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COVID-19 VS. CONSTITUTION; LIMITED GOVERNMENT'S UNLIMITED RESPONSE

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I. Introduction

I do solemnly swear (affirm) that I will support the Constitution of the United States, and the Constitution of the State of Illinois, and that I will faithfully discharge the duties of the office of . . . . to the best of my ability.[1] Such is the oath of office that must be taken by all those appointed to hold office in the state of Illinois.[2] This oath and the several oaths of sister states are largely modeled on the oath of office for those in the federal government.[3] From this oath, such members of office are bound to support the Constitution of both the federal government and the state government in which they serve.[4] What is most disconcerting is the patent sincerity of disregard many states had for their oaths in support of the Constitution in responding to the COVID-19 pandemic. In the case of *Marbury v. Madison,* Justice Marshall said,

The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.[5]

The COVID-19 pandemic garnered a panicked response from several states and the federal government; which President Trump re-

1. Ill. Cons. Art. XIII, § 3.
2. See Id.
3. See generally, U.S. Cons. Art. VI, cl. 3
4. Ill. Cons. Art. XIII, § 3; see also U.S. Cons. Art. VI, cl. 3
5. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

sponded to with his powers under the National Emergencies Act to declare a national emergency.[6] States' shutting down businesses in response to the National Emergency was a gross usurpation of power from our LIMITED GOVERNMENT.[7] Insofar as the Constitution grants powers, the Constitution also limits those powers.[8] Further, there are rights reserved by individuals that are RECOGNIZED AND PROTECTED by the Bill of Rights and additional amendments.[9] The relevant power granted to the government here is the power to regulate commerce.[10]

The purpose of this Note is to analyze, through a constitutional lens, the evolution of case law regulating commerce from its infancy to the constitutional rights of today and then apply these foundational tests, levels of scrutiny and other considerations to the current situation. Section III of this Note will provide a background on case law regulating commerce and the amendments—some of which may not be relevant or apply and as such will be briefly discussed. Section IV will focus on the most relevant cases. Section V will analyze the facts of the pandemic in light of the case law. Finally, Section VI shall provide the conclusion finding that shutting down businesses was an overstep of constitutional authority and should never be allowed to happen again.

II. HISTORY OF THE COMMERCE CLAUSE AND CONSTITUTIONAL AMENDMENTS

Article I, section 8, clause 3—termed the "Commerce Clause"—authorizes Congress, "to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes."[11] Since the birth of the Constitution, there has been significant case law in this area. The first case of importance which came before the Supreme Court of the United States addressing the Commerce Clause was the case of *Gibbons v. Ogden* in 1824.[12]

The bill in controversy issued an assignment from Livingston and Fulton to John R. Livingston, and from him to Ogden, the right to navigate the waters between Elizabethtown, and other places in New Jersey, and the City of New York. The following suit claimed that Gib-

6. https://www.whitehouse.gov/briefings-statements/message-congress-declaring-national-emergency-concerning-novel-coronavirus-disease-COVID-19-19-outbreak/; see also 50 U.S.C. 1621 § 201.

7. *Marbury*, 5 U.S. (1 Cranch) 137 (1803) (emphasis added).

8. *See generally*, U.S. Const.

9. *See generally*, U.S. Const. amend. I-X (Bill of Rights) (EMPHASIS ADDED).

10. U.S. Cons. Art. I, § 8, cl. 3.

11. U.S. Cons. Art. I, § 8, cl. 3.

12. *Gibbons v. Ogden*, 22 U.S. 1 (1824).

bons, possessed two steamboats, the Stoudinger and the Bellona, both of which ran between New York and Elizabethtown, violating the exclusive privilege allegedly conferred to Ogden.[13] In his majority opinion, Chief Justice John Marshall elucidated the definitions of the words found in the Commerce Clause. He interpreted the word "regulate" to mean, to make rules for; the term "commerce" to include, navigation; "among" connoted, intermingled with. From this reading, the Commerce Clause means that Congress may regulate conduct within a State so long as it extends to or affects other States.[14] In this instance, the state of New York did not have the power to grant exclusive navigable control over the waters as it affected other states.[15] The significance of this case demonstrated the Commerce Clause affecting an area not foreseen, but entirely understandable in principle. This decision sprung controversies of whether other facets of commerce which were entirely intrastate, could be regulated by the Federal Congress under the Commerce Clause, and this question was debated vigorously and challenged until the case of *Stafford v. Wallace* in 1922 established a since then accepted answer.[16]

The issue here was the constitutionality of the Packers and Stockyards Act of 1921. The Act provided for enforcement of federal supervision over stockyards which engaged in interstate commerce, even those which operated solely in one state; further, the facts show it was some of the largest stockyards in the world in 1920. The stockyard handled 15,000,000 heads of livestock including but not limited to cattle, calves, hogs, and sheep, shipped mainly from outside of Illinois. From the stockyard the livestock were loaded at their point of origin and shipped under a shipping contract which was a bill of lading. On arrival, the livestock were driven from the cars by the commission merchant, to the pens assigned by the stockyards company to the merchant for their use. The livestock were then in the exclusive possession of the merchant, and were watered and fed by the stockyards company at their request. With the delivery to the merchant, the transportation was completely ended. All the livestock sent to merchants were sold by them for a commission or brokerage, and not on their own account and that they were sold at the stockyards, and nowhere else;[17] To clarify the Commerce Clause further, Chief Justice Taft quoted Justice Holmes' opinion in a prior case explaining that,

13. *Id.* at 1-2.
14. *See generally id.*
15. *See generally id.*
16. *Stafford v. Wallace,* 258 U.S. 495 (1922).
17. *Id.* at 513.

Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another state from that of the seller and of the cattle.[18]

From this interpretation, the *Stafford* court found that Congress can regulate interstate commerce, including the sections of it which are intrastate.[19] Congress was breaking ground slowly but surely. In time, the Commerce Clause would become one of the most frequently used and far-reaching powers of Congress. Eleven years after the decision in *Stafford*, Congress passed the National Industrial Recovery Act of 1933, which was then challenged in 1935 in the *A.L.A. Schecter Poultry Corporation v. U.S.*[20] Schecter was in the business of buying poultry for slaughter and resale to retail poultry dealers and butchers who in turn sell directly to consumers. This business was not conducted in interstate commerce and they did not sell these in interstate commerce. Specifically, the Act stated, "any violation of any of their provisions in any transaction in or affecting interstate commerce" was to be deemed an unfair method of competition within the meaning of the Federal Trade Commission Act, and was punishable as a crime against the United States. Before approving, the President is to make certain findings as to the character of the association presenting the code and absence of design to promote monopoly or oppress small enterprises, and must find that it will "tend to effectuate the policy of this title."[21] Ultimately, the Court recognized the fact that the business was not engaged in the "current" or "flow" of interstate commerce; the Court said, "The mere fact that there may be a constant flow of commodities into a state does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the state and is there held solely for local disposition and use."[22] It continued on this rationale to note that the poultry had come to "permanently rest within the state" and it had no plans of

18. *Stafford* at 518 (quoting *Swift & Co. v. U.S.*, 196 U.S. 375 (1905).

19. *See generally id.*

20. *A.L.A. Schecter Poultry Corp. v. U.S*, 295 U.S. 495, 542 (1935).

21. *Id.* at 521-522.

22. *A.L.A. Schecter Poultry Corp.* at 543.

further transportation between states.[23] It was significantly noted by the Court that the question of whether it affected interstate commerce was the crux its analysis; the source of injury was irrelevant where the affect is concerned, and instead the effect upon commerce which was pivotal.[24] In analyzing the effect on commerce, the Court drew a distinction between "direct" and "indirect" effects on commerce.[25] Chief Justice Hughes noted,

If the Commerce Clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the State over its domestic concerns would exist only by sufferance of the federal government.[26]

Indeed, this salient point speaks to the heart of the past Chief Justice Marshall's statement on the limitations of the government.[27] Here, the Court found that the effects were merely indirect and therefore, the Act was unconstitutional.[28] Justice Cardozo furthers the distinction of "direct" and "indirect" in saying, "Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours 'is an elastic medium which transmits all tremors throughout its territory; the only question is of their size.'"[29] After the holding of *Schecter*, challenges were emboldened to try to escape the Commerce Clause's far-reaching grasp, especially where wage, hour, and price regulations were concerned; such as to be found challenged in the case of *Carter v. Carter Coal Co.* in 1936.[30]

Through the Commerce Clause, Congress passed the Bituminous Coal Conservation Act of 1935.[31] The act was geared, "to provide for co-operative marketing of bituminous coal; to levy a tax on such coal and provide for a drawback under certain conditions; to declare the production, distribution, and use of such coal to be affected with a national public interest; to conserve the national resources of such coal; to provide for the general welfare, and for other purposes."[32]

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23. *Ibid.*
24. *Id.* at 544 (quoting *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1 (1912)).
25. *Id.*at 547.
26. *Id.* at 546.
27. *Marbury*, 5 U.S. (1 Cranch) 137, 176 (1803).
28. *A.L.A. Schecter Poultry Corp.*, 295 U.S. 495, 542 (1935).
29. *Id.* at 554 (Cardozo, J. *concurring*).
30. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).
31. *Id.*at 278.
32. *Ibid.*

The shareholders brought suit against the company and the Internal Revenue Commissioner of the United States, as well as other officers of the United States, to enjoin them from accepting the Act or applying it to mining.[33] The Court through other precedent declared, "Mining is not interstate commerce, but like manufacturing, is a local business, subject to local regulation and taxation."[34] This statement was further supported by walking through the steps of all that is involved in the mining business, the conclusive answer is that the evils are all local evils over which the federal government has no legislative control. The relation of employer and employee is a local relation. At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character.[35]

The Act was found to be unconstitutional because the Commerce Clause allows for regulation of interstate commerce and intrastate commerce to the extent that it directly affects commerce; whereas here, all the regulation was at the local level which did not directly affect interstate commerce.[36] As Commerce Clause limitations were gaining momentum, a new decision came which did away with the "direct" and "indirect" approach, and replaced it with a new test.[37]

This case came forward due to the practice of firing employees who sought to unionize.[38] In *NLRB v. Jones & McLaughlin Steel Corp*, the respondents contended that their conduct was a means of regulating labor practices rather than interstate commerce; Chief Justice Hughes disagreed. He iterated that, "[t]he congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources."[39] Justice Hughes

33. *Ibid.*
34. *Id.* at 302.
35. *Id.* at 308-309.
36. *See generally Carter.*
37. *NLRB v. Jones & McLaughlin Steel Corp.*, 301 U.S. 1 (1937).
38. *See generally id.*
39. *Id.* at 36.

further explained that "if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."[40] We derive that if activities are intrastate, they can be a part of interstate commerce if they have such a close and substantial relationship to interstate commerce.[41] Under this approach, Congress continued to expand its power under the Commerce Clause bringing the controversy in *United States v. Darby*.[42]

Challenged for constitutionality, the Fair Labors Standards Act prevented the shipment in interstate commerce of certain products and commodities that were produced in the United States under labor conditions with respect to wages and hours which failed to conform to standards established by the Act; the Act provided for fine and imprisonment in the event of: (1) violation by an employer of such wage and hour provisions; (2) shipment by the employer in interstate commerce of any goods in the production of which any employee was employed in violation of such provisions, and (3) failure of the employer to keep such records of his employees and of their wages and hours, as shall be prescribed by administrative regulation or order.[43] The Court addressed the issue by acknowledging that manufacturing was still not interstate commerce; however, manufactured goods are interstate commerce and as such, are able to be regulated by the Commerce Clause.[44] In the Court's rationale, reasoned, "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control," justifying the act for being constitutional.[45] The ever expansive Commerce Clause was continuously growing, reaching new areas and testing the limits, such a limit reached an individual farmer and his wheat.[46]

Mr. Filburn operated a small farm where he maintained a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs. He also raised a small acreage of winter wheat, sown in the Fall and harvested in the following summer; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which was sold. Some was to use in making flour for home consumption, and to

40. *Id.* at 37 (citing *A.L.A. Schecter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935)).
41. *See generally NLRB* 301 U.S. 1 (1937).
42. *U.S. v. Darby*, 312 U.S. 100 (1941).
43. *Id.* at 109.
44. *Id.* at 113.
45. *Id.* at 115.
46. *Wickard v. Filburn*, 317 U.S. 111 (1942).

