JACOBSON 2.0: POLICE POWER IN THE TIME OF COVID-19

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The COVID-19 pandemic has become a legal, as well as a public health, crisis. In response to the pandemic, state and municipal governments have imposed unprecedented constraints on Americans' daily activities. These restrictions provoked a wave of constitutional challenges that have revealed the antiquated doctrinal foundations of states' police power in the area of public health. It has been over a century since the Supreme Court, in *Jacobson v. Massachusetts*, articulated a broadly deferential approach to constitutional review of state orders issued in response to a public health emergency. The constitutional order has changed since *Jacobson* was decided; many provisions of the Bill of Rights have been incorporated against the states, the Court has developed tiers of constitutional scrutiny, and constitutional doctrine has evolved a deeper regard for the rights of privacy and bodily autonomy. The *Jacobson* doctrine must be updated to incorporate contemporary constitutional norms.

This Article surveys cases evaluating constitutional challenges to states' COVID-19 orders, finding substantial variation in courts' efforts to reconcile *Jacobson* with the subsequent 117 years of constitutional development. It describes three distinct approaches to applying *Jacobson* that courts in the COVID-19 era have taken, and then offers a new doctrinal model—"*Jacobson* 2.0"—by which to evaluate the scope of state police power during a public health crisis. The *Jacobson* 2.0 model preserves *Jacobson*'s fundamental insight

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We are indebted to the following individuals for valuable insight and feedback on this Article: Yavar Bathaee, Carlos Bernal, Josh Blackman, Jeannette Cox, Malcolm Feeley, Erica Goldberg, Luke Haqq, Chris Roederer, Jeff Schmitt, Lawrence Solum, and Andy Strauss. We are especially indebted to Kseniia Mironova for invaluable research assistance.

that courts should grant states a measure of deference and discretion in their efforts to mitigate a public health emergency that would not apply in ordinary times, while explicitly preserving a meaningful role for judicial review in preventing pretextual or disproportionate abridgement of constitutional rights and liberties. Only by updating the Jacobson doctrine to incorporate contemporary constitutional norms can the constitutional law of public health effectively resolve the tension between individual rights and communal health presented in these cases.

They fancied themselves free, and no one will ever be free so long as there are pestilences.[1]

I. INTRODUCTION

The COVID-19 pandemic created a multitude of global crises—public health,[2] economic,[3] and legal,[4] among others. In the United States, state and local governments have faced a threat to public health unparalleled in the past century,[5] and have adopted measures to mitigate the COVID-19 threat drawing upon aspects of the state police power that have remained largely dormant within living memory.[6] Beginning in March 2020, states undertook a series of

[1] ALBERT CAMUS, THE PLAGUE 35 (Stuart Gilbert trans., 1948).

[2] *See, e.g.*, Waleed Alabdulmonem et al., *COVID-19: A Global Public Health Disaster*, 14 INT'L J. HEALTH SCI. 7 (2020); *Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV)*, WORLD HEALTH ORG. (Jan. 30, 2020), https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov) [https://perma.cc/N7L7-EZUR].

[3] *See, e.g.*, Gita Gopinath, *The Great Lockdown: Worst Economic Downturn Since the Great Depression*, INT'L MONETARY FUND, https://blogs.imf.org/2020/04/14/the-great-lockdown-worst-economic-downturn-since-the-great-depression [https://perma.cc/5WQF-W4CQ]; *How Is Covid-19 Affecting the Global Economic Order? Scenarios for the Global Monetary System*, INST. ADVANCED SUSTAINABILITY STUD. POTSDAM (July 5, 2020), https://www.iass-potsdam.de/en/news/zukunftsvisionen-globales-finanzsystem [https://perma.cc/GCX5-CZP9].

[4] *See, e.g.*, Troutman Pepper, *A Look Back at COVID-19 Legal Issues – and a Look Ahead*, JDSUPRA (Dec. 24, 2020), https://www.jdsupra.com/legalnews/a-look-back-at-covid-19-legal-issues-49368/ [https://perma.cc/7DMM-9REU].

[5] Marie Rosenthal, *Fauci: COVID-19 Worst Pandemic in 100 Years*, INFECTIOUS DISEASE SPECIAL EDITION (Oct. 21, 2020), https://www.idse.net/Covid-19/Article/10-20/Fauci--COVID-19-Worst-Pandemic-in-100-Years/60937 [https://perma.cc/E6GA-GCP3].

[6] The novelty of the measures undertaken to curb the pandemic is reflected in a comment by Wall Street Journal editor Matthew Hennessy, who tweeted on March 16, 2020, that "I didn't realize we lived in a country where a local political official could order private businesses closed." Keith E. Whittington, *Can the Government Just Close My Favorite Bar?*, VOLOKH

initiatives intended, initially, to "flatten the curve" of the pandemic—that is, to slow the spread of the virus in order to avoid overwhelming local hospitals' capacity to treat patients.[7] State COVID-19 orders varied widely in the details, but often included the shutdown of non-essential businesses, the closing of universities, museums, and churches, the imposition of moratoria on elective or non-essential medical procedures, requiring residents to remain in their homes except for necessary activities, and implementing social distancing or face mask requirements in public places.[8] These measures represented a sharp break in the daily routines of most Americans, and a disruption to civic life unprecedented in scope and duration in peacetime.[9]

It's therefore unsurprising that the states' COVID-19 orders quickly provoked a wave of constitutional challenges.[10] Americans suddenly precluded from working, shopping, worshiping, or even traveling with the freedom to which they had been accustomed asked the courts to enjoin enforcement of COVID-19 orders as exceeding the states' constitutional authority.[11] These cases asserted a variety of federal constitutional claims, pitting the states' police power to protect the public health and safety against individual liberties protected, as against the states, by the Fourteenth Amendment's Due Process and Equal Protection Clauses.[12] While cases challenging the scope of the public health police power have been routine fixtures in federal litigation over the past century,[13] the volume of litigation

CONSPIRACY (Mar. 16, 2020), https://reason.com/2020/03/16/can-the-government-just-close-my-favorite-bar [https://perma.cc/GUC4-GPHP]. Of course, local political officials order businesses closed for such things as municipal code violations all the time, but Hennessy's confusion reflects the fact that no state had implemented such measures on a wide scale in response to a public health crisis within his lifetime. *See id.*

[7] *See, e.g.*, Pierre-Olivier Gourinchas, *Flattening the Pandemic and Recession Curves*, *in* MITIGATING THE COVID ECONOMIC CRISIS: ACT FAST AND DO WHATEVER IT TAKES 31, 32 (Richard Baldwin & Beatrice Weder di Mauro eds., 2020).

[8] Lawrence O. Gostin & Lindsay F. Wiley, *Governmental Public Health Powers During the COVID-19 Pandemic: Stay-at-home Orders, Business Closures, and Travel Restrictions*, 323 J. AM. MED. ASS'N 2137, 2137 (2020). *See generally Status of State Covid-19 Emergency Orders,* NAT'L GOVERNORS ASS'N., https://www.nga.org/state-covid-19-emergency-orders [https://perma.cc/3KJ8-4ZFB] (surveying state COVID-19 orders).

[9] *See, e.g.*, Abid Haleem et al., *Effects of COVID-19 Pandemic in Daily Life*, 10 CURRENT MED. RSCH. & PRAC. 78, 78 (2020).

[10] *See infra* Part III.B (surveying COVID-19 litigation).

[11] *See infra* Part III.B.

[12] *See infra* Part III.B.

[13] *See, e.g.*, James R. Steiner-Dillon, *Sticking Points: Epistemic Pluralism In Legal Challenges To Mandatory Vaccination Policies*, 88 U. CIN. L. R. 169, 217–22 (2019) (surveying Twentieth and Twenty-First century legal challenges to mandatory vaccination requirements); Liberian

seeking to clarify the boundaries of states' public health police power in the context of constitutional challenges to COVID-19 orders appears to be unprecedented.[14]

The explosion of litigation challenging COVID-19 orders exposed the antiquated constitutional foundations of states' police power in the area of public health, while at the same time presenting an overdue opportunity to update and clarify the constitutional norms by which the states' power to protect public health is balanced against individuals' constitutional liberties. The leading decision of the United States Supreme Court on this matter is *Jacobson v. Massachusetts*, a case addressing the scope of municipal authority to impose a vaccination requirement during a smallpox outbreak.[15] Decided in 1905, *Jacobson* affirmed the power of a local government acting pursuant to a statutory delegation of power to impose a vaccine requirement backed by a criminal fine for non-compliance.[16] The Court held that, whatever individual liberties the Fourteenth Amendment might protect, they are subordinate in times of a public health crisis to the state's interest in protecting the community:

> There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his

Cmty. Ass'n of Connecticut v. Lamont, 970 F.3d 174, 178 (2d Cir. 2020) (affirming dismissal of constitutional challenges to state Ebola quarantine policies); Hickox v. Christie, 205 F. Supp. 3d 579, 584–85 (D. N.J. 2016) (dismissing constitutional claims arising from mandatory quarantine following plaintiff's exposure to Ebola).

[14] To take one simple measure, we note that, as of October 26, 2020, according to the Westlaw database, the Supreme Court's decision in *Jacobson v. Massachusetts*, had been cited by a total of 859 judicial opinions in its 117-year history. Jacobson v. Massachusetts, 197 U.S. 11 (1905). One hundred sixty-six, or 19%, of those citations were made between April and October 2020. In other words, the rate of citation to *Jacobson* between April and October 2020 (23.7 cites/month) was over *47 times higher* than the baseline rate of citation from March 1905 (shortly after *Jacobson* was decided on February 20, 1905) through March 2020 (0.5 cites/month).

[15] *See Jacobson*, 197 U.S. at 25–26; James G. Hodge, *The Role of New Federalism and Public Health Law*, 12 J. L. & HEALTH 309, 328 (1998).

[16] *See Jacobson*, 197 U.S. at 25–27.

> own, whether in respect of his person or his property, regardless of the injury that may be done to others.[17]

While *Jacobson* recognized that courts exercising constitutional review of public health orders should invalidate an order that is "beyond all question, a plain, palpable invasion of rights secured by the fundamental law,"[18] the constitutional limits of state power in the area of public health were left ambiguous. *Jacobson*'s open-ended deference to state action left the public health police power open to egregious abuse in the ensuing decades. Perhaps most notoriously, most legal scholars and attorneys are familiar with Justice Holmes's dictum in *Buck v. Bell*,[19] upholding the states' power to impose eugenic sterilization on those deemed mentally unfit, that "[t]hree generations of imbeciles are enough."[20] Less widely quoted is the sentence immediately preceding that pronouncement: "[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."[21] *Jacobson* was the only case that Justice Holmes cited for that principle.[22]

The questions that *Jacobson* left open concerning the limits of state police power have grown more urgent in the 117 years since the case was decided, as the Court has developed a constitutional framework with more robust protections for individual rights.[23] In 1905, no provision of the Bill of Rights had yet been incorporated, via the Fourteenth Amendment's Due Process Clause, against the states.[24]

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[17] *Id.* at 26.

[18] *Id.* at 31.

[19] Buck v. Bell, 274 U.S. 200 (1927).

[20] *Id.* at 207.

[21] *Id.* (citing *Jacobson*, 197 U.S. 11).

[22] *See Buck*, 274 U.S. at 207.

[23] *See, e.g.*, Josh Blackman, *What Rights Are "Essential"? The 1st, 2nd, and 14th Amendments in the Time of Pandemic*, 44 HARV. J. L. PUB. POL'Y 1, 43–45; James Colgrove & Ronald Bayer, *Manifold Restraints: Liberty, Public Health, and the Legacy of Jacobson v Massachusetts*, 95 AM. J. PUB. HEALTH 571, 571 (2005); *see also* Cnty. of Butler v. Wolf, 486 F. Supp. 3d 883, 896–97 (W.D. Pa. 2020) (noting that since *Jacobson* was decided, constitutional development "has seen a jurisprudential shift whereby federal courts have given greater deference to considerations of individual liberties, as weighed against the exercise of state police powers"). *See generally* Wendy K. Mariner et al., *Jacobson v Massachusetts: It's Not Your Great-Great-Grandfather's Public Health Law*, 95 AM. J. PUB. HEALTH 581, 587 (2005) ("One hundred years after *Jacobson*, neither public health nor constitutional law is the same.").

[24] The Court's decision in *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, is sometimes described as a proto-incorporation case. Chicago, Burlington & Quincy R.R. Co. v. City of Chicago 166 U.S. 226 (1897). *See, e.g.*, Akhil Reed Amar, *2000 Daniel J. Meador Lecture: Hugo Black and the Hall of Fame*, 53 ALA. L. REV. 1221, 1226–27 (2002). But the first case to explicitly recognize an incorporated constitutional provision was decided 20 years after

The Supreme Court had not yet developed the tiers of constitutional scrutiny that now apply in many areas of constitutional analysis.[25] And the constitutional right to privacy underlying contemporary notions of individual bodily and reproductive autonomy was, at best, in a nascent and largely unrecognizable state.[26] Even constitutional norms against racial discrimination—which Justice Kavanaugh, in 2020, would call a "red line" that cannot be crossed even during a public health emergency[27]—were less rigorous at the time *Jacobson* was decided.[28]

The changing constitutional landscape since *Jacobson* places courts adjudicating constitutional challenges to COVID-19 orders in a difficult position: how can *Jacobson*, which remains the leading Supreme Court case on the question of state police power in the public health context, be reconciled with a century of subsequent precedent, the language of which the *Jacobson* Court largely did not speak? Should the court ignore a century of constitutional precedent and hold that *Jacobson* alone, with its highly deferential approach and anachronistic disregard of federal constitutional limitations on states' interference with individual rights, decides the issue? Or should they ignore *Jacobson*, which by all appearances remains good law, and simply apply the traditional doctrinal tests with no regard to the unique demands of a public health emergency? Courts adjudicating constitutional challenges to COVID-19 orders have tried both approaches.[29] Most, however, have attempted to reconcile the precedents, finding a way to incorporate *Jacobson*'s fundamental holding into an analysis that also applies the traditionally applicable

Jacobson. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporating the First Amendment's Free Speech Clause against the states via the Fourteenth Amendment).

[25] United States v. Carolene Prod. Co., 304 U.S. 144, 152–53 n.4 (1938); *see, e.g.*, Akhil Reed Amar, *The Constitutional Virtues and Vices of the New Deal*, 22 HARV. J. L. & PUB. POL'Y 219, 222 (1998); Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087–88 (1982); *but see, e.g.*, Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 113 (2019) (describing the Roberts Court as an "anti-*Carolene*" court).

[26] *Compare supra* text accompanying notes 18–22 *with* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965); Roe v. Wade, 410 U.S. 113, 154 (1976), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 876 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) *and* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

[27] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2614 (2020) (Kavanaugh, J., dissenting).

[28] *See, e.g.*, Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 487, 495 (1954) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896)); Shelley v. Kraemer, 334 U.S. 1 (1948) (forbidding enforcement of racially restrictive covenants in the transfer of housing).

[29] *See infra* Part III.A.

tests and doctrines developed after *Jacobson*.[30] Yet these courts have struggled to find an approach that effectively synthesizes *Jacobson*'s holding and reasoning with the multitude of constitutional doctrines developed after that case.[31]

Underlying the courts' divergent treatment of *Jacobson* in constitutional challenges to COVID-19 orders is a fundamental constitutional question: to what extent should constitutional norms change during public health emergencies? Should state interventions that would, in normal times, unconstitutionally burden protected rights and liberties be permitted for the sake of preserving public health? Or should we be willing to pay a price, even in lives, for the preservation of rights and liberties that have, after all, been deemed to be "so rooted in the traditions and conscience of our people as to be ranked as fundamental"[32] or "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed"?[33] Any doctrinal framework for analyzing questions of state police power during a public health crisis—even one that denies that circumstance any special constitutional status—necessarily takes a position on these questions.[34] The COVID-19 litigation provides an opportunity to consider these questions anew, in light of both the constitutional developments of the Twentieth and early Twenty-first centuries as well as the stark realities, forgotten over time, of life during a deadly pandemic.

Several scholars have argued that courts should essentially ignore *Jacobson* in favor of subsequent doctrines, subjecting COVID-19 orders to "regular" constitutional review rather than the more deferential standard that *Jacobson* would require.[35] These scholars

[30] *See infra* Part III.A.

[31] *See infra* Part III.A.

[32] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (citing Twining v. New Jersey, 211 U.S. 78, 106, 111, 112 (1908); Rogers v. Peck, 199 U.S. 425, 434 (1905); Maxwell v. Dow, 176 U.S. 581, 604 (1900); Hurtado v. California, 110 U.S. 516 (1884); Frank v. Mangum, 237 U.S. 309, 326 (1915); Powell v. Alabama, 287 U.S. 45, 67 (1932)), *overruled* in part by Malloy v. Hogan, 378 U.S. 1, 6, 14 (1964).

[33] Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937) (citing *Twining*, 211 U.S. at 99); *see also* McDonald v. City of Chicago, 561 U.S. 742, 767 (2010); Washington v. Glucksburg, 521 U.S. 702, 720–21 (1993).

[34] *See, e.g.*, John D. Blum & Norchaya Talib, *Balancing Individual Rights Versus Collective Good in Public Health Enforcement,* 25 MED. & L. 273, 274, 279 (2006).

[35] Blackman, *supra* note 23, at 43–45; Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 Harv. L. Rev. F. 179, 182 (2020); Lindsay F. Wiley & Steve Vladeck, *COVID-19 Reinforces the Argument for "Regular" Judicial Review—Not Suspension of Civil Liberties—In Times of Crisis*, HARV. L. REV. BLOG (Apr. 9, 2020), https://blog.harvardlawreview.org/covid-19-reinforces-the-argument-

argue, for example, that "ordinary" constitutional review already leaves substantial room for states to act in furtherance of their "compelling" interest in mitigating the COVID-19 pandemic,[36] that the "suspension" model presumes a short-term crisis as opposed to the months- or years-long modifications of ordinary life that the COVID-19 pandemic will require,[37] and that active judicial review during times of crisis is necessary not only for the protection of individual liberties against pretextual or excessive state overreach, but also to preserve "the unique checking role" of judicial review in times of emergency.[38] They tend to present the choice between "ordinary" constitutional review and the "suspension" of civil liberties as dichotomous alternatives.

This Article argues for a middle path. We contend that *Jacobson* is long overdue for a *Casey*-like[39] reaffirmation and clarification that would preserve *Jacobson*'s essential holding that states enjoy greater regulatory latitude during a public health crisis, including latitude to enact temporary measures that might fail under "ordinary" constitutional review, while preserving meaningful judicial oversight as necessary to avoid pretextual or disproportionate state interference with individual rights and liberties. Drawing on the insights, and the shortcomings, of courts' initial efforts to reconcile *Jacobson* with subsequent constitutional standards, we propose a new model—"*Jacobson* 2.0"[40]—for judicial review of state actions that purport to be intended to mitigate a public health emergency.[41] The

for-regular-judicialreview-not-suspension-of-civil-liberties-in-times-of-crisis [https://perma.cc/LRT7-5RVD]; Ilya Somin, *The Case for "Regular" Judicial Review of Coronavirus Emergency Policies*, REASON: VOLOKH CONSPIRACY (Apr. 15, 2020), https://reason.com/volokh/2020/04/15/the-case-for-normal-judicial-review-of-coronavirus-emergency-policies/ [https://perma.cc/K73A-RTAK].

[36] Wiley & Vladeck, *supra* note 35, at 188–89.

[37] *Id.* at 183–87.

[38] *Id.* at 194–97; *see also* Somin, *supra* note 35 ("[I]mposing normal judicial review on emergency measures can help reduce the risk that the emergency will be used as a pretext to undermine constitutional rights and weaken constraints on government power even in ways that are not really necessary to address the crisis.").

[39] *See generally* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 846 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (reaffirming the "essential holding" of *Roe v. Wade*, while modifying the doctrinal test applicable to regulation of abortion).

[40] The term is something of a placeholder, insofar as the model we propose is a clarification and refinement of the *Jacobson* case. We do not claim that our model follows entirely from the *Jacobson* decision itself, but we believe that, like *Casey*, it preserves what was essential in *Jacobson* while updating the rule of that case in light of subsequent experience and constitutional developments. Thus, the doctrine would more naturally be named after the case in which the Supreme Court adopts it.

[41] *See infra* Part IV.

first step of our two-step model would require the state to establish the existence of a bona fide public health emergency to which the challenged action is plausibly related.[42] The requirement of a threshold showing is intended to curb pretextual abuses and would impose upon the state an obligation to articulate evidence-based reasons for its policies. But the threshold is low, as reflected in the plausibility standard by which the court will evaluate the challenged order's relation to the public health emergency. As *Jacobson* recognized, courts should generally avoid second-guessing the judgment of politically accountable officials in matters relating to the protection of public health.[43]

Having made the threshold showing, the state's challenged action would be entitled to "*Jacobson* deference," which would impose a single standard of review on all exercises of the state police power plausibly related to a public health emergency.[44] A court applying *Jacobson* deference would balance several factors, most prominently including the danger to the public posed by the public health threat, the relative risks and benefits of the regulated conduct, and the degree of interference with constitutionally protected liberties.[45] The state's action should be upheld when the balance of factors weighs in favor of the intervention, even at the cost of some incursion into constitutionally protected liberties that would exceed the scope of the state's legitimate authority in ordinary times. Thus, the state's legitimate need for broad authority to intervene quickly in a public

[42] *See infra* Part IV.B.1.

[43] Jacobson v. Massachusetts, 197 U.S. 11, 30 (1905) ("It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain.").

[44] *See infra* Part IV.B.2.

[45] *See infra* Part IV.B.2. The complete list of factors that the court would balance in applying *Jacobson* deference is as follows:

1. The danger to the public that the public health order purports to mitigate;
2. The comparative public risks and benefits of the protected activity;
3. The danger to affected individuals that the order purports to mitigate;
4. The degree to which the order impedes the exercise of a constitutionally protected right;
5. The duration of the order, including the degree to which the duration causes significant impairment to the exercise of the right;
6. Whether the order is targeted at constitutionally protected activity or incidentally includes constitutionally protected activity within a broader mandate; and
7. The degree to which the order or its enforcement creates a disparate impact on suspect or quasi-suspect classes.

health emergency is prioritized, subject to the judicial oversight necessary to prevent overreach and abuse.

This Article proceeds in five Parts. After this Introduction, Part II surveys the current constitutional paradigm applicable to judicial review of state public health orders, including the Supreme Court's landmark decision in *Jacobson*. Part III will examine the wave of recent litigation in response to public health orders directed at controlling the COVID-19 pandemic, discussing courts' divergent treatment of *Jacobson* in that context. Part IV then presents the *Jacobson* 2.0 model: a revised and updated framework for judicial review of public health orders during a public health emergency. Part V briefly concludes.

II. THE PUBLIC HEALTH POLICE POWER

A. Police Power in General

In the broadest sense, government "police powers" encompass the "inherent authority of the state . . . to enact laws and promulgate regulations to protect, preserve, and promote the health, safety, morals, and general welfare . . . ."[46] In order to carry out such authorities, the government necessarily must restrict private interests to some degree, including those in "autonomy, privacy, association, and liberty as well as economic interests in freedom to contract and uses of property."[47] Though Chief Justice John Marshall first "coined the term . . . police power" in 1827,[48] the values it incorporates represent a feature of sovereign governments throughout history: the power to regulate conduct in order to promote the health, safety, and welfare of the people.[49] The police powers allow the state to provide for the common good, even if that means having to restrict individual liberties and freedoms to some degree.

Long before the term "police" referred to the domestic body "specialized in keeping order and investigating crimes,"[50] it was used,

[46] LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 87–88 (3d ed. 2016); *see* Hodge, *supra* note 15, at 319; Edward P. Richards III & Katharine C. Rathbun, *The Role of the Police Power in 21st Century Public Health*, 26 SEXUALLY TRANSMITTED DISEASES 350, 351–52 (1999).

[47] GOSTIN &WILEY, *supra* note 46, at 88.

[48] Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 745 (2007) (citing Brown v. Maryland, 25 U.S. 419, 442–43 (1827)).

[49] *See* GOSTIN & WILEY, *supra* note 46, at 87–88.

[50] Legarre, *supra* note 48, at 761.

as far back as the sixteenth century, as a synonym for governmental policy.[51] By the eighteenth century, "police" had narrowed to mean only specific kinds of policy, "namely the regulation, discipline, and control of a community; civil administration and public order."[52] The concept of the government having "police powers" grew from the idea that an individual could commit a crime against the community rather than against another person. As Blackstone described, such offenses included bigamy, vagrancy, gambling, hunting certain types of animals, selling fireworks, running disorderly inns, and any other nuisances which "annoy the whole community in general, and not merely some particular person."[53] Each of these activities encroaches on the "common good[]," or the values of "public morals, public order, [and] public safety."[54]

These English legal concepts transferred to the American colonies before the founding of the United States.[55] But while founding Americans clearly embraced a vision of sovereignty encompassing a power to protect public order and safety, they viewed this specifically as a duty of the state, as opposed to the federal government.[56] In 1787, Constitutional Convention delegate Roger Sherman attempted to memorialize this division by adding a clause to Article V stating "no State should be affected in its internal police."[57] Though the Convention rejected this amendment, the Tenth Amendment in the Bill of Rights a few years later embodied the same spirit: because the Constitution does not explicitly grant the federal government "police powers," the states retained such authority.[58] Though federal ability to regulate police powers has since expanded, especially with the advent of the Fourteenth Amendment,[59] and growth of the Commerce Clause,[60] the states still retain the primary authority to "(1) promote the public health, morals, or safety, and the general well-being of the

[51] *See id.* at 749.
[52] *Id.*
[53] WILLIAM BLACKSTONE, THE COMMENTARIES ON THE LAWS OF ENGLAND 167–75 (4th ed. 1769).
[54] Legarre, *supra* note 48, at 762.
[55] *See id.* at 770–71.
[56] *See id.* at 778–79.
[57] MARK DAVID HALL, ROGER SHERMAN AND THE CREATION OF THE AMERICAN REPUBLIC 99 (2013); *see* Legarre, *supra* note 48, at 776.
[58] *See* Legarre, *supra* note 48, at 778–79.
[59] *See* Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 433–34 (2003).
[60] *See* SCOTT BURRIS ET AL., THE NEW PUBLIC HEALTH LAW: A TRANSDISCIPLINARY APPROACH TO PRACTICE AND ADVOCACY 124–26 (2018).

community; (2) enact and enforce laws for the promotion of the general welfare; (3) regulate private rights in the public interest; and (4) extend measures to all great public needs."[61] These values form an important core basis of the "constitutional compact" between the federal and state governments.[62]

The police powers of the state allow the government "to take coercive action against individuals for the benefit of society."[63] Of course, such tradeoffs form the fundamental basis of the "social contract" on which the Founders built the Constitution.[64] And, though police powers are often expansive, they are always subject to limitations based on federal and state constitutions.[65] Governments carry out these extensive powers via legislation, regulation, and adjudication that "necessarily limit private interests."[66] But the police powers are not always easy to define or articulate. As the U.S. Supreme Court stated in the *Slaughterhouse Cases* in 1872:

> [The police power] is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise. This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property.[67]

The state police powers form the legal basis for public health authority, which continually struggles to find a balance between the rights of the individual and the good of society as a whole.[68] And while police powers may encompass some issues that only tangentially implicate public health—such as eminent domain[69] and

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[61] Jorge E. Galva et al., *Public Health Strategy and The Police Powers of the State*, 120 PUB. HEALTH REP. 20, 20 (2005).
[62] *See* GOSTIN AND WILEY, *supra* note 46, at 89; Hodge, *supra* note 15 at 322.
[63] Richards & Rathbun, *supra* note 46, at 350.
[64] *See* GOSTIN AND WILEY, *supra* note 46, at 92.
[65] *See id.* at 88.
[66] *Id.* at 89.
[67] Slaughter-House Cases, 83 U.S. 36, 62 (1872).
[68] Richards and Rathbun, *supra* note 46, at 350.
[69] *See* Joseph L Sax, *Takings and the Police Power*, 74 YALE L. J. 36 (1964).

wildlife conservation[70]—public health concerns remain a central focus in the states' exercise of police power.

"Public health law is the study of the legal powers and duties of the state to assure the conditions for people to be healthy . . . and the limitations on the power of the state to constrain the . . . legally protected interests of individuals for the common good."[71] In general, public health seeks to assure, improve, and maintain the collective well-being of a community as whole.[72] It strives for this not through individual medical treatment, but mostly through a focus on prevention: identifying the social determinants of health and working to best ensure how entire populations of people can avoid becoming sick (or sicker) or injured.[73]

State and local governments have variously exercised these police powers in the interest of public health via infectious disease isolation and quarantine,[74] food safety standards,[75] vaccination mandates,[76] medical profession licensure,[77] workplace safety requirements,[78] environmental impact mitigation,[79] bicycle/motorcycle helmet

[70] *See* PHILLIP M KANNAN, UNITED STATES LAWS AND POLICIES PROTECTING WILDLIFE 76 (2009).

[71] GOSTIN AND WILEY, *supra* note 46, at 4.

[72] *See* BURRIS ET AL., *supra* note 60, at 3; *see also* GOSTIN AND WILEY, *supra* note 46, at 4 ("The prime objective of public health law is to pursue the highest possible level of physical and mental health in the population, consistent with the values of social justice.").

[73] BURRIS ET AL., *supra* note 60, at 4.

[74] *See, e.g.*, Wendy E. Parmet, *Quarantining the Law of Quarantine: Why Quarantine Law Does Not Reflect Contemporary Constitutional Law*, 9 WAKE FOREST J. L. & POL'Y 1 (2018); Katye M. Jobe, Comment, *The Constitutionality of Quarantine and Isolation Orders in an Ebola Epidemic and Beyond Comments*, 51 WAKE FOREST L. REV. 165 (2016).

[75] *See, e.g.*, INST. OF MED. & NAT'L RSCH. COUNCIL COMM. TO ENSURE SAFE FOOD FROM PRODUCTION TO CONSUMPTION, ENSURING SAFE FOOD: FROM PRODUCTION TO CONSUMPTION 28–29 (1998), https://www.ncbi.nlm.nih.gov/books/NBK209115/pdf/Bookshelf_NBK209115.pdf [https://perma.cc/9Q4Y-F7DM].

[76] *See, e.g.*, Efthimios Parasidis, *Recalibrating Vaccination Laws*, 97 B.U. L. Rev. 2153 (2017).

[77] *See, e.g.*, Eleanor Shanklin Truex, *David A. Johnson & Humayun J. Chaudry, Medical Licensing and Discipline in America: A History of the Federation of State Medical Boards*, 102 J MED LIBR. ASS'N. 133 (2014) (book review).

[78] *See, e.g.*, David Michaels & Jordan Barab, *The Occupational Safety and Health Administration at 50: Protecting Workers in a Changing Economy*, 110 AM. J. PUB. HEALTH 631, 632 (2020).

[79] *See, e.g.*, *Overview of EPA's Brownfields Program*, ENV'T PROT. AGENCY, https://www.epa.gov/brownfields/overview-epas-brownfields-program [https://perma.cc/BG5H-6NS3].

mandates,[80] seat belt laws,[81] sanitation systems,[82] drug use harm reduction,[83] consumer safety standards,[84] lead paint remediation,[85] fire exit requirements,[86] pre-natal care availability,[87] firearm restrictions,[88] safer sex promotion,[89] and many more.[90]

From the early days of American courts, the judiciary has supported the police powers and showed expansive deference to public health-related issues in particular. In some cases, the courts went so far as to question whether the exercise of police powers for public health purposes was even appropriate for judicial review at all.[91] Importantly, infectious diseases present a particular public health and police powers challenge—especially in the courts—because they threaten society in addition to threatening individuals.[92]

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[80] *See, e.g.*, Christopher P. Ogolla & Frederic E. Shaw, *Is the Repeal of Mandatory Motorcycle Helmet Legislation a Contributing Factor to Traumatic Brain Injury as a Public Health Problem? Recommendations for the Future*, 14 MICH. ST. U. J. MED. & L. 163 (2010); Alison Bateman-House & Kathleen Bachynski, Commentary, *Putting Local All-Ages Bicycle Helmet Ordinances in Context*, 47 J. L. MED. & ETHICS 292 (2019).

[81] *See, e.g.*, David A. Westenberg, *Buckle up or Pay: The Emerging Safety Belt Defense*, 20 SUFFOLK U. L. REV. 867, 934 (1986) (surveying state statutes).

[82] *See, e.g.*, Michael R. Greenberg, Editorial, *Sanitation and Public Health: A Heritage to Remember and Continue*, 102 AM. J. PUB. HEALTH 204 (2012); COMM., ON PRIVATIZATION OF WATER SERVS. IN THE U.S., PRIVATIZATION OF WATER SERVICES IN THE UNITED STATES: AN ASSESSMENT OF ISSUES AND EXPERIENCE 36 (2002).

[83] *See, e.g.*, Monica S. Ruiz et al., *Using Interrupted Time Series Analysis to Measure the Impact of Legalized Syringe Exchange on HIV Diagnoses in Baltimore and Philadelphia*, 82 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES S148 (2019).

[84] *See, e.g.*, Lars Noah, *This is Your Products Liability Restatement on Drugs*, 74 BROOK. L. REV. 839 (2009).

[85] *See, e.g.*, Chinaro Kennedy et al., *Evaluating the Effectiveness of State Specific Lead-Based Paint Hazard Risk Reduction Laws in Preventing Recurring Incidences of Lead Poisoning in Children*, 219 INT'L J. HYGIENE & ENV'T. HEALTH 110 (2016).

