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## EXECUTIVE UNDERREACH, IN PANDEMICS AND OTHERWISE

By David E. Pozen\* and Kim Lane Scheppele\*\*

### ABSTRACT

*Legal scholars are familiar with the problem of executive overreach, especially in emergencies. But sometimes, instead of being too audacious or extreme, a national executive's attempts to address a true threat prove far too limited and insubstantial. In this Essay, we seek to define and clarify the phenomenon of executive underreach, with special reference to the COVID-19 crisis; to outline ways in which such underreach may compromise constitutional governance and the international legal order; and to suggest a partial remedy.*

Legal scholars are familiar with the problem of executive overreach. Especially in emergencies, presidents and prime ministers may claim special powers that are then used to curb civil liberties, marginalize political opponents, and subvert the rule of law. Concerns about overreach have surfaced once again in the wake of COVID-19,<sup>1</sup> as governments across the globe have taken extreme measures to tackle the virus.

Yet in other countries, including the United States and Brazil, a very different and in some respects opposite problem has arisen, wherein the national executive's efforts to control the pandemic have been disastrously insubstantial and insufficient. Because so many public law doctrines reflect fears of overreach, President Trump's and President Bolsonaro's responses to COVID-19 have left the legal community flat-footed. In this Essay, we seek to define and clarify the phenomenon of *executive underreach*, with special reference to the COVID-19 crisis; to outline ways in which executive underreach may compromise constitutional governance and the international legal order; and to suggest a partial remedy.

### I. IDENTIFYING AND EXPLAINING EXECUTIVE UNDERREACH

When lawyers worry about executive branch responses to emergencies, they typically envision a president or prime minister who presses legal boundaries or invokes extraordinary powers to manage a claimed crisis, jeopardizing human rights and democratic norms in the process.<sup>2</sup> The Bush administration's "War on Terror" following the attacks of September

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<sup>1</sup> See, e.g., Selam Gebrekidan, *For Autocrats, and Others, Coronavirus Is a Chance to Grab Even More Power*, N.Y. TIMES (Apr. 14, 2020), at <https://www.nytimes.com/2020/03/30/world/europe/coronavirus-governments-power.html>.

<sup>2</sup> See generally OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* (2006).

11, 2001, furnishes a paradigmatic contemporary example. Such executive overreach may be difficult to resist in practice, but the problem itself is well known.

The idea of executive underreach is more novel, although versions of it have attracted attention in discrete legal contexts. U.S. administrative law scholars, for instance, have considered the circumstances under which agency “inaction” ought to trigger review by a court or other body,<sup>3</sup> while constitutional scholars have considered the circumstances under which the president may decline to enforce a validly enacted statute.<sup>4</sup> The problem of underreach, however, generalizes across legal systems and thus warrants a broader treatment.

We can define executive underreach, preliminarily, as *a national executive branch’s willful failure to address a significant public problem that the executive is legally and functionally equipped (though not necessarily legally required) to address*. This definition, unavoidably, contains multiple ambiguities. Perhaps most important, what is the baseline of appropriate action against which “failure” is to be identified? Some measure of the substantive need, legislative preference, or popular demand for executive exertion? The behaviors of similarly situated executives in other jurisdictions?

We submit that failure is best understood, for present purposes, relative to the expectations for executive action enshrined in a state’s own laws and in applicable international law norms. That is, underreach occurs when domestic and international legal sources are widely seen to authorize, if not also encourage or oblige, an executive to tackle a particular sort of problem with particular sorts of tools and yet the executive declines to do so. As a matter of positive law, an underreaching executive *could* do much more to protect the population from an imminent threat to its health, safety, or welfare. As a matter of political morality, an underreaching executive *should* do more, given the severity of the threat and the rationale behind the executive’s delegated or inherent power to confront it.<sup>5</sup>

Many executive branch omissions and abstentions do not count as underreach in our sense, even when they are intentional. In some cases, the relevant decision makers may credibly fear that they lack legal authority to act. In other cases, they may have ample authority but lack the material or institutional resources needed to make meaningful headway on a problem. “Underreach” assumes the practicability as well as the legality of “reaching” further; a minimal level of state capacity is a prerequisite. Above that threshold, underreach also implies a want of effort, not just of results. Reasonably competent and conscientious attempts to address a problem that turn out to be unsuccessful are not willful failures under our definition. Especially in conditions of uncertainty, executives must be afforded a margin of appreciation to experiment with different policies. In short, given the critical connotations of the label and the parallel literature on overreach, we propose to limit the concept of executive underreach to

<sup>3</sup> See, e.g., Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337 (2013); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653 (1985).

