication. Fourth, even if fear did play a greater negative role during emergencies than during normal times, it does not necessarily have a pro-security valence; fear could lead to libertarian panics as well as security panics.⁴³

The last point most sharply demonstrates the challenge that Posner and Vermeule pose to civil libertarians. What reason, either theoretical or empirical, is there to think that panicked responses to emergencies, if they occur, will *unduly* restrict liberty? That will certainly happen if the trade-off between liberty and security was correct before the emergency, remained correct after the emergency, and was altered to favor security afterward, but why should anyone suppose either or both of the first two propositions to be true?

Suppose that a law firm's rate of being sanctioned has risen twenty-five percent in the past year. Does that mean that the law firm is suddenly out of control? That will only be the case if it was being optimally (or overly) sanctioned before the increase.⁴⁴ Perhaps the firm is still not incurring enough sanctions, at least from the standpoint of its wealth-maximizing clients, and should be employing even more aggressive tactics. In order to criticize the increase, one has to evaluate the level before the increase and know whether circumstances have relevantly shifted (perhaps other firms are now getting so aggressive that a tit-for-tat model requires an active response). Similarly, to say that governments will systematically respond to emergencies by panicking and unduly restricting liberty makes major assumptions about the optimal mix of liberty and security. One must articulate and defend those assumptions before any such claims can be taken seriously. That does not mean that civil libertarians are wrong in their evaluations, either in specific cases or in general. It does mean, however, that the seemingly empirical claim that panic responses are likely may in fact rest on quite controversial, and perhaps unsupportable, normative claims about the proper trade-off between liberty and security. Posner and Vermeule's analysis forces consideration of this kind of problem,

⁴³ *Id.* at 59.

⁴⁴ It will also be true if the optimal rate of sanction is zero. But that is absurd; a law firm that is never sanctioned is surely not doing an optimal job of legally maximizing its clients' wealth. (I am grateful to my long-ago student Peter McCutchen for bringing this fact to my attention.) Similarly, given almost any understanding of the word "optimal," there is no reason to believe that the optimal rate of liberty restrictions is zero, or even that the optimal rate of abusive, unjustified liberty restrictions is zero. *See id.* at 56 ("Some rate of abuse is inevitable once an executive branch is created, and an increase in abuses is inevitable when executive discretion expands during emergencies, but both shifts may be worth it . . ."). Much depends on the costs of eliminating those abuses, and that in turn depends on what other goods – including freedom from aggressive but liberty-restricting actions – might be acquired at the relevant margin.

which is a huge contribution even if it does not foreordain any particular resolution.

Posner and Vermeule expose a number of questionable assumptions – both empirical and normative – that underlie the popular argument that majorities will use emergencies as excuses to abuse vulnerable minorities.⁴⁵ The most intriguing point that they make (at least from my standpoint) is that nothing in “democratic failure” theory indicates a higher likelihood of a pro-security rather than pro-liberty bias. “It is equally consistent with the democratic failure theory that majorities will cause governments to supply excessive liberty – insufficient regulation of terrorist threats – when majorities do not bear the full expected costs of terrorism, perhaps because those costs are concentrated in particular areas.”⁴⁶ If urban areas are the primary terrorist targets, suburbanites might choose a trade-off between liberty and security that is quite different from what they would select if they felt more personal risk. Although Posner and Vermeule do not expressly make the point, one might also ask whether intellectual classes, with a disproportionately high level of representation in and impact on government, might make different trade-offs between liberty and security than others. If one polled both the Yale law faculty and the membership of a random church in Wyoming⁴⁷ about the appropriate balance between liberty and security, it is quite possible that the two groups would give very different answers. If the people making decisions have more in common with the Yale law faculty than with Wyoming churchgoers, then the most likely political failure may not be in the direction that civil libertarians assume. Elections over the past decade, after all, seem to have gone more the way of the average Wyoming churchgoer than the way of the average member of the Yale law faculty.

Posner and Vermeule also address “ratchet” theories, (which posit that wartime security measures have perverse long-term effects lasting beyond the crises that prompted their enactment),⁴⁸ as well as various proposed schemes for checking executive action during emergencies, including prior legislative approval of emergency actions and ex post popular or legislative ratification of extra-legal crisis measures.⁴⁹ The authors then apply their analysis to current controversies in security policy, such as coercive interrogation,⁵⁰ censorship and due process,⁵¹ and the use of military force.⁵² Throughout these

⁴⁵ See *id.* at 87-129.

⁴⁶ *Id.* at 88.

⁴⁷ Why Wyoming? Because on the famous “red-blue” map from the 2000 election, every single county in Wyoming was red. See USA Today.com, 2000 Vote, County by County, <http://www.usatoday.com/news/politicselections/vote2004/countymap2000.htm> (last visited Apr. 1, 2007).

⁴⁸ See POSNER & VERMEULE, *supra* note 23, at 131-56.

