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**CORONAVIRUS, CIVIL LIBERTIES, AND THE COURTS:  
THE CASE AGAINST “SUSPENDING” JUDICIAL REVIEW**

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INTRODUCTION

For obvious reasons, local and state orders designed to help “flatten the curve”<sup>1</sup> of novel coronavirus infections (and conserve health care capacity to treat coronavirus disease<sup>2</sup>) have provoked a series of constitutional objections — and a growing number 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

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<sup>1</sup> 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 CTRS. FOR DISEASE CONTROL & PREVENTION, INTERIM PRE-PANDEMIC PLANNING GUIDANCE 9 (2007) (“Reshaping the demand for healthcare services by using [non-pharmaceutical 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. . . . Recent preliminary analyses of cities affected by the 1918 pandemic show a highly significant association between the early use of multiple NPIs and reductions in peak and overall death rates.”); see also NOREEN QUALLS ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, MORBIDITY AND MORTALITY WEEKLY REPORT: COMMUNITY MITIGATION GUIDELINES TO PREVENT PANDEMIC INFLUENZA — UNITED STATES, 2017, at 18 (2017) (“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.”).

<sup>2</sup> 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). See *Naming the Coronavirus Disease (COVID-19) and the Virus that Causes It*, WORLD HEALTH ORG., [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it) [https://perma.cc/8DNY-LQEQ].

elegantly teed up what we have 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?”<sup>3</sup>

To take one example from many, consider the Fifth Circuit’s analysis in *In re: Abbott*<sup>4</sup> 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.<sup>5</sup> In issuing a writ of mandamus to vacate a district court temporary restraining order (TRO) against the abortion ban,<sup>6</sup> the court of appeals relied heavily on its belief that *Casey*’s<sup>7</sup> familiar “undue burden” test<sup>8</sup> did not govern its analysis.<sup>9</sup> Rather, a far more deferential standard “for adjudging the validity of emergency measures,”<sup>10</sup> purportedly derived from the Supreme Court’s 1905 decision in *Jacobson v. Massachusetts*,<sup>11</sup> was appropriate.<sup>12</sup>

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<sup>3</sup> 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/> [<https://perma.cc/E8FD-VXHL>]. 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), which argues that public officials should be permitted to “act extralegally when they believe that such action is necessary for protecting the nation and the public in the face of calamity, provided that they openly and publicly acknowledge the nature of their actions,” *id.* at 1023, with David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565 (2003), which explains that judicial review “offer[s] an opportunity to set the terms of the *next* crisis, even if [decisions] often come too late to be of much assistance in the immediate term,” *id.* at 2566. For a more sarcastic take, see Alice Ristroph, *Professors Strangelove*, 11 GREEN BAG 2D 245, 245–49 (2008) (reviewing ERIC POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE* (2007)).

<sup>4</sup> 954 F.3d 772 (5th Cir. 2020).

<sup>5</sup> See Press Release, Ken Paxton, Attorney Gen. of Tex., Health Care Professionals and Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries and Procedures to Preserve Resources to Fight COVID-19 Pandemic (Mar. 23, 2020), <https://www.texasattorneygeneral.gov/news/releases/health-care-professionals-and-facilities-including-abortion-providers-must-immediately-stop-all> [<https://perma.cc/5HKF-8HWQ>]; Raga Justin, *No Abortions in Texas Unless the Mother’s Life Is in Danger, Texas Attorney General Says as Coronavirus Spreads*, TEX. TRIB. (Mar. 23, 2020, 3:00 PM), <https://texastribune.org/2020/03/23/texas-stops-most-abortions-during-coronavirus-outbreak> [<https://perma.cc/SYC5-5TEM>].

<sup>6</sup> *Abbott*, 954 F.3d at 777–78.

<sup>7</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>8</sup> *Id.* at 878 (plurality opinion).

<sup>9</sup> *Abbott*, 954 F.3d at 785–86.

<sup>10</sup> *Id.* at 787.

<sup>11</sup> 197 U.S. 11 (1905).

<sup>12</sup> *Abbott*, 954 F.3d at 783.

