

AGENCIES IN CRISIS? AN EXAMINATION OF STATE AND FEDERAL AGENCY EMERGENCY POWERS

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That state and federal agencies have emergency powers is well known. Much less is known about the process and circumstances under which these powers are exercised—subjects that divide scholars into two theoretical camps. Scholars on one side assert that ample agency discretion in time of need is not only desirable but is also laudable in the pursuit of efficiency and “deossification” of regulatory action. Scholars on the other side contend that emergency powers are so broadly granted, and representative procedure is so easily abandoned, that the inevitable result is agency unaccountability and aggrandizement. In response, this Article presents new empirical research that shows a startling rise in the actual use of federal emergency power (the “good cause” exemption) and extensive use by certain state agencies of their comparable emergency rulemaking powers. After conducting a novel and comprehensive normative analysis, this Article concludes by offering an approach to reharmonize the efficiency/public participation trade-off for emergency rulemaking at both the state and federal level: (1) to restrict federal agency emergency powers in language and structure and (2) to increase agency flexibility at the state level. Discussion of these proposals is particularly timely because the general level of emergency rulemaking has increased, and federal and state administrative agencies also must now gird themselves for an increased burden on agencies that regulate health insurance programs. In this arena in particular, the empirical evidence reveals intense tension between administrative efficiency, public participation, and a compelling need for an immediate rebalancing of these competing interests.

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INTRODUCTION

In the fall of 2010, the world watched as thirty-three exhausted and filthy men emerged from the dark depths of the Chilean mine in which they had been trapped for an unfathomable sixty-nine days. Their situation evoked a natural human empathy that prompted worldwide hopes for a quick, successful rescue. To comfort the families of the still trapped miners, Chilean President Sebastián Piñera boldly declared, “We’re going to look

for these men as if they were our own sons.”¹ The President immediately, personally, and with much praise—and great potential political risk—took charge of the miners’ rescue.² To find so admirable the singular takeover of the administrative state at such a crucial juncture is a revealing testimony to a political belief we perhaps all internalize—when there is imminent peril, the normal mode of agency decision making simply will not do. An emergency compels action, not procedural niceties.

But this need for action, the desire to achieve efficiency above all other objectives, is in diametric tension with the protracted processes of the administrative state. It is procedure, after all, that administrative law requires to comport with a uniquely American understanding of separation of powers and representative government. Under normal circumstances, a methodical procedure of public notice-and-comment precedes—and several opportunities for review follow—any agency rulemakings. What happens to representative democracy and government transparency when an agency can simply “opt out” of these procedural requirements in cases of emergency? As Carl Schmitt infamously noted, “Sovereign is he who decides on the exception.”³ There is a general public reluctance to permit an agency acting under a delegated authority to abandon the extensive checks on agency power that the Administrative Procedure Act⁴ (APA) and analogous state statutes have created. That public uneasiness may be distilled to the following sentiment: “Every dictatorship, it seems, begins with some sort of claim of crisis or emergency.”⁵ There is a balance that must be struck, even in time of emergency, between regulatory efficiency and the procedural safeguards created to protect representative government, curb agency overreach, and promote agency transparency. This Article examines that balance as embodied in the emergency rulemaking powers granted to federal and state agencies by their respective governing statutes.⁶

1. Tim Padgett, Anthony Esposito & Aaron Nelsen, *Time Person of the Year Runners-Up: The Chilean Miners*, TIME, Dec. 15, 2010, at 3.

2. Tim Padgett, *How the Miners’ Rescue Raised Up Chile’s President*, TIME (Nov. 7, 2010), available at <http://www.time.com/time/magazine/article/0,9171,2026923,00.html>; see also Peggy Noonan, *Viva Chile! They Left No Man Behind*, WALL ST. J., Oct. 16–17, 2010, at A17.

3. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., MIT Press 1985). Carl Schmitt was a leading German jurist and influential political thinker supportive of the Nazi Party.

4. 5 U.S.C. §§ 500–596 (2006).

5. Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1809 (2010).

6. The terms “emergency rulemaking power” and “emergency power” refer to the procedural power that both federal and state agencies are granted to respond quickly, without public participation, to a perceived emergency. In the federal arena this power is provided under 5 U.S.C. § 553(b)(3)(B) and is referred to as the “good cause” exemption. Each state has a parallel, if not precisely identical, procedural exemption.

The balance struck between efficiency and public participation in general rulemaking (not only emergency rulemaking) has been noted by several scholars. See, e.g., Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 101–02 (1998) (showing concern that an administrative regime shrouds “regulators from public scrutiny” and makes special interest regulation possible);

While several commentators have discussed the theoretical and historic balance of procedural restraint on agency powers, their scholarly discussion is largely untethered to the actual use and oversight of such powers.⁷ Even in October 2010, when the revisors of the Model State Administrative Procedure Act⁸ (Model State APA or MSAPA) addressed concerns over the definition of state agency emergency powers, they did so in the absence of statistical support or justification.⁹ This Article reopens the theoretical dialogue that surrounds agency emergency powers in the context of the original empirical findings presented. This more robust, contextual analysis reveals a startling rise in the use of the federal “good cause” exemption and extensive use by certain state agencies of their state emergency rulemaking options. If efficiency, transparency, and democratic restraint are of high public value, these findings represent potential and problematic imbalances in the inherent efficiency/public participation trade-off of these opt-out provisions.¹⁰

There is of course a theoretical aspect to this investigation, but there is also a crucial empirical component not previously explored. By uniting

M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1383–84 (2004) (discussing the extensive discretion—largely unregulated by courts—afforded to the typical administrative agency to select its own policymaking form); Edward Rubin, *It’s Time To Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 114 (2003) (arguing the need to reform the APA compromise struck between placing “restrictions” on the regulatory process and leaving the process unencumbered); Cass Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 227 (2006) (questioning the degree to which costly notice-and-comment rulemaking actually increases the quality of agency interpretations); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1123 (2009) (asserting that the APA’s “‘good cause’ is an open-ended standard that essentially delegates the issue to future decisions of agencies and judges”).

7. For example, as Cass Sunstein notes, the high tolerance for unabridged agency authority seen at the inception of the Great Society has waned in more recent years as “Congress has sought to impose greater control [including] increasing specificity in statutes; ‘agency-forcing’ in the form of timetables for agency action; various mechanisms of congressional oversight . . . ; [judicial review]; [and] statutes that set goals to be achieved instead of offering values to be balanced.” Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 478–79 (1987); see also David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2587 (2003).

8. See REVISED MODEL STATE ADMIN. PROCEDURE ACT § 309 (2010), available at http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa_final_10.pdf. The 2010 revision of the MSAPA was the first such effort since 1981.

9. *Id.* § 309 cmt.

10. The term “efficiency” in this context refers primarily to the speed and efficiency of the administrative process of rulemaking, not the efficiency of the rule that results from the process. There has been much commentary that the two are not necessarily synonymous and that “quick” rules are often “bad policy.” See Alden F. Abbott, *Case Studies on the Costs of Federal Statutory and Judicial Deadlines*, 39 ADMIN. L. REV. 467, 475–76 (1987) (remarking that the statutory deadline caused hasty and poorly crafted rules); Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703 (1999); M. Elizabeth Magill, *Congressional Control Over Agency Rulemaking: The Nutrition Labeling and Education Act’s Hammer Provisions*, 50 FOOD & DRUG L.J. 149, 150 (1995) (stating that the “hammer” statute, which made proposed regulations automatically final by their deadline date, caused the adoption of final rules before an agency was ready to issue them and resulted in neglect of other agency functions).

empiricism with doctrine and theory, this Article seeks to do three things. First, it looks at the dramatic and unexamined increase in the exercise of the “good cause” exemption—the APA provision that permits federal agencies to opt out of the normal rulemaking process.¹¹ Second, it explores how this shift evidences a potential and actual threat of agencies issuing rules with little review or oversight and no statutory expiration, thereby effectively, and perhaps permanently, circumventing tripartite restraints on agency power. Third, this Article examines the statutory language, structure, and use of similar opt-out emergency rules at the state level and considers the extent to which the state agency experiences highlight areas for needed legislative action and reform in both state and federal administrative procedure.

The empirical landscape and statutory analysis suggest that a rebalance of the efficiency/public participation trade-off is required at both the federal and state levels. Federal agencies presently exercise the “good cause” exemption with increasing and troubling frequency that indicates a casual disregard of public participation. In contrast, emergency power rulemaking at the state level is principally and recurrently exercised by a handful of agencies, which suggests that particular agencies struggle for greater efficiency. This Article advocates for three changes to both federal and state administrative procedure acts to reharmonize the efficiency/public participation trade-off in light of the modern demands on the regulatory state.

First, at the federal level, where the efficiency/public participation balance has tilted severely toward efficiency, constitutional restraint is well served if the current federal “good cause” exemption language is replaced by the “imminent peril” standard set forth in the Model State APA. The second change this Article advocates is structural reforms to the federal “good cause” exemption that (1) expressly limit the effective length of, and (2) increase the frequency of review for, emergency rules. Third, for the states that need increased flexibility and efficiency in particular areas, it is possible, and indeed desirable, to identify highly burdened agencies and to consider providing those agencies express authority to use emergency power to respond to specific situations (e.g., federal mandates) to increase agency efficiency.¹²

As to the first suggestion—a change to the language of the “good cause” exemption—this Article concludes that for federal agencies, the statutory language and structure of the “good cause” exemption is so broad, and effective review of agency action so low, that agency accountability and

11. All data used in the empirical analysis are public and were found by conducting a database search of the Federal Register on the Government Printing Office website (www.GPO.gov). *See infra* notes 42–43 and accompanying text.

12. This is consistent with the express provision suggested in the 2010 revision of the MSAPA. *See* REVISED MODEL STATE ADMIN. PROCEDURE ACT § 309 (providing for emergency power when there is “imminent peril” to public health and welfare “*or the loss of federal funding for an agency program*” (emphasis added)).

transparency are sacrificed.¹³ State agencies, however, appear constrained by statutory language and structure so that agency discretion to exercise emergency power is limited *ex ante*.¹⁴ The corollary to this *ex ante* limit on agency discretion is that the *need* for *ex post* review is concurrently lessened. This corollary consequence of the states' statutory construction is a much needed outcome for federal agency actions where review is currently limited, and increased review is costly and constitutionally complicated.¹⁵ Therefore, this Article advocates that the current, broad statutory language of the federal "good cause" exemption language be replaced by the more constraining "imminent peril" standard adopted by the majority of the states.¹⁶ In the analysis presented here, state agency emergency rulemaking procedures reveal that overall efficiency is not sacrificed, and constitutional restraint is well served under this narrow test.¹⁷ Under this proposal, those agencies that deal with well-defined, limited "emergencies" would still have the emergency rulemaking option, but an agency that addresses a longstanding "crisis" or nonemergent threat would be funneled to more transparent procedural avenues.¹⁸

13. In percentage terms, only about 1.5 percent of all emergency rules are judicially reviewed and of that percent reviewed, only 24 percent are found deficient. *See infra* note 49 and accompanying discussion; *see also infra* Part II.C.

14. The most common state emergency power standard is the "imminent peril" test. Under this test, courts and legislatures have held that the peril must be "emergent," not longstanding, and otherwise emphasize immediacy. *See, e.g.*, CONN. GEN. STAT. ANN. § 4-168 (West 2012); UTAH CODE ANN. § 63G-3-304 (LexisNexis 2012); WASH. REV. CODE § 34.05.350 (2011).

15. *See* discussion *infra* in Part II.C; *see also* 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, 1051–52 (2011) (discussing how the "various attempts to restrict or otherwise qualify the good cause exception indicate an awareness by . . . Congress that the language of Section 553(b)(B) is excessively broad and provides too much discretion to agencies"). *See generally* Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 ADMIN. L. REV. 113, 118 (1984) (noting that there are some situations where "public participation may be too costly or too destructive of the important values of efficiency and effectiveness").

16. *See* Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(B) (2006) ("good cause"); *see also, e.g.*, ALA. CODE § 41-22-5 (2011); CONN. GEN. STAT. ANN. § 4-168; GA. CODE ANN. § 50-13-4 (2011).

17. *See* discussion *supra* note 15. The federal APA does not contain distinct procedures for the promulgation of emergency rules, but rather allows an agency, in the absence of a controlling statute, to promulgate "emergency regulations" by dispensing with notice-and-comment requirements where the agency for good cause finds that notice and comment are impracticable, unnecessary, or contrary to the public interest. *See* discussion *supra* note 15.

18. This is consistent with what both the courts and authors of administrative law treatises envision for the "good cause" exemption in the first instance. *See* 2 AM. JUR. 2D *Administrative Law* § 184 (2012) ("The good-cause exception is essentially an emergency procedure, not an escape clause. It should be narrowly construed, and only reluctantly countenanced. Further, it is important to note that the agency bears the burden of demonstrating the grounds for good-cause."); Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1112 ("[S]ome of the most prominent and persistent calls for regulatory reform have tended to be procedural ones, including proposals to make agency decision-making procedures more transparent, politically responsive, and analytically rigorous.").

The second suggestion—changes to the statutory structure of the federal “good cause” exemption—also borrows from the states’ experience. All but nine of the fifty states place a time limit on the effectiveness of emergency rulemakings.¹⁹ This structure does not appear to harm state agencies’ efficiency and provides a significant benefit to principles of representative government. Along with a time limit, an additional *ex post* review mechanism is called for because so many federal emergency rulemakings escape all forms of review.²⁰ Specifically, this Article recommends a statutory trigger for review based on the frequency with which the “good cause” exemption is invoked by any particular agency. The empirical examination of the federal review process shows that current administrative, congressional, executive, and judicial review of emergency rulemaking powers are sharply outpaced by their exercise.²¹ Adding a frequency trigger would be a rough first step to increasing instances of review and creating an environment of agency restraint.

Finally, as previously stated, the state-level analysis points to specific agencies in need of greater emphasis on procedural “efficiency” to properly respond to public need and, in particular, federal mandates.²² As set forth below, statistical analysis of emergency rulemaking by category uncovers a potential proxy for agency inefficiencies or overburdening.²³ By examining the subject matter of the emergency rulemaking, it is possible to identify the events that most commonly trigger emergency rulemaking.²⁴ Once identified, a state can adjust procedures to expressly permit certain events, such as federal funding deadlines, or certain agencies (e.g., those that administer Medicaid) to use emergency power to increase efficiency and the speed of responsive regulation.

This Article is organized as follows. Part I provides a general overview of federal and state emergency powers. Part II presents a careful look at the theory, use, and review of federal agency “good cause” rulemaking.²⁵ Part III examines the state “imminent peril” test and compares it to the federal experience with the “good cause” rulemaking exemption. Part IV deconstructs the federal “good cause” statute and the states’ “imminent

19. Many states have emergency rulemaking provisions that are based on the 1961 MSAPA that includes a 120-day time limit. *See, e.g.*, ALA. CODE § 41-22-5; ALASKA STAT. § 44.62.260 (2011); GA. CODE ANN. § 50-13-4. The only state that expressly presumes emergency rule permanence as the default is Iowa. *See* IOWA CODE § 17A.4(3) (2011) (only certain categorical objections trigger a 180-day rule limit). *See generally infra* Part III.A.

20. The most extensive oversight of administrative rulemaking is reserved for “significant” rules. *See infra* Part II.C.3. A review trigger based on frequency would add another review dimension and limit an agency’s ability to “game” the review system by issuing dozens of “small” emergency rules rather than a single “significant” rule.

21. *See infra* Part III.C.

22. *See infra* Part II.D (discussing state Medicaid programs).

23. *See infra* Figure 3.

24. *See infra* note 53 (listing the nine subject matter categories that are considered for emergency rules).

25. As there is much similarity between the state and federal administrative procedure and review process, particular attention is paid to the federal construct.

peril” emergency statutes to uncover Congress’s and state legislators’ revealed preferences for agency efficiency versus public participation. The Article concludes with three proposals to rebalance the efficiency/public participation trade-off in both federal and state emergency power statutes.

I. AN OVERVIEW OF FEDERAL AND STATE EMERGENCY POWERS

To set the groundwork for analysis of emergency powers, this part begins with a description of the procedural norms for nonemergency rulemaking. It then takes empirical snapshots of the frequency of the use of emergency rulemaking by both federal and state agencies, respectively.

A. *The Procedural Norm for Rulemaking*

The federal APA sets out a formal process of rulemaking designed to accomplish the essential objectives of (1) superior agency-produced law, and (2) in some measure, “to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies.”²⁶ There is wide commentary that the regimented rulemaking process achieves the first, if not also the second, objective.²⁷ The federal rulemaking vetting process consists of a series of well-delineated steps.²⁸ First, an agency determines if a rule is required under its statutory mandate.²⁹ Next, the agency must craft a preliminary draft of a proposed rule, provide notice of the proposed rule, and invite comment by all interested parties.³⁰ Finally, the agency must read the

26. *Dia Navigation Co. v. Pomeroy*, 34 F.3d 1255, 1265 (3d Cir. 1994); see also ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 74 (2001) (claiming that administrative procedure must “fill in for the loss of democratic representation entailed by delegation of legislative power to [an] agency”).

27. See *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980) (stating that notice-and-comment rulemaking “reintroduc[es] public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies”); H.R. REP. NO. 79-1980, at 257 (1946) (explaining that the APA ensures that “the legislative functions of administrative agencies shall so far as possible be exercised only upon public participation”); David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 *YALE L.J.* 276, 304–05 (2010) (“It would seem inconsistent with both legislative intent and democratic theory to allow agencies to make such decisions without public input whenever they wish.”); Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 *MO. L. REV.* 695, 735 (2007) (“[I]ncreased public participation in agency decisionmaking is more democratic and increases the legitimacy of agency decisions and public trust in the agencies.”).

