

# CIVIL LIBERTIES IN A PANDEMIC: THE LESSONS OF HISTORY

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## INTRODUCTION

Throughout American history, whenever there has been a crisis the response has been a deprivation of rights. Frightening episodes in American history bear this out sadly, with the Supreme Court failing to protect the most vulnerable and marginalized communities, including in times of slavery, Jim Crow, war, and health crisis.<sup>1</sup> Ironically, protecting or serving the public’s health has served as a proxy for myriad forms of

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<sup>1</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404–05 (1857) (holding that the United States Constitution did not include citizenship to Black people, finding Black people were “considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.”); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 625–26 (1842) (holding that the Fugitive Slave Act of 1793 preempted a Pennsylvania law barring the kidnapping and removal of Black people out of the state of Pennsylvania and into slave territories and states); *Plessy v. Ferguson*, 163 U.S. 537, 548 (1896) (upholding the constitutionality of “separate but equal”); *Buck v. Bell*, 274 U.S. 200, 207 (1927) (permitting forced sterilization of individuals deemed “unfit”); *Korematsu v.*

racial discrimination, including targeting and stereotyping ethnic minority groups as pollutants or vectors of disease.<sup>2</sup> The rise in hate crimes against members of Asian and Asian American and Pacific Island communities tragically bears this out during the COVID-19 pandemic.<sup>3</sup> In turn, dangerous racial stereotypes have served as the basis to justify discrimination and the infringement of civil liberties and civil rights.<sup>4</sup>

American history is replete with examples of discrimination and civil liberties infringements targeting vulnerable groups on the basis that they risk the public's health.<sup>5</sup> In *Buck v. Bell*, an infamous Supreme Court ruling that permitted the compulsory sterilization of people deemed socially, morally, or mentally "unfit," Justice Oliver Wendell Holmes opined that the principle sustaining compulsory vaccination in states like Massachusetts "is broad enough to cover cutting the Fallopian tubes," because public welfare calls upon even "the best citizens for their lives."<sup>6</sup> Equally, much of the Jim Crow-era discrimination that barred Black Americans from utilizing

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United States, 323 U.S. 214, 223–24 (1944) (upholding the exclusion and detention of Japanese Americans).

<sup>2</sup> Colby Itkowitz, *Trump Again Uses Racially Insensitive Term to Describe Coronavirus*, WASH. POST (June 23, 2020, 8:05 AM), [https://www.washingtonpost.com/politics/trump-again-uses-kung-flu-to-describe-coronavirus/2020/06/23/0ab5a8d8-b5a9-11ea-aca5-ebb63d27e1ff\\_story.html](https://www.washingtonpost.com/politics/trump-again-uses-kung-flu-to-describe-coronavirus/2020/06/23/0ab5a8d8-b5a9-11ea-aca5-ebb63d27e1ff_story.html) [<https://perma.cc/Q5BC-ZB6C>] ("President Trump again referred to the novel coronavirus as 'kung flu,' eliciting laughter and wild cheers from a young crowd in Arizona on Tuesday."); *Reports of Anti-Asian Assaults, Harassment and Hate Crimes Rise as Coronavirus Spreads*, ADL (June 18, 2020), <https://www.adl.org/blog/reports-of-anti-asian-assaults-harassment-and-hate-crimes-rise-as-coronavirus-spreads> [<https://perma.cc/ZXY2-Q2FW>] ("Since January 2020, there have been a significant number of reports of AAPI ['Asian American and Pacific Islander'] individuals being threatened and harassed on the street. These incidents include being told to 'Go back to China,' being blamed for 'bringing the virus' to the United States, being referred to with racial slurs, spat on, or physically assaulted.")

<sup>3</sup> See Kimmy Yam, *Anti-Asian Hate Crimes Increased by Nearly 150% in 2020, Mostly in N.Y. and L.A., New Report Says*, NBC NEWS (Mar. 9, 2021, 3:37 PM EST), <https://www.nbcnews.com/news/asian-america/anti-asian-hate-crimes-increased-nearly-150-2020-mostly-n-n1260264> [<https://perma.cc/N7D6-Q4FB>].

<sup>4</sup> Michele Goodwin & Erwin Chemerinsky, *No Immunity: Race, Class, and Civil Liberties in Times of Health Crisis*, 129 HARV. L. REV. 956, 963–64 (2016) (book review).

<sup>5</sup> See, e.g., *Buck*, 274 U.S. at 207 (permitting forced sterilization of individuals deemed "unfit"); Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 53–55 (1985) (describing the circumstances of Carrie Buck's pregnancy and sterilization); see Cheryl I. Harris, "Too Pure an Air:" Somerset's *Legacy from Anti-Slavery to Colorblindness*, 13 TEX. WESLEYAN L. REV. 439, 444 (2007) (addressing the metaphors of enslaved African Americans as pollutants).

<sup>6</sup> *Buck*, 274 U.S. at 207.

restrooms, water fountains, swimming pools, and intimate contact with white Americans was rooted in harmful racial stereotypes and stigmas about African Americans being biologically compromised, inferior, and contagious.<sup>7</sup>

In hindsight, Americans came to realize that the loss of their liberty did not make them safer, nor did it prevent some from harms inflicted on them. This is particularly relevant now, in the midst of the COVID-19 global pandemic, when anti-abortion governors seek to use the pandemic as a proxy for denying or infringing on reproductive rights through anti-abortion measures.<sup>8</sup> Today, the United States is in the midst of the worst health crisis in over a century. As of this writing, over 500,000 people have died.<sup>9</sup> Hundreds of thousands, and perhaps millions, have become seriously or gravely ill.<sup>10</sup>

The pandemic reveals underlying institutional and infrastructural problems in society. The mortality rate is highest among African-American,<sup>11</sup> Native American,<sup>12</sup> and Latin in-

<sup>7</sup> See Andrea Patterson, *Germs and Jim Crow: The Impact of Microbiology on Public Health Policies in Progressive Era American South*, 42 J. HIST. BIOLOGY 529, 530–31 (2009); *Palmer v. Thompson*, 403 U.S. 217, 226–27 (1971) (although the Court held that the closing of swimming pools to all persons did not deny equal protection to Black people, the underlying issue involved the local municipality closing all public pools rather than allowing Black people to swim with white people).

<sup>8</sup> Dan Keating, Lauren Tierney & Tim Meko, *In These States, Pandemic Crisis Response Includes Attempts to Stop Abortion*, WASH. POST (Apr. 23, 2020), <https://www.washingtonpost.com/nation/2020/04/21/these-states-pandemic-crisis-response-includes-attempts-stop-abortion/?arc404=true> [<https://perma.cc/UQA3-TYXN>].

<sup>9</sup> JOHNS HOPKINS U. & MED. CORONAVIRUS RESOURCE CTR., <https://coronavirus.jhu.edu/> [<https://perma.cc/XK5J-Y6KS>] (last visited Mar. 24, 2021).

<sup>10</sup> There have already been over 161,000 hospitalizations related to COVID-19. *Laboratory-Confirmed COVID-19-Associated Hospitalizations*, COVID-NET, [https://gis.cdc.gov/grasp/covidnet/COVID19\\_5.html](https://gis.cdc.gov/grasp/covidnet/COVID19_5.html) [<https://perma.cc/YE39-N974>] (last visited Apr. 5, 2021).

<sup>11</sup> See Jazmyn T. Moore et al., *Disparities in Incidence of COVID-19 Among Underrepresented Racial/Ethnic Groups in Counties Identified as Hotspots During June 5-18, 2020 — 22 States, February-June 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1122, 1124 (2020).

<sup>12</sup> See Creede Newton, *Why Has Navajo Nation Been Hit So Hard by the Coronavirus?*, AL JAZEERA (May 27, 2020), <https://www.aljazeera.com/news/2020/05/27/why-has-navajo-nation-been-hit-so-hard-by-the-coronavirus/> [<https://perma.cc/62ZM-PJQJ>] (“You got the feds, you got everybody saying, “Wash your hands with soap and water,” but our people are still hauling water. Here’s a great opportunity for us to get running water to the Navajo people’ . . . .”); Hollie Silverman, Konstantin Toropin, Sara Sidner & Leslie Perrot, *Navajo Nation Surpasses New York State for the Highest COVID-19 Infection Rate in the US*, CNN (May 18, 2020, 5:55PM), <https://www.cnn.com/2020/05/18/us/navajo-nation-infection-rate-trnd/index.html> [<https://perma.cc/4BTR-VXBT>]; Hollie Silverman, *The Navajo Nation Is under a Weekend Curfew to Help Combat the*

dividuals.<sup>13</sup> We argue, based on history, there is every reason to fear that the pandemic could be used as a justification for a massive deprivation of rights and abuses. This has occurred in other countries. In Hungary, the prime minister used COVID-19 as the basis for greatly increasing his powers and claimed the ability to rule by decree.<sup>14</sup> The same occurred in the Philippines, where President Rodrigo Duterte threatened to order the police and military to “shoot them dead” when he referred to those who protested the lack of food, which violated coronavirus-related lockdowns.<sup>15</sup> Meanwhile, Bolivia cancelled its elections, and countries like Thailand and Jordan used their COVID-19 lockdowns to greatly restrict freedom of speech.<sup>16</sup>

Some of the most extreme of these actions have not materialized in the United States, perhaps because President Donald Trump constantly minimized the seriousness of the disease, even as he contracted the virus.<sup>17</sup> To be sure, there have been restrictions on freedom imposed at the state and local level—shelter in place orders, business closure requirements, restrictions on speech and assembly and worship. But overall, we believe these have been justified by the magnitude of the threat and do not approximate the enormous deprivations of liberty that have been imposed in other countries.<sup>18</sup>

Dozens of lawsuits—and likely hundreds of lawsuits—have been brought, and overwhelmingly they have upheld the government’s restrictions to limit the spread of COVID-19, with some exception after the addition of Judge Amy Coney Barrett to the Supreme Court.<sup>19</sup> However, the legal approach taken by

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*Spread of Coronavirus*, CNN (Apr. 12, 2020, 3:16 AM), <https://www.cnn.com/2020/04/12/us/navajo-nation-coronavirus/index.html> [<https://perma.cc/L9N8-G972>].

<sup>13</sup> See *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, APM RES. LAB (Mar. 5 2021), <https://www.apmresearchlab.org/covid/deaths-by-race> [<https://perma.cc/XVT2-5CSK>].

<sup>14</sup> Selam Gebrekidan, *Pandemic Tempts Leaders to Seize Sweeping Powers*, N.Y. TIMES, Mar. 31, 2020, at A1.