According to that standard:

[W]hen 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.”<sup>13</sup>

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.”<sup>14</sup> After the district court issued a narrower TRO on remand, the Fifth Circuit issued another writ of mandamus — reaffirming its earlier reliance upon *Jacobson*.<sup>15</sup> And in a challenge to a similar coronavirus abortion ban in Arkansas, the Eighth Circuit followed *Abbott*, “find[ing] that the district court’s failure to apply the *Jacobson* framework produced a patently erroneous result.”<sup>16</sup>

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, the governor of New Hampshire defended a statewide 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 believe that a restriction he imposed was necessary.”<sup>17</sup> Invoking *Smith v. Avino*,<sup>18</sup> a widely cited Eleventh Circuit decision regarding curfews imposed after Hurricane Andrew,<sup>19</sup> the New Hampshire trial court accepted the good faith/some factual basis standard proffered by the defendant on the grounds that certain “fundamental rights . . . may be . . . suspended” for the duration of the emergency.<sup>20</sup>

In a coronavirus abortion ban decision of its own, *Robinson v. Attorney General*,<sup>21</sup> 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*

<sup>13</sup> *Id.* at 784 (quoting *Jacobson*, 197 U.S. at 31).

<sup>14</sup> *Id.* at 786.

<sup>15</sup> *In re: Abbott*, 956 F.3d 696, 703 (5th Cir. 2020).

<sup>16</sup> *In re: Rutledge*, No. 20-1791, 2020 WL 1933122, at \*5 (8th Cir. Apr. 22, 2020).

<sup>17</sup> Objection to “Emergency Motion for Preliminary Injunction and Permanent Injunction” at 2, *Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Super. Ct. Mar. 25, 2020).

<sup>18</sup> 91 F.3d 105 (11th Cir. 1996).

<sup>19</sup> *Id.* at 107; *see also id.* at 109 (“In an emergency situation, fundamental rights such as the right of travel and free speech may be temporarily limited or suspended.” (first citing *Aptheker v. Sec’y of State*, 378 U.S. 500 (1964); and then citing *Korematsu v. United States*, 323 U.S. 214 (1944))).

<sup>20</sup> *Binford*, slip op. at 13 (quoting *Avino*, 91 F.3d at 109).

<sup>21</sup> 957 F.3d 1171 (11th Cir. 2020).

*disaster.*”<sup>22</sup> Second, the Eleventh Circuit held that the district court had not erred in concluding that “the burdens imposed by the [state’s] medical restrictions . . . are undue under *Casey*, and . . . they impinge the right to an abortion in a ‘plain, palpable’ fashion under *Jacobson*.”<sup>23</sup> As a result, the court declined to stay a preliminary injunction requiring Alabama to allow health care providers to determine whether to delay a patient’s abortion.<sup>24</sup> The Eleventh Circuit’s approach, which the Sixth Circuit followed soon thereafter,<sup>25</sup> suggests that the Supreme Court’s subsequent civil liberties jurisprudence can be reconciled with *Jacobson*’s broad language.

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*. These critiques likewise apply to instances in which courts purport to adopt the appropriate standard of review but do not actually apply it with appropriate rigor.<sup>26</sup>

First, the suspension principle is inextricably linked with the idea that a crisis is of finite — and brief — duration. To that end, the principle 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 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 have already demonstrated, most of these measures would have met with the same fate under “ordinary” scrutiny, too.<sup>27</sup> The principles of proportionality and balancing driving most

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<sup>22</sup> *Robinson v. Marshall*, No. 2:19CV365, 2020 WL 1847128, at \*12 (M.D. Ala. Apr. 12, 2020) (quoting *Avino*, 91 F.3d at 109 (emphasis added)); see also *Robinson*, 957 F.3d at 1179.

<sup>23</sup> *Robinson*, 957 F.3d at 1182 (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)).

<sup>24</sup> *Id.* at 1174.

<sup>25</sup> See *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 925–27 (6th Cir. 2020).

<sup>26</sup> See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216–18 (1944) (holding that internment of Japanese Americans passed “the most rigid scrutiny,” *id.* at 216, because of the compelling interests presented by national security concerns). *Korematsu* has been roundly rejected as part of the constitutional anticanon. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380, 387–90 (2011). In the absence of such a clear repudiation, soft applications of constitutional standards of review in times of crisis may create dangerous precedent for future applications of those standards once the crisis has passed. Justice Jackson articulated this concern in his *Korematsu* dissent: “[O]nce a judicial opinion . . . rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination.” 323 U.S. at 246 (Jackson, J., dissenting).

<sup>27</sup> *Cf.*, e.g., *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 by a church to an order prohibiting

modern constitutional standards permit greater incursions into civil liberties in times of greater communal need. That is the essence of the “liberty regulated by law” described by the Court in *Jacobson*.<sup>28</sup>

Finally, the most critical failure of the suspension model is that it does not 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.”<sup>29</sup> 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.”<sup>30</sup> Otherwise, we risk ending up with decisions like *Korematsu v. United States*<sup>31</sup> — 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.<sup>32</sup>

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 require it,”<sup>33</sup> the suspension model of judicial review relies heavily on an assumption that crises are fleeting. What is at

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gatherings without social distancing on the alternative ground that the order survives strict scrutiny).