⁴⁹ See *id.* at 161-81.

⁵⁰ See *id.* at 183-215.

⁵¹ See *id.* at 217-48.

discussions, Posner and Vermeule recognize the need to appreciate the limits of knowledge, to avoid making empirical claims that rest on unstated normative premises, or normative claims that rest on unstated empirical premises, and, perhaps most importantly, to face up to trade-offs and always look at both sides of the cost-benefit ledger. At the risk of over-generalizing – against which Posner, Vermeule, and I have just warned – academics do not always fare well by these standards. Whether one ultimately agrees or disagrees with any of their specific analyses, Posner and Vermeule have provided a clear roadmap for thinking critically about law and security.

II. TIMES OF CRISIS

Posner and Vermeule focus primarily on the real-world consequences of institutional allocation of decision-making authority in times of crisis. They do not attempt to ground their prescription for judicial deference in any species of originalism. Indeed, they are skeptical that originalism can support anything resembling the historical American pattern of vigorous executive action accompanied by passive judicial acquiescence.⁵³ Because they are not originalists,⁵⁴ Posner and Vermeule are generally unconcerned about the extent to which their prescriptions conform to the Constitution's original meaning. I however, as an originalist, am more interested than they are in these questions. It just so happens that Posner and Vermeule are defending the judicial role that the Constitution prescribes in times of emergency. Whether or not judicial deference in times of crisis is wise policy, it is good constitutional law.⁵⁵

A. *Nothing Over Thayer*

Making out a constitutional case for judicial deference in times of crisis would be easy if judges were expected to defer to executive (and legislative)

⁵² See *id.* at 249-72.

⁵³ See *id.* at 56.

⁵⁴ At the conference at which this paper was first presented, Professor Vermeule stated that he was concerned solely with the preferences of current actors and not with the original meaning of the Constitution.

⁵⁵ I should be very clear that by "constitutional law," I mean "the law prescribed by the Constitution," rather than the body of practices, doctrines, and interpretations that has emerged from presidents, congresses, courts, and voters over the past two and a quarter centuries. My enterprise here is to uncover the actual meaning of the Constitution, and that enterprise requires a hypothetical reconstruction of the meaning that would have been attributed to the Constitution by a reasonable observer in 1788. See generally Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47 (2006). Past actions by governmental actors, including judges, only bear on meaning to the extent that they constitute good evidence of original meaning – which is almost never. See Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. (forthcoming 2007) (manuscript at 26, on file with author) [hereinafter Lawson, *Mostly Unconstitutional*].

action at *all* times. There is a powerful argument in American law, dating back at least to James Bradley Thayer's classic 1893 article on judicial review,⁵⁶ that courts should overturn federal legislative and executive actions only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one, – so clear that it is not open to rational question."⁵⁷ This is essentially the standard that Posner and Vermeule advocate for judicial review of governmental action in times of crisis. If that is the correct constitutional rule in normal times, it is also the correct constitutional rule in crises.⁵⁸

But deference is not the appropriate baseline rule for judicial review. I have criticized the general Thayerian premise of judicial deference elsewhere,⁵⁹ and I do not think that those criticisms have faded with time. Without rehearsing the entire argument: All three departments of the national government have a coequal, independent power of interpretation, which counsels strongly against any across-the-board rules of deference in any direction.⁶⁰ This inference is strengthened by the fact that there are only five discrete occasions in which the Constitution grants power to some actor while specifically indicating that the actor has discretion to determine the proper exercise of that power.⁶¹ Where no such discretion is granted, other constitutional actors are presumptively capable of passing judgment on a coordinate institution's proper exercise of granted power. Moreover, a co-equal and coordinate power of interpretation, rather than a subordinate, deferential one, is more consistent with the

⁵⁶ James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); see also SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 13-44 (1990) (tracing the argument back to the Constitutional Convention).

⁵⁷ Thayer, *supra* note 56, at 144; see also SNOWISS, *supra* note 56, at 41 (arguing that the debates at the Constitutional Convention incorporated the eighteenth-century ideal of legislative supremacy and "reflected the understanding that judicial power over legislation was confined to the concededly unconstitutional act").

⁵⁸ One could attempt to argue that the judicial role is somehow *enhanced* in emergencies, but there is nothing in the Constitution on which to base such a view.

⁵⁹ See, e.g., Gary Lawson, *Thayer Versus Marshall*, 88 NW. U. L. REV. 221, 222-24 (1993); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1274-79 (1996).

⁶⁰ See Lawson & Moore, *supra* note 59, at 1275-76.

⁶¹ U.S. CONST. art. I, § 9, cl. 1 (granting states power until 1808 to import "such Persons as [they] shall think proper"); *id.* art. II, § 2, cl. 2 (granting Congress power to permit the President to appoint "such inferior Officers, as they think proper," without Senate confirmation); *id.* art. II, § 3 (imposing a presidential duty to recommend to Congress "such Measures as he shall judge necessary and expedient"); *id.* (authorizing the President to adjourn Congress "to such Time as he shall think proper" when the House and Senate cannot agree on a time of adjournment); *id.* art. V (granting Congress power to propose constitutional amendments "whenever two thirds of both Houses shall deem it necessary").

