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## God, Guns, and Hair Salons: Public Perceptions of Rights and Liberties During the COVID-19 Pandemic

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## GOD, GUNS, AND HAIR SALONS: PUBLIC PERCEPTIONS OF RIGHTS AND LIBERTIES DURING THE COVID-19 PANDEMIC

*Jessica R. Graham\** and *Dr. Kyle J. Morgan\*\**

### ABSTRACT

*In response to the COVID-19 pandemic, elected officials across the United States took efforts to slow the spread of the virus. Some of these efforts raised constitutional questions about the ability of the government to curtail rights during a crisis. This project makes use of an original dataset—letters to the editor submitted to 33 of the nation’s largest newspapers during the early months of the pandemic—to analyze public attitudes about these restrictions. Like much of the previous work regarding attitudes towards rights and liberties during a crisis, we find that these concerns are not front of mind to the public. However, our analysis suggests that this did not come from an ambivalence towards rights and liberties, and instead showed a level of nuance and sophistication among the public in how they conceptualized the tension between individual rights and public safety.*

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## I. INTRODUCTION

In March of 2020, the reality of the COVID-19 pandemic hit the United States. At the end of 2019, a scientist had discovered a “mysterious new pneumonia-like illness identified in Wuhan, China.”<sup>1</sup> Within a few months, COVID-19 had changed the world. Our focus here is to look at the immediate responses to the pandemic, and, more specifically, the lockdown measures enacted to slow the spread of the virus and protect public health. The measures taken by politicians and public health officials were something straight out of a civil liberties final exam. Governors ordered businesses closed, restricted or even banned worship services, impeded the ability to gather in public and in private, required masks to be worn, and took other actions to combat the spread of the virus.

We are not approaching this to analyze the public health merits of these plans or actions. Instead, we are interested in how the public responded to these restrictions. Many of these measures, for example, closing or restricting capacity at houses of worship, raise constitutional questions. Our analysis focuses on how the public responded to the pandemic. Did they respond with concerns about civil liberties and civil rights in mind? Or, as we have seen with previous emergencies such as the 9/11 terrorist attacks, did civil liberties concerns fall by the wayside?<sup>2</sup> It is worth reiterating that we are not taking a stance on whether the efforts taken to respond to the virus were “good” or “bad.” Rather, we recognize that, in responding to the virus, elected officials took actions that raise constitutional questions and are interested in the response to those actions.

We had several hypotheses in mind as we began this project. First, based on the existing literature, civil liberties and rights concerns would be present in the public discussion, but they would be less common compared to concerns about health or economics and statements politicizing the pandemic. We also expected that the concerns in these letters would be unique to the ongoing pandemic; however, given the evolving and unprecedented nature of the time analyzed, we were unsure specifically what concerns these letters would focus on. Therefore, we used a broad coding methodology, which we will describe in more detail shortly.

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<sup>1</sup> Kathy Katella, *Our Pandemic Year—A COVID-19 Timeline*, YALE MED. (Mar. 9, 2021), <https://www.yalemedicine.org/news/covid-timeline>.

<sup>2</sup> See, e.g., John L. Sullivan & Henriët Hendriks, *Public Support for Civil Liberties Pre- and Post-9/11*, 5 ANN. REV. LAW & SOC. SCI. 375 (2009); Herbert McClosky & Alida Brill, *Dimensions of Tolerance: What Americans Believe About Civil Liberties*, 83 MICH. L. REV. 907 (1985); James L. Gibson, *Measuring Political Tolerance and General Support for Pro-Civil Liberties Policies: Notes, Evidence, and Cautions*, 77 PUB. OP. Q. 45 (2013) [hereinafter Gibson, *Measuring Political Tolerance*]; James L. Gibson, *Enigmas of Intolerance: Fifty Years After Stouffer’s Communism, Conformity, and Civil Liberties*, 4 PERSP. ON POL. 21 (2006) [hereinafter Gibson, *Enigmas of Intolerance*].

We approach this topic from a unique direction. Instead of using survey data or analyses of social media content, we used published letters to the editor in 33 of the nation's largest newspapers. We explain the methodology and reasoning behind this data source in more detail below; however, it is worth stating at the outset that we believe this approach complements other measures by adding qualitative richness and detail that may be missing in other methods, while also noting that it is not a replacement for other means of capturing public opinion or sentiment. Our focus here is on the first four months of the pandemic (from the end of February 2020 through June 1, 2020). The use of letters provides us with a snapshot of public sentiment during this period and provides opportunities for expansion by either looking at a larger time frame of the pandemic or through different methodological approaches.

The paper proceeds in the following order. First, we briefly review the literature regarding civil rights and civil liberties during times of crisis. We then explain why we used letters to the editor for data and how others have used letters to the editor as a data source. We then show how we collected and coded these data, followed by some preliminary findings regarding the distributions of issues raised in the letters we coded. Our analysis then takes two different approaches: we first look at possible explanations for the distribution we found and then analyze the legal issues raised in the letters to see how the courts have handled some of these claims. Finally, we conclude with an exploration about how the debate over rights and liberties during the pandemic fits within the larger discussion about rights and liberties in previous times of crisis.

This paper makes several contributions to the scholarly conversation around rights and liberties during a time of crisis. Our use of letters to the editor provides data regarding attitudes toward questions of civil rights and liberties during the first four months of the crisis. Compared to other studies that look at these questions after the fact, the data collection here has the benefit of allowing for observation as the pandemic evolved. This project also provides evidence in support of previous scholarly work, finding that people are less concerned with rights and liberties amid a crisis. However, we find an important qualification to that conclusion—people are not making that decision out of fear or threat alone, nor are they unconcerned about rights. Instead, they are placing an emphasis on other rights over traditional civil liberties concerns, reflecting a more holistic approach to these questions than previous literature may suggest. Additionally, the language used in the letters analyzed suggests a sophistication and nuance that adds complexity to the existing discussion of public willingness to surrender rights and liberties during a crisis.

## II. LITERATURE REVIEW

Since the founding, we have grappled with the question of what to do regarding rights and liberties during a time of crisis. In the *Federalist Papers*, Madison and Hamilton both argued that there was a higher value in “self-preservation” and that the powers of national defense ought to be proportional to

the threat being confronted.<sup>3</sup> Even Thomas Jefferson, of “[t]hose who desire to give up freedom in order to gain security will not have, nor do they deserve, either one”<sup>4</sup> fame, also said: “[t]he law of necessity, of self-preservation of saving our country when in danger are of higher obligation. If we lose our country by a scrupulous adherence to written law, it would be to lose the law itself, with life, liberty, property, and all those who are enjoying them with us.”<sup>5</sup> This right of the state to security and preservation can be seen in a number of the Founders’ documents.<sup>6</sup>

These abstract themes, however, have been put to the test in various national crises. Lincoln’s suspension of habeas corpus in 1861 and the subsequent disregard of the decision in *Ex parte Merryman* is a prime example.<sup>7</sup> This tendency is seen again in 1919 when the Supreme Court upheld the conviction of Charles Schenck under the Espionage Act of 1917 for urging men to resist the draft, stating that during a time of war, speech that “in many places and in ordinary times” would be constitutionally protected can nonetheless be restricted.<sup>8</sup> Perhaps the most famous example is FDR’s Executive Order 9066,<sup>9</sup> which led to the relocation and detention of Japanese Americans following Pearl Harbor, and the subsequent Supreme Court decision, *Korematsu v. United States*,<sup>10</sup> upholding this action. While the Court is often mythologized as upholding rights and liberties, the historical record is nonetheless littered with cases where the Court intervenes to curtail individual rights in favor of public safety, security, or the common good.

Political scientists and legal scholars alike have been interested in how during times of crisis, both perceived and actual, the public views rights and liberties. Building on this literature, we divide our discussion into first, looking at American commitments to rights and liberties more generally, and second, how those commitments shift during a time of crisis or threat.

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<sup>3</sup> THE FEDERALIST NO. 41 (James Madison); THE FEDERALIST NO. 23 (Alexander Hamilton).

<sup>4</sup> BENJAMIN FRANKLIN, HISTORICAL REVIEW OF THE CONSTITUTION AND GOVERNMENT OF PENNSYLVANIA 289 (1759).

<sup>5</sup> Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in THOMAS JEFFERSON’S MONTICELLO: JEFFERSON QUOTES & FAMILY LETTERS, <https://tjrs.monticello.org/letter/2331>.

<sup>6</sup> See, e.g., *id.* (“[T]he laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. [T]o lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property & all those who are enjoying them with us”); Madison, *supra* note 3 (“It is in vain to oppose constitutional barriers to the impulse of self-preservation”); Hamilton, *supra* note 3 (Textual powers of national defense “ought to exist without limitation” if only to be equal to any and every potential threat or danger).

<sup>7</sup> 17 F. Cas. 144 (C.C.D. Md. 1861).

<sup>8</sup> Schenck v. United States, 249 U.S. 47, 52–53 (1919).

<sup>9</sup> Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

<sup>10</sup> 323 U.S. 214, 224 (1944).

While Americans have a long-standing support for the concept of civil liberties and rights, there is also skepticism of those same rights being put into practice or extended to “unpopular” groups.<sup>11</sup> Thomas E. Nelson, Rosalee A. Clawson, and Zoe M. Oxley find that changing the way in which an event is framed influences attitudes towards rights and liberties.<sup>12</sup> In their study, a hypothetical Klan rally was framed as either a “free speech issue” or an issue of public order.<sup>13</sup> They find that by making rights salient, respondents were more willing to support allowing the Klan rally, compared to when the issue of order was made salient, and subsequently support for allowing the rally decreased.<sup>14</sup> Simply by changing the framing, Nelson, Clawson, and Oxley documented a shift in attitudes towards this right—the freedom to assemble.<sup>15</sup> In addition to highlighting the shaky level of commitment to civil rights and liberties, their work also implicates three key ideas: “tolerance,” an unpopular group, and threat.

While distinct from pro-civil liberties positions, political tolerance has been used as a measure of attitudes towards rights and liberties by examining the extent to which Americans are willing to extend rights and liberties to members of groups that they find objectionable.<sup>16</sup> Imbedded in this research has been the concept of threat. Samuel A. Stouffer’s classic *Communism, Conformity, and Civil Liberties* focused on the extent to which Americans were willing to extend rights and liberties to “left-wing” groups or ideologies such as Communists, Socialists, and Atheists.<sup>17</sup> The unpopularity of these groups was inseparable from a perception of “threat”—be it real, perceived, or manufactured. A cottage industry has sprung out of this research, focused on political tolerance towards “the least liked groups” and their associated feeling of threat. For our purposes here, we set aside the debates about the first two elements identified by Nelson, Clawson, and Oxley, and focus primarily on the role of threat. While much of the existing work in this area has conceptualized threat differently, it is undeniable that the ongoing COVID-19 pandemic qualifies.

A consistent finding across the different crises studied has been that people place a higher value or emphasis on safety over liberties, particularly

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<sup>11</sup> See, e.g., Sullivan & Hendriks, *supra* note 2; McClosky & Brill, *supra* note 2.

<sup>12</sup> Thomas E. Nelson, Rosalee A. Clawson & Zoe M. Oxley, *Media Framing of a Civil Liberties Conflict and its Effect on Tolerance*, 91 AM. POL. SCI. REV. 567 (1997).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See, e.g., Gibson, *Measuring Political Tolerance*, *supra* note 2; Gibson, *Enigmas of Intolerance*, *supra* note 2.

