On the Constitutionality of Hard State Border Closures in Response to the COVID-19 Pandemic

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ON THE CONSTITUTIONALITY OF HARD STATE BORDER CLOSURES IN RESPONSE TO THE COVID-19 PANDEMIC

BENJAMEN FRANKLEN GUSSEN

I investigate the constitutionality of hard state border closures in the United States as a prophylactic response to a pandemic. This type of border closure prevents people from entering a State, except for exempt travelers, a category that includes, for example, military, judicial and government officers, and people granted entry on compassionate grounds. Those allowed to enter usually have to then go through a quarantine regime before being released into the community. During the COVID-19 pandemic, no State has attempted such closures. However, epidemiological experts suggest that, in comparison to other border and non-border measures, such closures are more effective. Given the World Health Organization prediction of more pandemics in the foreseeable future, it is imperative that the constitutionality of such hard closures is investigated. I use structural analysis to argue that a recent challenge to hard border closures in Australia suggests that, under a strict scrutiny review, the Supreme Court is likely to uphold such closures in the United States. While actual implementation requires investigating issues that go beyond a constitutional analysis, these findings highlight the need for a wider conversation around a federal goldilocks zone when responding to the next pandemic.

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I. INTRODUCTION

The World Health Organization (WHO) Director-General, Dr. Tedros Adhanom Ghebreyesus, ushered the first International Day of Epidemic Preparedness, held on 27 December 2020, by reminding us that the coronavirus crisis “will not be the last pandemic.” Our preparedness to respond to the next pandemic depends on the lessons we have learned in 2020. One key lesson is the alarming speed with which COVID-19 has spread across the globe. The basic reproduction rate for COVID-19 ($R_0$) is estimated at 5.7, which means that one person infected with COVID-19 can potentially transmit the virus to 5-6 people. In comparison, the 1918 Spanish flu had a reproduction rate between 1.4 and 2.8. In some countries, like Australia, the first line of defense was to close the national borders, given this high contagion rate. COVID-19 was declared a worldwide pandemic by the WHO on 11 March 2020.

On 21 January 2020, the Australian Chief Medical Officer, Dr. Brendan Murphy, determined that the newly emergent ‘human coronavirus with pandemic potential’ was a communicable disease with potential to cause significant harm to human health. Australian federal biosecurity officials began screening arrivals on flights from Wuhan, China on 23 January 2020. Australia recorded its first case on 25 January 2020. On 1 February, the Commonwealth government required returning citizens who had been in mainland China to self-quarantine for 14 days and closed the border to all

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3 One of the key lessons is the need for an integrated framework that enforces the same standards of protection to humans and animals alike. See, e.g., Marita Giménez-Candela, The collapse of the past: COVID-19, 11 DERECHO ANIMAL (F. ANIMAL L. STUD.) 12, 13 (2020) (arguing for the need to establish “a new ethic of integrated health that does not exclude animals, but includes their protection, and harmoniously integrates human beings with nature.”).

4 WHO Director-General’s opening remarks at the media briefing on COVID-19 - 11 March 2020, WORLD HEALTH ORGANIZATION (Mar. 11, 2020), https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (“[The] WHO has been assessing this outbreak around the clock and we are deeply concerned both by the alarming levels of spread and severity, and by the alarming levels of inaction. We have therefore made the assessment that COVID-19 can be characterized as a pandemic.”).


6 Id.


8 WORLD HEALTH ORGANIZATION, supra note 4.
foreign nationals arriving from that country. The same rules were soon applied to persons who had been in Iran, South Korea and Italy. During this time, the Australian States and Territories initiated testing and contact tracing regimes, while hospital intensive care and ventilator capacities were ramped up across the country. From 16 March 2020 all travelers arriving in Australia from any destination were required to self-isolate for 14 days and on 20 March 2020 the national border was entirely closed to non-residents and non-citizens.9

State borders were also closed to Australian citizens within Australia, and only exempt travelers were allowed to enter. The germane example is that of Western Australia, which closed its borders at midnight on 5 April 2020 pursuant to the Quarantine (Closing the Border) Directions, issued under the Emergency Management Act 2005 (WA) by the Commissioner of Police and State Emergency Coordinator … The Directions prohibit entry to Western Australia of anyone who does not qualify as an “exempt traveler”, a category that includes, for example: military, judicial and government officers; members of the Commonwealth Parliament and their staff; invited health and emergency service workers; transport, freight and logistics workers; fly-in-fly-out mine workers; and people granted entry on compassionate grounds. The Direction allows for conditions of entry to be imposed on any exempt traveler, including requirements as to quarantine. Putting to one side those categories of exempt traveler, and anyone benefitting from the residual discretion to permit in other exceptional circumstances, the Direction amounted to a “hard” border closure – that is, non-residents were not given the option of undertaking self-quarantine or entering hotel quarantine, even at their own expense, in order to earn the right of entry.10


Based on evidence provided by epidemiological and public health experts, these border closures proved to be critical in preventing the spread of COVID-19 at the state and national levels. As of early January 2021, the total number of cases in Australia was 28,595 and the total number of total deaths was 909. As a fraction of the total population, the number of total deaths is around 0.004 percent. Similarly, as of early January 2021, the number of cases in Western Australia was 875 with only nine deaths, or 0.00035 deaths per 100 inhabitants. In contrast, in New South Wales and Victoria, the two States that decided not to close their borders, and their combined number of cases were 25,417 with 874 deaths, which is significantly higher, even given their higher population density relative to the other States.

In the United States, state-imposed restrictions in response to the COVID-19 pandemic were also introduced through emergency measures intended to control the spread of the pandemic by curtailing the right to interstate travel. Some governors tightened their borders, but all stopped short from introducing hard border closures, opting instead for quarantine measures. For example, Texas Governor Greg Abbott signed executive orders imposing a fourteen-day mandatory self-quarantine on travelers coming to Texas from hotspots. While these state interventions seem to violate the essence of the federal compact in the United States, in comparison, the Governor of Western Australia went further, imposing hard border closures that prevented people from entering into the State. Each State and Territory developed their own set of entry

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11 Palmer v. State of Western Australia (No 4) [2020] FCA 1221 (25 August 2020) [71], [79]; Cf., Nicholas Aroney & Michael Boyce, supra note 9, at 28 (noting that the evidence “did not take into consideration the economic, social and individual impacts of the border closures, even though these latter factors could be relevant to a determination of whether the measures were reasonably proportionate” and that the evidence did not distinguish “between the probability of infection and the impact on human health in terms of morbidity and mortality”).


Intra and interstate controls reflected the latest evidence of community transmission within each jurisdiction:

Replicating subnational border closures during the Spanish flu, Tasmania (March 19) and Northern Territory (March 21) were the first to implement hard border closures. The closures refused entry to the state/territory even for some of its residents. Such closures were not recommended by the AHMPPPI [Australian Health Management Plan for Pandemic Influenza], and yet on March 24, South Australia also closed its borders, Queensland followed on March 25, and Western Australia on April 6. The only states with no hard border closures are the most populous, New South Wales and Victoria, despite both having higher community spread than the other states/territories combined. Although not closed they are effectively enclosed (to other states but not to each other) given closures and domestic travel bans elsewhere. Internal border closures were not publicly opposed by the Commonwealth government. This creates an impression of Australia protecting itself against international outsiders as well as the rest of Australia protecting itself against the 58 percent of Australians who live in New South Wales and Victoria.17

In contrast, the United States did not close neither its federal nor state borders, although some restrictions have been implemented at both levels.18 As of 10 January 2021, the United States has 21,761,186 confirmed cases and 365,886 deaths. That is a death rate of around 0.1115 percent, 28 times higher than that in Australia. While there are important geographic and demographic differences between the two counties,19 a critical question still emerges, namely, whether pandemic State border closures similar to those seen in Western Australia can be implemented as a first line of defense in the United States.

Historically, there were hard state border closures—but only briefly. For example, Texas closed its border with Louisiana following reports of yellow fever in New Orleans:

17 Kim Moloney & Susan Moloney, supra note 13.
19 For example, the fact that Australia is an island continent with a population density of 8 per square mile, compared to a total U.S. land border of around 6,000 miles (excluding the Alaska-Canada border), and a density of 90 per square mile in the United States.
On or about the 31st day of August, 1899, a case of yellow fever was officially declared to exist in the City of New Orleans ... as soon as said first case was reported, the said William F. Blunt, Health Officer of the State of Texas, claiming to act under the provisions of Article 4324 of the Revised Civil Statutes, under the pretense of establishing a quarantine, placed an embargo on all interstate commerce between the City of New Orleans and the State of Texas, absolutely prohibiting all common carriers entering the State of Texas from bringing into the state any freight or passengers, or even the mails of the United States, coming from the City of New Orleans, and to enforce these orders he immediately placed, and now maintains, armed guards, acting under the authority of the State of Texas, on all the lines of travel from the State of Louisiana into the State of Texas, with instructions to enforce the embargo declared by him *vi et armis*, which instructions these armed guards are carrying out to the letter; that about six days later, he modified his order so as to permit the government of the United States to carry and deliver the mails, and also modified his order so as to permit persons and their baggage to enter the State of Texas, after ten days’ detention at the quarantine detention camps established by him, and after fumigation of their baggage; but that he now maintains, and announces his intention to maintain indefinitely his absolute prohibition of all interstate commerce between the City of New Orleans and the State of Texas ...  

Note however, that the 1899 hard border closure lasted only for six days and was replaced by a state-run quarantine regime. Notwithstanding, Louisiana challenged the border closure arguing that it was unnecessary to protect public health and that it was designed to benefit cities in Texas at the expense of commerce with New Orleans. The Court decided that it did not have original jurisdiction to hear the case. The topic of subnational borders has received little attention in the social sciences; the same can be said about the role of subnational borders in contemporary research on federalism. In fact, some have suggested that such

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20 Louisiana v. Texas, 176 U.S. 1, 4 (1900) (emphasis added).
22 176 U.S. at 23 (“Finally, we are unable to hold that the bill may be maintained as presenting a case of controversy between a state and citizens of another state. Jurisdiction over controversies of that sort does not embrace the determination of political questions, and, where no controversy exists between states, it is not for this Court to restrain the governor of a state in the discharge of his executive functions in a matter lawfully confided to his discretion and judgment.”).
24 There is a growing literature on subnational constitutionalism. See, e.g., Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583 (2010); Patricia Popelier, *Subnational Multilevel Constitutionalism*, 6 PERSP. ON FED. E1 (2014). However, emphasis in this literature is on comparative analyses of the constitutional designed found at the
borders are no longer relevant. For example, Jessica Bulman-Pozen argues that American federalism is evolving away from the constitutional design dividing powers between the federal government and the States, and towards a partisan federalism that ensures the porosity of state borders. Dava Cox Downey and William Myers evince this bipartisan federalism in the context of the United States response to COVID-19: “Vertical collaboration and horizontal collaborative efforts in the United States have largely been on partisan lines, reflecting the limitations of American-style executive federalism in the face of a global pandemic.” Even in the face of these inefficiencies, the response to the COVID-19 pandemic has illustrated just how critical subnational governments are in preventing the spread of this pandemic. The declaration of a state of emergency by state governments allowed for prophylactic policies such as: non-symptomatic testing, use of personal protection equipment such as face masks, school closures, social distancing and social gathering limitations, home-bound policies such as working-from-home requirements, curfews and lockdowns; mandatory quarantine policies, including self-isolation; closure of non-essential businesses and services, including closure of restaurants and reduced public transportation services. However, hard state border closures, arguably the most effective measure in reducing the risk of community transmission, was not implemented consistently in the three great Anglo-American federations, the United States, Canada, and Australia. We find in Australia the full potential of hard closures that obviated the need for measures such as curfews and shutdowns, and thus prevented the onset of much of the grim economic consequences brought by these measures.

subnational level, rather than the role of subnational borders in forging an independent subnational constitutional identity.


28 Id. at 567.

29 In Canada, the residuum of powers rests with the federal government, while the Provinces have primary responsibility for public health. Hence, while any attempt by a Province to enforce hard border closures on inter-provincial travel is ultra vires, there is an inherent balancing in introducing these closures in response to a pandemic. See Emmett Macfarlane, Public Policy and Constitutional Rights in Times of Crisis, 53 CAN. J. POL. SCI 299, 300 (2020); Sujit Choudhry, COVID-19 & The Canadian Constitution, CANLII CONNECTS (July 10, 2020) https://www.canliiconnects.org/en/commentaries/71478 (arguing that the lack of a national agency for public health has not diminished the effectiveness of cooperation between the federal and provincial governments in responding to the pandemic). See also, Benjamen Franken Gussen, Reflections on La Fata Morgana: Watsonian “prestige” and Bagehotian “efficiency”, 12 J. COM. L. 80 (2017) (arguing that Canadian federalism is moving towards a shift of these residuum powers to the Provinces); Colleen M. Flood et al., Reconciling civil liberties and public health in the response to COVID-19, 5 FACETS 887, 889 (2020) (“At points during the outbreak, some provinces (New Brunswick, Prince Edward Island, Newfoundland and Labrador and Quebec) have prohibited ‘non-essential’ travel (tourism and social
The key point is that Western Australia’s hard border closures were upheld by the High Court of Australia as constitutional.\textsuperscript{30} Does this outcome suggest that similar hard state border closures would also be upheld in the United States and Canada? This article focuses on analyzing the possibility of a similar outcome in the United States.

In Australia, there have only been legal challenges to hard state border closures, and only in response to COVID-19. Historically, similar state border closures were implemented in response to the 1918 Spanish flu (H1N1) virus that infected one-third of the world’s population. In January 1919, Queensland closed its border with New South Wales in an effort to stop the spread of the virus,\textsuperscript{31} notwithstanding the indignation of locals cut off from essential services, joined by those unable to return home. Unlike the COVID-19 border closures, however, the 1918 Spanish flu closures did not attract legal challenges. Nor did supra- and substate restrictions on movement. Hence, while since March 20, 2020, Australia closed its international borders to all non-citizens and non-residents,\textsuperscript{32} and metropolitan Melbourne was under Stage 4 mobility restrictions from August 2 to October 28, 2020,\textsuperscript{33} these restrictions have not attracted constitutional challenges, unlike State border closures.

In contrast, as of early October 2020, around 1,000 lawsuits have been filed across the United States, challenging State and municipality-imposed restrictions.\textsuperscript{34} Historically, emergency quarantine orders ordinarily have not visits), implementing checkpoints at points of entry where travelers are questioned. More recently, the Atlantic provinces have established an ‘Atlantic bubble’, allowing residents of Newfoundland and Labrador, Prince Edward Island, Nova Scotia, and New Brunswick to travel without the 14-day quarantine imposed on visitors from non-Atlantic provinces”). As for the territories, they can impose such hard border closures because they are controlled directly by the federal government. See, e.g., Katie Toth, NWT to close borders to all inbound travel by air, land and port – with limited exceptions, CBC NEWS (20 March 2020), http://cbc.ca/news/canada/north/nwt-travel-ban-covid19-1.5505505 (reporting on hard border closures in the Northwest Territories in response to the COVID-19 pandemic).

\textsuperscript{30} See Palmer v Western Australia (2021) 95 ALJR 229 (Austl.). The High Court of Australia (HCA) applied a proportionality analysis to the interstate mobility right in section 92 of the Australian Constitution.


\textsuperscript{34} Association of State and Territorial Health Officials, Legal Challenges to State COVID-19 Orders, ASTHO REPORT (October 2020).
been found to infringe individual constitutional rights. Over the last century, however, individual liberties such as interstate travel have become salient. This evolution in federal constitutional law suggests that while a health emergency can provide justification for State restrictions, their constitutionality does not rest on State broad police powers, but on traditional judicial scrutiny.

The relevant research question, namely, whether state border closures similar to those seen in Western Australia can be implemented in the United State, is broad and touches on a number of disciplines. Therefore, this article will only focus on the constitutional aspect of hard state borders. There could still be other hurdles that prevent the introduction of such closures in the United States, at least in many States, or even if implemented, makes these border closures less effective than those in Australia. But without ascertaining the constitutionality of such closures, further analysis of their efficacy would be a moot point.

In addition, I focus only on the tension between hard state border closures and the right to interstate travel. Arguments based on burdening interstate commerce can be reduced to the same analytical structure of interstate mobility under strict scrutiny. The fact that the effect of hard state border closures on interstate commerce is only incidental pivots the analysis towards a balancing exercise of the compelling state interest behind the closures and the net benefit from the closures. In the context of responses to COVID-19, the burden of hard state border closures is likely to be upheld as constitutional. For example, in Dean Milk Co. v. City of Madison, Wis., Madison passed an ordinance requiring local pasteurization of all milk sold in the city. Dean Milk, an Illinois milk producer, challenged the constitutionality of this ordinance under the Dormant Commerce Clause, arguing that the ordinance was intended to protect local industries in Madison. A six-to-three majority of the Supreme Court agreed, finding the requirement for local pasteurization discriminated against interstate commerce. Justice Clark, who delivered the majority opinion explained that “In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against


36 See Jeffrey D. Jackson, Tiered Scrutiny in a Pandemic, 12 CONLAWNOW 39, 40 (2020).

37 See Palmer v. Western Australia (2021) 95 ALJR, ¶¶ 241-242 ¶¶ 45, 48, 50 (Kiefel CJ and Keane J), 249 ¶ 92, 253 ¶ 114 (Gageler J), ¶ (Gordon J) ALJR 229 (Austl.).

38 Dean Milk Co. v. City of Madison, Wis., 340 U.S. 349 (1951).
interstate commerce”. In *Bibb v. Navajo Freight Lines*, the Supreme Court struck down an Illinois statute requiring contour instead of customary straight rear fender mudguards to be installed on trucks and trailers operated on its highways. In delivering the Supreme Court opinion, Justice Douglas illustrated the requisite public safety effect of the impugned law as a net balancing analysis. The approach suggests a compelling state interest analysis, as found under the first prong of strict scrutiny. The second prong, however, will take into account the availability of less restrictive alternatives. In this sense, when analyzing the constitutionality of hard state border closures, the challenge to these closures from infringements on interstate travel encompass any discriminatory burden on interstate commerce.

The same argument applies to the first guarantee of section 92 under the Australian Constitution. The meaning of “trade and commerce” in section 92 is the same as that in section 51(i) (trade and commerce power). To ascertain whether a legislative or administrative action does in fact infringe the first guarantee in section 92, the interest underlying the said action has to be analyzed against the protectionist effect of the legislation. A two-stage approach applies to ascertaining whether an action infringes the freedom afforded trade and commerce. The first is whether the legislative or administration action (by the Commonwealth, a State or a Territory) is discriminatory on its face, that is, in its legal operation. The second is whether the factual operation of the action produced the discriminatory result. The starting point for analyzing the limit on legislative and executive action under the first element of section 92 is to analyze the nature of the impugned state law, to ascertain whether it has any

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39 *Id.* at 354. See also *Id.* at 357-58 (Black, J., dissenting, with whom Justices Douglas and Minton concurred, clarified the requisite discriminatory burden “Characterization of s 7.21 as a ‘discriminatory burden’ on interstate commerce is merely a statement of the Court’s result, which I think incorrect. The section does prohibit the sale of milk in Madison by interstate and intrastate producers who prefer to pasteurize over five miles distant from the city. But both state courts below found that s 7.21 represents a good-faith attempt to safeguard public health by making adequate sanitation inspection possible. While we are not bound by these findings, I do not understand the Court to overturn them. Therefore, the fact that s 7.21, like all health regulations, imposes some burden on trade, does not mean that it ‘discriminates’ against interstate commerce”.

40 *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 524 (1959) (“The regulation of highways ‘is akin to quarantine measures, same laws, and like local regulations of rivers, harbors, piers, and docks, with respect to which the state has exceptional scope for the exercise of its regulatory power, and which, Congress not acting, have been sustained even though they materially interfere with interstate commerce.’ These safety measures carry a strong presumption of validity when challenged in court. If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid state objective. Policy decisions are for the state legislature, absent federal entry into the field. Unless we can conclude on the whole record that ‘the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it’ we must uphold the statute”) (citing Southern Pacific Co. v. State of Arizona, 325 U.S. 761, 775-76, 783 (1915)).

41 *Id.* at 530.

42 *James v Commonwealth* (1936) 55 CLR 1, 60 (Austl.).

protectionist effect that singles out interstate trade and commerce.\textsuperscript{44} In addition, section 92 will prevent non-fiscal controls to interstate trade where those controls protect intrastate trade against competition, regardless of whether that discrimination is expressed in legal form or is the result of the practical effect of these controls.\textsuperscript{45} However, where the law has only an incidental protectionist effect, the interference with trade and commerce will be upheld as constitutional if it is appropriate and adapted to the resolution of the problems identified by the legislature or the executive, and the burden imposed on interstate trade is not disproportionate to that resolution.\textsuperscript{46}

In summary, in the context of public health safety, the challenges to hard state border closures based on discriminatory burden on interstate commerce can be incorporated in arguing that the constitutionality of such closures as unnecessary restrictions on the right to interstate travel in the context of public health safety. I therefore focus the analysis on the judicial review framework relevant to this right. I look at the constitutionality of hard state border closures as a prophylactic response to a pandemic.

In addition, I use the recent COVID-19 pandemic to contextualize the analysis, particularly in relation to recent High Court of Australia (HCA) jurisprudence upholding such closures. Australian jurisprudence has historical parallels with the United States in terms of the effect of federation on eliminating commercial protectionism, and the requisite interstate intercourse needed to give effect to the free trade.\textsuperscript{47} However, I concede that “[n]o single, simple formula predicts how U.S. courts might go about amplifying and regularizing the elements of proportionality that already exist, sometimes partially buried, in our doctrine.”\textsuperscript{48} Nevertheless, by analyzing parallels between recent HCA jurisprudence and the current tiered approach in this country, I hope to provide guidance on the availability of hard state border closures in response to a pandemic.

The article is structured as follows. Part II analyzes the nature of the right to interstate travel, to motivate the use in Part III of strict scrutiny as the standard

\textsuperscript{44} Id. at 408.
\textsuperscript{45} Id. at 399; Castlemaine Tooheys Ltd v South Australia (1990) 169 CLR 436 (Austl.); See also Cole v Whitfield (Tasmanian Crayfish case) (1988) 165 CLR 408 (“if a law … discriminates against interstate trade and commerce in pursuit of [an] object in a way or to an extent which warrants characterization of the law as protectionist, a court will be justified in concluding that it [offends section 92]”).
\textsuperscript{46} See generally, Castlemaine Tooheys Ltd v South Australia (1990) 169 CLR 436 (Austl.); see also Cunliffe v Commonwealth (Migration Agents Case) (1994) 182 CLR 272 (Austl.).
\textsuperscript{47} See, e.g., Cole v Whitfield (1988) 165 CLR 360, 387 (Austl.) (referring to intercolonial free trade as a “lion in the path” of federation); H. P. Hood and Sons Inc. v Du Mond 336 U.S. 525, 533-534 (1949) (arguing that State protectionism is a threat to the safety and peace of the Union); Cf., Stone, supra note 47, at 463 (Notwithstanding, there is an “overriding difference between the Australian and American Constitutions [that] resides … not in their provisions, but in the comparative youth of the Australian Constitution, as against the American, which is the oldest of ‘going’ written constitutions. This difference in constitutional maturity is accentuated by the industrial and demographic immaturity of the Australian economy”).
for judicial review of border closures. Part IV and Part V delineate the analysis of the two elements forming the structural common denominator for the constitutional analysis in the United States and Australia, namely, the justificatory doctrine of necessity and its requirement of the existence of an emergency, for state restrictions to be the only reasonable response to the emergency. The last part, Part VI, furnishes some final thoughts on the constitutionality of hard state border closures in the United States.

II. THE RIGHT TO INTERSTATE TRAVEL

To ascertain the constitutionality of hard state border closures in the United States, we must first ascertain the nature of the right to interstate travel. In this part, I argue that this right is a fundamental right. In the next part, the understanding of this right motivates an analysis of strict scrutiny, the judicial review standard that the Supreme Court will use to analyze the constitutionality of hard state border closures, given the fundamental nature of the infringed right. The next step is to analyze the right to interstate travel under the Australian Constitution to help inform the potential constitutionality of Western Australian-style border closures in the United States, by revealing the common analytical structure under each constitution.

A. As an Inferred Fundamental Right

Given that there is no explicit guarantee of interstate travel in the U.S. Constitution as found in section 92 of the Australian Constitution, the analytical framework for analyzing the constitutionality of hard state border closures turns on whether interstate travel can be interpreted as a fundamental right. If it is a fundamental right, “Courts [will] use strict scrutiny to judge the constitutional validity of legislation infringing on fundamental rights under the Equal Protection and Due Process Clauses of the Fourteenth and Fifth Amendments.”

While the rationale for interstate travel is as fundamental as protecting the cohesiveness of the Union, the right is not explicitly set forth in the U.S. Constitution. Perhaps, it is because the right is so elementary to the notion of a union that the founding fathers did not see a need to have it stated explicitly. Note,
After all, the right is “part of American heritage,” and traces its origins to England, where personal liberty is a birthright. It could also be that at the time of federation, there were no major issues with interstate mobility.

However, the lack of textual evidence in the U.S. Constitution on the right to interstate travel has not prevented the Supreme Court from asserting its fundamental character, as early as 1849. In Smith v. Turner, the Court stated that we are one people with one common country. We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own states.

In fact, the right has had a precise formulation since the 18th century. William Blackstone expresses the right as “the power of locomotion, of changing situation, or of moving one’s person to whatsoever place one’s inclination may direct without imprisonment or restraint, unless by due process of law.” Blackstone’s formulation suggests three different versions of the right to free travel. The first is the right to cross boundaries without deterrence (locomotion). The second is the right to leave your present location and go elsewhere (change situation). The third is the right to settle in a given location (moving to whatever place). This three-component formulation has also been adopted by the Supreme Court in Saenz v. Rae, where the right is understood as “the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State”. Hard state border closures similar to those implemented in Western Australia infringe the first component by preventing the citizen of one State from entering another State.

however, that Wilhelm uses the term “free movement” as synonymous to intrastate travel, rather than interstate travel.

