



## CONSTITUTIONAL LABORATORIES: SOME REFLECTIONS ON COVID-19 LITIGATION IN ARIZONA

Ilan Wurman\*

### INTRODUCTION

In federal court case after federal court case, plaintiffs challenging COVID-19 restrictions lost.<sup>1</sup> The reason is obvious.

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\* Associate Professor, Sandra Day O'Connor College of Law, Arizona State University. Thanks to the Pacific Legal Foundation and the participants of their "emergency powers" conference on February 3, 2022, in Washington, D.C., at which I presented this paper. Thanks also to the editors of the *NYU Journal of Law & Liberty* for their role in putting together this volume.

<sup>1</sup> See, e.g., *In re Abbott*, 954 F.3d 772, 786 (5th Cir. 2020) (holding that that all constitutional rights may be reasonably restricted to combat public health emergency); *4 Aces Enters., LLC v. Edwards*, 479 F. Supp. 3d 311, 329 (E.D. La. 2020) (substantive Due Process and Equal Protection claims fail because testimony and professional medical opinion showing "banning on-site consumption of food or drink at bars bears 'at least some 'real or substantial relation' to the public health crisis and is not

Under modern equal protection and substantive due process doctrine, states receive enormous deference when restricting rights that federal courts do not consider to be fundamental. The “rational basis” test, or the “any conceivable basis test,” provides that so long as some rational legislator could have thought a particular restriction was reasonable, it will be upheld.<sup>2</sup> More still, a substantive due process case from 1905 involving smallpox vaccination schemes has been erroneously taken for the proposition that even wider deference is necessary in a health emergency.<sup>3</sup>

State cases that raised issues of state law fared, on the whole, better.<sup>4</sup> This essay proposes a blueprint of available avenues under

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“beyond all question, a plain, palpable invasion or rights secured by the fundamental law.”” (quoting *id.* at 784 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905))); *McGhee v. City of Flagstaff*, 2020 U.S. Dist. LEXIS 81369, at \*15 (D. Ariz. May 8, 2020) (substantive Due Process claim fails because promulgated executive order and proclamations ordering restaurants and bars to close on-site dining had some “real or substantial relation” to the public health crisis resulting from COVID-19 under *Jacobson*); see also cases cited *infra* note 66. The exception being for religious liberty cases. See, e.g., *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020).

<sup>2</sup> *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993) (classification will be upheld “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification”); *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 488 (1955) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

<sup>3</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). As I have explained previously, see Ilan Wurman, *COVID-19 Litigation and the Rational Basis Test*, 67 WAYNE L. REV. 85, 85 (2021), the courts have misunderstood *Jacobson* because that case really had nothing to do with judicial deference in an emergency. The statute in *Jacobson* was a quasi-compulsory vaccination scheme that authorized local governments to impose vaccination requirements on penalty of paying a fine for refusal. *Jacobson*, 197 U.S. at 12. The United States Supreme Court upheld the law against a substantive due process challenge. *Id.* at 26-32. The very question was whether there was a constitutional right to be free of such vaccinations to begin with; not what amount of deference is owed to the legislature.

<sup>4</sup> See, e.g., *In re Certified Questions from U. S. Dist. Ct., W. Dist. of Mich.*, 958 N.W.2d 1, 31 (Mich. 2020) (holding the Governor did not possess authority under Emergency Management Act of 1976 or Emergency Powers of the Governor Act of 1945 to renew declaration of state of emergency or proclaim a state of emergency based on the COVID-19 pandemic); *Wis. Legislature v. Palm*, 942 N.W.2d 900, 918 (Wis. 2020)

state law for future potential challenges to assertions of emergency authority. Of course, not all government measures will be unconstitutional under state law, and many will be necessary and desirable. But some assertions of authority might be unconstitutional under state law even if constitutional under modern federal doctrine. The overarching claim is that state courts and state constitutions are not merely “laboratories of democracy,”<sup>5</sup> but also “laboratories of liberty” or, perhaps most fittingly, “laboratories of state constitutionalism.”<sup>6</sup> Reflecting on my own litigation in Arizona, this essay makes the case that in several areas of law—nondelegation, judicial review of executive acts, state “equal privileges or immunities” clauses, and the obligations of contract—state constitutional law provides more fruitful grounds for future challenges for at least some kinds of assertions of emergency authority, and that the independent development of state constitutional law in these areas should be encouraged.

First, some background. Arizona, like other states,<sup>7</sup> has a statute that delegates tremendous power to the Governor in the event of an emergency declaration. Arizona’s statute in fact delegates to the

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(holding Emergency Order 28 promulgated by the Wisconsin Department of Health Services restricting travel and ordering closures as exceeding authority under Wisconsin statute by impinging on the Legislative power).

<sup>5</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

<sup>6</sup> See generally JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (2021); JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2020).

<sup>7</sup> See, e.g., CAL. GOV’T CODE § 8627 (West 2022) (“During a state of emergency the Governor shall . . . have complete authority over all agencies of the state government and the right to exercise within the area designated all police power vested in the state by the Constitution and laws of the State of California in order to effectuate the purposes of this chapter.”).

Governor “all police power”<sup>8</sup> if the Governor declares an emergency resulting from “air pollution, fire, flood or floodwater, storm, epidemic, riot, earthquake or other causes.”<sup>9</sup> Pursuant to this authority, Governor Doug Ducey, a Republican, issued a series of executive orders during the 2020 coronavirus pandemic, imposing novel requirements on health insurers and prohibiting price gouging;<sup>10</sup> prohibiting “non-essential or elective” surgeries;<sup>11</sup> suspending some of the legal requirements for obtaining unemployment insurance;<sup>12</sup> prohibiting local governments from interfering with businesses he defined as “essential;”<sup>13</sup> delaying enforcement of eviction actions;<sup>14</sup> requiring individuals to stay home unless for essential activity;<sup>15</sup> prohibiting the commercial eviction of small businesses;<sup>16</sup> suspending regulatory requirements to allow restaurants to increase profits by selling grocery items;<sup>17</sup> immunizing healthcare workers from civil liability contrary to existing statutes;<sup>18</sup> delaying the start of the school year and waiving regulatory requirements related to education;<sup>19</sup> and funding and extending

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<sup>8</sup> ARIZ. REV. STAT. ANN. § 26-303(E)(1) (2022) (“The governor shall have complete authority over all agencies of the state government and the right to exercise, within the area designated, all police power vested in the state by the constitution and laws of this state in order to effectuate the purposes of this chapter.”).

