

COVID'S CONSTITUTIONAL CONUNDRUM: ASSESSING INDIVIDUAL RIGHTS IN PUBLIC HEALTH EMERGENCIES*

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Considerable legal challenges alleging infringements of constitutional rights have arisen against governments imposing social distancing or other restrictive measures to quell the COVID-19 pandemic. Courts assess these claims largely under two approaches. Consistent with constitutional re-balancing, judges weigh the application of rights against governments' compelling interests to protect public health and safety in emergencies. Alternatively, a minority of courts temporarily set aside existing rights to effectuate emergency responses. Both approaches insufficiently account for the

* This article is based in part on the brief essay, James G. Hodge, Jr. & Hanna Reinke, *COVID's Constitutional Conundrum*, O'NEILL INST. (June 30, 2020), <https://oneill.law.georgetown.edu/covids-constitutional-conundrum/>; and James G. Hodge, Jr. et al., *Constitutional Cohesion and the Right to Public Health*, 53 U. MICH. J. L. REFORM 173 (2019). The authors thank Claudia M. Reeves, J.D., Senior Legal Researcher, Center for Public Health Law and Policy, Sandra Day O'Connor College of Law, Arizona State University (ASU), for her research assistance.

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flexible nature of rights and freedoms in exigencies pursuant to the Constitution's cohesive design. In public health emergencies, courts should engage in guided assessments focused on the execution, efficacy, and purpose of public health interventions as a constitutional prerogative rather than examining alleged rights infringements framed outside crisis contexts.

INTRODUCTION

Amid catastrophic death, long-term morbidity, economic downturns, and social unrest tied to the COVID-19 pandemic of 2020–2022 arises an inescapable question from repeated constitutional challenges in U.S. courts: *how should alleged infringements of individual rights via exercises of emergency public health powers be assessed?*

Courts are justifiably perplexed. “[F]or more than a century,” noted U.S. Supreme Court Chief Justice John G. Roberts in December 2020, “the courts have not had to respond to such a widespread public health emergency.”¹ In reality, no sitting jurist has ever faced a legal environment like what has emerged from the pandemic. As examined in Part I, declared states of general emergency, disaster, and public health emergency (PHE) at the federal,² state,³ tribal,⁴ and local⁵ levels were in place for months.⁶ Such widespread, concomitant

1. Adam Liptak, *Chief Justice John Roberts Commends the Courts' Responses to the Pandemic*, N.Y. TIMES (Jan. 1, 2021), <https://www.nytimes.com/2021/01/01/world/chief-justice-john-roberts-commends-the-courts-responses-to-the-pandemic.html>.

2. See, e.g., JENNIFER K. ELSEA ET AL., CONG. RSCH. SERV., R46379, EMERGENCY AUTHORITIES UNDER THE NATIONAL EMERGENCIES ACT, STAFFORD ACT, AND PUBLIC HEALTH SERVICE ACT (2020), <https://crsreports.congress.gov/product/pdf/R/R46379>.

3. See, e.g., *Coronavirus State Actions*, NAT'L GOVERNORS ASS'N (July 31, 2020), <https://www.nga.org/coronavirus-state-actions-all/>.

4. See, e.g., *Tribes with State of Emergency Declarations*, NAT'L INDIAN COUNCIL ON AGING (Mar. 20, 2020), <https://www.nicoa.org/coronavirus-tribes-declare-state-of-emergency/>.

5. See, e.g., *Preparedness Brief*, NAT'L ASS'N OF CNTY. & CITY HEALTH OFFS., <https://www.naccho.org/blog/preparedness-brief> (last visited Feb. 23, 2021).

6. THE NETWORK FOR PUBLIC HEALTH LAW, COVID-19 EMERGENCY LEGAL PREPAREDNESS PRIMER 13 (Feb. 1, 2021) [hereinafter NETWORK PRIMER], <https://www.networkforphl.org/wp-content/uploads/2021/02/Western-Region-Primer-COVID-2-1-2021.pdf>.

declarations in response to a singular public health threat are unprecedented.⁷

The scope of modern emergency powers invoked via these declarations is extensive. Collectively, national and regional states of emergency transform the legal landscape, providing a vast array of real-time measures to control the spread of COVID-19.⁸ Among the most sensational of these are social distancing powers—e.g., quarantines, isolations, closures, curfews, assembly limitations, and shelter-in-place or stay-at-home orders—authorized directly or impliedly by emergency laws.⁹ Emergency measures also allow many governmental officials to temporarily waive routine statutory or regulatory laws inhibiting response efforts.¹⁰ Presidents Trump¹¹ and Biden,¹² as well as governors across the U.S., have issued numerous waivers to effectuate key response efforts.¹³

Despite commonalities among declarations at all levels of government, execution of emergency public health powers to quell the

7. The mere authority to issue multifarious, interjurisdictional PHEs in response to an emerging infectious disease did not even exist a century ago when the nation faced the Spanish flu pandemic of 1918–1919. JAMES G. HODGE, JR., *PUBLIC HEALTH IN A NUTSHELL* 11 (3d ed. 2018). It was not until after the terrorist attacks on September 11, 2001 and ensuing anthrax incidents when major legal reforms emerged to: “revamp governmental organization and response efforts; create new preparedness classifications centered on declaration of [PHEs]; and revise existing legal norms to clarify roles and responsibilities of public and private actors in emergency response efforts.” *Id.* at 350.

8. Lawrence O. Gostin & James G. Hodge, Jr., *US Emergency Legal Responses to Novel Coronavirus: Balancing Public Health and Civil Liberties*, 323 J. AM. MED. ASS'N 1131, 1131 (2020).

9. NETWORK PRIMER, *supra* note 6, at 27.

10. Routine laws affecting health services, medical licensure, scope of practice, vaccinations, insurance, housing, employment, taxation, and transportation may all be suspended for the duration of emergency declarations in furtherance of social distancing and other public health interventions. See Daniel G. Orenstein, *When Law Is Not Law: Setting Aside Legal Provisions During Declared Emergencies*, 41 J.L. MED. & ETHICS 73, 74–75 (2013).

11. See, e.g., ELSEA ET AL., *supra* note 2.

12. See, e.g., Lucia Bragg, *Biden Announces Retroactive Waiver of State Cost Share for COVID-19 FEMA Assistance*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 2, 2021), <https://www.ncsl.org/blog/2021/02/02/biden-announces-retroactive-waiver-of-state-cost-share-for-covid-19-fema-assistance.aspx>.

13. See, e.g., Press Release, Office of Governor Doug Ducey, COVID-19: Declaration Of Emergency, Executive Order (Mar. 11, 2020), <https://azgovernor.gov/governor/news/2020/03/governor-doug-ducey-issues-declaration-emergency-executive-order-combat> (allowing the Arizona Department of Health Services “to waive licensing requirements to provide healthcare officials with assistance in

pandemic have been haphazard, inconsistent, and, at times, contrary to public health science and best practices.¹⁴ Political actors often underutilized or outright failed to use available social distancing and other interventions (e.g., masks) proven to decrease infections.¹⁵ Primary reasons for political reticence include concerns over collateral economic damages and public consternation.¹⁶ Months-long virtual shutdowns of businesses greatly impacted global¹⁷ and U.S. economies.¹⁸ Tens of millions of Americans lost their jobs, health insurance, housing, or support.¹⁹ Individuals and groups protested

delivering services during times of heightened demand"); Press Release, Office of Governor Gavin Newsom, Governor Newsom Signs Executive Order in Response to COVID-19 (Aug. 24, 2020), <https://www.gov.ca.gov/2020/08/24/governor-newsom-signs-executive-order-in-response-to-covid-19-8-24-20/>; *Waived and Suspended Licensing Regulations*, PA. DEP'T OF STATE, <https://www.dos.pa.gov/Pages/COVID-19-Waivers.aspx> (last updated May 5, 2021).

14. John Yoon et al., *When It Comes to Their Own Pandemic Precautions, State Legislatures in the U.S. Are All Over the Map*, N.Y. TIMES (Feb. 8, 2021), <https://www.nytimes.com/2021/02/08/us/mask-mandate-state-legislature-coronavirus.html> ("[W]ith no national standard for legislating during a pandemic . . . there remains a patchwork of shifting, inconsistent rules about where to meet, how the public can take part, and what to do about masks."); see also Nancy J. Knauer, *The COVID-19 Pandemic and Federalism: Who Decides?*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 1 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3599239 (noting "elevated . . . friction" between federal, state, and local governments related to a patchwork of pandemic response efforts).

15. Lauren Leatherby & Rich Harris, *States That Imposed Few Restrictions Now Have the Worst Outbreaks*, N.Y. TIMES (Nov. 18, 2020), <https://www.nytimes.com/interactive/2020/11/18/us/covid-state-restrictions.html>.

16. See, e.g., Eric E. Johnson & Theodore C. Bailey, *Legal Lessons from a Very Fast Problem: COVID-19*, 73 STAN. L. REV. ONLINE 89, 97 (2020), <https://www.stanfordlawreview.org/online/legal-lessons-from-a-very-fast-problem-covid-19/> ("[I]t seems very clear at this point that politically accountable leaders of the public health response in the United States did not act as optimal decision-makers."); see also Lev Facher, *Social Distancing, Politicized: Trump Allies Are Urging an End to Isolation, Worrying Public Health Experts*, STAT NEWS (Mar. 24, 2020), <https://www.statnews.com/2020/03/24/social-distancing-politicized-experts-worried/> ("[S]ome right-wing political leaders have increasingly pushed to roll back social distancing measures [They argue that the] global economy has nosedived so dramatically that the expected recession could cause more suffering than the virus itself.").

17. See JAMES K. JACKSON ET AL., CONG. RSCH. SERV., R46270, GLOBAL ECONOMIC EFFECTS OF COVID-19 (2021), <https://fas.org/sgp/crs/row/R46270.pdf>.

18. See RENAS MILLER & MARC LABONTE, CONG. RSCH. SERV., IN11388, COVID-19: U.S. ECONOMIC EFFECTS (2020), <https://crsreports.congress.gov/product/pdf/IN/IN11388>.

19. See *infra* Part I; see also Abbe R. Gluck & Timothy Stoltzfus Jost, *What Happens When Our Insurance Is Tied to Our Jobs, and Our Jobs Vanish?*, WASH. POST (Apr. 13, 2020), <https://www.washingtonpost.com/outlook/2020/04/13/covid-19-jobs->

applications of public health powers impacting their freedom and livelihood.²⁰ Public health officials in multiple jurisdictions have been personally threatened or attacked, leading dozens to vacate their positions.²¹

To the extent social distancing and other public health measures have contributed to widespread isolation, economic losses, and social unrest, substantial litigation has followed. As explored in Part II, Americans have sued governments proclaiming infringements of rights to assemble, worship, speech, due process, and travel, among others.²² A litany of cases have ensnared judges trying to conduct appropriate constitutional reasoning during emergencies.²³ Struggling to reach accord on a series of legal challenges which have rarely, if ever, been raised before, courts adjudged these issues under two divergent approaches:

health-insurance/ ("More than 17 million people have filed for unemployment in the past four weeks as the novel coronavirus continues to drive the U.S. economy into recession. That means that millions are or soon will be without health insurance, and millions more will struggle to pay premiums and co-pays . . .").

20. Manny Fernandez, *Anti-Vaccine Activists Emboldened in California*, N.Y. TIMES (Feb. 6, 2021), <https://www.nytimes.com/2021/02/06/us/california-covid-vaccine.html> ("For months, far-right activists across the country have been rallying against mask-wearing rules, business lockdowns, curfews and local public health officials, casting the government's response to the virus as an intrusion on individual liberties. But as masks and lockdowns become an increasingly routine part of American life, some protesters have shifted the focus of their antigovernment anger to the Covid-19 vaccines."); see also Tara McKelvey, *Coronavirus: Why Are Americans So Angry About Masks?*, BBC NEWS (July 20, 2020), <https://www.bbc.com/news/world-us-canada-53477121>.

21. See Michelle M. Mello et al., *Attacks on Public Health Officials During COVID-19*, 324 J. AM. MED. ASS'N 741, 741 (2020) ("At least 27 health officers in 13 states . . . have resigned or been fired since the start of the coronavirus disease 2019 (COVID-19) pandemic. Across the US, health officers have been subject to doxing (publishing private information to facilitate harassment), angry and armed protesters at their personal residences, vandalism, and harassing telephone calls and social media posts, some threatening bodily harm and necessitating private security details.").

22. See *infra* Part II; see also Wendy E. Parmet, *Roman Catholic Diocese of Brooklyn v. Cuomo – The Supreme Court and Pandemic Controls*, 384 N. ENG. J. MED. 199, 199 (2020).

23. See, e.g., James R. Steiner-Dillon & Elisabeth J. Ryan, *Jacobson 2.0: Police Power in the Time of COVID-19*, ALBANY L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3720083 ("[S]tate and municipal governments have imposed unprecedented constraints on Americans' daily activities. These restrictions provoked a wave of constitutional challenges that have revealed the antiquated doctrinal foundations of states' police power in the area of public health.").

- (1) *Constitutional re-balancing*: assessing the shifting nature of rights in emergencies by balancing alleged infringements against governments' compelling interests in protecting the public's health and safety;²⁴ or
- (2) *Constitutional set-asides*: determining whether specific rights (as articulated in non-emergencies) may essentially be set aside temporarily to the degree their recognition inhibits critical facets of emergency responses.²⁵

Under the first, dominant approach, most jurists understand and uphold the malleable nature of constitutional rights. As the U.S. Supreme Court observed 116 years ago in its seminal public health decision approving community vaccine mandates, *Jacobson v. Massachusetts*,²⁶ individual rights and freedoms are not absolute.²⁷ They must constantly be balanced with varied governmental interests, especially states' inherent powers to protect the public's health and safety.²⁸ Just as in non-emergencies, however, balancing individual rights and communal objectives during PHEs can lead to conflicting results even at the highest judicial levels.

On May 29, 2020, the U.S. Supreme Court held that California's COVID-19 temporary limitations on religious assemblies outweighed congregants' First Amendment religious freedoms.²⁹ Ruling otherwise, concluded Chief Justice Roberts, could entail unconstitutional "second-guessing" of executive decisions, contrary to separation of powers principles.³⁰ Yet, just six months later on November 25, the Court (with newly arrived Justice Amy Coney

24. See *infra* Part II.A.

25. See *infra* Part II.B.

26. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

27. *Id.* at 29 ("[I]n every well-ordered society charged with the duty of conserving the safety of its members[,] the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.").

28. *Id.* at 25 ("[T]he police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.").

29. *S. Bay United Pentecostal Church v. Newsom (South Bay I)*, 140 S. Ct. 1613 (2020). Following this decision, the Court denied an emergency petition on July 24 in a similar claim brought by a religious institution in Nevada, essentially contesting closure orders applying to churches, but not to casinos. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020).

30. *South Bay I*, 140 S. Ct. at 1613–14.

Barrett) struck down a similar New York State measure impacting places of worship as contrary to the free exercise of religion.³¹ “Even if the Constitution has taken a holiday during this pandemic,” concurred Justice Gorsuch, “it cannot become a sabbatical.”³² On February 5, 2021, the Court declared California’s prohibition of indoor religious services unconstitutional,³³ essentially reversing its opinion in the same case eight months earlier. On April 9, 2021, it overturned California’s restrictions on multifamily gatherings in private homes under free exercise principles.³⁴

Justice Gorsuch’s stinging observation reflected concerns over the “mistaken” potential for courts to set aside constitutional rights in the throes of emergencies.³⁵ Under this second, minority view, jurists scuttle constitutional interests temporarily rather than re-balance them in the broader interests of public health. Despite limited historical precedence, some modern courts have gone in this direction.³⁶ On March 25, 2020, a New Hampshire state court determined that normal judicial scrutiny of alleged constitutional infringements of First Amendment rights may be abandoned during PHEs.³⁷ Similar reasoning undergirded a Fifth Circuit Court of Appeals decision on April 7, 2020, allowing Texas Governor Greg Abbott to temporarily ban non-emergency surgical abortions.³⁸

Both approaches, constitutional re-balancing and set-asides, are problematic. Judges attempting re-balancing take a rigid view of constitutional rights framed outside emergency contexts. Courts engaging in set-asides, even temporarily, improperly jettison constitutional rights. Rights stripped of applications in emergencies

31. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam) (declaring unconstitutional the social distancing order limiting attendees at religious services even though New York Governor Andrew Cuomo had already rescinded the social distancing order as applied to religious institutions).

