The Pandemic Constitution

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Pandemics threaten the health of our bodies and economies. They also threaten the health of our political and legal institutions. When COVID-19 hit, governments worldwide were utterly unprepared to meet the challenge. So were judges. Tasked with adjudicating the constitutionality of unprecedented lockdowns and emergency restrictions, and lacking recent precedents or scholarship to help them reflect, they reacted incoherently and ineffectively. To successfully meet the next, inevitable pandemic, we must learn from our current hardships and devise a set of constitutional tools tailored to deal with public health emergencies. We need a pandemic constitution.

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INTRODUCTION

Pandemics will be a recurring part of our future. Although we can take actions to minimize the risk,[1] the forecast is grim: more—and potentially deadlier—pandemics are in our future.[2] The effects of pandemics go far beyond health.[3] They disrupt our politics and economies, create the conditions for governments to encroach on

1. *See generally* Andrew P. Dobson et al., *Ecology and Economics for Pandemic Prevention*, 369 SCI. 379 (2020) (suggesting pandemic-preventing measures and assessing their costs).

2. *See* Miriam Berger, *Covid-19 'Not Necessarily the Big One,' WHO Warns*, WASH. POST, (Dec. 29, 2020, 10:49 AM), https://www.washingtonpost.com/world/2020/12/29/coronavirus-2020-the-big-one-who-pandemics [https://perma.cc/7KU5-B94L] ("The coronavirus pandemic might not be the 'big one' that experts have long feared, World Health Organization emergencies chief Mike Ryan warned . . . [T]he WHO has repeatedly warned that the world must prepare for even deadlier pandemics in the future.").

3. Michael T. Osterholm, *Unprepared for a Pandemic*, 86 FOREIGN AFF. 47, 48 (2007) ("[The next pandemic] will occur for sure, and . . . its implications will reach far beyond its toll on human health.").

fundamental rights, and place a great strain on constitutional systems. Despite numerous warnings, COVID-19 hit a world unprepared to face the challenges of a global pandemic.[4] This was as true for lawyers and judges as it was for public health officials. Assessing the constitutionality of unprecedented lockdowns and restrictions, courts were desperate for guidance. Without recent precedents on which to rely[5] or scholarship to help them reflect,[6] courts worldwide lacked a coherent understanding of their role during a severe public health emergency.

As courts repeatedly acknowledge their difficult task in this emergency, an obvious place for them to turn is "emergency constitutionalism":[7] the body of legal scholarship addressing the pressing challenges of managing emergencies while preserving

4. *The Best Time to Prevent the Next Pandemic Is Now: Countries Join Voices for Better Emergency Preparedness*, WORLD HEALTH ORG. (Oct. 1, 2020), https://www.who.int/news/item/01-10-2020-the-best-time-to-prevent-the-next-pandemic-is-now-countries-join-voices-for-better-emergency-preparedness [https://perma.cc/8KJG-KQJX] (citing Director-General Tedros Adhanom Ghebreyesus stating that "[o]ver the years we have had many reports, reviews and recommendations all saying . . . the world is not prepared for a pandemic [but] when the time came, the world was still not ready[.]").

5. In the United States, most courts relied on the 1905 case Jacobson v. Massachusetts, 197 U.S. 11 (1905), which is "often regarded as the most important judicial decision in public health." Lawrence O. Gostin, Jacobson v. Massachusetts *at 100 Years: Police Power and Civil Liberties in Tension*, 95 AM. J. PUB. HEALTH 576, 576 (2005). For all its canonical status, *Jacobson* is not well-suited to deal with public health emergencies. To give an idea of its age, *Jacobson* is prior to Lochner v. New York, 198 U.S. 45 (1905), and the tiered scrutiny inaugurated in Korematsu v. United States, 323 U.S. 214 (1944). This has prompted critics to note that "[o]ne hundred years after *Jacobson*, neither public health nor constitutional law is the same." Wendy K. Mariner, George J. Annas & Leonard H. Glantz, Jacobson v. Massachusetts: *It's Not Your Great-Great-Grandfather's Public Health Law*, 95 AM. J. PUB. HEALTH 581, 587 (2005). Moreover, *Jacobson* itself was arguably designed for public health, but not specifically for public health emergencies. In fact, as a critic has pointed out, "Harlan [writing for the Court] did not limit this test to emergencies, epidemics, or public health cases" Daniel A. Farber, *The Long Shadow of* Jacobson v. Massachusetts*: Public Health, Fundamental Rights, and the Courts*, 57 SAN DIEGO L. REV. 833, 840 n.69 (2020). For more on *Jacobson*, see *infra* Section II.A.1.

6. As we will see below, theories about emergency constitutionalism were overwhelmingly modelled around the specificities of national security crises. *See infra* Part I. As to public health law scholars, their attention has not been focused on the constitutionality of counter-pandemic measures. For example, one of the most popular public health law treatises in the United States devotes only one of its fourteen chapters to public health emergencies, and only three pages thereof to the constitutionality of the measures adopted to counter them—measures as severe as mandatory quarantines. *See* LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 428–30 (3d ed. 2016).

7. We adopt the term from BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN THE AGE OF TERRORISM 97 (2006).

democracy and the rule of law.[8] Emergency constitutionalism, however, has proven to be of little relevance when it comes to pandemics. Although sometimes built on an assumption of universality, emergency constitutionalism is overwhelmingly modeled on national security crises.[9] This Article argues that we need a pandemic constitution: a set of principles that will enable courts to mitigate a pandemic's particular risks to democracy and the rule of law while accounting for its demands. We pursue this goal by explaining the unique contours of pandemic emergencies and designing an emergency constitutionalism framework that deals specifically with them. Unlike traditional national security crises, a pandemic definitionally spans many jurisdictions simultaneously. The COVID-19 pandemic provided us with the chance to conduct a truly comparative exercise, enabling unprecedented cross-learning in judicial governance.

The Article makes two major contributions to the field, one descriptive and one normative.

As for the descriptive contribution, emergency constitutionalism is built around national security emergencies, which differ from pandemics in specific, fundamental ways. Emergency constitutionalism literature is not well-suited to inform judicial practice in the context of pandemics: Many of its tenets are grounded in preventing second attacks, gathering private information, or enabling secret government action, all of which are less relevant (or not relevant at all) in the context of a pandemic.[10] This inadequacy prevents courts from learning valuable lessons from emergency constitutionalism.[11]

Pandemics are different from national security crises in what they demand and what they jeopardize. Unlike traditional national security crises, pandemics involve not a flesh-and-blood enemy but a microscopic, biological one. The ways we fight these foes are fundamentally different. Human enemies can be defeated through

8. *See infra* Part I.

9. Tom Ginsburg & Mila Versteeg, *The Bound Executive: Emergency Powers During the Pandemic*, INT'L J. CONST. L., June 24, 2021, at 13, https://academic.oup.com/icon/advance-article-abstract/doi/10.1093/icon/moab059/6308959?redirectedFrom=fulltext [https://perma.cc/F8AS-KZJR] ("While existing accounts purport to apply to crisis governance *in general*, they appear to be based on . . . a national security crisis," and, accordingly, "little to none of the vast literature on emergency powers differentiates among different types of crises.").

10. *See infra* Parts I and III.

11. As our survey of court responses in the United States and abroad reveals, judges lacked a coherent framework for thinking about the emergency aspects of COVID-19. *See infra* Part II.

secret and sibylline action by government battalions or intelligence bodies. Germs, on the other hand, can only be effectively subdued by changing the daily lives of the vast majority of people—limiting social gatherings, hand-shaking, hugging.[12] Where national security emergencies demand secrecy in government action, pandemics demand transparency to legitimize government orders and expert recommendations, as well as to ensure that the population at large knows and follows those orders and recommendations.[13] Additionally, the long-term, open-ended nature of pandemics demands that public compliance outlast a powerful but ephemeral "rally 'round the flag'" effect.[14] The pandemic constitution must take into consideration this heightened need for government legitimacy.

Just as pandemics present different demands from national security emergencies, they also pose unique political dangers. Because pandemics demand long-term modifications in our daily habits, they pose a danger of unchecked, undesirable social and political change. We identify three fundamental mechanisms through which detrimental change can happen in pandemics. *First*, emergency measures are generally path-dependent; that is, they tend to make their own subsequent reversal difficult. In pandemics, this risk is heightened by the intrusive nature of government measures, which, in order to work, need to cover intimate aspects of citizens' behavior such as socialization, work, education, and even sex.[15] The most prominent example of a potentially change-resistant emergency measure in this context is digital surveillance,[16] but it is by no means the only one.[17] *Second*, pandemics provide a pretext for political incumbents to introduce norms that help them remain in power.[18] During the COVID-19 pandemic, democracies and autocracies alike have seen

12. *See infra* notes 231–233 and accompanying text.

13. *See infra* Section III.B.

14. *See infra* note 247.

15. *See* Tara Parker-Pope, *Masks, No Kissing and 'a Little Kinky': Dating and Sex in a Pandemic*, N.Y. TIMES (June 11, 2020), https://www.nytimes.com/2020/06/11/well/live/coronavirus-sex-dating-masks.html [https://perma.cc/LX99-R4ET] ("A number of public health agencies have offered tips for dating and sex during the [COVID-19] pandemic . . . .").

16. Oliver Holmes, Justin McCurry & Michael Safi, *Coronavirus Mass Surveillance Could Be Here to Stay, Experts Say*, GUARDIAN (June 18, 2020, 2:15 PM), https://www.theguardian.com/world/2020/jun/18/coronavirus-mass-surveillance-could-be-here-to-stay-tracking [https://perma.cc/FE46-SBXU] ("Extensive surveillance measures introduced around the world during the coronavirus outbreak have widened and become entrenched . . . .").

17. *See infra* Section III.A.1.

18. For President Trump's weaponization of the pandemic to delegitimize the 2020 electoral process in the United States, see *infra* Section III.A.3.

their leaders invoke the pandemic to attempt to alter or cancel elections,[19] punish inconvenient speech,[20] and forbid public assemblies.[21] *Third*, all these undesired changes can be brought about under the cover of epidemiological necessity. In the context of a pandemic, leaders often justify their actions (good faith or not) by claiming that theirs is the only course possible pursuant to science. As technocrats gain power and a popular petition attempts to declare Dr. Anthony Fauci the "sexiest man in the world,"[22] public officers increasingly argue that their political decisions are indeed epidemiological—or, perhaps worse, they actually are.

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19. *See, e.g.*, VASIL VASHCHANKA, POLITICAL MANOEUVRES AND LEGAL CONUNDRUMS AMID THE COVID-19 PANDEMIC: THE 2020 PRESIDENTIAL ELECTION IN POLAND 13 (Toby S. James et al. eds., 2020) ("The ruling party's postal voting legislation had been opportunistic and poorly conceived, putting in jeopardy the quality and credibility of the electoral process . . . .").

20. Some countries have enacted legislation purportedly directed at preventing misinformation about COVID-19, although they were reported to have spurious aims. *See* Cas Mudde, Opinion, *Don't Let Free Speech Be a Casualty of Coronavirus. We Need It More than Ever*, GUARDIAN (Apr. 6, 2020, 11:27 AM), https://www.theguardian.com/commentisfree/2020/apr/06/coronavirus-free-speech-hungary-fake-news [https://perma.cc/Q4VF-RRXW] ("[T]he current attack on free speech is particularly dangerous, because it does not only target, reasonably, 'fake news' on coronavirus, but also critique of inadequacies in hospitals by healthcare workers."). *See also Bolivia: COVID-19 Decree Threatens Free Expression*, HUM. RTS. WATCH (Apr. 7, 2020, 9:09 AM), https://www.hrw.org/news/2020/04/07/bolivia-covid-19-decree-threatens-free-expression [https://perma.cc/PY9Q-4SXU] ("A decree the Bolivian government has issued to respond to the COVID-19 emergency includes an overly broad provision that authorities could use to prosecute those who criticize government policies . . . ."); PETER NOORLANDER, COUNCIL OF EUROPE, COVID AND FREE SPEECH: THE IMPACT OF COVID-19 AND ENSUING MEASURES ON FREEDOM OF EXPRESSION IN COUNCIL OF EUROPE MEMBER STATES 7–8 (2020) (reviewing and evaluating legislation that included criminalization of "misinformation" in Armenia, Azerbaijan, Hungary, Republika Srpska, and Russia); Usha M. Rodrigues & Jian Xu, *Regulation of COVID-19 Fake News Infodemic in China and India*, 177 MEDIA INT'L AUSTL. 125, 126 (2020) (reviewing and critiquing authoritarian measures taken by governments in China and India to counter pandemic-related fake news).

21. *See, e.g.*, AMNESTY INTERNATIONAL, ARRESTED FOR PROTEST: WEAPONIZING THE LAW TO CRACKDOWN ON PEACEFUL PROTESTERS IN FRANCE 4 (2020), https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR2117912020ENGLISH.pdf [https://perma.cc/7NM2-2C97] ("The disproportionate restrictions on public assemblies . . . following the [French] government's decision to ease lockdown measures are . . . the continuation of a structural and long-term pattern in which law enforcement officials and prosecutorial authorities have weaponized vague laws to crackdown on peaceful protesters.").

22. Mary McNamara, *Column: Is Anthony Fauci the Sexiest Man Alive? Who the Hell Cares?*, L.A. TIMES (Apr. 18, 2020, 6:00 AM), https://www.latimes.com/entertainment-arts/story/2020-04-18/anthony-fauci-sexiest-man-alive [https://perma.cc/YBQ8-DL9F] (reviewing the online petition to make Anthony Fauci *People* magazine's "sexiest man alive").

The second contribution of this Article is normative.[23] We seek to build a set of principles that can orient courts in the vital task of preserving democracy, fundamental rights, and the rule of law while maintaining their own institutional legitimacy and ensuring that counter-pandemic policies are not unduly impaired. In this Article, we propose a three-part response to this challenge. We acknowledge that the onset of a pandemic requires a presumption of deference to the government, and in particular to the executive. The general principle acknowledges that when a pandemic first hits, the public demands quick and decisive action, and the executive is likely to be the institution best placed to assess the scarce information available in a reasonable amount of time. Moreover, the demands of the public will probably override attempts by courts to check the executive early on, which can harm courts' reputations and undermine their ability to act when their intervention is more needed.[24]

However, judicial intervention is imperative to both enhance the legitimacy of counter-pandemic measures and prevent the dangers associated with them. Therefore, we suggest two principled caveats that can serve this function. *First* is a principle of *democratic vigil*.[25] As the risk of undue political entrenchment remains ever-present in pandemics, so must judicial vigilance. The general rule of deference during pandemic emergencies should not extend to the limiting of political rights or the transformation of democratic processes. This constant judicial checking on entrenchment attempts is both inherently beneficial, as it prevents a possible power grab, and instrumental in preserving the democratic legitimacy of counter-pandemic measures, which is vital to their efficacy. *Second*, we propose a principle of *gradual reintroduction of judicial scrutiny*.[26] In pandemics, as time passes, the reasons for deference to the executive wane, and the justifications for judicial intervention intensify. As a pandemic transforms from a headline emergency to a feature of a new reality, judges find themselves in a territory they know better. It becomes easier to balance countervailing interests and rights, assess available scientific information, and demand explanations from the government. The gradual reintroduction of judicial review also has the potential of bolstering the legitimacy of counter-pandemic measures that survive judicial scrutiny.

The Article proceeds in four Parts. *Part I* surveys existing literature on emergency constitutionalism and shows how its

23. *See infra* Part IV.

24. *See infra* Section IV.A.

25. *See infra* Section IV.B.

26. *See infra* Section IV.C.

fundamental mandate applies to pandemic emergencies. It also shows, however, that because of the particular features of pandemics, the goals of emergency constitutionalism are better served by principles to be applied by courts reviewing counter-pandemic measures. *Part II* surveys the judicial response to COVID-19, the paradigmatic case study of a modern pandemic emergency. Our review of judicial decisions in the United States and abroad shows that courts were disoriented and lacked a general scheme to organize their decisions. Although it is clear that the way the courts most generally deferred to the government at the onset of the pandemic (through active validation of executive measures or through sheer silence), we also found that courts resisted, though not in a systematic way. It seems that courts were aware that they needed some form of emergency constitutionalism to deal with COVID-19, but they had nowhere to look for it. *Part III* draws on the previous parts to ask what makes pandemics a particular type of emergency. It does so by analyzing the political dangers posed by a pandemic (Section III.A) and its particular demands (Section III.B). *Part IV* explores how judicial review can work under a pandemic constitution. It acknowledges that an initial, albeit limited, presumption of deference is warranted in pandemics (Section IV.A). Then, it successively lays down the principles of democratic vigil (Section IV.B) and gradual reintroduction of judicial review (Section IV.C).

I. PANDEMICS AS EMERGENCIES

By mid-April 2020, when the COVID-19 pandemic had become a clear threat outside of China, almost one hundred countries[27] and all fifty American states[28] had declared a state of emergency under their constitutional regimes. These declarations were not merely rhetorical: Governments (mainly executives[29]) imposed burdensome

27. Christian Bjørnskov & Stefan Voigt, *The State of Emergency Virus*, VERFASSUNGSBLOG (Apr. 19, 2020), https://verfassungsblog.de/the-state-of-emergency-virus [https://perma.cc/ZPZ2-23AX].

28. *Coronavirus State Actions*, NAT'L GOVERNORS ASS'N, https://www.nga.org/coronavirus-state-actions-all [https://perma.cc/2Y7N-GW7H].

29. *See* Afsoun Afsahi et al., *Democracy in a Global Emergency: Five Lessons from the COVID-19 Pandemic*, 7 DEMOCRATIC THEORY v, vii (2020) ("What has been remarkable about [COVID-19 politics] is the broad uniformity with which democracies around the world have embraced 'the hour of the executive.'"). Executive dominance in COVID-19 policies has been noted also in regional contexts, such as Latin America, *see* Roberto Gargarella, *Democracy and Emergency in Latin America*, *in* DEMOCRACY IN TIMES OF PANDEMIC: DIFFERENT FUTURES IMAGINED 66, 69 (Miguel Poiares Maduro & Paul W. Kahn eds. 2020)

rights restrictions, including shutting down schools and businesses, limiting social and family gatherings,[30] monitoring cell phones,[31] imposing curfews,[32] military-enforced lockdowns,[33] and criminalizing coronavirus-related fake news.[34] In other cases, similarly draconian measures were imposed without a formal declaration of emergency.[35]

According to specialists, these measures were necessary to

("[C]hief executives in most Latin American countries are acting to restrict fundamental rights in ways not authorized by their constitution."); North America, *see* Grégoire Webber, *The Duty to Govern and the Rule of Law in an Emergency*, *in* VULNERABLE: THE LAW, POLICY AND ETHICS OF COVID-19, at 175, 179–80 (Colleen M. Flood et al. eds., 2020) ("Across the world, the legislative and judicial branches of government have retreated in part during the COVID-19 pandemic whereas members of the executive branch—understood to include public health officials—have assumed greater responsibilities."); and Europe, *see* Elena Griglio, *Parliamentary Oversight Under the Covid-19 Emergency: Striving Against Executive Dominance*, 8 THEORY & PRAC. LEGIS. 49, 49–50 (2020) ("In Europe, executive dominance in policymaking is indisputably one of the effects of the spread of the pandemic," where "legislative prerogatives were reduced to little more than ratifying executive proposals.").