<sup>15</sup> Lynzy Billing, *Duterte’s Response to the Coronavirus: ‘Shoot Them Dead’*, FOREIGN POL’Y (Apr. 16, 2020), <https://foreignpolicy.com/2020/04/16/duterte-philippines-coronavirus-response-shoot-them-dead/> [<https://perma.cc/4PMA-KVU9>].

<sup>16</sup> Gebrekidan, *supra* note 14, at A6.

<sup>17</sup> Peter Baker & Maggie Haberman, *Trump Tests Positive for the Coronavirus*, N.Y. TIMES (Oct. 8, 2020), <https://www.nytimes.com/2020/10/02/us/politics/trump-covid.html> [<https://perma.cc/7L8U-XUYG>].

<sup>18</sup> See *infra* text accompanying notes 136–146 and 150–154.

<sup>19</sup> See, e.g., *Tandon v. Newsom*, 593 U.S. \_\_ (2021) (per curiam) (granting an injunction against California limiting religious gatherings in homes in a 5-4 decision. Justice Roberts joined liberal justices in dissent. Notably, of 19 COVID-19

the courts in these cases has been troubling. Most courts have adopted the test from a case from more than a century ago, *Jacobson v. Massachusetts*, which upheld mandatory smallpox vaccinations and said that the government's action should be upheld so long as it has a "real and substantial" relationship to stopping the spread of a communicable disease.<sup>20</sup>

But we worry that this test, and the overall approach of *Jacobson*, is very much like the rational basis test.<sup>21</sup> In fact, many courts have said that the *Jacobson* approach is rational basis review.<sup>22</sup> Under contemporary constitutional law, infringements of fundamental rights must meet strict scrutiny—meaning it must be necessary to achieve a compelling government purpose.<sup>23</sup> However, the test under *Jacobson* does not require a compelling interest; nor does it demand that the government's action be necessary and the least restrictive alternative. As we articulate in this Article, the *Jacobson* standard does not require narrow tailoring and a substantial government

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era cases (between October 2020 and April 2021) this is only the second time the majority wrote an opinion for the Court offering its rationale); Erwin Chemerinsky, *COVID-19 Ruling Reveals Much About the New Supreme Court*, ABA J. (Dec. 3, 2020, 9:14 AM CST) (noting the importance of Justice Ruth Bader Ginsburg's passing after the Court's decision in Roman Catholic Diocese of Brooklyn, New York v. Cuomo, "decision is the first clear indication of the importance of the late Justice Ruth Bader Ginsburg having been replaced by Barrett. Twice earlier this year, the court rejected challenges by religious institutions to attendance restrictions at worship services. Both were 5-4, with Ginsburg joining Roberts, Breyer, Sotomayor and Kagan"), <https://www.abajournal.com/columns/article/chemerinsky-covid-19-ruling-reveals-much-about-the-new-supreme-court> [<https://perma.cc/LY4Q-QH9F>]; See also *infra* text accompanying notes 108–126.

<sup>20</sup> 197 U.S. 11, 19, 31 (1905).

<sup>21</sup> See, e.g., *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988) (defining the rational basis test); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 167–179 (1980) (upholding a legislative classification when "there are plausible reasons for Congress' action"); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1959) (stating that a classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation" to pass the rational basis test); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955) (refusing to say that that a state regulation of advertising relating to eye examination had "no rational relation[ship]" to the objective of improving medical treatment); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) ("[T]he state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare . . . within extremely broad limits.").

<sup>22</sup> See *infra* notes 108–126 and accompanying text; see, e.g., *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 129 (6th Cir. 2020) (rejecting a challenge to government closure orders by expressly using rational basis review).

<sup>23</sup> Multiple cases define strict scrutiny. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 920–21 (1995); *Burson v. Freeman*, 504 U.S. 191, 198–99 (1992); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500–09 (1989).

interest as is required under intermediate scrutiny.<sup>24</sup> Nor does it impose a balancing approach used for some constitutional rights.<sup>25</sup> Simply put, the *Jacobson* standard or test is a very deferential rational basis review.

Our thesis is that the use of the *Jacobson* test to evaluate government actions in a pandemic is a mistake for two reasons. First, it risks granting too much deference to the government. Second, it significantly threatens liberty. We believe that the history of repression during crises provides a basis for great caution about such deference. Instead, we argue that the traditional tests used for particular constitutional rights should be used in evaluating government actions in a pandemic as well.

We, of course, recognize the need for the government to act to stop the spread of COVID-19 and believe that much of what the government has done so far will meet the appropriate constitutional tests.<sup>26</sup> But we think maintaining *Jacobson* as the basis for review and constitutional analysis in a pandemic is a mistake, and it has enormous risks for the future. We offer an alternative. We argue the right involved, not the situation, should determine the level of scrutiny. The circumstances are certainly relevant in deciding whether the level of scrutiny has been met, but it should not change the legal test that is applied.

Part I of this Article sets the context: Throughout American history, whenever there has been a crisis the response has been an unnecessary loss of liberty. Part II describes how courts have widely used the test from *Jacobson v. Massachusetts* in analyzing the government's restrictions that have been imposed in dealing with COVID-19 and explains why this is undesirable. Part III argues that the usual tests for constitutional rights should be applied in analyzing particular government restrictions and applies this in considering the restrictions that have been imposed in four areas: speech, religion, abortion, and business closure.

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<sup>24</sup> See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (defining intermediate scrutiny); *Lehr v. Robertson*, 463 U.S. 248, 266 (1983).

<sup>25</sup> See, e.g., *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (using a balancing test for deciding what is an undue burden on the right to abortion), discussed *infra* in text accompanying notes 202–211.

<sup>26</sup> See *infra* text accompanying notes 136–146 and 150–154.

## I

## THE LESSONS OF HISTORY

COVID-19 obviously is not the first major crisis to confront the United States. A century ago, the 1918 Pandemic immobilized the world. An important lesson is to be learned from these earlier crises. Time and again, the government has used a perceived emergency as a basis for infringing on freedom, but in hindsight, we come to realize that the loss of liberty was unnecessary and did nothing to make the country safer. Our fear—and the experience in other countries in early 2020 shows that this fear is a reasonable one<sup>27</sup>—is that COVID-19 could be used to justify repression in the United States.

This history in the United States is familiar and need be only briefly recounted as the context for approaching any claim of government power in an emergency.<sup>28</sup> Early in American history, Congress enacted the Alien and Sedition Act of 1798,<sup>29</sup> which made it a crime to falsely criticize the government or government officers. Individuals were convicted and spent time in prison simply for giving speeches opposing the incumbent John Adams' administration.<sup>30</sup>

In 1798, Vermont Congressman Matthew Lyon was one of the first people to be placed on trial and sentenced under the Alien and Sedition Act.<sup>31</sup> In his critique of the Adams Administration, Lyon claimed that “every consideration of public welfare [was] swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, or selfish avarice” on the part of President Adams.<sup>32</sup> At sentencing, Judge William Patterson instructed the jury that their deliberations had “nothing whatever to do with the constitutionality or unconstitutionality of the sedition law” and

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<sup>27</sup> Gebrekidan, *supra* note 14, at A1, A6.

<sup>28</sup> An excellent, detailed description of this history can be found in GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004); *see also* ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 54–89 (2014) (describing the enforcement of the constitution in various times of crisis).

<sup>29</sup> *See* THE ALMANAC OF AMERICAN HISTORY 171 (Arthur M. Schlesinger, Jr. & John S. Bowman ed., 1983).

<sup>30</sup> *See* JOHN C. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* 76 (1951) (stating that the Sedition Act was directed at deterring people from saying anything negative about the government and those who carry out its measures).

<sup>31</sup> Bruce A. Ragsdale, *The Sedition Act Trials*, FED. JUD. CTR. 3 (2005), <https://www.fjc.gov/sites/default/files/trials/seditionacts.pdf> [<https://perma.cc/87QD-RW88>].

<sup>32</sup> *Id.* (“Lyon presented his own defense, arguing that the Sedition Act was unconstitutional and that he had demonstrated no intent to undermine the government.”).

that they “could only consider whether Lyon published the letters” and that he had the intent to stir up sentiment against the government.<sup>33</sup> The Congressman was fined \$1,000 (equivalent to over \$21,000 today) and sentenced to four months in jail.<sup>34</sup> Famously, he successfully ran for reelection from jail.<sup>35</sup> More than a dozen additional indictments were brought under the Alien and Sedition Act—targeting newspaper publishers and editors.<sup>36</sup>

Thomas Jefferson ran for President in 1800, in part, on a promise of repealing the Alien and Sedition Act.<sup>37</sup> After his election, he issued pardons to those convicted, and Congress passed a law to refund the fines paid.<sup>38</sup> Over a century and a half later, the Supreme Court said that it had been declared unconstitutional “in the court of history.”<sup>39</sup>

Unknown to many, during the Civil War, President Abraham Lincoln suspended the writ of habeas corpus, even though there is no such presidential authority to do so.<sup>40</sup> Only Congress may suspend the writ of habeas corpus and only if there is a rebellion or invasion.<sup>41</sup> The Supreme Court later declared the suspension of habeas corpus to be unconstitutional in *Ex Parte Milligan*.<sup>42</sup> It is often forgotten that hundreds of people were imprisoned during the Civil War just for speaking out and

<sup>33</sup> *Id.* at 4 (“Paterson announced that the fact of publication was certain, so the jury had only to decide if the language could be interpreted as anything other than seditious. Within an hour, the jury returned a verdict of guilty. Paterson thought a member of Congress convicted of seditious libel deserved severe punishment, and he sentenced Lyon to four months in prison and a \$1,000 fine.”).

<sup>34</sup> *See id.*; Value of \$1,000 from 1798 to 2020, CPI INFLATION CALCULATOR <https://www.officialdata.org/us/inflation/1798?amount=1000> [https://perma.cc/Z7E4-TTR4] (last visited Mar. 31, 2021).

<sup>35</sup> *See* Ragsdale, *supra* note 31, at 4.

<sup>36</sup> *See id.* at 4, 19–22; Nancy Murray & Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons from History*, 87 MASS. L. REV. 72, 73 (2002); MICHAEL LINFIELD, FREEDOM UNDER FIRE 23–25 (1990).

<sup>37</sup> *See* Douglas Bradburn, *A Clamor in the Public Mind: Opposition to the Alien and Sedition Acts*, 65 WM. & MARY Q. 565, 567, 594 (2008).

