

The Privilege of Persuasion: Reconciling Pandemic-Era CDC Publicity with Democratic Ideals

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AUTHOR NOTE:

I write this Note with solemn respect for the millions of people the COVID-19 pandemic has harmed and killed—and those who protected millions more. My objectives are to make a useful contribution to an avalanche of pandemic-related legal scholarship and satisfy my own nonpartisan curiosity and concern about the ineluctable conflict between public health and civil liberties when so many lives are in jeopardy. Perfection was impossible under the circumstances. We all did our best.

INTRODUCTION

The outbreak of SARS-CoV-2 (hereinafter “COVID-19”) in 2020 is not without precedent; it is not even the nation’s first encounter with a coronavirus.¹ When confronted with an outbreak of a predecessor coronavirus in 2003, the United States applied “traditional . . . public health interventions,” including quarantining and contact tracing, to forestall a pandemic.² But because COVID-19 occupies an epidemiological sweet spot compared to the virus from 2003—COVID-19 is extremely transmissible, spreads asymptotically, and is survivable for the majority, yet it is crippling or lethal to a minority large enough to disrupt the

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¹ See generally Anthony King, *An Uncommon Cold*, 246 NEW SCIENTIST 32, 33–35 (2020) (discussing the 1889-90 “Russian flu,” which some modern virologists now believe was a coronavirus outbreak); Nancy Tomes, “Destroyer and Teacher”: *Managing the Masses During the 1918-1919 Influenza Pandemic*, 125 PUB. HEALTH REPS. 48, 49–58 (2010) (summarizing the United States’ public health response to the 1918 flu).

² David M. Bell, *Public Health Interventions and SARS Spread, 2003*, 10 EMERGING INFECTIOUS DISEASES 1900, 1900 (2004).

entire healthcare system—standard interventions were no match for what became the most challenging epidemic threat to the United States since the influenza pandemic of 1918.³

Tragically, COVID-19 coincided with several exacerbating factors, including not only the tenure of one of the most questionable presidential administrations in the nation’s history, but also one of the most contentious presidential campaigns and elections imaginable.⁴ Even under a perfect chief executive capable of bridging all partisan gaps, the American public health system, decentralized by design, would have struggled anyway.⁵ The Internet-driven splintering of the information ecosystem also prolonged and intensified the pandemic by rendering effective public health communication—which was already extremely difficult—virtually impossible.⁶

Part I of this Note will address the medical and political pressures that forced the federal Centers for Disease Control and Prevention (hereinafter “CDC”) into an active messaging role; it will then briefly introduce the structure and mechanics of federal communicable disease protections. Part I will also discuss the recurring conflict between public health and individual autonomy and recount the CDC’s attempts to send a clear message to the entire population through a muddled and fragmented information ecosystem.

Part II will discuss the federal Food and Drug Administration’s (hereinafter “FDA”) use of adverse publicity and analyze the CDC’s use of comparable messaging to drive compliance among its regulated parties—in the CDC’s case, all residents of the United States.

Part III will argue that the CDC has either intentionally or inadvertently

³ See Ben Hu et al., *Characteristics of SARS-CoV-2 and COVID-19*, 19 NATURE REV. MICROBIOLOGY 141, 151–52 (2021); Liz Mineo, *The Lesson is to Never Forget*, HARVARD GAZETTE 2, 4 (May 19, 2020), <https://perma.cc/6AEH-QJWG> (comparing COVID-19 with the 1918 flu).

⁴ C-SPAN, C-SPAN SURVEY OF PRESIDENTIAL LEADERSHIP (2021) <https://perma.cc/NKM4-N3CY> (ranking former President Trump as 41st out of 44 individual presidents, above only Pierce, Andrew Johnson, and Buchanan, according to nonpartisan historians assessing a variety of objective criteria); see Paul Ratner, *The Most Contentious Election in American History Happened in 1876*, BIG THINK 1–2 (Dec. 13, 2020), <https://perma.cc/297W-RARS> (suggesting that the 1876 election, which Rutherford Hayes won after a chaotic electoral vote count and despite losing the popular vote, was at least as contentious as the 2020 election; however, this article predates the insurrection attempt of January 6, 2021).

⁵ See 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*, 51 PUBLIUS 650, 654 (2021).

⁶ See Kate Starbird et al., *Misinformation, Crisis, and Public Health—Reviewing the Literature*, MEDIAWELL 5 (June 25, 2020), <https://perma.cc/XA2Z-KZN4>.

eluded critical balancing questions and due process concerns by publishing and publicizing nonbinding recommendations that wield even more autonomy-constraining force than notice-and-comment rulemaking while leaving the public with virtually no practical recourse against either substantive overreach (actions unauthorized by Congress) or procedural overreach (insufficient justification or explanation to affected parties). Part III will further argue that legal scholarship about the FDA's adverse publicity practices also applies to the CDC's pandemic-era messaging activities. Finally, Part III will explore potential remedies, such as reforming the CDC to formalize and add transparency to its publicity powers during an emergency, and consider potential implications for due process and civil liberties.

I. Background

A. *A History of Federal Communicable Disease Protections*

The federal government has protected the public from communicable diseases for nearly its entire existence.⁷ Today, the FDA and CDC share responsibilities for preventing infectious diseases under the Public Health Service Act of 1944 (hereinafter "PHSA"), which authorizes the United States Department of Health and Human Services (hereinafter "HHS") to exercise both foreign and interstate quarantine powers.⁸ The FDA's focus has since changed to approving vaccines and other direct medical interventions, while the CDC now administers non-pharmaceutical interventions such as quarantines.⁹

The CDC began in 1946 as the Communicable Disease Center, a branch of the Public Health Service (a precursor to HHS), and specialized in communicable disease response until it later broadened its mission by acquiring agencies in other specialties.¹⁰ The agency issued its first guidelines in 1957 in connection with the first influenza vaccine.¹¹ Since then,

⁷ James J. Misrahi, *The CDC's Communicable Disease Regulations: Striking the Balance Between Public Health & Individual Rights*, 67 EMORY L.J. 463, 464 (2018).

⁸ *Id.* at 464–65.

⁹ *See id.* at 466.

¹⁰ *Historical Perspectives History of CDC*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 28, 1996), <https://perma.cc/B9KF-TDLJ>.

¹¹ Standards Required for the Development of CDC Evidence-Based Guidelines, No. 1 MMWR 1 (CDC Jan. 2022).

in response to due process concerns connected with prior public health emergencies, the CDC has periodically revised its standards for developing and enacting public health advice.¹²

The current CDC is primarily a scientific institution and a resource for state- and local-level policymakers.¹³ It typically advises and supports legislative and administrative policies at the state and local levels instead of passing its own regulations.¹⁴ State health officials and policymakers have been free to reject CDC guidelines throughout the pandemic.¹⁵

The CDC uses the terms “guidelines” and “recommendations” interchangeably to refer to prescriptive public health communications that “are developed by a group of multidisciplinary stakeholders, use evidence from systematic reviews and expert judgment, and include an assessment of benefits and harms.”¹⁶ “Guidance,” not to be confused with guidelines, refers to “an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue.”¹⁷ The CDC issues both guidelines and guidance, but guidance is a formal process subject to oversight from federal entities such as the Office of Management and Budget.¹⁸ Despite the relative formality of guidance documents compared to informal guidelines, legal scholars have questioned whether guidance furnishes agencies with a “loophole” to sidestep

¹² See Naseem S. Miller, *How Does the CDC Develop its Guidelines? A New Report Sheds Some Light*, JOURNALIST’S RES. (Jan. 13, 2022), <https://perma.cc/369M-SH2Q>; Memorandum from Anne Schuchat, Principal Deputy Dir., CDC, to Rochelle P. Walensky, Dir., CDC, Summary of Guidance Review 1–8 (Mar. 10, 2021), <https://perma.cc/D3HQ-3RQV>.

¹³ See Denver Nicks, *The CDC Has Less Power Than You Think, and Likes It That Way*, TIME (Oct. 17, 2014, 1:12 PM EDT), <https://perma.cc/2D6J-QX2X> (discussing the limits of CDC’s role, illustrated by its response to the 2014 Ebola outbreak).

¹⁴ See *CDC Policy Process*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://perma.cc/F7SC-GNXY> (last updated Mar. 15, 2022).