[86] *See, e.g.*, Maguire v. Reardon, 255 U.S. 271, 272–73 (1921) (upholding right of city to demolish building not meeting fire code requirements); PAUL E. TEAGUE, CASE HISTORIES: FIRES INFLUENCING THE LIFE SAFETY CODE 14 (2009), https://www.nfpa.org/~/media/Files/forms%20and%20premiums/101%20handbook/NFP101HB09_CHS1.pdf [https://perma.cc/MDL7-DFRC] (describing development of state fire code standards).

[87] *See* NAT'L CTR. FOR BIOTECHNOLOGY INFO., *Preventing Low Birthweight – Ensuring Access to Prenatal Care* (1985), https://www.ncbi.nlm.nih.gov/books/NBK214476 [https://perma.cc/E4GP-GPDG].

[88] *See* Julian Santaella-Tenorio et al., *What Do We Know About the Association Between Firearm Legislation and Firearm-Related Injuries?*, 38 EPIDEMIOLOGIC REV. 140, 144–45 (2016).

[89] *See* Douglas B. Kirby et al., *Sex and HIV Education Programs: Their Impact on Sexual Behaviors of Young People Throughout the World*, 40 J. ADOLESCENT HEALTH 206, 211 (2007).

[90] *See* GOSTIN AND WILEY, *supra* note 46, at 90.

[91] State *ex rel* McBride v. Superior Court for King Cty., 174 P. 973, 976–77 (Wash. 1918).

[92] Richards and Rathbun, *supra* note 46, at 350–51.

B. Vaccination and Public Health

The CDC has declared vaccination one of the greatest public health achievements of the Twentieth century.[93] Yet, despite the fact that it saved an estimated ten million lives worldwide in just a five-year span,[94] vaccination, particularly when mandated by the state, presents a tension between the rights of the individual and the good of the community.[95] Even as medical science has advanced and made vaccines far safer and more effective[96] than their first introduction to modern medicine in 1796,[97] some still oppose and even vilify the practice "because of disbelief in its efficacy and safety, religious or philosophical objections, opposition to state coercion, or some combination of these factors."[98] Immunization has fostered controversy for centuries;[99] examining the history of smallpox and vaccination is essential to understanding the *Jacobson v. Massachusetts* case, its impact on the current COVID-19 public health crisis, and the ultimate enduring tension between risk and coercion[100] that continues to play out in courts while both law and society adjust to the reality of a modern pandemic.

By the late 1700s, smallpox had existed for centuries—possibly as far back as 10,000 B.C.[101]—but was still rampant throughout the world, killing as many as three of every ten people who contracted it[102] and blinding a third of survivors.[103] Transmitted by the variola virus via saliva droplets, smallpox took root in the respiratory system

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93 *See Achievements in Public Health, 1900-1999 Impact of Vaccines Universally Recommended for Children -- United States, 1990-1998*, CDC (Apr. 02,1999), https://www.cdc.gov/mmwr/preview/mmwrhtml/00056803.htm [https://perma.cc/N7KH-6ZDE].

94 *The Power of Vaccines: Still Not Fully Utilized*, WORLD HEALTH ORG., http://www.who.int/publications/10-year-review/vaccines/en [https://perma.cc/M66E-7GQE].

95 JAMES COLGROVE, STATE OF IMMUNITY: THE POLITICS OF VACCINATION IN TWENTIETH-CENTURY AMERICA 2 (2006); Richards and Rathbun, *supra* note 46, at 350 ("The central dilemma in public health is balancing the rights of the individual against those of the society.").

96 *See, e.g.*, Yvonne A. Maldonado, *Current Controversies in Vaccination: Vaccine Safety*, 288 J. AM. MED. ASS'N 3155–88 (2002).

97 Stefan Riedel, *Edward Jenner and the History of Smallpox and Vaccination*, 18 BAYLOR U. MED. CTR. PROC. 21, 24 (2005).

98 COLGROVE, *supra* note 95, at 2; *see also* Steiner-Dillon, *supra* note 13, at 201 (describing the three major categories of antivaccinationist argument).

99 *See* COLGROVE, *supra* note 95, at 2; *see also* Reidel, *supra* note 97, at 24.

100 *See* COLGROVE, *supra* note 95, at 5–6; *see also* Blum & Talib, *supra* note 34, at 276.

101 Reidel, *supra* note 97, at 21.

102 *Id.*

103 *Id.*

and, within about ten to twelve days, caused fever, fatigue, aches, and a rash.[104] The rash, usually localized on the face and limbs, developed into lesions filled first with clear fluid and then with pus.[105] Complications of smallpox included encephalitis, pneumonia, arthritis, and corneal ulceration.[106]

The disease had been a continuing epidemic in Europe since at least the Middle Ages and was contributing to the devastation of the Americas, via European invaders exposing Native American tribes to the disease.[107] The Europeans even utilized smallpox as a form of biological warfare against the Native Americans, deliberately wielding it during the French and Indian War to decimate the native population.[108]

The fact that smallpox survivors were immune to further infection was common knowledge by the eighteenth century.[109] One strategy to control the disease—new to Europeans but long practiced by people in Africa, China, and India[110]—was variolation: taking pus from a smallpox sore of one person and scratching it into the skin of someone who had not had smallpox.[111] As a result, those people generally contracted smallpox, but often a more mild and less fatal variation of the disease.[112] In essence, variolation was "analogous to the use of small amounts of poison to render one immune to toxic effects."[113] In 1717, English aristocrat Lady Mary Wortley Montague, who had been disfigured by smallpox and had lost her brother to the disease, observed variolation practice in Istanbul and subsequently helped popularize the practice among royals by having her young children inoculated.[114] A royal physician then conducted a variolation trial using both prisoners and orphans; the trial proved successful when none of the subjects developed smallpox and ultimately proved

104 Michael R. Albert et al., *Smallpox Manifestations and Survival During the Boston Epidemic of 1901 to 1903*, 137 ANNALS INTERNAL MED. 993 (2002); *see also Frequently Asked Questions and Answers on Smallpox*, WORLD HEALTH ORG. (June 28, 2016), http://www.who.int/csr/disease/smallpox/faq/en [https://perma.cc/N4WZ-V93K].

105 Albert et al., *supra* note 104; WORLD HEALTH ORG., supra note 104.

106 Albert et al., *supra* note 104.

107 Riedel, *supra* note 97, at 21.

108 *Id.*

109 *See id.* at 22.

110 *See id.*

111 *See id.*

112 *See id.* at 23.

113 Stanley Plotkin, *History of Vaccination*, 111 PROC. NAT'L ACAD. OF SCI. 12283, 12283 (2014).

114 *See* Riedel, *supra* note 97, at 22.

immune to the disease.[115] In the following decades of the eighteenth century, variolation for smallpox became a common practice in Europe.[116] Though not always entirely successful (and sometimes the cause of other diseases), people variolated against smallpox overwhelmingly survived compared to people with "naturally occurring smallpox."[117]

A British doctor named Edward Jenner is often credited with laying the foundation of modern vaccination in 1796.[118] Dr. Jenner, an accomplished natural scientist as well as clinical surgeon,[119] heard anecdotally that country milkmaids who had recovered from cowpox before being variolated for smallpox often developed no smallpox symptoms at all, not even the common rash and fever.[120] To test the "folk wisdom" of these women who told him they were immune from smallpox,[121] Dr. Jenner took pus from a cowpox sore on the hand of milkmaid Sarah Nelmes and injected it into the arm of James Phipps, the eight-year-old son of his gardener.[122] The boy developed mild symptoms, but seemed to recover fully.[123] After a few months, Jenner directly exposed the boy to active smallpox multiple times, but the child never developed the disease.[124] Though Jenner was neither the first to make these observations nor the first to attempt smallpox inoculation using cowpox,[125] he legitimized the practice as having scientific backing, and he coined the term "vaccination" based on "*vaccinia*," the Latin word for cowpox.[126]

Dr. Jenner was able to successfully replicate his experiment on thirteen other people and presented his findings to the Royal Society of London in 1796.[127] However, the Royal Society rejected Jenner's

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115 *See id.*

116 *See id.*

117 *See id.* at 22–23.

118 *See, e.g.*, Harvard T.H. Chan School of Public Health, I*nnovations through Public Health History*, HARV. PUB. HEALTH MAG. (2020), https://www.hsph.harvard.edu/magazine/magazine_article/innovations-through-public-health-history/ [https://perma.cc/KNT6-RSBN].

119 *See id.*; Riedel, *supra* note 97, at 23.

120 Riedel, *supra* note 97, at 23.

121 *See* Nicolau Barquet & Pere Domingo, *Smallpox: The Triumph over the Most Terrible of the Ministers of Death,* 127 ANNALS INTERNAL MED. 635, 635 (1997).

122 *See* CDC, *supra* note 93; Riedel, *supra* note 97, at 24.

123 *See* Reidel, *supra* note 97, at 24.

124 *See* CDC, *supra* note 93; Barquet & Domingo, *supra* note 121, at 639.

125 *See* Riedel, *supra* note 97, at 21.

126 *See id.* at 24–25.

127 *See* Robert M. Wolfe & Lisa K. Sharp, *Anti-Vaccinationists Past and Present*, 325 BRITISH MED. J. 430, 430 (Aug. 24, 2002).

writings on the subject, and he failed to find any willing volunteers for more experiments.[128] But within just a few years, other doctors began using and finding success in smallpox vaccination, and its use spread relatively rapidly.[129] In 1801, Jenner published "On the Origin of the Vaccine Inoculation," which laid the foundation for vaccination in modern medicine.[130] Jenner remained devoted to vaccination and the eradication of smallpox, stating that "the annihilation of the small pox, the most dreadful scourge of the human species, must be the final result of [vaccination]."[131]

Jenner died from a stroke in 1823, but vaccination continued to grow.[132] In 1840, the United Kingdom enacted the first Vaccination Act, which outlawed inoculation/variolation in favor of vaccination.[133] The law even provided free vaccinations for the poor.[134] In 1853, the next Vaccination Act required vaccination for infants and provided that parents who failed to so vaccinate within a baby's first three months were subject to a fine or jail time.[135] But resistance to these requirements was strong, even leading to riots in some towns and the founding of the Anti-Vaccination League.[136] A third version of the Act in 1867 required vaccination for everyone up to age fourteen, with attendant fines and potential imprisonment.[137]

While certainly protective against disease, the growing anti-vaccination movement saw these compulsory laws as "a political innovation that extended government powers into areas of traditional civil liberties in the name of public health."[138] These laws represented some of the first instances of government encroaching on heretofore "private spheres such as child-rearing and sexual behavior."[139] The Anti-Vaccination League claimed that the laws "trample[d] upon the right of parents to protect their children from disease."[140] Others protested the principle that the government could

128 *See* Riedel, *supra* note 97, at 24.
129 *See id.*
130 *See* Riedel, *supra* note 97, at 25; *see* Barquet & Domingo, *supra* note 121, at 639.
131 Barquet & Domingo, *supra* note 121, at 639 (quoting Edward Jenner*, On the Origin of the Vaccine Inoculation*, 5 MED. &. PHYSICAL J. 505, 508 (June 1801)).
132 Riedel, *supra* note 97, at 24–25.
133 *See* Wolfe & Sharp, *supra* note 127, at 430.
134 *Id.*
135 *Id.*
136 *Id.*
137 *See id.*
138 *Id.*
139 COLGROVE, *supra* note 95, at 9.
140 Wolfe & Sharp, *supra* note 127, at 431.

wield power over a person's body, framing it as an issue of both overreach and physical violation.[141] The resistance to vaccines then, as now,[142] focused primarily on two aspects: skepticism as to vaccination's safety and indignance over the government forcing requirements on the people.[143]

At the turn of the nineteenth century, Edward Jenner's vaccination breakthrough had reached the United States.[144] Even before the United Kingdom enacted its own compulsory vaccination laws, Massachusetts enacted the first statewide law mandating smallpox vaccination for the general population in 1809.[145] By 1827, the City of Boston became the first municipality in the nation to require that school children be vaccinated.[146] And in 1855, the Commonwealth of Massachusetts again led the way by enacting the first statewide law mandating the vaccination of students.[147]

By the 1870s, however, smallpox was spreading again,[148] leading more states to enact compulsory laws.[149] But, just as in the United Kingdom, anti-vaccination movements popped up almost simultaneously to these laws requiring vaccination.[150] Opponents in the 1870s and 1880s founded organizations like the Anti-Vaccination Society of America, the New England Anti-Compulsory Vaccination League, and the Anti-Vaccination League of New York City.[151] As in the United Kingdom, these groups protested vaccination on three main bases: skepticism about the efficacy and safety of the practice, indignance over the government requiring people to submit to something (as opposed to most other laws, which require *refraining* from acting a certain way),[152] and objection to a medical practice that

141 *See* COLGROVE, *supra* note 95, at 9.

142 *See Can COVID-19 Vaccines Be Mandatory in the U.S. and Who Decides?*, JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH (Nov. 17, 2020), https://www.jhsph.edu/covid-19/articles/can-covid-19-vaccines-be-mandatory-in-the-u-s-and-who-decides.html [https://perma.cc/J2WC-4YT9].

143 *See* Wolfe & Sharpe, *supra* note 127, at 430–31.

144 COLGROVE, *supra* note 95, at 6.

145 Philip J. Smith et al., *Highlights of Historical Events Leading to National Surveillance of Vaccination Coverage in the United States*, 126 PUB. HEALTH REP. (Supp. 2, 3, 4)(2011).

146 *See* Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 NW. U. L. REV. 589, 596 (2016).

147 *See id.*, Michael R. Albert et al., *The Last Smallpox Epidemic in Boston and the Vaccination Controversy*, 1901–1903, 344 NEW ENG. J. MED. 375, 375 (2001).

148 *See* Wolfe and Sharp, *supra* note 127, at 431.

149 *See id.*

150 *Id.*

151 *Id.*

152 COLGROVE, *supra* note 95, at 10.

interfered with their concepts of religion.[153] By litigating, lobbying, appealing to the fears of the public,[154] spreading conspiracy theories like accusing doctors of falsifying death certificates to cover up vaccination dangers,[155] and even inciting riots, these organizations succeeded in repealing compulsory vaccination laws in eight states.[156] This antagonism persisted, even as more and more data proved that vaccination protected against smallpox. Germany, for example, enacted a law requiring vaccination in 1874 and subsequently had a much smaller rate of infection than the surrounding countries that did not have such a law.[157] But the harms of vaccination—though rare even then—may have seemed particularly stark because successful vaccination meant that *nothing happened*.[158] This illustrates a fundamental paradox of public health: prevention of disease succeeds via absence, which is much more difficult to measure—both quantitatively and anecdotally—than *something* happening. When the desired outcome is for people not to get sick, the rare cases of vaccination complications may seem heightened.

By the turn of the Twentieth century, side effects of the smallpox vaccine were considerably fewer in number and less severe than in previous decades. The practice of taking pus from one person's cowpox abscess and injecting it into another person had evolved; by the 1900s, doctors were using material removed directly from a cow's lymph node, which greatly reduced the risks of transmitting human bloodborne diseases.[159]

C. Jacobson v. Massachusetts

In the late nineteenth and early Twentieth centuries, smallpox outbreaks continued to happen across the country, seemingly unabated, in places including New York, Chicago, Milwaukee,

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153 *Id.* at 2.

154 *See* Wolfe and Sharp, *supra* note 127, at 431.

155 *See, e.g.*, COLGROVE, *supra* note 95, at 26.

156 Wolfe and Sharp, *supra* note 127, at 431.

157 COLGROVE, *supra* note 95, at 7. Germany's success in keeping smallpox infections minimal should not be taken to mean there was not opposition, however. Germans raised many of the same objections to vaccination as elsewhere, namely distrust in the procedure and offense at the government encroachment into otherwise "private" lives. *Id.* at 21. In fact, the skepticism and resentment over the program in Germany—which carried both monetary and jail punishments for non-cooperation—may have led to German immigrants in New York to actively hide from or resist the efforts of health officials there to vaccinate. *See id.*

158 *Id.* at 8–9.

159 *See id.* at 18–19.

Providence, and even Muncie, Indiana.[160] Boston in particular suffered a major smallpox epidemic in 1901–1903, with 1596 cases and 270 deaths.[161] All but the most severely symptomatic patients were "detained" at two city hospitals, which became "isolation and treatment" centers.[162] The detained patients were disproportionately Black and/or immigrants, compared to the city's overall population.[163] A full 73% of those admitted patients had been previously vaccinated in some form, likely as a result of those long-standing laws in both Boston and Massachusetts requiring vaccination of school students.[164] While vaccination obviously did not confer these patients full immunity against smallpox, the vaccinated patients presented with a generally milder form of the disease and they were more likely to survive: vaccinated patients had a 92% survival rate, as compared to a 73% survival rate of those without prior vaccination.[165] The vaccination did seem to "protect them somewhat by modifying disease severity."[166]

To address the epidemic, the Boston Health Department set up an early version of what is now known as contract tracing and conducted free, voluntary vaccinations.[167] By a few months into the epidemic, it had vaccinated 400,000 people, which constituted more than 70% of the Boston population.[168] But with cases continuing to rise, Boston ordered that every unvaccinated person be vaccinated "forthwith."[169] The Health Department sent physicians door-to-door, with instructions to vaccinate anyone who was willing.[170] The city ordinance required anyone who refused vaccination to pay a $5 fine or serve 15 days in jail.[171] However, while doctors were told not to ever use force, physicians sent specifically to rooming houses were accompanied by law enforcement, who would physically restrain any man who resisted so that the doctors could forcibly inject them.[172]

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160 *Id.* at 18, 25.
161 Albert et al., *supra* note 104, at 993.
162 *Id.*
163 *See* Albert et al., *supra* note 147, at 375.
164 Albert et al., *supra* note 104, at 996; *see* Albert et al., *supra* note 147, at 375.
165 Albert, *supra* note 104, at 997–98.
166 *Id.* at 998.
167 *See* Albert et al., *supra* note 147, at 375.
168 *See id.*
169 *Id.*
170 *Id.*
171 *Id.*
172 *Id.* at 375–76.

Many in Boston blamed these transient men for having spread the disease in the first place,[173] bolstered by the common cultural belief that "moral degeneracy and illness" were inextricably linked.[174] It is unclear whether the men vaccinated by force against their will were absolved of their "refusals" after being involuntarily injected or whether such refusals still led to criminal charges.

Despite vaccination having long been a requirement for school children in Massachusetts, opponents to mandatory vaccination were still organized and outspoken against it, even in the midst of an epidemic outbreak.[175] Opponents embraced inflammatory accusations that vaccination "slaughters tens of thousands of innocent children" and was "debilitating [to] the whole human race."[176] They levied criticism against the "authoritarian" practices employed by the physicians and police officers who physically forced vaccination on men in transient housing, framing the issue in terms of civil liberties.[177] Some questioned the "safety and efficacy" of the vaccination itself.[178] In 1902 – with Boston still very much in an epidemic – opponents even introduced legislation to repeal all state laws requiring vaccination.[179] After a lengthy, contentious battle between the vaccine opponents and the vaccine-supporting Massachusetts Medical Society,[180] the opponents ultimately lost.[181] Dr. Durgin, the head of the Boston Health Department, even offered a startling, questionably ethical proposition to anti-vaccinations: come to the smallpox hospital, be exposed to the disease, and see what happens.[182] Dr. Pfeiffer, a sixty-year-old anti-vaccine physician, unofficially took him up on the challenge by requesting access to one of the hospitals to ostensibly study the disease; Pfeiffer was convinced that he, as a healthy person, could not contract smallpox.[183] Unfortunately, he was quickly proven wrong when he became gravely ill, though he ultimately survived.[184] Dr. Durgin of the Boston Health

173 *Id.* at 375.
174 COLGROVE, *supra* note 95, at 24–25.
175 Albert et al., *supra* note 147, at 376.
176 GOSTIN & WILEY, *supra* note 46, at 121.
177 Albert et al., *supra* note 147, at 376; *see generally* Wolfe & Sharp, *supra* note 127, at 431.
178 Albert et al., *supra* note 147, at 376.
179 *See id.*
180 COLGROVE, *supra* note 95, at 37.
181 *See* Albert et al., *supra* note 147, at 376.
182 *Id.* at 377.
183 *Id.*
184 *Id.*

Department used the news of Pfeiffer's illness to proclaim that none of the vaccinated physicians at the hospitals had yet gotten sick.[185]

The case of *Jacobson v. Massachusetts*[186] – probably the most important public health law case in U.S. history[187] – emerged against this backdrop. At the time, in the early Twentieth century, local governments played the primary role in determining who and how to vaccinate,[188] but an inconsistent patchwork of court cases throughout the country muddled just how much power those local boards of health actually had to enforce compulsory vaccination.[189] Most courts upheld vaccine requirements, especially in the context of children attending school, recognizing that the Boards of Health had the scientific expertise and local knowledge that exemplified the police power worthy of deference.[190]

On February 27, 1902, the municipal board of health in Cambridge, Massachusetts, adopted a resolution requiring all residents "who have not been successfully vaccinated since March 1, 1897, be vaccinated or revaccinated."[191] The statute delegating authority to the board of health to adopt a vaccination requirement also prescribed a fine of five dollars for refusal to comply.[192] In July of 1902, Cambridge criminally charged six city residents with refusal to comply with the order.[193] One was Reverend Henning Jacobson, a forty-six-year-old Swedish immigrant and locally prominent Lutheran minister; another was Albert Pear, a staunchly outspoken opponent of vaccination and relatively politically prominent assistant city clerk; the third was Frank Cone, who retained a lawyer from the Massachusetts Anti-compulsory Vaccination Society.[194] The city was likely using the criminal charges as a way to demonstrate its

185 *Id.*

186 Jacobson v. Massachusetts, 197 U.S. 11, 11 (1905).

187 GOSTIN & WILEY, *supra* note 46, at 121.

188 COLGROVE, *supra* note 95, at 13–14. Indeed, much of public health work and outreach is still based at the local level. *See* Eileen Salinsky, *Governmental Public Health: An Overview of State and Local Public Health Agencies*, NAT'L HEALTH POL'Y F. 10 (2010), http://www.nhpf.org/library/background-papers/BP77_GovPublicHealth_08-18-2010.pdf [https://perma.cc/N55R-PM73].

189 *See* COLGROVE, *supra* note 95, at 37–38.

190 GOSTIN & WILEY, *supra* note 46, at 121–22.

191 *Jacobson*, 197 U.S. at 12–13.

192 *Id.* at 12.

193 KAREN L. WALLOCH, THE ANTIVACCINE HERESY: JACOBSON V. MASSACHUSETTS AND THE TROUBLED HISTORY OF COMPULSORY VACCINATION IN THE UNITED STATES 182 (2015).

194 *Id.* at 182–83. The city also criminally charged three other individuals: Ephraim Gould, Maggie Gould, and Paul Morse.

willingness to deploy "extreme measures" to combat the epidemic, a position apparently popular with city residents.[195] In court, the city government offered to vaccinate the defendants on the spot, for free,[196] and two agreed.[197] A third pleaded guilty immediately.[198] In the first hearing, the judge refused to hear the defendants' own testimony, and he convicted all three, who then elected to proceed to jury trials.[199] This time Cone's lawyer represented all of them.[200]

Pear, who had become the "public face" of the anti-vaccine argument, went to trial and was convicted first.[201] At Jacobson's trial several months later, his attorney attempted to introduce evidence as to the potential harms of vaccination and, further, attempted to put Jacobson on the stand.[202] The judge refused both offers of evidence, and refused to give a jury instruction that the compulsory vaccination law was "unconstitutional and void."[203] On appeal, Jacobson argued that the trial judge had erred in failing to find the vaccination law "was in derogation of the rights secured to the defendant by the Preamble of the Constitution of the United States," the Fourteenth Amendment, the general "spirit of the Constitution,"[204] and the Constitution of Massachusetts.[205]

The *Pear* and *Jacobson* cases went first on appeal to the Massachusetts Supreme Judicial Court (SJC), which scoffed at their claim that the state statute was unconstitutional, saying the law "was enacted with a view to the enforcement of necessary measures for the prevention of smallpox. That such an object is worthy of the intelligent thought and earnest endeavor of legislators is too plain for discussion."[206] The SJC went on to emphasize that the "police power [grants] general legislative authority to make laws for the common good," and specifically highlights that the Constitution of Massachusetts explicitly gives the legislature authority

195 *Id.* at 181–82.
196 *Jacobson*, 197 U.S. at 13.
197 WALLOCH, *supra* note 193, at 183.
198 *Id.*
199 *Id.*
200 *Id.*
201 *Id.* at 183–85.
202 *Id.* at 185.
203 *Id.*
204 Jacobson v. Massachusetts, 197 U.S. 11, 11 (1905).
205 Commonwealth v. Pear, 66 N.E. 719, 720 (Mass. 1903).
206 *Id.*

> to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances . . . as they shall judge to be for the good and welfare of this commonwealth[] . . . . That this power extends to the protection and preservation of the public health is not questioned.[207]

The SJC sternly lectured on the notion that the welfare of a community in danger must take precedence over individual rights, holding that "the liberty of the individual may be interfered with whenever the general welfare requires a course of proceedings to which certain persons objects because of their peculiar opinions or special individual interests."[208]

The U.S. Supreme Court granted Jacobson's petition for certiorari and rendered an opinion in 1905.[209] In an opinion by the first Justice John Marshall Harlan,[210] the Court framed the issue by asking: "Is the [compulsory vaccination] statute . . . inconsistent with the liberty which the Constitution of the United States secures to every person against deprivation by the State?"[211] First, it acknowledged the inherent ability of the states to exercise the police powers, which have long included "reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."[212] But, importantly, even if a state statute or order is squarely within the police powers, it remains subject to constitutional review.[213] The Court characterized Jacobson's argument as relying on the notion that any compulsory vaccination law is "unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that [the compulsory vaccination law] is nothing short of an assault upon his person."[214] This argument has

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[207] *Id.* (citing Salem v. E. R.R Co., 98 Mass. 431, 446 (1868)).
[208] *Pear*, 66 N.E. at 720.
[209] *Jacobson*, 197 U.S. at 22, 39.
[210] Justices Brewer and Peckham dissented but did not write dissenting opinions. *Id.* at 39 (Brewer, J., & Peckham, J., dissenting).
[211] *Id.* at 24 (majority opinion).
[212] *Id.* at 25 (citing Gibbons v. Ogden, 22 U.S. 1, 203 (1824); then citing R.R. Co. v. Husen, 95 U.S. 465, 469–70 (1877); and then citing Beer Co. v. Massachusetts, 97 U.S.25, 33 (1877); and then citing New Orleans Gas-Light Co. v. Louisiana Light & Heat Prod. & Mfg. Co., 115 U.S. 650, 672 (1885); and then citing Lawton v. Steele, 152 U.S. 133, 136 (1894)).
[213] *See Jacobson*, 197 U.S. at 25.
[214] *Id.* at 25–26.

been characterized as "a classic claim in favor of a laissez-faire society and the natural rights of persons to bodily integrity and decisional privacy."[215]

Famously, the Court responded that "the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint."[216] Otherwise, "society . . . would soon be confronted with disorder and anarchy."[217] In the present case, the Court reasoned, the state specifically required vaccination only when necessary for the public health, and vested that determination with the local Board of Health, presumably the best arbiter of making such a decision.[218] Because smallpox was, in fact, greatly affecting Cambridge at the time, the community had "the right to protect itself against an epidemic of disease which threatens the safety of its members."[219]

In essence, the Massachusetts legislature was facing a public health emergency, considered that vaccination was "at least an effective if not the best known way in which to meet and suppress the evils of a smallpox epidemic that imperilled [sic] an entire population," and made a decision to enact a statute that took these facts and circumstances into account.[220] The result was not "in palpable conflict with the Constitution."[221] Further, Mr. Jacobson was not entitled to any sort of exemption to this proper exercise of the police powers "simply because of this dread of the same evil results experienced by him when a child . . . "[222] The Court reasoned (perhaps a bit hyperbolically) that doing so would essentially nullify any legitimate order of compulsory vaccination.[223] If Jacobson could claim an exception based on fear and past experience, so could everyone else. And the Court was not going to

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[215] GOSTIN & WILEY, *supra* note 46, at 122.
[216] *Jacobson*, 197 U.S. at 26.
[217] *Id.*
[218] *See id.* at 27–28.
[219] *See id.* at 27 (citing Wisconsin, Minnesota, & Pac. R.R. Co. v. Jacobson, 179 U.S. 287, 301 (1900)). The Court acknowledged that there may be other situations in which a community could get overzealous and exercise this power "in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons." *See id.* at 28. But, this was not one of those situations. *See id.*
[220] *See id.* at 30–31.
[221] *Id.* at 31.
[222] *Id.* at 37.
[223] *Id.*

> hold that a minority, residing [in] or remaining in any city or town where smallpox is prevalent, and enjoying the general protection afforded by an organized legal government, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the State.[224]

Finally, the Court emphasized that, if a person had a demonstrable condition for which vaccination "would seriously impair his health or probably cause his death," it would not have reached the same conclusion as it did for Mr. Jacobson.[225] Indeed, such blanket enforcement "would be cruel and inhuman in the last degree."[226] But Mr. Jacobson was "in perfect health and [a] fit subject of vaccination" and deserved no such exception.[227] The Court affirmed his conviction.[228]

Jacobson became a landmark public health decision. Though the opinion is mostly devoid of specific constitutional references, its reasoning and holding provide a stark contrast to the same Court's infamous *Lochner v. New York* case.[229] Just three months after deciding *Jacobson*, showing careful deference to the state police power, the Court eviscerated economic regulations enacted in much the same manner by a different state.[230]

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[224] *Id.*

[225] *See id.* at 39.

[226] *Id.* at 38–39 (1905).

[227] *Id.* at 39.

[228] *Id.* Rev. Jacobson likely never had to get vaccinated or pay the $5 fine because the smallpox outbreak had ebbed in Cambridge by 1905 and the compulsory vaccination requirement was no longer in effect. *See* Albert et al., *supra* note 147, at 377; *see also Henning Jacobson Loses his Freedom to the Board of Public Health*, NEW ENG. HIST. SOC'Y, https://www.newenglandhistoricalsociety.com/henning-jacobson-loses-his-freedom-to-the-board-of-public-health/ [https://perma.cc/JU6H-SCD3]; WALLOCH, *supra* note 193, at 195. Rev. Jacobson continued as a well-loved minister in Cambridge and even built a church that still stands. *See* Linda Kush, *Faith Lutheran Church Celebrates 125 Years in Cambridge*, CAMBRIDGE WICKED LOC. (Dec. 20, 2017), https://cambridge.wickedlocal.com/news/20171220/faith-lutheran-church-celebrates-125-years-in-cambridge [https://perma.cc/U9W9-8BPT]; WALLOCH *supra* note 193, at 212. He died in 1930 at the age of 74. *See* Tucker Lieberman, *Rev. Henning Jacobson*, (July 21, 2013), https://www.findagrave.com/memorial/114161245/henning-jacobson [https://perma.cc/B43S-AQJ8].

[229] Lochner v. New York, 198 U.S. 45, 58 (1905).

[230] *See* GOSTIN & WILEY, *supra* note 46, at 121. *See* Josh Blackman, *Jacobson v. Massachusetts (1905) and Lochner v. New York (1905) in April 2020*, VOLOKH CONSPIRACY (Apr. 8, 2020), https://reason.com/volokh/2020/04/08/jacobson-v-massachusetts-1905-and-lochner-v-new-york-1905-in-april-2020/ [https://perma.cc/UEH6-N8KM]. The breakdown of votes between *Lochner*

The Supreme Court has most frequently used *Jacobson* to defend police powers and recognize the need to defer to legislatures' "experts" on issues of science, but the decision did recognize some limits to the states' authority.[231] The Court adopted a "means-and-ends" test, and articulated five standards that need to be present in order for a government to permissibly enact and enforce compulsory public health-related powers.[232] These standards are: public health necessity, reasonable means, proportionality, harm avoidance, and fairness.[233] Thus, while *Jacobson* certainly endorsed a deferential approach to constitutional review of state police power in the context of a public health emergency, the Court made clear that the states' authority in this area is never entirely free of judicially enforceable constitutional constraint.

D. Public Health Police Power Post-Jacobson

Jacobson remains a leading case concerning the scope of state police power during a public health crisis, even as rights-based notions of bodily autonomy and informed consent[234] gained broader influence during the Twentieth century.[235] As Gostin notes, "[t]he legacy of *Jacobson* surely is its defense of social welfare philosophy and unstinting support of police power regulation."[236] Twentieth-

and *Jacobson* presents an interesting puzzle. Most of the Justices acted consistently with their presumed policy preferences—four of the seven justices in the Jacobson majority dissented in *Lochner*, and the two *Jacobson* dissenters were in the *Lochner* majority. *See Jacobson*, 197 U.S. 11; *Lochner*, 198 U.S. 45. But Fuller, Brown, and McKenna were in the majority in both cases. *Jacobson*, 197 U.S. 11; *Lochner*, 198 U.S. 45. We are unaware of any scholarship investigating why these three Justices, in particular, viewed the municipal ordinance at issue in *Jacobson* as constitutionally permissible, but the regulation at issue in *Lochner* as exceeding the scope of the police power.

231 GOSTIN & WILEY, *supra* note 46, at 124. *See* Lawrence O. Gostin, *Jacobson v Massachusetts at 100 Years: Police Power and Civil Liberties in Tension*, 95 AM. J. PUB. HEALTH. 576, 581(2005). Whether state legislatures are more well-versed in science expertise than courts today is a separate question. *See, e.g.*, Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 201 (2018).

