JUDICIAL REVIEW OF EMERGENCY ADMINISTRATION

Desirée LeClercq[*]

ABSTRACT

This Article seeks to describe and defend the judicial review of federal agencies' responses to national emergencies – what I refer to as "emergency administration." That may prove difficult. Agencies are experts in their respective fields. During emergencies, scholars and policymakers assume that judges will defer to that expertise under the Administrative Procedure Act (APA). On January 13, 2022, the Supreme Court defied that assumption when it blocked the Biden Administration's workplace vaccine and masking rules. Critics now assume that judges are reviewing emergency administration to constrain regulation. Both assumptions conclude that judicial review is neither sincere nor helpful during crises. As a result, bipartisan members of Congress are introducing new legislation to take control over emergency oversight.

Efforts to rebalance emergency powers are mistaken. Using a unique dataset of the APA cases that arose during the first two years of the COVID-19 pandemic, I show how federal judges invalidated emergency administration that unjustifiably violated the APA in over half of the cases. Agencies carried out much of their emergency administration under presidential control and not, necessarily, their expertise. The trajectory of judicial review during emergencies suggests that judges are becoming increasingly aware of presidential control and its harmful effects on vulnerable populations. Judges' willingness to uphold the APA's standards and protections during emergencies has significant implications for current legislative efforts and the balance of emergency powers.

[*] Assistant Professor, Cornell ILR School & Associate Member of the Law Faculty, Cornell Law School. The author would like to thank Jack Beerman, Khiara Bridges, Jack Getman, Kati Griffith, Robert Howse, Jeff Rachlinski, Rachel Sachs, Mark Seidenfeld, Jodi Short, Jed Stiglitz, and Christopher Walker for their helpful comments and discussions on early drafts, as well as participants at the 2021 AALS New Voices in Administrative Law and Legislation, the Cornell University Law School faculty workshop, and the Power in the Administrative State workshop. I would also like to thank James Pezzullo for his exceptional research assistance and Suzanne Amy Cohen for her tireless efforts to help me navigate Cornell's library materials. Any remaining errors are my own. Nothing in this Article is reflective of the views of any institution within which I have worked.

Electronic copy available at: https://ssrn.com/abstract=4063950

TABLE OF CONTENTS

Electronic copy available at: https://ssrn.com/abstract=4063950

INTRODUCTION

This Article seeks to describe and defend judicial review of executive agencies' responses to national emergencies – what I refer to as "emergency administration."[1] That may prove difficult. Federal judges often bear the brunt of criticism during national emergencies. Scholars criticize them for being either too deferential[2] to the Executive Branch[3] or overly intrusive into executive regulation,[4] all while time is of the essence and lives are at stake. Neither view perceives judicial review of emergency administration as sincere or helpful. As a result, bipartisan members of Congress are considering new legislation that would grant Congress greater oversight authority during emergencies. Those efforts are misplaced.

The judicial review of emergency administration is contentious. On the one hand, populations are vulnerable and need protection during emergencies. Judicial review under the Administrative Procedure Act (APA)[5] is, in principle, one way of ensuring that the responsible agencies form and administer their emergency policies legitimately and transparently. On the other hand, agencies presumably enjoy unique expertise in handling crises that the judiciary lacks.[6] As Carl Schmitt

---

[1] By emergency administration, I mean activities under administrative law – either by Congress, the President, federal agencies, or the judiciary – to respond to and mitigate emergencies. This Article's uses the term "administrative law" to refer to the law of the federal government of the United States.

[2] Along the continuum of judicial treatment of executive actions, judicial deference implies that judges will require some degree of proof or surety before overturning a conclusion or decision reached by the executive. *See* Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441, 445 & n.15 (2004) (defining judicial deference pursuant to Black's Law Dictionary and caselaw). On the other end of that continuum, judicial scrutiny implies that judges will require some degree of proof or surety *before* deferring to a conclusion or decision. *See generally* Cass Sunstein, *In Defense of the Hard Look: Judicial Activism and Administrative Law*, 7 HARV. J. L. & PUB. POL'Y 51, 52 (1984) (explaining that judges may scrutinize administrative actions by requiring reasoning and explanations).

[3] *See, e.g.,* David Dyzenhaus, Schmitt v. Dicey: *Are States of Emergency Inside or Outside the Legal Order?*, 27 CARD. L. REV. 2005, 2023 (2007) (protesting the way that judges "blindly defer to the executive" during crises); Evan Criddle, *Mending Holes in the Rule of (Administrative) Law*, NW. U. L. REV. 309, 313-314 (2010) (describing the importance of judicial review during emergencies); Peter Raven-Hansen, *Detaining Combatants by Law or by Order? The Rule of Lawmaking in the War on Terrorists*, 64 LA. L. REV. 831, 832 (2004) (arguing that the exigencies of emergencies warrant observance of the rule of lawmaking critical).

[4] For a description of these accusations, *see infra* Part I.A-B.

[5] 5 U.S.C.S. §§ 704, 706 (defining the types of administrative actions reviewable under the APA and the authority of the courts to constrain the executive for associated violations).

[6] *See, e.g.,* Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1636 ("the conditions of the

Electronic copy available at: https://ssrn.com/abstract=4063950

prophesied long ago,[7] during emergencies, the executive will presumably take control of the nation with little to no judicial resistance.[8] Under this theory, judges recognize that "executive action must proceed untrammeled by even the threat of legal regulation and judicial review, no matter how deferential that review might be on the merits."[9]

Judges have, for the most part, proven this deference theory correct. During the September 11, 2001 aftermath, scholars and commentators were alarmed by the extent to which judges deferred to the Bush Administration's expansive emergency measures.[10] Those measures disparately affected vulnerable citizens and noncitizens.[11] Judges also accorded agencies similar deference during the swine flu epidemic[12] and the 2008 financial crisis, notwithstanding the executive's sweeping declarations of authority.[13]

---

administrative state make it practically inevitable that the executive and the agencies will be the main crisis managers…"). For further explanation of the executive's comparative advantage to manage emergencies, *see infra* Part I.B.

[7] CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (George Schwab trans., 1985) (1922). I refer to Schmitt's work because of his palpable impact on the current discourse on judicial review of emergency administration. *See, e.g.,* DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY 19 (2006) (discussing the work of Carl Schmitt in national emergencies); Mark Neocleous, *The Problem with Normality: Taking Exception to 'Permanent Emergency'*, 31 ALTERNATIVES 191 (2006) (discussing the activities of the Bush Administration during the September 11, 2001 crisis with reference to the work of Carl Schmitt). I nevertheless acknowledge that Schmitt was a Nazi sympathizer and "legal apologist" for abhorrent human behavior. *See, e.g.,* Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1797 (2010) (discussing Schmitt's Nazi fealties while recognizing his emergency work).

[8] SCHMITT, *supra* note 7, at 5.

[9] *See* Adrian Vermeule, *Our Schmittean Administrative Law*, 122 HARV. L. REV. 1095, 1133 (2009) (describing and supporting the Schmittean theory of emergency deference).

[10] *See* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?*, 112 YALE L.J. 1011, 1019 (2002) ("when grave national crises are upon us, democratic nations tend to race to the bottom as far as the protection of human rights and civil liberties, indeed of basic and fundamental legal principles, is concerned."); Masur, *supra* note 2, at 445 ("'Deference' has become a shibboleth that courts believe they must invoke if their wartime rulings are to have any hope of withstanding appellate (and public) scrutiny."); Raven-Hansen, *supra* note 3, at 831-832 (describing the Bush Administration's post-September 11 military orders, which were "greeted with alarm by civil libertarians as an assault on the rule of law."); Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 78 & n.2 (2010) (finding that "[m]ore than 120 law review articles" published between 2001 and 2010 examined judicial deference to the September 11 emergency administration).

[11] *See infra* Part I.C.

[12] *See, e.g.,* Levinson & Balkin, *supra* note 7, at 1810-1811 (noting the swine flu emergency and the deference accorded to agencies).

[13] *See id*.; Posner & Vermeule, *supra* note 6, at 1619-1628 (studying the 2008 financial crisis cases).

Electronic copy available at: https://ssrn.com/abstract=4063950

On January 13, 2022, in *NFIB v. DOL*,[14] the Supreme Court defied that tradition when it decided that the Biden Administration's Occupational Safety and Health Administration (OSHA) was not authorized to issue its "emergency temporary standard" (ETS).[15] OSHA's ETS required employers with 100 or more employees (with some exceptions) to impose mandatory COVID-19 vaccinations or masking and testing.[16] The Supreme Court majority held that "[p]ermitting OSHA to regulate the hazards of daily life – simply because most Americans have jobs and face those same risks while on the clock – would significantly expand OSHA's regulatory authority without clear congressional authorization."[17] Rather than defer to OSHA's expertise, as some critics believe they should have,[18] the majority restricted the agency's ability to regulate pandemic workplace policies.

The Supreme Court's stay of OSHA's ETS impacts over 80 million American workers.[19] Unsurprisingly, that decision reinvigorated criticism of the judicial review of emergency administration.[20] Whether judges are deferring to agencies

[14] NFIB v. DOL, 2022 U.S. LEXIS 496, at *1 (2022).
[15] Ohio v. DOL Occ. Safety & Health Admin., No. 21A247 and NFIB v. DOL were consolidated.
[16] *See* NFIB v. DOL, 2022 U.S. LEXIS 496, at *2.
[17] *Id*. at 7.
[18] *Id*.
[19] *Id*. ("imposing a vaccine mandate on 84 million Americans in response to a worldwide pandemic is simply not 'part of what the agency was built for.'").
[20] *See, e.g.,* Steven I. Vladeck, *F.D.R.'s Court-Packing Plan Had Two Parts. We Need to Bring Back the Second.*, THE NEW YORK TIMES (Jan. 7, 2022) (arguing that in these cases, judges may be "ideologically sympathetic" and "asked to decide important policy questions on the fly, with truncated briefing, with very little opportunity to develop a factual record with national impact."), https://www.nytimes.com/2022/01/07/opinion/supreme-court-vaccine-mandate.html?smid=tw-share; David Michaels, *The Supreme Court has strict covid rules. Will it let OSHA protect other workers?*, THE WASHINGTON POST (Jan. 7, 2022), https://www.washingtonpost.com/outlook/2022/01/07/osha-supreme-court-mandate/; Peter M. Shane, *The Supreme Court Takes COVID Legal Disputes Out of the "Shadows",* WASHINGTON MONTHLY (Jan. 4, 2022) (arguing that these cases may "provide indications of how intent the Court's right-wing majority is to curb the regulatory power of the executive branch in general."); Bridget C.E. Dooling, *What the Supreme Court's Rejection of the Employer Vaccinate-or-Test Rule Means for the Biden Administration*, LAWFARE (Jan. 24, 2022) (arguing that the Court is demonstrating "its willingness to scrutinize an agency's statutory authority, even in the face of a plausible, plain reading of the statute that supports the agency's response to the impact of a deadly pandemic…."), https://www.lawfareblog.com/what-supreme-courts-rejection-employer-vaccinate-or-test-rule-means-bidens-agenda; Luke Herrine, et al., *Seven Reactions to NFIB v. Department of Labor*, LPE PROJECT (Jan. 26, 2022) (providing seven scholarly opinions on the (in)appropriateness of the *NFIB* decision), https://lpeproject.org/blog/seven-reactions-to-nfib-v-department-of-labor/; Andrew Koppelman, *The Supreme Court's Embarrassing OSHA Decision*, SMERCONISH FOR

Electronic copy available at: https://ssrn.com/abstract=4063950

because of the executive's comparative advantages in handling crises or blocking agencies because they oppose the administrative state, many assume that judicial review under the APA during emergencies is pretextual.[21]

That assumption forecloses the possibility that judges invalidate agencies' emergency administration for legitimate purposes under the APA. It also fails to acknowledge that, through their review, judges are protecting vulnerable communities from harmful emergency measures. Because members of Congress and scholars fail to appreciate the check on executive emergency powers, they are currently proposing ways to reduce judicial discretion under the APA and strengthen Congress's oversight authority.[22]

This Article explains why those efforts will fail to galvanize a more legitimate emergency administration. It argues that judicial review under the APA is far more effective than the literature and congressional proposals acknowledge. Through a close examination of the cases challenging the Trump Administration's pandemic administration, I show that judges most reviewed the agencies' rules and decisions for valid reasons. Those agencies had carried out much of their emergency administration under presidential orders, agendas, or directives, not necessarily

INDEPENDENT MINDS (Jan. 25, 2022) ("The Court's opinion is so poorly reasoned that I cannot explain why the Court has decided to endanger millions and kill thousands."), https://www.smerconish.com/exclusive-content/the-supreme-courts-embarrassing-osha-decision.

[21] *See* Vermeule, *supra*, note 9, at 1097 (referring to judicial review of emergency administration as "effectively a sham" under the APA); DYZENHAUS, *supra* note 7, at 19 (arguing that deferential judicial review of emergency administration allows judges to temporarily suspend the rule of law so that they can later reinforce the law when the emergency has passed).

[22] For a description of these ongoing efforts, *see infra* Part IV.

Electronic copy available at: https://ssrn.com/abstract=4063950

based on their expert judgments.[23] They often failed to sufficiently explain their contradictory evidence, faulty rationale, or violative timing.[24]

My examination also shows that some of the agencies' emergency rules and policies would have restricted the rights of immigrants, workers, business owners, strip clubs, and incarcerated individuals, among others.[25] For example, the Small Business Administration (SBA) rules would have prevented persons in poverty (those whose small businesses had declared bankruptcy) from accessing critical pandemic-related loans, and the Department of Labor (DOL) tried to suspend immigrant workers' visas[26] – all while the economic strains of the pandemic rendered loans and employment opportunities critical lifelines. By ensuring compliance with the APA's rules and standards, judges prevented agencies from cutting those lifelines.

To shed empirical light on the judicial review of emergency administration, I developed a unique dataset of the 51 lower federal court decisions[27] that reviewed

---

[23] *See* Jonathan H. Adler, *Super Deference and Heightened Security (or When Super-Deference is Not So Super)*, FLA. L. REV. (forthcoming) (arguing that the Trump Administration's pandemic measures conflicted with constitutionally protected liberties). *See generally* Amy L. Stein, *Energy Emergencies*, 115 NW. U.L. REV. 799, 801 (2020) (arguing that despite their utility, the executive's "[e]mergency powers are subject to abuse…[because] emergency powers are so broadly granted and representative procedure is so easily abandoned."); ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 40-45 (2007) (discussing the inherent trade-offs between the actions of government officials to manage emergency risks and civil rights and liberties).

The focus of this Article is on judicial review of executive agencies and not of the President. Nevertheless, the President's efforts to broaden executive authorities – the implementing activities of which are subject to judicial review under the Administrative Procedure Act (APA) – is worrisome not only because they tend to diminish constitutional rights, but also because they contradict Art. II of the Constitution, which prohibits "presidential actions motivated by self-proclamation self-dealing, or an intent to corrupt…the legal system…". *See* Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article* II, 132 HARV. L. REV. 2111, 2188 & n. 462 (2019) (quoting *Law Professor Letter on President's Article II Powers*, PROTECT DEMOCRACY (June 4, 2018), https://protectdemocracy.org/law-professor-article-ii/).

[24] *See infra* Part II.

[25] *See infra* Part II.

[26] *See infra* Part II.

[27] By focusing on lower court decisions, this Article acknowledges that, although Supreme Court decisions would naturally be "the most important ones," lower court decisions "are sufficiently numerous to test various hypotheses." Cass R. Sunstein, *Judging National Security Post-9/11: An Empirical Investigation*, 2009 SUP. CT. REV. 269, 270 (2009). This propensity may reflect that lower courts, as opposed to the Supreme Court, "see the errors, overreach, arbitrary action, actions that appear to involve unnecessary or overly costly regulations, and the apparent imperviousness of some agencies to outside democratic influence or their capture by narrow interests." *See* Jack Beermann,

Electronic copy available at: https://ssrn.com/abstract=4063950

pandemic-related emergency administration under the APA between September 2020 and July 2021.[28] My examination included every case that dealt with the "Administrative Procedure Act," or "APA," and a federal agency activity directly linked[29] to "COVID-19" or "the pandemic."[30]

My data shows that judges used the APA's standards[31] – including its text, jurisprudence, and doctrines – to invalidate the agency's emergency administration

---

The Never-Ending Assault on the Administrative State, 93 NOTRE DAME L. REV. 1599, 1616 (2018); It also takes on the gauntlet thrown by Adrian Vermeule that "lower-court judges are systematically more deferential to executive and administrative claims than is the governing majority on the [Supreme] Court…". *See* Vermeule, *supra* note 9, at 1148. That is, if lower courts are "systematically deferential," then evidence that those courts ignored both institutional predispositions and circumstantial tendency by heightening their standards of review renders it all the more relevant. *See, e.g.,* Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 VA. L. REV. (forthcoming) (2022) (noting that lower courts "repeatedly halted major initiatives of the Trump Administration, often issuing decisive nationwide relief in the process.").

This Article omits state court decisions, which are addressed elsewhere in the literature, and which raise separate legal issues. *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, 197 (2020) (addressing whether judges should be able to exercise constitutional constraints on local and state orders during the pandemic). It also omits bankruptcy court decisions, given the special stature of non-Article III bankruptcy judges and the additional variables (such as salary, insecure tenure, separation of powers, to name a few) that those decisions would have invited. For a discussion of the differences between bankruptcy judges and judges under Article III of the Constitution, *see* Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 757-761 (2009).

[28] 5 U.S.C. §§ 551–559, 701–706 (2018).

[29] This examination omitted cases in which the pandemic was only tangentially related, such as cases that contested agency rules and invoked the pandemic as mitigating circumstances for harm caused by those rules. *See, e.g.,* UFW v. U.S. DOL, 509 F. Supp. 3d 1225, 1249 (E.D. Cal. 2020) (mentioning the pandemic only to establish that the "harms threatened if the Final Rule is implemented are further exacerbated by reduced hours caused by the ongoing COVID-19 pandemic, leaving an already impoverished population even more vulnerable."). Because the agency action in those cases was not directed at responding to the pandemic, those cases did not qualify as emergency administration.

[30] My examination looked at whether judges used their APA reviews to validate or invalidate emergency administration, and their grounds for doing so. My examination did not center on whether judges applied light, normal, or heightened standards. In that sense, this Article follows previous empirical models that use invalidation rates to measure whether judges are taking an active role in emergency cases. *See, e.g.,* Sunstein, *supra* note 27, at 270-271; Lee Epstein et al., *The Supreme Court during Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1, 71-74 (2005) (coding judicial review based on whether the panel ruled in favor of the agency or plaintiffs). By invalidate, I mean the judges issued a preliminary injunction, enjoined the action, or stayed the rule.

[31] *See, e.g.,* Vermeule, *supra* note 9, at 1148 (dismissing the value of legal tests to control judicial review, arguing that those "tests will themselves inevitably be standards rather than rules, and will

Electronic copy available at: https://ssrn.com/abstract=4063950

in nearly 63 percent of the cases.[32] When compared to previous emergencies' invalidation rates, my empirical results are striking;[33] the judicial review carried out by the lower courts during the pandemic was far more vigorous.[34]

The results of my study correct many of the misconceptions about the judicial review of emergency administration. Instead of deferring to the executive, most judges used their review to uphold the APA's procedural and substantive safeguards to benefit marginalized groups. As a former civil servant who worked at an agency under the Executive Office of the President during the pandemic, those results came as a relief.

To unfold these central claims, this Article proceeds in four parts. Part I describes the mainstream assumptions that undergird the judicial review of emergency administration. It also canvasses the substantial literature exposing how Presidents control their agencies, especially during emergencies. If it is presidential control and not agency expertise that drives emergency administration, the rationale for judicial deference gives way. Judges should review the resulting emergency administration skeptically.

Part II turns to my empirical findings and describes how judges were far more vigorous in their review of emergency administration during the pandemic than previous emergencies. Although the Bush Administration excerpted significant control over its agencies and expanded its regulatory powers during the September 11 aftermath, the majority of judges deferred to its emergency administration.[35] By contrast, most judges invalidated the Trump Administration's pandemic policies for violating the APA's rules and standards. This Part nevertheless acknowledges the complexities in judicial review by identifying disagreements across district courts and the minority of decisions that rested on ideology rather than APA merit.

---

contain adjustable parameters ("arbitrary and capricious," "clear," "reasonable") that lower courts will apply in a manner influenced by circumstances, including their perceptions of emergency.").