<sup>4</sup> See, e.g., Dawn E. Johnsen, *Presidential Non-enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7 (2000); Saikrishna Bangalore Prakash, *The Executive’s Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008).

<sup>5</sup> Our proposed definition of executive underreach thus combines descriptive and normative elements—as we believe is fitting for a term like underreach that embeds a negative judgment. Although commentators rarely take care to specify what they mean by “executive overreach,” virtually all discussions of that phenomenon appear to do likewise. See, e.g., Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1302 (2012) (associating executive overreach with presidential “aggrandize[ment]” and “sacrifice” of rights).

situations where an executive sees a significant threat coming, has access to information about what might mitigate or avert the threat along with the power to set a potentially effective plan in motion, and refuses to pursue such a plan.

So defined, executive underreach might seem to raise a puzzle: if presidents and prime ministers typically “take their political fortunes to depend upon perceptions of efficaciousness and accomplishment,”<sup>6</sup> why would they ever willfully fail to address a significant problem? Shouldn’t their electoral and reputational incentives point instead toward overreach, particularly when national security is at stake? Often that will indeed be the case. But some chief executives may be so uninformed or unhinged, or so resigned to losing office, that they ignore these incentives or fundamentally misperceive them. Other executives may be drawn to underreach for a range of more pedestrian reasons—from procedural and bureaucratic barriers to implementing their preferred policies, to a desire to shift blame and avoid responsibility, to a fear of alienating key supporters who would prefer passivity, to a political time horizon that leads them to discount future consequences of inaction, to a political program that disparages “big government” and promises to shrink it, to collective action difficulties that raise the expected cost or reduce the expected benefit of assertive action by a single state. More ominously, an incumbent may wish to capitalize on the chaos that follows from underreach and distract political or institutional rivals while he or she grabs power. Underreach, accordingly, may be a perfectly “rational” political tactic even if it disserves the public good.

Moreover, a variety of transnational trends may be increasing the risk of particularly pernicious forms of executive underreach. These trends include the degradation of liberal democratic institutions and the rise of authoritarian and proto-authoritarian leaders who trade in falsehoods and sneer at expertise;<sup>7</sup> the polarization of political blocs within numerous democracies and the opportunities this creates to adopt policies that benefit only certain constituencies;<sup>8</sup> the growth of executive power at the domestic level resulting from executive prominence in international networks and forums;<sup>9</sup> and the intensification of threats, such as climate change and internet security, that demand a global response.<sup>10</sup> National executive branches also tend to house the state’s most physically coercive institutions, including the military and security agencies. While legislative underreach and judicial underreach are also important phenomena worthy of study, the executive variant therefore warrants special scrutiny.

<sup>6</sup> David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 20 n. 78 (2014).

<sup>7</sup> See generally TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 68–119 (2018) (discussing the global spread of “democratic erosion”); V-DEM INST., DEMOCRACY REPORT 2020: AUTOCRATIZATION SURGES—RESISTANCE GROWS (2020), available at [https://www.v-dem.net/media/filer\\_public/f0/5d/f05d46d8-626f-4b20-8e4e-53d4b134bfcf/democracy\\_report\\_2020\\_low.pdf](https://www.v-dem.net/media/filer_public/f0/5d/f05d46d8-626f-4b20-8e4e-53d4b134bfcf/democracy_report_2020_low.pdf) (documenting the trend toward autocratization).

<sup>8</sup> Cf. STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 81–87 (2018) (cataloging ways in which aspiring autocrats attack the opposition through policies with disparate political impact).

<sup>9</sup> See MARTIN S. FLAHERTY, RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS 158–63 (2019) (arguing that globalization has empowered executives within their own legal systems); Kim Lane Scheppele, *Global Security Law and the Challenge to Constitutionalism After 9/11*, 2011 PUB. L. 353 (arguing that the internationalization of security law has strengthened national executives at home).

<sup>10</sup> See Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 352–54 (2011) (suggesting that the diffuse, complex, and interconnected nature of contemporary threats to social welfare increases the risk of “government underreach”).

