‘UNALIENABLE RIGHTS’: WHY THEY ARE NOT ABSOLUTE; THE PECULIAR RISKS AN EMERGENCY POSES TO INDIVIDUAL LIBERTY, AND THE ROLE OF THE SEPARATION OF POWERS IN AN EMERGENCY

TABLE OF CONTENTS

I.

IF OUR INDIVIDUAL RIGHTS ARE UNALIENABLE, WHY AREN'T THEY ABSOLUTE?

a. Recall our definition of liberty:

> "We hold these Truths to be self-evident, **that all Men are created equal**, **that they are endowed by their Creator with certain unalienable Rights**, that among these are Life, Liberty, and the Pursuit of Happiness—**That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed**,…"

[Declaration of Independence, (1776)(Jefferson)(emphasis added)].

'Unalienable' means "not to be separated" (American Heritage Dictionary). The First Amendment appears to express this idea:

> "Congress **shall make no law** respecting…."

[US Const.,(1789), Amendment I (1791)(emphasis added)].

But, in actuality, individual rights exist within the framework of the collective social good. Sometimes the collective need or collective good conflicts with an individual right. When that occurs, which must give way, the collective good in favor of the individual right? If the individual rights enumerated in the Bill of Rights were entirely absolute, then Congress would be powerless to act in the case of a conflict even though the greater public need required it. The result would be that the public welfare as a whole would suffer for the sake of an individual right. In sum, if the individual rights enumerated in the Bill of Rights were absolute, the government could not fully secure liberty, which is its prime function.

For this reason, it has always been accepted that individual rights are subordinate to government when its acts in furtherance of the public good. This is the concept of ordered liberty. Here is the Puritan view of ordered liberty, expressed in 1645:

"For the other point concerning liberty, I observe a great mistake in the country about that. **There is a twofold liberty, natural (I mean as our nature is now corrupt) and civil or federal. The first** is common to man with beasts and other creatures. By this, man as he stands in relation to man, simply hath liberty to do what he lists: **it is a liberty to evil as well as to good**. **This liberty is incompatible and inconsistent with authority**, and cannot endure the least restraint of the most just authority. The exercise and maintaining of this liberty makes men grow more evil, and in time to be worse than brute beasts: *omnes sumus licentia deteriores* [too much freedom debases us]. This is that great enemy of truth and peace, that wild beast, which all the ordinances of God are bent against, to restrain and subdue it.

The other kind of liberty I call civil or federal; it may also be termed moral, in reference to the covenant between God and man, in the moral law, and the politic covenants and constitutions, amongst men themselves. This liberty is the proper end and object of authority, **and cannot subsist without it**; **and it is a liberty to that only which is good, just, and honest**. This liberty you are to stand for, with the hazard (not only of your goods, but) of your lives, if need be. Whatsoever crosseth this is not authority, but a distemper thereof. **This liberty is maintained and exercised in a way of *subjection to authority*; it is of the same kind of liberty wherewith Christ hath made us free**. ….

…. If you stand for your natural corrupt liberties, and will do what is good in your own eyes, you will not endure the least weight of authority, but will murmur, and oppose, and be always striving to shake off that yoke; but **if you will be satisfied to enjoy such civil and lawful liberties, such as Christ allows you, then will you quietly and cheerfully submit unto that authority which is set over you,** in all the administrations of it, for your good. Wherein, if we fail at any time, we hope we shall be willing (by God's assistance) to hearken to good advice from any of you, or in any other way of God; **so shall your liberties be preserved, in upholding the honor and power of authority amongst you."**

[John Winthrop, Speech to the General Court, (1645)(emphasis added)].

The conflict between the greater good and the personal liberty rights enumerated in the Constitution and the Bill of Rights is especially acute in times war or other serious existential threats, such as a public health pandemic. Generally, the superior claim of governmental action will override personal liberty. Thomas Jefferson put it this way:

> "A strict observance of the written law is doubtless one of the high duties of a good citizen, but it is not the highest. **The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation**. To lose our country by a scrupulous adherence to the written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the ends to the means."

[Jefferson, Writings (Washington Ed. of 1853), vol. 5, p. 542(emphasis added].

