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**REDISCOVERING *JACOBSON* IN THE ERA OF COVID-19**

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## INTRODUCTION

On May 29, 2020, as states across the country continued to ease the social distancing measures that had been put in place to stem the spread of COVID-19, the Supreme Court in *South Bay United Pentecostal Church v. Newsom*,<sup>1</sup> by a 5-4 vote, denied an emergency request to enjoin California Governor Gavin Newsom's order limiting the number of worshippers at in-person religious services.<sup>2</sup> Although the Court issued no opinion, Chief Justice Roberts, in a concurring opinion, quoted the Supreme Court's 1905 decision in *Jacobson v. Massachusetts*<sup>3</sup>: "Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'"<sup>4</sup> In dissent, Justice Kavanaugh, who was joined by Justices Thomas and Gorsuch, ignored *Jacobson*. Instead, he argued that the Governor's emergency order violated the First Amendment.<sup>5</sup>

The Justices' disparate treatment of *Jacobson* echoed its reception by the lower courts. In *In re Abbott*,<sup>6</sup> one of the first cases reviewing a COVID-19-related order, the U.S. Court of Appeals for the Fifth Circuit relied on *Jacobson* to overturn an injunction of a Texas law banning abortions during the pandemic.<sup>7</sup> To the Fifth Circuit, *Jacobson* required courts to limit their review of constitutional rights during a public health emergency.<sup>8</sup> A little more than two weeks later, in another abortion case, the Eleventh Circuit disagreed, concluding that *Jacobson* "was not an absolute blank check for the exercise of governmental power."<sup>9</sup>

As courts continue to hear challenges to COVID-19-related orders, citations to *Jacobson* are bound to proliferate, and uncertainty as to its meaning is likely

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<sup>1</sup> 140 S. Ct. 1613 (2020) (mem.).

<sup>2</sup> *Id.*

<sup>3</sup> 197 U.S. 11 (1905).

<sup>4</sup> *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (quoting *Jacobson*, 197 U.S. at 38).

<sup>5</sup> *Id.* at 1614-15 (Kavanaugh, J., dissenting).

<sup>6</sup> 954 F.3d 772 (5th Cir. 2020).

<sup>7</sup> *Id.* at 778-79. Five days later, on April 13, 2020, the Fifth Circuit allowed a narrower temporary restraining order applying to medication abortions to remain in effect. *See In re Abbott*, No. 20-50296, 2020 WL 1866010, at \*2-3 (5th Cir. Apr. 13, 2020). Later in April, the Fifth Circuit struck the district court's revised temporary restraining order. *In re Abbott*, 956 F.3d 696 (5th Cir. 2020).

<sup>8</sup> *In re Abbott*, 954 F.3d at 783-85; *see also In re Abbott*, 956 F.3d at 703; 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/B83P-6PNJ]. For a further discussion of courts that have followed *In re Abbott*, see *infra* text accompanying notes 105-112.

<sup>9</sup> *Robinson v. Attorney General*, 957 F.3d 1171, 1179 (11th Cir. 2020).

to continue. Thus a re-examination of the 115-year-old decision seems timely. This Essay offers that re-examination, situating Justice Harlan's nuanced and Delphic opinion in its jurisprudential and public health context.<sup>10</sup>

This Essay proceeds in three parts. Part I discusses *Jacobson's* public health context. Part II examines the opinion in light of the police power jurisprudence of its age. Part III looks briefly at *Jacobson's* legacy, examining how courts have read the case in the years since 1905, including during the COVID-19 pandemic. This Essay ends by explaining what *Jacobson* does and does not have say about today's challenges.

### I. THE PUBLIC HEALTH SETTING

In 1900, smallpox (*variola major*) returned to the United States.<sup>11</sup> One of the most ancient and lethal of diseases—it killed up to thirty percent of people who contracted it—smallpox was also the first disease for which there was a vaccine. Indeed, the word “vaccination” derives from *vaccina*, the Latin term for cow, because the smallpox vaccine, discovered by Edward Jenner in 1796, relied on material from cowpox sores.<sup>12</sup>

The invention and dissemination of the vaccination did not immediately end smallpox epidemics.<sup>13</sup> During the nineteenth century, the United States experienced continuing outbreaks. When the disease was highly prevalent, people feared it and tended to accept vaccination. When the risk of smallpox fell, opposition to vaccination, which carried significant risks, grew and paved the way for another outbreak.<sup>14</sup> Governments began to compel vaccination for this reason. In 1827, Boston became the first U.S. jurisdiction to require schoolchildren to be vaccinated in order to attend public school.<sup>15</sup> By the time smallpox returned to the United States in 1900, vaccination mandates, usually

<sup>10</sup> This Essay does not attempt to review or assess the COVID-19 cases that discuss *Jacobson*. I intend to cover that ground in a forthcoming paper for the *San Diego Law Review*.

<sup>11</sup> MICHAEL WILLRICH, *POX: AN AMERICAN HISTORY* 2 (2011).

<sup>12</sup> *History of Smallpox*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/smallpox/history/history.html> [<https://perma.cc/KX8H-E3DJ>] (last updated August 30, 2016). Even before vaccination became available, physicians inoculated patients against smallpox by placing pus from other people with the disease under a patient's skin. This practice, known as variolation, tended to lead to mild cases that provided lifelong immunity. However, the practice was also dangerous, as inoculated patients could spread lethal disease to others. *Id.* For this reason, variolation was regulated in many communities long before the vaccination was invented. James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831, 836-38 (2001); 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, 288-90 (1993).

