

*SYMPOSIUM: PANDEMICS AND THE CONSTITUTION*

**TIERED SCRUTINY IN A PANDEMIC**

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During this spring of COVID-19, Americans are facing numerous state and local government-imposed restrictions that would have seemed implausible a few short months ago. While many of these restrictions seem to be unquestionably warranted, there have been others that have the potential to negatively impact fundamental rights. From abortion restrictions to gun control, these actions threaten liberty in the name of police powers.

During this time of crisis, there is a need for courts to be especially vigilant. Throughout the nation's history, the concept of emergency power has been used to justify restrictions on the rights of Americans, with tragic results.<sup>1</sup>

Some of the problem has been confusion over what governmental emergency powers are in times of crisis and how governmental actions taken to meet emergencies should be scrutinized by courts. Erroneous readings of early Supreme Court cases have led at least one circuit court to conclude that “when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some ‘real or substantial relation’ to the public health crisis and are not ‘beyond all question, a plain, palpable invasion of rights secured by the fundamental law.’”<sup>2</sup>

However, this purported standard is incorrect. The Constitution does not change with the onset of an emergency, and neither do its levels of scrutiny. While an emergency can provide justifications for governmental conduct that would otherwise be unavailable, the underlying framework

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1. *See, e.g.,* *Korematsu v. United States*, 323 U.S. 214 (1944).

2. *See In re Abbott*, No. 20-50264, 2020 U.S. App. LEXIS 10893, at \*16–17 (5th Cir. Apr. 20, 2020) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)).

remains intact. To believe otherwise takes the controlling precedent out of context.

In order to protect rights, however, the framework must be understood. This essay looks at the powers possessed by government during times of emergency, and how those powers interact with fundamental rights. Part I looks at the confusion surrounding the question of whether the Constitution mandates a different test in times of epidemic, and shows how the Supreme Court's jurisprudence does not mandate a more deferential standard for government action, but instead reaffirms that traditional judicial scrutiny remains even in times of emergency. Part II then looks at the constitutional questions raised by restrictions on individual liberty that have been imposed during the COVID-19 epidemic, and provides the framework for courts to evaluate them.

#### I. THE ROOT OF THE ISSUE: *JACOBSON* AND THE NEED FOR FURTHER ANALYSIS

It is beyond dispute that states have broad police powers in times of emergency that allow them to impose restrictions on the liberty of individuals for the public good: the Supreme Court said as much in the seminal case concerning governmental power to combat epidemics, *Jacobson v. Commonwealth of Massachusetts*.<sup>3</sup> In *Jacobson*, the issue was the power of Massachusetts to enact a statute requiring mandatory smallpox vaccinations for all adults whenever “necessary for the public health or safety.”<sup>4</sup> Any person refusing to comply would be fined five dollars.<sup>5</sup> In discussing the power of the State to pass such legislation, the Court stated, “[I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.”<sup>6</sup> The Court recognized, however, that not all laws purportedly passed for the safety of the public were actually valid, stating:

If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public

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3. 197 U.S. 11 (1905).

4. *Id.* at syllabus (quoting MASS. GEN. LAWS ch. 75, § 137).

5. *Id.*

6. *Id.* at 29.

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>7</sup>

Under this standard, the Court found the Massachusetts law in question to be valid.<sup>8</sup> However, the Court noted:

Before closing this opinion we deem it appropriate, in order to prevent misapprehension as to our views, to observe—perhaps to repeat a thought already sufficiently expressed, namely—that the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression.<sup>9</sup>

Of itself, *Jacobson* is unremarkable. The problem arises from courts that use *Jacobson* as if it provides a different, more deferential framework for the intrusion on fundamental rights than the normal scrutiny required by the Constitution.<sup>10</sup> This is the mistake that the Fifth Circuit made in *In re Abbott*.<sup>11</sup> There, the Fifth Circuit stated that, under *Jacobson*:

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.”<sup>12</sup>

But to read *Jacobson* in this manner takes the standard used in that case out of context, and ignores the last 70 or so years of Constitutional jurisprudence relating to fundamental rights.

The Court in *Jacobson* was not setting out a special framework for reviewing laws concerning emergency health regulations. Rather, the test set out in *Jacobson* was the exact same test the Court used at the time for reviewing every claim of due process and equal protection: the “classical rational basis test.”<sup>13</sup> At the time, there was no neat distinction between

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7. *Id.* at 31.

8. *Id.* at 39.

9. *Id.* at 38.

10. *See e.g.*, *In re Abbott*, No. 20-50264, 2020 U.S. App. LEXIS 10893, at \*16–17 (5th Cir. Apr. 20, 2020).

11. *See id.*, at 4 (stating that *Jacobson* provides “the framework governing emergency public health measures”).