30. *See generally COVID-19 Government Response Tracker*, UNIV. OXFORD: BLAVATNIK SCH. OF GOV'T, https://www.bsg.ox.ac.uk/research/research-projects/coronavirus-government-response-tracker [https://perma.cc/SJ77-9VMM] (last visited Sept. 2, 2021) (cataloguing and measuring the stringency of mobility measures taken worldwide); Joseph Spector & Jon Campbell, *New York Is Among States Limiting Private Gatherings to 10 People, But How Will It Be Enforced?*, USA TODAY (Nov. 17, 2020, 3:55 PM), https://www.usatoday.com/story/news/nation/2020/11/17/how-new-york-enforce-ban-private-gatherings-10-people/6324499002 [https://perma.cc/BV87-X2UD] (providing that New York is among several states limiting private gatherings to no more than 10 people); *Coronavirus: Social Gatherings Above Six Banned in England from 14 September*, BBC NEWS (Sept. 9, 2020), https://www.bbc.com/news/uk-54081131 [https://perma.cc/YMC2-PBFH] (reporting the ban on larger groups meeting anywhere socially indoors or outdoors in England).

31. *See* Alan Z. Rozenshtein, *Digital Disease Surveillance*, 70 AM. U. L. REV. 1511, 1513 (2021) ("Many governments have fought the coronavirus pandemic with *digital disease surveillance*.") (emphasis in original).

32. *See* Kwame Opam & Concepción de León, *Why Are States Imposing Virus Curfews?*, N.Y. TIMES (Nov. 21, 2020), https://www.nytimes.com/2020/11/21/us/coronavirus-curfew.html [https://perma.cc/AW4X-38HE].

33. *Id. See generally* Kevin Sieff, *Soldiers Around the World Get a New Mission: Enforcing Coronavirus Lockdowns*, WASH. POST (Mar. 25, 2020), https://www.washingtonpost.com/world/coronavirus-military-enforce-soldiers-armed-forces/2020/03/25/647cbbb6-6d53-11ea-a156-0048b62cdb51_story.html [https://perma.cc/Q6JA-HFZ7].

34. *See supra* note 21 and accompanying text.

35. *See* Gargarella, *supra* note 29, at 69 ("Presidents [in Latin America] have been making use of these easily accessible emergency powers, as if a state of siege existed, but without a declaration by Congress.").

save lives.[36] Others thought they reflected herd thinking and caused more suffering than they alleviated.[37] A similar split exists among legal scholars and political theorists. To some, emergency powers were exerted, mostly, in a contained and reasonable way.[38] Others, however, quick to warn about the dangers of abuse of emergency powers,[39] denounced an "infectatorship,"[40] a "decreetitis,"[41] or a "coronadiktatura."[42] Some of them did so in the most dramatic terms:

36. Seth Flaxman et al., *Estimating the Effects of Non-pharmaceutical Interventions on COVID-19 in Europe*, 584 NATURE 257, 260 (2020) (finding that by May 2020 "across 11 countries 3.1 (2.8–3.5) million deaths have been averted owing to interventions since the beginning of the epidemic").

37. *See The Great Barrington Declaration*, https://gbdeclaration.org/#read [https://perma.cc/3Q2J-BR2V]. This declaration, signed by thousands of public health specialists and medical practitioners worldwide, states that "[c]urrent lockdown policies are producing devastating effects on short and long-term public health." *Id.*

38. Ginsburg & Versteeg, *supra* note 9, at 3 ("[I]n many countries, checks and balances have remained robustly in place [during the current health crisis] . . . .").

39. *See, e.g.*, Gargarella, *supra* note 29, at 73. Former Judge of the European Court of Human Rights Paulo Pinto de Albuquerque noted that "[s]ome European states have approved manifestly excessive restrictions of fundamental rights [both in] consolidated democracies [and] new democracies," and they did so "without derogating from the [European] Convention [on Human Rights]." Roberto Conti, *"La Corte Edu è Uno Strumento de Solidarietà Tra i Popoli Europei." P. Pinto de Albuquerque ["The European Court of Human Rights Is an Instrument of Solidarity Among European People." P. Pinto de Albuquerque]*, GIUSTIZIA INSIEME (Apr. 17, 2020), https://www.giustiziainsieme.it/it/diritto-dell-emergenza-covid-19/1006-la-corte-edu-al-tempo-del-covid-19 [https://perma.cc/E6UD-N8WV]. Former Supreme Court Justice of the United Kingdom, Lord Sumption, similarly warned that the actions of the British authorities were a product of "collective hysteria" that "risk[ed] plunging Britain into a police state." Lisa O'Carroll, *Covid-19: Ex-Supreme Court Judge Lambasts "Disgraceful" Policing*, GUARDIAN (Mar. 30, 2020, 10:33 PM), https://www.theguardian.com/world/2020/mar/30/covid-19-ex-supreme-court-judge-lambasts-disgraceful-policing [https://perma.cc/EZ2E-2PXM].

40. A group of public intellectuals and public figures in Argentina used the portmanteau "infectatorship" ("infectadura") in an open letter denouncing government's alleged abuses of power under the excuse of the COVID-19 pandemic. *See Coronavirus: La Argentina Vive una "Infectadura", la Dura Carta de Científicos e Intelectuales [Coronavirus: Argentina Lives Under an "Infectatorship", Tough Letter of Scientists and Intellectuals]*, LA NACIÓN (May 29, 2020, 7:17 PM), https://www.lanacion.com.ar/politica/la-argentina-vive-infectadura-dura-carta-cientificos-nid2371426 [https://perma.cc/G93Q-LPHY].

41. Andrea Scoseria Katz, *Taming the Prince: Bringing Presidential Emergency Powers Under Law in Colombia*, 18 INT'L J. CONST. L. 1201, 1222 (2020) ("The spectacle of an overactive Government, a hamstrung Congress, and a plodding Court led one periodical to diagnose a severe case of 'decreetitis' in Colombia's crisis response.").

42. Eva S. Balogh, *Will the Law Just Enacted Bring "Koronadiktatúra" to Hungary?*, HUNGARIAN SPECTRUM (Mar. 30, 2020), https://hungarianspectrum.org/2020/03/30/will-the-law-just-enacted-bring-koronadiktatura-to-hungary [https://perma.cc/59MB-M7U8] ("Some Hungarians didn't find [Prime Minister Orbán's pun with "korona," which means crown in

"Emergency powers were instrumental in ending the Roman Republic and in the rise of Adolf Hitler, so we should always be wary of them."[43] In some cases, their warnings met significant public backlash.[44]

Entangled in the debate over COVID-19 and the legal responses to it are both descriptive and normative elements. There are, however, good reasons to make the effort to distill the factors that should shape the judicial response to a pandemic, regardless of any considerations of the particular features of this one. First, there is, sadly, agreement that the current pandemic is not the last we are going to face.[45] The next pandemic might reach whatever threshold a critic might impose to gain emergency status. Second, even if the reaction to COVID-19 is merely a moral panic,[46] the fact remains that if people (and governments) define a situation as an emergency, it is an emergency in its political consequences.[47] Public and institutional forces that perceive the outbreak as an emergency are unlikely to be swayed by legal scholars' concerns.

While some courts were preparing for a major public health event, they focused, reasonably, on preparing bench books to assist them procedurally and logistically.[48] Courts are not legal theorists, and

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Hungarian] at all funny and began calling the bill and the new legal situation koronadiktatúra.").

43. Alan Greene, *State of Emergency: How Different Countries Are Invoking Extra Powers to Stop the Coronavirus*, THE CONVERSATION (Mar. 30, 2020, 10:25 PM), https://theconversation.com/state-of-emergency-how-different-countries-are-invoking-extra-powers-to-stop-the-coronavirus-134495 [https://perma.cc/DW95-45P7]. *See also* Stephen Thomson & Eric C. Ip, *COVID-19 Emergency Measures and the Impending Authoritarian Pandemic*, 7 J.L. & BIOSCIENCES 1, 4 (2020) (positing that "[g]lobal history has witnessed numerous instances of emergency powers serving as catalysts or facilitators of authoritarianization" and providing examples).

44. *See* Andy McLaverty-Robinson, *Anti-Lockdown Theory: In Defence of Giorgio Agamben*, CEASEFIRE MAG. (Mar. 19, 2020, 9:31 AM), https://ceasefiremagazine.co.uk/anti-lockdown-theory-in-defence-of-giorgio-agamben [https://perma.cc/6A35-385A] (describing backlash suffered by Italian philosopher Giorgio Agamben when he warned about abuse of emergency powers early in the pandemic).

45. *See supra* note 2 and accompanying text.

46. Some argued this early on in the pandemic. *See, e.g.*, Samuel Paul Veissière, *The Coronavirus Is Much Worse than You Think*, PSYCH. TODAY (Feb. 27, 2020), https://www.psychologytoday.com/us/blog/culture-mind-and-brain/202002/the-coronavirus-is-much-worse-you-think [https://perma.cc/8379-YPKB] ("The coronavirus is quite simply, and almost exclusively, a moral panic . . . in the most literal sense.").

47. We are paraphrasing the Thomas theorem—"If men define situations as real, they are real in their consequences." Robert K. Merton, *The Self-Fulfilling Prophecy*, 8 ANTIOCH REV. 193, 193 (1948) (deeming the Thomas theorem "basic to the social sciences").

48. A 2016 U.S. overview noted that "[o]nly approximately twenty states had developed public health benchbooks, and many of those were already somewhat dated.". NATIONAL

it is not their job to draw grand theory from nonexistent events. And legal scholars have not addressed the delicate normative tensions underlying judicial review in the context of a pandemic. To illuminate this debate, therefore, we need to turn to the responses that legal scholars envisioned for emergencies generally.

A. Judicial Review in Emergencies

The question of the role of judicial review during emergencies is not, of course, limited to pandemic emergencies. It is usually raised in the context of national security crises.[49] Three foundational stances dominate this debate. The first is the *business-as-usual model*,[50] which contends that judicial review should proceed as usual during emergencies. The law of crisis is the same as the law of normal times. In fact, judicial review is all the more necessary in emergencies: Foregoing judicial review during emergencies is like having an umbrella but not using it when it rains for fear of breaking the umbrella. It is precisely in "times of crisis that constitutional rights

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CENTER FOR STATE COURTS, PREPARING FOR A PANDEMIC: AN EMERGENCY RESPONSE BENCHBOOK AND OPERATIONAL GUIDEBOOK FOR STATE COURT JUDGES AND ADMINISTRATORS 3 (2016). As the document points out, however, they were focused on "identif[ying] mission-essential functions, creat[ing] preparedness plans and creat[ing] continuity of operations plans." *Id.*

49. *See* Ginsburg & Versteeg *supra* note 9, at 4.

50. We take this term from Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1043–53 (2003) (defining and elaborating on the "Business as Usual Model"). This position roughly corresponds to one of the poles in other authors' typologies. *See, e.g.*, Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 50 (2004) (presenting, but not endorsing, "Liberty Maximalism" as the position holding that "in times of war, at least as much as in times of peace, federal judges must protect constitutional liberty."). *See also* Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime*, 5 THEORETICAL INQUIRIES L. 1, 4 (presenting, but not endorsing, the position of "civil libertarian idealists," who "sometimes deny . . . that shifts in the institutional frameworks and substantive rules of liberty/security tradeoffs do, indeed, regularly take place during times of serious security threats," or " refuse to . . . legitimate such changes."); RICHARD POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 41 (2006) (presenting "civil libertarians" as those "reluctant to acknowledge that national emergencies . . . justify any curtailment of the civil liberties that were accepted on the eve of the emergency."); ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 5 (2007) (presenting the "civil libertarian view," which "holds that courts should be willing to strike down emergency measures that threaten civil liberties to the same extent that they strike down security measures during normal times.").

and liberties are most needed because the temptation to sacrifice them in the name of national security will be at its most acute."[51]

Supporters of the business-as-usual model are attracted to its insistence on the idea that rights protections should not be contingent on circumstances and its demand that judges maintain high levels of vigilance during crises. For these reasons, some scholars argued in favor of the business-as-usual model during the COVID-19 pandemic.[52] Critics of the model argue that it is unduly rigid and that it ignores the need—both perceived and actual—for the government to act decisively and effectively in the face of crisis. Because the executive has institutional advantages with regard to acting decisively and promptly, it may well be reasonable for courts to be more deferential to it during times of crisis.[53]

There is another reason critics of business-as-usual consider it untenable: "ought" implies "can."[54] At the outset of an emergency—be it a national security emergency[55] or a public health one[56]—social

51. David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2567 (2003).

52. *See generally* Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179 (2020) (arguing against "suspending" judicial review during health emergencies and advocating for "ordinary" judicial review instead).

53. This is the argument put forward most prominently by POSNER & VERMEULE, *supra* note 50, at 5 (defending that during emergencies "the executive branch, not Congress or the judicial branch, should make the tradeoff between security and liberty. During emergencies, the institutional advantages of the executive are enhanced," and courts, "which are slow, open, and rigid, have less to contribute to the formulation of national policy than they do during normal times"). *See also* POSNER, *supra* note 50, at 35–36 (invoking "institutional competence" as a reason for judges to be deferential towards the executive during national security emergencies).

54. *See* Sunstein, *supra* note 50, at 51 ("[Liberty Maximalism] is unrealistic . . . judges simply will not protect liberty with the same aggressiveness when a country faces a serious threat to its survival . . . 'Ought implies can,' and it is unhelpful to urge courts to adopt a role that they will predictably refuse to assume.").

55. *See infra* note 248 and accompanying text (discussing the phenomenon of "rally 'round the flag" in national security emergencies). *See also* Darren W. Davis & Brian D. Silver, *Civil Liberties vs. Security: Public Opinion in the Context of the Terrorist Attacks on America*, 48 AM. J. POL. SCI. 28, 43 (2003) (showing that, after 9/11, "increased sense of threat leads to a greater willingness to concede some civil liberties in favor of security and order").

56. Adam Chilton et al., The Normative Force of Higher-Order Law: Evidence from Six Countries During the COVID-19 Pandemic 18 (Jan. 25, 2021) (unpublished manuscript), https://ssrn.com/abstract=3591270 [https://perma.cc/HDW9-VQ2W] (finding broad popular support for COVID-19 emergency measures in representative samples in the US, Japan, and Israel, which was not significantly affected by indicating respondents that those measures were likely unconstitutional). *See also infra* note 247 (discussing the phenomenon of "rally 'round the flag" after the eruption of COVID-19).

pressure to support whatever measures the executive imposes is enormous. If judges do not feel comfortable allowing for at least a temporary window of deference, the outcome will rarely be the invalidation of excessive measures but rather a rationalization thereof.[57] Under the cover of a regular balancing or proportionality analysis, judges risk legitimizing otherwise disproportionate or irrational policies. Conversely, powerless resistance will damage judicial authority that is needed in the times ahead.[58] An initial window of deference protects the system from these dangers.

On the other end of the spectrum is the *deferral model*, which holds that it is rational for courts to defer to the executive branch during a crisis—[59] because "the executive is the only organ of government with the resources, power, and flexibility to respond to threats to national security, it is natural, inevitable, and desirable for power to flow to this branch of government."[60] A variant on this position is that during times of crisis it is best to allow the executive 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."[61] The deferral model explicitly relies on the reassertion of constitutional norms and democratic institutions in the wake of the

57. *See also* Gross, *supra* note 50, at 1131–33 (drawing on Jackson's dissent in support of his "Extra-Legal Measures Model" for dealing with emergencies)*;* Mark Tushnet, *Defending* Korematsu*?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 306 (2003) (drawing on Jackson's dissent to conclude that "it is better to have emergency powers exercised in an extraconstitutional way, so that everyone understands that the actions are extraordinary, than to have the actions rationalized away as consistent with the Constitution and thereby normalized").

58. *See* ACKERMAN, *supra* note 7, at 102 (commenting on a French legal provision that allows the President to ignore the Constitutional Council's advisory opinion on emergency powers, which would create a "precedent [that] will damage judicial authority when it comes to later, and more appropriate, interventions by the judges").

59. This position roughly corresponds to other positions identified in the literature. *See, e.g.*, Sunstein, *supra* note 50, at 49–50 (presenting, but not endorsing, the position of "National Security Maximalists," who "understand the Constitution to call for a highly deferential role for the judiciary, above all on the ground that when national security is threatened, the President must be permitted to do what needs to be done to protect the country."). *See also* Issacharoff & Pildes, *supra* note 50, at 4 (presenting "executive unilateralists" who "conclude that unilateral executive discretion, not subject to oversight from other institutions, is required" in national security emergencies).

60. POSNER & VERMEULE, *supra* note 50, at 4.

61. Gross, *supra* note 50, at 1023.

emergency.[62] The people or the courts are supposed to either approve or disapprove ex post of public officials' and the executive's actions.

While the business-as-usual model may be naive and rigid, we agree with the critics who point out that the deferral model underestimates both the long-term political dangers of unchecked emergency powers and the courts' institutional capacity to mitigate them.[63] As we will see in Part II, the COVID-19 response showed that courts can at times pressure governments to change their counter-pandemic policies.

Finally, in this Article, we adopt the *emergency constitutionalism model*, located in between these two poles and inspired by Bruce Ackerman's work.[64] While business-as-usual protection is not possible during an emergency (because the population, being in the midst of a panic, will not tolerate judicial invalidation) and not desirable (because it would create potentially lethal delays), certain principles and institutional features both *can* and *should* be protected by courts during times of crisis. Emergency constitutionalism seeks to enable effective and flexible governance during a crisis while being very careful about the potential of emergencies to lead to democratic down-sliding. Ackerman proposes to accomplish this through a temporary institutional rearrangement. In his model—designed exclusively for the United States—after a terror attack, Congress delegates extraordinary authority to the President for a very short time to both reassure the public that government is in control and to prevent a second attack. This delegation of power can be extended by Congress, but only with increasing super-majorities: a simple majority for the first delegation, 60% for its first renewal, 70% for the second one, etc.[65] However, he does not stop at institutional rearrangement. Ackerman also recognizes that an emergency

62. *See id.* ("It is then up to the people to decide . . . how to respond to such actions," either condemning them or approving them). *See also* POSNER & VERMEULE, *supra* note 50, at 4 ("Only when the emergency wanes do these institutions reassert themselves, but this just shows that the basic constitutional structure remains unaffected by the emergency.").

63. *See infra* Section III.A.

64. *See generally* ACKERMAN, *supra* note 7. This model roughly corresponds to what Gross calls "models of accommodation." Gross, *supra* note 50, at 1021. In our reading, what Sunstein defends as "judicial minimalism" during emergencies can also be framed as a form of emergency constitutionalism. Sunstein, *supra* note 50, at 76 ("In the context of war, minimalists want above all to avoid large-scale interventions into democratic processes.").

65. *See* ACKERMAN, *supra* note 7, at 4.

constitution might entail unavoidable temporary loss of fundamental rights.[66]

Putting aside his particular proposal, we agree with the fundamental goal of his enterprise: the tailoring of constitutional responses to the exigencies of particular types of emergencies. The goal is to allow "the continued faithful adherence to the principle of the rule of law and fundamental democratic values, while at the same time providing the state with adequate measures to withstand the storm wrought by the crisis."[67] In Ackerman's own words, we should view a "state of emergency as a crucial tool enabling public reassurance in the short run without creating long-run damage to foundational commitments to freedom and the rule of law."[68]

To honor emergency constitutionalism, however, we need to adjust its solutions to the requirements of the particular type of emergency. There are two paramount differences between pandemics and the terror emergencies Ackerman had in mind when he designed his system. On the one hand, the temporal element Ackerman assumes does not hold in pandemics[69] (and likely does not apply to terror either).[70] On the other hand, terror (like war) imposes special demands concerning the secrecy of its measures that are absent in pandemics.[71]

The literature on emergency constitutionalism, based as it is on national security emergencies, largely assumes that emergencies are short-lived, preceded and succeeded by a sea of normalcy.[72] Ackerman again serves as a good example. He opined that the special arrangements demanded by a terrorist attack are justified for a short time to prevent a second attack and reassure the public that the

66. *See id.* at 114 (acknowledging the "very real loss" of fundamental rights that his proposal tolerates, but hoping that it "offers some consolation in the middle run, encouraging judges to protect rights more aggressively than they might otherwise").