¹⁵ E.g., Kassie McClung, *State Health Department Not Following CDC Guidelines Aimed to Get More People Tested for COVID-19*, FRONTIER (Mar. 12, 2020), <https://perma.cc/52A5-ND2S>; Cheryl Teh, *Florida’s Surgeon General Breaks with CDC Advice, Says the State Will Be the First to ‘Officially Recommend Against the COVID-19 Vaccine for Healthy Children’*, YAHOO! NEWS (Mar. 7, 2022), <https://perma.cc/WZ8G-5FXT>.

¹⁶ Guidelines and Recommendations: A CDC Primer, 3 (CDC July 2012), <https://perma.cc/B4SV-3D5C> [hereinafter A CDC Primer].

¹⁷ *Id.*; Connor N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 785 n. 1 (2010) (quoting Further Amendment to Executive Order 12866 on Regulatory Planning and Review, Exec. Order. No. 13,422, 3 C.F.R. 191, 192 (2007)).

¹⁸ A CDC Primer, *supra* note 16, at 3; see, e.g., *Guidance Documents*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://perma.cc/7H5H-H66K> (last visited Oct. 3, 2022).

accountability and public participation.¹⁹

Although they are legally little more than expert suggestions, CDC guidelines and recommendations can “unintentionally acquir[e] the force of policy” by lending direction and credibility to binding state and local rules.²⁰ Likewise, optional recommendations to state- and local-level officials “significantly influence decisions of businesses and customers alike with respect to whether to maintain lockdowns or social distancing even in the absence of mandatory requirements.”²¹

The PHSA authorizes the HHS—through the CDC and FDA—to issue regulations “‘necessary’ to prevent the foreign and interstate spread of communicable diseases.”²² During an active emergency, the PHSA empowers the CDC to indirectly protect public health with orders that would otherwise exceed the CDC’s mandate and expertise.²³ For instance, the PHSA authorized the CDC to enact an eviction moratorium early in the COVID-19 pandemic, even though eviction controls would normally lie far outside the CDC’s expertise or authority.²⁴ Even broader mandates, such as nationwide vaccine or mask requirements, arguably could fit within the CDC’s statutory authority under a broad reading of the PHSA, although Congress would likely need to amend the statute to ensure the mandates are constitutional and enforceable.²⁵

State and local governments are primarily responsible for protecting their constituents from public health emergencies; the federal government’s role is to supply funding, data, and policy recommendations when necessary.²⁶ Nevertheless, federal public health agencies, including the CDC and FDA, wield enormous influence over both state and local policymaking

¹⁹ Raso, *supra* note 17, at 785 n. 4 (citing, for instance, Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987)).

²⁰ A CDC Primer, *supra* note 16, at 5.

²¹ Emily Berman, *The Roles of the State and Federal Governments in a Pandemic*, 11 J. NAT’L SEC. L. & POL’Y 61, 76 (2020).

²² 42 U.S.C. § 264(a) (2002); WEN W. SHEN & CONG. RSCH. SERV., R46758: SCOPE OF CDC AUTHORITY UNDER SECTION 361 OF THE PUBLIC HEALTH SERVICE ACT (PHSA) 3 (2021), <https://perma.cc/TVJ6-ESFD>.

²³ See 42 U.S.C. § 264; SHEN & CONG. RSCH. SERV., *supra* note 22, at 3.

²⁴ SHEN & CONG. RSCH. SERV., *supra* note 22, at 3.

²⁵ *Id.* at 32.

²⁶ See Kelly J. Deere, *Governing by Executive Order During the Covid-19 Pandemic: Preliminary Observations Concerning the Proper Balance Between Executive Orders and More Formal Rule Making*, 86 MO. L. REV. 721, 730 (2021).

and public behavior, but only as long as they maintain credibility with regional officials and the public.²⁷ Trust is vital because public health agencies in representative democracies rely on voluntary compliance to implement even mandatory measures.²⁸ The CDC is singularly vulnerable to political and logistical challenges; for instance, because the CDC reports to HHS and is based in Atlanta instead of Washington, the executive branch can easily push the CDC to the sidelines, as the Trump administration did in 2020.²⁹ Following the transition to the Biden administration and the introduction of safe and effective vaccines, the CDC has resolved, with mixed results, to rebuild the credibility it lost because of political infighting in 2020.³⁰

The CDC's struggle against politicization exemplifies the conflict between a narrow view of public health, where experts "focus on the proximate health factors contributing to disease," and a broad view, where experts "consider the underlying societal causes of disease[] and even advocate to change them."³¹ The CDC initially purported to rise above political considerations as it formulated its guidance, but as the pandemic dragged on, the CDC began to implicitly factor politics into its guidance, even as it continued claiming an apolitical posture.³² Lacking the power to enforce any restrictions on public behavior or even compel states to share public health data, the current CDC's primary lever of emergency power is to influence public behavior through persuasion backed by scientific gravitas; however, out of concern that revealing its lack of direct power will damage its credibility among an already skeptical public, the CDC "sweep[s] the mess under science-y recommendations."³³ The public tends to notice anyway and the CDC squanders the same trust it had sought to preserve.³⁴

Case law from prior public health emergencies has acknowledged the intuitive yet commonly oversimplified conflict between private autonomy

²⁷ Lawrence O. Gostin et al., *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 94–95 (1999).

²⁸ Lindsay F. Wiley, *Democratizing the Law of Social Distancing*, 19 YALE J. HEALTH POL'Y L. & ETHICS 50, 59 (2020) (citing Gostin, *supra* note 27, at 94–95).

²⁹ Nicholas Florco, *The CDC Has Always Been an Apolitical Island. That's Left It Defenseless Against Trump*, STAT (July 13, 2020), <https://perma.cc/8JX2-LMSF>.

³⁰ Denise Chow, *CDC's Messaging Problem Highlights Pandemic's Uncertain Future*, NBC NEWS, <https://perma.cc/C9BJ-256V> (last updated Apr. 6, 2021, 8:56 PM EDT).

³¹ Tim Requarth, *We're Expecting the Wrong Things from the CDC*, SLATE (Mar. 21, 2022, 5:45 AM), <https://perma.cc/C7HE-V47Z>.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

and public health.³⁵ However, in the century since the last major American pandemic, Congress has become “less prescriptive in legislative actions, leaving states the ability to act with minimal coordination or guidance from Washington.”³⁶ In turn, when the current pandemic began, polarized state governments mounted a patchwork response as part of what some political scientists call “variable speed federalism,” in which states enacted public health measures based on their partisan alignment with, or opposition to, the Trump administration.³⁷ To respond at the necessary speed and scale, the CDC and other federal public health entities cannot always spare the time to coordinate with more than 50 state-level agencies or clear the regulatory hurdles of the Administrative Procedure Act (hereinafter “APA”); however, rather than even attempting to satisfy the APA’s laborious and political rulemaking process—a procedural system that would protect civil liberties at an unknown and likely excessive cost in lives and social disruption—federal public health agencies instead resorted to the “soft law” of recommendations, executive orders, and publicity.³⁸

Non-binding, persuasion-based policy responses helped the CDC work around either ineffective or malevolent leadership from the White House and pervasive misinformation and disinformation from countless media

³⁵ See *Jacobson v. Massachusetts*, 197 U.S. 11, 29, 39 (1905) (holding that a Massachusetts compulsory smallpox vaccination statute did not violate the Fourteenth Amendment; Justice Harlan famously wrote that individual liberties “may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand”); see also Samuel Reis-Dennis, *Understanding Autonomy: An Urgent Intervention*, 7 J. L. & BIOSCIENCES, June 2020, at 1, 7–8 (arguing that restrictions on autonomy, including isolation and quarantine, can be formulated to “express autonomy by reflecting our acknowledgment of the equal standing and rights of all rational agents”).

³⁶ Birkland et al., *supra* note 5, at 655.

³⁷ Birkland et al., *supra* note 5, at 655 (quoting Timothy J. Conlan & Paul L. Posner, *American Federalism in an Era of Partisan Polarization: The Intergovernmental Paradox of Obama’s ‘New Nationalism,’* 46 PUBLIUS 281, 299 (2016)).

