

# STATE OF EMERGENCY: AN EMERGENCY CONSTITUTION REVISITED

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## ABSTRACT

*Over the last ten years, various state and local governments in the United States have declared states of emergency that raise concerns over the protection of civil liberties. In response, this Article recommends that the emergency statutes of state governments be amended to expressly protect civil liberties during emergencies. It seeks a paradigm shift from statutory suspension of rights to strong affirmation that civil liberties be preserved during emergencies and that infringements be redressed following emergencies. It also argues that judges should use a strict scrutiny standard when analyzing allegations that state and local government officials violated people's civil liberties during emergencies.*

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*[T]he crowning glory of American federalism . . . is the protection the United States Constitution gives to the private citizen against all wrongful governmental invasion of fundamental rights and freedoms.*

*When the wrongful invasion comes from the State . . . federal courts must expect to bear the primary responsibility for protecting the individual. This responsibility is not new . . . . It makes federalism workable.*

—Judge John Minor Wisdom, U.S. Court of Appeals, Fifth Circuit<sup>1</sup>

## I. INTRODUCTION: STATE OF EMERGENCY AND CIVIL LIBERTIES

### A. FROM SUSPENSION TO PRESERVATION OF CIVIL LIBERTIES

Over the last ten years, state and local governments in the United States have struggled with constitutional issues related to civil liberties in emergency situations, including the Ferguson unrest,<sup>2</sup> the Ebola epidemic,<sup>3</sup> the Boston Marathon bombing,<sup>4</sup>

1. *Dombrowski v. Pfister*, 227 F. Supp. 556, 569–71 (E.D. La. 1964) (Wisdom, J., dissenting) (footnotes omitted) (emphasis omitted) (involving a civil rights criminal prosecution regarding segregation activities).

2. See, e.g., Carrie Johnson, *Rights of Protesters, Media Misunderstood in Ferguson*, NPR (Aug. 20, 2014, 5:06 AM), <http://www.npr.org/2014/08/20/341826098/rights-of-protesters-mediamisunderstood-in-ferguson>; Elliot C. McLaughlin, *Fatal Police Shooting in Missouri Sparks Protest*, CNN (Aug. 11, 2014, 12:13 AM), <http://www.cnn.com/2014/08/10/justice/missouri-police-involved-shooting/>.

Hurricane Sandy,<sup>5</sup> the protest in Baltimore,<sup>6</sup> and Hurricane Katrina.<sup>7</sup> State and local governments' responses to emergencies<sup>8</sup>

3. See, e.g., Charles Krauthammer, Opinion, *Ebola vs. Civil Liberties*, WASH. POST (Oct. 16, 2014), [https://www.washingtonpost.com/opinions/charles-krauthammer-ebola-vs-civil-liberties/2014/10/16/5e249a28-5561-11e4-892e602188e70e9c\\_story.html](https://www.washingtonpost.com/opinions/charles-krauthammer-ebola-vs-civil-liberties/2014/10/16/5e249a28-5561-11e4-892e602188e70e9c_story.html). The Centers for Law and the Public's Health have promulgated model legislation to authorize government response to public health emergencies. See MODEL STATE EMERGENCY HEALTH POWERS ACT (CTRS. FOR LAW & THE PUBLIC'S HEALTH 2001). But see *Model State Emergency Health Powers Act*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/technology-and-liberty/model-state-emergency-health-powers-act> (criticizing the Model State Emergency Health Powers Act); Sue Blevins, *The Model State Emergency Health Powers Act: An Assault on Civil Liberties in the Name of Homeland Security*, HERITAGE FOUND. (June 10, 2002) (same).

4. See, e.g., Brian Naylor, *Boston Lockdown "Extraordinary" But Prudent, Experts Say*, NPR (April 22, 2013, 5:20 PM), <http://www.npr.org/2013/04/22/178446136/boston-lockdown-extraordinary-but-prudent-experts-say> (discussing the decision by Boston government officials to issue a "shelter in place" order during the search for the Boston Marathon bombing suspects); Matt Sledge, *Boston Bombing Poll: Americans Favor Protecting Civil Liberties Over Passing New Anti-Terrorism Policies*, HUFFINGTON POST (May 1, 2013, 4:27 PM), [http://www.huffingtonpost.com/2013/05/01/boston-bombing-poll\\_n\\_3195311.html](http://www.huffingtonpost.com/2013/05/01/boston-bombing-poll_n_3195311.html) (referring to a Time/CNN/ORC international poll finding that "Americans are more concerned that new anti-terrorism policies will excessively restrict civil liberties than that government will fail to enact strong, new anti-terrorism policies. A plurality of people, 49%, would not be willing to give up civil liberties if it were necessary to curb terrorism, compared to 40% who would.").

5. See, e.g., CONSTITUTIONAL RIGHTS CLINIC, RUTGERS SCH. OF LAW, THE PERFECT STORM: VOTING IN NEW JERSEY IN THE WAKE OF SUPERSTORM SANDY (2014), <https://law.newark.rutgers.edu/files/RutgersLawHurricaneSandyReport.pdf> (arguing that the state of New Jersey's internet and fax voting procedures hastily put in place following the storm were illegal and left votes vulnerable to on-line hacking); Thomas S. Winkowski & Daniel H. Ragsdale, *ICE-CBP Joint Message Regarding Hurricane Sandy*, U.S. DEP'T HOMELAND SECURITY, <http://www.dhs.gov/ice-cbp-joint-message-regarding-hurricane-sandy> (last updated Sept. 30, 2015) ("U.S. Immigration and Customs Enforcement's (ICE) and U.S. Customs and Border Protection's (CBP) highest priorities are to promote life-saving and life-sustaining activities, the safe evacuation of people who are leaving the impacted area, the maintenance of public order, the prevention of the loss of property to the extent possible, and the speedy recovery of the impacted region.").

6. See, e.g., Greg Botelho et al., *Baltimore Protests: Crowds, Police Stand Off after Curfew*, CNN (Apr. 29, 2015, 4:18 AM), <http://www.cnn.com/2015/04/28/us/baltimore-riots/>; Justin Fenton, *Hundreds at Baltimore Police Station Protest Over Man's Injuries During Arrest*, BALT. SUN (Apr. 18, 2015, 9:50 PM), <http://www.baltimoresun.com/news/maryland/bs-md-shooting-20150418-story.html>.

7. See generally MITCHELL F. CRUSTO, INVOLUNTARY HEROES: HURRICANE KATRINA'S IMPACT ON CIVIL LIBERTIES (2015).

8. See 42 U.S.C. § 5122(1) (2012) ("'Emergency' means any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States."); see also LA. STAT. ANN. § 29:723 (Supp. 2015) (defining "emergency" as "(a) The actual or threatened condition which

invite us to revisit the debate over the suspension<sup>9</sup> of constitutional liberties<sup>10</sup> and the need for an emergency constitution.<sup>11</sup> This Article critically analyzes the constitutionality of state governments' emergency statutes (state emergency statutes) through the lens of the emergency statute in effect in Louisiana during Hurricane Katrina<sup>12</sup> and the state and

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has been or may be created by a disaster; or (b)(i) Any natural or man-made event which results in an interruption in the delivery of utility services to any consumer of such services and which affects the safety, health, or welfare of a Louisiana resident; or (ii) Any instance in which a utility's property is damaged and such damage creates a dangerous condition to the public. (iii) Any national or state emergency, including acts of terrorism or a congressional authorization or presidential declaration pursuant to the War Powers Resolution (50 U.S.C. 1541 et seq.).”.

9. See generally Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600 (2008) (exploring the suspension of habeas corpus by the federal government); see *id.* at 694 (“In the narrow circumstances believed by the Framers to justify suspending the privilege—times of Rebellion or Invasion—a suspension offers the government some measure of latitude in its efforts to restore order and preserve its very existence.”).

10. See U.S. CONST. amends. I–X, XIV.

11. On the constitutional dimension of the government's response to emergencies, see Bruce Ackerman, Essay, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004) (provocatively arguing for a separate constitutional regime for emergencies); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1011–34 (2003) (suggesting that an extralegal approach may be necessary and desirable when facing disaster so long as public officials “openly and publicly acknowledge the nature of their actions”); Oren Gross, *Providing for the Unexpected: Constitutional Emergency Provisions*, 33 ISRAEL Y.B. ON HUM. RTS. 13 (2003) (examining how various constitutional regimes differ in their treatment of emergencies); Patrick O. Gudridge, Essay, *Remember Endo?*, 116 HARV. L. REV. 1933 (2003) (analyzing *Ex Parte Endo*, a companion case to *Korematsu*, as an expression of a view that places the constitution as the foreground in light of which executive and administrative orders must be read); Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 605–44 (2003) (comparing the “accommodation” view that relaxes the role of the constitution during emergencies with the “strict” view which states that constitutional balancing tests already account for government interests including those that emerge during emergencies and thus constitutional rules should not be relaxed under such circumstances); Lawrence H. Tribe & Patrick O. Gudridge, Essay, *The Anti-Emergency Constitution*, 113 YALE L. J. 1801 (2004) (exploring the plausibility of an emergency constitution); Mark Tushnet, *Defending Korematsu? Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273 (2003) (interpreting *Korematsu* as a vehicle that through a process of social learning will enable greater defense of civil liberties during wartime); Kathleen M. Sullivan, *Do We Have an Emergency Constitution?*, Remarks to the American Academy (Nov. 23, 2004), in BULL. AM. ACAD., Winter 2006, at 30 (remarking on how a flexible continuous constitution allows for executive discretion during emergencies under a continuum theory).

12. For the current complete version of Louisiana's emergency statute, see Louisiana Homeland Security and Emergency Assistance and Disaster Act, LA. STAT. ANN. §§ 29:721–739 (2007 & Supp. 2015). The Louisiana governor's declarations of emergency during the storm relative to the federal government's authority to act are controversial, but are not the subject matter of this Article. See SELECT BIPARTISAN

federal cases examining allegations of governmental infringements of civil liberties in New Orleans after the hurricane.<sup>13</sup> The thesis has three parts: (1) Louisiana's emergency statute<sup>14</sup> failed to adequately preserve civil liberties resulting in myriad constitutional violations in the wake of Hurricane Katrina,<sup>15</sup> (2) any allegation of governmental infractions of fundamental rights committed during Hurricane Katrina should have been strictly scrutinized by the courts; and (3) many infringements of civil liberties in New Orleans following Hurricane Katrina were wrongful and should have been redressed by the judicial system. State governors, local officials, and courts (both federal and state) continue to face emergencies and the accompanying infringement on civil liberties, including the First Amendment right to freely assemble,<sup>16</sup> the Second

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COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, A FAILURE OF INITIATIVE, H. REPT. 109-377, at 63-65 (2006) [hereinafter, HOUSE REPORT].

13. See, e.g., CRUSTO, *supra* note 7.

14. At the time of Hurricane Katrina, the emergency statute of the state of Louisiana expressly noted that any actions taken thereunder must comply with the U.S. Constitution and the state constitution. See LA. STAT. ANN. § 14:329.6 (Supp. 2015) (providing for a proclamation of a state of emergency); LA. STAT. ANN. § 29:7 (Supp. 2015) (authorizing the governor to order the state militia into active service and expressly providing that the militia's power shall be exercised "all in accordance with the laws and constitutions of Louisiana and the United States of America"); LA. STAT. ANN. § 29:736(D) (2007) ("Nothing in this Chapter shall be interpreted to diminish the rights guaranteed to all persons under the Declaration of Rights of the Louisiana Constitution or the Bill of Rights of the United States Constitution. This Chapter shall not violate Article II (Distribution of Powers), Article III (Legislative Branch), or Article V (Judicial Branch) of the Louisiana Constitution."). In summary, the relevant sections of the Louisiana emergency statute expressly provide that all emergency actions are subject to the U.S. Constitution and Louisiana Constitution. This is true of both the emergency statute in effect at the time of Hurricane Katrina, and the current version of the emergency statute. Therefore, during emergencies, there is no suspension of constitutionally protected civil liberties. See Lisa Grow Sun, *Disaster Mythology and the Law*, 96 CORNELL L. REV. 1131, 1179 n.226 (2011) ("However, nothing in the relevant provisions suggests that the governor or any other official has the power to suspend constitutional rights or to circumvent normal criminal justice or judicial procedures. Indeed, the Louisiana statute specifically states that all actions taken pursuant to its provisions should be 'in accordance with the laws and constitutions of Louisiana and the United States.'" (citing LA. STAT. ANN. § 29:7(B) (Supp. 2015))).

15. See generally Sun, *supra* note 14, at 1179-85 (citing many examples of state emergency statutes and noting, "Although many state disaster laws do authorize governors during a state of disaster to suspend state substantive or procedural rules that might interfere with disaster relief, no state emergency or disaster law explicitly authorizes a declaration of 'martial law' or otherwise authorizes the suspension federal constitutional protections during emergencies." (footnotes omitted)).

16. U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a

Amendment right to bear arms,<sup>17</sup> the Fourth, Sixth and Eighth Amendment rights against wrongful arrest, pretrial detention, and wrongful imprisonment,<sup>18</sup> and the Fifth and Fourteenth Amendment rights of due process and equal protection,<sup>19</sup> including the fundamental right to travel.<sup>20</sup> After unconstitutional infringements on these liberties, the doctrine of sovereign immunity might prevent recovery.<sup>21</sup> Overall, this Article addresses the important constitutional question: Can a state government's emergency statute suspend civil liberties provided for by the U.S. Constitution?

### **B. HURRICANE KATRINA: NEW ORLEANS AS A LENS**

The judiciary plays an essential role in protecting citizens from infringements of their constitutional rights. Reflecting on

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redress of grievances.”).

17. U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

18. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”); U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”); U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

19. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .”); U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”)

20. *See Sáenz v. Roe*, 526 U.S. 489, 498, 500 (1999) (Stevens, J.) (holding that although the “right to travel” was not explicitly mentioned in the Constitution, the concept was “firmly embedded in our jurisprudence” and included the right to travel between states); *see also* *United States v. Guest*, 383 U.S. 745, 757 (1966) (collecting cases).

21. *See Price v. United States*, 174 U.S. 373, 375–76 (1899) (“It is an axiom of our jurisprudence. The government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it.”); *see also* *Hans v. Louisiana*, 134 U.S. 1 (1890) (holding that the Eleventh Amendment reaffirmed that state governments possess sovereign immunity and are therefore generally immune from being sued in federal court without their consent).

the introductory quotation from Judge John Minor Wisdom, expounded during the emergencies of the civil rights era of the 1960s, judges should be the ultimate protectors of civil liberties.<sup>22</sup> Judges have the delicate task of balancing constitutionally-protected individual rights against the government's authority to promote the public welfare during emergencies. In deciding not to vindicate those injured by the government, judges placed the unsubstantiated needs of the government over the liberties of individuals, consciously or unconsciously.<sup>23</sup> Critically, these decisions should be evaluated from the standpoint of equity, justice, and the need to utilize "empathic dialogue" as a judicial discipline.<sup>24</sup> This Article's analysis of state emergency statutes' effect on civil liberties is an important and relatively untouched area of scholarship. It has benefited greatly from other scholarship including, but not limited to, literature on constitutional law,<sup>25</sup> civil liberties,<sup>26</sup> civil rights,<sup>27</sup> disaster law

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22. For one reflection of the pivotal role of the judiciary in protecting civil rights, see JACK BASS, *UNLIKELY HEROES: THE DRAMATIC STORY OF THE SOUTHERN JUDGES OF THE FIFTH CIRCUIT WHO TRANSLATED THE SUPREME COURT'S BROWN DECISION INTO A REVOLUTION FOR EQUALITY* (1981).

23. On the effect of judicial predispositions, see John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1 (2010) (exploring unconscious influences on judicial decision-making and implicit bias); Dan M. Kahan, Foreword, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1 (2011) (examining how the study of cultural cognition explains the current "neutrality crisis" in Supreme Court decisionmaking); Paul M. Secunda, *Cultural Cognition at Work*, 38 FLA. ST. U. L. REV. 107 (2010) (applying "cultural cognition theory" to labor and employment law and concluding that a judge's cultural background shapes the outcome of legal decisions); see also KARL LLEWELLYN, *THE BRAMBLE BUSH* 12 (1960) ("What these officials do about disputes is, to my mind, the law itself.").