## II. EXECUTIVE OVERREACH AND UNDERREACH IN RESPONSE TO COVID-19

The COVID-19 crisis has generated dramatic examples of executive overreach and underreach. The crisis is still unfolding as we write this in late June 2020, and we can provide only a cursory summary here. Yet by juxtaposing the approach taken thus far by Hungarian Prime Minister Viktor Orbán with the approach taken by U.S. President Donald Trump and Brazilian President Jair Bolsonaro, we can begin to illustrate what overreach and underreach look like in a pandemic—and some of the surprising affinities between the two.

Before turning to those cases, it bears emphasis that executive responses to COVID-19 do not reflect a clear pattern of either overreach or underreach in the aggregate. Most states already had on the books, prior to 2019, some combination of public health laws and emergency constitutional powers enabling their executives to cope with an outbreak of infectious disease.<sup>11</sup> And while executives around the globe have adopted policies shuttering businesses and restricting civil liberties, most of these policies—such as stay-at-home orders, curfews, limitations on large gatherings, mask-wearing requirements, and testing and tracing programs—have rested on a plausible legal as well as epidemiological basis.<sup>12</sup> No doubt many missteps have been made, but at least since COVID-19 was declared a pandemic by the World Health Organization (WHO) on March 11, 2020, the measures taken by national executives by and large appear to reflect good faith attempts to meet a genuine crisis with a proportionate response.<sup>13</sup>

Against this backdrop, Prime Minister Orbán's response to the pandemic stands out. Orbán initially followed the Hungarian Basic Law's provisions for "special legal orders" in declaring an emergency on March 11.<sup>14</sup> Under these provisions, the prime minister may issue a decree to initiate a "state of danger," but the state of danger automatically lapses after fifteen days unless parliament extends it.<sup>15</sup> Orbán then moved to eliminate this constraint. He put before parliament a new law granting him the power to issue decrees that "suspend the application of certain Acts, derogate from the provisions of Acts[,] and take other extraordinary measures" for the duration of the current state of danger, the end

<sup>11</sup> Cf. Tom Ginsburg & Mila Versteeg, *Binding the Unbound Executive: Checks and Balances in Times of Pandemic* 23 (June 9, 2020) (unpublished manuscript), available at <https://ssrn.com/abstract=3608974> (reporting that in a global study of national government responses to COVID-19, "58% of the countries surveyed thus far have relied on legislation," while "just 36% of the countries . . . declared a state of emergency").

<sup>12</sup> See *id.* at 5–6 (finding that "in many countries, checks and balances have remained robustly in place during the current health crisis," with legislatures and especially courts playing an active oversight role, and characterizing these findings as "encouraging to those worried about . . . abuse of executive power"); see also Thomas Hale, Noam Angrist, Beatriz Kira, Anna Petherick, Toby Phillips & Samuel Webster, *Variation in Government Responses to COVID-19* 10 (Blavatnik Sch. of Gov't, Working Paper 2020/032 Version 6.0, May 2020), available at <https://www.bsg.ox.ac.uk/sites/default/files/2020-05/BSG-WP-2020-032-v6.0.pdf> (finding that from March 1 to May 27, countries generally "increase[d] their policy response as their number of confirmed COVID-19 cases r[is]e," albeit with "significant variation in the rate and timing of this relationship").

<sup>13</sup> But see note 21 *infra* (noting additional examples of arguable executive underreach).

<sup>14</sup> Hungary's current constitution, also known as its fundamental or basic law, went into effect on January 1, 2012. MAGYARORSZÁG ALAPTÖRVÉNYE, English translation available at [https://njt.hu/translated/doc/TheFundamentalLawofHungary\\_20190101\\_FIN.pdf](https://njt.hu/translated/doc/TheFundamentalLawofHungary_20190101_FIN.pdf). Its detailed provisions on "special legal orders" can be found in Articles 48 through 54.

<sup>15</sup> *Id.* § 53(3).

of which would be determined by Orbán himself.<sup>16</sup> The law also cancelled scheduled elections and created new criminal offenses for stating or disseminating “any untrue fact or any misrepresented true fact” regarding the pandemic, among other innovations.<sup>17</sup> Writing itself out of the pandemic response, the Hungarian Parliament passed this law on March 29.

