

The Long Shadow of *Jacobson v. Massachusetts*: Public Health, Fundamental Rights, and the Courts

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I. INTRODUCTION

The COVID-19 pandemic struck the United States in early 2020.¹ The coronavirus prompted public health mandates without precedent for at least a century.² Some states almost entirely locked down.³ These measures

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1. *Cases in the U.S.*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> [<https://perma.cc/3W4M-ZS9N>].

2. See, e.g., *Quarantine and Isolation: History of Quarantine*, CENTERS FOR DISEASE CONTROL & PREVENTION (2020), <https://www.cdc.gov/quarantine/historyquarantine.html> [<https://perma.cc/FE65-YFE6>].

3. See, e.g., Cal. Exec. Order No. N-33-20 (Mar. 4, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH->

inevitably impinged on activities that the Constitution would normally protect. In confronting these cases, many courts have turned to a 1905 Supreme Court case decision, *Jacobson v. Massachusetts*,⁴ often considered the leading case in public health law.⁵ There is little agreement, however, about how that decision fits into the current framework of constitutional law. As a result, courts have differed widely in the degree of deference they give public health authorities.⁶

This Article attempts to bring light to bear on this dispute. It begins by placing *Jacobson* in historical context and exploring how later Supreme Court cases make use of it. History undermines the argument for giving *Jacobson* talismanic significance in public health emergencies. The Article then examines how courts have applied *Jacobson* in abortion and religious freedom cases during the current pandemic. Some courts view *Jacobson* as virtually a blank check for government actions;⁷ others apply standard constitutional doctrines with little heed of the emergency.⁸

Finally, the Article attempts to provide some guidance about how courts should approach judicial review during the emergency.⁹ The best analogy seems to be found in national security cases dealing with free speech.¹⁰

ORDER.pdf [https://perma.cc/Z72L]; see also N.Y. Exec. Order No. 202 (Mar. 7, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.pdf [https://perma.cc/2626-ENLJ].

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

5. See Lawrence O. Gostin, *Jacobson v Massachusetts at 100 Years: Police Power and Civil Liberties in Tension*, 95 AM. J. PUB. HEALTH 576, 576 (2005) (*Jacobson* is “often regarded as the most important judicial decision in public health.”).

6. See *infra* Part III.

7. See, e.g., *In re Abbott (Abbott IV)*, 956 F.3d 696, 703 (5th Cir. 2020).

8. See, e.g., *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020).

9. This Article focuses on how courts should approach cases involving rights that normally receive heightened scrutiny. It does not address issues of public health law involving other kinds of personal liberty, such as personal mobility, which is limited during quarantines, and bodily integrity, which is limited by vaccination mandates. Gostin argues that courts have used *Jacobson* as the basis for a balancing test in those cases that in practice favors the government. Gostin, *supra* note 5, at 580.

10. There is a vigorous debate on the general subject of executive powers during emergencies. See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 4–5, 47–48 (2007) (arguing for virtually unrestricted executive power with little or no judicial or legislative oversight); Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt’s Theory of Emergency Powers and the “Norm-Exception” Dichotomy*, 21 CARDOZO L. REV. 1825, 1826 (2000) (critiquing a philosopher advocating authoritarian rule); Saikrishna B. Prakash & Michael D. Ramsey, *The Goldilocks Executive*, 90 TEX. L. REV. 973, 973–74 (2012) (critiquing Posner & Vermeule). Experience under the coronavirus indicates that courts have given state executives wide leeway but have not abdicated their role. See, e.g., *In re Rutledge*, 956 F.3d 1018, 1032 (8th Cir. 2020). Courts have also stressed the short-term nature of restrictions. See *infra* Part III. For a comparative international survey, concluding that non-executive institutions have played an important role during the pandemic, see Tom Ginsburg & Mila Versteeg, *The Bound*

Like outbreaks of dangerous diseases, national security threats pose the need for decisive government precautions, often in the face of great uncertainty.¹¹ The courts do not abandon normal constitutional tests in national security cases.¹² In applying those tests, however, they give substantial deference to the judgment of the responsible government officials.¹³ A similar approach should govern in public health emergencies.

II. THE CASE AND ITS EVOLVING INTERPRETATION

Jacobson needs to be understood in the context of constitutional development since the late nineteenth century. The case was decided in an era when the Supreme Court carefully scrutinized all government regulation to determine its reasonableness.¹⁴ Often, the Court found that regulation was unwarranted.¹⁵ In the case that became emblematic of this era, *Lochner v. New York*, the Court struck down a New York law limiting bakers to a sixty-hour work week.¹⁶ The Court concluded that the law unreasonably interfered with the freedom of bakery employees to work longer hours.¹⁷ The *Lochner* era reached its peak in the early 1930s as part of an effort to block New Deal legislation.¹⁸

Executive: Emergency Powers During the Pandemic (Va. Pub. Law & Legal Theory Research Paper No. 2020-52, Univ. of Chi. Pub. Law Working Paper No. 7472020, 2020), <https://ssrn.com/abstract=3608974> [<https://perma.cc/V27R-4NYH>]. For a survey of state laws governing use of executive power in emergencies, see Benjamin Dela Rocco et al., *State Emergency Authorities to Address COVID-19*, LAWFARE (May 4, 2020, 3:03 PM), <https://www.lawfareblog.com/state-emergency-authorities-address-covid-19> [<https://perma.cc/V66Q-U5FC>].

11. See POSNER & VERMEULE, *supra* note 10, at 4.

12. See Prakash & Ramsey, *supra* note 10, at 973–74.

13. *Id.* This approach also finds support in *Home Building & Loan Association v. Blaisdell*, where the Court upheld a restriction on remedies for mortgage default that would normally have violated the Contract Clause. 290 U.S. 398, 445 (1934). The Court held that the restrictions were valid during the economic emergency posed by the Great Depression, but it did say that “the relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency and could be granted only upon reasonable conditions.” *Id.*

14. See DANIEL FARBER & NEIL S. SIEGEL, UNITED STATES CONSTITUTIONAL LAW 258–59 (2019).

15. *Id.* at 256–59.

16. *Lochner v. New York*, 198 U.S. 45, 64–65 (1905), *overruled in part*, *Ferguson v. Skrupa*, 372 U.S. 726 (1963); see FARBER & SIEGEL, *supra* note 14, at 258–59.

17. *Lochner*, 198 U.S. at 62–64.

18. FARBER & SIEGEL, *supra* note 14, at 260.

The Supreme Court beat a hasty about-face in 1937 and adopted a new approach to constitutional law.¹⁹ Today, most regulations are subject to what is called “rational basis” review.²⁰ Rather than asking whether laws regulating the economy were reasonable, the courts upheld these laws unless they found no rational connection with any legitimate government purpose.²¹ Few if any laws failed this test.²² At the same time as it was virtually eliminating its oversight of economic regulations, however, the Supreme Court became more vigilant in enforcing the Bill of Rights.²³ Thus, there is a two-part standard: most laws are subject to hardly any judicial oversight, but courts carefully scrutinize laws involving fundamental rights such as free speech.²⁴ This phase of development culminated in the liberal Warren Court of the 1960s.²⁵ Since the Warren Court, the Supreme Court has become increasingly conservative.²⁶ In many areas, the effect has been to limit protection of individual rights, but there are exceptions such as free speech.²⁷

As the surrounding legal landscape has changed, the Court has also shifted in the way that it utilizes *Jacobson* in opinions. We begin with *Jacobson* itself, which the Supreme Court decided in the heyday of judicial suspicion of government regulation.²⁸ We will then trace how the Court’s references to *Jacobson* have shifted over time.

A. *The Jacobson Case*

Boston suffered a major smallpox outbreak at the turn of the twentieth century, with over fifteen hundred cases and almost three hundred deaths.²⁹ The outbreak began in May 1901.³⁰ In Boston, there were free vaccination stations, and doctors visited businesses in order to offer vaccinations to

19. *Id.* at 261.

20. *Id.* at 263.

21. *Id.* at 261–62.

22. *Id.* at 263.

23. *Id.* at 240–41.

24. See Donald L. Beschle, *No More Tiers? Proportionality as an Alternative to Multiple Levels of Scrutiny in Individual Rights Cases*, 38 PACE L. REV. 384, 384–85 (2018).

25. FARBER & SIEGEL, *supra* note 14, at 249.

26. See *id.*

27. *Id.* at 241–42.

28. See Gostin, *supra* note 5, at 579. For a recent nuanced discussion of *Jacobson*, see Wendy E. Parmet, *Rediscovering Jacobson in the Era of COVID-19*, 100 B.U. L. REV. ONLINE 117 (2020).

