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CORONAVIRUS, CIVIL LIBERTIES, AND THE COURTS: THE CASE AGAINST "SUSPENDING" JUDICIAL REVIEW

Lindsay F. Wiley* **and Stephen I. Vladeck†**

For obvious reasons, local and state orders designed to help "flatten the curve"[1] of novel coronavirus infections (and conserve health care capacity to treat coronavirus disease[2]) have provoked a series of constitutional objections—and a series of lawsuits attempting to have those orders modified or overturned. Like the coronavirus crisis itself, much of that litigation remains ongoing as we write this essay. But even in these early days, the emerging body of case law has rather elegantly teed up what we've previously described as "the central (and long-running) normative debate over emergency powers: Should constitutional constraints on government action be suspended in times of emergency (because emergencies are 'extraconstitutional'), or do constitutional doctrines forged in calmer times adequately accommodate exigent circumstances?"[3]

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[1] The now-ubiquitous phrase "flatten the curve" refers to a mitigation strategy identified through historical analysis of the 1918 influenza pandemic and endorsed in U.S. pandemic influenza plans in 2007. *See* U.S. CTRS. FOR DISEASE CONTROL & PREVENTION (CDC), INTERIM PRE-PANDEMIC PLANNING GUIDANCE: COMMUNITY STRATEGY FOR PANDEMIC INFLUENZA MITIGATION IN THE UNITED STATES—EARLY, TARGETED, LAYERED USE OF NONPHARMACEUTICAL INTERVENTIONS 9 (2007) [hereinafter "CDC (2007)"] ("Reshaping the demand for healthcare services by using [nonpharmaceutical interventions (NPIs), including social distancing] . . . . means reducing the burdens on the medical and public health infrastructure by decreasing demand for medical services at the peak of the epidemic and throughout the epidemic wave; by spreading the aggregate demand over a longer time; and, to the extent possible, by reducing net demand through reduction in patient numbers and case severity."); *id*. at 18 ("Although there is limited empirical evidence supporting the effectiveness of implementing any individual measure alone (other than school closures and dismissals), the evidence for implementing multiple social distancing measures in combination with other NPIs includes systematic literature reviews, historical analyses of the 1918 pandemic, and mathematical modeling studies.").

[2] We use the general term "coronavirus" to refer to severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), which in turn causes coronavirus disease 2019 (COVID-19).

[3] Lindsay F. Wiley & Steve Vladeck, *COVID-19 Reinforces the Argument for "Regular" Judicial Review—Not Suspension of Civil Liberties—In Times of Crisis*, HARV. L. REV. BLOG (Apr. 9, 2020), https://blog.harvardlawreview.org/covid-19-reinforces-the-argument-for-regular-judicial-review-not-suspension-of-civil-liberties-in-times-of-crisis/. We could hardly do justice to the extensive literature informing this age-old scholarly debate. But for a helpful modern point/counterpoint, compare Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003), with David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565 (2003). And for a more sarcastic

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To take one example from many, consider the Fifth Circuit's analysis of a Texas Executive Order that, as construed by the state's Attorney General, treated all abortions as "elective" medical procedures—effectively barring them for a significant period of time. In issuing a writ of mandamus to vacate a district court temporary restraining order against the abortion ban,[4] the Court of Appeals relied heavily on the conclusion that *Casey*'s familiar "undue burden" test[5] did not govern its analysis.[6] Rather, a far more deferential standard "for adjudging the validity of emergency orders," purportedly derived from the Supreme Court's 1905 decision in *Jacobson* v. *Massachusetts*,[7] was appropriate.[8]

Thus, "when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'"[9] The court did not limit its analysis to abortion: "*Jacobson* instructs that all constitutional rights may be reasonably restricted to combat a public health emergency."[10] After the district court issued a narrower TRO on remand, the Fifth Circuit issued another writ of mandamus—reaffirming its earlier reliance upon *Jacobson*.[11] And in a challenge to a similar coronavirus abortion ban in Arkansas, the Eight Circuit followed *Abbott*, "find[ing] that the district court's failure to apply the *Jacobson* framework produced a patently erroneous result."[12]

The reliance on the suspension principle has not been confined to coronavirus abortion bans. In one of the first cases arising from a coronavirus order, New Hampshire officials defended a state-wide ban on large gatherings by arguing that "[a] court should only interfere" with "[a]n executive's decision to exercise emergency powers in the face of a rapidly evolving public health crisis … when the executive's actions were not taken in good faith or if there is no factual basis for the executive to

take, see Alice Ristroph, *Professors Strangelove*, 11 GREEN BAG 2D 245 (2008) (reviewing ERIC POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS (2007)).

[4] *In re* Abbott, 954 F.3d 772 (5th Cir. 2020).

[5] *See* Planned Parenthood v. Casey, 505 U.S. 833, 878 (1992) (plurality opinion).

[6] *Abbott*, 954 F.3d at 785–86.

[7] 197 U.S. 11 (1905).

[8] *Abbott*, 954 F.3d at 779.

[9] *Id*. at 784.

[10] *Id*. at 786.

[11] *In re* Abbott, No. 20-50296, 2020 WL 1911216 (5th Cir. Apr. 20, 2020).

[12] *In re* Rutledge, No. 20-1791, 2020 WL 1933122, at *5 (8th Cir. Apr. 22, 2020).