<sup>17</sup> See Richard D. Schwartz, Book Note, 65 YALE L.J. 572 (1956) (reviewing SAMUEL A. STOUFFER, *COMMUNISM, CONFORMITY, AND CIVIL LIBERTIES: A CROSS-SECTION OF THE NATION SPEAKS ITS MIND* (1955)).

when they feel a sense of threat.<sup>18</sup> This focus on threat has come to dominate much of the research on attitudes towards rights and liberties as well as political tolerance.<sup>19</sup> Darren W. Davis and Brian D. Silver fielded a survey of Americans shortly after the 9/11 attacks, focusing on their attitudes towards civil rights and liberties.<sup>20</sup> They found that as perceived levels of threat increased, there was a greater willingness among the public to trade rights and liberties for security.<sup>21</sup> While their analysis focused on a time when terrorism was the primary threat motivating the restrictions on rights and liberties, their findings provide a useful lens through which to analyze the current pandemic.

The COVID-19 pandemic complements the existing literature on attitudes toward rights and liberties. While the element of threat is clear, it is different from what the literature has previously examined. Previous research has focused on targeting specific groups or ideologies to have their rights limited in the name of security or safety, whereas the COVID-19 pandemic has resulted in broader limits that affect society at large. Rather than questioning if the Klan can hold a rally, we are looking at public health restrictions on everyone's ability to hold a gathering. In this regard, the question of rights and liberties facing us today impacts a larger swath of society, and as a result, we may expect greater reluctance to limit these rights and liberties. Since the primary focus in the existing literature is on denying an outgroup their rights while retaining one's own, the literature does not address what to expect when the limiting of rights impacts large segments of society, if not everyone.

Additionally, the nature of the threat posed here raises important questions. In much of the existing literature, the threat is perceived as an abstract threat. In the current pandemic, the threat is more direct. As of the writing of this article, more than one million Americans have died from COVID-19, and millions more continue to get sick and deal with the long-term consequences of the virus.<sup>22</sup> In this regard, the threat presented by the virus is more direct. Even the terrorist attacks of 9/11 (which fueled a wave of research regarding attitudes towards rights, liberties, and tolerance), while undeniably horrific, pale in

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<sup>18</sup> See generally JOHN L. SULLIVAN, JAMES PIERSON & GEORGE E. MARCUS, *POLITICAL TOLERANCE AND AMERICAN DEMOCRACY* (1982).

<sup>19</sup> See, e.g., Leonie Huddy, Stanley Feldman, Charles Taber & Gallya Lahar, *Threat, Anxiety, and Support of Antiterrorism Policies*, 49 AM. J. POL. SCI. 593 (2005); see also Gibson, *Measuring Political Tolerance*, *supra* note 2; Sullivan & Hendriks, *supra* note 2.

<sup>20</sup> See Darren W. Davis & Brian D. Silver, *Civil Liberties vs. Security: Public Opinion in the Context of the Terrorist Attacks on America*, 48 AM. J. POL. SCI. 28 (2004).

<sup>21</sup> *Id.*

<sup>22</sup> Stephanie Adeline, Connie Hanzhang Jin, Alyson Hurt & Thomas Wilburn, *Tracking Coronavirus Around the U.S.: See How Your State is Doing*, NPR, <https://www.npr.org/sections/health-shots/2020/09/01/816707182/map-tracking-the-spread-of-the-coronavirus-in-the-u-s> (last visited Aug. 15, 2022).

comparison to the loss of life from the COVID-19 pandemic.<sup>23</sup> On the other hand, though COVID-19 is generally survivable, we now have a safe and effective vaccine.<sup>24</sup> Unfortunately, we do not have a vaccine against the Klan. Therefore, while the risk is perhaps more acute compared to what previous studies have looked at, it also has direct preventative measures that can be taken to mitigate the threat (such as the vaccine and wearing a mask), whereas there is no similar solution to unpopular or “dangerous” ideas or speakers exercising their rights.

Much of the literature on attitudes towards rights and liberties has focused on those concepts in reference to an unpopular group or under a condition of threat posed by another group. However, at the current moment, we are confronted not with dangerous people or ideas but with a dangerous virus. Obviously, the virus is spread via interpersonal contact, and thus we still have a sense that there is an “other” or outgroup posing a threat, but the threat and group in question here take on a different meaning than what scholars have previously analyzed.<sup>25</sup>

While terrorism, and in particular domestic terrorism, is a recognizable threat, we will see in the analysis of the letters to the editor that the concerns about the threat raised by COVID-19 are distinct and multifaceted. Previous work has focused on a threat to security (threat of a terrorist attack)<sup>26</sup> or a “way of life” (threat posed by allowing “anti-American” individuals to participate in civil society).<sup>27</sup> COVID-19 offers us a chance to broaden this analysis due to the myriad of ways in which the virus has altered almost every aspect of society.

During the COVID-19 pandemic, we are looking at the attitudes towards limits on rights and liberties broadly. Rather than just focusing on denying, for example, Communists, the right to assemble peacefully, we are looking at attitudes towards restrictions on assembly more generally. COVID-19 has placed restrictions on everyone, raising interesting questions about attitudes towards those limits when they are imposed both on others as well as on themselves. Further, instead of just asking how people would feel about restrictions on this abstract “other,” we gain insight into the attitudes of those whose rights are actively being restricted. While previous studies may have picked up the odd

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<sup>23</sup> See *id.*; NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 552 (2004), <https://govinfo.library.unt.edu/911/report/911Report.pdf>.

<sup>24</sup> COVID-19 DATA TRACKER, CDC, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last visited Aug. 23, 2022).

<sup>25</sup> Specifically, more than a year and a half into the pandemic, there is a real threat posed by the willfully unvaccinated and those refusing to wear masks. This has also resulted in “compassion fatigue” among leaders and the public at large. While this compassion fatigue and the increasing impatience towards those who refuse to get vaccinated or wear masks presents an interesting future study, during this initial data collection we did not have the added complication of an available vaccine to factor into our analysis.

<sup>26</sup> See, e.g., Davis & Silver, *supra* note 20.

<sup>27</sup> See, e.g., Gibson, *Measuring Political Tolerance*, *supra* note 2; Gibson, *Enigmas of Intolerance*, *supra* note 2; Schwartz, *supra* note 17.



communist or leftist in their survey,<sup>28</sup> few studies to date have offered an analysis of the attitudes of those whose rights are being limited, and, more interestingly, documented those attitudes as it is happening. Our timing and data collection provide us with a snapshot in time, which allows us to speak to whether individuals are accepting of these restrictions or angered by them. COVID-19 and the analysis we undertake here allows us to push our understanding of rights beyond the existing literature in important ways—be it an expanded conception of threat, questions of restricting rights for large segments of society instead of just for “least liked groups,” or by analyzing the attitudes of those who are being restricted rather than just those who are observing the restriction from the outside.

### III. METHODOLOGY

To understand the attitudes of Americans towards civil liberties during the pandemic, we employed a unique approach of analyzing letters to the editor in 33 of the nation’s largest newspapers.<sup>29</sup> This methodology deserves two important explanations: (1) the reason for analyzing letters to the editor, and (2) an explanation as to how the data from these letters were collected.

#### A. *Use of Letters to the Editor*

Letters to the editor are a unique way to understand the attitudes of the public. While letters to the editor are curated by the staff at the newspaper,<sup>30</sup> they offer a glimpse into what issues are salient with the public and how the public is conceptualizing those issues—in particular, what aspects of those issues are more or less important to them.

This paper is not the first to make use of letters to the editor. For example, Michael E. Dupre and David Mackey use letters to the editor as a measure of public concern about crime.<sup>31</sup> Specifically, their research focuses on two main questions: “1) To what extent were crime and justice concerns the focus

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<sup>28</sup> In much of the early work on attitudes towards civil rights and liberties, the groups asked about were on the “left” side of the political spectrum, reflecting the concerns of the 1950’s and 1960’s when this literature began.

<sup>29</sup> List of Newspapers is based on Pew’s 2019 “State of the Media Report,” which analyzed average Sunday circulation in 2015, 2016, 2017, and 2018 to determine the most circulated papers in the country. They also included, as did we, the *Wall Street Journal*, which they report to be one of the nation’s more widely read papers. But does not have a Sunday edition. See *State of the News Media Methodology*, PEW RSCH. CTR. (July 27, 2021), <https://www.pewresearch.org/journalism/2021/07/27/state-of-the-news-media-methodology/>.

<sup>30</sup> See generally Karin Wahl-Jorgensen, A “Legitimate Beef” Or “Raw Meat”? *Civility, Multiculturalism, and Letters to The Editor*, 7 COMM. REV. 89 (2004).

<sup>31</sup> See Michael E. Dupre & David A. Mackey, *Crime in the Public Mind: Letters to the Editor as a Measure of Crime Salience*, 8 J. CRIM. JUST. & POPULAR CULTURE 1 (2001).

of published letters to the editors? 2) When published letters to the editor focused on crime and justice concerns, what specific topics were addressed?”<sup>32</sup> Our analysis takes a similar direction, but changes the focus to civil rights and liberties rather than criminal justice.

We recognize at the outset that authors of letters to the editor are not representative of the public at large. For example, Bill Reader, Guido Stempel, and Douglas Daniel found that authors of letters to the editor are more likely to be male and “above average in terms of age, income, and education.”<sup>33</sup> Nonetheless, other scholars are more optimistic about the use of letters to the editor as a proxy for public opinion. David B. Hill,<sup>34</sup> as well as L. Siegelman and B.J. Walkosz,<sup>35</sup> argue that letters can be useful as a proxy for public attitudes, especially when looking at very salient issues—a standard the COVID-19 pandemic would certainly meet.

Letters to the editor also hold value as a voluntary means of political and social participation. Though not representative, they grant insight into the attitudes of those who feel strongly about a topic while also providing a richer data set than traditional survey methods may allow.<sup>36</sup> Especially during the pandemic, with lockdowns and restrictions on gatherings, looking at alternative forms of participation are particularly valuable.

Finally, although letters to the editor are curated by the editorial staff, research suggests that a majority of the letters received are published. For example, Karin Wahl-Jorgensen found that in most papers, between 50% and 90% of the letters received were published, although with the caveat that among the most selective of papers this declines to 5%.<sup>37</sup> In this regard, while there is a “gatekeeping effect” to consider, we should not write off analyzing letters to the editor for that reason alone. Further, David B. Hill found in his analysis of letters to the editor that the sentiment expressed in these letters largely mirrored available public opinion data and that the concerns about the gatekeeping effect of media outlets may not be as significant as hypothesized.<sup>38</sup>

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<sup>32</sup> *Id.* at 3.

<sup>33</sup> Bill Reader, Guido H. Stempel III & Douglas K. Daniel, *Age, Wealth, Education Predict Letters to Editor*, 25 *NEWSPAPER RSCH. J.* 55 (2004).

<sup>34</sup> David B. Hill, *Letter Opinion on ERA: A Test of the Newspaper Bias Hypothesis*, 45 *PUB. OP. Q.* 384 (1981).

<sup>35</sup> Lee Sigelman & Barbara J. Walkosz, *Letters to the Editor as a Public Opinion Thermometer: The Martin Luther King Holiday Vote in Arizona*, 73 *SOC. SCIS. Q.* 938 (1991).

<sup>36</sup> See generally Christopher Cooper, H. Gibbs Knots & Moshe Haspel, *The Content of Political Participation: Letters to the Editor and the People Who Write Them*, 42 *POL. SCI. & POL.* 131 (2009).

<sup>37</sup> Wahl-Jorgensen, *supra* note 30 at 93.