29. See LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 121 (3d ed. 2016).

30. Michael R. Albert, Kristen G. Ostheimer, & Joel G. Breman, *The Last Smallpox Epidemic in Boston and the Vaccination Controversy, 1901–1903*, 344 NEW ENG. J. MED. 375, 375 (2001).

combat the outbreak.³¹ When cases of the disease continued to emerge, doctors deployed to go door-to-door offering vaccinations.³² However, police forced the homeless to be vaccinated because they were considered a disease reservoir.³³ The last cases were reported in March 1903.³⁴

The outbreak sparked a bitter debate over vaccination.³⁵ People we might now call anti-vaxxers claimed that vaccination was a deadly risk to children.³⁶ At the time, states typically required vaccination of children for public school and used other indirect measures to encourage vaccination.³⁷ Massachusetts went a step further with a state law that empowered cities to mandate vaccination of all residents.³⁸

In 1902, the board of health in Cambridge, Massachusetts ordered all inhabitants to be vaccinated for smallpox.³⁹ Although the campaign to contain the disease in one part of the city initially seemed successful, it soon broke out all over Cambridge.⁴⁰ Six individuals were prosecuted for refusing to be vaccinated, including Henning Jacobson and Albert Pear.⁴¹ Jacobson was a Swedish Lutheran minister; Pear was the assistant city clerk.⁴² Doctors considered vaccinating them to be medically safe, although Jacobson claimed to have had a bad reaction to a childhood vaccination.⁴³ The Massachusetts Anti-Compulsory Vaccination Society chose a lawyer to represent Pear and Jacobson.⁴⁴

The Supreme Judicial Council—the state’s highest court—upheld the vaccination law.⁴⁵ The court found it “too plain for discussion” that the goal of preventing smallpox was “worthy of the intelligent thought and

31. *Id.*

32. *Id.*

33. *See id.* at 376.

34. *Id.* at 376 fig.1.

35. *Id.* at 377.

36. GOSTIN & WILEY, *supra* note 29, at 121.

37. *Id.* at 122.

38. *Id.*

39. *See* Commonwealth v. Pear, 66 N.E. 719, 719–20 (Mass. 1903), *aff’d sub nom.* Jacobson v. Massachusetts, 197 U.S. 11 (1905).

40. *See* KAREN L. WALLOCH, THE ANTIVACCINE HERESY: *JACOBSON V. MASSACHUSETTS* AND THE TROUBLED HISTORY OF COMPULSORY VACCINATION IN THE UNITED STATES 76–78 (2015).

41. *Id.* at 182.

42. *Id.*

43. *Id.* at 184.

44. *Id.* at 189.

45. Commonwealth v. Pear, 66 N.E. 719, 722 (Mass. 1903), *aff’d sub nom.* Jacobson v. Massachusetts, 197 U.S. 11 (1905).

earnest endeavor of legislators.”⁴⁶ As to the defendants’ claims that vaccination was ineffective or dangerous, the court held that the trial judge would have been obligated to reject any evidence offered to support those claims.⁴⁷ The court stressed that “for nearly a century most of the members of the medical profession have regarded vaccination, repeated after intervals, as a preventive of smallpox.”⁴⁸ It added that physicians have considered any possible risk as “too small to be seriously weighed as against the benefits coming from the discreet and proper use of the preventive.”⁴⁹ The court then upheld the law because it “relate[d] directly” to a proper legislative purpose.⁵⁰

With the assistance of a prominent lawyer chosen by the Anti-Compulsory Vaccination Society, Jacobson then appealed to the Supreme Court.⁵¹ In retrospect, the Supreme Court seemed to be a favorable venue for Jacobson’s claim in 1905.⁵² Only two months after *Jacobson*, the Court decided *Lochner v. New York*,⁵³ which became the symbol of an entire era in constitutional law.⁵⁴ In his opinion for the Court striking down the New York maximum-hours law, Justice Peckham charged the judiciary with determining whether a law was “a fair, reasonable and appropriate exercise of the police power of the State”⁵⁵ To pass muster under *Lochner*, the law must have more than a remote bearing on public welfare: it must “have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate.”⁵⁶ This approach gave courts freedom to second-guess the wisdom of economic regulation in the need of protecting “freedom of contract.”⁵⁷

Given what we know about the *Lochner* Court’s skepticism of government regulation, it would not seem out of character for a majority to rule against compulsory vaccination or at least rule that the defendants were entitled to a hearing in the trial court to determine the reasonableness of vaccination.⁵⁸

46. *Id.* at 720.

47. *Id.* at 721.

48. *Id.*

49. *Id.*

50. *Id.* at 722.

51. WALLOCH, *supra* note 40, at 196.

52. *See* *Lochner v. New York*, 198 U.S. 45, 56 (1905) (asserting that there are limits to the police power that a State may exercise).

53. *See id.* at 45 (decided Apr. 7, 1905); *Jacobson v. Massachusetts*, 197 U.S. 11, 11 (1905) (decided Feb. 20, 1905).

54. *See* Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 1 (1992).

55. *Lochner*, 198 U.S. at 56.

56. *Id.* at 57.

57. *Id.* at 57–58.

58. As to how the cases were distinguishable, the *Lochner* Court said only that the ruling in the *Jacobson* case was “far from covering the one now before the court.” *Id.* at 55–56. Perhaps a hint as to the distinction appears in the following passage:

Apparently, the author of the *Lochner* opinion, Justice Peckham, did think that the Massachusetts law was unconstitutional.⁵⁹ He and another member of the future *Lochner* majority dissented without opinion in *Jacobson*.⁶⁰ They clearly thought that it was up to courts, not health authorities, to decide on the need for vaccination.⁶¹ Several of the Justices who joined their later opinion in *Lochner*, however, apparently found *Jacobson* a more defensible exercise of government authority.⁶²

Justice Harlan, a future *Lochner* dissenter, wrote the majority opinion in *Lochner*.⁶³ Harlan relied on the government's "police power," which he defined to include "such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."⁶⁴ He then turned to the claim that the law was "unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such a way as seems to him best . . ."⁶⁵ Notwithstanding this individual interest, Harlan insisted that "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."⁶⁶ Referring to the military draft, he observed that individuals could be forced into combat if needed to protect the

It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, *sui juris*), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employees.

Id. at 64. Thus, it appears that the majority did not consider the law before it to be a good faith effort to protect health and was instead a disguised effort to regulate employment contracts in the interest of fairness.

59. *See id.* at 52; *see also* *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905) (Peckham, J., dissenting).

60. *Jacobson*, 197 U.S. at 39 (Brewer, J. and Peckham, J., dissenting).

61. *See id.*

62. *See Lochner*, 198 U.S. at 67–68 (Harlan, J., dissenting).

63. *Jacobson*, 197 U.S. at 22. Ironically, by the time the Supreme Court decided the case, the vaccination order had probably expired and the epidemic had ended, so *Jacobson* probably never had to get vaccinated. *See* WALLOCH, *supra* note 40, at 211–12.

64. *Jacobson*, 197 U.S. at 25.

65. *Id.* at 26.

66. *Id.* at 27.

community from danger.⁶⁷ Whatever medical controversy might exist about vaccination, the legislature was entitled to decide between conflicting theories rather than leaving this judgment to a court or jury.⁶⁸

Justice Harlan provided several different formulations for the standard of judicial review. One formulation that became influential applied broadly to any statute purportedly enacted to protect public health, morals, or safety.⁶⁹ The law is unconstitutional if it has “no real or substantial relation to those objects.”⁷⁰ Otherwise, it is unconstitutional only if it is “beyond all question, a plain, palpable invasion of rights secured by the fundamental law”⁷¹ Soon afterwards, Justice Harlan used this language from *Jacobson* to explain why *Lochner* was wrongly decided,⁷² showing that he did not regard this test as specific to epidemics or emergency situations.

Elsewhere, the *Jacobson* opinion dismissed the right of a minority to block actions authorized by statute and “acting in good faith,” at least “in any city or town where smallpox is prevalent.”⁷³ That formulation seems both narrower, in that it seems limited to smallpox or similar diseases, and broader, in that only “good faith” is required of government authorities.⁷⁴ Finally, Justice Harlan seemed to recognize that a facially valid law might be unconstitutional as applied to an individual whose medical condition

67. *Id.* at 29.

68. *Id.* at 30.

69. *Id.* at 31. Note that Harlan did not limit this test to emergencies, epidemics, or public health cases.

70. *Id.*

71. *Id.*

72. See *Lochner v. New York*, 198 U.S. 45, 68 (1905) (Harlan, J., dissenting). After quoting *Jacobson*, Harlan continued:

If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional.

Id. (citing *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)). Later in his *Lochner* dissent, Harlan again called on *Jacobson* for support:

I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the State and the end sought to be accomplished by its legislation. . . . Still less can I say that the statute is, beyond question, a plain, palpable invasion of rights secured by the fundamental law.

Id. at 69–70 (first citing *Mugler v. Kansas*, 123 U.S. 623, 661 (1887), then citing *Jacobson*, 197 U.S. at 31).

73. *Jacobson*, 197 U.S. at 37.

74. *Id.*

would make it “cruel and inhuman in the last degree,” although he construed the Massachusetts law not to apply in those circumstances.⁷⁵

The factual setting of the case made it unnecessary for Justice Harlan to focus closely on the scope of review. There was no dispute that smallpox was a dire threat to the community or that vaccination was the commonly accepted medical response.⁷⁶ This made it unnecessary to decide just how much leeway local authorities had to respond.

Finally, it was not altogether clear how much *Jacobson* extended beyond public health emergencies. It might be seen as upholding all public health measures, all emergency measures—including those in wartime—or even all exercises of the state’s police power. Or it might be limited to epidemics as a well-established special case in terms of the exercise of the police power. Whatever the Court originally had in mind about these issues in *Jacobson*, the surrounding constitutional landscape changed substantially in the decades after the decision.⁷⁷ Those changes raised the question whether *Jacobson* survived in the form of a special test for certain public health cases or whether it was subsumed under general constitutional standards that evolved later.⁷⁸

B. Evolving Supreme Court Interpretations

Jacobson saw immediate use in another vaccination case. A decade after *Jacobson*, the Supreme Court upheld a school vaccination mandate in *Zucht v. King*.⁷⁹ There, the Court upheld a Texas law requiring all children to be vaccinated to go to school.⁸⁰ “Long before this suit was instituted,” Justice Brandeis said in his brief opinion for the Court, “*Jacobson* . . . had settled that it is within the police power of a State to provide for compulsory vaccination.”⁸¹ He added: “That case and others had also settled that a State may, consistently with the Federal Constitution, delegate to a municipality

75. *Id.* at 38–39. Gostin sees four themes in *Jacobson* relating to the assessing public health measures: the necessity of responding to a threat to the community, choice of reasonable means, proportionality between means and ends, and avoidance of adverse side effects. Gostin, *supra* note 5, at 579.