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believe that a restriction he imposed was necessary."[13] Invoking *Smith* v. *Avino*, a widely cited Eleventh Circuit decision arising out of curfews imposed after Hurricane Andrew,[14] the New Hampshire trial court accepted the good faith/some factual basis standard proffered by the defendant on the grounds that usual, heightened scrutiny of state laws interfering with civil liberties should be "suspended" for the duration of the emergency.[15]

In a coronavirus abortion ban decision of its own, *Robinson* v. *Attorney General*,[16] the Eleventh Circuit carefully avoided a clear endorsement of suspension in the pandemic context. First, it did not dispute the district court's determination that *Avino*'s "far more deferential review" was limited to "temporary, partial restrictions on certain fundamental rights . . . when a *curfew* is imposed . . . in response to a *natural disaster*."[17] Second, the Eleventh Circuit held that a preliminary injunction requiring Alabama to allow health care providers to determine whether to delay a patient's abortion based on certain factors was proper because "the burdens imposed by the [state's] restrictions are undue under *Casey*, and . . . they impinge the right to an abortion in a 'plain, palpable' fashion under *Jacobson*."[18] The Eleventh Circuit's approach, which was followed soon thereafter by the Sixth Circuit suggests that the Supreme Court's subsequent civil liberties' jurisprudence can be reconciled with *Jacobson*'s broad language.[19]

In this essay, we argue that the suspension approach to judicial review is wrong—not just as applied to governmental actions taken in response to novel coronavirus, but in general. As we explain, the current crisis helps to underscore at least three independent objections to the "suspension" model some courts have derived from decisions like *Jacobson* and *Avino*. First, the suspension principle is inextricably linked with the idea that a crisis is of finite—and limited—duration. But to that end, it is ill-suited for long-term and open-ended emergencies like the one in which we currently find ourselves. Second, and relatedly, the suspension model is based upon

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[13] Objection to Emergency Motion for Preliminary Injunction and Permanent Injunction, Binford v. Sununu, No. 217-2020-CV-00152 (N.H. Super. Ct. Mar. 19, 2020).

[14] Smith v. Avino, 91 F.3d 105, 109 (11th Cir. 1996) ("In an emergency situation, fundamental rights such as the right of travel and free speech may be temporarily limited or suspended.") (citing Aptheker v. Secretary of State, 378 U.S. 500 (1964); Korematsu v. United States, 323 U.S. 214 (1944)).

[15] Binford v. Sununu, No. 217-2020-CV-00152 (N.H. Super. Ct. Mar. 25, 2020) (mem.).

[16] No. 20-11401-B, 2020 WL 1952370 (11th Cir. Apr. 23, 2020).

[17] Robinson v. Marshall, No. 2:19CV365-MHT, 2020 WL 1847128, at *12 (M.D. Ala. Apr. 12, 2020) (quoting *Avino*, 91 F.3d at 109).

[18] *Robinson*, 2020 WL 1952370, at *8 (citing *Jacobson*, 197 U.S. at 31).

[19] *See* Adams & Boyle, P.C. v. Slatery, No. 20-5408, slip op. at 14–17 (6th Cir. Apr. 24, 2020).

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the oft-unsubstantiated assertion that "ordinary" judicial review will be too harsh on government actions in a crisis—and could therefore undermine the efficacy of the government's response. In contrast, as some of the coronavirus cases already demonstrate, most of these measures would meet with the same fate under "ordinary" scrutiny, too.[20]

Finally, and perhaps most importantly, the suspension model fails entirely to account for the importance of an independent judiciary in a crisis—"as perhaps the only institution that is in any structural position to push back against potential overreaching by the local, state, or federal political branches."[21] Indeed, as Professor Ilya Somin has put it, "imposing normal judicial review on emergency measures can help reduce the risk that the emergency will be used as a pretext to undermine constitutional rights and weaken constraints on government power even in ways that are not really necessary to address the crisis."[22] Otherwise, we risk ending up with decisions like *Korematsu*[23]—in which courts sustain gross violations of civil rights because they are either unwilling or unable to meaningfully look behind the government's purported claims of exigency.[24]

In the process, we hope that our case for "ordinary" judicial review of civil liberties claims during public health emergencies will help to inform not only future academic debates over the role of courts during all manner of crises, but also ongoing litigation—and judicial decisions—arising out of governmental responses to novel coronavirus.

I. THE SUSPENSION MODEL AND THE MYTH OF TRANSITORY CRISES

Like the Constitution's explicit "suspension" power, which limits the suspension of habeas corpus to "Cases of Rebellion or Invasion in which the public Safety may

[20] *Cf.* Legacy Church, Inc. v. Kunkel, No. CIV 20-0327, 2020 WL 1905586, at *36 n.12 (D.N.M. Apr. 17, 2020) (rejecting First Amendment challenges to a shelter-in-place order on the alternative ground that the order survives strict scrutiny).

[21] Wiley & Vladeck, *supra* note 1.

[22] Ilya Somin, *The Case for "Regular" Judicial Review of Coronavirus Emergency Policies*, VOLOKH CONSPIRACY (Apr. 15, 2020), https://reason.com/2020/04/15/the-case-for-normal-judicial-review-of-coronavirus-emergency-policies/.

[23] Korematsu v. United States, 323 U.S. 214 (1944).

[24] *See generally* PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES (1993) (documenting the government's numerous misrepresentations to the federal courts in defending World War II-era internment camps).