<sup>38</sup> Hill, *supra* note 34 at 384. See also Daniel M. Butler & Emily Schofield, *Were Newspapers More Interested in Pro-Obama Letters to the Editor in 2008? Evidence From a Field Experiment*,

Through a series of interviews with editors to understand this gatekeeping effect, Wahl-Jorgensen found that there were two criteria that resulted in letters being rejected: first, “personal attacks” that may result in a lawsuit, and second, letters that were openly bigoted and did not “in any way contribute to the public debate.”<sup>39</sup> This is particularly important for the COVID-19 pandemic. Then-President Trump made any number of racist statements regarding COVID-19—statements which then appeared in our letters to the editor. We note that these statements, which may not normally be published in letters to the editor, seem to have been substantiated by then-President Trump, allowing their publication during the COVID-19 pandemic. Thus, we included them in our study as well to ensure that we captured the full range of public engagement.

An important strength of the letters is that they offer attitudes towards rights and liberties as the crisis is unfolding. In the most recent wave of research on attitudes towards rights and liberties in the wake of the 9/11 terrorist attacks, the data collection is being done months or even years after terrorist attacks. Even the fastest pollster has a delay to get into the field following any event. Letters to the editor by comparison offer us a day-by-day snapshot of public attitudes. We believe that this immediacy provides us with a unique and distinct vantage point from which to analyze these sentiments.

### B. Data Collection Methodology

Based on the list of the fifty largest newspapers in the nation,<sup>40</sup> we first looked for papers using the Access Word News “NewsBank” database.<sup>41</sup> Of the 50 largest newspapers, 27 of them (see Table 1 below) were present in the NewsBank database, and an additional six were accessed directly from their websites. For all the papers, we then narrowed down the timeframe to focus on the letters published between February 28, 2020, and June 1, 2020.<sup>42</sup> February 28 was selected as the start date as this was still before states or localities began lockdown procedures, but COVID-19 was beginning to become a topic of media

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38 AM. POL. RSCH. 356 (2010); Emmett H. Buell, Jr., *Eccentrics or Gladiators? People Who Write About Politics in Letters-to-the-Editor*, 56 SOC. SCIS. Q. 440 (1975).

<sup>39</sup> Wahl-Jorgensen, *supra* note 30, at 90.

<sup>40</sup> *State of the News Media Methodology*, *supra* note 29.

<sup>41</sup> NewsBank is an online database that provides access to “full-text electronic editions of more than 2,000 newspapers.” NEWSBANK, <https://www.newsbank.com/publishers/solutions/research-databases> (last visited Aug. 23, 2022).

<sup>42</sup> The end date of June 1st was not selected for any particular reason; instead, it was simply a cutoff point to allow us to begin the analysis.

coverage. February 28th also marks the day prior to the first confirmed COVID-19 death in the United States.<sup>43</sup>

For those papers that were not present in the NewsBank database, we attempted to access their letters to the editor directly through their websites. Importantly, we used the publicly available portion of their websites and did not purchase subscriptions. We were able to collect an additional six papers in this way (see Table 1).

While we do not claim to be providing a substitute for public opinion nor that we are technically nationally representative, our papers do represent a diverse swath of the nation. Our papers came from 19 different states and from almost all corners of the United States. The states where 20 of the papers were published had a Democratic governor during the time of our data collection, and 13 had a Republican governor. Our sample also included papers from the six largest states by population, as well several of the smallest such as Hawaii (41st largest) and Nebraska (39th). From these 33 papers, we collected a total of 12,671 letters to the editor published between February 28 and June 1, 2020. For both the papers accessed through the NewsBank database or individual websites, these 12,671 letters were then coded identically.

Since the focus was on the intersection of the COVID-19 pandemic and civil liberties, all letters were first coded to determine if they were about or mentioned the pandemic in some fashion. This could mean they directly mentioned COVID-19 or, among other things, mentioned the “coronavirus,” “the virus,” “the outbreak,” or “the pandemic.”<sup>44</sup> It also could mean that we looked for context clues if COVID-19 was not directly mentioned, such as using everyone’s two new least-favorite phrases: “the new normal” or “in these unprecedented times.” As a result, letters concerning COVID-19 were quite easy to identify, as they were either explicitly mentioning the virus in some form or were making obvious allusions to the pandemic. From the 33 newspapers we analyzed, 8,285 letters (65% of all the letters) were related to the pandemic in some fashion.

The next step was to analyze the content of those 8,285 letters. Each letter was coded by a member of the research team and then cross-checked by another to see if they included the following themes: health, economy, politics,

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<sup>43</sup> *Washington State Reports First COVID-19 Death*, CDC (Feb. 29, 2020), <https://www.cdc.gov/media/releases/2020/s0229-COVID-19-first-death.html>.

<sup>44</sup> We also included racist, not-so-subtle, dog whistle mentions of the virus including “the Chinese Virus” as these are nonetheless still discussing COVID-19. For example, on March 19 the New York Post published a series of letters debating what to call the Coronavirus. One letter writer had the following to say: “To everyone who has their panties in a bunch because Trump used what he dubbed the ‘accurate term’ by calling the virus, which has wreaked havoc globally, ‘the Chinese virus,’ I say: Put your big-boy pants on.” Letter to the Editor, *President Trump’s Use of the Term “China Virus” to Describe the Coronavirus*, N.Y. POST (Mar. 19, 2020), <https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/179CEBC1FB672358>.

and civil liberties or rights. Note also that letters could, and often times did, contain more than one theme. These first three themes represented the way in which many Americans were thinking about COVID-19, and, as a result, provide a useful comparison to the numbers we found relating to civil liberties. Additionally, the first two themes, health and the economy, represent a real threat or danger that the COVID-19 pandemic posed to millions of households.

To validate the coding, two of the authors reviewed all the coding, comparing their own coding of the letters against the other, resolving any disagreements, which, as a result, ensured intercoder reliability. This was done at all stages of the coding process, from the initial step of whether the letter concerned COVID-19, to whether it was related to civil liberties, health, economics, or politics, and then, finally, to code those letters that concerned civil liberties and rights for the specific themes within that classification. Since this project is an exploratory study of an issue as it developed, this hands-on and intensive coding process allowed us to gain a richer understanding of the data. Our subsequent coding was informed by this initial data collection process, as we lacked concrete knowledge as to what was going to emerge as important in the letters.

While analyzing letters for “health” themes, we coded for issues such as the ways the virus was spreading, the advice of doctors and healthcare professionals, and the impact or harm<sup>45</sup> that the virus had on health more generally. For example, in a March 3 letter to the *Denver Post*, someone wrote:

Of the several threats to humans’ dominance of Earth, we are facing one: a pandemic. And the single, stupidest thing to do is get a couple of million people together from all over the planet and put them in very close quarters. Then after two weeks, send them all back to virtually every country on the globe. The Olympics could easily be the biggest danger the human race has ever faced. I’ve read humans are smart enough to do everything but save themselves. Here’s your chance to prove it.<sup>46</sup>

This letter was coded as having a health theme because the author was worried about the spread of the disease at the Olympics. In our analysis, 49% of the letters that were about COVID-19 also included a health theme.

Beyond the health impact of the pandemic, another undeniable impact was economic. The pandemic resulted in unprecedented lockdowns around the world, forcing millions out of work for the short- and long-term. An analysis by the Brookings Institute found that the “total nonfarm employment [fell] by 20.5

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<sup>45</sup> Or in some cases, the incorrect belief that the virus posed little-to-no threat.

<sup>46</sup> Letter to the Editor, *Coronavirus Has Us Wringing—and Washing—Our Hands; Space for a Homeless Shelter*, DENV. POST (Mar. 3, 2020), <https://www.denverpost.com/2020/03/03/tuesday-march-3-2020-letters/>.

million jobs in April [2020].<sup>47</sup> It is, thus, unsurprising that many of the letters analyzed discussed the economic impact of the pandemic. This included discussions of problems with unemployment websites in Florida,<sup>48</sup> the Federal Reserve lowering interest rates,<sup>49</sup> paid sick leave,<sup>50</sup> businesses closing,<sup>51</sup> and more general concerns about the health of the economy given the virus and the public health response.<sup>52</sup> Since the pandemic impacted everyone's wallet in some way, be that negatively<sup>53</sup> or positively,<sup>54</sup> it is unsurprising that a large number of the letters coded included economic themes in them: 36% of the letters related to COVID-19 included economic themes.

Next, while the pandemic had clear health and economic consequences, like everything in modern American society, there was also a partisan or political side. In the letters marked "politics," we coded for, among other things, partisan blame,<sup>55</sup> praise,<sup>56</sup> criticism of partisanship when we need unity,<sup>57</sup> and concerns

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<sup>47</sup> Lauren Bauer, Kristen Broady, Wendy Edelberg & Jimmy O'Donnel, *Ten Facts About COVID-19 and the U.S. Economy*, THE BROOKINGS INST. (Sept. 17, 2020), <https://www.brookings.edu/research/ten-facts-about-covid-19-and-the-u-s-economy/>.

<sup>48</sup> Letter to the Editor, *DeSantis' Unemployment Victory Short-Lived*, ORLANDO SENTINEL (May 29, 2020), <https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/17B43740181344E0>.

<sup>49</sup> Letter to the Editor, *Wrong move by Fed*, VIRGINIAN-PILOT (Mar. 11, 2020), <https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/179A30CA29559AA0>.

<sup>50</sup> Letter to the Editor, *Fund Paid Sick Leave*, PHILA. INQUIRER (Mar. 11, 2020), <https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/179A32C477583A68>.

<sup>51</sup> Letter to the Editor, *Business Owner's Frustration*, OMAHA WORLD-HERALD (May 14, 2020), <https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/17AF5238A5239950>.

<sup>52</sup> Letter to the Editor, *Three More Months of Hunkering Down a Bad Idea*, ORANGE CO. REG. (Mar. 26, 2020), <https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/179F1F55F2ABC958>.

<sup>53</sup> *Tracking the COVID-19 Economy's Effects on Food, Housing, and Employment Hardships*, CTR. ON BUDGET & POL'Y PRIORITIES (Sept. 10, 2021), <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-economys-effects-on-food-housing-and>.

<sup>54</sup> Chase Peterson-Withorn, *The World's Billionaires Have Gotten \$1.9 Trillion Richer in 2020*, FORBES (Dec. 16, 2020, 7:00 AM), <https://www.forbes.com/sites/chasewithorn/2020/12/16/the-worlds-billionaires-have-gotten-19-trillion-richer-in-2020/?sh=1fa90bec7386>.

<sup>55</sup> Letter to the Editor, *Anyone But President Is Leading in Crisis*, ATLANTA J.-CONST. (Mar. 19, 2020), <https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/179CC852B15E8CC0>.

<sup>56</sup> Letter to the Editor, *Looking For The Helpful Rhetoric in Times of Crisis*, HARTFORD COURANT. (Apr. 2, 2020), <https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/17A16D540B3D9BF8>.

<sup>57</sup> Letter to the Editor, *Luckovich Cartoon Flies Against Uniting Nation Now*, ATLANTA J.-CONST. (Apr. 10, 2020), *NewsBank: Access World News*,

that this is all a plot by either of the two parties to take power.<sup>58</sup> Partisan bickering and sniping is to be expected, and this was only heightened by the fact that the pandemic coincided with the 2020 Democratic primary and general election. Voters wasted no time in finding ways to bring partisan politics and disagreement into the pandemic, with 40% of all the COVID-19-related letters including a partisan element.