keep the rest for the following seeding. Through the Agricultural Adjustment Act of 1938, the Secretary of Agriculture gave notice to Mr. Filburn of an allotment of how much crop to harvest in the forms of bushels for a certain amount of acreage; which he went beyond that by significant amount.[47] In light of *Darby*, the Commerce Clause extends to any goods intended to be sold in interstate commerce, however the issue is whether the Commerce Clause extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm.[48] The Court derived their holding in saying,

> The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. It follows that no form of state activity can constitutionally thwart the regulatory power granted by the Commerce Clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.[49]

What matters most is the aggregate effect of all regulated activities, commonly referred to as the "Wickard Aggregation Principle."[50] The Wickard Aggregation Principle was the standard for nearly twenty years until the height of the civil rights movement in which the Civil Rights Act of 1964 was enacted and brought with it new commerce regulations in light of racial discrimination.[51]

The case of *Katzenbach* was argued alongside *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964), both of which challenged the enforcement of Title II of the Civil Rights Act of 1964 prohibiting discrimination on the basis of race, color, religion, or national origin in establishments which were public accommodations, such as hotels, motels, restaurants, etc., where the owners believed they had a right to refuse service or condition the service regardless of the act.[52] The Court in addressing the issue developed a new test, one of rational basis in saying, "we must conclude that it had a rational basis for finding that racial discrimination in restaurants had a direct and adverse

47. *Wickard* at 114.

48. *Id.* at 118.

49. *Id.* at 124.

50. *See generally* Institute for Justice, *Wickard v. Filburn (1942)* (*last modified* Jan 1, 2020), https://ij.org/center-for-judicial-engagement/programs/victims-of-abdication/wickard-v-filburn-1942/#:~:text=IN%20order%20to%20sidestep%20the,on%20the%20interstate%20wheat%20market

51. *Katzenbach v. McClung,* 379 U.S. 294 (1964).

52. *See id.*; *see also* 42 U.S.C. § 2000a; *see also Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964).

effect on the free flow of interstate commerce."[53] The Court reasoned through looking to the Committee Hearings discussed in the *Heart of Atlanta* case, that Congress had done thorough research and thinking into drafting this bill, and given that no express constitutional limit was passed, there is no rational basis for overturning Congress' reasoning.[54] Review under rational basis is extremely deferential to legislatures' enactments justifying the acts which are "rationally related to a legitimate state interest."[55] With this new standard, the challenger must show irrationality of the enactment, which is nearly impossible due to the level of deference given; finding that so long as one can *rationally* see the connection between the act and the legitimate state interest, the challenge will likely fail.[56] There have been a vast variety of bills enacted which were challenged under rational basis and have failed; the standard has been arguably the greatest stepping stone in defending Congress' legislative initiatives.

In 1995, Congress passed the Gun-Free School Zone Act under the Commerce Clause which did forbid "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone."[57] The challenge was brought from one's conviction in violation of this act, as exceeding the Commerce Clause's authority; which until now had been growing expansively.[58] The Court looked to all of case law precedent with respect to the Commerce Clause and where its power lies, and where its limit ends.[59] From their sifting of precedent, they derived three areas in which Congress could regulate interstate commerce; the first is the power to regulate the use of the channels of interstate commerce; the second Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or the persons or things in interstate commerce, even though the threat may come only from intrastate activities; and finally the power to regulate those activities having a substantial relation to interstate commerce.[60] The Court recognized that neither the first nor second options were touched by the Act.[61] Even under the third category, the Court noted that it failed for having no connection to economic activity or com-

53. *Id.* at 384.

54. *See generally id.; see also generally Heart of Atlanta Motel,* 379 U.S. 241 (1964).

55. *See* Raphael Holoszyc-Pimentel, Note, *Reconciling Rational-Basis Review:When Does Rational Basis Bite?,* N.Y.U. L. Rev. 2070 (2015) (citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (*per curiam*)).

56. *See id.* at 2074-2075.

57. *United States v. Lopez,* 514 U.S. 549 (1995).

58. *Id.*

59. *See id.*

60. *Lopez* at 558-559.

61. *Id.* at 559.

merce.[62] From this, it is understood that if the activity is not economic in nature, it *cannot be aggregated* for Commerce Clause purposes.[63] In his concurrence, Justice Kennedy notes that, "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."[64] Justice Kennedy saw the rationale behind the enactment, but could not allow it to be used through the Commerce Clause for fear that it would give unlimited power to the Commerce Clause. The final case necessary for understanding the ability to regulate commerce comes from the challenge to the Controlled Substances Act.[65]

The majority compared the facts of this case to *Wickard* due to the similarities between the two.[66] Between both cases, the individuals were cultivating, for home consumption, a fungible commodity for which there is an established, interstate market and were both being regulated by a federal statute.[67] The Court—from comparing with *Wickard*—drew the Act to be rationally based in how it would affect interstate commerce if the acts of the challengers were aggregated.[68] Here, the Court used the "rational basis test" to hold the Act constitutional.[69] At this point, it is important to note that the Commerce Clause has guided the way states regulate commerce within their state where the Commerce Clause would not reach. When the Commerce Clause doesn't reach it, it is solely a state issue. However, the Constitution of the federal government still applies and preempts—in some cases—state initiatives that offend the Constitution.

To further develop an understanding of how the possible abridgment of a Constitutional right can be challenged, one must understand the tiers of review. Rational basis review is one of three—or arguably four—tiers of scrutiny applied to constitutional challenges. The other tiers being intermediate scrutiny and strict scrutiny which are more concerned with individual rights protected by the amendments of the

62. *Lopez* at 561.

63. *See generally id.* (*emphasis added*).

64. *Id.* at 577 (Kennedy, J. concurring).

65. *Gonzales v. Raich,* 545 U.S. 1 (2005).

66. *See generally id.; cf. Wickard v. Filburn,* 317 U.S. 111 (1942).

67. *Id.*; *cf. Wickard,* 317 U.S. 111 (1942).

68. *Id.* at 19-20.

69. *Id.* at 22.