[32] *See infra* Part II, Table 1. As described in Part II and illustrated in Table 1, 57 percent of district judges invalidated agencies' emergency policies for being arbitrary and capricious; nearly 90 percent critically evaluated agencies' proffered justifications for failing to follow the APA's notice-and-comment requirements; and approximately 56 percent invalidated agency interpretations under the *Chevron* doctrine.

[33] For a comparison between how the APA's standards were applied in the September 11 cases and the pandemic cases, *see* Part II *infra*.

[34] *See* Part II *infra*. Briefly, studies show that judges invalidated emergency administration in the early 2000s in approximately 15 percent of cases. *See* Sunstein, *supra* note 27, at 279.

[35] *See* Sunstein, *supra* note 27, at 279 (describing the empirical data on judicial deference to the Bush Administration's Sept. 11 measures).

Electronic copy available at: https://ssrn.com/abstract=4063950

Part III counters the assumption that judges' comparatively vigorous review during the pandemic merely reflected juridical disdain for the Trump Administration (the "Trump Effect"). The trajectory of judicial review, including the early Biden cases, suggests that judges are becoming more active during emergencies and more emboldened to hold agencies accountable to the APA's rules and standards.

The evolution in judicial review of emergency administration has far-reaching implications for the balance of emergency powers between the executive, the judiciary, and Congress. It also sheds new light on current legislative efforts to rebalance emergency powers. Part IV describes those efforts, which seek to give Congress a more substantial oversight over the executive through legislation. It argues that such legislation may ultimately backfire by insulating illegitimate administration from judicial review. Nevertheless, congressional mechanisms or dialogue through amici briefs could bolster judicial efforts by flagging credibility and interpretive concerns.

PART I: JUDICIAL REVIEW OF EMERGENCY ADMINISTRATION UNDER THE ADMINISTRATIVE PROCEDURE ACT (APA)

This Part describes the mainstream perspectives on the judicial review of emergency administration. Before doing so, a quick note on the definition of "emergency" is warranted. Adrian Vermeule and Eric Posner,[36] whose joint and single-authored work influences much of the emergency discourse, provide a helpful typology of emergencies to examine judicial review.[37] They explain that emergencies involve "a publicly observable event."[38] For example, the 2008 financial crisis involved the collapse of "highly visible financial institutions" and the plunging stock market.[39] Emergencies also involve "a threat about which ordinary people and many experts previously knew little or nothing."[40] Emergencies are "complex and ambiguous, and the proper response to the threat … highly uncertain."[41] During those times, "a general view emerge[s] that the

[36] *See generally* POSNER & VERMEULE, *supra* note 23; Posner & Vermeule, *supra* note 6. As discussed in Part I, there has been a minority of scholarship that counters these views. Most notably, Robert Howse disputes the Schmittean view of U.S. administrative law. *See infra* Part I.
[37] *See generally* Posner & Vermeule, *supra* note 6.
[38] *Id*. at 1638.
[39] *Id*.
[40] *Id*.
[41] *Id*.

Electronic copy available at: https://ssrn.com/abstract=4063950

executive need[s] additional discretion (as well as resources) in order to address the threat adequately."[42]

Legal scholars have generally followed this typology when reviewing financial[43] and health emergencies,[44] among others.[45] As Sanford Levinson and Jack Balkin note, "recent events, like fears of the swine flu epidemic and the economic collapse of 2008, demonstrate that emergencies can take a variety of forms, both foreign and domestic."[46]

Under that typology, the pandemic's interrelated health and economic exigencies place it within the academic discourse.[47] It monopolized news outlets and political campaigns, particularly as the number of hospitalized or critically ill continued to accelerate.[48] COVID-19's nature, transmission, and vaccination challenged scientists and other medical experts.[49] Meanwhile, the public watched

---

[42] *Id*. at 1638-39.

[43] *See, e.g.,* Giulio Napolitano, *The role of the state in (and after) the financial crisis: new challenges for administrative law*, *in* COMPARATIVE ADMINISTRATIVE LAW 569 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010) (noting how financial crises transform existing administrative law); Posner & Vermeule, *supra* note 6, at 1615-1628 (comparing the Sept. 11 and 2008 financial crisis emergencies and concluding both events impacted administrative law in the same way).

[44] *See, e.g.,* Levinson & Balkin, *supra* note 7, at 1811 (including "the swine flu epidemic and the economic collapse of 2008" among national emergencies).

[45] *See, e.g.,* Stein, *supra* note 23, at 801 (noting the potential for the executive to abuse its power during so-called energy emergencies); Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063, 1064 (2020) (including cyberattacks in her emergency analysis).

[46] Levinson & Balkin, *supra* note 7, at 1811.

[47] *See, e.g.,* Kenny Mok & Eric A. Posner, *Constitutional Challenges to Public Health Orders in Federal Courts during the COVID-19 Pandemic* (unpub. m.s., Aug. 5, 2021) (evaluating the constitutional cases that arose during the pandemic to illustrate how judges responded to constitutional questions during emergency circumstances), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3897441; Wendy E. Parmet, *The COVID Cases: A Preliminary Assessment of Judicial Review of Public Health Powers during a Partisan and Polarized Pandemic*, 57 SAN DIEGO L. REV. 999 (2020).

[48] *See, e.g.*, PEW RESEARCH CENTER, ELECTION 2020: VOTERS ARE HIGHLY ENGAGED, BUT NEARLY HALF EXPECT TO HAVE DIFFICULTIES VOTING 35 (2020) ("62% of voters say the [COVID-19] outbreak will be a very important factor in their decision about who to support in [the 2020 presidential election].")

[49] *See, e.g.*, WORLD HEALTH ORGANIZATION, WHO, China Leaders Discuss Next Steps in Battle Against Coronavirus Outbreak (January 28, 2020), https://www.who.int/news/item/28-01-2020-who-china-leaders-discuss-next-steps-in-battle-against-coronavirus-outbreak ("Much remains to be understood about [the virus] . . . . Better understanding of the transmissibility and severity of the virus is urgently required to guide other countries on appropriate response measures.")

Electronic copy available at: https://ssrn.com/abstract=4063950

closely for concrete guidance and information from the executive, hoping that federal resources would win the global race for vaccines and protective gear.[50]

A. *Assumptions of Judicial Deference*

According to the "conventional wisdom"[51] on the judicial review of emergency administration, judges should have deferred to the Trump Administration's pandemic measures even if they found the measures disagreeable or unlawful. Because the APA is silent as to emergency review, judges are free to set the standards of their reviews during emergencies "on such deferential terms as to make legality a pretense."[52]

Vermeule thus labels our administrative legal system "Schmittian" (a superior label, I suppose, to the alternative "Schmitty administrative law").[53] He argues that the APA facilitates executive dominance under the cloak of democratic legitimacy during emergencies.[54] It does so by providing "escape hatches," recognizing that "no code of administrative law and procedure could hope to specify, in advance, what to do about [emergency] circumstances."[55] Those escape hatches include the exceptions to judicial review of administrative action in "military or foreign affairs" and other APA rules that "create adjustable parameters" that allow judges to defer during crises.[56] The APA's vague provisions save judges, who are "at sea, even more so than are executive officials."[57] Posner and Vermeule jointly conclude that "[p]olitical conditions and constraints…leave rational legislators and judges *no real choice but to hand the reins to the executive and hope for the best*."[58]

---

[50] *See, e.g.*, PEW RESEARCH CENTER, THREE MONTHS IN, MANY AMERICANS SEE EXAGGERATION, CONSPIRACY THEORIES AND PARTISANSHIP IN COVID-19 NEWS 3 (2020) (listing the CDC as the most popular and most trusted source of news on the pandemic, the only source trusted by majorities in both parties).

[51] David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2568 (2003) (canvassing the emergency literature).

[52] *See* Vermeule, *supra* note 9, at 1658 ("the pragmatics of crisis governance give courts few alternatives [but to defer].").

[53] *Id.* at 1138.

[54] *Id*.

[55] *Id*. at 1139.

[56] *Id*. at 1138-1139.

[57] POSNER & VERMEULE, *supra* note 23, at 32.

[58] *See* Posner & Vermeule*, supra* note 6, at 1614 (emph. added). Both authors attempt to disclaim making broad predictions and attempt to narrow their findings to specific cases, while throwing in

Electronic copy available at: https://ssrn.com/abstract=4063950

Until recently, judges seem to have agreed. Consider *Korematsu v. United States*,[59] the paradigmatic case of harmful presidential emergency administration and "judicial decision-making gone wrong."[60] In that 1944 case, the Supreme Court stated that laws treating people differently based on race or national origin are generally subject to the most stringent judicial scrutiny.[61] The Court nevertheless deferred to the military's judgment that internment of the entire West Coast Japanese community was necessary.[62] *Korematsu* shows how judges defer to the executive during crises despite having powerful reasons for not doing so.[63]

In addition to that case, scholars have documented the significant judicial deference accorded to the Bush Administration after September 11, 2001.[64] Within two weeks of the September 11 attacks, the federal government had arrested or detained 500 people and subjected "thousands of resident aliens" to questioning.[65]

---

occasional terms like "practically inevitable" to preclude falsification. *See id.*, at 1636 ("the conditions of the administrative state make it *practically* inevitable that the executive and the agencies will be the main crisis managers…") (emph. added); Vermeule, *supra* note 9, at 1107 ("[t]he examples of law-free zones and sham review I will examine are not evidence of some further hypothesis…"). On the other hand, while disclaiming broader hypotheses and conclusions, Vermeule goes on to characterize judicial behavior and deferential outcomes as "inevitable" or "inevitably" 19 times in his *Our Schmittean Administrative Law* (*see supra*, note 9), and, as discussed later, Posner and Vermeule disagree with the administrative scholarship for considering an institutional role for the courts that lack such capacity. *See* Posner & Vermeule, *supra* note 6, at 1636.

[59] 323 U.S. 214 (1944). *See, e.g.,* Masur, *supra* note 2, at 454 ("the *Korematsu* Court announced that the military's factual assertions (the framework upon which its legal case was built) deserved almost limitless deference because of the Executive's particular expertise in military affairs."); Dyzenhaus, *supra* note 3, at 2023 (arguing that *Korematsu* manifests "the grand constitutional claim that in times of emergency, judges must blindly defer to the executive.").

[60] Neal Kumar Katyal, Trump v. Hawaii*, How the Supreme Court Simultaneously Overturned and Revived* Korematsu, 128 YALE L.J.F. 641, 642 (2018).

[61] *Korematsu*, 323 U.S. at 223-224.

[62] *Id*.

[63] *Id*. at 236-37 (Murphy, J., dissenting) ("justification for the exclusion is sought… mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment….").

[64] *See* Vermeule, *supra* note 9, at 1138; Donohue, *supra* note 10, at 78 & n.2 (2010) (noting the significant scholarship that focused on judicial deference to the Bush Administration in the September 11 administration cases); Raven-Hansen, *supra* note 3, at 841 (arguing that the Bush Administration's military orders would have been invalid "if the APA had applied.").

[65] *See* Liam Braber, Korematsu's *Ghost: A Post-September 11th Analysis of Race and National Security*, 47 VILL. L. REV. 451, 452-453 (2002) (noting that, within two weeks of the September 11 attacks, the government had arrested or detained 500 people and subjected "thousands of resident aliens" predominantly of Arabic or Middle Eastern descent to "random questioning").

Electronic copy available at: https://ssrn.com/abstract=4063950

It "engaged in immigration sweeps, detained people without charges, used coercive interrogation, and engaged in warrantless wiretapping of American citizens."[66]

As Posner notes, the September 11 emergency administration "would have been considered violations of the law and the U.S. Constitution if they had been undertaken…before the attacks."[67] Rather than invalidate it (as judges would do later during the pandemic[68]), most judges used their APA review standards to uphold the emergency administration.[69] Examining the appellate court review of emergency administration between September 11, 2001 and September 2008, Cass Sunstein finds that judges upheld executive agency activities in 85 percent of litigated cases.[70] Since the September 11 cases, subsequent examinations studying the swine flu epidemic[71] and the 2008 financial crisis[72] confirmed that judicial deference to agencies' emergency administration is practically inevitable.

Against that empirical background, the Supreme Court's *NFIB v. DOL*[73] decision holding that OSHA exceeded its emergency authorities appears suspiciously out of sync. Rather than defer to OSHA as expected, the majority blocked the agency's emergency administration.[74] Critics have reacted to this change in standards by shifting from assuming judicial deference to assuming (and critiquing) judicial interference during emergencies.[75] They suspect that judges are now using their reviews to constrain regulation, to the detriment of the balance of emergency powers and the executive's comparative advantages over the judiciary

---

[66] *See* Eric A. Posner, *Deference to the Executive in the United States After September 11: Congress, the Courts, and the Office of Legal Counsel*, 35 HARV. J.L. & PUB. POL'Y 213, 215 (2012) (cited cases omitted).
[67] *Id*.
[68] *See infra* Part II.
[69] *But see* Posner, *supra* note 66, at 215 (noting that although "the courts did not block actions that they would have blocked during normal times," after a while "courts also resisted some of the assertions the executive made.") (internal citations omitted).
[70] Sunstein, *supra* note 27, at 279.
[71] *See, e.g.,* Levinson & Balkin, note 7, at 1810-1811 (discussing the "variety of forms" emergencies may take).
[72] *See id*.; Posner & Vermeule, *supra* note 6, at 1619-1628 (studying the 2008 financial crisis cases in their emergency work).
[73] *NFIB v. Dep't of Lab*., 2022 U.S. LEXIS 496, at *2.
[74] *Id*.
[75] *Compare* Wiley & Vladeck, *supra* note 27, at 179-183 (urging judges to apply "ordinary" review during the COVID-19 pandemic – rather than the "suspension model" whereby judges suspend constitutional constraints on government action during emergencies) *with* Vladeck, *supra* note 20 (describing challenges against the Biden administration's COVID-19 rules as "an undeniable – and problematic – trend" by which a "volume of emergency relief cases…has become the new normal" and judges are "asked to decide important policy questions on the fly….").

Electronic copy available at: https://ssrn.com/abstract=4063950

to decide and conduct emergency responses.[76] The following section explains those advantages.

B. *Assumptions of Executive Advantage*

The traditional assumption of judicial deference during emergencies is based, at least in part, on the recognition that agencies have the expertise to design emergency responses in their substantive areas. By second-guessing that expertise, judges delay solutions and potentially put lives at stake. This section briefly describes the executive's perceived comparative advantages and how judicial review could undermine them.

1. Emergency Expertise

At its core, the theory of judicial deference assumes that agencies have better expertise to regulate emergencies than judges.[77] The executive is responsible for "provid[ing] a reasonable guarantee of life and safety" to the public.[78] Agencies carry out that responsibility by applying their subject-matter expertise to promulgate rules and form decisions. Consequently, some argue that judges, who lack such expertise, should refrain from second-guessing expert agencies during crises.[79]

---

[76] *See, e.g.,* Antara Haldar, *COVID Goes to Court*, PROJECT SYNDICATE (Jan. 14, 2022) (arguing that the Court's "vote was for individual liberty at all costs."); Ian Millhiser, *The Supreme Court can't get its story straight on vaccines*, VOX (Jan. 15, 2022) (arguing that decisions such as *NFIB* show that "this age of deference is over" and "suggest that Court will uphold rules that five of its members think are good ideas, and strike down rules that five of its members think are bad ideas."), https://www.vox.com/22883639/supreme-court-vaccines-osha-cms-biden-mandate-nfib-labor-missouri; Vladeck, *supra* note 20 (in light of *NFIB*, proposing that Congress require "special three-judge panels, rather than outlier district judges, to hear cases seeking to throw out state or federal rules.").

[77] *See* Vermeule, *supra* note 8, at 1135 (arguing that it is "institutionally impossible" for judges to exercise vigorous reviews during emergencies because judges "think the executive has better information than they do, and because this informational asymmetry or gap increases during emergencies."); Posner, *supra* note 66, at 216 ("The deference thesis rests on basic intuitions about institutional competence….").

[78] *See* Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328, 330 (2002) (arguing that the "fabric of American liberalism and democracy would be irreparably coarsened if government proves unable to provide a reasonable guarantee of life and safety to its citizens.").

[79] *See, e.g.,* John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427, 428 (2003) (arguing that the Constitution envisions no role for the judiciary in the review of war powers); Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN.

Electronic copy available at: https://ssrn.com/abstract=4063950

Most of this scholarly attention has focused on national security emergencies, where judicial interference could directly harm public interests by exposing confidential and sensitive policies.[80] David Pozen suggests that "[p]ublicizing information about these policies," such as exposing state secrets when required to do so by judges, "poses a risk of vitiating the underlying objective."[81] Enabling judges to undermine and override executive national security policymaking risks interfering with "matters of life and death" as well as exposing sensitive information to "a party against whom the government is taking adverse action."[82]

As the pandemic rages on, the conception of agency expertise has broadened to include disease response and workplace conditions.[83] For instance, OSHA has unique expertise in regulating various workplace issues.[84] The dissenting Supreme Court Justices in *NFIB v. DOL* argued that the majority undermined OSHA's expertise when it blocked the workplace ETS, placing lives in jeopardy in the process.[85] To them, it was the Court, and not the agency, that was "[a]cting outside of its competence and without legal basis…."[86]

L. REV. 1549, 1551 n.2 (2009) (collecting sources arguing for the superiority of executive decision-making on national security)*;* Vermeule, *supra* note 9, at 1135; Eric Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 Yale L.J. 1170, 1176 (2007) (arguing that the executive should be afforded deference "on the ground that resolving ambiguities requires judgments of policy and principle, and the foreign policy expertise of the executive places it in the best position to make those judgments.").

[80] *See, e.g.,* Masur, *supra* note 2, at 482 ("Any court scrutinizing the legality of executive military actions must wrestle with both its own comparative ignorance of the questions involved (and the Executive's comparative proficiency) and the specific constitutional role assigned to the Executive for management of these issues."); Posner, *supra* note 66, at 216 ("Secrecy is an important part of the [deference thesis].").

[81] *See, e.g.,* David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 275 (2010) (arguing that the executive has had unique access to "deep secrecy" surrounding national security matters).

[82] *Id*.

[83] *See* Vladeck *supra* note 20.

[84] *See, e.g.,* Michaels, *supra* note 20 (arguing that the Supreme Court should defer to OSHA's workplace rules); Shane, *supra* note 20 ("Whether or not the rules represent the best public health policy, the fit between the relevant statutory texts and the departments' respective exercises of regulatory authority seems reasonable on its face.").

[85] *NFIB v. DOL*, 2022 U.S. LEXIS 496 * 21-23 (Breyer, J., Sotomayor, J., & Kagan, J., dissenting) (arguing that the stay "stymies the Federal Government's ability to counter the unparalleled threat that COVID-19 poses to our Nation's workers.").

[86] *Id*.

Electronic copy available at: https://ssrn.com/abstract=4063950

2. Timely Responses

As experts in their respective fields, agencies presumably promulgate emergency responses quickly and decisively. They need the necessary regulatory space to do so.[87] Scholars have argued that judicial review threatens to impede that timeliness[88] by engendering "ossification" just when "time is of the essence."[89]

To these scholars, judicial review "introduces delay, diverts agency resources, upsets agency priorities, and shifts authority within agencies toward lawyers and away from policymakers."[90] As Elizabeth Fisher and Sidney Shapiro put it, if agencies are worried about potential invalidation, they will waste "extraordinary amounts of time and resources" attempting to perfect their "justifications for important and controversial rules lest a circuit court find their reasoning process to be unsatisfactory."[91]

Steven Vladeck cites the recent Supreme Court cases that reviewed the Biden Administration's vaccine and masking requirements.[92] He laments that the Justices have been accepting emergency cases to such extents as to "wildly confus[e] …policymakers and stakeholders…." He notes that the resulting

---

[87] *See, e.g.,* Joseph Landau, Chevron *Meets* Youngstown*: National Security and the Administrative State*, 92 B.U. L. REV. 1917, 1918 (2012) (arguing that "[m]any supporters of an administrative law approach to national security" advocate for a "super-strong" Chevron deference); CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNANCE IN THE MODERN DEMOCRACIES 209 (1948) ("Perhaps the perils of the Civil War or the Great Depression might have been more speedily and efficiently routed if the government was tenacious."); Gross, *supra* note 10, at 1029 ("The government's ability to act swiftly, secretly, and decisively against a threat to the life of the nation becomes superior to the ordinary principles of limitation on governmental powers and individual rights."); Cary Coglianese & Neysun Mahboubi, *Administrative Law in a Time of Crisis: Comparing National Responses to COVID-19*, 73 ADMIN. L. REV. 1, 11 (2021) (drawing lessons from COVID-19 responses around the world and arguing that "[r]apid responsiveness is paramount.").