<sup>9</sup> *Id.* § 26-301(15) (2022) (defining emergency as “the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons or property within the state caused by air pollution, fire, flood or floodwater, storm, epidemic, riot, earthquake or other causes, except those resulting in a state of war emergency, which are or are likely to be beyond the control of the services, personnel, equipment and facilities of any single county, city or town, and which require the combined efforts of the state and the political subdivision”).

<sup>10</sup> *See* Ariz. Exec. Order No. 2020-07 (2020).

<sup>11</sup> *See id.* No. 2020-10 (2020).

<sup>12</sup> *See id.* No. 2020-11 (2020).

<sup>13</sup> *See id.* No. 2020-12 (2020).

<sup>14</sup> *See id.* No. 2020-14 (2020); *see id.* No. 2020-49 (2020).

<sup>15</sup> *See id.* No. 2020-18 (2020).

<sup>16</sup> *See id.* No. 2020-21 (2020).

<sup>17</sup> *See id.* No. 2020-25 (2020).

<sup>18</sup> *See id.* No. 2020-27 (2020).

<sup>19</sup> *See id.* No. 2020-41 (2020); *id.* No. 2020-44 (2020).

programs, such as those administered by the Arizona Department of Environmental Quality, without legislative approval.<sup>20</sup>

In particular, one of his executive orders shut down “bars” in the state while leaving “restaurant” and “hotel” bars open—including those that turned into nightclubs—so long as those establishments had the correct license.<sup>21</sup> The only difference between the respective licenses was that a restaurant or hotel licensee’s food sales had to constitute at least forty percent of total annual sales.<sup>22</sup> This disparate treatment was perhaps not surprising given that the Governor came from the restaurant industry.<sup>23</sup> I was engaged by over one hundred bars to challenge these orders. The claims were deceptively simple: we argued first that the legislature should make the call if it wants to shut down certain businesses during an ongoing emergency in which the legislature is perfectly able to meet safely, and second that if it wanted to shut down businesses, it should distribute the economic costs equally and fairly.<sup>24</sup> Shutting down “bars” who were able to meet the same health standards as other establishments, while allowing restaurant and hotel bars to stay open, was the Governor’s way to appear to be doing something about the pandemic while minimizing the economic harm to a politically powerful group and channeling the harm to a political minority. Although these claims were sure to fail in federal court, they had a decent shot under

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<sup>20</sup> See *id.* No. 2020-46 (2020).

<sup>21</sup> See *id.* No. 2020-43 (2020); see *id.* No. 2020-52 (2020); see *id.* No. 2020-47 (2020) (allowing restaurants to stay open but at reduced capacity).

<sup>22</sup> ARIZ. DEP’T OF LIQUOR LICENSES & CONTROL, LIQUOR LICENSE APPLICATION KITS (2022) [<https://perma.cc/5QCH-P6DB>] (describing the different series of license).

<sup>23</sup> Hunter Schwarz, *New Arizona Governor is the Former CEO of Cold Stone and the State Capitol Now Sells Cold Stone Ice Cream*, WASH. POST (Dec. 2, 2014) [<https://perma.cc/H8TQ-2XLL>].

<sup>24</sup> The case, *Aguila v. Ducey*, No. CV-20-0335-PR, 2021 WL 1380612 (Ariz. March 24, 2021), ended up in the Arizona Supreme Court on a direct appeal from a denial of a preliminary injunction at the trial court. It was dismissed as moot before oral argument after the Governor rescinded some of his prior orders. See *id.* at \*2.

Arizona's own constitution. This essay reflects on those state constitutional arguments.

Part I examines the nondelegation doctrine. There is much scholarly work examining and questioning the current federal doctrine, and nondelegation is ripe for evaluation and experimentation in the states. Elaborating on prior work,<sup>25</sup> Part I proposes an administrable (or at least more administrable) theory of nondelegation that will allow states some power to delegate authority over private rights and conduct, but which would be significantly narrower than the modern federal doctrine. The idea is that legislatures must resolve the "important subjects," leaving matters of mere detail to administrators. What qualifies as important will depend on the nature of the right or conduct being regulated, the scope of the conduct that is authorized to be regulated, and the breadth of administrative discretion. Under this approach, delegating power to local health officials to mandate vaccinations in particular circumstances would almost certainly be constitutional; delegating all regulatory power in an emergency, on the other hand, would likely not be.

Part II will propose that "rational basis review" should not apply when Governors exercise unilateral power pursuant to broad delegations of authority. The law of municipal corporations to this day maintains that judges are to evaluate the reasonableness of municipal policies enacted in pursuance of broad and general delegations of power, for example to regulate for the public health. The idea is that the legislature, when delegating in broad terms, surely does not intend for the municipal corporation to exercise its delegated power unreasonably. The same doctrine should apply to delegations of broad authority to the executive who, like municipal corporations, is not checked and balanced by any other governmental institution. Critically, such review would not be on the constitutional merits of a Governor's actions; it would be on the

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<sup>25</sup> Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1490-94 (2021).

*statutory* merits of those actions. Such review would ensure the executive is comporting with the delegation from the legislature.

Part III will argue that state courts should be encouraged to experiment with state analogs to two clauses of the federal Constitution—the Contracts Clause<sup>26</sup> and the Privileges or Immunities Clause<sup>27</sup>—that will likely be of no use in future federal challenges. Under the Contracts Clause, historically a state could affect contracts only incidentally through general regulation. An eviction moratorium, for example, would likely have been understood to target existing contracts directly, and would have been unconstitutional.<sup>28</sup> Although the federal doctrine would preclude such a challenge today, some state courts may never have overturned their older doctrines under their own constitutions.

As for the Privileges or Immunities Clause, that clause was likely intended to be an antidiscrimination provision with respect to civil rights under state law.<sup>29</sup> Under numerous state constitutional provisions, this is indisputable: many states have “equal privileges or immunities” clauses that specifically prohibit discrimination in civil rights, including economic liberties. These clauses give a vehicle separate from the federal Equal Protection Clause to challenge restraints on economic liberty. Importantly, the scope of review under such state provisions will be much narrower than under a substantive due process analysis. The central question will be whether the state is merely regulating the content of a right, which is

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<sup>26</sup> U.S. CONST. art. I, § 10 (“No State shall . . . pass any . . . Law impairing the Obligations of Contracts . . .”).

<sup>27</sup> *Id.* amend. XIV, § 1, cl. 2 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”).

<sup>28</sup> See *infra* Part III.A. This argument was not raised in the bar owners’ litigation, which did not have to do with the eviction moratorium, but it is included here because of the prevalence of eviction moratoria during the early phases of the pandemic.