32. *Id.* at 70 (Gorsuch, J., concurring).

33. *S. Bay United Pentecostal Church v. Newsom (South Bay II)*, 141 S. Ct. 716 (2021). In a terse 6–3 opinion largely devoid of reasoning, the Court blocked California’s COVID-19 order banning all indoor religious services, leaving aside categorical bans on singing or chanting amid services and occupancy limitations, as a violation of First Amendment free exercise rights. *Id.*

34. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

35. *Cuomo*, 141 S. Ct. at 71 (Gorsuch, J., concurring).

36. *See infra* Part II.B.

37. *See generally* *Binford v. Sununu*, No. 217-2020-CV-00152, at 10–15 (N.H. Super. Ct. Mar. 25, 2020) (order denying preliminary injunction), https://courts-state-nh-us.libguides.com/ld.php?content_id=55731632.

38. *In re Abbott*, 954 F.3d 772 (5th Cir. 2020), *vacated as moot sub nom. Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021).

cease to be rights at all,³⁹ especially amid pandemics extending for months on end.⁴⁰ Such findings can give rise to unfettered governmental exercises (or omissions⁴¹) of public health powers disconnected from science or best practices.

As explicated in Part III, both methods reflect misapprehensions of rights via the Constitution's cohesive design. Constitutional structures and rights are sufficiently flexible to allow temporary, normative deviations within a federalist infrastructure that obligates government to act in the interests of public health and safety. In essence, rights flex just like governmental responsibilities to protect the public's health in emergencies.

Ultimately, the role of courts is not merely to (1) weigh rights-based infringements against PHE interventions or powers, or (2) ascertain when rights may be circumvented during exigencies. Rather, in declared emergencies, courts should assess how rights and public health protections align to produce a social good—*prevention of morbidity and mortality*—accomplishable only through sufficient, constitutional flexibility. An appropriate test to adjudge claims of rights-based infringements in emergencies entails frank, guided assessments of the execution, efficacy, and purpose of public health interventions.⁴²

While no test is foolproof, shifting modern judicial parlance to better reflect principles of constitutional design grounded in public health promotion is as essential to emergency responses as legislative authorizations and executive declarations of PHE powers. Ultimately,

39. See, e.g., Bret Stephens, *Thank You, Justice Gorsuch*, N.Y. TIMES (Dec. 1, 2020), <https://www.nytimes.com/2020/11/30/opinion/cuomo-gorsuch-coronavirus.html> ("As Justice Samuel Alito put it in a speech [in November] that caused some gnashing of teeth: 'All sorts of things can be called an emergency or disaster of major proportions. Simply slapping on that label cannot provide the ground for abrogating our most fundamental rights.'"). As to Justice Alito's observation on the scope of emergency classifications, see James G. Hodge, Jr. et al., *Legal Crises in Public Health*, 47 J.L. MED. & ETHICS 778, 778 (2019). "Since the onset of modern legal conceptions of [PHEs] in 2001, government officials at all levels have demonstrated a propensity to declare PHEs in response to a multitude of scenarios (e.g., emerging infectious diseases, natural disasters, terrorism events." *Id.*

40. See *infra* Part II.C.

41. Omissions refer to governmental failures to act in the interests of public health and safety. While positive actions to obviate pandemic impacts may implicate potential rights violations, inactions may not lend to similar rights-based claims. Even though governmental actors may avoid legal challenges through omissions, they may subsequently face considerable political repercussions. See, e.g., James G. Hodge, Jr. et al., *Constitutional Cohesion and the Right to Public Health*, 53 U. MICH. J.L. REFORM 173, 187 (2019).

42. See *infra* Part III.B.

enhanced judicial resolution of rights-based claims underscores how public health preservation and promotion, above all, are a constitutional prerogative.

I. UNPRECEDENTED EMERGENCY LEGAL RESPONSES

What surfaced initially in 2019 from deadly respiratory illnesses tied to a new strain of coronavirus in Wuhan, China escalated rapidly into the greatest infectious disease threat the world has experienced in a century. In just over 18 months since its inception in January 2020, the global COVID-19 pandemic infected more than 196 million persons and caused or contributed to nearly 4.2 million deaths.⁴³

While morbidity and mortality outcomes vary extensively across affected countries, the public health impacts of COVID-19 in the U.S. are profound.⁴⁴ As of July 29, 2021, the U.S. accounted for nearly 18% of all confirmed infections and 15% of all COVID-19-related deaths globally despite having only 4.25% of the world's population.⁴⁵ A February 2021 report indicated that approximately 40% of U.S. deaths to date were preventable if the average death rate in the U.S. compared with that of other industrialized nations.⁴⁶ Although the U.S. administered more COVID-19 tests than any country, public and private sectors have struggled to respond to a series of deadly waves of the virus affecting populations of all ages.⁴⁷

Rapid development and initial rollouts of COVID-19 vaccines beginning in late December 2020 raised Americans' hopes of subsiding

43. *COVID-19 Dashboard*, CTR. FOR SYS. SCI. & ENG'G (CSSE) AT JOHNS HOPKINS UNIV. [hereinafter JOHNS HOPKINS DASHBOARD], <https://coronavirus.jhu.edu/map.html> (last visited July 29, 2021).

44. *See Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last visited July 29, 2021) (illustrating via graphics how cases, infection rates, and death counts have increased over time).

45. JOHNS HOPKINS DASHBOARD, *supra* note 43; *United States Population*, WORLDOMETER, <https://www.worldometers.info/world-population/us-population/> (last visited July 29, 2021); *see also* Sarah Mervosh et al., *One Year, 400,000 Coronavirus Deaths: How the U.S. Guaranteed Its Own Failure*, N.Y. TIMES (Jan. 17, 2021), <https://www.nytimes.com/2021/01/17/us/covid-deaths-2020.html>.

46. Ken Alltucker, *Roughly 40% of the USA's Coronavirus Deaths Could Have Been Prevented, New Study Says*, USA TODAY (Feb. 15, 2021, 8:52 AM), <https://www.usatoday.com/story/news/health/2021/02/11/lancet-commission-donald-trump-covid-19-health-medicare-for-all/4453762001/>.

47. Aria Bendix & Skye Gould, *How the US Coronavirus Outbreak Compares to Other Countries in 11 Charts*, BUS. INSIDER (Oct. 26, 2020, 5:51 PM), <https://www.businessinsider.com/how-us-coronavirus-outbreak-compares-to-other-countries-charts-2020-10>.

the pandemic threat.⁴⁸ Yet, manufacturing limitations, communication disconnects, disorganized distributions, mutant viral strains, and widespread vaccine hesitancy have significantly lowered expectations.⁴⁹ Since his inauguration on January 20, 2021, President Joe Biden and his administration have acted to reshape domestic and global responses to the pandemic through multi-factorial efforts ensconced in a sophisticated new plan.⁵⁰ Likening COVID-19 as a national security threat, the Biden administration unleashed a gamut of federal powers and resources in coordination with states, territories, and tribes.⁵¹ “We can and will beat COVID-19[.]” promised President Biden, through responses “driven by science, data, and public health — not politics.”⁵²

The Biden administration’s efforts to control the pandemic included massive requests to Congress for economic relief for hard-hit American businesses and individuals.⁵³ COVID-19 is unquestionably one of the costliest public health threats in global history.⁵⁴ In the U.S. alone, economic losses are estimated to exceed \$16 trillion,⁵⁵ including direct federal expenditures.⁵⁶ The Coronavirus Aid, Relief, and

48. Katie Thomas et al., *F.D.A. Clears Pfizer Vaccine, and Millions of Doses Will Be Shipped Right Away*, N.Y. TIMES (Dec. 11, 2020), <https://www.nytimes.com/2020/12/11/health/pfizer-vaccine-authorized.html>.

49. Alexander Smith, *Covid Vaccines: Rollout in Disarray in U.S. and Abroad*, NBC NEWS (Jan. 31, 2021, 4:30 AM), <https://www.nbcnews.com/news/world/covid-vaccines-rollout-disarray-u-s-abroad-n1256144>; see also Tariro Mzezewa et al., *Demand Overwhelms Some U.S. Vaccine Registration Sites*, N.Y. TIMES (Jan. 9, 2021), <https://www.nytimes.com/live/2021/01/09/world/covid-19-coronavirus>.

50. THE WHITE HOUSE, NATIONAL STRATEGY FOR THE COVID-19 RESPONSE AND PANDEMIC PREPAREDNESS (Jan. 21, 2021) [hereinafter NATIONAL STRATEGIC PLAN], <https://www.whitehouse.gov/wp-content/uploads/2021/01/National-Strategy-for-the-COVID-19-Response-and-Pandemic-Preparedness.pdf>.

51. *Id.* at 4.

52. *Id.* at 5.

53. Erica Werner & Jeff Stein, *Biden Unveils \$1.9 Trillion Economic and Health-Care Relief Package*, WASH. POST (Jan. 14, 2021, 9:22 PM), <https://www.washingtonpost.com/us-policy/2021/01/14/biden-stimulus-covid-relief/>.

54. As early as October 2020, reports predicted expenses of battling COVID-19 could cost the U.S. over \$16 trillion, “or approximately 90% of the [country’s] annual gross domestic product[.]” David M. Cutler & Lawrence H. Summers, *The COVID-19 Pandemic and the \$16 Trillion Virus*, 324 J. AM. MED. ASS’N 1495, 1495–96 (2020), <https://jamanetwork.com/journals/jama/fullarticle/2771764>.

55. Avery Koop, *Putting the Cost of COVID-19 in Perspective*, VISUAL CAPITALIST (Jan. 14, 2021), <https://www.visualcapitalist.com/putting-the-cost-of-covid-19-in-perspective/>.

56. *How Is the Federal Government Funding Relief Efforts for COVID-19?*, DATA LAB, <https://datalab.usaspending.gov/federal-covid-funding/> (last updated Oct. 1, 2020).

Economic Security (CARES) Act,⁵⁷ signed by President Trump on March 27, 2020,⁵⁸ authorized nearly \$2.09 trillion toward individual stimulus checks, business and student loan relief, and state and local governments' pandemic response efforts.⁵⁹ On December 27, President Trump signed the Consolidated Appropriations Act, 2021, infusing another \$2.3 trillion into the economy.⁶⁰ President Biden implemented a \$1.9 trillion package of stimulus funds in March 2021,⁶¹ engendering speculation about long-term economic effects of repeated federal bailouts.⁶²

Severe financial impacts affecting tens of millions of Americans have contributed heavily to political and legal debates over public health response efforts. As rates of morbidity and mortality escalated, governments at all levels issued an array of emergency declarations and measures.⁶³ On January 31, 2020, Alex Azar, Secretary of the federal Department of Health and Human Services (HHS), declared a national PHE.⁶⁴ He also initiated a separate declaratory process through the federal Public Readiness and Emergency Preparedness (PREP) Act⁶⁵ to provide extensive liability and other protections for

57. Coronavirus Aid, Relief, and Economic Security (CARES) Act, 15 U.S.C.A. §§ 9001–9149 (West 2020).

58. Erica Werner et al., *Trump Signs \$2 Trillion Coronavirus Bill into Law as Companies and Households Brace for More Economic Pain*, WASH. POST (Mar. 27, 2020), <https://www.washingtonpost.com/us-policy/2020/03/27/congress-coronavirus-house-vote/>.

59. Kelsey Snell, *What's Inside the Senate's \$2 Trillion Coronavirus Aid Package*, NPR (Mar. 26, 2020, 5:34 PM), <https://www.npr.org/2020/03/26/821457551/whats-inside-the-senate-s-2-trillion-coronavirus-aid-package>.

60. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020).

61. Gabe Alpert, *U.S. COVID-19 Stimulus and Relief: A Breakdown of the Fiscal and Monetary Responses to the Pandemic*, INVESTOPEDIA (Aug. 4, 2021), <https://www.investopedia.com/government-stimulus-efforts-to-fight-the-covid-19-crisis-4799723> (“On March 11, 2021, President Biden signed the American Rescue Plan Act of 2021, implementing a \$1.9 trillion package of stimulus and relief proposals.”).

62. NORBERT J. MICHEL ET AL., HERITAGE FOUND., POTENTIAL LONG-TERM ECONOMIC CONSEQUENCES OF THE FEDERAL RESPONSE TO THE COVID-19 LOCKDOWNS 1, 1–2, 16 (2020), <https://www.heritage.org/sites/default/files/2020-06/BG3498.pdf> (suggesting that the Federal Reserve undergo reform in light of recent COVID-19 spending, lest it “jeopardiz[e] its policy independence and capacity to respond effectively to future downturns”).

63. NETWORK PRIMER, *supra* note 6, at 9–11.

64. Press Release, Alex M. Azar II, Sec’y, U.S. Dep’t of Health and Hum. Servs., Secretary Azar Declares Public Health Emergency for United States for 2019 Novel Coronavirus (Jan. 31, 2020).

65. Public Readiness and Emergency Preparedness (PREP) Act, 42 U.S.C.A. § 247d-6d (West 2021).

persons and entities implementing federally-approved medical countermeasures.⁶⁶

By March 13, 2020, with public health pressures mounting, President Trump issued concurrent emergency declarations under the Stafford Act⁶⁷ and National Emergencies Act⁶⁸ authorizing manifold public health powers and economic remedies.⁶⁹ Days later, on March 20, he invoked the Defense Production Act of 1950⁷⁰ allowing federal control over specific private sector manufacturing and distribution capacities.⁷¹ All of these emergency measures have been renewed or continued for months on end since their invocation.

State, territorial, tribal, and local governments declared their own emergencies. As illustrated in Figure 1 below, by the end of March 2020, every state Governor (and territories) had concurrently issued distinct emergency, disaster, or PHE declarations,⁷² a first in U.S. history.⁷³

66. Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15198 (Mar. 17, 2020).

67. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5207 (2018).

68. National Emergencies Act, 50 U.S.C. §§ 1601–1651 (2018).

69. *See generally Emergency Declarations and Authorities: Fact Sheet*, ASS'N OF STATE & TERRITORIAL HEALTH OFFS., <https://astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Emergency-Authority-and-Immunity-Toolkit/Emergency-Declarations-and-Authorities-Fact-Sheet/> (last updated 2012).

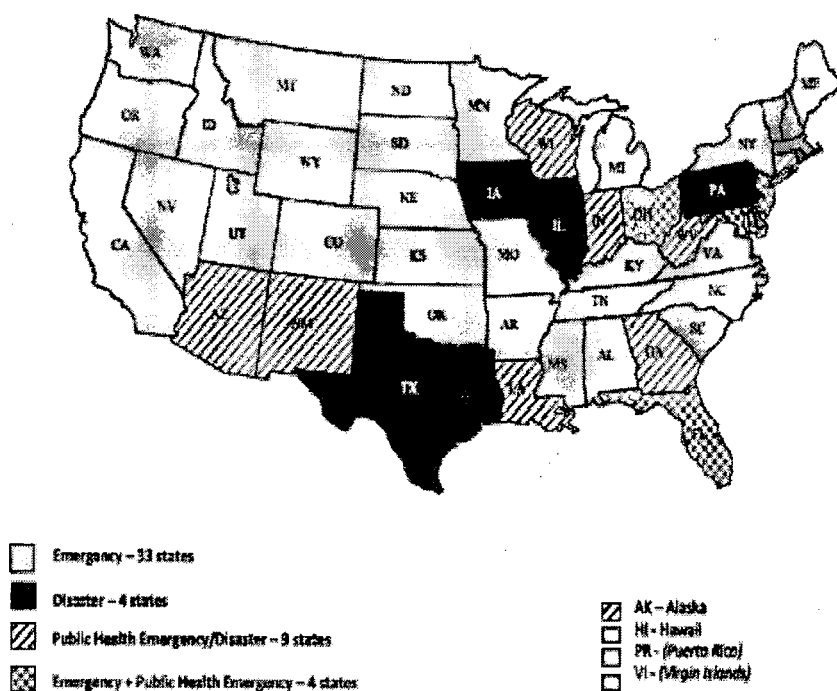
70. Defense Production Act of 1950, 50 U.S.C.A. § 4511(a) (West 2015).

71. MICHAEL H. CECIRE & HEIDI M. PETERS, CONG. RSCH. SERV., R43767, THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS (2020), <https://fas.org/sgp/crs/natsec/R43767.pdf>.