12. *Id.* at 16–17 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)).

13. *See id.* at 14–17; *Mugler v. Kansas*, 123 U.S. 623, 661–62 (1887); *Atchison, Topeka, & Santa Fe R.R. Co. v. Matthews*, 174 U.S. 96 (1899). *See also* Jeffrey D. Jackson, *Classical Rational*

what we now term “fundamental” rights and those that were not fundamental.<sup>14</sup> Instead, the Court applied the same test to all rights, with the test itself adjusting with the nature of the right that was purported to be infringed.<sup>15</sup> Thus, the test used in a case like *Mugler v. Kansas*, which concerned the power of the Kansas legislature to ban the manufacture and sale of liquor for personal use, was the same as that used in all cases from 1887 to 1912:

If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real and substantial relation to those objects, or is a 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>16</sup>

Even the case often held up as the epitome of judicial activism, *Lochner v. New York*, was decided under this framework.<sup>17</sup>

With this background, it becomes clear that *Jacobson* is not a case establishing a framework for review, rather it is a case about how far the police power of a state could extend. That is, could it go so far as to compel a person to be vaccinated. The Court in *Jacobson* affirmed that it could; that even such an intrusion could be justified if it passed the applicable substantive due process test.<sup>18</sup>

It was only after *Jacobson* that the Court’s substantive due process and equal protection jurisprudence began to evolve in the direction that would take it where it is today. Two months after *Jacobson*, *Lochner* purported to use the same test, but introduced what became the first real “fundamental right” formulation. The *Lochner* Court implicitly reversed the presumption of constitutionality normally afforded state legislation, instead finding a presumption in favor of “liberty of contract.”<sup>19</sup> The Court made this presumption explicit for liberty of contract in cases such as

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*Basis and the Right to Be Free of Arbitrary Regulation*, 14 GEO. J. L. & PUB. POL’Y 493, 496–98 (2016) (examining the test for all rights used in the late 1800s and early 1900s).

14. See Jackson, *supra* note 13 at 496–98.

15. See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 U.C.L.A. L. REV. 1267, 1286–89 (2007) (describing this feature).

16. *Mugler v. Kansas*, 123 U.S. at 661. See also *Jacobson v. Massachusetts*, 197 U.S. at 31.

17. See 198 U.S. 45, 53 (1905). The *Lochner* opinion cited *Jacobson* as the “latest” case to discuss health regulations. *Id.* at 55–56.

18. See *Jacobson v. Massachusetts*, 197 U.S. at 27–30.

19. See *Lochner v. New York*, 198 U.S. 45, 56 (1905); David E. Bernstein, *The Story of Lochner v. New York: Impediment to the Growth of the Regulatory State*, in CONSTITUTIONAL LAW STORIES 299, 318 (Michael C. Dorf ed., 2nd ed. 2009) (recognizing presumption in favor of liberty of contract).

*Adkins v. Children's Hospital*<sup>20</sup> and *Chas. Wolf Packing Co. v. Court of Industrial Relations*.<sup>21</sup> The Court also began applying the same standard to other “fundamental” rights, such as the rights of parents to send their children to religious schools.<sup>22</sup> While “liberty of contract” was soon to disappear, the notion of fundamental rights continued.<sup>23</sup> Eventually, the all-purpose classic rational basis test of *Muller* and *Jacobson* became the tiered-scrutiny approach we know today. Legislation affecting a fundamental right or a suspect class is examined under strict scrutiny; legislation affecting various quasi-suspect classes or incidentally burdening fundamental rights gets some sort of intermediate scrutiny, and legislation that does not burden a fundamental right gets only a cursory “modern” rational basis scrutiny.<sup>24</sup>

*Jacobson* still remains good law for the propositions that state governments have wide-ranging police powers to regulate health, safety, and welfare, and that police powers can overcome even fundamental rights given sufficient justification.<sup>25</sup> However, *Jacobson* does not set up any kind of framework for determining whether the justification is sufficient. That issue must be judged, not by the standards of 1905, but by the current law.

## II. TIERED SCRUTINY IN A PANDEMIC

The fact that *Jacobson* does not support a separate framework for review of government actions in an emergency does not mean that an emergency has no force. Rather, it means that the force is “baked in” to the Constitutional tests themselves. The basic framework our system of rights sets up is a balancing test between the necessity and importance of

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20. 261 U.S. 525, 546 (1923).

21. 262 U.S. 522, 534 (1923).

22. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399–403 (1923).

23. See David E. Bernstein, *Lochner Era Revisionism Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L. J. 1, 53–58 (2003) (tracing the development of fundamental rights after the demise of liberty of contract).