Prime Minister Orbán wasted no time issuing emergency decrees under the “Enabling Act,” as it came to be known. While some of these decrees echoed measures being taken by other countries, many had little to do with the pandemic.<sup>18</sup> For instance, military commanders were put in charge of every hospital and military teams were inserted into “strategic companies,” from which they exfiltrated data about employees and clients for no apparent public health reason. Other decrees punished political opponents by redirecting tax revenue away from cities where they had gained control. As criticism of the Enabling Act from European institutions, foreign governments, and the international press mounted, Orbán declared in late May that he would end the state of danger in mid-June. At that time, however, parliament passed another bill effectively giving Orbán back under a different legal rubric most of the powers he had ostensibly just relinquished.<sup>19</sup> The new law authorizes Orbán not only to issue decrees on a nearly unlimited range of subjects but also to direct the military to use force against civilians inside Hungary “up to but not including death.”<sup>20</sup> To date, Hungary offers the most blatant and alarming example of executive overreach in the COVID-19 crisis.

Meanwhile, in the two most populous countries in the Americas, executive responses to the pandemic unfolded in a starkly contrasting manner. Brazil’s President Bolsonaro and the United States’ President Trump were widely seen before COVID-19 as demagogic populists with authoritarian tendencies. One might have expected them to follow Orbán in exploiting the pandemic to demonstrate decisiveness and consolidate power. Instead, both presidents have flaunted their underreach.<sup>21</sup>

<sup>16</sup> 2020 évi XII. (III.30) törvény, a koronavírus elleni védekezésről, English translation available at <https://perma.cc/9LMR-YS3L>. The quoted language is from Section 2(1).

<sup>17</sup> *Id.* §§ 6, 337.

<sup>18</sup> For explanation of these decrees, see Gábor Halmai & Kim Lane Scheppele, *Don’t Be Fooled by Autocrats! Why Hungary’s Emergency Violates Rule of Law*, VERFASSUNGSBLOG (Apr. 22, 2020), at <https://verfassungsblog.de/dont-be-fooled-by-autocrats>; Gábor Halmai & Kim Lane Scheppele, *Orbán Is Still the Sole Judge of His Own Law*, VERFASSUNGSBLOG (Apr. 30, 2020), at <https://verfassungsblog.de/orban-is-still-the-sole-judge-of-his-own-law>.

<sup>19</sup> See Gwendoline Delbos-Corfield, *We Can’t Fall for Viktor Orbán’s Masquerade*, EURACTIV (June 19, 2020), at <https://www.euractiv.com/section/freedom-of-thought/opinion/we-cant-fall-for-viktor-orbans-masquerade>.

<sup>20</sup> See Gábor Halmai & Kim Lane Scheppele, *The Moment for Lies*, EURACTIV (June 26, 2020), at <https://www.euractiv.com/section/justice-home-affairs/opinion/the-moment-for-lies>.

<sup>21</sup> Additional democracies in which executive underreach is a plausible diagnosis since March 11 include Mexico and the United Kingdom. See, e.g., William Booth, *Boris Johnson and His Ministers Accused of Bungling Coronavirus Response, Unleashing Disaster*, WASH. POST (Apr. 20, 2020), at [https://www.washingtonpost.com/world/europe/boris-johnson-and-his-ministers-criticized-for-response-to-coronavirus-threat/2020/04/20/6e3d24e8-830a-11ea-81a3-9690c9881111\\_story.html](https://www.washingtonpost.com/world/europe/boris-johnson-and-his-ministers-criticized-for-response-to-coronavirus-threat/2020/04/20/6e3d24e8-830a-11ea-81a3-9690c9881111_story.html); Vanda Felbab-Brown, *AMLO’s Feeble Response to COVID-19 in Mexico*, BROOKINGS (Mar. 30, 2020), at <https://www.brookings.edu/blog/order-from-chaos/2020/03/30/amlos-feeble-response-to-covid-19-in-mexico>. Another notable case is that of Sweden, which controversially declined to impose a lockdown. But Sweden seems to us better classified as a good faith outlier than a willful underreacher, as its health authorities took a wide range of preventive measures—some of them mandatory, some advisory, all justified in a deliberative fashion—under constraints imposed by the Swedish constitution. See Lars Jonung, *Sweden’s Constitution Decides Its Exceptional COVID-19 Policy*, VOXEU.ORG (June 18, 2020), at <https://voxeu.org/article/sweden-s-constitution-decides-its-exceptional-covid-19-policy>.