28. This formal type of rulemaking is often referred to as “direct-final rulemaking” or “notice-and-comment rulemaking.” VANESSA K. BURROWS & TODD GARVEY, *CONG. RESEARCH SERV.*, R41546, *A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW* 4 (2011), available at <http://www.wise-intern.org/orientation/documents/CRSRulemakingCB.pdf>.

29. This is a rather murky area of law that, for example, implicates a definition for what constitutes a “law” versus mere “guidance.” See, e.g., *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987). Such questions of jurisprudence are beyond the scope of this Article.

30. This phase of the process is the Notice of Inquiry or the Notice of Proposed Rulemaking. See *Administrative Procedure Act*, 5 U.S.C. § 553(c) (2006).

comments over a minimum time period of thirty days and, after due consideration, may issue a final rule to take effect upon publication in the federal register.³¹ All fifty states have adopted similar procedural rules that involve some form of public participation by notice and comment.³²

The rulemaking process is time consuming, expensive, and arduous.³³ From an agency's perspective, the decisional processes of rulemaking may seem a waste of time. In addition, the bar to agency action in the absence of a codified rule may appear an excessive restraint to the agency's ability to take responsive action.³⁴ Perhaps because of these constraints, agencies have increasingly availed themselves of alternatives to the APA notice-and-comment rulemaking described above.³⁵ There are exceptions to the default procedures that permit an agency to act, even if in a limited way, without the time and expense of the rulemaking process. These actions include agency issued guidance documents, policy statements, handbooks, and express exemptions to the rulemaking process such as the "good cause" exemption.³⁶ Indeed, so many exceptions to formal rulemaking exist that commentators express concern that the exceptions have swallowed the rules that provide for public notice and comment.³⁷ This is particularly true of federal emergency power use due to the permissive language of the "good cause" statute. In contrast to the expense and tedium of the notice-and-comment period, the "good cause" exemption is no doubt a tempting alternative to a fervent agency administrator.

31. *Id.* § 553(d).

32. *See, e.g.*, ALA. CODE § 41-22-5 (2011); ALASKA STAT. § 44.62.210 (2011); CONN. GEN. STAT. ANN. § 4-168 (West 2012); DEL. CODE ANN. tit. 29, § 10119 (2011); FLA. STAT. § 120.525 (2011); GA. CODE ANN. § 50-13-4 (2011); MONT. CODE ANN. § 2-4-303 (2011); N.H. REV. STAT. ANN. § 541-A:11 (2011); N.J. STAT. ANN. § 52:14B-3 (West 2011).

33. *See* Stephen M. Johnson, *Junking the "Junk Science" Law: Reforming the Information Quality Act*, 58 ADMIN. L. REV. 37, 61 (2006) (discussing how "[o]ver the past few decades, Congress, the courts, and the executive branch have layered so many significant procedural requirements on notice-and-comment rulemaking that most academics and policymakers agree that the process has become ossified and inefficient"); *see also* Jordan, *supra* note 15, at 176 (noting that "the Senate clearly expects agencies to strive to achieve more 'correct,' efficient rules in terms of costs imposed and benefits achieved"); Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60 (1995) (stating that numerous administrative law scholars have suggested that the overburdening rulemaking process has led "many agencies . . . to skirt the informal rulemaking process, turning far more frequently than in the past to methods for promulgating policies that are even less formal").

34. *Understanding Administrative Rules in Iowa State Government: Emergency Rulemaking Process*, IOWA.GOV, http://www.adminrules.iowa.gov/how_rules_work/emergency.html (last visited Apr. 19, 2013) [hereinafter *Iowa Emergency Rulemaking*].

35. *See* Connor N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782 (2010) (examining the rise in agency guidance documents).

36. *Id.* *See generally* 2 AM. JUR. 2D, *supra* note 18, § 181. The notice-and-comment rulemaking procedures do not apply to "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A); *see also* discussion *infra* note 78.

37. *See, e.g.*, Vermeule, *supra* note 6, at 1096, 1123.

B. An Empirical Snapshot of Emergency Power Use

As stated above, the empirical analysis looks at the circumstances under which, and measures the frequency with which, some state and federal administrative law agencies bypass the normal notice-and-comment rulemaking procedures to adopt “emergency regulations.” The data examined are culled from several reporting agencies in the federal government and in several states. The data analysis includes, among other things, (1) an examination of the growth or decrease in the use of emergency powers over time, (2) the conditions (e.g., agency identity, natural or man-made disaster, or emergency) under which emergency powers are most likely to be employed, (3) what procedural due process factors are in place, and (4) the method and frequency of review. Increased use of emergency rulemaking powers can reveal unreasonable legislative mandates, unreasonable administrative procedures, inefficient agencies, or possibly, agency overreach.

Commentators stress the efficiency imperative to justify agency exercise of emergency powers.³⁸ In essence, these authors accept that federal agencies in particular dispense with public participation requirements either when there is great need or when there is simple administrative clean up required. In either instance, commentators rarely stress that the cost to democratic principles is too great in light of the alleged efficiency gains.³⁹ The actual number of times public participation is sacrificed for agency efficiency reveals a troubling historical trend of which the scholarly commentary has not taken account. Although commentators have concluded that democratic principles are not jeopardized by agency use of emergency powers, they did so in a time period when emergency power was rarely exercised.⁴⁰ As recently as 1999, federal agency emergency rulemakings accounted for a small percentage of total rulemakings.⁴¹ But in 2001 there was a systemic shift in the use of emergency powers by federal agencies (Figure 1).⁴² That shift is not explained by a general rise in

38. Asimow, *supra* note 10, at 711 (“[A]gencies genuinely wish to adopt rules that are as effective, efficient, and widely accepted as possible.”); *see also* Jordan, *supra* note 15, at 176 (“[T]he Senate clearly expects agencies to strive to achieve more ‘correct’ efficient rules in terms of costs imposed and benefits achieved.”).

39. *See* Asimow, *supra* note 10, at 707 (stating that “[i]nterim-final rules can, where legally authorized, strike a pragmatic compromise between the costs and delays inherent in complying with the various statutory constraints on the rulemaking process and the public benefits that accrue from complying with those provisions”).

40. For example, Asimow examined with approval the use of emergency power rulemaking in 1998 when the use of the “good cause” exemption was at an average high of 3 percent. *Id.* at 714.

41. The exercise of federal agency emergency power in 1999 was at the five-year average high of 3 percent of total rulemakings. *See infra* Figure 2; *infra* notes 42–43 and accompanying text.

42. Note that data is accumulated from a search of the U.S. Government Printing Office website (www.GPO.gov), Collection of the Office of the Federal Register. *Catalog of U.S. Government Publications*, U.S. GOV’T PRINTING OFF., <http://catalog.gpo.gov/F?RN=701558022> (last visited Apr. 19, 2013) (search criteria: collection: FR “553(b)(B)”).

rulemaking but is rather specific to agency use of its self-determined, emergency power (Figure 2).⁴³ The exercise of federal agency rulemaking increased by three-fold in a span of two years.⁴⁴ That jump in federal agency emergency rulemakings has not only continued but has steadily increased over the past decade.⁴⁵ Assuming that the type of events that necessitate the use of emergency power is relatively constant over time, this increased use of emergency power simply represents a new and higher absolute level of agency rulemaking without public participation.⁴⁶

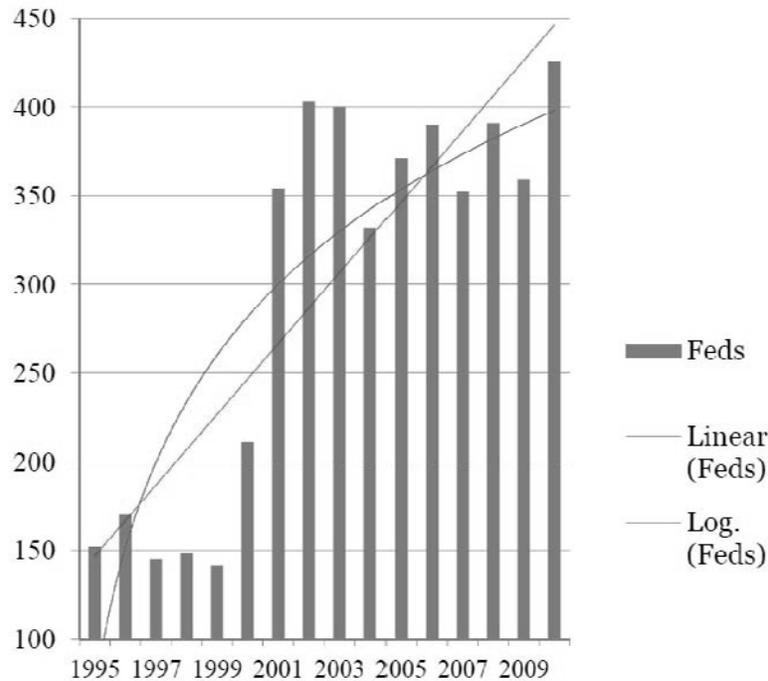
43. Data is accumulated from the U.S. Government Printing Office website (www.GPO.gov), Collection of the Office of the Federal Register, where the number of good cause regulations are compared with the total number of final regulations found on *Catalog of U.S. Government Publications*, *supra* note 42; see also Jeffrey S. Lubbers, *The Transformation of the U.S. Rulemaking Process—For Better or Worse*, 34 OHIO N.U. L. REV. 469, 473 (2008) (demonstrating the general decline in notice-and-comment rulemakings that indicate either “ossification of rulemaking or increased agency reluctance to use the APA’s rulemaking process”).

44. See *Catalog of U.S. Government Publications*, *supra* note 42.

45. The number of federal agency emergency rulemaking as a percentage of all rulemaking increased from 9 percent in 2001 to 13 percent in mid-2011. *Id.* As a point of comparison, federal emergency rulemakings comprised only an average of 3 percent of total rulemakings from 1995 to 1999. *Id.*

46. A cursory examination of the data does not reveal any discernible change in the “mix” of emergency power use (i.e., does the agency claim the power because formal rulemaking is (1) unnecessary; or (2) impracticable; or (3) “contrary to the public interest?”). It is difficult to ascertain which category the emergency rulemaking falls into, as many agencies simply claim that multiple exemptions apply. See *infra* note 82 and accompanying text (describing the interchangeable use of “impracticable” and “contrary to the public interest”). It can be assumed, however, that one of four states of reality exists: (1) the mix of emergency power rulemaking has remained constant and only the general level has increased; (2) there has been only an increase in uncontroversial, bureaucratic “clean up” required that does not warrant formal rulemaking; (3) there has been only an increase in the demands on agencies or events that make formal rulemaking “impracticable” or contrary to the public interest; or (4) some combination of states (2) and (3). In the time period of the study, there is no single event, intervening legislation, changes in reporting requirements, or change/increase in administrative procedure that would make any of these scenarios more likely than another. One potential event to explain a rise in federal emergency rulemaking is the 9/11 terrorist attack. However, the administrative state did not react en masse to these events until early in 2002 and cannot, therefore, explain the upward shift in 2001. See USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S. Code). Given that the increase in emergency powers occurred in a single year and has remained constant ever since, it is unlikely that a single event created an emergency to which all agencies reacted or, likewise, that all agencies suddenly engaged in more bureaucratic “clean up.” Therefore, the most likely states of reality are (1) and (4) described above. In short, there is a rise in the general level of emergency rulemaking with either (1) a constant “mix” of rationales or (2) a slightly different, but not significantly different, mix of rationales than set forth in prior years.

Figure 1: Federal Use of the “Good Cause” Exemption



Congressional, judicial, and executive oversight of emergency rulemaking has remained flat over time, which, given the expansive use of such powers at the federal level, means that emergency rulemaking is seldom reviewed.⁴⁷ Moreover, *if* reviewed, emergency rules are unlikely to be overturned. Judicial review, for example, is arguably inconsequential in the realm of emergency rulemaking. Between 1995 and 2011 the courts reviewed only seventy-four of the 4,986 federal “good cause” exemption rules.⁴⁸ Of the seventy-four reviewed, the court determined the exemption did not apply in only eighteen instances.⁴⁹ To put it differently, less than 0.4 percent of all emergency rules are found deficient.

State agencies provide a particular challenge to the empiricist. Data are often not forthcoming in easily accessible forums. Therefore, presented here is a sample set of the frequency of state agency emergency power use

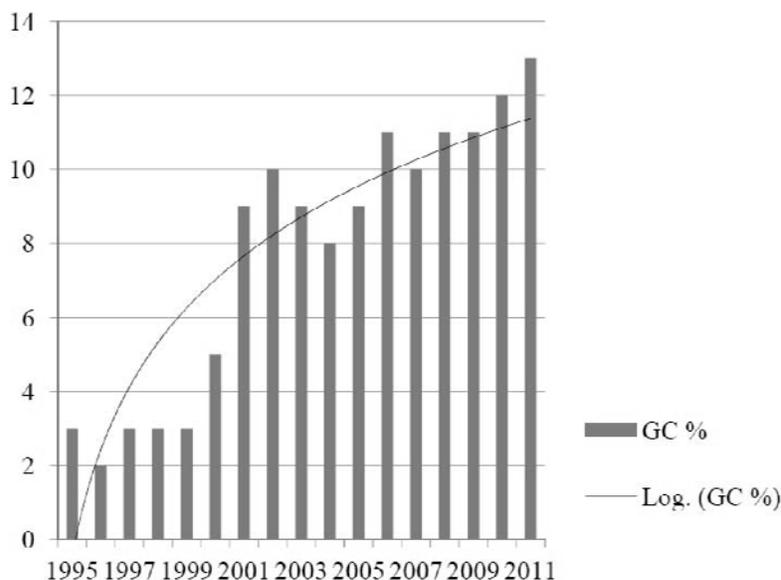
47. See OFF. INFO. & REG. AFF., EXECUTIVE OFF. PRESIDENT, www.reginfo.gov/public/ (last visited Apr. 19, 2013) (showing total pending actions under OIRA review).

48. List of cases is on file with the author.

49. In percentage terms, only about 1.5 percent of all emergency rules are judicially reviewed and of that 1.5 percent reviewed, only 24 percent are found deficient. List of cases is on file with the author.

gathered from those states reporting such data.⁵⁰ In general, it can be said that there is greater volatility in state agency use of emergency power than in federal agency use.⁵¹

Figure 2: “Good Cause” Rules As Percentage of All Federal Rules⁵²



Even with the limited data, it is possible to break down the state emergency rulemakings by type to observe which agencies (or subject matters) are most likely to necessitate the use of emergency powers.⁵³ The

50. Due to the concern expressed by administrators that agencies may underreport emergency rulemakings, the numbers reported here are likely to be skewed lower than the actual numbers.

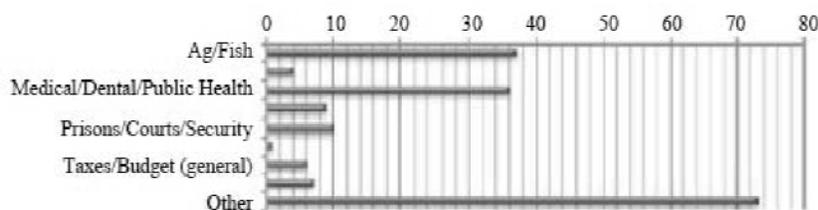
51. As the majority of the state data collected here begins after 2001, it is not possible to determine if there was a state rise in the level of emergency rulemakings parallel to the rise observed at the federal level.

52. Data for Figures 2 and 3 are gathered from the U.S. Government Printing Office website listed *supra* note 42. Two time trends are presented here to demonstrate the shift in frequency first observed in 2011. The straight line is a linear time trend and the curved line is a logarithmic time trend. In general, on a linear scale a change between two values is perceived as the *difference* between the values (e.g., a change from 1 to 2 is perceived as the same as a change from 4 to 5). On a logarithmic scale, in contrast, a change between two values is perceived as the *ratio* of the two values (e.g., a change from 1 to 2 is perceived as the same as a change from 4 to 8).

53. For this analysis, state emergency rulemakings are divided by type of rulemaking (rather than by enacting agency) into nine general categories: (1) agricultural and wildlife (does not include environmental protection rules); (2) financial industries and general insurance; (3) Medicaid, health insurance, and medical standards; (4) public schools

evidence is intriguing (e.g., Figure 3). The three top categories in 2011 by frequency of emergency rulemaking were “Ag/Fish,” “Other,” and “Medical/Dental/Public Health.”⁵⁴ The first two categories consist of a broad composite of agency actions. For example, the “Ag/Fish” category is used for such disparate issues as permitting pesticide use, opening fishing season, or increasing the limit for alligator hunting season.⁵⁵ The category “Other” is the catch-all category that includes such new regulations as clarification of voting machine use, administrative updates, and adjustments to the state lottery.⁵⁶

Figure 3: State’s Use of Emergency Power by Category—2011 Count



In contrast, the “Medical/Dental/Public Health” category is used intensively to respond to the singular requirements of Medicaid and other health insurance regulatory issues and deadlines. Therefore, Medicaid and health insurance issues are by far the single most likely subjects to require that public participation be sacrificed.⁵⁷ Of the seventeen states reporting data, *all* exercised emergency powers in connection to Medicaid and medical coverage. In the thirteen-year period of 1999 to 2011, the category of “Medicaid, Health Insurance and Medical Standards” was the second highest category for eight years.⁵⁸ By controlling only one statistical outlier, the Medicaid category rises to the number one spot in five of the thirteen years, and the number two spot in an additional four of the thirteen

(including school taxes); (5) prisons and the courts; (6) public utilities; (7) general taxes and the state budget; (8) environmental protection, and (9) all other categories.

