# Indiana Law Review

**Volume 55** **2022** **Number 1**

# NOTES

## BETWEEN SCYLLA AND CHARYBDIS: THE COURTS, THE CONSTITUTION, AND COVID-19

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*"So up the straight we sailed in sadness; for here lay Scylla, and there divine Charybdis fearfully sucked the salt sea-water down."*[1]

### INTRODUCTION

Like Odysseus and his crew, the United States often finds itself navigating between two imposing forces. But while Odysseus wrestled with mythical monsters and disgruntled gods, the United States grapples with something much more real. Indeed, the United States often must balance individual rights and various crises, from war and natural disasters to terrorism and economic tragedies—and now, disease.[2]

The balancing act between individual rights and national emergencies has

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1. HOMER, THE ODYSSEY 115-16 (Paul Negri & Susan L. Rattiner eds., George Herbert Palmer trans., Dover 1999) (1912). In Homer's Odyssey, Odysseus had to navigate his ship between two perilous legendary monsters: the terrible Scylla and the horrifying Charybdis. The expression describes a situation in which one faces "two equally unpleasant, dangerous, or risky alternatives, where the avoidance of one ensures encountering the harm of the other." The Free Dictionary, *Idioms: Between Scylla and Charybdis*, THE FREE DICTIONARY, https://idioms.thefreedictionary.com/between+Scylla+and+Charybdis [https://perma.cc/MDC8-MPJB] (last visited Mar. 2, 2021).

2. *See* Christina Farr, *The Covid-19 Response Must Balance Civil Liberties and Public Health —Experts Explain How*, CNBC (Apr. 18, 2020), https://www.cnbc.com/2020/04/18/covid-19-response-vs-civil-liberties-striking-the-right-balance.html [https://perma.cc/69GA-7FD3]; *see also* Korematsu v. U.S., 323 U.S. 214, 223-24 (1944); Smith v. Avino, 91 F.3d 105, 109-10 (11th Cir. 1996); Elhady v. Kable, 391 F. Supp. 3d 562, 577-79 (E.D. Va. 2019); Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934).

plagued societies for centuries.[3] The measures employed to combat public health issues raise important social, economic, political, and legal questions.[4] And the Constitution lacks clear instructions for answering these questions in such emergencies.[5]

Many emergencies request some sacrifice for the common good. How we address this question of sacrifice will help chart a course through the dynamic coronavirus pandemic and develop responses for future public health emergencies. But as we navigate the ebb and flow of the pandemic, is that the right question to ask?[6] Perhaps the better question is not whether the judiciary should acquiesce to government coronavirus responses, but rather, how *far* it should.[7]

In March 2020, the United States declared a national emergency for the coronavirus.[8] As state and federal governments confront evolving challenges during the pandemic, individual rights face uncertainty. However, in 1866 the Supreme Court noted that when

> peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty . . . but if society is disturbed by civil commotion . . . these safeguards need, and should receive, the watchful care of those intrusted [sic] with the guardianship of the Constitution and laws.[9]

Justice Davis's words epitomize a debate inherent in our constitutional system: What are the limits of constitutional deference in times of crisis? The Constitution is meant to govern "at all times, and under all circumstances."[10] Yet, Justice Goldberg opined that "while the Constitution protects against invasion of individual rights, it is not a suicide pact."[11] Indeed, "[t]here isn't one fundamental liberty that is absolute. It's a balancing test, it has to be."[12]

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3. *See* Eugiana Tognotti, *Lessons from the History of Quarantine, from Plague to Influenza A*, 19 EMERGING INFECTIOUS DISEASES 254 (2013).

4. *See id.*

5. OREN GROSS, THE OXFORD HANDBOOK OF THE U.S. CONST. § 37 EMERGENCY POWERS 785, 787 (Mark Tushnet et al. Eds., Oxford Univ. Press 2015).

6. Farr, *supra* note 2.

7. *Id.*

8. Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 18, 2020); *see generally* Anthony F. DellaPelle, *Constitutional Implications of COVID-19 and Its Impact on Property Rights and Personal Liberties*, AM. B. ASS'N. (July 27, 2020) https://www.americanbar.org/groups/litigation/committees/real-estate-condemnation-trust/articles/2020/covid-19-constitutional-impact-property-rights-personal-liberties/ [https://perma.cc/2YQ3-JZWB].

9. *Ex Parte* Milligan, 71 U.S. 2, 123-24 (1866).

10. *Id.* at 120-21.

11. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963).

12. Christopher Conover, *Where the Constitution and COVID-19 Intersect*, ARIZ. PUB. MEDIA (Aug. 3, 2020), https://news.azpm.org/p/coronavirus/2020/8/3/177702-where-the-constitution-and-covid-19-intersect/ [https://perma.cc/5PRV-NP5Q].

The dialectic between national crises and individual rights in a unique, global health pandemic strains judicial analysis of constitutional issues. After analyzing the judiciary's approach to constitutional rights during public health emergencies, a few things become clearer. While the coronavirus poses a new crisis, it does not necessarily demand a new approach to the Constitution, judicial review, or constitutional rights; indeed, courts should be wary of lowering judicial standards and be more critical of the sources of COVID-19 mandates in an ongoing emergency.

This note relieves the tension by analyzing the judiciary's treatment of individual rights during public health crises. First, the note explains emergency powers and how they interact with individual rights. Second, the note derives a framework from past pandemics. Third, the note examines various pandemic-related constitutional challenges. Fourth, this note proposes that while some of the early measures are appropriate, others impermissibly threaten constitutional rights. And fifth, the note concludes by summarizing the issue and the proposed resolution.

## I. EMERGENCY POWERS AND INDIVIDUAL RIGHTS: A HISTORY AND SUMMARY

### *A. Judicial Review of Individual Rights Generally*

Interestingly, COVID-19 polarizes the American political landscape. Indeed, "[p]ublic perceptions about the virus, and interventions designed to address to [sic] it, substantially fell along predictable ideological lines."[13] With sprouting disunity, efforts for a more unified response would help the United States discern a path through the pandemic and future public health emergencies. The judiciary is not immune to this disunity; however, it can help unite Americans through its approach to COVID-related constitutional challenges. Americans share a common goal "to safely return to families, jobs, schools, places of assembly, pubs, parks, and the myriad of other settings that make up human lives."[14] And we are committed to basic constitutional norms that can guide a safe return to normalcy.[15] An understanding of the interaction between emergency powers and individual rights helps navigate that return.

Constitutional norms during times of peace provide a useful baseline against which to juxtapose government response to public health emergencies, and they can also help develop appropriate responses.[16] For example, the Due Process and Equal Protection clauses embed principles of rationality, reasoned decision-making, and procedural fairness into government and even private action.[17] As such, these doctrines provide federal, state, and local governments "a common set

13. Toni M. Massarro et al., *Pandemics and the Constitution*, 2022 U. ILL. L. REV. 229, 229.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*; *see* U.S. CONST. amend. V; *see* U.S. CONST. amend. XIV, sec. 1.

of constitutional constraints when they adopt pandemic policies."[18]

These doctrines in the Fifth and Fourteenth Amendments provide strong textual guideposts for emergency action. The Fifth Amendment admonishes that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law."[19] Likewise, the Fourteenth Amendment applies that standard to the states, adding "nor shall any State deprive any person of life, liberty, or property, without due process of law."[20] The Fourteenth Amendment also includes the Equal Protection Clause, which prohibits states from denying "to any person within its jurisdiction the equal protection of the laws."[21] Additionally, due process protects not only procedural rights, but substantive rights as well by "requir[ing] that restraints on liberty are just, reasonable and not arbitrary."[22] Consequently, these doctrines play a critical role when state actors govern during national emergencies.