72. NAT'L GOVERNORS ASS'N, *supra* note 3; Ill. Gubernatorial Disaster Proclamation (Mar. 10, 2020), <https://www2.illinois.gov/sites/gov/Documents/CoronavirusDisasterProc-4-30-2020.pdf>; Minn. Exec. Order No. 20-01 (Mar. 13, 2020), https://mn.gov/governor/assets/EO%2020-01_tcm1055-422957.pdf; N.H. Exec. Order 2020-04 (Mar. 13, 2020), <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2020-04.pdf>; Ohio Exec. Order 2020-01D (Mar. 9, 2020), <https://governor.ohio.gov/wps/portal/gov/governor/media/executive-orders/executive-order-2020-01-d>; R.I. Exec. Order No. 20-02 (Mar. 9, 2020), <https://governor.ri.gov/executive-orders/executive-order-20-02>; S.C. Exec. Order No. 2020-08 (Mar. 13, 2020), <https://governor.sc.gov/executive-branch/executive-orders> (click “2020-08 Official (PDF)”).

73. Cecelia Smith-Schoenwalder, *U.S. Coronavirus Death Toll Passes 20,000 as All 50 States Declare Disasters*, U.S. NEWS & WORLD REP. (Apr. 11, 2020, 6:06 PM), <https://www.usnews.com/news/national-news/articles/2020-04-11/us-coronavirus-death-toll-passes-20-000-as-all-50-states-declare-disasters>.

Figure 1. State and Territorial Emergency Declarations in Response to COVID-19⁷⁴



These declarations directly authorized a broad slate of emergency legal authorities, supplemented by invocation of response plans, issuance of executive orders, real-time rule-making, and legislative proposals.⁷⁵ Efficacious public health interventions involving testing, screening, surveillance, contact tracing, treatment, and research were expeditiously implemented.⁷⁶ Essential supplies were secured rapidly through government contracts or takings of private sector inventories.⁷⁷ Health care and public health responders mobilized via

74. NETWORK PRIMER, *supra* note 6, at 11.

75. *Id.* at 12.

76. Gostin & Hodge, *supra* note 8, at 1132.

77. Taleed El-Sabawi et al., *No Time to Wait: Commandeering Healthcare Facilities in the Age of COVID-19*, 18 J. EMERGENCY MGMT. (SPECIAL ISSUE) 41, 41-42 (2020), <https://wmpllc.org/ojs/index.php/jem/article/view/2878/3071>.

interstate licensure allowances to work directly or via telemedicine in other states.⁷⁸ Specific liability protections provided immunity or indemnity for health care workers, volunteers, and entities against claims of ordinary negligence.⁷⁹ Medical standards of care shifted to accommodate crisis modes in hospitals, clinics, and other facilities.⁸⁰ Routine statutory or regulatory requirements governing health care, housing, transportation, and other impacted industries were eased or temporarily waived in support of response efforts.⁸¹

While each of these responses raised legal and political controversies, the most dynamic and contested public health response powers were those directly altering personal and social behaviors.⁸² Social distancing measures (e.g., quarantine,⁸³ isolation,⁸⁴ school and

78. *U.S. States and Territories Modifying Requirements for Telehealth in Response to COVID-19*, FED’N OF STATE MED. BDS., <https://www.fsmb.org/siteassets/advocacy/pdf/states-waiving-licensure-requirements-for-telehealth-in-response-to-covid-19.pdf> (last updated Sept. 15, 2021).

79. *Liability Protections for Health Care Professionals During COVID-19*, AM. MED. ASS’N, <https://www.ama-assn.org/practice-management/sustainability/liability-protections-health-care-professionals-during-covid-19> (last updated Apr. 8, 2020).

80. NAT’L ACADS. OF SCIS., ENG’G & MED., RAPID EXPERT CONSULTATION ON STAFFING CONSIDERATIONS FOR CRISIS STANDARDS OF CARE FOR THE COVID-19 PANDEMIC (2020), <https://www.nap.edu/catalog/25890/rapid-expert-consultation-on-staffing-considerations-for-crisis-standards-of-care-for-the-covid-19-pandemic-july-28-2020>; see also 1 NAT’L ACADS. OF SCIS., ENG’G & MED., CRISIS STANDARDS OF CARE: A SYSTEMS FRAMEWORK FOR CATASTROPHIC DISASTER RESPONSE FRAMEWORK (Dan Hanfling et al. eds., 2012), <https://www.nap.edu/download/13351>.

81. ASS’N OF STATE & TERRITORIAL HEALTH OFFES., *supra* note 69 (noting that state emergency declarations trigger “an array of authorities and actions by state and/or local governments[,]” including “[s]uspension and waiver of rules and regulations (and statutes, if allowed)”); see *supra* note 10 and accompanying text.

82. *Lawsuits About State Actions and Policies in Response to the Coronavirus (COVID-19) Pandemic, 2020-2021*, BALLOTPEdia, [https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_\(COVID-19\)_pandemic_2020-2021](https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic_2020-2021) (last visited Feb. 23, 2021) (documenting the prolific COVID-19-related litigation that has arisen over the course of the pandemic, focusing on some of the more noteworthy lawsuits throughout 2020).

83. *State Quarantine and Isolation Statutes*, NAT’L CONF. OF STATE LEGISLATURES (Aug. 7, 2020), <https://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx>.

84. *Id.*

business closures,⁸⁵ curfews,⁸⁶ masks,⁸⁷ travel restrictions,⁸⁸ and stay-at-home orders⁸⁹) are intended to create safe spaces among persons who might otherwise unwittingly spread infectious diseases.⁹⁰ In the absence of available efficacious treatment and widespread vaccinations, utilization of social distancing powers unquestionably helps to tamp down infection rates and save lives.⁹¹

85. Benedict Carey & Pam Belluck, *School Closures in the Spring Saved Lives, Study Asserts*, N.Y. TIMES (July 31, 2020), <https://www.nytimes.com/2020/07/29/health/covid-school-reopening.html>; Anjali Sundaram, *Yelp Data Shows 60% of Business Closures Due to the Coronavirus Pandemic Are Now Permanent*, CNBC (Dec. 11, 2020, 9:28 AM), <https://www.cnbc.com/2020/09/16/yelp-data-shows-60percent-of-business-closures-due-to-the-coronavirus-pandemic-are-now-permanent.html>.

86. Kwame Opam & Concepción de León, *Why Are States Imposing Virus Curfews?*, N.Y. TIMES (Jan. 26, 2021), <https://www.nytimes.com/2020/11/21/us/coronavirus-curfew.html>.

87. Andy Markowitz, *State-by-State Guide to Face Mask Requirements*, AARP (Aug. 26, 2021), <https://www.aarp.org/health/healthy-living/info-2020/states-mask-mandates-coronavirus.html>.

88. *Domestic Travel During COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 25, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html>.

89. Sarah Mervosh et al., *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>.

90. *Study Confirms Social Distancing as Most Effective Intervention Against COVID-19*, CHILDREN'S HOSP. PHILA. (July 23, 2020), <https://policylab.chop.edu/press-releases/study-confirms-social-distancing-most-effective-intervention-against-covid-19>; see *How to Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last updated Aug. 13, 2021).

91. David Rubin et al., *Association of Social Distancing, Population Density, and Temperature with the Instantaneous Reproduction Number of SARS-CoV-2 in Counties Across the United States*, J. AM. MED. ASS'N NETWORK OPEN, July 23, 2020, at 1, 1, <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2768570> ("In this cohort study of 211 counties in 46 states, social distancing, temperate weather, and lower population density were associated with a decrease in the instantaneous reproduction number of SARS-CoV-2. Of these county-specific factors, social distancing appeared to have the most substantial association with a reduction in SARS-CoV-2 transmission.").

Yet, inconsistent implementation of these powers across states impacted Americans' quality of life,⁹² contributed to social isolation,⁹³ and directly impinged economic livelihoods. Unprecedented job losses⁹⁴ resulted in over 87 million unemployment claims by the end of June 2021.⁹⁵ Hundreds of thousands of small businesses were forced to shutter.⁹⁶ Millions of Americans experiencing food insecurity waited in long lines for handouts at food banks.⁹⁷ Facing threats of eviction, tenants had to be bailed out by a federal moratorium initially issued on September 2, 2020 by the Centers for Disease Control and

92. In February 2021, the CDC released alarming data based on COVID-19 mortality. In just the first six months of 2020, U.S. life expectancy declined by roughly one year for all Americans to 77.8 years averaged across race, age, and gender. ELIZABETH ARIA ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, VITAL STATISTICS RAPID RELEASE: PROVISIONAL LIFE EXPECTANCY ESTIMATES FOR JANUARY THROUGH JUNE, 2020, at 1–2 (Feb. 2021), <https://www.cdc.gov/nchs/data/vsrr/Vsrr10-508.pdf>. It is the largest decline in U.S. life expectancy since World War II. Adela Suliman & The Associated Press, *Covid-19 Cuts U.S. Life Expectancy by a Year in First Half of 2020, Biggest Drop Since WWII*, NBC NEWS (Feb. 18, 2021, 6:29 AM), <https://www.nbcnews.com/news/us-news/covid-19-cuts-u-s-life-expectancy-year-first-half-n1258219>.

93. Julianne Holt-Lunstad, *The Double Pandemic of Social Isolation and COVID-19: Cross-Sector Policy Must Address Both*, HEALTH AFFS. (June 22, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200609.53823>.

94. Over 89 million Americans lost their jobs from January 2020 to June 2021. *Unemployment Level—Job Losers on Layoff*, FED. RES. BANK ST. LOUIS, <https://fred.stlouisfed.org/series/LNS13023653#0> (select “2020-01-01” for minimum and “2021-06-01” for maximum) (last visited July 28, 2021).

95. See *Unemployment Insurance Weekly Claims Data*, U.S. DEP’T OF LAB., EMP. & TRAINING ADMIN., <https://oui.doleta.gov/unemploy/claims.asp> (select 2020 for “Beginning Year” and 2022 for “Ending Year”) (last visited July 28, 2021); see also Kate Duffy, *It Could Take 4 Years to Recover the 22 Million Jobs Lost in the US During the Early Months of the COVID-19 Pandemic, Moody’s Warns*, BUS. INSIDER (Dec. 2, 2020, 8:08 AM), <https://www.businessinsider.com/covid-job-losses-unemployment-recovery-years-moodys-covid-2020-12>.

96. Ruth Simon, *Covid-19’s Toll on U.S. Business? 200,000 Extra Closures in Pandemic’s First Year*, WALL ST. J. (Apr. 16, 2021, 9:43 AM), <https://www.wsj.com/articles/covid-19s-toll-on-u-s-business-200-000-extra-closures-in-pandemics-first-year-11618580619> (reporting that approximately 200,000 small businesses closed across the U.S. during the pandemic’s first year); Sundaram, *supra* note 85 (reporting that over 163,000 businesses had closed down by the beginning of September 2020).

97. Sarah Wetter et al., *Ethical Allocation of Scarce Food Resources During Public Health Emergencies*, 49 J.L. MED. & ETHICS 132 (2021), https://papers.ssrn.com/sol3/papers.cfm?Abstract_id=3773067; Sharon Cohen, *Millions of Hungry Americans Turn to Food Banks for 1st Time*, ABC NEWS (Dec. 7, 2020, 2:51 PM), <https://abcnews.go.com/Health/wireStory/millions-hungry-americans-turn-food-banks-1st-time-74583542>.

Prevention (CDC),⁹⁸ and renewed multiple times.⁹⁹ Over the course of months of emotional stress, physical fatigue, and substantial economic downturns, individuals, groups, and business owners repeatedly contested social distancing measures as excessive, unnecessary, and, most importantly, unconstitutional.¹⁰⁰

II. RIGHTS-BASED JUDICIAL CHALLENGES

As U.S. governments utilized aggressive social distancing measures to combat COVID-19 and economic impacts mounted, Americans filed thousands of cases in courts across the country to directly challenge public health powers on multiple constitutional grounds.¹⁰¹ Individuals argued that social distancing powers directly infringed (1) First Amendment rights pursuant to the Free Exercise¹⁰²

98. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020).

99. Chris Arnold, *Biden to Extend Order Limiting Pandemic Evictions*, NPR (Jan. 20, 2021), <https://www.npr.org/sections/inauguration-day-live-updates/2021/01/20/958761873/biden-to-extend-order-limiting-pandemic-evictions>; CDC Director Extends the Eviction Moratorium for 30 Days, CTRS. FOR DISEASE CONTROL & PREVENTION (June 24, 2021), <https://www.cdc.gov/media/releases/2021/s0624-eviction-moratorium.html>; see also Andrew Ackerman, *Biden Asks Congress to Extend Federal Eviction Moratorium*, WALL ST. J. (July 29, 2021), <https://www.wsj.com/articles/biden-asks-congress-to-extend-federal-eviction-moratorium-11627571409>; Kaitlan Collins et al., *CDC Announces Limited, Targeted Eviction Moratorium Until Early October*, CNN (Aug. 3, 2021), <https://www.cnn.com/2021/08/03/politics/eviction-moratorium-high-covid-spread/index.html>.

100. Laurie Sobel & MaryBeth Musumeci, *Litigation Challenging Mandatory Stay at Home and Other Social Distancing Measures*, KAISER FAM. FOUND. (June 5, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/litigation-challenging-mandatory-stay-at-home-and-other-social-distancing-measures/>.

101. See *COVID-19 Complaint Tracker*, HUNTON ANDREWS KURTH, <https://www.huntonak.com/en/covid-19-tracker.html> (last visited July 28, 2021) (indicating that 11,463 complaints have been filed, roughly 1,799 of which have involved civil rights); see also Linda A. Sharp, Annotation, *COVID-19 Related Litigation: Constitutionality of Stay-at-Home, Shelter-in-Place, and Lockdown Orders*, 55 A.L.R. Fed. 3d 3 (2020) (footnote omitted) (cataloguing cases "in which federal courts have considered the constitutionality of state, federal, county, or local orders declaring quarantine, stay-at-home, travel bans, shelter-in-place, lockdowns, or similar acts during the COVID-19 pandemic").

102. See, e.g., *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 69 (2020) (blocking, via the First Amendment's Free Exercise Clause, New York Governor Cuomo's executive order implementing 10- and 25-person occupancy limits on houses of worship in certain high-risk areas of New York).

and Establishment Clauses,¹⁰³ as well as free speech,¹⁰⁴ freedoms of assembly,¹⁰⁵ and association;¹⁰⁶ (2) rights to travel;¹⁰⁷ (3) reproductive freedoms including the right to abortion;¹⁰⁸ (4) equal protection interests;¹⁰⁹ and (5) substantive and procedural due process.¹¹⁰ Businesses raised distinct constitutional claims, including takings challenges under the Fifth Amendment¹¹¹ and economic due process arguments under the Fourteenth Amendment.¹¹² The sheer number, scope, and extent of these arguments strained courts attempting to adjudicate claims while implementing their own social distancing efforts to conduct safe proceedings during the pandemic.¹¹³

103. *See, e.g.*, *Calvary Chapel of Bangor v. Mills*, 459 F. Supp. 3d 273 (D. Me. 2020) (upholding Maine Governor Mills' executive orders limiting the size of gatherings to ten people against a First Amendment Establishment Clause challenge).

104. *See, e.g.*, *Geller v. de Blasio*, No. 20cv3566, 2020 WL 2520711 (S.D.N.Y. May 18, 2020) (upholding New York Mayor de Blasio's executive order banning nonessential gatherings against a free speech challenge).

105. *See, e.g.*, *Ramsek v. Beshear*, 468 F. Supp. 3d 904 (E.D. Ky. 2020) (imposing a preliminary injunction on Kentucky Governor Beshear's executive order prohibiting mass gatherings as violating the freedom of assembly).

106. *See, e.g.*, *Lebanon Valley Auto Racing Corp. v. Cuomo*, 478 F. Supp. 3d 389 (N.D.N.Y. 2020) (upholding Governor Cuomo's executive order allowing racetracks to operate upon limiting access only to essential personnel against a freedom of association challenge).

107. *See, e.g.*, *Roberts v. Neace*, 457 F. Supp. 3d 595 (E.D. Ky. 2020) (granting in part a preliminary injunction, based on the right to travel, against Kentucky Governor Beshear's executive orders restricting travel into and out of the state).

108. *See, e.g.*, *Preterm-Cleveland v. Att'y Gen. of Ohio*, 456 F. Supp. 3d 917 (S.D. Ohio 2020) (granting a preliminary injunction against Ohio restrictions on surgical abortions, concluding that restrictions constituted an undue burden on the right to abortion).