U.S. Constitution, and the most significant amendment for our consideration is the Fourteenth Amendment.[70]

The Fourteenth Amendment's Due Process Clause incorporates any right set forth in the Bill of Rights to the States.[71] The Fourteenth specifically states in part,

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[72]

The Court noted that the past Courts grappled with the theories of incorporation in which there are two competing theories; full incorporation vs. selective incorporation.[73] The current principle accepted is that incorporated Bill of Rights protections "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."[74] Justice Alito notes that in order for a right to be incorporated, it must be "deeply rooted in this Nation's history and tradition,"[75] Justice Stevens believes it to be whether the value is "implicit in our ordered liberty."[76] Justice Scalia, agrees to an extent with Justice Alito, but adds that a right is fundamental if it, "is essential to the American 'scheme of ordered liberty.'"[77] Each Justice brings their own interpretation. The issue of how these different ways of viewing whether a right was to be incorporated comes with perspective. From Originalism, Textualism, and other judicial philosophies, one can arrive at different outcomes. For example, Originalism is:

> a theory of the interpretation of legal texts, including the text of the Constitution. Originalists believe that the constitutional text ought to be given the original public meaning that it would have had at the time that it became law. The original meaning of constitutional texts can be discerned from dictionaries, grammar books, and from other legal documents from which the text might be borrowed. It can also be inferred from the background legal events and public debate that

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70. R. Randall Kelso, Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice, U. Penn. J. Cons. L., 225, 228 (2002); *see also generally* U.S. Cons.

71. *McDonald v. City of Chicago,* 561 U.S. 742, 753 (2010).

72. U.S. Cons. amend. XIV, § 1.

73. *McDonald,* 561 U.S. 742, 762-763 (2010).

74. *Mcdonald* at 765 (quoting *Malloy v. Hogan,* 378 U.S. 1, 10 (1964).

75. *Id.* at 767 (quoting *Washington v. Glucksberg,* 521 U.S. 702).

76. *Id.* at 871 (Stevens, J. *dissenting*).

77. *Id.* at 811 (Scalia, J. *concurring*).

> gave rise to a constitutional provision. The original meaning of a constitutional text is an objective legal construct like the reasonable man standard in tort law, which judges a person's actions based on whether an ordinary person would consider them reasonable, given the situation. It exists independently of the subjective "intentions" of those who wrote the text or of the "original expected applications" that the Framers of a constitutional text thought that it would have.[78]

Where in contrast a "Living Constitutionalist" believes, "that the meaning of the constitutional text changes over time, as social attitudes change, even without the adoption of a formal constitutional amendment pursuant to Article V of the Constitution."[79] However, regardless of what philosophy was used, once a right has been incorporated, it is to be applied thereafter.

The Fourteenth Amendment is the keystone for purposes of applying constitutional rights against states. States under the Tenth Amendment retain rights not delegated to Congress and not prohibited which are not specifically listed as to be as broad as possible. It specifically reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[80] With the understanding of the Commerce Clause's powers and limitations, and the Incorporation Doctrine, we are able to move on to discuss, the rights at issue with the COVID-19 "safety measures," which were put in place and some new legislation that has followed as a result.

III. SUBJECT OPINION

In 1942, during the second World War, in fear of espionage from those ashore whose ancestry was shared by the enemy, Executive Order 9066 was put into effect which subjected all persons of Japanese ancestry in any prescribed West Coast military areas to remain in their residences from 8 p.m. to 6 a.m.[81] In furtherance of such order, another order, namely, "Exclusion Order No. 34" was put into effect which placed Japanese Americans under compulsion to evacuate and be held in detention at an "Assembly Center."[82] These orders were largely due to the attack on Pearl Harbor, which generated a fear

78. Steven Calabresi, *Originalism In Constitutional Interpretation,* https://constitutioncenter.org/interactive-constitution/white-papers/on-originalism-in-constitutional-interpretation

79. Calabresi, *Originalism In Constitutional Interpretation*

80. U.S. Const. amend. X

81. *Korematsu v. United States,* 323 U.S. 214 (1944).

82. *Korematsu* at 222-223.

about Japanese American born citizens and Japanese born citizens having allegiances overseas and being in the business of conducting espionage.[83] Regardless of how justified the fear may have been, there was an arbitrary choosing of Japanese Americans and not including further enemies such as the Germans and Italians.[84] It is the fear that gives way to dangerous decisions, and when it is rationalized by the Supreme Court to not offend the Constitution or rather that it is sanctioned by the Constitution, then it sets a precedent for all time.[85] As Justice Jackson eloquently said,

The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic."[86]

The principle Justice Jackson referred to, was the disregard for fundamental rights of an American Citizen in the name of a "public need" or "public safety" such as a plausible claim of a widespread virus.[87]

The Bill of Rights contemplated fundamental rights to our limited government system, but left the door open for future amendments and the courts to confer unenumerated rights.[88] Such an unenumerated right is the right to travel.[89] *Shapiro v. Thompson* involved a mother who moved from Massachusetts to Connecticut and applied for state-governmental assistance but was denied due to having not met their one-year requirement to become a citizen and obtain such benefits. The right was expounded upon by the majority in saying,

for all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.[90]

and,

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83. *See generally id.*

84. *See id.* at 243 (Jackson, J. *dissenting*).

85. *See id.* at 246 (1944) (Jackson, J. *dissenting*).

86. *Korematsu,* 246 (Jackson, J. *dissenting)* (quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921)).

87. *See generally id.* (Jackson, J. *dissenting*).

88. *See generally,* U.S. Cons.

89. *See Shapiro v. Thompson,* 394 U.S. 618 (1969).

90. *See id.* at 630.

The constitutional right to travel from one State to another occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized. The right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.[91]

This being a fundamental right, calls for strict scrutiny review, which requires the showing of a compelling government interest and to be as narrowly tailored as possible.[92] Absent a compelling governmental interest and a narrow tailoring, the fundamental right cannot be abridged.[93] This right was affirmed and explained further in 1999.[94] Justice Stevens enumerated the components of the right to travel in saying that the right embraces three different components: "the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State"[95] He continues to note how fundamental it is by quoting precedent finding that the right to travel is "assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all."[96] And finally in spirit of the Fourteenth Amendment, Justice Stevens presses a significant point, namely, "The states have not now, if they ever had, any power to restrict their citizenship to any classes or persons."[97] Compare for consideration any of the states' or their cities' restrictions on travel in and among the states which are antithetical to what Justice Stevens has stated above. The right to travel is strengthened further when one takes into consideration the First Amendment's right to peacefully assemble and right to association.[98]

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91. *See Shapiro* at 630-631.