54. See Figure 3.

55. The Ag/Fish category is perhaps the “poster child” for the need and effectiveness of an emergency power. The issues addressed are most often a result of natural phenomenon, are clearly “emergent,” and have natural termination dates. Under the proposed change of “good cause” to the “imminent peril” standard, such instances of emergency power use would be unaffected. See Figure 3; see also, e.g., CAL. OFFICE OF ADMIN LAW, NOTICE OF APPROVAL OF EMERGENCY REGULATORY ACTION (2011), available at http://www.oal.ca.gov/res/docs/pdf/emergency_postings/2011-0321-01E-Approved.pdf (establishing the opening date for ocean salmon sport fishing).

56. See, e.g., FLA. ADMIN. REG. & FLA. ADMIN. CODE, https://www.flrules.org/Gateway/View_notice.asp?id=8538054 (last visited Apr. 19, 2012).

57. See Figure 3. In fact, in many years Medicaid is the number one category of emergency rulemaking.

58. The number one category for this time period is “Other”—the catch-all category of the analysis.

years.⁵⁹ This statistical analysis of emergency rulemaking by type uncovers a potential proxy for agency inefficiency or overtaxing, indicating where customized procedural rules would benefit the public good. This is particularly needed in the area of health services at the state level—an area where agencies are tasked with an increasingly important role to implement the new health care legislation.⁶⁰

II. FEDERAL AGENCY EMERGENCY POWER

In the analysis of federal agency emergency power, two themes quickly surface. First, in contrast to the analogous state agency power, the language of the federal “good cause” statute provides for greater agency discretion.⁶¹ Second, the statutory structure of the federal “good cause” statute provides for no additional review and relies only on the *ex post* review permitted for general rulemaking.⁶² Again, as the state examples demonstrate, many states do provide for a variety of both *ex ante* and *ex post* review of emergency power.⁶³ This targeted review of emergency powers reflects an attitude that agency emergency power is an extraordinary power that requires additional safeguards.⁶⁴ This Article argues that the federal language and structure provides for too much agency discretion and little review in both theory and in practice. Although each branch of government has imposed various oversight regimes upon rulemaking, as described below, each regime is fraught with constitutional, political, and budgetary limitations. Although some changes to the federal review process may be helpful,⁶⁵ as the state example proves, the single best means to protect against an agency’s abuse of its emergency discretion is to limit it in the first instance.

A. Constitutional Issues and Administrative Safeguards

As the constitutional power to legislate is in the exclusive domain of Congress, an agency’s power to enact binding rules springs from the

59. The statistical outlier is the Florida state lottery. Unlike other states, the Florida lottery agency announces each new ticket type and issue—primarily by emergency rulemaking. *See, e.g.*, FLA. STAT. § 120.54(4) (2011).

60. For example, the new Patient Protection and Affordable Care Act of 2010 calls for extensive expansion of state Medicaid programs. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119, *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (codified as amended in scattered sections of the U.S. Code).

61. *See infra* Part II.B.

62. *See* Administrative Procedure Act, 5 U.S.C. § 706 (2006).

63. *See infra* Part III.

64. *See* MONT. CODE ANN. § 2-4-303 (2011) (“The sufficiency of the reasons for a finding of imminent peril to the public health, safety, or welfare is subject to judicial review upon petition by any person.”).

65. Indeed, such a recommendation is made here: add a frequency trigger to review. However, because of agency underreporting of rules, this review system will be limited in its effectiveness—as are all the review mechanisms currently in use.

delegation doctrine of legislative power.⁶⁶ The Supreme Court has repeatedly addressed, developed, and refined this doctrine to explain the degree and circumstances to which agencies may be constitutionally assigned legislative power. This complex and somewhat controversial doctrine is left to the Supreme Court's discussion in such well-known cases as *Crowell v. Benson*,⁶⁷ *Humphrey's Executor v. United States*,⁶⁸ and *Schechter Poultry v. United States*.⁶⁹ Once constitutionally delegated, the courts have instituted a tandem second step to legitimize the exercise of legislative power by an unrepresentative agency.⁷⁰ Specifically, courts have held that rulemaking must echo the democratic processes of Article I, and that the APA itself "serve[s] as a Congressionally mandated proxy for the procedures which Congress itself employs in fashioning its 'rules,' as it were, thereby insuring that agency 'rules' are also carefully crafted (with *democratic values served by public participation*) and developed only after assessment of relevant considerations."⁷¹

In this context, therefore, public participation is more than an expression of public values; it is a judicial requirement for the legitimization of a somewhat tenuous delegated authority. But at both federal and state levels, the extensive public participation procedures are set aside when an agency adopts "emergency regulations."⁷² In such situations the agency is

66. Article I defines legislative power and commits it to Congress. In addition to rulemaking, agencies also possess some delegated judicial and executive powers that flow from Article III and Article II, respectively. As this Article deals primarily with the rulemaking aspect of agencies, the most "legislative" of agency powers, the delegated Article I powers are the primary focus of discussion. See U.S. CONST. art. I.

67. 285 U.S. 22 (1932).

68. 295 U.S. 602 (1935).

69. 295 U.S. 495 (1935).

70. It should be noted that no amount of procedure can save improperly delegated legislative power. The binding of agency power by extensive procedure has legitimized agency rulemaking under a constitutionally delegated power. See *Whitman v. Am. Trucking Ass'n*, Inc., 531 U.S. 457, 472 (2001) ("We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute."); *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 576 (1939) (declaring that agency procedures "furnish protection against arbitrary use of properly delegated [legislative] authority," but they "cannot validate an unconstitutional delegation"). In *American Trucking*, the Supreme Court held that an overly broad delegation of power could not be "cure[d]" by the agency's narrow construction. See 531 U.S. at 472. In that case the Court reversed the D.C. Circuit, which had found the initial grant of power to the EPA under the Clean Air Act overly broad (but curable by agency constraint), by declaring the grant was not overly broad in the first instance. *Id.*

71. *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 951 (D.C. Cir. 1987) (Starr, J., concurring) (emphasis added); see also KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 219 (1969) (finding delegations unproblematic so long as administrative discretion is "guided by administrative rules adopted through procedure like that prescribed by the federal Administrative Procedure Act").

72. There are several ways to assure that public participation is meaningful. For example, a federal agency is required to issue a proposed rule and to put any statistical evidence, or other materials relied upon for the rule proposal, online for public view and comment. After the public notice and comment, the final adopted rule must be a logical outgrowth, or at least "substantially related" to the original proposed rule or else a second notice-and-comment period is required. Administrative Procedure Act, 5 U.S.C. §§ 552,

permitted to forgo the normal notice-and-comment period of rulemaking procedures. It is tautological to note, therefore, that since the notice-and-comment process in part legitimizes agency action, the use of the emergency power exemption in part decreases the legitimacy of agency action. While there may be times where streamlined rulemaking is necessary, the increased use of this opt-out power—achieved by short-circuiting administrative safeguards—raises significant concerns given the delegated nature of administrative authority.⁷³ Key to the analysis of the emergency power exemption, is how the legitimizing function of the public participation process is protected, and if need be, recaptured by statutory limitations, safeguards, and review of agency action. The following subsections examine in particular the federal “good cause” exemption and several federal oversight regimes. This analysis is provided not only to parse through the deficiencies of the federal “good cause” statute but also to serve as a backdrop to the corrective devices inherent in state emergency power procedures.

B. “Good Cause”

As stated, the default APA rulemaking requirements include a notice and public comment period of at least thirty days.⁷⁴ The “good cause” exemption is an express carve-out from standard rulemaking “when the agency for ‘good cause’ finds [that the notice and public comment procedures] are *impracticable, unnecessary, or contrary to the public interest.*”⁷⁵ The first attribute of this exemption is that the agency itself determines when, and with which justification, to invoke it.⁷⁶ The second

553(b)(3) (2006) (providing that the notice must advise of the potential content of a final rule by providing either a proposed rule or “a description of the subjects and issues involved.”); *see also* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 243 (1973) (stating that the notice must fairly advise of “exactly what” the agency proposed to do); 32 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 8173 (3d ed. 2008) (“[T]he final rule may be struck down if it strays too far from the proposed rule.”). Finally, agencies must read the comments made by the public during the notice-and-comment period. 2 AM. JUR. 2D, *supra* note 18, § 160 (“The notice-and-comment provision of the Federal Administrative Procedure Act has not been interpreted to require an agency to respond to every comment . . . [b]ut, an agency need respond only to those comments which . . . are relevant or significant.”).

73. *See, e.g.*, Hodel v. Va. Surface Mining & Reclamation Ass’n, 452 U.S. 264, 268 (1981) (stating that when the courts evaluate state and federal administrative acts, they must determine whether the relevant legislative body exceeded its powers and “transgressed affirmative limitations on the exercise of that power contained in the Fifth and Tenth Amendments”).

74. 5 U.S.C. § 553. Beyond the permissive circumvention of the notice-and-comment period, the APA “good cause” exemption has further consequences. For instance, it excuses an agency from compliance with the Regulatory Flexibility Act and the Unfunded Mandates Reform Act. *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601–612 (2006) (agency must assess impact of its new rule on small businesses); Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 658(a)–(g), 1501–1571 (2006) (agency must prepare a cost-benefit analysis for certain regulatory actions); *see also* Asimow, *supra* note 10, at 709.

75. 5 U.S.C. § 553(b)(3)(B) (emphasis added).

76. *See* SCHMITT, *supra* note 3, at 6–7.

attribute to note is the generality of the justifications permitted—in particular, the “contrary to public interest” standard. Again, as a theoretical matter, the combination of a permissive statutory standard with an agency-determined trigger increases the opportunity for agency overreach.⁷⁷

The specific language of the statute—“unnecessary,” “impracticable,” and “contrary to the public interest”—is somewhat framed by judicial review and administrative law definitions.⁷⁸ Notice and comment on proposed rules is often deemed “unnecessary” by agencies when the rules are technical, uncontroversial, and have little or no impact on regulated entities.⁷⁹ Examples of such “unnecessary” interim, or even final, rules are edits to prior rulemakings, corrections to text, or other practical housekeeping measures that do not warrant the expense of a comment period.⁸⁰ In contrast, “impracticable” has more substantive implication as it

77. The *Federal Procedure (Lawyers Edition)* guidelines describe the “good cause” exemption as “essentially an emergency procedure [that] should be narrowly construed.” 2 FEDERAL PROCEDURE, LAWYERS EDITION § 2:112 (2009). Moreover, the agency’s own finding of “good cause” is “not . . . binding on the courts” and ultimately the “agency bears the burden of demonstrating one of the grounds for ‘good cause.’” *Id.* In addition, the American Jurisprudence treatise cautions that

[t]he type of emergency situations which justify resort by the agency to the ‘good cause’ exemption . . . authorizes departures from the Federal APA’s requirements only when compliance would interfere with the agency’s ability to carry out its mission . . . [and] where the agency has been considering the problem addressed by the regulation ‘for some time,’ a court may conclude that no emergency exists and that normal rulemaking procedures can and should be followed.

AM. JUR. 2D, *supra* note 18, § 184. These are important words of guidance but, given the limited review of agency action, there is no disciplining agent to enforce them. For example, in accordance with these guidelines, emergency power is not the same as power to address a “serious problem.” There are many Americans, and perhaps agencies, that would characterize global warming and the Social Security program “crises” as “emergencies.” *See, e.g.,* John Shiffman & John Sullivan, *An Eroding Mission at EPA*, INQUIRER, Dec. 7, 2008, at A1 (decrying the inability of a bureaucrat to single-handedly dictate the production allocations for the U.S. domestic economy). Arguably, under the guidelines advocated by the Federal Procedure guidelines and the American Jurisprudence treatise, however, these situations are arguably “serious problems” that involve political decisions that are improper to address through the expediency of the emergency power exemption. It is exactly this type of overreach and expansive view of emergency power that is democratically problematic. *See generally* Roger D. Congleton, *The Political Economy of Crisis Management: Surprise, Urgency, and Mistakes in Political Decision Making*, 8 ADVANCES AUSTRIAN ECON. 183 (2005) (describing the distinction between crisis, emergency, and problem).

78. *See* Russell G. Donaldson, Annotation, *Exceptions Under 5 U.S.C.A. § 553(b)(A) and § 553(b)(B) to Notice Requirements of Administrative Procedure Act Rule Making Provisions*, 45 A.L.R. FED. § 2(b), at 12 (1979) (“Even though a particular type of rulemaking procedure might technically be exempt from the procedural requirements of 5 U.S.C. § 553, counsel should be aware that strong arguments can nevertheless be made for a judicial imposition of those requirements in particular instances.”).

79. *See* Michael A. Rosenhouse, *Construction and Application of Good Cause Exception to Notice and Comment Rulemaking Under Administrative Procedure Act (APA)*, 5 U.S.C.A. § 553(b)(B), 26 A.L.R. FED. 2D §§ 6–9, at 97 (2008) (discussing what makes notice and comment “unnecessary” within the meaning of the good cause exception); *see also* Nat’l Customs Brokers & Forwarders Ass’n of Am., Inc. v. United States, 59 F.3d 1219 (Fed. Cir. 1995); United States v. U.S. Trucking Corp., 317 F. Supp. 69 (S.D.N.Y. 1970).

80. *See* 2 AM. JUR. 2D, *supra* note 18, § 186 (stating that notice and opportunity to comment may be unnecessary if the agency is making only a minor or technical amendment

refers to a “situation in which the due and required execution of the agency functions would be unavoidably prevented by public rulemaking proceedings.”⁸¹ Some commentators note that the “contrary to public interest prong” is treated rather interchangeably with “impracticable.”⁸² And at least one author notes that the “contrary to public interest” prong may be “best applied” when an agency must take immediate action “to meet a serious health or safety problem, or some other risk of irreparable harm. . . .”⁸³ As a matter of statutory interpretation, however, there is no limitation on the undefined standard of “contrary to public interest,” and the prong arguably has a broad connotation that makes it most susceptible to abuse. Courts, cognizant of the exceptional nature of the emergency power and its potential to facilitate agency aggrandizement, maintain that they will construe the entire “good cause” exemption narrowly.⁸⁴ As a practical matter, however, given the dearth of review, this judicial admonition is arguably irrelevant.⁸⁵

There is an opportunity for the agency itself to “recapture” the benefits of public participation by inviting postenactment notice and comment. When a “good cause” exemption is evoked, what is issued most often is an “interim-final rule.” At this point, agencies may voluntarily request comments after the rule becomes effective.⁸⁶ The rule is therefore “interim” in that it may be reconsidered in light of comments and “final” in that it goes into effect immediately. The Administrative Conference of the United States has recommended (but cannot require) that the “interim-final” method, as opposed to a “final-final” method, be used for rules expedited by the “impracticable” and “public interest” tests.⁸⁷ Although many agencies have adopted a policy that permits after-enactment public

to its rules which does not affect the public interest); *see, e.g.*, *Nat'l Nutritional Foods Ass'n v. Kennedy*, 572 F.2d 377 (2d Cir. 1978).

81. 2 AM. JUR. 2D, *supra* note 18, § 185 (“[W]hile time constraints, imminence of a deadline, or the urgent need for agency action are factors to be considered, they are inadequate justification to invoke the good-cause exemption, especially when it would have been possible to comply with [a] statutory deadline.”); *see also* *Levesque v. Block*, 723 F.2d 175 (1st Cir. 1983); *Natural Res. Def. Council, Inc. v. EPA*, 683 F.2d 752 (3d Cir. 1982).

82. 73 C.J.S. *Public Administrative Law and Procedure* § 189 (2004) (noting that “public interest” supplements the terms “impracticable” or “unnecessary”); *ACLU of N.J., Inc. v. Cnty. of Hudson*, 799 A.2d 629 (N.J. Super. Ct. App. Div. 2002) (discussing federal law).

83. MICHAEL ASIMOW & RONALD M. LEVIN, *STATE AND FEDERAL ADMINISTRATIVE LAW* 308–09 (3d ed. 2009); *see, e.g.*, *Haw. Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995) (safety rule adopted to counteract the rise in helicopter accidents); *N. Arapahoe Tribe v. Hodel*, 808 F.2d 741, 750–52 (10th Cir. 1987) (noting the need for hunting regulations mid-season when herds might be overhunted to extinction); *cf.* *Action on Smoking and Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 801–02 (D.C. Cir. 1983) (noting that even if current rule is confusing and difficult to enforce, it does not support a “good cause” to replace it without prior notice).

84. *See Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749 (D.C. Cir. 2001).

85. *See supra* Part I, Figures 1–3 & accompanying discussion.

86. *See* Adoption of Recommendation 95-4, 60 Fed. Reg. 43,110 (Aug. 18, 1995).

87. *See id.*

comment on interim-final rules, one finding showed that nearly half of the interim-final rules enacted remained unrevised after three years.⁸⁸

*C. Policing Aggrandizement: The Difficulty and Paucity of
Review of Agency Discretion*

To safeguard against agency aggrandizement, several policing methods have been consistently employed. The following discussion breaks down these methods by virtue of the status of the overseer—(1) Congress, (2) the Judiciary, and (3) the Executive.