109. *See, e.g.*, *World Gym, Inc. v. Baker*, 474 F. Supp. 3d 426 (D. Mass. 2020) (upholding Massachusetts Governor Baker's order requiring closure of nonessential businesses against equal protection argument forwarded by business owners).

110. *See, e.g.*, *Xponential Fitness v. Arizona*, No. CV-20-01310-PHX-DJH, 2020 WL 3971908 (D. Ariz. July 14, 2020) (rejecting procedural due process argument against Arizona Governor Ducey's executive order limiting operations of fitness centers).

111. *County of Butler v. Wolf*, 486 F. Supp. 3d 883, 894 (W.D. Pa. 2020) (declining to address Takings Clause argument against social distancing orders issued by Pennsylvania Governor Wolf and Pennsylvania Secretary of Health Levine).

112. *Id.* at 928 (concluding that social distancing orders closing "non-life-sustaining" businesses violate the Due Process Clause of the Fourteenth Amendment).

113. Liptak, *supra* note 1. As observed by U.S. Supreme Court Justice John G. Roberts, "[b]y April [2020], judges around the country were guiding critical courts functions from their home offices — or kitchen tables Hearings of all sorts went virtual. Judges quickly (or at least eventually) learned to use a wide range of available audio and video conferencing tools." *Id.*

Judicial assessments of these alleged infringements during PHEs are classifiable in two distinct categories. Most courts embraced a strategy of *constitutional re-balancing* involving weighed assessments of pliable individual rights with compelling governmental interests underlying COVID-19 public health efforts.¹¹⁴ These decisions reflect judges' varied attempts to re-conceive individual rights under emergency circumstances. A minority of courts, however, employed a distinct strategy, concluding that some individual rights may be temporarily set-aside during emergencies.¹¹⁵

A. *Constitutional Re-balancing*

Courts performing re-balancing typically acknowledge that constitutional rights are malleable in declared emergencies based primarily on the degree and importance of governments' interests.¹¹⁶ Jurists diverge, however, on whether to apply a traditional or

114. See, e.g., *Givens v. Newsom*, 459 F. Supp. 3d 1302, 1312–15 (E.D. Cal. 2020)

The right to expressive association is not an absolute right and can be infringed upon if that infringement is: (1) unrelated to the suppression of expressive association; (2) due to a compelling government interest; and (3) narrowly tailored. . . . The State's order seeks to suppress the virus, not expressive association. And, as is now well-established, protecting California's residents from "[a] global pandemic and its local outbreak amount to a compelling state interest."

Id. at 1314–15 (citation omitted) (quoting *Legacy Church v. Kunkel*, 455 F. Supp. 3d 1100, 1159 (D.N.M. 2020)).

115. See, e.g., *In re Abbott*, 954 F.3d 772, 778 (5th Cir. 2020) (upholding Texas limitations on surgical abortions during pandemic, concluding that, during emergencies, all constitutional rights may be "reasonably restricted"), *vacated as moot sub nom.* *Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021); *In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020) (granting mandamus relief after district court temporarily blocked Arkansas directive prohibiting surgical abortions, concluding that the directive was not subject to constitutional challenge unless it "has no real or substantial relation to' the public health crisis, or 'is, beyond all question, a plain, palpable invasion of a woman's right to elective abortion'" (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905))); *Binford v. Sununu*, No. 217-2020-CV-00152, at 15 (N.H. Super. Ct. Mar. 25, 2020) (order denying preliminary injunction), https://courts-state-nh-us.libguides.com/ld.php?content_id=55731632 (upholding New Hampshire Governor Sununu's social distancing orders because they were enacted in good faith and supported by some factual basis).

116. See, e.g., *CH Royal Oak, LLC v. Whitmer*, 472 F. Supp. 3d 410, 419 (W.D. Mich. 2020) ("As the Supreme Court and the Sixth Circuit Court have made clear, the protections guaranteed by the federal [C]onstitution are not absolute. Individual constitutional rights are malleable under these emergency circumstances.").

alternative analytical framework to ascertain the scope of rights in PHEs.¹¹⁷ Confusion stems largely from courts' assessments of *Jacobson v. Massachusetts*, the U.S. Supreme Court's seminal 1905 decision upholding a Cambridge, Massachusetts smallpox vaccine mandate.¹¹⁸

In the context of analyzing the government's responses to a potential smallpox epidemic, the *Jacobson* Court considered the reasonableness of public health laws via language many courts have now adopted in assessing COVID-19 measures. Specifically, judicial review is appropriate when "a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law[.]"¹¹⁹

Framed in a different era of jurisprudence when notions of federalism reserved significant and nearly exclusive public health powers to states, *Jacobson* does not reflect modern principles of constitutional resolution.¹²⁰ To the extent the Court's opinion

117. See Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179, 189–90 (2020) (arguing that the traditional tiered scrutiny analysis is appropriate during emergencies based on certain case analyses and addressing problems posed when "some courts . . . argue[] that the Supreme Court's *Jacobson* decision settles the matter to the contrary").

118. *Jacobson*, 197 U.S. at 38.

119. *Id.* at 31. But see Wendy E. Parmet, *The COVID Cases: A Preliminary Assessment of Judicial Review of Public Health Powers During a Partisan and Polarized Pandemic*, 57 SAN DIEGO L. REV. 999, 1032–33 (2020) (explaining that Chief Justice Roberts' concurring opinion in *South Bay I* avoided limiting *Jacobson* to these "two discrete questions," and instead "treat[ing] *Jacobson* as a lens through which to analyze constitutional claims during a pandemic").

120. See, e.g., Daniel Farber, *The Long Shadow of Jacobson v. Massachusetts: Public Health, Fundamental Rights, and the Courts*, 57 SAN DIEGO L. REV. 833, 834 (2020) ("In confronting these cases, many courts have turned to . . . *Jacobson v. Massachusetts*, often considered the leading case in public health law. There is little agreement, however, about how that decision fits into the current framework of constitutional law. As a result, courts have differed widely in the degree of deference they give public health authorities."); James G. Hodge, Jr., *The Role of New Federalism and Public Health Law*, 12 J.L. & HEALTH 309, 327–28 (1998) ("[M]ost statutes and early court decisions presumed the pre-eminence of public health interests over individual rights. . . . *Jacobson* remains a forceful statement by the Court of the constitutional limits of the exercise of police powers in the interests of public health."); Wendy E. Parmet, *Rediscovering Jacobson in the Era of Covid-19*, 100 B.U. L. REV. ONLINE 117, 118–19 (2020) ("As courts continue to hear challenges to COVID-19-related orders, citations to *Jacobson* are bound to proliferate, and uncertainty as to its

predated traditional tiered scrutiny analyses and did not address fundamental constitutional rights, its applicability to alleged rights-based infringements during the COVID-19 pandemic is questionable.¹²¹ Still, the constitutional holding of the case remains good law routinely cited by the Supreme Court and lower tribunals addressing modern claims.¹²² Consequently, courts assessing COVID-19 legal claims have differed on whether to apply:

- (a) a deferential test to assess alleged rights-based infringements due to COVID-19 social distancing measures via the Court's guidance in *Jacobson* or

meaning is likely to continue.”); Steiner-Dillon & Ryan, *supra* note 23, at 1 (“The constitutional order has changed since *Jacobson* was decided; many provisions of the Bill of Rights have been incorporated against the states, the Court has developed tiers of constitutional scrutiny, and constitutional doctrine has evolved a deeper regard for the rights of privacy and bodily autonomy. The *Jacobson* doctrine must be updated to incorporate contemporary constitutional norms.”).

121. Parmet, *supra* note 119, at 1020 (concluding the Fifth Circuit in *In re Abbott* “did not consider that *Jacobson* predated contemporary notions of strict scrutiny” and “the court [did not] grapple with the fact that *Jacobson* did not deal with a fundamental constitutional right”); Wiley & Vladeck, *supra* note 117, at 193–94 (explaining that *Jacobson* predated modern constitutional scrutiny and that the Court “has never said that *Jacobson* applies – to the exclusion of subsequently articulated doctrinal standards – to all constitutional rights”).

122. See, e.g., *South Bay I*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (affirming *Jacobson*’s precedent, noting that the Constitution principally entrusts “[t]he safety and the health of the people” to the politically accountable officials of the States “to guard and protect” (quoting *Jacobson*, 197 U.S. at 38)); *In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020) (admonishing “the district court’s failure to apply the *Jacobson* framework” for reviewing constitutional challenges to state actions taken in response to a public health crisis, and citing *Jacobson* as authority to overrule the district court’s temporary order preventing the state of Arkansas from halting surgical abortions); *Liberian Cmty. Ass’n of Conn. v. Lamont*, 970 F.3d 174, 189 (2d Cir. 2020) (affirming Connecticut’s governor was authorized to mandate quarantine following a trip to Africa during the Ebola epidemic because “the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety” (quoting *Jacobson*, 197 U.S. at 25)); *Beshear v. Acree*, 615 S.W.3d 780, 818–19 (Ky. 2020) (finding *Jacobson* “[p]articularly apropos” and unanimously upholding the governor’s emergency regulations to slow the spread of COVID-19 “as the safety of the general public may demand” (quoting *Jacobson*, 197 U.S. at 29)).

other emergency assessments¹²³ (which can sometimes result in a constitutional set-aside);¹²⁴

(b) a more traditional tiered analysis, reviewing infringements under rational basis,¹²⁵ intermediate,¹²⁶ or strict scrutiny,¹²⁷ much as modern courts would in non-emergencies;¹²⁸ or

(c) an amalgam of these schemes. Some judges seemed to apply both traditional scrutiny and *Jacobson* analyses.¹²⁹ At least one court performed a secondary, traditional analysis even after acknowledging “while such an epidemic is ongoing,

123. *In re Abbott*, 954 F.3d 772, 783 (5th Cir. 2020) (applying *Jacobson* to uphold limitations on surgical abortion imposed during the pandemic), *vacated as moot sub nom.* *Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021); *Binford v. Sununu*, No. 217-2020-CV-00152, at 12–13, 15 (N.H. Super. Ct. Mar. 25, 2020) (order denying preliminary injunction), https://courts-state-nh-us.libguides.com/ld.php?content_id=55731632 (applying *Smith v. Avino*, 91 F.3d 105 (11th Cir. 1996), *abrogated on other grounds by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998), to uphold Governor Sununu’s executive orders during the pandemic).

124. *See infra* Part II.B.

125. Rational basis scrutiny asks whether the governmental action is “rationally related to a legitimate government purpose.” ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 565 (5th ed. 2015) (emphasis omitted).

126. Intermediate scrutiny asks whether law is “substantially related to an important government purpose.” *Id.* at 566 (emphasis omitted).

127. Strict scrutiny asks whether a law is “necessary to achieve a compelling government purpose.” *Id.* at 567 (emphasis omitted).

128. *See, e.g., County of Butler v. Wolf*, 486 F. Supp. 3d 883, 902 (W.D. Pa. 2020) (rejecting *Jacobson* and applying a traditional analysis to assess alleged rights infringements resulting from social distancing orders); *Bayley’s Campground Inc. v. Mills*, 463 F. Supp. 3d 22, 31–35 (D. Me. 2020), *aff’d*, 985 F.3d 153 (1st Cir. 2021) (same).

129. *See, e.g., Ass’n of Jewish Camp Operators v. Cuomo*, 470 F. Supp. 3d 197, 217 (N.D.N.Y. 2020) (applying both a traditional tiered scrutiny analysis and a *Jacobson* analysis in rejecting due process and free exercise challenges to executive orders prohibiting overnight summer camp operation during the pandemic); *see also Tandon v. Newsom*, 517 F. Supp. 3d 922, 949 (N.D. Cal. 2021) (demonstrating that some courts apply *Jacobson* to certain rights-based arguments but not others, noting that “[p]laintiffs argue that *Jacobson* does not apply because *Jacobson* arose in the context of substantive due process, whereas this case raises First Amendment claims as well . . . [but] the Court only applies *Jacobson* in the context of Plaintiffs’ substantive due process claim”), *relief pending appeal granted by Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

the 'traditional tiers of constitutional scrutiny do not apply.'"¹³⁰

Despite widespread confusion over the adequacy or appropriateness of specific tests, general patterns emerged across the gamut of constitutional re-balancing cases. To the extent all tiers of scrutiny require assessing governmental interests,¹³¹ courts essentially acknowledged that these interests in a pandemic are compelling with little or no analyses.¹³² In April 2020, for example, a Kentucky federal district court assessed a plaintiff's First Amendment free exercise challenge to an executive order banning Easter church services.¹³³ The court employed a traditional tiered scrutiny analysis only briefly considering *Jacobson*.¹³⁴ Although the court embarked on a lengthy discussion of religious persecution and rights,¹³⁵ it largely assumed the compelling nature of the government's interest without further elaboration.¹³⁶ Still, the orders were found to be unconstitutional.¹³⁷ "The COVID-19 pandemic has upended every aspect of our lives[.]" noted the court, "[b]ut even under *Jacobson*, constitutional rights still exist. Among them is the freedom to worship as we choose."¹³⁸

Courts used similar reasoning to address other alleged infringements. They presumed governmental interests are compelling

130. *Calvary Chapel of Bangor v. Mills*, 459 F. Supp. 3d 273, 284 (D. Me. 2020) (quoting *Cassell v. Snyders*, 458 F. Supp. 3d 981, 992–93 (N.D. Ill. 2020)).

131. *CHEMERINSKY*, *supra* note 125, at 565–67.

132. *Parinet*, *supra* note 119, at 1013–15 (analyzing relevant COVID-19 constitutional cases citing *Jacobson* between March 20 and May 29, 2020, concluding that "all of the courts accepted that COVID-19 constituted an emergency and that controlling it was an important or compelling state interest").

133. *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901 (W.D. Ky. 2020).

134. *Id.* at 912. Despite applying a traditional scrutiny analysis, the court further acknowledged that "nothing in this legal analysis should be read to imply that the rules of the road in constitutional law remain rigidly fixed in the time of a national emergency." *Id.*

135. *See generally id.* (beginning the decision with "[o]n Holy Thursday, an American Mayor criminalized the communal celebration of Easter" and continuing to discuss the pilgrims' journey to America in search of religious liberty as "heirs to a long line of persecuted Christians").

136. *Id.* at 910. Before delving into its analysis regarding the Free Exercise Clause, the court dedicated only one sentence to the government's interest: "To be sure, Louisville is pursuing a compelling interest of the highest order through its efforts to contain the current pandemic." *Id.*

137. *Id.* at 911–12.

138. *Id.* at 912 (footnote omitted).

and focused solely on whether the action is appropriately tailored.¹³⁹ Tiered assessments were particularly expedited in cases involving less than strict scrutiny. Judges applying rational basis review nearly automatically assumed that public health interventions are lawful given the extant PHE.¹⁴⁰ Some litigants challenging public health measures even conceded governments' interests are compelling.¹⁴¹

Re-balancing approaches included additional nuances. In select strict scrutiny cases, the boundaries of "narrow" tailoring were viewed expansively. For example, in a free speech challenge to an order limiting non-essential gatherings, the Southern District of New York upheld the restriction in May 2020.¹⁴² "While a measure restricting all public group activity may not likely be found narrowly tailored in ordinary times, *these times are extraordinary*."¹⁴³ That same month, a California federal district court approved a stay-at-home order against prospective protesters' free speech challenges, explaining that a "blanket ban" on protest permits did not "intuitively ring of narrow tailoring."¹⁴⁴ However, what is "narrow" in a public health crisis "is necessarily wider than usual."¹⁴⁵

139. See, e.g., *Roberts v. Neace*, 457 F. Supp. 3d 595, 603 (E.D. Ky. 2020) (temporarily blocking COVID-19 orders restricting out-of-state travel without discussing whether the state's interest was compelling, instead concluding that the orders were not narrowly tailored to achieve the government's purpose); *Bayley's Campground Inc. v. Mills*, 463 F. Supp. 3d 22, 35 (D. Me. 2020), *aff'd*, 985 F.3d 153 (1st Cir. 2021) (upholding COVID-19 orders against right to travel challenges, concluding that it was unclear whether there were any less restrictive means that could meet the government's goal of curbing COVID-19, without assessing whether or not that interest was compelling); *Day v. Johnston*, 510 F. Supp. 3d 1296, 1302 (S.D. Fla. 2020) (concluding that COVID-19 constituted a substantial interest, based on the Supreme Court's decision in *Roman Catholic Diocese of Brooklyn* indicating that controlling COVID-19 was "unquestionably a compelling interest").