[88] *See generally* Yoo, *supra* note 79, at 428 (arguing that judges should not impede the executive's emergency powers).

[89] *See* Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1287 (2014) (arguing that judges are ill-equipped to understand and trade off competing policy values); Vermeule, *supra* note 9, at 1135 (arguing that judges refrain from reviewing emergency administration because they fear "delay and ossification…that might be especially harmful when time is of the essence."). *But see* Bijal Shah, *Interagency Transfers of Adjudication Authority*, 34 YALE J. ON REG. 279, 351 (2017) (asserting that claims of agency ossification following hard look review "may be overstated.")

[90] Bagley, *supra* note 89, at 1287.

[91] *See* ELIZABETH FISHER & SIDNEY A. SHAPIRO, ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW 261 (2020).

[92] Vladeck, *supra* note 20.

Electronic copy available at: https://ssrn.com/abstract=4063950

emergency administration "changes seemingly every minute… at the expense of 'ordinary' litigation, which is pushed to the back burner while courts devote more of their finite resources to these 'emergency' appeals."[93]

3. A Coherent Emergency Approach

Emergencies require a singular coherent approach.[94] Agencies are well-suited to establish that coherence when they promulgate federal emergency responses. When judges block those responses, they risk establishing different standards and precedents in different jurisdictions.[95]

Citing *Chevron*, for instance, academics[96] and judges[97] complain that the standard of review "is so pliable that courts applying it can still reach any desired result," including by invalidating "interpretations with which they disagree."[98] During the pandemic, agencies weighed various competing interests and based their decisions on national priorities and objectives.[99] Judges did not always agree with those determinations, nor did they always agree with each other.[100]

---

[93] *Id*.

[94] *See, e.g.*, Levinson & Balkin, *supra* note 7, at 1804-1806 (describing our legal order, which deliberately enables a "constitutional dictator," that enjoys "the right to make binding rules, directives, and decisions" during circumstances such as emergencies).

[95] *See* Vladeck, *supra* note 20. For a critique of judicial review based on concerns of circuit splits and resulting contradictory legal decisions, *see* Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1249-1254 (1999) (rebutting the argument that judicial review is essential to preserving the rule of law).

[96] *See, e.g.,* Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 68 (2007) (arguing that *Chevron* inappropriately assumes that judges may confront through doctrine what is really "an institutional problem" concerning "the allocation of interpretive authority between agencies and courts…."); Kristin E. Hickman & Aaron L. Nielson, *The Future of* Chevron *Deference*, 70 DUKE L.J. 1015 (2021); Jack Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why it Can and Should Be Overruled*, 42 CONN. L. REV. 779, 782 (2010). *But see* Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125, 153 (arguing that while *Chevron* is a "rather lenient test," it does not amount to an "'anything goes' standard…").

[97] *See, e.g.,* Babb v. Wilkie, 140 S. Ct. 1168 (2020) (omitting mention of *Chevron*, despite disagreement in the briefs over *Chevron's* applicability); PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2055 (2019) (not resolving whether a Federal Communications Commission final order was eligible for *Chevron* deference); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1630 (2018) (rejecting deference where "the Executive seems of two minds" because the DOJ and the NLRB disagreed on statutory interpretation). *See also* Kristin Hickman & Aaron Nielson, *Narrowing* Chevron's *Domain*, 70 DUKE L.J. 931, 934–35 & n.15 (2021) (describing suggestions from Justices Clarence Thomas and Neil Gorsuch that *Chevron* violates the separation of powers).

[98] *See* Beermann, *supra* note 96, at 783.

[99] *See infra* Part II.C.

[100] For examples of how judges disagreed during the pandemic, *see infra* Part II.C.

Electronic copy available at: https://ssrn.com/abstract=4063950

When lawsuits challenging emergency administration were filed in multiple courts, as they were in *NFIB v. DOL* before the case reached the Supreme Court, different districts decided whether to stay implementation while the legal challenges were pending.[101] The resulting uncertainty led to further confusion and tensions.

This section has explained why scholars assume that judges would defer to agencies' emergency administration. It rests on the theory that judges should avoid second-guessing the agencies' unique expertise while those agencies are crafting timely and coherent emergency protections. That theory raises valid considerations, particularly given that these cases arise when lives are at stake. Nevertheless, as argued next, the premises underlining agencies' expertise to administer emergencies are misconstrued.

C. *The Unitary Executive and Need for Judicial Review*

The executive's advantages outlined above, if accurate, would render agencies worthy of broad deference. Their unique expertise would ensure timely, competent, and coherent emergency policies that judges should refrain from blocking, even if those judges would have acted differently. However, the above advantages are idealized and largely theoretical. Scholars fail to acknowledge that it is often Presidents, not agencies, who decide emergency priorities and policies.[102] And while a unitary decision-maker is well-positioned to make fast and discretionary decisions, its control over agencies undermines their expertise and delegated authority. The resulting emergency administration should be viewed skeptically.[103]

---

[101] *NFIB v DOL*, 2022 U.S. LEXIS 496 * 5-6 (describing the circuit split and the uncertainty concerning requests for stays and hearings in different jurisdictions).

[102] *See* Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 588 (2021) ("The Trump Administration presents perhaps the most extreme example of structural deregulation in recent history…") (2021); Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641, 644 (2020); Conor Casey, *Political Executive Control of the Administrative State: How Much is Too Much?*, 81 MD L. REV. 101, 111-112 (2021) (arguing that "U.S. Presidents of all political stripes have attempted to coordinate regulatory activity and leverage more centralized control over administrative bodies wielding delegated power…."); Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L Rev. 696, 702 (2007) (describing how "cabinet officials sometimes speak as if they were following binding presidential orders, rather than exercising their own statutory powers."); Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2185 (2016) (describing how the White House's Office of Management and Budget exercises control over agencies through its budget operations).

[103] Notably, scholars' points about the need for secrecy during national security emergencies is well taken. *See supra*, Part I.B.2. The pandemic cases did not implicate national security, however, and therefore did not implicate these concerns.

Electronic copy available at: https://ssrn.com/abstract=4063950

The literature examining presidential control over agencies is proliferating. Jody Freeman and Sharon Jacobs identify how former Presidents deployed specific "strategies," "tactics," and "instruments" that weakened their agencies.[104] During the September 11 aftermath, scholars focused on the significant control that President Bush excerpted over agencies.[105] After Bush, scholars noted "President Obama's open embrace of administrative power to advance" his agenda.[106] Addressing the Trump years, scholars[107] describe the presidential "assault" on agencies, including prohibiting federal employees from speaking to the press and firing or otherwise diverting resources away from subversive agency heads.[108]

However, Congress delegated authorities to "harness the superior expertise of an agency"[109] and not of Presidents. "When the President exercises power

[104] Freeman & Jacobs, *supra* note 102, at 594-623.

[105] *See* Gross, *supra* note 10, at 1017-1018 (referring to President Bush's "aggrandizement of powers of the federal government" and the restructuring of executive agencies during the September 11 aftermath); Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1003 (2004) (describing the ways in which the Bush Administration immediately began to issue executive orders following the announcement of a state of emergency in 2011); DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS IN CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003) (discussing the implications of the Bush Administration's September 11 emergency administration for rights and liberties).

[106] Gillian E. Metzger, *1930s Redux: The Administrative State under Siege*, 131 HARV. L. REV. 1, 77 (2017). *See also* Wendy Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 Col. L. Rev. 2109, 2036-2045 (2020) (describing how President Obama's White House interfered with agencies' scientific expertise).

[107] *See* Robert N. Roberts, *The Administrative Presidency and Federal Service*, AM. REV. PUB. ADMIN. 1, 3-5 (2021) (describing instances in which Trump fired agency leads who disagreed with him).

[108] *Id*.; Freeman & Jacobs, *supra* note 102, at 594-623 (describing the ways in which Trump undermined agencies such as the CDC by diverting resources away from them).

[109] *See e.g.,* Anne Joseph O'Connell & Jacob Gersen, *Deadlines in Administrative Law*, 121 U. PENN. L. REV. 923, 925-26 (2008) ("A central premise of the administrative state is that agencies have better information and greater expertise than the Congress that initially delegates authority to agencies."); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2260-61 (2001) (reviewing the history of Congressional delegation of powers to agencies and arguing that the "need for expertise emerged as the dominant justification for …enhanced bureaucratic power."); Kathryn E. Kovacs, *From Presidential Administration to Bureaucratic Dictatorship*, 105 HARV. L. REV. F. 104, 115 (2021) (arguing that the APA "codified conditions that legitimize statutory delegations of authority to agencies."). *But see* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 25 (1965) ("let us rid ourselves of the illusion that 'expertise' will produce formulas of demonstrable objectivity for resolving the conflict of interests involved in regulatory problems."); Bagley, *supra* note 90, at 352 (arguing that administrative law was "built on a bedrock of distrust" and was thus designed to ensure various safeguards of public accountability).

Electronic copy available at: https://ssrn.com/abstract=4063950

assigned by statute to another federal officer," observes Kathryn Kovacs, "the legitimacy of the delegation itself is undermined."[110]

Presidential control also defies the APA's transparency and accountability objectives.[111] The APA requires that agencies follow procedures such as notice-and-comment to afford the public, including those with "highly relevant expertise in the subject,"[112] the opportunity to participate in rulemaking through submitted comments.[113] It holds agencies accountable for engaging in arbitrary executive action.[114] The APA authorizes judicial review as a check to enforce its procedural and substantive rules.[115] If judges decide that agencies have violated the APA, those judges are responsible for invalidating and enjoining the agencies' activities under various standards depending on the activity (statutory interpretation, factfinding, or policy judgments).[116] That is the very purpose of their review.[117]

President Trump's visible and frequent control over his agencies invited judicial skepticism.[118] Bethany A. Davis Noll finds that although previous

---

[110] Kovacs, *supra* note 109, at 119.

[111] *See* Edward H. Stiglitz, *Delegating for Trust*, 166 U. PENN. L. REV. 633, 639 (2018).

[112] *See* Raven-Hansen, *supra* note 3, at 841-842 (describing the benefits of the APA's procedures during emergencies).

[113] 5 U.S.C.S. § 553(c).

[114] *Id*. at § 706(2)(A).

[115] 5 U.S.C.S. §§ 704, 706 (defining the types of administrative actions reviewable under the APA and the authority of the courts to constrain the executive for violations). *See, e.g.,* Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189, 2194 (2011) ("Courts will exercise relatively more control over issues within their expertise while according agencies relatively more leeway (but not unqualified deference) as to issues within theirs.").

[116] Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy From the Inside Out*, 37 HARV. ENV'T REV. 313 (2013) (describing judicial review as a mechanism to legitimize administrative action); Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 372 (2017) ("Courts set limits on agency action by policing the bounds of executive authority."); Gillian Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1925 (2015) (arguing that it is up to the courts to determine presidential limits and stressing that presidential involvement with administration must remain "within proper bounds…"); Kovacs, *supra* note 110, at 119 ("Indeed, underlying statutory delegations is the assumption that the officers exercising delegated power will be subject to the APA's procedural requirements and judicial review….").

[117] Judges may also invalidate agency activities for violating the agency's enabling act, as the Supreme Court held in *NFIB v. DOL*.

[118] *See, e.g.*, Chamber of Com. v. U.S. Dep't of Homeland Sec., 2020 U.S. Dist. LEXIS 224974, at *21 (N. D. Cal. 2020); Make the Rd. N.Y. v Pompeo, 475 F. Supp. 3d 232, 258 (S.D.N.Y. July 29, 2020) (in deciding not to defer to the Department of State, the judicial opinion recounted Trump's previous disparaging statements, including his explicit preference for people to immigrate into the

Electronic copy available at: https://ssrn.com/abstract=4063950

administrative agencies prevailed in approximately 70 percent of cases, the Trump Administration's agencies won only 23 percent of aggregate cases under review.[119] Noll theorizes that the Trump agencies' poor track record reflected their persistent disregard of the APA's statutory rules and limitations.[120]

Even Chief Justice Roberts' Supreme Court grew weary of Trump's agencies' demonstrable political agendas and illegitimacy. In *Dep't of Commerce v. New York*,[121] the Court intervened in a profoundly political dispute concerning the 2020 Census questionnaire. The Court began by upholding "Secretary Ross's constitutional and statutory authority to include the citizenship question" and "found that the administrative record supported Secretary Ross's decision…."[122] Nevertheless, later in the opinion, Chief Justice Roberts expressed frustration with Secretary of Commerce Wilbur Ross, whose efforts Trump had been outwardly supporting, and accused the agency of offering a "contrived" explanation that was merely "a distraction."[123] The Court recalled that the agency needed to "disclose the basis" of its action so as "to permit meaningful judicial review," but the "mismatch between the Secretary's decision and the rationale he provided" demonstrated that the explanation was pretextual.[124] The Court concluded that "[i]f judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case."[125]

During the pandemic, President Trump continued to pressure agencies to adopt and implement his policies in the name of pandemic responses, adding to the uncertainty and diminishing the agencies' expertise.[126] In 2020, I experienced the

---

United States "from places like Norway" and not from "'[expletive deleted] countries' such as Haiti and countries in Africa.").

[119] Bethany A. Davis Noll, *"Tired of Winning": Judicial Review of Regulatory Policy in the Trump Era,* 73 ADMIN. L. REV. 353, 356-57 (2021).

[120] *Id*. at 358.

[121] 139 S. Ct. 2551 (2019).

[122] *See* Christopher J. Walker, *Administrative Law: Harder Look Review?*, YALE J. REG. (June 27, 2019) (analyzing Part IV of Chief Roberts' opinion while noting that areas of the opinion upheld the agency's decision-making), *at* https://www.yalejreg.com/nc/what-the-census-case-means-for-administrative-law-harder-look-review/.

[123] *Dep't of Commerce*, 139 S. Ct. at 2559.

[124] *Id*. at 2573-2576 (affirming the district court's holding that the agency's explanation was pretextual).

[125] *Id*. at 2576.

[126] *See, e.g.,* Michele Goodwin & Erwin Chemerinsky, *Trump Administration: Immigration, Racism & COVID-19*, 169 U. PENN. L. REV. 313, 318-319 (2021) (describing the relationship between Trump's personal policies and his pandemic-related orders); Roberts, *supra* note 102, at 4

Electronic copy available at: https://ssrn.com/abstract=4063950

power of political pressure while working in high-level federal policymaking (my areas were international labor rights and trade). We had to make quick and unprecedented decisions at the behest of a President who tended to change his mind quickly and publicly. Policy solutions were neither simple nor obvious. Should we have prioritized health or economic policies? Here is a more specific example. Should we have prioritized the importation of personal protective equipment (PPE) sufficient to satisfy domestic demand or the statutory prohibitions on imported rubber gloves produced by forced labor along global supply chains?

Other agencies faced similar tensions.[127] Protocols to contain the virus required many American businesses to close.[128] Workers stayed home, the domestic economy slowed, and unemployment rose sharply.[129] Agencies faced a paradox: we had to simultaneously incentivize people to stay home to avoid contracting the virus while regenerating employment by encouraging businesses to continue their operations.[130] We were expected to absorb the various policy shocks of the pandemic while acting quickly and decisively, relying on information and expertise

(describing the various ways in which President Trump undermined executive agencies during the pandemic); Ashley Binetti Armstrong, *Co-opting Coronavirus, Assailing Asylum*, 35 GEO. IMM. L.J. 361, 363-64 (2021) (arguing that Trump "seized the opportunity" of the pandemic to prevent migrants and asylum-seekers from crossing the southern border into the United States); Thomas A. Birkland et al., *Governing in a Polarized Era: Federalism and the Response of U.S. State and Federal Governments to the COVID-19 Pandemic*, PUBLIUS: J. OF FEDERALISM 1, 9 (2021) (arguing that Trump's agenda manifested itself in his agencies' pandemic policies).

[127] *See, e.g.,* Birkland, et al., *supra* note 126, at 2 (lamenting that agencies "had little theoretical or practical knowledge of public health or crisis response in a federal system."); COLE, *supra* note 105, at 228 ("The standard assessment of emergency power is that in times of crisis, governments overreact, and only later recognize their errors.").

[128] *See* Jennifer Kates et al., *Stay-at-Home Orders to Fight COVID-19 in the United States: A Scattershot Approach*, KAISER FAMILY FOUND. (Apr. 05, 2020), https://www.kff.org/coronavirus-policy-watch/stay-at-home-orders-to-fight-covid19 [https://perma.cc/WXK4-BCPU].

[129] *See* Josh Bidens, *Principles for the relief and recovery phase of rebuilding the U.S. economy*, ECON. POL. INST. (Nov. 24, 2020) (By "stop the bleeding" we mean using fiscal policy to end the crisis of joblessness and restore the labor market to a reasonable degree of health."), at https://www.epi.org/publication/principles-for-the-relief-and-recovery-phase-of-rebuilding-the-u-s-economy-use-debt-go-big-and-stay-big-and-be-very-slow-when-turning-off-fiscal-support/.

[130] Center for Employment Equity, *The COVID-19 Recession: An Opportunity to Reform Our Low Wage Economy?*, UNIV. MASS. AMHERST (accessed June 1, 2021) (cautioning that "a deep recession will follow as both consumption and production stall, social distancing will continue, and businesses stay closed sales tax revenue weak."), at https://www.umass.edu/employmentequity/covid-19-recession-opportunity-reform-our-low-wage-economy.

Electronic copy available at: https://ssrn.com/abstract=4063950

unique to our institution.[131] But we also had to contend with unique health and labor exigencies and an overarching presidential agenda.[132]

While the public waited for executive leadership to "do the right thing," [133] and while agencies struggled to both understand and explain the science behind the COVID-19 virus,[134] President Trump issued a series of inconsistent and, at times, incoherent statements providing his own opinions on medical science and criticizing agencies that disagreed with him.[135] He either controlled agencies' policies or subjected reluctant agencies to public ridicule. For example, President Trump challenged the CDC's masking and social distancing directives, circulated misinformation,[136] and dismissed the viability of vaccines despite the CDC's appeal to the contrary.[137]

Even when more modest Presidents direct agencies during emergencies, the resulting administration rests on singular decision-making.[138] World leaders panic

---

[131] *See, e.g.,* Cole, *supra* note 51, at 2568 ("The conventional wisdom is that courts are ineffective as guardians of liberty when the general public is clamoring for security."); *See, e.g.,* Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the 'Rule of Law',* 101 MICH. L REV. 2275, 2276-2277 (2003) (noting the "surge" in interest concerning rule of law procedures, particularly after 9/11).

[131] *See, e.g.,* Posner & Vermeule, *supra* note 6, at 1614 ("In the modern administrative state, it is practically inevitable that legislators, judges, and the public will entrust the executive branch with sweeping power to manage serious crises of this sort.").

[132] *See infra* Part I.C.

[133] *See* Gross, *supra* note 10, at 1134 (characterizing emergencies as "a test of faith" in which government is trusted "to 'do the right thing' even in hard times…".).

[134] See, e.g., Ewen Callaway, et al., *COVID and 2020: An Extraordinary Year for Science*, NATURE, Dec. 14, 2020, https://www.nature.com/immersive/d41586-020-03437-4/index.html (acknowledging uncertainties surrounding COVID-19 transmission).

[135] *See* Roberts, *supra* note 107, at 4-5 ("Trump repeatedly told the American people the virus would disappear, whereas federal public health experts knew this would not happen. Trump declared war on experts at the CDC for doing their job."); Freeman & Jacobs, *supra* note 102, at 619-620 (describing various instances Trump's "widespread suppression of, and interference with, agency scientific work.").

[136] *See* Mark A. Rothstein, *The Coronavirus Pandemic: Public Health and American Values*, 48 J. L., MED. & ETHICS 354, 356 (President Trump touted chloroquine and hydroxychloroquine at press conferences as being "very effective" and possibly "the biggest game changer in the history of medicine.").

[137] *See* Birkland et al., *supra* note 126, at 10 (describing the ways in which the Trump administration undermined CDC directives and "never considered the idea of infectious disease as a serious matter.").

[138] *See generally* Dooling, *supra* note 20 (suggesting that the Biden Administration is "trying to cobble together authorities to serve the president's own goals, rather than hewing narrowly within well-established existing statutory boundaries…").