76. *Jacobson*, 197 U.S. at 28.

77. Gostin, *supra* note 5, at 576–77.

78. *See id.* at 578 tbl.1 (providing a useful tabulation of applications of *Jacobson* in later cases).

79. *Zucht v. King*, 260 U.S. 174, 177 (1922).

80. *Id.* at 175, 177.

81. *Id.* at 176 (citation omitted).

authority to determine under what conditions health regulations shall become operative.”⁸²

Beyond vaccinations, *Jacobson* was also cited as support for a wide range of public health and safety measures. In the foundational zoning case *Euclid v. Amber Realty Company*, it served as support for single-family zoning intended in part to provide more healthful living conditions.⁸³ It was also used to uphold food and drug safety laws,⁸⁴ coal mine safety laws,⁸⁵ a law banning child labor in hazardous jobs,⁸⁶ and medical licensing laws even in the absence of a professional consensus,⁸⁷ among other applications. It was the sole citation in a legal opinion that has now become infamous: the ruling in *Buck v. Bell*, which upheld the forced sterilization of a woman said to have had a hereditary mental disability.⁸⁸ Justice Holmes’s majority opinion cited *Jacobson* to support the following sentence: “The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.”⁸⁹ That sentence was followed by Holmes’s remark that “[t]hree generations of imbeciles are enough.”⁹⁰

Jacobson was also cited as a basis for upholding laws with no public health nexus. For instance, in *Schmidinger v. Chicago*, it was cited to establish that police power encompassed a city ordinance regulating the weight of bread loaves.⁹¹ *Jacobson* also served as support for a law governing damage awards by railroad employees,⁹² in a case involving insurance regulation,⁹³ and in a diverse set of other cases.⁹⁴ In a case where the government’s goal was to make train rides more peaceful, the Court quoted *Jacobson* at length to show that freedom of contract was limited by the state’s police

82. *Id.* (citing *Laurel Hill Cemetery v. San Francisco*, 216 U.S. 358 (1910)).

83. *Euclid v. Amber Realty Co.*, 272 U.S. 365, 379–80, 395 (1926) (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 30–31 (1905)). In another zoning case, *Jacobson* was deployed to uphold a local ordinance restricting billboards in a residential area. *See Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 530–31 (1917) (citing *Jacobson*, 197 U.S. at 30).

84. *See, e.g., Price v. Illinois*, 238 U.S. 446, 451–52 (1915); *Adams v. Milwaukee*, 228 U.S. 572, 581–82 (1913).

85. *See, e.g., Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 542–43 (1914) (citing *Jacobson*, 197 U.S. at 25); *Barrett v. Indiana*, 229 U.S. 26, 28–29 (1913).

86. *See Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U.S. 320, 325 (1913).

87. *See Collins v. Texas*, 223 U.S. 288, 297–98 (1912).

88. *Buck v. Bell*, 274 U.S. 200, 205–07 (1927) (citing *Jacobson*, 197 U.S. 11).

89. *Id.* at 207 (citing *Jacobson*, 197 U.S. 11).

90. *Id.*

91. *Schmidinger v. City of Chicago*, 226 U.S. 578, 582–83 (1913) (citing *Jacobson*, 197 U.S. at 25, 31).

92. *See Chicago, Burlington & Quincy R.R. Co. v. McGuire*, 219 U.S. 549, 567 (1911).

93. *See German Alliance Ins. Co. v. Hale*, 219 U.S. 307, 316–17 (1911).

94. *See, e.g., Stephenson v. Binford*, 287 U.S. 251, 272 (1932) (trucking regulation); *Lambert v. Yellowley*, 272 U.S. 581, 597 (1926) (medicinal alcohol regulation); *Welch v. Swasey*, 214 U.S. 91, 105 (1909) (building height restriction).

power.⁹⁵ Notably, *Jacobson*'s mention of military conscription was used as authority for denying religious exemptions from military training⁹⁶ and for denying citizenship to someone unwilling to bear arms in defense of the country.⁹⁷

Few if any of the cases involved emergency situations. The exception was *Sterling v. Constantin*, where an emergency at least purportedly existed.⁹⁸ The Governor of Texas declared an emergency on the ground that certain counties were in a state of turmoil and insurrection,⁹⁹ apparently because the bottom had dropped out of the oil market due to the Great Depression. After the National Guard was sent in, oil wells were shut down to prop up the price until a regulatory commission could rule.¹⁰⁰ After the commission ruled and the troops were withdrawn, a federal court issued a temporary restraining order against the commission's order.¹⁰¹ The Governor issued orders limiting production, believing that the court had no jurisdiction over such emergency orders.¹⁰² Although the Court ultimately found the Governor's actions to be unjustified, it emphasized the broad scope of the Governor's authority:

In the performance of its essential function, in promoting the security and well-being of its people, the State must, of necessity, enjoy a broad discretion. The range of that discretion accords with the subject of its exercise. . . . As the State has no more important interest than the maintenance of law and order, the power it confers upon its Governor as Chief Executive and Commander in Chief of its military forces to suppress insurrection and to preserve the peace is of the highest consequence.¹⁰³

95. *Williams v. Arkansas*, 217 U.S. 79, 85–86, 88 (1910) (quoting *Jacobson*, 197 U.S. at 26).

96. *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245, 264–65 (1934) (quoting *Jacobson*, 197 U.S. at 29).

97. *United States v. Macintosh*, 283 U.S. 605, 624 (1931) (quoting *Jacobson*, 197 U.S. at 29).

98. *Sterling v. Constantin*, 287 U.S. 378, 389–90 (1932); *cf.* *Butler v. Perry*, 240 U.S. 328, 333 (1916) (upholding Florida law “drafting” men to work on public roads).

99. *Sterling*, 287 U.S. at 389–90.

100. *Id.* at 390.

101. *Id.* at 387.

102. *Id.* at 387–88.

103. *Id.* at 398–99 (citations omitted) (first citing *Jacobson v. Massachusetts*, 198 U.S. 11, 31 (1905); then citing *Standard Oil Co. v. Marysville*, 270 U.S. 582, 584 (1929); and *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159 (1930)).

Nevertheless, the Court found that the Governor had acted outside of his very broad discretion to quell an insurrection in restricting oil production outside of the normal legal process.¹⁰⁴

Jacobson also made a surprise appearance in a very different context. Recall that the *Jacobson* Court suggested that the statute should not apply in circumstances where doing so would be inhumane.¹⁰⁵ *Sorrells v. United States*, a case familiar to criminal law teachers, used *Jacobson* as precedent in the very different setting of police entrapment.¹⁰⁶ *Jacobson* served as part of a string cite for the proposition that a general criminal statute “may and should be limited where the literal application of the statute would lead to extreme or absurd results.”¹⁰⁷

It seems clear that courts thought *Jacobson* to be particularly relevant to health and safety issues during this time period.¹⁰⁸ It also spoke to the need to uphold reasonable legislative judgments and the breadth of a state’s police power.¹⁰⁹ *Jacobson* also emphasized the need for individuals to sacrifice for the common good.¹¹⁰ In short, it was a handy cite whenever the Court wanted to uphold a legislative action.

In the *Lochner* era, all state legislation was subject to judicial scrutiny for reasonableness.¹¹¹ After 1937, the standard shifted from reasonableness to the very lenient rational basis, so that it was no longer necessary to find special authority for health regulations or other public interest regulation.¹¹² At the same time, the Court began to apply a higher level of scrutiny to government actions violating fundamental rights.¹¹³ In this period, *Jacobson*’s significance changed. It was frequently cited in cases involving religious freedom,¹¹⁴ most notably in *Prince v. Massachusetts*, where the Court rejected a religious exemption from child labor laws.¹¹⁵ It was also still cited, however, for broader propositions such as the breadth of government

104. *Id.* at 401–02.

105. *Jacobson*, 197 U.S. at 28–29.

106. *Sorrells v. United States*, 287 U.S. 435, 448 (1932).

107. *Id.* at 447–48 (quoting *United States v. Katz*, 271 U.S. 354, 362 (1926)).

108. *See supra* notes 84–87 and accompanying text.

109. *See Jacobson*, 197 U.S. at 25.

110. *Id.* at 26.

111. *See supra* notes 14–16 and accompanying text.

112. *See FARBER & SIEGEL, supra* note 14, at 260–61.

113. *See Beschle, supra* note 24, at 384–85.

114. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 403, 423 (1963) (majority distinguishing cases involving public safety and dissent showing that religious exemptions are never required); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 250 (1963) (Brennan, J., concurring); *Everson v. Bd. of Educ. of the Twp. of Ewing*, 330 U.S. 1, 32 n.9 (1947) (Rutledge, J., dissenting).