140. See, e.g., *Calvary Chapel of Bangor v. Mills*, 459 F. Supp. 3d 273, 286–87 (D. Me. 2020) (holding that plaintiff would be unlikely to show that Maine's public health orders were "unsupported by a rational basis" due to the "Governor's interest in limiting the spread of COVID-19").

141. *Ramsek v. Beshear*, 468 F. Supp. 3d 904, 918 (E.D. Ky. 2020).

142. *Geller v. de Blasio*, No. 20-CV-3566, 2020 WL 2520711 (S.D.N.Y. May 18, 2020).

143. *Id.* at *4 (emphasis added).

144. *Givens v. Newsom*, 459 F. Supp. 3d 1302, 1313 (E.D. Cal. 2020).

145. *Id.* (emphasis added); see also *Tandon v. Newsom*, 517 F. Supp. 3d 922, 969 (N.D. Cal. 2021) ("In sum, although the State's and County's private gatherings restrictions are significant, the restrictions are being imposed to address the worst public health crisis in one hundred years, and "narrow" in the context of a public health crisis is necessarily wider than usual." (quoting *Givens*, 459 F. Supp. 3d at 1313)), *relief pending appeal granted by Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

In sum, courts re-balancing constitutional rights often concluded that rights can temporarily shift during emergency circumstances. When Illinois Governor JB Pritzker ordered limitations of public assemblies (including religious services) to ten persons, the Seventh Circuit Court of Appeals rejected a free exercise challenge on June 16, 2020: "Perhaps a state could differentiate between the maximum gathering permitted in a small church and a cathedral with seats for 3,000, but we do not evaluate orders issued in response to [PHEs] by the standard that might be appropriate for years-long notice-and-comment rulemaking."¹⁴⁶ Similarly, on May 19, 2020, a federal district court in Connecticut rejected a freedom of assembly challenge to social distancing orders, explaining that "[c]ourts have upheld more extreme measures taken in response to public health needs, including quarantines, which limit a person's right to assemble with *any* other person."¹⁴⁷ On May 29, a federal district judge in Maine spurned a right to travel challenge to a fourteen-day quarantine requirement.¹⁴⁸

Some courts called out litigants for mischaracterizing rights-based claims as impassable and unbending barriers to governmental action. Dismissing a right to travel challenge to a state-based travel quarantine, the Federal District Court of Hawai'i explained: "Plaintiffs characterize the 14-day travel quarantine as a travel ban *when it is not*. In fact, the 14-day travel quarantine violated neither of the two components of the right to travel"¹⁴⁹ Still, the court felt obligated to justify government's emergency response as reasonable *in a pandemic*.¹⁵⁰

In rare instances, re-balancing resulted in upholding mischaracterized rights. In May 2020 multiple business owners and politicians challenged Pennsylvania Governor Tom Wolf's social distancing measures on several grounds, including freedom of

One scholar has proposed a reassessment of narrow tailoring, which would ask courts to assess not only the burdens imposed by governmental action, but also the offsetting benefits that the government may have provided to enable adjustment to emergency orders, including stimulus payments or unemployment compensation. Craig Konnoth, *Narrowly Tailoring the COVID-19 Response*, 11 CALIF. L. REV. ONLINE 193, 194 (2020).

146. *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 347 (7th Cir. 2020).

147. *Amato v. Elicker*, 460 F. Supp. 3d 202, 220 (D. Conn. 2020).

148. *Bayley's Campground Inc. v. Mills*, 463 F. Supp. 3d 22, 36 (D. Me. 2020) ("[G]iven the nature of the COVID-19 pandemic . . . I am not persuaded that the evidence supports a finding that the Governor has yet exceeded her powers"), *aff'd*, 985 F.3d 153 (1st Cir. 2021).

149. *Carmichael v. Ige*, 470 F. Supp. 3d 1133, 1145 (D. Haw. 2020) (emphasis added).

150. *Id.*

assembly.¹⁵¹ In September 2020, the federal district briefly acknowledged government's significant interests,¹⁵² but concluded that state limits on gatherings failed rational basis scrutiny, as the Governor's orders dissimilarly classified business and non-business gatherings.¹⁵³ Setting distinctive gathering standards, reasoned the court, "creates a topsy-turvy world where Plaintiffs are more restricted in areas traditionally protected by the First Amendment than in areas which usually receive far less, if any, protection."¹⁵⁴ Without specifically assessing the impacts of COVID-19, the court took a hardline view that the Constitution can *never* permit executive action placing *potentially* expressive activities in a less advantageous position than other kinds of activities.¹⁵⁵

B. Constitutional Set-Asides

While most judges applied constitutional re-balancing to assess shifting conceptions of rights in emergencies, a minority of courts adopted a distinctive set-aside approach largely lacking in precedent.¹⁵⁶ These jurists did not rely on traditional rights-based

151. County of Butler v. Wolf, 486 F. Supp. 3d 883, 890, 894 (W.D. Pa. 2020).

152. *Id.* at 907.

153. *Id.* at 907–08 (allowing businesses to operate and hold commercial events within percentage of occupancy limitations but limiting other gatherings to a certain number of persons).

154. *Id.*

155. *Id.* at 908.

As recognized by the court in *Ramsek*, "it is the right to protest – through the freedom of speech and freedom of assembly clauses – that is constitutionally protected, not the right to dine out, work in an office setting, or attend an auction." [*Ramsek v. Beshear*, 468 F. Supp. 3d 904, 918 (E.D. Ky. 2020).] In an analogous situation examining restrictions on religious practice, while permitting retail operations, a court aptly observed that "[i]f social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious services which, unlike the foregoing, benefit from constitutional protection." *Tabernacle Baptist Church, Inc. v. Beshear*, 459 F. Supp. 3d 847, 855 (E.D. Ky. 2020). The same applies here. The congregate limits in Defendants' orders are unconstitutional.

Id.

156. See, e.g., *Smith v. Avino*, 91 F.3d 105, 109 (11th Cir. 1996).

analyses, using them only for illustrative purposes, if at all. Rather, they seemed to conclude that emergency circumstances justify temporary rejections of individual constitutional rights, sometimes invoking *Jacobson* without right-specific elaboration.¹⁵⁷

In *Binford v. Sununu*,¹⁵⁸ three individuals brought freedom of assembly and free exercise challenges against New Hampshire Governor Sununu's March 16, 2020 executive order prohibiting gatherings of more than fifty people.¹⁵⁹ In a rapid decision on March 26, the court did not rely on a traditional tiered scrutiny analysis of First Amendment protections.¹⁶⁰ Rather, it applied *Smith v. Avino*,¹⁶¹ an Eleventh Circuit Court of Appeals decision issued in 1996 which analyzed the constitutionality of an emergency curfew in Florida in

[P]laintiffs argue that the curfew [imposed in response to Hurricane Andrew] is constitutionally flawed because it did not contain "built-in exceptions" for necessary activity. . . . While we would agree with plaintiffs that in a normal situation, the proclamation should be as informative as possible, under the emergency circumstances present in this case, the proclamation was not constitutionally flawed. . . . *In an emergency situation, fundamental rights such as the right of travel and free speech may be temporarily limited or suspended.*

Id. (emphasis added) (quoting *State v. Boles* 240 A.2d 920, 923 (1967)), *abrogated on other grounds by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *United States v. Chalk*, 441 F.2d 1277, 1280 (4th Cir. 1971) (addressing curfew imposed in 1969 after eruption of violence between police officers and black students in Asheville, North Carolina, stating that "[t]he invocation of emergency powers necessarily restricts activities that would normally be constitutionally protected"); *In re Juan C.*, 33 Cal. Rptr. 2d 919, 923 (Ct. App. 1994) (assessing a curfew imposed after a period of civil disorder, noting that "[a]n insurrection or riot presents a case in which the government's interest in safety outweighs the individual's right to assemble, speak or travel in public areas so long as an imminent peril of violence exists").

157. Professor Wendy Parmet observes how courts tended to devalue rights-based arguments against state and local public health measures for decades. Courts often concluded that individual due process, equal protection, and other rights must give way to structurally based police and *parens patriae* powers. WENDY E. PARMET, *POPULATIONS, PUBLIC HEALTH, AND THE LAW* 109–140 (2009) (describing an early series of federal and state court decisions, including the *Slaughter-House Cases*, where courts consistently concluded that "constitutional rights could not trump the police power because the former ended where the latter began").

158. *Binford v. Sununu*, No. 217-2020-CV-00152, at 10 (N.H. Super. Ct. Mar. 25, 2020) (order denying preliminary injunction), https://courts-state-nh-us.libguides.com/ld.php?content_id=55731632.

159. *Id.* at 1, 2–4.

160. *Id.* at 11, 13–15.

161. *Avino*, 91 F.3d 105.

response to Hurricane Andrew.¹⁶² In *Avino*, the court concluded that an executive's (1) good faith action (2) taken with some factual basis supporting the necessity of the curfew is constitutional even if individual freedoms are temporarily restricted.¹⁶³ In essence, a constitutional claim cannot overcome good faith, factual emergency response efforts. The *Binford* court found that Governor Sununu's emergency order was "sufficiently analogous to a curfew in response to a riot or natural disaster"¹⁶⁴ Adopting *Avino*'s two-part test, the court upheld the order,¹⁶⁵ performing a perfunctory, traditional right-specific analysis only "for the purposes of establishing a complete record[.]"¹⁶⁶

In the spring of 2020, the Fifth and Eighth Circuits applied similar reasoning in upholding state restrictions on abortions, indicating that *Jacobson*'s analysis justified temporary emergency set-asides of the right.¹⁶⁷ The Fifth Circuit, notably, did not limit its analysis to the right to abortion. On April 7, 2020, it explained that "*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a [PHE]."¹⁶⁸ The Eighth Circuit later agreed, finding that a lower court's "failure to apply the *Jacobson* framework produced a patently erroneous result."¹⁶⁹

The Northern District of New York reached a similar conclusion in assessing a freedom of assembly challenge by an auto racing arena that was allowed to continue operating without attendees during the pandemic.¹⁷⁰ The court acknowledged that the freedom of assembly,

162. *Id.* at 107.

163. *Id.* at 109.

164. *Binford*, No. 217-2020-CV-00152 at 13.

165. *Id.*

166. *Id.* at 16.

167. *In re Abbott*, 954 F.3d 772, 779–781, 786, 795 (5th Cir. 2020) (concluding that the district court erred in failing to consider *Jacobson*, the controlling precedent, thereby providing a "patently erroneous result: bestowing on abortion providers a blanket exemption from a generally-applicable emergency public health measure"), *vacated as moot sub nom.* *Planned Parenthood v. Abbott*, 141 S. Ct. 1261 (2021); *In re Rutledge*, 956 F.3d 1018, 1023–24, 1030, 1032 (8th Cir. 2020) (issuing mandamus relief in part in favor of Arkansas officials who required postponement of non-medically necessary surgeries, including surgical abortions, concluding that the directive complied with *Jacobson* and that the district court's failure to meaningfully apply *Jacobson* allowed the district court to usurp the power of state authorities during the PHE).

168. *In re Abbott*, 954 F.3d at 786.

169. *In re Rutledge*, 956 F.3d at 1028.

170. *Lebanon Valley Auto Racing Corp. v. Cuomo*, 478 F. Supp. 3d 389, 392 (N.D.N.Y. 2020).

like free speech, is not absolute, as illustrated in *Jacobson*.¹⁷¹ As long as elected officials work within the bounds of constitutional rights, noted the court, judges are prohibited from second-guessing their decisions.¹⁷² The court expressly refused “to insert itself in the ongoing nationwide debate regarding the proper balance to be struck between regulating for the public welfare on one hand and free enterprise on the other.”¹⁷³ Ultimately, because *Jacobson* required deference, and auto racing was not entitled to similar protections as religious institutions, the court held that the plaintiffs failed to state a claim.¹⁷⁴ In comparable fashion, in May 2020, a Missouri federal district judge rejected business owners’ claims of First Amendment violations.¹⁷⁵ Assessing orders by St. Louis City and County officials preventing physical gatherings at select businesses, the court utilized *Jacobson* to reject arguments over freedom of assembly violations without engaging in a right-specific tiered scrutiny analysis.¹⁷⁶

C. Limitations of Extant Approaches

Facing a complex series of constitutional claims challenging social distancing and other emergency response efforts during the COVID-19 pandemic, courts struggled to issue critical decisions in real-time. Their existing approaches to assessing rights-based claims reflected inherent limitations and flaws that, in part, contributed to divergent results across similar claims.

Court decisions essentially setting aside constitutional arguments in the throes of emergency are precarious. There is little support for

171. *Id.* at 396 (citing multiple decisions denying freedom of assembly challenges made against COVID-19 emergency orders).

172. *Id.* at 397.

173. *Id.*

174. *Id.* at 397–98 (“The New York State Legislature provided [Governor] Cuomo with significant powers during a pandemic, and Cuomo’s use of that authority cannot be said to have exceed[ed] ‘the confines of the people’s constitutional rights.’” (quoting *Henry v. DeSantis*, 461 F. Supp. 3d 1244, 1257 (S.D. Fla. 2020))).

175. *SH3 Health Consulting, LLC v. Page*, 459 F. Supp. 3d 1212, 1224–25 (E.D. Mo. 2020).

176. *Id.* at 1225 (“Plaintiffs could, among other ways, assemble through a video call or group chat over the internet. This *temporary infringement on the right to assemble in person* is not ‘beyond all question, a plain and palpable invasion’ of Plaintiffs’ First Amendment right to assemble.” (emphasis added) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905))); see also Parmet, *supra* note 119, at 1025 (finding that, while other judges had used *Jacobson* to assess rights-based infringements, “for Judge Clark, *Jacobson* did not simply offer a lens through which to view the First Amendment analysis; it largely replaced the need for a robust First Amendment analysis”).

skirting constitutional rights altogether based solely on exigencies. As the Supreme Court acknowledged in *Jacobson*, constitutionally protected rights cannot be ignored or obliterated during emergencies.¹⁷⁷ To the contrary, the modern Court has forcefully clarified in contemporaneous opinions how constitutional norms remain intact even during crises.¹⁷⁸

Unlike legislative or regulatory provisions that policymakers may temporarily waive through delegated authority via emergency declarations,¹⁷⁹ constitutional rights cannot be whisked away to effectuate PHE objectives. Adverse decisions among lower courts create opportunities for warrantless governmental interventions that not only lack respect for individual freedoms¹⁸⁰ but are also unmoored from science, best practices, or efficacy.

177. See *Jacobson*, 197 U.S. at 31.

If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, *beyond all question, a plain, palpable invasion of rights secured by fundamental law*, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Id. (emphasis added).

178. *South Bay II*, 141 S. Ct. 716, 717 (2021) (Roberts, C.J., concurring) (“I adhere to the view that the ‘Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States.’ But the Constitution also entrusts the protection of the people’s rights to the Judiciary” (citation omitted) (quoting *Jacobson*, 197 U.S. at 38)); *South Bay I*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (“The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the States ‘to guard and protect.’” (quoting *Jacobson*, 197 U.S. at 38)); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam) (“[E]ven in a pandemic, the Constitution cannot be put away and forgotten.”); *id.* at 69 (Gorsuch, J., concurring) (“Government is not free to disregard the First Amendment in times of crisis.”); *id.* at 81 (Sotomayor, J., dissenting) (“Free religious exercise is one of our most treasured and jealously guarded constitutional rights. States may not discriminate against religious institutions, even when faced with a crisis as deadly as this one.”).

179. See, e.g., Orenstein, *supra* note 10, at 73.

180. Wiley & Vladeck, *supra* note 117, at 191 (assessing *In re Abbott*, the Fifth Circuit decision justifying an abortion set-aside, and explaining that “decisions like *Abbott* raise the concern that a more deferential standard of review could allow judges

The majority of courts attempting to re-calibrate individual constitutional rights during the pandemic may seem validated in comparison to flawed efforts setting aside constitutional rights. Yet, constitutional re-balancing has its own shortcomings. Litigants objecting to social distancing measures frame their arguments based on fixed perspectives of what their rights mean even in emergencies.¹⁸¹ Some courts dismiss such claims as mischaracterizations of rights.¹⁸² Others dispense allegations by heavily valuing the strength of governmental interests.¹⁸³ Even among judges willing to seriously entertain re-balancing approaches, discordance arises over which method to employ—traditional tiers of scrutiny, some emergency assessment pursuant to *Jacobson*, or both.¹⁸⁴

Irrespective of their assessment, courts weighing emergency powers against routine perceptions of individual rights must tread carefully. Second-guessing the expertise of public health agencies can

to *uphold* incursions into civil liberties that they prefer not to protect for policy reasons"); see also Recent Case, *In re Abbott*, 94 F.3d 772 (5th Cir. 2020), 134 HARV. L. REV. 1228, 1233–34 (2021) (arguing that *In re Abbott* demonstrates the socially-conservative approach of "common-good constitutionalism" by which judges largely defer to public health actors taking actions for the "common good."). Under "common-good constitutionalism," "legal outcomes should accord with 'principles of natural morality,' or a socially conservative understanding of natural law. Consequently, existing 'jurisprudence on free speech, abortion, sexual liberties, and related matters will prove vulnerable' under common-good constitutionalism." *Id.* at 1233 (footnotes omitted) (quoting Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037>).