Constitution's design of divided government.⁶² Finally, government officials swear an oath to the Constitution rather than to any particular actor within the constitutional system,⁶³ again suggesting that they are not bound to follow the views of others.

None of these arguments is airtight, but cumulatively they strongly suggest that courts are not obliged to defer to Congress or the President, and the President and Congress are not obliged to defer to each other or to courts. Thus, if courts should generally defer to executive actors in times of emergency, it must be because of something unique to emergencies, not because of some universal principle of judicial review.

Since the Constitution's grant of the "judicial Power" makes no specific mention of emergencies, and the Constitution's affirmative grants of power to other actors generally do not distinguish emergency times from normal times, what could possibly generate a constitutional rule that would distinguish the circumstances under which the judicial power is exercised? To answer that question, we must take a deeper look at the concept of deference.

B. *The Deference Principle*

To defer to another actor means to give some weight to the other actor's views – that is, to consider the fact that another actor has reached a particular conclusion as a *reason* to adopt that conclusion yourself.⁶⁴ Deference is always a matter of degree: it can be absolute or very slight. The fact that someone else has reached a particular conclusion can be a very strong or a very weak reason for adopting that conclusion, depending on the circumstances.

Deference in the law takes essentially three forms, which I will call *legal* deference, *epistemological* deference, and *economic* deference.⁶⁵ Legal deference is deference that is commanded by some authoritative legal source and is normally based purely on the *status* of the prior decision maker. The classic example is judicial deference to jury verdicts. By constitutional command, a federal judge cannot enter a judgment contrary to a jury verdict simply because the judge thinks the jury erred in reaching its verdict.⁶⁶ This is true even if the judge has good reason to think that a particular jury was not very smart, not very attentive, or not very objective. The American legal

⁶² See Lawson & Moore, *supra* note 59, at 1276.

⁶³ See U.S. CONST. art. II, § 1, cl. 8 (setting forth the oath to be taken by the President); *id.* art. VI, cl. 3 (setting forth the oath to be taken by senators and representatives).

⁶⁴ Cf. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 571, 576 (1987).

⁶⁵ These categories are drawn from some of my prior work. See Gary Lawson, *Everything I Need To Know About Presidents I Learned from Dr. Seuss*, 24 HARV. J.L. & PUB. POL'Y 381, 384-86 (2001) [hereinafter Lawson, *Everything I Need To Know*]; Lawson, *Mostly Unconstitutional*, *supra* note 55 (manuscript at 10-13); Lawson & Moore, *supra* note 59, at 1278-79.

⁶⁶ See U.S. CONST. amend. V (prohibiting double jeopardy); *id.* amend. VII (limiting federal court review of civil jury verdicts).

system entitles juries to deference (absolute in the case of criminal acquittals, powerful but not absolute in the case of criminal convictions and civil verdicts), not because any specific juries are especially good decision makers, but simply because they are juries.

Epistemological deference involves giving weight to another's views because those views are likely to be good evidence of the right answer. Oftentimes, one actor is better situated than another – because of training, disposition, location, or experience – to resolve problems. Even if no legal obligation requires the current decision maker to consider those views, and the mission is simply to determine the right answer, the fact that a particular actor has reached a certain conclusion may constitute some of the best, or even *the* best, available evidence of the right answer. Much depends, of course, on contingent facts about the other decision maker. The extent to which the other decision maker's judgment counts as evidence depends upon various indicia of reliability. In the law, those indicia can include the methodology employed (really smart people using really bad methods are unlikely to get right answers), the actor's past record, her training and experience, and anything else that might go into an all-things-considered judgment of reliability. The calculus of epistemological deference can be very messy.

Finally, economic deference involves giving weight to another's views because it is easier and more cost-effective than independently determining the right answer. Getting the right answer can be costly. Even if the reliability of some prior decision maker's conclusion is doubtful, it may cost more for the current decision maker to figure out the correct answer (or to find and identify a more reliable decision maker) than it is worth, especially if the practical difference between a right answer and a wrong answer is relatively small.

I have already argued that, outside of five specific contexts, the Constitution generally does not contemplate legal deference to executive or legislative decisions. As a general matter, if the President and Congress enact a statute and deem it constitutional, courts are not bound to give weight to that judgment. Nor do I see much of a constitutional case for economic deference. Fidelity to the Constitution is a matter of oath, not a matter of convenience.⁶⁷ If there is any case for judicial deference, it must be an epistemological one. Yet in order for the decision to be constitutionally based rather than policy-driven, that epistemological deference must somehow transmute into a limited form of legal deference.