1. Congressional Review

The concern attributed to potential or perceived overreach of federal agencies' delegated authority is almost cyclical over time. Distress over agency overreach has waxed and waned and has generally mirrored the countervailing concern for agency efficiency and expediency. In the depths of the Great Depression, for example, social reformers claimed that "the system of separated functions prevented the government from reacting flexibly and rapidly to stabilize the economy."⁸⁹ At the dawn of the New Deal, this predominant focus on the efficiency of agencies and their ability to bypass the encumbrances of tripartite government was a structural goal for agency governance.⁹⁰ Not only was there no concern of agency overreach, but there also was an active preference for agency action untethered to oversight from the other branches of government.⁹¹ In this era, Congress established broad or minimal guidelines to limit administrative discretion.⁹²

But congressional comfort with the liberal delegation of its own legislative role has waned in more recent years.⁹³ The general lack of congressional oversight of all rulemaking—not only "good cause" rulemaking—coupled with a rise in both the volume and complexity of federal programs, led Congress itself to note that "many have complained that Congress has effectively abdicated its constitutional role as the national

88. See Asimow, *supra* note 10, at 736–37.

89. Sunstein, *supra* note 7, at 424.

90. *Id.* at 424–25.

91. The Iowa legislature has summarized these concerns in the introduction to its own emergency rulemaking procedures. *Iowa Emergency Rulemaking*, *supra* note 34. "The standard rulemaking process can take [between 108 days or longer than 6 months]. Such delays can hamstring an agency's ability to swiftly react to emergency situations. (The ability to respond swiftly . . . was a major reason why agency rulemaking was initially created)." *Id.*

92. See Sunstein, *supra* note 7, at 478. An example of such a statute would require an agency protect citizens against "unfairness." *Id.*; see, e.g., Communications Act of 1934, 47 U.S.C. § 548 (2006) (compelling the FCC to promote the "public interest").

93. The 112th Congress has had twenty-two bills introduced in the House and Senate that address regulatory reform. Among these measures is H.R. 214, which seeks to create a Congressional Office of Regulatory Analysis. See CURTIS W. COPELAND, CONG. RESEARCH SERV., R41834, REGULATORY REFORM LEGISLATION IN THE 112TH CONGRESS 25–26 (2011).

legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments In many cases, this criticism is well founded.”⁹⁴

Congress has expressed its concern for increased agency oversight in many ways. For example, Congress has increased exertion of control by imposing express, statutory limits on agency action.⁹⁵ Several statutes contain “agency-forcing” provisions that set timetables for agency action.⁹⁶ Agency-forcing is an example of an *ex ante* congressional push for increased regulatory action; but the traditional mode of congressional control is *ex post* review of agency rulemaking aimed at restraint of agency aggrandizement. Examples of such *ex post* review include congressional hearings, provisions for judicial review, and the sunset (or threat of sunset) of unproductive agencies.⁹⁷ Major legislation in years past has aided in the procedural control, transparency, and accountability of agency action. Included in the list of restraining legislation are the APA itself, enacted in 1946, and the Congressional Review Act (CRA), enacted in 1996.⁹⁸

94. *See infra* note 98.

95. This is easily the most direct and constitutionally valid means by which Congress can exert control. *See* *Patry v. Bd. of Trs., Firemen’s Pension Fund*, 461 A.2d 443, 448 (Conn. 1983); *Waterbury v. Comm’n on Human Rights & Opportunities*, 278 A.2d 771, 774 (Conn. 1971) (“[An agency] cannot modify, abridge or otherwise change the statutory provisions under which it acquires authority unless the statutes expressly grant it that power.”). In contrast to this direct statutory control of the agency, at times Congress has attempted to impose a review process that involved a “legislative veto” of agency rulemaking. *See* *INS v. Chadha*, 462 U.S. 919 (1983). In *Chadha* the Supreme Court made clear that the constitutional requirements of bicameral legislative votes and the duty to present the President all new laws must be preserved—even when Congress would redress a perceived wrong of an agency acting on delegated authority. *See id.* at 952–53 (citing U.S. CONST. art. I, §§ 1, 7). Specifically in *Chadha* the Court stated that congressional “action that ha[s] the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch” must comply with the constitutional requirements of presentment to the President for approval or veto following passage by both Houses of Congress. *Id.* at 952. In other words, the legislative veto is effectively a nullity.

96. Sunstein, *supra* note 7, at 479; *see, e.g.*, Clean Air Act, 42 U.S.C. § 7401 (2006). These deadlines themselves may contribute to circumstances where an “urgent rule” is necessary.

97. For example, Senator Muskie introduced sunset legislation in the 94th, 95th, and 96th Congresses. *See* 36 CONGRESSIONAL QUARTERLY ALMANAC 530 (1980).

98. The APA established the public accountability implicit in the notice-and-comment period as well as instances for judicial review. Administrative Procedure Act, 5 U.S.C. § 553(b)–(c) (2006). The Congressional Review Act (CRA) was included as Subtitle E of the Small Business Regulatory Enforcement Act of 1996, Pub. L. No. 104-121, 110 Stat. 857, 868 (codified at 5 U.S.C. §§ 801–808 (2006)). In explaining the need for the CRA, a joint statement of the House and Senate explained that

many have complained that Congress has effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help redress the balance, reclaiming for Congress some of its policy making authority, without requiring Congress to become a super regulatory agency.

Congress has at times experimented with *ex post* congressional review in the form of the “legislative veto.” Scholars agree that the Supreme Court has effectively tempered, if not fully dissembled, the constitutional theories upon which the “legislative veto” rests.⁹⁹ All congressional oversight of agency action must therefore acknowledge that the power once delegated by Congress has its own validity that Congress cannot merely withdraw on a whim. Indeed, it is the congressional delegation of power in the first instance that defines “[t]he boundary between legislative and executive action.”¹⁰⁰ The concept of a legislative veto is antithetical to power once delegated as it permits Congress to arrogate to itself the functions of the executive for the implementation of the laws. If Congress were permitted to take a “second bite of the apple” it could diminish the role of the executive as a separate, coequal branch of government.¹⁰¹ The complexity of the constitutional interaction of the legislative and executive illustrates the difficulty of congressional review of agency action once Congress delegates authority to an agency.¹⁰²

Any restriction on a legislative veto does not prohibit Congress from simply repeating the legislative process to ensure the constitutional requirements of passage by both houses of Congress and presentment to the President for approval or veto.¹⁰³ This is not easy, however, and the length and difficulty of such legislative correction minimizes the effectiveness of such action as a means of review. What may be done in the alternative is for Congress to use its unique power of the purse and vote to “defund” a certain agency action, or Congress may employ the review mechanisms set forth in the CRA.¹⁰⁴

Joint Explanatory Statement of House and Senate Sponsors, 142 CONG. REC. 6926 (1996) (legislative history). An identical Joint Statement of the Senate sponsors appears at 142 CONG. REC. 8196–8201 (1996).

99. See *Chadha*, 462 U.S. 919. The statute at issue in *Chadha* contained a provision that authorized one house of Congress to disapprove any agency order of more than twenty-five million dollars. That particular congressional disapproval mechanism was held unconstitutional as it permitted one house of Congress to limit the President’s legal powers. *Id.* at 952. In the past, legislative veto provisions were found in statutes that address rulemaking by executive departments and their agencies, as well as statutes that authorize rulemaking by independent agencies.

100. The Legislative Veto and Congressional Review of Agency Rules, 5 Op. O.L.C. 294, 302 (1981) (statement of Theodore B. Olson, Asst. U.S. Att’y Gen.).

101. *Id.*

102. One way that Congress can review emergency rulemaking is to withhold legislative power until after congressional approval—thereby delaying the moment of delegation. Such a regime has been employed by various states and is being proposed by Congress itself in the instance of “major” rules. See *Regulations from the Executive in Need of Scrutiny Act of 2013: Hearing on H.R. 367*, 113th Cong. (2013).

103. U.S. CONST. art. I, §§ 1, 7.

104. Under the CRA, Congress permits itself review of all rules—including nonlegislative rulemaking such as “guidance documents,” “policy manuals,” and, of interest here, “interim-final rules.” See *supra* note 102 and accompanying text. To comply with the CRA, agencies must submit a statement to Congress that includes a description of the rule and how the rule complies with other acts such as the Regulatory Flexibility Act, Small

The CRA is a mechanism of *ex post* review of agency action that does not employ the legislative veto device. The CRA, however, has not been constitutionally affirmed by the courts in part because it is relatively unused by Congress.¹⁰⁵ The lack of effective review produced by the CRA is illustrative of the legal and political difficulty inherent in any congressional *ex post* review scheme. Although more direct and effective in theory than proposing new legislation, the CRA has been used to overturn only one agency rule since 1996.¹⁰⁶ To put that number in perspective, even though from 1996 onward more than 57,000 rules have been reported to Congress, including 1,029 major rules, only forty-nine rules were met with congressional displeasure.¹⁰⁷ Those forty-nine rules inspired seventy-two resolutions of disapproval, but only one of those resolutions passed.¹⁰⁸ Compare that number to how many laws Congress passed to prohibit expenditures on proposed or final rules: 190 in a single ten-year period.¹⁰⁹

The exact number of rules and documents that Congress reviews cannot be determined, however, as there is severe underreporting to Congress by agencies in the first instance.¹¹⁰ The CRA (and much congressional and

Business Regulatory Enforcement Fairness Act, Unfunded Mandates Reform Act, Paperwork Reduction Act, and the Small Business Paperwork Relief Act.

105. In the current Congress, there are several proposed improvements to regulatory oversight. One such proposal comes from the Regulations from the Executive in Need of Scrutiny Act of 2013, which would deem major rules as mere proposals that only a joint resolution by Congress, passed within a specified time, can make effective. *See* Regulations from the Executive in Need of Scrutiny Act of 2013, H.R. 367, 113th Cong. This would change the review landscape for all major rules, not only major rules made under the “good cause” exemption. In effect, it makes congressional review *ex ante*, rather than *ex post*, and eliminates some of the constitutional complexities of the legislative veto. It is just such a model that many state legislatures have employed in the emergency power context—most commonly, imposing a requirement of *ex ante* approval of the threshold determination of “imminent peril.” *See REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. (2011); *Regulations from the Executive in Need of Scrutiny Act of 2011: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. (2011).

106. Morton Rosenberg, *The Congressional Review Act After 15 Years: Background and Considerations for Reform 4* (Sept. 16, 2011) (draft report prepared for the Administrative Conference of the United States), available at <http://www.acus.gov/sites/default/files/COJR-Draft-CRA-Report-9-16-11.pdf>.

107. *Id.* at 4.

108. *Id.* at 3.

109. *See* CURTIS W. COPELAND, CONG. RESEARCH SERV., RL 34354, CONGRESSIONAL INFLUENCE ON RULEMAKING AND REGULATION THROUGH APPROPRIATIONS RESTRICTIONS (2008); Rosenberg, *supra* note 106, at 3–4; *see, e.g.*, Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Rulemaking*, 49 ADMIN. L. REV. 95 (1997); Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051 (1999).

110. For example, “an investigation by [a House subcommittee] revealed that 7,523 guidance documents issued by the Departments of Labor, the Environmental Protection Agency, [and] the Department of Transportation had not been submitted for CRA review during less than a three year period.” MORTON ROSENBERG, CONG. RESEARCH SERV., RL 30116, CONGRESSIONAL REVIEW OF EMERGENCY RULEMAKING: A BRIEF OVERVIEW AND ASSESSMENT AFTER FIVE YEARS 13 n.26 (2001), available at <http://www.policyarchive.org/handle/10207/bitstreams/907.pdf>. In another example of lapsed self-reporting, the

executive review) is largely dependent on the good-faith and diligent reporting practices of agencies. If the agency fails to prioritize its reporting obligations, covered rules may come before Congress only by luck or through complaints of interest groups.¹¹¹ This potential lack of notice to Congress, to the Office of Information and Regulatory Affairs (OIRA), and to other interested parties is a problem with emergency rules as these rules are excused from the mechanisms that serve to notify Congress of their passage.¹¹² This release from reporting requirements arguably reflects a legislative preference for efficiency over public participation in certain situations, and even a preference for efficiency over congressional oversight. Such a preference is not clearly dictated by the circumstances, however. Several state legislatures have actually *increased* the congressional and executive notice requirements of agencies when the exercise of emergency powers necessitates that public notice is foregone.¹¹³ In other words, for many states, even when there is “imminent peril” to public safety, health, and welfare, the importance of alternative means of notice and review is intensified rather than diminished.

2. Judicial Review

In addition to legislative oversight, under the APA, Congress has expressly provided oversight powers to the judicial branch.¹¹⁴ In general, the judicial branch may review only *final* agency actions and may hold unlawful only those actions it finds to be “arbitrary, capricious, an abuse of

Congressional Research Service issued one study that revealed a ten-year period in which the Government Accountability Office (GAO) listed over 1,000 rules that it should have, but did not, receive. *See* CURTIS W. COPELAND, CONG. RESEARCH SERV., R40997, CONGRESSIONAL REVIEW ACT: RULES NOT SUBMITTED TO GAO AND CONGRESS 21 (2009). Of these 1,000 missing rules, almost all had not been reported to each House of Congress.

Nor are these unreported rules simply “unimportant.” In its study, the GAO determined that many of the unreported rules were determined “significant” rules by the Office of Information and Regulatory Affairs (OIRA). *See* ROSENBERG, *supra*, at 21; *see also* Congressional Review Act, 5 U.S.C. §§ 801–808 (2006). A “significant” rule is one that affects \$100 million of economic activity. *See* Exec. Order No. 12,866 § 3(f)(1), 58 Fed. Reg. 51,738 (Oct. 4, 1993). Moreover, the underreporting noted here pertains only to rules ultimately published in the Federal Register. As the CRA purports to cover the vast number of “informal” documents issued by agencies, the precise number of underreported rules and forms is almost impossible to determine.

111. For example, nine agency actions came to the attention of committee chairmen and members by mere happenstance. *See* Rosenberg, *supra* note 109, at 30.

112. For example, federal agencies that exercise the “good cause” exemption are excused from the filing and notification requirements under the Unfunded Mandates Reform and the Regulatory Flexibility Acts. *See supra* note 74 and accompanying text.

113. *See generally* COLO. REV. STAT. § 24-4-103(6)(a) (2012) (requiring review by legislative legal services); MD. CODE ANN., STATE GOV'T § 10-111(b) (LexisNexis 2011); MICH. COMP. LAWS § 24.248 (2004); MINN. STAT. § 14.388 (2011); MONT. CODE ANN. § 2-4-303 (2011); N.H. REV. STAT. ANN. § 541-A:18 (2011); N.Y. A.P.A. LAW. § 202 (McKinney 2012); OHIO REV. CODE ANN. § 119.03 (LexisNexis 2012); OKLA. STAT. tit. 75, § 75-253 (2010).

114. *See* 5 U.S.C. §§ 702, 704 (2006).

discretion, or otherwise not in accordance with law.”¹¹⁵ This standard of review is narrowly construed and does not permit the court to substitute its judgment for that of the agency.¹¹⁶ This standard is highly deferential to the agency and the court “presume[s] the validity of [the] agency action.”¹¹⁷ In its review of rulemaking, the APA limits the judiciary to examining only the agency’s decision-making process, not the decision itself.¹¹⁸ The result of this restriction is that the court is limited to ensuring that an agency applied the rulemaking procedures required by law and reached a reasonable conclusion.¹¹⁹

In the unique context of a § 553 rulemaking—the “good cause” exemption—the agency action taken is not in the classic sense “final”; rather it is often referred to as an “interim-final rule” to reflect its temporary nature.¹²⁰ However, in this arena the judiciary has determined it may review (1) the narrow actions of the initial agency determination of “emergency” and (2) whether there is sufficient evidence that one of the criteria to forgo public comment is met.¹²¹ The courts have indeed struck down agency conclusions on both counts.¹²²

The pertinent issue with respect to judicial review of emergency rulemaking is not one of authority; the courts have implied such a power even in the absence of an express provision. Rather the relevant issue is the frequency—the low level of actual judicial review of emergency rules.¹²³ As mentioned previously, between 1995 and 2011 the courts reviewed only seventy-four of the 4,986 federal “good cause” exemption rulemakings.¹²⁴ This means less than 2 percent of all “good cause” rules underwent any judicial review. Is this a problem? Recall that these rules are based on a delegated authority. Under normal circumstances the APA provides that this delegation to unelected administrators is checked by public participation. If the agency self-determines to use the “good cause” exemption, however, that check on agency overreach is removed. In the

115. *Id.* § 706(2)(A); *see also id.* §§ 702, 704 (authorizing judicial review of final agency actions); *UPMC-Braddock Hosp. v. Sebelius*, 592 F.3d 427, 430 (3d Cir. 2010).

116. *See Motor Vehicles Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Postal Serv. v. Gregory*, 534 U.S. 1, 7 (2001).

117. *SBC Inc. v. FCC*, 414 F.3d 486, 496 (3d Cir. 2005) (citations omitted).

118. *See NVE, Inc. v. Dep’t of Health & Human Servs.*, 436 F.3d 182, 190 (3d Cir. 2006).

119. *Id.*

120. *See supra* note 114 (permitting courts to review final agency actions).

121. *See, e.g., Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983) (finding insufficient evidence to forgo notice and comment); *Fed. Land Bank of Springfield v. Farm Credit Admin.*, 676 F. Supp. 1239, 1247–48 (D. Mass. 1987).

122. *See Levesque*, 723 F.2d at 184; *Farm Credit Admin.*, 676 F. Supp. at 1247–48.

123. This generous interpretation of judicial review is exemplified in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). In this case the Supreme Court explained that its view favoring review under section 706 of the APA resulted naturally from “the Administrative Procedure Act . . . [which] embodies the basic presumption of judicial review to one ‘suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.’” *Id.* at 140 (quoting 5 U.S.C. § 702).