Due process and equal protection employ a spectrum of judicial treatment. Government action restricting constitutional rights cannot be arbitrary and must have some rational link.[23] Thus, most "government action is subject to rational basis review, which requires only that the regulation be rationally related to a legitimate state interest."[24] In other words, the government must use rational means to accomplish a rational end. This is an extremely deferential, almost empty standard which "virtually never result[s] in government action being overturned."[25] Alternatively, some regulations implicate fundamental rights that are more cherished and consequently trigger more strenuous judicial review,[26] such as strict scrutiny, which requires the government action to be narrowly tailored to achieve a compelling state interest.[27]

Beyond substantive restraints, due process also circumscribes the procedure by which the government can divest or restrict a person's constitutional rights. These procedural protections ensure that the government does not deprive an individual of life, liberty, or property "without proper respect for the affected

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18. Massarro et al., *supra* note 14.

19. U.S. CONST. amend. V.

20. U.S. CONST. amend. XIV, § 1.

21. *Id.*

22. Matthew Baughman et al., *Constitutional Limitations on Emergency Authority,* JD SUPRA (Apr. 29, 2020), https://www.jdsupra.com/legalnews/constitutional-limitations-on-emergency-43173/#_ednref23 [https://perma.cc/W66X-M8V9].

23. *Id.*

24. *Id.*

25. Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1317 (2018).

26. Baughman et al., *supra* note 23; *see* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments.").

27. Legal Information Institute, *Strict Scrutiny*, CORNELL L. SCH., https://www.law.cornell.edu/wex/strict_scrutiny [https://perma.cc/76EX-VSRF].

parties' right to fair notice and opportunity to be heard."[28] Here, the courts employ a balancing test to determine whether the procedure by which the government deprived the individual's right was proper.[29]

When government action restricts fundamental rights, courts demand that the action satisfy higher standards than mere rationality.[30] For example, government action in various national emergencies—especially those affecting public health—implicate an assortment of essential freedoms, including assembly rights,[31] freedom of speech,[32] right to privacy,[33] and more. Many important constitutional rights have their own tests and standards, but most share three common traits:

> 1) the government has the burden of proving that the end in question is more than rational—it must be important or compelling; 2) the end must be substantially and directly advanced by the means; and 3) the means chosen must be narrowly tailored to the end so that infringements on the liberty are minimized as much as possible.[34]

These principles provide a useful background for analyzing judicial review of constitutional rights in public health emergencies.

### *B. The Emergency Powers, Police Powers, and Crises*

The second step in understanding judicial review of constitutional rights during public health emergencies is to evaluate what constitutes an emergency. In the midst of the Great Depression, the Supreme Court defined emergency "in terms of urgency and relative infrequency of occurrence as well as equivalence to a public calamity resulting from fire, flood, or like disaster not reasonably subject to anticipation."[35] Emergencies connote the existence of conditions that abruptly intensify the danger to life or well-being beyond tolerable limits.[36]

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28. Massarro et al., *supra* note 14.

29. *Id.* (The *Mathews v. Eldridge* test balances (1) the importance of the interest at stake; (2) the risk of an erroneous deprivation of the interest because of the procedures used, and the probable value of additional procedural safeguards; and (3) the government's interest.).

30. *Id.*

31. *See* Smith v. Alvino, 91 F.3d 105, 109-10 (11th Cir. 1996) (determining whether a county curfew in response to Hurricane Andrew was reasonable).

32. *See* Schenck v. United States, 249 U.S. 47, 51-53 (1919) (approving limits to free speech during wartime when that speech presented a clear and present danger).

33. *See* United States v. Moalin, 973 F.3d 977, 994-96 (9th Cir. 2020) (ruling that bulk telephone data collection by the National Security Administration is illegal).

34. Massarro et al., *supra* note 14, at 246.

35. L. ELAINE HALCHIN, CONG. RESEARCH. SERV., RL 98-505, NATIONAL EMERGENCY POWERS 3 (2021) (citing Home Bldg. and Loan Ass'n v. Blaisdell, 290 U.S. 398, 440 (1934)).

36. *Id.* (citing EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS: 1787–1957, at 3 (4th rev. ed. 1957).

While the exact definition of "emergency" evades clear, universal description, a few indicia help denote an "emergency" for political and legal purposes. Generally, four characteristics define an emergency. First, emergencies are temporal—they are sudden, unforeseen, and last for an unknown duration.[37] Second, the potential gravity is high because emergencies threaten life and well-being.[38] Third, there is a matter of perception: Who determines whether the event constitutes an emergency?[39] And fourth, responding to an emergency proves strenuous because they are unforeseen and cannot be handled according to well-established rules.[40]

To respond to such exigencies, the federal government exercises its emergency powers. Put simply, emergency power is the partial or complete suspension of a state's normal legal system, which involves curtailing individual rights and shifting the balance of power between the government's branches to respond more effectively to the identified crisis.[41] Such powers may be implied or explicitly stated in the Constitution, assumed by the president to be constitutionally permissible, or inferred from or specified by specific statutes.[42] Some of these powers are continuously available to the president, while others lie dormant until an emergency arises.[43]

A closely related principle is the states' police powers. The police powers doctrine "was adopted in early colonial America from firmly established English common law principles mandating the limitation of private rights when needed for the preservation of the common good."[44] Thus, the state and federal governments' emergency powers serve identical goals; however, state governments generally retain *broader* authority than the federal government to "provide for the public health, safety, and morals."[45] The contemporary emphasis on constitutional rights strains this doctrine and creates a difficult hurdle [46] that continues to exasperate this tension.

Individual rights have intersected (and sometimes collided) with emergency and police powers in ways that help inform our current pandemic situation. At "key points in American history," presidents have used these powers to take unauthorized steps to address various crises, even when Congress prohibited

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37. *Id.* at 3-4.

38. *Id.*

39. *Id.*

40. *Id.*

41. Brian McGiverin, *Note: In the Face of Danger: A Comparative Analysis of the Use of Emergency Powers in the United States and the United Kingdom in the 20th Century*, 18 IND. INT'L. & COMP. L. REV. 233, 234 (2008).

42. HALCHIN, *supra* note 36, at 1.

43. *Id*.

44. Jorge E. Galva et al., *Public Health Strategy and the Police Powers of the State*, 120 PUB. HEALTH REPS. 20 (2005).

45. Barnes v. Glen Theatre, 501 U.S. 560, 569 (1991).

46. Santiago Legarre, *Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 746, 746 (2007).

those steps.[47] For example, in World War II, President Roosevelt invoked emergency powers to intern residents of Japanese descent.[48] The Supreme Court affirmed President Roosevelt's order because of the ongoing wartime emergency.[49]

Additionally, after the terrorist attacks of September 11th, President Bush used emergency powers to conduct warrantless wiretappings, interrogations, and surveillance—often of American citizens.[50] Even President Lincoln employed emergency powers to suspend unilaterally habeas corpus.[51] Lincoln did so despite *admitting* it was constitutionally suspect and contrary to the Court's order in *Ex Parte Merryman*.[52]

Cases like these, and others that do not necessarily implicate individual constitutional rights, demonstrate how the judiciary checks government action.[53] The Supreme Court often finds ways to eschew judicial review of such emergency powers issues, at least while the crisis is underway.[54] But in some circumstances, the Court flexes its review power. For example, in *Youngstown Sheet & Tube Co. v. Sawyer,* the Court invalidated President Truman's attempt to expropriate the steel mills.[55] Justice Jackson's concurrence provides the framework for measuring the validity of executive action in a three-step analysis.[56] In circumscribing presidential power, Justice Jackson explained that

> [w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate . . . When the President acts in absence of either a congressional grant or denial of

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47. Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, THE ATLANTIC (January 2019), https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/ [https://perma.cc/P6LF-YQHH]; *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (prohibiting President Truman's seizure of steel mills during the Korean War).

48. Goitein, *supra* note 48; *see* Korematsu v. United States, 323 U.S. 214 (1944) (permitting the internment of people of Japanese descent thereby violating their freedom of movement).

49. Legal Information Institute, *Emergency Powers*, CORNELL L. SCH., https://www.law.cornell.edu/wex/emergency_powers [https://perma.cc/HKA4-A3VM] (last updated July 2017).