115. *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (citing *Jacobson*, 197 U.S. 11); *see also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 655 (1943) (Frankfurter, J., dissenting).

power to act in emergencies,¹¹⁶ the state's power to force individuals to get treatment for drug addiction,¹¹⁷ the federal government's power to strip citizenship from people who refuse military service,¹¹⁸ and limitations on constitutional rights in the face of compelling interests.¹¹⁹

Since the end of the Warren Court, *Jacobson* has continued to figure in cases involving the free exercise of religion,¹²⁰ as well as a scattering of other cases.¹²¹ In a case dealing with hair styles of police officers, of all things, the Court cited *Jacobson* as support for using the rational basis test.¹²² However, it appears more frequently in two categories relating to health care. The first category relates to confinement or compulsory treatment. In *O'Connor v. Donaldson*, the Court held that it was unconstitutional to confine mentally ill people who are not a threat to themselves or others.¹²³ In his concurrence, Chief Justice Burger emphasized, contrary to the court of appeals in the case, that confinement could be based on public safety, not merely on the need to provide treatment.¹²⁴ *Jacobson* also surfaced in

116. See *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 539 (1967).

117. See *Robinson v. California*, 370 U.S. 660, 664–65 (1962).

118. See *Trop v. Dulles*, 356 U.S. 86, 121–22 (1958) (Frankfurter, J., dissenting).

119. See *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960).

120. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972) (citing *Jacobson* as the basis for a public safety exception from religious freedom); *Gillette v. United States*, 401 U.S. 437, 461–62 (1971) (finding no constitutional right to religious exemption from military service).

121. See, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 356–57 (1997) (sexual predator law); *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (collection of evidence at the scene of a fire); *Ingraham v. Wright*, 430 U.S. 651, 673–74 & n.42 (1977) (corporal punishment in schools).

122. *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 30–31, 35–37 (1905)). *Jacobson* was one of two cases cited to support putting the burden of proof on the challengers to “demonstrate that there is no rational connection between the regulation, based as it is on the county’s method of organizing its police force, and the promotion of safety of persons and property.” *Id.* (first citing *United Pub. Workers v. Mitchell*, 330 U.S. 75 100–01 (1947); then citing *Jacobson*, 197 U.S. at 30–31, 35–37). The Court added:

Neither this Court, the Court of Appeals, nor the District Court is in a position to weigh the policy arguments in favor of and against a rule regulating hairstyles as a part of regulations governing a uniformed civilian service. The constitutional issue to be decided by these courts is whether petitioner’s determination that such regulations should be enacted is so irrational that it may be branded “arbitrary,” and therefore a deprivation of respondent’s “liberty” interest in freedom to choose his own hairstyle.

Id. at 248 (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487–88 (1955)).

123. *O'Connor v. Donaldson*, 422 U.S. 563, 576–77 (1975).

124. *Id.* at 582–83 (Burger, C.J., concurring).

Mills v. Rogers, a case involving the right to refuse antipsychotic drugs.¹²⁵ The majority opinion cited *Jacobson* as demonstrating the need to define a protected constitutional interest “as well as identification of the conditions under which competing state interests might outweigh it.”¹²⁶ Finally, in a case dealing with the right to refuse medical treatment at the end of life, Chief Justice Rehnquist relied on *Jacobson* as the basis for inferring a “constitutionally protected liberty interest in refusing unwanted medical treatment.”¹²⁷ He described *Jacobson* as having “balanced an individual’s liberty interest in declining an unwanted smallpox vaccine against the State’s interest in preventing disease.”¹²⁸

The second group of citations involved abortion. In *Roe v. Wade*, as well as a companion case, *Jacobson* was cited as proof that the Constitution does not recognize an absolute right to control one’s own body.¹²⁹ It was later cited as support for the idea that a protected right can be limited by a compelling state interest¹³⁰ and as indirectly supporting the view that “the State’s interest in the protection of life falls short of justifying any plenary override of individual liberty claims.”¹³¹ The most notable uses, however, were in two cases involving “partial birth abortion.” In the first case, the Court quoted *Jacobson* at length to show that the state government could decide between contested medical or scientific positions;¹³² in the second case, this was reformulated as a rule of deference to states in areas of scientific uncertainty.¹³³

What lessons can be distilled from this history? In most modern cases, references to *Jacobson* were perfunctory, often as part of a string of citations, giving the Court little reason for careful thought about the precedent’s implications.¹³⁴ The Supreme Court seems not to have thought of *Jacobson* as establishing a special rule for contagious diseases or providing a specific test for constitutionality. Rather, it has found a variety of lessons from

125. *Mills v. Rogers*, 487 U.S. 291, 293 (1982).

126. *Id.* at 299.

127. *Cruzan v. Dir., Mo. Dep’t of Pub. Health*, 497 U.S. 261, 278 (1990).

128. *Id.* In dissent, Justice Brennan distinguished *Jacobson* on the grounds that the vaccination program was a “‘paramount necessity’ to that State’s fight against a smallpox epidemic.” *Id.* at 312 & n.12 (Brennan, J., dissenting).

129. *Roe v. Wade*, 410 U.S. 113, 154 (1973) (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)); *Doe v. Bolton*, 410 U.S. 179, 215 (1973) (Douglas, J., concurring) (citing *Jacobson*, 197 U.S. at 37).

130. *See Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 808–09 (1986) (White, J., dissenting).

131. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 857 (1992) (citing *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 278 (1990)).

132. *See Stenberg v. Carhart*, 530 U.S. 914, 971–72 (2000) (Kennedy, J., dissenting).

133. *See Gonzales v. Carhart*, 550 U.S. 124, 163 (2007).

134. *See, e.g., id.; Casey*, 505 U.S. at 857; *Welch v. Swasey*, 214 U.S. 91, 105 (1909).

the case. Some of those lessons relate to subordinating individual interests such as religious freedom to collective necessities and respecting the individual interest in bodily integrity.¹³⁵ There are also lessons about deference to reasonable legislation,¹³⁶ to decisions by specialized agencies such as health boards,¹³⁷ and to government actions in areas of scientific uncertainty.¹³⁸ An unspoken premise in these seems to have been that *Jacobson* was obviously right about the need for forceful government action to stem a deadly epidemic. Yet just what that premise means in terms of contemporary law seems to remain a bit indistinct.

III. *JACOBSON* IN THE CORONAVIRUS PANDEMIC

By the beginning of this century, *Jacobson* was a relatively obscure case except to specialists in public health.¹³⁹ The coronavirus pandemic brought the century-old ruling into the limelight.¹⁴⁰ Courts have not been able to agree, however, on just what the case means for emergency public health regulations. This dispute has led to circuit splits in cases dealing with restrictions on abortions and religious gatherings.¹⁴¹ The issues in these two categories of cases are somewhat different, so they will be discussed separately below.

A. *Restrictions on Abortion*

Before examining the possible impact of the pandemic on abortion rights, it is first necessary to understand the protection those rights receive in normal times.¹⁴² Abortion has been one of the most fraught constitutional

135. See *supra* note 120 and accompanying text.

136. See *supra* note 109 and accompanying text.

137. See *supra* notes 121–28 and accompanying text.

138. See *supra* note 133 and accompanying text.

139. Joan Biskupic, *The 115-Year-Old Supreme Court Opinion that Could Determine Rights During a Pandemic*, CNN (Apr. 10, 2020, 2:58 PM), <https://www.cnn.com/2020/04/10/politics/pandemic-coronavirus-jacobson-supreme-court-abortion-rights/index.html> [<https://perma.cc/R2KZ-FZRR>].

140. *Id.*

141. See, e.g., *In re Abbott (Abbott IV)*, 956 F.3d 696, 707–08 (5th Cir. 2020) (permitting temporary restrictions on abortions during a pandemic); *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 917 (6th Cir. 2020) (denying temporary restrictions on abortion during a pandemic).

142. For a more detailed presentation of the evolution of doctrine in this area, see FARBER & SIEGEL, *supra* note 14, at 392–410.

issues of our time.¹⁴³ In *Roe v. Wade*, the Supreme Court held that the Constitution protected a woman’s right to obtain an abortion.¹⁴⁴ The Court allowed minimal abortion regulations in the first trimester of the pregnancy, regulations to protect the woman’s health in the second trimester, and almost complete bans in the third trimester, with an exception to protect the life or health of the pregnant woman.¹⁴⁵ After new judicial appointees by President Reagan, it was commonly expected that *Roe* would be overruled.¹⁴⁶ Instead, in *Casey*, the Court reaffirmed the principle that abortion was constitutionally protected.¹⁴⁷ However, it abandoned the trimester-based standard for reviewing abortion regulations. It adopted a new test under which abortion regulations were valid unless they placed an “undue burden” on abortion.¹⁴⁸ In a 2016 ruling, the Court clarified that the undue burden test required balancing the potential benefits of a regulation against the burden imposed on women seeking abortions.¹⁴⁹

Fast forward to 2020. In the face of the initial surge in coronavirus cases, a number of states banned elective medical procedures.¹⁵⁰ Those states took various stances with respect to abortion procedures.¹⁵¹ In New Jersey, for instance, abortion procedures were specifically authorized.¹⁵² In several

143. See *id.* at 392–93.

144. *Roe v. Wade*, 410 U.S. 113, 154 (1973).

145. See FARBER & SIEGEL, *supra* note 14, at 394.

146. See *id.* at 399.

147. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

148. *Id.* at 874–75.

149. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309–10 (2016).

150. See *COVID-19: Executive Orders by State on Dental, Medical, and Surgical Procedures*, AM. C. OF SURGEONS (June 8, 2020), <https://www.facs.org/covid-19/legislative-regulatory/executive-orders> [<https://perma.cc/CQ6T-HAW8>].