³⁸ Deere, *supra* note 26, at 743, 789 (discussing state agencies’ use of guidance instead of regulations and proposing that states address COVID-19 by passing either regulations or, better yet, emergency authorization statutes); see *Glossary*, EUR. CTR. FOR CONST. & HUM. RTS., <https://perma.cc/4YLV-JDXC> (last accessed Oct. 3, 2022) (defining “soft law” as “agreements, principles and declarations that are not legally binding”); Jeremiah Williams et al., *Administrative Responses to a Global Pandemic: Emergency Rulemaking and Other Mechanisms Agencies Are Employing to Respond to COVID-19*, ROPES & GRAY LLP (May 26, 2020), <https://perma.cc/U75R-TFWR>.

channels.³⁹ Where reason fell short of persuading an adequate number of Americans to vaccinate and wear masks, CDC officials sometimes appealed to emotion (particularly fear) to secure voluntary compliance, an effort reminiscent of fear-based campaigns against tobacco consumption.⁴⁰ In fairness, there is little indication that the CDC either intended or was sufficiently coordinated to conduct a nefarious fear-mongering campaign.⁴¹ Still, nominally nonbinding messaging decisions enabled the CDC to assist in rapidly imposing new social norms of mask-wearing and social distancing to mitigate spread at a phase when public health officials still knew little about how harmful the virus was and whether it affected all demographic groups equally.⁴² Later in the pandemic, the CDC, through a spokesperson, noted that it was unwilling to publish much of its data on wastewater tracking and booster effectiveness in younger populations because it was concerned the public would misinterpret the data.⁴³

Right-wing opponents immediately pounced on the CDC for its lack of perfect candor, but even from a nonpartisan perspective, outside experts have questioned whether the CDC's stated justification for withholding data was valid.⁴⁴ With the luxuries of time and hindsight, it is clear that withholding public health information partially abrogates the right to freedom of expression and further erodes Americans' already deteriorating trust in authority.⁴⁵ Allowing federal public health agencies to decide which

³⁹ See Birkland et al., *supra* note 5, at 666; Deere, *supra* note 26, at 791.

⁴⁰ See Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*, 99 CORNELL L. REV. 513, 556–57 (2014) (arguing that the constitutional harm of emotional appeals is “because of undue burden on the speaker, not because they are emotionally powerful”); Marisa Fernandez, *CDC Director Warns of “Impending Doom” as COVID Cases Increase*, AXIOS (Mar. 29, 2021), <https://perma.cc/2H6P-5ENY>.

⁴¹ See Nicholas Florke, *CDC's Slow, Cautious Messaging on Covid-19 Seems Out of Step with the Moment, Public Health Experts Say*, STAT (May 11, 2021), <https://perma.cc/JG2H-S64X>.

⁴² See Victoria Smith & Alicia Wanless, *Unmasking the Truth: Public Health Experts, the Coronavirus, and the Raucous Marketplace of Ideas* 6 (Carnegie Endowment for Int'l Peace, Working Paper, July 2020), <https://perma.cc/SUQ4-BQK5>.

⁴³ Apoorva Mandavilli, *The C.D.C. Isn't Publishing Large Portions of the Covid Data It Collects*, N.Y. TIMES, <https://perma.cc/88DT-FXAF> (last updated Feb. 22, 2022).

⁴⁴ Leslie Eastman, *Experts Blast CDC for Failing to Publish Critical Covid-Related Data It Collected*, LEGAL INSURRECTION (Feb. 22, 2022, 5:00 PM), <https://perma.cc/J363-QSPM> (representing a far-right partisan response); Mandavilli, *supra* note 43 (representing neutral expert questioning).

⁴⁵ See *Covid-19 Triggers Wave of Free Speech Abuse*, HUM. RTS. WATCH (Feb. 11, 2021, 3:00 AM EST), <https://perma.cc/D43E-CMMQ> (detailing more extreme information suppression in Turkey, El Salvador, and Bangladesh, among other nations); *Trust in the Age of COVID-19: The Role of Governments, Businesses and UNICEF*, UNICEF (Apr. 7, 2021), <https://perma.cc/4AUS->

data the public can or cannot handle sets a questionable precedent with uncertain long-term effects.⁴⁶

B. *Pandemics Consistently Justify Extensive Constraints on Personal Autonomy and Historically Overpower Nearly All Due Process Challenges*

Courts are perhaps understandably hesitant to interfere with legislative and administrative discretion in an emergency.⁴⁷ Professor Robert Gatter refers to courts' emergency deference as the "rubber-stamp risk," defined as "the risk that fear or politics—operating under the cover of an emergency—determines our public health response . . . rather than the best available scientific evidence" and that "individuals are unnecessarily or even irrationally deprived of personal liberties."⁴⁸ Since a public health threat as unpredictable and lethal as the COVID-19 pandemic will always qualify as a state interest more compelling than civil liberties, a generalized due process test becomes little more than a turnstile.⁴⁹

C. *States are Primarily Responsible for Pandemic Response Under Their General Police Power and Rely on CDC and Other Federal Agencies for Data, Funding, and Policy Guidance*

As sovereign entities responsible for protecting the health and welfare of their citizens through their exercise of police power, states are "the central authorities in the nation's public health system."⁵⁰ All states, not to mention territories and federal districts, have their own sets of public health agencies and policies and coordinate multitudes of local and regional health

J3EN ("[U]ntil recently, the assumption was that those 'weaponizers' of fake news were largely outside actors What we have seen now is that misinformation is largely a home-grown phenomenon. As a result of this, people are worried that their government leaders are purposely misleading them.").

⁴⁶ See generally P. O'Malley et al., *Transparency During Public Health Emergencies: From Rhetoric to Reality*, 87 BULL. WORLD HEALTH ORG. 614, 614 (2009).

⁴⁷ See Robert Gatter, *Reviving Focused Scrutiny in the Constitutional Review of Public Health Measures*, 64 WASH. U. J.L. & POL'Y 151, 156–57 (2021).

⁴⁸ *Id.* at 157.

⁴⁹ See Wiley, *supra* note 28, at 56 ("In the early months, most judges were hesitant to second-guess executive decisions made under conditions of scientific uncertainty and great peril.").

⁵⁰ COMM. FOR THE STUDY OF THE FUTURE OF PUB. HEALTH, DIV. OF HEALTH CARE SERVS., INST. OF MED., *THE FUTURE OF PUBLIC HEALTH* 77 (1988), <https://perma.cc/9JK2-MAM2>.

organizations.⁵¹ Pandemic response measures vary by state and typically correlate with partisan alignment.⁵² As one might expect, Republican-led states such as Florida and Alabama tended to resist CDC-recommended mandates, while Democrat-led states such as California and Washington often met or even exceeded CDC recommendations.⁵³

The mere mention of state sovereignty typically invites comparisons to conservative anti-civil-rights activism in the 1950s and 1960s.⁵⁴ History provides ample evidence that states may take unsavory policy positions if the federal government does not preempt them; curiously, however, there is evidence that “federalism has been a content-neutral principle to which both liberals and conservatives have appealed.”⁵⁵ Until the day we revise or replace the Constitution, the United States is a collection of sovereigns entrusted to manage their own public health under their police powers.⁵⁶ For better or worse, public health must operate within the constraints of a decentralized federal system until the people, through their elected representatives, choose otherwise.⁵⁷

II. Importance

A. *The Content, Tone, and Stated Justifications for Nonbinding Messaging Suggest that Policymakers Distrust Their Constituents*

The pandemic has called into question whether fellow members of the public can be trusted to do what is best for themselves, let alone for democracy or the public good.⁵⁸ Federal agencies’ posture regarding the

⁵¹ PUB. HEALTH L. CTR. STATE AND LOCAL PUBLIC HEALTH: AN OVERVIEW OF REGULATORY AUTHORITY 1–3 (2015), <https://perma.cc/5S4C-EFYL>

⁵² See Tanya Lewis, *How the U.S. Pandemic Response Went Wrong—and What Went Right—During a Year of COVID*, SCI. AM. (Mar. 11, 2021), <https://perma.cc/DW69-DASW>.

⁵³ Jill Colvin & Lindsay Whitehurst, *CDC Mask Guidance Met with Hostility by Leading Republicans*, AOL (July 29, 2021, 5:57 AM), <https://perma.cc/NXW5-EM6Z>; Austin Jenkins, *Washington State’s Mask Mandate Will Lift March 12, Ahead of Schedule*, KUOW (Feb. 28, 2022, 11:04 AM), <https://perma.cc/Q6AN-343B> (observing that Washington maintained an indoor mask mandate until March 12, 2022).