50. Goitein, *supra* note 48; American University School of Public Affairs, *4 Ways Presidential Power Has Changed Since 9/11*, AM. UNIV. SCH. PUB. AFFS. (Sept. 8, 2016), https://www.american.edu/spa/news/presidential-power-since-sept11-09082016.cfm [https://perma.cc/LM36-MFNM].

51. Goitein, *supra* note 48.

52. 17 F. Cas. 144 (1861); Legal Information Institute, *Emergency Powers*, CORNELL L. SCH., https://www.law.cornell.edu/wex/emergency_powers [https://perma.cc/4CYJ-7KNV] (last updated July 2017); Goitein, *supra* note 48.

53. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

54. Goitein, *supra* note 48.

55. *Id.*

56. *See Youngstown Sheet & Tube Co*., 343 U.S. at 635-38 (Jackson J., concurring).

> authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain . . . When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.[57]

The previous cases are rooted in historic emergencies; while different than public health emergencies, these cases teach a common lesson: "grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure."[58] Do these words loom just as ominously under COVID-19, a unique kind of emergency?

### *C. Public Health Emergencies as a Unique Kind of Crisis*

The coronavirus has sparked the most widespread emergency restrictions on individual liberty and constitutional rights in U.S. history.[59] Put bluntly, the coronavirus pandemic is different. Like other national emergencies, coronavirus measures have impacted assembly and speech rights[60] and rights to privacy.[61] However, coronavirus's effects are more ubiquitous. COVID-19 exceeds the typical emergency because it also threatens "bodily integrity and [the] right to refuse medical interventions,"[62] religious freedom,[63] reproductive rights,[64] the freedom of movement,[65] and even the right to bear arms.[66]

The coronavirus sparked a new kind of national emergency whose effects reached far; yet, the underlying dilemma is the same. In all emergencies, an inherent tension exists between the exercise of personal rights and the

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57. *Id.*

58. Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

59. Eric A. Posner, *Public Health in the Balance: Judicial Review of Pandemic-Related Government Restrictions*, LAWFARE (Apr. 20, 2020, 1:38 PM), https://www.lawfareblog.com/public-health-balance-judicial-review-pandemic-related-government-restrictions [https://perma.cc/W4YL-LJ2Z].

60. *See* Legacy Church, Inc. v. Kunkel, 455 F. Supp. 3d 1100 (D.N.M. 2020).

61. *See* MICHAEL A. FOSTER, CONG. RESEARCH. SERV., LSB10449, COVID-19, DIGITAL SURVEILLANCE, AND PRIVACY: FOURTH AMENDMENT CONSIDERATIONS 3-4 (2020).

62. Massaro et al., *supra* note 14, at 15 (citing E. THOMAS SULLIVAN ET AL., THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW, 41, 78-79, 148-51 (Oxford Univ. Press 2013)).

63. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020).

64. *In re* Abbott, 954 F.3d 772 (5th Cir. 2020).

65. Anthony Michael Kreis, *Contagion and the Right to Travel,* HARV. L. REV. BLOG (Mar. 27, 2020), https://blog.harvardlawreview.org/contagion-and-the-right-to-travel/ [https://perma.cc/9UN8-ZHCL].

66. Conn. Citizens Def. League v. Lamont, 465 F. Supp. 3d 56 (D. Conn. 2020) (issuing a preliminary injunction against policy that effectively banned many gun purchases).

government's desire to maintain order.[67] But unlike most emergencies, "[o]ur battle with the pandemic is fluid, presenting issues that evolve and change with each day that passes,"[68] and the pandemic's duration is unclear. Under these circumstances, some legal scholars and government officials argue that heightened judicial scrutiny should be "suspended for the duration of the emergency."[69] But past pandemics may offer some guidance for reviewing constitutional rights.

## II. THE PUBLIC HEALTH EMERGENCY FRAMEWORK: WHAT'S THE STANDARD?

### *A. Government Action and Constitutional Rights Under Past Pandemics*

Various cases exhibit the state and federal governments' power to regulate private activity as preventative measures.[70] For example, *Morgan's S.S.Co. v. Louisiana Board of Health* dealt with cholera and yellow fever outbreaks.[71] Between 1817 and 1905, yellow fever ravaged Louisiana, and in New Orleans during "epidemic years, during the months between July and October, it could wipe out 10 percent of the city's population."[72] In fact, "[y]ellow fever didn't just kill. It created an entire social structure based on who had survived the virus, who was likely to survive it and who was not long for this world."[73] Whether individuals were physically acclimated to the disease was especially difficult to prove;[74] thus, the state employed quarantine methods, especially for sailors in

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67. Matthew Richardson & Scott C. Smith, *The Clash Between Emergency Powers and Individual Rights During COVID-19 Pandemic*, JD SUPRA (May 16, 2020), https://www.jdsupra.com/legalnews/the-clash-between-emergency-powers-and-88205/ [https://perma.cc/U7L4-EPK6].

68. Anthony F. DellaPelle, *Constitutional Implications of COVID-19 and Its Impact on Property Rights and Personal Liberties*, Am. B. Ass'n. (July 27, 2020) https://www.americanbar.org/groups/litigation/committees/real-estate-condemnation-trust/articles/2020/covid-19-constitutional-impact-property-rights-personal-liberties/ [https://perma.cc/2YQ3-JZWB].

69. Lindsay F. Wiley & Steve Vladeck, *COVID-19 Reinforces the Argument for "Regular" Judicial Review—Not Suspension of Civil Liberties—In Times of Crisis*, HARV. L. REV. BLOG (Apr. 9, 2020), https://blog.harvardlawreview.org/covid-19-reinforces-the-argument-for-regular-judicial-review-not-suspension-of-civil-liberties-in-times-of-crisis/ [https://perma.cc/H8CS-D26K] [hereinafter *COVID-19 Reinforces the Argument*].

70. Ed Richards, *The Coronavirus and the Constitution*, THE VOLOKH CONSPIRACY (Feb. 10, 2020, 8:01 AM), https://reason.com/2020/02/10/the-coronavirus-and-the-constitution/ [https://perma.cc/ZPF2-NB5M].

71. 118 U.S. 455 (1886).

72. Leah Donella, *How Yellow Fever Turned New Orleans into the "City of the Dead*," NAT'L PUB. RADIO (Oct. 31, 2018, 11:00AM), https://www.npr.org/sections/codeswitch/2018/10/31/415535913/how-yellow-fever-turned-new-orleans-into-the-city-of-the-dead [https://perma.cc/48X7-VH5G].

73. *Id.*

74. *Id.*

port.[75] Consequently, in 1886 the U.S. Supreme Court addressed the constitutionality of Louisiana's quarantine efforts.[76]

In *Morgan's S.S. Co.*, Louisiana law required vessels on the Mississippi River, including those traveling between the states, to pass through a quarantine station.[77] In reviewing Morgan Steamship's challenge, the Supreme Court held that

> whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a national board of health, or to local boards, as may be found expedient, all State laws on the subject will be abrogated, at least so far as the two are inconsistent. But until this is done, the laws of the State on the subject are valid.[78]

Similarly, in *Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health,* Louisiana refused to allow a French company's cargo ship to enter port because of travel restrictions and quarantine laws.[79] The company sued, alleging equal protection and due process harms.[80] The Supreme Court held that various "cases expressly and unequivocally hold that the health and quarantine laws of the several States are not repugnant to the Constitution of the United States, although they affect foreign and domestic commerce."[81] In fact, the Court recognized that "from an early day the power of the States to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants has been recognized by Congress, is beyond question."[82]

These cases paint part of the background; however, *Jacobson v. Massachusetts* seems to provide the controlling analysis for public health cases.[83] In fact, some contend that the *Jacobson* analysis actually controls *all* constitutional rights during a pandemic.[84] *Jacobson* is the seminal case because it is "one of the few Supreme Court cases before 1960 in which a citizen challenged the state's authority to impose mandatory restrictions on personal liberty for public health purposes."[85] And further, the case "raises timeless questions about the power of state government to take specific action to protect

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75. Morgan's S.S. Co. v. La. Bd. of Health, 118 U.S. 455, 455 (1886).