<sup>28</sup> *Jacobson*, 197 U.S. at 27 (quoting *Crowley v. Christensen*, 137 U.S. 86, 90 (1890)).

<sup>29</sup> Wiley & Vladeck, *supra* note 3.

<sup>30</sup> Ilya Somin, *The Case for “Regular” Judicial Review of Coronavirus Emergency Policies, VOLOKH CONSPIRACY* (Apr. 15, 2020, 4:16 PM), <https://reason.com/2020/04/15/the-case-for-normal-judicial-review-of-coronavirus-emergency-policies> [<https://perma.cc/W82D-NKRN>].

<sup>31</sup> 323 U.S. 214.

<sup>32</sup> See generally PETER IRONS, *JUSTICE AT WAR* (1993) (documenting the government’s numerous misrepresentations to the federal courts in defending World War II-era internment camps).

<sup>33</sup> 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.”). The U.S. Constitution does not include any other reference to suspension of rights in times of crisis. This silence is in marked contrast to many other national constitutions, which expressly provide for emergency powers, including suspension of ordinary constitutional frameworks, and provide distinct procedural and/or substantive safeguards for emergency declarations. Tom Ginsburg & Mila Versteeg, *States of Emergencies: Part I*, HARV. L. REV. BLOG (Apr. 17, 2020), <https://blog.harvard-lawreview.org/states-of-emergencies-part-i> [<https://perma.cc/3WXN-JFQ3>] (“Over 90 percent of

stake, courts often claim, is but a “temporary loss of constitutional rights,”<sup>34</sup> 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 differs in two respects: First, the duration of the crisis — in which days have turned into weeks and weeks into months — already exceeds natural disasters or other episodic emergencies, and its length remains uncertain. Second, and more fundamentally, the incursions into 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, governments resort to ancient measures for separating the sick from the well.<sup>35</sup> When infectious individuals can be identified through testing or symptoms, they can be isolated and their contacts can be traced and quarantined.<sup>36</sup> 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.<sup>37</sup>

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constitutions in force today include emergency clauses that allow the government to step outside of the ordinary constitutional framework and to take actions that would not otherwise be permitted. . . . Fifty-six percent of constitutions with emergency provisions require the legislature to approve the declaration of an emergency, thereby placing an important check on gratuitous invocation. As a further check, many constitutions stipulate rules for ending the state of emergency, often by providing an automatic expiration date.”); *see also* John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT’L J. CONST. L. 210, 211–14 (2004) (discussing ancient and modern models of emergency power); Tom Ginsburg & Mila Versteeg, *States of Emergencies: Part II*, HARV. L. REV. BLOG (Apr. 20, 2020), <https://blog.harvardlawreview.org/states-of-emergencies-part-ii> [<https://perma.cc/8B88-C3NK>] (noting that the judicial branches in other countries have also provided checks on emergency powers). In the United States, emergency declarations by federal, state, and local executive branch officials are provided for by statute and act primarily as sweeping — and not always time-limited — delegations of authority from the legislature to the executive. *See* LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 396, 396–402 (3d ed. 2016) (surveying statutory authority for federal and state emergency declarations by the President, the Secretary of the Department of Health and Human Services, and state governors).

<sup>34</sup> *In re: Abbott*, 954 F.3d 772, 791 (5th Cir. 2020).

<sup>35</sup> *See* GOSTIN & WILEY, *supra* note 33, at 416 (noting that “age-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”).

<sup>36</sup> *Id.* at 416–23 (discussing isolation of individuals who are infected and quarantine of people who have been exposed).

<sup>37</sup> *Id.* at 424 (discussing travelers’ quarantines).

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.<sup>38</sup> Social distancing 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 people known to have been infected.<sup>39</sup> These strategies do not require perfect compliance to flatten the epidemic curve.<sup>40</sup> 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.<sup>41</sup> The few experts who discussed sheltering in place for the general population broached it as a voluntary measure, and one on which experts disagreed.<sup>42</sup>

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<sup>38</sup> *Id.* at 431–32 (discussing social distancing).