Electronic copy available at: https://ssrn.com/abstract=4063950

during emergencies.[139] They may consequently "make the wrong choice" or may unflinchingly "'brush[] civil libertarian objections aside as quixotic.'"[140]

And while presidential control may render the executive's institutional advantages theoretical, its effects on society, particularly vulnerable populations, remain salient. For example, during the years following September 11, the Bush Administration's treatment of Muslims in the United States was opaque and turbulent.[141] More recently, the Trump Administration's emergency administration led to a culture of racial and ethnic profiling[142] rather than coalescence around national policy and leadership. Although the Trump Administration's immigration policies preceded the pandemic (and are thus largely outside the scope of this project), some of his pandemic protocols specifically targeted the rights of immigrant workers.[143] Other emergency measures restricted the rights of incarcerated and formerly incarcerated individuals, workers, and small business owners.[144]

The effect of unchecked emergency administration on civil rights and liberties is extraordinarily harmful because it is unclear when the emergency will end.[145] One could argue that the United States has been in an emergency for the past twenty years, between dealing with the ripple effects of terrorism, the climate crisis, and now, the pandemic. As Schmitt prophetically noted, so long as it is the executive who decides when to cede her or his exceptional authorities, then the power may remain with the executive indefinitely.[146] The declaration of emergency

---

[139] *See, e.g.,* Richard Albert & Yaniv Roznai, *Emergency Unamenability: Limitations on Constitutional Amendment in Extreme Conditions*, 81 MD. L. REV. 243, 248 (describing the literature on leaders' reactions to national emergencies).

[140] *Id*. (quoting Bruce Ackerman, *Don't Panic*, 24 LONDON REV. BOOKS (2002)).

[141] *See, e.g.,* Levinson & Balkin*, supra* note 7, at 1819 ("Whether or not the 9/11 terrorist attacks 'changed everything,' they certainly provided everything that a would-be constitutional dictator might wish for."); Braber, *supra* note 65, at 452-453 (discussing the Bush Administration's treatment of Arab citizens).

[142] *See, e.g.,* Angela R. Gover, Shannon B. Harper & Lynn Langton, *Anti-Asian Hate Crime During the COVID-19 Pandemic: Exploring the Reproduction of Inequality*, 45 AM. J. CRIM. JUST. 647, 653-655 (2020) (attributing the anti-Asian rhetoric and violence that arose in 2020-2021 to Trump's use of the terms like "Chinese virus" for COVID-19).

[143] *See infra* Part III.C.

[144] *See infra* Part II.

[145] *See, e.g.,* Levinson & Balkin, *supra* note 7, at 1793-1794, 1809 ("even if dictatorship is initially justified by emergency, it may continue after the emergency is over.").

[146] *See* SCHMITT, *supra* note 7. *See also* Masur, *supra* note 2, at 445 ("Courts sitting in judgment of the Executive's wartime actions have permitted the military to effectively define the constitutional scope of its own authority.").

Electronic copy available at: https://ssrn.com/abstract=4063950

becomes a "self-fulfilling prophecy" in which the executive has judged a situation an emergency and frames its response in such a way as to construct a new emergency reality.[147] Emergency administration, if left unchecked, becomes the norm.

In addition to protecting civil rights and liberties, judicial review is critical to ensure competent emergency administration. Presidents do not necessarily have any greater expertise over, say, health and workplace policies than judges. Agencies implementing presidential directives or under presidential agendas, rather than their own expertise and delegated authorities, will not necessarily produce the coherent and deliberate emergency responses that their comparative advantages implicitly assure.

In some of the pandemic cases discussed next, the agencies' emergency administration was linked to their interpretations of statutes and not presidential directives.[148] However, as noted, President Trump's agenda loomed over agency activities.[149] Judges provided agencies adequate opportunity to disentangle their expert emergency policies from the President's overarching agenda. They requested agencies to demonstrate reasoning, credibility, and competence.[150] Those agencies often proved incapable of satisfying the judges' requests. Judges consequently blocked emergency administration that sought to advance President Trump's previously defeated rules, prioritize debt forgiveness based on conservative social policies, and restrict employment benefits and opportunities for immigrants.[151]

At the same time, I recognize that the judicial power to invalidate emergency administration under the APA faces potential drawbacks. For instance, the dissenting opinion in *Mass. Bldg Trades Council v. OSHA*[152] argued that emergency administration must be "more than 'reasonably' needful; it must be closer to 'indispensable.'"[153] As displayed during the oral hearings in *NFIB v.*

[147] *See* Levinson & Balkin, *supra* note 7, at 1809.
[148] *See* Part II *infra*.
[149] *See* Part I.C *supra*.
[150] *See* Part II *infra*.
[151] *Id*.
[152] 2021 U.S. App. LEXIS 37349 (6th Cir. Dec. 17, 2021).
[153] *Id*. at *73.

Electronic copy available at: https://ssrn.com/abstract=4063950

DOL[154] and its companion case *Biden v. Missouri*,[155] the Supreme Court Justices similarly focused on terms such as "reasonably necessary"[156] and "necessary in the interest of patient health"[157] when questioning the agencies' delegated emergency authority. These cases all illustrate how judges may set the standards of their APA review to improbably high thresholds to restrain regulation rather than protect the nation.[158]

Judicial review of emergency administration is thus sometimes ideological and often inconsistent. In other words, judges may suffer the same weaknesses when reviewing emergency administration as they do when reviewing ordinary agency activities.[159] That potential poses a challenge for judges when reviewing emergency administration, for agencies when promulgating it, and for Congress when considering how to legislate it, which I address in Part IV.

However, my examination of the district court cases, which I turn to next, did not show that potential in the aggregate. Most judges asked agencies to demonstrate the legitimacy of their emergency administration. After hearing the agencies' explanations, the judges that invalidated the Trump Administration's emergency measures did so for justifiable reasons under the APA.

---

[154] Transcript of Oral Argument, NFIB v. DOL, 2022 U.S. LEXIS 496 (2022) (Nos. 21A244, 21A247), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21a244_kifl.pdf.

[155] Transcript of Oral Argument, Biden v. Missouri, 2022 U.S. LEXIS 495 (2022) (Nos. 21A240, 21A241), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21a240_l537.pdf.

[156] Transcript of Oral Argument, NFIB v. DOL, *supra* note 154, at 8.

[157] Transcript of Oral Argument, Biden v. Missouri, *supra* note 155, at 8.

[158] *See* Richard Lempert, *The vaccine mandate cases, polarization, and jurisprudential norms*, BROOKINGS (Jan. 15, 2022) ("The classic judicial norms of respect for precedent and deviating as little as is needed to reach a favored result are increasingly seen as hindrances to rapid legal changes that a politicized judiciary wants to bring about."), https://www.brookings.edu/blog/fixgov/2022/01/15/the-vaccine-mandate-cases-polarization-and-jurisprudential-norms/; Linda Greenhouse, *What the Supreme Court's Vaccine Case Was Really About*, THE NEW YORK TIMES (Jan. 17, 2022) (arguing that *NFIB* "offered the conservative justices a chance to lay down a marker: that if there is a gap to fill in Congress's typically broadly worded grant of authority to an administrative agency, it will be the Supreme Court that will fill it, and not the agency."), https://www.nytimes.com/2022/01/17/opinion/supreme-court-vaccine-osha.html.

[159] *See* Richard J. Pierce Jr., *What do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 86-90 (2011) (proposing various factors to explain inconsistency and variance across judicial review during ordinary circumstances).

Electronic copy available at: https://ssrn.com/abstract=4063950

PART II: JUDICIAL REVIEW OF PANDEMIC ADMINISTRATION

The pandemic cases that arose under the APA make an important contribution to the literature on judicial review of emergency administration. These cases affected the rights of immigrants, workers, business owners, incarcerated individuals, tenants, and landlords. Before allowing agencies to promulgate their emergency policies, most judges demanded that they demonstrate compliance with the APA's rules to greater extents than the agencies had anticipated.

More specifically, as shown in Table 1, below, district judges invalidated the agencies' emergency administration in approximately 63 percent of the cases. My results, disaggregated by APA standard of review, are illustrated in Table 1, below.

TABLE 1: VOTING PATTERNS IN EARLY PANDEMIC CASES (N=51)

Standard of Review	Notice-and-Comment	Arbitrary & Capricious	*Chevron*	Overall
Invalidation Rate	88.9%	57.1%	56.2%	62.7%
Validation Rate	11.1%	42.9%	43.8%	37.3%

As Table 1 reveals, judges invalidated agencies' emergency policies in 57 percent[160] of the arbitrary and capricious cases; in nearly 90 percent[161] of the notice-and-comment cases; and in approximately 56 percent[162] of the *Chevron* cases.[163]

[160] Judges held that the agencies' pandemic activities were arbitrary and capricious in 12 out of the 21 applicable cases.

[161] Judges refused to accept the agencies' "good cause" explanations in eight out of the nine applicable cases.

[162] Citing *Chevron*, judges declined to afford agencies deference in nine of the 16 applicable cases. Of note, in an additional seven cases, the judges examined congressional intent and statutory language without ever expressly mentioning *Chevron*. Out of the seven applicable "silent *Chevron*" cases, five judges refused to grant the agencies deference. For a more detailed description of silent *Chevron* cases, *see* Michael Kagan, *Loud and Soft Anti-Chevron Decisions*, 53 WAKE FOREST L. REV. 37, 49 (2018) (discussing Supreme Court decisions that interpreted statutory language and simply "acts like *Chevron* deference does not exist.").

[163] In addition to these standards, a separate stream of cases examined emergency administration under the *Accardi* doctrine. In the interest of space, that stream was omitted from this Article's discussion although the cases contributed to the total 51 cases reviewed. Out of the six applicable cases, five judges (or approximately 83 percent) deferred to the agencies.

Electronic copy available at: https://ssrn.com/abstract=4063950

Nevertheless, some other judges deferred to the agencies' emergency administration. I am not suggesting that judicial review is becoming more homogenized during emergencies than under ordinary circumstances. Instead, I am using the pandemic cases to show that judges did not feel institutionally bound to ignore presidential control and illegitimacy simply because of the emergency, as traditional empirical scholarship of the emergency cases suggests. Nor did the majority of those judges express their objections to regulation more broadly, as more recent normative scholarship suggests. These sections describe those cases and briefly compare them to the September 11 cases that arose under (1) the arbitrary and capricious standard; (2) good cause exceptions to notice-and-comment; and (3) the Che*vron* doctrine.

A. *The Arbitrary and Capricious Standard: "Hard" or "Soft" Look Review?*

Under § 706(2)(a) of the APA, a court may set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law[.]"[164] A rule may be considered arbitrary and capricious if (1) the agency "has relied on factors which Congress has not intended it to consider;" (2) the agency "entirely failed to consider an important aspect of the problem;" (3) the agency's explanation "runs counter to the evidence before the agency;" or (4) the explanation "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[165]

Historically, judges' standards to review agency decision-making were highly deferential.[166] However, that deference began to evolve by the late 1960s,[167] when judges began to push their arbitrary and capricious review "up the intensity scale,"[168] culminating in the Supreme Court's 1971 decision in *Overton Park v. Volpe*.[169] In *Overton Park*, the Court held that the arbitrary and capricious standard

---

[164] 5 U.S.C. § 706(2)(A); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 103 S. Ct. 2856 (1983).
[165] *State Farm*, 463 U.S. at 43.
[166] *See* Masur, *supra* note 2, at 483-484 (describing the origins of the hard look doctrine).
[167] *See* LINDA D. JELLUM, MASTERING ADMINISTRATIVE LAW 211 (2nd ed. 2018) (noting that courts "began to apply a more intensive version of review" in the late 1960s).
[168] *Id*.
[169] 401 U.S. 402 (1971). For a discussion of the evolution of the hard look doctrine in *Overton Park* and *State Farm*, *see* Masur, *supra* note 2, at 487-489. Not all administrative law scholars agree. Jack Beermann, for instance, argues that *Overton Park* stands for the proposition "that reviewing courts

Electronic copy available at: https://ssrn.com/abstract=4063950

required courts to review the administrative record that was before the agency to decide whether "the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment.[170] The "hard look" doctrine was seemingly reaffirmed twelve years later, in *Motor Vehicle Manufacturers v. State Farm*,[171] when the Court added that: "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[172]

Heralded as the "sharpest judicial spur"[173] to agency authority, judges sometimes apply the "hard look" doctrine to scrutinize agency decision-making processes.[174] The hard look doctrine does not amount to the stringent *de novo* standard.[175] Nevertheless, courts using it may require agencies to "address all significant issues, take into account all relevant data, consider all feasible alternatives, develop an extensive evidentiary record, and provide a detailed explanation of its conclusions."[176]

Even though judges may take a hard look at the agency's decision-making processes during emergencies, scholars seem to agree that judges will usually take a "soft look" instead.[177] As Vermeule points out, in the September 11 era, judges applied this standard to "accept looser reasoning in support of agency policies and looser factfinding than would usually be accepted."[178] He describes several cases from the D.C. Circuit reviewing decisions by the Treasury Department's Office of

---

have the power, after a 'narrow' but 'searching and careful review,' to set aside agency action…." *See* Jack Beermann, Chevron *Is a Rorschach Test Ink Blot*, 21 J.L. & POL. 305, 308 (2017).

[170] *Overton Park*, 401 U.S. at 416.

[171] 463 U.S. at 43.

[172] *Id. See* Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the Hard Look*, 92 NOTRE DAME L. REV. 331, 334 (2016) (arguing that the Court in *State Farm* "gave its stamp of approval" to hard look review).

[173] *See* Kagan, *supra* note 109, at 2270 (describing this review standard as "[t]he sharpest judicial spur to [bureaucratic] expert authority…").

[174] *See, e.g.,* Greater Bos. Television v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) (stipulating that a judge would overturn agency decisions "if the court becomes aware…that the agency has not really taken a 'hard look' at the salient problems and has not genuinely engaged in reasoned decisionmaking.").

[175] *See* Masur, *supra* note 2, at 489 (explaining that the hard look standard "should not be confused with either a full *de novo* inquiry or some sort of a factual contest or 'battle of the experts' that challenges the agency's evidence on an equal basis.").

[176] *See* Kagan, *supra* note 109, at 2270.

[177] *See* Vermeule, *supra* note 9, at 1119; Masur, *supra* note 2, at 442-444 (citing wartime cases to argue that courts have granted the executive deference when they should have taken a "hard look").

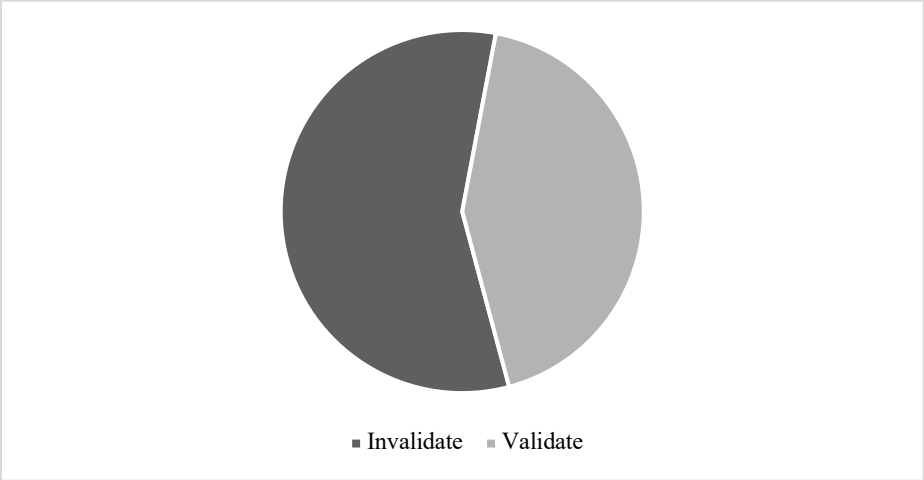
[178] *See* Vermeule, *supra* note 9, at 1119.

Electronic copy available at: https://ssrn.com/abstract=4063950

Foreign Assets Control (OFAC) after September 11.[179] The judges' review in those cases "had been dialed down to a minimum" such that "bare rationality is all that [was] required…."[180]

Contrary to the September 11 cases, the majority of judges took a "hard look" at and invalidated agencies' pandemic decision-making processes. Figure 1, below, illustrates that judges invalidated the agencies' decision-making processes in approximately 57 percent of the relevant cases.[181]

FIGURE 1: CASES DECIDED UNDER THE ARBITRARY & CAPRICIOUS STANDARD (N = 21)



This section uses the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") cases to demonstrate how judges cast their looks during the pandemic. In March 2020, Congress passed the CARES Act to address pandemic-related economic pressures on businesses, such as making payroll and paying operating expenses.[182] The CARES Act created, inter alia, a Paycheck Protection Program (PPP)[183] to give loans to eligible businesses and allow certain loans to be

[179] *Id*. at 1120-1121.
[180] *Id*. at 1121.
[181] Of the 21 cases that applied the arbitrary and capricious standard, judges agreed with the plaintiffs in 12 cases.
[182] Pub. L. No. 116-136, 134 Stat. 281 (2020) [hereinafter "CARES ACT"].
[183] 15 U.S.C. § 636(a)(36).

Electronic copy available at: https://ssrn.com/abstract=4063950

forgiven.[184] Congress authorized the SBA to implement the PPP[185] under the following loose guidance:

> During the covered period, in addition to small business concerns, any business concern… shall be eligible to receive a covered loan if the business concern… employs not more than the greater of-
> (I) 500 employees; or
> (II) if applicable, the size standard in number of employees established by the Administration for the industry in which the business concern…[186]

Without providing further eligibility criteria, Congress ordered the SBA to issue implementing regulations "[n]ot later than 15 days after the date of enactment of this Act."[187] The SBA accordingly adopted implementing rules, many of which led to accusations that the SBA had exceeded its statutory authority and made arbitrary and capricious decisions. Some judges examined those cases under *Chevron*, which I will discuss later. Suffice it to note that judges disagreed with one another under both standards – some judges deferred to the SBA while others criticized the SBA for failing to provide a sufficient explanation and consequently held that the SBA's rules were invalid.

For instance, the SBA issued two interim final rules addressing the eligibility for PPP loans. The first of these rules did not expressly exclude bankruptcy debtors, although it required applicants to fill out a standardized application.[188] That application asked whether applicants were presently involved in a bankruptcy proceeding and, if so, stated that the loan would not be approved.[189] The SBA's fourth interim rule was more precise and expressly excluded bankruptcy debtors from PPP loan eligibility.[190] A series of cases arose challenging those rules as arbitrary and capricious decision making.

Some judges required very little explanation from the SBA, their looks ostensibly softened by Congress' decision to provide the agency "barely more than two weeks to issue the regulations."[191] In *In re Vestavia Hills*,[192] a judge for the

---

[184] *See* 15 U.S.C. § 9005(b).
[185] *See* CARES ACT, *supra* note 182, at § 1102.
[186] *Id*. at § 1102 (i)(I), (II).
[187] *Id*.
[188] 85 Fed. Reg. 20,811, 20,812-815 (Apr. 15, 2020).
[189] *Id*. at 20,814.
[190] 85 Fed. Reg. 23,450, 23, 451 (Apr. 28, 2020).
[191] USF Fed. Credit Union v. Gateway Radiology Consultants, 983 F.3d 1239, 1263 (11th Cir. 2020).
[192] 630 B.R. 816 (S.D. Cal. 2021).