151. See Sobel et al., *State Action to Limit Abortion Access During the COVID-19 Pandemic*, KAISER FAM. FOUND. (June 25, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/state-action-to-limit-abortion-access-during-the-covid-19-pandemic/> [<https://perma.cc/KJ9Z-5RHR>].

152. See N.J. Exec. Order No. 109 (Mar. 23, 2020), <https://nj.gov/infobank/eo/056murphy/pdf/EO-109.pdf> [<https://perma.cc/NB79-V4S7>]. Governor Murphy made “[e]xplicit exemption for family planning and termination of pregnancies” in Executive Order 109 suspending elective surgeries. *Id.* Similarly, in Virginia, Governor Northam specifically excluded family planning services from restrictions of elective procedures in Executive Order of Public Health Emergency Two. Va. Exec. Order of Pub. Health Emergency No. 2 (Mar. 25, 2020), <https://www.governor.virginia.gov/media/governorviriniagov/executive-actions/Order-of-Public-Health-Emergency-Two—Order-of-The-Governor-and-State-Health-Commissioner.pdf> [<https://perma.cc/Q7UP-3TJR>]. Another example was the state of Washington, where Governor Inslee made a specific exemption to family planning services within Proclamation 20-24, amending 20-05, which limited elective procedures during COVID. Wash. Proclamation 20-24 (Mar. 19, 2020), https://www.governor.wa.gov/sites/default/files/20-24%20COVID-19%20non-urgent%20medical%20procedures%20%28tmp%29.pdf?utm_medium=email&utm_source=govdelivery [<https://perma.cc/RNU3-U9YE>].

states, however, abortion procedures were included in bans on elective procedures.¹⁵³ The circuits split on the validity of these restrictions.¹⁵⁴

Two circuits upheld the abortion restrictions.¹⁵⁵ Both courts relied heavily on *Jacobson*. In *In re Abbott*, the Fifth Circuit upheld a Texas executive order banning both surgical and medication abortions unless the woman's health or life were in danger.¹⁵⁶ The trial court had only entered a temporary restraining order (TRO),¹⁵⁷ which is not normally appealable.¹⁵⁸ The court of appeals leaped to the defense of the state restriction, using an extraordinary writ of mandamus to reverse the restraining order.¹⁵⁹ According to the appeals court, the trial judge had entered "an overbroad TRO that exceeds its jurisdiction, reaches patently erroneous results, and usurps the state's authority to craft emergency public health measures 'during the escalating COVID-19 pandemic.'"¹⁶⁰ The court set out a three-part test based on *Jacobson*.¹⁶¹ Under this test, a state regulation during the pandemic is valid if it (1) has "some 'real or substantial relation' to the public health crisis"; is (2) not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law"; and (3) provides "basic exceptions for 'extreme cases,' and [is not] . . . pretextual—that is, arbitrary or oppressive."¹⁶² Applying this lenient standard of review, the court upheld the Texas Governor's order because the trial court lacked sufficient evidence to reject the state's rationale, which was that the law helps preserve personal protective equipment such as masks for use in treating COVID-19

153. See Sobel et al., *supra* note 151.

154. See generally *id.*

155. See *In re Abbott (Abbott IV)*, 956 F.3d 696, 707–08 (5th Cir. 2020); *In re Rutledge*, 956 F.3d 1018, 1032 (8th Cir. 2020).

156. *Abbott IV*, 956 F.3d at 707–08.

157. *Id.* at 703.

158. 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3922.1 (3d ed. 2012).

159. *Abbott IV*, 956 F.3d at 703.

160. *Id.*

161. *Id.* at 704–05 (quoting *In re Abbott (Abbott II)*, 954 F.3d 772, 784 (5th Cir. 2020)).

162. *Id.* at 704–05. The dissenting judge argued that the final prong of the test might apply. In his view:

[T]here was sufficient evidence in the record to conclude that the enforcement of GA-09 as a prohibition on all three of the classes of abortion at issue was pretextual and motivated not by a desire to advance public health, but rather to reduce the number of abortions performed for its own sake.

Id. at 734 (Dennis, J., dissenting) (emphasis omitted).

patients.¹⁶³ As the court had explained in an earlier round of the litigation, its central premise was that “*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency.”¹⁶⁴

The Eighth Circuit also took extraordinary action in order to overturn a trial court for violating what the appeals court considered the mandate of *Jacobson*.¹⁶⁵ In reviewing an Arkansas order akin to that from Texas, the court drew a two-part test from *Jacobson*: (1) a government response to a public health crisis is valid unless it “lacks a ‘real or substantial relation’ to the public health crisis” or (2) is “‘beyond all question, a plain, palpable invasion’ of the right to abortion.”¹⁶⁶ Like the Fifth Circuit, the court was persuaded that banning nonessential medical procedures had a substantial relation to the state’s interest in public health.¹⁶⁷ Turning to the second part of its test, it asked whether the “directive, beyond all question, imposes an ‘undue burden’ on a woman’s ability to choose whether to terminate a pre-viability pregnancy.”¹⁶⁸ The court then faulted the district court for failing to give sufficient deference to the state’s view of public health requirements and failing to make detailed quantitative findings about the impact of the restriction on women seeking abortions.¹⁶⁹

In these cases, the State argued that abortions, like other elective medical procedures, require contact between the patient and medical

163. *Id.* at 733–34. The court exempted that part of the trial court’s order restraining enforcement of the order for patients “who, based on the treating physician’s medical judgment, would be past the legal limit for an abortion in Texas—22 weeks LMP—on April 22, 2020.” *Id.* at 723 (majority opinion). For a critique of the Fifth Circuit’s interpretation of *Jacobson*, see Parmet, *supra* note 28, at 130.

164. *Abbott II*, 954 F.3d at 786. Texas medical facilities have since been allowed to resume elective procedures. See *Information for Hospitals and Healthcare Professionals*, TEX. DEP’T ST. HEALTH SERVICES, <https://dshs.state.tx.us/coronavirus/healthprof.aspx#resume> [<https://perma.cc/FH58-NZV6>].

165. *In re Rutledge*, 956 F.3d 1018, 1032 (8th Cir. 2020).

166. *Id.* at 1028 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)).

167. *Id.* at 1029.

168. *Id.* at 1030 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 876 (1992)).

169. *Id.* at 1032. Specifically, the court did not determine the number of women that were seeking but unable to obtain a surgical abortion in Arkansas; how many of those women would be past the legal limit for obtaining an abortion by May 11; how many of those women would be forced to obtain a dilation and evacuation (D&E) abortion instead of an aspiration abortion by May 11; or how many of those women would be forced to undergo a two-day D&E abortion instead of the one-day procedure by May 11. *Id.* That seems a lot to demand of the challengers under pandemic conditions, when data collection would be difficult. The third member of the panel dissented without opinion. See *id.* at 1033 (Loken, J., dissenting). It should be noted that access to abortions in Arkansas is still limited due to an April 27 directive requiring those seeking “elective treatments” to have a negative COVID-19 test within forty-eight hours of the procedure. Ark. Directive on Resuming Elective Procedures (Apr. 27, 2020), <https://www.healthy.arkansas.gov/images/uploads/pdf/ResumeElectiveSurgeryDirectiveFINAL4.23.20.pdf> [<https://perma.cc/ML7L-CUF2>].

staff, and consume personal protective equipment (PPE) such as masks and gowns.¹⁷⁰ Without the high degree of deference given by the Eighth Circuit, the court might have been hard-pressed to reject the abortion provider’s counter-arguments. The provider argued it would not deplete PPE supplies for COVID-19 treatment because it had its own reserves and that continuing a pregnancy would entail even greater contact than an abortion.¹⁷¹ Notably, healthcare experts did not consider restrictions on abortion medically appropriate.¹⁷²

In contrast, two other circuits struck down similar state restrictions.¹⁷³ Their perspective on *Jacobson* differed from that of their sister circuits. The Sixth Circuit began by noting the factual distinctions between the two situations: “Leave aside the myriad factual differences between this case and *Jacobson*—asking a person to get a vaccination, on penalty of a small fine, is a far cry from forcing a woman to carry an unwanted fetus against her will for weeks, much less all the way to term”¹⁷⁴ The court found the connection between the abortion ban and public health attenuated at best,¹⁷⁵ and said it would “not countenance . . . the notion that COVID-19 has somehow demoted *Roe* and *Casey* to second-class rights, enforceable against only the most extreme and outlandish violations.”¹⁷⁶ The Tenth

170. See *Rutledge*, 956 F.3d at 1023.

171. *Id.* at 1029.

172. See *In re Abbott (Abbott II)*, 954 F.3d 772, 797 (5th Cir. 2020) (Dennis, J., dissenting). The American College of Obstetricians and Gynecologists released a statement that “abortion should not be categorized” as a “procedure[] that can be delayed during the COVID-19 pandemic.” The statement emphasized . . . that abortion is “a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks or potentially make it completely inaccessible.” *Id.*

173. See *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 929–30 (6th Cir. 2020); *Robinson v. Attorney Gen.*, 957 F.3d 1171, 1176, 1182 (11th Cir. 2020). A district court in the Tenth Circuit also struck down such an abortion restriction. *S. Wind Women’s Ctr. LLC v. Stitt*, No. CIV-20-277-G, 2020 WL 1677094, at *6 (W.D. Okla. Apr. 6, 2020), *appeal dismissed*, 808 F. App’x 677 (10th Cir. 2020) (order had same effect as TRO and was therefore non-appealable).