24. See, e.g. *Washington v. Glucksberg*, 521 U.S. 702, 719–23 (1997) (setting out tiered scrutiny for substantive due process); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (establishing “undue burden” strict scrutiny for right to abortion); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (establishing intermediate scrutiny for content-neutral time, place and manner restrictions); *United States v. O’Brien*, 391 U.S. 367 (1968) (establishing intermediate scrutiny for neutral regulations incidentally affecting speech); *Craig v. Boren*, 429 U.S. 190 (1976) (establishing intermediate scrutiny for regulations discriminating on the basis of gender); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955) (establishing highly-deferential rational basis test for nonfundamental rights).

25. See *Kansas v. Hendricks*, 521 U.S. 346, 356–57 (1997).

governmental action and the degree of interference with rights. This section looks at the way this balancing test plays out in some of the main issue that have arisen during the COVID-19 crisis so far, such as: business closures, including closures of firearms retailers; limits on gatherings, including religious services; and the application of orders restricting abortions.

#### A. *Business Closures in General*

A prominent feature of state government's response to COVID-19 has been the closure of nonessential businesses.<sup>26</sup> Subject to some exemptions, most businesses in a state have been temporarily closed to restrict the spread of the virus, severely impacting the lives and livelihood of many Americans.<sup>27</sup> These temporary closures raise three main legal questions: (1) do the orders themselves infringe on property rights in violation of due process; (2) do exemptions for certain businesses but not others violate equal protection; and (3) do the closures constitute a regulatory taking that would entitle business owners to compensation?

In general, these types of closing orders are well within state police powers. States have wide discretion in passing legislation relating to the operation of businesses, and most economic regulation will not violate due process.<sup>28</sup> Due process challenges to such orders, as with other business regulations, fall under "modern" rational basis review.<sup>29</sup> This standard of review is essentially toothless, requiring only that legislators might have thought the law was rationally related to some legitimate state interest, even if that interest was not the motivation for the law.<sup>30</sup> This test essentially frees legislation from any type of meaningful review.

The same is true for equal protection challenges to state exemptions. States have wide latitude in making decisions as to which businesses to exempt or not exempt from closure orders.<sup>31</sup> In *McGowan v. Maryland*, the Court held that, in determining whether exempting some businesses but not others from a Sunday closing law constituted an arbitrary classification, states were to be afforded:

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26. See Erin Shumaker, *Here are the states that have shutdown non-essential businesses*, ABC NEWS, (Apr. 3, 2020, 7:58 PM) <https://abcnews.go.com/Health/states-shut-essential-businesses-map/story?id=69770806> [<https://perma.cc/V64D-SQYD>].

27. See *id.*

28. See *Nebbia v. New York*, 291 U.S. 502, 533–39 (1934).

29. See *Williamson v. Lee Optical*, 348 U.S. 483, 487–89 (1955).

30. See *id.* For a detailed discussion of why this is a terrible standard and should be abandoned, see generally Jackson, *supra* note 13.

31. See *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961).

a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.<sup>32</sup>

Thus, arguments that different state exemptions on the closure of business violate equal protection are subject only to rational basis, and likely to fail.

Finally, there is generally no entitlement to compensation under the Fifth Amendment where a regulation temporarily closes a business. The Court has held that a prohibition upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health the community does not work a regulatory taking.<sup>33</sup> While it is true that even valid legislation can sometimes become so onerous as to constitute a regulatory taking,<sup>34</sup> it is unlikely that the temporary business closing regulations such as the ones in place would do so. There is some authority for the idea that extending a closing long beyond what is reasonably necessary to serve the public interest could eventually constitute a taking,<sup>35</sup> but in general, there is no Fifth Amendment takings issue with closing regulations in general.

### *B. The Special Case of Firearms Retailers*

One flashpoint regarding state action during the COVID-19 pandemic concerns the closing of stores selling firearms. While a large number of states have classified gun stores as essential businesses that can remain open, some states initially refused to do so.<sup>36</sup> On March 28, the Department of Homeland Security included “[w]orkers supporting the

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32. *Id.*

33. *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 593–94 (1962). *See Tahoe-Sierra Pres. Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 329 (2002) (reaffirming the rule).

34. *See Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922) (holding that where a regulation “goes too far” it will be held to constitute a taking).

35. *See Tahoe Sierra Pres. Council v. Tahoe Regional Planning Agency*, 535 U.S. at 342 (noting that the duration of a restriction must be considered in a regulatory claim).

36. *See Adam Edelman, Buckling to pressure, many states deem gun stores ‘essential,’ allow them to remain open during pandemic*, NBC NEWS, (Apr. 7, 2020, 4:17 PM) <https://www.nbcnews.com/politics/politics-news/buckling-pressure-many-states-deem-gun-stores-essential-allow-them-n1177706> [<https://perma.cc/Z9QK-2GX4>].

operation of firearm or ammunition product manufacturers, retailers, importers, distributors, and shooting ranges” on its advisory list of essential critical infrastructure workers.<sup>37</sup> Additionally, several lawsuits have been filed alleging that closing firearms retailers would be a violation of the Second Amendment.