232 GOSTIN & WILEY, *supra* note 46, at 124; Gostin, *supra* note 231, at 581.

233 GOSTIN & WILEY, supra note 46, at 124; *see also* Blum & Talib, *supra* note 34, at 280.

234 *See, e.g.*, Michael H. Shapiro, *Updating Constitutional Doctrine: An Extended Response to the Critique of Compulsory Vaccination*, 12 YALE J. HEALTH POL'Y L. & ETHICS 87, 92–93 (2012); Kristine M. Severyn, *Jacobson v. Massachusetts: Impact on Informed Consent and Vaccine Policy*, 5 J. PHARMACY L 249, 252, 255–56 (1995).

235 Lawrence O. Gostin, *Public Health Theory and Practice in the Constitutional Design*, 11 HEALTH MATRIX 265, 300 (2001) ("[E]ven in an era of heightened constitutional scrutiny, the Court continues its permissive approach in most matters of public health.").

236 *Id.* at 297.

century courts "consistently upheld compulsory measures to avert a risk, including the power to compulsorily test, report, vaccinate, treat, and isolate provided there are clear criteria and procedures."[237] Although state power to regulate conduct in the name of public health has been held subject to some constitutional constraints, courts have largely followed *Jacobson*'s lead in adopting a deferential approach emphasizing the protection of public health even at some expense to individual liberties.[238]

The scope of the post-*Jacobson* public health police power is seen, for example, in the cases affirming the state's power to order mandatory quarantines of individuals exposed to communicable disease.[239] The power to forcibly quarantine infectious or exposed individuals for the preservation of public health was well established prior to *Jacobson*,[240] and during the Twentieth century, states exercised that power to isolate individuals carrying, among other things, venereal disease,[241] smallpox,[242] tuberculosis,[243] and, perhaps

[237] Lawrence O. Gostin, *The Model State Emergency Health Powers Act: Public Health and Civil Liberties in a Time of Terrorism*, 13 HEALTH MATRIX 3, 28 (2003) (footnote references omitted).

[238] For example, the Supreme Court has cited *Jacobson* as a basis for "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment." Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990); *cf.* Washington v. Harper, 494 U.S. 210, 229 (1990) ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty."). But that interest has never been ranked as fundamental, nor have limitations on it been subjected to strict scrutiny. To the contrary, courts have often upheld the state's authority to impose medical treatment even on unwilling subjects. *See, e.g.*, *In re* Wash., 735 N.W.2d 111, 114 (Wis. 2007) (affirming right to detain patient with tuberculosis); City of New York v. Antoinette R., 630 N.Y.S.2d 1008, 1012 (App. Div. 1994) (illustrating the same); *Harper*, 494 U.S. at 236 (affirming authority of prison to administer antipsychotic medication to inmates against their will); Dunn v. White, 880 F.2d 1188, 1195 (10th Cir. 1989) (affirming prison's authority to impose nonconsensual AIDS testing on inmates); Reynolds v. McNichols, 488 F.2d 1378, 1379–80 (10th Cir. 1973) (affirming city's power to order compulsory treatment for venereal disease).

[239] *See, e.g.*, Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53, 104 (2007).

[240] *See, e.g.*, Compagnie Francaise De Navigation a Vapeur v. La. State Bd. of Health, 186 U.S. 380, 391 (1902).

[241] *See, e.g.*, *In re* Threatt, 151 P.2d 816, 816–17 (Okla. Crim. App. 1944); *Ex parte* Lewis, 42 S.W.2d 21, 21, 23 (Mo. 1931); *In re* Johnson, 180 P. 644, 644 (Cal. Ct. App. 1919); *see also* Batlan, *supra* note 239, at 101 (noting that under laws established after World War I, "more than 30,000 prostitutes were quarantined or incarcerated in an effort to curb the spread of venereal disease").

[242] *See, e.g.*, U.S. *ex rel.* Siegel v. Shinnick, 219 F. Supp. 789, 791 (E.D.N.Y. 1963); Crayton v. Larabee, 116 N.E. 355, 356, 358 (1917).

[243] *In re* Wash., 735 N.W.2d at 114; Best v. St. Vincents Hosp., No. 03-cv-365, 2003 U.S. Dist. LEXIS 11354, at *3 (S.D.N.Y. July 2, 2003); City of Newark v. J.S., 652 A.2d 265, 278 (N.J. Super. Ct. Law Div. 1993); Greene v. Edwards, 263 S.E.2d 661, 661 (W. Va. 1980).

most notoriously, typhoid fever.[244] Courts routinely cited *Jacobson* as authority for the states' broad power to compel quarantine, isolation, or testing of potentially infected individuals.[245]

Although many of the diseases for which quarantine was often ordered during the early Twentieth century have been eradicated or diminished through the efforts of modern medicine,[246] the quarantine power is still occasionally invoked. Just a few years before the COVID-19 pandemic, a high-profile controversy concerning the use of mandatory quarantine occurred during the Ebola outbreak of 2014, which originated in Guinea and became, by 2016, the largest outbreak in history.[247] In response to the outbreak, several states enacted a mandatory 21-day quarantine for anyone who had known contact with an infected person.[248] In a case that attracted widespread attention, Kaci Hickox, a nurse who had treated Ebola patients in Sierra Leone, was forcibly quarantined at Newark International Airport for several days before being permitted to return home to Maine, where the state government initially intended to enforce strict limitations on her activities until the end of the incubation period.[249] The Maine court determined that the state had not established by clear and convincing evidence, as required by Maine law, that such strict limitations were necessary, and imposed a looser set of conditions essentially requiring Hickox to participate in direct active monitoring and to inform the state public health authorities if any Ebola symptoms occurred.[250]

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[244] *See* Batlan, *supra* note 239, at 103 (recounting the story of "Typhoid Mary" Mallon's nearly thirty-year quarantine by the New York City Board of Health).

[245] *See, e.g.*, *Best*, 2003 U.S. Dist. LEXIS 11354, at *20 (quoting Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905); Love v. Superior Court, 276 Cal. Rptr. 660, 662 (Cal. Ct. App. 1990) (affirming mandatory AIDS testing of individuals convicted of prostitution); Dunn v. White, 880 F.2d 1188, 1195 (10th Cir. 1989) (nonconsensual AIDS test did not violate prisoner's First Amendment or Fourth Amendment rights); *cf.* People v. Teuscher, 221 N.Y.S. 20, 28–29 (Sup. Ct. Oneida Co. 1927) (granting injunction for quarantine of cattle herd infected with bovine tuberculosis (citing *Jacobson*, 197 U.S. at 25); *but see, e.g.*, Jew Ho v. Williamson, 103 F. 10, 26 (N.D. Cal. 1900) (pre–*Jacobson* decision holding that quarantining a predominately Chinese region of San Francisco to prevent the spread of the bubonic plague was "unreasonable, unjust, and oppressive" and "discriminating in its character").

[246] *See* Riedel, *supra* note 97, at 25.

[247] *2014–2016 Ebola Outbreak in West Africa*, CTR. DISEASE CONTROL & PREVENTION (Mar. 18, 2019), https://www.cdc.gov/vhf/ebola/history/2014-2016-outbreak/index.html [https://perma.cc/3V5E-M2BX].

[248] *See* Eang L. Ngov, *Under Containment: Preempting State Ebola Quarantine Regulations,* 88 TEMP. L. REV. 1, 3 (2015).

[249] *See* Hickox v. Christie, 205 F. Supp. 3d 579, 584 (D.N.J. 2016); Mayhew v. Hickox, No. CV-2014-36, 2014 Me. Trial Order LEXIS, at *5 (Me. Dist. Ct., Oct. 31, 2014).

[250] *See Mayhew*, 2014 Me Trial Order LEXIS, at *5–6.

Hickox then sued several New Jersey officials, including Governor Chris Christie, under 42 U.S.C. § 1983 for violation of her civil rights during the mandatory quarantine.[251] The U.S. District Court for the District of New Jersey granted a motion to dismiss Hickox's federal claims on the grounds of qualified immunity, noting that "[p]ublic health officials responsible for containing the spread of contagious disease must be free to make judgments, even to some degree mistaken ones, without exposing themselves to judgments for money damages."[252] The court cited *Jacobson* alongside the circuit and district court decisions in *Reynolds v. McNichols*[253] and *U.S. ex rel. Siegel v. Shinnick*[254] for the conclusion that, "given the important public interests at stake, the cases give the authorities a great deal of leeway to detain persons who may turn out not to have been sick at all."[255]

Though not as widely publicized, Connecticut also had multiple people in quarantine around the same time.[256] The state claimed that these quarantines were "voluntary,"[257] but a subsequent lawsuit revealed that police officers had been posted outside the homes of quarantined individuals to ensure that none of them left.[258] Several plaintiffs who had been subjected to the quarantine sued the state for unspecified damages.[259] The U.S. District Court for the District of Connecticut dismissed the complaint, holding that the plaintiffs lacked standing to seek prospective relief because, at the time the complaint was filed, there was no "real and immediate" threat that

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[251] *See Hickox*, 205 F. Supp. 3d at 584.

[252] *Id.* at 584–85.

[253] *See generally* Reynolds v. McNichols 488 F.2d 1378, 1383 (10th Cir.1973) ("[A]uthorizing limited detention in jail without bond for the purpose of examination and treatment for a venereal disease.").

[254] *See generally* U.S. *ex rel.* Siegel v. Shinnick, 219 F. Supp. 789, 790 (E.D.N.Y. 1963) (upholding administrative order mandating 14-day quarantine upon petitioner's return from Stockholm, deemed at the time a "small pox infected area[.]").

[255] *Hickox*, 205 F. Supp. 3d at 593.

[256] *See* Anemona Hartocollis, *9 in Connecticut Being Watched for Symptoms of Ebola*, N.Y. TIMES (Oct. 22, 2014) https://www.nytimes.com/2014/10/23/nyregion/9-in-connecticut-being-watched-for-symptoms-of-ebola.html [https://perma.cc/45KE-MR5P].

[257] *Id.*

[258] Liberian Cmty. Ass'n of Conn. v. Malloy, No. 3:16-cv-00201, 2016 WL 10314574, at *4 (D. Conn. Aug. 1, 2016) (denying class certification); *see also* Sheri Fink, *Connecticut Faces Lawsuit Over Ebola Quarantine Policies*, N.Y. TIMES (Feb. 7, 2016), https://www.nytimes.com/2016/02/08/nyregion/connecticut-faces-lawsuit-over-ebola-quarantine-policies.html [https://perma.cc/K9PH-SM9N].

[259] Liberian Cmty. Ass'n of Conn. v. Malloy, No. 3-16-cv-00201, 2017 WL 4897048, at *3–5 (D. Conn. Mar. 28, 2017).

any plaintiff would be subjected to mandatory quarantine,[260] and further holding, based in part on *Jacobson*, that the Connecticut Commissioner of Public Health was entitled to qualified immunity because "the plaintiffs have failed to show that [the] quarantine orders were contrary to any clearly established quarantine case law."[261] The Second Circuit affirmed both holdings, observing in the process that "[s]ince *Jacobson*, the Supreme Court has not addressed the limits imposed by due process on a State's power to manage infectious diseases," and that "[n]either civil commitment law nor other infectious disease cases had clearly articulated the substantive due process standard Appellants urge should have governed Dr. Mullen's actions."[262] The dissent, reasoning that Dr. Mullenv was not entitled to qualified immunity, invoked *Jacobson* to support a "narrowly tailored means" test that these quarantine circumstances would have failed.[263]

In the area of vaccination, *Jacobson* has deflected all constitutional challenges to mandatory vaccination requirements.[264] Following *Jacobson*'s lead, courts have generally deferred to the judgment of legislative or executive bodies that vaccination requirements, most often imposed on public school students and health care workers,[265] are an appropriate method for controlling the spread of preventable disease.[266] Even as the scope of constitutional protection of individual liberties expanded over the Twentieth century via the incorporation of many provisions of the Bill of Rights and the development of

[260] *Id.* at *7–8.

[261] *Id.* at *9, *11.

[262] Liberian Cmty. Ass'n of Conn. v. Lamont, 970 F.3d 174, 178, 190, 191 (2d Cir. 2020).

[263] *See id.* at 194, 198–99 (Chin, J., dissenting) (quoting Reno v. Flores, 507 U.S. 292, 301–02 (1993), and then quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

[264] *See* Steiner-Dillon, *supra* note 13, at 220–21 n.226–28 (surveying post-*Jacobson* challenges to vaccination mandates).

[265] The third common class of vaccination requirements in the Twentieth century are imposed on members of the military. *See* JARED P. COLE & KATHLEEN S. SWENDIMAN, CONG. RESEARCH SERV., RS21414, MANDATORY VACCINATIONS: PRECEDENT AND CURRENT LAWS 2, 5, 10 (2014). Because those requirements are grounded in the federal government's supervisory authority over the military, they do not involve the state police power and are beyond the scope of *Jacobson* and this Article. *See* United States v. Schwartz, 61 M.J. 567, 569 (N-M. Ct. Crim. App. 2005) (quoting Parker v. Levy, 417 U.S. 733, 743 (1974), then quoting United States v. Moore, 58 M.J. 466, 468 (2003), and then citing United States v. Chadwell, 36 C.M.R. 741, 749–50, (N.B.R.1965) (upholding convictions of two U.S. marines who refused to be vaccinated against smallpox, typhoid, paratyphoid, and influenza), and then quoting United States v. Womack, 29 M.J. 88, 90 (1989)).

[266] *See, e.g.*, Zucht v. King, 260 U.S. 174, 175, 177 (1922) (upholding a state ordinance requiring that students submit proof of vaccination in order to attend public school).

substantive due process privacy rights, courts, citing *Jacobson*, have uniformly refused to recognize any constitutional right against compliance with a generally applicable vaccine mandate.[267]

The Fourth Circuit's decision in *Workman v. Mingo County Board of Education* is illustrative of the modern era of vaccine litigation.[268] In that case, the plaintiff refused to obtain vaccinations for her daughter, required as a condition of public-school attendance under West Virginia law.[269] The plaintiff argued, among other things, that the vaccination requirement violated her rights under the Free Exercise Clause.[270] The Fourth Circuit rejected that argument and affirmed the district court's grant of summary judgment in favor of the defendants.[271] Citing *Jacobson* and the Supreme Court's dicta in *Prince v. Massachusetts*,[272] the Fourth Circuit held that "assuming for

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[267] *See* Steiner-Dillon, *supra* note 13, at 220–22. Courts have suggested, but have had no occasion to hold, that an exemption for individuals with medical contraindication to vaccination might be constitutionally required. *See, e.g.*, Brock v. Boozman, No. 4:01-cv-00760, 2002 WL 1972086, at *8 (E.D. Ark. Aug. 12, 2002) (suggesting federal statutory and constitutional bases for medical exemption requirement) (citing Cude v. Arkansas, 377 S.W.2d 816, 818–20 (Ark. 1964), and then citing Jacobson v. Massachusetts, 197 U.S. 11, 38–39 (1905)). Every state currently recognizes a statutory medical exemption. *See What is an Exemption and What Does it Mean?*, CTRS. DISEASE CONTROL & PREVENTION (Oct. 17, 2020), https://www.cdc.gov/vaccines/imz-managers/coverage/schoolvaxview/requirements/exemption.html [https://perma.cc/CP4B-BXJK].

[268] *See* Workman v. Mingo Cty. Bd. of Educ., 419 Fed. Appx, 348, 350–51 (4th Cir. 2011).

[269] *Id.* at 351.

[270] *Id.* at 352. At the time *Workman* was decided, West Virginia was one of only two states (the other being Mississippi) that lacked a statutory exemption for religious objection to public school vaccination requirements. *See* Douglas S. Diekema, *Personal Belief Exemptions from School Vaccination Requirements*, 35 ANN. REV. PUB. HEALTH 275, 284 (2014). Thus, although there was one statutory issue concerning the validity of a medical exemption the plaintiff had obtained, she lacked a statutory religious exemption of the sort available to religious antivaccinationists in most states and was forced to present only constitutional claims on that issue. *See Workman*, 419 Fed. Appx, at 356–57. Since *Workman* was decided, the states of California, New York, and Maine have repealed their statutory religious exemptions. S.B. 277, 2015–2016 Reg. Sess., 2015 Cal. Stat. 120325(c); An Act to Protect Maine Children and Students from Preventable Diseases by Repealing Certain Exemptions from the Laws Governing Immunization Requirements, H. Paper No. 586, 129th Leg., 1st Sess., 2019 Me. Laws § 6358(Sec. 10); *see* N.Y. PUB. HEALTH § 2164(9) (McKinney 2021); An Act to Amend the Public Health Law, in Relation to Exemptions from Vaccination Due to Religious Beliefs; to Repeal Subdivision 9 of Section 2164 of the Public Health Law, Relating to Exemption from Vaccination Due to Religious Beliefs; and Providing for the Repeal of Certain Provisions Upon Expiration Thereof, Assemb. B 2371A, 2019–2020 Leg., Reg. Sess. §§ 1, 3(f) (N.Y. 2019).

[271] *Workman*, 419 Fed. App'x at 353–54, 356–57.

[272] *Id.* at 353 ("The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.") (quoting Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) (internal quotation marks omitted) (citing People v. Pierson, 68 N.E. 243, 246–47 (1903)).

the sake of argument that strict scrutiny applies," controlling the spread of communicable disease "clearly constitutes a compelling interest" such that the vaccine requirement did not violate the plaintiff's Free Exercise rights.[273]

The Fourth Circuit's "assumption" that strict scrutiny applies to Free Exercise challenges to vaccine mandates illustrates the difficulty that courts have faced in reconciling the *Jacobson* precedent with doctrinal rules that developed during the decades after *Jacobson* was decided. As discussed in Part III, the global pandemic has thrust this difficulty to the forefront, as courts have struggled to apply *Jacobson* to the flood of litigation challenging states' COVID-19 orders.

III. COVID-19 LITIGATION AND COURTS' DIVERGENT APPROACHES TO THE PUBLIC HEALTH POLICE POWER

The COVID-19 pandemic precipitated a public health crisis of a magnitude unseen in the United States in the preceding century. The first case in the United States was reported in Washington State on January 20, 2020,[274] and the first documented cases of community transmission occurred in late February.[275] By March 17, every state reported at least one case.[276] Beginning in mid-March 2020, states issued a series of mandates—usually via a governor's executive order or an order of the state public health agency—implementing steps intended to "flatten the curve" of infection by slowing the rate at which transmission occurred.[277] The timing and content of these

[273] *Workman*, 419 Fed. App'x at 353.

[274] Michelle L. Holshue et al., *First Case of 2019 Novel Coronavirus in the United States*, 382 NEW ENG. J. MED. 929, 929 (2020).

[275] *Geographic Differences in COVID-19 Cases, Deaths, and Incidence — United States, February 12–April 7, 2020*, 69 MORBIDITY & MORTALITY WKLY REP. 465, 467 (Apr. 17, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6915e4-H.pdf [https://perma.cc/423B-BYPL].

[276] *See Archived Time Series,* COVID-19 DATA REPOSITORY BY CTR. FOR SYS. SCI. & ENGINEERING (CSSE) JOHNS HOPKINS U. (Mar. 25, 2020), https://github.com/CSSEGISandData/COVID-19/blob/master/archived_data/archived_time_series/time_series_19-covid-Confirmed_archived_0325.csv [https://perma.cc/S6Z4-RLYM].

[277] *See, e.g.*, Proclamation 9994: Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15,337, 15,337 (Sec. 1) (Mar. 13, 2020); New Hampshire Executive Order 2020-04 (Mar. 13, 2020), https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2020-04.pdf [https://perma.cc/WQU3-R4QA]; Ohio Executive Order 2020-01D (Mar. 9, 2020), https://governor.ohio.gov/wps/wcm/connect/gov/79a57015-902d-4e70-a2f1-

orders varied, but many involved the closure of "non-essential" business operations along with mandates that individuals remain at home when not engaged in some specifically exempted activity outside the home.[278] Schools, businesses, and religious services were required to close, and many states and municipalities began to require social distancing and the wearing of face masks in public spaces.[279] Around May 2020, many states began "reopening" in phases, usually contingent on the achievement of predefined contagion benchmarks;[280] these reopenings led to a surge in new cases over the ensuing weeks.[281] By February 2, 2021, 27,773,047 cases of

c489556bb917/Executive+Order+2020-01D.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-79a57015-902d-4e70-a2f1-c489556bb917-n3GDA-k [https://perma.cc/3P5W-GA85]; Rhode Island Executive Order 20-02 (Mar. 9, 2020), https://governor.ri.gov/documents/orders/Executive-Order-20-02.pdf [https://perma.cc/6JUX-EKFF].

[278] *See, e.g.*, California Executive Order N-33-20 (Mar. 19, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/03/EO-N-33-20-COVID-19-HEALTH-ORDER-03.19.2020-002.pdf [https://perma.cc/K93Z-YKM7]; Michigan Executive Order No. 2020-9 (1)–(2) (Mar. 16, 2020), http://www.legislature.mi.gov/(S(dcq3trlgoeqka50eftid0zg5))/documents/2019-2020/executiveorder/pdf/2020-EO-09.pdf [https://perma.cc/482A-HPVK]; New York Executive Order No. 202.3 (Mar. 16, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.3.pdf [https://perma.cc/64L3-JKWB]; New York Executive Order No. 202.6 (Mar. 18, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO202.6.pdf [https://perma.cc/66WJ-X722]; North Carolina Executive Order No. 121 §1(1), (3), §2(A)–(B) (Mar. 27, 2020), https://files.nc.gov/governor/documents/files/EO121-Stay-at-Home-Order-3.pdf [https://perma.cc/646R-8NA3].

[279] *See, e.g.*, Mass. Exec. Order No. 31 (May 1, 2020); N.Y. Exec. Order No. 202.17 (Apr. 15, 2020); Ohio Department of Public Health, *Director's Order* § 2 (a)–(c) (July 23, 2020), https://coronavirus.ohio.gov/static/publicorders/Directors-Order-Facial-Coverings-throughout-State-Ohio.pdf [https://perma.cc/MWP7-962V]; *Statewide Reopening Guidance – Masks, Face Coverings, Face Shields*, OR. HEALTH AUTH. (Feb. 10, 2021), https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/le2288K.pdf [https://perma.cc/5TFP-B7PU]; *but see* Ga. Exec. Order No. 7.15.20.01 (July 15, 2020) (suspending [a]ny . . . county, or municipal law, order, ordinance, rule, or regulation that requires persons to wear face coverings, masks, face shields, or any other Personal Protective Equipment while in places of public accommodation or on public property . . . to the extent that [such orders] are more restrictive than this Executive Order).

[280] Jasmine C. Lee et al., *See Coronavirus Restrictions and Mask Mandates for all 50 States*, N.Y. TIMES (last updated Feb. 22, 2021), https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html [https://perma.cc/95ZU-8ZEE]; *see also Summary of Public Health Criteria in Reopening Plans*, NAT'L GOVERNORS ASS'N, https://www.nga.org/coronavirus-reopening-plans [https://perma.cc/5RSM-TTZJ].

[281] Maria Abi Habib et al., *U.S. Hits Another Record for New Coronavirus Cases*, N.Y. TIMES (last updated July 23, 2020), https://www.nytimes.com/2020/07/09/world/coronavirus-updates.html [https://perma.cc/MW4C-VRLK] ("The surge in coronavirus cases in the United States has been driven largely by states that were among the first to ease virus restrictions as they moved to reopen their economies.").

COVID-19 had been identified in the United States; of those, 493,976 patients had died.[282]

The COVID shutdown orders affected the daily routines of nearly all persons within the United States on a scale perhaps unprecedented during peacetime.[283] Thus, it is no surprise that the state COVID orders sparked a wave of litigation challenging the constitutionality of the states' interventions, in the name of protecting public health, into virtually every aspect of public life. This litigation thrust *Jacobson* into the spotlight and quickly exposed the gaps and ambiguities that the decision left open.[284] Courts disagreed about how, and whether, *Jacobson* should affect the application of constitutional doctrines that evolved later, after most of the Bill of Rights had been incorporated against the states and the Fourteenth Amendment's Due Process and Equal Protection Clauses had developed greater individual protections than was the case in 1905.

This Part will survey courts' treatment of constitutional challenges to state COVID orders to date. Though this area is rapidly evolving, one point is clear: courts disagree sharply about how *Jacobson* should influence the adjudication of such challenges, and that disagreement affects their assessment of states' COVID orders in significant ways. Thus, Part III(A) will describe three broad approaches that courts have taken to reconciling *Jacobson* with later doctrines, and Part III(B) will examine COVID litigation according to the subject matter of the plaintiffs' primary claims.

A. Three Approaches to Jacobson

While it is true, as one district court noted, that "courts across the country have nearly uniformly relied on *Jacobson*'s framework to analyze emergency public health measures put in place to curb the

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[282] *See World Health Organization Health Emergency Dashboard*, WORLD HEALTH ORG. (last updated Feb. 2, 2021), https://covid19.who.int/region/amro/country/us [https://perma.cc/KDR8-QTEM].

[283] *See* Stephanie Segal & Dylan Gerstel, *Breaking Down the G20 Covid-19 Fiscal Response*, CTR. STRATEGIC & INT'L STUDS. COMMENTARY (Apr. 30, 2020), csis.org/analysis/breaking-down-g20-covid-19-fiscal-response [https://perma.cc/VMH9-XF74].

[284] *See, e.g.*, Joan Biskupic, *The 115-year-old Supreme Court Opinion that Could Determine Rights During a Pandemic*, CNN POLITICS (last updated Apr. 10, 2020), https://www.cnn.com/2020/04/10/politics/pandemic-coronavirus-jacobson-supreme-court-abortion-rights/index.html [https://perma.cc/Y6D3-GH57].

spread of coronavirus,"[285] this generalization masks substantial disparity in exactly *how* courts have applied *Jacobson*. Courts evaluating constitutional challenges to COVID orders have, for the most part, adopted one of three approaches to reconciling *Jacobson* with subsequent constitutional precedent: 1) *Jacobson preempts* subsequent doctrines when the state exercises police power to curb a public health emergency, in which case *Jacobson* alone provides the relevant test regardless of the plaintiff's specific constitutional claims; 2) *Jacobson* was entirely *superseded* by subsequent doctrines, in which case the rules traditionally applicable to the plaintiff's specific claim apply; or 3) *Jacobson overlays* the traditional doctrine, moving it in the direction of deference to the state during a public health crisis, but not preempting it entirely.

To be sure, the three approaches described below are archetypes to which individual court decisions adhere more or less strictly. Some decisions are difficult to typologize along these lines.[286] But this typology offers a conceptually helpful way of considering the relationship of *Jacobson* to subsequent constitutional developments, and most of the COVID cases fit comfortably within the described types.

1. *Jacobson* Preemption

Some courts have held that *Jacobson* alone controls the constitutional analysis of state police power in a public health emergency.[287] On this view, the "*Jacobson* test" displaces subsequently developed constitutional doctrines during a public

[285] Page v. Cuomo, 478 F. Supp. 3d 355, 366 (N.D.N.Y. 2020).

[286] For example, we classify as *Jacobson* supersession cases several decisions that applied *Jacobson* analyses *after* applying a traditional analysis in which no reference to *Jacobson* was made. *See* Adams & Boyle, P.C. v. Slatery, 956 F.3d 913, 922 (6th Cir. 2020); Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 347 (7th Cir. 2020); Talleywhacker, Inc. v. Cooper, 465 F. Supp. 3d. 523, 538 (E.D.N.C. 2020); CH Royal Oak, LLC v. Whitmer, 472 F. Supp. 3d 410, 417–19 (W.D. Mich. 2020). The characterization of these cases as supersession cases is imperfect; they seem to recognize some continued vitality or at least relevance of *Jacobson*. But insofar as these cases' *Jacobson* analyses are superfluous dicta offered as an alternative to the courts' traditional analysis, they suggest, at least, that doctrinal rules developed post-*Jacobson* are neither preempted nor altered by *Jacobson*'s holding during a public health crisis.

[287] *See, e.g.*, Vill. of Orland Park v. Pritzker, 475 F. Supp. 3d 866, 881 (N.D. Ill. 2020) ("The United States Supreme Court has long recognized that traditional constitutional analyses give way to a more deferential approach when courts evaluate the emergency exercise of state action during a public- health crisis.").

health crisis.[288] For example, in *Local Spot, Inc. v. Lee,*[289] the district court, denying the plaintiffs' motion for a temporary restraining order ("TRO") against a COVID-related shutdown order, wrote that "[d]uring a health pandemic, the court's power of review is not entirely negated, but it is limited to asking whether the governing authorities have taken action in 'an arbitrary, unreasonable manner' or through 'arbitrary and oppressive regulations.'"[290]

Since adopting a *Jacobson* preemption approach requires disregarding more recent, well-established precedent, it is perhaps predictable that district courts' commitment to the *Jacobson* preemption approach has been tentative. Nearly all of the district courts holding that *Jacobson* preempts traditional constitutional doctrines have also undertaken an "alternative" analysis under the traditional rules.[291] Moreover, nearly every court to do so has held that the exercise of police power at issue is also constitutional under the traditional doctrine—in other words, that although *Jacobson* adopted a deferential test granting states especially broad discretion to respond to public health emergencies, states have apparently never had to invoke that broad power to combat the COVID-19 pandemic.[292] Whatever this may suggest about legal realism and the

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288 *See, e.g.*, Luke's Catering Serv., LLC v. Cuomo, 485 F. Sup. 3d 369, 380 (W.D.N.Y.) (applying "*Jacobson* review" to plaintiff's various federal claims challenging New York's 50-person limitation on "non-essential" gatherings).

289 Local Spot, Inc. v. Lee, No. 3:20-CV-00421, 2020 U.S. Dist. LEXIS 123555, at *5 (M.D. Tenn. July 14, 2020).

290 Local Spot, Inc., 2020 U.S. Dist. LEXIS 123555, at *5 (quoting *In re* Abbott, 956 F.3d 696, 734 (5th Cir. 2020) (Dennis, J., dissenting).

291 *See, e.g.*, Gish v. Newsom, No. EDCV 20-755 JGB(KKx), 2020 U.S. Dist. LEXIS 74741, at *12, *15–16 (C.D. Cal. Apr. 23, 2020). One notable exception is the district court's decision in *Open Our Oregon v. Brown*, which relies exclusively on *Jacobson* without even identifying the plaintiffs' constitutional claims. Open Our Oregon v. Brown, No. 6:20-cv-773, 2020 U.S. Dist. LEXIS 87942, at *3–4 (D. Or. May 19, 2020). A review of the complaint indicates that the plaintiffs challenged the relevant COVID order as violating substantive and procedural due process, the Equal Protection Clause, the Fourth Amendment, and the Takings Clause. *Open Our Oregon,* 2020 U.S. Dist. LEXIS 87942, at *3–4; *see also* Slidewaters LLC v. Wash. Dep't of Labor & Indus., No. 2:20-cv-210, 2020 U.S. Dist. LEXIS 125955, at *12–13 (E.D. Wash. July 14, 2020) (applying only *Jacobson* standard to plaintiffs' substantive due process claims). The district court in *Altman v. Cty. of Santa Clara*, 464 F. Supp. 3d 1106 (N.D. Cal. 2020), complicated the situation further by applying separate *Jacobson* and traditional Second Amendment analyses, while expressly declining to decide whether *Jacobson* displaced the traditional analysis.

292 *See, e.g.*, *Gish*, 2020 U.S. Dist. LEXIS 74741, at *14-16 (quoting Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905)); Cassell v. Snyders, 458 F. Supp. 3d 981, 994 (N.D. Ill. 2020); Cross Culture Christian Ctr. v. Newsom, 445 F. Supp. 3d 758, 771 (E.D. Cal. 2020); Calvary Chapel of Bangor v. Mills, 459 F. Supp. 3d 273, 284 (D. Me. 2020); Amato v. Elicker, 460 F. Supp. 3d 202, 223 (D. Conn. 2020).

outcome-orientation of judicial reasoning, it is a wise approach for the district judge who wishes to avoid being overruled. It is far less helpful, however, for the clarification of doctrine, enabling appellate courts themselves to avoid the question of how *Jacobson* relates to subsequently developed constitutional doctrines.

2. *Jacobson* Supersession

Other cases have held that *Jacobson* was superseded by subsequent doctrinal developments and no longer provides the controlling test. These cases apply the traditional doctrinal tests for the constitutional claim presented. The extent to which the supersession cases engage with *Jacobson* varies widely; some cases explicitly reject *Jacobson* in favor of later-developed constitutional tests; [293] others tacitly adopt the supersession view by applying the traditional tests while ignoring or minimizing *Jacobson*.[294] Still

[293] *E.g.*, Bayley's Campground Inc. v. Mills, 463 F. Supp. 3d 22, 32 (D. Me. 2020) (rejecting and criticizing *Jacobson*, applying strict scrutiny to shutdown and quarantine orders); Cnty. of Butler v. Wolf, 486 F. Supp. 3d 883, 899 (W.D. 2020) ("The Court will apply 'regular' constitutional scrutiny to the issues in this case."). The district court in *First Baptist Church v. Kelly* held that *Jacobson* did not apply to its review of an executive order prohibiting "mass gatherings" that specifically included "churches or other religious facilities" because, unlike the executive order at issue, *Jacobson* dealt with a statute that was "facially neutral and generally applicable." First Baptist Church v. Kelly, 455 F. Supp. 3d 1078, 1087, 1088–89 (D. Kan. 2020).