<sup>39</sup> See CTRS. FOR DISEASE CONTROL & PREVENTION, PUBLIC HEALTH GUIDANCE FOR COMMUNITY-LEVEL PREPAREDNESS AND RESPONSE TO SEVERE ACUTE RESPIRATORY SYNDROME (SARS) VERSION 2 app. D1 at 7 (2004), <https://www.cdc.gov/sars/guidance/d-quarantine/app1.pdf> [<https://perma.cc/7SPY-QR3R>] (describing community-wide social-distancing measures as being applied to “[a]ll members of a community in which 1) extensive transmission of SARS-CoV [the earlier virus that caused the 2003–2004 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”).

<sup>40</sup> 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/mrc-gida/2020-03-16-COVID19-Report-9.pdf> [<https://perma.cc/G93J-SY8F>]. The Imperial College report models a combination of interventions to mitigate transmission of SARS-CoV-2: social distancing whereby households reduce contacts outside the house, work, or school by 75% and workplace contacts decrease by 25%; closure of schools and universities (with 25% of universities remaining open); isolation of people who are symptomatic (assuming 75% compliance); and quarantine of symptomatic patients’ household contacts (assuming 50% compliance). *Id.* The report finds that this combination should be sufficient to keep the need for critical-care beds within capacity in Great Britain. *Id.*

<sup>41</sup> See, e.g., CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 39 (discussing closure of schools and work sites, suspension of public markets, cancellation of events, scaling back of public transportation, and travel restrictions); QUALLS ET AL., *supra* note 1, at 12–18 (recommending “voluntary home isolation of ill persons,” *id.* at 13, “voluntary home quarantine of exposed household members,” *id.* at 14, and “temporary closures and dismissals of child care facilities, K–12 schools, and institutions of higher education,” *id.* at 16; and suggesting that “[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),” *id.* at 18, for influenza pandemic mitigation).

<sup>42</sup> See, e.g., Julia E. Aledort et al., *Non-pharmaceutical Public Health Interventions for Pandemic Influenza: An Evaluation of the Evidence Base*, 7 BMC PUB. HEALTH 208, 208 & tbl.3, fig.1 (2008) (assessing “voluntary sheltering” at home — defined as “voluntary sequestration of

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 nonessential business operations.<sup>43</sup> Within two weeks, the majority of state governors followed suit.<sup>44</sup> 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.<sup>45</sup>

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.<sup>46</sup> Testing was increasing but still far below what was needed to reliably isolate the infected and trace and quarantine their contacts.<sup>47</sup> 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.<sup>48</sup> They warned that this success would be squandered if

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healthy persons to avoid exposure” — in consultation with an expert panel, which disagreed about its advisability).

<sup>43</sup> See, e.g., City and County of San Francisco Department of Public Health, Order of the Health Officer No. C19-07 (Mar. 16, 2020), <https://sfgsa.org/sites/default/files/Document/OrderC19-07ShelterinPlace.pdf> [<https://perma.cc/QY48-MFZW>]; Julia Prodis Sulek, *Meet the Doctor Who Ordered the Bay Area's Coronavirus Lockdown, the First in the U.S.*, MERCURY NEWS (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> [<https://perma.cc/K4DH-QYG8>] (describing the events that led seven local jurisdictions to simultaneously issue nearly identical shelter-in-place orders).

<sup>44</sup> Jennifer Kates et al., *Stay-at-Home Orders to Fight COVID-19 in the United States: A Scattershot Approach*, KAISER FAMILY FOUND. (Apr. 5, 2020), <https://www.kff.org/coronavirus-policy-watch/stay-at-home-orders-to-fight-covid19> [<https://perma.cc/WXK4-BCPU>]; see also *State Data and Policy Actions to Address Coronavirus*, KAISER FAMILY FOUND., <https://www.kff.org/health-costs/issue-brief/state-data-and-policy-actions-to-address-coronavirus/#socialdistancing> [<https://perma.cc/4HYP-BKLU>] (tracking state social-distancing executive orders).

<sup>45</sup> See Chad Terhune et al., *Special Report: How Korea Trounced U.S. in Race to Test People for Coronavirus*, REUTERS (Mar. 18, 2020, 2:13 PM), <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> [<https://perma.cc/G78V-AG4R>].

<sup>46</sup> Kates et al., *supra* note 44.

<sup>47</sup> Keith Collins, *Coronavirus Testing Needs to Triple Before the U.S. Can Reopen, Experts Say*, N.Y. TIMES (Apr. 17, 2020), <https://nyti.ms/2VySMpw> [<https://perma.cc/KLR3-6SXZ>].