⁵⁴ See Paul D. Moreno, “So Long As Our System Shall Exist”: Myth, History, and the New Federalism, 14 WM. & MARY BILL RTS. J. 711, 714–15 (2005); Ronald Brownstein, *Why ‘States’ Rights’ Are Having a Republican Revival*, CNN, <https://perma.cc/RXW5-U7KT> (last updated Jan. 25, 2022, 7:51 AM EST).

⁵⁵ Moreno, *supra* note 54, at 742.

⁵⁶ See Berman, *supra* note 21, at 62.

⁵⁷ See Berman, *supra* note 21, at 62–64.

⁵⁸ See generally Natalie Wolchover, *People Aren’t Smart Enough for Democracy to Flourish, Scientists Say*, NBC NEWS (Feb. 28, 2012, 2:24 PM EST), <https://perma.cc/3DA2-DE2X>.

public has also shifted toward defensiveness and well-meaning manipulation as policymakers have gradually lost faith in the capabilities of the individual.⁵⁹ Federal-level policy and messaging decisions throughout the pandemic indicate some disrespect for the reasonableness and capacity of the American people on average.⁶⁰ Any policy response entails both benefits (preserving public health and protecting vulnerable individuals) and costs (e.g., resources, business closures, and the social effects of masking).⁶¹ Certain commentators are so eager to influence behavior and combat what they perceive to be misinformation that they deny the existence of the balance between personal liberty and public health, even when they have winning arguments in favor of public health.⁶²

B. *The Federal Executive Branch Has Never Been More Capable of Preempting State and Local Responses to the Next Pandemic*

Long before the pandemic, congressional dysfunction forced the executive branch to confront major policy issues through unilateral executive action.⁶³ Inconsistent state policies have prompted some commentators to call for federal intervention.⁶⁴ An additional argument for federal control is that people living in less cautious jurisdictions—especially those with comorbidities and immunodeficiencies—are at greater risk

⁵⁹ See Alberto Alemanno & Alessandro Spina, *Nudging Legally: On the Checks and Balances of Behavioral Regulation*, 12 INT'L J. CONST. L. 429, 429–30 (2014) (“Behavioral research, by showing that individuals deviate in predictable ways from neoclassical assumptions of rationality, may . . . revolutionize the way in which policies are formulated and implemented.”).

⁶⁰ See W. Bradley Wendel, *Truthfulness and the Rule of Law*, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 795, 797 (2021) (“An asserted basis for an official action that is not supported by adequate and reliable evidence is not a reason addressed to others in virtue of their status as free, equal, and rational agents. Treating others with respect requires giving reasons that can be assessed for their empirical support as well as their normative attractiveness.”).

⁶¹ See, e.g., Manfred Spitzer, *Masked Education? The Benefits and Burdens of Wearing Face Masks in Schools During the Current Corona Pandemic*, SCIENCE DIRECT 1–6 (Sept. 2020), <https://perma.cc/YUH7-3HU5>.

⁶² E.g., Jean Kim, *The CDC Needs to Talk to Psychologists*, PSYCH. TODAY (May 19, 2021), <https://perma.cc/SYV4-CG3W> (“[M]asking was needlessly transformed into a controversy split down party lines—into a debate about personal liberty when it should have been viewed as a simple activity with high benefit, minimal expense, and practically zero harm.”).

⁶³ See Philip Wallach, *The Administrative State's Legitimacy Crisis*, CTR. FOR EFFECTIVE PUB. MGMT. AT BROOKINGS 18 (Apr. 2016), <https://perma.cc/K6SP-RHUQ>.

⁶⁴ SHEN & CONG. RSCH. SERV., *supra* note 22, at 32.

because of where they happen to live.⁶⁵ De facto federal preemption of pandemic response powers is more justifiable today than in 1918 because technology has reduced the administrative burden of federal control, which was one of the original rationales for federalism.⁶⁶

C. *Replacing Binding Regulations with Nonbinding Guidance Permits Unlimited, Unexplained, and Unaccountable Constraints on Personal Liberties Whenever More Formal Policymaking Appears Inconvenient*

As the pandemic shifts from an acute emergency to a chronic issue, state governments are reforming their emergency public health powers ahead of the next epidemiological disaster.⁶⁷ Compared to the federal emergency order, state emergency declarations already operate under more stringent safeguards, such as short-term time limits (subject to renewal as needed), narrow tailoring to compelling interests, and expedited judicial review.⁶⁸ However, state-level reforms have no effect on whether federal agencies' nonbinding policy opinions can continue to indirectly and indefinitely constrain individual autonomy by applying social pressure for intrusive public health interventions with no realistic prospect of recourse through notice-and-comment rulemaking or any other form of procedural due process.⁶⁹

As a result of the disarray at the highest levels of American government following the initial outbreak in March 2020, CDC guidelines became more influential than ever and placed the agency into a more "active role in the information contest" about COVID-19 at the risk of "mimicking the heavy-handed behavior of autocracies and creating the kind of rigidly controlled environment autocrats seek."⁷⁰ The federal government's early reversal on the effectiveness of universal masking demonstrated that public health

⁶⁵ Berman, *supra* note 21, at 78; Ralph Ellis, *Gap in COVID Deaths Growing Between Red, Blue Areas*, WEBMD (Nov. 9, 2021), <https://perma.cc/7ACE-C8L3>.

⁶⁶ See Wallach, *supra* note 63, at 2, 9.

⁶⁷ Wiley, *supra* note 28, at 57.

⁶⁸ See Nick Murray, *Scoring Emergency Executive Power in All 50 States (2022 Edition)*, ME. POL'Y INST. (Feb. 2022), <https://perma.cc/D49K-C2CG>.

⁶⁹ See Amanda Lamonica-Weier, *Which Way to Go? Coping with Whiplash from CDC Guidelines*, THE HILL (Jan. 13, 2022, 7:00 AM EST), <https://perma.cc/YLN3-NVG5>. But see Bethany Mandel, *Perspective: Don't Blame Governors for Treating Kids Like Criminals. It's the CDC*, DESERET NEWS (Sept. 20, 2021, 12:00 AM EDT), <https://perma.cc/F397-4237> ("The CDC . . . is strangely unaccountable to the American public. It can take months and ignore deadlines set by members of Congress asking about its scientific rationale.").

⁷⁰ Smith & Wanless, *supra* note 42 (quoting Laura Rosenberger, *Making Cyberspace Safe for Democracy*, FOREIGN AFFS. (May/June 2020), <https://perma.cc/64ZA-6DJV>).

messaging is not infallible.⁷¹ More concerning is the CDC's failure to timely adjust its messaging on droplet transmission of COVID-19; the agency only recognized aerosol transmission in May 2021, leaving state and local governments to invest limited resources in reliance on outdated information.⁷² More concerning still is the CDC's protracted reluctance to acknowledge that natural immunity from COVID-19—in other words, immunity derived from prior infection instead of a vaccine—exists at all.⁷³

The CDC understandably hesitated to permit natural immunity to appeal to Americans as an alternative to vaccination, especially since infection poses a much greater individual and collective threat than vaccination, and verifying prior infection is more challenging than verifying vaccination status.⁷⁴ Even though its decision to downplay natural immunity may save lives, that type of decision is a far-reaching policy choice for which the public has no recourse outside of the next presidential election and the next leadership change at the CDC.⁷⁵ The decision also exemplifies the view that the same people we trust to issue jury verdicts and choose presidents cannot be trusted to handle objective truth; this view ultimately perpetuates a stratification between those who are receptive to logical discourse and those who can be reached only through calculated messaging and appeals to emotion.⁷⁶

⁷¹ See Nur Ibrahim, *Did Anthony Fauci Say People No Longer Need to Wear Masks?*, SNOPE (June 12, 2020), <https://perma.cc/3FL2-FWNM> (noting that Dr. Fauci likely did not necessarily lie but could have better handled changes in expert consensus).

⁷² Claudia E. Haupt & Wendy E. Parmet, *Lethal Lies: Government Speech, Distorted Science, and the First Amendment*, U. ILL. L. REV. (forthcoming 2022) (manuscript at 109), <https://perma.cc/M24U-K8B7> (“Critically, there is no magic date when the agency’s actions morphed from innocent misrepresentations to negligent misrepresentations to lies. Nevertheless, the transformation was readily evident.”).

⁷³ See generally Arthur Allen, *COVID Immunity Through Infection or Vaccination: Are They Equal?*, POLITIFACT (Oct. 11, 2021), <https://perma.cc/GW48-DF4R>.