92. *See id.* at 634 (finding that any classification which serves to penalize the exercise of a fundamental right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional).

93. *See id.*

94. *Saenz v. Roe,* 526 U.S. 489 (1999).

95. *Saenz* at 500.

96. *Id.* at 498 (quoting Shapiro v. Thompson, 394 U.S. at 643 (Stewart, J., concurring)).

97. *Id.* at 503.

98. *See generally,* U.S. Cons., amend. I

The Supreme Court unanimously held, "the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government."[99] Further, the right to assembly ties in freedom of speech and expression, for ex. attending a rally of a political party, or activist group.[100] The right to peacefully assemble was interrupted by the restriction of "large gatherings" in public spaces. Large gatherings are defined differently across different cities. In contrast, a "large gathering" does increase the likelihood of increased exposure and transmission of the virus so it is likely rationally founded. Hence, it begs the question of competing interests, defending liberties and freedoms versus the public health. The first amendment expression when set to restraints comes before courts with a heavy presumption of unconstitutionality.[101] In making decision which restrict liberty—where fundamental rights/interests are concerned;

An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.[102]

IV. ANALYSIS

In response to the COVID-19 pandemic, many states adopted the framework of distinguishing between "essential businesses/workers" and "non-essential businesses/workers."[103] For example, Illinois issued a stay at home order which not only created different classes of citizens, it restricted their movement, and in some cases prevented any kind of work.[104] The order specifically states, "All businesses and operations in the State, except Essential Businesses and Operations. . .are required to cease all activities within the State except Minimum Basic Operations. . ."[105] In reviewing more of the executive order, it notes that "Minimum Basic Operations" had to maintain the

99. *Bates v. City of Little Rock,* 361 U.S. 516, 522 (1960).

100. *Carroll v. President and Com'rs of Princess Anne,* 393 U.S. 175 (1968).

101. *Carroll* at 181.

102. *Id.* at 183 (quoting *Shelton v. Tucker,* 364 U.S. 479).

103. *See* Gov. Pritzker, *EXECUTIVE ORDER IN RESPONSE TO COVID-19-19 (COVID-19-19 EXECUTIVE ORDER NO. 8),* https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-10.aspx (Mar. 20, 2020); Gov. Newsom, *EXECUTIVE ORDER N-33-20,* https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-19-HEALTH-ORDER.pdf (Mar. 4, 2020); Gov. Cuomo, *EXECUTIVE ORDER NO. 202,* https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.pdf (Mar. 7, 2020).

104. *See generally id.*

105. *See id.*

value of the business's inventory, preserve the condition of the business's physical plant and equipment, ensure security, process payroll and employee benefits, or for related functions; and facilitate employees to work remotely, which was unworkable for certain businesses, for example: theaters, zoos, amusement parks, bars, etc.[106]

By differentiating between "essential businesses/workers" and "non-essential businesses/workers," a classification of citizens has been made based on their choice of work or profession.[107] In making laws, distinctions and groups have to be made somewhere, for ex. the age of buying alcohol shows a distinction of those of age and those who are not. Yet, Justice Harlan famously stated, "There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens."[108] The word "essential" when used as an adjective, is defined as, "of the utmost importance" with synonyms such as: "Basic," "Indispensable," and "Necessary."[109] In consideration of what is "of the utmost importance," or even in using the synonyms provided, in relation to any working citizen who, amidst a pandemic, is not their line of work "basic" or "of the utmost importance," to providing themselves with means to procure food, clothing, shelter, and all the "necessary" things for living and maintaining a level of health?[110] From January 21st of 2020, to April 28th, 2021, there has been 31,976,888 cases of COVID-19 in America with a total of 570,421 deaths, which results in about a 2% mortality rate, which in turn means there is a 98% survival rate.[111] Interestingly, the CDC reports in a table of comorbidities that, "For over 5% of the deaths, COVID-19 was the only cause mentioned."[112] On average, the rest of the deaths had at least 2.6 other underlying conditions or causes of death.[113] In calculating the deaths that were COVID-19 alone, as stated previously, 570,421 people have died in relation to COVID-19,

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106. *See generally* Gov. Pritzker, *EXECUTIVE ORDER IN RESPONSE TO COVID-19-19;* Gov. Newsom, *EXECUTIVE ORDER N-33-20; and* Gov. Cuomo, *EXECUTIVE ORDER NO. 202.*

107. *See generally id.*

108. *Plessy v. Ferguson,* 163 U.S. 537 (1896).

109. *Essential*, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/essential (last updated 2020).

110. *See generally id.*

111. CDC COVID-19 Data Tracker, (last updated April 28, 2021), https://COVID-19.cdc.gov/COVID-19-data-tracker/#cases_totalcases (the data tracker was updated weekly and the ratio remained relatively the same)

112. CDC, *Weekly Updates by Select Demographic and Geographic Characteristics*, https://www.cdc.gov/nchs/nvss/vsrr/COVID-19_weekly/index.htm?fbclid=IWAR3xvPBE9Q6NXcwqMIGtg439k100XtMfvy-9YBimKZMOSSRpCwiitPLS3vs#Comorbidities (last updated April 28, 2021).