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require it," [25] the suspension model of judicial review relies heavily on an assumption that crises are fleeting. What is at stake, courts often claim, is but a "temporary loss of constitutional rights,"[26] one that, as in *Avino*, is necessary only for so long as it takes to restore order after a natural disaster. In those contexts, the restriction on civil liberties is meant to be incidental—to allow government to focus its resources elsewhere. The coronavirus pandemic, in contrast, is open-ended in two respects: First, the duration of the crisis already far exceeds natural disasters or other episodic emergencies—in which days have turned into weeks and weeks into months. Second, and more fundamentally, the incursions on civil liberties are *central* to the crisis response insofar as they are designed to slow the progress of the epidemic. Thus, not only are the stopgaps potentially indefinite, but governments face a Catch-22 where the alternative to infringing civil liberties is to allow the crisis to worsen exponentially.

In the absence of effective vaccines and therapeutic treatments, which take months or years to develop on even the most optimistic timelines, pandemic responses resort to ancient measures for separating the sick from the well.[27] When infectious individuals can be identified through testing or symptoms, they can be isolated and their contacts can be traced and quarantined.[28] Travelers from highly affected areas can also be screened upon their entry into less affected areas and advised or required to quarantine for the duration of the virus's incubation period.[29] When many people in a community are contagious without knowing it, social distancing of the entire population may be used to reduce opportunities for the spread of infection from person to person.[30] It is typically initiated when an outbreak has reached the stage of extensive community transmission—with significant numbers of people acquiring the virus without any history of travel to an area known to be affected or any contact with

[25] *See* 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.").

[26] *In re* Abbott, No. 20-50264, 2020 WL 1685929, at *12 (5th Cir. Apr. 7, 2020).

[27] LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 416 (3d ed. 2016) ("[A]ge-old public health response strategies, which raise vital social, political and constitutional questions because they interfere with basic human freedoms: association, travel, and liberty" may be necessary because "medical interventions may be insufficient to impede the rapid spread of infection during an epidemic: vaccines and medical treatments may be unavailable or ineffective, and medical supplies may become scarce.").

[28] *Id.* at 416–23 (discussing isolation of individuals who are infected and quarantine of people who have been exposed).

[29] *Id.* at 424 (discussing travelers' quarantines).

[30] *Id.* at 431 (discussing social distancing).

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people known to have been infected.[31] These strategies do not require perfect compliance to flatten the epidemic curve.[32] They do, however, require widespread public trust and cooperation.

Prior to the 2020 coronavirus pandemic, social distancing guidelines and preparedness plans typically focused on school closures, cancellation of mass gatherings, closure of places where people congregate, and voluntary recommendations for people to stay home if they were ill or had been in contact with someone who was.[33] The few experts who discussed sheltering in place for the general population broached it as a voluntary measure, and one on which experts disagreed.[34]

But on March 16, 2020, as cases of community transmission of novel coronavirus began to mount, seven local health officers in the Bay Area followed the examples set by China and Italy, issuing mandatory shelter-in-place orders and prohibitions on all non-essential business operations.[35] Within two weeks, the majority of state

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[31] *See* CDC, Public Health Guidance for Community-Level Preparedness and Response to Severe Acute Respiratory Syndrome (SARS), Appendix D1: Interventions for Community Containment (2004), https://www.cdc.gov/sars/guidance/d-quarantine/app1.html [hereinafter "CDC (2004)"] (describing "community-wide measures to increase social distance" as being applied to "[a]ll members of a community in which 1) extensive transmission of SARS-CoV [the earlier virus that caused the 2003-04 SARS epidemic] is occurring, 2) a significant number of cases lack clearly identifiable epidemiologic links at the time of evaluation, and 3) restrictions on persons known to have been exposed are considered insufficient to prevent further spread").

[32] *See, e.g.*, NEIL M. FERGUSON ET AL., IMPERIAL COLLEGE COVID-19 RESPONSE TEAM REPORT 9: IMPACT OF NON-PHARMACEUTICAL INTERVENTIONS (NPIS) TO REDUCE COVID-19 MORTALITY AND HEALTHCARE DEMAND 6, 10 (Mar. 16, 2020), https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf (modeling interventions to mitigate transmission of SARS-COV-2 whereby "[a]ll households reduce contact outside household, school or workplace by 75% [while] workplace contact rates reduced by 25%" layered with closure of schools and universities (with 25% of universities remaining open) and isolation cases of people who are infected and symptomatic (assuming 75% compliance) and quarantine of their household contacts (assuming 50% compliance) and finding that this combination of interventions should be sufficient to keep the need for critical care beds within capacity in Great Britain).

[33] *See, e.g.*, CDC (2004), *supra* note 31 (discussing closure of schools and work sites, suspension of public markets, cancellation of events, scaling back of public transportation, and travel restrictions); CDC (2017), *supra* note 1, at 12–18 (recommending "voluntary home isolation of ill persons," "voluntary quarantine of exposed household members," "temporary closures and dismissals of child care facilities, K–12 schools, and institutions of higher education," and suggesting "[s]ocial distancing measures can be implemented in a range of community settings, including educational facilities, workplaces, and public places where people gather (e.g., parks, religious institutions, theaters, and sports arenas)" for influenza pandemic mitigation).