Answering the question of whether such restrictions do violate the Second Amendment is complicated by the fact that the Supreme Court has provided very little guidance as to what the parameters of the Second Amendment are. Although the Court held in *District of Columbia v. Heller*<sup>38</sup> that the Second Amendment guarantees a personal right to possess and carry weapons in case of confrontation, and in *McDonald v. City of Chicago*<sup>39</sup> that this right extends against the states, it has said little else. *Heller* holds that laws preventing the possession of handguns or long rifles inside the home are unconstitutional, but that other laws, such as prohibitions on the carrying of concealed weapons, or possession of firearms by felons or the mentally ill, or the carrying of firearms in “sensitive places” like schools or government buildings were presumably constitutional.<sup>40</sup> The Court also noted that “laws imposing conditions and qualifications on the commercial sale of arms” would be constitutional.<sup>41</sup> Beyond these examples, however, neither *Heller* nor *McDonald* offers much guidance, and neither suggests the level of tiered scrutiny that the Court would apply.

Circuit Courts of Appeal looking at the issue have generally applied strict scrutiny to those regulations that burden the “core” of the Second Amendment, such as the possession of weapons in the home. Those Circuits have applied a lesser, “intermediate” form of scrutiny to regulations that impose burdens outside the core, such as possession of

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37. Christopher C. Krebs, Director, CYBERSECURITY AND INFRASTRUCTURE SECURITY AGENCY, *Memorandum On Identification of Essential Critical Infrastructure Workers During COVID-19 Response*, Apr. 17, 2020, [https://www.cisa.gov/sites/default/files/publications/Version\\_3.0\\_CISA\\_Guidance\\_on\\_Essential\\_Critical\\_Infrastructure\\_Workers\\_4.pdf](https://www.cisa.gov/sites/default/files/publications/Version_3.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_4.pdf) [<https://perma.cc/2EJN-X3WT>].

38. 554 U.S. 570, 592 (2008).

39. 561 U.S. 742, 749–50 (2010).

40. 554 U.S. at 626.

41. *Id.* at 627.

assault weapons or extended magazines.<sup>42</sup> State courts have generally followed this framework as well.<sup>43</sup>

A temporary closing order on firearm retailers does not fit neatly into the tiered scrutiny framework. On the one hand, the closing order does not affect the right to possess or carry firearms for those persons who already have them. On the other hand, the closing order may completely foreclose the legal purchasing of firearms, albeit temporarily. Because under many state laws the purchase of firearms must be conducted through a licensed retailer,<sup>44</sup> a person does not have the option to purchase a firearm online or through the mail. Some retailers that offer firearms may be deemed essential and thus exempt from closure on a different basis, such as Walmart. But such retailers may not be available in all states.<sup>45</sup>

An order closing all firearm retailers is quite different from the “laws imposing conditions and restrictions on the commercial sale of arms” that are presumptively constitutional under *Heller*.<sup>46</sup> Regulations such as waiting periods or training requirements impose conditions on the Second Amendment right that courts have held to be valid.<sup>47</sup> By contrast, the effect of the law closing gun retailers is a total ban on the ability of all residents to purchase, at least in those states where retail stores do not otherwise sell firearms. Because the effect of the closing of gun stores in places where firearms are not available through other outlets that remain open for other reasons is that a person cannot legally purchase a firearm,

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42. See *Worman v. Healey*, 922 F.3d 26, 37–38 (1st Cir. 2019); *New York State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 254 (2nd Cir. 2015); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell v. City of Chicago*, 651 F.3d 684, 702–03 (7th Cir. 2011); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010); *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng’rs*, 788 F.3d 1318, 1322 (11th Cir. 2015); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1252 (D.C. Cir. 2011).

43. See, e.g. *Norman v. State*, 215 So.3d 18, 36 (Fla. 2017); *State v. DeCiccio*, 105 A.3d 165, 205-06 (Conn. 2014);

44. See, e.g. 18 PA. CONS.STAT. § 6111(a)(2) (requiring a licensed dealer to perform a background check in connection with the purchase of any firearm); 18 PA. CONS.STAT. § 6113(a)(1) (business of firearms dealer may only be carried on at the premises designated in the license or a licensed gun show).

45. See Asher Stocker, *Walmart Shuts Down All Gun Sales in New Mexico After State Expands Background Check Requirements*, NEWSWEEK (July 5, 2019, 12:21 PM), <https://www.newsweek.com/walmart-new-mexico-gun-sales-1447768> [https://perma.cc/57WM-UQKW].