Posner and Vermeule repeatedly point to two ways in which judges can employ deference in times of crisis. First, they can employ a relaxed standard of review by looking, for example, for a "rational basis" rather than a "compelling interest" or "substantial advancement of an important

⁶⁷ There is a limited case, based on the distinctive presidential oath prescribed by the Constitution, for economic deference by presidents to trusted staffers in some circumstances. See Lawson, *Everything I Need To Know*, *supra* note 65, at 388.

governmental interest.”⁶⁸ Second, they can employ the same standard of review as in normal times but allow an extended set of circumstances to satisfy it.⁶⁹ For instance, something that does not remotely rise to the level of a “compelling interest” during peacetime may easily satisfy the standard if the survival of the nation is at stake. Thus, to see whether judicial review during times of crisis should differ from judicial review during times of normalcy, one must consider both the extent (if any) to which the range of governmental powers might expand in emergencies and the extent (if any) to which courts should apply a more relaxed standard of review when emergency measures are at issue. The first consideration points strongly in favor of deferential judicial review in times of crisis, and the second points more weakly in the same direction.⁷⁰

C. *Constitutional Contingency*

As I said in the introduction to this Essay, the Constitution expressly says very little about emergency governance. The vast majority of constitutional provisions, at first glance, do not distinguish between crisis and normalcy. When carefully examined, however, some of the constitutional provisions that are most relevant to emergency governance do in fact expand and contract their range based on the circumstances. Whether by design or accident, provisions governed by *standards* rather than *rules* largely control crisis governance under the Constitution. Accordingly, they depend heavily on surrounding circumstances and context.

Perhaps the most familiar example of a provision whose content depends on surrounding circumstances is the Fourth Amendment’s prohibition on “unreasonable searches and seizures.”⁷¹ Suppose that government agents break into a farmhouse without a warrant and seize papers that they find inside. Have they violated the Fourth Amendment? There is no way to answer in the abstract. Under normal circumstances, the search might very well be unreasonable. But if the United States was at war, and suspected enemy agents

⁶⁸ See POSNER & VERMEULE, *supra* note 23, at 16-17, 121. I use these particular formulations as examples because they will be familiar to readers, not because Posner and Vermeule use them or because they have the remotest grounding in the actual Constitution.

⁶⁹ *Id.*

⁷⁰ Deferential judicial review means that a wider range of governmental decisions will pass muster, but it *does not* necessarily mean that courts will affirm government decisions more often during emergencies than during normal times. Affirmance rates depend not only on the effective standard for judicial review, but also on the selection of cases for litigation and on the legislative and executive responses to enhanced deference. For instance, if the executive is emboldened by the expectation of deferential judicial review and overreaches, reversal rates may actually rise, even if the effective scope of deference – that is, the range of circumstances that will result in affirmance of government action – has increased. I am grateful to David Walker for emphasizing this point.

⁷¹ U.S. CONST. amend. IV.

had been seen entering the house repeatedly over the previous four hours, it would be hard to say that the search and seizure was necessarily unreasonable. Whether a search is “reasonable” is a function of external events.

The extent to which the application of constitutional provisions hinges on external events depends very heavily on the content of the relevant provisions. To use some widely employed terminology, the Fourth Amendment lays out a *standard* rather than a *rule* for evaluating the legality of searches and seizures. Not every constitutional provision functions in this way. For example, Article II specifies that “neither shall any Person be eligible to that Office [of President] who shall not have attained to the Age of thirty five Years.”⁷² If it was very, very important for the country to have a particular person as President, but that person was thirty-two years old, that person could not serve as President without a constitutional amendment. The age provisions in the Constitution are rules rather than standards, and their meaning and application do not depend on circumstances.⁷³

There are some less obvious, but for present purposes far more important, constitutional provisions that prescribe (at least within certain limits) standards rather than rules. Indeed, the two provisions that are most relevant for federal crisis management take precisely this form, and therefore help to expand governmental powers in emergencies.

The President’s “executive Power”⁷⁴ perhaps represents the most important constitutional power for governmental crisis management. The precise scope of this power has been the subject of enormous controversy ever since the founding era, and I am not remotely going to attempt to define it here. The narrow point that I hope to establish is that, within a range important for crisis governance, the “executive Power” is broader in times of emergency. That is to say, more exercises of that power will be constitutionally permissible during crises than during normal times, meaning in turn that judges must allow greater scope for the exercise of that power (and thus effectively “defer” more often) during times of crisis.

At the threshold, many people will object that there is in fact no constitutional grant of “executive Power” to the President. The first sentence of Article II of the Constitution reads: “The executive Power shall be vested in

⁷² *Id.* art. II, § 1, cl. 5.

