

**REVISITING JACOBSON V. MASSACHUSETTS:
THE COVID CASES**

ABSTRACT

How should the political branches of state and local governments cooperate with one another to promulgate emergency public health legislation? And how much deference should the judiciary allocate state executives and legislatures when reviewing such legislation?

This Note proposes a local application of the War Powers Resolution’s “sliding scale of deference” in an effort to strike a constitutional balance between state executives and state legislatures. A local application of this fluid system of checks and balances would protect against unnecessarily burdening emergency executive orders by allowing state legislatures to recalibrate hurried emergency orders. Subsequently, this Note proposes replacing the Jacobson standard with heightened rational basis review when scrutinizing emergency executive orders. This process extends an additional layer of security to public health and fundamental rights in light of a declared emergency.

In sum, granting state legislatures more deference in redressing emergency public health orders and mandating the judiciary scrutinize such orders under heightened rational basis review offers better protection to public health and fundamental rights during declared emergencies.

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I. INTRODUCTION

Recent criticisms of COVID-19 executive orders that have temporarily limited—and in some cases continue to limit—constitutionally protected rights can be categorized into two factions: (1) the varying amount of power state executives and legislatures have in promulgating, overseeing, and checking emergency public health orders; and (2) the varying tiers of scrutiny the judiciary has applied to analyze emergency public health orders.¹

A state’s police power is available to state and local governments during emergency situations when states must take expeditious ac-

1. See Katherine Florey, *Covid-19 and Domestic Travel Restrictions*, 96 NOTRE DAME L. REV. REFLECTION 1, 1 (2020) (“While broad quarantines have a complicated and far from perfect record in the United States, more targeted measures are likely within states’ constitutional powers to impose, might be more palatable to the public, and could play a significant role in helping to contain the spread of COVID-19.”); Emily Berman, *The Roles of the State and Federal Governments in A Pandemic*, 11 J. NAT’L SEC. L. & POL’Y 61, 64 (2020) (“Thus, state governments are on the front lines in the fight against COVID-19, and it is with the states that the broadest public health authorities reside.”); Maggie Davis et. al., *Calling Their Own Shots: Governors’ Emergency Declarations During the Covid-19 Pandemic*, 12 CONLAWNOW 95, 95–96 (2020) (“The police powers, reserved for states in the Tenth Amendment and upheld by the U.S. Supreme Court in *Jacobson v. Massachusetts*, give states and their governors extremely broad powers to enact ‘reasonable regulations’ to protect public health and safety.”); Craig Konnoth, *Narrowly Tailoring the Covid-19 Response*, 11 CAL. L. REV. ONLINE 193, 208 (2020) (“Such measures present insufficiencies and ambiguities that may render them constitutionally irrelevant in the COVID-19 crisis—but they do offer new ways to think about narrowly tailoring constitutional scrutiny.”); Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against “Suspending” Judicial Review*, 133 HARV. L. REV. F. 179, 190 (2020) (“Nevertheless, some courts have argued that the Supreme Court’s *Jacobson* decision settles the matter to the contrary—and so, for better or worse, lower courts have no choice but to apply more deferential review to governmental restrictions during public health crises.”).

tion to protect the public.² The United States Supreme Court has vaguely defined the police power as the sovereign right of the government to protect the general welfare, comfort, morals, health, and lives of the people.³ The Supreme Court has refrained from directly defining or limiting the police power because such power must be fluid in its application to include an assortment of triggering causes.⁴ One of the drawbacks of this broad power is that its use may unnecessarily cause restrictions on fundamentally protected rights.⁵

A state's emergency power falls within the scope of its police powers and is used when "the very functioning of government is threatened."⁶ Generally, states have granted their executives broad emergency powers to sufficiently protect the health and safety of the state's population and adequately defend against various threats.⁷ State legislatures have created emergency power laws that grant their executives the authority to suspend, alter, or create new laws to better

2. David G. Tucker & Alfred O. Bragg, III, *Florida's Law of Storms: Emergency Management, Local Government, and the Police Power*, 30 STENSON L. REV. 837, 839 (2001).

3. Michael Cook, "Get Out Now or Risk Being Taken Out by Force": *Judicial Review of State Government Emergency Power Following A Natural Disaster*, 57 CASE W. RES. L. REV. 265, 286 (2006) (quoting *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 437 (1934)).

4. See *Slaughter-House Cases*, 83 U.S. 36, 62 (1872) ("[The police power] is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property.").

5. Cook, *supra* note 3, at 290.

6. Matthew S. Belser, *Martial Law After the Storm: A Constitutional Analysis of Martial Law and the Aftermath of Hurricane Katrina*, 35 S. U. L. REV. 147, 174-75 (2007).

7. See, e.g., NEB. REV. STAT. § 81-829.69(3) (1996) ("Under such regulations as [the governor] shall prescribe, to temporarily suspend or modify for not to exceed sixty days any public health, safety, zoning, transportation, or other requirement of law or regulation within this state . . ."); IOWA CODE § 29C.6(2) (2017) ("The governor may temporarily suspend or modify, for not to exceed sixty days, any public health, safety, zoning, transportation, or other requirement of law or regulation within this state . . ."); KAN. STAT. ANN. § 48-925(c)(1) (2020) ("[D]uring a state of disaster emergency . . . the governor may . . . [s]uspend the provisions of any regulatory statute prescribing the procedures for conduct of state business . . . if strict compliance with the provisions of such statute . . . hinder or delay . . . in coping with the disaster . . ."); COLO. REV. STAT. § 24-33.5-704(7)(a) (2018) ("In [a state of emergency], the governor may . . . [s]uspend the provisions of any regulatory statute . . . if strict compliance with the provisions of any statute . . . would in any way prevent, hinder, or delay necessary action in coping with the emergency . . ."); S.D. CODIFIED LAWS § 34-48A-5(4) (2020) ("In the event of . . . emergency that is beyond local government capability, the Governor . . . [m]ay suspend the provisions of any rules of any state agency, if strict compliance with the provisions of the rule would in any way prevent, hinder, or delay necessary action in managing a disaster . . ."); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1409 (1989) ("State legislatures followed the federal example, delegating broad emergency power to governors.").

manage emergencies.⁸ However, these emergency actions may negatively impact fundamental rights, which may never fully recover.⁹ Additionally, state executives could use these emergency powers as a stratagem to purposely discriminate against certain suspect classes.¹⁰

Recently, individuals have challenged the constitutionality of several emergency executive public health orders in response to the COVID-19 pandemic, claiming such orders infringe on constitutionally protected rights.¹¹ To make matters worse, the judiciary has at times utilized the standard set forth in *Jacobson v. Commonwealth of Massachusetts*¹² to scrutinize such emergency orders, which hardly authorizes judicial review.¹³ As a result, the judiciary has struggled with utilizing a uniform application of judicial review evidenced by some courts upholding the *Jacobson* standard, while others have abandoned the standard for the traditional tiers of scrutiny.¹⁴

8. Gregory Sunshine et al., *An Assessment of State Laws Providing Gubernatorial Authority to Remove Legal Barriers to Emergency Response*, 17 HEALTH SEC. 1, 1 (2019).

9. See John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210, 219 (2004) ("Liberties won slowly over long periods of time may be subject to rapid erosion in emergencies and these new restrictions, if they are embedded in law, may not be rapidly restored if they are restored at all.").

10. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018) ("Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."). However, the curtailment of civil rights by state executives is usually the product of sincerely protecting the health and safety of a state's population. See *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020) (opining the sincerity of Tennessee's governor in diminishing the spread of COVID-19 or his authority in protecting the population by limiting certain civil rights).

11. See *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 919 (6th Cir. 2020) ("Plaintiffs sought in the federal district court a 'temporary restraining order and/or preliminary injunction,' barring the State from enforcing 'EO-25 as applied to procedural abortions.'"); *First Baptist Church v. Kelly*, 455 F. Supp. 3d 1078, 1081 (D. Kan. 2020) ("The motion was filed in conjunction with Plaintiffs' verified complaint . . . which alleges that enforcement of restrictions on religious activity in Defendant Governor Laura Kelly's Executive Order . . . 20-18 would violate Plaintiffs' rights, including their First Amendment right to the free exercise of religion."); *Bayley's Campground Inc. v. Mills*, 463 F. Supp. 3d 22, 26 (D. Me. 2020), *recons. denied*, No. 2:20-CV-00176-LEW, 2020 WL 3037252 (D. Me. June 5, 2020) ("Together, these entities and individuals . . . challenge the summer-long application of the 14-day quarantine requirement and the Rural Reopening Plan, which they maintain are unlawful restrictions on interstate travel.").

12. 197 U.S. 11 (1905).

13. Compare *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905) (determining that during an emergency, any measures limiting or suspending constitutional rights are required to demonstrate a "real or substantial relation to" the emergency, and must not establish "a plain, palpable invasion of rights secured by the fundamental law"), with *Bayley's Campground*, 463 F. Supp. 3d at 31 ("*Jacobson*] barely authorizes judicial review at all.").

14. Compare, e.g., *Slatery*, 956 F.3d at 927 (declining to use the *Jacobson* standard and determining that when scrutinizing a woman's fundamental right in choosing to receive abortion procedures during the COVID-19 pandemic, traditional tiers of scrutiny should apply), with *In re Abbott*, 954 F.3d 772, 783 (5th Cir. 2020) (upholding the *Jacobson* standard and determining that when scrutinizing a woman's fundamental

Accordingly, the power to keep state executives in check during emergencies should belong to the state legislature, as opposed to the judicial system, because state legislatures determine the rectitude of state executives when they trade certain constitutional liberties for public health and safety.¹⁵ Additionally, state legislatures are critical in maintaining checks and balances in light of an emergency.¹⁶ Without state legislatures policing their executives during an emergency, the opportunity presents itself for these executives to use their emergency powers as a vehicle to unnecessarily limit individual liberties or obtain greater power for an extensive period of time.¹⁷

This Note argues the importance of protecting fundamental rights and preventing discrimination during a declared emergency.¹⁸ Section II of this Note provides a brief overview of four essential areas regarding this topic: (1) state executive emergency powers, (2) the *Jacobson* standard, (3) the recent application of the *Jacobson* standard in scrutinizing COVID-19 executive orders, and (4) the history, intended purpose, and intricacies of the War Powers Resolution.¹⁹ Section III of this Note proposes a local application of the War Powers Resolution in an effort to strike a balance between state executives and state legislatures to protect against unnecessarily burdening emergency executive public health orders.²⁰ Subsequently, this Note proposes replacing the *Jacobson* standard with heightened rational basis review when scrutinizing emergency executive public health orders to extend an additional layer of security to fundamental rights in light of a declared emergency.²¹ In sum, granting state legislatures more deference in policing emergency public health orders and subsequently mandating the judiciary scrutinize such orders under heightened rational basis review offers better protection to fundamental rights during declared emergencies.²²

right in choosing to receive abortion procedures during the COVID-19 pandemic, traditional tiers of scrutiny should not apply).

15. Compare Jim Rossi, *State Executive Lawmaking in Crisis*, 56 DUKE L.J. 237, 240 (2006) (“The exercise of executive emergency powers is most effectively policed by the state legislature and not courts.”), with Cook, *supra* note 3, at 290 (“State legislatures make the determinations as to acceptable trade-offs of liberty with every invocation of their police power.”).

16. Eric R. Daleo, *State Constitutions and Legislative Continuity in A 9/11 World: Surviving an “Enemy Attack”*, 58 DEPAUL L. REV. 919, 926 (2009).

17. *Id.* at 926 n.53.

18. See *infra* notes 124-41 and accompanying text.

19. 50 U.S.C. §§ 1541-1548 (1973); see *infra* notes 23-117 and accompanying text.

20. See *infra* notes 270-83 and accompanying text.

21. See *infra* notes 284-95 and accompanying text.

22. See *infra* notes 296-300 and accompanying text.

II. BACKGROUND

A. AN OVERVIEW OF STATE EXECUTIVE EMERGENCY POWERS

A state executive's duty to protect the public health and safety of a state's population is critical.²³ State constitutions include provisions that grant their respective state executives the title of commander-in-chief of the state's military forces, which affords these executives the power to maintain peace and suppress insurrection.²⁴ These provisions create the foundation of a state executive's emergency powers.²⁵ Generally, such authorities grant these executives broad discretion during a state of emergency to sufficiently protect state populations against real or imminent danger.²⁶ Further, these fairly broad powers grant state executives sweeping emergency law-making authority to sufficiently combat emergencies once a threat arises.²⁷ However, the scope of such emergency powers granted to state executives under their respective constitutions is unclear.²⁸

Strict compliance with existing laws during an emergency can hinder, delay, or completely prevent state executives from mitigating emergencies.²⁹ Therefore, although laws become incredibly adaptable

23. EARNEST B. ABBOT & OTTO J. HETZEL, *A LEGAL GUIDE TO HOMELAND SECURITY AND EMERGENCY MANAGEMENT FOR STATE AND LOCAL GOVERNMENTS* 54 (1st ed. 2005).

24. Karen J. Pita Loo, *When Protest Is the Disaster: Constitutional Implications of State and Local Emergency Power*, 43 SEATTLE U. L. REV. 1, 13 (2019).

25. *Id.* at 13-14.

26. See Michael S. Herman, *Gubernatorial Executive Orders*, 30 RUTGERS L.J. 987, 1006 (1999) ("Some of the Governor's broadest powers to issue executive orders are authorized by the emergency powers granted by the legislature."); see also *United States v. Chalk*, 441 F.2d 1277, 1280 (4th Cir. 1971) (quoting *Sterling v. Constantin*, 287 U.S. 378, 398 (1932)) ("[B]road discretion' [is] necessary for the executive to deal with an emergency situation."); *Sterling*, 287 U.S. at 398 ("In the performance of its essential function, in promoting the security and well-being of its people, the state must, of necessity, enjoy a broad discretion."); *Moorhead v. Farrelly*, 723 F. Supp. 1109, 1114 (D.V.I. 1989) ("The court refuses to define precisely what specific conditions justify continued imposition of the curfew, because doing so will destroy the broad discretion necessary for the executive to deal with an emergency situation."); *Rivera v. Cherry Hill Convalescent Ctr., Inc.*, No. CIV. 04-2449, 2006 WL 1373175, at *4 (D.N.J. May 17, 2006) ("The CDDCA grants the Governor broad discretion to control all civilian activities having to do with the emergency and to prescribe a course of conduct for the civilian population during the emergency.").

27. Rossi, *supra* note 15, at 242; see also Bernadette Meyler, *Economic Emergency and the Rule of Law*, 56 DEPAUL L. REV. 539, 544 (2007) ("In its classic contours, an emergency calls for rapid and decisive action by the executive branch, including the act of designating the situation an emergency or a 'state of exception.'").