46. See *Heller*, 554 U.S. at 627.

47. See *Silvester v. Harris*, 843 F.3d 816, 828 (9th Cir. 2016) (finding California’s 10-day waiting period constitutional); *Heller v. District of Columbia*, 801 F.3d 264, 278-79 (D.C. Cir. 2015) (mandatory one-hour training course required before possessing firearm held constitutional).

this seems to be the kind of law that strikes at the “core” of the Second Amendment, and thus warrants strict scrutiny.

Under the traditional strict scrutiny test, for a law to be valid the state must show a “compelling governmental interest” and that the regulation is “narrowly tailored” to advance that interest.<sup>48</sup> There is no serious question that the state possesses a compelling governmental interest in halting the spread of a pandemic. The problem comes in the “narrowly tailored” part of the test. Under the strict scrutiny test for rights, the statute must have a proper “fit” and not be over- or under-inclusive. Thus, allowing exemptions to some stores that pose the same risk as others might violate narrow tailoring. Of the states that do not provide an exception for firearms retailers, New York and Massachusetts both have deemed liquor stores to be “essential businesses.”<sup>49</sup> This poses a problem for a “narrow tailoring” analysis in those states, given the similar profiles and risk levels of firearms and liquor retailers.

There is a possibility that courts might choose to adopt a different framework for firearms sales that is akin to that applied to laws under the First Amendment for expressive conduct. Neutral laws of general applicability that only incidentally restrict speech get some form of intermediate scrutiny rather than strict scrutiny.<sup>50</sup> Despite what some firearms advocates claim,<sup>51</sup> the business closure laws fit into the category of neutral laws, in that they are not explicitly aimed at firearms retailers. Passing something akin to *O’Brien* intermediate scrutiny would require the regulation to have a substantial interest, be unrelated to the suppression of the right in question, and pose a restriction on the right “no greater than essential” to further the interest.<sup>52</sup> Again, this sort of test would come down to the “tailoring” prong. Although the “no greater than

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48. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

49. See Jessica Snouwaert, *New York liquor stores are considered ‘essential’ businesses by the state and will remain open during the coronavirus shutdowns*, BUSINESS INSIDER (Mar. 20, 2020, 4:20 PM), <https://www.businessinsider.com/coronavirus-new-york-liquor-stores-deemed-essential-can-stay-open-2020-3> [<https://perma.cc/94GC-B9FX>]; State of Massachusetts, *COVID-19: Essential Services*, <https://www.mass.gov/info-details/covid-19-essential-services> [<https://perma.cc/4BBR-PYFT>]. New Mexico, however, has not. Victoria Shupryt, *Liquor stores to close, grocery stores must limit customers as Governor extends emergency order*, KOAT Action News (Apr. 7, 2020, 9:39 AM) <https://www.koat.com/article/gov-lujan-grisham-extends-emergency-order-until-end-of-april/32058956#> [<https://perma.cc/QJN9-NZFJ>].

50. See *United States v. O’Brien*, 391 U.S. 367 (1968).

51. See Nat’l Rifle Ass’n Institute for Leg. Action, *COVID-19: Threat to Second Amendment*, <https://www.nraila.org/coronavirus> (arguing that “anti-gun lawmakers are exploiting the COVID-19 pandemic to deny you and your loved ones your fundamental right to self-defense and your Second Amendment rights”).

52. *Id.* at 376–77.

essential” requirement is less than the “narrowly tailored” requirement for strict scrutiny, it might be questionable in those states that have a long list of businesses that are exempted.

Finally, there is a small chance that a court might adopt an exception to the Second Amendment for neutral and generally applicable laws that mirrors the controversial standard adopted for freedom of religion.<sup>53</sup> Under this standard, adopted in the late Justice Scalia’s opinion in *Employment Division v. Smith*, a neutral and generally applicable law would get only rational basis review.<sup>54</sup> Adopting such a test would mean that a regulation would almost certainly be upheld. However, the adoption of such a test is highly unlikely, given the rightful unpopularity of the *Smith* test.<sup>55</sup>

In sum, restrictions on the conducting of business of retail firearms dealers invoke a Second Amendment analysis that is different from those of other businesses. While that does not mean that such retailers are automatically entitled to an exemption from closure, the restrictions do require a different level of scrutiny that must be met. Further, states that do not exempt gun retailers while exempting other businesses posing the same degree of risk may run afoul of this scrutiny.

### C. *Limits on Gatherings in General*

Another issue arising during the response to COVID-19 is the constitutionality of state limits on gatherings. A number of states have passed restrictions on gathering of unrelated persons in groups of ten or greater, and these restrictions raise questions regarding assembly and associational rights.