67. Gross, *supra* note 50, at 1021 (writing about "models of accommodation" generally).

68. ACKERMAN, *supra* note 7, at 89.

69. *See infra* Section III.A.

70. *See* Bernard Manin, *The Emergency Paradigm and the New Terrorism*, *in* THE USES OF THE SEPARATION OF POWERS 136, 157–63 (Sandrine Baume & Biancamaria Fontana eds. 2008) (arguing that the assumption of temporality inherent in emergency power regimes makes them inappropriate for terror because it is a long term crisis). *See also infra* Section III.B.

71. *See infra* Section III.B.

72. *See* ACKERMAN, *supra* note 7, at 57 ("My proposals make the most sense for societies afflicted by episodic terrorism—where events like September 11 remain exceptional."). *See also* Gross, *supra* note 50, at 1073 ("Crises constitute brief intervals in the otherwise uninterrupted flow of normalcy.").

government is still in control.[73] He believed that his argument would not work absent the premise that decisive executive action during a short window of time could prevent a second, potentially worse, terrorist attack.[74] Some have argued that any constitutional emergency powers regime must "presuppose that the circumstances calling for deviations from norms are in fact temporary."[75] This is because to grant extraordinary power limited to times of emergency, one must define their duration. Critics of Ackerman have attacked precisely that premise: There is no reason, they say, to think that a terror emergency will be as brief as Ackerman imagines.[76] They argue that without a limited time horizon, formally granting exceptional emergency powers to the executive loses a big part of its attractiveness. In any event, this premise does not match the reality of pandemics, where there is no second attack to prevent but rather a long, open-ended public health crisis.[77]

The nature of the decision-making process is radically different in national security emergencies and pandemics. In a national security emergency, secrecy is paramount and decisions have to be made rapidly, sometimes in minutes. This feature interferes with judicial review, as Justice Jackson famously noted in his dissent in *Korematsu*.[78] Nothing of the sort is true in pandemics,[79] where, on the contrary, transparency is key for sustaining the legitimacy of counter-pandemic measures.[80]

As a result of these two characteristics—a long time window and the need for transparency—the goals of Ackerman's emergency constitution are better served by discarding his institutional proposals. In the words of Ginsburg and Versteeg, while "a pandemic

73. *See* ACKERMAN, *supra* note 7, at 45 ("[T]he state should be granted extraordinary powers needed to prevent a devastating second strike, but only for a short period.").

74. *See id.* at 46–47 (laying down the premises for his "second strike" rationale).

75. Manin, *supra* note 70, at 27.

76. *See* David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1773 (2004) ("Ackerman's supermajoritarian escalator rests on an unproven and unprovable premise that emergencies are likely to be short-lived.").

77. *See infra* Part III.

78. Korematsu v. United States, 323 U.S. 214, 245 (1944) (Jackson, J., dissenting):

> In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal . . . Information in support of an order could not be disclosed to courts without danger that it would reach the enemy . . . Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.

79. *See* Farber, *supra* note 5, at 861 ("National security information often cannot be revealed to the public, which is rarely true of public health information . . . . [This points] toward greater judicial deference in national security cases than public health cases.").

80. *See infra* Section III.B.

undoubtedly constitutes a crisis, it is far from clear that crisis governance should be the same in a pandemic as in a national security crisis."[81] The open temporality of pandemics renders institutional rearrangements of the sort proposed by Ackerman ill-suited to the challenge.[82] The informational openness allowed and encouraged by the fight against a pandemic removes a plausible obstacle to the intervention of legislatures and, especially, courts in the oversight of counter-pandemic regulations. However, while we know that courts are institutionally capable of taking on this function, we still have to square their participation with the second aspect of the emergency constitution: substantive restrictions on fundamental rights.

II. EMERGENCY CONSTITUTIONALISM DURING COVID-19

In their book about the law in times of emergency, Eric Posner and Adrian Vermeule prophesied that when "emergencies strike, the executive acts, Congress acquiesces, and courts defer."[83] To some extent, this prediction came true during the COVID-19 crisis. As executive officials issued decisive, sometimes draconian, measures to fight the raging pandemic, courts largely deferred to their judgement. In the midst of an unexpected situation, it was only common sense that judges did not dare second-guess the political branches in finding a response.

A closer look, however, reveals a more complex picture. Most judges and courts seem to have adopted a hybrid stance: deferring in most cases while sometimes pushing back against government measures. Sometimes, courts accepted the general restrictive policy

81. Ginsburg & Versteeg, *supra* note 9, at 4. *But see* Farber, *supra* note 5, at 19 ("These considerations . . . suggest that, on balance, courts should treat public health emergencies much like national security threats for constitutional purposes.").

82. There is a fundamental reason why Ackerman's super majoritarian escalator is ill-suited for pandemics, at least in our account. In the kind of national security crisis he contemplates, it is paramount to suspend fundamental rights and grant the executive exceptional powers. As long as the emergency persists, these exceptional features might be necessary to prevent a second attack. Near-unanimity in the legislature is necessary, therefore, to ratify these powers and confirm the emergency is not only an excuse deployed by the government for expediency. In our account, pandemics are different. Here, although rapid executive action might be needed at the beginning, the institutional goal should be to create a "new normal" that factors in the risk of contagion among the compound risk of social life. In this new normal, the legislature (not the executive) is better suited to striking the right balance and demanding a supermajority would be granting the minority an unjustified veto power over it.

83. POSNER & VERMEULE, *supra* note 50, at 3.

while invalidating very specific aspects of it.[84] Other times, judges validated the measures in question but reminded the government that they could change their minds as the situation evolved or more scientific knowledge became available. To complicate things further, many judges seemed to change their approach to the judiciary's role in the pandemic according to the type of case at hand.[85]

In this Section, we provide a curated overview of judicial responses to rights-restrictive measures in the United States and abroad. As we described in Part I, emergency constitutionalism has two defining elements: an explicit or implicit adoption of a presumption of deference and a countervailing sense, again either explicit or implicit, that this deference presumption must be negated to defend a critical value or institution. As we will see, the reasoning and results in many pandemic cases are shaped by these two judicial stances, sometimes simultaneously. The differences across and within jurisdictions can be understood as disagreement on the precise calibration of these two tenets of emergency constitutionalism reasoning.

This Section explores these disagreements. First, we show that, at the onset of the COVID-19 pandemic, courts in the United States and abroad adopted deference as a general rule, albeit using different rationales. We also show, however, that this deference was not unfettered. Second, we show that courts did occasionally resist government measures deemed disproportionate or excessive. This resistance, however, was tailored to preserve various values deemed essential by the judges.

A. In the United States

1. Deference

In the United States, as a general rule, courts deferred to state governments and validated rights-restricting measures. Especially at the beginning of the pandemic, the Supreme Court "consistently stayed orders by which federal judges have used COVID-19 as a reason to displace the decisions of the policymaking branches of government."[86] The Court intervened to protect a state government's emergency policy

84. *See, e.g.*, *infra* note 150 (showing a generally deferential stance of the French Constitutional Court, which nonetheless invalidated specific policies).

85. As is prominently the case of the United States Supreme Court. *See infra* Section II.A.

86. Democratic Nat'l Comm. v. Bostelmann, 977 F.3d 639, 642 (7th Cir. 2020).

in areas such as elections,[87] prisoners' rights,[88] and restrictions on religious gatherings.[89]

Members of the Supreme Court have expounded on the rationales that justified deference to the elected branches of government. First, a traditional democratic argument for leaving policy design in the hands of the elected branches of government—according to Justice Gorsuch, executives and legislatures are better at making decisions in public health emergencies because they "can be held accountable by the people for the rules they write or fail to write; typically, judges cannot. Legislatures make policy and bring to bear the collective wisdom of the whole people when they do, while courts dispense the judgment of only a single person or a handful."[90]

Second, executives and legislatures have better institutional capacity for science-based policymaking: They "enjoy far greater resources for research and factfinding on questions of science and safety than usually can be mustered in litigation between discrete parties before a single judge."[91] The rationale from science is also connected with the democratic legitimacy of the political branches: Since the Constitution entrusts "the safety and the health of the people to the politically accountable officials of the States to guard and protect," it follows that "when those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad."[92] Counter-pandemic policies should not, therefore, "be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people."[93]

By laying down rationales for deference, the Court might also be setting the limits thereof. Lower courts, however, have sometimes justified deference through a blanket reference to an up-to-then

87. *See, e.g.*, Clarno v. People Not Politicians Oregon, 141 S. Ct. 206, 206 (2020) (reversing a district court that had altered a state's election rules); Merrill v. People First of Alabama, 141 S. Ct. 190, 190 (2020) (reversing a district court that suspended anti-fraud rules for early voting); Little v. Reclaim Idaho, 140 S. Ct. 2616, 2616 (2020) (staying an injunction that changed the rules for ballot initiatives during the pandemic).

88. *See* Barnes v. Ahlman, 140 S. Ct. 2620, 2620 (2020) (staying an order that overrode a prison's pandemic measures).

89. *See* South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (declining to change or suspend state regulation of public gatherings).

90. Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 29 (2020).

91. *Id.*

92. *South Bay*, 140 S. Ct. at 1613 (quoting Marshall v. United States, 414 U.S. 417, 427 (1974)).

93. *Id.* at 1614.

obscure Supreme Court case from 1905, *Jacobson v. Massachusetts*.[94] In *Jacobson*, "arguably one of the most expansive authorizations of the state's coercive force in American history,"[95] the Court upheld the authority of states to enforce compulsory vaccination laws. It is worth noting, however, that *Jacobson* does not prescribe absolute deference, as it has sometimes been read to do.

According to many lower courts, *Jacobson* mandates deference to government discretion in all cases in which there is some relation between the challenged policy and a public health goal.[96] Although *Jacobson* preceded the modern tiers-based judicial scrutiny, it has been interpreted as calling for the application of a rational basis test when counter-pandemic measures are under scrutiny[97] or even placing such measures completely outside the realm of the tiers of scrutiny.[98] Some circuit courts interpreted *Jacobson* as imposing a two-step test: The court must first ask if the government measure "'has no real or substantial relation' to the public health crisis," and then whether the measure is "beyond all question, a plain, palpable invasion of rights secured by the fundamental law."[99] Thus, several courts have granted

94. *See* Farber *supra* note 7, at 847 ("By the beginning of this century, *Jacobson* was a relatively obscure case except to specialists in public health.").

95. JOHN FABIAN WITT, AMERICAN CONTAGIONS: EPIDEMICS AND THE LAW FROM SMALLPOX TO COVID-19, at 57–58 (2020).

96. *See In re* Abbott, 954 F.3d. 772, 784 (5th Cir. 2020):

> [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.

97. Jeffrey D. Jackson, *Tiered Scrutiny in a Pandemic*, 12 CONLAWNOW 39, 41 (2020):

> The Court in *Jacobson* was not setting out a special framework for reviewing laws concerning emergency health regulations. Rather, the test set out in *Jacobson* was the exact same test the Court used at the time for reviewing every claim of due process and equal protection: the "classical rational basis test."

See also Farber, *supra* note 5, at 845 ("In a case dealing with hair styles of police officers, of all things, the Court cited *Jacobson* as support for using the rational basis test. However, it has more frequently been cited in two categories relating to health care.").

98. Wendy E. Parmet, *Rediscovering Jacobson in the Era of COVID-19*, 100 B.U. L. REV. ONLINE 117, 130 (2020) ("The Fifth Circuit has not been alone in its reading of *Jacobson*. In *Cassell v. Synders*, for example, the U.S. District Court for the Northern District of Illinois asserted that '[d]uring an epidemic, the *Jacobson* court explained, the traditional tiers of constitutional scrutiny do not apply.'"). In lieu of scrutiny, "courts may overturn public health rules *only* when they lack a 'real or substantial relation to [public health].'" *Id.*

99. *Id.* at 131 (quoting *In re* Rutledge, 956 F.3d 1018, 1028 (8th Cir. 2020).

wide discretion to the government in designing and applying counter-pandemic measures.[100]

The reading of *Jacobson* as requiring a strong presumption of deference in public health emergencies is, however, at least a slight exaggeration.[101] Justice Harlan, writing for the Court, held that "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."[102] He also made an oft-overlooked caveat:[103] "[T]he 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."[104] By itself, *Jacobson* does not provide the standard or rationale governing the general rule of deference and the limits to it. It is not surprising, therefore, that many interpretations can be, and were, made.[105]

2. Resistance

Although, as we have seen, deference was the preferred judicial response to counter-pandemic measures, it was not unfettered. When courts express their rationales for deferring, they are implying limitations to their deference: If they defer because of an emergency, this implies they will cease to defer once the emergency is over. If they defer because of the government's command of scientific knowledge, they will cease to defer in situations when such knowledge is not necessary. In other cases, courts select situations in which they are not willing to defer to the government. Both Republican- and

100. *See* James R. Steiner-Dillon & Elisabeth J. Ryan, Jacobson *2.0: Police Power in the Time of COVID-19*, ALBANY L. REV. (forthcoming 2021) (manuscript at 32), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3720083 [https://perma.cc/WQ8U-R299] (describing this reading as "*Jacobson overlays* the traditional doctrine, moving it in the direction of deference to the state during a public health crisis, but not preempting it entirely.").

101. Both Parmet, *supra* note 98, at 130 ("Of all the possible interpretations of *Jacobson*, [the Fifth Circuit's] is especially unconvincing") and Wiley & Vladeck, *supra* note 52, at 193 ("*Jacobson* . . . is not nearly as deferential as . . . the Fifth and Eighth Circuits' coronavirus abortion opinions would have it . . . ") agree that the deference reading of *Jacobson* is incorrect.

102. Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905).

103. WITT, *supra* note 95, at 60 ("Yet Justice Harlan's *Jacobson* opinion also contained a recessive note that many observers have failed to observe.").

104. *Jacobson*, 197 U.S. at 38.

105. Parmet, *supra* note 98, at 128 ("Given the different interpretations that courts and scholars have offered over the years, it is not surprising that courts have applied *Jacobson* in disparate ways since the start of the pandemic.").

Democrat-appointed members on the Supreme Court (and lower courts) have exempted select situations from general deference—although they disagree on which ones. Knowing which situations they select can help us understand what the rationale for deference was in the first place—that is, what their conception of emergency constitutionalism is.

When justices choose to defer to government action, they frame the matter as one of life or death and make judicial deference in emergencies the rule. In a religious liberty case, Justice Sotomayor reminded her colleagues on the Court that they were "enjoin[ing] one of New York's public health measures aimed at containing the spread of COVID-19" in the midst of "a pandemic that has already claimed over a quarter million American lives."[106] This, she feared, would "only exacerbate the Nation's suffering."[107] Justice Kavanaugh, who was in the majority, acknowledged that the pandemic "remain[ed] extraordinarily serious and deadly"[108] and that "substantial deference to state and local authorities" was therefore due,[109] but he added that "judicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised."[110]

Roles reverse when the topic at hand is different. In an election case, it was Justice Kavanaugh who reminded us that "[t]he COVID-19 pandemic has caused the deaths of more than 200,000 Americans, and it remains a serious threat . . . [b]ut federal judges do not possess special expertise or competence about how best to balance the costs and benefits of potential policy responses to the pandemic."[111] Therefore, "during the pandemic . . . [w]hen state and local officials 'undertake[] to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad.'"[112] Justice Kagan (joined by Justices Breyer and Sotomayor) disagreed: "There is not a moratorium on the Constitution as the cold weather

106. Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 78 (2020) (Sotomayor, J., dissenting).

107. *Id.* at 79.

108. *Id.* at 73 (Kavanaugh, J., concurring).

109. *Id.* at 74.

110. *Id.*

111. Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 32 (2020) (Kavanaugh, J., concurring).

112. *Id.* (quoting Andino v. Middleton, 141 S. Ct. 9, 10 (Kavanaugh, J., concurring in grant of application for stay).

approaches."[113] In this section, we try to make sense of these apparently contradictory statements.

a. Fundamental Rights Emergency Constitutionalism

A first place to look for judicial resistance is scrutiny over the restriction of fundamental rights. In emergency situations, courts could deem certain rights fundamental enough to negate any presumption of deference. In the United States, many rights have been considered so fundamental as to invalidate government action in normal situations—it should thus not come as a surprise that some judges and justices have thought they cannot be curtailed in emergency situations either.

In the early months of the pandemic, there were several Supreme Court anti-deference dissents—from conservatives and progressives—in Bill of Rights cases. Since we find both sides supporting a presumption of deference in other cases, these exceptions likely represent some idea of fundamental rights that outweigh the need for deference. For example, in his dissent in *South Bay*, Justice Kavanaugh wished to apply strict scrutiny, "the most rigorous of scrutiny," to California's regulation of attendance at religious services.[114] Clearly, as early as May 2020, Justice Kavanaugh (joined by Justices Gorsuch and Thomas) applied business-as-usual (in this case, strict) scrutiny to some COVID-19 cases. It seems that the dissenters believe that religious liberty is fundamental enough to negate the deference they advocated for in cases involving other rights.[115] Religious liberty dissents became endorsed by the majority after Justice Barrett replaced Justice Ginsburg on the Court.[116] The new majority, however, also offered a substantive reason for this change over time. Justice Gorsuch in his concurring opinion in *Roman Catholic Diocese*, argued that when the early line of cases developed:

> COVID [had] been with us, in earnest, for just three months. Now, as we round out 2020 and face the prospect of entering a second calendar year living in the

113. *Id.* at 42 (Kagan, J., dissenting).

114. South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614 (2020) (Kavanaugh, J., dissenting) (citing a non-emergency religious liberty case, wherein the court required state action that potentially discriminated against religious institutions to be "justified by a compelling governmental interest" and "narrowly tailored to advance that interest." Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531–32 (1993)).

115. For a scholarly iteration of this position, *see generally* Josh Blackman, *The "Essential" Free Exercise Clause*, 44 HARV. J.L. & PUB. POL'Y 637 (2021).

116. *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021).

> pandemic's shadow, that rationale [that we should defer because little is known about the pandemic] has expired according to its own terms. Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical. Rather than apply a nonbinding and expired concurrence from *South Bay*, courts must resume applying the Free Exercise Clause.[117]

As we shift from religious liberty to the protection of abortion rights or the treatment of prisoners, we find that the progressive wing adopts a non-deference stance. The (then) four progressives joined by Chief Justice Roberts refused to stay a nationwide injunction by a federal district court in Maryland preventing the FDA from requiring that patients sign a form before they get mifepristone (an abortion-inducing medication).[118] The district court held that such a requirement posed an undue burden on abortion rights during the COVID-19 pandemic. In his dissent, Justice Alito (joined by Justice Thomas) argued that this refusal to rule was contrary to the Court's general stance of deference.[119] It is likely that the majority believed that a woman's right to control her body outweighs any need for deference. Similarly, in a case dealing with an injunction by a federal court in Texas that forced a Texas prison to operate an extensive protocol of COVID-19 measures to protect its inmates, Justice Sotomayor wrote that the protection of prisoners' rights, which is normally very important, is even more crucial during a pandemic, "where inmates everywhere have been rendered vulnerable and often powerless to protect themselves from harm. May we hope that our country's facilities serve as models rather than cautionary tales."[120] Here again we see a situation where the presumption of deference was weighed against the responsibility of the state to vulnerable inmates.