124. *See supra* notes 52–47 and accompanying text.

absence of public participation, judicial review provides a potentially meaningful way to reassert democratic discipline over a zealous agency. In reality, however, the empirical evidence reveals a paucity of review that raises concern over the ability of judicial action to constrain agency action and to maintain the integrity of representative government.

One reason why there are so few instances of review of emergency rulemaking, and for that matter all rulemaking, is that it is difficult for potential plaintiffs to satisfy the threshold jurisdictional requirement of standing.¹²⁵ Briefly, to maintain an action in federal court a plaintiff must demonstrate the three elements that constitute the “irreducible constitutional minimum” of Article III standing.¹²⁶ Those elements include a showing (1) of a “concrete,” “particularized” injury-in-fact, which must be “actual or imminent, not ‘conjectural’ or ‘hypothetical,’” (2) that the injury is “traceable to the challenged action,” and (3) that a favorable decision would redress the injury.¹²⁷ Although all are required, it is often the injury-in-fact element that is determinative of the standing issue.¹²⁸ For example, in *Summers v. Earth Island Institute*,¹²⁹ the Court held that affidavits by members of an environmentalist group that alleged vague plans to visit public lands affected by an agency action were insufficient evidence of injury to support a challenge to the action.¹³⁰

In addition to the constitutional requirements of standing, there is an additional prudential standing requirement for a challenge to agency action.¹³¹ That means that the plaintiff must demonstrate that his interests are more than “marginally related to . . . the purposes implicit in the statute.”¹³² If, for example, a plaintiff alleges that notice-and-comment procedures are owed “to the public at large,” then the required “direct” injury for standing is difficult to establish. The court will not permit a

125. *See* *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 254 (3d Cir. 2005).

126. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

127. *Id.*

128. *See* *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 137–38 (3d Cir. 2009).

129. 555 U.S. 488 (2009).

130. *Id.* at 496–97. It is worth noting that the difficult “injury-in-fact” requirement is in no way lessened for associations. To establish associational standing, the association can only bring suit on behalf of its members when “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members.” *See* *Hunt v. Wash. Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977). The Court has determined that the first element, which includes the injury-in-fact standard, is an Article III necessity. *See* *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 554–55 (1996).

131. In *Ass’n of Data Processing Service Organizations, Inc. v. Camp*, for example, the court determined that not only must the plaintiff satisfy the Article III “injury-in-fact” requirement but plaintiff must also satisfy the additional requirement that the injury is “within the zone of interests to be protected or regulated by the statute . . . in question.” 397 U.S. 150, 153 (1970); *see also* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). The Court’s analysis of whether the plaintiff’s interests fall within the protected zone of interests is not meant to be especially demanding. *Ass’n of Data Processing*, 397 U.S. at 155.

132. *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399–400 (1987).

plaintiff to allege a “generalized” or “speculative” grievance.¹³³ In *Lujan v. Defenders of Wildlife*,¹³⁴ the Supreme Court reiterated the standing requirement that a procedural injury be plead with particularity, and that a mere public interest in the agency’s rulemaking process would not be sufficient.¹³⁵

To the extent that the public may not have standing to enforce its generalized interest in democratic processes, Congress has sought to institute standing statutes. In fact, as is discussed below, one state has enacted such a statute with respect to emergency rulemaking as a structural substitute to *ex ante* public comment and participation.¹³⁶ The viability of such statutes is complex and is an issue beyond the scope of this Article.¹³⁷ It is sufficient to say that Article III requirements for standing must still be satisfied and a standing statute may not modify or eliminate the necessity of standing as defined by the courts.¹³⁸ Due to the complexity of the analysis, therefore, for purposes of this discussion, the constitutionality of standing statutes is treated with skepticism. Ultimately, because of standing requirements that limit entry to the courts, and due to the deference afforded agency actions once in court, judicial review is unlikely to increase in frequency or in condemnation of broad and permissive emergency powers.

3. Executive Review

If Congress has constitutional limits to its agency oversight powers and the judiciary is limited by standing requirements, then what potential safeguard is left to protect against agencies’ manipulation of their emergency power? Under the Constitution, the executive branch is entrusted with the power to implement the laws duly enacted by

133. See *Fla. Audubon Soc’y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) (“[T]he plaintiff must show that the [failure of the] procedure in question will cause a distinct risk to a particularized interest of the plaintiff. The mere violation of a procedural requirement thus does not permit any and all persons to sue to enforce the requirement.”).

134. 504 U.S. 555 (1992).

135. *Id.* at 566–67.

136. See MONT. CODE ANN. § 2-4-303 (2011); *infra* Part II.D.

137. In general, if a standing statute does not modify Article III standing requirements, but only modifies “prudential standing” (court established rules to safeguard against potential separation of powers problems) then the standing statute may be enforced as written. To discern whether a statute implicates Article III or prudential rules of standing is a task that even the Supreme Court finds daunting. See, e.g., *United Food & Commercial Workers Union v. Brown Grp., Inc.*, 517 U.S. 544, 551–53 (1996) (noting that the definition of prudential rules is unclear). The Court has repeatedly defined prudential standing in tandem with Article III, so no distinction is readily discernible. See *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100–01 (1979) (explaining prudential standing by reference to the Article III standard that courts do not litigate generalized grievances); *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (declaring that both Article III and prudential standing are “founded in concern about the proper—and properly limited—role of the courts in a democratic society”).

138. See *Lujan*, 504 U.S. at 566–67 (rejecting the argument that the Endangered Species Act, which provides that “any person may commence a civil suit on his own behalf,” gave standing irrespective of Article III requirements).

Congress.¹³⁹ In broad strokes, therefore, once Congress has delegated authority to agencies (all predominantly members of the executive branch), the president has “the power to control [his] subordinates.”¹⁴⁰ That said, the power is less than straightforward, and the president has often been met with criticism when he exerts strong control over executive branch agencies. Indeed, the debate surrounding presidential authority over the executive branch is the “oldest . . . debate[] in constitutional law.”¹⁴¹

Nonetheless, the president has thrown his hat into the ring of regulatory review in a long lineage of executive orders that traverse political affiliations. Under the current regime, the executive branch has ordered that regulatory agencies submit to review of all significant draft rules and regulations by OIRA.¹⁴² By direct executive order, OIRA is obligated to review all draft rules and regulations of the many executive agencies.¹⁴³ However, the sixty-nine independent agencies may not be compelled to

139. U.S. CONST. art. II, § 3, cl. 4.

140. STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 4* (2008). There is a question as to which agencies constitute the executives “subordinates.” Agencies are divided into “executive” and “independent” agencies. Most independent agencies are constitutionally part of the executive branch. These agencies are “independent” to the extent that they do not fall under the direct control of an executive department. The President’s power is limited with respect to independent agencies to the extent he cannot remove the agency head or its members. Examples of legislative veto provisions were once found in rulemaking by the Department of Education (executive department) as well as the Federal Trade Commission (independent agency). *See* 20 U.S.C. § 1232(d) (1976 & Supp. IV 1980); Federal Trade Commission Improvements Act of 1980, 15 U.S.C. § 57a-1 (Supp. IV 1980).

141. CALABRESI & YOO, *supra* note 140, at 3. *See generally* Peter L. Strauss, *Overseer or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 700–02 (2007) (noting a concern that the executive’s influence on political appointees was an impermissible effort to control properly delegated agency authority).

142. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993) (stating the following goals: “to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public”); *see also* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (2011). Executive Order 13,563 is the most recent executive order in the lineage of regulatory review that supplements Executive Order 12,866 for executive branch regulatory agencies.

143. In general, Congress delegated to OIRA the power to review all collections of federal information and the power to develop and oversee the implementation in such areas as the setting of information quality and statistical standards. *See* Paperwork Reduction Act, 44 U.S.C. §§ 3501–3520 (2006). It is difficult to quantify how many executive agencies exist at the federal level because “federal agency” can be defined in many different ways. There are currently fifteen executive departments that may be categorized as “agencies” (the Departments of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, Justice, Labor, State, Transportation, Veterans Affairs, the Interior, and the Treasury). Most Americans, however, would consider other organizations beneath those categories to also be agencies (for example, the Farm Service Agency, which is within the Department of Agriculture, or the Missile Defense Agency, which is within the Department of Defense). If agencies are defined in this more granular manner, then there are over 400 federal executive agencies. *A–Z Index of U.S. Government Departments and Agencies*, USA.GOV, <http://www.usa.gov/directory/federal/index.shtml> (last updated Mar. 7, 2013).

submit to the executive ordered review but may only be encouraged to do so.¹⁴⁴ This means that such vital independent agencies as the Environmental Protection Agency, the Federal Communications Commission, and the Securities and Exchange Commission are subject to the review described here on a *voluntary* basis only.¹⁴⁵ This review divide between independent agencies and executive agencies is of obvious concern. President Obama recently attempted to bridge this divide by an executive order directed at independent agencies “asking” them to comply with the same review processes as their executive branch counterparts.¹⁴⁶

Executive agencies have additional reporting requirements if the *agency* believes the submitted rule to be a “significant” rulemaking.¹⁴⁷ Although all planned rules must be submitted to OIRA, rules not identified as significant by either (1) the agency upon submission to OIRA for review or (2) the Administrator of OIRA after submission, will not be subject to the extensive cost-benefit analysis requirements of the executive order.¹⁴⁸ Nor are emergency or unplanned regulations immune from review. As soon as possible, an agency that issues emergency procedures must comply with the reporting requirements of the executive order.¹⁴⁹ It is under the ultimate discretion of the OIRA administrator to determine whether a proposed rule

144. Exec. Order No. 12,866, 58 Fed. Reg. at 51,735. Examples of independent agencies include the Central Intelligence Agency, the Environmental Protection Agency, the Federal Communications Commission, the Federal Deposit Insurance Commission, and the Federal Elections Commission. *See Independent Agencies and Government Corporations*, USA.GOV, <http://www.usa.gov/Agencies/Federal/Independent.shtml> (last updated Feb. 21, 2013) (listing independent agencies). The count of sixty-nine independent agencies includes traditional administrative agencies and government corporations. *Id.*

145. *See Independent Agencies and Government Corporations*, *supra* note 144.

146. *President Barack Obama, Executive Memorandum—Regulation and Independent Regulatory Agencies*, WHITEHOUSE.GOV (July 11, 2011), <http://www.whitehouse.gov/the-press-office/2011/07/11/memorandum-regulation-and-independent-regulatory-agencies> (“With full respect for the independence of your agencies, I am asking you today to join in this review and produce your own plans to reassess and streamline regulations. For rules going forward, I am also asking you to follow the key cost-saving, burden-reducing principles [required of executive agencies].”); *see* Letter on Retrospective Review of Existing Regulations from David Hirshmann, President and Chief Exec. Officer, U.S. Chamber of Commerce, to Elizabeth M. Murphy, Sec’y, SEC (Oct. 6, 2011), *available at* <https://www.sec.gov/comments/s7-36-11/s73611-62.pdf> (commenting that while the SEC’s voluntary compliance with President Obama’s request for retrospective review of regulations is encouraging, the SEC should voluntarily comply with OIRA and other review mechanisms). *See generally* Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (2011) (encouraging independent agencies to comply with President Obama’s Executive Order for executive agencies); Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 U. PA. J. CONST. L. 637 (2010) (observing the various forms of pressure and control presidents attempt to assert over independent agencies).

147. *See generally* Exec. Order No. 12,866, § 6(a)(3)(A), 58 Fed. Reg. at 51,740. A significant rulemaking is one that will likely have an economic impact of 100 million dollars or more, or otherwise adversely affect the economy; creates an inconsistency with action of another agency; materially alters the budgetary impact of entitlements or raises novel legal or policy issues. *Id.* § 3(f)(1)–(4), 58 Fed. Reg. at 51,738.

148. *Id.* § 6(a)(3)(A), 58 Fed. Reg. at 51,740.

149. *Id.* § 6(a)(3)(D), 58 Fed. Reg. at 51,741.

qualifies as significant, and if it does, whether or not to enforce or waive the additional reporting requirements.¹⁵⁰

If a proposed rule is determined significant, OIRA will review the substance of the rule and permit it, suggest a modification to it, or send it back to the agency for reconsideration.¹⁵¹ Up until July 20, 2011 for example, forty-two “interim-final rules” were reviewed, of which thirty-seven were permitted with a suggested modification, and four were approved without change.¹⁵² If we assume that the category “interim-final rules” captures only emergency rulemakings (which it does not), OIRA reviewed about 17 percent of the total emergency rulemakings in 2011.¹⁵³ Only one “interim-final rule” was withdrawn and no “interim-final rule” was found to be improperly submitted.¹⁵⁴

This Article recommends that to increase restraint on emergency power discretion, a frequency trigger should be added to the OIRA metric. Such a trigger would be used much like the “significant” rulemaking trigger. Once an agency has issued, for example, twenty emergency rulemakings in a one-year period, an OIRA review of all twenty emergency rulemakings is activated.¹⁵⁵ The choice to review only significant rules is a prudent standard that safeguards tax revenues. The addition of a frequency trigger would further safeguard the administrative procedural process and would still minimize the cost of oversight.

D. A Note on Ex Post Review

With the exception of “agency-forcing” by statutory deadline, the key tools of congressional, judicial, and executive review of agency emergency rulemaking is after the rule’s enactment.¹⁵⁶ Scholarly comment is unnecessary to note that review of an emergency rule before enactment is facially distinct from postenactment review. As stated before, review of the federal “good cause” rulemaking is *ex post*. However, many state statutes provide for *ex ante* review, proving that there is more than one review option. This Article argues that the choice between *ex post* and *ex ante*

150. A designation of significance applies to all rulemakings regardless of the presence or absence of public comment. *Id.* § 6(a)(3)(A), 58 Fed. Reg. at 51,740.

151. 5 U.S.C. § 609 (2006).

152. See OFF. OF INFO. AND REG. AFFAIRS, <http://www.reginfo.gov/public/do/eoAdvancedSearchMain> (last visited Apr. 19, 2012) (EO Review Search Criteria: Agencies=All; Review Status=Concluded; 1/01/2011–07/20/2011; Stage of Rulemaking=Interim Final Rule).

153. Because OIRA does not distinguish between interim-final rules that are emergency rulemakings and those that are not, 17 percent is an overestimate of the actual percentage of OIRA emergency rulemaking review.

154. See OFF. OF INFO. AND REG. AFFAIRS, *supra* note 152.

155. The trigger level might be increased for certain agencies, such as the Coast Guard, that deal with emergent public safety issues that are finite in nature. See, e.g., *Aids to Navigation Team New York Mission and AOR*, U.S. COAST GUARD (Jan. 26, 2012), <http://www.uscg.mil/d1/antNewYork/UnitStatisticsandHistory.asp> (issuing a change in navigable waters due to Fourth of July fireworks in New York waterways).

156. See *supra* notes 61–62 and accompanying text.

review reveals a legislative preference for efficiency or public participation respectively.¹⁵⁷

Another indication of a legislative preference is in the choice to set a statutory time limit on the effectiveness of an emergency rulemaking. Under the federal “good cause” statute there is no time limit, and the rule may remain in effect permanently without any review or public comment.¹⁵⁸ This one statutory attribute alone demonstrates a sharp contrast to the state experience where there is usually a mandated time limit for the effectiveness of emergency rules, and where the renewal of such rules in the absence of public comment is severely limited.¹⁵⁹ Again, the lack of a time limit in the federal process arguably reveals a preference for efficiency that could effectively eliminate all public comment on a rule in perpetuity.

Some federal agencies, however, do voluntarily adopt a policy where *ex post* public comment on interim-final rules is invited.¹⁶⁰ But even the voluntary *ex post* notice-and-comment period, while surely better than no public participation, raises the question of whether it is a true substitute for *ex ante* comment. Much has been written on the potential prejudices that arise within an agency faced with *ex post* review.¹⁶¹ It is only logical to assume that agency bureaucrats and analysts of good intention, who have studied an issue and developed a solution in a vacuum, must convince themselves of both (1) the existence of a problem and (2) the effectiveness of their proposed solution, before issuing an emergency rule.¹⁶² To readdress an open question, this analytic process after the fact is a difficult human exercise. The potential of regulatory inertia in such instances is so widely acknowledged that some courts have demanded that an agency provide concrete evidence that it has reevaluated decisions with an “open mind.”¹⁶³

157. Note that this may potentially be remedied by the legislature by expressly expanding the “procedural injury” required for standing to include more than those parties most directly affected by the emergency statute. This is how the Montana legislature chose to expand public participation and the opportunity for judicial review. *See supra* note 136 and accompanying text. However, as noted previously, the jurisprudence sustaining such standing statutes is complex and the statutes’ viability is uncertain. *See supra* Part II.C.2.

158. 5 U.S.C. § 553(b)(3)(B) (2006). Emergency rulemakings are often referred to as “interim-final rules” but can just as well be considered “permanent-interim-final rules” as they can live on indefinitely. There are indeed many such instances where the “emergency” continues for a surprisingly long period.

159. *See* discussion *infra* Part III.B.1 and note 183.

160. *See, e.g., Comment on Regulations, Making Your Voice Heard at FDA: How To Comment on Proposed Regulations and Submit Petitions*, FDA (Feb. 7, 2008), <http://www.fda.gov/AboutFDA/ContactFDA/CommentonRegulations/default.htm>; *FTC Seeks Public Comment on Agency’s Rules of Practice*, FTC (Jan. 13, 2012), <http://www.ftc.gov/opa/2012/01/part2rules.shtm>.