113. *Ibid.*

times that by the 6% stated by the CDC, and we observe about 34,225 people have died from COVID-19 alone. Represented in a percentage, this means the 2% mortality, times the 6% of COVID-19 deaths alone results in a percentage of 0.12% of people who contract COVID-19 have died from it absent any other medical conditions. Globally, the pandemic has reached 149,036,962 cases and 3,141,143 deaths, which results in about a 2% morbidity rate, and a 98% survival rate; which rates are reflected by the U.S.[114] It is important to note this morbidity rate has not fluctuated, the numbers have remained consistent. In light of the relevant statistics, the cessation of operations for these "non-essential businesses/workers" was unwarranted; as it was noted in a recent lawsuit seeking to stay the governor of Pennsylvania's executive order, that violations of substantive due process and equal protection that interfere with important or fundamental rights, which includes, the right to travel, right operate a legitimate business and/or earn a living, right to assemble, etc. are serious deprivations.[115]

Constitutional challenges rose in response to the restriction against gathering, the closing of "non-life-sustaining businesses," and the stay-at-home order.[116] The judge was tasked with balancing legitimate public health concerns, with the Constitutional rights of citizens.[117] Judge Stickman said, "[G]ood intentions toward a laudable end are not enough to uphold governmental action against a constitutional challenge. Indeed, the greatest threats to our system of constitutional liberties may arise when the ends are laudable, and the intent is good—especially in a time of emergency."[118] The significance of this balance is further noted when Judge Stickman states, "In an emergency, even a vigilant public may let down its guard over its constitutional liberties only to find that liberties, once relinquished, are hard to recoup and that restrictions—while expedient in the face of an emergency situation—may persist long after the immediate danger has passed."[119] Appreciating the significance of the circumstances and consequences, the court proceeded to address the challenge.[120]

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114. John Hopkins, *COVID-19-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins*, https://coronavirus.jhu.edu/map.html (last updated April 28, 2021); *cf* CDC COVID-19 Data Tracker, (last updated April 28, 2021), https://COVID-19.cdc.gov/COVID-19-data-tracker/#cases_totalcases

115. *County of Butler v. Wolf*, 486 F. Supp.3d 883(W.D. Pa. Sep. 14, 2020).

116. *Id.*

117. *County of Butler.*

118. *Id.* at 890.

119. *County of Butler,* 486 F. Supp.3d 883(W.D. Pa. Sep. 14, 2020).

120. *Id.* at 894.

In reviewing which standard of scrutiny to apply to the constitutional challenge, the defendants argued that the holding of *Jacobson v. Massachusetts,* should apply.[121] In tackling the decision of *Jacobson*, this court looked to a then recent decision in Maine.[122] The constitutional challenge also required the correct level of scrutiny, which was argued between one of strict scrutiny—by the plaintiff—and a loose deferential standard—by the defendant.[123] The *Bayley's* court noted that the framework of the tiers of scrutiny was to be used and in doing so, the *Jacobson* court's very loose and wide discretion did not provide the level of scrutiny.[124] This notion is further supported by Justice Alito's dissent in the case of *Calvary Chapel Dayton Valley v. Sisolak, et al,* in which he states;

For months now, States and their subdivisions have responded to the pandemic by imposing unprecedented restrictions on personal liberty, including the free exercise of religion. This initial response was understandable. In times of crisis, public officials must respond quickly and decisively to evolving and uncertain situations. At the dawn of an emergency—and the opening days of the COVID-19 outbreak plainly qualify—public officials may not be able to craft precisely tailored rules. Time, information, and expertise may be in short supply, and those responsible for enforcement may lack the resources needed to administer rules that draw fine distinctions. Thus, at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules. In general, that is what has happened thus far during the COVID-19 pandemic. But a public health emergency does not give Governors and other public officials carte blanche to disregard the Constitution for as long as the medical problem persists. As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.[125]

The Court in *County of Butler* found particular agreement with Justice Alito and applied the tiers of scrutiny to the analysis of this chal-

121. *Id.* at 896 (citing *Jacobson v. Massachusetts,* 197 U.S. 11 (1905)).

122. *Id.* (citing *Bayley's Campground, Inc. v. Mills,* __ F. Supp. 3d __, 2020 WL 2791797 (D. Me. May 29, 2020)).

123. *See generally, Bayley's Campground, Inc.,* __ F. Supp. 3d __, 2020 WL 2791797 (D. Me. May 29, 2020)).

124. *Bayley's Campground, Inc.*; *see also Shapiro v. Thompson,* 394 U.S. 618 (1969) (finding that any classification which serves to penalize the exercise of a fundamental right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional); *see also Planned Parenthood v. Casey,* 505 U.S. 833, 857 (1992) (noting "cases since *Roe v. Wade* accord with the view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims").

125. *Chapel Dayton Valley v. Sisolak, et al,* 591 U.S. __ (2020) (Alito, J., dissenting).

lenge.[126] In applying strict scrutiny as the level of review, the court found that the restriction on public gatherings did violate the First Amendment; specifically, they noted that the restrictions were overly broad—therefore in conflict with making restrictions which are narrowly tailored—and were not even followed by the Governor—where the Governor partook in a protest.[127] The Court concluded that the restrictions with respect to the First Amendment's right to peacefully assemble were unconstitutional.[128] Next, the Court addressed the Due Process and Equal Protection of the Fourteenth Amendment.

Quarantines can be traced back to colonial times.[129] The response taken for COVID-19 were allegedly modeled by the Spanish Flu pandemic response; however, in examining history, there was no mitigation step that resembled the lockdowns.[130] The distinction the court noted was that during the Spanish Flu pandemic, the quarantine or isolation measures were VOLUNTARY, not coercive.[131] Judge Stickman took note that,

The fact that the lockdowns imposed across the United States in early 2020 in response to the COVID-19 pandemic are unprecedented in the history of our Commonwealth and our Country. They have never been used in response to any other response in our history. They were not recommendations by the CDC. They were unheard of by the people of the nation until just this year. It appears as though the imposition of lockdowns in Wuhan and other areas of China—a nation unconstrained by concern for civil liberties and constitutional norms—started a domino effect where one country, and state, after another imposed draconian and hitherto untried measures on their citizens. The lockdowns are, therefore, truly unprecedented from a legal perspective.[132]

Though he takes note that just because something is unprecedented, it does not render it unconstitutional.[133] The court further observes that not only is the right to travel fundamental, but it has expanded to a right to be out and about in public.[134] Stay-at-home orders went well beyond any ordinance observed in any of the right to travel, loitering,

126. *County of Butler* at 898.

127. *Id.* at 903-908.

128. *County of Butler* at 908.

129. *Id.* at 913 (citing Laura K. Donohue, *Biodefense and Constitutional Constraints,* 4 U. Miami Nat'l Sec. & Armed Conflict L. Rev. 82, 94 (2013-2014)).

130. *Id.* at 914.

131. *Id.* at 915. (EMPHASIS ADDED).

132. *Id.* at 916.

133. *County of Butler* at 916.

