

The background of the book cover is a reproduction of Howard Chandler Christy's 1861 painting, "Scene at the Signing of the Constitution of the United States". It depicts several of the Framers of the US Constitution in a grand room with large windows. One man in the foreground is seated, leaning on a cane, while others stand around him, some holding documents. The scene is formal and historical.

# **FAULT LINES**

## **IN THE**

# **CONSTITUTION**



**THE FRAMERS,  
THEIR FIGHTS,  
AND THE FLAWS THAT  
AFFECT US TODAY**

**CYNTHIA LEVINSON &  
SANFORD LEVINSON**

**CONTAINS  
TWO NEW  
CHAPTERS AND  
IMPORTANT  
UPDATES!**





## PART VII

### Emergency! Emergency!

In this section, we continue to deal with the ways the Constitution can trip us up at the worst possible time—when we are involved in wars of various sorts. In these situations, the victims of the Constitution’s fault lines aren’t members of Congress or the president. They’re ordinary citizens—possibly you.

We consider

- limitations on what you can say during wartime and
- ways the government can restrict your freedom of movement during an epidemic.



## CHAPTER 18

# At War

## Emergency Powers

### **“Disloyal, Profane, Scurrilous, or Abusive Language”**

By February 1917, World War I had been raging in Europe and the Middle East for two and a half years, but most Americans had no interest in entering the war. The issues those regions were fighting about—mostly ethnic and economic tensions—seemed confined to Europe and irrelevant to the United States. Besides that, battlefield conditions, Americans had heard, were dreadful. In just four months over the summer and fall of 1916, a million soldiers had died at the Battle of the Somme. It wasn’t surprising that President Woodrow Wilson was reelected with the slogan “He kept us out of war.”

But then a telegram surfaced in which the German foreign minister threatened to torpedo American ships. Outraged, Wilson changed his mind and asked Congress to declare war on the Central Powers.



“The world must be made safe  
for democracy.”

—President Woodrow Wilson



Congress agreed. Members adopted a resolution to go to war and passed several related laws.

- The Selective Service Act required men in their twenties to register for the draft.

- The Espionage Act of 1917 made it criminal to obstruct the draft and to send unpatriotic materials through the mail.

- The Sedition Act of 1918 declared it a federal offense to use “disloyal, profane, scurrilous, or abusive language” about the Constitution or the American government, flag, or military uniform.

Most Americans quickly caught war fever.

- Three million soldiers were inducted.
- Millions of other people volunteered to work on the home front.
- Restaurants replaced sauerkraut with “Liberty Cabbage.”
- Nebraska even banned teaching German.

Patriotism wasn’t merely important; it was a political and social imperative.

But despite the fervor and the new laws, some people continued to oppose America’s involvement in the Great War. One was a man named Eugene V. Debs.

When he was fourteen, Debs dropped out of school to work on the railroads. Seeing how railroad owners amassed fortunes while the laborers

remained impoverished, he demanded higher pay and organized strikes against management.

Over time, he joined and then led the Socialist Party of America. Socialists argued that there should be no private ownership of businesses or property. Everything should be shared. In the 1912 election, Debs ran for president under its banner, and more than nine hundred thousand people voted for him.

Debs believed that wars are similar to railroads. They are undertaken to benefit the wealthy—but are built and operated by the downtrodden. In June 1918, days after nearly ten thousand American soldiers were slaughtered at a battle site in France, Debs spoke to supporters at an outdoor rally in Canton, Ohio.

Rulers, Debs declared, “have always taught and trained you to believe it to be your patriotic duty to go to war and to have yourselves slaughtered at their command. But in all the history of the world you, the people, have never had a voice in declaring war.”

Debs understood that the government might consider his speech disloyal. Nevertheless, he concluded, “Do not worry about the charge of treason.”



“...it is extremely dangerous to exercise the constitutional right of free speech in a country fighting to make democracy safe for the world.”

—Eugene V. Debs



He had not directly urged the crowd to rebel or to resist conscription. However, he praised three people who were in jail for obstructing the draft. In addition, the Socialist Party had recently adopted a resolution calling for “continuous, active, and public opposition to the war, through demonstrations, mass petitions, and all other means within our power.”