24. See Mitchell F. Crusto, *Empathic Dialogue: From Formalism to Value Principles*, 65 S.M.U. L. REV. 845, 851 n.25 (2012) (defining "empathic dialogue" as "a judge's obligation to consciously make inquiry beyond professional, intellectual or personal worldviews and unconscious biases (1) to consider the experiences of others and the law's impact on the lives of everyday people; (2) to protect people from unfair outcomes, injustices; and (3) to redress those injustices especially when they result from unjust bias to achieve value principles of justice").

25. See OREN GROSS & FIONNUALA NÍ AOLÁINAW, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 35–72 (2006) (discussing emergency powers in constitutions around the world), William B. Fisch, *Emergency in the Constitutional Law of the United States*, 38 AM. J. COMP. L. SUPP. 389 (1990); Michael Cook, Note, "Get Out Now or Risk Being Taken Out by Force": *Judicial Review of State Government Emergency Power Following a Natural Disaster*, 57 CASE W. RES. L. REV. 265 (2006).

26. See generally N.Y. CIVIL LIBERTIES UNION, *UNDERSTANDING CIVIL LIBERTIES: A GUIDE FOR THE PERPLEXED* (3d ed. 2010); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565 (2003).

and policy,<sup>28</sup> the War on Terror,<sup>29</sup> and Hurricane Katrina.<sup>30</sup> This Article builds upon these sources by assessing how the concept of an emergency constitution, that is, the suspension of civil liberties during emergencies, might apply at the state, rather than the federal level.

### C. OVERVIEW

In order to assess the constitutionality of Louisiana's emergency statutes, this Article explores how federal and state courts in Louisiana adjudicated cases wherein people alleged that the government infringed their civil liberties following Hurricane Katrina. Part I introduces the need to critically assess the shortcomings of state emergency statutes that purport to suspend civil liberties during emergencies. Part II argues that during Hurricane Katrina state and local governmental officials wrongfully infringed on people's constitutionally guaranteed civil liberties and that the legal system, including the judiciary, did little to redress those wrongful infringements and failed to firmly establish the parameters of people's constitutional rights during emergencies. Part III posits a Uniform Model Preservation of Liberties during Emergencies Amendment (PLEA), designed to amend state emergency statutes in order to preserve and protect civil liberties and to redress any improper governmental infringements committed during emergencies. Part IV advances arguments in favor of amending state emergency statutes to preserve civil liberties during emergencies. Part V responds to arguments against pro-civil liberties preservation provisions in state emergency statutes. Lastly, Part VI concludes that state emergency legislation does not and cannot suspend civil liberties during emergencies, that it cannot eviscerate judicial authority when it comes to civil liberties, and that governmental statutes, policies, or actions that infringe upon the fundamental civil liberties of people during emergencies must be strictly scrutinized

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27. See, e.g., SHERYLL CASHIN, PLACE, NOT RACE: A NEW VISION OF OPPORTUNITY IN AMERICA (2015).

28. See, e.g., Jim Chen, *Modern Disaster Theory: Evaluating Disaster Law as a Portfolio of Legal Rules*, 25 EMORY INT'L L. REV. 1121 (2011); Daniel Farber, *Disaster Law and Inequality*, 25 LAW & INEQ. 297 (2007).

29. See, e.g., Kim Lane Scheppelle, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CON. L. 1001 (2004); see also *supra* note 11.

30. See, e.g., D'ANN R. PENNER & KEITH C. FERDINAND, OVERCOMING KATRINA, AFRICAN AMERICAN VOICES FROM THE CRESCENT CITY AND BEYOND (2009); BILL QUIGLEY, STORMS STILL RAGING: KATRINA, NEW ORLEANS AND SOCIAL JUSTICE (2008).

by the courts.

## II. PRESUMPTION OF SUSPENSION

Louisiana's emergency response to Hurricane Katrina, along with the courts' responses to alleged infringements of people's civil liberties, highlight deficiencies in state emergency statutes relative to civil liberties. During and following Hurricane Katrina, all levels of government assumed that civil liberties, along with other normal rules and regulations, could be functionally, although not legally, suspended. The governor, the legislature, mayors, other local officials, and many federal and state judges, for the most part, accepted the functional suspension of the Constitution.

### A. DECLARATIONS OF EMERGENCIES AND INFRINGEMENTS ON LIBERTIES

#### 1. FAILURE OF THE NEW ORLEANS LEVEES

The emergency in New Orleans occurred when the city's flood protection levees failed to hold back the storm surge created by Hurricane Katrina. On Monday, August 29, 2005, the hurricane veered east, saving the city from a direct hit.<sup>31</sup> Unfortunately, the hurricane's winds created a storm surge and resulted in the failure of the city's levees.<sup>32</sup> In a matter of hours, eighty percent of New Orleans was covered by floodwaters.<sup>33</sup> The people who were spared from the hurricane then needed to survive the floodwaters, which, in some places, were at a depth of twelve feet or higher.<sup>34</sup> Hundreds of people were killed and

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31. Kim Ann Zimmermann, *Hurricane Katrina: Facts, Damage & Aftermath*, LIVE SCI. (Aug. 27, 2015, 12:47 PM), <http://www.livescience.com/22522-hurricane-katrina-facts.html>.

32. *Hurricane Katrina Statistics Fast Facts*, CNN, <http://www.cnn.com/2013/08/23/us/hurricane-katrina-statistics-fast-facts/> (last updated Aug. 24, 2015, 11:30 AM).

33. *Id.*; see also Dan Swenson, *Flash Flood: Hurricane Katrina's Inundation of New Orleans*, TIMES-PICAYUNE (New Orleans), <http://www.nola.com/katrina/graphics/flashflood/swf> (last visited Jan. 26, 2016) (a series of interactive graphics showing the progression of the flooding of New Orleans from August 29 through September 1, 2005 as well as the depth of the floodwaters by neighborhood); see also Ivor van Heerden, *How New Orleans Flooded*, NOVA (Nov. 22, 2005), <http://www.pbs.org/wgbh/nova/earth/how-new-orleans-flooded.html> (describing the sequence of events through satellite photography).

34. FED. EMERGENCY MGMT. AGENCY, FEMA 549, HURRICANE KATRINA IN THE GULF COAST: MITIGATION ASSESSMENT TEAM REPORT, BUILDING PERFORMANCE OBSERVATIONS, RECOMMENDATIONS, AND TECHNICAL GUIDANCE ch. 8, at 3 (2006), [http://www.fema.gov/media-library-data/20130726-1520-20490-4521/549\\_ch8.pdf](http://www.fema.gov/media-library-data/20130726-1520-20490-4521/549_ch8.pdf).

hundreds of thousands left homeless.<sup>35</sup> Those who died in Louisiana from Hurricane Katrina represented many racial and ethnic backgrounds.<sup>36</sup> Where cause of death could be determined, 387 people drowned, while 246 people died from severe trauma or injuries.<sup>37</sup> Overall, among Hurricane Katrina-related deaths in New Orleans, “black men age 75 and older were significantly overrepresented.”<sup>38</sup>

## 2. THE GOVERNMENT PREPARES FOR THE WORST

On Friday, August 26, 2005, Hurricane Katrina was an imminent threat to New Orleans. It was a Category 2 hurricane with 105 mile-per-hour winds and expected to grow into a Category 3 storm.<sup>39</sup> Louisiana’s governor, Kathleen Blanco,<sup>40</sup> and New Orleans’s mayor, C. Ray Nagin,<sup>41</sup> along with the officials from neighboring communities and states, gave the hurricane their utmost attention.<sup>42</sup> Specifically, Governor Blanco declared a

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35. See RICHARD D. KNABB ET AL., NAT’L HURRICANE CTR., TROPICAL CYCLONE REPORT: HURRICANE KATRINA, 23–30 August 2005, at 11, 13 (2005, *updated* 2011) <http://www.nhc.noaa.gov/data/tcr/AL122055-Katrina.pdf> (noting that 1,833 people died and \$108 billion worth of property was damaged); Joan Brunkard et al., *Hurricane Katrina Deaths, Louisiana, 2005*, 2 DISASTER MED. & PUB. HEALTH 215 (providing a demographic breakdown of those killed by the hurricane).

36. See Brunkard et al., *supra* note 35, at 216–17 (reporting that of the 971 victims of Hurricane Katrina who died in Louisiana, 512 were men, 498 were black, 408 were white, eighteen were Hispanic, four were Asian, four were American Indian, and one was other).

37. See *id.* at 217.

38. *Id.*

39. See Elena DeLozier & Nina Kamp, *Hurricane Katrina Timeline*, BROOKINGS INST., <http://www.brookings.edu/fp/projects/homeland/katrinatimeline.pdf> (last visited Dec. 18, 2015); *Timeline Hurricane Katrina History 2005 New Orleans*, PEOPLE HIST., <http://www.thepeoplehistory.com/timelines/hurricanekatrina.html> (last visited Jan. 6, 2016).

40. For a brief biography, see *Kathleen Babineaux Blanco*, OFF. GOVERNOR, <http://www.blancogovernor.com/index.cfm?md=pagebuilder&tmp=home&cpid=2> (last visited Oct. 15, 2015).

41. For a brief biography, see Andrew Stevens, *Ray Nagin: Former Mayor of New Orleans*, CITY MAYORS, [http://www.citymayors.com/mayors/new\\_orleans\\_mayor.html](http://www.citymayors.com/mayors/new_orleans_mayor.html) (last visited Oct. 15, 2015). In 2014, Mayor Nagin was accused of taking over \$200,000 in bribes during his time in office and, after a highly publicized trial, was convicted of twenty counts of bribery; Nagin is currently serving a ten-year sentence in federal prison. Andy Grimm, *Ray Nagin Arrives at Federal Prison in Texas*, *Station Reports*, NOLA.COM/TIMES-PICAYUNE (Sept. 8, 2014, 12:20 PM), [http://www.nola.com/crime/index.ssf/2014/09/ray\\_nagin\\_arrives\\_at\\_federal\\_p.htm](http://www.nola.com/crime/index.ssf/2014/09/ray_nagin_arrives_at_federal_p.htm); Matt Smith & Deanna Hackney, *Ex-New Orleans Mayor Ray Nagin Guilty After Courtroom “Belly Flop,”* CNN (Feb. 14, 2014, 9:38 AM), <http://www.cnn.com/2014/02/12/justice/louisiana-nagin-convicted/>.

42. For descriptions of government responses to Hurricane Katrina, see HOUSE

state of emergency in Louisiana, effectively suspending normal rules and laws without making any reference to the protection of civil liberties under the Constitution.<sup>43</sup>

The next day, Saturday, August 27, disaster was imminent; weather experts predicted that Hurricane Katrina would directly hit New Orleans on Sunday, August 28 as a Category 5 hurricane with over 150 mile-per-hour winds.<sup>44</sup> Anticipating the worst, Governor Blanco requested that President Bush declare a federal state of emergency for Louisiana, making federal assistance, including federal troops, available to the state.<sup>45</sup> On Saturday,

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REPORT, *supra* note 12; U.S. SENATE COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, HURRICANE KATRINA: A NATION STILL UNPREPARED, S. REP. NO. 109-322 (2006) [hereinafter SENATE REPORT]; FRANCES FRAGOS TOWNSEND ET AL., WHITE HOUSE, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED (2006) [hereinafter WHITE HOUSE REPORT]; Willie Drye, *Hurricane Katrina: The Essential Time Line*, NAT'L GEOGRAPHIC NEWS (Sept. 14, 2005), [http://news.nationalgeographic.com/news/2005/09/0914\\_050914\\_katrina\\_timeline.html](http://news.nationalgeographic.com/news/2005/09/0914_050914_katrina_timeline.html); Dallas Tonsager, *Five Years after Katrina, USDA Continues to Assist Gulf Residents*, WHITE HOUSE (Aug. 25, 2010, 6:13 PM), <http://www.whitehouse.gov/blog/2010/08/25/five-years-after-hurricanes-rita-and-katrina-usda-continues-assist-gulf-residents>. *But see* DAVID M. DRIESEN ET AL., CTR. FOR PROGRESSIVE REFORM, PUB. NO. 512, AN UNNATURAL DISASTER: THE AFTERMATH OF HURRICANE KATRINA 34 (2005), [http://www.progressivereform.org/articles/Unnatural\\_Disaster\\_512.pdf](http://www.progressivereform.org/articles/Unnatural_Disaster_512.pdf) (“Natural disasters . . . strike unpredictably and at random, affecting black and white, rich and poor, sick and well alike. However, as Katrina has laid bare, the harms are not visited randomly or equally in our society.”).

43. *See* State of Emergency—Hurricane Katrina, Proclamation No. 48 KBB 2005 (citing LA. STAT. ANN. § 29:724 (Supp. 2015)) [http://www.nola.com/katrina/blancodocs/Executive\\_Orders\\_through\\_9%5B1%5D\\_16\\_05.pdf](http://www.nola.com/katrina/blancodocs/Executive_Orders_through_9%5B1%5D_16_05.pdf) (proclaiming a state of emergency to run from August 26 to September 25, 2005); LA. STAT. ANN. § 29:724(D)(1) (Supp. 2015) (authorizing the governor to “[s]uspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency”); *see also supra* note 14 (discussing additional provisions of the Louisiana Homeland Security and Emergency Assistance and Disaster Act); *cf. Martial Law Clarified*, TIMES-PICAYUNE (New Orleans) (Aug. 30, 2005, 9:02 PM, *updated* July 16, 2010, 11:09 AM) [http://www.nola.com/katrina/index.ssf/2005/08/martial\\_law\\_clarified.html](http://www.nola.com/katrina/index.ssf/2005/08/martial_law_clarified.html) (“But even though no martial law exists, Gov. Kathleen Blanco’s declaration of a State of Emergency [on August 26, 2005] gives authorities widespread latitude to suspend civil liberties as they try to restore order and bring victims to safety.”).

44. *See* KNABB ET AL., *supra* note 35, at 3.

45. Letter from Kathleen Babineaux Blanco, Governor of Louisiana, to President of the United States (Aug. 28, 2005), <https://web.archive.org/web/20111006041534/http://jjic.gov.state.la.us/Disaster%20Relief%20Request.pdf>. [hereinafter Letter from Governor Blanco]. A presidential emergency declaration grants a state government access to federal “financial, personnel, services, logistical, and technical assistance” resources, triggers emergency provisions, including “Social Security Act Section 1135 waivers and statutory immunities and liability protections,” and eases the

August 27, at 1:00 p.m., Mayor Nagin also declared a state of emergency and ordered a *voluntary* evacuation of the city, pursuant to state law.<sup>46</sup> Hurricane Katrina's winds and torrential rains were predicted to create a storm surge that would overtop New Orleans's levees and lead to substantial flooding.<sup>47</sup> On Sunday, August 28, with heightened concern for public safety, Mayor Nagin issued a *mandatory* evacuation of New Orleans at 9:30 a.m. and imposed a 6:00 p.m. curfew throughout the city.<sup>48</sup>

Under the mandatory evacuation order, nearly a million people left New Orleans and its suburbs for safety.<sup>49</sup> Some evacuees faced traffic-jammed highways as they left the city.<sup>50</sup> In spite of the mandatory evacuation order, nearly 100,000 people remained in New Orleans during the storm.<sup>51</sup> Some people stayed because they thought being in their homes or hotels would be sufficient to protect them from the storm.<sup>52</sup> Others lacked

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“regulatory requirements on individuals, organizations, and state and local governments.” *Emergency Declarations and Authorities: Fact Sheet*, ASS'N ST. & TERRITORIAL HEALTH OFFICIALS, <http://www.astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Emergency-Authority-and-Immunity-Toolkit/Emergency-Declarations-and-Authorities-Fact-Sheet/> (last visited Oct. 15, 2015). Parenthetically, in a September 26, 2005 U.S. House subcommittee hearing, Representative Stephen Buyer (R-IN) inquired as to why President Bush's declaration of a state of emergency on August 27, 2005 did not include the coastal parishes of Orleans, Jefferson, and Plaquemines. Judd Legum, *Brown Falsely Smears Blanco Under Oath*, THINK PROGRESS (Sept. 27, 2005 6:07 PM), <http://thinkprogress.org/politics/2005/08/27/1992/brown-false-smear/>. In response, then FEMA chief Michael Brown blamed Louisiana Governor Blanco for failing to include those parishes in her initial request for aid. *Id.* After the hearing, Blanco released a copy of her letter, which showed that she had requested assistance for “all the southeastern parishes including the City of New Orleans,” specifically naming fourteen parishes, including Jefferson, Orleans and Plaquemines, in which major damage was anticipated. *Id.*

46. See SENATE REPORT, *supra* note 42, at 68.

47. See *id.* at 68–69.

48. See *id.* at 68; *New Orleans Curfew*, TIMES-PICAYUNE (New Orleans) (Aug. 28, 2005, 12:00 PM), [http://www.nola.com/katrina/index.ssf/2005/08/new\\_orleans\\_curfew.html](http://www.nola.com/katrina/index.ssf/2005/08/new_orleans_curfew.html); see also *Reynolds v. City of New Orleans*, Civ. No. 05-4158 (E.D. La. Oct. 10, 2006), <https://casetext.com/case/reynolds-v-city-of-new-orleans> (granting summary judgment for defendants for forcing plaintiff to evacuate pursuant to the mayor's mandatory evacuation orders of August 28 and September 6), *aff'd*, 272 F. App'x 331 (5th Cir. 2008).