<sup>29</sup> As I have previously argued. See ILAN WURMAN, *THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT* 105 (2020).

permitted, or abridging that right by allowing some citizens to exercise that right but denying it to others, which is prohibited.<sup>30</sup>

### I. NONDELEGATION

It is black-letter law at the federal and state levels that the legislature may not delegate its legislative power.<sup>31</sup> The principle is easy enough to state but notoriously difficult to enforce. At the federal level, “[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power.”<sup>32</sup> This intelligible principle test has been ineffective at reining in broad delegations to the executive. “In the history of the [U.S. Supreme] Court we have found the requisite ‘intelligible principle’ lacking in only two statutes,” explained the late Justice Antonin Scalia.<sup>33</sup> As he observed, the Court has upheld delegation to regulate in the “public interest.”<sup>34</sup> Justice Scalia believed in the nondelegation doctrine in theory, but also that it was impossible to administer judicially.<sup>35</sup>

Justice Gorsuch recently argued, however, that it is unlikely that the intelligible principle test was intended to deviate significantly from earlier judicial pronouncements. “[A]s long as Congress makes

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<sup>30</sup> See *infra* Part III.B.

<sup>31</sup> See, e.g., *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) (“That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.”).

<sup>32</sup> *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

<sup>33</sup> *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474 (2001)

<sup>34</sup> See *id.*

<sup>35</sup> *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) (“But while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts. Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.”).



the policy decisions when regulating private conduct, it may authorize another branch to ‘fill up the details.’”<sup>36</sup> The federal “intelligible principle” test was not understood “to effect some revolution” in the nondelegation doctrine, and the inquiries remained discerning the line “between policy and details, lawmaking and fact-finding.”<sup>37</sup> The legal development of nondelegation in Arizona—where, as noted, I recently litigated a nondelegation challenge to the Governor’s authority—takes a similar course. Under its more recent pronouncements, if a statute establishes a “sufficient basic standard, i.e., a definite policy and rule of action which will serve as a guide for the administrative agency,” then it does not unconstitutionally delegate legislative power.<sup>38</sup> That test sounds similar to the federal intelligible principle test, but in that very same opinion the Arizona Supreme Court maintained that “[u]nder the doctrine of ‘separation of powers’ the legislature alone possesses the lawmaking power and, while it cannot completely delegate this power to any other body, it may allow another body to fill in the details of legislation already enacted.”<sup>39</sup>

This language evokes Chief Justice Marshall’s observation in *Wayman v. Southard* that Congress cannot delegate “exclusively legislative” power over “important subjects,” which “must be entirely regulated by the legislature itself,” but Congress could delegate matters “of less interest” by making “a general provision” and giving other departments the power “to fill up the details.”<sup>40</sup> In other words, ordinarily the presence of standards in a statute will indicate that the legislature has resolved the important questions, leaving only matters of detail to the executive.

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<sup>36</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

<sup>37</sup> *See id.* at 2139.

<sup>38</sup> *State v. Ariz. Mines Supply Co.*, 484 P.2d 619, 625-26 (Ariz. 1971).

<sup>39</sup> *See id.* at 625(emphasis added).

<sup>40</sup> 23 U.S. 1, 42-43 (1825).

The central question remains: how to distinguish between those matters that are sufficiently important such that the legislature must resolve them, and those of less interest? The inquiry will invariably be both fact dependent and subject to development over a series of cases. But it is important to establish the implausibility of the traditional formalist argument that any regulation of private rights is invalid.<sup>41</sup> Any regulation of private rights will be more “important” than a regulation of public rights; and a regulation of either will be more important than a mere regulation of official conduct. But there are too many examples both in early history and more modern times of regulations affecting private conduct that it would have been implausible to require the legislature to enact. What this Part will suggest instead is that under an important-subjects theory of delegation, it is likely that a legislature can delegate power to regulate private rights if such delegations are made specifically, the range of conduct reached is narrow, and the agency’s discretion is cabined by relatively more precise standards.

The direct tax of 1798 is perhaps the earliest legislation that reveals the weaknesses of a private-rights theory of nondelegation.<sup>42</sup> Nicholas Parrillo has recently shown that the 1798 direct tax legislation was the first major legislation involving private rights, and federal tax officials in each state were given broad discretion to value houses under the vague mandate that the valuations reflect what the houses or lands were “worth in money.”<sup>43</sup> More still,

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<sup>41</sup> See *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 70 (2015) (Thomas, J., concurring in the judgment) (“the Executive may not formulate generally applicable rules of private conduct”); *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (the framers understood legislative power to be the “power to adopt generally applicable rules of conduct governing future actions by private persons”); see also PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 84 (2014) (arguing that regulations “binding” on subjects as opposed to officials are legislative).

<sup>42</sup> Much of the discussion of this legislation appears in Ilan Wurman, *Nondelegation at the Founding*, *supra* note 25, at 1549-53.

<sup>43</sup> See Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 *YALE L.J.* 1288, 1303-04 (2021); see Act of July 9, 1798, ch. 70 § 8, 1 Stat. 580, 585.

higher-level tax commissioners had the power to adjust valuations of land and houses on district-wide levels so long as such adjustments were “just and equitable.”<sup>44</sup>

This delegation does appear to authorize regulations affecting private rights,<sup>45</sup> but that is not as troubling as it may seem on the surface. That is because Congress decided the most important questions: First, Congress decided that \$2 million should be raised. Second, because the Constitution provided that direct taxes were to be in proportion to the population of the various states, Congress decided how each state was to contribute its share. Each state would meet its allotment first by a 50-cent head tax on every enslaved person; next, by a valuation of houses, which were to be taxed at a rate fixed by Congress, depending on the valuation; and finally, any shortfall was to be made up by a tax on land at a rate necessary to achieve the state’s proportional amount of the tax.<sup>46</sup> Third and perhaps most significantly, Congress resolved for itself the most politically controversial issue: whether houses should be taxed separately from land, to ensure that most of the tax burden would fall upon wealthy city dwellers with large houses, as opposed to rural farmers with large tracts of land but more modest accommodations.<sup>47</sup>

To be sure, the requirement to value houses and land based on what they are “worth in money,” and the authority of the board of tax commissioners to equalize (make “just and equitable”) the valuations across an assessment district, created an arguably vague delegation that affected private rights. That does suggest the conventional formalist test for nondelegation may be overstated. The

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<sup>44</sup> See Act of July 9, 1798, ch. 70 § 20, 1 Stat. 580, 588.

<sup>45</sup> Although tax assessments may have been public rights. See Ann Woolhandler, *Public Rights and Taxation: A Brief Response to Professor Parrillo* 3 (Univ. of Va. Sch. of L. Public L. & Legal Theory Rsch. Paper Series 2022-09, 2022).