⁷⁴ See Tom Kertscher, *Nearly Half US Might Have ‘Natural Immunity’ from COVID-19, but Infection Brings High Risks*, POLITIFACT (Oct. 12, 2021), <https://perma.cc/Z7WE-LR9G>.

⁷⁵ See Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1749 (2009) (“If political accountability means accountability to the national majority, then presidential elections are too blunt an instrument to achieve it.”); Jennifer Block, *Vaccinating People Who Have Had COVID-19: Why Doesn’t Natural Immunity Count in the US?*, THE BMJ, <https://perma.cc/65QG-JECQ> (last updated Sept. 15, 2021).

⁷⁶ See generally Troy Campbell et al., *Persuasion in a “Post-Truth” World*, STAN. SOC. INNOVATION REV. (Jan. 25, 2017), <https://perma.cc/49WE-7ETV>.

ANALYSIS

III. Policy Communications That Indirectly Constrain Personal Liberties Should Be Reviewable Under the APA's Arbitrary-and-Capricious Standard, but the Best Approach Is to Prevent Unaccountable Constraints Using Safeguards Proposed for Adverse Publicity

Under the APA, only an “agency action,” defined as “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act,” is subject to judicial review.⁷⁷ To contest agency action in court, challengers must exhaust all remedies the agency provides, prove the complaint is “ripe for review,” and show that the agency action is “final” — that “the agency’s decision is the consummation of its decision-making process and determines a party’s legal rights or obligations, or otherwise has some legal consequence for the party.”⁷⁸ The APA’s definition of a “sanction” includes a “prohibition, requirement, limitation, or other condition affecting the freedom of a person” or “other compulsory or restrictive action.”⁷⁹ If adverse publicity fits the APA’s definition of “sanction,” then the publicity is arguably reviewable, although courts are consistently unwilling to intervene because publicity is virtually never a “final” action.⁸⁰

Because they are indirectly binding on the entire public, CDC recommendations should be subject to some form of notice, comment, and opportunity to be heard.⁸¹ As discussed above, CDC guidelines and recommendations indirectly dictate state, local, and private policy decisions.⁸² The CDC’s recommendations restricted individual freedom to make personal risk calculations such as whether to wear a mask—and arguably for good reason, considering the uncertain and deadly situation.⁸³

⁷⁷ 5 U.S.C. §§ 551(13), 704.

⁷⁸ Nathan Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, 2011 BYU L. REV. 1371, 1441–43.

⁷⁹ 5 U.S.C. § 551(10)(a), (g).

⁸⁰ See Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380, 1432 (1973); James T. O’Reilly, *The 411 on 515: How OIRA’s Expanded Information Roles in 2002 Will Impact Rulemaking and Agency Publicity Actions*, 54 ADMIN. L. REV. 835, 836 (2002).

⁸¹ See *CropLife Am. v. EPA*, 329 F.3d 876, 878–79 (D.C. Cir. 2003) (overturning the EPA’s attempt to impose a binding policy change through a press release instead of notice-and-comment rulemaking).

⁸² A CDC Primer, *supra* note 16, at 5.

⁸³ See Erik Gunn, *New COVID-19 Mask Guidelines Focus on Individual Judgment Over Mandates*,

Even if the CDC was justified in imposing restrictive guidelines, it should have openly acknowledged the costs and benefits of medical interventions, including universal masking.⁸⁴ Of course, trade-offs are easier to consider in a time of relative calm than in the middle of an accelerating outbreak.⁸⁵

Although the CDC did not issue adverse publicity against specific non-compliant parties, its policy opinions and related publicity (e.g., media appearances and quotes by senior officials) served as warnings to and about states, and private actors in those states, that were less careful about the pandemic than others.⁸⁶ The CDC's messaging was thus adverse to parties with conflicting views, especially as agreement or disagreement with CDC guidelines became a shibboleth for political alignment.⁸⁷ If CDC policy recommendations were treated as sanctions and final agency actions, they would be judicially reviewable under the APA's general cause of action for any party "adversely affected or aggrieved by agency action."⁸⁸ The recommendations would be reviewable for whether they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁸⁹ CDC recommendations could be deemed "final" agency actions because they are the organization's primary form of emergency

WIS. EXAM'R (Mar. 3, 2022, 6:15 AM), <https://perma.cc/5PCC-YZZ4> (quoting a Wisconsin public health official who observed that the relaxed March 2022 masking guidelines were "'a step away from where we've been in the past couple of years, where a lot of mask wearing decisions were made by governments and organizations'").

⁸⁴ See Leana S. Wen, *Opinion: In This Next Phase of the Pandemic, Beware of the Extremes*, WASH. POST (Feb. 8, 2022, 12:26 PM EST), <https://perma.cc/QHX3-Q3FB>.

⁸⁵ See Antony Davies & James R. Harrigan, *Coronavirus Shutdowns May Be Shortsighted | Opinion*, PHILA. INQUIRER, (Apr. 20, 2020), <https://perma.cc/5PPZ-8XLT>; Richard J. Tofel, *How Is America Still This Bad at Talking About the Pandemic?*, THE ATL. (Feb. 10, 2022), <https://perma.cc/952G-HN6N>.

⁸⁶ See, e.g., Rob Stein, *CDC Director's Warning of 'Impending Doom' Sparks Fear of Another Bad COVID-19 Surge*, NPR (Mar. 29, 2021, 4:06 PM EST), <https://perma.cc/F3S7-YTLB>; *CDC Director Warns of 'Pandemic of the Unvaccinated' Amid Rise in COVID Cases*, NBC CONN., <https://perma.cc/3QQE-CS5E> (last updated July 16, 2021, 3:42 PM EST).

⁸⁷ See Mugur V. Geana et al., *Walking the Party Line: The Growing Role of Political Ideology in Shaping Health Behavior in the United States*, POPULATION HEALTH 1–2 (Dec. 2021), <https://perma.cc/B9J6-V9NY>; Dan Diamond, *Trump Officials Interfered with CDC Reports on COVID-19*, POLITICO, <https://perma.cc/HT8J-KTFW> (last updated Sept. 12, 2020, 11:11 AM EDT) (highlighting the personal shame angle the CDC adopted under pressure from the prior presidential administration).

⁸⁸ 5 U.S.C. § 702 (2011).

⁸⁹ 5 U.S.C. § 706(2)(A) (2011).

policymaking and they leave the public with no practical means of public comment or challenge.⁹⁰

Despite justifiable concerns that lawsuits would delay and disrupt the public health system, judicial accountability is not categorically incompatible with a swift and effective emergency response.⁹¹ However, judicial review of CDC publicity under the APA is virtually impossible and may be inadvisable.⁹² In fast-evolving situations such as a pandemic, when fundamental facts about the threat are in flux, agencies may justifiably and reasonably act without full public explanation.⁹³ For situations such as these, Professor Adrian Vermeule proposes “thin rationality review,” which “posits that agencies are (merely) obliged to make decisions on the basis of reasons” and recognizes that “rational agencies may have good reason to decide in a manner that is inaccurate, nonrational, or arbitrary.”⁹⁴ Unlike the “hard look” doctrine the Supreme Court adopted in *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company*—which lower courts have incorrectly applied as a symbol of skepticism of agency rationality—thin rationality review first recognizes that agency decisions are bound by practical limits and then “asks what (nonideal) reasons agencies may have for acting inaccurately, nonrationally, or arbitrarily, in light of those limits.”⁹⁵

A. *There Is No Viable Cause of Action Against Nonbinding CDC Recommendations*

The COVID-19 pandemic sparked hundreds of due process challenges, most of which failed as courts hesitated or refused to intervene.⁹⁶ In reviewing the constitutionality of a range of policy interventions—including

⁹⁰ See A CDC Primer, *supra* note 16, at 4–6.

⁹¹ See Michael Barsa & David Dana, *Regulating During Emergencies*, 116 NW. U. L. REV. ONLINE 223, 240 (2021).

⁹² ADMIN. CONF. OF THE U.S., AGENCY PUBLICITY IN THE INTERNET ERA 105 (2015), <https://perma.cc/Q88U-T5KQ> (noting that while the D.C. Circuit has moved away from categorically denying review of agency publicity through a cause of action under the APA, very few cases acknowledge publicity as final agency action); see generally *Kaiser Aluminum & Chem. Corp. v. U.S. Consumer Prod. Safety Comm’n*, 414 F. Supp. 1047, 1062–63 (D. Del. 1976).