181. See, e.g., *Carmichael v. Ige*, 470 F. Supp. 3d 1133, 1145 (D. Haw. 2020) ("Plaintiffs characterize the 14-day travel quarantine as a travel ban when it is not.").

182. *Id.* at 1147 ("[T]he Court finds that the quarantine survives strict scrutiny and Plaintiffs cannot at this time establish a likelihood of success or raise serious question going to the merits of their right to travel claim.").

183. See, e.g., *Givens v. Newsom*, 459 F. Supp. 3d 1302, 1313 (E.D. Cal. 2020).

Admittedly, a blanket ban on the issuance of [California Highway Patrol] permits for an unspecified period does not intuitively ring of narrow tailoring. But "narrow" in the context of a public health crisis is necessarily wider than usual. . . . The State's stay at home order advances the only fool-proof way to prevent the virus from spreading at in-person gatherings: prohibiting in-person gatherings.

Id.

184. See *supra* Part II.A.

run afoul of separation of powers principles¹⁸⁵ which Supreme Court Chief Justice Roberts and others have counseled against.¹⁸⁶ In the end, as courts seek to navigate their way through rights-based claims against social distancing measures and other public health powers, utilization of divergent tactics lends to unpredictable outcomes with deleterious consequences.¹⁸⁷

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185. *South Bay II*, 141 S. Ct. 716, 723 (2021) (Kagan, J., dissenting).

In forcing California to ignore its experts' scientific findings, the Court impairs the State's effort to address a public health emergency. There are good reasons why the Constitution "principally entrusts the safety and the health of the people" to state officials, not federal courts. . . . [T]his foray into armchair epidemiology cannot end well.

Id. (quoting *South Bay I*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring)); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 79 (2020) (Sotomayor, J., dissenting) (per curiam) ("Justices of this Court play a deadly game in second-guessing the expert judgement of public health officials . . .").

186. *South Bay I*, 140 S. Ct. at 1613–14 (Roberts, C.J., concurring).

Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." . . . [T]hey should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people.

Id. (first quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905); then quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (1985)); *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 75–76 (Roberts, C.J., dissenting) ("[O]ur Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." . . . [T]he actual proposition asserted should be uncontroversial . . ." (quoting *South Bay I*, 140 S. Ct. at 1613–14)).

187. As noted in the Introduction, *supra*, the Supreme Court has profoundly reversed course with respect to pandemic limitations on worship services. Compare *South Bay I*, 140 S. Ct. at 1613 (rejecting an application for injunctive relief relating to California capacity limitations on places of worship during the pandemic), with *South Bay II*, 141 S. Ct. at 716 (enjoining California limitations on indoor worship services during the pandemic as violating the Free Exercise Clause). Pandemic challenges have resulted in clearly divergent responses in lower courts as well. Compare *County of Butler v. Wolf*, 486 F. Supp. 3d 883, 927–28 (W.D. Pa. 2020) (concluding that a pandemic shutdown of "non-life-sustaining businesses" violated the Equal Protection Clause of the Fourteenth Amendment by applying a rational basis test), with *Tandon v. Newsom*, 517 F. Supp. 3d 922, 952–53 (N.D. Cal. 2021) (concluding that business owners are not a suspect class, requiring analysis under

Depending on the outcomes of litigation, governmental authorities in specific jurisdictions are either empowered or stymied in using social distancing or other measures to protect the public's health from similar threats. Admittedly, dissonant results from extensive litigation impact public health efforts in other areas as well (e.g., tobacco control,¹⁸⁸ opioid prevention,¹⁸⁹ and environmental protections¹⁹⁰). Amid an active pandemic infecting millions of Americans, however, the stakes are raised. As Justices Sotomayor and Kagan observed, complexities and confusion around the scope and limits of constitutional rights arguably contribute to excess morbidity and mortality.¹⁹¹

III. COHESIVE ASSESSMENTS OF RIGHTS IN EMERGENCIES

Equivocating remedies across judicial cases attempting to assess constitutional rights in emergencies begins with the identification and frank assessment of divergent approaches. Slight adjustments to

rational basis scrutiny, and explaining that “[u]nder these deferential standards, every court considering Equal Protection challenges brought by business owners to COVID-related restrictions has upheld the restrictions, and Plaintiffs do not cite a single case to the contrary”), *relief pending appeal granted by* Tandon v. Newsom, 141 S. Ct. 1294 (2021).

188. See generally Stephen D. Sugarman, *Mixed Results from Recent United States Tobacco Litigation*, 10 TORT L. REV. 1 (2002) (noting that, while there has been some crucial plaintiff success in recent tobacco litigation, continued victories on behalf of tobacco industry defendants may be stifling substantial progress).

189. See generally Nicolas P. Terry, *The Opioid Litigation Unicorn*, 70 S.C. L. REV. 637, 653 (2019) (arguing that current methodology for approaching opioid crisis litigation is flawed by “misdirecting the public and policymakers away from the current epidemic . . . and the fundamental problem: the social determinants of health”).

190. Tara Lohan, *Supreme Danger: Environmental Protection Laws Risk Potential Upheaval*, REVELATOR (Sept. 11, 2018), <https://therevelator.org/supreme-court-environmental-laws/> (assessing that changes to the makeup of the U.S. Supreme Court's bench may lead to “roll[ing] back environmental protections[.]” thus altering the trajectory of environmental law moving forward).

191. *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 79 (Sotomayor, J., dissenting) (citations omitted) (“Earlier this year, this Court twice stayed its hand when asked to issue similar extraordinary relief. I see no justification for the Court's change of heart, and I fear that granting applications such as the one filed by the . . . (Diocese) will only exacerbate the Nation's suffering.”); see also *South Bay II*, 141 S. Ct. at 723 (Kagan, J., dissenting) (“The Court injects uncertainty into an area where uncertainty has human costs. . . . I fervently hope that the Court's intervention will not worsen the Nation's COVID crisis.”); Parmet, *supra* note 22, at 201 (“[T]he Court's approach in *Roman Catholic Diocese [of Brooklyn]* devalues federalism and public health, making it difficult for states to rely on science and craft fine-tuned measures in response to local conditions.”).

extant methods will not sufficiently clarify, guide, and resolve existing challenges. Courts adopting constitutional set-aside strategies rest their analyses on feeble legal grounds with practical repercussions and potential slippery slopes. Attempts to re-balance constitutional rights through alterations of routine judicial tests that (1) hyper-prioritize governmental interests, (2) revert to historic balancing tests, or (3) expand conceptions of narrowness collectively lack uniformity and justification as applied to novel legal claims. These methods have led to disparate and unpredictable legal adjudications impacting public health responses across jurisdictions. The limitations of these approaches necessitate a defensible, legal solution rooted in constitutional parlance and capable of application in current and future emergencies.

A. Constitutional Cohesion

Underlying both judicial methodologies is a rigid conception of constitutional rights and structural limitations based on an incomplete understanding of the Constitution's cohesive design. Litigants prone to view government exercises of social distancing powers as infringing on their rights misperceive the constitutional limits of individual freedoms.

Courts trying to rapidly apply appropriate rights-based analyses in PHEs lose sight of the larger constitutional framework in which claims arise. Most craft decisions tending to affirm the limited nature of rights (to the disdain of many litigants) using approaches more suited to routine evaluations. Yet, public health threats at the scale of the COVID-19 pandemic present unique legal issues exceeding typical applications. Standard balancing tests, even with tweaks and adjustments, are inapt in solving complex constitutional conundrums.

Assessing rights in the throes of the pandemic must commence with a clearer assessment of constitutional norms in a cohesive design. Conventional reasoning tends to view the U.S. Constitution as serving two distinct purposes: (1) creation of structural interventions (e.g., federalism, separation of powers) to mandate and guide governmental allocations of powers; and (2) conferral of rights to protect individuals and entities from unwarranted governmental

actions.¹⁹² In reality, these primary objectives are “mirror images”¹⁹³ of each other in a cohesive constitutional scheme acknowledged by jurists¹⁹⁴ and scholars alike.¹⁹⁵ Structural foundations and rights-based protections ultimately serve the same ends—to limit governmental vices (e.g., oppression, overreaching, tyranny, and malfeasance (including both acts and omissions)).¹⁹⁶

Principles of *constitutional cohesion*—i.e., how “structural facets and rights-based principles interwoven within the Constitution protect individuals and groups from governmental vices”—support manifold findings.¹⁹⁷ Under a cohesive view of the Constitution, structural and rights-based arguments are increasingly interchangeable because they are coextensively intended to limit governmental abuses of power.¹⁹⁸

192. Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1531 (1991) (advocating use of an “ordered liberty” model to approach issues of separation of powers to further the purpose of protecting citizens from tyranny).

193. Ozan O. Varol, *Structural Rights*, 105 GEO. L.J. 1001, 1004–05 (2017) (arguing that pigeonholing “structures” and “rights” into distinct categories negates the opportunity to examine how to fit them into a coherent, harmonious whole.). According to Varol, “constitutional structure affects individual liberty, [but] its mirror image has been left understudied[,]” as “[s]cholars have largely assumed that individual rights have little resemblance to constitutional structure.” *Id.* at 1004.

194. In *San Antonio Independent School District v. Rodriguez*, the Supreme Court linked federalism with principles of equal protection in assessing right to education claims. “[E]very claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State’s laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny.” 411 U.S. 1, 44 (1973). In *Printz v. United States*, invalidating federal firearm purchase background checks, the Court noted how constitutional structural components (e.g., separation of powers and federalism) are designed to protect individual liberty. 521 U.S. 898, 921 (1997). In *National Labor Relations Board v. Canning*, the Court equated structural concepts as “no less critical to preserving liberty than the later adopted provisions of the Bill of Rights.” 573 U.S. 513, 570 (2014).

195. J. Harvie Wilkinson, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1691, 1707 (2004) (arguing that the structure of the Constitution is largely disregarded in favor of a rights-based view).

196. Hodge et al., *supra* note 41, at 179–88; *see also* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (“The ‘constitutionally mandated balance of power’ between the States and the Federal Government was adopted by the Framers to ensure the protection of ‘our fundamental liberties.’” (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))).

197. Hodge et al., *supra* note 41, at 179–88.

198. *Id.*

Federalism arguments may surface, for example, to remedy alleged rights-based infringements. In *United States v. Lopez*,¹⁹⁹ attorneys representing a minor criminally charged with gun possession in violation of the federal Gun Free School Zones Act²⁰⁰ bypassed rights-based arguments to build a successful federalism challenge to Congress' commerce authority to implement the Act itself.²⁰¹ In 2017, President Trump issued Executive Order 13768²⁰² threatening to federally defund "sanctuary cities" providing cover for persons subject to federal deportation.²⁰³ Attorney General Jeff Sessions imposed similar conditions on funding for state and local law enforcement.²⁰⁴ Immediate judicial challenges to the President's order grounded in due process rights were adjudicated in select courts.²⁰⁵ Alternatively, a federal district court in Illinois rejected the Attorney General's actions as contrary to separation of powers principles.²⁰⁶

199. 514 U.S. 549 (1995).

200. Gun-Free School Zones Act, 18 U.S.C. § 922(q)(1)(A) (1990), *invalidated by* *United States v. Lopez*, 514 U.S. 549 (1995).

201. *Lopez*, 514 U.S. at 567–68 (finding Congress lacks commerce powers to penalize the mere possession, absent more, of a gun on or near school grounds and noting that, "[t]o uphold the Government's contentions here, [the Court] would have to . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States").

202. Exec. Order No. 13768, 82 Fed. Reg. 8799 (2017).

203. Suzannah Gonzales, *U.S. Sides Against Trump in Fight over Sanctuary Cities*, REUTERS (Sept. 15, 2017, 5:38 PM), <https://www.reuters.com/article/us-usa-immigration-sanctuary/u-s-judge-sides-against-trump-in-fight-over-sanctuary-cities-idUSKCN1BQ2VL>.

204. Press Release, U.S. Dep't of Justice, Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs (July 25, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial>.

205. See, e.g., *City of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 534, 535–36 (N.D. Cal. 2017) (granting Santa Clara and San Francisco an injunction on a finding that the Order was "unconstitutionally vague in violation of the Fifth Amendment's Due Process Clause").

206. *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 943 (N.D. Ill. 2017) ("The notice and access conditions therefore exceed statutory authority, and, consequently, the efforts to impose them violate the separation of powers doctrine and are *ultra vires*"). The Seventh Circuit Court of Appeals affirmed the district court. *City of Chicago v. Sessions*, 888 F.3d 272, 291, 293 (7th Cir. 2018) ("The plaintiffs have demonstrated a likelihood of success on the claim that the Attorney General lacked any Constitutional authority to impose the conditions upon the grant recipients, and therefore that the actions violated the separation of powers principles."), *reh'g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018).

More aggressive interpretations of constitutional cohesion recognize additional rights unspecified in plain text, but ensconced in national protections.²⁰⁷ Take, for example, the Supreme Court's assessment of rights to travel. For decades, the Court acknowledged specific aspects of a constitutional right to travel, but never fully tied these aspects to explicit constitutional language.²⁰⁸ As Justice Brennan noted in a 1986 decision, the "elusive" right to travel seems to be inferred from "the federal structure of government adopted by our Constitution."²⁰⁹ In *Saenz v. Roe*,²¹⁰ the Court reexamined three components of the right to travel in 1999. Two applications of the right—to be treated (1) as a welcome visitor and (2) like other citizens when traveling across states—have textual sources, concluded the Court.²¹¹ Yet, the Court could not affirm any direct constitutional support for the third component—citizens' rights to ingress and egress across state borders.²¹² Instead, it determined this component "may simply have been 'conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.'"²¹³ In

207. Hodge et al., *supra* note 41, at 206–10 (arguing for "the capacity of courts to recognize or create core principles that neither the structure nor language of the Constitution explicitly convey or denote," otherwise labeled "ghost righting" by the authors).

208. *Id.* at 209–10 ("The Court's evolving analysis regarding the scope of a right to travel evinces a clear case of ghost righting. Unwritten rights on an individualized level arise from the very structure of the Constitution with manifold public health ramifications."). Justice Gorsuch's concurring opinion in *Cuomo* illustrates an understanding that textually explicit rights may be treated differently than those outside the Constitution's text. See *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70–71 (2020) (Gorsuch, J., concurring) (per curiam) ("Even if judges may impose emergency restrictions on rights that some of them have found hiding in the Constitution's penumbras, it does not follow that the same fate should befall the textually explicit right to religious exercise.").

209. *Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 902 (1986) (finding that "the important role that [the right to travel] has played in transforming many States into a single Nation" precluded any need to textually base it).

210. 526 U.S. 489 (1999).

211. *Id.* at 500–03 (holding that U.S. citizens have a right "to be treated as a welcome visitor . . . when temporarily present" in another state under Article IV's Privileges and Immunities Clause and to be treated like other citizens who are permanent state residents pursuant to the Fourteenth Amendment's Privileges or Immunities Clause).

212. *Id.* at 498; see also *Soto-Lopez*, 476 U.S. at 902.

213. *Saenz*, 526 U.S. at 501 (citing *United States v. Guest*, 383 U.S. 745, 758 (1966)).

essence, a right to ingress and egress exists despite any explicit constitutional support.²¹⁴

At its apex, constitutional cohesion stands for another essential premise. Just as government must respect individual rights, it must also further those rights through societal interventions designed to protect and promote the public's health. As with facets of the right to travel, recognition of government's obligations to act in the interests of communal health is not clearly expressed in constitutional language. Nor is the Supreme Court apt to stretch the express boundaries of constitutional duties to recognize some affirmative right to public health.²¹⁵ This does not mean, however, that public health protections are not an essential role of government. In reality, there may be no higher duty of government than the preservation of communal health.²¹⁶

214. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (“[Walking, strolling, and wandering] are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity.”).