<sup>46</sup> See Act of July 14, 1798, ch. 75 § 2, 1 Stat. 597, 598; Parrillo, *supra* note 43, at 1303-04.

<sup>47</sup> For a sampling of the congressional debate over this issue, see 8 ANNALS OF CONG. 1837-41 (1798).

question, however, is whether Congress could have been expected to do more; if not, that is surely sufficient for a finding of constitutionality. At least as to houses—whose owners would bear the brunt of the tax, and valuations of which were even trickier than valuations of land—a more specific standard, such as a per-bedroom or per-window valuation, would have been possible but likely would not have accurately captured many differences in actual value.<sup>48</sup> And a given standard for valuation did not always make sense everywhere: Hence sales prices could be a guide in cities but less in rural areas, and in New York even rent could be included—a measure obviously inapplicable in most other places in that period.<sup>49</sup> South Carolina could value land based on the quality of the “tide swamp,” a feature inapplicable to the northern parts of the country.<sup>50</sup> Connecticut and Rhode Island could insist on historical sales prices for land, not just for houses, because of detailed records.<sup>51</sup> This variety shows the wisdom of Congress’s choice to let different boards establish standards that were both useful and obtainable for their particular states so that all states’ valuations could be conducted in a manner that would most nearly approximate the true value “in money” of every property.

There is also no doubt that the question of valuations is very different in kind from the questions Congress did, and arguably had to, resolve. Whether houses should be treated along with the land or separate from it, whether the burden should fall more on city-dwellers than farmers, and what the actual tax assessment on value should be, cannot be considered factual questions in any dimension. Those are pure questions of policy. The question of *how best to*

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<sup>48</sup> Such an approach would have the added shortfall of being open to manipulation. One recalls the famous window tax in England in the late seventeenth century. Homeowners simply bricked up their windows to avoid the tax. See Wallace E. Oates & Robert M. Schwab, *The Window Tax: A Case Study in Excess Burden*, J. ECON. PERSPS., Winter 2015, at 163, 163-64.

<sup>49</sup> See Parrillo, *supra* note 43, at 1371-72, 1372 n.387.

<sup>50</sup> See *id.* at 1373 (discussing a newspaper excerpt summarizing the standards set by South Carolina’s commissioners).

<sup>51</sup> See *id.* at 1375-76.

*determine* value is also question of policy, and Congress appears to have answered that, too – by letting assessors use any standards and metrics at their disposal to make as good an estimate of the true value of the property “in money” in their particular geography and circumstances. Such standards and metrics would vary from place to place, and it was therefore not thought wise or necessary to fix the same standards. That Congress could have chosen a policy that would have left less discretion to assessors and commissioners does not mean it did not answer the important policy questions itself.

To repeat, this episode is important because it demonstrates that the test for nondelegation likely does not depend entirely on whether private rights are affected by an administrative regulation. Another historical example is Congress’s steamboat legislation of 1852. To combat an epidemic of steamboat explosions, Congress enacted an extremely detailed law respecting the engineering and placement of boilers and forcing pumps on steamboats.<sup>52</sup> The law also, however, authorized inspectors to establish passenger limits on ships, and it authorized a board of supervising inspectors “to establish such rules and regulations to be obeyed by all such vessels in passing each other, as they shall from time to time deem necessary for safety.”<sup>53</sup> These latter two provisions authorized the regulation of private rights and conduct. But they do not seem problematic because these authorizations were made specifically, and they were narrow, each dealing with a very particular kind of private conduct (passenger limits, rules for passing ships).

*Jacobson v. Massachusetts*<sup>54</sup> is another example at the state level: in that case, the state legislature specifically authorized compulsory vaccination whenever a municipal board of health thought such vaccinations “necessary for the public health or safety.” This delegation is far less problematic than would be a delegation to

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<sup>52</sup> Act of Aug. 30, 1852, ch. 106 §§ 2-3, 10 Stat. 61, 61-62.

<sup>53</sup> § 29, 10 Stat. at 72; see § 9, 10 Stat. at 63, 65.

<sup>54</sup> 197 U.S. 11, 12 (1905).

exercise “any authority necessary for the public health and safety,” pursuant to which the executive might also authorize vaccine mandates. In the latter delegation, the legislature arguably did not resolve the important question: should the polity require all individuals to submit to vaccination, which would affect one of the greatest private rights of all? In the former delegation, it is still left up to the executive to *order* or *implement* vaccine mandates in specific circumstances – which affect private rights – but the legislature has made the important policy decision and significantly cabined the agency’s discretion.

This focus on the *scope* of conduct over which the agency is given power is not completely foreign to federal constitutional law. The U.S. Supreme Court has held that “the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred,”<sup>55</sup> although it is not clear that this proposition has ever been dispositive in any case. It was dispositive, however, for Justice Cardozo in the pair of 1935 cases in which the Supreme Court did strike down statutory provisions as unconstitutional delegations. In *A.L.A. Schechter Poultry Corp. v. United States*,<sup>56</sup> the Supreme Court struck down a delegation of authority to the President to make “codes of fair competition” for various industries. Justice Cardozo explained in concurrence that “[h]ere in effect is a roving commission to inquire into evils and upon discovery correct them.”<sup>57</sup> In contrast, in *Panama Refining Co. v. Ryan*,<sup>58</sup> in which Congress had delegated to the President the narrow question whether or not to prohibit the interstate shipment of “hot oil,” Justice Cardozo argued that the President was “not left to roam at will among all the possible subjects of interstate transportation, picking and choosing as he pleases.”<sup>59</sup>

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<sup>55</sup> *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 475 (2001).

<sup>56</sup> 295 U.S. 495 (1935).

<sup>57</sup> *Id.* at 551 (Cardozo, J., concurring).

<sup>58</sup> 293 U.S. 388 (1935).

<sup>59</sup> *Id.* at 434 (Cardozo, J., dissenting).