174. *Adams & Boyle*, 956 F.3d at 926.

175. More still, although mandatory vaccination clearly had a “real” and “substantial” relation to the state’s public health goals in *Jacobson*—indeed, as the Supreme Court emphasized, the importance of vaccination was widely accepted by the medical community—it is much harder to discern that relation here, given the paltry amount of PPE saved, and limited amount of in-person contact avoided, by halting procedural abortions for a three-week period (not to mention the lack of expert medical opinion in support of the State’s position).

Id.

176. *Id.* at 926–27.

Circuit also concluded that the government order “imposed a ‘plain, palpable invasion of rights,’” yet had “‘no real or substantial relation’ to the state’s goals” under *Jacobson*.¹⁷⁷

The state orders reviewed in these cases were not identical, nor was the evidence before the courts. Thus, it might be possible to reconcile the outcomes in the cases at least to a certain extent. What clearly differed were the lessons these courts took from *Jacobson*. The Fifth and Eighth Circuits understood *Jacobson* to allow remedies for only the most arbitrary or blatant violations of constitutional rights.¹⁷⁸ The Sixth and Tenth Circuits saw *Jacobson* as shifting the balance less dramatically, providing a strong additional justification in favor of regulation but not expanding the level of deference to regulators during the pandemic.¹⁷⁹

B. Restrictions on Religious Gatherings

The First Amendment guarantees the free exercise of religion.¹⁸⁰ This clearly frees religious doctrine and practices such as prayer from government regulation.¹⁸¹ A more difficult question is the extent to which the government can regulate conduct that may be religiously motivated. That question has arisen repeatedly during the pandemic as churches protested limitations on their right to conduct in-person services.¹⁸²

The Supreme Court’s view has shifted on the general issue of religious exemptions. In a 1963 case, *Sherbert v. Verner*, the Supreme Court held that religious objectors were entitled to exemptions from general regulations unless the government had a compelling interest in requiring compliance.¹⁸³ If that approach still held, public health restrictions would be subject to that demanding constitutional test.

177. *Robinson*, 957 F.3d at 1180 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)).

178. See *In re Abbott (Abbott IV)*, 956 F.3d 696, 711 (5th Cir. 2020); *In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020).

179. See *Adams & Boyle*, 956 F.3d at 926; *S. Wind Women’s Ctr. LLC v. Stitt*, No. CIV-20-277-G, 2020 WL 1677094, at *5 (W.D. Okla. Apr. 6, 2020), *appeal dismissed*, 808 Fed. Appx. 677 (10th Cir. 2020). For a review of the litigation over abortion restrictions during the pandemic, see B. Jessie Hill, *Essentially Elective: The Law and Ideology of Restricting Abortion During the COVID-19 Pandemic*, 106 VA. L. REV. ONLINE 99, 100 (2020) (arguing that abortions should be considered medically necessary rather than elective medical procedures).

180. U.S. CONST. amend. I.

181. See *id.*

182. See, e.g., *Calvary Chapel of Bangor v. Mills*, No. 1:20-cv-00156-NT, 2020 U.S. Dist. LEXIS 81962 (D. Me. May 9, 2020).

183. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). The Court’s application of this test in subsequent cases is described in DANIEL A. FARBER, *THE FIRST AMENDMENT* 275–81 (4th ed. 2014).

Since 1990, however, the Supreme Court has sharply limited the use of the compelling interest test. In *Employment Division v. Smith*, the Court held that there is no free exercise exemption from state laws that apply generally to the public.¹⁸⁴ In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, however, the Court recognized a limit to this principle: the compelling interest test continued to apply when state regulations target religious practices.¹⁸⁵ The regulation in that case was intentionally designed so that it applied only to the killing of animals in the form of ritual animal sacrifice, but not to the killing of animals for secular purposes.¹⁸⁶

Churches have brought a series of lawsuits demanding the right to conduct in-person services despite lockdown or social distancing rules. The district courts have rejected most of those claims,¹⁸⁷ but there have been exceptions.¹⁸⁸ So far, few of the cases have reached the appellate level. Like the abortion cases, those cases have sparked disagreements about the scope of judicial review during a public health emergency.¹⁸⁹

The first appellate case sided with the minority of district courts finding violations of the free exercise clause. In *Roberts v. Neace*, the court addressed two executive orders by the Governor of Kentucky.¹⁹⁰ One order banned

184. *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990). For further discussion of *Smith*, see FARBER, *supra* note 183, at 278–83.

185. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

186. *Id.* at 533–34.

187. *See, e.g.*, *Bullock v. Carney*, No. 20-674-CFC, 2020 U.S. Dist. LEXIS 94058, at *1–2, *14 (D. Del. May 29, 2020); *Antietam Battlefield KOA v. Hogan*, No. CCB-20-1130, 2020 U.S. Dist. LEXIS 88883, at *3–4 (D. Md. May 20, 2020); *Spell v. Edwards*, No. 20-00282-BAJ-EWD, 2020 U.S. Dist. LEXIS 85909, at *16 (M.D. La. May 15, 2020); *Calvary Chapel of Bangor v. Mills*, No. 1:20-cv-00156-NT, 2020 U.S. Dist. LEXIS 81962, at *2, *25 (D. Me. May 9, 2020); *Cassell v. Snyders*, No. 20 C 50153, 2020 U.S. Dist. LEXIS 77512, at *44 (N.D. Ill. May 3, 2020).

188. *See, e.g.*, *Berean Baptist Church v. Cooper*, No. 4:20-CV-81-D, 2020 U.S. Dist. LEXIS 86310, at *3 (E.D.N.C. May 16, 2020); *First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 U.S. Dist. LEXIS 68267, at *2 (D. Kan. Apr. 18, 2020); *On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-CV-264-JRW, 2020 U.S. Dist. LEXIS 65924, at *2–3 (W.D. Ky. Apr. 11, 2020).

189. *See, e.g.*, *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 942 (9th Cir. 2020) (Collins, J., dissenting).

190. *Roberts v. Neace*, 958 F.3d 409, 411 (6th Cir. 2020). The same court had previously ruled against these bans as applied to drive-in religious services by churches. *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 616 (6th Cir. 2020). The court observed in that case that “the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law.” *Id.* at 614 (citing *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012)).

gatherings of over twenty people, including “community, civic, public, leisure, faith-based, or sporting events.”¹⁹¹ Many normal business operations such as retail sales and normal office operations were exempted.¹⁹² The other order contained a list of “life-sustaining businesses” that were allowed to reopen, which did not include churches.¹⁹³ The court concluded that the ban was subject to strict scrutiny under *Church of the Lukumi Babalu Aye* because it singled out religious activities.¹⁹⁴ It could not survive that scrutiny because there appeared to be many less restrictive measures that the State could take to achieve its compelling interest in public health.¹⁹⁵

In contrast, the Ninth Circuit sided with the majority of district courts in rejecting the free exercise claim. In *South Bay United Pentecostal Church v. Newsom*, the Governor of California classified churches as “higher-risk workplaces,” meaning that they would reopen after ordinary retail and office operations but before concerts and other public gatherings.¹⁹⁶ The court observed that “[w]e’re dealing here with a highly contagious and often fatal disease for which there presently is no known cure,” then added, “[i]n the words of Justice Robert Jackson, if a ‘[c]ourt does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.’”¹⁹⁷

The dissenting judge rejected the State’s argument that *Jacobson* modified the applicable constitutional standards, though the existence of a pandemic

191. Ky. Pub. Health Order No. 20200319 (Mar. 19, 2020), https://governor.ky.gov/attachments/20200319_Order_Mass-Gatherings.pdf [<https://perma.cc/586R-UY3>].

192. *Id.*

193. Ky. Exec. Order No. 2020-257 (Mar. 25, 2020), https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf [<https://perma.cc/DR6Y-WPY5>].

194. *Roberts*, 958 F.3d at 413 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 553 (1993)).

195. *See id.* at 415.

The question is whether the orders amount to “the least restrictive means” of serving these laudable goals. That’s a difficult hill to climb, and it was never meant to be anything less. There are plenty of less restrictive ways to address these public-health issues. Why not insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the Governor has done for comparable secular activities? Or perhaps cap the number of congregants coming together at one time? If the Commonwealth trusts its people to innovate around a crisis in their professional lives, surely it can trust the same people to do the same things in the exercise of their faith.

Id. (citation omitted).

196. *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 940 (9th Cir. 2020) (Collins, J., dissenting).

197. *Id.* at 939 (majority opinion) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting)).

might be relevant to applying those standards.¹⁹⁸ The dissenter argued that the Governor had discriminated against religious conduct “by *explicitly* and categorically assigning all in-person ‘religious services’ to a future Phase 3—without any express regard to the number of attendees, the size of the space, or the safety protocols followed in such services.”¹⁹⁹ In the dissenter’s view, “[b]y regulating the specific underlying risk-creating behaviors, rather than banning the particular religious setting within which they occur, the State could achieve its ends in a manner that is the ‘least restrictive way of dealing with the problem at hand.’”²⁰⁰

Having been rebuffed by the court of appeals, the church turned to the Supreme Court for relief.²⁰¹ In opposing the stay, the State provided evidence that public gatherings such as indoor church services pose a heightened risk of coronavirus spread.²⁰² The Court denied the motion

198. *Id.* at 942 (Collins, J., dissenting). The judge’s discussion of this issue is worth quotation:

Nothing in *Jacobson* supports the view that an emergency displaces normal constitutional standards. Rather, *Jacobson* provides that an emergency may justify temporary constraints within those standards. As the Second Circuit has recognized, *Jacobson* merely rejected what we would now call a “substantive due process” challenge to a compulsory vaccination requirement, holding that such a mandate “was within the State’s police power.”