[294] *See, e.g.*, McDougall v. Cty. of Ventura California, No. 20-CV-02927-CBM-(ASx), 2020 U.S. Dist. LEXIS 77515, at * 5 (C.D. Cal. Apr. 1, 2020); Brandy v. Villanueva, No. CV 20-02874-AB (SKx), 2020 U.S. Dist. LEXIS 118501, at *10–11 (C.D. Cal. Apr. 6, 2020) (citing United States v. Chovan, 735 F.3d 1127, 1139 (9th Cir. 2013)); Carter v. Kemp, No. 1:20-cv-01517-SCJ, Dkt. No. 35, at *24, *31–32 (N.D. Ga. Apr. 20, 2020); High Plains Harvest Church v. Polis, No. 1:20-cv-01480-RM-MEH, 2020 U.S. Dist. LEXIS 105247, at *4-5 (D. Colo. June 16, 2020) (citing S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring)); Xponential Fitness v. Arizona, No. CV-20-01310-PHX-DJH, 2020 U.S. Dist. LEXIS 123379 at *19, *23 (D. Ariz. July 14, 2020) (citing *Jacobson*, 197 U.S. at 28); *see also* Friends of Danny DeVito v. Wolf, 227 A.3d 872, 886 (Pa. 2020) (citing Pennsylvania Rest. & Lodging Ass'n v. City of Pittsburgh, 211 A.3d 810, 817 (Pa. 2019), and then citing Nat'l Wood Pres., Inc. v. Commonwealth, 414 A.2d 37, 42–43 (Pa.1980). We classify the district court's decision in *Soos v. Cuomo* as a *Jacobson* supersession case. Soos v. Cuomo, 470 F. Supp. 3d 268, 278–79 (N.D.N.Y. 2020). Although the district court characterizes Chief Justice Roberts's quotations from *Jacobson* in *South Bay* as an instruction that courts "refrain from Monday-morning quarterbacking the other co-equal, elected branches of government when those branches are responding to difficulties beyond those that are incidental to ordinary governance," it characterized *South Bay* as not having addressed whether the "broad limits" to police power under *Jacobson* had been exceeded, and "turn[ed]" to traditional Free Exercise jurisprudence to answer that question. *Id.* at 278-79 (citing *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613). Thus, the court treated *Jacobson* as reducing to, without altering, the traditional analysis.

others cite *Jacobson* but apply the traditional analyses without commenting on or apparently recognizing the tension.[295]

Perhaps most notably, the district court in *County of Butler v. Wolf*[296] adopted a *Jacobson* supersession approach in striking down the state's orders restricting the size of in-person gatherings and shutting down "non-life-sustaining" businesses.[297] Noting that "*Jacobson* was decided over a century ago" prior to the doctrinal innovations that moved constitutional law toward greater solicitude for individual liberties, the court concluded "that an extraordinarily deferential standard based on *Jacobson* is not appropriate."[298] In support of that conclusion, it noted, first, the "ongoing and indefinite nature of Defendants' actions" which remained in effect six months after their initial promulgation,[299] and second, the court's conviction that "ordinary constitutional scrutiny is necessary to maintain the independent judiciary's role as a guarantor of constitutional liberties—even in an emergency."[300]

The Second Circuit, in a pre-COVID-19 case, issued an opinion that some COVID-19 plaintiffs characterize as adopting a *Jacobson* supersession approach. In *Phillips v. City of New York*,[301] the court held that *Jacobson* foreclosed the plaintiff's substantive due process challenge to a state vaccination requirement, but, addressing the plaintiffs' Free Exercise challenge, noted that "*Jacobson* does not specifically control [the plaintiffs'] free exercise claim" because "at the time it was decided, the Free Exercise Clause of the First Amendment had not yet been held to bind the states."[302] But the court went on to say that the "reasoning" of *Jacobson* and *Prince*,

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[295] *E.g.*, Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 614–15 (6th Cir. 2020) (citing *Jacobson*, 197 U.S. at 27); Lighthouse Fellowship Church v. Northam, 458 F. Supp. 3d 418, 428, 441–42 (E.D. Va. 2020) (citing Jacobson, 197 U.S. at 26).

[296] *Wolf*, 486 F. Supp. 3d at 890, *vacated* 8 F.4th 226 (3d Cir. 2021).

[297] *See id.* at 890–91.

[298] *Id.* at 896, 899.

[299] *Id.* at 899.

[300] *Id.* at 901; *see also* Denver Bible Church v. Azar, 494 F. Supp. 3d 816, 830 (D. Colo. 2020) (applying "normal constitutional scrutiny" to plaintiffs' Free Exercise claims). The district court in *County of Butler* did not suggest that *Jacobson* has been overruled, but it relied in part on Justice Alito's dissent in *Calvary Chapel Dayton Valley v. Sisolak*, stating that "a public health emergency does not give Governors and other public officials carte blanche to disregard the Constitution for as long as the medical problem persists," to conclude that *Jacobson* did not mandate a deferential constitutional review of the state's orders. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2605 (2020) (Alito, J., dissenting) (quoting *Wolf*, 486 F. Supp. 3d at 897).

[301] Phillips v. City of New York, 775 F.3d 538 (2d Cir. 2015).

[302] *Id.* at 543 (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).

taken presumably as *dicta*, led to the conclusion "that mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause."[303] District courts adjudicating challenges to COVID orders have generally rejected plaintiffs' arguments that *Phillips* mandates a *Jacobson* supersession approach for the Second Circuit.[304]

3. *Jacobson* Overlay

The third approach attempts, with varying degrees of explicitness, to reconcile *Jacobson*'s deferential approach to the exercise of police power in a public health crisis with subsequent doctrinal developments by applying *Jacobson* as a lens through which the traditional tests are distorted in the state's favor. This approach explicitly incorporates the traditional doctrinal tests to determine whether the order at issue constitutes a "palpable invasion of rights secured by the fundamental law,"[305] but in making that determination it recognizes a more capacious sphere of constitutional authority impinging on protected liberties than would be permitted by the traditional doctrines.

The Fifth Circuit's decision in *In re Abbott*[306] has been an influential model of the *Jacobson* overlay approach.[307] The plaintiff

[303] *Phillips*, 775 F.3d, at 543 (citing Workman v. Mingo Cty. Bd. of Educ., 419 F. Appx 348, 353–54 (4th Cir. 2011)).

[304] *See, e.g.*, Connecticut Citizens Def. League, Inc. v. Lamont, 465 F. Supp. 3d 56, 72 (D. Conn. 2020) (citing *Phillips* 775 F.3d at 542–43; Jacobson v. Massachusetts 197 U.S. 11, 31 (1905)); Ass'n of Jewish Camp Operators v. Cuomo, 470 F. Supp. 3d 197, 214 (N.D.N.Y 2020) (citing *Phillips*, 775 F.3d at 543).

[305] *Jacobson*, 197 U.S. at 31 (citing Mugler v. Kansas, 123 U.S. 623, 661 (1887), then citing State of Minnesota v. Barber, 136 U.S. 313, 320 (1890), and then citing Atkin v. State of Kansas, 191 U.S. 207, 223 (1903)).

[306] *In re* Abbott, 954 F.3d 772 (5th Cir. 2020).

[307] *See id.* at 784–85 (citing *Jacobson*, 197 U.S. at 29). Many courts within and outside of the Fifth Circuit have adopted the *Abbott* approach. *See, e.g.*, SH3 Health Consulting, LLC v. Page, 459 F. Supp. 3d 1212, 1222–23 (E.D. Mo. 2020) (citing *In Re* Rutledge, 956 F.3d 1018, 1028 (8th Cir. 2020)); McGhee v. City of Flagstaff, No. CV-20-08081-PCT-GMS, 2020 U.S. Dist. LEXIS 81369 at *14 (D. Ariz. May 8, 2020) (citing *Abbott,* 954 F.3d at 778); Pro. Beauty Fed'n of California v. Newsom, No. 2:20-cv-04275-RGK-AS, 2020 U.S. Dist. LEXIS 102019 *13 (C.D. Cal. June 8, 2020) (citing *Abbott* 954 F.3d at 773); Carmichael v. Ige, 420 F. Supp. 3d 1133, 1143 (D. Haw. 2020) (quoting *Jacobson*, 197 U.S. at 31; then quoting *Rutledge*, 956 F.3d at 1029; and then quoting *Abbott* 954 F.3d at 786); Local Spot, Inc. v. Lee, No. 3:20-cv-00421, 2020 U.S. Dist. LEXIS 123555 at *5 (M.D. Tenn. July 14, 2020) (quoting *Jacobson*, 197 U.S. at 25; then quoting *Abbott* 955 F.3d at 784); Page v. Cuomo, 478 F. Supp. 3d 355, 366 (N.D.N.Y. 2020) (citing *Abbott* 954 F.3d at 784); 4 Aces Enter., LLC v. Edwards, 479 F. Supp. 3d 311, 315 (E.D. La. 2020) (citing *Abbott*, 954 F.3d at 784; 910 E. Main LLC v. Edwards, 481 F. Supp. 3d 607, 617 (W.D. La. 2020)). Professors Wiley and Vladeck criticized *Abbott* as approving the

abortion providers challenged a Georgia executive order that required health care professionals and facilities to postpone "non-essential" medical procedures for one month.[308] The district court granted a TRO, holding that the challenged order effectively constituted an "outright ban" on abortion.[309] The Fifth Circuit granted a writ of mandamus, holding that the district court's failure "to apply (or even acknowledge) the framework governing emergency exercises of state authority during a public health crisis, established over 100 years ago in *Jacobson v. Commonwealth of Massachusetts*" constituted an "extraordinary error."[310] The court explained that "[u]nder *Jacobson*, the district court was empowered to decide only whether [the challenged executive order] lacks a 'real or substantial relation' to the public health crisis or whether it is 'beyond all question, a plain, palpable invasion' of the right to abortion."[311] Thus, under the "*Jacobson* test" as articulated by the Fifth Circuit and adopted by many subsequent decisions,[312] the first, threshold

"suspension" of judicial review during a public health emergency. *See* Lindsay F. Wiley & Steve Vladeck, *COVID-19 Reinforces the Argument for "Regular" Judicial Review—Not Suspension of Civil Liberties—In Times of Crisis*, HARV. L. REV. BLOG (Apr. 9, 2020), https://blog.harvardlawreview.org/covid-19-reinforces-the-argument-for-regular-judicial-review-not-suspension-of-civil-liberties-in-times-of-crisis [https://perma.cc/JJH9-DTF]. But *Abbott* did not hold that judicial review generally or the *Casey* test specifically were "suspended" during the COVID crisis. To the contrary, it noted that "individual rights secured by the Constitution do not disappear during a public health crisis, but the Court [in *Jacobson*] plainly stated that rights could be reasonably restricted during those times." *Abbott* 954 F.3d at 784 (citing *Jacobson*, 197 U.S. at 29). The Fifth Circuit reversed the trial court in part because it had mischaracterized the executive order at issue as an "outright ban" on pre-viability abortions, categorically forbidden under *Casey*. *See id.* at 778. But it noted that, on remand, "[r]espondents will have the opportunity to show at the upcoming preliminary injunction hearing that certain applications of GA-09 *may* constitute an undue burden under *Casey*, if they prove that, 'beyond question,' GA-09's burdens outweigh its benefits in those situations." *Id.* at 787–78 (citing Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016)). Thus, *Abbott* is properly characterized as a *Jacobson* overlay case—it interprets the second step of the *Jacobson* test as raising the threshold for establishing a constitutional violation but does not hold that judicial review is "suspended" during public health emergencies.

[308] *See Abbott*, 954 F.3d at 779–80.

[309] *See id.* at 777–78.

[310] *Id.* at 783 (citing *Jacobson*, 197 U.S. at 11).

[311] *Id.* at 786 (quoting *Jacobson*, 197 U.S. at 31).

[312] *See* Gish v. Newsom, No. EDCV 20-755 (KKx), 2020 U.S. Dist. LEXIS 74741, at *14–15 (C.D. Cal. Apr. 23, 2020) (citing United States v. Caltex, 344 U.S. 149, 154 (1952); then citing *Abbott*, 954 F.3d at 784; and then citing *Jacobson*, 197 U.S. at 31); Cassell v. Snyders, 458 F. Supp.3d 981, 993 (N.D. Ill. 2020) (citing *Abbott*, 954 F.3d at 783); Cross Culture Christian Ctr. v. Newsom, 445 F. Supp. 3d 758, 766 (E.D. Cal. 2020) (citing *Jacobson*, 197 U.S. at 31); Calvary Chapel of Bangor v. Mills, 459 F. Supp. 3d 273, 284 (D. Me. 2020) (citing *Jacobson*, 197 U.S. at 27; then citing *Abbott*, 954 F.3d at 784); Spell v. Edwards, 460 F. Supp. 3d 671, 676 (M.D. La. 2020) (citing *Abbott*, 954 F.3d at 772, and then citing *Jacobson*, 197 U.S. at 31); Ass'n of Jewish

question is whether the order at issue bears a "real or substantial" relation to an existing public health emergency.[313] The second step of this test, acknowledged to be more deferential to the exercise of state police power than the traditional constitutional doctrines it displaces,[314] asks only whether the order constitutes a "plain, palpable" invasion of a protected right.[315] As applied by the Fifth Circuit in *Abbott*, this second step required the district court to apply *Casey*'s undue burden analysis, overturning the order only if "'beyond question,' [the challenged executive order's] burdens outweigh its benefits" as applied to the postponement of non-essential abortions.[316]

Decisions within the *Jacobson* overlay approach can be further distinguished by the degree to which the court's application of *Jacobson* actually affects the traditional doctrinal analysis. In "tight" overlay cases, the court's application of *Jacobson* makes a significant difference in its application of the traditional tests, tilting the analysis substantially in the state's favor. The district court's decision in *Givens v. Newsom* is a good example.[317] The plaintiffs in that case sought a TRO against enforcement of a California stay-at-home order, primarily on free speech, association, and petition grounds.[318] The plaintiffs' principal argument was that the order unconstitutionally prohibited them from holding protests and rallies at the state capitol.[319] In evaluating the likelihood of success of the plaintiffs' claims, the court first, in a section headed "Emergency Powers," interpreted *Jacobson* and subsequent decisions to stand for the proposition that "in the context of this public health crisis, the

Camp Operators v. Cuomo, 470 F. Supp. 3d 197, 215 (N.D.N.Y. 2020) (citing *Abbott*, 954 F.3d at 786); *Local Spot, Inc.*, 2020 U.S. Dist. LEXIS 123555, at *5 (quoting *Abbott*, 956 F.3d at 734).

313 *Abbott*, 954 F.3d at 786 (citing *Jacobson*, 197 U.S. at 31).

314 *See, e.g.*, Best Supplement Guide, LLC v. Newsom, No. 2:20-cv-00965-JAM-CKD, 2020 U.S. Dist. LEXIS 90608, at *10 (E.D. Cal. May 22, 2020) (second step of *Jacobson* test "plainly puts a thumb on the scale in favor of upholding state and local officials' emergency public health responses"); Slidewaters LLC v. Washington Dep't of Labor & Indus., No. 2:20-CV-0210-TOR, 2020 U.S. Dist. LEXIS 125955, at *12 (E.D. Wash. July 14, 2020) (citing *Jacobson*, 197 U.S. at 28) ("So long as a public health law is reasonable and not overly broad or unequally applied, it is permissible even where it infringes on other protected interests.").

315 *See Abbott*, 954 F.3d at 786 (citing *Jacobson*, 197 U.S. at 31).

316 *See id.* at 786, 788 (citing *Jacobson*, 197 U.S. 11 at 31). The Eighth Circuit, following *Abbott*, applied an essentially identical *Jacobson* overlay analysis *in In re Rutledge*. *In re* Rutledge, 956 F.3d 1018, 1028 (8th Cir. 2020).

317 Givens v. Newsom, 459 F. Supp. 3d 1302, 1307–08 (E.D. Ca. 2020); *see also Best Supplement Guide*, 2020 WL 2615022, at *10.

318 *Givens*, 459 F. Supp. 3d at 1307–08.

319 *Id.*

judiciary must afford more deference to officials' informed efforts to protect all their citizens, especially their most vulnerable, against such a deadly pandemic."[320] That principle informed the court's analyses of the plaintiffs' specific claims—for example, evaluating whether an indefinite ban on the issuance of permits for rallies on the capitol grounds was a "narrowly tailored" incursion on the plaintiffs' free speech right, the court observed that "'narrow' in the context of a public health crisis is necessarily wider than usual."[321] In analyzing the plaintiffs' Assembly Clause claim, the court again cited *Jacobson* before holding that the challenged order "does not prohibit substantially more expressive association than is necessary to advance [public health]."[322]

On the other hand, some courts' application of the *Jacobson* overlay is much looser, even approaching lip service. The district court in *Legacy Church v. Kunkel*,[323] for example, commenced its Free Exercise analysis with the observation that "[t]he Court's analysis is broadly framed by the fact that, when the state faces a major public health threat, as New Mexico now does, its Tenth Amendment police and public health powers are at a maximum," although it cited *Prince v. Massachusetts* rather than *Jacobson* for that proposition.[324] But the court then proceeded with a traditional analysis based on *Employment Division v. Smith*[325] and *Lukumi Babalu*,[326] upholding the executive order under rational basis review with no further reference to *Jacobson* or *Prince*.[327]

[320] *Id.* at 1311 (citing *Jacobson*, 197 U.S. at 28–29, 34–38, then citing Gish v. Newsom, EDCV 20-755 JGB (KKx), 2020 U.S. Dist. LEXIS 74741 at *13–15 (Apr. 23, 2020)).

[321] *Givens*, 459 F. Supp. 3d at 1313.

[322] *Id.* at 1315 (citing *Jacobson*, 197 U.S. at 29).

[323] Legacy Church v. Kunkel, 455 F. Supp. 3d 1100, 1100 (D. N.M. 2020).

[324] *Id.* at 1145 (citing Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) (stating in dicta that "[t]he right to practice religion freely does not include liberty to expose the community . . . to communicable disease or the latter to ill health or death")).

[325] Emp't Div. v. Smith, 494 U.S. 872, 872 (1990).

[326] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 520 (1993).

[327] *Legacy Church*, 455 F. Supp. 3d at 1148, 1157 (citing Masterpiece Cakeshop, Ltd. V. Colorado Civil Rights Commission, 138 S. Ct. 1719, 1731–32 (2018). The court did return briefly to *Jacobson* in its analysis of the church's freedom of assembly and expressive association claim, holding that the challenged order survived strict scrutiny notwithstanding the exemption of some secular activities from the executive order's prohibition because "the Court is not in a position to second-guess expert decisions on which restrictions will be most effective at saving lives during an epidemic when those restrictions are based not on suppression of religion but suppression of a [*sic*] epidemic." *Legacy Church*, 455 F. Supp. 3d at 1160 (citing *In re* Abbott (*Abbott II*), 954 F.3d 772, 778 (5th Cir. 2020) (the cited passage in *Abbott* quoted *Jacobson*)). The court then added that because the executive order satisfied strict scrutiny as to the assembly claim, it also satisfied the "lesser standard of being related to

The Supreme Court has not yet taken a clear position on which approach to *Jacobson* is correct. Chief Justice Roberts cited the case in passing in his concurrence in the denial of an injunction pending appeal in *South Bay United Pentecostal Church v. Newsom*,[328] suggesting that, in his view, *Jacobson* has some relevance to the plaintiffs' Free Exercise claims and thus ruling out the *Jacobson* supersession approach.[329] Justice Alito's treatment of *Jacobson* in his dissent from the denial of an injunction pending appeal in another Free Exercise case, *Calvary Chapel Dayton Valley v. Sisolak*,[330] seems to rule out the *Jacobson* preemption approach and could be compatible with the supersession or overlay approaches.[331] Justice Gorsuch forcefully asserted a *Jacobson* supersession view in *Roman Catholic Diocese of Brooklyn v. Cuomo*,[332] and Chief Justice Roberts appeared to distance his concurring opinion in South Bay from an endorsement of the case.[333] But whatever individual Justices' conceptions of the relationship between *Jacobson* and subsequent constitutional doctrines may be, no majority decision has yet addressed the issue.

B. Specific Application

Plaintiffs have asserted a broad range of constitutional claims against COVID-related orders. This section will survey some of the more common types of cases and the approaches that courts have taken to them.[334] Two points stand out: first, aside from the plurality of approaches to *Jacobson* described above, additional disagreement

the safety of the general public" articulated by *Jacobson*. *Legacy Church*, 455 F. Supp. 3d at 1161. This seems oddly circular—invoking the *Jacobson* standard to conclude that the executive order satisfies strict scrutiny, then further holding that because it passes strict scrutiny, it passes the "lesser" *Jacobson* standard.

328 S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020).

329 *Id.* at 1613 (Roberts, J., concurring) (quoting Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905); *see infra* note 360 and accompanying text.

330 Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020).

331 *Id.* at 2608–09 (Alito, J. dissenting) (citing *S. Bay*, 140 S. Ct. at 1613); *see infra* notes 369–374 and accompanying text.

332 Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68–70 (2020) (Gorsuch, J., concurring).

333 *Id.* at 70–71 (Gorsuch, J., concurring), 75–76 (Roberts, C.J., dissenting) (citing *S. Bay*, 140 S. Ct. at 1613), and then citing *Jacobson*, 197 U.S. at 11.

334 Plaintiffs in many cases asserted a plethora of constitutional claims. For the most part, we classify each case by the claim that the court's decision treats as the principal one. Most cases have a single predominant claim, but a few cases, in which the court evaluated multiple discrete claims in depth, are included in more than one section below.

has emerged among courts concerning the degree to which various state responses to the pandemic (often involving business shutdowns, stay-at-home orders, or mask requirements) burden various constitutionally protected liberties. Variations in fact patterns—the details of the particular order and variations in the plaintiffs' circumstances—seem to account for some but not all of this disagreement. In some cases, judges' personal skepticism concerning the threat of the COVID-19 pandemic or the relative costs and benefits of shutdown orders seems to overtly influence their analyses. Second, although the populations of case types are small, courts appear to be more receptive to constitutional challenges in some kinds of cases than others. Abortion providers challenging moratoria on "non-essential" medical procedures as applied to abortion have been fairly successful at obtaining preliminary relief; general commercial businesses challenging shutdown orders have been largely unsuccessful. Religious groups challenging prohibitions on in-person religious services fall somewhere in the middle, with more recent cases showing some greater tendency to favor plaintiffs.

1. Abortion

The COVID-19 outbreak prompted many states to impose moratoria on "non-essential" medical or surgical procedures, sometimes including abortion procedures. These restrictions prompted litigation by abortion service providers or, in a few cases, women seeking abortion access, challenging the state's authority to apply the orders to constitutionally protected abortion procedures. The majority of plaintiffs at least initially won preliminary injunctive relief, though those injunctions were occasionally vacated on appeal.

The abortion cases involved less factual variation than most of the other categories of COVID-related restrictions. In the typical case, an executive order imposed a moratorium on "elective" or "medically unnecessary" medical procedures, including surgeries, for the duration of the emergency order—usually a few weeks.[335] The disparities in outcomes in the abortion cases turned less on the facts of the cases than on the legal test that the court applied.[336] The one

[335] *E.g.*, Adams & Boyle, P.C. v. Slatery, 956 F.3d 913, 916 (6th Cir. 2020) (temporary ban on "elective" and "non-urgent" surgeries); *In re* Abbott, 954 F.3d 772, 777–78 (5th Cir. 2020) (moratorium on "non-essential surgeries"); Preterm-Cleveland v. Ohio, 456 F. Supp. 3d 917, 921 (S.D. Ohio 2020) (moratorium on "non-essential or elective surgeries").

[336] *See supra* Part III(A) (typologizing courts' application of Jacobson).

decision applying a *Jacobson* supersession approach granted relief after finding that the plaintiffs had established a likelihood of success on the merits under the traditional tests[337] articulated by *Planned Parenthood v. Casey*[338] and *Whole Women's Health v. Hellerstadt*,[339] as did several decisions applying a *Jacobson* overlay approach.[340] However, the courts holding that *Jacobson* preempts the application of *Casey* and *Whole Women's Health* during a public health emergency generally denied relief, holding that the abortion moratoria survived the *Jacobson* test.[341]

The Fifth Circuit's decision in *In re Abbott* illustrates the latter approach. In that case, the United States District Court for the Western District of Texas entered a TRO against enforcement of an executive order, issued on March 22, 2020, that imposed a moratorium on "non-essential surgeries and procedures" until April 21, 2020.[342] The Fifth Circuit granted a writ of mandamus and directed the district court to dissolve the TRO, holding that the court "the district court clearly abused its discretion by failing to apply (or even acknowledge) the framework governing emergency exercises of state authority during a public health crisis, established over 100 years ago in *Jacobson v. Commonwealth of Massachusetts*."[343] Whereas the district court had held the order unconstitutional under *Casey* as an "outright ban" on abortion,[344] the Fifth Circuit held that, under *Jacobson*, "constitutional rights[, including the right to abortion,] may be reasonably restricted 'as the safety of the general public may demand.'"[345] Moreover, the court held, the TRO "usurped the power of the governing state authority when it passed judgment

[337] *See* Planned Parenthood Ctr. for Choice v. Abbott, 450 F. Supp. 3d 753, 757, 759 (W.D. Tex. Mar. 30, 2020).

[338] Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 876 (1992), *overruled* by Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[339] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309–2310 (2016) (citing *Planned Parenthood Ctr. For Choice*, 450 F. Supp. 3d at 887–98).

[340] South Wind Women's Ctr. v. Stitt, No. CIV-20-277-G, 2020 U.S. Dist. LEXIS 60020 (W.D. Okla. Apr. 6, 2020); Robinson v. Marshall, 454 F. Supp. 3d 1188, 1198–99 (M.D. Ala. Apr. 12, 2020), *aff'd*, 957 F.3d 1171 (2020); Preterm-Cleveland v. Ohio, 456 F. Supp. 3d at 931–32.

[341] *In re* Abbott, 954 F.3d 772, 791 (5th Cir. 2020); *In re* Rutledge, 956 F.3d 1018, 1030–32 (8th Cir. 2020). *But see* Adams & Boyle, P.C. v. Slatery, 956 F.3d 913, 925 (6th Cir. 2020) (affirming preliminary injunction; "even if *Jacobson's* more state-friendly standard of review is the test we should be applying here—rather than the usual *Roe*/*Casey* standard—we still think that Plaintiffs are likely to succeed on the merits of their constitutional claim").

[342] *Abbott*, 954 F.3d at 777–78.

[343] *Id.* at 783.

[344] Planned Parenthood Ctr. for Choice v. Abbott, 450 F. Supp. 3d 753, 758 (W. D. Tex. 2020).

[345] *Abbot*, 954 F.3d at 778 (quoting Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905)).

on the wisdom and efficacy of [the] emergency measure, something squarely foreclosed by *Jacobson*."[346] Dispensing with the traditional Casey analysis, the Fifth Circuit articulated a new inquiry based on *Jacobson*:

> [W]hen 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." Courts may ask whether the state's emergency measures lack basic exceptions for "extreme cases," and whether the measures are pretextual—that is, arbitrary or oppressive. At the same time, however, courts may not second-guess the wisdom or efficacy of the measures.[347]

Finding that the district court's TRO failed this test, the Fifth Circuit remanded with instructions to vacate the order.[348] Though by no means universally accepted, *Abbott's* gloss on *Jacobson* has been influential on courts evaluating COVID orders in abortion[349] and other areas.[350]

2. Free Exercise of Religion

Many of the first wave shutdown and stay-at-home orders included provisions limiting or prohibiting in-person gatherings for religious

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[346] *Id.* at 783 (citing *Jacobson*, 197 U.S. at 25).

[347] *Id.* at 784–85 (citations omitted) (quoting *Jacobson*, 197 U.S. at 31, 38) (citing *Jacobson*, 197 U.S. at 28, 30).

[348] *Id.* at 796. Judge Dennis dissented in the court's application of Jacobson but seemed to agree (at least insofar as his opinion applies *Jacobson* with no mention of *Casey* or *Hellerstadt*) that that case, rather than the traditional abortion analysis, applies to restrictions enacted in the context of a public health emergency. *Id.* at 800.

[349] *See, e.g.*, *In re* Rutledge, 956 F.3d 1018, 1025 (8th Cir. 2020) (adopting the Fifth Circuit's reasoning in *Abbott*); Little Rock Family Planning Servs. v. Rutledge, 458 F. Supp. 3d 1065, 1071–72 (E.D. Ark. May 7, 2020) (quoting *Rutledge*, 956 F.3d at 1027).

[350] *See, e.g.*, McGhee v. City of Flagstaff, 2020 U.S. Dist. Lexis 81369, at *9 (D. Ariz. May 8, 2020); Berean Baptist Church v. Cooper, 460 F. Supp. 3d 651, 659 (E.D.N.C. 2020) (citing Kansas v. Hendricks, 521 U.S. 346, 356–57 (1997); Roberts v. Neace, 958 F.3d 409, 414 (6th Cir. 2020); Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 614–15 (6th Cir. 2020)); *Abbott*, 954 F.3d at 783); Illinois Republican Party v. Pritzker, 470 F Supp. 3d 813, 821 (N.D. Ill. 2020) (citing *Abbott*, 954 F.3d at 784); Carmichael v. Ige, 470 F Supp. 3d 1133, 1143 (D. Haw. 2020) (citing *Abbott*, 954 F.3d at 786).

observance or celebration; these provoked legal challenges from churches, clergy, and religious individuals who argued that such restrictions violated the Free Exercise Clause of the First Amendment.[351] The traditional Free Exercise analysis on these issues principally involves the Supreme Court's decisions in *Employment Division v. Smith*, which held that rational basis review applies to a "neutral, generally applicable" law that encompasses religious activity,[352] and *Church of Lukumi Babalu Aye v. City of Hialeah*,[353] which imposed strict scrutiny on laws that "discriminate[] against some or all religious beliefs or regulate[] or prohibit[] conduct because it is undertaken for religious reasons."[354] Thus, a recurring question in these cases is whether executive orders implementing sometimes complicated tiers of restrictions on various activities, often expressly including faith-based services, are "neutral" and "generally applicable" within the meaning of *Smith*, or whether they "discriminate" against religion *qua* religion as did the municipal ordinance at issue in *Lukumi Babalu*. This, in turn, often involves an inquiry into whether religious services are treated less favorably than "comparable" secular activities—with considerable disagreement as to which activities are comparable to in-person religious services. Although the Supreme Court's brief forays into this issue brought a measure of uniformity to subsequent decisions, considerable uncertainty persists concerning the scope of state police

[351] Some plaintiffs also brought other claims, for example grounded in the Assembly Clause, the Equal Protection Clause, or state statutes. *See, e.g.*, Cassell v. Snyders, 458 F. Supp. 3d 981, 987 (N.D. Ill. 2020) (asserting Free Exercise and various state law claims); Lighthouse Fellowship Church v. Northam, 458 F. Supp. 3d 418, 428 (E.D. Va. 2020); Gish v. Newsom, No. EDCV 20-755 JGB (KKx), 2020 U.S. Dist. LEXIS 74741, at *4 (C.D. Cal. Apr. 23, 2020) (asserting 11 claims under the federal and California constitutions); *see also* Calvary Chapel Lone Mountain v. Sisolak, 466 F. Supp. 3d 1120, 1123 (D. Nev. 2020) (citing Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 804 (9th Cir. 2011) (asserting "as applied" Equal Protection challenge but not Free Exercise claim). For the most part, we will focus our discussion of these cases on the Free Exercise claims, which are consistently foregrounded. Even the court in *Calvary Chapel Lone Mountain*, in which no Free Exercise claim was asserted, applied *Employment Division v. Smith* and *Lukumi Babalu* to the plaintiff's nominal Equal Protection claim. *Calvary Chapel*, 466 F. Sup. 3d at 1123 (citing Am. Family Ass'n, Inc. v. City & Cty. of San Francisco, 277 F.3d 1114, 1123 (9th Cir. 2002)).

[352] Emp't Div. v. Smith, 494 U.S. 872, 881 (1990) (citing Wisconsin v. Yoder, 406 U.S. 205, 213–15 (1972); Follett v. McCormick, 321 U.S. 573, 574–75 (1944); Murdock v. Pennsylvania, 319 U.S. 105, 110–11 (1943); Cantwell v. Connecticut, 310 U.S. 296, 304–07 (1940); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925)).

[353] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532 (1993).

[354] *Church of Lukumi Babalu Aye*, 508 U.S. at 532 (citing Braunfeld v. Brown, 366 U.S. 599, 607 (1961); Fowler v. Rhode Island, 345 U.S. 67, 69 (1953)).

power to limit religious observances in response to the COVID-19 crisis.

More so than most other categories, the Free Exercise cases often turn on factual nuances. Several of the earliest decisions involve state or municipal orders in Kentucky prohibiting drive-in religious services, in which congregants would remain in their cars in the church's parking lot and listen to the service on the radio. These bans were consistently held to violate the Free Exercise Clause,[355] and other courts ruling against Free Exercise plaintiffs in other states noted that the challenged orders did not prohibit drive-in services.[356] Moreover, many courts interpreted *Smith* to require comparing the burdens placed on religious activity against comparable secular activities;[357] those comparisons created a lack of consistency both because different states' orders characterized activities differently and because judges disagree as to which activities are "comparable" to religious services. For example, in *On Fire Christian Center*, the court found especially significant the fact that liquor stores were deemed "essential" businesses and permitted to remain open, while drive-in church services were prohibited.[358] More broadly, courts that have granted equitable relief often have held that orders imposing more restrictive conditions on religious services than on retail stores,

[355] Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 614 (6th Cir. 2020) (quoting *Cantwell*, 310 U.S. at 303); On Fire Christian Ctr. v. Fischer, 453 F. Supp. 3d 901, 910, 913–14 (W.D. Ky. 2020); Tabernacle Baptist Church v. Beshear, 459 F. Supp. 3d 847, 850 (E.D. Ky. May 8, 2020) (enjoining prohibition of in-person and drive-in services). Note that in *Maryville Baptist Church*, the Kentucky governor denied that the state order at issue applied to drive-in worship services. *Maryville Baptist Church*, 957 F.3d at 613. Nevertheless, the Sixth Circuit, noting that the ordinance applied to "all mass gatherings" including "faith-based events" with no exception for drive-in services, construed it as covering such services and issued an injunction pending appeal against enforcement. *Id.* A week later, in a case brought by three congregants of the Maryville Baptist Church, the Sixth Circuit issued an injunction pending appeal prohibiting enforcement of the same orders against in-person services. *See* Roberts v. Neace, 958 F.3d 409, 411, 416 (6th Cir. 2020).