215. In multiple cases, the Court has expressed uneasiness with crafting new fundamental rights. See, e.g., *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) (“[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.”); *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (“There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court.”); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (“[T]he Constitution does not provide judicial remedies for every social and economic ill.”); see also Martin A. Schwartz, *Due Process and Fundamental Rights*, 17 *TOURO L. REV.* 237, 237 (2016) (“In more recent years, the Supreme Court has consistently expressed its reluctance to expand the doctrine of substantive due process, claiming that it poses a threat to the legitimacy of the Court's decision-making processes.”).

216. Over centuries, the Supreme Court has repeatedly affirmed the role of government to protect the public's health. See *McDonald v. City of Chicago*, 561 U.S. 742, 901 (2010) (Stevens, J., dissenting) (“[T]he ability to respond to the social ills associated with dangerous weapons goes to the very core of the States' police powers.”); *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (referring to states' “police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons” (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996))); *Breard v. City of Alexandria*, 341 U.S. 622, 640 (1951) (finding, in dicta, that “[t]he police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community”

From principles of constitutional cohesion thus arises a key takeaway related to interpretations of individual rights in exigencies. Specifically, constitutional rights are sufficiently flexible to adapt or adjust within a federalist infrastructure obligating government to act in the interests of public health and safety. In essence, as contexts change, so do rights. Altered perceptions of rights and freedoms in PHEs are constitutionally defensible because rights flex just like other governmental responsibilities to protect the public's health.

B. Cohesive Test for Assessing Rights-Based Claims in Emergencies

Adjudicating claims of rights-based violations extending from emergency public health powers must comport with practical applications of constitutional cohesion. Courts' roles are not merely to (1) weigh rights-based infringements against emergency interventions, or (2) ascertain when rights may be wholly circumvented. Both approaches intimate rights as contrary to public health protections—as if these interests are pitted against each other. In reality, respecting rights under principles of constitutional cohesion is synergistic with public health responses. Consequently, in lawfully declared emergencies, when the legal landscape is altered to respond to crises, courts should assess how rights and public health protections align to prevent excess morbidity and mortality.

An appropriate test to adjudge claims of rights-based infringements in emergencies entails guided assessments of the execution, efficacy, and purpose of public health interventions. In place of ill-suited balancing acts or blanket set-asides, courts may consider assessing claims of rights-based violations arising from governmental public health interventions in declared emergencies under the following constitutionally cohesive standard:

(emphasis added)); *Stone v. Mississippi*, 101 U.S. 814, 819 (1880) ("No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. . . . Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them."); *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650, 668 (1885) ("The preservation of these [powers] is so necessary to the best interests of social organization, that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime." (quoting *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 751 (1884))); *Phalen v. Virginia*, 49 U.S. 163, 168 (1850) ("[T]he suppression of nuisances injurious to public health or morality is among the most important duties of government."); *Gibbons v. Ogden*, 22 U.S. 1, 18–20 (1824) (accepting that states and localities have a fundamental role in protecting public health).

Does the intervention directly protect, promote, or preserve the public's health through focused efforts applied to specific persons or groups and grounded in validated science, proven efficacy, or highly reliable evidence of utility in a manner that is as minimally intrusive as possible on individual rights and interests for the limited duration of actual exigencies?

By shifting the primary focus from rights violations to constitutionally-viable emergency responses, the test equips courts with the capacity to assess claims under more objective criteria of public health interventions legitimated by proof or evidence instead of preconceived impressions of rights limitations. Specific applications of the test in appropriate cases (e.g., controversies implicating individual rights violations extending from PHE powers) entail courts' assessments as to whether:

- *The intervention directly protects, promotes, or preserves the public's health*—such interventions, including social distancing measures, allow courts to assess public health powers and implementation based on their capacity to advance communal health. Any governmental intervention that is not designed to effectuate these ends in emergencies is immediately suspect to the degree it impinges individual rights and freedoms;
- *Through focused efforts applied to specific persons or groups*—courts must assess whether an intervention is tied to focused efforts applicable to specified persons or groups in furtherance of intended public health objectives. Avoiding over-extensions of emergency powers to persons or groups whose liberties or other protected interests are impacted with no benefit to public health outcomes is key;
- *Grounded in validated science, proven efficacy, or highly-reliable evidence of utility*—PHE

interventions are legitimated by their efficacy.²¹⁷ Courts should not generate their own assessments toward this finding. Rather, they should rely on available evidence proffered by public health agencies or other legitimate sources.²¹⁸ This may be demonstrated via valid scientific assessments acknowledged by the court, introduced proofs of efficacy, or reliable evidence of the utility of an intervention toward accomplishing public health objectives (allowing sufficient flexibility for real-time innovations of emergency powers against perilous public health threats);

- *In a manner that is as minimally intrusive as possible on individual rights and interests*—courts should assess the degree to which a focused, proven intervention needlessly intrudes on individual rights. Substantial intrusions are only warranted with clear and proven justification, while minimal incursions are permissible so long as less intrusive options are not (1) equally effective and (2) cost-efficient. These two qualifiers prevent potentially unlimited postulating on imaginably less invasive alternatives that ultimately lack efficacy or are fiscally impractical.²¹⁹ Courts must act with the

217. See, e.g., Lawrence O. Gostin et al., *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 120 (1999) ("Public health interventions should be based on the degree of risk, the cost and efficacy of the response, and the burdens on human rights . . ." (emphasis added)); Wendy E. Parmet et al., *COVID-19: The Promise and Failure of Law in an Inequitable Nation*, 111 AM. J. PUB. HEALTH 47 (2021) (noting the range of factors that can impinge the efficacy of legal interventions in response to COVID-19).

218. Legitimate sources may include: (1) public health agencies, including the CDC's Morbidity & Mortality Weekly Report, available at www.cdc.gov/mmwr/index.html; (2) information provided by reputable health and medical organizations, including the National Academies of Sciences, Engineering, and Medicine, available at www.nationalacademies.org; and (3) studies published in peer-reviewed journals, including the Journal of the American Medical Association, available at www.jamanetwork.com, or the American Journal of Public Health, available at www.ajph.aphapublications.org.

219. There may be no end to devising more minimally invasive alternatives without requiring equal efficacy or cost-effectiveness. In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court examined the Affordable Care Act's (ACA) requirement of coverage for women's preventive care and screenings,

prime objective of maintaining utility in ordering adaptations of unwarranted public health efforts; and

- *For a limited duration of actual exigencies*—even targeted, proven PHE interventions that minimally intrude on individual rights are warranted only so long as they limit morbidity and mortality.²²⁰ Termination of the exigency, whether through proof of epidemiologic trends, warranted legal withdrawals of emergency declarations, or by the court's own recognition based on available, legitimate evidence (and not mere political or other

codified at 42 U.S.C. § 300gg-13(a)(4). HHS promulgated regulations pursuant to this section which required employers' group health plans to cover contraceptives without cost sharing but exempted religious and nonprofit organizations with religious objections. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725-01 (Feb. 15, 2012). The Court considered a challenge to the mandate brought by three closely held corporations pursuant to the Religious Freedom Restoration Act of 1993, 42 U.S.C.A. §§ 2000bb – 2000bb-4. *Hobby Lobby*, 573 U.S. at 691–93. The majority found that the mandate requirement as applied to the corporations was not the least restrictive means of achieving the government's objective in guaranteeing cost-free access to four challenged abortifacient contraceptives, concluding that government could assume the cost as a less restrictive alternative. *Id.* at 728. Justice Ginsburg's passionate dissent questioned where such an analysis might end: "[t]hen let the government pay (rather than the employees who do not share their employer's faith), the Court suggests. . . . And where is the stopping point to the 'let the government pay' alternative?" *Id.* at 765 (Ginsburg, J., dissenting). Without a limiting principle, Justice Ginsburg noted, additional "less-restrictive" alternatives may always be uncovered. *Id.*

220. Lawrence O. Gostin & Benjamin E. Berkman, *Pandemic Influenza: Ethics, Law, & the Public's Health*, 59 ADMIN. L. REV. 121, 147 (2007) ("Public health powers are exercised under the theory that they are necessary to prevent an avoidable harm."); Mark A. Rothstein, *From SARS to Ebola: Legal and Ethical Considerations for Modern Quarantine*, 12 IND. HEALTH L. REV. 227, 249 (2015) ("Utilitarian concerns about maximizing benefits . . . are not a blank check for public health interventions. In the United States, . . . the exercise of public health authority always must be preceded by a show of necessity, minimal infringement on individual rights, and essential procedural due process."); see also James J. Misrahi, *The CDC's Communicable Disease Regulations: Striking the Balance Between Public Health and Individual Rights*, 67 EMORY L.J. 463, 485–86 (2018) (assessing CDC's regulations on isolation and quarantine, explaining that "[t]he CDC's newly revised regulations are consistent with the standards for substantive due process required by the Fifth Amendment. . . . For purposes of interstate isolation and quarantine, it must be reasonably believed that an individual is in the communicable stage of the disease . . .").

opinions), may conclude support for specific emergency measures.²²¹

C. Constitutional Public Health Prerogative

Introduction of a refined, constitutionally cohesive test to adjudicate rights-based claims in PHEs is not intended to displace routine rights analyses grounded in tiered scrutiny in normal times or even simplify real-time assessments of rights during emergencies. Like extant approaches, applications of constitutionally-viable public health interventions grounded in science, efficacy, and respect for individual rights are neither easy nor foolproof.

In many ways, courts' assessments of the elements of the test may be more intense than existing models. The test emphasizes the need for evidence-based public health interventions more than current judicial approaches. Scientific or other evidence of efficacy for emergency response powers and interventions can be difficult to produce and hard to assess, especially at the inception of an emerging infectious disease with indeterminate epidemiology.²²² Public health agencies may be pressed to produce reliable findings in support of novel interventions. Litigants may provide inapposite information in support of their positions. Courts have little time to assess competing evidence in the midst of emergency determinations. Judges pressed to provide rapid resolutions may rely on the best available evidence, but even that is subject to change as viral threats like COVID-19 mutate and new data emerge.²²³

221. See, e.g., Tom Ginsburg & Mila Versteeg, *States of Emergencies: Part II*, HARV. L. REV. BLOG (Apr. 20, 2020), <https://blog.harvardlawreview.org/states-of-emergencies-part-ii/> (arguing that "to prevent a long-term deterioration of civil liberties," public health measures "should be limited to the duration of the outbreak").

222. Zisis Kozlakidis et al., *Global Health and Data-Driven Policies for Emergency Responses to Infectious Disease Outbreaks*, 8 LANCET GLOB. HEALTH 1361, 1362 (2020) ("In the case of emerging crises, as in the case of COVID-19 when the science is uncertain, adoption of the precautionary principle is reasonable to ensure public safety."); John W. Glasser et al., *Modeling and Public Health Emergency Responses: Lessons from SARS*, 3 EPIDEMICS 32, 36 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7105002/pdf/main.pdf> (acknowledging mistakes made during the 2003 SARS crisis because "[b]y virtue of their unknown biology, newly-emerging diseases are more challenging than familiar human scourges" and "[i]n retrospect . . . conveying complex and occasionally nonintuitive results supporting policy decisions to public health and medical professionals is challenging").

223. An example related to the COVID-19 pandemic arises from initial perceptions among public health officials that public wearing of masks was not a

Evolving evidence and changing circumstances may lend to different judicial outcomes across jurisdictions over the duration of a long-term threat like COVID-19, as well as during more limited threats (e.g., short-term infectious disease outbreaks impacting smaller populations).²²⁴ Vacillating judicial outcomes can be

legitimate or purposeful intervention to prevent the spread of the virus. *See, e.g., Interim Guidance: Advice on the Use of Masks in the Context of COVID-19*, WORLD HEALTH ORG. (Apr. 6, 2020), https://apps.who.int/iris/bitstream/handle/10665/331693/WHO-2019-nCov-IPC_Masks-2020.3-eng.pdf?sequence=1&isAllowed=y (“[T]he wide use of masks by healthy people in the community setting is not supported by current evidence and carries uncertainties and critical risks.”); *see also* Maria Cramer & Knvul Sheikh, *Surgeon General Urges the Public to Stop Buying Face Masks*, N.Y. TIMES (Feb. 29, 2020) <https://www.nytimes.com/2020/02/29/health/coronavirus-n95-face-masks.html> (quoting a tweet by U.S. Surgeon General Jerome M. Adams: “Seriously people – STOP BUYING MASKS! They are NOT effective in preventing general public from catching #Coronavirus”). As infections escalated and emerging epidemiological studies emerged, the CDC and other public health agencies reversed course through new prevention guidance firmly recommending mask wearing in public and private settings. *See, e.g.,* Tara Parker-Pope, *Should I Start Wearing a Mask?*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/article/coronavirus-N95-mask-DIY-face-mask-health.html> (“For the past few months, public health officials have been unyielding in their stance that healthy people should not wear masks But with new information about how the virus is spread . . . the [CDC] . . . recommended that everyone wear nonmedical face coverings in public settings.”). State, tribal, and local governments responded with a series of mask mandates of varying scope and applications nationally. *See Coronavirus Restrictions and Mask Mandates for All 50 States*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html> (last updated July 1, 2021); *see also* Lawrence O. Gostin et al., *Universal Masking in the United States: The Role of Mandates, Health Education, and the CDC*, 324 J. AM. MED. ASS’N 837, 837 (2020) (“As of July 27, 2020, statewide orders mandating face coverings in response to COVID-19 had been issued in 31 states and the District of Columbia.”). Similar observations regarding shifts in public health recommendations or requirements based on changing science and factors apply to business/school closures, curfews, isolation, quarantine, and other social distancing powers. *See, e.g.,* Tim Elfrink et al., *CDC Reverses Itself and Says Guidelines It Posted on Coronavirus Airborne Transmission Were Wrong*, WASH. POST (Sept. 21, 2020), <https://www.washingtonpost.com/nation/2020/09/21/cdc-covid-aerosols-airborne-guidelines/> (explaining that this reversal “was the third major revision to CDC information or guidelines published since May,” clarifying in this update that the virus is transmissible beyond six feet); Maureen Groppe, *Pence Says CDC Changing School Reopening Guidelines After Trump Called Them ‘Tough and Expensive’*, USA TODAY (July 8, 2020), <https://www.usatoday.com/story/news/politics/2020/07/08/pence-cdc-changing-coronavirus-school-guidelines-after-trump-attack/5398493002/> (“The [CDC] is revising its guidance on reopening schools after President Donald Trump tweeted his disagreement with [it]. . .”).

224. In recent years, Americans have faced limited outbreaks of infectious diseases like measles, mumps, rubella, tuberculosis, influenza, or Legionnaires’

problematic.²²⁵ Public health officials relying on science and real-time surveillance in support of their efforts may prefer consistency in legal approaches. They seek assurances that emergency powers and approaches employed at one point or stage of an emergency will be available (as warranted) in later stages as well.²²⁶

Multiple waves of infections among Americans during the COVID-19 pandemic, for example, have led to on-and-off-again social distancing measures and mask mandates, coupled with political calls

disease that impact limited regions or sub-populations. Control measures related to these outbreaks may entail similar social distancing measures as utilized in response to COVID-19, but on a considerably reduced scale. James G. Hodge, Jr. et al., *From [A]nthrax to [Z]ika: Key Lessons in Public Health Legal Preparedness*, 15 IND. HEALTH L. REV. 23, 33–34 (2018) (discussing social distancing efforts with respect to tuberculosis, MERS, and Ebola).