54 See Joseph v. Randolph, 71 Ala. 499, 505 (1882).
57 Id. at 492.
58 1 WILLIAM BLACKSTONE COMMENTARIES 134 (Lewis 3d ed. 1902).
59 Steinbach, supra note 53, at 418.
61 Id. at 500; see also, Chavez v. Illinois State Police 251 F.3d 612, 649 (7th Cir. 2001) (“the right of a citizen of one state to enter and leave another state” prohibits “direct impairment of the right to move between the states”).
It follows that the source of this right has to be inferred from a combination of other constitutional safeguards, namely, the conception of a national citizenship, the Privileges and Immunities Clauses under Article IV, § 2, cl. 1 and under the Fourteenth Amendment, the Commerce Clause under Article I, § 8, the Due Process Clauses under the Fifth and Fourteenth Amendments, and the Equal Protection Clause in the Fourteenth Amendment.  

For example, in 1941, the Court confirmed the status of interstate travel as “a right fundamental to the national character of our Federal government.” By the end of the 20th century, national citizenship, the primary signifier of this character, ensured upholding the rights of U.S. citizens against infringement by the States. This concept of nationhood has also influenced the earliest statement confirming the existence of a right to interstate travel flowing from the Privileges and Immunities Clause of the Fourteenth Amendment. The Privileges and Immunities Clause of the Fourteenth Amendment states that “no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States”. In its early jurisprudence on the Fourteenth Amendment, the Supreme Court limited the scope of this Clause to regulating the relationship between citizens and the federal government. However, in 1908, the Court held that “among the rights and privileges of National citizenship recognized by this court is the right to pass freely from State to State.” Similarly, the Privileges and Immunities Clause under Article IV, § 2 states that “the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States”. In its early jurisprudence, the Supreme Court interpreted this Clause to give the citizens of each State “the right of free ingress into other States and egress from the right of free ingress into other States.” On the one hand, in 1942, the Supreme Court has limited

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64 See Saenz v. Roe, 526 U.S. 489, 502 (1999) (arguing that the right to interstate travel “is protected not only by the new arrival’s status as a state citizen, but also by her status as a citizen of the United States”).
65 Slaughter-House Cases, 83 U.S. 36, 78-79 (1873) (arguing for the existence of a national character that gave the federal government the power to regulate the privileges and immunities clause).
67 See Paul v. Virginia, 75 U.S. 168, 180 (1868). See also, Zobel v. Williams, 457 U.S. 55, 79 (1982) (O’Connor, J., concurring) (arguing that art. IV, § 2 of the Constitution derives from art. IV, para. 1 of the Articles of Confederation); Saenz v. Roe, U.S. 489, 501 (1999) (“[the right to interstate travel] was expressly mentioned in the text of the Articles of Confederation”); and U.S. v. Guest, 383 U.S. 745, 758 (1966) (“Although the Articles of Confederation provided that ‘the people of each State shall have free ingress and regress to and from any other State,’ that right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.”). Article IV, para. 1 provides an explicit statement of all three elements of Blackstone’s formulation of the right to interstate travel: “the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively”. See ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1. See also, Andrew C. Porter, Comment,
its scope to State discrimination. In *United States v. Wheeler*, a case where two hundred and twenty-one citizens of the United States were forcibly removed from Arizona to New Mexico, the Court designated the right as fundamental.

The Supreme Court has also pronounced that the Privileges and immunities Clause “plainly and unmistakably secures and protects the right of a citizen of one State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation.” This dictum links the right to interstate travel to the Commerce Clause. The Clause gives to Congress “the power to regulate commerce … among the several states.” In 1941, the Supreme Court indicated that “Article I, § 8 of the Constitution delegates to the Congress the authority to regulate interstate commerce. And it is settled beyond question that the transportation of persons is ‘commerce,’ within the meaning of that provision.” However, the Commerce Clause preserves to the States the power to regulate interstate travel under quarantine laws. The most relevant case is *Zemel v. Rusk*, where Chief Justice Warren stated that interstate travel as guaranteed under the commerce clause,

> does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area or the nation as a whole.

Hence, under the Commerce Clause, the right to interstate travel is not absolute, and can be regulated by the States. However, Congress also has the power to regulate this right, and can hence override the States.

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68 *See, e.g., Comment, State Control of Interstate Migration of Indigents*, 40 MICH. L. REV. 711, 718 (1942); Hague v. Comm. For Indus. Org., 307 U.S. 496, 511 (1939) (arguing that the scope of the clause is limited to protection from discrimination by one State against the citizens from other States).

69 254 U.S. 281 (1920).

70 *Id.* at 293 (Chief Justice White) (“[i]n all the States from the beginning down to the adoption of the Articles of Confederation the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective States, to move at will from the limits of their respective States, to move from place to place therein, to have free ingress thereto and egress therefrom, with a consequent authority in the States to punish violations of this fundamental right”) (emphasis added). *See also,* Commonwealth v. Milton, 51 Ky. 212, 218 (1851) (arguing that the Constitution secures the right of interstate travel); Joseph v. Randolph, 71 Ala. 499, 505 (1882) (arguing that the freedom of egress and ingress is an implication of the Federal as well as State Constitutions).


72 U.S. CONST. art. I, § 8, cl. 3.


74 381 U.S. 1 (1965).

75 *Id.* at 15-16.
Additionally, in the late 1950s and early 1960s, the Supreme Court found the right to interstate travel emanated from the Due Process under both the Fifth and the Fourteenth Amendments, which ensures that “no person shall be deprived of life, liberty or property without due process.” Zachariah Chafee has suggested that the right to interstate travel “is best seen in due process terms” given that “the ‘liberty’ of all human beings which cannot be taken away without due process of law includes liberty of speech, press, assembly, religion, and also liberty of movement.” One of the earliest cases confirming Due Process as a source for interstate travel is Williams v. Fears, where the Court held that liberty

is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling.

In Kent v. Dulles, the Court held that “The right to travel is part of the ‘liberty’ of which the citizen cannot be deprived without due process of law under the Fifth Amendment.” Similarly, in Aptheker v. Sec’y of State, the Court held that a legislation that indiscriminately restricts the right to travel will infringe the liberty guaranteed by the Fifth Amendment. In United States v. Guest, Justice Harlan also found the Due Process Clause of the Fourteenth Amendment to be a source of the right to interstate travel. Arguably, the clearest pronouncement of the right to interstate travel came under the Equal Protection Clause of the Fourteenth Amendment. In 1966, Vivian Thompson changed her residence from Boston, Massachusetts to Hartford, Connecticut to be close to her mother. When she eventually applied for welfare assistance in Connecticut, her application was rejected on the ground that she has not resided in the State for the minimum period of one-year stipulated for under State legislation. In the United States District Court for the District of Connecticut a three-to-one majority found the chilling effect on interstate travel created by the one-year residency requirement to violate the Equal Protection Clause. On appeal to the Supreme Court agreed with the District Court, finding the waiting period to be unconstitutional under the Equal

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76 See Kent v. Dulles, 357 U.S. 116, 125 (1958) (“The right to travel is part of the ‘liberty’ of which the citizen cannot be deprived without due process of law under the Fifth Amendment”); Aptheker v. Sec. of State, 378 U.S. 500, 505 (1964) (arguing that a legislation that indiscriminately restricts the right to travel will infringe the liberty guaranteed by the Fifth Amendment).
78 179 U.S. 270 (1900).
79 Id. at 274.
81 Id. at 125.
83 Id. at 505.
85 d. at 769-70.
Protection Clause. In *Shapiro v. Thompson*, the Court stated that “the fundamental right of interstate movement … must be judged by the stricter standard of whether it promotes a compelling state interest,” adding that “… the nature of our Federal Union … require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes … which unreasonably burden or restrict their movement.”

In summary, regardless of source, the right to interstate travel has been recognized by the Supreme Court as a fundamental right. In the next part, Part III, this recognition will motivate the strict scrutiny analysis that the Supreme Court is likely to apply in ascertaining the constitutionality of hard border restrictions on this right.

**B. As an Express Guarantee**

The right to interstate mobility is found in sections 92 and 117 of the Australian Constitution. Section 92 states that: “On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free”. Section 117 states that:

A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

Below, I delineate the origin of these sections to inform our understanding of the right to interstate travel under the Australian Constitution.

Section 92 has no equivalent in the U.S. Constitution, at least not an explicit statement of an absolute right to interstate intercourse. The section is based on the design in the Canadian Constitution, in particular, section 121 of the *British North America Act, 1867*, stating that: “All articles of the growth, produce, or manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.” On the other hand, section 117 comes directly from the U.S. Constitution, based on Article IV, § 2: “The

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87 394 U.S. at 637.
88 *Id.* at 629.
89 Commonwealth of Australia Act, 1900 (Imp), 63 & 64 Victoria, c. 12, s 9 (U.K.) [hereafter, Australian Constitution].
90 *Australian Constitution* s 92.
91 *Australian Constitution* s 117.
92 Stone, *supra* note 47, at 470.
94 Excise Tax Act, R.S.C. 1985, app II, no 5, s 121 (Can.).
citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.”

When this article is read with Article 1, § 8, which allows Congress to regulate interstate trade, and the Fourteenth Amendment that provides that the citizens of each State shall be entitled to the privileges and immunities of citizens of the United States, these provisions have an effect similar to that of sections 92 and 117 of the Australian Constitution.

Therefore, we can analyze section 92, as illustrated in Palmer v. Western Australia, as relating to the current (strict scrutiny) judicial review framework in the United States. In the context of hard border closures during COVID-19, the relevance of Australian jurisprudence comes from how the interpretation of section 92 has been informed by U.S. jurisprudence:

   It does seem in fact that Australian constitutional review is similar to that practiced in the United States prior to 1936 and that, as McWhinney suggests, S. 92 has been converted into an “Australian due process clause”.

Similarly, Julius Stone has suggested that section 92 “is coming to be interpreted to include tacitly within itself a guarantee of individual freedom of contract and choice of vocation of persons operating within the field of interstate commerce.” Section 92 therefore functions as a restraint on federal power in the way the due process and contract clauses function in the United States. The parallels, however, are imperfect: “there is too much uncertainty and there are too many strands in the interpretation of Sec. 92 to make it possible to define its scope and operation with any dogmatic assurance.”

Section 92 interstate intercourse has also been described by the High Court in the following terms:

   the creation of a federal union with one government and one legislature in respect of national affairs assures to every free citizen

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95 U.S. Const. art. IV, § 2.
98 P. W. Hutchins & P. J. Kenniff, The Concept of Interstate Commerce: A Case Study of Judicial Review in Canada, the United States and Australia, 10 Les Cahiers de Droit, 705, 727 (1969) (citing Edward McWhinney, Judicial Review in the English-Speaking World 81 (3rd ed. 2018) “It is perhaps characteristic that the judges of the High Court of Australia should, in the spirit of Herbert Spencer’s social statics, have converted section 92 of the Australian Constitution into an ‘Australian due process clause’ while at the same time refusing to admit that social and economic considerations have any place in constitutional law adjudication”).
99 Stone, supra note 47, at 511.
100 Cowan, supra note 96, at 180.
the right of access to the institutions, and of due participation in the activities of the nation.\textsuperscript{101}

Moreover,

it is not essential that the means of movement be physically perceptible … the expression of ideas, whether in literary or other form, can be moved and a movement of that kind across State borders is capable of attracting the operation of s 92.\textsuperscript{102}

The protection of public health appears in the Australian Constitution in only two locations: section 51(ix) and section 69. Section 51(ix) creates a concurrent power that can be exercised by the Commonwealth and the States, although under the supremacy clause in section 109, analogous to Article VI, clause 2, the Commonwealth can decide to cover the field thus making its regulation of quarantine exclusive. Section 51 (ix) states that “The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to quarantine.”\textsuperscript{103} The Act gave the Commonwealth the power to “supersede Quarantine measures under State Acts.”\textsuperscript{104} The Commonwealth exercised this quarantine power in 1908,\textsuperscript{105} by passing a quarantine Act that allowed surveillance and control over Australia’s borders. Similarly, section 69 states that “On a date or dates to be proclaimed by the Governor-General after the establishment of the Commonwealth the following departments of the public service in each State shall become transferred to the Commonwealth … quarantine.”\textsuperscript{106} However, until this transfer is proclaimed, the States continue to have the power to introduce their own quarantine measures. Hence, while under the Act the Commonwealth can declare a state of emergency, the States can still also declare an emergency due to the same health crisis.\textsuperscript{107} Similarly, a state of disaster can be declared. The difference between the declaration of a disaster and an emergency is one of availability of resources to enable a control of the event. The former signals that said resources are not available to the level of government declaring the disaster, while available in the case of an emergency.\textsuperscript{108} In terms of declaring a state of disaster “the Commonwealth has legislative responsibility for taxation, postal

\textsuperscript{101} R v Smithers; Ex parte Benson (1912) 16 CLR 99, 109-10 (Austl.) (Barton J). See also Kruger v Commonwealth (1997) 190 CLR 1, 69 (Austl.) (Dawson), 90 (Toohey), and 116 (Gaudron J).
\textsuperscript{102} Nationwide News Ort Ltd v Wills (1992) 177 CLR 1, 56 (Austl.) (Brennan J).
\textsuperscript{103} Australian Constitution s 51(ix).
\textsuperscript{104} Quarantine Act 1908 (Cth) s 2A(1) (Austl.).
\textsuperscript{105} Quarantine Act 1908 (Cth) (Austl.).
\textsuperscript{106} Australian Constitution s 69.
and telegraphic communications, defense (which is relevant to the use of the defense force in disaster response), insurance and the payment of social security benefits”.

The incompleteness of the national emergency response framework became evident during the policy response to the Spanish flu:

Not only was Australia unprepared, but state/territory and Commonwealth disputes hampered coordinated responses. This included the failure of a 1918 agreement in which only the Commonwealth could declare interstate quarantine after notification by a state/territory chief health officer of regional concerns. Once the Commonwealth deemed interstate quarantine necessary, only the Commonwealth and not the state/territory could manage the response. When Victoria and New South Wales quibbled over whether New South Wales had accurately diagnosed an influenza epidemic, the situation devolved into “every State for itself”. Some states closed, while others, such as Queensland, battled the Commonwealth over whether soldiers could land at quarantine stations, and still others, such as Western Australia, “seized the trans-Australian trains”.

However, the “every State for itself” approach was not necessarily due to coordination failures. It is part of the canonical design for the Commonwealth of Australia, reflecting a federal goldilocks zone. Similar to the U.S. Constitution, the Australian Constitution does not have a framework of emergency powers. Also similar to the U.S. Constitution, under section 107, the Australian Constitution gives residual powers to the States. Section 107

111 H. P. LEE ET AL., EMERGENCY POWERS IN AUSTRALIA 6 (2nd ed. 2018). See Id. at 7 (“Because State Parliaments exercise plenary legislative powers, and are not bound to adhere to their own constitutions, they are generally free to define ‘emergency’ as they see fit, and confer emergency powers in conformity with that definition, without any significant boundaries. To the extent that there are constitutional limits on State emergency powers, they are imposed by the limited freedoms guaranteed by the Australian Constitution and, at the margins, the requirement that Parliaments not permanently abdicate their legislative powers. This means, essentially, that a State Parliament may redistribute legislative and executive power as it deems necessary in response to a state of emergency that it is free to define”).
112 Australian Constitution s 107 (“Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.”). Note that in Canada, even though the residual powers are vested in the federal government, “The provinces have a legislative power to deal with emergencies occurring within their own borders, in order to ensure the delivery of provincial services and the continuation of the provincial government”; Eburn, supra note 109, at 94.
was drafted with Amendment X in mind: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." One of these powers is the power to declare a state of emergency. The COVID-19 pandemic presented the federal government with a golden opportunity to consolidate its powers vis-à-vis the States. This consolidation effort has already been unfolding even prior to the pandemic. For example, in terms of public health, the 1908 Act has been replaced by the Biosecurity (Consequential Amendments and Transitional Provisions) Act 2015. The 2015 Act has been described as “shift[ing] the constitutional boundaries between the Commonwealth and States with respect to civil emergencies.” It gives the Commonwealth powers so wide in relation to quarantines and the declaration of a state of emergency that some describe the Act as “an unprecedented expansion of power by the federal executive.”

In addition to the 2015 Act, the response to COVID-19 was coordinated at the national level by the Communicable Disease Network Australia and a newly created National Cabinet. The latter signaled the federal government’s intention to take its consolidation effort much further. The Cabinet was formed on 13 March 2020. It is led by the Commonwealth Prime Minister and composed of all State Premiers and Territory Chief Ministers. On 29 May 2020,

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113 See **JOHN QUICK & ROBERT GARRAN, THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH 1136 (revised ed. 2015).**
114 U.S. CONST. amend. X.
115 For example, in New South Wales, s 4 of the Public Health Act 1991 (NSW) provides that where a “state of emergency” has been declared under the State Emergency and Rescue Management Act 1989 (NSW), and the Minister for Health (in consultation with the Minister for Emergency Services) decides on “reasonable grounds that the emergency could result” in a situation where the health of the public is, or is likely to be at risk, the Minister can direct that certain actions be taken to deal with the risk and the Minister may take action to avert the risk. This may include directing persons in a specified area or group to submit to medical examinations. Section 5 provides that in cases falling short of an emergency, but where the Minister considers “on reasonable grounds that a situation has arisen in which the health of the public is at risk, or is likely to be at risk,” the Minister may take action and give directions to deal with the risk and its possible consequences. Action that may be taken includes any measures the Minister considers necessary to reduce and remove the risk in an area, to segregate or isolate inhabitants, and prevent or restrict access to an area.


120 Kim Moloney & Susan Moloney, *supra* note 13, at 672.
the Prime Minister declared that the National Cabinet will be replacing the Council of Australia Governments (COAG) that was to this point the primary coordination body between the federal and State governments. In addition, the National Cabinet agreed on forming a National Federation Reform Council (NFRC). While the NFRC was intended to streamline the national and State responses to the pandemic, what emerged from this coordination was an understanding that no one-size-fits-all, and an every-State-for-itself approach continued to be the policy cornerstone in 2020, just like it did in 1918. Hence, Western Australia declared a state of emergency under its Emergency Management Act 2005. This Declaration was followed by Directions under the same Act purporting to close Western Australian borders to all persons “unless the person is an exempt traveler”. Under direction 27, an exempt traveler is someone who falls into a number of enumerated categories, including senior government official, active military personnel, and members of the Commonwealth Parliament.

The constitutional issue in relation to the Directions of Western Australia is their validity as a restriction on the interstate mobility right found in the Australian Constitution. The main argument relates to section 92 of the Constitution, in particular the interstate intercourse guarantee. Arguments based on another section that protects a similar right, section 117, were not pursued in the High Court.

III. THE CONSTITUTIONAL ANALYSIS

This part sets up the analytical framework for ascertaining this constitutionality, and elucidates the common structure underlying both frameworks as a rendition of the common law doctrine of justificatory necessity.

A. Strict Scrutiny

Given that the right to interstate travel is a fundamental right, as I have argued in Part II, the Supreme Court will apply strict scrutiny to ascertain the

121Press Release, Prime Minister of Australia, Update Following National Cabinet Meeting (May 29, 2020); Press Release, Department of the Prime Minister and Cabinet, COAG becomes National Cabinet (June 2, 2020).
124 Australian Constitution s 92.
125 See JOHN QUICK & ROBERT GARRAN, supra note 113, at 1163 (arguing that section 117 is based on Article IV, § 2, and the Fourteenth Amendment, § 1 of the U.S. Constitution; see also, Stone, supra note 47, at 461 (discussing the influence of the U.S. Constitution on the design and interpretation of the Australian Constitution). See generally, Benjamen Gussen, On the Hardingian renovation of legal transplants, LEGAL TRANSPLANTS IN EAST ASIA AND OCEANIA 84 (Vito Breda ed. 2019).
constitutionality of hard state border closures. The term “strict scrutiny” can be traced back to the 1800s, in the context of equity cases. Provided there was even a slight evidence that a debtor attempted to transfer his property to another family member to defeat the claim of creditors, the courts. However, as a standard for judicial review, strict scrutiny made its first appearance only in the late 1930s when the Supreme Court hinted to this standard without using the term “strict scrutiny.” In United States v. Carolene Products, the Carolene Products Company shipped interstate a compound in imitation of condensed milk. The Supreme Court upheld a federal law banning such interstate transport of compounds that resemble milk. In obiter, the Court stated that

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.... Nor need we enquire ... whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

The use of the term “strict scrutiny” as a judicial review standard had to wait for was not expressed until the Supreme Court judgment in Skinner v. Oklahoma. The State of Oklahoma had passed a statute that allowed for compulsory sterilization of habitual criminals as part of sentencing. Jack Skinner argued that his compulsory sterilization sentence was unconstitutional as it violated his rights under the Fourteenth Amendment. Skinner’s appeal to the Supreme Court was successful. In finding that the statute violated the Equal Protection Clause of the Fourteenth Amendment, the Court explained the rationale for strict liability in the following terms:

The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power

127 See, e.g., Booher v. Worrill, 57 Ga. 235, 238 (1876) (“Contracts between [relatives] which retain in the family property that would otherwise go to satisfy honest creditors are to be subjected to strict scrutiny—a vigilant judicial police.”); see also, Winkler, supra note 49, at 798 n. 10.
128 304 U.S. 144 (1938).
130 304 U.S. at 152 n.4.
131 316 U.S. 535 (1942).
of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.\textsuperscript{132}

In order to pass strict scrutiny, the impugned law must “further a compelling state interest,”\textsuperscript{133} and must be narrowly tailored to serve that interest:

If strict scrutiny is but one of the approaches that give enhanced protection to constitutional rights, the compelling state interest standard is just one part of strict scrutiny analysis. Strict scrutiny varies from ordinary scrutiny by imposing three hurdles on the government. It shifts the burden of proof to the government; requires the government to pursue a “compelling state interest;” and demands that the regulation promoting the compelling interest be “narrowly tailored.”\textsuperscript{134}

Moreover, strict scrutiny is context dependent. In \textit{Grutter v. Bollinger},\textsuperscript{135} the Supreme Court emphasized that strict scrutiny is “context matters.”\textsuperscript{136} In the context of preventing the infecting of State citizens with COVID-19, “strict scrutiny is designed to provide a framework for carefully examining the importance and sincerity of the reasons advanced by the [State]” for hard border closures.\textsuperscript{137}

There is no agreement on the overlap between proportionality and the tiered review. The former is used to ascertain the constitutionality of restrictions on interstate mobility in Australia. The latter is the analytical framework in the United States. Richard Fallon has argued that strict scrutiny can be understood as “mandating a proportionality inquiry”,\textsuperscript{138} while Alec Stone Sweet and Jud Mathews have argued that proportionality is “an analytical procedure akin to ‘strict scrutiny’ in the United States”.\textsuperscript{139} On the other hand, Vicki Jackson has

\begin{itemize}
\item \textsuperscript{132} \textit{Id}.
\item \textsuperscript{133} \textit{See} Miller v. Reed 176 F.3d 1202, 1205 (9th Cir. 1999) (“The Supreme Court has recognized a fundamental right to interstate travel”); \textit{see also} Peruta v. Cty. of San Diego 678 F.Supp.2d 1046, 1060 (S.D.Cal. 2010) (citing Soto-Lopez, 476 U.S. 898, 904–05 n.4 (1986)).
\item \textsuperscript{134} \textit{See} Stephen A. Siegel, \textit{The Origin of the Compelling State Interest Test and Strict Scrutiny}, 48 AM. J. LEGAL HIST. 355, 359-60 (2006); \textit{see also} Reno v. Flores 507 U.S. 292, 301-02 (1993) (“[D]ue process of law” to include a substantive component, which forbids the government to infringe certain “fundamental” liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest” (emphasis omitted)).
\item \textsuperscript{135} 539 U.S. 306 (2002).
\item \textsuperscript{136} \textit{Id.} at 327.
\item \textsuperscript{137} \textit{Id}.
\item \textsuperscript{139} \textit{Alec Stone Sweet & Jud Mathews, Proportionality Balancing and Global Constitutionalism}, 47 COLUM. J. TRANSNAT’L L. 72 (2008).
\end{itemize}
argued that “the United States [tiered approach] is often viewed as an outlier in [an] embrace [by many countries] of proportionality in constitutional law”.  

Similarly, Moshe Cohen-Eliya and Iddo Porat have argued that differences between proportionality and balancing outweigh similarities in terms of historical origins and analytical emphasis. Proportionality emerged from German administrative, where emphasis is on limiting a small set of protected rights, while strict liability emerged from German private law, with emphasis on protecting an expansive set of individual rights. Notwithstanding, when recalling that proportionality has three subsets, namely, necessity, minimal impairment (suitability) and proportionality in the strict sense (stricto sensu). The overlap between balancing and proportionality can be formulated through economic effectiveness and efficiency. The first two subsets (necessity and suitability) involve a comparison between means and ends. In particular, necessity is a form of effectiveness review, that compares to the rational basis (first tier) test. The second subset that relates to less-restrictive means, is a form of economic efficiency, in particular Pareto efficiency, where everyone can be made better off, without making any one worse off. The second subset of proportionality is therefore analogous to intermediate scrutiny under the less-restrictive-alternative principle. The last subset, proportionality stricto sensu, compares the end to the infringed right, which lends itself to establishing an appropriate relationship between the end and the right, or what is a balancing between the end and the limits imposed on the scope of the right. Therefore, Proportionality stricto sensu ensures that the marginal benefit created by the infringement on the right outweighs the marginal cost from said infringement, or what is referred to as Kaldor-Hicks efficiency. With this understanding, strict scrutiny can be understood as coinciding with the third subset of proportionality. In particular, under the “weighted balancing” theory of strict scrutiny, “the court weighs the costs of a law in terms of its impact on individual

142 Aurelien Portuese, Principle of Proportionality as Principle of Economic Efficiency, 19 EUROPEAN L.J. 612, 620, 622 (Table 1 provides a comparative analysis of the three subsets of proportionality as applied in EU law and the three tiers of judicial review in the United States); see also Jud Mathews & Alec Stone Sweet, supra note 48, at 797 (arguing that all three levels of review contain core elements of proportionality); supra note 139, at 72 (arguing that in the age of constitutionalism, proportionality underpins the ability of the judiciary to deal with politically salient and controversial issues); see generally ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers trans., Oxford Univ. Press 2002) (1986).
144 Moshe Cohen-Eliya & Iddo Porat, supra note 141, at 268.
145 See Aharon Barak, Proportionality and Principled Balancing, 4 L. & ETHICS HUM. RTS. 1, 7 (2010).
146 Aurelien Portuese, surpa note 142, at 620. (arguing that the components of proportionality are better explained using an economic analysis).
rights against the law’s benefits to society as a whole”.147 This approach is salient relative to other strict scrutiny theories,148 given that the two-prong test of compelling state interest and narrow tailoring were introduced as part of this cost-benefit (balancing) approach.149

Note, however, that the economic mapping of proportionality and tiered review do not necessarily mean that courts are open to interpreting the latter as an economic principle, at least not explicitly. When they do in the case of the former, for example the European Court of Justice (ECJ), proportionality has a clear normative distinction from balancing, including strict scrutiny.150 The latter being a concept usually treated in isolation of any efficiency considerations.151

Jud Mathews and Alec Stone Sweet also find an overlap between proportionality and the three-tiered approach, in particular, in relation to strict scrutiny.152 First, the two frameworks share constitutive components in terms of the comparative efficiency outlined above. Second, both are intended to limit legislative power. Third, both approaches are designed to implement constitutional values that prioritize preferred or fundamental rights. Fourth, both require a form of balancing that accounts for marginal benefits and costs from the impugned legislation and the protected right. The last point suggests that there is indeed a space where structured proportionality analysis such as that found in Australia could inform implementation of balancing under strict scrutiny. The analysis therefore suggests that strict scrutiny will uphold hard state border closures. Although a rejection of hard closures is likely to be more pronounced under the purpose scrutiny refinement,153 where the court looks for inconsistencies with “the structure and purposes of the federal system

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147 Winkler, supra note 49, at 803. See also Siegel, supra note 134, at 394 (“[S]trict scrutiny is a tool to determine whether there is a cost-benefit justification for governmental action that burdens interests for which the Constitution demands unusually high protection.”).
150 See portuese, supra note 142, at 612.
151 Cf. ROBERT ALEXY supra note 142, at 44-61 (arguing that rights are optimization requirements, and therefore, balancing is inherently a process of optimizing rights within a specific context).
152 Jud Mathews & Alec Stone Sweet, supra note 48, at 811.
153 Ashutosh Bhagwat, supra note 126, at 297 (identifying a Supreme Court trend marking a departure from balancing the strength of government interests against individual rights and moving instead towards a constitutional analysis framework that ties legislative purpose to the text and history of the Constitution).
established by the Constitution." The purposive approach is a refinement on
the traditional strict scrutiny analysis in that it informs the analysis of
compelling government interests by permitting only particular, specific
interests. Under this approach, hard state border closures will be upheld as
constitutional only if their prophylactic purpose is consistent with the principles
underlying the right to interstate travel. The later emanate directly from the
federal ideal, where freedom of interstate travel is synonymous with the very
essence of a political union.