The final category encompassed concerns about rights, liberties, and freedom. This coding was done in two stages. First, during the initial data collection, the team looked for letters that specifically mentioned Constitutional rights or liberties, as well as more general mentions of “rights,” “liberties,” or “freedom.” For example, take this May 11 letter that appeared in the *Wall Street Journal*, which praised Sweden’s response to the pandemic, highlighting that “[t]he Swedes get to keep their freedom.”<sup>59</sup> Or, take a May 7 letter in the *Post-Standard*, stating, in response to the reopening plan from New York’s Governor Cuomo, that “[a]s a Christian, I believe the ability to attend in-person church services to be not only my First Amendment right, but an essential part of my personal well-being. And yet, religious services are conspicuously absent from Governor Andrew Cuomo’s reopening plan.”<sup>60</sup> In both of these instances, be it a specific mention of “freedom” or a more specific mention of a protected constitutional right, we included the letter in our initial “rights, liberties, and freedom” category.

Importantly, and a point of interest that we will return to, not all of the letters in this category were bemoaning the loss of rights, liberties, and freedom. Instead, many used this language of rights to criticize those who, for example, did not wear masks:

[y]es, you have the right to not wear a mask if you wish when you are out and about. God forbid we should even think of asking you to wear that thing. However, nowhere in the

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<https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/17A408515F073CC0>.

<sup>58</sup> Letter to the Editor, *Dems Seek to Use Lockdowns to Win Elections*, ATLANTA J.-CONST. MAY 29, 2020), <https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/17B42E952EDA4728>.

<sup>59</sup> Letter to the Editor, *Sweden’s Doing Better than New York State*, WALL ST. J. (MAY 11, 2020), <https://www.wsj.com/articles/swedens-doing-better-than-new-york-state-11589221909?mod=searchresults&page=3&pos=7>.

<sup>60</sup> Opinion, *NY’s Reopening Plan Must Include Religious Services (Your Letters)*, POST-STANDARD (MAY 7, 2020), <https://www.syracuse.com/opinion/2020/05/nys-reopening-plan-must-include-religious-services-your-letters.html>.

Constitution does your right to not wear a mask trump my health and welfare.<sup>61</sup>

A number of the letters explored variations of the tension between individual rights and the safety of others. In total, 7% of all the letters that were collected and coded concerned “rights, liberties, or freedom.” On the surface, this in-and-of-itself is an important finding, and one that confirms one of our initial hypotheses. While rights and liberties were not absent from the conversation around the COVID-19 pandemic, they were not nearly as prevalent as health, the economy, or even partisan commentary.

The letters that were included in the “rights, liberties, and freedom” category were then analyzed more specifically to determine what rights were being referenced. Letters were coded as containing one, or more, of the following themes relating to “rights liberties and freedom”: voting, guns, assembly, church, masks, general, other, and reverse rights. We chose these categories after the initial data collection of the letters, guided by that experience and a desire to capture both direct constitutional questions (guns, assembly, churches, and voting) as well as more indirect questions (masks, general, and reverse rights) that were being raised in the broader public discourse.

Given the timing of the pandemic, amid the Democratic primary and then the general election, we saw a number of letters referencing the “right to vote” or the upcoming elections in some fashion. Twenty-three percent of the civil liberties letters in total concerned voting rights. These letters took a few different forms. Some, such as this letter from the *St. Louis Post-Dispatch*, concerned having to risk one’s life to go vote and the right to vote during the pandemic:

Regarding ‘Wisconsin voters wait for hours, others stay home amid virus’ . . . Everyone who can vote should vote. It should never be a chore, a hardship, a risk, or even difficult for any eligible American to exercise the right to vote.<sup>62</sup>

Other letters specifically mentioned voting by mail as a way to ensure “we still have a fair and viable democracy. . . .”<sup>63</sup> and a means by which people could exercise their right to vote safely amid the pandemic. We saw a number of

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<sup>61</sup> Letter to the Editor, *Your Rights and Masks*, DALLAS MORNING NEWS (May 31, 2020), <https://www.dallasnews.com/opinion/letters-to-the-editor/2020/05/31/letters-to-the-editor-pandemic-problems-hong-kong-col-sam-johnson-masks-wylie-mayor-taxes-racial-tensions/>.

<sup>62</sup> Letter to the Editor, *Voting Shouldn’t Really Be a Matter of Life or Death*, ST. LOUIS POST-DISPATCH, (Apr. 14, 2020), <https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/17A58BE492D75570>.

<sup>63</sup> Letter to the Editor, *Postal Service Is Good Enough for Taxes, As Well As Mail Ballots*, SEATTLE TIMES (May 30, 2020), <https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/17B486D2CBCE5E90>.



letters referencing voting as a right and raising concerns about the ability to exercise that right during the pandemic.

The second category we coded for was a mention of one's Second Amendment rights amid the pandemic. This was largely motivated by discussions during the early lockdown stages about whether gun shops and firing ranges were considered "essential," triggering several lawsuits challenging these closures.<sup>64</sup> In all, just 5% of the letters coded for civil liberties concerned gun rights. Some of these letters mentioned these closures as a power grab:

Joseph Sternberg's 'A Coronavirus Reckoning for the Left' (Political Economy, April 10) highlights the left/right divide on governance during this pandemic and in general. The overriding thrust of progressives is to embrace government authoritarianism as the solution for all problems involving disease control, health care, gun rights, freedom of speech, etc.<sup>65</sup>

Other letters were critical of the lawsuits previously mentioned—attacking those who are putting "gun rights" over public safety.<sup>66</sup>

The third category was the right to assemble. This coding was particularly salient during the pandemic, as many states took efforts to limit large gatherings to slow the spreading virus. This category, as well as several others, presents an interesting balancing act: on the one hand, there is a clear-cut constitutional right to assemble, and on the other hand, there are public safety concerns and the government's obligation to ensure public health, welfare, and wellbeing. In total, 16% of the letters coded for civil liberties were related to this right to assemble, and they frequently reflected the tension of balancing those two competing goals. For example, some specifically mentioned the First Amendment's right to peaceably assemble, arguing that bans on gatherings were unconstitutional.<sup>67</sup> Others, however, recognized those same rights but,

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<sup>64</sup> See Matthew S. Schwartz, *Virginia Gun Range Can Reopen—Governor Overstepped His Authority, Judge Rules*, NPR (Apr. 27, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/27/846757355/virginia-gun-range-can-reopen-governor-overstepped-his-authority-judge-rules>.

<sup>65</sup> Letter to the Editor, *Does Government's Power Grab Concern Anyone Else?*, WALL ST. J. (Apr. 15, 2020, 3:05 PM), <https://www.wsj.com/articles/does-governments-power-grab-concern-anyone-else-11586977527?mod=searchresults&page=2&pos=20>.

<sup>66</sup> Letter to the Editor, *Gun Lawsuit 'Absurd'*, VIRGINIAN-PILOT (Apr. 17, 2020), <https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/17A65E4950C69228>.

<sup>67</sup> See, e.g., Letter to the Editor, *The Arbitrary Lockdowns Violate the Constitution*, WALL ST. J. (May 19, 2020, 5:38 PM), <https://www.wsj.com/articles/the-arbitrary-lockdowns-violate-the-constitution-11589924317?mod=searchresults&page=1&pos=18>; Letter to the Editor, *'Tyrants in Training': Murphy, Other Blue-State Govs*, STAR-LEDGER (Apr. 26, 2020, 4:55 PM), <https://www.nj.com/opinion/2020/04/keep-the-faith-by-rejecting-plan-to-reopen-nj-churches-now-letters.html>.

oftentimes with a high degree of snark, criticized individuals for exercising them.<sup>68</sup> These letters, both for and against, also frequently appeared in conjunction with protests seeking to end the lockdowns or restrictions.

Related to the assembly coding, but deserving its own category, were those that brought up religious liberties. This question was one that even the U.S. Supreme Court found compelling enough to take on in *Roman Catholic Diocese of Brooklyn v. Cuomo*.<sup>69</sup> These letters, 8% of those coded, often invoked the First Amendment and assembly but were specifically interested in free exercise. For example, some raised concerns that the pandemic was being used to “kill constitutional freedoms” and “restrict First Amendment freedoms of religion.”<sup>70</sup> Others were more targeted at closures or restrictions on in-person worship and the constitutional questions that such closures presented.<sup>71</sup>

The final category was masks. In all, 9% of the civil liberties letters concerned masks. Interestingly, while some of these questioned mask mandates as government overreach,<sup>72</sup> many defended the mask mandate as constitutional or, more generally, not an infringement of one’s rights in the first place. In fact, a majority of the letters that concerned masks were rejections of the argument that mask mandates were unconstitutional, a finding we will return to shortly when we discuss “reverse rights.”

Thirty-seven percent of the civil liberties/rights related letters involved more broad and non-specific appeals to “rights,” “freedoms,” and “liberties.” For example, in an April 27 letter to the *Post-Standard*, one writer lamented:

[w]hat qualifies an essential business from non-essential? Why can’t I call my doctor? Why can’t my child go to school? Why can’t I go to the salon? I get that this pandemic has affected a

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<sup>68</sup> See Letter to the Editor, *Rights in a Pandemic*, ARK. DEMOCRAT-GAZETTE (Mar. 31, 2020), <https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/17A0D47F46E43C88>; Letter to the Editor, *Michigan Protesters Send the Wrong Message*, BUFFALO NEWS (May 31, 2020), <https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/17B4E2CA4569BE00>.

<sup>69</sup> 141 S. Ct. 63 (2020).

<sup>70</sup> Letter to the Editor, *First Amendment Rights at Risk from Pandemic*, HONOLULU STAR ADVERT. (Apr. 10, 2020), <https://www.staradvertiser.com/2020/04/10/editorial/letters/letters-dont-release-inmates-into-our-communities/>.

<sup>71</sup> Letter to the Editor, *Televised Worship Services Would Be Safer*, ORLANDO SENTINEL (April 3, 2020); see also Letter to the Editor, *Houses of Worship Should Be Reopened*, HONOLULU STAR ADVERT. (May 10, 2020), <https://www.staradvertiser.com/2020/05/10/editorial/letters/we-must-continue-to-protect-ourselves/>.

<sup>72</sup> Letter to the Editor, *City Restrictions Beyond What Is Necessary*, HONOLULU STAR ADVERT. (Apr. 20, 2020), <https://www.staradvertiser.com/2020/04/20/editorial/letters/letters-rimpac-possible-threat-to-hawaiian-islands/>; see also Letter to the Editor, *Is It Constitutional?*, VIRGINIAN PILOT (May 31, 2020), <https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/17B4E227EBE0B250>.

large portion of this country and world, but the quarantine and stay-at-home rule has been excessive — to the point of altering our freedoms.<sup>73</sup>

There is not a specific right that is being alluded to here, just a more general sense that the restrictions had “gone too far” and were “altering our freedoms.” Another author agreed with the restrictions in general, but cited their membership in the American Civil Liberties Union to encourage the organization to:

. . . clearly articulate what additional powers governments might have during a pandemic and address the civil-liberty claims of the protesters. I urge the ACLU to identify criteria for what constitutes justifiable liberty restrictions for public-health purposes, and to use that criteria to support or oppose government actions that have been under attack by people who feel their liberties have been curtailed.<sup>74</sup>

As we are dealing with a global pandemic where there were restrictions and lockdowns by the government, it is not surprising that many of the letter writers invoked these general themes regarding rights, liberties, and freedoms—something that “in these unprecedented times” few had yet to experience.