<sup>13</sup> Smallpox was the first and only natural disease that has been eradicated in nature due to vaccination. See *History of Smallpox*, *supra* note 12.

<sup>14</sup> See Diane S. Saint-Victor & Saad B. Omer, *Vaccine Refusal and the Endgame: Walking the Last Mile First*, PHIL. TRANSACTIONS ROYAL SOC'Y B, Aug. 5, 2013, at 1, 1-3.

<sup>15</sup> Hodge & Gostin, *supra* note 12, at 851.

120 tied to education, were relatively common and had been upheld by several state courts.<sup>16</sup>

By 1900, vaccine laws also rested upon a new understanding of public health protection. For more than a millennium, governments had enacted a wide range of public health measures, from quarantines to sanitary measures, without understanding how or whether they worked.<sup>17</sup> However, in the second half of the nineteenth century, the science of bacteriology blossomed, revealing the role of pathogens in spreading disease.<sup>18</sup> Armed with this new knowledge, governments adopted what Professors Gostin, Burris, and Lazzarini have called the microbial model of infectious disease control.<sup>19</sup> In contrast to earlier public health laws that emphasized widely applicable sanitary measures, the tools favored by the microbial model were more likely to apply to discrete individuals, aiming to prevent them from transmitting infection to others.<sup>20</sup> Interestingly, despite the many advances in medical science since 1900, in the absence of a COVID-19 vaccine, states have been forced to rely once again on nonpharmaceutical interventions, which this time took the form of stay-at-home orders and limits on mass gatherings.

## II. THE CASE

The smallpox epidemic that broke out in the United States in 1900 appeared to be less lethal than the variant which had plagued humanity for more than a millenium.<sup>21</sup> Nevertheless, by 1902, there were more than 2,300 cases and 284 deaths in Massachusetts.<sup>22</sup> Officials in Massachusetts and in other states took the threat seriously and instituted campaigns to increase vaccination. In some of

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<sup>16</sup> *Id.* at 851-54 (citing cases).

<sup>17</sup> See generally Parmet, *supra* note 12, at 271-302.

<sup>18</sup> Wendy E. Parmet, *From Slaughter-House to Lochner: The Rise and Fall of the Constitutionalization of Public Health*, 40 AM. J. LEGAL HIST. 476, 489 (1996).

<sup>19</sup> Lawrence O. Gostin, Scott Burris & Zita Lazzarini, *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 69-71 (1999).

<sup>20</sup> *Id.* at 70-71.

<sup>21</sup> See WILLRICH, *supra* note 11, at 41.

<sup>22</sup> Wendy E. Parmet, Richard A. Goodman & Amy Farber, *Individual Rights Versus the Public's Health—100 Years After Jacobson v. Massachusetts*, 352 NEW ENGLAND J. MED. 652, 653 (2005). This toll pales in comparison to that inflicted by COVID-19. By June 24, 2020, Massachusetts had reported over seven thousand deaths in three months from COVID-19. Jaelyn Reiss, *Mass. Reports 172 New Coronavirus Cases, 48 New Deaths; Key Metrics Remain Low Relative to Springtime Surge*, BOSTON GLOBE (June 24, 2020, 5:12 PM), <https://www.bostonglobe.com/2020/06/24/nation/mass-reports-172-new-coronavirus-cases-48-new-deaths-key-metrics-remain-low-relative-springtime-surge/> [https://perma.cc/3SVA-XPYC].

these campaigns, including in Boston, officials forcibly vaccinated African Americans, immigrants, and laborers.<sup>23</sup>

The Cambridge Board of Health employed a more moderate approach, relying on a state law to require all residents who had not been vaccinated since 1897 to be vaccinated or pay a five-dollar fine.<sup>24</sup> Despite the outbreak, the Board's move was highly controversial.<sup>25</sup> At the time, anti-vaccinationists, who believed that vaccines were unsafe, ineffective, and ungodly, were well organized in the United States and Europe.<sup>26</sup> Although they were wrong about the efficacy of vaccination, they were not totally mistaken in believing that smallpox vaccination could be dangerous. The smallpox vaccine had far higher rates of complications than most modern vaccines, and the serum used at the time was not sterile; hence it could spread other diseases, such as tetanus.<sup>27</sup>

Henning Jacobson, the appellant in *Jacobson v. Massachusetts*, was an immigrant from Sweden who served as a minister at the Augustana Lutheran Church in Cambridge.<sup>28</sup> A pious man, he viewed vaccination as state-sanctioned sacrilege.<sup>29</sup> He also believed that his own health and that of one of his sons had been harmed from past vaccinations.<sup>30</sup> When Cambridge health officials asked him to comply with the new vaccine mandate, he refused and was fined five dollars. Several other opponents of vaccination, including a city clerk named Albert Pear, likewise refused and were fined.<sup>31</sup>

Supported by organized anti-vaccinationists, Jacobson, Pear, and their co-defendants argued to the state court that the vaccine mandate violated their constitutional rights. Despite the religious roots of Jacobson's opposition, his lawyers did not raise a free exercise claim, no doubt because the Supreme Court had not yet held that the First Amendment applied to the states.<sup>32</sup> Nevertheless, the defendants' brief to the Massachusetts Supreme Judicial Court reflected Jacobson's religious opposition to vaccination, asking, "Can the free citizen of Massachusetts, who is not yet a pagan, nor an idolator, be compelled to undergo this rite and to participate in this new—no, revived—form of worship of the Sacred Cow?"<sup>33</sup>

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<sup>23</sup> JAMES COLGROVE, *STATE OF IMMUNITY: THE POLITICS OF VACCINATION IN TWENTIETH-CENTURY AMERICA* 17-18 (2006); WILLRICH, *supra* note 11, at 233; Parmet, Goodman & Farber, *supra* note 22, at 653.