49. *New Orleans Braces for Monster Hurricane*, CNN (Aug. 29, 2005, 12:10 AM), <http://www.cnn.com/2005/WEATHER/08/28/hurricane.katrina/> (reporting the estimate of Mayor Ray Nagin).

50. DRIESEN ET AL., *supra* note 42, at 26.

51. SENATE REPORT, *supra* note 42 at 243.

52. See Rose Palazzio, *Why Do Some Stay, Despite Evacuation Orders?*, ABC NEWS (Aug. 30, 2005), <http://abcnews.go.com/Health/Katrina/story?id=1080873>.

money, transportation, or shelter outside the city.<sup>53</sup> Still others stayed to care for immobile family members.<sup>54</sup> Of those who remained in the city, some looked to the government to provide them with safe shelter from the powerful winds—including approximately 20,000 people who sought refuge in the Superdome, which was ill-equipped to handle their needs.<sup>55</sup> No matter their reasons, all who stayed put their own lives and the lives of first responders at risk.

### 3. UNPRECEDENTED FLOODING PARALYZES THE GOVERNMENT

On the morning of Monday, August 29, Hurricane Katrina changed its path, making landfall fifty miles southeast of New Orleans.<sup>56</sup> Despite avoiding a direct hit, New Orleans still suffered from the hurricane's massive size and strength.<sup>57</sup> Its hurricane-force winds ripped holes in the roof of the Superdome, exposing thousands of people to the elements.<sup>58</sup> The hurricane's winds also created an unprecedented storm surge of water throughout the region, compromising the federally built flood protection levees located throughout the city.<sup>59</sup> The storm surge breached or overtopped several levees, flooding eighty percent of the city, including the Lower Ninth Ward.<sup>60</sup>

Due to rising floodwaters, the nearly 100,000 people stranded in the city were at great risk of drowning.<sup>61</sup> They sought higher ground in houses, apartment buildings, hotels, hospitals, and nursing homes; some struggled to survive on streets and on bridges.<sup>62</sup> Those who faced high floodwaters in

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53. See DRIESEN ET AL., *supra* note 42, at 26.

54. See, e.g., CRUSTO, *supra* note 7, at 153–55.

55. See DRIESEN ET AL., *supra* note 42, at 26.

56. See KNABB ET AL., *supra* note 35, at 3.

57. See, e.g., Doug MacCash & James O'Byrne, *After the Mighty Storm Came the Rising Water*, TIMES-PICAYUNE (New Orleans) (Aug. 30, 2005, 10:15 AM, updated Aug. 3, 2015, 12:48 PM), [http://www.nola.com/katrina/2005/08/after\\_the\\_mighty\\_storm\\_came\\_th.html](http://www.nola.com/katrina/2005/08/after_the_mighty_storm_came_th.html).

58. See DRIESEN ET AL., *supra* note 42, at 27.

59. CHRISTINE F. ANDERSEN ET AL., AM. SOC'Y OF CIVIL ENG'RS, THE NEW ORLEANS HURRICANE PROTECTION SYSTEM: WHAT WENT WRONG AND WHY 20–32 (2007), <http://ascelibrary.org/doi/pdf/10.1061/9780784408933> (describing the levee system constructed by the United States Army Corps of Engineers and its failure when exposed to Hurricane Katrina's storm surge).

60. See *id.* at 28–32; see also Swenson, *supra* note 33 (graphically depicting the flooding via flash animation).

61. See, e.g., MacCash & O'Byrne, *supra* note 57 (describing residents chased from their homes by rising water).

62. See, e.g., *id.*

their homes crawled up into the attics and chopped through their rooftops to avoid drowning.<sup>63</sup> Tragically, hundreds of people drowned in the floodwaters.<sup>64</sup> Others were left without running water, electricity, sanitation facilities, and hope of rescue.<sup>65</sup>

For the following two days, Tuesday and Wednesday, August 30 and 31, the government was paralyzed and in apparent disbelief over the extent of the disaster.<sup>66</sup> On Thursday, September 1, in utter frustration over the lack of rescue, Mayor Nagin demanded that the federal government send more buses to assist the rescue effort.<sup>67</sup> There were now some 30,000 people in the Superdome awaiting the delivery of supplies and evacuation, with some 20,000 in the same predicament at the Convention Center, and thousands more stranded throughout the city.<sup>68</sup> On the same day, U.S. Homeland Security Secretary Michael Chertoff insisted that aid was on the way and stated that the Federal Emergency Management Agency (FEMA) and other federal agencies had done a “magnificent job.”<sup>69</sup> On national television, President Bush described the horrors he saw from an aerial tour of New Orleans: people sitting on rooftops, waving flags, pleading to be evacuated from their rooftops by boat or helicopter.<sup>70</sup> Stating that the government’s first priority would be to save lives, the president assured the public that the National Guardsmen would provide food and water, evacuate those facing imminent death, and maintain law and order.<sup>71</sup>

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63. HOUSE REPORT, *supra* note 12, at 116.

64. Brunkard et al., *supra* note 35, at 217.

65. See, e.g., SENATE REPORT, *supra* note 42, at 69–70 (describing these conditions at the Superdome).

66. See *id.* at 69–70 (outlining the slow government response over these two days).

67. *New Orleans Mayor Lashes out at Feds*, CNN (Sept. 2, 2005, 2:41 PM), <http://www.cnn.com/2005/US/09/02/katrina.nagin/>.

68. HOUSE REPORT, *supra* note 12, at 116 (reporting that the Coast Guard rescued over 33,000 people and that the Louisiana National Guard rescued another 25,000); Julian Borger, “*It Reminds Me of Baghdad in the Worst of Times*”, *GUARDIAN* (Sept. 2, 2005, 7:05 PM), <http://www.theguardian.com/world/2005/sep/03/hurricanekatrina.usa6>; Nate Scott, *Refuge of Last Resort: Five Days Inside the Superdome for Hurricane Katrina*, *USA TODAY* (Aug. 24, 2015, 1:09 pm), <http://ftw.usatoday.com/2015/08/refuge-of-last-resort-five-days-inside-the-superdome-for-hurricane-katrina>.

69. *New Orleans Mayor Lashes out at Feds*, *supra* note 67.

70. See *Exclusive: Bush Says Focus Must Be on People*, *ABC NEWS* <http://abcnews.go.com/GMA/HurricaneKatrina/story?id=1086311> (last visited Oct. 15, 2015).

71. *Id.*

#### 4. MISLEADING REPORTS OF LOOTING AND CIVIL UNREST

The government's failed rescue efforts were negatively affected by widespread reports of looting and shootings. Shortly after the levees were breached, the national news media reported widespread looting and other lawless behavior throughout the city.<sup>72</sup> Many of these reports were later debunked as "little more than figments of frightened imaginations."<sup>73</sup> At one point, a report surfaced that a military helicopter was shot at; this report and others like it forced officials to temporarily suspend rescue efforts.<sup>74</sup> The city's police department reported that two hundred officers had deserted their jobs and that two of them had committed suicide. This shortage of law enforcement personnel greatly affected the government's ability to respond to the crisis.<sup>75</sup>

Initially, Mayor Nagin asserted that most of the apparent looters were actually people desperate to find food and water to

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72. See, e.g., Felicity Barringer & Jere Longman, *Police and Owners Begin to Challenge Looters*, N.Y. TIMES (Sept. 1, 2005), <http://www.nytimes.com/2005/09/01/national/nationalspecial/01lawless.html>; *New Orleans Shelters to Be Evacuated*, CNN (Aug. 31, 2005, 1:01 AM), <http://www.cnn.com/2005/WEATHER/08/30/katrina/index.html>.

73. See Jim Dwyer & Christopher Drew, *Fear Exceeded Crime's Reality in New Orleans*, N.Y. TIMES (Sept. 29, 2005), <http://www.nytimes.com/2005/09/29/us/nationalspecial/fear-exceeded-crimes-reality-in-new-orleans.html>; see also LAUREN BARSKY ET AL., NATURAL HAZARDS CTR., QUICK RESPONSE REP. NO. 184, DISASTER REALITIES IN THE AFTERMATH OF HURRICANE KATRINA: REVISITING THE LOOTING MYTH 4–5 (2006) ("[F]indings imply that the media was not always accurate in reports of looting made in the postdisaster time period."); Andrew Gumbel, *After the Storm, US Media Held to Account for Exaggerated Tales of Katrina Chaos*, INDEPENDENT (Sept. 28, 2005) ("One month after the storm, however, it appears that few, if any, of the most lurid reports breathlessly repeated on American television, echoed in official statements, and duly reported in many of the world's newspapers, had any basis in fact."); Brian Thevenot & Gordon Russell, *Reports of Anarchy at the Superdome Overstated*, SEATTLE TIMES (Sept. 26, 2005, 12:00 AM) ("The vast majority of reported atrocities committed by evacuees—mass murder, rapes and beatings—have turned out to be false, or at least unsupported by any evidence . . .").

74. See SENATE REPORT, *supra* note 42, at 11; Dwyer & Drew, *supra* note 73; Thevenot & Russell, *supra* note 73. But see *Relief Workers Confront 'Urban Warfare'*, CNN (Sept. 1, 2005, 11:36 PM), <http://www.cnn.com/2005/WEATHER/09/01/katrina.impact/> (reporting that FEMA denied suspending rescue operations, although it "conceded there had been isolated incidents where security has become an issue").

75. See Joseph B. Treaster, *Law Officers, Overwhelmed, Are Quitting the Force*, N.Y. TIMES (Sept. 4, 2005), <http://www.nytimes.com/2005/09/04/us/nationalspecial/law-officers-overwhelmed-are-quitting-the-force.html>; Keith O'Brien, *Amid Horror, Two Officers Commit Suicide*, BOS. GLOBE (Sept. 5, 2005), [http://www.boston.com/news/nation/articles/2005/09/05/amid\\_horror\\_2\\_officers\\_commit\\_suicide/](http://www.boston.com/news/nation/articles/2005/09/05/amid_horror_2_officers_commit_suicide/).

survive.<sup>76</sup> Faced with an increasing number of official and unofficial reports of lawlessness, on Wednesday, August 31, Mayor Nagin ordered the city's police department to ignore their search-and-rescue efforts and to focus instead on arresting looters.<sup>77</sup> He reportedly referenced "martial law" and stated that police officers were not required to uphold civil rights and *Miranda* rights when stopping looters.<sup>78</sup> A police officer later alleged that Deputy Police Chief Reilly ordered officers to shoot looters without question.<sup>79</sup>

In fact, subsequent reports show that several looting cases involved people scavenging to survive in the face of the failed government rescue efforts.<sup>80</sup> For example, Merlene Maten, a seventy-three-year-old church deaconess, great-grandmother, and diabetic, was accused of looting sausage at a convenience store.<sup>81</sup> In the week following the hurricane, out of the eleven civilians who were reportedly shot by police officers, just one of them was actually a looter.<sup>82</sup> When things calmed down, the news reporters apologized and announced that their reports of extensive looting and civil unrest were based on hysteria.<sup>83</sup> In light of these admissions, the government's focus on protecting property, rather than on saving lives, was especially questionable.<sup>84</sup>

## 5. GOVERNMENT OVERREACTION CREATED HARMS

With the unprecedented flooding by polluted water, New

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76. *New Orleans Mayor Lashes out at Feds*, *supra* note 67.

77. *New Orleans Mayor Orders Looting Crackdown*, NBC NEWS (Sept. 1, 2005, 7:25 AM), [http://www.nbcnews.com/id/9063708/ns/us\\_news-katrina\\_the\\_long\\_road\\_back/t/new-orleans-mayor-orders-looting-crackdown/](http://www.nbcnews.com/id/9063708/ns/us_news-katrina_the_long_road_back/t/new-orleans-mayor-orders-looting-crackdown/).

78. *See* Sun, *supra* note 14, at 179.

79. WDSU News, *NOPD Officer Says They Were Ordered to Shoot Looters After Katrina*, YOUTUBE (Aug. 24, 2010), <https://www.youtube.com/watch?v=gfvDbzpr8ec>.

80. *See* BARSKY ET AL., *supra* note 73 (describing varying perspectives on the degree to which looting was motivated by necessity or opportunism).

81. The Abrams Report, *Grandma Accused of Looting Makes Her Case*, NBC NEWS (Sept. 20, 2005, 11:08 AM), [http://www.nbcnews.com/id/9408059/ns/msnbc-the\\_abrams\\_report/t/grandma-accused-looting-make](http://www.nbcnews.com/id/9408059/ns/msnbc-the_abrams_report/t/grandma-accused-looting-make).

82. *NOPD Says Feds Probing Order to Shoot Looters*, WWLTV.COM (Aug. 27, 2010, 2:31 PM), <http://www.wwltv.com/news/NOPD-says-feds-probing-order-to-shoot-looters-101661588.html>.

83. *See supra* note 73; Steve Classen, "Reporters Gone Wild": *Reporters and Their Critics on Hurricane Katrina, Gender, Race & Place*, E-MEDIA STUDIES (2009), <https://journals.dartmouth.edu/cgi-bin/WebObjects/Journals.woa/1/xmlpage/4/article/336> (discussing journalists' apologies).

84. *See* Sun, *supra* note 14, at 1135 ("[T]he disaster myth of widespread looting and violence . . . engendered a legal and policy structure that frames natural disaster response too much as a law enforcement, rather than a humanitarian, problem.").

Orleans quickly became a public health and safety crisis. On Tuesday, September 6, over a week after the levees failed, the mayor ordered a second mandatory evacuation of all non-essential, non-government personnel.<sup>85</sup> He also ordered law enforcement officers to forcibly remove anyone who refused to leave their homes.<sup>86</sup> This state of emergency, functioning as martial law, remained in effect for nearly a month.<sup>87</sup>

Regrettably, the government's reaction to the post-hurricane flooding and apparent lawlessness infringed on the civil liberties of many people, even costing some their lives.<sup>88</sup> Many actions taken by the government harmed Hurricane Katrina survivors more than the hurricane itself. Take, for example, the instance in which the police mistakenly gunned down Ronald Madison, a man with intellectual disabilities, and then arrested and falsely imprisoned his brother, Lance, after planting a gun on him to conceal their own wrongdoings.<sup>89</sup> In another incident, Patricia Konie, a middle-aged, white woman spent months in prison without compensation because she would not surrender a small caliber pistol to the police officers who confiscated it without a warrant.<sup>90</sup> Kimberly and Cynthia Cantwell, working-class, white parents, tried to reach the safety of their own home on the other side of a bridge. They were denied safe crossing by police officers who stuck a shotgun in their children's faces.<sup>91</sup>

There is also the plight of women, including jazz and funk singer Charmaine Neville, who were sexually assaulted and who were virtually ignored when they tried to report the crimes they had suffered. In fact, government officials, after inflating

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85. See *Reynolds v. City of New Orleans*, 272 F. App'x 331, 334 (5th Cir. 2008) (per curiam), <http://www.ca5.uscourts.gov/opinions%5Cunpub%5C06/06-31122.0.wpd.pdf> (quoting the text of Mayor Nagin's order in full).