Some letters were coded as “other.” For example, some mentioned a “right to insist on restarting the economy,”<sup>75</sup> some discussed “freedom of expression,”<sup>76</sup> while others concerned issues of federalism,<sup>77</sup> and others still discussed how various elected officials had “tromped on the Constitution” through their actions, or lack thereof, during the pandemic.<sup>78</sup> While the “other”

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<sup>73</sup> Letter to the Editor, *Stay-at-Home Rule Is ‘Altering Our Freedoms’ (Your Letters)*, POST-STANDARD (Apr. 27, 2020, 12:11 PM), <https://www.syracuse.com/opinion/2020/04/stay-at-home-rule-is-altering-our-freedoms-your-letters.html>.

<sup>74</sup> Letter to the Editor, *ACLU*, SEATTLE TIMES (May 24, 2020) <https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/17B28A40C0C95AE0>.

<sup>75</sup> Letter to the Editor, *Don’t Equate the Coronavirus with Other Fatal Illnesses*, COLUMBUS DISPATCH (May 13, 2020, 4:10 AM), <https://www.dispatch.com/story/opinion/letters/2020/05/13/letter-don-8217-t-equate/1209849007/>.

<sup>76</sup> Letter to the Editor, *Courts Are Empowered to Limit Dangerous Speech*, COLUMBUS DISPATCH (Apr. 24, 2020, 4:11 AM), <https://www.dispatch.com/story/opinion/letters/2020/04/24/letter-courts-are-empowered-to/1299158007/>.

<sup>77</sup> Letter to the Editor, *Candidate Ought to Know Patriots Back the Constitution*, COLUMBUS DISPATCH (Apr. 17, 2020), <https://www.dispatch.com/story/opinion/letters/2020/04/17/letter-candidate-ought-to-know/1342632007/>.

<sup>78</sup> Letter to the Editor, *The Loss of Freedoms May Teach Us A Lesson*, SAN DIEGO UNION TRIBUNE (Apr. 23, 2020, 11:28 AM), <https://www.sandiegouniontribune.com/opinion/letters-to>

category comprised a large number of the civil liberties-related letters, 37%, a majority of those also involved one of the other frames discussed (55%). The remainder, which were only about an “other” issue, totaled 16% of all civil liberties letters.

Finally, the last category coded for was one that we previously alluded to when discussing the letters about masking: “reverse rights.” In these letters, we saw authors place different spins on the age-old adage that “[y]our right to swing your arms ends just where the other man’s nose begins.”<sup>79</sup> For example, a number of the letters mentioned that one may have a right to not wear a mask, but they don’t have a right to put others at risk while doing so. Other letters criticized the emphasis on individualism over collective welfare. For example, take these two letters:

Perhaps [a previous author] should turn his attention to the opening line of our Constitution, which does not read, ‘I the person,’ but does say, ‘We the people.’<sup>80</sup>

Life. Liberty. The Pursuit of Happiness. These ideals birthed our nation. However, the collective vision of our Founding Fathers has been perverted over the years by the callousness and greed of a privileged self-entitled minority.<sup>81</sup>

Some took a more hostile tone arguing that one may have a right to not follow public health guidelines, but, as a result, they should not be able to receive hospital care if they were to get sick.<sup>82</sup> In general, these reverse rights letters juxtaposed rights against each other. Be it masks, not following social distancing guidelines, or more generally ignoring public health experts, letters argued that individuals have some right to do all these things, but they do not have the right

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the-editor/story/2020-04-23/your-say-what-positives-have-you-witnessed-during-the-pandemic-quarantine; *see also* Letter to the Editor, *Should the City Use Cops to Keep NYers 6 Ft Apart?*, N.Y. POST, May 8, 2020.

<sup>79</sup> Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919).

<sup>80</sup> Letter to the Editor, *The Constitution Should Be Flexible During an Emergency*, ST. LOUIS DISPATCH (Mar. 28, 2020), <https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/179FE1A906ADA3F8>.

<sup>81</sup> Letter to the Editor, *Disappointing Response to Crisis Is Unsurprising*, BUFFALO NEWS (Mar. 30, 2020), <https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/17A07437027CA090>.

<sup>82</sup> Letter to the Editor, *Solution to Those Wanting Freedom to Live—Or Die*, BUFFALO NEWS (May 17, 2020), <https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/17B0470BBB9042B0>. Interestingly, this idea about those who refuse to get vaccinated or wear a mask has reemerged during the summer and fall of 2021 amid the “Delta Surge” and growing impatience and frustration among vaccinated individuals towards those refusing to get vaccinated or wear a mask.

to endanger others. These letters were also some of the most common in our analysis, appearing in 27% of all the civil liberties letters analyzed. This reverserights framing also presents an interesting complication to the existing literature on rights and liberties during a crisis, something we return to in more detail later in the paper.

Given the issues found to be salient in the letters to the editor, we proceed in two distinct ways. First, what is the legal basis for these claims? How, if at all, have these issues been litigated amid the current crisis, and what would precedent suggest as to how courts would resolve these issues? The second part of the analysis seeks to unpack the language used in the letters further.

#### IV. CONSIDERATION BY THE COURTS

While there have been a variety of civil liberties-related claims raised during the COVID-19 pandemic, some were deemed by the courts to be more meritorious than others. The analyses varied, and thus we look at one representative case for each issue to explore the justifications and language utilized by the court and how this analysis and the language used compares to what appeared in the letters. Additionally, this analysis serves to validate that, on a basic level, the issues raised in the letters from the public were not frivolous. If lawyers are raising these issues in court, and courts are not dismissing the claim as frivolous, then this suggests a certain level of credibility. We recognize that these are simply a subset of the cases litigated during the COVID-19 pandemic, and a future paper may want to explore each of these with more thorough detail once the dust of the pandemic has settled.

In analyzing the sample of cases, we saw that some debates were settled rather quickly—such as guns—whereas others reflected the court's unwillingness to take a stance on highly politicized issues. During crisis, the courts will often prioritize the procedure and institutional checks rather than deciding on the merits of the issue raised.<sup>83</sup> This pattern continues during the COVID-19 crisis, as we found strings of language that reflect this deeper goal: judicial restraint, separation of powers, and facially neutral analyses.

This focus on institutional checks and considerations would also suggest that, just as the public gave comparatively little attention to rights and liberties, the courts often avoided the substantive issues presented to them. If the public was more interested in questions of the economy, health, and partisan fighting, the courts, by comparison, generally appeared willing to set side-step questions of rights and liberties, allowing the elected branches to dive headlong into these

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<sup>83</sup> See generally Lee Epstein, Daniel E. Ho, Gary King & Jeffrey A. Segal, *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1, 1 (2005) (providing a quantitative analysis of the Supreme Court's decisions that curtail liberties during war); Robert Jerome Glennon, *The Nation's Teacher: The Role of the United States Supreme Court During Times of Crisis*, 24 SEATTLE U. L. REV. 327 (2000) (arguing that the Supreme Court should act as a third party during politicized crisis to maintain credibility).

disputes. Instead of protracted fights over rights and liberties, many of the disputes we saw raised by the public in the letters were settled relatively quickly and, in most cases, without working through subsequent levels of the judiciary.

One debate that was done away with quickly was the right to bear arms. In New Jersey, for example, a suit was filed on the grounds that Governor Murphy's classification as firearms and ammunition retailers as "non-essential" ran afoul of the Second Amendment.<sup>84</sup> This matter was administratively terminated on April 21, 2020, when Federal Firearms Licensees ("FFLs") were added to the list of essential retail businesses by Governor Murphy and thus allowed to remain open during COVID-19 restrictions.<sup>85</sup> This re-categorization occurred two days after the federal government issued advisory regulations that FFLs should be deemed essential businesses—guidelines which came five days after the initial litigation against Governor Murphy was filed.<sup>86</sup> The federal government's willingness to issue these guidelines, as well as Governor Murphy's alteration and administrative termination of the litigation, suggests that this was one of the more easily resolved concerns raised in the letters.

Staying in the Garden State, the court system also took an opinion on the right to assembly. In a lawsuit against New Jersey Governor Phil Murphy, AMC and other movie theater brands asserted that the regulations against their opening violated their First Amendment rights to speech and assembly, while simultaneously arguing that their establishments were safer than churches (more on this shortly).<sup>87</sup> In August 2020, the U.S. District Court for the District of New Jersey denied the plaintiff's motion for preliminary injunction, holding that the executive order limiting movie theater capacity was neutral and, thus, not unconstitutional as argued.<sup>88</sup> The court analyzed the suit under freedom of speech grounds, applying intermediate scrutiny and finding that the restrictions were narrowly tailored to the government's goal of restricting COVID-19, even if they were not the least restrictive means.<sup>89</sup> Additionally, since it was only indoor movies being limited, theaters had alternative means of communication through outdoor movies or streaming services.<sup>90</sup> Thus, the court took a position, ultimately ruling in favor of the government's restrictions. In deferring to the state executive, the court signaled a prioritization of procedure but was still willing to rule on the question at hand. One possible explanation of this

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<sup>84</sup> Complaint at 4, *Kashinsky v. Murphy*, No. 3:20-cv-03127 (D.N.J. Mar. 23, 2020) (No. 1).

<sup>85</sup> Consent Order at 1–2, *Kashinsky v. Murphy*, No. 3:20-cv-03127 (D.N.J. Apr. 21, 2020) (No. 28).

<sup>86</sup> See *New Jersey Second Amend. Soc'y v. Murphy*, No. 20-5228, 2021 WL 323723, at \*2 (D.N.J. Jan. 31, 2021).

<sup>87</sup> *Nat'l Ass'n of Theatre Owners v. Murphy*, No. 3:20-cv-8298, 2020 WL 5627145, at \*11 (D.N.J. Aug. 18, 2020).

<sup>88</sup> *Id.* at \*9.

<sup>89</sup> *Id.* at \*11.

<sup>90</sup> *Id.* at \*12.

willingness for the courts to weigh in here was that this specific question, movie theaters' ability to open, was not as politicized nor as partisan as some of the other issues we analyze.

Perhaps one of the more popularized concerns was the right to religious freedom. Part of the traction may be attributed to then-President Trump's public statements attacking state governors for closing houses of worship during COVID-19.<sup>91</sup> Additionally, it presents the strongest juxtaposition, where public safety regulations are up against the plain language of the First Amendment. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Supreme Court held that restrictions on attendance at worship services were a violation of citizens' First Amendment rights.<sup>92</sup> Specifically, the Court, ruling on an application for injunctive relief, stated that the loss of these First Amendment rights, even for a limited period of time, caused irreparable harm and thus necessitates an injunction.<sup>93</sup> The Court's decision rests on the disparate treatment of "essential" businesses and houses of worship, with the Court highlighting that "essential" businesses are able to admit as many people as they wish, while houses of worship were limited to ten or twenty-five people (depending on the zone).<sup>94</sup> Since these restrictions were not "neutral" in the eyes of the Court, the Court applied strict scrutiny and determined that the limitations could not satisfy the high burden.<sup>95</sup> The per curiam opinion reasoned that, "[s]temming the spread of COVID-19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as 'narrowly tailored.'"<sup>96</sup> The Court emphasized that these restrictions were severe and that there were many less-restrictive options, such as tailoring the capacity limit to the size of the house of worship.<sup>97</sup>

Though the Court took a stance on this issue, which was highly politicized, it was far from cohesive—with six separate opinions being published. This split within the Court further highlights the fractured approach

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<sup>91</sup> See Kevin Brueninger & Noah Higgins-Dunn, *Trump Slams Governors, Demands They Open Houses of Worship 'Right Now'*, CNBC (May 22, 2020, 4:19 PM), <https://www.cnbc.com/2020/05/22/trump-slams-governors-demands-they-open-houses-of-worship-right-now.html>.