Federal agents, who had been shadowing Debs, wrote down his words. Debs was arrested, tried, and convicted of violating the Espionage Act of 1917. He was sentenced to ten years in prison.

Debs’s lawyers appealed to the Supreme Court, arguing that he had a right to free speech and that, in any case, he hadn’t advised anyone to desert or resist conscription.

Writing for a unanimous court, Justice Oliver Wendell Holmes Jr. disagreed. Even though Debs did not explicitly tell his listeners to avoid the draft, that idea was the gist of his talk. And his words, according to Holmes, “create[d] a clear and present danger” to a country at war. He concluded that “no Court could regard them as protected by a constitutional right.”



“When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterances will not be endured so long as men fight.”

—Supreme Court Oliver Wendell Holmes Jr.



Debs, according to the court, was endangering the country during a time

of emergency. And so he must remain imprisoned.

### Meanwhile, Back in ~~1787~~ 1791...

When the Framers gathered in Philadelphia to write a new constitution, they were already breaking the rules. Congress's authorization specified that only limited revisions to the Articles of Confederation could be made. But the Framers believed that the fate of the country was at stake—definitely an emergency that warranted wholesale changes to form a new kind of government.



“...in certain seasons of public danger it is commendable to exceed power.”

—George Mason, Virginia



By mid-September 1787, they were ready to put the finishing touches on their handiwork and cart it off to the states for ratification. A few issues remained, however. One of these was a Bill of Rights.

Many state constitutions guaranteed their citizens fundamental rights, such as freedom of religion and of speech. The Framers discussed including such a Bill of Rights in the Constitution but James Madison of Virginia argued that lists of this, that, and the other rights were no better than “parchment barriers”—not worth the paper they were written on. The government could shred, burn, or ink them out the moment it felt threatened. After a few minutes of debate, the Framers voted unanimously not to include it.

Their reasoning was that they were creating a government with limited powers. Alexander Hamilton of New York pointed out that if a particular power, such as restricting freedom of speech, was not specifically granted to the government, then officials didn't have it. So why bother to tell people they could speak freely if those in power couldn't tell them not to?

During the ratification process, however, the public clamored for guaranteed rights, and supporters agreed to

add them as the first order of business in the new government.

Madison was convinced, and, after he was elected a representative from Virginia in the First United States Congress, he became the chief draftsman of the Bill of Rights. (Twelve amendments were submitted to the states for ratification but only Amendments Three through Twelve were ratified by 1791.)

What we call the First Amendment (originally the Third) opens powerfully and without compromise.



“Congress shall make no law...  
abridging the freedom of speech...”

—First Amendment



If there can really be “no law” that limits what people can say, how could Congress pass the Sedition Act of 1918, which made it a crime to use abusive language about the government?

The Constitution wouldn’t have been written if the Framers hadn’t disobeyed

rules and exceeded powers specified in the Articles of Confederation. A dozen years earlier, the country was founded on a revolution. Maybe it’s not surprising, then, that future members of Congress believed that in some cases they, too, could disobey the Constitution’s rules. This was especially the case when they faced emergencies.

In 1798, just seven years after the Bill of Rights was adopted, Congress passed a Sedition Act while America was involved in what was called a “quasi-war” of naval incidents against France. Several dozen newspaper writers who criticized the government were arrested, including one who had merely expressed his wish that a cannonball would wallop President John Adams in the rear.

When the journalists complained that they were being deprived of their rights under the First Amendment, government leaders responded that the Constitution allows Congress to bar sedition. After all, promoting disrespect of the president, especially during

a crisis, threatened the “domestic tranquility” promised in the Preamble. The reporters were jailed.

Thomas Jefferson, the next president, believed the act was unconstitutional and in 1801 pardoned those who remained in prison.

### So What’s the Big Problem?

Debs’s case raises questions about whether or not we lose our rights when the president and Congress agree that our country is threatened. The Constitution barely addresses what are called “emergency powers”—the additional authority that the government might assume during a war or other crisis. It seemed to Debs and many other people that his oration was protected by his First Amendment right to free speech. But the US government disagreed.