86. See *id.* Residents of the city's West Bank, an area that had not flooded, were not to be forcibly removed. *Id.*

87. See *id.* 334–35 (noting that Reynolds left his home on September 1, 2005 and that “[b]y September 27, 2005, all Plaintiffs had been allowed reasonable access to their properties”).

88. See generally CRUSTO, *supra* note 7.

89. See *id.* at 19–35; see also RONNIE GREENE, SHOTS ON THE BRIDGE: POLICE VIOLENCE AND COVER-UP IN THE WAKE OF KATRINA (2015); The Attorney Depot, *Raw Video of NOPD Danziger Bridge Shooting!*, YOUTUBE (Dec. 5, 2013), <https://www.youtube.com/watch?v=JwFEWcqwIvI> (reposting a WDSU News broadcast).

90. See CRUSTO, *supra* note 7, at 41–50.

91. See *id.* at 55–68. Police from an adjacent parish barricaded the bridge and prevented pedestrians from crossing because they falsely believed the evacuees would loot the adjacent community. *Id.* at 59–60.

incidents of rape following the hurricane, later repeatedly understated these crimes, as if they had not occurred.<sup>92</sup> Abusing its emergency authority, the state of Louisiana wrongfully terminated the employment of New Orleans's public school teachers, including Gwendolyn Adams, and stripped them of their pensions without meaningful due process.<sup>93</sup> Tourists Paul Kunkel and Robie Waganfeald were imprisoned and held in dangerous conditions in a criminal justice system that failed to grant them a timely hearing.<sup>94</sup>

Unbelievably, the government left elderly people stranded to die in public view, including disabled ninety-one-year-old Ethel Freeman, paralyzed seventy-nine-year-old Clementine Eleby, and chronically ill seventy-seven-year-old John J. DeLuca; it later denied responsibility for these deaths and refused to compensate their families.<sup>95</sup> The government's misconduct did not stop there. Years prior to Hurricane Katrina, the government had induced people, including Leatrice Roberts, to buy houses on a hazardous waste landfill, and then, after Katrina, when those houses were flooded, the government denied those very same homeowners

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92. See CRUSTO, *supra* note 7, at 73–88.

93. See *id.* at 109–30; Campbell Robertson, *Louisiana Illegally Fired 7,500 Teachers, Judge Rules*, N.Y. TIMES (June 21, 2012), <http://www.nytimes.com/2012/06/22/education/louisiana-illegally-fired-7500-teachers-judge-rules.html> (reporting the teachers' initial victory in district court). *But see* *Oliver v. Orleans Parish Sch. Bd.*, 2014-0329, 2014-0330, pp. 36–37 (La. 10/31/14); 156 So. 3d 596, 620–21 (holding that the government was permitted to terminate more than 7,500 New Orleans public school teachers and employees with no practical, prior notice and was not required to offer the terminated workers an opportunity to apply for jobs when they became available), *cert. denied*, 135 S. Ct. 2135 (2015).

94. See CRUSTO, *supra* note 7, at 139–48; *see also* *Waganfeald v. City of New Orleans*, 674 F.3d 475, 478–82 (5th Cir. 2012) (holding that the men imprisoned and denied a hearing for over thirty days while being held in dangerous conditions did not have their rights violated and were not entitled to compensation); NAT'L PRISON PROJECT, AM. CIVIL LIBERTIES UNION ET AL., *ABANDONED AND ABUSED: ORLEANS PARISH PRISONERS IN THE WAKE OF HURRICANE KATRINA* 88 (2006), [https://www.aclu.org/sites/default/files/field\\_document/oppreport20060809.pdf](https://www.aclu.org/sites/default/files/field_document/oppreport20060809.pdf) (describing the suffering of inmates left behind in the Orleans Parish Prison as Hurricane Katrina made landfall).

95. See CRUSTO, *supra* note 7, at 153–68; *see also* *Freeman v. U.S. Dep't of Homeland Sec.*, Nos. 06-4846, 06-5689, 06-5696, 2007 WL 1296206, at \*1–5 (E.D. La. Apr. 30, 2007) (holding that the government has no duty to rescue and that sovereign immunity exempted the government from wrongful death liability), *aff'd sub nom.* *Freeman v. United States*, 556 F.3d 326 (5th Cir. 2009); Martha Carr, *Judge Dismisses Wrongful Death Claims from Katrina*, NOLA.COM/TIMES-PICAYUNE (May 2, 2007, 1:41 PM, updated May 5, 2007, 3:53 PM), [http://blog.nola.com/times-picayune/2007/05/judge\\_dismisses\\_wrongful\\_death.html](http://blog.nola.com/times-picayune/2007/05/judge_dismisses_wrongful_death.html) (describing the facts of the case and the district court decision).

governmental disaster relief because their properties were built on toxic land.<sup>96</sup> The government's role of promoting the general welfare does not explain the harms that people suffered from the government's active and inactive responses to the crisis. After the government created these injuries, it did little or nothing to remedy them. The injured found it necessary to seek help from the legal system, particularly the judiciary, to redress their injuries.

## B. JUDICIAL COMITY IN FAVOR OF STATE'S AUTHORITY

To illustrate the types of injuries that accompanied the storm and its aftermath and the courts' responses to people's allegations of wrongdoing, this sub-section briefly describes how officers responded to Mayor Nagin's order to forcibly evacuate the city and the New Orleans police superintendent's order to confiscate privately-owned firearms. Specifically, the sub-section explores how officers infringed upon Patricia Konie's Second Amendment right to bear arms.<sup>97</sup>

### 1. STATE TAKES CONTROL

On Tuesday, August 30, 2005, the New Orleans, inundated by floodwaters, quickly became disorderly.<sup>98</sup> Reports of widespread criminal behavior, most of which were inaccurate or unsubstantiated, created a sense of chaos.<sup>99</sup> The national news reported that some criminals were shooting at the police, showing news footage of police helicopters being fired upon.<sup>100</sup> Armed vigilantes took the law into their own hands and shot at unarmed, innocent citizens.<sup>101</sup> Faced with real and imagined

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96. See CRUSTO, *supra* note 7, at 93–101. Despite knowing the building site was a contaminated former landfill, the government induced low-income tenants to move there by promising them home ownership through a lease-to-own program. *Id.* at 93, 97–98.

97. See *id.* at 41–50.

98. See, e.g., DeLozier & Kamp, *supra* note 39, at 3.

99. See *supra* note 73.

100. *Aftermath of Hurricane Katrina; New Orleans Mayor Pleads for Help; Race and Class Affecting the Crisis?*, CNN, <http://transcripts.cnn.com/TRANSCRIPTS/0509/01/sitroom.02.html> (last visited Jan. 6, 2016) (transcript of Sept. 1, 2005 television broadcast).

101. See A.C. Thompson, *Post-Katrina, White Vigilantes Shot African-Americans with Impunity*, PROPUBLICA (Dec. 19, 2008, 12:30 PM), <http://www.propublica.org/article/post-katrina-white-vigilantes-shot-african-americans-with-impunity> (“[C]onvinced that crime would arrive with the human exodus . . . [a] newly formed militia, a loose band of about 15 to 30 residents, most of them men, all of them white, was looking for thieves, outlaws or, as one member put it, anyone who simply ‘didn’t

threats to public safety, law enforcement officers were under stress.<sup>102</sup>

In response, the government took action to re-establish law and order. On Friday, September 2, 2005, Governor Blanco announced a military occupation of New Orleans, stating “They have M-16s and they are locked and loaded. These troops know how to shoot and kill and they are more than willing to do so if necessary and I expect they will.”<sup>103</sup> The following Tuesday, September 6, Mayor Nagin declared a state of emergency and ordered a second mandatory evacuation of the city.<sup>104</sup>

## 2. CONFISCATION OF FIREARMS

Under state and local orders, New Orleans police superintendent announced plans to secure the city. He ordered law enforcement officers to confiscate all civilian-held firearms:<sup>105</sup> “No civilians in New Orleans [would] be allowed to carry pistols, shotguns or other firearms. ‘Only law enforcement [would be] allowed to have weapons.’”<sup>106</sup> Pursuant to this order, officers, some equipped with assault rifles, went from house to house without warrants, searching for and seizing people’s registered and unregistered firearms.<sup>107</sup> Law enforcement officers assumed

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belong.”); see also Brendan McCarthy & A.C. Thompson, *Federal Hate Crime Charges Filed in Katrina Shooting of African-Americans*, TIMES-PICAYUNE (New Orleans) (July 16, 2010, 6:56 AM, updated July 30, 2010, 1:29 PM), [http://www.nola.com/crime/index.ssf/2010/07/federal\\_hate\\_crime\\_charges\\_fil.html](http://www.nola.com/crime/index.ssf/2010/07/federal_hate_crime_charges_fil.html); A.C. Thompson, *Katrina’s Hidden Race War*, NATION (Dec. 17, 2008), <http://www.thenation.com/article/katrinahas-hidden-race-war>.

102. Richard H. Weisler et al., Commentary, *Mental Health and Recovery in the Gulf Coast after Hurricanes Katrina and Rita*, 296 J. AM. MED. ASS’N 585, 585–86 (2005), <http://cretsemhd.psych.ucla.edu/nola/volunteer/FoundationReports/jama2.pdf>.

103. Thomas Jennings & Seth Bomse, *Law & Disorder*, FRONTLINE (PBS television broadcast, Aug. 25, 2010), <http://www.pbs.org/wgbh/pages/frontline/law-disorder/etc/script.html>; *New Orleans Rocked by Huge Blasts*, BBC NEWS (Sept. 2, 2005), <http://news.bbc.co.uk/2/hi/americas/4207202.stm>; *Troops Told “Shoot to Kill” in New Orleans*, ABC NEWS ONLINE (Sept. 2, 2005, 1:25 AM), <http://www.abc.net.au/cgi-bin/common/printfriendly.pl?http://www.abc.net.au/news/newsitems/200509/s1451906.htm>.

104. See *Reynolds v. City of New Orleans*, 272 F. App’x 331, 334 (5th Cir. 2008) (per curiam) (reporting the text of Mayor Nagin’s order).

105. Alex Berenson & John M. Broder, *Police Begin Seizing Guns of Civilians*, N.Y. TIMES (Sept. 9, 2005), <http://www.nytimes.com/2005/09/09/us/nationalspecial/police-begin-seizing-guns-of-civilians.html>.

106. *Id.* (quoting Edwin P. Compass III, the New Orleans police superintendent).

107. *Id.*; see also Stephen P. Halbrook, “Only Law Enforcement Will Be Allowed to Have Guns”: *Hurricane Katrina and the New Orleans Firearm Confiscations*, 18 GEO. MASON U. C.R.L.J. 339 (2008) (describing the suit by the National Rifle Association

they had the authority to use force to confiscate firearms, if and when necessary.<sup>108</sup> During these searches for weapons, officers also carried out the mayor's mandatory order to forcibly evacuate anyone who remained in the city.<sup>109</sup> Both actions, mandatory evacuation and confiscation of firearms, were taken without court order or court supervision.

Unfortunately, the government had no effective way to notify people of the mandatory evacuation and firearm confiscation orders, as the hurricane had destroyed electrical lines, radio and cell towers, and mass communications.<sup>110</sup> When law enforcement officers showed up unannounced at people's homes, demanding that they vacate the city and turn over their firearms, many people were reluctant and some were openly defiant.<sup>111</sup>

### 3. HOME INVASION

On September 8, 2005, Patricia Konie was in her home, untouched by the hurricane and unresponsive to the mayor's mandatory evacuation order and the police superintendent's gun confiscation order.<sup>112</sup> She was being interviewed by news reporters from a San Francisco television station and the *London Times*, about being a Hurricane Katrina survivor.<sup>113</sup> Thanks to

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to stop the seizures and require the government to return seized firearms).

108. Alex Berenson & Sewell Chan, *New Orleans Officials Grapple With How To Pull Out Residents*, N.Y. TIMES (Sept. 8, 2005), <http://www.nytimes.com/2005/09/08/us/nationalspecial/new-orleans-officials-grapplewith-how-to-pull-out-residents.html>.

109. *Id.* Apparently, Police Superintendent Eddie Compass's order did not apply to hundreds of security guards hired by businesses and wealthier individuals to protect property, some of whom openly carried M-16s and other assault rifles. See Berenson & Broder, *supra* note 105.

110. See John Wohlstetter, *Katrina: The Sounds of Communications Silence*, BANDWIDTH, Sept. 2005, at 1, 2–3 (2005), <http://www.discovery.org/scripts/viewDB/filesDB-download.php?command=download&id=540> (describing the telecommunications breakdown following Hurricane Katrina).

111. See *Mayor Orders New Orleans Evacuation*, GUARDIAN (Sept. 7, 2005), <http://www.theguardian.com/world/2005/sep/07/hurricanekatrina.usa7> (describing reluctant and defiant attitudes on the part of forced evacuees).

112. Amended and Restated Petition at 4, *Konie v. Louisiana*, No. 05-6310 (E.D. La. Oct. 18, 2007), 2007 WL 4544375.

113. *Hurricane Katrina Survivor Victimized Again: Injuries from Police Use of Excessive Force Required Surgery*, U.S. NEWSWIRE (Dec. 14, 2005), <http://newswire.vlex.com/vid/survivor-victimized-excessive-surgery-193058999> [hereinafter *Hurricane Katrina Survivor Victimized*]; see also GORDON HUTCHINSON & TODD MASSON, *THE GREAT NEW ORLEANS GUN GRAB, DESCENT INTO ANARCHY* 79–88 (2007). This book is not published by a mainstream publisher and its description in some places contradicts the account in this Article.

social media, what happened next was preserved on video.<sup>114</sup>

While Patricia was speaking with the news reporters, she heard a series of bangs on the front and back doors of her home.<sup>115</sup> When she opened the front door, she was greeted by four police officers who entered her home.<sup>116</sup> One officer was from the California Highway Patrol (CHIP), deployed to New Orleans to assist with law enforcement.<sup>117</sup> The officers asked Patricia how she planned to respond to looters.<sup>118</sup> Calmly, Patricia replied that she was all right, showing the officers that she had ample supplies and had her dogs for protection.<sup>119</sup>

Patricia told the officers that she had a gun and, in a non-threatening gesture, she openly showed the police officers what appeared to be an old, unused, small caliber revolver.<sup>120</sup> When she showed the gun to the officers, the CHIP police officer approached Patricia in her kitchen, suddenly lowered his body, and slammed the fifty-eight-year-old into the kitchen corner.<sup>121</sup> In the process, the officer fractured Patricia's shoulder and badly bruised her arm.<sup>122</sup>

Patricia screamed and begged the officer to release her.<sup>123</sup> Instead, the officers subdued her, and forced her to stand.<sup>124</sup> The officers forcibly escorted Patricia away from her home.<sup>125</sup> For several hours, the police held Patricia in custody and eventually arrested her for failing to surrender her firearm.<sup>126</sup> She was then flown out to South Carolina, where she was put in jail.<sup>127</sup>

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114. Pacificcoast, *Hurricane Katrina Firearms Confiscation*, YOUTUBE (June 17, 2006), <https://www.youtube.com/watch?v=B1Qx0cTze0M> (reposting a portion of a FoxNews story); see also NRA, *The Untold Story of Gun Confiscation After Katrina*, YOUTUBE (Mar. 7, 2007), <https://www.youtube.com/watch?v=taU9d26wT4>.

115. NRA, *supra* note 114.

116. See Amended and Restated Petition, *supra* note 112 at 4.

117. *Id.*

118. See HUTCHINSON & MASSON, *supra* note 113, at 84.

119. See *id.* at 84; see also NRA, *supra* note 114; Pacificcoast, *supra* note 114.

120. HUTCHINSON & MASSON, *supra* note 113, at 84; NRA, *supra* note 114; Pacificcoast, *supra* note 114.

121. See Amended and Restated Petition, *supra* note 112, at 4; HUTCHINSON & MASSON, *supra* note 113, at 84; Pacificcoast, *supra* note 114.

122. See *Konie v. Louisiana*, No. 05-6310, 2010 WL 812980 (E.D. La. Feb. 25, 2010).

123. See HUTCHINSON & MASSON, *supra* note 113, at 84.

124. *Id.* at 84–85.