President Trump's anemic response to COVID-19 has been well documented in the U.S. press.<sup>22</sup> Throughout the winter of 2020, Trump minimized the danger posed by the virus, declined to order the Centers for Disease Control and Prevention to prioritize it, ignored a National Security Council playbook on fighting infectious diseases, and failed to ensure adequate production and distribution of test kits, ventilators, or protective medical gear. A law called the Defense Production Act of 1950 (DPA) has long empowered U.S. presidents to order private companies to manufacture scarce supplies that are essential to the national defense, yet Trump did not utilize this law until late March, and even then in a manner that fell far short of what many experts recommended.<sup>23</sup> This reticence looks all the more remarkable in light of the Defense Department's routine use of the DPA to clear delays in the defense supply chain—an estimated 300,000 times annually in recent years.<sup>24</sup> The Trump administration likewise refused to dispense medical supplies from the national stockpile until late March, at which point it seems to have favored states with Republican governors.<sup>25</sup> Trump has additionally threatened to pull the United States out of the WHO; peddled dubious and dangerous cures; refused to wear a face mask in public; criticized governors who imposed lockdowns or followed public health advice to reopen gradually; and, by June 2020, started holding largely mask-free indoor rallies to gin up support for his reelection.

President Bolsonaro's response to COVID-19 mirrors President Trump's in numerous respects. Bolsonaro, too, has downplayed the danger posed by the virus, threatened to withdraw from the WHO, touted the efficacy of unproven treatments, made inaccurate claims about death counts, encouraged anti-lockdown protests, defied social distancing guidelines issued by his own health ministry, berated governors for closing down the economy, and pushed for a speedier reopening.<sup>26</sup> Bolsonaro also fired his health minister, whose successor resigned less than a month into the job.<sup>27</sup> Unlike Trump, Bolsonaro has faced meaningful pushback from the national congress and from the courts;<sup>28</sup> one federal judge recently ordered him to wear a face mask in Brasília or else pay a daily fine.<sup>29</sup> Like Trump, Bolsonaro nonetheless continues to deny responsibility and cultivate chaos. Confronted by

<sup>22</sup> See, e.g., Cameron Peters, *A Detailed Timeline of All the Ways Trump Failed to Respond to the Coronavirus*, VOX (June 8, 2020), at <https://www.vox.com/2020/6/8/21242003/trump-failed-coronavirus-response>.

<sup>23</sup> See Gavin Bade, *Despite Expanded DPA, Confusion Reigns over Coronavirus Industrial Response*, POLITICO (Apr. 3, 2020), at <https://www.politico.com/news/2020/04/03/trump-dpa-medical-goods-164036>.

<sup>24</sup> Zolan Kanno-Youngs & Ana Swanson, *Wartime Production Law Has Been Used Routinely, but Not with Coronavirus*, N.Y. TIMES (Mar. 31, 2020), at <https://www.nytimes.com/2020/03/31/us/politics/coronavirus-defense-production-act.html>.

<sup>25</sup> See Aaron Rupa, *How Trump Turned Ventilators into a Form of Patronage*, VOX (Apr. 10, 2020), at <https://www.vox.com/2020/4/10/21215578/trump-ventilators-coronavirus-cory-gardner-colorado-jared-polis-patronage>.

<sup>26</sup> See Omar G. Encarnación, *Brazil Is Suffering. Bolsonaro Isn't*, FOR. POL'Y (May 28, 2020), at <https://foreign-policy.com/2020/05/28/brazil-is-suffering-bolsonaro-isnt>.

<sup>27</sup> See Ernesto Londoño, *Another Health Minister in Brazil Exits amid Chaotic Coronavirus Response*, N.Y. TIMES (May 29, 2020), at <https://www.nytimes.com/2020/05/15/world/americas/brazil-health-minister-bolsonaro.html>.

<sup>28</sup> For an early account, see Emilio Peluso Neder Meyer & Thomas Bustamante, *Authoritarianism Without Emergency Powers: Brazil Under COVID-19*, VERFASSUNGSBLOG (Apr. 8, 2020), at <https://verfassungsblog.de/authoritarianism-without-emergency-powers-brazil-under-covid-19>.