Lest critics claim this analysis is too untethered to constitutional text, the analysis arguably follows from Founding-era understandings of legislative power—or at least James Madison’s understanding. Madison argued that a certain specificity was required of “laws,” particularly laws affecting private conduct. In arguing that the Alien and Sedition Acts violated nondelegation principles, James Madison explained:

Details, to a certain degree, are essential to the nature and character of a law; and, on criminal subjects, it is proper, that details should leave as little as possible to the discretion of those who are to apply and to execute the law. If nothing more were required, in exercising a legislative trust, than a general conveyance of authority, without laying down any precise rules, by which the authority conveyed, should be carried into effect; it would follow, that the whole power of legislation might be transferred by the legislature from itself, and proclamations might become substitutes for laws. A delegation of power in this latitude, would not be denied to be a union of the different powers.<sup>60</sup>

In other words, a certain amount of specificity is necessary for a law genuinely to be a “law.” If the legislature could make laws with insufficient standards, Madison argued, its “laws” would effect a *transfer* of legislative power to the executive. And, Madison argued, all this is particularly true of criminal laws, and more generally of laws that affect private liberty. He added:

To determine then, whether the appropriate powers of the distinct departments are united by the act . . . , it must be enquired whether it contains such details, definitions, and

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<sup>60</sup> James Madison, *The Report of 1800*, 17 THE PAPERS OF JAMES MADISON 303, 324 (David B. Mattern et al. eds., 1991).

rules, as appertain to the true character of a law; especially, a law by which personal liberty is invaded, property deprived of its value to the owner, and life itself indirectly exposed to danger.<sup>61</sup>

Simply put, laws require a certain amount of detail and the more a law affects private conduct or liberty, the more specificity the law requires. Perhaps for this reason, Congress almost never delegated authority over private conduct in the first half-century after Ratification.<sup>62</sup> The requirement of more detail and specificity when “personal liberty is invaded” is consistent with the general understanding of legislative power as the power to make rules for the government of society, and particularly of private citizens and subjects.<sup>63</sup>

Assessing these materials, it is plausible to think that *if* the legislature is going to delegate to the executive the power to make regulations governing private conduct, such a delegation must meet three conditions. First, it must be made *specifically*: the authorization cannot be hidden in a broad and general delegation to regulate in the “public interest,” or in a general grant of “all police power” — which was Arizona’s statutory delegation.<sup>64</sup> Second, the range of conduct that the executive may regulate must be narrow: the legislature cannot grant a roving commission to regulate a wide range of conduct, contrary again to the general grant of all police power in Arizona’s statute. Third, the guiding standards must be more precise than when private rights are not at issue. This understanding of the nondelegation doctrine is the most consistent with constitutional text and structure, with historical practice, and with judicial precedents. Importantly, adopting such a standard does not require the wholesale invalidation of the modern administrative state. Many

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<sup>61</sup> *Id.* at 325 (emphasis added).

<sup>62</sup> See Ilan Wurman, *Nondelegation at the Founding*, *supra* note 25, at 1538-53.

<sup>63</sup> See *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 70-83 (Thomas, J., concurring in the judgment); *Gundy v. United States*, 139 S. Ct. 2116, 2133 (Gorsuch, J., dissenting); HAMBURGER, *supra* note 41, at 83-90.

<sup>64</sup> See ARIZ. REV. STAT. ANN. § 26-303(E)(1) (2022).



modern statutes do specifically authorize regulations over a narrow category of private conduct and have sufficiently precise standards.

To be sure, some might criticize this approach as similarly unadministrable: what is “important” is often in the eye of the beholder. The multi-part test described here may also look to some little different than functionalism. The virtue of relying on state constitutions, however, is that state judiciaries can experiment with this better and more plausible version of the nondelegation doctrine. Doing so would certainly be no different than applying ordinary common-law judicial reasoning. And it is better than having no lines at all.

## II. JUDICIAL REVIEW OF UNILATERAL EXECUTIVE ACTS<sup>65</sup>

Dozens of courts around the country have deployed the “rational basis” test in analyzing various COVID-19 restrictions, at least those affecting economic liberty, which comprise the vast majority of such restrictions.<sup>66</sup> The rational basis test in these cases is standard fare. The test is a staple of modern equal protection doctrine and provides that a classification should be upheld “if there is any reasonably *conceivable* state of facts that *could* provide a rational basis for the classification.”<sup>67</sup> The test is probably a little less deferential than what most judges and scholars perceive to be the standard of deference

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<sup>65</sup> Much of Part II is adapted from Ilan Wurman, *COVID-19 and the Rational Basis Test*, *supra* note 3, at 85-91.

<sup>66</sup> See, e.g., *Big Tyme Invs. v. Edwards*, 985 F.3d 456, 469 (5th Cir. 2021); *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App’x 125, 126 (6th Cir. 2020); *New Orleans Catering, Inc. v. Cantrell*, 523 F. Supp. 3d 902, 909-10, 912 (E.D. La. 2021); *Tandon v. Newsom*, 517 F. Supp. 3d 922, 953-54 (N.D. Cal. 2021); *Desrosiers v. Governor*, 158 N.E.3d 827, 844-45 (Mass. 2020); see generally *Lawsuits About State Actions and Policies in Response to the Coronavirus (COVID-19) Pandemic, 2020-2021*, BALLOTPEDIA, (last visited March 29, 2022) [<https://perma.cc/7ZA4-JDBR>] (summarizing lawsuits and noting the application of rational basis deference).

<sup>67</sup> *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993) (emphasis added).

demanded by *Jacobson*, but it is nevertheless an extraordinarily deferential test.<sup>68</sup>

There is some reason to think, however, that the rational basis test, at least in its highly deferential formulation, should not apply to many of the COVID-19 restrictions to which it has been applied. That reason is that the test has historically applied to the actions of state legislatures. To my knowledge, no court has squarely addressed whether a governor, acting alone pursuant to broader delegations of power, should get the same immense deference that legislatures receive.

There are doctrinal antecedents suggesting a governor should not get such power. In the antebellum period, courts routinely invalidated municipal regulations for being unreasonable exercises of the police power. I have catalogued such cases in prior scholarship.<sup>69</sup> Summarizing these cases, Judge John F. Dillon, in his treatise on municipal corporations, wrote, “[W]hat the legislature distinctly says may be done cannot be set aside by the courts because they may deem it unreasonable,” but “where the power to legislate on a given subject is conferred, but the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid.”<sup>70</sup>

One of the justifications for such review was that municipal corporations exercised only delegated power—that is, power delegated by the state legislature. If the legislature had expressly authorized unreasonable actions, then there was nothing a court could do to enjoin such actions, absent an express constitutional prohibition.<sup>71</sup> But where the legislature delegated power more broadly—for example, when it delegated power to regulate the

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<sup>68</sup> See *New Orleans Catering*, 523 F. Supp. 3d at 910 (describing the rational basis test as the “laxest tier of constitutional scrutiny”).

<sup>69</sup> Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815, 826–36 (2020).

<sup>70</sup> JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 284 (1872).

<sup>71</sup> See *id.*

public health—any exercise of power had to be reasonable, the theory being that the legislature did not intend to delegate the power to do unreasonable things.