161. *See, e.g.,* Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 *YALE L.J.* 359, 368 (1972); Kim, *supra* note 15.

162. *See, e.g., Comment on Regulations, Making Your Voice Heard at FDA*, *supra* note 160 (“FDA rules have considerable impact on the nation’s health, industries and economy. These rules are not created arbitrarily or in a vacuum.”).

163. *See, e.g.,* *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979).

As should be immediately apparent to the reader, an open mind is more difficult to maintain in the wake of a decision than before the decision is made in the first instance. Such a showing may be mere agency artifice, and may not properly safeguard against strategic agency action.¹⁶⁴ In recognition of these harms, some courts do not require an “open mind” in postcomment review, but rather emphatically reassert that the notice-and-comment requirements of the federal APA are “designed to ensure that affected parties have an opportunity to participate in and influence agency decision making *at an early stage*, when the agency is more likely to give *real consideration* to alternative ideas.”¹⁶⁵ Therefore, these courts have concluded that the opportunity for comment after rule promulgation is a violation of the federal APA.¹⁶⁶

If *ex post* notice and comment fails to “correct” the *ex ante* exclusion of public comment, how can congressional *ex post* review fare much better? There is a problematic and inherent lack of congressional interest “to confront and deal with complex and sensitive policy issues that major rulemaking present.”¹⁶⁷ Congress, ever politically aware, may delegate to agencies sensitive issues in the first place to avoid negative political fallout.¹⁶⁸ As discussed earlier, congressional review is complex and may necessitate the enactment of legislation to overturn agency action.¹⁶⁹ There is little incentive, however, for Congress to do so as Congress is rarely held accountable for agency action. Indeed, to intervene has potential negative consequences as Congress’s members might risk being viewed as obstructionists if legislation is tried.¹⁷⁰ In short, congressional delegation of power in sensitive areas plus congressional abstention in agency review is a politically shrewd strategy.

The executive branch may have greater incentive for oversight as the political fallout for rulemaking may be more focused on the president than on members of Congress. Indeed, the executive branch’s use of OIRA is

164. As one court noted, even with an “open mind,” there is danger in arguing the fiction that the emergency amendment and the subsequent proceedings constitute a single regulatory action—the promulgation of an amendment *followed* by notice and comment. *See Mauzy v. Gibbs*, 723 P.2d 458, 463 (Wash. Ct. App. 1986) (“[Plaintiff] refer[s] us to federal courts that construe the federal APA to prevent such a stratagem.” (citations omitted)).

165. *U.S. Steel Corp.*, 595 F.2d at 214 (emphasis added).

166. *See id.* at 215. (“An agency that wished to dispense with pre-promulgation notice and comment could simply do so, invite post-promulgation comment, and republish the regulation before a reviewing court could act.”); *see also* N.J. Dep’t of Envtl. Prot. v. EPA, 626 F.2d 1038, 1050 (D.C. Cir. 1980); *Mauzy*, 723 P.2d at 463 (“We are convinced that the Fifth Circuit accurately assessed the psychological and bureaucratic realities of *post hoc* comments in rule-making [W]e have no evidence to rebut the presumption that *post hoc* comment was not contemplated by the [federal] APA and is generally not consonant with it.” (quoting *N.J. Dep’t of Envtl. Prot.*, 626 F.2d at 1050)).

167. Rosenberg, *supra* note 109, at 1083.

168. *Id.* at 756–60.

169. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2256–59 (2001) (postulating that Congress will be a powerless restraint on agency action in the face of a president intent on controlling the administration of law).

170. *Id.*

evidence of its active oversight role. However, OIRA review of emergency rulemaking is also *ex post* in nature and therefore suffers from the same shortcomings as judicial and administrative *ex post* review schemes. But executive branch *ex post* review is not the only means by which the executive may oversee agency action. As set forth in the next part, there are lessons to be learned from the state experiences. In particular, there are opportunities for *ex ante* review of emergency power that could be effectively incorporated into the federal emergency power statute.¹⁷¹ Again, this Article argues that all the variations of *ex ante* review have a common thread—a legislatively revealed preference for public participation.

III. STATE AGENCY EMERGENCY POWERS

In contrast to the federal agency emergency statute, the vast majority of states have taken a different tack.¹⁷² In general terms, the federal statute is characterized by (1) broad discretionary language plus (2) little structural restraint on agency power (i.e. no termination date and no particularized review). As is often the case, the states provide a variety of alternatives to the federal standard, but certain themes are common: (1) a rather restrictive discretionary mandate plus (2) various restraints—both *ex ante* and *ex post*—specific to the exercise of agency emergency power. Indeed, the states almost inherently employ a sliding scale that balances statutory language (the threshold emergency power trigger), with postenactment oversight (i.e., the more restrictive the former, the less exacting the latter). This Article argues that this approach is preferable to the current federal regime that displays no such calculated balance.

There is one “emergency,” however, for which this Article recommends that states disrupt the elaborate balance they have struck between efficiency and public participation: to comply with federal mandates that may be disruptive to state budgetary and administrative resources.¹⁷³ In this one arena, this Article advocates that the states should, regrettably, relinquish their preference for public participation and carve out an efficient and transparent means for state agencies to respond to federal mandates.

171. See discussion *infra* Part III.B (discussing *ex ante* review provisions provided in various state codes, such as legislative review and time limits).

172. For an excellent general source on state emergency powers, see Jim Rossi, *State Executive Lawmaking in Crisis*, 56 DUKE L.J. 237 (2006).

173. This viewpoint is consistent with that of Professor Jim Rossi, who argues that state rulemaking that is necessary to comply with federal statutes should be subject to more deferential constitutional and procedural review than other state legislative delegations. See Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1235–38 (1999).

A. "Imminent Peril"

In contrast to the broad federal standard, section 3(b) of the 1961 Model State APA, adopted in many states, provides a more restrictive mandate¹⁷⁴:

If an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than 20 days' notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule.¹⁷⁵

The choice of a restrictive standard was a deliberate one. Even though the states had the APA "good cause" exemption before them, only two states adopted a provision comparable to the "good cause" exemption.¹⁷⁶

In 1981, the states were once again provided with an express opportunity to adopt the "good cause" exemption. In that year the MSAPA editors changed course and recommended that the state legislatures adopt the broad "unnecessary, impracticable, or contrary to the public interest" language of the federal statute.¹⁷⁷ Again, the states largely rejected the recommendation and maintain the 1961 MSAPA "imminent peril" standard to this day. The MSAPA was recently revised in 2010, and the committee adopted a return to the "imminent peril" test of the 1961 MSAPA.¹⁷⁸ The recommended provision also includes express permission for immediate adoption of an emergency rule if "the loss of federal funding for an agency program requires [it]."¹⁷⁹ In addition, similar to the 1961 MSAPA provision, but unlike the federal "good cause" exemption, the 2010 MSAPA includes a time limit on how long the emergency rule will be effective and a one-time, limited renewal period.¹⁸⁰ By its return to the 1961 "imminent peril" standard from the "good cause" standard it recommended in 1981, the administrative conference clearly rejects the "good cause" language for state regulators and, arguably, tacitly rejects the standard for the federal administrators as well.¹⁸¹

B. State Review

Similar to the concerns of potential federal agency aggrandizement, state legislators also have adopted several policing mechanisms to watch over agencies invoking emergency powers. These policing mechanisms are

174. See 29 DEL. CODE ANN. tit. 101, § 10119; N.Y. A.P.A. LAW § 202 (McKinney 2012); UTAH CODE ANN. § 63G-3-304 (LexisNexis 2012); WASH. REV. CODE § 34.05.350 (2011).

175. MODEL STATE ADMIN. PROCEDURE ACT § 3(b) (1961) (revised in 1981 and 2010).

176. See IOWA CODE § 17A.4 (2011); 45 PA. CONS. STAT. § 1203 (2011).

177. MODEL STATE ADMIN. PROCEDURE ACT § 3-108(a) (1981) (revised in 2010).

178. REVISED MODEL STATE ADMIN. PROCEDURE ACT § 309 (2010).

179. *Id.*

180. *Id.* (providing that an emergency rule is effective for not longer than 180 days and is renewable once for an additional 180 days).

181. This is, of course, an extrapolation as there are constitutional and administrative concerns at the federal level that are unique. However, the experimentation and rejection of the federal model at least indicates an overall dissatisfaction with it.

categorized here by the status of the overseer: (1) Legislative Review, (2) Judicial Review, and (3) Executive Review.

1. Legislative Review

The states are less abashed than the federal legislature to include direct legislative review in their emergency rulemaking procedures. For example, in the Colorado emergency rulemaking statute, there is an express provision that emergency rules must be reviewed by the office of legislative legal services; Connecticut requires legislative regulatory review; and Maryland asks for *proposed* emergency rules to be approved by the Committee on Administrative, Executive, and Legislative Review and the Department of Legislative Service.¹⁸² The review process is sometimes before rule enactment, as is the case with Maryland, but may also be *ex post*.¹⁸³ Such is the case in Wisconsin, where not only is every emergency rule reviewed by the small business regulatory board but extension of the rule requires legislative committee approval.¹⁸⁴

The time limit on emergency rule effective dates are, by far, the most direct control state legislatures impose on the emergency rulemaking process. The vast majority of states, forty-one in all, impose a concrete time limit of some kind ranging from three to six months.¹⁸⁵ Only eight states impose no time limit on the effective length of emergency rulemaking, and only one, Iowa, makes the default effectiveness of emergency rules “permanent.”¹⁸⁶

2. Judicial Review

Many state emergency statutes do not expressly provide whether the initial, agency emergency determination is judicially reviewable. In fact, only six state emergency power statutes expressly mention judicial review.¹⁸⁷ However, given the importance for potential overreach, many state courts have determined that the relevant state procedures imply such a power.¹⁸⁸ For example, the court in *Melton v. Rowe*¹⁸⁹ noted that

182. See, e.g., COLO. REV. STAT. § 24-4-103(6)(a) (2012); CONN. GEN. STAT. ANN. § 4-168 (West 2012); MD. CODE ANN., STATE GOV'T § 10-111(b) (LexisNexis 2011).

183. MD. CODE ANN., STATE GOV'T § 10-111 (b).

184. WIS. STAT. § 227.24 (2012).

185. Maine has a ninety day limit; Arizona, California, Maryland, Massachusetts, Michigan, and Minnesota have a 180 day limit; Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, and Mississippi have a 120 day limit. The full list of statutes is on file with the author.

186. See FLA. STAT. § 120.525 (2011); IOWA CODE § 17A.4 (2011); KY. REV. STAT. ANN. § 13B.125 (West 2011); LA. REV. STAT. ANN. § 49:953 (2011).

187. See KY. REV. STAT. ANN. § 13B.125; ME. REV. STAT. tit. 5, § 8054 (2011); MO. REV. STAT. § 536.025 (2011); MONT. CODE ANN. § 2-4-303 (2011); N.C. GEN. STAT. ANN. § 150B-21.1A (West 2011); W. VA. CODE § 29A-3-15 (2011).

188. For example, Washington precedent establishes that all courts, including lower trial courts, have inherent power to review agency action to ensure that it is not arbitrary and capricious or contrary to law. *State v. Ford*, 755 P.2d 806, 807-08 (Wash. 1988); see also *Pierce Cnty. Sheriff v. Civil Serv. Comm'n*, 658 P.2d 648, 650-51 (Wash. 1983).

Connecticut had not specifically authorized the judicial review of an agency's finding that imminent peril required it to adopt emergency regulations.¹⁹⁰ Regardless of the express omission, the *Melton* court found that, under the circumstances, the right of judicial review was properly implied.¹⁹¹ In its explanation the court pointed to *Florida Home Builders Ass'n v. Division of Labor*,¹⁹² where a Florida court found that "[a]n agency's assumption of emergency powers in the absence of a bona fide emergency violates basic rights of due process, and constitutes a usurpation of power."¹⁹³ Likewise, in *Senn Park Nursing Center v. Miller*¹⁹⁴ an Illinois court echoed the common refrain that "[t]he importance of judicial scrutiny of administrative actions cannot be overemphasized."¹⁹⁵ Therefore, as in the federal environment, the state judiciary will imply a right to review agency emergency determinations even when the emergency statute does not expressly provide for such review.

3. Executive Review

The majority of states make no express provision for executive review. However, of those twenty-two states which do expressly consider executive review of emergency power use, that review takes several different forms. The most popular form of executive review is *ex ante* approval of the threshold determination of "emergency."¹⁹⁶ All but one of the remaining states require that the emergency rule be "filed" with either the governor or

189. 619 A.2d 483 (Conn. Super. Ct. 1992).

190. *Id.* at 485.

191. *Id.* (reviewing an agency's determination that an emergency existed because "[c]ourts are not conclusively bound by an agency's determination that an emergency exists, although it is recognized that what constitutes an emergency is primarily a matter for the agency's discretion." (citing *Poschman v. Dumke*, 107 Cal. Rptr. 596 (App. Dep't Super. Ct. 1973))); *Pioneer Liquor Mart, Inc. v. Alcoholic Beverages Control Comm'n*, 212 N.E.2d 549, 555 (Mass. 1965) (stressing "that 'emergency' findings under [Massachusetts statute] must be carefully scrutinized because if unwarrantably made, they may lead to improper denial of public hearings or comment on regulations, to evasion of the salutary purposes of [the statute] and possibly to other serious abuse").

192. 355 So. 2d 1245 (Fla. Dist. Ct. App. 1978).

193. *Id.* at 1247 (Booth, J., dissenting) (citation omitted).

194. 455 N.E.2d 162 (Ill. App. Ct. 1983), *aff'd sub nom.* *Senn Park Nursing Ctr. v. Miller*, 470 N.E.2d 1029 (Ill. 1984).

195. *Id.* at 170.

196. *Ex ante* approval of an "emergency" or "imminent peril" standard by the governor is required by eleven states, by the attorney general in Virginia, and by an administrative law hearings office in Minnesota. CONN. GEN. STAT. ANN. § 4-168 (West 2012); MD. CODE ANN., STATE GOV'T § 10-111(b) (LexisNexis 2011); MICH. COMP. LAWS § 24.248 (2004); MINN. STAT. § 14.388 (2011); NEB. REV. STAT. § 84-907 (2012); NEV. REV. STAT. § 233B.0613 (2011); N.J. STAT. ANN. § 52:14B-3 (West 2011); OHIO REV. CODE ANN. § 119.03 (LexisNexis 2012); OKLA. STAT. tit. 75, § 75-253 (2010); VA. CODE ANN. § 2.2-4011 (2011); WASH. REV. CODE § 34.05.350 (2011); WIS. STAT. § 227.24 (2012); WYO. STAT. ANN. § 16-3-103 (2011).

the secretary of state at the time of enactment.¹⁹⁷ The final state, Louisiana, expressly permits “discretionary” review by the governor.¹⁹⁸

IV. DO WORDS MATTER? COMPARING STATE AND FEDERAL AGENCY EFFICIENCY/PUBLIC PARTICIPATION PREFERENCES

When comparing the federal and state agency emergency powers, the first question is whether or not courts distinguish between the statutory language of “good cause” and “imminent peril” provisions. The following discussion addresses that question. After analysis of not only the language but also the statutory structure of the various statutes, the conclusion made is that courts should distinguish between “good cause” and “imminent peril” statutes.

A. “Good Cause” & “Imminent Peril”: Distinction Without a Difference?

The universe of major models for state emergency power legislation are (1) the APA’s “good cause” exemption enacted in 1946, (2) the 1961 MSAPA “imminent peril” test, (3) the 1981 MSAPA “good cause” exemption, and (3) the 2010 MSAPA “imminent peril” test. The contributors to the 2010 MSAPA made a choice to return to the 1961 “imminent peril” test and rejected the prior 1981 “impracticable” and “contrary to public interest” test. The latter is clearly modeled on the federal “good cause” exemption. There can be no mistake that the choice of the “imminent peril” test for the 2010 MSAPA was deliberate, conscious, and measured. In other words, there is a distinction between the two tests, and the contributing commissioners determined the “imminent peril” standard to be superior.¹⁹⁹

Although the 2010 MSAPA briefly footnotes the return to the 1961 standard, it is not entirely clear exactly why the commissioners’ ultimate preference was for an “imminent peril” rather than a “good cause” standard. However, by examination of the various state emergency powers, this Article argues that the choice between “good cause” and “imminent peril” demonstrates a conscious preference for agency efficiency, on the one hand, and public participation—and the attendant limitation of agency power—on the other. In short, “good cause” as adopted by Congress and two states reflects a desire for agency efficiency, even if the result is reduced control over agency action. The vast majority of states, however, adopt an “imminent peril” test or other trigger mechanism with the express intent of

197. See HAW. REV. STAT. § 91-4 (2011); MO. REV. STAT. § 536.025 (2011); TENN. CODE ANN. § 4-5-208 (2011); WASH. REV. CODE § 34.05.350; W. VA. CODE § 29A-3-15 (2011).

198. See LA. REV. STAT. ANN. § 49:953 (2011).

199. The National Conference of Commissioners on Uniform State Laws (National Conference Commissioners) adopted the revised MSAPA, subject to style changes, at its 2010 summer meeting. REVISED MODEL STATE ADMIN. PROCEDURE ACT (2010). However, at least one commissioner expresses great skepticism that there is a practical distinction between the two tests. See Ronald M. Levin, *Rulemaking Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 855, 871–72 (2011).

controlling agency action when public participation is not feasible or prudent.