28. Rossi, *supra* note 15, at 242.

29. See Patricia Sweeney & Ryan Joyce, *Gubernatorial Emergency Management Powers: Testing the Limits in Pennsylvania*, 6 PITT. J. ENV'T PUB. HEALTH L. 149, 153 (2012) (quoting 35 PA. CONS. STAT. § 7301(f)(1)) (stating that the Pennsylvania governor may suspend laws, rules, or regulations "if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with the emergency").

during declared emergencies, they nevertheless remain enforceable.³⁰ State legislatures have created emergency power laws that grant state executives the authority to suspend, alter, or implement new laws to better manage emergency situations.³¹ These laws outline, describe, and determine the powers of state executives during an emergency.³² Emergency declarations implemented by state executives describe the threat, establish what powers the executive intends exercise, and explain how the emergency powers will be used.³³ These declarations are often made by a governor issuing either an executive order or a proclamation.³⁴ During a declared emergency, executive orders reign supreme.³⁵

State legislatures are better suited to police state executive emergency powers than courts.³⁶ Judicial interpretation of emergency powers invites courts to speculate about determinations of emergencies, which fosters judicial intervention.³⁷ This intervention risks an interpretation of emergency executive powers that is too broad or too

30. See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 225 (1998) (“The laws will thus not be silent in time of war, but they will speak with a somewhat different voice.”); see also *Ex Parte Milligan*, 71 U.S. 2, 120-21 (1866) (“The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”); *Roberts v. Neace*, 958 F.3d 409, 414-15 (6th Cir. 2020) (“While the law may take periodic naps during a pandemic, we will not let it sleep through one.”); *First Baptist Church v. Kelly*, 455 F. Supp. 3d 1078, 1086 (D. Kan. 2020) (“Even in such extreme cases as a public health crisis, the police power of the state is not without limits, and is subject to appropriate judicial scrutiny.”).

31. Gregory Sunshine et al., *supra* note 8, at 1.

32. *Id.* at 2. A governor must first issue an emergency declaration before obtaining emergency powers. *Id.*

33. *Id.*

34. *Id.*

35. See Pita Loor, *supra* note 24, at 17 (“During an emergency, executive orders are the law of the land.”).

36. See Rossi, *supra* note 15, at 240 (“The exercise of executive emergency powers is most effectively policed by the state legislature and not courts.”); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting) (“[W]hen we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.”); Joel B. Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective*, 19 U. HAW. L. REV. 649, 651 (1997) (“Today we condemn [*Korematsu v. United States*, 323 U.S. 214 (1944)] and [*Hirabayashi v. United States*, 320 U.S. 81 (1943)] as constitutional and judicial failures, but at the time they were regarded by many as a successful example of the Court joining the political branches in support of a united war effort”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995) (“*Korematsu* demonstrates vividly that even ‘the most rigid scrutiny’ can sometimes fail to detect an illegitimate racial classification”); Mitchell F. Crusto, *State of Emergency: An Emergency Constitution Revisited*, 61 LOY. L. REV. 471, 502 (2015) (“More often than not, the courts showed a weak commitment to identifying civil liberties and redressing their abuses during the emergency.”).

37. Rossi, *supra* note 15, at 254.

narrow.³⁸ The judicial system has also routinely deferred to the state legislature's interpretation of its constitution.³⁹ Further, during an emergency, state legislatures determine the appropriateness of a state executive's actions when they surrender certain rights in the name of public health and safety.⁴⁰

Emergency powers grant executives too much discretion without enough checks to disprove deficient executive decisions.⁴¹ The local use of emergency powers has yielded mixed success due to power struggles between state legislatures and state executives.⁴² When a state executive and state legislature have differing political ideas, the chances of government failure to mitigate threats are higher.⁴³ Executive power may also be limited by a state's standards for separation of power between the executive, legislative, and judicial branches, including during times of crisis.⁴⁴ Some states have addressed this issue by requiring their executives to report to their state legislatures

38. *Id.* If judicial intervention causes the application of emergency powers to be interpreted too broadly, the judiciary then exercises the emergency powers as opposed to their politically accountable counterparts. *Id.*

39. Daleo, *supra* note 16, at 943; *see also* Whalen v. Roe, 429 U.S. 589, 597 (1977) ("For we have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern."). *But see* Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189, 226-27 (2002) (stating that a "determination of the scope of the governor's authority granted by Article III, section 16, as amended, will require a decision whether the bill involved here was an 'appropriation bill' as that term is used in our constitution. This determination, notwithstanding the legislative definition, is for the courts.").

40. *See* Cook, *supra* note 3, at 290 ("Thus, a court cannot justify a more probing inquiry into the state government's use of its police power based on the representative capacity of the legislative body consenting to the trade-off in liberty.").

41. Rebecca L. Haffajee & Michelle M. Mello, *Thinking Globally, Acting Locally—The U.S. Response to Covid-19*, 382 NEW ENG. J. OF MED. e75(1), e75(1) (2020); *see also* Nancy Murray & Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons from History*, 87 MASS. L. REV. 72, 73 (2002) ("United States history reveals that the state and federal governments have rarely passed up the temptation offered by the 'pressing exigencies of crisis' to enlarge their power and serve ulterior motives, at the expense of constitutional rights."); *but see* Leslie E. Gerwin, *Planning for Pandemic: A New Model for Governing Public Health Emergencies*, 37 AM. J.L. & MED. 128, 168 (2011) ("Legislators can establish in advance a process for evaluating executive emergency conduct.").

42. Rossi, *supra* note 15, at 242; *see also* Desrosiers v. Governor, 158 N.E.3d 827, 839-42 (2020) (rejecting claims by business owners that Governor Baker's emergency public health orders violated separation of powers principles, legislative delegation of authority, and claims of substantive due process).

43. *See* Rossi, *supra* note 15, at 242 ("In situations where the political goals of the executive are not identical to the legislature or to national officials, there is a strong potential for inaction in the face of crisis and, at the extreme, blame.").

44. *Id.*; *see also* Evan Caminker, *The Unitary Executive and State Administration of Federal Law*, 45 U. KAN. L. REV. 1075, 1106 (1997) ("[S]tate legislatures, which are not bound (at least by the Federal Constitution) by any nondelegation principle, might well accord a significant degree of discretion over basic goals and values to state executives.").

and call them into session shortly after declaring an emergency.⁴⁵ Other states do not enforce this reporting requirement until after an emergency has expired.⁴⁶

Emergency public health orders may warrant heightened rational basis review to properly scrutinize the rationality behind such orders because they temporarily hamper fundamental rights but do not completely contravene them.⁴⁷ Heightened rational basis review is satisfied when adequate evidence is presented to justify a legitimate state interest, and the law furthering that interest does not burden one specific group and exempt others subject to the same concerns.⁴⁸

B. *JACOBSON V. MASSACHUSETTS*: THE CONCEPTION OF VACANT JUDICIAL REVIEW IN SCRUTINIZING EMERGENCY PUBLIC HEALTH ORDERS

In *Jacobson v. Massachusetts*,⁴⁹ the United States Supreme Court decided that any measures limiting or suspending constitutional rights during an emergency are required to demonstrate a “real or substantial relation” to the emergency and must not establish a “plain, palpable invasion of rights secured by the fundamental

45. Rossi, *supra* note 15, at 246; *see, e.g.*, ALA. CODE § 31-9-8 (2005) (requiring the governor to immediately call the state legislature into session after declaring an emergency); ARIZ. REV. STAT. ANN. § 26-303 (2005) (same); GA. CODE ANN. § 38-3-51 (2006) (same); IDAHO CODE § 67-5506 (2006) (same); MINN. STAT. § 12.31 (2005) (same).

46. Rossi, *supra* note 15, at 246-47; *see, e.g.*, ALASKA STAT. § 26.20.040 (2006) (permitting the governor to use state resources but not requiring the governor to call the state legislature into session after a declared emergency); CAL. GOV'T CODE § 8624 (2006) (same); KAN. STAT. ANN. § 48-924 (2005) (same); MONT. CODE ANN. § 10-3-302 (2005) (same); N.C. GEN. STAT. § 14-288.15 (2005) (same); S.C. CODE ANN. § 1-3-420 (2005) (same); UTAH CODE ANN. § 63-5a-5 (2005) (same); WIS. STAT. § 166.03 (2006) (same).

47. *Compare* *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (determining that when fundamental rights are infringed, they are subject to close judicial scrutiny), *and* Raphael Holoszyk-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2089 (2015) (stating that when a law that somewhat burdens a fundamental right, but does not actually infringe the right, the burdened interest could warrant careful review of the rationality for the burden), *with* *Holder v. Humanitarian Law Project*, 561 U.S. 1, 36 (2010) (granting greater judicial deference “[g]iven the sensitive interests in national security”).

48. *Compare* *Plyler v. Doe*, 457 U.S. 202, 229 (1982) (determining that the evidence proffered did not support the claim that excluding undocumented children is likely to improve the quality of education in the State), *and* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (determining that denying a special use permit for a residential structure to house the mentally disabled because of several potential hazards, yet neglecting to impose similar restrictions and permitting similar use in the same neighborhood fails to rationally justify discrimination), *with* *County of Butler v. Wolf*, 486 F. Supp. 3d 883, 901 (W.D. Pa. 2020) (“[O]rdinary constitutional scrutiny is necessary to maintain the independent judiciary’s role as a guarantor of constitutional liberties—even in an emergency.”).

49. 197 U.S. 11 (1905).

law”⁵⁰ In *Jacobson*, the Board of Health of the City of Cambridge, Massachusetts (“Board of Health”) required its inhabitants to receive a smallpox vaccination as a result of a local outbreak.⁵¹ Mr. Henning Jacobson (“Jacobson”) did not comply with the Board of Health’s required vaccination and was criminally cited by the Commonwealth of Massachusetts.⁵² Jacobson plead not guilty to the criminal complaint, stating that compulsory vaccinations impinged on the spirit of the Constitution.⁵³ The Supreme Judicial Court of Massachusetts determined that even if Cambridge’s immunization statute invaded personal liberties, the statute was nonetheless created to promote the general welfare during a pandemic, and therefore justified the burdening effects of the statute as constitutional.⁵⁴ The court reasoned that, if necessary, the rights of the population must yield when the public safety and welfare of an entire community is at stake.⁵⁵

The United States Supreme Court honed the issue in *Jacobson* to be whether Cambridge’s compulsory immunization statute was inconsistent with the secured liberties of the Constitution, which affords protection against deprivation by the state.⁵⁶ The Supreme Court stated that constitutional rights are subject to reasonable conditions to ensure the health and safety of the community.⁵⁷ The Court further stated that liberty is not completely unrestricted, and is therefore regulated by law.⁵⁸ A state’s police power to enact health and quarantine laws remains within a state’s jurisdiction.⁵⁹ However, the Supreme Court completely abstained from attempting to interpret state

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

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

Id.

51. *Id.* at 12-13.

52. *Id.* at 13.

53. *Id.* at 13-14. Jacobson stated that mandatory vaccinations opposed the Constitution’s Preamble and the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause of the Fourteenth Amendment. *Id.*

54. See *Commonwealth v. Pear*, 66 N.E. 719, 721-22 (Mass. 1903), *aff’d sub nom. Jacobson*, 197 U.S. 11 (stating the language of Cambridge’s immunization statute made it clear that the legislative purpose of the statute was to prevent the spread of smallpox).

55. *Pear*, 66 N.E. at 720.

56. *Jacobson*, 197 U.S. at 24.

57. *Id.* at 26 (quoting *Crowley v. Christensen*, 137 U. S. 86, 89 (1890)).

58. *Id.* at 26-27 (quoting *Christensen*, 137 U. S. at 89).

59. *Id.* at 25.

police powers.⁶⁰ The Court reasoned it is necessary that states are granted the paramount right to protect themselves during pandemics.⁶¹ It was further reasoned that states should enjoy broad discretion to successfully execute public health objectives; although, states may not use this broad discretion to overtly infringe on rights protected by the Constitution.⁶²

A state could possibly use this broad power during a pandemic to create a health or quarantine law that is arbitrary or perhaps extends beyond what is reasonably required to ensure public health and safety.⁶³ State action of this caliber could target particular persons in certain circumstances, which would authorize or compel the judiciary to interfere and protect such persons.⁶⁴ Accordingly, the Court determined state health and quarantine laws that regulate liberties during an emergency are constitutional only if they demonstrate a “real or substantial relation” to public health and safety regarding the emergency, and do not establish “a plain, palpable invasion of rights secured by the fundamental law”⁶⁵

C. THE RECENT APPLICATION OF THE *JACOBSON* STANDARD IN
SCRUTINIZING EMERGENCY EXECUTIVE PUBLIC HEALTH ORDERS
DURING THE COVID-19 PANDEMIC

1. *The Right to Bear and Beget*

The United States Courts of Appeals for the Fifth and Sixth Circuits have arrived at contrary conclusions regarding when to apply

60. *Id.*

61. *Id.* at 27.

62. Devin W. Quackenbush, *Religion's Hepatitis B Shot: The Arkansas General Assembly Established an Overly Broad Religious Exemption to Mandatory Immunization After the District Court Invalidated the Original Religious Exemption – McCarthy v. Ozark Sch. Dist.*, 42 CREIGHTON L. REV. 777, 794 (2009).

63. *Jacobson*, 197 U.S. at 28. COVID-19, as well as previous pandemics, have been comparable to times of war because pandemics and wars both threaten global security and the lives of nations. See *United States v. Idris Browning*, No. 20 CR. 02, 2020 WL 2306566 at *3 (S.D.N.Y. May 7, 2020) (“This global pandemic has spurred a public health crisis frequently likened to war.”); Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53, 122 n.393 (2007) (citing HOMELAND SEC. COUNCIL, NAT’L STRATEGY FOR PANDEMIC INFLUENZA: IMPLEMENTATION PLAN (2006)) (stating that the impact of an extreme pandemic may be more comparable to war as opposed to various natural disasters or even acts of terrorism); J.M. Spectar, *The Olde Order Crumbleth: HIV-Pestilence As A Security Issue & New Thinking About Core Concepts in International Affairs*, 13 IND. INT’L & COMP. L. REV. 481, 490–91 (2003) (comparing pandemics to war and noting both foster an immense threat to global security); Alessandra Spadaro, *Covid-19: Testing the Limits of Human Rights*, 11 EUR. J. RISK REG. 317, 322 (2020) (“This assessment is further bolstered by the likening of the pandemic to a war, which is the paradigmatic example of a public emergency threatening the life of a nation.”).

64. *Jacobson*, 197 U.S. at 28.

65. *Id.* at 31.

the *Jacobson* standard to executive orders limiting abortion procedures during the COVID-19 pandemic.⁶⁶ Specifically, the Fifth and Sixth Circuits differed in how much deference the *Jacobson* standard should receive when scrutinizing the impact that emergency public health legislation has on potential abortion recipients during the pandemic.⁶⁷ However, both cases were comprised of strikingly similar facts.⁶⁸

In *Adams & Boyle, P.C. v. Slatery*,⁶⁹ the Sixth Circuit determined that providers of abortion services would likely succeed on the merits in claiming that an emergency public health order executed by Governor Bill Lee violated the constitutional right to access pre-viability abortions when the order postponed such procedures for three weeks.⁷⁰ The Sixth Circuit reasoned that the *Jacobson* standard should not usurp the rights of *Roe v. Wade*⁷¹ and *Planned Parenthood*

66. Compare *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 927 (6th Cir. 2020) (declining to use the *Jacobson* standard and determining that when scrutinizing a woman's fundamental right in choosing to receive abortion procedures during the COVID-19 pandemic, traditional tiers of scrutiny should apply), with *In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020) (upholding the *Jacobson* standard and determining that when scrutinizing a woman's fundamental right in choosing to receive abortion procedures during the COVID-19 pandemic, traditional tiers of scrutiny should not apply).