⁷³ This is the case despite the best efforts of very able scholars to argue otherwise. *See, e.g.,* Anthony D’Amato, *Aspects of Deconstruction: The “Easy Case” of the Under-Aged President*, 84 NW. U. L. REV. 250, 253-55 (1989) (suggesting that an attempt to challenge the election of an “unconstitutional” President could possibly be defeated by the application of various justiciability doctrines or, alternatively, by an argument that the age qualifications were superseded by the constitutional amendments which prohibit age discrimination). There may be questions about the content of the rule (must the age limit be reached at the time of election or at the time of swearing in?), but it is a rule (“thirty five Years”) rather than a standard (such as “adequate level of maturity”).

⁷⁴ U.S. CONST. art. II, § 1, cl. 1.

a President of the United States of America.”⁷⁵ One of the most persistent, long-lived, and fundamental debates in U.S. constitutional history concerns whether this sentence vests a package of powers in the President,⁷⁶ or merely designates the President as the holder of a certain office. Under the latter view, all of the President’s powers come from the specific enumerations in Sections 2 and 3 of Article II, plus whatever powers Congress grants pursuant to the Sweeping Clause.⁷⁷ The former view considers the enumerations in Sections 2 and 3 of Article II as limitations, clarifications, or qualifications of the “executive Power” granted by Article II’s Vesting Clause. This debate divided Madison and Hamilton in their famous Pacificus-Helvidius debate concerning President Washington’s power to issue the Neutrality Proclamation of 1793, and it continues to divide scholars and government officials today.⁷⁸

Guy Seidman and I have recently weighed in on this debate, and we decisively come down in favor of reading the Article II Vesting Clause as a grant to the President of “[t]he executive Power.” Building on pathbreaking work by Steve Calabresi,⁷⁹ we conclude that ordinary language, dictionary meanings, and intra-textual comparisons all indicate that the word “vested” in the Article II Vesting Clause functions to grant power to the President and that no other considerations sufficiently counterbalance this potent textual argument.⁸⁰ It is a grand understatement to describe the writing on this subject as voluminous,⁸¹ so for the present purposes I must simply rest my argument

⁷⁵ *Id.*

⁷⁶ Of course, this raises additional questions, which I have already tabled, about the extent of that package.

⁷⁷ *Id.* art. I, § 8, cl. 18 (granting Congress power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”). Today, this clause is generally called the Necessary and Proper Clause, but the founding generation almost uniformly called it the Sweeping Clause. See Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 270 & n.10 (1993).

⁷⁸ For accounts of this debate (which reach different conclusions about its implications for presidential power), see Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 679-86 (2004), and John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 899-901 (2001) (book review).

⁷⁹ See Calabresi, *supra* note 21, at 1405; Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 YALE L.J. 541, 570-81 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1194-1208 (1992).

⁸⁰ Lawson & Seidman, *supra* note 21, at 22-40.

⁸¹ Just two of the leading articles that oppose reading the Article II Vesting Clause as a grant of power total 263 Law Review pages. See Bradley & Flaherty, *supra* note 78 (144 pages); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (119 pages plus an Appendix).

on the assumption that the Constitution vests the President with “[t]he executive Power.”

Whatever the precise scope of the “executive Power,” it can be divided roughly into two categories: powers of law execution and enforcement, and all other powers. The former powers depend upon the existence of a law to execute and enforce, and their contours therefore depend to a considerable degree on the actions of others. The latter powers are self-contained and include, at a bare minimum, the power to command the military (which is clarified and qualified by the Commander-in-Chief Clause),⁸² the power to make treaties (which is clarified and qualified by the Treaty Clause),⁸³ and the power to govern occupied territory during wartime (which in peacetime is supplanted by Congress’ power under the Territories Clause).⁸⁴

The power to command the military and the power to govern occupied territory obviously expand during certain crises, most notably war; indeed, the power to govern occupied territory comes into play *only* during war. The President’s more basic powers of law execution and enforcement, however, similarly wax and wane with circumstances.

One of the most important tasks when executing a law is selecting the means through which to achieve the desired ends. Because the President is constitutionally vested with the power of law enforcement, the President has the power and the duty to make this selection. The Article II Vesting Clause does not specifically address this crucial topic, but the Constitution incorporates by reference a fundamental principle of administrative law that defines, limits, and expands the range of permissible means at the President’s disposal in times of crisis. At the time of the Constitution’s framing, British administrative law recognized a fundamental principle of delegated executive power that later came to be called the *principle of reasonableness*. Without going into detail,⁸⁵ the idea is that all delegated power to implement laws is subject to the implicit requirement that the choice of means be proportionate to the end, efficacious, and respectful of background constraints based in rights and structure.

For example, if a statute told sewer commissioners to impose water control measures “as case shall require, after your wisdoms and discretions,” and to assess the costs of those measures on adjoining landowners as the commissioners “shall deem most convenient to be ordained,” the commissioners could not impose the costs entirely on one landowner, even though nothing in the authorizing statute expressly limited the agency’s

⁸² U.S. CONST. art. II, § 2, cl. 1.

⁸³ *Id.* art. II, § 2, cl. 2.