First, it should be noted that there is no generalized right of social association or assembly.<sup>56</sup> There are, however, rights of association and assembly for the expression of First Amendment purposes. To the extent that bans on gatherings of more than ten persons infringe on those types of gatherings, they are subject to a higher level of constitutional scrutiny.<sup>57</sup> The applicable test is generally intermediate scrutiny in the context of reasonable time, place, and manner restrictions. Such restrictions must (1) be justified without reference to the content of speech; (2) be narrowly

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53. See *Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990).

54. See *id.* at 889–90.

55. See *infra* notes 60 to 62 and accompanying text (describing *Smith*).

56. See *City of Dallas v. Stanglin*, 490 U.S. 19, 24–25 (1989).

57. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

tailored to serve a significant governmental interest; and (3) leave open ample alternative channels for communication of the information.<sup>58</sup>

Under the circumstances, prohibitions on gatherings are content-neutral, as they do not depend upon the purpose and content of the gathering as the basis for the restriction. The governmental interest involved would almost certainly be classified as compelling, and, in the absence of unusual exemptions, would probably be held to be narrowly-tailored. Further, there are other channels for the communication of the message, including multiple gatherings or the use of a different medium, such as internet communications.

#### D. *Applying Limits on Gathering to Religious Services*

The application of otherwise valid limits on the number of persons in a gathering to religious services implicates an additional constitutional safeguard: the First Amendment's guarantee of free exercise of religion.<sup>59</sup> At the federal constitutional level, however, the Free Exercise Clause provides little protection against state action in this regard. That is because, as noted above, the late Justice Scalia's opinion in *Employment Division v. Smith* means that neutral laws of general applicability receive only rational basis review.<sup>60</sup> This has the unusual effect of giving even less protection against the effects of neutral laws in religious rights cases than in other constitutional contexts, such as speech.<sup>61</sup>

There is no doubt, moreover, that applying laws that are otherwise applicable to the size of gatherings to gatherings for religious purposes is neutral and generally applicable. Only when a law specifically targets religious exercise for unfavorable treatment will it come under strict scrutiny.<sup>62</sup>

*Employment Division v. Smith* is a controversial opinion, in that it (wrongly in my opinion) abandoned the use of the strict scrutiny test for laws substantially burdening the free exercise of religion that had been used in cases such as *Sherbert v. Verner*.<sup>63</sup> Congress almost immediately

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58. *Id.*

59. See U.S. Const. amend. I (prohibiting the making a law "prohibiting the free exercise" of religion).

60. See *Smith*, 494 U.S. at 889–90.

61. Compare *Smith* with *Ward v. Rock Against Racism*, 491 U.S. at 791 (subjecting content neutral legislation to intermediate scrutiny); *United States v. O'Brien*, 391 U.S. at 376–77 (neutral laws incidentally burdening speech get intermediate scrutiny).

62. See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534–35 (1993) (finding law was not neutral when "almost the only conduct subject to ordinances was the religious exercise of Santeria church members").

63. 374 U.S. 398 (1963). See *Smith*, 494 U.S. at 884–85.

attempted to reinstate the use of the *Sherbert* strict scrutiny test by passing the Religious Freedom Restoration Act of 1993 (RFRA).<sup>64</sup> However, the Court ruled in *City of Boerne v. Flores*<sup>65</sup> that RFRA could not be applied against state laws through the Fourteenth Amendment.

Twenty-one states, however, have passed their own versions of RFRA.<sup>66</sup> Like the federal act, these state laws subject state legislation to essentially the same strict scrutiny test that the Court used in *Sherbert*.<sup>67</sup> Therefore, any state legislation that “substantially burdens” the free exercise of religion must be justified by a “compelling governmental interest” and the legislation must be the “least restrictive means” of furthering that interest.<sup>68</sup>

It may fairly be questioned whether laws prohibiting a religious gathering of more than a certain number of persons are in fact “substantially burdening the free exercise of religion.” Such laws do not prohibit religious gatherings per se, but rather simply impose a restriction based on size. Moreover, in this day and age where churches are broadcasting services over the internet, or having in-car services in parking lots, it seems as though there are certainly options to worship that would not involve in-person social gatherings. However, to the extent that a person might be subjected to a criminal or civil penalty for attending a religious gathering, both state laws<sup>69</sup> and Free Exercise jurisprudence<sup>70</sup> would hold such penalties to be a “substantial burden.”

Thus, such a burden would be evaluated under strict scrutiny. As mentioned before, preventing the spread of virus in the midst of a pandemic would certainly constitute a compelling governmental interest. The question would be whether imposing the limit on religious gatherings would be the least restrictive means to further that interest. This is an extremely difficult burden to meet, as it requires the state to show that no other feasible alternative would serve the purpose as well and be less restrictive of rights.<sup>71</sup> Lower courts have generally interpreted this as

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64. See 42 U.S.C. § 2000bb-1 (1993).