76. *Id.*

77. *Id.*

78. *Id.* at 464.

79. 186 U.S. 380, 382 (1902).

80. *Id.* at 380-81.

81. *Id.* at 391; *see also* Gibbons v. Ogden, 22 U.S. 186, 203 (1824) (holding that "[i]nspection laws, quarantine laws, [and] *health laws of every description*" are within the powers of the state. (emphasis added)).

82. *Compagnie Francaise de Navigation a Vapeur*, 186 U.S. at 387.

83. 197 U.S. 11 (1905).

84. *In re* Abbott, 954 F.3d 772, 787 (5th Cir. 2020) (Duncan, J., dissenting).

85. Wendy K. Mariner et al., Jacobson v Massachusetts: *It's Not Your Great-Great-Grandfather's Public Health Law*, 95(4) AM. J. PUB. HEALTH 581, 581 (2005).

the public's health and the Constitution's protection of personal liberty."[86]

A major smallpox outbreak in Boston, which "resulted in 1596 cases and 270 deaths between 1901 and 1903[,]" set the stage for *Jacobson*.[87] To mitigate the epidemic's spread, Massachusetts required everyone to get a smallpox vaccine, but Jacobson refused.[88] In a 7-2 majority, Justice Harlan asserted that "the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint."[89] In a significant challenge to individual liberty, and affirmation of extensive police powers, the Supreme Court determined that the state could reasonably enforce mandatory vaccine laws.[90]

While the Court granted the states broad powers to mitigate the spread of diseases, it also cautioned the states:

> [T]he police power of a State, whether exercised by the legislature, or by a local body acting under its authority, may be exerted in such circumstances or by regulations so *arbitrary* and *oppressive* in particular cases as to justify the interference of the courts to prevent wrong and oppression.[91]

The *Jacobson* Court adopted a rational-means-and-ends test that requires a "reasonable relationship between the public health intervention and the achievement of a legitimate public health objective."[92] The Court clarified that "the methods adopted must have a 'real or substantial relation' to protection of the public health and cannot be 'a plain, palpable invasion of rights.'"[93]

More recently, the judiciary responded to the Ebola outbreak in 2014 in *Hickox v. Christie*.[94] Hickox served as a nurse during the Ebola epidemic in Africa.[95] Upon her arrival at a New Jersey airport, officials quarantined Hickox for eighty hours to monitor her health in accordance with Governor Christie's Ebola Preparedness Plan.[96] Through this plan, Governor Christie aimed to coordinate all efforts of key state departments, hospitals, the medical community, and the homeland security apparatus to protect public health and defend against Ebola.[97] Consequently, Hickox challenged the government's procedures under the

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86. *Id.*

87. Lawrence O. Gostin, Jacobson v Massachusetts *at 100 Years: Police Power and Civil Liberties in Tension*, 95:4 AM. J. PUB. HEALTH 576, 576 (2005).

88. Jacobson v. Massachusetts, 197 U.S. 11, 12-13 (1905).

89. *Id.* at 26.

90. *Id.* at 39.

91. *Id.* at 38 (emphasis added).

92. Gostin, *supra* note 88, at 579.

93. *Id.*

94. 205 F. Supp. 3d 579 (D.N.J. 2016).

95. *Id.* at 584.

96. *Id.* at 584-85.

97. N.J. Exec. Order No. 164 (Oct. 22, 2014), https://www.state.nj.us/infobank/circular/eocc164.pdf [https://perma.cc/9LEY-NU7L].

Fourth and Fourteenth Amendments.[98] But interestingly, while the positive cases and deaths worldwide soared to 28,600 and 11,325 respectively, the disease only afflicted eleven people in the United States.[99]

Hickox's challenge in the district court proved futile. In a thorough analysis, the New Jersey District Court held that "federal government possesses the power to declare and enforce a quarantine."[100] The court relied on *Jacobson* and determined that quarantine and isolation measures should be overturned only when "found to be arbitrary and unreasonable in relation to their goal of protecting the public health."[101] Thus, the court appeared to solidify the *Jacobson* approach as the preeminent public health analysis.

Put simply, *Jacobson* purported to establish the "floor of constitutional protection" during public health emergencies.[102] The standard rests upon four principles: necessity, reasonable means, proportionality, and harm avoidance.[103] This standard attempts to balance government intervention in public health with individual liberties; however, COVID-19 is a historic public health emergency that has called into question the *Jacobson* analysis. Several COVID-related constitutional challenges demonstrate how *Jacobson* fits into such a unique public health crisis.

## III. THE CURRENT CRISIS: APPLYING HISTORY TO CORONAVIRUS CHALLENGES

### *A. Distilling the COVID-19 Pandemic Approach from Previous Pandemics*

The case law suggests a few angles from which to analyze constitutional issues raised by public health emergencies.[104] Essentially, health departments and government officials can avoid liability for quarantines and mandated isolation measures if they show:

> (1) a public health necessity, (2) an effective intervention with a demonstrable connection between means and ends, (3) proportionality (i.e., that the intervention is neither too broadly nor too narrowly tailored), and (4) that the quarantine or isolation is in the least restrictive setting while accomplishing its purpose.[105]

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98. Hickox v. Christie, 205 F. Supp. 3d 579. 584 (D.N.J. 2016).

99. *2014-2016 Ebola Outbreak in West Africa*, CDC, https://www.cdc.gov/vhf/ebola/history/2014-2016-outbreak/index.html [https://perma.cc/82J3-ES34].

100. *Hickox*, 205 F. Supp. 3d at 590.

101. *Id.* at 592.

102. Gostin, *supra* note 88, at 576.

103. *Id.*

104. *See* Morgan's S.S. Co. v. La. Bd. of Health, 118 U.S. 455 (1886); Compagnie Francaise de Navigation a Vapeur v. La. Bd. of Health, 186 U.S. 380 (1902); Jacobson v. Massachusetts, 197 U.S. 11 (1905); *Hickox*, 205 F. Supp. 3d at 579.

105. Polly J. Price, *Quarantine and Liability in the Context of Ebola*, 131 PUB. HEALTH REPS. 500, 501 (2016) (citing Michelle A. Daubert, *Pandemic Fears and Contemporary Quarantine:*

Additionally, *Jacobson* provides the controlling analysis for methods that extend beyond social isolation. Justice Harlan stipulated that a government law to protect public health, morals, and safety can be struck down if it "has no real or substantial relation to those objects."[106] Otherwise, such laws can be invalidated only if they are "beyond all question, a plain, palpable invasion of rights secured by the fundamental law."[107]

Given the nature of emergencies,[108] many argue that the judiciary must defer heavily to the political branches.[109] Justice Harlan's words suggest a high bar for individuals to challenge the government's action. For a Constitution "implemented in the shadow of crisis[,]" surely the Framers contemplated how the judiciary and the political branches would interact.[110] But *to whom* exactly should courts defer, and how much? This is an important question to consider as we wade through current pandemic-related constitutional tests.

### *B. Constitutional Questions Posed by Government Action*

Today's pandemic-related constitutional challenges epitomize the fundamental debate intrinsic in our tripartite republic. However, the pervasive impact of COVID-19, with over nearly 80,000,000 Americans infected and almost 1,000,000 deaths, sharply exacerbates this debate.[111] In a significant coronavirus-related challenge, a Nevada church petitioned for injunctive relief.[112] Governor Sisolak ordered that religious institutions, regardless of size, could only host services for up to fifty people; yet, the order permitted casinos (some of which hold thousands of patrons) to accommodate 50% capacity.[113] The Supreme Court denied the church's request.[114]

The dissenters highlighted some of the key issues in the delicate balance between protecting constitutional rights and allowing the political branches sufficient power to respond to a fluctuating emergency. While the majority

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*Protecting Liberty Through a Continuum of Due Process Rights*, 54 BUFF. L. REV. 1299 (2007)) [https://perma.cc/C2D6-2GTN].

106. Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905).

107. *Id.*

108. *See supra* Section I.B (discussing the four characteristics of emergencies).

109. Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis*, 87 B.U. L. REV. 289, 293 (2007).

110. *Id.* at 289.

111. *Covid Data Tracker*, CDC (last updated Mar. 31, 2022), https://covid.cdc.gov/covid-data-tracker/#datatracker-home [https://perma.cc/NN4G-QS2W].

112. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct 2603, 2603 (2020).

113. Declaration of Emergency Directive 021 (May 28, 2020), https://gov.nv.gov/News/Emergency_Orders/2020/2020-05-28_-_COVID-19_Declaration_of_Emergency_Directive_021_-_Phase_Two_Reopening_Plan_(Attachments)/ [https://perma.cc/ZV6W-KHTM].; *see* Calvary Chapel Dayton Valley, 140 S.Ct at 2604.

114. *Id.* at 2603 (denial of application for injunctive relief for which there was no majority opinion).

acquiesced to the governor's emergency power, Justice Alito asserted that the governor claimed, "virtually unbounded power to restrict constitutional rights."[115]

Despite the widespread effects of COVID-19, Justice Alito maintained that "[w]e have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility."[116] In fact, Alito would not extend so much deference to the political branches. Instead, Alito argues that the Court should apply strict scrutiny to fundamental rights, such as religious freedom, and not lower the judicial standard of review.[117]

> Under the Free Exercise Clause, restrictions on religious exercise that are not "neutral and of general applicability" must survive strict scrutiny. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 531 (1993). "[T]he minimum requirement of neutrality is that a law not discriminate on its face," *id.*, at 533, 113 S.Ct. 2217, and "[t]he Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion." *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. ___, ___ (2018) (slip op., at 17) (quoting *Church of Lukumi*, 508 U. S., at 534).[118]

According to Alito, even *Jacobson* would not save the governor's directive, as "[i]t is a considerable stretch to read the decision as establishing the test to be applied when statewide measures of indefinite duration are challenged under the First Amendment. . . ."[119]

Another controversial coronavirus decision came from the Fifth Circuit's treatment of reproductive rights in *In re Abbot*.[120] The Fifth Circuit used the historical framework of *Jacobson* similar to the Supreme Court in *Calvary Chapel*. In In re Abbott, one of the first challenges to a COVID-19-related order, the court "overturn[ed] an injunction of a Texas law banning abortions during the pandemic."[121] The court stated simply that

> when faced with a society threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least *some "real or substantial relation" to the public health crisis* and are not "beyond all question a plain palpable invasion of rights secured by the fundamental law."[122]

The Fifth Circuit justified "suspending constitutional rights to pre-viability abortion [based] on a broad reading of the judicial deference accorded to states

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115. *Id.* at 2604 (2020) (Alito, J., dissenting).

116. *Id.*

117. *Id.* at 2607.

118. *Id.* at 2605.

119. *Id.* at 2608.

120. *In re* Abbott, 954 F.3d 772 (5th Cir. 2020).

121. Wendy E. Parmet, *Rediscovering Jacobson in the Era of COVID-19*, 100 B.U. L. REV. ONLINE 117, 118 (2020) [https://perma.cc/WF36-X7HY].

122. *Abbott*, 954 F.3d at 784 (emphasis added) (citation omitted).

exercising police powers."[123] The court loosened its standards of judicial review, deferred to the state, and expressed hesitancy to "usurp the functions of another branch of government" in responding to public health crises.[124]

While the judiciary has frequently deferred significantly to the political branches' extensive emergency powers, the Wisconsin Supreme Court took Justice Alito's approach to constitutional review in times of emergency. In *Wisconsin Legislature v. Palm*,[125] the court held that the secretary-designee of the Department of Health Services ("DHS")—an unelected official—failed to adhere to emergency rule procedures and exceeded her authority when she issued Emergency Order 28,[126] "ordering everyone to stay home, closing all 'non-essential' businesses, prohibiting private gatherings of any number of people who are not part of a single household, and forbidding all 'non-essential' travel."[127]

The court agreed with the legislature's argument that an "agency decision is 'arbitrary and capricious' if it 'lacks a rational basis and is the result of an unconsidered, willful or irrational choice rather than a "sifting and winnowing" process.'"[128] And whenever "a grant of legislative power is made, there must be procedural safeguards to prevent the 'arbitrary, unreasonable or oppressive conduct of the agency.'"[129] The court reasoned that the DHS Secretary's alleged power to declare which businesses are "nonessential" and punish violators was arbitrary and lacked adequate procedural safeguards.[130] Instead of actually distinguishing which businesses create an excessive risk of spreading the virus—a duty arguably within the purview of the DHS—the DHS simply made a blanket decision deciding which business were essential and which were not.[131]

Thus, the legislature urged the Wisconsin Supreme Court to review the DHS Secretary's action more critically because it provided "no reasoned basis" why, for example, arts and craft stores could remain open while furniture stores could

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123. Rachel Rebouché, *Abortion Opportunism*, 7 J. L. & BIOSCI. (2020) [https://perma.cc/Y9WA-ATXS].

124. *Abbott*, 954 F.3d at 784 (quoting Jacobson v. Massachusetts, 197 U.S. 11, 28 (1905)) (emphasis omitted).

125. Wis. Leg. v. Palm, 942 N.W.2d 900 (Wis. 2020).

126. Emergency Order 28 (Mar. 24, 2020), https://evers.wi.gov/Documents/COVID19/EMO28-SaferAtHome.pdf.

127. Kathy L. Nusslock, *Wisconsin's Safer at Home Order Overruled, So Is It Business As Usual?*, MILWAUKEE BUS. J. (June 10, 2020), https://www.bizjournals.com/milwaukee/news/2020/06/10/wisconsin-s-safer-at-home-order-overruled-so-is-i.html [https://perma.cc/PG2Y-ZQBP].

128. Memorandum in Support of Legislature's Emergency Petition for Original Action and Emergency Motion for Temp. Injunction at 56, Wis. Leg. v. Palm, No. 2020AP765-OA (Wis. May 13, 2020).

129. *Palm*, 942 N.W.2d at 913 (Wis. 2020) (quoting J.F. Ahern Co. v. Wis. State Bldg. Comm'n, 336 N.W.2d 679 (Wis. Ct. App. 1983)).

130. *Id.* at 913-14.

131. Memorandum in Support of Legislature's Emergency Petition for Original Action and Emergency Motion for Temp. Injunction, *supra* note 128, at 57.

not.[132] Indeed, the legislature argued that the Order failed under a "rational basis" test, which is traditionally a low bar for the state to pass.[133] The court ultimately accepted the legislature's arguments and held that the Order was an order of general applicability, thereby necessitating emergency rulemaking procedures.[134] But in so holding, the court's opinion highlighted the dialectic between emergencies and individual rights.

While the court curbed the Secretary's overreaching power, it acknowledged that the governor based his emergency powers on his inability to secure legislative action because of the pandemic.[135] However, Secretary Palm's Order did not rely on the governor's emergency power.[136] Given the nature of the pandemic, the court admitted that the executive branch could "declare an emergency and respond accordingly" when "[a]ction is needed."[137] At the same time, the court cautioned, "the Governor cannot rely on emergency powers indefinitely."[138]

In a significant victory *against* pandemic measures, the Supreme Court enjoined New York Governor Andrew Cuomo's executive order using categories to impose ten- and twenty-five-person occupancy limits on churches.[139] Governor Cuomo used different color codes to govern different regions of the state based on COVID-19 severity, with red being the most restrictive, orange slightly less, and yellow the least restrictive.[140] In *Roman Catholic Archdiocese of Brooklyn v. Cuomo*,[141] two churches were in "red" or "orange" zones, which meant that each church could have ten or twenty-five worshipers at a service, respectively.[142] The churches sought injunctive relief, alleging that Governor Cuomo's order violated the Free Exercise Clause of the First Amendment.[143] Remarkably, public health seemed to align perfectly with secular interests in New York, as businesses classified as "essential," like acupuncture facilities, campgrounds, garages, liquor stores, and transportation services, could host as many patrons as they wished, even inside a "red" zone.[144]

The Court reasoned that these classifications, coupled with the Governor's

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132. *Id.*

133. *See supra* Section I.A (discussing the extreme deference of rational basis review).