Electronic copy available at: https://ssrn.com/abstract=4063950

Southern District of California overruled the bankruptcy court and held in favor of the SBA. The judge reasoned that the SBA's rules were made under exigent circumstances as directed by Congress.[193] He was sympathetic to the plaintiff's allegations that "Congress likely did not intend the SBA to consider collectability as a primary factor in implementing the PPP"[194] and found other "shortcomings of the SBA's rules…."[195] Despite his sympathies, the judge ultimately held in the SBA's favor in the absence of a "clear error of judgment" in adopting the interim final rules.[196]

Other judges were less generous to the SBA. Looking at the same decision-making process in *Alaska Urological Inst., P.C. v. United States SBA*,[197] a District of Alaska judge held that the SBA's bankruptcy exclusion under its first interim final rule was arbitrary and capricious.[198] She reasoned that neither the terms of the SBA's rule nor its form "purport[] to explain the SBA's decision to implement the Bankruptcy Exclusion."[199] The SBA had pointed to language in the rule explaining that the Act intended for it to provide relief to small businesses by, among other things, "streamlining the requirements" of its regular loan program.[200] Contrary to the SBA's explanation, the judge found that the language in question was "nestled in the background" of the rule and was not linked to the bankruptcy exclusion, which was located "in an entirely different section of the rule."[201] She also held that while some of the SBA's additional arguments had "surface appeal," others did not "square with the SBA's contemporaneous statements"[202] or were otherwise "implausible."[203] She concluded that the SBA had failed to disclose "what data or factors it considered in reaching" its conclusions.[204]

---

[193] *Id*. at 845 ("Although this fact does not absolve the agency of its responsibility to consider relevant factors and make sound judgments, the expedited rulemaking process in this case does not, on its own, suggest that the SBA's decision was arbitrary or capricious.").
[194] *Id*.
[195] *Id*. at 847.
[196] *Id*.
[197] 619 B.R. 689 (Dist. Alaska 2020).
[198] *Id*. at 710.
[199] *Id*. at 705.
[200] *Id*.
[201] *Id*.
[202] *Id*. at 706.
[203] *Id*. at 709.
[204] *Id*. at 708.

Electronic copy available at: https://ssrn.com/abstract=4063950

In *Defy Ventures, Inc. v. United States SBA*,[205] a District of Maryland judge took a similarly hard look at the SBA's reasoning in promulgating its PPP rules. That case dealt with the SBA's interim final rules restricting PPP eligibility for individuals who were "incarcerated, on probation, on parole" or "presently subject to an indictment" or other criminal charges.[206] In examining the SBA's first two rules, she focused on the fact that the SBA had provided no contemporaneous explanation when it promulgated the rule[207] or any other "reasoned explanation…."[208] She nevertheless upheld the SBA's third rule because, as opposed to the others, the agency had provided "a reasoned explanation for a more limited criminal history exclusion."[209]

Alaska Urological and *Defy Ventures* show how some district judges were unwilling to accept agencies' threadbare and inconsistent explanations to justify PPP loan exclusions during the pandemic. Yet, as *Defy Ventures* demonstrates, judges were prepared to defer to those exclusions once agencies provided "a reasonable explanation" for their expert determinations.[210]

A judge for the Northern District of California displayed similar frustration with an agency's unwillingness to explain its CARES Act exclusions. In *Scholl v. Mnuchin*,[211] the Treasury and the IRS had decided to exclude incarcerated individuals from receiving economic impact payments (EIPs). The judge held that the agencies' exclusion "solely on the basis of [] incarcerated status is arbitrary and capricious."[212] Taking a hard look at the agencies' explanations, she noted that neither the Treasury Department nor the IRS had provided any reason to exclude payments to incarcerated individuals, "much less an adequate one."[213]

B. *"Good Cause" Exception to Notice-and-Comment Requirements*

The "good cause" exception to the APA's informal notice-and-comment requirements is one of the APA's few textual provisions inserted by Congress in

[205] 469 F. Supp. 3d 459 (Dist. Md. 2020). Of note, the judge also reviewed this case under *Chevron* and held that the eligibility criteria constituted permissible constructions of the statute. *Id*. at 474.
[206] *Id*. at 465.
[207] *Id*. at 475.
[208] *Id*. at 475-476.
[209] *Id*. at 476.
[210] *Id*.
[211] 494 F. Supp. 3d 661 (N.D. Cal. 2020).
[212] *Id*.
[213] *Id*. at 690.

Electronic copy available at: https://ssrn.com/abstract=4063950

anticipation of emergency administration.[214] To ensure that agencies do not exploit the exception, Congress restricted it to instances in which "the notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[215]

Like the "hard look" doctrine, the good cause exception's threshold is opaque.[216] Commentators complain that judges "inconsistently interpret both what constitutes good cause and what deference to give agency assertions of good cause."[217] For example, judges examining national security emergencies have disagreed on the evidentiary threshold of threat, proximity, and fault.[218] Some scholars accuse judges of being too deferential to agencies under this standard, even during non-emergency circumstances.[219]

Synthesizing the caselaw under the good cause exception, for example, Kyle Schneider notes that the D.C. Circuit became "the first appellate court to expressly review an agency's assertion of good cause de novo."[220] Schneider finds that most circuits have either never applied the de novo standard[221] or have applied it only once.[222] He urges judges to elevate their standards uniformly under the de novo standard.[223]

---

[214] *See* Vermeule, *supra* note 9, at 1123.

[215] *Id*. (*quoting* 5 U.S.C. § 553(b)(3)(B)); Kyle Schneider, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 STAN. L. REV. 237, 239 (2021) ("The drafters of the APA intended the exception to be reserved for rare instances when considerations such as exigency outweighed otherwise strong interests in public participation and agency deliberation.").

[216] *See* Schneider, *supra* note 215, at 252-254; Vermeule, *supra* note 9, at 1123.

[217] *See* Schneider, *supra* note 215, at 239-240.

[218] *See* James King, *For a Good Cause: Reforming the Good Cause Exception to Notice and Comment Rulemaking under the Administrative Procedures Act*, 18 GEO. MASON L. REV. 1045, 1054-55 (2010) (citing Tex. Food Ind. Ass'n v. U.S. Dept. of Ag., 842 F. Supp. 254 (W.D. Tex. 1993) (holding that the Department of Agriculture did not have good cause to dispel with notice-and-comment procedures issuing a new labeling procedure to warn against undercooked meat and poultry products).

[219] *See, e.g.,* Schneider, *supra* note 215, at 252-255.

[220] *See id.* at 255 (citing Sorenson Comm. Inc v. FCC, 755 F.3d 702, 704 (D.C. Cir. 2014)).

[221] The de novo standard is a more exacting standard in which the reviewing court will "reweigh the evidence compiled …to determine whether the findings are correct, not merely whether they are reasonable." *See* Judah A. Shechter, *De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights*, 88 COL. L. REV. 1483, 1483 n.3 (1988).

[222] *See* Schneider, *supra* note 215, at 256.

[223] *Id*. at 269-273 (arguing that the APA's text and objectives "reinforce the conclusion that good cause determinations should be reviewed de novo.").

Electronic copy available at: https://ssrn.com/abstract=4063950

Judges who are disinclined to scrutinize agency explanations during ordinary circumstances, Vermeule points out, will not otherwise be inclined to heighten their review during emergencies.[224] During the September 11 cases, judges approached the good cause exception "to the point where it ha[d] temporarily become as capacious as administrators 'deem necessary.'"[225]

What did judges do with this vacuous standard during the pandemic? Given the backdrop, one could easily assume that – even if judges did not dial their standards down – they would maintain their status quo deference under the arbitrary and capricious standard. As shown below in Figure 2, that assumption would be wrong.

FIGURE 2: CASES DECIDED UNDER THE "GOOD CAUSE" EXCEPTION (N = 9)

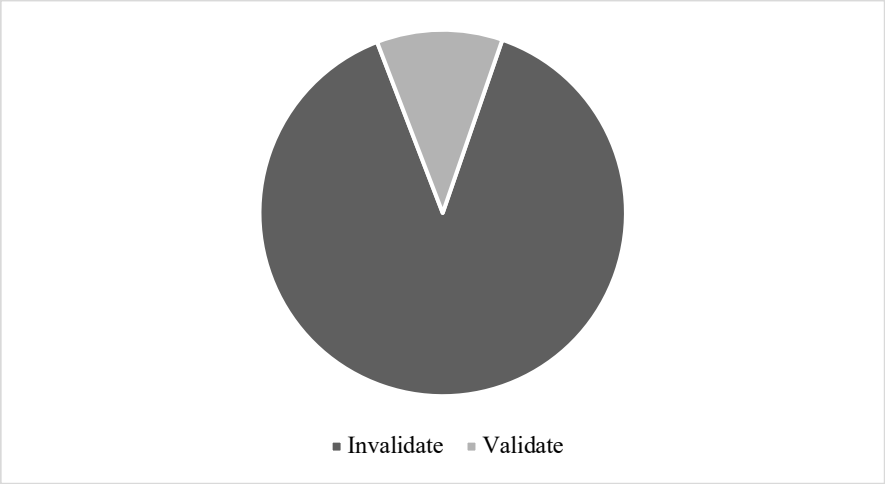


Figure 2 illustrates that judges invalidated the agencies' proffered rules because they violated the notice-and-comment requirements in 89 percent of the relevant pandemic cases.[226] While some judges did so without "making clear the standard of review," many applied the de novo standard. In both instances, judges declined to defer to the agencies' good cause justifications. These subsections describe the agencies' various rules regulating visas and drug pricing, their explanations for

[224] *See* Vermeule, *supra* note 9, at 1123-1124 (describing the 2004 seminal decision in Jifry v FAA, 370 F.3d 1174, 1177 (D.C. Cir. 2004) in which the D.C. Circuit upheld the Federal Aviation Administration (FAA) regulation that had been published without notice and comment in 2003).
[225] *Id*. at 1125.
[226] Judges invalidated the agencies' pandemic rules in eight out of the nine cases.

Electronic copy available at: https://ssrn.com/abstract=4063950

evading notice-and-comment procedures, and judges' skepticism and ultimate invalidation of those rules.

1. Visa Suspensions

On April 22, 2020, with the stated purpose of protecting American citizens from competing for jobs with immigrants during the "extraordinary economic disruptions caused by the COVID-19 outbreak,"[227] President Trump issued proclamations directing DOL and DHS to issue new visa rules. Proclamation 10014 suspended the entry of all immigrants into the United States for 60 days unless an immigrant qualified for an exception to the Proclamation.[228] Trump directed that, within 30 days of the Proclamation, DOL and DHS, in consultation with the State Department, "shall review nonimmigrant programs and shall recommend . . . other measures appropriate to stimulate the United States economy and ensure the prioritization, hiring, and employment of United States workers."[229] He similarly directed DOL and DHS to promulgate regulations in accordance with Proclamation 10052,[230] which suspended entire visa categories for four sets of nonimmigrant visas, including H-1B visas, from June 2020 until December 31, 2020, with discretion to be continued "as necessary."[231]

DOL and DHS published two interim final rules under those proclamations. The DHS rule revised the H-1B visa program by reducing the validity period and number of applicable occupations.[232] The DOL rule revised the formula to calculate the prevailing wage rates, which effectively raised the wage levels required of U.S. businesses to hire foreign workers over American workers.[233] Both agencies invoked the APA's good cause exception to notice-and-comment, arguing that the COVID-19 emergency circumstances required immediate action.[234]

Reviewing those rules under the APA in *Chamber of Commerce v. U.S. Dep't of Homeland Sec.*,[235] on December 1, 2020, a judge for the Northern District of California applied the de novo standard. He held that DHS and DOL failed to

---

[227] *See* Chamber of Com. v. U.S. Dep't of Homeland Sec., 504 F. Supp. 3d 1077, 1081-1982 (N.D. Cal. 2020).
[228] 85 Fed. Reg. 23, 441 (Apr. 27, 2020).
[229] *Id*. at 23, 442.
[230] 85 Fed. Reg. 38, 263 (June 25, 2020).
[231] *Id*.
[232] Chamber of Com. v. U.S. Dep't of Homeland Sec., 504 F. Supp. 3d at 1084.
[233] *Id*. at 1084-1085.
[234] *Id*.
[235] *Id*.

Electronic copy available at: https://ssrn.com/abstract=4063950

demonstrate good cause to excuse notice and comment.[236] The judge acknowledged the agencies' arguments that "skyrocketing" and "widespread" employment could "threaten immediate harm to the wages and job prospects of U.S. workers," thus necessitating exigent action.[237] Nevertheless, he held that, for evading notice-and-comment, agencies had to offer "something more than agency say-so."[238] He noted that the agencies had offered data concerning "the overall economic impact of the pandemic" and had urged the court to "look at the overall picture" and not the types of H-1B positions in question.[239] The judge then considered the plaintiff's evidence that unemployment figures in H-1B sectors had since declined.[240] He found that the agencies had not countered the plaintiff's allegations that their methodology had been erroneous.[241] In light of the above, the judge concluded that the agencies' "assertion of a dire fiscal emergency falters."[242]

On December 3, 2020, in *ITService Alliance, Inc. v. Scalia*,[243] a District of New Jersey judge found no need to expressly apply the de novo standard because the agency's explanation failed to satisfy even a deferential standard.[244] As in *Chamber of Commerce*, DOL's interim rule would have "significantly increased the prevailing wage rates" for H-1B workers.[245] DOL again attempted to explain its failure to satisfy notice-and-comment procedures by pointing to the pandemic's "high unemployment rates."[246] The judge held that DOL had failed to demonstrate "truly exigent or seriously harmful situations" such as "imminent threats to national security, public safety, or the environment."[247] The agency had even failed to evince the "possible fiscal harm" that it had cited to support its good cause.[248] Consequently, the agency's rule "missed the mark and failed to actually address the economic issues faced by many Americans."[249] He held that allowing the agency

[236] 504 F. Supp. 3d 1077, 1081 (N.D. Cal. Dec. 1, 2020).
[237] *Id*. at 1085.
[238] *Id*. at 1094 (internal citations omitted).
[239] *Id*. at 1090.
[240] *Id*. at 1091.
[241] *Id*.
[242] *Id*.
[243] 2020 U.S. Dist. LEXIS 227049 (D. N.J. Dec. 3, 2020).
[244] *Id*. at *11.
[245] 85 Fed. Reg. 63,899 (2020).
[246] *ITService Alliance, Inc. v. Scalia*, 2020 U.S. Dist. LEXIS 227049 at *12.
[247] *Id*. at *14.
[248] *Id*. at *16.
[249] *Id*. at *22.

Electronic copy available at: https://ssrn.com/abstract=4063950

to pursue the good cause exception on such a basis, and with no evidence of public harm, "would allow the exception to completely overtake the rule."[250]

On December 14, 2020, addressing DOL's H-1B visa rules in *Purdue Univ. v. Scalia*, a judge for the D.C. District Court likewise refused to defer to the agency's good cause justification.[251] Applying the de novo standard,[252] he found DOL's explanation insufficient. First, DOL had waited over six months to implement changes to the rule, suggesting that the circumstances were not so exigent as the agency proposed.[253] Second, expressly discounting DOL's "expert judgment," the judge held that DOL had "simply not provided record support establishing" imminent harm to U.S. workers.[254] He found that DOL's unemployment statistics offered to justify its exigent rule (14.7 percent in April 2020) covered all employment sectors across the United States, not just those targeted by DOL's rule.[255] More importantly, he found that those statistics were no longer valid when DOL issued its rule in September.[256] The judge based that finding on a statement by DOL's Secretary Eugene Scalia that unemployment in September was down to 7.9 percent.[257]

The above cases demonstrate how district judges looked closely at agencies' explanations, data, and evidence to determine whether the pandemic's circumstances warranted their new H-1B visa requirements. Some could question whether those judges went too far by questioning the statistics and evidence offered by the agencies, all of which fell under the agencies' expertise, during an emergency. It is difficult to fault them, however, considering DOL's own Secretary offered the contradictory evidence, and the agencies otherwise made no effort to reconcile the competing claims.

Not all judges reviewed emergency rulemaking so closely. In *Doe v. United States Dep't of Homeland Security*,[258] for example, a judge for the Central District of California deferred to DHS and held that "there is a strong indication that good

---

[250] *Id*. at *29.
[251] 2020 U.S. Dist. LEXIS 234049 (D.D.C. Dec. 14, 2020).
[252] *Id*. at *18-19 ("Review of an "agency's legal conclusion of good cause is de novo.") (internal citations omitted).
[253] *Id*. at *22.
[254] *Id*. at *26-27.
[255] *Id*. at *29.
[256] *Id*.
[257] *Id*. at *28.
[258] 2020 U.S. Dist. LEXIS 218715 (C.D. Cal. Nov. 20, 2020).

Electronic copy available at: https://ssrn.com/abstract=4063950

cause exists."[259] That case dealt with F-1 visas, which are required for international students hoping to enter and remain in the United States to study at U.S. institutions.[260] During the pandemic, DHS and ICE issued a series of inconsistent guidelines to international students as to whether they could enter the United States to attend academic programs that were temporarily held online.[261]

The district judge in *Doe* never articulated a clear legal standard; she simply held that good cause inquiries proceed "case-by-case, sensitive to the factors at play."[262] Unlike the judges in the above cases, she readily accepted DHS's explanation that "the statements and guidance were issued due to the conditions created by an emergency, namely the COVID-10 pandemic." She was not as concerned about whether the pandemic's exigent circumstances qualified as an emergency for notice-and-comment purposes, nor was she concerned about the inconsistencies in the agencies' guidelines.

2. Drug Prices

In 2018, President Trump launched an initiative to combat high prescription drug prices.[263] That year, the Centers for Medicare and Medicaid Services (CMS) provided advanced notice of proposed rulemaking to lower those prices, which it eventually abandoned.[264] Two years later, in July 2020, Trump again signed a series of executive orders to "massively lower" the costs of prescription drugs.[265] To implement those orders, on November 27, 2020, CMS published the Most Favored Nation (MFN) Rule, which introduced a new payment methodology for calculating Medicare drug payment amounts.[266] CMS did not follow the APA's notice-and-comment requirements, resulting in lawsuits from providers, doctors, patients, and pharmaceutical companies. To justify its expedient action, CMS cited "the rising cost of drug prices and the economic consequences of the COVID-19 pandemic" that, according to the agency, "rapidly exacerbated" problems associated with high drug prices.[267]

---

[259] *Id*. at *21.
[260] *Id*. at *2.
[261] *Id*. at *3-5.
[262] *Id*. at *21 (internal citations omitted).
[263] *See* 85 Fed. Reg. 76, 180 (Nov. 20, 2020).
[264] *See* Ass'n of Cmty. Cancer Ctrs. v. Azar, 509 F. Supp. 3d 482, 488 (D. Md. 2020) (discussing the previous CMS efforts to publish new rules to lower drug prices in 2018).
[265] *Id*. 488.
[266] 85 Fed. Reg. 76, 180.
[267] Ass'n of Cmty. Cancer Ctrs. v. Azar, 509 F. Supp. 3d at 488.

Electronic copy available at: https://ssrn.com/abstract=4063950

On December 23, 2020, in *Ass'n of Cmty. Cancer Ctrs. v. Azar*, a District of Maryland judge applied the de novo standard and enjoined CMS's MFN Rule.[268] She began by highlighting, as did the other judges, that the good cause exception to notice-and-comment was "narrowly construed" and restricted to instances in which "delay would do real harm."[269] Like some of the judges in the visa cases, she limited the good cause exception to "circumstances where it was necessary to issue rules of life-saving importance immediately, or where delaying implementation of a rule would jeopardize the very reason for implementing the rule in the first place."[270] Noting that agency explanations "are viewed with 'skepticism,'"[271] she held that the agency's justification "falls flat,"[272] was "factually deficient," and was based on COVID-19 statistics for which "CMS does not cite to any source at all."[273] The judge accused CMS of offering "conclusory and speculative assertions" and emphasized that "[a]n agency may not rely solely on its own expertise to establish good cause; findings of fact are required."[274] Dismissing CMS's argument that "the public would benefit from reducing drug prices in the midst of the COVID-19 pandemic," she emphasized that so, too, would the public benefit from compliance with the APA's notice-and-comment requirements.[275]

The following week, on December 30, 2020, a judge for the Southern District of New York also applied the de novo standard to issue a preliminary injunction against the MFN Rule.[276] In *Regeneron Pharms., Inc. v. United States HHS*, the judge dismissed CMS's argument that COVD-19 had caused the problem of high drug prices or difficulties in disease management.[277] Relying on President Trump's public statements and previous CMS analyses illustrating concerns about drug prices dating back to 2018, he concluded that "the agency's self-imposed delay cannot support a finding of good cause."[278] He admonished the agency for failing to "cite *any* studies or otherwise draw the conclusion that better chronic disease

---

[268] *Id*.
[269] *Id*. at 495-96.
[270] *Id*. at 495 (citing *Jifry*, 370 F.3d at 1179-81).
[271] *Id*.
[272] *Id*. at 497.
[273] *Id*.
[274] Ass'n of Cmty. Cancer Ctrs. v. Azar, 509 F. Supp. 3d at 497.
[275] *Id*. at 502.
[276] 510 F. Supp. 3d 29, at 46 (S.D.N.Y. 2020).
[277] *Id*. at 29.
[278] *Id*.