<sup>48</sup> 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> [<https://perma.cc/5FT8-7TFZ>] (quoting California Governor 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”).



they did not maintain restrictions 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.<sup>49</sup>

By the end of April, public health experts and elected officials widely acknowledged that the coronavirus pandemic would require some limits of indefinite duration on economic, social, and cultural activity.<sup>50</sup> Even those who had decided to begin easing restrictions still maintained limits on the size of gatherings.<sup>51</sup> Simply put, in the context of a crisis for which mitigation will prolong, rather than shorten, the emergency, suspending more rigorous judicial scrutiny threatens to allow 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 in other contexts; 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 be stopped only by veto-proof supermajorities of both houses of Congress.<sup>52</sup> And unless courts are going to rigorously review whether the factual justification for the emergency measure is still present (which would be antithetical to the suspension model), the government can adopt measures that wouldn't be possible during "normal" times long after the true exigency passed. Thus, the coronavirus pandemic serves to undermine defenses of the "suspension" model grounded in the putatively transitory nature of emergencies.

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<sup>49</sup> See, e.g., J. David Goodman & Michael Rothfeld, *Why the Path to Reopening New York City Will Be So Difficult*, N.Y. TIMES (May 10, 2020), <https://nyti.ms/2SRwwXi> [<https://perma.cc/EGX4-AKDZ>].

<sup>50</sup> See, e.g., *id.*

<sup>51</sup> See, e.g., Governor Brian P. Kemp, Executive Order on Reviving a Healthy Georgia (Apr. 23, 2020). Governor Kemp's order allowed some, but not all, businesses to reopen while imposing social-distancing and sanitation requirements, banned gatherings of ten or more people for which physical distance cannot be maintained, and required all residents and visitors over age sixty-five and those who have been diagnosed with diabetes, lung disease, or a host of other conditions to shelter in place. *Id.* The order did not establish an expiration date for these restrictions. See *id.*

<sup>52</sup> National Emergencies Act, 50 U.S.C. § 1622(a) (2012); see also Stephen I. Vladeck, *The Separation of National Security 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)).

## 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 impose too great a burden on the government during crisis times and thereby run the risk of either invalidating policies that ought to be sustained or, at a minimum, deterring governments from adopting such policies for fear of their invalidation.<sup>53</sup> Here, too, we think that the coronavirus pandemic provides a useful (if still-evolving) counterexample. For even if courts subject 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 — to the normal scrutiny applied to 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*<sup>54</sup> — 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 distancing.<sup>55</sup> In refusing to issue a preliminary injunction against the state order, the district court paid lip service to *Jacobson*<sup>56</sup> but in fact applied ordinary levels of scrutiny for First Amendment free exercise and freedom of assembly claims. Indeed, although the court held that, even under the usual doctrinal framework, strict scrutiny did not apply,<sup>57</sup> 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.<sup>58</sup>

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.<sup>59</sup> As these cases demonstrate, ordinary judicial scrutiny hardly handicaps governmental responses to public health emergencies, 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

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<sup>53</sup> See, e.g., POSNER & VERMEULE, *supra* note 3, at 29–39.

<sup>54</sup> No. CIV 20-0327, 2020 WL 1905586 (D.N.M. Apr. 17, 2020).

<sup>55</sup> *Id.* at \*1.

<sup>56</sup> *Id.* at \*25.

<sup>57</sup> *Id.* at \*36.

<sup>58</sup> *Id.* at \*36 n.12.

<sup>59</sup> See *Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Super. Ct. Mar. 25, 2020).

by more weighty reasons.”<sup>60</sup> It is inevitable that the 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 fail proportionality-based standards of review. We believe prohibition of nearly all abortions imposes an undue burden on the right to choose, even in a crisis.<sup>61</sup> We also believe that categorical prohibition of “drive-in” religious services during which congregants remain in their vehicles at all times — were any jurisdiction to *actually* impose such a prohibition — would impermissibly burden the exercise of religion if sitting in a parked car for other purposes were allowed.<sup>62</sup> A truly discriminatory prohibition on drive-in services would fail strict scrutiny because it would not be narrowly tailored to advance the state’s undeniably compelling interest in maintaining physical distancing to slow the spread of infection; it would be woefully underinclusive to achieving that purpose.

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 *disproportionate* 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 generally survive modern constitutional scrutiny under most circumstances. 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.<sup>63</sup>

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<sup>60</sup> Vicki C. Jackson, Feature, *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.

<sup>61</sup> See *Robinson v. Att’y Gen.*, 957 F.3d 1171, 1182 (11th Cir. 2020) (“[T]he district court did not err in concluding that the burdens imposed by the medical restrictions as interpreted at the TRO hearing are undue under *Casey*. . .”).