As I argue below, the standard strict scrutiny analysis requires that state action
is necessary to further a compelling state interest, or that the state action is
narrowly tailored to further a compelling state interest. However, such
scrutiny is not fatal to the possibility of hard state border closures. Strict
scrutiny is not a monolithic standard. The Supreme Court will tweak the
applicable analysis to fit different types of fundamental rights. Empirical
evidence suggests that the right to travel has the highest survival rate amongst
fundamental rights:

Laws infringing on the right to travel are relatively more likely to
withstand judicial review (40%). The laws challenged in the right-
to-travel cases include juvenile curfew laws, which are upheld in 66
percent of applications; durational residency requirements for
welfare, which are invalidated in both observed instances; and
restrictions on the ability of certain people to use national lands or
other designated areas, which survive 33 percent of the time.

154 See id. at 313. See also, Stephen E. Gottlieb, The Paradox of Balancing Significant
Interests, 45 HASTINGS L.J. 825 (1994); T. Alexander Aleinikoff, Constitutional Law in the
155 Ashutosh Bhagwat, supra note 126, at 338.
156 Id. at 356, (Figure 1).
157 Roy G. Spece, Jr. & David Yokum, Scrutinizing Strict Scrutiny, 40 VT. L. REV. 293, 295
158 See Adarand Constructors v. Pena, 515 U.S. 200, 237 (1995) (stating that strict scrutiny is not
necessarily fatal to challenged laws).
159 See, e.g., Richard H. Fallon, Jr., The Supreme Court, 1996 Term — Foreword: Implementing the
Constitution, 111 HARV. L. REV. 54, 60-62 (1997) (distinguishing between three forms of
(arguing that there is no unitary test of strict liability for claims of racial discrimination).
160 See, e.g., Roy G. Spece, Jr. & David Yokum, supra note 157, at 293 (2015) (arguing that
strict scrutiny is poorly articulated due to lumping of distinct analyses that apply differently in
different contexts); Anita K. Blair, Constitutional Equal Protection, Strict Scrutiny, and the
Politics of Marriage Law, 47 CATH. U. L. REV. 1231 (1998) (arguing that strict scrutiny is a
tool for ascertaining whether impugned legislation is founded on irrational assumptions).
161 Winkler, supra note 49, at 865 (2006) (citations omitted) (Table 12 on page 863 provides
the survival rate by type of fundamental right, although the p-value is only 0.71, and the
observed rate differences might not be significant).
In addition, the Supreme Court tweaks its application of strict scrutiny depending on the level of government infringing on a fundamental right.\textsuperscript{162} Hence, empirical evidence suggests that restrictions by State executive are the least likely to survive strict scrutiny: “Federal actors, such as Congress, the federal judiciary, and federal agencies are much more likely to have their laws upheld than state and local governmental actors”.\textsuperscript{163} The lower the government level, the less likely it is to survive strict scrutiny.\textsuperscript{164} Although, in the case of fundamental rights, “judicial review here shows signs of turning the federal/state hierarchy upside-down”.\textsuperscript{165}

The rest of this article fleshes out the requirements for satisfying strict scrutiny’s two-prong test as it applies to hard state border restrictions in response to COVID-19. It does so through a comparison with the analysis under section 92, and the doctrine of justificatory necessity.

\textbf{B. Free Trade Approach}

The full text of section 92 states that:

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, \textit{shall be absolutely free}.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.\textsuperscript{166}

The section ensures that trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be “absolutely free.” According to a number of authorities on the Australian Constitution,\textsuperscript{167}

\textsuperscript{162} See \textit{id.} at 821 (“tailoring can also occur when the courts apply the same standard of review … the same strict scrutiny test varies in its strictness depending upon the governmental actor behind the law”); \textit{see also} Mark D. Rosen, \textit{The Surprisingly Strong Case for Tailoring Constitutional Principles}, 153 U. P.A. L. REV. 1513, 1516 (2005) (arguing that courts should not apply the same standards of review to different levels of government).

\textsuperscript{163} Winkler, \textit{supra} note 49, at 821 (Table 2 on page 818 suggests that State agencies’ strict scrutiny survival rate is only 14 percent).

\textsuperscript{164} \textit{id.} at 822 (Table 3 shows that the survival rate of state laws is only 29 percent, compared to 50 percent for federal laws, and only 17 percent for local laws).

\textsuperscript{165} \textit{id.} at 865-66 (although the results have only a $p$-value of 0.551).

\textsuperscript{166} \textit{Australian Constitution} s 92 (emphasis added).

\textsuperscript{167} See W. A. Holman, \textit{Section 92—Should it be Retained?}, 7 AUSTL. L. J. 140, 141 (1933-34) (arguing that section 92 was introduced “not as part of the working machinery when the new government was set up, but as an aid to pass the difficult ordeal of the Referendum in New South Wales”); \textit{see generally} F. R. Beasley, \textit{The Commonwealth Constitution: Section 92, Its History in the Federal Conventions (Pt 1)}, 1 U. W. AUSTL. L. REV. 97 (1950); F. R. Beasley,
this section was drafted for political reasons, in particular, to convince New South Wales to join the proposed federation: “In 1891, New South Wales was the richest and second most populous of the States; she was the only free-trade State, and she feared the spread of protectionism under federation.”168 The section was merely intended to ensure that interstate trade was not “restricted or interfered with by taxes, charges or imports.”169 Given that section 90 of the Australian Constitution states that “On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive,”170 section 92 was to have only a “local and transient objective.”171 Therefore, it is no surprise that section 92 is silent as to the type of burdens or restrictions caught by the term “absolutely free.” Nevertheless, the rationale for this section makes it clear that the term “absolutely free” does not mean that trade, commerce and intercourse must be free from all laws.172 The complexities that later emerged in the HCA interpretation of section 92 (see infra)173 were largely due to its sidelining of the original intention of the draftsmen.174 Following the British approach, the HCA refused any use of legislative history and travaux préparatoires to help elucidate said intention.175

The rest of this section analyzes the legal tests for each of the guarantees under section 92, namely, with emphasis on the test relating to interstate intercourse. First, however, a look at the place of this section in the Australian Constitution to set the stage for analyzing the scope of its guarantees.

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168 See Stone, supra note 47, at 471.
169 See W. A. Holman, Section 92—Should it be Retained?, 7 Austl. L.J. 140, 142-143 (1933-34).
170 Australian Constitution, s 90 (emphasis added).
171 See Stone, supra note 47, at 471.
173 See generally, Michael Cooper, The Judicial Interpretation of Section 92 of the Australian Constitution (1981) (traces the evolution of section 92 interpretation in the High Court and the Privy Council).
175 See Stone, supra note 47, at 473. See, e.g., James v. Commonwealth [1936] AC 578, 614-15 (Lord Wright stating that “Nor can any decisive help here be derived from evidence of extraneous facts existing at the date of the Act of 1900: such evidence may in some cases help to throw light on the intention of the framers of the statute, though that intention can in truth be ascertained only from the language used”).
The placement of section 92 in the Australian Constitution suggests a very limited protection, relating only to the imposition of taxes and other financial charges. Section 92 appears in the Finance and Trade Chapter of the Constitution (Chapter IV). The other provisions in this chapter, sections 81 to 105A relate to the consolidated revenue fund (sections 81 and 82), appropriations (section 83), transfer of public service departments from the States to the Commonwealth (sections 84 and 85), passing of collection and control of customs and of excise to the Commonwealth (sections 86 to 90), State aid to or bounty on mining and production or export of goods (section 91), transitional provision on the duties of customs chargeable on goods imported into a State (section 93), transfer of surplus revenue to the States (section 94), transitional provision on the provision of duties of customs by the States (section 95), financial assistance by the Commonwealth to the States (section 96), transitional provision on receipt of revenue and expenditure of money by the States (section 97), power by Commonwealth to make laws with respect to trade relating to navigation and shipping, and to railways the property of any State (section 98); prohibition on the Commonwealth of giving preference to any State in terms of regulation of trade and commerce (section 99), an environmental law prohibiting the Commonwealth from limiting the right of States to the reasonable use of waters (section 100), interstate commission for the maintenance of the Constitution, including unreasonable or unjust discrimination by and State (sections 101 to 104), and takeover of the Commonwealth of State debts (sections 105 and 105A).

Notwithstanding, the scope of section 92 it has been enlarged by the High Court to the point of creating analytical complexities that prompted one of the founding fathers to contemplate a threat to an objective as fundamental as access to courts:

The creation of a limitation where none was expressed … was likely to produce a variety of propositions. And so it has. Sir Robert Garran contemplated that a student of the first fifty years of case law on s. 92 might understandably “close his notebook, sell his law books, and resolve to take up some easy study, like nuclear physics or higher mathematics: LaNauze, “Absolutely Free”, p. 58 (quoting Garran, Prosper the Commonwealth (1958), p. 415). Some thirty years on, the student who is confronted with the heightened confusion arising from the additional case law … would be even more encouraged to despair of identifying the effect of the constitutional guarantee.

A historical dichotomy between narrow and wide interpretations crystalized into two schools of thought on the scope of the guarantees in section 92. The earliest school, inspired by the intention of the framers of the Constitution, 178

176 The High Court has always interpreted s 92 to be wider than this approach.
178 In particular, “The difficulties which inhere in s 92 flow from its origin as a rallying call for federationists [sic] who wanted to be rid of discriminatory burdens and benefits in trade and who would not suffer that call to be muffled by nice qualifications”: Cole v Whitfield (Tasmanian Crayfish case) (1988) 165 CLR 360, 392 (Austl.).
favored a free trade approach,\textsuperscript{179} hence allowing for government restrictions on interstate trade and intercourse that are merely incidental to non-discriminatory schemes. The default position was to uphold state interference unless it interfered directly with the trade and commerce, or interstate intercourse, guaranteed in section 92. Under this approach that does not distinguish between intrastate and interstate trade,\textsuperscript{180} the purpose of section 92 is “to create a free trade area throughout the Commonwealth and to deny the Commonwealth and States alike a power to prevent or obstruct the free movement of people, goods and communications across State boundaries.”\textsuperscript{181} The prohibited discrimination is discrimination that results in a protectionist effect. This free trade approach is therefore part of a narrow interpretation, although wider than that suggested by the position of s 92 in the Constitution. After WWII, a second school, based on 19th century economic liberalism, came into prominence. This individual rights school is part of a wide interpretation that ushered a suite of complexities, as referred to above. The school, which was inspired by the Fifth and Fourteenth Amendments of the U.S. Constitution, emphasized the freedom of the individual and suggested that the section was interpreted as prohibiting any interference with interstate trade and intercourse.\textsuperscript{182} This school recognized the guarantees as individual rights, therefore preventing government from implementing a variety of policy programs even if they were not directed at regulating trade and commerce or intercourse.\textsuperscript{183} However, to compensate for enlarging the freedoms guaranteed by section 92, the Privy Council introduced two reservations. The first was the proposition that interstate regulation is compatible with the wide scope envisaged by this school.\textsuperscript{184} The second reservation, arguably the Achilles heel of this school, was based on remoteness: an indirect or consequential impediment that was too remote did not violate section 92.\textsuperscript{185} This distinction between direct and indirect impediments to the guarantees proved to be too problematic to uphold.\textsuperscript{186} Moreover, under what came to be known as the criterion of operation formula, this school focused on analyzing “the formal structure of an impugned law and ignored its real or substantive effect.”\textsuperscript{187}

By the early 1980s, the High Court could not agree on how to apply this formula.\textsuperscript{188} The individual rights approach itself did not command the

\textsuperscript{179} Fox v Robbins (1909) 8 CLR 115 (Austl.).
\textsuperscript{180} Bank of New South Wales v Commonwealth (Bank Nationalisation case) (1948) 76 CLR 1 (Austl.).
\textsuperscript{181} Tasmanian Crayfish case (1988) 165 CLR 360, 391 (Austl.).
\textsuperscript{182} Australian National Airways Pty Ltd v Commonwealth (1945) 71 CLR 29 (Austl.).
\textsuperscript{183} Commonwealth v Bank of New South Wales (1949) 79 CLR 49 (Austl.).
\textsuperscript{184} Id. at 639-41. The extent of permissible legislation was explored in cases such as Permewan Wright Consolidated Pty Ltd v Trewhitt (1979) 145 CLR 1 (Austl.), and Uebergang v Australian Wheat Board (1980) 145 CLR 266 (Austl.).
\textsuperscript{185} Commonwealth v Bank of New South Wales (1949) 79 CLR 639, 639 (Austl.).
\textsuperscript{186} Miller v TCN Channel Nine Pty Ltd (1986) 161 CLR 556 (Austl.).
\textsuperscript{187} Tasmanian Crayfish case (1988) 165 CLR 360, 384 (Austl.).
\textsuperscript{188} See the Wheat Stabilization Scheme cases, Clark King & Co Pty Ltd v Australian Wheat Board (1978) 140 CLR 120 (Austl.) and Uebergang v Australian Wheat Board (1980) 145 CLR 266 (Austl.).
acceptance of the majority of the high court. The individual rights school became outmoded, partially because of the unconvincing distinction between direct and indirect burdens on the guarantees, but also because of the difficulty in applying the criterion of operation formula, as well as the inconsistency of its wide scope with the plenary trade and commerce power under section 51(i)
(trade and commerce).

Instead, the High Court opted for a historical and purposive approach to interpreting section 92—an interpretation that saw a resurrection of the first school, the free trade school. Notwithstanding, even after Cole v Whitfield, the High Court has interpreted the section to include prohibition on any protectionist action, even if more subtle than the imposition of taxes. Moreover, the High Court has interpreted the intercourse guarantee to be a wide guarantee of personal freedom of movement among the States. The High Court stated that “there is no reason in logic or common sense for insisting on a strict correspondence between the freedom guaranteed to interstate trade and commerce and that guaranteed to interstate intercourse”, adding that “some forms of intercourse are so immune from legislative or executive interference that, if a like immunity were accorded to trade and commerce, anarchy would result.” Nevertheless, it would be legitimate to restrict movement “depending on the form and circumstances of the intercourse involved.” This differentiation in the scope of the guarantees under section 92, however, does not accord with the original intention from introducing this section, nor with its placement in the Constitution. The High Court was rather compensating for the lack of a bill of rights in Australia, by convoluting the context within which section 92 was intended to operate.

Note, lastly, that there is a common denominator between the two schools. Neither school bars imposing legislative or executive restrictions on section 92 guarantees. Both therefore envisage a boundary to the guarantees in section 92. The first school finds this boundary where the discrimination brought about by the impugned legislative or executive action is only incidental, or in relation to the intercourse guarantee, where there is proportionality between the action and the end it serves. The second school finds the boundary where the impediment is too remote from the guarantees in section 92. Later in this part, I bring this common denominator to bear on the definition of state police power.

189 Miller v TCN Channel Nine Pty Ltd (1986) 161 CLR 556, 571 (Mason J) (Austl.).
190 Cole v Whitfield (Tasmanian Crayfish case) (1988) 165 CLR 360 (Austl.).
191 Id. at 385.
192 Id. at 393 (Austl.) (joint judgment) (citing Gratwick v Johnson (1945) 70 CLR 1, 17 (Austl.).
194 Id. at 393 (citing Duncan v Queensland (1916) 22 CLR 556, 573 (Austl.); Freightlines & Construction Holding Ltd v New South Wales (1967) 116 CLR 1, 4-5 (Austl.).
195 Id. at 393.
In summary, today the High Court follows a free trade approach to interpreting section 92 that limits its guarantees where there is a necessary public interest. This is the same standard for meeting the compelling interest requirement under strict scrutiny (see above). The High Court, therefore, enlarges the analysis to include the practical effect of the impugned state action, as well as the political and economic factors that form the context for said action. In the words of the HCA Chief Justice, Susan Kiefel,

Economic consequence has therefore found its place in Australia as the critical consideration in the application of s 92. This may have the consequence that the focus of debate shifts to the reasonable necessity for legislation.

A legislative or administrative action by the Commonwealth, States or Territories will not infringe the trade and commerce guaranteed in section 92 if it does not have a discriminatory effect (in law or in fact). If the law is discriminatory, it still will not infringe section 92 if it does not serve a protectionist purpose.

Where the action passes a proportionality test balancing state action against the infringed guarantees to interstate intercourse, the action will also be constitutionally valid. Section 92 guarantees a personal freedom ‘to pass to and fro among the States without burden, hindrance or restriction’. The freedom of intercourse has been characterized as ‘a personal right in an Australian’ that is not limited to commercial contexts. See above for an analysis of the shift from this rights approach to one based on free trade.

The analytical framework for the interstate intercourse guarantee suggests that prima facie, a legislative or administrative action that has the purpose of interfering with interstate movement contravenes section 92. However, there will be no contravention if its effect is merely incidental to the pursuit of some other policy goal; and the impugned action does not go beyond what is

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198 Tasmanian Crayfish case (1988) 165 CLR 360, 403-404 (Austl.).
201 Castlemaine Tooheys Ltd v South Australia (1990) 169 CLR 436 (Austl.).
203 R v Smithers; Ex parte Benson (1912) 16 CLR 99, 113-14 (Austl.) (Isaacs J referring to Crandall v. State of Nevada 73 U.S. 35 (1868)); see also id. at 118 (Higgins J; intercourse includes ‘all migration or movement of persons from one State to another — of children returning for [sic] their holidays, of friends visiting friends, as well as of commercial travelers returning to their warehouses”).
204 Nationwide News Ort Ltd v Wills (1992) 177 CLR 1, 56 (Austl.) (Brennan J).
reasonably required to achieve that goal.\textsuperscript{205} Controls in pursuit of legitimate governmental interests will not infringe the second guarantee in section 92,\textsuperscript{206} where: “(1) the action is the principal purpose of the law is not to impede interstate intercourse, (2) the burden on interstate intercourse is appropriate and adapted to fulfilment of the law’s principal purpose; and (3) any burden on interstate intercourse is an incidental or necessary consequence of the law’s operation”.\textsuperscript{207} The proportionality requirement in step two is established where the burden is necessary to achieving the underlying interest.\textsuperscript{208} Hence, in \textit{Cole v Whitfield},\textsuperscript{209} the High Court held that Tasmanian controls on the possession of undersized crayfish was necessary to conserve this natural resource, given that local and interstate crayfish were indistinguishable.\textsuperscript{210} The High Court also upheld State legislation prohibiting advertising by barristers and solicitors of legal services relating to personal injury as there was neither discriminatory nor protectionist towards interstate trade and commerce.\textsuperscript{211}

As discussed below, the test for interstate intercourse can be reframed as a two-stage test.\textsuperscript{212} The first stage is where state action impeding interstate movement be justified (by showing a non-discriminatory purpose). This stage is analogous to the compelling state interest under strict scrutiny. The second stage requires a balancing analysis analogous to the least restrictive means test, where the means adopted by the state must be reasonably necessary for achieving the object of the restriction.

\subsection*{C. Structural Primogenitor: Justificatory Necessity}

In this section I explain how the interstate intercourse analytical framework in section 92 coincides with the least restrictive means test under strict scrutiny in that both are based on the doctrine of necessity. The doctrine has had influence on the legitimacy of state actions under constitutional constraints,\textsuperscript{213} and

\begin{footnotesize}
\begin{enumerate}
  \item AM\textit{s} v \textit{AIF} (1999) 199 CLR 160, 178-79 (Austl.) (Gleeson CJ, McHugh and Gummow JJ), 193 (Gaudron J), 217 (Kirby J), and 232-3 (Hayne J). See also \textit{APLA Ltd v Legal Services Commissioner (NSW)} (2005) 224 CLR 322 (Austl.).
  \item See \textit{Cole v Whitfield (Tasmanian Crayfish case)} (1988) 165 CLR 360, 408, 409 (Austl.); \textit{See generally, Castlemaine Tooheys Ltd v South Australia} (1990) 169 CLR 436 (Austl.). After \textit{Palmer v Wester Australia} (2021) 95 ALJR 229, the mobility right, just like the trade and commerce limb of section 92, must “be absolutely free from discriminatory burden of any kind.” (at 230 per Gageler J). Chief Justice Kiefel and Justice Keane made the same point by requiring “a law that burdens interstate movement should be subject to a requirement of justification by reference to a non-discriminatory purpose.” (at 230).
  \item See \textit{Nationwide News Pty Ltd v Wills (Industrial Relations Commission case)} (1992) 177 CLR 1, 59 (Austl.).
  \item See \textit{Tasmanian Crayfish case} (1988) 165 CLR 360, 409-10 (Austl.).
  \item See id.
  \item See id.
  \item See \textit{id.}
  \item See \textit{id.}
  \item See \textit{id.}
  \item See generally, Robert Alexy, \textit{Constitutional Rights and Proportionality}, 22 \textit{REVUS} 51 (defending the existence of a necessary connection between constitutional rights and proportionality, where proportionality is a question of the nature of impugned constitutional
\end{enumerate}
\end{footnotesize}
acknowledged under public international law as codified in Article 25 of the International Law Commission’s (ILC’s) Articles on State Responsibility.\textsuperscript{214}

One can think of the requisite necessity under United States and Australian jurisprudence as analogous to the common law doctrine of necessity as it applies to criminal law—also known as the choice of evils doctrine.\textsuperscript{215} This section fleshes out this thesis. The next section applies it to the High Court legal challenge of Western Australia’s hard border closures. First, however, a succinct summary of the common law doctrine of necessity as it applies in criminal law.

The choice of evils (justificatory necessity) defense, which has existed since the sixteenth century, is intended to prevent imminent danger.\textsuperscript{216} The development of the modern doctrine of necessity “has been profoundly influenced by the dominant political assumptions of the time,”\textsuperscript{217} an influence that is explicit in the how economic liberalism motivate a free trade interpretation of the interstate intercourse guarantee (see supra). Similar political influences can be discerned in Supreme Court jurisprudence on strict scrutiny.\textsuperscript{218} Economic influences are also evident in necessitarian analysis. In the United States, necessity represents an efficiency criterion that reflects a maximization of net social utility.\textsuperscript{219} The doctrine creates a hierarchy of interests, where collective interests dominate individual rights because the former maximizes net social utility.\textsuperscript{220} Under this necessitarian approach, balancing analysis ensures that individual rights submit


\textsuperscript{215} See Edward Arnolds & Norman Garland, \textit{The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil}, 65 J. CRIM. L. & CRIMINOLOGY 289 (1974) (arguing that the choice of evil terminology ensures the defense is not conflated with others such as self-defense and defense of property).


\textsuperscript{217} See id. at 1600.


\textsuperscript{219} See GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 229, 722 (2d ed. 1961) (“By necessity is meant the assertion that conduct promotes some value higher than the value of literal compliance with the law”).
to the prevention of a greater evil.\textsuperscript{221} Necessity is accordingly “an inherently act-utilitarian principle for the advancement of a collective good.”\textsuperscript{222} The same understanding of necessity explains the shift we have seen in interpreting section 92, from one based on individual rights, to one based on free trade, in that the latter approach exhibits an economic rationale for the right to interstate intercourse (see Part III B). The same act-utilitarian principle justifies state action under the first requirement of strict scrutiny (arguing a compelling state interest) and the second requirement (for least restrictive means) where there is balancing between ends and alternative means. These requirements are a gloss on the justificatory version of the defense of necessity, which is essentially a lesser evil defense, where state action that violates the right of interstate mobility is held to be constitutional given that it is the lesser evil option, that is where “the rights violated are of a lesser order of importance by comparison with the value being protected.”\textsuperscript{223} The State needs to show that it has acted in a way which, while infringing on the right to interstate travel, is a proportionate response to the harm which would otherwise occur. In the context of strict scrutiny and section 92 jurisprudence on interstate intercourse, the doctrine can be formulated as requiring four elements:\textsuperscript{224} (1) the state action (hard border closures) was committed to avoid a significant evil or harm (the treat to public safety from the transmission of the COVID-19 virus); (2) the State reasonably believed that its action was necessary to avoid this evil (suggesting the need for epidemiological evidence in support of the necessity to prevent the transmission of the virus, or at least to control its spread within the State); (3) the State had no alternative legal means of preventing this harm; and (4) the evil sought to be avoided is greater than the harm expected to result from infringing on the right to interstate travel.