Electronic copy available at: https://ssrn.com/abstract=4063950

management improves COVID-19 outcomes."[279] He also pointed out that the Rule was not temporary but was instead designed to last seven years.[280]

As with the other cases, these judges weighed the evidence to determine whether the agencies' emergency administration reflected their respective expertise or other agendas. To that end, judges requested that the agencies demonstrate supporting facts and studies. Agencies proved unprepared to do so and instead relied on "factually deficient" claims and the pandemic's exigent circumstances to support their explanations.

C. *The Chevron Doctrine*

The third, perhaps most (in)famous,[281] APA standard included in this analysis is the *Chevron* doctrine, which assesses whether an agency's statutory interpretation and conclusions are reasonable.[282] In *Chevron v. National Resources Defense Council*,[283] the Supreme Court articulated a two-pronged inquiry to guide courts when considering an agency's interpretation of a statute. First, under Step One, the reviewing court decides whether the statute is "clear" and thus speaks directly to the issue.[284] If so, the matter is resolved.[285] If not, such as when the statute is "silent or ambiguous," the reviewing court advances to Step Two, which asks whether the agency's interpretation is a "permissible construction of the statute."[286] If the court decides that the interpretation was reasonable, it concludes its inquiry.[287] However, if the court decides that the agency's interpretation was unreasonable, it may invalidate the interpretation.[288]

---

[279] *Id*. at 30.
[280] *Id*. at 34.
[281] *See* FISHER & SHAPIRO, *supra* note 91, at 216 ("The *Chevron* doctrine is currently the focus of the ideological wars over the administrative state."); Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 703 (2014) (canvassing the thousands of articles, opinions, and briefs that cited *Chevron*); Lisa Schultz Bressman & Kevin M. Stack, Chevron *Is a Phoenix*, 74 VAND. L. REV. 465, 473-474 (2021) (discussing tensions between Supreme Court Justices and between legal scholars concerning *Chevron*'s normative value); Jack M. Beermann, *supra* note 96, at 782-785 (advancing arguments to overrule *Chevron*).
[282] Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).
[283] *Id.*
[284] *Id*. at 842-43 & n.9.
[285] *Id*.
[286] *Id*. at 843.
[287] *Id*. at 844.
[288] *Id*.

Electronic copy available at: https://ssrn.com/abstract=4063950

Scholars have long argued that various subjective factors impact judges' thresholds for what constitutes a reasonable interpretation under *Chevron*.[289] They note that "the tests of clarity (at *Chevron* Step One) and reasonableness (at *Chevron* Step Two) are open-ended, and this is what creates proven scope for various ideological influences in *Chevron*'s application."[290]

How clear must a statute be to count as clear?[291] What is a reasonable interpretation?[292] Vermeule argues that judges asking themselves these questions "strongly favored" the government in the September 11 cases.[293] In those cases, "the intensity of judicial review of legal questions ha[d] been dialed down" to levels rendering "judicial review …more apparent than real."[294] He cites a series of court decisions upholding questionable orders by the Department of Defense, FAA, Board of Immigration Appeals, among others, using either *Chevron* Step One or Step Two.[295]

As shown in Figure 3 below, many judges came out differently during the pandemic. About 56 percent of them did not dial down the intensity of their review, but instead invalidated the agencies' interpretations under *Chevron*.[296]

---

[289] *See* Vermeule, *supra* note 9, at 1126, n 140 (citing Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron,* 73 U. CHI. L. REV. 823 (2006)); Anya Bernstein, *Differentiating Deference*, 33 YALE J. ON REG. 1, 52 (2016) ("Interrogating the doctrine's assumptions reveals that *Chevron*'s command to evaluate interpretive reasonableness is more difficult to follow than it claims to be."); Beermann, *supra* note 96, at 783 (arguing that there the doctrine is in "disarray," that its application is "highly unpredictable," and that "the decision itself is cited for opposing propositions.").

[290] *See* Vermeule, *supra* note 9, at 1131.

[291] *Id*. at 1125

[292] *Id*.

[293] *Id*. at 1125–1126.

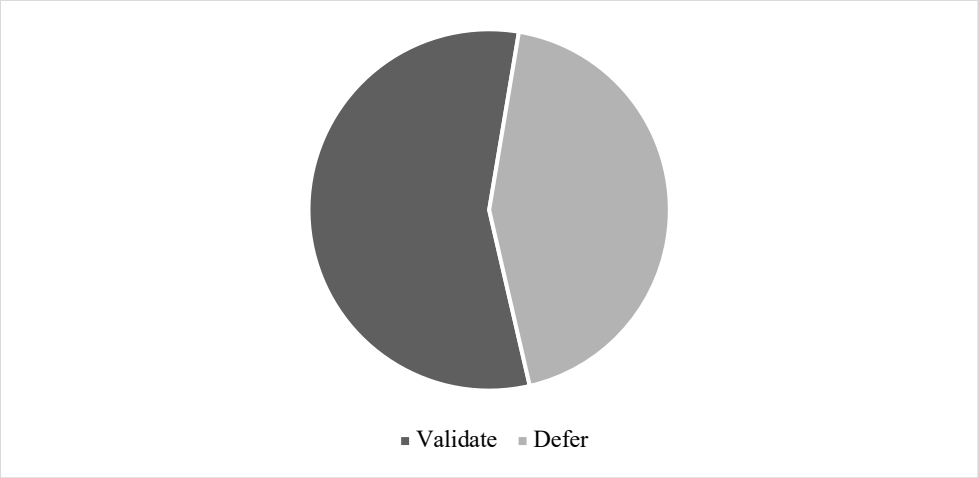
[294] *Id*. at 1131.

[295] *Id*. at 1127.

[296] Of the 16 cases that applied *Chevron*, 9 judges declined to defer to the executive's emergency administration.

Electronic copy available at: https://ssrn.com/abstract=4063950

FIGURE 3: CASES DECIDED UNDER THE *CHEVRON* STANDARD (N = 16)



The following subsections describe how judges reviewed new agency rules and policies under legislation to (1) subsidize income through paid leave, (2) administer small business loans, and (3) place moratoriums on evictions.

1. Paid leave

In March 2020, Congress passed the Families First Coronavirus Response Act (FFCRA)[297] to ensure that employees who were unable to work due to the pandemic could access federally subsidized paid leave. The FFRCA delegates authority to DOL, which, in turn, promulgated its Final Rule implementing FFCRA on April 1, 2020.[298] Two days later, on April 3, 2020, in *New York v. United States DOL*,[299] the State of New York brought suit in the Southern District of New York, alleging that "several features of [the] Rule exceed the agency's authority under the statute."[300] The State argued that four features of the Rule – a "work-availability" requirement; the Rule's definition of "health care provider"; the Rules' provisions relating to intermittent leave; and its documentation requirements – unduly restricted paid leave to struggling workers.[301]

[297] *See* Pub. L. No. 116-127, 134 Stat. 178 (Mar. 18, 2020).
[298] *See* 85 Fed. Reg. 19,326 (Apr. 6, 2020) ("Final Rule").
[299] New York v. DOL, 477 F. Supp. 3d 1 (S.D.N.Y. 2020).
[300] *Id.* at 2.
[301] *Id*.

Electronic copy available at: https://ssrn.com/abstract=4063950

Applying *Chevron*, the district judge could have dialed his review down to levels "more apparent than real," as judges did in the September 11 cases.[302] Instead, he dismissed the agency's argument that "the regulation must be interpreted consistent with the statute, even if such an interpretation is contrary to the regulation's unambiguous terms…."[303] He then undertook "anew the task of interpreting" the rule[304] and found that each of the four factors identified by the State of New York violated either Step One or Step Two of *Chevron*. He did so by finding that terms like "because," "due to," and "leave" were ambiguous.[305] Their interpretation, he stressed, did not foreclose "entitling employees whose inability to work has multiple sufficient causes – some qualifying and some not – to paid leave."[306] He further found that various components of the Rule were either "entirely unreasoned" [307] or "inconsistent with the statute"[308] and that DOL's rationale was "patently deficient."[309] As a parting shot, the judge concluded by observing:

> The Court acknowledges that DOL labored under considerable pressure in promulgating the Final Rule. This extraordinary crisis has required public and private entities alike to act decisively and swiftly in the face of massive uncertainty, and often with grave consequence. But as much as this moment calls for flexibility and ingenuity, *it also calls for renewed attention to the guardrails of our government*. Here, DOL jumped the rail.[310]

2. The CARES Act

Shortly after Congress enacted the CARES Act, the SBA adopted a rule excluding from PPP loan eligibility businesses that "[p]resent live performances of a prurient sexual nature…."[311] That exclusion was similar to section 7 of the Small Business Act, which excludes small businesses "of a prurient sexual nature" from the SBA

---

[302] *See* Vermeule, *supra* note 9, at 1131.
[303] *See NY v. DOL*, 477 F. Supp. 3d at 11.
[304] *Id*.
[305] *Id.* at 12-13. In the context of "because" and "due to," the judge agreed with DOL that the traditional meaning "implies a but-for causal relationship" but disagreed that those terms did so unambiguously. *Id*. at 12.
[306] *Id*. at 12.
[307] *Id*. at 13, 17.
[308] *Id*. at 17.
[309] *Id*. at 13.
[310] *Id*. at 18 (emph. added).
[311] 15 U.S.C. § 636.

Electronic copy available at: https://ssrn.com/abstract=4063950

loans.[312] Applying *Chevron*, some courts held that the SBA's PPP exclusion contradicted congressional intent in passing the CARES Act.[313]

On May 11, 2020, in *DV Diamond Club of Flint, LLC v. United States SBA*,[314] a judge for the Eastern District of Michigan held that, under *Chevron* Step One, the CARES Act unambiguously foreclosed the agency from excluding sexually-oriented businesses from PPP loan guarantees during the pandemic.[315] The judge emphasized that "the text of the PPP makes clear that every business concern meeting that statutory criteria [of which Congress only identified two that a business must satisfy] is eligible for a PPP loan during the covered period."[316]

A judge for the Eastern District of Wisconsin agreed one month later, in *Camelot Banquet Rooms, Inc. v. United States SBA*.[317] Without mentioning *DV Diamond* – or even *Chevron*, for that matter – she held that, to determine whether the SBA had acted within the scope of its authority,

> the court must know something about why the SBA decided to exclude businesses that present live performances of a prurient sexual nature from its business loan programs—programs in which nearly every other form of small business in the United States may participate.[318]

The Wisconsin district judge began her analysis by recalling that the purpose of the CARES Act is "keeping workers paid and employed."[319] She emphasized that strip clubs, like any other small business, had to make payroll and pay rent and other bills.[320] The judge found unpersuasive the SBA's argument that Congress, in creating the PPP, had specifically removed some conditions that would ordinarily apply to the SBA's loans. She concluded that Congress "must have intended for the SBA to enforce all other conditions, including the ineligibility of businesses that offer goods or services of a prurient sexual nature."[321] Because

---

[312] *Id.*
[313] *See* DV Diamond Club of Flint, LLC v. U.S. SBA, 459 F. Supp. 3d 943, 961 (E.D. Mich. 2020), *stay denied* 960 F.3d 743 (6th Cir. 2020); Camelot Banquet Rooms v. U.S. SBA, 548 F. Supp. 3d 1044 (E.D. Wis. 2020).
[314] 459 F. Supp. 3d 943, 961.
[315] *Id*. at 955 (citing Sixth Circuit precedent that the "judiciary is the final authority on issues of statutory construction.") (internal citations omitted).
[316] *Id*. at 956.
[317] Camelot Banquet Rooms v. U.S. SBA, 548 F. Supp. 3d 1044.
[318] *Id*. at 1053.
[319] *Id.* at 1055.
[320] *Id*.
[321] *Id*. at 1056.

Electronic copy available at: https://ssrn.com/abstract=4063950

Congress had made various small businesses eligible for PPP "that do not ordinarily qualify," the judge found evidence of a "clear intent to extend PPP loans to all small businesses affected by the pandemic," including "sexually oriented businesses…."[322]

A rare bedfellow of the strip club – a church – brought the next objection to the SBA's denial of a PPP loan, this time due to the SBA's creditworthiness exception. In *Diocese of Rochester v. United States SBA*,[323] plaintiffs relied on *DV Diamond* to argue that Congress had unambiguously intended to include all businesses aside from the two specified criteria in the CARES Act.[324] Despite finding the reasoning in *DV Diamond* "not unpersuasive on its face," a judge for the Western District of New York nevertheless disagreed that, by identifying two eligibility criteria, Congress had intended to foreclose additional criteria.[325] The judge focused on the SBA's statutory mandate "to ensure such loans 'shall be of such sound value or so secured as reasonably to assure repayment.'"[326] Because the CARES Act did not expressly foreclose considerations of creditworthiness in determining PPP eligibility, she declined to read in such a limitation.[327] Turning to *Chevron* Step Two, she reviewed the same explanations from the SBA as had the *DV Diamond* court but found those explanations "reasoned" and thus within the SBA's statutory authority.[328]

The variance in these opinions is not unusual. As mentioned earlier, critics of *Chevron* deference complain that its opacity enables an overly broad spectrum of interpretation to the detriment of predictability and legitimacy. Judges thus acted no differently during the pandemic than they do during ordinary circumstances. By engaging in a "real" and not "apparent" review, those judges nevertheless deviated from the level of review applied during the September 11 aftermath.[329]

---

[322] *Id*.
[323] 466 F. Supp. 3d 363 (W.D.N.Y. 2020).
[324] *Id*. at 375.
[325] *Id*. at 376.
[326] *Id*.
[327] *Id*.
[328] *Id*. at 378.
[329] *Compare with* Vermeule, *supra* note 9, at 1131 (describing the "apparent" review in the September 11 cases).

Electronic copy available at: https://ssrn.com/abstract=4063950

3. Eviction Moratoria

The eviction moratoria cases have already attracted attention for their constitutional dimensions.[330] The APA dimensions are equally important because they highlight how judges may use their reviews to address broader questions of delegated authority – a point that scholars critiquing judicial review raise to justify deference. The purpose of this Article is not to suggest that judges are incapable of using their review authority for ideological purposes, but rather to point out that they do so with less frequency than scholars and observers fear.

The CARES Act imposed a 120-day eviction moratorium on all rental properties that participated in federal assistance programs or were subject to federally-backed loans.[331] CDC then issued an Order to temporarily halt residential evictions under section 361 of the Public Health Service Act.[332] Unlike the CARES Act, the CDC Order applied to "all residential properties nationwide."[333] Under the Consolidated Appropriations Act, Congress extended the CDC Order from its initial expiration date of December 31, 2020, to January 31, 20201; CDC then extended the Order through March 31, 2021.[334]

CDC's eviction moratorium exposed some of the intrinsic tensions between rights during emergencies and the difficulties in prioritizing those rights through administration. In this line of cases, agencies had to choose between tenants' rights and landlords' rights. Tenants had suffered job losses and crippling health emergencies during the pandemic and could not pay rent. CDC decided to protect those renters from further loss and damage by declaring a moratorium on evictions. That moratorium required landlords to continue paying their mortgages and taxes without supplemental income through rents.

Contrary to assumptions of automatic deference, judges disagreed with one another on how to treat the CDC's approach. *Ala. Ass'n of Realtors v. United States HHS*[335] demonstrates how judges can change their own minds as cases percolate. When the case first arose in the D.C. District Court on May 5, 2021, the judge

---

[330] *See, e.g.,* Pamela Foohey, Dalie Jimenez & Christopher K. Odinet, *The Debt Collection Pandemic*, 11 CALIF. L. REV. ONLINE 222, 228-229 (2021) (discussing the moratoria's legal deficits)
[331] 2021 U.S. Dist. LEXIS 85568 (D.D.C. May 5, 2021) at *3 (citing Pub. L. No. 116-136, 134 Stat. 281 (2020)).
[332] *Id*. (citing 42 U.S.C. § 264(a) & 42 C.F.R. §70.2 85 Fed. Reg. 55,292 (Sept. 4, 2020)).
[333] *Id*. at *5.
[334] *Id*.
[335] *Id.*

Electronic copy available at: https://ssrn.com/abstract=4063950

vacated CDC's national eviction moratorium.[336] Applying *Chevron* Step One, she relied on the Public Health Service Act, which conferred to CDC "general rulemaking authority" that was "not limitless."[337] She rejected CDC's argument that Congress had granted it "broad authority" to make regulations that were "necessary to prevent the spread of the disease."[338] The fact that COVID-19 was difficult to detect did not "broaden [CDC's] authority beyond what the plain text [] permits."[339] The judge found that the eviction moratorium had "substantial economic effects" and had faced "earnest and profound debate in the country."[340] She observed that "[a]t least forty-three states and the District of Columbia" were struggling to determine state-based eviction policies and that Congress had twice addressed a nationwide moratorium. Rather than invalidate CDC's moratorium on technical APA grounds like the cases above, she rejected CDC's argument that Congress would have delegated authorities to resolve that "important question…"[341] – least of all in "so cryptic a fashion."[342]

One week later, the same judge issued a stay of vacatur pending appeal.[343] She again restricted CDC's authority to the responsibilities enumerated within the Public Health Act.[344] She reiterated that Congress had not clearly flagged its intention to broaden that authority.[345] She found that the agency had failed to show "a substantial likelihood of success on the merits," a failure which was, arguably, "a fatal flaw for its motion."[346] She also noted that the Sixth Circuit had "denied a similar emergency motion on this ground alone."[347] She then deferred to the CDC anyway,[348] relying on two earlier judgments in other circuits that had ruled in

---

[336] Ala. Ass'n. of Realtors v. Dep't of Health & Hum. Servs., 2021 U.S. Dist. LEXIS 85568 (D.D.C. May 5, 2021).
[337] *Id*. at *15.
[338] *Id*.
[339] *Id*. at *17.
[340] *Id*.
[341] *Id*. at *21.
[342] *Id*.
[343] *See* Ala. Ass'n. of Realtors v. Dep't of Health & Hum. Servs., 2021 U.S. Dist. LEXIS 92104 (D.D.C. May 14, 2021).
[344] *Id*. at *6.
[345] *Id*. at *8.
[346] *Id*. at *10
[347] *Id*.
[348] *Id*. at *10-14.

Electronic copy available at: https://ssrn.com/abstract=4063950

CDC's favor "at least at the preliminary injunction stage…."[349] Neither of the judges in those earlier cases – *Brown v. Azar* and *Chambless Enters., LLC v. Redfield* – had conducted their review under *Chevron*. Instead, they had both held in favor of the CDC based on their decision that the statute's plain text unambiguously evinced the legislative intention to defer to the CDC's judgment.[350]

***

This Part described how district judges set their standards of review under the APA during the pandemic. Those judges scrutinized and often invalidated the violative emergency administration using the same APA standards that supported judicial deference in the September 11 cases. Their review resembled the normal variance that arises during ordinary circumstances. In the following Part, I argue that judges demonstrated greater vigor during the pandemic because they are learning to become more skeptical of agencies' emergency administration. This skepticism extends beyond President Trump and has significant implications for future emergency administration and the balance of emergency powers.

PART III: AN EVOLUTIVE JUDICIAL REVIEW OF EMERGENCY ADMINISTRATION

Up to this point, I have argued that judges *should* review emergency administration as actively as they review ordinary administration because presidential control over agencies diminishes their expertise and contradicts their delegated authority. I have also shown that judges *could* review emergency administration as actively as they review ordinary administration by describing how they did so during the pandemic. This Part now addresses why judges *would* review future emergency administration as actively as they review ordinary administration.

Scholars may downplay the implications of vigorous judicial review for future emergencies by attributing the pandemic cases to President Trump. Professors Ming Hsu Chen and Daimeon Shanks attempt to do so by arguing that my pandemic "findings are a temporary course-correction rather than a 'new era'

---

[349] *Id*. at *10 (citing Brown v. Azar, 497 F. Supp. 3d 1270 (N.D. Ga. Oct. 29, 2020), *appeal filed,* No. 20-14210 (11th Cir. 2020) *and* Chambless Enters., LLC v. Redfield, 508 F. Supp. 3d 101 (W.D. La. Dec. 22, 2020), *appeal filed*, No. 21-30037 (5th Cir. 2021)).

[350] *Brown v. Azar*, 497 F. Supp. 3d at 1281 ("Congress' intent, as evidenced by the plain language of the delegation provision, is clear: Congress gave the Secretary of HHS broad power to issue regulations necessary to prevent the introduction, transmission or spread of communicable diseases."); *Chambless Enters., LLC v. Redfield*, 508 F. Supp. 3d at 111 ("the plain text of the statute is unambiguous and evinces a legislative determination to defer to the 'judgment' of public health authorities about what measures they deem 'necessary' to prevent contagion.")

