Judicial Review and Emergency Powers

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Lindsay Wiley and Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 **Harv. L. Rev. Forum** __ (forthcoming, 2020), available at SSRN.

The coronavirus epidemic has raised urgent questions of constitutional rights and judicial review. In response to the pandemic, which has taken over 100,000 lives in the US and many more abroad, governments at all levels have enacted a host of policies that potentially threaten constitutional rights or butt against structural limits on government power. Numerous cases have been filed challenging some of these policies, arguing that they violate the Free Exercise of Religion and Free Speech clauses of First Amendment, the Second Amendment, constitutional protection for abortion rights, the Takings Clause, separation of powers principles, and other provisions of federal and state constitutions.How should we treat these claims? In particular, how should *courts* treat them?

In light of these questions, it's hard to imagine a more timely and relevant constitutional law article than Lindsay Wiley and Steve Vladeck's forthcoming article. In it, Wiley and Vladeck ask whether normal judicial review should be "suspended" during the ongoing pandemic.

In reviewing such challenges, should courts opt for "normal," relatively non-deferential judicial review? Or should they give the government broad deference, so long as there is a minimally plausible emergency rationale for the challenged policy? Wiley and Vladeck call the latter approach the "suspension model," and offer three powerful considerations that count against it.

First, they emphasize that the suspension idea implicitly assumes that the crisis will be temporary, with civil liberties and limitations on government power soon to be restored. But in reality, the crisis may go on for a long time, especially if no effective vaccine or treatment is developed for the disease. The seemingly "temporary" suspension could easily become a "new normal." The authors note that this is a special danger with the coronavirus crisis because it could easily last for a long time, and because restrictions on civil liberties—in the form of mandatory closure and "social distancing" measures—are "central" to the policy response to the crisis. Mass lockdowns that force millions of people to "shelter in place" and abjure most normal commercial and social interactions go far beyond anything seen in previous public health emergencies. The scale of restrictions on liberty makes it especially important to use judicial review to ensure they go no farther than necessary.

As the coronavirus crisis has developed over time, it has become clear that it might potentially involve multiple cycles of lockdowns and other restrictions on civil liberties. Even if initial emergency measures are loosened or lifted, they can potentially be reinstated later. That makes it all the more important to avoid assuming that the crisis is temporary and will end quickly. At this point, it is difficult or impossible to tell how long it might last.

Second, the suspension model is based on what they call "the oft-unsubstantiated assertion that 'ordinary' judicial review will be too harsh on government actions in a crisis—and could therefore undermine the efficacy of the government's response." Wiley and Vladeck contend that this assertion is unwarranted, and that most legitimate emergency measures can and do survive "ordinary" judicial scrutiny. The first wave of judicial decisions in the coronavirus cases suggests that Wiley and Vladeck

are right. Courts that have applied "normal" judicial review have either upheld the challenged measures, struck down only limited aspects of them (as with decisions protecting gun rights or requiring the government to permit "drive-in" church services if they permit similar secular services), or invalidated the measures on separation-of-powers grounds that allow the state to reenact them if the legislature chooses to do so. Maintaining normal judicial review reduces the risk of pretextual policies and helps ensure that even well-intentioned ones do not overreach.

Finally—and in the authors' view most importantly—the suspension model entirely fails to account for the importance of an independent judiciary in a crisis. The judiciary, they write, is "perhaps the only institution that is in any structural position to push back against potential overreaching by the local, state, or federal political branches." Emergency situations are precisely when government power is often most likely to be abused. Rigorous judicial review can help prevent constitutional rights against assertions of emergency powers whose necessity is dubious, and whose claimed rationales often pretextual.

As Wiley and Vladeck emphasize, there is a long history of abuses of emergency powers, often legitimized by an over-deferential judiciary. The 1944 *Korematsu* case, in which the Supreme Court upheld the internment of Japanese-Americans during World War II is a particularly notorious example, long seen as "overruled in the court of history," that the Supreme Court finally repudiated in 2018 as "gravely wrong the day it was decided."