<sup>38</sup> *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

<sup>39</sup> *Id.* (“Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”).

<sup>40</sup> *See* James A. Dueholm, *Lincoln’s Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis*, 29 J. ABRAHAM LINCOLN ASS’N 47, 47 (2008) (“Lincoln’s power to suspend the writ of habeas corpus was extensively explored during the Civil War, but since then his suspensions have escaped detailed scrutiny despite the controversy they provoked, their widespread and effective use to combat malignant opposition to the war, and their uncertain grounding in the Constitution.”).

<sup>41</sup> U.S. CONST. art. I, § 9.

<sup>42</sup> 71 U.S. (4 Wall.) 2, 130–31 (1866).

criticizing the way the war was being fought.<sup>43</sup> But in hindsight, it is clear that the imprisonments did not do anything to enhance the chances of the North winning the Civil War.<sup>44</sup>

During World War I, Congress enacted the Espionage Act, which made it a crime to “willfully make . . . false statements with intent to interfere” with U.S. military success “or to promote the success of its enemies.”<sup>45</sup> The Espionage Act also punished those who, when the United States was at war, “willfully cause[d] or attempt[ed] to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or willfully obstruct[ed] the recruiting or enlistment service of the United States.”<sup>46</sup>

Individuals were prosecuted and convicted for speech without any proof that it caused any harm; such speech was an expression that clearly should have been protected by the First Amendment. A person could be indicted for violating the Espionage Act of 1917, “by causing and attempting to cause insubordination . . . in the military and naval forces of the United States” or obstructing “the recruiting and enlistment service of the United States.”<sup>47</sup> Problematically, almost any speech could fall within these categories.

For example, in *Schenck v. United States*, the Court upheld the conviction and sentence for Charles Schenck and Elizabeth Baer who circulated a leaflet arguing that the military draft was unconstitutional and that it was a form of involuntary servitude that violated the Thirteenth Amendment.<sup>48</sup> There was not a shred of evidence that their leaflet had the slightest effect on the draft or the war effort or that it posed any clear and present danger.<sup>49</sup> Baer and Schenck’s leaflets urged only peaceful ac-

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<sup>43</sup> See, e.g., THE LIBRARY OF CONGRESS CIVIL WAR DESK REFERENCE 720–21 (Margaret E. Wagner, Gary W. Gallagher, & Paul Finkelman eds., 2002) (discussing the riots by people opposing Lincoln’s policies and that those people were persecuted and imprisoned as a result); Paul Finkelman, *Speech, Press, and Democracy*, 10 WM. & MARY BILL RTS. J. 813, 823–25 (2002); Murray & Wunsch, *supra* note 36, at 74.

<sup>44</sup> See Finkelman, *supra* note 43, at 825; Murray & Wunsch, *supra* note 36, at 74.

<sup>45</sup> Espionage Act of 1917, Pub. L. No. 65-24, ch. 30, tit. 1, § 3, 40 Stat. 217, 219 (codified as amended at 18 U.S.C. § 2388(a) (2020)).

<sup>46</sup> *Id.*

<sup>47</sup> See, e.g., *Schenck v. United States*, 249 U.S. 47, 48–49 (1919).

<sup>48</sup> *Id.* at 48–53.

<sup>49</sup> Edward J. Bloustein, *Criminal Attempts and the “Clear and Present Danger” Theory of the First Amendment*, 74 CORNELL L. REV. 1118, 1127 (1989) (stating that there was no evidence in *Schenck* which proved that people failed to register for the draft as a result of defendants’ actions).

tion.<sup>50</sup> Nevertheless, both were convicted and sentenced to six months in prison.<sup>51</sup>

The Court, in an opinion by Justice Oliver Wendel Holmes, said that free speech is not absolute; and, to illustrate the bounds of free speech, it stated that there is no right to falsely shout fire in a crowded theater.<sup>52</sup> Of course, circulating the leaflet was the antithesis of falsely shouting “fire” in a crowded theater; this was political speech about an issue of national importance that failed to show any risk of imminent harm. Indeed, the Court admitted, “[I]n many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights.”<sup>53</sup> To our point, the Court upheld what would otherwise have been unconstitutional Congressional action in a time of peace, leading to a worrying result.

In *Abrams v. United States*, the Supreme Court affirmed the convictions of a group of Russian immigrants who circulated leaflets, in English and in Yiddish, objecting to America sending troops to Eastern Europe after the Russian revolution.<sup>54</sup> The defendants called for a strike at ammunition plants.<sup>55</sup> Their arrests were based on two leaflets tossed out a window in New York.<sup>56</sup> One leaflet denounced war and advocated for the halting of ammunition development.<sup>57</sup> The other denounced sending American military troops to Russia.<sup>58</sup> Even though the defendants’ speech was not directly about World War I or the draft, it was about how the United States should react to the Russian revolution. They were convicted of

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<sup>50</sup> See Charles Schenck, *World War I Anti-Draft Pamphlet*, U.S. NATIONAL ARCHIVES (1917), <https://artsandculture.google.com/asset/world-war-i-anti-draft-pamphlet-charles-schenck/dAE1fuuw7-VcEA?hl=en> [https://perma.cc/KU4N-LG8R].

<sup>51</sup> See Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 1003 (2012).

<sup>52</sup> See *Schenck*, 249 U.S. at 52 (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.”).

<sup>53</sup> *Id.* Without the benefit of a searching inquiry related to whether Baer and Schenck’s speech posed any threat to government, the Court introduced and broadly applied the clear and present danger test. Justice Holmes wrote, “[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” *Id.*

<sup>54</sup> See 250 U.S. 616, 616–24 (1919).

<sup>55</sup> See *id.* at 621.

<sup>56</sup> See *id.* at 618.

<sup>57</sup> See *id.* at 619–21.

<sup>58</sup> See *id.*

encouraging resistance and conspiracy to urge curtailment of the production of war materials and sentenced to 20 years in prison.<sup>59</sup> The Supreme Court, relying on *Schenck*, upheld the convictions.<sup>60</sup>

Likewise, during World War II, 110,000 Japanese-Americans, aliens, and citizens—and 70,000 were citizens<sup>61</sup>—were uprooted from their lifelong homes and placed in what President Franklin D. Roosevelt called “concentration camps.”<sup>62</sup> For many, if not most of them, their property was seized and taken without due process or compensation.<sup>63</sup> They were incarcerated. The only determinate that was used in this process was race.<sup>64</sup> Not one of these individuals was ever accused, indicted, or convicted of espionage or any crime against the country.<sup>65</sup> Race alone determined who was free and who was put behind barbed wire.<sup>66</sup>

Tragically, the Supreme Court in *Korematsu v. United States* upheld the constitutionality of the evacuation of Japanese-Americans from the west coast during World War II.<sup>67</sup> In 2018, Chief Justice Roberts, writing for the Court in *Trump v. Hawaii*, declared: “*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution.”<sup>68</sup>

During the McCarthy era, people lost their liberty and jobs simply for being suspected of being a communist.<sup>69</sup> The leading Supreme Court decision during this time, *Dennis v. United*

<sup>59</sup> See *id.* at 617, 629.

<sup>60</sup> See *id.* at 619–24.

<sup>61</sup> David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 989–90 (2002).

<sup>62</sup> WILLIAM MANCHESTER, *THE GLORY AND THE DREAM: A NARRATIVE HISTORY OF AMERICA, 1932-1972* 300 (1974).

<sup>63</sup> *Id.* at 300, 302; see also ERIC K. YAMAMOTO, IN THE SHADOW OF KOREMATSU: DEMOCRATIC LIBERTIES AND NATIONAL SECURITY 24 (2018) (analyzing the *Korematsu* decision and its implications).

<sup>64</sup> See Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257, 2270 n.81 (2002).

<sup>65</sup> *Id.*; see also Cole, *supra* note 61, at 992 (“[T]here was no evidence to support the concern that the Japanese living among us posed a threat.”).

<sup>66</sup> See *Jacobs v. Barr*, 959 F.2d 313, 314 (D.C. Cir. 1992) (stating that “[f]ifty years ago, President Roosevelt authorized his Secretary of War to send Japanese Americans to internment camps solely because of their race”).

<sup>67</sup> See 323 U.S. 214, 215–24 (1944).

<sup>68</sup> 138 S. Ct. 2392, 2423 (2018) (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)) (upholding the constitutionality of President Trump’s travel ban).

<sup>69</sup> See, e.g., Martin H. Redish & Kevin Finnerty, *What Did You Learn In School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 112–13 (2002) (explaining that schools in the McCarthy era dismissed teachers with even slight connections to Communism). The McCarthy era, which lasted from the late 1940s to the late 1950s, was a period when the

*States*, upheld broad government power to restrict speech.<sup>70</sup> In *Dennis*, a group of individuals got together to teach the works of Karl Marx and Friedrich Engels.<sup>71</sup> They were charged with the crime of conspiracy to advocate the overthrow of the United States Government.<sup>72</sup> They were not being charged with overthrowing the government or conspiring to do so, nor were they charged with advocating the overthrow of the government; their crime was conspiracy to advocate the overthrow of the government.<sup>73</sup> The Supreme Court, in a plurality opinion by Chief Justice Fred Vinson, upheld their convictions.<sup>74</sup> The plurality indicated that when the evil is grave and involves the overthrow of the government, there does not have to be any evidence that increases the likelihood of that overthrow in order to justify the restriction of individual rights.<sup>75</sup> There was no showing whatsoever that the speech of the defendants posed any risk to the country.

Nor has the Supreme Court's record been admirable in dealing with issues of public health. In *Buck v. Bell*, the Court upheld the ability of the government to involuntarily sterilize the mentally retarded.<sup>76</sup> In *Buck*, the Supreme Court stated that it was constitutional for the State of Virginia to sterilize Carrie Buck, an 18-year-old woman, pursuant to a law that provided for the involuntary sterilization of the mentally disabled who were in state institutions.<sup>77</sup> Justice Oliver Wendell Holmes, in some of the most offensive language found anywhere in the United States Reports, declared: "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough."<sup>78</sup>

The Court described Carrie Buck as a "feeble-minded white woman."<sup>79</sup> In fact, in 1980, Carrie Buck was found to be alive

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country "became obsessed with a perceived internal threat of subversion from American Communists." *Id.*

<sup>70</sup> See 341 U.S. 494, 509, 516-17 (1951) (plurality opinion).

<sup>71</sup> *Id.* at 582 (Douglas, J., dissenting).