Electronic copy available at: https://ssrn.com/abstract=4063950

in emergency administration…."[351] If that is true, judges will likely revert to providing deference as the pandemic progresses under President Biden and as future emergencies transpire. My results will prove to be an anomaly.

However, I believe that future judges will continue to be skeptical of emergency administration and will review it vigorously during future crises. First, the traditional emergency scholarship seemed to recognize that Presidents would take control during emergencies and that our legal order would allow them to do so. President Trump's control over his agencies should not have, alone, ignited unprecedented review over his agencies' emergency administration. Second, my data shows that most judges who blocked the Trump Administration's pandemic policies supported Trump's political ideologies. Finally, district judges have continued to block President Biden's emergency administration.

A. *Countering the Trump Effect*

This section counters the contention that the pandemic cases simply reflect the nuances of the Trump Administration. It argues that while President Trump exercised significant control over agencies, so did other Presidents. It also explains that most judges who invalidated the Trump Administration's pandemic activities were Trump appointees.

First, scholars may assume that the active judicial review during the pandemic resulted from judicial awareness of and distaste for President Trump's control over his agencies. As mentioned, scholars document how Trump used various tactics and strategies to dictate agency agendas, rules, and leadership.[352] Noll's data reveals that judges invalidated the Trump Administration's activities before the pandemic began.[353] In the pandemic cases, agencies were often unable to offer evidence or rationale that would have disentangled their emergency administration from overarching agendas. Therefore, it is not a stretch to assume that judges' invalidation rates merely reflect the judicial reaction to President Trump.

This argument fails to account for the previously deferential review that judges accorded to equally controlling Presidents.[354] President Bush exercised

---

[351] *See* Ming Hsu Chen & Daimeon Shanks, *The New Normal: Regulatory Dysfunction as Policymaking*, at 62 (forthcoming, draft on file with author) (responding to a draft of this manuscript).
[352] *See supra*, Part I.C.
[353] *See* Noll, *supra* note 119, at 358.
[354] *Id*.

Electronic copy available at: https://ssrn.com/abstract=4063950

significant and palpable control over his agencies during the September 11 aftermath.[355] His policies harmed civil rights and liberties while subjecting vulnerable populations to abusive interrogations, detentions, arrests, and racial profiling.[356] His agencies enjoyed significant judicial deference anyway.[357] Under this precedent, judicial review of the Trump Administration's activities should have become far more deferential following the national emergency declaration.[358]

Second, scholars may assume that judges actively reviewed the agencies' pandemic policy through a lens of political ideology and distaste for President Trump's agenda. Political ideology has always influenced judicial review,[359] including during emergencies.[360] Consider Sunstein's empirical analysis of the September 11 cases, which shows that the few judges who were willing to invalidate President Bush's agencies were mainly Democratic appointees.[361] Sunstein's data suggests that the Trump Administration may have been overruled by a swath of Democratic judges influenced by their political opposition. The conservative Supreme Court Justice's stay of the Biden Administration's ETS

---

[355] *See* Gross, *supra* note 10, at 1017-1018 (referring to President Bush's "aggrandizement of powers of the federal government" and the restructuring of executive agencies during the September 11 aftermath); Scheppele, *supra* note 105, at 1003 (describing the ways in which the Bush Administration immediately began to issue executive orders following the announcement of a state of emergency in 2011); COLE, *supra* note 105, at 2 (discussing the implications of the Bush Administration's September 11 emergency administration for rights and liberties).

[356] *See* COLE, *supra* note 105, at 2 (discussing the implications of the Bush Administration's September 11 emergency administration for rights and liberties).

[357] *See supra*, Part I.A.

[358] President Trump declared the COVID-19 pandemic a national emergency on March 13, 2020. *See* White House, *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak* (March 13, 2020), https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/.

[359] *See, e.g.,* Cross, *supra* note 95, at 1262 ("The political nature of law is particularly evident in the administrative state."); Eric A. Posner, *Does Political Bias in the Judiciary Matter? Implications of Judicial Bias Studies for Legal and Constitutional Reform*, U. CHI. L. REV. 853, 853 & n 2 (2008) (acknowledging the growing empirical literature showing that political biases of judges, as well as the racial and sexual characteristics of judges, impact their voting decisions and the outcome of cases); Sidney A. Shapiro & Richard Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses*, 19 Geo. MASON L. REV 319, 320 (2012) (arguing that any suggestion that judges can ignore their political affiliations and remain neutral "is poppycock."); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism,* 75 U. CHI. L. REV. 831, 832-33 (2008) (demonstrating the relationship between judges' political affiliations and case outcomes.).

[360] Sunstein, *supra* note 27, at 279.

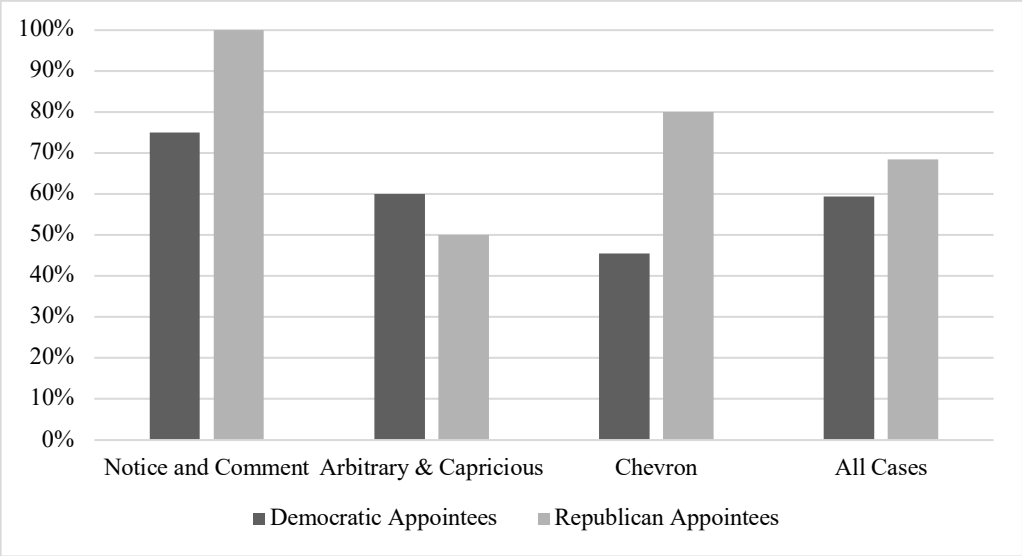
[361] *Id*. (showing that Republican judicial appointees were only willing to invalidate President Bush's executive agencies in 12 percent of the cases, while Democratic appointees invalidated those agencies at a greater frequency of 23 percent.).

Electronic copy available at: https://ssrn.com/abstract=4063950

workplace requirements could similarly confirm that judges set their review based on political ideology and not on APA merit.[362]

My data does not support that theory, at least not in the lower courts during the pandemic. In those cases, as illustrated in Figure 4 below, Republican appointees invalidated the Trump Administration's emergency measures in approximately 69 percent of cases,[363] a greater frequency than the Democratic appointees did at approximately 60 percent.[364]

FIGURE 4: INVALIDATION RATES OF FEDERAL JUDGES IN EARLY PANDEMIC CASES (N=51)



Furthermore, as shown in Figure 5, below, President Trump's *own judicial appointees* invalidated his agencies' emergency administration at a slightly higher

[362] *See, e.g.,* Jill Ament, *Conservative Supreme Court majority seems reluctant to allow Biden's COVID-19 vaccine mandate for large employers*, TX. STANDARD (quoting Vladeck, who states "This is a court, a new conservative majority of which is hostile to broad statutory delegations of power to federal administrative agencies."), https://www.texasstandard.org/stories/conservative-supreme-court-majority-seems-reluctant-to-allow-bidens-covid-19-vaccine-mandate-for-large-employers/; Lempert, *supra* note 158 ("The current Court majority… seems willing to go almost anywhere their politics takes them.").

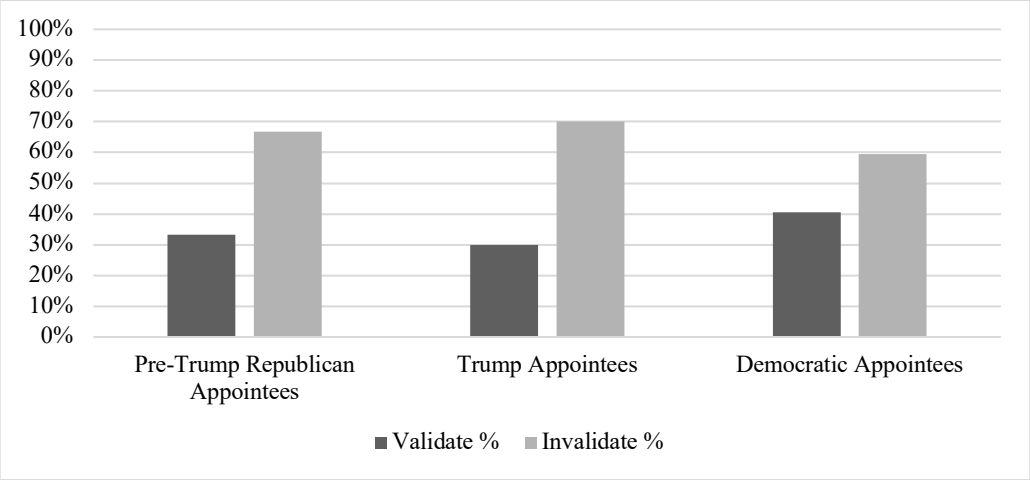
[363] In the cases decided by Republican appointees, judges declined to defer to the agencies in 13 of the 19 cases. This figure includes decisions by appointees of any Republican President, while the data in Figure 5 separates Trump appointees from all other Republican appointees.

[364] In the cases decided by Democratic appointees, judges declined to defer to agencies in 19 of the 32 cases.

Electronic copy available at: https://ssrn.com/abstract=4063950

rate than other Republican-appointed judges (70 percent).[365] That finding comports with a study by Kenny Mok and Eric Posner reviewing the constitutional cases during the pandemic. They found that, at least in religion cases, "Trump-appointed judges were substantially more likely to strike down public health orders than other Republican-appointed judges."[366]

FIGURE 5: VALIDATION RATE, BY NOMINATING PRESIDENT (N = 51)



Finally, if judges were merely reacting to the Trump Administration, then presumably, their review of his agencies' pandemic activities would have become more deferential once the Biden Administration took the helm in 2021. Future comparisons between the district courts' treatment of the Biden Administration's emergency activities in future years will be valuable. In the meantime, my preliminary search of cases that included the terms "Biden," "COVID," "Administrative Procedure Act," and "enjoins" showed that district courts have continued to enjoin or preliminarily enjoin the Biden Administration's pandemic

[365] Judges that were nominated by President Trump declined to defer to agencies in seven of the 10 cases over which they presided.
[366] *See* Mok & Posner, *supra* note 47, at 3.

Electronic copy available at: https://ssrn.com/abstract=4063950

policies.[367] Those early cases suggest that active judicial review during crises is here to stay.[368]

Some might argue that conservative judges are blocking emergency administration as a reaction to regulation and not to the emergency circumstances. That would help explain why judicial review has remained more active during the Biden Administration. And while it may be partly true – the early cases blocking the Biden Administration's vaccine policies seem to all be in conservative States[369] – that explanation fails to account for the previously deferential judicial review of the September 11 cases. Of course, those cases may be otherwise distinguishable – agencies' efforts to prevent terrorist attacks implicate the executive's unique national security expertise and access to classified information.[370] However, it fails to account for the similarly deferential judicial review during the swine flu pandemic and the 2008 financial crisis,[371] neither of which implicated those unique factors.

Another theory, and the one that I subscribe to, is that judicial review of emergency administration is evolving.[372] Judges are becoming more emboldened to question agencies' emergency activities and more skeptical of their explanations.

---

[367] Commonwealth v. Biden, 2021 U.S. Dist. LEXIS 228316 (E.D. Ky. Nov. 30, 2021) (enjoining vaccine enforcement); Missouri v. Biden, 2021 U.S. Dist. LEXIS 227410 (E.D. Mo. Nov. 29, 2021) (granting preliminary injunction against CMS vaccine mandates); La. v. Becerra, 2022 U.S. Dist. LEXIS 1333 (W.D. La. Jan. 1, 2022) (granting preliminary injunction against the Biden Administration's Head Start vaccine rules); USN Seals 1-26 v. Biden, 2022 U.S. Dist. LEXIS 2268 (N. D. Tex. Jan. 3, 2022) (granting preliminary injunction against U.S. Navy's mandatory COVID-19 vaccination policy); La. v. Biden, 2021 U.S. Dist. LEXIS 229949 (W. D. La. Nov. 30, 2021) (granting preliminary injunction against CMS's vaccine mandate); Texas v. Becerra, 2021 U.S. Dist. LEXIS 239608 (N.D. Tex. Dec. 15, 2021) (granting preliminary injunction against CMS's vaccine mandate); State v. Becerra, No. 5:21-CV-200-H, 2021 U.S. Dist. LEXIS 248309 (N.D. Tex. Dec. 31, 2021) (granting preliminary injunction against the Head Start vaccine program); Georgia v. Biden, 2021 U.S. Dist. LEXIS 234032 (S.D. Ga. Dec. 7, 2021) (granting preliminary injunction against E.O. 14042, which required federal contractors and subcontractors to be fully vaccinated); Feds v. Biden, No. 3:21-cv-356, 2022 U.S. Dist. LEXIS 11145 (S.D. Tex. Jan. 21, 2022).

[368] *See, e.g.,* Dooling, *supra* note 20 ("To the extent that the administration…is trying to cobble together authorities to serve the president's own goals, rather than hewing narrowly within well-established existing statutory boundaries, it may again find itself blocked by this court.").

[369] *See supra*, n. 367.

[370] *See supra*, Part I.B.

[371] *See* Levinson & Balkin, *supra* note 7, at 1811; Posner & Vermeule, *supra* note 6, at 1619-1628.

[372] *See* Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CALIF. L. REV. 991, 994 (2018) (arguing that "some courts are experimenting with new approaches to review and manage government claims" during crises.); *see generally* Maggie Gardner, *District Court En Bancs*, FORDHAM L. REV. (forthcoming, 2021) (recalling "the constant evolution of the federal judicial system.").

Electronic copy available at: https://ssrn.com/abstract=4063950

For the reasons explained below, I believe that judicial review will continue to be more vigorous in future crises.

B. *Judicial Awareness of Illegitimate Emergency Administration*

If judges are not merely reacting to the Trump Administration, what else might account for judges' more vigorous review of emergency administration? This section offers two non-exclusive explanations. It argues that judges are becoming more aware of the harms caused by presidential control to rights and liberties and of the executive's motives behind its emergency actions. That awareness sheds new light on the implications of unfettered presidential control when lives are at stake.

1. Emergency Hindsight

With each passing emergency – wars, depressions, flus and pandemics, climate change, and, depending on your conception of emergency, crises of democratic legitimacy and faith in government – judges are rewarded with new information.[373] That information is bound to influence their subsequent emergency reviews.

For example, when the Supreme Court majority decided *Korematsu*, it was unaware of critical information withheld by the Solicitor General that "could not have sustained the majority's holdings."[374] *Korematsu* taught of the perils of trusting the executive and the implications for fundamental rights and liberties.

Judges have learned a lot since *Korematsu*. Again, the Bush Administration adopted expansive measures under the auspices of the September 11 attacks. One measure established the detention center at Guantánamo Bay, a U.S. naval base in Cuba, ostensibly to combat terrorism in the United States. [375] Prisoners at Guantánamo Bay were not given their constitutional rights of due process, but rather "could be tried by military tribunals, in which the military would act as prosecutor, judge, jury, and executioner, without any appeal to a civilian court."[376] The torture and abusive interrogative methods used on individuals there – publicized through various information leaks and news outlets – again taught judges

---

[373] *See* John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210, 231-32 (2004) (providing a comprehensive definition of emergency).
[374] *See* Katyal, *supra* note 60, at 651.
[375] *See, e.g.,* Landau, *supra* note 87, at 1959 ("It became clear during the DTA litigation that the formalized process to review the combatant status of enemy combatant detainees at Guantánamo had not been implemented according to the Government's plan.").
[376] *See* COLE, *supra* note 105, at 2.

Electronic copy available at: https://ssrn.com/abstract=4063950

of the perilous impact of executive emergency administration on rights and liberties.[377] These lessons are not lost on them.

After these events and reveals, judicial skepticism of executive intentions would be reasonable. During the pandemic, some judges expressed that skepticism by criticizing agencies' "implausible" [378] or unreasoned[379] explanations[380] or refused to allow the pandemic to relieve agencies from notice-and-comment procedures,[381] particularly when those measures disparately targeted vulnerable groups. Recall that the SBA's PPP loan exclusions targeted the poor (in bankruptcy)[382] and the incarcerated or formerly incarcerated,[383] DOL and DHS attempted to make it harder for immigrants to enter the United States for work,[384] and DOL tried to block access to paid leave for struggling workers.[385] As opposed to their approaches to earlier emergency administration, judges demanded better explanations than "agency say-so" before allowing those pandemic activities to proceed.[386]

2. Social Media as a Window into Executive Intent

Social media contributes to judicial awareness of executive intentions. It can contextualize, foreshadow, and further explain activities and federal policies in a way that traditional news outlets cannot. President Obama garnered attention for his Open Government Initiative, which among other things, "led to agency adoption of social media applications, such as Twitter, Facebook, YouTube, blogs and others as mechanisms to increase public participation in government."[387] Since then, the executive's recourse to "work-related use of social media" has been increasing.[388]

---

[377] *See, e.g.,* Fleur Johns, *Guantánamo Bay and the Annihilation of the Exception*, 16 EUR. J. INT'L L. 613, 614 (2005) (the plight of the Guantánamo Bay detainees is less an outcome of law's suspension or evisceration than of elaborate regulatory efforts by a range of legal authorities.")
[378] *See, e.g., Alaska Urological*, 619 B.R. at 709.
[379] *See, e.g., Defy Ventures, Inc*., 469 F. Supp. 3d at 475-476.
[380] *See, e.g., Scholl*, 494 F. Supp. 3d at 690.
[381] *See, e.g., Chamber of Comm*., 504 F. Supp. 3d at 1091.
[382] *See, e.g., Alaska Urological Inst*., 619 B.R. at 710.
[383] *See, e.g., Defy Ventures, Inc*., 469 F. Supp. 3d at 465.
[384] *See, e.g., ITService Alliance, Inc*., 2020 U.S. Dist. LEXIS 227049, at *29.
[385] *See, e.g., New York*, 477 F. Supp. 3d at 18.
[386] *See, e.g., Chamber of Com*., 504 F. Supp. 3d at 1094.
[387] *See* John T. Snead, *Social media use in the U.S. Executive branch*, 30 GOV'T QUART. 56, 56 (2013).
[388] *Id*. ("Research also shows that agency employee work-related use of social media is growing.").

Electronic copy available at: https://ssrn.com/abstract=4063950

If judges had any doubt about President Trump's motives during the pandemic, they needed only to read his Twitter account. Well before the pandemic, for instance, President Trump took to various media platforms and ridiculed "immigrants from countries that are predominantly comprised of people of color," expressing his hope that "more people from places like Norway" would immigrate to the United States than immigrants from "[expletive deleted] countries…."[389]

In deciding the legitimacy of federal policies, judges noted and cited those tweets. They observed how President Trump's informal comments "linked immigrants and people of color with low education, crime, and terrorism."[390] Justices Sotomayor and Ginsburg, for example, quoted Trump's tweets in expressing their opposition to his travel bans in their dissenting *Hawaii* opinion.[391] They would have held that "[t]aking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications."[392]

President Trump's recourse to informal platforms was extreme. Yet, if the early efforts of the Biden administration to reach across various outlets to communicate with the public are any indication,[393] judges will continue to have greater exposure to the motives and intentions behind executive administration moving forward.