One of the clearest accounts of this justification in the antebellum period comes from *City of St. Paul v Laidler*<sup>72</sup> out of Minnesota.<sup>73</sup> The city enacted an ordinance prohibiting the sale or exposure for sale of fresh meat at any time and place except in the public market.<sup>74</sup> The city would rent out stalls in the public market to the highest bidder, with a minimum rent established by the ordinance.<sup>75</sup> The city's charter expressly granted it the power to "establish a public market," to "make rules and regulations for the government of the same," and to "license and regulate butcher stall shops."<sup>76</sup> The Court held:

[T]he ordinance . . . cannot be sustained upon principle or authority. And, while the right is conceded to municipal corporations to adopt such regulations as may be necessary and reasonable, to protect the lives, health, property or morals of its citizens, the exercise of this right should be carefully guarded, *and limited within the clear intent of the grant of power for such purpose*; and, where a question arises as to any particular ordinance which it is claimed interferes with the rights of individuals, as enjoyed under the common law or by statute, *the burden of proof should be on the corporation to show that it has not exceeded its authority in framing such ordinance.*<sup>77</sup>

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<sup>72</sup> 2 Minn. 190 (1858).

<sup>73</sup> This paragraph is adapted from Wurman, *Origins of Substantive Due Process*, *supra* note 69, at 826–27.

<sup>74</sup> See *Laidler*, 2 Minn. at 201–02.

<sup>75</sup> See *id.* at 201–02.

<sup>76</sup> *Id.* at 203 (quoting St. Paul City Charter §§ 18–19 (1858)).

<sup>77</sup> *Id.* at 209 (emphasis added).

Thus, as a corporate body exercising only delegated powers, when the municipality “interfere[d] with the rights of individuals,” the burden was on the municipality to show authority to do so.<sup>78</sup> The general idea was that the legislature likely did not intend such power to be exercised to the detriment of individual rights. In another case, the high court in Massachusetts held, in invalidating an ordinance: “There is nothing in the language of the statute, from which it can be inferred, that it was the intention of the legislature to delegate to the selectmen and town of Charlestown the power of imposing upon the citizens of the Commonwealth such an unreasonable restraint[.]”<sup>79</sup>

The application to COVID-19 restrictions and future emergencies should be obvious. Governors exercising power pursuant to broad delegations of emergency authority are more similarly situated to municipal corporations than to state legislatures. They exercise only delegated power. The legislature should perhaps get the benefit of the rational basis test—who better to decide on questions of the health, safety, welfare, and morals of the people? The legislature represents constituencies from various parts of the state. Its members must deliberate. And they are “checked and balanced” by an executive with the veto power. But a governor has none of those attributes conducive to policymaking. A governor exercising vast delegated powers need not deliberate with anyone and is not checked and balanced by the legislature. Why should one person acting alone get such immense deference? It is highly unlikely that the legislature would have intended to delegate the power to do unreasonable things, and therefore the courts must assess the reasonableness of a Governor’s actions to ensure consistency with the delegation. If a court were to invalidate the Governor’s actions, it would not be on constitutional grounds, but on statutory grounds: it would conclude that the executive has exceeded the delegation from the legislature.

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

<sup>79</sup> *Austin v. Murray*, 33 Mass. (16 Pick.) 121, 124 (1834).

None of this is to say that a more rigorous standard of review should apply to an agency's action taken pursuant to the state's administrative procedure act,<sup>80</sup> which generally provides a notice and comment requirement<sup>81</sup> and specifies the standard of review,<sup>82</sup> and according to which agencies must generally show that they adequately considered the relevant legal and factual factors.<sup>83</sup> Emergency rulemaking requirements also tend to limit emergency rules to a short period of time.<sup>84</sup> Some even have additional procedural safeguards; for example, in Arizona, any emergency rulemaking must first be published with the Secretary of State and approved by the Attorney General—requirements with which Arizona's Department of Health Services did not comply in promulgating the regulations respecting bars.

### III. STATE ANALOGS

#### A. CONTRACTS CLAUSE

Although not applicable to the bar owners' case, many states imposed eviction moratoria that plausibly create claims under the federal Contracts Clause, at least under that clause's original meaning. That clause provides that "[n]o State shall... pass any... Law impairing the Obligation of Contracts."<sup>85</sup> Arizona has an

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<sup>80</sup> See 5 U.S.C. §§ 551-59; ARIZ. REV. STAT. ANN. §§ 41-1001 to -1093 (2022).

<sup>81</sup> See, e.g., ARIZ. REV. STAT. ANN. §§ 41-1022, 1023 (2022).

<sup>82</sup> See, e.g., 5 U.S.C. § 706; Ariz. Rev. Stat. Ann. § 41-1092.12 (2022) (providing private right of action against agency actions that are "arbitrary, capricious or not in accordance with law.").

<sup>83</sup> See, e.g., *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (federal level); *Sharpe v. Ariz. Health Care Cost Containment Sys.*, 207 P.3d 741, 745 (Ariz. Ct. App. 2009) (describing judicial review of state agency action). These standards are obviously somewhat deferential, but anyone familiar with administrative law and the regularity with which courts invalidate administrative actions knows that these standards are much less deferential than the modern rational basis test.

<sup>84</sup> See ARIZ. REV. STAT. ANN. § 41-1026 (2022).

<sup>85</sup> U.S. CONST. art. I, § 10.

equivalent: “No . . . law impairing the obligation of a contract, shall ever be enacted.”<sup>86</sup> In my reading of the nineteenth-century cases, state legislatures may *incidentally* affect existing contractual relations when exercising their police powers. In other words, a general prohibition on alcohol or gambling can constitutionally abrogate existing contracts for sale involving alcohol or contracts involving lottery tickets: any such existing contracts are not the *target* of the more general prohibition, enacted as a legitimate police power measure. An eviction moratorium, however, does not merely incidentally affect existing rental contracts; such contracts are *the very object of the regulation*. In other words, nothing *other than* these existing contracts are affected by the regulations. This creates a possible violation of the Contracts Clause.

In 1905, the U.S. Supreme Court explained this general approach to the clause:

It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals.