<sup>29</sup> See Tom Phillips, *Brazilian Judge Tells Bolsonaro to Behave and Wear a Face Mask*, GUARDIAN (June 23, 2020), at <https://www.theguardian.com/world/2020/jun/23/brazilian-judge-tells-bolsonaro-to-behave-and-wear-a-face-mask>.

a journalist in late April about Brazil's rising death toll, Bolsonaro responded with a particularly pointed version of the underreacher's credo: "So what? . . . What do you want me to do?"<sup>30</sup>

It is all but impossible to quantify with precision the public health harms specifically attributable to Trump's or Bolsonaro's behaviors.<sup>31</sup> But it is safe to say that both countries have suffered from their administrations' underreach. As we write, infection rates continue to soar in Brazil and the United States, which lead all other countries by a factor of two and four, respectively, in number of confirmed COVID-19 cases.<sup>32</sup>

### III. THE DANGERS OF UNDERREACH

Almost by definition, executive overreach and underreach involve suboptimal responses to public problems. An overreaching executive misallocates resources by overstating a particular risk or overinvesting in a problematic solution, thereby jeopardizing people's "negative" rights and interests in being spared intrusive forms of state interference. An underreaching executive misallocates resources by understating a particular risk or underinvesting in a valuable solution, thereby jeopardizing people's "positive" rights and interests in enjoying safety, security, or other goods. What makes executive overreach a distinctive phenomenon, however, is not so much its direct costs for affected parties—who may also be harmed by countless legislative and judicial decisions—as its indirect, second- and third-order costs for state and society. As many scholars have discussed in the context of other emergencies, executive overreach can generate negative externalities ranging from the normalization of draconian measures and alarmist rhetorics to the militarization of public policy to the concentration of power in one set of institutions and the erosion of rule-of-law values.<sup>33</sup>

The potential negative externalities of executive underreach are somewhat subtler but no less profound. Because underreach may be a rational political tactic for executives, as explained above, it cannot be assumed that the problem will be limited to especially feckless leaders or that it will be self-correcting through the electoral mechanism. On the contrary, executive underreach may be self-perpetuating, insofar as it proliferates or deepens the set of public problems that will eventually require an expensive response or conditions voters to expect less from their officials. If not corrected quickly, underreach may also tend to foster cynicism and distrust of government, diminish state capacity, exacerbate inequality, and

<sup>30</sup> Tom Phillips, "So What?": Bolsonaro Shrugs Off Brazil's Rising Coronavirus Death Toll, *GUARDIAN* (Apr. 29, 2020), at <https://www.theguardian.com/world/2020/apr/29/so-what-bolsonaro-shrugs-off-brazil-rising-coronavirus-death-toll>.

<sup>31</sup> *But cf.* Sen Pei, Sasikiran Kandula & Jeffrey Shaman, Differential Effects of Intervention Timing on COVID-19 Spread in the United States (May 29, 2020) (unpublished manuscript), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7273294/pdf/nihpp-2020.05.15.20103655.pdf> (estimating that 54.0% of reported U.S. deaths from COVID-19 as of May 3, 2020, could have been avoided if social distancing and other control measures had been implemented just one week earlier).

<sup>32</sup> *Coronavirus Resource Center*, JOHNS HOPKINS UNIV., at <https://coronavirus.jhu.edu/map.html>.

<sup>33</sup> See, e.g., Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 *YALE L.J.* 1011, 1097 (2003) (noting the "strong probability that measures used by the government in emergencies will eventually seep into the legal system even after the crisis has ended"); Kim Lane Scheppele, *Exceptions That Prove the Rule: Embedding Emergency Government in Everyday Constitutional Life*, in *THE LIMITS OF CONSTITUTIONAL DEMOCRACY* 124 (Jeffrey K. Tulis & Stephen Macedo eds., 2010) (analyzing dozens of states of emergency to show that they share in common an "emergency script" damaging to constitutional governance).



stimulate dangerous or inefficient forms of self-help by private actors. More than that, executive underreach may tend to foster executive overreach by creating conditions of precarity or unrest that will then be addressed through more legally questionable means. When the problem at issue has a transnational dimension, as with pandemics and climate change, all of these harms may spill over across jurisdictions as well as administrations.

Whether and to what degree these harms will in fact materialize depends on many contextual factors. But the harms are sufficiently plausible and worrisome that, as scholars of administrative law have observed, “there is no reason to be systematically more concerned with overreaching than underreaching.”<sup>34</sup> Pushing the observation further, there is no reason to view overreach and underreach as diametrically opposed techniques of public administration. In many scenarios, they may be better conceptualized as overlapping and complementary modes of reactionary governance.