134. *Palm*, 942 N.W.2d at 918.

135. *Id.* at 914.

136. *Id.*

137. *Id.*

138. *Id.*

139. Exec. Order No. 202.68 (Mar. 7, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO202.68.pdf [https://perma.cc/83PN-QFBU]; *see* Roman Catholic Archdiocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam).

140. *Roman Catholic Archdiocese of Brooklyn*, 141 S. Ct. at 69 (Gorsuch, J., concurring).

141. *Id.* at 63 (per curiam).

142. *Id.* at 66.

143. *Id.*

144. *Id.* at 66, 69.

order, created disturbing results.[145] For example, according to Governor Cuomo, "laundry and liquor, travel and tools, are 'essential' while traditional religious exercises are not. That is exactly the kind of discrimination the First Amendment forbids."[146] Thus, the Court held that the order did not survive strict scrutiny because, while mitigating the spread of COVID-19 is a compelling state interest, the order was not narrowly tailored.[147] In short, the Court reasoned that while its members are "not public health experts, and . . . should respect the judgment of those with special expertise and responsibility in this area . . . the Constitution cannot be put away and forgotten,"even in a pandemic.[148]

More recently, the Supreme Court partially granted a church's application for injunctive relief in *South Bay United Pentecostal Church v. Gavin Newsom*.[149] California Governor Gavin Newsom imposed a ban on indoor worship services, instituted a percentage capacity limit on services up to a maximum of 100 people, and prohibited singing indoors.[150] In a 6-3 decision, the Court invalidated the Governor's ban on indoor services.[151] Chief Justice Roberts acknowledged that "federal courts owe significant deference to politically accountable officials with the 'background, competence, and expertise to assess public health.'"[152] But, in a break from similar pandemic cases, the Chief Justice reasoned that "the State's present determination—that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero—appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake."[153]

The path between health and safety on one hand, and protecting constitutional rights on the other, is not guided by a bright line. The Court's decisions in the two aforementioned cases stand in stark contrast to decisions like *In re Abbott*[154] and *Calvary Chapel Dayton Valley*,[155] further accenting the spectrum of the judiciary's approach to pandemic-related challenges. The Constitution undoubtedly commands the politically accountable officials to ensure the general welfare and safety of the people, but at the same time it entrusts the protection of the people's rights to the judiciary.[156] Indeed, "[d]eference, though broad, has its

145. *Id*. at 66.

146. *Id*. at 69 (Gorsuch, J., concurring).

147. *Id*. at 67 (per curiam).

148. *Id*. at 68.

149. S. Bay United Pentecostal v. Newsom, 141 S. Ct. 716 (2021).

150. Cal. Dept. of Pub. Health, *COVID-19 Industry Guidance: Places of Worship and Providers of Religious Services and Cultural Ceremonies* (July 29, 2020), https://files.covid19.ca.gov/pdf/guidance-places-of-worship.pdf [https://perma.cc/H6DM-RDVC].

151. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021) (mem.).

152. *Id*. (Roberts, C.J., concurring).

153. *Id*. at 717.

154. *In re* Abbott, 954 F.3d 772 (5th Cir. 2020).

155. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020).

156. *S. Bay United Pentecostal Church*, 141 S. Ct. at 717 (Roberts, C.J., concurring).

limits."[157]

These cases highlight the problem in the judiciary's exercise of judicial review in public health emergencies: the application of judicial review throughout the pandemic has been inconsistent, unclear, and exceedingly deferential. Put simply, "[p]eople, businesses and other institutions need to know how to proceed and what is expected of them."[158] And there are two principal ways to ensure that.

## IV. NOT ALL CORONAVIRUS MEASURES ARE CREATED EQUAL: A TWO-STEP SOLUTION

The judiciary's treatment of constitutional rights in coronavirus challenges is inconsistent and unclear. To assuage this problem, the judiciary should be wary of deferring too far to government action for too long. Specifically, the judiciary can improve its approach in two ways. First, the judiciary can refrain from suspending regular judicial scrutiny, especially when emergencies extend as long as this pandemic. Second, courts can be more critical of the source of coronavirus measures, whether it is local health departments, executives, or legislatures.

### *A. Step One: Judicial Review of the Government Action Itself*

The problem with the judiciary's approach becomes clearer after an analysis of current coronavirus constitutional challenges. For example, religious exercise and abortion rights are curtailed in some jurisdictions, while quarantines and lockdowns are rebuked in others.[159] Like Alito argues in *Calvary Chapel*, this inconsistency could stem from potential misunderstanding of the elected branches' emergency powers as analyzed in *Jacobson*.[160]

The public health standard essentially comes down to the *Jacobson* approach: courts can strike down government actions if they bear "no real or substantial relation" to public health, morals, and safety.[161] Otherwise, these laws can be struck down only if they are "beyond all question, a plain, palpable invasion of rights secured by the fundamental law."[162] Interestingly, Justice Harlan did not specifically intend for this test to be used for public health crises, emergencies, or epidemics.[163] Further, *Jacobson* explained that the Massachusetts law survived only because it "did not 'contravene the Constitution'" or "infringe any right

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157. *Id.*

158. Wis. Leg. v. Palm, 942 N.W.2d 900, 918 (2020).

159. *See generally Calvary Chapel Dayton Valley*, 140 S. Ct. at 2603; *Abbott*, 954 F.3d at 772; *Palm*, 942 N.W.2d at 900.

160. *Calvary Chapel Dayton Valley*, 140 S. Ct. at 2608 (Alito, J., dissenting).

161. Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905).

162. *Id.*

163. Daniel A. Farber, *The Long Shadow of Jacobson v. Massachusetts: Epidemics, Fundamental Rights, and the Courts*, 57 SAN DIEGO L. REV. 833, 840 (June 25, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3635740; *see also* Roman Catholic Archdiocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring) ("*Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no legal precedent for doing so.").

granted or secured by that instrument," and constitutional jurisprudence has developed significantly since 1905.[164] This understanding disrupts the theory that the judiciary, relying on *Jacobson*, should bend so much to the will of the political branches.

The Constitution itself also suggests that such deference to the political branches is not required. For instance, "[o]ther than Congress's power to suspend habeas corpus, there is nothing in the Constitution expressly distinguishing the 'judicial Power' in times of peace from the 'judicial Power' in times of war."[165] Thus, perhaps the judiciary's role in emergencies is not simply to let the government push constitutional rights to the brink, but to provide an active check on government powers. That is easier said than done. Acting as a check during emergencies requires a careful balancing act between deference and judicial independence in which one must consider the nature of the emergency, the timing, and which branch (and whom within that branch) implements the emergency responses.

While some coronavirus measures are appropriate, others impermissibly infringe on constitutional rights.[166] Justice Alito's dissent in *Calvary Chapel* epitomizes how the judiciary should approach constitutional review not only in coronavirus cases, but in public health emergencies, generally. Justice Alito astutely summarizes the balancing act:

> For months now, States and their subdivisions have responded to the pandemic by imposing unprecedented restrictions on personal liberty, including the free exercise of religion. This initial response was understandable. In times of crisis, public officials must respond quickly and decisively to evolving and uncertain situations. At the dawn of an emergency—and the opening days of the COVID–19 outbreak plainly qualify—public officials may not be able to craft precisely tailored rules. Time, information, and expertise may be in short supply, and those responsible for enforcement may lack the resources needed to administer rules that draw fine distinctions. Thus, at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules. In general, that is what has happened thus far during the COVID–19 pandemic.[167]

Emergencies are unexpected, continue indefinitely, and create grave risks.[168] As emergencies develop, state and local government actors are better enabled to create policies that sufficiently protect constitutional rights while still mitigating the medical emergency—the coronavirus does not offer a free pass to disregard

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164. *Roman Catholic Archdiocese of Brooklyn*, 141 S. Ct. at 71 (Gorsuch, J., concurring) (quoting Jacobson, 197 U.S. at 25).