These two explanations are insufficient to capture all the complexities behind the possible evolution in judicial review of emergency administration.[394] My intention is to show that, over time, judges have become increasingly aware of

---

[389] Make the Rd. N.Y. v Pompeo, 475 F. Supp. 3d 232, 265 (S.D.N.Y. 2020) (noting Trump's tweets and sentiments when interpreting the intention behind the federal policy).
[390] *Id*.
[391] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2437-2438 (2020) (Sotomayor & Ginsburg, JJ., dissenting).
[392] *Id*. at 2438.
[393] *See, e.g.,* Jamie Gillies, *Playing Catch Up from a Basement in Delaware: How the Biden Campaign Marketed 'Joe'*, *in* POLITICAL MARKETING IN THE 2020 U.S. PRESIDENTIAL ELECTION 15 (Jamie Gillies ed. 2022) (describing President Biden's late-stage campaign strategy as "total saturation" of marketing strategies, including through social media).
[394] For instance, a separate stream of administrative law charts evolutive judicial review under the APA outside of the emergency context. *See* Ronald M. Levin, *The Evolving APA and the Originalist Challenge*, 97 CHI.-KENT L. REV. at 8-10 (Oct. 2021, forthcoming) (describing the transformation in judicial review under various APA standards), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3944985&dgcid=ejournal_htmlemail_u.s.:administrative:law:ejournal_abstractlink.

Electronic copy available at: https://ssrn.com/abstract=4063950

presidential motives and the perilous impact of its emergency activities on vulnerable populations. Judges have fewer reasons to defer to agencies' expertise and more reasons to be skeptical of their emergency motives. The implications of that evolution are discussed next.

PART IV: FUTURE JUDICIAL REVIEW OF EMERGENCY ADMINISTRATION

If judicial review is evolving to demand a more legitimate emergency administration, as I argue it is, then the pandemic cases have significant implications for the balance of emergency powers.[395] Some scholars searching for greater procedural and substantive protections during emergencies demand that Congress play a more significant role.[396] Some members of Congress agree.[397] Many do so assuming that it is Congress, and not the courts, that "has the constitutional authority, democratic legitimacy, and institutional capacity to understand" the necessary trade-offs that undergird judicial review.[398]

Those efforts include proposals for legislation and new mechanisms that would grant Congress greater oversight during emergencies. This section explains those proposals, some of which might helpfully flag legislative intent and congressional concerns about specific emergency measures. Apart from congressional input during emergencies, I argue that, in the end, less is more.

A. *Legislative Limitations*

Some legal scholars and members of Congress frustrated with the role of judges in emergency administration propose new legislation specifically for emergency circumstances. They hope that such legislation might restrain the executive's

---

[395] *See* Posner, *supra* note 66, at 213 (discussing the interplay between relative executive, legislative, and executive powers during emergencies).

[396] *See* David S. Rubenstein, *"Relative Checks": Towards Optimal Control of Administrative Power*, 51 WM. & MARY L. REV. 2169, 2174 (2010) (noting the "congressional-control model" in which scholars advocate for Congress to "control administrative action through legislative power, committee pressure, and other modes of influence.") (internal citations omitted).

[397] *See, e.g.,* Cong. Rec. S8155, SA 4632 – National Emergencies Act Reform (Nov. 15, 2021), https://s3.documentcloud.org/documents/21111541/crec-2021-11-15.pdf [hereinafter, "National Emergencies Act Reform"]; Sen. Chris Murphy, *Murphy, Lee, Sanders Introduce Sweeping, Bipartisan Legislation to Overhaul Congress's Role in National Security* (July 20, 2021) (describing their efforts to introduce bipartisan legislation "to reclaim Congress's critical role in national security matters."), at https://www.murphy.senate.gov/newsroom/press-releases/murphy-lee-sanders-introduce-sweeping-bipartisan-legislation-to-overhaul-congresss-role-in-national-security [hereinafter "National Security Powers Act"].

[398] *See* Gross, *supra* note 10, at 1028.

Electronic copy available at: https://ssrn.com/abstract=4063950

emergency powers under more objective standards than judges provide in their APA review.[399]

While many of the current legislative initiatives center on constraining the executive's emergency powers, discussed below, other proposals deal specifically with the APA.[400] Professor Evan Criddle argues that "[a]s long as our administrative law depends upon flexible legal standards, courts will be tempted to distort those standards during emergencies in deference to the Executive Branch."[401] He and David Cole argue that Congress and the courts must amend the APA by "specify[ing] the principles that govern derogation from ordinary administrative procedure more clearly."[402]

Efforts to amend the APA are misconceived because they are based on misconceived problems.[403] Judges can and will use the APA's rules and standards to constrain emergency administration. If Congress were to amend the APA to remove judicial discretion, it would remove judges' ability to set their review based on the agencies' demonstrable expertise and motives. By thus binding judges, administrative law as proposed would enable agencies to promulgate emergency policies without fear of judicial scrutiny. In other words, those amendments would produce the very juridical staticity that rights scholars fear.

---

[399] *See, e.g.,* James Kim, *For a Good Cause: Reforming the Good Cause Exception to Notice and Comment Rulemaking under the Administrative Procedure Act*, 18 GEO. MASON L. REV. 1045, 1071-1072 (2011) (proposing that Congress amend the APA to remove judicial discretion concerning the "good cause" exception to notice-and-comment rulemaking, arguing that discretion during emergencies although agencies needed to be able to respond to emergencies, "it does not follow that this discretion should be left entirely unbounded."); King, *supra* note 218, at 1050-1052 (arguing that Congress had failed to make the good cause exception to notice-and-comment rulemaking procedures sufficiently narrow); Criddle, *supra* note 3, at 316-318 (proposing that Congress reform administrative law to hold agencies more accountable during emergencies); Schneider, *supra* note 215, at 257-258 (discussing efforts to amend the APA's good cause exception).

[400] *See* Criddle, *supra* note 3, at 316; Dyzenhaus, *supra* note 3, at 2023, 2039 (arguing in favor of strong legislation over strong judicial review); Kim, *supra* note 396, at 1071 (proposing that Congress "patch up these so-called black holes…especially in times of emergency when the risk of arbitrary state action is at its greatest.").

[401] *See* Criddle, *supra* note 3, at 312.

[402] *See* COLE, *supra* note 105, at 317.

[403] Shy of legislative reform, current efforts to amend judicial deference under the APA that extend beyond emergency circumstances target the *Chevron* doctrine. The scope of that argument extends beyond the contours of this Article, but for an interesting discussion, *see* Cass R. Sunstein, *Zombie* Chevron*: A Celebration*, 82 OHIO ST. L.J. 565, 566-567 (2022) (rejecting efforts to overrule *Chevron*).

Electronic copy available at: https://ssrn.com/abstract=4063950

Beyond the APA, Congressional efforts are underway to revise a series of emergency legislation[404] to give Congress a firmer say on the duration of the executive's emergency powers.[405] In 2019, five Democratic Senators and nine Republican Senators wrote that "Congress cannot continue to cede its powers to another branch" and urged progress "toward re-establishing the appropriate checks and balances between the Congress and the Executive that results in a federal government that is truly accountable to the people."[406]

Since that letter, Republican Senator Mike Lee has introduced amendments to the National Defense Authorization Act.[407] Representative Ilhan Omar has introduced amendments to the International Emergency Economic Powers Act (IEEPA) to give Congress greater oversight authority.[408] Democratic Senators Chris Murphy and Bernie Sanders have proposed new legislation that would give Congress a more significant say in emergency declarations.[409] This degree of bipartisan congressional consensus is rare.

The issue with these proposed reforms is that it is difficult, if not impossible, to conceptualize a legal text that could effectively ensure legitimate emergency administration while restricting agency overreach. Vermeule contends that attempts to enact such emergency legislation ignore factors that "cannot realistically be governed by ex-ante, highly specified rules…".[410] Schneider similarly argues that the "inevitable ambiguity in language, especially statutory language designed to

---

[404] *See, e.g.,* Patrick A. Thronson, Toward Comprehensive Reform of America's Emergency Law Regime, 46 U. MICH. J. L. REFORM 737, 778-783 (2013) (proposing various NEA amendments to ensure greater executive legitimacy during emergencies); Elizabeth Goitein, JUST SECURITY, *Good Governance Paper No. 18: Reforming Emergency Powers* (Oct. 31, 2020) (pointing out that, owing to Supreme Court jurisprudence interpreting the National Emergencies Act, "Congress can terminate an emergency declaration only by passing a law signed by the president—or, more likely, by mustering a supermajority to override the president's veto."), *at* https://www.justsecurity.org/73196/good-governance-paper-no-18-emergency-powers/.

[405] *See, e.g,* Jack Goldsmith & Bob Bauer, LAWFARE, *Emergency Powers Reform Within Grasp* (Nov. 17, 2021) ("emergency powers reform is still highly important reform that will reset the balance of power between the political branches in this vital area."), *at* https://www.lawfareblog.com/emergency-powers-reform-within-grasp.

[406] *Id*.

[407] *See* National Emergencies Act Reform, *supra* note 397.

[408] *See* H.R.5879, 116th Cong. (introduced February 12, 2020).

[409] *See* National Security Powers Act, *supra* note 397.

[410] *See* Vermeule, *supra* note 9, at 1101, 1139 ("The reasons that the APA's enactors created the black and grey holes were quite pragmatic, including …a lively appreciation of the inevitability of emergencies and unforeseen circumstances.").

Electronic copy available at: https://ssrn.com/abstract=4063950

specify all contingencies in which [emergency standards] may apply, renders futile attempts at" amending legislation.[411]

Even if those proposals manifest in new legislation, as Balkin points out, the very problem with the executive's emergency powers is its ability to enact new executive orders or find other ways around preexisting legislation.[412] To illustrate, Balkin refers to "the anti-torture statute and … various international law obligations" designed to "prevent the President from doing things we do not like" during emergencies.[413] That legislation failed to deter executive overreach during the September 11 aftermath because "the President's lawyers decided to read these substantive requirements away or declare them unconstitutional as impinging on the President's inherent powers as commander-in-chief."[414]

The current legislative efforts will likely be insufficient to constrain the President during emergencies. Nevertheless, members of Congress propose new legislation out of their frustration with the executive's sweeping emergency powers. The pandemic cases suggest that judicial review is more effective at constraining the executive's emergency administration than previously acknowledged. Nevertheless, the following section describes how Congress could enhance its role during emergencies.

B. *Congressional "Fire Alarm" Mechanisms*

Rather than amend or craft new legislation, other scholars have proposed strengthening congressional oversight of emergency administration through new mechanisms. Levinson proposes such a mechanism specifically for emergencies[415] that would entail "some mix of congressional and popular votes of no-confidence."[416] Under that mechanism, the public and Congress could "monitor and respond to failures of judgment on issues of great importance."[417] Levinson (joined

---

[411] *See* Schneider, *supra* note 215, at 262 (addressing efforts to amend the APA's good cause exception).
[412] *See* Levinson & Balkin, *supra* note 7, at 1856-1857. *See also* Ferejohn & Pasquino, *supra* note 373, at 215 ("it is a striking fact that, even in those advanced democracies whose constitutions contain provisions for emergency powers, these powers are not used.").
[413] *See* Levinson & Balkin, *supra* note 7, at 1856 (Balkin, writing alone, discussing the practical hurdles to legislate emergencies).
[414] *Id*. at 1856-1857.
[415] *Id*. at 1860.
[416] *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 119-120 (2006).
[417] *See* Levinson & Balkin, *supra* note 7, at 1860.

Electronic copy available at: https://ssrn.com/abstract=4063950

by Balkin) notes that the resulting action would also "have ripple effects throughout the political system," including "judicial review of administrative action."[418]

Justice Elena Kagan characterizes this type of a public-congressional oversight procedure as a "fire alarm" mechanism that could "monitor an agency and report any perceived errors to the relevant congressional committees."[419] Through such a mechanism, Congress could signal concerns about the executive, which, in turn, could help judges identify illegitimate emergency administration despite the distracting complexities of national emergencies. That type of exchange could also contribute to a more objective and consistent legal outcome.

For instance, recall *Ala. Ass'n of Realtors v. United States HHS*, in which the district court initially vacated the eviction moratorium.[420] That moratorium was intended to benefit tenants who had lost their jobs during the pandemic. The moratorium was *not* intended to benefit landlords who faced ongoing mortgage payments despite facing their own financial hardships. By blocking it, the judge made it easier for landlords to pay mortgages but also rendered tenants vulnerable to homelessness just when unemployment peaked. These are not clear-cut cases.

Also, recall the insurmountable standard on agencies that the *Mass. Bldg Trades Council* dissent would have imposed,[421] and the Supreme Court's objections to regulation in *NFIB v. DOL*.[422] These cases all elucidate the fundamental drawbacks of a judiciary opining on the intentions behind emergency provisions without congressional input.[423] Congressional mechanisms would inform those opinions.[424]

On the other hand, proposals to create or make better use of congressional mechanisms are unlikely to be put to use, at least to the degree necessary to identify and deter illegitimate emergency administration.[425] Congress has proven reluctant

---

[418] *Id*.
[419] *See* Kagan, *supra* note 109, at 2258.
[420] 2021 U.S. Dist. LEXIS 85568 (D. Alaska May 5, 2021).
[421] *Mass. Bldg. Trades Council*, 2021 U.S. LEXIS 37349, at *6.
[422] NFIB. v. Dep't of Lab., 2022 U.S. LEXIS 496, at *6-7 (explaining that agencies "only possess the authority that Congress has provided.").
[423] For a discussion of how such "countermajoritarian strategies" risk undermining the human rights agenda, *see* Samuel Moyn, *On Human Rights and Majority Politics*, 52 VAND. J. TRANSNAT'L L. 1135, 1139-1140 (2019).
[424] Although *see* Charlotte Garden's contribution to *Seven Reactions to NFIB v. Department of Labor*, *supra* note 20, in which she argues that "the Court's apparent concern with [Congress'] frame-of-mind" was inappropriate under current caselaw.
[425] *See, e.g.,* Schneider, *supra* note 215, at 264 (arguing that congressional oversight mechanisms are inadequate because they "are time and resource intensive.").

Electronic copy available at: https://ssrn.com/abstract=4063950

to use its oversight mechanisms and, when it has so attempted, the executive has simply dismissed them.[426] For instance, in a letter dated May 12, 2020, the Congressional Committees of jurisdiction over refugee, asylum, and national security laws wrote to the agency secretaries to express their "concern over the Trump Administration's deeply flawed legal 'justification' of its" asylum ban.[427] The Trump Administration and the agencies to whom the letter was directed ignored the letter's request for a "detailed explanation," dismissed congressional concerns, and continued to administer emergency policies per their agendas.[428] The executive's lackluster response may deter future congressional efforts.

Furthermore, apart from recent emergency legislation efforts, the May 12 letter is a notable exception to congressional gridlock.[429] It is unclear whether such bipartisan support is feasible on any broader level. Congressional reluctance to investigate President Trump's involvement in the January 06, 2021 Capitol riots, for instance, suggests otherwise.[430] Nevertheless, given the potential for Congress to weigh in on these critical matters during emergencies, a fire alarm mechanism is worth pursuing. Even if it chooses not to, Congress should engage with judges through amici briefs, discussed below.

C. *The Do-Nothing Approach*

The pandemic cases demonstrate that judges can set the standards of their review under the APA to ensure legitimate emergency governance. Those cases suggest that judges have begun to "adapt constructively"[431] to changes in the administrative state – including the increasing presidential control and all associated obstacles to

---

[426] *See* Kagan, *supra* note 109, at 2257 ("Even when Congress adopted mechanisms to facilitate administrative control, it declined…to make any real use of them.").

[427] Letter from Eliot L. Engel, Chaiman, House Comm. on For. Affs et al., to Mike Pompeo, Sec'y, U.S. Dep't of State et al. (May 12, 2020), https://foreignaffairs.house.gov/_cache/files/0/9/09edea3d-6ec9-4d13-bf16-890da17466da/1481CCA5405564F3519053090EC2B236.5-12-2020.ele-thompson-nadler-menendez-letter-to-pompeo-azar-wolf-on-covid-asylum-ban-pdf.pdf.

[428] *See* Armstrong, *supra* note 126, at 403-404 (describing the Administration's response to the May 12 letter, including its one-sentenced response asserting that its actions satisfied its legal obligations).

[429] *See* Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 889 (2007) (arguing that congressional members are equally vulnerable to ill motivations).

[430] *See generally* Kathryn A. Pearson, *The Legacies of Trump's Battles with Congress*, *in* THE TRUMP EFFECT: DISRUPTION AND ITS CONSEQUENCES IN US POLITICS 79 (Steven E. Schier & Todd E. Eberly, eds. 2022) (discussing how certain congressional members did not support an investigation into the January 6 riots).

[431] *See* Levin, *supra* note 394, at 19.

Electronic copy available at: https://ssrn.com/abstract=4063950

legitimate administration. Each emboldened judicial decision may influence "the judiciary's ability to exert control over the next emergency."[432]

Our governance system is designed to absorb an evolutive judicial review of emergency administration through a dynamic balance of powers across the three branches of government.[433] As the judiciary's role in emergency administration increases, Congress and the executive have the incentive to intensify their own roles.

In addition to pursuing a fire alarm mechanism, for example, Congress could intensify its role in emergency administration by participating as amicus curiae.[434] Through that participation, Congress would still contribute to a more democratic outcome by diluting some of the discretionary power enjoyed by judges to interpret delegated emergency authority. Congress already enjoys that avenue of dialogue with the judiciary during emergencies – it just needs to use it.[435]

The executive could also enhance its role by ensuring legitimate emergency administration. If Presidents are aware that judges are likely to invalidate their agencies, they may have a greater incentive to allow agencies to administer independently, based on agency expertise. Furthermore, if agencies are aware of a potentially vigorous review, they might make a greater effort to administer within the APA's rules.[436] Consequently, judges' invalidating decisions would "have the prophylactic effect of forestalling the same or similar measures in future emergencies."[437]

If that proves true, then some of the excessive emergency litigation that worries scholars, and the illegitimate administration that has prompted this project,

---

[432] *See* Cole, *supra* note 51, at 2576.

[433] *See generally* Kovacs, *supra* note 110, at 122 ("The APA represents the grand bargain of the administrative state.").

[434] *See generally* Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 919 (2012) (urging Congress to "take a more active role in federal litigation…."); Z. Payvand Ahdout, *Separation -of-Power Suits*, 135 HARV. L. REV. 42 (forthcoming, 2022) (arguing that in separation-of-power suits, Congress often formally participates as amicus curiae…"), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3815300.

[435] I recognize that this proposal, too, may prove improbable in the current congressional climate. In 2015, Neal Devins carried out an empirical examination of congressional amicus filings over the past forty years and found that "today's lawmakers are less likely to file bipartisan briefs than earlier less polarized Congresses." *See* Neal Devins, *Measuring Party Polarization in Congress: Lessons from Congressional Participation as Amicus Curiae*, 65 CASE W. RES. L. REV. 933, 933-934 (2015).

[436] *See* Hammond & Markell, *supra* note 116, at 314; Schneider, *supra* note 215, at 267-68 (describing empirical studies that show "that as litigation risks rose, agencies more frequently complied with procedural requirements.").

[437] *See* Cole, *supra* note 51, at 2575.

Electronic copy available at: https://ssrn.com/abstract=4063950

may dissipate. The solution thus rests not on creating new legislation to control judicial review during emergencies but on accepting that judicial review is already capable of ensuring legitimacy.

CONCLUSION

Bipartisan members of Congress, scholars, and commentators urge significant legal reforms to rebalance emergency powers. They do so while assuming that judges are incapable of constraining illegitimate administration during crises. While that assumption may have been correct during previous emergencies, judges demonstrated that they were both capable of and willing to apply the APA's rules, standards, and doctrines to ensure agency legitimacy and expertise during the pandemic.

Judges have done a better job of protecting vulnerable citizens during the pandemic than critics acknowledge. Many judges recognized that agencies' emergency activities were potentially based on presidential directives and agendas and not necessarily on substantive expertise. They gave agencies ample opportunity to prove otherwise. When agencies failed to explain their emergency administration sufficiently, judges justifiably invalidated it.

The more vigorous judicial review during the pandemic has far-reaching implications for emergency administration and the power dynamics between the executive, the judiciary, and Congress. It also provides a critical opportunity to engage in a normative debate on the judiciary's role during crises.

This Article seeks to launch a more informed debate on the judicial review of emergency administration and temper legislative efforts to constrain the executive through congressional oversight. Contrary to popular opinion, judges use their review authority to enforce the APA's procedural safeguards. Judicial review under the APA thus plays a significant role in ensuring a balanced emergency administration that protects the nation and abides by the law.

Electronic copy available at: https://ssrn.com/abstract=4063950