By supporting opponents of the war and urging his listeners not to become cannon fodder, was Debs encouraging people to disobey a law, resist the draft, and rebel against the government? Or

### WILL THIS EMERGENCY EVER END?

During an emergency in ancient Rome, a constitutional dictator could be appointed and handed nearly absolute power, but only for up to six months. The situation is different in modern America. Presidents can declare an emergency and use laws passed by Congress to take charge of many aspects of military and civilian life.

However, emergencies here are hardly ever officially called off. In 1976, with several obsolete “emergencies” still on the books, Congress passed a law requiring presidents to request a renewal every year. Critics charge that the law has not just failed—it has given presidents an emergency blank check. As of early 2019, thirty-one states of emergency were in effect, the oldest one dating back to 1979.



was he merely using an inflammatory term—“cannon fodder”—to describe how soldiers were treated, without implying what his audience should then do? Does freedom of speech cover advocating breaking the law?

The same concerns about national security arose when America entered World War II in 1941. Two months after Japanese aircraft bombed Pearl Harbor, a US military base in Hawaii, President Franklin Delano Roosevelt banned all Americans who had Japanese ancestors from living in a large swath of the western United States. Because they were Asian, US law at the time already prevented them from ever becoming citizens, but their children, who were born in the United States, did hold citizenship. Roosevelt feared that some would be more loyal to the country of their forefathers than to the country in which they lived and, in many cases, in which they were citizens. The military rounded up more than 110,000 people of Japanese ancestry and confined them

in internment camps, which were so miserable that Justice Owen Roberts called them concentration camps.

One Japanese-American man, Fred Korematsu, refused to follow orders and was jailed. He appealed to the Supreme Court but a majority of justices ruled against him in *Korematsu v. United States*. In this case, the court agreed with the president that during wartime it is more important to prevent possible threats to national security than to allow individuals their right to freedom. Although the court didn't say so, it came close to applying a maxim from ancient Rome: “In times of war, the laws fall silent.”

The Framers defined danger as being under attack. Today we understand that peril can take many forms—not just cannons, but also technological, medical, biological, and environmental threats. How much does the Constitution control the decisions the government can make when we face a crisis? Does it speak clearly in defense of indi-

### **FRED KOREMATSU— THE AFTERMATH**

In 1988, Congress passed a Civil Liberties Act, which President Ronald Reagan signed into law. The act formally apologized for the displacement and detention of Japanese-Americans and gave \$20,000 to every person who had been displaced. President Bill Clinton bestowed the Presidential Medal of Freedom on Korematsu in 1998. And in 2011, California established January 30 as the annual Fred Korematsu Day of Civil Liberties and the Constitution.

Seven years later, the Supreme Court abruptly overruled its original decision in the case. At the same time, though, the Court gave the president extensive power over immigration.

viduals? Or does it allow public officials to do whatever they think best? Was Madison right—is the Bill of Rights merely a parchment barrier?

### **There Are Other Ways States**

States often declare a state of emergency after a natural disaster like a hurricane, or during significant civic unrest, such as rioting. The situation might involve temporarily suspending citizens' ordinary rights by, for instance, imposing a curfew. But by the mid-twentieth century, courts agreed that there is no such thing as sedition or treason against a state as there is against a country.

### **Other Countries**

War is the fundamental stress test for any democratic constitution because during such a crisis, leaders are tempted to take control and shut the people out of the process. Citizens clamor to be protected from enemies, yet they also want their freedoms protected.

Around the world, 178 countries have constitutions with emergency powers, which give the head of state the ability to suspend all or some of the people's rights. Forty-six European

countries, including Russia, have signed onto the European Convention on Human Rights.

Article 10 of this document is far more detailed than the First Amendment to our Constitution.



1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority...
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such...restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure

of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

—Article 10,  
European Convention on Human Rights



## The United States

Perhaps the Constitution should be amended to define more clearly when the country faces a true emergency and what the government can and cannot do.

## The Story Continues

Holmes later admitted that he had found the issue a tough one to decide. “I hated to have to write the *Debs* case,” he wrote to a friend. “I could not see the wisdom of pressing the cases, especially when the fighting was over.”