More relevant to the two-element formulation to strict scrutiny and section 92 interstate intercourse guarantee, is one of the earliest formulations of the necessity justificatory defense.\textsuperscript{225} As it applies to hard state border closures in response to COVID-19, this formulation requires,\textsuperscript{226} first, that the state action is necessary to avoid inevitable and irreparable evil, and second, that the state action is no more than is reasonably necessary for the purpose to be achieved; put differently, the infringement on interstate mobility must not be disproportionate to the evil avoided by the hard border closures, namely, the public health threat posed by the COVID-19 virus. Modern renditions of this
two-element rendition of necessity include the common law defense in the States of New South Wales and South Australia. Stated in terms of the constitutionality of hard state border closures:227 (1) state action must have been committed under “an urgent situation of imminent peril,” and (2) the State acted with an intention to avoid a greater harm, and (3) there was open to the State no alternative to avoid the greater harm. As a two-element doctrine of necessity, the first and second elements combine to constitute a compelling state interest analysis, while the third, forms a least restrictive means test. In the State of Victoria, the doctrine is stated with direct reference to a state of emergency.228

The section is similar to the reasonable necessity requirement under strict scrutiny and section 92. The state action does not infringe the right to interstate travel where the state reasonably believed that there is an emergency, its action (the hard closure of borders) was the only reasonable way of dealing with the emergency, and its conduct was a reasonable response to the emergency. The frameworks above can also be reduced to two elements. For example, under the Victoria provision, the first element corresponds to the compelling state interest requirement (in response to “circumstances of sudden or extraordinary emergency”), and state action is the least restrictive means to mitigate the risk of death or serious injury (state action is “the only reasonable way to deal with the emergency”).

This two-element formulation of the doctrine of necessity can therefore be understood as a common structure to analyzing the constitutionality of hard state border closures under both the U.S. and Australian Constitution. Part IV illustrates how this analysis is likely to unfold in the Supreme Court, while using Australian jurisprudence and the recent Clive Palmer challenge to Western Australia’s border closures in Australia to motivate the conclusion that hard state border closures are likely to be upheld in the United States as they were in Australia.

IV. THE EXISTENCE OF AN EMERGENCY

The first hurdle requires arguing that the protection of state citizens against the spread of a global pandemic, such as COVID-19, is the existence of an emergency. In the following analysis, I show how this requirement coincides


228 Crimes Act 1958 (Vic) s 322R (Austl.):

Sudden or extraordinary emergency

(1) A person is not guilty of an offence in respect of conduct that is carried out in circumstances of sudden or extraordinary emergency.

(2) This section applies if—

(a) the person reasonably believes that—

(i) circumstances of sudden or extraordinary emergency exist; and

(ii) the conduct is the only reasonable way to deal with the emergency; and

(b) the conduct is a reasonable response to the emergency.

(3) This section only applies in the case of murder if the person believes that the emergency involves a risk of death or really serious injury.
with the compelling state interest test under strict scrutiny. Later, a discussion of the exercise of police power during a pandemic suggests that the introduction of hard state borders in the United States is unlikely to fail on the compelling state interest requirement. The states are not likely to have any legal issues arising on this limb, as “No known case law that invalidates a public health law as being unnecessary exists.”

The threshold of a compelling interest appeared for the first time in 1957, in Sweezy v. New Hampshire. In this case, Paul Sweezy, a university academic, was successful in appealing his contempt conviction for failing to answer questions put to him by the then New Hampshire Attorney General as part of an investigation into Sweezy’s connection to the Communist Party of the United States. Although concurring with the majority, Justice Felix Frankfurter, with whom Justice John Marshall Harlan II joined, wrote a separate opinion to delineate his balancing analysis, a reasoning substantially different form the narrow basis adopted by the majority, namely, that the questioning went beyond the resolution authorized by the subversive organizations law adopted by New Hampshire in 1951. In describing this balancing analysis, Justice Frankfurter stated that “For a citizen to be made to forego even a part of so basic a liberty as his political autonomy, the subordinating interest of the State must be compelling.”

However, beyond its ordinary meaning of “tending to demand action,” the word “compelling” does not provide guidance as to the nature of the requisite state interest. It can be interpreted as describing the social importance of the state interest. This importance has been limited further to where the interest is necessary rather than a matter of choice. This refinement of the requisite interest can be made concrete in the context of protecting public health, where courts are likely “to construe necessity to mean ‘a highly desirable public health interest,’ rather than applying the dictionary definition of necessary meaning ‘absolutely needed.’” We can therefore understand the phrase “compelling state interest” in the context of state response to the spread of a pandemic to illustrate the operation of the common law maxim salus populi suprema lex

231 Id. at 256 (Frankfurter, J., “Ours is the narrowly circumscribed but exceedingly difficult task of making the final judicial accommodation between the competing weighty claims that underlie all such questions of due process”).
232 Id. at 265.
233 Compelling, MERRIAM-WEBSTER’S DICTIONARY OF LAW (2nd ed. 2011).
235 See, e.g., Johnson v. City of Cincinnati 310 F.3d 484, 502 (6th Cir. 2002) (finding the interest “to enhance the quality of life in drug-plagued neighborhoods and to protect the health, safety, and welfare of citizens in those areas” a compelling government interest).
esto, which motivates the declaration of a state of emergency under state police power to protect public health. Infra, I develop this analysis further through examples from Supreme Court jurisprudence, with further illustrations from the High Court of Australia.

Examples of cases where health care has been upheld as a compelling state interest include Jacobson,237 and Compagnie Francaise.238 In Jacobson v. Commonwealth of Massachusetts,239 a case challenging mandatory smallpox vaccination, in a seven-to-two majority, the Supreme Court upheld the impugned legislation, and affirmed that “under the pressure of great dangers, [the rights of the individual in respect of his liberty may] be subjected to such restraints … as the safety of the general public may demand,”240 adding that constitutional validity rests on evincing a “real or substantial relation” to public safety.241 The reasoning in the Court’s majority opinion, delivered by Justice John Marshall Harlan II, used the principle of self-defense to balance the right of the State to endanger the individual for the common good:

Applying these principles to the present case, 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 somebody, 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 to protect itself against an epidemic of disease which threatens the safety of its members. It is to be observed that, when the regulation in question was adopted, smallpox, according to the recitals in the regulation adopted by the Board of Health, was prevalent to some extent in the city of Cambridge, and the disease was increasing.242

*Jacobson*, therefore, confirms our understanding of “compelling state interest” as paramount necessity in the context of protecting the state against an epidemic which threatens the safety of its citizens. The reference to “paramount” necessity suggests that the compelling interest relates to a specific type of necessity, not the absolute type, but as I explain below, one interpreted as

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239 197 U.S. 11 (1905).
240 *Id.* at 29.
241 *Id.* at 31.
242 *Id.* at 27 (emphasis added).
emanating from the salus populi maxim. In 2020, the Jacobson test was applied in In re Abbott I, where the Fifth Circuit dissolved a stay on a restraining order barring enforcement of a Texas executive order as applied to non-emergency and medication abortions, stating that “when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some ‘real or substantial relation’ to the public health crisis and are not ‘beyond all question, a plain, palpable invasion of rights secured by the fundamental law’”. This decision shows, instead, is that the first hurdle of a compelling state interest is likely to be met in the context of responding to the risk of community transmission of COVID-19.

243 Jefferey D. Jackson, Tiered Scrutiny in a Pandemic, 12 CONLAWNOW 39, 41 (2020) (in 1905, the Jacobson test was the same as the “classical rational basis test” used by the Supreme Court to review claims of due process and equal protection). Eventually, the classical rational basis test became the tiered-scrutiny approach. Under the current law, a fundamental right will attract strict scrutiny, where there is a need for balancing the necessity of COVID-19 restrictions with the degree of interference with the right to interstate travel. Cf. Robert Gatter, Reviving Focused Scrutiny in the Constitutional Review of Public Health Measures 2 (Saint Louis School of Law, Legal Studies Research Paper Series No. 2020-32, 2020) (arguing that even today, Jacobson affords a standard akin to rational basis scrutiny that constrains State police powers during a health crisis by a scientific focus on the efficacy of government interventions). Eventually, the classical rational basis test became the tiered-scrutiny approach. Under the current law, a fundamental right will attract strict scrutiny, where there is a need for balancing the necessity of COVID-19 restrictions with the degree of interference with the right to interstate travel. the Jacobson difference to state restrictions in response to the COVID-19 pandemic will be weighed against the tiered approach to judicial review. See generally, Association of State and Territorial Health Officials, Legal Challenges to State COVID-19 Orders, ASTHO REPORT (October 2020) https://www.astho.org/generickey/GenericKeyDetails.aspx?contentid=22924&folderid=5156&catid=7203. Alternatively, where the Jacobson test is interpreted as a differentiated standard, it is likely to be subjected to focused scrutiny. See Scott Burris, Rationality Review and the Politics of Public Health, VILL. L. REV. 933 (1989). Focused scrutiny is a refinement of the rational basis test that requires a focus on rational medical basis for public health restrictions; Id. at 978-79. This type of scrutiny can “offset the risk of judicial rubber-stamping, to defend against public health policy driven by fear or politics, and to strengthen the scientific basis of public health measures taken during the pandemic”; Robert Gatter, Reviving Focused Scrutiny in the Constitutional Review of Public Health Measures 16-17 (Saint Louis School of Law, Legal Studies Research Paper Series No. 2020-32, 2020). The main difficulty with focused scrutiny is that it envisages “an assessment of the best available scientific information about a disease”; Id. at 11, which during the critical early stages of State response, does not go beyond what can be ascertained under the precautionary approach. In other words, paucity of scientific information is the salient characteristic under which State interventions, such as hard state border closures, are to be reviewed. An explicit inquiry into the effectiveness of such interventions will not be formed on rational basis under such informational asymmetries. This point should not be confused with legal epidemiology that can inform State interventions in preventing the spread of future pandemics. See generally, SCOTT BURRIS, MICAH L. BERMAN, MATTHEW PENN & TARA RAMANATHAN HOLIDAY, THE NEW PUBLIC HEALTH LAW: A TRANSDISCIPLINARY APPROACH TO PRACTICE AND ADVOCACY (2018). This epidemiology allows for empirical study of the effectiveness of interventions only ex post. At the time that a legal challenge is mounted against any given State intervention, such information is not likely to be available.

244 954 F. 3d 772 (5th Cir. 2020).

245 Id. at 774.
Similarly, in *Compagnie Francaise de Navigation a Vapeur v. Louisiana Board of Health*, State quarantine laws were upheld by the Supreme Court as a reasonable exercise of the police power. In this case, quarantine laws issued by the Louisiana Board of Health banned entry of people into New Orleans. The owners of a ship transporting Sicilian immigrants into the U.S. filed for a restraining order under the Fourteenth Amendment enjoining the Board from enforcing the quarantine. The Supreme Court upheld the constitutionality of the quarantine under the Public Health Service Act of 1799:

The act of 1799 … clearly recognizes the quarantine laws of the states … And this very clearly has relation to laws created after the passage of that statute [requiring] that ‘there shall be no interference in any manner with any quarantine laws or regulations as they now exist or may hereafter be adopted under state laws,’ showing very clearly the intention of Congress to adopt these laws or to recognize the power of the states to pass them … But, aside from this, quarantine laws belong to that class of state legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of Congress.

Deference to state protection of public health was therefore the first enunciation of the compelling interest doctrine. This in turn invites a closer analysis of the nature of this state power, and how it is likely to be exercised in the context of preventing the spread of pandemics, a task that I return to after tracing the origins of the first clear statement of the compelling interest doctrine.

The first clear statement on the compelling state interest doctrine came in *Sherbert v. Verner*. Six justices of the Supreme Court applied this requirement to invalidate a state law that incidentally burdened the religious practice of observing the Sabbath. According to Justice Brennan,

> We must next consider whether some compelling state interest ... justified the substantial infringement of appellant’s First Amendment right. It is basic that no showing of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, “[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation.”

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250 Id. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).
The 1905 “paramount” qualifier in Jacobson is acknowledged again in 1963, in the first explicit reference to the phrase “compelling state interest.” In essence, “paramount interest” and “paramount necessity” describe the same standard under the first limb of strict scrutiny. Next, I explain this equivalence further by tracing the origin of state police power, especially as it applied to the protection of public health.

A. State Police Power

Very early in its history, the Supreme Court has declared a police power, including quarantine and isolation powers, to belong to the States. For example, in Gibbons v. Ogden, the Supreme Court struck down a law that gave exclusive navigation rights to certain individuals for the waters of New York. In its reasoning, the Court explained the local nature of laws protecting public health in the following terms:

But so do all other laws regulating internal trade, or the right of transit from one part to another of the same State; such as quarantine laws, inspection laws, duties on auctions, licenses to sell goods, &c. All these laws are acknowledged to be valid. They are passed, not with a view or design to regulate commerce, but to promote some great object of public interest, within the acknowledged scope of State legislation: such as the public health, agriculture, revenue, or the encouragement of some public improvement. Being passed for these legitimate objects, they are valid as internal regulations, though they may incidentally restrict or regulate foreign trade, or that between the States.

The “great object,” or paramount public interest in protecting public health is therefore held to be within the scope of state police power. However, the success of any legal challenge to hard state border closures depends on arguing that this action goes beyond this scope. We therefore need to ascertain the outer limits of power.

By way of definition:

The conservation of private rights is attained by the imposition of a wholesome restraint upon their exercise, such a restraint as will prevent the infliction of injury upon others in the enjoyment of [these rights] … The power of the government to impose this restraint is called police power.

251 Gibbons v. Ogden 22 U.S. 1 (1824).
252 Id. at 72.
253 CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT 1-2 (St. Louis, F.H. Thomas Law Book Co. 1886).
The police power can also be defined by reference to the functions of modern government. For example, in *National Federation of Independent Business v Sebelius*, 254 the Supreme Court stated that:

> The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution’s text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the “police power.” 255

These definitions suggest that the state police power extends to a complete suspension of individual rights in the interest of preventing harm to the public. The power envisages an occultation of individual rights to help protect a wider public good, in particular, public health. The scope therefore gives the qualifier “paramount” its full meaning, as “superior to all others” or “supreme.” 256

It is judicial review that defines the scope of the police power. The federal compact, the vertical division of legislative powers between the federal and State governments under the Ninth and Tenth Amendments ensures that the police power, one of the residual powers, is preserved to the States. 257 Notwithstanding, the Fourteenth Amendment 258 imposes due process and equal protection as outer limits on exercising this power. No longer is the police power a plenary one. 259 Given this federal compact, the review identifies a core area, beyond which exercise of this power is an impermissible limitation on the

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254 *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). *See also*, United States v. Morrison, 529 U.S. 598, 618–19 (2000) (“We can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”); U.S. v. Lopez, 514 U.S. 549, 566 (Rehnquist, J., delivering the opinion of the Court) (“The Constitution ... withhold[s] from Congress a plenary police power”); *Id.* at 584–585, (Thomas, J., concurring) (“[W]e always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power.”).

255 *Sebelius*, 567 U.S. at 535-36.

256 *Paramount*, MERIAM-WEBSTER ONLINE DICTIONARY.

257 U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”).

258 U.S. CONST. amend. XIV (“... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

259 Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 495 (2004) (“[T]he original meaning of the Privileges or Immunities Clause rules out the unlimited or plenary conception of state power and mandates that states justify any restrictions on the actions of their citizens as within the proper scope of the police power.”).
individual rights guaranteed under the U.S. Constitution.\textsuperscript{260} It follows that while during a pandemic, States have an authority to protect the public health of their respective citizens, they are able to do so only if restrictions on fundamental rights, such as interstate mobility, pass strict scrutiny. To inform the outer limits, given the common law origins of the right to interstate mobility, we need to trace the origin of the police power, back to English common law, and the underlying maxims of law that gave rise to this power in Roman law. This genealogy can then inform how judicial review within the context of a pandemic defines this outer limit.\textsuperscript{261}

The police power has its origin in English common law,\textsuperscript{262} in particularly, in the application of the Roman law maxim \textit{sic utere tuo ut alienum non laedas}.\textsuperscript{263} Under this maxim, the validity of legislation infringing on an individual right rests on preventing immediate harm to society. At the beginning of the 20th century, \textit{sic utere} was restated in terms of the doctrine of \textit{salus populi}.\textsuperscript{264} A brief genealogy of this doctrine can help understand how it fits with the compelling state interest requirement under strict scrutiny.

Salus, the ancient Roman goddess of health, security and wellbeing, is sometimes cited as the source of the civic virtues that cultivated the ideal of putting the city before the particular interests of its citizens.\textsuperscript{265} This Roman goddess is usually associated with the Greek goddess Hygeia.\textsuperscript{266} The name of the latter is etymologically connected with Ancient Greek ‘\textit{ในฐาน}’, health,\textsuperscript{267} what became ‘hygiene’, or the source of health. However, the name of the Roman goddess seems to communicate a wider idea.\textsuperscript{268} The Latin word ‘\textit{salus}’ means security, includes health, but also protection from enemies more generally.\textsuperscript{269} The root of the word ‘salus’ itself comes from the Indo-European
root *solh: or solidarity. Etymologically, *salus populi is therefore equivalent to the subordination of citizens’ particular interests to general interests. The same expectation can be described as “generalized reciprocity”, where subordination returns a benefit, not necessarily from direct personal reciprocation, but from the community as a whole.

The earliest known legal rendition of *salus populi was by Marcus Cicero, writing between 51 and 46 BC. He used the maxim *ollis salus populi suprema lex esto to conclude a paragraph in which he ruminates his design for a consular constitution. As the verb “esto” is in the hortatory future imperative tense, the phrase appears as an order to the magistrates: in order to face a danger to the Republic, the magistrates must not answer to anyone. They must obtain full powers, including military command: “in extreme circumstances … one of them or a third party [must operate] like … one-person command.” Cicero intended a suspension of the institutions of government, including constitutional limits on government power, to the end of protecting the common good.

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271 The concept of solidarity comes from the obligation in solidum, where a debt is not divided between the debtors. Instead, each debtor has the obligation to fulfill the whole debt at the request of the common creditor. The origin of solidarity is, then, this act of taking charge of the whole. See CARLOS GÓMEZ LIGUERRÈ, SOLIDARIDAD Y RESPONSABILIDAD. LA RESPONSABILIDAD CONJUNTA EN EL DERECHO ESPAÑOL DE DAÑOS (Universitat Pompeu Fabra, 2005).
273 Solidarity is part of the rule of assistance under the principle of subsidiarity, although the former looks at relations of care, while the latter looks at relations of accountability. In addition, solidarity envisages the application of this rule at the lowest possible scale for social organization, that of the individual, while subsidiarity looks at a wider applicability between different scales of social organization. The other two rules of subsidiarity, the rule of non-interference, and the rule of competency transfer, do not engage solidarity. The etymology of the word salus, therefore, leads to understanding the maxim salus populi as a special case of the principle of subsidiarity, applicable in extreme circumstances, and requiring emphasis on the assistance rule of subsidiarity. See generally, Benjamien Franken Gussen, Australian Constitutionalism between Subsidiarity and Federalism, 42 MONASH UNIVERSITY L. REV. 383 (2016); BENJAMEN GUSSEN, AXIAL SHIFT: CITY-SUBSIDIARITY AND THE WORLD SYSTEM IN THE 21ST CENTURY (2019); Francis J Schweigert, Solidarity and Subsidiarity: Complementary Principles of Community Development, 33 J. SOC. PHIL. 33 (2002); JACQUES H DRÈZE ET AL, THE INTERACTION BETWEEN SUBSIDIARITY AND INTERPERSONAL SOLIDARITY 10 (André Decoster ed., 2009).
274 MARCUS TULLIUS CICERO, ON THE LAWS (De leg., III, 3, 8) 5 (1842) (Although some jurists treat the maxim as metaphorical, not properly a law); See also A. R. DYCK, A COMMENTARY ON CICERO, DE LEGIBUS 459 (2004).
276 Cf., Ryan Patrick Alford, Is an Inviolable Constitution a Suicide Pact? Historical Perspective on Executive Power to Protect the Salus Populi, 58 ST. LOUIS U. L. J., 355, 368 (2013) (arguing that there is no constitutional doctrine of necessity that can trump citizens’ rights in time of crisis); See also BRIAN WALTERS, THE DEATHS OF THE REPUBLIC: IMAGERY OF THE BODY POLITIC IN CICERONIAN ROME 40 (2020); LORENZ WINKLER, SALUS: VOM STAATSKULT ZUR POLITISCHEN IDEE. EINE ARCHÄOLOGISCHE UNTERSUCHUNG (Verlag Archäologie und Geschichte, 1995).
Many salient jurists followed in Cicero’s footsteps. For example, Baruch Spinoza, who interprets *salus populi* beyond health and safety, sees it as a law for salvation. To enable this interpretation of *salus populi*, Spinoza severs the divine prudence flowing from the Roman and Greek goddesses and replaces them with civic salvation. This salvation comes from *salus populi* as a metanorm that underlies the rationale for constitutional limits on states. Spinoza is explicit in claiming that the doctrine is the most fundamental constitutional law of any state. To put it differently, “neither man nor God has a free will, [although] both are able to express their essences without being externally compelled.” It follows that the doctrine of *salus populi* underlies any constitutive power by which man, through the political state, can express his essence.

Our understanding of *salus populi* today comes from the late 17th century version by John Locke, who declared that “*Salus populi suprema lex* is certainly so just and fundamental a rule, that he who sincerely follows it cannot dangerously err.” This endorsement of the doctrine should not fault Locke for overlooking the dangers associated with the doctrine, specifically, the potential of abuse of power. Locke was simply making the point that the will of the people, as reflected in constitutional designs and the democratic ideal, is based on a metanorm. Therefore, when the issue is one of (constitutional) legitimacy, “The ultimate ground of legitimacy is not the will of the people, as such, but the good of the people.” Specifically, the Constitution is an instrument towards this metanorm, and instrument towards the good of the people, but not absolute of the good of the people. It follows that any legislative or executive action that is of advantage to the people, an action that has a rational connection to the public good, emanates from the metanorm, and therefore, cannot be invalid for violating the Constitution. Notwithstanding, while this Lockean conception of public good brought a broader discretion under the doctrine, it also introduced a limitation on the use of the police power where it infringes on individual rights. This version of *salus populi* states that

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277. See also, DAVID HUME, ESSAYS MORAL, POLITICAL AND LITERARY 489 (Eugene F. Miller ed., 1985).
283. See Barnett, supra note 259, at 490.
“fundamental rights … can only be interfered with … by lawful regulations necessary or proper for the mutual good of all.”

Necessity, therefore underpins the limits on *salus populi*, the exercise of the police power, and hence the requisite nature of a compelling state interest. The doctrine has been enough to define the scope of the policing power prior to protections under the Fourteenth Amendment, when a broad plenary power was still feasible. But even then, there were outer limits on the power. For example, Ernst Freund explains the inherent balancing under a broad power interpretation as follows:

Effective judicial limitations on the police power would be impossible, if the legislature were the sole judge of the necessity of the measures it enacted … the maintenance of private rights under the requirements of the public welfare is a question of proportionateness of measures entirely. Liberty and property yield to the police power, but not to the point of destruction …. The question of reasonableness usually resolves itself into this: Is regulation carried to the point where it becomes a prohibition, destruction, or confiscation?

Put differently, under a broad interpretation of the police power, the reasonableness of the impugned action is irrelevant to judicial review. Today, however, under strict scrutiny, the review has to look at the net benefit form invoking *salus populi* against the closure of state borders. There is a rational analysis of the necessity of state action.

As I have argued above, the genealogy of the maxim is directly connected to the health of citizens: “[i]n the midst of the coronavirus crisis, public health is an objectification of the problem of the common good.” I argue further that the essence of a *salus populi* action is prudence or caution in the protection of this common good—analagous to the precautionary principle. When applied to human actions, *salus populi* requires a form of sagacity that accommodates erring on the side of caution. This prudentia consideration provides guidance.

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285 *See*, e.g., Collins Denny, Jr., *The Growth and Development of the Police Power of the State*, 20 Mich. L. Rev. 173, 190-192 (1921) (arguing that an expanded scope of the police power is incompatible with the protections in the Fourteenth Amendment).
286 *See* ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 6 (1904) (arguing that “The maxim of this power is that every individual must submit to such restraints in the exercise of his liberty or of his rights of property as may be required to remove or reduce the danger of the abuse of these rights on the part of those who are unskillful [sic], careless or unscrupulous”.
287 *Id* at 60-6.
288 *Cf.* Charles Bufford, *The Scope and Meaning of Police Power*, 4 Cal. L. Rev. 269, 277 (1916) (“[A] regulation in the exercise of the police power, to be valid must not be unreasonably or unnecessarily burdensome, and must have some appreciable tendency towards accomplishing a result within the scope of police power.”).
289 This reasonable necessity, as I have argued in Part II, also informs the analysis by the High Court of Australia of hard state borders in Western Australia. *See* infra.
on the requisite constitutional restrictions on governmental actions. This proposition comes directly from what Cicero referred to as Prudentia, Latin for providence. For Cicero, “Salus is united and enshrined in” prudence because it serves to “stimulate the knowledge of the common good.” This understanding is confirmed by the origin of salus populi, as Salus, the ancient goddess of wellbeing (see supra). A pandemic invokes hope of divine providence to protect the common good. Prudence, the essence of a salus populi action, is explained by the extreme nature of the threat that attracts a salus populi action. This threat justifies the judicious cautiousness inherent in a salus populi action. The threat that will attract salus populi is one that requires the utmost caution in protecting the common good. We can also explain this prudence in an economic sense. In the extreme event of a pandemic, there is lack of data to assist in identifying the optimal response to protect the common good—the health and wellbeing of citizens. To ensure that the response will indeed protect the common good, what is an effectiveness criterion, action has to err on the side of caution. This informational asymmetry has to inform the analysis of reasonable necessity or proportionality under the compelling state response. The analysis has to take into account the asymmetries inherent in extreme circumstances such as a global pandemic.