165. Lawson, *supra* note 109, at 291.

166. *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (Alito, J., dissenting); *In re* Abbott, 954 F.3d 772 (5th Cir. 2020).

167. *Calvary Chapel Dayton Valley*, 140 S. Ct. at 2604-05 (Alito, J., dissenting).

168. HALCHIN, *supra* note 36, at 3-4.

the Constitution for as long as the medical emergency exists.[169] The people, and the judiciary, should expect legislatures and executive branch officials to move with greater tact as the problem shifts from one of exigency to carefully calculated policies and mitigation measures.

Alternatively, juxtaposed to Justice Alito's approach is Justice Rehnquist's approach that "[i]t is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime [or other national emergencies] as it does in peacetime."[170] Admittedly, that approach finds roots in U.S. history. Many of the Framers believed that the executive in our constitutional system must have a power, or prerogative, to act unilaterally to address serious unanticipated threats and emergencies.[171] As such, some people have urged for, and some courts have followed, a more deferential standard of review to help governors and executive officials "flatten the curve."[172]

Indeed, multiple federal and state courts have subscribed to this "suspension model" of judicial review during the pandemic.[173] When the world's infectious disease experts agreed at the outbreak that the infection and casualty rates would increase dramatically and quickly, numerous courts accepted that "fundamental rights . . . may be . . . limited or suspended."[174] While this approach allows state and federal executive branches more breathing room to "flatten the curve," confidence in this analysis is misplaced.

This approach has two fundamental flaws: it assumes an ephemeral emergency and undermines the judiciary's independence as a check on legislative and executive power.[175] Courts could better protect constitutional rights by heeding Justice Davis's admonition in *Ex parte Milligan* when reviewing

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169. *Calvary Chapel Dayton Valley*, 140 S. Ct. at 2604-05 (Alito, J., dissenting).

170. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 224-25 (Alfred A. Knopf, Vintage Books 2000).

171. William E. Scheuerman, *Emergencies, Executive Power, and the Uncertain Future of US Presidential Democracy*, 37 L. & SOC. INQUIRY 743, 746 (2012); THE FEDERALIST NO. 34 (Alexander Hamilton).

172. Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133:9 HARV. L. REV. F. 179, 179-80 (July 2020) [hereinafter *Coronavirus, Civil Liberties, and the Courts*]; *see generally In re* Abbott, 954 F.3d 772 (5th Cir. 2020).

173. *Coronavirus, Civil Liberties, and the* Courts, *supra* note 173, at 181-82; *see also* In re Abbott, 954 F.3d 772 (5th Cir. 2020); *In re* Rutledge, 956 F.3d 1018 (8th Cir. 2020) (holding that Arkansas could enjoin access to surgical abortions because of the publish health crisis); Binford v. Sununu, No. 217-2020-CV-00152, 2020 N.H. Super. LEXIS 20 (N.H. Super. Ct. Mar. 25, 2020) (upholding Governor Sununu's ban on large gatherings).

174. Order on Plaintiff's Petition for Preliminary Injunction and Defendant's Motion to Dismiss at 8-11, Binford v. Sununu, No. 217-2020-CV-00152 (N.H. Super. Ct. Mar. 25, 2020) (quoting Smith v. Avino, 91 F.3d 105, 109 (11th Cir. 1996)).

175. Wiley & Vladeck, *Coronavirus, Civil Liberties, and the* Courts, *supra* note 173, at 181-82; *see also In re* Abbott, 954 F.3d 772 (5th Cir. 2020).

government action directly.[176] While some restrictions are expected, particularly at the start of an emergency, the judiciary should ensure that government action is *substantially* related to the government's object. The Constitution is not a suicide pact;[177] yet, that does not mean we eschew meaningful judicial review and forget that the "Constitution guarantees the free exercise of religion [and other rights]. It says nothing about the freedom to play craps or blackjack, to feed tokens into a slot machine, or to engage in any other game of chance."[178] Importantly, who issues the government directive is just as important as the directive itself.

### *B. Step Two: Evaluating the Source of Coronavirus Measures*

Another step in solving this problem is evaluating, not simply the government action itself, but also the source of the action. While "local officials have wide latitude to enforce their directives during an emergency, such as the COVID-19 pandemic, the exercise of their authority cannot be overbroad."[179] But courts should be stricter about which branch, and who within each branch, exercises these powers when they encroach on constitutional rights.

The federal government provides examples of the numerous sources of public health measures that can burden constitutional rights. For instance, the U.S. Surgeon General has the authority to institute and enforce national quarantines and isolation orders.[180] And further, the Secretary of the Department of Health and Human Services can institute punishments for the violation of such quarantine laws.[181] Agencies undoubtedly possess the requisite expertise to create and implement coronavirus measures; however, such expertise should not give federal and state agencies *carte blanche* to disregard constitutional rights for an indefinite duration when implementing policy.

Illustrations of unelected agency actors also abound at the state level. For example, in *Wisconsin Legislature v. Palm*, which is one of the few cases to abrogate nearly all provisions of a stay at home order,[182] the legislature challenged the health secretary's authority to enact various extended stay-at-home

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176. *Ex parte* Milligan, 71 U.S. 2, 123-24 (1866).

177. Conover, *supra* note 13.

178. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. at 2603-04 (Alito, J., dissenting).

179. *How Much Authority Do State and Local Officials Have During a Health Emergency, Such As the COVID-19 Pandemic?*, A.B.A. (May 2020), https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-may-2020/state-local-authority-during-covid/ [https://perma.cc/W8RU-GJNN].

180. 42 U.S.C. § 264.

181. 42 U.S.C. § 271.

182. Laurie Sobel & Mary Beth Musumeci, *Litigation Challenging Mandatory Stay at Home and Other Social Distancing Measures*, KAISER FAMILY FOUND. (June 5, 2020), https://www.kff.org/coronavirus-covid-19/issue-brief/litigation-challenging-mandatory-stay-at-home-and-other-social-distancing-measures/ [https://perma.cc/335D-2TFU].

orders.[183] The Wisconsin Supreme Court emphasized the importance of adhering to the administrative rulemaking process for the protection of all people.[184] Notably, the Wisconsin Supreme Court's decision aligns with Justice Alito's dissent in *Calvary Chapel*. Deference to agencies and executives is more appropriate initially, given the nature of emergencies, but at a certain point, courts should be stricter with executive efforts that curb constitutional rights, particularly when those come from unelected agency officials.

As weeks turned into months, and those months have piled into years, "public health experts and elected officials widely acknowledge[] that the coronavirus pandemic would require some limits of indefinite duration on economic, social, and cultural activity."[185] In this context, where mitigation efforts actually extend the emergency situation instead of stop it, "suspending more rigorous judicial scrutiny threatens to allow the exception to swallow the rule."[186] As such, courts should scrupulously examine government action, the source of that action, and the factual basis for such actions to ensure better protection of constitutional rights; otherwise, "the government can adopt measures that wouldn't be possible during 'normal' times long after the true exigency passed."[187] Consequently, the unique nature of the coronavirus as a public health emergency demands more judicial protection of constitutional rights—applicable by employing normal standards of judicial review and ensuring that *extended* mitigation efforts come from democratically-elected officials.