<sup>62</sup> Cf. *Maryville Baptist Church, Inc. v. Beshear*, No. 20-5427, 957 F.3d 610 (6th Cir. 2020) (per curiam) (granting an injunction pending appeal that prohibited Kentucky from enforcing any ban on drive-in church services at the plaintiff’s church because the ban was discriminatory and not narrowly tailored). We do not believe that Kentucky’s emergency order in fact discriminated on the basis of religion — and we recognize that the court may have mischaracterized police enforcement actions. Kentucky maintained that there was no prohibition on drive-in services. *Id.* at 613. The court’s description of the facts indicates that police undertook enforcement activities at Maryville Baptist Church on Easter at a time when at least some congregants were there to attend in-person services. See *id.* (“[S]tate troopers . . . took down the license plate numbers of everyone there, whether they had participated in a drive-in or in-person service.”). So it seems possible that police were not aware that some congregants had planned to remain in their cars.

<sup>63</sup> Of course, we do not thereby automatically endorse judicial decisions that *invalidate* government actions taken in response to the pandemic, for it is just as possible that courts might incorrectly

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 it is flawed as a descriptive matter; *Jacobson* never quite said what it's been said to have said. In any case, subsequent events have overtaken *Jacobson*, 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,<sup>64</sup> and the Court framed the case in terms of the “authority to determine for all what ought to be done in such an emergency,”<sup>65</sup> but Justice Harlan's opinion eschewed any form of the suspension principle. Instead, *Jacobson* adopted a quintessential balancing test. Justice Harlan recognized that individual liberty is not “an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.”<sup>66</sup> Rather:

[I]n 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.<sup>67</sup>

Though Justice Harlan upheld 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,”<sup>68</sup> he paused in closing 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.”<sup>69</sup> While declining to “usurp the functions of another branch of government” by “adjudg[ing], as [a] 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:

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apply the correct degree of (heightened) scrutiny. To us, however, that risk is not an argument against applying the correct degree of scrutiny; it is an argument in favor of correctly applying the correct degree of scrutiny.

<sup>64</sup> See *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 26.

<sup>67</sup> *Id.* at 29.

<sup>68</sup> *Id.* at 27.

<sup>69</sup> *Id.* at 38.

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[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 to interfere for the protection of such persons.<sup>70</sup>

In other words, in a decision that predated even *Lochner* (by just under two months),<sup>71</sup> 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.<sup>72</sup> 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.

Of course, our understanding of *Jacobson* as imposing a stronger standard of review opens it up to the criticism directed at all judicial review that closely examines the government's assertions: that a greater judicial role in assessing reasonableness permits judges to inject their policy preferences into decisions. This criticism may be more salient if, in the face of the many unknowns that accompany a crisis such as the coronavirus pandemic, judges are more likely to rely on their instincts. If anything, decisions like *Abbott* raise the concern that a more deferential standard of review could allow judges to *uphold* incursions into civil liberties that they prefer not to protect for policy reasons.<sup>73</sup>

Many courts have continued to employ the *Jacobson* standard — nonarbitrary 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, and to decide cases without determining whether strict scrutiny applies.<sup>74</sup> 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, consider *United States ex rel. Siegel v. Shinnick*,<sup>75</sup> a 1963 Eastern District of New York case in which the plaintiff sought the release of her mother from a federal quarantine facility where she

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<sup>70</sup> *Id.* at 28.

<sup>71</sup> In fact, Massachusetts referenced the statute the Court would soon invalidate in *Lochner* as an example of a government action that, unlike the vaccination mandate, did not have "a real and substantial relation" to its goal. *Id.* at 19 (citing *People v. Lochner*, 69 N.E. 373 (N.Y. 1904)).

<sup>72</sup> See, e.g., *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955).

<sup>73</sup> See *In re: Abbott*, 954 F.3d 772, 784–85 (5th Cir. 2020).

<sup>74</sup> See, e.g., *Phillips v. City of New York*, 775 F.3d 538, 542–43 (2d Cir. 2015); *Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App'x 348, 353 (4th Cir. 2011).

<sup>75</sup> 219 F. Supp. 789 (E.D.N.Y. 1963).