Although the case law, involving mainly short injunctions and stays, is not explicit about this hierarchy of rights, it seems the most plausible reading of the fact that all justices both advocate for general deference and cordon off certain areas of law for business-as-usual

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117. Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 70 (Gorsuch, J., concurring).

118. FDA v. Am. Coll. of Obstetricians & Gynecologists, 141 S. Ct. 10, 11 (2020).

119. *Id.* (Alito, J., dissenting):

> Expressly denying a stay would highlight the inconsistency in the Court's rulings on COVID-19-related public safety measures. In response to the pandemic, state and local officials have imposed unprecedented restrictions on personal liberty, including severe limitations on First Amendment rights. Officials have drastically limited speech, banning or restricting public speeches, lectures, meetings, and rallies. The free exercise of religion also has suffered previously unimaginable restraints, and this Court has stood by while that has occurred.

120. Valentine v. Collier, 140 S. Ct. 1598, 1601 (2020) (Sotomayor, J., dissenting in denial of application to vacate stay).

review. In the words of Cass Sunstein, these cases can be read as "a kind of anti-*Korematsu*—that is, as a strong signal of judicial solicitude for constitutional rights, and of judicial willingness to protect against discrimination, even under emergency circumstances in which life is on the line."[121] The problem is that it is not clear which rights those are.

b. Democratic Emergency Constitutionalism

While the first idea involves a position of deference with exceptions where the business-as-usual model applies, the second idea finds that the protection of democratic institutions should outweigh the presumption of deference. Sometimes, protection of democracy is accomplished by protection of fundamental rights, such as voting rights. Other times, it comes through enforcing structural features of the decision-making system, such as making sure that democratic procedures are respected. In the United States, we have seen both types of democracy-protecting decisions.

One aspect of democratic emergency constitutionalism is concerned with elections and the right to vote. As the November 2020 elections drew near and it became apparent that they would take place during a surge in COVID-19 cases, many states (generally run by Democratic governors and legislatures) chose to adapt their election laws and regulations to allow for voting with reduced risk of infection and expanded (or established) procedures for early voting.[122] At the same time, many states (generally run by Republicans or by split governments) did not adapt their procedures to the pandemic.[123] In response, district courts in multiple states directly intervened in election procedures in an attempt to protect equal access to voting. Dealing with such a case, in *Republican National Committee v. Democratic National Committee*, the Supreme Court reversed a district court decision to grant a temporary extension of deadlines for electronic and mail-in voter registration and for the receipt of absentee ballots and to modify voter ID requirements in Wisconsin's April

121. Cass R. Sunstein, *Our Anti-Korematsu* 1 (Harv. Pub. L. Working Paper, Paper No. 21-21, 2020), https://ssrn.com/abstract=3756853 [https://perma.cc/X4AC-SYAW].

122. *See* Quinn Scanlan, *Here's How States Have Changed the Rules Around Voting Amid the Coronavirus Pandemic*, ABC NEWS (Sept. 22, 2020, 6:57 PM) https://abcnews.go.com/Politics/states-changed-rules-voting-amid-coronavirus-pandemic/story?id=72309089 [https://perma.cc/9LUY-B6FZ]; Zach Montellaro, *The Pandemic Changed How We Vote. These States Are Making the Changes Permanent.*, POLITICO (June 22, 2021, 4:30 AM), https://www.politico.com/news/2021/06/22/pandemic-voting-changes-495411 [https://perma.cc/Y3FK-ZHKD].

123. *See supra* note 122 and accompanying text.

primaries.[124] In her dissent, Justice Ginsburg (joined by Justices Breyer, Kagan, and Sotomayor) wrote that she feared that the majority's deferral to the state government would "result in massive disenfranchisement,"[125] as voters would either "have to brave the polls, endangering their own and others' safety, [or] lose their right to vote, through no fault of their own."[126] This, Justice Ginsburg continued, was "a matter of utmost importance—to the constitutional rights of Wisconsin's citizens, the integrity of the State's election process, and in this most extraordinary time, the health of the Nation."[127]

A similar case arose a few weeks before the presidential elections, after a district judge extended the absentee voting deadline in Wisconsin by six days. The Seventh Circuit reversed, and that reversal was upheld by the Supreme Court.[128] In her dissent, Justice Kagan argued that deference in the case of elections is misguided. The court's order would allow the state to throw "away the votes of people actively participating in the democratic process."[129] For this reason, on "the scales of both constitutional justice and electoral accuracy, protecting the right to vote in a health crisis outweighs conforming to a deadline created in safer days."[130] For Justice Kagan, election law is an area in which "deference to legislators should not shade into acquiescence"[131] because in this "field politicians' incentives often conflict with voters' interests—that is, whenever suppressing votes benefits the lawmakers who make the rules."[132] Because of these differing interests, Justice Kagan argued that elections should be vigorously defended by the courts in times of pandemic. Despite her reckoning of the gravity of the situation, in her understanding of emergency constitutionalism, deference does not override the democratic function of the court.

A second instance of democratic emergency constitutionalism arises with respect to the procedures through which counter-pandemic measures were enacted. This type of control features most prominently in the way some courts have policed separation of powers. For them, whether these restrictions were enacted by the legislative

124. Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1206–08 (2020) (per curiam).

125. *Republican Nat'l Comm.*, 140 S. Ct. at 1209 (Ginsburg, J., dissenting).

126. *Id.* at 1211.

127. *Id.*

128. Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 28 (2020) (mem.).

129. *Democratic Nat'l Comm.*, 141 S. Ct. at 42 (Kagan, J., dissenting).

130. *Id.*

131. *Id.* at 43.

132. *Id.*

branch, authorized by it, or issued through executive decree alone makes a difference as to their constitutional validity. This concern with the procedures required to restrict fundamental rights in times of emergencies resonates not only with the classical separation of powers framework but also with some canonical versions of emergency constitutionalism.[133]

In May 2020, in the midst of the first wave of COVID-19, the Wisconsin Supreme Court struck down Secretary-Designee of the Wisconsin Department of Health Services Andrea Palm's stay-at-home order, declaring that it was beyond her emergency powers without legislative approval (which the governor could not obtain).[134] By issuing stay-at-home orders, one of the justices reasoned, the secretary-designee "arrogated unto herself the power to make the law and the power to execute it."[135] The fact that a majority of people supported the measure could not alter the need to "protect the structural separation of powers,"[136] nor did the fact that the pandemic was an emergency:

> Although consolidation of power in one person may be tempting in times of exigency . . . history informs of the perils of the consolidation of power . . . . Regrettably, we have tangible examples of judicial acquiescence to unconstitutional governmental actions considered—at the time—to inure to the benefit of society, but later acknowledged to be vehicles of oppression.[137]

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133. *See supra* notes 64–66 and accompanying text (describing Ackerman's procedural design for dealing with national security emergencies); *see also* Issacharoff & Pildes, *supra* note 50, at 44 ("[Presidential systems] might justify a more process-based, institutionally-focused judicial role . . . during times of crises, such as wars."); Sunstein, *supra* note 50, at 109 (describing his minimalist approach to judicial interventions in emergencies as "a kind of Due Process Writ Large").

134. Wis. Legislature v. Palm, 942 N.W.2d 900, 920 (Wis. 2020) (Bradley, J., concurring).

135. *Id.*

136. *Id.* at 925:

> [R]epugnant cases [like *Korematsu*] must be cited to explain the fundamental importance of judicial resistance to popular pressures, which in times of crisis implore judges to cast aside the law in the name of emergency . . . Even if a significant portion of the public supports the Safer at Home Order, the judiciary must protect the structural separation of powers embodied in our state and federal constitutions in order to avoid future monumental mistakes from which our republic may never recover.

137. *Id.* at 922–23 ("We mention cases like *Korematsu* in order to test the limits of government authority, to remind the state that urging courts to approve the exercise of extraordinary power during times of emergency may lead to extraordinary abuses of its citizens.").

We find similar reasoning in a Michigan case. The Michigan Supreme Court invalidated extension of the governor's emergency powers.[138] The court argued that an extended state of emergency would put the governor in an unprecedented position of power, wherein she would hold:

> [C]oncentrated and standardless power to regulate the lives of our people, free of the inconvenience of having to act in accord with other accountable branches of government and free of any need to subject her decisions to the ordinary interplay of our system of separated powers and checks and balances.[139]

Therefore, the court wrote, to maintain "the public institutions that have most sustained our freedoms over the past 183 years, there must now be some rudimentary return to normalcy."[140] The Wisconsin and Michigan highest courts seemed to agree on the need to protect the Madisonian institutional framework even in times of emergency. In this case, since the legislature is the most democratic branch of state government, protecting separation of powers acts to protect democracy.

B. Outside the United States

1. Deference

The lack of a *Jacobson* precedent did not stop courts outside the United States from adopting a similarly deferential stance. This approach was especially dominant in the first weeks of the COVID-19 pandemic, when it was still possible to find courts uttering unqualified statements of deference to the government. In Chile, for example, courts acknowledged that counter-pandemic measures are "exclusive to the executive."[141] The Spanish Constitutional Tribunal used the argument of scientific uncertainty about the ways infection occurred and the consequences of the disease to uphold a ban on a celebration of International Workers' Day, even though it was to take place inside

138. Midwest Inst. of Health. v. Governor of Mich., 958 N.W.2d 1, 1 (Mich. Oct. 2, 2020).

139. *Id.* at 30.

140. *Id.* at 31.

141. *See, e.g.*, Corte de Apelaciones de Valparaíso [C. Apel.] [Valparaíso Court of Appeals], 23 marzo 2020, Rol de la causa: 8843-2020, salud, (Chile) (rejecting a petition to order the Executive to restrict circulation for epidemiological reasons).

individual cars.[142] The Italian Council of State probably issued the most stringent rationale when validating a government-mandated quarantine:

> [F]or the first time since the end of World War II, measures which are strongly restrictive of fundamental rights . . . have been decided and applied in defense of the still more primary and general constitutional value, public health, that is, the health of the generality of citizens, which is endangered by the persistence of individual conducts . . . according to scientific evidence and the tragic statistics of this time." Therefore, "the severity of individual grief cannot lead to derogate, limit, or compress the primary demand of caution advanced in the interest of the whole collective, corresponding to a national interest of today's Italy not surmountable in any way.[143]

This initial tendency toward outright judicial deference to the Executive was widespread, as noted by constitutional scholars in Europe,[144] North America,[145] South America,[146] Africa,[147] and

142. T.C., Apr. 30, 2020 (S.T.C., No. 40/2020, § II.4.b.2) (Spain) ("In the current state of scientific research . . . is not possible to have any certainty on the ways of infection, nor over the real impact of the spread of the virus" and "there are no scientific certainties on [its] mid- and long-term health consequences.").

143. Cons. Stato, sez. Ter., 30 marzo 2020, n. 01553, Foro amm. 2020, III, 3, 4 (It.).

144. *See* Angelo Jr Golia et al., *Constitutions and Contagion. European Constitutional Systems and the COVID-19 Pandemic*, MPIL RES. PAPER SERIES NO. 2020-42, at 53 (2020) ("[A]t the initial stages of the pandemic, French, German, and Italian courts generally proved quite deferential towards emergency measures, and then applied a stricter standard of scrutiny as the study period progressed, striking down emergency measures more often.").

145. *See* Paul Daly, *Governmental Power and COVID-19: The Limits of Judicial Review*, *in* VULNERABLE: THE LAW, POLICY AND ETHICS OF COVID-19, at 211, 213 (Colleen M. Flood et al. eds., 2020) ("[T]here is little prospect of muscular judicial engagement with governmental responses to the pandemic.").

146. *See* Roberto Gargarella & Jorge Ernesto Roa Roa, *Diálogo Democrático y Emergencia en América Latina*, MPIL RES. PAPER SERIES NO. 2020-21, at 27 (2020) (reviewing instances of judicial resistance to counter pandemic measures in Latin America, and deeming them "localized, limited, [and] exceptional").

147. *See* Gatsi Tazo & Charles Manga Fombad, *Cameroon's Response to the COVID-19 Pandemic: Combating a Deadly Pandemic within a Weak Rule of Law Framework*, *in* COVID-19 AND CONSTITUTIONAL LAW 3, 8 (Lic. Raúl Márquez Romero & Mtra. Wendy Vanesa Rocha Cacho eds., 2020) ("[E]xcessive judicial deference to the executive has limited the effectiveness of taking action against administrative authorities for abuse of office.").

Oceania.[148] A telling example comes from France, in which the Constitutional Council allowed an emergency law to be passed by Parliament in overt defiance of constitutional procedures because of the "particular circumstances of the case," which remained nonetheless unexplained.[149] At the onset of the pandemic, it seemed, the need for deference was so obvious as to remain tacit.

However, as time progressed, the courts' initial reaction ceased being blanket permission for the political branches to proceed as they pleased. Rather, they began to apply some form of loosened control, which in a majority of cases proved to be favorable to the executive's measures. Through these forms of relaxed proportionality analysis, courts around the world have validated extreme governmental restrictions such as mandatory confinement,[150] banning peaceful demonstration on the streets[151] and religious gatherings,[152] internal

148. *See* Eric L. Windholz, *Governing in a Pandemic: From Parliamentary Sovereignty to Autocratic Technocracy*, 8 THEORY & PRAC. LEGIS. 93, 94, 101 (2020) ("[In Australia] the oversight that courts provide is not being accessed," and "[court's] comparative lack of substantive expertise is likely to see them defer to the executive's findings on important questions of fact such as the necessity of declaring a state of emergency and issuing emergency directions."). *See also* Claudia Geiringer & Andrew Geddis, *Judicial Deference and Emergency Power: A Perspective on* Borrowdale v. Director-General, PUB. L. REV. (forthcoming) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3693450 [https://perma.cc/V4AX-N8MB] ("[T]he overall result in *Borrowdale* was predicated on a high degree of deference to executive power . . . [T]his is regrettable . . . [and] constitutes a dangerous precedent . . . .").

149. *See* Conseil constitutionnel [CC] [Constitutional Council] decision No. 2020-799DC, Mar. 26, 2020, J.O. 5 (Fr.). In this case, the French Constitutional Council quickly validated the emergency act passed by Parliament, even though the procedure did not comply with the constitutional enactment procedures mandating a 15 days delay between the two voting sessions. The sole explanation given by the Court was that "[t]aking into account the particular circumstances of the case, it is not appropriate to judge this organic law to have been adopted in violation of the rules of Article 46 of the Constitution." *Id.*

150. *See* Conseil constitutionnel [CC] [Constitutional Council] decision No. 2020-800DC, May 11, 2020, J.O. 2 (Fr.) ("The Constitution does not exclude the possibility for the legislator to provide for a governmental system of a public health state of emergency. In this situation, the legislator must ensure the reconciliation between the constitutional value of protecting health and the respect of [individual] rights and freedoms."). Note, however, that within this decision the Constitutional Council also declared a few provisions of the Emergency Act unconstitutional, primarily those involving the treatment of personal data. *Id.* ¶¶ 61–64.

151. *See* Commissioner of Police (NSW) v. Supple [2020] NSWSC 727 at [41] (N.Z.) ("[T]he balancing of those public health risks, even in their now mitigated form, as a result of the success of Governmental public health measures, outweighs, in the balance, the rights to public assembly and freedom of speech in the present context.").

152. *See* Parishad v. Union of India, No. 571/2020 (2020) ("Having regard to the danger presented by such a large gathering of people for the Rath Yatra, we consider it appropriate in

border closures,[153] closing schools,[154] and imposing curfews.[155] Courts also validated wide delegations of powers to the national executive,[156] in some cases announcing that they would exert judicial review with "broad flexibility" and "taking into consideration the [President's] broad capacity for action."[157]

All these decisions share the feature of implicit or explicit acknowledgement of the existence of an "emergency constitution." They recognize the presence of an exceptional circumstance that merits special deference and therefore allow for restrictions that would be unthinkable in regular times. Like the U.S. Supreme Court in *Jacobson*, however, they also refer to the need to preserve judicial review in time of emergencies to keep these measures appropriate and periodically revised.

2. Resistance

a. Fundamental Rights Emergency Constitutionalism

Outside the United States, rather than identifying fundamental rights that cannot be trumped even in an emergency such as the COVID-19 pandemic, courts engaged in proportionality analysis to ascertain when rights had been infringed beyond reasonableness.

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the interests of public health and safety of citizens who are devotees to restrain the respondents from holding the Rath Yatra this year."), *modified on reh'g*, No. 571/2020 (2020) (permitting limited religious gatherings).

153. *See Palmer v Western Australia* .[2021] HCA 5 ¶¶ 16–82 (Austl.) (conducting a lengthy and thorough assessment of the reasonableness of the travel restriction, including scientific evidence provided by five expert witnesses, before issuing a ruling on its validity)..

154. *See* Dolan v. SOS Health & Soc. Care [2020] EWHC (Admin) 1786, [61]–[62] (Eng.). The Court stated that, against the threatening background presented to public health authorities in March 2020, "it is simply unarguable that the decision to [impose certain rights restrictions] was in any way disproportionate to the aim of combating the threat to public health posed by the incidence and spread of the coronavirus." *Id.* Thus, it subsequently verified that restrictions that proved to be unnecessary were removed by the government.

155. *See* Loielo v Giles [2020] VSC 722 ¶ 253 (Austl.) ("In the circumstances I have described and, keeping in mind that Victoria was in a state of emergency, I do not consider that there were other reasonably available means . . . to achieve the purpose of reducing infections.").

156. *See* RvS [Council of State] (2nd ch.), Mar. 25, 2020, n° 67.142/2020, Advisory Opinion (Belg.) (holding the special powers granted to the executive constitutional because, "in the first place, there is no doubt that the situation created by the corona pandemic qualifies as a crisis").

157. *See* Corte Constitutional [C.C.] [Constitutional Court], mayo 20, 2020, Sentencia C-145/20 (para. 94) (Colom.).

After a prudential period, courts seemed to have run out of patience and began applying proportionality tests that looked much like their own usual policy analyses to conclude that some of the measures were not proportionate in some cases.[158] Other times, a lockdown appeared so excessive that they struck it down right away.[159] In yet other cases, courts intervened only when the violation of human rights was outrageous, such as a province preventing its citizens from returning home for many months[160] or the police detaining citizens for unspecified quarantine-related offenses.[161] Some courts also struck down specific provisions, invoking rationales such as age discrimination in mandatory isolation,[162] the protection of health data

158. *See De Beer v. Minister of Coop. Governance & Traditional Aff.*2020 (11) BCLR 1349 (GNP) at 24 para. 7.13 (S. Afr.) (invalidating a number of counter-pandemic regulations, declaring them "irrational" and stating that "there are many more instances of sheer irrationality included [in the regulations] . . . [T]he examples are too numerous to mention"). *See also* Suo Moto Action Regarding Combating the Pandemic of Corona Virus (COVID-19), (2021) 2020 S.M.C. (SC) 1, 5 (Pak.) (declaring unconstitutional the banning of opening shops on weekends, not "find[ing] any justifiable rational or reasonable classification on the basis of which these two days are excluded from doing business.").

159. *See In re* Kathumba v President of Malawi (Judicial Review Cause No. 22 of 2020) (2020) MWHC 8 at 19 (issuing an injunction prohibiting the government from "effecting and or otherwise enforcing the lockdown . . . until the final determination of the substantive judicial review")." It should be noted that at the time of this injunction there were no registered COVID-19 cases in Malawi. The injunction was later confirmed in *In re* Kathumba v. President of Malawi (Constitutional Reference No. 1 of 2020) (2020) MWHC 29 at 71 (declaring the orders issuing the lockdown unconstitutional for their effects on socioeconomic rights and urging Parliament to "pass a new law . . . that will comprehensively deal with issues of pandemics").

160. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 19/11/2020, Fallos de la Corte[Fallos] (2021-344-1137) (Arg.) (ordering the government of Formosa province to allow Argentineans into its territory).

161. *See El Salvador: President Defies Supreme Court*, HUM. RTS. WATCH (Apr. 17, 2020), https://www.hrw.org/news/2020/04/17/el-salvador-president-defies-supreme-court#:~:text=(Washington%2C%20DC)%20%E2%80%93%20El,Human%20Rights%20Watch%20said%20today [https://perma.cc/877Y-8H5W] (narrating how the Salvadoran President ignored successive Supreme Court rulings regarding detention of citizens for violations of quarantine regulations).

162. BANJALUKA CENTER FOR HUMAN RIGHTS, HUMAN RIGHTS IN TIMES OF COVID-19: IDENTIFIED OMISSIONS IN REALIZATION OF HUMAN RIGHTS IN BOSNIA AND HERZEGOVINA 15–16 (2020), https://www.osce.org/files/f/documents/7/7/470667.pdf [https://perma.cc/29ET-PF6A]:

> On 22 April, in fact, more than a month after the imposition of the aforementioned ban in [Bosnia and Herzegovina], the . . . Constitutional Court ruled that the blanket restriction on movement for minors and persons older than 65 in FbiH represents a violation of human rights and ordered the . . . government to change the measure within 5 days.

from privacy-invading COVID-19 policies,[163] or the protection of political gatherings.[164]

b. Democracy-Protecting Emergency Constitutionalism

Beyond the United States, some judges invalidated executive action on the ground that legislative authorization was required. This was the case in countries such as El Salvador,[165] Israel,[166] Kosovo,[167] Pakistan,[168] Romania,[169] and Spain.[170] In all these cases, courts did not, in principle, question the reasonableness of the measures *per se*, but rather established the need for legislative action if constitutional rights were to be infringed.

In other cases, protection of democracy came through the protection of fundamental rights, such as freedom of speech. The German Constitutional Court, for instance, after an initial phase of deference to government restrictions, lifted a ban on freedom of assembly, as it is an outstanding feature in a democracy—even in times of pandemic.[171] The French State Council lifted a similar ban on

163. Conseil constitutionnel [CC] [Constitutional Council] decision No. 2020-799 DC, Mar. 26, 2020, J.O. 5 (Fr.).

164. *See* Laura Hering, *COVID-19 and Constitutional Law: The Case of Germany* in COVID-19 AND CONSTITUTIONAL LAW, *supra* note 147, at 155 ("In a highly symbolic decision on April 15, 2020, the Federal Constitutional Court lifted a ban on assembly and underlined the freedom of assembly as an outstanding feature in a democracy—even in times of pandemic") (citing Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Apr. 15, 2020, 1 BvR 828/20 ¶¶ 2, 9, 11 (Ger.)).

165. *See* Habeas Corpus, no. 148–2020 ¶ 2, Constitutional Chamber of the Supreme Court of Justice of El Salvador, (2020) (El Salv.).

166. *See* HCJ 2187/20 Ben Meir v. Prime Minister, at 38 (2020) (Isr.).

167. *See* Constitutional Review of Decision No. 01/15 of the Government of the Republic of Kosovo, KO 54/20, 23 March 2020.

168. *See* Suo Moto Action Regarding Combating the Pandemic of Corona Virus (Covid-19) (2020) 2020 SMC 1, 2 (Pak.).

169. *See* Bianca Selejan-Gutan, *Romania in the Covid Era: Between Corona Crisis and Constitutional Crisis*, VERFASSUNGSBLOG (May 21, 2020), https://verfassungsblog.de/romania-in-the-covid-era-between-corona-crisis-and-constitutional-crisis [https://perma.cc/UUY4-5B5X].

170. S.T.S., Oct. 8, 2020 2020 T.S.J. 128 (Spain) ("[F]undamental rights vested by the Constitution on citizens cannot be affected by any state interference which is not authorized by their representatives through a provision with the quality of law, and which gathers the minimum conditions required by legal certainty . . . ."). *See also* Raphael Minder, *In Spain, Madrid's Highest Court Annuls a Federal Lockdown*, N.Y. TIMES (Oct. 8, 2020), https://www.nytimes.com/2020/10/08/world/in-spain-madrids-highest-court-annuls-a-federal-lockdown.html [https://perma.cc/555S-UHN6].

171. *See* Hering, *supra* note 164, at 155.

political gatherings arguing that "[f]reedom of expression . . . in particular through freedom to protest or gathering, is a condition of democracy and one of the guarantees of respect towards other rights."[172]

In sum, courts in the United States and abroad are aware of the need to adopt emergency constitutionalism. At times, they adopted deference as a general rule, either as an automatic response or as the result of loose scrutiny. At others, they selected areas in which they were not willing to defer or decided that, after a certain period of deference, judicial control should be reinstated. Each particular instance of judicial resistance responds to a particular institutional design and political constellation, so it would probably be hopeless to attempt to create a theory out of systematizing existing decisions. But this survey nonetheless provides a strong insight: Contrary to what many may have expected, courts are sometimes willing and capable of exerting judicial review of at least some rights-restrictive policies.

We should not let this judicial will go to waste. As our survey also shows, there is great variation in the kind of rationales for deference first and resistance after. One of the factors leading to this disparity was the lack of a normative theory of judicial review during a pandemic. As we have seen, theories about emergency constitutionalism have been modeled around terror attacks. Although pandemics are recurring phenomena, the differences between national security emergencies and pandemics became strikingly evident during the COVID-19 crisis. The need to adapt the emergency constitutionalism framework to this "new" emergency context has similarly become evident.

In the following sections we examine precisely those two considerations. In Part III, we further explore the features that make pandemics different from the kind of emergency for which emergency constitutionalism was designed. A pandemic poses different risks and requires different treatment than a national security emergency. In Part IV, we derive the normative consequences of those differences when it comes to judicial review.

III. HOW A PANDEMIC IS DIFFERENT: DEMANDS AND DANGERS

Like terror attacks and war, a pandemic poses unique dangers and demands unique sacrifices. All types of emergencies demand extraordinary sacrifice from citizens, risk unduly enhancing the power of rulers, consolidating exhausting and irrational norms, or

172. Conseil d'État [CE] [State Council], June 13, 2020, 440846, 440856, 441015 (Fr.).

legitimating undemocratic forms of decision-making. However, reminiscent of Tolstoy's unhappy families, each emergency risks tyranny in its own way.[173] In this Part, we explore the special demands of pandemics and the risks associated with them.

A. Unchecked Political Change

Pandemics are not times of short-lived moral panic.[174] They are constant and open-ended societal crises—and they are perceived as such.[175] While the initial panic of COVID-19 was significant, what followed was *not* a period of gradual return to calm and normalcy but one of constant fear.[176] COVID-19 measures penetrate and regulate the personal lives of billions. Counter-pandemic mechanisms seem designed to instill a sense of crisis and abnormality in the population. We are told to stay at home, keep away from other people, wear masks, and be repeatedly tested. All of these acts continuously remind us of the pandemic and its inherent dangers. The pandemic's penetration of personal life is complemented by the constant barrage of mass media reports on the epidemic and the endless policies, recommendations, and numbers produced by government agencies.[177] Pandemics dominate both our personal and public lives in ways that potentially surpass other types of emergencies. These social and legal mechanisms act to sustain the sense of fear and crisis, which can provide continued legitimacy to measures that may have anti-democratic ramifications.

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173. LEO TOLSTOY, ANNA KARENINA 1 (Constance Garnett trans.) (1901) ("Happy families are all alike; every unhappy family is unhappy in its own way.").

174. *But see* Veissière, *supra* note 46.

175. *See* Wiley & Vladeck, *supra* note 52, at 182 ("[Suspension of judicial review] is ill-suited for long-term and open-ended emergencies like the one in which we currently find ourselves."). Many cases discuss the long-term and open-ended nature of COVID-19. *See, e.g.*, Democratic Nat'l Comm. v. Bostelmann, 977 F.3d 639, 646 (7th Cir. 2020) ("The Covid-19 pandemic is no longer new but neither is it a static phenomenon; infection rates have ebbed and surged in multiple waves around the country and it is only now that Wisconsin is facing crisis-level conditions."). *See also* Wis. Legislature v. Palm, 942 N.W.2d 900, 914 (Wis. 2020) (Roggensack, C.J., concurring) ("For example, if a forest fire breaks out, there is no time for debate. Action is needed. The Governor could declare an emergency and respond accordingly. But in the case of a pandemic, which lasts month after month, the Governor cannot rely on emergency powers indefinitely.").

176. *See* Gianluca Serafini et al., *The Psychological Impact of COVID-19 on the Mental Health in the General Population*, 113 Q. J. MED. 529, 531 (2020) (reviewing the progressive rise in stress, anxiety, depression, frustration, and uncertainty during COVID-19).

177. *See generally* Ayesha Anwar et al., *Role of Mass Media and Public Health Communications in the COVID-19 Pandemic*, 12 CUREUS J. MED. SCI. (2020) (describing the role of mass media in promoting public health messages during COVID-19).

Unrelenting fear of the pandemic opens a window of opportunity for the passage of policies that have the strong potential to erode democratic and constitutional norms. An epidemic may be perceived to require emergency-type action by the executive *years* after its onset.[178] The long-term, open-ended, and constant nature of the pandemic crisis significantly exacerbates the danger of "normalization of emergency conditions—the creation of legal precedents that authorize oppressive measures without any end."[179] The constitutional system does not have time to reset and reexamine emergency measures. A pandemic constitution cannot rely on the natural reassertion of business-as-usual norms and institutions.[180] There are two distinct risks inherent in the open-ended nature of pandemics: the risk of creating detrimental path dependencies and the risk of antimajoritarian entrenchment. We will examine each in turn.

1. Path Dependency of Emergency Measures

The first potential challenge posed by the open-ended nature of pandemics is the risk of counter-pandemic measures becoming sticky and path dependent.[181] Path dependence is the mechanism through

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178. Many countries went through two or three cycles of lockdowns and numerous adjustments of less aggressive counter pandemic measures. *See generally* Nils Haug et al., *Ranking the Effectiveness of Worldwide COVID-19 Government Interventions*, 4 NATURE HUM. BEHAV. 1303 (2020) (describing and ranking the effectiveness of global non-pharmaceutical interventions in battling COVID-19).

179. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1043 (2003).

180. For example, in their theory of emergency powers, Posner and Vermeule rely explicitly on a cycle of emergency and normalcy. *See* POSNER & VERMEULE, *supra* note 50, at 3:

> When national emergencies strike, the executive acts, Congress acquiesces, and courts defer. When emergencies decay, judges become bolder, and soul searching begins. In retrospect, many of the executive's actions will seem unjustified, and people will blame Congress for its acquiescence and courts for their deference. Congress responds by passing new laws that constrain the executive, and courts reassert themselves by supplying relief to anyone who is still subject to emergency measures that have not yet been halted. Normal times return, and professional opinion declares that the emergency policies were anomalous and will not recur, or at least should not recur. Then, another emergency strikes, and the cycle repeats itself.

A similar faith in the immediate return of normalcy seems to animate Oren Gross, *supra* note 50, at 1089 ("Under the traditional understanding of the relationship between normalcy and emergency, the latter is understood to be no more than a transient phenomenon. Emergency powers should be available to the government only for short, well-defined periods.").

181. The literature on path dependence spans the social sciences. *See generally* BRIAN ARTHUR, INCREASING RETURNS AND PATH DEPENDENCE IN THE ECONOMY (1994) (developing an economic theory of path dependence); Scott E. Page, *Path Dependence*, 1 Q.J. POL. SCI. 87

which "specific institutions and technological arrangements tend to become accepted as natural the longer they are in place."[182] When policies are implemented, each step in a certain direction makes it increasingly hard to change course.[183] Indeed, once some institutional or technological arrangements have been put in place, several features might make their ultimate modification harder: Their cost is perceived to be already sunk and irrecuperable, institutions and people become better equipped to deal with the new situation, and self-fulfilling expectations about the persistence of the new status quo develop.[184] The result is a process that manifests itself as a historical inertia, whereby past choices constrain future choices and reproduce current legal and social arrangements. Any important policy—and public perceptions about it[185]—may "become subject to path-dependent processes that tend to lock in those developments."[186]

All emergencies have the potential to create detrimental path dependencies.[187] In the wake of the 9/11 attacks, many constitutional scholars warned about the risk of counterterrorist measures becoming

(2006) (examining the utilization of path dependence in political science theory); James Mahoney, *Path Dependence in Historical Sociology*, 29 THEORY & SOC'Y 507 (2000) (reviewing path dependence in the fields of history and sociology). For a criticism of the concept, *see* S.J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In, and History*, 11 J.L. ECON. & ORG. 205, 215–23 (1995).

182. Daniel Rosenbloom, James Meadowcroft & Benjamin Cashore, *Stability and Climate Policy? Harnessing Insights on Path Dependence, Policy Feedback, and Transition Pathways*, 50 ENERGY RES. & SOC. SCI. 168, 171 (2019).

183. *See* PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS 20 (2004) ("[P]ath dependence refers to the dynamic processes involving positive feedback, which generate multiple possible outcomes depending on the particular sequence in which events unfold.").

184. *See generally* Gregory C. Unruh, *Understanding Carbon Lock-In*, 28 ENERGY POL'Y 817 (2000) (arguing that industrial states are locked-in to fossil fuel technologies because of path dependence).

185. CLEM BROOKS & JEFF MANZA, WHOSE RIGHTS? COUNTERTERRORISM AND THE DARK SIDE OF AMERICAN PUBLIC OPINION 11 (2013) ("Another key source of path dependence in politics is that once adopted, policies may become popular with citizens and voters, so that they become entrenched or even simply taken-for-granted features of social and political life.").

186. *Id.* at 10.

187. *See* Yuval Noah Harari, *The World After Coronavirus*, FIN. TIMES, (Mar. 20, 2020), https://www.ft.com/content/19d90308-6858-11ea-a3c9-1fe6fedcca75 [https://perma.cc/G5SJ-NPRN]("Many short-term emergency measures will become a fixture of life. That is the nature of emergencies."). For the general role of path dependency in emergency policies, *see* BROOKS & MANZA, *supra* note 185, at 147–48.

entrenched in the legal fabric.[188] David Cole, for example, warned that "even where strictly limited to emergency periods, a preventive detention scheme is likely to have significant spillover effects that extend far beyond the emergency."[189] Dramatic as it was, the period of terror that followed 9/11 was caused by a single-day attack on US soil. The window of opportunity for policies to become entrenched during a pandemic, in which policies might be truly necessary for long periods of time, is wider. The 9/11 crisis left us with the PATRIOT Act.[190] It is too soon to know which liberty-restricting measures COVID-19 will leave us with. Perhaps cell-phone surveillance will be permanently enhanced[191] or curfews may become normalized and used for less and less exceptional reasons.[192]

Note that this process does not depend on counter-pandemic measures being excessive in the first place. A new health situation allows, and probably calls for, measures that are liberty-restrictive. What used to be a proper balance between collective health and life and individual liberties might no longer be an appropriate one. There is, certainly, a risk that a panicked government (pressured, or not, by a

188. *See generally* JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 (2012) (describing how the Bush regime's counterterrorism priorities and methods became entrenched and transferred into the Obama presidency).

189. David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1769 (2004).

190. *See* Kyle Welch, *The Patriot Act and Crisis Legislation: The Unintended Consequences of Disaster Lawmaking*, 43 CAP. U. L. REV. 481, 550 (2015):

> Whether the Patriot Act was a necessary sacrifice of civil liberties to wage the War on Terror or a monstrous overreach of federal authority, there is no arguing that the Act exploited a crisis to gain passage. Since Congress passed the Patriot Act, it has become a pillar of governmental authority with no timeline for an end to the War on Terror.

191. *See, e.g.*, Dana Sanchez, *NSA Whistleblower Snowden: Emergency Measures Are Sticky, Government Surveillance Could Continue Beyond Covid-19*, THE MOGULDOM NATION (Mar. 31, 2020), https://moguldom.com/267942/nsa-whistleblower-snowden-emergency-measures-are-sticky-government-surveillance-could-continue-beyond-covid-19 [https://perma.cc/VT3K-B5W7] ("Edward Snowden, a former CIA employee who leaked documents in 2013 about mass surveillance activities, warned that an uptick in high-tech surveillance used by governments to fight COVID-19 could outlast the epidemic."). *See also Israel Approves Cellphone Tracking of COVID-19 Carriers for Rest of Year*, REUTERS (July 20, 2020, 5:44 PM), https://www.reuters.com/article/us-health-coronavirus-israel-surveillanc-idUSKCN24L2PJ [https://perma.cc/RAZ4-WV48]] ("Israel's parliament voted on Monday to allow the country's domestic intelligence agency to track the cellphones of coronavirus carriers for the rest of the year.").

192. In fact, as critics noted before the COVID-19 crisis, curfews themselves "are the normalization of emergency powers in liberal democracies." DAVID CORREIA & TYLER WALL, POLICE: A FIELD GUIDE 44 (2018).

panicked population) will overshoot in its fight against a pandemic,[193] restricting liberties in ways that are unprincipled, ineffective, or disproportionate to their public health benefits.[194] But even in cases in which counter-pandemic measures are not impermissible in these ways, once the health situation improves, they should be revised to strike a new proper balance between the fundamental rights and social goals involved. Path dependency predicts that this reversal will face inertia and that at the end of the process the population may end up with a set of measures that does not accommodate their deliberate preferences and that was never given proper, democratic consideration in normal times.[195]

2. The Pandemic as an Excuse for Anti-Democratic Entrenchment

The second challenge is that pandemics provide excellent opportunities for different forms of political entrenchment. A pandemic can conveniently be used as cover for incumbents to fortify their position and make democratic change more difficult. This type of capture can happen by changing the constitution or passing statutes, but it can also occur less formally, by issuing policies that make the incumbent more powerful and popular or that limit the ability of political rivals to mount an effective challenge. Those currently in power can consolidate power and cripple political opposition under the

193. For a discussion on what they call the "panic thesis" in the context of national security emergencies (the idea that fear leads policymakers to overshoot in emergency response, neglecting civil liberties), *see* POSNER & VERMEULE, *supra* note 50, at 59–86.

194. During the first months of the COVID-19 pandemic, for example, it was sometimes warned that "clos[ing] parks and beaches without strong scientific evidence" was counterproductive, since "socializing may well move out of sight to more dangerous settings indoors." Zeynep Tufekci, *Scolding Beachgoers Isn't Helping*, THE ATLANTIC (July 4, 2020), https://www.theatlantic.com/health/archive/2020/07/it-okay-go-beach/613849 [https://perma.cc/VAN5-D2TU].