[34] *See, e.g.*, Julia E. Aledort, et al., *Non-Pharmaceutical Public Health Interventions for Pandemic Influenza: An Evaluation of the Evidence Base*, 7 BMC PUBLIC HEALTH 208 tbl.3, fig.1 (2008) (assessing "voluntary sheltering" at home—defined as "sequestration of healthy persons to avoid exposure"—in consultation with an expert panel, which was in disagreement as to its advisability).

[35] *See, e.g.*, City and County of San Francisco, Order of the Health Officer No. C19-07 (Mar. 16, 2020); Julia Prodis Sulek, *Meet the Doctor Who Ordered the Bay Area's Coronavirus Lockdown, the First in the U.S.*, MERCURY NEWS,

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governors followed suit.[36] Due to a series of government failures and a near-total abdication of federal responsibility for securing and distributing scarce supplies, widespread testing was not available to support state and local decisionmaking and minimize the duration of extreme social distancing.[37]

In the absence of widespread testing, cautious governors and local executives were left to make the only safe assumption: that transmission was extensive everywhere within their jurisdictions. In early April, as more states added stay at home orders, others issued extensions.[38] Testing was increasing, but still far below what was needed to reliably isolate the infected and trace and quarantine their contacts.[39] Left to rely on social distancing alone, elected officials explained that "lockdowns" were working, bending the curve of hospitalizations in the places that were hardest hit.[40] They warned that this success would be squandered if restrictions were not maintained for a longer duration, providing criteria for easing orders that relied on ramping up widespread testing, but without any concrete indication that such a ramp-up was on the horizon.[41]

By the end of April, the fact that the coronavirus pandemic would require some degree of limits on economic, social, and cultural activity for an unlimited duration was widely acknowledged among public health experts and elected officials, including those who had decided to begin easing restrictions.[42] Simply put, allowing for the

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Mar. 29, 2020, https://www.mercurynews.com/2020/03/29/she-shut-down-the-bay-area-to-slow-the-deadly-coronavirus-none-of-us-really-believed-we-would-do-it/ (describing the events that led to identical orders being issued simultaneously in seven local jurisdictions).

[36] State Actions to Mitigate the Spread of COVID-19, KFF.org, at https://www.kff.org/health-costs/issue-brief/state-data-and-policy-actions-to-address-coronavirus/#socialdistancing (last visited April 24, 2020) [hereinafter "KFF"] (tracking state social distancing executive orders by date).

[37] Chad Terhune, et al., *Special Report: How Korea Trounced U.S. in Race to Test People for Coronavirus*, REUTERS, Mar. 18, 2020, https://www.reuters.com/article/us-health-coronavirus-testing-specialrep/special-report-how-korea-trounced-u-s-in-race-to-test-people-for-coronavirus-idUSKBN2153BW.

[38] KFF, *supra* note 36.

[39] Keith Collins, *Coronavirus Testing Needs to Triple Before the U.S. Can Reopen, Experts Say*, N.Y. TIMES, Apr. 17, 2020, https://www.nytimes.com/interactive/2020/04/17/us/coronavirus-testing-states.html.

[40] *See, e.g.*, Kerry Crowley, *After Another High COVID-19 Death Total, Newsom Expands on Local Approach to Reopening*, MERCURY NEWS, Apr. 24, 2020, https://www.mercurynews.com/2020/04/24/after-another-high-covid-19-death-toll-newsom-expands-on-local-approach-to-reopening/ (quoting California Gov. Gavin Newsom: "Some encouraging signs, but we're not by any stretch of the imagination in a position to say those six indicators with which we make our determination about the future of our stay-at-home orders that any new lights are yet green.").

[41] *Id.*

[42] *See, e.g.*, Georgia Executive Order, Reviving a Healthy Georgia (Apr. 23, 2020) (allowing some, but not all, businesses to reopen while imposing social distancing and sanitation requirements, banning gatherings of 10 or more people for which physical distance cannot be maintained, and requiring all residents and visitors over age 65, or who

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suspension of more rigorous judicial review in the context of a crisis for which mitigation will prolong, rather than shorten the emergency, risks allowing the exception to swallow the rule.

To be sure, this concern is especially pronounced with respect to public health emergencies arising from the spread of infectious diseases. Natural (or man-made) disasters obviously do not present the same relationship between suppression and duration. But that is not to say that similar concerns aren't present; they are. At least under federal law, emergencies, once declared, tend not to end; the President can unilaterally extend national emergency declarations on an annual basis in perpetuity, and can only be stopped by veto-proof supermajorities of both houses of Congress.[43] And unless courts are going to rigorously review whether the factual justification for the emergency is still present (which is necessarily antithetical to the suspension model), measures can be adopted long after the true exigency passed that wouldn't be possible during "normal" times. Thus, the coronavirus pandemic helps to undermine defenses of the "suspension" model grounded in the putatively transitory nature of emergencies.

II. THE SUSPENSION MODEL AND THE MYTH OF UNDULY HARSH JUDICIAL REVIEW

One of the central defenses of the suspension model is that it is necessary—that standard degrees of judicial scrutiny will hold governments to too high a burden during crisis times, and thereby run the risk of either invalidating policies that ought to be sustained or, at a minimum, chilling governments from adopting such policies for fear of their invalidation.[44] Here, too, we think that the coronavirus pandemic provides a useful (if still-evolving) counterexample, for even if curtailments of liberty—from business closures to stay-at-home orders to quarantine orders premised on recent travel from an affected area without individualized risk assessment—are subjected to the normal scrutiny arising from comparable government incursions into civil liberties, most are likely to be upheld.