Familiar instances of this are where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the state, prohibiting the establishment or continuance of such

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<sup>86</sup> ARIZ. CONST. art. II, § 25.

traffic; in other words, that parties, by entering into contracts, may not estop the legislature from enacting laws intended for the public good.<sup>87</sup>

This is consistent with my reading of the antebellum cases.<sup>88</sup> For example, the prominent case *Thorpe v Rutland & Burlington Railroad Co.*,<sup>89</sup> decided by Vermont's highest court, "involve[d] the question of the right of the legislature to require existing railways to respond in damages for all cattle killed or injured by their trains until they erect suitable cattle-guards at farm-crossings."<sup>90</sup> There would have been no serious doubt as to the state's power to enact such a law if the requirement had already existed in the corporation's charter or by virtue of the "general laws of the state at the date of the charter."<sup>91</sup>

The court analyzed the case under a police-powers framework. "We think the power of the legislature to control existing railways in this respect, may be found in the general control over the police of the country, which resides in the law-making power in all free states."<sup>92</sup> "This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state."<sup>93</sup> The court concluded that "the authority of the legislature to make the requirement of existing railways may be vindicated, because it comes fairly within the police of the state."<sup>94</sup> However, "it must be conceded that all which goes to the constitution of the corporation and its beneficial

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<sup>87</sup> *Manigault v. Springs*, 199 U.S. 473, 480 (1905).

<sup>88</sup> Ilan Wurman, *Origins of Substantive Due Process*, *supra* note 69, at 845-47 (explaining that in the antebellum period, legislatures could incidentally affect existing contracts in pursuance of a legitimate police-power purpose). The following paragraphs borrow heavily from, but also expand on, that Article.

<sup>89</sup> 27 Vt. 140 (1855).

<sup>90</sup> *Id.* at 142.

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

<sup>92</sup> *Id.* at 149.

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

<sup>94</sup> *Id.* at 156.

operation” cannot be revoked “without a violation of the grant, which is regarded as impairing the contract, and so prohibited by the United States constitution.”<sup>95</sup> That is because “[a]ll the cases agree that the indispensable franchises of a corporation cannot be destroyed or essentially modified.”<sup>96</sup> Putting these together, it would appear that the state can make a prospective and generally applicable police-power regulation that incidentally affects the value of existing contracts, but it cannot directly impair rights and obligations that form the very essence of the contracts.

The future Justice Holmes described this line of doctrine in a footnote to Chancellor Kent’s *Commentaries* in 1873. He wrote that “acts which can only be justified on the ground that they are police regulations” because they affect existing contracts (or interstate commerce), in apparent contradiction to the prohibitions in the federal Constitution, “must be so clearly necessary to the safety, comfort, or well-being of society, or so imperatively required by the public necessity, that they must be taken to be impliedly excepted from the words of the constitutional prohibition.”<sup>97</sup> This is a somewhat stronger statement than appears justified by the cases, but the point is similar: the existence of contracts do not abridge the police powers of the state; the state, so long as it is legitimately exercising its police power for a proper purpose, may affect existing contracts, even if the state may not directly impair those contracts.

In *Home Building & Loan Ass’n v. Blaisdell*,<sup>98</sup> the Supreme Court approved of a state “mortgage moratorium” in the face of widespread defaults during the Great Depression, and in doing so, the Court rejected this “incidental effects” test for a reasonableness test during emergencies that heavily favors the government.<sup>99</sup> But state courts are typically bound to interpret the *state’s* equivalent of

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<sup>95</sup> *Id.* at 145.

<sup>96</sup> *Id.* at 151.

<sup>97</sup> 2 JAMES KENT, *Of Personal Property*, in COMMENTARIES ON AMERICAN LAW 411 n.2 (Oliver Wendell Holmes, Jr. ed., Little, Brown 12th ed. 1873) (emphasis added).

<sup>98</sup> 290 U.S. 398 (1934).

<sup>99</sup> See *id.* at 438, 444-47.



the Contracts Clause as it was understood when it was adopted.<sup>100</sup> Here, then, is another example where federal doctrine is not favorable to plaintiffs challenging emergency executive actions in the states but state constitutional law may provide a better avenue for relief.

#### B. PRIVILEGES OR IMMUNITIES

Lastly are the various state equal privileges or immunities clauses. Arizona's provides that "[n]o law shall be enacted granting to any citizen, class of citizens, or corporation . . . , privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."<sup>101</sup> Under modern equal protection doctrine, economic classifications—for example distinguishing bars from restaurants—are subject to the extremely deferential "any conceivable basis" test described previously.<sup>102</sup> It is therefore not surprising that every COVID-19 case brought in federal court by an economic actor under federal equal protection principles failed.<sup>103</sup>

An analysis under the state equal privileges or immunities clauses does not have to be so deferential; but neither would such an analysis lead to courts sitting in judgement over the reasonableness of most legislative actions. As I have explained elsewhere, the federal

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<sup>100</sup> At least that is the law in Arizona. *State v. Mixton*, 478 P.3d 1227, 1247 (Ariz. 2021) (Bolick, J., dissenting) ("[T]he dominant school of state constitutional interpretation at the time was originalism, so the framers likely expected their handiwork to be interpreted on its own terms rather than through federal court interpretations of a different constitution. Our early cases specified that the purpose of rules of interpretation is to arrive at the intent of the framers.") (internal citation omitted); see also *Arizona v. Evans*, 514 U.S. 1, 8 (1995) ("[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.").

<sup>101</sup> ARIZ. CONST. art. 2, § 13.

<sup>102</sup> See *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)

<sup>103</sup> See, e.g., cases cited *supra* notes 1 & 66.

Privileges or Immunities Clause<sup>104</sup> was also likely intended to be an equality provision.<sup>105</sup> This meant that a state was free to regulate and define the content of rights, but it could not *abridge* those rights by giving the rights to one class of citizens but denying it to another class. It is not always easy to distinguish between a regulation and an abridgement, but that threshold does significant work in many cases.

For example, if a state legislature were to enact a law prohibiting all citizens from working for wages more than five hours in a day, or made jaywalking punishable by death, such laws are unlikely to pass muster even under modern substantive due process analysis. Under the equality reading of the Privileges or Immunities Clause, however—and assuming no substantive component to due process<sup>106</sup>—there would be no inequality. The legislature would be acting unreasonably toward everyone. Such laws would not be “majority tyranny” in the sense that the majority is tyrannizing a minority, but rather the majority would be tyrannizing itself—which some people might say is just self-government. To bring the point closer to home, if the legislature were to enact a vaccine mandate that applied to everybody as in *Jacobson v. Massachusetts*,<sup>107</sup> that might raise a substantive due process concern,<sup>108</sup> but it would not raise any equal privileges or immunities concerns.

On the other end there are cases which clearly involve inequality in that the legislature is purporting to authorize some citizens to exercise certain rights that it is denying to other citizens. Race-based discriminations are an obvious example: the discriminations in the Black Codes did not regulate or define the content of any right, but

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<sup>104</sup> U.S. CONST. amend. XIV, § 1, cl. 2 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”)

<sup>105</sup> WURMAN, *THE SECOND FOUNDING*, *supra* note 29, at 105.