67. See *Slatery*, 956 F.3d at 927 ("What we will not countenance, however, is the notion that COVID-19 has somehow demoted *Roe* and *Casey* to second-class rights, enforceable against only the most extreme and outlandish violations. Such a notion is incompatible not only with *Jacobson*, but also with American constitutional law writ large."); but cf., *Abbott*, 954 F.3d at 784 (upholding the *Jacobson* standard and determining that when scrutinizing a woman's fundamental right in choosing to receive abortion procedures during the COVID-19 pandemic, traditional tiers of scrutiny should not apply).

68. Compare *Adams & Boyle, P.C. v. Slatery*, 455 F. Supp. 3d 619, 623–24 (M.D. Tenn.), *aff'd as modified*, 956 F.3d 913 (6th Cir. 2020), and *modified*, No. 3:15-CV-00705, 2020 WL 2026986 (M.D. Tenn. Apr. 27, 2020) (stating that healthcare providers filed a complaint stating that Tennessee governor's Executive Order 25, which postponed invasive surgical procedures that were non-urgent and elective until April 30, 2020, was unconstitutional as applied to abortion recipients), with *Abbott*, 954 F.3d at 777, 780 (stating that healthcare providers filed a complaint stating that Texas governor's Executive order GA-09, which postponed non-essential surgeries and procedures until April 21, 2020, was unconstitutional as applied to abortion recipients). See Kasee Sparks, *Differences in Legal and Medical Standards in Determining Sexually Violent Predator Status*, 32 L. & PSYCHOL. REV. 175, 177 (2008) ("[S]tate legislatures have developed a unique form of commitment hearings which incorporate both legal and medical elements."). There has been heightened discrimination and reduced legal standards present in previous pandemics. See Necia B. Hobbes, *Out of the Frying Pan into the Fire: Heightened Discrimination & Reduced Legal Safeguards When Pandemic Strikes*, 72 U. PITT. L. REV. 779, 787 (2011) ("During a pandemic, the government may take emergency actions that will likely have the unfortunate side effect of reducing legal safeguards against inadvertent discrimination.").

69. 956 F.3d 913 (6th Cir. 2020).

70. *Slatery*, 956 F.3d at 927.

71. 410 U.S. 113 (1973).

of *Southeastern Pennsylvania v. Casey*⁷² solely due to the COVID-19 pandemic.⁷³

Adversely, in *In re Abbott*,⁷⁴ the Fifth Circuit upheld Governor Greg Abbott's executive order postponing non-essential surgeries to reduce the spread of COVID-19.⁷⁵ The Fifth Circuit reasoned that during a pandemic, traditional tiers of scrutiny do not apply.⁷⁶ Instead, the Fifth Circuit utilized the *Jacobson* standard and determined measures limiting or suspending fundamental rights must have a "real or substantial relation to" the public health emergency, and those measures must not represent "a plain, palpable invasion of" fundamentally secured rights.⁷⁷

2. *The Free Exercise of Religion*

Several courts have grappled with the application of the *Jacobson* standard when scrutinizing emergency public health legislation impeding the free exercise of religion.⁷⁸ Courts have chiefly diverged in their determinations when interpreting the exemptions of COVID-19 executive orders that limit certain secular and non-secular activities.⁷⁹

72. 505 U.S. 833 (1992).

73. *Slatery*, 956 F.3d at 927.

74. 954 F.3d 772 (5th Cir. 2020).

75. *Abbott*, 954 F.3d at 796.

76. *Id.* at 784.

77. *Id.* (citing *Jacobson*, 197 U.S. at 31).

78. See *Cassell v. Snyders*, 458 F. Supp. 3d 981, 994 (N.D. Ill. 2020) ("Based on the plethora of evidence here, the Court finds that COVID-19 qualifies as the kind of public health crisis that the Supreme Court contemplated in *Jacobson* and that the coronavirus continues to threaten the residents of Illinois."); *Gish v. Newsom*, No. EDCV20755JGBKXX, 2020 WL 1979970, at *4 (C.D. Cal. Apr. 23, 2020) ("The Court agrees: Defendants have a right to protect California residents from the spread of COVID-19—even if those protections temporarily burden constitutional rights to a greater degree than normally permissible."); *First Baptist Church v. Kelly*, 455 F. Supp. 3d 1078, 1087 (D. Kan. 2020) (citing *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990)) ("[T]he court concludes that *Smith*, *Abbott*, *Jacobson*, and similar cases do not provide the best framework in which to evaluate the Governor's executive orders because all those cases deal with laws that are facially neutral and generally applicable."); *Abbott*, 954 F.3d at 784; and *Jacobson*, 197 U.S. at 31); *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020) (denying the *Jacobson* standard and determined that "restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom."); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring) (refusing to apply the *Jacobson* standard claiming is not a source of authority state and local governments may use to part ways with the Constitution during a pandemic).

79. Compare *Neace*, 958 F.3d at 413 (stating that the emergency public health orders consisted of four pages of exceptions to the prohibition, and accordingly targeted a protected class), with *First Baptist*, 255 F. Supp. 3d at 1090 (upholding the *Jacobson* standard by banning non-secular in-person worshiping activities to slow the spread of COVID-19, yet carving out broad exemptions for several secular activities that risked similar personal contact that would occur during in-person non-secular worshiping ac-

In *Ward v. Polite*,⁸⁰ the Sixth Circuit held that a facially neutral policy becomes discriminatory against religion if the policy is wrought with only *secular* individualized exemptions.⁸¹ Comparatively, the *Jacobson* standard should be implemented when measures limiting or suspending constitutional rights during an emergency are required to demonstrate a “real or substantial relation to” the emergency, and must not establish “a plain, palpable invasion of rights secured by the fundamental law”⁸² However, COVID-19 executive orders that exempt secular activities from certain restrictions, yet ban strikingly similar non-secular worshipping services under *Ward*’s individualized exemption standard, are nevertheless upheld under the *Jacobson* standard.⁸³

D. THE WAR POWERS RESOLUTION OF 1973: ITS HISTORY, INTENDED PURPOSE, AND THE INTRODUCTION OF THE “SLIDING SCALE OF DEFERENCE” IN CALIBRATING EXECUTIVE DECISIONS DURING A STATE OF EMERGENCY

1. *The War Powers Resolution of 1973: Its History and Intended Purpose*

During the Vietnam War, Congress was unsettled because it was unsuccessful in bringing American troops home when it intended.⁸⁴ The Vietnam War came to an end after nearly two decades due to exceptional Congressional effort and Americans’ flagging support for President Nixon’s Vietnam War policy.⁸⁵ At its close, Congress en-

tivities). There have been instances where the fundamental right to travel has been impacted by exemptions in emergency public health orders as well. *See, e.g.*, *Bayley’s Campground Inc. v. Mills*, 463 F. Supp. 3d 22, 24 (D. Me. 2020), *reconsideration denied*, No. 2:20-CV-00176-LEW, 2020 WL 3037252 (D. Me. June 5, 2020) (“[A]ll lodging operations must close as non-essential businesses, subject to certain enumerated exceptions.”); *Page v. Cuomo*, 478 F. Supp. 3d 355, 359 (N.D.N.Y. 2020) (“With a few limited exceptions, the [State Department of Health] guidance requires any person traveling to New York from one of these so-called ‘restricted’ states to self-quarantine for fourteen days.”).

80. 667 F.3d 727 (6th Cir. 2012).

81. *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012). The Sixth Circuit stated state action of such a caliber warrants strict scrutiny. *Id.*

82. *Jacobson*, 197 U.S. at 31.

83. *See Gish*, 2020 WL 1979970, at *2 (upholding the *Jacobson* standard and barring in-person non-secular activities, yet the emergency public health order exempted secular activities such as shopping at stores and malls without justification); *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (Kavanaugh, J., dissenting) (analyzing the justification between the emergency public health order subjecting non-secular activities to a twenty-five percent occupancy gap, but not comparable secular businesses such as pet grooming shops, cannabis dispensaries, and florists).

84. Gary Minda, *Congressional Authorization and Deauthorization of War: Lessons from the Vietnam War*, 53 WAYNE L. REV. 943, 945 (2007).

85. *Id.*

acted the War Powers Resolution of 1973⁸⁶ to counter President Johnson's and President Nixon's executive overreach of their respective commander-in-chief powers during the Vietnam War.⁸⁷

The War Powers Resolution was crafted to satisfy the intent of the Constitution's framers in guaranteeing that both the President and Congress collectively evaluate the introduction of United States military into hostilities.⁸⁸ Further, the Resolution was created so the President and Congress could cohesively evaluate situations where circumstances indicate real or imminent involvement with hostilities.⁸⁹ The Resolution sources its power through the Constitution.⁹⁰ Specifically, the Necessary and Proper Clause of the Constitution affords Congress the power to create all laws necessary and proper for execution, including any constitutional powers vested in the United States government, along with its departments or officers.⁹¹ In addition, the Constitution grants the President the commander-in-chief power, which affords the President the power to either introduce the United States military into hostilities, or where clear circumstances indicate imminent involvement with hostilities to protect the population.⁹² However, the commander-in-chief power may only be triggered when Congress declares war, it is authorized by statute, or in a state of national emergency resulting from an attack upon the United States.⁹³ Therefore, the overall purpose of the Resolution is to guarantee that the President refrains from overreaching when introducing troops without congressional consent.⁹⁴

To maintain its purpose, the War Powers Resolution states the President shall consult with Congress whenever possible before introducing the United States military into hostilities or situations where

86. 50 U.S.C. §§ 1541-1548 (1973).

87. See Brendan Flynn, *The War Powers Consultation Act: Keeping War Out of the Zone of Twilight*, 64 CATH. U. L. REV. 1007, 1029 (2015) ("As the Vietnam War drew to an end, Congress responded to the perceived and actual overreach of two successive Presidents by drafting what became known as the War Powers Resolution of 1973 . . . which overcame President Nixon's veto in 1973.")

88. War Powers Resolution, 50 U.S.C. § 1541(a) (1973); see also *Congressional Control of Presidential War-Making Under the War Powers Act: The Status of A Legislative Veto After Chadha*, 132 U. PA. L. REV. 1217, 1218 (1984) (quoting *War Powers Legislation, Hearings Before the Subcomm. on Nat'l Sec. Pol'y and Sci. Dev. of the Comm. on Foreign Affairs, House of Representatives*, 92d Cong., 1st Sess. 2 (1971) [hereinafter *War Powers Legislation*]) (stating that the purpose of the War Powers Act was to "restore the 'proper constitutional balance between Congress and the President'" [hereinafter *Congressional Control*]).

89. § 1541(a).

90. *Id.*

91. § 1541(b) (citing U.S. CONST. art. I, § 8).

92. § 1541(c).

93. *Id.*

94. Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 103 (1984).

circumstances indicate imminent involvement with hostilities.⁹⁵ Additionally, the President is to consult regularly with Congress until military presence has been extinguished, or until the deployed military is no longer engaged in hostilities.⁹⁶ Through these initial and reoccurring consultations, the President is required to obtain congressional consent, which harbors an open line of communication to better reach a shared communion of purpose between the political branches.⁹⁷

The War Powers Resolution possesses nondelegable language declaring that no provision under the Resolution should be interpreted to alter constitutional authority of either the President or Congress.⁹⁸ Further, this language states that no provision under the Resolution should be interpreted to grant the President the authority to introduce United States military into hostilities, which the President would not have without the Resolution.⁹⁹

The War Powers Resolution mandates a presidential reporting requirement.¹⁰⁰ Per the reporting requirement, the President must send a written report to Congress within forty-eight hours of introducing the United States military into foreign hostilities absent a congressional declaration of war.¹⁰¹ This written report sets forth the circumstances detailing the President's reasoning for utilizing a military presence, the legislative and constitutional authority of the military introduction, and the estimated duration and scope of military involvement.¹⁰² The presidential reporting requirement is integral because it triggers two executive limitations Congress may utilize.¹⁰³ These executive limitations can be initiated by two termination provisions within the reporting requirement.¹⁰⁴

95. § 1542.

96. *Id.*

97. *See id.* (describing the presidential reporting requirements and the rationale to strike a balance to limit the presidential war powers).

98. *Congressional Control*, *supra* note 88, at 1223-24 (quoting War Powers Resolution, 50 U.S.C. § 1547(d)(1)).

99. *Id.* at 1223 (quoting § 1547(d)(2)).

100. § 1543(a).

101. *Id.*

102. *See* § 1543(a)(3)(A)-(C) (stating without declaration of war, "the President shall submit within 48 hours to [Congress] a report . . . setting forth . . . the circumstances necessitating the introduction of United States Armed Forces . . . the constitutional and legislative authority under which such introduction took place and . . . the estimated scope and duration of the hostilities").

103. Carter, *supra* note 94, at 129 ("The War Powers Resolution contains two provisions that might be construed as legislative vetoes.").

104. *Congressional Control*, *supra* note 88, at 1224-25 (quoting § 1544(c)) ("The second termination provision . . . enables Congress at any time, by concurrent resolution, to direct the President to withdraw forces 'engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization.'").

The first termination provision, or natural termination provision, requires that deployment of United States military terminate within sixty days of the introduction of the reporting requirement, unless Congress authorizes otherwise.¹⁰⁵ The second termination provision, or concurrent resolution provision, enables Congress to mandate the President by concurrent resolution to extinguish forces that are engaged in hostilities absent a declaration of war or statutory authorization.¹⁰⁶ In other words, absent congressional declaration of war or congressional authorization of military force, the President must cease military operations within sixty days after the introduction of the reporting requirement.¹⁰⁷ Supporters of the Resolution believed the sixty day automatic termination provision would implement a safeguard against involvement in future possible Vietnam-style wars.¹⁰⁸ These provisions within the Resolution are integral in framing executive limitations during emergency situations.¹⁰⁹

2. *The War Powers Resolution of 1973: The Introduction of the “Sliding Scale of Deference” in Calibrating Executive Decisions During a State of Emergency*

The War Powers Resolution’s termination provisions and its broad deference to Congress together create a scale that gradually slides decision-making authority from the President to Congress during a declared emergency.¹¹⁰ Although the President has broad authority to use military force at the outset and during an emergency,

105. *Id.* at 1224 (citing § 1544(b)) (“The first [termination provision] mandates that deployment of troops be terminated within sixty days of the commencement of the reporting period unless Congress expressly authorizes otherwise.”).

106. *Id.* at 1224-25. A concurrent resolution does not require presidential approval, unlike a bill or joint resolution, therefore avoiding potential presidential veto of congressional resolution mandating the President to extinguish United States military. *Id.* at 1225.

107. Brief of the United States Senate, Appellee-Petitioner app. at 68, *I.N.S. v. Chadha*, 462 U.S. 919, 1003 (1983) (No. 80-1832) (citing § 1544(b), (c)) (“Absent declaration of war, [the] President may be directed by concurrent resolution to remove United States armed forces engaged in foreign hostilities.”).

108. *Crockett v. Reagan*, 558 F. Supp. 893, 900 (D.D.C. 1982).

109. *Chadha*, 462 U.S. at 970-71 (White, J., dissenting).