An especially telling example is the New Mexico district court's decision in *Legacy Church, Inc.* v. *Kunkel*—a lawsuit challenging the state's refusal to exempt places of worship from its statewide ban on gatherings of more than five people without social

have been diagnosed with diabetes, lung disease, or a host of other conditions to shelter in place without establishing an expiration date).

[43] *See* National Emergencies Act, 50 U.S.C. § 1622(a); *see also* Stephen I. Vladeck, *The Separation of Emergency Powers: Lessons from the Second Congress*, 129 YALE L.J. F. 610, 611 & n.15 (2020) (summarizing the difficulty of terminating national emergencies, especially after *INS* v. *Chadha*, 462 U.S. 919 (1983)).

[44] *See, e.g.*, POSNER & VERMEULE, *supra* note 3, at 29–39.

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distancing.[45] In refusing to issue a preliminary injunction against the state order, the district court paid lip service to *Jacobson*,[46] but otherwise relied heavily on "ordinary" levels of scrutiny for First Amendment free exercise and freedom of assembly claims. Indeed, although the court held that, even under the ordinary doctrinal framework, strict scrutiny did not apply,[47] it held in the alternative that the state order also *survived* strict scrutiny—because the government's interest in suppressing the spread of the novel coronavirus was unquestionably compelling and because, in context, the order was narrowly tailored.[48]

We think the same can be said of the New Hampshire trial court ruling described above—where, had the court applied heightened scrutiny, New Hampshire's ban on large gatherings would also likely have survived. As these cases demonstrate, "ordinary" judicial scrutiny hardly handicaps governmental responses to public health emergencies at least largely because most modern constitutional standards of review turn on some assessment, whether explicitly or implicitly, of proportionality—"the idea that larger harms imposed by government should be justified by more weighty reasons and that more severe transgressions of the law be more harshly sanctioned than less severe ones.[49] It is inevitable that proportionality analysis will tilt in favor of the government in those circumstances in which the government has the most compelling case for action.

Of course, some crisis measures will still fail proportionality-based standards of review. The key for us is that such failures will typically stem from—and trace to—their disproportionality. And it is quite a different argument, in our view, to claim that governments should be allowed to adopt *dis*proportionate measures during emergencies than to claim that ordinary judicial review will be fatal to properly calibrated responses. Thus, what the coronavirus pandemic helps to make clear is that even widespread, mass incursions into civil liberties, such as statewide shelter-in-place orders, can survive modern constitutional scrutiny. And if they can't, we think that says far more about the challenged governmental action than it does about the role of the courts.

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[45] No. CIV 20-0327, 2020 WL 1905586 (D.N.M. Apr. 17, 2020).

[46] *Id*. at *25.

[47] *Id*. at *36.

[48] *Id*. at *36 n.12.

[49] *See* Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3098 (2015). To be clear, our claim is not that *all* liberties protected by the Constitution are subject to some form of proportionality review. Rather, it is that, in general, modern constitutional scrutiny tends to rest to some degree on principles of proportionality—and that those principles are responsive to crises insofar as they are dynamic.

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Nevertheless, some courts have argued that the Supreme Court's *Jacobson* decision settles the matter to the contrary—and so, for better or worse, lower courts have no choice but to apply more deferential review to governmental restrictions during public health crises. Although we have already suggested why we believe this approach is flawed as a normative matter, we also believe that this claim is flawed as a descriptive matter; *Jacobson* never quite said what it's been said to have said, and it has in any event been overtaken by events, not the other way around.

Jacobson was one of the Supreme Court's earliest efforts to articulate *any* standard for adjudicating individual rights claims under the Fourteenth Amendment. The Cambridge Board of Health prefaced its adult vaccination mandate with a declaration of a local smallpox outbreak and the Court framed the case in terms of "authority to determine for all what ought to be done in an emergency," but Justice John Marshall Harlan's opinion eschewed any form of the suspension principle. Instead, *Jacobson* adopted a quintessential balancing test. Harlan recognized that individual liberty is not "an absolute right in each person to be, in all times and in all circumstances, wholly free from restraint."[50] Rather, "in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand."[51]

Though upholding the emergency vaccination mandate on the grounds that the board of health reasonably believed "it was necessary for the public health or the public safety,"[52] in closing, Harlan paused to "observe . . . that the police power of a state . . . may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression."[53] While declining to "usurp the functions of another branch of government," by "adjudg[ing], as matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case," the Court also recognized that the "acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts

[50] 197 U.S. 11 (1905).

[51] *Id.* at 29.

[52] *Id.* at 26.

[53] *Id.* at 29.

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to interfere for the protection of such persons."[54] In other words, in a decision that predated even *Lochner* (by just under two months), the Supreme Court's reference to what was "reasonable" was far more robust than what we tend to think of today as "minimum rationality" rational basis review.[55] Even on its own terms, then, we don't think *Jacobson* can fairly be read to establish as weak a standard of review as some contemporary courts have concluded.