195. *Cf.* Harari, *supra* note 187 ("Decisions that in normal times could take years of deliberation are passed in a matter of hours. Immature and even dangerous technologies are pressed into service, because the risks of doing nothing are bigger."). *See also* Gross *supra* note 50, at 1126–30 (marking as one of the advantages of his "Extra-Legal Measures Model" that it allows for open and informed public deliberation on the emergency measures after the emergency is past). We should note that the theoretical question of inter-temporal preference shifts is a deep one. It might well be the case that, after the emergency, citizens' preferences might have actually changed. If this is the case, there is no ready answer to whether past or present preferences have normative preference, see AMARTYA SEN, RATIONALITY AND FREEDOM 569–70 (2002) (explaining that social change may bring a genuine modification of values, and stating that this brings the issue of according to which set of values should policy evaluations be made). However, if we assume that pre-emergency tradeoffs had somehow developed to be responsive to citizens' preferences, there is reason to think that sudden changes that had no time to be debated and tested do not have the same democratic strength.

guise of implementing counter-pandemic measures. This is true of all emergencies;[196] however, the open-ended nature of a pandemic allows those currently in power to implement elaborate long-term consolidation plans. Furthermore, the epidemiological nature of the emergency allows politicians to present many policies as based on scientific truth[197] and thereby shroud some of their political implications and motivations.

To be clear, this is not a hypothetical concern.[198] In June 2020, numerous human rights institutions, former chief executives, and Nobel laureates signed an open letter warning that "[a]uthoritarians around the world see the [COVID-19] crisis as a new political battleground in their fight to stigmatize democracy as feeble and reverse its dramatic gains of the past few decades."[199] Scholars also feared that while stable democracies might remain relatively unaffected, antidemocratic trends would intensify in countries in which democratic erosion was already underway.[200] To some extent, that happened. In backsliding democracies, governments passed laws severely affecting free speech, manipulating election dates and modalities, or passing unjustified powers onto the executive.[201] Philippine President Rodrigo Duterte threatened to "shoot" people who did not comply with public health regulations, which was perceived not only as obviously draconian but also as an opposition-

196. *See* NOMI CLAIRE LAZAR, STATES OF EMERGENCY IN LIBERAL DEMOCRACIES 8–9 (2009):

> But emergencies are fundamentally dangerous. Even the most genius emergency institutions can be subverted by a cunning and charismatic leader, and the lack of emergency powers has proved no safer. Emergency powers are only more or less safe: a good set of emergency powers is safer than a bad set, and safer still than no emergency powers at all.

197. *See infra* Section III.A.3.

198. *See* SARAH REPUCCI & AMY SLIPOWITZ, FREEDOM HOUSE, DEMOCRACY UNDER LOCKDOWN: THE IMPACT OF COVID-19 ON THE GLOBAL STRUGGLE FOR FREEDOM 1 (2020), https://freedomhouse.org/report/special-report/2020/democracy-under-lockdown [https://perma.cc/H93P-WAVD] ("Since the coronavirus outbreak began, the condition of democracy and human rights has grown worse in 80 countries.").

199. *A Call to Defend Democracy*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE (June 25, 2020), https://www.idea.int/news-media/multimedia-reports/call-defend-democracy [https://perma.cc/5WBV-27YZ].

200. Lauri Rapeli & Inga Saikkonen, *How Will the COVID-19 Pandemic Affect Democracy?*, 7 DEMOCRATIC THEORY 25, 26 (2020):

> We predict that the COVID-19 pandemic will not have grave long-term effects on established democracies that are characterized by several decades of uninterrupted democratic rule with genuinely open competition for political power . . . However, we expect that the repercussions of the COVID-19 pandemic may seriously aggravate the situation in countries where democracy is already eroding, such as Hungary and Poland.

201. *See supra* notes 18—21 and accompanying text.

silencing device.[202] The actions of Hungarian Prime Minister Viktor Orbán are "perhaps the most extreme example of executive overreach in the pandemic."[203] After first using emergency powers in accordance with the Hungarian Constitution, Orbán passed a law allowing him to rule entirely by decree until the end of the COVID-19 pandemic.[204] In using these powers, Orbán accomplished a series of illegitimate, non-pandemic-related goals, such as redirecting tax revenue from districts governed by the opposition to districts that were friendly to his regime and taking over the boards of non-health-related private companies.[205]

Democratic erosion, however, also affected stable democracies, as more pessimistic scholars warned it might.[206] In Israel, for example, critics repeatedly warned against Prime Minister Benjamin Netanyahu using COVID-19 as an excuse for a "power grab without precedent in Israeli history, including wartime."[207] In the United States, President Trump used the political cover of a pandemic to undermine public trust in the 2020 presidential elections. He accomplished this by waging an extended disinformation campaign to undermine the legitimacy of mail-in and early voting.[208] By

202. *See* Lynzy Billing, *Duterte's Response to the Coronavirus: 'Shoot Them Dead*,' FOREIGN POL'Y (Apr. 16, 2020, 9:08 AM), https://foreignpolicy.com/2020/04/16/duterte-philippines-coronavirus-response-shoot-them-dead [https://perma.cc/UF5L-FDZK] (surveying the Philippine government's threats to quarantine violators and political opponents' and international organizations' concerns that emergency powers might be used to undermine democracy and rule of law).

203. Kim Lane Scheppele & David Pozen, *Executive Overreach and Underreach in the Pandemic*, *in* DEMOCRACY IN TIMES OF PANDEMIC, *supra* note 29, at 43.

204. *Id*. at 43 ("Orbán proposed a new law giving him unlimited decree powers for the duration of the COVID-19 crisis.").

205. *Id*. at 39–40.

206. Thomson & Ip, *supra* note 43, at 4 ("The COVID-19 pandemic has . . . sparked authoritarian political behavior worldwide, not merely in regimes already considered to be disciplinarian or tyrannical but also in well-established liberal democracies with robust constitutional protections of fundamental rights.").

207. Noga Tarnopolsky, *Critics in Israel Say Netanyahu Using Coronavirus as Pretext for Massive Power Grab*, L.A. TIMES (Mar. 18, 2020, 4:40 PM), https://www.latimes.com/world-nation/story/2020-03-18/israel-coronavirus-netanyahu [https://perma.cc/ER8C-FGPH] ("Elyakim Rubinstein, a former Supreme Court justice, said in an interview that the confluence of events presented a 'clear danger to Israeli democracy.'").

208. *See* Yochai Benkler et. al., *Mail-In Voter Fraud: Anatomy of a Disinformation Campaign* 1, 47 (Berkman Klein Center for Internet & Society at Harvard University Working Paper, Paper No. 2020-6, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3703701 [https://perma.cc/2Z7J-S4AF]:

> This assertion capped a six months long disinformation campaign waged by the president and his party against expansion of mail-in voting during the pandemic of 2020. There is no disinformation campaign more likely to affect voter participation in the 2020 U.S. election and perceptions of the election's

suggesting that changes to election procedures were not due to the pandemic but actually in preparation for massive fraud, and by using state legislatures controlled by Republicans to prevent counting early votes before election day, President Trump constructed a narrative that allowed him to continue contesting the results of the election months after his defeat. Although ultimately failing to change the outcome, the president succeeded in convincing a majority of registered Republicans that he was defeated because of election fraud,[209] a feat that is hard to imagine without the unique circumstance created by COVID-19. The storming of the Capitol in January 2021 is only the first of the unpredictable ramifications of this strategy.

3. Unchecked Technocratic Change

During pandemics, medical professionals proliferate in the public sphere. In the United States, as in many other countries, weobserved the sudden rise to stardom of previously unknown physicians and epidemiologists.[210] Natural and reasonable as it might be, this feature creates political risks. The eagerness with which politicians defer to medical experts to find answers—answers that sometimes do not exist—opens the door to technocracy. In the realm of technocracy, actors and actions are legitimate because they are perceived as being univocally necessitated by science,[211] not because they are representative of the people. Even though this deference to science might become popular, it comes with an inevitable democratic cost. As Sheila Jasanoff put it, "[w]hen an area of intellectual activity

> legitimacy than the repeated false assertion that mail-in voting is fraught with the risk of voter fraud.

209. Emily Badger, *Most Republicans Say They Doubt the Election. How Many Really Mean It?*, N.Y. TIMES (Nov. 30, 2020), https://www.nytimes.com/2020/11/30/upshot/republican-voters-election-doubts.html [https://perma.cc/NAG8-WLYN] ("Since the election, surveys have consistently found that about 70 percent to 80 percent of Republicans . . . say enough fraud occurred to tip the outcome.").

210. *See* McNamara, *supra* note 22.

211. Miguel Angel Centeno, *The New Leviathan: The Dynamics and Limits of Technocracy*, 22 THEORY & SOC'Y 307, 313 (1993) ("Technocratic legitimacy is based on the appeal to scientific knowledge. This claim accompanies an implicit, and often explicit, rejection of 'politics' as inefficient and possibly corruptive,"). Also:

> In all these cases, legitimacy comes not from the barrel of a gun or from the ballot box, but from adherence to the dictates of a 'book.' Whether that document contains the word of god, a theory of history, or the econometric functions that describe equilibria, those best able to interpret its message and implement its laws cannot take opposition or popular participation into account.

is tagged with the label 'science,' people who are not scientists are *de facto* barred from having any say about its substance."[212]

A *first* risk associated with the rise of technocracy is that politicians might deploy this newfound mode of legitimation as a cover for actions that were decided according to other rationales. In times of pandemic, the legitimacy of experts grounds the very legitimacy of governmental emergency measures.[213] The executive's relationship to expertise makes it (the so-called "most knowledgeable branch")[214] the legitimate actor during a pandemic emergency. Research shows that during the life cycle of a pandemic, citizens' preferences shift strongly toward technocratic government.[215] Behind this shift is the idea that science is beyond politics—that it can create policies that are not part of the cesspool of democratic politics.[216] Scientific language and charisma can produce the "effects of naturalness, neutrality, facticity, objectivity, and inevitability—as modes of depoliticization."[217] This shift creates a window of opportunity for politicians to create long-term changes to law and norms—under the guise of scientific depoliticization—that can potentially be detrimental to democracy and liberty. This antagonistic logic of democracy and technocracy is central to judicial deferral to the executive branch. As we have seen above, courts often explain their deferral to the executive as a deferral

212. SHEILA JASANOFF, THE FIFTH BRANCH: SCIENCE ADVISERS AS POLICYMAKERS 14 (1990).

213. *See* Windholz, *supra* note 148, at 105–06 ("The core resource that enables them to perform this role is their expertise. Their specialised knowledge and expertise brings with it status, reputation, and the perception of objectivity and independence. This imbues them with authority and credibility in the public domain.").

214. *See generally* Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607 (2015).

215. *See generally* FRANCESC AMAT ET AL., PANDEMICS MEET DEMOCRACY: EXPERIMENTAL EVIDENCE FROM THE COVID-19 CRISIS IN SPAIN (2020) (documenting a rise in technocratic preferences in Spain in the first months of the COVID-19 pandemic).

216. *See* Lawrence O. Gostin & Sarah Wetter, *Using COVID-19 to Strengthen the WHO: Promoting Health and Science Above Politics*, MILBANK MEMORIAL FUND: THE MILBANK Q. (May 6, 2020), https://www.milbank.org/quarterly/opinions/using-covid-19-to-strengthen-the-who-promoting-health-and-science-above-politics [https://perma.cc/Z6YU-ALN5] ("In this once-in-a-century health crisis, we have the opportunity to empower WHO to protect the world—following no political agenda, while advocating for science and equity.").

217. Sheila Jasanoff, *Science and Democracy*, *in* THE HANDBOOK OF SCIENCE AND TECHNOLOGY STUDIES 259, 266 (Ulrike Felt et al. eds., 4th ed. 2017).

to superior access to scientific knowledge.[218] In extreme cases, courts might even order the executive to "follow science."[219]

This leads us to the *second* risk associated with technocracy: that scientists will shift from informing decision-makers to becoming the decision-makers themselves. While it might be true that the executive has a superior capacity to access scientific knowledge, it is false that the decisions it makes are necessitated by science. In fact, governments balance a wide variety of factors, of which epidemiological laws are only one, and make political decisions. In the words of Paul Kahn, "[e]conomists and epidemiologists can help clarify facts, but they cannot decide for us. They can describe costs and benefits, but they cannot tell us what sort of costs matter most. There is no scale independent of politics by which to assess these costs."[220]

The reason disagreement over risk assessment runs so deep is that it is no mere disagreement about costs and benefits. As Dan Kahan et al. put it, "public risk disputes, however much they are dominated by technical analyses of empirical data, are in essence 'the product of an ongoing political debate about the ideal society.'"[221] Different activities entail different risks and costs, but both the activities and the costs carry social meanings that differ for individuals with different world views. Through their assessments of risks and their consequent assessment of what activities are worth pursuing despite the risks, "individuals . . . express their commitment to particular ways of

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218. *See, e.g.*, Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring) ("Legislatures enjoy far greater resources for research and factfinding on questions of science and safety than usually can be mustered in litigation between discrete parties before a single judge."); R v. SOS for Health and Soc. Care [2020] EWHC 1392 (Admin) 21 (UK) ("What steps are to be taken, in what order and over what period will be determined by consideration of scientific advice, and consideration of social and economic policy. These are complex political assessments which a court should not lightly second-guess.").

219. In an extreme case, the Supreme Court of the Brazilian State of Maranhão ordered the regional executive to enforce a lockdown, since "measures of social isolation and of temporary prohibition of activities that favor the crowding of people, according to health authorities and entities and organs representing health experts, are the most adequate for the moment and have the aim of delaying the growth of the curve of virus spread." T.J.M.A., Ação Civil Pública No. 0813507-41.2020.8.10.0001, Relator: Des. Douglas de Melo Martins, Diario Oficial dos Estados [D.O.E.M.A.], 18.05.2020, 1 (Braz.).

220. Paul W. Kahn, *Democracy and the Obligations of Care: A Demos Worthy of Sacrifice*, *in* DEMOCRACY IN TIMES OF PANDEMIC, *supra* note 29, at 196–97.

221. Dan M. Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071, 1105 (2006) (quoting MARY DOUGLAS & AARON WILDAVSKY, RISK AND CULTURE 36 (1982)).

life."[222] Scientists, needless to say, "have no special competence to identify what vision of society . . . the law should endorse."[223] Although they might frame their policy recommendations in the language of pure science, counter-pandemic measures pervade all areas of human life. By endorsing one or another set of values, scientists are trespassing past the limits of their expertise.[224]

Scientists are not only neutral experts, but also a group with their own "moral standards and their own code of honor," and "one of the most potent power-generating groups in all history."[225] In times of pandemic, medical professionals and scientists have the potential to become "the technocrats in the autocratic technocracy."[226] One of the unique challenges of pandemic emergencies is that they lead to a collapse of the distinction between politics and expertise. In such a world, pandemic decisions need not be responsive to public opinion at all, but just made by experts. Under the logic of technocracy, the ideal state is Singapore or China, where scientific policies are forced unchecked on a trusting public.[227] This exacerbates the peril of democratic erosion. In a time of pandemic, technocracy can potentially depoliticize the actions of the executive, making resistance that much harder: under technocracy, those who disagree do not make

222. *Id.* at 1088.

223. *Id.* at 1106.

224. *See* Madhukar Pai, *Covidization of Research: What Are the Risks?*, 26 NATURE MED. 1159, 1159 (2020) ("By indulging in epistemic trespassing, wherein well-intentioned scientists with real expertise in one field intrude into another, passing judgment where they lack expert-level training and insight, we open the door to big mistakes with bad consequences."); Nathan Ballantyne & David Dunning, Opinion, *Which Experts Should You Listen to During the Pandemic?*, SCI. AM. (June 8, 2020), https://blogs.scientificamerican.com/observations/which-experts-should-you-listen-to-during-the-pandemic [https://perma.cc/AJM5-XGT9] ("We have witnessed a cavalcade of epistemic trespassing on pandemic topics.").

225. HANNAH ARENDT, THE HUMAN CONDITION 324 (2d ed. 2018):

> It certainly is not without irony that those whom public opinion has persistently held to be the least practical and the least political members of society should have turned out to be the only ones left who still know how to act and how to act in concert. For their early organizations, which they founded in the seventeenth century for the conquest of nature and in which they developed their own moral standards and their own code of honor, have not only survived all vicissitudes of the modern age, but they have become one of the most potent power-generating groups in all history.

226. *See* Windholz, *supra* note 148, at 105.

227. *See* Centeno, *supra* note 211, at 327:

> This attitude has been perhaps best expressed by Prime Minister Lee Kuan Yew of Singapore, who summed up his political philosophy by declaring: 'Every time anybody wants to start anything which will unwind or unravel this orderly, organized, sensible, rational society, and make it irrational and emotional, I put a stop to it without hesitation.

a legitimate political choice but rather undermine truth and go against science.[228]

B. Enduring and Active Cooperation from Citizens

Counter-pandemic measures require enduring and active cooperation from the population. This makes the task of legitimizing those measures in the eye of the public both crucial and challenging. On the one hand, they need greater legitimation in order to be regularly and voluntarily complied with by as many citizens as possible. On the other, unlike national security emergencies, the prolonged need for cooperation and trust by the population cannot rely on emergency discourses.

National security measures involve granting a lot of power to the government to the detriment of citizens—typically, these actions include the spread of state surveillance, the relaxation of due process guarantees for detention and interrogation, normalization of otherwise unjustifiable racial profiling, curtailing of certain forms of speech, etc.[229] In their extreme form, these measures remain secret, as secrecy is thought to increase state capacity in the investigation and prosecution of individuals suspected of terrorist activities.[230] If they are not secret, they are discreet: Citizens do not need to be reminded daily of the counter-terrorism measures that they are, in fact, enduring.

Counter-pandemic measures are, for the most part, exactly the opposite. In the absence of medication or vaccines, the only way to contain a pandemic is with non-pharmaceutical interventions,[231] which

228. According to Alfred Moore, "in order for expertise to be responsive and reliable it requires a context of contestation." ALFRED MOORE, CRITICAL ELITISM: DELIBERATION, DEMOCRACY, AND THE PROBLEM OF EXPERTISE 49 (2017).

229. *See* POSNER & VERMEULE, *supra* note 50, at 7–9 (enumerating the following typical policy responses to national security emergencies: military action, detention of enemy combatants outside the theater of hostilities, heightened search and surveillance power, ethnicity motivated search and surveillance, coercive interrogation, immigration sweeps and surveillance, terrorism support statutes, military trials, and censorship).

230. *See* SUDHA SETTY, NATIONAL SECURITY SECRECY: COMPARATIVE EFFECTS ON DEMOCRACY AND THE RULE OF LAW 1 (2017) ("The terrorist attacks of September 11, 2001, served as the justification for administrations around the world to keep secret their controversial and sometimes outright illegal counterterrorism programs.").

231. Shabnam Iezadi et al., *Effectiveness of the Non-Pharmaceutical Public Health Interventions Against COVID-19; a Protocol of a Systematic Review and Realist*, 15 PLOS ONE (Sept. 29, 2020), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0239554 [https://perma.cc/9T9J-M2XN] ("Without any pharmaceutical intervention and vaccination, the only way to combat [COVID-19] is to slow down the spread of the disease by adopting non-pharmaceutical public health interventions.").

require major, self-aware changes in everyone's daily behavior.[232] Where anti-terror measures require secrecy, counter-pandemic measures demand transparency and diffusion of accurate information.[233] Where anti-terror activity demands nothing from citizens other than their peaceful acquiescence to otherwise impermissible manifestations of state power, counter-pandemic measures demand active cooperation by citizens through deep changes in social behavior and norms.[234] Think of the sudden change in social norms that was quite successfully fostered by governments and experts at the onset of the COVID-19 pandemic: Within weeks, most people adopted otherwise unthinkable norms, such as refraining from shaking hands and wearing masks in public.

The kind of quality cooperation required by pandemic-containment measures is extremely hard, if not impossible, to enforce. Most obviously, there are not enough state officials to control whether someone is shaking hands or visiting their grandparents.[235] Even if this kind of control was possible for some measures, social science research suggests that state sanctions not aligned with social norms might actually backfire and induce more noncompliance. [236] On the

232. *See* NICHOLAS A. CHRISTAKIS, APOLLO'S ARROW: THE PROFOUND AND ENDURING IMPACT OF CORONAVIRUS ON THE WAY WE LIVE 88–89 (2020) ("By definition, [nonpharmaceutical interventions] involve a certain level of personal choice . . . .").