<sup>92</sup> 141 S. Ct. 63, 66 (2020). The decision addressed both the claims raised in *Roman Cath. Diocese of Brooklyn* and *Agudath Israel of Am. v. Cuomo*, demonstrating that these concerns were not limited to one religion, sect, etc. See Application for Injunctive Relief, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), ECF No. 1. The question of bans or limits on religious worship was also viewed by the Court to be significant and clear-cut enough to merit resolution via the Shadow Docket, deciding the issue on the merits alone and without any oral argument. See *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

<sup>93</sup> *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 66–67.

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

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

<sup>96</sup> *Id.* at 67.

<sup>97</sup> *Id.*

toward rights and liberties during this period. Notably, one of the dissents emphasized the need to exercise judicial restraint, citing COVID-19 statistics to show urgency.<sup>98</sup> The dissent, written by Justice Breyer, joined by Justice Sotomayor and Justice Kagan, first writes that “COVID–19 has infected more than 12 million Americans and caused more than 250,000 deaths nationwide. At least 26,000 of those deaths have occurred in the State of New York, with 16,000 in New York City alone.”<sup>99</sup> Justice Breyer then emphasizes that these statistics show the urgency of the matter and cites to amicus curiae briefs written by the medical and scientific community.<sup>100</sup> The Court’s role, in his view, is much different than what the majority opinion seems to state. Justice Breyer argues, “[t]he elected branches of state and national governments can marshal scientific expertise and craft specific policies in response to changing facts on the ground . . . And they can do so more quickly than can courts.”<sup>101</sup> This dissent falls more in line with the Court’s precedent regarding the powers of the government during a time of crisis. The Court has historically been deferential during times of crisis, most frequently war, to the determinations of the elected branches on how to respond appropriately to the situation at hand.<sup>102</sup>

Given the timing of our data collection, a concern that was mentioned frequently was the ability to vote and, more specifically, the ability to do so safely and securely.<sup>103</sup> Voting is universally deemed a fundamental right,<sup>104</sup> leading to the reasonable assumption that the courts would be involved in protecting the election process during a time of crisis. The Supreme Court, though, disagreed. In *Republican National Committee v. Democratic National Committee*, the Court overturned the U.S. District Court for the Western District of Wisconsin, holding that the court’s involvement in the election process of Wisconsin “on the eve of an election” was improper.<sup>105</sup> The district court had ordered an injunction designed to protect absentee voting. The Court’s decision turned on the fact that the district court’s ruling provided a relief that the

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<sup>98</sup> *Id.* at 77–78 (Breyer, J., dissenting).

<sup>99</sup> *Id.* at 77 (Breyer, J., dissenting).

<sup>100</sup> *Id.* at 78 (Breyer, J., dissenting).

<sup>101</sup> *Id.* at 78 (Breyer, J., dissenting) (internal quotations omitted).

<sup>102</sup> *See generally* Epstein, Ho, King & Segal, *supra* note 83.

<sup>103</sup> We want to note that there are widespread 14th Amendment complaints regarding the right to vote as well. *See, e.g.*, *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603 (8th Cir. 2020); *Black Voters Matter Fund v. Raffensperger*, 478 F. Supp. 3d 1278 (N.D. Ga. 2020); *Bognet v. Sec’y Pa.*, 980 F.3d 336 (3d Cir. 2020). These are beyond the scope of the paper, but their importance cannot be understated.

<sup>104</sup> *See, e.g.*, *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966), *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966). *Cf.* Joshua A. Douglas, *Is the Right to Vote Really Fundamental*, 18 CORNELL J.L. PUB. POL’Y 1 (2008) (providing a comprehensive review of the Supreme Court’s opinions about voting).

<sup>105</sup> 140 S. Ct. 1205, 1205 (2020).



plaintiffs themselves had not specifically requested and that the district court thus fundamentally altered the election.<sup>106</sup> The Court thus emphasized that it was the intervention of the district court that was improper and narrowed the question to avoid addressing the deeper question about the safety of elections.<sup>107</sup> The court went so far as to include the qualifying statement that “[t]he court’s decision on the narrow question before the court should not be viewed as expressing an opinion on the broader question of whether to hold the election, or whether other reforms or modifications in election procedures in light of COVID–19 are appropriate.”<sup>108</sup> The court’s reluctance to write an outright decision regarding mail-in votes and the election process may be interpreted to reflect the validity of the concerns raised, as the decision was written *per curiam*.<sup>109</sup> Either way, it certainly reflects the tendency of the court to defer to other branches or assert the preference to prioritize institutional separations during crisis.

Another strongly politicized issue was the concern over mask mandates, which then implicated concerns of separation of powers (i.e., whether it was the federal government, state government, or municipalities that held power for restrictions and mandates).<sup>110</sup> The combination of these concerns can be seen in multiple high-profile cases, such as cases in Texas<sup>111</sup> and South Carolina.<sup>112</sup> In particular, the Supreme Court of South Carolina has ruled on two separate suits regarding mask mandates and separation of powers: first ruling that a proviso in the 2021-2022 State Appropriations Act did not prohibit university-wide mask mandates that applied universally to vaccinated and unvaccinated individuals,<sup>113</sup> and then ruling that a different proviso in the same Act prohibits a mask mandate in K-12 schools.<sup>114</sup> In interpreting the Act, the Supreme Court of South Carolina asserted that their hands were tied—claiming that, though the State Attorney General has a differing opinion from the schools and municipalities regarding mask mandates, the court is only in the role of interpretation, not legislation. Thus, argues the court, the litigation must be “resolved purely as a function of

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<sup>106</sup> *Id.* at 1207.

<sup>107</sup> *Id.* at 1206.

<sup>108</sup> *Id.* at 1208.

<sup>109</sup> *Id.* at 1206.

<sup>110</sup> Masks would become one of the most politicized events shortly after the conclusion of our data collection. As a result, much of the litigation around masks followed our data collection, coinciding with the fact that masks have become an element of a “culture war” at present.

<sup>111</sup> See Joshua Fetcher, *A Texas School District Doesn’t Require Masks. The State is Suing the District Anyway.*, TEX. TRIB. (Sept. 14, 2021), <https://www.texastribune.org/2021/09/14/texas-mask-mandate-lawsuits/>.

<sup>112</sup> See, e.g., *Creswick v. Univ. of S.C.*, 862 S.E.2d 706 (S.C. 2021); *Wilson ex rel. State v. City of Columbia*, 863 S.E.2d 456 (S.C. 2021).

<sup>113</sup> *Creswick*, 862 S.E.2d at 706.

<sup>114</sup> *Wilson*, 863 S.E.2d at 456.

statutory interpretation.”<sup>115</sup> The language regarding higher education directs colleges and universities that they are not permitted to use any funds to require students to be vaccinated or “to be present at the institution’s facilities without being required to wear a facemask,”<sup>116</sup> whereas the language regarding K-12 schools states, “[n]o school district, or any of its schools, may use any funds appropriated or authorized pursuant to this act to require that its students and/or employees wear a facemask at any of its education facilities.”<sup>117</sup> In interpreting these provisos, the court highlights that the language regarding higher education is about applying the rule to *all* students, not only those who are unvaccinated.<sup>118</sup> Thus, the court says, the mandate may remain in place.<sup>119</sup> In reconciling this with the K-12 proviso, the court reasoned the proviso specifically prohibited mandates in K-12 schools, and, because of separations of powers concerns, that must be upheld.<sup>120</sup> Specifically, the court dodged the mask question itself, stating:

We fully recognize that strong and passionate opinions exist on both sides of this debate. Yet, we must remind ourselves, the parties, and the public that, as part of the judicial branch of government, we are not permitted to weigh in on the merits of the facemask debate. Rather, we are a court that is constitutionally bound by the rule of law—specifically, separation of powers—to interpret and apply existing laws; we do not, and cannot, set public policy ourselves.<sup>121</sup>

The court thus used a common practice, judicial restraint, to avoid the politically controversial question by stating that their hands were tied by separation of powers concerns.

Throughout most of the cases concerning COVID-19 civil liberties concerns, there is a resounding pattern: language prioritizing restraint, separation of powers, and facially neutral laws. This practice has been utilized by the Supreme Court itself, especially during times of crisis. In one of the first quantitative studies examining this trend, *Epstein, et al.*, concluded that, although the Court is much more likely to curtail rights during times of war or crisis, “[i]nstead of balancing rights and security in high stakes cases directly related to the [crisis], the justices retreat to ensuring the institutional checks of the democratic branches.”<sup>122</sup> This conclusion substantiates our exploration about

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<sup>115</sup> *Id.* at 458.

<sup>116</sup> *Creswick*, 862 S.E.2d at 707.

<sup>117</sup> *Wilson*, 863 S.E.2d at 456.

<sup>118</sup> *Creswick*, 862 S.E.2d at 708.

<sup>119</sup> *Id.*

<sup>120</sup> *Wilson*, 863 S.E.2d at 459–60.

<sup>121</sup> *Id.*

<sup>122</sup> Epstein, Ho, King & Segal, *supra* note 83, at 1.

current litigation: the courts have stepped away from questions about requiring masks (which is directly related to the current crisis), but took a strong stance on churches, for example.<sup>123</sup> For the directly related question, i.e., masks, the courts did exactly what *Epstein, et al.*, suggests: “retreated” to protect institutional checks rather than deciding on the merits.<sup>124</sup> Time will tell if this trend of deferring to the elected branches of government remains or if the court seeks to involve itself during cases as the pandemic continues. In either case, our analysis provides some evidence to support the conclusion by *Epstein, et al.*,<sup>125</sup> however, it must be qualified that we examined only a handful of these cases, and did so primarily early in the pandemic.

Perhaps the most well-known example of prioritizing the protection of the institutional procedure rather than the rights and liberties of American citizens is *Korematsu v. United States*.<sup>126</sup> *Korematsu* was the result of Japanese internment during World War II, in which Japanese Americans, whether believed to have ties to Japan or not, were relocated from their homes and placed into “camps.”<sup>127</sup> These camps were initiated by Exclusion Order No. 34, which declared a “military area” covering a vast range of California.<sup>128</sup> Relying on a previous case regarding curfews during World War II,<sup>129</sup> the Supreme Court held that it was within the executive powers to issue this order.<sup>130</sup> The Court repeatedly made clear that it was deferring to the executive branch, stating, “the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.”<sup>131</sup> Thus, rather than deciding the validity of the camps, as the dissent called for,<sup>132</sup> the Court prioritized the institutional checks. This shift in focus undergirds the current patterns in COVID-19 civil liberties cases. The language reflecting judicial restraint, separation of powers, and facially neutral laws all demonstrate the underlying desire to maintain a series of process-based institutional checks during crisis.

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<sup>123</sup> While *Epstein et al.* specifically analyzes the Supreme Court, we will be applying their findings universally to the judicial system, as not every question has yet reached the Supreme Court.

<sup>124</sup> See, e.g., *Creswick*, 862 S.E.2d 706; *Wilson*, 863 S.E.2d 456.

<sup>125</sup> See *Epstein, Ho, King & Segal*, *supra* note 83.

<sup>126</sup> See 323 U.S. 214 (1944), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

<sup>127</sup> *Id.* at 216.

<sup>128</sup> See *id.* at 215. Civilian Exclusion Order No. 34 was backed by Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

<sup>129</sup> See *Hirabayashi v. United States*, 320 U.S. 81 (1943).

<sup>130</sup> *Korematsu*, 323 U.S. at 217–18.