<sup>24</sup> Parmet, Goodman & Farber, *supra* note 22, at 652-53.

<sup>25</sup> *Id.*

<sup>26</sup> Hodge & Gostin, *supra* note 12, at 844-49.

<sup>27</sup> WILLRICH, *supra* note 11, at 192-201.

<sup>28</sup> Parmet, Goodman & Farber, *supra* note 22, at 653.

<sup>29</sup> WILLRICH, *supra* note 11, at 287-88.

<sup>30</sup> *Id.*

<sup>31</sup> Parmet, Goodman & Farber, *supra* note 22, at 652-53.

<sup>32</sup> *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

<sup>33</sup> Parmet, Goodman & Farber, *supra* note 22, at 654.

After Jacobson and his co-defendants lost before the trial court, the Massachusetts high court, in *Commonwealth v. Pear*,<sup>34</sup> had little trouble affirming their convictions.<sup>35</sup> As Justice Knowlton explained, “It is a fact of common knowledge that smallpox is a terrible disease, whose ravages have sometimes swept away thousands of human beings in a few weeks.”<sup>36</sup> He added that “all courts that have considered the subject have recognized the right of the Legislature to enact laws founded upon the theory that vaccination is important as a preventative of smallpox.”<sup>37</sup>

The Massachusetts Supreme Judicial Court then went on to conclude that Cambridge’s policy fit well within the bounds of the state’s police power. As the court stated, “It is generally held that, if a statute purports to be enacted to promote the general welfare of the people, and is not at variance with any provision of the Constitution, the question whether it will be for the good of the community is a legislative, and not a judicial, question.”<sup>38</sup> In the instant case, there was reason to believe that the ordinance met the test. It was “wholesome and reasonable in the sense that it relates to a subject about which the Legislature may well concern itself.”<sup>39</sup> Moreover, there was “no reason for holding that the measures authorized by it do not relate directly to the promotion of the intended object.”<sup>40</sup> The court added that the ordinance did not authorize force. The “worst that could happen” to someone who objected was that they would be fined five dollars.<sup>41</sup>

Jacobson alone appealed his conviction to the Supreme Court. In a 7-2 opinion written by Justice Harlan, the Court affirmed the conviction. Justices Peckham (the author of *Lochner v. New York*<sup>42</sup>) and Brewer dissented without opinion.

In his majority opinion, Justice Harlan first rejected Jacobson’s claim that the mandatory vaccination violated the preamble to the Constitution.<sup>43</sup> The heart of the opinion, however, was the Court’s discussion of whether the law’s mandate violated the Fourteenth Amendment. To answer that question, the Court turned to a consideration of “what is commonly called the police power.”<sup>44</sup> Justice Harlan explained that the Court

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<sup>34</sup> 66 N.E. 719 (Mass. 1903), *aff’d sub nom.* *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

<sup>35</sup> *Id.* at 721-22.

<sup>36</sup> *Id.* at 720.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 721.

<sup>39</sup> *Id.* at 722.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> 198 U.S. 45 (1905).

<sup>43</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905).

<sup>44</sup> *Id.* at 24-25.

has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a state to enact quarantine laws and “health laws of every description;” indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states.<sup>45</sup>

With this statement, the Court situated its analysis in the police power jurisprudence that it had developed over the course of the nineteenth century. Beginning with *Gibbons v. Ogden*,<sup>46</sup> the Court had emphasized that the states retained their power to regulate their purely domestic affairs, which encompassed—perhaps especially encompassed—state public health laws.<sup>47</sup> Hence, laws that were viewed as public health laws were seen as falling within the jurisdiction of the states, as opposed to the federal government, in disputes over the lines between federal and state authority.<sup>48</sup> Importantly, these police power cases were decided as repeated waves of infectious epidemics roiled the nation. In an era in which epidemics that could paralyze communities were common, it was easy for the Court to view public health laws as an inherent and unquestioned attribute of sovereignty.<sup>49</sup> Society could not exist unless governments could act to mitigate the toll exacted by epidemics.

Jacobson’s claim, however, was based not on the federalism issues that formed the initial impetus for the development of the Court’s police power jurisprudence. Rather, he relied on the Fourteenth Amendment. Here too, starting with the *Slaughter-House Cases*<sup>50</sup> (which upheld a New Orleans ordinance that sought to prevent the spread of yellow fever), the Court had utilized the concept of the police power (and public health law’s place within that power) to determine the limits of the Fourteenth Amendment’s application to state laws.<sup>51</sup> By so doing, the Court had constitutionalized old common law concepts that were related to the police power, as illustrated by the maxims of *sic utere tuo ut alienum non laedas* (use your property so not to injure others) and *salus populi suprema lex* (the well-being or health of the public is the highest law). These maxims reflected the well-established view that individual rights were inherently circumscribed by the state’s interest in protecting the public’s health and well-being.<sup>52</sup> Thus, under the nineteenth-century police power jurisprudence, the police power did not, strictly speaking, limit individual rights

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<sup>45</sup> *Id.* at 25 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824)).