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.<sup>76</sup> Judge Dooling pointed to the importance of an individualized risk assessment, “taking into account previous vaccinations and the possibilities of her exposure to infection.”<sup>77</sup> 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 was not).<sup>78</sup> The judge also emphasized the use of a less restrictive alternative, urging “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.”<sup>79</sup>

At the same time, Judge Dooling was deferential to the scientific determinations of health officials:

[T]he 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 their judgment there must be a reliable showing of error.<sup>80</sup>

Judge 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.”<sup>81</sup> In a footnote, he commented favorably on the health officials’ risk assessment as “a function of the gravity of the situation as measured by their expert judgments dispassionately formed.”<sup>82</sup>

More recently, a federal district court adopted a similar approach in considering a quarantine of a person suspected of being capable of transmitting Ebola virus. Upon her return to the United States from treating Ebola patients in Sierra Leone, nurse Kaci Hickox was quarantined for eighty hours by New Jersey officials in Newark Airport.<sup>83</sup> After her release, Hickox went home to Maine, where authorities asked a state trial judge to order a home quarantine for a twenty-one-day incubation

<sup>76</sup> *Id.* at 790.

<sup>77</sup> *Id.* at 791.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* n.3.

<sup>83</sup> *Hickox v. Christie*, 205 F. Supp. 3d 579, 585–88 (D.N.J. 2016).

period,<sup>84</sup> 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.<sup>85</sup> In *Mayhew v. Hickox*,<sup>86</sup> Maine District Court Chief Judge LaVerdiere ordered that Hickox submit 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.<sup>87</sup>

Almost two years later, when it was clear that Hickox had never been an Ebola carrier, Judge McNulty of the United States District Court for the District of New Jersey relied on *Jacobson* to rule that Hickox's initial quarantine upon her arrival in New Jersey did not entitle her to damages on constitutional grounds.<sup>88</sup> Judge 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.<sup>89</sup> 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."<sup>90</sup>

These cases illustrate why *Jacobson* itself is not nearly as deferential as decisions like the Fifth and Eighth Circuits' coronavirus abortion opinions 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 four of its 1938 decision in *Carolene Products*<sup>91</sup> and as expounded in the familiar decisions of the 1960s and 1970s. Indeed, this later framework may explain why courts relying on *Jacobson* 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

<sup>84</sup> Maine's quarantine law provides for judicially imposed quarantine orders. ME. STAT. tit. 22, § 811(3) (2020).

<sup>85</sup> *Mayhew v. Hickox*, No. CV-2014-36, slip op. at 1–2 (Me. Dist. Ct. Oct. 31, 2014); Sydney Lupkin & Aaron Katersky, *Nurse Says She Won't Have Officials Violate "My Civil Rights,"* ABC NEWS (Oct. 29, 2014, 8:00 PM), <https://abcnews.go.com/Health/ebola-america-nurse-maine-health-officials-violate-civil/story?id=26542668> [<https://perma.cc/9NL4-EZ2B>].

<sup>86</sup> No. CV-2014-36.

<sup>87</sup> *Id.* slip op. at 2–3.

<sup>88</sup> *Hickox*, 205 F. Supp. 3d at 592–94; *see also id.* at 603 (dismissing all federal causes of action for damages); *Liberian Cmty. Ass'n of Conn. v. Malloy*, No. 16-cv-00201, 2017 WL 4897048 (D. Conn. Mar. 30, 2017) (dismissing suit for damages and injunctive relief by group of individuals quarantined under state orders in Connecticut based on travel in Ebola-affected countries).

<sup>89</sup> *See Hickox*, 205 F. Supp. 3d at 598–600.

<sup>90</sup> *Id.* at 598.

<sup>91</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

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.<sup>92</sup>

In other words, because (1) *Jacobson* applies to all constitutional rights, and (2) none of the Supreme Court’s abortion decisions suggests 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 scrutiny is a case that says nothing of the sort.<sup>93</sup> Instead, *Kansas v. Hendricks*<sup>94</sup> cited *Jacobson* for the proposition that “an individual’s constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context.”<sup>95</sup> 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 overrelies 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

<sup>92</sup> *In re: Abbott*, 954 F.3d 772, 786 (5th Cir. 2020).

<sup>93</sup> *See id.* at 785 (citing *Kansas v. Hendricks*, 521 U.S. 346, 356–57 (1997)).

<sup>94</sup> 521 U.S. 346.

<sup>95</sup> *Id.* at 356; *see also id.* at 356–57 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905)).