125. NRA, *supra* note 114; Pacificcoast, *supra* note 114.

126. *Hurricane Katrina Survivor Victimized*, *supra* note 113.

127. *Id.*

On October 13, 2005, a month after the incident, Patricia was permitted to return to New Orleans.<sup>128</sup> She was distraught by what had happened to her. Her physical injuries required her to undergo extensive physical therapy.<sup>129</sup> At the time of the incident, Patricia had no idea why the police had come to her home, inquired about her safety, or that they wanted to take her small revolver.<sup>130</sup> Had the officers patiently explained their reasons for intruding into her home, things might have turned out differently. They were there for a particular purpose beyond seeing that she evacuated from the city—and that purpose was to seek and confiscate her gun. The officers did not produce evidence of their authority to take her gun or to force her from her home. Furthermore, the government never returned her gun, and only God knows what became of her pet dogs.

#### 4. SEEKING REDRESS

On November 30, 2005, three months after the police confiscated her gun and arrested her, Patricia Konie filed a lawsuit in federal court, alleging several civil rights violations, including the illegal confiscation of her handgun, wrongful arrest, and false imprisonment in South Carolina.<sup>131</sup> Her lawsuit focused on the CHIP police officer's use of excessive force and on the government's violation of her Second Amendment right to bear arms.<sup>132</sup> In response to her claims, the New Orleans public officials argued that under the state emergency statute, their actions were authorized and they were immune from prosecution.<sup>133</sup>

Patricia's case did not go well—the court ruled that the two newspaper articles written by a person who was not an eyewitness to the incident were inadmissible as hearsay evidence.<sup>134</sup> Over four years after the incident, the court

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128. Complaint and Demand for Trial by Jury at 2, *Konie v. Louisiana*, No. 05-6310 (E.D. La. Nov. 30, 2005).

129. *Hurricane Katrina Survivor Victimized*, *supra* note 113.

130. *Id.*

131. Complaint and Demand for Trial by Jury, *supra* note 128; *see also* *Konie v. Louisiana*, No. 05-6310, slip op. at 1–6 (E.D. La. Apr. 15, 2011) (summarizing the procedural history of the entire case).

132. Complaint and Demand for Trial by Jury, *supra* note 128, at 2–3.

133. Answer to Plaintiffs' First Supplemental and Amending Complaint at 2–3, *Konie v. Louisiana*, No. 05-6310 (E.D. La. July 17, 2006); Memorandum in Support of Defendants' Motion to Dismiss at 5–10, No. 05-6310 (E.D. La. Sept. 7, 2007), 2007 WL 2981443.

134. *Konie v. Louisiana*, No. 05-6310, 2009 WL 3756567, at \*1, \*3 (E.D. La. Nov. 5,

dismissed several of Patricia's claims.<sup>135</sup> However, the court did allow Patricia's claims against the CHIP police officer to go forward.<sup>136</sup> Without much of a record, on May 12, 2011, the court dismissed the remainder of Patricia's claims.<sup>137</sup> Shortly thereafter, on July 21, 2011, the United States Fifth Circuit dismissed her appeal for failure to pay a filing fee.<sup>138</sup>

This case is one of many examples of how courts failed to aggressively redress government infringements of people's civil liberties following Hurricane Katrina. In a related case, the government escaped from liability even though its negligence was found to be the cause of harm because the court applied the doctrine of sovereign immunity.<sup>139</sup>

### C. THE SOVEREIGN IMMUNITY BARRIER TO COMPENSATION

Unlike the rest of us, the government can escape legal liability for harms it causes through the doctrine of sovereign immunity. This doctrine dictates that the government cannot be sued unless the government gives a claimant permission to sue.<sup>140</sup> The rationale behind the doctrine is that, because the government or the sovereign has absolute authority, the courts have no power to compel the sovereign to be bound by the courts

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2009). The rule against hearsay generally prohibits the use of another person's statement as equivalent to testimony by the witness to the fact unless one of the exceptions to the rule is satisfied. FED. R. EVID. 801.

135. *Konie v. Louisiana*, No. 05-6310, 2010 WL 812980 (E.D. La. Feb. 25, 2010) (dismissing every claim except the claim of excessive force against the officer who slammed Ms. Konie against the wall of her home).

136. *Id.* at \*2.

137. *Konie v. Louisiana*, No. 05-6310 (E.D. La. May 11, 2011); *see also Konie v. Louisiana*, No. 05-6310 (E.D. La. Apr. 15, 2011) (giving reasons for dismissal).

138. *Konie v. Louisiana*, No. 11-30577 (5th Cir. July 21, 2011) (dismissing the appeal for failure to "timely pay docketing fee"). Even though Ms. Konie's case did not bear fruit, another lawsuit regarding the scope of the Second Amendment right to bear arms did. *Nat'l Rifle Ass'n of Am., Inc. v. Nagin*, No. 05-20,000, 2005 WL 2428840, at \*1 (E.D. La. Sept. 23, 2005). On September 23, 2005, weeks after the Patricia Konie incident, two pro-gun rights groups, the National Rifle Association (NRA) and the Second Amendment Foundation (SAF), entered into a consent decree with law enforcement in Orleans and St. Tammany Parishes that enjoined law enforcement from confiscating firearms and ordered their return to their owners. *Id.*

139. *Infra* note 145–175.

140. *See Price v. United States*, 174 U.S. 373, 375–76 (1899) ("It is an axiom of our jurisprudence. The government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it."); *Gray v. Bell*, 712 F.2d 490, 507 (D.C. Cir. 1983) (holding that intentional torts committed by law enforcement officers may nevertheless fall within the discretionary function exception of the Federal Tort Claims Act).

without the government's permission.<sup>141</sup> The United States Supreme Court has determined that as the state and federal governments are sovereign entities, it is "inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."<sup>142</sup>

In order to give consent, Congress must provide a clear legislative statement of its intent to abrogate its immunity and do so pursuant to a valid constitutional power.<sup>143</sup> Preserving the concept of sovereign immunity and its broad application, Congress has enacted limited exceptions. The Federal Tort Claims Act (FTCA) is the principal means by which the federal government has waived the protection afforded by sovereign immunity.<sup>144</sup> Nevertheless, the applicability of the doctrine of sovereign immunity was tested in an important Hurricane Katrina case.

In *In re Katrina Canal Breaches Consolidated Litigation*,<sup>145</sup> a federal district court held that the federal government negligently maintained and operated levees causing substantial damage in New Orleans.<sup>146</sup> More than four hundred property owners filed lawsuits, many of which were consolidated, and argued before the federal district court in New Orleans.<sup>147</sup> One group of plaintiffs filed claims against the Army Corps of Engineers under the FTCA.<sup>148</sup>

On November 18, 2009, following a nineteen-day trial, the district court found in favor of some of the named plaintiffs.<sup>149</sup> Specifically, the court found that neither the immunity provision

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141. See *Gray*, 712 F.2d at 510–11; *Sovereign Immunity*, WEX, [https://www.law.cornell.edu/wex/sovereign\\_immunity](https://www.law.cornell.edu/wex/sovereign_immunity) (last visited Oct. 15 2015).

142. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1995) (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)); see also *Alden v. Maine*, 527 U.S. 706 (1999) (holding that sovereign immunity extends to suits against a state by that state's citizens in state court); *United States v. Lee*, 106 U.S. 196 (1882) (tracing the history of sovereign immunity from English common law and noting that Congress must consent for the United States to be sued).

143. *Seminole Tribe*, 517 U.S. at 55.

144. 28 U.S.C. § 1346(b) (2012).

145. *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644 (E.D. La. 2009), *aff'd in part, rev'd in part sub nom. In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012).

146. *Id.* at 672.

147. *In re Katrina Canal Breaches Litig.*, 673 F.3d 381, 385–86 (5th Cir.), *opinion withdrawn on reh'g*, 696 F.3d 436 (5th Cir. 2012).

148. *In re Katrina*, 647 F. Supp. 2d at 646–47.

149. *Id.* at 646–47, 736.

of the Flood Control Act of 1928 (FCA)<sup>150</sup> nor the discretionary-function exception (DFE) to the FTCA protected the federal government from suit.<sup>151</sup> After ruling on this point of law, the court found that some of the plaintiffs proved that their damages arising from Hurricane Katrina could be substantially attributable to the Corps's negligence, in failing to appreciate certain hydrological risks related to armoring the Mississippi River Gulf Outlet Canal (MRGO).<sup>152</sup> The court awarded just under \$720,000 to three plaintiffs, opening the door to recovery for hundreds of New Orleans residents similarly affected.<sup>153</sup> Consequently, if the decision remained unchallenged, the federal government would have been liable for billions of dollars in flood damages to New Orleans residents and businesses.

Given that a large amount of money was at stake, the federal government predictably appealed the district court's finding of liability to the U.S. Fifth Circuit.<sup>154</sup> Inexplicably, the same appellate panel ruled on the case twice.<sup>155</sup> Initially, on March 2, 2012, the Fifth Circuit affirmed the district court's ruling, holding that the federal government *was* liable for the damages caused by defective levees in New Orleans.<sup>156</sup> Relative to the FCA-immunity defense, the Fifth Circuit relied on a narrow holding that the MRGO "cannot be characterized as flood-control activity."<sup>157</sup> Thus, because the FCA is applicable only to flood-control activity, the FCA did not immunize the federal government against liability for flooding caused by the MRGO.<sup>158</sup> This Fifth Circuit decision was a major victory for the plaintiff-

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150. 33 U.S.C. § 702c (2012).

151. *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644, 699 (E.D. La. 2009) (finding that neither section provided the government with immunity in this case), *aff'd in part, rev'd in part sub nom. In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012).

152. *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644, 676, 699 (E.D. La. 2009) (finding the Corps negligent in failing to construct adequate armoring or foreshore protection.), *aff'd in part, rev'd in part sub nom. In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012).

153. *Id.* at 736 (finding the Corps negligent in failing to construct adequate armoring or foreshore protection.).

154. *See In re Katrina Canal Breaches Litig.*, 673 F.3d 381, 386 (5th Cir.), *opinion withdrawn on reh'g*, 696 F.3d 436 (5th Cir. 2012).

155. *In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 441 (5th Cir. 2012).

156. *In re Katrina*, 673 F.3d at 386; *see also* Michael B. Gerrard, *Hurricane Katrina Decision Highlights Liability for Decaying Infrastructure*, N.Y. L.J., May 10, 2012, at 1 (describing implications of the decision on federal, state, and municipal agencies).

157. *In re Katrina*, 673 F.3d at 387.

158. *Id.*

survivors of Hurricane Katrina. But this was not the end of the story. Not deterred by the Fifth Circuit's opinion in the plaintiffs' favor, the federal government filed a petition for rehearing en banc, requesting that the Fifth Circuit reconsider its decision.<sup>159</sup>

On September 24, 2012, less than six months after the initial decision, the same panel of Fifth Circuit judges granted the government's petition for a rehearing en banc.<sup>160</sup> Instead of the entire bank of Fifth Circuit judges rehearing the case, the same three-judge appellate panel treated the en banc petition as a petition for rehearing and withdrew its initial March 2, 2012 ruling.<sup>161</sup> The same panel reversed its prior decision and, in an opinion written by the same judge who wrote the first decision, granted the government immunity from liability.<sup>162</sup> The new ruling agreed that the FCA did not immunize the government against liability from the flooding.<sup>163</sup> However, this time, the Fifth Circuit held that the DFE did apply and "completely insulate[d] the government from liability."<sup>164</sup> The court explained, "there is ample record evidence indicating the public-policy character of the Corps's various decisions contributing to the delay in armoring Reach 2."<sup>165</sup> This was a complete reversal of its earlier finding.<sup>166</sup>

The Fifth Circuit held that the Corps's decisions regarding how to protect the MRGO from flooding were *discretionary* decisions because it elected to use other types of flood protection instead of foreshore protection.<sup>167</sup> Although the court in one

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159. Corrected Petition of the United States for Rehearing En Banc at 1, *In re Katrina Canal Breaches Litig.*, 673 F.3d 381 (5th Cir. 2012) (Nos. 10-30249, 11-30808).

160. *In re Katrina*, 696 F.3d at 441; see Willis Hon, *5th Circuit Reverses Itself on Hurricane Katrina Liability Lawsuit*, COLUM. J. ENVTL. L. (Apr. 22, 2013), [http://www.columbiaenvironmentallaw.org/assets/Hon-MACRO-final-4222013\\_PO\\_ST\\_.pdf](http://www.columbiaenvironmentallaw.org/assets/Hon-MACRO-final-4222013_PO_ST_.pdf); Robert Verchick, *Fifth Circuit's Reversal on Katrina Litigation Leaves Flood Victims Gasping for Air*, CTR. FOR PROGRESSIVE REFORM (Sept. 30, 2012), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=08E62277-9773-4CA1-85E69FD4E5843072>.

161. *In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 441 (5th Cir. 2012).

162. *Id.*

163. *Id.* at 444–48.

164. *Id.* at 454.

165. *Id.* at 451. Reach 2 refers to a particular section of the MRGO.

166. See *In re Katrina Canal Breaches Litig.*, 673 F.3d 381, 394 (5th Cir. 2012) ("The . . . plaintiffs and *amici* point to ample record evidence indicating that policy played no role in the government's decision to delay armoring MRGO."), *opinion withdrawn on reh'g*, 696 F.3d 436 (5th Cir. 2012).

167. *In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 451 (5th Cir. 2012). Thus,

breath considered that this type of protection “may well have been optimal,” in the next, it dismissed this fact as “hindsight,” giving it no weight at all.<sup>168</sup> It only noted that the Corps was immune because it considered several reports and studies and made a discretionary decision.<sup>169</sup> Both the original withdrawn opinion and the replacement opinion use exactly the same language to discuss the National Environmental Policy Act (NEPA) provisions, which according to the later opinion, provided discretion.<sup>170</sup> In both cases, the court found that at most the Corps abused its discretion and that this was immunized by the DFE.<sup>171</sup> Thus, this is not a point upon which the panel is in disagreement with itself.

Additionally, while the Fifth Circuit originally found that there was “ample record evidence” indicating that there was no public policy aspect of the Corps’s decision to insufficiently armor the MRGO,<sup>172</sup> on rehearing the court found that this same “ample” evidence showed that the Corps’s decision was entirely grounded in policy decisions.<sup>173</sup> Significantly, the court failed to explain how it reached its reversal—leaving the plaintiffs guessing why they were now refused the compensation which they deserved and which had been previously granted to them. On appeal for the second time, the Fifth Circuit decided that sovereign immunity applied and so the federal government was not liable for the damages and lives lost in New Orleans due to the failure of defective federal levees.<sup>174</sup>

In a final attempt to obtain redress, various plaintiffs in the *Katrina Canal Breaches Litigation* filed a petition for writ of certiorari in the U.S. Supreme Court on March 7, 2013. On June 24, 2013, the U.S. Supreme Court denied writ.<sup>175</sup> This practically

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the court again used sovereign immunity doctrine to immunize the government from liability for its wrongdoing. *Id.*

168. *In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 451 (5th Cir. 2012).

169. *Id.*

170. Compare *id.* at 449–50 with *In re Katrina Canal Breaches Litig.*, 673 F.3d 381, 392–93 (5th Cir.), *opinion withdrawn on reh’g*, 696 F.3d 436 (5th Cir. 2012).

171. Compare *In re Katrina*, 696 F.3d at 450 with *In re Katrina*, 673 F.3d at 393.

172. *In re Katrina*, 673 F.3d at 394.

173. *In re Katrina*, 696 F.3d at 441, 451.

174. *Id.* at 454.

175. *Lattimore v. United States*, 133 S. Ct. 2855 (2013); see Jennifer Hans, *U.S. High Court Denies Petition Disputing Government’s Immunity In Katrina Dispute*, LEXISNEXIS LEGAL NEWSROOM: LITIG. (June 25, 2013, 12:38 PM), <http://www.lexisnexis.com/legalnewsroom/litigation/b/litigation-blog/archive/2013/06/28/u-s-high-court-denies-petition-disputing-government-39-s-immunity-in-katrina-di>

ended these plaintiffs' claims against the federal government.