The Great War ended on November 11, 1918. The decision in *Debs v. United States* was handed down in 1919. The justice probably knew that Debs was no longer endangering America. Nevertheless, he didn’t change his mind, though

he added, “I think it quite possible that if I had been on the jury I should have been for acquittal.”

Debs appealed to Wilson to pardon him, but the president refused. “This man was a traitor to his country,” Wilson declared, “and he will never be pardoned during my administration.”

In 1920, Debs ran for the presidency for the fifth time. During this campaign he was imprisoned, so he was identified on ballots as Prisoner 9653. Again, over nine hundred thousand people voted for

him. The winner of the election, Warren G. Harding, a Republican, commuted Debs’s sentence on Christmas Day in 1921 and invited him to the White House.



“I have heard so damned much about you, Mr. Debs, that now I am very glad to meet you personally.”

—President Warren G. Harding







## CHAPTER 19

# At War with Bugs

## Habeas Corpus

### A “National Security Priority”

In March 2014, officials finally identified the disease that, in the previous three months, had killed fifty-nine residents of the West African country of Guinea. Ebola virus disease, a zoonosis (an illness that can leap from animals to humans) had already crossed borders, infecting people in Sierra Leone and Liberia. From there, Ebola went, well, viral. The disease spread rapidly; many people were concerned that it would also go global.

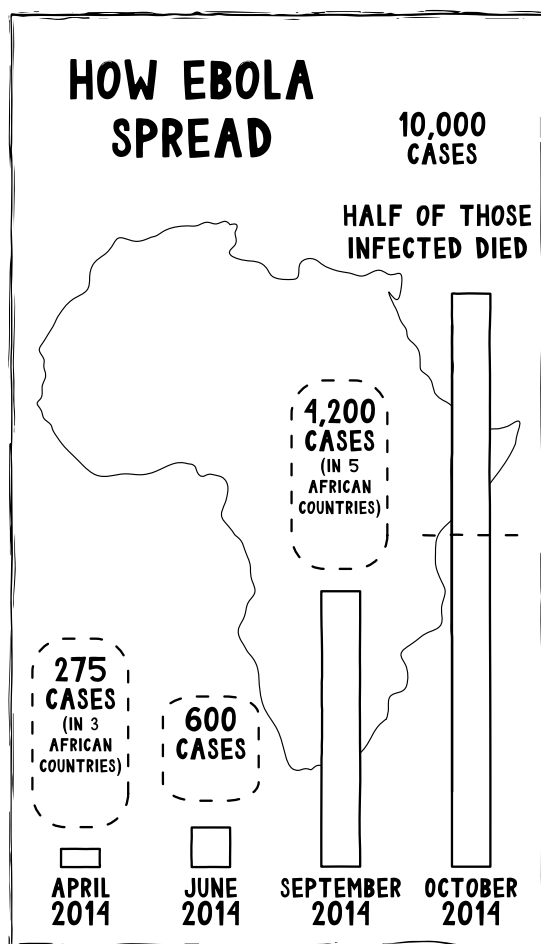
In December 2013, the first victim, a one-year-old child in Guinea, died days after he spiked a fever, vomited, and spewed black feces. Within weeks, his sister and mother, and three women

who cleaned their house suffered the same symptoms and also died. When his grandmother got sick, she sought treatment in another town. She died, as did her doctor and the people who buried her and her doctor.

In October 2014, two nurses in Texas who had cared for an American with Ebola became infected.

President Barack Obama declared Ebola a “national security priority.” Some members of Congress called for a travel ban between the United States and West Africa.

On October 24, 2014, the governors of New York, New Jersey, and Illinois—two Democrats and one Republican—issued a mandate: all



health-care workers who had contact with Ebola patients in West Africa must be quarantined for twenty-one days upon entering the United States.

At 1:00 that afternoon, Kaci Hickox landed in Newark, New Jersey. A specialist in tropical nursing who had worked for ten years in medical hotspots

around the world, she had spent the previous six weeks caring for Ebola patients in Sierra Leone. The night before she left, she'd treated a ten-year-old girl for seizures; to her dismay, the child died. Hickox's trip home took two days, and she arrived exhausted and hungry.