Implicit in this step is an analysis of the facts and public health experts on which the various legislative and executive branches rely. The factual underpinnings of public health cases are unique compared to other emergencies; thus, some would encourage the judiciary to defer to public health experts.[188] Indeed, public health and infectious disease control are not standard components of legal education, and judges should appreciate the educational gap.[189] While judges are not scientific experts, and any "foray into armchair epidemiology cannot end well," they are not immune to the political and social pressures of novel public health crises.[190] Nonetheless, judges occupy an important role in trying times: they are the shield of constitutional rights. The judiciary should safeguard constitutional rights and leave consideration of public health experts' opinions to the branch with the "background, competence, and expertise to assess

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183. 942 N.W.2d 900 (Wis. 2020).

184. *Id.*

185. Wiley & Vladeck, *Coronavirus, Civil Liberties, and the Courts*, *supra* note 173, at 187.

186. *Id.*

187. *Id.*

188. *See* S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 720 (2021) (Kagan, J., dissenting).

189. Jonathan N. Kromm et al., *Law and the Public's Health,* 124 PUB. HEALTH REPS. 889, 891 (2009).

190. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 723 (2021) (Kagan, J., dissenting).

public health."[191] After all, the judiciary's job is "to say what the law is"—to call the balls and strikes when government action impedes constitutional freedoms, regardless of the circumstances.[192]

The justices' opinions in *South Bay United Pentecostal Church* v. *Newsom* highlights the Court's fractured treatment of public health experts. For example, Justice Kagan writing for the dissenters, chided the Court's mistreatment of public health experts, asserting that "the Court displace[d] the judgments of experts about how to respond to a raging pandemic."[193] Such displacement, Kagan argued, "exceeds [the Court's] judicial role, and risks worsening the pandemic."[194] Alternatively, Justice Gorsuch acknowledged that "[o]f course we are not scientists, but neither may we abandon the field when government officials with experts in tow seek to infringe a constitutionally protected liberty."[195] Certainly, the facts and expert opinions underlying pandemics matter, but the Court's approach to those is split much like its deference to executive and legislative officials. Some deference to public health experts may be necessary at the outset of public health crises; however, the Court's principal interest during emergencies—perhaps *especially* during emergencies—must be to hold governments accountable to the Constitution when extended mitigation efforts impede constitutional rights.[196]

Equally important in step two is the legislature's role in protecting constitutional rights. For example, "[i]rritated by the sweeping use of executive orders during the COVID-19 crisis, state lawmakers around the U.S. are moving to curb the authority of governors and top health officials to impose emergency restrictions such as mask rules and business shutdowns,"[197] even in more liberal states such as New York.[198] In fact, Indiana persisted in a state of emergency for nearly two years, and Governor Holcomb extended that emergency order *twenty-three* times.[199] Holcomb's use of emergency powers motivated even legislators

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191. *S. Bay United Pentecostal Church*, 140 S. Ct. at 716 (Roberts, C.J., concurring).

192. Marbury v. Madison, 5 U.S. 137, 177 (1803).

193. *S. Bay United Pentecostal Church*, 141 S. Ct. at 720 (Kagan, J., dissenting).

194. *Id*.

195. *Id.* at 718 (Gorsuch, J., concurring).

196. *Id.*

197. Associated Press, *State Lawmakers are Pushing to Curb Governors' Virus Powers*, WTHI-TV (Jan. 29, 2021, 2:07 PM), https://www.wthitv.com/content/news/State-lawmakers-are-pushing-to-curb-governors-virus-powers-573689721.html [https://perma.cc/MA84-TABG]

198. *See* Shannon Young & Bill Mahoney, *New York Lawmakers Pass Measure to Limit Cuomo's Emergency Powers*, POLITICO (Mar. 5, 2021), https://www.politico.com/states/new-york/albany/story/2021/03/05/new-york-lawmakers-move-to-limit-cuomos-emergency-powers-1367170 [https://perma.cc/N7NA-VU8D] (discussing the New York legislature's passage of a bill to limit Governor Cuomo's "king-like emergency powers").

199. Kaitlin Lange, *Indiana Republican Lawmakers Prepare to Limit Gov. Eric Holcomb's Emergency Powers*, INDIANAPOLIS STAR (last updated Dec. 29, 2020, 4:23 PM), https://www.indystar.com/story/news/politics/2020/12/29/indiana-republican-lawmakers-seek-limit-gov-holcombs-powers-coronavirus/3961725001/ [https://perma.cc/F4AP-PV28]; Kaitlin Lange, *Gov.*

within his own party to consider curbing his emergency powers.[200] After all, "[t]he rule of law and constitutional rights are eroded in small steps rather than giant leaps."[201] Perhaps state legislatures endeavoring to restrict the broad application of emergency powers will motivate the judiciary to embrace these proposed steps and provide a better framework for responding future public health emergencies.

## CONCLUSION

The coronavirus response and the protection of constitutional rights have pitted the United States between Scylla and Charybdis. The United States is no stranger to crises; indeed, throughout the nation's relatively brief history, she has wrestled with wars, natural disasters, economic collapses, terrorism, and much more.[202] During such emergencies, Americans are often expected to sacrifice. But how far should those sacrifices go and who can demand them?

The federal and state governments have broad authority to exercise emergency and police powers to preserve the well-being of the citizenry and mitigate the spread of coronavirus. But that does not necessarily mean that constitutional rights become secondary. While many courts have historically deferred to government action in emergencies and lowered their standards of review, that may not be the correct approach for a unique crisis that continues indefinitely.

By analyzing the history of emergency and police powers, judicial precedent in public health emergencies, and constitutional challenges under current coronavirus measures, this note proposes that the judiciary solidify its approach. The historical framework provides a way to analyze constitutional rights during public health crises, but it does not call for such extreme judicial deference as many courts have shown. Indeed, "[w]hat power was thus granted [by the Constitution] and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system."[203]

These are questions which have potential answers in our democratic, tripartite experiment. Surely, federal, state, and local governments need latitude to respond

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*Holcomb Extends Public Health Emergency Through March 4*, THE INDIANAPOLIS STAR (Feb. 1, 2022), https://www.indystar.com/story/news/politics/2022/02/01/gov-holcomb-extends-public-health-emergency-through-march-4/9297620002/ [https://perma.cc/XWW4-H48Y].

200. Lange, *supra* note 200.

201. Steve Simpson & Timothy Snowball, *Can They Really Do That? What Are the Limits of Government During COVID-19?*, PAC. LEGAL FOUND. (Jan. 7, 2021), https://pacificlegal.org/limits-of-government-during-covid-19/ [https://perma.cc/Q2MZ-595Z].

202. *See generally* Korematsu v. United States, 323 U.S. 214 (1944); Smith v. Avino, 91 F.3d 105 (11th Cir. 1996); Elhady v. Kable, 391 F. Supp. 3d 562 (E.D. Va. 2019); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425-26 (1934).

203. Wiley & Vladeck, *Coronavirus, Civil Liberties, and the Courts*, *supra* note 173, at 197 (July 2020) (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425-26 (1934)).

to emerging threats; however, the separation of powers principle enables executive branches to exploit crises at the expense of individual rights.[204] But the separation of powers can also act as a shield for individual rights during emergencies—even the COVID-19 pandemic and future public health emergencies—in two ways. First, the judiciary should refrain from lowering its standards of review indefinitely during an emergency. This would ensure the judiciary acts consistently as a check to support individual rights. Second, the judiciary should scrutinize more rigorously executive branch action to encourage democratic responses in ongoing emergencies.

In short, the uniqueness of the coronavirus as a public health emergency demands that courts review closely extended government measures that implicate constitutional rights. Though executives and agencies require some deference initially to respond to the perceived threat, at some point the judiciary should expect legislatures and other elected officials to craft careful policies that balance constitutional rights, mitigation efforts, and the facts underlying the emergency. To give constitutional credence to loosening judicial review and allowing executives unbridled power in extended emergencies is chilling—for "[t]he principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need,"[205] even after the exigent circumstances might have ended.

204. Scheuerman, *supra* note 172 at 743.

205. *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).