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 [the coronavirus pandemic] — and a body of law to guide public health legal preparedness for the next one."<sup>96</sup> That is to say, robust judicial review not only helps to smoke out pretext for government actions during an emergency, but 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 Professor Robert Gatter argues in his critique of Ebola quarantine cases:

[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 . . . identify and explain the logic the agency deployed to reach its conclusion . . .<sup>97</sup>

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<sup>98</sup> — 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. As we have noted previously: "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."<sup>99</sup> While all

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<sup>96</sup> Wiley & Vladeck, *supra* note 3; see also, e.g., Robert Gatter, Foreword, *The Ongoing and Iterative Task of Pandemic Preparedness*, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 1, 2–3 (2010); James G. Hodge, Jr. et al., *From [A]nthrax to [Z]ika: Key Lessons in Public Health Legal Preparedness*, 15 IND. HEALTH L. REV. 23 (2018); Wendy K. Mariner et al., *Pandemic Preparedness: A Return to the Rule of Law*, 1 DREXEL L. REV. 341, 366–67, 381–82 tbl.1 (2009); Wendy E. Parmet, *Quarantining the Law of Quarantine: Why Quarantine Law Does Not Reflect Contemporary Constitutional Law*, 9 WAKE FOREST J.L. & POL'Y 1 (2018); Mark A. Rothstein, *From SARS to Ebola: Legal and Ethical Considerations for Modern Quarantine*, 12 IND. HEALTH L. REV. 227, 246 (2015).

<sup>97</sup> Robert Gatter, *Three Lost Ebola Facts and Public Health Legal Preparedness*, 12 ST. LOUIS U. J. HEALTH L. & POL'Y 191, 211 (2018) (citation omitted).

<sup>98</sup> *Kaci Hickox, Nurse in Ebola Quarantine Standoff, Goes for a Bike Ride*, NBC NEWS (Oct. 30, 2014, 8:51 PM), <https://www.nbcnews.com/storyline/ebola-virus-outbreak/kaci-hickox-nurse-ebola-quarantine-standoff-goes-bike-ride-n237421> [<https://perma.cc/CR7R-V3FZ>].

<sup>99</sup> Wiley & Vladeck, *supra* note 3.

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 noncitizen enemy combatants at Guantánamo Bay, Cuba. Although detainees were originally sent to Guantánamo at least in part to minimize litigation risk,<sup>100</sup> Supreme Court decisions in 2004<sup>101</sup> and 2008<sup>102</sup> 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 one the government had initially defended.<sup>103</sup>

In the process, roughly sixty 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 the government determined that it could not defend their detention.<sup>104</sup> On the flip side, the decisions *upholding* the long-term noncriminal confinement of many of the detainees not only solidified (for many, at least) the legitimacy of much of the Guantánamo detention operation, but also articulated substantive detention standards that Congress subsequently codified.<sup>105</sup> Indeed, one of the common defenses of the fact that forty 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.<sup>106</sup> 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

<sup>100</sup> Memorandum from Patrick F. Philbin & John C. Yoo, Deputy Assistant Att’y’s Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep’t of Def. 1, 8 (Dec. 28, 2001).

<sup>101</sup> *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (holding that federal courts had statutory jurisdiction over habeas petitions brought by noncitizens detained at Guantánamo).

<sup>102</sup> *Boumediene v. Bush*, 553 U.S. 723, 771, 792 (2008) (holding that the Suspension Clause “has full effect” at Guantánamo, *id.* at 771, 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).

<sup>103</sup> 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 classified as an enemy combatant. *Id.* at 537. In later Guantánamo cases, the government thus argued, and the D.C. Circuit begrudgingly assumed without deciding, that a “preponderance of the evidence” standard applied. *Al-Adahi v. Obama*, 613 F.3d 1102, 1105 (D.C. Cir. 2010); *see also id.* at 1103–04.

<sup>104</sup> *See* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 926 (7th ed. 2020).

<sup>105</sup> *See, e.g.*, National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b), 125 Stat. 1298, 1562 (2011).

<sup>106</sup> *See, e.g.*, Aziz Z. Huq, *The President and the Detainees*, 165 U. PA. L. REV. 499, 534 fig.4, 570–74 (2017).

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 important not only 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-lasting 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, 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 "nonessential" 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.<sup>107</sup> Writing for the Court, Chief Justice Hughes drew a distinction between power created by emergencies and emergencies as occasions to exercise existing power.<sup>108</sup> 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."<sup>109</sup>

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 what have turned out to be fraudulent governmental claims of exigency.

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<sup>107</sup> *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

<sup>108</sup> *Id.* at 426 ("While emergency does not create power, emergency may furnish the occasion for the exercise of power.").

<sup>109</sup> *Id.* at 425–26.

More fundamentally, though, 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 also to find pretexts for triggering such emergencies in the first place.<sup>110</sup>

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<sup>110</sup> 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.”).