The conclusion that statutory word choice indeed matters is surprisingly unapparent to many, including some in the judiciary. For example, as posited by Michael Asimow and Ronald Levin in their influential administrative law casebook, it is unclear whether the distinction between “good cause” and “imminent peril” makes any difference in legal outcomes.²⁰⁰ The authors point to the judicial analysis in *Jewish Community Action v. Commissioner of Public Safety*,²⁰¹ where the Minnesota emergency power exemption of the time permitted rulemaking in the face of “serious and immediate threat to the public health, safety, or welfare.”²⁰² On the basis of that exemption, the state’s department of public safety adopted a rule (without comment) that would require, among other things, more stringent proof of citizenship and identity for the issuance of drivers’ licenses.²⁰³ The stated goal was to impede terrorist activity.²⁰⁴ The rule was invalidated by the court, which held that the agency had not demonstrated that public rulemaking would be “contrary to the public interest.”²⁰⁵ This, of course, picks up the language of the third prong of the federal “good cause” exemption. The wording of the decision exemplifies a possible judicial disregard of finer distinctions between the “imminent peril” and “contrary to the public interest” tests.

This judicial conflation of the federal “good cause” test and the state “imminent peril” test is of concern as it obfuscates what appears to be a real distinction in the minds of state legislatures. Of the fifty states, only two, Iowa and Pennsylvania, have adopted the exact language of the federal “good cause” exemption.²⁰⁶ In total, twenty-seven states, or 54 percent, use the term “imminent” or “immediate” to trigger the use of the emergency power.²⁰⁷

But Asimow and Levin astutely question whether this legislative distinction is appreciated, in particular by the judiciary.²⁰⁸ The general lack

200. ASIMOW & LEVIN, *supra* note 83, at 309.

201. 657 N.W.2d 604 (Minn. 2003).

202. ASIMOW & LEVIN, *supra* note 83, at 309.

203. *Id.* at 308.

204. *Id.* See generally Rebecca Smith et al., *Low Pay, High Risk: State Models for Advancing Immigrant Workers’ Rights*, 28 N.Y.U. REV. L. & SOC. CHANGE 597, 649 (2004).

205. *Jewish Cmty. Action*, 657 N.W.2d at 607.

206. IOWA CODE § 17A.4 (2011); 45 PA. CONS. STAT. ANN. § 1203 (2011); See *Iowa Emergency Rulemaking*, *supra* note 34.

207. ALA. CODE § 41-22-5 (2011); ALASKA STAT. § 44.62.250 (2011); CONN. GEN. STAT. ANN. § 4-168 (West 2012); DEL. CODE ANN. tit. 29, § 10119 (2011); FLA. STAT. § 120.525 (2011); GA. CODE ANN. § 50-13-4 (2011); HAW. REV. STAT. § 91-4 (2011); IDAHO CODE ANN. § 67-5226 (2012); KY. REV. STAT. ANN. § 13B.125 (West 2011); LA. REV. STAT. ANN. § 49:953 (2011); ME. REV. STAT. tit. 5, § 8054 (2011); MISS. CODE ANN. § 25-43-3.108 (2012); MO. REV. STAT. § 536.025 (2011); MONT. CODE ANN. § 2-4-303 (2011); N.H. REV. STAT. ANN. § 541-A:18 (2011); N.J. STAT. ANN. § 52:14B-3 (West 2011); N.D. CENT. CODE § 28-32-03 (2011); R.I. GEN. LAWS § 42-35-3 (2012); S.C. CODE ANN. § 1-23-130 (2011); S.D. CODIFIED LAWS § 1-26-5 (1978).

208. ASIMOW & LEVIN, *supra* note 83, at 309.

of judicial review of state agency emergency power makes this question difficult to answer definitively.²⁰⁹ Added to the complication is the distinction in the wording of each individual state statute. However, at least one state court has directly addressed and summarily dismissed the proposition that there is no distinction between “good cause” and “imminent peril.”²¹⁰ In *Mauzy v. Gibbs*,²¹¹ the state court examined the standard for emergency rulemaking under the Washington APA in a case of first impression.²¹² The Washington APA at the time followed the 1961 MSAPA and permitted emergency rulemaking when an agency determined it necessary to dispense with public participation for the “protection of the public health or welfare.”²¹³ The court declared emphatically that “[t]he federal [“good cause” exemption] (which we find entirely persuasive within the scope of the statute that it construes) is *irrelevant here* and *unpersuasive* in the construction of the Washington APA.”²¹⁴ In contrast to the federal authority, the *Mauzy* court reasoned that in order to justify the use of the emergency rule statute “the [agency’s] reasons should be truly emergent and persuasive to the reviewing court.”²¹⁵ In the same vein, the court articulated that an emergency must be grounded in a finding of facts and not “mere statements of the motivation for the enactment” and must otherwise provide an adequate basis for judicial review.²¹⁶

In an interesting analogy, the *Mauzy* court looked to the Washington Supreme Court, which addressed the issue of emergency legislation but not emergency rulemaking by a state agency.²¹⁷ To explain the importance of the standard of “emergent” danger, the *Mauzy* court quoted the Supreme Court’s analysis as follows:

The [Open Public Meeting] act is intended to guarantee public access to the participation in the activities of their representative agencies. The decisions of governmental bodies are usually important and the

209. For example, a search for judicial review that might conflate the distinction between “good cause” and “imminent peril” revealed only four candidates. *See Valdez v. Ariz. Dep’t of Econ. Sec.*, 577 P.2d 730, 732 (Ariz. Ct. App. 1978); *Beverly Enters.-Mo. Inc. v. Dep’t of Soc. Servs., Div. of Med. Servs.*, 349 S.W.3d 337, 350 (Mo. Ct. App. 2008); *State v. MacKenzie*, 60 P.3d 607, 613 (Wash. Ct. App. 2002); *Mauzy v. Gibbs*, 723 P.2d 458, 460 (Wash. Ct. App. 1986).

210. Asimow and Levin posed a similar question in their casebook. *See ASIMOW & LEVIN, supra* note 83, at 309 (“Is the § 3(b) ‘imminent peril’ test different from the ‘impracticable, unnecessary, or contrary to the public interest’ language of federal APA and 1981 MSAPA § 3-108(a)?”). The analysis set forth above and in the following paragraphs leads this author to conclude the answer is “yes”—the two tests are indeed different.

211. 723 P.2d 458 (Wash. Ct. App. 1986).

212. *See generally id.*

213. WASH. REV. CODE § 34.04.030 (1989); *Mauzy*, 723 P.2d at 460.

214. *Mauzy*, 723 P.2d at 463 (emphasis added).

215. *Id.* at 461–62 (noting that considerations of administrative and fiscal convenience alone cannot satisfy that standard); *see Poschman v. Dumke*, 107 Cal. Rptr. 596, 602 (Ct. App. 1973). *But see Armistead v. State Pers. Bd.*, 583 P.2d 744 (Cal. 1978) (“The recitals in the resolution in question may be a sound declaration of policy but do not reflect a crisis situation, emergent or actual . . .”).

216. *Mauzy*, 723 P.2d at 462.

217. *Id.* at 462.

circumstances in which they are made are often pressing. Were we to allow them to escape public scrutiny by the simple expedient of declaring the situations they face emergent, we would subject the act's requirements to the whim of the public officials whose activities it is designed to regulate.²¹⁸

In the view of the *Mauzy* court, the same considerations for emergency legislation apply equally, if not more so, to agency rulemaking.²¹⁹

Key, therefore, is not only the wording of the “imminent peril” test but also the structural safeguards of the procedural statute. In essence, there is a sliding scale of a tight reign on the trigger and length of effectiveness coupled with a more lenient ability for *ex post* official adoption. This theory is borne out by the various state statutes: the more lenient the trigger, often the more rigorous the *ex post* adoption procedures. This balance of *ex ante* restriction and *ex post* leniency is arguably reflected (in reverse) by the federal “good cause” procedure. The federal “good cause” exemption has a relatively generous trigger but limits postadoption review. However, this delicate balance is completely nullified at the federal level because of the lack of a time limit on the emergency rule. Because a rule may simply continue as an “interim-interim” rule, the restrictions placed on the *ex post* public participation may never come to be.

B. *The Illustrative Extremes of Iowa and Montana*

Two states that seem to occupy the opposite ends of the “efficiency” versus “public participation” spectrum are Iowa and Montana. These two examples are examined below in greater detail.

1. Iowa—The “Efficiency” State

In the description of its emergency rule statutes, the relevant Iowa website boasts that it is a “misnomer” to call its exemption of agency rulemaking from notice and comment an “emergency” rulemaking.²²⁰ The site notes further that “[emergency rulemaking] is not limited to emergency situations and that ‘emergency’ does not even appear in the statute.”²²¹ The Iowa administrators make no apology that their emergency statutes are based soundly on expediency, describing the emergency rules as a means to “shorten or even eliminate delays caused by the rulemaking process.”²²² In fact, the Iowa administrators assert that the origin of the administrative state is rooted in the need for agencies to “respond swiftly to changing circumstances.”²²³ Seemingly unaware of its own institutional conceit, the Iowa administrators decry the lengthy rulemaking process—that

218. *Id.* n.4 (quoting *Mead School Dist. v. Mead Educ. Ass’n*, 530 P.2d 302, 305 (Wash. 1975)).

219. *Id.*

220. See *Iowa Emergency Rulemaking*, *supra* note 34.

221. *Id.*

222. *Id.*

223. *Id.*

troublesome public participation requirement meant to maintain the democratic integrity of a worrying delegated authority—as a bothersome delay that “can hamstring an agency’s ability to swiftly react.”²²⁴

The Iowan attitude is enlightening if not somewhat disturbing to those who have a general uneasiness about the constitutionality of the administrative state. There is a certain element of *realpolitik* to the Iowan view and the Iowan statutes—but do they run perilously close to blessing overt agency aggrandizement? On its face, the risk of aggrandizement or agency overreach is higher under the Iowan—and by analogy, the federal “good cause” provisions—than under the alternative state emergency provisions described below. Most telling, the Iowa administrators describe the term “contrary to the public interest”—the same phrase used in the federal statute—to be what many intuitively believe (fear) it to be: “a catch-all phrase that requires *an agency* to weigh the value of notice and public participation against the value of speeding implementation of the rule.”²²⁵ In other words, the agency, consisting of unelected, largely unaccountable bureaucrats, will decide if the participatory governance envisioned by the Constitution and the APA is worth it.

2. Montana—The “Public Participation” State

In stark contrast to the bravado of the Iowa administrators, twenty-seven legislatures have included a trigger for emergency rulemaking that is defined by “imminent peril” or “immediate danger” as proposed by the 1961 and 2010 MSAPAs.²²⁶ Compare the Iowan attitude to that of the Montana legislature cited earlier.²²⁷ Explaining its own “imminent peril” standard, the Montana statute states that “[a]n emergency rule may be adopted only in circumstances that *truly and clearly* constitute an *existing* imminent peril . . . that cannot be averted or remedied by any other administrative act.”²²⁸ To emphasize its view that the preclusion of notice and participation is an “extraordinary power requiring extraordinary safeguards,” Montana gives standing to “*any person*” to challenge the emergency determination and requires expedited judicial review of any such challenge.²²⁹ Montana obviously does not share the same tolerance

224. *Introduction, Emergency Rulemaking Process*, ADMIN. RULES IOWA ST. GOV’T, http://www.adminrules.iowa.gov/how_rules_work/emergency.html (last visited Apr. 19, 2013).

225. *See id.* (emphasis added).

226. *See, e.g.*, ALA. CODE § 41-22-5 (2011); ALASKA STAT. § 44.62.250 (2011); CONN. GEN. STAT. ANN. § 4-168 (West 2012); DEL. CODE ANN. tit. 29, § 10119 (2011); FLA. STAT. § 120.525 (2011); GA. CODE ANN. § 50-13-4 (2011); HAW. REV. STAT. § 91-4 (2011); IDAHO CODE ANN. § 67-5226 (2012); KY. REV. STAT. ANN. § 13B.125 (West 2011); LA. REV. STAT. ANN. § 49:953 (2011); ME. REV. STAT. tit. 5, § 8054 (2011); MISS. CODE ANN. § 25-43-3.108 (2012); TENN. CODE ANN. § 4-5-208 (2011).

227. *See supra* note 206–07 and accompanying text.

228. MONT. CODE ANN. § 2-4-303 (2011) (emphasis added).

229. *Id.* (emphasis added).

for agency discretion as demonstrated by the Iowa statute. Any court that conflates the two standards would be in error.

C. The Public Participation Preference of the States

Although the Montana and Iowa statutes more overtly demonstrate their respective preferences for public participation and efficiency, other legislatures have also made their preferences known by statutory construction. In particular, states vary in the degree of discretion permitted to agencies to determine the threshold issue of what may constitute an “emergency.” Iowa and Pennsylvania federal agencies enjoy a combination of (1) broadly phrased statutory language for emergency rulemaking and (2) *ex post* review, providing these agencies with the maximum discretion to act efficiently under any federal law.²³⁰ Such a combination is a demonstration of an “efficiency” preference. Montana and twenty-seven other states, on the other hand, have rather narrow statutory language: the “imminent peril” test.²³¹ In addition to the limiting language of the statute, twenty-four of the “imminent peril” statutes include an express time limit.²³² This combination—limiting statutory language plus a time limit—is arguably a revealed preference for public participation over efficiency.

But what of those states that do not adopt the language of the federal APA but do have a broad, undefined trigger of “emergency” for the preclusion of notice and comment? At first blush, it may appear that these states share the federal appetite for agency efficiency over public participation. However, this is far from the case. Of the eleven states that have an undefined (or loosely defined) emergency criteria, nine require the *ex ante* approval of the governor before an emergency rule becomes effective.²³³ In other words, only the governor has the ultimate discretion to decide what constitutes an “emergency.” This absolute executive control of agency discretion balances the broad wording of the statute and is a far cry from the *sua sponte* determinations of “good cause” of federal agencies.

230. See IOWA CODE § 17A.4 (2011); 45 PA. CONS. STAT. ANN. § 1203 (2011).

231. Twenty-eight states in all have the pure “imminent peril” standard: Alabama, Alaska, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maine, Mississippi, Missouri, Montana, New Hampshire, New Jersey, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, and West Virginia. A list of the state statutes is on file with the author.

232. The four states of the twenty-eight that do not have time limits are Florida, Kansas, Kentucky, and Louisiana. See FLA. STAT. § 120.525 (2011); KAN. STAT. ANN. § 77-536 (2011); KY. REV. STAT. ANN. § 13B.125 (West 2011); LA. REV. STAT. ANN. § 49:953 (2011).

233. The nine states that require governor approval for emergency rulemaking are: Michigan, Nebraska, Nevada, Ohio, Oklahoma, Virginia, Washington, Wisconsin, and Wyoming. See MICH. COMP. LAWS § 24.248 (2004) (governor must concur with emergency determination); NEB. REV. STAT. § 84-907 (2012); NEV. REV. STAT. § 233B.0613 (2011); OHIO REV. CODE ANN. § 119.03 (LexisNexis 2012); OKLA. STAT. tit. 75, § 253 (2010); VA. CODE ANN. § 2.2-4011 (2011); WIS. STAT. § 227.24 (2012); WYO. STAT. ANN. § 16-3-103 (2011).

Of the remaining two states with broad “emergency” language, both require alternative *ex ante* review of the emergency determination.²³⁴

In addition to pre-approvals, a few states emphasize their preference for public participation and their view of the extraordinary nature of the emergency power by including express provisions that the emergency rule itself must be narrowly drafted to cover the emergency situation only. For example, Florida, Idaho, Kansas, and Maine all have “imminent peril” or “threat” standards for preclusion of notice-and-comment rulemaking. These states limit the resulting emergency rule to that necessary to “prevent or avoid the immediate danger.”²³⁵

While the majority of the states have adopted an “imminent peril” standard, some soften the immediacy element of the test. These nine states permit agency use of emergency power for the “preservation” of the public health, safety, or welfare.²³⁶ It is unclear if this makes a distinction in the review process but, again, it arguably opens the door to a more liberal interpretation that might indicate a preference for efficiency over public participation. Unlike the states that simply do not define the trigger term but impose strong executive restraints to administrative power, the states with the “preservation” standard are a bit of a mixed bag.²³⁷ Eight of the nine “preservation” prong states do have a time limit on how long the emergency rule may be effective—two have the shortest time limit (sixty days) of any of the fifty states.²³⁸ Three “preservation” states require *ex ante* approval of the rulemaking by either the governor or the attorney

234. See CAL. GOV'T CODE § 11350 (West 2012); MD. CODE ANN., STATE GOV'T § 10-111(b) (LexisNexis 2011) (mandating approval by the Joint Committee on Administrative, Executive, and Legislative Review and the Department of Legislative Services); MINN. STAT. § 14.388 (2011) (administrative law judge review is mandatory).

235. See, e.g., FLA. STAT. § 120.525 (2011) (“The agency takes only that action necessary to protect the public interest under the emergency procedure.”); IDAHO CODE ANN. § 67-5247 (2012) (“The agency shall take only such actions as are necessary to prevent or avoid the immediate danger that justifies the use of emergency contested cases.”); KAN. STAT. ANN. § 77-536 (“The state agency may take only such action as is necessary . . . [t]o prevent or avoid the immediate danger . . . that justifies use of emergency adjudication.”); ME. REV. STAT. tit. 5, § 8054 (2011) (providing that agencies may modify rulemaking procedures “to the minimum extent required to enable adoption of rules designed to mitigate or alleviate the threat found”).