⁸⁴ *Id.* art. IV, § 3, cl. 2. For a detailed discussion of the power to govern territory, see generally GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE* 121-201 (2004).

⁸⁵ For more discussion of the principle of reasonableness, see LAWSON & SEIDMAN, *supra* note 84, at 52-56.

discretion.⁸⁶ Similarly, if a statute authorized paving commissioners to repair streets “in such a manner as the commissioners shall think fit,” the commissioners would not be permitted to raise (and would therefore be liable in damages for raising) a street so high that it obstructed access to a house.⁸⁷ It was irrelevant that the authorizing statute did not impose a reasonableness requirement on the discretion of the agents; it was simply presumed that all discretion in executing the law would be exercised reasonably.

The Federal Constitution of 1788, unlike previous constitutive documents, represents a delegation of powers to agents. At least to the extent that the delegated power is implementational power, there is every reason to suppose that a framing generation versed in Blackstone (who authored the leading eighteenth-century decision applying the principle of reasonableness)⁸⁸ would take as given that delegated executive powers must be exercised reasonably. The Constitution’s grant of the “executive Power” constrains the President in the selection of means for executing and enforcing laws by precisely the same considerations of efficacy, proportionality, and regard for background rights and structural principles as those which constrained the agents of Parliament when executing statutes. This principle did not need to be textually spelled out in Article II because it was part and parcel of any delegation of executive authority.

Just as the reasonableness requirement of the Fourth Amendment accommodates emergencies, the principle of reasonableness embedded in Article II allows the President’s executory authority to wax and wane with circumstances. Common sense suggests that presidents should have more discretion in “reasonably” enforcing the law when foreign soldiers are advancing toward Baltimore or terrorists are plotting to blow up buildings than in normal times of peace. The principle of reasonableness essentially enshrines common sense into the law. Courts that are following the Constitution should accordingly find a wider range of circumstances to justify executive action in times of crisis than in times of normalcy, which is precisely what the deference thesis prescribes and predicts.

Reasonableness operates as a standard rather than a rule, which means that it is impossible to specify in advance a strict set of circumstances that will justify any particular kind of executive action. One can, however, try to craft terms that will describe, as best as possible, the kind of inquiry mandated by the principle of reasonableness. The three crucial elements of reasonableness in law execution are efficacy, proportionality, and respect for background constraints. Whether means are efficacious depends on a causal connection between the means and ends. A good way to express this relationship is to say that the chosen means must be necessary to achieve the desired end, where

⁸⁶ See *Rooke’s Case*, 5 Co. Rep. 99b, 100a, 77 Eng. Rep. 209, 210 (C.P. 1598).

⁸⁷ See *Leader v. Moxon*, 2 Black. W. 924, 925-26, 96 Eng. Rep. 546, 546-47 (C.P. 1773).

⁸⁸ *Id.*

necessary describes “some obvious and precise affinity”⁸⁹ between means and ends. A good way to express the elements of proportionality and respect for background constraints would be to say that the means must be *proper* for achieving the desired ends. Thus, the implicit meaning of the Article II Vesting Clause is that the President may select whatever means are *necessary and proper for carrying into execution the President’s constitutionally vested powers*. And what is “necessary and proper” during extraordinary times may not be “necessary and proper” during periods of normalcy.

Of course, the phrase “necessary and proper” appears in the Constitution, but in Article I rather than Article II. Congress is given power in Article I to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [of Congress] and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”⁹⁰ This power is the constitutional engine for authorizing searches, taking private property, appropriating funds, supplementing presidential war powers, defining crimes and prescribing their penalties, and generally keeping the government in motion. Under a correct constitutional analysis (which bears at best only an accidental relationship to modern law), “virtually all federal laws are executory laws enacted pursuant to, and thus subject to the limitations of, the Sweeping Clause.”⁹¹

I have argued at length elsewhere that this language in the Sweeping Clause incorporates the principle of reasonableness into Congress’ power to implement enumerated federal powers.⁹² It was necessary to write the principle expressly into Article I but not Article II because it was very unclear in 1788 whether the principle of reasonableness had automatic application to legislative bodies or was presumptively applicable only to executive (and judicial) agents.⁹³ Thus, the Sweeping Clause expressly, and the Article II Vesting Clause implicitly, import principles of efficacy, proportionality, and respect for background constraints into the Constitution. The range of laws that is “necessary and proper” for implementing federal powers, like the range of executive action that is necessary and proper for executing federal law, will expand and contract with circumstances. Laws that are necessary and proper during wartime may not be necessary and proper during peacetime. For example, a measure with a ten percent chance of stopping a small amount of marijuana from changing hands may fail a constitutional test of efficacy, while a measure that offers a ten percent chance of preventing a major terrorist attack on the United States could pass with flying colors (though it might nonetheless

⁸⁹ Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 THE WRITINGS OF JAMES MADISON 447, 448 (Gaillard Hunt ed., 1908).