<sup>131</sup> *Id.* at 223–24.

<sup>132</sup> *Id.* at 245–48 (Jackson, J., dissenting).

While *Korematsu* is an objectively horrendous decision, the Court raised an interesting argument regarding civil responsibility.<sup>133</sup> The Court theorized that “[c]itizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier.”<sup>134</sup> While America is not at war now, it is undeniable that we are in a time of crisis. Thus, according to the Court, the burden of responsibility should be heavier. A faction of the American public, though, seems to disagree.

## V. THE PUBLIC DISCOURSE

In light of the action (or sometimes lack thereof) by the courts during the COVID-19 pandemic, we return to the public side of this discussion and an analysis of how these issues were raised by the public at large. Concerns about rights and liberties were by no means absent during the conversation about the COVID-19 pandemic, but they did not appear to be at the front of most people’s minds—appearing in just 7% of the letters to the editor that concerned the pandemic. However, it is unsurprising that, based on the existing literature regarding threats during a time of crisis, this pales in comparison to 34% of the pandemic letters containing mention of economic issues and 49% containing discussion of health-related issues.

Though COVID-19 differed from the events that motivated earlier research into rights and liberties during a crisis, our findings are consistent with what those earlier works would lead us to expect. Regardless of whether the letter’s author was worried or optimistic regarding health; the economy; or rights, liberties, and freedom, it is quite clear from these data that much of the attention was on issues of health and the economy. While this in-and-of-itself is not surprising, when we unpack the letters that discussed civil liberties in more detail, we find some interesting trends and a more nuanced set of findings.

While it has arguably presented the most basic constitutional conflict, restricting in-person worship services accounts for only 8% of the civil liberties letters. Of those letters about worship services, 32% also involved the reverse rights framing, suggesting that even when this issue did come up in the letters, many of the authors juxtaposed the right to worship against the potential danger this posed to others. Related to the question of worship was the freedom of assembly, which was mentioned in 16% of the civil liberties letters. However, just as in the case of religious worship, a sizeable number of these assembly letters, 47%, also had a reverse rights message. Regardless of one’s feelings about the restrictions, closing or placing restrictions on an individual’s ability to worship in person or gather freely raises what might be the most straightforward constitutional question of any of the issues we discuss. Further, the addition of the reverse rights element suggests that, even when these issues were raised in

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<sup>133</sup> *Id.* at 219.

<sup>134</sup> *Id.*

the letters, a sizeable number of people were not receptive to the argument that rights to worship or assemble are untouchable.

Masks were not necessarily the hyper-partisan issue they have become, but this issue did appear in 9% of our letters to the editor. While the aforementioned First Amendment restrictions may have been the clearest-cut constitutional issue, masks are likely the least grounded in the constitution. Nonetheless, this issue has escalated since our data collection—to the point where there has been actual violence over masks, and local school board meetings have been forced to adjourn due to protests over their consideration of a mask mandate.<sup>135</sup> It is interesting, and perhaps a function of the early timeframe of the data collection, that masks were not more prevalent in the data.

Though it was surprising that masks were not more of an issue, it is unsurprising that a sizeable number of these letters, 72%, also invoked a reverse rights frame. Masks are the prime example of the principle behind this concept. Being asked to wear a mask does not infringe upon any constitutional right—it only presents at worst an inconvenience or discomfort to the individual wearing one. While one may, in theory, have a right to not wear a mask,<sup>136</sup> given the nature of how COVID-19 is spread, not wearing one poses a risk to others' rights to health and safety.<sup>137</sup>

Even though a sizeable number of the worship letters involved the reverse rights frame, there is some element of consent between the parties there. If you decide to attend worship, you have made that decision, as has everyone else in attendance. However, the broad mask mandates during the early stages of the pandemic applied to most activities where one would be in the presence of others, such as grocery shopping, attending school, or traveling. While one may “consent” to attend a religious service and be exposed as a result, it is more of a reverse rights idea that, in the course of normal daily life, one could be exposed to someone who decides to not wear a mask, potentially endangering their life. For this reason, it is unsurprising that we saw so many of the letters calling out those who refused to wear a mask, as there is no constitutional right to not wear a mask, and exercising this perceived right endangered those around them.

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<sup>135</sup> See, e.g., Clint Berge, *EC School Board Adjourns Meeting When Some Attendees Refuse to Wear Masks*, ABC NEWS (Sept. 21, 2021), <https://wqow.com/2021/09/21/watch-ec-school-board-adjourns-meeting-when-some-attendees-refuse-to-wear-masks/>; Martin Slagter, *Manchester School Board Adjourns Meeting When Parents Refuse to Wear Masks*, MICH. LIVE (Sept. 21, 2020, 7:04 PM), <https://www.mlive.com/news/ann-arbor/2021/09/manchester-school-board-adjourns-meeting-when-parents-refuse-to-wear-masks.html>.

<sup>136</sup> We do not endorse the opinion that there is a constitutional right to not wear a mask. Rather, we are referring to a broader perceived “right” to not be told what to do.

<sup>137</sup> We refer to someone’s “right to health” or “right to safety” as basic human rights, as the United Nations has codified them as such. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25 (Dec. 10, 1948).

Gun rights, despite being the source of considerable litigation,<sup>138</sup> appeared in only 5% of the civil liberties, rights, and freedom letters. The letters that mentioned gun rights were also less likely to make use of the reverse rights argument, which was present in only 31% of those letters. Despite guns being a hot-button issue, as well as restrictions on gun stores and shooting ranges during the pandemic, authors were the least likely to raise this concern out of any theme for which we coded.

Finally, voting was the most mentioned of the specific issues that we analyzed, as it was present in 23% of the civil liberties, rights, and freedoms letters. This may simply have been a function of there being considerable debate about how states would expand or restrict voting rights amid the pandemic. Couple this with a highly contentious general election and a competitive Democratic primary, and it is unsurprising that many of letters to the editor raised this issue. Voting-related letters also appear to be something distinct from the others, as there was no overlap between the reverse rights framing and voting letters. This lends evidence to our conceptualization of reverse rights. If the reverse rights framing is about harming others through the exercise of rights, or perceived rights, voting does not pose the same type of risk as do masks, assembly, or attending worship services.

While voters were willing to engage in some discussion of their rights and liberties in the midst of the COVID-19 pandemic, the discussion here paled in comparison to the talk about health, the economy, and partisanship. Our findings confirm previously researched attitudes towards rights and liberties during a crisis, specifically that these issues are just not as salient. However, our analysis of the reverse rights language adds an important caveat to that conclusion. The public does not appear to be disinterested in rights and liberties, instead, they are engaged in a balancing act between traditional civil liberties and the right to health and safety. This more nuanced conclusion is important to consider for those studying rights and liberties during the next crisis.

#### VI. YOUR RIGHT TO SPREAD A GLOBAL PANDEMIC ENDS AT MY MASK

Interestingly, though a faction of the American public argued that their rights were infringed upon, an equal, if not greater, population was arguing almost the opposite. It is this “reverse rights” framing that we find to be the most interesting finding, and something that distinguishes the reaction to the COVID-19 pandemic from the crises that motivated earlier scholars to study rights during a time of crisis. While we are not the first to present this “reverse rights” framing, as we discuss below, it is striking to see an analysis from more than 100 years ago reemerge with such prominence.<sup>139</sup>

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<sup>138</sup> See generally *New Jersey Second Amend. Soc’y v. Murphy*, No. 20-5228, 2021 WL 323723, at \*2 (D.N.J. Jan. 31, 2021).

<sup>139</sup> See Chafee, *supra* note 79, at 942.

Rather than being concerned by the right to not wear a mask or attend in-person worship, the letters in this category took the perspective that the rights of the individual ends when the life of another is at risk. Many recognized that individuals may have the freedom to not wear a mask or that canceling in-person worship raised First Amendment questions. Taking the conversation further, they juxtaposed those rights against the rights of others to basic safety (or even life, given the nature of the COVID-19 virus). This is not an unfounded claim, as restricting rights for the protection of other citizens has been a pattern of the Court.<sup>140</sup> Beyond the Court's precedent, though, the moral argument of restricting rights for others has been around for decades. In 1919, the Harvard Law Review published *Freedom of Speech in War Time*, written by Zechariah Chafee, Jr.<sup>141</sup> This is one of the first articles to explore the quandary and presents the following hypothetical:

The agitator asserts his constitutional right to speak, the government asserts its constitutional right to wage war. The result is a deadlock. Each side takes the position of the man who was arrested for swinging his arms and hitting another in the nose, and asked the judge if he did not have a right to swing his arms in a free country. 'Your right to swing your arms ends just where the other man's nose begins.'<sup>142</sup>

Though, as we have stated, COVID-19 is not technically a "war,"<sup>143</sup> it is nevertheless a crisis, and thus is being treated similarly by the Courts. With that, COVID-19 presents a similar hypothetical: the government's right to stop the spread of the virus, and an individual's personal liberty to, for example, not wear a mask. Some letter authors thus raised this deadlock, arguing that a person's liberty ends where it begins to directly hurt someone else.

After posing the hypothetical regarding war above, Chafee explains the solution: balance. Rather than looking only to the courts, the balance must be achieved by considering basic human facts.<sup>144</sup> Chafee argues that "there are individual interests and social interests, which must be balanced against each

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<sup>140</sup> See Epstein, Ho, King & Segal, *supra* note 83, at 22.

<sup>141</sup> Chafee, *supra* note 79.

<sup>142</sup> *Id.* at 957.

<sup>143</sup> Despite the rhetoric of President Trump claiming to be a "War Time President" and efforts to use the Defense Authorization Act to facilitate a response to COVID-19. See Paul M. Renfro, *War Has Been the Governing Metaphor for Decades of American Life. This Pandemic Exposes Its Weaknesses*, TIME (April 15, 2020, 6:23 PM) <https://time.com/5821430/history-war-language/>. See also Tom Vanden Brook, *Trump Invokes Wartime Authority of Defense Production Act to Speed Coronavirus Aid. What is it?*, USA TODAY (Mar. 18, 2020, 1:51 PM), <https://www.usatoday.com/story/news/politics/2020/03/18/coronavirus-what-defense-production-act-trump-has-invoked/2865598001/>.

<sup>144</sup> Chafee, *supra* note 79 at 957.

other if they conflict, in order to determine which interest shall be sacrificed under the circumstances and which shall be protected and become the foundation of a legal right.”<sup>145</sup> The Supreme Court has provided weight to Chafee’s analysis, directly citing it in both times of crisis and generalized individual rights cases.<sup>146</sup>

Though we do not discuss vaccination in this article, as there was not yet a vaccine at the time of our data collection, *Jacobson v. Massachusetts*<sup>147</sup> provides an additional, important framework for the concept we have deemed “reverse rights” and reflects a logic similar to what is seen in the Chafee article above.<sup>148</sup> Decided in 1905, *Jacobson* predates Chafee’s analysis by more than a decade and considers a Massachusetts state statute which mandated vaccinations or one faced a penalty of five dollars.<sup>149</sup> The Supreme Court upheld the mandate—concluding that it is within the state government’s “police powers”<sup>150</sup> to do so. Though refusing to outline exactly what may fall under “police powers,” the Supreme Court articulated that “the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”<sup>151</sup> The Court found that both of these requirements were met by the Massachusetts statute.<sup>152</sup> In doing so, the Court reasoned:

it is to be observed that the legislature of Massachusetts required the inhabitants of a city or town to be vaccinated only when, in the opinion of the board of health, that was necessary for the public health or the public safety. The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body; and surely it was appropriate for the legislature to refer that question, in the first instance, to a board of health composed of persons residing in the locality affected, and appointed, presumably, because of their fitness to determine such questions. To invest such a body with authority over such matters was not an unusual, nor an unreasonable or arbitrary, requirement. Upon the principle of self-defense, of paramount necessity, a community has the right

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

<sup>146</sup> *See, e.g.,* Schaefer v. United States, 251 U.S. 466, 486 (1920) (overturning a lower court’s conviction under the Espionage Act for the distribution of newspapers in German); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 746 (2014) (Ginsburg, J., dissenting) (arguing that Hobby Lobby’s claim about religious liberty would harm its employees and thus is not valid).