On December 20, 2013, more than a year after the Fifth Circuit's second opinion, the district court issued another opinion after hearing the remaining levee breach claims.<sup>176</sup> The court dismissed the nearly five hundred thousand claims against the Corps that had been brought by residents, businesses, and governments.<sup>177</sup> Relying on the Fifth Circuit's second opinion, the court held that the Corps was immune from liability because it was protected by sovereign immunity and the discretionary-function exception of the FTCA.<sup>178</sup> This officially marked the end of all lawsuits against the Corps for damage resulting from the flooding caused by the breached levees, a substantial victory for the government.

These decisions interpreted sovereign immunity in a manner that left hundreds of thousands of individuals and businesses affected by Hurricane Katrina without any redress for the injuries they sustained as a result of the federal government's negligence. In retrospect, in these cases, as well as in the wrongful death cases involving the three elders, Ethel Freeman, Clementine Eleby, and John J. DeLuca, the courts should not have relied on such an inequitable principle to allow federal entities to harm thousands of people and then walk away without being held liable. These court decisions represent one of the most heartbreaking stories to come from Hurricane Katrina. Not only were people forced to endure experiences that will scar them forever, but they later had to watch the legal system allow the responsible parties to escape liability.

Hence, even though the court found that the government was responsible for building the defective levees that caused the

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176. *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2013 WL 6834764 (E.D. La., Dec. 20, 2013), *aff'd sub nom. In re Katrina Canal Breaches Litig.*, Nos. 14-30060, 14-30136, 2015 WL 3407410 (5th Cir. May 28, 2015); *see also* Mark Schleifstein, *Federal Judge Dismisses Most of Remaining Katrina Damage Lawsuits*, NOLA.COM/TIMES-PICAYUNE (Dec. 27, 2013, 5:03 PM), [http://www.nola.com/environment/index.ssf/2013/12/federal\\_judge\\_dismisses\\_most\\_o.html](http://www.nola.com/environment/index.ssf/2013/12/federal_judge_dismisses_most_o.html) (describing the district court's final dismissal of lingering claims related to the canal breaches).

177. *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2013 WL 6834764, at \*3 (E.D. La., Dec. 20, 2013), *aff'd sub nom. In re Katrina Canal Breaches Litig.*, Nos. 14-30060, 14-30136, 2015 WL 3407410 (5th Cir. May 28, 2015); *Judge Ends Katrina Flooding Lawsuits Against Feds*, USA TODAY (Dec. 28, 2013, 5:57 PM), <http://www.usatoday.com/story/news/nation/2013/12/28/judge-ends-katrina-flooding-lawsuits-against-feds/4233217/>.

178. *In re Katrina*, 2013 WL 6834764, at \*2.

flooding of New Orleans following Hurricane Katrina, sovereign immunity was an excuse to refuse to hold the government accountable. What is equally disturbing is that the Fifth Circuit's second contradictory opinion on the same matter ultimately determined that the Corps *was* immune from liability under the FTCA and that Corps had no duty whatsoever to construct a storm barrier around the MRGO.<sup>179</sup> This radical change was even more unexpected because the Fifth Circuit's original opinion did not contain a dissent.<sup>180</sup>

#### **D. THE PROBLEM: WEAK COMMITMENT TO CIVIL LIBERTIES**

What do the events and subsequent cases surrounding Hurricane Katrina tell us about the extent of governmental infringement on civil liberties during emergencies? These experiences from Hurricane Katrina paint a dark picture of our legal system—a legal system based on legal technicalities and marred by compounding layers of injustice. The first layer of injustice is obvious: following Hurricane Katrina, in a rush to ensure public safety and the protection of property, some government officials abused people's rights and violated the public's trust. They infringed upon people's civil liberties and caused substantial harm and injury. These governmental abuses ranged from wrongfully shooting innocent survivors on the Danziger Bridge<sup>181</sup> to negligently failing to rescue stranded elderly people at the Convention Center.<sup>182</sup> With a few exceptions, the governmental abuse was not intentional, premeditated, or malicious. Generally, it was tangential to the government's attempt to ensure public safety and to protect property. Nevertheless, the abuse was still inexcusable.

The second layer of injustice is equally disturbing—the legal system failed to redress these abuses. There are some instances in which the courts condemned many of the atrocities committed against the victims.<sup>183</sup> But overall, these cases support the view of the continuous, invariant nature of the Constitution, meaning that the judges did not waiver in upholding constitutional rights

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179. *In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 444, 450–53 (5th Cir. 2012).

180. Katie Schaefer, *Reining in Sovereign Immunity to Compensate Hurricane Katrina Victims*, 40 *ECOLOGY L.Q.* 411, 428 (2013) (noting, however, that “the panel’s decision to reverse its previous opinion is not unheard of in the Fifth Circuit”).

181. *See CRUSTO*, *supra* note 7, at 22–24.

182. *See id.* at 154–56.

183. *See, e.g., id.* at 32–34 (describing court victories for victims of police brutality following Hurricane Katrina).

simply because there was an emergency. In other words, the courts did not use the emergency to diminish the government's duty to act in a constitutionally responsible manner. But, in order to do so, the justice system had to be continuously prodded by the tireless efforts of Hurricane Katrina survivors and their families.<sup>184</sup>

Unfortunately, the courts' views of those constitutional norms did little to help the victims of governmental abuses, especially after a disaster. Accordingly, the legal system did not stretch its application of equity to achieve more sympathetic remedies for the victims. More often than not, the courts showed a weak commitment to identifying civil liberties and redressing their abuses during the emergency. The legal system also failed to adequately compensate the victims for governmental infringements of people's rights. As a result of these shortcomings, at least in the Hurricane Katrina cases, when justice was served, it left a bitter aftertaste.

During the hurricane, all levels of government assumed that Louisiana's emergency statute was constitutional, even though its application is inherently questionable. Most pertinently, the judiciary failed to challenge the statute's constitutionality, as applied to infringements of civil liberties by governmental officials. Instead, for the most part, the courts narrowly construed the civil liberties in the Constitution and did little to redress Hurricane Katrina-related violations. Either expressly or impliedly, the courts deferred to the emergency statute and to sovereign immunity in failing to hold the government accountable for its actions.

This conclusion is based on the fact that none of these cases critically questioned the constitutionality of Louisiana's emergency statute as it applied to civil liberties, pursuant to the strictest of judicial scrutiny standards. For example, in one post-Hurricane Katrina case, a resident challenged the mandatory evacuation orders following the hurricane, arguing that the emergency order lasted too long and wrongfully prevented him and others from reentering New Orleans.<sup>185</sup> The federal court

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184. See, e.g., CRUSTO, *supra* note 7, at 25 (describing the tireless efforts of victims' families that resulted in successful indictments of police officers involved in the Danziger Bridge shooting and cover-up).

185. See *Reynolds v. City of New Orleans*, Civ. No. 05-4158 (E.D. La. Oct. 10, 2006), <https://casetext.com/case/reynolds-v-city-of-new-orleans> (granting summary judgment for defendants for forcing plaintiff to evacuate pursuant to the mayor's mandatory evacuation orders of August 28 and September 6), *aff'd*, 272 F. App'x 331

decided that the resident-plaintiff failed to make a constitutionally sufficient argument.<sup>186</sup>

The court failed to address the constitutionality of the state's emergency statutes and its application relative to civil liberties.<sup>187</sup> A critical observer may have expected a more empathic judicial approach—one that, at a minimum, recognized that people's rights must be respected, even during emergencies. Such a critical observer may have concluded that the Louisiana emergency statute failed to protect civil liberties in the wake of storms.

The emergency statute in effect at that time was inadequate because it failed to expressly provide for the protection of civil liberties. Consequently, because many of the rights violated were "fundamental," such as the rights to travel and to bear arms, the courts should have applied strict scrutiny to governmental violations of those rights. Had they done so, the courts might have produced results more consistent with a reading of the Constitution that aggressively recognizes and protects rights. These Hurricane Katrina experiences of governmental abuse of civil liberties show that the Louisiana emergency statute was overbroad in its authority and that many governmental actions taken under its authority were clearly unreasonable and unjustified. The Louisiana statute, and similar emergency statutes in other states, should be amended to identify constitutional rights as fundamental, thereby triggering judicial strict scrutiny.

### III. PRESERVING CIVIL LIBERTIES DURING EMERGENCIES

In response to the government's failure to protect people's civil liberties during Hurricane Katrina and the judiciary's failure to redress governmental infractions, I posit that state emergency statutes should be immediately amended to preserve people's civil liberties during emergencies. The following Model Preservation of Liberties during Emergencies Amendment (PLEA) attends to five areas of statutory revision: (1) expressly providing that civil

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(5th Cir. 2008).

186. *Reynolds v. City of New Orleans*, Civ. No. 05-4158, slip op. at 2 (E.D. La. Oct. 10, 2006), <https://casetext.com/case/reynolds-v-city-of-new-orleans>, *aff'd*, 272 F. App'x 331 (5th Cir. 2008).

187. *See id.* at 2–3.

liberties are not suspended,<sup>188</sup> (2) requiring judicial approval prior to enforcing policies that infringe on civil liberties, (3) requiring that allegations of infringement of fundamental rights pass strict scrutiny review, (4) providing that any unconstitutional infringement of civil liberties be compensated accordingly, and (5) holding an offending governmental official personally liable for infringement of civil liberties, without governmental indemnification. Each proposed revision is discussed briefly. The following sub-sections detail the specific statutory revisions that would make state emergency statutes more protective of civil liberties.

#### A. CIVIL LIBERTIES SHALL NOT BE SUSPENDED

The PLEA is consistent with the Founding Fathers' provisions of the U.S. Constitution that promote a continuous constitution, wherein rights are not subject to governmental suspension. In fact, there is only one instance in the Constitution where the government is expressly permitted to suspend a fundamental right, and then only for a temporary period of time.<sup>189</sup>

#### B. SUSPECT LAWS AND PRACTICES MUST RECEIVE PRIOR JUDICIAL APPROVAL

Louisiana's emergency statutory provisions, in effect in 2005 when Hurricane Katrina struck and still in effect today, violate the fundamental principle of separation of powers. The statute functionally gives the executive branch of government sole and unfettered authority during emergencies.<sup>190</sup> This is tantamount to declaring martial law, which illegally diminishes the role of judicial review. Had the statute honored the balance of power, the atrocities and injustices described above might have been avoided. For example, had the statute required prior judicial review, a court may have enjoined the confiscation of legal firearms. Further, under a balance of power, more legislative input may have ensured that the fundamental right to bear arms, especially for self-defense during an emergency, was protected. Hence, the PLEA reflects the constitutional balance of power

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188. See Sun, *supra* note 14, at 1182 (anticipating this recommendation).

189. U.S. CONST. art I., § 9, cl. 2; *infra* note 228 and accompanying text.

190. See LA. STAT. ANN. § 14:329.6(A) (Supp. 2015) (granting chief executive officers of political subdivisions the power to proclaim a state of emergency). *But see* LA. STAT. ANN. § 29:736(D) (providing that legislative and judicial authority may not be violated by actions taken under the Louisiana Homeland Security and Emergency Assistance and Disaster Act, LA. STAT. ANN. §§ 29:721–739 (2007 & Supp. 2015)).

between the three branches of government, by heightening the authority of the judiciary in protecting civil rights during emergencies.

### **C. ALLEGATIONS OF INFRINGEMENTS MUST PASS STRICT SCRUTINY JUDICIAL REVIEW**

The PLEA promotes the protection of civil liberties during emergencies by requiring that courts use the highest level of judicial review in assessing allegations of wrongful infringements.<sup>191</sup>

### **D. COMPENSATION FOR INFRINGEMENTS, EXPRESS WAIVER OF SOVEREIGN IMMUNITY**

The PLEA protects civil liberties during emergencies by expressly waiving sovereign immunity and providing for financial compensation for wrongful infringements. Sovereign immunity neutralizes the deterrent effect of litigation, thus promoting infringement of civil liberties.<sup>192</sup>

### **E. PERSONAL, UN-INDEMNIFIED LIABILITY FOR OFFENDING OFFICIALS**

The PLEA promotes the protection of civil liberties during emergencies by holding government officials personally liable for wrongful infringements, regardless of whether or not those infringements occurred during the course of performing governmental functions. Personal liability will discourage infringements, but, as will be discussed in greater detail, raises a counterargument—that personal liability will force officers to be overly-cautious, putting themselves and the citizens they are supposed to protect in danger.

The following arguments show the efficacy of amending state emergency statutes to preserve civil liberties during emergencies. Promoting strict scrutiny to assess the constitutionality of governmental infringement of civil liberties will establish a balanced approach to the executive and legislative branches' responses to emergencies.

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191. See *infra* Section IV. B (discussing in greater detail this component of the PLEA).

192. See *infra* Section IV. C (discussing in greater detail this component of the PLEA).

#### IV. ARGUMENTS FOR PRESERVING CIVIL LIBERTIES DURING EMERGENCIES

Public policy supports adoption of the PLEA to preserve civil liberties and to avoid the suspension of such civil rights during emergencies. There are three strong reasons to adopt these revisions. First, the PLEA protects against the unconstitutional abuse of power, including the use of martial law, by respecting the separation of powers doctrine. Second, the PLEA protects people from wrongful infringements by establishing the highest level of judicial scrutiny. And third, the PLEA provides sanctions and remedies which promote civil liberties by providing punishment for wrongful infringements.

##### A. THE PLEA PROTECTS AGAINST UNCONSTITUTIONAL ABUSE OF POWER AND MARTIAL LAW BY RESPECTING THE SEPARATION OF POWER DOCTRINE AND THE RULE OF LAW

The PLEA would protect people from the abuse of governmental power during an emergency and avoid the illegal use of martial law. Hurricane Katrina and the subsequent flooding of New Orleans were catastrophic events that demanded an unprecedented government response. Every state has the power to enact state constitutional and statutory provisions for emergencies.<sup>193</sup> The most common justifications for state emergency laws are the protection of the state and the promotion of the common good.<sup>194</sup> It is uncontroverted that, at all levels, a government has the right to take action to preserve itself and to protect the public, which is one rationale for why a government might be allowed to suspend rights when self-preservation is at issue.<sup>195</sup> During an emergency, the government has the authority to temporarily suspend normal operations that regulate citizen

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193. See Tyler, *supra* note 9, at 680 (describing *Moyer v. Peabody*, 212 U.S. 78 (1909), as upholding a governor's authority to preventatively detain citizens in order to put down an insurrection "so long as the governor had the authority under the state constitution to put down the insurrection and his actions were consistent with that authority"). But see Sun, *supra* note 14, at 1179–81 ("Although many state disaster laws do authorize governors during a state of emergency to suspend state substantive or procedural rules that might interfere with disaster relief, no state emergency or disaster law explicitly authorizes a declaration of 'martial law' or otherwise authorizes the suspension [of] federal constitutional protections during emergencies.").

194. See Sun, *supra* note 14, at 1190–1203 (discussing various potential justifications for anti-looting laws).

195. See generally Tyler, *supra* note 9 (providing a historical analysis of "what it means to suspend the privilege" of the writ of habeas corpus).

behavior and to implement preparedness plans.<sup>196</sup> The rationale behind the ability to declare a state of emergency is that, during an emergency, the government's interest in public health and safety supersedes its normal functions.<sup>197</sup>

A declaration of a state of emergency does not automatically invoke martial law,<sup>198</sup> which is a complete suspension of civil law reserved for times of enemy invasion.<sup>199</sup> Essentially, under martial law, the military takes over control of the state, usually to maintain order and security or to provide essential services.<sup>200</sup> Martial law has sometimes resulted in a temporary suspension of civil liberties.<sup>201</sup> Unlike martial law, a declaration of a state of emergency does not suspend constitutionally fundamental civil liberties.<sup>202</sup> A state of emergency should not be treated as automatic power to declare martial law. Wrongfully associating these two distinct concepts provides public officials with a

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196. U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”); 50 U.S.C. § 1622(d) (2012) (setting a limit of one year on emergency declarations unless the president explicitly extends them); *id.* § 1631 (requiring the president to specify in advance which legal provisions will be invoked); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585–89 (1952) (establishing that presidents may not act contrary to acts of Congress during an emergency).