⁹⁰ U.S. CONST. art. I, § 8, cl. 18.

⁹¹ Lawson & Granger, *supra* note 77, at 324.

⁹² Gary Lawson, *Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 256-61 (2005).

⁹³ See *id.* at 258-59.

fail the separate tests of proportionality or consistency with background rights and structural principles). Quarantining a city may be a wholly disproportionate (improper) response to an outbreak of the common cold, but an entirely sensible (proper) response to the outbreak of a deadly epidemic. The power granted to Congress by the Sweeping Clause is larger in times of crisis than in times of normalcy because the set of “necessary and proper” laws expands and contracts with circumstances. Thus, courts applying precisely the same standard of review across time should uphold some laws enacted pursuant to the Sweeping Clause in times of emergency that they would not uphold in other times, simply because the existence of the emergency renders a wider range of laws constitutionally “proper.”

In short, the constitutional powers most relevant in times of crisis – the President’s “executive Power” and Congress’ Sweeping Clause power – are designed to expand in those times. Even if courts take the same formal approach to executive and legislative actions during emergencies as they do during normalcy, it will appear as though the courts are being more deferential because the range of governmental action that meets constitutional requirements will be larger.

Three points about the principle of reasonableness and its application to crisis governance bear brief mention.⁹⁴ First, the principle of reasonableness is part of the Article II (and Article III) Vesting Clause because it is part and parcel of eighteenth-century delegations of executive authority. Reasonableness is also part of the Sweeping Clause because the language of the Sweeping Clause specifically incorporates it. There is *no* general principle of reasonableness that underlies all constitutional provisions. Nor does every constitutional provision incorporate standards rather than rules. The extent to which any given constitutional provision embodies rules or standards is, as economists are wont to say, an empirical question: one must look at the provision. Indeed, even within the context of the Sweeping Clause, it is perhaps easier to see the word “proper” as embodying a more flexible standard than the word “necessary.” If the term “necessary” refers purely to the causal connection between means and ends, it is quite possible that the required strength of that connection remains constant through circumstances. If, on the other hand, an inquiry into necessity also entails consideration of available *alternative* means, the calculus gets more complex.

Second, to say that the President’s executive power and Congress’ Sweeping Clause authority expand in times of crisis is not to say that they expand without limit. The limits broaden, but they still exist. Moreover, anything done by the President must still constitute an exercise of executive rather than legislative or judicial power, and anything done by Congress must be “for carrying into Execution” some other enumerated federal power.⁹⁵ It is very

⁹⁴ Actually, they bear extended discussion rather than brief mention, but they are only getting brief mention here.

⁹⁵ U.S. Const. art. I, § 8, cl. 18.

hard to come up with a plausible theory of the executive power which would enable the President to take over the domestic steel industry in wartime without statutory authority,⁹⁶ or a plausible theory of the Sweeping Clause that would allow Congress to regulate wheat grown for home consumption.⁹⁷ Accordingly, even if one considers the New Deal era a time of crisis that would expand presidential and congressional power,⁹⁸ one is not going to be able to extract the most extravagant elements of the New Deal case law out of the Article II Vesting Clause and the Sweeping Clause, no matter how hard one strains.

Third, overhanging this entire discussion is the problem of determining *when a crisis exists*, which, when present, would alter the scope of authority under the Article II Vesting Clause and the Sweeping Clause.⁹⁹ If the President declares a crisis – or, more to the point, if Congress declares war – does that obligate courts to go into crisis mode and view executive and legislative powers through the lens of emergency governance? Or are courts permitted, at the threshold, to second-guess the judgments of the political departments about whether or not a crisis exists? Given the Constitution's general silence about matters of crisis governance, the best answer seems to be that the judgments of the political departments do not bind the courts in this respect. Even if Congress declares war, that is not necessarily conclusive for purposes of judicial review. After all, wars exist whether or not Congress declares them,¹⁰⁰ and a war, *for purposes of the scope of federal power*, can fail to exist even if Congress declares it. A congressional declaration of war is absolutely conclusive with respect to the international law effects that result from a declaration of war, and perhaps with respect to domestic statutes that are triggered by the existence vel non of war (though that is a matter of statutory interpretation rather than constitutional law). However, when it comes to determining whether exercises of federal power are constitutionally permissible, the external events in the world either warrant the governmental action in question or they render it void. Congress or the President cannot conclude the inquiry by fiat.

⁹⁶ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582-89 (1952).

⁹⁷ *But see Wickard v. Filburn*, 317 U.S. 111, 118-29 (1942).

⁹⁸ An assumption which is somewhat dubious – a drop in the stock market does not rise to the level of war.

⁹⁹ I am grateful to Adeno Addis for highlighting this important point.

¹⁰⁰ Cf. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 295 (1996) (“[T]he Declare War Clause does not add to Congress’ store of war powers at the expense of the President. Rather, the Clause gives Congress a judicial role in declaring that a state of war exists between the United States and another nation . . .”).