Id. (quoting *Phillips v. City of New York*, 775 F.3d 538, 542 (2d Cir. 2015) (citing *Zucht v. King*, 260 U.S. 174, 176 (1922) (“*Jacobson* ‘settled that it is within the police power of a state to provide for compulsory vaccination.’”)).

199. *Id.* at 945.

200. *Id.* at 946 (quoting *Roberts*, 958 F.3d at 416).

201. See *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020).

202. See *Opposition of State Respondents to Emergency Application for Writ of Injunction* at 8–9, *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (No. 19A1044). The State’s filing in *South Bay Pentecostal* summarizes some of the evidence:

In the view of state public-health officials, large public gatherings pose a heightened risk of spread because attendees are “stationary in close quarters for extended periods of time.” Moreover, at religious services, “congregants are often speaking aloud and singing, which increases the danger that infected individuals will project respiratory droplets that contain the virus,” “thereby infect[ing] others.” As James Watt, M.D., M.P.H., an epidemiologist with the California Department of Health, explained in a declaration submitted to the district court, there “have been multiple reports of sizable to large gatherings such as religious services, choir practices, funerals, and parties resulting in significant spread of COVID-19.” Defendants pointed, for example, to a worship service in Sacramento tied to 71 COVID-19 cases; a choir practice in Seattle linked to 32 cases; a Kentucky church revival tied to 28 cases; and a religious service in South Korea where over 5,000 cases were traced back to a single infected individual in attendance.

Id.

for preliminary relief without an opinion,²⁰³ but two separate opinions were filed in support of and against the denial.²⁰⁴

Chief Justice Roberts wrote a concurring opinion explaining his reasons for denying relief.²⁰⁵ According to Chief Justice Roberts, the Supreme Court grants temporary injunctive relief only when “the legal rights at issue are ‘indisputably clear’ and, even then, ‘sparingly and only in the most critical and exigent circumstances.’”²⁰⁶ He emphasized that the “precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement.”²⁰⁷ Quoting language from *Jacobson*, he stressed that the Constitution “principally entrusts ‘the safety and the health of the people’ to the politically accountable officials of the States ‘to guard and protect.’”²⁰⁸ Moreover, “[w]hen those officials ‘undertake to act in areas fraught with medical and scientific uncertainties,’ their latitude ‘must be especially broad.’”²⁰⁹ In contrast, the federal judiciary “lacks the background, competence, and expertise to assess public health and is not accountable to the people.”²¹⁰ The Chief Justice found it unlikely that a case decided under that standard would be “indisputably clear.”²¹¹

Justice Kavanaugh dissented, joined by Justices Gorsuch and Thomas.²¹² Justice Kavanaugh could find no reason why churches should not be treated the same as “comparable secular businesses” such as “factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries.”²¹³ Perhaps this statement is a sign that comparability is to some degree in the eyes of the beholder. Some observers might have found it incongruous to say that businesses like pet grooming shops are comparable to churches, whether in the risks of spreading the virus or in other respects. It would also seem that the dissenters gave no deference to the State’s medical

203. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613.

204. *See id.* at 1613–14.

205. *Id.* at 1613 (Roberts, C.J., concurring).

206. *Id.* (quoting STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 17.4 (11th ed. 2019)).

207. *Id.*

208. *Id.* (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)).

209. *Id.* (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)).

210. *Id.* at 1613–14.

211. *Id.* at 1614.

212. *Id.* (Kavanaugh, J., dissenting). The same four Justices who dissented in *South Bay United Pentecostal Church* also dissented in a later case involving a similar restriction on church services in Nevada. *See Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070, 2020 WL 4251360, at *1, *6 (U.S. July 24, 2020).

213. *S. Bay Pentecostal Church*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting).

judgments nor to the evidence that churches have been sources of serious outbreaks.

As this Article was going to press, the Supreme Court decided another request for emergency relief from restrictions on religious activities during the pandemic, *Roman Catholic Diocese of Brooklyn v. Cuomo*.²¹⁴ The Governor had imposed stringent limits on religious gatherings in certain areas experiencing disease outbreaks, including a requirement that religious gatherings in certain areas be limited to ten people.²¹⁵ In a *per curiam* opinion, the Court held that the challenge to the restriction was likely to prevail, citing several factors. First, the restrictions were far harsher than those on secular businesses, even though the religious institutions in question had “admirable safety records.”²¹⁶ For that reason, strict scrutiny was required.²¹⁷ The Court found it “hard to believe that admitting more than 10 people in a 1,000 seat church or 400-seat synagogue would create a more serious health risk than many other activities that the State allows[,]” especially given that the restrictions were much more stringent than those applied by other jurisdictions.²¹⁸ Concurring, Justice Gorsuch said that classifying religious activities as “non-essential” violated the Free Exercise Clause.²¹⁹ He viewed *Jacobson* as applying at most only to limited restrictions on rights that were not expressly protected by the Constitution. Justice Kavanaugh wrote a more cautious concurrence, stressing that the restrictions before the Court went “much further” than those in previous cases.²²⁰ He agreed, however, that federal courts “must afford substantial deference to state and local authorities about how best to balance competing policy considerations during the pandemic.”²²¹

Although he dissented on procedural grounds, Roberts agreed with Kavanaugh that the New York measures “raise serious concerns under the

214. *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, 2020 WL 6948354 (U.S. Nov. 25, 2020) (*per curiam*). In the interim between *South Bay United Pentecostal* and *Roman Catholic Diocese*, Justice Ruth Bader Ginsberg had died and been replaced by Justice Amy Coney Barrett.

215. *Id.* at *1–2.

216. *Id.* at *2. The Court apparently ignored arguments that secular businesses generally involve smaller risks because of the different nature of the activities involved. It also ignored the difficulty of tailoring pandemic restrictions to the particular safety records of individual religious groups.

217. *Id.*

218. *Id.*

219. *Id.* at *4 (Gorsuch, J., concurring).

220. *Id.* at *7 (Kavanaugh, J., concurring).

221. *Id.* at *8.

Constitution” and were distinguishable from those in prior cases.²²² Writing for himself and Justices Sotomayor and Kagan, Justice Breyer agreed with Roberts on the procedural point but argued that the Court had given insufficient deference to the government in an area requiring quick responses based on rapidly changing circumstances and expert medical judgment.²²³

The majority opinion did not discuss the reasons why localities were placed in these high-risk categories or the justifications given by the state for imposing such harsh restrictions. This may in part reflect the dangers of making important decisions in truncated summary proceedings, without giving the parties full hearings. The majority seemed content to apply “common sense,” rather than medical evidence, in assessing risks. It may also have been misled by terminology in thinking that “essential” activities were considered by the State more necessary than others, whereas for many activities the distinctions were based on levels of risk. Still, in the end, the majority did recognize the need for deference to public health authorities, and the case may be distinguishable in the future because of the unusual severity of the restrictions.

IV. RETHINKING JUDICIAL REVIEW IN A PANDEMIC

The opinions in recent abortion and religion cases reveal disparate views of *Jacobson*. Some courts view *Jacobson* as creating a special constitutional test for situations like the pandemic.²²⁴ Under this test, a state regulation is valid if it has some relationship to public health and does not blatantly violate any specific fundamental right.²²⁵ At the opposite end of the spectrum, some courts view *Jacobson* merely as emphasizing the strength of the government’s interest in controlling the pandemic.²²⁶ The cases in the middle vary, but they generally seem to give the government a thumb on the scale in applying the standard constitutional tests.²²⁷

The view that *Jacobson* establishes a special test for public health emergencies does not seem consistent with history. As we saw in Part II,

222. *Id.* at *9 (Roberts, C.J., dissenting).

223. *Id.* at *10–11 (Breyer, J., dissenting).

224. *See, e.g., In re Abbott (Abbott II)*, 954 F.3d 772, 785–86 (5th Cir. 2020); *In re Rutledge*, 956 F.3d 1018, 1028–30 (8th Cir. 2020).

225. *See Abbott II*, 954 F.3d at 786–88; *Rutledge*, 956 F.3d at 1028–30.

226. *See, e.g., Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 924–27 (6th Cir. 2020); *Robinson v. Attorney Gen.*, 957 F.3d 1171, 1179, 1182 (11th Cir. 2020).