When Abraham Lincoln suspended the right of habeas corpus during the Civil War (*see*, U. S. Const., Art I, Sec. 9, par. 2) he explained why to a Special Session of Congress held on July 4, 1861:

> [that an insurrection] "in nearly one-third of the States had subverted the whole of the laws . . . Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?"

In sum, our individual rights are 'unalienable' in the sense that they are at all times inherent in our human nature. But, the experience of our individual rights as enumerated in the Bill of Rights must yield whenever the government has a competing, legitimate need, tailored to the extent needed.

II

INDIVIDUAL LIBERTY IN A TIME OF CRISIS: HOW AN EMERGENCY LEADS TO THE CONCENTRATION OF POWER AND REDUCES THE OPERATION OF THE SEPARATON OF POWERS TO ITS LOWEST EBB

The separation of powers decentralizes power throughout government, thus forcing rule by laws enacted by representatives selected by the people,

instead of by the whim of an official in whom all power is concentrated. This formula secures individual liberty. But, as noted, whenever circumstances arise that put individual liberty in conflict with the greater good, individual liberty must yield to securing the greater good. Two extreme circumstances when this dynamic occurs are war and a public health emergency, such as a novel, easily transmissible airborne virus, like COVID 19, for which there was initially no known treatment.

A true emergency is a clearest case for legitimate governmental action which may infringe upon individual rights. This is because the governmental response to an emergency is often to **concentrate governmental power**. The remaining focus of this outline will be on how the Constitution operates in this specific subset of "legitimate governmental need" to limit individual rights.

The typical response to a crisis has been to concentrate power into the hands of the chief executive by means of temporary emergency laws. New Jersey's omnibus emergency law, for example, was enacted in June 1942, six months after the bombing of Pearl Harbor. It combines the power of the legislative and executive branches into the hands of the Governor temporarily to respond to the emergency. *N.J.S.A. App. A:9-34*. (Note, as a matter of federalism, public health is typically handled at the state level and not at the level of the central government.)

New Jersey's omnibus emergency law – entitled the Civilian Defense and Disaster Control Act - is activated by a disaster, defined as:

> "any **unusual incident** resulting from natural or unnatural causes **which endangers the health, safety or resources of the residents of one or more municipalities of the State**, and which **is or may become too large in scope or unusual in type to be handled in its entirety by regular municipal operating services."**

N.J.S.A. App. A:9-33.1(1)(emphasis added). *See also*, *Id*. at App. A:33.1(4)(definition of emergency includes definition of "disaster").

The purpose of New Jersey's emergency law is to:

> "**provide for the health, safety and welfare of the people of the State of New Jersey and to aid in the prevention of damage to and the destruction of property during any emergency** as herein defined by prescribing a course of conduct for the civilian population of this State during such emergency and by centralizing control of all civilian activities having to do with such emergency under the Governor and for that purpose to give to the Governor control over such resources of the State Government and of each and every political subdivision thereof as may be necessary to cope with any condition that shall arise out of such emergency and **to invest the Governor with all other power convenient or necessary to effectuate such purpose.**"

N.J.S.A. App. A:9-33.

N.J.S.A. App. A:9-34 vests two types of power to the Governor. First, the Governor is authorized to centralize and manage all State and local public resources:

> "[t]he Governor is authorized to utilize and employ all the available resources of the State Government and of each and every political subdivision of this State, whether of men, properties or instrumentalities, …"

N.J.S.A. App. A:9-34.

Second, the Governor is authorized to deploy private citizens and private property as is necessary to respond to an emergency:

> **"…and to commandeer and utilize any personal services and any privately owned property necessary to avoid or protect against any emergency** subject to the future payment of the reasonable value of such services and privately owned property as hereinafter in this act provided."

N.J.S.A. App. A:9-34. (emphasis added).

Who decides when an emergency exists? The Governor. *N.J.S.A*. App. A:9-51(a)(2):

> "[w]henever, in his opinion, the control of any disaster is beyond the capabilities of local authorities, the Governor is authorized:
>
> (2) To proclaim an emergency if he deems the same necessary…"

[*N.J.S.A*. App. A: 9-51(a)].

Who decides when the emergency is over? The Governor. *N.J.S.A*. App. A:9-51(e):

> "When, in the opinion of the Governor, the period of emergency under which action has been taken by him as provided under subsection a. of this section has passed, he shall issue a proclamation declaring its end…."

N.J.S.A. App. A:9-51(e).