<sup>72</sup> *Id.* at 497.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 516-17.

<sup>75</sup> See *id.* at 509.

<sup>76</sup> 274 U.S. 200, 207-08 (1927). For an excellent history of this case, see PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL 103-85 (2008).

<sup>77</sup> *Buck*, 274 U.S. at 205, 207.

<sup>78</sup> *Id.* at 207.

<sup>79</sup> *Id.* at 205.

and living with her sister, who also had been sterilized by the state.<sup>80</sup> Carrie Buck was discovered to be a woman of normal intelligence.<sup>81</sup> She was one of almost 60,000 “forced eugenic sterilizations” that had been performed in the United States by 1935.<sup>82</sup> Although the Court subsequently declared a eugenics law unconstitutional in *Skinner v. Oklahoma*,<sup>83</sup> to this day, *Buck v. Bell* has never been expressly overruled.

The point of this short recitation of history is to show why great pause should be given before judicial deference to the government in a crisis. In all these instances and many more, the Court deferred to the government, upheld loss of liberty, but did nothing to make the country safer. This should be the context for looking at government restrictions to protect public health in a pandemic.

## II

### THE MISPLACED RELIANCE ON *JACOBSON V. MASSACHUSETTS*

Despite the myriad communicable diseases, ranging from smallpox to Hepatitis A and B, HIV/AIDS, and flu,<sup>84</sup> if one does a Westlaw or Lexis search on the Supreme Court data base and searches for cases addressing “communicable diseases,” relatively few are found and many of those are about livestock.<sup>85</sup> Prior to 2021, there is only one Supreme Court decision concerning government power to stop the spread of communicable disease and that is *Jacobson v. Massachusetts*—a case decided by the Court in 1905.<sup>86</sup>

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<sup>80</sup> See Stephen Jay Gould, *Carrie Buck's Daughter*, 2 CONST. COMMENT. 331, 335 (1985).

<sup>81</sup> See *id.* at 336.

<sup>82</sup> See CHEMERINSKY, *supra* note 28, at 4.

<sup>83</sup> 316 U.S. 535, 536, 543 (1942).

<sup>84</sup> *Communicable Disease*, ALAMEDA COUNTY PUB. HEALTH DEPT., <https://acphd.org/communicable-disease/> [<https://perma.cc/A3RF-694N>] (last visited Apr. 5, 2021).

<sup>85</sup> Based on a Westlaw search of “communicable disease” within the filter of “United States Supreme Court” cases (Feb. 21, 2021), which yielded 30 total hits. See, e.g., *Mo., Kan. & Tex. Ry. Co. v. Haber*, 169 U.S. 613, 619, 621 (1898) (concerning the passage of the Animal Industry Act, adopted in part to help fight against the spread of communicable diseases amongst livestock). The results on Lexis were even smaller—yielding only 19 results. See, e.g., *Reid v. Colorado*, 187 U.S. 137, 143–46 (1902) (discussing the role of the Commissioner of Agriculture in passing rules and regulations regarding the safe transportation of livestock).

<sup>86</sup> 197 U.S. 11 (1905). *But see* *United States v. Comstock*, 560 U.S. 126, 142 (2010) (discussing the government’s role when a prisoner contracts a communicable disease).

In response to a smallpox epidemic in the Northeast, Massachusetts adopted a law that granted city boards of health the authority to require vaccination when “necessary for the public health or safety.”<sup>87</sup> The City of Cambridge issued an order requiring the adult population to be vaccinated for smallpox.<sup>88</sup> Violations of the law were punished by a five dollar fine.<sup>89</sup> Reverend Henning Jacobson refused the vaccination.<sup>90</sup> He expressed concerns over the vaccination’s safety and claimed that he previously had experienced adverse reactions to vaccinations.<sup>91</sup> He was convicted of violating this law and fined \$5.<sup>92</sup>

The Supreme Court, in a 7-2 decision, ruled against Jacobson. The Court focused on his claim that government-mandated vaccination was “inconsistent with the liberty which the Constitution of the United States secures to every person against deprivation by the State.”<sup>93</sup> Jacobson argued that he should be able to make the decisions concerning his health and that compulsory vaccination was a deprivation of liberty in violation of the due process clause.<sup>94</sup>

The Court spoke broadly of the police powers of the state to take actions to protect public health.<sup>95</sup> The Court stressed that liberty under the Constitution is not absolute and said that “all rights are subject to such reasonable conditions . . . essential to the safety, health, peace, good order, and morals of the community.”<sup>96</sup> The Court emphasized, “[e]ven liberty itself, the greatest of all rights, is not unrestricted license to act according to one’s own will.”<sup>97</sup>

The Court expansively described the government’s power. This included state power to stop the spread of a communicable disease. The Court explained, “[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”<sup>98</sup> The Court then articulated the approach that courts should use in evaluating the constitu-

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<sup>87</sup> *Jacobson*, 197 U.S. at 12.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 13.

<sup>91</sup> *Id.* at 36.

<sup>92</sup> *Id.* at 14.

<sup>93</sup> *Id.* at 24.

<sup>94</sup> *Id.* at 26.

<sup>95</sup> *Id.* at 25.

<sup>96</sup> *Id.* at 26-27.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 27.

tionality of a government action to stop the spread of a communicable disease:

[I]t might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all, might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.<sup>99</sup>

Even granted such broad authority, the Court acknowledged the possibility of courts needing to strike down government actions. For example, invasive government actions and grabs of power purporting to fulfill a public health need, but that do not relate to protecting the public's health, should not be upheld. According to the Court,

[I]f 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, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.<sup>100</sup>

From the perspective of today, it is striking how much *Jacobson* used the language of rational basis review, although that as a formal test was not formulated until much later by the Supreme Court. The Court spoke of government actions being invalidated if they were "arbitrary" and "unreasonable."<sup>101</sup> It said actions should be struck down only if they lack a "real or substantial" relation to public health or "beyond all question, a plain, palpable invasion of rights."<sup>102</sup> This is a tremendously deferential standard.<sup>103</sup>

Less than two decades after the Court's decision in *Jacobson*, the Court reaffirmed itself in *Zucht v. King*.<sup>104</sup> Rosalyn Zucht, a student in San Antonio, Texas, was barred from attending school because of not having been vaccinated as re-

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<sup>99</sup> *Id.* at 28.

<sup>100</sup> *Id.* at 31.

<sup>101</sup> *See id.* at 16, 21, 26, 28.

<sup>102</sup> *Id.* at 31.

<sup>103</sup> *See* Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 296 (2007) (recognizing "*Jacobson* is striking and important" because of its deference to the legislature's discretion when protecting the public welfare).

<sup>104</sup> 260 U.S. 174, 176 (1922).

quired by state law.<sup>105</sup> The Supreme Court reaffirmed *Jacobson* and ruled against Zucht.

Justice Louis Brandeis wrote the opinion for the Court and said:

Long before this suit was instituted, *Jacobson v. Massachusetts* had settled that it is within the police power of a State to provide for compulsory vaccination. That case and others had also settled that a State may, consistently with the Federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative. And still others had settled that the municipality may vest in its officials broad discretion in matters affecting the application and enforcement of a health law.<sup>106</sup>

The Court ruled in favor of the government and said that “these ordinances confer not arbitrary power, but only that broad discretion required for the protection of the public health.”<sup>107</sup> Once more the language of the Court was much like what today would be called rational basis review.

#### A. The Current Reliance on *Jacobson v. Massachusetts*

Because there is so little precedent concerning the government’s power to stop the spread of communicable disease, it is not surprising that courts have relied on *Jacobson v. Massachusetts* in evaluating government actions to stop the spread of COVID-19. Less explicable, as we argue below, is why the courts feel the need to have a special legal standard for a pandemic rather than apply whatever test is used for the particular right involved.

In *South Bay United Pentecostal Church v. Newsom*, the Supreme Court considered a challenge by a church to restrictions on assembly deemed necessary to prevent the spread of coronavirus.<sup>108</sup> The church argued that California Governor Gavin Newsom’s restrictions infringed on the free exercise of religion.<sup>109</sup> The district court denied the church a temporary restraining order on California’s restrictions and the United States Court of Appeals for the Ninth Circuit affirmed.<sup>110</sup> The

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<sup>105</sup> *Id.* at 175.

<sup>106</sup> *Id.* at 176 (citations omitted).

<sup>107</sup> *Id.* at 177.

<sup>108</sup> See 140 S. Ct. 1613, 1613–14 (2020).

<sup>109</sup> *Id.* at 1614 (Kavanaugh, J., dissenting).

<sup>110</sup> See *S. Bay United Pentecostal Church v. Newsom*, No. 20-cv-865-BAS-AHG, 2020 WL 2529620, at \*1 (S.D. Cal. May 18, 2020); *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 939–40 (9th Cir. 2020).

church asked the Supreme Court to enjoin enforcement of California's Executive Order.

The Court, in a 5-4 decision, denied this relief.<sup>111</sup> The justices split along ideological lines. Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan were the majority. There was no opinion for the Court. The matter was not argued in the Court.<sup>112</sup> Chief Justice Roberts wrote an opinion "concurring in denial of application for injunctive relief."<sup>113</sup> Chief Justice Roberts relied on *Jacobson v. Massachusetts* and expressed the need for great deference to government officials in acting to stop the spread of a communicable disease:

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." When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." 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.<sup>114</sup>

This language is likely to be enormously important for lower courts when they consider challenges to government actions taken to limit the transmission of COVID-19. In fact, many lower courts have already relied on *Jacobson* and its tremendous deference to the government in evaluating measures taken to stop the spread of COVID-19.<sup>115</sup>

In *In re Abbott*, the United States Court of Appeals for the Fifth Circuit reversed the lower court's preliminary injunction

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<sup>111</sup> *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613.

<sup>112</sup> See *South Bay United Pentecostal Church v. Newsom*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/south-bay-united-pentecostal-church-v-newsom/> [<https://perma.cc/JY9W-F3HM>] (last visited Mar. 25, 2021). As discussed below, the Supreme Court subsequently shifted away from this approach and provided greater protection for religious worship. See *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68–69 (2020) (granting preliminary injunction to stop enforcement of orders restricting size of attendance for religious worship); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716 (2021) (granting preliminary injunction against Governor's order preventing indoor religious worship but denying injunction against order limiting capacity at religious services or preventing singing and chanting).

<sup>113</sup> *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613.

<sup>114</sup> *Id.* at 1613–14 (citations omitted).