⁹³ ADRIAN VERMEULE, *LAW’S ABNEGATION* 133, 153–54 (2016).

⁹⁴ *Id.* at 156–57.

⁹⁵ *Id.* at 159–60. See generally *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

⁹⁶ *Wiley*, *supra* note 28, at 56–57; see, e.g., *Parker v. Wolf*, 506 F. Supp. 3d 271, 291 (M.D. Pa. 2020); *Antietam Battlefield KOA v. Hogan*, 501 F. Supp. 3d 339, 344–45 (D. Md. 2020); *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 877 (Pa. 2020).

business closures, quarantines, mask mandates, vaccine mandates, and travel restrictions—courts have consistently cited *Jacobson v. Massachusetts* for the proposition that “the state can restrict individual liberty to promote the common welfare” as long as there is a “reasonable fit” between the restriction and the state’s interest in protecting public health.⁹⁷ Early in the pandemic, courts generally concluded that the *Jacobson* test protects any policy with a “real and substantial relation” to public health.⁹⁸ These opinions relied on the pandemic’s severity and novelty to justify their near-complete deference to the executive branch.⁹⁹ But as the virus has become less deadly—partially because of improved medical interventions—and its novelty has worn away, courts have struggled to decide when and how to step back from emergency deference and give public health policy a harder look.¹⁰⁰ Even without the jurisprudential cover of the *Jacobson* doctrine, most state courts still would have declined to intervene in the pandemic response effort at such an early phase.¹⁰¹

Some recent decisions have rebounded from *Jacobson*’s deferential approach to apply the modern tiers of constitutional scrutiny.¹⁰² *Jacobson* itself predated the tiers of scrutiny but “essentially applied rational basis review.”¹⁰³ Although *Jacobson*’s continued relevance is in doubt, several courts have resolved to continue applying it until the Supreme Court explicitly overrules it.¹⁰⁴ Most due process claims, however, have targeted state and local policy interventions that are legally binding under the state

⁹⁷ Josh Blackman, *The Irrepressible Myth of Jacobson v. Massachusetts*, 70 BUFF. L. REV. 131, 169 (2022) (paraphrasing *Jacobson v. Massachusetts*, 197 U.S. 11, 30 (1905)); see, e.g., *Jones v. Cuomo*, 542 F. Supp. 3d 207, 216 (S.D.N.Y. 2021); *Delaney v. Baker*, 511 F. Supp. 3d 55, 60–61 (D. Mass. 2021).

⁹⁸ See Gatter, *supra* note 47, at 154 (citing *Bayley’s Campground Inc. v. Mills*, 463 F. Supp. 3d 22, 32 (D. Me. 2020) (“[T]he permissive *Jacobson* rule floats about in the air as a rubber stamp for all but the most absurd and egregious restrictions on constitutional liberties, free from the inconvenience of meaningful judicial review.”)).

⁹⁹ E.g., *Cassell v. Snyders*, 458 F. Supp. 3d 981, 993 (N.D. Ill. 2020).

¹⁰⁰ E.g., Blackman, *supra* note 97, at 245–46.

¹⁰¹ Blackman, *supra* note 97, at 268 (“Judges of all stripes have a natural tendency to exercise restraint in times of crisis.”).

¹⁰² E.g., *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70–71 (2021) (Gorsuch, J., concurring); *Andre-Rodney v. Hochul*, 569 F. Supp. 3d 128, 138 (N.D.N.Y. 2021).

¹⁰³ *Roman Cath. Diocese*, 141 S. Ct. at 70; *Andre-Rodney*, 569 F. Supp. 3d at 138.

¹⁰⁴ *Andre-Rodney*, 569 F. Supp. 3d at 138.

police power, rather than indirect and nonbinding federal messaging.¹⁰⁵

Public health officials' intentional or negligent misstatements may be actionable under a tort theory comparable to professional malpractice.¹⁰⁶ The reviewing court would judge the official's conduct compared to that of a reasonable official under the circumstances with the information available at that time.¹⁰⁷ By anchoring acceptable conduct to reasonableness under the circumstances, a reviewing court would avoid the "challenge . . . created by the incomplete and changing nature of scientific information," especially in the early months of a pandemic.¹⁰⁸ Whether public officials can or should be held liable for failure to provide information, akin to a legal professional's failure to warn a client, is an open question.¹⁰⁹

B. *Because Judicial Review Is Impractical, the CDC Should Adopt Internal Procedural Safeguards Proposed for the FDA's Use of Adverse Publicity Against Noncompliant Private Entities*

As administrative law scholars have acknowledged for generations, "most agency activity inevitably occurs behind the scenes and beyond the reach of the [APA]."¹¹⁰ As Congress delegates more rulemaking and quasi-legislative power to agencies, and as the notice-and-comment process becomes even more "ossified" with expensive and time-consuming procedural hurdles, agencies circumvent the APA in favor of faster, more efficient yet less democratic solutions.¹¹¹ Among the forms of circumvention is adverse publicity, which includes "affirmative measures taken by an agency which, by calling public attention to agency action, may adversely affect persons identified in the publicity," even if the agency did not intend to impose adverse effects.¹¹² Adverse publicity often imposes "deprivation . . . on the affected party, without articulated standards or safeguards."¹¹³ Adverse publicity helps agencies stretch their limited

¹⁰⁵ See Deere, *supra* note 26, at 744–45.

¹⁰⁶ Haupt & Parmet, *supra* note 72, at 126, 137.

¹⁰⁷ Haupt & Parmet, *supra* note 72, at 132.

¹⁰⁸ Haupt & Parmet, *supra* note 72, at 132–33.

¹⁰⁹ See Haupt & Parmet, *supra* note 72, at 133–34.

¹¹⁰ Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 874.

¹¹¹ Ronald A. Cass, *Rulemaking Then and Now: From Management to Lawmaking*, 28 GEO. MASON L. REV. 683, 705–07 (2021); see Barsa & Dana, *supra* note 91, at 227 ("Notice-and-comment requirements have been criticized as slowing agency responses to circumstances in the real world to the point that the requirements can contribute to the ossification of agency actions.").

¹¹² Gellhorn, *supra* note 80, at 1381.

¹¹³ Gellhorn, *supra* note 80, at 1381.

budgets, signal that the agencies are satisfying their legislative mandates, and avoid the time and trouble of judicial review.¹¹⁴ Since adverse publicity commentary emerged in the 1960s and 1970s, rapid changes in communication technology (i.e., the Internet) have exponentially increased publicity's speed and effectiveness, transforming mere information disclosure into "a supplement, sometimes even an alternative, to regulation" and a means of changing public behavior outside of existing protections against administrative overreach.¹¹⁵ Even before the Internet, affected parties were left with "usually no protection other than the common sense and good will of the administrator."¹¹⁶ Most agencies lack explicit statutory authority to release adverse publicity but can likely justify it as "necessary and proper" to fulfill their statutory missions.¹¹⁷ A pervasive issue with adverse publicity is that judicial review cannot "unring the bell" of harmful agency speech; the most obvious remedy, corrective publicity, is notoriously ineffective.¹¹⁸

Scholars and commentators have proposed an assortment of preemptive measures, such as internal procedures and standards, to ensure publicity is appropriate and accurate from the start and prevent irreparable harm.¹¹⁹ Although preemptive solutions would help, the COVID-19 pandemic proved that public health agencies will ditch procedural niceties that appear to conflict with their mission to protect American lives.¹²⁰ External accountability mechanisms—ideally including the threat of judicial scrutiny and adversarial cross-examination—are both a check on the agency's past and present use of the publicity power and a determinant of future agency behavior.¹²¹ Even the best internal policies are no substitute for accountability through judicial review and adversarial examination.¹²² At the same time, indirect policy recommendations "lack . . . coercive nature" and are "anomalous administrative acts" that are difficult for the judicial

¹¹⁴ Cortez, *supra* note 78, at 1379–80.

¹¹⁵ ADMIN. CONF. OF THE U.S., *supra* note 92, at 15.

¹¹⁶ Cortez, *supra* note 78, at 1383–84 (quoting Gellhorn, *supra* note 80, at 1420).

¹¹⁷ Cortez, *supra* note 78, at 1384–85.

¹¹⁸ Cortez, *supra* note 78, at 1387.

¹¹⁹ Cortez, *supra* note 78, at 1433.

¹²⁰ See Dylan Scott, *The Most Consistently Botched Part of the US Pandemic Response*, VOX (Jan. 14, 2022, 6:00 AM EST), <https://perma.cc/NWC2-N27D>.