[356] *See* Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 343, 347 (7th Cir. 2020); Legacy Church v. Kunkel, 455 F. Supp. 3d 1100, 1123, 1165 (D.N.M. 2020); *Cassell*, 458 F. Supp. 3d at 995, 1003; Cross Culture Christian Ctr. v. Newsom, 445 F. Supp. 3d 758, 766 n.2, 772 (E.D. Cal. 2020); Calvary Chapel of Bangor v. Mills, 459 F. Supp. 3d 273, 280, 288 (D. Me. 2020); Bullock v. Carney, 463 F. Supp. 3d 519, 523–24 (D. Del. 2020); Abiding Place Ministries v. Newsom, 465 F. Supp. 3d 1068, 1070–71 (S.D. Cal. 2020); *but see* Soos v. Cuomo, 470 F. Supp. 3d 268, 276, 285 (N.D. N.Y. 2020) (finding the concept of drive-in Masses insufficient because "[c]ongregants are prohibited by the executive orders from leaving their vehicles . . . prevent[ing] congregants from kneeling while receiving Holy Communion, as is commanded by the Catholic religion").

[357] *See Legacy Church*, 455 F. Supp. 3d at 1150–52; *Cassell*, 458 F. Supp. 3d at 995.

[358] *On Fire Christian Ctr.*, 453 F. Supp. 3d at 911 ("[I]f beer is 'essential,' so is Easter.").

offices, or transportation hubs irrationally discriminate against religion and are therefore subject to strict scrutiny;[359] courts denying relief, on the other hand, have often emphasized that such "comparable" secular activities as schools, concerts, movie theaters, and, in one case, casinos are subject to restrictions equal to or greater than those imposed on religious observance, and that the orders have a rational basis.[360]

As of September 2020, the only instances in which the Supreme Court has opined on the substance of constitutional challenges to COVID-19 orders have occurred in three cases challenging state orders limiting attendance at religious services. As these opinions have proved highly influential on lower court decisions, subsection (i) will discuss the Supreme Court's trilogy of Free Exercise opinions, while subsection (ii) will discuss the lower courts' responses.

i. The Supreme Court's Free Exercise Trilogy[361]

[359] *See Maryville Baptist Church*, 957 F.3d at 614–15; *Roberts*, 958 F.3d at 414–16; *On Fire Christian Ctr.*, 453 F. Supp. 3d at 910; First Baptist Church v. Kelly, 455 F. Supp. 3d 1078, 1082–83, 1090, 1092 (D. Kan. 2020); *Tabernacle Baptist Church*, 459 F. Supp. 3d at 847, 855; Berean Baptist Church v. Cooper, 460 F. Supp. 3d 651, 656–57, 662 (E.D.N.C. 2020) (citing *Roberts,* 958 F.3d at 413); *see also Soos,* 470 F. Supp. 3d at 271, 282–83 (granting preliminary injunction where "non-essential" secular businesses, outdoor protests, and graduation ceremonies were treated more favorably than religious services); *cf.* First Pentecostal Church of Holly Springs v. City of Holly Springs, 959 F.3d 669, 670–71 (5th Cir. 2020) (Willett, J., concurring in temporary injunction pending further proceedings before the district court) ("Singling out houses of worship—and *only* houses of worship, it seems—cannot possibly be squared with the First Amendment.").

[360] *See Elim Romanian Pentecostal Church*, 962 F.3d at 346–47; *Legacy Church*, 455 F. Supp. 3d at 1150–52, 1165; *Cassell*, 458 F. Supp. 3d at 995, 1002–03; *Cross Culture Christian Ctr.*, 445 F. Supp. 3d at 770–72; *Calvary Chapel*, 459 F. Supp. 3d at 286–88; Antietam Battlefield KOA v. Hogan, 461 F. Sup. 3d 214, 231 (D. Md. 2020) (quoting *Legacy Church*, 455 F. Supp. 3d at 1160) (retail outlets such as Lowe's and Walmart not "comparable" to religious services because they are "part of the critical infrastructure, according to the U.S. Department of Homeland Security's Cybersecurity and Infrastructure security agency . . . and, unlike religious services, they cannot operate remotely"); High Plains Harvest Church v. Polis, 2020 U.S. Dist. LEXIS 105247, at *4–6 (D. Colo. June 16, 2020).

[361] Like another great trilogy, this one is arguably comprised of four parts. *Cf.* DOUGLAS ADAMS, THE HITCH HIKER'S GUIDE TO THE GALAXY: A TRILOGY IN FOUR PARTS (Picador 2002). In *Danville Christian Academy, Inc. v. Beshear*, the applicants (a private Christian school and the Attorney General of Kentucky) sought to vacate a stay granted by the Sixth Circuit of a preliminary injunction entered by the U.S. District Court for the Eastern District of Kentucky, which would have enjoined the State of Kentucky from enforcing a statewide school closure order against religious schools. Danville Christian Academy, Inc. v. Beshear, 141 S. Ct. 527 (2020). The Court denied the application because the challenged order was due to expire "this week or shortly thereafter, and there is no indication that it will be renewed." *Id.* Justice Alito

In the first case, *South Bay United Pentecostal Church v. Newsom*,[362] the Court denied a petition by the plaintiff church for injunctive relief against enforcement of a California executive order limiting in-person attendance at places of worship to 25% of building capacity or a maximum of 100 attendees.[363] The Court did not issue a majority opinion, but Chief Justice Roberts wrote a solo concurrence, while Justice Kavanaugh wrote a dissent, joined by Justices Thomas and Gorsuch.

Chief Justice Roberts's concurrence, after noting the severity of the COVID-19 crisis and the fact that mandatory injunctions are disfavored,[364] concluded that California's limitations on in-person religious gatherings "appear consistent with the Free Exercise Clause of the First Amendment."[365] His analysis relied principally on the fact that "comparable secular gatherings" including lectures and concerts were subject to "[s]imilar or more severe restrictions," while only "dissimilar activities, such as operating grocery stores, banks, and laundromats" were treated more leniently.[366] Chief Justice Roberts made no reference to *Employment Division v. Smith* or *Lukumi Babalu*, though he did cite *Jacobson* in passing for the proposition that "politically accountable officials of the States" enjoy broad discretion to act in response to public health emergencies,[367] to which the "unelected federal judiciary" should defer.[368]

Justice Kavanaugh's dissent characterized the California regulations as an instance of invidious discrimination against religion. Kavanaugh applied *Lukumi Babalu* to subject the regulations at issue to strict scrutiny, and concluded that California must show a "compelling justification" for the distinction drawn between religious worship services and "the litany of other secular businesses"—the aforementioned grocery stores, banks, and

filed a dissent arguing that the denial of relief was "unfair" because applicants had acted expeditiously. *Id.* at 528 (Alito, J., dissenting). Justice Gorsuch's dissent was more substantive and influenced the Sixth Circuit's analysis in *Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep't*. *Id.* (Gorsuch, J., dissenting); Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep't, No. 20-4300, 2020 WL 7778170 (6th Cir. Jan. 6, 2021). *See infra* notes 416–423 and accompanying text.

362 S. Bay United Pentecostal Church v. Newsom,140 S.Ct. 1613 (2020).

363 *Id.* at 1613–14.

364 *See id.* (quoting Respect Me. PAC v. McKee, 562 U.S. 996, 996 (2010)).

365 *Id.*

366 *Id.*

367 *Id.* (first quoting Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905); then quoting Marshall v. United States, 414 U.S. 417, 427 (1974)).

368 *Id.* (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)).

laundromats, among others—"not subject to an occupancy cap."[369] He would have held that California failed to establish a compelling distinction between church services and those "comparable secular businesses," and that the regulations therefore constituted impermissible "discriminat[ion] against religion."[370]

The Court revisited the issue in *Calvary Chapel Dayton Valley v. Sisolak*, where the Justices denied a motion for an injunction pending appeal in a case presenting a Free Exercise challenge to a Nevada executive order that allowed some secular businesses, notably including casinos, to reopen at 50% capacity while limiting church services to fifty people, regardless of the church's capacity.[371] As in *South Bay*, Chief Justice Roberts and Justices Breyer, Ginsburg, Kagan, and Sotomayor were in the majority, while Justices Alito, Gorsuch, Kavanaugh, and Thomas dissented.[372] Unlike *South Bay*, no member of the majority wrote an opinion, but the dissenters wrote three.[373]

Justice Alito's dissent argued for a limited *Jacobson* supersession approach where the plaintiff alleges infringement of an "enumerated" right. Justice Alito first applied traditional Free Exercise and Free Speech analyses, arguing that the plaintiffs were likely to succeed on appeal on both claims.[374] He then addressed the state's argument that the *Jacobson* test controlled the analysis, stating that "it is a mistake to take language in *Jacobson* as the last word on what the Constitution allows public officials to do during the COVID–19 pandemic."[375] He emphasized that *Jacobson* must be read in the context of "a substantive due process challenge to a local ordinance requiring residents to be vaccinated for small pox."[376] "It is a considerable stretch," he wrote, "to read [*Jacobson*] as establishing the test to be applied when statewide measures of indefinite duration

[369] *Id.* at 1614–15 (Kavanaugh, J., dissenting) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993)).
[370] *Id.* (citing Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n, 479 U.S. 1312 (1986) (Scalia, J., in chambers)).
[371] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2603 (2020); *id.* at 2604 (Alito, J., dissenting).
[372] *See id.* at 2603, 2609.
[373] *See id.* Justice Gorsuch's dissent in *Calvary Chapel Dayton Valley* consists of a single paragraph with little substantive analysis. *See id.* at 2609. We therefore omit it from further discussion.
[374] *Id.* at 2605 (Alito, J., dissenting).
[375] *Id.* at 2608.
[376] *Id.* (footnote omitted).

are challenged under the First Amendment or other provisions not at issue in that case."[377]

Justice Kavanaugh's dissent was a bit more ambiguous but could be read to assert the same limited supersession argument as Justice Alito's. Justice Kavanaugh argued that where the state relies on regulatory classifications that favor some secular businesses over others, the Free Exercise Clause *requires* the state to include religious organizations in the more favored class unless the state provides a "sufficient justification for the differential treatment and disfavoring of religion."[378] Justice Kavanaugh would have held that Nevada's restrictions on religious services failed that test, because the state did not provide sufficient justification for imposing more stringent limitations on religious services than on restaurants, bars, casinos, and gyms.[379] As to the state's argument that *Jacobson* prescribed deference to its judgment amid a public health emergency, Justice Kavanaugh argued that *Jacobson* recognized certain "red lines that a State may not cross even in a crisis," which include "racial discrimination, religious discrimination, and content-based suppression of speech."[380] Justice Kavanaugh did not explain whether these "red lines" are uncrossable because they refer to enumerated rights, to rights that are somehow even more fundamental than other constitutionally protected rights, or for some other reason. Thus, Justice Kavanaugh's dissent could be read to endorse the same limited *Jacobson* supersession approach based on the distinction between enumerated and unenumerated rights that Justice Alito's dissent, which Kavanaugh joined, did. But his opinion is equally consistent with an overlay or even a limited preemption approach that draws "red lines" around certain specially protected rights, however identified.

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[377] *Id.* Justice Alito's view echoes that of others who would draw a distinction between challenges asserting infringement of "unenumerated" substantive due process provisions and those asserting infringement of "enumerated" rights. *See infra* Part IV.A.

[378] *Calvary Chapel Dayton Valley*, 140 S. Ct. at 2613 (Kavanaugh, J., dissenting) (citing Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 884 (1990)). This was the crux of Justice Kavanaugh's disagreement with Chief Justice Roberts's concurrence in *South Bay*. He rejected Chief Justice Roberts's search for "comparable" secular businesses, interpreting the Free Exercise Clause to require that religious organizations receive the most favorable treatment that any secular businesses receive, "[u]nless the State provides a sufficient justification otherwise." *Id.* at 2612.

[379] *Id.* at 2615.

[380] *Id.* at 2614–15.

The final decision in the Supreme Court's Free Exercise trilogy, *Roman Catholic Diocese of Brooklyn v. Cuomo*,[381] marked a change in trajectory from the prior two cases. The opinion addressed Free Exercise challenges by a Catholic diocese as well as an Orthodox synagogue to a New York executive order imposing numeric limits of ten persons at religious services in areas coded "red" (indicating the highest prevalence of COVID-19) and twenty-five persons in areas coded "orange."[382] Notably, fewer or no limits applied to businesses deemed "essential" by the state, which the *per curiam* and concurring opinions pointed out included "acupuncture facilities, camp grounds,"[383] "liquor stores and bike shops."[384] On the other hand, religious services were treated more favorably than such conventionally comparable secular activities as "movie theaters, concert venues, and sporting arenas" which were shut down entirely in orange and red zones.[385]

Unlike its prior decisions in *South Bay* and *Calvary Chapel*, the Court granted a stay pending appeal, holding, in relevant part, that the petitioners had established a likelihood of success on their First Amendment claims and that they would suffer irreparable injury if the stay were not granted.[386] The *per curiam* majority accepted the petitioners' framing of the issue as whether "the regulations treat houses of worship much more harshly than comparable secular facilities,"[387] and held that the plaintiffs were likely to succeed on their Free Exercise claims where the challenged regulations

> are far more restrictive than any COVID–related regulations that have previously come before the Court, much tighter than those adopted by many other jurisdictions hard-hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicants' services.[388]

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381 Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam).

382 *See id.* at 65–66.

383 *Id.* at 66; *see id.* at 69 (Gorsuch, J., concurring).

384 *Id.* at 72 (Gorsuch, J., concurring).

385 *See id.* at 80 (Sotomayor, J., dissenting).

386 *Id.* at 66–69 (citing Winter v. NRDC, Inc. 555 U.S. 7, 24–25 (2008)).

387 *See Roman Catholic Diocese*, 141 S. Ct. 63 at 66.

388 *Id.* at 67. In distinguishing *South Bay* and *Calvary Chapel*, the Court suggested that attendance limits based on building capacity rather than flat caps would more likely pass constitutional review. *See id.* at 67 (maximum attendance "could be tied to the size of the church or synagogue . . . It is hard to believe that admitting more than 10 people to a 1,000–

The Court further held that the petitioners established irreparable injury in part because the attendance caps would prevent many people from attending services, and solutions such as online viewing do not permit an equivalent experience.[389]

The *Roman Catholic Diocese per curiam* decision adopted a *Jacobson* supersession approach, insofar as the Court applied *Lukumi Babalu* with no mention of *Jacobson*.[390] The *per curiam* majority's silence, coupled with the treatment of the case in concurring and dissenting opinions, may suggest that the Justices are reluctant to apply *Jacobson* to COVID-19 litigation. Justice Gorsuch's concurrence included a lengthy and pointed critique of the case. He argued that *Jacobson* "involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction" than the executive order at issue in *Roman Catholic Diocese*.[391] Although the decision predates the Court's recognition of tiers of scrutiny, Justice Gorsuch characterized *Jacobson* as having effectively applied rational basis review in a case that did not involve a fundamental right; "put differently, Jacobson didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so."[392] Justice Gorsuch distinguished between

seat church or 400–seat synagogue would create a more serious health risk than the many other activities that the State allows.")

[389] *Id.* at 67–68.

[390] *See id.* at 66.

[391] *Id.* at 70. (Gorsuch, J., concurring).

[392] *Id.* We think this mischaracterizes the *Jacobson* opinion. Aside from the obvious fact, which Justice Gorsuch acknowledged, that "rational basis scrutiny" did not exist at the time *Jacobson* was decided, the *Jacobson* opinion is replete with language emphasizing the *special deference* to which an exercise of police power to mitigate a public health crisis is due. *Id.*; *See, e.g.,* Jacobson v. Massachusetts, 197 U.S. 11, 28 (1905). The Court stated:

> Smallpox being prevalent and increasing at Cambridge, the court would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case.

Id. Further, the Court held,

> [The state of Massachusetts] was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease.

Id. at 30. Lastly the Court stated,

"textually explicit" rights, like free exercise, and other substantive due process rights "that some [judges] have found hiding in the Constitution's penumbras," arguing that *Jacobson*, if it does permit "emergency restrictions" on the exercise of rights, should be restricted to the latter category.[393] Finally, he argued that the invasion of Reverend Jacobson's bodily autonomy was "avoidable and relatively modest" insofar as the municipal ordinance permitted residents of Cambridge to "accept the vaccine, pay the fine, or identify a basis for exemption."[394] Thus, Justice Gorsuch argued that the states citing *Jacobson* as authority for a deferential approach have mistaken a "modest decision . . . for a towering authority that overshadows the Constitution during a pandemic."[395]

If Justice Gorsuch's antipathy to *Jacobson* is unsurprising, given his concurrence with the *per curiam* majority's *Jacobson* supersession approach, the reluctance on the part of the *Roman Catholic Diocese* dissenters to defend the case is more puzzling. Chief Justice Roberts, who cited *Jacobson* in his *South Bay* concurrence,[396] simply noted that his *South Bay* concurrence cited *Jacobson* only for the "uncontroversial" proposition that "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'"[397] Chief Justice Roberts rejected Justice Gorsuch's "speculat[ion] that there is so much more" to *South Bay*'s reference to *Jacobson* "than meets the eye."[398] Neither of the other dissents, by Justice Breyer and Justice Sotomayor, even mentions the *Jacobson* case. This is especially surprising in the case of Justice Sotomayor's dissent, which argued

> While this court should guard with firmness every right appertaining to life, liberty, or property as secured to the individual by the Supreme Law of the land, it is of the last importance that it should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law. The safety and the health of the people of Massachusetts are, in the first instance, for that commonwealth to guard and protect.

Id. at 38.

[393] *See Roman Catholic Diocese*, 141 S. Ct. at 71. We discuss the enumerated-vs.-unenumerated distinction in Part IV(A). *Infra* notes 481–497 and accompanying text.

[394] *Id.* at 71 (citing *Jacobson*, 197 U.S. at 12, 14).

[395] *Roman Catholic Diocese*, 141 S. Ct. at 71.

[396] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring).

[397] *Roman Catholic Diocese*, 141 S. Ct. at 75–76 (Roberts, C.J., dissenting) (quoting *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring)).

[398] *Id.* at 76 (Roberts, C.J., dissenting).

on the merits of First Amendment doctrine for the constitutionality of the challenged executive order.[399] Indeed, Justice Sotomayor even argued that "Justices of this Court play a deadly game in second guessing the expert judgment of health officials about the environments in which a contagious virus . . . spreads most easily"—a proposition as to which a citation to *Jacobson* would seem naturally to follow.[400] Evidently, no Justice read *Jacobson* as permitting a departure from traditional Free Exercise doctrine; unfortunately, only Justice Gorsuch's opinion articulated a clear view of *Jacobson*'s contemporary relevance.

ii. Lower Courts' Responses to the Free Exercise Trilogy

Although concurring opinions are non-binding and the precedential value even of a *per curiam* decision granting an emergency motion for a stay pending appeal is questionable,[401] the Court's Free Exercise trilogy has been highly influential on lower courts. In the months after *South Bay*, nearly all courts evaluating Free Exercise challenges to COVID-19 restrictions denied relief. *Roman Catholic Diocese* reversed that trend, moving courts to find more restrictions not "generally applicable" and therefore subject to strict scrutiny under *Smith* and *Lukumi Babalu*.

Almost every court to address the issue between *South Bay* and *Roman Catholic Diocese* denied relief on a Free Exercise challenge to a state COVID-19 order, often citing Chief Justice Roberts's concurrence in *South Bay* as persuasive authority.[402] There are only

[399] *Id.* at 78–81 (Sotomayor, J., dissenting).

[400] *Id.* at 79.

[401] In *Barefoot v. Estelle*, the dissent noted that *denial* of an application for a stay pending appeal is a non-precedential decision. Barefoot v. Estelle, 463 U.S. 880, 908 n.5 (1983) (Marshall, J., dissenting). We are not aware of any direct authority on the question whether the *grant* of such an application is precedential, but would note that such decisions are generally made in a matter of days or weeks, often without the benefit of full briefing, oral argument, or a full record on appeal.

[402] Harvest Rock Church, Inc. v. Newsom, 977 F.3d 728, 731 (9th Cir. 2020) (denying injunction pending appeal where "Harvest Rock has not shown that the restrictions at issue in this appeal are materially different than those presented in *South Bay United Pentecostal,* and though we are not bound by it, we are persuaded by the Supreme Court's conclusion that injunctive relief is not warranted."); Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 346 (7th Cir. 2020); Ass'n of Jewish Camp Operators v. Cuomo, 470 F. Supp. 3d 197, 214–15 (N.D.N.Y. 2020) (state order prohibiting the operation of overnight children's camps did not violate Free Exercise Clause as applied to camps operated by Jewish organization; relying primarily on *Jacobson* and *South Bay*); High Plains Harvest Church v. Polis, No. 20-cv-01480-RM-MEH, 2020 U.S. Dist. LEXIS 105247, at *4-5 (D. Colo. June 16, 2020) (denying TRO based on selective

two exceptions to this generalization. The first is the decision of the United States District Court for the Northern District of New York in *Soos v. Cuomo*, which relied heavily on a perceived disparity of treatment between religious services and racial justice protests by Governor Cuomo and Mayor de Blasio.[403] *Soos* acknowledged *South Bay*, but characterized Chief Justice Roberts's concurrence as not having addressed whether the "broad [constitutional] limits" contemplated by *Jacobson* "have been exceeded."[404] The second exception is the decision of the United States District Court for the District of Colorado in *Denver Bible Church v. Azar*.[405] In a decision that seems prescient of *Roman Catholic Diocese*, the court applied a *Jacobson* supersession approach to hold that the numeric caps and face mask requirements on religious services were "not generally applicable," and therefore unconstitutional, because the public health order at issue "creates exemptions for a wide swath of secular institutions deemed 'critical,' including: meat-packing plants, distribution warehouses, P-12 schools, grocery stores, liquor stores, marijuana dispensaries, and firearms stores" that were not applicable to religious institutions.[406]

Like *South Bay* before it, the Court's decision in *Roman Catholic Diocese* quickly influenced lower courts' treatment of Free Exercise claims, moving several courts of appeals to a more expansive view of Free Exercise liberties and perhaps signaling a long-term shift in the *Lukumi Babalu* "neutrality" test. For example, in subsequent proceedings in *Calvary Chapel Dayton Valley v. Sisolak*, the Ninth

enforcement theory; outdoor protests were not "comparable" to religious services and no evidence that the state "permitted or encouraged" the protests); Calvary Chapel Lone Mountain v. Sisolak, 466 F. Supp. 3d 1120, 1123, 1124–25, 1127 (D. Nev. 2020) (denying motion for preliminary injunction and citing *South Bay* as "guid[ing]" the court's Equal Protection analysis); Christian Cathedral v. Pan, No. 20-cv-03554-CRB, 2020 U.S. Dist. LEXIS 101781, at *2, *4 (N.D. Cal. June 10, 2020) (denying TRO where "evidence does not adequately support" the church's allegation of selective enforcement); Abiding Place Ministries v. Newsom, 465 F. Supp. 3d 1068, 1069, 1072 (S.D. Cal. 2020) (denying motion for preliminary injunction as moot; church challenged previous version of stay-at-home orders and its outdoor services were permitted by orders currently in place); Bullock v. Carney, 463 F. Supp. 3d 519, 523–25 (D. Del. 2020) (denying TRO because of lack of irreparable harm; explicitly declined to evaluate merits of First Amendment and Equal Protection claims); *see also* Elkhorn Baptist Church v. Brown, 466 P.3d 30 (Or. 2020) (reversing a preliminary injunction based on the expiration of a statutory time limit for the exercise of emergency powers; citing *Jacobson* and *South Bay*).

[403] Soos v. Cuomo, 470 F. Supp. 3d 268 (N.D.N.Y. 2020).

[404] *Id.* at 279 (citing S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613–14 (2020)).

[405] Denver Bible Church v. Azar, 494 F. Supp. 3d 816, 822–23 (D. Colo. 2020).

[406] *Id.* at 832.

Circuit vacated the district court's decision and entered a preliminary injunction against enforcing more stringent occupancy limits on houses of worship than applied to secular businesses under the executive order then in effect.[407] The court described *Roman Catholic Diocese* as a "seismic shift in Free Exercise law" that "compel[led]" the reversal of the lower court's decision.[408] According to the Ninth Circuit, the preliminary injunction was warranted because "the Directive treats numerous secular activities and entities [including casinos, bowling alleys, retail businesses, and restaurants] significantly better than religious worship services," insofar as such businesses were permitted to operate at 50% of their fire code capacity whereas religious services were limited to fifty persons, regardless of building capacity.[409] Thus, the court held, strict scrutiny applied, and the restriction was not narrowly tailored because it relied on a numeric rather than a capacity cap.[410] The Ninth Circuit acknowledged, but did not respond to, the state's argument that *Jacobson* provides the applicable doctrinal framework.[411]

The Second Circuit applied similar reasoning in further proceedings in the *Roman Catholic Diocese* litigation.[412] The court vacated the district court's decision denying a preliminary injunction to both parties and remanded with instructions to enter an injunction against enforcement of the numeric caps in both the *Roman Catholic Diocese* and *Agudath Israel* cases, and to apply strict scrutiny to Agudath Israel's Free Exercise challenge to the 25% and 33% capacity limits that the executive order imposed in the alternative to numeric limits.[413] In a section addressing the state's reliance on *Jacobson*, the Second Circuit, citing the *per curiam* and concurring opinions in *Roman Catholic Diocese*, held that the district court's, and its own, prior reliance on the decision was "misplaced."[414] Under the Second Circuit's new understanding, the court is to "grant no special

[407] Calvary Chapel Dayton Valley v. Sisolak, 982 F.3d 1228, 1234 (9th Cir. 2020).
[408] *Id.* at 1232 (citing Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63 (2020).
[409] *Id.* at 1233.
[410] *Id.* at 1234.
[411] *Id.* at 1231 (citing Jacobson v. Massachusetts, 197 U.S. 11 (1905).
[412] *See* Agudath Isr. v. Cuomo, 983 F.3d 620, 635–37 (2d. Cir. 2020).
[413] *Id.* at 628–30.
[414] *Id.* at 634–35.

deference to the executive when the exercise of emergency powers infringes on constitutional rights."[415]

The Sixth Circuit's decision in *Monclova Christian Academy v. Toledo-Lucas Cty. Health Dep't* also read *Roman Catholic Diocese* as having effected a fundamental change to Free Exercise law.[416] At issue in that case was a public health resolution closing all schools grades 7-12, including but not limited to private religious schools, as of December 4, 2020.[417] The court granted the plaintiffs' motion for an injunction pending appeal of a decision of the United States District Court for the Northern District of Ohio, which denied plaintiffs' motion for a preliminary injunction against enforcement of the school closings.[418] The Sixth Circuit emphasized that the Free Exercise Clause is violated if the overall structure of COVID-19 restrictions and exemptions discriminates against religious exercise, even if the specific order challenged is "neutral" as to religion.[419] Thus, the court looked not only at the executive order regarding school closure, which applied only to schools, but also considered other COVID-19 orders that left open such secular businesses as "gyms, tanning salons, office buildings, and the Hollywood Casino."[420] The court held that, under *Roman Catholic Diocese*, the question whether secular activities are "comparable" to religious activities is to be determined by reference to the interests the state asserts in regulating the conduct.[421] "Specifically," the court wrote, "comparability depends on whether the secular conduct 'endangers these interests in a similar or greater degree than' the religious conduct does."[422] On that rationale, the court held that the secular activities that remained open were "comparable" to religious services, applied strict scrutiny, and held that the resolution, as applied to private parochial schools, violated the Free Exercise Clause.[423]

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[415] *Id.* at 635.
[416] *See* Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep't, 984 F.3d 477 (6th Cir. 2020).
[417] *Id.* at 479.
[418] *Id.*
[419] *See id.* at 481–82.
[420] *Id.* at 481 ("A myopic focus solely on the provision that regulates religious conduct would thus allow for easy evasion of the Free Exercise guarantee of equal treatment.").
[421] *Id.* at 480.
[422] *Id.* at 482 (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993)).
[423] *Id.*

3. Speech, Assembly, and Petition

The cases presenting free speech, assembly, or petition claims primarily involved challenges to stay-at-home orders by plaintiffs who wished to engage in political protest.[424] The results of these cases have been mixed. In *Givens v. Newsom*, the U.S. District Court for the Eastern District of California denied a TRO to plaintiffs who argued that California's stay-at-home order violated their speech, assembly, and petition rights insofar as they were prevented from obtaining permits to hold "political demonstrations, rallies, protests, and religious services" while the orders were in effect.[425] The court, applying a tight *Jacobson* overlay, held that the executive orders were not a " plain, palpable invasion" of any of the asserted rights.[426] The U.S. District Court for the Southern District of New York reached the same result on a similar claim in *Geller v. de Blasio*.[427]

[424] Other cases evaluating free speech and assembly claims in the commercial context are discussed below. *See infra* Part III(B)(5). In addition to protest cases, many cases asserting speech, assembly, or petition claims involved elections or voter referenda. These cases involved challenges to preexisting requirements relating to elections or referenda as applied in the context of the COVID-19 pandemic. *See* Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020) (per curiam); Democratic Nat'l Comm. v. Bostelmann, No. 20-cv-249, 2020 LEXIS 54269 (W.D. Wis. Mar. 28, 2020), *modified on reconsideration*, 451 F. Supp. 3d 952 (W.D. Wis. Apr. 2, 2020), *stayed in part sub nom.*; Arizonans for Fair Elections v. Hobbs, 454 F. Supp. 3d 910 (D. Ariz. 2020); Esshaki v. Whitmer, 455 F. Supp. 3d 367 (E.D. Mich. 2020), *motion for relief from judgment denied*, 456 F. Supp. 3d 897 (E.D. Mich. 2020), *motion for injunction pending appeal granted in part*, 813 Fed. Appx. 170 (6th Cir. 2020); Garbett v. Herbert, 458 F. Supp. 3d 1328 (D. Utah 2020); Bambenek v. White, No. 3:20-cv-3107, 2020 LEXIS 79798 (C.D. Ill. May 1, 2020); Morgan v. White, No. 20-cv-2189, 2020 LEXIS 86618 (N.D. Ill. May 18, 2020), *aff'd*, 964 F.3d 649 (7th Cir. 2020); Thompson v. DeWine, 461 F. Supp. 3d 712 (S.D. Ohio 2020), *stay pending appeal granted*, 959 F.3d 804 (6th Cir. 2020); Fair Maps Nevada v. Cegavske, 463 F. Supp. 3d 1123 (D. Nev. 2020); Hawkins v. DeWine, No. 2:20-cv-2781, 2020 LEXIS 111037 (S.D. Ohio June 24, 2020); Whitfield v. Thurston, 468 F. Supp. 3d 1064 (E.D. Ark. 2020); Reclaim Idaho v. Little, 469 F. Supp. 3d 988 (D. Idaho 2020); Libertarian Party of Connecticut v. Merrill, 470 F. Supp. 3d 169 (D. Conn. 2020); SawariMedia, LLC v. Whitmer, 963 F.3d 595 (6th Cir. 2020); Kishore v. Whitmer, No. 20-cv-11605, 2020 LEXIS 120737 (E.D. Mich. July 8, 2020); People Not Politicians Oregon v. Clarno, 472 F. Supp. 3d 890 (D. Or. 2020); McCarter v. Brown, No. 6:20-cv-1048, 2020 LEXIS 127325 (D. Or. July 20, 2020). Because these cases presented constitutional challenges to existing legislation (e.g., signature requirements to place a candidate or referendum item on a ballot) as applied in the COVID context, rather than state action adopted specifically in response to the pandemic for the preservation of public health, they are beyond the scope of this Article.

[425] Givens v. Newsom, F. Supp. 3d 1302, 1307–08 (E.D. Cal. 2020).

[426] *Id.* at 1311–12 (quoting Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905).

[427] *See* Geller v. De Blasio, No. 20-cv-3566, 2020 LEXIS 87405, at *1, 12–13 (S.D.N.Y. May 18, 2020).