When she told an airport immigration officer where she had been, he donned a mask and gloves, then took her to a quarantine office. A series of people dressed in coveralls, gloves, and face shields—and one wearing a weapons belt—questioned her.

Two people took her temperature but one did so inaccurately and jumped to the conclusion that she had a fever, which can be the first sign of Ebola infection. Hickox was zipped into a hazmat suit and put into an ambulance. Eight police cars, lights flashing and sirens blaring, escorted her from the airport to a tent in a hospital parking lot, where she was ordered to stay.

A doctor took her temperature: normal. A technician tested her blood for Ebola: negative.

Dr. Thomas Frieden, the director of the Centers for Disease Control and Prevention (CDC), a federal agency, clarified that it was not necessary to quarantine Hickox. No fever: no danger. She simply needed to check her temperature twice a day for twenty-one days.

Obama protested her detention. Nevertheless, New Jersey Governor Chris Christie demanded that Hickox remain isolated in the unheated tent, wearing only paper scrubs.

After two days, Hickox hired a civil rights lawyer to argue her case against the state of New Jersey. “I feel like my basic human rights have been violated,” Hickox said, calling the state’s actions not “Constitutionally just.”

The next day, after Hickox again tested negative, Christie released her—on the condition that she proceed directly to her home in northern Maine. That state’s governor, Paul LePage, insisted that she remain there for three days and then follow the CDC’s guidelines.

On her journey from New Jersey to Maine, Hickox passed through five other states, including New York, whose governor had imposed the same quarantine restrictions as New Jersey. If he had apprehended her en route, she would have had to threaten to take him to court, too, to release her.

“I remain appalled by these home quarantine policies that have been forced upon me, even though I am in perfectly good health,” Hickox stated. “I will go to court to fight for my freedom.”



“The conditions that the state of Maine is now requiring Kaci to comply with are unconstitutional and illegal and there is no justification for the state of Maine to infringe on her liberty.”

—Norman Siegel, Kaci Hickox’s lawyer



In response, LePage took Hickox to court to enforce the quarantine. He also posted state police outside her home.

## Meanwhile, Back in 1787...

One of the rights, in addition to freedom of speech, that the Framers considered including in the Constitution was the writ of habeas corpus. This is a court order with a Latin term meaning “that you have the body.” It guarantees a person who has been imprisoned the right to produce what is called the great writ, which directs the court to either release the prisoner or explain why the government has the power to keep the person in jail.

The colonists were accustomed to the right of habeas corpus because the British had guaranteed this protection to citizens for more than a century. Some people traced it back to Magna Carta in 1215. Nevertheless, through most of the summer, the Framers did not include it in the Constitution. They considered it one of those basic rights that belonged in a Bill of Rights.

In August, they returned to the issue. Alexander Hamilton of New York argued that habeas corpus belonged in the Constitution proper. He quoted

William Blackstone, a British judge, who had said “confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten” was the worst form of tyranny. Hamilton labeled unjustified imprisonment a “fatal evil.”

Other Framers agreed with Hamilton, although they debated whether to include exceptions—circumstances under which protection against long-term imprisonment could be halted. Gouverneur Morris of Pennsylvania proposed that “Rebellion or invasion” would justify suspending the right of habeas corpus. Nearing the end of their work, the Framers agreed to incorporate habeas corpus, with Morris’s exception, into the Constitution.



“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”

—Article I, Section 9





The first Congress then passed a law giving US courts the power to issue writs—court orders—to enforce this provision. They could do so by demanding that the government justify detentions and, if it could not, then demanding release of the prisoner.

But how would this right be protected? The Framers addressed the system, called due process, in the Fifth Amendment, part of the Bill of Rights. It guaranteed individuals the right to protect their very lives, freedom, and goods through a legal process, such as by making their case in a court of law.

In 1833, the Supreme Court decided that the Fifth Amendment applied only to the national government, so the Fourteenth Amendment was added in 1868. It is identical to the Fifth Amendment, except that it applies to state governments.

But in times of rebellion or invasion, the government does not necessarily have to follow these rules. During these times the writ of habeas corpus can be

suspended, and suspects can be kept in jail indefinitely without any official having to explain why.