¹²¹ Wendel, *supra* note 60, at 808–10 (arguing that the presence of an effective adversarial system deters arbitrary abuse (i.e., abuse) of power).

¹²² See Wendel, *supra* note 60, at 808–10.

branch to scrutinize without “a full understanding of the social context and of [the] *de facto* consequences” of the recommendations.¹²³

Adverse publicity can theoretically qualify for judicial review as both a sanction and an agency action when the content of a publicity campaign is “the consummation of [a] decision-making process that determined rights or obligations or from which legal consequences flowed.”¹²⁴ Here, although the messaging does not meet the typical definition of adverse publicity because the CDC does not target individual non-compliant entities, many of the legal contours of adverse publicity do fit CDC messaging.¹²⁵ As stated above, the CDC’s messaging activities have a socially binding and limiting effect on a public that lacks meaningful input or recourse.¹²⁶ The CDC’s policy guidelines resulted from decision-making processes at high levels—including the director of the CDC, the Secretary of HHS, and even the President of the United States—and set the parameters for imposing pervasive and costly obligations upon the entire American public.¹²⁷ Therefore, even though the CDC does not engage in “adverse” publicity, its messaging fits the adverse publicity schema because the CDC releases formal and informal communications that set parameters for binding legal obligations at the state and local levels and establish the CDC as such a scientific authority that it has no need to explain itself to the public it serves.¹²⁸

Standing is a practically insurmountable obstacle to judicial review of CDC messaging because it requires individual harm, which is hard for any putative party to prove because messaging and indirect policy recommendations are naturally amorphous and virtually never targeted toward individuals or specific entities.¹²⁹ Alternatively, a putative plaintiff

¹²³ Alemanno & Spina, *supra* note 59, at 452.

¹²⁴ See *Invention Submission Corp. v. Rogan*, 357 F.3d 452, 459 (4th Cir. 2004).

¹²⁵ Cf. Gellhorn, *supra* note 80, at 1381.

¹²⁶ See A CDC Primer, *supra* note 16, at 1; Gostin, *supra* note 27, at 94–95.

¹²⁷ See Erin Banco & Adam Cancryn, *CDC Weighs Updating Messaging Around Transmission and Masking*, POLITICO (Feb. 9, 2022, 2:33 PM EST), <https://perma.cc/GSM3-WP5N>.

¹²⁸ See Anders Esmark, *How Does Crisis Affect the Conflict Between Technocracy and Populism? Lessons From the COVID-19 Pandemic*, POLITICS, Oct. 2021, at 1, 13 (“Technocracy and populism are ultimately equally undemocratic, or at least democratically ambiguous. The former may be granted legitimacy more often than the latter, but technocracy nevertheless remains in fundamental conflict with democracy as well.”); Requarth, *supra* note 31. See generally A CDC Primer, *supra* note 16.

¹²⁹ See *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990); see also Yasmeeen Abutaleb et al., *‘The War Has Changed’: Internal CDC Document Urges New Messaging, Warns Delta Infections Likely*

could exhaust review options at the agency level or take advantage of a specific cause of action in the governing statute, but “[p]arties aggrieved by agency publicity need not exhaust administrative remedies because typically there are none.”¹³⁰ The effects of harmful agency publicity are so difficult to remediate that prevention is the best solution—if not the only solution.¹³¹

IV. Congress Should Reorganize the Federal Pandemic Response System to Enable a Swift, Effective, and Accountable Emergency Response That Also Respects Constituents’ Autonomy and Intelligence

The COVID-19 pandemic has demonstrated both the need and popular demand for a stronger and more coordinated federal public health agency.¹³² Public health experts at the National Academies of Sciences, Engineering, and Medicine are already proposing substantial regulatory reforms to the CDC and amendments to the PHSA, its governing statute.¹³³ The National Academies propose amending the PHSA to expand the measures available to the CDC on the condition that CDC leadership find such measures necessary to prevent international or interstate outbreaks.¹³⁴ Notably, the National Academies also call for “tethering the continued necessity of [CDC orders] . . . to the termination of the HHS secretary’s [public health emergency] determination”¹³⁵ Another proposed reform is for the CDC to promulgate rules “to clarify the scope and limits of its powers under Section 361(a) [of the PHSA].”¹³⁶

Reforms to nonbinding messaging should both codify and expand the

More Severe, WASH. POST (Jul. 29, 2021, 8:58 PM EDT), <https://perma.cc/B5LL-KXZ7> (illustrating the CDC’s broad approach to messaging).

¹³⁰ Cortez, *supra* note 78, at 1377.

¹³¹ See 3 JAMES T. O’REILLY, FEDERAL INFORMATION DISCLOSURE § 25:1 (2022) (“Beyond the ouster of criminal cases for egregious publicity, the government’s position is so strong that it leaves virtually no remedies for the aggrieved person who is injured by publicity.”).

¹³² See Jacqueline Salwa & Christopher T. Robertson, *The Need for a Strong and Stable Federal Public Health Agency Independent from Politicians*, in COVID-19 POLICY PLAYBOOK: LEGAL RECOMMENDATIONS FOR A SAFER, MORE EQUITABLE FUTURE 64–65 (Scott Burris et al., eds., 2021), <https://perma.cc/E2Q2-RTT7>.

¹³³ See NAT’L ACADS. OF SCIS., ENG’G, AND MED., IMPROVING THE CDC QUARANTINE STATION NETWORK’S RESPONSE TO EMERGING THREATS 190–94 (2022).

¹³⁴ *Id.* at 194–95.

¹³⁵ *Id.* at 195.

¹³⁶ *Id.* at 197.

CDC's current makeshift role as a policy template for state and local governments.¹³⁷ In addition to centralizing and formalizing the messaging function, a restructured CDC or successor agency could also expedite public notice, comment, and redress against any abuses of authority, thereby reducing the cost of accountability.¹³⁸ "Even where fundamental rights are not at stake, for an expert federal public health agency to have its decisions upheld, the questions will [include] . . . whether the agency exercised appropriate procedures (including allowing time for public comment) in making its decision."¹³⁹ Furthermore, instead of leaving the public no choice but to seek injunctive or monetary relief through the courts under the APA's general cause of action or under a tort theory of malpractice—lawsuits that, even if they could overcome the barriers of standing, ripeness, and redressability, would frustrate the agency's emergency response mission—the agency could institute its own expedited review mechanisms to obtain and secure public trust.¹⁴⁰

However, federal preemption of public health through a strong federal public health agency calls into question not only the propriety of federalism but also the American public's faith in its own collective competency to govern.¹⁴¹ The American political system—ideally, if not practically—rests on the belief and hope that members of the public are rational enough to handle decisions as crucial as whether to condemn their peers to criminal punishment in jury trials.¹⁴² Strong colonial juries, wielding the power to decide questions of both fact and law, resisted the heavy hand of King George III prior to the Revolution; in return, the federal government and the states enshrined jury trial rights in their constitutions.¹⁴³ Perhaps

¹³⁷ Salwa & Robertson, *supra* note 132, at 68 ("At a minimum, one could imagine a limited independent agency in charge of some of CDC's current functions, curating health statistics and making health recommendations, both to the public as to appropriate behaviors and to policymakers as to a united, and federal, plan of action.").

¹³⁸ See Salwa & Robertson, *supra* note 132, at 67.

¹³⁹ Salwa & Robertson, *supra* note 132, at 67.

¹⁴⁰ See Ed Yong, *The CDC's New Quarantine Rule Could Violate Civil Liberties*, THE ATL. (Dec. 30, 2016), <https://perma.cc/J986-QPKF> (discussing the CDC's failure to include "due process steps" in its expansion of quarantine powers in 2016 to prepare for a then-hypothetical future pandemic).

¹⁴¹ COMM. FOR THE STUDY OF THE FUTURE OF PUB. HEALTH, *supra* note 50, at 120–21.

¹⁴² See Shaun P. Martin, *Rationalizing the Irrational: The Treatment of Untenable Federal Civil Jury Verdicts*, 28 CREIGHTON L. REV. 683, 683 n.2 (1995).