The plaintiffs in *Ramsek v. Beshear*[428] were more successful.[429] They sought a preliminary injunction permitting public protests on the Kentucky state capitol grounds, arguing that an order by the acting Secretary of the Cabinet for Health and Family Services prohibiting "mass gatherings" violated the plaintiffs' speech, assembly, and petition rights.[430] The U.S. District Court for the Eastern District of Kentucky initially denied the plaintiffs' motion for a preliminary injunction, holding that they lacked standing because there was no "credible threat" that the executive order prohibiting mass gatherings would actually be enforced against them.[431] The Sixth Circuit reversed that ruling, finding standing established.[432] On remand, the district court granted the plaintiffs' motion for a preliminary injunction.[433] The court held that the plaintiffs would likely prevail on their claims because the mass gathering order at issue was not "narrowly-tailored" insofar as Kentucky had permitted such venues as restaurants, office buildings, and auctions to reopen with prophylactic measures such as mask requirements, social distancing, and frequent hand washing in place, but made no provision for the resumption of political protest even with such measures in place.[434]

One of the few cases in which plaintiffs have prevailed against limitations on public gatherings as well as general shutdown and stay-at-home orders was styled primarily as a Free Speech and Assembly challenge. In *County of Butler v. Wolf*, the U.S. District Court for the Western District of Pennsylvania, declining to adopt the Jacobson supersession approach, held that Pennsylvania's limitations on the size of events and gatherings violated the First Amendment's speech and assembly provisions, and that the state's stay-at-home order and the closure of "non-life sustaining" businesses violated substantive due process and, as to the business closures, Equal Protection.[435] Although the court appeared skeptical that Jacobson should displace ordinary constitutional review in any

[428] Ramsek v. Beshear, 468 F. Supp. 3d 904 (E.D. Ky. 2020).
[429] *Id.* at 908.
[430] *See id.* at 907–09.
[431] Ramsek v. Beshear, No. 3.20-cv-00036, 2020 LEXIS 89602, at *2, 22 (E.D. Ky. May 21, 2020).
[432] *See* Ramsek v. Beshear, No. 20-5542, 2020 LEXIS 17203, at *1–2 (6th Cir. May 29, 2020).
[433] *See Ramsek*, 468 F. Supp 3d at 921.
[434] *See id.* at 918–19.
[435] *See* Cnty. of Butler v. Wolf, 486 F. Supp. 3d 883, 907–09, 918 (W.D. Pa. 2020).

circumstance,[436] it heavily emphasized the orders' duration in declining to adopt a deferential standard of review: the "emergency" orders had been in place for six months, and the state defendants had no plan in which the restrictions would be fully lifted in the foreseeable future.[437] Applying intermediate scrutiny, the court found the limits on gathering unconstitutional under the First Amendment where "they place substantially more burdens on gatherings than needed to achieve their own stated purpose."[438] Moreover, the court found the lockdown orders, although suspended at the time, violated the plaintiffs' substantive due process right to intrastate travel as well as the "fundamental right to simply be out and about in public,"[439] and that the shutdown of non-life sustaining business violated the substantive due process right "to earn a living by pursuing one's calling and to support oneself and one's family"[440] as well as the Equal Protection Clause.[441]

4. Second Amendment

A few cases challenged COVID-related orders or practices as violating plaintiffs' Second Amendment rights, again, with mixed results.[442] In *Altman v. County of Santa Clara*, the U.S. District Court for the Northern District of California denied a motion for a preliminary injunction against the defendant counties' shutdown of non-essential businesses as applied to shooting ranges and gun retail outlets.[443] The court held the orders constitutional both under

[436] *See id.* at 896–97.
[437] *See id.* at 899–901
[438] *Id.* at 907.
[439] *Id.* at 918 ("Broad population-wide lockdowns are such a dramatic inversion of the concept of liberty in a free society as to be nearly presumptively unconstitutional unless the government can truly demonstrate that they burden no more liberty than is reasonably necessary to achieve an important government end.") (discussing Lutz v. City of York, 899 F.2d 255, 256–57 (3d Cir. 1990) (recognizing intrastate travel right)).
[440] *Id.* at 926.
[441] *See id.* at 919–28. Both the due process and equal protection violations were largely grounded in the fact that the state's distinction between "life-sustaining" and "non-life-sustaining" businesses was "an arbitrary, *ad hoc*, process that [the defendants] were never able to reduce to a set, objective and measurable definition." *Id.* at 927.
[442] *E.g.*, McDougall v. City of Ventura Cal., No. 20-cv-2927-CBM-AS, 2020 U.S. Dist. LEXIS 77515, at *12, 6 (C.D. Cal. Mar. 30, 2020) (denying TRO to individual gun purchaser challenging business shutdown order); *see also* Brandy v. Villanueva, No. 20-cv-02874-AB, 2020 U.S. Dist. LEXIS 118501, at *23, 56 (C.D. Cal. Apr. 6, 2020) (applying intermediate scrutiny under traditional Second Amendment analysis and denying TRO).
[443] *See* Altman v. Cty. of Santa Clara, 464 F. Supp. 3d 1106, 1111 (N.D. Cal. 2020).

Jacobson and the Ninth Circuit's traditional Second Amendment doctrine.[444] The U.S. District Court for the Northern District of New York followed similar reasoning in *Dark Storm Industries LLC v. Cuomo*,[445] though it adopted a *Jacobson* supersession approach and mentioned *Jacobson* only as an afterthought.[446]

The plaintiffs in *Connecticut Citizens Defense League, Inc. v. Lamont* had more success.[447] They challenged an executive order granting police departments discretion to refuse to take fingerprints of gun license applicants for the duration of the COVID crisis, effectively denying new licenses.[448] The U.S. District Court for the District of Connecticut granted the preliminary injunction in favor of the plaintiffs.[449] Although noting the need for deference to executive judgment during a public health emergency,[450] the court held that the defendants "have not shown that there continues to be a substantial fit between the goal of protecting people from COVID-19 and a suspension of all fingerprinting collection requirements."[451] However, the plaintiffs in *Carter v. Kemp* fared less well on a claim relating to the issuance of gun licenses, albeit a factually distinguishable one.[452] After the state probate court, responsible for issuing the weapon licenses required to carry a loaded handgun in public, declared the issuance of such licenses "non-essential business" to be discontinued for the duration of the COVID-19 pandemic, the plaintiffs challenged application of the Georgia statutory provision requiring a license to carry a loaded handgun in public.[453] The court denied a TRO because, since the license is only required to carry a loaded handgun in public and not for any other purpose, the

[444] *See id.* at 1120 (citing Robinson v. Marshall, 454 F. Supp. 3d 1188, 1198 (M.D. Ala. 2020).
[445] Dark Storm Indus. LLC v. Cuomo, 471 F. Supp 3d 482 (N.D.N.Y. 2020).
[446] *See id.* at 503–04 (citing S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020); Conn. Citizens Def. League v. Lamont, 465 F. Supp 3d 56, 72–73 (D. Conn. 2020); *Altman*, 464 F. Supp 3d at 1111; Jacobson v. Massachusetts, 197 U.S. 11, 27–35 (1905)).
[447] *See Conn. Citizens Def. League Inc.*, 465 F. Supp. 3d at 74–75.
[448] *See id.* at 61.
[449] *Id.* at 74–75
[450] *Id.* at 73 (citing *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613–14) ("[C]ourts owe great deference to the protective measures ordered by government officials in response to the COVID-19 crisis, not simply because the virus has lethal consequences but also because the virus acts in unknown ways that engender uncertainty about what scope of protective measures are warranted.").
[451] *Conn. Citizens Def. League Inc.*, 465 F. Supp. 3d at 73.
[452] *See* Order at 27, Carter v. Kemp, No. 1:20-CV-1517-SCJ (D. Ga. Apr. 20, 2020).
[453] *Id.* at 2–6.

plaintiff's temporary inability to obtain a license did not "gut" her Second Amendment rights.[454]

5. The Right to Travel

Several cases raised claims asserting that COVID orders restricting inter or intrastate travel or requiring quarantine for out-of-state visitors violated constitutional rights to travel.[455] With the exception of *County of Butler*, discussed above,[456] plaintiffs have uniformly failed to obtain injunctive relief on this theory.[457] These courts almost unanimously applied a *Jacobson* overlay approach to hold that the quarantine requirements bore a real and substantial relationship to the state's interest in curbing the COVID-19 pandemic, and that they did not constitute a plain or palpable invasion of any constitutionally protected right.[458]

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[454] *Id.* at 26–27, 33 (quoting GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs, 788 F.3d 1318, 1326 (11th Cir. 2015)).

[455] *See, e.g.*, Page v. Cuomo, 478 F. Supp. 3d 355, 359 (N.D.N.Y. 2020); Carmichael v. Ige, 470 F. Supp. 3d 1133, 1139 (D. Haw. 2020); Bayley's Campground Inc. v. Mills, 463 F. Supp. 3d 22, 24 (D. Me. 2020); Best Supplement Guide, LLC v. Newsom, No. 2:20-cv-00965-JAM-CKD, 2020 U.S. Dist. LEXIS 90608, at *13 (E.D. Cal. May 22, 2020); McGhee v. City of Flagstaff, No. CV-20-08081-PCT-GMS, 2020 U.S. Dist. LEXIS 81369, at *14 (D. Ariz. May 8, 2020); Transcript at 4, 25, Corbett v. Cuomo, No. 20 CV 4864 (LGS) (S.D.N.Y. July 20, 2020) (unpublished oral decision; transcript on file with author). The Supreme Court has noted that "[t]he word 'travel' is not found in the text of the Constitution. Yet the 'constitutional right to travel from one State to another' is firmly embedded in [Supreme Court] jurisprudence." Saenz v. Roe, 526 U.S. 489, 498 (1999) (quoting United States v. Guest, 383 U.S. 745, 757 (1966)). The constitutional right to travel "embraces at least three different components." *Saenz*, 526 U.S. at 500. The Court explains,

> It protects 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.

Id. The existence of a constitutional right to intrastate travel is less clear, and several courts evaluating such claims against COVID orders have been skeptical that such a right exists. *See, e.g.*, Six v. Newsom, 462 F. Supp. 3d 1060, 1069 (C.D. Cal. 2020); *Best Supplement Guide*, 2020 U.S. Dist. LEXIS 90608, at *13–14; Village of Orland Park v. Pritzker, 475 F. Supp. 3d 866, 884 (N.D. Ill. 2020) (citing Hannemann v. S. Door Cnty. Sch. Dist., 673 F.3d 746, 756 (7th Cir. 2012)). *But see* Cnty. of Butler v. Wolf, 486 F. Supp. 3d 883, 917–18 (W.D. Pa. 2020) (holding that state stay-at-home orders violate substantive due process right to intrastate travel).

[456] *See supra* note 436.

[457] *See, e.g.*, Complaint at 1–3, Bailey v. County of Dare, No. 2:20-CV-00020-FL (E.D.N.C. Apr 07, 2020), *case dismissed per stipulation*, No. 2:20-CV-00020-FL (E.D.N.C. July 29, 2020) (raising similar claims but settling via mediation before the court ruled on the plaintiffs' motion for a preliminary injunction.).

[458] *See, e.g.*, *Carmichael*, 470 F. Supp. 3d at 1144–45; *McGhe*e, 2020 U.S. Dist. LEXIS 81369, at *15. *But see Bayley's Campground*, 463 F. Supp. 3d at 32.

6. Miscellaneous Commercial Challenges

Many private business owners, customers, and trade associations brought actions challenging shutdown orders or restrictions imposed on general commercial activity. The theories of these cases varied, but often invoked the Dormant Commerce Clause,[459] the Takings Clause,[460] the Due Process or Equal Protection Clauses,[461] and occasionally claims concerning free speech and assembly,[462] or other

[459] *See, e.g.*, Antietam Battlefield KOA v. Hogan, 461 F. Supp. 3d 214, 240 (D. Md. 2020); League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, 468 F. Supp. 3d 940, 946–47 (W.D. Mich. 2020); PCG-SP Venture I LLC v. Newsom, No. EDCV 20-1138 JGB (KKx), 2020 U.S. Dist. LEXIS 137155, at *2 (C.D. Cal. June 23, 2020) (noting the plaintiff's Dormant Commerce Clause claim among the plaintiff's other claims but not analyzing that claim individually).

[460] *See, e.g.*, Prof. Beauty Fed'n of Cal. v. Newsom, No. 2:20-cv-04275-RGK-AS, 2020 U.S. Dist. LEXIS 102019, at *1 (C.D. Cal. June 8, 2020); Talleywhacker, Inc. v. Cooper, 465 F. Supp. 3d 523, 540 (E.D.N.C. 2020); McCarthy v. Cuomo, No. 20-cv-2124 (ARR), 2020 U.S. Dist. LEXIS 107195, at *7 (E.D.N.Y. June 18, 2020); *PCG-SP Venture I LLC*, 2020 U.S. Dist. LEXIS 137155, at *2; Xponential Fitness v. Ducey, No. CV-20-01310-PHX-DJH, 2020 U.S. Dist. LEXIS 123379, at *14–15 (D. Ariz. July 14, 2020); TJM 64, Inc. v. Harris, 475 F. Supp. 3d 828, 832 (W.D. Tenn. 2020).

[461] *E.g.*, Best Supplement Guide LLC v. Newsom, No. 2:20-cv-00965-JAM-CKD, 2020 U.S. Dist. LEXIS 90608, at *15, 18 (E.D. Cal. May 22, 2020); Hartman v. Acton, No. 2:20-cv-1952, 2020 U.S. Dist. LEXIS 72068, at *19, 30 (S.D. Ohio Apr. 21, 2020); *Prof. Beauty Fed'n of Cal.*, 2020 U.S. Dist. LEXIS 102019, at *19, 21; *Talleywhacker*, 465 F. Supp. 3d at 528; *McCarthy*, 2020 U.S. Dist. LEXIS 107195, at *7; *PCG-SP Venture I*, 2020 U.S. Dist. LEXIS 137155, at *16; *Xponential Fitness*, 2020 U.S. Dist. LEXIS 123379, at *14–15; Slidewaters LLC v. Wash. Dep't of Labor, No. 2:20-CV-0210-TOR, 2020 U.S. Dist. LEXIS 125955, at *8 (E.D. Wash. July 14, 2020); CH Royal Oak, LLC v. Whitmer, 472 F. Supp. 3d 410, 414 (W.D. Mich. 2020); TJM 64, Inc. v. Harris, 475 F. Supp. 3d 828, 83233 (W.D. Tenn. 2020); Vill. of Orland Park v. Pritzker, 475 F. Supp. 3d 866, 877–78 (N.D. Ill. 2020); 4 Aces Enters., LLC v. Edwards, 479 F. Supp. 3d 311, 329–30 (E.D. La. 2020); 910 E. Main LLC v. Edwards, 481 F. Supp. 3d 607 (W.D.. La. 2020); Friends of Danny DeVito v. Wolf, 227 A.3d 872, 892 (Pa. 2020).

[462] In some cases, it was unclear whether the commercial activity at issue constituted protected speech. *Compare Best Supplement Guide*, 2020 U.S. Dist. LEXIS 90608, at *11 (operating a fitness center is not expressive conduct) *with Talleywhacker*, 465 F. Supp. 3d at 541 (quoting City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000)) (holding nude dancing is within the "outer ambit" of protected speech). Others held that content-neutral bans on in-person gatherings did not violate the plaintiffs' speech rights, *McCarthy*, 2020 U.S. Dist. LEXIS 107195, at *11–12 (plaintiffs' assertion that ban on large gatherings, as applied to adult dancing, targeted "alternative lifestyle . . . has no basis in reality"); *CH Royal Oak*, 472 F. Supp. 3d 410 at 417–18 (executive order banning in-person gatherings, as applied to planned Juneteenth film festival, did not violate First Amendment where "nothing in the EO singles out expressive activity or has the effect of singling out expressive activity"), or that the plaintiffs' compelled-speech arguments were implausible. *Antietam Battlefield KOA*, 461 F. Supp. 3d 214 at 237 (quoting Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 66 (2006)) ("[W]hile wearing a face covering might be to several of the plaintiffs a 'sign of capture on the battlefield, and subservience to the captor,' (Compl. ¶ 73), that meaning is not 'overwhelmingly apparent.'"). Some courts found the availability of online venues for speech or assembly to weigh against the plaintiffs' claims. *E.g.*, *Antietam Battlefield KOA*, 461 F. Supp. 3d 214 at 236 ("[T]he order leaves open ample alternative channels for communication, at least in view of the

more exotic theories.[463] Commercial entities enjoyed very little success, nearly always failing to obtain injunctive relief on rational basis review.[464] Regardless of their approach to *Jacobson*, courts were almost always willing to defer to the executive's judgment in matters pertaining to the regulation of commercial activity in response to the pandemic, including complete shutdowns and restrictions or conditions on reopening.[465]

One partial exception to that rule illustrates the point of convergence between *Jacobson* and the traditional rational basis test as applied to economic regulation. In *League of Independent Fitness Facilities & Trainers, Inc. v. Whitmer*,[466] the plaintiffs, including the owners of several fitness facilities in Michigan as well as a trade association, challenged an executive order that kept indoor gyms closed while permitting such venues as "bowling alleys, climbing facilities, night clubs, [and]

COVID-19 context."); SH3 Health Consulting, LLC v. Page, 459 F. Supp. 3d 1212, 1225 (E.D. Mo. May 8, 2020) ("The Orders impinge on Plaintiffs' rights to assemble *in person*, but, thanks to modern technology, Plaintiffs could, among other ways, assemble through a video call or group chat over the internet."); Benner v. Wolf, 461 F. Supp. 3d 154, 166 (M.D. Pa. 2020) (denying TRO where "'alternative avenues' are still available to Pennsylvanians to express themselves" online); *but cf.* Amato v. Elicker, 460 F. Supp. 3d 202, 217–18 (D. Conn. 2020) ("assum[ing]" standing where "[p]laintiffs' . . . alleged inability to meet with friends and like-minded people generally . . . is fairly traceable to Executive Order No. 7N and would be redressable by a favorable ruling on their motion," but finding no likelihood of success on the merits). In the one case in which plaintiffs prevailed, the District Court for the District of Massachusetts enjoined enforcement of an executive order prohibiting the commencement of debt collection actions or making debt collection telephone calls to debtors for the duration of the COVID pandemic. ACA Int'l v. Healey, 457 F. Supp. 3d 17, 33 (D. Mass. May 6, 2020). The court held that the order violated the plaintiff debt collectors' speech and petition rights. *Id.* at 25, 30, 33 (applying tacit *Jacobson* supersession approach).

[463] Among the more exotic theories, the plaintiffs in *Professional Beauty Federation of California* asserted an Eighth Amendment claim against the application of California's stay-at-home orders to cosmetology workers but did not rely on that claim in their motion for a preliminary injunction. *Prof. Beauty Fed'n of Cal.*, 2020 U.S. Dist. LEXIS 102019, at *24. The plaintiff fitness center franchisors in *Xponential Fitness v. Arizona* argued that the state's shutdown order violated the Contract Clause. *Xponential Fitness*, 2020 U.S. Dist. LEXIS 123379, at *14–15. The court rejected that argument, holding that the temporary shutdown of fitness centers likely did not "operate[] as a substantial impairment of a contractual relationship," and even if it did, the shutdown orders were "drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'" *Id.* at *28–29 (quoting Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 (1978); Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411–12 (1983)).

[464] *But see Wolf*, 486 F. Supp. 3d 883 at 927–28 (reversing closure of "non-life-sustaining" businesses on substantive due process and Equal Protection grounds); *see supra* notes 297–300 and accompanying text.

[465] *See, e.g.*, *Antietam Battlefield KOA*, 461 F. Supp. 3d 214 at 242; *Best Supplement Guide*, 2020 U.S. Dist. LEXIS 90608, at *13–14.

[466] League of Indep. Fitness Facilities & Trainers v. Whitmer, 468 F. Supp. 3d 940 (W.D. Mich. 2020).

sports arenas" to reopen with restrictions.[467] The district court, overlaying *Jacobson* atop traditional procedural due process, equal protection, and dormant Commerce Clause analyses, initially granted a preliminary injunction where the state failed to identify "any evidence that shows a rational relation between the continued closure of indoor gyms and the preservation of public health."[468] The court noted that the state's counsel "could not articulate a reason [for the disparity in treatment] beyond the bare assertion that gyms are dangerous[,]"[469] and held that this conclusory assertion failed "the deferential review it is due under *Jacobsen* [*sic*]."[470] The Sixth Circuit quickly granted an emergency stay pending appeal, finding a likelihood of reversal on appeal.[471] The Sixth Circuit agreed that the district court's critique of the state's conclusory arguments at the preliminary injunction hearing was "fair," but held that rational basis scrutiny did not require the governor "to explain that choice [to keep indoor gyms closed] at all, let alone exhaustively."[472] Rational basis review requires only "'rational speculation' that offers 'conceivable' support to the Governor's order."[473] The "idea that heavy breathing and sweating in an enclosed space containing many shared surfaces creates conditions likely to spread the virus" provided "conceivable" support sufficient to rationally justify the disparate treatment, even if "unsupported by evidence or empirical data."[474] Thus, although the Sixth Circuit cited *Jacobson*, its analysis shows that *Jacobson*'s deferential standard adds little to the maximally deferential rational basis standard that traditionally applies to review of economic regulation.[475]

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[467] *Id.* at 944–45 (W.D. Mich. 2020), *stay pending appeal denied,* 2020 U.S. Dist. LEXIS 110880, at *2 (W.D. Mich. June 22, 2020), *stay pending appeal granted*, 814 Fed. Appx. 125, 130 (6th Cir. 2020).

[468] *Id.* at 947, 449–50.

[469] *Id.* at 950.

[470] *Id.* at 951.

[471] League of Indep. Fitness Facilities and Trainers, Inc. v. Whitmer, 814 Fed. Appx. 125, 127 (6th Cir. 2020).

[472] *Id.* at 128 (citing F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313–14 (1993)).

[473] *Id.* (quoting *Beach*, 508 U.S. at 315).

[474] *Id.* (quoting *Beach*, 508 U.S. at 315).

[475] Another case, not strictly commercial, in which plaintiffs prevailed on rational basis review was the decision of the Northern District of New York in *DiMartile v. Cuomo*. *See* DiMartile v. Cuomo, 478 F. Supp. 3d 372, 388 (N.D.N.Y. 2020). There, the plaintiffs, a group of individuals who wished to hold weddings at venues that also operated as restaurants, along with those venues' owners, challenged the state's limitation of wedding groups to no more than fifty people under, as relevant to the court's analysis, the Equal Protection Clause. *See id.* at 377. The plaintiffs argued that the fifty-person limit on weddings was irrational, when the same venues

IV. *JACOBSON* 2.0: A REVISED MODEL OF JUDICIAL REVIEW OF STATE POLICE POWER IN PUBLIC HEALTH EMERGENCIES

Most courts have held that *Jacobson* is relevant, in some way, to the constitutional review of COVID orders,[476] yet as one district court noted, "*Jacobson* has been thoughtfully criticized by legal scholars for lacking in limiting principles characteristic of legal standards."[477] The goal of this Part is to propose such principles and to articulate a framework of constitutional review that preserves *Jacobson*'s insights while constraining its reach. We agree with Professors Wiley and Vladeck that judicial review of state action should not be "suspended" during a pandemic—the potential for unprincipled abuse in the name of public health should courts abandon constitutional oversight altogether is obvious.[478] But we believe that a range of intermediate possibilities exists between "ordinary" judicial review and the "suspension" of civil liberties during a pandemic, and that an intermediate position better serves the interests on both sides.[479] States' legitimate need for expansive authority to take decisive action to protect the public health in moments of genuine crisis is reconcilable with meaningful judicial review and the preservation of constitutional norms. *Jacobson*'s approach to reconciling these compelling needs is, we believe, fundamentally correct. But the *Jacobson* framework stands in need

were permitted to operate as restaurants at 50% capacity. *Id.* The court, granting plaintiffs' motion for a preliminary injunction, agreed. *Id.* at 389. It held that the State's policy of limiting weddings to fifty persons while permitting the same venues to operate at 50% capacity for restaurant dining lacked any rational basis. *Id.* at 388. The court further observed that the State's policy permitting other large gatherings, including outdoor graduation ceremonies of up to 150 people, also undermined the asserted basis of the limitations on wedding size. *Id.*; *but see* Luke's Catering Serv., LLC v. Cuomo, 485 F. Supp. 3d 369, 383 (W.D.N.Y. 2020) (rejecting challenges to New York's limits on gathering sizes brought by several event and banquet centers, distinguishing *DiMartile* on the ground that, *inter alia*, *DiMartile* "involved hybrid facilities that acted as both restaurants and private venues").

[476] *See supra* Part III(A).

[477] Bayley's Campground Inc. v. Mills, 463 F. Supp. 3d 22, 31 (D. Me. 2020).

[478] Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 180 (2020); *see also* Blum & Talib, *supra* note 34 at 281 ("Respect for individuals need not manifest itself in such a way as to compromise the broad need for public health protections, but should be viewed as a core consideration in forging strategies to fight emerging infectious diseases."); *see* Colgrove & Bayer, *supra* note 23, at 575.

[479] *Cf.* Cnty. of Butler v. Wolf, 486 F. Supp. 3d 883, 899 (W.D. Pa. 2020) (holding that "[t]he Court will apply 'regular' constitutional scrutiny to the issues in this case").

of updating, acknowledging the evolution of legal norms during the Twentieth and Twenty-first centuries since *Jacobson* was decided and thoroughly repudiating *Buck v. Bell*'s interpretation of *Jacobson* as permitting eugenic sterilization.[480] At the same time, the core insights of *Jacobson* remain as relevant today as they were in 1905. These insights must be preserved to allow states to effectively curb life-threatening outbreaks, regulating as necessary individual conduct that would be constitutionally protected in normal times.

This Part will offer an updated framework for evaluating constitutional challenges to state actions undertaken to protect public health. Taking the two-part *Jacobson* test articulated by the recent COVID decisions as a foundation,[481] we will suggest modifications to and elaborations upon that approach to better accommodate both states' need for greater latitude for quick and decisive action in public health emergencies against individual and collective interests in the preservation of fundamental liberties and restraints on the arbitrary or abusive exercise of police power. We propose the recognition of a doctrine of *Jacobson* deference, which will function analogously to an affirmative defense insofar as the state bears the burden of raising the issue and demonstrating its factual prerequisites. *Jacobson* deference would apply where the state demonstrates that any official action—be it a legislative act, executive order, agency regulation, or otherwise—is plausibly related to an ongoing public health emergency. *Jacobson* deference is not a complete or partial affirmative defense, however, insofar as it would not necessarily relieve the state of any liability, but, drawing on *Jacobson*'s language that a "plain, palpable" invasion of rights is unconstitutional even during a public health emergency,[482] it would impose a more deferential standard of constitutional review.

A. The Unity of Substantive Due Process

We must address at the outset a point of constitutional ontology that has muddled much of the recent discussion concerning the scope of the *Jacobson* decision. Our model would apply the *Jacobson* 2.0 paradigm to *all* constitutional challenges to state actions undertaken

[480] Buck v. Bell, 274 U.S. 200, 207 (1927) ("The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes." (citing Jacobson v. Massachusetts, 197 U.S. 11, 27–35 (1905); *see, e.g.*, Mariner et al., *supra* note 23 at 586–87.

[481] *See supra* notes 312–314 and accompanying text.

[482] *See supra* notes 287–288 and accompanying text.

against a public health emergency, regardless of the specific constitutional right or rights that the plaintiff claims were violated. This approach is at odds with the increasingly prevalent view that *Jacobson* applies only to "unenumerated" substantive due process claims and does not cover claims grounded in "enumerated" constitutional rights. Several Justices have endorsed this view,[483] as have other courts[484] and scholars.[485] We find the prevalence of this view somewhat perplexing, as there is simply no such thing as an "enumerated" provision of the Bill of Rights applicable against the states.

While the Constitution does explicitly "enumerate" a few constraints directly applicable to the states,[486] no provision of the Bill of Rights is among them.[487] Rather, the rights enumerated in the Bill of Rights have come to apply to the states only through the piecemeal

[483] Criticizing *Jacobson*, Justice Gorsuch's concurring opinion in *Catholic Diocese* argued that "[e]ven if judges may impose emergency restrictions on rights that some of them have found hiding in the Constitution's penumbras, it does not follow that the same fate should befall the textually explicit right to religious exercise." Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S.Ct. 63, 70–71 (2020). Justice Alito endorsed this view in *Calvary Chapel*, and Justice Kavanaugh's opinion in that case could be read to support it. *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2608 (2020) (Alito, J., dissenting); *see id.* at 2609 (Kavanaugh, J., dissenting).

[484] *See* S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938, 942 (9th Cir. 2020) (Collins, J., dissenting) ("*Jacobson* says nothing about what standards would apply to a claim that an emergency measure violates some other, enumerated constitutional right; on the contrary, *Jacobson* explicitly states that other constitutional limitations may continue to constrain government conduct."). The Second Circuit's reasoning in *Phillips v. City of New York* rests on the same distinction. Phillips v. City of New York, 775 F.3d 538, 543 (2d Cir. 2015); *see supra* note 302 and accompanying text. The Seventh Circuit arguably endorsed the same view in Pritzker when it noted, evidently in *dicta*, that "[a]t least at this stage of the pandemic, *Jacobson* takes off the table any general challenge to EO43 based on the Fourteenth Amendment's protection of liberty[,]" but proceeded to analyze the plaintiffs' free speech claims under traditional First Amendment doctrine. *See* Illinois Republican Party v. Pritzker, 973 F.3d 760, 763 (7th Cir. 2020). The district court in *Page v. Cuomo* rejected a similar argument. Page v. Cuomo, 478 F. Supp. 3d 355, 368 (N.D.N.Y. 2020). The plaintiff argued that "a plaintiff who alleges the deprivation of a fundamental right has necessarily satisfied the 'plain, palpable invasion' language of *Jacobson*, which opens the door to the same means–end scrutiny of challenged state action that would ordinarily occur in the absence of a public health crisis." *Id.* The court rejected this "circular exercise" as "a roundabout way of saying that *Jacobson* should be held inapplicable to certain constitutional rights." *Id.* The court noted that "it is the temporary infringement of those core rights that generates the greatest impact on public health during an outbreak of disease." *Id.*

[485] Josh Blackman, *What Rights Are "Essential"? The 1st, 2nd, and 14th Amendments in the Time of Pandemic*, 44 Harv. L. J. Pub. Pol'y 1, 39–54 (2020); *see also* Josh Blackman, *Did Chief Justice Roberts Signal His Harry Blackmun Moment?*, REASON (May 30, 2020), https://reason.com/2020/05/30/did-chief-justice-roberts-signal-his-harry-blackmun-moment.

[486] *See* U.S. CONST., art. I, § 10 (imposing various constraints on state power).

[487] Barron v. Baltimore, 32 U.S. 243, 248–49 (1833).

process of *incorporation* via the Fourteenth Amendment. While courts and scholars may speak loosely, or in shorthand, of a "First Amendment" or "Second Amendment" claim against a state, such claims arise, speaking more precisely, under a substantive aspect of the Fourteenth Amendment's Due Process Clause that happens to coextend with an enumerated provision of the Bill of Rights.[488] For example, the Free Exercise Clause was incorporated against the states in *Cantwell v. Connecticut*, which explicitly applied a substantive due process analysis to conclude that "[t]he fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment[,]" rendering the states "as incompetent as Congress to enact" laws restricting the free exercise of religion.[489] The Court long ago held that the same doctrinal *standards* apply to Bill of Rights provisions incorporated via substantive due process against the states as apply against the federal government directly,[490] but has never held that the rights enumerated under the Bill of Rights apply *directly*, rather than via the intermediary of substantive due process, against the states.[491]

For the most part, the tendency to speak of Bill of Rights provisions as applying directly against the states makes no difference to the application of constitutional doctrine, particularly given the Court's alignment of doctrinal standards in *Malloy*.[492] Where the same standard applies, the distinction between a claim arising under the Free Exercise Clause of the First Amendment and the free exercise aspect of the Fourteenth Amendment's Due Process Clause is academic. But *Jacobson* presents a unique situation: a doctrine developed prior to the mid-century cases incorporating the Bill of Rights that applies to Fourteenth Amendment challenges to a state's exercise of police power during a public health emergency. Here, the distinction is significant. *Jacobson* inquired "whether *any right* given, or secured by the Constitution, is invaded" by the

[488] *See generally* McDonald v. City of Chicago, Ill., 561 U.S. 742, 759–65 (2010) (Alito, J.) (surveying historical evolution of incorporation doctrine).

[489] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[490] Malloy v. Hogan, 378 U.S. 1, 10 (1964); *see also McDonald*, 561 U.S at 765 (2010) (citing *Malloy*, 378 U.S. at 10–11.).

[491] *McDonald*, 561 U.S. at 759–66.

[492] We have used this shorthand ourselves in describing constitutional challenges to COVID-19 orders. *See supra* Part III(B).

Massachusetts ordinance, and concluded that none was.[493] While the Court did not explicitly recognize substantive due process rights mirroring the enumerated provisions of the Bill of Rights as within the scope of *Jacobson*'s purview, it seems a sufficient explanation for this oversight that such rights were not discovered until after *Jacobson* was decided.[494] But given the breadth of *Jacobson*'s inquiry and the Court's conclusion that the Massachusetts ordinance did not violate "any right" protected by the Fourteenth Amendment, it would seem that *Jacobson*'s holding encompasses all aspects of the Due Process Clause, whether co-extensive with an enumerated provision of the Bill of Rights or not. The Supreme Court recognized as much in *Prince v. Massachusetts*, where, citing *Jacobson*, the Court noted that a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds."[495] If the Court believed that *Jacobson* did not apply to incorporated rights, the *Prince* citation would make no sense.

Even setting aside the specious constitutional distinction between "enumerated" and "unenumerated" rights as applied to the states and the Court's express statement that its analysis in *Jacobson* applied to "any right" protected by the Fourteenth Amendment, the distinction makes little sense as a normative matter. A court adopting that distinction would leave traditional, exacting standards of constitutional review in place when a regulation burdens a fundamental right that happens to coincide with a limitation imposed on the federal government via the Bill of Rights, while adopting a more deferential standard of review on equally fundamental "unenumerated" rights. Not only would this double standard complicate efficient review of public health orders, particularly given the tendency of many plaintiffs to assert a smorgasbord of constitutional claims, it is constitutionally arbitrary. Contrary to

[493] Jacobson v. Massachusetts, 197 U.S. 11, 25–26 (1905) (emphasis added). In context, it was clear that the Court was referring to "any right" guaranteed by the Fourteenth Amendment.