236. The nine states that invoke a “preservation” standard for emergency powers are Arizona, Colorado, Massachusetts, Michigan, New Mexico, New York, Oklahoma, Washington, and Wisconsin. See, e.g., ARIZ. REV. STAT. ANN. § 41-1026 (2012); COLO. REV. STAT. § 24-4-103(6)(a) (2012); MASS. GEN. LAWS ch. 30a, § 2 (2011); MICH. COMP. LAWS § 24.248; N.M. STAT. ANN. § 12-8-4 (2011); N.Y. A.P.A. LAW § 202 (McKinney 2012); OKLA. STAT. tit. 75, § 75-253 (2010); WASH. REV. CODE § 34.05.350 (2011); WIS. STAT. § 227.24.

237. See, e.g., CAL. GOV'T CODE § 11342.545 (West 2012) (providing that an “emergency” triggers the power, and defining “emergency” as “a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare”); 5 ILL. COMP. STAT. 100/5-45 (2011) (emergency triggers the power but is not defined).

238. N.M. STAT. ANN. § 12-8-4 (2011); N.Y. A.P.A. LAW § 202.

general of the state.²³⁹ In sum, five of the nine have a relatively strong indicator that the preference is for public participation over efficiency (very short time limit or *ex ante* approval), but the other four have only their statutory time limits to indicate such a preference.

Finally, Iowa's stated preference for efficiency is noted previously, and this articulated preference is confirmed by the construction of the Iowa statute.²⁴⁰ For example, unlike the forty-one states that put an express time limit on the effectiveness of the emergency rule, Iowa emergency rules are permanent unless there is an objection.²⁴¹ The other "good cause" state, Pennsylvania, also has no expiration date for emergency rules.²⁴² This limitless approach to emergency rulemaking echoes that of the federal statute, which notoriously allows emergency rules to live in perpetuity as "interim-final rules" at the discretion of the agency.²⁴³

D. Preference Versus Pragmatism: The Problems of Federal Funding, Agency-Forcing, and Medicaid

An interesting development in state emergency power statutes is the express demarcation of emergency powers for certain enumerated classes. These express triggers are almost invariably related to federal mandates. The 2010 MSAPA itself picks up on this trend by recommending that the state emergency power permit agencies to quickly respond to federal funding deadlines.²⁴⁴

This trend to provide express emergency power with respect to federal statutes reflects a state administrative reality. In particular, state statutes that provide for express federal triggers do so for federal mandates concerning "Medicaid" and "medical assistance programs."²⁴⁵ This is a practical carve-out as state emergency power is used overwhelmingly in connection to these programs.²⁴⁶ A great deal more medical program administration looms in the future. For now, before full enactment of new federal health care laws, there is time for state legislatures to consider new procedures designed to cope with medical programs.

239. See MICH. COMP. LAWS § 24.248 (governor must "concur" with agency's determination); OKLA. STAT. tit. 75, § 75-253 (rule must first be approved by the governor); WIS. STAT. § 227.24 (approval by governor required).

240. IOWA CODE § 17A.4 (2011).

241. *Id.*

242. 45 PA. CONS. STAT. § 1203 (2011).

243. 5 U.S.C. § 553 (2006); see *supra* Part II.B (describing interim-final rules).

244. REVISED MODEL STATE ADMIN. PROCEDURE ACT § 309 (2010) (providing for emergency rules).

245. See, e.g., COLO. REV. STAT. § 24-4-103(b)(a) (2012) (emergency power allowed as "imperatively necessary to comply with a . . . federal law or federal regulation"); 5 ILL. COMP. STAT. 100/5-46.2 (2011) (emergency power permitted to comply with Medicaid plan requirements); LA. REV. STAT. ANN. § 49:953 (2011) (emergency power permitted in relation to avoiding penalty and securing federal funding benefits in medical assistance programs); *Iowa Emergency Rulemaking*, *supra* note 34 (expressly exempts Medicaid rules from all administrative rules, including the "emergency" rulemaking statute).

246. See *supra* Figure 3.

The most pragmatic approach to the administrative difficulty of the federal medical programs is arguably Iowa's. Although Iowa presents a liberal interpretation of administrative emergency and demonstrates a somewhat flip irreverence to the benefits of public participation, Iowa's response to the Medicaid federal mandates is clean and practical. Iowa simply excludes an entire class of repetitive rulemaking from public participation, "especially in the area of Medicaid policy."²⁴⁷ An Iowan agency may adopt a rule without public participation if it details why the rule fits in a "very narrowly tailored category of rules" set forth by statute.²⁴⁸

This pragmatic approach is adopted in various manners by other states that carve out particular categories of permissive emergency rulemaking. For example, Indiana tailors emergency rulemaking to thirty-eight enumerated agencies.²⁴⁹ Illinois not only permits emergency rulemaking for timely completion of its Medicaid plan but also permitted it for the "expeditious" implementation of the state fiscal budgets in years 1999–2011.²⁵⁰ The key enumeration, when one is expressed, is to permit immediate compliance with federal laws.²⁵¹

This concern for compliance with federal mandates is echoed in the 2010 MSAPA, which includes for the first time an allowance for emergency rulemaking when there is a risk of "loss of federal funding."²⁵² Inclusion of the "loss of federal funding" test is a highly practical and efficient express directive for state level agencies. This is especially true as (1) Congress increasingly includes statutory deadlines in its legislation and (2) federal programs are increasingly pushed down to the state level for implementation.²⁵³

However, it is the need for such a provision that is lamentable. If legislation is rushed at the congressional level and state implementation is forced by mandate at impractical rates, is not the combined effect to limit or eliminate state-representative public participation? Given the dictatorial nature of many federal mandates, and of the requirements to receive the

247. *Iowa Emergency Rulemaking*, *supra* note 34.

248. IOWA CODE § 17A.4 (2011).

249. IND. CODE § 4-22-2-37.1 (2011).

250. 5 ILL. COMP. STAT. 100/5-45 (2011).

251. *See generally* ALA. CODE § 41-22-5 (2011); COLO. REV. STAT. § 24-4-103(6)(a) (2012); 5 ILL. COMP. STAT. 100/5-45; IND. CODE § 4-22-2-37.1; IOWA CODE § 17A.4; LA. REV. STAT. ANN. § 49:953 (2011).

252. REVISED MODEL STATE ADMIN. PROCEDURE ACT (2010).

253. *See, e.g.*, 20 U.S.C. §§ 6302–6304 (2006); Patient Protection and Affordable Care Act of 2010, 42 U.S.C. § 1396a (Supp. V 2011), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010) (codified as amended in scattered sections of the U.S. Code); 42 U.S.C. § 18001 (Supp. V 2011); CONN. GEN. STAT. ANN. § 17b-427 (West 2012) (establishing Connecticut's "CHOICES" program in accordance with federal Medicare laws); UTAH CODE ANN. § 53A-1-904 (LexisNexis 2012) ("In accordance with the No Child Left Behind Act . . . school officials shall determine . . . if the No Child Left Behind Act: (i) requires the state to spend state or local resources in order to comply . . . or (ii) causes the state, local education agencies, or schools to change curriculum in order to comply . . .").

federal funding associated with various mandates, potential overreaching by state agencies is not of central concern. Rather, the most pertinent issue is the extent that federal programs supplant local democratic processes.²⁵⁴ It appears that under the new federal scheme of health care, for example, the states may be compelled to adopt not only the policy but also the administrative procedural preferences of the federal government. Such a result is an affront to the constitutional scheme that envisions the states as coequal sovereigns with the federal government—not as the most junior of partners.²⁵⁵

To put in perspective the issue of health care, it is essential to understand its magnitude and the extent to which that state administration is defined by health care programs. The most prominent state health care program is Medicaid. Medicaid is actually a joint venture of the federal government and participating state governments to provide public health care to those in need. Currently, Medicaid costs average roughly 20 percent of state budgets.²⁵⁶ The Patient Protection and Affordable Care Act (ACA) includes several Medicaid expansion provisions that will impose a vast enlargement on the current system.²⁵⁷ The ACA's expansion is estimated to increase Medicaid enrollment by 24 million beneficiaries by 2015, and by 2021 it is estimated that almost 100 million Americans will be under the Medicaid umbrella.²⁵⁸ Even counting federal funding, this will increase state costs by \$20 billion to \$42 billion by the end of the decade.²⁵⁹

Although the states currently have discretion as to how to define the scope of coverage—for example, what defines the poverty level—if a state selects to opt in to the ACA, compliance with additional conditions will be required.²⁶⁰ Federal Medicaid funds currently account for more than 40

254. Other administrative concerns associated with federal mandates are that they (1) create the inherent inefficiencies for which one-size-fits-all mandates are notorious and (2) impose real administrative costs on the states that are not calculated or compensated for at the time of the mandate adoption. *See supra* notes 243–50 and accompanying text.

255. *See, e.g.,* *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (“[O]ur federal system preserves the integrity, dignity, and residual sovereignty of the States.”); *Texas v. White*, 74 U.S. 700, 725 (1868) (“[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution, as the preservation of the Union and the maintenance of the National government.”).

256. *2008 State Expenditure Report*, NAT'L ASS'N ST. BUDGET OFFICERS (Fall 2009), <http://www.nasbo.org/sites/default/files/FY08%20State%20Expenditure%20Report.pdf>.

257. The Patient Protection and Affordable Care Act §§ 2001–2002, 42 U.S.C. § 1396a.

258. CONG. BUDGET OFFICE, *THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2011 TO 2021*, at 62 (Jan. 2011), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/120xx/doc12039/01-26_fy2011outlook.pdf.

259. KAISER COMM'N ON MEDICAID & THE UNINSURED, *MEDICAID COVERAGE & SPENDING IN HEALTH REFORM 6* (May 2010), *available at* <http://www.kff.org/healthreform/upload/medicaid-coverage-and-spending-in-health-reform-national-and-state-by-state-results-for-adults-at-or-below-133-fpl.pdf>; Letter from Douglas Elmendorf, Dir., Cong. Budget Office, to Nancy Pelosi, Speaker, U.S. House of Representatives (March 20, 2010), *available at* <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/113xx/doc11379/amendreconprop.pdf>.

260. Soon after the passage of the ACA, twenty-five states joined with Florida to sue for a declaratory judgment that the ACA is unconstitutional to the extent it threatened to end all

percent of all federal funds granted to the states, a total of \$276 billion in 2011 alone.²⁶¹ These federal funds account for 50 to 83 percent of state Medicaid budgets.²⁶² Given that federal Medicaid criteria already contribute greatly to the exercise of state agency emergency power, the exponential increase of the Medicaid program under the ACA will likely place a proportionate (or greater) pressure on state administrative agencies. In other words, states who opt-in to the ACA program are well advised to gird their administrative agencies for the regulatory onslaught.²⁶³

As noted in the case of Medicaid, “agency-forcing,” the congressional practice of assigning strict deadlines and specific compliance criteria, may be directly responsible for the removal of public participation opportunities at both the federal and state levels.²⁶⁴ Regardless of the preference for

Medicaid funds if states did not comply with the additional requirements of the ACA. *See Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1271 (N.D. Fla.), *order clarified*, 780 F. Supp. 2d 1307 (N.D. Fla.), *aff’d in part, rev’d in part sub nom. Florida ex rel. Att’y. Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir.), *aff’d in part, rev’d in part sub nom. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). Part of that suit was based on the grounds that the ACA’s mandatory expansion of Medicaid was unconstitutionally coercive, infringing on state sovereignty and the Constitution’s framework of federalism. The defendants were granted summary judgment on the state’s coercion claim at the district court level and that decision was later affirmed by the Eleventh Circuit. *Florida ex rel. Att’y. Gen.*, 648 F.3d at 1307. That court invited the Supreme Court to speak on the issue of its Spending Clause cases. *Id.* at 1263–68. The Supreme Court agreed to address the issue and scheduled a full hour of oral argument on the coercion claim alone. In a highly fractured opinion, the Supreme Court arguably held that—at a minimum—states could not be coerced to adopt ACA conditions on threat of loss of federal funding for the state’s entire Medicaid program. However, the federal government could provide grants under the ACA and “require the States to comply with accompanying conditions.” *See Nat’l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012).

261. THE PRESIDENT’S BUDGET FOR FISCAL YEAR 2012, HISTORICAL TABLES 159 tbl.8.5, available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/hist.pdf>.

262. *See 2008 State Expenditure Report*, *supra* note 256, at 43–51.

263. For example, in Florida, if the pre-ACA Medicaid program was financed from the state’s own funds it would consume two-thirds of the state’s revenues. Memorandum in Support of Plaintiffs’ Motion for Summary Judgment at 33, *Florida v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011) (No. 3:10-cv-91-RV/EMT). The federal government imposes more than \$110 billion per year in federal taxes on Florida residents, or three times the state tax burden of \$32 billion. *Id.* A failure to comply with the Medicaid expansion means that Florida would be deprived of the federal return from much of its federal tax monies. In addition, the federal tax levels have arguably left Florida little capacity to raise taxes on its own to fill any gap created by the removal of federal monies.

264. *See, e.g., Badly Written Bad Rules*, WALL ST. J., Dec. 23, 2012, at A12; Christopher J. Conover & Jerry Elling, *BEWARE THE RUSH TO PRESUMPTION, PART A: Material Omissions in Regulatory Analyses for the Affordable Care Act’s Interim Final Rules* (Mercatus Ctr., Working Paper No. 12-01, 2012), available at http://mercatus.org/sites/default/files/publication/Beware_the_Rush_to_Presumption_PartA_ConoverEllig.pdf (evaluating the Affordable Care Act’s Interim Final Rules); Christopher J. Conover & Jerry Elling, *BEWARE THE RUSH TO PRESUMPTION, PART B: Substandard Regulatory Analyses for the Affordable Care Act’s Interim Final Rules* (Mercatus Ctr., Working Paper No. 12-02, 2012), available at http://mercatus.org/sites/default/files/publication/Beware_the_Rush_to_Presumption_PartB_ElligConover_0.pdf (comparing the Obamacare interim-final rules to the interim-final homeland security regulations created during the Bush Administration in response to 9/11).

public participation, the State should bend and adopt a solution as proposed by the 2010 MSAPA that clearly permits emergency rulemaking to comply with federal law. In particular, this means that thirty-two states would be well advised to readdress their current statutes.²⁶⁵ That said, for those states that do have a strong preference for public participation and for all states that value transparency and accountability, there are perhaps accounting mechanisms that might be used to preserve these qualities and yet allow agencies the flexibility required to secure federal funds.²⁶⁶

CONCLUSION

To protect the balance of efficiency and constitutional restraint in agency use of its emergency rulemaking powers, this Article proposes several changes to the administrative procedure acts. The rise of the federal agencies use of the “good cause” exemption is startling, but the state-level analysis reveals what is missing at the federal level: a clear, limited definition of emergency to encourage agency restraint. As noted, some courts and scholars indicate that the “contrary to public interest” standard may be “best applied” when an agency must take immediate action “to meet a serious health or safety problem, or some other risk of irreparable harm.”²⁶⁷ If that is indeed the case, then what harm is there to efficiency to expressly replace the “good cause” language with that of the state “imminent peril” standard? The potential benefit to public participation is great as the state standard restricts the threshold trigger of emergency power. Especially given the complexity and difficulty of *ex post* review, the best restraint on agency power is to limit agency discretion in the first instance.

Moreover, the increase of federal emergency rulemakings in the absence of a corresponding rise in review indicates that the time is ripe for a new standard of oversight—preferably one that includes (1) an automatic termination date and (2) agency-specific, frequency-triggered review. Finally, the statistical analysis of state emergency rulemaking by type uncovers a means to pinpoint which agencies are overburdened. What the

265. Eighteen states have an express provision permitting emergency rulemaking to comply with federal mandates—in particular, to prevent the loss of federal funds: Alabama, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, New Jersey, North Carolina, North Dakota, Oklahoma, South Dakota, Texas, Utah, Virginia, Washington, and West Virginia. A list of these state statutes is on file with the author.

266. One such mechanism would be to follow the example of Iowa and select particular agencies by name, such as the administrator of Medicaid, from the emergency provision. *See Iowa Emergency Rulemaking*, *supra* note 34. However, the state could require extensive recording of each mandate in a category separate from emergency rulemaking, reported in a separate category from the emergency rulemaking, and posted on the internet in real time. These records might then be reviewed and scored for costs to the state, impact on small business, and all the other review standards foregone under emergency statutes. These cumulative reports may give power to the state to argue for additional funds or give fodder to state congressional representatives to push for fewer mandates, longer timeframes, and more accurate reporting of state administrative costs in federal statutes.

267. *See supra* note 83 and accompanying text.

data reveal is that there is particular need for efficiency and streamlined procedure in the area of health services—an area where agencies are tasked with an increasing role of importance with the impending implementation of new health care legislation.²⁶⁸

Although the states have struck a healthy balance between efficiency and public participation, this balance is being eroded by continued increases in federal mandates. For the states that value public participation and democratic ideals, administrative realities will regrettably compel increased sacrifice of notice-and-comment rulemaking. By adopting the 2010 MSAPA, state administrative agencies will gain the additional flexibility they will need in the future; changes to federal mandates, the root cause of much of the state administrative burdens, should be addressed by the state representatives to Congress. In short, as the federal and state administrative regimes continue to grow, the time has come to rebalance both federal and state administrative procedure acts to keep pace with the public need and desire for agency efficiency, government transparency, and the constitutional restraint of agency authority even in times of emergency.

268. Patient Protection and Affordable Care Act of 2010, 42 U.S.C. § 1396v (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (codified as amended in scattered sections of the U.S. Code) (providing references to other provisions in the Act affecting Medicaid).