D. “*We Want Information . . . Information . . . Information!*”

Not only does the Constitution expand executive and legislative powers during times of crisis, it may also shrink judicial powers at the same time. The mechanism of this shrinkage, however, is less direct than the expansion of presidential and congressional powers, and I am not entirely confident that it works in the manner that I suggest here. Further inquiry into this question is clearly warranted.

For a sizeable percentage of emergency measures taken by the federal government, the ultimate legal question will be whether the President has exceeded the scope of the “executive Power” or whether Congress has enacted a law that is not in fact “necessary and proper for carrying into Execution” some federal power. In many cases, the answer will turn on *judgments* of efficacy, proportionality, and consistency with background restraints, rather than on *rules* that lend themselves to straightforward legal analysis. And therein lies the problem for courts.

For all of the reasons of comparative institutional competence described at great length by Posner and Vermeule, courts reviewing government action in times of crisis must recognize that executive actors are in a much better position than they are to identify, evaluate, and make the necessary trade-offs, which in turn largely determine whether action is efficacious and proportionate. Judges lack the information needed to assess threats, and the costs of wrongful judicial intervention are potentially catastrophic. While judges may sometimes suspect that government decision making is badly motivated or simply wrongheaded, there is frequently no obvious way to tell the good from the bad.¹⁰¹ A badly motivated decision, for instance, can still be correct on the merits – just as a well-motivated decision can be flagrantly unlawful (and foolish in the bargain). From a judicial standpoint, if one is looking to see whether action under the Article II Vesting Clause or the Article I Sweeping Clause conforms to the principle of reasonableness, the best available evidence may well be the judgment of the executive and legislative departments. There is no general constitutional requirement of legal deference to executive or legislative actors; the deference that I have just described is *prima facie* epistemological. It is possible, however, for epistemological deference to shade into legal deference on some occasions. The “judicial Power,” which is the only power granted to federal judges by the Constitution,¹⁰² is the power to decide cases in accordance with governing law.¹⁰³ One must determine the law in order to decide cases in accordance with it, which is the inferential source of the federal courts’ power of legal

¹⁰¹ In the rare cases where the government decision is obviously bad, even a strong rule of deference would permit judicial intervention. The point is not that courts have no jurisdiction to entertain claims of governmental overreaching during times of crisis, but only that they ought to tread very, very carefully.

¹⁰² See Lawson & Moore, *supra* note 59, at 1272-73.

¹⁰³ *Id.* at 1273.

interpretation. But what if some other actor is *systematically* better situated than the courts to determine the answers to certain legal questions?

Where the legal question involves nothing more than straightforward statutory interpretation or the application of originalist constitutional methodology, there is no good reason to suppose that any of the federal departments have a systematic advantage: presidents and congresses can hire staffers who are at least as capable as judges and their law clerks of applying proper methodologies (and vice versa). There are some legal questions, however, that do not turn solely on the application of legal methodologies. For instance, application of originalism to the Article II Vesting Clause and the Article I Sweeping Clause shows that each power is subject to the principle of reasonableness. *How that principle applies in given circumstances*, though, is not necessarily something that can be determined by legal methodologies. One can stare at the Constitution for a very long time and still not know whether a particular executive law enforcement action is or is not efficacious and proportionate enough to satisfy the principle of reasonableness and therefore survive constitutional scrutiny. One would need to know the facts that prompted the action, the risks of not taking it, the likely costs and benefits of various alternatives, and the costs and benefits of taking the time to figure out the costs and benefits of various alternatives while terrorists plant bombs. These are legal questions in the sense that they may determine the constitutionality of the action. But their resolution depends on facts, inferences, and evaluations that judges are extremely unlikely to be in a good position to acquire, make, and perform. In this limited class of determinations, when time is of the essence and the stakes are enormously high, deference to the factual judgments of those who are better situated to make them becomes part of the courts' legal obligation to determine the governing law through the best tools available. Sometimes – not often, but sometimes – deference really is the best tool.

Once the crisis has passed, the balance shifts considerably. At that point, courts can take the time necessary to look more carefully at the government's justifications, and the crisis-induced legal deference morphs back into the milder practice of epistemological deference. In this process, the same governmental action that would properly be upheld by a court during an emergency might properly be invalidated during a time of normalcy, simply because the constitutionally mandated process for resolving legal questions changed with the circumstances. This cycle of deference during crises followed by more searching judicial review once the emergency has passed is precisely the cycle described by Posner and Vermeule as the actual practice of courts and the most normatively attractive model of judicial review in times of crisis.¹⁰⁴ It is also essentially the cycle prescribed by the Constitution.

¹⁰⁴ See POSNER & VERMEULE, *supra* note 23, at 3 (“When national emergencies strike, the executive acts, Congress acquiesces, and courts defer. When emergencies decay, judges become bolder, and soul searching begins.”).