<sup>106</sup> Which is my view. *Id.* at 28-35; *see also* Nathan S. Chapman and Michael W. McConnell, *Due Process as Separation of Powers*, 121 *YALE L. J.* 1672, 1678-80 (2012); Wurman, *Origins of Substantive Due Process*, *supra* note 69, at 880-81.

<sup>107</sup> 197 U.S. 11 (1905).

<sup>108</sup> Although such a challenge was rejected in *Jacobson* in 1905. *Id.* at 24-30.

rather sought to prevent certain citizens from exercising the very same right that other citizens were allowed to exercise. A monopoly is also a classic example of discrimination: it is a grant of exclusive privileges to one set of persons, and there are no regulations to which those excluded can conform in order to participate.<sup>109</sup> Thus even if *Lochner v. New York*<sup>110</sup> was wrongly decided, that does not mean the *Slaughter-House Cases*<sup>111</sup> were rightly decided.

Between these two extremes fall everything in between. Take three classic cases: *Lochner*, *United States v. Carolene Products*,<sup>112</sup> and *Williamson v. Lee Optical*.<sup>113</sup> In my view, the first two of these cases do not raise any equal privileges or immunities concern because there was no inequality. In *Lochner*, no baker was permitted to work more than 60 hours in a week.<sup>114</sup> In *Carolene Products*, no producer was permitted to produce filled milk.<sup>115</sup> To be sure, in each case the legislation was likely motivated by rent-seeking and protectionism. But not all rent-seeking is unconstitutional. Many laws benefit more established firms who can more easily comply with additional laws and regulations, but that does not make those laws unconstitutional. No citizen has been denied a privilege or immunity that is granted to other citizens.

*Lee Optical* presented a different story. There two groups of citizens—opticians on the one hand, and optometrists and

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<sup>109</sup> See *City of Chicago v. Rumpff*, 45 Ill. 90, 97 (1867) (“Where [a legislative] body have made the necessary regulations required for the health or comfort of the inhabitants, all persons inclined to pursue such an occupation should have the opportunity of conforming to such regulations, otherwise the ordinance would be unreasonable and tend to oppression. . . . We regard it neither as a regulation nor a license of the business, to confine it to one building, or to give it to one individual. Such action is oppressive, and creates a monopoly that never could have been contemplated by the general assembly.”).

<sup>110</sup> 198 U.S. 45 (1905).

<sup>111</sup> 83 U.S. (16 Wall.) 36 (1872).

<sup>112</sup> 304 U.S. 144 (1938).

<sup>113</sup> 348 U.S. 483 (1955).

<sup>114</sup> See *Lochner*, 198 U.S. at 52.

<sup>115</sup> See *Carolene Products*, 304 U.S. at 145-46.

ophthalmologists on the other – sought to engage in the exact same activity. The law in question granted only the latter group the right to fit lenses, unless the customer first obtained a prescription from that group.<sup>116</sup> Where two citizens are seeking to engage in the same activity or right, there is now a plausible case of abridgement. A court would therefore need to engage in some kind of inquiry to determine whether the law truly abridges the right or merely defines and regulates its content. To make the point more concrete, consider marriage: is limiting marriage to opposite-sex couples a definition and regulation of the content of the right, or an abridgement by denying that right to some class of citizens?

The answer to this question will invariably require an analysis of arbitrariness, reasonableness, and legislative good faith. If the law's distinction is relevant to the purpose of the right, then it will be a regulation of the content of that right. But if the distinction is irrelevant to the purpose of the right or privilege – as race is in most if not all cases – then that is the central indicator that the legislature was not seeking to define and regulate the right but rather to abridge that right by giving it to some citizens to the exclusion of others. In my view, *Lee Optical* is such a case. The restrictions on opticians had essentially no relevance to the actual task sought to be accomplished, and therefore was an abridgement: the legislature was seeking to give an exclusive privilege to a favored group of persons on the basis of an arbitrary distinction.

To be sure, there remains a level of generality problem. In *Lochner*, the right could easily have been defined as the right of *anyone* to work more than 10 hours in a day. In *Carolene Products*, the right could have been defined as the “right to earn a living.” But the higher the level of generality, the easier it will be for the legislature to show that its legislation was reasonably related to the purpose of the right. The legislature could usually easily justify limiting and regulating

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<sup>116</sup> See *Lee Optical*, 348 U.S. at 485.

certain occupations but not others because of the higher risk to employee or consumer health or safety.

The application to the bar owners' litigation in Arizona should now be clear. There the right could be very narrowly defined: the right to serve liquor in an establishment open to the public. The Governor's executive orders authorized establishments with a restaurant or hotel license to engage in this activity, but not establishments with a "bar" license simply.<sup>117</sup> The only difference between the bar license and the restaurant license is that forty percent of a restaurant licensee's annual sales had to be of food.<sup>118</sup> Many bars, however, also served food (and sometimes food constituted more than forty percent of their annual sales), and many restaurants could effectively act as simple "bars" late at night when individuals could drink at the restaurant bar without ordering any food at all. A court need not defer to the executive's judgment in this matter: it should decide for itself whether this restriction on bars constitutes a mere regulation or a discrimination.

The upshot is that an analysis of legislative good faith, pretext, and the proper ends of government will be necessary under state equal privileges or immunities clauses, but the set of cases to which the analysis would apply is narrower than under a substantive due process framework. In many cases there is no plausible discrimination. But where citizens are trying to engage in the same activity—as in the Black Codes, *Slaughter-House*, or *Lee Optical*—an arbitrariness analysis is inevitable, and is the only way to distinguish between a genuine regulation of the content of a right and an abridgement of that right.

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<sup>117</sup> See Ariz. Exec. Order No. 2020-43 (2020).

<sup>118</sup> Ariz. Dep't of Liquor Licenses & Control, *supra* note 22 (describing the different series of license).

### CONCLUSION

This essay has offered some reflections on my own experience litigating a challenge to COVID-19 restrictions in Arizona and my own related scholarship to provide a blueprint for future challenges to executive actions during a declared emergency. To be clear, many such actions will surely be perfectly constitutional and even desirable. Some statutes delegate very specific emergency authority, for example the authority of public health agencies to impose vaccine mandates. And many economic restrictions will be fairly distributed rather than single out less politically powerful economic groups. But some of the time—such as the statutes and executive orders at issue in Arizona in the second half of 2020—the constitutional violations are relatively clear at least under an originalist approach to state constitutional law. In such cases, litigants should avoid federal court in favor of state courts, which can be laboratories of state constitutionalism.