[494] The earliest case arguably resembling the modern incorporation doctrine was *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, which effectively incorporated the Takings Clause against the states via the Fourteenth Amendment's Due Process Clause. Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 226 (1897). In *Twining v. New Jersey*, decided three years after *Jacobson*, the Court expressly recognized the possibility that the Fourteenth Amendment incorporated substantive provisions of the Bill of Rights. Twining v. New Jersey, 211 U.S. 78, 99–100 (1908). But incorporation of specific provisions took much longer. For example, the Free Exercise Clause was not deemed incorporated against the states until 1940. *See Cantwell*, 310 U.S. at 303.

[495] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

Justice Gorsuch's suggestion that "the textually explicit right to religious exercise" is to be exalted above other substantive due process rights "found hiding in the Constitution's penumbras,"[496] *all* rights protected by the substantive aspect of the Fourteenth Amendment's Due Process Clause, whether "incorporated" rights or otherwise, are upheld by "principle[s] of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental," and therefore "implicit in the concept of ordered liberty."[497] As there simply *are no* "textually explicit" substantive due process rights applicable against the states, it is arbitrary to suggest that some aspects of substantive due process are entitled to preferential enforcement against the state during a public health emergency due to the coincidence of their mirroring an enumerated provision of the Bill of Rights.

B. The Jacobson 2.0 Model

1. The Existence of a Bona Fide Public Health Emergency to which the State Action Is Plausibly Related

Wiley and Vladeck express concern that "soft applications of constitutional standards of review in times of crisis may create dangerous precedent for future applications of those standards once the crisis has passed."[498] We share that concern, and therefore would require an explicit threshold finding of the existence of a public health emergency as a precondition to the application of *Jacobson* deference.[499]

This is implicit in the *Jacobson* decision itself, which held that courts might invalidate an order that lacks "a real or substantial

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[496] Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70–71 (2020) (Gorsuch, J., concurring).

[497] Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Cardozo, J.) (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); *see also* Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[498] Wiley & Vladeck, *supra* note 35, at 182 n.26.

[499] Wiley and Vladeck further observe that "unless courts are going to rigorously review whether the factual justification for the emergency measure is still present (which would be antithetical to the suspension model), the government can adopt measures that wouldn't be possible during 'normal' times long after the true exigency passed." *Id.* at 187. Our model avoids this problem by treating the *existence* of a public health emergency as a threshold question as to which the state is entitled to no deference.

relation" to the protection of public health.[500] The existence of a public health emergency has already become a threshold test for some courts adjudicating COVID litigation. Before evaluating plaintiffs' constitutional claims, these courts first inquire whether the order at issue is valid in a *prima facie* sense as having a "real or substantial relation" to mitigating the COVID pandemic.[501] While maintaining the requirement of a nexus between state action and public health rationale as a threshold inquiry, our model would modify this inquiry in two ways: first, tightening it by requiring the state to produce evidence of a public health *emergency*; and second, loosening it by requiring that the state articulate only a *plausible* relationship between the order at issue and its public health goals.

i. The Public Health Emergency Requirement

Insofar as *Jacobson* deference constitutes a departure from ordinary constitutional review, it must require a showing of emergency circumstances. Courts need not be especially deferential to routine state action to protect the public health; only when the threat to public health is both particularly acute and the situation demands an immediate response should ordinary constitutional review be modified in favor of the state. Thus, a state asserting entitlement to *Jacobson* deference must first establish, as a threshold matter, the existence of a public health emergency.

What is an "emergency," then, and how must its existence be shown? In the COVID-19 case, the genuineness of the emergency has been sufficiently clear that those courts to consider the issue explicitly have concluded with little discussion that a public health emergency exists, and that combating it is a compelling state interest.[502] In future cases, however, the existence of a *bona fide* public health emergency could be more closely contested. In our view, the most salient features of a public health emergency are the i)

[500] Jacobson v. Massachusetts, 197 U.S 11, 31 (1905) (quoting Mugler v. Kansas, 123 U.S. 623, 661 (1887)).

[501] *See, e.g.*, Carmichael v. Ige, 470 F. Supp. 3d 1133, 1138–39 (D. Haw. 2020); Ass'n of Jewish Camp Operators v. Cuomo, 470 F. Supp. 3d 197, 211–12 (N.D.N.Y. 2020); Prof. Beauty Fed'n of Cal. v. Newsom, No. 20-cv-4275, 2020 U.S. Dist. LEXIS 102019, at *4–6 (C.D. Cal. June 8, 2020); Amato v. Elicker, 460 F. Supp. 3d 202, 212 (D. Conn. 2020).

[502] *See, e.g.*, *Carmichael*, 470 F. Supp. 3d at 1137–38; Antietam Battlefield KOA v. Hogan, 461 F. Supp. 3d 214, 226–28 (D. Md. 2020); SH3 Health Consulting, LLC v. Page, 459 F. Supp. 3d 1212, 1218 (E.D. Mo. 2020); Gish v. Newsom, No. 20-755, 2020 U.S. Dist. LEXIS 74741, at *6 (C.D. Cal. Apr. 23, 2020).

temporary ii) *high risk* of iii) *severe* health consequences requiring an iv) *immediate* response.[503] All of these terms will require some elaboration and development. "Temporary," of course, means limited in time; the point at which a health crisis becomes the "new normal" and ceases to be temporary is to some degree an arbitrary one, but it is clear, for example, that obesity,[504] gun violence,[505] and endemic racism[506] may be public health *crises*, but they are not public health *emergencies* insofar as they are chronic states that persist across years or decades.[507] "High" risk and "severe" harm are likewise vague terms, necessarily calling for development over time and sensitive, to some degree, to variations in context; the severity and magnitude of risk following, say, a bioweapon attack may be evaluated somewhat differently than that of a viral pandemic. As to the necessity of an immediate response, most of the time in which the first three factors are satisfied, this one will likely follow. Nevertheless, to the extent that *Jacobson* deference is premised in part upon the need for quick and decisive action against an extraordinary public health risk, the actual necessity of such action should be explicitly considered.

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[503] The Sixth Circuit surveyed the following dictionary definitions of the term:

> The Oxford English Dictionary defines "emergency" as "a state of things unexpectedly arising, and urgently demanding immediate attention," . . . while Merriam-Webster defines it as "an unforeseen event or condition requiring prompt action . . . ." Similarly, the American Heritage Dictionary defines "emergency" as "[a] serious situation or occurrence that happens unexpectedly and demands immediate attention."

Acuity Ins. Co. v. McDonald's Towing & Rescue, Inc., 747 F. App'x 377, 381 (6th Cir. 2018) (citations omitted).

[504] *See, e.g.*, Agnes Ayton & Ali Ibrahim, *Re: Should Obesity be Recognized as a Disease?, Comment to Should Obesity be Recognized as a Disease?*, THEBMJ (Aug. 7, 2019), https://www.bmj.com/content/366/bmj.l4258/rapid-responses [https://perma.cc/5SJL-GXHK].

[505] *See, e.g.*, Howard Bauchner et al., *Death by Gun Violence—A Public Health Crisis*, 74 JAMA PSYCHIATRY 1195, 1195–96 (2017), https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2657419 [https://perma.cc/BS47-4ER2]; David Hemenway & Matthew Miller, *Public Health Approach to the Prevention of Gun Violence*, 368 N. ENG. J. MED. 2033, 2034 (2013).

[506] *See, e.g.*, Jennifer Jee-Lyn García & Mienah Zulfacar Sharif, *Black Lives Matter: A Commentary on Racism and Public Health*, 105 AM. J. PUB. HEALTH 27, 27 (2015), https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2015.302706 [https://perma.cc/P39A-NESP]; Joe Feagin & Zinobia Bennefield, *Systemic Racism and U.S. Health Care*, 103 SOC. SCI. & MED. 7, 7 (2014).

[507] *Cf.* Cnty. of Butler v. Wolf, 486 F. Supp. 3d 883, 899–900 (W.D. Pa. 2020) (declining to adopt deferential standard of review where, *inter alia*, "the record shows that Defendants view the presence of disease mitigation restrictions upon the citizens of Pennsylvania as a 'new normal' and they have no actual plan to return to a state where all restrictions are lifted").

If these are the factors that the state must establish to invoke *Jacobson* deference, by what standard should the court determine their existence? In considering this question, two principles are in tension: *first*, judicial scrutiny of state claims should be sufficiently rigorous to identify pretextual invocations of emergency; and *second*, courts should avoid judicial second-guessing of public health experts' judgment, either expressed through public health agency directives or incorporated in legislation or executive orders, in matters relating to their expertise.[508] The first principle is simply the impetus for the threshold inquiry. In order to avoid unwarranted abuses of rights and liberties under the guise of a public health emergency, it is necessary that the state bear the burden of establishing the existence of such an emergency, and that this burden carry real weight. The state must offer *reasons*, as opposed to mere *ipse dixit*, supporting its assertion that the factors noted above are present. At the same time, the second principle counsels epistemic humility on the part of the court. Judges are not physicians, epidemiologists, or public health officials. Courts generally have difficulty interpreting and applying scientific evidence to resolve legal disputes, particularly when presented with conflicting accounts by opposing partisan expert witnesses.[509] Moreover, it is widely, though not universally, accepted that legislatures and agencies have greater institutional capacity to investigate and discover facts about complex challenges, including public health emergencies.[510]

We believe that these principles are most effectively balanced by requiring the state, as a condition of *Jacobson* deference, to issue a formal declaration that a public health emergency exists, supported

[508] The Fifth Circuit recognized these principles in *In re Abbott*. *In re* Abbott, 956 F.3d 696, 784–85 (5th Cir. 2020) (citing Jacobson v. Massachusetts, 197 U.S. 11, 28, 30–31 (1905) ("Courts may ask whether the state's emergency measures . . . are pretextual—that is, arbitrary or oppressive[,] . . . [but should] not second-guess the wisdom or efficacy of the measures."); *see also* Somin, *supra* note 35 ("[M]aintaining normal judicial review [of COVID orders] reduces the risk of pretextual policies, and helps ensure that even well-intentioned ones do not overreach.").

[509] James R. Dillon, *Expertise on Trial*, 19 COLUM. SCI. & TECH. L. REV. 247, 250–51 (2018).

[510] *See, e.g.*, Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 578 (1994); Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 5–6 (1986); *but see* Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 223 (2018) ("[C]ourts . . . may be uniquely equipped to focus on the sources of the facts and to resist the motivated reasoning that leads to the proliferation of alternative facts."); Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L. J. 1169, 1178–87 (2001).

by sufficient detail to permit the court to evaluate the legitimacy of the assertion without second-guessing the expert judgment of state public health officers or the experts on which governors and legislatures rely. At a minimum, the declaration should: 1) identify the specific disease(s) or condition(s) giving rise to the emergency; 2) offer some evidence-based evaluation of the potential risk; and 3) articulate clear criteria for declaring the emergency over.[511] Where these criteria are satisfied, the state has established, as a threshold matter, existence of a public health emergency. But this question must be subject to regular revisitation over time as conditions change and new data become available. While recognizing that epidemiological models and medical understanding of a disease or condition's effects will improve over time as more data are collected and more resources committed to study,[512] courts should continuously ask: Have early projections been borne out? Is disease more or less dangerous than initially believed? Do interventions appear to be successful? To what degree do new data revise earlier projections concerning when the emergency will end? The answers to these questions should inform the courts' willingness to recognize an ongoing public health emergency, even after the existence of such an emergency has been initially established.[513]

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[511] Many states already distinguish between a general declaration of emergency and the declaration of a public health emergency. *See, e.g.*, CONN. GEN. STAT. ANN. § 19a-131a (West 2020); NEV. REV. STAT. ANN. § 439.970 (LexisNexis 2020); N.M. STAT. ANN. § 12-10A-5 (West 2021).

[512] *Cf. supra* notes 101–117 and accompanying text (describing how understanding of smallpox led to better treatments and more effective studies).

[513] The district court in *Six v. Newsom*, applying the first step of the traditional *Jacobson* test to hold that California's stay-at-home order had a real and substantial relationship to public health, addressed this issue as follows:

> Plaintiffs' claim that the Stay-at-Home Order is out of touch with "scientific data" because "[a] variety of studies are showing that infection rates and hospitalization rates around the country and in California are much lower than originally predicted" fails to account for the possibility that numbers are lower *because* of the Stay-at-Home Order. Even if that is not the case, that numbers are lower than predicted certainly does not support a conclusion that the Stay-at-Home Order has no real or substantial relation to public health.

Six v. Newsom, 462 F.Supp.3d 1060, 1068-69 (C.D. Cal. 2020). *See also* PCG-SP Venture I LLC v. Newsom, No. EDCV 20-cv-1138 JGB (KKx), 2020 WL 4344631, at *7 (C.D. Cal. June 23, 2020) (rejecting plaintiff's argument that shutdown order lacks rational basis "because Palm Springs[,where plaintiff's hotel is located,] has very few active COVID-19 cases and deaths").

ii. The Plausible Relation Requirement

The second threshold showing necessary to invoke *Jacobson* deference is the demonstration that the challenged measure is *plausibly* related to mitigating the public health emergency. We say "plausibly" advisedly, intending that the threshold showing be somewhat lower than the "real or substantial relation" test that some courts currently apply. Particularly at the onset of a public health emergency, when information concerning the nature of the threat and the effectiveness of various strategies is at its most tentative, a plausibility standard gives the state the necessary latitude for policy experimentation as well as the flexibility to adapt to a rapidly changing knowledge environment.

The plausibility standard we advocate is similar to that which the Supreme Court has deemed applicable to civil pleading under Rule 8(a)(2) of the Federal Rules of Civil Procedure. In *Bell Atlantic Corp. v. Twombly*[514] and *Ashcroft v. Iqbal*,[515] the Court interpreted Rule 8(a)(2) to require that complaints contain factual allegations sufficient to establish a "plausible" claim to relief.[516] *Iqbal* describes a two-step process for the review of pleadings: first, the court must identify legal conclusions, which are not entitled to the presumption of truth at the motion to dismiss stage.[517] Second, the court reviews the "well-pleaded factual allegations" to "determine whether[, taken as true for purposes of a motion to dismiss,] they plausibly give rise to an entitlement to relief."[518] Although a majority of courts have held that the "plausibility" standard does not apply to the pleading of affirmative defenses,[519] we believe it is appropriate in the semi-analogous context of *Jacobson* deference's threshold inquiry. The Second Circuit's decision in *GEOMC Co. v. Calmare Therapeutics*

[514] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).
[515] Ashcroft v. Iqbal, 556 U.S. 662 (2009).
[516] *See Iqbal*, 556 U.S. at 679 (establishing that plausibility standard applies to all civil claims); *Twombly*, 550 U.S. at 555-56 (articulating the plausibility standard).
[517] *Iqbal*, 556 U.S. at 679.
[518] *Id.*
[519] Brian Soucek & Remington B. Lamons, *Heightened Pleading Standards for Defendants: A Case Study of Court-Counting Precedent*, 70 ALA. L. REV. 875, 891 (2018) (reporting that as of 2017, 62% of courts did not apply heightened pleading standard to affirmative defenses); William M. Janssen, *The Odd State of Twiqbal Plausibility in Pleading Affirmative Defenses*, 70 WASH. & LEE L. REV. 1573, 1605–06 (2013) (stating that majority of decision in 2009 and 2010 applied plausibility standard to pleading of affirmative defenses; as of 2011, majority shifted to not applying that standard).

Inc.,[520] holding that the *Twombly/Iqbal* plausibility standard applies to the pleading of affirmative defenses in a "context-specific" manner, illustrates the point.[521] The Second Circuit noted that defendants may have less time to develop the factual foundations of an affirmative defense than plaintiffs have to develop the pleadings in the complaint, and that the facts underlying some affirmative defenses may be unavailable to the defendant until discovery.[522] These concerns do not apply to the threshold *Jacobson* inquiry. Unlike the typical civil defendant in the typical civil case, the state defendant in a constitutional challenge has ample time and resources prior to the commencement of litigation to establish the factual foundations upon which to assert plausibly the existence of a public health emergency[523]—indeed, the *point* of the threshold inquiry is to ensure that the state has established just such a foundation for the challenged action. For the same reason, there can be no concern about the state lacking access to the requisite facts; again, the purpose of the inquiry is to establish that the state can articulate a plausible connection between the challenged policy and its purpose of mitigating the public health emergency. Finally, the plausibility standard should require courts to categorically disregard epistemically unreasonable factual claims, including those that openly rely upon a rejection of scientific inquiry or on pseudoscientific claims.[524]

The modified threshold inquiry described in Part IV(A)(1)-(2) should avoid the need for categorical "red lines" of the sort Justice Kavanaugh advocated in his *Calvary Chapel* dissent,[525] while preventing such misapplications of *Jacobson* deference as Justice Holmes's invocation of the case to affirm the practice of eugenic

[520] GEOMC Co. v. Calmare Therapeutics Inc., 918 F. 3d 92 (2d Cir. 2019).

[521] *Id.* at 98 (citing *Iqbal*, 556 U.S. at 679); *see also Twombly*, 550 U.S. at 557.

[522] *Id.* (citing FED. R. CIV. 12(a)(1)(A)(i), FED. R. CIV. P. 15(a)(1)(B), FED. R. CIV. P. 15(a)(3)).

[523] *See* Timothy Sandefur, *The Timing of Facial Challenges*, 43 AKRON L. REV. 51, 58 (2015) (explaining constitutional challenges are not time barred).

[524] Steiner-Dillon, *supra* note 13, at 224–31 (discussing non-scientific and pseudoscientific epistemic unreasonableness). Such disregard, of course, should be limited at this stage to obvious and overt unreasonableness. Moreover, since the state would bear the burden of proof at the threshold inquiry stage, only epistemically unreasonable claims advanced *by* the state in support of *Jacobson* deference would be at issue here. To the extent that plaintiffs rely on nonscientific or pseudoscientific factual assertions in support of their constitutional claims, the court should, of course, disregard such assertions in applying the balancing test described in Part IV(B).

[525] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2614–615 (2020) (Kavanaugh, J., dissenting).

sterilization in *Buck v. Bell*.[526] Most overt instances of racial or religious discrimination, for example, could not be even plausibly related to combating a public health emergency.[527] And the generalized desire to improve human genetic stock that motivated the eugenics movement, even supposing that the scientific premises of that movement were not long discredited,[528] would not qualify as an acute "emergency" sufficient to invoke *Jacobson* deference to such practices. Courts under *Jacobson* may continue to affirm the state's power to require vaccination for the protection of public health, though such a power does not, notwithstanding Justice Holmes's view to the contrary, "cover cutting the Fallopian tubes."[529]

Of course, the COVID crisis itself has shown that "discrimination," particularly with respect to regulations that encompass religious alongside secular practices, can be a contested term.[530] To the extent that questions arise whether some state action burdening a protected liberty or class constitutes impermissible "discrimination" even in the context of a public health emergency, we prefer to avoid "red lines" in favor of the flexible, evidence-based approach that constitutes the substantive doctrine of *Jacobson* deference. We now turn to describing that doctrine in detail.

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[526] Buck v. Bell, 274 U.S. 200, 207 (1927) ("The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.") (citing Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905)).

[527] To the extent that racial or religious identity *overlaps* with some heightened risk, it is possible that a state could constitutionally adopt policies that disparately impact that group. In October 2020, New York re-imposed a lockdown of certain areas of the city, including areas with predominantly Orthodox Jewish populations, in response to rising rates of COVID-19 infection. *See, e.g.*, Ginia Bellafante, *When Covid Flared Again in Orthodox Jewish New York*, N.Y. TIMES (Oct. 8, 2020), https://www.nytimes.com/2020/10/05/nyregion/orthodox-jewish-nyc-coronavirus.html [https://perma.cc/LY6H-TFKX]. Some have suggested that the targeted lockdowns of predominantly Orthodox Jewish areas constitute religious discrimination. *See, e.g.*, Josh Blackman, *New York Governor Cuomo Announces Jewish Redlining Policy*, REASON (Oct. 6, 2020), https://reason.com/2020/10/06/new-york-governor-cuomo-announces-jewish-redlining-policy [https://perma.cc/HUM3-Q2J3] ("Governor [Cuomo] is drawing up the 21st century equivalent of ghettos for Jews."). While taking no position on this particular controversy, we note that our model would not categorically prohibit state action imposing disparate impacts onto minority populations or suspect classes, where the classification actually overlaps with a heightened risk. At the same time, as discussed below, the model does treat disparate impact on a suspect or quasi-suspect class as a factor weighing against the constitutionality of the order. *See infra* Part IV(B)(2).

[528] *See generally* ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK 205–210, 275 (Penguin Press eds., 2016); *See* EDWIN BLACK, WAR AGAINST THE WEAK: EUGENICS AND AMERICA'S CAMPAIGN TO CREATE A MASTER RACE 411 (Dialog Press eds., 2d ed. 2012).

[529] *Buck*, 274 U.S. at 207 (citing *Jacobson*, 197 U.S. at 25–26).

[530] *See supra* Part III(B)(2).

iii. Jacobson Deference

Once the threshold existence of a public health emergency is established, a constitutional challenge to a state statute, regulation, or other mandate intended to curtail that emergency should be reviewed under a deferential standard, which is to say that federal courts should explicitly recognize states' discretion to take action against public health crises as permitting limitations on liberties, including constitutionally protected liberties, that would be impermissible in normal times.[531] But *Jacobson* deference is not absolute; it is not an abdication of courts' institutional mandate to enforce constitutional limits on state curtailment of protected liberties and, equally importantly in this context, to demand that the state's incursions on protected liberties be justified by a rational evaluation of the available evidence.[532]

We propose that, where the threshold factors are satisfied, federal courts apply a single, flexible balancing test to review the constitutionality of state action undertaken to mitigate a public health emergency. While we are cognizant of the critiques of balancing tests' manipulability and unpredictability,[533] we believe that a flexible balancing test can most effectively express all of the constitutionally relevant values while also providing the court sufficient flexibility to identify and emphasize the weightiest factors

[531] We emphasize that *Jacobson* deference applies only to federal constitutional review of state actions undertaken to combat a public health emergency. It has no application in state courts evaluating the legitimacy of agency or executive actions under the state constitution. For example, state statutes delegating expansive emergency powers to the governor or a public health agency during a declared state of emergency routinely impose temporal and other limitations on such authority. *See, e.g.*, Bailey v. Pritzker, No. 2020-CH-06, filed July 2, 2020 (granting summary judgment to plaintiff on claim that executive orders exceeded governor's powers under the Illinois Emergency Management Agency Act) https://clearinghouse.net/detail.php?id=17570 [https://perma.cc/7SGZ-3CDE]; Elkhorn Baptist Church v. Brown, 466 P.3d 30, 46 (Or. 2020) (28-day time limit on public health emergencies did not apply to Governor's executive orders); *cf.* Wisconsin Legislature v. Palm, 942 N.W.2d 900, 904–05 (shutdown orders issued by Secretary-designee of Department of Health and Human Services exceeded statutory authority). Nothing in *Jacobson*, or in the federal Constitution, preempts such limitations and conditions on emergency powers. Moreover, to the extent that courts continue to read *Jacobson* as applying a deferential federal constitutional review to state action during a public health emergency, state courts' vigilance in ensuring that any such actions comport with state constitutional and statutory limitations seems normatively desirable.

[532] *See, e.g.*, Colgrove & Bayer, *supra* note 23.

[533] *See, e.g.*, James G. Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431, 436 (1985) ("[T]he very discretion inherent in balancing tests makes them unpredictable, malleable, and as their critics have so often said, 'ad hoc.'").

on a case-by-case basis. Moreover, the test is intentionally skewed in favor of the state—only where the factors weigh heavily against the state's justification should the court override the state's judgment as embodied in its exercise of the public health police power. We also believe, for the reasons noted above,[534] that the application of a single, flexible test makes more sense pragmatically and as a matter of constitutional doctrine than would a series of claim-specific tests. Traditional doctrinal analyses would continue to play a role, insofar as our proposed factors would consider the degree to which state action interferes with constitutionally protected liberties—a question that can only be answered by looking to the traditional doctrinal test.

Thus, we propose that a court applying *Jacobson* deference uphold the state action unless the following factors, considered holistically, establish clearly and convincingly that the state has exceeded the scope of legitimate authority in burdening the exercise of constitutionally protected rights or liberties:

1. The danger to the public that the order purports to mitigate;
2. The comparative public risks and benefits of the protected activity;
3. The danger to affected individuals that the order purports to mitigate;
4. The degree to which the order impedes the exercise of a constitutionally protected right;
5. The duration of the order, including the degree to which the duration causes significant impairment to the exercise of the right;
6. Whether the order is targeted at constitutionally protected activity or incidentally includes constitutionally protected activity within a broader mandate; and
7. The degree to which the order or its enforcement creates a disparate impact on suspect or quasi-suspect classes.

The most significant departure that our proposed model makes from traditional approaches is the abandonment of strict scrutiny. Traditionally, where a regulation burdens a fundamental right or a suspect class, it is constitutionally permissible only where the regulation is narrowly tailored to achieve a compelling state interest

[534] *See supra* Part IV(A).

via the least restrictive means available.[535] In our view, the requirement that regulations adopted to advance a compelling state interest do so via the least restrictive means where strict scrutiny applies would unduly restrict the state's capacity to take swift and decisive action against a public health emergency.[536]

Rather than requiring states to adopt the least restrictive means to achieve their compelling interest, our model recognizes the constitutional priorities underlying strict scrutiny while explicitly balancing those priorities against the necessities of combating a public health crisis. Factors three, five, and six consider the degree to which the state regulation impedes constitutionally protected liberties, and those factors weigh more heavily against the constitutionality of a regulation that, because it impedes a fundamental right or burdens a suspect class, would be subject to strict scrutiny under ordinary review.[537] But at the same time, the model imposes no requirement that the means adopted be the least restrictive available, and does not penalize the state for failing to choose the least restrictive means. This is appropriate for two reasons. First, the least restrictive means test would deprive states of necessary flexibility to experiment with policy interventions, especially in the crucial early days and weeks of a public health crisis. Indeed, insofar as scientific knowledge about the threat is rapidly evolving during that time, it may be difficult or impossible for the state to determine what the least restrictive means effective to mitigate the emergency *is*, and courts are ill-equipped to second-guess the state's judgment on that question.[538] Second, the absolute prioritization of fundamental individual rights that the least

[535] *See, e.g.*, Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 451 (2008); *cf.* Denver Bible Church v. Azar, 494 F. Supp. 3d 816, 824 (D. Colo. 2020) (invalidating COVID orders limiting size of religious gatherings as failing the "least restrictive means" test).

[536] The "least restrictive means" test does not apply to other levels of constitutional scrutiny. *Compare* Boos v. Barry, 485 U.S. 312, 321–22, 329 (1988) (least restrictive means analysis applies to content-based restriction on speech via strict scrutiny) *with* Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) (least restrictive means analysis does not apply to content-neutral time, place, or manner regulation).

[537] *See supra* Part IV(B)(2)(iv), (vi)–(vii).

[538] As *Jacobson* cautioned, "[i]t is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease." Jacobson v. Massachusetts, 197 U.S. 11, 30 (1905); *cf.* Ass'n of Jewish Camp Operators v. Cuomo, 470 F. Supp. 3d 197, 216 (N.D.N.Y. 2020) ("From the Court's humble perspective, there appears to be more than one reasonable response to the COVID-19 virus . . . The Court will not substitute its own view of another measure it believes would have been more appropriate under the circumstances.").

restrictive means standard effectively requires is inappropriate to the context of a public health emergency. As *Jacobson* noted, "'[t]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community.'"[539]

iv. Magnitude of the Public Health Threat in General

The protection of public health lies at the heart of the state police power. Thus, the magnitude of the public risk is the most significant factor in evaluating the constitutionality of a state intervention during a public health emergency. This factor weighs in favor of the state in a fairly linear way—as the danger posed by the public health emergency increases, the state is justified in increasingly drastic interventions in response. We leave open the question whether, at the tail end, that linear relationship falters—either in hard constitutional limits (Justice Kavanaugh's "red lines")[540] beyond which the state cannot venture in even the most dire emergency, or in the complete dissipation of constitutional review to avoid "suicide pact" scenarios.[541] Barring moments of existential threat, in the "mine run" of public health emergencies, a roughly linear association between public risk and justification of state action seems a sufficient starting assumption.

Like all factors, courts' evaluation of the public threat must respond dynamically both to changed conditions on the ground (increases or decreases in infection and mortality rates, the present risk of overwhelming hospital capacity, and the like) and in scientific knowledge. Early estimates of a pandemic's danger necessarily become more precise over time; often, due to selection and other effects, estimates of a novel virus's contagion and mortality rates decrease as more data are collected.[542] Thus, an aggressive early response may prove unjustified later, as further data reveal that the

[539] *Jacobson*, 197 U.S. at 26 (quoting Crowley v. Christensen, 137 U. S. 86, 89 (1890)).

[540] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2614 (2020).

[541] Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").

[542] *See* David Baud et al., *Real Estimates of Mortality Following COVID-19 Infection*, 20 LANCET 773, 773 (2020), https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(20)30195-X/fulltext [https://perma.cc/JR96-XZUA].

danger was not as great as initially believed. Of course, dangers not apparent initially may be discovered over time, thus increasing rather than decreasing the degree to which this factor weighs in favor of state intervention.[543] Even aside from new information justifying a more aggressive response, the public danger may increase as the condition spreads. For example, the district court in *PCG-SP Venture I LLC v. Newsom*, after citing the court's earlier decision in *Gish v. Newsom*[544] and Chief Justice Roberts's concurring opinion in *South Bay United Pentecostal Church v. Newsom*,[545] noted that "[t]he reasons for applying *Jacobson*'s relaxed constitutional scrutiny have only become more pressing since *Gish* and *South Bay*.. . . In California, confirmed cases of COVID-19 have risen to unprecedented levels."[546] As the risk to public health increases, judicial deference to state action plausibly related to protecting the public health becomes increasingly justified.

It is likely that in many public health emergencies, the scope of the public risk will be a matter of contestation between the parties. Such has been the case during the COVID pandemic[547] and earlier public health crises.[548] In resolving the question, and thus deciding how much this factor weighs in favor of the state action, the court will encounter familiar difficulties in evaluating contested issues of scientific fact presented by partisan expert witnesses.[549] While the

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[543] For example, COVID-19 was initially understood as primarily a respiratory ailment; subsequent developments have shown that the virus may have extensive, and still to some extent unknown, effects on other organs. *See, e.g.*, W. Wayt Gibbs & Steve Mirsky, *COVID-19: What the Autopsies Reveal*, SCI. U.S. SCI. TALK (Apr. 23, 2020) (podcast episode), https://www.scientificamerican.com/podcast/episode/covid-19-what-the-autopsies-reveal [https://perma.cc/UW5Z-A8VP].

[544] *See* Gish v. Newsom, EDCV 20-755 JGB (KKx), 2020 U.S. Dist. LEXIS 74741 (C.D. Cal. Apr. 2, 2020).

[545] *See* South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (Roberts, J., concurring); *supra* notes 362–368 and accompanying text.

[546] PCG-SP Venture I LLC v. Newsom, EDCV 20-1138 JGB (KKx) 2020 U.S. Dist. LEXIS 137155, at *14 (C.D. Cal. June 23, 2020). The court continued: "In times of great peril, the sovereign has the right — if not the obligation — to protect its people from danger. We live in a time of great peril." *Id.* at *15.

[547] *See, e.g.*, Ron Paul, *Is The 'Second Wave' Another Coronavirus Hoax?*, HIGHLAND COUNTY PRESS (June 16, 2020), https://highlandcountypress.com/Content/Opinions/Opinion/Article/Is-the-second-wave-another-coronavirus-hoax-/4/22/57991 [https://perma.cc/8HP9-PNGN].

[548] *See, e.g.*, Steiner-Dillon, *supra* note 13, at 203–04 (examining nineteenth-century and contemporary instances of antivaccinationist denial of the severity of vaccine-preventable disease).

[549] *See, e.g.*, Dillon, *supra* note 509509, at 272–83 (surveying empirical literature on judicial competence to evaluate scientific evidence); Scott Brewer, *Scientific Expert Testimony and*

evaluation of such evidence will necessarily be context-specific, we offer two observations that should guide courts in this area. First, a court reaching this stage of the analyses will have already concluded that a public health emergency *exists*; thus, plaintiffs' arguments denying the existence of any danger should not be given significant weight at this stage of the analysis, having already been (at least implicitly) rejected when the court decided the threshold issue of the existence of a public health emergency to which the challenged state action is plausibly related in the state's favor. Second, noting that requests for preliminary injunctive relief will be a significant feature in many such cases and that the Federal Rules of Evidence are usually not applied in adjudicating motions for preliminary relief,[550] courts should apply at least some of the factors relevant under FRE 702[551] and the *Daubert* trilogy[552] to evaluate the weight of the parties' scientific evidence at the preliminary stage. Although information sufficient to undertake a full Rule 702 analysis will not be available at the preliminary stage, courts can evaluate the credentials, publication records, participation in relevant research, and potential conflicts of interest of the contending experts at least at a *prima facie* level and weigh those experts' conclusions accordingly. Given the significance of this factor, courts should be encouraged to retain independent experts pursuant to FRE 706[553] to assist them in parsing the parties' disagreements regarding the scope of public danger, to the extent that such assistance is feasibly available within the time frame in which requests for preliminary relief are decided and should certainly consult independent experts before entering a permanent injunction.[554]

v. Comparative Public Risks and Public Benefits of the

Intellectual Due Process, 107 YALE L. J. 1535, 1538–39 (1997); Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1114 (1991).

550 Maggie Wittlin, *Meta-Evidence and Preliminary Injunctions*, 10 U.C. IRVINE L. REV. 1331, 1340–41 (2019).

551 FED. R. EVID. 702.

552 *See, e.g.*, Dillon, *supra* note 509, at 261–63 (discussing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); General Electric Co. v. Joiner, 559 U.S. 136 (1997); Kumho Tire v. Carmichael, 526 U.S. 137 (1999)).