<sup>46</sup> 22 U.S. (9 Wheat.) at 203.

<sup>47</sup> *See, e.g.*, *Thurlow v. Massachusetts (The License Cases)*, 46 U.S. (5 How.) 504, 582-84 (1847); *Mayor of N.Y. v. Miln*, 36 U.S. (11 Pet.) 102, 132-34 (1837).

<sup>48</sup> *See* Parmet, *supra* note 18, at 480.

<sup>49</sup> *Id.* at 479.

<sup>50</sup> 83 U.S. (16 Wall.) 36 (1873).

<sup>51</sup> *Id.* at 62-64. For a discussion of the public health aspects of the *Slaughter-House Cases*, see Parmet, *supra* note 18, at 481-88.

<sup>52</sup> *See, e.g.*, *In re Vandine*, 23 Mass. (6 Pick.) 187, 191-92 (1828).

precisely because individuals had no rights in contravention of the public's health, safety, or welfare.<sup>53</sup>

To be sure, the Court's understanding of the police power had evolved in the closing decades of the nineteenth century. Most importantly, in cases such as the *Minnesota Rate Cases*,<sup>54</sup> the Court had come to insist that even laws that purportedly lay within the police power were unconstitutional if they were unreasonable.<sup>55</sup> Indeed by 1900, the Court read the Fourteenth Amendment as imposing a general reasonableness limit on the police power. Justice Harlan in *Jacobson* adopted that approach,<sup>56</sup> but he did so while also offering the Supreme Court's fullest and most eloquent defense of the police power and its nuanced relationship to liberty. He explained:

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. . . . Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that "persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state . . . ."<sup>57</sup>

For this reason, "[e]ven liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to [the] equal enjoyment of the same right by others. It is then, liberty regulated by law."<sup>58</sup> Indeed, he stated that a "fundamental principle of the social compact" as codified by the Massachusetts Constitution is that liberty can be restrained in furtherance of the common good.<sup>59</sup> Thus for Justice Harlan, liberty does not exist outside of law; it exists only within the social compact that aims to promote the common good, including public health.

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<sup>53</sup> See, e.g., *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 103 (1851) (discussing police power in light of an eminent domain claim).

<sup>54</sup> 230 U.S. 352 (1913).

<sup>55</sup> See *id.* at 410-12; *Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota ex rel. R.R. & Warehouse Comm'n*, 134 U.S. 418, 458-59 (1890). This approach differed from the Court's earlier approach to reviewing economic regulations under the Fourteenth Amendment in cases such as *Munn v. Illinois*, 94 U.S. 113, 123, 135-36 (1876), which held that a statute that set a maximum grain storage capacity for warehouses did not violate the Fourteenth Amendment. The newer approach was more consonant with the doctrine of "constitutional limitations" put forth by treatise writers such as Judge Cooley. See generally THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS (5th ed. 1883).

<sup>56</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

<sup>57</sup> *Id.* at 26 (quoting *R.R. v. Husen*, 95 U.S. 465, 471 (1877)).

<sup>58</sup> *Id.* at 26-27 (quoting *Crowley v. Christensen*, 137 U.S. 86, 88-90 (1890)).

<sup>59</sup> *Id.* at 27.

After explaining the importance of and justification for the police power and why liberty cannot be unlimited, Justice Harlan turned to “[a]pply[] these principles to the present case.”<sup>60</sup> Here, he offered some interesting departures from the traditional police power jurisprudence with which he began his opinion. First, despite his earlier recitation of the well-established reasonableness limit that applied to all public health laws, he emphasized the necessity of the moment, noting 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.”<sup>61</sup> Of course, this did not mean that the general reasonableness test did not apply. Rather, the necessity helped to explain what was reasonable under the circumstances.

Second, in an early endorsement of administrative delegation, he affirmed the state’s grant of authority to the Board of Health: “To invest such a body with authority over such matters was not an unusual, nor an unreasonable or arbitrary, requirement.”<sup>62</sup> He also took pains to emphasize key empirical facts: the presence of smallpox and the knowledge of medical authorities and ordinary people as to the efficacy of vaccination.<sup>63</sup> The regulation was not simply reasonable because it aimed to prevent a deadly epidemic but because it was based on public health knowledge, such as it was. In this way, Justice Harlan’s opinion presaged, as did his famous dissent in *Lochner*, Legal Realism’s emphasis on empirical facts.

There are other ways in which Justice Harlan’s opinion anticipated the approach that the Court adopted after the New Deal. Despite emphasizing that “real liberty” exists only in relation to law and that courts should defer to the police power, he offered that “[t]here is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government,—especially of any free government existing under a written constitution, to interfere with the exercise of that will.”<sup>64</sup> He also envisioned a role for courts:

If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge . . . .<sup>65</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 29.

<sup>65</sup> *Id.* at 31.