It is not surprising, given the constitutional constraints imposed on Salus Populi through the U.S. Constitution, that States have shunned explicit statements of the police power in their respective constitutions. Instead, the power is found in state emergency legislation. An analogy between Canada and the United States can help understand issues with the current U.S. approach:

Although the United States and Canada have had quite different constitutional frameworks, their uses of emergency powers through most of the nineteenth and twentieth centuries were very similar. In the nineteenth century, national troops were used to put down local rebellions in both countries, often at the request of local governors. With World War I, however, both moved to a statute-based system of regulating emergencies. In Canada, the War Powers Act provided broad delegations of power from the parliament to the executive. In the U.S., delegations were also broad, but accomplished through a series of smaller statutes. These frameworks lasted until abuses of emergency powers were exposed in both countries in the 1970s. And there the parallel history ended. Canada adopted a comprehensive constitutional revision that brought all emergency powers within


\[292\] Ángel Sánchez de la Torre, El objeto de la legalidad en la expresión salus populi suprema lex esto, 12 CUADERNOS DE FILOLOGÍA CLÁSICA: ESTUDIOS LATINOS 44 (1997).

\[293\] Id.

\[294\] Barnett, supra note 259, at 434 (“Originally, the obvious places to look were state constitutions to see what powers a particular state had been granted. However, as was already mentioned, the enactment of the Fourteenth Amendment complicated this by forbidding states from improperly abridging the privileges or immunities of their own citizens even where permitted by their constitutions.”).
constitutional understandings. The U.S., on the other hand, continued its use of statutory patches to regulate the relationship between the executive and legislature in times of crisis. As a result, the reactions of the two countries to the events of 9/11 were quite different. Canada responded with a moderate use of exceptional powers, while the US plunged into more extreme uses of emergency powers.295

The U.S. Constitution does not have a specific legislative power for emergencies or disasters,296 save for the suspension of habeas corpus “when in Cases of Rebellion or Invasion the public Safety may require it.”297 Instead, the Constitution has an incidental power, under Article 8, to “make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”298 The courts will recognize a declaration of a state of emergency by the executive branch of federal and state governments if backed by their respective legislatures.299 There are also some implied powers that authorize presidential emergency rule, including the president’s power as commander in chief of the armed forces.300 This constitutional design, with its separation of powers principle, envisages assigning emergency powers through federal and state government legislation, a form of the accommodation view discussed infra. The effectiveness of this model, however, is limited to external emergencies, such as the COVID-19 pandemic. In the case of internal emergencies, such as a rebellion, the willingness of legislatures to enact statutes that concede powers to the executive might not be supported by their respective constituencies.301

The legal issue on determining what constitutes an external emergency. An emergency is defined as a crisis of uncertain duration, but of such magnitude that, if not contained, will pose a threat not only to public safety, but to the stability, or even the existence, of a political state.302 Sometimes, a distinction is made between internal and external emergencies:

296 Eburn, supra note 109, at 98.
297 U.S. CONST. art. I, § 9, cl. 2.
298 U.S. CONST., art. 8.
300 U.S. CONST. art. II, § 2, cl. 1.
302 H. P. LEE ET AL., supra note 111, at 170. (stating that emergencies “can arise from any of a multitude of causes: political, financial, large-scale natural disasters and armed insurrection”). See also Bhagat Singh & Ors v. The King Emperor AIR 1931 P.C. 111, 169 (Lord Dunedin stating that “A state of emergency is something that does not permit of any exact definition: it connotes a state of matters calling for drastic action. . .”); Stephen Kalong Ningkan v. Government of Malaysia [1970] A.C. 379, 390 (Lord MacDermott stating that “Although an ‘emergency’ to be within that article must be not only grave but such as to threaten the security or economic life of the Federation or any part of it, the natural meaning of the word
[An] Emergency may be defined as a situation that produces a grave disturbance of the political system or order, threatening its survival. The emergency can have an *exogenous* or *endogenous* origin. The most obvious case of an exogenous threat is a war or invasion: the attempt by “enemies” to destroy, occupy, or somehow take control over a country … More problematic are two other cases: terrorism and civil war. By civil war we mean the attempt by internal political actors to destroy the constitutional order (for instance, the Kapp putsch at the beginning of the Weimar Republic; the OAS during the Algerian war in France). Terrorism (internal terrorism, such as that of the Italian Red Brigades or the German RAF or the French Action Directe) seems to be part of the same family. International terrorism may be somewhere between the two—war and civil war.

Pandemics are external emergencies. A pandemic is defined as a disease spreading rapidly on a worldwide scale within a short period of time. Pandemics are therefore highly infectious and can cause a large number of deaths in a short period of time. And although deaths *per se* are not a necessary part of the definition of a pandemic, they can measure the level of threat that a pandemic poses to public safety. For example, COVID-19 resulted in around 1.9 million deaths during the period from December 2019 to December 2020. Governments therefore can use emergency powers to prevent the spread of COVID-19. Hence, COVID-19 was declared a public health emergency on 31 January 2020, and a national emergency on 13 March. Similar declarations, including disaster proclamations, were made in every State.
In summary, since Cicero’s formulation, salus populi has exerted a strength similar to that of acts of parliament, including in England, and the United States. The relevance of salus populi is informed by its genealogy and the underlying origin of state police power. The declaration of a state of emergency allows governments to implement policies that would normally infringe on some individual rights, such as the right to interstate mobility. Infra, I explain how salus populi informed the jurisprudence of the Supreme Court and the High Court of Australia.

B. Salus Populi Jurisprudence

The doctrine of salus populi has been part of Supreme Court jurisprudence since the early 1800s. Its place in tiered scrutiny, however, seems to have faded away in favor of a direct balancing of state action against fundamental rights, without an explicit analysis of the limits that such rights impose on a state action motivated by salus populi. Further insights of how this doctrine qualifies state interest as compelling comes from the High Court of Australia, and related appeals to the Privy Council.

1. Supreme Court Cases

The earliest mention of salus populi came in 1847, in Thurlow v. Massachusetts, three different proceedings on appeal from three different States (Massachusetts, Rhodes Island, and New Hampshire) that were argued together before the Supreme Court. The cases related to several importers of foreign liquor who had been convicted for selling foreign liquor without a State license, although they have had authorization from Congress to import liquor. The importers challenged the liquor licensing system in each state, arguing that the license requirement was unconstitutional given that they already have an authorization by Congress for liquor importation. The Supreme Court disagreed and affirmed the judgments of the respective State courts, finding that all three State licensing restrictions were not inconsistent with the Constitution, because “they are police regulations of the States, and derived from a right reserved to make and execute such laws; and are not, therefore, regulations of foreign commerce, though, for the purposes of protecting life, health, and property, they necessarily deal with it”. The Court’s pronouncements relating to a State’s police power can be illustrated by the following quote:


311 Sperber, supra note 261, at 205.
312 STEFAN WEINSTOCK, DIVUS JULIUS (1971).
313 Thurlow v. Massachusetts, 46 U.S. 504 (1847).
314 Id. at 514, 573.
315 Id. at 527.
It has been frequently decided by this court, ‘that the powers which
relate to merely municipal regulations, or what may more properly
be called internal police, are not surrendered by the States, or
restrained by the constitution of the United States; and that
consequently, in relation to these, the authority of a State is
complete, unqualified, and conclusive.’ Without attempting to
define what are the peculiar subjects or limits of this power, it may
safely be affirmed, that every law for the restraint and punishment
of crime, for the preservation of public peace, health, and morals,
must come within this category.

As subjects of legislation, they are from their very nature of primary
importance; they lie at the foundation of social existence; they are
for the protection of life and liberty, and necessarily compel all laws
on subjects of secondary importance, which relate only to property,
convenience, or luxury, to recede, when they come in conflict or
collision, ‘salus populi suprema lex.’

Justice Catron went on to clarify the boundary of the police power in relation to
federal legislation as follows:

The assumption is that the police power was not touched by the
constitution, but left to the states, as the constitution found it. This
is admitted; and whenever a thing, from character or condition, is of
a description to be regulated by that power in the state, then the
regulation may be made by the state, and congress cannot interfere.
But this must always depend on facts subject to legal ascertainment,
so that the injured may have redress. And the fact must find its
support in this, whether the prohibited article belongs to, and is
subject to be regulated as part of, foreign commerce, or of commerce
among the states. If, from its nature, it does not belong to commerce,
or if its condition, from putrescence or other cause, is such, when it
is about to enter the state, that it no longer belongs to
commerce, or,
in other words, is not a commercial article, then the state power may
exclude its introduction; and, as an incident to this power, a state
may use means to ascertain the fact. And here is the limit between
the sovereign power of the state and the federal power; that is to say,
that which does not belong to commerce is within the jurisdiction of
the police power of the state, and that which does belong to
commerce is within the jurisdiction of the United States.

316 Id. at 631-32 (Justice Grier concurring with the judgments of the other justices, but for
different reasons. He formulated the issue in the three cases as whether “the States have a
right to prohibit the sale and consumption of an article of commerce which they believe to be
pernicious in its effects, and the cause of disease, pauperism, and crime.”). Id. at 631.
317 Id. at 599. See also, Lake Shore & Michigan Southern R. Co. v. Ohio, 173 U.S. 285, 297–
98 (1899) (“When Congress acts with reference to a matter confided to it by the Constitution,
then its statutes displace all conflicting local regulations touching that matter, although such
regulations may have been established in pursuance of a power not surrendered by the States
to the General Government”).
In *Smith v. Turner*, three cases with similar facts were decided by the Supreme Court in one judgment. Both relate to state laws requiring foreign vessels to pay fees to support the State quarantine system. The fees were based on the number of steerage-class. Turner, the New York health commissioner, brought an action against George Smith under the State’s maritime hospital law. The law allowed for the recovery from every foreign vessel of fees that would then go to pay for quarantining passengers when required. Smith, who was master of a British ship that had arrived at New York City, refused to pay these fees. In the other case, Norris, the master of a British vessel, brought an action against the City of Boston to recover money he had been compelled to pay under Massachusetts law for each passenger that had embarked without a bond. In both cases, the master of the vessel argued that the power to impose such fees was exclusive to Congress under Article 1, § 8. Five out of the nine justices of Supreme Court agreed. The fees were in the nature of taxes that infringe on Congress’ power to regulate commerce. The important point in the two cases, notwithstanding, is that all nine justices recognized state police power, although in this case they found the power not to be relevant as the impugned law was about taxes, rather than measures taken to respond to an emergency.

In *Hannibal & St. J.R. Co. v. Husen*, a Missouri statute prohibited the entry of cattle into the State between the first of March and the first of November of each year. The Supreme Court found this statute to be in violation of the Commerce Clause, because it was more than a quarantine regulation and therefore not a legitimate exercise of the State police power. The Court was clear on the applicable standard defining the outer boundary of the police power:

> While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, &c., from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection.

We can already recognize the same absolute necessity standard that came later on to guide the meaning of the phrase “compelling state interest” under strict scrutiny.

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319 Id. at 368.
320 Id. at 410 (Justices Wayne, McLean, Catron, McKinley, and Grier; Justices Taney, Daniel, Nelson and Woodbury dissenting).
321 Id. at 398 (McLean), 423 (Wayne), 448 (Catron), 452 (Grier), 452 (McKinley), 488 (Taney), 508 (Daniel), 518 (Woodbury).
323 Id. at 468.
324 Id. at 472 (Strong, J., delivering the opinion of the Court) (emphasis added).
A similar interpretation of the policing power arose thirty years later, in *Boston Beer Co. v. State of Massachusetts*,325 after the State of Massachusetts seized liquor manufactured by the Boston Beer Co. The Superior Court rejected the Boston Beer Co.’s argument that its charter, granted in 1828, gave it the right to manufacture and sell liquor, and that Massachusetts’ prohibition laws were void. The Supreme Court found that the charter was not absolute, and that the impugned Act does not violate the Constitution, adding that the State may “in the exercise of her police power, subject the company to the same restraints in the use of its property as may be imposed upon natural persons”.326 The Court elaborated on the exercise of the police power:

If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the state. Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise…327

The same understanding of state police power was endorsed in *Butchers’ Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*,328 where the State of Louisiana incorporate the Crescent City Live-stock Landing & Slaughter-house Company under the 1869 Act titled “An act to protect the health of the city of New Orleans.”329 The Act gave the company an exclusive right to butcher live-stock within certain areas of New Orleans. The plaintiff argued that this exclusive right was forbidden by the Fourteenth Amendment. Justice Miller, in delivering the judgment of the Court elaborated on the State police power:

It cannot be permitted that, when the constitution of a state, the fundamental law of the land, has imposed upon its legislature the duty of guarding, by suitable laws, the health of its citizens, especially in crowded cities, and the protection of their person and

326 *Id.* at 28.
327 *Id.* at 33 (emphasis added).
329 *Id.* at 747.
property by suppressing and preventing crime, that the power which enables it to perform this duty can be sold, bargained away, under any circumstances, as if it were a mere privilege which the legislator could dispose of at his pleasure. This principle has been asserted and repeated in this court in the last few years in no ambiguous terms. The first time it seems to have been distinctly and clearly presented was in the case of *Boyd v. Alabama*, 94 U. S. 646 ... [The] principle became the foundation of the decision in the case of *Beer Co. v. Massachusetts*, 97 U. S. 28 ...\(^{330}\)

A similar pronouncement on the state policing power came in *Leisy et al. v. Hardin*,\(^ {331}\) where the State of Iowa confiscated a quantity of beer manufactured by the plaintiffs at their brewery in Peoria, Illinois. The plaintiffs, having transported the beer from Peoria to Keokuk, Iowa, offered the same for sale at a property occupied by their sales representative. Under Iowa laws, no intoxicating liquors from any other state or territory of the United States can be sold in Iowa without a certificate issued by the State.\(^ {332}\) The Supreme Court reversed the finding of the Superior Court that these laws were in contravention of Article 1 § 8 of the Constitution.\(^ {333}\) While the Court did not attempt to define the police power,\(^ {334}\) it pronounced that

> it may safely be affirmed that every law for ... for the preservation of the public peace, health, and morals ... lie at the foundation of social existence; they ... necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience, or luxury, to recede, when they come in conflict or collision; *salus populi suprema lex* ... It is for this reason that quarantine laws, which protect the public health, compel mere commercial regulations to submit to their control ... not from any power which the states assume to regulate commerce or to interfere with the regulations of congress, but because police laws for the preservation of health, prevention of crime, and protection of the public welfare must of necessity have full and free operation, according to the exigency which requires their interference.\(^ {335}\)

In *St. Louis & S.F.R. Co. v. Mathews*,\(^ {336}\) buildings on Mathews’ land caught fire from locomotive engines operating on an adjoining railway line. The legal issue on appeal to the Supreme Court was whether the State of Missouri statute imposing liability on railroad corporations for damage to property resulting from fire generated by its locomotive engines was inconsistent with the Constitution. In finding the statute to be constitutional and a valid exercise of

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\(^{330}\) *Id.* at 750.

\(^{331}\) *Leisy v. Hardin*, 135 U.S. 100 (1890).

\(^{332}\) *Id.* at 107.

\(^{333}\) *Id.* at 104.

\(^{334}\) *Id.* at 145.

\(^{335}\) *Id.*

\(^{336}\) *St. Louis & S.F.R. Co. v. Mathews*, 165 U.S. 1 (1897).
the state’s policing power, the Court cited with approval Justice Bradley’s dicta in *Boston Beer Co. v. Massachusetts*, for the *salus populi* doctrine.

The same approach was adopted in *Workman v. City of New York*. In this case, a fireboat responding to a call to extinguish fire at a warehouse situated on the East River of New York City caused damages to Workman’s vessel, which was moored in the vicinity of the warehouse. The City appealed the lower courts’ decision awarding Workman damages. The Supreme Court found for the City, because “the principles affirmed and illustrated in the authorities already cited forbid the maintenance of a private action against a municipal corporation for injuries caused by the negligence of members of a fire department, while engaged in the performance of their official duties.” These principles confirm the wide interpretation of state police power that we see in the earlier cases:

The danger is so great and imminent that it is especially one of those cases in which the public safety must be preferred to private interests. *Salus populi suprema lex*. It is the public good, the general welfare, that justifies the destruction of neighboring buildings to prevent the spreading of a fire which as yet rages in one building only. The duty of protecting, so far as may be, all property within the state against destruction by fire, is a public and governmental duty, which rests upon the government of the state; and it does not cease to be a duty of that character because the state has delegated it to, or permitted it to be performed by, a municipal corporation. When intrusted [sic] by the legislature to a municipal corporation, a political division of the state, it is not for the peculiar benefit of that corporation or division, but for its benefit in common with the whole public.

The *Boston Beer Co.* approach continued in *Texas & N.O.R. Co. v. Miller*. A railway engineer died after the locomotive engine he was driving derailed. The railroad was being operated by two companies through the States of Texas and Louisiana. The accident was caused by the negligence of the two companies. However, the Louisiana legislation incorporating the Louisiana company contained a provision exempting the company from liability for the death of any person in its service. This provision was repealed in 1884, before the accident, and the question for the Supreme Court on appeal from the Fourth Supreme Judicial District of the State of Texas was whether said provision have survived such repeal given that it was part of the company’s charter. Put differently, whether the State of Louisiana had the power to alter the contract between the

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337 Id. at 27.
338 Id. at 23-24 (citing *Beer Co. v. Massachusetts*, 97 U. S. 25, 33 (1877)).
340 Id. at 585.
341 Id.
342 *Texas & N.O.R. Co. v. Miller*, 221 U.S. 408 (1911).
company and the deceased. Citing *Boston Beer Co. v. Massachusetts*, the Court confirmed that “The doctrine that a corporate charter is a contract which the Constitution of the United States protects against impairment by subsequent state legislation is ever limited in the area of its operation by the equally well-settled principle that a legislature can neither bargain away the police power nor in any wise withdraw from its successors the power to take appropriate measures to guard the safety, health, and morals of all who may be within their jurisdiction.” The Court, therefore, affirmed the lower courts’ decision in favor of the plaintiff.

The boundary of the police power clarified further in *Oregon-Washington R. & Nav. Co. v. State of Washington*. The proceedings originated from an action by the State of Washington against the Oregon-Washington Railway & Navigation Company, an interstate common carrier in the states of Idaho, Oregon, and Washington. The State was concerned about the rapid spread of a harmful insect that existed in the areas of the States of Utah, Idaho, Wyoming, Oregon, and Nevada. The cost of a proper inspection to ascertain the presence of the eggs of this insect was prohibitive, and the only practical method of preventing its spread into uninfected districts was to prohibit the transportation of hay from infected districts. On or about September 17, 1921, the Washington director of agriculture declared a quarantine against all infected areas, and forbade the importation into Washington of hay, except in sealed containers. The Oregon-Washington Railway & Navigation Company, in violation of the quarantine, shipped into Washington, in common box cars, and not in sealed containers, approximately 100 cars of hay originating from the infected areas. By a seven-to-two majority, the Supreme Court found the quarantine law to be unconstitutional given that Congress has already covered the field, thereby rendering this quarantine law illegal.

In the relation of the states to the regulation of interstate commerce by Congress there are two fields. There is one in which the state cannot interfere at all, even in the silence of Congress. In the other, and this is the one in which the legitimate exercise of the state’s police power brings it into contact with interstate commerce, so as to affect that commerce, the state may exercise its police power until Congress has by affirmative legislation occupied the field by regulating interstate commerce and so necessarily has excluded state action.

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343 Id. at 414 (referring to the discussion of salus populi suprema lex in *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 32-33 (1877)).
344 Id. at 417.
346 275, 37 Stat. 315, 318 (West 1912), amended by 39 Stat. 1165 (West 1917). The Act made it unlawful to import into the United States any nursery stock unless permit had been issued by the Secretary of Agriculture under regulations prescribed by him.
347 *Oregon-Washington R. & Nav. Co.*, 270 U.S. at 101 (Taft, J., delivering the opinion of the Court). (McReynolds, J., & Sutherland, J., dissenting, arguing that the Secretary of Agriculture has not taken any affirmative action, adding that “[i]t is a serious thing to paralyze the efforts of a state to protect her people against impending calamity, and leave them to the
The next section illustrates the same necessitarian logic underlying the police power in the jurisprudence of the High Court of Australia.

2. High Court Cases

The first High Court reference to *salus populi* as part of the common law of Australia, came in *Marconi’s Wireless Telegraph Co Ltd v Commonwealth (No 2)*, where the plaintiff alleged that the Commonwealth has infringed his wireless telegraphy patent by using an apparatus based on the same technology. The Crown opposed inspection of the apparatus by the plaintiff on the ground that such inspection would reveal Commonwealth secrets that could be determinantal to public welfare. Chief Justice Griffith and Justice Barton allowed the inspection, arguing that doing so would not risk the disclosure of any secret. Justice Isaacs dissentient opinion, argued that under common law certain classes of evidence are excluded because “however relevant that evidence might be, its admission would, on the whole, do more harm to society at large, or sometimes to third parties, than it would do good to the individual litigants”. In support of this doctrine, his honor cites with approval Justice Buller in *The Governor and Company, the British Cast Plate Manufacturers, v. Meredith*, where

he gives some common law instances, in which the preservation and defense of the kingdom are involved, and there he says individuals may suffer certain damage and yet have no right of action against the person who caused it. “This,” says the learned Judge, “is one of those cases to which the maxim applies, *salus populi suprema est lex*.” Of course, that is no warrant for extending the maxim to cases beyond those recognized by law as governed by it.

However, it was only in *James v Cowan*—two decades later, that the overlap between *salus populi* and section 92 was considered, and only on appeal to the Privy Council. The case concerned the validity under section 92 of a marketing system enforced by public control. The system, which had been

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349 *Marconi’s Wireless Telegraph Co Ltd v Commonwealth (No 2)* (1913) 16 CLR 178 (Austl.).

350 Id. at 196.

351 *The Governor and Company, the British Cast Plate Manufacturers, v. Meredith* [1792] 4 TR 794, 797 (Buller J) (Austl.).

352 *Marconi’s Wireless Telegraph Co Ltd v Commonwealth (No 2)* (1913) 16 CLR 178, 204 (Isaacs J) (Austl.).

353 *James v Cowan* (1929) 43 CLR 386 (Austl.).

354 Id.; *James v Cowan* (1932) AC 558, 559; 47 CLR 386 (Privy Council) (Austl.).
introduced in Victoria and South Australia, imposed quotas on the sale of dried fruit within Australia, including in States other than South Australia, where the plaintiff’s sheds were located, and compelled growers to sell the rest of their produce in the less profitable overseas market. In a ratio of three-to-one (Justice Isaacs dissenting), on appeal to the Full Court of the High Court, Chief Justice Knox and Justice Gavan Duffy agreed with the earlier judgment delivered by Justice Starke. Justice Rich also upheld the Act, arguing for “the principle that legislation authorizing compulsory acquisition did not immediately or directly affect inter-State trade but did so only consequentially. If this view is right, it goes a long distance to decide the present case.” On the other hand, Justice Isaacs found the paraphrasing to be fallacious, because “Sec. 92 cannot be limited, in its relation to commerce, to contracts for transportation.”

On appeal to the Privy Council, Lord Atkin, in obiter dictum, stated that “legislation which has for its primary object such matters as defense against an enemy, prevention of famine, disease and the like, is directed primarily to such matters and does not infringe s 92 because incidentally interstate trade is affected”. Lord Atkin’s statement explains how legislative action that has the objective of defense against a disease will not be impermissible under the trade and commerce guarantee in section 92. It seems, without more, that this formulation coincides with that prior to the Fourteenth Amendment, namely when the police power was still absolute. Probably, Lord Atkin’s formulation is even broader; it does not contemplate any boundary on the scope of this power.

While Lord Atkin’s statement referred only to legislation, executive action in response to the same extreme circumstances is likely to be treated equally, as confirmed by Chief Justice Griffith in R v Kidman. The case raised questions about the applicability of a Commonwealth statute that makes any person who conspires with any other person to defraud the Commonwealth guilty of an indictable offence. The offence charged in the indictment was alleged to have been committed before the commencement of the statute. Chief Justice Griffith reasoned that the Commonwealth has power under s 51(xxxix) of the

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355 James v Cowan (1929) 43 CLR 386, 392 (Starke J) (Austl.) (“Sec. 92 may … be paraphrased thus: Every owner of goods shall be at liberty to make such contracts for the transportation of goods from one State to another as he thinks fit without interference by law. It follows that as soon as he ceases to be the owner of the goods the section ceases to have any operation so far as those goods are concerned.”).
356 Id. at 425.
357 Id. at 417.
358 Id. at 418. Note also that on Rich J’s reading of Isaacs J’s judgment in the case, ‘In substance Isaacs J. concurred with [the view that a transfer, compulsory or otherwise, of the ownership in a chattel was not an impairment of the liberty to transact business inter-State], as I read his judgment, although he qualified its statement by the condition that the State should deal with the property on the basis of property and regulate its ownership irrespective of any element of inter-State trade. Id. at 425.
360 R v Kidman (1915) 20 CLR 425 (Austl.).
Constitution to legislate common law of the Commonwealth, such as the law recognizing an offence to conspire to defraud the Commonwealth, and that such a statute would be a law of procedure, and hence capable of retrospective operation, at least as far as it refers to the fora in which the offence is to be prosecuted. His honor also discussed other classes of statutes that are capable of retrospective operation, including:

… laws validating retrospectively Acts of the Executive Government which at the time when they were done were not authorized by law, but were necessary under the rule *Salus populi suprema lex*, would be within the [incidental] power. In both these cases the authority rests upon *necessity* ...\(^{361}\)

Similarly, in *Shaw Savill & Albion Co Ltd v Commonwealth*,\(^ {362}\) the plaintiff sued the Commonwealth in Admiralty for damages in consequence of a collision which occurred between HMAS Adelaide and a motor vessel owned by the plaintiff. The plaintiff argued negligence of the defendant’s officers and servants. Justice Starke, in accepting that the Commonwealth has wide prerogative powers to defend Australian when the necessity arises,\(^ {363}\) cited Lord Moulton in *Attorney-General v De Keyser’s Royal Hotel Ltd*:\(^ {364}\)

> But such *necessity* would be in general an actual and immediate necessity arising in face of the enemy and in circumstances when the rule *Salus populi suprema lex* as clearly applicable. The *necessity* would in almost all cases be local, and no-one could deny the right of the Crown to raise fortifications on or otherwise occupy the land of the subject in the face of the enemy, if it were *necessary* so to do.\(^ {365}\)

Chief Justice Griffith and Justice Starke are referring to a special rendition of *necessity*, one that should not be conflated with that under structured proportionality, or the balancing exercise under the test for permissible limits on intercourse. Jurists have formulated this necessity under the German concept of *übergesetzlicher Notstand* (supra-legal emergency),\(^ {366}\) or its common law counterpart, what is referred to as the doctrine of overruling necessity.\(^ {367}\) Note, however, that there are subtle differences between *salus populi* and these civil and common law doctrines. *Salus populi* necessity is based on prudence, on a

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\(^{361}\) *Id.* at 435.