For instance, many courts have continued to employ *Jacobson*'s standard of "non-arbitrary and justified by public health necessity" (with "necessity" not being used in the strict sense of the word) to adjudicate challenges to routine compulsory public health measures (especially school vaccination mandates[56]) and decide the case without deciding whether strict scrutiny applies. State and lower federal courts have also relied on balancing tests in cases reviewing quarantines of travelers from areas affected by smallpox and Ebola outbreaks. These cases have not adopted the suspension principle, but their approach to balancing has been less-than-strict in ways that mirror *Jacobson* (though without necessarily citing it).

For instance, in *United States ex rel. Siegel* v. *Shinnick*, a 1963 Eastern District of New York case in which the plaintiff sought release of her mother from a federal quarantine facility where she was being held on suspicion that she was capable of transmitting smallpox following a trip to Sweden that may have coincided with an outbreak there,[57] Judge John Francis Dooling, Jr. pointed to the importance of an individualized risk assessment, "taking into account previous vaccinations and the possibilities of her exposure to infection."[58] He noted that officials had drawn an appropriate distinction between Siegel (who, "with a history of unsuccessful vaccinations, was peculiarly in a position to have become infected and to infect others") and her husband (who apparently had been successfully vaccinated prior to the trip they took together).[59] The judge also emphasized the use of a less restrictive alternative, noting "caution[] against light use of isolation," which "is not to be substituted for surveillance unless the health authority considers the risk of transmission of the infection by the suspect to be exceptionally serious."[60] At the same

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[54] *Id.* at 28.

[55] *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[56] *See, e.g.*, Phillips v. City of New York, 775 F.3d 538 (2d Cir. 2015); Workman v. Mingo County Bd. of Educ., 419 F. App'x 348 (4th Cir. 2011).

[57] 219 F. Supp. 789 (E.D.N.Y. 1963).

[58] *Id.*at 791.

[59] *Id.*

[60] *Id.*

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time, Dooling was deferential to the scientific determinations of health officials, noting that "the judgment required is that of a public health officer and not of a lawyer used to insist[ing] on positive evidence to support action; their task is to measure risk to the public and to seek for what can reassure and, not finding it, to proceed reasonably to make the public health secure. They deal in a terrible context and the consequences of mistaken indulgence can be irretrievably tragic. To supercede [sic] their judgment there must be a reliable showing of error."[61] Dooling declined to expressly identify the level of scrutiny he applied to the federal quarantine order, but noted that the three "medical men" who testified on behalf of the federal defendants "shared a concern that was evident and real and reasoned."[62] In a footnote, he commented favorably on the health officials' risk assessment was "a function of the gravity of the situation as measured by their expert judgments dispassionately formed."[63]

More recently, Kaci Hickox, a nurse, was quarantined twice—first by New Jersey and later by Maine—when she returned from treating Ebola patients in Sierra Leone. Authorities in Maine asked a state trial judge to impose a court-ordered home quarantine for a 14-day incubation period,[64] which Hickox resisted on the grounds that she had tested negative for Ebola, she did not have any symptoms, and transmission during the incubation period prior to symptom-onset was not a concern.[65] In *Hickox* v. *Mayhew*, Maine state trial court judge Charles LaVerdiere determined that Hickox could properly be subjected to mandatory direct active monitoring (with direct observation by state health authorities at least once per day to review her symptoms and monitor her temperature), a less restrictive alternative to the home quarantine the state was seeking.[66] Almost two years later when it was clear that Hickox had never been an Ebola carrier, federal district court judge Kevin McNulty relied on *Jacobson* to rule that Hickox's initial quarantine for 80 hours upon her arrival in New Jersey did not entitle her to damages on constitutional grounds.[67]

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[61] *Id.*

[62] *Shinnick*, 219 F. Supp. at 791.

[63] *Id.*

[64] Maine's quarantine law provided for judicially imposed quarantine orders. 22 M.R.S. § 811(3) (2014).

[65] Mayhew v. Hickox, No. CV-2014-36, Maine Trial Court Order (Oct. 31, 2014); Sydney Lupkin & Aaron Katersky, *Nurse Says She Won't Have Officials Violate 'My Civil Rights,'* ABC NEWS, Oct. 29, 2014, https://abcnews.go.com/Health/ebola-america-nurse-maine-health-officials-violate-civil/story?id=26542668.

[66] *Id.*

[67] Hickox v. Christie, 205 F. Supp. 3d 579 (D.N.J. 2016); *see also* Liberian Cmty. Ass'n of Conn. v. Malloy, No. 3:16-cv-00201, 2017 WL 4897048 (D. Conn. Mar. 30, 2017) (dismissing suit for damages by class of individuals quarantined under state orders in Connecticut based on travel in Ebola-affected countries).

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McNulty declined to formally endorse the notion that authorities must conduct an individualized risk assessment and adopt the least restrictive alternative to justify brief detention of travelers. He "assume[d] without deciding that the… 'individualized assessment' of the individual's illness and ability or willingness to abide by treatment can, mutatis mutandis, be adapted to the situation of a temporary detention for observation based on a risk of infection."[68]

All of this goes both to why *Jacobson* itself is not nearly as deferential as decisions like the Fifth and Eighth Circuit's coronavirus abortion cases would have it, and why governments responding to public health crises should still be able to meet higher burdens. But it is also worth emphasizing that *Jacobson* predated the entire modern canonization of constitutional scrutiny—as first suggested by the Court in footnote 4 of its 1938 decision in *Carolene Products*,[69] and as expounded in the familiar decisions of the 1960s and 1970s. Indeed this may be why courts relying on it typically cover their bases by assuming, without deciding, that strict scrutiny applies, and finding that it would be satisfied. Law students may come to loathe the permutations that have resulted from these modern tiers of scrutiny, but the idea that they all have baked-in "*Jacobson* exceptions" falls apart under even modest … scrutiny. Consider how the Fifth Circuit justified ignoring the "undue burden" test in *Abbott*:

> *Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency. We could avoid applying *Jacobson* here only if the Supreme Court had specifically exempted abortion rights from its general rule. It has never done so. To the contrary, the Court has repeatedly cited *Jacobson* in abortion cases without once suggesting that abortion is the only right exempt from limitation during a public health emergency.[70]

In other words, because (1) *Jacobson* applies to all constitutional rights; and (2) none of the Supreme Court's abortion decisions suggest abortion is somehow exempt from *Jacobson*, *Jacobson* applies to abortion.

The problem with this analysis is that the Supreme Court has *never* said that *Jacobson* applies—to the exclusion of subsequently articulated doctrinal standards—to all constitutional rights. Indeed, the only Supreme Court decision the Fifth Circuit cited as evidence that *Jacobson* relaxes subsequently articulated standards of

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[68] *Id.*

[69] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[70] *In re* Abbott, 954 F.3d 772, 786 (5th Cir. 2020).

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scrutiny is a case that says nothing of the sort.[71] Instead, *Kansas v. Hendricks* cited *Jacobson* for the proposition that "an individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context."[72] That's true so far as it goes, but it hardly establishes that modern doctrines of heightened scrutiny all have a *Jacobson* asterisk. Simply put, broadly deferential judicial review of government responses to public health emergencies is neither normatively defensible nor compelled by precedent.

III. THE VIRTUES OF AN INDEPENDENT JUDICIARY DURING CRISIS TIMES

Parts I and II set out our view that the suspension model over-relies on both the transitory nature of emergencies and misperceptions about the effects (and doctrinal foundations) of "ordinary" judicial review. But perhaps the most important argument against the suspension model is also the strongest affirmative argument for ordinary review during crises: the unique checking role of an independent judiciary and the costs of its absence.

To be clear, our claim is more than just a rehash of the virtues of judicial review writ large. Rather, it is a more specific contention about the unique role courts can play *during emergencies* because they are independent of the political branches. Among other things, meaningful judicial review requires the government to dot its proverbial i's by building a record that can survive proportionality-driven standards of review. To that end, as we have suggested, "a robust judicial role may be indispensable not only in minimizing the loss of our liberties, but also in facilitating the development of a sustainable, long-term response to this crisis—and a body of law to guide public health legal preparedness for the next one."[73] That is to say, robust judicial review not only helps to smoke out pretext for government actions during an emergency, but it also has value for the *government*—which can use the case law its policies generate to help define the boundaries of its future approaches.

As Robert Gatter argued in his critique of Ebola quarantine cases,

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[71] *See id*. at 785 (citing Kansas v. Hendricks, 521 U.S. 346, 356–57 (1997)).

[72] *Hendricks*, 521 U.S. at 356–57 (quoting Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905)).

[73] Wiley & Vladeck, *supra* note 3; *see also, e.g.*, Wendy E. Parmet, *Quarantining the Law of Quarantine: Why Quarantine Law Does Not Reflect Contemporary Constitutional Law*, 9 WAKE FOREST J.L. & SOCIAL POL'Y 1 (2018); James G. Hodge, Jr., Lexi C. White, & Sarah A. Wetter, *From [A]nthrax to [Z]ika: Key Lessons in Public Health Legal Preparedness*, 15 IND. HEALTH L. REV. 22 (2018); Mark A. Rothstein, *From SARS to Ebola: Legal and Ethical Considerations for Modern Quarantine*, 12 IND. HEALTH L. REV. 227, 246 (2015); Robert Gatter, *The Ongoing and Iterative Task of Pandemic Preparedness*, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 1 (2010); Wendy K. Mariner, George Annas, & Wendy Parmet, *Pandemic Preparedness: A Return to the Rule of Law*, 1 DREXEL L. REV. 341 (2009).

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> judges' responsibility to assure [relevant scientific] facts are discovered and accounted for . . . is inherent in even the most deferential standard of judicial review. A court asked to address whether a public health agency has acted reasonably and without abusing its discretion need not simply defer to the expertise of the agency without requiring that the agency to identify and explain the logic the agency deployed to reach its conclusion.[74]

While Gatter's criticism was leveled at mandatory orders requiring named individuals to stay on their property at all times—in the case of Hickox, with police cruisers parked outside her home and following her when she exited for solitary outdoor exercise[75]—the same reasoning applies to the somewhat less intrusive but far more widely applied social distancing measures adopted to mitigate the coronavirus pandemic for an indefinite duration. "By subjecting government incursions on civil liberties to meaningful judicial review, courts force the government to do its homework—to communicate not only the purposes of its actions, but also how the imposed restrictions actually relate to and further those purposes."[76] While all may be in agreement that the general purpose of social distancing is to combat the spread of the virus, state and local governments have been slow to specify whether they are measuring success in terms of keeping the curve of the epidemic within hospital capacity or preventing every death from coronavirus that they possibly can. These goals are distinct; the measures necessary to achieve them and the duration for which they are likely to be required may vary widely.