Furthermore, according to Justice Harlan, courts should intervene if the police power was exercised in a way that was “so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression.”<sup>66</sup> Likewise, he surmised that it would be “easy” to imagine a case involving a particular individual for “whom . . . vaccination in a particular condition of his health or body would be cruel and inhuman in the last degree.”<sup>67</sup> In such circumstances, a court had the power “to interfere and protect the health and life of the individual concerned.”<sup>68</sup>

Hence, despite his strong endorsement of the protection of public health as part of the social compact—indeed, as a rationale for the existence of that compact—and his insistence that courts must defer to reasonable police power laws enacted by the legislature, Justice Harlan offered hints of judicially protected limitations on public health powers. These include the need for public health evidence (as it exists) to support the restriction of liberty and for the police power not to be used in a way that is unreasonable, a plain invasion of fundamental rights, or arbitrary, oppressive, or cruel to particular individuals.<sup>69</sup> Perhaps even more importantly, in the very opinion in which the Court offered its most powerful support for public health protection, Justice Harlan also endorsed a relatively modern vision of individual liberty as a sphere of self-sovereignty and accepted for the first time that the Fourteenth Amendment provides courts with a basis for limiting laws that infringe upon bodily integrity. Thus in a Janus-faced opinion, *Jacobson* looked back to its nineteenth-century police power jurisprudence and forward to the fundamental-rights jurisprudence that would develop in the mid-twentieth century.

### III. *JACOBSON*'S LEGACY

Situated in the pre-New Deal police power jurisprudence while foreshadowing the mid-twentieth-century Court's focus on rights to bodily integrity, *Jacobson* has endured while other cases of its era have fallen into disrepute. It has also been cited as authority for a wide range of potentially conflicting propositions.<sup>70</sup> Although a full discussion of the many (often inconsistent) citations to *Jacobson* is beyond the scope of this Essay, it is worth noting that shortly after *Jacobson* was decided, Justice Peckham, who dissented

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<sup>66</sup> *Id.* at 38.

<sup>67</sup> *Id.* at 38-39.

<sup>68</sup> *Id.* at 39.

<sup>69</sup> *Id.* at 25.

<sup>70</sup> See, e.g., Wendy K. Mariner, George J. Annas & Leonard H. Glantz, *Jacobson v Massachusetts: It's Not Your Great-Great Grandfather's Public Health Law*, 95 AM. J. PUB. HEALTH 581, 583 (2005) (stating that “[p]eople who have quite different world views or philosophies can accept the decision because it need not require the same result for different laws or in different circumstances”).

in *Jacobson*,<sup>71</sup> wrote the majority's decision in *Lochner*.<sup>72</sup> As Justice Peckham saw it, New York's law establishing maximum hours for bakers was not a public health law and therefore was not controlled by *Jacobson*.<sup>73</sup> In contrast, in their *Lochner* dissents, both Justices Harlan and Holmes relied on *Jacobson* to assert that courts should be deferential to exercises of the police power.<sup>74</sup> That deference was taken to the extreme by Justice Holmes more than twenty years later in *Buck v. Bell*,<sup>75</sup> where he stated: "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."<sup>76</sup> For Holmes, *Jacobson* compelled almost total deference to the police power, even in the absence of any epidemic or time-limited exigency.

Somewhat less controversially, in *Zucht v. King*,<sup>77</sup> the Supreme Court cited *Jacobson* with little discussion to uphold a law requiring vaccination of schoolchildren even in the absence of an outbreak.<sup>78</sup> Once again, the Court did not see *Jacobson* as limited to the exercise of what we might today call emergency powers. And a few years later, in *Prince v. Massachusetts*,<sup>79</sup> the Court cited *Jacobson* for the proposition that an individual "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds."<sup>80</sup> This view that *Jacobson* condones almost all vaccine mandates (even in the absence of an outbreak) has continued despite the significant changes in constitutional doctrine since 1905. For example, in recent years, both the Fourth<sup>81</sup> and Second Circuits<sup>82</sup> have relied on *Jacobson* while rejecting free exercise and substantive due process challenges to state vaccine laws.

Yet, the Justices have also cited *Jacobson* in support of a constitutional right to privacy. In his concurring opinion in *Roe v. Wade*,<sup>83</sup> for example, Justice Douglas quoted *Jacobson*'s statement that there is "a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing

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<sup>71</sup> See *Jacobson*, 197 U.S. at 39 (Brewer & Peckham, JJ., dissenting).

<sup>72</sup> See *Lochner v. New York*, 198 U.S. 45, 52 (1905).

<sup>73</sup> *Id.* at 58-59.

<sup>74</sup> *Id.* at 68 (Harlan, J., dissenting); *id.* at 74-75 (Holmes, J., dissenting). For a fuller discussion of the distinctions between *Lochner* and *Jacobson*, see Parmet, *supra* note 18, at 500.

<sup>75</sup> 274 U.S. 200 (1927).

<sup>76</sup> *Id.* at 207 (citing *Jacobson*, 197 U.S. at 35).

<sup>77</sup> 260 U.S. 174 (1922).

<sup>78</sup> *Id.* at 176 (stating that *Jacobson* "settled that it is within the police power of a state to provide for compulsory vaccination").

<sup>79</sup> 321 U.S. 158 (1944).

<sup>80</sup> *Id.* at 166.

<sup>81</sup> See *Workman v. Mingo Cty. Bd. of Educ.*, 419 Fed. App'x 348, 353-54 (4th Cir. 2011).

<sup>82</sup> See *Phillips v. City of New York*, 775 F.3d 538, 543-44 (2d Cir. 2015).