\(^{362}\) *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344 (Austl.).

\(^{363}\) *Id.* at 354, 357.

\(^{364}\) *Attorney-General v De Keyser’s Royal Hotel Ltd.*, [1920] AC 508 (Austl.).

\(^{365}\) *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344, 354 (Austl.) (Starke J) (emphasis added) (citing *Attorney-General v De Keyser’s Royal Hotel Ltd.* [1920] AC 508, 552 (Austl.)).


prcautionary principle, on erring on the side of caution, rather than on necessity arising out of a calculus that attempts ranking alternative actions against burdening constitutional guarantees. The necessity refers instead to lack of certainty in combating an extreme emergency, that justifies occulting constitutional limits on legislative and executive actions.

Perhaps the most significant High Court dicta on salus populi came in Victorian Chamber of Manufactures v Commonwealth.368 The Victorian Chamber of Manufactures, inter alia, brought an action against the Commonwealth, the Minister for Labour and National Service and the members of the Women’s Employment Board, alleging that provisions in the Women’s Employment Act 369 empowering the Board to make binding decisions on the plaintiffs were invalid because they were outside Commonwealth powers under the Constitution. In upholding the provisions, Justice Williams discussed salus populi as follows:

The paramount consideration is that the Commonwealth is undergoing the dangers of a world war, and that when a nation is in peril, applying the maxim “salus populi suprema lex,” the Courts must concede to the Parliament and to the Executive which it controls a wide latitude to determine what legislation is required to protect the safety of the realm. As Isaacs, J, said in Farey v Burvett,370 “they alone have the information, the knowledge and the experience, and also by the Constitution, the authority to judge of the situation and lead the nation to the desired end.”371

However, the role of salus populi in interpreting section 92 guarantees is more complex than indicated by the above authorities. In James v the Commonwealth,372 the Privy Council, in a judgment delivered by Lord Wright, cautioned that:

It is certainly difficult to read into the express words of sec. 92 an implied limitation based on public policy … the question whether in proper cases the maxim “salus populi est suprema lex” could be taken to override sec. 92 is one of great complexity. Their Lordships in this case will accordingly follow the example set by this Board in James v. Cowan and treat the question as reserved until it arises, if it ever does.373
An opportunity to address this complexity arose in *R v Connare; Ex parte Wawn*. John Connare laid an information against Victor Aubrey Wawn of Sydney, alleging that Wawn was guilty of an offence under section 21 of the *Lotteries and Art Unions Act* in that Wawn offer in Sydney a ticket in a foreign lottery conducted in Tasmania. A foreign lottery is defined in s 19 of the Act to mean any lottery conducted outside New South Wales. The question on appeal to the High Court was whether section 92 is infringed by the Act, given that it prohibits the sale or offer for sale in New South Wales of tickets in lotteries which are lawful in other States of the Commonwealth. Justice Herbert Evatt looked at earlier decisions discussing *salus populi*, then stated the following:

Undoubtedly the fact that by a particular legislative provision the State is genuinely endeavoring to restrict the spread of disease, although at the same time it is directly regulating certain aspects of interstate commerce may in the circumstances tend to show that freedom of the frontier is not being impaired. In such cases, however, the reason is, not that provisions directed towards the prevention of disease are an exception carved out of s 92, but that s 92, properly construed and properly applied, does not prohibit the States from exercising a particular precautionary power having no real relation to interstate trade.

We can, therefore, see two approaches to analyzing the effect of *salus populi* on s 92. One that allows for an implied limitation based on public policy, as seen in *James v the Commonwealth*. This approach fits into the free trade school (see Part III B). The other approach, seen in *Ex parte Wawn*, eschews the complexities of looking for such an exception, and instead, looks for accommodating *salus populi* in the lack of a real relationship between the legislative or executive action and interstate trade. This latter approach mirrored the individual rights school, which at some point was in ascendancy, although obsolete today (see Part III B).

The High Court had an opportunity to express its preference on these approaches in *Gratwick v Johnson*, a case analyzing the intercourse guarantee under section 92. Dulcie Johnson was charged of contravening the restrictions on interstate travel, an offence against the *National Security Act*. On or about 2 October 1944, Ms. Johnson, travelled by rail from Sydney to Perth.

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374 *R v Connare; Ex parte Wawn* (1939) 61 CLR 596 (Austl.).
375 *Lotteries and Art Unions Act 1901-1929* (NSW) (Austl.).
376 The comment was made in relation to *Ex parte Nelson (No 1)* (1928) 42 CLR 209 (Austl.). The case was about the introduction of livestock from Queensland into New South Wales, which was contrary to certain provisions in the *Stock Act 1901* (NSW) (Austl.), prohibiting such importation when there is reason to believe the stock is infected with a contagious disease.
377 *R v Connare; Ex parte Wawn* (1939) 61 CLR 596, 625 (Evatt J) (Austl.).
378 *Gratwick v Johnson* (1945) 70 CLR 1 (Austl.).
379 *National Security Act 1939-1943* (Cth) (Austl.)
to see her fiancé, without a permit under the *Restriction of Interstate Passenger Transport Order* (‘the Restrictions Order’), which was made in pursuance of the *National Security (Land Transport) Regulations*, which in turn were made under the *National Security Act*. Ms. Johnson decided to travel even after she has been informed that her reasons for travel did not warrant the granting of a permit. In the High Court, counsel for Gratwick argued that the Restrictions Order was a valid exercise of the defense power (section 51(vi)), and that “[w]hen the country is at war, there must be power to control transport generally on account of the possibility of its being urgently required for naval or military purposes.”³⁸⁰ They elaborated that “in time of war … the word ‘free’ in s 92 must be given such a limited meaning as to enable society to protect itself against an enemy and so preserve the organism of government and the Constitution itself. If, in time of war, the court is satisfied that what is being done is reasonably necessary for the purpose of prosecuting the war, there is not in that case an infringement of s 92.”³⁸¹ Counsel for Ms. Johnson argued that the Restrictions Order has no connection with the defense power. Rather, it was a direct infringement on section 92 because it prohibited commercial transport of passengers from one State to another.³⁸² Notwithstanding, the reasoning seems to suggest that there can be extreme circumstances that invoke a policy exception, stating that “There is nothing in the evidence … in this case to show that a crisis has arisen entitling the Court to adopt the maxim *salus populi suprema lex* in such a way as to ignore what would ordinarily be the construction of the Constitution.”³⁸³

Chief Justice Latham was of the view that the Commonwealth has “very large powers of controlling transport in time of war”,³⁸⁴ although said powers cannot “exclude the application of s 92.”³⁸⁵ In his honor’s opinion, the Restrictions Order was a mere prohibition of interstate intercourse,³⁸⁶ and therefore “invalid because it is inconsistent with s 92 of the Constitution.”³⁸⁷ As to *salus populi*, he reasoned that

> The maxim … [is] indistinguishable from *silent leges inter arma*. If such a rule does find any place in the legal system of Australia, it can apply only in *times of the gravest crisis and emergency, when the necessity of preserving the community and the lives of the people takes precedence over all other considerations* …³⁸⁸

³⁸⁰ Gratwick v Johnson (1945) 70 CLR 1, 4 (Spender KC, with him Sugerman KC and Dignam) (Austl.).

³⁸¹ Id. at 5 (citing Andres v Howell (1941) 65 CLR 255, 263, 287 (Austl.)).

³⁸² Id. at 6.

³⁸³ Id. at 7.

³⁸⁴ Id. at 10.

³⁸⁵ Id. at 11.

³⁸⁶ Id. at 14.

³⁸⁷ Id. at 15.

³⁸⁸ Id. at 11-12.
Unfortunately, this statement does not distinguish between the approaches in *James v the Commonwealth* and *Ex parte Wawn*. It refers to the common denominator between the two section 92 interpretation schools, namely the boundary to the guarantees, but does not help explain the locus of this boundary. Potentially, the use of the words “gravest crisis and emergency” is meant to suggest a wide interpretation. Although I believe that the description simply confirms that the boundary is reached in the event of an extreme emergency, hence triggering a *salus populi* action. In terms of the first requirement under strict scrutiny, the compelling state interest, the same necessity analysis discussed earlier under the Supreme Court cases is also operational in Chief Justice Latham’s reasoning.

As to Justice McTiernan, he dealt only briefly with *salus populi*, stating that “Whatever be the legal content of the maxim ... it is not the constitutional basis of the present Order and the maxim cannot therefore invest the Order with the force of a law superior to s 92 of the Constitution.” 389 In contrast, Justices Rich, Starke and Dixon seem to favor *Wawn*. Justice Rich was also of the view that *salus populi* had no application on the facts in the case. Nonetheless, he added that the maxim “was, in olden days, the basis of policies, but in these latter days has not the same overriding effect, especially in the case of a Constitution where the defense power is subject to s 92.” 390 Similar to Chief Justice Latham opinion, his honor stated that “cases may occur where the exigencies of war require the regulation of the transport of men and material.” 391 His honor, therefore, seems to suggest *salus populi* does not create a policy limitation on section 92. Instead, the effect of this maxim is to evince permissibility of the legislative or executive action under wide section 92 guarantees.

However, Justice Starke seems to be dismissive of any role for *salus populi*, stating that

> legislation pointed directly at the passing of people to and fro among the States also contravenes the provisions of s. 92. It is immaterial, as I understand the cases, that the object or purpose of the legislation, gathered from its provisions, is for the public safety or defense of the Commonwealth or any other legislative purpose if it be pointed directly at the right guaranteed and protected by the provisions of s. 92 of the Constitution. 392

Contrast this view with that of Justice Dixon, who stated that

> s 92 does not relate to the factual consequences which ensue from the actual conduct of war ... The consequences or incidents to which the actual conduct of war in fact gives rise can scarcely be regarded as any more within the protection of s 92 than if they flowed from

389 *Id.* at 21.
390 *Id.* at 16.
391 *Id.*
392 *Id.* at 17.
enemy action. But these are considerations which have no relation to a general administrative order expressly detracting from the freedom guaranteed by s 92.  

Notwithstanding the differing views expressed in the High Court, Gratwick was an express rejection of the public policy limitation approach under the police power. This outcome should not surprise the reader. Gratwick was decided in 1945, at a time the wide interpretation of s 92, under the obsolete individual rights school, was gaining ascendency. Only three years later, the policy limitation approach seems to have received new endorsement. In the Bank Nationalisation case, a case that scrutinized the validity of a Commonwealth Act that authorized the compulsory acquisition by the Commonwealth of shares in all Australian private banks, the High Court found the Act to be invalid as it did not provide for acquisition on just terms, as required under the section 51(xxxi) of the Constitution. This was an opportunity for Justices Rich and Williams to restate the salus populi doctrine as follows: “in cases of grave emergency the maxim salus populi est suprema lex can override s 92,” explaining that the Privy Council in James v The Commonwealth treated this principle as reserved until it arose, and that it was not upheld by the High Court in Gratwick v Johnson. This application of the police power was endorsed on appeal to the Privy Council. It was held that section 92 did not prevent the exclusion from passage across the frontier of State of creatures or things calculated to injure citizens. The Privy Council was already looking to displace the individual rights school.

By 1951, the policy limitation approach seemed to make a strong comeback. In the Australian Communist Party Dissolution Act case, Chief Justice Latham was of the opinion that

If Parliament decides that there is an internal danger sufficiently serious to justify legislation, in my opinion the Court has no authority to overrule Parliament upon the ground that Parliament has made a mistake as to “the facts”, or that, even if Parliament is right as to the facts, the facts show no real danger to Australia. The Government is responsible to Parliament and Parliament is responsible to the people for such decisions. If Parliament disagrees with the Government, or the people disagree with either the Government or the Parliament, our system of government provides

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393 Id. at 20.
394 Bank of New South Wales v Commonwealth (Bank Nationalisation case) (1948) 76 CLR 1 (Austl.).
395 Id. at 293.
397 Gratwick v Johnson (1945) 70 CLR 1 (Austl.).
398 Gratwick v Johnson (1950) AC 235; Gratwick v Johnson 79 CLR 497 (Austl.).
399 Gratwick v Johnson (1950) AC 235; Gratwick v Johnson 79 CLR 497, 499 (Austl.).
400 Australian Communist Party v Commonwealth (Communist Party Dissolution Act case) (1951) 83 CLR 1 (Austl.).
a political means of changing the policy. The courts have nothing whatever to do with such decisions.\textsuperscript{401}

The above quote seems, at first, to suggest an endorsement of a policy limitation. However, the authority that Chief Justice Latham is discussing, was limited to a mistake of fact as to whether an internal danger would justify legislative intervention. Hence, Chief Justice Latham also stated that:

Ciceronian apophthegms as “Silent enim leges inter arma” and “Salus populi suprema est lex” … represent not an application, but a negation, of law. In my opinion the Constitution of the Commonwealth has not been so imperfectly framed that, in what the Government and Parliament consider a time of crisis when the national existence is at stake, they can act promptly and effectively, by means of executive action and legislation, only by breaking the law.\textsuperscript{402}

Chief Justice Latham’s statements seem to miss much of what great jurists have said about salus populi and its place in the jurisprudence of England and the United States.\textsuperscript{403} The relevance of this doctrine does not signal an imperfection in the Commonwealth Constitution, but rather maturity in its interpretation.

Justice Dixon, on the other hand, seemed to continue his support to the policy limitation approach, referring with approval to Justice Williams’s judgment in \textit{Victorian Chamber of Manufactures} (see supra).\textsuperscript{404} He also stated that

\begin{quote}
[\textit{W}hether regulations made under the war powers were within the power to make laws … [has] uniformly been based upon the principle that there is to be no inquiry into the actual effect the regulation would have or be calculated to have in conducting to an end likely to advance the, prosecution of the war and that it was at least enough if it tended or might reasonably be thought conducive or relevant to such an end.\textsuperscript{405}
\end{quote}

Although, it might also be that Justice Dixon is suggesting that the boundary of the plenary defense power is capable of accommodating salus populi through the expansion of its core, or under its implied incidental area, or even under the incidental power in section 51(\textit{xxxix}) of the Australian Constitution. To Justice Dixon, such expansion of this purposive power, seems not to infringe the guarantees under section 92.

\textsuperscript{401} \textit{Id.} at 152.
\textsuperscript{402} \textit{Id.} at 164.
\textsuperscript{403} See Juste, supra note 265, at 43 (Please refer to the brief genealogy of salus populi presented in this part for an elaboration of this point.)
\textsuperscript{404} \textit{Id.} at 202.
\textsuperscript{405} \textit{Id.} at 199.
As to Justice Williams, he continued his support for the policy limitation approach, stating that:

During hostilities there are many facts which in the public interest cannot be disclosed, and it is necessary that the Parliament and the Executive charged with the defense of the nation should be accorded the widest possible latitude of discretion. In this period the Court should, in my opinion, uphold the legislation if, in accordance with the test laid down in Farey v. Burvett,406 per Isaacs J., “the measure questioned may conceivably in such circumstances even incidentally aid the effectuation of the power of defense”.407

Justice McTiernan also seemed to support the policy limitations approach, but again, only where the emergency is an impeding war. He was of the opinion that deciding on whether there is an emergency that would attract the operation of salus populi should be through

[T]he guidance of a formal statement made by the Executive Government of its appreciation of the international situation. The Court would be bound to give very great weight to such a statement, particularly if it positively said that there was an impending danger of war. The existence of an emergency of that nature at the time this Act was passed would contribute enormously to its validity …408

Similarly, Justice Fullagar, even though he does not deal with the section 92 argument in the case, he seems to endorse the policy limitation approach as follows:

The matter is in effect, taken in two stages. At the first stage, the existence of war or national emergency is recognized as bringing into play the secondary or extended aspect of the defense power. This is done simply as a matter of judicial notice, and it provides the justification for a presumption of validity which might not otherwise exist in the case of an enactment which on its face bore no relation to any constitutional power. At the second stage, the enactment in question is examined with regard to its character as a step to assist in dealing with the emergency, and the presumption is, so to speak, reinforced by the respect which the court pays to the opinion or judgment of the other organs of government, with whom the responsibility for carrying on the war rests.409

Only Justice Webb argued in favor of the real connection approach. However, he did so in a direct reference to section 92, therefore, suggesting support for a

406 (1916) 21 CLR 433, 455 (Isaacs J) (Austl.).
407 Communist Party Dissolution Act case (1951) 83 CLR 1, 223 (Williams J) (Austl.).
408 Id. at 207.
409 Id. at 255.
wide interpretation of its guarantees. Note his reference to remoteness in the following excerpt:

[Section 92] affords protection to industrial organizations and their officials and employees; but it cannot prevent the operation of the defense power or the incidental power under s. 51, for the same reasons that it cannot prevent the operation of the Crimes Act. The effect on inter-State trade, commerce or intercourse of laws made under the defense power or the incidental power is remote. Such laws do not regulate or prohibit inter-State trade, commerce or intercourse contrary to s. 92. They are not laws about inter-State movements or operations.\textsuperscript{410}

After the \textit{Communist Party} case, it took 55 years for a \textit{salus populi} argument to resurface in the High Court, and only in passing. In \textit{New South Wales v Commonwealth},\textsuperscript{411} Kirby J referred to William J’s judgment in \textit{Victorian Chamber of Manufacturers},\textsuperscript{412} citing with approval the \textit{salus populi} doctrine: ‘[when] a nation is in peril, applying the maxim \textit{salus populi suprema lex}, the courts must concede to the Parliament and to the Executive which it controls a wide latitude to determine what legislation is required to protect the safety of the realm …’\textsuperscript{413}

In summary, while, as it relates to section 92, the \textit{salus populi} policy limitation has been rejected by the High Court, there is support for such limitation under the defense power. One way of transferring the policy limitation in the defense power cases to section 92 is to recognize that unlike state Parliaments, the Commonwealth Parliament has no emergency power, except with respect to naval and military defense.\textsuperscript{414} Unlike the position in Canada, in Australia residual powers reside with the States. We can extend the policy limitation approach, under a narrow, free trade interpretation of section 92, by explaining the power defense cases as applying to the Commonwealth emergency powers. The same rationale would then apply to emergency powers that, under the Australian Constitution, belong to the other level of government. The Palmer challenge to hard state border closures as a response to COVID-19 provides support for this proposition.

3. The Palmer Challenge

Western Australia declared a State of Emergency on 15 March 2020, under the Western Australian \textit{Emergency Management Act}.\textsuperscript{415} On 5 August 2020, under

\textsuperscript{410}Id. at 240.
\textsuperscript{411}New South Wales v Commonwealth of Australia (2006) 229 CLR 1 (Austl.).
\textsuperscript{412}Id.
\textsuperscript{413}Id. at 231.
the same Act, the State of Emergency was extended until 12 am on 20 August 2020, and later until 3 September 2020. Concerns over these measures attracted media coverage after Queensland mining tycoon Clive Palmer took the government of Western Australia to the High Court over their 5 April 2020 Quarantine (Closing the Border) Directions, purported to be made under ss 56 and 67 of the Emergency Management Act 2005 (WA). Sections 56 and 67 state that:

56. Minister may make state of emergency declaration

(1) The Minister may, in writing, declare that a state of emergency exists in the whole or in any area or areas of the State.
(2) The Minister must not make a declaration under this section unless the Minister —
   (a) has considered the advice of the State Emergency Coordinator; and
   (b) is satisfied that an emergency has occurred, is occurring or is imminent; and
   (c) is satisfied that extraordinary measures are required to prevent or minimize —
      (i) loss of life, prejudice to the safety, or harm to the health, of persons or animals;

67. Powers concerning movement and evacuation

For the purpose of emergency management during an emergency situation or state of emergency, a hazard management officer or authorized officer may do all or any of the following —

(a) direct or, by direction, prohibit, the movement of persons, animals and vehicles within, into, out of or around an emergency area or any part of the emergency area;

…

Paragraphs 4 and 5 of the Directions related to exempted travelers:

Only certain exempt travelers can enter

Note: it is anticipated that an electronic pre-approval system will be put in place to facilitate entry into Western Australia by exempt travelers and to determine a request for any approval which a person must have before they can enter Western Australia as an exempt traveler. These directions are in effect irrespective of whether or not that system is in place.

4. A person must not enter Western Australia unless the person is an exempt traveler.

5. A person who is an exempt traveler must not enter Western Australia if the person:

(a) has symptoms; or

(b) has received oral or written notice from a responsible officer that the person is a close contact; or

(c) is awaiting a test result after having been tested; or

(d) has received a positive test and has not received a certificate from a medical practitioner or a responsible officer certifying that the person has recovered from COVID-19 within the meaning of the COVID-19 Series of National Guidelines.420

Under these directions, Clive Palmer was refused entry into Western Australia.421 His counsel commenced proceedings in the High Court on 25 May 2020 for a declaration that the directions made by Christopher Dawson, the then Western Australian State Emergency Coordinator and Commissioner of Police,

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421 Clive Palmer, in an interview with a radio station in Perth (www.6pr.com.au) explained the reason for the legal challenge as follows: ‘This whole challenge started because FIFO workers contacted me, there was a high suicide rate among them, and some of them were separated from their family for months and couldn’t see them, and some of them came from NT where there’s zero cases, or less cases than WA, they came from the ACT where there’s also zero cases, and also Tasmania where there’s zero cases’. See Nathan Hondros, Federal Court Finds “Low or Very Low” Risk to WA if Hard Border Dropped to Safe States, WATODAY (Aug. 26, 2020), https://www.watoday.com.au/national/western-australia/federal-court-finds-low-or-very-low-risk-to-wa-if-hard-border-dropped-to-safe-states-20200825-p55p8v.html.
prohibiting entry into the State by persons other than “exempted travelers”\textsuperscript{422}, are invalid because they contravene s 92.\textsuperscript{423}

On 18 June 2020, the High Court remitted the matter to the Federal Court of Australia, for a determination on “the claim by the defendants of the reasonable need for and efficacy of the community isolation measures contained in the Quarantine (Closing the Border) Directions … made on 5 April 2020.”\textsuperscript{424} In anticipation of the Federal Court judgment, Western Australia passed legislation to prevent any potential liability, reported to be as high as $30 billion dollars,\textsuperscript{425} from their quarantine directions.\textsuperscript{426} This legislative intervention raised even more questions as to the constitutionality of Western Australia’s border closures.\textsuperscript{427}

The Hon Darryl Cameron Rangiah delivered the Federal Court judgment on 25 August 2020.\textsuperscript{428} The judgment makes extensive reference to expert opinions, as well as comparative analysis between border closures and other methods of transmission control.\textsuperscript{429} It even assesses the possibility of partial border closures given the current community transmission rates in other State. Hence, in rejecting Western Australia’s argument that “The easing [of the border closure] can only occur without an increased risk of morbidity and mortality within the

\textsuperscript{422} Under s 27 of the Directions, an exempt traveler is a person who falls into at least one of the following categories: National and State security and governance; health services; transport, freight or logistics; specialist skills not available in Western Australia; FIFO employees who are not specialist and their families; emergency service workers; courts, tribunals and commissions; entry approved on compassionate grounds, to comply with a court order or on a residential facility ground; and persons otherwise approved on any other grounds, including other compassionate grounds.

\textsuperscript{423} There are other challenges, including a defamation case against the Western Australian Premier, Palmer v State of Western Australia [2020] FCA 962 (9 July 2020) [3] (Austl.) (emphasis added).


\textsuperscript{425} from Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Act 2020 (WA) (Austl.). Received royal assent on 13 August 2020 and came into force on the same day (s 2 of the Act).


\textsuperscript{427} Palmer v State of Western Australia (No 4) [2020] FCA 1221 (Austl.); Palmer v State of Western Australia (No 3) [2020] FCA 1220 (Austl.).

\textsuperscript{428} Palmer v State of Western Australia (No 4) [2020] FCA 1221 ¶ 366 (Austl.) (Rangiah J).
Western Australian community or population while there is no community transmission within other Australian States and Territories,”\(^{430}\) Justice Darryl Rangiah suggested that such easing may be possible “without a significantly increased risk of morbidity and mortality in the Western Australian population while there is ongoing community transmission within other States and Territories,”\(^{431}\) relying on expert evidence that “the disease can be considered to be ‘eliminated’ when there has been no community transmission from an unknown source for 28 days.”\(^{432}\) This statement was made even after the second COVID-19 outbreak in New Zealand. On 11 August 2020, Prime Minister Jacinda Ardern informed the public of “the country’s first case of community transmission in 102 days.”\(^{433}\) Moreover, all cases “come from the same New Zealand household and the source of the infection is unknown.”\(^{434}\)

Western Australia argued that the objective of the Directions imposing hard border closures are to protect “the population of Western Australia against the risks of an emergency situation,”\(^{435}\) by “limiting the numbers of people who enter Western Australia in order to reduce the probability that people infected with SARS-CoV-2 will enter.”\(^{436}\) They also argued that the closures did not infringe the interstate intercourse guarantee under section 92 because they are “reasonably necessary for, regulating or preserving the population of Western Australia against the health risks of COVID-19,”\(^{437}\) and are “reasonably appropriate and adapted to advance that purpose or object where there are no other equally effective means available to achieve that purpose or object, but which impose a lesser burden on interstate intercourse.”\(^{438}\)

However, analyzing the constitutionality of Western Australia’s directions required an assessment of the risk of the COVID-19 virus spreading into the Western Australian population.\(^{439}\) Assessing this risk, which itself is “a function of probability and impact,”\(^{440}\) required analyzing the following issues:

(a) whether there is ongoing community transmission of COVID-19 in Australia; (b) the public health consequences of persons infected

\(^{430}\) Id. at ¶ 365 (Rangiah J, at allegation (i)) (emphasis added).

\(^{431}\) Id.

\(^{432}\) Id.


\(^{435}\) Palmer v State of Western Australia (No 4) [2020] FCA 1221 ¶¶ 16-17 (Austl.).

\(^{436}\) Id. at ¶ 70.

\(^{437}\) Id. at ¶¶ 17, 22 (Austl.).

\(^{438}\) Id.

\(^{439}\) Id. at ¶ 12.