233. *See* R. Bhattacharyya & Partha Konar, *Modelling the Influence of Progressive Social Awareness, Lockdown and Anthropogenic Migration on the Dynamics of an Epidemic*, 9 INT'L J. DYNAMICS & CONTROL 1, 16 (2020) (using mathematical modelling to find that "awareness lowers the effective [reproductive rate] and reduces the peak infection rate while delaying its appearance").

234. However, in those cases in which counter-terrorist measures demand citizen cooperation, government legitimacy has also been found to enhance compliance with them. *See generally* Tom R. Tyler et al., *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 L. & SOC'Y REV. 365 (2010) (finding empirical evidence that Muslim Americans were more likely to cooperate with government efforts to fight terrorism when they perceived them as legitimate).

235. As one of the leading experts on political legitimacy has put it, the more dependent an authority is on "the degree of cooperation and the quality of performance on the part of subordinates . . . to that extent is legitimacy important for what they can achieve as well as for the maintenance of their power." DAVID BEETHAM, THE LEGITIMATION OF POWER 29–31 (2013). That is, the more an authority needs quality in the cooperation of subordinates, the less it can rely on coercion and the more it demands legitimacy.

236. *See* William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1872 (2000):

> If the law strays too far from the norms, the public will not respect the law, and hence will not stigmatize those who violate it. Loss of stigma means loss of the most important deterrent the criminal justice system has. If the law is to have any value at all, it needs to stick close to the norms (footnote omitted).

See also Cristina Bicchieri & Hugo Mercier, *Norms and Beliefs: How Change Occurs*, *in* THE COMPLEXITY OF SOCIAL NORMS 37, 41 (Maria Xenitidou & Bruce Edmonds eds., 2014)

other hand, when laws fall reasonably close to existing social norms, they have the potential of legitimizing and gradually modifying them.[237]

Any successful strategy against a pandemic involves active (and voluntary[238]) cooperation by citizens and even a shift of social norms. At best, this is more easily performed with active cooperation by citizens; at worst, it is impossible without it. This kind of cooperation cannot be realistically micromanaged or enforced by state officials. In order for it to happen, therefore, people must both know the recommendations and instructions coming from health authorities and trust them to make the right decisions.[239] Any judicial response to COVID-19 measures needs to take into consideration the need to preserve their legitimacy in the eyes of citizens.[240] As one specialist put it in the midst of the COVID-19 pandemic, "maintaining public trust can be seen as its own nonpharmaceutical intervention."[241]

Governments have struggled with this need to maintain the legitimacy of highly demanding measures since the beginning of the pandemic. At first, many of them called the population to rally around

("[P]erhaps the most important factor that determines successful enforcement is a shared sense that the existing legal arrangements are as they ought to be, in that they do not appear so distant from existing social norms as to lose credibility.").

237. *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2029–33 (explaining how legal norms can shift social norms and behavior even in the absence of enforcement).

238. "Nudges" and other measures can do a part of the work, but only a part. *See* Jay J. Van Bavel et al., *Using Social and Behavioural Science to Support COVID-19 Pandemic Response*, 4 NATURE HUM. BEHAVIOUR 460, 463 (2020) ("Nudges and normative information can be an alternative to more coercive means of behaviour change or used to complement regulatory, legal and other imposed policies when widespread changes must occur rapidly.").

239. *See* CHRISTAKIS, *supra* note 232, at 96 ("[I]n any epidemic, a basic educational task of leaders is to help people understand what is actually happening.") (footnote omitted).

240. The effects of legitimacy in inducing counter-pandemic behavior have been noted before and during COVID-19, both by public health scholars and political legitimacy scholars. *See* Margaret Levi et al., *Conceptualizing Legitimacy, Measuring Legitimating Beliefs*, 53 AM. BEHAVIORAL SCIENTIST 354, 355 (2009) ("Legitimacy can increase citizen support of war efforts and compliance with health regulations during an epidemic.") (internal citations omitted); Windholz, *supra* note 148, at 96 ("Compliance with these measures on the scale required is unlikely to be achieved by coercive policing tools alone. It also requires an unprecedented level of voluntary compliance. A growing body of research establishes that legitimacy is essential to a government's ability to obtain behaviour change in these circumstances."); Michael D. White & Henry F. Fradella, *Policing a Pandemic: Stay-at-Home Orders and What They Mean for the Police*, 45 AM. J. CRIM. JUST. 702, 712 ("In terms of the current pandemic, citizens who view the police (and the government, more generally) as legitimate will be more likely to obey [stay-at-home orders] . . . .").

241. CHRISTAKIS, *supra* note 232, at 96.

the flag,[242] but this method of encouraging public cooperation with extreme counter-pandemic measures had its limitations. While these discourses may promise a seductively high level of initial adherence, they are prone to burning out quickly. Perhaps the most common example is war. From the start of the COVID-19 pandemic, leaders globally have appealed to the imagery of war to ask their citizens for extraordinary sacrifice.[243] The coronavirus SARS-CoV-2 became an "invisible enemy,"[244] staying home was part of a "fight," and those in charge were "wartime presidents."[245] In countries in which the memory of nationhood-defining wars was still fresh, the COVID-19 pandemic was immediately associated with those wars.[246] The war narrative inspired sacrifices, but this narrative was short-lived.[247] As the pandemic wore on, no one was seriously talking about waging war against the virus anymore. As the number of dead kept rising dramatically, deaths were no longer war casualties, people staying in

242. Kai Chi Yam et al., *The Rise of COVID-19 Cases Is Associated with Support for World Leaders*, 117 PROCEEDINGS NAT. ACAD. SCI. 25429, 25429 (2020) ("Amid the present COVID-19 pandemic, we find that many citizens around the world 'rally 'round the flag' and increase their support for their respective political leaders.").

243. *See* Yuval Benziman, *"Winning" the "Battle" and "Beating" the COVID-19 "Enemy": Leaders' Use of War Frames to Define the Pandemic*, 26 PEACE & CONFLICT: J. PEACE PSYCH. 247, 253 (2020):

> The United Kingdom and U.S. leaders continued to announce tougher restrictions—they told their citizens to stay at home, they asked their viewers and listeners to accept the fact that the economy would collapse, and much more—because, according to their framing, this is wartime and the rules of action in such a time permit it.

244. *Id.* at 249 (providing numerous examples of leaders calling COVID-19 the "invisible" or "hidden" enemy).

245. See *id.* at 253, which identifies the following "five themes" in the initial framing of the pandemic by world leaders:

> Describing the pandemic as a war, supposedly having a plan on how to "win" it, framing isolation as patriotism, naming medical teams as heroes, and joining a global effort to overcome it while creating a distinction between "our" unique (and better) treatment of it—is the way they described the situation.

246. *See, e.g.*, Jeff Greenfield, *No, the Covid Fight Isn't Like WWII—And That's Bad News*, POLITICO (May 9, 2020, 7:00 AM), https://www.politico.com/news/magazine/2020/05/09/covid-world-war-ii-245252 [https://perma.cc/N4KX-S6RX].

247. *See* Ann Mongoven, *"Othering," Bad and Good, the Coronavirus* (Mar. 23, 2020), https://www.scu.edu/ethics-spotlight/covid-19/othering-bad-and-good-the-coronavirus [https://perma.cc/VA9R-A9NN] (arguing that the "war" narrative entails the risk of otherization); Matthew Flinders, *Democracy and the Politics of Coronavirus: Trust, Blame and Understanding*, 74 PARLIAMENTARY AFF. 483, 488–89 (2020) ("Although most analyses of 'rallying around the flag' effects are concerned with wars, invasions or terrorist attacks with a clear enemy, rather than public health pandemics in which the enemy is a new strain of virus, the overall conclusion is that the ""rally effect" is usually short-lived.").

their homes were no longer heroes, and those violating social distancing recommendations were no longer traitors.

This failure is hardly surprising. The "rally 'round the flag" effect has proved to be short-lived in the past, even when there was a real outgroup enemy to rally against.[248] Relying on this kind of tribalistic legitimating device for pandemics (which not only lack flesh-and-bone enemies but also are unpredictably long) seems ill-advised. After the initial outburst of patriotism fades away, the legitimating devices left are those of normal politics. There is, to be sure, a large role to be played by scientific knowledge in ascertaining the measures to take and in legitimating them in the eyes of the public.[249] In democratic societies, however, there is a "popular conviction that decisions cannot be fully legitimate if they are comprehensible only to the initiated." [250] Therefore, these measures must gain public trust and cooperation primarily through the democratic process: through a transparent public debate enshrined in an institutional decision-making process.[251]

Two risks arise from a failure by government to engender or maintain the legitimacy of counter-pandemic measures. First, and most obviously, without widespread cooperation, health measures begin to falter and fail, leading to tragedy and even catastrophe.[252] Second, if the government does not acquiesce in this failure, it may decide that, since public cooperation is no longer doing the job, it must turn to harsher enforcement measures. The dangers of this strategy are evident—the government becomes "authoritarian, but also unimpressive."[253] The kind of intimate human behavior that can be modified to fight a pandemic is, by its nature, extremely difficult to control with laws.[254] Conversely, the facets of human behavior that are easier to control are not necessarily those most relevant to pandemic containment, and the state action that would be necessary involves a level of intrusion into private life that arouses legitimate concerns about authoritarianism.

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248. *See* Flinders, *supra* note 247, at 489.

249. *See* Centeno, *supra* note 211, at 313.

250. *See* JASANOFF, *supra* note 212, at 9.

251. *See infra* Section IV.A.

252. *See* Levi et al., *supra* note 240 (arguing legitimacy is central to compliance with nonpharmaceutical interventions) and Iezadi et al., *supra* note 231 (arguing that effective nonpharmaceutical interventions are crucial to halt or slow down the pandemic).

253. JORGE LUIS BORGES, THE ALEPH AND OTHER STORIES 1933-1969, at 4 (1971).

254. *See* BEETHAM, *supra* note 235 and accompanying text.

IV. THE PANDEMIC CONSTITUTION

A. Why Deference and Why Judicial Review

As we saw in Part I, constitutionalism during emergencies can be seen as a spectrum. At one end we find the deference model, which posits that all kinds of powers should be concentrated in the executive to fight the emergency while the legislature and the courts defer. On the other we find the business-as-usual model, which suggests that judicial review should operate normally during emergencies. Many scholars approaching the topic from the perspective of national security emergencies believe neither model is appropriate,[255] and for similar reasons we believe the same is true in the context of a pandemic. We need an emergency constitution—or, more specifically, a pandemic constitution.

Urging judges to conduct business as usual would not be helpful in the initial stages of a pandemic. The reasons for this are similar to those raised by emergency constitutionalism generally: First, at the onset of a pandemic what is needed is decisive, prompt, and (as much as possible) well-informed action. Without it, lives will be lost and societal suffering will increase. A strong presumption of deference lets the executive proceed unencumbered by judicial intervention. Second, during the initial stages of a pandemic, the popularity of the executive's responsive measures and the public's support for them probably will reach extremely high levels, regardless of their legality.[256] Against this backdrop, courts are unlikely to have the institutional capacity to effectively resist some of the counter-pandemic measures and therefore are prone to rationalize their acceptance.[257]

This does not mean, however, that judges should adopt a fully deferential stance in relation to counter-pandemic measures. Again, some concerns that apply to emergencies generally also apply to pandemics: Emergency measures may affect fundamental rights in disproportionate ways, and unchecked emergency measures may become entrenched permanent features of the political system.[258] Beyond these points, some characteristics of pandemics render a fully deferential model all the more inappropriate. First, pandemics are long

255. *See supra* notes 50–56 and accompanying text (describing the critiques to the business-as-usual model).

256. *See* Chilton et al., *supra* note 56 (finding empirical evidence that support to counter-pandemic measures is unaffected by perceptions of its constitutionality).

257. *See supra* notes 52–57 and accompanying text.

258. *See generally supra* Section III.A.2.

and open-ended. Granting total deference to the government in times of pandemic might amount to granting government almost unlimited power, not only in scope but also in time.[259] During a long pandemic, life settles into a new normal; the risk of getting sick and dying from the disease becomes just another of life's many risks. Though the disease's relative weight may be heavier because it is deadlier or more contagious than other illnesses, the risks it poses are not different in kind. Once the state of emergency has given way to a new normal (albeit a more dangerous one), it is hard to justify continued deference to governmental counter-pandemic measures. Second, the legitimacy of counter-pandemic measures is essential to their effectiveness.[260] Whereas in other kinds of emergencies there might be a trade-off between the legitimacy of the measures and their effectiveness, that is less true in pandemics, in which their effectiveness depends, partially but crucially, on their legitimacy. Any institutional scheme designed to fight pandemics must take the preservation of legitimacy into account.

At least three features of pandemics make courts particularly relevant actors in checking the political branches, in a way they might not be in national security emergencies. *First*, unlike in national security emergencies, there is no need for secrecy in the executive's actions—on the contrary, transparency is key.[261] This removes one of the obstacles usually deployed against court participation in emergency situations.[262] *Second*, because pandemics are long-term and open-ended, and counter-pandemic measures interfere with many aspects of daily life, they have the potential to create a new legal order, so to speak. No centralized organ (certainly not the executive, and probably not the legislature) can massively reform the legal system in such a short term. Courts have the ability to check the real-life effects of counter-pandemic measures in (relative) real time.[263]

Both of these points can be thought of as subsets of a third, fundamental reason for actively engaging courts in a pandemic

259. *See* Wiley & Vladeck, *supra* note 52, at 184.

260. *See supra* Section III.B.

261. *See* O'Malley, et al., *Transparency During Public Health Emergencies: From Rhetoric to Reality*, 87 BULL. OF THE WORLD HEALTH ORG. 614, 615 (2009) ("Transparency, however, about what is not known is just as important to the promotion of public trust as transparency about what is known. Trust requires honest, open and two-way communication.").

262. *See* Korematsu v. United States, 323 U.S. 214, 245 (1944) (Jackson, J., dissenting) (for the claim that government secrecy in national security crises advises against court intervention).

263. *See* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 17–28 (1981) (describing courts' role in social control and administration of a regime's norms).

constitution: To be effective, counter-pandemic measures need heightened legitimacy in the eyes of the public, and the mere existence of judicial review can reinforce public trust in them. Thomas Poole argued that judicial review can be understood "as a means of trying to engender public trust in the operation of government. By showing itself willing to allow decisions to be challenged on the basis of legality, a government accepts that it is fallible."[264] As many scholars have argued for decades, courts generally,[265] and judicial review in particular,[266] have a legitimating role towards the political regime[267] or the administrative state.[268]

The fact that judicial intervention is needed does not mean that courts should do what they usually do. Rather, special principles of judicial review are needed. This need runs contrary to a widely held supposition about judicial review in emergencies. Many believe that judicial review during emergencies will naturally lead to a different balance of the constitutional rights involved because judges will factor the dangers of the situation into their proportionality analysis. This will allow for more rights-restrictive policies, not because of any ad hoc theory of emergency powers, but simply because the element at one end of the proportionality analysis (state interest, or its equivalent under different tests) will be much weightier than usual during a pandemic. This proposition has been defended by scholars discussing

264. Thomas Poole, *Legitimacy, Rights and Judicial Review*, 25 OXFORD J. LEGAL STUD. 697, 720 (2005).

265. *See* SHAPIRO, *supra* note 263, at 22 ("[G]overning authorities seek to maintain or increase their legitimacy through the courts.").

266. *See* Jack M. Balkin, *Constitutional Interpretation and Change in the United States: The Official and the Unofficial*, 14 JUS POLITICUM 1, 10 (2015):

> [J]udicial review does not simply impose limitations on state power; rather courts are institutions that legitimate power, describing and reshaping government action . . . Judicial review should not be understood in isolation as a deviant institution in American democracy; it should be understood as part of a dialectical process of legitimation.

267. *See* Thomas Franck, *The Political and the Judicial Empires: Must There Be Conflict Over Conflict-Resolution?*, *in* INTERNATIONAL LEGAL ISSUES ARISING UNDER THE UNITED NATIONS DECADE OF INTERNATIONAL LAW 621, 630 (Najeeb Al-Nauimi & Richard Meese eds., 1995) ("[J]udicial review legitimates political discretion. By having the legality of their actions subject to validation by independent review, the decisions of political organs gain legitimacy.").

268. *See* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965) ("The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.").

the business-as-usual,[269] the deference model,[270] and emergency constitutionalism,[271] as well as by Supreme Court justices.[272]

This account of judicial reasoning during emergencies might capture its theoretical underpinnings, and it might be adequate if the pandemic becomes the new normal, with all rights and interests duly taken into consideration after their substantial modification.[273] Unfortunately, however, it cannot provide any practical guidance in a context of extreme uncertainty and heated popular sentiment. At the onset of a pandemic, a lone judge sitting before her desk, as confused as anyone else about the present and the near future, is unlikely to perform a good-faith balancing between the extremely uncertain risks and benefits of a health policy and the uncertain cost of possibly unprecedented rights restrictions. Whatever the merits of aggressive judicial control of counter-pandemic measures, an adjusted, brand-new balancing test is unlikely to be one.

If routine judicial review will not do the job and blanket deference is undesirable, judges need general principles to guide their actions during pandemics. These principles should be sensitive to the special needs and dangers of pandemics. On the one hand, they should avoid political entrenchment and technocratic deviations while they preserve the legitimacy of the government's counter-pandemic

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269. *See* Wiley & Vladeck, *supra* note 52, at 189 ("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.").

270. *See* POSNER, *supra* note 50, at 147:

> A constitutional right *should* be modified when changed circumstances indicate that the right no longer strikes a sensible balance between competing constitutional values, such as personal liberty and public safety. A national emergency, such as a war, creates a disequilibrium in the existing system of constitutional rights. Concerns for public safety now weigh more heavily than before. The courts respond by altering the balance, curtailing civil liberties in recognition that the relative weights of the competing interests have changed in favor of safety.

See also POSNER & VERMEULE, *supra* note 50, at 12, 21–30 (arguing that liberty-restricting emergency measures move the social equilibrium along a static "security-liberty frontier.").

271. *See* Sunstein, *supra* note 50, at 51–52 ("Liberty Maximalism is undesirable. The government's power to intrude on liberty depends on the strength of the justifications it can muster on behalf of the intrusion. When security is at risk, government has greater justifications than when it is not.").

272. *See* Stephen Breyer, *Liberty, Security, and the Courts*, SUP. CT. U.S. (Apr. 14, 2003) http://www.supremecourtus.gov/publicinfo/speeches/sp_04-15-03.html [https://perma.cc/BFX6-WTKT] ("The Constitution, emergency or no emergency, typically defines basic liberties in terms of equilibrium," and in emergency situations "[t]he value does not change; the circumstances change, thereby shifting the point at which a proper balance is struck.").

273. *See infra* Section IV.C (for further analysis of the role of the time in judicial review in pandemics).

measures in the eyes of the citizenry. On the other, they should be ready to deal with a pandemic that might last for several years (as, for example, some experts expect COVID-19 to do[274]). During such a long time, all the risks and demands of the pandemic come into full bloom: policies have enough time to become truly entrenched, the risk of technocracy becomes more pronounced, and the need to maintain the cooperation of citizens is more extreme. Taking these needs into consideration, we posit that courts should apply the principles of "democratic vigil" and "gradual reintroduction of rights," as developed below.