110. See Russell Dean Covey, *Adventures in the Zone of Twilight: Separation of Powers and National Economic Security in the Mexican Bailout*, 105 *YALE L.J.* 1311, 1343 (1996) (“As with the War Powers Resolution, the timing mechanism should prevent the President from taking advantage of congressional inertia to conduct a maverick foreign policy.”); Michael Stokes Paulsen, *Youngstown Goes to War*, 19 *CONST. COMMENT.* 215, 245 (2002) (“Congress . . . enacted into law an explicit lack of deference to any tradition of unilateral presidential war authority and an explicit rejection of the propriety of inferring authority from legislation in the neighborhood of granting the specific authority at issue but not in fact granting it.”); Donna Haynes Henry, *The War Powers Resolution: A Tool for Balancing Power Through Negotiation*, 70 *VA. L. REV.* 1037, 1050 (1984) (“The approach that Congress ultimately adopted represented a compromise between the interests of the legislative and executive branches.”).

over time, the President's extensive emergency powers are gradually conveyed to Congress to prevent presidential overreach.¹¹¹ This is evidenced by the Resolution's nondelegable language that allocates Congress broad deference, as well as the Resolution's two executive termination provisions.¹¹²

This nondelegable language places the burden of obtaining congressional authority to continue a military presence on the President.¹¹³ If the President wishes to continue a military presence after the Resolution's natural termination point of sixty days, the President may only do so if Congress allows it.¹¹⁴ Congress may grant the President permission to continue military presence by declaring war, enacting specific authorization for use of military force, or by extending the sixty day natural termination period.¹¹⁵ In the alternative, if Congress decides against the President's actions, Congress is afforded the authority to terminate United States military presence with one of the two termination provisions within the Resolution.¹¹⁶ This fluid system of checks and balances ultimately authorizes the President to exercise inherent military power only if Congress does not prevent it.¹¹⁷

111. Compare John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 200 (1996) (discussing the historical importance of a broad Executive military authority during an emergency), with Covey, *supra* note 110, at 1343 (stating that the War Power Resolution's timing mechanism prevents presidential overreach), and Brief of the United States Senate, *supra* note 107, at app. 68 (citing § 1544(b), (c)) ("Absent declaration of war, [the] President may be directed by concurrent resolution to remove United States armed forces engaged in foreign hostilities.").

112. Compare § 1544(b) ("Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1) of this title, whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted . . ."), and § 1544(c) ("Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States . . . without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution."), with *Crockett*, 558 F. Supp. at 900 (quoting 119 CONG. REC. 1400 (1973)) ("The approach taken in the War Powers Bill reverses the situation by placing the burden on the Executive to come to Congress for specific authority. The sponsors of the Bill believe that this provision [the 60-day automatic cutoff] will provide an important national safeguard against creeping involvement in future Vietnam style wars.").

113. *Crockett*, 558 F. Supp. at 900.

114. § 1544(b). The President may continue military presence without congressional permission if and only if Congress is not able to meet in the event of an attack on the United States. *Id.*

115. *Id.*

116. § 1544(b), (c).

117. Carter, *supra* note 94, at 124.

III. ANALYSIS

This Note argues that protecting fundamental rights and preventing discrimination is imperative, even during a pandemic.¹¹⁸ Subsequently, this Note argues that state legislatures should provide initial oversight to state executive authorities when promulgating emergency orders during a public health crisis.¹¹⁹ However, this Note asserts the importance of the judiciary's role during a public health crisis by arguing courts should provide secondary oversight by granting more deference to state legislative findings when reviewing emergency public health orders.¹²⁰ Additionally, this Note argues that states should adopt a local version of the War Powers Resolution¹²¹ for the context of state executive authority during public health emergencies to appropriately protect fundamental rights during a public health emergency.¹²² Lastly, this Note argues the *Jacobson* standard should be replaced with heightened rational basis review when scrutinizing emergency public health legislation.¹²³

A. PROTECTING FUNDAMENTAL RIGHTS AND PREVENTING DISCRIMINATION IS IMPERATIVE, EVEN DURING A PANDEMIC

Although laws become increasingly adaptable during declared emergencies—such as the COVID-19 pandemic—a state's police power is not completely without limits during such emergencies because, while laws do become more malleable, they nevertheless remain enforceable.¹²⁴ Fundamental rights during a public health crisis may not be identical to the fundamental rights during ordinary times; however, this difference alone should neither reduce constitutional protection nor only enforce such protection when there is a “plain, palpable invasion” of those rights.¹²⁵ Further, government pol-

118. See *infra* notes 124-41 and accompanying text.

119. See *infra* notes 142-56 and accompanying text.

120. See *infra* notes 157-243 and accompanying text.

121. 50 U.S.C. §§ 1541-1548 (1973).

122. See *infra* notes 270-83 and accompanying text.

123. See *infra* notes 284-95 and accompanying text.

124. Compare *Cassell v. Snyders*, 458 F. Supp. 3d 981, 993 (N.D. Ill. 2020) (“This is not to say that the government may trample on constitutional rights during a pandemic.”), and *REHNQUIST*, *supra* note 30, at 225 (“The laws will thus not be silent in time of war, but they will speak with a somewhat different voice.”), with *Ex Parte Milligan*, 71 U.S. 2, 120-21 (1866) (“The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”), and *Roberts v. Neace*, 958 F.3d 409, 414–15 (6th Cir. 2020) (“While the law may take periodic naps during a pandemic, we will not let it sleep through one.”).

125. Compare *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 927 (6th Cir. 2020) (“Of course, we do not mean to suggest that abortion rights during a public health crisis are identical to abortion rights during normal times.”), with *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905) (determining that during an emergency, any measures limiting or

icy in response to emergencies should be strongly criticized because these fundamental rights are held to a high standard, and temporarily limiting such rights may subsequently lead to more permanent restrictions.¹²⁶

The judiciary has historically regretted the temporary abandonment of fundamental rights during emergency situations because of the lasting impacts that have followed.¹²⁷ For example, cases such as *Hirabayashi v. United States*¹²⁸ and *Korematsu v. United States*¹²⁹ were originally considered successful examples of the judiciary joining the political branches to support the war effort, yet these cases are condemned today as constitutional and judicial failures because they granted excessive power to the political branches, and further baselessly discriminated against a protected class.¹³⁰

In *Hirabayashi*, the United States Supreme Court held the President and Congress, in cooperation, possessed the constitutional power to prescribe a curfew order imposed on those of Japanese ancestry when the order was created as a defense measure to safeguard an adjacent military zone from sabotage and espionage.¹³¹ The Court reasoned such an order was constitutional because it was prescribed with the purpose of prosecuting the war, the Constitution grants Congress the power to wage war, and the Constitution further grants the President the commander-in-chief powers.¹³²

In *Korematsu*, a Fundamental Exclusion Order excluding all persons of Japanese ancestry from a military zone was determined to be enforceable since some people of Japanese descent within the zone remained loyal to Japan and maintained an allegedly poor disposition towards the United States as a result of several investigations.¹³³ The Court reasoned the dereliction of the fundamental rights of a sin-

suspending constitutional rights during an emergency are required to demonstrate a “real or substantial relation to” the emergency, and must not establish “plain, palpable invasion[s] of rights secured by the fundamental law”).

126. Compare REHNQUIST, *supra* note 30, at 178 (“But if freedom of speech is to be meaningful, strong criticism of government policy must be permitted even in wartime.”), with Daleo, *supra* note 16, at 926 n.53 (quoting FREEMAN, *supra* note 16, at 3) (“Without a legislative check, it may be possible for a governor or her associates to employ emergency powers to permanently undermine individual liberties or seize greater powers within the state.”).

127. See *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting) (“[W]hen we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.”).

128. 320 U.S. 81 (1943).

129. 323 U.S. 214 (1944).

130. Grossman, *supra* note 36, at 651.

131. *Hirabayashi*, 320 U.S. at 92.

132. *Id.*

133. *Korematsu v. United States*, 323 U.S. 214, 219 (1944), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

gle racial group can potentially be justified for reasons of public health and safety; however, the Court acknowledged that racial antagonism may never be justified.¹³⁴ The Court concluded by stating such legal restrictions should be subject to the most rigid scrutiny.¹³⁵

Hirabayashi and *Korematsu* are now seen as constitutional and judicial blunders because of the Court's failure to detect baseless, illegitimate emergency legislation that burdened a single racial group when applying the most rigid scrutiny to review such legislation.¹³⁶ *Hirabayashi* and *Korematsu* are also considered failures because of the amount of power the judiciary granted the political branches to promulgate and execute discriminatory orders motivated by racial prejudice, failed political leadership, and wartime hysteria without adequate evidence.¹³⁷

These judicial errors conducted in wartime should be similarly anticipated during a pandemic such as COVID-19, as well as previous pandemics.¹³⁸ Both war and pandemics threaten global security and the very lives of nations.¹³⁹ Accordingly, if federal and local governments are permitted to trample fundamental rights during a pandemic without evidencing adequate justifications, then the nation may be faced with the same mistakes made in *Hirabayashi* and *Korematsu* because the judiciary could potentially permit unnecessarily sweeping, discriminatory emergency legislation, and demonstrate lowered

134. *Korematsu*, 323 U.S. at 216 (“Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.”).

135. *Id.* “That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.” *Id.*

136. Compare Grossman, *supra* note 36, at 651 (condemning the judiciary's failure to protect minority rights in wartime), with *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995) (“*Korematsu* demonstrates vividly that even ‘the most rigid scrutiny’ can sometimes fail to detect an illegitimate racial classification . . .”).

137. Compare Grossman, *supra* note 36, at 651 (“Today we condemn *Korematsu* and *Hirabayashi* as constitutional and judicial failures, but at the time they were regarded by many as a successful example of the Court joining the political branches in support of a united war effort . . .”), with *Adarand Constructors*, 515 U.S. at 236 (quoting Civil Liberties Act of 1988, 50 U.S.C. § 4202(a) (1988)) (“[T]hese actions [of relocating and interning civilians of Japanese ancestry] were carried out without adequate security reasons . . . and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership . . .”).

138. See, e.g., *United States v. Idris Browning*, 2020 WL 2306566 at *3 (S.D.N.Y. May 7, 2020) (“This global pandemic has spurred a public health crisis frequently likened to war.”).

139. See Batlan, *supra* note 63, at 122 n.393 (citing HOMELAND SEC. COUNCIL, NAT. STRATEGY FOR PANDEMIC INFLUENZA: IMPLEMENTATION PLAN (2006)) (stating that the impact of an extreme pandemic may be more comparable to war as opposed to various natural disasters or even acts of terrorism); Spectar, *supra* note 63, at 490–91 (comparing pandemics to war and noting both foster an immense threat to global security); Spadaro, *supra* note 63, at 322 (“This assessment is further bolstered by the likening of the pandemic to a war, which is the paradigmatic example of a public emergency threatening the life of a nation.”).

procedural safeguards.¹⁴⁰ Therefore, protecting fundamental rights and preventing discrimination is imperative during a pandemic because, historically, federal and local governments have seized opportunities to inflate their powers, execute ulterior motives, and curtail constitutionally protected rights during declared emergencies.¹⁴¹

B. STATE LEGISLATURES ARE BETTER POSITIONED TO INITIALLY REVIEW COVID-19 EXECUTIVE ORDERS FOR CONSTITUTIONAL VIOLATIONS; HOWEVER, THE JUDICIARY SHOULD BE AUTHORIZED TO REVIEW THE STATE LEGISLATURE'S FINDINGS

1. *State Legislatures Should Provide Initial Oversight to State Executive Authorities When Promulgating Emergency Orders During a Public Health Crisis*

At the outset, state legislatures should act as a first line of defense in recalibrating state executive emergency orders because state legislatures are granted the authority to perform such a function when maintaining separation of powers principles during an emergency.¹⁴² This permissible exercise of power allows state legislatures to ensure these emergency orders strike a constitutionally permissible balance between preserving public health and safety and protecting against the unnecessary burdening of fundamental rights.¹⁴³

Undoubtedly, when an emergent situation presents itself, state executives are called to respond to the threat immediately in an effort

140. Hobbes, *supra* note 68, at 787, 791. "People are more likely to discriminate and stigmatize racial or ethnic minorities out of fear when disease or terrorists strike," and unfortunately, "the Due Process Clause will not provide the same substantive or procedural protections during a pandemic as it does under normal circumstances. For example, the government interest in limiting the effects of a pandemic will likely be found sufficiently compelling to justify involuntary quarantine and isolation." *Id.*

141. See Murray & Wunsch, *supra* note 41, at 73 ("United States history reveals that the state and federal governments have rarely passed up the temptation offered by the 'pressing exigencies of crisis' to enlarge their power and serve ulterior motives, at the expense of constitutional rights.").

142. Compare Rossi, *supra* note 15, at 242 ("State separation of powers principles sharply limit the power of the executive branch to exercise authority not specifically assigned to it, either under a state's constitution itself or pursuant to legislative delegations."), with ALA. CODE § 31-9-8 (2005) (requiring the governor to immediately call the state legislature into session after declaring an emergency), and ARIZ. REV. STAT. ANN. § 26-303 (2005) (same), and GA. CODE ANN. § 38-3-51 (2006) (same), and IDAHO CODE ANN. § 67-5506 (West 2006) (same), and MINN. STAT. ANN. § 12.31 (West 2005) (same)).

143. Compare Daleo, *supra* note 16, at 926 ("Legislatures are also 'essential' to the maintenance of a system of checks and balances during, and immediately following, periods of disaster."), with Haffajee & Mello, *supra* note 41, at 75 ("The primary concern regarding this emergency legal framework has long been that it affords officials too much discretion, with too few checks on poor decisions.").

to minimize the resulting harm from the emergency.¹⁴⁴ However, state legislatures, unlike their executive counterparts, have access to the expertise necessary to evaluate scads of information regarding the emergency.¹⁴⁵ For instance, state legislatures have the resources to hear medical experts give testimony concerning COVID-19 when reviewing emergency executive orders.¹⁴⁶ Further, in their representative capacity, state legislatures are better suited than state executives in reflecting the values and protected rights of their constituents when determining if these orders are overly restrictive.¹⁴⁷ When state legislatures flounder in policing their state executives during an emergency, the opportunity presents itself for executives to misuse seemingly boundless emergency powers to seize opportunities to inflate their authority, execute ulterior motives, and curtail constitutionally protected rights.¹⁴⁸ Accordingly, if emergency public health orders issued by state executives were to be checked by their legislatures, then it would ensure the utmost protection to public health and safety, provide fundamental rights the appropriate protection at the outset, and limit the expanded power of the executive branch during an emergency.¹⁴⁹

144. See Meyler, *supra* note 27, at 544 (“In its classic contours, an emergency calls for rapid and decisive action by the executive branch, including the act of designating the situation an emergency or a ‘state of exception.’”).

145. See Gerwin, *supra* note 41, at 135 (“The chief executive does not have the expertise to evaluate the information proffered as fact.”).

146. See Sparks, *supra* note 68, at 177 (“[S]tate legislatures have developed a unique form of commitment hearings which incorporate both legal and medical elements.”).

147. Compare Caminker, *supra* note 44, at 1106 (“[S]tate legislatures, which are not bound (at least by the Federal Constitution) by any nondelegation principle, might well accord a significant degree of discretion over basic goals and values to state executives.”), with Cook, *supra* note 3, at 290 (“State legislatures make the determinations as to acceptable trade-offs of liberty with every invocation of their police power.”).

148. See Daleo, *supra* note 16, at 926 n.53 (quoting FREEMAN, *supra* note 16, at 3). (“Without a legislative check, it may be possible for a governor or her associates to employ emergency powers ‘to permanently undermine individual liberties or seize greater powers within the state.’”).