<sup>83</sup> 410 U.S. 113 (1973).

under a written constitution, to interfere with the exercise of that will.”<sup>84</sup> And in *Cruzan v. Director, Missouri Department of Health*,<sup>85</sup> Chief Justice Rehnquist relied on *Jacobson* for the “principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment.”<sup>86</sup> The joint opinion in *Planned Parenthood v. Casey*<sup>87</sup> also cited *Jacobson* to assert that “a State’s interest in the protection of life falls short of justifying any plenary override of individual liberty claims.”<sup>88</sup>

Legal scholars have also offered varied interpretations. In an earlier work, I celebrated Justice Harlan’s recognition that protection of public health is part of the social compact.<sup>89</sup> Professor Lawrence O. Gostin has noted that aspect of *Jacobson*, but has also read it as requiring that state laws conform to “public health necessity, reasonable means, proportionality, and harm avoidance.”<sup>90</sup> Professor James G. Hodge Jr. and colleagues have read the case as examining “the interrelatedness of structural foundations and individual rights to craft reasonable and fair impositions on individual freedoms from vaccination requirements justified by the need to protect the public’s health.”<sup>91</sup>

Given the different interpretations that courts and scholars have offered over the years, it is not surprising that courts have applied *Jacobson* in disparate ways since the start of the pandemic. In his concurring opinion in *South Bay United Pentecostal Church*, Chief Justice Roberts hinted at one approach.<sup>92</sup> While explaining why the Court should not issue an emergency injunction against a California order limiting attendance at places of worship to twenty-five percent of building capacity or a maximum of 100 worshippers, he quoted *Jacobson* to establish that the Constitution “entrusts” the protection of the public’s health and safety to “politically accountable” officials.<sup>93</sup> But he also noted that the challenged restrictions on places of worship “appear consistent with the Free

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<sup>84</sup> *Id.* at 213-14 (Douglas, J., concurring) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905)). In contrast, Justice Blackmun’s majority opinion cited *Jacobson* for the view that the right of privacy is not “unlimited.” *Id.* at 154 (majority opinion).

<sup>85</sup> 497 U.S. 261 (1990).

<sup>86</sup> *Id.* at 278. To be sure, the Chief Justice’s statement was written within an opinion that permitted states to require clear and compelling evidence before stopping treatment of patients who were no longer competent. *Id.* at 282. In his dissent in *Cruzan*, Justice Brennan also cited *Jacobson* for the claim that the “right to be free of unwanted medical intervention, like other constitutionally protected interests, may not be absolute.” *Id.* at 312 (Brennan, J., dissenting).

<sup>87</sup> 505 U.S. 833 (1992).

<sup>88</sup> *Id.* at 857 (plurality opinion).

<sup>89</sup> See, e.g., WENDY E. PARMET, POPULATIONS, PUBLIC HEALTH, AND THE LAW 39 (2009).

<sup>90</sup> LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 68 (1st ed. 2000).

<sup>91</sup> James G. Hodge, Jr. et al., *Constitutional Cohesion and the Right to Public Health*, 53 U. MICH. J.L. REFORM 173, 191 (2019).

<sup>92</sup> See *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, C.J., concurring).

<sup>93</sup> *Id.* at 1613.

Exercise Clause of the First Amendment” because they were in line with “[s]imilar or more severe restrictions [that] apply to comparable secular gatherings.”<sup>94</sup> In addition, he emphasized that he was reviewing an emergency interlocutory order, for which a petition should be denied unless the constitutional violations are “indisputably clear.”<sup>95</sup> Thus while using *Jacobson* to help set the context for his decision to grant the state deference, the Chief Justice did not suggest that *Jacobson* established any “test” for analyzing constitutional challenges to public health laws. Moreover, he left open the possibility that his approach or conclusions might change if the constitutional claim were more compelling or if the procedural posture were different.

In contrast, Justice Kavanaugh in dissent analyzed the Free Exercise claim without citing to *Jacobson*. Instead, he explained that although the state has “substantial room to draw lines, especially in an emergency,” it cannot discriminate against religion,<sup>96</sup> which he concluded that the state had done by placing a twenty-five percent occupancy cap on religious worship.<sup>97</sup>

Other courts reviewing COVID-related claims have placed *Jacobson* more central to their analysis. Unfortunately, in so doing, many have disregarded both the complexity and nuance of Justice Harlan’s opinion, ignoring its moorings in police power jurisprudence and neglecting its discussion of real liberty and the social compact.<sup>98</sup> The approach taken by the Fifth Circuit in *In re Abbott* is especially problematic. *In re Abbott* concerned a challenge to the application of an emergency order postponing non-essential surgeries and procedures to abortions.<sup>99</sup> On March 30, the District Court granted a temporary restraining order.<sup>100</sup> Texas then asked the Fifth Circuit to lift the TRO.

In an opinion by Judge Duncan, the Fifth Circuit quoted *Jacobson* for the “[f]amous[]” assertion that “a community has the right to protect itself against

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<sup>94</sup> *Id.* Although he did not cite any authority for this point, his conclusion seemed to rely on the holding of *Employment Division v. Smith*, 494 U.S. 872 (1990), which applied rational basis review for non-discriminatory laws that burden religious activities. *Id.* at 882.

<sup>95</sup> *S. Bay United Pentacostal Church*, 140 S. Ct. at 1614.

<sup>96</sup> *Id.* at 1615 (Kavanaugh, J., dissenting).