New Jersey's emergency powers law essentially vests the Governor with the policymaking powers of the legislative branch and central administrative powers of executive branch. In other words, the Governor holds the power of two branches of government. Thus, the law **concentrates** power during an emergency. This concentration of power is just the opposite of the decentralization of power called for by the separation of powers doctrine. It is justified in the case of an emergency because in theory an emergency is limited to catastrophic situations that are temporary.

What could go wrong?

Chief Justice Arthur T. Vanderbilt was heavily involved in the drafting of New Jersey's current constitution, in 1947. Among other things, he is responsible for seeing to it that the New Jersey Constitution included an express provision mandating the separation of powers:

> "1. The powers of the government shall be divided among the three distinct branches, the legislative, the executive and the judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others except as expressly provided in this Constitution."

N.J. Const. [1947], Article III, par. 1.

A few years later Chief Justice Vanderbilt gave a lecture about the separation of powers, which was published. He surveyed the systems of government in several countries in which representative government devolved into a dictatorship or other form of concentrated governmental power. Here is his analysis of why governments in Latin America seemed vulnerable to this problem:

> "…[W]hy is it that the doctrine of the separation of powers does not effectively operate in most Latin-American countries to prevent the concentration of power and the resultant deprivation of individual rights? The answer is not readily apparent. These countries have had a long history of revolts and revolutions which have resulted in the ascension to power of strong military leaders through means outside the framework of the established government. **To protect the existing government against new revolutions it has generally been considered essential to grant to the executive great emergency powers. Whether or not the existence of these emergency powers has contributed to the stability of the governments in the Latin-American countries or has been a source of even greater instability is difficult to determine, but in any event the concentration of power in the executive and the obliteration of much of the significance of the doctrine of the separation of powers have long been a common political phenomenon in Latin America.**
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> …
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> **The granting of extraordinary powers to the executive for the purpose of dealing with emergencies seriously affects the utility of the doctrine of the separation of powers *unless* the declaration of the emergency is left to the legislative branch and *unless* the courts have the power—and exercise it—to enjoin the executive from acting in the absence of such a declaration and from taking action not reasonably necessary to cope with a declared emergency.** Any nation must be capable of dealing with special conditions that present a threat to its very existence, **but in providing the executive with the necessary emergency powers effective checks and restraints must be available, else the remedy in the long run may prove more dangerous than the disease.**
>
> …

> Generally the consequences of emergency action in the Latin-American countries are much more drastic than those we are accustomed to here**. In most of these countries the immediate effect of an emergency decree is the suspension of all constitutional guarantees pertaining to civil liberties**. …
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> …
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> In the light of the constitutional provisions of the Latin-American countries it is inevitable that executive dominance is a far more common and more far-reaching phenomenon in those countries **during times of crises** than it has proved to be in the United States. In the Latin-American countries there have been more than a hundred revolutions since 1900 and innumerable revolts. While one may not assert a direct causal connection between the framework of their constitutions and revolutions, **it is obvious that the constitutional grant of emergency powers to the president and his frequent exercise of such powers, often in dictatorial fashion, does not make for respect for the constitutional rights of the individual.** To an indeterminable extent therefore their constitutional deficiencies are an incitement to revolution and revolt."

[Vanderbilt, Arthur T, "The Doctrine of The Separation of Powers and Its Present Day Significance", (Univ. Nebraska Press, 1953, 1963) (Lib. Congress No. 55-7056), at p. 26-32, 34 (footnotes omitted)(emphasis added)]

III

IN AN EMERGENCY THAT CONCENTRATES LEGISLATIVE AND EXECUTIVE POWERS, THE SEPARATION OF POWERS OPERATES AS A CHECK BY MEANS OF JUDICIAL REVIEW DEPENDING ON THE COURT'S USE OF 'DEFERENCE'

A. The Separation of Powers and the 'Delegation Doctrine'

The NJ state Legislature – the representative branch – chose to enact the omnibus emergency law that delegates its own policymaking power to the executive. The separation of powers doctrine permits this kind of

delegation of power from one branch to another, but it **does not** allow one branch to **abandon** its power to another.