149. Compare Daleo, *supra* note 16 at 926 (“Legislatures are also ‘essential’ to the maintenance of a system of checks and balances during, and immediately following, periods of disaster.”), and Sparks, *supra* note 68, at 177 (“[S]tate legislatures have developed a unique form of commitment hearings which incorporate both legal and medical elements.”), with Murray & Wunsch, *supra* note 41, at 73 (“United States history reveals that the state and federal governments have rarely passed up the temptation offered by the ‘pressing exigencies of crisis’ to enlarge their power and serve ulterior motives, at the expense of constitutional rights.”), and Rossi, *supra* note 15, at 242 (“State separation of powers principles sharply limit the power of the executive branch to exercise authority not specifically assigned to it, either under a state’s constitution itself or pursuant to legislative delegations.”).

State legislators should establish a clear process that effectively evaluates state executive emergency conduct.¹⁵⁰ To begin, state legislatures should hear testimony by medical professionals that render expert opinions to the impact of the original emergency orders and any proposed adjustments to those orders.¹⁵¹ Essentially, if a state legislature is able to determine an emergency order issued by a state executive—backed by adequate evidence—overly burdens a protected right, this process would allow legislatures to check their executives by calibrating the order to strike an appropriate balance and grant greater protection to fundamental rights.¹⁵² To ensure legislatures do not abuse this process and jeopardize public health and safety, they should be mandated to proffer adequate evidence in support of their alteration of the original emergency order.¹⁵³

To clearly define the role of a state legislature in an emergency situation, Congress retains the authority to consider and adopt national legislation that would clarify the functions of state and local governments when evaluating such executive emergency conduct.¹⁵⁴ In essence, Congress could generate legislation that would outline the functions of state legislatures in emergency situations to include the function of comparing executive emergency legislation to evidence that would grant heightened protection to the public's health and fundamental rights.¹⁵⁵ Additionally, legislation of this caliber could be used as a supplemental layer of protection against potential preemp-

150. See Gerwin, *supra* note 41, at 168 (“Legislators can establish in advance a process for evaluating executive emergency conduct.”).

151. Sparks, *supra* note 68, at 177.

152. Compare Holozyc-Pimentel, *supra* note 47, at 2089 (stating that when a law somewhat burdens a fundamental right, but does not actually infringe the right, the burdened interest could warrant careful review of the rationality for the burden), and Plyler v. Doe, 457 U.S. 202, 229 (1982) (requiring adequate evidence presented to justify a legitimate state interest to satisfy rational basis review), with Cassell v. Snyders, 458 F. Supp. 3d 981, 994 (N.D. Ill. 2020) (“Based on the plethora of evidence here, the Court finds that COVID-19 qualifies as the kind of public health crisis that the Supreme Court contemplated in *Jacobson* and that the coronavirus continues to threaten the residents of Illinois.”), and Daleo, *supra* note 16, at 926 (“Legislatures are also ‘essential’ to the maintenance of a system of checks and balances during, and immediately following, periods of disaster.”).

153. Compare Gerwin, *supra* note 41, at 135 (“The chief executive does not have the expertise to evaluate the information proffered as fact.”), and Plyler, 457 U.S. at 229 (requiring adequate evidence to justify a legitimate state interest to satisfy rational basis review), with Sparks, *supra* note 68, at 177 (“[S]tate legislatures have developed a unique form of commitment hearings which incorporate both legal and medical elements.”).

154. See Rossi, *supra* note 15, at 258 (“In addition, Congress also has the power, in considering national legislation, to adopt a presumption that would clarify the role of state and local governments in emergency planning . . .”).

155. *Id.*

tion and separation of powers challenges in response to legislative review of executive emergency functions.¹⁵⁶

2. *The Judiciary Should Provide Secondary Oversight to State Executive Authorities When Promulgating Emergency Orders During a Public Health Crisis*

The judicial system should initially defer to the state legislature in checking these orders because legislatures best determine what fundamental rights are acceptable to exchange for safety when state executives invoke their police powers.¹⁵⁷ This is demonstrated by the judiciary exhibiting a weak commitment in both establishing and redressing the exploitations of fundamental rights during declared emergencies.¹⁵⁸ Even if the judiciary were to step in during a state legislature’s review of evidence to evaluate these exchanges of fundamental rights for safety, a judicial interpretation of this caliber invites the courts to speculate about determinations of emergencies.¹⁵⁹ Additionally, the judiciary has long accepted that state legislatures possess the authority to determine whether the exchange of a fundamental right for ensuring public health and safety is necessary.¹⁶⁰ However, if the state legislature is challenged in its attempt in proffering adequate evidence when recalibrating emergency executive orders, the judiciary should be authorized to review the state legislature’s findings and apply a uniform standard of review with great judicial deference.¹⁶¹

Courts should aim for a more uniform approach in reviewing emergency executive public health orders to aid in striking a balance between public health and fundamental rights during a declared

156. See, e.g., *Desrosiers v. Governor*, 158 N.E.3d 827, 839-42 (2020) (rejecting claims by business owners that Governor Baker’s emergency public health orders violated separation of powers principles, legislative delegation of authority, and claims of substantive due process).

157. See *Cook*, *supra* note 3, at 290 (“State legislatures make the determinations as to acceptable trade-offs of liberty with every invocation of their police power.”).

158. See *Crusto*, *supra* note 36, at 502 (“More often than not, the courts showed a weak commitment to identifying civil liberties and redressing their abuses during the emergency.”).

159. See *Rossi*, *supra* note 15, at 254 (“Although some state courts may interpret emergency powers too narrowly, judicial intervention also risks interpreting these powers too broadly, to the point where judges—rather than politically accountable officials—exercise emergency powers.”).

160. *Cook*, *supra* note 3, at 290.

161. Compare *Plyler v. Doe*, 457 U.S. 202, 229 (1982) (requiring adequate evidence to justify a legitimate state interest to satisfy rational basis review), with *Holder v. Humanitarian Law Project*, 561 U.S. 1, 36 (2010) (granting greater judicial deference “[g]iven the sensitive interests in national security”).

emergency.¹⁶² In recent reviews of such orders, courts have reached a crossroads in either applying the *Jacobson* standard or the traditional tiers of scrutiny.¹⁶³ The unnecessary burdening of fundamental rights has become more likely since the *Jacobson* standard hardly authorizes judicial review, allowing otherwise unconstitutional actions to go unchecked.¹⁶⁴ *Jacobson* materializes a secondary issue in recent applications as evidenced by how courts have used its standard.¹⁶⁵ Some courts have used the *Jacobson* standard to mandate a nexus between burdening COVID-19 executive orders and public health, absent “a plain, palpable invasion of rights secured by the fundamental law”¹⁶⁶ For others, the *Jacobson* standard is utilized as a standard to emphasize the heightened interests and powers of state executives during emergency situations.¹⁶⁷

162. See *County of Butler v. Wolf*, 486 F. Supp. 3d 883, 901 (W.D. Pa. 2020) (“[O]rdinary constitutional scrutiny is necessary to maintain the independent judiciary’s role as a guarantor of constitutional liberties—even in an emergency.”).

163. Compare *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 927 (6th Cir. 2020) (declining to use the *Jacobson* standard and determining that when scrutinizing a woman’s fundamental right in choosing to receive abortion procedures during the COVID-19 pandemic, traditional tiers of scrutiny should apply), with *In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020) (upholding the *Jacobson* standard and determining that when scrutinizing a woman’s fundamental right in choosing to receive abortion procedures during the COVID-19 pandemic, traditional tiers of scrutiny should not apply).

164. Compare *Bayley’s Campground Inc. v. Mills*, 463 F. Supp. 3d 22, 31 (2020) (“[Jacobson] barely authorizes judicial review at all.”), with *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 927 (6th Cir. 2020) (“What we will not countenance, however, is the notion that COVID-19 has somehow demoted *Roe* and *Casey* to second-class rights, enforceable against only the most extreme and outlandish violations. Such a notion is incompatible not only with *Jacobson*, but also with American constitutional law writ large.”), and *Ex Parte Milligan*, 71 U.S. 2, 120-21 (1866) (“The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”).

165. Compare *Slatery*, 956 F.3d at 927 (declining to use the *Jacobson* standard and determining that when scrutinizing a woman’s fundamental right in choosing to receive abortion procedures during the COVID-19 pandemic, traditional tiers of scrutiny should), with *Abbott*, 954 F.3d at 784 (upholding the *Jacobson* standard and determining that when scrutinizing a woman’s fundamental right in choosing to receive abortion procedures during the COVID-19 pandemic, traditional tiers of scrutiny should not apply).

166. Compare *Jacobson*, 197 U.S. at 31 (determining that during an emergency, any measures limiting or suspending constitutional rights are required to demonstrate a “real or substantial relation to” the emergency, and must not establish “a plain, palpable invasion of rights secured by the fundamental law”), with *Slatery*, 956 F.3d at 927 (“What we will not countenance, however, is the notion that COVID-19 has somehow demoted *Roe* and *Casey* to second-class rights, enforceable against only the most extreme and outlandish violations. Such a notion is incompatible not only with *Jacobson*, but also with American constitutional law writ large.”).

167. See, e.g., *Gish v. Newsom*, No. EDCV20755JGBKX, 2020 WL 1979970, at *2 (C.D. Cal. Apr. 23, 2020) (upholding the *Jacobson* standard and barring in-person non-secular activities, yet the emergency public health order exempted secular activities such as shopping at stores and malls without justification).

For instance, in *Gish v. Newsom*,¹⁶⁸ Governor Gavin Newsom, Riverside County's Public Health Advisor, and the County of San Bernardino Board of Supervisors all promulgated and executed emergency public health orders, each limiting the free exercise of religion by banning public gatherings, which included churches.¹⁶⁹ Thereafter, congregants claimed the orders violated their constitutional right to the free exercise of religion.¹⁷⁰ State executives argued they were entitled to greater judicial deference under the *Jacobson* standard, and therefore were not subject to traditional tiers of scrutiny because the orders were promulgated and executed in response to COVID-19.¹⁷¹

In *Gish*, the United States District Court for the Central District of California determined emergency public health orders created and administered by state executives were not subject to the traditional tiers of scrutiny when such orders were merely temporary and executed in response to COVID-19.¹⁷² The court reasoned emergency public health orders may burden fundamental rights to a greater degree than traditionally permissible in a state of emergency because California executives must have broad deference to protect the health and safety of their residents.¹⁷³ In its reasoning, the court quoted *Jacobson* and determined that the need to protect the health and safety of the public during an emergency may potentially curtail such fundamentally protected rights.¹⁷⁴ Therefore, the court decided that California state executives may implement measures that limit or suspend constitutional rights during an emergency only if they have a

168. 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020).

169. *Gish*, 2020 WL 1979970, at *2. The Governor of California's order stated and required that "all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors," yet designated a list of essential critical infrastructure workers that included religious "services that [were] provided through streaming or other technology." *Id.* Riverside County's Public Health Officer issued an order that prohibited "[a]ll public or private gatherings . . . including, but not limited to an auditorium, . . . church, . . . or any other indoor or outdoor space used for any non-essential purpose including, but not limited to . . . church . . ." *Id.* Finally, the County of San Bernardino Board of Supervisors signed an order that allowed "faith based [sic] services that are provided through streaming or other technology, while individuals remain in their homes, but does not allow individuals to leave their home for driving parades or drive-up services, or for picking up non-essential items." *Id.*

170. *Id.* at *3.

171. *Id.* at *4.

172. *Id.*

173. *Id.* at *5.

174. *Gish*, 2020 WL 1979970, at *5. "Recognizing that the need to protect the public may trump individual rights during a crisis, the Supreme Court has held that states and municipalities have greater leeway to burden constitutionally protected rights during public emergencies . . ." *Id.*

“real or substantial relation to” the emergency and do not represent a “plain, palpable invasion of” fundamentally protected rights.¹⁷⁵

On the other hand, some courts have chosen to apply the traditional tiers of scrutiny instead of the *Jacobson* standard to review constitutional claims to emergency executive public health orders because the traditional tiers of scrutiny check these orders under a more restrictive scope.¹⁷⁶ For example, in *First Baptist Church v. Kelly*,¹⁷⁷ Governor Laura Kelly issued Executive Order 20-18, which enhanced restrictions of mass gatherings and changed existing prohibitions for the purpose of slowing the spread of COVID-19.¹⁷⁸ Executive Order 20-18 expressly targeted religious facilities by including churches on a list of venues where mass gatherings were restricted.¹⁷⁹ This order preserved a list of exemptions for facilities and activities, which included most governmental operations, various retail establishments including bars, restaurants, and grocery stores, as long as these facilities complied with social distancing protocol.¹⁸⁰ Congregants then

175. *Id.* “In other words, during an emergency, traditional constitutional scrutiny does not apply. Instead, any measures that limit or suspend constitutional rights (1) must have a ‘real or substantial relation’ to the crisis and (2) must not represent ‘plain, palpable’ invasions of clearly protected rights.” *Id.* (quoting *Jacobson*, 197 U.S. at 31).

176. *Compare Bayley’s Campground*, 463 F. Supp. 3d at 31 (“And when the Supreme Court elaborates a new standard for analyzing a constitutional claim, we use that most recent formulation, rather than the framework from a decision for a different constitutional claim, . . . in a different state, facing a different public health emergency in a different century.”), with *Slatery*, 956 F.3d at 927 (“What we will not countenance, however, is the notion that COVID-19 has somehow demoted *Roe* and *Casey* to second-class rights, enforceable against only the most extreme and outlandish violations. Such a notion is incompatible not only with *Jacobson*, but also with American constitutional law writ large.”).

177. 455 F. Supp. 3d 1078 (D. Kan. 2020).

178. *First Baptist Church v. Kelly*, 455 F. Supp. 3d 1078, 1082 (D. Kan. 2020). “On April 7, 2020, five days before Easter, the Governor issued EO 20-18. It found enhanced measures were needed to slow the spread of COVID-19, and it made certain changes to existing prohibitions.” *Id.*

179. *First Baptist*, 455 F. Supp. 3d at 1082. EO 20-18 implemented the following restriction on religious activities:

With regard to churches or other religious services or activities, this order prohibits gatherings of more than ten congregants or parishioner in the same building or confined or enclosed space. However, the number of individuals – such as preachers, lay readers, choir or musical performer, or liturgists – conducting or performing a religious service may exceed ten as long as those individuals follow appropriate safety protocols, including maintaining a six-foot distance between individuals and following other directive regarding social distancing, hygiene, and other efforts to slow the spread of COVID-19.

Id.