\(^{440}\) Id. at ¶ 78.
with COVID-19 entering Western Australia and transmitting the virus; (c) the extent of the contribution made by the border restrictions to reducing the probability of community transmission in Western Australia; (d) the probability of COVID-19 being imported into Western Australia and community transmission occurring, including uncontrolled and uncontrollable community transmission, if the border restrictions were removed; (e) the efficacy of measures other than the border restrictions in reducing the risk of introduction of COVID-19 into, and transmission within, Western Australia.\textsuperscript{441}

The scientific facts required to answer the above issues were provided by five experts on epidemiology and disaster management.\textsuperscript{442} These experts agreed that the risk of COVID-19 being imported into Western Australia depends largely on community transmission numbers, that is, on cases where the source of the infection is unknown.\textsuperscript{443} However, given that Australian States and Territories “have strong surveillance/testing regimes,”\textsuperscript{444} they agreed that “if there have been no cases of community transmission (being where the source of the infection is unknown) for 28 days in the state of origin then that is as low risk a situation as can reasonably be hoped for.”\textsuperscript{445} Notwithstanding, there would still be a high risk of uncontrolled transmission from the introduction of a single COVID-19 case to Western Australia, as demonstrated in other Australian States and other countries.\textsuperscript{446} It follows that “border restrictions are important to ensure higher transmission risk populations do not spread Covid-19 to lower risk transmission populations.”\textsuperscript{447} The experts also agreed that while there are other non-border measures that are useful in preventing the transmission of COVID-19,\textsuperscript{448} “in many cases people do not follow [these] measures.”\textsuperscript{449}

Nevertheless, there was an inherent uncertainty about the transmission risk:

There are many uncertainties about whether the disease might enter, the ways it might spread and the effectiveness of measures for the control of its entry and spread. The issues, accordingly, involve making predictions about what may happen in the future in hypothetical scenarios. What is known is that in the worst-case scenario, there may be catastrophic consequences for the population.

\textsuperscript{441}Id. at ¶ 34.
\textsuperscript{442}Id. at ¶¶ 43-62
\textsuperscript{443}Id. at ¶ 64 (Austl.).
\textsuperscript{444}Id.
\textsuperscript{445}Id.
\textsuperscript{446}Id.
\textsuperscript{447}Id.
\textsuperscript{448}Id. at ¶ 64 (These measures include: “intra-state movement restrictions; isolation; quarantine; Personal Protective Equipment (PPE); good hand hygiene practices; physical distancing controls; restrictions on mass gatherings; appropriate surveillance (including testing and analysis of the data for targeted action); facilitating contact tracing; and support for communities and individuals to engage in the above mentioned practices.”).
\textsuperscript{449}Id.
These circumstances call for identification of principles that ought to be applied when making decisions about measures to protect against such risks to public health.\textsuperscript{450}

According to expert evidence, this uncertainty required adopting a precautionary approach,\textsuperscript{451} and the Federal Court acknowledged that “the precautionary principle is an accepted principle of management of a pandemic which involves the potential for grave public health risks.”\textsuperscript{452} The principle applies even where the probability of the health risk is small, but its consequences are “potentially catastrophic.”\textsuperscript{453} While the probability of the health risk was found to be small in Western Australia,\textsuperscript{454} based on the expert evidence, the Court accepted that

If COVID-19 is introduced into the Western Australian population, community transmission may be controlled or uncontrolled. Not all cases of community transmission will become uncontrolled, particularly as Australia has good systems of community controls and tracing, as the experts agreed. The initial outbreaks from February to April 2020 were brought under control in all States and Territories, except perhaps Victoria. However, if left uncontrolled for any substantial length of time, outbreaks will cause very severe consequences for the health of the Western Australian population. In the worst-case, the consequences could be catastrophic.\textsuperscript{455}

This conclusion established that a precautionary approach should be adopted in Western Australia to reduce the risk of COVID-19 transmission into the State. What was even more assuring was Justice Rangiah’s acknowledgment that ascertaining the constitutionality of State border closures “involves making predictions about what may happen in the future in hypothetical scenarios.”\textsuperscript{456} He therefore accepted expert opinion emphasizing the “precautionary principle” in combating the transmission of COVID-19.\textsuperscript{457} The relevance of this principle is explained in the following terms:

[Given that] the probability of importation of COVID-19 into Western Australia from a State where community transmission cannot be known or quantified from reported data … such uncertainty mandates the application of risk management principles including the “precautionary principle” … traditional public health interventions have generally focused on removing hazards that have already been identified. In contrast, the precautionary principle

\textsuperscript{450} Id. at ¶ 72.
\textsuperscript{451} Id. at ¶ 73.
\textsuperscript{452} Id. at 76.
\textsuperscript{453} Id. at ¶ 79.
\textsuperscript{454} Id. at ¶ 117.
\textsuperscript{455} Id. at ¶ 109.
\textsuperscript{456} Id. at ¶ 72.
\textsuperscript{457} Id. at ¶ 302.
states that action should be taken to prevent harm ‘even if some cause and effect relationships are not fully established scientifically’. The precautionary principle therefore seeks to shift health and environmental policy from a strategy of ‘reaction’ to a strategy of ‘precaution’. 458

However, Justice Rangiah’s interpretation of this principle, based on expert opinion, led to risk management analysis, namely, that the risk of transmission of COVID-19 into the population in Western Australia as the product of two factors: (1) the probability of transmission, and (2) the consequences of transmission.459 He elaborated on this risk analysis by explaining that even if the probability factor is small, if its consequences are potentially catastrophic, a precautionary approach is required. This means, from a purely public health perspective, all reasonable and effective measures to mitigate that risk should ideally be put in place. This analysis, however, does not take into account the legal, economic and social considerations that must, in practice, be considered.460

Note two critical points in this statement: first, the reference to an ideal solution. Second, that this ideal relates only to a “public health perspective,” to the exclusion of other perspectives. The argument, it seems, is that what should happen, even without considering constitutional guarantees, is to balance these perspectives, to get an optimal suite of measures to combat the pandemic. Put differently, the precautionary principle is only an ideal.

A closer look at the risk analysis shows that on the first factor Justice Rangiah found:

The border restrictions presently reduce the probability of COVID-19 being imported into Western Australia to a very substantial extent, broadly by somewhere in the region of 85%–90%. Screening and PCR [Polymerase Chain Reaction] testing would not have the same effectiveness in preventing importation of the virus. The wearing of masks would not have any affect [sic] on the importation of the virus, except to the extent it may reduce transmissions on planes, but would assist to contain its spread I conclude that the border restrictions are more effective than the combination of such alternative measures would be.461

On the other hand, his honor found that

458 Id. at ¶ 73
459 Id. at ¶¶ 70-81, 172.
460 Id. at ¶ 79.
461 Id. at ¶ 315.
If the disease were introduced, transmission within the community may be able to be controlled, as it was in some States and Territories, or it may be uncontrolled for at least some period of time, as appears to be the case in Victoria. By the time an outbreak is brought under control, there may be substantial health consequences.\textsuperscript{462}

The next issue after accepting the precautionary approach was to establish the effectiveness of hard border closures as part of this precautionary approach in reducing this risk.\textsuperscript{463} While the parties agreed that the border closure reduced the number of people entering into Western Australia by around 90 percent,\textsuperscript{464} they disagreed as to the effectiveness of this reduction.\textsuperscript{465} The Court, after reviewing all expert evidence, found that these closures were “accepted and effective component of the public health response to the control of infectious disease outbreaks,”\textsuperscript{466} and that

the border restrictions are presently making a substantial contribution to keeping Western Australia free of COVID-19. An indication of the extent of that contribution is provided by comparing the numbers of people entering Western Australia before and after the restrictions.\textsuperscript{467}

V. \textbf{ONLY REASONABLE WAY TO DEAL WITH THE EMERGENCY}

This hurdle, the oldest element of strict scrutiny,\textsuperscript{468} is an efficiency criterion that compares the net benefit from alternative means.\textsuperscript{469} I analyze it by elucidating the interpretation of the least restrictive means test under the U.S. Constitution, as well as under the Australian Constitution. The analysis reveals a common design on which both Constitutions are based when it comes to the constitutionality of infringements on interstate travel.

\textsuperscript{462} \textit{Id.} at ¶ 83.
\textsuperscript{463} \textit{Id.} at 1221 ¶ 118.
\textsuperscript{464} \textit{Id.} at ¶¶ 120-21 (The number of people entering Western Australia before the border closures was on average around 4,000 per day, and that after the border closure, the number on average was reduced to 470 per day).
\textsuperscript{465} \textit{Id.} at ¶ 122.
\textsuperscript{466} \textit{Id.} at ¶ 151.
\textsuperscript{467} \textit{Id.} at ¶ 157.
A. The Least Restrictive Means Test

The courts have interpreted this requirement to mean that the restrictions on the infringed fundamental right must be “the least restrictive means” to accomplish the government’s goal.\textsuperscript{470} Hard state border closures are only one response that can protect citizens from the spread of a pandemic. As discussed in Part I, the response to COVID-19 included other measures, such as social distancing, non-symptomatic testing, and even curfews and the closure of non-essential business activities. The issue under this second limb of strict scrutiny is that the protection

cannot be pursued by means that broadly stifle fundamental personal liberties when [that protection] can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.\textsuperscript{471}

In this sense, the test of least restrictive means requires that state restrictions on fundamental rights must be narrowly tailored to achieve the state’s compelling interest. However, the test goes further. It represents a higher level of scrutiny compared to narrow tailoring.\textsuperscript{472} State action is narrowly tailored if it does no more than eliminate the source of evil it sought to remedy.\textsuperscript{473} On the other hand, the least restrictive means test is an element of the overbreadth doctrine.\textsuperscript{474} The doctrine states that “government may not achieve its concededly valid purpose by means that sweep unnecessarily broadly, reaching constitutionally protected as well as unprotected activity.”\textsuperscript{475} This necessity formulation can also be seen in the floor requirement for the least restrictive means test as found under narrow tailoring: “Narrow tailoring requires that the law capture within its reach no more activity (or less) than is necessary to advance those compelling ends,”\textsuperscript{476} and government action will be upheld “only if ... it is necessary to

\textsuperscript{470} Johnson v. City of Cincinnati, 310 F.3d 484, 502, 503 (6th Cir. 2002) (If “any other methods exist to achieve the desired results,” then “a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.‘”) (citing Dunn v. Blumstein, 405 U.S. 330, 343 (1972)).


\textsuperscript{472} See Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 464, 464 (1969). See also, Ill. Election Bd. v. Socialist Workers Party, 440 U.S. 173, 188-89 (1979) (Blackman, J., concurring) (equal protection) (“A judge would be unimaginative indeed if he could not come up with something a little less ‘drastic’ or a little less ‘restrictive’ in almost any situation, and thereby enable himself to vote to strike legislation down”).


\textsuperscript{474} Martin H. Redish, The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine, 78 NW. U. L. REV. 1031, 1035 n. 28 (1983) (“The Supreme Court, however, appears to view ‘less drastic means’ as merely one means of articulating the elements of overbreadth analysis.”).

\textsuperscript{475} Id. at1034-35.

\textsuperscript{476} Winkler, supra note 49, at 800.
achieve ... [the] compelling interest.” While this necessity formulation constructs a common thread, not only between this hurdle and the compelling state interest requirement, but also interjurisdictionally, between the Supreme Court analysis and that of the High Court of Australia, the necessity under the second hurdle is different from that under the compelling interest hurdle, as I discuss below. 

The requirement is that “the ‘government achieve[s] its compelling . . . interest in the way that least restricts or burdens the fundamental rights’—essentially, what amounts to a least restrictive alternative test.” Adam Winkler explains this requirement as follows:

To insure [sic] that government’s reasons are truly of sufficient magnitude to warrant invasion of rights, the courts use narrow tailoring to police against means that are overinclusive or underinclusive. A law with poor fit—one that does not capture all like threats—suggests that the government itself does not really believe the underlying ends are so compelling.

The reference to over- and under- inclusive means emphasizes that the test imposes a higher standard on state action, in the form of a balancing analysis:

balance no more than the state’s interest in the added effectiveness of the chosen means against the individual interest and the use of less drastic ones. ... [T]he Justices must estimate how much less effective various alternatives means would be, how much more they would cost—not merely in terms of the resources they would require, but also in terms of their effects upon other non-first amendment social values—and measure against accompanying gains these losses to expression, association, and belief.

An early explanation of the least restrictive means approach was given by Justice Frankfurter in *Shelton v. Tucker*, a case challenging the constitutionality of an Arkansas statute that required disclosure by all public-school educators of every organization that they have been affiliated with over

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477 See generally, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 645 (2d ed. 2002)
482 Shelton v. Tucker, 364 U.S. 479 (1960). See also, Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293, 296 (1961) (citing with approval Shelton v. Tucker, 364 U.S. 479, 488 (1960) (standing for the proposition that “even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved”).
a five-year period. Shelton refused to comply with this disclosure requirement. As a result, his employment contract was not renewed. In a five-to-four decision, the Supreme Court struck down the statute because the scope of the disclosure went beyond what was required to ascertain the fitness and competence of public educators. Justice Frankfurter stated that:

Whenever the reasonableness and fairness of a measure are at issue as they are in every case in which this Court must apply the standards of reason and fairness, with the appropriate scope to be given those concepts, in enforcing the Due Process Clause of the Fourteenth Amendment as a limitation upon state action-the availability or unavailability of alternative methods of proceeding is germane ... But the consideration of feasible alternative modes of regulation in these cases did not imply that the Court might substitute its own choice among alternatives for that of a state legislature, or that the States were to be restricted to the “narrowest” workable means of accomplishing an end .... Consideration of alternatives may focus the precise exercise of state legislative authority which is tested in this Court by the-standard of reasonableness, but it does not alter or displace that standard. The issue remains whether, in the light of the particular kind of restriction upon individual liberty which a regulation entails, it is reasonable for a legislature to choose that form of regulation rather than others less restrictive. To that determination, the range of judgment easily open to a legislature in considering the relative degrees of efficiency of alternative means in achieving the end it seeks is pertinent.483

In the context of COVID-19, considering the efficiency of alternative means is part of balancing the end of protecting citizens from the spread of a pandemic to the means of a hard border closure. Such closures will pass the least restrictive means test only if they optimize the net benefit between ends and means.

The balancing approach can also be seen in Schneider v State of New Jersey.484 In this case, Clara Schneider and three others were convicted of distributing handbills without a permit as required by the ordinances of four different municipalities. The Supreme Court held all four ordinances invalid, noting that

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484 Schneider v. State of New Jersey, 308 U.S. 147 (1939). See also, Talley v. California, 362 U.S. 60, 63 (1960) (While the case was decided before Shelton v. Tucker, the Court cited its decision in Schneider in arguing for less restrictive means: “Frauds, street littering and disorderly conduct could be denounced and punished as offenses.”); Jamison v. State of Texas, 318 U.S. 413, 416 (1943) (showing where the court followed the Griffin and Schneider cases in striking down an ordinance prohibiting the distribution of handbills, stating that “one who is rightfully on a street carries with him there as elsewhere the constitutional right to express his views in an orderly fashion by handbills and literature as well as by the spoken word”).
many opinions of this court [stress] the importance of preventing the restriction of enjoyment of [fundamental rights and liberates]. In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.  

The balancing approach adopted by the Court has to therefore go beyond the formality of state action and looks at its legal effect. It is through this effect that we can ascertain the requisite necessity in relation to the least restrictive means test. This point was considered in American Communications Ass’n v. Douds, where the Supreme Court held that provision of the Labor Management Relations Act, requiring for the recognition of a labor organization the filing of affidavits by its officers that they do not belong to the Communist Party of the United States, is constitutional. The Court stated that:

Although the First Amendment provides that Congress shall make no law abridging the freedom of speech, press or assembly, it has long been established that those freedoms themselves are dependent upon the power of constitutional government to survive … ‘the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state (or Congress) constitutionally may seek to prevent.’ Mr. Justice Brandeis, concurring in Whitney v. California, 274 U.S. 357, 373, 47 S.Ct. 641, 647, 71 L.Ed. 1095. By this means they sought to convey the philosophy that, under the First Amendment, the public has a right to every man’s views and every man the right to speak them. Government may cut him off only when his views are no longer merely views but threaten, clearly and imminently, to ripen into conduct against which the public has a right to protect itself.

The same interpretive philosophy can be extrapolated from freedom of speech to interstate mobility. The requisite necessity inherent in the least restrictive means test is therefore analogous to the paramount necessity under the compelling state interest requirement (see Part V). In fact, the same precautionary principle flows through from the compelling interest requirement

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485 Schneider v. N.J., 308 U.S. 147, 161 (1939) (emphasis added).
to also inform the least restrictive means requirement, where the perception of “a clear and imminent danger of some substantive evil” is also an apt description of the effect of a pandemic on the public health of citizens.

This idea of necessity became more explicit in Supreme Court jurisprudence by the mid-1960s, concurrently with the formulation of strict scrutiny analysis. For example, in *NAACP v. Alabama ex rel. Flowers*, where the State of Alabama attempted to restrain the National Association for the Advancement of Colored People (N.A.A.C.P.) from operating within Alabama, arguing that the association failed to comply with statutory requirements imposed on foreign associations for doing business in Alabama. In rejecting this argument, the Supreme Court provided an explicit link between the least restrictive means test and the balancing approach based on necessity:

This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.

The application of this test in the area of free speech has been explained as follows:

Under the least restrictive means test the court must first determine whether the governmental purpose underlying the Statute is “legitimate and substantial.” Assuming the state’s interest meets this test, the court must then look to see if the statutory provisions are narrowly tailored so as to be the least restrictive means of achieving that legitimate goal. Just how narrowly tailored the statutory provisions must be depends to some extent on how weighty the government’s asserted interest proves to be. Although the Supreme Court has assiduously eschewed the terminology of “balancing” in this area, an inverse relationship appears implicit in the Court’s approach toward the substantiality of the government’s interest on the one hand, and the degree to which statutes impinging upon free speech must be narrowly tailored on the other.

The narrow tailoring requirement is hence understood as a least restrictive means test, where alternative means have to be compared to state action using an efficiency criterion. In the context of a response to a pandemic, the necessity of the state action depends on its optimality; on being the most efficient response to the threat of community infection. The necessity becomes apparent when we think of this efficiency as analogous to the minimal impairment

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requirement under proportionality. This necessity emerges where there is no reasonable alternative for achieving the compelling state interest that is less restrictive on the infringed right, that is, when less-restrictive alternatives are less effective in achieving the compelling state interest. However, the structured version of proportionality goes beyond the least restrictive means element. It applies proportionality stricto sensu, where the state action infringing on a fundamental right has to be “adequate in the balance”:

a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

In other words, “The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.” For example, where a State closes its borders to all traffic to address the compelling interest in reducing the spread of COVID-19, the State has to show that a less restrictive means to addressing the spread of COVID-19 into the State does not exist. This is a harder hurdle to clear in the context of prophylactic hard border closures, given the existence of less restrictive means such as curfews, stay home rules, and social distancing. However, Palmer v. Western Australia, suggests that there is a high likelihood that the Supreme Court will uphold these restrictions.

**B. Proportionality Analysis**

The analysis of the mobility guarantee in section 92 requires a balancing exercise where different alternatives to state action, in our case hard border closures, are assessed for their ability to achieve the state objective with a lower burden on the infringed right, the right to interstate travel. As I illustrate below, sometimes this balancing analysis is framed in terms of reasonableness of state action, more specifically, the analysis is framed as one of reasonable necessity. An example of this approach can be found in AMS v. AIF (see below). Under reasonable necessity, the focus is the same as when comparing alternatives: the net benefit from each alternative, that is the benefit from an alternative over and above the burden imposed by the alternative on the infringed right, is analyzed to see if any of the alternatives has a higher net benefit than the impugned state

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494 Quebec (Att’y Gen.) v. A., [2013] 1 S.C.R. 61, ¶ 442 (McLachlin, CJ, “The question at the minimum impairment stage is whether the limit imposed by the law goes too far in relation to the goal the legislature seeks to achieve. ‘Less drastic means which do not actually achieve the government’s objective are not considered at this stage’”, citing Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 S.C.R. 567, ¶ 54) (Can.).
496 R. v. Oakes, [1986] 1 S.C.R. 103, 139-40 (Dickson, C.J., explaining the meaning of proportionality as such, also known as proportionality in stricto sensu) (Can.).
497 AMS v AIF (1999) 199 CLR 160 (Austl.).
action. If the net benefit from the state action is the largest, it is said to be the reasonable action to achieve the state objective (protection of public health) in response to the emergency (pandemic). Another approach, also found in *AMS v. AIF*, tests whether state action is appropriate and adapted to achieve the state objective. An example of a complete failure of the state action to be appropriate and adapted to achieve an objective relating to public health and safety is illustrated below in the case of *R v Smithers; Ex parte Benson*.498

1. **High Court Cases**

An example is where the High Court found impermissible restrictions on a parent from moving interstate for the objective of protecting the welfare of the child. In *AMS v. AIF*,499 a couple who met in Perth, Western Australia, had a child after they have moved to the Northern Territory. After the couple separated in 1994, they returned to live in Perth, and the child continued to live with the mother. However, the following year, the mother wanted to go back to the Northern Territory with the child, and the father obtained an order restraining the mother from removing the child from Western Australia. However, under the *Northern Territory (Self-Government) Act*,500 intercourse between the Northern Territory and the States shall be absolutely free. This was an additional guarantee to interstate mobility, in addition to that under section 92 of the Australian Constitution. The mother argued that the restraining order made by the Family Court of Western Australia was in contravention of this guarantee.

In the High Court, all seven justices disagreed with the mother, finding that the restraining order did not infringe neither the federal nor Northern Territory guarantees. Chief Justice Gleeson, with whom Justices McHugh, Gummow and Hayne concurred, adopted a balancing analysis which framed the legal issue as follows: whether “the impediment was greater than that reasonably required to achieve the [objective of protecting the child].”501 This reasonableness requirement compares the actual impediment to alternatives to ensure that the least restrictive means are adopted to protect the interests of the child. Justice Gaudron applied instead a necessity analysis, but similarly close to the one seen under the least restrictive means test. She focused on whether the impediment was “appropriate and adapted to avert risk to the child’s well-being,”502 finding that “A power to restrain a parent from moving interstate, if that is necessary to avert a risk to the welfare of the child, may fairly be considered appropriate and adapted to securing the child’s welfare.”503 Justice Kirby, adopting an approach closer to the plurality, analyzed the issue as one based on proportionality, given that the burden on interstate travel was only incidental to the welfare of the

498 See *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 (Austl.).
499 *AMS v AIF* (1999) 199 CLR 160 (Austl.).
500 *Northern Territory (Self-Government) Act* 1978 (Cth) s 49 (Austl.).
502 See Id. at 162.
503 See Id. at 162. See also, Id. at 189-90.
child. Justice Callinan seemed to combine these different analytical approaches by stating that the restraining order was neither disproportionate nor inappropriate, but reasonably necessary to secure or protect the welfare of the child.

Similarly, there is authority that a state action preventing entry of socially undesirable persons will contravene s 92. In R v Smithers; Ex parte Benson, John Benson was convicted in the State of Victoria of the offence of having insufficient lawful means of support and was sentenced to imprisonment for twelve months. After his release, he immediately went to Sydney, in the State of New South Wales, to search for employment. He was convicted under a New South Wales law that required the lapse of three years before people convicted of the same offence and receiving the same sentence as Benson can enter the State. The High Court struck down this requirement as contravening the interstate mobility guarantee under section 92, because Benson’s offence was outside the state policing power as the offence did not one affecting public safety. Justice Barton made a useful comparison:

The reasoning of the Supreme Court of the United States in the case of Crandall v. State of Nevada, 6 Wall., 35 as expressed by Miller J. … is as cogent in relation to the Constitution of this Commonwealth, as it was when applied to the Constitution of the United States. The whole of that memorable judgment is instructive upon the rights of the citizens of a federation. The reasoning shows that the creation of a federal union with one government and one legislature in respect of national affairs assures to every free citizen the right of access to the institutions, and of due participation in the activities of the nation. In my opinion, the reasons for the decision are conclusive as to all parts of Australia. A great deal of that which it is usual to call the “police power,” the “right of self-defense” in respect of such matters as internal order, or the safety, health and morals of the people of the State, is probably affected by this new right … It is probable that the right of the citizen, so far as it may be described by the word “intercourse,” is not carried much further by sec. 92 of the Australian Constitution than the fact of union necessarily carried it, though the express prohibition of that section against restriction no doubt makes the Australian Charter much stronger than the American in respect of trade and commerce … whatever may be the residue of power left to the State in this regard, it is clearly limited by the existence of some necessity for the defensive precaution.

504 See Id. at 214-15.
505 See Id. at 249.
506 See Id.
507 See R v Smithers; Ex parte Benson (1912) 16 CLR 99 (Austl.).
508 See Id. at 99, 108-09 (Griffith, CJ), 113 (Isaacs J), 119 (Higgins J).
509 See R v Smithers; Ex parte Benson (1912) 16 CLR 99, 109-110 (Austl.).

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According to Justice Barton, the same necessity approach was therefore held to be a common denominator on restriction on interstate mobility in the United States and in Australia.

However, there is also authority that the Commonwealth cannot prohibit interstate travel, even if the stated objective is to protect public safety. In Gratwick v Johnson, Dulcie Johnson was charged under a national security statute for traveling without a permit from the State of South Australia to the State of Western Australia. The High Court found the statute to contravene the interstate intercourse guarantee under section 92. The reasoning given by Chief Justice Latham was stated as follows:

In the present case, the provision in the Order that no person shall without a permit travel by rail from any State in the Commonwealth to any other State therein is a mere prohibition of inter-State [sic] intercourse. It is in terms “directed against” such intercourse … [However,] There are no provisions in the Order which can be relied upon for the purpose of preventing the Director-General of Land Transport from exercising his powers in a completely arbitrary manner.

For Justice Rich, with whom Justice Dixon agreed, the legal issue turns instead on whether there was a compelling state interest to require such restrictions on interstate intercourse.

For Justice Starke, with whom Justice McTiernan agreed, the fact that the permit system was a direct restriction on the interstate intercourse guarantee was enough to make it contravene section 92. A direct restriction requires that the state objective is to impede interstate mobility. In the case of COVID-19 hard state border closures, the objective is to impede the transmission of the virus into the State, which is therefore an indirect interference with the mobility guarantee.