Generally, the delegation of Legislative power to the executive is valid so long as the Legislature gives the executive branch guidelines it must follow when exercising the delegated power. Speaking in the context of the New Jersey constitution and the State legislature, Chief Justice Arthur T. Vanderbilt explained that unless guidelines are provided:

> "**the legislation is void** as passing beyond the legitimate bounds of delegation of legislative power and **as constituting a surrender and abdication to an alien body of a power which the Constitution confers on the Senate and General Assembly alone**…."

State v. Traffic Telephone Workers' Fed. of NJ, 2 N.J. 335, 353-354 (1949)(emphasis added).

This so-called 'delegation doctrine' is not yet fully fleshed-out in the law, particularly at the federal level. Once it becomes more attractive to a public official to use emergency powers precisely because they are so concentrated, there ought to be more judicial (and public) focus on whether the delegation of power is proper in every detail. For example, is it proper for the legislature to delegate to the Governor the decision of whether an emergency exists in the first place? Or, is it proper for the Legislature to delegate the decision of when the emergency is over? Until such time as the delegation doctrine is further developed in the context of an emergency, the sole governmental check on the use of emergency power is judicial review by the Judicial branch.

B. The Separation of Powers and the Role of 'Deference' in Judicial Review

> "'There is no liberty," [Montesquieu] said, "if the judiciary power be not separated from the legislative and executive." This concept is the heart of his great contribution to political philosophy."

[Vanderbilt, Arthur T, "The Doctrine of The Separation of Powers and Its Present Day Significance", (Univ. Nebraska Press, 1953, 1963) (Lib. Congress No. 55-7056), at p. 97-98 (footnotes omitted)].

The Judiciary's special job in an emergency is to check the overreach of concentrated power. It is a challenging task at all times, but especially so during the height of an emergency, when there is much uncertainty, fear and anxiety among the populace. Our recent experience of the Covid public health emergency provides a good example of how you might expect the Judiciary to act to check governmental overreach that affects individual rights.

When the Covid outbreak began, the response of many Governors, including of New Jersey and California, was to issue stay-at-home orders and to require the closure of many places where people could congregate, including houses of religious worship. This is an example of a greater governmental need restricting a citizen's foundational right to worship, especially those religions for which worshiping as a congregation is a central aspect of religious practice itself.

The Governor of California issued an emergency order that forbade any congregate activity. This meant that houses of worship, among other places, had to close entirely. Religious institutions were not singled out by the regulation. Secular institutions were affected as well.

Because the power to respond to Covid was primarily at the State level, there were a variety of responses taken countrywide, according to what the Governor of each state thought suited to the conditions in that state. The Governors of some states, such as North Dakota, for example, never issued any lock-down orders. Others Governor's limited congregate activity to 10, or some other low number. This meant that your right to worship – a foundational right guaranteed by the First Amendment – varied depending upon where you lived.

South Bay United Pentecostal Church sued the California Governor (Newsom) in federal court for the reason that the emergency order forbidding any congregate activity violated the First Amendment right to worship. It sued in federal court because the First Amendment has been incorporated into the Fourteenth Amendment, which gave the federal trial-level court jurisdiction over the actions of a state governor.

It takes time for a case to get decided. If the Church was right about the fact that its worship rights were being violated, that meant that a long

time would pass before this important foundational right was vindicated. This kind of harm is viewed as irreparable when success on the merits of the claim is likely and not otherwise inconsistent with the public interest. For this reason, and in these circumstances, a special legal procedure permits some judicial remedy *before* the case is actually decided. This procedure, which is a form of preliminary equitable relief, has a variety of legal names, but is generally speaking referred to as an application for a preliminary injunction. The application is usually made at the time of or shortly after the filing of the plaintiff's lawsuit.

South Bay made a request for a preliminary injunction when it filed its lawsuit. The trial court denied it. South Bay appealed. In late May, the trial court's ruling denying the application for preliminary relief made its way to the Supreme Court. This was only about two months after the Covid pandemic began. The Supreme Court agreed with the trial judge's decision to deny preliminary relief. Chief Justice Roberts was among those who voted *to deny* relief. He wrote a concurring opinion explaining why:

> "Applicants seek to enjoin [by means of a preliminary injunction] enforcement of the [emergency shut-down] Order. ….This power is used where **"the legal rights at issue are indisputably clear"** and, even then, "**sparingly and** only in the **most critical and exigent circumstances**."
>
> …
>
> **Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States** "to guard and protect." When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," **their latitude "must be especially broad." Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary**," which lacks the background, competence, and expertise to assess public health and is not accountable to the people.
>
> **That is especially true where**, as here, a party seeks emergency relief in an interlocutory posture [i.e., while the case is still pending], while **local officials are actively shaping their response to changing facts on the ground. The notion that it is "indisputably**

clear" that the Government's limitations are unconstitutional seems quite improbable."