180. *Id.* Other exempted facilities included childcare locations, job centers, airports, public transportation, hotels, various production facilities, food pantries and shelters, office spaces, detoxification centers, and libraries. *Id.* Essentially, EO 20-18 singled out religious services by prohibiting mass gatherings of more than ten individuals, regardless of social distancing compliance, while providing broad exemptions for twenty-six secular activities. *Id.*

claimed Executive Order 20-18 violated their rights under the Free Exercise Clause.¹⁸¹

In *First Baptist*, the United States District Court for the District of Kansas determined Governor Kelly's emergency public health orders prohibiting mass gatherings, in light of COVID-19, were subject to strict scrutiny when they expressly targeted religious gatherings and therefore violated First Amendment free exercise rights.¹⁸² The district court reasoned Governor Kelly's orders were at the mercy of strict scrutiny because, even during a pandemic, a state's police power is not without limits.¹⁸³ Governor Kelly's argument heavily relied on *In re Abbott*,¹⁸⁴ where the United States Court of Appeals for the Fifth Circuit upheld Governor Abbott's executive order postponing non-essential surgeries to reduce the spread of COVID-19.¹⁸⁵ The district court reasoned the governor's reliance on *Abbott* was misplaced because the Fifth Circuit applied the decision in *Jacobson*.¹⁸⁶ *Jacobson* did not provide the best framework to scrutinize the Governor's orders because *Jacobson* was used to review a facially neutral law, and the order in this case lacked facial neutrality.¹⁸⁷ Therefore, because the Governor's Executive Order expressly targeted religious gatherings, it was not facially neutral and therefore subject to the rigors of strict scrutiny.¹⁸⁸

The traditional tiers of scrutiny have demonstrated some success in protecting fundamental rights when reviewing emergency public health orders due to their restrictive scopes.¹⁸⁹ However, the judiciary's lack of uniformity in applying the traditional tiers has primarily

181. *Id.* at 1083. "Plaintiffs have made a sufficient showing that a live controversy exists as to whether the Governor's current restrictions on religious activity – found in both EO 20-18 and EO 20-25 – violate Plaintiffs' First Amendment right to freely exercise their religion." *Id.*

182. *Id.* at 1090. "As such, the restriction is likely subject to strict scrutiny, and can be sustained only if it is narrowly tailored to further the compelling state interest in slowing or halting the spread of COVID-19." *Id.*

183. *Id.* at 1086. "[E]ven in such extreme cases as a public health crisis, the police power of the state is not without limits, and is subject to appropriate judicial scrutiny." *Id.*

184. 954 F.3d 772 (5th Cir. 2020).

185. *First Baptist*, 455 F. Supp. 3d at 1085 (citing *Abbott*, 954 F.3d at 779-80).

186. *Id.*

187. *Id.* at 1087. "*Abbott*, *Jacobson*, and similar cases do not provide the best framework in which to evaluate the Governor's executive orders because all those cases deal with laws that are facially neutral and generally applicable." *Id.*

188. *See id.* at 1089 ("These provisions show that these executive orders expressly target religious gatherings on a broad scale and are, therefore, not facially neutral.").

189. *See Slatery*, 956 F.3d at 927 ("What we will not countenance, however, is the notion that COVID-19 has somehow demoted *Roe* and *Casey* to second-class rights, enforceable against only the most extreme and outlandish violations. Such a notion is incompatible not only with *Jacobson*, but also with American constitutional law writ large.").

led to overly restrictive burdens on these rights.¹⁹⁰ This was demonstrated in *Cassell v. Snyders*¹⁹¹ when the United States District Court for the Northern District of Illinois determined that Governor J. B. Pritzker's amended executive order allowing worshippers to freely exercise religion as long as they adhered to social distancing requirements was subject to rational basis scrutiny.¹⁹² The district court reasoned the executive order qualified as a generally applicable, neutral law, and withstood First Amendment scrutiny because it satisfied rational basis review.¹⁹³ In *Cassell*, the Stephenson County Department of Public Health served pastor Stephen Cassell ("Cassell") a cease-and-desist notice.¹⁹⁴ The notice stated Cassell was to comply with the requirements outlined in the executive order and religious gatherings consisting of ten or more people were prohibited.¹⁹⁵ The notice further stated violators could be subject to criminal and civil penalties.¹⁹⁶ As a result, Cassell was forced to hold virtual sermons on various social media platforms.¹⁹⁷ Cassell and various congregants claimed Governor Pritzker's COVID-19 executive order violated their free exercise rights.¹⁹⁸

The district court cited *Jacobson* and stated that, during a pandemic, the traditional tiers of scrutiny are not applicable.¹⁹⁹ Under the *Jacobson* standard, courts may only overturn rules lacking a "real or substantial relation" to public health and safety, or rules amounting to "plain, palpable invasion[s]" of rights secured by the fundamen-

190. Compare *Cassell v. Snyders*, 458 F. Supp. 3d 981, 998-99 (N.D. Ill. 2020) ("Given the importance of slowing the spread of COVID-19 in Illinois, the Order satisfies [the rational basis] level of scrutiny, and Plaintiffs do not seriously argue otherwise. As a result, the Court finds that Plaintiffs' Free Exercise claim is unlikely to succeed on the merits."), with *Slatery*, 956 F.3d at 927 (declining to use the *Jacobson* standard and determining that when scrutinizing a woman's fundamental right in choosing to receive abortion procedures during the COVID-19 pandemic, traditional tiers of scrutiny should apply).

191. 458 F. Supp. 3d 981 (N.D. Ill. 2020).

192. *Cassell*, 458 F. Supp. 3d at 998-99. The Illinois Governor's initial executive order did not include religious events regarding Essential Activities, the order was amended after Plaintiffs filed suit and requested a temporary restraining order. *Id.* at 989.

193. *Id.* at 998-99.

194. *Id.* at 989.

195. *Id.* In essence, these orders directed citizens to practice social distancing, meaning "limiting activity outside the home, staying at least six feet apart from others, and refraining from congregating in groups of more than ten." *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 990.

199. *Id.* at 993. The district court noted that "the Supreme Court has recognized that 'a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.'" *Id.* (citing *Jacobson*, 197 U.S. at 27). During an epidemic, the traditional tiers of scrutiny do not apply. *Abbott*, 954 F.3d at 784.

tal law.²⁰⁰ The district court stated the *Jacobson* standard ceases when the epidemic ends; thereafter, government constraints on constitutional rights must satisfy their traditionally recognized levels of scrutiny.²⁰¹ It is worth mentioning the district court criticized *First Baptist* by stating courts must examine how an executive order treats religious and secular activities that are comparable to one another, which these cases neglected to do.²⁰²

In *Cassell*, the district court determined the executive order was constitutional because it was generally applicable, neutral, and supported under a rational basis.²⁰³ The district court reasoned Governor Pritzker did not display a propensity of animus with religious worshiping services, the limitations in the order applied to places where most people gather and did not target religious services, and the order did not suppress more religious conduct than necessary.²⁰⁴ The district court ultimately decided the executive order did not foist special disabilities on religious status because the order proscribed religious and secular conduct alike.²⁰⁵

When the United States Supreme Court arrived at the crossroads of either applying the *Jacobson* standard or the traditional tiers of scrutiny, the Court opted for the *Jacobson* standard in a 5-4 decision.²⁰⁶ In *South Bay United Pentecostal Church v. Newsom*,²⁰⁷ the Court denied injunctive relief to Governor Gavin Newsom's executive order limiting attendance in places of worship to either a maximum of one hundred attendees, or twenty-five percent building capacity.²⁰⁸ In a concurring opinion, Chief Justice Roberts reasoned the order's guidelines adhered to the First Amendment's Free Exercise Clause.²⁰⁹

200. *Cassell*, 458 F. Supp. 3d at 993 (quoting *Jacobson*, 197 U.S. at 31).

201. *Id.* The district court noted that in the meantime, "courts must remain vigilant, mindful that government claims of emergency have served in the past as excuses to curtail constitutional freedoms." *Id.* (citing *Korematsu v. United States*, 323 U.S. 214 (1944), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018)).

202. *Cassell*, 458 F. Supp. 3d at 997-98.

203. *Id.* at 994 (citing *Ill. Bible Colleges Ass'n. v. Anderson*, 870 F.3d 631, 639 (7th Cir. 2017)). "But even the foundational rights secured by the First Amendment are not without limits; they are subject to restriction if necessary to further compelling government interests—and, certainly, the prevention of mass infections and deaths qualifies." *Id.* at 988.

204. *Id.* at 995 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 536 (1993)).

205. *Id.* (citing *Emp. Div. Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990)).

206. *See S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (denying application for injunctive relief).

207. 140 S. Ct. 1613 (2020).

208. *S. Bay*, 140 S. Ct. at 1613.

209. *Id.* (Roberts, C.J., concurring). Chief Justice Roberts stated that similar restrictions apply to analogous secular gatherings, including concerts, lectures, and movies, all of which include large groups of people that gather close to one another for an

Chief Justice Roberts cited *Jacobson* and stated the Constitution entrusts the health and safety of the people to accountable state political officials to guard and protect during a public health crisis.²¹⁰ The Court closed by stating when there are medical uncertainties, state officials should be granted broad authority to combat public health crises; thus, upholding the *Jacobson* standard.²¹¹

However, Justice Kavanaugh dissented and asserted he would grant the temporary injunction because the order favored similar secular businesses, yet discriminated against places of worship, thus violating the First Amendment's Free Exercise Clause.²¹² Justice Kavanaugh reasoned South Bay United Pentecostal Church was willing to adhere to the exceptions for secular businesses regarding hygiene and social distancing.²¹³ The twenty-five percent occupancy limit on religious worshiping services was not imposed on similar secular businesses, and therefore discriminated against religious worshiping services.²¹⁴ As a result of the discriminatory treatment, Justice Kavanaugh urged strict scrutiny be applied to Governor Newsom's order.²¹⁵ The California governor had a compelling interest; however, restrictions that are applied to one group but inexplicably exempted from another group do not further the compelling interest and result in impinging religious freedom.²¹⁶ Justice Kavanaugh ultimately determined that California must demonstrate a compelling justification in distinguishing amongst secular businesses and religious worship services, thus, departing from the *Jacobson* standard.²¹⁷

Six months later, the Supreme Court revisited the *Jacobson* standard as it applied to yet another governor's emergency executive order restricting occupancies on houses of worship.²¹⁸ In *Roman Cath. Dio-*

extended period of time. *Id.* The order exempts only those activities that are dissimilar, like banks, laundromats, and grocery stores, in which do not include large groups of people that gather close to one another for an extended period of time. *Id.*

210. *Id.* (citing *Jacobson*, 197 U.S. at 38 (1905)).

211. *Id.* (citing *Marshall v. United States*, 414 U.S. 417, 427 (1974)). "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." *Id.* at 1613-14 (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545 (1985)).

212. *Id.* at 1614 (Kavanaugh, J., dissenting).

213. *Id.*

214. *Id.*

215. *Id.* "To justify its discriminatory treatment of religious worship services, California must show that its rules are 'justified by a compelling governmental interest' and 'narrowly tailored to advance that interest.'" *Id.* (quoting *Church of the Lukumi*, 508 U.S. at 531).

216. *Id.* at 1614-15 (quoting *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020)). California has a compelling interest in limiting the spread of COVID-19 as well as protecting the health and safety of its citizens. *Id.* at 1614.

217. *Id.* at 1615.

218. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

cese of Brooklyn v. Cuomo,²¹⁹ the Court enjoined the enforcement of Governor Andrew Cuomo's Executive Order 202.68 because it overly restricted attendance at worshiping services.²²⁰ There, the Roman Catholic Diocese of Brooklyn and Agudath Israel of America sought relief from Governor Cuomo's Executive Order 202.68, which limited worshiping services to ten or twenty-five people in "red" and "orange" zones respectively.²²¹ Petitioners argued Executive Order 202.68 treated houses of worship more harshly than similar secular facilities.²²² Their arguments were evidenced by the ability of an "essential" business in a red zone to admit an unlimited number of people in its facility while nonsecular entities were limited to ten individuals.²²³ This disparity was even more drastic in an orange zone since "non-essential" businesses were able to determine their own capacities while worshiping services were limited to twenty-five individuals.²²⁴

Therefore, Executive Order 202.68 was placed at the mercy of strict scrutiny because it was neither neutral on its face nor generally applicable.²²⁵ The Court determined that although slowing the spread of COVID-19 effortlessly passed constitutional muster as a compelling state interest, Executive Order 202.68 was not narrowly tailored since its regulations were more burdensome than proven required to slow the spread of the virus.²²⁶ In fact, Executive Order 202.68's regulations bore the harshest COVID-19 restrictions the Court had seen.²²⁷ Accordingly, the Court determined Governor Cuomo's Executive Order 202.68 violated the First Amendment's Free Exercise Clause because it baselessly prohibited countless worshipers from attending religious services.²²⁸

In a concurring opinion, Justice Gorsuch wrote separately to stress that state and local governments may not detract from the Constitution during a pandemic.²²⁹ To remedy this recurring problem, Justice Gorsuch urged courts to continue applying the rigors of the Constitution, as the majority did in *Cuomo*, rather than Chief Justice

219. 141 S. Ct. 63 (2020).

220. *Cuomo*, 141 S. Ct. at 69.

221. *Id.* at 66.

222. *Id.*

223. *Id.* "[T]he 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." *Id.*

224. *Id.*

225. *Id.* at 67.

226. *Id.*

227. *Id.*

228. *Id.* at 68.

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

Roberts' proposition set forth in *South Bay*.²³⁰ Justice Gorsuch heavily criticized *South Bay* for its reliance on the *Jacobson* standard because *Jacobson* is not a source of authority state and local governments may use to part ways with the Constitution during a pandemic.²³¹ Justice Gorsuch reasoned that *Jacobson*'s mode of analysis did not depart with well-founded law during a pandemic because it essentially applied what would become rational basis review to a Fourteenth Amendment challenge brought by *Jacobson*.²³² Accordingly, *Jacobson* did not set a precedent for state and local governments to diverge from adherence to the Constitution amid a pandemic.²³³

However, Chief Justice Roberts doubled down on his interpretation of *Jacobson* in a dissenting opinion and stated the Constitution entrusts the health and safety of the people to accountable state political officials to guard and protect during a public health crisis.²³⁴ Chief Justice Roberts exchanged blows with Justice Gorsuch by criticizing his overemphasis on the Chief Justice's interpretation of *Jacobson*.²³⁵

Under a more uniform approach in reviewing these orders, the judiciary could protect public health and fundamental rights by imposing a burden on state executives to proffer adequate evidence that backs their interests if the state legislature fails to act within a reasonable amount of time.²³⁶ This approach has been demonstrated in cases such as *Plyler v. Doe*²³⁷ and *City of Cleburne, Texas v. Cleburne Living Ctr.*,²³⁸ where the Court required the state to present adequate evidence to justify its legitimate interest and also found that the law furthering that interest could not burden one specific group and exempt others that are subject to the same concerns.²³⁹ Additionally, in

230. Compare *id.* at 70 (declining to use the *Jacobson* standard when reviewing a First Amendment challenge), with *S. Bay*, 140 S. Ct. at 1613 (opting to use the *Jacobson* standard when reviewing a First Amendment challenge).

231. *Cuomo*, 141 S. Ct. at 70.

232. *Id.* "Rational basis review is the test this Court normally applies to Fourteenth Amendment challenges, so long as they do not involve suspect classifications based on race or some other ground, or a claim of fundamental right." *Id.*

233. *Id.*

234. *Id.* at 75-76 (Roberts, C.J., dissenting) (citing *Jacobson*, 197 U.S. at 38 (1905)).

235. *Id.* at 76.

236. Compare *Plyler*, 457 U.S. at 229 (requiring adequate evidence to justify a legitimate state interest to satisfy rational basis review), with *Holder*, 561 U.S. at 36 (granting greater judicial deference "[g]iven the sensitive interests in national security").

237. 457 U.S. 202 (1982).

238. 473 U.S. 432 (1985).