65. 521 U.S. 507, 536 (1997).

66. National Conference of State Legislatures, *State Religious Freedom Restoration Acts*, (May 4, 2017), <https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> [<https://perma.cc/NYT3-EHYN>].

67. See, e.g., Tex. Civ. Prac. & Remedies Code §110.001–110.012 (2015); KAN. STAT. ANN. § 60-5301(2013).

68. See, e.g., KAN. STAT. ANN. § 60-5303(a).

69. See, e.g., KAN. STAT. ANN. § 60-5302(a) (defining burden to include “assessing criminal, civil or administrative penalties” for religious activity).

70. *Locke v. Davey*, 540 U.S. 712, 720 (2004) (recognizing that subjecting a person to civil or criminal penalties for religious activity would constitute a substantial burden).

71. See *Burwell v. Hobby Lobby*, 573 U.S. 682, 728–32 (2014).

requiring exemptions for religions where other comparable categories are exempted.<sup>72</sup>

In this case, however, it may be that state laws applying the person gathering limit in fact meet this burden, so long as they are applying the same burden on the number of persons that they apply for other similar gatherings, such as concerts, demonstrations, recreational activity and the like. It is difficult to conceive of another way in which the same benefits of social distancing could be achieved to the same degree with less impact on freedom of religion. Certainly, putting law enforcement officers in churches to enforce social distancing requirements would not be less restrictive, and trusting church members to practice social distancing on their own would be less effective. Thus, this may be the rare case in which the unique nature of the social distancing situation means that there is simply no less restrictive means through which the state's interest could be achieved.

#### *E. Restrictions on Abortions*

One other feature of the COVID-19 pandemic has been the attempt by a number of states to use it as an opportunity to shut down abortions. Six states—Arkansas, Alabama, Iowa, Ohio, Oklahoma, and Texas—have attempted such bans by designating abortions as nonessential, and citing the need to free up masks, gloves, and surgical equipment to meet

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72. See *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (police department who permitted person to wear beards to avoid skin problems could not forbid Muslim employees from wearing beards as required by their religion); *Rader v. Johnston*, 924 F. Supp. 1540 (D. Neb. 1996) (university could not force freshmen students to live in dorms rather than a Christian residence when it allowed other freshman to live off campus).

the virus.<sup>73</sup> While most of those have been overturned by courts,<sup>74</sup> Texas's order survived in some respects.<sup>75</sup>

The right to an abortion is governed by the “undue burden test” established by the Court in *Planned Parenthood of Southeastern Pa. v. Casey*.<sup>76</sup> In *Casey*, the Court held that a state may not impose an “undue burden” on the ability of a woman to obtain an abortion before viability.<sup>77</sup> The Court stated that “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.”<sup>78</sup> In *Whole Woman's Health v. Hellestadt*,<sup>79</sup> the Court stated that, in order to determine whether a regulation imposes an undue burden, a reviewing court must consider

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73. See Hannah Gold & Claire Lampen, *Every State That's Tried to Ban Abortion Over The Coronavirus*, THE CUT (Apr. 14, 2020), <https://www.thecut.com/2020/04/every-state-thats-tried-to-ban-abortion-over-coronavirus.html> [<https://perma.cc/NGM4-CE5D>]; Molly Hennessy-Fiske, *Abortion during coronavirus: State bans, closed clinics, self-induced miscarriages*, LOS ANGELES TIMES (Apr. 16, 2020, 3:00 AM), <https://www.latimes.com/world-nation/story/2020-04-16/abortion-during-coronavirus-state-bans-canceled-appointments-travel> [<https://perma.cc/MAM5-SDWM>].

74. On April 6, a federal district court granted a temporary restraining order against most of Oklahoma's restrictions *S. Wind Women's Ctr, LLC v. Stitt*, No. CIV-20-277-G, 2020 WL 1677094 (W.D. Okla. Apr. 6, 2020). The restraining order prevented the enforcement of the prohibition on surgical abortions with respect to any patient who will lose her right to lawfully obtain an abortion in Oklahoma on or before the date of expiration of the Executive Order, and prevented the enforcement of the prohibition on medication abortions in total. *Id.* On April 12, a preliminary injunction was granted against Arkansas's attempt. *Robinson v. Marshall*, No. 2:19CV365-MHT, 2020 WL 1847128 (M.D. Ala. Apr. 12, 2020). The decision allowed health care providers to determine whether an abortion should be delayed. *Id.* Ohio's ban was stayed, and the Sixth Circuit refused a request to overturn the stay. *Pre-term Cleveland v. Attorney Gen. of Ohio*, No. 1:19-cv-00360 (S.D. Ohio Mar. 30, 2020), stay denied and appealed dismissed, No. 20-3365 (6th Cir. Apr. 6, 2020). Enforcement of Arkansas's order was similarly stayed. *Little Rock Family Planning Services v. Rutledge*, \_\_\_ F. Supp. 3d \_\_\_, 2020 WL 1862830 (E.D. Ark. Apr. 14, 2020).