In many countries around the world, authoritarian leaders are using the pandemic as an excuse to expand their power and crush dissent. Liberal democracy is more firmly entrenched in the US than in countries like Hungary, where Prime Minister Viktor Orban has exploited the crisis to consolidate authoritarian rule. But it would be naive to imagine we are immune from the tendency of governments to exploit crises for their benefit. To the contrary, we too have a long history of crises being used to undermine constitutional rights, subvert limits on government power, and target unpopular minorities. Those who fear (often with good reason) that Donald Trump and the GOP have significant authoritarian tendencies should be especially wary of assuming that coronavirus emergency measures should be exempt from normal judicial scrutiny.

But such concerns cut across party lines. Recent events have raised serious concerns about the extent to which some public officials—including liberal Democrats—will go easy on enforcing rules against mass gatherings or protests when they agree with the cause they espouse, while condemning others. In some areas, officials who were quick to enforce restrictions against anti-lockdown protestors and religious gatherings have been unwilling to do so when it comes to recent protests against police brutality and racism – sometimes even openly supporting the latter. While the latter protests address a worthy cause, it is dangerous for the government's reactions to mass gatherings to be dictated by the viewpoints those gatherings support.

Indeed, the genuinely severe nature of the current health crisis may actually make the threat of exploitation even greater, as the severity of the danger makes Americans more willing to sacrifice constitutional rights to address it, and less likely to closely scrutinize government actions enacted in response.

One standard critique of non-deferential judicial review in such situations is that judges may lack the specialized expertise needed to assess emergency policy. Few if any judges have expertise in epidemiology or public health. But anti-coronavirus policies are, in most cases, enacted by politicians who themselves are not experts. They can, of course, rely on advice provided by such experts. But the same is true of judges exercising the power of judicial review, who routinely consider testimony and other evidence submitted by scientists and other experts of various kinds.

If the government's policies really are based on strong scientific evidence, then they should be able to prove that in court, without any special judicial deference. Wiley and Vladeck rightly point out that robust judicial review can actually incentivize the government to improve the quality of the evidence it relies on, to provide greater specificity in its explanations of the purposes restrictions on civil liberties are intended to achieve, and to take greater care to ensure that those restrictions do not go too far.

If lack of technical expertise were a justification for suspending normal judicial review, it would apply to a vast range of cases, not just challenges to public health policies. The same rationale can be (and often is) used to justify broad deference in the fields of immigration, national security policy, and almost any other government action that addresses a complex issue. In many of these fields too, the government can and does claim that its constitutionally questionable policies are necessary to save lives, and that those policies are based on specialized expertise that courts are not qualified to assess. (I explain in greater detail why such arguments for special deference should be rejected here.)

The emergency argument for judicial deference should be distinguished from claims that some constitutional rights claims are just generally wrong, or that the right in question generally deserves little judicial protection. Many conservatives, for example, take that view of abortion rights, and many on the left have a similar view when it comes to gun rights. If you believe that gun rights claims or abortion rights claims are wrong irrespective of whether there is a public health emergency going on, then by all means make that argument. But we should resist the temptation to argue that rights claims we dislike should be excluded from normal judicial review because of the need to defer to the government's judgment in emergency situations. The same rationale can easily be used to gut judicial protection for rights you *do* care about, especially in a society where judges and government officials have diverse views. Those who live by the sword of special deference in emergency situations can all too easily die by it.

One notable issue that Wiley and Vladeck do not consider is the changing ideological valence of arguments for the "suspension" model they criticize. During the Cold War and the War on Terror, it was primarily conservatives who argued for special deference based on the existence of an emergency situation and the government's supposed possession of specialized expertise. Liberals viewed such claims with great skepticism. With a few exceptions (such as challenges to restrictions on abortion), left and right have almost completely changed places when it comes to legal challenges to coronavirus emergency measures. In this context, much of the left accepts arguments for judicial deference that they vehemently rejected when it comes to national security threats; the right has gone in the opposite direction. Wiley and Vladeck are unusual in maintaining a consistent stance on judicial review during both sets of emergencies. Future research should consider why such consistency is rare.

Wiley and Vladeck's analysis does not by itself tell us how any particular legal challenge to coronavirus emergency measures should be resolved. But they do explain why courts should not abjure normal judicial review in favor of the suspension model. That insight is essential for as long as this crisis lasts—and will be valuable for future emergencies, as well. Sadly, this one is unlikely to be the last.

Parts of this piece are adapted from a post *at the* Volokh Conspiracy *law and politics blog, affiliated with* Reason.

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