225. See *supra* Part II.C.

226. Changes in legislative or regulatory laws present their own risks. See, e.g., Trip Gabriel, *State Lawmakers Defy Governors in a Covid-Era Battle for Power*, N.Y. TIMES (Feb. 22, 2021), <https://www.nytimes.com/2021/02/22/us/politics/republicans-democrats-governors-covid.html> (“Across the country, lawmakers in 37 states have introduced more than 200 bills or resolutions this year to clip the emergency powers of governors, according to the lobbying firm Stateside, which focuses on state governments.”); David A. Lieb, *State Lawmakers Are Pushing to Curb Governors’ Virus Powers*, ABC NEWS (Jan. 28, 2021, 5:40 PM), <https://abcnews.go.com/Health/wireStory/state-lawmakers-pushing-curb-governors-virus-powers-75540378> (“[S]tate 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.”). The American Legislative Exchange Council (ALEC) has proposed model legislation requiring “any exercise of emergency powers by state or local officials be narrowly tailored to serve a compelling public health or safety purpose, with expedited judicial review of these requirements.” *Emergency Power Limitation Act*, AM. LEGIS. EXCH. COUNCIL (Jan. 8, 2021), <https://www.alec.org/model-policy/emergency-power-limitation-act/>. State governors and other elected leaders may issue or withdraw executive orders at their discretion. *Legislative Oversight of Emergency Executive Powers*, NAT’L. CONF. STATE LEGISLATURES (Feb. 12, 2021), <https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx> (“Once an emergency has been declared, executive powers expand until the emergency ends.”); *Governors Powers and Authority: Emergency Powers*, NAT’L GOVERNORS ASS’N, <https://www.nga.org/governors/powers-and-authority/#emergency> (last visited Feb. 23, 2021) (“State emergency management laws usually define how a governor may declare and end a state of emergency.”); see also *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 72 (2020) (Gorsuch, J., concurring) (“[T]he Governor loosened his restrictions, all while continuing to assert the power to tighten them again anytime as conditions warrant. . . . [N]othing would prevent the Governor from reinstating the challenged restrictions tomorrow.”). While these legal shifts unquestionably may impact public health practices, they are not grounded in binding constitutional interpretations like court decisions that may affix standards for public health intervention.

to reopen businesses, schools, and religious institutions²²⁷ as disease rates oscillate. Courts initially assessing rights challenges under the test may clearly support more restrictive public health measures (e.g., closures, curfews, stay-home orders). Their judgments may help contribute to lowering disease transmission in affected communities. As infection rates subside, judicial applications of the same test later under renewed challenges may produce what appears as inapposite judgments as the public health factual bases and justification for the intervention diminish.

The primary dilemma for public health officials occurs when infections invariably rise again, as they have during the COVID-19 pandemic due largely to the highly infectious Delta variant.²²⁸ If public health tools (e.g., tests, screenings, treatments, vaccinations) to combat disease spread are no more available or advanced in a subsequent wave than during the first, officials may seek to re-impose prior social distancing measures to tamp down escalating cases. They may find, however, that their capacity to do so is limited judicially.

A prime illustration of this legal dilemma is evinced in the Supreme Court's flip-flop over the extent of First Amendment free exercise interests as a protection against social distancing limits on religious assemblies.²²⁹ *South Bay II* greatly limits the capacity of states or localities to implement closure orders applied to religious institutions similar to other assemblies, even as Delta variant infections rise.²³⁰ Just days after the Court's decision on February 5, 2021, California officials lifted assembly limits applied solely to religious entities while retaining restrictions on similar gatherings outside the protection of the First Amendment,²³¹ despite little-to-no

227. Grace Panetta, *Trump Went on a Twitter Spree Urging the US Economy to Go Back to Business as Usual Starting as Early as Next Week*, BUS. INSIDER (Mar. 23, 2020, 10:03 AM), <https://www.businessinsider.com/coronavirus-trump-urges-economic-restart-early-as-next-week-2020-3> (acknowledging that President Trump pushed to reopen the U.S. economy back in early April 2020, contradicting guidance from public health experts).

228. Apoorva Mandavilli, *C.D.C. Internal Report Calls Delta Variant as Contagious as Chickenpox*, N.Y. TIMES (July 30, 2021), <https://www.nytimes.com/2021/07/30/health/covid-cdc-delta-masks.html> ("The Delta variant is much more contagious, more likely to break through protections afforded by the vaccines and may cause more severe disease than all other *known* versions of the virus, according to an internal presentation circulated within the [CDC].").

229. See discussion *supra* Introduction and Part II.

230. See *supra* note 33 and accompanying text.

231. Alex Wigglesworth & Thomas Curren, *Some California Churches Will Reopen Sunday After Supreme Court Lifts Ban on Indoor Services*, L.A. TIMES (Feb. 7, 2021, 5:27 PM), <https://www.latimes.com/california/story/2021-02-07/some-churches->

epidemiological basis for this distinction. As Justice Kagan aptly observed, “[i]t is difficult enough in a predictable legal environment to craft COVID policies that keep communities safe. That task becomes harder still when officials must guess which restrictions this Court will choose to strike down.”²³²

These and other legal risks are inherent in any judicial approach used to vet these claims. Variations are endemic. Yet the value-added of a constitutionally cohesive test, as contrasted with extant approaches, centers on its purposeful shift away from a rights-centric focus to a public health-oriented standard with multiple benefits for courts, health officials, and the public. Courts relying on enhanced assessments based on evidentiary grounds (instead of ad hoc determinations) may avoid the specter of second-guessing governmental efforts to protect the public’s health.²³³ If public health authorities extend beyond constitutional parameters (e.g., implementing widespread quarantine orders without epidemiologic bases), courts can exercise their role as arbiters to instantly call for reforms. Public health agencies benefit too by (1) framing their interventions with greater understanding of constitutional boundaries and tripping points; (2) relying on judicial decisions grounded in science and evidence to promote greater uniformity; and (3) making real-time adjustments to the implementation of emergency powers through innovations or best practices aligning with science, evidence, and a respect for individual rights.

Populations, however, have the most to gain through applications of a test designed to further positive impacts on communal and individual health. Throughout the pandemic, many Americans have vehemently objected to perceived incursions on their rights and freedoms at the hands of governmental actors.²³⁴ No one wants their

reopen-after-supreme-court-lifts-ban-on-indoor-services (noting that religious institutions in California may resume services at limited capacity, while other restrictions (e.g., dining) remain squarely in place).

232. See *South Bay II*, 141 S. Ct. 716, 723 (2021) (Kagan, J., dissenting) (“And who knows what today’s decision will mean for other restrictions challenged in other cases? . . . The Court’s decision leaves state policymakers adrift, in California and elsewhere.”).

233. See *South Bay I*, 140 S. Ct. 1613, 1613–14 (2020) (explaining that broad latitude is owed to politically accountable state officials in areas of medical and scientific uncertainty, and that, where “those broad limits are not exceeded, they should not be subject to second-guessing by an ‘unelected federal judiciary,’ which lacks the background, competence, and expertise to assess public health and is not accountable to the people” (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (1985))).

234. See *supra* Introduction.

rights limited for specious reasons. No rational person contests the significant impacts of COVID-19, but many Americans question the seriousness of the threat applied to them. This is partially understandable. Millions of Americans have been infected, but only a relatively small percentage (~1.7%) have died,²³⁵ the grand majority of which are persons aged 65 years and older.²³⁶ Younger individuals may discount the threat of COVID-19 to them despite potential long-term risks of extended morbidity tied to infections.²³⁷

What nearly every American has experienced, however, are significant economic and social impacts of extensive social distancing measures, contributing to considerable litigation among persons seeking an end to perceived governmental overreactions.²³⁸ Balancing

235. JOHNS HOPKINS DASHBOARD, *supra* note 43. This figure is based on U.S.-based data since the inception of the pandemic up to August 3, 2021, calculated as follows: Total # of known U.S. COVID-19 deaths since the inception of the pandemic infections (613,834), divided by the total # of known U.S. COVID-19 cases (35,143,810) = .01746. This percentage is subject to significant debate over likely under-reporting of actual numbers of COVID-19 positive cases and deaths in the U.S. since both figures entail confirmation via positive tests or other criteria which were not available or widely used at the inception of the pandemic. Michael D. Shear et al., *The Lost Month: How a Failure to Test Blinded the U.S. to Covid-19*, N.Y. TIMES (Mar. 28, 2020) <https://www.nytimes.com/2020/03/28/us/testing-coronavirus-pandemic.html> (“The absence of robust screening until it was ‘far too late’ revealed failures across the government,” and “the early inability to test was ‘a failing’ of the administration’s response to a deadly, global pandemic.”); Robert P. Baird, *What Went Wrong with Coronavirus Testing in the U.S.*, NEW YORKER (Mar. 16, 2020), <https://www.newyorker.com/news/news-desk/what-went-wrong-with-coronavirus-testing-in-the-us> (“The void created by the [CDC’s] faulty tests made it impossible for public-health authorities to get an accurate picture of how far and how fast the disease was spreading.”).

236. *Demographic Trends of COVID-19 Cases and Deaths in the US Reported to CDC*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 2, 2021), <https://covid.cdc.gov/covid-data-tracker/#demographics> (illustrating that individuals of at least 65 years of age account for roughly 80% of COVID-19-related deaths in the U.S.).

237. *COVID-19 (coronavirus): Long-term Effects*, MAYO CLINIC (May 6, 2021), <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-long-term-effects/art-20490351> (providing that “[m]uch is still unknown about how COVID-19 will affect people over time” in regards to emerging data on long-term health effects post-infection); see also John Wagner, *Biden Says Long-Term Effects of COVID-19 Can Be Considered a Disability Under Federal Civil Rights Laws*, WASH. POST (July 26, 2021, 12:10 PM), https://www.washingtonpost.com/politics/biden-ada-long-covid-disability/2021/07/26/972f2a04-ee20-11eb-a452-4da5fe48582d_story.html (“Many Americans seemingly recovered from the virus still face lingering challenges like breathing problems, brain fog, chronic pain and fatigue,” [President] Biden said during a ceremony in the Rose Garden at the White House “These conditions can sometimes rise to the level of a disability”).

238. See *supra* Part II.

societal health protections and a stable economy is a worthy goal of legislative, executive, and judicial actors. However, no American life should be unduly sacrificed to achieve this goal in a just, ethical society.²³⁹ To conclude otherwise is an affront to bedrock principles of public health, individual worth, and social justice.²⁴⁰

As President Biden observed in his national strategic plan, rebuilding the economy is only possible by suppressing the immediate and known risks of COVID-19.²⁴¹ This entails concerted, coordinated efforts across all branches and levels of government, including the judiciary. Shifting modern judicial assessments of PHE interventions must be consistent with principles of constitutional design valuing public health promotion. In a system of government founded on

239. See, e.g., Parmet, *supra* note 119, at 1037 (“During the [applicable timeframe of the article], more than 100,000 Americans died. . . . What was their constitutional claim? How do we protect the liberty they lost? Or prevent others from meeting a similar fate? To those questions, [the analyzed COVID-19 judicial decisions] offer only silence.”); James G. Hodge, Jr. et al., *Generating Legal Cohesion Across U.S. Responses to COVID-19*, THE HILL (Aug. 3, 2020, 12:00 PM), <https://thehill.com/opinion/healthcare/510261-generating-legal-cohesion-across-us-responses-to-covid-19#bottom-story-socials> (“Our approach prioritizes the government’s duty to protect public health while sustaining safe economic activities and promoting social values. . . . Americans’ livelihoods are clearly at stake. Yet while temporary setbacks and economic losses may be remedied, lost lives can never be reclaimed.”).

240. JUSTIN BERNSTEIN ET AL., JOHNS HOPKINS UNIV., AN ETHICS FRAMEWORK FOR THE COVID-19 REOPENING PROCESS 8 (May 27, 2020), <https://bioethics.jhu.edu/wp-content/uploads/2019/10/FINAL-SNF-Agora-Covid-19.pdf> (noting that COVID-19 policy decisions are “best understood as a series of tradeoffs that reflect many shared values in our society, including not only our shared interests in health and economic flourishing, but also our shared interest in other aspects of well-being, and in liberty and justice”); All Things Considered, *The Ethics of Who Gets the COVID-19 Vaccine and When*, NPR (Dec. 20, 2020, 5:13 PM), <https://www.npr.org/2020/12/20/948614855/the-ethics-of-who-gets-the-covid-19-vaccine-and-when> (explaining that the ethics of vaccine prioritization requires identifying “ethics values that matter the most” with the goal of “get[ting] as much good in terms of the public’s health as we can from the vaccines available” while considering “questions of fairness, equity and also reciprocity”).

241. NATIONAL STRATEGIC PLAN, *supra* note 50, at 11, 79 (“A comprehensive national public health effort to control the virus — even after the vaccination program ramps up — will be critical to saving lives and restoring economic activity.”).

principles of federalism,²⁴² separation of powers,²⁴³ and protection of individual rights,²⁴⁴ judicial adherence to public health priorities is as essential to emergency responses as corollary invocations or alterations in legislative and regulatory laws authorized via emergency declarations. Like legislators or executive officials serving their respective roles, judges' efforts as real-time legal interpreters are a critical component of governments' safeguarding communal health in a cohesive constitutional design.

In the end, enhanced resolution of rights-based claims supporting emergency measures underscores how public health protection and promotion are not merely the product of political choices, executive options, or individual caprices. Rather, they are a constitutional prerogative just the same as the rights argued in counterbalance to their achievement. While courts may not likely ascribe a communal "right to public health"²⁴⁵ in the same breath as fundamental rights to speech, assembly, or due process, they must affirm the unwavering obligation of government to sustain the public's health. No interest of government is more vital than the health and safety of its population.²⁴⁶ Rooted deep in constitutional foundations, it is indispensable to the recognition of rights and societal benefits individuals are entitled to or enjoy.²⁴⁷ As Thomas Jefferson observed

242. See, e.g., Hodge, *supra* note 120, at 313–15; see also Knauer, *supra* note 14, at 1 (finding that, lacking a coordinated national response, the COVID-19 pandemic has "underscored both the promise and limits of the Tenth Amendment[,] and noting that state and local actors have "produced many innovative programs and novel attempts at regional coordination, but [have] also led to direct competition between and among jurisdictions as they vie for desperately needed resources").

243. See, e.g., CHEMERINSKY, *supra* note 125, at 1 (discussing constitutional separation of powers principles generally); Erwin Chemerinsky, *What Mitch McConnell Got Right*, N.Y. TIMES (Feb. 12, 2021) ("[Federal courts] are the last protection against abuses by other branches of government.").

244. See CHEMERINSKY, *supra* note 125, at 4–6.

245. See Hodge et al., *supra* note 41, at 210–25.

246. See INST. OF MED., BD. ON HEALTH PROMOTION & DISEASE PREVENTION, THE FUTURE OF THE PUBLIC'S HEALTH IN THE 21ST CENTURY 96 (2003) (quoting President Franklin Delano Roosevelt: "The success or failure of any government in the final analysis must be measured by the well-being of its citizens. Nothing can be more important to a state than its public health; the state's paramount concern should be the health of its people.").

247. See, e.g., Lawrence O. Gostin, *Public Health Law in a New Century, Part I: Law as a Tool to Advance the Community's Health*, 283 J. AM. MED. ASS'N 2837, 2838 (2000).

Public health takes on a special meaning and importance in political communities. Health is indispensable not only to individuals, but to

in 1809, "the care of human life and happiness, and not their destruction, is the first and only object of good government."²⁴⁸

CONCLUSION

Voluminous challenges to COVID-19 emergency declarations, orders, and social distancing measures demonstrate litigants' attempts to assess the boundaries between protecting communal health and respecting individual rights. Courts under stress have produced inconsistent results. Most jurists perform constitutional re-balancing, attempting to re-assess individual rights against compelling government interests in quelling the pandemic. Select courts essentially set aside constitutional rights based on emergency circumstances. Both approaches are flawed. Individual rights cannot be swept away, even in emergencies. Re-balancing efforts mischaracterize rights outside the larger constitutional framework. Appropriate constitutional interpretation requires consideration of rights and structural limitations as part of a cohesive structure that necessitates governmental action to protect and promote the public's health while respecting individual rights. Shifting courts' focus toward appropriate, evidence-based PHE responses furthers the constitutional prerogative to protect and promote the public's health.

the community as a whole. . . . Health is necessary for much of the joy, creativity, and productivity that each person derives from life. . . . Without minimum levels of health, populations cannot fully engage in the social interactions of a community, participate in the political process, generate wealth and ensure economic prosperity, and provide for common defense and security. Public health, then, becomes a transcendent value because a fundamental level of human functioning is a prerequisite for engaging in activities that are critical to communities.

Id.; see also CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), Comm. on Econ., Soc. & Cultural Rts. on its Twenty-Second Session, U.N. Doc. E/C 12/2000/4 (Aug. 11, 2000), <https://www.refworld.org/pdfid/4538838d0.pdf> ("Health is a fundamental human right indispensable for the exercise of other human rights.").

248. 1 THOMAS JEFFERSON, THE PAPERS OF THOMAS JEFFERSON, RETIREMENT SERIES, 98–99 (J. Jefferson Looney ed., Princeton Univ. Press 2004) (1809) (letter to the Republican Citizens of Washington County, Mar. 31, 1809).