<sup>115</sup> See *infra* note 126.

enjoining a Texas action to restrict abortions as part of the effort to stop the spread of COVID-19.<sup>116</sup> The Court expressly invoked *Jacobson* as articulating “the framework governing emergency public health measures” and said that “[u]nder the pressure of great dangers,’ constitutional rights may be reasonably restricted ‘as the safety of the general public may demand.’”<sup>117</sup>

The Fifth Circuit reversed the district court for not following *Jacobson* and quoted *Jacobson* as establishing that “‘it is no part of the function of a court’ to decide which measures are ‘likely to be the most effective for the protection of the public against disease.’”<sup>118</sup> The Court said that “*Jacobson* remains good law.”<sup>119</sup> Relying on *Jacobson*, the Fifth Circuit Court of Appeals said:

The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some “real or substantial relation” to the public health crisis and are not “beyond all question, a plain, palpable invasion of rights secured by the fundamental law.” Courts may ask whether the state’s emergency measures lack basic exceptions for “extreme cases,” and whether the measures are pretextual—that is, arbitrary or oppressive. At the same time, however, courts may not second-guess the wisdom or efficacy of the measures.<sup>120</sup>

This, of course, is very much the language of rational basis review and very deferential rational basis review at that.<sup>121</sup>

Similarly, in *League of Independent Fitness Facilities and Trainers, Inc. v. Whitmer*, the Sixth Circuit rejected a challenge to government closure orders, expressly using rational basis review.<sup>122</sup> The court declared:

All agree that the police power retained by the states empowers state officials to address pandemics such as COVID-19 largely without interference from the courts. This century-old historical principle has been reaffirmed just this year by a chorus of judicial voices, including our own. The police

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<sup>116</sup> See 954 F.3d 772, 772, 796 (5th Cir. 2020), discussed *infra* at text accompanying notes 190–195.

<sup>117</sup> *Id.* at 778 (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905)).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 785.

<sup>120</sup> *Id.* at 784–85 (citations omitted).

<sup>121</sup> Compare *id.* (outlining the scope of deference in the face of a “society threatening epidemic”) with *supra* note 21 (cases giving definition of “rational basis review”).

<sup>122</sup> See 814 F. App’x 125, 127–28 (6th Cir. 2020).

power, however, is not absolute. “While the law may take periodic naps during a pandemic, we will not let it sleep through one.” The parties agree that rational basis review is the hurdle the Governor’s Order must clear. Utilizing that legal framework, we presume the Order is constitutional, making it incumbent upon Plaintiffs to negate “every conceivable basis which might support” it.<sup>123</sup>

In *Swain v. Junior*, the Eleventh Circuit refused to provide prisoners relief in light of the danger of the spread of COVID-19.<sup>124</sup> Once more, the Court invoked *Jacobson* to justify great deference to the government:

[W]hile it doubtlessly advances the public interest to stem the spread of COVID-19, at Metro West and everywhere, the same public interest just as doubtlessly favors a proper allocation of public-health resources—an allocation that politically accountable (and often local) officials are best equipped to make. . . . (“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.’”)<sup>125</sup>

Many other courts as well have relied on *Jacobson* and upheld government restrictions using rational basis review.<sup>126</sup> It is clear in the first months of litigation dealing with issues arising from COVID-19 that courts view *Jacobson* as the controlling test in all areas and see it as expressing great deference to the government while only requiring that the government meet a rational basis test.

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<sup>123</sup> *Id.* (citations omitted).

<sup>124</sup> *See* 961 F.3d 1276, 1293–94 (11th Cir. 2020).

<sup>125</sup> *Id.* (citations omitted).

<sup>126</sup> *See, e.g.*, *Elim Romanian Pentecostal Church v. Pritzker*, No. 20-1811, 2020 WL 2517093, at \*1 (7th Cir. May 16, 2020) (upholding an Illinois executive order restricting gatherings during COVID-19); *In re Rutledge*, 956 F.3d 1018, 1031–32 (8th Cir. 2020) (upholding an Arkansas regulation restricting non-medically necessary surgeries because it did not meet the *Jacobson* “beyond all question” standard); *In re Abbott*, 956 F.3d 696, 704–05 (5th Cir. 2020) (upholding a Texas executive order restricting non-medically necessary surgeries because it not meet the *Jacobson* “beyond all question” standard); *Geller v. de Blasio*, — F. Supp. 3d —, —, 2020 WL 2520711, at \*3, 5 (S.D.N.Y. May 18, 2020) (upholding a New York City executive order restricting non-essential gatherings using the *Jacobson* test); *McGhee v. City of Flagstaff*, No. CV-20-08081-PCT-GMS, 2020 WL 2308479, at \*3 (D. Ariz. May 8, 2020) (upholding Arizona executive orders restricting businesses and individuals because “the Court simply does not possess the authority to second-guess Governor Ducey’s decision to declare a state of emergency, . . . where there was some evidence, upon which he relied, to support the existence of a public health emergency.”); *Givens v. Newsom*, 459 F. Supp. 3d 1302, 1310–11 (E.D. Cal. 2020) (upholding a California stay at home order using the *Jacobson* test).

## B. The Misplaced Reliance on *Jacobson v. Massachusetts*

*Jacobson* was decided in 1905, long before strict scrutiny was developed for fundamental rights and for race discrimination under equal protection, and long before the levels of scrutiny were articulated.<sup>127</sup> The levels of scrutiny determine how constitutional balancing is to be done. When there is a restriction placed on a fundamental right or a regulation based upon racial discrimination, the weights on the scale are arrayed against the government and it has a heavy burden to uphold to justify its actions.<sup>128</sup> For most economic and social government regulation, there is deference to the government's decisions, and only rational basis review is used.<sup>129</sup>

The cases that rely on *Jacobson* ignore this fundamental development in constitutional law and uncritically apply rational basis review and great judicial deference even when there are claims of infringement of fundamental rights.<sup>130</sup> No court has explained why the *Jacobson* approach is more preferable than applying a contemporary approach to rights protected by the Constitution. We cannot think of another situation in which the social context, rather than the right involved, determines the level of scrutiny and, most important, does so for all the different areas of constitutional law.

For decades, the Supreme Court has recognized that rational basis review is inadequate when there are claims that the

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<sup>127</sup> For an excellent discussion of the development of strict scrutiny as a legal test, see Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1275–78, 1281–84 (2007); Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 359–60 (2006). The classic article describing the emergence of the levels of scrutiny was Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

<sup>128</sup> See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1977) (establishing that “[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (establishing that restriction of a fundamental right “must be judged by the stricter standard of whether it promotes a *compelling* state interest.”).

<sup>129</sup> Many trace this to the famous footnote four in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

<sup>130</sup> See, e.g., *League of Indep. Fitness Facilities & Trainers v. Whitmer*, 814 F. App'x 125, 126–27 (6th Cir. 2020) (applying rational basis review despite the Plaintiffs' challenge that the executive order “violated . . . the Fourteenth Amendment's guarantee of equal protection of the laws”); *McGhee*, 2020 WL 2308479, at \*4 (applying rational basis review despite the Plaintiff's challenge that the executive order “deprives him of his fundamental right to travel and movement without notice or a hearing as required by due process.”).

government is infringing on a fundamental right.<sup>131</sup> Abandoning heightened scrutiny runs the grave risk of the type of undue judicial deference that has occurred throughout American history and that was described in Part I of this Article.<sup>132</sup> Heightened judicial scrutiny is meant to prevent unjustified intrusions on freedom and discrimination.<sup>133</sup> The government's burden to justify an infringement of a fundamental right should not change in an emergency, even though the emergency can present the compelling interest sufficient to uphold the government's action.

Nor is there a need to change the level of scrutiny to uphold the actions that the government needs to take to stop the spread of COVID-19. Preventing the transmission of a communicable disease is surely a compelling government interest. When there is an infringement of a fundamental right, the government needs to demonstrate—and it should have to show—that its actions are narrowly tailored and necessary to accomplish that interest.<sup>134</sup> And the government can do this when the restrictions are warranted. It is also important to remember that often the claims presented will not involve fundamental rights and only lower levels of scrutiny then need be met. In the next part of this Article, we consider several examples of government restrictions that have been imposed and analyze how they should be treated under traditional constitutional law principles.

Simply stated, it is a mistake to use *Jacobson* in analyzing government restrictions that are imposed to deal with COVID-19, or for that matter, any crisis. An overarching test for all areas of constitutional law, and one that defers to the government, is a serious mistake. Courts should apply the traditional legal test or level of scrutiny used for the particular right in question. Of course, it is quite possible that the Court will come to the same result using that test. But applying heightened scrutiny at least offers the hope that unjustified restrictions on freedom will not be upheld and that the history described in Part I of this Article will not repeat itself.

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<sup>131</sup> See Fallon, *supra* note 127, at 1281–83 (discussing various cases that held that the rational basis test was inappropriate).

<sup>132</sup> See *supra* Part I.

<sup>133</sup> See Fallon, *supra* note 127, at 1268–69.

<sup>134</sup> *Id.* at 1283.

## III

## ANALYZING RIGHTS IN A PANDEMIC

What would it mean to analyze challenges to government restrictions under the usual legal tests rather than under the rational basis approach of *Jacobson v. Massachusetts*? That is what we address in this part of the Article. We believe that the government can still take the needed actions to stop the spread of a communicable disease while the courts use contemporary legal tests to police unjustified restrictions and avoid dangerous precedents for the future. We consider four examples: speech, religion, abortion, and business closure orders.

## A. Speech

Many state and local governments have imposed limits on gatherings as part of the effort to stop the spread of COVID-19.<sup>135</sup> Obviously, people assembling—whatever the purpose may be—risks transmitting a communicable disease. Several challenges have been brought with courts consistently ruling in favor of the government. For example, in *Givens v. Newsom*, the plaintiffs challenged California Governor Gavin Newsom's stay at home order as impermissibly infringing upon their constitutional rights to speak, assemble, and petition the government.<sup>136</sup> The federal district court expressly applied *Jacobson* and rejected the challenge: “[The *Jacobson*] standard has endured. Courts continue to apply it when reviewing emergency public health measures enacted pursuant to emergency police powers.”<sup>137</sup> The Court said that restricting public gatherings was justified to stop the spread of coronavirus.<sup>138</sup>

Similarly, *Murphy v. Lamont* involved a challenge to restrictions imposed by the Connecticut Governor as impermissibly interfering with freedom of speech, association, and assembly.<sup>139</sup> The district court rejected the First Amendment claims and upheld the restrictions.<sup>140</sup> Likewise, in *McCarthy v. Cuomo*, plaintiffs challenged the New York Governor's COVID-19 restrictions as violating the First Amendment (among many

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<sup>135</sup> 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> [<https://perma.cc/4VZL-5AN7>] (last visited Oct. 5, 2020).