¹⁴³ See Ryan Shymansky, Note, "The Great Bulwark of . . . Political Liberties": The Decline of Jury Power and the Rise of Slave Interests in the Early American Republic, 107 GEO. L.J. 1733, 1735–38 (2019).

disappointingly, juries in the early United States owed more of their strength to demographics than democratic idealism; these juries solely consisted of white male property owners who usually protected proprietary interests (e.g., slavery) against perceived government interference.¹⁴⁴ The decline of jury power and the deletion of juries' ability to hear questions of law were at least partially driven by the system's lack of trust in juries' reasonableness, but they also correlated with and were arguably caused by the gradual decline of the white, male, propertied elite as a percentage of the average venire and the elite's fear that more diverse and independent juries would dismantle slavery and enfranchise Black people one verdict at a time.¹⁴⁵ The unfortunate story of declining American jury power as it relates to the end of slavery is an illustration of how the political system's faith in individual competence can wax and wane depending on any number of factors aside from their competence.¹⁴⁶

For better or worse, as the nation has become more heterogeneous and the world more complex, academics and policymakers, as well as citizens themselves, have gradually questioned and eroded the founders' assumption that the public meets a basic threshold of rationality.¹⁴⁷ Economics and sociology teach that cognitive biases and information deficits limit individual rationality, preventing even intelligent and well-educated individuals from efficiently serving either the public interest or their own self-interest.¹⁴⁸ In a polarized era, left- and right-wing partisans are converging on a consensus that the public cannot be trusted to operate a representative democracy capable of solving the 21st century's mounting problems.¹⁴⁹

¹⁴⁴ *Id.* at 1756, 1756 n. 171.

¹⁴⁵ *See id.*

¹⁴⁶ *See* Frederick Schauer, *On The Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 170–172 (2006).

¹⁴⁷ *See* RonNell Andersen Jones & Lisa Grow Sun, *Freedom of the Press in Post-Truthism America*, 98 WASH. U. L. REV. 419, 436–37 (2020) (disputing the Supreme Court's assumption in First Amendment cases that press audiences are rational seekers of truth).

¹⁴⁸ *See* Martin Lodge & Kai Wegrich, *The Rationality Paradox of Nudge: Rational Tools of Government in a World of Bounded Rationality*, 38 LAW & POL'Y 250, 251–52 (2016).

¹⁴⁹ *See, e.g.*, Joseph H. Manson, *Right-Wing Authoritarianism, Left-Wing Authoritarianism, and Pandemic-Mitigation Authoritarianism*, PERSONALITY & INDIVIDUAL DIFFERENCES 1–2 (July 16, 2020), <https://perma.cc/4NME-9NUM>. *See generally* Thomas H. Costello et al., *Clarifying the Structure and Nature of Left-Wing Authoritarianism*, 122(1) J. PERSONALITY & SOC. PSYCH. 135

The inevitable debate between federalism and individual rationality resembles questions about due process and judicial accountability for behavioral science, which (as does modern public health) often substitutes individual autonomy for collective protection or gain.¹⁵⁰ Policy interventions informed by behavioral science work because their informality “is not a mere quality . . . but the strength or deliberate strategy deployed . . . to overcome the legal boundaries of [the agency’s] relationship with private parties.”¹⁵¹ The regulatory structure that eventually takes over the CDC’s current makeshift role should either respect and empower individual judgment or admit that modern policy challenges are too complex for founding-era autonomy and require a degree of paternalism—a concept under debate since at least the early 20th century.¹⁵²

Even if public health paternalism is justified and a classical sense of individual autonomy is outdated, the federal public health apparatus should explicitly say so and build a framework for some public input, rather than engaging in the “transparent subterfuges” of “justify[ing] the regulation of [behavior] in non-paternalistic terms.”¹⁵³ “It would be more honest—and in the long term more protective of public health—to acknowledge that intervention is sometimes necessary to protect individuals from their own foolish or dangerous [behavior] because such efforts can have a broad and enormous impact at a population level.”¹⁵⁴ At issue in this Note is not whether public health agencies should take drastic measures to protect public safety, but whether Americans deserve—or are even competent to receive—full explanations of those measures and honest opportunities to object.¹⁵⁵

While no nation has responded to COVID-19 perfectly, certain nations’ public health systems were more effective than the American system and more transparent and accountable to their people.¹⁵⁶ For instance, the United

(2022) (explaining how authoritarianism research has historically focused on right-wing authoritarianism, but present studies have shifted towards left-wing authoritarianism (LWA), finding many similarities between the two).

¹⁵⁰ See, e.g., Alemanno & Spina, *supra* note 59, at 446.

¹⁵¹ Alemanno & Spina, *supra* note 59, at 450.

¹⁵² See EDWARD L. BERNAYS, PROPAGANDA 13–18, 20 (1928); Ronald Bayer, *The Continuing Tensions Between Individual Rights and Public Health*, 8 EMBO REPS. 1099, 1102 (2007).

¹⁵³ See Bayer, *supra* note 152, at 1102.

¹⁵⁴ Bayer, *supra* note 152, at 1102.

¹⁵⁵ See Bayer, *supra* note 152, at 1102.

¹⁵⁶ See generally Luisa Enria et al., *Trust and Transparency in Times of Crisis: Results from an Online Survey During the First Wave (April 2020) of the COVID-19 Epidemic in the UK*, PLOS ONE (Feb. 16, 2021), <https://perma.cc/ADE7-9YA2>.

Kingdom's National Health Service, although it faces significant criticism for inefficiencies and underfunding, is a powerful central source for public health messaging and policy.¹⁵⁷ Nations with universal national health insurance, such as the United Kingdom and Canada, were better able to stage an integrated national response to COVID-19.¹⁵⁸ The United Kingdom also relies on its Scientific Advisory Group for Emergencies, a panel of public health advisors who release findings and disclosures relating to policy initiatives—even including behavioral science initiatives, which are typically surreptitious by design.¹⁵⁹ While the United Kingdom is not a perfect role model (it explicitly leaned on “emotive” and often fear-based messaging early in the pandemic and tends to rely on anonymous leaks to gauge public responses to pandemic measures), it presents useful lessons for revising the American public health system.¹⁶⁰

CONCLUSION

Federal policy messaging and recommendations will never be an ideal fit for judicial review. Court intervention is particularly unattainable and even undesirable in a fast-paced medical crisis where seemingly bulletproof understandings can change by the day. Nevertheless, an emergency is the ultimate test of our commitment to civil liberties. As shown by the reforms administrative law scholars have proposed for adverse publicity and behavioral science, as well as the public health systems of other developed nations, the United States could answer important due process concerns while still responding fast enough to save many thousands of lives. One of the most important features of the ideal public health system is a fundamental respect for the intelligence, agency, and democratic representation of the people whose liberty will inevitably sometimes yield to the greater good.

Fear and uncertainty during the COVID-19 pandemic, caused both by

¹⁵⁷ See Denis Campbell, *Years of Underfunding Leave NHS 'Woefully Short' for Covid Second Wave*, THE GUARDIAN, <https://perma.cc/4PU5-74VA> (last updated Nov. 5, 2020, 2:00 EST).

¹⁵⁸ See Tomes, *supra* note 1, at 61; Smith & Wanless, *supra* note 42 (discussing how the United Kingdom “rallied to unite the British public around” the national hospital system, while Canada, although it does have a national health insurance system, did not adopt the same messaging strategy).

¹⁵⁹ See Stuart Mills, *Coronavirus: How the UK Government Is Using [behavior]al Science*, THE CONVERSATION (Mar. 24, 2020, 12:23 PM EDT), <https://perma.cc/8W63-PUEA>.

¹⁶⁰ See Smith & Wanless, *supra* note 42.

the biological attributes of the virus and the sociopolitical conditions of the time, encouraged well-intentioned officials to adopt measures that jeopardized due process, expanded the role of the already-expanding administrative “branch” of government, and articulated an implicit conclusion that the classical notion of the rational individual is now obsolete. In light of COVID-19’s terrible cost to society, these actions and conclusions could have been correct. Nevertheless, if paternalistic measures and expanded federal control are the best ways to prevent or respond to the next pandemic, then the best solution is for Congress to pass a statute that provides both unambiguous authority and expedited procedures for notice, comment, and due process. And although any challenge to the expansion of administrative power (especially given legislative gridlock) is easy to stereotype as a right-wing talking point, the fact remains that observers from anywhere on the political spectrum should guard themselves against result-oriented or ends-justified reasoning and respect the public’s ability to understand high-quality information. Some percentage of the population will always need to be nudged, but there is still plenty of room to educate and empower those with the capacity to be educated and empowered.