The COVID-19 crisis helps illustrate this point. Both President Trump and President Bolsonaro have defended their underreach by appealing to populist themes and attacking the legitimacy of domestic and international public health institutions. Both have tried to compensate for or distract from their failures by manipulating the truth, denouncing the media, and threatening to overreach on other margins, as by compelling states to reopen or deploying military force against protesters.<sup>35</sup> And both have contributed to cascading health and economic crises that cannot be contained within their borders, that have especially dire implications for vulnerable social groups, and that may have the effect of making authoritarian regimes such as China look good by comparison.<sup>36</sup> Their strategies share with Orbán’s the corrosive effects of vilifying responsible actors while rewarding political allies. Hence, although the previous Part highlighted the contrast between Orbán’s overreach and Trump’s and Bolsonaro’s underreach, it is equally important to recognize the ways in which all three countries’ responses to COVID-19 may be facilitating similar illiberal and anti-democratic agendas.

#### IV. AN INTERNATIONAL (PRE-)LEGAL RESPONSE?

Domestic constitutional law struggles to deal with executive underreach. The United States is especially inhospitable to legal challenges, given the degree to which its constitutional text privileges negative liberties, the judiciary’s turn away from “structural” injunctions, and the longstanding rule that executive nonenforcement decisions are presumptively unreviewable.<sup>37</sup> Other countries offer more avenues for redress. The Colombian Constitutional Court, for instance, famously ordered the government in 2008 to reconfigure the public health

<sup>34</sup> Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 235 (discussing U.S. administrative agencies).

<sup>35</sup> See, e.g., Robert Farley, *Constitutional Experts: Trump Lacks Power to “Open Up the States,”* FACTCHECK (Apr. 14, 2020), at <https://www.factcheck.org/2020/04/constitutional-experts-trump-lacks-power-to-open-up-the-states>; Darlene Superville, Tim Sullivan & Aaron Morrison, *Trump Threatens Military Force Against Protesters Nationwide*, AP NEWS (June 2, 2020), at <https://apnews.com/a2797b342b4fc509e43f404817a56aa9>.

<sup>36</sup> See Alexandra Ma, *Trump’s Incompetent Response to the US Coronavirus Outbreak Is Helping China Look Good*, BUS. INSIDER (May 9, 2020), at <https://www.businessinsider.com/trump-coronavirus-response-chaos-helps-china-propaganda-2020-5>.

<sup>37</sup> See, e.g., *Heckler v. Chaney*, 470 U.S. 821 (1985).

system,<sup>38</sup> while the German Federal Constitutional Court ordered the government earlier this year to take a series of steps to ensure the legality of a European Central Bank asset-purchase program.<sup>39</sup> But most judiciaries have preferred to avoid issuing broad structural remedies for underreach, and those they have tried have met with significant resistance.<sup>40</sup> Efforts to bring “actions for inaction” under Article 265 of the Treaty on the Functioning of the European Union have been unsuccessful to the point of futility.<sup>41</sup> In a dynamic crisis situation such as a pandemic, constitutional courts cannot be counted on to spur government action in time to head off disaster. This is even truer of slower-moving and more remedially constrained regional human rights bodies, which might be relatively sympathetic to claims of state liability for failure to ensure the right to health, the right to life, or other positive obligations.<sup>42</sup>

International law is long on possible theories for challenging underreach in a pandemic but short on effective enforcement mechanisms. Canvassing the field, Talita de Souza Dias and Antonio Coco have identified no fewer than five different sets of “due diligence” obligations—grounded in international human rights treaties, the WHO’s International Health Regulations, and the International Law Commission’s 2016 Draft Articles on Protection of Persons in the Event of Disasters, among other sources—that allegedly “require States to take all feasible measures to contain the COVID-19 outbreak and prevent the virus from spreading even further.”<sup>43</sup> Although these obligations may be met in a variety of ways, de Souza Dias and Coco conclude that “[t]he message of international law is clear: prevention is better than cure, and States must do their best to achieve that . . .”<sup>44</sup> How this message can be translated into practical results is not discussed. Yet if past is prologue, no government body is likely ever to be held legally responsible for actions or omissions that have exacerbated the pandemic.<sup>45</sup> In international law as in domestic law, norms against underreach go underenforced.