<sup>136</sup> 459 F. Supp. 3d 1302, 1315 (E.D. Cal. 2020).

<sup>137</sup> *Id.* at 1310–11.

<sup>138</sup> *Id.* at 1311.

<sup>139</sup> No. 3:20-CV-0694 (JCH), 2020 WL 4435167, at \*1, \*5 (D. Conn. Aug. 3, 2020).

<sup>140</sup> *Id.* at \*12–14, \*16.

other claims).<sup>141</sup> The court rejected the challenge and observed: “[C]ourts across the country . . . have overwhelmingly upheld COVID-related state and local restrictions on gatherings over the last few months, citing *Jacobson*.”<sup>142</sup>

We do not disagree with the results in these cases; stopping people from gathering, no matter why they are coming together, is crucial to limiting the transmission of COVID-19. But the application of *Jacobson* is unnecessary to achieve this. The law under the First Amendment is well established that content-neutral regulation of speech only has to meet intermediate scrutiny, while content-based restrictions must meet strict scrutiny. In *Turner Broadcasting System v. Federal Communications Commission*, the Court expressly said that the general rule is that content-based restrictions on speech must meet strict scrutiny, while content-neutral regulation only need meet intermediate scrutiny.<sup>143</sup> The Court said it uses “the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”<sup>144</sup> But, “[i]n contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny.”<sup>145</sup>

A law regulating speech is content-neutral if it applies to all speech regardless of the message.<sup>146</sup> For example, a law prohibiting the posting of all signs on public utility poles was deemed content-neutral because it applied to every sign regardless of its subject matter or viewpoint.<sup>147</sup> Indeed, in *Turner Broadcasting System*, the Supreme Court found that a federal law requiring cable companies to carry local broadcast stations was content-neutral because they were required to include all stations, whatever their programming.<sup>148</sup>

Laws that prohibit people from assembling, such as the restrictions on gathering in groups of more than 10 people, are

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<sup>141</sup> No. 20-CV-2124 (ARR), 2020 WL 3286530, at \*3–4 (E.D.N.Y. June 18, 2020).

<sup>142</sup> *Id.* at \*3 (citations omitted).

<sup>143</sup> *See* 512 U.S. 622, 642 (1994).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *See id.* at 643.

<sup>147</sup> *See* *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 789, 804 (1984).

<sup>148</sup> 512 U.S. 622, 647 (1994). In *Turner Broadcasting*, the Supreme Court remanded the case for the application of intermediate scrutiny. *Id.* at 662, 668. After a remand, the Supreme Court held that the regulation met intermediate scrutiny because of the government’s important interest in protecting the over-the-air, free broadcast media. 520 U.S. 180, 189–90, 196 (1997).

content-neutral. They apply to all assemblies, including for speech, regardless of their subject matter or their viewpoint. Therefore, intermediate scrutiny is the appropriate test—not strict scrutiny and not the rational basis approach of *Jacobson*. Intermediate scrutiny is met because stopping the transmission of COVID-19 is certainly an important interest and keeping people from gathering is substantially related to achieving that goal.<sup>149</sup>

## B. Religion

One of the most frequent grounds for challenging government COVID-19 restrictions has been based on the free exercise of religion.<sup>150</sup> Four times, the Supreme Court has considered religious challenges to restrictions on assembly. In the first two instances, the Court, 5-4, sided with the government.<sup>151</sup> Most, though not all, of the lower court cases likewise have sided with the government and ruled against the free exercise claims.<sup>152</sup> As Chief Justice Roberts did in *South Bay United Pentecostal Church*, the lower courts generally have relied on *Jacobson*.<sup>153</sup>

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<sup>149</sup> In fact, this is the approach the court used in *McCarthy v. Cuomo*, No. 20-CV-2124 (ARR), 2020 WL 3286530, at \*4 (E.D.N.Y. June 18, 2020).

<sup>150</sup> See, e.g., *Maryville Baptist Church v. Beshear*, 957 F.3d 610, 611–12 (6th Cir. 2020) (plaintiffs challenged COVID-19 orders restricting mass gatherings “including, but not limited to, community, civic, public, leisure, faith-based, or sporting events” on religious freedom grounds); *Antietam Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214, 226 (D. Md. 2020) (plaintiffs claimed a “violation of the right to free exercise of religion”); see also *Calvary Chapel of Bangor v. Mills*, 459 F. Supp. 3d 273, 282 (D. Me. 2020) (claiming a Free Exercise Clause violation); *Cross Culture Christian Ctr. v. Newsom*, 445 F. Supp. 3d 758, 766 (E.D. Cal. 2020); *Cassell v. Snyders*, 458 F. Supp. 3d 981, 993 (N.D. Ill. 2020); *Gish v. Newsom*, No. EDCV 20-755 JGB (KKx), 2020 U.S. Dist. LEXIS 74741, at \*4 (C.D. Cal. Apr. 23, 2020); *Legacy Church, Inc. v. Kunkel*, 455 F. Supp. 3d 1100, 1117 (D.N.M. 2020) (plaintiffs complained that the order prevented them “from physically gathering in its house of worship”); *On Fire Christian Ctr. v. Fischer*, 453 F. Supp. 3d 901, 910 (W.D. Ky. 2020) (plaintiffs’ complaint was a violation of the Free Exercise Clause).

<sup>151</sup> *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2603, 2609 (2020); *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020).

<sup>152</sup> See, e.g., *Beshear*, 957 F.3d at 616 (ruling in favor of the petitioner to enjoin enforcement of government restrictions on “drive-in” religious services); *Fischer*, 453 F. Supp. 3d at 910 (finding that government orders violated the Free Exercise Clause).

<sup>153</sup> See, e.g., *Antietam Battlefield KOA*, 461 F. Supp. 3d at 228 (“*Jacobson* provides the proper scope of review.”); see also *Lighthouse Fellowship Church v. Northam*, No. 2:20-CV204 2021 WL 302446, at \*10 (E.D. Va. Jan. 27, 2021) (granting Governor’s motion to dismiss); *Herndon v. Little*, No. 1:20-CV-00205-DCN, 2021 WL 66657, at \*1, \*7 (D. Idaho Jan. 7, 2021) (upholding restrictions on religious worship).

Again, we agree with the result in these cases. There are now known to be many instances of COVID-19 spread during religious services.<sup>154</sup> People assembling for religious worship can spread the disease like any other gathering—maybe even more so because of the singing and vocal participation.<sup>155</sup> Free exercise of religion, of course, is not absolute.<sup>156</sup>

But rather than use rational basis review and *Jacobson*, the preferable approach would have been to apply the usual test for the Free Exercise Clause. For example, in 1990, in *Employment Division v. Smith*,<sup>157</sup> the Court held that the Free Exercise Clause cannot be used to challenge a neutral law of general applicability.<sup>158</sup> Justice Scalia, writing for the majority, rejected the claim that free exercise of religion required an exemption from an otherwise valid law.<sup>159</sup> Scalia said that “[w]e have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.”<sup>160</sup> Scalia thus declared “that the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”<sup>161</sup>

In other words, no matter how much a law burdens religious practices, it is constitutional under *Smith* so long as it does not single out religious behavior for punishment and was not motivated by a desire to interfere with religion.<sup>162</sup> For example, in *Smith*, the Court said that a law prohibiting con-

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<sup>154</sup> See Kate Conger, Jack Healy & Lucy Tompkins, *Churches Were Eager to Reopen. Now they Are Confronting Coronavirus Cases*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/07/08/us/coronavirus-churches-outbreaks.html> [<https://perma.cc/G64L-RY68>] (last updated July 10, 2020).

<sup>155</sup> See Anastasia Tsioulcas, *Is Singing Together Safe in the Era of Coronavirus? Not Really, Experts Say*, NPR (Aug. 10, 2020, 5:00 AM) <https://www.npr.org/2020/08/10/888945949/is-singing-together-safe-in-the-era-of-coronavirus-not-really-experts-say> [<https://perma.cc/3L45-MTH4>].

<sup>156</sup> See *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940).

<sup>157</sup> 494 U.S. 872 (1990).

<sup>158</sup> *Id.* at 879.

<sup>159</sup> *Id.* at 878-79.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 879 (citation omitted).

<sup>162</sup> See *id.* at 877-79, 882. Under the Religious Freedom Restoration Act, this would be different, and strict scrutiny would need to be met if it is a challenge to the federal government. See *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 719 n.30 (2014).

sumption of peyote—a hallucinogenic substance—did not violate the Free Exercise Clause even though such use was required by some Native American religions.<sup>163</sup> The Court explained that the state law prohibiting consumption of peyote applied to everyone in the state and did not punish conduct solely because it was religiously motivated.<sup>164</sup>

Under this approach, the government may regulate religious observances just like it regulates any other gatherings.<sup>165</sup> There is no First Amendment Free Exercise Clause right to an exemption from closure orders, limits on gatherings, or other restrictions imposed to stop the spread of COVID-19.

But two subsequent Supreme Court decisions have come to opposite conclusions. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court, 5-4, granted a preliminary injunction against gatherings for religious worship.<sup>166</sup> New York Governor Andrew Cuomo created a detailed approach to dealing with the COVID-19 pandemic, including dividing the state into zones depending on the prevalence of the disease. These regulations specified what could be opened and at what occupancy, including for religious worship. In “red zones” attendance at worship services is limited to 10 people, while in “orange zones” attendance is limited to 25 people.<sup>167</sup>

Lawsuits were filed by Roman Catholic Diocese of Brooklyn and by Agudath Israel of America challenging these restrictions.<sup>168</sup> At the time the lawsuits were filed, these places of worship were in red or orange zones. But by the time the matter came to the Supreme Court, they were in “yellow zones,” where attendance is limited to 50% of the building’s maximum capacity.<sup>169</sup> This is at least as good as the plaintiffs were requesting from the courts.

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<sup>163</sup> See *Smith*, 494 U.S. at 890.

<sup>164</sup> See *id.* at 879, 882. For a defense of the *Employment Division v. Smith* approach to the free exercise clause see, HOWARD GILLMAN & ERWIN CHERMERINSKY, *THE RELIGION CLAUSES: THE CASE FOR SEPARATING CHURCH AND STATE* 127–38 (2020) (agreeing with the *Smith* court that neutral laws may restrict religious autonomy).