To take another especially noteworthy example, consider the decades-long litigation arising out of the detention of non-citizen enemy combatants at Guantánamo Bay, Cuba. Although detainees were originally sent to Guantánamo at least in part to minimize litigation risk,[77] Supreme Court decisions in 2004[78] and

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[74] Robert Gatter, *Three Lost Ebola Facts and Public Health Legal Preparedness*, 12 ST. LOUIS U. J. HEALTH L. & POL'Y 191, 211 (2018).

[75] *Kaci Hickox, Nurse in Ebola Quarantine Standoff, Goes for a Bike Ride*, NBC NEWS, Oct. 30, 2014, https://www.nbcnews.com/storyline/ebola-virus-outbreak/kaci-hickox-nurse-ebola-quarantine-standoff-goes-bike-ride-n237421.

[76] Wiley & Vladeck, *supra* note 3.

[77] Memorandum from Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys General, Office of Legal Counsel, to William J. Haynes II, General Counsel, Dept. of Defense (Dec. 28, 2001).

[78] Rasul v. Bush, 542 U.S. 466 (2004) (holding that federal courts had statutory jurisdiction over habeas petitions brought by non-citizens detained at Guantánamo).

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2008[79] progressively cemented their entitlement to meaningful judicial review of their detention via habeas corpus—and pursuant to a more rigorous standard of review than the government had initially defended.[80]

In the process, roughly 60 detainees had their claims conclusively resolved by the courts, but hundreds more were transferred out of U.S. custody—almost certainly, in some cases, after governmental determinations that their detention could not be defended.[81] On the flip side, the decisions *upholding* the long-term non-criminal confinement of many of the detainees not only solidified (for many, at least) the legitimacy of much of the Guantánamo detention operation, but they also articulated substantive detention standards that Congress subsequently codified.[82] Indeed, one of the common defenses of the fact that 40 detainees remain at Guantánamo still today is that most of them have had their day in court—and have had their amenability to such detention independently reviewed.[83] Thus, "ordinary" judicial review through habeas, which the government had initially and steadfastly opposed, appears to have (1) incentivized the government to abandon the cases it could not defend; (2) allowed some detainees to hold the government accountable by prevailing in their habeas cases; (3) crystallized the government's authority in the cases it won; and (4) incentivized Congress to legislate—to set clear, forward-looking rules for future cases.

We don't mean to make too much out of the Ebola and smallpox quarantine cases or the Guantánamo cases, which are sui generis in any number of ways. Rather, our point is to show how meaningful judicial review even in extraordinary circumstances is not only important for the protection of civil liberties. It can also promote more transparent governance and clearer communication of the government's rationale and the details of how its orders operate. For a long-duration crisis like the coronavirus pandemic, there are a multitude of decisions to be made and continually reassessed. These choices should be guided by the best available scientific evidence,

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[79] Boumediene v. Bush, 553 U.S. 723 (2008) (holding that the Suspension Clause "has full effect" at Guantánamo, and that the Military Commissions Act of 2006 violated the Suspension Clause insofar as it stripped the federal courts of jurisdiction over Guantánamo habeas petitions without providing an adequate alternative).

[80] In *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), the Court rejected the government's argument that "some evidence" was sufficient to justify the detention of a U.S. citizen enemy combatant. In later Guantánamo cases, the government thus argued for, and the D.C. Circuit begrudgingly accepted, a "preponderance of the evidence" standard. *See* Al Adahi v. Obama, 613 F.3d 1102, 1105 (D.C. Cir. 2010).

[81] *See* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 926 (7th ed. 2020).

[82] *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §1021(b), 125 Stat. 1298, 1562 (2011).

[83] *See, e.g.*, Aziz Z. Huq, *The President and the Detainees*, 165 U. PA. L. REV. 535, 594–611 (2017).

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but they cannot be answered by objective scientific principles alone. Democratic deliberation will ultimately have to play a part in determining the balance between suppressing viral transmission and allowing some degree of "non-essential" economic, social, educational, and cultural activity to resume outside the home. Court proceedings requiring elected officials to articulate and justify their plans may be an important step in that process.

CONCLUSION

In 1934, in the midst of the Great Depression, the Supreme Court upheld against a Contract Clause challenge a Minnesota law that effectively imposed a moratorium on mortgages.[84] Writing for the Court, Chief Justice Hughes drew a distinction between emergency powers and emergencies that "furnish the occasion for the exercise of [ordinary] power."[85] To him, and the Court, even though the economic emergency provided the state with justifications for impairing private contracts that might not suffice in better days, "[w]hat power was thus granted [by the Constitution] and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system."[86]

This nuance is wholly missing from the suspension model—and from a growing number of judicial decisions sustaining local and state government responses to the coronavirus pandemic. And although many of these measures would likely survive ordinary judicial review as well, some might not. That should be troubling enough in the abstract given our experience with civil liberties incursions justified by have what turned out to be fraudulent governmental claims of exigency. More fundamentally, the more that courts coalesce around a standard in which governments are held to exceedingly modest burdens of justification for incursions into our civil liberties during emergencies, the more those same governments might be incentivized not only to use emergencies as pretexts for scaling back our rights, but to find pretexts for triggering such emergencies in the first place.[87]

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[84] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

[85] *Id*. at 426.

[86] *Id*. at 425–26.

[87] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 650 (1952) (Jackson, J., concurring) ("[The Founders] knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.").

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