197. See Scott P. Sheeran, *Reconceptualizing States of Emergency Under International Human Rights Law: Theory, Legal Doctrine, and Politics*, 34 MICH. J. INT'L L. 491, 498–500 (2013).

198. See Sun, *supra* note 14, at 1179 (“A declaration of martial law has no particular meaning under Louisiana law: Louisiana’s emergency-management laws do not mention martial law, much less confer power on local officials to declare it.”); see *id.* at 1179 n.226 (“A Westlaw search of Louisiana’s Constitution and statutes yields no results for ‘martial law.’ Louisiana law does grant the governor the power to order the militia into active service to respond to natural disasters and also authorizes the governor to confer on responding members of the Louisiana Guard and military police the ‘powers and authority of peace officers.’ LA. REV. STAT. § 29:7.A, B (2007). However, nothing in the relevant provisions suggests that the governor or any other official has the power to suspend constitutional rights or to circumvent normal criminal justice or judicial procedures. Indeed, the Louisiana statute specifically states that all actions taken pursuant to its provisions should be ‘in accordance with the laws and constitutions of Louisiana and the United States.’ *Id.* § 29:7.B.”).

199. See *Martial Law*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“The law by which during wartime the army, instead of civil authority, governs the country because of a perceived need for military security or public safety. The military assumes control purportedly until civil authority can be restored.”).

200. *Id.*

201. See *id.*

202. See generally GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., 2005) (theorizing that by depriving certain people or groups of people of their civil and political rights, government-declared “states of emergency” can transform democracies into dictatorships).

seemingly legal means of achieving otherwise questionable, often politically motivated ends.

After Hurricane Katrina, both state and local governments failed to distinguish between their right to declare an emergency and their authority to operate under martial law. They had no right to declare or operate under martial law. During emergencies, governments often infringe on people's freedoms under the assumption that the government's emergency authority and the need for public safety supersede normal laws and regulations and perhaps even individual freedoms. During those weeks, even when public need for assistance was at its peak, the government's employment of martial law was neither appropriate nor effective. Sovereign soil was not under threat of invasion by a foreign enemy, as the Framers had envisioned,<sup>203</sup> nor did declaring martial law actually provide any great measure of safety for the public beyond what could be administered during a proclamation of a state of emergency. Rather, it had the opposite effect of heightening hysteria and removing the limited means survivors had to protect themselves in the face of lawlessness and chaos.

#### **B. THE PLEA PROTECTS PEOPLE AGAINST WRONGFUL INFRINGEMENTS BY ESTABLISHING THE HIGHEST LEVEL OF JUDICIAL SCRUTINY**

The courts in many Hurricane Katrina-related cases failed to redress allegations of governmental infringements on people's civil liberties. One reason for this outcome is that the courts failed to apply the strict scrutiny standard. Laws or government actions are allowed to regulate and modify civil liberties, as long as they meet the appropriate judicial test.<sup>204</sup> Depending on the type of law involved, different tests are applied which balance the government's interests against the relatedness of the means. Under strict scrutiny, the government can infringe on certain fundamental rights or use a suspect classification only if it can persuade the court that the government's law or action serves a compelling governmental interest, is narrowly tailored to achieve

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203. See Tyler, *supra* note 9, at 694.

204. See *United States v. Carolene Products Co.*, 304 U.S. 144, 148–52 & n.4 (1938) (Stone, J.) (applying minimal scrutiny (rational basis review) to an economic regulation, but proposing a heightened level of review for certain other types of cases); see also Jennifer L. Greenblatt, *Putting the Government to the (Heightened, Intermediate, or Strict) Scrutiny Test: Disparate Application Shows Not All Rights and Powers Are Created Equal*, 10 FLA. COASTAL L. REV. 421, 433–36 (2009) (discussing different levels of judicial review).

that interest, and is the least restrictive means to achieve that interest.<sup>205</sup> Under the intermediate scrutiny test, the government must show the law or action being challenged furthers an important governmental interest in a way that is “substantially related” to that interest, but it need not be the least restrictive means of achieving such interest.<sup>206</sup> Under the rational basis test, only the most egregious enactments, those not rationally related to a legitimate government interest, are overturned.<sup>207</sup> The court applies one of these tests, in part, based on how “fundamental” the alleged violated is considered. For example, the First Amendment right to free speech is considered fundamental, so any governmental violation of that right, especially relating to speech content, must pass the strict scrutiny test.<sup>208</sup> These varying types of judicial review translate into the reality that no constitutionally provided-for right is absolute and a government violation can be outweighed by an important governmental interest. This reality is evident in the experiences of the survivors of Hurricane Katrina.

Additionally, the Constitution relies on the integrity and goodwill of government officials to enforce its rights provisions.<sup>209</sup> All federal and state legislators, executives, and judicial officers

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205. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 505, 515 (2005) (holding that California’s policy of racially segregating inmates when moving them into new facilities is subject to strict scrutiny); *Korematsu v. United States*, 323 U.S. 214, 216, 223 (1944) (holding that President Roosevelt’s Executive Order to place Japanese-Americans into internment camps during World War II regardless of citizenship status was constitutional because it passed the strict scrutiny test).

206. *See, e.g.*, *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150, 152 (1980) (applying intermediate scrutiny to hold that the provision of the Missouri workers’ compensation laws denying a widower benefits on his wife’s work-related death unless he is either mentally or physically incapacitated or proves dependence on his wife’s earnings, but granting a widow death benefits without her having to prove dependence violated the Equal Protection Clause of the Fourteenth Amendment).

207. *See, e.g.*, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) (upholding an Oklahoma law requiring a prescription before an optician may fit or duplicate eyeglass lenses as sufficiently related to the state’s legitimate interest in protecting public health).

208. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”); *see, e.g.*, *Cohen v. California*, 403 U.S. 15, 24, 26 (1971) (holding that wearing a jacket bearing the words “Fuck the Draft” inside the Los Angeles courthouse in the corridor outside the municipal court was permissible speech).

209. Barack Obama, Second Inaugural Address (Jan. 21, 2013), <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>.

take an oath to uphold the Constitution.<sup>210</sup> While the Constitution charges the president to swear to “preserve, protect, and defend the Constitution,”<sup>211</sup> it fails to provide penalties, short of impeachment, for presidential disobedience. Similarly, the Reconstruction Amendments expressly empower Congress to create enforcement legislation,<sup>212</sup> although the U.S. Supreme Court has greatly curtailed Congress’s authority to enact enforcement legislation.<sup>213</sup>

Further, the Constitution charges all judges in federal, state, and local courts and tribunals to abide by the Constitution as the supreme law of the land.<sup>214</sup> Yet again, there are no enforcement provisions shy of impeachment, which is seldom utilized.<sup>215</sup> Moreover, even when judges are dedicated to protecting civil liberties, they face difficult tasks of interpretation and application. Hence, there are only weak provisions in effect to ensure individual rights are protected. This is not to say that the judges who heard the Katrina-related cases lacked either integrity or goodwill. Judges have a duty to follow the rules of law; unfortunately, in these cases, the law was on the government’s side.

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210. U.S. CONST. art. VI, cl. 3 (“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . .”).

211. U.S. CONST. art. II, § 1, cl. 7 (“Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”).

212. U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

213. See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (Kennedy, J.) (“Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2012), *as recognized in* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

214. U.S. CONST. art. VI, cl. 2; see also Tyler, *supra* note 9, at 604–05, 612, 674 (examining the oath to uphold the constitution in the context of the suspension of habeas corpus).

215. See *Judicial Impeachment is Rare*, JUD. CONDUCT REP., Spring 1997, at 4 (discussing the extreme rarity of impeachment of state and federal judges). Even when judges seek to find appropriate remedies for injustices, they may have to be creative in doing so. See, e.g., OWEN FISS, *THE CIVIL RIGHTS INJUNCTION* 38–85 (1978) (analyzing the hierarchy of remedies and the development of the civil rights injunction to enforce the *Brown* decision to desegregate public schools); BASS, *supra* note 22.

This brief analysis of the nature and limitations of governmental infringements of civil liberties is a necessary background for understanding the judicial response to governmental abuses following Hurricane Katrina. Recognizing that the federal government might overreach its policing authority during emergencies, Congress granted the state and local governments the primary role in responding to natural and manmade disasters.<sup>216</sup> This layering of responsibility—making the federal government’s response secondary to the state’s—is not a good idea. Each and every level of the government has a separate and concurrent duty to help people during a disaster, in a constitutionally prescribed manner. The legal system has the ultimate duty to address governmental abuses of people’s rights in a fair, just, and empathic way.<sup>217</sup>

### **C. THE PLEA PROVIDES SANCTIONS AND REMEDIES WHICH PROMOTE CIVIL LIBERTIES AND PUNISH WRONGFUL INFRINGEMENTS**

The PLEA seeks to provide people whose civil liberties are abused during emergencies with appropriate compensation, to offset the negative results of the doctrine of sovereign immunity. Under the doctrine of sovereign immunity, the government cannot be sued unless it expressly permits a claimant to pursue suit.<sup>218</sup> Under this exception, Congress may abrogate immunity by providing a clear legislative statement of its intent.<sup>219</sup> Accordingly, in the several Hurricane Katrina cases, the

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216. The comity that the federal government must show to state and local governments during a disaster is found in the various provisions of the Insurrection Act, 10 U.S.C. §§ 331–333 (2012) (limiting a president’s authority to deploy federal troops to put down lawlessness, insurrection, and rebellion), the Posse Comitatus Act, 18 U.S.C. § 1385 (2012) (prohibiting use of federal troops to enforce laws domestically), and the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5170b(c)(1) (2012) (regulating the deployment of federal military resources for disaster relief operations). The issue of federal troop occupation of state jurisdictions has been a contentious issue ever since Northern troops were ordered to withdraw from the occupied formerly Confederate states in 1877. See CHARLES DOYLE & JENNIFER K. ELSEA, CONG. RESEARCH SERV., R42659, THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW 19–21 (2012), <http://www.fas.org/sgp/crs/natsec/R42659.pdf> (describing the circumstances surrounding the passage of the act).

217. See generally *Crusto*, *supra* note 24.

218. See *Price v. United States*, 174 U.S. 373, 375–76 (1899) (“It is an axiom of our jurisprudence. The government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it.”); *Gray v. Bell*, 712 F.2d 490, 507 (D.C. Cir. 1983).

219. See *Gray*, 712 F.2d at 512 (citing *Dalehite v. United States*, 346 U.S. 15 (1953)).

government contended that its actions were discretionary and thereby protected by sovereign immunity<sup>220</sup>

Sovereign immunity stands in direct conflict with the general underlying principles on which our government is based—that no one, including the government, is above the law and that everyone, including government agents, is accountable for wrongful or negligent acts.<sup>221</sup> The doctrine of sovereign immunity derives from the common law principle that “the King can do no wrong.”<sup>222</sup> The United States is an elected democracy—not a monarchy—and sometimes makes mistakes. Today, the doctrine of sovereign immunity allows for governmental officials to act with disregard for the law.<sup>223</sup> As applied, the doctrine radically contradicts a compensatory principle of justice, that is, that one should pay when one’s actions caused harm. Hence, it should be subjected to critical analysis. Overall, the doctrine of sovereign immunity protected the government from repercussions for breaking laws that it had enacted.

In the Hurricane Katrina cases, the application of sovereign immunity was brutal—the federal government was held not to be liable for harms resulting from defective levees in New Orleans.<sup>224</sup> The federal government voluntarily took on the task of building flood control levees because it knew that such levees would save lives and protect property in times of need. Having taken on this vital task, one would think that it had a duty to build effective ones. While the decision to build the levees might

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220. See *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644, 703–32 (E.D. La. 2009) (discretionary function exception to the FTCA), *aff’d in part, rev’d in part sub nom. In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012); *McWaters v. Fed. Emergency Mgm’t Agency*, 436 F. Supp. 2d 802, 808–09 (E.D. La. 2006) (discretion under Stafford Act).

221. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1202 (2001).

222. See *id.*; see also HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 23–24 (1845) (describing the common law interpretation of the maxim, “The king can do no wrong”).

223. See Kenneth Culp Davis, *Sovereign Immunity Must Go*, 22 ADMIN. L. REV. 383, 383–405 (1970) (“[T]he many judicial recitations that courts cannot stop a single officer in his tracks even when a court finds that he is acting illegally and doing irreparable damage to the plaintiff are very much in need of reexamination.”); see also Stephen L. Goldstein, *Law Unfair to Its Victims*, SUN-SENTINEL (Broward Cnty.) Aug. 1, 2007), [http://articles.sun-sentinel.com/2007-08-01/news/0707310256\\_1\\_sovereign-immunity-christopher-reeve-uphill-battle](http://articles.sun-sentinel.com/2007-08-01/news/0707310256_1_sovereign-immunity-christopher-reeve-uphill-battle) (describing efforts to persuade the Florida legislature to appropriate money in order to overcome a statutory cap created by sovereign immunity that limits recovery for victims of tortious conduct by the state).

224. *In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 454 (5th Cir. 2012).

have been discretionary, the decision to maintain life-saving standards was mandatory. As a result, while the application of sovereign immunity was technically correct, the Fifth Circuit's decision allowing the Corps to escape liability serves as an unfortunate example of the inherently unjust, and often illogical, application of the doctrine.

Hurricane Katrina should serve as a lesson to the three branches of government that sovereign immunity should not shield the government from liability for negligent acts committed during emergencies. If under the rules, the judiciary could not provide a remedy, then the legislature should have enacted legislation to do so. In a manner similar to what the government did following the tragedy of September 11, Congress should have established a "Katrina Fund" to compensate the victims of the defective levees in New Orleans.<sup>225</sup> With fewer than 2,000 reported Hurricane Katrina-related deaths, the federal government could have provided adequate compensation to the families of the deceased. Additionally, compensation for property damage resulting from the defective levees, while this would add substantially to the cost to the government, is also appropriate. In retrospect, this Hurricane Katrina account is a sad one that sends an even sadder message—that the legal system provides no remedy for the deaths and property damage that could have been avoided, but for the negligence of the government.

In summary, the amendment of state emergency statutes supports good public policy. It reflects the fundamental balance of power among the branches of government, promotes the judicial exercise of strict scrutiny and civil liberties by providing sanctions, and remedies wrongful infringements.

## **V. OBJECTIONS TO PRESERVING CIVIL LIBERTIES DURING EMERGENCIES**

Several public policy arguments have been articulated against the PLEA. First, critics argue that the amendment would paralyze the government's response during an emergency; second, some civil liberties are not absolute and are appropriately infringed-upon when necessarily caring for the common good; and third, a few minor violations do not necessitate an amendment to state constitutions. This Article addresses each of these arguments in turn.

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<sup>225</sup> See generally Mitchell F. Crusto, *The Katrina Fund: Repairing Breaches in Gulf Coast Insurance Levees*, 43 HARV. J. ON LEGIS. 329 (2006).

**A. STATE EMERGENCY LAW AUTHORIZES STATE AND LOCAL  
OFFICIALS TO TEMPORARILY SUSPEND NORMAL RULES OF LAW  
AND ARE RATIONALLY BASED**

Some PLEA critics argue that the state emergency statutory provisions direct government officials to temporarily suspend normal rules of law, including diminishing civil liberties in order to facilitate effective emergency efforts. Thus, some scholars suggest that, in the case of a national emergency, such as the War on Terror, the government needs—and is authorized to institute—a temporary suspension of civil liberties.<sup>226</sup> They find this authority implied in the Constitution in the balance of powers provisions and the war powers authority.<sup>227</sup> Thus, some believe that for national emergencies and for state emergencies it is rational for the government to suspend civil liberties.

This raises the question: relative to emergencies at the state level, does the U.S. Constitution provide state and local governments the authority to temporarily suspend civil liberties? State governments apparently believe that they have such authority. For example, as previously noted, the Louisiana emergency statute expressly provides state and local officials to regulate during emergencies in a manner that infringes on civil liberties. The Louisiana statute contradicts itself because while expressly taking away rights during emergencies, it expressly states that no provision of the emergency statute supersedes the U.S. Constitution, the Bill of Rights, or the Louisiana state constitution.