239. Compare *Plyler*, 457 U.S. at 229 (determining that the evidence does not support the claim that excluding undocumented children is likely to improve the quality of education in the State), with *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (determining that denying a special use permit for a residential struc-

Holder v. Humanitarian Law Project,²⁴⁰ the Court granted greater judicial deference for interests in national security.²⁴¹ In its reasoning, the Court determined that issues of national security can develop apace, which can lead to immense difficulty in obtaining information and evaluating the impact of resulting conduct.²⁴² Accordingly, the judiciary could uniformly apply these standards to aid in striking a constitutional balance between protecting both public health and fundamental rights in a declared emergency by granting greater judicial deference.²⁴³

C. THE WAR POWERS RESOLUTION STRIKES A JUST BALANCE OF POWER BETWEEN STATE EXECUTIVES AND STATE LEGISLATURES

1. *State Executives and the President Possess Similar Emergency Powers, yet They Display Contrasting Levels of Deference Due to Their Inconsistent Reporting Requirements and Termination Provisions*

State executives and the President both source their emergency powers through commander-in-chief provisions in their respective constitutions.²⁴⁴ These emergency executive powers are used by state executives and the President in response to imminent danger.²⁴⁵ Such powers grant state executives and the President extensive deference during a state of emergency to sufficiently protect state populations

ture to house the mentally disabled because of several potential hazards, yet neglecting to impose similar restrictions and permitting similar use in the same neighborhood fails to rationally justify discrimination).

240. 561 U.S. 1 (2010).

241. *Holder*, 561 U.S. at 36 (granting greater judicial deference “[g]iven the sensitive interests in national security”).

242. *Id.* at 34 (“One reason for that respect is that national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess.”).

243. *Compare Plyler*, 457 U.S. at 229 (requiring adequate evidence to justify a legitimate state interest to satisfy rational basis review), *with Holder*, 561 U.S. at 36 (granting greater judicial deference “[g]iven the sensitive interests in national security”).

244. *Compare* War Powers Resolution, 50 U.S.C. § 1541(c) (1973) (“The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities . . . are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”), *with* Pita Loor, *supra* note 24, at 13 (“All state constitutions contain provisions making the governor the commander-in-chief of the state military with the power of maintaining the peace, suppressing insurrection, or both.”).

245. *Compare* 50 U.S.C. § 1541(c) (describing the President’s power during an emergency), *with* *Moorhead v. Farrelly*, 723 F. Supp. 1109, 1114 (D.V.I. 1989) (“The court refuses to define precisely what specific conditions justify continued imposition of the curfew, because doing so will destroy the broad discretion necessary for the executive to deal with an emergency situation.”).

against such danger.²⁴⁶ State executives and the President both share the responsibility of reporting to their respective legislative bodies after taking action to mitigate imminent danger to ensure they have taken sufficient action.²⁴⁷ However, state executives have failed to use uniform reporting requirements with their respective legislative bodies in response to compelling threats.²⁴⁸ These inconsistent reporting requirements either afford state legislatures the authority to adequately police emergency legislation, or render state legislatures politically powerless and unable to police their executives whatsoever.²⁴⁹ In the alternative, the War Powers Resolution²⁵⁰ mandates the President report to Congress within forty-eight hours of responding to an emergency, which grants Congress greater power to police the President's emergency actions.²⁵¹

246. Compare *Sterling v. Constantin*, 287 U.S. 378, 398 (1932) (“In the performance of its essential function, in promoting the security and well-being of its people, the state must, of necessity, enjoy a broad discretion.”), with § 1541(c) (describing the President’s power during an emergency).

247. Compare ALA. CODE § 31-9-8 (2005) (requiring the governor to immediately call the state legislature into session after declaring an emergency), and ARIZ. REV. STAT. ANN. § 26-303 (2005) (same), and GA. CODE ANN. § 38-3-51 (West 2006) (same), and IDAHO CODE ANN. § 67-5506 (West 2006) (same), and MINN. STAT. ANN. § 12.31 (West 2005) (same), with 50 U.S.C. § 1543(a)(3)(A)-(C) (stating without declaration of war, “the President shall submit within 48 hours to [Congress] a report . . . setting forth . . . the circumstances necessitating the introduction of United States Armed Forces . . . the constitutional and legislative authority under which such introduction took place and . . . the estimated scope and duration of the hostilities”).

248. Compare ALA. CODE § 31-9-8 (2005) (requiring the governor to immediately call the state legislature into session after declaring an emergency), and ARIZ. REV. STAT. ANN. § 26-303 (2005) (same), and GA. CODE ANN. § 38-3-51 (West 2006) (same), and IDAHO CODE ANN. § 67-5506 (West 2006) (same), and MINN. STAT. ANN. § 12.31 (West 2005) (same), with ALASKA STAT. ANN. § 26.20.040 (West 2006) (permitting the governor to use state resources but not requiring the governor to call the state legislature into session after a declared emergency), and CAL. GOV’T CODE § 8624 (West 2006) (same), and KAN. STAT. ANN. § 48-924 (West 2005) (same), and MONT. CODE ANN. § 10-3-302 (West 2005) (same), and N.C. GEN. STAT. ANN. § 14-288.15 (West 2005) (same), and S.C. CODE ANN. § 1-3-420 (2005) (same), and UTAH CODE ANN. § 63-5a-5 (West 2005) (same), and WIS. STAT. ANN. § 166.03 (West 2006) (same).

249. Compare, e.g., ALA. CODE § 31-9-8 (2005) (mandating a gubernatorial reporting requirement that has the potential to allow state legislatures to keep state executive authority in check shortly after the governor has taken emergency action), with, e.g., ALASKA STAT. ANN. § 26.20.040 (West 2006) (permitting the governor to use state resources but not requiring the governor to call the state legislature into session after a declared emergency).

250. 50 U.S.C. §§ 1541-1548 (1973).

251. Compare § 1543(a)(3)(A)-(C) (stating without declaration of war, “the President shall submit within 48 hours to [Congress] a report . . . setting forth . . . the circumstances necessitating the introduction of United States Armed Forces . . . the constitutional and legislative authority under which such introduction took place and . . . the estimated scope and duration of the hostilities”), with Brief of the United States Senate, Appellee-Petitioner, *supra* note 107, at app. 68 (citing § 1544(b), (c)) (“Absent declaration of war, [the] President may be directed by concurrent resolution to remove United States armed forces engaged in foreign hostilities.”).

State executives and the President are both held to certain standards during declared emergencies to protect against absolute executive authority and overreach.²⁵² The standards set forth in the War Powers Resolution narrow the President's authority over time when responding to imminent threats, whereas the state level has varying levels of executive narrowing authority.²⁵³ Further, emergency powers granted to state executives terminate at inconsistent times and through inconsistent processes, which affords state legislatures varying levels of deference in checking their executives in emergency situations, as opposed to the Resolution's termination provisions.²⁵⁴ Therefore, the Resolution's broad deference to respond to emergencies is only temporary in the hands of the President and is promptly propelled to Congress during a declared emergency to prevent the President from imposing on congressional inertia in conducting radical military decisions.²⁵⁵

2. *The War Powers Resolution Has Successfully Brought Constitutional Balance Between the President and Congress*

At its conception, the War Powers Resolution was created to strike a suitable constitutional balance between the President and

252. Compare § 1543(a)(3)(A)-(C) (describing congressional limitations on presidential authority during wartime), with *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905) (determining that during an emergency, any measures limiting or suspending constitutional rights during an emergency are required to demonstrate a "real or substantial relation to" the emergency, and must not establish "plain, palpable invasions of rights secured by the fundamental law").

253. Compare § 1544(b) (describing the presidential reporting requirement to Congress during wartime), with, e.g., ALA. CODE § 31-9-8 (2005) (mandating a gubernatorial reporting requirement that has the potential to allow state legislatures to keep state executive authority in check shortly after the governor has taken emergency action). But see, e.g., ALASKA STAT. ANN. § 26.20.040 (West 2006) (permitting the governor to use state resources but not requiring the governor to call the state legislature into session after a declared emergency).

254. Compare, e.g., ALA. CODE § 31-9-8 (stating that the emergency shall terminate after sixty days unless extended by the Governor or the Legislature by joint resolution), with Brief of the United States Senate, Appellee-Petitioner, *supra* note 107, at app. 68 (citing § 1544(b), (c)) ("Absent declaration of war, President may be directed by concurrent resolution to remove United States armed forces engaged in foreign hostilities."). But see § 1544(c) ("Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if . . . Congress so directs by concurrent resolution.").

255. Compare Covey, *supra* note 110, at 1343 ("As with the War Powers Resolution, the timing mechanism should prevent the President from taking advantage of congressional inertia to conduct a maverick foreign policy."), with Paulsen, *supra* note 110, at 245 ("Congress . . . enacted into law an explicit lack of deference to any tradition of unilateral presidential war authority and an explicit rejection of the propriety of inferring authority from legislation in the neighborhood of granting the specific authority at issue but not in fact granting it.").

Congress after several failed attempts by Congress to bring troops engaged in hostilities home.²⁵⁶ An example of the President and Congress striking such a balance can be found within the Lebanon Conflict.²⁵⁷ There, President Reagan notified Congress of his deployment of Marines in Lebanon in August and September of 1982 for various peacekeeping missions.²⁵⁸ Although President Reagan notified Congress, he failed to cite to section 4(a)(1) of the Resolution and reasoned the Marines were not technically engaged in hostilities.²⁵⁹

After the Lebanon Conflict transformed from peaceful to hostile, Congress called for President Reagan to comply with the War Powers Resolution.²⁶⁰ Essentially, Congress agreed that in exchange for President Reagan signing a joint resolution invoking the Resolution and strictly limiting the military mission to peacekeeping, Congress would authorize such a presence in Lebanon for eighteen months.²⁶¹ The agreement further required President Reagan to submit a status report to Congress every three months detailing how the mission in Lebanon abided by the agreement, as well as other various updates to the mission.²⁶² Although this application of the Resolution was not executed in a way Congress intended, due to its agreement to surrender notable power under the Resolution in its negotiations with President Reagan, the political branches nevertheless reached common

256. Compare *Congressional Control*, *supra* note 88, at 1218 (quoting *War Powers Legislation*, *supra* note 88) (stating that the purpose of the War Powers Act was to “restore the ‘proper constitutional balance between Congress and the President’”), with *Minda*, *supra* note 84, at 945 (“During the American war in Vietnam, the United States Congress became frustrated in its failure to bring American troops home from South-east Asia as the land war became stymied . . .”).

257. See Haynes Henry, *supra* note 110, at 1050 (“The approach that Congress ultimately adopted represented a compromise between the interests of the legislative and executive branches.”).

258. See *id.* at 1048-49 (“[T]he President first sent Marines to Lebanon in August 1982 to oversee the evacuation of Palestine Liberation Organization guerillas,” and again “in September 1982 to join the peacekeeping force in Beirut.”).

259. See *id.* (stating that in the August deployment, President Reagan “notified Congress but did not specifically cite any section in his report,” and in the September deployment, President Reagan “again failed to cite any particular section” of the War Powers Resolution).

260. See *id.* at 1049-50 (“Dissatisfied with the semantic distinction, Congress called for [President Reagan’s] compliance with the Resolution.”).

261. See *id.* at 1050-51.

262. See *id.* at 1053 (“The compromise resolution required the President to submit a status report to Congress at least every three months regarding the nature of the United States mission in Lebanon,” including “detailed information on the composition and responsibilities of the peacekeeping force, the results of efforts to reduce and eventually eliminate the force, [and] information regarding how the continued participation of the force advanced American foreign policy interests in the Middle East . . .”).

ground in a situation involving American troops engaged in hostilities.²⁶³

3. *A Local Implementation of the War Powers Resolution's Sliding Scale of Deference Would Illustrate Superior Outcomes in Scrutinizing Emergency Public Health Orders*

If the War Powers Resolution's forty-eight hour mandatory reporting requirement was implemented at the state level, then state legislatures would be granted greater deference in policing their state executives' emergency public health orders.²⁶⁴ Similarly, if the Resolution's termination provisions were enforced at the local level, then appropriate power would be granted to state legislatures over time to calibrate emergency executive public health orders.²⁶⁵ The Resolution's natural termination provision—requiring the termination of military forces within sixty days from the introduction of the reporting requirement—applied at the state level would prevent state executives from overreaching by limiting the amount of time an executive may independently exercise emergency powers.²⁶⁶ Further, if state legislatures opine that executives have egregiously abused their emergency powers within the sixty day period, then the Resolution's concurrent resolution termination provision should be implemented at

263. See *id.* at 1051 (“Nevertheless, although Congress bargained away much of its power under the Resolution, the legislative and executive branches reached common—although perhaps shaky—ground regarding the role of Congress and the War Powers Resolution in situations involving American troop deployment into areas of conflict.”).

264. Compare Rossi, *supra* note 15, at 246-47 (“Other states do not require the governor to call the legislature into session until the time of an emergency expires—too late to authorize a governor or other official to take action during the emergency.”), with § 1543(a)(3)(A)-(C) (stating without declaration of war, “the President shall submit within 48 hours to [Congress] a report . . . setting forth . . . the circumstances necessitating the introduction of United States Armed Forces . . . the constitutional and legislative authority under which such introduction took place and . . . the estimated scope and duration of the hostilities . . .”), and Brief of the United States Senate, Appellee-Petitioner, *supra* note 107, at app. 68 (citing § 1544(b), (c)) (“Absent declaration of war, President may be directed by concurrent resolution to remove United States armed forces engaged in foreign hostilities.”).

265. Compare, e.g., MINN. STAT. ANN. § 12.31 (West 2005) (stating that the legislature may terminate an emergency extending beyond thirty days), with Brief of the United States Senate, Appellee-Petitioner, *supra* note 107, at app. 68 (“Absent declaration of war, President may be directed by concurrent resolution to remove United States armed forces engaged in foreign hostilities.”).

266. Compare § 1544(b) (“Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1) of this title, whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted . . .”), with *Crockett v. Reagan*, 558 F. Supp. 893, 900 (D.D.C. 1982) (quoting 119 CONG. REC. 1400 (1973)) (“The approach taken in the War Powers Bill reverses the situation by placing the burden on the Executive to come to Congress for specific authority. The sponsors of the Bill believe that this provision [the 60-day automatic cutoff] will provide an important national safeguard against creeping involvement in future Vietnam style wars.”).

the state level to prevent such an executive overreach.²⁶⁷ If applied, state legislatures should use the concurrent resolution method of terminating executive emergency powers as opposed to the joint resolution method since joint resolutions run the risk of an executive veto.²⁶⁸ Therefore, when both of the Resolution's termination provisions are implemented at the local level, after sixty days, unnecessary emergency public health orders enforced by state executives would cease unless authorized or calibrated by state legislatures.²⁶⁹

4. *Therefore, States Should Adopt a Local Version of the War Powers Resolution for the Context of State Executive Authority During Public Health Emergencies to Adequately Protect Both Public Health and Fundamental Rights*

State legislatures have the power to create legislation that is similar to the War Powers Resolution's sliding scale of deference because the United States Supreme Court has granted states great latitude in experimenting with new techniques to control vital state interests.²⁷⁰ For example, in *Whalen v. Roe*,²⁷¹ the New York State legislature passed legislation that mandated the recording of personal information for those who obtained certain drugs used in lawful and unlawful markets in an attempt to better monitor their uses.²⁷² In drafting the

267. Compare § 1544(c) ("Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution."), with *Congressional Control*, *supra* note 88, at 1224-25 (quoting § 1544(c)) ("The second termination provision . . . enables Congress at any time, by concurrent resolution, to direct the President to withdraw forces 'engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization.'").