75. See *In re Abbott*, No. 20-50264, 2020 U.S. App. LEXIS 1089 (5th Cir. Apr. 20, 2020). Originally, the United States District Court for the Western District of Texas issued a temporary restraining order barring enforcement of the governor's executive order as applied to non-emergency surgical and medication abortions. The Fifth Circuit granted mandamus reversing the temporary restraining order. *Id.* The district court then issued a new temporary restraining order on April 10 which prevented the executive order from applying, until April 19, to three categories of abortion: (1) medication abortions; (2) abortions for women who would be more than 18 weeks LMP (“last menstrual period”) by April 22 and unable to reach an ambulatory surgical center; and (3) abortions for women who would be past Texas's legal limit—22 weeks LMP—for abortion by April 22. The Fifth Circuit then granted a partial administrative stay of the temporary restraining order, except as to the part applying to women who would be 22 weeks LMP by April 22. Finally, on April 13, the Fifth Circuit dissolved the stay on the restraining order as applied to medication abortions. *Id.*

76. 505 U.S. 833 (1992).

77. *Id.* at 878–79.

78. *Id.* at 878.

79. 136 S. Ct. 2292 (2016).

“the burdens a law imposes on abortion access together with the benefits those laws confer.”<sup>80</sup>

So far, the executive orders at issue have been ones that do not single out abortion, but rather treat abortion as an “elective” surgery.<sup>81</sup> The general reasons for postponing such surgeries are to limit face-to-face contact, preserve the availability of personal protective equipment, and conserve hospital beds, staff, and other resources.<sup>82</sup>

Certainly, temporarily delaying elective surgeries does not generally implicate constitutional rights. However, as with the Second Amendment analysis of closing businesses, classifying abortion procedures as “elective surgeries” causes a different degree of a problem. That is, it completely removes the ability of the person affected to exercise her constitutional right to an abortion for as long as the order remains in place. Moreover, because of the nature of the right itself, a delay would in fact eliminate the right, as the person affected will have passed the stage where the right can be exercised.<sup>83</sup> Finally, because abortion can become more dangerous later in the pregnancy, delay of the right increases the possibility of complications, which have the potential to implicate more medical resources.<sup>84</sup>

In comparison, the benefits from delaying abortions are vanishingly small. As the district court found in *Robinson v. Marshall*, the Alabama decision, abortions are generally performed in outpatient procedures that require very little protective gear, and rates of complications are low.<sup>85</sup> The benefits of delay are even less pronounced in cases of “medication abortions,” which require even fewer resources.<sup>86</sup>

The important thing to understand is that, unlike other procedures that the state may deem to be “elective,” an abortion is actually a recognized constitutional right. Under the circumstances, it seems highly unlikely that the executive orders can withstand application of the appropriate level of scrutiny. Therefore, they are likely to be held unconstitutional.

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80. *Id.* at 2309.

81. *See, e.g.* *S. Wind Women’s Ctr. LLC v. Stitt*, No. CIV-20-277-G, 2020 WL 1677094 at \*2 (W.D. Okla. Apr. 6, 2020) (concerning Oklahoma’s order, which directs “Oklahomans and medical providers in Oklahoma shall postpone all elective surgeries, minor medical procedures, and non-emergency dental procedures” until the expiration of the order).

82. *See id.*

83. *See Robinson v. Marshall*, No. 2:19CV365-MHT, 2020 WL 1847128 (M.D. Ala. Apr. 12, 2020).

84. *See id.*

85. *See id.* at 10–11.

86. *See S. Wind Women’s Ctr. LLC v. Stitt*, No. CIV-20-277-G, 2020 WL 1677094 at \*5 (W.D. Okla. Apr. 6, 2020).

### CONCLUSION

These are interesting times. The COVID-19 crisis has shaken the world, and mitigating its effects has required governmental action that would have been almost unthinkable a few short months ago. During the struggle to keep the population safe, it may seem that rights should take a lesser place. However, it is during these times that rights are even more important. The rights we possess do not fade away in an emergency, and it is during an emergency that courts most need to enforce rights. Fortunately, our constitutional system is already well-equipped to balance rights and safety. A proper understanding of the framework involved is vital to this endeavor.