Another example of the indirect restrictions is Cunliffe v Commonwealth. Ian George Cunliffe and Ian John Nicol, both practitioners from the States of New South Wales and Victoria respectively, sued the Commonwealth in the High Court for a declaration that part of the Migration Act was invalid because it prohibited a person who was not registered under the Act from giving immigration assistance unless he or she came within certain exceptions. In upholding the impugned part of the Act, the High Court elaborated on the

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510 Gratwick v Johnson (1945) 70 CLR 1 (Austl.). This case was discussed in detail in Part V(B) when discussing the doctrine of salus populi.
511 Id. at 15.
512 Id. at 20.
513 Id. at 16.
514 Id. at 1, 17 (Starke, J.), 22 (McTiernan, J.).
515 Cunliffe v Commonwealth (Migration Agents Case) (1994) 182 CLR 272 (Austl.)
516 Migration Act 1958 (Cth) Pt 2A (Austl.).
interstate intercourse test. A legislative or administrative action “may incidentally restrict movement interstate, provided the means adopted to achieve the purpose of the action are not inappropriate or disproportionate.”

Further clarification of the indirect contravention criterion came in ALPA Ltd v Legal Services Commissioner (NSW), the statute regulating the legal profession in New South Wales prohibited practitioners from publishing an advertisement that included any legal service relating to recovery of money in respect of personal injury. The plaintiffs claimed that the statute infringed the guarantees in section 92 because they impeded advertisements of the prohibited class from other States, for example, through the internet. In the High Court, Chief Justice Gleeson, and Justices Gummow, Hayne, Callinan and Heydon, (Justices McHugh, Kirby not deciding) found that the statute did not discriminate against interstate trade or commerce in a protectionist sense. Hence, it did not contravene the first limb of s 92 of the Constitution. Moreover, that, to the extent the prohibition extended to interstate communications which were not in trade and commerce, but which were intercourse, the purpose of the statute was not to impede interstate intercourse. The test was that any incidental impediment was not greater than was reasonably required to achieve the objective of the statute, namely, to restrict advertising legal services relating to personal injury. Chief Justice Gleeson and Justice Heydon summarized their reasoning as follows:

Communication is intercourse, and covers advertising which is not part of trade and commerce. Let it be assumed that at least some of the advertising covered by the regulations is in that category. The object of the regulations is not to impede interstate intercourse. The test to be applied therefore is whether the impediment to such intercourse imposed by the regulations is greater than is reasonably required to achieve the object of the regulations. The object of the regulations is to restrict the advertising of legal services to be provided in New South Wales. That object can only be achieved by a general restriction on the advertising of such services. The impediment to interstate intercourse is no greater than is reasonably required to achieve the object of the regulations.

The threshold of indirect or incidental interference is confirmed as the first step in the analysis. Only where the contravention of the guarantee is incidental to state action will the balancing analysis be relevant, namely, that the impediment to interstate intercourse is not greater than what is reasonably required to achieve the object of the legislation which is otherwise within the legislative power. However, this distinction between direct and indirect, or incidental,

518 ALPA Ltd v Legal Services Commissioner (NSW) (2005) 224 CLR 322 (Austl.).
519 ibid. at 353 (discussing the applicability of the intercourse guarantee in section 92 to the NSW regulations) (internal citations omitted).
restrictions on the right to interstate travel is unlikely to pause a hurdle to
upholding state action as it relates to hard border closures in response to a
pandemic. The analytical framework remains one of reasonable necessity of the
state action infringing on interstate intercourse.

_ALPA Ltd v Legal Services Commissioner (NSW)_ also provides useful gloss on
the balancing analysis under the mobility guarantee in section 92. Justice
McHugh clarified that the validity of state action under this balancing analysis
has to take into consideration the social and practical implications of state
action, stating that “Validity is determined after examining ‘the nature and
quality of the restriction in the light of the known and proved economic social
and other circumstances of its imposition and of the community in which it is
imposed’.”[^521^] Likewise, Justice Gummow applied the balancing analysis as a
reasonable necessity requirement on state action.[^522^] Arguably, the clearest
pronouncement on the intercourse limb of section 92 came from Justice Hayne.
After a detailed review of the authorities on interstate intercourse, his honor
provides a succinct statement of the test: “the impugned regulations work on
interstate intercourse is no greater than is necessary to achieve their purpose.”[^523^]

In summary, the above examples from High Court jurisprudence illustrate
the balancing analysis required by the interstate intercourse guarantee in section 92.
The examples confirm that this analysis is detailed as a reasonable necessity
criterion, which verifies that the doctrine of (justificatory) necessity underlies
second element of this constitutional analysis. The next section expands on this
point as it relates directly to COVID-19 and the constitutionality of hard state
border closures in response to this pandemic.[^524^]

2. _The Palmer Challenge_

In the legal challenge to Western Australia’s border closures, the Australian
Federal Court had to also engage the proportionality analysis of identifying
alternative measures to hard border closures and their effectiveness relative to
these closures.[^525^] The Court accepted expert opinion identifying two sets of
alternatives. There were alternative non-border measures, and alternative border
measures. Experts identified non-border measures, including, intrastate
movement restrictions, self-isolation, quarantine regimes, the mandatory use of
personal protective equipment (PPE), good hand hygiene practices, social
(physical) distancing requirements, restrictions on mass gatherings, surveillance

[^521^] ALPA Ltd v Legal Services Commissioner (NSW) (2005) 224 CLR 322, 368 (Austl.)
(citing Jacobs J. in North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW (1975)
134 CLR 559, 624 (Austl.)).
[^522^] ALPA Ltd v Legal Services Commissioner (NSW) (2005) 224 CLR 322, 394 (Austl.)
[^523^] Id. at 463.
[^524^] Palmer v State of Western Australia (No 4) [2020] FCA 1221 ¶ 63 (Austl.). This analysis
was later endorsed by the High Court in Palmer v Western Australia (2021) 95 ALJR 229,
238 ¶ 23 (Austl.). Id. at 247 ¶ 79 (Per Kiefel CJ and Keane J, adding that “Because of the uncertainties about the level of risk
and the severe, or even catastrophic, outcomes which might result from community
transmission, a precautionary approach should be adopted.)
[^525^] Id. at ¶ 158.
and contact tracing, and community education on how to engage with these measures. From these non-border measures the experts identified a “Common Measures” set adopted by all States and Territories:

measures taken to isolate all cases, and quarantine all potential cases, of COVID-19; measures taken (or that have been previously taken and could be reimposed) to prevent or limit the movement of persons geographically within a State (including stay-at-home directions, maximum distance travel-from-home directions and regulations preventing movement into and out of particular locations, including remote communities); measures taken (or that have been previously taken and could be reimposed) to limit the number of people that may meet in a group; measures encouraging individuals to practice social distancing; measures encouraging individuals to undertake regular handwashing; measures facilitating contact tracing; and measures taken to increase the testing of potential COVID-19 cases.

The proportionality analysis requires first a clear formulation of the state interest underlying hard border closures. This in turn requires identifying the relevant risk arising from the COVID-19 pandemic. There was disagreement between the parties on this point. Counsel for Clive Palmer argued that the relevant risk is the risk of the virus becoming uncontrollable within Western Australia, while Western Australia argued that the relevant risk is the risk of spreading the COVID-19 virus within the State. The Court had to carry out separate proportionality analysis for each of these risks. Under both analyses, the Court had to also take into account that Western Australia, in addition to its hard border closure directive, had also in place all non-border “Common” measures, with the exception of “an absolute limit on the numbers of people permitted to meet in groups.” Both analyses turned on the uncertainty as to whether, on the introduction of a COVID-19 case into Western Australia, transmission within the community would be controllable or uncontrollable. Put differently, the Court had to assess the health consequences of the introduction of the virus into Western Australia.

Relevant to both identified risks was the fact that the COVID-19 virus has an incubation period, before symptoms develop, of up to 14 days, while up to around 40 percent of persons remain asymptomatic, even after contracting the virus. By the time a hotspot is identified, therefore, a “number of generations of transmission may have already occurred.” Moreover, testing for the virus,
with an uptake of at most 50 percent, was found to still return a negative result for an infected person. Moreover, COVID-19 was said to have an exponential transmission rate, suggesting that rapid uncontrolled transmission could result from the introduction of a single case into the community, even where non-border measures such as surveillance and contact tracing are in place. Around 10 percent of symptomatic cases were found to require hospitalization.

The Court emphasized the difference between border and non-border measures in that “border measures reduce the risk of infected individuals entering the community, whereas other measures reduce the risk that infected individuals who enter the community will transmit disease into the community.” The Court, therefore found that “the border restrictions offer a tangible and substantial layer of protection to the Western Australian community over the protection offered by the Common Measures.” Moreover, based on expert evidence, the Court found that the probability of persons infected with COVID-19 entering Western Australia under border restrictions to be low, notwithstanding the risk of failure of hotel quarantine measures imposed on exempt travelers. In comparison, expert opinion indicated that the same probability under non-border measures would be increased, given that “Western Australia would not have the capacity to safely manage the increased numbers under a regime requiring mandatory hotel quarantining for all entrants.” Based on the expert evidence, the Court came to the conclusion that the probability of there being any community transmission of COVID-19 in Western Australia at present is negligible. However, there is ongoing community transmission, both from known and unknown sources, elsewhere in Australia. The experts specifically agree in their joint report that border restrictions are important to ensure higher transmission risk populations do not spread COVID-19 to lower transmission risk populations. Therefore, the border restrictions aim to guard the Western Australian population against an ongoing risk.

534 Id. at ¶ 92.
535 Id. at ¶ 90.
536 Id. at ¶ 88.
537 Id. at ¶ 89.
538 Id. at ¶ 86.
539 Id. at ¶ 161. See also, ¶ 162 (“The Common Measures and the border restrictions contained in the Directions target different risks of transmission of COVID-19. The border restrictions aim to restrict the chance that COVID-19 will be imported. The Common Measures aim to limit or control the spread of the virus once it has been imported. The Common Measures do not affect the risk of the importation of the virus”).
540 Id. at ¶ 171.
541 Id. at ¶ 307.
542 Id. at ¶ 326.
543 Id. at ¶¶ 328-29.
544 Id. at ¶ 117.
The Court identified the relevant risk as “an ongoing risk.” This conclusion relates to both types of risk identified by the parties, the risk of spreading the virus within Western Australia, as well as the risk of the virus becoming uncontrollable. Under the “Common” non-border measures, higher transmission populations within Australia can lead to uncontrollable transmission within Western Australia, even from one positive case coming into the community.

As to alternative border measures, these were identified as, first a targeted quarantine regime, and second, a hotspot regime. A targeted quarantine regime requires “any person entering Western Australia from a COVID-19 hotspot designated by Western Australia to isolate for a period of 14 days on conditions specified by Western Australia.” This regime is considered a border measure because it targets persons from hotspots, where a hotspot is defined as “a region or locality with a higher prevalence of COVID-19 cases than others.” These hotspots are dynamic in the sense that the requisite prevalence changed regularly depending on not only community transmission of the virus, but also on asymptomatic testing rates in any given State, or part of a State. The second border alternative, a hotspot regime, in comparison imposes hard border closures where “people from a designated hotspot would be banned from entering Western Australia altogether.”

The analysis of the net benefit of border measures depended on the risk of importation of the virus into Western Australia, and the efficacy of border measures in mitigating this risk. However, the accuracy of the analysis was limited by uncertainties relating to the efficacy of border measures. Assessing this efficacy was limited given that “COVID-19 has only recently emerged in the human population, the clinical, epidemiological and scientific knowledge base in respect of the disease is limited.” It was expected, therefore, that there would be disagreement among the experts as to the effectiveness of the border measures. After reviewing all available efficacy evidence the Court accepted the opinion that:

border measures are an accepted and effective component of the public health response to the control of infectious disease outbreaks. That is reflected in the fact of controls upon Australia’s international borders, and the effectiveness of border closures in New Zealand … I accept that they are a particularly important measure for the protection of a region with no community transmission from

545 id. at ¶ 331.
546 id. at ¶ 332.
547 id (“[A] ‘hotspot’ [is] a region or locality with a higher prevalence of COVID-19 cases than others.”).
548 id.
549 id. at ¶ 95.
550 id. at ¶ 122.
importation of the virus from regions with ongoing community transmission.\textsuperscript{551}

Expert evidence also indicated that even in comparison to a targeted quarantine regime or a hotspot regime hard border closures are more effective, given that where “a targeted quarantine regime or a hotspot regime does not cover the whole of a State or Territory in which there is ongoing community transmission, it would be less effective in preventing infected persons from travelling into Western Australia than the existing border restrictions.”\textsuperscript{552}

In summary, the Federal Court decision confirms that the hard border closures imposed by Western Australia passed both hurdles of responding to an emergency as well as being the only reasonable response to that emergency.

Following the judgment in the Federal Court, the matter was resumed in the High Court. The parties agreed on a special case. There were two questions stated in the special case. One related to costs, the other to the constitutionality of the impugned hard border closures. This second question was formulated as follows: “Are the Quarantine (Closing the Border) Directions (WA) and/or the authorizing Emergency Management Act 2005 (WA) invalid (in whole or in part, and if in part, to what extent) because they impermissibly infringe s 92 of the Constitution?”.\textsuperscript{553} On 6 November 2020, the High Court answered this question in favor of Western Australia, stating that section 56 and 67 of the 2005 Act did not infringe the mobility guarantee in section 92, because they were a response to “an emergency constituted by the occurrence of a hazard in the nature of a plague or epidemic.”\textsuperscript{554} The High Court of Australia, therefore, confirmed the findings by the Federal Court in upholding Western Australia’s hard border closures as permissible limitations on interstate mobility under the Australian Constitution.

VI. Final Thoughts

The Supreme Court is likely to uphold hard state border closures in response to a pandemic. These closures prevent persons from entering a State unless they belong to a category of exempt travelers. This conclusion is a gloss on the observation that “It is difficult, if not impossible, to identify an instance in which judicial intervention has prevented effective emergency action.”\textsuperscript{555} Judicial review is unlikely to provide relief while the health emergency is at its

\textsuperscript{551} Id. at ¶ 151.

\textsuperscript{552} Id. at ¶ 350.


height. The permissibility of hard state border closures as a restriction on the right to interstate travel turns on whether the nature of the threat, namely the COVID-19 global pandemic, necessitates an exercise of the police power under state emergency legislation. The analysis looks at the threat giving rise to a stated objective, rather than a characterization of the response to that threat, i.e., the action taken to achieve the objective. Balancing state action against alternative responses to the epidemic requires erring on the side of caution given the inherent uncertainty of just how effective prophylactic measures are in preventing community transmission of the pandemic, an uncertainty that is likely to linger even ex post the pandemic.

In response to COVID-19, no U. S. State imposed hard border closures. In response to future pandemics, to mitigate the need for more intrusive non-border measures, such as curfews and non-essential business closures, as seen in response to COVID-19, States should consider implementing hard border closures. Under an extreme emergency such as the COVID-19 pandemic, the validity of actions to respond to this threat cannot be ascertained through a proportionality test. There is simply not enough certainty in available data on the best way to combat the virus. We are only certain of the fact that the World Health Organization (WHO) has classified the threat of the COVID-19 epidemic as a pandemic. The extreme nature of this event is evinced by its scale. When faced with an extreme emergency that is compounded by lack of information on the best response, time is of the essence. The decision-maker

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557 Some jurists suggest a different analysis, where the current crisis juxtaposes rights against efficiency. The rights model is based on constitutional due process and federalism guarantees, where restrictions on liberty must be limited in duration, non-discriminatory, and use the least restrictive means to achieve their goals. The public health model is an efficiency model, focusing on data about the risk of infection, the likelihood of severe illness and death, and the strain on hospital and financial resources. See, e.g., Meryl Justin Chertoff, Insight: Coronavirus Threatens Constitutionally Protected Freedom of Movement, BLOOMBERG LAW (Apr. 2, 2020) https://news.bloomberglaw.com/us-law-week/insight-coronavirus-threatens-constitutionally-protected-freedom-of-movement-44.
561 See Brown v Tasmania [2017] HCA 43 (Austl.).
562 See Health Kelly, The Classical Definition of a Pandemic is not Elusive, 89 BULL. OF THE WORLD HEALTH ORG. 540 (2011) (According to the WHO, a pandemic is defined as “an epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people.”).
should implement the safest action. In the context of COVID-19, the safest action is hard border closures.\textsuperscript{563}

However, the above normative signal is limited to the constitutional analysis furnished in this paper. This analysis does not extend to considering the constitutionality of State legislative intervention to limit potential exposure to damages once such closures are in place. Nor does it extend to considering pandemic protectionism, where State action in response to the threat of community transmission is influenced by potential electoral rents from pursuing hard border closures.\textsuperscript{564} These issues, while relevant to a wider evaluation of the implementation of hard border closures, do not affect the constitutionality of permissible limitations on the right to interstate travel. In addition, the analysis is only part of a larger feasibility question that needs to also take into account social and economic factors that could militate against adopting such border measures.

When refocusing the research problem on possibilities for Supreme Court review, thinking about hard state border closures can also be framed within a wider construction question on how States should respond to extreme emergencies. In this article, I have followed a business-as-usual model to analyze infringement on a fundamental right during a pandemic. Under this “strict enforcement” model,\textsuperscript{565} constitutional analysis proceeds as usual, as if there is no pandemic. The rationale for using this model is that, given “the Constitution was intended to function in emergencies as well as in normal times,”\textsuperscript{566} the same framework that tests the constitutionality of infringement on fundamental rights continues to apply to government actions taken in response to the pandemic. A broad interpretation of the Constitution is integral to this approach so that state governments can respond effectively to emergencies.\textsuperscript{567} As early as 1798, the Supreme Court has recognized a Tenth Amendment State residual police power to respond to a health emergency.\textsuperscript{568} When this response infringes on fundamental individual rights, such as those sourced from the Due Process Clauses of the Fifth and Fourteenth Amendments, or the Equal Protection Clause of the Fourteenth Amendment, the government encroachment has to be justified under strict scrutiny by showing that the impugned State action is necessary to protect a compelling State interest.\textsuperscript{569} The difficulty with


\textsuperscript{566} See Fisch, \textit{supra} note 554, at 392.

\textsuperscript{567} Id.


\textsuperscript{569} See Fisch, \textit{supra} note 554, at 415-16.
this view is that it “disregards the reality of government exercise of extraordinary measures and powers in response to emergencies.”

Other models, however, have been suggested in lieu of the business-as-usual model. A second model is based on accommodation, where a form of “crisis jurisprudence” tweaks the applicable constitutional framework to afford state and federal governments more flexibility in responding to the pandemic. In particular, where the government intervenes to protect public safety in times of war, the Supreme Court is likely to “defer to emergency policy once they determine that an emergency exists.” Alternatively, the Court is likely to make the review standard easier to meet due to the emergency. Under this model, “conditions which may be characterized as an ‘emergency’ are likely to support significant restrictions on individual liberty.” It follows that balancing state response to the emergency against the infringed individual right can now proceed under one of the lower scrutiny standards, namely, intermediate scrutiny or rational basis. Quantitative studies suggest that “when crises threaten the nation’s security, the justices are substantially more likely to curtail rights and liberties than when peace prevails.” This view is criticized as leading to a “slippery slope toward excessive governmental infringement on individual rights and liberties while undermining constitutional structures and institutions in the process.”

The third model suggests that during a pandemic, federal and state governments can respond extra-constitutionally. This view, which sometimes is also

570 Gross, supra note 564, at 1021.
571 Posner & Vermeule, supra note 564, at 606 (2003) (arguing for “the longstanding judicial practice of deferring to the political branches, and especially to the executive branch, during wartime and other emergencies”).
572 See Id. (explaining the accommodation view); Gross, supra note 564, at 1021 (explaining a general category of “models of accommodation”).
574 See Posner & Vermeule, supra note 564, at 606-07.
576 See Fisch, supra note 554, at 416.
577 Id.
578 See Epstein et al., supra note 574, at 8.
579 See Gross, supra note 564, at 1022.
580 See generally, Kevin Jon Heller, The Rhetoric of Necessity (or, Sanford Levinson’s Pinteresque Conversation), 40 GA. L. REV. 779 (2006). See also, Michael Stokes Paulsen, The Constitution of Necessity, 79 NOTRE DAME L. REV. 1257, 1257-58 (2004) (arguing that explicit constitutional restraints can be ignored during an emergency); Gross, supra note 564, at 1134 (“There may be circumstances when it would be appropriate to go outside the legal order, at times even violating otherwise accepted constitutional dictates, when responding to emergency situations”). But cf., Alford, supra note 276, at 357 (refuting Paulsen-Gross by arguing that it departs from millennia of constitutional tradition).
referred to as the suspension approach,\textsuperscript{581} suggest that governments “may act extralegally when they believe that such action is necessary for protecting the nation and the public in the face of calamity, provided that they openly and publicly acknowledge the nature of their actions.”\textsuperscript{582} A stronger version claims that governments \textit{must} act extralegally in response to emergencies.\textsuperscript{583} The rationale for this view recognizes explicitly the need for extraconstitutional State action in response to a health emergency.\textsuperscript{584} Put differently, “law is good in ordinary times but that it must be suspended when extreme measures are needed.”\textsuperscript{585} This rationale is based on efficiency, the fact that the “government’s ability to act swiftly, secretly, and decisively against a threat to the life of the nation becomes superior to the ordinary principles of limitation on governmental powers and individual rights,”\textsuperscript{586} Historically, a line of cases dating back to World War I and World War II indicate that judicial review, regardless of the applied scrutiny standard, “has largely failed to protect individual rights when their protection is most needed.”\textsuperscript{587} Therefore, the extraconstitutional approach replaces judicial review with political accountability, either directly through elections, or indirectly, through legislative intervention.

The business-as-usual model adopted in this article is the hardest hurdle to pass, as it imposes a strict scrutiny standard. Showing that the Supreme Court is likely to find such closures constitutional under this view, gives assurance even if the accommodation or extra-constitutional views are adopted. The legal challenge to Western Australia’s hard border illustrates how this model has been applied by the High Court of Australia, and how it is likely to be applied by the Supreme Court in response to future pandemics. Moreover, at least in theory, the accommodation and extraconstitutional models can engage in a downward cycle towards more repressive laws. Bruce Ackerman once wrote that “Terrorist

\begin{itemize}
\item \textsuperscript{581} See Lindsay Wiley & Stephen I. Vladeck, \textit{Coronavirus, Civil Liberties, and the Courts: The Case Against “Suspending” Judicial Review}, 133 \textit{Harv. L. Rev.} F. 179 (2020) (arguing that the suspension approach as seen in the Jacobson real or substantial relation test is wrong and should not be applied in analyzing the constitutionality of COVID-19 responses).
\item \textsuperscript{582} See Gross, \textit{supra} note 564, at 1023.
\item \textsuperscript{584} See George J. Alexander, \textit{The Illusory Protection of Human Rights by National Courts During Periods of Emergency}, 5 \textit{Hum. Rts. L.J.} 1, 27,65 (1984) (arguing that a political rather than a judicial review would be more effective during an emergency). See Gross, \textit{supra} note 564, at 1023 (arguing that government can act extra constitutionally provided these actions are not made publicly); Mark Tushnet, \textit{Defending Korematsu?: Reflections on Civil Liberties in Wartime}, 2003 \textit{Wis. L. Rev.} 273, 306-307 (2003) (“[l]t is better to have emergency powers exercised in an extraconstitutional way, so that everyone understands that the actions are extraordinary, than to have the actions rationalized away as consistent with the Constitution and thereby normalized.”). Cf., Cole, \textit{supra} note 555, at 2590-91 (arguing that extraconstitutional measures are not appropriate during an emergency, given that the ability of political processes to judge emergency measures is dubious).
\item \textsuperscript{586} See Gross, \textit{supra} note 564, at 1023.
\item \textsuperscript{587} Cole, \textit{supra} note 555, at 2566. See, e.g., Schenck v. United States, 249 U.S. 47 (1919); Korematsu v. United States, 323 U.S. 214 (1944); Dennis v. United States, 341 U.S. 494 (1951).
\end{itemize}
attacks will be a recurring part of our future,”^588 predicting that “Even if the next half-century sees only four or five attacks on the scale of September 11, this destructive cycle will prove devastating to civil liberties by 2050.”^589 The cycle results from political attempts to prevent further attacks by imposing more infringements on individual rights. A similar downward cycle is likely to be obtained in a health emergency. We have seen this ratcheting approach in the severity of restrictions imposed during the second wave of the COVID-19 pandemic.\(^590\) Assuming that the Supreme Court will use strict enforcement to balance the right to interstate travel against hard state borders takes into account the Courts effort to prevent or break this cycle.

At a deeper analytical level, the finding on hard border closures invites a wider rethinking of how we need to construct the Constitution’s rendition of the federal ideal. There is a need for a reconstruction of American federalism as a dynamic form of the principle of subsidiarity.\(^591\) As observed by Steven Calabresi and Lucy Bickford back in 1994, “our time is witness to the decline and fall of nation-states as they dissolve from above and from below.”\(^592\) In this weltanschauung, globalization is being replaced by continentalization.\(^593\) The principle explains how this continentalization can come about. It allows for a move away from strict division of powers between federal and state governments and envisages instead a dynamic sharing of these powers to optimize governance.\(^594\) In the United States, however, subsidiarity is a constitutional pariah.\(^595\) To be clear, my point is not about the Supreme Court

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^589^ *Id.* at 1030.


^593^ JEREMY RIFKIN, *THE THIRD INDUSTRIAL REVOLUTION: HOW LATERAL POWER IS TRANSFORMING ENERGY, ECONOMY, AND THE WORLD 162* (2011) (arguing that while earlier Industrial Revolutions were accompanied by nation-states, The Internet of Things, because it is distributed and collaborative by nature, favors continental unions. Globalization is moribund and being replaced by continentalization).


revival of federal limits on national power, but about the efficiency demands remodulating federal limits on state power. Subsidiarity, which extends to contexts beyond responding to extreme emergencies, holds the promise of forming a centripetal field over the U.S. political spectrum because it allows for local elasticities along socioeconomic divides. It thus even suggests a revival of radical reimagination, not only of the calculus of power distribution, but of the territorial evolution of the United States as a polity—in itself a generous unifying force. The defeat of the Confederacy in the Civil War (1861-1865) only strengthened the “manifest destiny” theory promulgated by the United States in the 19th century, which prophesized the expansion of the United States across the rest of North America. Arguably, “the most enduring statement of America’s Manifest Destiny” was Lincoln’s Gettysburg address on 19 November 1863. A similar support comes from the theory of “continentalism,” which shares the same prophecy. These theories call for peaceful expansion, for example, such as the Alaska purchase (on 18 October 1867), to a continental scale, as already seen in Australia—from water to water. Subsidiarity can illuminate a federal goldilocks zone that expands the efficiency gains from federation, and therefore, allows for the emergence of much larger, continental, polities.