<sup>147</sup> 197 U.S. 11 (1905).

<sup>148</sup> *Id.* at 27–30.

<sup>149</sup> Five dollars in 1905 is approximately \$155 today. *See* U.S. INFLATION CALCULATOR, <https://www.usinflationcalculator.com/> (last visited Aug. 19, 2022).

<sup>150</sup> *Jacobson*, 197 U.S. at 25.

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

<sup>152</sup> *Id.* at 27.



to protect itself against an epidemic of disease which threatens the safety of its members.<sup>153</sup>

The use of the term “self-defense” is especially interesting given Chafee’s later analysis about protecting another citizen’s wellbeing. Chafee draws the distinction between an individual’s right, and another’s;<sup>154</sup> *Jacobson* analyzes the tension between a government mandate and a community’s wellbeing.<sup>155</sup> Both of these tensions have come to the spotlight during the COVID-19 crisis.

It is most likely not the case that our letter writers had specifically Chafee or the *Jacobson* decision in mind when they promulgated their reverse rights arguments, but it is striking how closely the rhetoric is mirrored. A number of letters discussed the concept of self-preservation or self-defense seen in *Jacobson*, and many more used variations of Chafee’s “[y]our right to swing your arms ends just where the other man’s nose begins.”<sup>156</sup> In this regard, the arguments presented in these reverse rights letters may demonstrate the most sophisticated understanding of Constitutional law across all of the letters analyzed.

Justice Harlan’s majority opinion in *Jacobson* reads, in part, “[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own [liberty], whether in respect of his person or his property, regardless of the injury that may be done to others.”<sup>157</sup> A number of the reverse rights letters discussed this reality—that while individuals may have rights and liberties, in order to have a functional society with liberty, sometimes individual rights must be constrained for the greater good.

While many other projects have analyzed the loss of rights and liberties during a time of crisis, such as after the 9/11 terrorist attacks, in these reverse rights letters we see a different way of conceptualizing a similar notion. Rather than simplistically lamenting the loss of rights, we see authors recognizing other rights, such as life and health, and placing them, and their broader social significance, above more individualistic rights. The reverse rights letters that appeared in conjunction with closing or limiting in-person worship services were not suggesting that these rights should not return, but instead that, for the time being, collective rights and a right to health or even one’s life should take priority. This suggests not that people were unconcerned with rights and liberties during the pandemic but instead that they looked beyond the four corners of the Constitution and the Bill of Rights by placing a higher value on more universal,

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<sup>153</sup> *Id.*

<sup>154</sup> Chafee, *supra* note 79, at 942.

<sup>155</sup> *Jacobson*, 197 U.S. at 27.

<sup>156</sup> Chafee, *supra* note 79, at 957.

<sup>157</sup> *Jacobson*, 197 U.S. at 26.

and even basic, human rights such as life and health. Rather than suggesting that people give up rights in the face of threat, it may be that some emphasis on individual rights, which can endanger others, diminishes while an emphasis on basic and collective rights rises. It is the understanding that to have individual rights tomorrow, we must collectively survive today.

## VII. CONCLUSION

This project provides both confirmation and complication of some of the existing literature regarding rights and liberties during a pandemic. Recognizing that the data presented here are by no means the end of the conversation regarding public attitudes toward rights and liberties during a pandemic, our analysis presents several important conclusions. In the broadest sense, we find evidence in support of the conclusion that rights and liberties are not front of mind for the public amid a crisis. Instead, we find that safety and security, be it in terms of health or the economy, are more salient themes compared to rights and liberties. Further, to the extent that health and economic wellbeing can be conceptualized as a “threat” in the current pandemic, our data support the conclusion that threat takes precedence over rights and liberties in the public’s mind. The pandemic, compared to the events that motivated some of these earlier studies, presents a different set of considerations which we believe may explain some of these results.

With a closer look at how the courts have been considering litigation during the COVID-19 pandemic, our preliminary data and analysis suggest that the general conclusions of *Epstein, et al.*,<sup>158</sup> have stood the test of time. Equating the COVID-19 pandemic with a similar crisis or war, the courts have continued to avoid politicized questions and defer to other branches—only taking a stance on issues that they deem “clear cut” when balanced with government purposes. Closing churches, for example, failed the balancing test in *Roman Catholic Diocese v. Cuomo*,<sup>159</sup> as the Supreme Court found that the right to free exercise was paramount, and the legislation was not narrowly tailored. However, when it comes to masks—arguably the most divisive issue the nation currently faces—the courts defer, avoiding answering the divisive question at all.<sup>160</sup>

This pattern can be seen in other crises, such as in *Korematsu v. United States*,<sup>161</sup> where the judicial branch deferred to other branches, placing individual rights and liberties on the back burner. We emphasize again that this analysis focuses on the initial reaction during the first few months of the pandemic. A future project may look more broadly at this question once the proverbial dust

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<sup>158</sup> See Epstein, Ho, King & Segal, *supra* note 83.

<sup>159</sup> 141 S. Ct. 63, 67 (2020).

<sup>160</sup> See, e.g., *Creswick v. Univ. of South Carolina*, 862 S.E.2d 706, 708 (S.C. 2021); *Wilson ex rel. State v. City of Columbia*, 863 S.E.2d 456, 459–60 (S.C. 2021).

<sup>161</sup> See 323 U.S. 214, 217–19 (1944), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

has settled, however, our data and analysis do appear to support *Epstein, et al.*'s conclusions.

The universality of the COVID-19 pandemic may have heightened the sense of threat that previous work has found to be so important. Communists, socialists, and assorted leftists in the 1950s, and then terrorism in the 2000s, were abstract threats for most people. Despite the rhetoric amid the Cold War, it was nonetheless exactly that, a Cold War, and despite the horrific nature of the 9/11 terrorist attacks, the possibility that one would be hurt or killed by a terrorist attack was exceedingly low.<sup>162</sup> COVID-19 on the other hand has killed more than 675,000 Americans in less than two years and infected millions more.<sup>163</sup> Further, the efforts taken to slow the spread of the virus have impacted almost everyone in the nation—and changed our everyday lives. The sheer scale and scope of the pandemic may explain the unique twist on the rights language documented in the letters coded. Specifically, when confronted with restrictions and mandates to slow the spread of a virus, which are more direct and observable (as compared to a hypothetical restriction on an unpopular speaker or enhanced screening one only sees at an airport), Americans engage in a more nuanced discussion of balancing constitutional rights and liberties with more basic rights to health and safety.

It was in these reverse rights letters that we saw a surprising level of sophistication in how Americans understand rights, especially when exercising those rights impacts others. Rather than suggesting these rights are untouchable and absolute, we were surprised to see that many of the letters expressed sentiment similar to how the Supreme Court has handled these issues, specifically balancing individual rights versus safety and security and giving special consideration to the context and situation presented to them. For example, in a May 12 letter to the *Seattle Times*, one author said “[a]ny right that is given to us by God, the Constitution or our legislators has limits. The First Amendment covering free speech does not cover dangerous speech like yelling fire in a crowded theater.”<sup>164</sup> Another letter made a similar claim but specifically mentioned First Amendment rights to worship and assemble but realized how those rights can be limited and especially at a time like this for public health

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<sup>162</sup> *American Deaths in Terrorist Attacks, 1995-2016*, NAT'L CONSORTIUM FOR THE STUDY OF TERRORISM AND RESPONSES TO TERRORISM (Nov. 2017), [https://www.start.umd.edu/pubs/START\\_AmericanTerrorismDeaths\\_FactSheet\\_Nov2017.pdf](https://www.start.umd.edu/pubs/START_AmericanTerrorismDeaths_FactSheet_Nov2017.pdf) (showing that the number of people killed by terrorist attacks in the United States between 1995 and 2016 was 3,277).

<sup>163</sup> Adeline, *supra* note 22.

<sup>164</sup> Letter to the Editor, *Help Protect Others*, SEATTLE TIMES (May 12, 2020), <https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/17AE9385329EC168>.

reasons.<sup>165</sup> And finally, a March 28 letter to the St. Louis Post-Dispatch correctly noted that the “. . . the U.S. Supreme Court has ruled repeatedly in favor of the legitimacy of extra-constitutional measures in the event of a national emergency”<sup>166</sup>

Based on our letters, Americans were not just willing to table rights for others but were also willing to do it for themselves. In the process of doing so, they framed the balancing act of rights versus rights. It was not that they were willing to forgo or surrender” their rights,<sup>167</sup> but instead that they weighed those individual rights against collective rights and broad rights to wellbeing. This is an important distinction—it was not that people necessarily wanted to, for example, surrender the right to assemble for safety, but rather that they were weighing the right to assemble against the right of others to health.

Recognizing the caveats in the use of letters to the editor and data collection early in the pandemic, the analysis here suggests a challenge to some traditional discourse regarding rights and liberties during times of crisis. Instead of being unconcerned with rights or the implications of denying rights during a crisis, many in the letters appear to engage in a more thoughtful consideration than previous literature suggests. Authors recognized the magnitude of the situation and of placing limits on rights and came down on the side that, at the moment, more fundamental rights like the safety of themselves and those around them need to take precedence. It is not that voters do not care about rights, it is rather that they care about rights in a context broader than the Bill of Rights. Research looking at rights amid a crisis should be attentive to this type of language and nuanced discussion, as it reflects a level of consideration and analysis that deserves more consideration and attention.

Future work may take this analysis in a number of different directions. The data presented here is limited to the first few months of the pandemic, where the entire experience was new and frightening for many. As the pandemic has worn on and fatigue has settled in, there may be a greater reluctance to surrender the rights and liberties that enable “normal life,” and thus we may see a greater degree of backlash to restrictions. For example, masking, which appeared in some of our letters, has become a hot-button political issue in the months after our data collection ended.

By expanding the time frame, a more systematic doctrinal analysis can also be conducted. The analysis here only scratched the surface of cases regarding COVID-19 restrictions. A future project may involve tracking the

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<sup>165</sup> Letter to the Editor, *Protecting Public Health*, ORANGE CNTY. REG. (Apr. 14, 2020), <https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/17A562299075DE00>.

<sup>166</sup> Letter to the Editor, *The Constitution Should Be Flexible During an Emergency*, ST. LOUIS POST-DISPATCH (Mar. 28, 2020), <https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/179FE1A906ADA3F8>.

<sup>167</sup> See generally *supra* Section VI.

litigation surrounding each of these issues to see how they differ by both location and timing since the response to COVID-19 and government efforts to slow its spread have evolved over time and are different depending on where in the nation one looks.

Research may also approach the newspapers and data collection regarding public attitudes in a more expansive and quantitative direction. Due to the newness of the experience, we believe that there was much to be gained in terms of qualitative data by hand coding the letters. Future projects may take this type of content analysis more broadly, analyzing more papers and other sources of public commentary, such as social media. By expanding the data collection process, future projects can build on the groundwork and fundamental ideas suggested here.