134. *Id.* at 917 (citing *City of Chicago v. Morales,* 527 U.S. 41 (1999)).

and vagrancy cases.[135] In summation, the court concluded that the stay-at-home orders were unconstitutional and said,

Broad population-wide lockdowns are such a dramatic inversion of the concept of liberty in a free society as to be nearly presumptively unconstitutional unless the government can truly demonstrate that they burden no more liberty than is reasonably necessary to achieve an important government end. The draconian nature of a lockdown may render this is a high bar, indeed.[136]

Next the court turned to the issue of shutting down businesses.[137] Similarly to the unprecedented nature of lockdowns, businesses being divided into "life-sustaining" and "non-life-sustaining" (or "essential" and "non-essential") has never been done before.[138] The Fourteenth Amendment's Due Process Clause contains a component that bars arbitrary, wrongful, government action "regardless of the fairness of the procedures used to implement them."[139] A citizen's right to support themselves in choosing a given profession is deeply rooted in our nation's legal and cultural history and has been long recognized as a component of the liberties which the Fourteenth Amendment protects.[140] This contention is supported from the Supreme Court which addressed this issue and said, "it requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure."[141] The Supreme Court had further noted in a subsequent case that "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a government officer that is at issue."[142] In cases where it there is a challenge to legislative acts where substantive due process is concerned, the rational basis scrutiny is used to review the act.[143] Rational basis scrutiny requires only that the government action "bear a rational relationship to some legitimate end."[144] One of the interesting facts noticed by the court was the strange occurrence of businesses which were classified as "non-life-

135. *County of Butler* at 917 (citing *City of Chicago v. Morales,* 527 U.S. 41 (1999); *Papchristou v. Jacksonville,* 405 U.S. 156 (1972); *Bykofsly v. Borough of Middletown,* 429 U.S. 964 (1976); *Waters v. Barry,* 711 F. Supp. 1125 (D.D.C. 1989)).

136. *Id.* at 913.

137. *Id.* at 919.

138. *Ibid.*

139. *County of Butler* at 920 (citing *Zinermon v. Burch,* 494 U.S. 113 (1990)).

140. *Id.* at 919.

141. *Id.* at 920 (quoting *Truax v. Raich,* 239 U.S. 33 (1915)).

142. *County of Butler* at 910 (quoting *Cty. Of Sacramento v. Lewis,* 523 U.S. 833, 846 (1998)).

143. *Id.* at 910.

144. *Id.* at 922 (quoting *Romer v. Evans,* 517 U.S. 620, 631 (1996)).

sustaining" sold some of the same products or provided some of the same services as those classified as "life-sustaining."[145] In shutting down businesses, one is being deprived of their right to work; such was noted to be "life-sustaining" as seen by an opinion by the late Justice Douglas of the Supreme Court;

The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on Politics, "A man has a right to be employed, to be trusted, to be loved, to be reversed." It does many men little good to stay alive and free and propertied if they cannot work. To work means to eat. It also means to live. For many, it would be better to work in jail than to sit idle on the curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man.[146]

Due to the arbitrary nature used in discerning between "life-sustaining" and "non-life-sustaining" violated the substantive due process of the Fourteenth Amendment.[147] Finally, the Court progressed to the final issue of whether the orders violated the Equal Protection's Clause of the Fourteenth Amendment.

To prevail on a claim of Fourteenth Amendment violation, absent a suspect class such as; race, religion, ethnicity, gender or nationality, the claim arises under the "class of one theory," and must prove three elements; (1) the defendant treated the plaintiff differently than those similarly situated; (2) the defendant did so intentionally; and (3) there was no rational basis for the difference in treatment.[148] In this case, the record clearly reflected all three elements being present and therefore being in violation of the Fourteenth Amendment's Equal Protection Clause.[149] Examples of disparate treatment can be observed across the country.

Restaurants being told to close their indoor dining, but being allowed to remain open if they are able to have outdoor dining seems paradoxical; as the Illinois Department of Public Health, Dr. Ngozi Ezike said at a press conference, "an indoor tent is the same as indoor

145. *Id.* at 925.

146. *Id.* at 926 (quoting *Barsky v. Regents of University of State of New York,* 347 U.S. 442, 472 (1954)).

147. *Id.* at 926.

148. *County of Butler* at 926-927 (citing *Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000)).

149. *Id.* 928.

dining."[150] With this in mind, it would seem the rule of no indoor dining but outdoor dining in a tent being acceptable is irrational to those which cannot provide outdoor dining.[151] Further, the distinction such as places of worship as "non-essential" vs. places labelled as "essential," for example, acupuncture facilities; where the former is limited to about ten to twenty-five individuals, whereas the latter is not limited in how many it can have.[152] As the Supreme Court noted, "these classifications lead to troubling results."[153] Because the restrictions in this situation were not generally applicable, they are required to pass strict scrutiny through narrowly tailoring them.[154] It is clear that the stay-at-home orders and restrictions against public gatherings and keeping businesses open is in direct violation of both the First Amendment and the Fourteenth Amendment.[155] What is even more concerning is that many individuals at the state and federal level have been observed breaking their state's—and in some cases their own drafted—rules.

As Justice Jackson had feared, these COVID-19 protocols have created a precedent which has been lying about like a loaded gun and once again has been fired. The State of New York's Senate has proposed a bill which is the prime example of history repeating itself, it's summary reads as follows, "[R]elates to the removal of cases, contacts and carriers of communicable diseases that are potentially dangerous to the public health."[156] The summary fails to explain precisely what it means, but rest assured the bill makes it quite clear in reading,

> "MAY ORDER THE REMOVAL AND/OR DETENTION OF SUCH A PERSON OR OF A GROUP OF SUCH PERSONS BY ISSUING A SINGLE ORDER, IDENTIFYING SUCH PERSONS EITHER BY NAME OR BY A REASONABLY SPECIFIC DESCRIPTION OF THE INDIVIDUALS OR GROUP BEING DETAINED. SUCH PERSON OR GROUP OF PERSONS SHALL BE DETAINED IN A MEDICAL FACILITY OR OTHER APPROPRIATE FACILITY OR PREMISES DESIGNATED BY THE GOVERNOR OR HIS OR HER DELEGEE

150. NBC News, *'An Indoor Tent is The Same as Indoor Dining,' Illinois' Top Doctor Says*, https://www.nbcchicago.com/news/local/an-indoor-tent-is-the-same-thing-as-indoor-dining-illinois-top-doctor-says/2358370/ (published October 23, 2020).