In the past, presidents have claimed sweeping powers when they decide “the public Safety may require it.” President Abraham Lincoln came to this conclusion shortly after the start of the Civil War.

John Merryman, a farmer and militiaman from Maryland, was accused of destroying railroad tracks, a bridge, and telegraph lines in order to prevent Union soldiers from defending Washington, DC, against rebel attacks. He was arrested and imprisoned for treason.

Lincoln suspended habeas corpus for everyone in the area. Merryman demanded the great writ. Lincoln ordered the jailer to reject all writs “most respectfully...[until] the present unhappy difficulties are at an end.”

Many Americans from both North and South objected strongly to Lincoln’s suspending the writ, arguing that only

Congress could take this drastic action. But the president responded, “the Constitution itself, is silent as to which, or who, is to exercise the power... I think the man whom, for the time, the people have, under the constitution, made the commander-in-chief, of their Army and Navy, is the man who holds the power.”

Merryman’s case went to a federal circuit court presided over by Supreme Court Chief Justice Roger B. Taney. The judge accused Lincoln of grabbing “a power which he does not possess under the Constitution.” Taney pointed out that even the English monarch couldn’t suspend habeas corpus without approval by Parliament. Consequently, the justice concluded, “the people of the United States are no longer living under a Government of laws.” Instead, he asserted, they were living in a military dictatorship. While many people agreed with Taney, others praised Lincoln for doing what was necessary to defend the union and, therefore, constitutional order.

## So What’s the Big Problem?

In addition to military situations, nowadays we face many possible emergencies that didn’t occur to the Framers. These include not only public health hazards but also cyberterrorism, telecommunications shutdowns, natural disasters, and economic crises. In these frightening instances, we might need someone who can make fast, unquestioned decisions. But it’s not clear who has the authority to do what. And shouldn’t a constitution specify or limit what that person can do?

## Really, I’m Fine. Uh-oh.

The habeas corpus clause limits the federal government’s ability to suspend habeas corpus to cases of “Rebellion or Invasion.” Can an infectious microbe be considered an invasion, like a foreign army?

Compared to other possible epidemics, Ebola is easy to address. Because victims develop a fever before they become contagious, no one, including

nurses who travel from affected countries, needs to be restrained until and unless they develop symptoms.

But other diseases, such as influenzas that have killed millions, can be spread by people who do not yet show signs of being sick. If there is an outbreak of such an epidemic, can—or should—the president order everyone in the country to stay at home, whether or not they seem sick, or confine them if they insist on leaving home?

### **That's an (Executive) Order!**

Congress has authorized the president to issue an executive order identifying particular diseases as “quarantinable.” With that, US law allows the president to order the “apprehension, detention, or conditional release of individuals... for the purpose of preventing the introduction, transmission, or spread of such communicable diseases...” If the president issues this executive order, the CDC's powers to oversee these processes kick in.

Article I, Section 8 of the Constitution, known as the Commerce Clause, gives Congress the “power...to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” In the late eighteenth century this had nothing to do with emergencies. But today, the CDC uses this clause to justify Congress's ability to delegate authority for imposing isolation and quarantine in some situations. Traffic in sick people, the CDC asserts, is the same as traffic in cars or washing machines or any other product that crosses borders.

### **The Long Arm of the State**

The authority to enforce quarantine and isolation are among the “police powers”—the protection of the public health, safety, and welfare—that states commonly carry out. States can't violate the US Constitution, but they are given wide latitude in defining such protection. States have often expanded their authority in cases of public health emergencies.

In 2001, several congressmen received envelopes in the mail that contained anthrax, a poisonous powder. In response to this biohazard threat, the CDC asked lawyers and health specialists to draft a set of laws that state legislatures could adopt before another threat loomed. They came up with the Model State Emergency Health Powers Act. So far, around forty states have introduced their own versions of this act.

As a result, various states are allowed to do some or all of the following:

- Define “public health emergency” almost however they like.
- Require pharmacists to report prescriptions to the government.
- “Commandeer or utilize any private property...necessary to cope with the emergency.” Property owners cannot claim a right to keep their land and will not necessarily be paid for their losses.