Given this state of affairs, it seems to us that correcting globally damaging underreach requires a change at the level of international legal culture prior to, and perhaps in lieu of,

<sup>38</sup> Corte Constitucional, Julio 31, 2008, Sentencia T-760/08, at <http://www.corteconstitucional.gov.co/relatoria/2008/t-760-08.htm> (in Spanish).

<sup>39</sup> BVerfG, Judgment of the Second Senate of 05 May 2020, 2 BvR 859/15, at [http://www.bverfg.de/e/rs20200505\\_2bvr085915en.html](http://www.bverfg.de/e/rs20200505_2bvr085915en.html) (in English).

<sup>40</sup> See, e.g., David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT’L L.J. 189, 199–201 (2012) (explaining that courts enforcing social rights generally have relied on “individualized” or “negative injunction” remedies, rather than more systematic measures, with little impact on bureaucratic performance).

<sup>41</sup> See Inga Dauksienė & Arvydas Budnikas, *Has the Action for Failure to Act in the European Union Lost Its Purpose?*, 7 BALTIC J. L. & POL. 209 (2014).

<sup>42</sup> Cf. Natasa Mavronicola, *Positive Obligations in Crisis*, STRASBOURG OBSERVERS (Apr. 7, 2020), at <https://strasbourgobservers.com/2020/04/07/positive-obligations-in-crisis> (discussing positive obligations under the European Convention on Human Rights potentially applicable in the pandemic).

<sup>43</sup> Talita de Souza Dias & Antonio Coco, *Part III: Due Diligence and COVID-19: States’ Duties to Prevent and Halt the Coronavirus Outbreak*, EJIL: TALK! (Mar. 25, 2020), at <https://www.ejiltalk.org/part-iii-due-diligence-and-covid-19-states-duties-to-prevent-and-halt-the-coronavirus-outbreak>.

<sup>44</sup> *Id.* Other commentators have reached similar conclusions based on the right to health specifically. See, e.g., Dainius Pūras, Judith Bueno de Mesquita, Luisa Cabal, Allan Maleche & Benjamin Mason Meier, *The Right to Health Must Guide Responses to COVID-19*, LANCET (June 20, 2020), at [https://www.thelancet.com/journals/lanct/article/PIIS0140-6736\(20\)31255-1/fulltext](https://www.thelancet.com/journals/lanct/article/PIIS0140-6736(20)31255-1/fulltext).

<sup>45</sup> See Matiangai Sirleaf, *COVID-19 and Allocating Responsibility for Pandemics*, JURIST (Mar. 31, 2020), at <https://www.jurist.org/commentary/2020/03/matiangai-sirleaf-responsibility-for-pandemics>.

changes at the level of legal substance. Because the problem of executive overreach is so familiar and salient, legal observers tend to be on the lookout for it as soon as a real or alleged emergency arises. The various international standards that have been proposed for regulating domestic states of emergency reflect this tendency by focusing almost exclusively on what must *not* be done.<sup>46</sup> As far as we can tell, all of the major civil society efforts to monitor government responses to COVID-19 have similarly highlighted the risk of overreach while ignoring or deemphasizing the risk of underreach. Consider, for example, the “COVID-19 Civic Freedom Tracker”<sup>47</sup> and the numerous compilations of states of emergency.<sup>48</sup>

Before international law can respond effectively to underreach such as President Trump’s and President Bolsonaro’s, the balance of critical scrutiny must shift in its direction. By moving beyond the negative-liberty paradigm for assessing government performance in pandemics and other emergencies—and in particular by naming and shaming underreach when it threatens severe harm to health, security, or other basic goods—advocates and academics can help lay a foundation for more successful legal and political challenges. We hope this Essay contributes to that project.

<sup>46</sup> See, e.g., Queensland Guidelines for Bodies Monitoring Respect for Human Rights During States of Emergency, *reprinted in* 85 AJIL 716 (1991); Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, *reprinted in* UN Doc. E/CN.4/1985/4.

<sup>47</sup> Int’l Ctr. for Not-for-Profit L., *COVID-19 Civic Freedom Tracker*, at <https://www.icnl.org/covid19tracker>.

<sup>48</sup> See, e.g., Ctr. for Civ. & Pol. Rts., *Tracking Tool—Impact of States of Emergencies on Civil and Political Rights*, at <http://ccprcentre.org/ccprpages/tracking-tool-impact-of-states-of-emergencies-on-civil-and-political-rights>.