It is true that the U.S. Constitution might grant the federal government special powers in certain emergencies, such as in times of war.<sup>228</sup> As a result, state statutes that seek to provide absolute authority to governors in times of emergencies, without regard to civil liberties, are unconstitutional. In addition, giving a governor primary authority to act during an emergency is not a good idea, as it introduces that particular governor's political agenda into the equation at a time when decisions should be free of political considerations. Furthermore, emergencies should not

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226. See, e.g., Posner & Vermeule, *supra* note 11, at 605–07 (describing this view).

227. *Id.* at 607 & n.6.

228. U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”); *id.* art. II, § 2 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .”).

be a reason for a governor or any government official, for that matter, to suspend civil liberties. Hopefully, the experiences of the Hurricane Katrina survivors will convince decision-makers to change the law and public policy.

**B. RIGHTS ARE NOT ABSOLUTE AND THE GOVERNMENT NEEDS THE AUTHORITY TO ACT FOR THE COMMON GOOD**

Some critics might argue that the PLEA makes civil liberties absolute and effectively denies the government the authority to act for the public good during emergencies. In assessing this position, it must be acknowledged that rights are not absolute. In order to contextualize how civil liberties are protected against governmental infringements, it is essential to briefly review the history and current nature of those liberties to show why rights are not absolute. In 1787, the Founding Fathers drafted the Constitution based on their collective belief that God empowered man with fundamental rights superior to government authority, as reflected in the Declaration of Independence.<sup>229</sup> They divided power between the federal and the state governments in order to delineate which powers the states were giving to the central government compared to those they were retaining.<sup>230</sup> In addition, in the Bill of Rights they highlighted the liberties retained by individuals and provided for the duty of the federal government to protect individual liberties.<sup>231</sup> They also elevated the Constitution as the supreme law of the land, prevailing over federal, state, and local laws.<sup>232</sup>

The history of constitutional rights development promotes the argument of a substantially more absolutist reading of the enumerated rights found in the Constitution, perhaps greater than what the courts have done over the centuries. In 1791, the

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229. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”); see generally THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE FOR RATIFICATION (Bernard Bailyn ed., 1993).

230. See U.S. CONST. art. IV, §§ 1–4; *id.* art. VI; *id.* amend. X.

231. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (noting that while federalism sets boundaries between institutions of government, it also “secures the freedom of the individual”).

232. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.”).

Bill of Rights amended the Constitution to include certain individual rights which were meant to supersede the power and authority of government at all levels.<sup>233</sup> The Bill of Rights sought to protect personal freedoms, including the freedom of speech, religion, press, assembly, association, and the right to keep and bear arms.<sup>234</sup> Notably, the Bill of Rights reserved all freedoms not expressly addressed in the Constitution to the states and to the people.<sup>235</sup> The Founders expected rights enumerated in the first ten Amendments to be guaranteed even in times of emergency, with perhaps an exception during times of war.<sup>236</sup> In fact, the Founders included an express provision in the Constitution for the only instance in which they believed there should be a suspension of any rights. This rare “suspension provision” relates to habeas corpus, the right to be released from imprisonment following an unlawful arrest, and is very limited in its application.<sup>237</sup>

In 1868, following the Civil War, the Fourteenth Amendment expanded the Fifth Amendment’s “due process of law” requirement to apply not only to the federal government, but also to the exercise of power by state governments.<sup>238</sup> Further, it created a new universal standard of fairness, by stating, “nor [shall any State] deny to any person within its jurisdiction the

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233. See Bill of Rights, S.J. Res., 1st Cong., pmb., 1 Stat. 97, 97 (1789) (“The Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution . . .”).

234. U.S. CONST. amends. I–II.

235. *Id.* amend. IX (“The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”); *id.* amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

236. See, e.g., *id.* amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”); *id.* amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

237. *Id.* art. I, § 9, cl. 2.

238. *Id.* amend. XIV, § 1 (“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

equal protection of the laws.”<sup>239</sup> The Fourteenth Amendment’s primary purpose was to establish the federal government’s role in protecting all citizens, including racial minorities, from state or local governmental abuse.<sup>240</sup> Over the years, civil liberties initially enumerated in the Bill of Rights, have been greatly expanded beyond those ten Amendments.

Over the nearly one hundred and fifty years since the passage of the Fourteenth Amendment, the Supreme Court has recognized many implied civil liberties.<sup>241</sup> Specifically, it has identified certain “unenumerated” rights in the “penumbras” and “emanations” of other constitutional protections, particularly the Due Process Clause of the Fourteenth Amendment.<sup>242</sup> These “unenumerated” liberties are often referred to as “fundamental” rights and include the right to vote, the right to interstate travel, and the right to privacy.<sup>243</sup>

In addition to recognizing constitutionally protected enumerated and unenumerated rights, the Supreme Court broadened its protection of procedural due process as well as established the “substantive due process” doctrine.<sup>244</sup> Under this doctrine, one cannot be deprived of “liberty” unless the government can offer sufficient justification for the deprivation.<sup>245</sup> Rights are fundamental under the Due Process Clause if the putative right is “implicit in the concept of liberty” or “deeply

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239. U.S. CONST. amend. XIV, § 1.

240. See Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1269 (2001) (noting that the “overall purpose of the Fourteenth Amendment [is] to constrain state misuse of power”).

241. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 482–83 (1965) (recognizing the freedom of association, the freedom to teach, the freedom of thought, the right to study a particular subject or foreign language, and the right to educate children in a school of the parents’ choice as implicit in the Constitution).

242. See *id.* at 481, 484; see also U.S. CONST. amend IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

243. See *Bush v. Gore*, 531 U.S. 98, 104 (2000) (the right to vote); *Jones v. Helms*, 452 U.S. 412, 418 (1981) (the right to travel); *Roe v. Wade*, 410 U.S. 113, 152–54 (1973) (the right to privacy), modified by *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

244. For a brief history of the Court’s development of substantive due process, see DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* 75–83 (2007).

245. Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501 (1999).

rooted in this Nation's history and tradition."<sup>246</sup> For example, in 2010, the Supreme Court determined the Second Amendment's right to bear arms for self-defense purposes was incorporated as a fundamental right and, accordingly, this right applies to the states.<sup>247</sup>

Despite a long list of civil liberties that have been recognized by the Supreme Court, the Constitution does not apply universally nor does it ensure its own enforcement. The Constitution applies to governmental infringement of rights and generally does not apply to abuses by individuals acting in their personal, non-governmental capacity.<sup>248</sup> When the Constitution applies to governmental actions, it grants the government latitude to govern; that is, it allows for permissive infringements of rights when necessary to achieve a reasonable governmental purpose.<sup>249</sup> As such, governmental infringements of civil liberties are subjected to various levels of judicial review to determine their constitutionality.<sup>250</sup>

The PLEA does not seek to usurp the government's authority to promote the general welfare nor does it seek to make rights absolute. On the contrary, it provides an important reminder that the government's general welfare mission should tread carefully on the rights of individuals, especially during emergencies. When those rights are fundamental, the PLEA directs the courts to use strict scrutiny to assess whether or not governmental infringement of civil liberties violates the Constitution and needs to be redressed. Therefore, the PLEA does not hinder the government's ability to effectively respond to emergencies, but it does seek to preserve people's civil liberties and see to their redress judicially.

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246. *Lutz v. City of York*, 899 F.2d 255, 267 (3d Cir. 1990) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

247. See *McDonald v. City of Chicago*, 561 U.S. 742, 778, 791 (2010) (clarifying the uncertainty left in the wake of *District of Columbia v. Heller*, 554 U.S. 570 (2008), as to the scope of gun rights in regard to the states).

248. See *The Civil Rights Cases*, 109 U.S. 3 (1883) (holding that under the Fourteenth Amendment, Congress could not outlaw private racial discrimination, but could only regulate conduct by the States).

249. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 147-48, 153-54 (1938).

250. See Greenblatt, *supra* note 204, at 433-36 (discussing different levels of judicial review).

### C. MINOR INFRINGEMENTS DO NOT REQUIRE CHANGE

Some critics might argue that the governmental abuses of people's rights following Hurricane Katrina were few in number, limited in time, minor in scope, and justified because of the dire nature of the emergency. For several reasons, these assertions are unacceptable and callous, and they conflict with the lessons of history.

The past cautions us that seemingly small and temporary abuses of people's rights during emergencies may lead to lengthy and widespread human rights violations. For example, in 1933, then-Chancellor Adolf Hitler exploited a limited emergency, a fire that destroyed the German Parliament building, to suspend constitutionally guaranteed civil liberties and eventually to achieve full dictatorial power.<sup>251</sup> Initially, the world ignored the Nazis's violations of the rights of German Jews. Ultimately, however, over twenty-six million people died.<sup>252</sup> This chapter in history illustrates how a seemingly insignificant emergency can facilitate unimaginable misery and loss of human life.

This lesson from Nazi Germany is more than a mere cautionary note. Closer to home, during World War II, the United States temporarily suspended the rights of Japanese American citizens.<sup>253</sup> While the laws were originally designed to locate war spies, they led to the extended detention of innocent individuals in internment camps.<sup>254</sup> During the 1960s in the United States, the legal system faced a different form of emergency.<sup>255</sup> This emergency resulted from acts of terror against African-Americans and other civil rights workers throughout the South. It included lynchings, church bombings,

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251. See WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH* 191 (1960); *The "Enabling Act" (March 24, 1933)*, GERMAN HIST. DOCUMENTS & IMAGES, [http://germanhistorydocs.ghi-dc.org/sub\\_document.cfm?document\\_id=1496](http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=1496) (last visited Oct. 15, 2015) (printing an introduction to and an English translation of the "Law to Remove the Distress of the People and the State," which provided Hitler's cabinet with "emergency" legislative powers).

252. SERVICE D'INFORMATION DES CRIMES DE GUERRE, *CAMPS DE CONCENTRATION* 197 (1945). Millions more people were injured or suffered property damage. For detailed discussions of the Holocaust, see MARTIN GILBERT, *ATLAS OF THE HOLOCAUST* (1993); ISRAEL GUTMAN, *ENCYCLOPEDIA OF THE HOLOCAUST* (1995); RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* (3d ed. 2003).

253. See *Korematsu v. United States*, 323 U.S. 208, 215–20 (1944) (permitting the exclusion of people of Japanese ancestry from areas of the United States near the Pacific Coast during World War II).

254. See *id.* at 220–22.

255. See generally BASS, *supra* note 22.

and widespread physical intimidation, often with tacit, if not open, support from the state.<sup>256</sup> In response to these abuses, some federal judges, including Judge John Minor Wisdom, developed judicial doctrines to protect people from extreme segregationists and other reactionaries, especially those who were governmental actors.<sup>257</sup> As noted in the quotation at the start of this Article, these judges emphasized that under our federalist form of government, the Constitution protects private citizens from all wrongful governmental invasions of fundamental rights.

Contrary to would-be critics, we must not repeat mistakes from history by categorizing as minor or insignificant the rights violations which occurred during Hurricane Katrina, or by ignoring them altogether. When we fail to protect people's civil liberties, especially during emergencies, we concede that the Constitution is not worth the paper on which it is written.

In summary, there is no such thing as a minor infraction of a civil liberty. This is especially true when the judiciary condones a purportedly minor infraction and in the process establishes legal precedent that is anti-rights. For example, some might consider Patricia Konie's experiences following Hurricane Katrina to be a minor, unfortunate, and avoidable injury. For those critics, such an incident does not rise to a constitutionally prohibited wrongdoing. They do not foresee it sliding into a constitutional abyss that changes the nature of our civil liberties. Such shortsighted thinking supported the logic that led to the United States's temporarily suspension of the rights of Japanese-American citizens during World War II, which we now recognized as a major abuse of civil liberties.<sup>258</sup>

In response to those critics of the slippery-slope argument, there is another aspect of the Konie incident and the government's confiscation of firearms that is more menacing. That is the federal court's response to the incident. In both the Patricia Konie case and the NRA anti-confiscation cases (as in many other Katrina civil liberties cases), the federal courts failed to establish any boundary on the government's regulation of the Second Amendment right to bear arms and the search and seizure of firearms without prior judicial review.<sup>259</sup> While the court did, in fact, issue an injunction against the confiscation in

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256. See BASS, *supra* note 22 *passim*.

257. See, e.g., *id.* at 24, 271–73 (describing the “freezing” doctrine).

258. See *supra* note 253.

259. See *supra* notes 105–39 and accompanying text.

the NRA case, it expressly stated that its decision did not weigh in on the constitutionality of the state's emergency statute.<sup>260</sup>

The court's failure to chastise the government for violating Second Amendment principles is disturbing. It implies that the right to bear arms is subjected to the whims of the government, particularly at the state and local levels, during states of emergency. Since a state of emergency can be declared for a great range of conditions, from a pending natural disaster to civil unrest, such a rule is overly board. The fact that the right to bear arms can be suspended during an emergency, without prior judicial approval and without effective subsequent judicial disapproval, is troublesome. In summary, relative to the Konie incident, the true damage to the Constitution was not done by the police officers who brutalized Patricia Konie (as awful as that action was and for which the officers should have been reprimanded), but by the judiciary that failed to protect people's civil liberties from governmental abuse.

Judges, especially federal judges, are the ultimate protectors of our civil liberties. When they fail to elaborate on the limits of the government relative to those rights, they open the door to broader abuse of our liberties. Therein lies the slippery slope. The courts' failure to reprimand the state and local government for the door-to-door confiscation of people's firearms following Hurricane Katrina without prior judicial approval establishes a dreadful, anti-rights precedent for future states of emergencies. As a result, a relatively minor infraction of people's rights during an emergency established the judicial precedent that, at least in the Eastern District of Louisiana, the fundamental right to bear arms is diminished or, at worst, suspended during an emergency. Each minor infringement opens the door to major abuses of rights. The PLEA redresses the minor abuses that may lead to horrific deprivations by focusing on the preserving civil liberties, even though this might make government authority less effective or efficient during a disaster.

## **VI. CONCLUSION: HEIGHTENING PROTECTION DURING EMERGENCIES**

So, do emergencies suspend the Constitution, suggesting the need for an "emergency constitution"? The Constitution is a social compact between the people and the government. It

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260. Nat'l Rifle Ass'n of Am., Inc. v. Nagin, No. 05-20,000, 2005 WL 2428840, at \*2 (E.D. La. Sept. 23, 2005).

legitimizes the democratic state and holds together the political community. It nurtures trust—the glue that holds democracies together. People expect the government to aid them, especially during an emergency. When the government violates the rights of its citizens, their ability to trust is damaged. Hence, the social compact is compromised and democracy is threatened. People reasonably expect that when mistakes are made, the government will redress them through the legal system.

Following Hurricane Katrina, in its response to the unprecedented flooding of the city of New Orleans, some government officials injured innocent people and in some instances killed them. The lesson to learn from Hurricane Katrina is that the Constitution represents a covenant of freedom between the people and the government, and it must not be suspended during emergencies. These Katrina experiences also show us that liberty cannot rest solely on the shoulders of government officials; it must be invoked by the victims against their violators.<sup>261</sup>

While civil liberties are neither absolute nor guaranteed, this Article concludes that the suspension of rights by state governments is not constitutionally permissible. This is especially true during emergencies when the government's response results in the diminution of rights. While all levels of government are obligated to protect and preserve the Constitution, we especially look to the judiciary to protect constitutionally recognized civil liberties from the near-sighted statutes often approved by the masses in response to emergencies, from the inequities that often result from majoritarian democracy.

When it comes to protecting civil liberties during emergencies, we should apply the haunting words from Judge John Minor Wisdom: “[T]he crowning glory of American federalism . . . is the protection the United States Constitution gives to the private citizen against all wrongful governmental invasions of fundamental rights and freedoms. When the wrongful invasion comes from the State, . . . federal courts must expect to bear the primary responsibility for protecting the individual.”<sup>262</sup> Simply stated, during emergencies, we need to

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261. See generally DAVID K. SHIPLEY, *THE RIGHTS OF THE PEOPLE: HOW OUR SEARCH FOR SAFETY INVADES OUR LIBERTIES* 388–89 (Vintage Books 2012) (2011) (emphasizing the need for victims of the War on Terror to seek redress).

262. *Dombrowski v. Pfister*, 227 F. Supp. 556, 569–71 (E.D. La. 1964) (Wisdom, J.,

heighten our protection of people's civil liberties, not diminish it.