227. *See, e.g., Tabernacle Baptist Church, Inc. v. Beshear*, No. 3:20-CV-00033-GFVT, 2020 WL 2305307, at *4–5 (E.D. Ky. May 8, 2020); *S. Wind Women’s Ctr. LLC v. Stitt*, No. CIV-20-277-G, 2020 WL 1932900, at *1–2, *8–9 (W.D. Okla. Apr. 20, 2020); *Robinson v. Marshall*, No. 2:19CV365-MHT, 2020 WL 1847128, at *8–12 (M.D. Ala. Apr. 12, 2020).

the case was decided nearly at the same time as *Lochner*.²²⁸ Like *Lochner*, it reflects a general view of how courts should review regulations.²²⁹ During the *Lochner* era, *Jacobson* was commonly cited to support arguments for upholding regulations—not just in public health emergencies, but in more routine contexts.²³⁰ As we have seen, the Court has treated it as standing for a cluster of propositions since the *Lochner* era ended, such as the permissibility of vaccination mandates, with or without an epidemic,²³¹ the need for government leeway in dealing with scientific uncertainty,²³² and the strength of the government’s interest in public safety.²³³

Thus, the use of *Jacobson* as a special test for constitutionality during public health or other emergencies seems unsupported by history—at least in the Supreme Court—or by the way the Court has treated issues of similar urgency in the area of national security. Yet the opposing view, which treats public health emergencies like garden-variety constitutional cases, also seems wrong. Contagious diseases pose unique challenges.²³⁴ In particular, contagious diseases have the ability to quickly jump from a few individual cases to a major health crisis.²³⁵ The speed and extent of the threat has several consequences. The government must formulate responses quickly, based on incomplete information, and in the face of scientific uncertainty.²³⁶ Because of the high costs of inaction, the response must also be highly precautionary.²³⁷ The upshot is that the government may not be in a position to make fine-grained distinctions or to provide

228. See *supra* note 53 and accompanying text.

229. See *supra* Part II.

230. See *supra* notes 83–87, 91–95 and accompanying text.

231. See, e.g., *Zucht v. King*, 260 U.S. 174, 176 (1922).

232. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007).

233. See, e.g., *O’Connor v. Donaldson*, 422 U.S. 563, 582–83 (1975) (Burger, C.J., concurring); *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972) (citing *Jacobson* as the basis for a public safety exception from religious freedom); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

234. For a discussion of how these challenges require that courts respect the need for flexible government responses, see Jeff Thaler, *The Next Surge Is Coming: What Can Governors Constitutionally Do to Prevent More COVID-19 Deaths and Cases This Fall?* (Aug. 14, 2020) (unpublished manuscript), <https://ssrn.com/abstract=3604706> [<https://perma.cc/EJ2J-J69L>].

235. See, e.g., Steven Sanche et al., *High Contagiousness and Rapid Spread of Severe Acute Respiratory Syndrome Coronavirus 2*, 26 EMERGING INFECTIOUS DISEASES 1470, 1470 (2020), <https://wwwnc.cdc.gov/eid/article/26/7/pdfs/20-0282.pdf> [<https://perma.cc/Q66F-5ZBW>].

236. See POSNER & VERMEULE, *supra* note 10, at 4.

237. See *id.*

detailed supporting evidence and explanation. Applying the usual modes of judicial review is asking more precision and deliberation from these emergency decisions than the government can realistically supply. Given these realities, the “business as usual” approach adopted by some courts, including the dissenters in *South Bay Pentecostal*, seems too grudging and is also inconsistent with the treatment of similar issues in national security cases.²³⁸

The government clearly has an especially powerful interest in acting in the face of an epidemic. The most comparable situation would appear to involve national security measures during wartime. In that situation, national interests of the highest order are also in play. The Court’s treatment of these national security measures is instructive. It does not appear, however, that the Supreme Court has ever announced a special standard for constitutional review in such cases.

For instance, during World War I, the Court took the position that the parameters of permissible speech were smaller in wartime, but that was because of a changed situation, not because the test for constitutionality was different.²³⁹ Consider the following language from an early opinion by Justice Holmes upholding such a conviction:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured²⁴⁰

Note that the first sentence states a test that applies “in every case,” while the second sentence says applying the test leads to different results in wartime.²⁴¹

238. Lindsay Wiley and Stephen Vladeck argue against suspending judicial review in emergencies such as the pandemic and in favor of applying ordinary judicial review. See Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against “Suspending” Judicial Review*, 133 HARV. L. REV. F. 179, 182–83 (2020). To the extent that they are arguing for application of the normal constitutional tests rather than across-the-board deference to government actions, their conclusion seems to be correct. *Korematsu v. United States* is a vivid demonstration of why courts should not abandon their scrutiny of government actions during emergencies. *Korematsu v. United States*, 323 U.S. 214, 217–18 (1944). If by ordinary judicial review they mean to call for searching inquiry into the factual bases for government actions, that approach seems too likely to interfere with the need for immediate response to a rapidly shifting situation under conditions of uncertainty.

239. See, e.g., *Schenck v. United States*, 249 U.S. 47, 52 (1919).

240. *Id.*

241. *Id.* This clearly was not a blank check for government suppression of speech. In the course of upholding a conviction under this test in a later case, Holmes complained that the absence of a full factual record made it impossible to determine whether the

The test applied in free speech cases has changed over the years.²⁴² But whatever the current test may be, the Court continues to apply that test in national security cases as well as other cases.²⁴³ For instance, in *Holder v. Humanitarian Law Project*, the plaintiffs challenged a statute that illegalized material support to international terrorist groups, as applied to communication activities undertaken in coordination with one such group.²⁴⁴ The Court rejected the argument that a lower level of scrutiny should apply.²⁴⁵ The central issue in the case was whether speech-based assistance to a terrorist organization's non-violent activities could be distinguished from assistance to its terrorist activities.²⁴⁶ The Court rejected this distinction, based in part on its own review of evidence in the record.²⁴⁷ The Court also stressed the need for judicial deference "[g]iven the sensitive interests in national security and foreign affairs at stake."²⁴⁸

Some of the reasons the *Holder* Court gave for deference apply equally to public health emergencies. In the national security setting, the Court said, the government must "confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess."²⁴⁹ The Court continued that "[i]n this context, conclusions must often be based on informed judgment rather than concrete evidence, and that reality affects what we may reasonably insist on from the Government."²⁵⁰

Admittedly, there are differences between national security and public health threats. National security information often cannot be revealed to the public, which is rarely true of public health information.²⁵¹ Moreover, foreign and military affairs have long been thought to be within the special authority of the President.²⁵² These differences point toward greater judicial deference in national security cases than public health cases. On the other

defendant's remarks really did pose a threat. *Frohwerk v. United States*, 249 U.S. 204, 209 (1919).

242. See Donald L. Beschle, *Clearly Canadian?* *Hill v. Colorado and Free Speech Balancing in the United States and Canada*, 28 HASTINGS CONST. L. Q. 187, 190–91 (2001).

243. See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 39 (2010).

244. *Id.* at 7–8.

245. *Id.* at 28.

246. *Id.* at 14–15.

247. *Id.* at 33–39.

248. *Id.* at 36.

249. *Id.* at 34.

250. *Id.* at 34–35.

251. See Classified Nat'l Sec. Info., 75 Fed. Reg. 707, 707 (Dec. 29, 2010).

252. See FARBER & SIEGEL, *supra* note 14, at 206–14.

hand, national security cases often lack the urgency of disease outbreaks.²⁵³ That difference could justify a more demanding standard of review for national security decisions. Furthermore, public health emergencies are temporary whereas national security threats can last years or decades—consider the Cold War or the current terrorism issue.²⁵⁴ Thus, restrictions imposed in an epidemic are likely to entail briefer and therefore less serious invasions of constitutional rights.

These considerations seem offsetting and suggest that, on balance, courts should treat public health emergencies much like national security threats for constitutional purposes. This means that normal constitutional tests should continue to apply. However, in determining whether a regulation is tailored to the government’s interest in combatting the epidemic, the courts should take into account the government’s need to take immediate precautionary actions under conditions of high uncertainty. Thus, something like the *Holder*²⁵⁵ approach is appropriate. It is not surprising that Chief Justice Roberts, who wrote *Holder*,²⁵⁶ advocated a similar approach in *South Bay Pentecostal*.²⁵⁷

In principle, this additional degree of deference should function within the setting of whatever standard generally applies to the constitutional right in question. For courts that are committed to treating *Jacobson* as providing a special standard of review, the analogy to national security cases could be treated as an interpretation of the “real or substantial relation” and “palpable invasion” prongs of *Jacobson*.²⁵⁸

253. One metric of a situation’s gravity—fatalities—shows that disease outbreaks can present decision-makers with much greater “urgency” than threats to national security. *Compare Cases and Deaths in the U.S.*, CENTERS FOR DISEASE CONTROL & PREVENTION (Aug. 1, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/us-cases-deaths.html> [<https://perma.cc/D5ZX-BMYJ>] (reporting 4,542,579 coronavirus cases and 152,870 attributable deaths in the United States as of August 1, 2020), with Hannah Ritchie et al., *Terrorism*, OUR WORLD IN DATA (Nov. 2019), <https://ourworldindata.org/terrorism> [<https://perma.cc/THG9-C3GA>] (recording sixty-seven terrorism deaths in the United States in 2017 and noting that terrorism deaths have constituted less than .01% of deaths in the United States every year since 1970, excepting 2001).

254. See, e.g., *The Cold War*, JFK LIBRARY, <https://www.jfklibrary.org/learn/about-jfk-jfk-in-history/the-cold-war> [<https://perma.cc/CB7F-A9LD>]. The Cold War lasted more than four decades. See *id.* Some argue that the sweeping and apparently permanent restrictions on constitutional rights and civil liberties in the wake of the September 11 terrorist attacks have created a “post-constitutional” era. Peter Van Buren, *What We’ve Lost Since 9/11*, HUFFPOST (June 15, 2014, 9:32 PM), https://www.huffpost.com/entry/what-weve-lost-since-911_b_5497673 [<https://perma.cc/H76Q-QM7E>].

255. *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

256. *Id.* at 6.

257. See *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020).

258. *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905).

Either way, it will not always be easy to balance the need for deference in an emergency and the court's duty to protect constitutional rights. Unfortunately, there is no magic formula for striking the balance. At least, however, courts can steer clear of the extremes, neither giving the government a blank check nor hamstringing its emergency response.