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

<sup>98</sup> *See, e.g., In re Rutledge*, 956 F.3d 1018, 1032 (8th Cir. 2020) (granting writ of mandamus dissolving TRO of ban on abortions during public health emergency); *Spell v. Edwards*, No. 20-cv-00282, 2020 WL 2509078, at \*6 (M.D. La. May 15, 2020) (rejecting Free Exercise challenge to state emergency law), *appeal docketed*, No. 20-30358 (5th Cir. June 8, 2020); *SH3 Health Consulting, LLC v. Page*, No. 4:20-cv-00605, 2020 WL 2308444, at \*11 (E.D. Mich. May 8, 2020) (rejecting claim against shut down law); *Little Rock Family Planning Servs. v. Rutledge*, No. 4:20-cv-00470, 2020 WL 2240105, at \*7 (E.D. Ark. May 7, 2020) (applying *In re Abbott* and *Jacobson* to uphold abortion ban).

<sup>99</sup> *In re Abbott*, 954 F.3d 772, 777-78 (5th Cir. 2020).

<sup>100</sup> *Planned Parenthood Ctr. for Choice v. Abbott*, No. A:20-cv-00323, 2020 WL 1502102, at \*4 (W.D. Tex. Mar. 30, 2020), *vacated*, 2020 WL 1808897 (Apr. 8, 2020).

an epidemic of disease which threatens the safety of its members.”<sup>101</sup> The court then claimed that *Jacobson* commands that the

scope of judicial authority to review rights-claims under these circumstances . . . is “only” available “if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has *no real or substantial relation to those objects*, or is, *beyond all question, a plain, palpable invasion of rights secured by the fundamental law*.”<sup>102</sup>

While acknowledging that *Jacobson* required “a medical exception for [e]xtreme cases,”<sup>103</sup> the Fifth Circuit asserted that “when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some ‘real or substantial relation’ to the public health crisis and are not ‘beyond all question, a plain, palpable invasion of rights secured by the fundamental law.’”<sup>104</sup> Thus, the Fifth Circuit read *Jacobson* as concluding that states can effectively suspend constitutional rights during a public health emergency; and that in such circumstances, judicial review must be limited to plain and palpable violations of fundamental law.

The Fifth Circuit has not been alone in its reading of *Jacobson*. In *Cassell v. Synders*,<sup>105</sup> for example, the U.S. District Court for the Northern District of Illinois asserted that “[d]uring an epidemic, the *Jacobson* court explained, the traditional tiers of constitutional scrutiny do not apply.”<sup>106</sup> Instead, courts may overturn public health rules only when they “lack a ‘real or substantial relation to [public health].’”<sup>107</sup>

Of all the possible interpretations of *Jacobson*, this one is especially unconvincing. First, *Jacobson* rested on a police power jurisprudence that applied to all public health laws, not simply those issued during an emergency. For this reason, the Court in the years immediately after *Jacobson* did not limit it to emergencies.<sup>108</sup> Of course, this doesn’t mean that the existence of an emergency was irrelevant to the *Jacobson* Court. Rather, the omnipresent risk

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<sup>101</sup> *In re Abbott*, 954 F.3d at 783 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905)).

<sup>102</sup> *Id.* at 784 (quoting *Jacobson*, 197 U.S. at 31).

<sup>103</sup> *Id.* (quoting *Jacobson*, 197 U.S. at 38).

<sup>104</sup> *Id.* (quoting *Jacobson*, 197 U.S. at 31). The Fifth Circuit offered a similar approach in its later review of the same case stating that the Court should block the state’s order only when the constitutional violation was “beyond question.” *In re Abbott*, 956 F.3d 696, 711 (5th Cir. 2020).

<sup>105</sup> No. 20-cv-50153, 2020 WL 2112374 (N.D. Ill. May 3, 2020), *appeal docketed*, No. 20-1757 (7th Cir. May 6, 2020).

<sup>106</sup> *Id.* at \*6.

<sup>107</sup> *Id.* at \*6 (alteration in original) (quoting *Jacobson*, 197 U.S. at 31).

<sup>108</sup> *See* *Buck v. Bell*, 274 U.S. 200, 207 (1927); *see also* *Zucht v. King*, 260 U.S. 174, 176 (1922); Wiley & Vladeck, *supra* note 8.

of emergencies was cited as a justification for the police power. And of course, laws that may be reasonable during an emergency may not be reasonable in its absence. But Justice Harlan's opinion did not call for a different approach to constitutional review during an emergency.

Moreover, *Jacobson* did not and could not have affirmed the suspension of heightened standards of review for specific constitutional claims, nor did it say that the "traditional tiers of constitutional scrutiny did not apply." Indeed, in 1905, the Court had not yet recognized the specific rights at issue in most of the COVID-19 cases, nor had it adopted "tiers of constitutional scrutiny." To the contrary, while *Jacobson* undoubtedly upheld the state's power (given the existence of public health facts) to limit liberty, the Court also recognized for the first time that the Constitution provides some protection for bodily integrity.

*Jacobson* has also endured, in part, precisely because it eschewed simple tests. It exclaimed the importance of public health protection and recognized that liberty can require limitations on individual rights.<sup>109</sup> Yet, it also emphasized that the police power was limited and offered a *mélange* of criteria for when courts should intervene (unreasonable, oppressive, plain and palpable invasions of rights). But the one thing that *Jacobson* did not offer was a clear and easy test. Nevertheless, in recent weeks, many courts have reduced it to such.