Before proceeding, a cautionary note: These principles are general and meant to serve in different legal systems. The price for this breadth is, naturally, impreciseness. The need for democratic legitimation and the ways it is obtained vary greatly in different legal cultures[275] and institutional arrangements.[276] Similarly, courts have different institutional capacities and perceived legitimate roles in different democracies, which might call for different actions.[277] We are therefore humble about our goals in this Part. The guiding principles we offer are meant to aid judges in making sense of their role during a pandemic emergency; putting them into practice will require adjusting them to the particular features of the legal culture, institutional mechanics, and real-life circumstances.

B. The Principle of Democratic Vigil

During a pandemic crisis, the government might impose extreme restrictions on the population. Generally, as discussed above, there are good reasons for judges at the onset of a pandemic to be

274. *See, e.g.*, Arlene Weintraub, *It Could Take 5 Years for 2 Leading COVID-19 Vaccines to Debut, AI Analysis Finds*, FIERCEPHARMA (Apr. 17, 2020), https://www.fiercepharma.com/pharma/don-t-count-a-covid-19-vaccine-for-at-least-five-years-says-ai-based-forecast [https://perma.cc/WKP8-BCY6] ("Global analytics firm Clarivate . . . came to a sobering conclusion: It will take at least five years for either vaccine candidate to complete the development process through full regulatory approval.").

275. *See, e.g.*, Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1976–2004 (2004) (identifying "American" and "European" modes of constitutionalism, depending on whether they derive their legitimacy from their democratic origin or adherence to abstract principles, respectively).

276. *See, e.g.*, Issacharoff and Pildes, *supra* note 50, at 45 (making the caveat that their process-based approach to emergencies might not work for courts in parliamentary systems).

277. *See, e.g.*, JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 34–38 (4th ed. 2019) (differentiating the roles, training, and capacities of judges in common law and civil law systems).

deferential to the government in the implementation of these policies. However, judicial deference is not a synonym of judicial passivity. It is one thing to acknowledge the relatively better position of the executive vis-à-vis other state organs and quite another thing to transform the executive into some form of Schmittian sovereign.[278] During pandemics, people remain sovereign, and they are therefore entitled to democratically influence and resist counter-pandemic measures, no matter how well-intentioned they are. The *principle of democratic vigil* aims to ensure this continuing democratic responsiveness.

The principle of democratic vigil implies that, unlike what happens with other civil liberties, judicial deference should not be the rule when governments try to limit the forums and institutions through which the public seeks to affect its elected officials. Courts should be constantly vigilant in their protection of the rights that enable this process to occur, both to preserve democratic governance and to prevent autocratic deviations.

The discussion so far makes two points clear: The erosion of democratic means of resistance is a real danger during a pandemic, and courts have some potential for preventing such an erosion. On the one hand, many of the policies put in place by democratic governments can undermine the ability of citizens to try to influence public opinion and government policy through different forms of expression, even in established democracies. For example, there were real concerns about disenfranchisement in the recent U.S. election,[279] and human rights organizations warned that governments in 158 countries have used COVID-19 regulations as a cover for restrictions on the right to protest.[280] On the other hand, courts have sometimes been active with regard to these issues. Some courts in the United States have sought to protect the right to vote by forcing states to adapt their election laws to the circumstances of the pandemic.[281] High courts in countries like France and Germany invalidated laws restricting public assemblies because they are "a condition of democracy."[282] More compromised

278. *See* ACKERMAN, *supra* note 7, at 56–57 (arguing that Carl Schmitt's ideas might be relevant for polity-destroying threats, such as Nazism or the American Civil War, not terrorism or—we add—pandemics).

279. *See supra* Section II.A.2.

280. *See Will Our Right to Protest Ever Be Fully Returned?*, AMNESTY INT'L (Sept. 29, 2020, 11:00 AM), https://www.amnesty.org/en/latest/news/2020/09/will-our-right-to-protest-ever-be-fully-returned [https://perma.cc/MP85-FPCL]. *See also Democracy Under Lockdown*, *supra* note 198..

281. *See* People First of Alabama v. Merrill, 491 F. Supp. 3d 1076, 1180 (N.D. Ala. 2020) (granting an injunction that waved absentee ballot requirements in several counties).

282. *See supra* notes 171–172 and accompanying text.

democracies, however, such as Bolivia, India, and Hungary, passed laws restraining free speech under the guise of counter-pandemic measures that were not checked by courts.[283]

The proposition that courts should be especially vigilant to preserve democratic channels is an old one,[284] but in the context of pandemics it becomes more contentious. During the global Black Lives Matter protests, for example, many complained that while things of fundamental importance such as visiting loved ones in the hospital and sending children to school were forbidden, massive protests were allowed.[285] Similar complaints were voiced when the protestors were anti-lockdown activists.[286] The application of the principle of democratic vigil might therefore be perceived as unjust by some people, depending on their political sensibilities. This collateral damage is warranted: The principle of democratic vigil supports the right of those same people to express their discontent. This serves two functions.

The *first* goal of democratic vigilance is to minimize opportunities for political entrenchment under the cover of the pandemic. As we discussed above, one of the dangers created by the long-term and open-ended nature of pandemics is that they will create a pretext for different forms of power grabbing. This political entrenchment can happen in different ways, such as the manipulation of election mechanisms or the undermining of the public's ability to resist by, for example, putting limits on protests or speech.

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283. *See generally* Rodrigues & Xu, *supra* note 20. India is a partial exception, since the Supreme Court of India denied a government request to prevent media from publishing COVID-19 related news without clearance from the government. However, the Court also "directed news outlets to use official version of the COVID-19 developments in their reporting," which "caused concern among journalists." *See* Rodrigues & Xu, *supra* note 20, at 128.

284. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (defending a "representation-reinforcing" theory of judicial review).

285. Josh Hanrahan, *How Can 60,000 Go to Protests when Anzac Day Marches Were Banned and There Are Still Strict Limits on Weddings and Funerals? Outrage over 'Double Standards' After Black Lives Matter Rallies Were Allowed in Australia*, DAILY MAIL (June 7, 2020, 8:41 PM), https://www.dailymail.co.uk/news/article-8395619/Black-Lives-Matter-protests-lead-calls-COVID-19-restrictions-lifted.html [https://perma.cc/3CCM-MC7Q] ("The decision to allow enormous protests on the streets of Australian cities has led to a flurry of calls for all COVID-19 restrictions to be lifted completely.").

286. Not surprisingly, attitudes toward the health effects of protests often depended on who was protesting what. *See* Michael Powell, *Are Protests Dangerous? What Experts Say May Depend on Who's Protesting What*, N.Y. TIMES (Oct. 11, 2020), https://www.nytimes.com/2020/07/06/us/Epidemiologists-coronavirus-protests-quarantine.html [https://perma.cc/VQ9U-V8LC].

Regular and free elections and vital public discourse are accountability mechanisms that limit the ability of elected officials to pursue forms of self-entrenchment. Therefore, judicial deference to elected officials in a manner that does not protect these political rights and institutions removes a central defense mechanism at the very time when it is most needed. In its anti-entrenchment goal, the democratic vigil principle grounds itself in the idea that constitutional law must maintain an "indispensable commitment to the preservation of an appropriately competitive political order,"[287] and to advance this goal requires constant "suspicion of legislative *action* that entrenches incumbency."[288] In this sense, democratic vigilance is the pandemic version of an old principle: The presumption of constitutionality based on the democratic qualities of decision-makers recedes when it comes to issues that can favor lawmakers.[289]

The *second* function of the democratic vigilance principle is to bolster the legitimacy of counter-pandemic measures. As we described above, one of the serious challenges in times of pandemic is the need to maintain a high level of public cooperation, which cannot be achieved by state coercion alone.[290] Rather, pandemic measures must be seen by citizens as worth adhering to. The intrusive, shifting, and open-ended nature of counter-pandemic policies makes maintaining their legitimacy extremely difficult. Maintaining the possibility of judicial review is one way the judiciary can boost the legitimacy of counter-pandemic measures.[291]

However, judicial review is far from being the primary source of legitimacy in the modern state. Rather, modern democracies gain legitimacy when their citizens believe the state is responsive to their preferences, ideas, and values. To be legitimate, a democratic state must be perceived as responsive to public opinion. If citizens are able to engage in public discourse addressing governmental policies—potentially disagreeing with and resisting them—then it is to be hoped

287. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 716 (1998).

288. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 509 (1997).

289. *See e.g.*, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627–28, (1969):

> [T]he deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials . . . The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.

290. *See supra* Section III.B.

291. *See supra* Section IV.A.

that even if the state acts in ways that are contrary to their preferences, the citizens will view these policies as worth adhering to. They had their say.[292]

Democratically illegitimate counter-pandemic measures risk being self-defeating: While they might succeed in restraining liberties in a way that diminishes contagion, they do so in a way that undermines the legitimacy they require to be respected. This is an additional reason for courts to maintain vigilance with regard to freedoms that have a significant democratic function, such as the rights to assembly, expression, and participation in elections. By maintaining normal levels of scrutiny with regard to political freedoms, the courts can bolster the public's trust in the response to the pandemic.

C. Gradual Reintroduction of Rights-Based Revision

When it comes to civil liberties that do not have a direct bearing on the political process, we believe that courts should start by granting broad deference to government policies and thereafter gradually reintroduce more judicial control on liberty-restricting measures. This *gradual reintroduction principle* is, therefore, time sensitive because the pandemic emergency is. Courts should gradually increase the level of scrutiny of counter-pandemic measures for at least three reasons. *First*, the institutional reasons that initially prompted deference shift with time: As the executive loses its primacy, legislatures and courts become more able to act. *Second*, the passage of time compounds the negative effects of some of the counter-pandemic measures, as path dependence crystallizes and detrimental effects accumulate. *Third*, as time passes, restrictive measures call for different forms of legitimation as the legitimation provided by the emergency itself fades. Each reason depends on a particular feature of pandemics in relation to time. We examine them successively.

The *first* reason for this temporal sensitivity is that the factors that render executives better equipped to deal with the pandemic and the justifications for courts to refrain from entering the scene both gradually disappear. This can be seen clearly in one of the features of emergency decision-making: the executive's claim to exclusiveness in

292. *See* Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011):

> The value of democratic legitimation occurs . . . specifically through processes of communication in the public sphere. It requires that citizens have access to the public sphere so that they can participate in the formation of public opinion, and it requires that governmental decision making be somehow rendered accountable to public opinion.

science-based policy.[293] At the onset of a pandemic, both scientific and public knowledge of the disease, its symptoms, and how it is transmitted will be scant. Governments might be forced to rely on their intuitions to take measures that, in hindsight, will look useless. As time passes, science will allow for more intelligent tailoring of counter-pandemic measures.[294] Moreover, and more importantly, this knowledge about the pandemic will be somehow democratized. In order to understand and adjust their behavior, the people themselves will need to have a reasonably precise grasp of the relative risks associated with different behaviors and the relationship between them and background risks.[295] While governments will still probably have a better command of scientific knowledge than courts, their position is no longer exclusive. Governments have an indisputably greater legitimacy to make the kinds of intuitive judgments needed at the beginning of a pandemic emergency,[296] but as more information becomes available, courts recover their capacity to make informed decisions about the reasonableness of policies—at least similarly to the way in which they do so in normal times.[297] Courts can become *translators* of the science contained in counter-pandemic policies, allowing for better deliberation on them,[298] without hindering necessary experimentation in an unfamiliar situation.[299]

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293. *See supra* note 91 and accompanying text.

294. *See* Tufekci, *supra* note 194.

295. *See* O'Malley et al., *supra* note 261, at 615 (showing how transparency in pandemic related information is key to compliance).

296. *See* Gonzalez v. Carhart, 550 U.S. 124, 163, (2007) ("The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.").

297. *See e.g.* Palmer v. W. Austl., [2021] HCA 5 ¶¶ 16–82 (Austl.) (conducting a lengthy and thorough assessment of the reasonableness of the travel restriction, including scientific evidence provided by five expert witnesses, before issuing a ruling on its validity).

298. *See* Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 778 (2011) ("[Courts] translat[e] the highly technical and scientific information in agency records for public consumption. This observation suggests a normative role for the generalist courts whereby they convey specialized information, enhancing opportunities for participation and encouraging transparency, deliberation, and accountability.").

299. This point has been made in the context of COVID-19 digital surveillance policies and can be generalized. *See* Rozenshtein, *supra* note 31, at 1571 (arguing that given the unprecedented nature of the pandemic, and the novelty of many of the digital disease surveillance programs that will have to be undertaken, it is likely that the first generation of such programs will fail to reach some or most of the safeguards described above. Accordingly, "[c]ourts should recognize this deep uncertainty and preserve a space for experimentation."). *Id*.

Second, the detrimental effects of liberty-restricting policies, even when they stay formally the same, tend to get worse with time. For some policies this is true because they have, so to speak, increasing marginal costs: staying home for a week does not impose the same psychological toll as staying home for two months;[300] missing school for a month does not impair learning as much as missing school for a year does.[301] There is, however, another way in which time affects liberty-restricting policies: As they persist over time, the risk of path dependency increases.[302] Even in the absence of increasing marginal costs, the persistence of restrictions makes it more likely that they will become entrenched. The implication is that concern about path dependency is a good reason to increasingly heighten judicial pressure on liberty-restricting counter-pandemic measures.

The *third* reason supporting the *gradual reintroduction principle* is the increased need for sources of legitimation of counter-pandemic measures. As we have seen, at the start of the pandemic the "rally 'round the flag'" effect can give governments the legitimacy they need to introduce exceptional measures. However, this effect is short-lived.[303] As time passes and the legitimation provided by the emergency itself no longer suffices to legitimate demands for extraordinary sacrifice, judicial review can provide some of this missing legitimacy. We have so far explored two ways in which this can happen: The mere openness of government to judicial review provides some legitimacy,[304] and judicial enforcement of democratic responsiveness provides more.[305] There is a third way in which judicial review can serve the function of giving counter-pandemic measures the legitimacy they need to thrive: There is empirical evidence that policies that are validated judicially gain legitimacy in

300. Deeksha Pandey et al., *Psychological Impact of Mass Quarantine on Population During Pandemics—The COVID-19 Lock-Down (COLD) Study*, 15 PLOS ONE 15(10): e0240501 (Oct. 22, 2020), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0240501 [https://perma.cc/2JJA-XQPE] (finding empirical evidence for "a progressively detrimental impact of lockdown on various aspects of psychological health").

301. *See* UNICEF, AVERTING A LOST COVID GENERATION: A SIX-POINT PLAN TO RESPOND, RECOVER AND REIMAGINE A POST-PANDEMIC WORLD FOR EVERY CHILD 5 (2020), https://www.unicef.org/media/86881/file/Averting-a-lost-covid-generation-world-childrens-day-data-and-advocacy-brief-2020.pdf [https://perma.cc/ZD9K-H2F9]("The longer schools are closed, the more children suffer from extensive learning losses with long term negative impacts, including future income and health.").

302. *See supra* Section III.A.1.

303. *See supra* note 247.

304. *See supra* Section IV.A.

305. *See supra* Section IV.B.

the eyes of citizens.[306] However, in order for this to happen, an actual review has to be conducted—validation through rubber-stamping is unlikely to provide any sort of legitimacy. By potentially invalidating some measures, courts strengthen the ones that survive constitutional scrutiny.[307]

All these reasons support gradual reintroduction of judicial review. However, they do not tell us whether judicial review should be based on substance (for example, through proportionality analysis), on procedure (ensuring that constitutional procedures were respected), or both. The right balance will be highly dependent on the particular constitutional system at hand, and it is likely that there cannot be many general rules in this regard. However, one trend should be pointed out: all the reasons for gradual reintroduction of judicial review are also reasons for greater legislative intervention. As time passes and knowledge about the pandemic becomes democratized, legislatures have more opportunities and capacity to act, may enact measures with greater democratic legitimacy, and might block socially undesired change. All this gives courts a strong reason to start enforcing procedural controls even before they re-engage with substantive rights-based review.

CONCLUSION

In January 2021, as daily deaths caused by COVID-19 reached historic heights in the United States, an armed mob stormed the U.S. Capitol in an attempt to prevent the 2020 presidential election from being certified by Congress. Further, across the Atlantic, a new strain of the SARS-CoV-2 estimated to be almost twice as contagious as the original had emerged in Europe and would soon sweep the globe. Air routes are being shut down again, and severe curfews are being imposed in both hemispheres.

306. *See* Rosalee A. Clawson et al., *The Legitimacy-Conferring Authority of the U.S. Supreme Court: An Experimental Design*, 29 AM. POLIT. RES. 566, 567 (2001) (providing a literature review about the "legitimacy conferring hypothesis" and providing empirical evidence that "[the Supreme Court] most certainly [confers legitimacy on a policy]. Its pronouncements can validate policies and, perhaps more importantly in a democracy of more than 300 million citizens, discourage political protest among the portion of the public most apt to take actions against the policy." *Id.* at 580.).

307. *See* Balkin *supra* note 266, at 10:

> [J]udicial review . . . legitimate[s] the constitutional constructions that are produced by the other branches. The idea of legitimation is Janus-faced. Courts explain what political actors can do by explaining what they cannot do. Through this process courts simultaneously create limitations and avenues of power; they both bound and bless the exercise of power.

However, this time there is hope. Dozens of countries (most in the developed world, but some elsewhere) have already started to provide vaccines manufactured by a handful of companies worldwide. Israel has already vaccinated more than 30% of its population and has already seen some effects in the rate of contagion. Other countries, despite being far behind, have already successfully immunized their medical workers. Those who haven't started vaccinating yet, wait for their turn in hope. The situation is as much of a commendation of the technological advances of the last decades as it is a powerful indictment of unbearable world inequality.

The COVID-19 pandemic may soon be over. Normal life might soon restart. In order to come to terms with the legacy of the pandemic, we must now start a difficult conversation about the functioning of our political and legal institutions during the crisis. This conversation is not inevitable. As Alfred Crosby documents in a book about the Spanish Flu aptly titled *America's Forgotten Pandemic*, "[t]he average college graduate born since 1918 literally knows more about the Black Death of the fourteenth century than the World War I pandemic."[308] As this example suggests, avoidance and suppression are a distinct possibility for the aftermath of COVID-19[309]—and maybe one that fulfills a psychological function.[310]

But we think this conversation is beyond vital. Someday we will be able to take stock of the COVID-19 pandemic and see how much suffering was alleviated by the policies of our governments, how much of it was unnecessary, and how much of it was made worse. Legal institutions had a crucial role in striking this balance and, as we have shown in this Article, they often did not rise up to the challenge. In order to build stronger institutions for the next recurrence, we need to learn the painful lessons from our current predicament. The Pandemic Constitution we develop in this Article seeks to be the first step in this direction. If we want the next pandemic to be dealt with in a democratic and intelligent way, it should not be the last.

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308. ALFRED W. CROSBY, AMERICA'S FORGOTTEN PANDEMIC: THE SPANISH FLU OF 1918 314–15 (2003).

309. This possibility seems to be advanced by SAMUEL MOYN, *The Irrelevance of the Pandemic*, *in* DEMOCRACY IN TIMES OF PANDEMIC: DIFFERENT FUTURES IMAGINED 104, 104–05 (Miguel Poiares Maduro & Paul W. Kahn eds., 2020) (wondering whether COVID-19 will "suffer a similar oblivion" to the Spanish Flu).

310. As Stanley Cohen put it in the context of repression of collective memories about atrocities, "there is . . . no evidence that to get well, you must remember, or that you must reconstruct the past *honestly* to be happy in the future." *See* STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING 124 (2001).