<sup>165</sup> In both *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2607 (2020) (Alito, J., dissenting), and *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (Kavanaugh, J., dissenting), the dissents argued that religious organizations were being treated differently from other groups. Whether religious groups were treated differently from comparable secular groups is a factual question and the lower courts found no basis for the claims in those cases.

<sup>166</sup> 141 S. Ct. 63, 65–66 (2020).

<sup>167</sup> *Id.* at 66.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 71.

The lower federal courts upheld Governor Cuomo's orders as applied to these religious institutions. But the Supreme Court, in a 5-4 decision, reversed the lower courts and ruled in favor of the challengers.<sup>170</sup> There was a *per curiam* opinion for a majority comprised of Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett; Gorsuch and Kavanaugh wrote separate concurring opinions. Chief Justice Roberts and Justices Sotomayor and Breyer wrote dissents. Justice Kagan joined both the Sotomayor and the Breyer dissents.<sup>171</sup>

The *per curiam* opinion stressed that in red and orange zones, religious institutions are treated worse than secular businesses:

In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as "essential" may admit as many people as they wish. And the list of "essential" businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities.<sup>172</sup>

The Court said that this discrimination against religion meant that strict scrutiny was required: "Because the challenged restrictions are not 'neutral' and of 'general applicability,' they must satisfy 'strict scrutiny,' and this means that they must be 'narrowly tailored' to serve a 'compelling' state interest."<sup>173</sup>

The *per curiam* opinion also said that there was no evidence linking spread of the disease to these places of worship and there were less restrictive alternatives to limit the transmission of COVID-19.<sup>174</sup> The Court explained that the case was not moot, even though the religious institutions were now in the "yellow zone," because they could be reclassified at any time.<sup>175</sup>

The Court concluded: "But even in a pandemic, the Constitution cannot be put away and forgotten."<sup>176</sup> This was the theme of Justice Gorsuch's concurring opinion, which was

<sup>170</sup> See *Roman Catholic Diocese of Brooklyn, N.Y. v. Cuomo*, No. 20-CV-4844 (NGG) (CLP), 2020 WL 6120167 (E.D.N.Y. Oct. 16, 2020), *aff'd* 90 F.3d 222 (2nd Cir. 2020).

<sup>171</sup> *Roman Catholic Diocese of Brooklyn, N.Y.*, 141 S. Ct. at 63 (citation omitted).

<sup>172</sup> *Id.* at 66.

<sup>173</sup> *Id.* at 67 (citation omitted).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 68?69.

<sup>176</sup> *Id.* at 68.

much more pointed in criticizing state governors who had imposed limits on religious worship. He wrote: “Government is not free to disregard the First Amendment in times of crisis. . . . Yet recently, during the COVID pandemic, certain States seem to have ignored these long-settled principles.”<sup>177</sup> He criticized lower courts and earlier Supreme Court opinions that relied on the Court’s 1905 decision in *Jacobson v. Massachusetts* and saw it as allowing reasonable government restrictions to stop the spread of a communicable disease.

Justice Kavanaugh also wrote a concurring opinion. He, too, stressed the need to protect constitutional rights in a pandemic: “But judicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised.”<sup>178</sup>

There were three dissenting opinions on behalf of the four dissenting justices. Chief Justice Roberts emphasized that the case was moot because the challengers no longer were in the red or orange zones where there were significant restrictions.<sup>179</sup> He said that if they were reclassified into those zones, the Court could take the matter up again quickly.<sup>180</sup> Justice Breyer, too, argued that an injunction was unnecessary at this time and pointed to the toll of COVID-19 and the current significant increase in cases.<sup>181</sup> Justice Sotomayor’s dissent disputed that religious entities were treated differently from similar secular ones and said that, in fact, “New York treats houses of worship far more favorably than their secular comparators.”<sup>182</sup>

What explains the Court’s shift from the earlier two rulings to this one? It was not about the difference in facts or law, but instead a reflection of the change in the composition of the Supreme Court. The first two cases, in May and July 2020, were 5-4 decisions with Justice Ginsburg in the majority. But *Roman Catholic Diocese of Brooklyn* was 5-4 the other way, with Justice Barrett joining the dissenters from the earlier cases to create the majority.

Finally, in *South Bay United Pentecostal Church v. Newsom*, on February 5, 2021, the Court granted a preliminary

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

178 *Id.* at 74 (Kavanaugh, J., concurring).

179 *Id.* at 75 (Roberts, C. J., dissenting).

180 *Id.*

181 *Id.* at 78 (Breyer, J., dissenting).

182 *Id.* at 80 (Sotomayor, J., dissenting).

injunction against Governor's order preventing indoor religious worship but denied an injunction against order limiting capacity at religious services or preventing singing and chanting.<sup>183</sup> The Court was quite fractured but was 6-3 in issuing the injunction, with Justices Breyer, Sotomayor, and Kagan dissenting.<sup>184</sup> We agree with the Court's approach in these latter cases applying the established test for the Free Exercise Clause rather than *Jacobson* but disagree with the Court's conclusion. Contrary to the Court's approach in *Roman Catholic Diocese of Brooklyn*, we do not see the government as treating religious institutions differently or worse than comparable secular ones. Equality requires that likes be treated alike and religious institutions under the Governor's order were treated the same as similar entities where there was a significant risk of the spread of COVID-19. We agree here with Justice Sotomayor:

*South Bay* and *Calvary Chapel* provided a clear and workable rule to state officials seeking to control the spread of COVID-19: They may restrict attendance at houses of worship so long as comparable secular institutions face restrictions that are at least equally as strict. New York's safety measures fall comfortably within those bounds. Like the States in *South Bay* and *Calvary Chapel*, New York applies "[s]imilar or more severe restrictions . . . to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time." Likewise, New York "treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." That should be enough to decide this case.<sup>185</sup>

### C. Abortion Restrictions

Abortion and reproductive health are other areas for which we have concern. For example, during COVID-19, the Supreme Court granted the Trump Administration's "request to reinstate restrictions for patients seeking to obtain a drug used to terminate early pregnancies."<sup>186</sup> In *Food and Drug Adminis-*

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<sup>183</sup> 141 S. Ct. 716, 716-17 (2021).

<sup>184</sup> *Id.*

<sup>185</sup> *Roman Catholic Diocese of Brooklyn, N.Y.*, 141 S. Ct. at 79 (Sotomayor, J., dissenting) (citation omitted).

<sup>186</sup> Jaclyn Diaz, *Supreme Court Oks White House Request to Limit Abortion Pill Access During Pandemic*, NPR (Jan. 13, 2021, 2:56 AM ET), <https://www.npr.org/2021/01/13/956279232/supreme-court-oks-white-house-re->

tration v. American College of Obstetricians and Gynecologists,<sup>187</sup> the Supreme Court reinstated a requirement that patients prescribed mifepristone (to terminate a pregnancy) pick the drug up in person, possibly endangering their health and lives as well as medical professionals and essential care workers.

Notably, this was the only drug out of more than 22,000 that the Food and Drug Administration (FDA) imposed this requirement. In her dissent, Justice Sotomayor wrote that the government's requirements "impose[d] an unnecessary, irrational, and unjustifiable undue burden on women seeking to exercise their right to choose."<sup>188</sup> Pointing to the government's lack of empathy and care, she further explained, "Women must still go to a clinic in person to pick up their mifepristone prescriptions, even though physicians may provide all counseling virtually, women may ingest the drug unsupervised at home, and any complications will occur long after the patient has left the clinic."<sup>189</sup>

Several states have used COVID-19 as the basis for imposing restrictions on abortion. For example, Texas imposed a ban on elective surgical procedures and put abortions in this category.<sup>190</sup> Likewise, the Governor of Tennessee imposed a similar ban with no exception for abortions.<sup>191</sup> Arkansas and Alabama, too, banned elective surgical procedures, including abortions.<sup>192</sup>

The Circuits have split on the question of whether such restrictions are allowed. Both the Fifth Circuit and the Eighth Circuit upheld the limits on abortion,<sup>193</sup> while the Sixth and Eleventh Circuits invalidated them.<sup>194</sup> The Fifth and the Eighth Circuits explicitly invoked *Jacobson*—referring to it as the controlling test. The Fifth Circuit declared—and the Eighth Circuit then quoted the Fifth Circuit's opinion: "[T]he effect on abortion arising from a state's emergency response to a public health crisis must be analyzed under the standards in *Jacobson*

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quest-to-limit-abortion-pill-access-during-pande [https://perma.cc/PQ62-6DTK].

<sup>187</sup> 592 U.S. \_\_ (2021).

<sup>188</sup> *Id.* (Sotomayor, J., dissenting).

<sup>189</sup> *Id.*

<sup>190</sup> *In re Abbott*, 954 F.3d 772, 777–78 (5th Cir. 2020).

<sup>191</sup> *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 918 (6th Cir. 2020).

<sup>192</sup> *In re Rutledge*, 956 F.3d 1018, 1023 (8th Cir. 2020) (Arkansas); *Robinson v. Attorney Gen.*, 957 F.3d 1171, 1174 (11th Cir. 2020) (Alabama).

<sup>193</sup> *In re Abbott*, 954 F.3d at 777–79; *In re Rutledge*, 956 F.3d at 1032.

<sup>194</sup> *Adams*, 956 F.3d at 917; *Robinson*, 957 F.3d at 1174.

son.”<sup>195</sup> Both Circuits reversed district courts that enjoined restrictions on abortion.<sup>196</sup> Both professed the need for deference to the government’s choices in a pandemic.<sup>197</sup>

We firmly believe that this is the wrong analysis. To begin with, abortions are different from other medical procedures in that there is a constitutional right to have an abortion.<sup>198</sup> Also, delays in abortion are different from many other medical procedures. After a certain point in pregnancy, abortions become illegal and the later they are in pregnancy, the more complicated and dangerous they may become.<sup>199</sup> And, it is just irrational to use COVID-19 as a basis for restricting medically induced abortions.

From a constitutional law perspective, the Fifth and the Eighth Circuits are wrong because the test should be the “undue burden” analysis from *Planned Parenthood v. Casey*,<sup>200</sup> not rational basis review. Under *Casey*:

[T]he undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty. . . . A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.<sup>201</sup>

In *Whole Woman’s Health v. Hellerstedt*, the Court struck down a Texas law that would have closed most facilities in that state where abortions were performed and clarified the undue burden test.<sup>202</sup> The Court stressed that in deciding whether a law imposes an undue burden on abortion it is for the judiciary to balance the justifications for the restrictions against their

<sup>195</sup> *In re Rutledge*, 956 F.3d at 1028 (quoting *In re Abbott*, 954 F.3d at 786).