For example, after the Fifth Circuit decided *In re Abbott* but before the Supreme Court issued its decision in *South Bay United Pentecostal Church*, several federal courts read *Jacobson* as establishing a simple two-part test for reviewing public health emergency laws. For example, in *In re Rutledge*, the Eighth Circuit cited *In re Abbott* for its conclusion that *Jacobson* requires courts to first ask if the government order "'has no real or substantial relation' to the public health crisis."<sup>110</sup> If so, the inquiry must be limited to whether the measure is "beyond all question, a plain, palpable invasion of rights secured by the fundamental law."<sup>111</sup> Likewise, in reviewing a First Amendment claim against New York City's emergency ban on public protests, the U.S. District Court for the Southern District of New York relied on *Jacobson* to hold that judicial scrutiny must be reserved for a measure "that has no real or substantial relation to" public health or is "beyond all question, a plain, palpable invasion of rights."<sup>112</sup>

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<sup>109</sup> See Wendy Parmet, *Rethinking Freedom: Liberty vs Health Is a False Dichotomy*, IAI NEWS (May 5, 2020), <https://iai.tv/articles/rethinking-freedom-auid-1531> [<https://perma.cc/AU56-DTMY>].

<sup>110</sup> *In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020) (quoting *In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020)).

<sup>111</sup> *Id.* (quoting *In re Abbott*, 954 F.3d at 784).

<sup>112</sup> *Geller v. de Blasio*, No. 20-cv-03566, 2020 WL2520711, at \*3 (S.D.N.Y. May 18, 2020), *appeal docketed*, No. 20-1592 (2d Cir. May 19, 2020). Other courts have done the same. See *Amato v. Elicker*, No. 3:20-cv-00464, 2020 WL 2542788 (D. Conn. May 19, 2020) (rejecting First Amendment challenge); *Spell v. Edwards*, No. 20-cv-00282, 2020 WL 2509078 (M.D. La. May 15, 2020) (rejecting First Amendment challenge to ban on religious

As should not be surprising given *Jacobson*'s ambiguous legacy, other courts have disagreed. Most notably, in reviewing challenges to state emergency laws brought by churches and worshippers, the Sixth Circuit rejected the idea that *Jacobson* requires the suspension of constitutional rights. In *Maryville Baptist Church, Inc. v. Beshear*,<sup>113</sup> the court stated, "While the law may take period naps during a pandemic, we will not let it sleep through one."<sup>114</sup> Similarly in *First Baptist Church v. Kelly*,<sup>115</sup> the U.S. District Court for the District of Kansas struck down a ban on religious services after deciding that *Jacobson* did not apply because it did not deal with a question of religious liberty.<sup>116</sup> Yet what that court failed to note was that in *Prince v. Massachusetts*, the Supreme Court itself cited *Jacobson* to reject a claim of religious liberty.<sup>117</sup> Other courts have applied the same two-part test but have then gone on to analyze First Amendment claims as if the test did not exist.<sup>118</sup> For them, it seems, *Jacobson* is merely an idol to which they must bow but can then cast aside.

So what does *Jacobson* have to say to us today? Born in a very different constitutional era and during an emergency far less severe than the one we now confront, *Jacobson* does not resonate because it gives courts easy tests or easy ways to adjudicate the limits of public health powers. To the contrary, *Jacobson* endures when so many of its kin have not precisely because it avoids simplistic answers. Justice Harlan's opinion reminds us that our liberty depends in part on the government's capacity to protect the public's health but also that public health powers can be abused. Hence, although deferential to the need to protect public health, courts must also be vigilant against abuses of public health powers. To do that they must ask what is reasonable, look at the public health evidence, and be alert to pretext or abuse of power. They must respect autonomy but also cannot forget that real liberty requires the protections that only organized society can afford.

Thus as the Chief Justice seemed to suggest in his concurring opinion in *South Bay United Pentacostal Church*, *Jacobson* helps to set the table. It provides a

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gatherings), *vacating as moot*, No. 20-30358, 2020 WL 3287239 (5th Cir. June 18, 2020); *Givens v. Newsom*, No. 2:20-cv-00852, 2020 WL 2307224 (E.D. Cal. May 8, 2020) (rejecting claim that emergency order infringes on rights to speech, assembly, and petition government), *appeal docketed*, No. 20-15949 (9th Cir. May 19, 2020); *SH3 Health Consulting, LLC v. Page*, No. 4:20-cv-00605, 2020 WL 2308444 (E.D. Mich. May 8, 2020) (rejecting constitutional and statutory challenges to emergency order).

<sup>113</sup> 957 F.3d 610 (6th Cir. 2020) (per curiam).

<sup>114</sup> *Id.* at 615. Soon after, the Sixth Circuit "incorporate[d] some of the reasoning (and language) from" *Maryville Baptist Church* in ruling in *Roberts v. Neace*, 958 F.3d 409, 412 (6th Cir. 2020).

<sup>115</sup> No. 20-cv-01102, 2020 WL 1910021 (D. Kan. Apr. 18, 2020).

<sup>116</sup> *Id.* at \*6.

<sup>117</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

<sup>118</sup> *See, e.g.,* *Tabernacle Baptist Church, Inc. v. Beshear*, No. 3:20-cv-00033, 2020 WL 2305307, at \*6 (E.D. Ky. May 8, 2020) (striking down ban on religious services).

vital reminder of the context through which courts should review public health measures, especially—but not only—during emergencies. But *Jacobson* does not provide an easy answer as to how courts can align contemporary doctrine to that context. Nor should we expect an opinion written before the Court had recognized most of the individual rights that we now take for granted and long before the Court had settled upon levels of review, to provide a ready guide. It can only remind us that because facts and context matter, and both the liberty from government and the liberty from disease are important, the challenge must remain ours to answer.