268. Compare, e.g., ALA. CODE § 31-9-8 (stating that a declared emergency shall terminate by the by joint resolution), with *Congressional Control*, *supra* note 88, at 1225 ("A concurrent resolution, unlike a bill or joint resolution, does not go to the President for approval and thus avoids the possibility of a presidential veto of a congressional resolution directing the President to withdraw United States forces.").

269. Compare § 1544(b) ("Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1) of this title, whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted"), with § 1544(c) ("Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.").

270. See *Whalen v. Roe*, 429 U.S. 589, 598 (1977) ("At the very least, it would seem clear that the State's vital interest in controlling the distribution of dangerous drugs would support a decision to experiment with new techniques for control.").

271. 429 U.S. 589 (1977).

272. See *Whalen*, 429 U.S. at 591-92 (discussing the legislative history of the New York's State Controlled Substances Act of 1972).

legislation, the State legislature held extensive hearings and looked to other states, such as California and Illinois, where like recording systems were being used efficiently.²⁷³ Subsequently, a group of patients that regularly received these various drugs challenged the constitutionality of the legislation, claiming constitutionally protected rights to privacy.²⁷⁴

In *Whalen*, the Supreme Court determined that state legislation burdening some liberties may not be unconstitutional even when a court finds such legislation unnecessary in whole or in part.²⁷⁵ The Court reasoned such legislation may be constitutionally valid because the Court has regularly recognized states require broad discretion in experimenting with potential solutions to problems of integral local concern.²⁷⁶ Accordingly, the Court determined that New York State had a vital interest in controlling the distribution of various dangerous drugs; therefore, the State should have great latitude in experimenting with new techniques to control this concern.²⁷⁷ Thus, the legislation was determined to be a reasonable exercise of the State's broad police powers.²⁷⁸

In consequence, state legislatures may amend their emergency reporting requirements and termination provisions to mirror the War Powers Resolution's sliding scale of deference, thereby affording themselves the power to adequately police their executives because the Court has allowed similar experimental techniques to control like issues of vital importance.²⁷⁹ Granting state executives the forty-eight

273. *Id.* at 597. It is manifestly the product of an orderly and rational legislative decision. *Id.* It was recommended by a specially appointed commission which held extensive hearings on the proposed legislation, and drew on experience with similar programs in other States. *Id.*

274. *Id.* at 589.

275. *Id.* at 597. "State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part." *Id.*

276. *Id.*

277. *Id.* at 598.

278. *Id.* "It follows that the legislature's enactment of the patient-identification requirement was a reasonable exercise of New York's broad police powers." *Id.*

279. Compare Rossi, *supra* note 15, at 246-47 ("Other states do not require the governor to call the legislature into session until the time of an emergency expires—too late to authorize a governor or other official to take action during the emergency."), and 50 U.S.C. § 1543(a)(3)(A)-(C) (stating without declaration of war, "the President shall submit within 48 hours to [Congress] a report . . . setting forth . . . the circumstances necessitating the introduction of United States Armed Forces . . . the constitutional and legislative authority under which such introduction took place and . . . the estimated scope and duration of the hostilities"), with Brief of the United States Senate, Appellee-Petitioner, *supra* note 107, at app. 68 (citing § 1544(b), (c)) ("Absent declaration of war, President may be directed by concurrent resolution to remove United States armed forces engaged in foreign hostilities."), and *Whalen*, 429 U.S. at 598 ("At the very least, it would seem clear that the State's vital interest in controlling the distribution of dangerous drugs would support a decision to experiment with new techniques for control.").

hour reporting requirement and the termination provisions outlined in the Resolution would afford state legislatures the appropriate deference and time to police emergency public health orders.²⁸⁰ The state level application of the Resolution would create a sliding scale of deference so, over time, broad emergency powers wielded by state executives can shift to state lawmaking bodies to prevent overreach and therefore effectively hold state executives in check.²⁸¹ Initially, state executives should exercise great authority to properly govern an emergency situation and promote the security of their people.²⁸² However, the application of the Resolution's sliding scale of deference would better police state executives by uniformly minimizing executive overreach by calibrating emergency executive orders over time, as opposed to the current inconsistent checks implemented at the state level.²⁸³

280. Compare Rossi, *supra* note 15, at 246-47 (describing different states' methods of dealing with an emergency), with § 1543(a)(3)(A)-(C) (describing limitations on presidential authority during an emergency), and Brief of the United States Senate, Appellee-Petitioner, *supra* note 107, at app. 68 (describing presidential authority absent a declaration of war from Congress).

281. Compare Rossi, *supra* note 15, at 240 ("The exercise of executive emergency powers is most effectively policed by the state legislature and not courts."), with § 1543(a)(3)(A)-(C) (stating without declaration of war, "the President shall submit within 48 hours to [Congress] a report . . . setting forth . . . the circumstances necessitating the introduction of United States Armed Forces . . . the constitutional and legislative authority under which such introduction took place and . . . the estimated scope and duration of the hostilities . . ."), and Brief of the United States Senate, Appellee-Petitioner, *supra* note 107, at app. 68 (citing § 1544(b), (c)) ("Absent declaration of war, President may be directed by concurrent resolution to remove United States armed forces engaged in foreign hostilities.").

282. Compare Herman, *supra* note 26, at 1006 ("Some of the Governor's broadest powers to issue executive orders are authorized by the emergency powers granted by the legislature."), with *United States v. Chalk*, 441 F.2d 1277, 1280 (4th Cir. 1971) ("[B]road discretion' [is] necessary for the executive to deal with an emergency situation."), and *Sterling v. Constantin*, 287 U.S. 378, 398 (1932) ("In the performance of its essential function, in promoting the security and well-being of its people, the state must, of necessity, enjoy a broad discretion.").

283. Compare Carter, *supra* note 94, at 103 (quoting § 1541(a) (1973)) (stating that the purpose of the War Powers Resolution is to "insure that the collective judgment of both the Congress and the President will apply to the introduction of the United States Armed Forces into hostilities"), with ALA. CODE § 31-9-8 (2005) (requiring the governor to immediately call the state legislature into session after declaring an emergency), and ARIZ. REV. STAT. ANN. § 26-303 (2005) (same), and GA. CODE ANN. § 38-3-51 (West 2006) (same), and IDAHO CODE ANN. § 67-5506 (West 2006) (same), and MINN. STAT. ANN. § 12.31 (West 2005) (same), and with ALASKA STAT. ANN. § 26.20.040 (West 2006) (permitting the governor to use state resources but not requiring the governor to call the state legislature into session after a declared emergency), and CAL. GOV'T CODE § 8624 (West 2006) (same), and KAN. STAT. ANN. § 48-924 (West 2005) (same), and MONT. CODE ANN. § 10-3-302 (West 2005) (same), and N.C. GEN. STAT. ANN. § 14-288.15 (West 2005) (same), and S.C. CODE ANN. § 1-3-420 (2005) (same), and UTAH CODE ANN. § 63-5a-5 (West 2005) (same), and WIS. STAT. ANN. § 166.03 (West 2006) (same).

D. HEIGHTENED RATIONAL BASIS REVIEW SHOULD REPLACE THE INEFFICIENT *Jacobson* Standard

Although the Constitution entrusts the health and safety of the people to politically accountable state officials, such broad power can be used in a discriminatory fashion.²⁸⁴ To help protect against such discrimination, the *Jacobson* standard grants the judiciary the authority to eradicate laws using a public health crisis as a guise for infringing individual liberties.²⁸⁵ However, requiring states to demonstrate adequate evidence to justify the burdening of fundamental rights during an emergency would offer heightened protection from unwarranted discrimination.²⁸⁶ Ultimately, this standard would ensure state executives are not abusing discretion at the outset of an emergency, as the War Powers Resolution²⁸⁷ similarly does for the President.²⁸⁸

When a fundamental right has been burdened, but not completely infringed, it may warrant heightened rational basis review to properly scrutinize the rationality of the burdening law.²⁸⁹ Heightened rational basis review is satisfied when adequate evidence is presented to justify a legitimate state interest and the law furthering that interest does not burden one specific group and exempt others that are subject to the same concerns.²⁹⁰ If state executives were to be scrutinized

284. Compare *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)) (“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.’”), with *Korematsu v. United States*, 323 U.S. 214, 216 (1944), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (“Pressing public necessity may sometimes justify the existence of” legal restrictions that “curtail the civil rights of a single racial group . . .”).

285. See *Cassell v. Snyders*, 458 F. Supp. 3d 981, 993 (N.D. Ill. 2020) (“*Jacobson* preserves the authority of the judiciary to strike down laws that use public health emergencies as a pretext for infringing individual liberties.”).

286. See *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 926 (6th Cir. 2020) (“And the State has never, at any point in this litigation, attempted to support its policy choice with expert or medical evidence.”).

287. 50 U.S.C. §§ 1541-1548 (1973).

288. Compare *Plyler v. Doe*, 457 U.S. 202, 229 (1982) (requiring adequate evidence to justify a legitimate state interest to satisfy rational basis review), and *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (determining that a law furthering a state interest may not burden one group and exempt others), with § 1543(a)(3)(A)-(C) (describing limitations on presidential authority without a declaration of war from Congress).

289. Compare *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (determining that when fundamental rights are infringed, they are subject to close judicial scrutiny), with *Holoszyc-Pimentel*, *supra* note 47, at 2089 (stating when a law somewhat burdens a fundamental right, but does not actually infringe the right, the burdened interest could warrant careful review of the rationality for the burden).

290. Compare *Plyler*, 457 U.S. at 229 (determining that the evidence does not support the claim that excluding undocumented children is likely to improve the quality of education in the State), with *Cleburne*, 473 U.S. at 450 (determining that denying a

under heightened rational basis review when implementing emergency public health orders as opposed to the *Jacobson* standard, then state executives would be held to a higher standard that would further protect fundamental rights during a pandemic.²⁹¹

Without requiring state executives to show adequate evidence justifying the furtherance of a legitimate state interest by discrimination and allowing state executives to burden one group of individuals and exempt others that are subject to the same state interest, the curtailment of constitutionally protected rights is permissible.²⁹² Further, holding state executives accountable to demonstrate such evidence to satisfy heightened rational basis review would be similar to the reporting requirement outlined in the War Powers Resolution.²⁹³ Therefore, holding these executives to an evidence based standard of review would ensure future emergency public health orders would not unnecessarily burden fundamental rights during a pandemic, as opposed to the *Jacobson* standard.²⁹⁴ Additionally, this standard allows

special use permit for a residential structure to house the mentally disabled because of several potential hazards, yet neglecting to impose similar restrictions and permitting similar use in the same neighborhood fails to rationally justify discrimination).

291. Compare *Plyler*, 457 U.S. at 229 (requiring adequate evidence to justify a legitimate state interest to satisfy rational basis review), and *Cleburne*, 473 U.S. at 450 (determining that a law furthering a state interest may not burden one group and exempt others), with *Jacobson*, 197 U.S. at 31 (determining that during an emergency, any measures limiting or suspending constitutional rights during an emergency are required to demonstrate a “real or substantial relation to” the emergency, and must not establish “plain, palpable invasions of rights secured by the fundamental law”).

292. Compare *Slatery*, 956 F.3d at 926 (“And the State has never, at any point in this litigation, attempted to support its policy choice with expert or medical evidence.”), and *First Baptist Church v. Kelly*, 455 F. Supp. 3d 1078, 1087 (D. Kan. 2020) (“Nevertheless, while these executive orders begin with a broad prohibition against mass gatherings, they proceed to carve out broad exemptions for a host of secular activities, many of which bear similarities to the sort of personal contact that will occur during in-person religious services.”), with *Bayley’s Campground Inc. v. Mills*, 463 F. Supp. 3d 22, 31 (D. Me. 2020) (“[*Jacobson*] barely authorizes judicial review at all.”).

293. Compare *Plyler*, 457 U.S. at 229 (requiring adequate evidence to justify a legitimate state interest to satisfy rational basis review), and *Cleburne*, 473 U.S. at 450 (determining that a law furthering a state interest may not burden one group and exempt others), with § 1543(a)(3)(A)-(C) (stating without declaration of war, “the President shall submit within 48 hours to [Congress] a report . . . setting forth . . . the circumstances necessitating the introduction of United States Armed Forces . . . the constitutional and legislative authority under which such introduction took place and . . . the estimated scope and duration of the hostilities”).

294. Compare *Plyler*, 457 U.S. at 229 (requiring legitimate state interest be warranted by adequate evidence to satisfy rational basis review), and *Cleburne*, 473 U.S. at 450 (establishing a legitimate state interest may not be furthered by burdening one group while exempting others), with § 1543(a)(3)(A)-(C) (limiting presidential authority without a Congressional declaration of war), and *Bayley’s Campground*, 463 F. Supp. 3d at 31 (“[*Jacobson*] barely authorizes judicial review at all.”).

state legislatures to calibrate emergency public health orders to the level of scrutiny they see fit through their sliding scale of deference.²⁹⁵

IV. CONCLUSION

Protecting fundamental rights and preventing discrimination is imperative, even during a pandemic.²⁹⁶ States should adopt a local application of the War Powers Resolution²⁹⁷ for the context of state executive authority during public health emergencies to adequately protect public safety and fundamental rights.²⁹⁸ Replacing the *Jacobson* standard with heightened rational basis review when scrutinizing emergency executive public health orders extends an additional layer of security to fundamental rights in light of a declared emergency.²⁹⁹ In sum, granting state legislatures more deference in policing emergency public health orders and subsequently mandating the judiciary scrutinize such orders under heightened rational basis review offers better protection to fundamental rights during declared emergencies.³⁰⁰

This proposal allows state executives the authority to utilize powers necessary to implement future emergency public health orders that protect the health and safety of a state's population. Additionally, this proposal ensures emergency executive lawmaking is neither absolute nor permanent, and ultimately free from unnecessarily burdening fundamental rights by scrutinizing all challenged emergency orders under heightened rational basis review. After a state executive declares a state of emergency and implements emergency legislation, they should be required to report to the state legislature. This reporting requirement should outline legislative and constitutional authority of the emergency legislation and the estimated duration and scope of the legislation. Thereafter, state legislatures would have the authority to calibrate these emergency executive orders to pass constitutional muster, therefore adhering to the appropriate level of scrutiny the legislature deems fit. With this sliding scale of deference, state legislatures would have the authority to hold their state executives in

295. Compare *Plyler*, 457 U.S. at 229 (mandating that to survive rational basis review, the government must put on adequate evidence to justify a legitimate state interest), and *Cleburne*, 473 U.S. at 450 (determining a law furthering a state interest may not burden one group and exempt others), with *Covey*, *supra* note 110, at 1343 (“As with the War Powers Resolution, the timing mechanism should prevent the President from taking advantage of congressional inertia to conduct a maverick foreign policy.”).

296. See *supra* notes 124-41 and accompanying text.

297. 50 U.S.C. §§ 1541-1548 (1973).

298. See *supra* notes 270-83 and accompanying text.

299. See *supra* notes 284-95 and accompanying text.

300. See *supra* notes 296-300 and accompanying text.

check by either calibrating existing emergency public health legislation or nullifying it altogether.

- *Robert J. Toth, Jr., '22*

† This Note is dedicated to Robert F. Toth and Robert J. Toth, Sr. Thank you for inspiring this Paper Chase.