State governments might well need to take some of these actions so that health officials can curtail the spread of what they fear are epidemics. But both

liberals and conservatives have strongly criticized these broad powers that states have given themselves.

- The liberal American Civil Liberties Union pointed out that officials could enforce quarantines with no justification—just as New Jersey and Maine did regarding Ebola.

- Phyllis Schlafly, a conservative lawyer, labeled such quarantines “an unprecedented assault on the constitutional rights of the American people.”

- The Association of American Physicians and Surgeons warned that such “model” laws turn “governors into dictators.”

Furthermore, with each state developing its own laws, the country could become a crazy quilt of rules and procedures. Hickox was subject to quarantine in three of the six states she passed through but could travel freely through three others. In a full-on emergency, how would travelers know which states they could traverse and where they could be apprehended?



## **There Are Other Ways States**

Although states might try, they cannot suspend due process and round people up in times of emergency. Most states do give their governors the power to call out the National Guard under many more circumstances than just rebellion or invasion. Florida's constitution, for instance, states, "The governor shall have power to call out the militia to preserve the public peace, execute the laws of the state, suppress insurrection, or repel invasion."

Governors tend to use this power in cases of severe weather, such as hurricanes, violent demonstrations, or mass shootings, as Florida's Governor Rick Scott did in 2016.

In 2018, the governors of Texas and Arizona deployed troops along the US–Mexico border in support of President Donald J. Trump's zero-tolerance immigration policies. There was disagreement about whether the arrival of several thousand people

seeking jobs and safety in the United States amounted to an emergency, though Trump declared it to be one the following year and vetoed Congress's attempt to override it.

In other disease-related news, Jay Inslee, the governor of Washington, declared an emergency there because of a measles outbreak in 2019. Going a step further, a county executive in New York barred all children who had not been vaccinated against measles from appearing in public. Ten days later, a judge overruled the order. Then, the mayor of New York ordered everyone in four boroughs to be vaccinated. It's not clear who's in charge during medical emergencies.

## **Other Countries**

The constitution of South Africa offers a modern model of emergency powers. Here are its main features:

- Only the national legislature—not the president or the courts—can declare a state of emergency.

- The Constitution recognizes many kinds of emergencies, including “war, invasion, general insurrection, disorder, natural disaster, or other public emergency.”

- Parliament can declare a state of emergency only when two conditions are met: “(a) the life of the nation is threatened by [these circumstances] and; (b) the declaration is necessary to restore peace and order.”

- A declared state of emergency can last no more than twenty-one days. It can be extended by the lower house of Parliament, but only for three months at a time. After the first extension, at least 60 percent of the lower house must agree to another one.

- Even then, the courts can determine whether or not the emergency is valid and, if so, whether any “action taken in consequence of a declaration” is valid. That is, the courts can overrule Parliament’s declaration and any emergency laws it passes.

The South African Constitutional

Court has not had an occasion to rule on a state of emergency. But the Constitutional Court of Colombia has twice ruled emergencies declared by the president to be illegal.

### **The United States**

The Constitution would serve the country better if it were amended to spell out more clearly and in more detail the actions particular federal officials could take in times of crisis. In addition, the definition of crisis needs to include more than invasion and rebellion.

### **The Story Continues**

Several days after LePage tried to confine Hickox to her home, the legal system in Maine ruled in her favor.



“The court is fully aware of the misconceptions, misinformation, bad science, and bad information being spread from shore to shore in our country with respect to Ebola. The

court is fully aware that people are acting out of fear and that this fear is not entirely rational.”

—Judge Charles C. LaVerdiere



Hickox responded by calling it “a good day” and added that her “thoughts, prayers, and gratitude” were with her patients in West Africa. The governor replied, “I don’t trust her.”

She also won her suit against New Jersey. Rather than take payment for her pain and suffering, she asked the court to tell the state that it must allow

people who are quarantined to contest the order confining them.

In early 2017, the CDC adopted rules that allow the federal government to impose national quarantines and prohibit travel from one state to another. In 2018, the Trump administration disbanded the Global Health Security Team, which was in charge of our country’s response in case of a pandemic.

Authorities are likely to get into a free-for-all at the first uncertain sign of such an emergency.