<sup>196</sup> *See In re Abbott*, 954 F.3d at 796; *In re Rutledge*, 956 F.3d at 1033.

<sup>197</sup> *See In re Abbott*, 954 F.3d at 795; *In re Rutledge*, 956 F.3d at 1031–32.

<sup>198</sup> *See Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016) (referencing a “woman’s right to decide to have an abortion”).

<sup>199</sup> As of September 2020, twenty states ban abortions at viability, four states ban abortions at 24 weeks, seventeen states ban abortions at 22 weeks, one state bans abortions at 20 weeks, and one state bans abortion in the third trimester. *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (Sept. 1, 2020), <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions#> [<https://perma.cc/5C3N-TP63>]; cf. Stephanie Watson, *What Are the Different Types of Abortion?*, HEALTHLINE (Dec. 6, 2018), <https://www.healthline.com/health/types-of-abortion> [<https://perma.cc/TX8V-VPJS>] (explaining which abortion procedures are used as the pregnancy progresses and the associated risks for the different procedures).

<sup>200</sup> *See* 505 U.S. 833, 876 (1992).

<sup>201</sup> *Id.* at 876–77.

<sup>202</sup> *See* 136 S. Ct. at 2309–10.

effects on the ability of women to have access to abortions.<sup>203</sup> Specifically, courts must balance the benefits in terms of women's health against the burden on access to abortion.<sup>204</sup> The Court found the Texas laws in question created an undue burden and undermined access to abortion.<sup>205</sup>

In 2020, the Court followed this decision in *June Medical Services v. Russo*, and struck down a Louisiana law that would have imposed a similar requirement on abortion, namely that a doctor have admitting privileges at a hospital within 30 miles of an abortion center in order to perform an abortion.<sup>206</sup> Justice Breyer wrote for the plurality and said that the inquiry is to “weigh[] the asserted benefits’ of the law ‘against the burdens’ it imposed on abortion access.”<sup>207</sup> Chief Justice Roberts concurred in the judgment and said that the Court must follow the precedent of *Whole Woman’s Health*, though he rejected the balancing test used in that case and by Justice Breyer; instead, he would just apply the undue burden test as articulated in *Casey*.<sup>208</sup>

The balancing test of *Whole Woman’s Health* has not been overruled by a majority of the Court and thus remains controlling.<sup>209</sup> But whether it is that test or the undue burden test of *Casey*, the restrictions on abortion that have been imposed should be analyzed under those tests and not under rational basis review. There is no benefit to women's health from delaying abortions and there are potentially great consequences.<sup>210</sup> And there is no doubt that the restrictions on abortion were imposed with the purpose of, and have the effect of, impeding access to abortion. It therefore is not surprising that the Sixth Circuit, which used the undue burden test to evaluate Tennessee's restriction on abortion as part of halting the spread of

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203 *Id.* at 2309–10.

204 *Id.* at 2309.

205 *See id.* at 2313.

206 *See June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2113 (2020).

207 *Id.* at 2120 (citing *Whole Women’s Health*, 136 S. Ct. at 2310).

208 *Id.* at 2139 (Roberts, C. J., concurring).

209 The Eighth Circuit says that the balancing test is no longer to be used because it was not followed by five justices in *June Medical Services*. *See Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020). The court said that Chief Justice Roberts' opinion was the narrowest ground that a majority agreed to and therefore was controlling. We disagree with that conclusion. Overruling a precedent—here, the test from *Whole Women’s Health*—should require a majority of the Court. One justice cannot do that. Also, the dissenters would have upheld the law so it is not clear why Chief Justice Roberts' opinion should be seen as the narrowest opinion.

210 *See Watson*, *supra* note 199.

COVID-19, affirmed a preliminary injunction blocking the abortion ban.<sup>211</sup>

#### D. Business Closure Orders

As part of trying to limit the spread of COVID-19, many states have adopted laws requiring the closure of non-essential businesses.<sup>212</sup> This imposes a great burden on businesses, and as a result, challenges have been brought. For example, in *SH3 Health Consulting, LLC v. Page*, the plaintiffs were two businesses that had effectively been shut down by government “stay at home” orders.<sup>213</sup> They sought a temporary restraining order on the ground that the orders violated their due process rights under the U.S. Constitution.<sup>214</sup> The court then used the *Jacobson* test and concluded that that the orders do not violate the Constitution.<sup>215</sup> The court said that they have a real and substantial relation to managing the public-health pandemic, and they are not “beyond all question, a plain, palpable invasion of rights secured by the fundamental law.”<sup>216</sup> Other courts have faced similar claims and come to the same conclusion.<sup>217</sup>

If businesses bring their challenges under due process, it is clear that rational basis review will be used, just as it is under *Jacobson*.

Since 1937, not one state or federal economic regulation has been found unconstitutional as infringing liberty of contract as protected by the due process clauses of the Fifth and Fourteenth Amendments. The Court has made it clear that economic regulations—laws regulating business and employment practices—will be upheld when challenged under the

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<sup>211</sup> See *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 930 (6th Cir. 2020).

<sup>212</sup> See *Coronavirus Restrictions and Mask Mandates for All 50 States*, *supra* note 135. There are separate legal issues in terms of the constitutionality and permissibility of quarantine and shelter in place orders. See Mark A. Rothstein, *From SARS to Ebola: Legal and Ethical Considerations for Modern Quarantine*, 12 IND. HEALTH L. REV. 227, 239–49 (2015) (highlighting various state policies related to the protection and safety during public health emergencies); Michael R. Ulrich & Wendy K. Mariner, *Quarantine and the Federal Role in Epidemics*, 71 SMU L. REV. 391, 399–412 (2018) (reviewing how states promulgate laws in times of public health emergencies in concert with federal regulations).

<sup>213</sup> See 459 F. Supp. 3d 1212, 1217 (E.D. Mo. 2020).

<sup>214</sup> See *id.* at 1217, 1225.

<sup>215</sup> See *id.* at 1222–24, 1227.

<sup>216</sup> *Id.* at 1222 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)).

<sup>217</sup> See, e.g., *Benner v. Wolf*, 461 F. Supp. 3d 154, 168 (M.D. Pa. 2020) (“Governor took swift, reasonable action to prevent more widespread destruction . . . [i]t is not the place of this Court to question the reasonable motives of elected officials.”).

due process clause so long as they are rationally related to serve a legitimate government purpose.<sup>218</sup>

But if a challenge is brought by businesses under the Takings Clause, it is a different test—albeit one still likely to be deferential to the government. The claim would be that the government regulation is effectively taking the property from the owner by requiring closure. The Court articulated the test for whether there is a regulatory taking in *Penn Central Transportation Co. v. New York City*.<sup>219</sup> The Court explained that although it has generally eschewed any set formula for identifying a “taking” forbidden by the Fifth Amendment, it has observed that what frequently is considered a “taking” is largely dependent “upon the particular circumstances” of the case.<sup>220</sup> The Court, through engaging in such “ad hoc, factual inquiries” of previous cases, identifies three factors that have “particular significance” in determining what constitutes a taking: (1) “[t]he economic impact of the regulation on the claimant;” (2) “the extent to which the regulation has interfered with distinct investment-backed expectations;” and (3) “the character of the governmental action.”<sup>221</sup>

But it also must be remembered that in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court held that temporarily denying an owner development of property is not a taking so long as the government action is reasonable.<sup>222</sup> The Court narrowly ruled that a moratorium on the development of property for almost three years in order to complete a land-use plan was reasonable and did not require compensation under the Takings Clause.<sup>223</sup>

How these cases ultimately will be decided will depend on the specific facts. Our point is that the test should be the one used for takings claims, not the all-purpose *Jacobson* approach. Thus far, courts have consistently rejected takings claims.<sup>224</sup>

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<sup>218</sup> ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 677 (6th ed. 2019).

<sup>219</sup> 438 U.S. 104, 124 (1978)

<sup>220</sup> See *id.* at 123–24.

<sup>221</sup> See *id.* at 124.

<sup>222</sup> 535 U.S. 302, 341–42 (2002).

<sup>223</sup> See *id.* at 341–43.

<sup>224</sup> See, e.g., *Hund v. Cuomo*, No. 20-CV-1176 (JLS), 2020 WL 6699524, at \*12 (W.D.N.Y. Nov. 13, 2020); *AJE Enter. LLC v. Justice*, No. 1:20-CV-229, 2020 WL 6940381, at \*10 (N.D.W. Va. Oct. 27, 2020); *Bimber’s Delwood, Inc. v. James*, No. 20-CV-1043S, 2020 WL 6158612, at \*17 (W.D.N.Y. Oct. 21, 2020).

## CONCLUSION

COVID-19 reveals underlying inequities in our society as well as gaps in the law. The gaps in the law can lead to serious consequences affecting the full and free exercise of civil liberties and civil rights. As we show in this Article, the United States government trampled civil liberties in times of actual and perceived national disaster, imposing serious harms on individuals who posed no serious threat to our government, society, or democracy.<sup>225</sup> Thus, perhaps the response to our observations and analyses will be to ask whether the legal test to measure government's authority during crisis really matters because courts are so inclined to defer to the government in a time of emergency. That is certainly a reasonable reaction. But constitutional law is based on the assumption that legal tests—such as the level of scrutiny—really do matter.

In the several months in which courts have addressed cases arising from COVID-19, *Jacobson v. Massachusetts* has become the ubiquitous test applied to evaluating all types of government regulations.<sup>226</sup> *Jacobson* professes great deference to the government and is seen, in the language of modern constitutional law, as using rational basis review.<sup>227</sup> It is familiar that the government almost always wins under the rational basis test. Chief Justice Roberts observed, writing for the Court, that “it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny.”<sup>228</sup>

As we argue, adopting rational basis review to evaluate government actions to limit the transmission of a communicable disease gives too much deference to the government. It risks, as has been seen through American history,<sup>229</sup> upholding government actions that unjustifiably deprive basic liberties. Our solution is a simple one: Courts should apply the usual test for the particular right in question and not the rational basis approach of *Jacobson v. Massachusetts*.

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225 See *supra* Part I.

226 See *supra* subpart II.A.

227 See *supra* subpart II.B.

228 *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018).

229 See *supra* Part I.