151. *See generally, Village of Willowbrook,* 528 U.S. 562 (2000); *cf* NBC News, *'An Indoor Tent is The Same as Indoor Dining,' Illinois' Top Doctor Says*, https://www.nbcchicago.com/news/local/an-indoor-tent-is-the-same-thing-as-indoor-dining-illinois-top-doctor-says/2358370/ (published October 23, 2020).

152. *Roman Catholic Diocese of Brooklyn v. Cuomo,* 592 U.S. __ (2020).

153. *Id.* (referring to the classifications of "essential" vs. "non-essential").

154. *See Roman Catholic Diocese of Brooklyn*

155. *See generally,* U.S. Const. amend. I. & XVI

156. S.B. A416, N.Y. (2021)

> AND COMPLYING WITH SUBDIVISION FIVE OF THIS SECTION."[157]

The decision in *Korematsu* has been regarded as one of –if not the—worst decisions of our nation's history. And to allow a possible repeat is alarming.

Now in contrast, there is the argument of public health being more important than business and livelihood. As noted above, the Tenth Amendment provides for rights not granted to Congress are reserved to the states and citizens. Such leads way to concerns of public health. States all, to some effect, have within their statutory codes, powers related to public health. Illinois for ex. states,

> The State Department of Public Health has general supervision of the interests of the health and lives of the people of the State. It has supreme authority in matters of quarantine and isolation, and may declare and enforce quarantine and isolation when none exists, and may modify or relax quarantine and isolation when it has been established. The Department may adopt, promulgate, repeal and amend rules and regulations and make such sanitary investigations and inspections as it may from time to time deem necessary for the preservation and improvement of the public health, consistent with law regulating the following. . .[158]

This provides for the quarantine measures which were enforced in Illinois. Importantly, further in this same section states,

> Except as provided in this Section, no person or a group of persons may be ordered to be quarantined or isolated and no place may be ordered to be closed and made off limits to the public except with the consent of the person or owner of the place or upon the prior order of a court of competent jurisdiction. The Department may, however, order a person or a group of persons to be quarantined or isolated or may order a place to be closed and made off limits to the public on an immediate basis without prior consent or court order if, in the reasonable judgment of the Department, immediate action is required to protect the public from a dangerously contagious or infectious disease. In the event of an immediate order issued without prior consent or court order, the Department shall, as soon as practical, within 48 hours after issuing the order, obtain the consent of the person or owner or file a petition requesting a court order authorizing the isolation or quarantine or closure. When exigent circumstances exist that cause the court system to be unavailable or that make it impossible to obtain consent or file a petition within 48 hours after issuance of an immediate order, the Department must obtain consent or file a petition requesting a court order as soon as reasonably possible.[159]

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157. *Id.* § 2120A(2)
158. 20 ILCS 2305/2(a)
159. 20 ILCS 2305/2(c)

In a publication by the American Bar Association, it discusses the extent of authority granted to governors and public health officials generally in times of a pandemic. It concludes that, "While state governors and local officials have wide latitude to enforce their directives during an emergency, such as the COVID-19 pandemic, the exercise of their authority cannot be overbroad. Judicial review, guided by the Constitution and Supreme Court precedents, will have the last word."[160] It is important to note the difficulty of balancing these competing interests as public policy tries to prevent anyone from dying for lack of taking reasonable measures to mitigate exposure and spread versus the ability of autonomy and freedoms enjoyed being abridged and deteriorating such freedoms prospectively. The Constitution's Supremacy Clause states that federal law is, "the supreme Law of the Land" and thus, the federal preemption doctrine is derived.[161] The doctrine of federal preemption, provides that,

> federal law supersedes conflicting state laws. The Supreme Court has identified two general ways in which federal law can preempt state law. First, federal law can expressly preempt state law when a federal statute or regulation contains explicit preemptive language. Second, federal law can impliedly preempt state law when Congress's preemptive intent is implicit in the relevant federal law's structure and purpose.[162]

Ultimately, the Constitution is the highest law of our country, and as such, if there is any law or regulation that is contrary to it, such law or regulation must fail.

V. CONCLUSION

The government is limited in its power; this purpose has always served as the keystone to our democratic republic, and thus should not be abridged and disregarded so haphazardly. In its limited powers, it is able to regulate commerce and provide for the public welfare; however, it is not able to seize and destroy upon the liberties of the citizens merely in pursuit of such goals, even those which come from the well-respected principle of the "public good." Consider for yourself the following excerpt from Ayn Rand's narrative "Atlas Shrugged"

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160. American Bar Association, *How much authority do state and local officials have during a health emergency, such as the COVID-19-19 pandemic?,* (May 2020), https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-may-2020/state-local-authority-during-COVID-19/

161. Congressional Research Service, *Federal Preemption: A Legal Primer* (July 23, 2019) https://fas.org/sgp/crs/misc/R45825.pdf

162. *Id.*

"Do you mean that you are refusing to obey the law?" asked the judge.

"No. I am complying with the law - to the letter. Your law holds that my life, my work and my property may be disposed of without my consent. Very well, you may now dispose of me without my participation in the matter. I will not play the part of defending myself, where no defence is possible, and I will not simulate the illusion of dealing with a tribunal of justice."

"But, Mr. Rearden, the law provides specifically that you are to be given an opportunity to present your side of the case and to defend yourself."

"A prisoner brought to trial can defend himself only if there is an objective principle of justice recognised by his judges, a principle upholding his rights, which they may not violate and which he can invoke. The law, by which you are trying me, holds that there are no principles, that I have no rights and that you may do with me whatever you please. Very well. Do it."

"Mr. Rearden, the law which you are denouncing is based on the highest principle - the principle of the public good."

"Who is the public? What does it hold as its good? There was a time when men believed that 'the good' was a concept to be defined by a code of moral values and that no man had the right to seek his good through the violation of the rights of another. If it is now believed that my fellow men may sacrifice me in any manner they please for the sake of whatever they deem to be their own good, if they believe that they may seize my property simply because they need it - well, so does any burglar. There is only this difference: the burglar does not ask me to sanction his act.