553 FED. R. EVID. 706.

554 *Cf.* James R. Steiner-Dillon, *Epistemic Exceptionalism*, 52 IND. L. REV. 207, 251–53 (2019) (advocating revision of FRE 706 to "nudge" courts to appoint independent experts more routinely).

Regulated Activity

Aside from the general magnitude of the public health risk, some comparative balancing of the risks and public benefits of the regulated activity against permitted or less strictly regulated activities is appropriate. Courts often undertake only one-half of this balancing, comparing only the relative risks of the activities at issue. In many of the Free Exercise cases, for example, courts compared the risks of COVID-19 transmission in religious services with the risks associated with various permitted activities, such as shopping at grocery stores, liquor stores, and bike shops.[555] Some courts accepted the state's rationale that religious services, involving groups of people standing, speaking, and sometimes singing in close proximity for substantial amounts of time, presented greater risks than these secular activities;[556] the Supreme Court, in *Roman Catholic Diocese*, rejected that premise, albeit without examining any evidence of the comparative risks.[557] We think this analysis is only half complete. A comparison of risks without an accompanying comparison of relevant public benefits omits vital information from the court's analysis.

How does one compare the relative public benefit of in-person religious services against the benefit of, say, access to bicycle maintenance? Such a comparison is not easy; Justice Gorsuch failed to acknowledge the vital necessity of bicycles and maintenance services to New Yorkers who rely on bikes as a mode of transportation,[558] but, as Professor Cass Sunstein notes, New York's regulations may well have manifested a "selective sympathy and indifference" to the spiritual benefits of in-person services to many New Yorkers.[559] Some such comparisons may have an inherently subjective element, but some may not. Take a simpler case of access to grocery stores. Professor Josh Blackman characterizes Judge Easterbrook's observation in *Elim Romanian Pentecostal Church v. Pritzker*, that "[f]eeding the body requires teams of people to work

[555] *See, e.g.*, On Fire Christian Ctr. v. Fischer, 453 F. Supp. 3d 901, 911 (W.D. Ky. 2020) (describing shopping in liquor stores and attending drive-in religious services as "equally dangerous").

[556] *See* Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 343–44 (7th Cir. 2020).

[557] *See* Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66–67 (2020).

[558] *See id.* at 69 (Gorsuch, J., dissenting).

[559] Cass R. Sunstein, *Our Anti-Korematsu*, HARV. PUB. L. 1, 5–6 (2020) (unpublished paper) (internal quotation marks omitted), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3756853 [https://perma.cc/W5ET-X5GL].

together in physical spaces, but churches can feed the spirit in other ways" than in-person services[560] as "hubris!"[561] He contends that "[h]ouses of worship have been feeding the spirit long before the ink on our Constitution dried."[562] While acknowledging longstanding authority for the importance of spiritual nourishment,[563] we are unaware of any documented cases of literal starvation following even several weeks of suspended in-person religious services. Whatever significance congregants may attach to regular, in-person observance—significance that may be great indeed—Judge Easterbrook is surely correct that disruption of the national food supply over a period of weeks or months would cause material suffering of an entirely different order. Thus, *even if* the risk of COVID-19 spread at such locations is comparable to that of other activities, it may be necessary to accept that elevated risk as a hedge against other, greater calamities. The public *benefit*—in this case, the avoidance of mass starvation—of a challenged activity can justify, of necessity, a measure of risk that would be unjustifiable in the absence of such benefit.

vi. Risk to Participating Individuals

The degree to which states may legitimately exercise police power to protect individuals from harm to themselves is controversial.[564] In our view, it is appropriate to give some, albeit less, weight to the risk posed to the individual as distinct from the risk to the public. In general, the greater the risk to the individual, the greater the state's justification in exercising its police power to avoid that harm, even to the extent of temporarily curbing individual liberties.

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560 Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 347 (7th Cir. 2020); *see* PCG-SP Venture I LLC v. Newsom, No. EDCV 20-1138 JCB (KKx), 2020 U.S. Dist. LEXIS 137155, at *17–18 (C.D. Cal. June 23, 2020) (finding rational basis for distinction between "essential" retailers and plaintiff's hotel business: "[T]he products sold by those retailers—food, medicine, and other essential goods—are, unlike a room in a hotel, necessary to sustain life").

561 Josh Blackman, *Judge Easterbrook Admits What Was Implicit in Chief Justice Robert's South Bay Decision*, REASON (June 17, 2020, 5:22 PM) (exclamation point in original), https://reason.com/2020/06/17/judge-easterbrook-admits-what-was-implicit-in-chief-justice-roberts-south-bay-decision [https://perma.cc/FC5E-FMNG].

562 *Id.*

563 *See Matthew* 4:4 (King James) ("Man shall not live by bread alone, but by every word that proceedeth out of the mouth of God.").

564 *See, e.g.*, John Kleinig, *Paternalism and Human Dignity*, 11 CRIM. L. & PHIL. 19, 21 (2017); Thomas A. Lambert, *From Gadfly to Nudge:* The *Genesis of Libertarian Paternalism*, 82 MO. L. REV. 623, 623 (2017); R. George Wright, Forward, *Legal Paternalism and the Eclipse of Principle*, 71 U. MIAMI L. REV. 194, 202–03 (2016).

Such legal paternalism seems especially justified in the context of a public health emergency, where the risks to individuals are often not well understood initially,[565] and the epistemic pluralism endemic to American culture[566] makes communicating those risks, particularly in a short time frame, difficult. Nevertheless, in deference to the individual libertarianism that underlies much Bill of Rights jurisprudence, to the extent that the harm to the individual can be segregated from the risk of harm to the broader public, this factor should receive comparatively less weight.

vii. Degree to Which the Order Impedes the Exercise of a Constitutionally Protected Right

While the public danger is the factor weighing most heavily in favor of deference to the state, the degree to which a state order or policy impedes the exercise of a constitutionally protected right is the factor weighing most heavily against it. The relationship here is relatively straightforward: policies affecting protected rights are due less deference than policies not affecting any such right; and policies impeding the *core* of a protected right are due less deference than policies impeding its periphery. To take a couple of examples from First Amendment cases, orders impeding the right to political protest, perhaps especially protest of the shutdown orders themselves, impede the right to speech and assembly more centrally than do orders effecting the shutdown of exotic dance venues.[567] Similarly, a hypothetical order requiring the cessation of all religious services, including online, would affect Free Exercise rights more centrally than the actual forbidding of only in-person services; orders permitting drive-in services affect that right to a lesser degree than an absolute ban on in-person services, but nevertheless constrain

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[565] *See* Anne Schuchat, *Public Health Response to the Initiation and Spread of Pandemic COVID-19 in the United States, February 24–April 21, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 551, 554 (May 8, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6918e2-H.pdf [https://perma.cc/84NC-VRFE].

[566] *See* Steiner-Dillon, *supra* note 13, at 172, 179.

[567] *Compare* Geller v. De Blasio, No. 20cv3566 (DLC), 2020 U.S. Dist. LEXIS 87405, at *7 (S.D.N.Y May 18, 2020) ("'Speech on matters of public concern is at the heart of the First Amendment's protection' and is 'entitled to special protection.'" (quoting Snyder v. Phelps, 562. U.S. 443, 451–52 (2011))), *with* Talleywhacker, Inc. v. Cooper, 465 F. Supp. 3d 523, 541 (E.D.N.C. 2020) (exotic dancing "is entitled to some, albeit limited, protection under the First Amendment") (citing City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000)).

Free Exercise rights to the extent that some forms of religious celebration are difficult or impossible in drive-in services.[568]

Determining whether, and to what degree, an order or policy impedes the exercise of a constitutionally protected right logically requires the court to look to the traditional doctrine defining the contours of that right. Thus, our model overlaps with the *Jacobson* overlay approach insofar as courts must apply the traditional doctrine in order to determine the weight to be accorded this factor. In a case challenging a moratorium on "non-essential" medical procedures as applied to abortion, for example, the court must apply the *Casey* test,[569] as modified by later decisions,[570] to determine whether, and to what degree, the constitutional right to abortion is affected. Likewise, a court evaluating the effect of a commercial shutdown order on Second Amendment rights must look to *Heller* and its progeny to define the scope of such rights.[571] But a finding that a challenged order impedes the exercise of a right, even the core of a right, is not dispositive; it is a factor that must be weighed against the others listed in this Part to determine the validity of the state action. Thus, an order that impedes the core of constitutionally protected right or liberty will, *ceteris paribus*, be more likely found to exceed the state's police power than an order that impedes only the periphery of a right, but the court in all cases must consider the degree to which interference with the constitutionally protected right is justified by the mitigation of risk from the public health emergency.[572]

viii. Duration of the Order

In *County of Butler*, the district court noted that "the ongoing and indefinite nature of Defendants' actions weigh strongly against

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[568] *See* Soos v. Cuomo, 470 F. Supp. 3d 268, 274, 276, 281–82 (N.D.N.Y. 2020); *cf.* Vill. of Orland Park v. Pritzker, 475 F. Supp. 866, 886 (N.D. Ill. 2020) (holding that state order granting more favorable treatment to religious services than restaurants did not violate equal protection in part due to "the fact that practicing a religion is a fundamental right, while dining out is not").

[569] Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[570] *See, e.g.*, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2120 (2020); Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

[571] D.C. v. Heller, 554 U.S. 570 (2008); *see also* McDonald v. City of Chicago, 561 U.S. 742, 744–45 (2010).

[572] Unlike traditional approaches, this model does not require the state to adopt the "least restrictive means" to mitigate such risk. *See infra* Part IV(B)(2).

application of a more deferential level of review."[573] While that court adopted a *Jacobson* supersession approach that gave *no* deference to the State's exercise of police power against a public health crisis,[574] we believe that the duration of the state's order is appropriately considered even under a more deferential approach. The duration, both retrospective and prospective, of the curtailment of liberties and rights under the challenged order is a factor that weighs more heavily against the constitutionality of an ongoing order the longer it has existed and is expected to continue. The relationship of time to scrutiny is not linear; at some point, an ongoing situation ceases to be an "emergency," and the state's efforts to mitigate it cease to be entitled to *Jacobson* deference.[575] The point at which that transition occurs may be context-specific; in any event, we make no attempt to delineate it with precision. But even prior to the point at which a public health crisis becomes the "new normal," the court should consider the duration of the state's intervention and the degree to which it has disrupted the exercise of constitutionally protected rights or liberties.

The weight to be accorded the duration of the state's intervention must, of course, be assessed in context and against the background of the other factors. Even a long-term restriction on liberty, for example, might be upheld during a more dangerous pandemic, whereas courts might overturn even a short-term restriction where the curtailment of a constitutionally protected liberty is significant, and the danger is relatively low. Similar to the court's analysis of the threshold issue, the weight accorded to this factor should increase over time, as the state's burden to justify its ongoing intervention increases and the efficacy of the intervention thus far can be, at least to some extent, empirically evaluated.[576] While the state clearly

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[573] Cnty. of Butler v. Wolf, 486 F. Supp. 3d 883, 899 (W.D. Pa. 2020); *see also* Denver Bible Church v. Azar, 494 F. Supp. 3d 816, 830 (D. Colo. 2020) ("*Jacobson's* emphasis . . . on the need for judicial deference to policymakers' analysis of evolving scientific and medical knowledge helps explain why, as 'emergency' restrictions extend beyond the short-term into weeks and now months, courts may become more stringent in their review."); *cf.* Wiley & Vladeck, *supra* note 35, at 182, 187 (criticizing "the suspension principle" as "inextricably linked with the idea that a crisis is of finite — and brief — duration. . . . Simply put, in the context of a crisis for which mitigation will prolong, rather than shorten, the emergency, suspending more rigorous judicial scrutiny threatens to allow the exception to swallow the rule").

[574] *See Cty of Butler*, 486 F. Supp. 3d at 896–97.

[575] *See supra* Part IV(B)(1).

[576] *See Denver Bible Church*, 494 F. Supp. 3d at 830 ("[A]s time passes, scientific uncertainty may decrease, and officials' ability to tailor their restrictions more carefully will increase.").

needs flexibility to experiment with policy solutions and to adapt to newly developed scientific knowledge, application of this factor should reflect the fact that the state's burden to justify intervention is continuously increasing.

In addition to affecting the court's assessment of the merits of the plaintiff's claim, the duration of the intervention is also relevant to the "irreparable harm" requirement for injunctive relief. Many courts reviewing COVID orders quote the plurality's statement in *Elrod v. Burns*,[577] a political speech case, that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,"[578] to hold that *any* imposition on the exercise of speech or religion constitutes an irreparable harm.[579] *Elrod*'s rigid standard should give way where *Jacobson* deference applies to accommodate the realities of a public health crisis, though courts should recognize that the effect of delay or suspension of liberties may create irreparable injury more quickly in some situations than in others.[580] A few missed or remotely-held

[577] Elrod v. Burns, 427 U.S. 347, 373 (1976).

[578] *Id.* at 373 (irreparable injury where employees of county sheriff's office "were threatened with discharge or had agreed to provide support for the Democratic Party in order to avoid discharge.").

[579] *E.g.*, Ass'n of Jewish Camp Operators v. Cuomo, 470 F. Supp. 3d 197, 227 (N.D.N.Y. 2020) (citing Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality); LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 426 (2d Cir. 1995); Jolly v. Coughlin, 76 F.3d 468, 482 (2d Cir. 1996)); Ramsek v. Beshear, 468 F. Supp. 3d 904, 919 (E.D. Ky. 2020) (citing *Elrod*, 427 U.S. at 373); First Baptist Church v. Kelly, 455 F. Supp. 3d 1078, 1090 (D. Kan. 2020) (citing *Elrod*, 427 U.S. at 373); On Fire Christian Center v. Fischer, 453 F. Supp. 3d 901, 913 (W.D. Ky. 2020) (citing *Elrod*, 427 U.S. at 373); *cf.* Amato v. Elicker, 460 F. Supp. 3d 202, 217 (D. Conn. 2020) ("assum[ing] without deciding that Plaintiffs have shown irreparable harm" while noting " 'tension' in Second Circuit caselaw as to 'whether irreparable harm may be presumed with respect to complaints alleging First Amendment violations.'" (quoting Bronx Household of Faith v. Board of Educ. Of City of New York, 331 F.3d 342, 349 (2d Cir. 2003)). Other courts have applied the doctrine more broadly, replacing "First Amendment" with "constitutional rights." *E.g.*, Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012); *see* Altman v. Cnty. of Santa Clara, 464 F. Supp. 3d 1106, 1133 (N.D. Cal. 2020) (Second Amendment challenge to COVID order) (citing *Melendres*, 695 F.3d at 1002; quoting *Elrod*, 427 U.S. at 373); Xponential Fitness v. Arizona, No. 20-cv-1310, 2020 U.S. Dist. LEXIS 123379, at *31 (D. Ariz. July 14, 2020) (due process, equal protection, and other challenges to COVID order) (citing *Melendres*, 695 F.3d at 1002; quoting *Elrod*, 427 U.S. at 373).

[580] The district court's decision in *Page v. Cuomo* took a more reasonable approach. The court noted that under Second Circuit precedent, "when a plaintiff seeks injunctive relief based on an alleged constitutional deprivation, 'the two prongs of the preliminary injunction threshold merge into one . . . in order to show irreparable injury, plaintiff must show a likelihood of success on the merits,'" and held that because the plaintiff failed to establish a likelihood of success on the merits of her constitutional claims, she likewise failed to establish irreparable harm. Page v. Cuomo, 478 F. Supp. 3d 355, 364, 369 (N.D.N.Y. 2020) (quoting Turley v. Giuliani, 86 F. Supp. 2d 291, 295 (S.D.N.Y. 2000); citing *Jolly*, 76 F.3d at 482)).

religious services do not impair the congregation's ability to resume its regular observance when the emergency has passed—certainly any such injury is less "irreparable" than the injury to a congregant or member of the public who becomes sick and perhaps dies because the virus was spread at an in-person service. On the other hand, as several courts evaluating orders postponing "non-essential" medical procedures noted, a pregnant woman's injury becomes quite literally irreparable if a moratorium on abortion causes her pregnancy to progress beyond the point at which abortion is legally available.[581] Harm, albeit of a different nature and degree, is also irreparable where First Amendment rights of speech and assembly are curbed to prohibit political protests, particularly protests of the COVID orders themselves.[582] Even in the commercial setting, a long-term shutdown risks creating irreparable harm by depleting a business's resources and preventing its eventual reopening.[583] Thus, the duration of the order weighs against the state, and the degree to which the duration imposes irreparable harm on the exercise of certain rights weighs heavily—but courts applying *Jacobson* deference should apply a context-specific analysis that avoids categorical findings of irreparable harm based on inconvenience or genuinely temporary suspension of rights and liberties.

ix. Whether the Order is Targeted at, or Incidentally Includes, a Constitutionally Protected Right

Professor Somin argues that maintaining "normal" constitutional review of COVID-19 orders "can help reduce the risk that the

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[581] *E.g.*, Preterm-Cleveland v. Ohio, 456 F. Supp. 3d 917, 923 (S.D. Ohio 2020); Robinson v. Marshall, 454 F. Supp. 3d 1188, 1205 (M.D. Ala. 2020); South Wind Women's Center LLC v. Stitt, No. 20-cv-277, 2020 U.S. Dist. LEXIS 60020, at *12, 14 (W.D. Okla. Apr. 6, 2020).

[582] Most courts, following *Elrod*, hold that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373; *see, e.g.*, *Ramsek*, 668 F. Supp. at 920. Thus, no court of which we are aware has suggested that the loss of ability to protest the order itself constitutes a uniquely irreparable injury. Nevertheless, while we believe the *Elrod* rule should be relaxed where *Jacobson* deference applies, where the duration of the order would deprive plaintiffs of meaningful opportunity to engage in political protest of the order itself, courts should consider the possibility of a genuinely irreparable harm.

[583] *See, e.g.*, Performance Unlimited, Inc. v. Questar Publishers, Inc., 52 F.3d 1373, 1382 (6th Cir. 1995) (irreparable harm was established where "in the absence of injunctive relief . . . [plaintiff] will be unable to operate its business and the business will suffer economic collapse or insolvency."); *cf.* Hartman v. Acton, 20-cv-1952, 2020 U.S. Dist. LEXIS 72068, at *11 (S.D. Ohio Apr. 21, 2020) (stating irreparable harm not established where plaintiffs provided no evidence "that bankruptcy or permanent closure is imminent").

emergency will be used as a pretext to undermine constitutional rights and weaken constraints on government power even in ways that are not really necessary to address the crisis."[584] We agree that pretextual or excessive measures are a risk under a more deferential standard of review, but we believe that this concern can be addressed while simultaneously granting states additional constitutional latitude under the *Jacobson* 2.0 model. This factor, while subordinate to the question whether the order at issue impedes a constitutionally protected right or liberty at all, requires independent consideration largely as a check against pretextual interference with rights under the guise of public health protection. A public health order that specifically targets a constitutionally protected right or liberty, especially a right or liberty at the "core" of constitutional protection, should require a comparatively higher degree of justification than one that encompasses constitutionally protected rights within a broad-sweeping regulation of conduct. For example, it is appropriate to scrutinize moratoria on non-essential medical procedures as applied to abortions insofar as those orders regulate conduct at the core of a constitutionally protected right,[585] but the court should require a *greater* balance of factors to approve an order specifically imposing a moratorium on abortion alone.

Of course, a moderately sophisticated drafter could prepare legislation or an executive order to avoid facially targeting the exercise of a constitutionally protected right; thus, this factor alone deters only the most blunt attempts to undermine rights via the pretext of public health. But the model taken as a whole—the threshold requirements of the existence of a public health emergency to which the state order is plausibly related, and the other factors considered under *Jacobson* deference—is intended to deter or reveal more subtle pretexts.

x. Disparate Impact on Suspect or Quasi-Suspect Classes

Like the preceding factor, this factor serves as a check against undue incursion of state power into particularly fraught constitutional terrain, though in this case it is intended to address both pretextual and inadvertent disparities created by state orders. To the extent that such orders impose heavier burdens on suspect or

[584] Somin, *supra* note 35; *see also* Wiley & Vladeck, *supra* note 35, at 183.

[585] *See supra* Part III(B)(1).

quasi-suspect classifications, that fact weighs against the constitutionality of the order.[586] This is not a "red line," as disparity of impact may be justified by other factors where, for example, the danger posed to the public is somehow associated with the classification drawn, but this factor is a signal to states to tread carefully in drawing classifications along suspect or quasi-suspect lines, and a reminder to courts to scrutinize such classifications closely.[587]

Some disparity of impact will be apparent on the face of the order itself. An order that by its terms imposes heavier burdens along the lines of race, religion, and gender, for example, will require substantial justification from the other factors. But where the order is facially neutral, proving disparity of impact will, as is the case in employment and equal protection litigation generally,[588] require detailed empirical analysis that may be difficult to obtain at the preliminary relief stage—particularly where, unlike, for example, employment discrimination litigation, lawsuits against public health orders are often filed quickly after the order itself is issued,[589] leaving little time for pre-litigation data analysis. This may be an impediment to obtaining preliminary relief on the ground that the order at issue disparately impacts a protected class, but as with the preceding factor, the entire model is designed to avoid egregious disparities in impact arising from the application of public health orders.

C. *Jacobson* 2.0 and Originalism

In presenting our model, we have intentionally avoided committing ourselves to any particular theory of constitutional interpretation. We believe that the *Jacobson* 2.0 model is compatible with all major theories of constitutional interpretation and we propose it largely on normative grounds as an optimal synthesis of respect for individual rights and liberties, meaningful judicial review, and appropriate

[586] *Cf.* Jew Ho v. Williamson, 103 F. 10, 26 (N.D. Cal. 1900) (pre-*Jacobson* decision holding that quarantining a predominately Chinese region of San Francisco to prevent the spread of the bubonic plague was "unreasonable, unjust, and oppressive" and "discriminating in its character").

[587] *See supra* note 526.

[588] *See, e.g.*, Bradley v. City of Lynn, 443 F. Supp. 2d 145, 167 (D. Mass. 2006) (reviewing "significant statistical evidence" submitted in support of plaintiffs' Title VII claims).

[589] *See In Re* Abbott, 954 F.3d 772, 777 (5th Cir. 2020).

deference to states' efforts to manage a public health emergency. But, particularly in light of several originalist Justices' criticisms of *Jacobson* in recent non-precedential opinions,[590] this section will briefly explain our model's compatibility with the originalist method of interpretation, and particularly with recent originalist scholarship on the scope of the state police power and its relationship to the Fourteenth Amendment.

In brief, the balancing test we propose is consistent with prominent originalist perspectives on the scope of state police power vis-à-vis constitutionally protected rights. While originalists such as Justice Thomas and Randy Barnett would locate the textual basis for the incorporation doctrine in the Privileges and Immunities Clause rather than the substantive aspect of the Due Process Clause, they and other originalists generally agree that the Fourteenth Amendment is properly construed to apply some or all of the provisions of the Bill of Rights against the states.[591]

Given that agreement, the originalist must consider the original understanding of the scope of the state police power and its relationship to Fourteenth Amendment rights—an inquiry complicated by the fact that, before the Fourteenth Amendment was enacted, no theory of state police power was necessary because the limits of each state's legislative authority were almost entirely matters of state constitutional law.[592] Randy Barnett, who has written most extensively on the topic, argues that the Constitution's original public meaning contains a "presumption of liberty" pursuant to which "[t]he exercise of liberty by the citizen should not be restricted unless the state can show, to the satisfaction of an independent tribunal of justice, that such a restriction is both necessary and proper," a task made more difficult by the fact that,

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[590] *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2608 (Alito, J., dissenting).

[591] *See* McDonald v. City of Chicago, 561 U.S. 742, 805–06 (2010) (Thomas, J., concurring); Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment The Original Meaning of "Privileges or Immunities"*, 95 NOTRE DAME L. REV. 499 (2019); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 323 (rev'd ed. 2014); *see also McDonald*, 561 U.S. at 805–06 (Scalia, J., concurring); Michael W. McConnell, *No More (Old) Symbol Cases*, 2019 CATO SUP. CT. REV. 91, 116; Alan Gura et al., *The Tell-Tale Privileges or Immunities Clause*, 2010 CATO SUP. CT. REV. 163, 166–67 (2010).

[592] *Cf.* BARNETT, *supra* note 591, at 330-31 ("Because the original meaning of the Fourteenth Amendment makes it necessary to distinguish legitimate from illegitimate exercises of state power, it requires the construction of some such doctrine as the police power of the states.").

unlike that of Congress, the scope of state legislatures' power is unenumerated.[593] Barnett endorses the *Lockean* conception of state police power articulated by Thomas Cooley, among others, as a method by which to demarcate the legitimate scope of state regulatory authority from illegitimate invasions of individual rights protected by the Fourteenth Amendment.[594]

Under Barnett's *Lockean* conception, the police power is comprised of states' authority "to *regulate rightful* and *prohibit wrongful* acts."[595] "Rightful" acts include the exercise of natural rights, which "define the boundary or space within which people are at liberty to do as they please provided their actions do not interfere with the rightful actions of others operating within their own boundaries or spaces."[596] According to Barnett, the legitimate scope of the police power in its regulatory capacity and the natural rights protected by the Fourteenth Amendment are non-overlapping—a legitimate exercise of the police power is *necessarily* constitutional under the Fourteenth Amendment.[597] Notably, the legitimate exercise of the police power includes the reasonable regulation of private rights for the public good, including the protection of public health and safety.[598] Barnett notes that during the Reconstruction and Progressive eras, courts, applying this *Lockean* conception of the legitimate scope of the police power, "examined whether a particular law benefited every person in the community as a whole or whether it instead was implemented for the benefit of a majority or minority faction (what today would be called a 'special interest' group)."[599]

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[593] BARNETT, *supra* note 591, at 323-24; *see also* Barnett, *supra* note 59, at 492 ("The original meaning of the Fourteenth Amendment stands as a barrier by which those against whom the police power is used can seek to defend themselves in Congress and in the courts. So too does the original conception of the police power that evolved alongside the amendment.").

[594] *See* BARNETT, *supra* note 591, at 324–28; *see also* Barnett, *supra* note 59, at 479–80.

[595] *See* Barnett, *supra* note 59, at 483.

[596] *Id.* at 484 (noting that "proper police power regulations specify the manner in which persons may exercise their liberties so as to prevent them from accidentally interfering with the rights of others").

[597] *See id.* at 430.

[598] *See* BARNETT, *supra* note 591, at 333–34; *see also* Barnett, *supra* note 59, at 455 ("[T]he protection and facilitation of everyone's retained rights in civil society is the purpose of any 'police' regulation by law, and this object or end is the measure of whether a particular regulation is or is not reasonable.").

[599] BARNETT, *supra* note 591, at 334; *see also id.* (quoting Howard Gillman's explanation that under the jurisprudence of this era, "laws that singled out specific groups or classes for special treatment would withstand constitutional scrutiny only if they could be justified as really related to the welfare of the community as a whole . . . and were not seen as corrupt attempts to use the powers of government to advance purely 'private' interests.") (quoting HOWARD

The *Jacobson* 2.0 model can be understood by originalists as an attempt to give content to the "reasonableness" standard in the context of a public health emergency. Both conceptually and historically, the protection of public health is indisputably a public good, and thus a legitimate purpose for the exercise of state regulatory authority under the *Lockean* conception.[600] The mitigation of public health risk benefits every person in the community to a similar, if not exactly identical, degree, and warrants the regulation of individual liberties to a greater degree than would be justified in the absence of a public health emergency. Hence, the threshold question of the 2-step *Jacobson* 2.0 analysis would place the burden on the state to show the existence of a genuine public health emergency and a plausible relationship of the challenged restriction of liberty to the goal of mitigating that risk. Such measures were routinely upheld as constitutional during the pre-New Deal era in which Barnett argues that constitutional jurisprudence reflected the original public understanding of the police power.[601] Parmet, for example, notes that public health measures constituted an exception to the *Lochner*-era Court's general antipathy to social regulation, as they "clearly" fit within the scope of the state's police power and thus did not offend the Fourteenth Amendment.[602] The second step of the *Jacobson* 2.0 analysis, though not motivated by Barnett's "presumption of liberty," is quite compatible with it insofar as the balancing test we propose strives to

GILLMAN, THE CONSTITUTION BESIEGED: THE RISE & DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 49–50 (1995)); Barnett, *supra* note 59, at 487.

600 *See* Wendy E. Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 HASTINGS CONST. L. Q. 267, 312 (1993) ("Despite the disagreement and uncertainty over the actual meaning of 'the common good' [during the founding era,] it seems likely that the preservation of public health, as exemplified by protection against epidemics, was one meaning that all would share."); *see also, e.g.*, Haverty v. Bass, 66 Me. 71, 74 (1876) (affirming municipality's constitutional authority to isolate infected individuals; observing that "[t]he maxim *salus populi suprema lex* is the law of all courts and countries").

601 *See* BARNETT, *supra* note 591, at 332.

602 Wendy E. Parmet, *Legal Rights and Communicable Disease: AIDS, the Police Power, and Individual Liberty*, 14 J. HEALTH POL'Y, POL. & L. 741, 744 (1989) (citing DAN BEAUCHAMP, THE HEALTH OF THE REPUBLIC: EPIDEMICS, MEDICINE, AND MORALISM AS CHALLENGES TO DEMOCRACY (1988)). *Jacobson* itself, decided the same year as *Lochner* but affirming a broad conception of the state police power in the area of public health as opposed to *Lochner*'s more constrained conception of state regulatory power in the conditions of employment, is a prime example of this tendency. Eighty-one years earlier, in *Gibbons v. Ogden*, Chief Justice Marshall extensively discussed quarantine laws as a quintessential example of an authority retained by the states, notwithstanding such laws' effects on interstate commerce. Gibbons v. Ogden, 22 U.S. 1, 203–06 (1824).

maintain the maximum degree of individual liberty compatible with the state's need to regulate otherwise permissible conduct during a public health emergency. Although we don't present the factors to be weighed in the second step as defining a distinction between "special interest" and "general interest" legislation as nineteenth century courts did,[603] an originalist could conceive of those factors as striving to ensure that the regulation at issue emphasizes the general welfare over private economic or cultural interests. And the originalist could view the factors as an effort to minimize state incursion on the natural rights that Barnett argues were reserved to the people by the Ninth Amendment in the context of a public health emergency, where the police power to protect public health and safety necessarily permits regulation of rights and liberties to a greater degree than in normal times.[604]

V. CONCLUSION

Cass Sunstein has called the *Roman Catholic Diocese* opinion the Court's "anti-*Korematsu*."[605] We doubt that a *per curiam* opinion on an emergency motion for a stay pending appeal, briefed and decided within two weeks, can fairly be compared to a full decision on the merits, but setting that issue aside, Sunstein's characterization may be accurate in the sense he intends—a case in which the Court refused to grant *any* deference to executive judgment in a national emergency. But while *Korematsu* vividly illustrated the dangers inherent in complete judicial abdication of constitutional review,[606] it does not follow that the solution to the *Korematsu* problem is a complete *lack* of judicial deference to executive judgment, exercised in good faith and grounded in competent expert advice, in moments of crisis. Justice Gorsuch is surely correct that the Constitution "cannot [take] a sabbatical" during national emergencies,[607] but the question of how meaningful constitutional review is to be balanced

603 *See* Barnett, *supra* note 59, at 488 (citing GILLMAN, *supra* note 599, at 49–50).
604 *See id.* at 442–48.
605 Sunstein, *supra* note 559.
606 Korematsu v. United States, 323 U.S. 214, 216–18 (1944), *expressly overruled* by Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018); *Korematsu*, 323 U.S. at 242–48 (Jackson, J., dissenting); *see also* Wiley & Vladeck, *supra* note 35, at 182 and n.26.
607 Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring).

against the legitimate need to curb constitutional liberties in the face of a genuine emergency can't be reduced to pithy slogans.

We agree with Professors Wiley, Vladeck, and Somin that meaningful judicial review is essential "even in extraordinary circumstances" both "for the protection of civil liberties" as well as to "promote more transparent governance and clearer communication of the government's rationale and the details of how its orders operate."[608] But we reject the presumption asserted in much of the academic commentary that the COVID-19 litigation presents a stark choice between "ordinary" judicial review that gives no accommodation to the dire circumstances of a pandemic, within which states must make life-or-death choices in the face of significant scientific uncertainty, and a full "suspension" of civil liberties during a public health crisis. We believe that the legitimate interests on both sides can be accommodated and that the *Jacobson* decision, though surely in need of a *Casey*-like reaffirmation and clarification, was fundamentally correct in its balancing of these interests.

In this Article, we have offered a model by which the *Jacobson* precedent should be updated to offer a new doctrinal framework for judicial review of state police power during a public health emergency. We believe that the *Jacobson* 2.0 model preserves *Jacobson*'s insight that extraordinary public health crises call for extraordinary, and temporary, latitude in the exercise of state police power for the protection of public health. At the same time, our model preserves a meaningful, indeed essential, role for the exercise of judicial oversight. The requirement that states establish the ongoing existence of a public health emergency to which a challenged intervention is plausibly related will ensure that judicial review will continue to compel the state to articulate evidence-based rationales for its policies. At the same time, once that threshold question is resolved in the state's favor, the balancing test we prescribe as the second step of the analysis will grant the state broad, but by no means limitless, latitude to adopt policies calculated to protect the public by mitigating the risk. The COVID-19 crisis will eventually abate; we hope that our proposed reforms will enable the federal courts to more effectively balance the competing interests at stake the next time a public health crisis arises.

[608] Wiley & Vladeck, *supra* note 35, at 197; *see also* Somin, *supra* note 35.