[SOUTH BAY UNITED PENTECOSTAL CHURCH v. NEWSOM, 590 U.S. ___ (2020)(May 29, 2020)(Roberts, CJ, concurring)(emphasis added)].

A public health emergency is not a static situation. With the passage of time, more becomes known about how to respond to the disease and how to treat it. Vaccines are developed and become available. This is what happened in the nine months following the Supreme Court's ruling. But although conditions were improving, California's emergency order prohibiting any congregate activity remained unchanged. The Church filed a second application in its pending lawsuit for preliminary relief. The trial court denied the application a second time and the denial was appealed again all the way to the Supreme Court. This time the Court reversed the trial court and *granted* the application for preliminary relief.

Chief Justice Roberts voted *in favor* of granting the application this time. He explained why in a concurring opinion:

"As I explained the last time the Court considered this evolving case, **federal courts owe significant deference to politically accountable officials** with the "background, competence, and expertise to assess public health."

…. **At the same time, the State's present determination**—that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero—**appears to reflect not expertise or discretion**, but instead insufficient appreciation or consideration of the interests at stake.

I adhere to the view that the **"Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States."** ***Ibid.*** **(internal quotation marks and alteration omitted). But the Constitution also entrusts the protection of the people's rights to the Judiciary**—not despite judges being shielded by life tenure, see *post,* at 6 (KAGAN, J., dissenting), but because they are. **Deference, though broad, has its limits**."

[SOUTH BAY UNITED PENTECOSTAL CHURCH v. NEWSOM (II) 592 U.S. ___ (2021) (Feb. 5, 2021) (Roberts, CJ concurrence)(emphasis added)].

Same case. Same governing law concerning applications for preliminary relief. Yet different outcomes nine months apart. Is there a principled reason for this? Yes. Chief Justice Roberts' two concurring opinions give us a birds-eye view of a judicial technique called 'deference' employed whenever it engages in judicial review. (Remember *Marbury v. Madison*?)

Whenever a court is asked to determine whether a law, or in this case, a State emergency order, violates the constitution it must as a practical matter decide how much latitude to give to the governmental action. This is called 'deference'. On one end of the spectrum, courts give a lot of latitude, or, in other words, deference, to the governmental action. On the other end of the spectrum, courts do not. How much deference to give is the first step in judicial analysis. It is what the Supreme Court had to do when considering how to decide the two applications of the South Bay Church. The Court initially gave the State Governor a lot of deference to handle the crisis because the crisis was still an active and largely unknown phenomenon. The second time, the Court did not. As Justice Roberts said, "deference has its limits" and the State could not explain why a building capacity limit of zero was justifiable nearly a year into the pandemic. (Note that few other states had capacity restrictions this extreme at this point, with apparently no significantly detrimental effect.).

Here is how to think of judicial deference in lawsuits claiming a violation of foundational civil rights:

←----------DEFERENCE----------→
High Low

1. Functionally, Judicial Review is extent of judicial oversight over a State or federal law impinging a constitutional right:

- High Deference = Lowest oversight (scrutiny) over Gov't action - greatest latitude
= Favors Gov 't/Disfavors Indiv. Right

- Low Deference = Highest oversight (scrutiny) over Gov't action – little latitude
= Disfavors Gov't/Favors Indiv. Right

2. Ordinarily: Low deference approach is used for a challenged law that impinges upon a constitutional right, BUT an emergency *reverses* the calculus, especially at the beginning stages. Gov't action impinging a constitutional right is given high deference approach.

In sum, the separation of powers is at its lowest ebb in an emergency, especially during the early stages. The only branch of government available to secure individual rights against overreaching governmental power is the judiciary, but not early on.

Citizens may still, however, express their voice to their representatives and "in the court of public opinion" (such as: on social media?)

C. **FOOD FOR THOUGHT**: How can an effective citizen protect his/her rights to the greatest extent possible in an emergency?